UNITED STATES
SENTENCING COMMISSION

PUBLIC HEARING

Monday
March 6, 2006

Sheraton Suites Hotel
701 A Street
Ovations Conference Room
San Diego, California 92101

AD HOC REPORTING
110 West C Street, Suite 807
San Diego, California 92101
(619) 236-9325

Ad Hoc Reporting
U.S. SENTENCING COMMISSION

Commissioners Present:
Michael E. Horowitz
Beryl A. Howell
Ruben Castillo
John R. Steer
Michael J. Elston

Commission Staff Present:
Judith W. Sheon
Krista Rubin

Ad Hoc Reporting
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opening Remarks</td>
<td>5</td>
</tr>
<tr>
<td>Judicial Perspective from the Southern District of California</td>
<td>7</td>
</tr>
<tr>
<td>Honorable Irma Gonzalez</td>
<td>7</td>
</tr>
<tr>
<td>Chief Judge</td>
<td>7</td>
</tr>
<tr>
<td>Southern District of California</td>
<td>7</td>
</tr>
<tr>
<td>Honorable Marilyn Huff</td>
<td>11</td>
</tr>
<tr>
<td>District Court Judge</td>
<td>11</td>
</tr>
<tr>
<td>Southern District of California</td>
<td>11</td>
</tr>
<tr>
<td>Judicial Perspective from the District of New Mexico</td>
<td>31</td>
</tr>
<tr>
<td>Honorable Martha Vazquez</td>
<td>31</td>
</tr>
<tr>
<td>Chief Judge</td>
<td>31</td>
</tr>
<tr>
<td>District of New Mexico</td>
<td>31</td>
</tr>
<tr>
<td>Anita Chavez</td>
<td>46</td>
</tr>
<tr>
<td>Chief Probation Officer</td>
<td>46</td>
</tr>
<tr>
<td>District of New Mexico</td>
<td>46</td>
</tr>
<tr>
<td>Phillip Munoz</td>
<td>48</td>
</tr>
<tr>
<td>Assistant Deputy Chief Probation Officer</td>
<td>48</td>
</tr>
<tr>
<td>District of New Mexico</td>
<td>48</td>
</tr>
<tr>
<td>Department of Justice Perspective</td>
<td>61</td>
</tr>
<tr>
<td>Johnny K. Sutton, Esq.</td>
<td>61</td>
</tr>
<tr>
<td>United States Attorney</td>
<td>61</td>
</tr>
<tr>
<td>Western District of Texas</td>
<td>61</td>
</tr>
<tr>
<td>Defense and Other Advocates</td>
<td>84</td>
</tr>
<tr>
<td>Reuben Camper Cahn, Esq.</td>
<td>84</td>
</tr>
<tr>
<td>Executive Director</td>
<td>84</td>
</tr>
<tr>
<td>Federal Defenders of San Diego</td>
<td>84</td>
</tr>
<tr>
<td>Jon Sands, Esq</td>
<td>92</td>
</tr>
<tr>
<td>Federal Public Defender</td>
<td>92</td>
</tr>
<tr>
<td>District of Arizona</td>
<td>92</td>
</tr>
<tr>
<td>Judicial Perspective from the District of Arizona</td>
<td></td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Honorable John M. Roll .......................... 107</td>
<td></td>
</tr>
<tr>
<td>District Court Judge</td>
<td></td>
</tr>
<tr>
<td>District of Arizona</td>
<td></td>
</tr>
<tr>
<td>Magdeline E. Jensen ................................ 113</td>
<td></td>
</tr>
<tr>
<td>Chief United States Probation Officer</td>
<td></td>
</tr>
<tr>
<td>District of Arizona</td>
<td></td>
</tr>
<tr>
<td>Mario Moreno ...................................... 117</td>
<td></td>
</tr>
<tr>
<td>Assistant Deputy Chief Probation Officer</td>
<td></td>
</tr>
<tr>
<td>District of Arizona</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Probation Officer Perspective from the Southern and Central Districts of California</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michelle Carey ................................. 129</td>
</tr>
<tr>
<td>Assistant Deputy Chief Probation Officer</td>
</tr>
<tr>
<td>Central District of California</td>
</tr>
<tr>
<td>David J. Sultzbaugh ......................... 139</td>
</tr>
<tr>
<td>Assistant Deputy Chief Probation Officer</td>
</tr>
<tr>
<td>Southern District of California</td>
</tr>
</tbody>
</table>
COMMISSIONER CASTILLO: We're starting today. I'd like to welcome everybody on behalf of the Sentencing Commission. My name is Ruben Castillo. I'm a District Court Judge in Chicago. I'm also on the Sentencing Commission.

Starting on my left is Commissioner Michael Horowitz, Commissioner Beryl Howell, Commissioner John Steer, and Commissioner Mike Elston, who is ex officio from the Department of Justice. Unfortunately, we're missing our chair, Ricardo Hinojosa, who has been under the weather, but is getting better. It was under his fine leadership that we agreed to have a series of regional hearings, principally along the U.S./Mexican border, to evaluate the proposals that we are looking at this year in terms of immigration and criminal law.

We greatly respect and appreciate the work of all the judges along the U.S./Mexican border. They are pressed to do too much with too little. Simply put, our statistics show that there has been a five-fold increase in immigration offenses that are being dealt with along the border. We appreciate also, on behalf of the Commission, that the vast majority of these cases are sentenced within the guidelines.

What does the Commission want to do? Well, we want to help. We certainly don't want to in any way pass any type
of guidelines that would hinder the great over-tasked work being conducted by our colleagues along the U.S./Mexican border.

This is our second regional hearing. The first was in San Antonio, Texas last month. We heard what was occurring in Texas. Today we hope to continue and expand our dialogue with judges from San Diego, the Southern District of California, New Mexico, Arizona. And I really want to emphasize that this is just the start of what we hope will be an ongoing dialogue. We had tried to, by having working groups -- and I know some of you participated in that in D.C. -- we also previously sent Judges Kendall and Judge Sterling-Johnson to a Fifth Circuit conference. Maybe we don't get out from D.C. often enough. It's not because we don't want to. We think it was important that these hearings be conducted here, especially in the Southern District of California.

Where we're concerned, as I said, is the proposed amendments that deal with the unfortunate events at the border. The focus is not only on analyzing those who come from Mexico to the U.S., but more importantly, on protecting their safety and their lives, while maintaining the integrity of our borders in this challenged post-911 era that we all live in.

We're not here also to set any type of immigration
policy on who should come across and who should not. Our job is strictly to try and get the penalties right with regard to violations of the criminal law. It will be up to Congress to decide as part of the national policy what the immigration laws should be with regard to who comes in and who does not.

So with that, I'd like to welcome our first panel from the over-tasked Southern District of California. I call upon Chief Judge, and my good friend, Irma Gonzalez, and also the previous Chief Judge, and my good friend, Marilyn Huff, to please step up. Thank you. And we can proceed in whatever order you want.

JUDGE GONZALEZ: I'm going to start.

(Pause; adjusting microphone.)

Thank you for the opportunity to provide testimony before the Sentencing Commission here today concerning the proposed amendments regarding the immigration guidelines. As Chief Judge of the Southern District of California, I'd like to extend a warm welcome to all of you, and hopefully you'll have an opportunity to enjoy our beautiful city, and hopefully the weather will hold up. I know tomorrow you have a tour of the border scheduled, and hopefully that will go forward without any problems as far as the weather is concerned.

The judges in the Southern District of California appreciate the opportunity to discuss the proposed changes to

Ad Hoc Reporting
Ad Hoc Reporting

the immigration guidelines due to the high volume of cases that this court handles -- immigration cases this court handles. The most recently published numbers in the 2003 Source Book of Federal Sentencing Statistics indicates that our district sentenced 2,046 immigration defendants out of the total of 15,081 defendants, or approximately 13.6 percent of the total immigration cases in the District Courts. For that reason, we are grateful that the Sentencing Commission is here for this public hearing to discuss these very important issues that are raised by the proposed amendments.

Our court also compliments the Sentencing Commission for the thoughtful and reasoned analysis accompanying the proposed amendments. We encourage the Commission to carefully consider the proposed amendments in light of all the testimony you will hear from everyone here today, not only the judges, but the members of the Department of Justice, and also the Federal Defenders or Federal Public Defenders. As judges, we welcome comments from all those that are interested in this topic of public concern, as I'm sure you also welcome these comments.

In general, our district supports the concept that amendments to the immigration guidelines might help achieve the statutory purposes of sentencing, while providing advisory guidance to the District Courts in immigration cases. I will highlight in particular certain issues
relating to the proposed amendments for Section 2L1.1, that is, smuggling, transporting or harboring unlawful aliens, while my colleague, Former Chief Judge Marilyn Huff, will address special issues that relate to high-speed chases and unlawful entry under Section 2L1.2, and also the overall uniformity of the immigration guidelines compared to the drug smuggling guidelines, and the success in our district of the Fast Track Program.

As far as Section 2L1.1 is concerned, the court supports the proposed amendment to increase the base offense level for national security concerns, and leaves it to the Commission to determine the best option after public comment. The Commission might also want to consider whether a similar adjustment for national security concerns might be available in appropriate cases under Section 2L2.2, that is, fraudulently acquiring documents relating to naturalization, citizenship or legal resident status for own use. I notice that there are some -- just one small proposed amendment for trafficking in fraudulent documents, but not for fraudulently acquiring the documents, although the court in this district has limited experience with document cases. We see very few of those in our district.

The court supports an increase for offenses involving a large number of aliens, that is, over 100. I had the opportunity to attend the last round table discussion in
Washington concerning these issues. It is a very big issue in some districts that more than 100 undocumented persons are being smuggled into the country. I agree, and this court agrees, that it requires some attention and more guidance as far as the larger number of aliens that are being smuggled. However, the court leaves it to the Commission to determine the best option after public comment.

The court supports an increase for offenses if the defendant smuggled, transported or harbored a minor unaccompanied by the minor's parent, and leaves it to the Commission as to which option is best. Again, this court has few cases where a minor is unaccompanied by an adult. I know that that is a significant problem in other districts. I know there are two options that are being proposed by the Commission, and one option defines the age of the minor. I think our Federal Defender and the other Federal Public Defender that's here I believe will address that issue more appropriately.

The court supports the changes to the guidelines in cases where death occurs, and agrees that it is appropriate to allow for cumulative enhancements in cases where both bodily injury and death occur. So, therefore, the court supports this stand-alone specific offense characteristic. That is a severe problem, not only in this district, but in other districts where, unfortunately, when a large number of
aliens are being smuggled, and in particular, when there is a high-speed chase, when there is the high probability that not only serious bodily injury will occur, but death will occur. Our judges have found it a little frustrating, when death does occur, that that guidelines don't appear to provide an appropriate adjustment for that. So we support an increased adjustment for that. We find that a stand-alone specific offense characteristic would be appropriate.

As far as the high-speed chases are concerned and evasion of law enforcement, I'll hand that matter over to my colleague, Judge Huff.

JUDGE HUFF: Thank you.

Touching on that, particularly problematic in our district are those cases where there's a high-speed chase, or a failure to abide by the port, or a failure to stay at the checkpoint, or a non-response to lights and sirens. I had attached an article, which was in the news at the time we were preparing our testimony. But then, coincidentally, yesterday, sadly, again, there was another incident where 20 undocumented aliens were in a van that overturned -- failure to comply with the red light -- and seven were taken to the hospital. So some of our judges have commented that the increase for death and serious bodily injury is appropriate in many cases, but you might also take a look at the high-speed chase and see if you need to correlate those two a
little bit better.

Next issue that I want to briefly talk about is the consistency between the immigration guidelines and the drug guidelines, because the sentencings are not just in a vacuum. The more you address the immigration adjustments, then typically, at least in our district, it's a smuggling. It's a smuggling of individuals or it's a smuggling of drugs. And in the drug smuggling, one may get two levels for the safety valve. Frequently, the U.S. Attorney here will offer two levels for minor role. Those four level of adjustments may or may not be available -- well, safety valve is not available -- in the alien smuggling cases. So in the big picture, whatever is done in the immigration guidelines, there should be some proportionality and consistency with the drug smuggling. In the materials that we got, I didn't see it cross-referenced to that. So that's something that you might take a look at.

The next issue that I want to talk about are the proposed amendments. Very interesting attempts to fix this issue under 2L1.2, unlawfully entering or remaining in the United States. This raises the issue of, what do you do about the categorical approach required by law by Taylor and Shepard? We took a look at the five proposed options, and then concluded that, as long as the phrase "aggravated felony" remains in the guidelines and the law, and if the
court is required to determine whether something is an aggravated felony as a predicate to sentencing, then by law one needs to do the categorical approach, which I think you heard at your round table is document-intensive, sometimes the documents are not available, and is a difficult challenge for the courts.

So we are not sure that these amendments would necessarily fix the proposed challenge. However, we compliment you on the various approaches. Of the approaches, there's pros and cons with each. We do think that some symmetry in the immigration guidelines and the sentencing approach is warranted.

Also, of the various options, I think we've sort of settled on perhaps option one or option two. Option one provides more clarity and certainty. It's the 13 months, and one can then look at the rap sheet, and then decide whether the 13-month threshold is met or not. But some of my colleagues prefer option two, which has more grades, and then also then perhaps gives more proportionality and more punishment for the type of offense.

So on this issue, I think we would like to hear from the views of everybody else, too, because it is an issue that comes up. I can tell you from personal experience that there have been at least three trials that I had in the last year that, in my estimation, probably went to trial over a
guideline dispute, over whether the 16 levels applied or it didn't apply. And so to the extent that one of these options can assist the courts -- and defense attorneys and prosecutors and everybody involved -- in deciding ahead of time what is done, then I think that that would be helpful. And I'm sure you'll hear this from probation, as well, but to the extent that we can ease the burden on the record-keeping, that's always helpful. Remember that people plead, at least in our district, 11 weeks before we ever get a presentence report. So the certainty and clarity is appreciated.

Finally, I'd like to close by touching on the success of our Fast Track Program, which is authorized by the Protect Act. In doing this, I got some statistics from our U.S. Attorney's Office that they received from Customs and Border Protection. The number that hit me, again, was that in our district, there were 85 million immigration inspections -- 85 million. We have six ports of entry, and the busiest land port of entry is at San Ysidro, which hopefully you'll get a chance to look at.

What this means is that there is a huge potential for cases, and depending upon prosecutorial discretion, they decide which cases to bring and which cases not to bring. But there is a huge potential for cases to be brought in our district. And indeed over the years, we've seen the tremendous increase in the immigration cases. So with that
said, it's a tribute to our system that, despite the plethora of cases that have been brought in our district, our district remains, according to the 2005 statistics -- the Federal Court Management Statistics -- the second fastest in disposition of criminal cases.

What that means as a practical matter is it saves marshal's cost. Housing prisoners in downtown San Diego is far more expensive than housing prisoners in Oklahoma or maybe some other places on the Southwest border. It's just very expensive for them. It saves interpreter cost, investigator cost, Federal Defender cost, U.S. Attorney's cost, judge cost, probation cost, the whole plethora of items that go into a federal prosecution. And so Congress recognized the benefit of this when it enacted the Protect Act, and it requires the support of the Attorney General. That support is there in our district. And we do believe that the early disposition programs do save costs and conserve resources.

So thank you again for coming. We again compliment you on trying to address these very challenging issues.

JUDGE GONZALEZ: Do you have any questions?

COMMISSIONER CASTILLO: We certainly do. We're not a shy group.

JUDGE GONZALEZ: Good.

COMMISSIONER CASTILLO: Mike, do you have a
question?

COMMISSIONER HOROWITZ: Well, let me ask the judges, at our prior hearing in San Antonio, we heard mostly from judges from the Western District of Texas. They indicated that they were concerned that the guidelines on smuggling were too low. Generally across the board, in cases they had seen, they thought the guidelines were on the low side. I'm obviously generalizing, but that was, I think, a fair impression to take away. They had different thoughts on the illegal reentry. Some thought there were occasions where they were too high based on some concerns you've indicated.

Focusing, though, on the harboring and smuggling guidelines, do you have a sense as to whether they are generally too low across the board? Do you think that it creates any problems or issues by increasing the guidelines as we've proposed?

JUDGE GONZALEZ: I'm just going to make one comment, and then if Judge Huff wants to comment. I personally don't think they're too low. Most of our smuggling cases involve cases where a person's in the trunk or a person is being smuggled in a special compartment. There's already an 18 -- it's increased to 18. We rarely have smuggling cases where you start at a base offense level under 18. So when you're starting at 18, then I think that the guidelines do provide for appropriate punishment, and
there are always other enhancements that we can look to. But if you were talking about guidelines that just start at 12, and then you worked your way down with downward adjustments, then certainly I would be concerned that they may not be high enough.

We also have -- we just have started the Fast Track Program with regard to the smuggling cases. So, obviously, the Department of Justice, at least in our district, views some of these smuggling cases as not being as serious as perhaps in other districts. But the fact that they do provide a Fast Track Program for those who plead guilty early on leads me to believe that at least our U.S. Attorney's Office feels that the seriousness of these offenses are well addressed by the guidelines as they are.

JUDGE HUFF: I would add that, as I said, where there's the death, serious bodily injury, high-speed chase, the egregious conduct, then on occasion those are too low. But in our district, since our bread and butter cases are drugs at the border and aliens at the border, if you make alien smuggling too high, then the drug ones become too low. And I'm sure you used to hear that the drug ones were too high. So there is that balance. At least with the kinds of cases that we get in our district, I think if you took a poll of our judges, maybe a couple would say they're too low, a couple would say they're too high, but probably most would
say, with a couple of exceptions of the high-speed chase
cases, they're about right.

JUDGE GONZALEZ: Because we're generally talking
two or three persons being smuggled, as opposed to a hundred
or with the high-speed chases.

COMMISSIONER HOROWITZ: That was going to be my
other question that we also heard in San Antonio, was that
most of the smuggling cases there, they never even come close
to the six-level -- to the six-person cutoff that we have for
an enhancement. So from their standpoint, talking about 100
or 200 or 400 being additional levels being added, they
actually talked about perhaps lowering the number six down to
pick up the three, four, five-person smuggling operations.
Do you have any sense of that, as well, in your district?
Are you seeing smuggling cases that generally involve larger
numbers, or are you seeing also the one, two-person type
smuggling operations?

JUDGE GONZALEZ: Generally the one, two-persons.
Once in a while we'll have trucks, like the ones that Judge
Huff referred to, where we have 20 or 24. We never see the
really high numbers at all. But it's usually two or three or
four. In this district, I agree, we rarely reach the six --
more than six. And so, therefore, that enhancement doesn't
apply as much.

