
UNITED STATES SENTENCING COMMISSION



TRANSCRIPT

PUBLIC HEARING

AUGUST 12, 1996



U.S. Sentencing Commission

One Columbus Circle, NE
Washington, DC 20002-8002

NEWS RELEASE

For Immediate Release
Monday, July 22, 1996

Contact: Michael Courlander
Public Information Specialist
(202) 273-4590

FEDERAL GUIDELINE SIMPLIFICATION HEARING TO BE HELD AUGUST 12, 1996, IN DENVER

WASHINGTON, D.C. (July 22, 1996) — The United States Sentencing Commission will convene a public hearing to hear suggestions for simplifying the federal sentencing guidelines August 12, 1996, at the Byron White Federal Courthouse, 1823 Stout Street, Denver, Colorado. The hearing is scheduled to begin at 9:00 a.m.

"Perhaps the greatest criticism of the guidelines I have heard — apart from their severity in certain drug cases, a result driven in large part by mandatory minimum statutes — is their complexity and rigidity," said Judge Richard P. Conaboy, Commission Chairman. "The Commission plans to examine these criticisms through its simplification project and search for workable solutions."

In 1995, the Commission initiated a multi-year project to comprehensively assess and refine its *Guidelines Manual*. During the first phase of this review, Commission staff examined data on more than 250,000 cases sentenced under the guidelines, numerous appellate decisions, academic literature, and extensive public comment. Commission staff prepared briefing papers on major guideline topics to provide a foundation for the project and to identify possible options for refinement.

While the hearing will be open to comment on all simplification issues, the Commission anticipates focusing its attention on relevant conduct/acquitted conduct, departures/offender characteristics, and drug sentencing/role in the offense. Anyone wishing to be considered as a witness should call the Commission at (202) 273-4590 no later than July 26, 1996. In addition to oral testimony at the hearing, the Commission is accepting written public comment on these issues.

Witnesses slated to testify include U.S. District Court Judges Lewis T. Babcock and Wiley Y. Daniel, Chief Probation Officer Richard F. Miklic and Federal Defender Michael Katz, all from the District of Colorado.

The U.S. Sentencing Commission, an independent agency in the Judicial Branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines, which went into effect November 1, 1987, structure the courts' sentencing discretion to ensure that similar offenders who commit similar offenses receive a similar sentence. The Commission has ongoing responsibility to monitor and amend the guidelines. ■

UNITED STATES SENTENCING COMMISSION

Regional Public Hearing - August 12, 1996

Byron White Federal Courthouse, Courtroom 1, 9:00 a.m. to 1:00 p.m.
1823 Stout Street; Denver, Colorado

FIRST PANEL OF WITNESSES - OVERVIEW

This first panel of witnesses was chosen to give the different perspectives of judges, probation officers, prosecutors, and defense attorneys (defenders and CJA panel) about how guideline sentencing is working in the District of Colorado and, generally, how the guidelines might be simplified.

Each of these witnesses will deliver prepared remarks of up to **ten minutes** in length followed by questions from the Commission. They may submit additional written comments.

Judge Lewis T. Babcock

United States District Court for the District of Colorado
U.S. Courthouse C-550
1929 Stout Street
Denver, CO 80294
(303) 844-2527

Judge Babcock earned his B.A. at the University of Denver in 1965 and graduated from University of Denver Law School in 1968. He then earned his L.L.M. from the University of Virginia in 1968. He entered private legal practice with Mitchell & Babcock from 1968 to 1976. He served as City Attorney for Las Animas, CO from 1969 to 1974; City Attorney for Rocky Ford, CO from 1970 to 1976; and Assistant District Attorney for the 16th Judicial Circuit from 1973 to 1976. Judge Babcock became Judge for the Colorado 16th Judicial Circuit from 1976 to 1983 and then served as Judge for the Colorado Court of Appeals from 1983 to 1988. He was nominated for appointment to the U.S. District Court for the District of Colorado by President Reagan in 1988.

Mr. Richard F. Miklic

Chief Probation Officer
1961 Stout Street
Suite 1525
Denver, CO 80294-0101
(303) 844-5424 ext. 224

Mr. Miklic has been the Chief Probation Officer for the District of Colorado since 1989. Before coming to Colorado, he completed over fifteen years of service in the Southern District of Florida, where he was appointed as a U.S. Probation Officer in 1974, Supervising Probation Officer in 1983 and Deputy Chief Probation Officer in 1987.

In 1985, Mr. Miklic formulated an original proposal for the use of intensive supervision and electronically monitored home confinement as an alternative to incarceration. He later led a working group that was organized by the Administrative Office to implement this proposal at two pilot sites.

Mr. Miklic served on several other working groups formed by the Administrative Office and the Federal Judicial Center, including one that designed the "financial condition" section of the guideline presentence report, and another that developed a program to train probation and pretrial services officers in financial investigation. He has made several presentations and served as a trainer for the Federal Judicial Center. He has appeared before two congressional subcommittees. In 1984, Mr. Miklic testified about commodity investment fraud before the Senate Subcommittee on Investigations. In 1989, he testified about alternatives to incarceration before the House Subcommittee on Crime.

Mr. Michael Katz

Federal Public Defender
1099 18th Street, #300
Denver, CO 80202
(303) 294-7002

Mr. Katz earned his B.A. in political science from the University of Michigan in 1969 and went on to earn an M.A. in English literature from the University of Michigan in 1970. In 1973 he graduated from the University of Illinois College of Law. Upon graduation, Mr. Katz worked first as Assistant State Public Defender in Florida and then worked as Assistant State's Attorney in Florida. In 1976, he relocated to Colorado and began working with the clinical faculty at the University of Colorado Law School, eventually becoming Director of Clinical Programs. Mr. Katz became an Assistant Federal Public Defender in 1978 and has served as Federal Public Defender since 1979.

Note - Attached is a summary of Mr. Katz' remarks at the Regional Public Hearing held November 5, 1986.

Mr. Henry Solano (invited, but not expected to testify)

U.S. Attorney for the District of Colorado
U.S. Attorney's Office
1961 Stout Street
Federal Building, Suite 1200
Denver, CO 80294
(303) 844-2081

Mr. Henry Solano earned a B.S. in mechanical engineering from the University of Denver in 1973. He went on to graduate from University of Colorado Law School and practiced immigration and public welfare law upon graduation in 1976. Solano joined the Colorado Attorney General's Office, where he became supervisor of attorneys representing the human

services agencies, and then joined the Colorado United States Attorney's Office doing civil and criminal litigation. In 1987, he joined Governor Romer's administration with responsibility for the management of the Department of Regulatory Agencies, the Department of Institutions, the Department of Corrections and the department responsible for public mental health, developmental disabilities and youth services. Mr. Solano left Colorado for a period to teach at the Kennedy School of Government, Harvard University, where he lectured with respect to public sector management, including policies and practices internal and external to public organizations. In 1994, Solano was sworn in as the United States Attorney for the District of Colorado.

Mr. Robert S. Litt

Deputy Assistant Attorney General, Criminal Division
U.S. Department of Justice
11th and Constitution Avenue, NW
Room 2112
Washington, D.C. 20530
(202) 514-2636

Mr. Robert Litt is a Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice. Mr. Litt graduated from Harvard College in 1971 and Yale Law School in 1976. He clerked for Judge Edward Weinfeld in the United States District Court for the Southern District of New York and Justice Potter Stewart on the United States Supreme Court.

Mr. Litt served as an Assistant United States Attorney in the Southern District of New York, prosecuting fraud, racketeering and official corruption cases from 1978 to 1984. He worked as an associate at the firm of Williams & Connolly in Washington, D.C. from 1984 to 1993 and became partner in 1988. He served as Special Advisor to the Assistant Secretary of State for European and Canadian Affairs from 1993 until 1994 and then joined the Department of Justice.

Note: because of scheduling problems Judge Daniel and Judge Weinshienk will testify together at 11:30 or 11:45 a.m. - hopefully, immediately before the final panel on Departures/Offender Characteristics. Judge Daniel will have brief prepared remarks and field questions from the Commission; although she will not have prepared remarks Judge Weinshienk will answer questions.

Judge Wiley Y. Daniel

United States District Court for the District of Colorado
U.S. Courthouse C-236
1929 Stout Street
Denver, CO 80294
(303) 844-2170

Judge Daniel received his B.A. from Howard University in 1968 and graduated from

Howard University School of Law in 1971. He worked in several private law firms before becoming managing partner of Popham, Haik, Schnobrich & Kaufman, Ltd.'s Denver office. Judge Daniel has experience in civil litigation handling issues including products liability, contract and warranty, real estate, corporate and insurance issues. In addition, he served as a member of the Civil Justice Reform Act Advisory Group for the U.S. District Court for the District of Colorado from 1991 until 1994. He also served as the president of the Colorado Bar Association from 1992 to 1993. Judge Daniel was recently appointed to the U.S. District Court for the District of Colorado.

Judge Zita L. Weinshienk

United States District Court for the District of Colorado
U.S. Courthouse C-400
Denver, Colorado 80294
(303) 844-2784

Judge Weinshienk received her B.A. from the University of Arizona in 1955 (*magna cum laude*) and her J.D. from Harvard Law School in 1959 (*cum laude*). From 1964-65 she served as Judge, Denver Municipal Court; from 1965-71 as Judge, Denver County Court; from 1972-79 Judge, Denver District Court. She was appointed to the District Court by President Carter in 1979.

BIG PICTURE / HISTORICAL WITNESSES

This second panel of witnesses was chosen to include persons with substantial experience under the guidelines as well as before the guidelines. A couple of the witnesses also testified at the Commission's 1986 public hearing in Denver. It is hoped that these witnesses will comment on the Commission's list of priority issues for simplification (included in your materials).

Each of these witnesses will give prepared remarks of up to **five minutes**. After each panel member has testified they will take questions from the Commission.

Mr. Patrick Burke, Esq.

Coordinator of Criminal Justice Act Panel of Attorneys
150 East 10th Street
Denver, CO 80202
(303) 831-6390

Mr. Burke received his B.A. from Regis College in 1970 and received his law degree from the University of Denver School of Law in 1973. He served as the Assistant Attorney General for Colorado from 1975 until 1978. In 1978 he became Federal Public Defender and served in this position until he opened his private practice in 1982. Mr. Burke's private practice centers around criminal defense and personal injury work.

Mr. Frederick G. Bach

Supervising Probation Officer
1961 Stout Street
Suite 1525
Denver, CO 80294
(303) 844-5424

Mr. Bach began his career as a U.S. Probation Officer in 1987, in the Eastern District of New York, where he served in the Special Offender Unit supervising members of organized crime and career criminals. In this position, he worked with both pre-guidelines presentence reports as well as guidelines presentence reports. In 1990, Mr. Bach transferred to the District of Colorado, where he performed presentence and supervisory functions until his promotion to Senior U.S. Probation Officer. He served as a District Drug Specialist supervising career criminals and sophisticated white collar offenders. In the period from 1994 until 1996, Mr. Bach supervised the Presentence Investigation Unit where he was responsible for reviewing most of the presentence reports prepared in the District of Colorado. He presently supervises the Supervision Units in both Lakewood and Colorado Springs, Colorado.

Mr. Arthur Nieto, Esq.

Former Chairman of Criminal Law Section of Colorado
1626 Washington Street
Denver, CO 80203

(303) 832-9476

Mr. Arthur Nieto has an extensive background in criminal law. He served as Colorado State Deputy Public Defender from 1974 until 1978. He went into private practice as a partner at Pena, Pena & Nieto from 1978 to 1983. Since 1983 Mr. Nieto has been stockholder of Arthur Nieto, P.C. In addition, he has served the Colorado legal community as a member of the Criminal Justice Act panel; a former chairman of the Colorado Bar Association, Criminal Law section; a former president of the Colorado Hispanic Bar Association and a retired member of the Colorado Supreme Court Grievance Committee.

Note - Attached is a summary of Mr. Nieto's remarks at the Regional Public Hearing held November 5, 1986.

Mr. Michael Bender, Esq.
Defense Attorney
1660 Wynkoop Street, Suite 1160
Denver, CO 80202
(303) 893-8000

Mr. Bender received his B.A. from Dartmouth College in 1964 and then received his J.D. from the University of Colorado School of Law in 1967. He began his career as a Deputy State Public Defender in Denver where he remained until 1971. He then entered private practice. He returned to public service in 1975 serving as the Supervising Attorney for the Jefferson County Public Defender until 1977, at which time he became the Division Chief for the Denver Public Defender. After working briefly in the private sector and teaching criminal law at the University of Denver College of Law, Mr. Bender became a member of Bender & Treece, P.C. in 1983.

Note - Attached is a summary of Mr. Bender's remarks from the Regional Public Hearing held November 5, 1986.

SIMPLIFICATION TOPIC PANELS

The third part of the hearing deals with three of the priority issues for simplification: relevant conduct/acquitted conduct, drugs and role in the offense, and departures/offender characteristics. Three separate panels will discuss these issues. Again, each witness on a given panel will give prepared remarks of up to **five minutes**; after each member of the panel has testified they will entertain questions from the Commission.

Topic Panel #1 - RELEVANT CONDUCT / ACQUITTED CONDUCT

Professor Kevin R. Reitz

University of Colorado Law School
Campus Box 401
Boulder, CO 80309
(303) 492-3085

Prof. Reitz is Associate Professor of Law at the University of Colorado School of Law since 1988 (criminal law and procedure, white-collar criminal law seminar, sentencing law and policy, etc. Reitz is a 1979 graduate of Dartmouth College and a 1982 *cum laude* graduate of the University of Pennsylvania Law School. Reitz served as co-reporter of the ABA Standards for Sentencing and has written numerous articles on sentencing with a particular focus on state guideline systems. He authored an article on real offense sentencing, "Sentencing Facts: Travesties of Real-Offense Sentencing," 45 *Stanford Law Review* 523 (February 1993)(see p. 531 re: prior acquittals), co-authored *Model Penal Code, Sentencing Provisions, Evaluation and Recommendations for Revision* (American Law Institute), and recently was a featured speaker at the National Association of Sentencing Commissions in Madison, Wisconsin on the topic of appeals of sentencing decisions where he discussed federal and state data.

Mr. Kurt A. Thoene

Senior U.S. Probation Officer
1961 Stout Street
Suite 1525
Denver, CO 80294
(303) 844-5424

Mr. Thoene received his B.S. degree in political science/ criminal justice from Colorado State University in 1984. He worked as a state probation officer in Lake County, Illinois from 1985 until 1991. In 1991, he was appointed as a U.S. Probation Officer for the District of Colorado, where he supervised a caseload and prepared presentence investigation reports until he became a member of a specialized presentence investigation unit. Mr. Thoene attended a corporate guideline presentence investigation training session in 1992. In 1993, he became a Sentencing Guideline Specialist whose duties included the preparation of presentence investigation reports on more complex fraud, multi-defendant and corporate cases, the review of probation officer reports and the assignment of caseloads. Mr. Thoene became the District of

Colorado representative to the U.S. Sentencing Commission's Probation Officer Advisory Working Group in 1994. In 1994, he also served a six week temporary tour of duty at the U.S. Sentencing Commission assisting with guideline application questions from U.S. Probation Officers.

Mr. David M. Connor

Assistant Federal Public Defender
1099 18th Street, #300
Denver, CO 80202
(303) 294-7002

Mr. Connor earned his B.A. from Dartmouth College in 1976 and then graduated with his J.D. from the University of Denver in 1980. He worked as an associate with Davis, Graham & Stubbs from 1980 until 1982. Mr. Connor served as the Chief Deputy District Attorney for Denver from 1982 until 1988 and then became Assistant U.S. Attorney for Denver in 1988.

Mr. Robert Litt

Deputy Assistant Attorney General, Criminal Division
U.S. Department of Justice
11th and Constitution Avenue, NW
Room 2112
Washington, D.C. 20530
(202) 514-2636

Topic Panel #2 - DRUGS AND ROLE IN THE OFFENSE

Mr. Christopher J. Perez

Senior U.S. Probation Officer
1961 Stout Street
Suite 1525
Denver, CO 80294
(303) 844-5424

Mr. Perez received his B.S. in criminal justice from the University of Texas at El Paso in 1983. He worked as a probation officer with the Denver Juvenile Court performing pretrial, presentence investigations and intensive supervisory duties from 1986 until 1991. Mr. Perez became a U.S. Probation Officer for the District of Colorado performing both investigative and supervisory duties in 1991. In 1993, he was promoted to Sentencing Guideline Specialist. Over the past three years he has completed nearly 200 guideline presentence investigations, many of which have involved high profile defendants and complex guideline applications. Mr. Perez received U.S. Sentencing Commission guidelines training in corporate presentence reports and has completed a dozen corporate presentence reports. His duties also include workload assignments, review of line officer presentence reports and leading complex multi-defendant cases.

Raymond P. Moore

Assistant Federal Public Defender
1099 18th Street, #300
Denver, CO 80202
(303) 294-7002

Mr. Moore graduated with his B.A. from Yale College in 1975 and then received his J.D. in 1978. He worked as an associate with Davis, Graham & Stubbs from 1978 until 1982. Mr. Moore worked as an Assistant U.S. Attorney for Denver from 1982 until 1986 and then returned to private practice as a partner with Davis, Graham & Stubbs from 1986 until 1992. He became Assistant Federal Public Defender in Denver in 1993.

Ms. Jeralyn Merritt, Esq.

303 17th Avenue
Suite 400
Denver, CO 80203
(303) 837-1837

Ms. Merritt received her B.A. from the University of Michigan in 1971 and graduated with a law degree from the University of Denver College of Law in 1973. She has practiced criminal law in Colorado since 1974. Her practice is limited to criminal defense, with an emphasis on complex federal drug and white collar crime, as well as civil and criminal forfeiture. In addition, Ms. Merritt served on and chaired the Standing Committee on the Criminal Justice Act for the U.S. District Court for the District of Colorado from 1994 to 1995. In 1996, she was chosen by Chairman Bill McCollum, House Judiciary Committee, Subcommittee on Crime, to present oral and written congressional testimony on federal marijuana sentencing laws on behalf of the National Association of Criminal Defense Lawyers.

Mr. Robert Litt

Deputy Assistant Attorney General, Criminal Division
U.S. Department of Justice
(202) 514-2636

Topic Panel #3 - DEPARTURES / OFFENDER CHARACTERISTICS

Professor Kevin R. Reitz

University of Colorado Law School
Campus Box 401
Boulder, CO 80309
(303) 492-3085

See bio above.

Ms. Suzanne Wall Juarez
U.S. Probation Officer
1961 Stout Street
Suite 1525
Denver, CO 80294
(303) 884-5424

Ms. Juarez graduated from the University of New Mexico with a B.S. in English literature and psychology. She began her career in corrections by working as counselor at La Paseda Halfway House in Albuquerque, New Mexico. In 1985, Ms. Juarez began working as a probation officer for the state of New Mexico where she prepared presentence reports and supervised a caseload of offenders. She was appointed a U.S. Probation Officer for the District of New Mexico in 1991. Her duties included both presentence investigations and the supervision of offenders until she was assigned to the specialized presentence investigations unit. In 1996, Ms. Juarez transferred to the U.S. Probation Office for the District of Colorado where she is assigned to the presentence unit. Throughout her period of employment in Colorado, she has completed more than 200 presentence reports on defendants charged with crimes ranging from distribution of drugs to more complex crimes.

Ms. Virginia L. Grady (tentative)
Assistant Federal Public Defender
1099 18th Street, #300
Denver, CO 80202
(303) 294-7002

Ms. Grady attended both Loyola College and Hollins College and graduated in 1980. He then received his J.D. from Syracuse University in 1983. She began his legal career as a Deputy State Public Defender for Denver from 1984 until 1990. Ms. Grady has worked as an Assistant Federal Public Defender for Denver since 1990.

Mr. Robert Litt
Deputy Assistant Attorney General, Criminal Division
U.S. Department of Justice
(202) 514-2636

See bio above.

Regional Public Hearing - Denver, CO
November 5, 1986
Summary of Witness Remarks

Michael Katz, Esq. (scheduled as a witness in this hearing)
Federal Defender

Mr. Michael Katz introduced himself and informed the Commission that his experience with the criminal justice system included two years as a prosecutor in South Dakota, two years spent teaching at the University of Colorado, several years spent working as an Assistant Public Defender and the past two years spent working as the Federal Public Defender. (R. at 243). He stated that his experience with sentencing left him with the impression that judges effectively balance the interests of the victim, the defendant and the individual circumstances of each case in rendering a sentence. (R. at 243).

Mr. Katz expressed concern with interpreting the statute, because it requires the imposition of a twenty-year sentence or probation and nothing between the two options. (R. at 244). To illustrate that such a system ineffectively limits judicial discretion, Mr. Katz provided the following example: A forty-eight year old teacher was convicted of skyjacking when, after a night of heavy drinking with friends, he carried out a dare to go to Stapleton Airport and walk on a plane and take it to Ireland and take a prisoner. (R. at 244). Because the judge believed that the case was a tragic circumstance and twenty years imprisonment was inappropriate, he chose to sentence the defendant under the indeterminate sentence provision. (R. at 244). Mr. Katz noted that, in his opinion, all defendants do not need to serve prison time. (R. at 246). He noted that a mechanical formula for weighting all aggravating and mitigating factors is ineffective. (R. at 246).

Mr. Katz suggested broadening the range of possible punishments to allow judges to grant probation as an alternative to incarceration and eliminating the aggravating and mitigating circumstances provisions to give judges greater discretion in making adjustments. (R. at 247). Finally, he urged the Commission not to undermine the integrity of the criminal justice system by forcing prosecutors and defense attorneys to "play games" with the sentencing guideline formulas or to try a greater number of cases. (R. at 247).

When asked whether his experience led him to believe that defendants get credit for guilty pleas, Mr. Katz replied that when the court recognizes an issue that needs to be tried the defendant is not treated more harshly when subsequently convicted. (R. at 254). However, he noted that when defendants go to trial showing no remorse and no issue to litigate judges may impose harsher sentences. (R. at 255).

Michael Bender, Esq. (scheduled as a witness in this hearing)
Defense Attorney

Mr. Michael Bender began his remarks by emphasizing that the most important concern with respect to the guidelines was ensuring that judges retain flexibility in sentencing. (R. at 116). He also stated that the most striking aspect of the proposed guidelines was that defendants pleading guilty received substantially lower sentences than defendants that were convicted after a trial. (R. at 116). Such a disparity eliminated the incentive for the defendant to require the government to prove its case at trial. (R. at 116). In the absence of probation, there would be more sentencing hearings and more defendants being incarcerated. (R. at 118). Another problem with the proposed guidelines was that they allowed for the imposition of cumulative sentences in an indictment if the prosecutor was clever enough to charge from different sections of the guidelines. (R. at 118). Mr. Bender believed that the application of the proposed guidelines would be complex, confusing and difficult at best. (R. at 119).

Mr. Bender suggested that due process required the Commission to address specifically the type of notice and discovery the court must provide the defendant when it intends to base the sentence upon an aggravated circumstance or that the defendant must provide to introduce a mitigating circumstance. (R. at 120). Another problem that he felt should be addressed by the Commission was the potential public backlash which might occur if increased penalty lengths resulted in increasingly crowded prisons and necessitated the release of other inmates. (R. at 121).

Mr. Bender expressed concern that the guidelines allow the government to circumvent the constitutional requirement that each element of a crime be proved beyond a reasonable doubt. (R. at 122). He provided the example of a defendant convicted of unarmed robbery who will receive a sentence increased for the use of a weapon if shown by a preponderance of the evidence. (R. at 122). Such actions transfer sentencing discretion from the court to the charging authorities who are given discretion to control the charges brought in the indictment. (R. at 122). Mr. Bender believed that fairness does not equate with numerical uniformity. (R. at 123).

Mr. Bender suggested increasing the flexibility of the guidelines by making probation an alternative sanction, but Commissioner Wilkins noted that the statute prohibits this approach by mandating no more than a twenty-five percent variance for the term of incarceration under the guidelines. (R. at 126). Mr. Bender explained that his interpretation of the statute was that the first decision to be made by the sentencing judge was the decision as to whether to impose a sentence of probation or to require imprisonment. (R. at 127). Once the judge opted for imprisonment, he should follow the sentencing guideline range. (R. at 127).

Mr. Bender continued his comments by noting that he did not agree with any guideline that would authorize a sentence reduction in a case in which a defendant pled guilty as opposed to standing trial. (R. at 129). The Commission continued by questioning Mr. Bender about his views on the relative value of real offense and modified real offense sentencing. (R. at 132). Mr. Bender put forth several suggestions including the following: 1) requiring the prosecution to file a statement of their claim, 2) eliminating the cumulative sentencing provided in the draft guidelines, and 3) following the suggestions of Judge Kane in developing a real conviction sentencing system. (R. at 133).

Mr. Bender indicated that the abolition of the Parole Commission will not undermine the goal of eliminating sentencing disparity if the guidelines are drafted to grant judges limited discretion. (R. at 134). Mr. Bender's final comment related to the need for an accurate fact finding process to be established before courts begin to sentence based on real offense factors. (R. at 137).

Arthur Nieto, Esq. (scheduled as a witness in this hearing)
Former Coordinator of the CJA Panel
1626 Washington Street
Denver, CO 80203
(303) 832-9476

Mr. Arthur Nieto introduced himself as the Chairman of the Criminal Law Section of the Colorado Bar and a member of the Spanish Bar attending the regional public hearing in an individual capacity. (R. at 43). Mr. Nieto's initial comments summarized his finding that comparison of the sanctioning units and the sentence term in months reflected reduced sentencing disparities for minor offenses and greater sentence disparities between higher level offenses. (R. at 44).

Mr. Nieto suggested several changes to the Guidelines. For example, he suggested the Commission consider more use of non-imprisonment sanctions at the lower end of the sanction unit scale and a limitation upon non-imprisonment sanctions at the upper end of the scale. (R. at 45). With respect to the practical implementation of the guidelines, Mr. Nieto suggested having the Probation Department do an initial analysis using a computerized form to be submitted to both the prosecutor and the defense counsel for the purpose of determining whether agreement exists between the parties as to the sanctioning units associated with any particular defendant. (R. at 46). In the event of disagreement over aggravating or mitigating circumstances, each side would present evidence to support its argument and a decision would be based on the preponderance of the evidence. (R. at 47).

Although Mr. Nieto expressed concern over a sentencing system in which uncharged conduct is taken into account if it meets a preponderance of the evidence standard, as opposed to a beyond a reasonable doubt standard, he stated that the adversarial process compensates for this by allowing each side to present all available evidence and the court to make a determination based on an appropriate standard. (R. at 47). With respect to drug cases, he stated that in recent years the government has shifted its focus from the defendant to the defendant's attorney with forfeiture provisions and CCE statutes which have a chilling effect on the vigor with which an attorney approaches a case. (R. at 48). Mr. Nieto suggested that a particular offender shouldn't be sanctioned in a given sentencing proceeding for conduct which has already been sanctioned. (R. at 49). For example, there was already a grievance process for attorneys that assist and facilitate crimes. (R. at 49). Therefore, additional forfeiture provisions were unduly complicated and inconsistent with the policy of avoiding duplicative sanctions for the same conduct. (R. at 49).

Mr. Nieto asserted that the range of sanction units assigned to immigration violations are quite consistent based on his experience representing Mexican immigrants. (R. at 50). He supported continued monitoring and measuring activities by the Commission in order to track changing attitudes with respect to highly politicized issues such as immigration violations. (R. at 51).

Following Mr. Nieto's comments, Commissioner Wilkins asked for his assessment of the Acceptance of Responsibility provisions. (R. at 52). Although Mr. Nieto did not believe that judges sentence clients who elect to stand trial more harshly than those who plead guilty, he recognized that defense attorneys may use such provisions to their advantage by coaching clients to make statements regarding their consciences during Probation Department interviews and before the judge. (R. at 53).

Commissioner MacKinnon next asked Mr. Nieto for his opinion about the number of Colorado lawyers disciplined by the Bar in connection with narcotics. (R. at 54). Mr. Nieto replied that as a member of the Grievance Committee, which meets every six weeks, it is routine to deal with lawyers involved in dealing and distributing drugs. (R. at 54). In those situations, the Grievance Committee issues a license suspension and requires the attorney to show cause for a license reinstatement. (R. at 54). Mr. Nieto informed the Commission that he could not remember any cases in the past few years in which an attorney was disbarred for drug offenses. (R. at 55). When asked whether he felt the drug sentences imposed on attorneys were more stringent in Miami than in Denver, Mr. Nieto explained that based on conversations with other attorneys he believed the sentences imposed in Miami were uniformly higher. (R. at 55). Mr. Nieto

stated that larger quantities of drugs are involved in Miami cases, because the drugs are distributed by the time that they reach Denver. (R. at 56).

Mr. Robert Miller, Esq. (declined to testify because of a scheduling conflict)

Then United States Attorney for Colorado

633 17th Street, Suite 2800

Denver, CO 80202

Mr. Miller introduced himself to the Sentencing Commission and noted that he had been an attorney for 21 years and a prosecutor for 15 of those years. (R. at 6). He stated that it is important for the Commission to articulate the many factors and criteria considered by judges in making sentencing decisions. (R. at 7). Offense conduct (chapter two) and Offender Characteristics (chapter three) are particularly important components of any sentencing decision. (R. at 7). Despite his support for the Commission's enumeration of sentencing factors, Mr. Miller considered the draft guidelines unduly complicated, procedurally vague and difficult to implement. (R. at 7). His criticisms included the fact that offense conduct and offender characteristics are human factors not readily quantifiable. (R. at 7). In addition, the measurement of considerations including aggravating and mitigating circumstances, defendant cooperation, psychological harm and other factors will unnecessarily burden the criminal justice system. (R. at 8). Mr. Miller believed that plea bargains are inconsistent with the ideal of real offense sentencing, because they involve the stipulation of facts which do not necessarily reflect a defendant's responsibility for the crime and are not an appropriate basis for sentence. (R. at 8). He also believed that victim harm should be taken into account in the sentencing process, but a victim's physical, psychological and financial harm is difficult to quantify. (R. at 9). Mr. Miller considered it inappropriate to change the cornerstone of the present sentencing system from an analysis of a defendant's intent to an analysis of the victim's harm. (R. at 9).

Mr. Miller proposed an alternative system whereby a definite term of years would be assigned to every crime. (R. at 9). The presumptive sentence could be assigned unless there were a sufficient number of aggravating or mitigating circumstances as set forth in the draft guidelines under Offense Conduct or Offender Characteristics. (R. at 9). Mr. Miller believed that such a system would result in greater uniformity and less complexity in the sentencing process while allowing for consideration of human variables. (R. at 9).

Judge John L. Kane (subsequently very little experience in guideline sentencing)

United States District Judge

United States District Courthouse

1929 Stout Street, C-428

Denver, CO 80294

Judge Kane welcomed the Sentencing Commissioners to the District Court and gave a brief description of the previous Colorado District Court judges whose portraits appear throughout the courtroom. (R. at 75). Judge Kane gave a brief description of a case he provided to the Commissioners as part of his testimony, United States v. O'Driscoll. (R. at 77). Although the details of the crime were not explained, the judge stated that he sentenced O'Driscoll under a statute which allowed the judge to sentence the defendant and to fix the parole eligibility date at less than a third of the sentence. (R. at 78). Judge Kane sentenced O'Driscoll to three hundred years and fixed the parole date at ninety-nine years. (R. at 78). Judge Kane indicated that the lengthy sentence stemmed from concerns about the factors used by the U.S. Parole Commission in making parole decisions. (R. at 79).

Judge Kane gave a brief description of his service as a prosecutor in a state district attorney's office, as the first Public Defender in the state of Colorado and as a private practitioner. (R. at 80). He then

indicated that he had a reputation for giving lengthy sentences for violent crimes and for being less likely to grant probation. (R. at 80).

Judge Kane indicated that the judges in his district do not engage in the practices which the Commission seeks to correct. (R. at 81). The practices to which the judge referred include the following: participating in plea bargains, agreeing to a sentence in advance of a plea, permitting probationers to work as informants, sentencing without review of a presentence report, and accepting presentence reports from other jurisdictions without review, accepting unconscionable plea agreements and sentencing defendants tried by other judges. (R. at 82). Judge Kane disagreed with the Commission's assumption that sentencing disparities are due to a lack of guidance. (R. at 82). He stated that the judges in his district were knowledgeable about local, regional and national sentencing patterns and statistics. (R. at 82).

Judge Kane disagreed with the concept of a Real Offense Sentencing System, because he felt that this was not a system but a "shallow attempt to put qualitative and sometimes ineffable concepts into quantitative terms." (R. at 83). In addition, Judge Kane felt the proposed guidelines did not seek uniformity of sentencing but the elimination of the judicial function from the sentencing process. (R. at 83). He believed that more often than not it was unnecessary to include dropped charges into the sentence consideration. (R. at 84). The judge informed the Commission that he would never follow any guidelines which give reductions for guilty pleas or reward cooperation with the prosecution and he would resign his commission before taking such action. (R. at 84).

Judge Kane suggested abandoning the concept of numerical values in determining sentences and replacing it with a system of qualitative guidelines. (R. at 86). In response to Chairman Wilkins' question as to how the Commission could formulate qualitative guidelines and remain within its congressional mandate, Judge Kane made the following suggestions: 1) inform Congress that the law needs to be changed, and 2) require that five year sentences are satisfied with three year sentences unless the reduction is justified with existing criteria. (R. at 88).

Judge Kane explained his opposition to granting downward adjustments for assistance provided to the government by defendants as stemming from his belief that a trial is a search for truth and to grant such credits is to undermine the judicial function in this respect. (R. at 91).

Further, the judge expressed his belief that a system which takes into consideration a wide range of factors when adjusting a five year sentence becomes overly complicated. (R. at 95). By assigning numerical values to different behaviors the Commission created a false impression of precision. (R. at 96). He asserted that judges familiar with the culture of their jurisdictions are better able to determine sentences than they would be using uniform quantitative guidelines. (R. at 97).

In response to Commissioner Robinson's inquiries about the role of the guidelines in providing uniformity after the elimination of the U.S. Parole Commission, which had previously corrected the natural disparity between judges, Judge Kane noted the following: 1) the Parole Commission should have been abolished before it was started, and 2) a judge exercising discretion but required to supply a reasoned explanation is better than an anonymous parole officer making such determinations. (R. at 100). The judge stated that he does not favor a sentencing system based on total judicial discretion, but favors a system whereby judges be required to articulate the basis for their sentence and sentences be subject to appellate review. (R. at 102). Commissioner Breyer summarized Judge Kane's criticism of the preliminary guidelines as the need to inject judicial discretion into the sentencing formula. (R. at 106).

In response to questioning, Judge Kane agreed that the guidelines comply with the statutory mandate. (R. at 109). In closing, the Commission invited Judge Kane to take a small section of the guidelines and redraft the language to give them an understanding of the practicality of incorporating greater judicial flexibility into the document. (R. at 114).

Judge Bobby R. Baldock (not a witness in this hearing)
United States Court of Appeals for the Tenth Circuit
P.O. Box 2388
Roswell, NM 88202

Judge Baldock began by thanking the Commission for its work and for the explanation of modified real sentencing as presented in the draft guidelines. (R. at 196). He indicated that his comments would cover the following three issues: 1) guilty pleas, 2) trial convictions, and 3) fines and supervised probation. (R. at 196).

Judge Baldock expressed concern that it would be difficult for a judge to decide whether to recognize aggravating and mitigating circumstances in assessing sentences in the event of a plea bargain, because the judge would not have listened to all the evidence routinely presented at trial. (R. at 197). In the event of a plea bargain, there may arise the need for an extensive sentencing hearing. (R. at 197). However, if a defendant is not provided with an opportunity for a full hearing of the issues, the defendant may appeal his sentence with the argument that he was not allowed to fully present all mitigating factors. (R. at 198). Further, Judge Baldock expressed concern over a prosecutor's discretion to decide which aggravating factors will be presented for review by the judge. (R. at 199). He felt this practice might promote sentencing disparity if overworked prosecutors disregard characteristics that should be considered. (R. at 199). Finally, Judge Baldock stated that trial judges should intervene less frequently in plea bargains. (R. at 200). He felt that U.S. attorneys should be given complete discretion with respect to questions such as whether the defendant is entitled to a sentence reduction for assistance to authorities. (R. at 200). In Judge Baldock's opinion, judicial intervention undermines the goal of judicial impartiality. (R. at 200).

Judge Baldock next discussed his concerns with respect to trial convictions. (R. at 200). He stated that trial judges should be given discretion to consider all evidence presented at trial, regardless of whether the government pursues such factors at sentencing. (R. at 201). The judge next considered the problem of sentencing based on lesser included offenses. (R. at 201). For example, the judge objected to a situation in which a jury convicted on a lesser included offense not involving the use of a weapon, but the judge considered the use of a weapon in sentencing. (R. at 201). The judge objected to the consideration of factors not proved beyond a reasonable doubt in sentencing. (R. at 201). In addition, he felt that Congress should retain the task of determining what constitutes a crime or a defense. (R. at 202).

Judge Baldock next addressed the issue of fines and probation. (R. at 202). The judge stated that violations of any conditions of probation should not result in partial credit for successful time of probation, because this eliminates the incentive for a defendant to stay out of trouble when out on probation. (R. at 202). He also argued that home detention as a condition of probation or supervisory release will put too great a burden on the U.S. probation system. (R. at 203). Finally, the judge indicated that the imposition of fines against an indigent defendant is ineffective, because the defendant most likely lacks the means to pay such fines. (R. at 203).

SENTENCES IMPOSED UNDER THE GUIDELINES FOR THE DISTRICT OF COLORADO

	1995	1994	1993
<ul style="list-style-type: none"> ● Sentence Within Guideline Range 	66.2%	67.9%	70.4%
<ul style="list-style-type: none"> ● Sentence Above Guideline Range 	0.0%	0.8%	0.8%
<ul style="list-style-type: none"> ● Sentence Below Guideline Range 	10.9%	10.8%	7.0%
<ul style="list-style-type: none"> ● Sentence Below Guideline Range for Substantial Assistance on Motion for Government 	23.0%	20.5%	21.8%
	Based on 331 cases	Based on 361 cases	Based on 399 cases

COLORADO
10th Circuit



Cities Supplying Guideline Documentation¹

- (1) Denver
- (2) Boulder
- (3) Colorado Springs

Number of Court Professionals	District Court Judges ²	7
	Assistant U.S. Attorneys ³	32
	Assistant Federal Defenders ⁴	15
	Probation Officers ⁵	57
Cases Filed	Civil ⁶	3,286
	Criminal ⁷	444
Population	Total ⁸	3,377,216
	Per Square Mile ⁹	32.6
Age Distribution¹⁰	Percent Age 0-14	22.6
	Percent Age 15-24	13.9
	Percent Age 25-34	17.6
	Percent Age 35-44	18.1
	Percent Age 45-64	18.7
	Percent Age 65+	9.1

Crimes Reported To Police¹¹	Number of Crimes	Per 100,000 Population
Murder	190	6
Forcible Rape	1,575	47
Robbery	3,861	114
Aggravated Assault	12,567	372
Burglary	33,372	988
Larceny/Theft	123,724	3,663
Motor Vehicle Theft	14,167	419
Crime Index Total	189,456	5,610

Economic Indicators	Income per Capita ¹²	\$ 14,821
	Percent Unemployed ¹³	3.9

Distribution of Non-Farm Employment¹⁴	Percent Manufacturing	12.3
	Percent Retail	12.6
	Percent Finance ¹⁵	18.2
	Percent Service	39.0
	Percent Other ¹⁶	17.9

Agriculture	Percent Farm Acreage ¹⁷	51.2
--------------------	------------------------------------	------

Per Capita Local Expenditures¹⁸	Police Protection	\$ 177.15
	Education	\$ 793.00
	Health and Hospitals	\$ 307.52
	Public Welfare ¹⁹	\$ 417.02
	Highways	\$ 106.18

FISCAL YEAR 1995 GUIDELINE SENTENCES

COLORADO

Cases Received by USSC (by sentencing month) ¹

October 94	19	April 95	26
November 94	25	May 95	27
December 94	30	June 95	36
January 95	36	July 95	39
February 95	20	August 95	23
March 95	26	September 95	27

TOTAL = 334

Monthly Income ³

	mean	median
TOTAL	\$965	\$0
Male	\$930	\$0
Female	\$1,167	\$833

Average Age ⁵

TOTAL	34.2	32.0
Male	34.3	32.0
Female	33.3	32.0

Gender, Race, and Ethnicity ²

	TOTAL	Male	Female
TOTAL	334 (100.0%)	285 (85.3%)	49 (14.7%)
White	149 (44.6%)	124 (83.2%)	25 (16.8%)
Black	66 (19.8%)	60 (90.9%)	6 (9.1%)
Hispanic	93 (27.8%)	79 (84.9%)	14 (15.1%)
Other	26 (7.8%)	22 (84.6%)	4 (15.4%)

Departure Status ⁴

Sentenced within Guideline Range	219 (66.2%)
Substantial Assistance Departure	76 (23.0%)
Other Downward Departure	36 (10.9%)
Upward Departure	0 (0.0%)

Mode of Conviction ⁶

TOTAL	334 (100.0%)
Plea	324 (97.0%)
Trial	10 (3.0%)

SENTENCING INFORMATION BY PRIMARY OFFENSE ⁷

	TOTAL	Robbery	Larceny	Embezzlmt	Fraud	Drug Traffc	Counterftng	Firearms	Immigratr	All Other
	332 (100.0)	13 (100.0)	26 (100.0)	11 (100.0)	64 (100.0)	98 (100.0)	2 (100.0)	20 (100.0)	29 (100.0)	69 (100.0)

CASES INVOLVING PRISON ⁸

Total Receiving Prison	238 (71.7)	13 (100.0)	7 (26.9)	7 (63.6)	38 (59.4)	89 (90.8)	2 (100.0)	17 (85.0)	25 (86.2)	40 (58.0)
Prison	223 (67.2)	13 (100.0)	7 (26.9)	5 (45.5)	29 (45.3)	88 (89.8)	2 (100.0)	17 (85.0)	25 (86.2)	37 (53.6)
Prison/Community Split	15 (4.5)	0 (0.0)	0 (0.0)	2 (18.2)	9 (14.1)	1 (1.0)	0 (0.0)	0 (0.0)	0 (0.0)	3 (4.3)
Prison Term Ordered										
Up to 12 months	62	0	3	6	21	9	1	0	5	17
13-24 months	46	1	4	1	8	15	1	2	6	8
25-36 months	28	1	0	0	6	12	0	4	1	4
37-60 months	50	3	0	0	3	20	0	5	11	8
Over 60 months	52	8	0	0	0	33	0	6	2	3
Mean Sentence	41.3	72.0	12.6	7.6	16.2	58.2	14.5	58.9	34.6	26.5
Median Sentence	28.0	71.0	15.0	6.0	12.0	46.0	14.5	60.0	38.0	18.0

CASES INVOLVING PROBATION

Total Receiving Probation	94 (28.3)	0 (0.0)	19 (73.1)	4 (36.4)	26 (40.6)	9 (9.2)	0 (0.0)	3 (15.0)	4 (13.8)	29 (42.0)
Probation Only	65 (19.6)	0 (0.0)	12 (46.2)	3 (27.3)	22 (34.4)	6 (6.1)	0 (0.0)	1 (5.0)	4 (13.8)	17 (24.6)
Probation and Confinement	29 (8.7)	0 (0.0)	7 (26.9)	1 (9.1)	4 (6.3)	3 (3.1)	0 (0.0)	2 (10.0)	0 (0.0)	12 (17.4)

CASES INVOLVING FINES AND RESTITUTION ⁹

Total Receiving Fines and Restitution	110 (33.0)	9 (69.2)	18 (69.2)	10 (90.9)	38 (59.4)	9 (9.2)	1 (50.0)	1 (5.0)	2 (6.9)	22 (31.4)
Median Dollar Amount	\$4,000	\$4,065	\$1,533	\$4,500	\$6,671	\$4,000	\$10,400	\$2,000	\$2,625	\$2,000

Footnotes and a complete description of all variables in this table are provided in Appendix A.
SOURCE: U.S. Sentencing Commission, FY1995 Data File, MONFY95

SENTENCES IMPOSED UNDER THE GUIDELINES NATIONALLY

	1995	1994	1993
● Sentence Within Guideline Range	71.0%	71.7%	75.3%
● Sentence Above Guideline Range	0.9%	1.2%	1.1%
● Sentence Below Guideline Range	8.4%	7.6%	6.6%
● Sentence Below Guideline Range for Substantial Assistance on Motion for Government	19.7%	19.5%	16.9%
	Based on 36,975 cases	Based on 38,498 cases	Based on 40,442 cases

FISCAL YEAR 1995 GUIDELINE SENTENCES

NATIONAL DATA

Cases Received by USSC (by sentencing month) ¹

October 94	3,106	April 95	3,152
November 94	3,078	May 95	3,595
December 94	2,883	June 95	3,599
January 95	3,312	July 95	3,099
February 95	2,967	August 95	3,286
March 95	3,188	September 95	3,235

TOTAL = 38,500

Monthly Income ³

	mean	median
TOTAL	\$1,559	\$500
Male	\$1,649	\$400
Female	\$1,080	\$791

Average Age ⁵

TOTAL	35.0	33.0
Male	34.9	33.0
Female	35.2	34.0

Gender, Race, and Ethnicity ²

	TOTAL		Male		Female
TOTAL	38,222	(100%)	32,540	(85.1%)	5,682 (14.9%)
White	14,998	(39.2%)	12,506	(83.4%)	2,492 (16.6%)
Black	11,139	(29.1%)	9,342	(83.9%)	1,797 (16.1%)
Hispanic	10,449	(27.3%)	9,341	(89.4%)	1,108 (10.6%)
Other	1,636	(4.3%)	1,351	(82.6%)	285 (17.4%)

Departure Status ⁴

Sentenced within Guideline Range	26,259	(71.0%)
Substantial Assistance Departure	7,271	(19.7%)
Other Downward Departure	3,110	(8.4%)
Upward Departure	335	(0.9%)

Mode of Conviction ⁶

TOTAL	38,443	(100%)
Plea	35,319	(91.9%)
Trial	3,124	(8.1%)

SENTENCING INFORMATION BY PRIMARY OFFENSE ⁷

	TOTAL	Robbery	Larceny	Embezzlmt	Fraud	Drug Traffc	Counterftng	Firearms	Immigratn	All Other
	38,114 (100%)	1,594 (100%)	2,443 (100%)	809 (100%)	5,864 (100%)	14,116 (100%)	787 (100%)	2,566 (100%)	3,160 (100%)	6,775 (100%)
INVOLVING PRISON ⁸										
Total Receiving Prison	29,982 (78.7)	1,573 (98.7)	945 (38.7)	457 (56.5)	3,646 (62.2)	13,381 (94.8)	442 (56.2)	2,352 (91.7)	2,863 (90.6)	4,323 (63.8)
Prison	28,290 (74.2)	1,530 (96.0)	798 (32.7)	282 (34.9)	3,090 (52.7)	13,126 (93.0)	401 (51.0)	2,258 (88.0)	2,819 (89.2)	3,986 (58.8)
Prison/Community Split	1,692 (4.4)	43 (2.7)	147 (6.0)	175 (21.6)	556 (9.5)	255 (1.8)	41 (5.2)	94 (3.7)	44 (1.4)	337 (5.0)
Prison Term Ordered										
Up to 12 months	7,124	21	623	366	1,864	1,127	272	244	1,031	1,576
13-24 months	5,462	46	195	68	971	1,499	119	400	1,274	890
25-36 months	2,917	149	64	11	400	1,335	26	304	111	517
37-60 months	5,257	372	53	9	283	2,968	14	556	277	725
Over 60 months	9,152	985	10	0	121	6,438	11	848	137	602
Mean Sentence	63.1	108.6	13.5	7.6	18.3	89.7	14.4	79.8	21.7	41.9
Median Sentence	33.0	78.0	10.0	5.0	12.0	60.0	12.0	48.0	21.0	21.0

CASES INVOLVING PROBATION

Total Receiving Probation	8,132 (21.3)	21 (1.3)	1,498 (61.3)	352 (43.5)	2,218 (37.8)	735 (5.2)	345 (43.8)	214 (8.3)	297 (9.4)	2,452 (36.2)
Probation Only	5,165 (13.6)	13 (0.8)	1,069 (43.8)	246 (30.4)	1,307 (22.3)	389 (2.8)	230 (29.2)	119 (4.6)	238 (7.5)	1,554 (22.9)
Probation and Confinement	2,967 (7.8)	8 (0.5)	429 (17.6)	106 (13.1)	911 (15.5)	346 (2.5)	115 (14.6)	95 (3.7)	59 (1.9)	898 (13.3)

CASES INVOLVING FINES AND RESTITUTION ⁹

Total Receiving Fines and Restitution	14,718 (38.5)	991 (62.1)	1,825 (73.4)	643 (79.3)	4,377 (74.3)	2,524 (17.9)	437 (55.3)	662 (25.8)	293 (9.3)	2,966 (43.5)
Median Dollar Amount	\$3,852	\$3,104	\$2,330	\$8,029	\$10,100	\$2,000	\$1,595	\$2,000	\$1,000	\$3,000

Footnotes and a complete description of all variables in this table are provided in Appendix A.
SOURCE: U.S. Sentencing Commission, FY1995 Data File, MONFY95

APPEALS STATISTICS

<u>No. of Cases Sentenced</u>		<u>% of Cases Appealed by End of FY 1995</u>	<u>Affirmance Rate</u>
FY 1993	42,107	7.3%	79.8%
FY 1994	39,971	6.1%	81.2%

<u>No. of Issues Appealed in FY 1995</u>		<u>Affirmance Rate</u>
by Defendant	7,665	89.4%
by Government	167	37.7%

SOURCE: U.S. Sentencing Commission Annual Reports, 1993-95.

GUIDELINE SIMPLIFICATION PRIORITIES
(pursuant to Commission working session 5/28/96)

TOP PRIORITIES – 1997 AMENDMENT CYCLE

Relevant Conduct

1. Simplify the relevant conduct guidelines assuming no substantive policy changes.
2. Revise the relevant conduct guideline to 1) prohibit the use of acquitted conduct in the calculation of the guideline range, or 2) limit the use of acquitted conduct to a departure factor.

Level of Detail/Guideline Complexity

1. Explore consolidation of all important definitions of general applicability in a single Chapter 1 guideline.
2. Consolidate or eliminate rarely or never used Chapter 2 and 3 guidelines and specific offense characteristics except where there are important policy reasons (e.g., treason guideline).
3. Clarify definitions of "loss."
4. Review and clarify or eliminate problematic Chapter Two cross references.
5. Revise Acceptance of Responsibility adjustment to address case law issue and remove restriction on who can receive 3-level reduction.

Departures/Offender Characteristics

1. Review Koon decision.
2. Explore options to revise departure policy statements to provide examples of appropriate departure circumstances.
3. Revise general guideline departure standard to clarify "non-heartland" concept and create more consistency between departure language in Chapters 1 and 5.

Criminal History

1. Reorder and streamline Chapter 4 to simplify application of the criminal history guidelines.
2. Develop proposals to revise the current criminal history measure using a sentence-length-based model that better targets serious, repeat offenders (this project will use the ISS data currently in production).

Appellate Litigation and other Statutory Issues

1. Develop proposals to restrict the scope of appellate review of certain guideline factual findings.
2. Redraft introduction to Manual and departure sections to send signal to appellate courts to afford greater deference to district court guideline determinations.
3. Develop proposals to widen bands in monetary and drug tables with the goal of reducing appellate litigation.

Drug Sentencing/Role in the Offense

1. Develop proposals to revise the role in the offense guideline to better reflect actual experience, including a better measure of drug organizational hierarchy and case law development.

Introduction to Guidelines Manual

1. Draft revised introduction to remove outdated material and bring the manual up-to-date on the evolution of the guidelines. Coordinate with changes to the introduction to the departure guidelines in Chapter 5.

LOWER PRIORITY GUIDELINE SIMPLIFICATION ISSUES – 1998 AMENDMENT CYCLE

Relevant Conduct

1. Explore substantive changes to relevant conduct that limit the extent to which unconvicted conduct can affect the sentence.
2. Explore the implications of raising the standard of proof from preponderance of the evidence to clear and convincing.

Sentencing Table

1. Develop proposals to reduce significantly the number of offense levels in the sentence table.

WORKING GROUP ON GUIDELINE SIMPLIFICATION: PURPOSE STATEMENT

I. INTRODUCTION

The Sentencing Commission, at its May meeting, identified comprehensive review of the federal guidelines system as a top agency priority. The Commission is well positioned to undertake this task, given the vast amounts of information available from the more than 225,000 cases sentenced under the guidelines during the past eight years, numerous appellate opinions issued on various guidelines issues, the growing body of academic literature and public comment, and the extensive empirical analysis of the guidelines conducted to date.

This purpose statement outlines the working group's proposed scope of inquiry and methodology.

II. WORKING GROUP MANDATE

The objective of the working group's comprehensive review of the guidelines is twofold: 1) to reduce the complexity of guideline application ("simplification"); and 2) to improve federal sentencing by working closely with the judiciary and others to refine the guidelines (revisiting the balance of judicial flexibility/discretion and the availability of alternative punishments). The group will comprehensively and aggressively assess each major section of the guidelines, critique application complexities, and develop options for Commission consideration. Complexity is viewed as the source of confusion and frustration in guideline application. Moreover, this confusion results in unreliable application and judicial resistance – two outcomes that undermine the effectiveness of the guidelines.

Guideline complexity derives, in part, from fundamental decisions made by the original Commission in its effort to meet the Sentencing Reform Act's twin goals of: 1) assuring that the purposes of sentencing are met (*i.e.*, just punishment, deterrence, incapacitation, and rehabilitation); and 2) providing certainty and fairness in meeting the purposes of sentencing while avoiding unwarranted disparities between similarly situated defendants (see 28 U.S.C. § 991(b)(1)). To ensure that the ramifications of all options for change are clear, the group will highlight the broader policy implications of its proposals (*e.g.*, its effect on proportionality or a judge's ability to individualize sentences).

III. METHODOLOGY

The working group proposes the following strategy to assist commissioners in their deliberations on how they might simplify and improve the guidelines system. The group will prepare concise issue papers on major guideline topics to provide a foundation for Commission consideration of relevant issues and possible sentencing models. Each paper will:

- review the history behind the original policy decision so as to ensure that the Commission is sensitive to the underlying principles and the impact of any revisions on these principles;
- assess how the particular guideline is working (e.g., application complexities; frequency of use identified through monitoring data);
- summarize information needs that might reasonably assist the Commission's decision making on the topic; and
- outline broad options for refinement.

These papers will provide sound bases for commissioners, staff, and the public to understand the current guidelines and assess any proposals for change. The working group proposes to discuss each issue with commissioners in an informal working session to receive guidance as to which options to develop in more detail for public comment.

The group is currently drafting issue papers on the following topics:

1. Sentencing Reform Act (and subsequent sentencing legislation)
2. drafting process used by initial Commission; major changes since that time
3. real offense sentencing (Relevant Conduct)
4. criminal History
5. level of detail (specific offense characteristics)
6. chapter Three adjustments
7. departures/offender characteristics
8. sentencing table/sentencing ranges
9. availability of probation/split sentences (alternatives)
10. multiple counts

This methodology will enable staff to provide the Commission the full range of options for reviewing and revising the guidelines. In its review, the working group will examine how state guideline systems have addressed issues that judges and practitioners have found particularly complex in the federal system. In addition, the group will consult closely with judges and practitioners and solicit a wide variety of public comment from the Criminal Law Committee of the Judicial Conference, Practitioners' and Probation Officers' Advisory Groups, Department of Justice, Federal and Community Defenders, and others. Finally, the working group will analyze all responsible suggestions for guideline reform from outside individuals and groups.

The simplification process should be developmental and done with caution because significant changes may result in unforeseen anomalies. Therefore, it is important that as the simplification working group develops proposals it ensures that the proposals: 1) be consistent with the Sentencing Reform Act; 2) be sensitive to caselaw; and 3) be aware of the underlying premises that the previous Commission used in developing the guidelines. This caution will ensure that the guidelines are an evolving set of standards that change as information and experience buttresses the need for change.

IV. TIMETABLE

The working group proposes the following timetable for completion of this project:

Phase I

Prepare issue papers on major guideline topics; discuss with commissioners at working sessions.

Time Frame: June–December 1995

Phase II

Develop and present a refined range of options to Commission for consideration and publication. Regional public hearings held during this phase.

Analyze public comment and revise models to produce guideline amendments. Present options to Commission together with impact analyses.

Time Frame: January–June 1996

Phase III

Publish proposals in Federal Register for comment. Field testing.

Time Frame: July–October 1996

Phase IV

Public hearings, Commission deliberations, fine-tuning of proposals, and submission to Congress.

Time Frame: November 1996–April 1997

PROPERTY OF THE U.S. GOVERNMENT
ADMINISTRATIVE OFFICE
OF THE U.S. COURTS LIBRARY

JAN 3 1995

AO Libran

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

NFC. 16 1994

JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN THE MATTER OF)
PROCEDURES FOR GUIDELINE SENTENCING)
UNDER THE SENTENCING REFORM ACT OF 1984)

GENERAL ORDER ~~1994-3~~

This General Order sets forth statements of Court policy and is entered to establish certain procedures to ensure the uniformity, integrity and fairness of the sentencing process in criminal proceedings. It is hereby

ORDERED that the following procedures are adopted for all sentencings in the District of Colorado conducted under the Sentencing Guidelines unless otherwise ordered by a specific written order in a particular case.

1. In cases where the conviction is obtained by either verdict or court finding, within five days of conviction, counsel for the Government shall file with the Court and serve upon the defendant and defendant's counsel a Sentencing Statement setting forth sentencing factors to be considered at sentencing.

2. The defendant may file with the Court and serve upon the counsel for the Government a Sentencing Statement setting forth sentencing factors to be considered at sentencing.

3. Resolution of disputed factors shall be accomplished by the sentencing judge pursuant to Section 6A1.3 of the Sentencing Guidelines in accordance with the procedure ordered by the sentencing judge.

4. All plea agreements shall be presented in writing, signed by counsel for the Government, counsel for the defendant, and the defendant. The Court will require that all plea agreements include a written stipulation of facts relevant to sentencing. Those stipulations shall:

- (1) set forth the relevant facts and circumstances of the relevant offense conduct and offender characteristics; and
- (2) set forth with meaningful specificity the reasons why the sentencing range resulting from the proposed agreement is appropriate.

5. Pursuant to Rule 11(e)(2), Fed.R.Crim.P. if the agreement is of the type specified in subdivision (e)(1)(A) or (C), the Court will defer the decision to accept or reject the agreement until there has been an opportunity to consider the presentence report.

6. The stipulations required by paragraph 4 above shall be included in the presentence investigation report required by Rule 32(b)(4)(A), Fed.R.Crim. P., as amended December 1, 1994.

This order supersedes General Order 1987-5. It is subject to further modification as experience may require.

This General Order is necessary to implement the Sentencing Reform Act of 1984 (Public Law 98-473, Title II, §§ 211-239), effective November 1, 1987.





UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500
WASHINGTON, DC 20002-8002

Richard P. Conaboy, Chairman
Michael S. Gelack, Vice Chairman
A. David Mazzone, Vice Chairman
Wayne A. Budd
Julie E. Carnes
Michael Goldsmith
Deanell R. Tacha
Jo Ann Harris (*ex officio*)
Edward F. Reilly, Jr. (*ex officio*)

(202) 273-4500

Fax
(202) 273-4529

January 3, 1996

MEMORANDUM

TO: Chairman Conaboy
Commissioners
Senior Staff

FROM: Phyllis J. Newton *PJN*
Staff Director

SUBJECT: Outline For Relevant Conduct Discussion

The attached outline provides a general framework for discussions focusing on relevant conduct simplification. The outline specifically focuses the discussion on whether as part of simplification the Commission wants to consider substantive – or merely clarifying – changes to the relevant conduct guideline.¹ The answer to this question has important implications for future work of not only the relevant conduct and offense seriousness working groups, but for all areas of guideline simplification.

At this point in the discussions, the Commission has not taken a position with respect to broad policy changes. The attached outline assumes a move away from the status quo – whether the changes be minor, clarifying amendments or broad policy reconsiderations. This is not to suggest that staff believes changes are required; rather, the outline provides options should the Commission decide changes best serve the interests of the Commission, the courts, and the sentencing guidelines.

¹ If the Commission wishes to consider substantive changes to the guidelines, including relevant conduct, staff recommends an intensive case review project. With regard to relevant conduct, this case review will help address the important question posed by Commissioner Carnes at a recent working session: can we quantify the impact of conduct beyond the count of conviction in determining the offense level?

It would be most helpful to have you consider the options presented in the attached outline and identify proposals you would like to eliminate from further consideration. Conversely, if you have suggestions not reflected in these materials, staff will prepare your suggested options in a similar format for future Commission discussions.

Following Commission discussion and any additional fleshing out in the next month during the Commission retreat, the resulting product could serve as a prototype for formally describing potential guideline modifications. The Commission could publish for comment this material and use it to form the bases for regional hearings.

We look forward to the discussions at the working session on January 9th. If you have questions regarding this outline, please give me a call at (202) 273-4510.

Attachment

Discussion Outline For January Working Session:
RELEVANT CONDUCT

The attached outline briefly reviews the major issues raised by the relevant conduct guideline issue paper presented in September. It sets out a continuum of potential substantive options for change, although this continuum should not be interpreted as inclusive of all potential options. Commissioners may well identify additional options they would like analyzed, and may want to eliminate some of those proposed. Based on Commission decisions, staff will prepare materials that could provide a vehicle for generating informed public comment.

I. Issues Related to the Current Relevant Conduct Standard

Subsection (a)(1) of the relevant conduct guideline addresses conduct inherently part of and related to the offense of conviction.¹ Subsection (a)(2) bases guideline application for specified quantity-driven offenses on all conduct part of the “same course of conduct or common scheme or plan” as the offense of conviction.²

In making a decision about the substantive options you want to explore further, the following threshold question should be addressed:

To what extent should conduct outside the count of conviction be used to determine the guideline sentencing range?

To help answer this basic question, the following more specific questions should be considered (each question reflects different approaches to imposing limits on unconvicted conduct explicitly considered in the guidelines).

1. Should there be one relevant conduct rule for all offenses? (Currently, there is a “two-tiered” system: offenses against the person are limited to the offense of conviction while “aggregatable” offenses, such as drug trafficking, consider unconvicted conduct.)

¹ All state guideline systems base application on conduct related to the count(s) of conviction. State systems may enhance the guideline sentence recommendation for unconvicted conduct, but they generally treat such conduct in two ways. First, some are silent as to any limits on considering such conduct and leave its consideration to aggravating/mitigating factors or reasons for departure. Second, other states explicitly consider unconvicted conduct (such as use of a weapon in the commission of the offense), limiting consideration of such unconvicted conduct, however, to the conviction offense.

² As reported in previous briefing papers, quantity-based offenses account for nearly 80 percent of federal cases sentenced. Furthermore, no state guideline system has taken a similar approach.

2. Should unconvicted conduct now considered part of relevant conduct be more limited in its impact than at present or given lesser weight than convicted conduct?

The following issues are pertinent if the Commission thinks it might want to limit the role of unconvicted conduct along these lines.

- Should the use of unconvicted conduct be limited to conduct that was charged and subsequently dismissed, thereby barring use of uncharged conduct?
- Should the use of unconvicted conduct exclude acquitted conduct?
- Should the impact of unconvicted conduct be limited to an established amount?
- Should unconvicted conduct that is used to increase the guideline range be weighted equally to convicted conduct?
- Should the guidelines impose a higher evidentiary standard (*i.e.*, “clear and convincing”) on the use of unconvicted conduct, or at least on conduct considered under the (a)(2) prong of relevant conduct?
- Should the prosecutor be required to notify the defendant prior to plea or trial of the extent to which unconvicted conduct will be relied upon at sentencing?
- When unconvicted conduct drives the sentence (*e.g.*, accounts for more than a 50% increase), should the Commission allow courts to depart downward?

Clarifying Relevant Conduct

In addition to exploring the more substantive options for change, staff is examining the following issues in the current relevant conduct guideline:

1. the scope of “reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity” (§1B1.3(a)(1)(B));
2. the recently amended standard for “same course of conduct/common scheme or plan” (§1B1.3(a)(2)); and
3. clarify definition of offenses that fall under (a)(1) and (a)(2) prongs of relevant conduct.

II. Substantive Amendment Proposals

Several overarching principles form the basis upon which potential relevant conduct options were developed. These principles adhere to the basic tenets outlined in the Sentencing Reform Act, but in no way suggest that the original relevant conduct guideline falls short of these principles. The potential options attempt to increase predictability of guideline application; increase uniformity in application; reduce complexity of relevant conduct without sacrificing a high standard of fairness; reduce necessity for fact finding and ultimate appellate litigation; and promote the reduction of disparity. The following options incorporate these overarching principles to lesser or greater degrees depending upon the specific proposal.

Staff has attempted to consider the implications of the various options in order to provide a starting point for discussion. In thinking of the implications, we asked ourselves, "What would be the impact on plea bargaining? Predictability? Past practice? Complexity?" We have deliberately not referred to issues in terms of their possible effects on "fairness" because the term is so subjective. What is perceived as fair to some would be viewed as unfair by others. Consequently, specific implications for each option are provided, although, again, the listed implications should not necessarily be interpreted as inclusive.

OPTION 1: Eliminate the use of conduct outside the offense of conviction in determining the applicable guideline range by deleting the (a)(2) prong of relevant conduct. (Guideline ranges would be determined on the basis of conduct related solely to the offense(s) of conviction. A variation of this proposal would provide that unconvicted conduct could be used as reason to depart upward.)

Implications:

- Basing guideline application on convicted behavior would bring the federal guidelines closer to the "conviction offense" model used by most of the state guideline systems.
- Simpler than present system because it would abandon "two-tiered" approach to relevant conduct.
- Plea bargaining: 1) Impact of plea would be more predictable leading to greater certainty in sentencing outcomes; 2) Increased prosecutorial control of sentencing outcomes;
- May affect charging practices (creates incentives for charging full offense conduct or more extensive use of conspiracy charges)
- Reduced district court fact-finding and appellate litigation
- Substantial change from preguideline practice that permitted and guideline practice that requires consideration of full extent of offender's criminal conduct.
- Addresses due process concerns raised by commentators

OPTION 2: Delete the (a)(2) prong of relevant conduct and replace it with a new provision in Chapter Three that provides either a flat adjustment (*e.g.*, two levels), or a graduated adjustment (two, four, or six levels, depending on the seriousness of the unconvicted conduct) for conduct that the court finds was part of the same course of conduct or common scheme or plan as the offense of conviction.

Implications:

- Guideline sentences would be based primarily on convicted behavior, but unconvicted conduct could affect the sentence to a lesser extent than the present system
- Abandons "two-tiered" approach to relevant conduct, but would still require court to assess extent of unconvicted conduct
- Increased prosecutorial control of sentencing outcomes compared to current system, but less than under a total offense-of-conviction-based model (*e.g.*, Option 1)
- Plea bargaining: 1) Impact of plea would be more predictable than present system (but less so than in Option 1); 2) Moderates prosecutorial control of sentencing outcomes (compared to Option 1)
- Possible reduction in district court fact-finding and appellate litigation
- May better replicate preguidelines sentencing practices (*i.e.*, relative contribution of unconvicted conduct to an offender's sentence); significant change from current guideline practice that requires consideration of offender's unconvicted conduct
- Unclear impact on complexity of guideline application

OPTION 3: **Modify the relevant conduct guideline to limit the magnitude of the offense level increase for conduct beyond the count of conviction.** This preserves the two-tiered structure and substance of the current relevant conduct rule. The Commission could limit the impact of unconvicted conduct in a variety of ways; three options are presented below:

(A): Limit the impact of unconvicted conduct to an increase of a set number of levels (*e.g.*, two, four, or six levels).

(B): In addition to providing an absolute limit on any increase in offense levels due to unconvicted conduct, count unconvicted conduct less than convicted conduct. For example, unconvicted conduct might count one-half as much as convicted conduct and no more than six levels in all.

(C): Set a time limit on the use of unconvicted conduct (e.g., additional drug amounts in a seven- or 30-day period).

Implications:

- Guideline sentences would be based primarily on convicted behavior, but unconvicted conduct could affect the sentence to a lesser extent than the present system
- Increased prosecutorial control of sentencing outcomes compared to current system, but less than under a total offense-of-conviction-based model (e.g., Option 1)
- Plea bargaining: 1) Impact of plea would be more predictable than present system (but less so than in Option 1); 2) Moderates prosecutorial control of sentencing outcomes (compared to Option 1)
- Possible reduction in district court fact-finding and appellate litigation
- May better replicate preguidelines sentencing practices (i.e., relative contribution of unconvicted conduct to an offender's sentence); significant change from current guideline practice that requires consideration of offender's unconvicted conduct
- Unclear impact on complexity of guideline application

OPTION 4: Eliminate the use of uncharged and/or acquitted conduct. This alternative could be included as part of any other alternative (except Option 1). Such a rule would provide that conduct charged but subsequently dismissed could be used to increase the offense level, but uncharged and/or acquitted conduct would be prohibited for determining the guideline range.

Implications:

- Addresses most frequently raised due process concerns raised by commentators
- Reduces district court fact-finding and appellate litigation
- Plea bargaining: 1) Impact of plea would be more predictable leading to greater certainty in sentencing outcomes; 2) Increased prosecutorial control of sentencing outcomes; 3) increases incentive for defendants to go to trial; 4) May result in overcharging to ensure use in guideline determinations
- May affect charging practices (creates incentives for charging full offense conduct or more extensive use of conspiracy charges)

OPTION 5: Retain the substance of the current rule, but impose additional requirements or add flexibility through departures. (These alternatives could be included as part of any other alternative (except Option 1) or each other.)

(A): Impose a higher evidentiary standard (*i.e.*, "clear and convincing") for 1) all guideline application; or 2) unconvicted conduct only.

Implications:

- Addresses, to an extent, due process concerns raised by commentators
- Introduction of a second standard of proof for sentencing determinations increases complexity of guideline application

(B): Authorize a downward departure when the weight of unconvicted conduct far exceeds that associated with the counts of conviction.

Implications:

- Increases judicial discretion (and disparity) through more unstructured departures
- Decreases predictability of sentences

(C): Require additional notice (in the indictment or a special notice filed prior to plea or trial) to alert the defendant of the intended use of unconvicted conduct in calculation of the guideline range.

Implications:

- Minimizes sentencing "surprise" by requiring government to inform defendant of the use of unconvicted conduct
- May reduce disparate use of unconvicted conduct

UNITED STATES SENTENCING COMMISSION

Staff Discussion Paper

Relevant Conduct

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

Discussion Paper

RELEVANT CONDUCT AND REAL OFFENSE SENTENCING

I. Introduction

Any punishment, if it is to be reasonable, must be meted out based substantially on an offender's conduct. The scope of an offender's conduct to be considered in coming up with a particular punishment thus becomes a critical determinant of the punishment. In the criminal law, if a sentencing judge considers only the set of criminal acts detailed within the four corners of the charging document that formed the basis of the conviction, the sentence will often be quite different than if the same judge considers related uncharged misconduct or even unrelated uncharged misconduct. If uncharged misconduct is considered, punishment is based on facts proven outside procedural protections constitutionally defined for proving criminal charges, introducing an argument of unfairness that has been repeated often by critics of "real offense sentencing." Defining the appropriate scope of conduct on which to base punishment has been a tug-of-war of fairness and justice for many years for both courts and sentencing commissions.

The scope of conduct considered at sentencing will also affect, at least to some extent, the complexity of a sentencing system. The scope can be as limited as the conduct defined by the elements of the offense or as broad as any wrongdoing ever committed by the defendant or the defendant's partners in crime. All things being equal, a large scope of considered conduct will require more fact-finding than a more limited scope. Generally, then, if a sentencing judge considers only a limited set of facts in determining a sentence, her/his job will be simpler than if she/he considers a much greater set of facts. In the latter case, not only will the number of factual disputes for the judge be greater, but more legal issues will likely be introduced as well. However, as will be discussed ahead, the way relevant conduct is applied, we believe, has a far greater impact on complexity, as well as on fairness, than simply its scope.

Besides fairness and complexity, the scope of conduct considered at sentencing may have serious implications for the balance between prosecutorial and judicial power in sentencing. For example, if the scope of considered conduct is confined to the offense of conviction, many argue that the sentencing system will provide relatively more power to prosecutors to control sentences. If the scope of considered conduct is broader -- more like real offense sentencing -- the prosecutor's charging decisions seem to be much less important.

Finding the right balance among fairness, complexity, and the role of the prosecutor has been a struggle for sentencing commissions generally and, amid the mandate of the Sentencing Reform Act, for the federal commission specifically. It has most often been described simply as

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

a debate between real-offense and charge-offense sentencing. This paper briefly explores this issue and the Commission's response to it: the relevant conduct guideline. Section II discusses the federal criminal code and how the code and the Sentencing Reform Act, in many ways, eliminate the possibility of a pure offense of conviction sentencing system. Section III and IV review the history of the relevant conduct guideline, how critics and the Commission's training staff view the guideline. Section V looks at how state systems have defined the scope of conduct to be considered at sentencing, and how those systems use and apply this conduct to set sentences. Finally, section VI provides some analysis and outlines broad options the Commission has in addressing relevant conduct as well as research questions the Commission may look to answer in order to help choose the appropriate option for refinement.

II. The Federal Criminal Code Compels A Provision Like Relevant Conduct

The federal criminal code has been criticized as a hodgepodge of statutes passed at various times and for disparate and wide-ranging reasons. There have been considerable efforts over the past several decades to reform the federal criminal code so as to provide a more coherent structure. As of now, the code remains a mix of some very specific statutes and some very general and broad statutes, many of which were drafted largely with jurisdictional concerns in mind.¹ As a result, for much of the federal criminal code, offenses do not contain elements that significantly differentiate culpability among classes of offenders.

For example, the mail fraud statute prohibits using the mails to commit a fraud. The statute does not differentiate those offenders who commit large frauds from those who commit small frauds, those who target vulnerable victims from those who do not, or those who abuse their positions of trust from those who do not. Because the Sentencing Reform Act mandates that the Commission's guidelines differentiate sentences among offenders of different culpabilities, the guidelines, to some degree, must consider aggravating and mitigating factors beyond the elements of the offense in setting sentences for many, if not most federal offenses. Otherwise, a person committing a \$1,000 fraud would be sentenced in much the same way as someone committing a \$1,000,000 fraud.

As a result, the guidelines must define the scope of conduct beyond the elements of the offense of conviction from which these aggravating and mitigating factors will be gleaned.

¹ The jurisdictional concerns result from the limits the Constitution places on the reach of the federal government into criminal matters.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

Similarly, because conspiratorial and accomplice liability are charged and proven so often in the federal system, the guidelines must define the scope of such liability in determining sentences. The point is that in some way, the federal sentencing guidelines must define the conduct to be considered at sentencing beyond the elements of the offense.

III. History of the Relevant Conduct Guideline

Deemed the "cornerstone" of the federal sentencing guidelines, relevant conduct defines the scope of behavior that must be considered in every federal case. Relevant conduct, as it is now defined, can include uncharged conduct, acquitted conduct, conduct described in dismissed counts, and conduct of co-conspirators. Because its application is so critical to the determination of the severity of federal sentences, it has been the subject of significant scrutiny and litigation.

When the Commission was first constructing the guidelines, it sought to develop a pure real offense system.² It did so for the explicit reason that a charge offense system "affords prosecutors [the potential] to influence sentences by increasing or decreasing the number [and content] of counts in an indictment."³ The Commission was concerned not only with sentence disparity as a result of judicial discretion but also disparity as a result of "inappropriate manipulation" of the charging decision by prosecutors. As the Commission noted in its discussion of real offense versus offense of conviction sentencing, "the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary." The Commission believed that to achieve certainty and uniformity, it was mandated to get to the "real" facts of a case irrespective of the prosecutorial charging decision. It also believed that under pre-guidelines practice, sentencing judges could and did consider whatever facts they wanted to, whether related to the offense of conviction or not. Finally, the Commission drew on the fact that the Parole Commission did in fact consider all real-offense conduct in making parole decisions.

The early Commission tried to devise a sentencing system that would use real-offense behavior and would separately account, in a detailed and formulaic way, for as many harms

² United States Sentencing Commission, Guidelines Manual, Chapter 1, Part A(3), "The Basic Approach," (November 1987) pp. 2-4.

³ *Id.*

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

caused by defendants as was practicable. The early commissioners, however, found that a pure real offense system that separately accounts for all harms would be intolerably complicated.

To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated "real harm" facts in many typical cases.⁴

The complexity that the Commission found was due not only to the scope of relevant conduct but also to the fact that the Commission wanted to account for all the real offense facts through detailed sentencing formulas.

As a result, the commissioners reluctantly moved away from a real offense system toward an offense of conviction system. To be true to their mandate, though, they moved only as far as they thought they needed to create a "workable" system. The guidelines still needed a real-offense component, and as a result, the Commission still needed a formulaic way to get to the real-offense facts irrespective of what was in the prosecutor's charging document. Hence, the creation of "relevant conduct" and the modified real offense system. Under this system, the offense of conviction provides the starting point -- the Chapter Two guideline -- for calculating sentences. In applying the appropriate Chapter Two guideline, however, relevant conduct allows for consideration of real offense facts: facts beyond those directly related to the offense of conviction.

The relevant conduct guideline defines the scope of conduct to be considered at sentencing in two ways. For one set of offenses, notably robbery and offenses against the person, section (a)(1) of the relevant conduct guideline limits the scope of conduct to be considered at sentencing to acts that occurred during the commission of the offense of

⁴ *Id.*

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for the offense. This is somewhat close to an offense of conviction scheme.⁵ The conduct used to determine the sentence goes beyond the elements of the offense but is limited to conduct occurring around the offense of conviction. Under section (a)(1), all acts committed by a defendant, aided and abetted by him/her, and reasonably foreseeable in furtherance of his/her jointly undertaken criminal activity are considered part of relevant conduct so long as the acts are related, as described above, to the offense of conviction.

For a second set of offenses – so-called "aggregatable offenses" including drug, fraud, and firearms offenses – however, section (a)(2) broadens relevant conduct to include conduct that is part of the same course of conduct or common scheme or plan as the offense of conviction. This is the provision that allows consideration of uncharged conduct, acquitted conduct, and conduct described in dismissed counts. Sentences for the offenses that use this broader definition of relevant conduct were considered by the early Commission to be quantity driven or "aggregatable." The Commission believed that before the guidelines, in sentencing these offenses, judges considered the real and complete quantity of the contraband involved in the illegal activity irrespective of how the prosecutor charged the offense (*i.e.*, how much of the contraband was actually described in the charging document) and irrespective of whether a jury acquitted on one count or another of a multiple count indictment.⁶ The Commission determined that continuing this practice was the appropriate way of fulfilling the mandate of the Sentencing Reform Act.

The Commission believed, however, that the non-aggregatable offenses were very similar to state law criminal conduct, and thus the Commission thought that it was more appropriate to use a sentencing system tied more to the offense of conviction for these offenses. The aggregatable offenses were thought to be more uniquely federal. Because the Commission found that pre-guidelines sentencing practice considered conduct beyond the offense of conviction most often for these offenses and because, as stated above, the parole guidelines -- which the

⁵ This is not, however, close to an elements of the offense of conviction scheme. Section (a)(1) requires the consideration of facts beyond the elements of the offense but, as stated in the text, directly related to the offense of conviction.

⁶ This mixed sentencing system – a system that is predominantly charge-based for certain offenses but predominantly real offense-based for so-called "aggregatable offense" – in and of itself has caused confusion and complexity for many practitioners.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

sentencing guidelines were in part replacing -- were based on real offense conduct, the Commission determined that sentences for aggregatable offenses should be based more on real offense conduct.

In addition, it should be noted that since their initial development, the Commission has introduced into the guidelines a significant number of cross-references to other guidelines. These cross-references allow relevant conduct, rather than the offense of conviction, to determine the appropriate Chapter Two guideline from which the sentencing calculation begins. As the number of cross-references increases, real-offense conduct becomes more important in the sentencing determination and the offense of conviction becomes less important. In other words, by introducing more cross-references over the recent years, the Commission has moved the guidelines closer to a real-offense system.

IV. How Critics and the Commission Training Staff View the Relevant Conduct Guideline

A. The View of the Critics

Most of the outside criticism of the relevant conduct guideline surrounds the issue of fairness and section (a)(2) which brings into consideration acts not encompassed by a count of conviction that are part of the same course of conduct or common scheme or plan as the offense of conviction. Critics charge that relevant conduct, and specifically section (a)(2), encompasses too much unconvicted conduct, that sentences can be driven by unconvicted conduct, and as a result the full constitutional protections surrounding the criminal justice system, for practical purposes, are lost. These critics point out that there is no grand jury review of relevant conduct, no need to set out relevant conduct in a charging document, and lesser procedural or evidentiary protections surrounding its proof. Few critics, however, suggest that relevant conduct alone is responsible for the guidelines' complexity.

B. The View of the Training Staff

Since the initial set of guidelines were issued in 1987, the Commission's training staff has found that the relevant conduct guideline has been among the most troublesome for application and that the guideline's application has been very inconsistent across districts and circuits. In attempts to remedy this situation, the relevant conduct guideline has been amended nearly every year since the guidelines were promulgated. The training staff believes that there are several reasons for the application problems. First, in defining relevant conduct and in so doing, describing sentencing liability, the Commission used legal terms of art that had been traditionally

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

used to describe criminal liability. For example, the Commission intended that relevant conduct include specific acts or omissions the defendant "aided and abetted." Because the Commission used the terms "aided and abetted," which have a specific and broader meaning in the criminal law than the meaning intended by the Commission, many users focus not on the specific acts the defendant aided and abetted, as the Commission seems to have intended, but rather on the entire principal crime that the defendant aided and abetted. As a result, the training staff believes that application has been inconsistent and in many cases not what the Commission intended. The definition of conspiratorial liability under the guidelines poses similar problems.

Second, because the Commission defined sentencing liability for conspiracies more narrowly than traditional criminal law conspiratorial liability and because the Commission's definition of sentencing liability for conspiracies is intricate and fact specific, the training staff believes that applying this definition has been a struggle for attorneys, probation officers, and courts since the advent of the guidelines. Specifically, unlike criminal conspiratorial liability, relevant conduct limits sentencing conspiratorial liability to "jointly undertaken criminal activity." This prong of relevant conduct often requires courts to hold significant hearings to determine what part of a defendant's criminal law conspiratorial liability "the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement)" as well as all reasonably foreseeable conduct of others in furtherance of the jointly undertaken activity.⁷ Because this determination is case- and fact-specific, and because the determination can drive a guideline sentence, it is litigated in many cases. Commission research shows that after the drug guideline, relevant conduct is the most frequently appealed guideline issue. These data further show that most of the appeals surround the definition of conspiratorial liability.

Third, the training staff believes that several aspects of the way the relevant conduct guideline is drafted make for difficulties in application. For example, in setting out the offenses for which the "same course of conduct, common scheme or plan" rules apply, the Commission refers to offenses "for which §3D1.2(d) would require grouping of multiple counts." This has confused some attorneys and probation officers who think that this section applies only if there are in fact multiple counts. The training staff has also found that because of the structure of the guideline, many users applying §1B1.3(a)(2) do not realize that the criteria from §1B1.3(a)(1) also must be met for proper application.

⁷ USSG §1B1.3n2.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

The training staff can cite other examples of application difficulties with the relevant conduct guideline. Many of these application problems might be addressed without changing the fundamental policy choices concerning the current modified real-offense system. However, it is not clear that any changes to address these application problems would significantly simplify the guidelines in general or the relevant conduct guideline in particular.³

IV. State Guideline Systems

Like the federal criminal code, most state criminal codes, for many classes of crimes, do not differentiate among offenders of differing culpabilities. As a result, most state guidelines systems consider conduct beyond the elements of the offense of conviction in determining sentences. In fact, most state guideline systems consider as much or more of a defendant's conduct than the federal sentencing guidelines. However, sentences under these systems are primarily determined by the scope of conduct that occurred during the offense of conviction. Under most of these systems, the judge is then able to adjust the sentence for conduct that goes beyond the offense of conviction.

The North Carolina sentencing guidelines are a good example. Like the federal guidelines, the North Carolina guidelines determine sentences based on a grid. The sentencing judge first determines the offense severity level, which is fixed by the offense of conviction. Next, the judge determines the defendant's prior criminal record. These determinations define the grid location which contains three sentencing ranges: a presumptive sentencing range, an aggravated range, and a mitigated range. The judge next determines whether there are aggravating or mitigating factors present in the case and whether the aggravating factors outweigh the mitigating factors or vice versa. If aggravating factors outweigh mitigating, the judge sentences in the higher aggravating range. If mitigating factors predominate, the judge sentences in the lower mitigating range. If neither aggravating or mitigating factors predominate, the judge sentences in the presumptive range.

³ Most of the yearly amendments to the relevant conduct guideline were made attempting to clarify the guideline and make its application easier. Some argue that since many significant amendments to relevant conduct have been made recently and because the concepts surrounding relevant conduct are inherently complex, that courts are still struggling to catch-up and interpret these changes. This might suggest that if no substantive policy changes are to be made, that simplifying relevant conduct may mean simply leaving the guideline alone and allowing courts to interpret and adjust to it.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

The North Carolina guidelines' list of aggravating factors include specific factors related to the offense of conviction (e.g., "whether the offense was especially heinous, atrocious, or cruel") and a catch-all: "[a]ny other aggravating factor reasonably related to the purposes of sentencing." Similarly, the list of mitigating factors include a catch-all: "[a]ny other mitigating factor reasonably related to the purposes of sentencing." The catch-all aggravating factor has been interpreted by the North Carolina Supreme Court to allow consideration of events that were part of an uncharged course of misconduct.⁹ In other words, under the North Carolina system, uncharged conduct, and the other elements of the federal relevant conduct, can be considered at sentencing. However, the consideration is limited by the structure of the sentencing calculus so that the final sentence is driven primarily by the offense of conviction.

Almost all other state guidelines allow for consideration of uncharged conduct in determining sentencing. However, most of these systems, like the North Carolina guidelines, determine sentences first and primarily through the offense of conviction.

V. Analysis, Options For Refinement, and Research Questions

There is one paramount policy question the Commission must answer in determining whether and how to substantively refine relevant conduct and related guidelines: does the Commission want to continue to move toward a real-offense sentencing system, does it want to stay with the current mixed system, or does it want to reverse direction and move toward a charge-offense system. As referred to earlier, the answer to this question depends in significant part on the Commission's view of plea bargaining, whether the Commission continues to see as its role the regulation of the plea process -- so as to avoid unwarranted disparity and satisfy the mandate of the Sentencing Reform Act -- and whether the issues of fairness raised by the guidelines' critics outweigh the concerns over the plea process. If the Commission moves closer to either a real-offense system or a charge-offense system, the repercussions on the plea process and fairness could be significant. In addition, the complexity of guideline application may be significantly affected depending on the techniques the Commission uses to implement the change.

In answering the fundamental policy question of real- versus charge-offense sentencing, the Commission will likely want to examine information and data being collected by the current Assessment Project. These data will hopefully address, for example, whether the real-offense

⁹ North Carolina v. Farlow, 336 N.C. 534 (1994).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

approach of the guidelines has helped prevent or reduce unwarranted disparity caused by prosecutorial decisions, whether the real-offense approach has led to abuses in which prosecutors take advantage of the relaxed procedural safeguards in the sentencing hearing, and whether and to what degree the critics' charges of unfairness are real. In addition, the Commission will likely want to assess what the likely results would be of a more charge-oriented sentencing system.

