UNITED STATES SENTENCING COMMISSION

TRANSCRIPT

PUBLIC HEARING

NOVEMBER 5, 1986

Public Hearing: Denver, Colorado
November 5, 1986
Table of Contents and Summary
Created: April 1, 2003

function in sentencing. I will never follow guideline reductions for guilty pleas or cooperation. They are also too much based in numbers.

Guidelines are very complex and more flexibility needs to be given to the sentencing judge. Should not be penalized for exercising your right to trial. Sentencing under the guidelines is much more severe than currently practiced. Will reduce the usage of probation, which will increase the number of people in federal institutions. Guidelines transfer sentencing discretion from judges to prosecutors.

Judges are provided currently with guidance and research from the probation department regarding sentencing and parole board guidelines. The amount of disparity is exaggerated. Guidelines might shift sentencing discretion to the prosecutor instead of the judge. No need for courts to reward defendants for cooperation, prosecutors can do that through charge bargaining. Criminal history should be based on the offense of conviction not on the time served for the conviction. Guideline sentences are more severe than are currently practiced. They are too complex.

Guidelines need to be flexible enough to allow for alternative sentences for nonviolent offenders. Guidelines work against street level drug dealers by looking at weight and not purity. A more effective way to get rid of disparity would be to come up with national charge-plea negotiation guidelines.

Navajo people do not break their perception of justice into phases of a larger criminal process i.e. accusation, trial and sentencing. For the sentencing of Indian defendants there should be the option to defer to local community/cultural alternatives to prison. Guidelines are very complex.

Antitrust should be measured by amount of commerce not injury. Minimum jail terms under the guidelines increase too fast. Fines for persons convicted of antitrust should be based on their ability to pay not the harm caused. The fine maximum for corporations should be increased and corporation probation is unnecessary and ineffective.

The guidelines will cause extensive sentencing hearings even when the defendant has waived his right to trial. The judge will in effect be cut out of sentencing entirely when the prosecutor and defense decide in advance which factors to discuss and the judge will never know if those factors are not presented to the court. U.S. attorney should be given discretion in determining cooperation. If someone violates probation they should not be given credit for any time successfully completed. Should base fines on ability to pay.

Guidelines are too complex. By lessening the availability of a sentence of probation more people will end up in prison for longer terms. Sentencing should take geographic factors into account. Should not do away with split sentencing. Every person released from incarceration needs a period of supervision.

The guidelines should not count convictions in other countries as part of the criminal history. Should not count misdemeanor or tribal counsel convictions as part of the criminal history. The guidelines are increasing sentences, and prisons are already overcrowded.

Judges should have more sentencing discretion regarding length as well as type. A mechanical formula cannot be established for weight to be given to aggravating and mitigating factors.

ORIGINAL

UNITED STATES SENTENCING COMMISSION

Regional Public Hearing
Denver, Colorado
November 5, 1986

Proceedings of a Regional Public Hearing of the United States Sentencing Commission, beginning at 10:00 a.m., on the 5th day of November, 1986, in the Ceremonial Courtroom, United States Courthouse, Denver, Colorado.

Commissioners Present:

William W. Wilkins, Jr., Presiding.

Michael K. Block

Stephen G. Breyer

Helen G. Corrothers

George E. MacKinnon

Ilene H. Nagel

Paul H. Robinson

Donna G. Spencer
Certified Shorthand Reporter
Denver, Colorado

INDEX

REMARKS OF:

PROCEEDINGS

COMMISSIONER WILKINS: I will call this hearing to order.

Good morning, ladies and gentlemen, and welcome to this public hearing held by the United States Sentencing Commission.

Let me introduce the Commissioners who are here in Denver today.

To my right is Stephen Breyer. To my immediate right is Ilene Nagel. To my left is Helen Corrothers. In front of us, to my right, is Paul Robinson. In the middle is George MacKinnon,and to his left is Michael Block, and my name is Billy Wilkins.

And I thank all of you for coming, and I am confident we will have a productive and interesting hearing.

During this hearing, we will be focusing on the many issues and many complex issues, which this Commission must ultimately resolve prior to the submission of the guidelines to the United States Congress by April of next year.

This is one of a series of public hearings that the Commission has been holding in Washington, D. C., and areas around the country.

Our next hearing will be held in San Francisco, and then we have a final hearing to be held in Washington, sometime in the first part of December.

A few weeks ago, we published what we have entitled a preliminary draft. It identifies many issues that must be resolved. It also sets forth some approaches that can be taken in a guideline system.

The Commission voted to publish this preliminary draft, but it did not approve of this draft in any particular way.

We did it for this purpose, to generate public comment, to provide a vehicle for extensive public debate, and critical analysis.

We have conducted our work as openly as possible. We have enlisted the aid of United States Attorneys, defense attorneys, judges, probation officers, District witness advocates, and all those interested in the criminal justice field, working with us in Washington, in preparing this preliminary draft and working on the latest edition.

We thought it would be necessary and advisable to put out a document to the public and all those interested in what we are doing could respond back and give us critical analysis, tell us the good and bad, and how to make it good, so when we finally produce a document next April it will be one that reflects the thinking of a wide range of citizens interested in the administration of justice.

I want to thank all of you for coming. We recognize the great changes that are going to take place. The Congress

has decided we are going to have guidelines. The question is what are they going to look like.

We need a lot of help, not only to make them intelligible. Parole is going to be abolished. Determinative is going to be the name of the game.

So, our guidelines are so important that we need to use ever resource in drafting this available.

A lot of you have spent a great deal of time and effort and it's reflected in the documents you have submitted.

We appreciate that. These documents are not looked at in a cursory fashion, and put aside. They are studied in detail, not only by this Commission, but staff, in a very systematic way, and already many ideas coming in from across the country are being incorporated in new drafts and refinements of the preliminary draft we published a few weeks ago.

We appreciate very much your helping us in this very important task.

The first witnesses today are two very distinguished United States Attorneys, one from the District of Colorado, and one from the Western District of Oklahoma.

We have relied very heavily on United States Attorneys throughout the country in assisting us in these issues, as we have heavily on defense attorneys and others.

We are very happy to have with us today, Mr. Robert Miller, United States Attorney, District of Colorado, and

Mr. William S. Price, United States Attorney from the Western District of Oklahoma.

Gentlemen, if you will all come forward, we will be glad to hear from you, and if you will allow us to subject you to some cross-examination, we will appreciate it also.

MR. ROBERT MILLER: Judge Wilkins, Members of the Sentencing Commission, I am Robert N. Miller, United States Attorney for Colorado.

I appreciate very much this opportunity to appear before you and discuss with you my impressions of the preliminary draft of the sentencing guidelines.

The views I am going to express are my own, and not those of the Department of Justice.

I appreciate all the work that I know you have put into these guidelines. I also appreciate the opportunity of having been invited once to come back and discuss these.

I thought it would be important for me to lay out some of my background so you know where I am coming from when I make my comments.

First of all, I have been a lawyer for twenty-one years, and prosecutor for fifteen of those twenty-one years.

It has been my experience that imposing an appropriate sentence is probably the most difficult decision that any Court has to make.

I commend the Sentencing Commission for its efforts

to bring rationality and standards to this process.

It's also notable and important that the Commission has attempted to articulate the many factors and criteria which have been considered by judges over the years in making these decisions.

I know that you have had mandates put upon you by Congress in the Act, and I know that you have struggled to try to come up with something that makes sense.

I particularly agree with and commend the Commission for the Statement of Purpose that is set out on pages 6 and 7 of the draft. Most, if not all, the factors enumerated in Chapter Two, Offense Conduct, and Chapter Three, Offender Characteristics, should be considered in any sentencing of any defendant, I believe.

However, I believe that the sentencing process proposed in these draft guidelines is in the end unduly complicated, and procedurally vague, and nearly impossible to implement as a practical matter.

Offense conduct and offender characteristics, which must be considered in every case under these guidelines, are human factors, which in my opinion do not lend themselves to a quantification or numerical weighting system as proposed in this draft.

Because of this incongruity, the sentencing phase of the criminal case under these proposed guidelines will

become bogged down in hearing after hearing to measure by a preponderance of the evidence in most cases aggravating and mitigating factors, degree of cooperation, psychological harm, the role of the defendant played in the crime, and many other factors, which apparently are to be determined in court proceedings under these guidelines.

Scarce court resources will be further overburdened. Swift and sure punishment will remain an illusive ideal. Often, under these guidelines, the sentencing phase will require more court time than the trial itself.

As a practical matter, it is unclear to me how plea agreements and these guidelines can co-exist. Ninety percent of the criminal cases here and across the nation are plea bargained. If the proposed guidelines are implemented, these pleas by necessity will involve stipulated facts, and therefore may not reflect, quote, real offense sentencing, in the end.

The guilty plea secured by plea bargain may not be a recognition of the defendant's responsibility for the crime, and therefore will not be an appropriate basis for a sentence reduction as proposed in these guidelines.

This incompatibility becomes more pronounced when plea bargaining is applied to cases involving multiple counts and multiple crimes.

Also left unclear to me is the treatment of lesser

included offenses in a plea bargain.

Finally, I believe that the harm to victims is definitely something that ought to be considered in every sentencing. But attempting to quantify a victim's physical, psychological and financial harm doesn't seem to me to be feasible, and to change the cornerstone of our present sentencing system from an analysis of the defendant's intent to an analysis of the victim's harm strikes me as inappropriate.

As an alternative, perhaps the Commission ought to ascribe a definite term of years to every crime. This term could be calculated from a mean score derived from all sentences imposed in the last three to five years across the United States.

This presumptive sentence would be given in each case unless a sufficient number of mitigating or aggravating factors were found to be present. These factors could be compiled from those set out in the draft guidelines under the headings of Offense Conduct and Offender Characteristics. The sentencing judge could be limited to a certain percentage deviation from the presumptive sentence.

Such a determinate sentencing scheme would be more uniform than the one we presently have, also enjoy a rationality and standardization we presently do not have, yet retains the flexibility to address the human variables.

Most importantly, it would not be so complicated

that it would unduly prolong every sentencing hearing.

That would conclude my comments. I know Mr. Price has some.

CHAIRMAN WILKINS: Thank you, Mr. Miller. We will hear from Mr. Price, and talk to both of you. Thank you.

MR. WILLIAM S. PRICE: Mr. Chairman and Members of the Commission:

Let me first state the views I express are my own, and not that of the Department of Justice.

I appreciate the opportunity to appear before the Commission and present my views of the mandatory guidelines for the sentencing of defendants proposed by the Commission.

First, let me express my appreciation of the procedure this Commission has followed in receiving ideas and opinions from all quarters concerning these guidelines. I and ten other U. S. Attorneys have had the opportunity to meet with this Commission for several days in a free exchange of ideas before these guidelines were drafted.

I realize that these guidelines are a draft to be approved and refined by both these public hearings and later more lengthy sessions between this Commission and various groups such as U. S. Attorneys, which I understand are planned in the future.

At the time of our first meeting, I discovered the

truly arduous task before this Commission.

The Administration and Congress in setting forth mandatory sentencing, abolition of the Parole Board, and formulating the perimeters within which this Commission must operate, was in response to a public cry to have the sentences in this country more stringent, more uniform and less control by parole boards.

This commendable goal is very difficult to put into practice. A large measure of this cry for change derived from the public's view of the sentencing and parole procedures followed in most states in this country, including the State of Oklahoma.

The sentences given in most states have little or no relationship to the time actually served. Defendants receiving large state sentences for violent crime or serious drug offenses are all too often reduced to a few months served by parole boards.

We who operate in the federal system have been proud of the fact that this can't happen in federal sentencing. Defendants must almost always serve at least a third of the sentence, and many times much more than that, depending upon the parole guidelines.

The parole guidelines in effect have been smoothing out the differences between strict and lenient sentencing in the federal system. The inequities in the current system

occur not from the judge imposing too stringent a sentence, because these are equalized by the parole guidelines, but from the judge imposing no sentence at all.

Luckily, in our district, defendants committing serious crimes rarely receive probation. I realize other districts are not so fortunate.

In reviewing the proposed guidelines in the light of whether they correct the perceived ills, there are a number of good points as well as faults to these guidelines.

In general, the guidelines appear to be fairly high, though perhaps not high enough in light of several practical factors that will significantly lower the average sentence given in these guideline objectives.

Since over ninety-five percent of the defendants will hopefully continue to plead and a huge percentage will cooperate to some degree, most sentences will be at least forty percent below the guideline amounts. Add to that the human tendency of the judges not to go above the guidelines, where one hundred percent of their decisions will be appealed by defense attorneys, and to far more often go somewhat below the guidelines, where the government will only rarely have the inclination and the resources to appeal and you have an inevitable lowering of the guidelines from theory to practice.

The same tendency will cause subjective or factually close hearing questions to be decided in the

defendant's favor to avoid appeals.

For all these reasons, the higher the sentencing guidelines, the greater the flexibility there is, and the less likelihood of hearings and appeals.

The guidelines also seem to be drafted with the premise that moderate to high level white collar crimes deserve some terms of imprisonment. I agree with the Commission that although the prison sentences in white collar crimes don't need to be as lengthy as narcotics or violent crimes, most significant fraud, public corruption, antitrust and tax cases should involve imprisonment.

My primary criticism of the proposed guidelines is in their complexity. The real danger of these guidelines is that in the attempt to find the perfect system that includes all variables, we may totally bog down all our judicial and prosecutive resources in hearings and appeals. The more these subjective factors are found in the guidelines, the greater the likelihood of controversy and appeals, and the more worthwhile cases will have to be declined for lack of prosecutive resources.

There are generally too many sub-categories within each offense. There are factors such as psychological harm to victims that are almost impossible to objectively quantify.

Certain offenses, such as rape, inevitably involve psychological harm to the victim, and these offenses are rated

as more severe because of the likelihood of such harm.

But to apply a psychological factor to all offenses is not practical. It does not make sense, for example, to have hearings on every fraud case to determine whether the victim was a little upset, or very upset, in losing his or her money.

One additional problem in having too many factors to consider is that it adds to the mathematical complexity of computing the sentence. Perhaps a change in the format of the guidelines could improve this somewhat, but I and others who have reviewed them have found real difficulty in going through all the computations necessary to determine the proper sentence, and this adds to the possibility of human error by judges and probation officers.

Another specific suggestion is that prior conviction records, unless the underlying offense is drug-related, do not increase the penalties sufficiently.

A judge in our district commented to me that he computed a typical first offense bank robbery came out at about about eleven years under these guidelines, whereas the same bank robber with a previous bank robbery conviction would receive slightly more than a year additional.

He and I both agreed that the second instance warranted significantly greater punishment.

Also, a criminal history score based primarily on the

number of certain types of prior convictions rather than on the basis of prior years served for each prior offense would seem to be less complex and a better measure of criminal background.

All of us have seen lengthy rap sheets of felons convicted of numerous serious crimes who have not served as much, if any time, and whose background would not rate nearly as high as they deserve under these guidelines.

Currently, defendants with three prior felony convictions for burglary, robbery, narcotics or crimes of violence, caught with a gun, face a fifteen year mandatory sentence without parole. The guidelines provide for a substantial increase in sentence for two prior convictions of this variety but far too small an increase for one such serious conviction.

Another area I believe the guidelines to be too lenient is the area of child pornography. Although there is a factor increasing the sentence for children under twelve, the age of the child would be very difficult, if not impossible, to prove in most instances. The guidelines carry a penalty of only about two years, which I believe is too low.

Again, instead of a factor for psychological injury in child pornography cases, which would call for a lengthy hearing and appeal and might require the child's testimony, which would add to the injury, the offense guidelines should be raised and the psychological factor should be eliminated.

The other fear inherent in any guideline is that the rate of trials will greatly increase and bring the system to a halt.

This Commission has attempted to mitigate this problem by allowing totally within the discretion of the trial judge a reduction for acceptance of responsibility and a further reduction for various certified levels of cooperation by U. S. Attorneys.

I believe that such provisions are essential to make the system work, but I am concerned that these factors and considerations are clearly made permissive and totally within the discretion of the judge or U. S. Attorney, not a right, subject to hearings and appeals based on these subjective factors.

I would support a smaller automatic reduction for a plea of guilty, as this would be an objective standard that would encourage pleas.

In conclusion, although these guidelines have their good points, the system overall is too complex, and too difficult to compute, and the profusion of variables will cause the increased likelihood of hearings and appeals in every criminal case.

I realize how incredibly difficult your job is in drafting such guidelines under the perimeters set forth by Congress.

I also realize how much easier it is to criticize such a task than to propose alternative solutions.

It is vitally important to law enforcement that we develop the most workable guidelines possible. I look forward to working with this Commission in future sessions, in helping any way I can in the drafting of these guidelines.

I might at the conclusion add a few additional points, that in the relatively short time I had to review the guidelines, I noticed, after I drafted these remarks, some additional things that did cause concern, and I might address those very quickly.

One thing that did concern me is under the fraud and deception area, which involves a huge percentage of our crime, there is no factor whatsoever for anything other than actual gain or loss, and this is of great concern on many cases.

In other words, if you have an individual that attempted a multi-million dollar fraud, it's going to be considered exactly the same as somebody that attempted a five dollar fraud.

It brings to mind specifically a case in Oklahoma, which involved the Governor seeking a multi-million dollar favorable contract for someone, and due to receive a hundred thousand dollars, well, for his -- in kickbacks for his efforts.

The thought is that under this fraud and deception guideline, where there must be actual gain, the very fact that law enforcement was able to monitor this crime and catch it before its completion would have caused absolutely no actual gain or loss, and this would be rated as a very nominal crime, and I think that result would have been just devastating under these guidelines.

So, there are some other practical things that in looking through these guidelines, I am concerned about, but I think at this time I will go ahead and open it up for both of us to submit to questions.

CHAIRMAN WILKINS: Thank you very much, Mr. Price.

Do I understand you are concerned that perhaps some of the sentences under these temporary, certainly, guidelines, the numbers are too low, and we just got back from another hearing where we were criticized severely because they were too high.

Like trying a case that both sides get mad at you and you are probably doing something right.

But I share your concern. These are very tentative, we have to keep in mind, and do two years mean today like six years sentence.

One comment that I want to ask you about, Mr. Miller. You talked about the complexity, as you did, Mr. Price, and we are so concerned about the complexity of this,

to try and remove the complexity, and any way you can help us do it, we seek that.

On the other hand, if we want to recognize, for example, a drug conspiracy to distribute a kilo of cocaine, the mastermind who planned the whole thing, the pilot who flew it in, and the mule who was paid a few thousand dollars to take the cocaine in, they were all convicted of the same statute, conspiracy to distribute.

Now, do we want to make a distinction in the sentencing of those people?

Should the mastermind get an increased sentence over the mule?

And I think you will agree with me, the answer is yes, we want to do that, and to do that, we have got to have a section called "Role in Offense," and we may have to have a hearing so the judge can say, "You are the kingpin. I'm going to give you ten years under these guidelines. And you are the mule. You get three years."

How do we make it less complex to identify the characteristics that you as U. S. Attorneys and judges use in reaching appropriate sentence?

MR. MILLER: In response to that, it seems to me those decisions are made today not with the benefit of having these guidelines, and it does seem to me that we have, on one hand, it seems to me, a procedure to take away a good deal

of judicial discretion, and if we are going to have that, we have got to have a good amount of detail.

On the other hand, if we are going to get done what you suggest and have flexibility, I think it means we have got to increase judicial discretion under these guidelines, maybe not take it as far as it is today, which seems to be the trend.

But I do think it involves judicial discretion by necessity in all of these examples that you point out, and I do not think that anybody is going to be able to sit down and write every variable that's going to come up and give it a point value and have a probation officer or judge add it up and figure out where they are.

I think most judges, and Bill and I were talking before we came down here, maybe we are fortunate in our two districts, but most of our judges can find it out now, and when they do, deliver the appropriate sentence.

So I think some narrowing of discretion is in order, but not perhaps as far as has been done in these guidelines.

CHAIRMAN WILKINS: Yes, sir, go ahead.

MR. PRICE: And, of course, you are caught, as a Commission, within the guidelines the Congress has set forth, which puts you in a position where you cannot determine that law, but one possibility is to have the plea bargaining provision clearly so that the U. S. Attorneys can in the

plea bargaining cases determine whether there is major, minor, or whatever, participants.

That is at least one possibilty that might reduce the number of hearings.

I think, too, I wanted to mainly get across in my comments the reason why, or give you all maybe publicly some reason or justification for having the guidelines as high as they are, because I think maybe there are some people that testified here before, have turned around, and simply looked at the guidelines and thinking the average person will serve this amount, and not realizing that the migitgating factors really take care of themselves in this, because if the judge drops significantly below the guidelines because of a true mitigating factor, the odds of the government agreeing with that mitigating factor and not appealing are about ninety-eight percent.

So, the higher you have the guidelines, the more real judicial discretion you have, and the less complexity you have, and, so, I think the guidelines are fairly high, for very good reason, and do not let anyone persuade you to go down, and if anything, I would go slightly up.

But I think they are very justifiably high, because of the difference between the theory and the reality, and also they really give a combination of the discretion of the judge and the prosecutor acting in concert, give the

system some flexibility, because the judge can always drop below the guidelines, if he thinks the prosecutor is obviously not going to care, and he gives some flexibility there, whereas going above the guidelines is always going to involve hearings, appeals and all the process you have.

So, plea bargaining is one way. I think having the guidelines as high as possible, believe it or not, adds to the flexibility.

CHAIRMAN WILKINS: All right, thank you.

Let me ask, any Commissioners to my right have any questions?

COMMISSIONER NAGEL: This is for both Mr. Miller and Mr. Price.

Mr. Miller, you indicated that in your proposed solution you might suggest that we look at current practices as an anchor, and then specified mitigating or aggravating factors.

In view of Mr. Price's concerns about the reduction for plea and cooperation and other factors, and the essentially low sentences we have now, would you be inclined to look at current practice as defined by the sentence that is now given, or current practice as defined by the sentences now served, or some other measure?

MR. MILLER: My understanding from the legislation is that that is the study which you already had to make,

which is one of the reasons why I used that.

I frankly don't know what system you did in conducting the study, but it seems to me that the only fair thing to do would be to look at how much time he actually served, and make some kind of transposition from that to what they would serve under this system, which we all agree is probably going to be more because of the abolition of parole.

My suggestion that I put in there, frankly, is a rough guideline at best, but I was hesitant, frankly, to be critical without coming up with something I thought might be workable, because I know it's a tough problem you all have to face, and I'm like Bill, I don't want to sit out here and throw stones unless I have something that I think might work better.

But my system would be using the mean that has been imposed across this country in the last three to five years, and thereby come up with something that is apparently acceptable to at least most jurisdictions in the country, and then have these factors that we have talked about on the right hand and on the left hand, and a finding of those, and you all would have to decide whether it takes three aggravating or five aggravating or two to three mitigating to raise or lower that within some kind of boundaries.

But I think that gives -- it does what you have tried to do with these guidelines, and that is specify those

things that ought to mitigate and ought to aggravate, and then allow judges to have some discretion in finding those and then apply them, rather than saying if you find this, it's worth four points, and if you find this one, it's worth three points.

It just doesn't seem to me to be workable in the real world when you get that specific.

So, it's a general proposal that I do think has some anchor in reality out here.

I don't think we can sit here and say all sentences that have been imposed in our present system are bad, and I think that we go for the mean, translate that from actual time served to actual time of these guidelines, and then give discretion for finding these factors without hearings.

It seems to me that anything we do in the sentencing system that makes a sentencing process longer than it is now is going to unduly burden our courts and our entire system.

You know, a sentencing now may take twenty minutes in this district, and under these guidelines it's going to take much longer than that in most, and I think it's going to just create an insurmountable problem in court backlog.

COMMISSIONER NAGEL: Mr. Price, do you have any difficulty with -- given your concerns earlier about too much jurisdiction or some sentences that are too low -- if we build in a system that is in part replicated in the past?

MR. PRICE: Well, I don't think there is a problem especially, well, along two different lines, two worries I think the public and prosecutors have had.

For instance, in narcotics cases, the idea that one judge routinely gives probation in some areas of the country, I believe that Congress, believe it or not, while the Sentencing Commission has been meeting, by creating minimum mandatory sentences for certain kinds of offenses has been busily eliminating some of the problems this whole sentencing process was intended to correct.

There are now minimums on most serious narcotics cases.

There could be some sort of minimum base, which this Sentencing Commission has discussed, somewhere around six months or whatever, on some white collar crimes. That might eliminate the problem with the guidelines as proposed by Mr. Miller. I have not seen it, but from talking to Bob about it, apparently his recommendations were based in part on some kind of procedure followed in the state courts of Colorado.

I don't know if this Commission has reviewed that as a possibility, but it would be probably advisable as a possible alternative system.

I don't know enough about the system of Colorado to know whether it's likely to work or not.

CHAIRMAN WILKINS: Judge Breyer.

COMMISSIONER BREYER: Three questions.

Mr. Miller, I am addressing your proposal, and I see that you are modeling it after the Colorado idea?

MR. MILLER: Yes.

COMMISSIONER BREYER: And the difficulty that we have with that, which is set out within pages 15, 16 and 17 of the discussion of modified real offense sentencing, what you say, just take the mean of the sentences now served, for what? For what?

You see, the state systems, by and large, have a criminal code, where the particular provisions of the code pick out the discrete forms of behavior, like robbery, murder, et cetera.

We found that we couldn't do that. Our reasons for not being able to do it were three, really.

One of them is we start looking at the U. S. Code, and it doesn't say robbery. It says things like, "Whoever transfers in interstate commerce with intent to promote any unlawful activity."

That's a statute, right?

MR. MILLER: I understand that.

COMMISSIONER BREYER: What's the mean for that?

Or even bank robbery. It says something like, "Whoever enters a bank with intent to commit a felony."

Now, you can't just look to the particular words, and say, "Well, look at what's charged."

And then another problem we have with that is if you took that literally, you would say, well, if they charged sending one fraudulent letter through the mail --

MR. MILLER: Yes.

COMMISSIONER BREYER: It's a month. Fifty, fifty months. Who decides whether there is going to be one count or fifty?

The U. S. Attorney.

Who then will decide the sentence entirely?

U. S. Attorney.

See? I mean there was that problem.

Then there was the problem of just not making sense, if we think, well, a person goes into a bank and violates the bank robbery statute, isn't there a big difference whether he has a gun and hits somebody over the head or doesn't?

Those are the things that led us away from this simple charge system.

Now, if you can think -- I don't mean now, but I mean with your knowledge of how the state court thing has worked out, and if you see a way that we can move towards that, I would be very interested, particularly if you can write it down.

MR. MILLER: Well, the only response I would have

to that is that it does seem to me it's important not to look at the charges, as you suggest, and my proposal was to look at what the person was convicted of and serving time for, or probation, or whatever it may be.

And I certainly agree with you. Bill and I talked about this. Were it that the federal crimes were as specific and neatly divided as the state's, and they are simply not.

But I don't know that that's a terribly big impediment to getting to where we want to be.

COMMISSIONER BREYER: I agree.

MR. MILLER: I am not sure that what we have here solves that problem necessarily. I mean in what we are talking about, frankly, I think you are inherenting those very problems that you identified into these guidelines.

COMMISSIONER BREYER: The other thing, that's what I think it comes back to, you, both of you, saying. I thought we had a very good example in Mr. Price -- you see, I'm just as schizophrenic as you -- in the following sentences:

"Well, look, this really has to have a lot more discretion to it. You should really have fairly broad categories to define each crime, like bank robbery, and then let them use discretion."

And then suddenly, you got worried, because you suddenly thought of the crime of fraud, and said, "Wait a minute, they don't have enough distinction. They ought to

have a distinction between attempts, attempts where you can identify the amount of money if it had been stolen and attempts where you can't identify the amount of money, and attempts where that amount of money is likely to be large or small."

We are pushed in the same directions. I tend to think a lot of these problems can be solved if we build in discretion.

But there is another approach to all these problems. One sort of mind-set says solve them by building in a lot of discretion. A very different sort of mind-set says solve them by every time you find one, proliferate a few more rules.

It's really the Department of Justice I think we are getting the most pressure to follow the latter approach. I mean more simply than elsewhere. They are not one hundred percent set on it.

But the arguments are if you dont' do it that way, you undercut the very purpose of the guidelines to give too much discretion to the judges to pick any old sentence.

I put that to you for whatever response you want to make.

MR. PRICE: Well --

COMMISSIONER BREYER: I tend to be sympathetic to the discretion.

MR. PRICE: We think in many ways there should be

more discretion, and I think we want not to have white collar crimes continually given probation, for instance, or major narcotics or violent crimes not getting some degree of, you know, some pretty stiff sentence.

But, beyond that, we don't have as much -- that much criticism of the judges' discretion in many ways as some do.

I think another way you can solve some of these is giving somewhat more leeway to the prosecutor in terms of plea bargaining.

I am fearful there is a little bit of tendency to think there is a set crime out there, that, you know, when you talk about multiple bank robberies or multiple checks that have been forged, or whatever, you know what crime there is.

What I get fearful about, too, is in the plea bargaining process, under this real offense sentencing, you know a judge is going to be trying to determine what the real offense is, and many white collar crimes or narcotics cases, it's just kind of like when you stopped investigating this crime determines your real offense.

You know, he may have defrauded a million people, and you stopped at twenty-five, and if you have that kind of decision or that kind of plea bargaining to determine, or, "We will plea bargain this to twenty-five people, because we really don't know about that two hundred other victims that we would be spending twenty-five years trying to find out

about," or in a narcotics case, "We could prove this set of crimes, but we really don't know very well whether there is millions more out there."

If there is some kind of judicial review of that plea bargain, by the judge, it starts getting even scarier, because it's going to be hard to determine what is the substantive crime under a real plea bargaining -- real sentence procedure.

COMMISSIONER BREYER: One other thing, on your numbers, I am not certain of your gamesmanship kind of theory on the numbers.

I mean I thought that these numbers -- I do think, they don't represent anything, the numbers in this. We really haven't made decisions about them, in this draft, and there was no effort to iron them out to make them consistent or reflect actual practice, et cetera.

They are what they purport to be, illustrative, so you can figure out what the guidelines are.

Well, I would think the judges, most district court judges, will not give a sentence outside the guidelines, whether they think there is an appeal or not an appeal.

And some of these numbers, for example, you know, I think it says, for example, a woman from -- you know, there are a lot of women in New York, Judge Weinstein told us, who come from poor African countries, who are persuaded to be

couriers. That's the problem with South America. They look innocent. They are on an airplane. They are given a kilo of cocaine.

What's an appropriate sentence for somebody who comes from a very poor country, doesn't know quite what's going on?