COMMISSIONER HOWELL: Just to pick up on that, it
was interesting to me that the Federal Public Defenders have
told us that, you know, increasing the numbers for, you know,
a hundred and over in terms of the smuggling of aliens just would be over-complicating to the
guidelines, and, you know, there are only two percent of the
cases nationally that involve that number of aliens. It was
interesting to me to hear in San Antonio that the judges
thought that we really should actually increase the offense levels for numbers of aliens before -- you know, that are --
when the numbers of aliens involved are under six.

But you all don't -- you don't feel that that's
really a necessary step to take?

JUDGE HUFF: The reason is because you go up to an
18, so often the number of alien adjustment is subsumed
within the 18. So most of ours that are prosecuted are
compartment cases where the person has a prior, where they
were given a pass before, and then did it again. So I guess
the answer to your question is that it wouldn't really make
that much difference in our district if there was an
enhancement for under six, because we're already starting at
an 18.

COMMISSIONER HOWELL: Judge Huff, I was interested
in your comment that you had three trials just in the past --
just fairly recently over the lack of clarity over guidelines
issues in over what an aggravated felony is. Is there -- I
mean, there may be no way that the Commission can provide --
you know, can provide sufficient clarity to reduce, you know,
all -- you know, all necessary trials on these matters. But
is there anything from those fairly recent experiences that
you've had that you could share with us in terms of ideas for
how we might clarify the aggravated felony provision in the
guidelines?

JUDGE HUFF: I wish I knew. Some just requires
taking a look at whatever the state statute is, and doing an
element-by-element analysis, and then there -- in the cases
I had, there was a disagreement. One side said, we think the
trend in Ninth Circuit law will be that you do not apply the
16-level enhancement. Another, the prosecution, felt that
the 16-level enhancement under the case law was appropriate.

I was talking to somebody from the U.S. Attorney's
Office, and one comment was, what if you took out the word
"aggravated" from the guidelines entirely, and just made it
felony-based? I don't know. The statute right now says
"aggravated felony," so I think we're stuck with "felony."
But the -- when "aggravated felony" got -- became broadened
to include the kitchen sink -- almost everything is an
aggravated felony -- and so how ironic, you get 16 levels for
an aggravated felony, but you only get ten levels for death.
So I just don't have the answer. I hope that other people
smarter than I am will come and provide that, because it does
Ad Hoc Reporting

seem that, apparently, perhaps a conditional plea would be something that could be evaluated. But we can't get involved in that. And I do think that these cases were going to trial simply because there was a disagreement over this guideline enhancement.

COMMISSIONER HOWELL: Well, do you think that if we did take, as we're proposing, a much more nuanced approach to when the 16 levels kicks in, that there wouldn't be such a dramatic jump up from 16 levels, and that that might help in some of those sentencing disputes?

JUDGE HUFF: One of my colleagues likes that. I'm on the flip side, because the more you have those nuanced approaches, then you need to get the records. You don't get the criminal hist- -- we get rap sheets, but rap sheets are not set in stone, and often they're wrong. In the derivations of the name, a lot of times you pick up things later in the presentence report that weren't in the rap sheet. So to me, the nuanced approach is good because it punishes those people that should be punished. The nuanced approach is bad in that it provides more uncertainty as to whether you fit within that.

For example, the one proposal that says three misdemeanors, misdemeanor records are very spotty, and sometimes hard to get from high volume metropolitan areas. So we might be spending a lot of time and effort by having
investigators and other people go out and get these records.

JUDGE GONZALEZ: In Los Angeles, most of the records are just printouts -- computer printouts -- and we don't get actually an abstract of the conviction. So our probation office has a very difficult time determining what the offense was for. So that's a reason why some of our defense lawyers argue that this was not an aggravated felony. So it's just really difficult.

Right now, with the word "aggravated felony" in four of your options at least, you have to go back to 1101 anyway and figure out whether in fact these apply, and you still have to apply the Taylor and Shepard analysis.

COMMISSIONER CASTILLO: When we were out in Texas, the Federal Defenders gave some, I thought, compelling testimony that said, in the first instance, the Commission has never articulated a justification for the 16-level enhancement. My question to you as judges here in the Southern District is, have you seen instances where the 16-level enhancement, which is a big draconian factor in any sentence, is over-inclusive, just sweeps too broadly in bringing in defendants into that category?

JUDGE GONZALEZ: Well, I think one of the issues in your questions is whether we should count felonies that are more than, let's say, 15 years old. And so at time, I know personally I have felt the 16-level enhancement is somewhat
draconian if in fact the conviction -- there's maybe one conviction that's 20 years old, but it is an aggravated felony, and I have to apply the 16-level enhancement. And I know that's one of the issues that you're trying to resolve is whether the age of the conviction should track the sentencing guidelines. I know that there are pros and cons. The statute is another issue.

COMMISSIONER CASTILLO: They actually went to the trouble of drafting a proposal, and we will get that to you. I wonder if we could ask you all to submit later on any reaction to their proposal on 2L1.2, illegal reentry, because it is something that I would like to take a look at. The problem is, there's not a great deal of time. But if you'd be good enough to do that, that'd be great.

Here's my last question, and then I'll turn it over: I take it -- and I'm not a big fan of the Fast Track Program -- I have to tell you quite honestly -- but if there ever was a district that should have it, it's the Southern District of California. I take it you could not survive in this district without a Fast Track Program. Is that fair?

JUDGE HUFF: I think it would be very difficult. And then it also creates, interestingly, different disparities. On our drug cases, for example, many go to the state court, and in the state court system, the judge that was primarily handling it would give a day a pound. So you
Ad Hoc Reporting

might have a marijuana case that happens at the border where somebody gets 60 days for 60 pounds. So you end up -- by -- if we have too many cases, something will happen to those cases. It might be charge bargaining, it might be something else. This, in my estimation, maximizes resources, where the U.S. Attorney can decide which are the worst cases to prosecute, and then devote those resources to those cases that should be prosecuted.

JUDGE GONZALEZ: I think we would be departing more. I mean, we just don't depart because the Fast Track is at the front end, and it takes into consideration issues that we may have relied upon in departing from the guideline. So our district, I don't think, would've survived had we not had the Fast Track Program. I think the U.S. Attorney's Office realized that, and the judges, for the most part, welcomed that.

COMMISSIONER HOWELL: Can I just -- oh, go ahead. JUDGE HUFF: Could I just add, on the material witness issue, that became, after Crawford, not an alien smuggling case at all, but an evidence case. It became a real issue: What do you do with our material witnesses? -- where our Ninth Circuit law says you need to process them very quickly. Well, then that set up videotaped depositions, which, at the outset, cost a thousand dollars. The defenders would say they don't have, at the very outset of the case,
all of the necessary information in order to cross-examine this witness that's going to be the critical testimony for trial. So it was an example of a case that -- perhaps the Supreme Court wasn't really thinking about alien smuggling cases -- but it had a big impact in our district. The Fast Track Program is an attempt to balance these issues and address that, and release the material witnesses quickly without losing the case.

COMMISSIONER HOWELL: Let me just make one last comment, which is the concern you raised about additional downward departures is something that we're particularly sensitive to, you know, in the post-Booker world -- that -- and that the proposals that we have would increase sentences -- guideline sentences for alien smuggling and unlawful entry and various other things. So one of the things we've been looking at is, you know, will that produce just additional downward Booker variances outside of the guideline sentences, because, with the increases, judges are going to feel like the sentences are going to be too significant and look for ways to downwardly depart? So in that context, I really appreciate your thoughts about some more symmetry between some of the safety valve, the mitigating role abilities for downward departure in the immigration context, because -- and that's another thing just to echo something else from the Federal Defenders'
proposal -- they also had some interesting suggestions on downward departures, so that, at the same time, if we are increasing penalties, that we also provide judges with this ability within the guideline structure in appropriate cases to find appropriate downward departures.

JUDGE GONZALEZ: Right. Because right now it still is difficult to depart. I think most judges would rather look at the advisory guidelines and not depart if not necessary.

COMMISSIONER CASTILLO: Any other questions? Yes, Commissioner Steer?

COMMISSIONER STEER: A number of my questions have been addressed. Let me ask you, Judge Huff, you mentioned the need for some coordination between the drug smuggling and the alien smuggling guidelines. I think you mentioned the lack of safety valve in the alien smuggling guideline as being -- are you suggesting that the Commission should consider creating something like that in the alien smuggling guideline?

JUDGE HUFF: I think it would be good. What we typically see in our district is a person who is hired as a driver. They are very low level. They're hired at the border to simply drive somebody across. And it could be drugs or it could be aliens. And so I've always struggled with, why do you get minor role and safety valve for drugs,
but you don't get it for aliens? And so it's something to
think about. I think it would add some symmetry in at least
the cases that are frequently brought in our district.

JUDGE GONZALEZ: I think most of our judges adjust
downward for role because the driver of these aliens many
times is just one of them, and has just been hired, or is
just doing it in lieu of payment. So, therefore, we adjust
downward. It's usually opposed by the U.S. Attorney's Office
because they see a difference between smuggling drugs and
smuggling people, and that's their argument.

COMMISSIONER STEER: Of course, one of the
principal ideas behind the safety valve as applied to drug
offenses was to avoid the mandatory minimum. You don't
generally have a mandatory minimum for alien smuggling, do
you?

JUDGE GONZALEZ: We have a three-year minimum
mandatory.

COMMISSIONER STEER: Well, that's for smuggling the
child in?

JUDGE GONZALEZ: Oh, no. Whenever someone is going
to make any money, any profit, for the smuggling venture,
including not having to pay, there's an argument that could
be made that that person is facing a three-year minimum
mandatory sentence. That's a real issue.

JUDGE HUFF: Almost always there are two counts.
One is alien smuggling, and one is alien smuggling for financial gain. And if there are more than one alien involved, then it could go from a three-year mandatory minimum up to a five-year mandatory minimum. And so it's most typical that the defendants are facing some type of mandatory minimum charge, at least in our district.

COMMISSIONER STEER: That seems to be something maybe different for your district. I don't think that that is -- that's something new from what I've learned --

JUDGE GONZALEZ: One of the draconian sentences that I did have to impose had to do with just a mule, a hired driver. He happened to be transporting several aliens. I think it was three. And he did go to trial, and he was facing -- and it was for profit -- and he -- I had to give him five years, and that was my only choice. He had no prior record. He was 19 years old. I felt it was just very -- it was very difficult to impose that sentence.

COMMISSIONER ELSTON: Is that sentence that could've been avoided if the person had gotten a Fast Track, or is that --

JUDGE GONZALEZ: Back then there was no Fast -- this is a couple years ago, so there was no Fast Track at that time.

COMMISSIONER ELSTON: But typically that would be the kind of case that would be charged differently under the
Fast Track Program; is that correct?

JUDGE GONZALEZ: Probably, yes.

COMMISSIONER STEER: On the illegal reentry, one of the difficulties with going entirely with a sentence length measurement that you saw proposed in a number of the options there is that there may be some serious offenses that were not -- that you don't recognize that also may overstate the seriousness of some. Since you get only the rap sheets, I guess looking at the underlying facts of the prior conviction would be difficult, as well. You don't get information about that. Some have suggested, for example, that instead of using the crime of violence definition, that if you had something that -- language more like the safety valve, "involves violence," or involves some of these other kinds of behavior that are considered to be particularly objectionable, like "involves drug trafficking," or whatever, that that might be -- that in combination with a sentence-linked approach might be a way to get at this. I'm wondering about the practicality from what you said about the information you get.

JUDGE GONZALEZ: Well, we get a little more information when there's a presentence report written 11 weeks later. But as I mentioned, sometimes it's even difficult for the probation office to get these records.

One of the problems we have in California is that
the state drug statute is very broad. We have many arguments with the defense lawyers over whether that is an aggravated felony, especially when it's charged as transportation of drugs, which may not be covered under the definition of "aggravated felony." So sometimes it's charged that way, and so you really have to dig and look at what the person pled to, and you have to get a transcript of the plea colloquy usually, and the judgment, and the charging documents.

JUDGE HUFF: I like your idea on the crime of violence, to then broaden, and not just say -- have us say, is it or is it not a crime of violence, but make it broader. I think that would help to clarify some of these cases that come before us. I had one that went to trial over whether statutory rape of a 15-year-old was or was not a crime of violence under California law. One side said yes, and the other side said no. So if it was broader, maybe that's a way to help people understand whether the enhancement is or isn't going to apply.

COMMISSIONER STEER: Thank you.

COMMISSIONER CASTILLO: Any other questions?

(No responses.)

COMMISSIONER CASTILLO: Let me just say -- I didn't mean to overlook this -- my good friend and colleague, Judge Sessions, is on the phone from Vermont. Bill, are you still there?
MS. RUBIN: Judge Castillo, he had to step away.

COMMISSIONER CASTILLO: He had to step away. Okay. Well, then he won't get on my case about overlooking him.

Thank you very much.

JUDGE HUFF: Thank you.

JUDGE GONZALEZ: Thank you.

COMMISSIONER CASTILLO: We will switch gears to the District of New Mexico. Maybe I'll give people a chance to get some coffee while we do that.

(Recess from 10:30 a.m., until 10:35 a.m.)

COMMISSIONER CASTILLO: Now we're going to turn our attention to the District of Mexico, and my good friend, Chief Judge Martha Vazquez, along with Anita Chavez, the Chief Probation Officer from the District of New Mexico, and Phillip Munoz, the Assistant Deputy Chief Probation Officer from the same district. Welcome, and we're happy to hear from you.

JUDGE VAZQUEZ: Thank you. Thank you very much for inviting us. We are very pleased to be here. We value very much the work that the Commission's doing on this very important topic, and we're very pleased to come and to share the experiences that we have in New Mexico.

Over 63 percent of the cases that come before my district involve immigration. It is apparent that these numbers will continue to increase based upon the increased
funding of Border Patrol and the increased emphasis on national security. I'm here today with our Chief Probation Officer, Anita Chavez, and Phillip Munoz, our Assistant Deputy Chief, to offer our perspective based upon our experience to ensure that the immigration guidelines fulfill the congressional mandate of 18 United States Code 3553.

This is a particularly difficult directive when it comes to fashioning immigration guidelines, and I do not envy your task. We will be highlighting a few of our observations and comments with regard to the proposed guidelines. We've attempted to redraft some of the amendments in a manner that addresses our concerns. We've been doing so for the last two weeks. I must say that we really appreciate the challenges of your job.

We have worked hard in the last two weeks attempting to address our concerns, and trying to find a way that -- with our experiences of sentencing all of these defendants in these immigration cases, had no idea how difficult it was to try to put into the amendments all of the different problems that we always complain about in the guidelines.

I'm going to start with 2L1.2. My comments will be general, and then I will turn it over to our probation team. The country is rightfully very focused on terrorists crossing our borders. But the most egregious immigration cases that
make the nightly news do not reflect what we see in our
courtrooms on a daily basis. In our district, over 90
percent of the cases were sentenced under the primary
guideline of 2L1.2, unlawfully entering or remaining in the
United States. These aliens are not terrorists, and the vast
majority of them are not violent criminals. Overwhelmingly,
they are motivated by poverty to come to the United States to
work. They come from Mexico or Central American countries to
support their families or to reunite with family members who
are already in the United States. The bottom line is that
they come for the many jobs that are available to them in the
United States. I need to refer you only to your interim
staff report on immigration reform in the Federal Sentencing
Guideline recently published in January, in which you state
that our economy is based in large part on our illegal
immigrant work force.

The fact that, in our experience, the aliens who
appear before us in New Mexico are not terrorists does not
mean that we don't treat them as potential terrorists. Every
illegal entry case in the District of New Mexico is treated
as a potential terrorist case. The cases are screened by our
pretrial division, and the judge is given a bail report with
that defendant's criminal history, so that every judge is
able to make an informed decision about release. A
defendant's background is again screened at sentencing, where
a more thorough investigation about the defendant's background, the defendant's whereabouts in the United States, and the defendant's criminal history category is provided to the sentencing judge. Even during times of severe financial restraints, as the judges on the Commission know we've had in the last few years, even during those times, although tempted, we never took any shortcuts during this period of time, and continue to provide all of our judges exhaustive and complete pretrial and PSR reports to all of our judges.

These measures to protect our borders are necessary and can be done. These measures protect our borders without having to exhaustively punish an entire class of defendants who do not present a national security threat. In light of this, and keeping in line the requirements of 3553, it is critical that this guideline reflect the actual offense conduct and the characteristic of the defendant's sentence under it. We feel strongly that the harshest enhancements should be reserved for those with the most serious prior aggravated felony convictions, and those who pose a risk to American society.

For this reason, of the options related to this guideline presented by the Commission, we have redrafted option number one to address our concerns. Those will be pre- -- that option will be presented to you -- actually, I think it has been presented to you, and Mr. Munoz will go...
over that with you.

In our opinion, option one, in its present form, and options one through three, as they have been presently drafted by the Commission, we believe inappropriately lump all defendants who have committed an aggravated felony, as defined in 8 United States Code 801(a)(43) into a single category. These three proposals calls for long prison sentences for all entering felons, including those who committed offenses such as property crimes. As a rule, a defendant who's sentenced for an underlying offense committed -- I'm sorry -- that exceeds 13 months would face a minimum of 51 to 63 months without getting acceptance of responsibility.

As a policy matter, we may choose to punish more harshly those illegal aliens who reenter after having been convicted of drug crimes or crimes of violence. But I question whether even these criminal defendants should be punished under these guidelines that are designed to target terrorists who pose national security threats.

Using the statutory definition of "aggravated felony" as proposed in the amendments would indiscriminately, and yet significantly, increase the sentences of defendants who have been convicted of non-violent offenses and misdemeanors. Based on our experience, we're concerned that this approach would fail to provide appropriate penalties.
based on the relative seriousness and the risk levels of the different prior offenses. It would result in unfair sentences, and would unnecessarily burden the prison system, while perhaps doing little to protect the public.

Too often these prior convictions triggering the 16-level adjustment involve assault charges stemming from drunken bar fights, or drug convictions where the defendant was a low level mule or back-packer, or the defendant suffered a state felony conviction for possession of a small amount or drugs for personal use.

I will give you an example from our district in which probation, pursuant to the guidelines, assigned a 16-level increase where the defendant had a prior Colorado conviction for a third degree assault. The conviction arose from an incident in which the defendant threw a rock at the rear window of an SUV after the driver had attempted to run over the defendant four times during a dispute over a Sony Discman. The defendant pled guilty and spent 24 days in jail for this offense. At the time of his conviction, Colorado codified third degree assault as a misdemeanor punishable by a term of 6 to 18 months. Because third degree assault in Colorado has as an element the knowing or reckless use of force against the person of another, it was a crime of violence under the guideline, and thus it warranted a 16-level enhancement -- I'm sorry -- an adjustment.
The defendant in this case was lucky. The documents were available for that conviction, and the judge was my colleague, Judge Brack. He was able to carefully assess the offense conduct, and he granted a downward departure. This is the United States versus Perez-Nunez case, 368 F.Supp.2d at 1265, a 2005 case.