In broad terms, the Commission has at least six options in addressing the relevant conduct guideline. First, the Commission could simply leave the guideline alone and make no changes. Obviously, this would leave in place the substantive decisions of earlier Commissions and would not address the criticisms of the guideline. Simply in terms of complexity and application, some argue that over the past eight years, judges, attorneys, and probation officers have struggled in applying relevant conduct, but now, users are becoming more familiar and soon application problems and some of the appellate review will diminish (*see footnote 7*). Because the relevant conduct guideline has been amended so often, and because the concepts underlying the guideline are inherently difficult to apply, amending the guideline when no substantive changes are being made may not clarify or simplify but may simply continue whatever confusion already exists and perhaps create new confusion. In other words, it may not be productive to rewrite a guideline in an attempt to clarify it.

Second, the Commission could leave in place the scope of the current relevant conduct guideline and simply try to revise the language to address some of the application problems discussed above. For example, the Commission could spell out the offenses when section (a)(2) applies rather than referencing the multiple count grouping rules. This might eliminate the confusion over the need for multiple counts before applying section (a)(2). As mentioned above, such changes could cause confusion rather than simplify.

Third, the Commission could narrow the scope of relevant conduct – moving closer to a charge-offense system – and leave in place the way relevant conduct is applied.¹⁰ As discussed above, this would likely lead to some moderate changes in the complexity of the guidelines – as the scope of facts to be considered by district judges would decrease – while at the same time

¹⁰ If the Commission followed this course, it might also alter the way accomplice and conspiratorial liability are defined for sentencing purposes by the guidelines. This could also be done in a variety of ways and would similarly implicate prosecutorial power and the plea process.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

addressing some of the concerns and criticisms about fairness. However, this would leave in place the way the guidelines overall calculate sentences and thus would arguably not address the fundamental complexity of the guidelines.

Fourth, the Commission could change the way relevant conduct is used in calculating sentences but leave in place the current scope of relevant conduct. As will be discussed in future briefing papers, relevant conduct is applied in a long list of case-specific aggravating and mitigating factors. Because these aggravating and mitigating factors are applied in formulas with specific numerical values given to each factor and because all aspects of relevant conduct can drive sentences, the importance of the scope of relevant conduct is greatly increased. In other words, if relevant conduct were not so pivotal in sentencing or if it were applied differently (more simply, like some of the state systems), it might not be so complicated or so feverishly litigated. Also, if the impact on sentences of uncharged, acquitted, or dismissed conduct were limited, many of the criticisms concerning fairness could be addressed.

As stated above, currently, relevant conduct beyond the offense of conviction can drive a sentence. The Commission could limit the way uncharged, acquitted, or dismissed counts could be used in the sentence calculation. This could be done in a variety of different ways, including placing a cap on the increases attributable to unconvicted conduct or implementing a single upward adjustment for uncharged misconduct. Depending on the Commission's choice, the mechanistic nature of the guidelines could be reduced.

Fifth, the Commission could narrow the scope of relevant conduct and change the way relevant conduct is used. And sixth, the Commission could move in the other direction and expand the scope and application of relevant conduct, moving even closer to a real-offense system. Depending on the mechanism used to do so, this could further complicate the guidelines or could simplify them.¹¹

¹¹ If relevant conduct were expanded and the current application mechanism were retained, the system would likely become more complicated. However, if there were a single adjustment for real-offense conduct, even if the real-offense component were expansive, the overall sentencing system could be much simpler.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

VII. Conclusion

The decision on whether to continue with the Commission's momentum toward a real-offense sentencing system is a fundamental one that will drive the decision whether and how to refine relevant conduct. The Assessment Project should provide some information with which to help make the decision. Each of the broad options outlined above have implications for fairness, complexity, prosecutorial power, and justice. Depending on the substantive policy choice the Commission chooses and the specific mechanism chosen to implement the choice, a new balance of fairness, complexity, prosecutorial power, and justice can be struck.

UNITED STATES SENTENCING COMMISSION

Staff Discussion Paper

Departures and Offender Characteristics

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

Table of Contents

I.	INTRODUCTION	1
II.	THE OPERATION AND STATUTORY FRAMEWORK OF THE GUIDELINES' DEPARTURE AND OFFENDER CHARACTERISTICS POLICIES	1
A.	Departures Generally	1
B.	Departures and <u>Offender</u> Characteristics	2
C.	Departures and <u>Offense</u> Characteristics	7
D.	Departure Treatment Outside of Chapters One and Five	9
E.	Relevant Legislative History	9
III.	A BRIEF REVIEW OF RELEVANT DATA	14
IV.	STANDARDS OF APPELLATE REVIEW	15
V.	WHAT CRITICS SAY	20
A.	In General	20
B.	Characteristics "Not Ordinarily Relevant"	20
C.	Mechanical Handling of Mitigating Factors	21
D.	Guided Discretion Model	21
E.	Other Criticisms	21
VI.	STATE GUIDELINE SYSTEMS	22
A.	Offender Characteristics	22
B.	Departure Standards	22
C.	Reasons for Departure	23
D.	Unique Provisions	23
E.	Appellate Review	23
F.	Departure Rates	24
VII.	OPTIONS FOR REFINEMENT	24
A.	Simplify/Clarify	24
B.	Reduce/Combine	26
C.	Redesign	26

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

DEPARTURES AND OFFENDER CHARACTERISTICS

I. INTRODUCTION

Fundamental to an analysis of any sentencing guidelines system is an understanding of the system's treatment of offender characteristics and its allowance for sentences outside the recommended range — *i.e.*, departures. In theory, these topics are distinct: offender characteristics may be taken into account directly by the guidelines themselves — not just through departures — and the permissible scope of departures in a guideline system may go beyond those based just on offender characteristics.

Under the current federal sentencing system, however, the treatment of offender characteristics and judicial authority to depart are closely interwoven. There are two primary reasons for this. First, *offender* characteristics are only minimally accounted for under the guideline provisions that generate guideline ranges and instead are largely dealt with through policy statements that seek to regulate departures. Second, *offense* characteristics are accounted for in fairly substantial detail under the guideline provisions that generate guideline ranges, leaving relatively less of this conduct to be accounted for through departures. Thus, while the topics of departures and offender characteristics are theoretically distinct, the federal sentencing guidelines' policies toward these topics are, in fact, significantly interlinked.

Mindful of this association, this paper analyzes departures and offender characteristics under the guidelines. Part II provides an overview of how the guidelines operate in these areas and examines how the guidelines' approach relates to pertinent provisions in the Commission's enabling statute. Part III presents general empirical information on current departure practice. Part IV describes appellate review standards with respect to departures. Part V summarizes illustrative criticism of the guidelines' policies toward departures and offender characteristics. Part VI compares how selected state systems operate with respect to these two topics. Finally, Part VII suggests options the Commission may wish to consider to simplify and otherwise improve the operation of the guidelines with respect to departures and offender characteristics. (Because sentence reductions for a defendant's substantial assistance raise unique and complex issues, this paper considers this category of departures only peripherally.)

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

II. THE OPERATION AND STATUTORY FRAMEWORK OF THE GUIDELINES' DEPARTURE AND OFFENDER CHARACTERISTICS POLICIES

A. Departures Generally

The introduction in Chapter One of the Guidelines Manual¹ describes the Commission's overall philosophy and intent regarding the use of departures under the federal sentencing guidelines. This commentary begins by citing the relevant sentencing statute,² which provides that a court may depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence" that is outside the guideline range. The commentary explains that, consistent with this statute, the Commission intends for each guideline to apply to a "heartland" of typical cases reflecting the conduct that the guideline generally describes. A court may consider whether to depart, therefore, when a guideline "linguistically applies" but the facts of the particular case before the court do not represent the norm.

B. Departures and Offender Characteristics

Following this general description of the guidelines' philosophy toward departures, the Chapter One commentary lists a number of offender characteristics (*i.e.*, race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, drug or alcohol dependence, and economic duress) that the guidelines *preclude* as a basis for departure. "With those specific exceptions, however," the commentary continues, "the Commission did not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case."³ The key words in this sentence are "in an unusual case" because the Commission has taken additional steps, not referred to in the introductory commentary, to limit departures with respect to a variety of other offender characteristics.

¹Chapter One, Part A, Subpart (4)(b).

²18 U.S.C. § 3553(b).

³For further discussion of the Commission's intent with regard to departures, *see* USSG §5K2.0.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

Chapter Five, Part H of the guidelines (Specific Offender Characteristics) contains 12 policy statements dealing with offender characteristics seven of which categorize one or more offender characteristics as being "not ordinarily relevant" to a departure decision. These seven policy statements — in conjunction with the statutory standard allowing departures only for factors "not adequately taken into consideration by the Sentencing Commission" — are understood by the courts to significantly constrain departures based on offender characteristics.⁴

(1) *Statutory Directives Relating to Offender Characteristics*

The guidelines' limitations on offender characteristics are not entirely the product of Commission policy-making discretion. Many of the offender characteristics that the guidelines either preclude or generally discourage as "not ordinarily relevant" as a basis for departure derive, at least to some degree, from requirements in the Commission's enabling statute. The relevant statutory provisions are subsections (d) and (e) of 28 U.S.C. § 994 and these provisions interrelate in a complex fashion.

Subsection (d) provides a baseline requirement for offender characteristics under the guidelines by directing that "the Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." This provision also instructs the Commission, however, to evaluate whether certain other enumerated characteristics — several of which might be argued to *have* potential

⁴See, e.g., *United States v. Thomas*, 930 F.2d 526, 530 (7th Cir. 1991)(concluding that Part H policy statements should "be read as establishing the limited parameters within which certain offender characteristics... are relevant" to "reflect Congress's desire to base criminal punishment on the offense committed rather than on the defendant's personal characteristics"; *United States v. Garza-Juarez*, 992 F.2d 896, 913 (9th Cir. 1993)(use of "not ordinarily relevant" in §5H1.3 is indication that a defendant's mental or emotional condition is relevant in only limited circumstances); *United States v. Johnson*, 964 F.2d 124, 127-29 (2d Cir. 1992)("not ordinarily relevant" language does not prohibit departures based on family ties but limits departures to extraordinary circumstances); *United States v. Williams*, 891 F.2d 962, 964, 967 (1st Cir. 1991)(emphasizing that departure is limited only to the meaningfully atypical case); *United States v. Studley*, 907 F.2d 254, 257 (1st Cir. 1990)("not ordinarily relevant" language in §5H1.3 requires district court to make express findings that the mental or emotional condition is atypical).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

racial, ethnic and/or socioeconomic impact — "have any relevance" to the imposition of sentences. The enumerated factors that the Commission must consider for relevance are:

- age;
- education;
- vocational skills;
- mental and emotional condition ("to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant");
- physical condition, including drug dependence;
- family ties and responsibilities;
- community ties;
- role in the offense;
- criminal history; and
- degree of dependence upon criminal activity for a livelihood.

Finally, 28 U.S.C. § 994(e) limits the use of some of these same factors *with respect to sentences of imprisonment* by requiring "that the guidelines and policy statements in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."

(2) *The Commission's Execution of the Statutory Directives*

The Commission has executed the statutory directives in subsections (d) and (e) by grouping the offender characteristics addressed by the directives into five categories:

- (1) offender characteristics *directly taken into account by the guidelines* (e.g., the role in the offense,⁵ criminal history⁶);

⁵See Chapter Three, Part B. Arguably, this characteristic is better classified as an offense characteristic rather than an offender characteristic.

⁶See Chapter Four.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

- (2) offender characteristics that *may be relevant for purposes of departure* (e.g., inadequately accounted for criminal history, criminal livelihood, diminished mental capacity, and duress);
- (3) offender characteristics "*ordinarily not relevant*" for purposes of departure (e.g., age, education, vocational skills, mental and emotional condition, physical condition, employment record, family ties, and community ties);
- (4) offender characteristics that are "*not a reason*" for departing below the guideline range (e.g., drug or alcohol dependence); and
- (5) offender characteristics *whose consideration is precluded with respect to any aspect of the sentencing decision* (e.g., race, socioeconomic status).

Table I sets forth a comparison of the statutory directives with their treatment under the guidelines. As Table I shows, most of the statutory directives and the actions taken by the Commission to execute these directives bear a reasonably close relationship. For example, the statute directs the Commission to ensure that the guidelines are "neutral" with respect to race and §5H1.10 instructs the courts that race is "not relevant" in determining the sentence. Similarly, education, vocational skills, and several other offender characteristics are categorized by the statute as "generally inappropriate" considerations in determining whether (and for how long) to impose a prison sentence. The guidelines, in turn, classify these factors as "not ordinarily relevant" in evaluating whether a case warrants a departure.

On the other hand, it might be argued that the Commission took a more restrictive stance toward these latter-mentioned offender characteristics than it needed to. The statute can be understood to mean that the listed offender characteristics should generally not increase the *likelihood of imprisonment* being imposed as a sentence but not that a non-incarcerative sanction — i.e., *probation* — would be similarly disfavored based on these factors. (As noted in

Table 1: Execution of Statutory Directives Relating to Offender Characteristics

STATUTORY DIRECTIVE					GUIDELINE EXECUTION				
	Guidelines must be "neutral"	USSC to "consider relevance"	Factor generally inappropriate for prison	Guidelines require neutrality (factor "not relevant")	Guideline provision explicitly accounts for this factor	Policy statement indicates "not ordinarily relevant" as basis for departure	Policy statement indicates may be basis for departure or otherwise "is relevant"	Relevant guideline provision(s)	
Race, Sex Socioeconomic Status etc.	Yes	—	—	Yes	—	—	—	§5H1.10	
Age	—	Yes	—	—	—	Yes	—	§5H1.1	
Education		Yes	Yes	—	—	Yes	—	§5H1.2	
Vocational Skills		Yes	Yes	—	—	Yes	—	§5H1.2	
Mental and Emotional Condition	—	Yes	—	—	—	Yes	Yes ⁷	§§5H1.3, 5K2.12, 5K2.13	
Physical Condition	—	Yes	—	—	—	Yes	—	§5H1.4	
Drug and Alcohol Dependence	—	Yes	—	Yes ⁸	—	—	—	§5H1.4	
Employment Record	—	Yes	Yes	—	—	Yes	—	§5H1.5	
Family Ties	—	Yes	Yes	—	—	Yes	—	§5H1.6	
Community Ties	—	Yes	Yes	—	—	Yes	—	§5H1.6	
Role in the Offense	—	Yes	—	—	Yes		Yes	§§3B1.1-12, 5H1.7	
Criminal History	—	Yes	—	—	Yes	—	Yes	Chapter 4, ⁹ §5H1.8	
Criminal Livelihood	—	Yes	—	—	Yes	—	Yes	§§4B1.1, 4B1.3, 5H1.9	

⁷Pursuant to §§5K2.12-13 coercion, duress, and diminished capacity may provide bases for a downward departure.

⁸To be technically precise, §5H1.4 does not require sentence neutrality on drug dependence (as §5H1.10 does with race, etc.) but rather precludes it as a basis for a downward departure. However, the preclusion is absolute; this factor is characterized as "not a reason" for a downward departure.

⁹Chapter Four governs criminal history. §4A1.3 provides specific guidance on departures due to inadequacy of criminal history scoring.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

II(E)(3) below, the legislative history suggests that this asymmetrical reading of the statute — in other words, that these factors should not increase a defendant's likelihood of being sentenced to prison but may increase a defendant's likelihood of being sentenced to probation — may have been what the drafters had in mind.)

Table I shows that the Commission did take a more restrictive view than required by the statute with respect to four offender characteristics: age, mental and emotional condition, general physical condition, and drug dependence. Although the statute required only that the Commission *consider* the possible relevance of these characteristics, the Commission treated three of these characteristics the same as those that the statute puts into the "generally inappropriate" for prison category. In other words, the Commission specified that these offender characteristics factors are "not ordinarily relevant" to a departure decision. The Commission went a step further with drug dependence, saying categorically that this characteristic "is not a reason for imposing a sentence below the guidelines."¹⁰

(3) *Other Generally Disfavored Offender Characteristics — A Reaction To Case Law*

While most of the guidelines' limitations on the consideration of offender characteristics derive, at least to a degree, from directives in the Commission's enabling statute, several additional limitations on offender characteristics came about in response to court decisions. Offender characteristics that courts upheld as a basis for departure but that the Commission subsequently categorized as "not ordinarily relevant" to a departure are:

- physical appearance and physique (§5H1.4);
- military, civic, charitable or public service; employment-related contributions; record of prior good works (§5H1.11).

The Commission blanketly labeled one category of offender characteristics approved by courts for departure as "not relevant grounds for imposing a sentence outside the applicable range." This category is "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing."¹¹

¹⁰USSG §5H1.4, p.s.

¹¹See USSG §5H1.12, p.s.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

C. Departures and Offense Characteristics

The Commission has also provided significant guidance to the courts with respect to departures based on offense characteristics. This guidance is primarily set forth in Part K of Chapter Five. Part 5K — bearing the title "Departures" — is the portion of the Guidelines Manual that ostensibly governs *all* departures. However, because Chapter Five, Part H (Specific Offender Characteristics) already delineates Commission policies on offender characteristic-based departures, Part 5K is, in fact, residual; it governs what is otherwise not treated, namely departures based on offense characteristics.

Part 5K primarily consists of policy statements setting forth Commission views on the use of various offense characteristics (*e.g.*, victim death, victim injury) as a basis for departure. However, one of Part K's policy statements, §5K2.0, provides a general discussion of the Commission's basic approach to departures. Some of §5K2.0's discussion parallels that found in Chapter One's introduction (discussed above).¹²

Section 5K2.0 differs most from the Chapter One commentary in its detailed discussion of departures based on offense characteristics that Chapter Two of the guidelines already to some degree takes into account. In this regard, §5K2.0 makes clear that the Commission designed the guidelines with an understanding that there would be an inverse relationship between the detail in Chapter Two and the courts' ability to depart. Section 5K2.0 states in relevant part:

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus... physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with

¹²Like the Chapter One commentary, for example, §5K2.0 both cites the statute that regulates departures and briefly outlines the "heartland" concept underlying the guidelines' design.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

injury to more than one victim, departure would be warranted if several persons were injured.

As noted, apart from this general discussion of departure policy, Part 5K primarily consists of individual policy statements, each addressing the merits of a possible departure based on a particular offense characteristic. Table II contains a list of offense characteristics addressed by policy statements in Part 5K, including two policy statements adopted in the most recent amendment cycle. As Table II illustrates, three of Part 5K's policy statements are intended to authorize downward departures. The remaining 13 policy statements authorize upward departures.

D. Departure Treatment Outside of Chapters One and Five

The introductory commentary in Chapter One, the policy statements on offender characteristics in Chapter Five, Part H, and the departure policy statements in Chapter Five, Part K do not exhaust the treatment of departures in the Guidelines Manual. Guidance on departures is also contained in Chapters Two through Four.

Chapter Two (Offense Conduct) contains references to departures in various application notes. For instance, note 4 to §2B1.3 (Property Damage or Destruction) states that an upward departure may be warranted if the monetary value of the property damaged or destroyed does not reflect the extent of harm caused. Overall, there are approximately 40 application notes in Chapter Two that recommend upward departures, ten that recommend downward departures, and four that state more generally that a departure is permissible.

Chapter Three (Adjustments) also contains several departure references. For example, note 3 to §3A1.3 (Restraint of Victim) states that an upward departure may be warranted if the restraint was sufficiently egregious. Finally, recommendations on departures are made in Chapter Four (Criminal History and Criminal Livelihood). Policy Statement §4A1.3 (Adequacy of Criminal History) indicates that a departure from the applicable guideline range may be warranted when the defendant's criminal history category over-represents or under-represents either the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.

In sum, guidance on departures has been incorporated into *all five* chapters of the Guidelines Manual that may affect the defendant's sentence.

Table II: Grounds For Departure Based On Offense Characteristics

POLICY STATEMENT	WHAT THE POLICY STATEMENT GENERALLY COVERS	WHAT THE POLICY STATEMENT GENERALLY PROVIDES
5K2.1	Death	"may increase the sentence;" "substantial increase may be appropriate"
5K2.2	Physical Injury	"may increase the sentence;" "substantial increase may be appropriate"
5K2.3	Extreme Psychological Injury	"may increase the sentence"
5K2.4	Abduction/Unlawful Restraint	"may increase the sentence"
5K2.5	Property Damage/Loss	"may increase the sentence"
5K2.6	Weapons and Dangerous Instrumentalities	"may increase the sentence" firearm discharge may "warrant a substantial sentence increase"
5K2.7	Disruption of Governmental Function	"may increase the sentence"
5K2.8	Extreme Conduct	"may increase the sentence"
5K2.9	Criminal Purpose	"may increase the sentence"
5K2.10	Victim's Conduct (contributed to provoking offense)	"may reduce the sentence"
5K2.11	Lesser Harms (offense committed to avoid other harm, e.g., mercy killing)	"a reduced sentence may be appropriate"
5K2.14	Public Welfare (significantly endangered)	"may increase the sentence"
5K2.15	Terrorism	"may increase the sentence"
5K2.16	Voluntary Disclosure of Offense ¹³	"a departure below ... range may be warranted"
5K2.17 ¹⁴	High-Capacity, Semiautomatic Firearms	"an upward departure may be warranted"
5K2.18 ¹⁵	Violent Street Gangs	"an upward departure may be warranted"

¹³ This characteristic might be better characterized as an offender characteristic.

¹⁴ Added November 1, 1995.

¹⁵ Added November 1, 1995.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

E. Relevant Legislative History

As discussed earlier, the Commission's enabling statute includes several provisions that bear directly on how Congress expected the Commission to approach offender characteristics and departures. The legislative history to the Sentencing Reform Act (SRA) provides significant additional insight.

Because this legislative history is extensive — especially a detailed Senate Report that accompanied the legislation in 1983, a year before its enactment¹⁶ — analysis of congressional intent by reference to this history is inherently somewhat subjective. People can differ on which portions of this history they find especially significant. It should also be kept in mind that — except in instances where the underlying statute might be viewed as lacking a plain meaning — this legislative history is not legally binding on the Commission. Nevertheless, with these caveats noted, several clear themes appear to emerge from the SRA's legislative history that may be worthy of Commission consideration as it assesses how best to move forward.

(1) A Desire To Reduce Disparity by Controlling Departures

The first theme is that the reduction of unwarranted disparity was a very high priority for Congress in enacting the SRA — arguably the highest¹⁷ — and that Congress believed that judicial adherence to the guidelines was the means by which disparity would be remedied. Departures, in other words, could help individualize sentences in the unusual case, but Congress clearly intended that they be the exception. Colloquies among Senators spanning nearly a decade

¹⁶S. Rep. No. 225, 98th Cong., 1st Sess. (1983) [hereafter "Senate Report"]. The sentencing reform portion of this Report is over 150 pages long and includes 430 footnotes.

¹⁷References to the goal of reducing disparity are scattered throughout the Senate Report. For example, the Report's "General Statement" on the bill highlights disparity as a key target of sentencing reform and calls its existence "shameful." Senate Report at 65. In construing 28 U.S.C. § 994(f), which instructs the Commission to promote statutorily enumerated purposes of sentencing, the Senate Report identifies disparity reduction as "particularly" important. Senate Report at 174.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

of deliberation on the SRA strongly reflect this view,¹⁸ and a proposed amendment in 1983 that "would have expanded significantly the circumstances under which judges could depart" was rejected in committee.¹⁹

Some have cited a footnote in the Senate Report as evidence that Congress might have tolerated more departures than the current guidelines allow. The relevant footnote states:

The United States Parole Commission currently sets prison release dates outside its guidelines in about 20 percent of the cases.... It is anticipated that judges will impose sentences outside the sentencing guidelines at about the same rate or possibly at a somewhat lower rate since the sentencing guidelines should contain recommendations of appropriate sentences for more detailed combinations of offense and offender characteristics than do the parole guidelines.²⁰

Because the current guideline departure rate is significantly below this 20 percent figure *if substantial assistance departures are not counted*,²¹ it might be argued that the legislative history would support some easing of current departure policy. On the other hand, it appears that the Parole Commission's 20 percent departure rate included departures based, at least in part, on a defendant's cooperation. This fact suggests, in turn, that the relevant guideline figure to

¹⁸*See, e.g.*, 124 Cong. Rec. 382-383 (1978) (statement of Senator Kennedy, "We want to make sure these guidelines are followed in the great majority of cases;" statement of Senator Hart that "the presumption is that the judge will sentence within the guidelines"); 133 Cong. Rec. S16644-48 (daily ed. Nov. 20, 1987) (joint statement of Senators Biden, Thurmond, Kennedy and Hatch, "If the [departure] standard is relaxed, there is a danger that trial judges will be able to depart from the guidelines too freely, and such unwarranted departures would undermine the core function of the guidelines . . . to reduce disparity").

¹⁹*See* Senate Report at 79.

²⁰*Id.* at 52 n.71.

²¹If substantial assistance departures are not counted, the current departure rate is only about nine percent. *See* Part III, below.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

compare with the Parole Commission's 20 percent departure rate would be the guidelines' overall departure rate — *i.e.*, the rate including substantial assistance departures. As discussed in Part III, below, the overall guideline departure rate is about 28 percent.

(2) *Support for Comprehensive Consideration of Offender Characteristics
— But Regulated by Guidelines*

Various sections of the Senate Report indicate that Congress wanted sentences to reflect "a comprehensive examination of the characteristics of the particular offender."²² However, the means by which Congress apparently thought offender characteristics would be brought into the sentencing calculus was not through open-ended departures or broadly proscriptive policy statements. Rather, the Senate Report indicates a preference for factoring offender characteristics into sentences through a system of guidelines that would seem to be even more detailed than the current version of the guidelines.

This congressional vision of highly detailed guidelines is, for example, reflected in the portion of the Senate Report devoted to explaining the intent of 28 U.S.C. § 994(b) — the cornerstone provision in the Commission's enabling statute that instructs the Commission to "establish a sentencing range" "for each category of offense involving each category of defendant." The Report provides:

This subsection is of major significance. It contemplates a detailed set of sentencing guidelines... The [Senate Judiciary] Committee expects that there will be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances. There would be expected to be, for example, several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances. The guidelines may be designed and promulgated for use in the form of a series of grids, charts, formulas, or other appropriate devices, or perhaps a combination of such devices. Whatever their form... the effects of individual factors... would be traceable to Sentencing Commission determinations. The result should be a complete set of guidelines that covers in one manner or

²²Senate Report at 53.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results....

For a particular penal offense... there might be numerous guideline ranges, each keyed to one or more variations in relevant factors.... All the ranges together, however, would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense....

The Committee expects the Commission to issue guidelines sufficiently detailed and refined to reflect every important factor relevant to sentencing for each category of offense and each category of offender, give appropriate weight to each factor, and deal with various combinations of factors.²³

This concept — detailed guidelines accounting for a comprehensive array of offender characteristics — is also reflected in the portions of the Senate Report explaining Congress's intent in adopting §994 (d) and (e) (the statutory sections that direct the Commission's attention to various offender characteristics).²⁴ The Report concludes its discussion of how the Commission is to deal with offender characteristics by stressing that it is the Commission — and, notably, not the courts individually through departures — that should have primary policy-making responsibility for offender characteristics:

It should be emphasized... that the Committee decided to... permit the Sentencing Commission to evaluate [offender characteristics'] relevance, and to give them application in particular situations

²³*Id.* at 168-69 (citations omitted). A footnote to this section further stresses both Congress's view as to the importance of offender characteristics as well as its expectation that they would be dealt with through detailed guidelines: "For example, it is possible in some cases that the sentencing recommendation for a particular type of case will vary as to length or type of sentence because different purposes of sentencing apply in different categories of offenders convicted of basically similar offenses." *Id.* at 168 n.404.

²⁴*See id.* at 171-75.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

found to warrant their consideration. The Committee believes that it is important to encourage the Sentencing Commission to explore the relevancy to the purposes of sentencing of all kinds of factors, whether they are obviously pertinent or not; to subject those factors to intelligent and dispassionate professional analysis; and on this basis to recommend, with supporting reasons, the fairest and most effective guidelines it can devise.²⁵

(3) “Generally Inappropriate” Factors and Prison

As Table I illustrated, the Commission decided to treat the offender characteristics that 28 U.S.C. § 994(e) designates as “generally inappropriate” for prison determinations as “not ordinarily relevant” for purposes of departure. The legislative history to subsection (e), however, indicates that Congress had a narrower, more particularized focus than the approach taken by the Commission suggests. The Senate Report provides simply, “The purpose of the subsection is, of course, to guard against the inappropriate use of incarceration for those defendants who *lack* education, employment, and stabilizing ties.”²⁶

Thus, in assessing the flexibility the Commission has to address the offender characteristics enumerated in subsection (e), it appears that Congress’s concern was asymmetrical: Congress wanted to ensure that the *lack* of the enumerated factors would *not increase the likelihood of prison* — not that these factors could have no bearing on the possibility of probation. Portions of the Senate Report that discuss approaches the Commission might take to address the offender characteristics listed in the statute support this interpretation. The following excerpts are illustrative:

Subsection (e) specifically requires that the Sentencing Commission insure that the sentencing guidelines and policy statements reflect the “general inappropriateness” of considering education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant in recommending a term of imprisonment or the length of a term of

²⁵*Id.* at 175.

²⁶*Id.* (emphasis added).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

imprisonment. As discussed in connection with subsection (d), *each of these factors may play other roles in the sentencing decision; they may, in an appropriate case, call for the use of a term of probation instead of imprisonment*, if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community.²⁷

* * * *

Subsection (e) specifies that education should be an inappropriate consideration in determining to sentence a defendant to a term of imprisonment or in determining the appropriate length of such a term. *The Commission might conclude, however, that the need for an educational program might call for a sentence to probation if such a sentence were otherwise adequate to meet the purposes of sentencing, even in a case in which the guidelines might otherwise call for a short term of imprisonment.*²⁸

III. A BRIEF REVIEW OF RELEVANT DATA

Since 1991, the Commission's Monitoring Office has collected information on all cases involving departures from the prescribed guidelines range. (Prior to that year, information from a 25 percent random sample of departures was collected.) In 1991, approximately 81 percent of the cases were sentenced within the applicable guideline range. The number of substantial assistance departures in 1991 was almost 12 percent — about double the percent of all other downward departures (5.8%). The percent of upward departures was relatively nominal in 1991 — less than two percent.

The 1994 departure data indicate change since 1991. "Within guideline" sentences have dropped from 81 percent in 1991 to 72 percent in 1994 — a decrease of almost ten percent. In turn, the percent of substantial assistance departures during this same period increased dramatically, from 12 percent in 1991 to close to 20 percent (19.5%) in 1994. While the

²⁷*Id.* at 174-75 (emphasis added).

²⁸*Id.* at 172-73 (emphasis added).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

percentage of other downward departures has also increased since 1991, this increase is far less than with substantial assistance departures — 5.8 percent in 1991 compared to 7.6 percent in 1994. The percent of upward departures has actually decreased since 1991, from 1.7 percent in 1991 to 1.2 percent in 1994. From these data it is clear that the vast majority of departures from the sentencing guidelines are for defendant assistance to the government. *See* Table III.

The most frequently cited reasons for downward departures in non-substantial assistance cases include: sentence agreed to in a written plea agreement; criminal history category over-represents the defendant's prior criminal conduct or record; general mitigating circumstances; family ties and responsibilities; physical condition; instant offense behavior was an isolated incident; and diminished capacity. Each of these reasons represented at least five percent of the reasons for the non-substantial assistance downward departures. (Of course, as a percentage of *all* cases the frequency is considerably lower. For example, while "pursuant to a plea agreement" accounts for 24 percent of all downward departures, departures based on this factor occurred in only 1.7 percent of all cases sentenced in 1994.) *See* Table IV.

The only frequently cited reason for the upward departures is the inadequacy of the defendant's criminal history category based on the seriousness of the defendant's prior conduct or the risk of future misconduct based on the defendant's prior conduct or record. *See* Table V. The frequently cited reasons for both downward and upward departures mentioned above were fairly consistent from year to year.

IV. STANDARDS OF APPELLATE REVIEW

Section 3742 of title 28 establishes a key feature of the SRA, the right of an aggrieved party to appellate review of a departure from the guidelines. The statutory standard for appellate review of a departure is, however, broad — requiring only that the courts of appeals determine whether the departure is "unreasonable" in light of several enumerated factors.²⁹ To make appellate review of departures consistent and workable, courts of appeals have therefore had to develop more detailed standards to guide their review process. Because changes in the Commission's departure policy could, in turn, have implications for the appellate review process, this section briefly outlines the approach courts of appeals take in reviewing departures.

²⁹*See* 28 U.S.C. §3742 (e)(3).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

The First Circuit was the first court to address the issue of appellate review of departures in *United States v. Diaz-Villafane*.³⁰ Pursuant to *Diaz-Villafane*, the court must 1) review the departure circumstances to determine whether they are factors of a kind or to a degree that may justify departure; 2) review the evidence to determine whether the record supports a finding that the departure circumstances "actually exist"; and 3) determine whether the degree of departure was reasonable. Review of the first factor is "essentially plenary," suggesting minimal deference to the district court. With respect to the second and third factors, appellate review is deferential. The appellate court reviews factual issues under a clearly erroneous standard, and reviews the reasonableness of the degree of the departure for an abuse of discretion. While a few appellate courts have modified the analysis slightly,³¹ most circuits have mirrored the *Diaz-Villafane* test.³²

In 1993, however, the First Circuit modified *Diaz-Villafane* in *United States v. Rivera*³³ to give district courts a modest amount of additional deference with respect to their departure determinations. The *Rivera* court explained that plenary review would be limited to determine either (1) "whether or not the allegedly special circumstances (*i.e.*, the reasons for departure) are of the 'kind' that the Guidelines, in principle, permit the sentencing court to consider at all," or (2) the "nature of [a] guideline's 'heartland' (to see if the allegedly special circumstance falls within it)."³⁴ Thus, legal interpretations of the words of a guideline would continue to be subject to plenary review.

³⁰874 F.2d 43 (1st Cir.), *cert. denied*, 110 S. Ct. 177 (1989).

³¹*See, e.g., United States v. Hummer*, 916 F.2d 186 (4th Cir. 1991) (uses a similar four-part test that asks the additional question of whether the departure factor is of sufficient importance to warrant a sentence outside the guideline range).

³²*See, e.g., United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991); *United States v. Lang*, 898 F.2d 1378 (8th Cir. 1990); *United States v. White*, 893 F.2d 276 (10th Cir. 1990); *United States v. Barbotin*, 907 F.2d 1494 (5th Cir. 1990); *United States v. Joan*, 883 F.2d 491 (6th Cir. 1989).

³³994 F.2d 942 (1st Cir. 1993) (Breyer, J.).

³⁴*Id.* at 951.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

However, when the issue on appeal is "whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent," the circuit court should consider the sentencing judge's superior "feel" for the case.³⁵ A district court likely will have special competence to decide such issues because it has seen more ordinary guideline cases than the appellate court and thus would have a better idea of what constitutes an "unusual" case.³⁶

Whether the *Diaz-Villafane* or *Rivera* standard is appropriate may be resolved by the Supreme Court later this year. On September 27, 1995, the Court granted certiorari in *Koon v. United States*³⁷ to review the Ninth Circuit's *de novo* determination that the district court relied on impermissible departure factors when it granted an eight-level departure.

V. WHAT CRITICS SAY

A. In General

A review of the many scholarly articles written about the guidelines reveals that critics apportion responsibility for a perceived inflexibility in the current guideline system to three groups: Congress, the Commission and the courts. Congress is criticized for enacting mandatory minimum statutes and for tying substantial assistance departures to government motions. The Commission is blamed for designing an overly mechanical system that strips consideration of an offender's individual qualities from the sentencing process.

District and the appellate courts are criticized as well: district courts for not exercising the discretion that was left to them and appellate courts for ruling that the Commission had adequately considered aggravating and mitigating factors when it is not clear how adequate that

³⁵*Id.*

³⁶*Id.* See also, *United States v. Canoy*, 38 F.3d 893, 908 (7th Cir. 1994)(district court has a unique vantage point to determine whether family circumstances are extraordinary); *United States v. Simpson*, 7 F.3d 813, 820 (8th Cir. 1993)(directing the district court's attention to *Rivera* on resentencing).

³⁷34 F.3d 1416 (9th Cir. 1994), *cert. granted*, ___ U.S. ___, (No. 94-1664, Sept. 27, 1995).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

consideration was. As one critic put it, "Some of the courts that have denied departures seem to have been motivated by the impression that departures violate the spirit of the guidelines and ruin any uniformity the system hoped to achieve."

The following sections illustrate the broader criticisms that have been levied at the guidelines' offender characteristics and departure policies.

B. Characteristics "Not Ordinarily Relevant"

Professor Daniel J. Freed of Yale Law School wrote in 1992 that the guidelines process is at work on two different tracks. One is the visible, officially reported level of adherence to (and open departure from) the guidelines. The second is the level of quiet, non-compliance in reaction to "appellate rejection of reasonable departures from unreasonable guidelines. Increasingly, the second, underground level of sentencing seems to be displacing the first, visible level...." The Commission's tightening of "loopholes, combined with strict enforcement by courts of appeals hostile to departures, has increased the level of non-compliance in trial courts."

Freed criticizes the policy statements in Part 5H that identify many offender characteristics as "not ordinarily relevant" to sentencing. He argues that these policy statements are inconsistent with 18 U.S.C. §§ 3553(a) and 3661. In section 3553(a) judges are directed to consider the history and characteristics of the offender and section 3661 provides that no limitation is to be placed on the defendant's background information for a judge to consider in determining an appropriate sentence. Freed argues that the Commission has not provided reasons for designating offender characteristics as "not ordinarily relevant."

C. Mechanical Handling of Mitigating Factors

In the keynote address at The Yale Law Journal's 1992 Conference on the Federal Sentencing Guidelines, Marvin E. Frankel, former U.S. district judge for the Southern District of New York, criticized the Commission's "relatively cursory and mechanical handling of mitigating factors" as promoting undue sentencing severity. By designating the offender characteristics identified by Congress (such as age, education, family ties) as not ordinarily relevant, Frankel argued that the Commission has eliminated reasons traditionally used by judges as mitigating factors; many courts of appeals have then tended to interpret the phrase "not ordinarily relevant" as "never relevant" and thus compounded the rigidity of the guidelines. Frankel urged that judges be given more leeway to depart downward.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

D. Guided Discretion Model

In an early article criticizing the guidelines, Charles J. Ogletree, Jr., then visiting professor at Harvard Law School, wrote, "The Commission failed to draft guidelines addressing some of the complex issues involved in sentencing, particularly the significance of the purposes of sentencing and the individual characteristics of offenders.... The Commission also failed to address through the promulgation of guidelines the particular problem of racial disparity in sentencing."

Ogletree urged the Commission to increase consideration of offender characteristics by adopting a new model that would specify offense level reductions for various mitigating reasons. According to Ogletree, treating poverty, family instability, and similar characteristics as mitigating factors would help reduce racial disparities. "It is true that the primary mandate of the Commission was to establish guidelines that would eliminate disparities in the sentences of similarly situated offenders, but offenders who differ from one another in their personal circumstances are not similarly situated." A guided discretion model would allow more attention to the underlying purposes of sentencing because offender characteristics raise different rationales for sentences; for example, rehabilitation is a more important purpose than retribution in designing an effective sentence for a youthful offender.

E. Other Criticisms

The Commission should be aware that a significant amount of additional literature has been generated that deals with offender characteristics and departures. Many of the articles that have been written make proposals with respect to a particular offender characteristic or set of characteristics (*e.g.*, offender's history of substance abuse, offender's role as primary caretaker in family, offender's victimization by spouse).

VI. STATE GUIDELINE SYSTEMS

An examination of state guideline models reveals that, while the majority have adopted departure provisions, most states have not developed approaches as detailed or restrictive as the federal system. Instead, state systems providing for departures generally permit the sentencing court to simply depart for "substantial" or "compelling" reasons or provide nonexclusive lists of reasons for departures. The state systems reviewed range from the North Carolina guidelines, which do not permit standard departures, to the Pennsylvania system, which not only authorizes

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

departures, but also severely restricts appellate review of the court's decision to depart. This section compares the offender characteristic and departure provisions of the North Carolina, Washington, Minnesota, and Pennsylvania guidelines. These four systems were selected as representative of the various state departure models.

A. Offender Characteristics

The North Carolina, Washington, and Pennsylvania guidelines do not specifically prohibit the sentencing court from considering certain offender characteristics in determining a defendant's sentence. Indeed, North Carolina specifically permits a court to consider offender characteristics that are considered "not ordinarily relevant" under our Part 5H (*e.g.*, defendant age, employment history, drug treatment, family ties, and community ties), in determining whether a case is aggravating or mitigating.

Likewise, Pennsylvania allows the sentencing court to rely on status and stability factors — *i.e.*, education and employment status — in deciding upon a specific sentence within a given sentencing range. Of the states reviewed, only the Minnesota guidelines prohibit a sentencing court from considering certain offender characteristics. This prohibition has been modified somewhat by the Minnesota courts, however, which have established that although a sentencing court may not rely on offender characteristics in determining whether to impose a durational departure, a court may rely on these factors (*e.g.*, a defendant's family ties and employment record), in determining the appropriateness of a dispositional departure.³⁸

B. Departure Standards

All of the state guidelines reviewed contained departure provisions except for North Carolina. The North Carolina guidelines structure includes three broad sentencing ranges and a sentence outside these sentencing ranges is considered illegal. Similar to the North Carolina guidelines, the Pennsylvania guidelines provide three broad sentencing ranges. However, under the Pennsylvania guidelines a sentencing court is permitted to depart or sentence outside the three ranges. Both the Washington and Minnesota sentencing guidelines permit departures for "substantial and compelling reasons."

³⁸A durational departure is a departure in the length of a defendant's sentence. A dispositional departure, on the other hand, is defined as a departure from one type of incapacitation to another (*e.g.*, from incarceration to probation).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

C. Reasons for Departure

The Minnesota and Washington guidelines permit departures for reasons similar to Part 5K, including diminished capacity and extreme conduct, as well as for reasons that the federal guidelines include as mandatory Chapter Three adjustments (*e.g.*, vulnerable victim and role in the offense). The lists of reasons to depart are nonexclusive and are provided without detailed commentary. The Pennsylvania guidelines do not provide reasons to depart, relying instead on a statement that the reasons for departure "should not include aspects of the case that are already incorporated in the guidelines." Although the North Carolina guidelines do not permit departures, the lists of aggravating and mitigating factors for the court to consider in selecting the appropriate range contain many of the same factors that are reasons for departure in the federal guidelines, including, *inter alia*, extreme conduct, coercion or duress, and diminished capacity. None of the state guidelines reviewed specifically provide for substantial assistance departures.

D. Unique Provisions

Although the North Carolina guidelines prohibit departures, in limited circumstances the sentencing court is authorized to impose intermediate punishment (*e.g.*, boot camp or electronic monitoring) when the guidelines mandate active incarceration. This option is available if the court finds that "extraordinary mitigating factors of a kind significantly greater than the normal case exist." North Carolina also provides that in the case of drug trafficking, the defendant must receive a sentence of active imprisonment unless the court finds that the defendant provided substantial assistance in the identification, arrest, or conviction of another. If the court finds substantial assistance, the court may impose active, intermediate, or community punishment.

A distinguishing feature of the Washington guidelines is the statutory first time offender waiver provision. Under this provision, the court has broad discretion to sentence outside the sentencing range if the defendant has no prior felony offenses and if the defendant's current offense is not a violent offense. Neither the government nor the defendant can appeal the court's decision with regard to a first time offender waiver. Finally, Minnesota case law has established that a departure sentence generally should not be more than twice as long as the presumptive sentence.³⁹

³⁹See *State v. Evans*, 311 N.W.2d 481 (Minn. 1981).

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

E. Appellate Review

Unlike federal appellate courts, which review certain aspects of the departure decision under a strict, plenary standard, state courts generally provide limited appellate review of a court's decision to depart. Under the Washington and Minnesota systems, the sentencing court's decision to depart is subject to review under an abuse of discretion standard. For discretionary decisions by a sentencing court, which includes decisions to depart, the Pennsylvania statute permits a "petition for allowance of appeal ... where it appears a substantial question that the sentence is not appropriate." The Pennsylvania appellate court will find no substantial issue regarding appropriateness of sentence if the sentencing court had the benefit of a presentence investigation report and there is evidence the court considered it. Under these circumstances, the sentence is presumed valid. If an appeal is allowed, the standard of review is manifest abuse of discretion, and the appellate court will affirm unless the sentence is unreasonable.

F. Departure Rates

Table VI displays the 1993 departure rates for Washington, Minnesota, Pennsylvania and the United States Sentencing Commissions (excluding substantial assistance departures). Minnesota has the highest combined rate of departure at 21.3%. This may be explained by the fact that Minnesota has a single sentencing range for a given offense seriousness and criminal history category and the ranges are very narrow (top of the range is 8-10% greater than the bottom of the range). At 16 percent, Pennsylvania's rate of departure is also relatively high (compared to the federal rate of 7.7 percent). This could be a function of the lack of detailed restrictions on a court's departure authority and the strict standards governing appellate review.

VII. OPTIONS FOR REFINEMENT

Outlined below are options that the Commission might wish to consider to simplify or otherwise improve the guidelines' treatment of departures and offender characteristics.

A number of these options overlap and a number would seek to improve the guidelines by essentially competing methods — for example, some would "simplify" by dropping specificity and some would "clarify" by adding specificity. A complete analysis of these options would benefit from further case law review and empirical data. In this regard, an extensive departure study initiated by Commissioners Gelacak and Nagel could contain highly instructive information.

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

A. Simplify/Clarify

1. Replace "not ordinarily relevant" language with departure standards stated positively. For example, policy statement 5H1.1 currently states, "Age (including youth) is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Age may be a reason to impose a sentence below the applicable guideline range when the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration." This language could be changed by deleting the first sentence and providing the court with information as to when age may be an important sentencing consideration. For example, the policy statement could explain that with respect to offenders who have a history of violence and whose current offense is a violent offense, then the younger the offender, the greater the likelihood of recidivism, and the greater the justification for using age as an aggravating factor.

2. Establish additional standards such as specifically recognizing departures based on a single act of aberrant behavior, or a combination of factors which alone may not be appropriate to justify a departure; provide examples of "exceptional case."

B. Reduce/Combine

Eliminate unnecessary commentary or language and streamline the guidelines by combining similar concepts into single section.

1. Delete policy statements 5K1.7 (Role in the Offense), 5K1.8 (Criminal History), and 5K1.9 (Criminal Livelihood) as duplicative and unnecessary.

2. Delete infrequently applied 5K departure provisions (*e.g.*, §§5K2.1-2.2, 5K2.4-2.5, 5K2.7, 2.10, 2.14-2.15).

3. Combine Chapter Five 5, Parts H and K into a single Part, possibly with introductory commentary from Chapter One.

C. Redesign

1. Redesign the guidelines to be more "advisory" by:

DRAFT

Disclaimer: This document was developed by staff for discussion purposes only and does not represent the views of any commissioner. It should not be interpreted as legislative history to any subsequent Commission action. The discussion draft is provided to facilitate public comment on improving and simplifying the sentencing guidelines.

(a) Expanding departure reasons to include all Chapter Three factors (except acceptance of responsibility) as reasons for departure and incorporate infrequently applied Chapter Two specific offense characteristics.

(b) More definitively stating the Commission's view as to how courts of appeals should view departures. For example, the Commission might more clearly state its view as to the proper relationship between the guidelines and the courts; *i.e.*, that it is the Commission's responsibility to set general guidelines, but the sentencing judge's responsibility to determine whether the guideline recommendation is correct, and, if not, to sentence appropriately outside the guidelines.

(c) Allowing the court to consider certain factors for dispositional departures (*e.g.*, employment status, family responsibilities).

2. Increase "presumptiveness" of the guidelines by:

(a) Limiting departure length by indicating, for example, that a departure below the guidelines of greater than half of the lowest guideline sentence may only be given in extraordinary cases and an aggravating sentence of greater than twice the maximum in the guideline range may only be given in extraordinary cases.

(b) Limiting the increase or decrease that a given departure factor should have on an offender's sentence and limiting the cumulative total of such adjustments to perhaps half or twice the guideline lower and upper limits, respectively.

3. Establishing a "mixed model." Create aggravating and mitigating ranges to handle most current departure issues but allow departures outside of these ranges very rarely. (This approach is similar to North Carolina's.) There could be a larger list of factors allowed for aggravating or mitigating the sentence than under current practice and thus greater latitude to "adjust" the sentence; but the ability to go further than these ranges would be tightly constrained.

CHART A

USSC: GUIDELINE SIMPLIFICATION PRIORITIES	FJC: KEY SURVEY RESULTS ¹	COMMITTEE ON CRIMINAL LAW: KEY PROPOSALS
1. RELEVANT CONDUCT	RELEVANT CONDUCT	RELEVANT CONDUCT
<ul style="list-style-type: none"> • Clarify/Streamline guideline (no substantive policy changes) • Limit or prohibit acquitted conduct • <i>Examine use of unconvicted conduct*</i> • <i>Change burden of proof*</i> 	<ul style="list-style-type: none"> • 58.3 % indicated that relevant conduct standard is sufficiently clear (p. 36) • 58.7% believe that the scope of offender behavior considered is not appropriate (p. 37) • Included in top five major guidelines issues requiring substantive change (p. 24) • 68.5% of judges and 32.3% of chiefs agreed that there should be a limit on the offense level increase for unconvicted conduct (p. 9) • Majority supported preponderance standard (p. 19) • For conduct outside offense of conviction, about 30% preferred clear and convincing standard (p. 19) • 69% of judges and 64.7% of chiefs agreed that prior to pleading guilty, offenders should be given notice of what conduct beyond the count of conviction the government will ask the court to use in sentencing (p. 38) 	<ul style="list-style-type: none"> • Resolve circuit splits by amending relevant conduct & 5K2.0 to specify whether or not any categories of conduct (such as dismissed, uncharged, or acquitted) should be excluded, <u>per se</u>, from consideration for relevant conduct or for departure (p. 13)

Summary of
FJC Survey
of Judges &
Probation Officers
1996
Charts A & B

1. Unless otherwise specified, survey results represent responses from both district judges and chief probation officers. "Agreed" means that respondents either strongly or somewhat agreed.

* Not a priority in the '97 amendment cycle but will be considered in '98 or beyond.

**USSC: GUIDELINE
SIMPLIFICATION
PRIORITIES**

II. LEVEL OF DETAIL/COMPLEXITY

- Explore consolidation of all important definitions of general applicability in a single Chapter One guideline
- Consolidate/Eliminate Chapters Two and Three guidelines and specific offense characteristics
- Clarify definition of loss
- Examine problematic cross references
- Revise Acceptance of Responsibility

**FJC: KEY
SURVEY
RESULTS**

LEVEL OF DETAIL/COMPLEXITY

- Consolidation of similar guidelines rated as one of the top four most important potential changes (p. 7)
- Determining loss in fraud cases rated one of the top four most difficult aspects of the guidelines (p. 18)
- 57.6% of judges and 47.8% of chiefs reported having a case where a cross reference resulted in a sentence that was too harsh (although this occurred very or somewhat infrequently) (pp. 19, 61)
- 61.5% of judges and 68.1% of chiefs support having separate reductions for guilty plea and for other indications of acceptance (pp. 14, 50)
- 59.0% of judges and 56.7% of chiefs endorsed permitting all offenders to be eligible for a three-level acceptance reduction (pp. 14, 50)

**COMMITTEE ON
CRIMINAL LAW:
KEY PROPOSALS**

LEVEL OF DETAIL/COMPLEXITY

- Harmonizing related specific offense characteristics listed as one of five areas recommended for assessment and amendment (p. 14)
- Revision of fraud and theft guidelines identified as an area of critical importance (p. 8)
 - Does the loss table over-punish small loss amounts but under-punish very large loss amounts?
 - Is the specific offense characteristic for "more than minimal planning" necessary for offenses with a loss of more than \$100,000?
 - Could specific offense characteristics 4, 5, & 6 in §2F1.1 be replaced with an upward departure suggestion?
 - Why are §§2F1.1 and 2F1.2 separate guidelines?
- Resolve circuit split about what kind of interest the Commission intended to exclude from its definition of "loss" (p. 12)
- Resolve circuit split involving whether acceptance of responsibility can be denied for conduct not related to the offense of conviction (p. 12)

**USSC: GUIDELINE
SIMPLIFICATION
PRIORITIES**

**FJC: KEY
SURVEY
RESULTS**

**COMMITTEE ON
CRIMINAL LAW:
KEY PROPOSALS**

II. LEVEL OF DETAIL/COMPLEXITY

LEVEL OF DETAIL/COMPLEXITY

LEVEL OF DETAIL/COMPLEXITY

- Revise the acceptance of responsibility guideline to provide for a separate and distinct reduction for guilty pleas ².
- Make a clear distinction between a guilty plea and a "timely" guilty plea
- Consider a possible four-level discount in larger cases
- Amend list of appropriate considerations for reduction to include defendant's cooperation with the probation officer

². See letter from the Committee on Criminal Law dated 12/5/95 for a detailed discussion of their proposed revisions to the acceptance of responsibility guideline.

USSC: GUIDELINE
SIMPLIFICATION
PRIORITIES

III. DEPARTURES

- Review Koon decision
- Explore options to revise departure policy statements
- Revise general guideline departure standard to clarify "non-heartland" concept

FJC: KEY
SURVEY
RESULTS

DEPARTURES

- Ranked as number one out of 15 issues requiring substantive change (p. 24)
- Judges rated increasing availability of downward departures and providing greater guidance on the circumstances warranting departure as two of the top four priorities (p. 7)
- Fashioning a non-§5K1.1 departure rated by the judges as the most difficult of 18 aspects of the guidelines and chiefs rated this issue as the third most difficult (p. 18)

COMMITTEE ON
CRIMINAL LAW:
KEY PROPOSALS

DEPARTURES

- Resolve circuit split involving whether a departure should be measured from the mandatory minimum or guideline range (p. 12)
- Resolve circuit split concerning whether the collateral consequences of a conviction support a departure (especially where the consequence is potential deportation, a very commonly occurring situation) (p. 12)

IV. CRIMINAL HISTORY

- Re-order and streamline chapter
- Revise assignment of points to better target serious, repeat offenders

CRIMINAL HISTORY

- 90.1% of judges and 67.7% of chiefs supported changing points to rely more on the nature of the prior offense than on sentence length (p. 17)
- 96.1% of judges and 81.1% of chiefs supported giving more weight to prior violence in criminal history scoring (p. 17)
- 72.8% of judges and 58.8% of chiefs supported a separate criminal history category for those with no prior convictions (p. 17)
- Reducing number of criminal history categories rated as the least important change (rated 16th out of 16 by both judges and chiefs) (p. 34)

CRIMINAL HISTORY

- Resolve circuit splits involving the computation of criminal history, such as whether to count time in a treatment center as imprisonment, how to count prior set-aside convictions, whether burglary of a dwelling includes commercial burglary, and how to determine if offenses are "similar" to certain listed offenses (p. 12)
- Resolve circuit split involving whether a federal prison camp is "similar" to treatment centers and halfway houses for escape purposes (p. 12)

USCC: GUIDELINE SIMPLIFICATION PRIORITIES	FJC: KEY SURVEY RESULTS	COMMITTEE ON CRIMINAL LAW: KEY PROPOSALS
<p>V. SENTENCING TABLE *</p> <ul style="list-style-type: none"> • <i>Reduce number of offense levels *</i> • <i>Review table's "zone" structure *</i> • <i>Consider alternatives to prison sentences *</i> 	<p>SENTENCING TABLE</p> <ul style="list-style-type: none"> • 67.0% of judges and 63.8% of chiefs thought that more offenders should be eligible for alternatives (p. 63) • Reducing number of offense levels rated as one of the least important changes (p. 35) • Alternatives to incarceration ranked second out of 15 issues requiring substantive change (p. 24) • Of the six potential statutory changes presented, broadening the ranges in the sentencing table was one of the two changes most agreed with by the judges (p. 5) 	<p>SENTENCING TABLE</p> <ul style="list-style-type: none"> • Commission's interpretation of the 25% rule listed as one of five areas recommended for assessment and amendment (p. 1)
<p>VI. APPELLATE LITIGATION AND OTHER STATUTORY ISSUES</p> <ul style="list-style-type: none"> • Consider restricting appellate review of certain guideline factual findings • <u>Revise introduction to the Guidelines Manual</u> and departure section • Widen bands in monetary and drug tables to decrease litigation 	<p>APPELLATE LITIGATION AND OTHER STATUTORY ISSUES **</p> <ul style="list-style-type: none"> • 84.8% of judges and 88.1% of chiefs agreed with the current standard of review for determination of facts (clearly erroneous) (pp. 22, 65) • 71.1% of judges and 84.8% of chiefs think that a "due deference" standard is appropriate for appellate review of application of guidelines to the facts of a case (pp. 22, 66) • 90.1 % of judges and 95.6% of chiefs agreed with expanding the district court's authority to correct its own errors (pp. 22, 69) 	<p>APPELLATE LITIGATION AND OTHER STATUTORY ISSUES</p> <ul style="list-style-type: none"> • Examine if the bands of the loss table should be broader (p. 8) • 25% rule (p. 1)

* Not a priority in the '97 amendment cycle but will be considered in '98 or beyond.

** Note that the survey was completed prior to the Koon decision

**USSC: GUIDELINE
SIMPLIFICATION
PRIORITIES**

**VII. DRUG SENTENCING /ROLE
IN THE OFFENSE**

- Revise role in the offense and its application to the drug guidelines

**FJC: KEY
SURVEY
RESULTS**

**DRUG SENTENCING /ROLE
IN THE OFFENSE**

- Use of quantity in drug cases and role in the offense ranked among the top five issues requiring substantive change (p. 24)
- Judges rated determining drug quantity as one of the four most difficult areas of guideline application (p. 18)
- Evenly split on whether quantity should remain the same or have a smaller role in determining drug sentences (p. 10)
- 43.6% thought that role or other culpability factors should have the same effect as quantity and 40.3% thought quantity should have a smaller effect than role or other culpability factors (p. 10)
- Judges rated highest in importance having flexible adjustments for role, while chiefs placed most importance on clarifying the distinction between "minor" and "minimal" participant (p. 13)

**COMMITTEE ON
CRIMINAL LAW:
KEY PROPOSALS**

**DRUG SENTENCING /ROLE
IN THE OFFENSE**

- Revisions to the role guidelines described as critically important (p. 2)
- Aggravating role and mitigating role guidelines should be similar and symmetrical (p. 2)
- The court should be asked to consider a list of specific factors to determine the defendant's role (p. 2)
- Give the court a "sliding scale" upon which to place the defendant's role (p. 3)
- Key terms should either be defined or be self-evident (p. 3)
- It should not be necessary to compare the defendant's activity to a defendant who might commit the entire offense alone (p. 3)
- Move away from "mechanical measurements" such as the requirement that a certain number of persons must be involved or be supervised (p. 3)

USSC: GUIDELINE
SIMPLIFICATION
PRIORITIES

VIII. INTRODUCTION TO
GUIDELINES MANUAL

- Update to reflect evolution of
guideline sentencing process

FJC: KEY
SURVEY
RESULTS

INTRODUCTION TO
GUIDELINES MANUAL

- Not specifically addressed

COMMITTEE ON
CRIMINAL LAW:
KEY PROPOSALS

INTRODUCTION TO
GUIDELINES MANUAL

- Not specifically addressed

CHART B

Key FJC Survey Results and Committee on Criminal Law Proposals Not Specifically Addressed in Sentencing Commission Priorities

FJC Survey	Committee on Criminal Law
<ul style="list-style-type: none"> • Of the six potential statutory changes, expansion of the “safety valve” (18 U.S.C. § 3553(e)) was one of the two most agreed with by judges (p. 5) • 79.3% of judges and 71.0% of chiefs agreed with de-linking the sentencing guidelines from statutory mandatory minimums (pp. 5, 33) • 66.6% of judges agreed that they should have authority under 18 U.S.C. § 3553(e) to sentence below a mandatory minimum for “substantial assistance” in absence of government motion (p. 6) • Amending the guidelines less frequently was rated as one of the four most important changes (p. 7) • Chiefs rated providing greater guidance on the mechanics of re-sentencing as one of the four most important changes (p. 7) 	<ul style="list-style-type: none"> • Amend §2D1.2 (Drug Offenses Occurring Near Protected Locations) (p. 16) • Resolve circuit splits <ul style="list-style-type: none"> - Whether the defendant bears the burden of establishing that a weapon was not connected to a drug offense (p. 12) - Amend §5E1.2(i) regarding a fine for costs of incarceration and supervision to clarify that it is a fine rather than a true assessment of costs, or eliminate it as a separate fine provision (p. 12) - Amend §1B1.8 regarding protected information to state whether the Commission intended that such information, when given to the probation officer, should be identified but included nonetheless in the presentence report (p. 12)

FJC Survey

Committee on Criminal Law

- Judges rated applying the multiple count rules as one of four most difficult aspects of the guidelines (p. 18)
 - 54% of judges responded that amendments to the guidelines should not be made retroactive. 73.6% of chiefs responded that guideline amendments should be made retroactive but 61.8% of chiefs said this should be done infrequently (pp. 23, 70)
 - 76.8% of judges and 58.2% of chiefs reported that prosecutors have the greatest influence on the final guideline sentence relative to the judge, defense attorney, or probation officer (pp. 11, 44)
 - 43.3% of judges and 55.5% of chiefs from districts in which plea agreements contain stipulated facts indicated that the stipulations understate offense conduct about half the time or more frequently (pp. 11, 45)
 - 87.8% of judges and 82.6% of chiefs agreed that the sentencing guidelines give too much discretion to prosecutors (pp. 12, 47)
 - 74.4% of judges and 92.8% of chiefs agreed that plea bargains are a source of hidden unwarranted disparity in the guidelines system (pp. 12, 47)
- Amend §1B1.11 to provide a clear definition of “clarifying” amendments (p. 13)
 - Exempt Class A misdemeanors (12/5/95 letter from Committee on Criminal Law)

- 82.2% of judges and 88.9% of chiefs agreed that the guidelines should be amended to clarify the court's discretion to reject a plea when it believes the facts or guidelines have been manipulated (pp. 12, 48)
- 79.4% of judges and 83.9% of chiefs agreed that USSC should amend guidelines to resolve circuit splits (pp. 22, 69)
- When asked whether waivers of appeal should be used less frequently, 28.3% of judges and 26.5% of chiefs agreed (pp. 22, 69)
- Majority agreed that more guideline education and training is needed for everyone involved in the guideline sentencing process, but especially for CJA and private defense attorneys (p. 30)

1 know of its existence and generally what its duties
2 were. So I thought maybe I would just give a brief
3 bit about the Sentencing Commission.

4 The Commission came about as a result
5 of the 1984 Sentencing and Reform Act passed by the
6 Congress in an effort to end what was perceived as
7 significant disparity in sentencing in the various
8 district courts throughout the United States.

9 One of the first duties given to this
10 Commission was to develop and to adopt a set of
11 Sentencing Guidelines which were to be used in every
12 Federal court throughout the country. And that job
13 was accomplished in 18 months as mandated by the
14 statute. It was a significant, almost an overwhelming
15 job and to the great credit of the Commission that
16 they were able to get it done within that period of
17 time.

18 Those Guidelines, as all of you may
19 know, remained in full force and effect to this -- to
20 this day and must be used by every sentencing court in
21 the Federal system. From time to time, either the
22 Commission on its own after receiving input from
23 various people around the country or by legislation
24 from time to time amends the Guidelines. As I say,
25 the Guidelines have been and continue to be amended

1 and changed and updated and indeed, in almost every
2 session of the legislature, the Congress seems to pass
3 some type of legislation which impacts on the work
4 that the Sentencing Commission must do. Either to
5 develop new guidelines or new -- or -- or in their
6 judgment to ordain new criminal conduct which we then
7 must translate into methodology of sentencing under
8 the Guidelines.

9 The Commission, itself, is made up of
10 seven voting members. Each of the seven members is
11 appointed by the President of the United States and
12 confirmed by the Senate. And we also have two
13 nonvoting ex officio members named in the statute, the
14 Attorney General and the chairman of the United States
15 Parole Commission. Of those seven voting members, the
16 statute also requires that at least three must be
17 Federal judges and that no more than four can be of
18 any one political party.

19 I want to introduce you to the members
20 of the Commission and tell you just a tiny bit about
21 their background.

22 As I indicated, I was appointed as
23 chairman in 1994 by President Clinton and I serve --
24 in addition to my duties as the chairman of the
25 Commission, I serve on the District Court in the

1 Middle District of Pennsylvania in Scranton where we
2 like to say we have the best district court in the
3 country, but I won't say that since I'm here in
4 Colorado.

5 But in addition to myself as a judge,
6 Judge Dave Mazzone -- the name tags you can see on the
7 bench in front of us. Judge Mazzone serves on the
8 Federal District Court in Boston, Massachusetts, and
9 has been a long-time member of the bench in a variety
10 of other activities associated with judicial conduct.

11 And Judge Tacha, who all you know very
12 well, serves here in this area on the appellate court
13 for the Tenth Circuit.

14 And Judge Julie Carnes, another Federal
15 District Judge serves on the District Court in
16 Atlanta.

17 In addition to those judges on the
18 Commission, Commissioner Wayne Budd from Boston is
19 presently the senior vice-president of Ninex, the
20 corporation in Boston and he was formerly a Deputy
21 Attorney General of the United States and formerly
22 United States Attorney for Massachusetts.

23 Michael Gelacak, a lawyer. Michael is
24 originally from Buffalo, New York. He practiced law
25 there and in several other areas and also formerly

1 served with the Senate Judiciary Committee in a
2 variety of capacities, including staff director for
3 Senator Joseph Byden.

4 Michael Goldsmith is also a lawyer who
5 has served in a var -- practiced in a variety of
6 capacities in various areas of the country and
7 presently serves as a professor of law at Brigham
8 Young University Law School in Utah.

9 In addition to those voting members,
10 the chairman of the United States Parole Commission,
11 Edward Reilly, also sits by designation under the
12 statute.

13 And the attorney general has designated
14 Mary Harkenrider, who is counsel to the Assistant
15 Attorney --

16 MS. HARKENRIDER: -- General of the
17 criminal division.

18 JUDGE CONABOY: -- for the criminal
19 division in the Department of Justice. Mary
20 Harkenrider also serves on the Commission with us.

21 We have a -- our offices are located in
22 the new judiciary building in Washington, D.C. where
23 we have a staff of about 100 people who perform a
24 variety of capacities.

25 Most people, I think, when you think of

1 the United States Sentencing Commission, are inclined
2 to think of the Sentencing Guidelines and sometimes
3 there's a feeling that perhaps that's all that we do.
4 However, that's a -- an erroneous assumption or
5 presumption because the Commission, indeed, has a wide
6 variety of very important duties. Among those are a
7 research obligation that we take very seriously in
8 trying to carry out our duties. We do -- we monitor
9 every sentence in the United States courts and we do
10 evaluation of that sentencing process. We have a very
11 strong training arm that goes around the country and
12 trains a -- the judges, trial lawyers and others,
13 probation officers, et cetera. And we serve as a
14 general clearinghouse for sentencing information for
15 the United States Congress, for criminal justice
16 practitioners and for the public. However, the
17 guideline process is at the center of our activity and
18 most of what we do eventually translates itself in
19 some way into the guideline process.

20 In 1994, when I became chairman,
21 several other members joined the Commission and the
22 entire Commission at that time made as one of our
23 priorities an effort to try to simplify the
24 Guidelines. The Guidelines have been in existence
25 since 1987 and there is complaint over that period of

1 time that generally centered on accusations of
2 complexity and lack of flexibility in the mechanistic
3 nature of the Guidelines so we have been struggling in
4 the last year or so to try to determine some ways that
5 perhaps we could make the Guidelines easier to work
6 with and a -- and, in general, more responsive to the
7 purposes for which they were initiated.

8 We have been involved in this process
9 for a long time. During this -- the initial phases of
10 it, we studied every aspect of the Guidelines to try
11 to determine why that part of the Guidelines came into
12 existence, what its purpose is, how it was structured
13 initially, and what the complaints are about it, how
14 it's working in the field and what alternative ways
15 there might be for us to make those sections of the
16 Guidelines work better.

17 In carrying out that project, we have
18 talked to people all over the country and we've had
19 advice from a probation officers' advisory committee,
20 from defense counsel advisory committee, from a judge
21 advisory committee, and from other people such as the
22 Criminal Law Committee of the judicial conference that
23 have helped us and given us suggestions as we move
24 along. And we're in a -- we're at a point now where
25 we're trying to narrow down those areas where we feel

1 some changes can be made and, hopefully, will be made
2 for the better.

3 We realize, of course, as we're
4 involved in this process that much of what we do as a
5 Commission is not final. It's kind of a humbling
6 lesson perhaps maybe for a trial judge to learn that
7 your decisions are not final. As a district court
8 judge, we know that and we know that your decisions
9 are subject to appeal, but it's a different
10 proposition on the United States Commission because
11 when we make decisions, we must publish those and let
12 them out for public comment and, more importantly, we
13 must then translate or transfer it to Congress and
14 Congress has the final say in making determinations on
15 most of the changes that -- and most of the
16 determinations to be made.

17 So it's a political process as well as
18 a public process as well as legal process and trying
19 to work within that framework sometimes is tedious.
20 But it is a system we have in our country. It has
21 worked well for 200 years and we struggle as a
22 Commission to try to work within that framework and
23 try to get accomplished as much as we can to make the
24 system better.

25 We have recently published a number of

1 matters in the Federal Register and other places
2 looking for comment on those things and we hope to
3 publish some others in the near future. There are a
4 number of items that we are looking at in the
5 Guidelines and I think that most of those who will be
6 speaking to us today or are speaking with us today
7 have received some information on those areas that
8 we're looking at and we're hopeful that perhaps some
9 of you or maybe all of you will address some of those
10 areas and give us your comments on what you see in the
11 field about the application of the Guidelines, their
12 use and the results that come about from their use.

13 One of the traditional discussions that
14 we always hear about the Guidelines is the whole issue
15 of discretion and whether or not judges had too much
16 discretion prior to the adoption of Guidelines and
17 whether they have too little discretion now and
18 whether discretion has been transferred from the
19 judicial area to the prosecution area and whether the
20 defense has lost or should gain more in the way of
21 their input into the application of the Guidelines.
22 And all of these things are important to us to hear
23 about from you who are using the Guidelines on a daily
24 basis. And your comments are most helpful to us as
25 we're trying to make important decisions at these

1 various hearings.

2 I'd like to move into the first panel.
3 And each of you, I think, has been informed that we
4 are asking you to keep your remarks to ten minutes in
5 length. And we do have a large number of witnesses
6 scheduled for this morning and I would ask you if you
7 would be careful and try to maintain that time
8 limitation. This gadget in front here, I think, will
9 be telling you how much time has expired and we would
10 ask each of you if you would try to keep to that time
11 limit.

12 I would also ask the members of the
13 Commission if you would hold your questions until we
14 have heard from all of the speakers on each panel.
15 And then I think it would be more orderly if we would
16 then question in that fashion unless someone feels
17 there's something of such significance -- a
18 significant portion they might want to break in.

19 On our first panel, we have sitting
20 here before us and again, I extend my gratitude --
21 when I say mine, I mean of the entire Commission -- to
22 all of you to take the time to come here this morning
23 and to talk to us and to give us your impressions of
24 the matters you're going to talk about.

25 We have Judge Lewis Babcock who is a --

1 on the United States District Court here in Colorado,
2 appointed by President Reagan in 1988. Am I correct,
3 Judge?

4 JUDGE BABCOCK: Yes.

5 JUDGE CONABOY: The judge is a graduate
6 of the University of Denver in both its undergraduate
7 and law school and practiced here in this area for --
8 since his graduation from law school in 1968 and went
9 on the bench in 1988.

10 And we have Mr. Richard Miklic, who is
11 the chief probation officer here in Denver, in
12 Colorado and has been chief probation officer since
13 1989 according to my notes. Am I correct?

14 MR. MIKLIC: Yes.

15 JUDGE CONABOY: Thank you, Mr. Miklic.

16 We also have Mr. Michael Katz, who is
17 the Federal Public Defender here in Colorado and has
18 been the -- became an assistant in 1978 and the Public
19 Defender since 1979. I don't know if those dates are
20 correct.

21 And then we have Mr. Robert Litt, who
22 is a Deputy Assistant Attorney General in the criminal
23 division with the United States Department of Justice.
24 Mr. Litt has been with the Department since 19 --

25 MR. LITT: June of '94.

1 JUDGE CONABOY: '94. '94. Well, thank
2 you all for being here. And Judge Babcock, are you
3 going to talk to us first?

4 JUDGE BABCOCK: Yes, sir.

5 JUDGE CONABOY: If you are, if you
6 would proceed, sir.

7 JUDGE BABCOCK: May it please the
8 Commission, Mr. Chairman. I confess that I haven't
9 appeared before a bench in 20 years and the anxieties
10 washed over as they always did before.

11 I was a Colorado State judge from 1976
12 until I assumed the Federal bench in 1988. And as
13 such, I have a context of experience in sentencing
14 within a wide range of discretion as well as, of
15 course, since I assumed the bench in 1988, sentencing
16 under the United States Sentencing Guidelines.

17 When I attended the Federal Judicial
18 Center and was introduced to the Guidelines, I also
19 confess that it was somewhat overwhelming.
20 Fortunately, however, I always enjoyed working my way
21 through the mazes of the Uniform Commercial Code and,
22 consequently, I became somewhat comfortable working
23 with the Guidelines in fairly short order.

24 In addition or having had the
25 experience of the contracts, sentencing individuals

1 where I had to exercise discretion with a wide
2 range -- Colorado had a rather rudimentary system of
3 presumptive ranges of sentencing -- one of the things
4 I learned early on as a judge is that you must express
5 a reason for a sentence imposed. You have a
6 constituency that you're speaking to. Of course, you
7 speak to the defendant who is going to suffer the
8 sentence. The defendant's family, the defense
9 counsel, the prosecution, the public needs to know a
10 reason for a sentence. And last but not least, if you
11 can't express a sentence in a rational fashion,
12 articulated rationally so that you understand it
13 yourself, you probably haven't got a handle on the
14 decision.

15 Factors such as the harm caused by the
16 conduct, the role of a defendant in committing the
17 offense or offenses, a defendant's expression of
18 remorse, what we now know is acceptance of
19 responsibility, numerous of the factors constructed
20 into the Sentencing Guidelines were always touchstones
21 that I looked to in fashioning the sentence where I
22 had wide discretion.

23 I've, in my experience, therefore,
24 found that there is a very keen and sharp logic to the
25 Sentencing Guidelines. The bad news is, as we all

1 know, discretion is extremely narrow, tightly
2 controlled. When I sentenced people within a wide
3 range of sentences, I found myself losing sleep,
4 suffering, struggling to articulate the reason. When
5 I sentence under the Sentencing Guidelines, I find I
6 sleep just fine because I have very little thinking to
7 do. It's done for me. It's done for me by the
8 attorneys prosecuting the case and defense counsel in
9 structuring the proposed sentence. And it's done for
10 me by extremely able probation officers under the
11 guidance of Mr. Miklic. Their work and the quality of
12 their work is exceptional. The lawyers, I find, are
13 well schooled for the most part. There are exceptions
14 where you have someone not familiar with the
15 Guidelines who I see is disadvantaged in the plea
16 negotiation process.

17 Basically, my sentencing hearings take
18 about 20 minutes. I have very few contested issues.
19 These issues are resolved largely through the
20 negotiation process. Has discretion shifted to the
21 attorneys, the Government and the defense attorneys?
22 I think that discretion was always there before
23 Sentencing Guidelines in charging decisions and in
24 fashioned plea agreements.

25 But there is not much discretion on the

1 bench. We have in Colorado General Order 1994-3
2 through the application of which the issues that may
3 be in dispute at a sentencing hearing are narrowed
4 early on. It comports with notice, due process. If
5 there is an adverse jury verdict, the Government files
6 a sentencing statement setting forth the Government's
7 position with regard to the application of the
8 Guidelines, the defense may respond. If there is a
9 plea agreement, the parties' estimate of the
10 application of the Guidelines is set forth in the plea
11 agreement in advance of the sentencing hearing after
12 all sides have had an opportunity to review the
13 pre-sentence report.

14 If there are contested issues, those
15 issues are made known. They are honed, they are
16 narrowed. And it is not an unwieldy time-consuming
17 process to resolve those questions either as a
18 resolution of dispute of fact or interpretation of the
19 Guidelines and application of the Guidelines to the
20 facts. So I don't find myself burdened with
21 Guidelines.

22 I suppose the question is should I. I
23 sometimes long -- often long for more flexibility in
24 dealing with first-time offenders. Criminal history
25 category levels of a level 1 are often largely

1 meaningless in terms of -- there are -- I mean, they
2 have meaning, but there is not much flex in treating
3 somebody who has never been before a court of law in
4 their lives. And that bothers me. I have difficulty
5 dealing with drug quantity questions. I have
6 difficulty dealing with loss determinations in complex
7 white collar crime cases. I have -- one of the most
8 difficult cases I've dealt with dealt with acquitted
9 conduct, although that doesn't appear before me
10 frequently.

11 The Guidelines have achieved their
12 purpose in resolving disparity across Federal
13 districts. I think the areas of disparity now perhaps
14 reside in circuit splits. And that may be a fertile
15 ground to plow by the Commission in resolving these
16 circuit splits. It certainly would be helpful, I
17 think, to the integrity of the Guidelines to keep the
18 burdens as they are. I think the burdens lie where
19 they ought to.

20 I have a note of caution to sound and
21 that's this: Change is unsettling. In my experience
22 in watching the Colorado sentencing system change
23 frequently, I saw most unsettling change among the bar
24 and it impacted the defendants and prisoners greatly.
25 We have a substantial body of appellate case law now.

1 I'm always nervous when somebody tells me that they
2 are going to simplify something. I wholeheartedly
3 endorse simplification. But if simplification is a
4 mere term and not accomplished in fact, the complexity
5 that arises out of a simplification process may be
6 unworkable.

7 Thank you for your invitation made to
8 appear here. I appreciate that very much.

9 JUDGE CONABOY: Thank you, Judge, very
10 much. I can tell you that last comment that we're
11 very worried and concerned about that ourself, to make
12 things less complex by trying to make them more
13 simple.

14 Now Mr. Miklic, would you like to make
15 your remarks, please.

16 MR. MIKLIC: Mr. Chairman and members
17 of the Commission, I'm pleased to have the opportunity
18 to be here today to comment on the simplification of
19 the Federal Sentencing Guidelines.

20 Complexity of the Guidelines is as
21 serious a problem for probation officers as I think it
22 is for others in the criminal justice system. Let me
23 give you an example of how it's affecting our work.

24 When I was appointed as a Federal
25 probation officer in 1974, one of my duties was to

1 prepare pre-sentence reports for judges of my court.
2 I already had considerable experience preparing these
3 reports at the State level and I found the basic
4 process was not that different in Federal court. I
5 did have to familiarize myself with the Federal
6 Criminal Code and the Federal Rules of Criminal
7 Procedure and I also had to acquire a sound working
8 knowledge of Federal crimes in the Federal criminal
9 justice system. This was a challenging task, but it
10 was a manageable one even though I had other important
11 duties to perform. Besides preparing pre-sentence
12 reports, I was also responsible for providing
13 community supervision of 50 to 60 offenders who were
14 on probation and parole.

15 The situation is strikingly different
16 for someone coming into the Federal probation system
17 today. Officers who will be preparing pre-sentence
18 reports are given, in addition to the Federal Criminal
19 Code and the Rules of Criminal Procedure, the current
20 Guidelines manual consisting of two volumes and
21 incorporating more than 500 amendments, the eight
22 previous editions of the Guidelines manual, a 53 page
23 document published by the Commission which provides
24 the answers to most frequently asked questions about
25 Sentencing Guidelines, a 1,500 page annotated handbook

1 which provided detailed legal analysis for each
2 Guideline and policy statement, a 450-page guide to
3 preparing Guideline pre-sentence reports issued by the
4 administrative office of the United States courts, an
5 outline of appellate case law and selected cases guide
6 published by the Federal Judicial Center of 248 pages.
7 This is supplemented by periodic sentencing updates
8 that provide digests of more recent decisions, an
9 index from the Tenth Circuit Court of Appeals
10 currently consisting of 249 pages, a computer program
11 developed by the Sentencing Commission to help
12 officers make our Guideline calculations, passwords to
13 provide access to on-line legal research services, the
14 telephone number of a Sentencing Commission hotline
15 for probation officers, and a telephone number for
16 obtaining legal advice from the administrative office
17 of the United States courts.

18 In addition, because of the complex and
19 highly technical nature of the Guidelines, many
20 pre-sentence report writers are assigned to
21 specialized units where they have no contact with the
22 offenders in the community.

23 The problem is not just we're making a
24 job more difficult and time consuming. The real
25 problem is that we're turning probation officers who

1 used to be valued for their judgment and experience
2 into highly specialized technicians who are frequently
3 expected to act as a kind of Guidelines police. We
4 find ourselves in this situation because in the
5 interests of uniformity, we have tried to reduce the
6 sentencing process to a set of precise mathematical
7 calculations and if you try to capture all the factors
8 that go into a good sentencing decision in a set of
9 formulas, you are going to end up with a very complex
10 and mechanical system.

11 Consider, for example, the robbery
12 Guideline section 2B3.1. Robbery is normally a fairly
13 simple crime. Nevertheless, this Guideline contains
14 six different specific offense characteristics that
15 can increase the base offense level, including whether
16 a death threat or weapon or firearm was involved, the
17 extent of any bodily injury, the loss, whether a
18 firearm was taken or was the object of the offense,
19 whether the property of a financial institution or
20 post office was taken and whether a carjacking was
21 involved. Each of these characteristics is broken
22 down into even greater detail as with a threat with
23 weapon or firearm adjustment where you get 2 levels
24 for a death threat, 3 for brandishing, displaying or
25 possessing a weapon, 4 levels for a weapon that was

1 otherwise used and so on up to 7 levels for a firearm
2 that was actually discharged.

3 Naturally, each of these terms, weapon,
4 firearm, brandished, displayed or otherwise used and
5 so forth must be meticulously defined. Altogether,
6 there are 23 different ways in which the base offense
7 level can be increased by a specific amount, not to
8 mention one additional provision that limits the
9 cumulative adjustment for death threats, weapons,
10 firearms and bodily injury.

11 One unfortunate result of this system
12 is that the participants become preoccupied with the
13 mechanics, often losing sight of the big picture.
14 Probation officers who prepared pre-sentence reports
15 in the pre-Guidelines era approached each case with a
16 fresh eye and had to carefully justify each sentencing
17 recommendation. As a result, such factors as the
18 seriousness of the offense, the need for detention,
19 protection of the public, and rehabilitation of the
20 offender would be continually on their minds. I don't
21 see much opportunity for that kind of reflection under
22 the current system. Today's probation officers are so
23 busy dealing with the minutiae of Guideline
24 application and trying to police plea agreements --
25 the role of which incidentally many find

1 distasteful -- that they have few opportunities to
2 reflect on what the sentencing process is or should be
3 trying to accomplish.

4 A system that tries to reduce
5 everything to a series of complex mathematical
6 calculations also leads little room for independent
7 judgment and analysis. Historically, one reason for
8 having probation officers involved in the sentencing
9 process was that they had valuable insights to offer
10 based on their experience working with the offenders
11 in the community. Specialized Guideline technicians
12 rarely have that kind of experience and those who do
13 have few opportunities to make use of it.

14 The current system doesn't really
15 produce uniformity, either. For one thing, you are
16 always going to have circumstances that don't fit the
17 formulas and each court is going to handle those
18 situations differently. The very complexity of the
19 system also makes it vulnerable to subjective
20 interpretation which creates its own brand of
21 disparity. This is evident from the conflicting
22 opinions that have come out of the courts of appeal.

23 Finally, and most important, the more
24 complex in fact and rule-driven the system becomes,
25 the more dependent it is on the expression of the

1 prosecuting attorney who has the burden in our
2 adversarial system of proving the facts that drive the
3 sentencing decision. A Guideline that provides a
4 precise adjustment for possession of a firearm is
5 useless if the prosecuting attorney is unable or
6 unwilling to prove that the gun was there. So
7 although a rigid mechanical system may give the
8 appearance of strict objectivity and uniformity, in
9 practice, it's often quite another story. This is
10 especially frustrating for probation officers who put
11 a lot of time and effort into mastering the Guidelines
12 and applying them in a particular case only to see the
13 adversarial system take over, in the end producing
14 results that are sometimes quite different from what
15 Commission and Congress intended.

16 The complexity of the Federal
17 Sentencing Guidelines is not an accident. And it's
18 not the result of carelessness or lack of literary
19 skill. It's a necessary characteristic of a rigid and
20 mechanical system which does not necessarily promote
21 fairness and consistency in sentencing and which may,
22 in fact, be producing the exact opposite result. If
23 we really want to eliminate this complexity or at
24 least reduce it, we'll have to create a system that
25 strikes a balance between the general and the

1 particular, between structure and decision -- and
2 discretion and between mathematics and common sense.
3 In other words, we'll have to develop what are
4 commonly known as Guidelines.

5 With respect to the robbery section I
6 mentioned earlier, the Commission could, for example,
7 provide a general discussion of aggravated and
8 mitigating factors that must be considered in
9 sentencing including those currently listed, but allow
10 the Court to impose sentence within a specified range
11 depending on the circumstances of the individual case.
12 Changes like this would convert our rigid collection
13 of rules and definitions to a true guideline system
14 and would restore balance, fairness and a sense of
15 humanity to the sentencing process.

16 Thank you, very much.

17 JUDGE CONABOY: Thank you, very much,
18 Mr. Miklic.

19 Mr. Katz, are you ready to proceed
20 next?

21 MR. KATZ: Sure. Mr. Chairman and
22 members of the Commission. I have to start by saying
23 I realize that as a Federal defender many years, the
24 remarks that I'm about to have may have -- carry undue
25 weight with the Sentencing Commission and with

1 Congress, as well.

2 JUDGE CONABOY: Would you pull your
3 microphone over a little closer, Mr. Katz.

4 MR. KATZ: I remember --

5 JUDGE MAZZONE: You should repeat.

6 MR. KATZ: I remember 10 or 12 years
7 ago sitting not in this courtroom but a courtroom
8 across the street and saying in about three pages
9 worth of testimony that I thought the Guidelines were
10 a bad idea and that the reason I thought they were a
11 bad idea was it was taking discretion away from judges
12 and placing it in a paint by the numbers type of
13 sentencing scheme. And I think two years later, of
14 course, we had the full blown Sentencing Guideline
15 manual and then a couple years after that, I got a
16 letter from then commissioner -- I guess Deputy
17 Commissioner Nagel who wanted to come to Colorado and
18 talk to us about the Sentencing Guidelines and how
19 they were working and I wrote a long letter back
20 saying I prefer not to participate in that discussion,
21 which that letter ultimately got published in the
22 Federal Sentencing Report because somebody got ahold
23 of it and thought it was good.

24 But in any event, I -- at that time, I
25 again agreed to sit down and talk to a commissioner

1 and some of the staff members and I don't recall any
2 changes coming about as a result of that interchange.
3 Or any positive ones anyway.

4 And so then when I got the invitation
5 to come back from Mr. Purdy, I thought, why is it I
6 have this sort of reluctance to do this. And perhaps
7 I should try to pinpoint why I have this reluctance
8 because it's certainly nothing to do with any
9 animosity towards the Commission or any individual
10 members of the Commission.

11 I guess I feel like the Sentencing
12 Guidelines are a -- a fictional vehicle on a journey
13 to a mythical planet called Justicia and the planet
14 Justicia is one where there is no sentencing -- there
15 is no -- no disparity of sentencing, that the
16 sentences are proportionate and just and, in fact,
17 it's a world where there is very little crime. And of
18 course, it doesn't exist and it's not going to exist
19 as a result of a sentencing -- the Sentencing
20 Guideline vehicle is never going to find it.