At the moment, what we were told was that judges would not tend to sentence those people, they wouldn't give them forty-five year sentences, and yet this particular number, and that's why it says fifteen years really served, if you get that down to seven and a half by various forms of cooperation, I mean as an experienced prosecutor, do you think you would recommend for such a defendant what would be equivalent now to a twenty-five year term?

MR. PRICE: No, but what I think will happen in those kinds of things where the judge and prosecutor both agree, boy, they shouldn't get that, the judge is going to put it way below the guidelines, and the prosecutor is going to cheer.

COMMISSIONER BREYER: Maybe you have some judges who would do that, but what would you think, have all or even most judges do that if the guidelines says you can't do it? Don't you think most judges would follow what the guidelines are.

I mean my experience with district court judges is

by and large they try to follow the law even if there is no appeal in the offing.

MR. PRICE: Well, it isn't like this is the law. This is like this is the guidelines that they know are subject to appeal if they are above or below. They are going to very easily drop way down below guidelines if they think that meets the facts of the case. They aren't going to hesitate a minute to do that, especially if they can sit there and look at that prosecutor, and they know in that prosecutor's heart that he or she agrees with them a hundred percent.

COMMISSIONER BREYER: Should we recommend the equivalent of the twenty-five year sentence to one of these mules that comes from a South American country or African country? I mean, would you do that?

MR. PRICE: No, I wouldn't do that. That is too high. But I'm trying to give you one of the reasons why the guidelines need to be pretty high, and the higher they are, the more discretion comes in.

What I was trying to point out is that that's a factor that a lot of people don't know the system, that might be coming from outside and saying, "These guidelines are too high," are not going to realize.

CHAIRMAN WILKINS: You are not suggesting we write guidelines for mules. We have got to write them for the

average, and then provide discretion so the judge can take care of it.

COMMISSIONER CORROTHERS: A question for Mr. Price. Concerning criminal history, you said that we should base this on types of offenses, rather than the length of time that the offender received, and that makes sense.

Of course, if you don't use the length of the sentence as an indicator of seriousness, then you need to made sure and know what the offense was.

Now, I am wondering, because of plea agreements, pertaining to past offenses, would we be able to ascertain what the specific conduct was.

MR. PRICE: You're right, thre is problems both ways. You know, regardless of which system you choose, you are going to have problems.

The hole I found in there, which I want to point out specially, was it looks like the Commission recommendations when it comes to like three prior serious convictions for violent crimes, or narcotics, or whatever, I mean that's built into the statute right now. At least, just really serious, an extra fifteen years over and above, without parole, in addition to any other sentence. You know, you built in two or more prior serious convictions like bank robbery or whatever.

The hole I saw was that if you have a bank robbery

in front of you, with one prior bank robbery conviction, that's pretty important. That's a lot more important than adding a year or a year and a half to the sentence. That's much more important.

And it seems like to me the sentencing guidelines took into account the two or more convictions for those serious things, but the one conviction for something like bank robbery in your past ought to up the sentence a heck of a lot more than what was indicated.

So, I guess my first flaw was that it didn't seem like it upped it on those serious offenses, and I was thinking that delineating those was maybe the most important of all, because I think you would agree that people with prior convictions for narcotics distribution, for armed robbery, for violent crime, whether there is one or two of them, more severe if two, but for one of them ought to up the guidelines very radically, and that's more looking at the type of prior offense, than necessarily the prior sentence served.

CHAIRMAN WILKINS: I take it your point is the more serious your crime today, the less the prior record aggravates it; the less serious, the more the prior record aggravates it.

It seems to me it should be the other way around.

These demonstrate the current practices, these guidelines, but I agree with you, this needs a lot of study.

MR. PRICE: Let me say, too, I have some of the same schizophrenia. It's a lot easier to criticize and talk about the complexity, like, for instance, the fraud area, I almost advocate a little more complexity there, and that flies in the face of what I say.

The problem I saw in the fraud area was the differentiation of time between the perosn that walks in and falsifies a bank loan. A lot of times they falsify the extent of their collateral, or something, or maybe added one or two pieces of collateral they really don't have, or are about to buy, and that's a typical bank fraud case, and you have tons of those, cause a million dollar loss when the guy went bankrupt, so you look back and under your guidelines that guy is a major criminal.

That farmer that came in and said he had an extra piece of equipment that he didn't is the biggest criminal in the world. He would go to jail forever, whereas the person that embezzled a million dollars from a bank is about the same variety of criminal.

So, there, I am asking in some of these areas I think a little more complexity may be needed, becuase bank loan cases involving losses are a lot different from embezzlement cases or public corruption cases.

So, in that area, I am going against my general comments, and saying there needs to be some differentiation

because the crimes are so dissimilar.

MR. MILLER: I might just toss into that, I guess the other side of that, however, would be either they would be more complex in the guideline form, or they would be more generous in the giving of discretion, and I guess what I am opting for is the latter, becuase I don't think we can take in New York South American mules any better than we can take in the farming equipment problem in Oklahoma and Colorado, and that doesn't fit in New York, and the New York situation doesn't fit in Colorado.

And I think that all points to the fact that we are not going to, even given the next decade, come up with every conceivable situation we could think of, even in this small group, and cover. The only reasonable option seems to me to be to broaden discretion given to the court.

MR. PRICE: That does bring into focus what I was really talking about in complexity. Maybe instead of a whole elaborate point system on aggravation or reducing factors, allow them a little more, similar to the Colorado system, is there one of those factors, but have maybe a certain bottom to those, to certain crimes, that, you know, you don't get less than six months, let's say, if it's X seriousness of white collar crime.

I think there may be some ways to reduce that complexity, and along that type. That would be a rather

radically different approach than from what's here.

CHAIRMAN WILKINS: Let me ask the Commissioners, do you have any questions?

Commissioner Robinson? George?

COMMISSIONER MAC KINNON: Mr. Miller, do you think the present draft conforms to the statute?

MR. MILLER: Yes, I do.

COMMISSIONER MAC KINNON: You think so?

MR. PRICE: It appears to. That's one of the problems. Some of the things we are proposing, I am not sure whether they do or not.

COMMISSIONER MAC KINNON: One of the things we are concerned about are regional variances. Is there anything that you conceive about the offenses that you prosecute, in Oklahoma, and in Colorado, that have any peculiar regional characteristics, either as to severity, or mode of execution, or the sentence imposed?

MR. MILLER: Well, I think we just touched on one. This entire region being uniquely agricultural, we do have a considerable amount of activity with banks involving agriculture, and I think Bill pointed out that that may not fit in with the classic bank fraud, or bank embezzlement situation, that you see in other regions of the country.

COMMISSIONER MAC KINNON: Well, I found out when I was U. S. Attorney that fifty percent of my cases in

Minnesota related in some way to agriculture, or to some company that was processing agricultural commodities, and I think that's generally true maybe, west of the Alleghenies and short of the Rockies.

Do you both agree that tax violators ought to get some -- reasonably substantial tax violators ought to get some time?

MR. MILLER: Yes.

MR. PRICE: I agree with it, too, and I like the way -- one of my gripes has been that it seems that judges did one or the other thing in tax cases, either sent them to prison for three or four years or gave them probation, and there wasn't anything in between.

There wasn't any, you know, two months, four months, five months, six months sentences, and I have always had a feeling that somebody that is not a huge tax violator, but a moderate, is deterred about as much by a few months sentence as by a three year sentence, and we ought to have more of the type of sentences that are advocated by this Commission in those type of violations.

MR. MILLER: Judge, let me just respond one other thing in that regard. The thing that jumped out at me when I read the guidelines is the presumption of illegality of proceeds not reported on a tax charge.

The presumption attendant to that guideline struck

me as being tenuous at best, and unconstitutional at worst.

I guess it goes further in what I was saying about generating hearings, because as I recall that guideline, the presumption was that the proceeds not reported were -- was that it was illegal, and then the burden was on the defendant to prove in fact that they were legal, which to me says that we are going to generate an entire hearing here on the nature of these proceeds not reported, that I think could again prolong this thing much longer than it should be.

COMMISSIONER MAC KINNON: You are talking about things that might constitute an offense or an aggravation of an offense?

MR. MILLER: Yes.

COMMISSIONER MAC KINNON: That doesn't get into the indictment or into the trial.

MR. MILLER: Yes.

COMMISSIONER MAC KINNON: Well, of course, as the Supreme Court has remarked, sentencing judges have been relying on those matters for years.

Let me ask you this. You indicated that you thought the judge ought to review the plea bargaining, and that gets to a further question as to what role do you now play in adjudging sentences?

MR. PRICE: Well, really --

COMMISSIONER MAC KINNON: In the sentence adjudged?

MR. PRICE: Yeah. Well, the main role that we play is that we set a cap, by the type of charge that a person pleads to.

COMMISSIONER MAC KINNON: Or which you might want to dismiss --

MR. PRICE: Right, so you set some kind of cap, and generally, what I do, is I figure out the number of years that the judge, the best expecation, is likely to give, and then I try to figure out some charge some place that gives him that discretion to give it, and then we also -- I prefer some charge that makes him look better if he is going to be a witness up there, and that's about it.

That's usually the way our pleas are determined, is giving the sentencing judge enough discretion to give him -- and I look at the parole guidelines. I try to figure out if under those parole guidelines, would it really matter whether he got twenty years or whether he got five years, would he get out about the same.

If he would, who cares whether he got multiple count charges?

MR. MILLER: Of course, there is another factor, and that is the matter of the prosecutor's statement, and the statement of offense, especially if it's agreed upon between the prosecutor and defense, we limit it even further or expand it, whichever the case may be, which was the problem

I was pointing out earlier, under these guidelines, on plea agreements, and real offense sentencing.

COMMISSIONER MAC KINNON: You make a statement about the offense when the judge comes in all ready to impose sentence?

MR. MILLER: We have a prosecutor's statement, which sets forth the offense, and that is reviewed by the defense attorney and taken by the Court, and used in sentencing.

COMMISSIONER MAC KINNON: Is that customary, usually or always?

MR. MILLER: Always.

MR. PRICE: Our --

COMMISSIONER MAC KINNON: Do you practice that in Oklahoma?

MR. PRICE: I would say part of the time it is. It is negotiated, our plea. Part of the time, it's not.

When it's rather obvious, it's not.

When it's a situation where there are offenses we got him on, and then there is maybe a whole bunch of offenses out there we don't have quite enough to charge, we negotiate as to what it is really going to be included in that offense, because they are going to want to know, are you going to come in and try to dump a whole bunch of things that you might really have a handle on as part of the government's version of the offense.

I would say most cases it is not negotiated, but I would say in a substantial minority of the cases, it is.

COMMISSIONER MAC KINNON: That's all I have, thank you.

CHAIRMAN WILKINS: Thank you very much, gentlemen. We appreciate your remarks. Please stay in touch with us and keep in mind the statute under which we labor.

I believe we all agree we need flexibility, but we must do what the law tells us to do.

MR. PRICE: Also we would continue to study these guidelines and come back for any kind of session whatsoever.

CHAIRMAN WILKINS: Thank you. I am sure we are going to call on you again.

Our next witness is an attorney, Mr. Arthur Nieto. He is the Chairman of the Criminal Law Section of the Colorado Bar and a member of the Spanish Bar.

We are glad to have you with us. We appreciate your taking your time.

MR. ARTHUR NIETO: I have submitted written remarks. I mentioned in those remarks that I got the preliminary draft about two weeks ago, and during half times and seventh inning stretches I have reviewed it.

It is clearly a handful of work. The two weeks of cursory study I have done doesn't really do justice to it.

I am here on my own individual capacity, as a

human being, defense lawyer, and not as a member of the Spanish Bar or the Criminal Law Section of the Bar Association.

What I did, when I was going through the guidelines, when I finally got through to the guidelines table, the actual numerical table, I made myself a little graph.

On the bottom coordinate is the number of sanction units. On the vertical coordinate is the number of months.

And I am sure it wasn't coincidental that the graph turned out as it did. Down at the bottom of the sanction units, there is relatively narrow range of months of imprisonment, if you will. At the top, you have a much wider range.

And to the extent that one of the goals of the Commission is to eliminate or to avoid unwarranted disparities, I think that by that mathematical configuration what you do is you avoid disparities as between minor offenses, and by the mathematical formulation you in a way allow for greater disparity among different offenders in the higher sanction unit categories.

I am not sure if you wanted to do that, and I don't know if it makes much sense to put a greater emphasis on the eliminating disparity at the lower end of the sanction unit scales and allowing for greater disparity at the upper end, and I would ask that you consider that.

The formula is in terms of months of incarceration, and you all did direct a good deal of commentary to other forms of sanctions like probation and community corrections, home detention, fines, et cetera.

The more you incorporate those alternative sanctions into the months of imprisonment, I think the more you encourage disparities as between different offenders.

I would also suggest that what you might consider is that you consider more use of non-imprisonment sanctions at the lower end of the sanction units and some kind of limitation on the use of non-incarceration type sanctions at the upper end.

Mathematically, how you do it, I mean obviously you all are faced with a large task just by trying to reduce human behavior into numbers, and how you do it with non-imprisonment type of sanctions, I have no idea, although I think that minor offenders ought to have those sanctions available much more so than more serious offenders.

We could go on for a long time, and the other witnesses certainly have adverted to the difficulty of the task of numerically quantifying human behavior, but the factors that you have all included do appear to be appropriate.

I would also suggest that for every defense lawyer and prosecutor that reads these guidelines, you are going to get more suggestions as to other factors that should be

included and perhaps factors that shouldn't be, and in the time I have had to study the situation, I certainly don't have any wisdom about that.

But assuming that you get to the point where you have the formula, where you have got the numbers more or less settled upon, you invite comments about the way you propose to apply the guidelines, reading from the preliminary draft, it appears to put the major emphasis on having the court make its own analysis.

First, you say you flip to a certain section of the book. You find the statute with which you are charged. You go through that and cross-references and indexes, and it appears that the burden is on the court to engage in that analysis.

And I would suggest that once you get past this difficulty of putting the number on everything, what might be a workable way to approach it is to have the Probation Department do an initial analysis, perhaps even with the use of some kind of computerized form.

I mean that certainly occurred to me as I was reading the guidelines, that this could probably be made into some kind of form.

But I would suggest perhaps the Probation Department do an initial study, submit it to both defense counsel and the prosecutor, have them confer. If there are sanction units

which they agree upon, then those should be submitted to the Court, and agreed upon, and then if either the defense or the prosecution feels that there is mitigation or aggravation that is reflected in this Probation Department work, thereby then they will try to agree on that, and if they can't, presumably each side will be allowed to present evidence.

We suggest a burden of preponderance, and as a practical matter I think that's the burden that's operating now, in sentencing hearings.

Perhaps it's a little low. If you are claiming a conduct outside the charged offense for which the defendant needs to be sanctioned, it seems to me like the preponderance is a pretty low burden when you are in that area because you are asking the Court to sanction somebody for criminal conduct that you don't have to prove beyond a reasonable doubt, not even by clear and convincing, so it seems to me some work needs to be done on that.

But some of the other witnesses were referring to the possibility that this structure would create terrific backlog in the courts and would unduly complicate the process.

I think if you made use of the adversary process, whereby either side can present whatever they think bears on the issue, and the Court makes a decision based on whatever burden is appropriate, that that to a degree streamlines the process and allows the adversary process to work its way

through the sentencing.

There is an area of your preliminary draft that proposes to I think multipy the sanction units by one-point-two, and particularly drug offenses, and this strikes close to my heart, where a lawyer is involved, and you also referred to members of our skills, trades and learned professions.

I have some difficulty with that. One reason for my difficulty is that I perceived in the last few years, doing a fair amount of drug defense, that the prosecutor, and the government, have been shifting their focus somewhat away from the defendant, and more towards the lawyers.

There is forfeiture provisions, and there is RICO, and the CCE statutes that are directed at the lawyers, have a tendency to have a very chilling effect on the vigor with which you approach one of these offenses if you feel it's going to be subject to forfeiture.

I don't think I agree with the proposition that in certain drug cases the participation of lawyers is essential. I don't think that's any truer than, say, in securities violations.

I would also ask the Commission to think about perhaps the role of doctors in Medicaid fraud cases.

This section applies specifically to drug violations. You don't have corresponding sanctions or there is no sanctions

for other types of violations, and I see this as part of some of the thinking that has gone into RICO and CCE forfeiture provisions.

Besides that, in another part of the guidelines, I suggest that the particular offender shouldn't be sanctioned in a given sentencing proceeding for conduct for which there has already been a sanction, and I submit to you that lawyers that involve themselves in assisting and facilitating the commission of crimes face another sanction.

That is the grievance process, and to add another layer on top of that I think strikes me as unduly complicated and it's kind of inconsistent with the other part of the preliminary draft that says, "We are not going to sanction you over and over again for the same conduct. If you have got sanctioned for it, you have got it."

Let's go on to what's pertinent at the sentencing hearing.

I speak Spanish. I represent a goodly number of immigration criminal cases in this jurisdiction. Not very may are brought, and with few exceptions, the lawyer is appointed by the Court.

In this jurisdiction, the vast majority of immigration crime involves Mexican nationals coming from south of the border into Colorado.

I looked at the range of sanction units you all

have ascribed in this immigration violation, and they appear to me to be quite consistent with what I have seen happening in the last ten years in this jurisdiction.

The amount of sanction units resulting in sentencing is around a year, maybe two if there is a lot of cocaine involved, if there is the use of a gun, if there is a lot of monetary amount involved in the smuggling, that looks pretty consistent to me.

Mr. MacKinnon was referring to regional considerations and how that might affect your thinking about the preliminary draft.

I have communicated with lawyers who represent immigration defendants as well as drug defendants in areas closer to the border, Miami, for instance, or El Paso, or California. My perception from those communications is that an immigration case brought in Denver is going to bring the same defendant a goodly higher sentence if the same case is brought in San Diego or Miami, and I think the same is true with drug cases, although to a lesser degree.

As you are closer to the border, the defendants are more likely closer to the source of the drugs, and so, I think that there is certain sense to the courts engaging in this regional variation.

I think the drug problem in Miami is probably much more aggravated and much more of a local concern than in

Colorado.

Now, there has been a good deal of politicking and rhetoric lately about drug offenses. The government isn't in favor of the Jar Wars, and the President has pretty much told Congress, "We want to have the death penalty in certain drug cases and we really want to crack down on this crack business."

I mention that because drug law is particularly sensitive right now. There are some changes going on right now in the Congress having to do with the immigration law.

The point is that as time passes, different types of offenses get more or less emphasis from the government, and I think the good feature about the preliminary draft is the monitoring and measuring function, as a continual part of the process that I think should always be part of the process, particularly immigration.

If you look at the course of immigration law over the last two hundred years in this country, immigration is radically different than what it was a hundred years ago and I daresay will be different in the next fifty.

I think it's very important for you all to build in a monitoring function that takes account of changes and vital attitudes and the governmental priorities so that we are not stuck with a codified system of numbers that can't be changed to reflect reality.

My reservation about that is kind of like with prices of housing. Once the price goes up to a certain level, rarely does it come down. And once you all settle on sanctions at a certain level for a given type of conduct, or characteristic of an offender, I think it's going to be hard to reduce those, but I think the possibility should be there for doing that.

That's all I have.

CHAIRMAN WILKINS: Thank you very much. I appreciate those remarks.

I am interested in your assessment of the area of the guidelines we called "Acceptance of Responsibility."

Under current practices today, the defendant who pleads guilty receives a less severe sentence than he would have received if that person stood trial, and the discount varies according to the nature of the crime.

But it's a real fact of life, you get a discount for pleading guilty. For various good reasons, perhaps.

Do we want to continue that process, or not?

And the flip side of that is if we have to write it down, aren't we saying, "You get punished if you stand trial and exercise that constitutional right."

We don't want to do that, and what we have said is, "Judge, you may reduce it, whether he stands trial or pleads guilty, you may reduce the sentence under the

guidelines up to twenty percent if you find this defendant sincerely accepts responsibility for his or her criminal act." And we give examples of things.

What do you think about that, or should we just say, "Stand trial or plead guilty, you get the same sentence."

MR. NIETO: Well, I think it's kind of a -- I mean, if that's what the rule is, there are certain ways you can manifest your acceptance of responsibility.

As a defense lawyer, you take your client aside and say, "Listen, say these words when you are going before the judge. When you are being interviewed by the Probation Department, be sure to mention how clear your conscience is of your criminality and how sorry you are, and plead guilty and accept the consequences."

If that's what the rule is, I suspect that defense lawyers like myself will react to the rule to get maximum benefit for our clients.

I don't think in my perception that I have seen clients who stand trial and get convicted of an offense, or plead guilty to that very same offense, and find themselves being penalized for going to trial.

I have seen very little, and clients believe that that's the case, and I have counseled a few clients that they shouldn't feel that way.

I hope I am never wrong, but I haven't seen that

taking place in this jurisdiction.

CHAIRMAN WILKINS: Thank you. Any questions to my right?

Any questions from any of the Commissioners?

George.

COMMISSIONER MAC KINNON: How many lawyers, in Colorado, that you know of have been disciplined by the Bar in connection with narcotics?

MR. NIETO: Well, I also happen to serve on the Grievance Committee.

CHAIRMAN WILKINS: You are a good person to answer the question.

MR. NIETO: I dont' have the statistics, but I assure you we get together every six weeks as an entire panel, and from time to time we split up in groups to hear the crime, and it is a fairly routine matter in the grievance process to see lawyers getting involved in using drugs.

COMMISSIONER MAC KINNON: In using?

MR. NIETO: Right. As far as dealing drugs, distributing drugs, in the few cases that have happened, the Grievance Committee is very quick, frankly at the direction of the Supreme Court, to issue suspension of the license and put the burden on the lawyer to show cause why his license should be reinstated.

COMMISSIONER MAC KINNON: How many have been

disqualified or suspended?

MR. NIETO: Disbarred?

COMMISSIONER MAC KINNON: Disbarred.

MR. NIETO: For drug offenses?

COMMISSIONER MAC KINNON: Yes.

MR. NIETO: I can't think of any in the past few years.

COMMISSIONER MAC KINNON: Well, it was my experience when I was U. S. Attorney that we got very little help from the Bar disciplinary action when we recommend or call some violation of a lawyer to their particular attention.

What did you find out about the drug sentences in Miami, compared to what you impose here in Denver?

MR. NIETO: That they are higher, uniformly.

COMMISSIONER MAC KINNON: They are higher or uniform?

MR. NIETO: Uniformly higher.

COMMISSIONER MAC KINNON: Higher, uniformly, higher. Here?

MR. NIETO: In Miami.

COMMISSIONER MAC KINNON: In Miami. How about California?

MR. NIETO: Some of them. This is not based on an empirical study. This is lawyers talking.

COMMISSIONER MAC KINNON: I know. We have our own

general impression they don't impose as severe sentence for drug offenses, for possession generally, say, or distribution, minor distribution, in Miami, as they do here. It's known as a more serious offense here. That's your conclusion?

MR. NIETO: That possession is the more serious offense here?

COMMISSIONER MAC KINNON: Possession or distribution.

MR. NIETO: No, based on my jawboning with other lawyers, my impression is that possession would be treated more seriously in Miami than here.

COMMISSIONER MAC KINNON: Is that right?

MR. NIETO: Right, but you have to recognize the source of my information.

COMMISSIONER MAC KINNON: Yes, and the quantity. Did you notice any difference between the quantities involved, or did you get down to that level?

MR. NIETO: My perception is that you see larger quantities being involved in cases in Miami than, say, in Colorado, because a good amount is distributed by the time it gets to Colorado.

COMMISSIONER MAC KINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much. We appreciate your testimony and the work you did in preparing for it.

We will call our next witnesses up, please.

Mary Ann Castellano, who is the Victim-Witness Coordinator in Denver, Colorado, and also we have Victim Advocates with us, who have been active in this field, Ms. Terry Lee Martin, Mr. Lynn Bogle and Ms. Gena Campbell.

MS. MARY ANN CASTELLANO: I would like to extend my appreciation to the Commission for this opportunity to address the Commission regarding the issue of psychological injury of the victims of several violations.

As Victim Advocate, I am concerned about proposed evaluation of the victim's psychological injury that would as the guidelines state be established by a preponderance of the evidence by expert testimony.

I personally feel that would only prolong the pain the victims have had to endure throughout the whole judicial justice process.

The victims have experienced the pain of the event, the trial, the confusion of plea negotiations, and now would be asked to submit to a battery of tests to insure that they in fact have been psychologically harmed.

This information would then be presented to the Court by expert testimony.

This approach would remove from the victims the possible opportunities to address the Court themselves.

Who knows more than the victim the psychological pain they have endured, and who can present it better than

the victim?

The opportunity to address the Court should be afforded to every victim in sentencing, thus allowing the judge to receive the information directly, without the use of an intermediary.

This would enhance the ability of the Court to shape the sentence to fit the offense.

At sentencing the defendant is accorded the right to address the Court. Let us not forget the victim, and invite them to speak if they so choose at that time.

This approach is used in our state courts and has not brought any undue confusion to the sentencing process.

In addition, it's considered an essential component in the healing process.

Those are my comments, and now, what I would like to do is have two victims of offenses that have been prosecuted by our office speak to the Commission and they are Ms. Terry Martin and Mr. Lynn Bogle.

MS. TERRY MARTIN: I really appreciate this opportunity to be here. It's difficult for me, and I think it's wonderful that you care, and that you allow me to be here.

In January of 1983, my husband was abducted from a shopping center. He and his car were taken. His body was found in Kansas three days later, where he had been shot at

that time, and the -- the apparent motive for this was to acquire the vehicle, and to leave.

It took approximately a year for the criminal to be apprehended. And then, several months later, he was tried.

It was -- very difficult. My anger, I think, kept me going during that time, my desire for him to be apprehended, and tried, and sentenced.

And I was very gratified by the sentence. It was three hundred years.

Before that, the trial and that time, I had been told by my attorney, and friends, in discussing what might happen, what the sentence could be, and I think at that time I was naive to think that a life sentence would be life.

I learned during that time that there was a possibility of parole after thirty-three years, and I was really concerned, that this person might be paroled in thirty-three years.

To me that was not long enough, so, I will have to say that -- that I was extremely gratified by the sentence, and the belief that he would not be allowed back on the streets, and seeing that in fact happen has enabled me to go on with my life.

CHAIRMAN WILKINS: Thank you.

MR. LYNN BOGLE: Good morning. I also thank the Commission for the invitation to come and speak to them.

About approximately three years ago, I became involved with two gentlemen in a loan fraud scheme.

The two gentlemen were from California. Came into Colorado. At that time I was farming or ranching down in the San Luis Valley, southern Colorado.

Myself and eighteen -- or seventeen other individuals were victimized by these gentlemen. Initially, they took over six hundred thousand dollars in advances from all the victims. Indirect losses of the scheme totaled over fifteen million dollars.

About a year ago, almost to the day now, the trial was held here in this courthouse. Both gentlemen were sentenced separately, or one plea bargained. One went to trial. The one that plea bargained was probably the kingpin of the whole thing.

He was already serving a sentence on a similar charge out of California, a four year sentence, in a federal institution. He had, due to the plea bargain agreement, on his eighteen counts, he was sentenced to an additional two years, so making a total of six years he was to be incarcerated.

The other gentleman went to trial and he was sentenced also to six years.

Out of the group of people -- go back a little in history -- group of people involved, about three of the

eighteen survived in the agribusiness. The rest have indirectly because of these people or directly have lost their -- all their assets, and had to go into different things, or start over, as I have done, which I am young enough to do it. Some of the people were not young enough to.

I lost two million dollars, in assets. I felt very bitter after the sentence, six years, for how many lifetimes of work, and time?

I have read part of your guidelines, thumbed through to the fraud section and read part of it.

It's a little hard for me to understand. I'm not an attorney. It's a little tough to understand, but I think that these guidelines for white collar crime are not near severe enough. These crimes are just as serious as any other crime, murder, kidnapping, extortion, it's just as serious, white collar crime, but it just seems to be handled by our courts during sentencing as a very light offense.

Six years did not justify the crime by any means, and these gentlemen will probably be out on parole in two or three years.

Which brings me to another point, restitution within -- as a part of sentencing.

I realize it's awfully hard for a court to say, "Okay, restitute back six hundred thousand dollars to the

people you bilked it from," because the chances are they don't have it.

But there should be ways to enforce after they get out of prison, excuse me, to enforce the restitution process upon these people.

I mean they shouldn't stop paying, just because they served six years in prison or five years in prison, or whatever. They should make that a right, to the victim.

I also work part time at the Prowers County Sheriff's Department at the present time. We see a lot of cases go to court, that the sentences are reduced drastically because of plea bargaining.

I am not an advocate of plea bargaining. I realize that this would speed the judicial system and stop a lot of backlog which the courts already have. But a lot of times the criminal himself, I feel, gets by with a lot less of a sentence, because of a plea bargain agreement.

Perhaps this should be addressed a little more seriously in sentencing.

Also the restitution, and also I feel the sentences from white collar crimes should be increased.

That's about all I have. Thank you, sir.

CHAIRMAN WILKINS: Thank you very much. This Commission is very concerned about the rights and feelings and opinions of victims. We have been working with various

victim advocate groups without exception.

We are very concerned about this idea of psychological harm. It's not anywhere in the federal law you find this as a provision for sentencing, but we all know that judges do and should take that into consideration.

The issue, at least the preliminary draft identifies it as an issue, but how do we include this in the sentencing process, and we have suggested one way, and I might add we did not intend to indicate it would exclude the victim from having the right of elocution. We, of course, encourage that.

But I think generally what we are grasping for is the best way to include this issue, harm, called psychological injury, in the sentencing process, and we are most interested in hearing how you think we can best do it.

Even now, of course, as you give it more flexibility, we think it should be there. The question is how should it be put in there?

MS. CASTELLANO: Just in looking over the guidelines and speaking with other people regarding it, one concern we have, again, is, you know, how will -- you talk about the expert testimony, and does this mean -- maybe the confusion I have -- does this mean the prosecution will have, you know, their doctor, you know, evaluate the victim, and then the defense will have to have theirs, and then the

person is brought in, and what will this psychiatrist find and what will the other?

And to me that's victimization again. And I guess maybe because here in the state, the victim can get up at that sentencing, and we are not talking about an hour's worth of testimony before the judge, but the Court knows, it has certain questions it would like to ask the victim, and they can get this, the emotional pain and trauma, and at that time, and decide on it.

The only concern I have, and I hate to use this phrase, it has been used so much, but this is victimizing, the victim.

CHAIRMAN WILKINS: I think the point is well made.

COMMISSIONER BREYER: I think that is a good point, because we are debating between two approaches, see what you might then favor, which might be absolutely the right thing to do, is to include the psychological harm, some kind of unusual psychological harm, or psychological harm accompanying the crime as an aggravating factor.