In light of the problems such as this one, we're particularly concerned with option five. We believe that a better approach would be to limit the reach of the 16-level adjustment to felons who actually pose a risk to society or who have committed crimes that are particularly repugnant to society rather than increasing the base offense level of all reentering defendants, and decreasing the level only if the prior conviction was not for a felony. We would suggest that a guideline that makes distinctions among reentry defendants through the use of specific characteristic adjustments and more harshly punishes the more dangerous individuals. An underlying prior offense that is non-violent or involves minimal offense conduct should not prompt an adjustment equal to those underlying offenses that demonstrate the defendant's propensity for violence or danger to society.

In my experience, in too many cases the 16-level adjustment for illegal reentry does not fulfill the sentencing goals set forth in 3553. I raise the following point only by way of comparison. I was again reminded of the
harshness of this enhancement when I reviewed the 2005 amendment to Section 2R1.1, the guideline for antitrust crimes and related conduct. That guideline now has a base offense level of 12. Under 2R1, to reach the highest special offense characteristic adjustment, that is the 16-level increase, an antitrust defendant would have committed an offense that affected a volume of commerce to the tune of $1.5 billion. By contrast, we have the defendant I just discussed above, who would have the 16-level adjustment for illegally reentering the United States after having been convicted of throwing a rock at the SUV.

The application of the 16-level adjustment for a relatively minor prior offense is troubling for another reason. Because the prior offense is accounted for in the criminal history, it is, in effect, used twice to increase the defendant's sentence. This double-counting problem becomes triple-counting when the prior conviction is recent enough to warrant the application of two additional criminal history points because the defendant reentered the United States less than two years after his or her release from custody. The prior offense, in effect, is counted four times in terms of raising the defendant's sentence if the defendant reentered the United States while still on probation or on supervised release from the prior offense. And let us keep in mind and not lose sight of the fact that this is an
offense for which the defendant has already paid his debt to society.

Another related concern is what we see as a shift in the burden of proof in these cases. This 16-level adjustment for prior convictions in effect transfer the burden of proof of establishing the character and the quality of this prior offense. Defendants, like the rock-thrower that I've discussed, who wish to argue for a departure based on the fact that the offense conduct of the triggering felony should not warrant a 16-level increase faces challenges. These defendants are in trouble if they do not inform their attorney, probation officer or the court about the relatively minor nature of their prior offenses, or if they don't remember the details, or if they cannot obtain the records of their prior offense. How many judges are going to believe the word of a defendant under these circumstances? It seems inappropriate that this burden is in effect shouldered by the defendants, who, for the most part, have very little education, are very inarticulate, can barely read or write in their own language, much less in the English language, and have not been raised in our country, have overburdened state public defenders as their attorneys for the underlying offenses.

Next, I wish to go on with very brief comments with regard to the smuggling, transporting or harboring unlawful
aliens pursuant to 2L1.1. Offenses relating to smuggling only make up eight percent of the immigration cases in my district. People illegally crossing the Mexican/American border take incredibly dangerous risks and are exposed to the desert conditions in our district. And while we all read about the terrible instances where smugglers inflict injury and death, these types of cases account for only a tiny percentage of the smuggling cases we see.

The average case we see usually involves fewer than six individuals who pooled their resources to make the trip and obtain a car or rent a motel room. By the time they are arrested north of the border, the coyote who took them across the border is long gone. The driver of the car may be charged as the smuggler, when in fact he may have just been the least tired of the group, or the one who happened to have a driver's license, or the one whose turn it was to drive.

Post-Booker statistics from your Commission which were extracted from the December 21st, 2005 documents show that, of the 1,314 immigration cases sentenced in this district during this period, only 101 were for smuggling offenses. In only two of these cases the defendant was assessed points because a victim was injured. Likewise, there were only two cases in which the defendant was assessed points because the smuggling victim died.

In light of these statistics, and based on our
experiences at this district, we provide the following observations and our proposed solutions. The challenge is to craft a guideline that protects the United States from terrorists, but avoids an overly broad sweep. We are concerned that the proposed amendments may be too broad. Our probation team will address our proposal specifically.

Additionally, we are concerned with the practical impact of increasing the base offense level from 12 to 14. There already exists a disparity in sentencing based on nationality, creating a higher base offense level aggravates this disparity for all defendants, not just those engaged in smuggling terrorists.

An additional concern about the amendment is its recommended base offense level of 23 if the assisted alien, not the defendant, had a conviction for any aggravated felony. I believe Judge Huff has talked about this and addressed this issue a little bit. But the broadening of that definition triggers and encapsulates many, many more defendants. We worry that the proposed guideline will include too many defendants who simply should not be sentenced at a base offense level of 23. Our fear is that these unjustifiably inflated sentences would waste judicial resources without advancing the goals of 3553 or promoting our national security.

In light of these concerns, and consistent with
both the statute of conviction and with the principle of
enhancing punishment in relation to danger or risk to our
society, we offer the proposals that Mr. Munoz and Ms. Chavez
will address more specifically. We would ask the Commission
to consider our proposals, which sets a lower base offense
level, and increases with special offense characteristics.

I now wish to turn to the proposed adjustments
under the category of endangerment of minors. We would ask
the Commission to consider adopting a guideline that does not
enhance the sentence for harm involved in the smuggling of a
minor unaccompanied by his or her parents, because these
proposals would enhance sentences for conduct that does not
constitute endangerment, and would most harshly punish
defendants who are most often the least morally culpable.

I will explain. While the most widely publicized
of these cases involves smugglers bringing children into the
States for nefarious purposes, the vast majority of the cases
that we see do not involve those types of facts. We see
parents who have entered the United States long before they
bring their children in. They leave their children in Mexico
or in other Central American countries, and after they have
settled, they ask a friend or family members to bring their
children back into the United States after they have found a
job, and after they have made a home for them in the United
States.
These parents are less likely to entrust their children to the care of strangers who are professional smugglers. Thus those defendants who are committing the offense of bringing in children unaccompanied by their parents are most often not the traditional for-profit smugglers, but rather, they are friends or family members, who may have received compensation for expenses, but who are primarily motivated by the goal of family reunification, and for whom an increased sentence is inappropriate.

If you do decide to include this provision, a possible protection for the least culpable defendants would be to limit the application of this adjustment if the defendant is eligible for a mitigating role adjustment. This would help minimize the problem that we see too often where minor players or mules face the same severe sentences as the more culpable defendants.

I raise an additional concern based on a cultural pattern that we have seen in our courts. Too many Mexican or Central American children, very young children, at the age of 12, 13, or even younger, on their own pay their own fare to a smuggler or come on their own to the United States. These children may be orphaned, abandoned. They leave their impoverished families to find work in this country, or to find their parents who left them behind when they come to find work in the United States. While those who smuggle,
transport or harbor these children expose them to the same
dangers that adult immigrants face, the proposed adjustments
may not account properly for these defendants' culpability.
Thus I am concerned about a guideline that would sweep too
broadly and encompass these individuals.

I don't know if any of the commissioners saw last
Friday's Good Morning America or the Today Show. I don't
remember which show had it. But they were chronicling the
voyage of a young boy called Enrique, who came from a Central
American country. It was a book that was written about
Enrique, but the author chronicled Enrique's trip from his
country. I believe it was Honduras. Enrique's mother left
Honduras and left Enrique with family, and she came to the
United States illegally to work. She was a housekeeper
cleaning people's homes in a state on the East Coast. She
told Enrique that she would be back. She kept sending home
money to Enrique and to his brothers and sisters.

Two years and three years passed, and she didn't
return. She kept sending money, but she didn't return, and
Enrique got to be too homesick for his mother. At the age of
ten, Enrique left his home in Honduras and travelled to find
his mother in the United States. The story is about this
author retracing Enrique's steps. It's a harrowing story
about how this boy, at the age of ten, rode on boxcars and
travelled on foot, no money, by himself, at the age of ten.
Some people helped Enrique with free food, because apparently many children make this trip. They stretch out their arms as the boxcar travels, and people -- other people just as poor as Enrique -- apparently reach out and give all these children in the boxcars who are stretching out their hands food.

Enrique made it across. Some people were not kind, and Enrique was lucky to be alive. But he made it across, made it to New York or wherever it was that his mother lived.

I bring that point out because all of those individuals that helped Enrique make it to the United States could potentially come within the grip of this guideline. We need to be careful. I found it very difficult to do the job that you are attempting to do here, trying to think about all the potential cases that have come before our courts, and this was one example.

I conclude by reiterating my greatest concern about fashioning immigration guidelines. While there is a great deal of repetition in these types of immigration cases, the range of offense conduct, the circumstances and character of the defendants in these cases are more varied in immigration offenses than in any other cases that we see. For this reason, I ask the Commission to fashion guidelines that give judges refined options and more alternatives, which would allow us to make critical distinctions among these
highly fact-specific cases. It is much easier for a court to increase a sentence based on readily available evidence than it is for a defendant to marshal the resources and evidence needed to convince a court to grant a departure from a guideline sentence in those cases where a lower sentence is justified.

This is the case because the courts and probation are overloaded, and immigration defendants are likely non-English speaking and unfamiliar with the court system, and without resources to hire a lawyer and investigators necessary to prove that the guideline is inapplicable in their circumstances, and unduly harsh as applied.

Again, I thank you for the opportunity to appear here today, and I am grateful to you for the opportunity to present the faces and the lives of the people that we sentence. Thank you very much.

COMMISSIONER CASTILLO: Thank you, Chief Judge Vazquez. Thanks for participating in our immigration round table in Washington. Now we'll pass the baton over to your probation officers.

JUDGE VAZQUEZ: Thank you very much.

MS. CHAVEZ: Good morning. Thank you.

We have prepared a packet that I believe you've all received. That's to help get through some of these questions that you've posed to us. I'm going to start, and Phillip and
I will be kind of bouncing back and forth in terms of different issues. The first one will address the 2L1.1, and that's the Attachment A that we've given you.

I want to speak first to the choice that we've had in terms leaving a level 12. We believe that, first of all, this adequately captures the behavior. I believe those questions were there before.

To out one issue of what we consider maybe disparity, a U.S. citizen who transports six or less aliens would be at a level 12, and usually receives a minus-two for acceptance of responsibility, resulting in an offense level of ten. The illegal alien would receive the same offense level of ten under the same circumstances. The U.S. citizen would be subject to a probationary period with electronic monitoring, community confinement or a jail, while the illegal alien must serve at least five months in custody.

If it's to be raised to a 14, we think that might create a larger disparity, in that the U.S. citizen would then face five months in custody at the bottom of the guideline range, while the illegal alien would face ten months automatically, which would double the sentence.

We do understand that in reentry cases appellate courts have rejected the argument that the status as a deportable alien is not a basis for a downward departure. The argument for a downward departure based on deportable
alien status is based on adverse penal consequences that illegal aliens sentenced to prison will face, such as
ineligibility for assignment to a community correction center or home confinement for the final portion of that sentence.

Notwithstanding these opinions, however, we are concerned as to the disparity here based on their illegal status. Because of that concern, we believe 2L1.1(a)(1) should remain at a level 12. So we would start with that recommendation.

I'm going to let Phillip discuss the specific offense characteristics. We've kind of gone with the option two, of making those specific offense characteristics, as opposed to starting at level 25 and 23.

MR. MUNOZ: Good morning.

COMMISSIONER CASTILLO: Good morning, Mr. Munoz.

MR. MUNOZ: I would just turn your attention to our Attachment A, in that we really felt that the smuggling guideline should start at a 12, and it would build from that point on depending on the specific characteristics of that particular offense. I would point out that the specific offense characteristic contained in (b)(1), a particular concern was the language contained in 8 U.S.C. 1182(a)(3). I would also point out that this issue was also raised in the interim staff report, is that it would be too broad in defining in fact what an inadmissible alien was. Because of
that reason, we have specifically struck that provision in the statute -- (ii) I believe -- and have limited the application of this enhancement to 13 levels to (i) and (iii). I would only point that out as we proceed here.

The only other issue I would say is we -- the base offense level 13 in (b)(1) and (b)(2) are also consistent with what the proposed amendment is, in that they would ultimately result in a cumulative level of 25 and 23, respectively.

If I could have you -- the only other changes -- if I could have you look at page 2, we have added two additional levels for death. In New Mexico, we have had -- in the last 18 months, we've had six cases. During that time, ten Mexican nationals have died as a result of those accidents. We just had six die last week alone. For those reasons, and because the accidents involved are usually traffic-related accidents involving either criminally negligent conduct or reckless conduct, we have provided all of you with an additional gradation of either eight or ten levels to account for that, which would mirror the language contained in the involuntary manslaughter guideline currently in the guidelines.

And I believe --

COMMISSIONER ELSTON: So let me make sure I understand that.
MR. MUNOZ: Certainly.

COMMISSIONER ELSTON: Under that proposal, the Government would have to show by a preponderance of the evidence that the defendant acted with -- acted negligently or acted recklessly, and that's what -- we have to make that distinction to determine whether it's eight or ten levels?

MR. MUNOZ: If -- if -- in the involuntary manslaughter guideline, because of the reckless behavior that is usually created during these transporting cases, that would be in the charging document, and, yes, the Government would be the one that would charge that.

COMMISSIONER ELSTON: We're not talking about the charging document. We're talking about this guideline -- this proposed guideline. This is an additional decision point and additional evidence that the Government would have to prove at sentencing would be the intent of the defendant.

MR. MUNOZ: It would be the --

COMMISSIONER ELSTON: You see my problem and concern.

MR. MUNOZ: Right.

COMMISSIONER ELSTON: One of the things that makes -- I think drives everybody in the system crazy is when you create more decision points and more factors and more litigation issues that have to be decided at sentencing. It's one thing to prove that somebody died. That's a fairly
straightforward thing to prove and to establish at sentencing. This strikes me as something that's very complicated to establish at sentencing.

MS. CHAVEZ: If I may address that, I believe the intent was to follow the guidelines that are set forth under involuntary manslaughter, which gives specific behaviors that can relate to that guideline. Our difficulty was, in our district, especially a death and an increase of ten levels, sometimes it's not intentional. They're more died into involuntary manslaughters, like maybe a DWI that resulted in deaths in the vehicle, which is more reckless, as opposed to somebody that left somebody in a boxcar for ten days without food and water. We just felt that if we gave some gradation to address these issues, that the officer would have a better chance to address the actual behavior. It really was not our intent to have to have it in the language to specify that the government has proven negligence, or the Government has proven reckless behavior. I believe the involuntary manslaughter guideline gives us guidance as to what some of those behaviors may be. So I think that was more our intent, to try to create an understanding that there are different ways that people die in these situations, and that it's not just always an aggravating factor.

COMMISSIONER ELSTON: And I understand that, but there would be -- there is a cross-reference to those
guidelines where the level would be below that. And doesn't 
that take care of the occasions where you would want to 
import that language about whether it's voluntary 
manslaughter or involuntary manslaughter, or whatever else?

MS. CHAVEZ: I don't believe I understand. You're 
indicating that it's already --

COMMISSIONER ELSTON: Well, what you're essentially 
saying is that we should have a cross-reference to these 
other guidelines.

MS. CHAVEZ: Well, we would have options, I guess. 
You could do a cross-reference to try to mirror what they've 
already set forth in the involuntary manslaughters, and the 
eight-level increase really matches the negligent behavior 
that you find in a homicide guideline section. Or we could 
incorporate more language again within this guideline that 
mirrors that, but would address this specific offense 
behavior. That's, I think, our only intent is to try to show 
that there are different levels of culpability in what may 
have happened in the actual offense, as opposed to just 
trying to capture all of it with a level ten increase.

Our other concern with this is that, in the current 
guidelines, and as we see them, and in our recent discussion 
that Phillip had mentioned, we had a rollover accident of --
I think it was 14 defendants -- I mean, victims -- in a 
Suburban, and four died, and there's six still in the
hospital. There's not a multiple death guideline either, and
that concerns us also. We feel that this guideline better
addresses that in that it's more cumulative to at least two
victims, and that you can go to 5K2 to do the death penalty
enhancement. So -- or I'm sorry -- not penalty, but the
death -- multiple death enhancement for an upward departure.

I think we're just trying to be fair because of
what we've seen, and trying to address the issues as they
come up, and also address the multiple death issue when it
does, unfortunately, hit our cases.

COMMISSIONER HOWELL: Can I just address this
point?

MS. CHAVEZ: Sure.

COMMISSIONER HOWELL: I think that's one of the
things that sort of jumps out, you know, from your proposal,
what Commissioner Elston was focusing on as, will this be
just inviting a lot of litigation? Although if I understand
your concern correctly, from our proposed amendment, it's
that just a blanket trigger of ten levels may not really be
appropriate in some circumstances and sufficiently reflect
the different circumstances where death may result, where
there could be some people who leave somebody, as you said,
in a trailer for ten days without food or water, I mean,
that's just blatant intentional murder, versus somebody who
had a DWI, and that it would be unfair to give both of them
a ten-level increase and treat them both the same. Am I understanding the intent of what you were trying to do here?

MS. CHAVEZ: Yes.

COMMISSIONER HOWELL: There may be different ways -- perhaps in an application note -- to make suggestions to the court for consideration of departures either up or below ten levels if death results, depending on the circumstances that may avoid -- that may address your concern about a more nuanced approach, and plus certainly what would be the judges' and the Government's concern about -- and defense lawyers, too -- about just increasing, you know, trials over, you know, points and circumstances.

I have to say, I just want to thank you very, very much. It's very, very helpful to us when people have -- and you've clearly thought through some of the things that we're struggling with here, and so I just want to say how much, certainly from my perspective, we appreciate the effort that you took to put your proposals on paper. It's very, very helpful for us in helping to put in concrete form some of the concerns that you have.

MS. CHAVEZ: Thank you.

MR. MUNOZ: I believe the only other highlight that we'd like to -- or the only other point we'd like to make as it relates to 2L1.2, the reentry guideline, would be that a large majority of cases in New Mexico that are most
problematic are these 16-level increases resulting in these Colorado assault cases and which the judge included in her remarks. The only point we would make is that the Commission consider keeping those misdemeanor convictions resulting -- the misdemeanor convictions, regardless of the statutory penalties, that they would be considered misdemeanors. If they're considered misdemeanors in the state, then for guideline applications, they would also be considered misdemeanors for that particular guideline.

COMMISSIONER ELSTON: Well, let me -- I always jump in and ask questions --

MR. MUNOZ: That's fine.

COMMISSIONER ELSTON: -- and forget to do the things that Beryl does, and that's why I appreciate her all the time making us appear to be more generous, and we ought to be more generous, especially given the amount of time that you've put into this. And you certainly have put a lot of time into this, and the time and the travel to come here. And I do appreciate that, as well.