21 And so when I'm asked, you know, should
22 we bifurcate this rule or should we amend this rule or
23 tweak this rule, I guess I feel a little bit like I've
24 landed on a square that says you've just encountered a
25 meteor field, go left or right two moves to avoid it.

1 Or you have landed on another square that says go back
2 two spaces to refuel on Mars because I really think
3 that the -- that the mission -- that the goal is
4 that -- is that fictional and it is that imprecise.
5 And the problem with it is, as Mr. Miklic has sort of
6 alluded to -- and it's what we've said all along --
7 you can't take all the factors that go into a just,
8 fair sentence and you can't -- and you cannot quantify
9 them and put them into a manual regardless of whether
10 the manual is few hundred pages or a few thousand
11 pages.

12 I also have said in the past and will
13 say again, based on eight years of experience, that
14 this scheme is a brilliant attempt to do that. This
15 is very rational, well thought out. The references
16 back and forth between different chapters and
17 different guidelines in an attempt to avoid disparity
18 and not have different guidelines trip over one
19 another is really awesome in a sense. I think that if
20 people -- if we could produce this kind of manual in
21 some other areas, perhaps, in the Government, we could
22 take some pride in the product.

23 The problem is -- I'll give you a
24 simple example in a case, and until you can deal with
25 this, you can't really take care of the problem with

1 the Sentencing Guidelines. When Trigger Lock was en
2 vogue and every Federal agent in the Alcohol, Tobacco
3 and Firearms was tripping over themselves to go to gun
4 and pawn shops and to find anybody who had a prior
5 felony by cross referencing with the computer to bring
6 them to Court to prosecute them because these were,
7 after all potentially violent offenders, felons who
8 had guns, what they came up with in some cases, for
9 example -- and these are cases I actually handled --
10 was the 62-year-old man with a long record whose
11 father was 90 years old, had gotten senile and gone
12 into the Colorado State Hospital and said to his son,
13 son, I don't need that gun anymore, so go pawn the
14 gun. He took the gun to a pawnshop and he pawned the
15 gun. He probably had the gun for an hour. Where is
16 that dealt with in the Sentencing Guidelines? Where
17 is that dealt with under the chapter felon with a gun?

18 What about the young man, another felon
19 with a gun case, who was living with a woman whose
20 ex-husband had gone to prison and who -- she needed
21 money and she decided she wanted to pawn her ex-
22 husband's gun. So she has my client go with her to
23 the pawnshop and she was trying to pawn that firearm
24 at one pawnshop and wasn't successful, so my client
25 said let me show you how it's done. He negotiates a

1 better deal with the next pawnshop. \$50 instead of
2 \$10 for the gun. And he signs off that he is, in
3 fact, the owner of that firearm.

4 Those were two cases that were
5 prosecuted in the U.S. District Court in Colorado.
6 Nothing in the Guidelines to tell a judge or a
7 prosecutor or defense lawyer or to allow us even to
8 deal with the quality and the nature of that criminal
9 conduct because, on paper, it is a clear-cut
10 possession of firearm by a convicted felon.

11 I could -- I could give you so many
12 examples in the cases of illegal aliens who are
13 aggravated felons by virtue of the fact that on a
14 street corner somewhere, they handed a dime bag to
15 somebody for \$25 and now they are going to go to
16 prison for five or six years, although depending on
17 what part of the country you're in, you might -- you
18 might not even see it prosecuted in San Diego the
19 first time they come back. The second time they come
20 back, you might see them get a petty offense and the
21 third time they come back, they might get an illegal
22 reentry after deportation for a felony, leaving me in
23 Colorado to argue to the judge well, this time -- this
24 time, my client has the expectation that he's going to
25 be treated the same way. And there's almost an

1 estoppel type of argument because, in fact, in the
2 past, the Federal Government hasn't treated this man
3 as though that prior conviction, that minor drug
4 distribution was, in fact, an aggravated felony. A
5 misdemeanor one time and a -- and a two-year felony
6 one time.

7 So in any event, I see every day --
8 every day, I see those types of problems with
9 Sentencing Guidelines which leads me as a practitioner
10 to be cynical about the Guidelines, to try to do my
11 best to represent my client and try to find some sort
12 of justice for my client despite the Guidelines and by
13 learning and using the Guidelines scheme and trying to
14 become as expert as I possibly can in it.

15 Am I manipulating it? Perhaps I am.
16 Am I trying to reach a just result for my client? Is
17 the prosecutor trying to reach a just result for the
18 people? I think so. And I think the proof of that is
19 in most of these cases where we come in with these
20 types of departures and these types of -- of spins on
21 the facts of the case, judges are willingly signing
22 off on those plea agreements and sentencing the
23 defendants accordingly because I think, in fact, the
24 judges realize the Sentencing Guidelines are much too
25 harsh and -- and consequently, I think they are

1 willing to go along with these plea bargains that we
2 fashion in some of these cases.

3 What has the sentencing -- what have
4 the Sentencing Guidelines wrought in the last eight
5 years in this district? My experience is a huge body
6 of case law. I used to think I knew the law. I still
7 think I know the law. It's just there is this whole
8 tremendous segment of the law dealing with Sentencing
9 Guidelines that you couldn't possibly master or know
10 unless you are having cases dealing with those
11 particular points and issues.

12 A lot more people are in prison.
13 There's no question about that. Statistics bear that
14 out.

15 Certainly, there's more uniformity in
16 sentencing. There's no question about that if that's
17 the goal.

18 A lot more time is spent on sentencing.
19 I do -- offenders now do what we call timekeeper
20 because Congress wanted to have more feedback on why
21 defenders were spending more time in general
22 representing their clients. And it's staggering when
23 I look back at my week and at my month to search how
24 much time with each individual client is spent on
25 sentencing.

1 In fact, I think we could point to the
2 fact that we have a growth in staff as a result of the
3 Sentencing Guidelines. We've had a need to grow
4 because we can't handle this many cases due to the
5 Sentencing Guidelines and not so much the complexity
6 of the Guidelines, but just the fact of the Guidelines
7 and how many issues there are to deal with and how the
8 plea bargaining process has been complicated.

9 I think also, we have fewer trials as a
10 result of the Sentencing Guidelines, whether that's
11 good or bad, because now, there's a much greater
12 degree of certainty with regard to plea bargaining
13 and, quite frankly, it doesn't take much to be able to
14 fashion a plea agreement that will be a lot less harsh
15 than would be the result if one went to trial under
16 the Guidelines.

17 In other words, pre -- in fashioning
18 the plea agreement, negotiating, we can probably get
19 the benefit of the doubt on the role or more than
20 minimal planning, acceptance of responsibility, of
21 course, and that can have substantial impact on the
22 ultimate sentence. So that's another byproduct of the
23 Guidelines.

24 I've got only a few seconds left. How
25 are they working generally? Well, we've adapted and,

1 of course, we would adapt. It was inevitable. We're
2 trying to do justice in this district, I think,
3 despite the Guidelines, but I don't believe that
4 there's a judge in the United States Federal judiciary
5 who couldn't fashion a better sentence or who believes
6 that he or she couldn't fashion a better sentence that
7 the Sentencing Guideline book can fashion.

8 And finally, I just want to say this:
9 I don't think complexity is a problem with the
10 Guidelines. I think it takes a little time to learn
11 the Guidelines. The problem, as Mr. Miklic indicated,
12 is you've got by its very nature not so much
13 complexity, but you've got a lot of factors that have
14 to be weighed. You can put on the green eyeshade.
15 You can work through it relatively easily and that's
16 why the Guidelines are fairly manageable in that
17 regard. Thank you.

18 JUDGE CONABOY: Thank you, Mr. Katz.
19 Mr. Litt. When you're ready, proceed.

20 MR. LITT: Thank you, Mr. Chairman.
21 Members of the Commission. I'm pleased to be here
22 today on behalf of the Department of Justice to
23 discuss the Sentencing Guidelines in general and in
24 particular your efforts to try to simplify them.

25 Some of what I'm going to say may be

1 somewhat familiar to you already from the comments of
2 our able representative on the Commission, Mary
3 Frances Harkenrider. That's not because we're robots
4 all set up here to toe the same line, but because the
5 Department of Justice really takes its
6 responsibilities in this area to the Commission, to
7 the public, to the criminal justice system very
8 seriously and before we take the position or express
9 views on this matter, we make sure that they reflect
10 the views not only of the United States Attorneys and
11 of the criminal division, but of all other affected
12 components of the department. And I can attest to the
13 tremendous amount of time that we and in particular
14 Mary spent on these issues to really try to give the
15 questions you raised the serious consideration they
16 deserve.

17 I want to begin by emphasizing that, in
18 our view, the Sentencing Guidelines have really
19 benefitted the criminal justice system. No longer
20 does a defendant coming to court face a sentence
21 that's based on the luck of the draw in the courthouse
22 and all of us who were practicing criminal law before
23 the Guidelines know how much of a factor the luck of
24 the draw could be. Instead, the Guidelines have
25 brought a reasonable degree of uniformity and

1 certainty to sentencing. Not absolute uniformity but
2 a reasonable degree.

3 Guideline sentences vary according to
4 the seriousness of the offense and the criminal
5 background of the offender. Proportionality of the
6 sentence to the offense is an important goal. A
7 defendant doesn't get a benefit because his or her
8 socioeconomic background is similar to that of the
9 professionals in the courtroom. Judges still under
10 the Guidelines have the room to individualize a
11 sentence by selecting a particular point within the
12 Guideline, by imposing alternatives to incarceration
13 where permitted and by departing from the Guidelines
14 where there is a factor that the Guidelines don't
15 adequately take into account. But in great measure,
16 we believe that the Guidelines have achieved their
17 paramount goal of fairness, predictability and
18 consistency in sentencing.

19 There are unquestionably costs that we
20 have incurred in implementing this system. It's much
21 cheaper and easier to sentence without Guideline
22 constraints and without worrying about like offenders
23 are receiving like sentences. We all know that
24 judges, lawyers and probation officers have had to
25 become familiar with a brand new body of law, one that

1 is still being fleshed out by the Commission and the
2 courts. Sentencing under the Guidelines is
3 undoubtedly and inevitably more complex and more time
4 consuming than under a system of unguided discretion,
5 but we believe that, by and large, the benefits that
6 the Guidelines have outweigh these costs. That's not
7 to say that we believe that the current Guideline
8 system is perfect, but it is to say, however, that any
9 effort at simplification or reform of the Guidelines
10 should not by so doing sacrifice the achievement of
11 the Guidelines.

12 We're very grateful that the Commission
13 has undertaken the study of simplifying the Guidelines
14 and, as you know, we have been participating and will
15 continue to participate fully in this effort.

16 In our view, there are two steps that
17 the Commission could take that would achieve much in
18 terms of simplifying the Guidelines process, while
19 minimally disrupting or changing the system. The
20 first would be to limit the number of the amendments
21 that are passed each year and the second would be the
22 retroactive application of those amendments. Let me
23 talk briefly about each of them.

24 In less than ten years, there have been
25 536 amendments to the Guidelines. The amendments are

1 now as lengthy as the Guidelines, themselves. The
2 drug guideline, 2D1.1 has undergone 37 amendments
3 since 1988. As Judge Babcock noted, these constant
4 changes which range from minor clarifications to
5 farreaching revisions have led to a great deal of
6 complexity in litigation. Often just as lawyers,
7 judges and probation officers become comfortable with
8 one set of amendments, there's another set of
9 amendments that we have to deal with. And so our
10 suggestion would be that a paramount way to simplify
11 the Guidelines process is to reduce the number of
12 amendments.

13 I'd like to suggest three specific
14 things that the Commission could look at in this area.
15 The first is simply to amend less. This past year
16 because of its focus on simplification, the Commission
17 decided to consider very few amendments. And I think
18 most of us in the criminal justice system applauded
19 this and would ask for more of the same in the future.

20 Secondly, we would urge you that in
21 studying the simplification process to take into
22 account the complexity the change, itself, introduces
23 and to recognize the amount of litigation and
24 confusion that is likely to be engendered simply by a
25 change in the Guidelines.

1 Finally, we suggest that the Commission
2 might consider, for example, moving to a two-year
3 Guideline cycle to slow down the process and give the
4 parties an opportunity to deal with change.

5 Retroactivity is another issue which we
6 think the Commission could address. Each time the
7 Commission adds to the list of retroactive Guideline
8 amendments, we have to devote tremendous resources to
9 litigating cases that we all thought were over and
10 done with. Legal issues that should have been laid to
11 rest long ago arise again, such as the interaction
12 between the Guidelines and the mandatory minimum
13 sentences. The settled expectations of parties and
14 the Court at the time plea agreements were entered
15 into may be upset and there is, on occasion, a need to
16 go back and litigate factual issues years after the
17 case is long over.

18 Although the Sentencing Reform Act does
19 permit the Commission to make Guideline sentence
20 reductions retroactive, it's not compelled to do so in
21 all circumstances. And we would urge the Commission
22 to consider carefully the impact that decisions on
23 retroactivity have on prosecutors, defendants and the
24 courts as well as the increase in complexity created
25 by the addition of retroactive amendments.

1 We think that there should be a
2 presumption against retroactivity. That amendments to
3 the Guidelines should not be made retroactive unless
4 there is really a compelling reason to do so and we
5 strongly urge that whether or not amendments are to be
6 retroactive be decided at the same time the amendment
7 is adopted. I think that would really help everybody
8 in their expectation and their understanding of how
9 the amendment is going to be applied.

10 I want -- I know that the Commission
11 has identified a number of areas of possible Guideline
12 simplification as the priority for studying during the
13 1997 amendment cycle. I'm not going to comment
14 specifically on these now. I will be doing so a
15 little later on some of the other panels. And I look
16 forward to participating in those panel discussions.
17 But let me say in general that the Department is
18 committed to continuing to work with you in
19 identifying areas of complexity and in assessing the
20 possible proposed solutions to these areas to see if
21 we can, in fact, reduce the complexity of the system
22 without sacrificing the fundamental goals of fairness,
23 predictability and certainty.

24 In addition, there are, we think, two
25 other sources of complexity that we suggest you should

1 consider including in your study of simplification.
2 The first is the multiple counts rule. In our view,
3 the Guideline related to multiple counts is one of the
4 most complicated and difficult to apply in the -- in
5 the Guidelines. I can certainly say my first
6 acquaintance with the Guidelines came when I was in
7 defense practice and trying to assess the multiple
8 counts rules gave me more headaches than anything else
9 in the Guidelines. And we think that this is an area
10 that -- that the Commission study -- this topic ought
11 to be included.

12 We would also suggest that under the
13 rubrick of dealing with appellate litigation, you
14 examine in particular whether or not it's possible to
15 clarify what issues are open when it -- when a case is
16 remanded for re-sentencing. This is an area in which
17 there is a lot of confusion and frequently engenders
18 litigation if there is a -- if one issue is -- is
19 treated by the Court of Appeals and the case is
20 remanded for sentencing and people try to open --
21 reopen the whole sentencing to litigate.

22 As the Commission continues its study
23 of the Guidelines and possible simplification, you may
24 well determine that changes are needed in some areas
25 or that no changes are needed. Or that while changes

1 may be needed, they are not worth the disruption that
2 they would cause to the settled expectations of the
3 system or, finally, you may determine it's still too
4 early in the process to assess whether particular
5 changes are warranted as not.

6 In any event, we will be pleased to
7 work with you and hope this is a fruitful and
8 stimulating process for all of us. Thank you, very
9 much.

10 JUDGE CONABOY: Thank you, Mr. Litt. I
11 might -- I meant to mention to all of you -- and I was
12 just reminded to do so -- if you wished to supplement
13 any of the remarks you've made by a written
14 submission, we'd be glad to hear from you. We'd like
15 you to get that to us at least by the end of the month
16 if you would, please.

17 We didn't determine a time limitation
18 for questions so supposing we just -- can you set that
19 for 15 minutes?

20 MR. NELSON: Yes, sir, I can.

21 JUDGE CONABOY: Let's see what happens
22 if we try to do that. We can have questions that last
23 beyond that. Maybe they won't last that long. Can we
24 start with Judge Mazzone.

25 JUDGE MAZZONE: I'd like to make a

1 couple of -- ask a couple of questions of Judge
2 Babcock. More or less observations rather than
3 questions. Thank you for taking time from your very
4 busy schedule to come here.

5 I'd like to ask two questions,
6 Mr. Babcock. First, if you know, how many of your
7 criminal cases end up in plea bargains? I know that
8 the plea rate in Colorado to me is astonishing because
9 it's 97 percent here and it's only 80 percent in
10 Massachusetts. So I don't know how you do it, but
11 what percentage do you believe of your criminal cases
12 end up in plea bargains?

13 JUDGE BABCOCK: I can't give you a
14 percentage, Judge.

15 JUDGE MAZZONE: Maybe Mr. Miklic can.

16 MR. MIKLIC: I have the most recent
17 statistics from the most recent annual report to the
18 Commission and it reflects that 97 percent of cases
19 were decided by a plea in Colorado.

20 JUDGE MAZZONE: How much of that is
21 reflected in a plea agreement signed by both parties?

22 JUDGE BABCOCK: Almost all of that.

23 MR. MIKLIC: I should mention also that
24 the national average is 92 percent, so Colorado is not
25 that much higher than the national average. 91.9

1 percent was the national average of conviction by
2 plea. And yes, I think most of them are by plea
3 agreement.

4 JUDGE BABCOCK: There are very few
5 cases that are straight up pleas to the indictment
6 absent a plea agreement. They are almost all, I would
7 say, subject to a written plea agreement signed by
8 both parties.

9 JUDGE MAZZONE: The second question I
10 would ask of you is would it help you -- first, let me
11 go back a step. Sometimes when you work in
12 Washington, you tend to lose the picture outside. And
13 when I do talk to my colleagues, I'm struck sometimes
14 by how differently they view the process. You seem to
15 have had -- you seem to have accepted the process and
16 it seems not to have -- using your words -- burdened
17 you and you've learned to live with it and work with
18 it. The key word back ten years or so ago was
19 evolutionary. And my question to you is how much
20 attention, really, you pay to what we do in
21 Washington. In other words, would it help you if we
22 were to -- by that I mean, do you simply go on having
23 adopted your rules and adopted your acceptance and
24 moved along, controlling your docket your own way?
25 Would it help you at all if we undertook to re-write,

1 re-comment, do our commentary again, do our
2 introductions again, just sort of give you an idea of
3 what it is that we gathered over the past seven or
4 eight years, sort of like a five-, six-, seven-year
5 review on what we've learned and what we have evolved
6 into? Would you read it if we wrote it? Is it
7 something that would be helpful for you to know and
8 for everybody else in the panel to know that we really
9 do think about the issues that Mr. Litt was talking
10 about, Mr. Katz is talking about? Would it help you
11 for us to undertake that review and tell you about it?

12 JUDGE BABCOCK: Of course, I speak only
13 for myself and not for my colleagues nor for our court
14 as an institution. When I told you that I had an
15 affinity for the Uniform Commercial code, it was true.
16 I found it a very meaningful way in which people could
17 structure their commercial transactions with certainty
18 to cross state lines.

19 The Sentencing Guidelines and the
20 review that you do propose or the review that you
21 propose would be of interest to me because I have a --
22 a bent for looking at the big picture. I would -- I
23 enjoy seeing how Colorado fits into the national
24 scheme; whether we are skewed in some fashion one way
25 or the other, whether it be a chart or graph. Some of

1 the materials that Mr. Purdy sent had graphs. I wish
2 I had more time to study them. It's a time factor.

3 But yes, I would personally, I think,
4 benefit from seeing how the system has worked
5 historically because history gives us perspective
6 about where we're going in the future.

7 Your comments about Washington, D.C.
8 are fraught with all sorts of potential for me to
9 address in that --

10 JUDGE MAZZONE: Feel free. I work
11 there.

12 JUDGE BABCOCK: -- one of the blessings
13 of living in Colorado is that we are removed
14 substantially geographically at least from all of the
15 fallout and the intense feeling that seems to pervade
16 the Beltway on a day-to-day basis. That has the
17 advantage of, I suppose, sitting back and looking at
18 what occurs in Washington, D.C. with some perspective
19 and it also has the benefit of some insulation from
20 the slings and arrows of the outrageous fortunes that
21 occur within the Beltway that seems so important at
22 the time.

23 My -- my sense is that what we do here
24 in Colorado is no different from what judges do in
25 Montana; Portland, Oregon; Phoenix, Arizona; El Paso,

1 Texas; Columbia, South Carolina, wherever. And that
2 is you give us the law and we try to apply it to the
3 facts as are presented to us. It's -- and it is a
4 matter of acceptance. It's the law. And it's our
5 job. It's our duty. It's our oath to apply the laws
6 to the facts as we have before us. And we accept
7 that.

8 JUDGE MAZZONE: I guess I could just
9 summarize that, my question. Should -- do you need
10 anything further from us because --

11 JUDGE BABCOCK: No, sir.

12 JUDGE MAZZONE: -- that's what -- I
13 think that's what the answer is -- to tell you when
14 and where and under what circumstances you can depart?
15 You need more from us or are you confident, do you
16 have enough to work with right -- what you -- what
17 you've done, what you've put into your own system?

18 JUDGE BABCOCK: The Supreme Court in
19 *Koon* gave, I think, we trial judges a great tool to
20 work with. My concern is that the Commission still
21 has within your power the ability to further constrain
22 departures by saying where I can't depart.
23 Departures, I think, are something that I would
24 welcome a more expansive and expanded area of
25 discretion in terms of application.

1 And in that respect, the other side of
2 that coin is that the Commission has within its power
3 the ability to define either areas of encouraged
4 departure or areas where departure is prohibited. But
5 I would welcome that expanded area in the area of
6 departure, yes, sir.

7 JUDGE MAZZONE: Thank you.

8 JUDGE TACHA: Let me just see if I can
9 summarize what I've heard from this panel. It seems
10 to me three of you saying -- at least three of you are
11 saying complexity is not the problem. Now, Mr. Katz
12 and Mr. Miklic sort of seem to say it's the
13 Guidelines, friends. Mr. Miklic, you pointed to one
14 area where it seemed to me you were saying complexity
15 is a bit of a problem and that is in the offense
16 characteristics.

17 Is that -- do I read that correctly?

18 MR. MIKLIC: Well, I was looking at --
19 at complexity more in a fundamental sense.

20 JUDGE TACHA: That's what I was getting
21 at.

22 MR. MIKLIC: Not that it's difficult
23 for us to apply. We can do it. And I agree with
24 Mr. Katz in that. It can be done and it's not to say
25 that the Guidelines are unclear or that people have to

1 struggle to understand what is meant, but it's
2 complexity in the sense that it's just an -- it's very
3 mechanical complexity in that sense and that I think
4 there's too much of a shift of balance towards the
5 mathematical mechanistic function and not enough
6 recognition that you have to allow some room for
7 discretion. So to me, if you get a very mechanistic
8 system, it's going to be very complex and involved.
9 That doesn't necessarily mean difficult to apply.

10 JUDGE TACHA: We have struggled with
11 what does it mean to simplify and I think I've heard
12 from all of you in one way or another the problem with
13 the Guidelines is less the complexity issue and more
14 as I think you pointed out and you, Mr. Katz, that
15 it's just the Guidelines and -- and the -- the fetters
16 that have put upon the sentencing decision. I don't
17 think you probably want to address this at this point.
18 If we take this, given that the Guidelines are here
19 and we take as a given we see no indication in
20 Congress of a retreat from at least some Guideline
21 concept, then it seems to me it might be helpful to us
22 if you thought about specific places within them where
23 complexity does present a problems. And keep in mind
24 what I hear Judge Babcock saying and which, by the
25 way, the Federal Judicial Center found out that

1 complexity may mean more -- change may result in more
2 complexity than any efforts to simplify and specific
3 examples would help us greatly.

4 Mr. Litt, I want to ask you a question
5 that's somewhat pedestrian in nature and self-
6 interested, but you point out the problem of reopening
7 a whole sentence on remand after an appellate
8 determination on a piece of a sentence, I assume.
9 Perish the thought, but is that more a problem of lack
10 of precision in the appellate opinion than it is a
11 problem in the Guidelines? It's hard for me to kind
12 of think how that's a Guidelines problem. It seems to
13 me it's a remand problem.

14 MR. LITT: Far be it for me to
15 criticize appellate courts.

16 JUDGE TACHA: Thank you.

17 MR. LITT: I think it's an area where
18 the -- where the Commission could, within the scope of
19 the Guidelines, provide guidance to the courts. I --
20 I think, obviously, that if in every case an appellate
21 court was completely precise about what issues were
22 and were not left open, it would be helpful in that
23 regard.

24 JUDGE TACHA: Judge Babcock, is that
25 your opinion? You have immunity.

1 JUDGE BABCOCK: No. The Tenth Circuit
2 never reverses my sentences. And the reason why they
3 don't is because I have such able probation officers
4 working in our court and such able counsel working
5 with the United States Attorneys office and in
6 defense. As I -- I have not seen that and I read the
7 Tenth Circuit opinions and I have not seen that to be
8 a problem in the Tenth Circuit opinions. The issues
9 are very narrow by the time they reach the appellate
10 panel in the first place where there is reversals, for
11 example, for additional findings and an expression of
12 reason for exercise of discretion.

13 The remands say just where and how they
14 are to address that. So the issue is very narrow as
15 it goes back. I have not seen that as a problem with
16 the Tenth Circuit.

17 JUDGE CONABOY: Mr. Gelacak?

18 MR. GELACAK: Thank you. One
19 observation and one question if I could. Mr. Litt, by
20 way of observation, I can't tell you how pleased I am
21 to hear part of your testimony this morning because
22 since I came to the Sentencing Commission, I have been
23 on a horse about less amendments, a two-year amendment
24 cycle and while not specifically arguing about
25 retroactivity, the fact that this Commission ought to

1 have some established rules in place and I've taken a
2 fair amount of grief over the years. It's a real
3 pleasure to hear the department take that position
4 finally.

5 Judge Babcock, if I could, I was -- I
6 too was struck by your reference to the Uniform
7 Commercial Code because over the years, I've likened
8 the Guidelines a little bit to the interstate highway
9 system in a remark made by Charles Kuralt years ago
10 when he said what we've done is constructed a
11 wonderful system where people can go from coast to
12 coast and see absolutely nothing of the country. And
13 much the same can, on occasion, be said about the
14 Guidelines.

15 The other thing that you said that
16 struck me was what Judge Tacha has just referred to,
17 that sometimes we create more problems by talking
18 about simplification than we anticipate or that we can
19 even envision, but it strikes me that one of the ways
20 that we can simplify the system is the simplest one
21 and it may be sacrilegious to ask you this question,
22 but as we see the political atmosphere that we are
23 involved in today where our Congress and our
24 legislature continually wants to get tougher on crime,
25 yet they pay no attention to the Guideline system as

1 they go about that search for a tougher and tougher
2 penalties, they complicate the system as they change
3 the laws. And as a result, the system gets more and
4 more complex.

5 One of the ways, obviously, we can
6 simplify the system is to suggest to Congress that we
7 no longer need a Guideline system and my question to
8 you, sir, is having functioned in the State court with
9 a considerable amount of discretion and recognizing
10 that only under the Guidelines have you served in
11 the -- on the Federal bench, but are we better off --
12 would we be better off without the Guidelines?

13 JUDGE BABCOCK: Well, that's, of
14 course, fundamental. And that -- the answer to that
15 question depends upon one's philosophy about the role
16 of judges in the sentencing decision. Your analogy to
17 the interstate highway system is very apt in the area
18 of Sentencing Guidelines because I think what we have
19 said here on our panel today and in one faction or
20 another is that we have dehumanized the sentencing
21 process and when you dehumanize a function of the law,
22 I think it has potential consequences beyond simply
23 well, let's be tough on crime. When you dehumanize
24 a -- a fact -- facet of our legal system, I think
25 it -- the problem is that it undermines the very

1 foundation of the rule of law as being a human
2 institution in the first place. And that troubles me.

3 If the Guidelines existed as pure
4 guidelines, as touchstones for judges to look at, to
5 articulate sentences fashioned within a wide
6 discretion, I think they would be very helpful. So
7 what I'm saying to you perhaps is the potential for a
8 middle ground and that has been addressed by others
9 and that is rather than making guidelines not
10 guidelines but mandatory law to apply to a sentencing
11 decision. Make them truly guidelines. There for the
12 guidance of the sentencing court, guidance to the
13 probation officers.

14 Would we be better off if we didn't
15 have even those, I probably think not because one of
16 the reasons I think we have guidelines in the fashion
17 we have them is that judges didn't think about the way
18 in which to articulate sentencing decisions to the
19 constituencies which in and of itself leads to
20 arbitrary sentencing decisions and arbitrariness in
21 the sentencing process, I think, led to the
22 disparities that largely have been addressed through
23 the Sentencing Guidelines. So the Guidelines have had
24 the beneficial effect, I think, of lending reason to
25 sentences imposed, but in doing so and in the way in

1 which they have been mechanistic and dehumanized, we
2 have lost the articulation in the process. I mean,
3 it's there if somebody wants to read it. But it's
4 still not articulated. So I'm troubled by that.

5 JUDGE CONABOY: Any other questions?
6 Judge Carnes.

7 JUDGE CARNES: Let me just ask
8 Mr. Katz. You had said that you and the Government
9 try to strive -- both of you -- to get just results
10 for your clients and structure plea agreements in that
11 regard in around 97 percent of the cases in the
12 district last year. It sounds as if you all have come
13 up with a formula where you have adjusted fairly well
14 and I have contrasted that to, say, other districts
15 where the U.S. Attorneys Office is quite adamant in
16 insisting that the Guidelines be followed to the
17 letter and appeal judges when they think improper
18 departure is made. I also know for years, there are
19 some judges in the Denver District who won't even
20 consider relative conduct and do not allow it to be
21 put in the pre-sentence report. It sounds like
22 different creative things have been going on.

23 In that vein, while somebody in another
24 district, another defender in another district might
25 find the Guideline results have been too harsh and

1 unjust, it sounds to me as if there is an adjustment
2 here. Are things working out pretty well for you from
3 your point of view?

4 MR. KATZ: As I think we said before,
5 we've made it work and what I said at one point to the
6 Sentencing Commission in the previous time was that
7 give lawyers a -- give lawyers and a judge a just
8 result and the Guidelines won't prevent us from
9 getting there. That's my experience. And I think in
10 this District, at the outset of the Guidelines, this
11 District Court decided very wisely to have counsel try
12 to resolve Guideline disputes in the plea agreement up
13 front before pleading guilty.

14 I've read plea proceedings from other
15 districts where I represented a client also convicted
16 in another district where I've seen all of that left
17 until sentencing and the probation officer actually
18 getting up and speaking to each of those issues. It
19 horrifies me when I read that. In this District, we
20 have most of that, if not all of that worked out. Not
21 to say that professions necessarily always agree or
22 that something we didn't anticipate doesn't come up.
23 I think that's one reason why this district is --
24 works a lot better.

25 I have specifically told former Area

1 Commissioner Nagel the concept that lawyers and judges
2 are going to seek an opportunity to have litigated
3 sentencing proceedings so that they can fight over the
4 meeting of more than minimum planning or two level,
5 three level, four level role in an offense to satisfy
6 the -- the philosophy, let's say of the Sentencing
7 Commission is beyond my comprehension and it hasn't
8 worked that way in this district and, frankly, we've
9 had, I think, very reasonable -- the United States
10 Attorneys office have been very reasonable over two or
11 three different United States Attorneys.

12 We have seasoned prosecutors who have
13 been in state court. I think that the judges in this
14 District are reasonable people who understand that the
15 Guidelines if you apply them --

16 JUDGE CARNES: It sounds like they
17 maybe use the Guidelines and the people are adapting
18 and doing what they think are right --

19 MR. KATZ: There are occasions I would
20 just -- the bank robbery case I had two weeks ago,
21 where we struggled -- both sides struggled to try to
22 get this somewhat impaired get-away driver of a
23 vehicle in a bank robbery that was sort of a Keystone
24 comedy in itself, to get him down to what would have
25 been a fair and reasonable sentence for this man,

1 despite the fact that he had a fairly long record.
2 It's difficult sometimes, I feel sometimes like the
3 challenge is all right, we sit down and we look at it
4 and now we've got to figure out how to make some of
5 these things disappear, go away and mitigate and in
6 the process, some may say that's intellectually
7 dishonest. If that's true, I say then doing justice
8 is subverting the intent of the Congress or Congress
9 and that's too bad.

10 JUDGE CONABOY: We're running out of
11 time.

12 MR. GOLDSMITH: I've got a few
13 questions.

14 JUDGE CONABOY: I can't set a time
15 limit.

16 MR. GOLDSMITH: Mr. Katz, you gave us
17 examples of problematic Guideline cases, those
18 involving the gun possession and pawnshop context.
19 What was the result in those situations? Do you
20 recall the type of sentence that was imposed?

21 MR. KATZ: I know we had departures.
22 In one case, we had a departure. The second case, the
23 young man was simply with the young woman. I believe
24 I got the case dismissed. I'm not certain. We were
25 able to demonstrate the circumstances sufficiently,

1 but there was no legitimate vehicle in the Guideline
2 was my point.

3 MR. GOLDSMITH: Would the departure
4 concept work appropriately to resolve the problem?

5 MR. KATZ: Because we were able to do
6 an 11E1C sentence bargain with that departure built in
7 and the judge realized it was fair and was not going
8 to torture the application of that particular
9 departure. We've done some very creative things on
10 both sides here and I guess I have the sense of a bad
11 little boy that maybe we're not supposed to be able to
12 get away with this and we have to almost do things
13 that are outside the mainstream. I don't think the
14 Guidelines invite that. I realize take -- taking into
15 account something that the Sentencing Commission did
16 not consider or, to a degree, did not consider is part
17 of it, but now you're talking about the basic --

18 MR. GOLDSMITH: The Commission has
19 asked counsel and the bench to give us examples of
20 unjust results under the Guidelines so I'm especially
21 grateful for you to illustrate those problems for us
22 today. If you could give us examples in the future,
23 as well, either in supplemental comments or at any
24 other time, I would be grateful.

25 Let me ask you, now, however, in your

1 judgment, how many cases, percentage-wise, do the
2 Guidelines produce unjust results?

3 MR. KATZ: If they were applied
4 literally in this District, I think we're basically
5 getting to just results, of course, given the fact
6 that crack Guideline --

7 MR. GOLDSMITH: How about in the whole
8 in this District and under what you view as literal
9 application?

10 MR. KATZ: I can't really answer that
11 question. All I can say is I think we -- in this
12 District, we come a lot closer than I think most other
13 districts.

14 JUDGE CONABOY: Thank you. Ms. -- I'm
15 sorry.

16 MR. GOLDSMITH: Two or three more. Mr.
17 Litt, you expressed some concern about retroactivity.
18 I think the Commission likewise shares some of those
19 concerns. But could you give us an example of
20 circumstances under which you think retroactivity
21 would be appropriate? When would that be valid to
22 you?

23 MR. LITT: I prefer not to -- I mean, I
24 haven't thought that through and I'd prefer not to
25 shoot something off the top of my head for fear it

1 would come back and be used against me later on. If
2 you don't mind, I'd like to consider that and get back
3 to you on that.

4 MR. GOLDSMITH: That would be great.
5 Mr. Miklic, you had mentioned the vast array of
6 resources that probation officers are given at the
7 outset of their responsibility in this context. I'm
8 wondering in how many cases do probation officers
9 really have to rely upon all those sources? I mean,
10 they have got a terrific library, it seems to me, to
11 turn to, but how often do they have to consult them?

12 MR. MIKLIC: They have to consult them
13 with frequency. There's an awful lot of case law that
14 regulates how the guidelines are interpreted.

15 MR. GOLDSMITH: So this is an ongoing
16 problem?

17 MR. MIKLIC: Yes, I think it is.

18 MR. GOLDSMITH: Fair enough. Let me
19 also ask you, in your experience, what percentage of
20 the cases do you think the results are unjust given
21 the -- the technicians that you stated we've now
22 produced as the probation officer? Are the results
23 nevertheless appropriate?

24 MR. MIKLIC: As far as a percentage,
25 that's just complete speculation. I really couldn't

1 even make a guess of that. The question was are in
2 most cases the sentences reasonable or fair?

3 MR. GOLDSMITH: Okay.

4 MR. MIKLIC: Was that your question?

5 MR. GOLDSMITH: Sure.

6 MR. MIKLIC: I think in most -- I think
7 in most cases, there are some -- yeah. Some -- some
8 general conforming to what's reasonable and what's
9 fair.

10 MR. GOLDSMITH: Thank you. Judge
11 Babcock, I appreciate your presence and your remarks.
12 I'd liken it more than the UCC to the Tax Code.

13 JUDGE BABCOCK: Well, I --

14 MR. GOLDSMITH: Hadn't thought about
15 that?

16 JUDGE BABCOCK: I'm kind of a quirky
17 character. I like the UCC but I can't stand the Tax
18 Code.

19 MR. GOLDSMITH: Thank you.

20 JUDGE BABCOCK: You're welcome.

21 JUDGE CONABOY: Commissioner Budd, do
22 you have any questions? Mr. Reilly.

23 MR. REILLY: I might like to ask, if I
24 might, Chief Miklic, I appreciate some of the comments
25 you made. In terms of the numbers of documents you

1 have to associate with your work, and you mentioned
2 that you were Guidelines police. Recognizing that you
3 also have a responsibility under the statutes to serve
4 the U.S. Parole Commission, we're deeply grateful for
5 the wonderful work your staff and your folks do. I'm
6 curious about what percentage of the time, in view of
7 the fact that you're the Guidelines police that you're
8 obviously out policing the people you're supposed to
9 supervise -- in other words, percentage-wise, it
10 sounds to me as if a considerable amount of time is
11 taken today in meeting with judges and prehearings and
12 so on and I'm curious as to just the amount of -- what
13 amount of time is now spent actually out on the road
14 supervising offenders.

15 MR. MIKLIC: I'd estimate we spend
16 about 70 percent of our time on supervision activities
17 as opposed to pre-sentence activities. One of the
18 ways we have been able to keep our head above water is
19 to specialize and bifurcate things.

20 It's very difficult to stay on top of
21 people in the community when you're trying to do
22 Guideline research reports and run legal inquiries and
23 keep up with case law at the same time. It's about 70
24 percent, I would estimate.

25 MR. REILLY: Do you feel comfortable

1 commenting on the fact that under the new system, more
2 and more -- more and more of these individuals are
3 being put under what I may call administrative
4 supervision which is basically they are in the file,
5 but they are really not being supervised? Is that
6 dangerous approach in view of what --

7 MR. MIKLIC: Well, I think it varies,
8 frankly, somewhat from district to district how much
9 commitment you want to make to supervision. I think
10 there are districts where there is such a
11 preoccupation with Guidelines that supervision,
12 frankly, is suffering and suffering quite a bit, but
13 it hasn't been the case here because we've -- we
14 have -- we see community supervision and community
15 protection as a very important if not the most
16 important part of our mission, so we are continuing to
17 focus on that. We do make some use of administrative
18 case laws, but we use it on a limited basis and it's
19 very carefully selected for offenders who do not pose
20 a risk to the community. People that pose the risk,
21 we devote quite a bit of our resources to them. I
22 wouldn't say that's necessarily true nationwide.

23 MR. REILLY: Thank you.

24 JUDGE CONABOY: Commissioner
25 Harkenrider?

1 MS. HARKENRIDER: No.

2 JUDGE CONABOY: Thank you. The
3 commissioners went eight minutes and 45 seconds over
4 their time, which means there is no time for the
5 chairman. This is what always happens. No. I do
6 thank all of you very much and as you can see, your
7 testimony generates a lot of interest and questions.
8 We could go on for a long time, but I thank you very
9 much for your provocative remarks and a -- I would
10 like to move to the next panel if you don't mind
11 changing seats. Thanks again, very much.

12 Some people are asking for a break. I
13 exercise my own prerogative and I'm not going to give
14 you any break. We'll move on with this panel if you
15 don't mind.

16 This next panel consists of Mr. Patrick
17 Burke, who was the public defender here in the
18 Colorado from '78 to '82, I guess, and a -- Mr. Burke
19 is now the coordinator of Criminal Justice Act Panel
20 Attorneys here in Colorado.

21 And Mr. Frederick Bach, who is the
22 supervising probation officer here in Colorado.

23 Mr. Arthur Nieto?

24 MR. NIETO: Nieto.

25 JUDGE CONABOY: Am I pronouncing it

1 right?

2 MR. NIETO: That's perfect.

3 JUDGE CONABOY: Who is a former
4 chairman of the criminal law section of the Colorado
5 Bar Association.

6 MR. NIETO: Right.

7 JUDGE CONABOY: And has an extensive
8 background in the criminal law. And served as a
9 Colorado State Public Defender for a number of years
10 back in 1974 to 1978.

11 And Mr. Michael Bender, who is a
12 defense attorney here in Denver and was a Deputy State
13 Public Defender in Denver until 1971 and a -- was
14 division chief for the Denver Public Defenders Office
15 for a number of years.

16 So we will begin this panel with
17 Mr. Burke. If you don't mind going first. You can
18 use that microphone or stand, whichever you like. I
19 understand your panel has agreed to five minutes each.

20 MR. BURKE: I'll move quickly, Your
21 Honor. I'm standing up.

22 JUDGE CONABOY: Reset the clock and
23 we'll give you a full five minutes if we can.

24 MR. BURKE: Mr. Chairman, members of
25 the Commission, Mr. Purdy asked me to direct my

1 remarks to the effect that the guidelines have on
2 panel attorneys with perhaps an additional perspective
3 on how it's worked in this District and I have been
4 practicing law in this District for a sufficient
5 number of years to comment on the latter topic, as
6 well.

7 The way the guidelines impact panel
8 attorneys is perhaps best discussed by mentioning a
9 typical case in this district. What happens with
10 panel attorneys most often is we will get the many
11 co-defendants in a drug case, for example, or the
12 public defender will get a defendant and then panel
13 attorneys will be appointed for a half dozen or dozen
14 co-defendants. And we will begin our attorney-client
15 relationship by meeting our client in a little teeny
16 room with metal tables and chairs, sometimes with a
17 piece of glass between us.

18 The Sentencing Guidelines are part of
19 the triumvirate of congressional micromanaging of the
20 Federal criminal justice system. The other two being
21 making sure that the defendants are detained in drug
22 cases and the other one is being minimum mandatories.
23 And I saw that the chairman made a remark about the
24 effect of minimum mandatories in one of the papers
25 that I received.

1 So we meet our clients in little rooms.
2 They have been detained and they are facing minimum
3 mandatories and that's how we get started. It's
4 almost impossible to develop a good attorney-client
5 working relationship under those circumstances.

6 In one of our early meetings, we will
7 go out to meet with the client. We will take the
8 Federal criminal law and the Guidelines book and we
9 will work our way through to the right point on the
10 grid that the defendant is probably looking at because
11 in this district, fortunately we get some discovery
12 early.

13 At the end of those early meetings, our
14 clients are almost invariably convinced that we're
15 just part of the system. They look at us as another
16 one of those people up on the hill with all these
17 weapons pointing down at them. It's very, very
18 difficult under the Guidelines and under minimum
19 mandatories to have a good working attorney-client
20 relationship. So one of the things that's happened
21 with the Guidelines is the attorney-client
22 relationship has suffered tremendously.

23 The next thing that has happened
24 because of the Guidelines is -- and this was mentioned
25 by a number of the earlier witnesses, particularly

1 Mr. Katz -- we've turned -- and the questions were all
2 right on target -- we've turned into plea bargainers.

3 The most important tool that the panel
4 attorney has these days is not skillfully turning the
5 phrase or being a good researcher. It's getting the
6 knee pads out to go into the prosecutor and start
7 working for a suitable plea bargain. The casualty is
8 the attorney-client relationship and the casualty is
9 we don't get to try cases that need to be tried
10 because the risks are too great.

11 As far as how the Guidelines are --
12 have worked in this district, I did a number of cases
13 before they went into effect in the old days and the
14 sentencing judge would receive an excellent
15 pre-sentence report. That's not being synchophantic.
16 The probation department in this district has always
17 provided good pre-sentence reports with good personal
18 backgrounds and a judge would just grapple with what
19 to do. And Judge Babcock was not kidding when he said
20 he would have sleepless nights. I could see in the
21 faces of the judges that they had not slept in the old
22 days. They would come and on the Friday morning
23 docket would be sentencings and they would be haggard
24 and they hadn't slept and they agonized. And that's
25 how the system worked. And I'll tell you what. It

1 was a better system. It was a better system because
2 Article 3 judges took their jobs so seriously and they
3 did agonize over it. The decisions were
4 individualized, they were personalized.

5 And so with my 40 seconds left, I will
6 go to the only suggestion that I think makes the most
7 sense is to make them guidelines, not make them
8 mandatory. Let these Article 3 judges struggle over
9 what they will do, individualize what they will do
10 with each of my individual clients. That's what panel
11 attorneys would like to see.

12 I read some of the history and I
13 remember it brought it back that Senator Matthias and
14 some others said these should be discretionary
15 guidelines, not mandatory and they should be
16 discretionary and the Article 3 judges should be given
17 more options and they should be given more discretion
18 so that my clients get a sense -- and a couple of
19 witnesses talked about it -- that they were treated
20 humanly, that the process is humanized.

21 JUDGE CONABOY: Thank you, Mr. Burke.
22 Mr. Bach, would you go next, please.

23 MR. BACH: Sure. My name is Fred Bach
24 and I'm a supervising U.S. probation officer for the
25 District of Colorado. I haven't spent my whole career

1 into Colorado. I began my career in 1987 in the
2 Eastern District of New York, Brooklyn and at a time
3 when the Sentencing Guidelines were a rumor which no
4 one really thought would become a reality. In the
5 Eastern District of New York, I served in the special
6 offender unit, supervising members of organized crime
7 and career criminals. I also had the opportunity to
8 write many old law pre-sentence reports as well as
9 Guideline pre-sentence reports.

10 In late 1990, I transferred to the
11 District of Colorado where I continued to write
12 pre-sentence reports and also served as the district
13 special offenders specialist. In October 1994, I
14 became supervisor and until last month, I supervised
15 the pre-sentence investigation unit where I was
16 responsible for reviewing most of the pre-sentence
17 reports prepared in this district.

18 In light of my experience, I'd like to
19 address my remarks to the impact that the Sentencing
20 Guidelines have had on the probation officer's role
21 during the sentencing process.

22 During pre-Guideline 1presentence
23 investigation in most districts, the probation officer
24 interviewed and reviewed the files of the
25 investigating agents and Assistant United States

1 Attorneys and wrote the prosecution version of the
2 section of the report. The defendant was also
3 interviewed regarding the nature and circumstances of
4 the offense and that information was included in a
5 defendant's version section of the report. These
6 sections, combined with an in-depth description of the
7 defendant's character, personality and relationships
8 were presented to the sentencing judge in an organized
9 objective report so that the judge could evaluate the
10 information and impose an appropriate sentence.

11 When the Guidelines went into effect in
12 November of 1987, prosecutors, defense attorneys and
13 judges looked to Federal probation officers to become
14 the experts on Guideline sentencing and, much to their
15 credit, Federal probation officers rose to the
16 challenge of mastering the intricacies of guideline
17 sentencing. However, the Guidelines also imposed upon
18 the probation officer the duty of evaluating the
19 defendant's relevant conduct in determining a
20 tentative range. This duty essentially forces the
21 probation officer to take a position in this
22 adversarial proceeding to which the probation officer
23 is not a party.

24 Because of the importance of case facts
25 and the correct application of Guidelines to those

1 facts, attorneys for opposing sides often aggressively
2 contest the accuracy of the probation officer's facts
3 and Guideline applications. Probation officers are
4 now placed in a position where they must defend their
5 Guideline applications and become familiar with case
6 law in the issues in dispute.

7 Since the implementation of Guideline
8 sentencing, I have seen both defense and Government
9 attorneys' attitudes towards probation officers shift
10 from cooperative to adversarial. The probation
11 officer's role in Guideline sentencing has sometimes
12 led attorneys on both sides to accuse probation
13 officers of busting plea agreements and practicing law
14 without a license.

15 Probation officers now expend an
16 excessive amount of time responding to objections,
17 which often lead to lengthy and complicated hearings
18 in both the district courts and the courts of appeals.
19 The more time probation officers spend dealing with
20 objections and lengthy hearings, there's less time
21 spent supervising offenders in the community.

22 Since the implementation of the
23 Sentencing Reform Act, sentencing has become a more
24 generally cumbersome and expensive process than it
25 ever was before, with the probation officer frequently

1 caught in the middle of disputes. In the early days
2 of Guideline sentencing, the probation officer's
3 expertise was welcomed. However, in recent years,
4 many probation officers have come to feel like an
5 uninvited guest at the sentencing table.

6 I would also like to address the
7 problems probation officers now have obtaining
8 information for inclusion in the pre-sentence report.
9 Because the pre-sentence report has become a more
10 heavily litigated document than it ever was in the
11 past, probation officers are less likely to obtain
12 important information from defendants, as many defense
13 attorneys now screen the information provided to the
14 probation officer. Attorneys regularly advise
15 defendants not to discuss their offense, criminal
16 history, drug use, or finances with the probation
17 officer out of a fear that the information will be
18 used against them. This results in a more sterile,
19 less informative report, which sometimes compromises
20 the Court's ability to get a comprehensive picture of
21 the defendant and his behavior.

22 I believe that the Commission's
23 proposals which consider simplification of relevant
24 conduct and other issues would help remove probation
25 officers from the awkward role they often find

1 themselves in. Most Guideline disputes are related to
2 relevant conduct issues which potentially could be
3 ironed out before a guilty plea is entered.

4 Simplification of the Guidelines would also be more
5 consistent with the plea bargaining process, which,
6 for better or for worse, drives our criminal justice
7 system. Thank you.

8 JUDGE CONABOY: Thank you, very much,
9 Mr. Bach. Mr. Nieto, will you go next, please.

10 MR. NIETO: Thank you for inviting me.
11 Please the Commission and Mr. Chairman. Mr. Purdy
12 supplied me with a copy of my testimony from the 1986
13 hearings. I was struck at the difference in outlook
14 that the last ten years has wrought as far as my
15 approach to the Guidelines. I practiced criminal law
16 in the Federal courts for about ten years before the
17 Guidelines were enacted and then since then, I've
18 continued to practice in Federal court.

19 Many of my concerns after having read
20 the initial drafts in 1986 actually didn't come to
21 fruition. What I have observed is that the process
22 changed basically in regard to the participation of
23 the defendant, whereas before the Guidelines were
24 enacted, we received an indictment, we did the
25 discovery, we planned pretrial motions, we did some

1 discussion based on the strength or weakness of the
2 Government's case with the Guidelines in effect, the
3 defendant is immediately put in the middle of the
4 process.

5 The two issues that -- that come up
6 fairly immediately, long before litigating pretrial
7 motions, are acceptance of responsibility and
8 substantial assistance. I was surprised to hear that
9 97 percent of the cases in Colorado end up in plea
10 bargains. My perception has been that since the
11 enactment of the Guidelines, fewer of my cases go to
12 trial than before the Guidelines, but I wasn't sure if
13 that was because of the Guidelines or my maturity or
14 my better analysis of cases.

15 But what acceptance of responsibility
16 does is certainly puts a -- an incentive on the
17 defendant to -- to make a deal and make a deal as soon
18 as possible. Is that good? Well, to the -- to the
19 degree that it -- it relieves docket pressure and it
20 results in fewer trials and more deals, it's probably
21 good.

22 I -- I happen to believe in the -- the
23 right to trial by jury, not only as a means of
24 avoiding punishment or potential punishment on the
25 part of the defendant but as a societally meaningful

1 process. It not only educates the defendant, but it
2 educates the public about what is civilized and what
3 is uncivilized behavior and what is punishable and
4 what is okay. And by fewer cases going to trial, I
5 think that society has fewer opportunities to -- to
6 participate in that sort of cleansing process of -- of
7 societally acceptable behavior.

8 On the other hand, the Guidelines are
9 here so we deal with acceptance of responsibility and
10 we deal with it very quickly.

11 The other aspect of the Guidelines that
12 I see often in my practice is the matter of
13 substantial assistance. My perspective -- and I see
14 my time is running out more quickly than I expected.
15 My perception of substantial assistance is it really
16 penalizes the little guy. It penalizes the first
17 offender, the person with fewer criminal contacts.

18 Particularly in Government sting type
19 operations where the -- the actors in a criminal
20 enterprise are -- are Government agents, a defendant
21 can't snitch on anybody because they are all
22 Government agents. A first offender doesn't know
23 other criminals. A person at a lower level of -- of a
24 large conspiracy can't give the Government information
25 that it should have and the first offenders and the

1 lower level criminals are really, I would submit, the
2 defendants that should have the benefit of the 5K1
3 departure for substantial assistance and not the --
4 not the bigger crooks.

5 I -- one case in particular that was
6 really problematic was a child pornography case that I
7 did about six months ago. And this fellow had been
8 the subject of a Government sting in 1992. He didn't
9 buy it. The Government put away its file and revived
10 it in 1996. He did buy some child pornography in 1996
11 and because he doesn't know anybody in child
12 pornography except for Government agents, he is
13 looking at a solid level 13. This man is a hard
14 working State employee, frankly, with a family and
15 with no criminal history and he's going to jail.

16 I see that there's some consideration
17 being given to making 3 point acceptance of
18 responsibility credit available to everybody. I
19 endorse that. I think that would be one way of
20 correcting the inequities in the substantial
21 assistance part of the guidelines.

22 I -- in 1986 and today, I agreed with
23 one part of the Commission's work and that is to
24 continue to refine the Guidelines and to tinker with
25 them and I applaud your efforts to tinker with them

1 and make them more workable. Thank you.

2 JUDGE CONABOY: Thank you. Mr. Bender.

3 MR. BENDER: Your Honor, members of the
4 Commission. Mr. Chairman, I mentioned about finality.
5 In my opinion, there was a saying that my excellent
6 high school math teacher said, there's only three
7 things in life that you know for sure, death, taxes,
8 and homework. So with that in mind, I'm going to take
9 Mr. Purdy and his death, taxes and homework and I'm
10 going to take Mr. Purdy's comments and talk
11 philosophically. I understand the guidelines are here
12 to stay. I understand public opinion is what it is.
13 But I think you heard from persons other than defense
14 lawyers who have told you that there is much more to
15 respect for the law than simply punishment and that
16 one of these things is the whole concept of fairness
17 and due process.

18 The things that occur to me as a
19 practitioner in the field, the first is obvious, the
20 Commission has spoken about it, the crack penalties.
21 The second is one disparity. That may not only be
22 true in this district, but there is an enormous
23 difference in sentencing between State and Federal
24 court systems, particularly in the drug area. We have
25 in Denver a drug court which I think is very forward

1 looking and very successful and it's causing a lot of
2 the resources on cases to be brought into the Federal
3 system. I can give you some anecdotal evidence later.

4 But probably the most important thing
5 is the guidelines in my view, as Mr. Katz said, are
6 Draconian. We talked about a mythical journey. I
7 couldn't agree more. But the most and worst example
8 of that, in my view, is the substantial assistance
9 aspect. 5K1.1. I'd say that in our district, I
10 believe I've never met a prosecutor who didn't act in
11 good faith and didn't make a judgment. It's not a
12 personal thing at all.

13 This is an area which breeds enormous
14 sentencing disparities and even though it may be on a
15 national basis, the districts are similar. Here you
16 have a situation where instead of having 548 Article 3
17 judges making independent sentencing decisions, you
18 have thousands of Federal prosecutors replacing the
19 judgment of an Article 3 judge. You have historical
20 conspiracy, which we call no dope dope cases. Little
21 guys and loners receive harsh sentences while
22 Mr. Nieto pointed out organized people in the business
23 of crime receive less harsh ones, but probably more
24 importantly is the impact that the Guidelines as a
25 whole and the 5K1.1 have specifically on the role of

1 the defense lawyer, a transformation, in my view, of
2 fundamental jurisprudence by limiting or reducing the
3 role of the defense lawyer as well as the judge.

4 You heard Judge Babcock say now he
5 sleeps well. And what is usually said is what the
6 lawyers -- the lawyers bring the plea bargain and
7 bring the arrangement to the Court. That's true. The
8 lawyer, though -- as Mr. Katz alluded to, candidly
9 speaking, you don't have to be a rocket scientist or a
10 great criminal defense lawyer or a good legal
11 researcher or do a lot of factual homework to get
12 something that's better than what the Guidelines
13 Draconionally insist in terms of mandatory minimum
14 sentence. So what the job of the defense lawyer is is
15 to get any kind of deal they can.

16 5K1.1 is -- is the ultimate, if you
17 will. It sort of reminds me of the Allstate ads. Put
18 your life in the hands of the good people. And they
19 are good people. I'm not criticizing them. But they
20 just represent one aspect of the tripartide
21 adversarial system. And as far as the constitutional
22 defense advocate, he is getting on knee pads is a
23 polite way of saying it in the overall scheme of the
24 system. Less cases are litigated on constitutional
25 issues. Less cases are investigated. And instead,

1 you have a huge body of case law developed about
2 application of the Sentencing Guidelines. And the
3 vast majority of the cases in this district, while
4 there's cooperation and it's good, it's well done, I
5 have no quarrel with it, the prosecutor determines the
6 sentence that the person gets.

7 And I, for one, would ask you to
8 eliminate 5K1 period. If you want -- if you like,
9 make it a grounds for departure. Think about that.
10 Really, what I'm arguing for is a return to the good
11 old days where there is no penalty for exercising your
12 constitutional right of trial. An individual, a
13 citizen is sentenced based on proof beyond a
14 reasonable doubt on the conduct that has been charged
15 and except for the most heinous crimes, people have --
16 the judge has the option of placing the person on
17 probation.

18 There should be, as Judge Babcock said,
19 an articulation of the conscience of the community in
20 the specific case where sentence is handed down and
21 the guidelines, as intellectually awesome as they are,
22 don't do it. Thank you.

23 JUDGE CONABOY: Thank you, Mr. Bender,
24 very much. As we go to questions on this one, if we
25 can, can we set that for ten minutes this time and see

1 if we can do a little better since we're getting
2 pressed for time.

3 And Commissioner Budd, since you didn't
4 ask any questions before, we'll start with you.

5 MR. BUDD: Well, thank you, very much,
6 Mr. Chairman. And I'd like to ask a question of all
7 of the panelists. I'd like to -- I listened very
8 carefully to what you had to say and you know as I do
9 that the purpose of the Guidelines is to achieve some
10 measure of consistency in fairness in sentencing and
11 I'm wondering in your view, with respect to this how
12 far have the Guidelines gone in achieving these goals
13 of consistency and fairness? Overall fairness and
14 consistency. And I have in mind what has been
15 mentioned by a number of the panelists this morning
16 and that is, in the State of Colorado, 97 percent of
17 the cases are pled out and of those -- in that 97
18 percent, as I understand it, the vast majority had
19 agreed upon plea agreements.

20 MR. BURKE: I think it's failed for
21 that exact reason. Plea bargaining is different in
22 different districts and, therefore, sentences are
23 different in different districts. It's not because
24 the prosecutors here are lenient. They are a little
25 more fair-minded. The question about this district

1 seems to be reaching out for some sense of rough
2 justice where some prosecutors in another district
3 will hammer on the Guidelines, take advantage of all
4 the piling on points that are available in the
5 guidelines and you end up with different sentences for
6 the same conduct.

7 So it's really failed and I have lots
8 of anecdotal information about that, too, people
9 calling from prison and this person and so forth. So
10 it really has failed. It's a good idea, but it
11 failed.

12 MR. BENDER: I want to reply to one
13 narrow area. The Denver drug court, we're -- there's
14 a presumption that you've -- if it's a first offender,
15 you're going to get a diversion, placed in a diversion
16 program. It's incredibly inconsistent as to which
17 jurisdiction you find yourself involved in committing
18 a minor drug offense, a Federal -- Federally or not.

19 Secondly, I think there's a huge
20 disparity internally just in what constitutes
21 substantial assistance. I mean, for example, a famous
22 case, I'm sure you heard testimony where they had 27
23 Government informants. Each one of those individuals
24 had enormous drug involvement and I know they were
25 given all kinds of deals. I mean, how do you square

1 that with the case of where I have -- I represent a --
2 I represent on a court-appointed basis an African-
3 American who sold in, I think, a three-month period of
4 time 16 grams of crack. First offender. He's now
5 doing -- and I had a sympathetic judge, sympathetic
6 prosecutor. They called it substantial assistance,
7 but he didn't have anybody to really snitch on and
8 he's now doing 30 months in a Federal prison.
9 Everybody thought the case should not be brought in
10 Federal court, but there we were. So I don't think
11 it's been successful.

12 MR. NIETO: Not successful. Drug cases
13 come to mind. I think in Colorado, you're in better
14 shape if you're the wife of a kingpin smuggling
15 multiple grams of cocaine in the United States than if
16 you're a first offense single time fellow who sells a
17 kilogram of cocaine to an undercover officer. The
18 wife walks. The first time offender, I know one
19 that's doing nine years.

20 MR. BUDD: Just given the
21 presumption -- that we should have talked for these
22 purposes -- at least that the Guidelines are going to
23 remain in effect, then what should be done to
24 accomplish those goals?

25 MR. BENDER: I'll jump in. I think a

1 lot of the -- the questions that you are asking are
2 very helpful, very positive. I applaud the whole
3 issue of relative conduct and how that should be dealt
4 with. I think it's wonderful. I'm in favor of it.
5 If this is simplification, I applaud it. I mean,
6 certainly, there are problems with simplification that
7 you all know, but, to me, the thing that you're doing
8 is making a bad system a little more digestable and
9 it's certainly useful.

10 JUDGE CONABOY: What would you do with
11 relevant conduct?

12 MR. BENDER: If I were writing the law,
13 I would only consider relevant conduct in terms of
14 conduct at conviction. Period.

15 MR. GELACAK: Just one quick one,
16 Mr. Bender. I think everyone on this Commission has
17 been struck by the disparity between State sentencing
18 and Federal sentencing particularly. Are you aware of
19 any studies that have been done here to -- to
20 demonstrate how that decision is made?

21 MR. BENDER: You know, I'm not
22 specifically. You mean the law enforcement decision
23 whether to come to Federal court or State court?

24 MR. GELACAK: Yes. That may be an
25 unfair question. If you are aware or if there is some

1 work being done, we would appreciate seeing the
2 results.

3 MR. BENDER: You know, I -- I don't. I
4 know that I talked to the chief of the Mountain States
5 Drug Task Force last week who advised me that he was
6 having a meeting with the Denver District Attorney's
7 Office. I assume it was something along the lines
8 you're saying. The only thing that I know that
9 statistically is true is in the drug area in Denver,
10 Denver County. Not in the other counties. And
11 there's no question about the difference in treatment.
12 And there's no question if you talk to narcotics
13 detectives who actually do both Federal and State
14 prosecutions, they will tell you that when they want
15 to cause someone more problem, they will bring them in
16 the Federal system. There's just no doubt about that.

17 JUDGE TACHA: I just quickly want to
18 ask, the question of the first time offender is one
19 that we hear all over the country. It's one that's
20 expressed a lot. Has the safety valve amendment
21 alleviated that somewhat?

22 MR. BENDER: I have another court-
23 appointed case where the safety valve alleviates the
24 mandatory minimum, but it doesn't alleviate the basic
25 harshness, for instance, of the crack cocaine

1 penalties. So sure, it's better than nothing, but
2 it's certainly -- and it's nothing like it would have
3 been eight or nine, ten years ago. The Court has no
4 discretion but to give a mandatory minimum sentence of
5 a substantial amount of time.

6 JUDGE CONABOY: Any other?

7 MR. GOLDSMITH: First, I would like to
8 invite members of the panel again in your supplemental
9 comments, if any, to advise us about any cases that
10 you think demonstrate unjust applications of the
11 guidelines. Just cases where someone obviously was --
12 the trial judge ought to be thinking about those cases
13 as being terribly unfair.

14 Beyond that, I wanted to clarify,
15 Mr. Bender, your concern or criticism of 5K1.1. Was
16 your criticism aimed at that provision in general or
17 simply to the aspect of it that you first get the
18 Government authority to make the decision about
19 whether to award 5K1.1?

20 MR. BENDER: I think that the
21 Government -- as far as I'm concerned, prosecution
22 is -- I've been involved for almost 30 years -- the
23 Government always has the decision whether to
24 prosecute someone or not or make deals, so to speak.
25 I certainly think that's fine. What I think is bad is

1 that the way it is structured in 5K1.1 is a
2 philosophical matter. It pronounces the impacted
3 effect of the prosecution. So I wouldn't say it
4 should be eliminated for that reason. I think all the
5 Guidelines do is have that shift as Mr. Nieto
6 explained to you. You don't look at a case and
7 determine -- when you get a case, you don't determine
8 what kind of legal issues are here, what are the
9 facts. You look right away at the defendant.

10 MR. GOLDSMITH: The sense then is it is
11 more fundamental than simply with the fact that the
12 Government has authority to make the decision about
13 whether to file that motion. Even if we said that the
14 Court has discretion to award substantial assistance
15 points, you would object?

16 MR. BENDER: Well, no, I wouldn't. I
17 say that would be a proper role for departure within a
18 guideline system. But the problem I have is that what
19 the Government says is usually followed, as a
20 practical matter, and so they are determining the
21 whole matter and judges and defense lawyers, we don't
22 know how to evaluate the information that somebody has
23 given.

24 I don't have enough time to explain
25 this. I don't have the experience to know who are the

1 proper targets and what information is and how truly
2 valuable the information can be that's given. That's
3 really the role of the prosecutor. It's used as a
4 means to -- to get out of a Draconian system.
5 Sometimes in a very just way. But I don't think in
6 terms of an overall system, it's a healthy thing.

7 MR. GOLDSMITH: Thank you. Mr. Burke,
8 a question for you. Are you satisfied overall with
9 the level of understanding demonstrated by panel
10 attorneys with respect to the Guidelines? Do they
11 know the Guidelines well enough, in your judgment?

12 MR. BURKE: Most of the time -- we have
13 mailings that go out almost once a month and we
14 conduct four seminars a year and so there's a lot of
15 information being disseminated.

16 I heard Judge Babcock say every once in
17 a while, you get an inexperienced lawyer that comes in
18 and is not doing a great job for their client. When I
19 heard that, I thought it was probably a younger
20 retained lawyer, seriously. The information gets out
21 from the AO, from our panel and from the Federal
22 Public Defenders office.

23 MR. GOLDSMITH: It gets out and it gets
24 read?

25 MR. BURKE: I think most of the time,

1 it does get read. We talk about it a lot amongst
2 ourselves in the seminars.

3 MR. GOLDSMITH: Thank you.

4 MR. BURKE: You're welcome.

5 JUDGE CONABOY: All right. Thank you,
6 very much. Judge Weinshienk, I see in the courtroom.
7 We're going to take a bit of a break here. Would you
8 like to make some comments either now or right after
9 the break, Judge, or --

10 JUDGE WEINSHIENK: After the break is
11 fine.

12 JUDGE CONABOY: After the break. Okay.
13 Thank you. All right. Let's take a ten-minute break.
14 We'll resume at 11:20.

15 (There was a recess taken from 11:06
16 p.m. to 11:17 p.m.)

17 JUDGE CONABOY: Almost everyone is
18 here. Let me at least introduce the panel. The next
19 panel is intended to talk principally about relevant
20 conduct and acquitted conduct. And again, we have
21 asked the speakers to limit their comments here to
22 five minutes and then I'll ask for some questions.

23 Professor Kevin Reitz is an associate
24 professor of law at the University of Colorado Law
25 School and served as a reporter for the ABA Standards

1 for Sentencing and has written a number of articles
2 and does considerable speaking on sentencing matters
3 throughout the country. He was with us just recently
4 in Madison at the National Association of State
5 Sentencing Commissions.

6 And Mr. Kurt Thoene --

7 MR. THOENE: Thoene.

8 JUDGE CONABOY: Thoene?

9 MR. THOENE: Yes.

10 JUDGE CONABOY: -- is a senior
11 probation officer also here in the -- in Denver and
12 has spent, likewise, some of his time in trying to
13 work with others around the country and in developing
14 better sentencing processes.

15 And Mr. David Connor is the
16 assistant -- Assistant Public Defender here in Denver.
17 Served as Chief Deputy District Attorney from 1980 to
18 '88 and then became Assistant U.S. Attorney in Denver
19 here in 1988.

20 Then now and finally, Mr. Robert Litt
21 is with us again on this panel to help us with these
22 topics, also.

23 So let's begin, if we can, with
24 Professor Reitz.

25 Judge Weinshienk, I want you to know

1 something. Every one of the commissioners has asked
2 me why I'm not calling on you.

3 JUDGE WEINSHIENK: I'll be available
4 after this panel.

5 JUDGE CONABOY: I keep telling them
6 that, but they don't believe me. I just want you to
7 know how popular you are. Just because you came out
8 of the great 1979 class of district judges. Best
9 ever, they tell me.

10 JUDGE MAZZONE: And you're buying
11 lunch.

12 JUDGE CONABOY: Professor, would you go
13 first.

14 PROFESSOR REITZ: Sure. Judge Conaboy
15 and members of the Commission, thanks for inviting me
16 here.

17 I think that I am called upon to
18 testify not so much as an expert in the Federal
19 Guidelines, which I'm not in particular, but as
20 someone who has spent time around various sentencing
21 guideline systems around the country, particularly at
22 the State level. I have written, I think, the only
23 article on real offense sentencing that concentrates
24 on issues at a State level rather than Federal level.
25 I haven't spoken before in any detail about the

1 Federal relevant conduct provision.

2 So what I'd like to try to do today is
3 perhaps provide some perspective in terms of policy
4 choices or design choices different sentencing systems
5 have faced in terms of real offense sentencing and
6 bring them to bear on the relevant conduct in the
7 provision of real offense features of the Federal
8 guidelines.

9 I would begin by saying I think your
10 staff discussion paper is very good on this issue.
11 That there is no such thing as a pure offensive
12 conviction sentencing system in the country, at least
13 to my knowledge, just as I think there is no such
14 thing as a pure or ideal real offense sentencing
15 system, either. What tends to happen in different
16 jurisdictions, particularly in guidelines
17 jurisdictions, is that the system as a whole leans
18 more heavily towards one side of the continuum or
19 other, so that either more or fewer real offense
20 elements are incorporated into the eligible factors at
21 sentencing.

22 So it's -- it's a misnomer or unless we
23 understand that the term "conviction offense" tends to
24 signify a -- a system that leans towards conviction
25 offense sentencing rather than an ideal system. If we

1 can agree on that sort of approximate terminology,
2 then I think, definitionally, understanding is
3 improved.

4 Now, in terms of the Federal system and
5 where the Federal system lies on this continuum, I see
6 two different types of real offense actors or elements
7 entering into the Federal guidelines; one of which is
8 very common and is shared with other systems around
9 the country and the second of which is not so common
10 and is more controversial.

11 The first, the Federal system
12 incorporates a number of real offense elements and by
13 that I mean facts in addition to the statutorily
14 defined elements of the offense for what I would call
15 grading purposes in order for the judge of sentencing
16 to determine how serious the case of mail fraud, of
17 bank robbery or so on is before the Court. And this,
18 in fact, is something in terms of extra offense fact
19 finding that is done in every state system that I know
20 of. Every state considers facts beyond the offense to
21 determine where on the possible scale of seriousness a
22 particular crime lands.

23 Now, in addition to that, the Federal
24 system does something that, to my knowledge, is unique
25 among guideline systems and that is it incorporates a

1 real offense sentencing to actually change the
2 definition of crimes, which is the foundation of the
3 sentence calculation as you move through the
4 Guidelines, so that it's possible in the Federal
5 system for the Guideline calculation to proceed on the
6 basis of three counts where the count of -- where
7 there's only one count of conviction or perhaps a
8 differently defined criminal offense than the count of
9 conviction.

10 Now, that is something that is not done
11 in state-wide systems, to my knowledge, and I have
12 distributed, I think, to Commission members an excerpt
13 of the American Bar Association's recently published
14 criminal justice standards which includes as a matter
15 of policy that as a base predicate for sentencing
16 consideration, the offense of conviction is a better,
17 more just starting place than perhaps a different set
18 of offenses as determined at sentencing.

19 Now I should say after having made that
20 distinction that both types of real offense sentencing
21 for grading and for selection of the crimes that will
22 be built upon for sentencing purposes -- both types of
23 real offense sentencing, I think, are constitutional
24 under existing case law and are eligible for the
25 Commission within its policy judgment to choose

1 between.

2 The principle or the -- the basic
3 philosophy of those of us who prefer a conviction
4 offense orientation is simply this: The belief that
5 if Government is going to impose a criminal punishment
6 on a citizen, it should first convict that citizen of
7 a crime for which punishment will be imposed. Again,
8 this is not a constitutional principle. It's not a
9 principle that everyone agrees with. When I speak to
10 someone whose experience primarily is in the Federal
11 system, they often tell me, Professor, you're right as
12 a matter of idealism or principle, but the real world
13 doesn't work that way. I continue to take some
14 comfort in the fact that the State guideline systems
15 work that way. It at least gives me some sense that
16 there is a real world possibility here that is
17 somewhat different than I see under the Federal
18 relevant conduct provision.

19 JUDGE CONABOY: Thank you. Mr. Thoene,
20 if you will proceed next, please.

21 MR. THOENE: Good morning,
22 Mr. Chairman. I'm not as polished a speaker as some
23 of the other panelist members so I was going to
24 confine my comments strictly to my written notes.
25 However, after hearing some of the other panelists

1 already this morning, I do have an observation and
2 that is my observation is that the majority of us, I
3 think, in the criminal justice system, probation
4 officers, Federal judges, U.S. Attorneys and defense
5 attorneys who didn't experience the evolutions of --
6 the so-called evolution of the Guideline process, I
7 don't feel that we are as burdened as some of the
8 people that have lived through that evolution process
9 and have experienced what the system was like before
10 the Guidelines. And I think that we have an easier
11 time, even though we may have reams of information to
12 go through to help us to determine the Guidelines. I
13 think that we feel more comfortable with that.

14 Comments on relevant conduct. After a
15 finding of guilt by -- either through a jury or by the
16 entry of a guilty plea, a defendant's case is assigned
17 to a U.S. probation officer to prepare the
18 pre-sentence report. The officer determines the
19 appropriate offense guideline and then is instructed
20 to determine the applicable guideline range in
21 accordance with Section 1B1.3. That's the relevant
22 conduct guideline.

23 The local rule for the District of
24 Colorado requires that plea agreements contain a
25 stipulation of factual basis. That is, the plea

1 agreement must set forth the facts of the case. How
2 much the loss was, how much the quantity of drugs --
3 the quantity of drugs involved, the role the defendant
4 played in committing the offense and any pertinent
5 information that would affect guideline application.

6 In addition, the plea agreements
7 drafted in the District of Colorado also contain
8 detailed Chapter 2 and Chapter 3 guideline annotations
9 based upon the stipulation of facts. The probation
10 officer uses the stipulation of facts as a starting
11 point when attempting to ascertain the real offense
12 conduct.

13 Additionally, the probation officer
14 reviews the investigating case agent's reports, grand
15 jury testimony and additional discovery materials to
16 determine if all the relevant conduct has been asked
17 for in the plea agreement.

18 It is when the probation officer sets
19 forth the real offense facts gleaned from the
20 discovery materials that the application of the
21 relevant conduct provisions become problematic for the
22 probation officer. Not problematic in the sense of
23 what is to be considered relevant conduct for
24 Guideline application, but problematic in how the
25 inclusion of this information has an effect on the

1 plea negotiation process.

2 On occasion, the probation officer
3 learns that the stipulation of facts contained in the
4 plea agreement does not correlate with the information
5 contained in the discovery materials. For example,
6 there may have been more drugs involved in the offense
7 or the defendant may have possessed a weapon. All of
8 these factors may have an impact on Guideline
9 calculations. By including this information as
10 relevant conduct, probation officer is often seen as a
11 plea buster. The Government will say well, that
12 information -- both the Government and the defense
13 counsel are most likely aware of that information;
14 however, the information may not have been included in
15 the plea because of -- of plea negotiation processes.
16 This leaves the probation officer in an awfully
17 difficult and frustrating situation. On one hand, you
18 have a plea agreement which is beneficial to the
19 defendant. On the other hand, there is a prosecuting
20 attorney who wants to uphold the plea to prevent the
21 case from proceeding to trial.

22 The probation officer has essentially
23 become a third-party adversary in the sentencing
24 process. However, if the Government is not known to
25 support the application of what appears to be

1 applicable relevant conduct, the probation officer is
2 not in a position to put on evidence or call witnesses
3 at the sentencing hearing.

4 In addition, the application of
5 additional relevant conduct not accounted for in the
6 plea agreement often results in Guideline range
7 overlaps and these overlaps can -- the Court can often
8 make a finding that this is not an issue that will
9 actually affect the guideline range and, therefore, he
10 will not make a finding on the disputed issue.

11 I've been a United States probation
12 officer for six years and my job duties involve the
13 reviewing of other probation officers' reports. In
14 addition, I have served a temporary tour of duty on
15 the Sentencing Commission hotline, answering numerous
16 probation officers' questions on the application of
17 the Guidelines. Based upon this information, it is my
18 belief that over the past eight years, U.S. probation
19 officers have developed a good understanding of how
20 the present relevant conduct provisions found in
21 Section 1B1.3 are to be applied. My personal
22 experience indicates that officers preparing
23 pre-sentence reports resolve many of the difficulties
24 in determining what is relevant conduct and how to
25 apply the current relevant conduct provisions.

1 Although my previous comments have
2 reflected upon procedural problems in applying the
3 relevant conduct guidelines in the District of
4 Colorado, I believe that the current guideline
5 provision for the way relevant conduct is used in
6 calculating sentences does not need clarification or
7 modification unless a major substantive change is made
8 to the charge offense system. Any clarifying
9 amendments to the relevant conflict guideline may
10 create new confusion and complexity to this issue.
11 Thank you.

12 JUDGE CONABOY: Thank you, Mr. Thoene.
13 Mr. Connor.

14 MR. CONNOR: Thank you, Your Honor.
15 May it please the Commission.

16 The relevant conduct Guidelines Section
17 1B1.3 and then related sections in Chapter 3 are the
18 driving engine of the Sentencing Guidelines. And
19 while some of what has been good about the Sentencing
20 Guidelines stem from the purview in Section 1B1.3 of
21 the relevant conduct guideline, almost all of what is
22 bad about the Sentencing Guidelines stem from that
23 particular Guideline.

24 I would urge the Commission to consider
25 that, number 1, no acquitted conduct should be used in

1 computing the applicable Sentencing Guideline -- in
2 coming up with the applicable Guideline range.

3 Likewise, I would strongly urge the
4 Commission to consider limiting the relevant conduct
5 to the offense or offenses of the conviction in a
6 given case or, in addition to that, any additional
7 conduct to which the defendant agrees or stipulates is
8 part of a plea bargain or in the post-conviction phase
9 prior to sentencing.

10 This weekend, I thought about this
11 issue and thought about defendants basically having to
12 defend against conduct that they have been acquitted
13 of, then in a sentencing proceeding having to answer
14 to conduct that was not part of the offense of
15 conviction and the term "recumbent" came to mind and I
16 won't ride that horse any further since Mr. Bender
17 made such use of it in the previous panel. The term
18 "Kafkaesque" came to mind as well. But as I was
19 listening to some of the proceedings here earlier this
20 morning, I did some of what lawyers do sometimes. I
21 sat down and was working on another legal issue and
22 was reading various appellate opinions and I came
23 across a line in the *United States vs. Villano*, which
24 is a Tenth Circuit opinion which states, I think,
25 pretty much what my position is about relevant conduct

1 and why it should only be the charge or charges of
2 conviction. And the Tenth Circuit said, "The
3 imposition of punishment in a criminal case affects
4 the most fundamental of human rights, life and
5 liberty."

6 Fundamental fairness mandates that
7 acquitted conduct should not be used in computing
8 relevant conduct and computing the sentencing range.
9 And likewise, that it be limited to the count or
10 counts of conviction.

11 I think one of the problems that exists
12 in this area is in Chapter 1, in 1B1.3, the -- all
13 facts for sentencing purposes are assumed to be
14 equally as provable as all other facts and, in
15 reality, that's just not the case.

16 Likewise, in Chapter 1, it assumes that
17 all facts or any facts that may fall under the purview
18 of Section 1B1.1 -- or excuse me -- 1B1.3 are as
19 easily provable as any other facts and that just as
20 well simply is not the case. That's all.

21 JUDGE CONABOY: Thank you, Mr. Connor,
22 very much. Mr. Litt.

23 MR. LITT: Thank you. The relevant
24 conduct guideline and the real offense approach that
25 it carries out in our view is critical to the goals of

1 the Sentencing Guidelines which I mentioned earlier,
2 being predictability, certainty, uniformity and
3 fairness in sentencing.

4 We believe that if the concept of
5 relevant conduct were significantly limited, it could
6 have a very detrimental effect on the central purposes
7 of the sentencing format.

8 There was some discussion in the last
9 panel of the unfairness of some of the drug sentences
10 wherein you have a kingpin who can -- who can
11 cooperate, sometimes getting the benefit for a
12 sentence that the mule who can't cooperate in any
13 significant manner doesn't have. And I think people
14 expressed concern about that. I think you're going to
15 find the same thing if you go to a charge -- more to a
16 charge offense system or something that's limited to
17 the offense of conviction. You can have two drug
18 dealers who look very similar, but one of them, for
19 whatever reason, be it that the witnesses are
20 intimidated or evidence is not available, is convicted
21 of far lesser counts than the other and yet these two
22 people who to all intents are -- are engaged in the
23 same conduct, one of them will get a significantly
24 lower sentence than the other.

25 I don't think that that, in the long

1 run, will be productive of confidence -- public
2 confidence in the sentencing system. I also find it
3 somewhat ironic that many of the same people who
4 complain about the supposed increase in prosecutorial
5 control of the system are advocating moving towards a
6 charge offense system because that will undoubtedly be
7 seen as further increasing the control the prosecutors
8 have, since it is the prosecutor and not the Court who
9 determines what charges are brought.

10 Finally, one criticism that -- that's
11 made is the -- it was referred to before -- is the
12 idea of these upsetting the expectation -- that
13 relevant conduct can upset the expectation of the
14 parties in guilty pleas. I think that by now, eight
15 years into the Guidelines, the attorneys should know
16 at this point that relevant conduct is going to be
17 taken into account in sentencing.

18 The Commission's listing of the
19 priorities suggests the possibility of considering a
20 simplifying of the relevant conduct guideline without
21 making any substantive change in it. We would urge
22 you not to do that. This guideline has been amended
23 in 1988, 1989, 1990, 1991, 1992, and 1994 and we think
24 it would be better to let this guideline rest for a
25 while, let people have a chance to interpret it,

1 become familiar with it. We really don't think that a
2 shorter version would provide greater clarity.

3 I think that the problems that people
4 have with the relevant conduct guideline are not on --
5 in the area of clarity, but I think what we've heard
6 is sort of fundamental objections to the concept of
7 relevant conduct that I don't think can be addressed
8 by trying to simplify.

9 Let me talk briefly about the issue of
10 acquitted conduct. This has, of course, long been
11 traditional in sentencing that acquitted conduct could
12 be considered by courts in imposing a sentence and we
13 don't think that that long tradition should be
14 reversed at this stage. In our view, there is clearly
15 no legal problem with the consideration of acquitted
16 conduct. There is only one circuit that has held that
17 acquitted conduct cannot be considered and we have a
18 pending certiorari petition before the Supreme Court
19 to try to get that conflict resolved.

20 But in -- in our view, the prior cases
21 really make it fairly clear that, as a legal matter,
22 acquitted conduct can properly be considered. As a
23 matter of policy, we think there are excellent reasons
24 to include acquitted conduct within the concept of
25 relevant conduct. Of course, a jury's verdict of

1 acquittal does not mean that the defendant is, in
2 fact, innocent; but only that the jurors found a
3 reasonable doubt.

4 Before a court can take acquitted
5 conduct into account at sentencing, it has to find by
6 a preponderance of the evidence that the defendant
7 committed the crime and this standard has always been
8 held to afford sufficient procedural protection for
9 defendants at sentencing.

10 Moreover, the elements of the offense
11 may not actually match the Guidelines factor. The
12 defendant may be acquitted under 924(c) of using or
13 carrying a weapon, whereas the Guideline standard
14 applies only to possession. You're then faced with a
15 choice of either saying well, you have -- you have to
16 either apply the acquitted conduct prohibition more
17 broadly than the actual acquitted conduct or the
18 courts are going to have to make an effort to try to
19 determine exactly what facts were found by the jury in
20 acquitting the defendant. And that, I think, is going
21 to lead to a tremendous amount of litigation and
22 complication analogous to what you get in collateral
23 estoppel issues.

24 In general, we're not aware that the
25 current system of incorporating acquitted conduct has

1 resulted in significant unfairness and we urge you
2 again not to change this settled mode of sentencing.
3 Thank you.

4 JUDGE CONABOY: Thank you, Mr. Litt.
5 I'm going to take about 10 minutes for questions,
6 please.

7 JUDGE MAZZONE: Just one question to
8 Mr. Litt. Mr. Litt, can you conceive of any
9 situation, any case in which acquitted conduct
10 actually -- I should say the tail of acquitted conduct
11 actually bites the dog? Is there any case that you
12 can conceive of in which it might be necessary for a
13 judge to use in order to see that the tail doesn't
14 bite the dog?

15 MR. LITT: I would think that if --
16 obviously, one can conceive of such a case. You can
17 construct a case like that.

18 JUDGE MAZZONE: You don't have to
19 construct it. It exists. *LaBonte*.

20 MR. LITT: I would say that given the
21 right set of facts that a judge could -- that fell
22 sufficiently outside the heartland, the judge could
23 depart downward under those circumstances if he felt
24 the facts were sufficiently established justifying a
25 acquittal.

1 The judge still does have to find by a
2 preponderance of the evidence that the conduct did
3 take place before the judge can take that into account
4 at sentencing.

5 JUDGE MAZZONE: Okay. LaBonte is a
6 First Circuit case in which -- a life sentencing case
7 in which state circ -- the state court had murder
8 acquittals. That case is now, I believe, on appeal.
9 I believe it's on appeal. But there's no question but
10 a very good, very conscientious judge found by a
11 preponderance of the evidence that the murders had
12 been convicted of, although the state court jury
13 acquitted the defendant. Now, should that judge
14 ignore the standard and detract --

15 MR. LITT: Is this an underlying
16 narcotics case where the murders were convict --
17 committed in the course of the narcotics conspiracy?

18 JUDGE MAZZONE: No. LaBonte.

19 MR. LITT: I don't know the particular
20 case. I mean, presumably, the murders fell within
21 relevant --

22 JUDGE MAZZONE: No matter.

23 MR. LITT: Presumably, the murders fell
24 within relevant conduct as it's defined within the
25 guidelines. Part of the offense of conviction. I

1 must say that I don't find a fundamental unfairness if
2 the judge is, in fact, persuaded that conduct did
3 occur in taking into account sentencing. There are a
4 wide variety of circumstances in which a state case
5 might not have resulted in a conviction. The
6 fundamental question is for the judge to be satisfied
7 as to whether or not the conduct occurred.

8 JUDGE CONABOY: Any other questions?

9 MR. GOLDSMITH: Mr. Litt, I may have
10 misunderstood you. I thought you said that the
11 standard applied with respect to relevant conduct in
12 the context of acquittals as clear and convincing.
13 More recently, you said that it was a preponderance of
14 the evidence which is the standard that I think does
15 apply.