We say, "Judge, you can go outside the guidelines where this is present," and then for the judge to find out whether it is present, he would have to hear the victim, and that would be done informally.

That's something we are thinking about, certainly.

The problem with the formal approach is just what

you said, you have a big hearing, and everybody hears it.

COMMISSIONER CORROTHERS: Mr. Bogle, it would appear that the plea bargain was the difference between a two year sentence and a six year sentence from your testimony, because the first individual you indicated has a prior offense, and that the judge just added two years, which was saying to me he got two years for what he did to you, and he was the leader.

The second offender, who got the six years, who did not plea bargain, do you know whether he had a prior record?

MR. BOGLE: He did not have a prior record at all.

COMMISSIONER CORROTHERS: Was that just a difference of plea bargain that made a difference of four years?

MR. BOGLE: Yes. Yes, it was.

COMMISSIONER CORROTHERS: Thank you.

COMMISSIONER ROBINSON: Ms. Castellano, what would you think about an approach of psychological damage used as criteria, not psychiatric testimony about disorders or something like that, but use more objective criteria, like what sort of dysfunction in this person's real life, like was this person unable to work for a time, did they have to be committed to a doctor's care for a certain period of time, or those sort of dysfunction factors that are essentially within the knowledge of the victim?

Now, what that would mean is still that there would

be what you might call continuing victimization. That is, you still have the victim give some statement about what the nature of their dysfunction is. You will avoid the battle of psychological experts.

MS. CASTELLANO: Right now, why can't the victim impact statements be used? I know they are used effectively, and you do -- you ask about the psychological injuries, the physical injury, the loss of the funds, whatever, all of that. All of those questions are found in the victim impact statement.

COMMISSIONER ROBINSON: So you are not opposed to having that sort of information elicited from a victim? What you are opposed to is going beyond to have psychological experts?

MS. CASTELLANO: And then it generates another hearing and then we add that part on the other part of the criminal justice system, and you know how long it will take to finally have closure on that.

COMMISSIONER ROBINSON: Well, there may be some hard choices here. I'm not sure exactly what Judge Breyer has in mind when he talks about an aggravating factor, if the implication is where you don't have to have a hearing.

The hard choice may be either you suffer some sort of hearing or you have guidelines without psychological injury at all.

The fact of the matter is that every sentencing under the guideline system will depend on facts, which they all do, will all generate some kind of hearing, then I suppose having one additional thing in the hearing, that being psychological injury,is not significant harm.

If you were faced with that choice, that is having the victim actually come into court and say, "This is what my dysfunction is," as opposed to not having it in the guidelines at all, which is your preference?

MS. CASTELLANO: I would like to have it there, but I think you can simply fill that by having that through the victim impact statement, and hopefully the Court will allow the victim at sentencing to make a few remarks, and I really believe that that will take care of it.

COMMISSIONER ROBINSON: Thank you.

COMMISSIONER MAC KINNON: As I see the problem on the expert testimony, vis-a-vis the more lay testimony, with psychological injury you can use both, but -- and I think you were critical of the fact that the present more or less limited it to expert testimony?

MS. CASTELLANO: Yes.

COMMISSIONER MAC KINNON: Well, I don't think that will survive long. But the other side of the coin is that you ought to have some expert testimony because it's a factor where some expert testimony can be valuable, and to leave it

just to the non-expert testimony, you get into a lot of description of factors that don't weigh too heavily with a judge who is experienced in dealing with all these problems, and there are family considerations, and, of course, all of these crimes involve some effect on other individuals, and to get to the point where you are going to limit it to them, and not have some expert testimony, would be a disservice actually to the victim.

The other thing is that the victim is a very poor witness in court at the time of the sentencing, to influence a judge on a sentence, and I think experience has proved that the greatest impact on the judge's sentence is the interview that the probation officer has with the victim, and which is communicated to the judge, and that he evaluates it, and in my experience, I have found relatively few victims that wanted to get up in open court, and make some kind of a statement as to a particular offense.

I have had victims -- well, when you put them on the stand in a bank robbery, and you ask them if they identify the bank robber, they say, "Yeah, he is over there," and they are afraid to look at him.

And a lot of these -- many victims, because of emotional considerations, aren't the best witnesses, in court, and particularly at the time of sentencing, because the judge has made a very thorough review of the case, and

I will venture to suggest that most judges have a fair concept of what they are going to adjudge by way of a sentence when they go into court, and they are maybe influenced somewhat by the elocution of the defendant or lawyer or something.

But I think the general parameters of the events have been made prior to that time.

MS. CASTELLANO: I agree with that, but one issue I must take is that I -- I guess because of my role as an advocate, and because I have worked within the criminal justice system at the state level, and I know -- I know victims who, yes, are frightened, they are frightened to testify, and they -- invited to come to the sentencing, they decline. Okay, and that's fine.

But there are those, who denied that time -- and for me to have to tell them, or someone to tell that that, "We are going to have this expert testimony as to how you feel," when maybe the most beneficial thing for them to do is to testify before the Court themselves, I don't think that would be appropriate, and I would hope that that would be a consideration, for those who feel they can and would like to do it, that they have a right to do that.

COMMISSIONER MAC KINNON: I notice that a number of courts in the country, and yourself here probably in Colorado, do allow that. My recollection is that in England they turned it down cold. I forget exactly the reason now.

Well, Ms. Martin, I take it that your offense was prosecuted in state court?

MS. MARTIN: No.

COMMISSIONER MAC KINNON: It wasn't?

MS. MARTIN: It was the kidnapping charge that was the strongest, the --

COMMISSIONER MAC KINNON: How did he get a three hundred year sentence in federal court?

MS. MARTIN: I'm not -- I can't answer.

COMMISSIONER MAC KINNON: You can't answer that? But I just wondered. Well, that is a lot.

MS. MARTIN: The criminal earlier this year asked to be brought back to Kansas to be tried for the murder and I was asked at that time by the authorities in Kansas how I felt about it.

Fortunately, they gave me some time to think about it. My initial reaction was, yes, bring him back to Kansas and try him for the murder and try him for everything he ever did.

However, I realized, he had nothing to lose, by leaving, himself. He had everything to gain by probably attempting a break or something else,and that was his motivation for being brought back.

COMMISSIONER MAC KINNON: Yes.

MR. WILLIAM GRAVES: Judge MacKinnon, if I might

mention that, the sentencing judge in that matter is in the courtroom now and I think he is going to be testifying as a witness.

COMMISSIONER MAC KINNON: Thank you. Mr. Bogle, I was wondering about your particular fraud.

What was the nature of it? How did it operate? How did he get that money out of those people?

MR. BOGLE: Well, it really wasn't very hard. It was a very, very good scheme, probably as -- Bill Farrell, the -- your U. S. Attorney, the U. S. Attorney's Office, prosecuted the case. He has told me it was probably one of the best ones he had ever seen put together.

I think it's very good. It's clever. You could check out these individuals from -- which I did. I took a lot of time. I had a private investigator just to check on these guys for me.

It ended up being a very fool-proof scheme. It looked very legitimate.

COMMISSIONER MAC KINNON: Well, what did he do? What did he offer?

MR. BOGLE: Okay, at that time -- I will give you a little history. At that time, agriculture, and still is, in Colorado, was in trouble, as it is all over the country.

Traditional lending institutions were not lending expansion capital to any agribusiness, such as your insurance

companies, local banks, they were really cutting down on agriculture, because they were so far extended into agriculture.

So, therefore, these guys came in, and you ended up putting a ten percent front to institute the loan proceedings, of which the loan itself was guaranteed by an annuity, that was also secured by certain real estate and chattel property, of each individual.

At that time, you gave them the ten percent advance fees, and they approved the loan, which took some time. It took almost a month to get approval on it.

Then at that time they would disburse the funds, to you, to be used as specified within your loan application.

Well --

COMMISSIONER MAC KINNON: Well -- go ahead.

MR. BOGLE: Okay, and at the same time, after you received the loan, there was a portion of that went to commissions for them.

Of course, as far as it ever got was into the advance fees, and they just rocked along, making excuse, after excuse.

COMMISSIONER MAC KINNON: Well, where did the six hundred thousand dollars come from?

MR. BOGLE: Okay, those were all advance fees.

COMMISSIONER MAC KINNON: Advance fees paid for

what? To get a loan?

MR. BOGLE: Yes.

COMMISSIONER MAC KINNON: From whom?

MR. BOGLE: From each individual. Oh, where the loan came from?

COMMISSIONER MAC KINNON: Yes.

MR. BOGLE: It was supposedly they were arranging it through a -- an international banker, out of New York.

COMMISSIONER MAC KINNON: And did -- were the loans actually made for six hundred thousand dollars?

MR. BOGLE: No, they were not.

COMMISSIONER MAC KINNON: So all the -- the offense was the accumulation of the fees, for a non-existent service, that was never rendered?

MR. BOGLE: Yes, I believe it also involved some interstate -- or interstate use of the wire services.

COMMISSIONER MAC KINNON: That's what I was wondering, whether it was a mail fraud or wire fraud.

MR. BOGLE: Wire and mail fraud.

COMMISSIONER MAC KINNON: Wire and mail fraud.

Thank you.

CHAIRMAN WILKINS: Thank you, all of you, very much. We appreciate your attendance.

We are going to stand in recess for not more than ten minutes. We will start back just prior to the noon hour.

(The public hearing recessed from 11:49 a.m. until 11:59 a.m.)

CHAIRMAN WILKINS: We are honored to have as our next witness Judge John L. Kane, United States District Judge, here in Denver, Colorado.

Judge, thank you for appearing.

JUDGE JOHN L. KANE: Thank you, Judge Wilkins.

I suppose as the one judge from this district, that I should depart from the schedule just a moment to welcome all of you to our court, and especially to this particular courtroom. I think it has some bearing on my remarks.

If you look to your left, and nearest to you, you will see the portrait of the first judge to occupy a seat on this court, Judge Moses Hallett.

When Colorado was a territory, he was a judge, and then he became the federal judge, when the federal District of Colorado was established.

He was succeeded by Judge John Lewis, whose daughter is still alive today, and whose husband is the senior partner of one of the largest firms in Denver.

Then there is Judge J. Foster Symes, who was a judge here, quite a colorful personality, so I'm told.

Judge Lee Knous, who was the Governor of Colorado before becoming a member of this court.

On your right, closest to you, and all five of

these judges on your right, I must say I have had the privilege of being a judge with them, and also of having appeared as an attorney before each one of them.

Judge Jean Breitenstein, who passed away this past February, at the age of eighty-five, was frequently called upon by the Supreme Court of the United States to serve as a Master, and served on this court, and then was elevated to the Court of Appeals, where he most certainly was regarded as a judge's judge.

Next to him, and still on the bench, as the senior judge on our bench, Alfred A. Arraj, who was eighty just this past September. I was appointed when he took senior status, but I surely state for the record that I have not replaced him.

Next to him is Judge Hatfield Chilson, who is still an active member of our court. Judge Chilson is I think eighty-five, or eighty-four, at this juncture.

In addition to being a judge of this court, he was at one time a district attorney. At another time, he was the Solicitor General of the U. S. Department of Interior.

He and Judge Arraj were appointed, as was Judge Breitenstein, by President Eisenhower, and recently Judge Arraj was inducted into the Colorado Sports Hall of Fame. He was the original inventor of the running jump pass, and he says he did that because he was so short he couldn't see

over the linemen in order to throw the ball.

Next is Judge William E. Doyle, who died this past January, an extraordinarily distinguished jurist, who was on the state district court in Denver. Before that he was a prosecutor in the Denver District Attorney's Office. He was on the Colorado Supreme Court, and then appointed to this court by President Kennedy, served here, and then was elevated to the Tenth Circuit Court of Appeals by President Nixon.

And following him, the last picture is of former Chief Judge Fred Winner, who resigned from the bench after having taken senior status, and now is a practicing trial lawyer, some say once again, and some say as always.

I make that introduction, sincerely welcoming all of you here, and also to point out that more than half of the judges of this court are presently alive and either judges or practicing law.

This is a very, very young area. In the 1880's, the Colorado Session Laws were printed, in English, in Spanish, and in German, because of the enormous number of German immigrants who came from Russia, from the Volga River Valley, to populate the northeastern part of this state, and all of these different cultures met here in Denver.

And, of course, as district judges for the entire district, we try cases in the metropolitan area of Denver. We are also authorized to sit in Boulder. We are authorized

and do sit in Grand Junction, Durango, in the southwest corner of the state, and in the city of Pueblo, one hundred twenty miles south.

Before going into my formal remarks, I have one other matter I would like to mention, because it was raised just a moment ago, by Judge McKinnon.

Before appearing here, I had sent to the Commission a copy of my opinion in the United States vs. O'Driscoll, and another opinion of mine that was United States vs. Hendee.

Today, I have given you another opinion of mine. That is United States vs. Jones, and I will refer to that opinion in my formal remarks.

But, to answer Judge MacKinnon's question, the opinion which has previously been provided was delivered by me, in open court, when Mr. O'Driscoll, the defendant, was standing to be sentenced, and I did that, and I frankly would do it again today, if called upon to repeat my sentence.

The sordid history of Mr. O'Driscoll does not need to be mentioned in detail at this time. Sufficeth to say that I was confronted with a person whom I felt, and clearly everyone else did, that was involved in the case, was a psychopathic killer, who should never see the light of day again without having cross-bar shadows between him and

daylight.

And the way in which the sentence was done, Judge MacKinnon, was this. Under the kidnapping statute, the penalty is for any terms of years or for life.

Had I sentenced Mr. O'Driscoll to life, he would have been eligible for parole consideration in ten years' time.

There is another statute. I can't -- it's in the opinion, but I can't recall the specific citation, which says that a judge may sentence a person and fix the parole eligibility date, at less than one-third of the sentence.

So I sentenced Mr. O'Driscoll to three hundred years on the kidnapping count as any term of years, and fixed his parole date at ninety-nine years.

In addition to that, I gave him twenty-five years consecutive to a bank robbery conviction,and I think that if you look at the case and see the history of this particular individual and the record, that you would agree with the Tenth Circuit Court of Appeals when they affirmed that decision.

His attorney, as he should have, filed a petition for writ of certiorari, which was denied by the United States Supreme Court.

But what I want to state here and now, I think for the first time publicly, in answer to the obvious question,

why would I put so much time on an individual, and I did mention that, alluded to it in the opinion itself, and the answer is this, that the United States Parole Commission sought to have the Solicitor General of the United States confess error, in that case, on the petition for certiorari, because, it represented to them, an undue interference with agency discretion.

And I mention that because some of the comments I have are naturally based upon the experience that we have had as jurists with the U. S. Parole Commission.

I did a Lexus survey, and in the last four years found over a hundred cases in which the U. S. Parole Commission had been involved in some kind of disagreement over their guidelines, and salient factor scores, and things that are used by that commission.

I thank the distinguished members of this commission for permitting me to make these few brief comments. The comments are personal to me. I have not sought nor have I received authority to speak on behalf of my fellow judges.

Before proceeding further, I think it might be helpful for you to know something about me, so you can form a basis for evaluating my remarks.

I was appointed to this bench in December, 1977, and am now completing my eighth year as a district judge.

I have not kept an accurate record of the

sentencings I have imposed, but a rough estimation is that I have sentenced approximately five hundred people during the past eight years.

My sentences have ranged from a suspended fine to three hundred twenty-five years imprisonment. I am sure that in any given sentence, someone has disagreed, but I am pleased to say that I have never been reversed for imposing an illegal sentence.

Before coming to the bench, I served first as a prosecutor in a state district attorney's office, then as the first Public Defender in the State of Colorado, and then as a private practitioner.

I have appeared in countless cases, ranging from petty offenses to death penalty cases.

As I judge, I believe I have a reputation of sentencing on the high side, in violent crimes, especially where weapons and injuries to the person are involved, and average for this district and circuit on other offenses.

The pivotal role of a judge under the present system, however, is in deciding whether to sentence or place on probation and whether to revoke probation.

I am unaware of any records kept on this basis, and can only guess as to my performance. My guess is that I am low in granting probation, because I frequently use the split sentence option presently available, and I am very high

on revocations.

I hope that this information is helpful to you.

Now, to get down to the business at hand, I want to express my complete and enthusiastic support for appellate review of sentences. As long as sentencing remains a judicial act, and I will have more to say about that in a moment, there is no reason at all why such a criticial judical function should not be subject to review.

The greatest danger, however, in the use of guidelines such as those contained in this commission's preliminary draft, is that the entire process will become trivialized to the point that it advances cynicism and insults justice.

I think it would be a foolish waste of your valuable time for me to review the statute and guidelines with you. I'm aware of practices which exist in some other jurisdictions which lend at least a little credence to some of the basic assumptions of your proposed guidelines. Nevertheless, I implore you to consider that national uniformity has never been a wise solution to any sectional problem.

I can tell you without fear of contradiction that the judges of this district do not engage in practices which you seek to correct. We do not participate at all in so-called plea bargaining. We never will agree to a certain sentence or even a range of possible sentences in advance of a plea.

We do not and never will permit probationers to

work as informants, paid or otherwise. We do not sentence anyone without receiving a fully documented and prepared presentence report from our outstanding Probation Department. We do not accept presentence reports from other jurisdictions without review and verification by our own department.

Our Local Rule of Practice 202-A provides that no plea agreement involving dismissal of charges will be accepted by the Court unless written notification of the agreement is received at least ten days before the Monday of the week of trial.

Further, the judges of this district have refused to accept plea agreements which they have deemed unconscionable or which have attempted to circumscribe the Court's sentencing authority.

Finally, cases are not bandied about in this district. The judge who takes the plea or tries the case is the same judge who imposes the sentence.

The Commission's assumptions that, and I quote, unwarranted disparity is due to judges not being provided with adequate guidance has absolutely no support from this federal district.

The judges of this district are fully advised of local, regional and national sentencing patterns and statistics. Further, our judges are fully advised concerning the entire factual background of charges which are dropped

or admitted.

In that regard, I have previously presented you with two opinions I have written on individual sentences, and I now submit a third, United States vs. Jones, at 475 F. Supp. 1152, which shows you the practice and level of expectation regarding sentencing in this district.

It is easy to substitute slogans and catch words for hard thinking. Frequently, the use of slogans is also fraught with peril. I think a perfect example of this sort of dangerous practice is found in your use of the term, and I quote, Real Offense Sentencing System, end of quote.

In all candor, my review suggests that it is not a system at all. It is a shallow attempt to put qualitative and sometimes ineffable concepts into quantitative terms.

The use of such pseudo-scientific numerology may look good on paper or fit nicely into some computer's data base, but it has no more validity to it than does astrology. In fact, astrology is less harmful because it is less pretentious. In fact, by what sort of legerdemain does the offense of theft have a base value of two, while trespass has six, and advising tax fraud has ten?

I would respectfully suggest that the proposed guidelines do not seek uniformity of sentencing, but, rather, the elimination of the judicial function from the sentencing process.

If that is indeed the intent, if relegation is the purpose, then why not say so, and take judges out of the process entirely?

On the other hand, any judge should be able to look a defendant straight in the eye when imposing sentence, and tell that unfortunate soul exactly why the precise sentence is being imposed. I don't believe the defendant, the victim, or society, deserves anything less, and I make it a point to do so in every case I have.

Sometimes it is necessary to include consideration of charges that have been dropped into the sentence computation. Other times, in fact more often, it is not. Should the sentence in any way be affected by the idiosyncratic judgment of an Assistant United States Attorney? Your proposed guidelines do just that.

Has this commission seriously considered the ludicrous nature of sentencing under these proposed guidelines? Am I supposed as a judge to say to a defendant, "You are sentenced to twenty-two months because that is the top of the guideline range. Actually, you scored twenty-eight, but I am giving you the benefit of a doubt because there were no points for transactions outside the United States, and I have made an adjustment by using the cooperation multiplier, because you testified against your brother and sister-in-law."

Isn't it better to say to the same defendant,

"You were charged with fifteen counts in the indictment and plead guilty to one. The prosecutor in your case always files multiple counts and he always gives away the farm by accepting a plea to one count. The facts, not the counts in the indictment, show that you not only committed the crime charged in Count I of the indictment, but you conspired with others to do it, and what is more serious, you inveigled a young person with no previous criminal record to join with you."

Quite frankly, I suggest the latter makes more sense and better justice.

I will not burden you further. Sufficeth to say that I will never follow any guidelines which give reductions for guilty pleas, or reward cooperation with the prosecution. I would resign my commission first.

I shall avoid comment on the obvious constitutional infirmities which envelop such provisions. I will simply say it is not a judge's function to be a sub-station of the prosecutor's office, any more than it would be to become a branch office of the Public Defender. I believe that to engage in such rationing of justice is blatantly unethical, and I can't imagine anyone who would do it knowing of the ethical violations involved.

Since at least the Seventeenth Century, the law in this country has been regarded as an expression of the

common consciousness of the people. As judges, we must strive to know and express, not our own sense of right, and certainly not some supercilious formula for uniformity, but, rather, the felt convictions of our culture. That is what this country stands for. These guidelines simply do not help nor will they achieve that end.

I suggest you abandon entirely the concept of numerical values and replace it with qualitative guidelines which will assist the judge, in the search for justice, however lacking in the lock-step of uniformity such a search might be.

Sentencing should be both historical and systematic. A judge should be required to articulate the inner coherence of the sentence handed down. To relegate this judicial function to a clerical application of arbitrarily determined arithmetic points is neither historical or systematic.

Thank you.

CHAIRMAN WILKINS: Thank you very much, Judge.

Let me say the guidelines under this preliminary draft do not require the judge to discount a plea of guilty, and we went to great lengths to say that.

JUDGE KANE: I understand, but it is permitted under the guidelines.

CHAIRMAN WILKINS: It is permitted.

JUDGE KANE: I think it is a foul practice, and I

realize I am stating that forcefully.

CHAIRMAN WILKINS: It is a practice you would not agree with, although it is one followed widely throughout the United States?

JUDGE KANE: That is why I prefaced by comments by saying I welcomed you here to Colorado and we don't feel we should be victimized by practices in other courts. We simply do not ration justice on that basis in this district.

CHAIRMAN WILKINS: I don't disagree with that, of course, but I didn't want you to walk away with the understanding that we could require you to do something.

JUDGE KANE: I understand.

CHAIRMAN WILKINS: I guess we could not do that, but we wouldn't do that.

I would say this, too. We share many of your concerns. What we seek, though, is someone read the statute, and I know you have, and tell us how you would do exactly what you suggest we do, and yet comply with the law that created this commission.

You know, it talks about ranges of twenty-five percent variance.

JUDGE KANE: Well, I think there are two things -- excuse me.

CHAIRMAN WILKINS: Go ahead.

JUDGE KANE: I think there are two things I wanted

to say about that, Judge.

The first is, I don't think there is anything wrong with the Commission going back to Congress and saying, "We think your law needs to be amended. It isn't workable in the way in which you have presented it to us."

That seems to me to be a commendable approach to take, and it is certainly not without precedent. Other commissions in the past established by Congress have done the same thing.

Secondly, if you look at all of the sentences that are provided by statute, the vast majority of them are five year sentences. Very, very few are in excess of that, and there are some that are less than that.

This kind of exercise on a five year sentence I think is ludicrous. It seems to me that a very simplified process could be done by saying for five year sentences the expected sentence is three; if you don't give three, justify it. And then use the various criteria and the things that you have done so well, in identifying the constituent elements of sentencing, to allow those to be used as guidelines for the judge so that the judge can articulate the reason for the sentence.

There is no way under these guidelines that, as Mrs. Martin who was here earlier testified and as I sentenced the man that murdered her husband, there is no way in the

world under these guidelines that that kind of a sentence could be imposed that would prevent such a person from being released to the public.

CHAIRMAN WILKINS: I take issue with that. Indeed, the guidelines would say life without parole is life without parole.

JUDGE KANE: Well --

CHAIRMAN WILKINS: But, in any event, I understand. We do need to provide for the unusual case, the particularly heinous case, and we need to identify those things, not by example, because there are so many different ways those type of crimes occur, but by telling the judge himself, when you come across this case, you deviate from the guidelines.

JUDGE KANE: And it should be done. And there is no reason why judges shouldn't do that, and no reason why they shouldn't be appealed. But I really believe there is no rational basis for taking numbers and trying to crunch them together to come out with this.

Life is not an arithmetic exercise. Human experience is not an arithmetic exercise.

It has some place, I agree, but I certainly don't think Judge Posner's writings should govern criminal law.

If they did, can you imagine what would happen in the Georgia case that Justice White wrote?

CHAIRMAN WILKINS: Any questions to my right?

COMMISSIONER BREYER: Well, I just say, I want to underscore this, one of the very purposes of the statute is to allow, in fact to require, the very kind of sentencing that you gave in the case that you are talking about.

JUDGE KANE: Yes, and I --

COMMISSIONER BREYER: Parole is abolished.

JUDGE KANE: Yes.

COMMISSIONER BREYER: And therefore, the sentence given is the sentence that will be served. Thus, in an egregious case, that's a long sentence, life, it will be served.

JUDGE KANE: Under the present system, it's only ten years, and until somebody decides to let the person go.

COMMISSIONER BREYER: The other thing, I am quite interested, I mean it's a problem, for example, in the statute, it says, "The Court, on motion of the government," they amended Rule 35, and it now will read, "The Court, on motion of the government, may within one year after, lower a sentence to reflect a defendant's subsquent substantial assistance in the investigation or prosecution of another person." And -- I mean right in the statute is the notion that you will, or at least you may, lower a sentence to reflect the cooperation of the defendant with the prosecuting authority.

JUDGE KANE: Well, I am not an Assistant United

States Attorney, and I don't believe that Assistant United States Attorneys should have black robes on and sit in a courtroom, and do that very thing, it seems to me, and I tell people when they come into my court with their lawyers, that whatever deal they make is the U. S. Attorney is a deal between the two of them.

I am not going to modify the statutory requirement that exists presently for sentencing, which is set forth in the Jones opinion, which I have given, and it has nothing in there to say that cooperation with the prosecution is supposed to be a mitigating factor for a sentence.

COMMISSIONER BREYER: We have been told in sentencing hearings, throughout the country, U. S. Attorneys have told us, non-stop, "If you don't give an enormous discount or permit an enormous discount for cooperation, we won't be able to solve crimes."

JUDGE KANE: Oh, that's horsefeathers. We have never done that in this district and Mr. Miller was here earlier and told you. He runs a very fine office and they have a conviction rate that is just as high or higher than anyplace else, and they don't have any difficulty at all. Judging by the increased number of filings, they are doing quite well.

The problem as I see it, a trial is supposed to be a search for the truth, and you are suborning witnesses by

giving them credits. It's not only a non-judicial act, it's counter productive of the total ethical obligation of the judge to see that truth is discovered.

CHAIRMAN WILKINS: Any questions?

COMMISSIONER CORROTHERS: Just one comment, to make sure that I understand one area.

First of all, nice to see you again.

JUDGE KANE: Nice to see you.

COMMISSIONER CORROTHERS: How are you? You would propose our elimination of all the mathematical calculations, and that we instead provide a list of criteria and factors to be considered that are obviously relevant within the various offenses, by the judge, within a range. Is that what you are proposing?

JUDGE KANE: And I am proposing that in each and every sentence the judge be required to articulate his reasons for the sentence imposed.

COMMISSIONER CORROTHERS: Thank you.

CHAIRMAN WILKINS: Questions?

COMMISSIONER BLOCK: Yes. In terms of -- I can appreciate the problems that you have with our numbers.

Let me assure you that Judge Posner had no effect on these guidelines.

JUDGE KANE: Well, you know, he is -- he does commendable work in the antitrust law, in terms of economics,

but -- I think we are more governed by history than economics. Unless one is a Marxist, I suppose.

COMMISSIONER BLOCK: Let me follow up, not that line, but another line of inquiry.

On this question of some numbers, but not many, you suggest two approaches. One is to go back to Congress and say, "Well, you are wrong. You should reconstitute that task."

Assuming we don't prevail, or we don't take that option, we have a statute --

JUDGE KANE: You know as well as I do that it wasn't a Congressman that came up with this concept. Somebody else crunched a bunch of numbers and got a Congressman to sponsor it.

COMMISSIONER BLOCK: Let me return to the task at hand, and that is some numbers, but not many.

You suggest that, let's say, for a particular generic offense, say, robbery, we have an average, and then we have a bunch of factors that the judge would use to either mitigate or aggravate.

Let me just push that a little bit further.

Would you be against subdividing robbery into armed robbery and unarmed robbery, and then allowing mitigating or aggravating, or would you require --

JUDGE KANE: I think they are factors, but let me

give you some examples of how these things work.

An eighteen year old young man from an Indian reservation in Wyoming, who gets picked up by two people from California, that are using LSD, and other kinds of controlled substances, and they come into Denver, in this area for the first time in his life. He is staying in a motel room. They bring in some prostitutes, and they start negotiations on drug deals, run out of money, and they rob a bank. Weapons are used, in the bank, in the robbery itself.

Is that the same as taking the two accomplices with him, and then the district attorney says, "Well, I'm going to allow you to plead robbery without a weapon."

You see, who does he allow to do that? The one that's going to testify for him. Maybe it's not the eighteen year old boy. Maybe it's the twenty-four year old.

I don't think that you can look at crimes and put them into such quantitative traces. There has to be a mobility of thought that takes place.

COMMISSIONER BLOCK: I think there is reasonably broad agreement among many of us that that general thought is shared.

There is the problem of providing bench warrants, of saying, "Okay, here is an average sentence. Go above or below, but tell us why."

Well, you have to have that bench warrant. It's

not simply the average sentence.

JUDGE KANE: Well, what are you going to do with a five year sentence? You can't plug in as many figures into the five year sentence as you want and have any meaning at all.

I'm saying if you are going to be arbitrary and come up with figures, say three. If Congress says five, and we say three is the average sentence. The guy has got a prior conviction, add another year. But to go through this kind of an exercise, when you are talking about a five year sentence, you end up with madness.

COMMISSIONER BLOCK: I think the intent -- not intent, but the attempt even in the five year cases is to give three or four or five bench warrants, which there can be variation around.

You have to decide somehow what characterizes those bench warrants.

I think that's in large measure the way to see the preliminary draft, not necessarily as a scoring technique, but rather as an attempt to set a series of bench warrants.

JUDGE KANE: Why not, say, you have got a robbery case that is these guidelines, say, "You should consider the following factors where applicable."

That makes a lot more sense to me, than giving some kind of numerical value. Numbers do not equate with

magic.

COMMISSIONER BLOCK: No.

JUDGE KANE: That's what this is. I'm being very gracious not taking the psychoanalytic approach to this, because you know, you could have a lot of fun doing that kind of analysis, obsessive, compulsive personalities, et cetera.

I'm just saying by putting these numerical values on, you are creating a false impression.