On that last point, though, allowing the states to define a misdemeanor versus a felony I think creates a great deal of disparity in the system, rather than having a uniform -- which is what we generally have now -- which is that a felony is more than a year. We have the same problem. I'm from Virginia and was a prosecutor in Virginia for a
number of years. And in Maryland, there are a lot of two-year misdemeanors, where you can get up to two years. They call them misdemeanors for a variety of things. But wouldn't we be inviting a lot of disparity from state to state, depending on how the state legislators fix these things?

MR. MUNOZ: We did discuss that, and quite honestly, Commissioner, what we were trying to do is, as it relates to this particular guideline and what cases bring us most problems, is that if we don't take another nuanced approach to how we're going to do these, these become problematic. I think some of the cases that have been highlighted, both this morning by the judges from the Southern District, as well as Judge Vazquez, is that they -- we do get these cases in which 16-level enhancements are given, and quite honestly, it may not be warranted. I think that these aggravated felony cases out of Colorado, for example, that we get in New Mexico, and the problems with all the records that are needed in order to get to that level, are becoming increasingly difficult for the Probation Department to really pour over in the limited amount of time that we often get.

Oftentimes they do result in evidentiary hearings. I think that if you wanted to simplify it -- and I -- I -- I can appreciate what you're saying, and yet I think that some of these cases, if we really limit 'em to the misdemeanor
definition of anything that is considered a misdemeanor in the state, it may help out for applicability purposes.

COMMISSIONER ELSTON: One of the things that we're considering is this 13-month time period. That sounds like it would correct the 24 days. I understood from the judge that it was a 24-day sentence. So if you're looking at cases where the judges in the state courts have said this is serious enough that we're going to put you away for 13 months or more of actual imprisonment, versus 24 days, I guess maybe that strikes me as a better way of looking at it, rather than what the state legislature labels it as, a felony or a misdemeanor, looking at what the judge has imposed and how serious the conduct they thought it was based on the length of imprisonment. I don't know if that helps -- would help or not.

MR. MUNOZ: We are actually -- we like proposal -- or option number one, as well, and for those reasons. We're just worried about some of those cases that -- in which an 18-month sentence could be imposed. Again, for the conduct that is there, and the record-keeping that is involved, and the analysis that is required --

COMMISSIONER ELSTON: Well, that's another issue altogether --

MR. MUNOZ: Yes.

COMMISSIONER ELSTON: -- with the categorical
approach and all of those things.

MR. MUNOZ: And I think that for that particular
guideline -- I'm sorry to cut you off -- but for that
particular guideline, that becomes a real problem.

COMMISSIONER ELSTON: I understand. I agree.

JUDGE VAZQUEZ: We wrestled with that one,
Commissioner. That's when we started realizing what a tough
issue this is, because we've wrestled with that. I mean, we
see cases from the states where the state public defenders
are so overburdened that some defendants get long sentences
just because people forgot they were in jail. And when you
look at their records, the records are an embarrassingly
minor misdemeanor, and they ended up serving time in jail
because their state public defenders are so under-funded. I
mean, these are tough, and sometimes -- I mean, it's just a
tough issue. We spent a lot of time on this one, and, you
know, came up with the best we could.

COMMISSIONER HOWELL: I was also interested very
much in your comments about how to deal with the smuggling of
minors, because this is one -- and we're going to hear from
Judge Roll later -- where we've heard very, I think, powerful
stories about children being drugged and abused, you know, if
not kidnapped and held for ransom when they're brought by
coyotes or other smugglers for profit, not friends of the
family. It's a very hard -- you know, it's a very hard, you
know, drafting issue, let alone the factual issue, depending on -- even if we draft it correctly, it will then become a factual issue for how to separate the family friend who's doing a good deed for family reunification versus a smuggler who may be really hurting -- putting a child at very serious risk.

Is your -- I mean, what I -- I mean, I couldn't tell from your proposal is, is it your sense that, given, in your experience, the family reunification purpose and the friendly smuggler of children, that we shouldn't be addressing this, or -- or --

JUDGE VAZQUEZ: I was concerned that it would be so broad that it would necessarily encompass this situation that we see too often, and I just urged caution to make sure that it wouldn't encompass this situation. I am very familiar with those stories, as well. I'm also very concerned about those incidents. It seems to me -- however, I can't say that -- because I don't have experience with those types of smuggling with children, I can't say that I've studied those provisions of the guidelines that I think would be applicable. But it seems to be that there are provisions of the guidelines that could punish those defendants. The kidnapping provisions and the other sex offenses provisions would be applicable in those situations.

But in any event, my point and the reason in
bringing it up is that I just wanted to make sure that you were familiar with those types of cases that we see just to make sure that those scenarios wouldn't be included somehow in the redrafting of those situations.

COMMISSIONER HOWELL: Well, we do -- I mean, we do have language, I think, in the amendment about the smuggler not being authorized to have the child. So maybe that is the -- it would then become a factual issue whether it's a family friend who was authorized by the parents to bring the child versus somebody who wasn't. But I think it's an issue that -- you know, as you can tell from our amendments, we've been very interested in addressing and responding to very thoughtful correspondence that we've gotten from judges, but yet some of us also share your same concern.

COMMISSIONER CASTILLO: Any other questions?

(No responses.)

COMMISSIONER CASTILLO: Let me just thank you. We appreciate the hard work and your putting yourselves in the place we are. We're certainly going to take all your comments to bear. It is too bad that our chair, Judge Hinojosa, is not here, because I'm reminded that our Commission benefits from having a chair who is, in essence, along the Mexican/U.S. border. We hope to bring all of this to bear, and somehow end up with something that is along the lines that you outlined, Judge Vazquez.
Thank you.

JUDGE VAZQUEZ: Thank you very much.

COMMISSIONER CASTILLO: We'll go on to our next panel. I know we're running behind. I don't want to keep anyone. We'll get the Department of Justice perspective, and speaking about Texas, switch back to the Western District of Texas. I welcome the U.S. Attorney from that district, Mr. Sutton. Thank you for being here.

MR. SUTTON: Thank you. Good morning everyone. Thank you, Mr. Chairman, and members of the Commission for letting me come before you today. Good morning.

It is my privilege to appear before you to discuss these important issues surrounding immigration and federal sentencing policy. My name is Johnny Sutton. I'm the United States Attorney for the Western District of Texas. Before becoming a U.S. Attorney, I served as an associate deputy attorney general for the Department of Justice. I was on the transition team that had the pleasure of transitioning in 2001, which was a very exciting event we can talk about another time, when I discovered that the Department of Justice was 125,000 strong, and we had to be ready to go on January 20th.

I was also, before that, the criminal justice policy director for then-Governor Bush, George W. Bush. And before that, I was a front-line prosecutor as an assistant...
district attorney with Harris County, Texas -- that's Houston -- for eight years as a state prosecutor. I am currently the Acting Chairman of the Attorney General's Advisory Committee.

The reentry of criminal aliens after deportation, aside from displaying general disrespect for our laws, presents a significant threat to public safety. The vast majority of defendants we prosecute for reentry after deportation have felony convictions, and a very large percentage of those defendants have multiple felony convictions.

As the sentencing guidelines acknowledge, repeated criminal behavior is an indicator of limited likelihood of successful rehabilitation. Every conviction of a criminal alien represents a reduction in the risk of future crimes in the United States. With this in mind, the Department believes it's important to maintain the strength of the existing sentencing guideline scheme in order to deter future criminal conduct, and incapacitate criminal aliens, thereby preventing them from committing further crimes. It is the Department's hope that amendments to the immigration sentencing policy address and reflect the threat to public safety that is presented by aliens who return after being deported.

The Department also believes that we can further
strengthen the sentencing guidelines by making them simpler. Prosecutors, agents and probation officers spend an inordinate amount of time identifying and documenting and researching prior convictions to determine whether they qualify as aggravated felonies. Defense attorneys must perform the same analysis, and eventually judges must do so, as well. If a case proceeds to sentencing, the process begins anew to determine not only whether a particular conviction qualifies as an aggravated felony, but also to determine which, if any, of the enhancements set forth in Section 2L1.2 of the sentencing guidelines will apply in the case.

As the interim staff report notes, the application of Section 2L1.2 does not always depend on whether a crime qualifies as an aggravated felony. This is especially true in the context of the definition of "crime of violence" in the statute and in Section 2L1.2.

It is important to put these proposals and hearings in context. Our position regarding the amendments to the guidelines is part of a comprehensive strategy addressing border security. As President Bush recently stated:

"Keeping America competitive requires an immigration system that upholds our laws, reflects our values, and serves the interests of our economy. Our
nation needs orderly and secure borders. To meet this goal, we must have stronger immigration enforcement and border protection, and we must have a rational, humane guest worker program that rejects amnesty, allows temporary jobs for people who seek them legally, and reduces smuggling and crime at the border."

To achieve these goals, the administration, working with Congress, has been seeking ways to improve border security, discourage, and prevent illegal entries, and hopefully, as a result, reduce the number of such cases brought before the courts. We are using new technologies to detect and identify individuals attempting entry at our borders, and to discourage anyone from entering except at authorized entry points.

We have increased security, particularly here in the Southwest, where we have increased and will continue to increase the number of federal agents who patrol the border. Just recently, the President signed the Department of Homeland Security Appropriations Bill, which provides funding for an additional 1,000 Border Patrol agents. The increased funding will allow Immigration and Customs Enforcement -- ICE -- to add roughly 250 new criminal investigators to
better target human smuggling operations. It will also allow
ICE to add 400 new immigration enforcement agents.

The Department is also working with the Congress on
a number of proposals to amend the criminal and civil
provisions of the Immigration and Nationality Act, as well as
Chapter 75 of Title 18, which deals with passport and visa
violations. In addition, the administration has expanded
detention and removal capabilities to eliminate the "catch
and release," and has greatly increased interior enforcement
of our immigration laws, including increased work site
enforcement.

In the Del Rio Division of the Western District of
Texas, my office has worked closely with Border Patrol and
the U.S. Customs and Border Enforcement to carry out
Operation Streamline II, a no-tolerance approach to illegal
entrance without inspection. Border Patrol was apprehending
a large number of aliens from South and Central America in
this area who were surrendering voluntarily to secure their
release into the United States pending removal hearings. The
vast majority of those released disappeared into the interior
and did not return for their scheduled hearing.

With a view to ending this catch and release
practice, and to deterring illegal entry in the Eagle Pass
area, we began prosecuting all undocumented aliens
apprehended in certain zones between Eagle Pass and Del Rio,
Texas for misdemeanor reentry without inspection. From late December of 2005, when the operation began, through late February, more than 1600 illegal entrants have been prosecuted under this operation. Of course, prosecution is an important component of border strategy, and one most relevant to today's hearings. As your statistics reveal unequivocally, the number of immigration cases has steadily increased over the last decade, so that now immigration and related cases dominate the work of the courts along the Southwest border, and account for 22 percent of the entire federal criminal docket.

In the Western District of Texas, for example, in fiscal year 2002 through fiscal year 2005, felony immigration cases increased from 35.3 percent of our docket to 54.2 percent of the docket. During that period, the total number of immigration felonies increased from about 1400 to over 2700 cases. The vast majority of those cases involved illegal reentry after deportation or removal.

The Department as a whole also continues to see increases in the number of reentry cases prosecuted. Between 2001 and 2005, the number of such prosecutions rose to some 59 percent. We expect this trend to continue, if not accelerate.

Although we hope to reduce the number of new cases through the deterrence factor that accompanies increased
border security, we recognize that the number of new reentry cases continues to rise, in part as a result of ever-improving ability to identify returning criminal aliens. Along the Southwest border, the staggering and ever-increasing number of these cases has forced U.S. Attorneys to develop innovative strategies to handle their case loads. We're all doing all that we can to maintain our ability to prosecute every deserving case by maximizing efficient use of our finite resources.

To that end, some of our offices employ the Attorney General-approved early disposition program, as authorized by Section 401(m) of the Protect Act and Section 5K3.1 of the sentencing guidelines. To be effective in protecting the public, we must assure that returning criminal aliens are caught, and that they receive appropriate and proportional punishment. With the staggering number of immigration cases now being prosecuted, we believe the goals of this guideline amendment cycle should include ensuring that guidelines account for the risk factors and aggravating circumstances that are presented by returning criminal aliens. By accounting for such risk and aggravating circumstances, deterrence and incapacitation can be targeted where they are most needed. At the same time, we are keenly aware of the burdens of large numbers of cases on all the elements in the criminal justice system, and the need for
sensible reform that simplifies application of Section 2L1.2 in a fair manner in order to relieve the litigation burdens on the participants in the sentencing process.

The Department believes that the options described in the January 25th proposed amendments to the sentencing guidelines are a step in the right direction towards achieving these goals. We further believe that improvement can be attained by simplifying the guidelines to eliminate the Shepard/Taylor categorical approach altogether in the guideline sentencing context, or by avoiding the creation of undue narrow categories of application.

Let me turn to the proposals in the section. As the interim report notes, under this section, the current specific offense characteristics require duplicate, sometimes conflicting analysis when first determining the statutory maximum penalty, and then determining which, if any, of the specific offense characteristics apply under Section 2L1.2. Indeed the categorical analysis has led to counter-intuitive, it not capricious, results in some cases, allowing bad actors to avoid appropriate punishment on seemingly technical grounds.

Let me give you a few examples from my district. In one case, the defendant had a prior conviction for an aggravated battery under Illinois law. Although the prior conviction involved nearly strangling his victim with a rope
to death, we had to take the position at his conviction that
his conviction was not a crime of violence. Under the Fifth
Circuit authority applying Shepard, aggravated battery under
Illinois law is not a crime of violence because it can be
committed without the use or attempted use of force.
Although the prior crime was clearly violent, the defendant
was not subject to the 16-level adjustment under the
guideline as presently formulated.

In another case, we had to conclude that an assault
on a police office under Texas law was not a crime of
violence, even though the defendant conceded that he gave the
arresting officer a head butt to the eye, tore a ligament in
the officer's thumb, and kicked the officer in the shin while
resisting address. Because the offense could've been
committed without the use of force, the prior conviction did
not satisfy the categorical test of crime of violence.
Again, we were compelled to concede that the 16-level
adjustment did not apply to the undisputedly violent
offender.

The analysis of qualifying convictions is performed
according to the Supreme Court decisions in Taylor and
Shepard. Under these decisions, a conviction qualifies as an
aggravated felony or triggers a specific offense
characteristic only if, one, the statute of conviction fits
within the definition of qualifying offense, for instance,
Ad Hoc Reporting

1 the modern generic definition of "burglary," or two, if the
2 statute of conviction contains offenses that fall within the
3 definition, or others that do not, in the limited judicial
4 records establish the conviction was for an offense that fits
5 within the definition. This analysis is cumbersome, and
6 obtaining the necessary records is a time-consuming process
7 for prosecutors, defense attorneys and probation officers.

8 In addition, the categorical analysis has sparked
9 a seemingly endless wave of litigation in the trial and
10 appellate courts. Eliminating the need for this analysis
11 would greatly reduce the workload for the participants in the
12 sentencing process and improve the efficiency and reliability
13 of sentencing determinations.

14 The Department favors moving towards a system in
15 which the length of the prior sentence is the guiding factor.
16 Such a sentence could still include enhancements for prior
17 convictions for certain serious offenses, such as murder,
18 rape, kidnapping and terrorism. The defendants who believe
19 their sentences were unduly harsh in the underlying case, and
20 therefore trigger too stiff an enhancement, could move for
21 downward departure and rely on reports and other records in
22 the underlying case to support their request, similar to
23 current practice.

24 Of the options presented to the Commission to
25 address the categorical approach, the Department favors
option one, with one modification. This option requires an aggravated felony conviction to trigger the enhancements in Subsections (b)(1)(A), (B) and (C) of Section 2L1.2. As the interim staff report notes, this would result in only one categorical analysis being performed, but would not do away with the analysis completely. However, as proposed, this option would create an unduly narrow class of cases subject to enhancement in Subsection (b)(1)(B) through the use of the term "aggravated felony" in that subsection.

Many of the crimes included as aggravated felonies in 8 U.S.C, Section 1101(a)(43), include crimes of violence, theft and burglary, and require a sentence of at least 12 months' imprisonment to have been imposed in order to qualify. As a result, a requirement that a conviction be aggravated -- be an aggravated felony to trigger the enhancement in Subsection (b)(1)(B) means only defendants who receive a sentence between 12 and 13 months of imprisonment would be subject to that specific characteristic. We would submit that this is not a large enough class of repeat criminals to justify a special guideline enhancement.

We think the better option would be to drop the word "aggravated" from Subsection (b)(1)(B), which would result in enhancements ranging from four levels for those defendants convicted of three or more misdemeanors or ordinary felonies with a sentence of probation, to 16 levels
for defendants convicted of aggravated felonies with sentences of imprisonment exceeding 13 months.

I'm going to let the record reflect that I'm skipping to the end to save time. There's a couple other issues that we address, but we'll address those in our written -- in written form, and I can answer any questions. But in conclusion, I want to thank you all for this opportunity to address the Commission on these important issues. And particularly I want to commend you all's staff for diligently listening to the views of the Department, public defenders, judges, probation officers and others in preparing their interim staff report and developing the various options that we are discussing today.

Thank you very much.

COMMISSIONER HOWELL: Mr. Sutton, I'm just going to start out here. It was interesting that you -- you know, you point out that, you know, Congress is now taking up a lot of this policy debate on immigration issues, and they're very thorny, very important, you know, issues for our economy, our national security, and so on. The Federal Defenders also commented in their testimony that Mr. Sands submitted for today, you know, saying quite vociferously that the Sentencing Commission shouldn't be acting because Congress is taking up these issues. And I have to admit -- and I don't think I'm revealing anything -- that this is an issue that we
on the Commission have thought about. You know, Congress is
taking this up. We think it's also a very important issue
for us to address. You know, so I'm just going to ask you
this simple question: Should we be acting now, or should we
wait for Congress?

MR. SUTTON: We are encouraged by the steps that
are being taken, so I think -- you know, I don't want to get
too far out on a limb here in speaking for the Department,
but, I mean, a lot of the steps you're taking we're
encouraged to see, and we think they're helpful steps. I
mean, that'd be my short answer. I guess I'm a little
hesitant to jump too broadly into gigantic issues of
immigration policy, because it's very difficult --

COMMISSIONER HOWELL: Let us do that.

MR. SUTTON: -- and thorny. But we're certainly
encouraged by some of the steps we are seeing.

COMMISSIONER ELSTON: Do you think it would be fair
to say that the proposals that you've advocated in your
testimony are largely consistent with the legislative
proposals that the Department is advocating with Congress?
Is that a fair statement?

MR. SUTTON: I think that's a very fair statement.

Much of what we're seeing here is consistent with the
sentencing structure that the Congress set up. So I don't --
from what we've seen, we don't see any dramatic departures,
and it's consistent and good.