16 MR. LITT: If I said clear and
17 convincing, I misspoke.

18 MR. GOLDSMITH: Preponderance, you
19 think that's the appropriate standard, as well?

20 MR. LITT: Yes.

21 MR. GOLDSMITH: The other questions I
22 have, I think, reflect comments made by other panel
23 members throughout the day. I think it's come to the
24 attention of the Commission, certainly, that the
25 practice in Denver with respect to the guidelines may

1 be quite different from practices elsewhere. Here,
2 for example, there seems to be the U.S. Attorneys work
3 more closely with defense counsel and achieve results
4 that perhaps all concerned are satisfied with; whereas
5 that's not the case necessarily in other districts.
6 That suggests a problem of potential disparity and I'm
7 wondering what, if anything, the Department of Justice
8 might do to achieve greater uniformity by virtue of
9 perhaps greater control over the practices of local
10 U.S. Attorneys offices.

11 MR. LITT: I'm actually glad you asked
12 that question because I had noted the people's
13 comments that were made and while I do think Denver is
14 a wonderful city, I think it's less exceptional in
15 that regard than some of the comments here may have
16 indicated. My impression both based on my experience
17 in the Department and when I was in private practice
18 is that, by and large, most prosecutors and defense
19 attorneys do try to work and courts do try to work for
20 just results in individual cases.

21 They may use different routes to get
22 there, but, by and large, I think that in most places
23 in the country, people are working out accommodations
24 within the system to deal with it.

25 If -- what -- what I'm more interested

1 in hearing as you have asked about instances where
2 guidelines lead to an unjust result, I would be -- and
3 from the Department's point of view would be
4 interested in hearing about districts where people
5 feel that the system is producing seriously unjust
6 results on a systemic basis because the parties and
7 the courts are not able to work through these issues.

8 MR. GOLDSMITH: I should say I've been
9 making this request for unjust results for years and
10 I've been underwhelmed by the results I've received.
11 Neither defense counsel nor judges have certainly
12 buried me with comments or examples of that type of
13 problem.

14 JUDGE CARNES: But it is -- unjust
15 results is a fairly useless phrase. Unjust means
16 something to a defense attorney. Unjust may mean
17 something else to a prosecutor. So to use those terms
18 doesn't help. And the results in Denver may be
19 something that if I knew what they were, I'd think
20 they were great, but it does seem to me if the main
21 notion of this sentencing system was to avoid
22 unwarranted disparity, if you have some districts
23 where everybody is just sort of ignoring the
24 guidelines and other districts -- and I know those
25 other districts exist -- where they are adamantly

1 enforcing the guidelines, then you have a situation
2 where a defendant, not by the luck of the draw of the
3 judge, but by the luck of the draw where he lives, has
4 now got a harsher sentence.

5 MR. LITT: We haven't seen any
6 indication of tremendous disparity in sentencing
7 between districts. We do try to look for these things
8 and the -- the bottom line results don't appear to be
9 tremendously different between districts from what we
10 can tell.

11 JUDGE TACHA: Let me just ask those of
12 you who are concerned about the relevant conduct and
13 this real offense system, if -- and this is only a
14 hypothetically, if the power to depart is somewhat
15 expanded, could some of your concerns be alleviated by
16 greater departure?

17 MR. CONNOR: If the question is what is
18 a fair sentence in a given case, then -- and if the
19 district court determines to depart based on that,
20 then yes, but I think that what is at question here,
21 Your Honor, is the fundamental underpinnings of the
22 criminal justice system and what it's about. Are you
23 innocent until or unless you're proven guilty of it,
24 for example. And if so, by what standard. I thought
25 that the -- I read some of the materials and I thought

1 that the, you know, Commission or -- or certainly,
2 people who work for the Commission have had some
3 concerns on this about the idea of going to clear and
4 convincing evidence as opposed to -- as opposed to
5 preponderance of the evidence. Why not make it proof
6 beyond a reasonable doubt? The Rules of Evidence
7 still don't apply at the sentencing hearing. And then
8 let the Court determine whether or not it can be
9 proven beyond a reasonable doubt before using it to
10 enhance somebody's sentence.

11 However, I think that what is at the
12 core of what we're talking about here is whether or
13 not you're accountable for conduct that you have not
14 been convicted of, have not admitted. And while some
15 of what Mr. Litt says is true in terms of acquitted
16 conduct has previously been able to be considered by a
17 sentencing court -- in other words, the Court can look
18 at all the surrounding facts and circumstances as to
19 what went on in a given case, what we're talking about
20 here is there being guidelines which adjust that
21 sentence and basically channel a court's discretion
22 upward -- and so I -- I would basically say to you
23 that in terms of looking at results in individual
24 cases, yes, that might help.

25 In looking at creating respect for the

1 system and those sorts of things, it should be charge
2 of conviction or charges of conviction.

3 PROFESSOR REITZ: It seems to me the
4 relevant conduct provision has appropriately been
5 referred to as a cornerstone of the guideline system
6 and it seems to me that the departure power which you
7 hope will be used very infrequently would not be --
8 would not be a remedy if you were concerned about the
9 way the cornerstone was operating. I should say and I
10 noted in some of the Commission documents or
11 discussion drafts that one idea under consideration
12 was to move relevant conduct considerations into the
13 departure power so that a judge may say in a given
14 case that a conviction offense does not substantially
15 lead to a just sentence and so that the relevant
16 conduct considerations may be cited as a ground for
17 departure rather than as the basis for sentencing in
18 the first place.

19 I'm attracted to that suggestion in
20 some respects. It -- it strikes me as resembling what
21 I see as -- as traditional pre-Guidelines practice
22 where judges did not automatically fix sentences to
23 some personal view or view of reality established at
24 the sentencing hearing, but would often modify their
25 sense of what the -- the -- I'm not saying that very

1 well. But would often say the conviction doesn't
2 reflect in this case what I see as happening. I will
3 make some adjustment in sentence for that.

4 That -- that logic, I think, more
5 closely tracks the traditional pre-Guideline scheme
6 than a mandated relevant conduct provision that really
7 tells judges you should start here in every case.

8 JUDGE CONABOY: All right. Anything
9 else?

10 MR. GOLDSMITH: Judge. Mr. Litt, do
11 you agree with the criticism of the guidelines that,
12 for the most part, they have transferred discretion
13 from the judges to the prosecutors?

14 MR. LITT: No.

15 MR. GOLDSMITH: Why not?

16 MR. LITT: It's --

17 JUDGE CONABOY: That's a surprise.

18 MR. LITT: Certainly, most of the
19 existent U.S. Attorneys who I speak to don't feel that
20 way. The bottom line is that the sentence is imposed
21 by the judge and the judge has to make the appropriate
22 findings.

23 MR. GOLDSMITH: Doesn't the prosecutor
24 have control by virtue of charging decisions and facts
25 that are made available to the probation officer?

1 MR. LITT: Well, in terms of charging
2 decisions, of course, that's what the relevant conduct
3 is supposed to account for. Obviously, there's -- the
4 prosecutors always have a certain amount of influence
5 over the sentencing decision by virtue of charging
6 decisions.

7 The most obvious example is the number
8 of counts you charge limits the maximum possible
9 sentence.

10 In terms of information made available
11 to the probation officer, our policy is we're not
12 supposed to withhold information from the probation
13 officer. The probation officer and the Court is
14 supposed to be given full access to all the relevant
15 facts for sentencing.

16 MR. GOLDSMITH: Thank you. For
17 Professor Reitz and Mr. Connor, it seems to me that
18 the problem is that prior practice before the
19 Guidelines, of course, was that relevant conduct could
20 be considered by judges and some did and some didn't
21 and the degree to which they considered it varied
22 considerably. The Guidelines reflect an effort to
23 achieve uniformity and so the system established by
24 the Commission sought to achieve that uniformity by
25 mandating the Court must consider relevant conduct

1 under certain circumstances providing that certain
2 objective criteria have been satisfied.

3 Short of -- well, how can we achieve
4 the goal of uniformity which is the cornerstone of the
5 Sentencing Reform Act in a manner that gives a judge
6 discretion whether or not to consider relevant
7 conduct. But that's a potential dilemma that we face
8 here. To the degree we allow the court to make up its
9 mind in each case whether to consider relevant
10 conduct, that may produce an outcome that oftentimes
11 will be systemically disparate from what we presently
12 have achieved.

13 MR. CONNOR: I think that's why I'm
14 saying make it a count of conviction plus anything
15 else that the -- the defendant admits during the
16 course of -- of plea -- or in the course of arriving
17 at a plea. My experience as a prosecutor before
18 becoming a Federal defender was that, basically, in
19 terms of prosecuting someone, that you attempted to
20 apply the guidelines and you attempted to do it the
21 way the Sentencing Commission set forth in conjunction
22 with Department of Justice guidelines which were
23 promulgated and that is basically what occurred. You
24 don't have a situation where prosecutors are deciding
25 that it's either too much trouble to prosecute someone

1 more harshly or someone less harshly or for some
2 other -- for some other reason that's not a good
3 reason. The problem with the relevant conduct
4 definitions now are that they assume and the impact on
5 plea bargaining is that they assume that basically you
6 can prove -- you can prove any fact just as easily as
7 you could prove any other fact.

8 Take a bank robbery example. That it
9 was an armed bank robbery. That it was a firearm as
10 opposed to a dangerous weapon or device or things of
11 that nature. And -- and that can, number 1, be the
12 difference between being convicted of the crimes of,
13 say, armed bank robbery or simple bank robbery. And
14 so I think that you will not encounter large
15 disparities of sentencing in sentences if what you do
16 is you limit it to the counts or count of conviction.

17 MR. GOLDSMITH: Wouldn't that even be a
18 more radical transformation of our criminal justice
19 system than we have in mind by virtue of the
20 Sentencing Reform Act? In effect, you're telling the
21 court the court may not consider the complete picture.
22 Under prior practice, the judge could consider the
23 complete picture and sentence accordingly. Now, the
24 judge may not consider any relevant conduct at all.
25 That seems to be achieving uniformity at the risk of

1 producing outcomes that are inappropriate.

2 MR. CONNOR: Of course, the Court can
3 probably consider any conduct that it desires in
4 sentencing within the applicable sentencing guideline
5 range, number 1. Number 2, what you have now, though,
6 is a situation where the Guidelines themselves mandate
7 consideration of the things which are not part of a
8 count of conviction.

9 In other words, the Guidelines,
10 themselves, tell a court that you must consider
11 something that was acquitted conduct. That you must
12 consider something which is not a charge of
13 conviction.

14 MR. GOLDSMITH: Thank you.

15 JUDGE CONABOY: Anything else? All
16 right. Thank you, very much, gentlemen. We'll call
17 the -- I see Judge Daniel is here now. So we'll call
18 Judge Daniel and Judge Weinshienk next, please. I
19 think this is the only panel that you're not on.

20 MR. LITT: Okay. I'm out of here.

21 JUDGE CONABOY: I understand, Judge
22 Daniel, that you have some prepared remarks and we're
23 going to hear from you first. Judge Daniel is
24 appointed to the District Court here in the District
25 of Colorado, serves here in this district and he

1 served as a member of the Civil Justice Reform Act
2 Advisory Group in this district from 1991 to 1994 and
3 was president of the Colorado Bar Association from
4 1992 to 1993. And just recently -- what was the date
5 of your appointment?

6 JUDGE DANIEL: September 1, 1995. So
7 I'm approaching my one-year anniversary.

8 JUDGE CONABOY: We're happy to have you
9 here with us today. Judge Weinshienk, who we talked a
10 little bit about several times earlier today, has been
11 a member of the District Court since 1979 and served
12 since 1964 on various other courts before entering
13 onto the United States District Court in 1979 so we're
14 happy to have both of you here with us. And Judge
15 Daniel, if you want to proceed with your remarks.

16 JUDGE DANIEL: I will. My remarks will
17 be relatively brief in that I've got a criminal trial
18 I started this morning and so if I have to leave
19 before this is completed, that's the reason why.

20 JUDGE CONABOY: Sentencing?

21 JUDGE DANIEL: Not yet. Not yet. My
22 perspective on this is probably one that I think may
23 be useful to you in that I've been a judge for less
24 than a year. And when I was a practicing lawyer, I
25 practiced in the civil rather than criminal arena so I

1 had virtually no contact with the Sentencing
2 Guidelines. I knew they existed, but I never had to
3 use them as an advocate.

4 So when I got appointed to the bench,
5 obviously, I knew what they were and I had to commence
6 some reading on them. In fact, I saw some of you at
7 the program in Boston last summer. I attended that
8 before I actually was sworn in. But we had a very,
9 very intensive program in San Francisco last October
10 as part of a videotaped presentation and Rusty was
11 there and he was giving us the dog and pony show on
12 the Guidelines.

13 But at or about that same time, I had
14 begun the process of taking pleas, evaluating the
15 Guidelines and between now and then, I have taken a
16 number of pleas and I've sentenced a number of people
17 and what I want to do is share with you some
18 impressions I have of the Guidelines for someone who's
19 been a judge for about 11-1/2 months. I will give you
20 some things that have been confusing to me and some
21 concerns that I have with the recognition that I don't
22 have the judicial tenure and oversight that my
23 colleague Judge Weinshienk has, but perhaps my
24 comments may be of use to you.

25 What my overall reaction to the

1 Guidelines is sometimes I feel like I'm in a
2 straitjacket in the sense that it's -- I took an oath
3 to follow the law, but sometimes, applying the
4 guidelines in the way that's fair and just in
5 individual defendants -- defendant causes some
6 conflict. And what I've tried to do is figure out a
7 way to reconcile that conflict without doing violence
8 to the Guidelines.

9 And one area in particular that has
10 caused me concern is this whole issue of criminal
11 history. I've had cases where I felt the criminal
12 history was underrepresented and other cases where it
13 was overrepresented and I have utilized Section 4A1.3
14 to try to come up with some findings that I believe
15 were proper and fair. But I would hope that you try
16 to put some more flexibility into the judge's ability
17 to determine what a representative criminal history
18 is.

19 I'll give you an example. Most
20 recently, I had a gentleman in front of me and he was
21 20, 21 and he had a pretty substantial juvenile
22 record. Of course, that didn't count. And he was
23 charged with a weapons and gun charge down in the
24 Colorado Springs area. Well, I had a concern about
25 whether or not his criminal history as recommended by

1 the probation department was -- was high enough
2 because he had been charged substantially with
3 kidnapping, with robbery, and with basically using a
4 code name to engage in drug activities and he had a
5 whole bunch of pending charges in State court. And
6 those State charges were pending until the Federal
7 case got resolved. And now we're talking about the
8 sentencing stage because I had taken his plea 70 days
9 before.

10 But when we got to the sentencing
11 phase, I was very concerned about whether or not the
12 criminal history, which I think was a category 2, was
13 accurately reflective of the seriousness of these
14 charges because I had the probation department bring
15 me in the State court file and I reviewed it, I saw
16 the affidavits from the local law enforcement
17 officials and I determined that this guy has some
18 serious problems.

19 And so I took it up to the next higher
20 level and I took it up based upon the exception that
21 deals with pending criminal charges and I tried to
22 make findings that would protect me in the event there
23 was a challenge on that.

24 But then I have had it the other way.
25 I had a very serious case where a 22-year-old African-

1 American male was charged with crack cocaine -- and by
2 the way, I've got to say this because this has been
3 the other reaction I've had. I've been very
4 troubled -- I know that's not on your agenda today --
5 about huge disparities between crack cocaine, cocaine
6 and marijuana. I've got a case right now where
7 defendants transported huge amounts of marijuana from
8 California through Arizona through Colorado to
9 Minnesota. Approximately, oh, sixteen were indicted
10 and eight were charged and -- and all of them had
11 filed pleas and when I look at the range of penalties
12 there, some of which ranged from a recommended
13 probation up to maybe eight months in jail, I'm
14 troubled when I had this African-American male in
15 front of me and the issue was whether or not I sent
16 him to jail for eight years or nine years. In any
17 event, I ended up sending him to jail for eight years
18 because I felt his criminal history overrepresented
19 the seriousness of what he had done.

20 So I see some need there to try to give
21 some more focus, thoughts as to sort of what the
22 criminal history component of the sentencing should
23 be, what factors should be looked at by the district
24 judge and giving the district judge more flexibility
25 so that if you see a situation that isn't right, that

1 you can adjust it without allowing total discretion to
2 return.

3 A related point has to do with the
4 offense levels. I've looked at the Guidelines tables
5 a number of times and what I realize is you've got a
6 whole bunch of numbers in here and I understand how
7 they work now. I think it would be wonderful if you
8 could reduce the 43 offense levels to something that's
9 fewer in number because I think the whole goal here
10 should be to come up with some ranges that perhaps
11 suggest some minimums and maximums, but I think,
12 really, since we're on the firing line, when we see
13 things that we believe need to be adjusted, we ought
14 to be able to adjust them more than we can adjust them
15 right now without being reversed for just violating
16 the Guidelines. So anyway, that's one area.

17 I'm very troubled about the 5K1.1
18 motion. Let me explain. I think, to a large extent,
19 sentencing discretion has been transferred to the
20 prosecutors because what I've experienced is I think
21 sometimes 5K1.1 motions are filed for the simple
22 reason of arriving at a predetermined result based on
23 a negotiations between the defendant's counsel and the
24 prosecution. And I -- I require the prosecuting
25 attorneys to show that there has been some substantial

1 assistance rendered or I will decline them. And I'll
2 even require them to give me things under seal if they
3 don't want to reveal in the public record what the
4 substantial assistance has been.

5 But I think the 5K1.1 motion has been
6 abused and that's something you ought to look at. And
7 it ought to be limited to certain narrow situations
8 because what certain prosecutors and counsel do, I
9 think, is use that as a vehicle to arrive at a
10 sentence that would under other circumstances be
11 incompatible with the Guidelines. But once we get it
12 that way, it's hard for us to do much about it. That
13 is, I either reject the motion or I don't reject the
14 motion. And so I think you need to look at this 5K1.1
15 and whether or not it's being used for the purpose for
16 which it was intended.

17 I had an interesting case recently and
18 these are some continuations of my observations
19 involving obstruction of justice. The particular
20 defendant, I think, perhaps lied to me under oath at
21 his change of plea. And the reason -- the way it was
22 set up was there was a reference in the pre-sentence
23 report to the fellow having been convicted while in
24 the military in Baltimore, Maryland, and I asked the
25 defendant about that and he said I was never in

1 Baltimore, Maryland and I was never convicted of
2 anything. What we found out later, because I just had
3 a brief printout from our pretrial services
4 department, we found out it wasn't in Baltimore. That
5 was a clearinghouse for military records and what had
6 really happened was the defendant, while serving in
7 the military in Germany, had used some credit cards
8 improperly. Calling cards. And so he had been
9 subject to some administrative discipline. And of
10 course, the administrative discipline isn't the same
11 as a conviction. But he was playing cute with me.

12 And so when I found out what the real
13 facts were, then I was trying to figure out if, in
14 fact, obstruction of justice was warranted under
15 Section 3C1.1, but in trying to figure out what all
16 that meant, I had to go to a recent case, *U.S. vs.*
17 *Medina-Estrada*, 981 F.3rd 871. And that case holds
18 that a defendant, while testifying under oath or
19 affirmation, if he gives false testimony concerning
20 material matters with willful intent to provide false
21 information rather than as a result of confusion and
22 mistake or faulty memory, then I can make an
23 obstruction of justice finding. So anyway, I took a
24 record and ended up not taking a finding because the
25 record wasn't clear enough. Really, the Guidelines

1 didn't give me a lot of insight and guidance on that
2 issue. I just sort of had to figure out what the case
3 law was and make a finding that -- that made some
4 sense.

5 That's the other thing I've learned. I
6 need to make findings that make sense, so Judge Tacha,
7 when she sees my cases, can understand why I ruled the
8 way I ruled.

9 The final observation I want to make
10 has to do with role in offense. I had a very
11 interesting case where this young man -- older man, he
12 was in his mid-twenties to thirties, 30 -- he was --
13 well, he was 25 to 30, but, anyway, he engaged in a
14 scheme with a minor whereby they somehow got driver's
15 licenses from some people and then they set up some
16 bogus bank depositories and then they had some bank
17 statements -- excuse me -- bank checks mailed to this
18 phony post office box. They proceed to write
19 thousands of dollars off the check. They defrauded
20 both the individuals who had the accounts and, more
21 fundamentally, the financial institutions.

22 So at the change of plea hearing --
23 actually, it was at the sentencing, the older
24 gentleman said no, we were all co-equals. This was a
25 co-equals plan between myself and this underage

1 person. And so you should not -- you should not give
2 a two-level increase because of the -- because the
3 defendant was an organizer, leader, manager or
4 supervisor. And, of course, I read that and looked at
5 the comments and made some findings. And I found that
6 he was a supervisor, but, again, I think this role in
7 the offense is something that comes up quite
8 frequently in our cases and if there's a way to give
9 more meaning to what the terms "organizer, leader,
10 manager, supervisor" mean in a greater range of
11 context so that increases or decreases are more
12 supported by comments in Guidelines, that's another
13 area I'd like you to at least think about.

14 So my final comments sort of have to do
15 with just some overall goals that I think are
16 warranted. One is more ability to individualize
17 sentences. Whatever you do, you should give us more
18 discretion to individualize sentences so they meet the
19 problems that we see. I already mentioned the
20 application of the criminal history guidelines should
21 be simplified and reduce the number of offense levels.

22 So those are kind of some things that I
23 have observed and I tried to go through my -- my
24 memory bank and pick those things that stood out in my
25 mind rather than just giving you the things you

1 already know.

2 So those are some brief comments and I
3 hope they will be useful to the Commission.

4 JUDGE CONABOY: Thanks, Judge, very
5 much. Judge Weinshienk.

6 JUDGE WEINSHIENK: Thank you. I, too,
7 will be brief.

8 I was one of the few judges that was
9 here before the Guidelines and I sentenced both as a
10 State judge before the Guidelines and as a Federal
11 judge before the Guidelines. And, indeed, as one of
12 the panel members stated, sometimes we lost sleep
13 deciding what we were going to do because we did have
14 discretion before the Guidelines, but we also did have
15 tables and charts which told us how the sentencing had
16 been for a particular crime in the district and
17 nationally. And I think we were very conscientious in
18 trying to follow those charts and to keep the
19 sentencing within those goals.

20 After the Guidelines, I am enough of a
21 realist to know that they are here and they are not
22 going to be erased and I have learned to live with the
23 Guidelines. There are some big problems, though, that
24 do cause me loss of sleep. And I would second the
25 comments of the very -- various panel members who say

1 try to make them more guidelines and let the judge
2 have some more discretion. We do not have the
3 discretion that I think we should have. And it is
4 very difficult to try to -- what can I say, lean on
5 the prosecutor to file a 5K1 when we feel that that's
6 the only way we can give a lower sentence. Sometimes
7 it works. But it's not the way that it should be
8 working.

9 Let me give you an example. Bank
10 robbers. The first bank robber is the one who went
11 into the bank with the gun. And the other young man
12 that came with him was someone they found out about
13 because they talked to him first. His attorney had
14 them -- had him give substantial information to the
15 prosecutor. So with the most culpable bank robber, he
16 gave the information about his two buddies, one of
17 whom was his disabled younger brother who he convinced
18 to drive the car. The way the case came to me was
19 that I had sentenced the first bank robber who had
20 given the information who had gotten a very good deal
21 with 5K1's, with departures and then, all of a sudden,
22 I was getting the younger brother, the disabled
23 brother, who was talked into it and who was facing a
24 much longer sentence than the more culpable older
25 brother, even though there was much more mitigation.

1 And frankly, I said to the prosecutor
2 at that point, this just isn't fair. It isn't right
3 and I just don't see how I can sentence someone who is
4 much less culpable to a greater sentence just because
5 he was -- he didn't get in there early to give his
6 information. In that case, the prosecutor agreed. It
7 wasn't fair. And he filed a 5K1 not because of any
8 assistance, but just to give me the vehicle for
9 departing and trying to issue a fair sentence. I
10 think that's the type of case that the judge really
11 struggles with and loses sleep over.

12 And just one more example because I
13 think there are examples. A young African-American
14 woman, A and B student at East High School, made the
15 bad mistake of falling in love with a young man,
16 having his baby, who decided that the way for him to
17 succeed would be in drugs, in crack. And was living
18 with him and was aware of his very large -- his very
19 large deals in crack. She had a little child. She
20 knew about it. She was charged. The amount of the
21 drugs was -- was weighed in. She was a young woman
22 who had opportunity, had she chosen, to have athletic
23 scholarships at two different colleges. She was
24 bright. She was talented. She was an athlete. She
25 made a wrong decision because of love. And she faced

1 135 months minimum.

2 That was the -- that was the bottom of
3 the Guideline schedule that I could give her. I
4 departed. I thought for a while there was going to be
5 an appeal on it. It wasn't appealed, but I departed
6 to 120 months mandatory minimum. She is serving 120
7 months.

8 Had that been before the Guidelines,
9 this would have been a far different situation. That
10 was a case where the case went to trial and,
11 therefore, because it went to trial, there was no deal
12 and I don't know if there was a deal even offered
13 before the trial.

14 But I do lose sleep over it. And I
15 still to this day think about whether there's some way
16 that this young woman could get out of prison earlier
17 than serving the full 120 months. Those are the types
18 of things that are very frustrating to the judge.

19 And as Judge Daniel said, we're not
20 talking about crack and powder, but the crack and
21 powder disparity is a real serious problem for the
22 judge.

23 The other problem is the fact that we
24 just weigh the drugs. A young college student from
25 Minnesota stood before me with tears in his eyes

1 because a buddy had asked him to deliver a package
2 from Minnesota to Colorado. He was coming down on
3 vacation. Told him it was cocaine but said if you get
4 caught, it won't be more than 90 days. Don't worry.
5 Well, he was facing the five-year mandatory minimum
6 and he stood there with tears and said, you know, my
7 life is totally ruined. My college, my fiancée. He
8 was going to be married. And there he is. And I have
9 no discretion. No discretion.

10 So these are the problems that the
11 judges face and we worry about them and wish there
12 were ways that we could give a sentence which was more
13 in accordance with justice. But I do live with the
14 Guidelines. I follow them.

15 I hope you will give us a little more
16 discretion under the Guidelines in the future. I hope
17 that something can be done about mandatory minimums.
18 I know that the safety valve has helped. Yes, we
19 appreciate that because in the proper case, that
20 certainly helps.

21 I would disagree with my colleague to
22 one extent. I don't want more tightly drawn
23 constrictures. I would like to have the discretion in
24 some of these cases to be able to make decisions. I'd
25 like the discretion in some cases to decide whether it

1 is or is not relevant conduct because that gives me a
2 little more discretion in a proper case.

3 Thank you for the opportunity of giving
4 you my remarks.

5 JUDGE CONABOY: Well, we thank both of
6 you for taking the time to come in. As we said
7 earlier this morning, it's very important for us to
8 hear from people who are on the front lines and
9 working on the front lines every day.

10 Are there any questions for either of
11 the judges?

12 MR. BUDD: Well, Judge Weinshienk, just
13 curious. You mentioned the very difficult situation
14 you had with the young woman to whom you awarded a
15 sentence of ten years. The gentleman who came before
16 you, you gave him five years because that's what was
17 required as you saw the law. How would you have
18 decided had you had complete discretion in -- in those
19 circumstances?

20 JUDGE WEINSHIENK: Both of those
21 situations involved mandatory minimums, so I think the
22 answer to the mandatory minimum is either get rid of
23 it and -- let me deal with the Guidelines or else give
24 me some additional discretion to find an exceptional
25 case and go beyond the -- below the mandatory minimum.

1 MR. BUDD: I think you know the
2 Commission has gone on record about five years ago as
3 being opposed to mandatory minimums, but I was asking
4 in these two anecdotal situations you cited, what
5 would you have done had you had complete discretion?

6 JUDGE WEINSHIENK: Had I had
7 discretion --

8 MR. BUDD: I'm sorry. I wasn't clear.

9 JUDGE WEINSHIENK: All right. A
10 similar case before the guidelines of a young man from
11 Minturn, Minturn, Colorado, who was bringing a lot of
12 drugs into Denver for a buddy because he asked him,
13 you know, would you do me a favor and drive these
14 drugs in. I gave him six months plus some long term
15 of supervised release and probation after. He had not
16 been in trouble before. I would have done the same
17 thing with the young man from Minnesota.

18 With the young woman with the small
19 child who had gotten -- who had fallen in love with
20 the drug dealer, some time -- I would have given her
21 some time, but certainly not ten years. She didn't
22 need ten years to make the point that she -- in fact,
23 she was never -- I was never going to see her in the
24 future. I think this -- I will never. I hope. I
25 don't know what prison is going to do to her. But

1 she's bright, she's -- she has everything to live for
2 and she's spending ten years in prison.

3 JUDGE DANIEL: I'd like to add a
4 supplement to what Judge Weinshienk said and it's from
5 a different perspective. When we had our orientation
6 session in San Francisco last fall, we visited the
7 prison facility in Pleasanton and we met with some
8 inmates and we asked them their reaction to their
9 sentencing and I happened to talk to an African-
10 American female who had been sentenced by Judge
11 Weinshienk. But her reaction and the reaction of
12 other women on the panel because that's a women's
13 facility and we were in the facility and we asked them
14 to tell us what they thought about the guidelines, the
15 uniform response was that they are too harsh. That we
16 realize we did something wrong, we realize that we
17 need to go to jail. But the length of our sentence is
18 so extreme that it gives us no incentive to retool,
19 reskill and be prepared to reenter society.

20 And that left an impression on me
21 because there was the person who had been sentenced by
22 Judge Weinshienk. She was involved in drug activity,
23 but it was because of a boyfriend and she was faced
24 with some huge, huge minimum sentence under the
25 guidelines and so, therefore, she cut a deal, but the

1 deal she cut was for a very, very long period of time
2 and this woman was relatively young. She was in her
3 thirties. And she had young children.

4 And this was echoed by some other
5 relatively young female prisoners who had children,
6 who realized they had made a mistake. They needed to
7 go to prison, but there was a degree of hopelessness
8 expressed by them because of the total length of their
9 sentences.

10 I'm not here to try to second-guess the
11 sentence and judge who did that, but I think it's
12 worth noting sort of what inmates tell you about what
13 they need to get motivated to reenter society because,
14 hopefully, that is an ingredient of what this is all
15 about. That it is finding people, sentencing them,
16 but also giving them some hopes that they can reenter
17 society and be productive citizens. I wanted to add
18 that comment.

19 JUDGE WEINSHIENK: The boyfriend of the
20 woman that I sentenced to 120 months received a life
21 sentence and I also had problems with that, too. He
22 deserved a long sentence, but a life sentence means
23 there's no light at the end of the tunnel. Nothing.
24 I would have much preferred to give him 360 months. I
25 would give -- rather give him 30 years and just let

1 him know that he's going to get out than to give him
2 life.

3 JUDGE CONABOY: Any other questions?

4 All right. Thank you, very much.

5 JUDGE WEINSHIENK: Thank you.

6 JUDGE DANIEL: Thank you.

7 JUDGE CONABOY: We have a Deputy
8 Attorney General from the Department of Justice. Does
9 that sound familiar? All right. This panel is on
10 drugs and role in the offense and essentially any
11 other comments you wish to make. Again, we're asking
12 you to try to limit your comments to five minutes and
13 I'll ask my fellow commissioners to try to limit the
14 questioning, if there is some this time, to ten
15 minutes, because we are, in fact, running out of time.

16 We have Mr. Christopher Perez, who is a
17 senior probation officer here in the -- in Denver and
18 at one time, he was promoted to the Sentencing
19 Guidelines specialist here in the -- in Denver.

20 And we also have Mr. Raymond Moore, who
21 is an Assistant Federal Public Defender. Mr. Moore
22 was an Assistant U.S. Attorney here from '82 to '86, I
23 believe, and then after being in private practice for
24 a number of years became the Assistant Federal Public
25 Defender here in Denver. So he's been on both sides

1 of the equation.

2 And we have Ms. Jeralyn Merritt.

3 Ms. Merritt is a practitioner here in Denver and a
4 graduate of the University of Denver College of Law.
5 She chaired the committee on the Criminal Justice Act
6 for this District here in Colorado from 1994 to 1995.
7 And she limits her practice, as I understand it,
8 pretty much to criminal defense. So we're happy to
9 have all of you here, along with Mr. -- what's his
10 name again -- Mr. Litt from the Department of Justice.
11 We appreciate your staying with us, Bob, for all of
12 these panels.

13 MR. LITT: Thank you.

14 JUDGE CONABOY: Let's see. We'll
15 start, if you don't mind, with Mr. Perez.

16 MR. PEREZ: Good afternoon. The
17 Commission has asked the members of this panel to
18 address the issues of the drug offense and role in the
19 offense guidelines. Historically, the drug Sentencing
20 Guidelines were designed to reflect the Anti-drug
21 Abuse Act's emphasis on the use of drug quantity to
22 establish penalties. Until Congress changes the focus
23 of this statute, I think it would be difficult for the
24 Commission to change the drug quantity emphasis of the
25 guideline. Still I'm not convinced that the nature of

1 the Guidelines, itself, should be changed anyway.

2 That is with the exception of the crack
3 ratio. And I'll go ahead and address the crack ratio.
4 No discussion of the drug and offense would be
5 complete without it. Still it's my understanding that
6 Congress views the crack cocaine guideline as being 10
7 times worse than the powder cocaine guideline,
8 primarily because the crack co -- the crack traffic
9 involves the -- the use of street gangs and violence.
10 To me, it seems kind of a presumption to send those
11 crack offenders based on a 10 to 1 ratio based on the
12 assumption that they are all violent gang bangers. It
13 seems to me it would be more appropriate to make gang
14 affiliation and use of violence, those type of
15 factors, variable specific offense adjustments than
16 simply to make across the board assumptions, but, in
17 general, I find that 2B1.11 represents an objective
18 measured approach to determining the severity of an
19 offense.

20 In practice, I find that the majority
21 of the problems in applying the drug guideline
22 involves evidentiary relevant conduct related issues.
23 That once drug type quantity issues have been resolved
24 by the Court, the application of the guideline is
25 relatively simple and very mechanical and I do admit

1 that the use of the quantity driven nature of the
2 Guidelines in itself is a mechanical approach to
3 sentencing. And I have been told in the past that I
4 have executed my duties as a probation officer with
5 accountant-like precision.

6 But I think that the mechanical
7 approach to Guidelines using these quantities is one
8 balanced by the other Guidelines, the Guidelines which
9 bring into consideration the role in the offense,
10 acceptance of responsibility, other culpability
11 related factors. Still other Guidelines in the form
12 of departure policy statements bring a subjective
13 creative and humanistic approach, I think, to
14 sentencing.

15 Now, I've heard the Commission pretty
16 much put to us that the Guidelines are here to stay
17 and you're looking for specific examples where we can
18 make suggestions on reducing the complexity and
19 simplifying Guidelines. I'll try to do so as far as
20 they relate to the role in the offense guidelines.

21 Chapter 3 Guidelines most frequently
22 used in combination with drug guidelines involve the
23 role in the offense adjustment. The problem with the
24 Guidelines is they appear to be based on an organized
25 crime model. Even the language of the commentaries

1 seem to be directed at standard organized group
2 dynamics. In reality, however, what I find in this
3 district is more drug traffic conspiracies are loose-
4 knit relatively unorganized associations of
5 participants. More often than not, the defendants
6 involved in these associations are independent
7 contractors who obtain and sell their drugs on
8 consignment. They are not guided by some central
9 kingpin figure, rather by the more elemental forces of
10 supply and demand.

11 One significant problem that arises
12 from this organized crime approach involves the
13 aggravating role guideline. Specifically, because
14 most drug trafficking conspiracies are loose-knit
15 associations of independent contractors, the five or
16 more participant adjustment is no longer an accurate
17 way to measure a person's relative culpability in a
18 group.

19 Now, the application of the mitigating
20 role guideline I find to be even more problematic.
21 Unlike the aggravating role guideline, the commentary
22 for the mitigating role guideline identifies few
23 factors for probation officers and judges and others
24 to consider in determining whether a defendant is, in
25 fact, a minor player or a participant.

1 Application to -- application to the
2 guideline even seems to suggest or discourage the use
3 of the guideline altogether. It would seem to me that
4 any simplifications to the role in the offense
5 guideline should focus on several things and, again,
6 I'm suggesting this as maybe a model for the
7 simplification of other guidelines, as well, but in
8 simplifying the role in offense guidelines, I would
9 suggest that both these guidelines, the aggravating
10 and mitigating guidelines, should be made more
11 symmetrical, each setting forth clear and simple
12 criteria to identify the characteristics of those that
13 are mitigating offenders and those that are
14 aggravating offenders. This five or more participant
15 standard should be reduced to one of these factors
16 rather than carrying its own offense level driving
17 weight.

18 The second thing that I think would
19 help would be the role in the offense guideline should
20 be redesigned to provide the courts with an increased
21 level of judicial discretion in making role
22 determinations. Language could be added to the
23 commentary that would recognize each district court is
24 in a unique position to assess the role and
25 culpability of each defendant within a group. Then

1 rather than using the current 2 to 4 level increase,
2 decrease scale, a sliding scale approach would more
3 accurately reflect the Court's increased level of
4 discretion in making these role determinations and
5 lend itself better to a case-by-case determination
6 approach.

7 Now, in closing, I would like to say
8 that I believe most probation officers in this
9 District are no longer intimidated by the Guidelines,
10 but, through experience, have become more adept in
11 interpreting the Guidelines and applying them both
12 accurately and reasonably.

13 I think that any simplification efforts
14 by the Commission should now focus on clearly
15 identifying the principles underlying the application
16 of the Guidelines rather than the application of the
17 Guideline process in itself. Thank you.

18 JUDGE CONABOY: Thank you, Mr. Perez.
19 And Mr. Moore, would you proceed next, please.

20 MR. MOORE: Yes, sir. It feels
21 somewhat ironic to be talking about simplification of
22 the drug guidelines because I don't know that there's
23 a scale where you put your drugs on the scale on one
24 side and your sentence comes off on the other.

25 Not surprisingly, having made that

1 comment, I would ask this Commission to consider
2 revamping the drug guidelines from top to bottom. I
3 have a tremendous problem with the notion of quantity
4 being the be all and end all -- functionally the be
5 all and end all of the drug sentence. I understand
6 that part of that is because of mandatory minimums and
7 the relationship there. Ms. Merritt is going to talk
8 more about mandatory minimums.

9 I have problems. I have problems with
10 an ounce dealer who over time gets up to a kilo and is
11 treated the same as the kilo dealers who the
12 Government decides to take down after that one
13 transaction. I have problems with those rules that
14 equate those two people. I have problems with
15 equating a -- a drug dealer who comes to his
16 transactions with an Uzi in his hand and comes to his
17 transaction with a prior conviction for drugs and for
18 which he got probation and didn't get the message and
19 equating him with an ounce dealer who may have a
20 derringer in his back pocket with or without a bullet
21 and he's got a prior shoplifting conviction. But
22 under the Guidelines, those guys are exactly the same
23 because all you look at is the quantity.

24 I just don't think that that
25 functionally defines who is a bad guy, who needs to be

1 taken down and who is more serious and I think you can
2 do it with specific offense characteristics like you
3 do in the other guidelines.

4 It has certainly not been, in my
5 experience, difficult for prosecutors and defense
6 lawyers pretty quickly to decide in a given case
7 whether they have got a problem bad guy or whether
8 they have got somebody who seems to stagger in,
9 girlfriend or something else. But in this system, all
10 that matters is the amount of drugs. And there's no
11 distinguishing them. And that's what leads judges to
12 these concerns and moans and cries about the
13 sentencing disparity. They don't have tools to
14 distinguish them when all you look at is drugs.

15 I don't have much time. Let me tick
16 off some things that I think need to be offense
17 characteristics, but let me say this first: If you're
18 thinking of just adding offense crack to the existing
19 quantity table, well, kill it twice. Basically
20 quantity tables are so high that I don't think there's
21 much sense in that. I think what I'm suggesting is
22 lower the effect or the range or the hit. Cap it at
23 20, 22, whatever you want, but cap it at some
24 reasonable levels so there's some distinguishing of
25 offenders within drug cases. What might be offense

1 characteristics? Prior convictions for drugs, role
2 and type of firearm, size of transaction, the nature
3 of the offense, whether you're a manufacturer, a
4 distributor, courier, whether there's violence.

5 I mean, everywhere else in the
6 Guidelines, what you see is violence is an important
7 point. Prior drug convictions is an important point.
8 When you get to a drug crime, it doesn't matter. All
9 that matters is quantity. I think you should, in any
10 event, expand the quantity guide -- the ranges within
11 these quantity tables, give everybody a little more
12 room. Right now, you have people fighting over five
13 grams, six grams because the ranges are so tight and
14 the stepping increments, levels of two, are so severe
15 that it makes a major difference and that leads to
16 strange results. It leads to unnecessary fighting
17 more in drug cases over relevant conduct issues or
18 some of these other things that you've talked about
19 because the ramification is so great.

20 Simple example. There's a case in our
21 office that I won't get into the details because Judge
22 Tacha is here and she's going to hear about it later
23 where a judge -- district court judge -- and not whom
24 you might think -- refused to take a plea because
25 there was a big dispute about the amount involved and

1 the judge said you're going to trial. You -- I just
2 think it's too heavily slanted.

3 Let me close, because my time is
4 running out, by saying a couple of things. It's real
5 easy to sit here as the defense lawyer and take the
6 defense lawyer position of saying people, please,
7 you're crushing little guys or girlfriends or what
8 have you that don't need the hits that they are
9 getting. And I personally believe that that is a
10 waste of my breath. I think in this political
11 climate, with the way things are going, both in the
12 public and in the Congress and in the newspaper,
13 people might listen to that, but they are not going to
14 be moved by it.

15 I think if you want to look at what's a
16 sensible way of going about it is whether these
17 quantity tables, these heavy quantity hits for drug
18 offenses makes sense. I'll give you another way. Are
19 you really getting what you want? I'll tell you that
20 I've been a prosecutor, I've been a defense lawyer,
21 I've been with agents, I've been against agents. I've
22 been on all sides of this thing and if you equalize
23 everybody, people being human, agents are going to go
24 and investigate the lowest common denominator. If I'm
25 an agent, I'm not going to spend two years trying to

1 find a kilo dealer when I can spend four months
2 getting a one ounce dealer up to a kilo and have him
3 be the same. If you think that these 5K's and all the
4 rest of it are going to lead you up the chain, with
5 this system, it won't because it provides no means of
6 distinguishing drug offenses and provides no incentive
7 for bringing in the big dealer, whether it be a trophy
8 or advance or pay raise or promotion to say I got the
9 really bad guys because they are all bad guys. The
10 guy on the street corner selling dime bags is as bad
11 as the kilo dealer and people aren't going to take the
12 time, the investment to go after who you believe they
13 are going after.

14 5K's can be used to go sideways or
15 down. Why? Because they are all the same. If you
16 want them to go up, why should an agent spend two
17 years of his time getting a conviction of a kilo
18 dealer while the guy next to him is nailing the five
19 guys on the street corner who happen to know each
20 other and it is the case that these things are all
21 related. Years ago, you didn't see conspiracies where
22 everybody was brought in, the girlfriends and crippled
23 brother who is half retarded and bring them in. They
24 didn't bring them in not because they didn't know how
25 to charge conspiracy, but because they didn't get bang

1 for the buck. Now they bring them in. Conspiracy,
2 you can get 20, 30, 40 years.

3 So you see this happening. I've used
4 up my time. Let me just quickly throw in two things.
5 Unrelated to anything I've said before, I'd like to
6 see a two level wild card departure. Bad name for it,
7 I know. But give the judge some of this -- some of
8 this discretion back and whether two levels is too
9 much or one level is too much, who knows.

10 Lastly, a minor point, I'm a little bit
11 offended, a little bit touchy over the notion that
12 maybe we're doing something weird in this district.
13 Whether you think we are or not, well, that's life. I
14 mean, I tend to see it from the inside, from the
15 trenches. What I know is we have lawyers who keep
16 each other informed. We work our butts off. We make
17 sure, Mr. Katz does, that he hires people who know
18 what they are doing. As you can see, he's taken
19 people from both sides of the -- there's no -- you
20 don't have to be a dyed in the wool defense lawyer.
21 People who know the defense law, know the law, know
22 the agent. What we get done, we get done from hard
23 work and understanding these Guidelines, not from
24 circumventing them.

25 JUDGE CONABOY: Thank you, Mr. Moore.

1 Ms. Merritt.

2 MS. MERRITT: I'm going to stand.

3 Mr. Chairman, members of the committee. I appreciate
4 the opportunity to be here today, to appear before you
5 and give you my views on Sentencing Guidelines as they
6 apply to drug offenses.

7 I have defended persons accused of drug
8 trafficking crimes in this and other Federal districts
9 and circuits for over 20 years. 13 of those years
10 were before the United States Sentencing Guidelines
11 and the last eight of them, of course, have been since
12 then. I've lectured to lawyers around the country on
13 the use and application of the Sentencing Guidelines
14 and I serve as a chair of the legislative committee
15 for the National Association of the Criminal Defense
16 Lawyers.

17 And as I listen here today to what I've
18 been hearing from the judges, from all of the
19 counsel -- the defense counsel and from the probation
20 officers who have testified is we need to find a way
21 to reempower the Federal judiciary. This system is
22 not working. The system has broken. My opinion of
23 what is going on with the Federal sentencing system
24 today is that it's becoming morally bankrupt.

25 There is something wrong with a system

1 that unfairly targets minorities and persons of color
2 and women. There is something wrong with a system
3 that allows the use of purchased testimony. There is
4 something wrong with a system that has transferred the
5 power given to judges by the United States
6 Constitution to prosecutors. And we have to do
7 something to fix it.

8 One of the things that we have done as
9 part of the legislative work of the National
10 Association of the Criminal Defense lawyers is to
11 draft a proposed piece of legislation that would be an
12 amendment to 18 USC Section 3555 3(E). It has already
13 been endorsed by two members of the Federal judiciary.
14 Judge Hadder from the Central District of Los Angeles
15 and Judge Powter from the Western District of Texas.
16 Both of those judges traveled to Washington, D.C. in
17 May and agreed and did participate on a panel on
18 mandatory minimum sentencing. And what they told us
19 was that 88 percent of the judges in this country have
20 said no more mandatory minimum sentences. Sentencing
21 statutes should be enacted. 85 percent said judges
22 should have more discretion in imposing Federal
23 sentences. 88 percent said that the current Federal
24 system gives too much discretion to the prosecutors.
25 And 70 percent of the Federal judges opposed

1 maintaining the current system of the mandatory
2 minimum sentences.

3 Our legislative proposal would allow
4 the judges to depart from mandatory minimum sentences
5 for extraordinary circumstances. Not only upon motion
6 by the prosecutor because of substantial assistance,
7 but because of a motion by the Court on its own motion
8 and because of a defendant's motion.

9 And we -- what I am asking this
10 Commission here today is for each and every one of you
11 to assist us in finding sponsors among the members of
12 Congress and supporters for this measure so that we
13 can reempower the Federal judiciary to make the
14 sentencing decision that should be done in this case.
15 In all cases.

16 With respect to the specific issues of
17 relevant conduct and as to role in offense, with
18 respect to relevant conduct, I would submit that
19 relevant conduct must be limited to the count of
20 conviction. I would submit that the burden of proof
21 with respect to relevant conduct should not only be
22 clear and convincing, it should be beyond a reasonable
23 doubt. I would disallow increases for relevant
24 conduct based upon the uncorroborated testimony of
25 former co-conspirators who are getting a sentence

1 reduction for testifying at a sentencing hearing
2 against their former co-conspirators. I would mandate
3 notice to the defendant of the intent of the
4 prosecutor for the court to rely on uncharged conduct
5 or conduct outside the count of conviction.

6 And for all drug offenses, I would get
7 away from quantity, as Mr. Moore said, as a means of
8 determining the guideline offense level in drug cases.
9 Quantity is not the best yardstick. It creates
10 disparity.

11 I think that the Commission should
12 establish more alternatives to incarceration,
13 particularly for nonviolent drug offenses.

14 We should be increasing the range under
15 the Sentencing Guidelines for persons convicted of
16 drug offenses in which no guns, no weapons, no
17 violence is used should be allowed to serve part of
18 their sentences on home detention or in community
19 correction facilities.

20 Instead of having all of these 43
21 levels or 38 levels or whatever the levels are for
22 drug offenses, we should go to a flat level and based
23 upon that level, the judge should be free to depart in
24 the instances of heavy residivism, guns, violence or
25 extreme quantities.

1 There are unjust cases that happen
2 every day with the application of the Federal
3 Sentencing Guidelines and most of them are because of
4 the charging discretion given to the prosecutors.
5 Some of the worst abuses are in cases of historical
6 conspiracies, cases in which former co-conspirators
7 testified against the current defendant. We have to
8 do something to change that system.

9 With respect to role in the offense, it
10 is noted in the materials that that is the issue that
11 is most frequently appealed out of all the Sentencing
12 Guidelines decisions in this country. There is a
13 tremendous variation by districts around the country,
14 particularly with respect to mitigating role in the
15 offense. For example, 71.3 percent of the defendants
16 in the Eastern District of New York are awarded
17 downward departures for mitigating role, while only 21
18 percent in the Southern District of Florida. I
19 thought for a minute well, maybe that was because
20 Kennedy Airport is located in the Eastern District of
21 New York, but then I looked at the statistics for New
22 Mexico and they are up at 54 percent, so that isn't
23 it, either.

24 There is too much disparity and a
25 change in the entire system must be worked and it must

1 be started soon. There are too many people
2 languishing in our prisons who do not need to be
3 there. Thank you.

4 JUDGE CONABOY: Thank you, Ms. Merritt.
5 Mr. Litt.

6 MR. LITT: Thank you. I don't envy the
7 Commission for taking on the task of trying to deal
8 with drug guidelines. On the one hand, the testimony
9 this morning has made clear that to the extent that
10 there are perceived problems with the guidelines,
11 particularly from the defense bar, they focus on the
12 drug cases. This is the area of greatest irritation.

13 On the other hand, as we all know, this
14 is also an area where the political constraints upon
15 our ability to act are very severe. That is a major
16 problem in the country today and there's not a lot of
17 enthusiasm in the political sphere for lowering drug
18 sentences. The Commission has already taken some
19 steps in recent years to address some of the problems.
20 You have lowered the cap on the quantity. You've
21 changed the definition of relevant conduct. And in
22 large part, through your efforts, the Congress enacted
23 the safely valve which hopefully will in the future be
24 able to take care of the cases such as those Judge
25 Weinsheink was talking about. You've also lowered the

1 Guideline sentences for many offenses involving
2 marijuana plants and we understand that you're still
3 studying the effect that these changes have had and
4 will have in the future in dealing with the drug
5 guidelines.

6 But we don't think that the -- that
7 this is an appropriate time or appropriate
8 circumstances and that there's a need for wholesale
9 rewriting of the drug guidelines.

10 From the point of view of simplicity, I
11 think everybody agrees that quantity is about as
12 simple and straightforward a measure as you -- as you
13 can get for making a sentencing assessment. We've
14 heard just a short while ago that role in the offense
15 is a much more difficult concept to apply and is going
16 to lead to much more litigation and complication.

17 The other factor in this regard is that
18 if you do try to dramatically change the structure of
19 the drug Sentencing Guidelines, you're going to run
20 smack into the mandatory minimum sentences that
21 Congress has out there and it's not going to
22 accomplish anything to lower the drug guidelines if
23 you're going to submit people to mandatory minimums.
24 You also run the risk that Congress will respond to
25 changes in the Guidelines by enacting more minimums

1 and, of course, the minimums are themselves quantity
2 driven.

3 Your -- your commentary, your list
4 suggests that one of the topics that you may consider
5 is looking at the role in the offense guidelines to
6 see if it actually reflects actual experience and to
7 respond to some of the concerns that people have that
8 the definitions in the standards in the role in the
9 offense guideline are not sufficiently clear and --
10 and the courts need more guidance. We think that it's
11 a good idea to study this. We'd like to work with you
12 to see whether we can -- whether it's necessary and
13 possible to get a -- a crisper and more precise and
14 clearer definition of role in the offense, but we need
15 to bear in mind that any changes in the role in the
16 offense guideline affect not only drug cases but apply
17 across to the board and to the extent we're making
18 these changes, we have to make sure they are
19 appropriate for fraud cases, theft cases and any other
20 case that is we have to deal with. Not only drug
21 cases.

22 I think that's all I have. Thanks.

23 JUDGE CONABOY: Thank you, very much.

24 Any questions? Commissioner Gelacak?

25 MR. GELACAK: One observation and one

1 question if I could. Ms. Merritt, I'd be happy to
2 take a look at your legislative proposal, if it's as
3 you represented. I'll also be happy, speaking for
4 myself personally, to assist you in getting
5 co-sponsors on the Hill.

6 MS. MERRITT: I appreciate that and I
7 will submit it at the conclusion of the hearing.

8 MR. GELACAK: Mr. Litt, I take it by
9 your comments about the politics of drug sentencing
10 because I -- I've been concerned about this area for
11 quite a while and, in fact, a long time before I was
12 ever on the Sentencing Commission, but it strikes me
13 that there's always more than one way to skin a cat
14 and I recall sending over a proposal to the Department
15 that when something like this -- if mandatory minimums
16 are the problem -- and we all agree that they do drive
17 the system in the drug area -- and concern over the
18 politics of lowering penalties is the reason why we
19 cannot deal with that issue, then why don't we
20 approach it by suggesting to Congress that we increase
21 the penalties in the drug area, but that we do it by
22 changing the mandatory minimum statutes so that they
23 do not focus on quantity, they focus on role in the
24 offense. And we then prosecute the people that
25 Congress says they want to prosecute, to-wit those

1 kingpins, those major players in the drug area who are
2 out there rather than the lowest common denominator
3 that Mr. Moore refers to. Because I, in large part,
4 agree with everything that he said.

5 And if we were to -- if we were to
6 suggest to Congress that we could put forward a
7 proposal where they could increase penalties for the
8 bad folks, we could prosecute those people that we
9 ought to be spending our financial resources
10 prosecuting rather than chasing the small time dealers
11 on the street. That we might be able to make some
12 inroads.

13 I'll agree -- I think we all will --
14 I'll go so far as to agree on the politics. We
15 couldn't do anything this year. I wouldn't even
16 attempt to do anything in a presidential election
17 year. I think we could make some inroads and impact.
18 And I never heard back from the Department. Not a
19 word.

20 MR. LITT: If I could make a couple of
21 observations in response. When I was referring to
22 politics, I wasn't speaking only of Congress. I'm
23 speaking also of the public at large and, frankly, of
24 the mood within the Department of Justice. I think
25 there is a perception that this is a -- that drugs are

1 a serious problem and one that has to be addressed at
2 least in part through substantial law enforcement
3 effort.

4 Contrary to what Mr. Moore said, I
5 think we are making an effort to try to focus on the
6 major kingpins and the major distributors. That this
7 is our --

8 MR. GELACAK: I didn't mean to suggest
9 that you're not.

10 MR. LITT: That's not so much a
11 response to you as a response to him. But I question
12 whether there is an -- a need or even an opportunity
13 to do a lot to increase the penalties for them. Most
14 of those people -- most of the kingpins, by the time
15 we get them, they are up at the top of the sentencing
16 scale anyway. They are going to jail for life. The
17 cartel leaders, the people who are bringing across
18 multi hundred kilograms of the cocaine from Mexico, if
19 we get them and prosecute them, we have got the
20 sentences on them.

21 MR. GELACAK: I agree with you. We're
22 communicating on two levels. I didn't mean to suggest
23 we can't hammer those people down. We can. The
24 purpose of my suggestion for a change in the wording
25 of the mandatory minimum statutes is to take the focus

1 off the people on the low end of the spectrum. We
2 don't need to hammer those people. We can deal with
3 them in our system and we have dealt with them for
4 years. But when we focus on the mandatory minimum
5 based only on quantity, people who -- everyone, even
6 the Department agrees, in some instances that we've
7 got the wrong people, people who could receive --
8 could and perhaps should receive a break, but we're
9 not able to give it to them.

10 The purpose of changing the -- the
11 standard from quantity to role would be to give some
12 assistance to people on the lower end, not the -- we
13 can always get people on the upper end.

14 MR. LITT: Can I just make one more
15 comment? I don't think that we would support a -- a
16 system that is totally divorced from quantity. I
17 think that the quantity --

18 MR. GELACAK: We could make it a
19 factor.

20 MR. LITT: -- is an important measure
21 of the harm to the community. Somebody who is
22 distributing an ounce of crack cocaine a week or over
23 a long period of time, it should be attributable for
24 that harm done to the community.

25 JUDGE CONABOY: Commission Goldsmith.

1 MR. GOLDSMITH: I've got two questions,
2 I suppose. First, Ms. Merritt, earlier, I asked Mr.
3 Litt to comment about whether discretion under the
4 Guidelines had been transferred to prosecutors from
5 judges and I believe he, in essence, said no for a
6 variety of reasons. You touched upon that issue in
7 brief in your testimony. Would you care to elaborate
8 further? Could you give specific examples of why you
9 believe that the discretion has been transferred to
10 the prosecutors?

11 MS. MERRITT: The discretion has been
12 transferred to the prosecutors because of their
13 ability to choose the charges that are going to be
14 brought. For example, in some cases, if you are -- we
15 as defense lawyers would be retained to represent
16 people pre-indictment. An offer will come down
17 pre-indictment and we will be told it will be a
18 nonmandatory minimum offer, but if we do not take that
19 offer pre-indictment, there will be a charge after
20 indictment and the person will be indicted for a
21 mandatory minimum quantity.

22 MR. GOLDSMITH: That's not a Guideline
23 problem. That's a mandatory minimum.

24 MS. MERRITT: But it becomes a
25 Guideline problem, as well, and the reason it does is

1 because you know the sentence your client is going to
2 get under the first scenario and not under the second.
3 It's the prosecutor that has the power instead of the
4 judge who looking at the entire spectrum of the
5 defendant's activities at sentencing can say I believe
6 this is the appropriate sentence based upon your
7 conduct and based upon this offense.

8 MR. GOLDSMITH: But that kind of
9 example, it seems to me, really fits more within Mr.
10 Litt's view. It's always been that way. The
11 prosecutor has always had control over the charge and
12 so if it's simply a matter of the prosecutor having
13 control over the charge, it's always been that way so
14 there's been no transfer in that respect. So that
15 reflects the prior practice.

16 MS. MERRITT: Except for relevant
17 conduct. Except for when the prosecutor will tell you
18 I will only indict for this offense and the relevant
19 conduct will never get before the judge because the
20 judge is not going to know about these other
21 transactions. I think that affects the Guidelines, as
22 well.

23 JUDGE CARNES: That's a prosecutor who
24 is essentially cheating or lying. How can a guideline
25 system protect against somebody like that?

1 MS. MERRITT: First of all --

2 JUDGE CARNES: If he's not going to
3 tell the judge, you don't think that's a lie?

4 MS. MERRITT: No. Because I think
5 there are some instances in which the prosecutor could
6 say based upon what I know at the present time, I
7 could say this other count, which is not readily
8 provable --

9 JUDGE CARNES: In your hypothetical, if
10 you didn't deal with the prosecutor, it was going --

11 MS. MERRITT: That's the --

12 JUDGE CARNES: I don't how to you
13 design a system to ward off people who don't tell the
14 truth.

15 MS. MERRITT: Again, I do not want to
16 say anybody is not telling the truth. They may be.
17 It's essentially what gamble are you going to take.
18 Again, if you're pre-indictment, you have not seen the
19 discovery in the case, you haven't seen how strong a
20 case the Government has against a client.

21 To me, that is one of the worst, the
22 worst of the elements of the system with respect to
23 charging by the prosecutor.

24 JUDGE MAZZONE: Yet some of your
25 predecessors have told us they want to go to charge of

1 conviction. You're saying just the opposite. The
2 Federal Defenders before us have said they would
3 rather go strictly with what you can prove in court,
4 the charge conviction offense system.

5 MS. MERRITT: I agree post-indictment.
6 The example I was giving was when I said -- as I said,
7 when you retain pre-indictment and the prosecutor --
8 the first time the prosecutor has the opportunity to
9 sway the system is at the pre-indictment level. After
10 indictment, I agree again, but, again, I think at that
11 point, you can only or you should only count the
12 offense of conviction. You should not be counting
13 uncharged conduct. Particularly again, it's with
14 respect to the former co-conspirators who now agree to
15 assist the Government and become testifying witnesses
16 for the Government. Based upon their uncorroborated
17 testimony, I think it is extremely unfair to be able
18 to bump a defendant's sentence up.

19 I represented on appeal a young African
20 American 26-year-old first offender with no violence
21 whose sentence, based upon the offense of conviction,
22 would have been about seven years. Based upon the
23 testimony at sentencing of a former co-defendant who
24 took the Fifth Amendment and wouldn't even testify at
25 this defendant's trial, he bumped this defendant up to

1 life and this young man is doing life in prison and
2 has lost his appeal.

3 MS. HARKENRIDER: It was the judge who
4 found that co-defendant credible.

5 MS. MERRITT: That's correct. It was
6 uncorroborated. My suggestion to the Commission is we
7 not allow people to be sentenced based on
8 uncorroborated testimony.

9 JUDGE TACHA: I just have a quick
10 question. You pointed out, Mr. Perez, I believe what
11 we have heard in a number of circumstances and that is
12 that the Chapter 3 guidelines are based on a model
13 of -- sort of the big organized crime model and that
14 many of the drug markets are -- are quite different
15 and quite loosely organized. In your experience --
16 and I think you sort of affirmed the quantity-based
17 Guidelines. In your experience, is quantity at least
18 a representative proxy for how the organization works?

19 MR. PEREZ: That's a difficult question
20 because the scenarios do -- do vary so greatly. One
21 of the problems that we see here are just the -- not
22 the structure, but the way these things are
23 associated. The way the defendants act in these type
24 of associations. What I think of just off the top of
25 my head is -- and this is a scenario that I see

1 frequently -- there's an individual who is so-called a
2 supplier. But he's only a supplier because he knows
3 where to get the cocaine from. Let's just use
4 cocaine.

5 JUDGE TACHA: But it's not a kingpin
6 situation. It's out there, circles of --

7 MR. PEREZ: Often, it seems the
8 supplier, it's a cousin. I mean, he knows a cousin in
9 Mexico that gets him cocaine. He buys the cocaine,
10 brings it across the border, gives it to a
11 distributor, who then in turn distributes to a
12 multitude of other people who this central supplier
13 may never know about, the guy got it from the cousin
14 and it's really hard to say well, this individual
15 should be held responsible. You know, one of the
16 other distributors should be held responsible for the
17 entire quantity.

18 And -- and what I see in the District
19 is they -- the charging decision will charge just the
20 defendant for his -- for his scope of his conduct.
21 The conspiracy doesn't really encompass everybody
22 else's behavior that they are aware of. And
23 therefore, then the role guideline is less important
24 because they are only charging the scope of his
25 conduct. And I see that used as a remedy for the

1 larger expansive problem, charge everybody with the
2 larger drug amount and then get into the role
3 adjustments which, again, like I said, the mitigating
4 role seems somewhat confusing. It's easier to stay
5 away from that issue and just charge just their
6 conduct.

7 MS. HARKENRIDER: So the Commission's
8 changing of relevant conduct a few years ago to make
9 it clear that relevant conduct should only apply to
10 that among those jointly undertaken helped to some
11 extent?

12 MR. PEREZ: I think it did. I think it
13 narrowed the focus.

14 JUDGE CONABOY: Commissioner Goldsmith.

15 MR. GOLDSMITH: One final question for
16 Mr. Litt. As you know, Mr. Litt, the Commission has
17 been studying the question of crack cocaine and the
18 appropriate ratio between crack and powder. And I
19 know that we are anxious to receive input from the
20 Department on a specific ratio that you think would
21 further both prosecution policy and -- and justice in
22 this context. The Department acknowledged that the
23 problem needed to be studied, but has not been
24 forthcoming with any recommended ratio. When, if
25 ever, do you think we can expect the Department to

1 take a position on that, if you know?

2 MR. LITT: I can't give you a specific
3 date. I mean, we've -- we're continuing to be willing
4 to work with you and with Congress on this because
5 Congress is now a player in this as well, to try to
6 assess whether there is another ratio that can meet
7 the law enforcement need. Obviously, I don't have to
8 run through our views on this. You've heard them.

9 MR. GOLDSMITH: Actually, we haven't
10 heard views. We have heard the Department is studying
11 the problem. I guess I'm saying we would like to get
12 some input from the Department as soon as possible.
13 Thank you.

14 JUDGE CONABOY: Thank you all, very
15 much and we'll go to the last panel now and I
16 appreciate everybody being so patient. Thank you all,
17 very much.

18 On the last panel, we'll be talking
19 somewhat about departures. For instance, it would
20 bring back the Professor Reitz with us before and also
21 Mr. Litt will be staying with us again for the last
22 panel. And the two new members are Ms. Suzanne Wall
23 Juarez, who is a probation officer here in Denver.
24 Began your career in New Mexico, as I understand it,
25 and transferred here in 1996 and there are now a

1 probation officer here in Denver. Happy to have you
2 with us.

3 And Ms. Virginia Grady, who is also a
4 an Assistant Public Defender here in the -- in Denver.
5 Let's see. You've been working here as an Assistant
6 Fed -- I see. You were a State Public Defender from
7 1984 to 1990. And now you're with the Federal Public
8 Defenders office.

9 MS. GRADY: That's right.

10 JUDGE CONABOY: Thank you for being
11 with us. Suppose we start with you, Ms. Grady.

12 MS. GRADY: Thank you, Mr. Chairman and
13 members of the Commission. As you just heard, I
14 started off my career as a lawyer working for the
15 State Public Defender in the Denver trial office and
16 came to the Federal Defenders office after practicing
17 State law, which is, of course, very different, for
18 about seven and a half years.

19 So I've had the pleasure of comparing
20 the Federal Sentencing Guidelines to the State
21 sentencing system where you are walking in with a
22 client having virtually no idea what -- where the
23 sentence could end up as opposed to the Federal
24 sentence where you have basically a range of about 10
25 to 15 months in most cases.

1 I'd like to begin with the suggestion
2 in the staff discussion paper that the language in
3 Section 5(h) needs to be clarified and specifically
4 with reference to the ordinarily, not ordinarily
5 relevant language. The problem that I experienced as
6 a practitioner with this language is that it seems to
7 mandate at least to some judges that certain
8 characteristics which Justice Kennedy identified as
9 discouraged grounds for departure, it seems to me to
10 least mandate to some judges that these are not
11 particularly good grounds for departure at all. And
12 in cases where you have a sentencing judge who is, in
13 fact, considering these discouraged grounds for
14 departure that are identified in 5(h), I think that
15 there is a clear suggestion with the language that the
16 defendant is beginning this argument with a handicap,
17 which I don't think is what the Commission intended
18 when it drafted this section of the Guidelines. You
19 can replace this not ordinarily relevant language with
20 other language which clarifies it or as the -- the
21 paper -- discussion paper suggests, you can replace it
22 with specific examples of how particular
23 characteristics might justify a ground for departure,
24 but I think that you'll just find that simplifying or
25 attempting to clarify this language is simply going to

1 create a more complicated scenario and area for
2 discussion.

3 I think that the particular reasons
4 that a court may depart downward are endless and the
5 point is that every case is different. And there is
6 never one particular factor which is going to be used
7 to justify a motion for downward departure and if
8 there is a defense lawyer who is standing there,
9 arguing that there's one particular factor such as age
10 or education or socioeconomic status as a basis for a
11 motion for downward departure, then something's wrong
12 and that's easily identifiable. And the problem that
13 I see with the -- with all motions for downward
14 departure and with the -- and with the discouraged
15 grounds for departure that are identified in Section
16 5(h) is not with the particular current or historical
17 factors that might be considered mitigating.

18 The problem that I see is that once the
19 defense lawyer or the judge or the prosecutor or the
20 probation officer is able to identify a particular
21 factor which would justify a motion for downward
22 departure or a variety of factors which is more usual,
23 I think, which would justify a motion for downward
24 departure, nobody seems to know what to do with it.
25 And I think the reason for that is because the -- the

1 players are all so concerned with whether or not the
2 particular factors are, as Justice Kennedy phrased it,
3 discouraged factors or encouraged factors or if they
4 are not in the list at all, should we even be talking
5 about them or looking at them and when you start
6 making a list, you get a short list or a long list,
7 somebody is going to read it as a suggestion that
8 you're excluding particular areas for departure or
9 that this is an all-inclusive list or that this is the
10 only list. And as all of us know who have argued and
11 considered particular grounds for departure, the
12 variety is -- of examples that you could come up with
13 is exponential.

14 So I think where the problem that --
15 that we have here and what I would suggest to the
16 Commission is please don't make the list longer. I
17 don't know about making the list shorter, but perhaps
18 the suggestion that you could certainly make it more
19 abundantly clear or put it in a more positive light
20 that you're not -- this is not an exclusive list and
21 that there are many other. You can certainly invite
22 any court to consider any ground for a downward
23 departure. What I think that we are all missing is a
24 logistical model. Something that lawyers can use and
25 that prosecutors and probation officers and the courts

1 can use to ask certain questions that will answer the
2 question how is a particular set of potentially
3 mitigating factors related to the current offense.

4 For example, you could have a bank
5 robber defendant who is confined to a wheelchair. But
6 the fact that that person is confined to a wheelchair
7 is not necessarily, in and of itself, going to be
8 considered a ground for departure. Although it may be
9 mitigating, it does not necessarily -- it's not
10 necessarily going to constitute a ground for
11 departure, unless the story which explains how that
12 person got into a wheelchair is somehow related to the
13 reason that that person committed the bank robbery in
14 the first place or if you look at that situation from
15 the other end of sentencing, the question may be how
16 does the sentencing impact this person's ability --
17 ability to continue basic -- basic living.

18 In other words, is the person's health
19 so poor that a sentence to imprisonment would severely
20 impact it or is that person -- or is a sentence of
21 imprisonment outweighed more by this person's variety
22 of health reasons that may be associated with why he's
23 in a wheelchair in the first place.

24 Another example I give you is -- this
25 is from a case that is in the Tenth Circuit that you,

1 Judge Tacha, may be familiar with. There is a Vietnam
2 vet who had a lengthy history of having post-traumatic
3 stress syndrome and is also the sole caretaker of his
4 child and had a variety of particular reasons. That's
5 the *Webb* case, Judge Tacha, and had a variety of
6 different grounds -- of different circumstances which
7 would justify a motion for downward departure and that
8 motion was denied by the trial judge at sentencing.
9 And what you often see is that the people aren't
10 discussing at the district court level in the
11 sentencing how these particular circumstances are
12 related to why that person is in Federal court in the
13 first place. And so I would suggest that if we're
14 going to attempt to achieve commonality in downward
15 departures which, you know, by definition downward
16 departures mean you're not going to have
17 commonality -- you're going to have disparity in
18 sentences because you're talking about a case which
19 simply cannot -- is not a heartland case and cannot be
20 quantified, but if you want to achieve commonality, I
21 suggest we achieve commonality in logic and that a
22 logistical model be formulated in the form of a policy
23 statement, nothing more, but that invites us to ask a
24 certain number of questions every time we're looking
25 to get a motion for downward departure. I'm sorry I'm

1 going beyond the time I set for myself. The first --

2 JUDGE CONABOY: I won't have to say
3 that now. I'm glad you said it.

4 MS. GRADY: Pardon me?

5 JUDGE CONABOY: I said I'm glad you
6 said it.

7 MS. GRADY: The first question that I'm
8 asked --

9 JUDGE CONABOY: You're way over.

10 MS. GRADY: Pardon me. May I go on or
11 do you want me to stop?

12 JUDGE CONABOY: Would you try to wrap
13 it up? I don't -- it is an interesting point, but
14 we're just running out of time. I know you're from a
15 Syracuse, but I --

16 MS. GRADY: Don't hold that against me.
17 I have nothing to do with basketball. The questions
18 that I would ask are, 1, are the circumstances which
19 are cited by the defendant as potentially mitigating
20 circumstances, are they unusual or exceptional and,
21 number 2, if so, are they causally related to the
22 offense conduct or if you're approaching the downward
23 departure from the other end -- that is, whether or
24 not the sentence itself is going to impact an ongoing
25 or unusual situation -- a common logistical model

1 should ask whether the usual goals of imprisonment are
2 outweighed by the need for a downward departure.

3 If you would invite all of us to ask
4 some basic questions, I think in addition to inviting
5 more discretion with downward departures, I think that
6 would be a great improvement to the Guidelines.

7 JUDGE CONABOY: Thank you, Ms. Grady.
8 And Ms. Juarez, will you go next.

9 MS. JUAREZ: First of all, I'd like to
10 thank the Commission for allowing us to address these
11 issues. And I hope that it will result in
12 simplification, which is why we're here.

13 My experience with the Federal
14 Guideline Sentencing process in two districts within
15 the Tenth Circuit spans a five-year period. The
16 general attitude of probation officers was that there
17 was a legitimate need for reform in the Federal system
18 to deal with disparity in an attempt to achieve
19 uniformity. While officers understand that the
20 Guidelines are here to stay, officers believe that the
21 Guidelines somewhat restrict the sentencing process.

22 Probation officers in the Federal
23 system are responsible for preparing a pre-sentence
24 report. Our goal is to present the Court with the
25 facts of the case and correctly interpret it and apply

1 the Guidelines. This task is often misrepresented or
2 viewed with skepticism. Prosecutors protect a plea
3 agreement that they have negotiated and the defense
4 attorney is to represent his client in the best way
5 possible. As the only party without an agenda or a
6 deal to preserve, we are often placed in the awkward
7 position of being an adversary to both sides.

8 In general, I'd just like to say that I
9 know that the Commission recognized that there would
10 be some problems with the Guidelines in general and
11 that one of them identified as a potential problem was
12 the ability of the prosecutor to influence sentences
13 by increasing or decreasing the number of counts in an
14 indictment. Manipulation of the indictment may not be
15 as prevalent as manipulation of Guideline applications
16 related to adjustments for role in the offense and
17 downward departures for substantial assistance.
18 Officers face this problem every day. Prosecutors
19 have the discretion to present these Rule 11's which
20 essentially precludes the Court from being able to
21 consider any additional information uncovered in
22 pre-sentence investigation. After such a plea
23 agreement has been accepted by the Court, the
24 pre-sentence report is rendered inconsequential and
25 unaffected as it accomplishes little more than

1 fulfilling the statutory requirement.

2 When a sentence has been determined at
3 the time of the plea, probation officers often
4 question why a report was prepared because it was of
5 little value in the sentencing process.

6 Perhaps most importantly, this practice
7 greatly limits the sentencing judge's authority to
8 sentence the defendants appropriately based on factors
9 that may not be considered at the time of plea.

10 With regard to offender
11 characteristics, I think it's a very good idea that
12 the Commission consider eliminating unnecessary or
13 redundant commentary and combine certain sections
14 together to create a little bit more simplification
15 and generalization. However, I don't believe that
16 expanding the reasons or the list would be a good
17 idea. I think it would just create more confusion.
18 It is difficult not to consider certain offender
19 characteristics in the decision to depart downward
20 because each individual is unique and their situation
21 is different. These characteristics should be
22 considered on an individual basis and consideration
23 should include extraordinary circumstances or
24 characteristics.

25 I believe that the current method of

1 determining validity of the downward departure
2 addresses the pertinent issues and allows for judicial
3 discretion. The courts are required to consider the
4 basis for downward departure and make the ultimate
5 decision, but I think perhaps judges should be
6 imparted with even more discretion to depart downward
7 for reasons that they believe are critical to
8 rendering an appropriate decision. The Commission may
9 achieve real simplification by allowing the judges
10 discretion to determine if a defendant qualifies for a
11 downward departure based on a variety of criteria that
12 would be applied to each case to help determine the
13 defendant -- to determine if the defendant's
14 particular circumstances warrant a departure. Thank
15 you.

16 JUDGE CONABOY: Thank you, very much.
17 Professor Reitz.

18 PROFESSOR REITZ: Thank you. I'd like
19 to begin by joining in a number of comments I heard,
20 particularly in the morning, applauding the decision
21 of the *United States vs. Koon*. I think it will have a
22 beneficial impact at least in the appellate practice
23 that is generated by guidelines and that's going to
24 filter down to, I hope, new attitudes of -- of -- in
25 the district courts to a clear discretionary power.

1 One question that I would predict would
2 be on the mind -- on the minds of the Commission
3 members would be whether in light of Koon it is -- it
4 would be wise simply to wait a while and see what the
5 effect of that decision was going to be on this
6 difficult issue of departures and the standard of
7 review of -- of Guideline decisions at the district
8 court level. I don't think the issue is -- is clear-
9 cut.

10 My inclination and my recommendation I
11 think for today is that it would be a shame if the
12 Commission would just short circuit the simplification
13 process, at least consideration of what could be done
14 at the Commission level about the departure standard
15 perhaps in conjunction with Koon.

16 Now, what I would like to do in the
17 short time I have is make two suggestions for actions
18 that the Commission may consider. Although I have to
19 say I'm impressed with the extent to which I agree
20 with what Virginia Grady has said about the
21 advisability or desirability of an overarching logic
22 to departure decisions that might be promoted and
23 encouraged by the Commission. Although you'll see as
24 I proceed through my two suggestions, they are
25 somewhat different.

1 My first order of recommendation, I'm
2 afraid, would require legislative change. I know the
3 Commission can't accomplish that, but it can recommend
4 it.

5 The second order of recommendation I'll
6 make will have to do with how closely the Commission
7 could approach the effect of a legislative change I
8 would recommend.

9 The departure standard in Section 3553,
10 itself, seems to me to be the source of some problems
11 that will probably continue even after Koon. The
12 wording of the departure standard that draws attention
13 to whether or not factors have been adequately
14 considered by the Commission, I think probably does
15 not resemble what a trial judge ought to be thinking
16 about in the departure decision.

17 To my way of thinking, a Commission
18 that performs all of its tasks, even in an exemplary
19 manner, let alone in an adequate manner is going to
20 produce a general statement of sentencing policy that
21 will still need in the occasional case some
22 flexibility in application. So that the standard
23 of -- of review of the guidelines at least in the
24 first instance for departure decisions that or -- is
25 oriented towards the adequacy of Commission

1 consideration is -- is a bit off the mark. As a
2 suggested redraft, the Commission may think about a
3 standard that has been in use in a number of state
4 systems, the, quote, substantial and compelling reason
5 standard that expresses a sense that there is
6 substantial and compelling reasons that some sentence
7 other than the Guideline sentence is appropriate in a
8 given case with the understanding that there will be
9 few of those cases, not many of those cases.

10 Now, the second change that would be
11 ideal legislatively would be to draw attention in the
12 departure standard not simply to principles that can
13 be derived from the Guidelines in the Guideline manual
14 as the statute currently states, but that draws
15 further attention to the underlying purposes of
16 sentencing and the sentencing process that Congress
17 has addressed in 3553(a). I think Ms. Grady, again,
18 was getting at some of this.

19 Now, this -- these sorts of ideas again
20 are for Congress, not the Commission. The Commission
21 can recommend. It can't act legislatively. However,
22 it occurs to me that in Guideline amendments, some of
23 this work can be done if the Commission were to
24 consider it desirable.

25 So my second order of recommendation is

1 addressed to that. The Sentencing Commission, if it
2 chose to, could say in the guideline manual there are
3 certain offender characteristics, for example, in the
4 5(h) section of the Guidelines that resist
5 quantification and are difficult in advance to
6 consider, quote, adequately within the meaning of the
7 statutory language.

8 Therefore, the Commission could, I
9 think, direct sentencing judges in cases where such
10 factors are present in substantially compelling degree
11 to consider departure in that case. The Commission,
12 in effect, could, through its own prerogative, do some
13 of the work that I have suggested legislatively.

14 Further, I think the Commission could
15 direct a sentencing court in thinking through such a
16 process to the underlying statutory purposes of
17 sentencing that Congress adopted in 3553(a), which one
18 would hope would be both a fount of the Commission's
19 work and the -- as well as the foundation of a
20 district court discretionary decision built upon the
21 guidelines. Thank you.

22 JUDGE CONABOY: Thank you, Professor.
23 Mr. Litt, again.

24 MR. LITT: Thank you. I think I can be
25 relatively brief this time because I think the

1 Department's view on this is that the Koon decision is
2 likely to substantially change the practice with
3 respect to departures or at least has the possibility
4 of substantially changing the practice with respect to
5 departures and we don't think it would be a wise thing
6 to -- at the same time that the courts are trying to
7 deal with the effect of Koon, to go and be changing
8 the underlying guidelines that are being dealt with
9 this in process.

10 I think that we need to give the courts
11 time to evaluate the increased discretion that Koon
12 has given the district courts to depart before we
13 determine whether anything more is needed. I would
14 only note in addition the necessary tension between
15 the calls for increased flexibility in departures and
16 what I have identified as the primary goals of the
17 Sentencing Reform Act, which are to eliminate
18 disparities in sentencing and make sentencing fair and
19 more predictable and more uniform. The more you open
20 the field for departures, the more -- the less you can
21 achieve uniformity and predictability. And so I think
22 that that -- that's another reason to wait and see
23 what happens with Koon before attempting to tinker
24 with the underlying structure on this.

25 JUDGE CONABOY: Thank you all, very

1 much. Are there any questions of the panel? I
2 appreciate it very much. Thank you all, very, very
3 much for some of your thoughts.

4 If any of you wish or maybe you have
5 already given us copies of your written statements
6 even if you had them read, we'd like to add copies of
7 those if you haven't already given those to us.

8 MS. GRADY: I would prefer to edit mine
9 just a little bit.

10 JUDGE CONABOY: You can send those in.
11 We would appreciate that. Thank you, very much.

12 Is there anyone else here in the
13 audience who has any comment or wishes to be heard?
14 If not, we thank all of you very much for your
15 patience and for your determination.

16 We'll conclude the meeting.

17 (The meeting was concluded at 1:30
18 p.m.)