COMMISSIONER BLOCK: Of precision.

JUDGE KANE: That's right.

Mr. Robinson.

COMMISSIONER ROBINSON: Let me ask, if I might, I take it your general point of view is that the variety of human, and including criminal, conduct is so complex that any attempt to try to define it in all variations is hopeless. If we do, we will simply generate an imperfect system we won't like.

JUDGE KANE: I don't think it's hopeless. I think that's what judges are to be about.

COMMISSIONER ROBINSON: It's hopeless to quantify. Basically, it's something so complex, all we can do is use human experience and judicial judgment?

JUDGE KANE: I think it's silly to say that somebody is one hundred sixty-eight point narcotis peddler and somebody

else one hundred fiftytwo point narcotics peddler, and come out with a distinction in the sentence they receive based on that kind of quantitative exercise.

COMMISSIONER ROBINSON: All right.

JUDGE KANE: I think a judge who immerses himself in the culture of his jurisdiction, who understands, is there on a daily basis, understands what's going on and has the advice, and believe me, in our jurisdiction the excellent advice, of a highly trained probation department, is able to make a much better judgment on that than applying to some kind of a computer base that is applied on a national basis.

Crime is different in different localities, and it's Orwellian in its nightmarish application.

COMMISSIONER ROBINSON: I guess what I am not quite sure I understand about your position, your position obviously has a lot of appeal to us in a lot of respects, but, of course we see it as a somewhat more complex picture, at least I do, and that is there is a cost to having judges retain that ability to do right, take into account a specific individual case, and the cost, of course, is what has been troubling the sentencing reformers for decades, fifteen, twenty years --

JUDGE KANE: I think what's troubling --

COMMISSIONER ROBINSON: If I may --

JUDGE KANE: I'm sorry. I usually interrupt in my

court. It's a bad habit.

COMMISSIONER ROBINSON: The cost, of course, is this problem with disparity. Every judge may feel very good when that defendant is, you know, look him in the eye, and you feel like you have given him a sentence, and it's in a sense a personal relationship, and in fact, I have no doubt he feels like you are acting sincerely, and that's part of what justice is all about, that sort of a committed judge making a committed determination.

But, of course, the world is more complex than that. He leaves your courtroom and goes to the prison and talks to other prisoners, who maybe didn't appear before you, who may have done the same thing, and they had another committed, very sincere judge, giving a very sincere sentence and maybe not as significant, different jurisdiction in the country.

The problem is one of disparity, and as you allow that judicial discretion, which we all think is important, there is inevitably some sort of lack of uniformity, and the challenge, of course, is to come up with some sort of a trade-off. This obviously is not a new problem. We have been living with it for a long time.

We did do one thing. We got all the compulsive-obsessive people together and put them in the United States parole community, and they have been doing the real sentencing

except in the cases where you are able to subvert the system and cut out the system.

But in the majority of the cases, you may feel better, and the defendant may feel better, but, not only then he finds disparity in the sentencing, when he gets to prison he also finds out that it's a charade anyway. It's the United States Parole Commission, for years correcting the natural disparity between judges.

My problem is part of what your concern about the statute is a concern you ought to be just as upset about by having the United States Parole Commission.

The have numbers. They crank numbers through. They don't take account of these things, and don't even see the people.

Under this kind of system, you would at least be the person in charge of crunching the numbers.

If that's an alternative, the United States Parole Commission, isn't there some possibility that perhaps we could live with a system that had some numbers in it, and better than what we have now?

JUDGE KANE: Well, it's an interesting rhetorical exercise, but let me suggest to you a couple of things.

First, if you read any of my opinions about the U. S. Parole Commission, it will be very clear to you I think it should have been abolished before it was ever

started.

And, secondly, it seems to me that having a judge have discretion, when a judge is on the record, before the public eye, in making a sentence in public, and being required to state his reasons, is a damn sight better than having some anonymous bureaucrat in Washington, D. C. manipulating that sentence, without having the faintest idea as to why it was imposed, or paying any attention to it at all.

And we had many, many times in which those sentences have been changed by judges, with the use of Rule 35(b), because of the kind of point assessment that that Commission gives, which was totally contrary to the intent of the sentencing judge.

And the other thing, when you start talking about disparity, I really can't believe that two bank robbers are going to be at the El Reno federal correctional facility, and say, "Aw, man, boy, this disparity of sentence has really ruined my chance for rehabilitation."

It's just the grossest insult in the world to a commonly accepted sense of fairness that, "You got fourteen years and I got twenty-five."

I don't believe that. I don't thing it has anything at all to do with disparity of sentence.

Let me give you an example. When you commit

an aggravated bank robbery, that is with a weapon, in a rural area in Colorado, and you come before the U. S. District Court, you are talking twenty to twenty-five years.

And there is a very good reason for that, because the sheriffs and the deputies don't have the manpower or the equipment to go out into these places, and so they know, and the word is out, don't commit your aggravated bank robberies in Colorado, because the judges are tough on that.

Now, on the other hand, it seems to me that there is a great deal of sentiment throughout this report about income tax evasion. In some countries, that's considered a sport, not a crime. But in the United States, it's criminal.

How am I supposed to sentence, when you take some of these people who are converted to a kind of religious group, in which they have their prayer meetings, and they join some concept that they have a common law right to form a posse and enforce their own laws, and they declare their independence from the United States?

Am I supposed to take that person, and give them the same kind of sentence that an income tax evader on Wall Street is getting?

That's a regional situation, where we are dealing with demographics, and to me that kind of cultural analysis is exceedingly important.

But to give numbers to all this, what does it do?

COMMISSIONER ROBINSON: Of course, the United States Parole Commission does not now take into account all those regional disparities you want, and you may think are being, and they use numbers to impose uniformity.

JUDGE KANE: Exactly why I think this thing is wrong, because all it is is a recapitulation of the United States Parole Commission practice, and it's a nefarious practice.

COMMISSIONER ROBINSON: What you want us to do is now go back, say, "We can't do what you want to do," and also go back, and, oh, by the way, abolish the United States Parole Commission. Let's not go back to the status quo. Let's go back to 1945, where judges have total discretion, and they are the masters of total discretion.

JUDGE KANE: I am not asking anything like total discretion for the judge. I am saying judicial process is the way that sentencing should be handled, and a judge should be required to articulate his sentence and those reasons, and that sentence ought to be, for two reasons, subject to appellate review.

The first is to see if it follows the guidelines and is a rational judicial act, and the second, to avoid what goes on with courts of appeal now, time and time again, where they look and say, "The judge gave that guy too much time. I don't know why there is an error there, but I'm

going to find one."

I know why that happens. An appellate judge told me that. "What's going on with that judge? Why is he letting all these people loose?"

I'm saying put it out in the open. Make the judge make his findings and subject it to the public eye and subject it to appellate review.

We had Mr. Nieto, who was here early this morning, very skillful defense attorney, highly regarded by our court, and he said that according to the jawboning he has with these people down in Miami, that they are giving heavier sentences down there.

Well, I don't know. I mean I certainly don't question the accuracy of his reporting. But I know what happens up here. When we get sentences on drug cases, if we have kingpins or if we have wholesalers, they get plenty of time, but if we have the end person who is a car salesman that is buying two units of cocaine, so he can feed his own habit, and sell the other one to the other car salesman, or we have two college students with no prior records that get involved in it, we are not giving them the same kind of time as they are down there where they are dealing on a constant basis. It makes sense.

Let me give you another, one final example. I am taking up too much of your time now.

COMMISSIONER MAC KINNON: Leave out the word "final." Go ahead.

JUDGE KANE: All right, the other example I want to tell you about is embezzlement. Denver is a hub for far beyond the geographic boundaries of Colorado. We get people coming in here from the sandhills of Nebraska. We get them coming in from Wyoming, New Mexico, Utah, and they come into the Denver area.

We get young girls, out of high school, that come in and get a job in a bank. And then the bank tells them, "You have got to go have your hair cut, and here is the kind of dress code we have for you." And then they get a lease on an apartment, house, where there are a lot of other young people that live in a certain area, and then the bank says, "Now, you have to get to and from work. We have a great deal for you on a car loan with one of our automobile dealer clients, and so you can get a loan at three percent interest."

So, all of a sudden, they are getting paid four hundred dollars a month, and they have got five hundred dollars a month in obligations, and they start tipping the till.

Now, if contributory criminality or contributory negligence or contributory insensitivity were defenses, the U. S. Attorney wouldn't file. But we get those young people that come into our courts. Are we supposed to tally up the

amount of money they have taken because nobody has bothered to audit the account, and say the volume of money taken by this person over a two or three year period of time is such that probation isn't going to be given?

We are supposed to send that little girl from the farm into a prison?

I don't think that's right, and that's the kind of thing that we have got to deal with.

Now, that's not the same as the con man who comes in or the embezzler who is a sophisticated individual, but you have to look at all of these factors, and formulate a sentence and I say you can't reduce that to numbers.

COMMISSIONER ROBINSON: Let me say I really appreciate your candor and color. It's so easy for us to get caught up in the details, and it's nice, a breath of fresh air, to come in, a man with a perspective.

JUDGE KANE: Gosh, it's nice to say I have a breath of fresh air. There are other things some people in the audience might say about it.

COMMISSIONER BREYER: Well, you know, I take your basic point. I'm used to it, even worse.

I take it your basic point is what we should do -- we have a rough preliminary draft, which we have flagged in big letters, very preliminary, going to be revised, the numbers aren't serious, et cetera -- we should be injecting

lots and lots of discretionary power as well as simplicity, giving lots of flexibility to the judge.

My reaction to that is it is not as simple to do that as you might think at first blush, because of the statute. I don't think it absolutely forbids it, but I did not hear the judges at the time it was being enacted giving this kind of testimony to Congress. Might have been a few. By and large, there wasn't this reaction.

And having, you know, been a little needling by saying that, I would end by saying I think your basic point about flexibility is well taken, and I would be very, very surprised, to tell you the truth, if the next draft of this commission does not reflect a considerable injection of flexibility, because of statements like yours.

JUDGE KANE: As far as I know, Congress has never asked me for anything.

COMMISSIONER MAC KINNON: It's a constitutional right to petition Congress that isn't limited to individuals in the street.

JUDGE KANE: Judge, we have had in the past -- since October of 1984, we have a total of forty-two months of judicial vacancy on this court with an increase in case filings every month, and if I am going to petition anybody, it's going to be the Executive branch to find somebody they think is qualified they can nominate to come here.

I don't have any information about these things until suddenly it's already been done.

COMMISSIONER MAC KINNON: Well, everybody ought to look at it.

I have some questions.

JUDGE KANE: Yes, sir.

COMMISSIONER MAC KINNON: I don't want to impugn your knowledge or background, but I want to talk about it.

JUDGE KANE: All right.

COMMISSIONER MAC KINNON: And some of the things that you omitted. For instance, when you were talking about Judge and Governor Knous, you failed to mention that he was the first governor that came from the western slope of Colorado, and from Montrose, where he used to practice law.

JUDGE KANE: That's right.

COMMISSIONER MAC KINNON: You failed to mention that.

JUDGE KANE: His son will give me hell about that.

COMMISSIONER MAC KINNON: You also failed to mention that Judge Arraj was a member of the 1923 class at the University of Colorado, at Boulder, at the same time I was.

JUDGE KANE: Oh, my goodness. Did you know him as valedictorian of the Swink High School Class of 1919?

COMMISSIONER MAC KINNON: I think he came from

La Junta.

JUDGE KANE: Swink.

COMMISSIONER BREYER: Judge MacKinnon is too modest to tell you about his football career. It's considerable.

COMMISSIONER MAC KINNON: You also failed to mention that Judge Chilson over there was one of the greatest athletes that the University of Colorado ever saw, and when he could only compete for three years, that he made nine letters in three sports.

You also said that Colorado was a young area and that they had a considerable import of English, German and Spanish, and, of course, I would be remiss in my historical background if I did not say that one person of Germanic background by the name of Burger was the mother of a person called Byron White.

JUDGE KANE: That's right.

COMMISSIONER MAC KINNON: And from up north around Fort Collins.

You also put in proper perspective the fact that the court sits in Grand Junction, Durango and Pueblo.

I graduated from Grand Junction high school, in 1923, and my parents are buried in Durango.

So, with that background filled in, I would like to ask you a few questions.

JUDGE KANE: I have had my butt kicked by senior

judges for so long.

COMMISSIONER MAC/KINNON: Do you think the guidelines conform to the statute?

JUDGE KANE: I think -- yes.

COMMISSIONER MAC KINNON: And you indicated that --

JUDGE KANE: But that's not -- that doesn't mean that's the only --

COMMISSIONER MAC KINNON: We have a very difficult statutory problem to comply with.

JUDGE KANE: I agree with that. I don't think that because I say the guidelines comply that this is the exclusive means of compliance with the statute.

COMMISSIONER MAC KINNON: No, there are other ways.

JUDGE KANE: Yes.

COMMISSIONER MAC KINNON: You attack numbers, but numbers can -- as a matter of fact, you always descend to a number of months, in determining the qualitative degree of a particular offense. Always.

JUDGE KANE: Well, not in a life sentence. But that would be --

COMMISSIONER MAC KINNON: Well, twenty months, twenty-five months, you talk about, for bank robbery.

JUDGE KANE: Judge, I don't want to quibble. I accept your point. I do think there are some exceptions to it. One is under the Youth Corrections Act, with

indeterminate sentencing and the other is with a life sentence, and also with special parole term in continuing enterprise statutes.

There are some slight variations, but I accept the general point you make.

COMMISSIONER MAC KINNON: Now, there is a litany in the legislative history that indicated that the Congress should follow the Minnesota guidelines.

That was an unfortunate observation, because I happened to have been admitted to the Minnesota bar in 1929, and stayed out there until 1969 until I went on the court, and I have considerable familiarity with the Minnesota guidelines, and if you follow the Minnesota guidelines, the import of it, and try to translate it to our work, as Congress sort of indicated we should, you have some difficulties in finding criticism with some of the things that the present draft is beginning to expose.

Now, you said that you couldn't use the gun -- you posed a hypothetical where the man used the gun, but he wasn't charged with it, and couldn't be sentenced for it, but you can.

JUDGE KANE: No, I think --

COMMISSIONER MAC KINNON: Congress says you can, or the Supreme Court says you can.

JUDGE KANE: If I said that, I misspoke, but I

believe that's not what I had indicated.

My suggestion in the fact situation was that the eighteen year old did not use the gun, but someone else in the offense did. That was the -- he would be charged with aggravated bank robbery as well, is my intent.

COMMISSIONER MAC KINNON: Yes, he aided and abetted and he is the principal in the offense.

JUDGE KANE: That's correct.

COMMISSIONER MAC KINNON: Now, you talk about the intent of the sentencing and how it -- how that should be the controlling factor, and you talked about a sentence of twenty to twenty-five years, but, of course, as you know, that resolved itself really to an actual sentence of seven to seven and a half to eight years, under the sentencing guidelines, so it isn't as sacrosanct as you might think.

I would like to give you an example of disparity that you sometimes get into, with sentencing judges.

Now, you may not think that that's a problem, but it is, and that's what we were talking about, and through these hearings that we have been going around, I have been talking and asking questions, about what they think Congress was talking about, when they said they wanted us to do away with disparity.

And invariably they say, well, one guy gets ten years for something, the other guy gets probation, and, so,

really, what they were talking about was wide disparity, and not the moderate disparity that might result from some person looking at one of these factors that we have in here a little different from some other person.

And I have lived with that. When I was U. S. Attorney. I had two judges -- I had more than that, of course, but I had two judges. One of them couldn't sentence anybody to prison, and the other one couldn't sleep if he didn't send somebody to prison, and they were sitting right across the hall from each other. And yet, they had their own peculiarities.

One of the judges was a devout Roman Catholic, and we brought a counterfeiter before him one day, one of the great counterfeiters of the country, served any number of sentences for counterfeiting, and, of course, you would think that just on the counterfeiting that he would get a terrible sentence, get a maximum sentence.

He came before this judge, who was usually the most lenient guy of any judge that you could find in America, and the judge looked down at him, when he came up before him, and he said, "And so you have been married eleven times?"

Well, what does that have to do with it?

JUDGE KANE: Shows a certain elan vitale that most people don't have.

COMMISSIONER MAC KINNON: Now, on the regional aspect, you put income tax on a cultural difference, between something around New York and something around Denver, or maybe Grand Junction.

What do you think of the cultural difference, or a difference, regionally, between sentences for income tax evasion in the south and in the north?

I'm talking about southern Confederate states.

JUDGE KANE: Judge, I -- I have been to the south once in my life. I don't know what the situation is there. I wouldn't pretend to try and sentence on that basis.

I -- what I am saying is that there are other factors involved than just merely the offense itself that one has to look at, and I would -- were I to be in the north or south, I would want to look at it.

But I just don't know.

COMMISSIONER MAC KINNON: Well, when I was U. S. Attorney, I was told by the people in Internal Revenue that they had practically never been able to get a sentence or get a conviction, much less a sentence, for an income tax violation against these terrible federal taxes, in the old Confederate states, and --

JUDGE KANE: They just didn't want to give up that war, did they?

COMMISSIONER MAC KINNON: They are still fighting.

CHAIRMAN WILKINS: Judge, you know we learned in Atlanta that you all had all the money. That's the reason.

COMMISSIONER MAC KINNON: So that's another kind of a regional problem that we have to deal with, Judge.

JUDGE KANE: Sure.

COMMISSIONER MAC KINNON: I appreciate your testimony.

JUDGE KANE: Judge, thank you.

CHAIRMAN WILKINS: Judge Kane, thank you.

Let me ask you to do this, if you will. Take any section of these guidelines, personal property, securities, just a small portion, if you will, and then write down on a piece of paper what you suggest these guidelines ought to look like.

JUDGE KANE: All right.

CHAIRMAN WILKINS: So we can see the concrete, as we try to produce in concrete really what you are talking about, and let's analyze it.

I don't think we disagree on anything you said.

I think the Congress is not going to change the law. I don't believe that's going to happen, but, other than that, we would really like to see what you mean when you say some of these things and apply it to something that says property or taxes or drugs, any section you pick, and see how it works.

Maybe we can model the rest of the guidelines after it.

JUDGE KANE: I will certainly take a crack at it.

CHAIRMAN WILKINS: Thank you very much.

JUDGE KANE: Thank you.

CHAIRMAN WILKINS: Our next witness is Michael Bender.

MR. MICHAEL BENDER: Judge Kane is a very hard act to follow, and I know why he has that sudden interest in astrology.

Briefly, let me say I thank the Commission for giving me the opportunity to speak on this subject.

Really, it's my first opportunity to say anything to such a prestigious body.

Listening to the questions and testimony this morning, I am really awed by the knowledge here. I am very much awed by the guidelines themselves.

I frankly can't tell you that I understand them. I have read them several times, but I think the task is Herculean, and the ability to describe a systematic articulation for just and equal punishment for criminal conduct to me, at least in my limited experience, is absolutely impossible, and I think that based on the comments, particularly that Judge Kane made, and the questions asked of Judge Kane, when it gets all over and done, I think it's most

important that there be much, much more flexibility given to the sentencing judge than what these guidelines state.

I think that to me is the most overriding concern.

The proposed guidelines, the question of Judge Wilkins, to me, as a defense lawyer, with a defense lawyer's background, the most striking aspect was the commentary, which states as an empirical fact that offenders who plead guilty currently receive substantially lower sentences than those sentenced after a trial, and then the commentary suggests that a rationale for this disparity is the first step towards rehabilitation and the guilty plea conserves the resources of the judicial system, and invites public comment.

I am really dismayed that a body such as this would lend any type of support, however slight, to what I would view an unconstitutional practice.

In my view, if such a practice does occur, it certainly doesn't occur in the United States District Court of the District of Colorado. As Judge Kane said, it violates fundamental jurisprudence.

To me, a citizen, rich or poor, no matter how heinous his acts, should be always able to exercise his rights to trial, without fear of sentence.

I think the courts are all the constitutional overseer of the individual's rights as well as the individual.

When an individual's liberty is at stake, basic aspects of the system, such as the right to put the government to the proof, cannot and should not be denigrated for the sake of expediency and efficiency.

The right to a jury trial is unfettered, and should be recognized by all. It's really central to our democracy.

Obviously, the remorse of offenders is an appropriate consideration for sentencing. However, it should never be linked in my opinion to the offender's decision to seek to put the goverment to its proof.

I guess the second most striking aspect to me is how simply Draconian and punitive these guidelines are.

The penalties are far more severe than presently the case in our crime sentencing systems.

Divesting the sentencing judge with power to grant probation when fourteen points are shown is unbelievably harsh and certainly not mandated by Congress.

This question, as has been asked, I think, is that Congress intended probation and custody be equal alternative sanctions, and as I read the statute it was not the congressional intent to prohibit the grant of probation as an independent sentence.

To that extent, at least in my view, I don't think these proposed guidelines comport with the specific statutory language as I read the language, because the guidelines have

the impact of limiting probation for any offense which would receive a punishment of greater than six months.

As a practical matter, I think the impact of guidelines such as these is very clear. I can't imagine that the Commission hasn't heard this before. There are going to be more trials. There will be many more sentencing hearings, and there will be many more people spending more time in federal institutions.

I can give you some examples from my current practice, which I think indicate some of the problems with the guidelines.

Presently I have a tax fraud case, which if you apply the guidelines, would require the imposition of a ten to eighteen month sentence.

I don't think that any of us in this room, reviewing the circumstances of this matter, would think that would be an appropriate sanction. I think probation would be appropriate.

However, it is forbidden by these guidelines if they were applied.

Another problem which these guidelines impose in terms of a Draconian nature of the sentence is they permit the cumulative sentences in an indictment if the prosecutor is clever enough to charge from different sections of your guidelines.

If you add up, you do the point tabulation, you come up with an absolute maximim sentence, statutory maximum sentence, for conduct which I think that most of us would not believe to render or necessitate the maximum sentence provided by law.

Specifically, what I am talking about, is if an indictment, for instance, includes charges of both wire fraud and securities fraud, or drug offenses and tax frauds, the guidelines require that those penalties be added up and cumulatively given.

I am talking about specifically the case guidelines.

I don't think that this is a healthy thing.

The actual application of the proposed guidelines to me will be complex, confusing and difficult at best, and in most cases there will be substantially significant fact-finding sentence hearings.

Jurisdictionally, in Colorado, the appellate courts refuse to be bound by any sentence recommendation by the prosecution. Fact-findings as to each particular section would result. For example, whether the offender had a minor role, whether the defendant had accepted responsibility for the crime involved, whether the criminal supervised other persons, whether the offender had been involved in a non-charged criminal conduct.

I am referring particularly to a section that

permits an aggravated sentence under Section 3222(f) if there is non-charged criminal conduct that's alleged, in drug cases determining the actual scale of the offense pursuant to Section D211.

Other questions come to mind as to what notice and discovery the government must give when it intends to see the sentence based on aggravated circumstances, what notice and discovery must the Court give the defendant when it is determined that it is concerned about an aggravating circumstance that is not part of the conviction before the Court, what notice and discovery the defense must give when it intends to present a mitigating circumstance, the role of the Probation Department.

To me, these must be addressed by the Commission because due process requires that the information used to determine sentence be accurate.

I think it's obvious, looking at these guidelines, that one effect is to require the imprisonment of more persons for longer periods of time.

I think that this creates destructive tensions between the two institutions, the courts and public, and causes great loss of confidence by the public in the system itself.

The proposed guidelines would create a situation similar to that now existing in our state, where the

legislature has dramatically increased the penalties for crimes. As a result, more persons are sent to institutions already crowed, understaffed. The institutions are forced to release some persons. The public and legislature are enraged.

If the courts comply with the legislative directives the problems of the institutions continue to mount. A vicious cycle is created, with no hope for intelligent solution.

There are a few other matters I would like to draw to your attention.

To me, the penalties for drug offenses are totally incommensurate with penalties for other crimes.

For example, the sale of one kilogram of cocaine is 144. Well, the basic offense of an offender who holds up a federal bank is 123.

In drug offenses, a minor player receives a subtantially aggravated sentence because of co-conspirators that may be attributed to him. The drug offender who sells a small quantity of controlled substance, for example, an ounce of cocaine, to an undercover agent, but in negotiations has puffed by claiming he has dealt in substantial quantities, may also receive an aggravated sentence.

Because of the manner in which may drug investigations are conducted, that is by an undercover agent who buys a controlled substance, law enforcement personnel are able to determine by the precise quantity purchased the ultimate

sentence given the defendant.

There may be other instances in which the proposed guidelines to me raise questions of due process violations.

They permit the government to circumvent the constitutional requirement that each element of a crime be proved beyond a reasonable doubt.

A clear example of this is where the government charges unarmed robbery, under Title 18, U. S. Code, Section 2113(a), when in fact a dangerous weapon was used. To sustain a conviction, the government must prove the offender committed the robbery by proof beyond a reasonable doubt.

If the government obtains conviction of the unarmed robbery, the government may prove the use of the weapon by merely a preponderance of the evidence, and thereby obtain a sentence.

It seems to me the real impact of these provisions is to transfer sentencing discretion from the Court to the charging authorities. Prosecutors and law enforcement personnel may control the sentences imposed by creatively selecting and manipulating the charges brought in the indictment.

The reduction of sentence disparity, which is obviously a major concern of this commission and the Congress, and the incapacitation of certain types of defendants are goals of this system, but I think there exist other goals,

general deterrence and rehabilitation.

The criminal system must be respected by the participants, by the public at large, and must strive to achieve all its goals in a fair way.

But structurally elminating the sanction of probation and requiring the imposition of lengthy prison sentences will impose long term guidelines which are inconsistent with criminal justice goals, and do not operate with fairness.

Fairness does not equate with numerical uniformity. Fairness means the system must have the capacity to act compassionately and respect the constitutional rights of the accused.

I sincerely request that the Commission rethink these guidelines and the significant impact they will have on our criminal justice system and restore to the federal court a power to exercise a greater degree of discretion and even occasionally act with a touch of mercy.

Thank you.

CHAIRMAN WILKINS: Thank you very much. Let me point out just one or two things, to set the record straight.

I think I understand you to have concern with the language in the guidelines that provides the defendants who plead guilty currently receive substantially lower sentence than those who stand trial.

Now, that's just a statement. That's not a policy.

That's a fact, and we merely said that, so that you and anyone else reading this would understand that's what happens today in the United States of America, and it's between twenty-eight and seventy percent discounted depending on the crime.

It is not our decision to do that.

Now, let me go on and say the rationale for this dispartity is that guilty plea is the first step toward rehabilitation, so forth and so on. That is merely the rationale given, not the rationale of the Commission.

Now, bearing in mind that's the true status of the facts today, we tried to address that problem.

What we did is say, "Judge, if you find that the individual has accepted responsibility," we gave some ways to do that, "You may take that into account in sentencing."

But we did not say, specifically we did not say, that, "You will get an automatic discount for pleading guilty."

We also did not say, "You get punished for standing trial."

We tried to avoid that problem, but we agreed exactly with what you said, you shouldn't get an automatic discount and shouldn't be punished if you stand trial.

With that in mind is waht we were trying to say. In fact, we didn't say it as well as we could.

As far as the drug sentences, let me say we are not necessarily dreaming up these sentences and saying we are going to get rough on drugs.

I refer to Section 988 of the law. That says if you get a prior drug conviction and get another one you are going to get maximum term, which is fifteen years, around five years which is real time.

So the two of these are objectives.

We have an obligation in our guidelines. Some of these are directed in it by law, and we are mandated by law to follow the congressional intent.

I think the Congress has stepped in and dictated some of the sentences we have, but I agree with you, we have got to build flexibility.

As I asked Judge Kane, if you can take a section of the guidelines, any section you like, and show us what you mean by that in concrete, it will be most helpful to us.

We can talk all day long, we have got to have more flexibility. We agree on that, but how we get it is another question.

So, give us a concrete example, if you can.

MR. BENDER: Why not just make granting of probation an alternative sanction, period?

CHAIRMAN WILKINS: The law specifically does not allow it. That's a problem. Unless you can tell us within

the statute how to do that.

MR. BENDER: I guess I am having trouble understanding that, and I of course --

CHAIRMAN WILKINS: Well, it says the sentence of incarceration is going to be given. There is twenty-five percent variance, or six months, and that variance, only in the zero to six months range does the law allow for an option.

COMMISSIONER BREYER: "If a sentence specified by a guideline includes a term of imprisonment, the maximum established for the range of such a term shall not exceed the minimum of range by more than fifteen years."

As you pointed out, we could say the following, "Judge, when you get that bank robber, you have the following choices, you put him in jail for eight years, up to ten years, or you let him go entirely on probation."

Maybe that's what the statute means, but it's a pretty odd reading of the statute that would allow the person to give no jail time or eight years, but wouldn't allow three, four, five or six or seven years.

I grant you it's technically possible to say we could give an alternative of probation, but it would be an odd reading of that statute.

That's why you get the reaction. It's very tough to figure out how we as a commission within this statute say to the judge, "On any sentence, like fifteen, twenty years,

you have an alternative of probation."

If you can figure out a way of doing it --

MR. BENDER: I have also been accused of being a vox populi. I know the Commission --

CHAIRMAN WILKINS: No, I would like to have you be one.

MR. BENDER: But I guess I dont' quite get that. If you look at 28-994(a)(1), that language seems to say, to me, that the guidelines -- that the Commission should come up with specific guidelines for the grant of probation, as well as the grant of imprisonment and fines.

Now, I see nothing inconsistent with the language I think that you are referring to, which is paragraph (b), that the first decision the sentencer must make is whether to impose a sentence of probation or not. Then, once you say no probation, then you get into the guidelines for imprisonment, and if you look at 18-3551, in all due respect, I think it's very clear, Section (b)(1), where it talks about a sentence of probation, and if you follow it through --

COMMISSIONER BREYER: I know what it says. Why don't you send us a memo? I think it would be very interesting to have a memo on this legal point.

You realize what's bothering me is the sentence I read to you is the law, and I grant you there is nothing that says we could not do the following, "Judge, sentence

this bank robber to probation, or if you decide probation is not appropriate, you have to give him eight to ten years."

I'm just saying that's a little weird. It's a little weird, becuase you think it odd to have a commission rule which says, "Judge, it's either no prison, or it's eight to ten years." What about your two, three, four, five, six and seven?

If you can figure out an interpretation of the statute that gets around that problem, I think the best thing to do would be to write it down and send it to us, because I would be very interested in reading it.

I dont' think you can think it out right now. Maybe you can.

MR. BENDER: Well, are you referring, Your Honor, to 28-994(b)?

COMMISSIONER BREYER: There are lots of other things that give the Commission lots and lots of discretion.