COMMISSIONER ELSTON: And just so my fellow commissioners don't think that I've done a terrible job organizing the Department's responses to their invitations, the reason that you were not able to testify in San Antonio is that you were not available that day. Correct?

MR. SUTTON: That's right. I was traveling that day, and in classic Department fashion, I'm in San Diego when my home base is San Antonio. But I apologize for that.

COMMISSIONER CASTILLO: Did you get a chance to look at the proposal the Defenders made from Texas?

MR. SUTTON: Yes, sir.

COMMISSIONER CASTILLO: And what's your position with regard to that?

MR. SUTTON: We think it weakens the guidelines and raises the burden on the Government, which we don't approve of either one of those ideas.

COMMISSIONER CASTILLO: You think the net effect of that is to lower the penalties in an unfair manner?

MR. SUTTON: We think that that's accurate, that it would weaken the guidelines and lower the penalties. We also are concerned about some of the proposals and the entitlements of defendants to return to visit family and cultural assimilation. We really feel that those are issue -- those are truly issues that are best left to
COMMISSIONER CASTILLO: Do you see any way to target the 16-level enhancement any better? Because there's been a lot of thought that, number one, it was never really fully explained to begin with, and number two, it is overly inclusive at this point in time.

MR. SUTTON: Can you be more specific on what you mean?

COMMISSIONER CASTILLO: Well, that the term "aggravated felony" just includes too many felonies. Why are we labeling them all as a 16-level enhancement, which, as you know, under the sentencing guidelines, has a dramatic effect on someone's sentence? Can't we do any better?

MR. SUTTON: I think there's widespread agreement that it causes a lot of grief in a lot of places. We like option one. We think that removing "aggravated" and having some set time might make it more streamlined. We're dealing in such huge volume, especially in the Western District of Texas, that our judges and probation officers are literally pulling their hair out because of trying to stop and figure this out. So the Department supports the idea of a set number and the idea of, if we can remove "aggravated," that may help. But I certainly am not claiming any expertise to solve that issue.

COMMISSIONER HOWELL: And may I just interrupt and
follow up on that?

COMMISSIONER CASTILLO: Yes.

COMMISSIONER HOWELL: What do you think about the proposal from our two distinguished judges on our first panel about having a safety valve because of mandatory minimums that are at play in alien smuggling, both three years and five years, and also for mitigating role?

MR. SUTTON: Right.

COMMISSIONER HOWELL: I don't want to put you on the spot.

MR. SUTTON: Yeah, it's a little bit of putting me on the spot there.

COMMISSIONER HOWELL: You have a very senior Department person here also.

MR. SUTTON: Yeah. At least I'm not in my district with my judges.

(Laughter.)

MR. SUTTON: We would probably be resistant to that.

COMMISSIONER HOWELL: Why is that?

MR. SUTTON: Well, I guess the main thing is that one of our struggles is always to get the appropriate punishment on alien smugglers, and in our district at least, we feel that they're not getting the punishment they deserve in many situations. We resist, I guess, dropping that down.
We feel that we move cases fairly well, with reasonable results. But I think you heard from some of our judges that were concerned that alien smugglers were not getting maybe the punishment they deserve in every case. Anything that sends the message to the smugglers that, you know, you can make a whole bunch of money, and it's going to be a punishment level that may come down, we would resist.

COMMISSIONER HOWELL: Okay. Well, I just have one last question, because you talked about deterrence. I was just curious about this, and it really doesn't have to do with the guidelines per se. But in 8 U.S.C. 1324(e), there is a provision that asks -- you know, that requires the Department of Homeland Security and the AG to develop and implement an outreach program in the U.S. and abroad to help deter -- to educate the public about penalties for alien smuggling and harboring.

Do you know anything about -- is there such a program?

MR. SUTTON: Honestly, I -- I mean, I'm sure there's someone at the Department that is probably working on that. I honestly do not know the answer to that question. I know that we do work very, very closely with the Mexican Government. When I was with the Department, we would have meetings all the time in Mexico City and in Washington to try to educate folks. From my experience, the Mexican Government...
was pretty good about getting the message out. There's parts of it that are not, and we've gone back and forth on that. But I assume that what that is -- well, maybe I shouldn't assume anything. I can call the Department and follow up on that. And Mike may know the answer.

COMMISSIONER CASTILLO: And I take it you're a believer in the Fast Track Programs that exist.

MR. SUTTON: We are. We are a believer. We think it's important. Obviously, there's some dynamics to it that are difficult. But on the Southwest border, I mean, we did over 5,000 felony indictments, 2500 in our El Paso Division alone, which is 31 lawyers, of which, you know, probably only 21 of them are full-time non-supervisor criminal lawyers. So it's an incredible burden. Frankly, we don't -- you know, there's districts like San Diego that use it a little more strongly than we do. But we think it's an important tool. It's something that the Attorney General is looking at very closely to determine where it should be appropriately used, and that's something that we're reviewing at the current time.

COMMISSIONER CASTILLO: Is it accurate that El Paso does not have a Fast Track Program?

MR. SUTTON: We do have a -- well, it's a little bit of a nuanced answer there. We are authorized for Fast Track. We are able to move a lot of cases without doing a
lot of Fast Track, but we want to have Fast Track in El Paso, and a lot of it is internal situations that are unique to that district -- to our division. But we don't do a great deal of Fast Track. But I certainly don't want that to give you an impression that we don't want it and have that tool available, because it's very important to us.

COMMISSIONER ELSTON: Just to follow up on that, and since you are the Acting Chair of the AG, and seeing an issue presumably that all the U.S. Attorneys are struggling with and are dealing with, I think one of the concerns that we all have on the Commission -- I think you've heard it from those of us here, and the Western District hearing in San Antonio, I think it's fair to say the other two commissioners mentioned it also -- it's the concern being that it seems still somewhat haphazard how Fast Track is being used. Hearing about it in the Southern District of Texas and in your district, for example, some divisions have them, some don't. The Chair who sits on the border does not have it in his district, and is able -- and he can speak for himself on this -- but is obviously able to handle his case load. I think it's those kind of examples that cause all of us to sit back somewhat and scratch our head on, when is it really necessary? Obviously, 85 million border entries in this district speaks quite powerfully to a problem. But I think one of the things we hear as we have these hearings and hear
from people on the subject is a concern that it's somewhat haphazard, that -- also a concern, I think, that we all have is, in terms of application of the guidelines, whether it makes sense for someone to get a four-level reduction, say, under a Fast Track Program if you're caught in El Paso, but not if you're caught at a border crossing 200 miles away, or flip it around to the Southern District of Texas, if you're caught at certain borders. So I think that's the concern that we have in a sense of a need to, on the Department's part, to put together some more coherent strategy or plan for where Fast Track is truly needed and where it's not.

MR. SUTTON: Well, I can tell you the Department definitely has Fast Track under review, as the Congress allowed us to do the Fast Track. So it's certainly something that's approved and was considered when having this debate over disparity. And again, generally it's a choice between a reduction in sentence versus nothing happening at all, which is -- you know, the question is, how do you balance that in fairness nationwide, and keep it in control? All I can say is the Department is carefully reviewing it right now, and is, I think, doing a pretty good job of controlling it. There's always going to be dynamics that are very unique to certain divisions, like El Paso versus San Diego, that are -- you know, are very hard to, without explaining a whole lot of factors and a lot of time, explain why certain
districts need it and others don't need it as dramatically. But I can tell you, the Southwest Border Team -- U.S. Attorney Team -- feels very strongly that we should keep it, and that it makes America safer.

COMMISSIONER CASTILLO: John -- Commissioner Steer, any questions?

COMMISSIONER STEER: I did have one sort of derived from the Defender proposal. It raises the issue of a heightened offense level for the individual who reenters after having multiple prior convictions for aggravated felonies. In your experience, is that a frequently occurring situation?

MR. SUTTON: To see people come back with multiple priors?

COMMISSIONER STEER: Yes.

MR. SUTTON: Unfortunately, that does happen more than we'd like.

COMMISSIONER STEER: Not just multiple priors, but multiple prior aggravated felonies.

MR. SUTTON: Uh-huh. And that is one of the dynamics that we're trying to address here, is not only do we have an illegal alien, but many of them have been convicted, gone to prison, been deported, come back, been deported. So that's, I think, one of the reason we feel so strongly about increased punishment, and really not giving much in this
regard, because this is a class of offender that we feel very
strongly about that we've already made the decision to keep
them out, and the only thing that we can do to keep America
safe is to, you know, ramp up their punishment as they
continue to come back, because our experience, unfortunately,
is they will continue to come, and that the best deterrent
for us is increased punishment, literally locking them up in
some time.

COMMISSIONER STEER: Punishments are pretty severe
in this area, but we don't seem to come anywhere close to
what Congress has authorized for aggravated felony
conviction, 20 years. So I don't know what category would --
we ought to be looking at, other than the terrorist, of
course.

MR. SUTTON: Right.

COMMISSIONER STEER: But no one's talking about
enhancements that come anywhere close to pushing penalties to
that range.

MR. SUTTON: Right.

COMMISSIONER CASTILLO: Anything else?

COMMISSIONER ELSTON: One quick question. I notice
that option five didn't attract a lot of interest. I just
wanted to get a little bit of your sense on that, because
from a prosecutor's perspective, you would think that option
five would be a good one, because it does tend to shift the
Ad Hoc Reporting

1 burden to have the different -- you know, you get the top
2 level unless you can establish that your criminal history is
3 less serious than others. But I take the Department is not
4 in favor of option five.

5 MR. SUTTON: Well, our choice is option number one
6 is our first option. We think that option five is an
7 attractive option. It's simple, it's easy, and it would
8 eliminate a lot of the categorical problems that we see.
9 Option one's our favorite, but we certainly don't not like
10 that one.

11 COMMISSIONER ELSTON: Right. Understood.
12 COMMISSIONER CASTILLO: Thank you very much,
13 Mr. Sutton.

14 MR. SUTTON: Thank you.

15 COMMISSIONER CASTILLO: We'll continue right along
16 with the perspective from the defense. I'll recognize Mr.
17 Sands, Federal Public Defender from the District of Arizona,
18 someone who's (coughing; indiscernible) Commission. And then
19 I also welcome Mr. Reuben Camper Cahn, Executive Director of
20 the Federal Defenders of San Diego.

21 MR. SANDS: I note that Commissioner Howell had to
22 step out for a conference call.

23 COMMISSIONER CASTILLO: Yes, she did. So excuse
24 her absence, but a record is being kept. So -- have you
25 decided who would go first? -- flipped a coin?
MR. CAHN: I think I'm the choice to go first.

COMMISSIONER CASTILLO: Okay, Mr. Cahn.

MR. SANDS: He's getting acceptance of responsibility.

COMMISSIONER CASTILLO: Hometown advantage. We'll let you proceed first.

MR. CAHN: Let me begin by thanking the Commission for giving me the opportunity to speak. I appreciate that.

I should begin probably by a confession of my limitations, which is that I am neither an expert on immigration nor on the guidelines. I'm a trial lawyer, and I've practiced here in San Diego, and in another district with a fairly difficult immigration problem, the Southern District of Florida, where I was for 13 years. What I'd like to do is give a perspective based upon my experience in those two different places.

Let me begin with my adopted city, my adopted home of San Diego, and talk about the way things really work here in San Diego. And I think it works well. Let me begin with that. I echo the judges' comments that Fast Track works well here. It's appropriate. It's absolutely necessary. But beyond being necessary, I endorse it because it results on the whole in more just sentences than would be obtained solely by application of the guideline.

What that means in reality here -- here in San
Diego, on the whole, the U.S. Attorney's Office does not prosecute 1326 cases that don't involve felony -- prior felony convictions or prior aggravated felonies. Nevertheless, the general offer made in the average case is a 30-month offer. That's the vast majority -- well, let me just say the majority of cases are resolved by a 30-month offer under the Fast Track Program.

The next category of cases are those cases that involve either someone with a category five or category six criminal history, or particular priors that lead to greater scrutiny and a fear that there's greater risk in their returning, greater punishment is called for. Those individuals receive an offer of 48 months. In the exceptional case, those cases where neither of those sentences is felt to be adequate, those cases where, for instance, someone has a prior conviction for a sexual offense, sexual assault, or some sexual offense involving a minor, in those cases, there's simply no offer made, and the offer is only to a guideline sentence to be determined by the court after a full sentencing hearing.

The Government appears to have, one, no difficulty in making the distinctions that need to be made in determining, who are the real people who need to be punished most severely? Who are the people who need to be punished less severely? And who are those that fall in the middle?
The extensive litigation that has plagued so many districts, and at times plagues our district, about the fine distinctions made in the guidelines and in immigration law is eliminated and the system works well. And as I said, the sentences are just, and what are more just than might otherwise be obtained. And when I say that, I want to emphasize that these are offers made by the prosecution, and when the prosecution -- DOJ -- the Government -- comes in, they are neither holding their nose nor swallowing hard in making these offers. And judges, I don't believe, are having any problems in imposing the sentences called for by these offers.

So I think when the Commission looks at the possibility of ramping up penalties well beyond where they are now, it needs to look at the fact that these are sentences being imposed in so many cases in a district which has, as Judge Gonzalez and Judge Huff said, 13.6 percent of all the immigration offenses, and they're considered to be adequate, sufficient and just, that it makes little sense to look hard at ramping up all penalties without focus on specific harms that might justify some particular action.

On the other hand, having practiced here -- I also practiced, as I said, a long time in Miami -- and Miami is a district with -- I don't know if a Fast Track Program has ever been authorized, but there's certainly never been one
implemented. All our cases were done as strict guideline sentences. As a result, all the cases involved protected litigation, both to look for possible defenses, because the sentences were so severe, and protracted litigation about the sentencing itself. So I was often involved in sentencing hearings that lasted many, many hours, if not an entire day or longer. And there was a general sense, I think, at least amongst the judges, and I think amongst practitioners as a whole on both sides, both the Department of Justice and defense attorneys, that the sentences were our of whack. And when I say that, I mean that -- let me step back and say that the District of -- the Southern District of Florida has a very broad range of crimes being prosecuted there. So we saw a lot of gun cases, we saw a lot of bank robberies, we saw a lot of drug cases, both importations, but other sorts of drug cases. What was very difficult for me, and I think very difficult for many judges, and for some of the prosecutors, as well, was trying to understand why somebody who had reentered, often somebody who had been in the country for a good period of time after their reentry, had committed no further crimes, had not harmed the country beyond their simple reentry into the country, would be subject to a sentence as long as somebody who was facing a felon in possession charge, a drug charge, or some other very serious charge. There was just something out of kilter in that
regard, that these severe sentences were being imposed
regardless of the actual conduct of the person after
reentering, and regardless of any harm they had caused.

So looking at these two different situations, I'm
troubled by the idea that a more severe guideline system
would be generally imposed in those districts without Fast
Track. Aside from increasing the disparities that exist
already, I think they would simply be unjust, and I think
that the injustice, when people look at particular cases,
would be recognizable to almost anyone.

I'd like to give a couple brief comments very
targeted on the alien smuggling cases. I won't attempt to
give any broad perspective on them. But I wanted to address
particularly the adjustment that's included in the proposals
for smuggling of children, unaccompanied minors. The way in
which it's drafted, I feel reaches far too broadly, as I
understand the harm that's being sought to be prevented.

When I was at the immigration round table that took
place in Washington, there was a very specific harm that was
talked about, and that was the harm of young children brought
to this country by smugglers who were in no way connected
with the family themselves, and children of such an age that,
when there were apprehensions and arrests, there would be an
inability of the children to identify relatives, parents, and
there were extreme difficulties on the part of authorities
here in the United States and in Mexico, or whatever country these individuals came from, in reuniting these minor children with their parents. That was a specific harm about which concern was voiced. And yet the proposal, reaching all the way up to children who may be as old as 17, children in name only, doesn't seem in any way to address that harm, and seems likely to simply ramp up penalties in ways that don't make sense.

I would note that in this district -- this is not something I saw in Miami because Miami was very different -- we have unaccompanied minors who are coming on their own. They're not seeking to reunite with parents. They're simply coming here to work -- age 15, 16, 17. Oftentimes these individuals are acting as guides coming across the mountains. So to impose enhanced penalties in that range of ages for minor children being smuggled simply seems too broad and doesn't seem to address the harm with which the Commission was concerned.

Last -- or actually, I guess there are two other things I'd like to briefly comment on based on my experience as a practitioner and somebody who's often been flummoxed by the complexity of these guidelines and the difficulty of litigating under them.

The Department of Justice representative said that they advocated the Commission acting despite all the bills

Ad Hoc Reporting
that are pending in Congress and the myriad approaches that might be taken. And while the Commission's -- some of the Commission's suggestions may be in line with some of those bills that are pending, they may not be in line with some of the other bills. One of the greatest difficulties as a practitioner in dealing with these cases, and advising our clients, and in litigating these matters before the courts is uncertainty in new law. I would hate to put this district, to put my office, to put my clients, and to put the judges in a position of litigating what would essentially become a brief interim regime. I'm reminded of the position we were all in between Blakely and Booker, when none of us knew what was happening. We were all litigating in anticipation of the Supreme Court acting. I can see us being put in exactly the same position here, and this just being incredibly difficult for everybody who operates in our system in very difficult conditions already.

Last, I have one comment that I imagine is not authorized by the defenders or anyone else, but it comes out of my particular experience. One of the things I didn't mention is that before becoming a Federal Defender in Miami, I was a state public defender in Broward County, Florida, and I did that for four years after leaving corporate law. I spent a lot of time, as most state public defenders do, in arraignments 21 days after the arrest of defendants, talking
to defendants who were sitting in the jury box with nothing but what's called a PC affidavit, which is a very, very brief complaint, talking to them about their case, and oftentimes resolving their cases at arraignment.

In federal court, I think we tend to get the idea, well, we really -- we have the luxury of time and resources, even if we're pressed. So we believe, because this is what we do, that when a 13 or 14-month sentence is imposed instead of a six-month sentence or an eight-month sentence, or a 22-month sentence, there are very good and proper reasons for that, that all the litigants have brought to bear their resources to convince the decision-maker, the judge, about what's appropriate, that the judge, with the benefit of a good deal of information, has really very carefully decided what sentence to impose. And that's true in federal court. But I can tell you that is absolutely not true in the state courts of Florida, and I imagine it's not true at all in any other state court in this country.

Oftentimes decisions were made on things as simple as whether or not the client didn't want to litigate his case because there was a time-served offer that day. I made decisions to plead people to what were, generally speaking, very lengthy terms of imprisonment, because I knew at various times when I was in the State of Florida that they would serve as little as a month on a year sentence. Those are the
realities of what I did, doing the best job I could do with 160 case files as a public defender in the State of Florida. So I'm really concerned about the idea of tying fine gradations in the guideline to sentences in state court that may in no way reflect considered judgments about the culpability of the individuals who are involved in those cases. And so I'd ask the Commission to look very hard at that, and be very skeptical about that possibility.