19

20

21

22

23

24

25

-S-			1991 [2] 107:23 123:2	40 [2] 71:5 154:2	60:11 64:18 114:7	121:25
\$10 [1] 31:2			1992 [3] 79:8 107:23	43 [2] 128:8 158:20	116:16 128:14 137:24	acknowledged [1]
\$25 [1] 31:15			123:4	45 [1] 66:3	160:24 164:11 166:9	173:22
\$50 [1] 31:1			1993 [1] 123:4	450-page [1] 21:2	170:17 177:20 183:20	acquaintance [1]
-I-			1994 [6] 5:23 8:20	4A1.3 [1] 125:13	above [1] 64:18	42:6
			72:13 107:23 123:2		absent [1] 45:6	acquire [1] 20:7
			143:6		absolute [1] 37:1	acquittal [2] 109:1
			1994-3 [1] 17:1	-5-	absolutely [1] 53:12	110:25
'78 [1] 66:18			1995 [2] 123:6 143:6	5 [4] 176:3 176:14	abundantly [1] 178:19	acquittals [2] 111:8
'82 [2] 66:18 142:22			1996 [4] 1:2 79:10	177:16 189:4	Abuse [1] 143:21	112:12
'86 [1] 142:22			79:10 174:25	50 [1] 20:13	abused [1] 129:6	acquitted [21] 18:8
'88 [1] 93:18			1997 [1] 41:13	500 [1] 20:21	abuses [1] 159:5	92:20 103:25 104:12
'94 [3] 13:25 14:1			1:30 [1] 191:17	53 [1] 20:22	accept [1] 48:6	105:7 108:10 108:11
			1B1.1 [1] 105:18	536 [1] 38:25	acceptable [1] 78:7	108:15 108:17 108:22
			1B1.3 [6] 99:21	54 [1] 159:22	acceptance [9] 15:18	108:24 109:4 109:12
-1-			102:21 103:17 103:20	548 [1] 81:16	34:20 45:23 48:4	109:16 109:17 109:25
1 [10] 1:3 17:25			105:12 105:18	5K's [2] 153:3 153:14	77:7 77:15 78:9	110:9 110:10 111:13
103:25 105:12 105:16			1presentence [1]	5K1 [4] 79:2 83:8	79:17 145:10	116:15 122:11
121:11 122:5 123:6			72:22	134:5 135:7	accepted [2] 45:15	acquitting [1] 109:20
144:11 181:18			-2-	5K1's [1] 134:21	183:23	act [14] 4:5 22:3
1,500 [1] 20:25			2 [6] 22:23 100:8	5K1.1 [10] 81:9	access [2] 21:13	40:18 66:19 74:23
10 [5] 27:6 110:5			122:5 126:12 148:1	81:25 82:16 89:15	119:14	81:10 120:5 121:20
144:6 144:11 175:24			181:21	89:19 90:1 128:17	accident [1] 25:17	123:1 143:5 160:15
100 [1] 7:23			20 [6] 14:9 16:18	128:21 129:5 129:14	accommodations [1]	171:23 188:21 190:17
11's [1] 183:19			125:21 150:23 154:2	-6-	113:23	Act's [1] 143:21
11-1/2 [1] 124:19			155:9	60 [1] 20:13	accomplish [4] 24:3	actions [1] 186:17
11:06 [1] 92:15			200 [1] 10:21	62-year-old [1] 30:10	86:24 161:22 187:3	activities [5] 6:10
11:17 [1] 92:16			21 [2] 125:21 159:17	-7-	4:13 10:23 19:4	64:16 64:17 126:4
11:20 [1] 92:14			22 [1] 150:23	7 [1] 23:1	accomplishes [1]	168:5
11E1C [1] 60:6			22-year-old [1] 126:25	70 [4] 64:16 64:23	183:25	activity [2] 8:17
12 [2] 1:2 27:6			23 [1] 23:6	126:8 156:25	accordance [2] 99:21	140:22
120 [4] 136:6 136:6			248 [1] 21:6	71.3 [1] 159:15	137:13	actors [2] 78:19
136:17 141:20			249 [1] 21:10	-8-	37:3	96:6
13 [2] 79:13 155:9			25 [1] 131:13	80 [1] 44:9	according [2] 13:13	actual [2] 109:17
135 [1] 136:1			26-year-old [1] 170:20	85 [1] 156:21	32:23	162:6
15 [2] 43:19 175:25			27 [1] 85:22	871 [1] 130:17	121:23	adamant [1] 56:15
16 [1] 86:4			2B1.11 [1] 144:17	88 [2] 156:19 156:23	account [8] 37:15	adamantly [1] 114:25
18 [2] 4:13 156:12			2B3.1 [1] 22:12	-9-	39:22 60:15 107:17	adapt [1] 35:1
1823 [1] 1:4			2D1.1 [1] 39:2	90 [2] 30:11 137:4	109:5 111:3 112:3	adapted [1] 34:25
19 [1] 13:24			-3-	91.9 [1] 44:25	119:3	adapting [1] 58:17
1964 [1] 123:12			3 [12] 22:24 71:2	92 [1] 44:24	accountable [1] 116:13	add [3] 140:3 141:17
1968 [1] 13:8			71:8 71:16 79:17	924 [1] 109:12	accountant-like [1]	191:6
1971 [1] 67:13			81:16 81:19 100:8	97 [6] 44:9 44:18	145:5	added [1] 147:22
1974 [2] 19:25 67:10			103:17 145:21 156:12	56:11 77:9 84:16	accounted [1] 102:5	adding [1] 150:18
1976 [1] 14:11			171:12	84:17	accounts [1] 131:20	addition [17] 5:24
1978 [2] 13:18 67:10			30 [6] 86:8 89:22	981 [1] 130:17	accuracy [1] 74:2	6:5 6:17 7:9
1979 [4] 13:19 94:8			131:12 131:13 141:25	-A-	accurate [1] 146:16	14:24 20:18 21:18
123:11 123:13			154:2	ABA [1] 92:25	accurately [3] 126:13	40:25 41:24 96:13
1980 [1] 93:17			3553 [3] 187:9 188:17	ability [10] 48:21	148:3 148:12	96:23 100:6 102:4
1984 [2] 4:5 175:7			189:17	49:3 75:20 125:16	accusations [1] 9:1	102:14 104:6 182:4
1986 [3] 76:12 76:20			3555 [1] 156:12	132:16 160:15 167:13	accuse [1] 74:12	190:14
79:22			360 [1] 141:24	179:16 179:17 183:12	accused [1] 155:7	additional [8] 23:8
1987 [3] 8:25 72:1			37 [1] 39:2	able [20] 4:16 16:10	achieve [13] 38:17	52:11 68:2 100:15
73:12			38 [1] 158:21	34:13 36:2 52:3	84:9 113:3 113:8	102:5 104:6 138:24
1988 [7] 13:2 13:9			3C1.1 [1] 130:15	52:4 59:25 60:5	119:23 119:24 120:3	183:21
14:12 14:15 39:3			-4-		180:14 180:20 180:21	Additionally [1] 100:13
93:19 107:23			4 [2] 22:25 148:1		182:18 185:9 190:21	address [11] 11:9
1989 [2] 13:13 107:23					37:16 120:12	40:6 47:9 50:17
1990 [3] 72:10 107:23					achievement [1]	52:14 72:19 75:6
175:7					38:10	143:18 144:3 160:19
					achieving [2] 84:12	182:10
						addressed [6] 55:8
						55:22 108:7 165:1
						188:17 189:1

addresses [1]	185:2	African [4]	86:2	Alcohol [1]	30:2	64:13	74:16	89:5	148:15	148:16	155:13															
adds [1]	40:7	126:25	140:9	170:19	aliens [1]	31:12	109:21	119:4	135:20	159:2	187:22															
adept [1]	148:10	African-American [2]	127:14	135:13	all-inclusive [1]	178:9	150:10	151:25	173:2	applications [4]	74:3	74:5	89:10													
adequacy [1]	187:25	afternoon [1]	143:16	again [26]	12:20	alleviate [1]	88:24	amounts [1]	127:7	183:15	applied [5]	41:9														
adequate [1]	187:19	27:25	29:13	40:11	alleviated [2]	88:21	115:15	analogous [1]	109:22	61:3	102:21	112:11														
adequately [3]	37:15	46:1	46:2	66:11	alleviates [1]	88:23	31:7	50:6	56:20	185:12	applies [1]	109:14														
187:13	189:6	89:8	92:20	93:21	allow [7]	26:9	120:8	157:3	171:7	apply [17]	42:4	48:2	48:5	49:23												
adjust [4]	116:20	98:7	110:2	132:6	allowed [1]	158:17	31:7	50:6	56:20	50:9	55:10	58:15	102:25	109:16	112:15											
128:1	128:14	142:11	143:10	147:5	allowing [3]	128:1	120:8	157:3	171:7	116:7	120:20	155:6	161:15	162:16	173:9											
adjusted [2]	56:13	170:10	170:13	173:3	182:10	185:9	182:10	185:9	156:14	182:25	applying [5]	25:12	103:2	125:3	144:21											
128:13		174:21	188:17	188:19	allows [2]	156:3	185:2	Allstate [1]	82:17	148:11	appointed [9]	3:25	5:11	5:22	13:2											
adjustment [7]	22:23	189:23	against [10]	41:2	185:2	alluded [2]	29:6	82:8	almost [12]	4:14	5:11	5:22	13:2	19:24	68:13	88:23										
23:9	25:4	57:1	62:1	75:18	104:12	182:10	185:9	156:3	5:1	31:25	19:24	68:13	88:23	122:24	124:4	appointment [1]	123:5									
118:3	145:23	146:16	152:21	158:2	159:7	182:10	185:9	156:3	45:6	60:12	155:3	163:6	174:16	191:2	191:11	approach [12]	65:6									
adjustments [3]			168:25	169:20	181:16	182:10	185:9	156:3	69:14	89:22	155:3	163:6	174:16	191:2	191:11	76:15	105:24	144:18								
144:15	173:3	183:16	age [1]	177:9	agenda [3]	2:17	127:4	183:5	69:14	89:22	155:3	163:6	174:16	191:2	191:11	145:2	145:7	145:13								
administrative [6]			152:25	153:16	154:22	agent [4]	30:2	152:25	69:14	89:22	155:3	163:6	174:16	191:2	191:11	146:12	148:2	148:6								
21:4	21:16	65:3	152:25	153:16	154:22	agent's [1]	100:14	152:25	69:14	89:22	155:3	163:6	174:16	191:2	191:11	163:20	187:7	approached [1]	23:15							
65:17	130:9	130:10	152:25	153:16	154:22	agents [7]	72:25	78:20	78:22	79:12	155:3	163:6	174:16	191:2	191:11	163:20	187:7	approaching [2]	123:7	181:22						
admit [1]	144:25	admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	45:23	45:23	189:17	adoption [1]	11:16	ads [1]	82:17	advance [3]	17:11	153:8	189:5						
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	45:23	45:23	189:17	adoption [1]	11:16	ads [1]	82:17	advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3					
admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	45:23	45:23	189:17	adoption [1]	11:16	ads [1]	82:17	advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10		
adopt [1]	4:10	adopted [4]	41:7	45:23	45:23	189:17	adoption [1]	11:16	ads [1]	82:17	advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10				
adopted [4]	41:7	45:23	45:23	189:17	adoption [1]	11:16	ads [1]	82:17	advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10						
45:23	45:23	189:17	adoption [1]	11:16	ads [1]	82:17	advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10								
adoption [1]	11:16	ads [1]	82:17	advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10											
ads [1]	82:17	advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10													
advance [3]	17:11	153:8	189:5	advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10															
advantage [2]	47:17	85:3	adversarial [5]	25:2	25:13	73:22	74:10																			
adversarial [5]	25:2	25:13	73:22	74:10																						
25:13	73:22	74:10																								
82:21																										
adversary [2]	101:23	183:7	adverse [1]	17:5	advice [2]	9:19	21:16	advisability [1]	186:21	advise [2]	75:14	89:9	advised [1]	88:5	advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3				
adversary [2]	101:23	183:7	adverse [1]	17:5	advice [2]	9:19	21:16	advisability [1]	186:21	advise [2]	75:14	89:9	advised [1]	88:5	advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3				
adverse [1]	17:5	advice [2]	9:19	21:16	advisability [1]	186:21	advise [2]	75:14	89:9	advised [1]	88:5	advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3							
advice [2]	9:19	21:16	advisability [1]	186:21	advise [2]	75:14	89:9	advised [1]	88:5	advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3									
advisability [1]	186:21	advise [2]	75:14	89:9	advised [1]	88:5	advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3												
advise [2]	75:14	89:9	advised [1]	88:5	advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3														
advised [1]	88:5	advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3																	
advisory [4]	9:19	9:20	9:21	123:2	advocate [2]	82:22	124:3																			
9:20	9:21	123:2	advocate [2]	82:22	124:3																					
advocate [2]	82:22	124:3																								
124:3																										
advocating [1]	107:5	affect [3]	100:5	102:9	162:16	affected [1]	36:11	affecting [1]	19:23	affects [2]	105:3	168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2
advocating [1]	107:5	affect [3]	100:5	102:9	162:16	affected [1]	36:11	affecting [1]	19:23	affects [2]	105:3	168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2
affect [3]	100:5	102:9	162:16	affected [1]	36:11	affecting [1]	19:23	affects [2]	105:3	168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2		
102:9	162:16	affected [1]	36:11	affecting [1]	19:23	affects [2]	105:3	168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2				
affected [1]	36:11	affecting [1]	19:23	affects [2]	105:3	168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2						
affecting [1]	19:23	affects [2]	105:3	168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2								
affects [2]	105:3	168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2										
168:21	affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2												
affidavits [1]	126:16	affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2													
affiliation [1]	144:14	affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2															
affinity [1]	46:15	affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2																	
affirmation [1]	130:19	affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2																			
affirmed [1]	171:16	afford [1]	109:8	afraid [1]	187:2																					
afford [1]	109:8	afraid [1]	187:2																							
afraid [1]	187:2																									

42:24 49:3 49:4 178:8	Association [5] 67:5 93:4 123:3 155:15 156:10	August [1] 1:2 authority [3] 89:18 90:12 184:7	bangers [1] 144:12 bank [18] 58:20 58:23 96:17 121:8 121:9 121:13 121:13 131:16 131:16 131:17 132:24 134:9 134:10 134:11 134:15 134:19 179:4 179:13	102:18 believes [1] 35:5 below [1] 138:25 Beltway [2] 47:16 47:21 bench [10] 6:7 6:9 13:9 14:9 14:12 14:15 17:1 54:11 60:19 124:4
arena [1] 123:25 argue [1] 31:23 argued [1] 178:10 arguing [3] 52:24 83:10 177:9 argument [2] 32:1 176:16 arise [1] 40:11 arises [2] 19:5 146:11 Arizona [2] 47:25 127:8 arm [1] 8:11 armed [2] 121:9 121:13 arranged [1] 2:14 arrangement [1] 82:7 array [1] 62:5 arrive [1] 129:9 arriving [2] 120:16 128:22 arrows [1] 47:20 Arthur [1] 66:23 article [6] 71:2 71:8 71:16 81:16 81:19 94:23 articles [1] 93:1 articulate [3] 16:4 55:5 55:18 articulated [2] 15:12 56:4 articulation [2] 56:2 83:19 ascertain [1] 100:11 aspect [5] 9:10 78:11 81:9 82:20 89:17 assess [4] 42:7 43:4 147:24 174:6 assessing [1] 41:19 assessment [1] 161:13 assigned [2] 21:20 99:16 assist [3] 157:11 163:4 170:15 assistance [15] 77:8 78:13 78:15 79:3 79:21 81:8 85:21 86:6 90:14 129:1 129:4 135:8 157:6 166:12 183:17 assistant [12] 7:14 13:18 13:22 72:25 93:16 93:16 93:18 142:21 142:22 142:24 175:4 175:5 associate [2] 64:1 92:23 associated [3] 6:10 171:23 179:22	Association's [1] 97:13 associations [4] 146:4 146:6 146:15 171:24 assume [4] 51:8 88:7 121:4 121:5 assumed [3] 14:12 14:15 105:13 assumes [1] 105:16 assumption [2] 8:4 144:12 assumptions [1] 144:16 astounding [1] 44:8 athlete [1] 135:24 athletic [1] 135:22 Atlanta [1] 6:16 atmosphere [1] 53:22 attempt [5] 29:14 29:17 164:16 180:14 182:18 attempted [2] 120:19 120:20 attempting [3] 100:11 176:25 190:23 attended [2] 14:17 124:7 attention [6] 45:20 53:25 112:24 187:12 188:11 188:15 attest [1] 36:12 attitude [1] 182:16 attitudes [2] 74:9 185:24 attorney [18] 5:14 6:21 6:22 7:13 7:15 13:22 25:1 25:5 67:12 70:4 93:17 93:18 101:20 114:16 134:13 142:8 142:22 183:4 Attorney's [1] 88:6 attorney-client [5] 68:14 69:4 69:19 69:21 70:8 attorneys [29] 16:8 16:21 16:21 36:10 52:5 56:15 58:10 58:11 66:20 68:2 68:8 68:10 68:13 71:11 73:1 73:12 74:1 74:12 75:13 75:14 91:10 99:4 99:5 107:15 113:2 113:10 113:19 118:19 128:25 attorneys' [1] 74:9 attracted [1] 117:19 attributable [1] 166:23 audience [1] 191:13	average [3] 44:24 44:25 45:1 avoid [3] 28:25 29:17 114:21 avoiding [1] 77:24 award [2] 89:19 90:14 awarded [2] 138:14 159:16 aware [6] 87:18 87:25 101:13 109:24 135:18 172:22 away [7] 27:11 59:5 60:12 79:9 90:9 158:7 173:5 awesome [2] 29:19 83:21 awful [1] 62:13 awfully [1] 101:16 awkward [2] 75:25 183:6 -B- B [1] 135:14 Babcock [28] 12:25 13:4 14:2 14:4 14:7 39:3 44:2 44:6 44:13 44:22 45:4 46:12 47:12 48:11 48:18 50:24 51:24 52:1 53:5 54:13 63:11 63:13 63:16 63:20 70:19 82:4 83:18 91:16 baby [1] 135:16 Bach [5] 66:21 71:22 71:23 71:23 76:9 background [4] 5:21 37:5 37:8 67:8 backgrounds [1] 70:18 bad [17] 15:25 27:10 27:11 34:11 59:9 60:10 87:8 89:25 103:22 135:15 149:25 150:7 153:9 153:9 153:10 154:6 164:8 bag [1] 31:14 baggage [1] 2:8 bags [1] 153:10 balance [3] 25:25 26:14 50:4 balanced [1] 145:8 Baltimore [3] 129:24 130:1 130:4 bang [1] 153:25	basic [7] 20:3 60:17 88:24 98:2 179:17 179:17 182:4 basis [12] 11:24 47:16 65:18 81:15 86:2 97:6 99:25 114:6 117:17 177:10 184:22 185:4 basketball [1] 181:17 bear [3] 33:13 95:6 162:15 became [7] 3:23 8:20 13:18 14:22 72:14 93:18 142:24 become [14] 23:12 32:14 37:25 39:7 72:4 73:13 74:5 74:23 75:9 100:21 101:23 108:1 148:10 170:15 becomes [2] 24:24 167:24 becoming [2] 120:18 155:24 began [2] 72:1 174:24 begin [7] 36:17 67:16 68:14 93:23 95:9 176:1 185:19 beginning [1] 176:16 begun [1] 124:14 behalf [1] 35:22 behavior [4] 75:21 78:3 78:7 172:22 belief [2] 98:4	102:18 believes [1] 35:5 below [1] 138:25 Beltway [2] 47:16 47:21 bench [10] 6:7 6:9 13:9 14:9 14:12 14:15 17:1 54:11 60:19 124:4 Bender [15] 67:11 80:2 80:3 83:23 85:12 86:25 87:12 87:16 87:21 88:3 88:22 89:15 89:20 90:16 104:16 beneficial [3] 55:24 101:18 185:22 benefit [6] 34:19 37:7 47:4 47:19 79:2 106:11 benefits [1] 38:5 benefitted [1] 36:19 bent [1] 46:22 best [7] 3:11 6:2 32:11 68:8 94:8 158:9 183:4 better [23] 3:18 9:16 10:2 10:24 31:1 35:5 35:6 54:11 54:12 55:14 57:24 71:1 71:1 76:6 77:14 82:12 84:1 86:13 89:1 93:14 97:16 107:24 148:5 between [18] 25:25 26:1 26:2 29:16 40:12 68:17 80:23 87:17 98:1 115:7 115:9 121:12 124:15 127:5 128:23 131:25 173:18 190:14 beyond [11] 43:23 54:22 58:7 83:13 89:14 96:20 116:6 116:9 138:25 157:22 181:1 bifurcate [2] 28:22 64:19 big [6] 23:13 46:22 133:23 151:25 153:7 171:13 bigger [1] 79:4 bit [15] 2:19 4:3 5:20 28:23 49:15 53:8 65:12 65:21 92:7 123:10 154:10 154:11 184:14 188:1 191:9 bite [1] 110:14 bites [1] 110:11 blessings [1] 47:12 blown [1] 27:14 board [2] 144:16 162:17 Bob [1] 143:11

bodily [2] 22:17 23:10	building [1] 7:22	carefully [4] 23:16 40:22 65:19 84:8	150:25 151:17 157:15 158:8 159:1 159:5 159:6 160:12 160:24 162:16 162:19 162:24 162:21 167:14 175:25 176:12 188:9 188:9	187:2 187:7 188:10 190:2
body [4] 18:25 33:5 37:25 83:1	built [3] 60:6 97:22 189:20	carelessness [1] 25:18		changed [4] 5:1 76:22 144:1 160:21
bogus [1] 131:16	bullet [1] 149:20	caretaker [1] 180:3		changes [14] 10:1 10:15 26:12 28:2 39:4 42:24 42:25 42:25 43:5 143:22 161:3 161:25 162:15 162:18
book [2] 35:7 69:8	bump [1] 170:18	carjacking [1] 22:20		changing [7] 38:19 66:11 163:22 166:10 173:8 190:4 190:7
border [1] 172:10	bumped [1] 170:25	Carnes [9] 6:14 56:6 56:7 58:16 114:14 168:23 169:2 169:9 169:12	casualty [2] 70:7 70:8	channel [1] 116:21
Boston [4] 6:8 6:18 6:20 124:7 18:4	bunch [2] 126:5 128:6	Carolina [1] 48:1	cat [1] 163:13	chapter [8] 30:17 100:8 100:8 103:17 105:12 105:16 145:21 171:12
bothers [1] 18:4	burden [2] 25:1 157:20	carries [1] 105:25	category [2] 17:25 126:12	chapters [1] 29:16
bottom [4] 115:8 118:20 136:2 149:2	burdened [3] 17:20 45:16 99:7	carry [3] 2:24 8:8 26:24	caught [2] 75:1 137:4	character [2] 63:17 73:7
box [1] 131:18	burdens [2] 18:18 18:18	carrying [3] 9:17 109:13 147:16	causally [1] 181:21	characteristic [1] 25:19
boy [1] 60:11	buried [1] 114:12	cartel [1] 165:17	caused [2] 15:15 125:10	characteristics [14] 22:14 22:21 49:16 147:12 150:2 150:17 151:1 176:8 176:23 184:11 184:19 184:21 184:24 189:3
boyfriend [2] 140:23 141:19	Burke [11] 66:17 66:18 67:17 67:20 67:24 71:21 84:20 91:7 91:12 91:25 92:4	case [98] 16:8 18:25 21:5 23:15 25:12 26:11 29:24 30:19 32:21 33:6 40:17 42:15 42:19 51:20 58:20 59:22 59:22 59:24 62:13 64:23 65:13 65:18 68:9 68:11 73:24 74:5 77:2 79:5 79:6 83:1 83:20 85:22 86:1 86:9 88:23 90:6 90:7 96:16 97:24 99:16 100:1 100:14 101:21 104:6 105:3 105:15 105:20 110:9 110:11 110:16 110:17 111:6 111:6 111:8 111:16 111:20 112:4 113:5 115:18 116:19 117:14 118:2 118:7 120:9 126:7 126:25 127:6 129:17 130:16 130:17 131:2 131:11 134:18 135:6 135:10 136:10 136:10 137:19 138:2 138:25 139:10 150:6 151:20 153:20 157:14 162:20 169:19 169:20 177:5 179:25 180:5 180:18 180:19 182:25 185:12 187:21 188:8 189:11	causes [1] 125:5	charge [18] 103:8 105:1 106:15 106:16 107:6 117:1 119:8 122:12 125:23 153:25 167:19 168:11 168:13 169:25 170:4 172:19 173:1 173:5
brand [2] 24:20 37:25	buster [1] 101:11	cases [68] 18:7 18:8 21:5 30:8 30:9 31:4 31:12 32:19 33:2 33:10 34:4 40:9 44:7 44:11 44:18 45:5 56:11 59:17 61:1 62:8 62:20 63:2 63:7 68:22 70:9 70:12 77:9 77:11 77:14 78:4 81:2 81:20 82:24 82:25 83:3 84:17 86:12 89:9 89:11 89:12 108:20 113:20 116:24 125:11 125:12 131:7 132:8 137:24 137:25	causing [1] 81:1	charged [6] 83:14 125:23 126:2 127:1 127:10 135:20
brandished [1] 23:4	busting [1] 74:13		caution [1] 18:20	charges [8] 105:1 107:9 117:2 126:5 126:6 126:14 126:21 167:13
brandishing [1] 22:24	busy [2] 23:23 44:4		center [4] 8:17 14:18 21:6 50:25	charging [8] 16:23 118:24 119:1 119:5 159:4 169:23 172:19 172:24
break [9] 12:18 66:12 66:14 92:7 92:9 92:10 92:12 92:13 166:8	butts [1] 154:16		centered [1] 9:1	Charles [1] 53:9
breakfast [1] 2:20	buy [2] 79:9 79:10		central [4] 106:6 146:8 156:14 172:12	chart [1] 46:25
breath [1] 152:10	buying [1] 94:10		certain [12] 59:24 119:4 120:1 120:1 129:7 129:8 176:7 179:1 180:24 184:13 184:18 189:3	charts [2] 133:15 133:18
breeds [1] 81:13	buys [1] 172:9		certainly [18] 18:16 28:8 33:15 42:5 77:16 87:6 87:9 89:2 89:25 112:24 114:11 116:1 118:18 137:20 139:21 150:4 178:18 178:21	chasing [1] 164:10
brief [7] 4:2 123:17 130:3 133:2 133:7 167:7 189:25	Byden [1] 7:3		certainty [5] 34:12 37:1 41:23 46:17 106:2	cheaper [1] 37:21
briefly [2] 38:23 108:9	byproduct [1] 34:22		certiorari [1] 108:18	cheating [1] 168:24
Brigham [1] 7:7	Byron [1] 1:3		cetera [1] 8:13	check [1] 131:19
bright [2] 135:24 140:1	-C-		chain [1] 153:4	checks [1] 131:17
brilliant [1] 29:14	c [1] 109:12		chair [1] 155:14	chief [6] 13:11 13:12 63:24 67:14 88:4 93:17
bring [12] 30:5 82:6 82:7 88:15 95:6 126:14 145:9 145:12 153:23 153:24 154:1 174:20	calculating [1] 103:6		chaired [1] 143:5	child [6] 79:6 79:10 79:11 135:19 139:19 180:4
bringing [3] 139:11 153:7 165:17	calculation [2] 97:3 97:5		chairman [20] 3:2 5:14 5:23 5:24 7:10 8:20 14:8 19:16 26:21 35:20 66:5 67:4 67:24 68:23 76:11 80:4 84:6 98:22 155:3 175:12	children [2] 141:3 141:5
brings [1] 172:10	calculations [4] 21:12 22:7 24:6 101:9		chains [1] 68:16	choice [1] 109:15
broadly [1] 109:17	California [1] 127:8		challenge [3] 59:3 73:16 126:23	
broken [2] 22:21 155:22	calls [1] 190:15		challenging [1] 20:9	
Brooklyn [1] 72:2	candidly [1] 82:8		chance [1] 107:25	
brother [5] 134:17 134:22 134:23 134:25 153:23	cannot [5] 29:8 108:17 163:19 180:19 180:19		change [23] 18:21 18:22 18:23 39:22 39:25 40:4 51:1 54:2 97:1 103:7 107:21 110:2 129:21 131:22 143:24 159:8 159:25 161:18 165:24	
brought [7] 36:25 71:13 81:2 86:9 107:9 153:22 167:14	cap [3] 150:22 150:23 160:20			
buck [1] 154:1	capacities [3] 7:2 7:6 7:24			
Budd [8] 6:18 63:21 84:3 84:5 86:20 138:12 139:1 139:8	capture [1] 22:7			
buddies [1] 134:16	car [1] 134:18			
buddy [2] 137:1 139:12	card [1] 154:6			
Buffalo [1] 6:24	cards [2] 130:7 130:8			
	care [3] 29:25 160:24 167:7			
	career [5] 71:25 72:1 72:7 174:24 175:14			
	careful [1] 12:7			

choices [2] 95:4	91:18 168:1 169:20 175:22 183:4	combination [1] 145:22	143:24 145:15 148:14 149:1 157:10 158:11	19:4 19:20 24:18 25:16 25:23 34:5
choose [2] 97:25 167:13	clients [6] 33:22 56:10 69:1 69:14 71:10 71:18	combine [1] 184:13	160:7 160:18 163:12 166:25 171:6 173:16 175:13 176:17 178:16	35:9 35:13 39:6 39:22 40:24 41:19 41:21 41:25 49:11
chose [1] 189:2	climate [1] 152:11	comedy [1] 58:24	182:10 183:9 184:12 185:8 186:2 186:12 186:14 186:18 186:23	49:14 49:19 50:2 50:3 50:13 50:23 51:1 51:2 103:10
chosen [1] 135:22	Clinton [1] 5:23	comfort [1] 98:14	187:3 187:6 187:14 187:17 187:25 188:2 188:20 188:20 188:23	145:18
Christopher [1] 142:16	clock [1] 67:22	comfortable [4] 14:22 39:7 64:25 99:13	189:1 189:8 189:11 189:14	complicate [1] 54:2
circ [1] 111:7	close [1] 152:3	coming [5] 20:16 28:2 36:20 104:2 137:2	Commission's [5] 75:22 79:23 107:18 173:7 189:18	complicated [4] 34:8 42:4 74:17 177:1
circles [1] 172:6	closely [3] 113:3 118:5 187:6	commence [1] 124:5	commissioner [10] 6:18 27:16 27:17 27:25 58:1 63:21 65:24 84:3 162:24 173:14	complication [2] 109:22 161:16
circuit [15] 6:13 18:14 18:16 21:9 52:1 52:7 52:8 52:16 104:24 105:2 108:16 111:6 179:25 182:15 186:12	closer [2] 27:3 61:12	comment [11] 10:12 11:2 19:10 19:18 41:13 68:5 141:18 149:1 166:15 167:3 191:13	commissioners [3] 66:3 94:1 142:13	component [1] 127:22
circuits [1] 155:9	closing [1] 148:7	commentaries [1] 145:25	Commissions [1] 93:5	components [1] 36:12
circumstances [23] 24:16 26:11 40:21 48:14 59:25 61:20 69:5 73:3 110:23 112:4 116:18 120:1 129:10 138:19 157:5 161:8 171:11 180:6 180:11 181:18 181:20 184:23 185:14	co [1] 144:8	commentary [5] 46:1 146:21 147:23 162:3 184:13	commitment [1] 65:9	comports [1] 17:4
co-conspirators [4] 157:25 158:2 159:6 170:14	co-defendant [2] 170:23 171:4	commenting [1] 65:1	committed [4] 41:18 109:7 111:17 179:13	comprehension [1] 58:7
co-defendants [2] 68:11 68:14	co-equals [2] 131:24 131:25	comments [27] 11:10 11:24 36:1 47:7 60:23 63:24 80:10 89:9 92:8 92:21 98:24 99:14 103:1 112:22 113:13 113:15 114:12 124:24 132:5 132:12 132:14 133:2 133:25 142:11 142:12 163:9 185:19	common [6] 26:2 96:8 96:9 152:24 164:2 181:25	comprehensive [1] 75:20
co-sponsors [1] 163:5	coast [2] 53:11 53:12	Commission [127] 1:1 2:25 3:2 3:13 3:21 3:22 3:24 4:3 4:4 4:10 4:15 4:22 5:4 5:9 5:15 5:20 5:25 6:18 7:10 7:20 8:1 8:5 8:21 8:22 10:5 10:10 10:22 12:13 12:21 14:8 18:15 19:17 20:23 21:11 21:14 25:15 26:6 26:22 26:25 28:9 28:10 35:21 36:2 36:6 38:1 38:12 38:17 39:14 39:16 40:1 40:6 40:7 40:19 40:21 41:10 42:10 42:22 44:18 48:20 49:2 51:18 52:22 52:25 57:6 58:7 60:15 60:18 61:18 64:4 67:25 76:11 80:4 80:20 87:16 94:15 97:12 97:25 102:15 103:15 103:24 104:4 112:24 116:1 116:2 117:10 119:24 120:21 133:3 139:2 143:17	commonality [4] 180:14 180:17 180:20 180:21	compromises [1] 75:19
cocaine [16] 86:15 86:17 88:25 127:1 127:5 127:5 137:3 144:6 144:7 165:18 166:22 172:3 172:4 172:9 172:9 173:17	code [8] 14:21 20:6 20:19 46:15 53:7 63:12 63:18 126:4	commercial [4] 14:21 46:15 46:17 53:7	commonly [1] 26:4	computer [2] 21:10 30:5
coin [1] 49:2	collar [1] 18:7	Commission [127] 1:1 2:25 3:2 3:13 3:21 3:22 3:24 4:3 4:4 4:10 4:15 4:22 5:4 5:9 5:15 5:20 5:25 6:18 7:10 7:20 8:1 8:5 8:21 8:22 10:5 10:10 10:22 12:13 12:21 14:8 18:15 19:17 20:23 21:11 21:14 25:15 26:6 26:22 26:25 28:9 28:10 35:21 36:2 36:6 38:1 38:12 38:17 39:14 39:16 40:1 40:6 40:7 40:19 40:21 41:10 42:10 42:22 44:18 48:20 49:2 51:18 52:22 52:25 57:6 58:7 60:15 60:18 61:18 64:4 67:25 76:11 80:4 80:20 87:16 94:15 97:12 97:25 102:15 103:15 103:24 104:4 112:24 116:1 116:2 117:10 119:24 120:21 133:3 139:2 143:17	communicating [1] 165:22	computing [3] 104:1 105:7 105:8
collateral [1] 109:22	colleague [2] 124:23 137:21	colleagues [2] 45:13 46:13	community [12] 20:13 21:22 24:11 64:21 65:14 65:14 65:20 74:21 83:19 158:18 166:21 166:24	Conaboy [72] 2:1 3:1 7:18 13:5 13:15 14:1 14:5 19:9 26:17 27:2 35:18 43:10 43:21 52:17 56:5 59:10 59:14 61:14 63:21 65:24 66:2 66:25 67:3 67:7 67:22 71:21 76:8 80:2 83:23 87:10 89:6 92:5 92:12 92:17 93:8 93:10 94:5 94:12 94:14 98:19 103:12 105:21 110:4 112:8 118:8 118:17 122:15 122:21 123:8 123:20 133:4 138:5 142:3 142:7 143:14 148:18 154:25 160:4 162:23 166:25 173:14 174:14 175:10 181:2 181:5 181:9 181:12 182:7 185:16 189:22 190:25 191:10
clarification [1] 103:6	collection [1] 26:12	college [3] 136:24 137:7 143:4	comparing [1] 175:19	conceive [3] 110:8 110:12 110:16
clarifications [1] 39:4	colleges [1] 135:23	color [1] 156:1	compelled [1] 40:20	concentrates [1] 94:23
clarified [1] 176:3	Colorado [42] 1:4 2:3 6:4 13:1 13:12 13:17 14:11 15:2 17:1 18:22 27:17 30:12 31:5 31:23 44:8 44:19 44:24 46:23 47:13 47:24 66:18 66:20 66:22 67:4 67:9 71:25 72:1 72:11 77:9 84:16 86:13 92:24 99:24 100:7 103:4 122:25 123:3 125:24 127:8 137:2 139:11 143:6	collar [1] 18:7	compelling [4] 41:4 188:4 188:6 189:10	concept [8] 50:21 58:1 60:4 80:16 106:4 108:6 108:24 161:15
clarifies [1] 176:20	collateral [1] 109:22	colleague [2] 124:23 137:21	complain [1] 107:4	concern [7] 48:20 61:17 89:15 106:14 125:10 125:24 163:17
clarify [3] 42:15 89:14 176:25	colleagues [2] 45:13 46:13	collection [1] 26:12	complaint [1] 8:25	concerned [8] 19:11 89:21 113:4 115:12 117:8 126:11 163:10
clarifying [1] 103:8	college [3] 136:24 137:7 143:4	colleges [1] 135:23	complaints [1] 9:13	
clarity [2] 108:2 108:5	color [1] 156:1	Colorado [42] 1:4 2:3 6:4 13:1 13:12 13:17 14:11 15:2 17:1 18:22 27:17 30:12 31:5 31:23 44:8 44:19 44:24 46:23 47:13 47:24 66:18 66:20 66:22 67:4 67:9 71:25 72:1 72:11 77:9 84:16 86:13 92:24 99:24 100:7 103:4 122:25 123:3 125:24 127:8 137:2 139:11 143:6	complete [6] 62:25 121:21 121:23 138:18 139:5 144:5	
class [1] 94:8	coin [1] 49:2	collar [1] 18:7	completed [1] 123:19	
cleansing [1] 78:6	collateral [1] 109:22	colleague [2] 124:23 137:21	completely [1] 51:21	
clear [15] 108:21 112:12 112:16 116:3 130:25 139:8 147:11 157:22 160:9 162:9 173:9 176:15 178:19 185:25 186:8	colleagues [2] 45:13 46:13	collection [1] 26:12	complex [9] 18:6 19:12 21:18 22:9 24:5 24:24 38:3 50:8 54:4	
clear-cut [1] 31:9	college [3] 136:24 137:7 143:4	colleges [1] 135:23	complexity [26] 9:2	
clearer [1] 162:14	color [1] 156:1	Colorado [42] 1:4 2:3 6:4 13:1 13:12 13:17 14:11 15:2 17:1 18:22 27:17 30:12 31:5 31:23 44:8 44:19 44:24 46:23 47:13 47:24 66:18 66:20 66:22 67:4 67:9 71:25 72:1 72:11 77:9 84:16 86:13 92:24 99:24 100:7 103:4 122:25 123:3 125:24 127:8 137:2 139:11 143:6		
clearinghouse [2] 8:14 130:5	Columbia [1] 48:1			
clearly [2] 108:14 148:14				
client [15] 30:22 30:24 31:24 32:11 32:12 32:16 33:24 57:15 68:15 69:7				

178:1	33:20	50:20	53:23	conspiracies [4]	contrasted [1]	56:14	97:7	97:8	105:9
concerning [1]	130:19	54:6	59:8	146:3	control [6]	107:5	120:14	121:16	122:8
concerns [7]	61:19	143:22	144:6	153:21	107:7	113:9	125:22	157:19	158:5
76:19	115:15	157:12	160:22	159:6	168:11	168:13	169:7	170:11	
124:21	150:12	161:24	163:20	conspiracy [6]	controlled [1]	16:2	counties [1]	88:10	
conclude [1]	191:16	164:6	164:22	81:20	controlling [1]	45:24	counting [1]	170:12	
concluded [1]	191:17	174:5	188:16	154:1	controversial [1]	96:10	country [24]	2:4	
conclusion [1]	163:7	189:17		constant [1]	convert [1]	26:12	3:6	3:8	4:12
conduct [108]	5:6	congressional [1]		constituencies [1]	convict [2]	98:6	4:23	6:3	7:6
6:10	15:16	68:19		constituency [1]	111:16		8:11	9:18	10:20
31:9	56:20	conjunction [2]	120:21	constitute [1]	convicted [9]	31:10	31:17	53:12	88:19
75:24	76:2	186:15		constitutes [1]	57:15	106:20	93:3	93:13	94:21
85:6	87:3	Connor [8]	93:15	Constitution [1]	116:14	121:12	95:12	96:9	113:23
87:13	87:14	103:13	103:14	156:6	129:23	130:1	155:12	156:19	159:12
92:20	92:20	115:17	119:17	constitutional [5]	158:15		159:13	160:16	
95:6	98:18	122:2		82:21	conviction [35]	32:3	counts [9]	42:2	
99:22	100:12	conscience [1]	83:19	82:24	45:1	87:14	42:3	42:8	97:6
100:21	100:23	conscientious [2]		97:23	95:23	95:24	105:10	106:21	119:8
102:1	102:5	111:10	133:17	98:8	97:9	97:16	121:16	183:13	
102:24	102:25	consequences [1]		constrain [1]	104:5	104:15	County [1]	88:10	
103:5	103:16	54:22		constraints [2]	105:10	106:17	couple [6]	27:15	
103:25	104:4	consequently [2]		160:14	112:5	117:2	44:1	44:1	71:18
104:12	104:14	14:22	32:25	constrictures [1]	117:14	118:1	152:4	164:20	
105:7	105:8	consider [34]	22:11	137:23	121:16	122:8	courier [1]	151:4	
106:5	106:23	39:17	40:2	construct [2]	130:11	149:17	course [24]	10:3	
107:16	107:20	42:1	56:20	110:19	153:17	157:20	14:15	15:6	27:14
108:7	108:10	60:16	62:2	constructed [2]	170:1	170:4	28:18	34:21	35:1
108:16	108:17	87:13	103:24	53:10	170:21		46:12	54:14	61:5
108:24	108:25	119:25	120:6	consult [2]	convictions [2]	151:1	108:10	108:25	111:17
109:16	109:17	121:21	121:22	62:12	151:7		119:2	119:19	120:16
110:9	110:10	122:3	122:10	consuming [2]	convinced [3]	69:14	119:2	119:19	120:16
111:24	112:2	146:24	149:1	38:4	134:17	143:25	120:16	122:2	125:22
112:11	115:12	178:22	183:21	contact [2]	convincing [4]	112:12	130:10	132:4	155:11
116:16	117:4	184:18	185:3	124:1	112:17	116:4	162:1	175:17	
117:16	118:6	188:24	189:6	contacts [1]	cooperate [2]	106:11	court [78]	4:12	
119:19	119:25	considerable [4]		contain [2]	106:12		4:20	5:25	6:2
120:10	121:3	93:2	54:9	100:7	cooperation [1]	83:4	6:8	6:12	6:15
122:3	122:11	considerably [1]	64:10	contained [2]	cooperative [1]	74:10	10:7	13:1	18:3
144:22	151:17	119:22		101:5	coordinator [1]	66:19	20:1	20:4	21:9
157:18	157:19	consideration [10]		contains [1]	copies [2]	191:5	24:17	26:10	30:6
157:24	158:4	36:15	79:16	22:13	191:6		31:5	36:20	40:14
160:21	168:7	108:15	117:11	74:2	copy [1]	76:12	42:19	46:13	48:18
168:19	170:13	145:9	184:22	contested [2]	core [1]	116:12	51:21	52:4	54:8
172:25	173:6	188:1	186:13	17:14	corner [3]	31:14	55:12	57:11	58:13
173:9	181:22	considerations [2]		context [6]	153:10	153:19	76:18	80:24	80:25
conference [1]	9:22	117:12	117:16	59:18	cornerstone [3]	117:5	82:7	85:13	86:10
confess [2]	14:8	considered [14]	26:8	132:11	117:9	120:4	87:23	87:23	88:22
14:19		100:23	108:12	173:22	corporation [1]	6:20	89:3	90:14	96:17
confidence [2]	107:1	108:22	116:16	continually [2]	correct [5]	13:2	102:7	107:8	108:18
107:2		119:21	177:17	53:24	13:13	13:20	109:4	111:7	111:12
confident [1]	48:15	179:8	184:9	continuations [1]	171:5		115:19	116:8	116:17
confine [1]	98:24	187:14		continue [6]	correcting [1]	79:20	116:17	119:13	119:25
confined [2]	179:5	considering [2]	107:19	38:15	correction [1]	158:19	120:8	121:21	121:21
179:6		176:13		79:24	correctly [2]	49:17	122:2	122:10	122:24
confirmed [1]	5:12	considers [1]	96:20	179:17	182:25		123:11	123:13	126:5
conflict [4]	103:9	consignment [1]		76:18	correlate [1]	101:4	126:15	144:24	147:23
108:19	125:6	146:8		continues [1]	costs [2]	37:19	151:23	157:7	158:4
conflicting [1]	24:21	consistency [5]	25:21	42:22	counsel [14]	7:14	170:3	177:4	178:22
conforming [1]	63:8	37:18	84:10	41:18	9:20	15:9	180:10	180:12	182:24
confusing [2]	124:20	84:14		65:16	52:4	57:11	183:20	183:23	186:8
173:4		consistent [1]	76:5	95:18	101:13	113:3	189:15	189:20	
confusion [5]	39:24	consisting [2]	20:20	contractors [2]	128:23	129:8	court's [3]	75:20	
42:17	103:10	21:10		146:15	155:19		116:21	148:3	
184:17		consists [1]	66:16	contracts [1]	count [12]	97:6	court-appointed [1]	86:2	
Congress [29]	4:6			Contrary [1]			courthouse [2]	1:3	
5:2	8:15						36:21		
10:14	25:15						courtroom [5]	1:3	
	27:1						27:7	27:7	37:9

92:6		criteria [3]	120:2	153:1 153:2 153:7	defendants [15]	18:24	113:13 114:18 139:12	
courts [26]	3:8	147:12 185:11		153:11 153:18	32:23 40:23 68:21		142:17 142:19 142:25	
4:8 8:9 21:4		critical [2]	105:25	dealers [3]	75:12 75:15 79:2		143:3 143:4 174:23	
21:17 24:22 38:2		185:7		149:11 164:10	104:11 109:9 125:5		175:1 175:4 175:15	
40:24 51:15 51:19		criticism [4]	89:15	dealing [9]	127:7 146:5 159:15		depart [11]	48:14
74:18 74:18 76:16		89:16 107:10 118:11		18:5 18:6 23:23	171:23 184:8		48:22 110:23 115:14	
108:12 109:18 113:19		criticize [1]	51:15	33:8 33:10 42:13	defended [1]	155:7	115:19 157:4 158:23	
114:7 123:12 147:20		criticizing [1]	82:19	74:19 161:4	defender [15]	13:17	177:4 184:19 185:6	
162:10 178:25 185:3		crooks [1]	79:4	deals [5]	13:19 26:23 56:24		190:12	
185:25 190:6 190:10		cross [2]	30:5 46:18	89:24 126:21 135:19	66:17 67:9 67:13		departed [2]	136:4
190:12		crushing [1]	152:7	dealt [7]	68:12 93:16 120:18		136:5	
cousin [3]	172:8	culpability [3]	145:10	30:16 30:17 87:3	142:21 142:25 175:4		departing [2]	37:13
172:8 172:13		146:17 147:25		166:3 190:8	175:6 175:15		135:9	
crack [20]	61:6	culpable [3]	134:15	death [5]	defenders [6]	33:21	department [26]	7:19
80:20 86:4 88:25		134:24 135:4		22:24 23:9 80:7	67:14 91:22 170:2		13:23 13:24 35:22	
127:1 127:5 135:17		cumbersome [1]		80:9	175:8 175:16		36:5 36:12 41:17	
135:19 136:20 136:20		74:24		decide [2]	defense [41]	9:20	53:3 70:16 113:7	
144:2 144:3 144:6		cumulative [1]	23:9	150:6	11:20 15:8 16:8		113:17 120:22 126:1	
144:8 144:8 144:11		curious [3]	64:6	decided [7]	16:21 17:8 31:7		126:14 130:4 142:8	
150:18 166:22 173:17		64:12 138:13		39:17 41:6 44:19	42:7 52:6 67:12		143:10 163:14 164:18	
173:18		current [14]	20:19	57:11 135:16 138:18	73:12 74:8 75:12		164:24 166:6 173:20	
create [6]	25:24	23:22 24:14 38:7		decides [1]	80:13 82:1 82:3		173:22 173:25 174:10	
53:17 103:10 177:1		102:25 103:4 109:25		deciding [2]	82:10 82:14 82:22		174:12	
184:14 184:17		148:1 156:23 157:1		133:13	90:21 99:4 101:12		Department's [2]	
created [1]	40:24	159:7 177:16 179:3		decision [24]	113:3 113:18 114:11		114:3 190:1	
creates [2]	24:20	184:25		22:8 25:3 26:1	114:16 143:8 150:5		departure [48]	49:4
158:9		cut [3]	140:25 141:1	50:16 54:16 55:11	152:5 152:6 152:20		49:4 49:6 56:18	
creating [1]	116:25	186:9		87:20 87:22 89:18	154:20 154:21 155:15		59:22 60:3 60:6	
creative [3]	56:22	cute [1]	130:11	89:23 90:12 119:5	155:19 156:10 160:11		60:9 79:3 83:9	
60:9 145:13		cycle [3]	40:3	135:25 157:14 172:19	167:15 177:8 177:19		90:17 115:16 117:6	
credible [1]	171:4	41:13 52:24		184:19 185:5 185:8	define [1]	49:3	117:13 117:17 145:12	
credit [4]	4:15	cynical [1]	32:10	185:20 186:5 187:16	defined [4]	23:5	154:6 176:9 176:11	
73:15 79:18 130:7				189:20 190:1	96:14 97:8 111:24		176:14 176:23 177:7	
cries [1]	150:12			decisions [19]	defines [1]	149:25	177:11 177:14 177:15	
crime [15]	18:7			10:8 10:11 11:25	definition [4]	97:2	177:22 177:24 178:8	
22:13 28:17 53:24				16:23 21:8 40:22	160:21 162:14 180:15		178:11 178:23 179:8	
54:23 72:6 81:23				55:18 55:20 71:3	definitionally [1]		179:11 180:7 180:25	
96:22 98:7 109:7				81:17 118:24 119:2	96:2		181:23 182:2 185:1	
133:16 145:25 146:12				119:6 137:24 159:12	definitions [3]	26:13	185:4 185:11 185:14	
151:8 171:13				186:7 186:22 187:24	121:4 162:8		186:14 186:22 187:9	
crimes [6]	20:8			decline [1]	defrauded [1]	131:19	187:12 187:16 187:24	
83:15 97:2 97:21				129:1	defendant [43]	15:7	188:12 189:11	
121:12 155:8				decrease [1]	15:16 36:20 37:7		departures [16]	32:20
criminal [56]	5:6			decreases [1]	68:12 69:10 73:2		48:22 48:23 59:21	
7:17 7:18 8:15				decreasing [1]	75:21 76:23 77:3		134:21 159:17 174:19	
9:22 13:22 17:24				deeply [1]	77:17 77:25 78:1		180:15 180:16 182:5	
19:22 20:6 20:6				defend [2]	78:20 90:9 100:3		183:17 186:6 190:3	
20:8 20:18 20:19				104:12	101:7 101:19 104:7		190:5 190:15 190:20	
31:8 36:7 36:11				defendant [43]	109:1 109:6 109:12		dependent [1]	24:25
36:19 36:22 37:4				15:16 36:20 37:7	109:20 111:13 115:2		depending [2]	26:11
39:18 44:7 44:11				68:12 69:10 73:2	120:15 125:5 129:20		31:16	
66:19 67:4 67:8				75:21 76:23 77:3	129:25 130:6 130:18		deportation [1]	31:22
68:20 69:8 75:15				77:17 77:25 78:1	132:3 146:24 147:25		depositories [1]	
76:6 76:15 78:17				78:20 90:9 100:3	158:3 159:7 170:25		131:16	
78:19 79:15 82:10				101:7 101:19 104:7	172:20 176:16 179:5		Deputy [6]	6:20
97:8 97:14 98:5				109:1 109:6 109:12	181:19 185:10 185:13		13:22 27:16 67:12	
99:3 105:3 115:22				109:20 111:13 115:2	defendant's [12]		93:17 142:7	
121:18 123:17 123:25				120:15 125:5 129:20	15:8 15:17 73:5		derived [1]	188:13
125:10 125:11 125:17				129:25 130:6 130:18	73:7 73:19 99:16		derringer [1]	149:20
125:25 126:12 126:21				132:3 146:24 147:25	128:23 157:8 168:5		description [1]	73:6
127:18 127:22 132:20				158:3 159:7 170:25	170:18 170:25 185:13		deserve [1]	36:16
143:5 143:8 155:15				172:20 176:16 179:5			deserved [1]	141:22
156:10				181:19 185:10 185:13			design [2]	95:4
criminals [3]	72:7			defendant's [12]			169:13	
78:23 79:1				15:8 15:17 73:5			designated [1]	7:13
crippled [1]	153:22			73:7 73:19 99:16			designation [1]	7:11
crisper [1]	162:13			128:23 157:8 168:5				
				170:18 170:25 185:13				

designed [1] 143:20	45:14 97:8	106:8 117:11 144:4	147:23 148:9 151:23	Draconionally [1] 82:13
desirability [1] 186:21	difficult [18] 18:8	176:2 176:21 177:2	154:12 156:14 156:15	draft [1] 156:11
desirable [1] 188:24	21:24 42:4 49:22	discussions [2] 11:13	159:16 159:18 159:20	drafted [2] 100:7
desires [1] 122:3	50:9 59:2 64:20	41:16	172:18 180:10 185:25	176:18
despite [3] 32:12	69:18 101:17 134:4	dishonest [1] 59:7	186:7 189:20 190:12	drafts [2] 76:20
35:3 59:1	138:13 143:23 150:5	dismissed [1] 59:24	districts [19] 18:13	117:11
detail [2] 22:22	161:15 171:19 184:18	disparate [1] 120:11	56:14 57:15 61:13	dramatically [1] 161:18
94:25	186:6 189:5	disparities [5] 55:22	65:10 72:23 81:15	draw [5] 36:21 36:24
detailed [2] 21:1	difficulties [1] 102:23	81:14 121:15 127:5	84:22 84:23 113:5	115:2 115:3 188:11
100:8	difficulty [2] 18:4	190:18	114:4 114:22 114:24	drawn [1] 137:22
details [2] 2:19	18:6	disparity [18] 4:7	114:25 115:7 115:9	draws [2] 187:12
151:21	digestable [1] 87:8	18:12 18:13 24:21	155:8 159:13 182:14	188:14
detained [2] 68:21	digests [1] 21:8	28:15 29:17 80:21	diversion [2] 85:15	drive [4] 25:2 134:18
69:2	dilemma [1] 120:7	85:20 87:17 113:6	85:15	139:13 163:16
detectives [1] 88:13	dime [2] 31:14 153:10	114:22 115:6 136:21	division [5] 7:17	driven [2] 145:1
detention [2] 23:18	direct [3] 67:25	150:13 158:10 159:24	7:19 13:23 36:11	162:2
158:18	189:9 189:15	180:17 182:18	67:14	driver [1] 58:22
determination [3] 51:8 148:5 191:15	directed [1] 146:1	displayed [1] 23:4	divorced [1] 166:16	driver's [1] 131:14
determinations [5] 10:14 10:16 18:6	direction [1] 2:24	displaying [1] 22:24	docket [3] 45:24	drives [1] 76:6
147:22 148:4	director [1] 7:2	dispute [4] 17:3	70:23 77:19	driving [2] 103:18
determine [19] 9:4	disabled [2] 134:17	17:18 74:6 151:25	document [2] 20:23	147:16
9:11 42:24 43:3	134:22	disputed [1] 102:10	75:10	drug [61] 18:5
43:17 90:7 90:7	disadvantaged [1] 16:15	disputes [3] 57:12	documents [2] 63:25	32:3 39:2 68:11
96:16 96:21 99:12	disagree [1] 137:21	75:1 76:1	117:10	68:21 75:16 80:24
99:20 100:16 109:19	disallow [1] 157:23	disrupting [1] 38:19	does'n't [18] 18:9	80:25 85:13 85:18
116:8 125:17 185:10	disappear [1] 59:5	disruption [1] 43:1	24:14 28:18 34:13	85:24 86:12 88:5
185:12 185:13 190:13	discharged [1] 23:2	disseminated [1] 91:15	37:7 50:9 57:22	88:9 106:9 106:17
determined [3] 97:18	discipline [2] 130:9	distasteful [1] 24:1	78:22 79:11 88:24	126:4 139:20 140:22
126:17 184:2	130:10	distinction [1] 97:20	98:13 106:13 110:13	143:18 143:19 143:21
determines [4] 83:5	discourage [1] 147:2	distinguish [1] 150:14	114:18 118:1 118:23	143:24 144:4 144:21
99:18 107:9 115:19	discouraged [4] 176:9	distinguished [2] 2:5 2:10	151:8 172:21	144:23 145:22 146:3
determining [7] 73:19	176:13 177:14 178:3	distinguishing [3] 150:11 150:24 153:6	dog [3] 110:11 110:14	146:14 148:22 149:2
90:20 102:24 144:18	discovery [6] 69:11	distributed [1] 97:12	124:11	149:5 149:15 150:25
146:24 158:8 185:1	76:25 100:15 100:20	distributes [1] 172:11	dollars [1] 131:19	151:7 151:8 151:17
detract [1] 111:14	101:5 169:19	distributing [1] 166:22	done [28] 2:22	152:17 153:6 155:6
detrimental [1] 106:6	discretion [56] 11:15	distribution [1] 32:4	4:16 16:7 16:7	155:7 158:6 158:8
develop [5] 3:16	11:16 11:17 11:18	distributor [2] 151:4	16:9 30:25 40:10	158:13 158:16 158:22
4:10 5:5 26:3	14:14 15:1 15:22	172:11	48:17 49:24 53:10	160:8 160:12 160:17
69:4	16:1 16:20 16:22	distributors [2] 165:6	60:9 83:4 86:23	161:4 161:9 161:19
developed [3] 21:11	16:25 26:2 27:11	172:16	87:19 88:1 96:19	161:22 162:16 162:20
83:1 102:19	38:4 48:25 50:7	district [79] 4:8	97:10 127:19 137:17	163:9 163:17 163:21
developing [1] 93:13	52:12 54:9 55:6	5:25 6:1 6:2	139:5 139:16 154:22	164:1 171:14 173:2
device [1] 121:10	71:17 89:4 90:14	6:8 6:15 6:15	154:22 156:8 157:14	drugs [16] 100:2
devote [2] 40:8	116:21 118:12 120:6	10:7 13:1 31:5	166:24 186:13 188:23	100:3 101:6 135:17
65:21	128:1 128:19 132:18	33:5 35:2 56:12	dope [2] 81:20 81:20	135:21 136:24 139:12
Diego [1] 31:18	133:14 134:2 134:3	56:19 56:24 56:24	doubt [7] 34:19	139:14 142:10 146:7
difference [5] 76:13	137:9 137:9 137:16	57:10 57:11 57:16	83:14 88:16 109:3	148:23 149:17 150:10
80:23 88:11 121:12	137:23 137:25 138:2	57:19 57:23 58:8	116:6 116:9 157:23	150:14 151:1 164:25
151:15	138:18 138:24 139:5	58:14 61:4 61:8	down [17] 9:25	due [3] 17:4 34:4
different [36] 2:4	139:7 147:21 148:4	61:12 65:8 65:8	22:22 27:25 40:3	during [5] 9:9
10:9 20:4 20:15	154:8 156:22 156:24	68:3 68:4 68:9	58:24 59:3 69:17	41:12 72:21 72:22
22:14 23:6 25:14	159:4 167:3 167:9	69:11 70:12 70:16	83:20 104:21 125:23	120:15
29:16 29:17 29:18	167:11 182:5 183:19	71:25 72:2 72:5	137:2 149:12 150:1	duties [10] 2:25
47:24 56:22 58:11	185:3 185:6 185:10	72:11 72:12 72:17	153:15 165:23 167:16	4:1 4:9 5:24
84:21 84:22 84:23	190:11	74:18 80:22 81:9	185:24	8:6 8:8 19:25
84:23 85:5 95:4	discretionary [4] 71:14 71:16 185:25	83:3 84:25 85:2	downward [22] 110:23	20:11 102:12 145:4
95:15 96:6 97:17	189:20	88:6 93:17 94:8	159:17 177:4 177:7	duty [4] 48:5 73:18
98:17 113:1 113:21	discuss [2] 35:23	99:23 100:7 103:3	177:11 177:13 177:21	73:20 102:14
115:9 135:23 136:9	75:15	115:19 122:24 122:24	177:23 178:22 180:7	dyed [1] 154:20
140:5 171:14 175:17	discussed [1] 68:8	122:25 123:2 123:11	180:14 180:15 180:25	dynamics [1] 146:2
177:5 180:6 180:6	discussing [1] 180:10	123:13 127:23 127:24	181:22 182:2 182:5	
184:21 186:25	discussion [10] 26:7	133:16 143:6 146:3	183:17 184:19 185:1	
differently [3] 24:18	27:20 77:1 95:10		185:4 185:6 185:11	
			dozen [2] 68:13	
			68:13	
			Draconian [2] 81:6	
			91:4	

-E-

E [1] 156:12	employee [1] 79:14	especially [2] 25:10	excellent [3] 70:14	128:18
early [8] 15:4 17:4	en [1] 30:1	60:20	80:5 108:23	explained [1] 90:6
43:4 69:6 69:12	enacted [4] 76:17	essence [1] 167:5	except [4] 79:12	explains [1] 179:11
69:13 75:1 135:5	76:24 156:21 160:22	essentially [6] 73:20	83:15 168:16 168:17	exponential [1] 178:13
easier [4] 9:5	enacting [1] 161:25	101:22 142:10 168:24	exception [2] 126:20	express [3] 15:4
37:21 99:10 173:4	enactment [1] 77:11	169:17 183:20	144:2	15:11 36:8
easily [4] 35:15	encompass [1] 172:21	establish [2] 143:22	exceptional [4] 16:12	expressed [4] 61:17
105:19 121:6 177:12	encounter [1] 121:14	158:12	113:14 138:24 181:20	88:20 106:14 141:8
East [1] 135:14	encountered [1] 28:24	established [4] 53:1	exceptions [1] 16:13	expresses [1] 188:5
Eastern [4] 72:2	encouraged [3] 49:3	110:24 117:23 119:23	excerpt [1] 97:12	expression [3] 15:17
72:5 159:16 159:20	178:3 186:23	estimate [3] 17:9	excessive [1] 74:16	24:25 52:11
easy [1] 152:5	end [18] 4:6 22:9	64:15 64:24	excluding [1] 178:8	extend [1] 12:20
echoed [1] 141:4	25:13 43:15 44:7	estoppel [2] 32:1	exclusive [1] 178:20	extensive [1] 67:7
Ed [1] 2:16	44:12 69:13 77:9	109:23	excuse [2] 105:18	extent [7] 22:17
edit [1] 191:8	85:5 141:23 149:4	et [1] 8:13	131:17	128:18 137:22 160:9
editions [1] 20:22	149:5 166:1 166:12	evaluate [3] 73:9	executed [1] 145:4	162:17 173:11 186:19
educates [2] 78:1	166:13 175:23 179:15	90:22 190:11	exemplary [1] 187:18	extra [1] 96:18
78:2	181:23	evaluating [2] 73:18	exercise [3] 15:1	extraordinary [2] 157:5 184:23
education [1] 177:10	ended [2] 127:17	124:14	52:12 66:13	extreme [2] 140:18
Edward [1] 7:11	130:24	evaluation [1] 8:10	exercising [1] 83:11	158:25
effect [18] 4:19	endless [1] 177:4	event [6] 27:24	exist [3] 28:18 28:18	extremely [3] 16:1
55:24 68:1 68:24	endorse [2] 19:3	32:7 43:6 126:22	114:25	16:10 170:17
70:13 73:11 77:2	79:19	127:17 151:10	existed [2] 55:3	eye [1] 23:16
86:23 90:3 100:25	endorsed [1] 156:13	eventually [1] 8:18	124:2	eyes [1] 136:25
106:6 121:20 150:22	enforcement [4] 87:22 126:16 165:2	everybody [12] 41:7	existence [3] 4:1	eyeshade [1] 35:14
161:3 186:5 187:7	174:7	46:8 79:18 86:9	8:24 9:12	
effort [9] 4:6	enforcing [1] 115:1	114:23 151:11 152:23	existent [1] 118:19	
8:23 25:11 38:9	engage [1] 126:4	153:22 161:11 172:21	existing [2] 97:24	
38:15 109:18 119:22	engaged [2] 106:22	173:1 174:16	150:18	
165:3 165:5	131:13	everywhere [1] 151:5	exists [2] 105:11	
efforts [5] 35:24	engendered [1] 39:24	evidence [10] 81:3	110:19	
51:2 79:25 148:13	engenders [1] 42:17	102:2 106:20 109:6	expand [1] 151:10	
160:22	engine [1] 103:18	111:2 111:11 112:14	49:5 115:15	
eight [13] 20:21	engineers [1] 42:17	116:4 116:5 116:6	expanded [3] 48:24	
29:13 33:4 46:4	engine [1] 103:18	evident [1] 24:21	49:5 115:15	
66:3 89:3 102:18	enhance [1] 116:10	evidentiary [1] 144:22	expanding [1] 184:16	
107:14 127:10 127:13	enjoy [1] 46:23	evolution [2] 99:6	expansive [2] 48:24	
127:16 127:17 155:11	enjoyed [1] 14:20	99:8	173:1	
either [18] 3:4	enormous [3] 80:22	evolutionary [1] 45:19	expect [1] 173:25	
4:21 5:4 17:17	81:13 85:24	evolutions [1] 99:5	expectation [4] 31:24	
24:15 49:3 60:23	entered [2] 40:14	evolved [1] 46:5	41:8 107:12 107:13	
92:8 95:15 95:19	76:3	ex [2] 5:13 30:21	expectations [2] 40:13 43:2	
99:15 109:15 109:16	entering [2] 96:7	ex-husband [1] 30:20	expected [2] 22:3	
120:25 129:13 138:10	123:12	exact [2] 25:22	78:14	
138:22 159:23	enterprise [1] 78:20	84:21	expend [1] 74:15	
El [1] 47:25	enthusiasm [1] 160:17	exactly [2] 109:19	expensive [1] 74:24	
elaborate [1] 167:7	entire [5] 8:22	149:22	experience [25] 14:13	
election [1] 164:16	12:21 159:25 168:4	examine [1] 42:14	14:25 15:23 18:21	
elemental [1] 146:9	172:17	example [27] 19:23	20:2 22:1 24:10	
elements [6] 95:20	entry [1] 99:16	22:11 26:6 29:24	24:12 29:13 33:5	
96:6 96:12 96:14	envision [1] 53:19	30:9 40:2 52:11	57:9 62:19 72:18	
109:10 169:22	envy [1] 160:6	61:19 68:11 81:7	90:25 98:10 99:5	
eligible [2] 95:20	equalize [1] 152:22	85:21 101:5 113:2	102:22 113:16 120:17	
97:24	equally [1] 105:14	115:24 119:7 121:8	148:10 150:5 162:6	
eliminate [3] 25:23	equate [1] 149:14	125:19 134:9 135:12	171:15 171:17 182:13	
83:8 190:17	equating [2] 149:15	151:20 159:15 167:14	experienced [3] 99:9	
eliminated [1] 90:4	149:19	168:9 170:6 179:4	128:20 176:5	
eliminating [1] 184:12	equation [1] 143:1	179:24 189:3	expert [2] 32:14	
elsewhere [1] 113:1	era [1] 23:15	examples [11] 31:12	94:18	
emphasis [2] 143:21	erased [1] 133:22	51:3 59:17 60:19	expertise [1] 75:3	
143:24	erroneous [1] 8:4	60:22 114:12 135:13	experts [1] 73:14	
emphasizing [1] 36:17		145:17 167:8 176:22	expired [1] 12:9	
		178:12	explain [2] 90:24	

Index Page 10

August 12, 1996

142:8 144:17 182:16 183:8 183:10 187:20 generalization [1] 184:15 generally [4] 4:1 9:1 34:25 74:24 generated [1] 185:23 generates [1] 66:7 gentleman [3] 125:20 131:24 138:15 gentlemen [1] 122:16 geographically [1] 47:14 Germany [1] 130:7 get-away [1] 58:22 girlfriend [1] 150:9 girlfriends [2] 152:7 153:22 given [30] 4:9 9:23 20:18 50:18 50:19 61:5 62:6 62:20 71:16 71:17 79:17 85:25 86:20 90:23 91:2 104:6 110:20 115:18 116:19 117:13 119:14 134:20 139:20 150:6 156:5 159:4 188:8 190:12 191:5 191:7 giving [6] 124:11 127:24 132:25 138:3 141:16 170:6 glad [4] 43:14 113:11 181:3 181:5 glass [1] 68:17 gleaned [1] 100:19 goal [7] 29:3 33:17 37:6 37:17 120:4 128:9 182:24 goals [8] 41:22 84:12 86:24 105:25 132:15 133:19 182:1 190:16 goes [3] 2:13 8:11 52:15 Goldsmith [37] 7:4 59:12 59:16 60:3 60:18 61:7 61:16 62:4 62:15 62:18 63:3 63:5 63:10 63:14 63:19 89:7 90:10 91:7 91:23 92:3 112:9 112:18 112:21 114:8 118:10 118:15 118:23 119:16 121:17 122:14 166:25 167:1 167:22 168:8 173:14 173:15 174:9 gone [4] 30:11 30:20 84:12 139:2 good [30] 2:1 22:8 27:23 34:11 69:4 69:19 70:5 70:17 70:17 77:18 77:21 81:11 82:10 82:18 82:19 83:4 83:10 85:10 95:10	98:21 102:19 103:19 111:10 121:2 134:20 143:16 162:11 176:11 184:11 184:16 Government [27] 16:21 17:5 29:21 32:2 56:8 74:8 78:18 78:20 78:22 78:24 79:8 79:9 79:12 85:23 89:18 89:21 89:23 90:12 90:19 98:5 101:11 101:12 101:24 149:12 169:20 170:15 170:16 Government's [2] 17:6 77:2 grading [2] 96:15 97:21 graduate [2] 13:5 143:4 graduation [1] 13:8 Grady [12] 175:3 175:9 175:11 175:12 181:4 181:7 181:10 181:16 182:7 186:20 188:17 191:8 grams [4] 86:4 86:15 151:13 151:13 grand [1] 100:14 graph [1] 46:25 graphs [1] 47:1 grapple [1] 70:18 grateful [4] 38:12 60:21 60:24 64:4 gratitude [1] 12:20 great [13] 2:20 4:15 37:15 39:5 48:19 62:4 70:10 82:10 91:18 94:8 114:20 151:19 182:6 greater [8] 22:22 34:11 108:2 113:8 113:9 115:16 132:10 135:4 greatest [1] 160:12 greatly [4] 18:24 51:3 171:20 184:7 green [1] 35:14 grid [1] 69:10 grief [1] 53:2 ground [7] 18:15 55:8 117:16 176:23 178:22 179:8 179:10 grounds [7] 83:9 176:9 176:11 176:13 177:15 178:11 180:6 group [4] 123:2 146:1 146:18 147:25 grow [1] 34:3 growth [1] 34:2 guess [9] 2:2 27:16 28:11 28:23 48:8 60:10 63:1 66:18 174:11 guest [1] 75:5	guidance [7] 2:24 16:11 51:19 55:12 55:12 131:1 162:10 guide [3] 21:2 21:5 151:10 guided [1] 146:8 guideline [101] 8:17 8:19 21:2 21:3 21:12 22:12 22:13 23:23 24:11 25:3 26:13 27:14 28:20 35:7 37:3 37:12 37:21 38:7 39:2 40:3 40:7 40:19 41:11 42:3 50:20 53:25 54:7 56:25 57:12 59:17 60:1 61:6 64:22 72:9 73:14 73:16 74:3 74:5 74:7 74:11 75:2 76:1 90:18 94:21 96:25 97:5 98:14 99:6 99:19 99:20 99:22 100:5 100:8 100:24 101:8 102:6 102:9 103:4 103:9 103:21 103:23 104:1 104:2 105:24 107:20 107:22 107:24 108:4 109:13 117:5 122:4 136:3 143:25 144:6 144:7 144:21 144:24 146:13 146:20 146:21 146:22 147:2 147:3 147:5 147:19 148:17 158:8 161:1 162:9 162:16 167:22 167:25 168:24 172:23 182:14 183:15 186:7 188:7 188:13 188:22 189:2 guidelines [286] 4:11 4:18 4:24 4:25 5:5 5:8 8:2 8:24 8:24 9:3 9:5 9:10 9:11 9:16 11:5 11:11 11:14 11:16 11:21 11:23 14:16 14:18 14:23 15:20 15:25 16:5 16:15 16:23 17:8 17:10 17:19 17:19 17:21 18:11 18:17 19:19 19:20 20:20 20:22 20:25 21:19 22:3 25:11 25:17 26:4 27:9 27:18 28:12 29:17 29:18 30:1 30:16 31:6 32:9 32:10 32:12 32:13 32:24 33:4 33:9 34:3 34:5 34:6 34:6 34:10 34:16 34:23 35:3 35:10 35:11 35:16 35:23 36:18 36:23 36:24 37:10 37:13 37:14 37:16 38:2 38:6 38:9 38:11 38:13 38:18 38:25 39:1 39:11	39:25 40:12 41:3 42:5 42:6 42:9 42:23 46:19 49:13 49:25 50:13 50:15 50:18 51:11 51:12 51:19 53:8 53:14 54:10 54:12 54:18 55:3 55:4 55:9 55:10 55:11 55:16 55:23 55:23 56:16 57:8 57:10 58:15 58:17 60:14 60:20 61:2 62:14 64:2 64:7 65:11 68:1 68:7 68:18 69:8 69:18 69:21 69:24 70:11 71:7 71:15 72:3 72:20 73:11 73:17 73:25 76:4 76:15 76:17 76:23 77:2 77:11 77:12 77:13 78:8 78:11 79:21 79:24 80:11 81:5 81:24 82:12 83:2 83:21 84:9 84:12 85:3 85:5 86:22 89:11 90:5 91:10 91:11 94:19 95:8 95:16 96:7 97:4 99:10 99:12 102:17 103:3 103:16 103:18 103:20 103:22 106:1 107:15 109:11 111:25 112:25 114:2 114:24 115:1 116:20 118:11 119:19 119:22 120:20 120:22 122:6 122:9 124:2 124:12 124:15 124:18 125:1 125:4 125:8 128:4 128:16 129:11 130:25 132:12 132:20 133:9 133:10 133:11 133:14 133:20 133:23 134:1 136:8 137:14 137:16 138:23 139:10 140:14 140:25 142:19 143:19 143:20 144:1 145:2 145:7 145:8 145:8 145:11 145:16 145:19 145:20 145:21 145:22 145:24 147:7 147:8 147:9 147:10 148:9 148:11 148:16 148:22 149:2 149:22 150:3 151:6 154:23 155:5 155:10 155:13 158:15 159:3 159:12 160:8 160:10 161:5 161:9 161:19 161:22 161:25 162:5 167:4 168:21 171:12 171:17 175:20 176:18 182:6 182:20 182:21 183:1 183:10 185:23 187:23 188:13 189:4 189:21 190:8 guilt [1] 99:15 guilty [5] 57:13 76:3 99:16 107:14 115:23 gun [14] 25:6 30:3	30:13 30:14 30:14 30:15 30:15 30:17 30:19 30:22 31:2 59:18 125:23 134:11 guns [3] 30:8 158:16 158:24 guy [7] 78:16 126:17 149:25 150:7 153:10 153:18 172:13 guys [6] 81:21 149:22 152:7 153:9 153:9 153:19 -H- h [4] 176:3 176:14 177:16 189:4 Hadder [1] 156:14 haggard [1] 70:23 half [3] 68:13 153:23 175:18 hammer [3] 85:3 165:23 166:2 hand [6] 78:8 101:17 101:19 149:16 160:8 160:13 handbook [1] 20:25 handed [2] 31:14 83:20 handicap [1] 176:16 handle [3] 15:13 24:17 34:4 handled [1] 30:9 hands [1] 82:18 happening [2] 118:2 154:3 happy [8] 2:2 2:14 123:8 123:14 143:8 163:1 163:3 175:1 hard [7] 2:17 2:21 51:11 79:13 129:12 154:22 172:14 Harkenrider [8] 7:14 7:16 7:20 36:3 65:25 66:1 171:3 173:7 harm [3] 15:15 166:21 166:24 harsh [6] 32:25 34:14 56:25 81:21 81:23 140:15 harsher [1] 115:4 harshly [2] 121:1 121:1 harshness [1] 88:25 head [3] 61:25 64:18 171:25 headaches [1] 42:8 health [2] 179:18 179:22 healthy [1] 91:6 hear [11] 11:14 11:22 43:14 50:24 52:21 53:3 77:8 88:19
--	---	---	--	---

122:23 138:8 151:22	heard [19]	12:14	49:9 50:11 80:13	82:4 85:22 91:16	91:19 108:5 145:15	161:14 164:18 171:11	174:8 174:10 174:10	175:13 185:19 191:13	hearing [15]	1:2	2:23 3:9 17:3	17:11 98:25 102:3	114:1 114:4 116:7	117:24 131:22 155:18	158:1 163:7	hearings [5]	12:1	16:17 74:17 74:20	76:13	heartland [2]	110:22	180:19	heavily [3]	75:10	95:18 152:2	heavy [2]	152:17	158:24	heinous [1]	83:15	held [4]	108:16 109:8	172:15 172:16	help [14]	21:11 41:7	45:10 45:21 45:25	46:10 51:3 75:24	93:21 99:12 114:18	116:24 147:19 185:12	helped [3]	9:23	137:18 173:10	helpful [7]	11:24	18:16 46:7 50:21	51:22 55:6 87:2	helping [1]	2:7	helps [1]	137:20	high [4]	80:6 126:1	135:14 150:20	higher [2]	44:25	126:19	highly [2]	21:19	22:2	highway [2]	53:8	54:17	hill [2]	69:16 163:5	hires [1]	154:17	historical [3]	81:19	159:5 177:16	historically [3]	24:7	47:5 143:19	history [14]	17:24	47:5 71:12 75:16	79:15 125:11 125:12	125:17 125:25 126:12	127:18 127:22 132:20	180:2	hit [1]	150:22	hits [2]	152:8 152:17	hold [2]	12:13 181:16	holds [1]	130:17	home [1]	158:18	homework [3]	80:8	80:9 82:11	honed [1]	17:15	honor [5]	2:5	67:21 80:3 103:14	115:21	hope [12]	2:22	11:2 43:7 117:7	125:15 133:3 137:15	137:16 139:24 182:11	185:24 189:18	hopeful [1]	11:8	hopefully [3]	10:1	141:14 160:23	hopelessness [1]	141:7	hopes [1]	141:16	horrifies [1]	57:19	horse [2]	52:23	104:16	Hospital [1]	30:12	hotel [2]	2:6 2:11	headline [2]	21:14	102:15	hour [1]	30:15	huge [7]	33:5 83:1	85:19 127:5 127:7	140:24 140:24	human [3]	55:1	105:4 152:23	humanistic [1]	145:13	humanity [1]	26:15	humanized [1]	71:20	humanly [1]	71:20	humbling [1]	10:5	hundred [2]	29:10	165:18	husband's [1]	30:22	hypothetical [1]	169:9	hypothetically [1]	115:14	-I-			idea [11]	27:10 27:11	46:2 85:10 107:12	116:3 117:11 162:11	175:22 184:11 184:17	ideal [3]	95:14 95:25	188:11	idealism [1]	98:12	ideas [1]	188:19	identifiable [1]	177:12	identified [6]	41:11	176:8 176:14 177:15	183:11 190:16	identifies [1]	146:22	identify [2]	147:12	177:20	identifying [2]	41:19	148:15	ignore [1]	111:14	ignoring [1]	114:23	illegal [2]	31:12	31:21	illustrate [1]	60:21	immediately [2]	77:3 77:6	immunity [1]	51:25	impact [12]	34:21	40:22 68:7 72:19	81:24 101:8 121:4	164:17 179:16 179:20	181:24 185:22	impacted [2]	18:24	90:2	impacts [1]	5:3	impaired [1]	58:22	imparted [1]	185:6	implementation [2]	74:7 74:22	implementing [1]	37:20	importance [1]	73:24	important [17]	8:6	11:22 11:25 20:10	24:23 37:6 47:21	65:15 65:16 70:3	75:12 81:4 138:7	151:6 151:7 166:20	172:23	importantly [3]	10:12	81:24 184:6	impose [3]	26:10	73:10 98:5	imposed [6]	15:5	55:25 59:20 73:17	98:7 118:20	imposing [3]	37:12	108:12 156:22	imposition [1]	105:3	impossible [1]	69:4	imprecise [1]	29:4	impressed [1]	186:19	impression [2]	113:16	140:20	impressions [2]	12:23	124:18	imprisonment [3]	179:19 179:21 182:1	improper [1]	56:17	improperly [1]	130:8	improved [1]	96:3	improvement [1]	182:6	in-depth [1]	73:6	inappropriate [1]	122:1	incarceration [2]	37:12 158:12	incentive [3]	77:16	140:18 153:6	incidentally [1]	23:25	inclination [1]	186:10	inclined [1]	8:1	include [2]	108:24	184:23	included [3]	42:11	73:4 101:14	includes [1]	97:14	including [5]	7:2	22:15 26:9 42:1	101:9	inclusion [2]	75:8	100:25	incompatible [1]	129:11	inconsequential [1]	183:24	inconsistent [1]	85:16	incorporated [1]	95:20	incorporates [2]	96:12 96:25	incorporating [2]	20:21 109:25	increase [8]	22:15	40:24 107:4 132:2	148:1 163:20 164:7	165:13	increased [5]	23:7	147:20 148:3 190:11	190:15	increases [2]	132:11	157:23	increasing [3]	107:7	158:14 183:13	incredibly [1]	85:16	increments [1]	151:14	incurred [1]	37:20	indeed [3]	5:1	8:5 133:11	independent [4]	24:6 81:17 146:6	146:15	index [1]	21:9	indicated [3]	5:22	35:11 113:16	indicates [1]	102:22	indication [2]	50:19	115:6	indict [1]	168:18	indicted [2]	127:9	167:20	indictment [6]	45:5	76:24 167:20 170:10	183:14 183:14	individual [12]	26:11	28:9 33:24 71:10	83:12 113:20 116:23	125:5 172:1 172:14	184:20 184:22	individualize [4]	37:10 71:9 132:16	132:18	individualized [1]	71:4	individuals [4]	14:25	65:2 85:23 131:20	inequities [1]	79:20	inevitable [1]	35:1	inevitably [1]	38:3	inexperienced [1]	91:17	influence [2]	119:4	183:12	informants [1]	85:23	information [32]	8:14 11:7 73:4	73:10 75:8 75:12	75:13 75:17 78:24	85:8 90:22 91:1	91:2 91:15 91:20	99:11 100:5 100:25	101:4 101:9 101:12	101:13 101:14 102:17	119:10 119:12 130:21	134:14 134:16 134:20	135:6 183:21	informative [1]	75:19	informed [2]	12:3	154:16	infrequently [1]	117:7	ingredient [1]	141:14	initial [2]	9:9	76:20	initiated [1]	9:7	injury [2]	22:17	23:10	inmates [2]	140:8	141:12	innocent [2]	109:2	115:23	input [4]	4:22	11:21 173:19 174:12	inquiries [1]	64:22	inroads [2]	164:12	164:17	inside [1]	154:14	insight [1]	131:1	insights [1]	24:9	insist [1]	82:13	insisting [1]	56:16	instance [3]	88:25	174:19 187:24	instances [4]	114:1	158:24 166:6 169:5	instead [6]	31:1	36:24 81:16 82:25	158:20 168:3	institution [3]	22:19	46:14 55:2	institutions [1]	131:21	instructed [1]	99:19	insulation [1]	47:19	integrity [1]	18:17	intellectually [2]	59:6 83:21	intended [4]	25:15	92:19 129:16 176:17	intense [1]	47:15
---------------------	------------	-------	------------------	------------------	--------------------	----------------------	---------------------	----------------------	--------------	-----	---------------	-------------------	-------------------	----------------------	-------------	--------------	------	-------------------	-------	---------------	--------	--------	-------------	-------	-------------	-----------	--------	--------	-------------	-------	----------	--------------	---------------	-----------	------------	-------------------	------------------	--------------------	----------------------	------------	------	---------------	-------------	-------	------------------	-----------------	-------------	-----	-----------	--------	----------	------------	---------------	------------	-------	--------	------------	-------	------	-------------	------	-------	----------	-------------	-----------	--------	----------------	-------	--------------	------------------	------	-------------	--------------	-------	------------------	---------------------	----------------------	----------------------	-------	---------	--------	----------	--------------	----------	--------------	-----------	--------	----------	--------	--------------	------	------------	-----------	-------	-----------	-----	-------------------	--------	-----------	------	-----------------	---------------------	----------------------	---------------	-------------	------	---------------	------	---------------	------------------	-------	-----------	--------	---------------	-------	-----------	-------	--------	--------------	-------	-----------	----------	--------------	-------	--------	----------	-------	----------	-----------	-------------------	---------------	-----------	------	--------------	----------------	--------	--------------	-------	---------------	-------	-------------	-------	--------------	------	-------------	-------	--------	---------------	-------	------------------	-------	--------------------	--------	------------	--	--	-----------	-------------	-------------------	---------------------	----------------------	-----------	-------------	--------	--------------	-------	-----------	--------	------------------	--------	----------------	-------	---------------------	---------------	----------------	--------	--------------	--------	--------	-----------------	-------	--------	------------	--------	--------------	--------	-------------	-------	-------	----------------	-------	-----------------	-----------	--------------	-------	-------------	-------	------------------	-------------------	----------------------	---------------	--------------	-------	------	-------------	-----	--------------	-------	--------------	-------	--------------------	------------	------------------	-------	----------------	-------	----------------	-----	-------------------	------------------	------------------	------------------	--------------------	--------	-----------------	-------	-------------	------------	-------	------------	-------------	------	-------------------	-------------	--------------	-------	---------------	----------------	-------	----------------	------	---------------	------	---------------	--------	----------------	--------	--------	-----------------	-------	--------	------------------	---------------------	--------------	-------	----------------	-------	--------------	------	-----------------	-------	--------------	------	-------------------	-------	-------------------	--------------	---------------	-------	--------------	------------------	-------	-----------------	--------	--------------	-----	-------------	--------	--------	--------------	-------	-------------	--------------	-------	---------------	-----	-----------------	-------	---------------	------	--------	------------------	--------	---------------------	--------	------------------	-------	------------------	-------	------------------	-------------	-------------------	--------------	--------------	-------	-------------------	--------------------	--------	---------------	------	---------------------	--------	---------------	--------	--------	----------------	-------	---------------	----------------	-------	----------------	--------	--------------	-------	------------	-----	------------	-----------------	------------------	--------	-----------	------	---------------	------	--------------	---------------	--------	----------------	-------	-------	------------	--------	--------------	-------	--------	----------------	------	---------------------	---------------	-----------------	-------	------------------	---------------------	--------------------	---------------	-------------------	-------------------	--------	--------------------	------	-----------------	-------	-------------------	----------------	-------	----------------	------	----------------	------	-------------------	-------	---------------	-------	--------	----------------	-------	------------------	----------------	------------------	-------------------	-----------------	------------------	--------------------	--------------------	----------------------	----------------------	----------------------	--------------	-----------------	-------	--------------	------	--------	------------------	-------	----------------	--------	-------------	-----	-------	---------------	-----	------------	-------	-------	-------------	-------	--------	--------------	-------	--------	-----------	------	---------------------	---------------	-------	-------------	--------	--------	------------	--------	-------------	-------	--------------	------	------------	-------	---------------	-------	--------------	-------	---------------	---------------	-------	--------------------	-------------	------	-------------------	--------------	-----------------	-------	------------	------------------	--------	----------------	-------	----------------	-------	---------------	-------	--------------------	------------	--------------	-------	---------------------	-------------	-------

intensive [1] 124:9	129:19 161:1	44:14 44:15 44:20	5:17 6:17 8:12	26:19 26:21 27:3
intent [3] 59:8	ironed [1] 76:3	44:22 45:4 45:9	11:15 20:1 27:11	27:4 27:6 35:18
130:20 158:3	ironic [2] 107:3	46:12 47:10 47:12	32:21 32:24 37:9	46:10 49:11 49:24
intents [1] 106:22	148:21	48:8 48:11 48:12	37:24 39:7 47:24	50:14 56:8 57:4
interaction [1] 40:11	irritation [1] 160:12	48:18 49:7 49:8	48:19 54:16 55:4	58:19 59:16 59:21
interchange [1] 28:2	issue [23] 11:14	49:20 50:10 50:24	55:17 56:17 56:19	60:5 61:3 61:10
interest [2] 46:21	40:5 42:18 50:13	51:16 51:24 51:24	58:1 58:13 64:11	70:1 81:5 82:8
66:7	52:14 87:3 95:10	52:1 52:17 53:5	70:21 71:2 71:8	154:17
interested [5] 3:6	102:8 102:10 103:10	53:16 54:13 56:5	71:16 73:13 81:17	keen [1] 15:24
3:9 51:6 113:25	104:11 104:21 108:9	56:6 56:7 57:7	90:21 94:8 99:4	keep [9] 12:4 12:10
114:4	125:10 127:15 131:2	58:16 59:10 59:14	114:11 117:22 118:7	18:17 50:23 64:18
interesting [3] 129:17	135:9 159:10 163:19	60:7 61:14 63:10	118:13 119:20 133:8	64:23 94:5 133:18
131:11 181:13	167:6 173:5 186:6	63:13 63:16 63:20	137:11 138:11 146:23	154:15
interests [1] 22:5	issued [1] 21:3	66:25 67:3 67:7	150:11 155:18 156:5	Kennedy [3] 159:20
internally [1] 85:20	issues [31] 16:18	67:22 70:14 70:18	156:16 156:19 156:21	176:8 178:2
interpret [2] 107:25	16:19 17:2 17:14	70:19 71:21 73:8	156:25 157:4 167:5	Kevin [1] 92:23
182:25	17:15 33:11 34:7	73:9 76:8 80:2	176:7 176:10 185:5	key [1] 45:18
interpretation [2]	36:14 40:10 40:16	81:19 82:3 82:4	judgment [8] 5:6	Keystone [1] 58:23
17:18 24:20	42:15 46:9 51:21	83:16 83:18 83:23	22:1 24:7 61:1	kidding [1] 70:19
interpreted [1] 62:14	52:8 57:18 74:6	86:5 87:10 88:17	81:11 81:19 91:11	kidnapping [1] 126:3
interpreting [1] 148:11	75:24 76:2 77:5	89:6 89:12 91:16	97:25	kill [1] 150:19
interstate [2] 53:8	82:25 90:8 94:24	92:5 92:6 92:9	judicial [10] 3:14	kilo [6] 149:10 149:11
54:17	109:23 114:7 143:18	92:10 92:12 92:17	6:10 9:22 11:19	153:1 153:2 153:11
interviewed [2] 72:24	144:22 144:23 151:17	93:8 93:10 93:25	14:17 21:6 50:25	153:17
73:3	157:16 182:11 185:2	94:3 94:5 94:10	124:22 147:21 185:2	kilogram [1] 86:17
intimidated [2] 106:20	items [1] 11:4	94:12 94:14 96:15	judiciary [6] 7:1	kilograms [1] 165:18
148:9	itself [12] 5:9	98:19 103:12 105:21	7:22 35:4 155:21	kind [12] 10:5
intricacies [1] 73:16	8:18 39:22 55:19	110:4 110:7 110:13	156:13 157:13	22:3 23:21 24:12
introduce [2] 5:19	58:24 144:1 145:2	111:1 111:3 111:5	Julie [1] 6:14	29:20 51:11 63:16
92:18	148:5 148:17 179:7	111:10 111:13 111:18	jump [1] 86:25	82:15 90:8 132:22
introduced [1] 14:18	181:24 187:10	112:8 114:14 115:3	June [1] 13:25	144:10 168:8
introduces [1] 39:22	-J-	115:11 117:13 118:8	jurisdiction [1] 85:17	kinds [1] 85:25
introductions [1]	jail [6] 79:15 127:13	118:10 118:17 118:21	jurisdictions [2]	kingpin [4] 86:14
46:2	127:16 127:17 140:17	118:21 120:5 121:22	95:16 95:17	106:10 146:9 172:5
invariably [1] 69:14	165:16	121:24 122:15 122:17	jurisprudence [1]	kingpins [3] 164:1
investigate [1] 152:24	Jeralyn [1] 143:2	122:18 122:18 122:21	82:2	165:6 165:14
investigated [1]	job [7] 4:12 4:15	122:21 122:23 123:6	jurors [1] 109:2	knee [2] 70:6 82:22
82:25	21:24 48:5 82:14	123:8 123:9 123:14	jury [6] 17:5 77:23	knew [5] 33:6
investigating [2]	91:18 102:12	123:16 123:20 123:21	99:15 100:15 109:19	114:19 124:2 124:5
72:25 100:14	jobs [1] 71:2	127:24 127:24 131:6	111:12	135:20
investigation [3]	joined [1] 8:21	133:4 133:4 133:5	jury's [1] 108:25	knit [1] 146:4
72:15 72:23 183:22	joining [1] 185:19	133:6 133:10 133:11	justice [35] 7:19	knowledge [4] 20:8
investment [1] 153:12	jointly [1] 173:10	134:1 135:10 136:18	8:15 13:23 19:22	95:13 96:24 97:11
invitation [2] 19:7	Joseph [1] 7:3	136:19 136:22 138:5	20:9 32:12 35:2	known [3] 17:15
28:4	journey [2] 28:12	138:12 138:20 139:6	35:22 36:5 36:7	26:4 101:24
invite [4] 60:14	81:6	139:9 140:3 140:4	36:19 39:18 59:7	knows [3] 154:9
89:8 178:21 182:3	Juarez [3] 174:23	140:10 140:22 141:11	66:19 68:20 76:6	172:2 172:8
invites [1] 180:23	182:8 182:9	141:19 142:3 142:5	85:2 97:14 99:3	Koon [9] 48:19
inviting [3] 76:10	judge [249] 2:1	142:6 142:7 143:14	113:7 115:22 120:22	185:21 186:3 186:15
94:15 182:4	2:5 2:9 2:12	148:18 151:21 151:23	121:18 123:1 129:19	187:11 190:1 190:7
involve [2] 102:12	2:13 3:1 3:23	151:23 152:1 154:7	130:14 130:23 137:13	190:11 190:23
145:22	6:5 6:6 6:7	154:25 156:14 156:15	142:8 143:5 143:10	Kuralt [1] 53:9
involved [15] 9:8	6:11 6:14 6:15	158:23 160:4 160:24	164:24 173:21 176:8	Kurt [1] 93:6
10:4 22:16 22:21	7:18 9:20 10:6	162:23 166:25 168:4	178:2	-L-
24:8 50:8 53:23	10:8 12:25 13:3	168:19 168:20 168:23	Justicia [2] 28:13	LaBonte [3] 110:19
85:17 89:22 100:3	13:4 13:5 13:5	169:2 169:3 169:9	28:14	111:5 111:18
101:6 138:21 140:22	13:15 14:1 14:2	169:12 169:24 171:3	justify [6] 23:16	lack [3] 9:2 25:18
146:6 151:25	14:4 14:5 14:7	171:9 172:5 173:14	176:23 177:7 177:21	51:9
involvement [1]	14:11 15:4 19:9	177:19 180:1 180:5	177:23 180:7	laid [1] 40:10
85:24	19:9 26:17 27:2	180:8 181:2 181:5	justifying [1] 110:24	landed [2] 28:24
involves [3] 144:9	27:5 31:6 31:23	181:9 181:12 182:7	juvenile [1] 125:21	29:1
144:22 146:12	35:4 35:18 39:3	185:16 187:15 189:22	-K-	lands [1] 96:22
involving [3] 59:18	43:10 43:21 43:24	190:25 191:10	Kafkaesque [1] 104:18	
	43:25 44:1 44:13	judge's [2] 125:16	Katz [23] 13:16	
		judges [54] 2:10		

language [10] 145:25 147:22 176:2 176:5 176:6 176:15 176:19 176:20 176:25 189:7	learn [3] 3:18 10:6 35:10	147:21 148:1 148:3 154:6 154:9 158:8 158:22 158:23 170:9 180:10 186:8 186:14	litigated [3] 58:2 75:10 82:24	lose [2] 45:12 136:14
languishing [1] 160:2	learned [5] 15:4 45:17 46:5 131:5 133:22	levels [14] 17:25 22:23 22:25 23:1 128:4 128:8 132:21 150:24 151:14 154:8 158:21 158:21 158:21 165:22	litigating [2] 40:9 77:6	loses [1] 135:11
large [12] 12:5 38:5 78:24 113:18 113:22 121:14 128:18 135:18 135:19 160:22 164:3 164:23	learning [2] 3:7 32:13	Lewis [1] 12:25	litigation [6] 39:6 39:23 42:13 42:18 109:21 161:16	losing [2] 16:3 23:13
largely [3] 16:19 17:25 55:22	learns [1] 101:3	liberty [1] 105:5	Litt [52] 13:21 13:24 13:25 35:19 35:20 43:10 46:9 51:4 51:14 51:17 52:19 61:17 61:23 93:20 105:22 105:23 110:4 110:8 110:8 110:15 110:20 111:15 111:19 111:23 112:9 112:16 112:20 113:11 115:5 116:15 118:10 118:14 118:16 118:18 119:1 122:20 143:10 143:13 160:5 160:6 163:8 164:20 165:10 166:14 166:20 167:3 173:16 173:16 174:2 174:21 189:23 189:24	loss [4] 18:6 22:17 100:2 133:24
larger [2] 173:1 173:2	least [20] 5:16 15:10 25:24 43:15 47:14 49:10 50:20 86:22 92:18 95:12 98:15 132:13 165:2 171:17 176:7 176:10 185:22 186:13 187:23 190:3	library [1] 62:10	Litt's [1] 168:10	lost [4] 11:20 56:2 133:12 171:2
last [19] 2:6 9:4 15:10 19:10 33:4 43:22 43:23 56:12 72:14 76:14 88:5 106:8 124:7 124:9 140:6 155:11 174:15 174:18 174:21	leave [1] 123:18	license [1] 74:14	live [4] 45:17 133:22 137:13 140:1	lots [1] 85:7
lastly [1] 154:10	leaves [1] 101:16	licenses [1] 131:15	lived [1] 99:8	love [3] 135:15 135:25 139:19
late [1] 72:10	leaving [1] 31:22	lie [2] 18:18 169:3	lives [2] 18:4 115:3	low [1] 166:1
latter [1] 68:5	lectured [1] 155:12	lied [1] 129:20	living [4] 30:19 47:13 135:17 179:17	lower [7] 78:23 79:1 106:24 134:6 150:22 161:22 166:12
law [47] 6:24 7:7 7:8 9:22 13:7 13:8 18:3 18:25 21:5 33:6 33:6 33:7 33:8 36:22 37:25 48:2 48:4 54:21 55:1 55:10 62:13 64:23 67:4 67:8 68:4 69:8 72:8 74:6 74:13 76:15 80:15 83:1 87:12 87:22 92:24 92:24 97:24 125:3 126:16 131:3 138:17 143:4 154:21 154:21 165:2 174:7 175:17	led [3] 39:5 55:21 74:12	lies [1] 96:5	local [3] 99:23 113:9 126:16	lowered [2] 160:20 160:25
laws [3] 48:5 54:3 65:18	left [6] 28:25 34:24 51:22 57:16 71:5 140:20	life [12] 80:7 82:18 105:4 111:6 137:7 141:20 141:22 142:2 154:13 165:16 171:1 171:1	located [2] 7:21 159:20	lowering [2] 160:17 163:18
lawyer [18] 6:23 7:4 31:7 82:1 82:3 82:8 82:10 82:14 91:17 91:20 123:24 152:5 152:6 152:20 154:20 175:14 177:8 177:19	legal [12] 10:18 21:1 21:13 21:16 40:10 54:24 64:22 82:10 90:8 104:21 108:15 108:21	light [4] 72:18 141:23 178:19 186:3	lock [1] 30:1	lowest [2] 152:24 164:2
lawyers [19] 8:12 16:12 37:24 39:6 57:7 57:7 58:1 80:14 82:6 82:6 90:21 104:20 150:6 154:15 155:12 155:16 156:10 167:15 178:24	legislation [3] 4:23 5:3 156:11	likely [4] 39:24 75:11 101:13 190:2	logic [4] 15:24 118:4 180:21 186:21	luck [4] 36:21 36:23 115:2 115:3
lead [6] 74:17 109:21 114:2 117:15 153:4 161:16	legislative [6] 155:14 156:9 157:3 163:2 187:2 187:7	likened [1] 53:7	logistical [3] 178:24 180:22 181:25	lying [1] 168:24
leader [2] 132:3 132:9	legislatively [3] 188:11 188:21 189:13	likewise [5] 61:18 93:12 104:3 105:9 105:16	loners [1] 81:21	
leaders [1] 165:17	legislature [2] 5:2 53:24	limit [7] 12:11 38:20 59:15 92:21 121:16 142:12 142:13	long-time [1] 6:9	-M-
leads [6] 24:6 32:9 55:19 150:11 151:15 151:16	legitimate [2] 60:1 182:17	limitation [2] 12:8 43:17	longer [6] 36:19 54:7 134:24 146:16 148:9 178:16	Madison [1] 93:4
lean [1] 134:4	lend [1] 148:5	limited [6] 65:18 105:9 106:5 106:16 129:7 157:19	look [19] 33:23 39:14 41:15 55:4 59:3 69:15 90:6 90:9 106:18 115:7 116:17 127:11 129:6 129:14 149:23 150:14 152:15 163:2 179:14	mail [1] 96:16
leans [2] 95:17 95:24	less [19] 19:12 34:14 38:24 39:15 44:2 50:13 52:23 74:20 75:11 75:19 81:23 82:24 82:25 113:14 121:1 123:23 135:4 172:23 190:20	limiting [2] 82:2 104:4	looked [6] 15:21 73:13 127:23 128:4 132:4 159:21	mailed [1] 131:17
	lesser [1] 106:21	limits [4] 23:8 119:8 143:7 184:7	looking [16] 11:2 11:4 11:8 46:22 47:17 49:18 69:10 79:13 81:1 116:23 116:25 145:17 162:5 168:4 178:5 180:24	mailings [1] 91:13
	lesson [1] 10:6	line [5] 36:4 104:23 115:8 118:20 128:12	loose [1] 146:3	main [1] 114:20
	letter [4] 27:16 27:19 27:21 56:17	lines [4] 46:18 88:7 138:8 138:9	loose-knit [1] 146:14	mainstream [1] 60:13
	level [28] 17:25 20:3 22:15 23:7 58:4 58:5 58:5 78:23 79:1 79:13 91:9 94:22 94:24 94:24 126:20 147:16	list [12] 40:7 162:3 178:4 178:6 178:6 178:6 178:9 178:10 178:16 178:17 178:20 184:16	loosely [1] 171:15	maintain [1] 12:7
		listed [1] 26:9	Los [1] 156:14	maintaining [1] 157:1
		listen [3] 3:5 152:13 155:17		major [6] 103:7 151:15 160:15 164:1 165:6 165:6
		listened [1] 84:7		majority [4] 83:3 84:18 99:2 144:20
		listening [1] 104:19		makes [4] 24:19 71:6 151:15 152:18
		listing [1] 107:18		male [2] 127:1 127:14
		literal [1] 61:8		man [14] 2:7 30:10 30:18 32:2 58:25 59:23 79:13 131:11 131:11 134:11 135:15 139:10 139:17 171:1
		literally [1] 61:4		manageable [2] 20:10 35:16
		literary [1] 25:18		manager [2] 132:3 132:10
		litigate [2] 40:16 42:21		mandate [4] 122:6 158:2 176:7 176:10
				mandated [2] 4:13 118:6
				mandates [1] 105:6
				mandating [1] 119:25
				mandatories [4] 68:22 68:24 69:3 69:19
				mandatory [28] 40:12