The only thing that's bothering me is the sentence I read you, so what I think would be useful is for you to write out --

MR. BENDER: I shall.

COMMISSIONER BREYER: How one deals with that sentence. That's a purely legal point.

MR. BENDER: Sure.

COMMISSIONER BREYER: It's very complex, and I

think it is.

MR. BENDER: The only comment I want to make in response to what Judge Wilkins said, I am not exactly familiar with the statistics you quoted. Thre is probably from an empirical factual perspective a difference which may occur between the plea bargain sentence and a trial, for reasons having nothing to do with punishing a defendant as he seeks to go to trial, but I can only tell this group that I have tried a number of cases in the state courts here and some other federal courts in other jurisdictions, and never once have I ever actually be confronted with a situation where the person I represented was found guilty, was punished, because he exercised his right to a trial, and I don't think that we should permit a judge to automatically, even indicate, that a good reason for giving a sentence reduction is the fact that the person plead guilty.

I mean there are plenty of reasons which may indicate remorse and so forth.

CHAIRMAN WILKINS: We don't say that.

MR. BENDER: I know you don't say that, Your Honor, but you give credence from an official party to a practice which I think, at least for whatever it's worth, is certainly not appropriate.

And I also think that I have been threatened by prosecutors from many jurisdictions with the same kind of

language. You know, "Plead guilty here, or else," and somehow or other, they usually tell you what the "or else" is, and when it comes to time for sentencing, most judges pay attention to the argument, "If they were going to give you such and such before the case went to trial, please don't punish this man because he exercised his right."

CHAIRMAN WILKINS: Well, I appreciate your -- we are trying to strike a balance, so, for example, a defendant may feel motivated to make voluntary restitution to the victim, and the judge -- I would think would be a fact a judge could consider, might consider, and say we don't want to tie the judge's hands.

This is one of the areas we can build in discretion, build in some flexibility, so the judge is not locked into simply the facts of the offense and not some of the defendant's conduct, if it was good conduct and given under the right circumstances.

But your point is well made. I will say that I don't think the statistics are wrong that people generally speaking across the country don't sentence as harshly for guilty plea as those who stand trial, for good reason or bad reason.

Commissioner Robinson, do you have a question?

COMMISSIONER ROBINSON: Yes, I was actually fairly sympathetic to your concern that the guidelines, the

application of the guidelines might be affected by the particular charging pattern of the prosecutor, for two obvious reasons.

One is that ought to be within the judge's control, and not the prosecutor's control, and, second, of course, there are differences in charging patterns. You could get reintroduction, not with the judge you are appearing before, but the prosecutor charging, and it seems to me there are some ways of avoiding that. One of them is to have the guidelines based on an offense of conviction. Of course, that has it's own problems.

Then, in a sense, it's not the prosecutor by himself but the parties, or defense counsel and the prosecutor, who can effectively determine the application of the guidelines, and, of course, that's a significant deviation from current practice.

Judges know, whatever the offense of conviction may be, may be unarmed bank robbery is the plea, but they don't ignore the fact that a gun is there, and once more, that's what the United States Parole Commission does not simply look at the conviction.

If that's not a viable alternative, how is it otherwise we can limit a particular prosecutor's ability through his charging to affect the guidelines?

Another is to have a real unrestricted system, that

is have a system look at what was done and have it not based on -- not only a conviction or charging pattern, either.

My guess is that some defense counsel may not like that, and I would like to hear whether that's troubling to you or not.

But one interesting point there is to see that this using the charging pattern in some way is a way of restricting the liability of your client.

The alternative might well be, and we certainly have gone back and forth on this, and the Commission I don't think has a real position on real offense or modified real offense or what kind of modified real offense, but that certainly is an option.

Is that more attractive to you, or less?

MR. BENDER: Your question raises a lot of questions in my own mind. Let me try out some different suggestions.

First of all, I don't see why you couldn't as already is done in Colorado, in federal courts, require the prosecution to file a statement of what their -- essentially set forth the claim, because I think, as you pointed out in the report, that there are aspects of the statutory language that have nothing to do with an -- an element in the crime that has nothing to do with the sentence.

To a large extent, that solves as a practical matter some of the problems you raise.

Another suggestion is simply don't provide the cumulative sentencing in the way that the draft does.

I don't think you and I can sit and figure out for every pattern of criminal conduct how you could aggravate a mail fraud or a drug case or a tax fraud and securities fraud, for what is basically the same crime.

So, that's one suggestion.

I think the kind of things that Judge Kane was talking about, what a real conviction sentence consists of, to me make a lot of sense. I think we have something similar to that kind of thing in state court, where you have an articulation of a sentence by the Court, and you have a right of appeal, and there is a right of elocution, in a serious evidentiary way, as to aggravating or mitigating facts.

I also think the thing that's obviously troubling the Commission is the enormous disparity in sentencing, which I think kind of underlies the value of your question, and I think part of that is being done by the operation of the statute, itself. The Parole Commission has effectively been abolished. NARA is eliminated. B(2) sentences are taken out. Youth Offender Act is no longer here.

Their limiting of the discretion is going forward, not just the Court's discretion, but also the Parole Commission's discretion.

I don't know if I have answered your question specifically. I --

COMMISSIONER ROBINSON: Some people would argue that abolishing the Parole Commission is throwing us back into the disparity problem, that they are the one central force that brings uniformity that doesn't come out of the district courts, and by abolishing them you are throwing the weight of having to have uniformity back onto the district court, and therefore, the problems, the differences in charging patterns, the differences between judges, that would have been corrected by the Parole Commission now won't be.

MR. BENDER: I agree with that, and that is certainly true in some circumstances, but if you have a narrow sentencing range and you have a determined sentencing system, which is what I think this envisions, which means to me that there are a specific number of years that are to be given, and if I think as Judge Kane pointed out, the majority of the maximum sentences that courts can give is five years, there is a limit to the amount of discretion that can actually be given under those sentences.

It's further limited when you have articulated aggravating and mitigating factors that a court must state fully in this particular case.

So I think there is -- there still will be some of

that sentencing disparity, but I guess, from that point of view, of the way in which the system operates, and the examples given, and the questions to Judge Kane, it's very significant that there be a sensitivity between the sentencer and the defendant, to feel it was being sentenced appropriately, even though it may differ to some degree between a judge in Minnesota and a judge here.

I think that's awfully significant.

CHAIRMAN WILKINS: Thank you very much, Mr. Bender. We look for -- wait a minute, I think Judge MacKinnon has a question.

COMMISSIONER MAC KINNON: You think it's an unconstitutional practice to give less for a guilty plea?

MR. BENDER: Solely because of the fact that the person plead guilty, yes.

COMMISSIONER MAC KINNON: Yes. Yes.

MR. BENDER: Yes.

COMMISSIONER MAC KINNON: You do?

MR. BENDER: Yes.

COMMISSIONER MAC KINNON: Well, the Supreme Court doesn't think so. But every person, most defense lawyers, that have come in, have said that.

But you must be aware what the Supreme Court has said with respect to it.

MR. BENDER: I am.

COMMISSIONER MAC KINNON: But they don't give anything additional for standing trial. But the reason that some people get what they think is something additional for standing trial is that when they go into trial, the United States Attorney comes out with all of the terrible facts involving the offense, which would have been more or less subordinated if they had just come in and plead guilty and it hadn't been published in the newspapers for a week or so and every person really realized what the man did.

Those are the things that realize -- that cause him to get a greater sentence, in my opinion, on these particular offenses.

The other point is don't you think that the prosecution in federal court gets its analysis of the offense before the judge in the probation report?

Don't you think the probation officer gets the file from the United States Attorney or talks to them about a particular case, in writing his report, if he is concerned about the details, that is particularly if a man did plead guilty?

Isn't that the same thing as filing your statement that you do in state court?

MR. BENDER: I'm not sure I understand the question, Your Honor. This is --

COMMISSIONER MAC KINNON: Well, you suggested that

they ought to file a statement of the offense, and I say don't you think that the -- that the United States Attorneys ought to do that? Don't you think that the United States Attorney's position on a particular offense is articulated in the report from the Probation Office?

MR. BENDER: Of course.

COMMISSIONER MAC KINNON: Yes.

MR. BENDER: It's also articulated in this district by a defendant's statement.

COMMISSIONER MAC KINNON: In addition to the federal side?

MR. BENDER: Yes. My point was only in response to the question Commissioner Robinson asked me, as to whether or not I felt some version of real offense sentencing be adopted, and that is to indicate that the fact-finding process be accurate before somebody is sentenced, so the Court and defendant may have notice of real offense factors, and that be included in the statement.

COMMISSIONER MAC KINNON: Well, the statute requires now or will that the statement of reasons for the offense be stated in open court, period. That's the language of the statute. The information upon which he bases the sentence.

Thank you.

CHAIRMAN WILKINS: Thank you, Mr. Bender. We

appreciate your comments and the work that you did prior to coming, and we look forward to your comments coming soon.

Bill, let me ask you, do you want to testify now or wait until after lunch?

MR. WILLIAM GRAVES: Let's do it now.

CHAIRMAN WILKINS: Good. We are delighted to have with us William Graves, Chief Probation Officer here in Denver, and Perry Mathis, who is the Chief U. S. Probation officer in Kansas City, Kansas.

We're delighted to have you both. I might add that probably no one group of individuals has supported and worked with the United States Sentencing Commission like the probation officers have, and, of course, they have a vested interest. Whatever we come up with, they are going to be on the first line, trying to figure it out.

So, we are delighted you are here, and appreciate it.

MR. WILLIAM GRAVES: Thank you for your comments, Your Honor. We certainly do, and I certainly do appreciate the comments.

Mr. Chairman and Commissioners: I am William D. Graves, Chief Probation Officer for the District of Colorado.

I have previously testified before the Commission on July 15, 1986, and at that time provided a biographical information sheet. However, in brief, my graduate training

is in corrections and administration. I have over twenty-six years of professional experience, administering institutional and community center programs. I have been a United States Probation Officer for fifteen years, eight of those years as Chief Probation Officer for this district.

I am the Western Regional Representative to the Probation Division's Chief Management Council, and am active with numerous associated professional groups and working committees.

I have reviewed the preliminary draft of the United States Sentencing Commission. I have also been privileged to have been involved in responding to policy issues parior to the preliminary draft and am gratified to see many of the suggestions I and others have made have been incorporated.

I am limiting my statement now to a summary statement, but I have provided a more detailed written statement that I would hope the Commission would review when it sits down to make modifications after testimony is taken across the country.

First, I am going to comment on disparity.

Disparity is a complex problem and I believe it is predominantly created prior to a judge becoming involved in a criminal case.

Law enforcement agencies have control of what

crimes they investigate, what individuals they arrest, what cases they refer for prosecution.

Prosecutors similarly have considerable discretion what cases they accept, which cases they decline.

The greater disparity, though, occurs as the prosecutor and defense counsel become involved in charge bargaining.

The reduction of the disparities is a superordinate goal of the Commission, and the national policy on charge and plea bargaining is as much needed as sentencing policy.

I take real exception that judges aren't provided with guidance on sentencing. The U. S. Probation Department nationwide provides judges with a statistical analysis of what has happened previously to offenders of the same crime and provides the Court with an analysis with guide ranges currently used by the Parole Commission for defendants with similar background.

This is not to say there isn't a disparity. That represented is much more dramatic than warranted, in my opinion.

Perhaps a tune-up of the existing mechanism, rather than an overhaul, would have been sufficient.

Policy issues, modified real offense sentencing system, the system tht the Commission proposes, is closely akin to the practices of this court. The court relies on

the facts of the conviction offense to impose sentence.

My concern with adopting the proposed guideline is that it might restrict what the Court is allowed to consider and might incur a shift in the sentencing function to the prosecutor.

The Commission has addressed that issue and has noted that its mandate is reduce disparity, not transfer its source.

An important point in adopting either a modified real offense sentencing system or allowing the judge to consider all conduct is to insure the policy is well known to the defendant prior to the plea.

For example, our court currently advises defendants that the Parole Commission is going to consider unadjudicated counts in determining the length of time before release on parole.

The overriding concern of the modified real offense sentencing system is that the Court must be allowed sufficient latitude to impose a just and fair sentence.

Automatic reduction for guilty pleas, it is my firm conviction that to reward people for entering guilty pleas is to punish those others who take advantage of constitutional rights to a trial.

The alternate approach of regarding a person who takes responsibility for their behavior is a much more

palatable approach, and less likely to be reviewed by the appellate court.

Rewarding cooperative defendants I don't feel is a proper place for the Court to be involved, and I have stated my reasons for that in my previous correspondence. The prosecution is capable of rewarding cooperative defendants through charge bargaining.

Criminal history, the requirements are going to require a re-emphasis of the information contained in the presentence report. I do think it important to factor criminal history into sentencing calculations. Either alternative provided by the Commission would work.

The use of a table format appears easiest to use and an approach that would result in the least calculation error.

The Commission asked for comments on the appropriate relationship between criminal records and sentence.

I suspect at this time it's going to be beyond the Commission's capability to determine which offenders are likely to recidivate.

What seems proper for the Commission to do is establish openly and publicly that those inmates who do recidivate are going to serve longer sentence.

In addition, what should be emphasized is the offense that a person has been convicted of in the past.

That's my opinion. The offense, not the amount of time that was imposed.

Sanctions for probation, I do think the Commission will want to consider assigning sanction units for probation with percentaqe under a high activity supervision or with special conditions that require an abridgement of liberty, for example, community service, community treatment center residence, urine screens, et cetera, receiving more sanction units.

This would provide the Court with some greater flexibility to grant probation where the case facts warrant it.

Our attempts at application have indicated that the sentencing envisioned by the guidelines are exceptionally more severe than sentences currently being meted out by this Court.

In plain language, it would appear that grant of probation would occur in only the most minor of cases.

Conditions of probation supervised release, I found that the conditions of probation supervised release suggested by the Commission to be well done. I suspect they might get some adverse counsel on the third party risk condition.

We have had hearings in closed cases in our court, and that seems to have worked well. An addendum to the

Commission might be simply to suggest that questionable cases be reviewed by the Court.

The only other item of note is that restitution can become a mandatory condition of supervision, if it is under the Strict Restitution Act.

It is our understanding that restitution under that act is not affected by change in the probation status. For example, revocation, the restitution is seen as an independent sentence.

Violations of probation and supervisory release, the number approach is extremely cumbersome and invites error in computation. It is over-complex.

I make that same objection to the charging guidelines. It seems to me a somewhat similar, less arithmatic system could evolve from the mandate.

Application problems, in my letter of October 29, I outlined some problems we had in attempting to apply the guidelines to real cases.

I provided a specific example, a young woman plead guilty to a felony fraud, granted probation with a number of special conditions, including community treatment, community service and restitution.

I had our supervisors and two senior probation officers attempt to score that relatively simple case with the Commission's guidelines.

Each of the officers reported that the instructions were difficult to follow, that it wasn't easy to decipher the meaning of the terms used in the guidelines, and taken together it doesn't flow -- did not flow logically to a common conclusion.

Each officer came up with different results, and in fact, the only item that the officers agreed on were where to find a particular offense in the guideline book. The index was well done. And all agreed that this woman breached a fiduciary trust. Otherwise, nothing was scored the same.

The officers all agreed, though, that this woman would have had to have gone to prison for at least ten months, and one officer felt she would have to do a minimum of a twenty-six month sentence.

A special note. I am sure a number of these disparity problems would be remedied somewhat through training and experience.

Our officers reported taking some thirty minutes to apply the guidelines, but I imagine it would take the Court much longer than that to resolve controverted items. I am sure that it could result in a mini-trial of what applies and what doesn't.

I was shocked that the Court had such low discretion in the matter and would have had to sentence this woman to prison, when in our estimation and the Court's she need not

be there.

There are two final areas I would like to address that could become potential areas of abuse if not headed off early by the Commission.

I fear that defense counsels, prosecutors, probation officers and the courts, could begin looking for loopholes that would allow the Court to focus on the human factors that come into every case.

I realize that the law limits the range of sentences possible in the guidelines, but would hope that some adjustment can be made of those guideliens to allow for a broader range of cases where probation could be considered.

The second possible area for abuse might be the prosecutor's use of the sentencing process to circumvent due process rights of the defendants during trial.

It strikes me that it might be far easier to prove certain aggravating factors at a preponderance of the evidence hearing, rather than at a more stringent beyond a reasonable doubt standard necessary at trial.

I agree with the Commission's assessment that there can't be a perfect system for sentencing that takes into account every variable, every time, and precisely the same way. Were it that simple, we wouldn't need judges. We would simply score a defendant's current offense, his previous behavior, and then have the computer intone a sentence. That would insure that

there was no disparity, but it certainly wouldn't be perceived by the public or a defendant as a humane way to conduct human affairs.

It's a matter of delicate balancing, and I certainly have no easy answer beyond the hope that there would be significant room for judicial discretion.

I again appreciate the opportunity to have input into the Commission's deliberations, and certainly wish you well as you wrestle with these very large issues.

I assure you that the United States probation system, and I believe I can speak for the entire system, stands ready to assist in this task in whatever manner it can.

THE COURT: Thank you very much.

Mr. Mathis.

MR. PERRY MATHIS: Commissioners, my name is Perry Mathis. You may be able to tell as I get into talking that I am really not a midwesterner. I moved to the midwest from Alabama. I was a probation officer in the fedreal courts in Alabama for about sixteen years, and worked as a supervising probation officer in that court before moving to the District of Kansas. I have been in the District of Kansas now since October, 1983, as the Chief Probation Officer.

I appreciate the opportunity of being here to address you today. I realize that you have one of the most tremendous tasks that I think Congress has given to one agency in

accomplishing a mandated goal of restructuring an entire criminal sentencing process.

It was my desire to be very positive about the sentencing guidelines when I was invited to appear here. I regret that an honest answer from my viewpoint as a federal probation officer doesn't allow me to do so.

The non-binding Senate Resolution in 1984, which was to be used as a guide prior to the enactment of the guidelines, indicated that federal prison space must be treated as a scarce resource, and prison resources should be reserved for those violent and serious offenders who posed the most dangerous threats to society.

Courts were urged to consider the general appropriateness of imposing a sentence other than imprisonment in the cases in which the defendant has not been convicted of a crime of violence or otherwise serious offense.

It seems reasonable to me to believe that Congress intended for that resolution to continue as a goal after the guidelines go into effect.

Congress has abolished parole in its present form, and it appears that the preliminary guidelines have abolished probation as an alternative to incarceration. Whereas supervised release has been substituted for parole, incareertaion appears to have been substituted for probation.

This is partially evidenced in the statement that the

guidelines were designed in order to give an offender who commits a minor violation probation.

I understand more about that after hearing from you today, and realizing that it's really not the guidelines, it's your interpretation of what Congress has mandated you to do.

My impressions during the last nineteen years in the Federal Probation Service are that the federal judges sit with reason and mostly give fair sentences. The Bureau of Prisons maintains fairness in their dealings with prisoners. The U.S. Parole Commission has paroled and revoked parole for good reason and has administered the system according to the laws and regulations governing them.

Sometimes we haven't agreed with what they have done, but they are bound by certain regulations, as other agencies are bound by those regulations.

U. S. probation officers have accomplished their responsibilities in an excellent manner, and have always worked in the best interests of society. I think this is evidenced in the fact that during 1984 the success rate for probationers under supervision was ninety-six percent. In 1985, the success rate is ninety-five percent, and in 1986, the success rate was ninety-five percent.

This was presented in my earlier written presentation to you. To me, this indicates that probation could be used more, not less, than it is presently being used.

The guidelines must be flexible enough to keep non-violent and less dangerous offenders out of the prison system.

We have always been primarily concerned with the public safety. We have always focused toward intensive probation supervision.

We read articles now about intensive probation supervision, and some people think that that is a new thing. But some of those people have case loads of fifteen to twenty. Intensive supervision is not a new idea in the federal system, but staff is required to accomplish it.

Home detention is a relatively new concept, but it can be done with the equipment which will allow sufficient monitoring.

The federal probation officer's probation case load has also included felonies. We have been successful to a high degree.

The figures for sentencing in my judgment are much too high and will not allow probation where it has been shown to be effective in the past.

The more regulations we have, the more difficult it will be for probation officers to get their work done. We as probation officers are so wrapped up now in reports and statistics that we have become paper shufflers instead of people workers.

Scoring mechanisms, determining if a defendant

violated probation conditions classified as less serious or more serious would put us in a box. There is no cookbook for classifying human behavior, which you have recognized, and I know you are now wrestling with that fact.

The sentencing guidelines appear to me to build disparity into themselves. Some of that disparity favors those who seem to be more serious, violent-prone offenders, and punishes non-violent offenders.

As an example, the method of determining the quantity of drugs. It is certainly easier for an officer to look at the total weight of the substance, rather than the purity, but in my opinion it can lead to longer sentences for the user-street dealer than for the main supplier.

Scoring directions say if any mixture contains any amount of controlled substance, the entire amount of mixture shall be considered in measuring the quantity.

A supplier may have fifty grams of cocaine at eighty percent purity. A user-street dealer may have fifty grams at twenty percent purity. Both offenders receive a base score of sixty-six and would be subject to fifty-four to sixty-six months.

If the user-street dealer had two hundred grams of cocaine at a purity of twenty percent, he would have the same amount of cocaine as the supplier, who had fifty grams at eighty percent, and yet, because the mixture weighed more,

then he would score seventy-two and he would receive a sentencing guideline of sixty to seventy-four months.

I submit that the supplier is the more dangerous and the more serious offender. He is also the one who can present more information to the U. S. Attorney to get his sentence reduced by forty percent.

The U. S. Attorney will control much of the sentencing before the case even reaches the point of a reduction for cooperation, yet the courts continue to allow plea negotiations as they presently allow.

A case involving drug violations in our district illustrates this point. Two separate indictments and one information was filed against Offender A. Indictment One involved the distribution of seventy-eight grams of cocaine. Indictment Two involved the distribution of six-point-seven grams of cocaine. The information involved the distribution of one gram of cocaine.

The U. S. Attorney negotiated a plea to Indictment Two, and the information, in return for Indictment One, which was seventy-eight grams of cocaine.

The sanction units dropped from sixty-six for the seventy-eight grams of cocaine to fifty-six units for the other indictment and information.

Directions for the application of the modified real offense indicate that the Court is barred from considering the

seventy-eight grams in the Indictment ONe, because dismissal of that indictment as I understand it would constitute conduct for which further prosecution is barred.

The answer to the question that's raised by the Commission, to what extent should power to influence the sentence vest in the prosecutor rather than the judge, I think is quite evident, in this instance.

A U. S. Attorney could attempt in these instances to influence sentencing to a greater degree, so controls are necessary and may be exercised by the Court, which they do now, in refusal to accept a guilty plea.

Another possibility might be establishment of a national charge-plea negotiation guideline, which was suggested by Chief Graves.

Another example of disparity, in my opinion, against the least dangerous non-violent offender is a bank embezzler, as an example, who takes twenty-five thousand dollars.

The reference is B-211. The base score is twenty-four. The offense value from the property table and/or the twenty-five thousand dollars is sixteen in this case. Directions require us to add six to the value, since money was embezzled. We have a base value of twenty-four, which calls for a sentence of twelve to eighteen months. The embezzler may have been able to make restitution. Probably cannot supply significant information to the U. S. Attorney. But must go to jail.

Compare that to a defendant who constructs his own explosive device, takes it to a government building, and is charged under 18 U.S.C. 844, reference is K-215. The base value of that offense is twelve.

Even the guidelines indicate that the violation is a substantial danger to the public and is rarely inadvertant or for personal security.

The offender may be placed on unconditional probation with no added controls.

A firearms violation, under 18 U.S.C. 922, carries a five year maximum sentence, which is the same maximum sentence for the bank embezzler referred to earlier.

Reference under K-221 shows a base value of six. If it's a short barrel shotgun, add twelve to the base value, for eighteen. If we don't take into consideration the mitigating or aggravating circumstances, just as we did in the embezzlement case, we have a potentially violent offender who qualifies for a sentence of six to twelve months, whereas the bank embezzler qualified for a sentence of twelve to eighteen months.

I suggest the guidelines may be putting the wrong defendant in jail for a longer period of time.

The U. S. Attorney can double the sentence reduction adjustment by certification of cooperation. In my opinion, in order for an offender to be taking advantage of that

mitigation, he or she would probably have to be involved in other criminal activities to a large degree, before coming into the system, or they would have to be intimately associated with the criminal element.

The sophisticated criminal can end up with a reduced sentence, whereas the loan offender who has no such invovlement or knowledge must suffer those consequences.

How does the bank embezzler in a small town know of other similar or unrelated crimes in a community to give the U. S. Attorney enough information to have their sentence reduced by twenty, thirty or forty percent?

Will the U. S. Attorney even ask the question for cooperation?

This system appears unfair to many offenders, allows the truly serious offender to influence the sentence more than the judge's own discretion will allow.

Offenders involved in more criminal behavior can cause mitigating circumstances to have more effect on their sentence than those who are less involved.

This seems to allow unfair disparity and further removes sentencing from the Court. The Court can adjust a sentence twenty percent, by acceptance of responsibility, and yet the U. S. Attorney can cause the sentence to be adjusted by forty percent, by certification of cooperation.

The supervisory release program is a substitute for

parole. The federal probation officer is accustomed to dealing with these types of offenders and processing through the U. S. Parole Commission. The Probation Service staff has frequently been called upon to take emergency actions by taking violators into custody, modifying conditions to require in-patient drug treatment and halfway house placement.

The offender on supervised release will present many more problems than the offender on probation, just as the offender on parole now presents more problems than the offender on probation.

The courts will have the responsibility, and I feel that it will add significantly to the court time and may delay our ability to respond to emergency situations, since the process apparently will change from an administrative one to a judicial determination.

Case jurisdictions will have to be transferred in some instances before the case can be processed or the offender will have to be transferred to an original district for a hearing.

This not only delays actions, but it causes additional work for the Court, and it may be a frequent occurrence.

I also note that we will continue to have offenders on parole, long after the Parole Comission ceases to exist.

I urge you to look at the idea of somehow establishing

some kind of administrative body within the system that could take care of the supervised release program, rather than to put it back to the courts.

The courts have done the sentencing. They have pronounced that defendant is to serve three years supervised release. I wonder if there is a way that revoking that supervised release could be administratively handled, rather than go back through the judicial process.

I realize that the congressional directive must be carried out, but it's my hope that we can have a trial run by delaying implementation for a year or so after the guidelines are approved in final form, allow the Probation Service to double our efforts and to provide the needed information in selective cases and then determine the effect of some of these guidelines.

Of course, the problems of defense and prosecution objections to the computations will remain unknown during this time and we would not know the method of resolving those objections.

If that is not possible, then I suggest that consideration be given to putting the guidelines into effect for those offenses involving a person, Part A of your guidelines, and offenses involving drugs, Part D of your guidelines, and give the system an opportunity to adjust.

I know that you can take the statistics over the

last few years and basically determine what type sentence would have been imposed if the present guidelines were in effect. You cannot determine the practical problems which would have existed, and that is one of my concerns.

Placing the entire guidelines into effect at one single time, in my opinion, could overtax the system greatly.

I appreciate the opportunity of being here and talking to you. I appreciate the efforts that you are making to comply with the law as Congress has directed.

I gave you some written comments prior to my arrival here that went into much more detail than I have gone into today.

I realize that it is not very beneficial to you to come in and give a lot of criticism, without giving you some alternatives to consider. I hope that I have been able to accomplish that in the written comments I have given.

CHAIRMAN WILKINS: You have. We appreciate it.

Mr. Graves, you used the guideline. I want you to understand it was not the fact that detailed and thorough reports were not submitted. That is the fact. We referred to the fact that there is not somewhere in the system to apprise some other judge in some other court in the nation. The presentence reports always are most detailed.

I will ask you to take a look and see any specific examples where you think we can build some more discretion

into the system, where we can provide more use of probation than we currently are, because we share that concern.

MR. GRAVES: I will do that.

CHAIRMAN WILKINS: Thank you very much, and Mr. Mathis, purity is something we debated a long time, so we had to either include purity or not include purity.

We haven't decided not to include purity. We just didn't put it in this draft because that makes it even more complicated. Sixty percent. Fifty percent. How would you suggest we include your suggestion?

MR. MATHIS: Well, it might make it more complicated but the system is set up now to include purity in our reports that we prepare.

Most of the time we get the purity from the DEA agent or U. S. Attorney's files, and that information is placed in the presentence report.

The U. S. Parole Commission I believe factors in purity. I'm not sure. I don't have their guidelines, but I think they have a system where they do factor in purity.

To me, that -- if it does complicate it a little bit more, it will make it more fair to these defendants than the present way of doing it, because I don't -- from what I interpret it, we could end up with a person with lesser amount of cocaine getting a larger sentence, and I don't believe --

CHAIRMAN WILKINS: Well, let's assume that you -- if we had points for purity level and the report says it's eighty-two percent purity, that means as a defendant I am going to do more time than if it's seventy percent pure.

That's what I am talking about.

MR. MATHIS: Yes.

CHAIRMAN WILKINS: I can say, "I want that checked by my own chemist and I want that chemist from Washington here so he can testify." That's the problem we have been talking about.

MR. GRAVES: I might add it happens quite a bit now.

CHAIRMAN WILKINS: It does? I'm not familiar with it happening that much. I know as a sentencing judge, when they say, "We don't believe it's that pure," I say, "I am not going to take that into consideration."

When you have to put a number in, DEA was concerned. They said, "We can't fly agents all over the United States all the time."

We are wrestling with that. How do we do it from a practical standpoint?

MR. MATHIS: I think you will get a very similar argument by doing it the other way. I think the person will come in and say right the opposite, "Even though I only had a pound or two hundred grams, you are sentencing me more than the fellow who had the same amount, or more, cocaine, than I

actually had."

CHAIRMAN WILKINS: Well, there won't be a contest over purity, because the U. S. Attorney will be well aware.

Any questions to my right?

COMMISSIONER CORROTHERS: A comment before my question. Mr. Mathis, on the supervised release area, in this area, I share your concern about the tremendous problems involved there.

I would be interested in having people like you and Bill and other people with tremendous experience looking at that area as a separate area and writing down for us, or describing a model in detail of how you think the supervised release ought to work.

I really would be interested in seeing that as a separate thing, because I know all the tremendous problems and we have got a bucket of worms in that area.

My question is, Mr. Mathis, you are proposing in your written testimony that some consideration be built into the guidelines for cooperation subsequent to sentencing.

I think you said while on probation or during supervised release.

My question is would you also feel that consideration should be built in and given to the individual who cooperates or continues to do so during incarceration?

MR. MATHIS: I believe you probably are referring

to working as an informant.