And with that, I'd pass it over to my far more learned colleague.

We are grateful for the opportunity to appear in front of Commission once again. For 15 years, we've had this dialogue about what is a proper sentence, what is fairness, and we are appreciative of the spot at the table, the spot at previous tables, working with the staff, especially in immigration.

The topic we talk about are sentences. And although the grammar may have been changed because of Booker, we are still seeking the right thing, which is an appropriate sentence in this matter.

The Commission's proposals are put forth at a time which there are voices in Congress that are discussing other options. The Department has talked about it, and the Commission itself is aware. As Mr. Cahn has said, it is
troublesome to imagine a state of maximum uncertainty in which the Commission finally acts on guidelines, and then Congress acts, and then the Commissioner has to come back yet again. We are then talking about not only three looks, but three supplements, and what are we going to do? So despite the fact that the Commission has spent a great deal of time looking at this, a go-slow approach, given the uncertainties, might be something the Commission should think about.

The Commission's proposals in this matter are troublesome on several aspects. The Defenders' proposal, while not perfect, attempts to adopt the graduations and the calibration that has been the hallmark of the Commission for the past 15 years. It seeks to target the most culpable defendants, using language, using a matrix that the Commission is aware of, trying to find within the language of the guidelines ways of punishing, as I said, the most culpable, and yet having least punishment for those that are least culpable. What our proposal does, as the Commission is aware, is look at those that have several priors, looks at the length of sentences, and gives the court the guided discretion that the Commission has sought.

Against this, we are looking at the proposals from others that use the plus-16, again, as the bludgeon to try to sweep in all these sentences. The plus-16, as the Commissioners have pointed out, has never really been
justified. It is there, and that has caused a great deal of
trouble and a great deal of criticism for some time.

The Commission is an expert body. It was
recognized as such at its formation. It's been lauded as such
by the courts. The Supreme Court has recognized its
expertise in Booker, the case whose name should be spoken.
It's just one of those things, I thought I would say "Booker"
and not shy away from it. The Commission should undertake
that responsibility of saying why it's level 16, a level, as
previous panelists pointed out, is a billion dollars in
antitrust, 25 million in fraud, approximately the same as
manslaughter. That is a huge cliff, the steepest -- or
not -- one of the steepest in the guidelines. The
Commission, in trying to rectify that, should go back to
first principles.

The definition of "aggravated felony,"
unfortunately, is overbroad and ambiguous. It sweeps in far
too many. At the present rate, it seems like close to 40,
soon to be 50 percent of the cases are defined as aggravated
felonies. You're looking at sentences for a defendant who
may have served days or a few months in the state all of a
sudden facing three, four or five years in the federal system
for offenses that he's truly not cognizant of.

There's been a great deal of discussion by my
learned adversary, Mr. Sutton, about homeland security, about
keeping the border safe. But a lot of -- most of the defendants that are coming back are pulled by economic reasons, family reasons. They are still guilty. They shouldn't come back. It is illegal. But it's far different to recognize why they're coming back from that very small percentage of cases of people coming back to do ill or coming back with a wish to do ill against the country. The pull for most of the illegal reentries is economic and family.

In looking at the proposals that the Commission has done, and looking at the prior history, as Reuben pointed out, the state sentences are not a good marker. The Commission was forced to use that 15 years ago because, at the time, it was one of the better ways of predicting priors. Scholarship and commentators have cast doubt on that. We know that there are some states in which a sentence of 21 months is really three months or four months. King County in Seattle, Washington routinely gives 21 months for drug cases for very small amounts. They don't serve nearly that amount. But we see them coming in, and they are caught as much as someone who's given just a few months in California. It is difficult using a prior state as a marker. It just brings in that unwarranted disparity that the Commission has been concerned about for some time, and which it's studying even now in its criminal history report.

Of all the options, aside from ours, which we
embrace and trumpet, option four is probably the least ill-advised. We would argue and ask that the Commission consider putting in just what I said, and maybe a time frame for the sentences of drug use and crimes of violence, and to limit crimes of violence against the person. Crimes of property is of a different magnitude, far less, I would argue, than a crime against a person. It's one that we could deal with.

In all of these proposals that deal with calibration, that deal with looking at the priors, there's been criticism of Shepard and Taylor as having it being over-complicated. In some respects, sentencing, as I've heard judges state, is the most difficult thing for a court to do because you have a person's liberty at stake. A court should take the time, and the resources of the federal courts should be brought to bear on giving that appropriate sentence.

I wish to laud the court in the District of Arizona and the Probation Office in providing us with the materials for doing that. I have heard complaints from other districts. The system works in the District of Arizona, and it's the commitment of the court and the probation officer to providing the prior records, to getting us the information.

I must take issue with Commissioner Horowitz with saying that San Diego is the only district that would call out for Fast Track. I imagine that Judge Roll and Maggie Jensen would say that the District of Arizona would also be
in that realm. But all the Southwest faces those issues. It's not too much asking that when someone is facing years and years, that his or her priors -- that the Government does prove it, and prove it by that element. Even if the Government is unable to get the records, it's not as if the person's going scott free. They will do a time, and the Government, the prosecutor, can always ask for a high end or a variance or an upward. The Government has tools to inflict maximum punishment and maximum pain. The Government should, in the appropriate case, look toward that.

Lastly, in dealing with the Fast Track, the Department of Justice has authorized it for a number of districts. We scratch our heads at those districts, too. We recognize, as I mentioned, that the Southwest has a problem. North Dakota has a Fast Track, maybe because of the hockey players trying to get in from Canada. Nebraska, Idaho has it. There's that little bit up there. And so --

COMMISSIONER ELSTON: The people in Idaho will point out to you that, at one point, the southern border of Idaho was the border between Mexico and the United States. (Laughter.)

COMMISSIONER ELSTON: I think that historic anomaly maybe is not the explanation for the --

COMMISSIONER HOROWITZ: I think Mexico would like to go back to that border.
MR. SANDS: Plus I think there are people in Idaho that want to form their own country, too. Idaho has their own problems.

But with Fast Track, the Commission should be concerned that the districts where 75 percent of the cases are coming through do have Fast Track, and where most of the cases are different from what the guidelines are. It's a situation, as Reuben says, in which the prosecutors are coming in and doing an appropriate sentence, unlike San Diego, we have the Fast Track that's based on the guidelines. So if it's an aggravated felony, and you accept the deal, and you have to accept it quickly, you get four levels off for Fast Track, plus three levels for acceptance, which has a result of cutting the sentence in half. That's virtually across the board for all types of defendants. Most of them do not have violent felonies, but have a drug problem.

The prosecutors know that this is a fair sentence. The court knows that this is a just sentence. The guidelines should reflect that. There is a concern by the prosecutors that if there is a calibration of the guidelines so that many defendants are facing a lower sentence, that they would just go to trial. That won't be the case. The prospect of getting out in two years as opposed to three years is still a strong incentive. The prospect of getting out in six
months as opposed to 18 months is still a strong incentive. If the guidelines are adjusted to accurately reflect the true cost of these sentences, there are not towns in Mexico or Central America in which billboards will go up saying the guidelines have come down, go north, young man. That is not how it works. They're pulled here by economics. They're pulled here by family. We believe the guidelines should reflect the realities. There should be punishment, but it should be calibrated.

Thank you.

COMMISSIONER CASTILLO: Thank you both.

I will tell you, Mr. Sands, we're not afraid to mention the word "Booker." In fact, one of the things we're, unfortunately, spending a lot of time here in San Diego on -- and it's not a well-kept secret -- is the issuance of a forthcoming one-year Booker report by the Sentencing Commission. So stay tuned. It'll be out there.

Speaking of that, one of the problems with the Fast Tracks is, in a district such as mine in Chicago, the arguments are being made by defense attorneys, and accepted by some of my colleagues -- not yours truly -- that because there is a Fast Track Program in Arizona, or a Fast Track Program in San Diego, therefore, a reentry defendant in Chicago should get the benefit of those Fast Track Programs, because it creates undue sentencing disparity. That's part
of the national reality we're dealing with.

MR. SANDS: What is so strange about the Fast Track is that we think there is an image that there is this lone border agent on the border grabbing people desperately as this hoard comes. In Phoenix, every couple weeks I go to the County Jail, and anyone with an Hispanic name gets asked (unintelligible). It's not -- it doesn't take a lot of work -- or if they fall into the hands of the Government. The border itself has other problems. It's a reaction. But it is a situation, as one of you pointed out, where a defendant who manages to get through Phoenix, but ends up in Nevada, all of a sudden loses the 30 months opportunity. And it could be a matter of two hours.

COMMISSIONER CASTILLO: Right.

MR. SANDS: His van is stopped outside of Phoenix as opposed to outside of Las Vegas. Does that make good policy? Does that promote the unwarranted disparity that is the goal of 3553 and the guidelines? It's troublesome. And what we are seeing is the expansion of early disposition, from illegal reentry, to drugs, to smuggling. What's next, low level fraud at various at various parts, expanded firearms? It is a situation in which the Department of Justice, if one listens carefully, is all in favor of them having the full discretion, and they will push that.

COMMISSIONER HOROWITZ: So are you opposed to any
expansion, then, of the Fast Track Programs to other offenses, to other types of crime? I would assume that's something you actually don't oppose.

MR. SANDS: What we think is interesting about the Fast Track is it shows that the Department of Justice recognizes in certain cases that perhaps the guidelines are too high, and that punishment is too severe.

COMMISSIONER ELSTON: Well, I can't really let that one slip by. They do pay my salary.

MR. SANDS: I was just trying to goad you.

COMMISSIONER ELSTON: That certainly isn't the reason why the Department of Justice supports Fast Tracks, and it's not the Department of Justice that has placed the discretion in the prosecutor's hands with respect to Fast Track Programs, but Congress has done that. That's the law.

MR. SANDS: But Commissioner, --

COMMISSIONER ELSTON: That's the law. Let me finish. The reason why the Department supports Fast Track Programs, particularly on the border -- and I'm not here to defend Idaho or Nebraska or any of that -- but particularly with respect to the border -- because it's about immigration -- is that we believe that there is a more significant disparity created by not prosecuting people coming across the border than by prosecuting everybody, or a larger number of people, and giving them lower sentences to
make it work. That's the argument that we hear from judges and defense attorneys in the Southern Dis- -- and prosecutors in the Southern District of California, that if we don't have these Fast Track Programs, we will have to send them back without prosecuting them, and that's a bigger disparity than the disparity that's created by the Fast Track Program, having it here in the Southern District of California and not having it in Pennsylvania or wherever. So the Department's view is not that these penalties are sufficient.

I have to take some issue with some of the comments that your colleague made earlier, as well, because it's very clear to me that neither Congress nor the Department thinks that the penalties are too high. In fact, you're seeing significant -- outside of the border area -- significant pressure to not only increase prosecutions, but increase penalties in these areas. That's what the national debate is about. I don't think you're going to see a national debate about lowering the penalties for illegal reentry after having had an aggravated felony. So I don't think that you should assume that the Department's support for Fast Track supports some support for lower sentences in this area, because that's not at all the case.

MR. SANDS: I believe I made the point that the Department wanted justice, and you took me at issue with that. So I just thought that --
COMMISSIONER ELSTON: You said lower. You were very clear about that, that the Department thinks that the sentences are too high.

MR. SANDS: Well, the Fast Track started to come in as early as 1991 and sooner, which is prior to the congressional mandate. And this was being done under 5K2.0, which the Department then sort of used to say that the courts were out of control. So Fast Track has been the bedevilment of the guidelines from day one.

COMMISSIONER ELSTON: Absolutely, which your argument, then, is that we shouldn't have them at all, is what I'm hearing.

MR. CAHN: Let me comment briefly on -- because you took issue with my point. I want to make clear, my point isn't that the Department of Justice supports lower or higher guidelines. That's not for me to say. What I am saying is that when I go into court, and when my lawyers go into court, individual prosecutors are asking for these sentences, individual judges are imposing them, and everyone is more than comfortable with those sentences. There is not a sense that the sentences need to be higher for any of the legitimate purposes of sentencing. And so I don't speak to DOJ's overall policies. It's not my job or my role. But I do say what I see in the individual courtrooms, and the view is that these sentences are adequate and sufficient and are
COMMISSIONER ELSTON: But isn't part of that informed by the need in San Diego to have Fast Track? Because if it's not -- if it's not, then I think that the Fast Track Program should be eliminated nationwide, and we should just go to that system. We should sentence people -- I wrote it down -- we should sentence everybody to 30 months, unless they have category five or six, or a really bad prior, and then we give 'em 48. And then we have exceptional cases where we give them whatever's beyond that. Is that what you're suggesting, that we do that nationwide?

MR. CAHN: What I'm saying is that there is a need in San Diego, and that the program addresses the need, but that separate and apart from that, these are sentences that are seen by real practitioners, who see these cases day in and day out, as just and appropriate sentences.

COMMISSIONER ELSTON: (Indiscernible) by the need to have them lower than other parts of the country.

MR. CAHN: As I said, I confessed my limitations when I came in here. I am not an expert in immigration or guidelines or on national policies. I can talk about, as a practitioner, as a trial lawyer, what I see in the courtroom and what people who deal with these cases day in and day out see as good, appropriate, just sentences. That's what I'm telling you.
MR. SANDS: Prosecutorial discretion rests solely with the Department of Justice and with the district and with the U.S. Attorneys. It's their choice whether to go with 1326s for those in category six, or for those with crimes of violence, and to give everyone else 1324s or 1325s, or different types, or petties. It's a way of balancing. The Department of Justice and the U.S. Attorneys have made a decision in certain districts to expand 1326 for everyone -- it could easily say that we would only do it for a group, for only drug priors, or only crimes of violence. That is your hands. What we are saying is that Fast Track gets a large number of sentences with appropr-- what we feel are appropriate sentences, and which the court feels are appropriate sentences. If a court did not feel that justice was being done, it would reject it out of hand. But the Government in all these 1326s, under the Fast Track, is saying, this is an appropriate case. And we think that the Commission should be aware of that, and should look at that in fashioning sentences that aren't on the border, or aren't in the Northern District of California, or Nebraska, or Idaho, or the other strange districts.

MR. CAHN: Can I add one little piece of information? -- which is that it's worth knowing, I think, for the Commission, that there are times in this district where individual judges have questioned and required the
Government to justify particular offers that were made, and the Government has either done that, or sometimes there's been an adjustment of the offer. So it's not that anyone's asleep at the wheel and just shoving these cases through. That is not what's happening. I think it's important that the Commission understand that.

COMMISSIONER CASTILLO: Any other questions?

(No responses.)

COMMISSIONER CASTILLO: Thank you both. I can't let you leave here without thanking you for participating in the round table in D.C. Thank yo for that.

MR. SANDS: And thank you.

COMMISSIONER CASTILLO: We'll stand in recess until 2:30.

(Luncheon recess from 12:27 p.m., until 2:40 p.m.)
AFTERNOON SESSION

--oOo--

COMMISSIONER CASTILLO: As we make the transition to Arizona, so I'll welcome Judge John Roll and his Chief U.S. Probation Officer, Magdeline Jensen, and her Assistant Deputy, Mario Moreno. Please take a seat, and we will proceed. Judge Roll, thank you for being here, first of all, and waiting to testify.

JUDGE ROLL: Good afternoon.

COMMISSIONER CASTILLO: Good afternoon.

JUDGE ROLL: Judge Gonzalez scared me after she did that this morning, and now I'm afraid the microphone isn't on.

Thank you very much for the opportunity to appear before you. And thank you for making the trip west to one of the border districts so that we would have a chance to visit with you. Based on the case load, it's obviously very difficult for us to get away to come and appear before you. We very much appreciate the opportunity to address you here. It was a very impressive list of witnesses this morning.

I do only speak for myself. I'm a district judge in the District of Arizona. I sit in Tucson. Judge Cindy Jorgensen and I have in the past collaborated in some correspondence to the Sentencing Commission concerning the sentencing of individuals who smuggle minors. She has
authorized me to tell you that she concurs in my recommendation concerning that, and also on a few other matters that I would just like to very briefly touch on after I've had a chance to address the smuggling of minors.

Our judges in the District of Arizona, Tucson Division, sentence -- we average 500 sentencings per year per judge. We handle about two thirds of the criminal case load for the District of Arizona in the Tucson Division. So, obviously, we are more of a criminal court than Phoenix, which has a much higher civil case load number.

I have prepared some materials I'd like to submit to you at the end of my testimony.

COMMISSIONER CASTILLO: Absolutely. We'll be happy to take it.

JUDGE ROLL: Those materials address the same matters, of course, that I'd like to touch on now, and it includes an appendix that consists of 31 sentencings over which I presided in the last 24 months by a purely random draw of cases. Each of those 31 involved child smuggling cases in the Tucson Division, just in cases assigned to me. Those cases reflect that typically in our child smuggling cases that we see, the children are young, and much below the 12-year-old range that has been discussed here. I think virtually all of the cases have involved children under the age of seven, and several of them have involved children
under the age of two.

As you very well are aware, under the sentencing guidelines, there is currently no provision made or no consideration given as far as offense level calculation to the age of the individual who is smuggled. What I would like to encourage the Commission to do, and Judge Jorgensen joins me, is to take that factor into consideration. Now, the proposal that is in the materials suggests perhaps a four-level increase based on children who are under the age of 12 who are smuggled. Judge Jorgensen and I think that is an excellent starting point. But we would also urge the Commission to consider perhaps a six-level enhancement for children under the age of six, and perhaps an eight-level enhancement for children under the age of two.

These are the most vulnerable individuals. Several things are present. Obviously, they're not in a position to do anything once they're in the United States as far as extricating themselves ordinarily. We are not urging that you make these enhancements applicable when parents or even immediate relatives are involved. But every one of the cases that I've mentioned involved smugglers who were unrelated to the child, and in only one case was the mother along with the child, and they put the mother and the child in the trunk of the car when they tried to smuggle them into the United States. The entire list of cases that I will be providing to
you, these were all stranger cases.

It's my practice -- and I think the other Tucson Division judges also use this practice -- I always inquire at sentencing, what is the connection between the defendant and the child that was smuggled? Seldom, if ever, is there any connection. I heard the testimony this morning, and obviously districts can differ, and the experience of different judges in different districts can differ, but it is not a situation where they say, well, I knew the mother, and the mother asked me to bring the child across. These are strangers who accept money to bring children into the United States.

The other -- few other items I would like to discuss, with your permission, deal with the early disposition, Fast Track. Chief Probation Officer Magdeline Jensen and Chief Deputy Mario Moreno have prepared some written testimony for you. The District of Arizona has seen 53 percent of all of the arrests of individuals who are illegally in the United States for fiscal year 2005. We had over 630,000 individuals arrested in the District of Arizona for being there illegally in 2005. Only about 6800 of these people were prosecuted for crimes. This shows a judicious use of the resources -- the limited resources -- of the Government. It also, I think, reflects concentration on individuals who appropriately are in the District Court
facing serious consequences.