55:10 71:8 71:15 82:13 88:24 89:4 136:6 137:5 137:17 138:21 138:22 138:25 139:3 149:6 149:8 156:18 156:20 157:1 157:4 161:20 161:23 163:15 163:22 165:25 166:4 167:21 167:23	81:14 87:24 99:11 101:6 101:7 101:8 101:14 103:9 103:15 105:17 109:11 109:12 112:9 112:25 113:15 113:21 114:16 114:18 117:13 117:16 120:10 121:21 121:24 123:22 124:24 149:19 156:17 162:4 169:16 172:13 177:4 179:8 179:15 179:22 180:1 181:10 183:14 184:9 185:8 186:18 188:2	26:22 28:1 28:10 35:21 67:24 72:6 80:3 89:8 94:15 97:12 98:23 112:23 133:12 133:25 143:17 155:3 156:13 157:11 174:22 175:13 186:3	mind [16] 50:23 62:2 66:10 66:15 67:17 80:8 84:14 86:13 104:15 104:18 120:9 121:19 132:25 143:15 162:15 186:2	modification [1] 103:7 modify [1] 117:24 money [1] 30:21 monitor [1] 8:8 Montana [1] 47:25 month [4] 33:23 43:15 72:14 91:13 months [14] 4:13 79:7 86:8 124:19 127:13 136:1 136:6 136:7 136:17 139:14 141:20 141:24 153:1 175:25
manipulating [1] 32:15 manipulation [2] 183:14 183:15 manner [4] 106:13 120:5 187:19 187:19 manual [8] 20:20 20:22 27:15 29:9 29:10 29:20 188:13 189:2 manufacturer [1] 151:3 marijuana [3] 127:6 127:7 161:2 mark [1] 188:1 markets [1] 171:14 married [1] 137:8 Mars [1] 29:2 Mary [4] 7:14 7:19 36:2 36:14 Maryland [2] 129:24 130:1 Massachusetts [3] 6:8 6:22 44:10 master [1] 33:9 mastering [2] 25:11 73:16 match [1] 109:11 material [1] 130:20 materials [6] 47:1 100:15 100:20 101:5 115:25 159:10 math [1] 80:6 mathematical [3] 22:6 24:5 50:5 mathematics [1] 26:2 matter [13] 36:9 48:4 78:12 90:2 90:20 90:21 97:14 98:12 108:21 108:23 111:22 151:8 168:12 matters [6] 11:1 12:24 93:2 130:20 150:10 151:9 Matthias [1] 71:13 maturity [1] 77:13 maximum [1] 119:8 maximums [1] 128:11 may [61] 4:18 14:7 17:2 17:8 18:14 19:5 25:7 25:21 26:24 35:25 40:15 42:23 43:1 43:3 51:1 51:1 53:21 59:6 65:3 80:21	mazes [1] 14:21 Mazzone [19] 6:6 6:7 27:5 43:24 43:25 44:15 44:20 45:9 47:10 48:8 48:12 49:7 94:10 110:7 110:18 111:5 111:18 111:22 169:24 mean [25] 12:21 18:1 45:22 50:9 50:11 51:1 56:2 61:23 62:9 85:21 85:25 87:5 87:22 96:13 109:1 111:20 114:16 132:10 151:5 154:14 165:8 165:22 172:8 174:3 180:16 meaning [3] 18:2 132:9 189:6 meaningful [2] 46:16 77:25 meaningless [1] 18:1 means [7] 66:4 77:23 91:4 114:15 141:22 153:5 158:7 meant [3] 43:11 50:1 130:16 measure [6] 37:15 84:10 146:17 157:12 161:12 166:20 measured [1] 144:18 mechanical [7] 22:10 25:7 25:20 50:3 144:25 145:2 145:6 mechanics [1] 23:13 mechanistic [4] 9:2 50:5 50:7 56:1 Medina-Estrada [1] 130:17 meet [5] 2:18 69:1 69:7 132:18 174:6 meeting [7] 2:15 58:4 64:11 68:15 88:6 191:16 191:17 meetings [2] 69:6 69:13 member [4] 2:5 6:9 123:1 123:11 members [31] 2:16 5:10 5:10 5:13 5:15 5:19 7:9 8:21 12:12 19:16	memory [2] 130:22 132:24 mention [3] 23:8 43:11 44:23 mentioned [9] 26:6 62:5 64:1 69:24 80:4 84:15 106:1 132:19 138:13 mentioning [1] 68:8 mere [1] 19:4 Merritt [18] 143:2 143:3 149:7 155:1 155:2 160:4 163:1 163:6 167:2 167:11 167:24 168:16 169:1 169:4 169:11 169:15 170:5 171:5 message [1] 149:18 met [2] 81:10 140:7 metal [1] 68:16 meteor [1] 28:25 method [1] 184:25 methodology [1] 5:7 meticulously [1] 23:5 Mexico [4] 159:22 165:18 172:9 174:24 Michael [5] 6:23 6:23 7:4 13:16 67:11 micromanaging [1] 68:19 microphone [2] 27:3 67:18 mid-twenties [1] 131:12 middle [4] 6:1 55:8 75:1 77:3 might [24] 3:11 9:15 12:18 31:17 31:18 31:20 31:21 40:2 43:11 50:21 56:24 63:23 63:24 110:12 112:5 113:8 116:24 150:25 151:24 152:13 164:11 176:23 177:17 186:22 Miklic [25] 13:10 13:14 13:15 16:11 19:14 19:16 26:18 29:5 35:11 44:15 44:16 44:23 49:12 49:13 49:18 49:22 62:5 62:12 62:17 62:24 63:4 63:6 63:24 64:15 65:7 military [3] 129:24 130:5 130:7	minerals [16] 50:23 62:2 66:10 66:15 67:17 80:8 84:14 86:13 104:15 104:18 120:9 121:19 132:25 143:15 162:15 186:2 minds [2] 23:20 186:2 mine [2] 12:21 191:8 minimal [1] 34:20 minimally [1] 38:19 minimum [26] 40:12 58:4 68:22 68:24 69:2 69:18 82:13 88:24 89:4 136:1 136:6 137:5 138:22 138:25 140:24 156:18 156:20 157:2 157:4 161:20 163:22 165:25 166:4 167:18 167:21 167:23 minimums [10] 128:11 137:17 138:21 139:3 149:6 149:8 161:23 161:25 162:1 163:15 Minnesota [4] 127:9 136:25 137:2 139:17 minor [6] 32:3 39:4 85:18 131:14 146:25 154:10 minorities [1] 156:1 Minturn [2] 139:11 139:11 minute [1] 159:19 minutes [11] 12:4 16:18 43:19 66:3 67:19 67:23 83:25 92:22 110:5 142:12 142:15 minutiae [1] 23:23 misdemeanor [1] 32:5 misnomer [1] 95:22 misrepresented [1] 183:1 missing [1] 178:23 mission [2] 29:3 65:16 misspoke [1] 112:17 mistake [3] 130:22 135:15 141:6 misunderstood [1] 112:10 mitigate [1] 59:5 mitigating [12] 26:8 146:19 146:22 147:10 147:13 159:14 159:17 173:3 177:17 179:3 179:9 181:19 mitigation [1] 134:25 moans [1] 150:12 mode [1] 110:2 model [7] 145:25 147:6 171:12 171:13 178:24 180:22 181:25	most [53] 2:10 7:25 8:18 10:15 10:15 11:5 11:24 16:13 18:7 18:23 20:24 24:23 32:19 39:18 42:4 44:16 44:17 45:2 57:20 61:12 63:2 63:6 63:7 65:15 68:10 70:3 71:6 72:16 72:23 76:1 81:4 81:7 83:15 91:12 91:25 101:13 105:4 113:18 113:22 118:12 118:18 119:7 125:19 134:15 145:21 146:14 148:8 159:3 159:11 165:13 165:14 175:25 184:6 motion [16] 90:13 128:18 129:5 129:13 129:14 157:5 157:7 157:7 157:8 177:7 177:11 177:21 177:23 180:7 180:8 180:25 motions [4] 76:25 77:7 128:21 177:13 motivated [1] 141:13 Mountain [1] 88:4 move [7] 9:23 12:2 66:10 66:14 67:20 97:3 117:12 moved [2] 45:24 152:14 moves [1] 28:25 moving [2] 40:2 107:5 Ms [37] 7:16 61:14 66:1 143:2 143:3 149:7 155:1 155:2

160:4 163:1 163:6	70:9 103:6 127:20	98:24	obstruction [3] 129:19	161:14 162:5 162:9
167:2 167:11 167:24	128:13 129:14 131:6	nothing [8] 28:8	130:14 130:23	162:14 162:16 163:24
168:16 169:1 169:4	139:22 140:17 141:13	31:6 53:12 89:1	obtain [2] 75:11	168:7 168:18 170:4
169:11 169:15 170:5	150:16 152:8 155:20	89:2 141:23 180:23	146:7	170:12 170:21 179:3
171:3 171:5 173:7	160:2 161:8 162:10	181:17	obtaining [2] 21:16	181:22 183:16
174:22 175:3 175:9	162:14 165:12 166:2	notice [2] 17:4	75:7	offenses [11] 15:17
175:11 175:12 181:4	174:7 182:2 182:17	158:3	obvious [2] 80:19	97:18 104:5 152:18
181:7 181:10 181:16	187:21 190:10	noting [1] 141:12	119:7	153:6 155:6 158:6
182:7 182:8 182:9	needed [7] 30:20	notion [3] 114:21	obviously [8] 51:20	158:13 158:16 158:22
188:17 191:8	42:24 42:25 43:1	149:3 154:11	54:5 64:8 89:11	161:1
mule [1] 106:12	141:6 173:23 190:13	November [1] 73:12	110:16 119:3 124:5	offensive [1] 95:11
multi [1] 165:18	needs [3] 15:9	now [59] 9:24 11:17	174:7	offer [4] 24:9 167:16
multiple [4] 42:2	149:25 176:3	15:18 18:13 18:25	occasion [3] 40:15	167:18 167:19
42:3 42:7 86:15	negotiated [1] 183:3	19:14 31:15 33:19	53:13 101:2	offered [1] 136:12
multitude [1] 172:12	negotiates [1] 30:25	34:11 39:1 41:14	occasional [1] 187:21	office [14] 21:4
murder [1] 111:7	negotiating [1] 34:18	49:11 59:4 60:17	occasions [1] 58:19	21:16 22:20 52:5
murders [4] 111:11	negotiation [4] 16:16	60:25 62:21 64:13	occur [3] 47:21	56:15 58:10 67:14
111:16 111:20 111:23	16:20 101:1 101:15	66:19 74:4 74:15	80:18 112:3	88:7 91:22 131:18
must [18] 4:20	negotiations [1] 128:23	75:7 75:13 82:4	occurred [2] 112:7	151:21 175:8 175:15
5:4 5:7 5:16	Neither [1] 114:11	86:4 86:8 92:8	120:23	175:16
10:11 10:13 15:4	NELSON [1] 43:20	93:20 96:4 96:23	occurs [2] 47:18	officer [37] 13:11
23:5 26:8 74:4	nervous [1] 19:1	97:10 97:19 107:14	188:22	13:12 19:25 57:17
100:1 112:1 119:25	never [14] 18:3	111:8 111:13 115:4	October [2] 72:13	62:22 66:22 71:24
122:10 122:11 157:19	28:20 52:2 81:10	121:4 121:23 122:5	124:9	72:23 73:18 73:21
159:25 159:25	124:2 129:25 130:1	122:17 124:15 126:7	off [15] 31:2 32:22	73:22 74:25 75:14
mythical [2] 28:13	139:23 139:23 139:24	127:6 128:7 128:15	54:11 54:12 55:14	75:17 86:17 93:11
81:6	164:18 168:19 172:13	145:15 146:19 148:7	61:25 131:19 148:24	99:17 99:18 100:10
	177:6	148:14 151:12 154:1	150:16 154:16 166:1	100:13 100:18 100:22
-N-		170:14 174:5 174:15	169:13 171:24 175:14	101:2 101:10 101:16
Nagel [2] 27:17	nevertheless [2] 22:13 62:23	174:25 175:7 181:3	188:1	101:22 102:1 102:12
58:1	new [16] 5:5 5:5	186:16 188:10 188:19	offended [1] 154:11	102:25 109:11 119:13
nailing [1] 153:18	5:6 6:24 7:22	number [33] 10:25	offender [13] 23:20	119:13 142:17 145:4
name [5] 6:6	37:25 65:1 72:2	11:4 12:5 21:14	37:5 72:6 78:17	174:23 175:1 177:20
71:23 126:4 143:10	72:5 103:10 159:16	21:15 38:20 39:11	78:22 85:14 86:4	officer's [4] 72:20
154:6	159:21 159:21 174:22	41:11 67:9 67:15	86:18 88:18 170:20	74:2 74:11 75:2
named [1] 5:13	174:24 185:24	68:5 69:25 70:12	184:10 184:18 189:3	officers [41] 8:13
names [1] 2:11	news [1] 15:25	84:15 93:1 96:12	189:3	16:10 19:21 20:17
narcotics [3] 88:12	newspaper [1] 152:12	103:25 119:7 121:11	offenders [16] 17:24	21:12 21:15 21:25
111:16 111:17	next [14] 26:20 31:1	122:5 122:5 124:16	20:13 21:22 24:10	23:14 23:22 24:8
narrow [6] 9:25	66:10 66:16 69:23	124:16 128:5 128:9	30:7 33:19 37:22	25:10 37:24 39:7
16:1 52:9 52:14	71:22 76:9 92:18	132:21 142:24 171:11	64:14 65:19 72:13	52:3 55:13 62:6
85:13 129:7	98:20 122:18 126:19	180:24 181:21 183:13	74:21 78:25 144:11	62:8 73:13 73:15
narrowed [3] 17:3	148:19 153:18 182:8	185:19 188:3	147:13 147:14 150:25	74:3 74:9 74:13
17:16 173:13	Nieto [10] 66:23	numbers [3] 27:12	offense [90] 15:17	74:15 74:19 75:4
national [8] 44:24	66:24 66:24 67:2	63:25 128:6	22:14 22:15 22:18	75:7 75:11 75:25
44:25 45:1 46:23	67:6 76:9 76:10	numerous [2] 15:19	23:6 23:18 31:20	99:4 102:19 102:22
81:15 93:4 155:15	81:22 86:12 90:5	102:15	37:4 37:6 49:15	146:23 148:8 155:20
156:9	night [1] 2:6	-O-	58:5 73:4 75:15	178:25 182:16 182:19
nationally [1] 133:17	nights [1] 70:20	oath [4] 48:5 125:2	85:18 86:16 94:23	182:20 182:22 183:18
nationwide [1] 65:22	nine [3] 86:19 89:3	129:20 130:18	95:5 95:7 95:14	184:3
Naturally [1] 23:3	127:16	object [2] 22:18	95:19 95:23 95:25	officers' [3] 9:19
nature [10] 9:3	Ninex [1] 6:19	90:15	96:6 96:12 96:14	102:13 102:16
21:19 31:8 35:12	nobody [1] 177:24	objections [3] 74:16	96:18 96:20 97:1	offices [2] 7:21
51:5 73:3 121:11	nonmandatory [1] 167:18	74:20 108:6	97:8 97:16 97:20	113:10
143:25 145:1 151:2	nonviolent [1] 158:13	objective [3] 73:9	97:23 98:4 99:19	officials [1] 126:17
near [1] 11:3	nonvoting [1] 5:13	120:2 144:17	100:4 100:11 100:19	officio [1] 5:13
necessarily [8] 25:20	nor [2] 46:13 114:11	objectivity [1] 25:8	101:6 103:8 104:5	often [23] 17:23
50:9 57:21 65:22	normally [1] 22:12	obligation [1] 8:7	104:14 105:24 106:16	17:25 23:13 25:9
113:5 179:7 179:9	note [2] 18:20 190:14	observation [6] 52:19	106:17 107:6 109:10	39:6 62:11 68:10
179:10	noted [4] 39:3	52:20 99:1 99:2	111:25 115:13 117:14	74:1 74:17 75:25
necessary [4] 25:19	notes [2] 13:13	131:9 162:25	128:4 128:8 131:10	78:12 98:11 101:10
110:12 162:12 190:14		observations [3] 44:2 129:18 164:21	132:7 132:21 142:10	102:6 102:7 117:24
need [30] 23:18		observed [2] 76:21	143:18 143:19 144:4	118:1 146:5 172:7
30:13 34:3 40:15		132:23	144:15 144:19 145:9	180:9 183:1 183:6
48:9 48:15 54:7			145:20 145:23 147:4	184:3
			147:8 147:16 147:19	oftentimes [1] 120:10
			150:2 150:16 150:18	old [5] 30:11 70:13
			150:25 151:3 157:17	70:21 72:8 83:11
			158:8 159:9 159:15	

older [3] 131:11 131:23 134:24	opposite [2] 25:22 170:1	-P-	177:6 177:9 177:16 177:20 178:2 178:8 178:11 179:2 180:4 180:11 185:14	165:23 166:1 166:2 166:5 166:7 166:7 166:12 166:13 167:16 169:13 171:7 172:12 180:9
on-line [1] 21:13	option [1] 83:16	p.m [3] 92:16 92:16 191:18	particularly [12] 69:25 78:18 80:24 87:18 94:21 95:16 158:13 159:14 160:11 170:13 176:11 185:20	people's [1] 113:12
once [5] 91:13 91:16 129:11 144:23 177:18	options [1] 71:17	package [1] 137:1	parties [6] 40:4 40:13 44:21 45:8 107:14 114:6	perceived [2] 4:6 160:10
one [107] 4:9 5:18 8:22 11:13 15:3 18:7 19:25 20:10 23:8 23:11 24:7 24:15 28:14 29:18 30:24 32:5 32:6 34:15 37:25 39:8 42:3 42:18 46:24 47:12 49:13 50:12 52:18 52:19 53:19 53:20 54:5 54:19 55:15 57:5 57:23 59:22 64:17 68:22 68:24 69:6 69:16 69:20 72:4 79:5 79:19 79:23 80:16 80:21 82:20 83:7 83:24 85:12 85:23 86:18 87:15 87:15 88:18 88:19 94:1 95:18 96:7 97:7 101:17 105:11 106:18 106:23 107:10 108:16 110:7 110:16 117:11 123:22 125:9 128:16 132:16 133:8 133:11 134:10 134:16 135:12 137:22 142:18 145:7 146:11 147:15 148:23 149:12 153:2 154:9 156:8 157:10 160:8 162:4 162:25 162:25 163:13 165:1 166:14 169:21 171:20 172:15 173:15 177:6 177:9 183:11 186:1 189:17	order [7] 14:23 17:1 96:15 110:13 187:1 187:5 188:25	pads [2] 70:6 82:22	party [3] 5:18 73:23 183:5	percentage [5] 44:11 44:14 62:19 62:24 64:6
one's [1] 54:15	orderly [1] 12:15	pages [5] 21:6 21:10 27:8 29:10 29:11	parties' [1] 17:9	percentage-wise [2] 61:1 64:9
one-year [1] 123:7	ordinarily [3] 176:4 176:4 176:19	paint [1] 27:12	parts [1] 2:4	perception [3] 77:10 78:15 164:25
ones [2] 28:3 81:23	Oregon [1] 47:25	panel [41] 12:14 12:19 41:16 46:8 49:9 52:10 54:19 66:10 66:14 66:16 66:19 67:16 67:19 68:2 68:7 68:10 68:12 70:3 71:10 89:8 91:9 91:21 92:18 92:19 93:21 94:4 104:17 106:9 112:22 122:19 133:12 133:25 140:12 142:9 143:17 156:17 174:15 174:18 174:22 191:1	party [3] 5:18 73:23 183:5	Perez [8] 142:16 143:15 143:16 148:18 171:10 171:19 172:7 173:12
ongoing [2] 62:15 181:24	organization [1] 171:18	panelists [3] 84:7 84:15 98:25	pass [1] 5:2	perfect [2] 38:8 67:2
onto [1] 123:13	organized [8] 72:6 73:8 81:22 145:24 146:1 146:12 171:13 171:15	panels [2] 41:15 143:12	passed [2] 4:5 38:21	perform [2] 7:23 20:11
open [4] 42:15 42:20 51:22 190:19	organizer [2] 132:3 132:9	paper [5] 31:9 95:10 176:2 176:21 176:21	passwords [1] 21:12	performs [1] 187:18
operating [1] 117:9	orientation [2] 98:4 140:5	papers [1] 68:24	past [7] 29:12 32:2 39:15 46:3 75:11 102:18 145:3	perhaps [24] 8:3 9:5 10:6 11:8 18:13 28:6 29:21 32:15 55:7 68:2 68:8 95:3 97:7 97:17 113:4 113:9 124:23 128:10 129:20 166:8 178:17 184:6 185:5 186:15
operations [1] 78:19	oriented [1] 187:25	paramount [2] 37:17 39:10	pawn [4] 30:4 30:13 30:21 30:23	period [8] 4:16 8:25 83:8 86:3 87:14 141:1 166:23 182:15
opinion [6] 51:10 51:25 80:5 80:12 104:24 155:22	originally [1] 6:24	Pardon [2] 181:4 181:10	pawned [1] 30:14	periodic [1] 21:7
opinions [4] 24:22 52:7 52:8 104:22	otherwise [3] 2:20 23:1 23:4	parole [4] 5:15 7:10 20:14 64:4	pawndrop [5] 30:14 30:23 30:24 31:1 59:18	Perish [1] 51:9
opportunities [3] 24:1 24:13 78:5	ought [9] 18:19 42:10 52:25 89:12 128:13 129:6 129:7 164:9 187:15	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	pay [3] 45:20 53:25 153:8	permit [1] 40:19
opportunity [11] 17:12 19:17 23:21 40:4 58:2 72:7 135:22 138:3 155:4 165:12 170:8	outcome [1] 120:10	participant [3] 146:16 146:25 147:14	pedestrian [1] 51:5	permitted [1] 37:13
opposed [7] 64:17 116:4 116:4 121:10 139:3 156:25 175:23	outcomes [1] 122:1	participants [2] 23:12 146:5	penalizes [2] 78:16 78:16	person [13] 78:17 78:23 83:6 83:16 85:9 132:1 140:21 167:20 179:6 179:12 179:13 179:20 180:12
opposing [1] 74:1	outline [1] 21:5	participate [4] 27:20 38:15 78:6 156:17	penalties [9] 54:2 80:20 89:1 127:11 143:22 163:18 163:21 164:7 165:13	person's [4] 146:17 179:16 179:18 179:21
	outlook [1] 76:13	participating [2] 38:14 41:16	pending [4] 108:18 126:5 126:6 126:21	personal [4] 70:17 81:12 102:21 117:23
	outrageous [1] 47:20	participation [1] 76:22	Pennsylvania [2] 3:22 6:1	personality [1] 73:7
	outset [2] 57:10 62:7	particular [30] 25:12 26:1 33:11 35:24 36:13 37:11 42:14 43:4 60:8 79:5 94:19 96:22 103:23 111:19 125:9 129:19 133:16 176:22 177:3	people [68] 3:7 4:23 7:23 7:25 9:18 9:21 16:2 29:20 32:18 33:12 42:20 46:16 49:25 53:11 58:14 58:17 64:8 64:21 65:20 66:12 69:16 81:22 82:18 82:19 83:15 85:8 99:8 106:13 106:22 107:3 107:25 108:3 113:23 114:4 116:2 124:16 131:15 138:8 141:15 149:14 151:12 152:6 152:13 152:23 153:11 154:17 154:19 154:21 160:1 161:23 162:7 163:24 164:8 165:14 165:17	personalized [1] 71:4
	outside [4] 45:12 60:13 110:22 158:5			personally [3] 47:3 152:9 163:4
	outweigh [1] 38:6			persons [4] 80:13 155:7 156:1 158:15
	outweighed [2] 179:21 182:2			perspective [7] 47:5 47:18 68:2 78:13
	overall [6] 82:23 84:13 91:6 91:8 124:25 132:15			
	overarching [1] 186:21			
	overlaps [2] 102:7 102:7			
	overrepresented [2] 125:13 127:18			
	oversight [1] 124:22			
	overwhelming [2] 4:14 14:19			
	own [8] 4:22 24:20 45:24 48:17 66:13 147:16 157:7 189:12			
	owner [1] 31:3			

95:3 123:22 140:5	84:21 99:16 99:24	possessed [1] 101:7	72:9 72:12 72:15	pretrial [3] 76:25
persuaded [1] 112:2	99:25 100:6 100:17	possessing [1] 22:25	72:16 75:8 75:9	77:6 130:3
pertinent [2] 100:4	101:1 101:4 101:11	possession [4] 25:4	99:18 102:23 129:22	pretty [6] 57:2
185:2	101:15 101:15 101:18	31:10 59:18 109:14	182:23 183:22 183:24	104:25 125:21 143:8
pervade [1] 47:15	101:20 102:6 104:8	possibility [3] 98:16	precise [4] 22:6	145:15 150:6
petition [1] 108:18	120:16 120:17 121:5	107:19 190:3	25:4 51:21 162:13	prevalent [1] 183:15
petty [1] 31:20	126:8 129:21 131:22	possible [11] 41:11	precision [2] 51:10	prevent [2] 57:8
phase [2] 104:8	151:24 183:2 183:22	41:20 42:14 42:23	145:5	101:20
126:11	184:3 184:9	77:18 96:21 97:4	precludes [1] 183:20	previous [4] 20:22
phases [1] 9:9	pleading [1] 57:13	119:8 162:13 174:12	predecessors [1] 169:25	57:6 103:1 104:17
philosophical [1] 90:2	pleas [5] 45:5 107:14	183:5	predetermined [1] 128:22	previously [1] 116:16
philosophically [1] 80:11	124:14 124:16 127:11	possibly [2] 32:14	predicate [1] 97:15	pride [1] 29:22
philosophy [3] 54:15	Pleasanton [1] 140:7	33:9	predict [1] 186:1	primarily [2] 98:10
58:6 98:3	pleased [4] 19:17	post [2] 22:20 131:18	predictability [4] 37:17 41:23 106:2	144:8
Phoenix [1] 47:25	35:21 43:6 52:20	post-conviction [1] 104:8	190:21	primary [1] 190:16
phony [1] 131:18	pleasure [2] 53:3	post-indictment [1] 170:5	predictable [1] 190:19	principally [1] 92:19
phrase [2] 70:5	175:19	post-traumatic [1] 180:2	prefer [5] 27:20	principle [4] 98:2
114:15	pled [1] 84:17	potential [7] 47:8	61:23 61:24 98:3	98:8 98:9 98:12
phrased [1] 178:2	plow [1] 18:15	54:22 55:7 77:24	191:8	principles [2] 148:15
pick [1] 132:24	plus [2] 120:14 139:14	113:6 120:7 183:11	preferred [1] 141:24	188:12
picture [6] 23:13	pocket [1] 149:20	potentially [4] 30:7	prehearings [1] 64:11	printout [1] 130:3
45:12 46:22 75:20	point [23] 9:24	76:2 179:2 181:19	preoccupation [1] 65:11	priorities [2] 8:23
121:21 121:23	34:1 37:11 50:17	powder [4] 136:20	preoccupied [1] 23:12	priority [1] 41:12
piece [3] 51:8 68:17	51:6 57:3 57:5	136:21 144:7 173:18	prepare [2] 20:1	prison [11] 30:20
156:11	60:2 69:9 79:17	power [8] 48:21	99:17	31:16 33:12 85:9
piling [1] 85:4	100:11 107:16 114:3	49:2 115:14 117:6	prepared [5] 23:14	86:8 136:16 139:25
pinpoint [1] 28:7	128:3 135:2 139:22	117:13 156:5 168:3	72:17 122:22 140:19	140:2 140:7 141:7
place [10] 2:18	151:7 151:7 154:10	185:25	184:4	171:1
52:10 53:1 55:2	161:10 170:11 177:5	Powter [1] 156:15	preparing [6] 20:2	prisoners [2] 18:24
97:17 111:3 117:18	181:13	practical [1] 90:20	20:11 20:17 21:3	141:5
179:14 179:23 180:13	pointed [4] 49:13	practice [17] 25:9	102:22 182:23	prisons [1] 160:2
placed [3] 74:4	50:14 81:22 171:10	42:7 76:18 78:12	20:11 20:17 21:3	private [2] 113:17
85:15 183:6	pointing [1] 69:17	112:25 113:17 117:21	102:22 182:23	142:23
places [3] 11:1	points [3] 33:11	119:18 121:22 142:23	preponderance [6] 109:6 111:2 111:11	privilege [1] 3:3
50:22 113:22	85:4 90:15	143:7 144:20 168:15	112:13 112:18 116:5	probation [86] 8:13
placing [2] 27:12	police [4] 22:3	184:6 185:22 190:2	prerogative [2] 66:13	9:19 13:11 13:12
83:16	23:24 64:2 64:7	190:4	189:12	16:10 19:21 19:25
plan [1] 131:25	policing [1] 64:8	practiced [5] 6:24	presence [1] 63:11	20:14 20:16 21:15
planet [2] 28:13	policy [10] 21:2	7:5 13:7 76:15	102:20 169:6 182:24	21:25 23:14 23:22
planned [1] 76:25	95:3 97:15 97:25	123:25	183:19 189:10	24:8 25:10 37:24
planning [2] 34:20	108:23 119:11 145:12	practices [2] 113:1	presentation [1] 124:10	39:7 52:3 55:13
58:4	173:21 180:22 187:20	113:9	present [6] 50:23	57:17 62:6 62:8
plants [1] 161:2	polished [1] 98:22	practicing [5] 36:22	102:20 169:6 182:24	62:22 66:22 70:16
played [1] 100:4	polite [1] 82:23	68:4 74:13 123:24	183:19 189:10	71:24 72:20 72:23
player [2] 146:25	political [6] 5:18	175:16	presented [1] 48:3	73:13 73:15 73:18
174:5	10:17 53:22 152:10	practitioner [4] 32:9	73:8	73:21 73:22 74:2
players [2] 164:1	160:14 160:17	80:19 143:3 176:6	77:7 120:11	74:3 74:9 74:10
178:1	politics [4] 163:9	practitioners [1] 8:16	preserve [1] 183:6	74:12 74:15 74:19
playing [1] 130:11	163:18 164:14 164:22	pre [1] 34:17	president [4] 5:11	74:25 75:2 75:4
plea [58] 16:15 16:24	pony [1] 124:11	pre-Guideline [2] 72:22 118:5	5:23 13:2 123:3	75:7 75:11 75:14
17:9 17:10 23:24	poor [1] 179:19	pre-Guidelines [2] 23:15 117:21	presidential [1] 164:16	75:16 75:24 83:17
32:22 33:1 34:8	popular [1] 94:7	pre-indictment [6] 167:16 167:17 167:19	pressed [1] 84:2	93:11 99:3 99:17
34:12 34:14 34:18	pornography [3] 79:6 79:10 79:12	169:18 170:7 170:9	pressure [1] 77:19	100:9 100:13 100:18
40:14 44:7 44:8	portion [1] 12:18	pre-sentence [24] 17:13 20:1 20:11	presumably [2] 111:20	100:22 101:2 101:10
44:12 44:19 44:21	Portland [1] 47:25	20:17 21:3 21:20	111:23	101:16 101:22 102:1
45:2 45:2 45:6	pose [2] 65:19 65:20	23:14 56:21 64:17	presumption [5] 8:5 41:2 85:14	102:11 102:13 102:16
45:7 56:10 57:12	position [11] 17:7	70:15 70:17 72:8	86:21 144:10	102:18 118:25 119:11
57:14 70:2 70:7	36:8 53:3 73:21		presumptive [1] 15:3	119:12 119:13 126:1
74:13 76:3 76:5	74:4 102:2 104:25			126:14 127:13 139:15
77:9 82:6 84:19	147:24 152:6 174:1			142:17 145:4 146:23
	183:7			148:8 149:18 155:19
	positive [3] 28:3			174:23 175:1 177:20
	87:2 178:19			178:25 182:16 182:22
				184:3
				problem [48] 19:21

21:23 21:25 29:5 29:23 29:25 35:9 35:11 49:11 49:15 50:12 51:6 51:9 51:11 51:12 51:13 52:8 52:15 54:25 60:4 62:16 88:15 90:18 108:15 113:6 114:13 119:18 121:3 136:21 136:23 145:23 146:11 149:3 150:7 160:16 163:16 165:1 167:23 167:25 173:1 173:23 174:11 176:5 177:12 177:18 178:14 183:11 183:18	21:23 21:25 29:5 29:23 29:25 35:9 35:11 49:11 49:15 50:12 51:6 51:9 51:11 51:12 51:13 52:8 52:15 54:25 60:4 62:16 88:15 90:18 108:15 113:6 114:13 119:18 121:3 136:21 136:23 145:23 146:11 149:3 150:7 160:16 163:16 165:1 167:23 167:25 173:1 173:23 174:11 176:5 177:12 177:18 178:14 183:11 183:18	21:23 21:25 29:5 29:23 29:25 35:9 35:11 49:11 49:15 50:12 51:6 51:9 51:11 51:12 51:13 52:8 52:15 54:25 60:4 62:16 88:15 90:18 108:15 113:6 114:13 119:18 121:3 136:21 136:23 145:23 146:11 149:3 150:7 160:16 163:16 165:1 167:23 167:25 173:1 173:23 174:11 176:5 177:12 177:18 178:14 183:11 183:18	productive [2] 107:1 141:17 professionals [1] 37:9 professions [1] 57:21 professor [13] 7:7 92:23 92:24 93:24 94:12 94:14 98:11 117:3 119:17 174:20 185:17 185:18 189:22 program [4] 21:10 85:16 124:7 124:9 prohibited [1] 49:4 prohibition [1] 109:16 project [1] 9:17 promote [1] 25:20 promoted [2] 142:18 186:22 promotion [1] 153:8 promulgated [1] 120:23 pronounces [1] 90:2 pronouncing [1] 66:25 proof [4] 32:18 83:13 116:5 157:20 proper [5] 90:17 91:1 125:15 137:19 138:2 properly [1] 108:22 property [1] 22:19 Proportionality [1] 37:5 proportionate [1] 28:16 proposal [4] 157:3 163:2 163:14 164:7 proposals [1] 75:23 propose [2] 46:20 46:21 proposed [3] 16:9 41:20 156:11 proposition [1] 10:10 prosecute [7] 30:6 89:24 120:25 163:24 163:25 164:8 165:19 prosecuted [2] 31:5 31:18 prosecuting [7] 16:8 25:1 25:5 101:19 120:19 128:24 164:10 prosecution [7] 11:19 15:9 73:1 89:21 90:3 128:24 173:21 prosecutions [1] 88:14 prosecutor [30] 31:7 32:17 70:6 81:10 83:5 86:6 91:3 107:8 114:17 118:23 120:17 134:5 134:15 135:1 135:6 152:20 157:6 158:4 168:3 168:11 168:12 168:17	168:23 169:5 169:10 169:23 170:7 170:8 177:19 183:12 prosecutorial [1] 107:4 prosecutors [23] 40:23 58:12 73:12 81:18 84:24 85:2 107:7 113:18 118:13 119:4 120:24 128:20 129:8 150:5 156:6 156:24 159:4 167:4 167:10 167:12 178:25 183:2 183:18 protect [3] 126:22 168:25 183:2 protection [3] 23:19 65:15 109:8 proud [2] 3:13 3:14 provable [3] 105:14 105:19 169:8 prove [5] 25:6 121:6 121:6 121:7 170:3 proven [2] 115:23 116:9 provide [8] 21:8 21:13 26:7 51:19 95:3 108:2 130:20 147:20 provided [3] 21:1 70:17 75:13 provides [4] 20:23 25:3 153:5 153:6 providing [2] 20:12 120:1 proving [1] 25:2 provision [8] 23:8 89:16 95:1 95:7 98:18 103:5 117:4 118:6 provisions [3] 100:21 102:20 102:25 provocative [1] 66:9 proxy [1] 171:18 public [28] 1:2 8:16 10:12 10:18 13:17 13:18 15:9 23:19 36:7 66:17 67:9 67:13 67:14 68:12 78:2 80:12 91:22 93:16 107:1 129:3 142:21 142:24 152:12 164:23 175:4 175:6 175:7 175:15 publish [2] 10:11 11:3 published [5] 10:25 20:23 21:6 27:21 97:13 pull [1] 27:2 punishable [1] 78:3 punishment [6] 77:24 77:24 80:15 98:5 98:7 105:3	purchased [1] 156:3 Purdy [6] 2:16 28:5 47:1 67:25 76:11 80:9 Purdy's [1] 80:10 pure [3] 55:3 95:11 95:14 purpose [6] 9:12 18:12 84:9 129:15 165:24 166:10 purposes [8] 9:7 86:22 96:15 97:22 105:13 106:6 188:15 189:16 purview [2] 103:20 105:17 put [16] 25:10 29:9 35:14 48:17 50:16 56:21 65:3 77:3 79:9 82:17 102:2 125:16 145:16 148:23 164:6 178:19 puts [1] 77:16 putting [2] 2:17 2:22 -Q- qualifies [1] 185:10 quality [2] 16:11 31:8 quantification [1] 189:5 quantified [1] 180:20 quantify [1] 29:8 quantities [2] 145:7 158:25 quantity [29] 18:5 100:2 100:3 143:21 143:24 144:23 145:1 149:3 149:23 150:19 150:20 151:9 151:10 151:11 152:17 152:17 158:7 158:9 160:20 161:11 162:1 163:23 166:5 166:11 166:16 166:17 167:21 171:17 172:17 quantity-based [1] 171:16 quarrel [1] 83:5 questioning [1] 142:14 questions [32] 12:13 17:17 18:5 20:24 36:15 43:18 43:22 44:1 44:3 44:5 56:5 59:13 63:22 66:7 70:1 83:24 84:4 87:1 92:22 102:16 110:5 112:8 112:21 138:10 142:3 162:24 167:1 179:1 180:24 181:17 182:4 191:1 quick [2] 87:15 171:9	quickly [6] 67:20 78:10 78:14 88:17 150:6 154:4 quirky [1] 63:16 quite [11] 25:9 25:14 34:13 56:15 65:12 65:21 113:1 132:7 163:11 171:14 171:15 quote [2] 188:4 189:6 -R- radical [1] 121:18 raise [1] 153:8 raised [1] 36:15 ramification [1] 151:19 range [17] 14:14 15:2 16:3 26:10 39:4 73:20 99:20 102:6 102:9 104:2 105:8 122:5 127:11 132:10 150:22 158:14 175:24 ranged [1] 127:12 ranges [4] 15:3 128:10 151:10 151:13 rarely [1] 24:12 rate [1] 44:8 rather [17] 15:2 44:2 55:9 94:24 95:25 117:17 123:25 130:21 132:25 141:25 146:9 147:16 148:1 148:16 164:2 164:10 170:3 ratio [7] 144:3 144:3 144:11 173:18 173:20 173:24 174:6 rational [2] 15:11 29:15 rationally [1] 15:12 Raymond [1] 142:20 re-comment [1] 46:1 re-sentencing [1] 42:16 re-write [1] 45:25 reach [3] 32:16 32:17 52:9 reaching [1] 85:1 reaction [5] 124:25 127:3 140:8 140:11 140:11 read [14] 46:6 49:17 52:6 56:3 57:14 57:19 71:12 76:19 91:24 92:1 115:25 132:4 178:7 191:6 readily [1] 169:7 reading [2] 104:22 124:6 ready [2] 26:19 35:19
--	--	--	--	---	--	--

Reagan [1] 13:2	recognition [2] 50:6	56:11 76:22 113:15	51:13	21:13 64:22
real [22] 21:24 53:2	124:21	161:17 184:10	remanded [2] 42:16	researcher [2] 70:5
94:23 95:5 95:7	recognize [2] 39:23	regarding [1] 73:3	42:20	82:11
95:14 95:19 96:6	147:23	regardless [1] 29:9	remands [1] 52:13	resemble [1] 187:15
96:12 97:1 97:20	recognized [1] 183:9	Regional [1] 1:2	remark [2] 53:9	resembling [1] 117:20
97:23 98:12 98:16	recognizing [2] 54:9	Register [1] 11:1	68:23	Reset [1] 67:22
100:11 100:19 105:24	64:2	regularly [1] 75:14	remarks [12] 12:4	reside [1] 18:14
115:13 130:12 136:21	recommend [3] 187:3	regulates [1] 62:14	19:15 26:24 43:13	residivism [1] 158:24
152:4 185:9	187:8 188:21	rehabilitation [1] 23:19	63:11 66:9 68:1	resist [1] 189:4
realist [1] 133:21	recommendation [5] 23:17 186:10 187:1	Reilly [5] 7:11	72:19 122:22 123:15	reskill [1] 140:19
reality [4] 72:4	187:5 188:25	63:22 63:23 64:25	123:16 138:4	resolution [1] 17:18
105:15 117:23 146:2	recommended [3] 125:25 127:12 173:24	65:23	remedy [2] 117:8	resolve [4] 17:17
realize [7] 10:3	reconcile [1] 125:7	Reitz [8] 92:23	172:25	57:12 60:4 102:23
26:23 32:24 60:14	record [7] 30:10	93:24 94:14 117:3	remember [4] 2:11	resolved [4] 16:19
128:5 140:16 140:16	59:1 125:22 129:3	119:17 174:20 185:17	27:4 27:6 71:13	108:19 126:7 144:23
realized [2] 60:7	130:24 130:25 139:2	185:18	reminded [1] 43:12	resolving [2] 18:12
141:6	records [1] 130:5	reject [2] 129:13	reminds [1] 82:17	18:15
really [38] 2:12	recumbent [1] 104:15	129:13	remorse [1] 15:18	resources [5] 40:8
24:14 25:23 29:2	redesigned [1] 147:20	relate [1] 145:20	remove [1] 75:24	62:6 65:21 81:2
29:19 29:25 36:5	redraft [1] 188:2	related [12] 42:3	removed [1] 47:13	164:9
36:14 36:18 41:4	reduce [7] 22:5	76:1 103:17 128:3	rendered [2] 129:1	respect [18] 26:5
41:7 45:20 46:8	24:4 25:24 39:11	144:22 145:11 153:21	183:24	49:1 80:15 84:11
61:10 62:9 62:25	41:21 128:8 132:21	179:3 179:12 180:12	rendering [1] 185:8	91:10 112:11 112:25
65:5 72:4 78:15	reduced [1] 147:15	181:21 183:16	reopen [1] 42:21	116:25 157:16 157:18
79:1 79:6 83:10	reducing [2] 82:2	relationship [6] 68:15	reopening [1] 51:6	157:21 159:9 159:14
85:7 85:10 86:7	145:18	69:5 69:20 69:22	repeat [1] 27:5	168:14 169:22 170:14
91:3 108:1 108:21	reduction [1] 158:1	70:8 149:7	replace [2] 176:19	190:3 190:4
118:6 128:12 130:6	reductions [1] 40:20	relationships [1] 73:7	176:21	respects [1] 117:20
130:25 135:10 152:19	redundant [1] 184:13	relative [3] 56:20	replacing [1] 81:18	respond [3] 17:8
153:9 168:9 172:14	reempower [2] 155:21	87:3 146:17	reply [1] 85:12	161:24 162:7
172:21	157:13	relatively [7] 35:15	report [17] 17:13	responding [1] 74:16
reams [1] 99:11	reenter [3] 140:19	123:17 141:2 141:5	21:20 27:22 44:17	response [4] 140:15
reason [24] 15:5	141:13 141:16	144:25 146:4 189:25	56:21 70:15 73:2	164:21 165:11 165:11
15:10 16:4 24:7	reentry [1] 31:22	release [1] 139:15	73:5 73:9 75:8	responsibilities [1] 36:6
27:10 41:4 52:2	reference [3] 53:6	relevant [67] 73:19	75:9 75:19 99:18	responsibility [9] 15:19 34:20 62:7
52:12 55:24 57:23	129:22 176:4	75:23 76:2 87:11	129:23 182:24 183:24	64:3 77:7 77:15
84:21 90:4 106:19	references [1] 29:15	87:13 92:19 95:1	184:4	78:9 79:18 145:10
121:2 121:3 123:19	referencing [1] 30:5	95:6 98:18 99:14	reporter [1] 92:25	responsible [5] 20:12
128:22 129:21 163:18	referred [3] 53:16	99:21 100:16 100:21	reports [15] 20:1	72:16 172:15 172:16
167:25 177:25 179:13	107:11 117:5	100:23 101:10 102:1	20:3 20:12 20:18	182:23
188:4 190:22	referring [1] 164:21	102:5 102:20 102:24	21:3 23:14 64:22	responsive [1] 9:6
reasonable [14] 36:25	refers [1] 164:3	102:25 103:3 103:5	70:17 72:8 72:9	rest [3] 40:11 107:24
37:2 58:9 58:10	refine [1] 79:24	103:9 103:16 103:21	72:12 72:17 100:14	153:4
58:14 58:25 63:2	reflect [7] 24:2	104:4 104:25 105:8	102:13 102:23	restore [1] 26:14
63:8 83:14 109:3	36:9 112:22 118:2	105:23 106:5 107:13	represent [6] 32:11	restrict [1] 182:21
116:6 116:9 150:24	119:22 143:20 148:3	107:16 107:20 108:4	82:20 86:1 86:2	result [20] 4:4
157:22	reflected [2] 44:21	108:7 108:25 111:21	167:15 183:4	23:11 23:17 25:18
reasonably [1] 148:12	103:2	111:24 112:11 115:12	representative [3] 36:2 125:17 171:18	25:22 28:2 28:19
reasons [9] 55:16	reflection [1] 23:21	117:4 117:12 117:15	represented [3] 57:15	32:16 32:17 34:2
108:23 167:6 177:3	reflective [1] 126:13	118:6 119:2 119:14	163:3 170:19	34:10 34:15 51:1
179:22 180:4 184:16	reflects [3] 44:18	119:19 119:25 120:6	representing [1] 33:22	54:3 57:8 59:19
185:7 188:6	162:6 168:15	120:9 121:3 121:24	represents [1] 144:17	114:2 128:22 130:21
receive [6] 70:14	reform [9] 4:5	138:1 144:22 151:17	request [1] 114:9	182:11
81:21 81:23 166:7	38:9 40:18 74:23	157:17 157:18 157:19	require [3] 128:24	resulted [2] 110:1
166:8 173:19	120:5 121:20 123:1	157:21 157:23 160:21	129:2 187:2	112:5
received [5] 11:7	182:17 190:17	168:16 168:18 173:8	required [2] 138:17	results [23] 11:12
68:25 76:24 114:10	refuel [1] 29:2	173:9 176:5 176:19	185:3	25:14 56:9 56:25
141:20	refused [1] 151:24	relieves [1] 77:19	requirement [1] 184:1	60:20 61:2 61:5
receiving [2] 4:22	regard [9] 17:7	reluctance [2] 28:6	requires [2] 5:16	62:20 62:22 75:18
37:23	34:12 35:17 51:23	28:7	99:24	77:20 88:2 102:6
recent [6] 21:8		rely [2] 62:9 158:4	research [3] 8:7	113:3 113:20 114:6
44:16 44:17 75:3		remain [1] 86:23		114:9 114:10 114:15
130:16 160:19		remained [1] 4:19		114:18 115:8 116:23
recently [7] 10:25		remand [2] 51:7		
93:3 97:13 112:13				
123:4 125:20 129:17				
recess [1] 92:15				

151:16	92:14	93:20	36:3	148:2	148:23	148:23	190:22	46:23	sentenced [9]	16:2
resume [1]	92:14	robots [1]	36:3	165:16			seeing [3]	46:23	83:13	124:16
retain [1]	170:7	rocket [1]	82:9	scenario [3]	168:2		47:4	88:1	134:19	140:10
retained [2]	91:20	role [46]	15:16	171:25	177:1		seek [1]	58:2	141:20	171:7
167:15		34:19	54:15	scenarios [1]	171:20		seem [6]	45:14	sentences [30]	16:3
retarded [1]	153:23	72:20	74:11	schedule [2]	44:4		49:12	114:20	28:16	37:3
retool [1]	140:18	81:25	82:3	136:3			147:3	146:1	40:13	52:2
retreat [1]	50:20	91:3	100:3	scheduled [1]	12:6		sees [1]	131:7	55:25	63:2
retroactive [6]	38:22	132:6	142:10	scheme [7]	27:13		segment [1]	33:8	84:22	85:5
40:7	40:20	145:9	145:20	29:14	32:13		selected [2]	21:5	106:9	117:22
41:3	41:6	146:13	146:20	82:23	118:5		65:19		132:17	132:18
retroactivity [6]		146:22	147:4	scholarships [1]	131:14		selecting [1]	37:11	156:20	156:23
40:5	40:23	147:19	147:21	135:23			selection [1]	97:21	157:4	158:18
52:25	61:17	148:4	151:1	school [6]	7:8		self [1]	51:5	161:1	161:20
return [2]	83:10	159:9	159:14	13:7	13:8		sell [1]	146:7	180:18	183:12
128:2		161:14	162:5	92:25	135:14		selling [1]	153:10	sentencing [229]	
revamping [1]	149:2	162:14	162:15	schooled [1]	16:13		sells [1]	86:16	1:1	3:2
reveal [1]	129:3	166:11	172:23	scientist [1]	82:9		seminars [2]	91:14	3:17	3:21
reversals [1]	52:10	173:4	183:16	scope [3]	51:18		92:2		3:24	4:3
reversed [2]	108:14	rooms [1]	69:1	172:20	172:24		sen [1]	3:16	4:7	4:11
128:15		rose [1]	73:15	Scranton [1]	6:1		7:1		5:4	5:7
reverses [1]	52:2	rough [1]	85:1	screen [1]	75:13		Senate [2]	5:12	8:2	8:10
review [7]	17:12	routes [1]	113:21	seal [1]	129:2		7:1		14:13	14:15
46:5	46:11	rubrick [1]	42:13	search [2]	33:23		Senator [2]	7:3	14:25	15:3
46:20	186:7	rudimentary [1]	15:2	54:1			71:13		15:25	16:5
reviewed [2]	72:24	15:2		seasoned [1]	58:12		send [2]	144:10	16:23	17:3
126:15		ruined [1]	137:7	seats [1]	66:11		191:10		17:11	18:22
reviewing [2]	72:16	rule [7]	28:22	second [12]	31:19		127:17		20:25	21:7
102:13		28:23	42:2	38:21	45:9		163:14		21:14	22:6
reviews [1]	100:14	99:23	183:19	80:21	96:9		senile [1]	30:11	23:16	24:2
revisions [1]	39:5	rule-driven [1]	24:24	147:18	168:2		senior [3]	6:19	25:3	25:17
revived [1]	79:9	ruled [2]	131:7	188:10	188:25		93:10	142:17	26:9	26:15
rewriting [1]	161:9	rules [8]	20:6	second-guess [1]	141:10		sense [21]	26:2	27:13	27:14
Richard [2]	3:1	26:13	42:8	141:10			26:14	29:19	27:22	28:11
13:10		53:1	116:6	Secondly [2]	39:20		49:19	50:2	28:15	28:19
rid [1]	138:22	149:13		85:19			60:10	71:7	30:1	30:16
ride [1]	104:16	rumor [1]	72:3	seconds [3]	34:24		85:1	90:10	32:22	32:24
right [27]	28:25	run [5]	64:22	66:3	71:5		100:22	117:25	33:4	33:8
48:16	58:18	161:19	161:24	section [18]	22:12		131:4	131:6	33:18	33:25
67:1	67:6	174:8		26:5	67:4		152:18	188:5	34:5	34:10
70:2	77:23	running [5]	59:10	73:5	99:21		sensible [1]	152:16	35:23	36:18
90:9	92:5	78:14	142:15	103:16	103:20		sent [2]	47:1	37:18	38:2
92:13	98:11	181:14		125:13	130:15		sentence [72]	3:24	42:20	42:21
118:8	122:16	Rusty [1]	124:10	176:3	176:18		8:9	15:5	50:16	52:22
127:25	128:15			187:9	189:4		15:10	15:11	54:18	54:20
139:9	142:4			sections [4]	9:15		16:5	16:9	55:12	55:18
151:12	175:9			73:6	103:17		29:8	34:22	55:21	55:23
rights [1]	105:4			110:13	117:21		35:6	36:20	57:17	58:3
rigid [3]	25:7			122:17	127:20		37:11	37:21	60:15	68:18
26:12				128:12	132:19		51:7	51:8	72:3	72:19
risk [4]	65:20			139:23	143:14		59:20	60:6	73:8	73:14
121:25	161:24			153:21	154:3		82:14	83:6	74:8	74:11
risks [1]	70:10			154:14	154:18		89:4	97:3	74:23	75:2
road [1]	64:13			162:12	171:21		106:24	108:12	80:23	81:14
robber [4]	134:10			172:18	172:25		115:18	116:10	83:2	84:10
134:15	134:19			175:6	177:13		117:15	118:3	87:18	93:1
robbers [1]	134:10			180:9	186:4		119:9	121:23	93:5	93:14
robbery [12]	22:11						134:6	134:24	94:23	95:4
22:12	26:5						135:4	135:9	95:12	95:14
58:23	96:17						138:15	140:17	95:25	96:15
121:9	121:13						141:11	141:21	97:15	97:18
126:3	179:13						141:22	148:24	97:22	97:23
Robert [2]	13:21						157:25	168:1	102:3	102:15
							170:18	170:21	103:19	103:22
							175:24	179:19	104:9	104:13
							181:24	184:2	105:13	106:1
							188:6	188:7	106:7	107:2
									108:11	109:5
									110:2	111:4
									112:3	114:21
									116:7	116:17

117:24	119:5	119:15	seven-year [1]	46:4	186:12	140:19	141:13	141:17	82:9	93:2	163:3
120:5	120:21	121:15	several [4]	6:25	simplifications [1]	socioeconomic [2]			164:22	164:23	
121:20	122:4	122:4	8:21	123:10	147:4	37:8	177:10		special [2]		72:5
123:20	124:1	126:8	severe [2]	151:14	simplified [1]	132:21			72:13		
126:10	127:22	128:19	160:15		simplify [9]	8:23			specialist [2]		72:13
131:23	133:15	133:19	severely [1]	179:19	19:2	35:24	39:10		142:19		
140:9	141:15	142:18	severity [1]	144:18	50:11	51:2	53:20		specialize [1]		64:19
143:19	145:3	145:14	shame [1]	186:11	54:6	108:8			specialized [3]		21:21
150:13	155:5	155:10	shape [2]	2:21	simplifying [6]	38:13			22:2	24:11	
155:13	155:23	156:18	86:14		38:18	107:20	145:19		specific [14]		22:14
156:20	157:14	158:1	share [1]	124:17	147:8	176:24			23:7	39:13	50:22
158:15	159:3	159:11	shared [1]	96:8	simply [16]	39:15			51:2	83:20	144:15
161:13	161:19	163:9	shares [1]	61:18	39:24	45:22	54:22		145:17	150:2	157:16
163:12	165:15	168:5	sharp [1]	15:24	59:23	80:15	89:17		167:8	173:20	174:2
170:23	175:20	175:21	shift [3]	50:4	90:11	98:4	105:20		176:22		
176:12	179:15	179:16	shifted [1]	16:20	144:16	168:12	176:25		specifically [7]		41:14
180:8	180:11	182:14	shoot [1]	61:25	180:19	186:4	188:12		52:24	57:25	81:25
182:21	184:5	184:7	shoplifting [1]	149:21	single [1]		86:16		87:22	146:13	176:3
187:20	188:16	188:16	shops [1]	30:4	sit [3]	27:25	59:3		specified [1]		26:10
189:1	189:9	189:15	short [6]	14:23	152:5				spectrum [2]		166:1
189:17	190:17	190:18	161:14	178:6	sits [1]	7:11			168:4		
190:18			186:17		sitting [3]		12:19		speculation [1]		62:25
sentencings [1]	70:23		shorter [2]	108:2	27:7	47:17			spend [5]		64:15
September [1]	123:6		show [3]	30:25	situation [15]	20:15			74:19	152:25	153:1
series [1]	24:5		128:25		22:4	81:16	101:17		153:16		
serious [8]	19:21		side [3]	49:1	110:9	115:1	120:24		spending [3]		33:21
36:15	96:16	126:18	148:24		122:6	127:25	136:9		140:2	164:9	
126:25	136:21	150:1	sides [9]	17:12	138:13	172:6	179:14		spent [8]		33:18
165:1			60:10	74:1	181:25	184:20			33:24	36:14	64:13
seriously [5]	8:7		142:25	152:22	situations [5]	24:18			71:25	74:21	93:12
36:8	71:2	91:20	183:7		59:19	129:7	138:21		94:20		
114:5			sideways [1]	153:14	139:4				sphere [1]		160:17
seriousness [5]	23:18		sight [1]	23:13	six [7]	22:14	31:16		spins [1]		32:20
37:4	96:21	126:13	signed [2]	44:21	46:4	79:7	102:12		splits [2]		18:14
127:19			significance [1]	12:17	139:14	151:13			18:16		
serve [6]	5:23	5:25	significant [6]	4:7	sixteen [1]	127:9			spoken [2]		80:20
8:13	64:3	155:14	4:14	12:18	size [1]	151:2			94:25		
158:17			110:1	146:11	skepticism [1]	183:2			sponsors [1]		157:11
served [12]	3:21		significantly [2]	106:5	skewed [1]	46:24			Springs [1]		125:24
7:1	7:5	54:10	signify [1]	95:24	skill [1]	25:19			square [3]		28:24
67:8	72:5	72:12	signing [1]	32:21	skillfully [1]	70:4			29:1	85:25	
92:25	93:17	102:14	signs [1]	31:2	skin [1]	163:13			staff [8]	2:17	7:2
123:1	123:11		similar [4]	37:8	slanted [1]	152:2			7:23	28:1	34:2
serves [6]	6:7		simple [9]	19:13	sleep [6]	16:3	16:6		64:5	95:10	176:2
6:12	6:15	7:7	22:13	29:24	133:12	133:24	135:11		stage [2]	108:14	126:8
7:20	122:25		128:21	144:25	136:14				stagger [1]		150:8
services [2]	21:13		151:20	161:12	sleepless [1]	70:20			staggering [1]		33:22
130:3			simplest [1]	53:20	sleeps [1]	82:5			stand [3]		63:17
serving [3]	130:6		simplicity [1]	161:10	slept [2]	70:21	70:24		67:18	155:2	
136:6	136:17		simplification [22]	19:3	sliding [1]	148:2			standard [18]		109:7
session [2]	5:2		19:18	38:9	slings [1]	47:20			109:13	111:14	112:11
140:6			signify [1]	32:21	slow [1]	40:3			112:14	112:19	115:24
set [18]	4:10	17:10	signing [1]	31:2	smack [1]	161:20			146:1	147:15	166:11
22:6	22:8	36:4	signs [1]	31:2	small [2]	139:18			186:6	186:14	187:9
39:8	39:8	43:18	similar [4]	37:8	164:10				187:12	187:22	188:3
59:14	83:25	97:17	81:15	106:18	smuggling [1]	86:14			188:5	188:12	
100:1	110:21	120:21	22:13	29:24	snitch [2]	78:21			standards [3]		92:25
129:22	131:15	179:2	128:21	144:25	86:7				97:14	162:8	
181:1			151:20	161:12	so-called [2]	99:6			standing [2]		67:21
sets [1]	100:18		182:12	184:14	172:1				177:8		
setting [2]	17:6		185:9		societally [2]	77:25			start [8]	26:22	43:24
147:11					society [4]	78:5			70:6	84:4	118:7
settled [3]	40:13								143:15	175:11	178:5
43:2	110:2								started [4]		69:3
seven [6]	5:10										
5:10	5:15	46:3									
170:22	175:18										

123:18 160:1 175:14	stop [1] 181:11	78:15 79:3 79:20	supplement [2] 43:12	106:16 107:2 107:5
starting [2] 97:17	story [2] 25:9 179:11	81:8 85:21 86:6	140:4	107:6 109:25 113:24
100:10	Stout [1] 1:4	89:5 90:14 125:21	supplemental [2]	114:5 114:21 115:13
state [33]	straight [1] 45:5	128:25 129:4 134:14	60:23 89:8	115:22 117:1 117:5
20:3 30:12 46:18	straightforward [1]	157:6 165:2 183:17	supplemented [1]	119:23 121:19 150:9
54:8 58:13 67:9	161:12	188:4 188:6	21:7	153:5 155:21 155:22
67:12 79:14 80:23	straitjacket [1] 125:2	substantially [6]	supplied [1] 76:12	155:23 155:25 156:2
84:16 87:17 87:23	strange [1] 151:16	47:14 117:14 126:2	supplier [4] 172:2	156:4 156:24 157:1
88:13 93:4 94:22	street [7] 1:4	189:10 190:2 190:4	172:2 172:8 172:12	159:8 159:25 163:17
94:24 96:19 96:20	27:8 31:14 144:9	substantive [2] 103:7	supply [1] 146:10	166:3 166:16 168:25
98:14 111:7 111:7	153:10 153:19 164:11	107:21	support [2] 101:25	169:13 169:22 170:4
111:12 112:4 126:5	strength [1] 77:1	subverting [1] 59:8	166:15	170:9 175:21 182:17
126:6 126:15 133:10	stress [1] 180:3	succeed [1] 135:17	supported [1] 132:12	182:23
175:6 175:15 175:17	strict [1] 25:8	successful [4] 30:24	supporters [1] 157:12	systemic [1] 114:6
175:20 188:3	strictly [2] 98:24	81:1 86:11 86:12	suppose [4] 17:22	systemically [1]
state-wide [1] 97:11	170:3	such [18] 9:21	47:17 167:2 175:11	120:11
statement [4] 17:6	strikes [4] 25:25	12:17 14:13 15:15	supposed [6] 60:11	systems [8] 80:24
21:2 180:23 187:20	53:19 117:20 163:12	23:17 40:11 52:3	64:8 107:4 119:3	94:21 95:4 96:8
statements [3] 131:17	strikingly [1] 20:15	52:4 65:10 95:11	119:12 119:14	96:25 97:11 98:14
145:12 191:5	strive [1] 56:9	95:13 104:17 110:16	supposing [1] 43:18	188:4
states [34]	strives [1] 3:18	160:24 177:9 183:22	Supreme [2] 48:18	
3:2 3:24 4:8	striving [1] 3:15	189:9 189:15	108:18	-T-
5:11 5:14 6:21	strong [2] 8:11	sudden [1] 134:21	surprise [1] 118:17	table [2] 75:5 150:19
6:22 7:10 8:1	169:19	suffer [1] 15:7	surprised [1] 77:8	tables [6] 68:16
8:9 8:15 10:10	strongly [2] 41:5	suffering [3] 16:4	surprisingly [1]	128:4 133:15 150:20
13:1 13:23 14:16	104:3	65:12 65:12	148:25	151:11 152:17
21:4 21:17 35:4	struck [5] 45:13	sufficient [2] 68:4	surrounding [1]	Tacha [17] 2:5
36:10 52:5 58:9	53:6 53:16 76:13	109:8	116:18	2:12 6:11 49:8
58:11 72:25 86:15	87:17	sufficiently [4] 59:25	Suzanne [1] 174:22	49:20 50:10 51:16
88:4 102:11 104:23	structure [6] 26:1	110:22 110:24 162:9	sway [1] 170:9	51:24 53:16 88:17
104:24 123:13 155:10	46:17 56:10 161:18	suggest [14] 39:13	sworn [1] 124:8	115:11 131:6 151:22
156:5 185:21 188:14	171:22 190:24	40:1 41:25 42:12	sympathetic [2]	171:9 172:5 180:1
statistically [1] 88:9	structured [2] 9:12	54:6 128:11 147:2	147:11	180:5
statistics [3] 33:13	90:1	147:9 164:6 165:8	symmetrical [1]	tags [1] 6:6
44:17 159:21	structuring [1] 16:9	165:22 178:15 180:13	147:11	tail [2] 110:10 110:13
status [1] 177:10	struggle [3] 10:21	180:21	synchophantic [1]	takes [2] 35:10 36:5
statute [6] 4:14	50:1 71:8	suggested [2] 188:2	70:15	taking [8] 27:11
5:13 5:16 7:12	struggled [3] 50:10	189:13	syndrome [1] 180:3	44:3 60:14 112:3
143:23 188:14	58:21 58:21	suggesting [3] 147:6	Syracuse [1] 181:15	124:14 130:24 138:6
statutes [4] 64:3	struggles [1] 135:11	150:21 163:20	system [113] 3:14	160:7
156:21 163:22 165:25	struggling [2] 9:3	suggestion [9] 39:10	3:16 3:16 4:21	talented [1] 135:24
statutorily [1] 96:13	16:4	71:6 117:19 165:24	10:20 10:24 15:2	target [1] 70:2
statutory [3] 184:1	136:24	171:6 176:1 176:15	18:22 19:22 20:9	targets [2] 91:1
189:7 189:16	studied [2] 9:10	178:7 178:18	20:16 22:10 23:11	156:1
stay [5] 64:20 80:12	173:23	suggestions [6] 3:5	23:22 24:4 24:14	task [4] 20:9 88:5
145:16 173:4 182:20	studies [1] 87:19	3:10 9:23 145:18	24:19 24:24 25:2	160:7 183:1
staying [3] 2:10	study [6] 38:13	186:17 186:24	25:7 25:13 25:20	tasks [1] 187:18
143:11 174:21	42:1 42:10 42:22	suggests [4] 107:19	25:24 26:13 36:7	Tax [2] 63:12 63:17
stem [2] 103:20 103:22	47:2 162:11	113:6 162:4 176:21	36:19 37:20 38:4	taxes [2] 80:7 80:9
step [1] 45:11	studying [5] 39:21	suitable [1] 70:7	38:8 38:19 39:18	teacher [1] 80:6
stepping [1] 151:14	174:10	summarize [2] 48:9	41:21 43:3 47:4	tears [2] 136:25 137:6
steps [2] 38:16 160:19	subject [4] 10:9	49:9	48:17 50:8 53:9	technical [1] 21:19
sterile [1] 75:18	45:7 79:8 130:9	summer [1] 124:7	53:11 53:20 53:25	technicians [3] 22:2
still [14] 33:6 37:9	subjective [2] 24:19	supervise [1] 64:9	54:2 54:3 54:6	24:11 62:21
38:1 43:3 48:20	145:12	supervised [3] 65:5	54:7 54:17 54:24	tedious [1] 10:19
56:4 111:1 116:7	submission [1] 43:14	72:14 139:15	65:1 68:20 69:15	teeny [1] 68:15
136:15 143:25 144:5	submit [5] 79:1	supervising [5] 64:14	70:25 71:1 71:1	telephone [2] 21:14
145:11 161:2 187:21	157:18 157:20 161:23	66:22 71:24 72:6	76:7 81:3 82:21	21:15
stimulating [1] 43:8	163:7	74:21	82:24 87:8 88:16	telling [4] 12:9
sting [2] 78:18 79:8	substantial [21] 18:25	supervision [6] 20:13	90:18 91:4 91:6	94:5 121:20 169:16
stipulates [1] 104:7	34:21 77:8 78:13	64:16 65:4 65:9	95:12 95:15 95:17	tells [2] 19:1 118:7
stipulation [4] 99:25		65:11 65:14	95:24 95:25 96:4	temporary [1] 102:14
100:9 100:10 101:3		supervisor [4] 72:14	96:5 96:11 96:19	ten [12] 12:4 38:24
stood [3] 132:24		132:4 132:6 132:10	96:24 97:5 98:11	45:18 76:14 76:16
136:25 137:6			99:3 99:9 103:8	

83:25 89:3 138:15 139:21 139:22 140:2 142:14	191:2 191:11 191:14 thanks [4] 66:11 94:15 133:4 162:22	tiny [1] 5:20 to-wit [1] 163:25 Tobacco [1] 30:2 today [20] 11:6 11:6 19:18 20:17 35:22 53:23 54:19 60:22 64:11 79:22 95:2 123:9 123:10 127:4 155:4 155:17 155:24 157:10 160:16 186:11 Today's [1] 23:22 toe [1] 36:4 together [3] 2:17 2:22 184:14 too [20] 11:15 11:17 32:24 43:3 50:4 53:6 56:25 59:9 70:10 85:8 120:25 133:6 140:15 141:21 152:2 154:8 154:9 156:24 159:24 160:1 took [7] 30:14 71:2 125:2 126:19 126:20 130:23 170:24 tool [2] 48:19 70:3 tools [1] 150:13 top [5] 61:25 64:20 149:2 165:15 171:24 topic [2] 42:10 68:5 topics [2] 93:22 162:4 torture [1] 60:8 total [2] 128:1 141:8 totally [2] 137:7 166:16 touched [1] 167:6 touchstones [2] 15:20 55:4 touchy [1] 154:11 tough [1] 54:23 tougher [3] 53:24 54:1 54:1 tour [1] 102:14 towards [7] 28:9 50:4 74:9 95:18 95:24 107:5 187:25 tracks [1] 118:5 tradition [1] 108:13 traditional [4] 11:13 108:11 117:21 118:5 traffic [2] 144:8 146:3 trafficking [2] 146:14 155:8 training [1] 8:11 trains [1] 8:12 transaction [3] 149:13 149:17 151:2 transactions [3] 46:17 149:16 168:21 transfer [2] 10:13 168:14	transferred [9] 11:18 72:10 118:12 128:19 156:4 167:4 167:9 167:12 174:25 transformation [2] 82:1 121:18 translate [2] 5:7 10:13 translates [1] 8:18 transported [1] 127:7 travel [1] 3:6 traveled [1] 156:16 treated [5] 31:25 32:2 42:19 71:19 149:11 treating [1] 18:2 treatment [1] 88:11 tremendous [7] 33:8 36:13 40:8 109:21 115:6 149:3 159:13 tremendously [2] 69:22 115:9 trenches [1] 154:15 trial [19] 8:12 10:6 34:15 48:19 77:12 77:23 78:4 83:12 89:12 101:21 123:17 136:10 136:11 136:13 152:1 170:25 175:15 180:8 187:15 trials [2] 34:9 77:20 tried [5] 22:5 70:9 125:6 126:21 132:23 tries [1] 24:4 Trigger [1] 30:1 trip [1] 29:18 tripartide [1] 82:20 tripping [1] 30:3 triumvirate [1] 68:19 trophy [1] 153:7 trouble [2] 120:25 139:16 troubled [4] 56:4 127:4 127:14 128:17 troubles [1] 55:2 true [8] 26:13 46:15 59:7 65:22 80:22 82:7 88:9 116:15 truly [2] 55:11 91:1 truth [2] 169:14 169:16 try [42] 2:24 3:11 3:17 8:23 9:4 9:10 10:22 10:23 12:7 12:10 22:7 28:7 32:10 32:11 35:24 36:14 42:20 43:22 48:2 56:9 57:11 58:21 70:9 95:2 108:19 109:18 113:19 113:19 115:7 125:14 125:15 127:20 134:1 134:4 141:10 142:12 142:13 145:19 161:18 165:5 174:5	181:12 trying [23] 8:8 9:25 10:18 11:25 19:12 23:24 24:3 30:23 32:13 32:16 32:17 35:2 42:7 64:21 93:12 108:8 130:13 130:15 133:18 135:9 152:25 160:7 190:6 tunnel [1] 141:23 turn [2] 62:11 172:11 turned [2] 70:1 70:2 turning [2] 21:25 70:4 tweak [1] 28:23 twice [1] 150:19 two [35] 5:12 20:20 27:13 28:25 29:2 31:4 38:16 41:24 44:5 58:4 58:10 58:20 61:16 68:20 77:5 96:6 106:17 106:21 134:16 135:23 139:4 149:14 151:14 152:25 153:16 154:4 154:6 154:8 156:13 165:22 167:1 174:22 182:14 186:17 186:24 two-level [1] 132:2 two-year [3] 32:5 40:2 52:23 type [11] 5:3 27:12 32:1 59:20 78:18 114:12 135:10 144:14 144:23 151:2 171:23 types [7] 32:8 32:20 32:20 96:6 97:20 97:22 136:17 typical [1] 68:9
83:25 89:3 138:15 139:21 139:22 140:2 142:14	191:2 191:11 191:14 thanks [4] 66:11 94:15 133:4 162:22	tiny [1] 5:20 to-wit [1] 163:25 Tobacco [1] 30:2 today [20] 11:6 11:6 19:18 20:17 35:22 53:23 54:19 60:22 64:11 79:22 95:2 123:9 123:10 127:4 155:4 155:17 155:24 157:10 160:16 186:11 Today's [1] 23:22 toe [1] 36:4 together [3] 2:17 2:22 184:14 too [20] 11:15 11:17 32:24 43:3 50:4 53:6 56:25 59:9 70:10 85:8 120:25 133:6 140:15 141:21 152:2 154:8 154:9 156:24 159:24 160:1 took [7] 30:14 71:2 125:2 126:19 126:20 130:23 170:24 tool [2] 48:19 70:3 tools [1] 150:13 top [5] 61:25 64:20 149:2 165:15 171:24 topic [2] 42:10 68:5 topics [2] 93:22 162:4 torture [1] 60:8 total [2] 128:1 141:8 totally [2] 137:7 166:16 touched [1] 167:6 touchstones [2] 15:20 55:4 touchy [1] 154:11 tough [1] 54:23 tougher [3] 53:24 54:1 54:1 tour [1] 102:14 towards [7] 28:9 50:4 74:9 95:18 95:24 107:5 187:25 tracks [1] 118:5 tradition [1] 108:13 traditional [4] 11:13 108:11 117:21 118:5 traffic [2] 144:8 146:3 trafficking [2] 146:14 155:8 training [1] 8:11 trains [1] 8:12 transaction [3] 149:13 149:17 151:2 transactions [3] 46:17 149:16 168:21 transfer [2] 10:13 168:14	transferred [9] 11:18 72:10 118:12 128:19 156:4 167:4 167:9 167:12 174:25 transformation [2] 82:1 121:18 translate [2] 5:7 10:13 translates [1] 8:18 transported [1] 127:7 travel [1] 3:6 traveled [1] 156:16 treated [5] 31:25 32:2 42:19 71:19 149:11 treating [1] 18:2 treatment [1] 88:11 tremendous [7] 33:8 36:13 40:8 109:21 115:6 149:3 159:13 tremendously [2] 69:22 115:9 trenches [1] 154:15 trial [19] 8:12 10:6 34:15 48:19 77:12 77:23 78:4 83:12 89:12 101:21 123:17 136:10 136:11 136:13 152:1 170:25 175:15 180:8 187:15 trials [2] 34:9 77:20 tried [5] 22:5 70:9 125:6 126:21 132:23 tries [1] 24:4 Trigger [1] 30:1 trip [1] 29:18 tripartide [1] 82:20 tripping [1] 30:3 triumvirate [1] 68:19 trophy [1] 153:7 trouble [2] 120:25 139:16 troubled [4] 56:4 127:4 127:14 128:17 troubles [1] 55:2 true [8] 26:13 46:15 59:7 65:22 80:22 82:7 88:9 116:15 truly [2] 55:11 91:1 truth [2] 169:14 169:16 try [42] 2:24 3:11 3:17 8:23 9:4 9:10 10:22 10:23 12:7 12:10 22:7 28:7 32:10 32:11 35:24 36:14 42:20 43:22 48:2 56:9 57:11 58:21 70:9 95:2 108:19 109:18 113:19 113:19 115:7 125:14 125:15 127:20 134:1 134:4 141:10 142:12 142:13 145:19 161:18 165:5 174:5	181:12 trying [23] 8:8 9:25 10:18 11:25 19:12 23:24 24:3 30:23 32:13 32:16 32:17 35:2 42:7 64:21 93:12 108:8 130:13 130:15 133:18 135:9 152:25 160:7 190:6 tunnel [1] 141:23 turn [2] 62:11 172:11 turned [2] 70:1 70:2 turning [2] 21:25 70:4 tweak [1] 28:23 twice [1] 150:19 two [35] 5:12 20:20 27:13 28:25 29:2 31:4 38:16 41:24 44:5 58:4 58:10 58:20 61:16 68:20 77:5 96:6 106:17 106:21 134:16 135:23 139:4 149:14 151:14 152:25 153:16 154:4 154:6 154:8 156:13 165:22 167:1 174:22 182:14 186:17 186:24 two-level [1] 132:2 two-year [3] 32:5 40:2 52:23 type [11] 5:3 27:12 32:1 59:20 78:18 114:12 135:10 144:14 144:23 151:2 171:23 types [7] 32:8 32:20 32:20 96:6 97:20 97:22 136:17 typical [1] 68:9
83:25 89:3 138:15 139:21 139:22 140:2 142:14	191:2 191:11 191:14 thanks [4] 66:11 94:15 133:4 162:22	tiny [1] 5:20 to-wit [1] 163:25 Tobacco [1] 30:2 today [20] 11:6 11:6 19:18 20:17 35:22 53:23 54:19 60:22 64:11 79:22 95:2 123:9 123:10 127:4 155:4 155:17 155:24 157:10 160:16 186:11 Today's [1] 23:22 toe [1] 36:4 together [3] 2:17 2:22 184:14 too [20] 11:15 11:17 32:24 43:3 50:4 53:6 56:25 59:9 70:10 85:8 120:25 133:6 140:15 141:21 152:2 154:8 154:9 156:24 159:24 160:1 took [7] 30:14 71:2 125:2 126:19 126:20 130:23 170:24 tool [2] 48:19 70:3 tools [1] 150:13 top [5] 61:25 64:20 149:2 165:15 171:24 topic [2] 42:10 68:5 topics [2] 93:22 162:4 torture [1] 60:8 total [2] 128:1 141:8 totally [2] 137:7 166:16 touched [1] 167:6 touchstones [2] 15:20 55:4 touchy [1] 154:11 tough [1] 54:23 tougher [3] 53:24 54:1 54:1 tour [1] 102:14 towards [7] 28:9 50:4 74:9 95:18 95:24 107:5 187:25 tracks [1] 118:5 tradition [1] 108:13 traditional [4] 11:13 108:11 117:21 118:5 traffic [2] 144:8 146:3 trafficking [2] 146:14 155:8 training [1] 8:11 trains [1] 8:12 transaction [3] 149:13 149:17 151:2 transactions [3] 46:17 149:16 168:21 transfer [2] 10:13 168:14	transferred [9] 11:18 72:10 118:12 128:19 156:4 167:4 167:9 167:12 174:25 transformation [2] 82:1 121:18 translate [2] 5:7 10:13 translates [1] 8:18 transported [1] 127:7 travel [1] 3:6 traveled [1] 156:16 treated [5] 31:25 32:2 42:19 71:19 149:11 treating [1] 18:2 treatment [1] 88:11 tremendous [7] 33:8 36:13 40:8 109:21 115:6 149:3 159:13 tremendously [2] 69:22 115:9 trenches [1] 154:15 trial [19] 8:12 10:6 34:15 48:19 77:12 77:23 78:4 83:12 89:12 101:21 123:17 136:10 136:11 136:13 152:1 170:25 175:15 180:8 187:15 trials [2] 34:9 77:20 tried [5] 22:5 70:9 125:6 126:21 132:23 tries [1] 24:4 Trigger [1] 30:1 trip [1] 29:18 tripartide [1] 82:20 tripping [1] 30:3 triumvirate [1] 68:19 trophy [1] 153:7 trouble [2] 120:25 139:16 troubled [4] 56:4 127:4 127:14 128:17 troubles [1] 55:2 true [8] 26:13 46:15 59:7 65:22 80:22 82:7 88:9 116:15 truly [2] 55:11 91:1 truth [2] 169:14 169:16 try [42] 2:24 3:11 3:17 8:23 9:4 9:10 10:22 10:23 12:7 12:10 22:7 28:7 32:10 32:11 35:24 36:14 42:20 43:22 48:2 56:9 57:11 58:21 70:9 95:2 108:19 109:18 113:19 113:19 115:7 125:14 125:15 127:20 134:1 134:4 141:10 142:12 142:13 145:19 161:18 165:5 174:5	181:12 trying [23] 8:8 9:25 10:18 11:25 19:12 23:24 24:3 30:23 32:13 32:16 32:17 35:2 42:7 64:21 93:12 108:8 130:13 130:15 133:18 135:9 152:25 160:7 190:6 tunnel [1] 141:23 turn [2] 62:11 172:11 turned [2] 70:1 70:2 turning [2] 21:25 70:4 tweak [1] 28:23 twice [1] 150:19 two [35] 5:12 20:20 27:13 28:25 29:2 31:4 38:16 41:24 44:5 58:4 58:10 58:20 61:16 68:20 77:5 96:6 106:17 106:21 134:16 135:23 139:4 149:14 151:14 152:25 153:16 154:4 154:6 154:8 156:13 165:22 167:1 174:22 182:14 186:17 186:24 two-level [1] 132:2 two-year [3] 32:5 40:2 52:23 type [11] 5:3 27:12 32:1 59:20 78:18 114:12 135:10 144:14 144:23 151:2 171:23 types [7] 32:8 32:20 32:20 96:6 97:20 97:22 136:17 typical [1] 68:9
83:25 89:3 138:15 139:21 139:22 140:2 142:14	191:2 191:11 191:14 thanks [4] 66:11 94:15 133:4 162:22	tiny [1] 5:20 to-wit [1] 163:25 Tobacco [1] 30:2 today [20] 11:6 11:6 19:18 20:17 35:22 53:23 54:19 60:22 64:11 79:22 95:2 123:9 123:10 127:4 155:4 155:17 155:24 157:10 160:16 186:11 Today's [1] 23:22 toe [1] 36:4 together [3] 2:17 2:22 184:14 too [20] 11:15 11:17 32:24 43:3 50:4 53:6 56:25 59:9 70:10 85:8 120:25 133:6 140:15 141:21 152:2 154:8 154:9 156:24 159:24 160:1 took [7] 30:14 71:2 125:2 126:19 126:20 130:23 170:24 tool [2] 48:19 70:3 tools [1] 150:13 top [5] 61:25 64:20 149:2 165:15 171:24 topic [2] 42:10 68:5 topics [2] 93:22 162:4 torture [1] 60:8 total [2] 128:1 141:8 totally [2] 137:7 166:16 touched [1] 167:6 touchstones [2] 15:20 55:4 touchy [1] 154:11 tough [1] 54:23 tougher [3] 53:24 54:1 54:1 tour [1] 102:14 towards [7] 28:9 50:4 74:9 95:18 95:24 107:5 187:25 tracks [1] 118:5 tradition [1] 108:13 traditional [4] 11:13 108:11 117:21 118:5 traffic [2] 144:8 146:3 trafficking [2] 146:14 155:8 training [1] 8:11 trains [1] 8:12 transaction [3] 149:13 149:17 151:2 transactions [3] 46:17 149:16 168:21 transfer [2] 10:13 168:14	transferred [9] 11:18 72:10 118:12 128:19 156:4 167:4 167:9 167:12 174:25 transformation [2] 82:1 121:18 translate [2] 5:7 10:13 translates [1] 8:18 transported [1] 127:7 travel [1] 3:6 traveled [1] 156:16 treated [5] 31:25 32:2 42:19 71:19 149:11 treating [1] 18:2 treatment [1] 88:11 tremendous [7] 33:8 36:13 40:8 109:21 115:6 149:3 159:13 tremendously [2] 69:22 115:9 trenches [1] 154:15 trial [19] 8:12 10:6 34:15 48:19 77:12 77:23 78:4 83:12 89:12 101:21 123:17 136:10 136:11 136:13 152:1 170:25 175:15 180:8 187:15 trials [2] 34:9 77:20 tried [5] 22:5 70:9 125:6 126:21 132:23 tries [1] 24:4 Trigger [1] 30:1 trip [1] 29:18 tripartide [1] 82:20 tripping [1] 30:3 triumvirate [1] 68:19 trophy [1] 153:7 trouble [2] 120:25 139:16 troubled [4] 56:4 127:4 127:14 128:17 troubles [1] 55:2 true [8] 26:13 46:15 59:7 65:22 80:22 82:7 88:9 116:15 truly [2] 55:11 91:1 truth [2] 169:14 169:16 try [42] 2:24 3:11 3:17 8:23 9:4 9:10 10:22 10:23 12:7 12:10 22:7 28:7 32:10 32:11 35:24 36:14 42:20 43:22 48:2 56:9 57:11 58:21 70:9 95:2 108:19 109:18 113:19 113:19 115:7 125:14 125:15 127:20 134:1 134:4 141:10 142:12 142:13 145:19 161:18 165:5 174:5	181:12 trying [23] 8:8 9:25 10:18 11:25 19:12 23:24 24:3 30:23 32:13 32:16 32:17 35:2 42:7 64:21 93:12 108:8 130:13 130:15 133:18 135:9 152:25 160:7 190:6 tunnel [1] 141:23 turn [2] 62:11 172:11 turned [2] 70:1 70:2 turning [2] 21:25 70:4 tweak [1] 28:23 twice [1] 150:19 two [35] 5:12 20:20 27:13 28:25 29:2 31:4 38:16 41:24 44:5 58:4 58:10 58:20 61:16 68:20 77:5 96:6 106:17 106:21 134:16 135:23 139:4 149:14 151:14 152:25 153:16 154:4 154:6 154:8 156:13 165:22 167:1 174:22 182:14 186:17 186:24 two-level [1] 132:2 two-year [3] 32:5 40:2 52:23 type [11] 5:3 27:12 32:1 59:20 78:18 114:12 135:10 144:14 144:23 151:2 171:23 types [7] 32:8 32:20 32:20 96:6 97:20 97:22 136:17 typical [1] 68:9
83:25 89:3 138:15 139:21 139:22 140:2 142:14	191:2 191:11 191:14 thanks [4] 66:11 94:15 133:4 162:22	tiny [1] 5:20 to-wit [1] 163:25 Tobacco [1] 30:2 today [20] 11:6 11:6 19:18 20:17 35:22 53:23 54:19 60:22 64:11 79:22 95:2 123:9 123:10 127:4 155:4 155:17 155:24 157:10 160:16 186:11 Today's [1] 23:22 toe [1] 36:4 together [3] 2:17 2:22 184:14 too [20] 11:15 11:17 32:24 43:3 50:4 53:6 56:25 59:9 70:10 85:8 120:25 133:6 140:15 141:21 152:2 154:8 154:9 156:24 159:24 160:1 took [7] 30:14 71:2 125:2 126:19 126:20 130:23 170:24 tool [2] 48:19 70:3 tools [1] 150:13 top [5] 61:25 64:20 149:2 165:15 171:24 topic [2] 42:10 68:5 topics [2] 93:22 162:4 torture [1] 60:8 total [2] 128:1 141:8 totally [2] 137:7 166:16 touched [1] 167:6 touchstones [2] 15:20 55:4 touchy [1] 154:11 tough [1] 54:23 tougher [3] 53:24 54:1 54:1 tour [1] 102:14 towards [7] 28:9 50:4 74:9 95:18 95:24 107:5 187:25 tracks [1] 118:5 tradition [1] 108:13 traditional [4] 11:13 108:11 117:21 118:5 traffic [2] 144:8 146:3 trafficking [2] 146:14 155:8 training [1] 8:11 trains [1] 8:12 transaction [3] 149:13 149:17 151:2 transactions [3] 46:17 149:16 168:21 transfer [2] 10:13 168:14	transferred [9] 11:18 72:10 118:12 128:19 156:4 167:4 167:9 167:12 174:25 transformation [2] 82:1 121:18 translate [2] 5:7 10:13 translates [1] 8:18 transported [1] 127:7 travel [1] 3:6 traveled [1] 156:16 treated [5] 31:25 32:2 42:19 71:19 149:11 treating [1] 18:2 treatment [1] 88:11 tremendous [7] 33:8 36:13 40:8 109:21 115:6 149:3 159:13 tremendously [2] 69:22 115:9 trenches [1] 154:15 trial [19] 8:12 10:6 34:15 48:19 77:12 77:23 78:4 83:12 89:12 101:21 123:	