COMMISSIONER CORROTHERS: You mentioned -- you used the word cooperation. You did refer to informants, but you also used the word cooperation, which could be as an informant, with new information, or it could be related to a case where they had initially started to cooperate and continued to do so, going out to trial, I assume, as cases developed, that we have now.

I forget what page that's on.

MR. MATHIS: Maybe you are talking about page 7, the attachment, probation requirements, agreement to act as an informer or special agent, where I mentioned that even sometimes cooperation would have to continue even after final sentencing.

I really had not thought about that, but my initial -- just from the top of my head, would indicate to me that if it continued and -- and after the person went into custody, serving a prison sentence, that perhaps a motion could be filed by the U. S. Attorney.

I don't know -- could they file motions under Rule 35 for a reduction of sentence based on cooperation after the sentence had taken place?

That would be one way of taking care of it.

CHAIRMAN WILKINS: Thank you. Any other questions?

Gentlemen, thank you very much. We look forward

to continuing to work with you and I am sure we will hear from you soon.

We are going to take a short recess. We are running a little late. It's almost two-fifteen.

We will start back at two-forty-five sharply, with our next series of witnesses.

Thank you.

(The Commission recessed from 2:13 p.m. until 2:47 p.m.)

CHAIRMAN WILKINS: We are delighted to have with us as our first witness Donna Chavez. She is an Assistant Attorney General of the Navajo Nation.

We are delighted that you are here,and look forward to hearing from you.

MS. DONNA CHAVEZ: Thank you, Mr. Chairman and Commissioners.

I am Donna Christensen Chavez, and I work with the Navajo National Department of Justice.

The Navajo Nation, as many of you may know, lies within the States of Arizona, Utah and New Mexico, and is about roughly the size I think of maybe the State of West Virginia.

I have come here to give you just some very brief comments and reactions on the draft guidelines, but I first want to give you an idea of what perspective I am coming from.

I am not a criminal defense attorney and have not practiced in the federal system, and in fact the attorneys who work in the Navajo Nation Department of Justice, none of those attorneys do that type of work except one small arm of the government, which is funded and called a Legal Aid Office, and which is funded by our government. It does do a very small amount of federal practice in the criminal area.

However, we are very much impacted by the work that I see that you are charged with doing, in that we have many Navajo citizens who come before the federal courts for sentencing under the Major Crimes Act.

I was a little reluctant to come because I did not have written comments gathered from the many people that the Attorney General wants to receive information from to present to you, but she felt it was wonderful of you to take the time to invite us to be present, and I should in any event go ahead and come.

So many times the federal agencies forget that Indian tribal governments are viable entities and need to be considered and need to be consulted on issues which impact on us, so I again thank you.

There are some points of particular concern that I and others who briefly looked at them, proposed guidelines, that I and others have reacted to.

First, I think I need to let you know that

traditional Navajo people do not necessarily break their perception of justice into discrete phases of the criminal process which would allow the separation of the idea of sentencing from the accusatory and trial phases.

Local Navajo communities are much more likely to see crime and punishment as just one single process that should require local input.

Consistency and fairness as they relate to the four purposes of sentencing that you outlined in your proposed guidelines would take on a very different aura from that perspective, and so I want to ask your indulgence if I address some issues that might be seen by you perhaps as being out of the narrow domain of sentencing.

As I stated a while ago, the Indian defendants that are appearing in federal court come before the court because of violations of the Major Crimes Act, which was adopted in 1885, to bring within federal jurisdiction felonies committed by Indian people in Indian country, and that then removed from our own local Indian communities, including the Navajos, the immediate ability to accuse, determine guilt, and set punishment for the most serious of crimes, in their own cultural manner, and then placed upon the United States that burden to insure enforcement of laws.

Regrettably, I must tell you that since assuming that obligation in 1885, and you know at that time the crimes

were I think at the number of seven and they have been expanded to fifteen enumerated crimes, the federal prosecution has been, in the eyes of most Indian tribes, including the Navajo Nation, as woefully lacking.

There are many reasons for this. That we have Bureau of Indian Affairs and Federal Bureau of Investigation staff who are primarily responsible for conducting law enforcement investigations. However, in reality, it tends to be the Navajo Nation who really has to deal first line with these crimes as they happen, and the problems become large when we have three agencies trying to work together on a felony event.

This places many stresses on the local communities, because very often as the result of those stresses, crimes often go unpunished and felony declinations are extremely high.

The Navajo Nation invited the United States of America, through the Justice Department, to sit down with us and the Bureau of Indian Affairs, about a year and a half ago, to see what we could do to address the declination problem, which we thought was unreasonably high, and the very first thing that happened when we sat down with both of the federal agencies, Justice and BIA could not come up with any kind of statistics that meant anything to anyone in terms of declination. No one could tell us what the

accurate figures are.

So we took it into our hands to start beginning to compile the records to see if we can.

All I can say is it's extremely high, and it's complicated by the fact that you have various jurisdictions and because there are three states, you have three federal jurisdictions.

Until a few days ago, the tribal courts in this country were limited in terms of the type of punishment they could mete out to defendants.

Under the Indian Civil Rights Act of 1968, the limitations placed by Congress on tribal courts for criminal offenses was six months and five hundred dollars in fines.

It is my understanding that the President's omnibus drug bill has a rider in there that increases the power of the Indian tribal courts to levy fines of five thousand dollars, and it increases their ability to sentence criminal defendants to one year, and that may be very helpful to tribal courts in dealing with these local problems I discussed, where we have misdemeanor jurisdiction.

The point of all this is to provide necessary context to understanding concerns of Navajos when viewing federal sentencing as part of the total enforcement efforts.

The failure to supply federal law enforcement results in prosecutions that are arbitrary, and so in like

manner sentences received for similar crimes do seem disproportionate.

Further, the delays I have talked to you about, and the problems, the internal jurisdictional problems I have talked to you about, sometimes become such long and unreasonable delays that I think it does happen with the Indian culture, and the Navajo culture in particular, that the local people will arrive at some type of a cultural restitution as a means of solving a problem that they do not wish to rely on the federal government to resolve.

And so, that's something that happens,and yet, I think that that may be a problem for federal prosecutors, who decide to take a case he does not wish to refer to that cultural disposition, a case, the disposition being between members of both families.

I received a data sheet from one of your staff administrators, and I do not believe it was within the booklet I reviewed this morning as I was coming here, but I recall in that data sheet there was a comparison between Indian defendants and non-Indian defendants who had received -- or the average length of sentences, and I think maybe you are familiar with that particular document that I am speaking of, and I think that that document suggests that Indian people do receive lesser sentences than their non-Indian counterparts, but I think that in discussing this

with my colleagues who have worked on the reservation and with law enforcement people, that the disparity would tend to disappear or reverse if first time offenders only were taken into account, because Indian offenders, particularly for the more serious crimes, tend to have much lower recidivism rates, very much lower, probably maybe to a point of significance. I'm not sure.

That's data that I would be happy to try to locate, if you don't have that available, although you may well.

However, if the problem in the federal system with regard to that information is as difficult as we found it in terms of declination, I am not sure that we will ever find out.

There is another factor, or the other important factor for this Commission to consider in my view is that the local Indian communities do have a large and direct stake in this process, sentencing process.

They have a very great stake, and for this reason. I think that one suggestion I might made is that the Commission consider the sentencing of Indian defendants in view of local community input resources as an alternative, and one suggestion I might make might focus on one section of your report, specifically on the federal responsibilities to Indian communities, becuase of the unique trust relationship which exists between the federal government and the

Indian communities and discuss how those obligations would be met in the sentencing phase of the federal judicial system.

I am aware that some United States Probation Offices, in particular, the one in New Mexico, has made a real effort to locate and hire a probation officer who was bilingual in the Navajo language, and sent this man to work on my particular reservation, the Navajo, and that has certainly been helpful I would assume in preparing presentence reports that take into consideration some of the cultural factors that I have been talking to you about.

In looking over the guidelines again very briefly, I have not studied them in depth, but it sort of jumps out at me, that the role of the probation officer is certainly, it seems to me, increased to a large degree by the requirements set forth in having to interpret and apply the factors which are present.

I don't want to belabor discussion on the complex nature of the booklet. I think that's been discussed enough in the short time that I was here, so I won't bore you with emphasizing that, other than to say I certainly found it complex.

I think I have a great concern that if in sentencing when one's criminal history is viewed, and where points will be possibly added to offenses, that any view of that criminal

history, be it state, foreign or tribal courts, convictions, certainly should require I would think some intense study by the judiciary as to whether or not that individual defendant did indeed receive due process protections, particularly whether that person has a legal counsel, say as a starter, and I think you mention that in the booklet that that is certainly something that is of concern.

The Navajo Nation has a very sophisticated tribal court system, when compared with other tribal courts that I am aware of, in that all of the practitioners must be licensed in the Navajo Bar Association, which requires taking an examination, and passing it, before you are allowed to practice.

Many of us are licensed attorneys in other jurisdictions, others are not.

However, our court system, as I said, is changing, and changing much for the better. We presently have a few licensed attorneys on the bench, whereas a year ago we did not have even one, and so you see, in the more serious cases, you see representation, you see legal counsel, more often than not, when there is a serious charge within the tribal court system.

That is not certainly necessarily so in other tribal courts, and so I think it will be important to look at those due process concerns, rather than just attaching

a number as to whether or not there was a conviction on the record.

And as I said, though, I think that that needs to be looked at, in any event, because even a civil case that is brought into another court to look at, another jurisdiction, it's like a state case, that the second state will certainly look behind the first state's judgment to see that there was minimal due process, so it should certainly be present in the criminal.

Before you ask me for this, I will present written suggestions for some of the information I have just given you, and I am aware that we have been told it would be nice to have this by early December, and you shall so have it, but there are a number of people who are sitting down with me working on it, and we have to get back together.

And one of the big areas that we talked about, that is the group that worked with me, was the idea of cultural restitution, and how important that was or was not, and was our particular tribe changing such that we would discard that notion, or was it something that we could still say a majority of people believed in and should be respected by the federal system, so we will put together these ideas for you in writing.

I hope that I have made a little bit of sense, and I thank you for inviting us, for inviting me to be here.

CHAIRMAN WILKINS: Thank you very much. We do look forward to receiving your written submission.

Any questions to my right?

COMMISSIONER CORROTHERS: Ms. Chavez, with regard to criminal history, you were concerned that in the case of tribal court dispositions that there would be some intensive study to determine if due process has occurred.

Are you saying that in the case of violent offenses, such as murder, that if subsequent to this study it is found that the offender did not have appropriate counsel, that that be -- are you suggesting that events so far as criminal history is concerned be discounted, or are you saying that it be disregarded completely?

MS. CHAVEZ: I am just saying that it should be looked into.

Let me give you an example that might help. Okay, the tribal courts do not have jurisdiction in the first place to look -- to take a murder case. However, because of the felony declination problem I have articulated to you, if the federal government declines, say, a homicide case, we can still through concurrent jurisdiction pursue that crime as a lesser included crime within our statute if it is present.

If we did so, and that person did not have legal counsel, but we charged them with aggravated assault, and they did not have counsel, it would go down on the record, as

aggravated assault, and so, I am not saying that you should look at that case and say, well, just because he didn't have counsel we should disregard it, but you should have enough records available for you to -- for the judge to be able to make a decision as to whether there were adequate protections and I think you can't just retry that case, however. You can't just retry that case based on a record where there wasn't a record, you know, where maybe there was just a guilty plea, or which would normally be the case, by the way, if there was no counsel, just be a guilty plea, and you would not get behind whether there was in fact a bona fide case.

CHAIRMAN WILKINS: Any other questions?

COMMISSIONER MAC KINNON: What is the population of the Navajo Nation?

MS. CHAVEZ: Oh, now, you have to ask me a hard question. I suppose -- I think we are very prolific, Your Honor, but I think we are nearing one hundred and ninety thousand, maybe close to two hundred, growing very rapidly. The average age I think under twenty-five, easily.

COMMISSIONER MAC KINNON: And is the relationship with the federal government controlled by any treaty?

My recollection from living in that area was that there was no treaty.

MS. CHAVEZ: There is a treaty, that was established

between the Navajo government and the -- the Navajo tribe of Indians and federal government in 1868.

COMMISSIONER MAC KINNON: Does that affect this at all?

MS. CHAVEZ: I think it does, Your Honor, to the extent that because of that political relationship that evolved out of that treaty, there is -- there is what we call a trust responsibility on the part of the United States government, and I feel that part of the -- and part of that trust responsibility comes with keeping law and order and providing adequate safety for the Indian beneficiaries, for the Navajo beneficiaries, and so since that is in the treaty language, it seems to me that there is an obligation to work with those beneficiaries, in looking at this problem.

COMMISSIONER MAC KINNON: Is there any relationship that differs between that and the Utes?

MS. CHAVEZ: I -- are you speaking of like the Ute Mountain Utes or Southern Utes?

COMMISSIONER MAC KINNON: Southern Utes I think are close to you.

MS. CHAVEZ: I am not sure of what type of relationship they have with the United States. They may have a treaty also.

COMMISSIONER MAC KINNON: Now, you said -- I think they did have a treaty. Deos the law address individual

Navajos, or -- that is, off the reservation, your law, or is it confined to offenses committed on the reservation?

MS. CHAVEZ: It's confined to offenses committed on the reservation, by Indians. The Code reads by Indians. At this time there hasn't been a definitive ruling as to whether that means only Navajos or other Indians, and so most tribes are applying it to any Indian on the reservation.

COMMISSIONER MAC KINNON: Has there been any contention that -- of double jeopardy between tribal court trials and federal trials?

MS. CHAVEZ: I am sure that there have, but there have been successful prosecutions. There have been successful prosecutions that I am aware of by the tribal courts, arising from the same facts, that resulted also in the prosecution in a federal court.

I don't think it happens often. I think practical reality is if one body will -- you know, pursue, the other one doesn't.

But I am aware that it has happened, and I can't cite you the case law anywhere.

COMMISSIONER MAC KINNON: I presume the Navajos have a written language?

MS. CHAVEZ: No, Your Honor, the Navajos do not have a written language.

COMMISSIONER MAC KINNON: And how do they communicate

in writing, solely in English?

MS. CHAVEZ: No, Your Honor. Are you speaking within the judicial system, or period?

COMMISSIONER MAC KINNON: Generally.

MS. CHAVEZ: Well, we communicate in both languages. There are --

COMMISSIONER MAC KINNON: Orally?

MS. CHAVEZ: Orally, we communicate in Navajo and in English, and within our court system, our courts are required, I mean our judges are required to speak both languages, so often the court session if all parties speak Navajo will be held in Navajo, but it's a court of record, so that if -- if it's a criminal matter, of course, it's placed into English so that it can become a matter of record.

COMMISSIONER MAC KINNON: Thank you. My last suggestion is that you put your suggestions together promptly, because the Commission is working, and the sooner you get them in, the more likelihood they are to have a real impact that you want them to have.

MS. CHAVEZ: Thank you, I will.

COMMISSIOENR MAC KINNON: Thank you.

CHAIRMAN WILKINS: Professor Block.

COMMISSIONER BLOCK: Yes, just a quick follow-up to the question that you raised about the fact that you thought we should take special consideration of the trust relationship.

Would you expand that for a moment? What would you think that in our role we could do more formally in the trust relationship?

MS. CHAVEZ: Well, I think that's going to come as a written report. However, I think that at least as a policy matter, a written recognition of that relationship and your responsibilities to those communities might be a starter.

The -- as I -- well, I didn't point out, but I will -- I think that federal judges, many of the federal judges that have presided over these Major Crimes cases have really worked hard to -- in sentencing, to listen to the cultural differences, to determine if they should mitigate, so that they understand the perosn, before they apply the sentence.

But, going back to your question, if it is going to be -- if you are going to have written guidelines and so many of the people that will be brought in on some of these crimes, under this law, will be Indians, by virtue of federal action, and I think that's why there needs to be a recognition of that responsibility.

COMMISSIONER BLOCK: Thank you. I encourage you to get that in.

COMMISSIONER MAC KINNON: One other question. How many tribal courts do you have? Do you have one, or are there several?

MS. CHAVEZ: We have our -- our reservation is -- and I guess when I say reservation, I should say Navajo Indian Country, because it's treaty land and then additional land that was annexed and placed in trust, and we call it Navajo Indian Country, as does the federal government, for purposes of the Major Crimes Act, that's divided into five agencies or districts, court, if you will, and those districts each have a district court judge, and then we have an appellate court called the Navajo Nation Supreme Court, and that court issues written decisions, and we have a court reporter system and has three judges to sit on it.

COMMISSIONER MAC KINNON: Where do they sit?

MS. CHAVEZ: They sit in Window Rock, Arizona, which is the capital of our government.

COMMISSIONER MAC KINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much.

MS. CHAVEZ: Thank you.

CHAIRMAN WILKINS: We have with us today the distinguished Chairman of the Antitrust Section of the ABA, a member of the law firm of Hopkins and Sutter, Mr. Mark Crane. We appreciate your taking your time to be with us today, and we have received your written submission already.

MR. MARK CRANE: Mr. Chairman, Members of the Commission:

I want to thank the Commission, on my behalf, on

behalf of the other leaders of the Antitrust Sections who have signed the written testimony, for the opportunity to appear before you today, for a second time, this time to comment specifically on the guidelines.

Since the written submission, two other members of our leadership, including our immediate past chairman, have indicated a wish to sign the testimony, and I would like permission to substitute with Ms. Hayes a copy of the testimony signed by the other two people. Otherwise, it is identical to what you have already received.

I thought I would summarize very briefly the five major points that we made in testimony, and comment on two aspects of them where perhaps we had some additional thoughts that were not expressed in writing, and then submit to questions.

I know that -- is this on? I think I lost my sound. Plug come off?

COMMISSIONER BREYER: I think I kicked it.

MR. CRANE: Well, Judge, that's one way to shorten oral argument.

I have a fairly strong voice. Perhaps I can be heard without the mechanical amplification.

Our testimony makes five points, which I will only cover briefly, because I know that you have had an opportunity to read it.

First, we strongly endorse the conclusion of the Commission that the seriousness of an antitrust conspiracy should be measured by the amount of commerce involved, rather than by the so-called antitrust injury, which would govern a civil proceeding.

Our reasons for that were set forth in our first written testimony, on June 10, and have been briefly repeated in our recent written testimony, and I will not repeat them here.

Secondly, we believe that the minimum jail terms for individuals under the guidelines escalates too fast.

And that's a point to which I wish to come back.

Third, we believe that individual fines for persons convicted of antitrust offenses should be based upon their ability to pay, rather than on a harm-caused basis.

The indication in the guidelines is that a harm-caused basis was going to be -- is going to be used, because the fine will be tied to the amount of commerce invovled, and yet, you invite comments on the question of whether a harm-caused basis or ability to pay basis is preferable.

Because the harm caused by an antitrust offense is generally caused more by the corporate entity rather than the individuals and benefits the corporate entity more than the individuals and because any fine tied to harm caused would we believe in most cases be so much in excess of the executive to

pay, we believe the ability to pay standard is preferable, and I refer you again to the written testimony for a more detailed explication.

As far as corporate fines are concerned, we believe that the schedule creates fines which vastly exceed the statutory maximum setting forth guideline fines for conspiracies with commerce involved exceeding fifty million, whereas the guideline reaches a maximum with a conspiracy involving merely two million dollars. We believe this can only bring disrepute on the guideliens because they are unrealistic in connection with the statutory maximum, and, frankly, would be confisticatory if imposed at the level presented in the guidelines. I will return briefly to that.

Finally, we believe the corporate probation is unnecessary and uneffective in most cases where there is an antitrust conviction, and again the reasons are set forth in the written paper.

Let me amplify just two points going beyond what's in the written paper.

First, there is the question of how to effect lower minimum jail terms. A possibility would be to simply lower the base offense value of the antitrust crime, so that the minimum sentence in the regular jail table would not exceed six months, and that is what we propose, on page 7 of our paper.

We realize that this reduces the maximum sentence as well, because the table is tied to both minimums and maximums.

We suggest that perhaps the reduction in the maximum is also acceptable, for several reasons.

First, history would show that the maximum sentence authorized by the statute, of three years, has never been imposed in an antitrust case, and nothing close to it has ever been imposed.

Even if the guidelines which we suggest, which would bring the maximum sentence I believe to eighteen months, under normal circumstances, were to be adopted, it would constitute a major increase in the jail sentence for antitrust crime, where the sentences usually run in the two, three or four month range.

Secondly, we believe that the guidelines are not designed to necessarily reach the statutory maximum in many cases, and I understand from the staff this is because there is no parole provided for in the guidelines.

Indeed, your guidelines do not provide for a maximum sentence which would reach the three year maximum.

We propose that, for other reasons, when there is a person in control of the conspiracy, where the guidelines provide for a multiplier of one-point-two, that that multiplier should be increased so that the judge has discretion to

multiply by one-point-two to one-point-five, in recognition of the different roles people can play in conspiracies, and if you were to do that, our schedule of base offense values would result in a maximum sentence for a controlling co-conspirator of twenty-seven months, only three months less than yours.

Finally, I would like to talk for just a moment about our proposed scale for corporate fines.

We have vastly reduced the percentage of commerce from the fifty percent test, which is used in the guidelines, to a sliding percentage starting at ten to fifteen percent, and running down to one to five percent, and we use a regressive system, that is the first commerce effective carries a larger percentage than the subsequent commerce effective.

Our feeling is that the lower fines when coupled with the treble damage remedy which already exists will be more than sufficient to both punish and deter.

Perhaps in the smaller conspiracies there is a conscious decision to try and beat the system by the price fixed. In larger conspiracies, in our experience, the executives are not that -- that thoughtful. They try to solve a particular competitive problem, but without a balancing of, "Will we be able to get away with it? And if we do, will the penalty be so small it will be a profitable thing still to do?"

We think that kind of exercise is not something they

engage in.

We feel with our schedule, with treble damage, that would be sufficient to deter and punish.

We think there is some rough analogy between our position and the position the guidelines take on page 168 when they talk about how much of the injury should you take into account when there are multiple injuries, and the example was a bus crash, one person or a number of persons are injured, and we believe that what I would call a regressive schedule of percentages would be justified the same way. As the amount gets up, the amount becomes sufficient to both deter and punish without taking into account a percentage which applies the same percentage of fine to each percentage of commerce that is involved.

With those complementary comments, Mr. Chairman, I know you are running late, it's getting late in the day, I would be happy to answer questions, and I would refer to details in support of our position in the written paper we have given.

CHAIRMAN WILKINS: Thank you. Your written submission goes into detail as well. We appreciate that one.

Any questions?

COMMISSIONER BREYER: There is one.

MR. CRANE: Yes, Judge.

COMMISSIONER BREYER: Something I wasn't certain

about what you said. I thought there was a -- where the guideline now would apportion the amount of commerce by dividing the total amount of commerce by the number of participants, and then you thought that -- well, suppose it was a very small participant.

To a degree, the small participant would be taken care of by the role in the event, particularly if the judge has in consideration what the role of the offense is.

Would you also need to take care of it by somehow diminishing the share of the commerce, you might say in a price fixing? Everyone there agrees, if it's going to fall apart -- I grant you there could be some totally -- but unless -- I mean unless people basically go along, small and large alike, it won't stand up.

Why is the small one any less guilty than the large one? Why should he get a lesser term? Unless you want to adjust for role in the offense, which is different.

MR. CRANE: Let me -- let me be sure I understand.

We made two points, and I think you are talking about our concern with the guidelines which said that you could attribute to a corporate co-conspirator either his share of commerce or his per capita portion of the commerce involved.

COMMISSIONER BREYER: Whichever is greater.

MR. CRANE: Whichever is greater, and not the question of whether the individual executive --

COMMISSIONER BREYER: And you think that's all right for the individual?

MR. CRANE: No, I think -- let me cover both, if I may.

COMMISSIONER BREYER: I was thinking individual.

MR. CRANE: All right, let me talk about the individual. It seemed to us that the way you had it set up, the individual, the apportionment among the individuals would be first to look at their employers and see what share the employer has, and then to give the judge the discretion to apportion among the individuals indicted and convicted from a single employer.

And we have two problems with that. One is that one company with a ten percent share and another company with a ten percent share, both indicted and convicted, one has one regional manager who gets caught and the other has two, it seemed to us it is unfair to apportion among the two, but stick one with the entire commerce of an employer.

Our experience is these conspiracies are usually regional and that the better way is to look at the commerce that the individual was responsible for in deterrmining how much commerce there was for purposes of determining his jail term and his fine.

CHAIRMAN WILKINS: Questions?

COMMISSIONER BLOCK: Yes, I have a couple of

follow-up questions on fines.

I find the notion of regressive fine somewhat perplexing, as I would have this very crude notion that antitrust violations are done for profit, and I believe I have no reason to doubt your report that they are not super-calculated.

It still seems to me somewhat strange that in fact we give a volume discount, that in a sense the fines would -- which are monetary, so the cost of this activity would decrease and the scale of activity increase.

Now, the best example I can understand, imprisonment is a very different phenomenon, but from a rational calculating point of view, the value of imprisonment, because it takes up over time diminishes as you start piling up more and more years.

The same I don't think is true of dollars, so I think the analogy of page 168, if I understand the logic, is not clear.

Could you perhaps expand on these regressive fines for me?

MR. CRANE: Yes, certainly. First of all, I don't suggest that the analogy is perfect. I simply suggest there is something similar about the two.

Secondly, we start with the premise that the commerce involved is a proxy, but not an exact proxy, for the harm.

As we point out in our paper, even your assumption of perhaps the general overcharge, ten percent, may vary dramatically between various --

COMMISSIONER BLOCK: Yes.

MR. CRANE: So, it's very rough, and commerce is a proxy even for that, and therefore I don't think that the argument that the more -- the larger the offense necessarily the larger the harm follows.

It may be a very rough proxy, but it is only that.

And clearly, our fine increases as the offense increases in size. It's simply the percentage relationship which decreases, and the judge has some discretion, so that he can take that into account.

That's Point Number One.

Point Number Two, we do have piled on top of this the treble damage action, which gives you some treble -- some kind of judicial determination of harm.

Point Number Three, we believe that these fines get so large that judges simply won't impose them.

One of the things that has struck me over the years, we have got very large treble damage awards, half a billion dollars, one hundred fifty million dollars. They are almost always reduced either by the trial judge or Court of Appeals, and I think if you get one of these conspiracies, with very large fines, the judge simply won't follow your

guidelines, and this is a way to deal with that, because the total dollars get just too big in the real world.

Fourth, we are concerned about the impact of a fine that is fifty percent of sales, or even anything close to it, on the competitive viability of the company in the future.

It's a peculiar result to impose a fine which could -- for an antitrust offense, which could either force a company out of business, or force it from being as vigorous a competitor, and we don't think it's necessary either to punish or deter, because the numbers get so big.

I have been involved in a civil case, and I don't want to identify the industry, because indictments were never brought, even though there was an investigation, where I represented a company, one of the small fry in the industry, somewhere between five and ten percent, but in five years about three hundred fifty million dollars in commerce was affected, and the conspiracy had gone on for much more than five years if you believe the plaintiff's allegation.

We could have been a small fry with perhaps a billion dollars worth of commerce, and your guidelines would come up with five hundred million or, even if you cut the percentage down, to two hundred fifty million dollars, I don't think it would be ever imposed, and we are the small fry.

I suppose the last point I would make in response to Judge Breyer, my impression is in many industries where you

have several large companies, you don't have to have everybody go along, simply have to be price followers.

COMMISSIONER BLOCK: I guess I am still puzzled because you bring up the treble damage as monetary fine.

I think there are two issues there. One, in many of the bid rigging cases we have seen recently, there aren't any treble damage follow-ups. In some sentences all we have is fines and imprisonment.

The second point is I think equally troublesome. If you use treble damages, that could also bankrupt the firm.

But the idea that somehow the fine be some multiple of the benefits, you can't have it both ways, treble damages following some multiple of the gains or harm, and then the fines have a different pattern, and saying, well, the reason the fines are different is because they might put the firm out of business, but the treble damage provision is fine.

MR. CRANE: But the treble damage doesn't in fact put it out for a couple of reasons. One is you are talking about a percentage of the profit, which may be very different from a percentage of the sales.

Secondly, in fact, that all shakes out in the court proceeding, either in the settlement proceedings or in the court proceedings, because the result simply is not something that people can't pay, because the damages have to be paid.

There is no point of getting damages that can't be

paid, no point of putting somebody in jail in bankruptcy.

But with your guidelines, there isn't that flexibility, unless they go outside the guideline, and I am resisting the concept of a guideline that would do those things.

If you question the regressive nature, you can start with a much smaller percentage and have it the same, but then I think you get the too small fines for the conspiracy.

I would say in some of these road building, bid rigging cases, to which you refer, you have another factor at work, and that is the actual physical individual co-conspirator is often the president of the firm, and there you have all kinds of penalties at work that don't exist when senior management is insulated from the conspiracy just because it didn't get up that far, and you are punishing forty, fifty, sixty thousand dollar a year regional managers. The treble damages bite is on the individual defendant, the jail bite is on the firm. All right.

COMMISSIONER MAC KINNON: Would you have any objection to the imposition of injunctions as additional disposition?

MR. CRANE: No, Your Honor. I don't think I would. Particularly if they were imposed in a parallel civil proceeding, as is often the case today.

COMMISSIONER MAC KINNON: What about in a criminal

proceedings imposing them?

MR. CRANE: Well, I think that gets to the question of probation. I think probation is the criminal equivalent of civil injunction.

COMMISSIONER MAC KINNON: Well, it isn't, because it doesn't continue as long. An injunction continues forever.

MR. CRANE: I suppose you could get the -- well, let me say first, most injunctions don't continue forever, and particularly in the antitrust field, where current trends even by the federal government is to clear --

COMMISSIONER MAC KINNON: Well, they are still trying to get rid of injunctions granted back in the Nineties.

MR. CRANE: That's true, but the antitrust enforcement authorities have taken the initiative to try and remove those because the competitive conditions change.

I am involved in one now wherein the firms that existed at the time the 1942 cease and desist injunction by the SEC was entered, only about a third of them exist, and indeed several have merged into a single firm, and the injunction no longer makes any sense, because of changed conditions, so I think any attempt to put long term injunctions would fly in the face of experience of antitrust injunctions over the years.

The current trend is to say ten years, and we will

look at it.

I would have no problem with injunction as a concept, as part of a criminal proceeding, if there is a way to impose it, but you would have to have two things.

One, the kind of hearing that you have now, before you put an injunction in, and, two, some system so that the injunction was self-executing, because as we point out in our paper, many of of the quasi-injunctive conditions that would be imposed as part of the parole would be fairly vacuous, i.e., don't violate the law again.