I know that in discussing illegal reentry cases, also previously there was much discussion about terrorism and about whether the individuals who were arrested were terrorists. That's one component, one factor. But I would respectfully submit another factor is, are these individuals who are habitual criminal offenders? Even if they're not terrorists, are they individuals who repeatedly are arrested for offenses when they are in the United States? That is what my experience is in seeing the individuals who the U.S. Attorney's Office in the District of Arizona prosecute. These individuals are by and large people with formidable records who have come back into the United States, and when they're in the United States, they are committing crimes, many of them serious.

I am a very strong supporter and urge continuation of the early disposition Fast Track Program.

There was also a reference to ransom -- and the other items are just very brief. There was a reference to a proposal that -- for -- that an enhancement be given when individuals who are held in safe houses for long periods of time. I would only urge that the Commission consider that sometimes, either through extraordinary police work, or through happenstance, individuals who are holding someone for ransom are rapidly apprehended. And that has happened in
child smuggling cases in the District of Arizona, as well. Should that person be the beneficiary of not having the enhancement just because, through no fault of their own, they were quickly apprehended?

There was also a discussion concerning double-counting in 2L1.2. I would respectfully submit that, at least, again, my limited experience in the District of Arizona, seeing the selectivity of the cases being prosecuted, there is no injustice worked from the double-counting -- so-called double-counting of a prior conviction being used to calculate the offense level in an illegal reentry case, and also being factored in for purposes of the criminal history. Insofar as historical convictions are concerned, and not counting those or considering those, those are sometimes the reason why the individual was originally excluded from the United States. They are oftentimes very serious convictions. And again, I would urge caution before those are necessarily thrown out the window.

The final item I would like to touch on is the focus upon the length of sentence in calculating the offense level in illegal reentry cases. That is certainly a factor. But again, it's been my limited experience that many state judges, for the most serious crimes, impose minimal sentences because they believe the person will be deported, and that it is senseless for the Government to bear the cost of
incarcerating someone when they're going to be deported anyway. And so in child molestation cases, in sexual assault cases, other cases, I have seen minimal sentences and lifetime probation, or very long periods of supervision. And from that, at least it's my sense that the judge was thinking the person's going to be deported, and we want them deported as soon as possible.

Thank you again for the opportunity to appear before you. If I could now --

COMMISSIONER CASTILLO: That'll be fine. Let me thank you. In particular, I now have a copy of that -- March '04 you sent me a letter when I was operating as the person who was presiding over the Commission and bringing to our attention the issue of the minors. You can see, sooner or later, we get to this. So thank you.

JUDGE ROLL: Thank you very much.

COMMISSIONER CASTILLO: Ms. Jensen, thank you for being here.

MS. JENSEN: It's a pleasure to be here. I'd like to introduce you to Mario Moreno, one of our Deputy Chiefs. He's in charge of presentence operations throughout the district, and is our primary developer of policies and practices with regard to presentence reports.

We thank you for the opportunity to provide comments regarding proposed amendments to the immigration
guidelines. Since we apply these guidelines daily, the opportunity to provide input is certainly welcome.

During 2005 -- fiscal year 2005, Border Patrol apprehended 1,188,977 unlawful aliens in the United States. 632,933 unlawful aliens, or 53 percent of the national total, were detained by Border Patrol along the Arizona border with Mexico. Of these captured unlawful aliens, 6,672 defendants were prosecuted. Why the huge difference? The answer is staffing limitations at the U.S. Attorney's Office. Using limited resources, the U.S. Attorney's Office in Arizona prosecuted the worst of the worst, meaning those aliens committing egregious crimes, or those with extensive criminal histories.

The Probation Office produced presentence reports for the felony prosecutions. Of these, 73 percent involved unlawful reentry offenses, and 26 percent pertained to alien smuggling.

The overwhelming majority of all of these immigration offenders have pages and pages of criminal history in the United States. This brief statistical profile of our district explains why our primary concerns pertain to 2L1.2, unlawfully entering or remaining in the United States, and 2L1.1, smuggling, transporting or harboring an unlawful alien.

First we offer comments on 2L1.2. The Commission's
interim staff report on immigration reform and prior testimony by border court staff in San Antonio and today suggests that you are well aware of the practical effects on our daily work by the findings in Taylor versus the United States and Shepard versus the United States. These cases require us to use the categorical approach, and sometimes modified categorical approach, in trying to determine whether the defendant has a prior aggravated felony.

Only judicially noticeable documents may be used in this analysis, not information contained in prior presentence reports or police reports. Accordingly, we find ourselves endeavoring to obtain court documents, such as indictments, informations and complaints, as well as plea agreements and court transcripts of statements made at the time of the guilty plea, to determine if the elements of a conviction exist to match the definitions of aggravated felonies at 18 U.S.C. 1101(a)(43) and the definitions in the commentary at 2L1.2.

These documents were not necessarily designed to provide the answers we seek. So even after an extensive investigation and effort to obtain such documents, we sometimes cannot make a clear determination.

Probation officers in Arizona perform one categorical approach, to report whether a prior conviction is an aggravated felony. That, of course, determines the
statutory penalty. They also perform a second categorical
analysis, to determine if specific offense level increases
are appropriate. Since there is a statutory definition of an
aggravated felony, and sometimes a second definition in the
guidelines, the analysis is further complicated. And of
course, in addition, the officers must be aware of circuit
court opinions that offer guidance on statutory and guideline
application.

In short, the responsibility to obtain judicially
noticeable documents in order to establish if an aggravated
felony exists is a vexing and time-consuming one. Since
72 percent of our 2L1.2 cases involve the 16, 12, or 8-level
increase, any assistance the Commission can provide in
streamlining this process will be most appreciated.

We have 11 units of probation officers in Arizona
writing presentence reports, each of which consists of a
supervisor, a guideline specialist, and five probation
officers, for a total of 66 people exclusively working on
presentence reports every day. We met with our 11
supervisors, who spend their days reviewing presentence
reports, in order to obtain some informed comments regarding
the Commission's proposals.

In reviewing the five options to amend 2L1.2,
option five is immediately attractive because it would
eliminate the second level of categorical analysis and
improve the quality of our lives immeasurably. However, it
does not provide a graduated structure for different types of
aggravated felonies. It makes no distinction between a
1326(b)(1), which has a penalty of ten years, and a
1326(b)(2) that has a penalty of 20 years. It would make no
difference which way it was charged. The way that option
five is currently drafted, it would make no difference.

Perhaps the Commission could explore option five,
this approach, with a base offense level for a 1326(b)(1)
conviction, and a higher base offense level for a 1326(b)(2)
conviction. Option five, with refinements, might provide
some promise.

MR. MORENO: Like option five, options one through
three have the effect of eliminating a second level of
categorical analysis. However, rather than associating
offense level increases with certain types of aggravated
felony convictions, these options link offense level
increases exclusively to the sentence imposed on the
aggravated felony conviction. This alternate method of
considering the severity of aggravated felony convictions
would probably have the effect of redistributing the
proportion of defendants who receive the 16, 12 and the
8-level offense level increases.

A second feature of options one through three which
would probably contribute to the redistribution of defendants
who receive the various offense level increases is the adoption of the statutory definition of crime of violence. It seems likely that the number of defendants who receive the higher offense level increases would be higher if the property component of 18 U.S.C. 16(a) and the substantial risk component under 18 U.S.C. 16(b) become guideline considerations.

Option four provides some procedural improvement in that the guideline definitions match the statutory definitions of the various types of aggravated felony convictions. One set of definitions would provide some simplification in the definitions used in the categorical approach.

Another feature in option four that distinguishes it from the others is the combined approach of linking the type of aggravated felony conviction with the length of sentence imposed to determine the higher offense level increases. Realizing that one categorical analysis is necessary, the elimination of a second level of categorical analysis is an improvement, as is the combined approach of considering both the type of aggravated felony and the length of sentence. For these reasons, we support option four.

As to 2L1.1, smuggling, transporting or harboring, we support option two, which provides an expansion of the table for the number of unlawful aliens smuggled or
transported. As the Commission's interim reports document, we see few cases with an extremely large number of unlawful aliens. But in those cases prosecuted, which we believe occur more frequently in the Western District of Texas than in Arizona, it makes sense to provide some guidance.

We also support option two regarding transportation or smuggling of a minor accompanied by strangers. As detailed in the testimony of the Honorable John M. Roll, the phenomenon of very young children being smuggled by strangers is relatively new, but is a serious development. Children who are unable to identify themselves because they are so young run the risk of being displaced when they return to Mexico. We respectfully suggest the language "unaccompanied by the minor's parents" be revised to "unaccompanied by an immediate family member," which could be defined in the application notes to include parents, grandparents, older siblings, aunts, uncles and cousins.

We thank you for the opportunity to provide comments regarding your proposed amendments to the immigration guidelines. Your willingness to consider the observations of those of us who work with these guidelines is most appreciated.

COMMISSIONER CASTILLO: Thank you. We certainly appreciate that day-to-day work that you're doing every day in your district.
COMMISSIONER HOWELL: Well, let me -- let me -- I mean, I -- let me just start with the minor issue, since I think all of us felt that your letter was -- you know, really required a response from the Commission, and consideration, which is why you see it as part of the amendments. What has been an interesting learning experience, and I'll speak personally for myself, is how controversial what started off as a fairly no-brainer type of proposal has turned out to be. I would really be interested in hearing, you know, your response to some of the reactions we've gotten. And I'll deal with two primarily. One, we've heard from various people that, rather than having a nuanced approach -- which I -- which was in your original proposal, and has a certain amount of -- you know, I -- I -- I find a lot to be said for that. The criticism has been that it would require too much litigation over the ages of children, and that some people have proposed that, instead of having this nuanced approach, just say any minor being smuggled, because with the nuanced approach, you'd have to go through medical tests almost to determine whether the age of a child -- whether the child is a 12 or a 13-year-old, or a 14-year-old, or a 7-year-old versus a 10-year-old. So that's been one issue that has been raised. I was just curious, since you've had so many of
these cases in your courtroom, whether it's been a diffi- -- if -- whether you've encountered difficulty in ascertaining the age of the child.

Two, and this has to do with, you know, some of the testimony we also have heard today, and we've heard from others, that so often children are being smuggled for family reunification purposes. It's interesting hearing the differences among -- you know, between the districts, and that you're finding that they're mostly strangers, and that in other districts, people are finding them as usually close family friends. I just wanted to ask you whether you think that some of the people who are saying that they are strangers and don't have any relationship with the child, or know anything about the family, whether you think that the defendants are saying that in order to protect the family, or whether it's really been fairly clear that they are indeed strangers just doing this for money.

It sort of goes to how we actually frame a targeted approach, which I think your proposal makes an effort to be, to go after the real strangers as opposed to the family members. So I just wanted your reaction to both of those, I think, in my view, the most significant criticisms and considerations that we have to make in drafting a final version of this proposal.

JUDGE ROLL: I think that if the categories are
broad enough -- under two years of age, under six years of age, and under 12 years of age -- many of the problems as far as identifying exactly how old the child is may evaporate.

As far as the family reunification, I don't -- my sense is not that the people are denying that there is a connection with the family because they want to protect the family, because their attorneys and the defendants understand that it would be considered a mitigating factor by me if they say that they have a connection to the family. So they have every incentive to try to do that. Of course, we don't just say, "Is there a connection?" Tell us what the connection is. And sometimes that is the stumbling block, because they may be prepared to say there is a connection, but they can't say anything about -- they can't give us any information about who the family is, how they know the family. So that claim evaporates. But I don't think there is a -- I don't think there's an under-representation of that -- of -- of some connection that exists. I think that these are really stranger smugglings.

MS. JENSEN: And I guess I would add, Commissioner, that these aren't either/or. I think our testimony is focusing on a slice of the children who come across. We see a lot of cases with relatives, which is why we suggested -- and a lot of times it's not the parents. It might be the grandparents, might be an older sibling who's 18 or 20. What
we're focusing on is a smaller slice of this large population that doesn't include children. But there are many that do come with relatives. But that's not what's of concern. The concern are those children who cannot speak for themselves, and get apprehended, or are in the company of strangers for a long period of time until they can successfully cross. Although if we have them, they haven't successfully crossed. But it's not all or nothing. We're looking at one slice of a broader phenomenon.

COMMISSIONER HOWELL: No, we understand that. It's just a matter of targeting that specific slice as opposed to being over-broad, which is --

MS. JENSEN: And it might also be that we are on the border, and the long border, that, therefore, this might be seen more here than in New Mexico because we've got this huge border, and they're just coming across, probably to their parents. But if they get apprehended, and their parents are nowhere around, that's the problem.

COMMISSIONER CASTILLO: Kind of along the same line, switching to reentry, could it be because of the volume of reentry cases that you do have in Arizona, and because they're only prosecuting the more aggravated ones, you are seeing sort of a different group than New Mexico or California or Texas?

MS. JENSEN: I think that's true. There was one
point about two years ago where the volume was so high that
the U.S. Attorney's Office was declining (b)(1)s, and was
only going forth with (b)(2)s, just because the volume was
just so high. So that may well be the case.

MR. MORENO: We've rarely seen a 1326(a).

MS. JENSEN: It's just that they don't get
prosecuted.

COMMISSIONER HOROWITZ: If I could just follow upon
the minors point, because I agree with Commissioner Elston
and your proposal, Judge, that, on its face, obviously, there
are greater harms to younger children, and it makes sense to
try and address that. One of the things I've learned through
these hearings, both in San Antonio and today, is I gather
when minors come across the border and are found through
harboring cases, one of the goals of the Border Patrol is to
get the child as quickly as possible back into the Mexican
Consulate to allow the child to get back to Mexico.

So one of the practical questions that I have now,
thinking about these issues, and the litigation, and a
proceeding, whether it's a sentencing or a trial, given
Crawford, is, how do you deal with the confrontation clause
issue and the right for defendants to perhaps question the
child, assuming the child's old enough to be questioned and
be a witness? How do you preserve the evidence, essentially?
One of the goals, which I think is a very legitimate goal, is
to get the child back, through the Mexican Consulate, as quickly as possible back to their home country, assuming it's Mexico, obviously.

JUDGE ROLL: That is certainly a legitimate concern. I think probably the majority of the children that I refer to in the materials wouldn't even be competent to testify they are so young. They wouldn't be in a position to offer testimony, to be able to understand an oath, and to be found to be a competent witness. So the worst cases, at the far end, I don't think that it would be an issue.

If I could touch on one other thing related to what was just discussed, and that has to do with -- one of the cases you'll see that I refer to, the children were drugged when they were brought across. And in another case, after the child was across, they contacted the parents, and they said, it's going to be more than what we said because your child is hungry, or your child needs food, or something like that. These children are also ripe for being held for ransom and for higher smuggling fees because they are so vulnerable, and they won't be turned over to the parents unless and until the smugglers decide to do that. And these aren't the ones at the border, obviously. These are the ones when they've actually succeeded in coming into the United States.

COMMISSIONER HOROWITZ: And just, again, just in terms of practical questions, to follow up on the immediate
family members as opposed to parents, proving who's an immediate family member, or whatever the categorization is, whoever fits in that universe, is that something from a judicial standpoint you have any concerns over being able to resolve? In terms of making the decisions, is that something that creates more of a process cost and lag time in the process, or is there a practical way of dealing with that issue?

JUDGE ROLL: Again, just off the top of my head, the attorneys that practice in District Court in Tucson Division are very capable of getting materials, birth certificates, other documents to show the connections when they write on behalf of defendants who are being sentenced. I suspect they would follow the same practice as far as using marriage certificates, birth certificates, other documents, other correspondence to establish it.

MS. JENSEN: From Mexico.

COMMISSIONER HOROWITZ: That suggests to me just that -- well, I was going to actually put out that, is this one of those rare areas where we should be thinking about starting at a higher number and getting a reduction, and it obviously puts the burden of proof on the defendant to demonstrate that they were transporting their immediate family member, as opposed to having this burden on the Government of trying to go back and figure out who's an
immediate family member?

JUDGE ROLL: That also has a lot to commend it as an approach. The guidelines, I think, are typically 6 to 12 months on these types of smuggling cases when the individual is brought across. And the U.S. Attorney's Office in the District of Arizona charges the bringing across for profit, and then gets an upward -- receives an upward departure under 5K1.21 -- I think it is -- for a plea to a charge less than -- that is less than what the individual faces a mandatory minimum. That was discussed this morning, the three-year mandatory minimum, bringing in for profit. And so in some of these cases with child smuggling, the U.S. Attorney's Office is able to obtain pleas above what the guideline range is. But the guideline range is very low considering the risk to the children.

COMMISSIONER CASTILLO: Commissioner Steer.

COMMISSIONER STEER: I'm sorry to switch gears again and go back to the unlawful reentry, but I did want to ask a question there, again, to try to get at what's practical here. We've talked about the possibility of an approach that uses the length of sentence, and the shortcomings. Judge Roll, I think you've pointed out some of them there. So that might lead us to think about a combination approach, if we can somehow get away from the second categorical determination. Do you think that with
respect to that prior conviction, you get enough information
to determine in a real offense -- on a real offense basis
whether it involves violence, whether it involves child
pornography, things of that nature, rather than whether it
fits the category of that?

MR. MORENO: I would say, Commissioner, that
officers would have better success at getting arrest report
information or real offense information than obtaining
judicially noticeable facts. So to the extent that would
make it easier, that would help.

COMMISSIONER STEER: Some risk that it may not be
accurate -- you know, the -- a lot of things to balance here
to find something that works.

Well, I appreciate your comments.

COMMISSIONER CASTILLO: Any other questions?

(No responses.)

COMMISSIONER CASTILLO: Then we thank you.

JUDGE ROLL: Thank you.

MS. JENSEN: Thank you.

MR. MORENO: Thank you.

COMMISSIONER CASTILLO: We'll move to our last
panel, which is the perspective of probation officers in the
Southern and Central Districts of California.

I'll recognize Michelle Carey, who is the Assistant
Deputy Chief Probation Officer in the Central District of
California, and Mr. Sultzbaugh, the Assistant Deputy Chief
Probation Officer of the Southern District of California.
Welcome.

MS. CAREY: Thank you.
MR. SULTZBAUGH: Thank you.
MS. CAREY: Good afternoon.
COMMISSIONER CASTILLO: Good afternoon. Who wants
to go first? Ladies first?
MR. SULTZBAUGH: Absolutely.
COMMISSIONER CASTILLO: Okay.
MS. CAREY: Good afternoon, members of the
Commission. On behalf of the Central District of California,
under the leadership of Chief Loretta Martin, I thank you for
this opportunity to comment on the proposed amendments to the
immigration guidelines.