Index Page 25

47:21 48:21 49:2	156:4 166:7 177:11		
50:22 51:18 55:5	wrote [3] 27:19		
90:17 97:25 108:24	46:6 73:1		
111:20 111:24 111:24	wrought [2] 33:4		
113:24 122:4 133:19	76:14		
147:25 150:25 151:10			
164:24 168:9 182:14			
189:6			
without [12] 37:21			
37:22 41:22 54:12	yardstick [1] 158:9		
74:14 107:20 125:7	year [8] 9:4 38:21		
128:1 128:15 144:5	39:15 56:12 91:14		
149:20 183:5	123:24 164:15 164:17		
witnesses [6] 12:5	years [53] 10:21		
69:25 71:19 102:2	14:9 26:23 27:6		
106:19 170:15	27:13 27:15 29:13		
woman [9] 30:19	30:11 31:16 33:5		
59:23 135:14 135:21	38:24 40:16 45:18		
136:16 138:14 139:18	46:4 53:2 53:7		
141:2 141:20	53:9 56:18 67:9		
women [2] 140:12	67:15 68:5 75:3		
156:2	76:14 76:16 86:19		
women's [1] 140:12	89:3 89:22 102:12		
wonderful [5] 53:11	102:18 107:15 114:9		
64:5 87:4 113:14	127:16 127:16 127:17		
128:7	138:15 138:16 139:2		
wondering [3] 62:8	139:21 139:22 140:2		
84:11 113:7	141:25 142:24 152:25		
wool [1] 154:20	153:17 153:21 154:2		
word [2] 45:18 164:19	155:9 155:9 160:19		
wording [2] 165:24	166:4 170:22 173:8		
187:12	175:18		
words [8] 26:3	yet [5] 53:25 106:21		
34:17 45:16 45:21	123:21 123:21 169:24		
64:9 116:17 122:9	York [5] 6:24 72:2		
179:18	72:5 159:16 159:21		
workable [1] 80:1	young [21] 2:7		
worked [9] 2:17	7:8 30:18 59:23		
10:21 47:4 57:20	59:23 131:11 134:11		
58:8 68:3 70:12	135:13 135:15 135:21		
70:25 159:25	136:16 136:24 138:14		
works [3] 57:24	139:10 139:17 139:18		
134:7 171:18	141:2 141:3 141:5		
world [4] 3:12	170:19 171:1		
28:17 98:12 98:16	younger [3] 91:19		
worried [1] 19:11	134:17 134:22		
worry [2] 137:4	yourself [2] 15:13		
137:11	85:17		
worrying [1] 37:22			
worse [2] 76:6			
144:7			
worst [4] 81:7			
159:5 169:21 169:22			
worth [3] 27:9			
43:1 141:12			
wrap [1] 181:12			
write [3] 72:8 72:11			
131:18			
writers [1] 21:20			
writing [1] 87:12			
written [6] 43:13			
45:7 93:1 94:22			
98:24 191:5			
wrong [7] 135:25			
140:16 155:25 156:2			

INDEX



UNITED STATES SENTENCING COMMISSION
Regional Public Hearing - August 12, 1996
Byron White Federal Courthouse, Courtroom 1
1823 Stout Street, Denver, Colorado

Page 1

UNITED STATES SENTENCING COMMISSION

Regional Public Hearing - August 12, 1996

Byron White Federal Courthouse, Courtroom 1

1823 Stout Street, Denver, Colorado

Page 3

1 I'm Judge Richard Conaboy. I'm
2 chairman of the United States Sentencing Commission.
3 And it's a privilege, as I said, to be here in Denver
4 and to welcome all of you who came here either to talk
5 to us or to listen or to give us some suggestions.
6 We're interested, as we travel around the country, in
7 learning what other people think of the sentencing
8 process in the Federal courts in this country. And
9 we're interested in hearing about what is working well
10 and what isn't working well and suggestions that you
11 might have for us to try to make this process the best
12 in the world.

13 We on the Commission are very proud of
14 the Federal judicial system and we are proud of the
15 fact that we are striving along with all of you to
16 develop in that system a sen -- a system for
17 sentencing that will be fair and just and we'll try to
18 be -- and which strives to get better as we learn from
19 all of you.

20 I know that everyone is not familiar
21 with the Sentencing Commission. Even though I served
22 on the Sentencing Commission in Pennsylvania before I
23 became a Federal judge, I was not very familiar with
24 the sentence -- United States Sentencing Commission
25 myself before I was appointed to it, other than to

Page 2

Page 4

1 JUDGE CONABOY: Well, good morning,
2 everyone. And I guess we're all happy to be here in
3 Denver, Colorado. We've all gotten here from
4 different parts of the country and come out here to
5 honor our distinguished member, Judge Tacha.

6 When I got to the hotel last night,
7 there was a young man who was helping me up with the
8 baggage. He asked me what I did and when I told him I
9 was a Federal judge, he said oh, we have some of the
10 most distinguished Federal judges staying here at our
11 hotel. I said do you remember any of the names. He
12 said Judge Tacha. So you're -- you're really -- your
13 fame goes before you, Judge.

14 We're happy that you arranged this
15 meeting here in Denver and I want to thank you and I
16 want to thank Ed Purdy and the other members of the
17 staff who worked hard at putting together an agenda
18 and getting us a place to meet and all of the other
19 details. We do have to do a little bit more work on
20 the breakfast, but, otherwise, everything is in great
21 shape and we appreciate all the hard work that you've
22 done in putting together what we hope is a -- is a --
23 will be a fruitful hearing and give us some more
24 guidance and direction as we try to carry out our
25 duties on this Commission.

1 know of its existence and generally what its duties
2 were. So I thought maybe I would just give a brief
3 bit about the Sentencing Commission.

4 The Commission came about as a result
5 of the 1984 Sentencing and Reform Act passed by the
6 Congress in an effort to end what was perceived as
7 significant disparity in sentencing in the various
8 district courts throughout the United States.

9 One of the first duties given to this
10 Commission was to develop and to adopt a set of
11 Sentencing Guidelines which were to be used in every
12 Federal court throughout the country. And that job
13 was accomplished in 18 months as mandated by the
14 statute. It was a significant, almost an overwhelming
15 job and to the great credit of the Commission that
16 they were able to get it done within that period of
17 time.

18 Those Guidelines, as all of you may
19 know, remained in full force and effect to this -- to
20 this day and must be used by every sentencing court in
21 the Federal system. From time to time, either the
22 Commission on its own after receiving input from
23 various people around the country or by legislation
24 from time to time amends the Guidelines. As I say,
25 the Guidelines have been and continue to be amended

Page 5

Page 7

1 and changed and updated and indeed, in almost every
2 session of the legislature, the Congress seems to pass
3 some type of legislation which impacts on the work
4 that the Sentencing Commission must do. Either to
5 develop new guidelines or new -- or -- or in their
6 judgment to ordain new criminal conduct which we then
7 must translate into methodology of sentencing under
8 the Guidelines.

9 The Commission, itself, is made up of
10 seven voting members. Each of the seven members is
11 appointed by the President of the United States and
12 confirmed by the Senate. And we also have two
13 nonvoting ex officio members named in the statute, the
14 Attorney General and the chairman of the United States
15 Parole Commission. Of those seven voting members, the
16 statute also requires that at least three must be
17 Federal judges and that no more than four can be of
18 any one political party.

19 I want to introduce you to the members
20 of the Commission and tell you just a tiny bit about
21 their background.

22 As I indicated, I was appointed as
23 chairman in 1994 by President Clinton and I serve --
24 in addition to my duties as the chairman of the
25 Commission, I serve on the District Court in the

1 served with the Senate Judiciary Committee in a
2 variety of capacities, including staff director for
3 Senator Joseph Byden.

4 Michael Goldsmith is also a lawyer who
5 has served in a var -- practiced in a variety of
6 capacities in various areas of the country and
7 presently serves as a professor of law at Brigham
8 Young University Law School in Utah.

9 In addition to those voting members,
10 the chairman of the United States Parole Commission,
11 Edward Reilly, also sits by designation under the
12 statute.

13 And the attorney general has designated
14 Mary Harkenrider, who is counsel to the Assistant
15 Attorney --

16 MS. HARKENRIDER: -- General of the
17 criminal division.

18 JUDGE CONABOY: -- for the criminal
19 division in the Department of Justice. Mary
20 Harkenrider also serves on the Commission with us.

21 We have a -- our offices are located in
22 the new judiciary building in Washington, D.C. where
23 we have a staff of about 100 people who perform a
24 variety of capacities.

25 Most people, I think, when you think of

Page 6

Page 8

1 Middle District of Pennsylvania in Scranton where we
2 like to say we have the best district court in the
3 country, but I won't say that since I'm here in
4 Colorado.

5 But in addition to myself as a judge,
6 Judge Dave Mazzone -- the name tags you can see on the
7 bench in front of us. Judge Mazzone serves on the
8 Federal District Court in Boston, Massachusetts, and
9 has been a long-time member of the bench in a variety
10 of other activities associated with judicial conduct.

11 And Judge Tacha, who all you know very
12 well, serves here in this area on the appellate court
13 for the Tenth Circuit.

14 And Judge Julie Carnes, another Federal
15 District Judge serves on the District Court in
16 Atlanta.

17 In addition to those judges on the
18 Commission, Commissioner Wayne Budd from Boston is
19 presently the senior vice-president of Ninex, the
20 corporation in Boston and he was formerly a Deputy
21 Attorney General of the United States and formerly
22 United States Attorney for Massachusetts.

23 Michael Gelacak, a lawyer. Michael is
24 originally from Buffalo, New York. He practiced law
25 there and in several other areas and also formerly

1 the United States Sentencing Commission, are inclined
2 to think of the Sentencing Guidelines and sometimes
3 there's a feeling that perhaps that's all that we do.
4 However, that's a -- an erroneous assumption or
5 presumption because the Commission, indeed, has a wide
6 variety of very important duties. Among those are a
7 research obligation that we take very seriously in
8 trying to carry out our duties. We do -- we monitor
9 every sentence in the United States courts and we do
10 evaluation of that sentencing process. We have a very
11 strong training arm that goes around the country and
12 trains a -- the judges, trial lawyers and others,
13 probation officers, et cetera. And we serve as a
14 general clearinghouse for sentencing information for
15 the United States Congress, for criminal justice
16 practitioners and for the public. However, the
17 guideline process is at the center of our activity and
18 most of what we do eventually translates itself in
19 some way into the guideline process.

20 In 1994, when I became chairman,
21 several other members joined the Commission and the
22 entire Commission at that time made as one of our
23 priorities an effort to try to simplify the
24 Guidelines. The Guidelines have been in existence
25 since 1987 and there is complaint over that period of

Page 9

Page 11

1 time that generally centered on accusations of
2 complexity and lack of flexibility in the mechanistic
3 nature of the Guidelines so we have been struggling in
4 the last year or so to try to determine some ways that
5 perhaps we could make the Guidelines easier to work
6 with and a -- and, in general, more responsive to the
7 purposes for which they were initiated.

8 We have been involved in this process
9 for a long time. During this -- the initial phases of
10 it, we studied every aspect of the Guidelines to try
11 to determine why that part of the Guidelines came into
12 existence, what its purpose is, how it was structured
13 initially, and what the complaints are about it, how
14 it's working in the field and what alternative ways
15 there might be for us to make those sections of the
16 Guidelines work better.

17 In carrying out that project, we have
18 talked to people all over the country and we've had
19 advice from a probation officers' advisory committee,
20 from defense counsel advisory committee, from a judge
21 advisory committee, and from other people such as the
22 Criminal Law Committee of the judicial conference that
23 have helped us and given us suggestions as we move
24 along. And we're in a -- we're at a point now where
25 we're trying to narrow down those areas where we feel

1 matters in the Federal Register and other places
2 looking for comment on those things and we hope to
3 publish some others in the near future. There are a
4 number of items that we are looking at in the
5 Guidelines and I think that most of those who will be
6 speaking to us today or are speaking with us today
7 have received some information on those areas that
8 we're looking at and we're hopeful that perhaps some
9 of you or maybe all of you will address some of those
10 areas and give us your comments on what you see in the
11 field about the application of the Guidelines, their
12 use and the results that come about from their use.

13 One of the traditional discussions that
14 we always hear about the Guidelines is the whole issue
15 of discretion and whether or not judges had too much
16 discretion prior to the adoption of Guidelines and
17 whether they have too little discretion now and
18 whether discretion has been transferred from the
19 judicial area to the prosecution area and whether the
20 defense has lost or should gain more in the way of
21 their input into the application of the Guidelines.
22 And all of these things are important to us to hear
23 about from you who are using the Guidelines on a daily
24 basis. And your comments are most helpful to us as
25 we're trying to make important decisions at these

Page 10

Page 12

1 some changes can be made and, hopefully, will be made
2 for the better.

3 We realize, of course, as we're
4 involved in this process that much of what we do as a
5 Commission is not final. It's kind of a humbling
6 lesson perhaps maybe for a trial judge to learn that
7 your decisions are not final. As a district court
8 judge, we know that and we know that your decisions
9 are subject to appeal, but it's a different
10 proposition on the United States Commission because
11 when we make decisions, we must publish those and let
12 them out for public comment and, more importantly, we
13 must then translate or transfer it to Congress and
14 Congress has the final say in making determinations on
15 most of the changes that -- and most of the
16 determinations to be made.

17 So it's a political process as well as
18 a public process as well as legal process and trying
19 to work within that framework sometimes is tedious.
20 But it is a system we have in our country. It has
21 worked well for 200 years and we struggle as a
22 Commission to try to work within that framework and
23 try to get accomplished as much as we can to make the
24 system better.

25 We have recently published a number of

1 various hearings.

2 I'd like to move into the first panel.
3 And each of you, I think, has been informed that we
4 are asking you to keep your remarks to ten minutes in
5 length. And we do have a large number of witnesses
6 scheduled for this morning and I would ask you if you
7 would be careful and try to maintain that time
8 limitation. This gadget in front here, I think, will
9 be telling you how much time has expired and we would
10 ask each of you if you would try to keep to that time
11 limit.

12 I would also ask the members of the
13 Commission if you would hold your questions until we
14 have heard from all of the speakers on each panel.
15 And then I think it would be more orderly if we would
16 then question in that fashion unless someone feels
17 there's something of such significance -- a
18 significant portion they might want to break in.

19 On our first panel, we have sitting
20 here before us and again, I extend my gratitude --
21 when I say mine, I mean of the entire Commission -- to
22 all of you to take the time to come here this morning
23 and to talk to us and to give us your impressions of
24 the matters you're going to talk about.

25 We have Judge Lewis Babcock who is a --

Page 13

1 on the United States District Court here in Colorado,
2 appointed by President Reagan in 1988. Am I correct,
3 Judge?

4 JUDGE BABCOCK: Yes.

5 JUDGE CONABOY: The judge is a graduate
6 of the University of Denver in both its undergraduate
7 and law school and practiced here in this area for --
8 since his graduation from law school in 1968 and went
9 on the bench in 1988.

10 And we have Mr. Richard Miklic, who is
11 the chief probation officer here in Denver, in
12 Colorado and has been chief probation officer since
13 1989 according to my notes. Am I correct?

14 MR. MIKLIC: Yes.

15 JUDGE CONABOY: Thank you, Mr. Miklic.

16 We also have Mr. Michael Katz, who is
17 the Federal Public Defender here in Colorado and has
18 been the -- became an assistant in 1978 and the Public
19 Defender since 1979. I don't know if those dates are
20 correct.

21 And then we have Mr. Robert Litt, who
22 is a Deputy Assistant Attorney General in the criminal
23 division with the United States Department of Justice.
24 Mr. Litt has been with the Department since 19 --

25 MR. LITT: June of '94.

Page 14

1 JUDGE CONABOY: '94. '94. Well, thank
2 you all for being here. And Judge Babcock, are you
3 going to talk to us first?

4 JUDGE BABCOCK: Yes, sir.

5 JUDGE CONABOY: If you are, if you
6 would proceed, sir.

7 JUDGE BABCOCK: May it please the
8 Commission, Mr. Chairman. I confess that I haven't
9 appeared before a bench in 20 years and the anxieties
10 washed over as they always did before.

11 I was a Colorado State judge from 1976
12 until I assumed the Federal bench in 1988. And as
13 such, I have a context of experience in sentencing
14 within a wide range of discretion as well as, of
15 course, since I assumed the bench in 1988, sentencing
16 under the United States Sentencing Guidelines.

17 When I attended the Federal Judicial
18 Center and was introduced to the Guidelines, I also
19 confess that it was somewhat overwhelming.
20 Fortunately, however, I always enjoyed working my way
21 through the mazes of the Uniform Commercial Code and,
22 consequently, I became somewhat comfortable working
23 with the Guidelines in fairly short order.

24 In addition or having had the
25 experience of the contracts, sentencing individuals

Page 15

1 where I had to exercise discretion with a wide
2 range -- Colorado had a rather rudimentary system of
3 presumptive ranges of sentencing -- one of the things
4 I learned early on as a judge is that you must express
5 a reason for a sentence imposed. You have a
6 constituency that you're speaking to. Of course, you
7 speak to the defendant who is going to suffer the
8 sentence. The defendant's family, the defense
9 counsel, the prosecution, the public needs to know a
10 reason for a sentence. And last but not least, if you
11 can't express a sentence in a rational fashion,
12 articulated rationally so that you understand it
13 yourself, you probably haven't got a handle on the
14 decision.

15 Factors such as the harm caused by the
16 conduct, the role of a defendant in committing the
17 offense or offenses, a defendant's expression of
18 remorse, what we now know is acceptance of
19 responsibility, numerous of the factors constructed
20 into the Sentencing Guidelines were always touchstones
21 that I looked to in fashioning the sentence where I
22 had wide discretion.

23 I've, in my experience, therefore,
24 found that there is a very keen and sharp logic to the
25 Sentencing Guidelines. The bad news is, as we all

Page 16

1 know, discretion is extremely narrow, tightly
2 controlled. When I sentenced people within a wide
3 range of sentences, I found myself losing sleep,
4 suffering, struggling to articulate the reason. When
5 I sentence under the Sentencing Guidelines, I find I
6 sleep just fine because I have very little thinking to
7 do. It's done for me. It's done for me by the
8 attorneys prosecuting the case and defense counsel in
9 structuring the proposed sentence. And it's done for
10 me by extremely able probation officers under the
11 guidance of Mr. Miklic. Their work and the quality of
12 their work is exceptional. The lawyers, I find, are
13 well schooled for the most part. There are exceptions
14 where you have someone not familiar with the
15 Guidelines who I see is disadvantaged in the plea
16 negotiation process.

17 Basically, my sentencing hearings take
18 about 20 minutes. I have very few contested issues.
19 These issues are resolved largely through the
20 negotiation process. Has discretion shifted to the
21 attorneys, the Government and the defense attorneys?
22 I think that discretion was always there before
23 Sentencing Guidelines in charging decisions and in
24 fashioned plea agreements.

25 But there is not much discretion on the

Page 17

1 bench. We have in Colorado General Order 1994-3
2 through the application of which the issues that may
3 be in dispute at a sentencing hearing are narrowed
4 early on. It comports with notice, due process. If
5 there is an adverse jury verdict, the Government files
6 a sentencing statement setting forth the Government's
7 position with regard to the application of the
8 Guidelines, the defense may respond. If there is a
9 plea agreement, the parties' estimate of the
10 application of the Guidelines is set forth in the plea
11 agreement in advance of the sentencing hearing after
12 all sides have had an opportunity to review the
13 pre-sentence report.

14 If there are contested issues, those
15 issues are made known. They are honed, they are
16 narrowed. And it is not an unwieldy time-consuming
17 process to resolve those questions either as a
18 resolution of dispute of fact or interpretation of the
19 Guidelines and application of the Guidelines to the
20 facts. So I don't find myself burdened with
21 Guidelines.

22 I suppose the question is should I. I
23 sometimes long -- often long for more flexibility in
24 dealing with first-time offenders. Criminal history
25 category levels of a level 1 are often largely

Page 18

1 meaningless in terms of -- there are -- I mean, they
2 have meaning, but there is not much flex in treating
3 somebody who has never been before a court of law in
4 their lives. And that bothers me. I have difficulty
5 dealing with drug quantity questions. I have
6 difficulty dealing with loss determinations in complex
7 white collar crime cases. I have -- one of the most
8 difficult cases I've dealt with dealt with acquitted
9 conduct, although that doesn't appear before me
10 frequently.

11 The Guidelines have achieved their
12 purpose in resolving disparity across Federal
13 districts. I think the areas of disparity now perhaps
14 reside in circuit splits. And that may be a fertile
15 ground to plow by the Commission in resolving these
16 circuit splits. It certainly would be helpful, I
17 think, to the integrity of the Guidelines to keep the
18 burdens as they are. I think the burdens lie where
19 they ought to.

20 I have a note of caution to sound and
21 that's this: Change is unsettling. In my experience
22 in watching the Colorado sentencing system change
23 frequently, I saw most unsettling change among the bar
24 and it impacted the defendants and prisoners greatly.
25 We have a substantial body of appellate case law now.

Page 19

1 I'm always nervous when somebody tells me that they
2 are going to simplify something. I wholeheartedly
3 endorse simplification. But if simplification is a
4 mere term and not accomplished in fact, the complexity
5 that arises out of a simplification process may be
6 unworkable.

7 Thank you for your invitation made to
8 appear here. I appreciate that very much.

9 JUDGE CONABOY: Thank you, Judge, very
10 much. I can tell you that last comment that we're
11 very worried and concerned about that ourself, to make
12 things less complex by trying to make them more
13 simple.

14 Now Mr. Miklic, would you like to make
15 your remarks, please.

16 MR. MIKLIC: Mr. Chairman and members
17 of the Commission, I'm pleased to have the opportunity
18 to be here today to comment on the simplification of
19 the Federal Sentencing Guidelines.

20 Complexity of the Guidelines is as
21 serious a problem for probation officers as I think it
22 is for others in the criminal justice system. Let me
23 give you an example of how it's affecting our work.

24 When I was appointed as a Federal
25 probation officer in 1974, one of my duties was to

Page 20

1 prepare pre-sentence reports for judges of my court.
2 I already had considerable experience preparing these
3 reports at the State level and I found the basic
4 process was not that different in Federal court. I
5 did have to familiarize myself with the Federal
6 Criminal Code and the Federal Rules of Criminal
7 Procedure and I also had to acquire a sound working
8 knowledge of Federal crimes in the Federal criminal
9 justice system. This was a challenging task, but it
10 was a manageable one even though I had other important
11 duties to perform. Besides preparing pre-sentence
12 reports, I was also responsible for providing
13 community supervision of 50 to 60 offenders who were
14 on probation and parole.

15 The situation is strikingly different
16 for someone coming into the Federal probation system
17 today. Officers who will be preparing pre-sentence
18 reports are given, in addition to the Federal Criminal
19 Code and the Rules of Criminal Procedure, the current
20 Guidelines manual consisting of two volumes and
21 incorporating more than 500 amendments, the eight
22 previous editions of the Guidelines manual, a 53 page
23 document published by the Commission which provides
24 the answers to most frequently asked questions about
25 Sentencing Guidelines, a 1,500 page annotated handbook

Page 21

1 which provided detailed legal analysis for each
2 Guideline and policy statement, a 450-page guide to
3 preparing Guideline pre-sentence reports issued by the
4 administrative office of the United States courts, an
5 outline of appellate case law and selected cases guide
6 published by the Federal Judicial Center of 248 pages.
7 This is supplemented by periodic sentencing updates
8 that provide digests of more recent decisions, an
9 index from the Tenth Circuit Court of Appeals
10 currently consisting of 249 pages, a computer program
11 developed by the Sentencing Commission to help
12 officers make our Guideline calculations, passwords to
13 provide access to on-line legal research services, the
14 telephone number of a Sentencing Commission hotline
15 for probation officers, and a telephone number for
16 obtaining legal advice from the administrative office
17 of the United States courts.

18 In addition, because of the complex and
19 highly technical nature of the Guidelines, many
20 pre-sentence report writers are assigned to
21 specialized units where they have no contact with the
22 offenders in the community.

23 The problem is not just we're making a
24 job more difficult and time consuming. The real
25 problem is that we're turning probation officers who

Page 22

1 used to be valued for their judgment and experience
2 into highly specialized technicians who are frequently
3 expected to act as a kind of Guidelines police. We
4 find ourselves in this situation because in the
5 interests of uniformity, we have tried to reduce the
6 sentencing process to a set of precise mathematical
7 calculations and if you try to capture all the factors
8 that go into a good sentencing decision in a set of
9 formulas, you are going to end up with a very complex
10 and mechanical system.

11 Consider, for example, the robbery
12 Guideline section 2B3.1. Robbery is normally a fairly
13 simple crime. Nevertheless, this Guideline contains
14 six different specific offense characteristics that
15 can increase the base offense level, including whether
16 a death threat or weapon or firearm was involved, the
17 extent of any bodily injury, the loss, whether a
18 firearm was taken or was the object of the offense,
19 whether the property of a financial institution or
20 post office was taken and whether a carjacking was
21 involved. Each of these characteristics is broken
22 down into even greater detail as with a threat with
23 weapon or firearm adjustment where you get 2 levels
24 for a death threat, 3 for brandishing, displaying or
25 possessing a weapon, 4 levels for a weapon that was

Page 23

1 otherwise used and so on up to 7 levels for a firearm
2 that was actually discharged.

3 Naturally, each of these terms, weapon,
4 firearm, brandished, displayed or otherwise used and
5 so forth must be meticulously defined. Altogether,
6 there are 23 different ways in which the base offense
7 level can be increased by a specific amount, not to
8 mention one additional provision that limits the
9 cumulative adjustment for death threats, weapons,
10 firearms and bodily injury.

11 One unfortunate result of this system
12 is that the participants become preoccupied with the
13 mechanics, often losing sight of the big picture.
14 Probation officers who prepared pre-sentence reports
15 in the pre-Guidelines era approached each case with a
16 fresh eye and had to carefully justify each sentencing
17 recommendation. As a result, such factors as the
18 seriousness of the offense, the need for detention,
19 protection of the public, and rehabilitation of the
20 offender would be continually on their minds. I don't
21 see much opportunity for that kind of reflection under
22 the current system. Today's probation officers are so
23 busy dealing with the minutiae of Guideline
24 application and trying to police plea agreements --
25 the role of which incidentally many find

Page 24

1 distasteful -- that they have few opportunities to
2 reflect on what the sentencing process is or should be
3 trying to accomplish.

4 A system that tries to reduce
5 everything to a series of complex mathematical
6 calculations also leads little room for independent
7 judgment and analysis. Historically, one reason for
8 having probation officers involved in the sentencing
9 process was that they had valuable insights to offer
10 based on their experience working with the offenders
11 in the community. Specialized Guideline technicians
12 rarely have that kind of experience and those who do
13 have few opportunities to make use of it.

14 The current system doesn't really
15 produce uniformity, either. For one thing, you are
16 always going to have circumstances that don't fit the
17 formulas and each court is going to handle those
18 situations differently. The very complexity of the
19 system also makes it vulnerable to subjective
20 interpretation which creates its own brand of
21 disparity. This is evident from the conflicting
22 opinions that have come out of the courts of appeal.

23 Finally, and most important, the more
24 complex in fact and rule-driven the system becomes,
25 the more dependent it is on the expression of the

Page 25

1 prosecuting attorney who has the burden in our
2 adversarial system of proving the facts that drive the
3 sentencing decision. A Guideline that provides a
4 precise adjustment for possession of a firearm is
5 useless if the prosecuting attorney is unable or
6 unwilling to prove that the gun was there. So
7 although a rigid mechanical system may give the
8 appearance of strict objectivity and uniformity, in
9 practice, it's often quite another story. This is
10 especially frustrating for probation officers who put
11 a lot of time and effort into mastering the Guidelines
12 and applying them in a particular case only to see the
13 adversarial system take over, in the end producing
14 results that are sometimes quite different from what
15 Commission and Congress intended.

16 The complexity of the Federal
17 Sentencing Guidelines is not an accident. And it's
18 not the result of carelessness or lack of literary
19 skill. It's a necessary characteristic of a rigid and
20 mechanical system which does not necessarily promote
21 fairness and consistency in sentencing and which may,
22 in fact, be producing the exact opposite result. If
23 we really want to eliminate this complexity or at
24 least reduce it, we'll have to create a system that
25 strikes a balance between the general and the

Page 26

1 particular, between structure and decision -- and
2 discretion and between mathematics and common sense.
3 In other words, we'll have to develop what are
4 commonly known as Guidelines.

5 With respect to the robbery section I
6 mentioned earlier, the Commission could, for example,
7 provide a general discussion of aggravated and
8 mitigating factors that must be considered in
9 sentencing including those currently listed, but allow
10 the Court to impose sentence within a specified range
11 depending on the circumstances of the individual case.
12 Changes like this would convert our rigid collection
13 of rules and definitions to a true guideline system
14 and would restore balance, fairness and a sense of
15 humanity to the sentencing process.

16 Thank you, very much.

17 JUDGE CONABOY: Thank you, very much,
18 Mr. Miklic.

19 Mr. Katz, are you ready to proceed
20 next?

21 MR. KATZ: Sure. Mr. Chairman and
22 members of the Commission. I have to start by saying
23 I realize that as a Federal defender many years, the
24 remarks that I'm about to have may have -- carry undue
25 weight with the Sentencing Commission and with

Page 27

1 Congress, as well.

2 JUDGE CONABOY: Would you pull your
3 microphone over a little closer, Mr. Katz.

4 MR. KATZ: I remember --

5 JUDGE MAZZONE: You should repeat.

6 MR. KATZ: I remember 10 or 12 years
7 ago sitting not in this courtroom but a courtroom
8 across the street and saying in about three pages
9 worth of testimony that I thought the Guidelines were
10 a bad idea and that the reason I thought they were a
11 bad idea was it was taking discretion away from judges
12 and placing it in a paint by the numbers type of
13 sentencing scheme. And I think two years later, of
14 course, we had the full blown Sentencing Guideline
15 manual and then a couple years after that, I got a
16 letter from then commissioner -- I guess Deputy
17 Commissioner Nagel who wanted to come to Colorado and
18 talk to us about the Sentencing Guidelines and how
19 they were working and I wrote a long letter back
20 saying I prefer not to participate in that discussion,
21 which that letter ultimately got published in the
22 Federal Sentencing Report because somebody got ahold
23 of it and thought it was good.

24 But in any event, I -- at that time, I
25 again agreed to sit down and talk to a commissioner

Page 28

1 and some of the staff members and I don't recall any
2 changes coming about as a result of that interchange.
3 Or any positive ones anyway.

4 And so then when I got the invitation
5 to come back from Mr. Purdy, I thought, why is it I
6 have this sort of reluctance to do this. And perhaps
7 I should try to pinpoint why I have this reluctance
8 because it's certainly nothing to do with any
9 animosity towards the Commission or any individual
10 members of the Commission.

11 I guess I feel like the Sentencing
12 Guidelines are a -- a fictional vehicle on a journey
13 to a mythical planet called Justicia and the planet
14 Justicia is one where there is no sentencing -- there
15 is no -- no disparity of sentencing, that the
16 sentences are proportionate and just and, in fact,
17 it's a world where there is very little crime. And of
18 course, it doesn't exist and it's not going to exist
19 as a result of a sentencing -- the Sentencing
20 Guideline vehicle is never going to find it.

21 And so when I'm asked, you know, should
22 we bifurcate this rule or should we amend this rule or
23 tweak this rule, I guess I feel a little bit like I've
24 landed on a square that says you've just encountered a
25 meteor field, go left or right two moves to avoid it.

Page 29

1 Or you have landed on another square that says go back
2 two spaces to refuel on Mars because I really think
3 that the -- that the mission -- that the goal is
4 that -- is that fictional and it is that imprecise.
5 And the problem with it is, as Mr. Miklic has sort of
6 alluded to -- and it's what we've said all along --
7 you can't take all the factors that go into a just,
8 fair sentence and you can't -- and you cannot quantify
9 them and put them into a manual regardless of whether
10 the manual is few hundred pages or a few thousand
11 pages.

12 I also have said in the past and will
13 say again, based on eight years of experience, that
14 this scheme is a brilliant attempt to do that. This
15 is very rational, well thought out. The references
16 back and forth between different chapters and
17 different guidelines in an attempt to avoid disparity
18 and not have different guidelines trip over one
19 another is really awesome in a sense. I think that if
20 people -- if we could produce this kind of manual in
21 some other areas, perhaps, in the Government, we could
22 take some pride in the product.

23 The problem is -- I'll give you a
24 simple example in a case, and until you can deal with
25 this, you can't really take care of the problem with

Page 30

1 the Sentencing Guidelines. When Trigger Lock was en
2 vogue and every Federal agent in the Alcohol, Tobacco
3 and Firearms was tripping over themselves to go to gun
4 and pawn shops and to find anybody who had a prior
5 felony by cross referencing with the computer to bring
6 them to Court to prosecute them because these were,
7 after all potentially violent offenders, felons who
8 had guns, what they came up with in some cases, for
9 example -- and these are cases I actually handled --
10 was the 62-year-old man with a long record whose
11 father was 90 years old, had gotten senile and gone
12 into the Colorado State Hospital and said to his son,
13 son, I don't need that gun anymore, so go pawn the
14 gun. He took the gun to a pawnshop and he pawned the
15 gun. He probably had the gun for an hour. Where is
16 that dealt with in the Sentencing Guidelines? Where
17 is that dealt with under the chapter felon with a gun?

18 What about the young man, another felon
19 with a gun case, who was living with a woman whose
20 ex-husband had gone to prison and who -- she needed
21 money and she decided she wanted to pawn her ex-
22 husband's gun. So she has my client go with her to
23 the pawnshop and she was trying to pawn that firearm
24 at one pawnshop and wasn't successful, so my client
25 said let me show you how it's done. He negotiates a

Page 31

1 better deal with the next pawnshop. \$50 instead of
2 \$10 for the gun. And he signs off that he is, in
3 fact, the owner of that firearm.

4 Those were two cases that were
5 prosecuted in the U.S. District Court in Colorado.
6 Nothing in the Guidelines to tell a judge or a
7 prosecutor or defense lawyer or to allow us even to
8 deal with the quality and the nature of that criminal
9 conduct because, on paper, it is a clear-cut
10 possession of firearm by a convicted felon.

11 I could -- I could give you so many
12 examples in the cases of illegal aliens who are
13 aggravated felons by virtue of the fact that on a
14 street corner somewhere, they handed a dime bag to
15 somebody for \$25 and now they are going to go to
16 prison for five or six years, although depending on
17 what part of the country you're in, you might -- you
18 might not even see it prosecuted in San Diego the
19 first time they come back. The second time they come
20 back, you might see them get a petty offense and the
21 third time they come back, they might get an illegal
22 reentry after deportation for a felony, leaving me in
23 Colorado to argue to the judge well, this time -- this
24 time, my client has the expectation that he's going to
25 be treated the same way. And there's almost an

Page 32

1 estoppel type of argument because, in fact, in the
2 past, the Federal Government hasn't treated this man
3 as though that prior conviction, that minor drug
4 distribution was, in fact, an aggravated felony. A
5 misdemeanor one time and a -- and a two-year felony
6 one time.

7 So in any event, I see every day --
8 every day, I see those types of problems with
9 Sentencing Guidelines which leads me as a practitioner
10 to be cynical about the Guidelines, to try to do my
11 best to represent my client and try to find some sort
12 of justice for my client despite the Guidelines and by
13 learning and using the Guidelines scheme and trying to
14 become as expert as I possibly can in it.

15 Am I manipulating it? Perhaps I am.
16 Am I trying to reach a just result for my client? Is
17 the prosecutor trying to reach a just result for the
18 people? I think so. And I think the proof of that is
19 in most of these cases where we come in with these
20 types of departures and these types of -- of spins on
21 the facts of the case, judges are willingly signing
22 off on those plea agreements and sentencing the
23 defendants accordingly because I think, in fact, the
24 judges realize the Sentencing Guidelines are much too
25 harsh and -- and consequently, I think they are

Page 33

1 willing to go along with these plea bargains that we
2 fashion in some of these cases.
3 What has the sentencing -- what have
4 the Sentencing Guidelines wrought in the last eight
5 years in this district? My experience is a huge body
6 of case law. I used to think I knew the law. I still
7 think I know the law. It's just there is this whole
8 tremendous segment of the law dealing with Sentencing
9 Guidelines that you couldn't possibly master or know
10 unless you are having cases dealing with those
11 particular points and issues.

12 A lot more people are in prison.
13 There's no question about that. Statistics bear that
14 out.

15 Certainly, there's more uniformity in
16 sentencing. There's no question about that if that's
17 the goal.

18 A lot more time is spent on sentencing.
19 I do -- offenders now do what we call timekeeper
20 because Congress wanted to have more feedback on why
21 defenders were spending more time in general
22 representing their clients. And it's staggering when
23 I look back at my week and at my month to search how
24 much time with each individual client is spent on
25 sentencing.

Page 34

1 In fact, I think we could point to the
2 fact that we have a growth in staff as a result of the
3 Sentencing Guidelines. We've had a need to grow
4 because we can't handle this many cases due to the
5 Sentencing Guidelines and not so much the complexity
6 of the Guidelines, but just the fact of the Guidelines
7 and how many issues there are to deal with and how the
8 plea bargaining process has been complicated.

9 I think also, we have fewer trials as a
10 result of the Sentencing Guidelines, whether that's
11 good or bad, because now, there's a much greater
12 degree of certainty with regard to plea bargaining
13 and, quite frankly, it doesn't take much to be able to
14 fashion a plea agreement that will be a lot less harsh
15 than would be the result if one went to trial under
16 the Guidelines.

17 In other words, pre -- in fashioning
18 the plea agreement, negotiating, we can probably get
19 the benefit of the doubt on the role or more than
20 minimal planning, acceptance of responsibility, of
21 course, and that can have substantial impact on the
22 ultimate sentence. So that's another byproduct of the
23 Guidelines.

24 I've got only a few seconds left. How
25 are they working generally? Well, we've adapted and,

Page 35

1 of course, we would adapt. It was inevitable. We're
2 trying to do justice in this district, I think,
3 despite the Guidelines, but I don't believe that
4 there's a judge in the United States Federal judiciary
5 who couldn't fashion a better sentence or who believes
6 that he or she couldn't fashion a better sentence that
7 the Sentencing Guideline book can fashion.

8 And finally, I just want to say this:
9 I don't think complexity is a problem with the
10 Guidelines. I think it takes a little time to learn
11 the Guidelines. The problem, as Mr. Miklic indicated,
12 is you've got by its very nature not so much
13 complexity, but you've got a lot of factors that have
14 to be weighed. You can put on the green eyeshade.
15 You can work through it relatively easily and that's
16 why the Guidelines are fairly manageable in that
17 regard. Thank you.

18 JUDGE CONABOY: Thank you, Mr. Katz.
19 Mr. Litt. When you're ready, proceed.

20 MR. LITT: Thank you, Mr. Chairman.
21 Members of the Commission. I'm pleased to be here
22 today on behalf of the Department of Justice to
23 discuss the Sentencing Guidelines in general and in
24 particular your efforts to try to simplify them.

25 Some of what I'm going to say may be

Page 36

1 somewhat familiar to you already from the comments of
2 our able representative on the Commission, Mary
3 Frances Harkenrider. That's not because we're robots
4 all set up here to toe the same line, but because the
5 Department of Justice really takes its
6 responsibilities in this area to the Commission, to
7 the public, to the criminal justice system very
8 seriously and before we take the position or express
9 views on this matter, we make sure that they reflect
10 the views not only of the United States Attorneys and
11 of the criminal division, but of all other affected
12 components of the department. And I can attest to the
13 tremendous amount of time that we and in particular
14 Mary spent on these issues to really try to give the
15 questions you raised the serious consideration they
16 deserve.

17 I want to begin by emphasizing that, in
18 our view, the Sentencing Guidelines have really
19 benefitted the criminal justice system. No longer
20 does a defendant coming to court face a sentence
21 that's based on the luck of the draw in the courthouse
22 and all of us who were practicing criminal law before
23 the Guidelines know how much of a factor the luck of
24 the draw could be. Instead, the Guidelines have
25 brought a reasonable degree of uniformity and

Page 37

1 certainty to sentencing. Not absolute uniformity but
2 a reasonable degree.

3 Guideline sentences vary according to
4 the seriousness of the offense and the criminal
5 background of the offender. Proportionality of the
6 sentence to the offense is an important goal. A
7 defendant doesn't get a benefit because his or her
8 socioeconomic background is similar to that of the
9 professionals in the courtroom. Judges still under
10 the Guidelines have the room to individualize a
11 sentence by selecting a particular point within the
12 Guideline, by imposing alternatives to incarceration
13 where permitted and by departing from the Guidelines
14 where there is a factor that the Guidelines don't
15 adequately take into account. But in great measure,
16 we believe that the Guidelines have achieved their
17 paramount goal of fairness, predictability and
18 consistency in sentencing.

19 There are unquestionably costs that we
20 have incurred in implementing this system. It's much
21 cheaper and easier to sentence without Guideline
22 constraints and without worrying about like offenders
23 are receiving like sentences. We all know that
24 judges, lawyers and probation officers have had to
25 become familiar with a brand new body of law, one that

Page 38

1 is still being fleshed out by the Commission and the
2 courts. Sentencing under the Guidelines is
3 undoubtedly and inevitably more complex and more time
4 consuming than under a system of unguided discretion,
5 but we believe that, by and large, the benefits that
6 the Guidelines have outweigh these costs. That's not
7 to say that we believe that the current Guideline
8 system is perfect, but it is to say, however, that any
9 effort at simplification or reform of the Guidelines
10 should not by so doing sacrifice the achievement of
11 the Guidelines.

12 We're very grateful that the Commission
13 has undertaken the study of simplifying the Guidelines
14 and, as you know, we have been participating and will
15 continue to participate fully in this effort.

16 In our view, there are two steps that
17 the Commission could take that would achieve much in
18 terms of simplifying the Guidelines process, while
19 minimally disrupting or changing the system. The
20 first would be to limit the number of the amendments
21 that are passed each year and the second would be the
22 retroactive application of those amendments. Let me
23 talk briefly about each of them.

24 In less than ten years, there have been
25 536 amendments to the Guidelines. The amendments are

Page 39

1 now as lengthy as the Guidelines, themselves. The
2 drug guideline, 2D1.1 has undergone 37 amendments
3 since 1988. As Judge Babcock noted, these constant
4 changes which range from minor clarifications to
5 farreaching revisions have led to a great deal of
6 complexity in litigation. Often just as lawyers,
7 judges and probation officers become comfortable with
8 one set of amendments, there's another set of
9 amendments that we have to deal with. And so our
10 suggestion would be that a paramount way to simplify
11 the Guidelines process is to reduce the number of
12 amendments.

13 I'd like to suggest three specific
14 things that the Commission could look at in this area.
15 The first is simply to amend less. This past year
16 because of its focus on simplification, the Commission
17 decided to consider very few amendments. And I think
18 most of us in the criminal justice system applauded
19 this and would ask for more of the same in the future.

20 Secondly, we would urge you that in
21 studying the simplification process to take into
22 account the complexity the change, itself, introduces
23 and to recognize the amount of litigation and
24 confusion that is likely to be engendered simply by a
25 change in the Guidelines.

Page 40

1 Finally, we suggest that the Commission
2 might consider, for example, moving to a two-year
3 Guideline cycle to slow down the process and give the
4 parties an opportunity to deal with change.

5 Retroactivity is another issue which we
6 think the Commission could address. Each time the
7 Commission adds to the list of retroactive Guideline
8 amendments, we have to devote tremendous resources to
9 litigating cases that we all thought were over and
10 done with. Legal issues that should have been laid to
11 rest long ago arise again, such as the interaction
12 between the Guidelines and the mandatory minimum
13 sentences. The settled expectations of parties and
14 the Court at the time plea agreements were entered
15 into may be upset and there is, on occasion, a need to
16 go back and litigate factual issues years after the
17 case is long over.

18 Although the Sentencing Reform Act does
19 permit the Commission to make Guideline sentence
20 reductions retroactive, it's not compelled to do so in
21 all circumstances. And we would urge the Commission
22 to consider carefully the impact that decisions on
23 retroactivity have on prosecutors, defendants and the
24 courts as well as the increase in complexity created
25 by the addition of retroactive amendments.

Page 41

Page 43

1 We think that there should be a
2 presumption against retroactivity. That amendments to
3 the Guidelines should not be made retroactive unless
4 there is really a compelling reason to do so and we
5 strongly urge that whether or not amendments are to be
6 retroactive be decided at the same time the amendment
7 is adopted. I think that would really help everybody
8 in their expectation and their understanding of how
9 the amendment is going to be applied.

10 I want -- I know that the Commission
11 has identified a number of areas of possible Guideline
12 simplification as the priority for studying during the
13 1997 amendment cycle. I'm not going to comment
14 specifically on these now. I will be doing so a
15 little later on some of the other panels. And I look
16 forward to participating in those panel discussions.
17 But let me say in general that the Department is
18 committed to continuing to work with you in
19 identifying areas of complexity and in assessing the
20 possible proposed solutions to these areas to see if
21 we can, in fact, reduce the complexity of the system
22 without sacrificing the fundamental goals of fairness,
23 predictability and certainty.

24 In addition, there are, we think, two
25 other sources of complexity that we suggest you should

1 may be needed, they are not worth the disruption that
2 they would cause to the settled expectations of the
3 system or, finally, you may determine it's still too
4 early in the process to assess whether particular
5 changes are warranted as not.

6 In any event, we will be pleased to
7 work with you and hope this is a fruitful and
8 stimulating process for all of us. Thank you, very
9 much.

10 JUDGE CONABOY: Thank you, Mr. Litt. I
11 might -- I meant to mention to all of you -- and I was
12 just reminded to do so -- if you wished to supplement
13 any of the remarks you've made by a written
14 submission, we'd be glad to hear from you. We'd like
15 you to get that to us at least by the end of the month
16 if you would, please.

17 We didn't determine a time limitation
18 for questions so supposing we just -- can you set that
19 for 15 minutes?

20 MR. NELSON: Yes, sir, I can.

21 JUDGE CONABOY: Let's see what happens
22 if we try to do that. We can have questions that last
23 beyond that. Maybe they won't last that long. Can we
24 start with Judge Mazzone.

25 JUDGE MAZZONE: I'd like to make a

Page 42

Page 44

1 consider including in your study of simplification.
2 The first is the multiple counts rule. In our view,
3 the Guideline related to multiple counts is one of the
4 most complicated and difficult to apply in the -- in
5 the Guidelines. I can certainly say my first
6 acquaintance with the Guidelines came when I was in
7 defense practice and trying to assess the multiple
8 counts rules gave me more headaches than anything else
9 in the Guidelines. And we think that this is an area
10 that -- that the Commission study -- this topic ought
11 to be included.

12 We would also suggest that under the
13 rubrick of dealing with appellate litigation, you
14 examine in particular whether or not it's possible to
15 clarify what issues are open when it -- when a case is
16 remanded for re-sentencing. This is an area in which
17 there is a lot of confusion and frequently engenders
18 litigation if there is a -- if one issue is -- is
19 treated by the Court of Appeals and the case is
20 remanded for sentencing and people try to open --
21 reopen the whole sentencing to litigate.

22 As the Commission continues its study
23 of the Guidelines and possible simplification, you may
24 well determine that changes are needed in some areas
25 or that no changes are needed. Or that while changes

1 couple of -- ask a couple of questions of Judge
2 Babcock. More or less observations rather than
3 questions. Thank you for taking time from your very
4 busy schedule to come here.

5 I'd like to ask two questions,
6 Mr. Babcock. First, if you know, how many of your
7 criminal cases end up in plea bargains? I know that
8 the plea rate in Colorado to me is astonishing because
9 it's 97 percent here and it's only 80 percent in
10 Massachusetts. So I don't know how you do it, but
11 what percentage do you believe of your criminal cases
12 end up in plea bargains?

13 JUDGE BABCOCK: I can't give you a
14 percentage, Judge.

15 JUDGE MAZZONE: Maybe Mr. Miklic can.

16 MR. MIKLIC: I have the most recent
17 statistics from the most recent annual report to the
18 Commission and it reflects that 97 percent of cases
19 were decided by a plea in Colorado.

20 JUDGE MAZZONE: How much of that is
21 reflected in a plea agreement signed by both parties?

22 JUDGE BABCOCK: Almost all of that.

23 MR. MIKLIC: I should mention also that
24 the national average is 92 percent, so Colorado is not
25 that much higher than the national average. 91.9

Page 45

1 percent was the national average of conviction by
2 plea. And yes, I think most of them are by plea
3 agreement.

4 JUDGE BABCOCK: There are very few
5 cases that are straight up pleas to the indictment
6 absent a plea agreement. They are almost all, I would
7 say, subject to a written plea agreement signed by
8 both parties.

9 JUDGE MAZZONE: The second question I
10 would ask of you is would it help you -- first, let me
11 go back a step. Sometimes when you work in
12 Washington, you tend to lose the picture outside. And
13 when I do talk to my colleagues, I'm struck sometimes
14 by how differently they view the process. You seem to
15 have had -- you seem to have accepted the process and
16 it seems not to have -- using your words -- burdened
17 you and you've learned to live with it and work with
18 it. The key word back ten years or so ago was
19 evolutionary. And my question to you is how much
20 attention, really, you pay to what we do in
21 Washington. In other words, would it help you if we
22 were to -- by that I mean, do you simply go on having
23 adopted your rules and adopted your acceptance and
24 moved along, controlling your docket your own way?
25 Would it help you at all if we undertook to re-write,

Page 46

1 re-comment, do our commentary again, do our
2 introductions again, just sort of give you an idea of
3 what it is that we gathered over the past seven or
4 eight years, sort of like a five-, six-, seven-year
5 review on what we've learned and what we have evolved
6 into? Would you read it if we wrote it? Is it
7 something that would be helpful for you to know and
8 for everybody else in the panel to know that we really
9 do think about the issues that Mr. Litt was talking
10 about, Mr. Katz is talking about? Would it help you
11 for us to undertake that review and tell you about it?

12 JUDGE BABCOCK: Of course, I speak only
13 for myself and not for my colleagues nor for our court
14 as an institution. When I told you that I had an
15 affinity for the Uniform Commercial code, it was true.
16 I found it a very meaningful way in which people could
17 structure their commercial transactions with certainty
18 to cross state lines.

19 The Sentencing Guidelines and the
20 review that you do propose or the review that you
21 propose would be of interest to me because I have a --
22 a bent for looking at the big picture. I would -- I
23 enjoy seeing how Colorado fits into the national
24 scheme; whether we are skewed in some fashion one way
25 or the other, whether it be a chart or graph. Some of

Page 47

1 the materials that Mr. Purdy sent had graphs. I wish
2 I had more time to study them. It's a time factor.

3 But yes, I would personally, I think,
4 benefit from seeing how the system has worked
5 historically because history gives us perspective
6 about where we're going in the future.

7 Your comments about Washington, D.C.
8 are fraught with all sorts of potential for me to
9 address in that --

10 JUDGE MAZZONE: Feel free. I work
11 there.

12 JUDGE BABCOCK: -- one of the blessings
13 of living in Colorado is that we are removed
14 substantially geographically at least from all of the
15 fallout and the intense feeling that seems to pervade
16 the Beltway on a day-to-day basis. That has the
17 advantage of, I suppose, sitting back and looking at
18 what occurs in Washington, D.C. with some perspective
19 and it also has the benefit of some insulation from
20 the slings and arrows of the outrageous fortunes that
21 occur within the Beltway that seems so important at
22 the time.

23 My -- my sense is that what we do here
24 in Colorado is no different from what judges do in
25 Montana; Portland, Oregon; Phoenix, Arizona; El Paso,

Page 48

1 Texas; Columbia, South Carolina, wherever. And that
2 is you give us the law and we try to apply it to the
3 facts as are presented to us. It's -- and it is a
4 matter of acceptance. It's the law. And it's our
5 job. It's our duty. It's our oath to apply the laws
6 to the facts as we have before us. And we accept
7 that.

8 JUDGE MAZZONE: I guess I could just
9 summarize that, my question. Should -- do you need
10 anything further from us because --

11 JUDGE BABCOCK: No, sir.

12 JUDGE MAZZONE: -- that's what -- I
13 think that's what the answer is -- to tell you when
14 and where and under what circumstances you can depart?
15 You need more from us or are you confident, do you
16 have enough to work with right -- what you -- what
17 you've done, what you've put into your own system?

18 JUDGE BABCOCK: The Supreme Court in
19 Koon gave, I think, we trial judges a great tool to
20 work with. My concern is that the Commission still
21 has within your power the ability to further constrain
22 departures by saying where I can't depart.
23 Departures, I think, are something that I would
24 welcome a more expansive and expanded area of
25 discretion in terms of application.

Page 49

Page 51

1 And in that respect, the other side of
2 that coin is that the Commission has within its power
3 the ability to define either areas of encouraged
4 departure or areas where departure is prohibited. But
5 I would welcome that expanded area in the area of
6 departure, yes, sir.

7 JUDGE MAZZONE: Thank you.

8 JUDGE TACHA: Let me just see if I can
9 summarize what I've heard from this panel. It seems
10 to me three of you saying -- at least three of you are
11 saying complexity is not the problem. Now, Mr. Katz
12 and Mr. Miklic sort of seem to say it's the
13 Guidelines, friends. Mr. Miklic, you pointed to one
14 area where it seemed to me you were saying complexity
15 is a bit of a problem and that is in the offense
16 characteristics.

17 Is that -- do I read that correctly?

18 MR. MIKLIC: Well, I was looking at --
19 at complexity more in a fundamental sense.

20 JUDGE TACHA: That's what I was getting
21 at.

22 MR. MIKLIC: Not that it's difficult
23 for us to apply. We can do it. And I agree with
24 Mr. Katz in that. It can be done and it's not to say
25 that the Guidelines are unclear or that people have to

1 complexity may mean more -- change may result in more
2 complexity than any efforts to simplify and specific
3 examples would help us greatly.

4 Mr. Litt, I want to ask you a question
5 that's somewhat pedestrian in nature and self-
6 interested, but you point out the problem of reopening
7 a whole sentence on remand after an appellate
8 determination on a piece of a sentence, I assume.
9 Perish the thought, but is that more a problem of lack
10 of precision in the appellate opinion than it is a
11 problem in the Guidelines? It's hard for me to kind
12 of think how that's a Guidelines problem. It seems to
13 me it's a remand problem.

14 MR. LITT: Far be it for me to
15 criticize appellate courts.

16 JUDGE TACHA: Thank you.

17 MR. LITT: I think it's an area where
18 the -- where the Commission could, within the scope of
19 the Guidelines, provide guidance to the courts. I --
20 I think, obviously, that if in every case an appellate
21 court was completely precise about what issues were
22 and were not left open, it would be helpful in that
23 regard.

24 JUDGE TACHA: Judge Babcock, is that
25 your opinion? You have immunity.

Page 50

Page 52

1 struggle to understand what is meant, but it's
2 complexity in the sense that it's just an -- it's very
3 mechanical complexity in that sense and that I think
4 there's too much of a shift of balance towards the
5 mathematical mechanistic function and not enough
6 recognition that you have to allow some room for
7 discretion. So to me, if you get a very mechanistic
8 system, it's going to be very complex and involved.
9 That doesn't necessarily mean difficult to apply.

10 JUDGE TACHA: We have struggled with
11 what does it mean to simplify and I think I've heard
12 from all of you in one way or another the problem with
13 the Guidelines is less the complexity issue and more
14 as I think you pointed out and you, Mr. Katz, that
15 it's just the Guidelines and -- and the -- the fetters
16 that have put upon the sentencing decision. I don't
17 think you probably want to address this at this point.
18 If we take this, given that the Guidelines are here
19 and we take as a given we see no indication in
20 Congress of a retreat from at least some Guideline
21 concept, then it seems to me it might be helpful to us
22 if you thought about specific places within them where
23 complexity does present a problems. And keep in mind
24 what I hear Judge Babcock saying and which, by the
25 way, the Federal Judicial Center found out that

1 JUDGE BABCOCK: No. The Tenth Circuit
2 never reverses my sentences. And the reason why they
3 don't is because I have such able probation officers
4 working in our court and such able counsel working
5 with the United States Attorneys office and in
6 defense. As I -- I have not seen that and I read the
7 Tenth Circuit opinions and I have not seen that to be
8 a problem in the Tenth Circuit opinions. The issues
9 are very narrow by the time they reach the appellate
10 panel in the first place where there is reversals, for
11 example, for additional findings and an expression of
12 reason for exercise of discretion.

13 The remands say just where and how they
14 are to address that. So the issue is very narrow as
15 it goes back. I have not seen that as a problem with
16 the Tenth Circuit.

17 JUDGE CONABOY: Mr. Gelacak?

18 MR. GELACAK: Thank you. One
19 observation and one question if I could. Mr. Litt, by
20 way of observation, I can't tell you how pleased I am
21 to hear part of your testimony this morning because
22 since I came to the Sentencing Commission, I have been
23 on a horse about less amendments, a two-year amendment
24 cycle and while not specifically arguing about
25 retroactivity, the fact that this Commission ought to

Page 53

1 have some established rules in place and I've taken a
2 fair amount of grief over the years. It's a real
3 pleasure to hear the department take that position
4 finally.

5 Judge Babcock, if I could, I was -- I
6 too was struck by your reference to the Uniform
7 Commercial Code because over the years, I've likened
8 the Guidelines a little bit to the interstate highway
9 system in a remark made by Charles Kuralt years ago
10 when he said what we've done is constructed a
11 wonderful system where people can go from coast to
12 coast and see absolutely nothing of the country. And
13 much the same can, on occasion, be said about the
14 Guidelines.

15 The other thing that you said that
16 struck me was what Judge Tacha has just referred to,
17 that sometimes we create more problems by talking
18 about simplification than we anticipate or that we can
19 even envision, but it strikes me that one of the ways
20 that we can simplify the system is the simplest one
21 and it may be sacrilegious to ask you this question,
22 but as we see the political atmosphere that we are
23 involved in today where our Congress and our
24 legislature continually wants to get tougher on crime,
25 yet they pay no attention to the Guideline system as

Page 54

1 they go about that search for a tougher and tougher
2 penalties, they complicate the system as they change
3 the laws. And as a result, the system gets more and
4 more complex.

5 One of the ways, obviously, we can
6 simplify the system is to suggest to Congress that we
7 no longer need a Guideline system and my question to
8 you, sir, is having functioned in the State court with
9 a considerable amount of discretion and recognizing
10 that only under the Guidelines have you served in
11 the -- on the Federal bench, but are we better off --
12 would we be better off without the Guidelines?

13 JUDGE BABCOCK: Well, that's, of
14 course, fundamental. And that -- the answer to that
15 question depends upon one's philosophy about the role
16 of judges in the sentencing decision. Your analogy to
17 the interstate highway system is very apt in the area
18 of Sentencing Guidelines because I think what we have
19 said here on our panel today and in one faction or
20 another is that we have dehumanized the sentencing
21 process and when you dehumanize a function of the law,
22 I think it has potential consequences beyond simply
23 well, let's be tough on crime. When you dehumanize
24 a -- a fact -- facet of our legal system, I think
25 it -- the problem is that it undermines the very

Page 55

1 foundation of the rule of law as being a human
2 institution in the first place. And that troubles me.

3 If the Guidelines existed as pure
4 guidelines, as touchstones for judges to look at, to
5 articulate sentences fashioned within a wide
6 discretion, I think they would be very helpful. So
7 what I'm saying to you perhaps is the potential for a
8 middle ground and that has been addressed by others
9 and that is rather than making guidelines not
10 guidelines but mandatory law to apply to a sentencing
11 decision. Make them truly guidelines. There for the
12 guidance of the sentencing court, guidance to the
13 probation officers.

14 Would we be better off if we didn't
15 have even those, I probably think not because one of
16 the reasons I think we have guidelines in the fashion
17 we have them is that judges didn't think about the way
18 in which to articulate sentencing decisions to the
19 constituencies which in and of itself leads to
20 arbitrary sentencing decisions and arbitrariness in
21 the sentencing process, I think, led to the
22 disparities that largely have been addressed through
23 the Sentencing Guidelines. So the Guidelines have had
24 the beneficial effect, I think, of lending reason to
25 sentences imposed, but in doing so and in the way in

Page 56

1 which they have been mechanistic and dehumanized, we
2 have lost the articulation in the process. I mean,
3 it's there if somebody wants to read it. But it's
4 still not articulated. So I'm troubled by that.

5 JUDGE CONABOY: Any other questions?
6 Judge Carnes.

7 JUDGE CARNES: Let me just ask
8 Mr. Katz. You had said that you and the Government
9 try to strive -- both of you -- to get just results
10 for your clients and structure plea agreements in that
11 regard in around 97 percent of the cases in the
12 district last year. It sounds as if you all have come
13 up with a formula where you have adjusted fairly well
14 and I have contrasted that to, say, other districts
15 where the U.S. Attorneys Office is quite adamant in
16 insisting that the Guidelines be followed to the
17 letter and appeal judges when they think improper
18 departure is made. I also know for years, there are
19 some judges in the Denver District who won't even
20 consider relative conduct and do not allow it to be
21 put in the pre-sentence report. It sounds like
22 different creative things have been going on.

23 In that vein, while somebody in another
24 district, another defender in another district might
25 find the Guideline results have been too harsh and

Page 57

Page 59

1 unjust, it sounds to me as if there is an adjustment
2 here. Are things working out pretty well for you from
3 your point of view?

4 MR. KATZ: As I think we said before,
5 we've made it work and what I said at one point to the
6 Sentencing Commission in the previous time was that
7 give lawyers a -- give lawyers and a judge a just
8 result and the Guidelines won't prevent us from
9 getting there. That's my experience. And I think in
10 this District, at the outset of the Guidelines, this
11 District Court decided very wisely to have counsel try
12 to resolve Guideline disputes in the plea agreement up
13 front before pleading guilty.

14 I've read plea proceedings from other
15 districts where I represented a client also convicted
16 in another district where I've seen all of that left
17 until sentencing and the probation officer actually
18 getting up and speaking to each of those issues. It
19 horrifies me when I read that. In this District, we
20 have most of that, if not all of that worked out. Not
21 to say that professions necessarily always agree or
22 that something we didn't anticipate doesn't come up.
23 I think that's one reason why this district is --
24 works a lot better.

25 I have specifically told former Area

1 despite the fact that he had a fairly long record.
2 It's difficult sometimes, I feel sometimes like the
3 challenge is all right, we sit down and we look at it
4 and now we've got to figure out how to make some of
5 these things disappear, go away and mitigate and in
6 the process, some may say that's intellectually
7 dishonest. If that's true, I say then doing justice
8 is subverting the intent of the Congress or Congress
9 and that's too bad.

10 JUDGE CONABOY: We're running out of
11 time.

12 MR. GOLDSMITH: I've got a few
13 questions.

14 JUDGE CONABOY: I can't set a time
15 limit.

16 MR. GOLDSMITH: Mr. Katz, you gave us
17 examples of problematic Guideline cases, those
18 involving the gun possession and pawnshop context.
19 What was the result in those situations? Do you
20 recall the type of sentence that was imposed?

21 MR. KATZ: I know we had departures.
22 In one case, we had a departure. The second case, the
23 young man was simply with the young woman. I believe
24 I got the case dismissed. I'm not certain. We were
25 able to demonstrate the circumstances sufficiently,

Page 58

Page 60

1 Commissioner Nagel the concept that lawyers and judges
2 are going to seek an opportunity to have litigated
3 sentencing proceedings so that they can fight over the
4 meeting of more than minimum planning or two level,
5 three level, four level role in an offense to satisfy
6 the -- the philosophy, let's say of the Sentencing
7 Commission is beyond my comprehension and it hasn't
8 worked that way in this district and, frankly, we've
9 had, I think, very reasonable -- the United States
10 Attorneys office have been very reasonable over two or
11 three different United States Attorneys.

12 We have seasoned prosecutors who have
13 been in state court. I think that the judges in this
14 District are reasonable people who understand that the
15 Guidelines if you apply them --

16 JUDGE CARNES: It sounds like they
17 maybe use the Guidelines and the people are adapting
18 and doing what they think are right --

19 MR. KATZ: There are occasions I would
20 just -- the bank robbery case I had two weeks ago,
21 where we struggled -- both sides struggled to try to
22 get this somewhat impaired get-away driver of a
23 vehicle in a bank robbery that was sort of a Keystone
24 comedy in itself, to get him down to what would have
25 been a fair and reasonable sentence for this man,

1 but there was no legitimate vehicle in the Guideline
2 was my point.

3 MR. GOLDSMITH: Would the departure
4 concept work appropriately to resolve the problem?

5 MR. KATZ: Because we were able to do
6 an 11E1C sentence bargain with that departure built in
7 and the judge realized it was fair and was not going
8 to torture the application of that particular
9 departure. We've done some very creative things on
10 both sides here and I guess I have the sense of a bad
11 little boy that maybe we're not supposed to be able to
12 get away with this and we have to almost do things
13 that are outside the mainstream. I don't think the
14 Guidelines invite that. I realize take -- taking into
15 account something that the Sentencing Commission did
16 not consider or, to a degree, did not consider is part
17 of it, but now you're talking about the basic --

18 MR. GOLDSMITH: The Commission has
19 asked counsel and the bench to give us examples of
20 unjust results under the Guidelines so I'm especially
21 grateful for you to illustrate those problems for us
22 today. If you could give us examples in the future,
23 as well, either in supplemental comments or at any
24 other time, I would be grateful.

25 Let me ask you, now, however, in your

Page 61

1 judgment, how many cases, percentage-wise, do the
2 Guidelines produce unjust results?
3 MR. KATZ: If they were applied
4 literally in this District, I think we're basically
5 getting to just results, of course, given the fact
6 that crack Guideline --

7 MR. GOLDSMITH: How about in the whole
8 in this District and under what you view as literal
9 application?

10 MR. KATZ: I can't really answer that
11 question. All I can say is I think we -- in this
12 District, we come a lot closer than I think most other
13 districts.

14 JUDGE CONABOY: Thank you. Ms. -- I'm
15 sorry.

16 MR. GOLDSMITH: Two or three more. Mr.
17 Litt, you expressed some concern about retroactivity.
18 I think the Commission likewise shares some of those
19 concerns. But could you give us an example of
20 circumstances under which you think retroactivity
21 would be appropriate? When would that be valid to
22 you?

23 MR. LITT: I prefer not to -- I mean, I
24 haven't thought that through and I'd prefer not to
25 shoot something off the top of my head for fear it

Page 62

1 would come back and be used against me later on. If
2 you don't mind, I'd like to consider that and get back
3 to you on that.

4 MR. GOLDSMITH: That would be great.
5 Mr. Miklic, you had mentioned the vast array of
6 resources that probation officers are given at the
7 outset of their responsibility in this context. I'm
8 wondering in how many cases do probation officers
9 really have to rely upon all those sources? I mean,
10 they have got a terrific library, it seems to me, to
11 turn to, but how often do they have to consult them?

12 MR. MIKLIC: They have to consult them
13 with frequency. There's an awful lot of case law that
14 regulates how the guidelines are interpreted.

15 MR. GOLDSMITH: So this is an ongoing
16 problem?

17 MR. MIKLIC: Yes, I think it is.

18 MR. GOLDSMITH: Fair enough. Let me
19 also ask you, in your experience, what percentage of
20 the cases do you think the results are unjust given
21 the -- the technicians that you stated we've now
22 produced as the probation officer? Are the results
23 nevertheless appropriate?

24 MR. MIKLIC: As far as a percentage,
25 that's just complete speculation. I really couldn't

Page 63

1 even make a guess of that. The question was are in
2 most cases the sentences reasonable or fair?

3 MR. GOLDSMITH: Okay.

4 MR. MIKLIC: Was that your question?

5 MR. GOLDSMITH: Sure.

6 MR. MIKLIC: I think in most -- I think
7 in most cases, there are some -- yeah. Some -- some
8 general conforming to what's reasonable and what's
9 fair.

10 MR. GOLDSMITH: Thank you. Judge
11 Babcock, I appreciate your presence and your remarks.
12 I'd liken it more than the UCC to the Tax Code.

13 JUDGE BABCOCK: Well, I --

14 MR. GOLDSMITH: Hadn't thought about
15 that?

16 JUDGE BABCOCK: I'm kind of a quirky
17 character. I like the UCC but I can't stand the Tax
18 Code.

19 MR. GOLDSMITH: Thank you.

20 JUDGE BABCOCK: You're welcome.

21 JUDGE CONABOY: Commissioner Budd, do
22 you have any questions? Mr. Reilly.

23 MR. REILLY: I might like to ask, if I
24 might, Chief Miklic, I appreciate some of the comments
25 you made. In terms of the numbers of documents you

Page 64

1 have to associate with your work, and you mentioned
2 that you were Guidelines police. Recognizing that you
3 also have a responsibility under the statutes to serve
4 the U.S. Parole Commission, we're deeply grateful for
5 the wonderful work your staff and your folks do. I'm
6 curious about what percentage of the time, in view of
7 the fact that you're the Guidelines police that you're
8 obviously out policing the people you're supposed to
9 supervise -- in other words, percentage-wise, it
10 sounds to me as if a considerable amount of time is
11 taken today in meeting with judges and prehearings and
12 so on and I'm curious as to just the amount of -- what
13 amount of time is now spent actually out on the road
14 supervising offenders.

15 MR. MIKLIC: I'd estimate we spend
16 about 70 percent of our time on supervision activities
17 as opposed to pre-sentence activities. One of the
18 ways we have been able to keep our head above water is
19 to specialize and bifurcate things.

20 It's very difficult to stay on top of
21 people in the community when you're trying to do
22 Guideline research reports and run legal inquiries and
23 keep up with case law at the same time. It's about 70
24 percent, I would estimate.

25 MR. REILLY: Do you feel comfortable

Page 65

1 commenting on the fact that under the new system, more
2 and more -- more and more of these individuals are
3 being put under what I may call administrative
4 supervision which is basically they are in the file,
5 but they are really not being supervised? Is that
6 dangerous approach in view of what --

7 MR. MIKLIC: Well, I think it varies,
8 frankly, somewhat from district to district how much
9 commitment you want to make to supervision. I think
10 there are districts where there is such a
11 preoccupation with Guidelines that supervision,
12 frankly, is suffering and suffering quite a bit, but
13 it hasn't been the case here because we've -- we
14 have -- we see community supervision and community
15 protection as a very important if not the most
16 important part of our mission, so we are continuing to
17 focus on that. We do make some use of administrative
18 case laws, but we use it on a limited basis and it's
19 very carefully selected for offenders who do not pose
20 a risk to the community. People that pose the risk,
21 we devote quite a bit of our resources to them. I
22 wouldn't say that's necessarily true nationwide.

23 MR. REILLY: Thank you.

24 JUDGE CONABOY: Commissioner
25 Harkenrider?

Page 66

1 MS. HARKENRIDER: No.
2 JUDGE CONABOY: Thank you. The
3 commissioners went eight minutes and 45 seconds over
4 their time, which means there is no time for the
5 chairman. This is what always happens. No. I do
6 thank all of you very much and as you can see, your
7 testimony generates a lot of interest and questions.
8 We could go on for a long time, but I thank you very
9 much for your provocative remarks and a -- I would
10 like to move to the next panel if you don't mind
11 changing seats. Thanks again, very much.

12 Some people are asking for a break. I
13 exercise my own prerogative and I'm not going to give
14 you any break. We'll move on with this panel if you
15 don't mind.

16 This next panel consists of Mr. Patrick
17 Burke, who was the public defender here in the
18 Colorado from '78 to '82, I guess, and a -- Mr. Burke
19 is now the coordinator of Criminal Justice Act Panel
20 Attorneys here in Colorado.

21 And Mr. Frederick Bach, who is the
22 supervising probation officer here in Colorado.

23 Mr. Arthur Nieto?

24 MR. NIETO: Nieto.

25 JUDGE CONABOY: Am I pronouncing it

Page 67

1 right?

2 MR. NIETO: That's perfect.

3 JUDGE CONABOY: Who is a former
4 chairman of the criminal law section of the Colorado
5 Bar Association.

6 MR. NIETO: Right.

7 JUDGE CONABOY: And has an extensive
8 background in the criminal law. And served as a
9 Colorado State Public Defender for a number of years
10 back in 1974 to 1978.

11 And Mr. Michael Bender, who is a
12 defense attorney here in Denver and was a Deputy State
13 Public Defender in Denver until 1971 and a -- was
14 division chief for the Denver Public Defenders Office
15 for a number of years.

16 So we will begin this panel with
17 Mr. Burke. If you don't mind going first. You can
18 use that microphone or stand, whichever you like. I
19 understand your panel has agreed to five minutes each.

20 MR. BURKE: I'll move quickly, Your
21 Honor. I'm standing up.

22 JUDGE CONABOY: Reset the clock and
23 we'll give you a full five minutes if we can.

24 MR. BURKE: Mr. Chairman, members of
25 the Commission, Mr. Purdy asked me to direct my

Page 68

1 remarks to the effect that the guidelines have on
2 panel attorneys with perhaps an additional perspective
3 on how it's worked in this District and I have been
4 practicing law in this District for a sufficient
5 number of years to comment on the latter topic, as
6 well.

7 The way the guidelines impact panel
8 attorneys is perhaps best discussed by mentioning a
9 typical case in this district. What happens with
10 panel attorneys most often is we will get the many
11 co-defendants in a drug case, for example, or the
12 public defender will get a defendant and then panel
13 attorneys will be appointed for a half dozen or dozen
14 co-defendants. And we will begin our attorney-client
15 relationship by meeting our client in a little teeny
16 room with metal tables and chairs, sometimes with a
17 piece of glass between us.

18 The Sentencing Guidelines are part of
19 the triumvirate of congressional micromanaging of the
20 Federal criminal justice system. The other two being
21 making sure that the defendants are detained in drug
22 cases and the other one is being minimum mandatories.
23 And I saw that the chairman made a remark about the
24 effect of minimum mandatories in one of the papers
25 that I received.

Page 69

1 So we meet our clients in little rooms.
2 They have been detained and they are facing minimum
3 mandatories and that's how we get started. It's
4 almost impossible to develop a good attorney-client
5 working relationship under those circumstances.

6 In one of our early meetings, we will
7 go out to meet with the client. We will take the
8 Federal criminal law and the Guidelines book and we
9 will work our way through to the right point on the
10 grid that the defendant is probably looking at because
11 in this district, fortunately we get some discovery
12 early.

13 At the end of those early meetings, our
14 clients are almost invariably convinced that we're
15 just part of the system. They look at us as another
16 one of those people up on the hill with all these
17 weapons pointing down at them. It's very, very
18 difficult under the Guidelines and under minimum
19 mandatories to have a good working attorney-client
20 relationship. So one of the things that's happened
21 with the Guidelines is the attorney-client
22 relationship has suffered tremendously.

23 The next thing that has happened
24 because of the Guidelines is -- and this was mentioned
25 by a number of the earlier witnesses, particularly

Page 70

1 Mr. Katz -- we've turned -- and the questions were all
2 right on target -- we've turned into plea bargainers.

3 The most important tool that the panel
4 attorney has these days is not skillfully turning the
5 phrase or being a good researcher. It's getting the
6 knee pads out to go into the prosecutor and start
7 working for a suitable plea bargain. The casualty is
8 the attorney-client relationship and the casualty is
9 we don't get to try cases that need to be tried
10 because the risks are too great.

11 As far as how the Guidelines are --
12 have worked in this district, I did a number of cases
13 before they went into effect in the old days and the
14 sentencing judge would receive an excellent
15 pre-sentence report. That's not being synchophantic.
16 The probation department in this district has always
17 provided good pre-sentence reports with good personal
18 backgrounds and a judge would just grapple with what
19 to do. And Judge Babcock was not kidding when he said
20 he would have sleepless nights. I could see in the
21 faces of the judges that they had not slept in the old
22 days. They would come and on the Friday morning
23 docket would be sentencings and they would be haggard
24 and they hadn't slept and they agonized. And that's
25 how the system worked. And I'll tell you what. It

Page 71

1 was a better system. It was a better system because
2 Article 3 judges took their jobs so seriously and they
3 did agonize over it. The decisions were
4 individualized, they were personalized.

5 And so with my 40 seconds left, I will
6 go to the only suggestion that I think makes the most
7 sense is to make them guidelines, not make them
8 mandatory. Let these Article 3 judges struggle over
9 what they will do, individualize what they will do
10 with each of my individual clients. That's what panel
11 attorneys would like to see.

12 I read some of the history and I
13 remember it brought it back that Senator Matthias and
14 some others said these should be discretionary
15 guidelines, not mandatory and they should be
16 discretionary and the Article 3 judges should be given
17 more options and they should be given more discretion
18 so that my clients get a sense -- and a couple of
19 witnesses talked about it -- that they were treated
20 humanly, that the process is humanized.

21 JUDGE CONABOY: Thank you, Mr. Burke.
22 Mr. Bach, would you go next, please.

23 MR. BACH: Sure. My name is Fred Bach
24 and I'm a supervising U.S. probation officer for the
25 District of Colorado. I haven't spent my whole career

Page 72

1 into Colorado. I began my career in 1987 in the
2 Eastern District of New York, Brooklyn and at a time
3 when the Sentencing Guidelines were a rumor which no
4 one really thought would become a reality. In the
5 Eastern District of New York, I served in the special
6 offender unit, supervising members of organized crime
7 and career criminals. I also had the opportunity to
8 write many old law pre-sentence reports as well as
9 Guideline pre-sentence reports.

10 In late 1990, I transferred to the
11 District of Colorado where I continued to write
12 pre-sentence reports and also served as the district
13 special offenders specialist. In October 1994, I
14 became supervisor and until last month, I supervised
15 the pre-sentence investigation unit where I was
16 responsible for reviewing most of the pre-sentence
17 reports prepared in this district.