Or something that has to be self-executing, because it's too hard to have a probation officer, too expensive to have it audited on a regular basis, but to the extent you think an effective probation, the kind we explain in our paper, should extend beyond the probation period, I would have no trouble with incorporating an injunction.

COMMISSIONER MAC KINNON: Well, probation as continuing punishment or anything like that has a limited ability, but if you get an injunction you could come in with a contempt action.

MR. CRANE: Correct.

COMMISSIONER MAC KINNON: And that's pretty good, and you don't have to limit it to three years.

MR. CRANE: I agree with that, and it's not the limitation on time that I have any problem with. It's the

type ofhearing that you would need to set it up, effectively, and the conditions, and if the conditions --

COMMISSIONER MAC KINNON: Well, generally, when they are caught in those particular situations, why, they will agree to an injunction.

MR. CRANE: I agree with that, Your Honor.

COMMISSIONER MAC KINNON: At least, that's been my experience.

MR. CRANE: And that would be an injunction, though usually in a parallel civil proceeding might never be tried.

COMMISSIONER MAC KINNON: Or by consent.

MR. CRANE: Or by consent, and I would have no objection to that, but I have some question as to how you frame that in a guideline.

COMMISSIONER MAC KINNON: Just say that injunction might be considered an alternative subject to agreement.

MR. CRANE: I would have no objection to that, Your Honor.

CHAIRMAN WILKINS: Thank you very much, Mr. Crane.

MR. CRANE: Thank you, Mr. Chairman and members of the Commission. On behalf of myself and my colleagues, I appreciate the opportunity to come and speak to you.

CHAIRMAN WILKINS: Our next witness is two federal judges, Bobby R. Baldock, United States Court of Appeals for the Tenth Circuit, and Clarence A. Brimmer, Chief Judge,

United States District Court, Cheyenne, Wyoming.

Judges, thank you so much for being with us today. We look forward to hearing from you.

HONORABLE BOBBY R. BALDOCK: Mr. Chairman and Members of the Commission, we do thank you for the opportunity to appear here.

I want to first state that my statements are kind of an overview outline form. I do have my comments here that I will be happy to furnish to the Commission, if you desire that they be given.

First, I want to take this opportunity to express our gratitude to the Commission for the work that you have undertaken, excellent job, and when we go through the draft that you prepared, and to see the details you have put in it.

I want to thank you for the explanation of the modified real sentencing and identifying and discussing the issues raised by the guidelines. Also the approach has been to balance the formative nature of what the undertaking is that you proceeded on and I do commend you for that.

I also want to address three items in my comments:

First, the issue which will come up where the defendants plead guilty, without a trial, and the next one, the issue that concerns me, where the defendant is actually tried and convicted. And then, finally, on the fines and the supervised probation.

As to the issue that concerns me where the defendants plead guilty, first, there is a potential for having an extended trial on the sentencing only.

The vast majority of the defendants in criminal matters plead guilty, and under the present guidelines as I understand them, the trial judge must first find the base offense, or the base offense value, for the offense that the defendant pleads to, and add values for specific offense characteristics of what you call them. Then he must consider whether to apply cross-references, whether to increase the total offense value.

And what conduct the trial judge may consider in deciding specific offense characteristics and whether to increase the sentence raises questions, because the burden of persuasion for proving aggravating circumstances is on the government, and the government must prove those offense characteristics or adjustment factors.

Likewise, the burden of persuasion is on the defendant to prove the mitigating offender characteristics applying, which would reduce the total offense value.

Where the case goes to trial, the trial judge can make these decisions on aggravating and mitigating factors more easily because he has seen and heard the evidence.

But where he is merely accepting a guilty plea, there may be the need for an extensive hearing, because a

judge needs an evidentiary basis for his decision.

For example, most defendants will claim acceptance of responsibility, which is worth a twenty percent reduction in the total offense value.

I found that from your pages 123 and 124. But at what point in time? If the defendant has contested this matter, and then has it on appeal, and you have the defendant before you sentencing him, he is not going to claim a twenty percent reduction because of remorse. He is still claiming that he is denying ever having committed the offense.

Now, many of the statements that the defendant will make at this guilty plea will tend to be self-serving, and the trial will need to be had, but at least be limited to testimony, or otherwise you are going to have a four or five day hearing on mitigating circumstances.

I also maintain that the way that the decisions are running right now that the defendant will be entitled to fully present all mitigating factors, not limited, but all mitigating factors, and if you cut him off, there is going to be an appeal to the effect he was not given the opportunity to fully present the mitigating circumstances.

Now, as to the reduction in the discretion of the trial judge, in considering aggravating and mitigating factors, is also these problems where the defendant pleads guilty, the prosecutor and defense attorney have discretion

to determine what factors the judge will consider.

The prosecutor may use his discretion in deciding aggravating factors and what aggravating factors will be proved is his decision. He will put forward only those that he wants to put forward.

In practice, I would expect to see wide-spread sentencing bargaining.

You do have the pleas already. The parties will have agreed beforehand as to what characteristics apply and what the sentence will be. The trial judge may never know about the other factors and would not be able to consider them if the prosecutor does not pursue them.

Any overworked prosecutor may disregard characteristics which should be considered, thereby creating sentencing disparity. Rather than the judge making the disparity, there would be the prosecutor making sentencing disparities.

The prosecutor has tremendous discretion to bargain not only for the offense, but also for the sentence.

Judges presently exercise discretion in sentencing on the theory that they are neutral. Obviously, a party, such as the government, is not a neutral person.

Other matters that bother me in regard to the plea bargain or the defendant that pleads guilty is the judicial scrutiny on the plea and the sentence bargains should be limited.

Under the present law, the trial judge must be satisfied that there is a truthful, factual basis for the plea.

While certain factors which ought to be considered might not be given in the sentence bargain, judicial intervention in plea and sentence bargain should be discouraged. That is not the place for the judge. Such intervention conflicts with the judge's impartial role and judges should not act as prosecutor.

There also could be a conflict where the defendant claims he was a tremendous help to the government, i.e. as the guidelines provide to a forty percent reduction in sentence. The government does not agree, and the judge must decide. The defendant will say, "I cooperated. I led to the conviction. I am entitled to forty percent." The government says no. The judge is the one that's going to have to decide what about that. The judge may have to learn about those matters, which will come before him, in resolving this issue.

This is why I favor allowing the U. S. Attorney complete discretion in this area, without judicial review of such discretion.

On the issues that concern me where the defendant is tried and convicted, the trial judge should be able to consider any trial evidence, in deciding aggravating and

mitigating factors. That should be clearly set forth from the very beginning.

If the trial judge hears the evidence and the testimony that was presented through a two, three or four week trial, then he should be allowed to consider all of that, that he has sat through and heard. Having seen the trial, it should be expressed that the trial judge may rely on any evidence, whether or not the government elects to pursue such factors at the sentencing phase.

Now, there is the problem of conviction on lesser included offenses. May the trial judge sentence the defendant based on elements the jury did not find to be proved beyond a reasonable doubt? I.e., the jury convicts on a lesser included offense, not involving the use of a weapon, but the judge may think that there was a use of a weapon. At a preponderance hearing, the jury has said, "We don't find him guilty of that."

Are you now going to allow the judge to sentence him for that?

That just patently seems unfair to me. I cannot under any stretch of the imagination figure how that should be included in the sentencing guideline.

Other concerns that bother me in regard to this, the treatment on rare aggravating or mitigation circumstances should be left to the Congress. There is a potential for

judicial intrusion upon the legislative decisions as to what constitutes a crime or a defense, that judges are allowed to consider the wisdom of the law, in passing upon the sentencing, i.e., your example of euthanasia.

Homicide is defined as homicide. If Congress desires to make euthanasia an offense, that's where it belongs, not putting the burden upon the sentencing judge to say, "I'm going to weigh that particular matter."

In the southwest, we are oftentimes faced with the situation of the illegal alien and the problem where people are coming into this country because there is no work at all in the country they are coming from.

Those matters are hard-pressed for judges to consider, and if the Congress wants the offense changed, they should do it. Don't push the poor judge any further than he is being pushed in that matter already. I don't favor such discretion being placed with the courts.

In regard to probation and fines, violations of any conditions of probation should not result in partial credit for successful time of probation. To grant any credit for successful time on probation disturbs the incentive for staying out of trouble when you are out on probation. If you are going to get the good time anyway, why bother? Either stay clean or lose it all.

The home detention as a condition of probation or

supervisory release will put too great a burden on the U. S. Probation.

Your draft indicates a high degree of contact would be required. This would be too hard on the probation officer, who has many other clients on probation to start with. I think the employment roll is going to go ten-fold if that continues.

For reasons stated in the draft, i.e., fair ability to pay approach in the imposition of fines, it does no good to fine a person five hundred dollars when they are indigent to begin with and they had court-appointed counsel, and then the judge says, "I am going to fine you five hundred dollars," when there is no basis any way for him to pay that fine.

With those, that concludes my comments. I would like to defer to Judge Brimmer, if he has some.

HONORABLE CLARENCE A. BRIMMER: Thank you, Judge Baldock.

Judge Wilkins, and Members of the Commission, on behalf of the smallest district of the judicial districts of the national, let me thank you for the opportunity to be heard.

It was only this year that I became chief of a tribe of two. Until then, I was the only judge in the District of Wyoming, except for my senior judge, to whom I will refer in just a moment.

Let me also, like the others, express my awe at the Herculean task that has been put before you, and the magnitude of the efforts of the Commission to approach those labors.

And before the questioning, let me also say this, that I was only given this assignment last Friday. At that time, I commenced a review of the sentencing guidelines. I do not pretend that my review of them is even comprehensive and it certainly isn't adequate.

However, there are some things that occur to me that perhaps are worthy of commenting on.

In general, I think that most of my comments have been already touched on by many of the others, and all I can do is perhaps second the motions of Judge Kane as well as some of the rest of the speakers who have been here.

First, let me say this, in general the complexity of the sanctioned unit systems greatly concerns me.

While the conscientious judge will always give sentencing procedures a larger part of his time than any other duties, the extreme complexities of these new procedures will require an unduly large amount of judicial time, as you have already heard, and that's already limited, and it's going to be to the detriment of other judicial duties.

The end result of such complexity could well be the development perhaps on down the line of a specialized

sentencing judge, one who has become expert in sentencing procedures.

To require that sort of sentencing specialization might be unfair to that person, as well as to other judges of the court, to say nothng of the defendants in criminal cases.

Heretofore, district judges have been generalists. I submit that they should remain that way, for it's to the advantage of the defendants in criminal cases to come before a man with broad general experience, rather than a specialist in one niche of the criminal law, namely, that of tallying sanction units for sentencing.

In addition, the complexity of the new system is surely greater than the patience and will to learn of many senior judges, who are now rendering effective judicial assistance to their courts, but who in the future may be driven further into judicial retirement by such new and complex procedures as those proposed in these guidelines.

It will surely take a plethora of sentencing institutes and instructional sessions before the bench and bar are completely comfortable with these new procedures.

In any criminal corrections meeting such as this, sentencing disparities is always a problem.

Let me say this, that as previously proved by the Parole Commission, we can assign specific salient factor

scores to an individual based on his background and his situation, but the one thing that we tend to lose sight of as we begin assigning numbers is the human factor that's present in every case before any U. S. District Judge throughout the nation.

This human factor for many years has been interpreted by the probation officer or by the judge during the sentencing hearing,and it's something which regretfully is about to be taken away through legislation.

Each district judge can surely present cases to the Commission where the human factor brought about a sentence to probation, where all other factors indicated a need for incarceration, and where the probation term then subsequently proved beyond any doubt to be the appropriate sentence.

The Bureau of Prisons statistics show continuing growth of the federal prison population and serious overcrowding in institutions, but the guideline table contained in the preliminary draft on page 141 shows that sanctioned units totalling fourteen or more will require the Court to impose some term of imprisonment.

I feel strongly that the Commission needs to reevaluate its very low number of sanctioned units for the availability of probation. Perhaps some other guideline could be written into the sentencing options to utilize again the human factor in determining the grant of probation.

Also, I think the geography plays an important part in this whole process. A case involving a couple of ounces of cocaine in Wyoming, or perhaps a few thousand dollars in a bank fraud, is surely an important case in Wyoming, and it needs to be treated with a severity that it would not be treated with in any of our large coastal cities.

Those kinds of cases would be lost, probably wouldn't even be prosecuted, in any of the big cities of America.

Judges are selected from the areas in which they sit, and the needs of the judicial district are considered when they are selected. The human factor in each case I feel then is a strong need for consideration in eliminating sentencing disparity.

Modified real offense sentencing procedures is always a major concern in a sparsely populated judicial district such as Wyoming, where criminal cases are so highly visible.

By limiting the Court to imposing a sentence solely for the offense on which a defendant might enter a guilty plea, and not allowing the Court to consider the overall offense severity might likely prompt disrespect for the courts and the judges.

Allowing sentencing only on the offense to which an offender enters a plea of guilty transfers too much power

to the United States Attorney's Office through the plea bargaining process. Defendants in Wyoming are well aware that the Court imposes sentences on overall offense severity at the time they enter their guilty pleas. This has had rather a salutary effect on plea bargaining in our courts.

I feel strongly that a sentence should be imposed for the criminal offense and all of the aggravating acts connected therewish.

Should the United State Attorney be empowered to bargain away acts which the Court cannot consider at sentencing, then it seems to me that judges will have to defer accepting plea bargains until the completion of the presentence report.

In the matter of rewarding cooperation, the Court in Wyoming has always given strong consideration to defendants who cooperate with the United States during the criminal investigation and prosecution.

However, I would discourage the Sentencing Commission from incorporating fixed automatic reductions for the established guidelines. Again, too much power is being placed in the hands of the United States Attorney's Office. The United States Attorney uses dismissal of counts of an indictment or an actual reduction of charges in exchange for cooperation. Then to further reduce that lesser sentence, even further, would not promote respect for

the law or for the court.

Also, in the matter of criminal history, I personally do not feel that one prior conviction should automatically exclude anyone from the opportunity to be placed upon probation.

In reviewing the proposed guidelines, I was unhappy to see that the split sentence has been eliminated as a sentencing option. I have personally seen that procedure serve as a great purpose in many different cases.

I would encourage the use of sanction units for probation, if this could -- if this would provide greater latitude in the granting of probation.

Such sanction units could easily determine high activity supervision with appropriate special conditions of probation.

And finally, with regard to violation of supervised release, I personally believe that each person released from confinement needs a period of supervision in the community.

I support your current guidelines and conditions of release in the preliminary draft, but I recommend that the Commission review the penalties for violation of the conditions of supervised release.

As I understand it, the concurrent proposal for holding the violator in contempt of court, under 18 United States Code, Section 401, seems to me to be a poor solution.

It could easily result in a person who was originally sentenced for a relatively minor offense being required to serve the same penalty for violation as another person who is originally sentenced for a very serious offense.

And, finally, what attitudes will be developed by sentencing judges through this process? Will the judge, without meaningful discretion, really care anymore, when shopping bag sentencing has dictated the total sentence like the tape on a supermarket cash register?

It would be a tragedy if he didn't care anymore, but I submit this is a strong possibility.

CHAIRMAN WILKINS: Thank you, Judge.

As I understand it -- ask both of you -- you would like a guideline system that says if you accept your responsibility for your criminal act as determined by the sentencing judge, the judge may in his total discretion award some consideration for that, be it one percent, ten percent, or twenty percent?

JUDGE BRIMMER: Amen, Brother.

CHAIRMAN WILKINS: I thought that was what we were trying to do in this guideline, but we need to go back, because I completely agree with what you said.

You see, that would build a great deal of discretion in the system. Someone gets up, self-serving remarks, "I'm sorry I did it," you simply disregard it, wouldn't have to

regard that type of conduct.

Judge, I wanted to ask you, if you would -- I know you have only been given this assignment a short period of time, but let me assure everyone that we are not directly drafting this preliminary draft or any other guidelines in a complex manner because we want to make it complex.

We don't know any better way to do it. We are searching for it.

If you could tell us how to reduce complexity and still provide a system that allows the sentencing judge to distinguish this defendant from this defendant and thereby promote fairness, that would be --

JUDGE BRIMMER: I don't believe you can do that. I basically agree with Judge Kane that the Commission ought to go back to Congress and tell them that they have given them a task that is an impossible task, and ought to be -- the legislation under which you are laboring ought to be revised.

CHAIRMAN WILKINS: Well, I don't think that's a real possibility.

JUDGE BRIMMER: I heard you when you said you didn't think that was a likelihood.

CHAIRMAN WILKINS: We have got a few amendments of opened up discretion, very little, and that was like pulling hen's teeth, so I don't think we are going back on

that.

That's why the document is so complex, as everyone says. We have tried to identify factors that distinguish one bank robber from another bank robber, and the more factors you have, the more complex. At least the more crunching of large numbers of people in one category, and that may produce some unfairness.

I know you appreciate our task. Please give us some thoughts, some suggestions, in real concrete suggestions, what you would do, in this section dealing with fraud, "You could make it less complex and yet accomplish the same goal as the legislation, moving this Section A, or taking out this, whatever."

It would be most helpful to us.

And I think your comments on cooperation are well taken. I am sure we have visited in that area, and there are several ways we can deal with allowing the judge the discretion of, as he has today, to take cooperation into account with sentencing, and I think we are all committed to deal with that.

Any questions to my right?

COMMISSIONER NAGEL: Judge Brimmer, I was curious and interested very much that you lamented the loss of the human factor which often prompts probation in a sentence, as we do in those cases probation was ultimately thought to be

beyond a doubt the appropriate sentence.

Do you do any follow-up, or is there some basis for drawing your conclusion that probation was the appropriate sentence? Is there some way you can help to enlighten us to know how we can know that probation is the appropriate sentence, especially in those cases where it would not have ordinarily been given, but it was in fact given for this human factor, as you call it?

JUDGE BRIMMER: On direct answer to your question, I don't do any statistical follow-ups, but I do follow up on the offenders that I sentence.

I check with my Chief Probation Officer almost constantly on how so and so is doing, and he reports to me when they are on probation, and I follow the probation process sort of on the side, but I haven't kept a statistical record.

But I do know that the old senior judge that is with us on the bench, and I am quite sensitive to his concerns, and that's why I mentioned that point about the senior judges, but he always had an old saw that said if he made a mistake in sentencing a man to probation, he could always correct it, but if he made a mistake in sentencing him to prison, he might not be able to, and this is what I was really saying on that point.

COMMISSIONER BREYER: You may not have had a lot

of time, but it seems to me you got to the heart of the matter.

The problem throughout is the problem of discretion, which undercuts the guidelines, versus proliferating rules, which becomes unworkable. That's what we are trying to balance.

And one of the questions which I know is a very tangential point, but it has come up, and I was curious that you mentioned it, Judge Baldock, is fines.

One of the reasons, one of the difficulties that popped out, when we began to think of gearing fines to a defendant's ability to pay, which takes place in certain European countries, I think called the daiphon, percentage of wages, who would we know what his ability to pay is?

He would say, "Oh, no, I have no money," and the prosecutor says, "Oh, yeah, you're very rich, you have money stashed all over the world." Then there will be a big hearing and he may not produce his IRS certificate, but the very fact that he doesn't hold a steady job may prove he is quite capable of paying, devotes his full time to something.

We saw so many arguments, we couldn't figure out a practical system of working out gearing ability to pay to fine.

Do you have any thoughts on that?

JUDGE BALDOCK: Yes, because I don't think

practically it's as complicated as we want to lend to the process.

Every one of you have already had in most instances where a person comes in and says, "I cannot even afford an attorney." He has got an elaborate system he goes through with the magistrate, approved by the federal District Court, says, "You're right, you should have counsel." So that part of the problem is already over.

Surely to goodness, although this is what leads to the problem with the Commission, there are some judges that do not have the sense to understand that that's a problem.

COMMISSIONER BREYER: Well, if a person is impecunious, he probably can't afford a fine, period. But when you get beyond that and try to gear amounts of fines among those who do have any income, maybe there is a way of some discretion on it.

JUDGE BALDOCK: I think the problem lies when you get down with if the fine stays there, the key to it is ability to pay and if you have to have a hearing where the prosecutor comes in and says, "You can pay," and he has got to prove it, and the defendant says, "I can't," and he is defending this, a decision must be made.

I don't see that as an overriding problem. I just think it should be based upon the ability to pay.

CHAIRMAN WILKINS: How about corporate fines? Fines against the corporation?

JUDGE BALDOCK: Well, I listend to the gentleman that went before us, and I am like the Commission member here when he was talking about the bus accident.

Again, that is -- I think even more so, you are going to have to have the hearings there, because if a fine is apropos and it should be imposed, then the judge is going to have to take time to hear it, and do what the Commission or what the guidelines recommend.

CHAIRMAN WILKINS: Should that be based on ability to pay as far as the corporation or dealing with the corporate defendants?

Is it wise within a motive to regain a loss of -- I don't know -- I --

JUDGE BALDOCK: That's the -- then you have got the problems of -- well, if you fine a person two hundred fifty million dollars, you have for all practical purposes put him out of business. I can't say maybe he shouldn't be out of business. I don't know. That depends on the type of violation you have got. Just have to wait and see on that particular case

CHAIRMAN WILKINS: Any other questions? George.

COMMISSIONER MAC KINNON: You talked about disagreeing with home detention. There is a new thing that's arisen.

You think it might be quite appropriate in a number of instances, where you have defendants that have some physical infirmity, some disease or something of that charcter, that they might be better cared for by their local physician at home, under a home detention sentence?

JUDGE BALDOCK: Judge, let me say that as far as my disliking the home detention, no, I think that is an area that should be expanded similar to the halfway house.

What I am saying is to put the burden then upon the probation officer to have to supervise and maintain that type of situation, it's just unduly cumbersome.

If the person is a candidate for that type of service, then I think there has to be a great deal of latitude, almost like on your own recognizance, rather than put that additional burden on the probation people.

They have got enough serious problems, where if the Court feels that that type of sentencing should be given, you are dealing with an offender that is pretty much not going to be a repeat offender.

COMMISSIONER MAC KINNON: Whether or not -- to the extent to which the Court, a court, might consider other counts and counts that are dropped, and things of that character, the statute provides this:

"No limitation shall be placed on the information concerning the background, character and conduct of a person

convicted of an offense, which a court of the United States may receive and consider, for the purpose of imposing an appropriate sentence."

Absolutely without limit.

JUDGE BALDOCK: On a convicted offense.

COMMISSIONER MAC KINNON: On a convicted offense.

JUDGE BALDOCK: Yes, but that's different in my opinion from the -- the aggravating and mitigating circumstances that may not have arisen to a convicted offense, i.e., whether or not the person committed the offense of armed robbery of a bank versus an unarmed robbery, and they choose in a plea not to disclose that fact to the trial court.

COMMISSIONER MAC KINNON: This says not limited to the convicted offense. It says on the conduct of a person. In other words, goes back to prior history.

Now, incidentally, on that particular issue, there have been some cases involving the extent to which the Parole Commission can consider offenses of that nature, and certainly it gets to exactly the same issue.

Now, the Third -- well, the Tenth Circuit, your own circuit, held in Robinson vs. Hayden, back in '83, that they can consider counts dismissed by the plea bargain.

The Third Circuit held that they -- the Court could consider counts dismissed with prejudice.

The Eighth Circuit held that they could consider

cases dismissed, counts dismissed in a plea bargain, and the Fifth Circuit had the same conclusion. Those are all --

JUDGE BALDOCK: They can consider them, but my point is the power that lies in the hands of the prosecutor of not disclosing.

Right now, when you take a plea bargain, you must consider the factual basis for the truth of the plea, and if the prosecutor and defense lawyer agree that this is going to be what he is going to be charged with, this is going to be the guidelines, to the extent where does it say that they are obligated to tell that trial judge of all these other circumstances?

COMMISSIONER MAC KINNON: I get your point on that. You agree with the validity of this?

JUDGE BALDOCK: Oh, yes.

COMMISSIONER MAC KINNON: And you want to keep the prosecutor straight?

JUDGE BALDOCK: Yes.

COMMISSIONER MAC KINNON: Well, so do I. And the statute says that he has to prosecute offenses. And if he doesn't, why, he is going to be subject to a little discipline by the United States Department of Justice, but, that's our present understanding. They are going to issue -- well, they have already issued some standards, that were at the end of the prior administration, in '80. They didn't get implemented

or haven't been implemented too much since then, maybe, but we are given to understand that they will share their burden, in that respect, but we can do some things on that respect ourselves, I think in our guidelines.

CHAIRMAN WILKINS: Any other questions?

Thank you very much.

Over the last few months, the Federal Public Defenders have given us a great deal of assistance.

We are delighted to have with us two Federal Public Defenders, Tova Indritz from Albuquerque, New Mexico, and Michael Katz, from Denver, Colorado.

We call on the Federal Public Defenders time and time again, and we appreciate the response that we have been given in the past. We appreciate your attendance today, and we look forward to a continued working relationship with you as individuals as well as your organization.

MS. TOVA INDRITZ: Thank you very much. My name is Tova Indritz. I am the Public Defender for the District of New Mexico. I have been in the Public Defender's Office for ten years, five years as assistant, and five years as head of the office.

In that time, I have personally represented hundreds of indigent defendants, and my office has represented literally thousands of clients.

A great many, but not all of our defendants reach

the sentencing phase and our district covers the whole State of New Mexico.

I have reviewed the preliminary draft of the sentencing guidelines promulgated by this Commission, and I appreciate very much the opportunity to come and share my views.

As you mentioned, the federal defenders, although all independently appointed by our respective Circuit Courts of Appeals, have cooperated, because we feel that the sentencing guidelines is a very important matter, and we can devote somewhat more time than the private CJA panel attorneys, who may take one or two cases a year.

Nevertheless, our goals dictate that we share and cooperate in sharing our views.

I wanted to today share some of my own thoughts, but in concert with the papers which the federal defenders are in the process of preparing for submission.

I want to address two very narrow specific issues, and then to the extent I have time talk about several broader concerns that I have.

First, I want specifically to address the area of foreign convictions being counted in criminal histories.

The present guidelines propose that sentencings resulting from foreign convictions are counted if they are criminal for conduct committed in the United States.

I have represented several persons in New Mexico

state prisons who have elected to return to Mexico, and one case Canada, under the prisoner transfer treaties that are in effect in the United States and every other country, whereby persons convicted in one country but citizens of another country, can elect to return and serve out the sentences in their home country.

In June of this year was the first time I had an opportunity to go overseas, and represent a person who was imprisoned elsewhere, and I was sent to Peru to represent an American who was in the Nocho Prison, which is reputed to be one of the worst of the prisons in the world.

Other federal defenders have been sent similarly to Turkey, Mexico, Bolivia and Canada, and other countries, to represent Americans incarcerated there who wish to return to the United States.

That was a very interesting experience for me to go to Peru. I saw firsthand and I was in a Peruvian prison on two occasions during the week that I was there.

It is very difficult to convey to Americans, particularly to Americans who are not involved with the criminal justice system, the reality of what is a real act of justice and due process, as we perceive it in our country's criminal justice system.

One night when I was in Lima, I took out to dinner a Peruvian prosecutor and criminal defense lawyers. They were

very interested in how the United States criminal justice system functions, and asked me a lot of questions about how the criminal justice systems operate, and I explained our system of jury trials, burden of proof, presumption of innocence, and the requirement of the unanimous jury verdict to either acquit or convict.

I told them as an example about a recent trial in my office where one of my assistants represented a defendant who was charged with murder, and the jury had acquitted the individual.

The prosecutor, the Peruvian prosecutor, with whom I was having dinner, was really shocked to hear this story. The prosecutor was very taken aback with my explanation of the jury system and the need for unanimity. When I told her that the jury had acquitted, she said, "You mean the jury does not have to do what the prosecutor tells them to do?"

She could not conceive of a possibility of an acquittal in the Peruvian courts, and was really genuinely surprised to hear of a possibility.

United States Consul officials with whom I worked in connection with this prison transfer also told me that once a person is charged with a crime in the Peruvian system, there is no possibility other than finding of guilty. The only question is how long it will take.

I want to bring to the Commission's attention the

case from the distinguished Second Circuit Court of Appeals, which is at 621 F.2d 1179, a 1980 case, from the Second Circuit, and in that case four Americans had been tortured and wrongly convicted in Mexico.

They transferred back to the United States under the U.S.-Mexico prison transfer treaty to serve out their sentences.

One of the provisions, by the way, under the statute implementing the prisoner transfer treaties is that a foreign crime be one that is also a crime in the United States, and I cite the citation in my paper.

That is the sole condition, of course, that this Commission would apply.

The four individuals were caught, were convicted of narcotics offenses, so it does meet that requirement of dual formality.

The Second Circuit describes in great detail in that opinion, those convictions under Mexican law are, in the words of the Second Circuit, manifested a shocking insensitivity to the dignity as human beings and were obtained under a criminal process devoid of even a scintilla of rudimentary fairness and decencies.

These U. S. citizens brought a habeas corpus action to set aside the convictions. The Second Circuit accepted as true the very detailed descriptions of electrical shock to

genitals, hanging by handcuffs from the ceiling, extortions and tortures, set out in that opinion.

However, the Court held that in the interest of enabling future Americans detained in what the Court described as brutal, outrageous and horrible conditions of Mexican prisons, in the interest of allowing those future Americans to return home, under the treaty, the Court decided that it could not overturn these particular petitioners' convictions, notwithstanding that they were improperly obtained.

In that Resoto opinion the Court gave examples of other countries' tortures and brutalities, and the opinion also refers to the congressional hearings on the situations of Americans in Mexican prisons. I cite in the paper which I have submitted the citation for the hearings.

The movies, "Midnight Express," "Missing," and "Kiss of the Spiderwoman," are fictional, but they do not portray fiction.

Where this country's panoply of rights, including rights of due process, cross-examination, presumption of innocence, burden of proof beyond a reasonable doubt for the prosecution and the right to effective assistance of counsel, and to appointed counsel do not exist, then it seems to me foreign convictions should not be counted.

Likewise, where police practice torture, coerced

confessions and the like, they should not be counted.

Because it would be difficult for the courts and probation officers and difficult for foreign policy relations, too, to analyze whether, for example, a conviction in Britain or Canada may be comparable to our own in terms of the defendant, whereas a conviction in Turkey, Mexico, Peru, Bolivia or somewhere else may not be so comparable, it seems to me the better rules for this Commission to adopt is foreign convictions ought not to be counted at all.

One indication of congressional intent in that regard is in the prisoner transfer treaty portion of the statute, which is at 18 USC 4112. Congress specifically provided that persons who transfer back to the United States, pursuant to this prisoner transfer treaty, are not saddled with disability of a person who would have had such a conviction in our country, and they do not meet the political or or civil rights, and so I would ask this Commission to consider not counting foreign convictions for the reasons I discussed.