Although the Central District of California does
not have the volume of immigration cases that the individual
border district handles, the immigration cases do constitute
about 15 to 18 percent of our overall case load. I think
also fairly significantly, we are tangentially impacted by
the overall number of immigration cases to the extent that
our office responded to more than 3800 collateral requests
from other districts in 2005, and about 50 percent of those
collateral requests originated from the border districts.

MR. SULTZBAUGH: Sorry about that.
(Laughter.)

MS. CAREY: Just to put that in perspective, the number of presentence reports and supplemental reports to BOP that we disclosed in 2005 was around 1800. Often the border districts are challenged to determine, based on the categorical approach or modified categorical approach, whether certain crimes meet the statutory or guideline definition of crime of violence of aggravated felony. So they are challenging us to obtain the criminal history records to enable them to make that determination. That just has a tremendous impact on our resources. So for all those reasons, I'm glad to have the opportunity to participate today.

I admit up front that my comments often focus on areas where we think that further clarification may be useful. We kind of approached this by looking down the road and applying these amendments and thinking of possible areas of disagreement. So I apologize up front if I come with more questions than suggestions.

COMMISSIONER CASTILLO: That's okay.

MS. CAREY: Looking at the 2L1.1, the smuggling guideline, officers in my office could not recall a case where we had a base offense level under Subsection (a), the base offense level of 23. So we do not think this amendment will impact our district too much. However, I think we
prefer option one to the extent the Government is going to prove up the 1182(a)(3), either at trial or as an admission at the time of the change of plea.

We think we may have some challenges with option two if it's relevant conduct-based, because in our district we have had some spy and espionage cases. So we think of the example where you have an alien involved in terrorist activities, and we wonder whether or not we would have the requisite security clearance in order to obtain that information from the Government. So we would think it would be clearer and cleaner if option one is utilized, and the Government is kind of proving that up front.

With respect to number of aliens, to the extent defendants who smuggle aliens may not be punished proportionally to the aliens they smuggle, it certainly makes sense to amend the structure of the table to increase the enhancements at the lower levels, since most often the enhancements are at the low end, which is the 6 to 24 alien range. So we support option two.

At the other end, in our district, it's rare to see a case in which the number of smuggled aliens exceeds a hundred. I think the example I think of is when you have a case that's a drop house, and the case agent discovers the pay/owe sheets. But those cases are certainly rare, and we, in the past, have dealt with those cases with respect to
departures. But if you wanted to ensure greater uniformity with respect to the increase, then it makes sense to also extend the table at the top end of the range so that you have uniformity amongst the districts. So we support that option, as well.

Smuggling minors is another issue that we do not see often in our district. Obviously, the trek of an alien from their country of origin to the United States is fraught with dangers and uncertainties. If you want to discourage that behavior, it makes sense for us that you increase the penalty for smugglers who engage in this conduct. We have thought about the options, and in thinking about option two, and in a district where issues are often litigated strongly, we could see option two being fraught with evidentiary issues when you talk about making distinctions -- you know, at the 12-year-old I think is one cutoff. Determining whether or not a minor is 12, as opposed to 10 or 11, or 13 or 14, is going to be extremely difficult in our district, unless we have birth certificates or testimony from parents or other close relatives, and, of course, one of the features of the enhancement is that the minor is not in the company of the parents. So that evidence and information may be difficult to obtain.

We were thinking that option one with "minor" defined fairly highly at 16 or 18 might be a better approach...
to dissuading smugglers from bringing children into the United States, because the enhancement will be easily applied in most cases that you want to reach where the minor is visibly young from a lay person's perspective. That may not get at a lot of the teenagers who come across, but if the goal is really to get at the younger, smaller children, then putting that cutoff point at 16 to 18, you will be able to easily capture the younger children who you hope to protect by that enhancement.

Some of the things that we were thinking about -- and I know it seems obvious -- but we were thinking that we would need a definition for the term "parent." It seems obvious, but is that limited to biological parents? What about step-parents? What if the child's in the company of the legal guardian? Is that a departure ground? So those are some of the things that we were looking at. We saw that there was a definition of "parent" at 8 U.S.C. 1101(a)(44). We thought that was clear as mud -- didn't find that overly useful.

I know there's been some talk about possibly avoiding the problem with whether or not the minor is in the company of the parent by just having the enhancement applicable if you have any situation where there is a minor. We thought about that a little bit, too, but then we thought about the situation where the defendant is the parent of the
minor. You end up with this really interesting circumstance where you're taking off three levels under Subsection (b)(1), and then adding back however many levels you decide on because there is a minor child involved. And we thought that that sent a very conflicting message.

So we were back at option one setting the "minor" definition at around 16 or 18, clearly defining "parent," and thinking that that would certainly dissuade smugglers from bringing minor children into the country who are without the nurture and protection of their parents. There's just something about parents that certainly comes to mind in terms of thinking that, who is most likely to make sure that the children aren't in or try to protect them from harm? It's the parent more so than any other person, even another close family relative.

We thought about the vulnerable victim enhancement at Section 3A1.1, and we did not think that that was the best approach. First, the application of the enhancement would not be certain. We felt that case law in the circuits would answer whether or not it would be applied. Second, that enhancement is defendant-based, and maybe that isn't the extensive reach that we would necessarily want. And third, the court -- even if a court decided that the vulnerable victim enhancement could be applied in this situation, the court would still have to determine if the minor was of an
age as to make him or her vulnerable. And we thought that that age might differ from circuit to circuit. So we just thought it'd be clearer and cleaner to put the enhancement right in the guideline.

Holding aliens for ransom. We certainly see increased smuggling fee cases in our district and unlawful restraint. In the past, this has impacted where within the range we recommend the sentence. If this now becomes an enhancement, we have a few concerns about how the fee increase will be proven up at sentencing. Is the word of the smuggled alien sufficient indicia of a ransom or unlawful restraint? What is the fee, the amount told to the smuggled alien, the price quoted to the family member or relative footing the bill? Whose price quote? Oftentimes we have a middleman in the alien's country of origin, and then you also have the smuggler, so which price quote are we talking about? So those are some questions that were raised in our mind.

And then with respect to the term "unlawful restraint," at which point do you have unlawful restraint? If you have an alien who has admittedly not paid the agreed to smuggling fee, and they are required to stay at the drop house, at what point does that become unlawful restraint? So those were some of the questions that came to mind with respect to those amendments.

The trafficking guidelines at 2L2.1 and 2L2.2,
document cases -- we have lots of document cases, and we
certainly have document cases exceeding 100. So extending
the table at the high end is supported in our district to
make sure that we adequately punish defendants who are
engaged in trafficking large numbers of documents.

In terms of types of documents, proportionality
between the document fraud guidelines -- great idea -- and
certainly focusing on foreign passports. We also support the
other types of documents that we see a lot of -- of course
are visa, resident alien cards and driver's licenses, those
documents that enable an illegal alien to work in the
country. So those are some of the other documents that might
be added to the specific offense characteristic at some
point.

Moving on to the final one, the 2L1.2, illegal
reentry, like a lot of people have said, option five
certainly has its plusses. It certainly would relieve us of
that collateral problem that we have. But we do not support
option five just because it lumps illegal aliens with a vast
array of prior felony convictions together in a single pie,
and we just don't think that that's a fair outcome. We think
the guidelines should make distinctions between defendants
with violent prior felonies and lengthier prison terms from
those with minor, non-violent felony offenses and shorter
terms.
We prefer options one, two and three to the extent that there's a single definition of "aggravated felony." The guideline definition mirrors the statutory definition. Some of the time frames may be a little awkward, because first you kind of start with the statute. Let's say you have theft, and you're looking at a sentence of at least one year. And then you go to the guideline, and you're looking at a different time frame for whether a 16, 12 or 8-level enhancement applies. And then you finally move on to chapter four, where there are different considerations regarding the sentencing and computing that criminal history score. I think that applies to all except option three.

Overall, comparing to what we have now, those options are the most wieldy, in our opinion, because there's a single definition for "aggravated felony" found at the statute. When you have a case that deals with a particular state statute in your circuit, then that's it for both the guideline and the statute.

Also, we like that options one, two and three that one of the considerations is the length of the prior sentence, because that happens to be one of the considerations that our Government has now when they determine whether or not to offer a defendant a Fast Track plea, it's the length of the sentence in the prior case. so that would be consistent.
One observation that we had is the term of imprisonment we note in the commentary includes any sentence imposed upon revocation of probation, parole and supervised release. We would seek language mirroring Section 4A1.2(k), that the revocation sentence is added to the original sentence, if that's what the Commission intends. Absence of that specific language might lead to arguments that this guideline only allows you to consider the revocation term separately, and does not permit addition of the revocation term to the original sentence.

Option four. Once again, you still have the single location for the definition of aggravated felony, but it's kind of two-tiered. You have certain offenses that are aggravated felonies -- or I should say, certain offenses -- itemized aggravated felony offenses that are considered, and then you still look at the length of sentence, as well. I think we just had a preference for one, two or three, which simply looked at the length of sentence. There may be some overbreadth concerns with that, that it may capture too many aggravated felonies, some aggravated felonies that we do not want to capture. But one thing that we noted that's different from prior to the 2001 amendments, there was no threshold sentence requirement prior to the amendments. They used to just be, aggravated felony, you got a plus-16. At least under options one, two and three, at a minimum, that
prior sentence would've been 13 months. We think that that may alleviate, at least from our experience in our district, some of the concerns about that specific offense characteristic being overbroad and capturing too many aggravated felonies.

So those are all of my prepared remarks. I thank you once again for the opportunity to testify. And I can answer any questions either now or after we hear from my colleague to the south.

MR. SULTZBAUGH: Well, that was a hard act to follow.

MS. CAREY: No, not at all.

COMMISSIONER CASTILLO: That was very comprehensive. So we thank you.

We'll proceed to Mr. Sultzbaugh.

MR. SULTZBAUGH: Thank you. On behalf of the officers of the Southern District of California, we also want to express our appreciation for the opportunity to provide input in this important process.

As the other border districts have indicated, we see these cases every day. This is the overwhelming majority of what our investigation officers handle -- you know, 2L1.1 and 2L1.2 -- and that's why I'm going to limit my comments to. Unlike my colleague from the Central District, we really do not see a lot of document cases -- once in a great
while -- but when we do see them, they're normally a small
number of documents. So I'm going to focus on the other two.

I also would like to say by way of introduction is
that I have spoken with our judges, and also know with the
commentary they made this morning, and we're obviously in
support of their positions, as well, and we've worked with
them on a lot of those issues. The point of views that I'm
going to give are more from the probation officers'
perspective who are preparing those reports on behalf of our
bench.

I'd like to start by saying we believe that a
suggested increase in penalties for smuggling individuals who
pose a national security threat are appropriate. One of the
issues that I think was brought up in some of the literature
that was forwarded to us was whether a higher base offense
level approach being defendant-specific or offense-specific.
We thought that probably it would be more fair if it was a
defendant-based approach. However, we recognize that this
does open up the issue of trying to prove the defendant's
knowledge of the type of people that they were smuggling.
And it's been our experience that the overwhelming majority
of the folks that are arrested in our district don't really
know a whole lot about who it is they're transporting, or
certainly they say they don't. But in a lot of the cases
they don't. They are given maybe a break on their smuggling
fee, or they just get to the border, and someone says, who
knows how to drive? -- and they say, I will, and they get in
and drive. So we recognize that that might bring up some
issues there. But it still seems that maybe a defendant as
opposed to offense-based, because if it were offense-based,
then those guys who just volunteer to drive are going to be
held responsible for a much higher -- almost twice as high --
base offense level.

On the issue of the base offense level, we think
the current of 12 is probably okay for most of the majority
of the cases.

The number of aliens, as in the Central District,
we don't see a lot of the huge numbers. We see them
occasionally. But we see the smaller numbers, and so more of
a graduated maybe at that lower level might be appropriate.
We think that anything over a hundred, perhaps the departure
that we currently have would be appropriate. But we would
leave that to the Commission to determine, because know there
are some districts who do see those huge numbers, and
certainly have a better experience than we do.

Although not specifically under consideration at
this time, there's another area that the supervisors in
particular in our district have discussed and other officers
have brought to our attention that we would like to comment
on. That is, when applying the guidelines as currently

Ad Hoc Reporting
written, the number of aliens is considered prior to the
enhancement for dangerousness. Our question would be, has
the Commission given any consideration to reversing the order
of those adjustments?

And the reason we ask this question is, we were
thinking of it from the perspective of, if an individual
smuggles one person in the trunk of a vehicle, it's
dangerous, automatically goes to 18. If they smuggle, as we
often see, 15 or 20 maybe stacked on top of each other in a
van, automatically goes to 18. Now, you give 'em plus-three
to start with for the number, but that becomes moot because
it goes to 18. So the person that smuggled the one and the
person that smuggled the 20, they are ultimately subject to
the same guideline range, all things being equal, obviously,
criminal history and those types of things.

You could, of course, argue that, well, we could
give the person the high end, or maybe a departure, or
something like that. But we're usually at relatively low
ranges of imprisonment, and there's not that big of a
difference. So the question is, is smuggling one person
basically the equivalent of smuggling 20, or whenever you get
to the threshold where you actually go high enough that
another two levels would make a difference?

For smuggling of minors, which we don't see a whole
lot in this district either, we also would agree with what
Ms. Carey said earlier. The option one would seem to be the easier to apply certainly in practice for us, because we often have no idea what the age of the people that are being smuggled, or even oftentimes the defendants themselves. We get some who say they are minors. We don't know necessarily whether they're minors or adults. We can certainly see a lot of litigation over the fact of whether this person is 12 or 10 or 8 or 14, or whatever age they might be. So it appears that if there was going to be some type of enhancement, it would be easier if it were just the fact that the person was transported without a family member.

We would also support an additional increase -- and I think our judges referenced this earlier -- for causing the death of any individual being smuggled, and agree that adjustments for both injury and death, should they be present in the same offense, are appropriate. The extent of the increase for the death of an individual being smuggled is an area that we think might benefit from further consideration. We were talking about, as an example, if one person was smuggled, that person died during the offense, we would end up with an offense level of 28. It'd be 18 for dangerousness, assuming -- and then plus 10, I believe. If the defendant received an acceptance of responsibility, they'd be at level 25. That's 57 to 71 months, less than five years for the death of someone.
From our district's perspective, when we see the sentences that many of the drug couriers are subjected to, as opposed to someone who actually was causing a death, it seems like there might be some consideration that that may not necessarily be a sufficient sentence if someone who's smuggling drugs is getting five, six, eight, ten years, and someone who caused the death of another individual is looking at less than five years. Although we also recognize there is the cross-reference to the homicide guideline, and maybe in some cases that would take that into consideration, but perhaps not all.

I also believe our judges mentioned this morning that we see a lot of high-speed chases in this district. The Border Patrol's policies change occasionally whether they're going to actually pursue them. They try spike strips and various other things to try to stop them. But I do believe that there might be some consideration given to, if that's the type of thing that occurs prior to an injury or death of an alien, it might be something else the Commission could consider. It can be reckless endangerment during flight, but is that a sufficient increase? That maybe is an issue that we would want to address further.

Okay. Moving on to the 2L1.1 reentry, we share the frustration voiced just a few minutes ago by our colleagues from Arizona, the categorical analysis in obtaining the
documents. And we're one of the districts that's the main offenders probably for the Central District of asking for all of these documents. And so anything that would make it easier for us to not have to go through that would obviously help.

However, as both the previous officers have commented, option five we're not in favor of. Although it might eliminate some of the categorical analysis, might make it easier obtaining the documents, we honestly believe that the seriousness of the defendant's prior offense is an important consideration, and should still be considered when determining the sentence. One of the things that we discuss in our office is, in California, if you commit two petty thefts, the second one could be charged as a felony. So a petty theft with a prior, you would get the same offense level as someone who murdered someone, or assaulted, or did any other type of serious offense under option five, and we just don't feel like that would be an equitable way of sentencing.

The amendments -- I guess the section of the amendment that we would be most in favor of -- and Ms. Carey also touched on -- is just to bring the statutory and guideline definition of "aggravated felony" and "crime of violence" together. We have historically struggled in a lot of those cases -- and they're not all that rare in this
district, and I'm sure other border districts -- where the
two definitions are somewhat at odds, or there's some
disagreement about, okay, is this an aggravated felony? Is
it a crime of violence? Is it both? Is it neither? If
there was a way that at least there was a starting point that
everyone could agree upon -- I know I spoke with our court,
and they talked about the categorical analysis and whether
you would still need to do that. And perhaps you would still
need to do it, but at least we'd all be starting from the
same agreed-upon point of what is the definition, and then
starting on the categorical analysis.

As for the individual options, the first two, and
even the third, probably would be the ones that we would be
most in favor of. Again, the obtaining of the documents to
determine is still going to be an issue regardless of any of
those, I think, in the future. If we could have the
definitions to start with, then we can leave it to the courts
and the litigants to decide the more pressing issues.

The question of time frames is also one we feel is
worth further discussion. We talked about whether a
defendant with one extremely dated prior conviction should
receive the same sentence as an individual with a similar
conviction who returns to the United States almost
immediately after being deported. One of the remedies we
thought of is that maybe the Commission could consider if
they were going to implement that type of guideline is a commentary which is similar to under-representation in criminal history, that if the person has numerous prior offenses, or some very serious prior offenses that are outside the time frame, that could be a consideration for an upward departure. So we think it's something that could still be explored further.

I believe that's all my prepared comments.

COMMISSIONER CASTILLO: Questions?

COMMISSIONER HOWELL: I just have a comment, which is, one of the things that has been very impressive, and it's demonstrated by this panel, is the dedication and the commitment, and just how lucky we are in the criminal justice system to have such really wonderful probation officers who have spent -- I know you all have spent a lot of time putting together these remarks, talking to your colleagues, to give us sort of your best advice. And I just wanted to say thank you.

MR. SULTZBAUGH: Thank you. We appreciate the time.

COMMISSIONER CASTILLO: I will echo that. On behalf of all of the commissioners who are here, we all went through all kinds of different hoops to get out here. I will tell you, as I sat at Chicago's airport, which was full of snow, the thought did cross my mind, would today be worth it?
I can tell you my answer to that is a resounding yes. Not only your panel at the end of the day, which is difficult, but every single panel really showed such devotion and dedication to trying to give us their best input. All we can say is thank you, and we will try and do our best to do the right thing, and certainly not do anything that hurts the work that you're doing.

So we'll end on that note. Thank you very much.

(Hearing adjourned at 3:39 p.m.)

CERTIFICATE

I certify, under penalty of perjury, that the foregoing is a verbatim transcription prepared from the electronic sound recording produced at the proceedings in the above-entitled matter, and is a true and accurate transcript of said proceedings to the best of my ability and belief.

Michael J. Williamson, Transcriber     Date