The second specific area that I would like to talk about are Indian tribal convictions.

About twenty percent of the cases handled by my office in New Mexico arise on Indian reservation land. We have several hundred such cases over the year.

In New Mexico we have nineteen Indian pueblos, Mescalera, Apache and Santa Clara reservations, and a very

amount of the Navajo, although it is a minority, of the reservation.

In the written submission I provided last week, I stated at page 9 that under 25 U. S. Code 1302, the Indian tribal courts can't impose a sentence more than six months imprisonment and five hundred dollars fine.

However, since I prepared that paper, on October 27, the President signed the Antidrug Abuse Act of 1986, which in one sentence changes that, so as Donna Chavez testified now the tribes will be able to impose up to one year imprisonment and five thousand dollars fine, but still retaining jurisdiction, so I want to specifically make that correction to my paper so it will be up to date.

Our proposal, the proposal on use of prior convictions, which the federal defenders have submitted, proposes that misdemeanor convictions may not be counted at all for reasons set forth in that paper, and, of course, then tribal convictions would not be counted.

But as long as misdemeanors are being counted, I want to address specific problems of tribal convictions.

It is not quite clear to me from the guidelines, but it says they were counted the same as other convictions, so I assume, for example, disorderly conduct would only count if thirty or more days in jail were given, whereas public intoxication wouldn't count at all.

But under 25 U.S. Code 1302, in the Civil Rights Act, there is no right to appointed counsel in tribal courts.

The great majority of Indian defendants, both those appearing in tribal courts and federal courts, are indigent and cannot afford counsel. Some tribal courts have different rules about allowing the lawyers to participate, and exclude lawyers who are not part of the tribe, on the theory they jeopardize their traditional control over tribal members.

I would say that counsel in tribal courts is rare.

The Navajo have paralegals, who they call advocates, most simply high school graduates who have some additional training, but for the most part people are represented by advocates, whereas in the pueblo courts and Apache courts it is extremely seldom someone is represented by counsel at all.

As you heard earlier, most of the tribal judges are not lawyers.

The U. S. Civil Rights Commission has recently been investigating allegations and abuses in tribal courts. There is indication that abuses do occur, and even where they operate with the utmost good faith, the quality varies widely from one tribe to another. They are poorly funded and have limited access to training.

I recall one client of mine who was arrested, brought before a tribal judge, tried and convicted and

sentenced, all in less than a half an hour.

In that case, I later made an agreement with the tribal judge that the sentence would be suspended, if my client would leave the reservation and not return for a year.

There is no requirement that the offense be an offense in the non-Indian legal world. For example, in the Jicarilla two offenses punishable by jail and fine are wearing curlers in the courtroom and wearing pouches.

The problem I have is translating those prior convictions into the predicate for enhancing a sentence in the federal system.

There is a lack of due process in many tribal courts, a lack of counsel in most tribal court situations, and a lack of appointed counsel in every tribal court situation that I am aware of.

I urge the Commission not to count any tribal court convictions, and I would be glad to answer questions about that.

My position is that only counseled convictions should be counted in any event, including convictions in federal and state courts.

The question that the Commissioner asked in one situation, what if there had been a murder, I don't think how serious the allegation originally raised, federal or state court, or whatever is controlling, and there is a need

for counsel, and there is a need for an opportunity to show that perhaps there is self-defense involved or the opportunity for a person to defend themselves, and in order to utilize a prior conviction to actually enhance the sentence, which is what is happening here, rather than limiting it, one factor as it is now is that it should be limited to counseled convictions.

I would like to address some specific areas, and I will be real brief and conclusory and respond to questions, because some of my comments repeat what other people have said.

I believe very much in the tenets of our criminal justice system, presumption of innocence, burden of proof upon the government, proof beyond a reasonable doubt as a standard to deprive someone of their freedom, a right to see and hear the evidence against one, to confront and cross-examine witnesses, compulsory process for writs, and the right to jury trial,and to the extent that some of those rights are derogated by this numerical system and kind of slide into not having an opportunity for the government to prove another crime beyond a reasonable doubt, but rather enhancement of some other sentence, I would urge the Commission not to do that.

For example, to the extent that the defendant has the burden of proving unreported income as in fact legitimate income, that reversal of the burden of proof seems to me

improper.

There should be a due process hearing, to allow presentation of evidence, because here we are facing someone spending an extra year in jail based on some other allegation, which to me is just as serious as being charged with that in a separate crime, where they would have these rights.

The guidelines are terribly complex. There will be lots of people who will have different views on what they mean. It's going to lead to a lot of litigation.

It seems to me it will require much more funding for probation offices to do all this work.

My office frequently offers seminars for private attorneys who are willing to undertake Criminal Justice Act appointments. Some of those are people who may only take a case or two in federal court a year, and to ask them to master the system is really I think too much to ask.

I have read them and I am not sure that I fully understand them.

The guidelines call for sentences that are far too long. In every instance that I thought of a case that I have or have had recently and looked at the guidelines, not only were the guidelines far longer than the sentences imposed, but in many instances far longer than the statutes under which the person was convicted allowed.

The Commission is, of course, well aware what we have

now is symbolic sentencing, fifteen years in the prison, and that's what the public reads in the newspapers, and yet that's not nearly what the person serves.

So, to the extent that we take away good time, take away parole, take away opportunities for early release, we need to think about what will happen and what's going to happen is there is going to be increasing logarithmically the number of person years served.

Even now the prisons are overcrowded. Just recently they were sent from La Tuna in El Paso to the county jail facilities in New Mexico.

At the same time, Bernalillo County Detention Center, which is the county where Albuquerque is located, and is the biggest county in New Mexico, increased their rate for federal prisoners from sixty-two dollars fifty cents a day to ninety dollars a day, so the Marshals have had to move the prisoners who were pretrial in our jail other places.

The local jails may be a short term solution, but they are certainly not a long term solution in terms of housing federal prisoners.

One exception always is murder cases. We have a disproportionately large number of murder cases in New Mexico for our size, our share of cases in the federal system, because of the reservation jurisdiction.

Right now, in my office, we have four, in fact when

I left yesterday afternoon a fifth murder case in my office.

Two of those are cases where brothers are charged with -- two men are charged with killing their brothers. One is a battered wife who is charged with killing her husband, and one is a case of self-defense involving two young men who were slightly acquainted and got into an altercation. The one that came in yesterday is a juvenile case, and I really don't know what that is about yet.

But under these new procedures, the person will end up doing a minimum of a thirty year sentence, which with good time means twenty-five years actually being incarcerated.

That is far longer than people are looking at now. Now, someone with a life sentence is eligible for parole after ten years, and if there are not aggravating circumstances involved, such as a felony murder, or something of that nature, ten years is a reasonable expectation of parole.

So we are looking at dramatically increased sentences. Of course, as I mentioned, it's going to use up a lot more resources. I foresee a lot more trials, much more litigation of the meaning of sentences, the meaning of the guidelines as applied to the sentences imposed, much more lengthy hearings.

I am concerned about the lack of procedural due process in the sentencing process, that the government should

carry the burden and any new burden is beyond a reasonable doubt.

For example, one concern I have is the guideline that was perjury or obstruction of justice, that the sentence should be increased by a certain numerical factor, when those are things the government can prosecute for, and if the government were to prosecute those offenses, then there is burden of proof and the standard of proof that obtains in your normal criminal case.

So what would happen here is that the burden of proof slips down and the person ends up being incarcerated for the very same thing that he might be if he got convicted.

I would urge this Commission not to slip below the level of rights we have in a normal criminal case.

Also I don't see how the Commission can enforce the double jeopardy prohibition so someone could not subsequently be prosecuted for perjury. That would certainly change when jeopardy commences under the current state of the law.

CHAIRMAN WILKINS: You are probably right. You couldn't say you couldn't prosecute. But you could say the sum would be zero if you convicted for perjury.

MS. INDRITZ: And it would have to come back and be reduced.

CHAIRMAN WILKINS: Well, if you couldn't -- this

conviction percentage is zero, you see, so nobody would prosecute for it.

MS. INDRITZ: Well, then it counts as a new conviction in certain other contexts, let's say, habitual offender, and so on.

I feel that judges are entrusted with discretion in many areas, civil rulings and so forth, and it seems to me that there should be more opportunity for discretion for judges in the criminal sentencing area.

There are so many factors that are really hard, and I would say impossible to quantify. The age of the defendant. Sometimes it cuts one way, sometimes it cuts another way. The health of the defendant. The balance of the offense.

The ordinary federal crime has a five year statute of limitations. I often find myself representing someone who is charged with something which occurred three years ago.

The availability of resources in the community, and influence of family members. Availability of foster care for children.

The very last sentencing I happened to have in federal court was last week, and it was a young man who was charged with assaulting his brother. I personally interviewed the brother, who was allegedly the victim in the case, and

he told me, that is the brother, that he had started the fight, and tried to get my client to fight, and my client refused to fight him.

The brother insisted, and said, "I want you to come out." My client said, "No, I don't want to fight," and the brother started hitting, and my client started defending himself, and at that point it escalated.

The brother also told the prosecution he didn't want to allow law enforcement. There was a very strong case of self-defense. On the other hand, some questions of whether my client had over-reacted.

Under these guidelines, my client would be looking at ninety points under the guidelines, ninety sanction points, and yet the judge was able to take into account the self-defense aspect, the fact that my client was enrolled in a vocational school for Indians, which were living in the dormitory setting and receiving counseling, and the judge felt that the appropriate sentence was probation.

CHAIRMAN WILKINS: This is a terribly delicate area. We have talked about it all the time. You tell us what the guidelines should say to take care of that situation.

If you can do that today, it's worth all our trip out here and back twenty times over.

MS. INDRITZ: Well, let me tell you how the U. S. Attorney plugged into that. He knew he had a pretty weak

case because of the self-defense. My client was originally charged with a 20 year offense. We ended up entering into a plea agreement of simple assault with a maximum penalty.

The sentencing judge was looking at either three months in prison, or letting my client continue on the vocational schooling he was at and doing pretty well,and I think wisely the judge felt putting him on three years probation, three years of supervision, with three months of prison still hanging over his head --

CHAIRMAN WILKINS: I don't argue with the way it was worked out. I am asking you to tell us what we can say in these guidelines that will allow for that same conclusion, allow for substantial justice to be done.

Brothers fighting brothers. We can't write guidelines for brothers fighting brothers. But it does happen.

MS. INDRITZ: Happens a lot.

CHAIRMAN WILKINS: Friends drinking and one stands up to the other.

MS. INDRITZ: We see a lot of that.

CHAIRMAN WILKINS: Tell us what we can say.

MS. INDRITZ: All right. One thing, it seems to me what the statute calls for is a preliminary determination by the trial judge whether probation is appropriate or not, and only if the judge determines that probation is not

appropriate does he then turn to the guidelines, however they end up being structured, and I think that's one of the deficiencies in the guidelines, that there is not a separate set of suggested characteristics for the judge to take into account in deciding whether probation or not probation is the appropriate track to look at, and then when the judge gets on that track of probation or track of imprisonment, then he goes and looks at a straight set of guidelines how long the imprisonment should be for, and that brings up the question you asked before.

COMMISSIONER BREYER: Maybe it isn't weird.

MS. INDRITZ: No, I don't think it's weird.

COMMISSIONER BREYER: You said the judge decided not to send him to prison at all, in your case. If he decided not to put him on probation, it is twenty years.

MS. INDRITZ: Just an example, just along those lines we were talking about, but yes, I think there are some instances where that's the decision the judge has to make.

COMMISSIONER BREYER: But just having him depart -- I mean normally you go to twenty years in this kind of thing. After all, we can't see everything. Brother fighting brother. Depart. That's what departures are for, where we can't see everything in the world.

MS. INDRITZ: Well, as one of the previous witnesses said, I think the judges make a very good faith,

conscientious effort to follow the law, whether they agree with it or not, to the extent this is what they perceive.

COMMISSIONER BREYER: We could write it as a departure policy, some unusual situation, the victim provoked to a significant degree, or euthanasia or something, the classical reason for giving a lighter penalty.

I mean we can't write our guidelines with our unusual cases in mind, but if you find an unusual case, judge, you are not supposed to follow the guidelines, that's another case for departure.

MS. INDRITZ: In the national case, that may be a reason.

COMMISSIONER BREYER: You are saying in the regional --

MS. INDRITZ: Our cases of violence that we handle almost all come off of the Indian reservations. Sometimes there is a case on the military base, or something like that, but, other than perhaps a very aggressive bank robbery, mostly we do not have cases of violence except on the Indian reservations.

I can tell you, in ten years, only once can I remember a question of identity. Always people who know each other, primarily family members, and primarily where alcohol is involved, not only on the part of the defendant, but on the part of most if not all the victims and witnesses.

CHAIRMAN WILKINS: I agree with you, but we can't say if an Indian kills an Indian, it's not as serious as if it's a non-Indian.

I don't think that's what the courts are saying, it's not as serious if it had occurred --

MS. INDRITZ: Well, for example, Donna Chavez was talking about cultural restitution. I see that sometimes where the tribe will, sometimes through the tribal courts, or sometimes not, have arranged sort of mediated settlememt between the families, and the victim's family says, "We don't want this guy to go to prison," and the family members -- I mean I had a case last fall where my client was charged with killing his uncle, and the family all got together and said, "You know, we lost one person. It was partly his fault, and we don't want this kid to go to jail."

So, I think the two answers to the question are, one, a consideration of probation versus incarceration as a threshold issue separate from these guidelines, and, secondly, more opportunity for discretion on the part of the trial judges, who really are the only ones who can take into account the particular facts which may seem unusual or may not be so unusual.

COMMISSIONER BREYER: Well, you have have something unusual to the country as a whole, but nonetheless of the

particular community it may be premeditated crimes are less common and provoked more common, even though it's unusual in that community, in which case we don't have to write a guideline I wouldn't think that governs all kinds of family relationships which may be common in some parts of the world, and not in others.

MS. INDRITZ: I think that's the reason there should be more room for discretion.

COMMISSIONER BREYER: Depart.

CHAIRMAN WILKINS: Allow for departure, brother against brother, friend against friend, acquaintance against aquaintance, drinking buddies against drinking buddies. I mean it's a whole group of cases you are talking about. But they have to know, "Judge, this is not something we wrote guidelines for." It has to be just more than that.

COMMISSIONER BREYER: There are various forms of provocation. Is there some element of provocation involved?

MS. INDRITZ: Oftentimes, and oftentimes, there is alcohol involved.

COMMISSIONER BREYER: Perhaps if it's alcohol involved, it's a diminished state of mind. That is the intent is less.

MS. INDRITZ: I agree with that, yes.

COMMISSIONER BREYER: Maybe we could put it in

those terms.

MS. INDRITZ: But that's only one of the factors which I think are not --

COMMISSIONER BREYER: Well, the thing to do is write a departure policy, and you could look at that and try to figure out what other things ought to be in there.

That's possible. I mean you could have an escape clause, you know, and say, "We haven't thought of everything," and time will -- time and monitoring and appellate court decisions and just looking and seeing what happens that will identify it for us.

MS. INDRITZ: One thing I want to say before I turn it to my colleague is that there should be more attention paid to non-incarceration.

There are a lot of community resources that oftentimes can provide much more supervision than even the halfway house. For example, this client of mine who is at a vocational school, but there are many other resources throughout the country and thinking as one of the previous witnesses said, federal resources are scarce and looking to non-violent offenders being placed in community resource centers.

But I think sometimes violent crimes, those people are also good candidates, and are not likely to repeat those offenses.

CHAIRMAN WILKINS: Thank you very much. Mr. Katz.

MR. MICHAEL KATZ: Mr. Chairman and Members of the Commission, I know the hour is late. You have heard other speakers. Mr. Miller, Judge Kane and myself, Bill Graves, all seem to have the same sort of thoughts.

Let me first tell you I was a prosecutor for two years in South Dakota, taught for two years at the University of Colorado, several years as Assistant Public Defender and I have been Federal Public Defender for two years.

I have entered a lot of guilty pleas, and there is a little door to your left which is the way most of my clients exit from this courtroom. Takes them up to the Marshal's lock-up.

I have to say, though, despite the fact many of my clients have walked out in custody, that I by and large have no complaints about the way the sentencing system is operated in the Federal District Court in Colorado.

I think that the interests of the victim, the defendant, the circumstances in each offense, has been taken into account.

I don't feel my clients have been punished for going to trial. I feel by and large the judges have balanced all the factors that go into determining sentence in each case, have wrestled with those factors, and reached fair and just sentences, and I think if we were to chart those

sentences by the type of case, crimes of violence versus non-violent, I don't know that we would find that we would see much consistency.

Most cases are unusual cases. If I can get back to a point made by Judge Baldock, I can entertain to the extent you are content to be entertained, with some unusual cases.

Skyjacking case, forty-eight year old school teacher, Teacher of the Year in Adams County, became increasingly alcoholic, married man, family and home, who one night was in a bar in a little town called Louisville, drinking with his friends, and on a dare said he could go down to Stapleton Airport and walk on a plane and take it to Ireland, and take some prisoner. It was that confused.

He did that. He went down. He had a knife. Went right through, onto the plane, nobody detected it. Walked into the cockpit and said, "Take this plane to Ireland."

He was convicted. Had a trial. It was an insanity defense, involving alcohol and intoxication. It was a tragic case.

He was convicted, and Judge Matsch, who sentenced him in that case, had only one of two options, either probation or twenty years minimum sentence for skyjacking. He didn't want to do that, but he had to. So he used 4205(b)(2), indeterminate sentence, and wrote some very strong letters

to the U. S. Parole Commission about believing this man should be released.

COMMISSIONER BREYER: You have just given exactly what was bothering me about interpreting the statute in such a way, we are supposed to say probation or twenty years, nothing in between.

MR. KATZ: That's right, that is a problem.

The man was released after three years. As far as I know, it's been four or five years, he has been successful on parole. He is being supervised.

That's an unusual case. But it's not uncommon.

I mean that I think that human nature is perhaps subject to those kinds of expression. Cases don't come to us neatly wrapped and packaged. Bank robbers aren't all the same. Homicide cases aren't all the same.

I represented another -- I will give you one other example. I represented a young Navajo Indian on a kidnapping charge.

He had grown up and never been off the reservation. Age of eighteen, he enlisted in the U. S. Army, and came to Colorado Springs, Fort Carson. He was, to say the least, in cultural shock. Didn't have the language skills. Abused, ridiculed, abused psychologically by the other young men in his troop.

One night, after drinking, he decided to go back

to Shiprock, Arizona. Intoxicated, he went out and went to a parked car, where there was another military man with a child sleeping in the back seat, and put the knife to the man's neck and said, "Drive me to Ms. Indritz' hometown of Albuquerque," which he did, and my client caught a Greyhound bus back to the reservation, and he was convicted on kidnapping and placed on probation, and he should have been on the facts of that case.

He was also placed into a community treatment center and he successfully completed his probation.

I guess the comment I have to the Commission is who need to go to prison? What's the purpose of prison?

In my experience, very few need to go to prison. The one who needs to go needs to go for a long period of time to protect the public. The vast majority don't need it.

But these guidelines are going to put those people in prison.

My philosophy may be obviously not in the mainstream of what the American people want, or what perhaps wiser people who have had a chance to study this problem want, but that's my impression having been on both sides of the system for thirteen years.

Secondly, you can't use a mechanical formula for determining how much weight to be given each of these aggravating and mitigating factors.

My solution would be broaden the range of possible punishments. Ms. Indritz indicated make probation a decision that comes first. If not probation, a jail sentence.

Broaden the range as much as possible and don't build in all the aggravating and mitigating factors. Allow the judges to use those factors to go perhaps on occasion to extremes. In either direction. I will take my chances with a three hundred year sentence that Judge Kane imposed on somebody. It was a justified sentence. I know that case.

I will also take my chances of probation on the skyjacking case.

Finally, don't put us in a position where the integrity of the system is compromised. If you force prosecuting attorneys and defense lawyers to play games with these equations, we will find a way to do it. I can assure you of that. Or we will try a lot more cases. Maybe a combination of both.

But we will try to find a way to try to put blinders on the judge or probation office. We will find a way to distort what happened. Find some offense that will fit in the result the prosecutor and defense lawyer desire will be reached.

I think you do disservice to the system. As it is now, the judge can track it, and by the same token there is due process.

And I am concerned that there is a difference, between saying, as Judge MacKinnon said, doesn't the judge have a right to consider everything?

Yes, he does, but if you require a judge to make a determination, a specific determination, on, for example, percentage, and to then assess a point value, or to weight that, it's extremely -- it's not only difficult, but I think it leads to some artificial results.

I would rather have the judge say, and judges have said to my clients, "I have watched you during that trial. I didn't see remorse in your eyes. I watched you when the victim's mother testified. I didn't see any concern, even concern that the court reporter perhaps was showing or the clerk of the court was showing for the plight of that person."

I have no trouble with that being considered, but you can't -- you can't make it so concrete. It can't be that concrete and still work.

I have other specific comments, but I think they are addressed in my paper.

CHAIRMAN WILKINS: Well, thank you very much.

Any questions to my right?

Anyone have any questions?

COMMISSIONER MAC KINNON: Ms. Indritz, I read your testimony. I thought it was very good.

MS. INDRITZ: Thank you.

COMMISSIONER MAC KINNON: And on your actual testimony and your statement, if we were to follow your recommendation about foreign convictions, there isn't any country in the world that would comply with your requirements.

Absolutely. English, Scottish courts, convictions, we couldn't consider them. They don't apply reasonable doubt in Great Britain. They have a majority verdict in Scotland. No country in the world could comply with your requirements.

MS. INDRITZ: Your Honor, I think when we are talking about taking someone's freedom for a period of time, we need to apply the standards in this country, and I don't know whether there are countries that meet our standards or not, but I think the diplomatic problem of considering some countries and not others is one to take into account, and it is my recommendation that no foreign convictions be considered as part of the past criminal conviction scoring methodology.

COMMISSIONER MAC KINNON: Well, in some respects, people consider the English system as superior to ours.

MS. INDRITZ: Perhaps it is. I dont' know. I know that Congress in passing 18 U.S.C., Section 4112, decided that even someone who transfers back to this country under the prisoner transfer treaty which we now have with England are, like the people who transfer back here from Mexico,

Turkey, Thailand or any other country, not considered to have a felony in terms of civil rights.

There is a distinction between, I think, in light of that statute that Congress has passed, that no foreign conviction should be counted. That's the position I would ask the Commission to undertake, Your Honor.

COMMISSIONER MAC KINNON: You appreciate the difficulty of that, and, certainly, we will take -- take Hauptmann, the Lindbergh kidnapper. He was convicted in Germany of climbing up a ladder and getting into a person's house and stealing something. He climbed up a ladder in New Jersey, and went into a window, and stole the Lindbergh baby.

Don't you think that was a fair matter to be considered?

MS. INDRITZ: We have on the one hand what Mike was talking about, taking into account, all the things judges are now permitted to take into account.

We have, on the other hand, this Commission's proposing to cast in numerical formulae prior convictions, and I think in regard to counting that as a prior conviction, no foreign convictions should be counted.

COMMISSIONER MAC KINNON: They don't have to be counted, but they can be considered.

MS. INDRITZ: But there is a specific formula here where you add up convictions. I am saying for those

purposes that no foreign conviction should be included in that tally. That's the position I'm taking.

COMMISSIONER MAC KINNON: I will say --

MS. INDRITZ: I think also, Your Honor, if I might respond to that, I think this whole system imposes on all the court personnel, the judges, defense lawyers, the probation officers probably most, and to add to that the burden of sort of making an evaluation on violation of the criminal justice system any criteria is just too much to ask.

COMMISSIONER MAC KINNON: You were talking about an instance where the sentence was longer than the maximum provided. That can't be.

MS. INDRITZ: I undertand that can't be, but that's just an illustration about how long these guidelines are.

COMMISSIONER MAC KINNON: That's how long?

MS. INDRITZ: In terms of looking up the points. I added up the points and turned to page 140. In a number of instances --

CHAIRMAN WILKINS: We would like to see those. Of course, the statute maximums prevail, but I would be interested to see how they exceed the numbers. All the factors have been taken in, except perhaps drugs. There the statute said you must sentence.

MS. INDRITZ: Well, for example, vehicular homicide, three years imprisonment. If it involves alcohol,

which every involuntary manslaughter that we have had in the office, or almost all of them do, you could right away get up to sixty-four points. Adding up the involuntary manslaughter, plus alcohol, and it translates into more than three years.

CHAIRMAN WILKINS: Did you take any of the other factors into account?

MS. INDRITZ: Not even adding if the guy has any prior record or anything. But right before, off the bat, fifty-four points is somewhere between forty and fifty -- fifty-six points is forty-four to fifty-four months.

So, that's one example that I can think of right off the bat that's over the statutory limit, and I just -- not that I think a person would do more than the statute, but illustrative of how high they are.

COMMISSIONER MAC KINNON: Did I understand you to say that you didn't think perjury committed during the trial should be considered?

MS. INDRITZ: I am saying that people -- in my view --

COMMISSIONER MAC KINNON: You want them charged separately?

MS. INDRITZ: I think that people should be sentenced for what they got convicted for, and if they got convicted for Crime A, they should be sentenced for A, not A, B and C.

I see, for example, times where the prosecutor brings an indictment that has multiple counts, and I say to my client in my counseling session with them, "You know, we both agree that they can surely convict you of Count I, and we think we have a good chance on Counts II, III and IV, but they are offering a plea bargain, plead to Count I."

And my client says, "I'm not guilty of Counts II, III and IV." I say, "Yes, the very best result we could get on trial is a conviction on Count I, and nothing on the others, so it's a reasonable plea offer."

An example, a defendant of mine was charged with transporting illegal aliens. Evidence quite strong. Another count, he assaulted an immigration officer. In my view, the immigration officer assaulted him. And he wanted to go to trial, to prove he didn't assault the immigration officer, but we were offered a plea.

I said, "If we go to trial, that's where we are going to be, anyway," so he pleads to that, and I have a real problem with the judge then penalizing my client for assaulting this immigration officer, and maybe I should have gone to trial so that he could have been acquitted of that count, and therefore it couldn't be taken into account under these guidelines. If these guidelines were adopted, in this case I would have told him to go to trial, just for that reason.

COMMISSIONER MAC KINNON: You heard me read all the

cases where counsel dismissed and everything else, and they can still be considered, and the courts upheld that, but I believe you come down to perjury, and perjury committed at trial can be considered by the sentencing judge, and the Supreme Court has said it is an exercise of judicial discretion, by evaluating the defendant's personality and his prospects for rehabilitation. That's where that stands today.

Now, what you are advocating is something that more or less the court has passed on.

So far as Mr. Katz is concerned, I was wondering whether that instance you gave whether the man got credit for a guilty plea?

MR. KATZ: Which instance?

COMMISSIONER MAC KINNON: Well,the first one. You started off --

MR. KATZ: The skyjack?

COMMISSIONER MAC KINNON: Yes.

MR. KATZ: Well, what I was referring to, under the present sentencing he had to receive a sentence of twenty years. He did receive a sentence of twenty years.

COMMISSIONER MAC KINNON: In your practice, generally do you find they do get credit for guilty pleas?

MR. KATZ: I think to some extent. I think that the Court -- there are certainly certain cases where the Court knows that there is an issue to be tried, and the

defendant is not punished for trying that case.

My experience has been that I can't see any difference between the sentence the defendant received in that case as opposed to other defendants similarly situated on pleading guilty.

I think on occasion, on the other hand, a defendant goes to trial and shows no remorse and no issue to litigate, I am certain that sentence would be higher.

COMMISSIONER MAC KINNON: You understand your proposals to eliminate aggravating and mitigating circumstances, that would result in giving the judge complete discretion, which would in effect repeal the statute. That's the way it operates.

MR. KATZ: I understand. I said broaden the guidelines as much as possible and don't build in the mitigating and aggravating factors.

COMMISSIONER MAC KINNON: Well, we wouldn't have to have any guidelines.

MR. KATZ: I have a real problem with this law and these guidelines.

MS. INDRITZ: Could I respond to your last comment?

COMMISSIONER MAC KINNON: Sure.

MS. INDRITZ: First of all, I would say I am not advocating perjury, but in most cases if the jury convicts,

it is because the jury didn't believe the defendant, so that circumstance then is not necessarily perjury.

COMMISSIONER MAC KINNON: It carries more judgmental decision than just something outside of the court proceeding. You feel that the jury has in some way passed upon it?

MS. INDRITZ: Well --

COMMISSIONER MAC KINNON: Is part --

MS. INDRITZ: Well, not on the question of perjury. I mean I think perjury as a criminal offense indictable on its own is far more than simply the jury not accepting the defendant's version of it in the context of the testimony of all the witnesses in the case, and there is some possibility that this guideline about perjury may mean that in any case where the defendant testifies, and the jury obviously doesn't buy his side of the story, because they convicted, in any case the defendant testifies, there may possibly be that kind of enhancement, and I don't think that's really what the Commission contemplated in putting that in there, but there is certainly that possible interpretation and possibly that's something that should be cleared up.

CHAIRMAN WILKINS: Thank you very much.

I hope that you will write to us with more ideas. This idea of complexity, you tell us how to take some of the complexity out. You may come up with some real good ideas,

something concrete. In this section of harm against the property of persons, do this. Sometimes in the late hours of the evening, you may come up with a brainstorm.

I know you have put a lot of thought and study into it. It's obvious from your testimony. Please don't forget about it in the next few months.

COMMISSIONER MAC KINNON: What does U. S. versus Tucker hold? You mentioned that.

MS. INDRITZ: The Tucker case is included in the paper which the federal defenders submitted, and rather than going into detail, it holds uncounseled convictions cannot be used to enhance a sentence, and also the judge can take many factors into account, but not an uncounseled conviction.

CHAIRMAN WILKINS: Thank you again.

MS. INDRITZ: Thank you.

CHAIRMAN WILKINS: In keeping with our policy, anyone who wishes to come forward and offer any testimony and make any comments is free to do so at this time.

Anybody like to have any comments? Have any comments to make?

Seeing no volunteers, we will stand in recess.

Thank you very much.

(Whereupon, at 5:15 p.m., the public hearing was closed.)

REPORTER'S CERTIFICATE

I, Donna G. Spencer, Certified Shorthand Reporter and Registered Professional Reporter, do hereby certify that I was present at and reported in machine shorthand the proceedings in the foregoing Public Hearing of the United States Sentencing Commission, held in Denver, Colorado, on the 5th day of November, 1986.

Further that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing verbatim transcript of such public hearing.

Further that said verbatim transcript is a full and accurate record of said public hearing.

Dated at Denver, Colorado, this 12th day of November, 1986.

Donna G. Spencer

Donna G. Spencer
Certified Shorthand Reporter