18 In light of my experience, I'd like to
19 address my remarks to the impact that the Sentencing
20 Guidelines have had on the probation officer's role
21 during the sentencing process.

22 During pre-Guideline I pre-sentence
23 investigation in most districts, the probation officer
24 interviewed and reviewed the files of the
25 investigating agents and Assistant United States

Page 73

Page 75

1 Attorneys and wrote the prosecution version of the
2 section of the report. The defendant was also
3 interviewed regarding the nature and circumstances of
4 the offense and that information was included in a
5 defendant's version section of the report. These
6 sections, combined with an in-depth description of the
7 defendant's character, personality and relationships
8 were presented to the sentencing judge in an organized
9 objective report so that the judge could evaluate the
10 information and impose an appropriate sentence.

11 When the Guidelines went into effect in
12 November of 1987, prosecutors, defense attorneys and
13 judges looked to Federal probation officers to become
14 the experts on Guideline sentencing and, much to their
15 credit, Federal probation officers rose to the
16 challenge of mastering the intricacies of guideline
17 sentencing. However, the Guidelines also imposed upon
18 the probation officer the duty of evaluating the
19 defendant's relevant conduct in determining a
20 tentative range. This duty essentially forces the
21 probation officer to take a position in this
22 adversarial proceeding to which the probation officer
23 is not a party.

24 Because of the importance of case facts
25 and the correct application of Guidelines to those

1 caught in the middle of disputes. In the early days
2 of Guideline sentencing, the probation officer's
3 expertise was welcomed. However, in recent years,
4 many probation officers have come to feel like an
5 uninvited guest at the sentencing table.
6 I would also like to address the
7 problems probation officers now have obtaining
8 information for inclusion in the pre-sentence report.
9 Because the pre-sentence report has become a more
10 heavily litigated document than it ever was in the
11 past, probation officers are less likely to obtain
12 important information from defendants, as many defense
13 attorneys now screen the information provided to the
14 probation officer. Attorneys regularly advise
15 defendants not to discuss their offense, criminal
16 history, drug use, or finances with the probation
17 officer out of a fear that the information will be
18 used against them. This results in a more sterile,
19 less informative report, which sometimes compromises
20 the Court's ability to get a comprehensive picture of
21 the defendant and his behavior.

22 I believe that the Commission's
23 proposals which consider simplification of relevant
24 conduct and other issues would help remove probation
25 officers from the awkward role they often find

Page 74

Page 76

1 facts, attorneys for opposing sides often aggressively
2 contest the accuracy of the probation officer's facts
3 and Guideline applications. Probation officers are
4 now placed in a position where they must defend their
5 Guideline applications and become familiar with case
6 law in the issues in dispute.

7 Since the implementation of Guideline
8 sentencing, I have seen both defense and Government
9 attorneys' attitudes towards probation officers shift
10 from cooperative to adversarial. The probation
11 officer's role in Guideline sentencing has sometimes
12 led attorneys on both sides to accuse probation
13 officers of busting plea agreements and practicing law
14 without a license.

15 Probation officers now expend an
16 excessive amount of time responding to objections,
17 which often lead to lengthy and complicated hearings
18 in both the district courts and the courts of appeals.
19 The more time probation officers spend dealing with
20 objections and lengthy hearings, there's less time
21 spent supervising offenders in the community.

22 Since the implementation of the
23 Sentencing Reform Act, sentencing has become a more
24 generally cumbersome and expensive process than it
25 ever was before, with the probation officer frequently

1 themselves in. Most Guideline disputes are related to
2 relevant conduct issues which potentially could be
3 ironed out before a guilty plea is entered.
4 Simplification of the Guidelines would also be more
5 consistent with the plea bargaining process, which,
6 for better or for worse, drives our criminal justice
7 system. Thank you.

8 JUDGE CONABOY: Thank you, very much,
9 Mr. Bach. Mr. Nieto, will you go next, please.

10 MR. NIETO: Thank you for inviting me.
11 Please the Commission and Mr. Chairman. Mr. Purdy
12 supplied me with a copy of my testimony from the 1986
13 hearings. I was struck at the difference in outlook
14 that the last ten years has wrought as far as my
15 approach to the Guidelines. I practiced criminal law
16 in the Federal courts for about ten years before the
17 Guidelines were enacted and then since then, I've
18 continued to practice in Federal court.

19 Many of my concerns after having read
20 the initial drafts in 1986 actually didn't come to
21 fruition. What I have observed is that the process
22 changed basically in regard to the participation of
23 the defendant, whereas before the Guidelines were
24 enacted, we received an indictment, we did the
25 discovery, we planned pretrial motions, we did some

Page 77

1 discussion based on the strength or weakness of the
2 Government's case with the Guidelines in effect, the
3 defendant is immediately put in the middle of the
4 process.

5 The two issues that -- that come up
6 fairly immediately, long before litigating pretrial
7 motions, are acceptance of responsibility and
8 substantial assistance. I was surprised to hear that
9 97 percent of the cases in Colorado end up in plea
10 bargains. My perception has been that since the
11 enactment of the Guidelines, fewer of my cases go to
12 trial than before the Guidelines, but I wasn't sure if
13 that was because of the Guidelines or my maturity or
14 my better analysis of cases.

15 But what acceptance of responsibility
16 does is certainly puts a -- an incentive on the
17 defendant to -- to make a deal and make a deal as soon
18 as possible. Is that good? Well, to the -- to the
19 degree that it -- it relieves docket pressure and it
20 results in fewer trials and more deals, it's probably
21 good.

22 I -- I happen to believe in the -- the
23 right to trial by jury, not only as a means of
24 avoiding punishment or potential punishment on the
25 part of the defendant but as a societally meaningful

Page 78

1 process. It not only educates the defendant, but it
2 educates the public about what is civilized and what
3 is uncivilized behavior and what is punishable and
4 what is okay. And by fewer cases going to trial, I
5 think that society has fewer opportunities to -- to
6 participate in that sort of cleansing process of -- of
7 societally acceptable behavior.

8 On the other hand, the Guidelines are
9 here so we deal with acceptance of responsibility and
10 we deal with it very quickly.

11 The other aspect of the Guidelines that
12 I see often in my practice is the matter of
13 substantial assistance. My perspective -- and I see
14 my time is running out more quickly than I expected.
15 My perception of substantial assistance is it really
16 penalizes the little guy. It penalizes the first
17 offender, the person with fewer criminal contacts.

18 Particularly in Government sting type
19 operations where the -- the actors in a criminal
20 enterprise are -- are Government agents, a defendant
21 can't snitch on anybody because they are all
22 Government agents. A first offender doesn't know
23 other criminals. A person at a lower level of -- of a
24 large conspiracy can't give the Government information
25 that it should have and the first offenders and the

Page 79

1 lower level criminals are really, I would submit, the
2 defendants that should have the benefit of the 5K1
3 departure for substantial assistance and not the --
4 not the bigger crooks.

5 I -- one case in particular that was
6 really problematic was a child pornography case that I
7 did about six months ago. And this fellow had been
8 the subject of a Government sting in 1992. He didn't
9 buy it. The Government put away its file and revived
10 it in 1996. He did buy some child pornography in 1996
11 and because he doesn't know anybody in child
12 pornography except for Government agents, he is
13 looking at a solid level 13. This man is a hard
14 working State employee, frankly, with a family and
15 with no criminal history and he's going to jail.

16 I see that there's some consideration
17 being given to making 3 point acceptance of
18 responsibility credit available to everybody. I
19 endorse that. I think that would be one way of
20 correcting the inequities in the substantial
21 assistance part of the guidelines.

22 I -- in 1986 and today, I agreed with
23 one part of the Commission's work and that is to
24 continue to refine the Guidelines and to tinker with
25 them and I applaud your efforts to tinker with them

Page 80

1 and make them more workable. Thank you.

2 JUDGE CONABOY: Thank you. Mr. Bender.

3 MR. BENDER: Your Honor, members of the
4 Commission. Mr. Chairman, I mentioned about finality.
5 In my opinion, there was a saying that my excellent
6 high school math teacher said, there's only three
7 things in life that you know for sure, death, taxes,
8 and homework. So with that in mind, I'm going to take
9 Mr. Purdy and his death, taxes and homework and I'm
10 going to take Mr. Purdy's comments and talk
11 philosophically. I understand the guidelines are here
12 to stay. I understand public opinion is what it is.
13 But I think you heard from persons other than defense
14 lawyers who have told you that there is much more to
15 respect for the law than simply punishment and that
16 one of these things is the whole concept of fairness
17 and due process.

18 The things that occur to me as a
19 practitioner in the field, the first is obvious, the
20 Commission has spoken about it, the crack penalties.
21 The second is one disparity. That may not only be
22 true in this district, but there is an enormous
23 difference in sentencing between State and Federal
24 court systems, particularly in the drug area. We have
25 in Denver a drug court which I think is very forward

Page 81

Page 83

1 looking and very successful and it's causing a lot of
2 the resources on cases to be brought into the Federal
3 system. I can give you some anecdotal evidence later.

4 But probably the most important thing
5 is the guidelines in my view, as Mr. Katz said, are
6 Draconian. We talked about a mythical journey. I
7 couldn't agree more. But the most and worst example
8 of that, in my view, is the substantial assistance
9 aspect. 5K1.1. I'd say that in our district, I
10 believe I've never met a prosecutor who didn't act in
11 good faith and didn't make a judgment. It's not a
12 personal thing at all.

13 This is an area which breeds enormous
14 sentencing disparities and even though it may be on a
15 national basis, the districts are similar. Here you
16 have a situation where instead of having 548 Article 3
17 judges making independent sentencing decisions, you
18 have thousands of Federal prosecutors replacing the
19 judgment of an Article 3 judge. You have historical
20 conspiracy, which we call no dope dope cases. Little
21 guys and loners receive harsh sentences while
22 Mr. Nieto pointed out organized people in the business
23 of crime receive less harsh ones, but probably more
24 importantly is the impact that the Guidelines as a
25 whole and the 5K1.1 have specifically on the role of

1 you have a huge body of case law developed about
2 application of the Sentencing Guidelines. And the
3 vast majority of the cases in this district, while
4 there's cooperation and it's good, it's well done, I
5 have no quarrel with it, the prosecutor determines the
6 sentence that the person gets.

7 And I, for one, would ask you to
8 eliminate 5K1 period. If you want -- if you like,
9 make it a grounds for departure. Think about that.
10 Really, what I'm arguing for is a return to the good
11 old days where there is no penalty for exercising your
12 constitutional right of trial. An individual, a
13 citizen is sentenced based on proof beyond a
14 reasonable doubt on the conduct that has been charged
15 and except for the most heinous crimes, people have --
16 the judge has the option of placing the person on
17 probation.

18 There should be, as Judge Babcock said,
19 an articulation of the conscience of the community in
20 the specific case where sentence is handed down and
21 the guidelines, as intellectually awesome as they are,
22 don't do it. Thank you.

23 JUDGE CONABOY: Thank you, Mr. Bender,
24 very much. As we go to questions on this one, if we
25 can, can we set that for ten minutes this time and see

Page 82

Page 84

1 the defense lawyer, a transformation, in my view, of
2 fundamental jurisprudence by limiting or reducing the
3 role of the defense lawyer as well as the judge.

4 You heard Judge Babcock say now he
5 sleeps well. And what is usually said is what the
6 lawyers -- the lawyers bring the plea bargain and
7 bring the arrangement to the Court. That's true. The
8 lawyer, though -- as Mr. Katz alluded to, candidly
9 speaking, you don't have to be a rocket scientist or a
10 great criminal defense lawyer or a good legal
11 researcher or do a lot of factual homework to get
12 something that's better than what the Guidelines
13 Draconionally insist in terms of mandatory minimum
14 sentence. So what the job of the defense lawyer is is
15 to get any kind of deal they can.

16 5K1.1 is -- is the ultimate, if you
17 will. It sort of reminds me of the Allstate ads. Put
18 your life in the hands of the good people. And they
19 are good people. I'm not criticizing them. But they
20 just represent one aspect of the tripartite
21 adversarial system. And as far as the constitutional
22 defense advocate, he is getting on knee pads is a
23 polite way of saying it in the overall scheme of the
24 system. Less cases are litigated on constitutional
25 issues. Less cases are investigated. And instead,

1 if we can do a little better since we're getting
2 pressed for time.

3 And Commissioner Budd, since you didn't
4 ask any questions before, we'll start with you.

5 MR. BUDD: Well, thank you, very much,
6 Mr. Chairman. And I'd like to ask a question of all
7 of the panelists. I'd like to -- I listened very
8 carefully to what you had to say and you know as I do
9 that the purpose of the Guidelines is to achieve some
10 measure of consistency in fairness in sentencing and
11 I'm wondering in your view, with respect to this how
12 far have the Guidelines gone in achieving these goals
13 of consistency and fairness? Overall fairness and
14 consistency. And I have in mind what has been
15 mentioned by a number of the panelists this morning
16 and that is, in the State of Colorado, 97 percent of
17 the cases are pled out and of those -- in that 97
18 percent, as I understand it, the vast majority had
19 agreed upon plea agreements.

20 MR. BURKE: I think it's failed for
21 that exact reason. Plea bargaining is different in
22 different districts and, therefore, sentences are
23 different in different districts. It's not because
24 the prosecutors here are lenient. They are a little
25 more fair-minded. The question about this district

Page 85

1 seems to be reaching out for some sense of rough
2 justice where some prosecutors in another district
3 will hammer on the Guidelines, take advantage of all
4 the piling on points that are available in the
5 guidelines and you end up with different sentences for
6 the same conduct.

7 So it's really failed and I have lots
8 of anecdotal information about that, too, people
9 calling from prison and this person and so forth. So
10 it really has failed. It's a good idea, but it
11 failed.

12 MR. BENDER: I want to reply to one
13 narrow area. The Denver drug court, we're -- there's
14 a presumption that you've -- if it's a first offender,
15 you're going to get a diversion, placed in a diversion
16 program. It's incredibly inconsistent as to which
17 jurisdiction you find yourself involved in committing
18 a minor drug offense, a Federal -- Federally or not.

19 Secondly, I think there's a huge
20 disparity internally just in what constitutes
21 substantial assistance. I mean, for example, a famous
22 case, I'm sure you heard testimony where they had 27
23 Government informants. Each one of those individuals
24 had enormous drug involvement and I know they were
25 given all kinds of deals. I mean, how do you square

Page 86

1 that with the case of where I have -- I represent a --
2 I represent on a court-appointed basis an African-
3 American who sold in, I think, a three-month period of
4 time 16 grams of crack. First offender. He's now
5 doing -- and I had a sympathetic judge, sympathetic
6 prosecutor. They called it substantial assistance,
7 but he didn't have anybody to really snitch on and
8 he's now doing 30 months in a Federal prison.
9 Everybody thought the case should not be brought in
10 Federal court, but there we were. So I don't think
11 it's been successful.

12 MR. NIETO: Not successful. Drug cases
13 come to mind. I think in Colorado, you're in better
14 shape if you're the wife of a kingpin smuggling
15 multiple grams of cocaine in the United States than if
16 you're a first offense single time fellow who sells a
17 kilogram of cocaine to an undercover officer. The
18 wife walks. The first time offender, I know one
19 that's doing nine years.

20 MR. BUDD: Just given the
21 presumption -- that we should have talked for these
22 purposes -- at least that the Guidelines are going to
23 remain in effect, then what should be done to
24 accomplish those goals?

25 MR. BENDER: I'll jump in. I think a

Page 87

1 lot of the -- the questions that you are asking are
2 very helpful, very positive. I applaud the whole
3 issue of relative conduct and how that should be dealt
4 with. I think it's wonderful. I'm in favor of it.
5 If this is simplification, I applaud it. I mean,
6 certainly, there are problems with simplification that
7 you all know, but, to me, the thing that you're doing
8 is making a bad system a little more digestable and
9 it's certainly useful.

10 JUDGE CONABOY: What would you do with
11 relevant conduct?

12 MR. BENDER: If I were writing the law,
13 I would only consider relevant conduct in terms of
14 conduct at conviction. Period.

15 MR. GELACAK: Just one quick one,
16 Mr. Bender. I think everyone on this Commission has
17 been struck by the disparity between State sentencing
18 and Federal sentencing particularly. Are you aware of
19 any studies that have been done here to -- to
20 demonstrate how that decision is made?

21 MR. BENDER: You know, I'm not
22 specifically. You mean the law enforcement decision
23 whether to come to Federal court or State court?

24 MR. GELACAK: Yes. That may be an
25 unfair question. If you are aware or if there is some

Page 88

1 work being done, we would appreciate seeing the
2 results.

3 MR. BENDER: You know, I -- I don't. I
4 know that I talked to the chief of the Mountain States
5 Drug Task Force last week who advised me that he was
6 having a meeting with the Denver District Attorney's
7 Office. I assume it was something along the lines
8 you're saying. The only thing that I know that
9 statistically is true is in the drug area in Denver,
10 Denver County. Not in the other counties. And
11 there's no question about the difference in treatment.
12 And there's no question if you talk to narcotics
13 detectives who actually do both Federal and State
14 prosecutions, they will tell you that when they want
15 to cause someone more problem, they will bring them in
16 the Federal system. There's just no doubt about that.

17 JUDGE TACHA: I just quickly want to
18 ask, the question of the first time offender is one
19 that we hear all over the country. It's one that's
20 expressed a lot. Has the safety valve amendment
21 alleviated that somewhat?

22 MR. BENDER: I have another court-
23 appointed case where the safety valve alleviates the
24 mandatory minimum, but it doesn't alleviate the basic
25 harshness, for instance, of the crack cocaine

Page 89

Page 91

1 penalties. So sure, it's better than nothing, but
2 it's certainly -- and it's nothing like it would have
3 been eight or nine, ten years ago. The Court has no
4 discretion but to give a mandatory minimum sentence of
5 a substantial amount of time.

6 JUDGE CONABOY: Any other?

7 MR. GOLDSMITH: First, I would like to
8 invite members of the panel again in your supplemental
9 comments, if any, to advise us about any cases that
10 you think demonstrate unjust applications of the
11 guidelines. Just cases where someone obviously was --
12 the trial judge ought to be thinking about those cases
13 as being terribly unfair.

14 Beyond that, I wanted to clarify,
15 Mr. Bender, your concern or criticism of 5K1.1. Was
16 your criticism aimed at that provision in general or
17 simply to the aspect of it that you first get the
18 Government authority to make the decision about
19 whether to award 5K1.1?

20 MR. BENDER: I think that the
21 Government -- as far as I'm concerned, prosecution
22 is -- I've been involved for almost 30 years -- the
23 Government always has the decision whether to
24 prosecute someone or not or make deals, so to speak.
25 I certainly think that's fine. What I think is bad is

1 proper targets and what information is and how truly
2 valuable the information can be that's given. That's
3 really the role of the prosecutor. It's used as a
4 means to -- to get out of a Draconian system.

5 Sometimes in a very just way. But I don't think in
6 terms of an overall system, it's a healthy thing.

7 MR. GOLDSMITH: Thank you. Mr. Burke,
8 a question for you. Are you satisfied overall with
9 the level of understanding demonstrated by panel
10 attorneys with respect to the Guidelines? Do they
11 know the Guidelines well enough, in your judgment?

12 MR. BURKE: Most of the time -- we have
13 mailings that go out almost once a month and we
14 conduct four seminars a year and so there's a lot of
15 information being disseminated.

16 I heard Judge Babcock say every once in
17 a while, you get an inexperienced lawyer that comes in
18 and is not doing a great job for their client. When I
19 heard that, I thought it was probably a younger
20 retained lawyer, seriously. The information gets out
21 from the AO, from our panel and from the Federal
22 Public Defenders office.

23 MR. GOLDSMITH: It gets out and it gets
24 read?

25 MR. BURKE: I think most of the time,

Page 90

Page 92

1 that the way it is structured in 5K1.1 is a
2 philosophical matter. It pronounces the impacted
3 effect of the prosecution. So I wouldn't say it
4 should be eliminated for that reason. I think all the
5 Guidelines do is have that shift as Mr. Nieto
6 explained to you. You don't look at a case and
7 determine -- when you get a case, you don't determine
8 what kind of legal issues are here, what are the
9 facts. You look right away at the defendant.

10 MR. GOLDSMITH: The sense then is it is
11 more fundamental than simply with the fact that the
12 Government has authority to make the decision about
13 whether to file that motion. Even if we said that the
14 Court has discretion to award substantial assistance
15 points, you would object?

16 MR. BENDER: Well, no, I wouldn't. I
17 say that would be a proper role for departure within a
18 guideline system. But the problem I have is that what
19 the Government says is usually followed, as a
20 practical matter, and so they are determining the
21 whole matter and judges and defense lawyers, we don't
22 know how to evaluate the information that somebody has
23 given.

24 I don't have enough time to explain
25 this. I don't have the experience to know who are the

1 it does get read. We talk about it a lot amongst
2 ourselves in the seminars.

3 MR. GOLDSMITH: Thank you.

4 MR. BURKE: You're welcome.

5 JUDGE CONABOY: All right. Thank you,
6 very much. Judge Weinshienk, I see in the courtroom.
7 We're going to take a bit of a break here. Would you
8 like to make some comments either now or right after
9 the break, Judge, or --

10 JUDGE WEINSHIENK: After the break is
11 fine.

12 JUDGE CONABOY: After the break. Okay.
13 Thank you. All right. Let's take a ten-minute break.
14 We'll resume at 11:20.

15 (There was a recess taken from 11:06
16 p.m. to 11:17 p.m.)

17 JUDGE CONABOY: Almost everyone is
18 here. Let me at least introduce the panel. The next
19 panel is intended to talk principally about relevant
20 conduct and acquitted conduct. And again, we have
21 asked the speakers to limit their comments here to
22 five minutes and then I'll ask for some questions.

23 Professor Kevin Reitz is an associate
24 professor of law at the University of Colorado Law
25 School and served as a reporter for the ABA Standards

Page 93

1 for Sentencing and has written a number of articles
2 and does considerable speaking on sentencing matters
3 throughout the country. He was with us just recently
4 in Madison at the National Association of State
5 Sentencing Commissions.
6 And Mr. Kurt Thoene --
7 MR. THOENE: Thoene.
8 JUDGE CONABOY: Thoene?
9 MR. THOENE: Yes.
10 JUDGE CONABOY: -- is a senior
11 probation officer also here in the -- in Denver and
12 has spent, likewise, some of his time in trying to
13 work with others around the country and in developing
14 better sentencing processes.
15 And Mr. David Connor is the
16 assistant -- Assistant Public Defender here in Denver.
17 Served as Chief Deputy District Attorney from 1980 to
18 '88 and then became Assistant U.S. Attorney in Denver
19 here in 1988.
20 Then now and finally, Mr. Robert Litt
21 is with us again on this panel to help us with these
22 topics, also.
23 So let's begin, if we can, with
24 Professor Reitz.
25 Judge Weinshienk, I want you to know

Page 94

1 something. Every one of the commissioners has asked
2 me why I'm not calling on you.
3 JUDGE WEINSHIENK: I'll be available
4 after this panel.
5 JUDGE CONABOY: I keep telling them
6 that, but they don't believe me. I just want you to
7 know how popular you are. Just because you came out
8 of the great 1979 class of district judges. Best
9 ever, they tell me.
10 JUDGE MAZZONE: And you're buying
11 lunch.
12 JUDGE CONABOY: Professor, would you go
13 first.
14 PROFESSOR REITZ: Sure. Judge Conaboy
15 and members of the Commission, thanks for inviting me
16 here.
17 I think that I am called upon to
18 testify not so much as an expert in the Federal
19 Guidelines, which I'm not in particular, but as
20 someone who has spent time around various sentencing
21 guideline systems around the country, particularly at
22 the State level. I have written, I think, the only
23 article on real offense sentencing that concentrates
24 on issues at a State level rather than Federal level.
25 I haven't spoken before in any detail about the

Page 95

1 Federal relevant conduct provision.
2 So what I'd like to try to do today is
3 perhaps provide some perspective in terms of policy
4 choices or design choices different sentencing systems
5 have faced in terms of real offense sentencing and
6 bring them to bear on the relevant conduct in the
7 provision of real offense features of the Federal
8 guidelines.
9 I would begin by saying I think your
10 staff discussion paper is very good on this issue.
11 That there is no such thing as a pure offensive
12 conviction sentencing system in the country, at least
13 to my knowledge, just as I think there is no such
14 thing as a pure or ideal real offense sentencing
15 system, either. What tends to happen in different
16 jurisdictions, particularly in guidelines
17 jurisdictions, is that the system as a whole leans
18 more heavily towards one side of the continuum or
19 other, so that either more or fewer real offense
20 elements are incorporated into the eligible factors at
21 sentencing.
22 So it's -- it's a misnomer or unless we
23 understand that the term "conviction offense" tends to
24 signify a -- a system that leans towards conviction
25 offense sentencing rather than an ideal system. If we

Page 96

1 can agree on that sort of approximate terminology,
2 then I think, definitionally, understanding is
3 improved.
4 Now, in terms of the Federal system and
5 where the Federal system lies on this continuum, I see
6 two different types of real offense actors or elements
7 entering into the Federal guidelines; one of which is
8 very common and is shared with other systems around
9 the country and the second of which is not so common
10 and is more controversial.
11 The first, the Federal system
12 incorporates a number of real offense elements and by
13 that I mean facts in addition to the statutorily
14 defined elements of the offense for what I would call
15 grading purposes in order for the judge of sentencing
16 to determine how serious the case of mail fraud, of
17 bank robbery or so on is before the Court. And this,
18 in fact, is something in terms of extra offense fact
19 finding that is done in every state system that I know
20 of. Every state considers facts beyond the offense to
21 determine where on the possible scale of seriousness a
22 particular crime lands.
23 Now, in addition to that, the Federal
24 system does something that, to my knowledge, is unique
25 among guideline systems and that is it incorporates a

Page 97

Page 99

1 real offense sentencing to actually change the
2 definition of crimes, which is the foundation of the
3 sentence calculation as you move through the
4 Guidelines, so that it's possible in the Federal
5 system for the Guideline calculation to proceed on the
6 basis of three counts where the count of -- where
7 there's only one count of conviction or perhaps a
8 differently defined criminal offense than the count of
9 conviction.

10 Now, that is something that is not done
11 in state-wide systems, to my knowledge, and I have
12 distributed, I think, to Commission members an excerpt
13 of the American Bar Association's recently published
14 criminal justice standards which includes as a matter
15 of policy that as a base predicate for sentencing
16 consideration, the offense of conviction is a better,
17 more just starting place than perhaps a different set
18 of offenses as determined at sentencing.

19 Now I should say after having made that
20 distinction that both types of real offense sentencing
21 for grading and for selection of the crimes that will
22 be built upon for sentencing purposes -- both types of
23 real offense sentencing, I think, are constitutional
24 under existing case law and are eligible for the
25 Commission within its policy judgment to choose

1 already this morning, I do have an observation and
2 that is my observation is that the majority of us, I
3 think, in the criminal justice system, probation
4 officers, Federal judges, U.S. Attorneys and defense
5 attorneys who didn't experience the evolutions of --
6 the so-called evolution of the Guideline process, I
7 don't feel that we are as burdened as some of the
8 people that have lived through that evolution process
9 and have experienced what the system was like before
10 the Guidelines. And I think that we have an easier
11 time, even though we may have reams of information to
12 go through to help us to determine the Guidelines. I
13 think that we feel more comfortable with that.

14 Comments on relevant conduct. After a
15 finding of guilt by -- either through a jury or by the
16 entry of a guilty plea, a defendant's case is assigned
17 to a U.S. probation officer to prepare the
18 pre-sentence report. The officer determines the
19 appropriate offense guideline and then is instructed
20 to determine the applicable guideline range in
21 accordance with Section 1B1.3. That's the relevant
22 conduct guideline.

23 The local rule for the District of
24 Colorado requires that plea agreements contain a
25 stipulation of factual basis. That is, the plea

Page 98

Page 100

1 between.

2 The principle or the -- the basic
3 philosophy of those of us who prefer a conviction
4 offense orientation is simply this: The belief that
5 if Government is going to impose a criminal punishment
6 on a citizen, it should first convict that citizen of
7 a crime for which punishment will be imposed. Again,
8 this is not a constitutional principle. It's not a
9 principle that everyone agrees with. When I speak to
10 someone whose experience primarily is in the Federal
11 system, they often tell me, Professor, you're right as
12 a matter of idealism or principle, but the real world
13 doesn't work that way. I continue to take some
14 comfort in the fact that the State guideline systems
15 work that way. It at least gives me some sense that
16 there is a real world possibility here that is
17 somewhat different than I see under the Federal
18 relevant conduct provision.

19 JUDGE CONABOY: Thank you. Mr. Thoene,
20 if you will proceed next, please.

21 MR. THOENE: Good morning,
22 Mr. Chairman. I'm not as polished a speaker as some
23 of the other panelist members so I was going to
24 confine my comments strictly to my written notes.
25 However, after hearing some of the other panelists

1 agreement must set forth the facts of the case. How
2 much the loss was, how much the quantity of drugs --
3 the quantity of drugs involved, the role the defendant
4 played in committing the offense and any pertinent
5 information that would affect guideline application.

6 In addition, the plea agreements
7 drafted in the District of Colorado also contain
8 detailed Chapter 2 and Chapter 3 guideline annotations
9 based upon the stipulation of facts. The probation
10 officer uses the stipulation of facts as a starting
11 point when attempting to ascertain the real offense
12 conduct.

13 Additionally, the probation officer
14 reviews the investigating case agent's reports, grand
15 jury testimony and additional discovery materials to
16 determine if all the relevant conduct has been asked
17 for in the plea agreement.

18 It is when the probation officer sets
19 forth the real offense facts gleaned from the
20 discovery materials that the application of the
21 relevant conduct provisions become problematic for the
22 probation officer. Not problematic in the sense of
23 what is to be considered relevant conduct for
24 Guideline application, but problematic in how the
25 inclusion of this information has an effect on the

Page 101

1 plea negotiation process.

2 On occasion, the probation officer
3 learns that the stipulation of facts contained in the
4 plea agreement does not correlate with the information
5 contained in the discovery materials. For example,
6 there may have been more drugs involved in the offense
7 or the defendant may have possessed a weapon. All of
8 these factors may have an impact on Guideline
9 calculations. By including this information as
10 relevant conduct, probation officer is often seen as a
11 plea buster. The Government will say well, that
12 information -- both the Government and the defense
13 counsel are most likely aware of that information;
14 however, the information may not have been included in
15 the plea because of -- of plea negotiation processes.
16 This leaves the probation officer in an awfully
17 difficult and frustrating situation. On one hand, you
18 have a plea agreement which is beneficial to the
19 defendant. On the other hand, there is a prosecuting
20 attorney who wants to uphold the plea to prevent the
21 case from proceeding to trial.

22 The probation officer has essentially
23 become a third-party adversary in the sentencing
24 process. However, if the Government is not known to
25 support the application of what appears to be

Page 102

1 applicable relevant conduct, the probation officer is
2 not in a position to put on evidence or call witnesses
3 at the sentencing hearing.

4 In addition, the application of
5 additional relevant conduct not accounted for in the
6 plea agreement often results in Guideline range
7 overlaps and these overlaps can -- the Court can often
8 make a finding that this is not an issue that will
9 actually affect the guideline range and, therefore, he
10 will not make a finding on the disputed issue.

11 I've been a United States probation
12 officer for six years and my job duties involve the
13 reviewing of other probation officers' reports. In
14 addition, I have served a temporary tour of duty on
15 the Sentencing Commission hotline, answering numerous
16 probation officers' questions on the application of
17 the Guidelines. Based upon this information, it is my
18 belief that over the past eight years, U.S. probation
19 officers have developed a good understanding of how
20 the present relevant conduct provisions found in
21 Section 1B1.3 are to be applied. My personal
22 experience indicates that officers preparing
23 pre-sentence reports resolve many of the difficulties
24 in determining what is relevant conduct and how to
25 apply the current relevant conduct provisions.

Page 103

1 Although my previous comments have
2 reflected upon procedural problems in applying the
3 relevant conduct guidelines in the District of
4 Colorado, I believe that the current guideline
5 provision for the way relevant conduct is used in
6 calculating sentences does not need clarification or
7 modification unless a major substantive change is made
8 to the charge offense system. Any clarifying
9 amendments to the relevant conflict guideline may
10 create new confusion and complexity to this issue.
11 Thank you.

12 JUDGE CONABOY: Thank you, Mr. Thoene.
13 Mr. Connor.

14 MR. CONNOR: Thank you, Your Honor.
15 May it please the Commission.

16 The relevant conduct Guidelines Section
17 1B1.3 and then related sections in Chapter 3 are the
18 driving engine of the Sentencing Guidelines. And
19 while some of what has been good about the Sentencing
20 Guidelines stem from the purview in Section 1B1.3 of
21 the relevant conduct guideline, almost all of what is
22 bad about the Sentencing Guidelines stem from that
23 particular Guideline.

24 I would urge the Commission to consider
25 that, number 1, no acquitted conduct should be used in

Page 104

1 computing the applicable Sentencing Guideline -- in
2 coming up with the applicable Guideline range.

3 Likewise, I would strongly urge the
4 Commission to consider limiting the relevant conduct
5 to the offense or offenses of the conviction in a
6 given case or, in addition to that, any additional
7 conduct to which the defendant agrees or stipulates is
8 part of a plea bargain or in the post-conviction phase
9 prior to sentencing.

10 This weekend, I thought about this
11 issue and thought about defendants basically having to
12 defend against conduct that they have been acquitted
13 of, then in a sentencing proceeding having to answer
14 to conduct that was not part of the offense of
15 conviction and the term "recumbent" came to mind and I
16 won't ride that horse any further since Mr. Bender
17 made such use of it in the previous panel. The term
18 "Kafkaesque" came to mind as well. But as I was
19 listening to some of the proceedings here earlier this
20 morning, I did some of what lawyers do sometimes. I
21 sat down and was working on another legal issue and
22 was reading various appellate opinions and I came
23 across a line in the United States vs. Villano, which
24 is a Tenth Circuit opinion which states, I think,
25 pretty much what my position is about relevant conduct

1 and why it should only be the charge or charges of
2 conviction. And the Tenth Circuit said, "The
3 imposition of punishment in a criminal case affects
4 the most fundamental of human rights, life and
5 liberty."

6 Fundamental fairness mandates that
7 acquitted conduct should not be used in computing
8 relevant conduct and computing the sentencing range.
9 And likewise, that it be limited to the count or
10 counts of conviction.

11 I think one of the problems that exists
12 in this area is in Chapter 1, in 1B1.3, the -- all
13 facts for sentencing purposes are assumed to be
14 equally as provable as all other facts and, in
15 reality, that's just not the case.

16 Likewise, in Chapter 1, it assumes that
17 all facts or any facts that may fall under the purview
18 of Section 1B1.1 -- or excuse me -- 1B1.3 are as
19 easily provable as any other facts and that just as
20 well simply is not the case. That's all.

21 JUDGE CONABOY: Thank you, Mr. Connor,
22 very much. Mr. Litt.

23 MR. LITT: Thank you. The relevant
24 conduct guideline and the real offense approach that
25 it carries out in our view is critical to the goals of

1 run, will be productive of confidence -- public
2 confidence in the sentencing system. I also find it
3 somewhat ironic that many of the same people who
4 complain about the supposed increase in prosecutorial
5 control of the system are advocating moving towards a
6 charge offense system because that will undoubtedly be
7 seen as further increasing the control the prosecutors
8 have, since it is the prosecutor and not the Court who
9 determines what charges are brought.

10 Finally, one criticism that -- that's
11 made is the -- it was referred to before -- is the
12 idea of these upsetting the expectation -- that
13 relevant conduct can upset the expectation of the
14 parties in guilty pleas. I think that by now, eight
15 years into the Guidelines, the attorneys should know
16 at this point that relevant conduct is going to be
17 taken into account in sentencing.

18 The Commission's listing of the
19 priorities suggests the possibility of considering a
20 simplifying of the relevant conduct guideline without
21 making any substantive change in it. We would urge
22 you not to do that. This guideline has been amended
23 in 1988, 1989, 1990, 1991, 1992, and 1994 and we think
24 it would be better to let this guideline rest for a
25 while, let people have a chance to interpret it,

1 the Sentencing Guidelines which I mentioned earlier,
2 being predictability, certainty, uniformity and
3 fairness in sentencing.

4 We believe that if the concept of
5 relevant conduct were significantly limited, it could
6 have a very detrimental effect on the central purposes
7 of the sentencing format.

8 There was some discussion in the last
9 panel of the unfairness of some of the drug sentences
10 wherein you have a kingpin who can -- who can
11 cooperate, sometimes getting the benefit for a
12 sentence that the mule who can't cooperate in any
13 significant manner doesn't have. And I think people
14 expressed concern about that. I think you're going to
15 find the same thing if you go to a charge -- more to a
16 charge offense system or something that's limited to
17 the offense of conviction. You can have two drug
18 dealers who look very similar, but one of them, for
19 whatever reason, be it that the witnesses are
20 intimidated or evidence is not available, is convicted
21 of far lesser counts than the other and yet these two
22 people who to all intents are -- are engaged in the
23 same conduct, one of them will get a significantly
24 lower sentence than the other.

25 I don't think that that, in the long

1 become familiar with it. We really don't think that a
2 shorter version would provide greater clarity.

3 I think that the problems that people
4 have with the relevant conduct guideline are not on --
5 in the area of clarity, but I think what we've heard
6 is sort of fundamental objections to the concept of
7 relevant conduct that I don't think can be addressed
8 by trying to simplify.

9 Let me talk briefly about the issue of
10 acquitted conduct. This has, of course, long been
11 traditional in sentencing that acquitted conduct could
12 be considered by courts in imposing a sentence and we
13 don't think that that long tradition should be
14 reversed at this stage. In our view, there is clearly
15 no legal problem with the consideration of acquitted
16 conduct. There is only one circuit that has held that
17 acquitted conduct cannot be considered and we have a
18 pending certiorari petition before the Supreme Court
19 to try to get that conflict resolved.

20 But in -- in our view, the prior cases
21 really make it fairly clear that, as a legal matter,
22 acquitted conduct can properly be considered. As a
23 matter of policy, we think there are excellent reasons
24 to include acquitted conduct within the concept of
25 relevant conduct. Of course, a jury's verdict of

Page 109

1 acquittal does not mean that the defendant is, in
2 fact, innocent; but only that the jurors found a
3 reasonable doubt.

4 Before a court can take acquitted
5 conduct into account at sentencing, it has to find by
6 a preponderance of the evidence that the defendant
7 committed the crime and this standard has always been
8 held to afford sufficient procedural protection for
9 defendants at sentencing.

10 Moreover, the elements of the offense
11 may not actually match the Guidelines factor. The
12 defendant may be acquitted under 924(c) of using or
13 carrying a weapon, whereas the Guideline standard
14 applies only to possession. You're then faced with a
15 choice of either saying well, you have -- you have to
16 either apply the acquitted conduct prohibition more
17 broadly than the actual acquitted conduct or the
18 courts are going to have to make an effort to try to
19 determine exactly what facts were found by the jury in
20 acquitting the defendant. And that, I think, is going
21 to lead to a tremendous amount of litigation and
22 complication analogous to what you get in collateral
23 estoppel issues.

24 In general, we're not aware that the
25 current system of incorporating acquitted conduct has

Page 110

1 resulted in significant unfairness and we urge you
2 again not to change this settled mode of sentencing.
3 Thank you.

4 JUDGE CONABOY: Thank you, Mr. Litt.
5 I'm going to take about 10 minutes for questions,
6 please.

7 JUDGE MAZZONE: Just one question to
8 Mr. Litt. Mr. Litt, can you conceive of any
9 situation, any case in which acquitted conduct
10 actually -- I should say the tail of acquitted conduct
11 actually bites the dog? Is there any case that you
12 can conceive of in which it might be necessary for a
13 judge to use in order to see that the tail doesn't
14 bite the dog?

15 MR. LITT: I would think that if --
16 obviously, one can conceive of such a case. You can
17 construct a case like that.

18 JUDGE MAZZONE: You don't have to
19 construct it. It exists. LaBonte.

20 MR. LITT: I would say that given the
21 right set of facts that a judge could -- that fell
22 sufficiently outside the heartland, the judge could
23 depart downward under those circumstances if he felt
24 the facts were sufficiently established justifying a
25 acquittal.

Page 111

1 The judge still does have to find by a
2 preponderance of the evidence that the conduct did
3 take place before the judge can take that into account
4 at sentencing.

5 JUDGE MAZZONE: Okay. LaBonte is a
6 First Circuit case in which -- a life sentencing case
7 in which state circ -- the state court had murder
8 acquittals. That case is now, I believe, on appeal.
9 I believe it's on appeal. But there's no question but
10 a very good, very conscientious judge found by a
11 preponderance of the evidence that the murders had
12 been convicted of, although the state court jury
13 acquitted the defendant. Now, should that judge
14 ignore the standard and detract --

15 MR. LITT: Is this an underlying
16 narcotics case where the murders were convict --
17 committed in the course of the narcotics conspiracy?

18 JUDGE MAZZONE: No. LaBonte.

19 MR. LITT: I don't know the particular
20 case. I mean, presumably, the murders fell within
21 relevant --

22 JUDGE MAZZONE: No matter.

23 MR. LITT: Presumably, the murders fell
24 within relevant conduct as it's defined within the
25 guidelines. Part of the offense of conviction. I

Page 112

1 must say that I don't find a fundamental unfairness if
2 the judge is, in fact, persuaded that conduct did
3 occur in taking into account sentencing. There are a
4 wide variety of circumstances in which a state case
5 might not have resulted in a conviction. The
6 fundamental question is for the judge to be satisfied
7 as to whether or not the conduct occurred.

8 JUDGE CONABOY: Any other questions?

9 MR. GOLDSMITH: Mr. Litt, I may have
10 misunderstood you. I thought you said that the
11 standard applied with respect to relevant conduct in
12 the context of acquittals as clear and convincing.
13 More recently, you said that it was a preponderance of
14 the evidence which is the standard that I think does
15 apply.

16 MR. LITT: If I said clear and
17 convincing, I misspoke.

18 MR. GOLDSMITH: Preponderance, you
19 think that's the appropriate standard, as well?

20 MR. LITT: Yes.

21 MR. GOLDSMITH: The other questions I
22 have, I think, reflect comments made by other panel
23 members throughout the day. I think it's come to the
24 attention of the Commission, certainly, that the
25 practice in Denver with respect to the guidelines may

Page 113

1 be quite different from practices elsewhere. Here,
2 for example, there seems to be the U.S. Attorneys work
3 more closely with defense counsel and achieve results
4 that perhaps all concerned are satisfied with; whereas
5 that's not the case necessarily in other districts.
6 That suggests a problem of potential disparity and I'm
7 wondering what, if anything, the Department of Justice
8 might do to achieve greater uniformity by virtue of
9 perhaps greater control over the practices of local
10 U.S. Attorneys offices.

11 MR. LITT: I'm actually glad you asked
12 that question because I had noted the people's
13 comments that were made and while I do think Denver is
14 a wonderful city, I think it's less exceptional in
15 that regard than some of the comments here may have
16 indicated. My impression both based on my experience
17 in the Department and when I was in private practice
18 is that, by and large, most prosecutors and defense
19 attorneys do try to work and courts do try to work for
20 just results in individual cases.

21 They may use different routes to get
22 there, but, by and large, I think that in most places
23 in the country, people are working out accommodations
24 within the system to deal with it.

25 If -- what -- what I'm more interested

Page 114

1 in hearing as you have asked about instances where
2 guidelines lead to an unjust result, I would be -- and
3 from the Department's point of view would be
4 interested in hearing about districts where people
5 feel that the system is producing seriously unjust
6 results on a systemic basis because the parties and
7 the courts are not able to work through these issues.

8 MR. GOLDSMITH: I should say I've been
9 making this request for unjust results for years and
10 I've been underwhelmed by the results I've received.
11 Neither defense counsel nor judges have certainly
12 buried me with comments or examples of that type of
13 problem.

14 JUDGE CARNES: But it is -- unjust
15 results is a fairly useless phrase. Unjust means
16 something to a defense attorney. Unjust may mean
17 something else to a prosecutor. So to use those terms
18 doesn't help. And the results in Denver may be
19 something that if I knew what they were, I'd think
20 they were great, but it does seem to me if the main
21 notion of this sentencing system was to avoid
22 unwarranted disparity, if you have some districts
23 where everybody is just sort of ignoring the
24 guidelines and other districts -- and I know those
25 other districts exist -- where they are adamantly

Page 115

1 enforcing the guidelines, then you have a situation
2 where a defendant, not by the luck of the draw of the
3 judge, but by the luck of the draw where he lives, has
4 now got a harsher sentence.

5 MR. LITT: We haven't seen any
6 indication of tremendous disparity in sentencing
7 between districts. We do try to look for these things
8 and the -- the bottom line results don't appear to be
9 tremendously different between districts from what we
10 can tell.

11 JUDGE TACHA: Let me just ask those of
12 you who are concerned about the relevant conduct and
13 this real offense system, if -- and this is only a
14 hypothetically, if the power to depart is somewhat
15 expanded, could some of your concerns be alleviated by
16 greater departure?

17 MR. CONNOR: If the question is what is
18 a fair sentence in a given case, then -- and if the
19 district court determines to depart based on that,
20 then yes, but I think that what is at question here,
21 Your Honor, is the fundamental underpinnings of the
22 criminal justice system and what it's about. Are you
23 innocent until or unless you're proven guilty of it,
24 for example. And if so, by what standard. I thought
25 that the -- I read some of the materials and I thought

Page 116

1 that the, you know, Commission or -- or certainly,
2 people who work for the Commission have had some
3 concerns on this about the idea of going to clear and
4 convincing evidence as opposed to -- as opposed to
5 preponderance of the evidence. Why not make it proof
6 beyond a reasonable doubt? The Rules of Evidence
7 still don't apply at the sentencing hearing. And then
8 let the Court determine whether or not it can be
9 proven beyond a reasonable doubt before using it to
10 enhance somebody's sentence.

11 However, I think that what is at the
12 core of what we're talking about here is whether or
13 not you're accountable for conduct that you have not
14 been convicted of, have not admitted. And while some
15 of what Mr. Litt says is true in terms of acquitted
16 conduct has previously been able to be considered by a
17 sentencing court -- in other words, the Court can look
18 at all the surrounding facts and circumstances as to
19 what went on in a given case, what we're talking about
20 here is there being guidelines which adjust that
21 sentence and basically channel a court's discretion
22 upward -- and so I -- I would basically say to you
23 that in terms of looking at results in individual
24 cases, yes, that might help.

25 In looking at creating respect for the

Page 117

1 system and those sorts of things, it should be charge
2 of conviction or charges of conviction.

3 PROFESSOR REITZ: It seems to me the
4 relevant conduct provision has appropriately been
5 referred to as a cornerstone of the guideline system
6 and it seems to me that the departure power which you
7 hope will be used very infrequently would not be --
8 would not be a remedy if you were concerned about the
9 way the cornerstone was operating. I should say and I
10 noted in some of the Commission documents or
11 discussion drafts that one idea under consideration
12 was to move relevant conduct considerations into the
13 departure power so that a judge may say in a given
14 case that a conviction offense does not substantially
15 lead to a just sentence and so that the relevant
16 conduct considerations may be cited as a ground for
17 departure rather than as the basis for sentencing in
18 the first place.

19 I'm attracted to that suggestion in
20 some respects. It -- it strikes me as resembling what
21 I see as -- as traditional pre-Guidelines practice
22 where judges did not automatically fix sentences to
23 some personal view or view of reality established at
24 the sentencing hearing, but would often modify their
25 sense of what the -- the -- I'm not saying that very

Page 118

1 well. But would often say the conviction doesn't
2 reflect in this case what I see as happening. I will
3 make some adjustment in sentence for that.

4 That -- that logic, I think, more
5 closely tracks the traditional pre-Guideline scheme
6 than a mandated relevant conduct provision that really
7 tells judges you should start here in every case.

8 JUDGE CONABOY: All right. Anything
9 else?

10 MR. GOLDSMITH: Judge. Mr. Litt, do
11 you agree with the criticism of the guidelines that,
12 for the most part, they have transferred discretion
13 from the judges to the prosecutors?

14 MR. LITT: No.

15 MR. GOLDSMITH: Why not?

16 MR. LITT: It's --

17 JUDGE CONABOY: That's a surprise.

18 MR. LITT: Certainly, most of the
19 existent U.S. Attorneys who I speak to don't feel that
20 way. The bottom line is that the sentence is imposed
21 by the judge and the judge has to make the appropriate
22 findings.

23 MR. GOLDSMITH: Doesn't the prosecutor
24 have control by virtue of charging decisions and facts
25 that are made available to the probation officer?

Page 119

1 MR. LITT: Well, in terms of charging
2 decisions, of course, that's what the relevant conduct
3 is supposed to account for. Obviously, there's -- the
4 prosecutors always have a certain amount of influence
5 over the sentencing decision by virtue of charging
6 decisions.

7 The most obvious example is the number
8 of counts you charge limits the maximum possible
9 sentence.

10 In terms of information made available
11 to the probation officer, our policy is we're not
12 supposed to withhold information from the probation
13 officer. The probation officer and the Court is
14 supposed to be given full access to all the relevant
15 facts for sentencing.

16 MR. GOLDSMITH: Thank you. For
17 Professor Reitz and Mr. Connor, it seems to me that
18 the problem is that prior practice before the
19 Guidelines, of course, was that relevant conduct could
20 be considered by judges and some did and some didn't
21 and the degree to which they considered it varied
22 considerably. The Guidelines reflect an effort to
23 achieve uniformity and so the system established by
24 the Commission sought to achieve that uniformity by
25 mandating the Court must consider relevant conduct

Page 120

1 under certain circumstances providing that certain
2 objective criteria have been satisfied.

3 Short of -- well, how can we achieve
4 the goal of uniformity which is the cornerstone of the
5 Sentencing Reform Act in a manner that gives a judge
6 discretion whether or not to consider relevant
7 conduct. But that's a potential dilemma that we face
8 here. To the degree we allow the court to make up its
9 mind in each case whether to consider relevant
10 conduct, that may produce an outcome that oftentimes
11 will be systemically disparate from what we presently
12 have achieved.

13 MR. CONNOR: I think that's why I'm
14 saying make it a count of conviction plus anything
15 else that the -- the defendant admits during the
16 course of -- of plea -- or in the course of arriving
17 at a plea. My experience as a prosecutor before
18 becoming a Federal defender was that, basically, in
19 terms of prosecuting someone, that you attempted to
20 apply the guidelines and you attempted to do it the
21 way the Sentencing Commission set forth in conjunction
22 with Department of Justice guidelines which were
23 promulgated and that is basically what occurred. You
24 don't have a situation where prosecutors are deciding
25 that it's either too much trouble to prosecute someone

Page 121

Page 123

1 more harshly or someone less harshly or for some
2 other -- for some other reason that's not a good
3 reason. The problem with the relevant conduct
4 definitions now are that they assume and the impact on
5 plea bargaining is that they assume that basically you
6 can prove -- you can prove any fact just as easily as
7 you could prove any other fact.

8 Take a bank robbery example. That it
9 was an armed bank robbery. That it was a firearm as
10 opposed to a dangerous weapon or device or things of
11 that nature. And -- and that can, number 1, be the
12 difference between being convicted of the crimes of,
13 say, armed bank robbery or simple bank robbery. And
14 so I think that you will not encounter large
15 disparities of sentencing in sentences if what you do
16 is you limit it to the counts or count of conviction.

17 MR. GOLDSMITH: Wouldn't that even be a
18 more radical transformation of our criminal justice
19 system than we have in mind by virtue of the
20 Sentencing Reform Act? In effect, you're telling the
21 court the court may not consider the complete picture.
22 Under prior practice, the judge could consider the
23 complete picture and sentence accordingly. Now, the
24 judge may not consider any relevant conduct at all.
25 That seems to be achieving uniformity at the risk of

1 served as a member of the Civil Justice Reform Act
2 Advisory Group in this district from 1991 to 1994 and
3 was president of the Colorado Bar Association from
4 1992 to 1993. And just recently -- what was the date
5 of your appointment?

6 JUDGE DANIEL: September 1, 1995. So
7 I'm approaching my one-year anniversary.

8 JUDGE CONABOY: We're happy to have you
9 here with us today. Judge Weinshienk, who we talked a
10 little bit about several times earlier today, has been
11 a member of the District Court since 1979 and served
12 since 1964 on various other courts before entering
13 onto the United States District Court in 1979 so we're
14 happy to have both of you here with us. And Judge
15 Daniel, if you want to proceed with your remarks.

16 JUDGE DANIEL: I will. My remarks will
17 be relatively brief in that I've got a criminal trial
18 I started this morning and so if I have to leave
19 before this is completed, that's the reason why.

20 JUDGE CONABOY: Sentencing?

21 JUDGE DANIEL: Not yet. Not yet. My
22 perspective on this is probably one that I think may
23 be useful to you in that I've been a judge for less
24 than a year. And when I was a practicing lawyer, I
25 practiced in the civil rather than criminal arena so I

Page 122

Page 124

1 producing outcomes that are inappropriate.

2 MR. CONNOR: Of course, the Court can
3 probably consider any conduct that it desires in
4 sentencing within the applicable sentencing guideline
5 range, number 1. Number 2, what you have now, though,
6 is a situation where the Guidelines themselves mandate
7 consideration of the things which are not part of a
8 count of conviction.

9 In other words, the Guidelines,
10 themselves, tell a court that you must consider
11 something that was acquitted conduct. That you must
12 consider something which is not a charge of
13 conviction.

14 MR. GOLDSMITH: Thank you.

15 JUDGE CONABOY: Anything else? All
16 right. Thank you, very much, gentlemen. We'll call
17 the -- I see Judge Daniel is here now. So we'll call
18 Judge Daniel and Judge Weinshienk next, please. I
19 think this is the only panel that you're not on.

20 MR. LITT: Okay. I'm out of here.

21 JUDGE CONABOY: I understand, Judge
22 Daniel, that you have some prepared remarks and we're
23 going to hear from you first. Judge Daniel is
24 appointed to the District Court here in the District
25 of Colorado, serves here in this district and he

1 had virtually no contact with the Sentencing
2 Guidelines. I knew they existed, but I never had to
3 use them as an advocate.

4 So when I got appointed to the bench,
5 obviously, I knew what they were and I had to commence
6 some reading on them. In fact, I saw some of you at
7 the program in Boston last summer. I attended that
8 before I actually was sworn in. But we had a very,
9 very intensive program in San Francisco last October
10 as part of a videotaped presentation and Rusty was
11 there and he was giving us the dog and pony show on
12 the Guidelines.

13 But at or about that same time, I had
14 begun the process of taking pleas, evaluating the
15 Guidelines and between now and then, I have taken a
16 number of pleas and I've sentenced a number of people
17 and what I want to do is share with you some
18 impressions I have of the Guidelines for someone who's
19 been a judge for about 11-1/2 months. I will give you
20 some things that have been confusing to me and some
21 concerns that I have with the recognition that I don't
22 have the judicial tenure and oversight that my
23 colleague Judge Weinshienk has, but perhaps my
24 comments may be of use to you.

25 What my overall reaction to the

Page 125

1 Guidelines is sometimes I feel like I'm in a
2 straitjacket in the sense that it's -- I took an oath
3 to follow the law, but sometimes, applying the
4 guidelines in the way that's fair and just in
5 individual defendants -- defendant causes some
6 conflict. And what I've tried to do is figure out a
7 way to reconcile that conflict without doing violence
8 to the Guidelines.

9 And one area in particular that has
10 caused me concern is this whole issue of criminal
11 history. I've had cases where I felt the criminal
12 history was underrepresented and other cases where it
13 was overrepresented and I have utilized Section 4A1.3
14 to try to come up with some findings that I believe
15 were proper and fair. But I would hope that you try
16 to put some more flexibility into the judge's ability
17 to determine what a representative criminal history
18 is.

19 I'll give you an example. Most
20 recently, I had a gentleman in front of me and he was
21 20, 21 and he had a pretty substantial juvenile
22 record. Of course, that didn't count. And he was
23 charged with a weapons and gun charge down in the
24 Colorado Springs area. Well, I had a concern about
25 whether or not his criminal history as recommended by

Page 126

1 the probation department was -- was high enough
2 because he had been charged substantially with
3 kidnapping, with robbery, and with basically using a
4 code name to engage in drug activities and he had a
5 whole bunch of pending charges in State court. And
6 those State charges were pending until the Federal
7 case got resolved. And now we're talking about the
8 sentencing stage because I had taken his plea 70 days
9 before.

10 But when we got to the sentencing
11 phase, I was very concerned about whether or not the
12 criminal history, which I think was a category 2, was
13 accurately reflective of the seriousness of these
14 charges because I had the probation department bring
15 me in the State court file and I reviewed it, I saw
16 the affidavits from the local law enforcement
17 officials and I determined that this guy has some
18 serious problems.

19 And so I took it up to the next higher
20 level and I took it up based upon the exception that
21 deals with pending criminal charges and I tried to
22 make findings that would protect me in the event there
23 was a challenge on that.

24 But then I have had it the other way.
25 I had a very serious case where a 22-year-old African-

Page 127

1 American male was charged with crack cocaine -- and by
2 the way, I've got to say this because this has been
3 the other reaction I've had. I've been very
4 troubled -- I know that's not on your agenda today --
5 about huge disparities between crack cocaine, cocaine
6 and marijuana. I've got a case right now where
7 defendants transported huge amounts of marijuana from
8 California through Arizona through Colorado to
9 Minnesota. Approximately, oh, sixteen were indicted
10 and eight were charged and -- and all of them had
11 filed pleas and when I look at the range of penalties
12 there, some of which ranged from a recommended
13 probation up to maybe eight months in jail, I'm
14 troubled when I had this African-American male in
15 front of me and the issue was whether or not I sent
16 him to jail for eight years or nine years. In any
17 event, I ended up sending him to jail for eight years
18 because I felt his criminal history overrepresented
19 the seriousness of what he had done.

20 So I see some need there to try to give
21 some more focus, thoughts as to sort of what the
22 criminal history component of the sentencing should
23 be, what factors should be looked at by the district
24 judge and giving the district judge more flexibility
25 so that if you see a situation that isn't right, that

Page 128

1 you can adjust it without allowing total discretion to
2 return.

3 A related point has to do with the
4 offense levels. I've looked at the Guidelines tables
5 a number of times and what I realize is you've got a
6 whole bunch of numbers in here and I understand how
7 they work now. I think it would be wonderful if you
8 could reduce the 43 offense levels to something that's
9 fewer in number because I think the whole goal here
10 should be to come up with some ranges that perhaps
11 suggest some minimums and maximums, but I think,
12 really, since we're on the firing line, when we see
13 things that we believe need to be adjusted, we ought
14 to be able to adjust them more than we can adjust them
15 right now without being reversed for just violating
16 the Guidelines. So anyway, that's one area.

17 I'm very troubled about the 5K1.1
18 motion. Let me explain. I think, to a large extent,
19 sentencing discretion has been transferred to the
20 prosecutors because what I've experienced is I think
21 sometimes 5K1.1 motions are filed for the simple
22 reason of arriving at a predetermined result based on
23 a negotiations between the defendant's counsel and the
24 prosecution. And I -- I require the prosecuting
25 attorneys to show that there has been some substantial

Page 129

Page 131

1 assistance rendered or I will decline them. And I'll
2 even require them to give me things under seal if they
3 don't want to reveal in the public record what the
4 substantial assistance has been.

5 But I think the 5K1.1 motion has been
6 abused and that's something you ought to look at. And
7 it ought to be limited to certain narrow situations
8 because what certain prosecutors and counsel do, I
9 think, is use that as a vehicle to arrive at a
10 sentence that would under other circumstances be
11 incompatible with the Guidelines. But once we get it
12 that way, it's hard for us to do much about it. That
13 is, I either reject the motion or I don't reject the
14 motion. And so I think you need to look at this 5K1.1
15 and whether or not it's being used for the purpose for
16 which it was intended.

17 I had an interesting case recently and
18 these are some continuations of my observations
19 involving obstruction of justice. The particular
20 defendant, I think, perhaps lied to me under oath at
21 his change of plea. And the reason -- the way it was
22 set up was there was a reference in the pre-sentence
23 report to the fellow having been convicted while in
24 the military in Baltimore, Maryland, and I asked the
25 defendant about that and he said I was never in

1 didn't give me a lot of insight and guidance on that
2 issue. I just sort of had to figure out what the case
3 law was and make a finding that -- that made some
4 sense.

5 That's the other thing I've learned. I
6 need to make findings that make sense, so Judge Tacha,
7 when she sees my cases, can understand why I ruled the
8 way I ruled.

9 The final observation I want to make
10 has to do with role in offense. I had a very
11 interesting case where this young man -- older man, he
12 was in his mid-twenties to thirties, 30 -- he was --
13 well, he was 25 to 30, but, anyway, he engaged in a
14 scheme with a minor whereby they somehow got driver's
15 licenses from some people and then they set up some
16 bogus bank depositories and then they had some bank
17 statements -- excuse me -- bank checks mailed to this
18 phony post office box. They proceed to write
19 thousands of dollars off the check. They defrauded
20 both the individuals who had the accounts and, more
21 fundamentally, the financial institutions.

22 So at the change of plea hearing --
23 actually, it was at the sentencing, the older
24 gentleman said no, we were all co-equals. This was a
25 co-equals plan between myself and this underage

Page 130

Page 132

1 Baltimore, Maryland and I was never convicted of
2 anything. What we found out later, because I just had
3 a brief printout from our pretrial services
4 department, we found out it wasn't in Baltimore. That
5 was a clearinghouse for military records and what had
6 really happened was the defendant, while serving in
7 the military in Germany, had used some credit cards
8 improperly. Calling cards. And so he had been
9 subject to some administrative discipline. And of
10 course, the administrative discipline isn't the same
11 as a conviction. But he was playing cute with me.

12 And so when I found out what the real
13 facts were, then I was trying to figure out if, in
14 fact, obstruction of justice was warranted under
15 Section 3C1.1, but in trying to figure out what all
16 that meant, I had to go to a recent case, U.S. vs.
17 Medina-Estrada, 981 F.3rd 871. And that case holds
18 that a defendant, while testifying under oath or
19 affirmation, if he gives false testimony concerning
20 material matters with willful intent to provide false
21 information rather than as a result of confusion and
22 mistake or faulty memory, then I can make an
23 obstruction of justice finding. So anyway, I took a
24 record and ended up not taking a finding because the
25 record wasn't clear enough. Really, the Guidelines

1 person. And so you should not -- you should not give
2 a two-level increase because of the -- because the
3 defendant was an organizer, leader, manager or
4 supervisor. And, of course, I read that and looked at
5 the comments and made some findings. And I found that
6 he was a supervisor, but, again, I think this role in
7 the offense is something that comes up quite
8 frequently in our cases and if there's a way to give
9 more meaning to what the terms "organizer, leader,
10 manager, supervisor" mean in a greater range of
11 context so that increases or decreases are more
12 supported by comments in Guidelines, that's another
13 area I'd like you to at least think about.

14 So my final comments sort of have to do
15 with just some overall goals that I think are
16 warranted. One is more ability to individualize
17 sentences. Whatever you do, you should give us more
18 discretion to individualize sentences so they meet the
19 problems that we see. I already mentioned the
20 application of the criminal history guidelines should
21 be simplified and reduce the number of offense levels.

22 So those are kind of some things that I
23 have observed and I tried to go through my -- my
24 memory bank and pick those things that stood out in my
25 mind rather than just giving you the things you

Page 133

1 already know.

2 So those are some brief comments and I
3 hope they will be useful to the Commission.

4 JUDGE CONABOY: Thanks, Judge, very
5 much. Judge Weinshienk.

6 JUDGE WEINSHIENK: Thank you. I, too,
7 will be brief.

8 I was one of the few judges that was
9 here before the Guidelines and I sentenced both as a
10 State judge before the Guidelines and as a Federal
11 judge before the Guidelines. And, indeed, as one of
12 the panel members stated, sometimes we lost sleep
13 deciding what we were going to do because we did have
14 discretion before the Guidelines, but we also did have
15 tables and charts which told us how the sentencing had
16 been for a particular crime in the district and
17 nationally. And I think we were very conscientious in
18 trying to follow those charts and to keep the
19 sentencing within those goals.

20 After the Guidelines, I am enough of a
21 realist to know that they are here and they are not
22 going to be erased and I have learned to live with the
23 Guidelines. There are some big problems, though, that
24 do cause me loss of sleep. And I would second the
25 comments of the very -- various panel members who say

Page 134

1 try to make them more guidelines and let the judge
2 have some more discretion. We do not have the
3 discretion that I think we should have. And it is
4 very difficult to try to -- what can I say, lean on
5 the prosecutor to file a 5K1 when we feel that that's
6 the only way we can give a lower sentence. Sometimes
7 it works. But it's not the way that it should be
8 working.

9 Let me give you an example. Bank
10 robbers. The first bank robber is the one who went
11 into the bank with the gun. And the other young man
12 that came with him was someone they found out about
13 because they talked to him first. His attorney had
14 them -- had him give substantial information to the
15 prosecutor. So with the most culpable bank robber, he
16 gave the information about his two buddies, one of
17 whom was his disabled younger brother who he convinced
18 to drive the car. The way the case came to me was
19 that I had sentenced the first bank robber who had
20 given the information who had gotten a very good deal
21 with 5K1's, with departures and then, all of a sudden,
22 I was getting the younger brother, the disabled
23 brother, who was talked into it and who was facing a
24 much longer sentence than the more culpable older
25 brother, even though there was much more mitigation.

Page 135

1 And frankly, I said to the prosecutor
2 at that point, this just isn't fair. It isn't right
3 and I just don't see how I can sentence someone who is
4 much less culpable to a greater sentence just because
5 he was -- he didn't get in there early to give his
6 information. In that case, the prosecutor agreed. It
7 wasn't fair. And he filed a 5K1 not because of any
8 assistance, but just to give me the vehicle for
9 departing and trying to issue a fair sentence. I
10 think that's the type of case that the judge really
11 struggles with and loses sleep over.

12 And just one more example because I
13 think there are examples. A young African-American
14 woman, A and B student at East High School, made the
15 bad mistake of falling in love with a young man,
16 having his baby, who decided that the way for him to
17 succeed would be in drugs, in crack. And was living
18 with him and was aware of his very large -- his very
19 large deals in crack. She had a little child. She
20 knew about it. She was charged. The amount of the
21 drugs was -- was weighed in. She was a young woman
22 who had opportunity, had she chosen, to have athletic
23 scholarships at two different colleges. She was
24 bright. She was talented. She was an athlete. She
25 made a wrong decision because of love. And she faced

Page 136

1 135 months minimum.

2 That was the -- that was the bottom of
3 the Guideline schedule that I could give her. I
4 departed. I thought for a while there was going to be
5 an appeal on it. It wasn't appealed, but I departed
6 to 120 months mandatory minimum. She is serving 120
7 months.

8 Had that been before the Guidelines,
9 this would have been a far different situation. That
10 was a case where the case went to trial and,
11 therefore, because it went to trial, there was no deal
12 and I don't know if there was a deal even offered
13 before the trial.

14 But I do lose sleep over it. And I
15 still to this day think about whether there's some way
16 that this young woman could get out of prison earlier
17 than serving the full 120 months. Those are the types
18 of things that are very frustrating to the judge.

19 And as Judge Daniel said, we're not
20 talking about crack and powder, but the crack and
21 powder disparity is a real serious problem for the
22 judge.

23 The other problem is the fact that we
24 just weigh the drugs. A young college student from
25 Minnesota stood before me with tears in his eyes

Page 137

Page 139

1 because a buddy had asked him to deliver a package
2 from Minnesota to Colorado. He was coming down on
3 vacation. Told him it was cocaine but said if you get
4 caught, it won't be more than 90 days. Don't worry.
5 Well, he was facing the five-year mandatory minimum
6 and he stood there with tears and said, you know, my
7 life is totally ruined. My college, my fiancée. He
8 was going to be married. And there he is. And I have
9 no discretion. No discretion.

10 So these are the problems that the
11 judges face and we worry about them and wish there
12 were ways that we could give a sentence which was more
13 in accordance with justice. But I do live with the
14 Guidelines. I follow them.

15 I hope you will give us a little more
16 discretion under the Guidelines in the future. I hope
17 that something can be done about mandatory minimums.
18 I know that the safety valve has helped. Yes, we
19 appreciate that because in the proper case, that
20 certainly helps.

21 I would disagree with my colleague to
22 one extent. I don't want more tightly drawn
23 constrictures. I would like to have the discretion in
24 some of these cases to be able to make decisions. I'd
25 like the discretion in some cases to decide whether it

1 MR. BUDD: I think you know the
2 Commission has gone on record about five years ago as
3 being opposed to mandatory minimums, but I was asking
4 in these two anecdotal situations you cited, what
5 would you have done had you had complete discretion?
6 JUDGE WEINSHIENK: Had I had
7 discretion --
8 MR. BUDD: I'm sorry. I wasn't clear.
9 JUDGE WEINSHIENK: All right. A
10 similar case before the guidelines of a young man from
11 Minturn, Minturn, Colorado, who was bringing a lot of
12 drugs into Denver for a buddy because he asked him,
13 you know, would you do me a favor and drive these
14 drugs in. I gave him six months plus some long term
15 of supervised release and probation after. He had not
16 been in trouble before. I would have done the same
17 thing with the young man from Minnesota.
18 With the young woman with the small
19 child who had gotten -- who had fallen in love with
20 the drug dealer, some time -- I would have given her
21 some time, but certainly not ten years. She didn't
22 need ten years to make the point that she -- in fact,
23 she was never -- I was never going to see her in the
24 future. I think this -- I will never. I hope. I
25 don't know what prison is going to do to her. But

Page 138

Page 140

1 is or is not relevant conduct because that gives me a
2 little more discretion in a proper case.

3 Thank you for the opportunity of giving
4 you my remarks.

5 JUDGE CONABOY: Well, we thank both of
6 you for taking the time to come in. As we said
7 earlier this morning, it's very important for us to
8 hear from people who are on the front lines and
9 working on the front lines every day.

10 Are there any questions for either of
11 the judges?

12 MR. BUDD: Well, Judge Weinshienk, just
13 curious. You mentioned the very difficult situation
14 you had with the young woman to whom you awarded a
15 sentence of ten years. The gentleman who came before
16 you, you gave him five years because that's what was
17 required as you saw the law. How would you have
18 decided had you had complete discretion in -- in those
19 circumstances?

20 JUDGE WEINSHIENK: Both of those
21 situations involved mandatory minimums, so I think the
22 answer to the mandatory minimum is either get rid of
23 it and -- let me deal with the Guidelines or else give
24 me some additional discretion to find an exceptional
25 case and go beyond the -- below the mandatory minimum.

1 she's bright, she's -- she has everything to live for
2 and she's spending ten years in prison.

3 JUDGE DANIEL: I'd like to add a
4 supplement to what Judge Weinshienk said and it's from
5 a different perspective. When we had our orientation
6 session in San Francisco last fall, we visited the
7 prison facility in Pleasanton and we met with some
8 inmates and we asked them their reaction to their
9 sentencing and I happened to talk to an African-
10 American female who had been sentenced by Judge
11 Weinshienk. But her reaction and the reaction of
12 other women on the panel because that's a women's
13 facility and we were in the facility and we asked them
14 to tell us what they thought about the guidelines, the
15 uniform response was that they are too harsh. That we
16 realize we did something wrong, we realize that we
17 need to go to jail. But the length of our sentence is
18 so extreme that it gives us no incentive to retool,
19 reskill and be prepared to reenter society.

20 And that left an impression on me
21 because there was the person who had been sentenced by
22 Judge Weinshienk. She was involved in drug activity,
23 but it was because of a boyfriend and she was faced
24 with some huge, huge minimum sentence under the
25 guidelines and so, therefore, she cut a deal, but the

Page 141

1 deal she cut was for a very, very long period of time
2 and this woman was relatively young. She was in her
3 thirties. And she had young children.
4 And this was echoed by some other
5 relatively young female prisoners who had children,
6 who realized they had made a mistake. They needed to
7 go to prison, but there was a degree of hopelessness
8 expressed by them because of the total length of their
9 sentences.

10 I'm not here to try to second-guess the
11 sentence and judge who did that, but I think it's
12 worth noting sort of what inmates tell you about what
13 they need to get motivated to reenter society because,
14 hopefully, that is an ingredient of what this is all
15 about. That it is finding people, sentencing them,
16 but also giving them some hopes that they can reenter
17 society and be productive citizens. I wanted to add
18 that comment.

19 JUDGE WEINSHIENK: The boyfriend of the
20 woman that I sentenced to 120 months received a life
21 sentence and I also had problems with that, too. He
22 deserved a long sentence, but a life sentence means
23 there's no light at the end of the tunnel. Nothing.
24 I would have much preferred to give him 360 months. I
25 would give -- rather give him 30 years and just let

Page 142

1 him know that he's going to get out than to give him
2 life.

3 JUDGE CONABOY: Any other questions?
4 All right. Thank you, very much.

5 JUDGE WEINSHIENK: Thank you.

6 JUDGE DANIEL: Thank you.

7 JUDGE CONABOY: We have a Deputy
8 Attorney General from the Department of Justice. Does
9 that sound familiar? All right. This panel is on
10 drugs and role in the offense and essentially any
11 other comments you wish to make. Again, we're asking
12 you to try to limit your comments to five minutes and
13 I'll ask my fellow commissioners to try to limit the
14 questioning, if there is some this time, to ten
15 minutes, because we are, in fact, running out of time.

16 We have Mr. Christopher Perez, who is a
17 senior probation officer here in the -- in Denver and
18 at one time, he was promoted to the Sentencing
19 Guidelines specialist here in the -- in Denver.

20 And we also have Mr. Raymond Moore, who
21 is an Assistant Federal Public Defender. Mr. Moore
22 was an Assistant U.S. Attorney here from '82 to '86, I
23 believe, and then after being in private practice for
24 a number of years became the Assistant Federal Public
25 Defender here in Denver. So he's been on both sides

Page 143

1 of the equation.

2 And we have Ms. Jeralyn Merritt.
3 Ms. Merritt is a practitioner here in Denver and a
4 graduate of the University of Denver College of Law.
5 She chaired the committee on the Criminal Justice Act
6 for this District here in Colorado from 1994 to 1995.
7 And she limits her practice, as I understand it,
8 pretty much to criminal defense. So we're happy to
9 have all of you here, along with Mr. -- what's his
10 name again -- Mr. Litt from the Department of Justice.
11 We appreciate your staying with us, Bob, for all of
12 these panels.

13 MR. LITT: Thank you.

14 JUDGE CONABOY: Let's see. We'll
15 start, if you don't mind, with Mr. Perez.

16 MR. PEREZ: Good afternoon. The
17 Commission has asked the members of this panel to
18 address the issues of the drug offense and role in the
19 offense guidelines. Historically, the drug Sentencing
20 Guidelines were designed to reflect the Anti-drug
21 Abuse Act's emphasis on the use of drug quantity to
22 establish penalties. Until Congress changes the focus
23 of this statute, I think it would be difficult for the
24 Commission to change the drug quantity emphasis of the
25 guideline. Still I'm not convinced that the nature of

Page 144

1 the Guidelines, itself, should be changed anyway.

2 That is with the exception of the crack
3 ratio. And I'll go ahead and address the crack ratio.
4 No discussion of the drug and offense would be
5 complete without it. Still it's my understanding that
6 Congress views the crack cocaine guideline as being 10
7 times worse than the powder cocaine guideline,
8 primarily because the crack co -- the crack traffic
9 involves the -- the use of street gangs and violence.
10 To me, it seems kind of a presumption to send those
11 crack offenders based on a 10 to 1 ratio based on the
12 assumption that they are all violent gang bangers. It
13 seems to me it would be more appropriate to make gang
14 affiliation and use of violence, those type of
15 factors, variable specific offense adjustments than
16 simply to make across the board assumptions, but, in
17 general, I find that 2B1.11 represents an objective
18 measured approach to determining the severity of an
19 offense.

20 In practice, I find that the majority
21 of the problems in applying the drug guideline
22 involves evidentiary relevant conduct related issues.
23 That once drug type quantity issues have been resolved
24 by the Court, the application of the guideline is
25 relatively simple and very mechanical and I do admit

Page 145

Page 147

1 that the use of the quantity driven nature of the
2 Guidelines in itself is a mechanical approach to
3 sentencing. And I have been told in the past that I
4 have executed my duties as a probation officer with
5 accountant-like precision.

6 But I think that the mechanical
7 approach to Guidelines using these quantities is one
8 balanced by the other Guidelines, the Guidelines which
9 bring into consideration the role in the offense,
10 acceptance of responsibility, other culpability
11 related factors. Still other Guidelines in the form
12 of departure policy statements bring a subjective
13 creative and humanistic approach, I think, to
14 sentencing.

15 Now, I've heard the Commission pretty
16 much put to us that the Guidelines are here to stay
17 and you're looking for specific examples where we can
18 make suggestions on reducing the complexity and
19 simplifying Guidelines. I'll try to do so as far as
20 they relate to the role in the offense guidelines.

21 Chapter 3 Guidelines most frequently
22 used in combination with drug guidelines involve the
23 role in the offense adjustment. The problem with the
24 Guidelines is they appear to be based on an organized
25 crime model. Even the language of the commentaries

1 Application to -- application to the
2 guideline even seems to suggest or discourage the use
3 of the guideline altogether. It would seem to me that
4 any simplifications to the role in the offense
5 guideline should focus on several things and, again,
6 I'm suggesting this as maybe a model for the
7 simplification of other guidelines, as well, but in
8 simplifying the role in offense guidelines, I would
9 suggest that both these guidelines, the aggravating
10 and mitigating guidelines, should be made more
11 symmetrical, each setting forth clear and simple
12 criteria to identify the characteristics of those that
13 are mitigating offenders and those that are
14 aggravating offenders. This five or more participant
15 standard should be reduced to one of these factors
16 rather than carrying its own offense level driving
17 weight.

18 The second thing that I think would
19 help would be the role in the offense guideline should
20 be redesigned to provide the courts with an increased
21 level of judicial discretion in making role
22 determinations. Language could be added to the
23 commentary that would recognize each district court is
24 in a unique position to assess the role and
25 culpability of each defendant within a group. Then

Page 146

Page 148

1 seem to be directed at standard organized group
2 dynamics. In reality, however, what I find in this
3 district is more drug traffic conspiracies are loose-
4 knit relatively unorganized associations of
5 participants. More often than not, the defendants
6 involved in these associations are independent
7 contractors who obtain and sell their drugs on
8 consignment. They are not guided by some central
9 kingpin figure, rather by the more elemental forces of
10 supply and demand.

11 One significant problem that arises
12 from this organized crime approach involves the
13 aggravating role guideline. Specifically, because
14 most drug trafficking conspiracies are loose-knit
15 associations of independent contractors, the five or
16 more participant adjustment is no longer an accurate
17 way to measure a person's relative culpability in a
18 group.

19 Now, the application of the mitigating
20 role guideline I find to be even more problematic.
21 Unlike the aggravating role guideline, the commentary
22 for the mitigating role guideline identifies few
23 factors for probation officers and judges and others
24 to consider in determining whether a defendant is, in
25 fact, a minor player or a participant.

1 rather than using the current 2 to 4 level increase,
2 decrease scale, a sliding scale approach would more
3 accurately reflect the Court's increased level of
4 discretion in making these role determinations and
5 lend itself better to a case-by-case determination
6 approach.

7 Now, in closing, I would like to say
8 that I believe most probation officers in this
9 District are no longer intimidated by the Guidelines,
10 but, through experience, have become more adept in
11 interpreting the Guidelines and applying them both
12 accurately and reasonably.

13 I think that any simplification efforts
14 by the Commission should now focus on clearly
15 identifying the principles underlying the application
16 of the Guidelines rather than the application of the
17 Guideline process in itself. Thank you.

18 JUDGE CONABOY: Thank you, Mr. Perez.
19 And Mr. Moore, would you proceed next, please.

20 MR. MOORE: Yes, sir. It feels
21 somewhat ironic to be talking about simplification of
22 the drug guidelines because I don't know that there's
23 a scale where you put your drugs on the scale on one
24 side and your sentence comes off on the other.

25 Not surprisingly, having made that

Page 149

1 comment, I would ask this Commission to consider
2 revamping the drug guidelines from top to bottom. I
3 have a tremendous problem with the notion of quantity
4 being the be all and end all -- functionally the be
5 all and end all of the drug sentence. I understand
6 that part of that is because of mandatory minimums and
7 the relationship there. Ms. Merritt is going to talk
8 more about mandatory minimums.

9 I have problems. I have problems with
10 an ounce dealer who over time gets up to a kilo and is
11 treated the same as the kilo dealers who the
12 Government decides to take down after that one
13 transaction. I have problems with those rules that
14 equate those two people. I have problems with
15 equating a -- a drug dealer who comes to his
16 transactions with an Uzi in his hand and comes to his
17 transaction with a prior conviction for drugs and for
18 which he got probation and didn't get the message and
19 equating him with an ounce dealer who may have a
20 derringer in his back pocket with or without a bullet
21 and he's got a prior shoplifting conviction. But
22 under the Guidelines, those guys are exactly the same
23 because all you look at is the quantity.

24 I just don't think that that
25 functionally defines who is a bad guy, who needs to be

Page 150

1 taken down and who is more serious and I think you can
2 do it with specific offense characteristics like you
3 do in the other guidelines.

4 It has certainly not been, in my
5 experience, difficult for prosecutors and defense
6 lawyers pretty quickly to decide in a given case
7 whether they have got a problem bad guy or whether
8 they have got somebody who seems to stagger in,
9 girlfriend or something else. But in this system, all
10 that matters is the amount of drugs. And there's no
11 distinguishing them. And that's what leads judges to
12 these concerns and moans and cries about the
13 sentencing disparity. They don't have tools to
14 distinguish them when all you look at is drugs.

15 I don't have much time. Let me tick
16 off some things that I think need to be offense
17 characteristics, but let me say this first: If you're
18 thinking of just adding offense crack to the existing
19 quantity table, well, kill it twice. Basically
20 quantity tables are so high that I don't think there's
21 much sense in that. I think what I'm suggesting is
22 lower the effect or the range or the hit. Cap it at
23 20, 22, whatever you want, but cap it at some
24 reasonable levels so there's some distinguishing of
25 offenders within drug cases. What might be offense

Page 151

1 characteristics? Prior convictions for drugs, role
2 and type of firearm, size of transaction, the nature
3 of the offense, whether you're a manufacturer, a
4 distributor, courier, whether there's violence.

5 I mean, everywhere else in the
6 Guidelines, what you see is violence is an important
7 point. Prior drug convictions is an important point.
8 When you get to a drug crime, it doesn't matter. All
9 that matters is quantity. I think you should, in any
10 event, expand the quantity guide -- the ranges within
11 these quantity tables, give everybody a little more
12 room. Right now, you have people fighting over five
13 grams, six grams because the ranges are so tight and
14 the stepping increments, levels of two, are so severe
15 that it makes a major difference and that leads to
16 strange results. It leads to unnecessary fighting
17 more in drug cases over relevant conduct issues or
18 some of these other things that you've talked about
19 because the ramification is so great.

20 Simple example. There's a case in our
21 office that I won't get into the details because Judge
22 Tacha is here and she's going to hear about it later
23 where a judge -- district court judge -- and not whom
24 you might think -- refused to take a plea because
25 there was a big dispute about the amount involved and

Page 152

1 the judge said you're going to trial. You -- I just
2 think it's too heavily slanted.

3 Let me close, because my time is
4 running out, by saying a couple of things. It's real
5 easy to sit here as the defense lawyer and take the
6 defense lawyer position of saying people, please,
7 you're crushing little guys or girlfriends or what
8 have you that don't need the hits that they are
9 getting. And I personally believe that that is a
10 waste of my breath. I think in this political
11 climate, with the way things are going, both in the
12 public and in the Congress and in the newspaper,
13 people might listen to that, but they are not going to
14 be moved by it.

15 I think if you want to look at what's a
16 sensible way of going about it is whether these
17 quantity tables, these heavy quantity hits for drug
18 offenses makes sense. I'll give you another way. Are
19 you really getting what you want? I'll tell you that
20 I've been a prosecutor, I've been a defense lawyer,
21 I've been with agents, I've been against agents. I've
22 been on all sides of this thing and if you equalize
23 everybody, people being human, agents are going to go
24 and investigate the lowest common denominator. If I'm
25 an agent, I'm not going to spend two years trying to

Page 153

Page 155

1 find a kilo dealer when I can spend four months
2 getting a one ounce dealer up to a kilo and have him
3 be the same. If you think that these 5K's and all the
4 rest of it are going to lead you up the chain, with
5 this system, it won't because it provides no means of
6 distinguishing drug offenses and provides no incentive
7 for bringing in the big dealer, whether it be a trophy
8 or advance or pay raise or promotion to say I got the
9 really bad guys because they are all bad guys. The
10 guy on the street corner selling dime bags is as bad
11 as the kilo dealer and people aren't going to take the
12 time, the investment to go after who you believe they
13 are going after.

14 5K's can be used to go sideways or
15 down. Why? Because they are all the same. If you
16 want them to go up, why should an agent spend two
17 years of his time getting a conviction of a kilo
18 dealer while the guy next to him is nailing the five
19 guys on the street corner who happen to know each
20 other and it is the case that these things are all
21 related. Years ago, you didn't see conspiracies where
22 everybody was brought in, the girlfriends and crippled
23 brother who is half retarded and bring them in. They
24 didn't bring them in not because they didn't know how
25 to charge conspiracy, but because they didn't get bang

Page 154

Page 156

1 for the buck. Now they bring them in. Conspiracy,
2 you can get 20, 30, 40 years.

3 So you see this happening. I've used
4 up my time. Let me just quickly throw in two things.
5 Unrelated to anything I've said before, I'd like to
6 see a two level wild card departure. Bad name for it,
7 I know. But give the judge some of this -- some of
8 this discretion back and whether two levels is too
9 much or one level is too much, who knows.

10 Lastly, a minor point, I'm a little bit
11 offended, a little bit touchy over the notion that
12 maybe we're doing something weird in this district.
13 Whether you think we are or not, well, that's life. I
14 mean, I tend to see it from the inside, from the
15 trenches. What I know is we have lawyers who keep
16 each other informed. We work our butts off. We make
17 sure, Mr. Katz does, that he hires people who know
18 what they are doing. As you can see, he's taken
19 people from both sides of the -- there's no -- you
20 don't have to be a dyed in the wool defense lawyer.
21 People who know the defense law, know the law, know
22 the agent. What we get done, we get done from hard
23 work and understanding these Guidelines, not from
24 circumventing them.

25 JUDGE CONABOY: Thank you, Mr. Moore.

1 Ms. Merritt.

2 MS. MERRITT: I'm going to stand.
3 Mr. Chairman, members of the committee. I appreciate
4 the opportunity to be here today, to appear before you
5 and give you my views on Sentencing Guidelines as they
6 apply to drug offenses.

7 I have defended persons accused of drug
8 trafficking crimes in this and other Federal districts
9 and circuits for over 20 years. 13 of those years
10 were before the United States Sentencing Guidelines
11 and the last eight of them, of course, have been since
12 then. I've lectured to lawyers around the country on
13 the use and application of the Sentencing Guidelines
14 and I serve as a chair of the legislative committee
15 for the National Association of the Criminal Defense
16 Lawyers.

17 And as I listen here today to what I've
18 been hearing from the judges, from all of the
19 counsel -- the defense counsel and from the probation
20 officers who have testified is we need to find a way
21 to reempower the Federal judiciary. This system is
22 not working. The system has broken. My opinion of
23 what is going on with the Federal sentencing system
24 today is that it's becoming morally bankrupt.

25 There is something wrong with a system

1 that unfairly targets minorities and persons of color
2 and women. There is something wrong with a system
3 that allows the use of purchased testimony. There is
4 something wrong with a system that has transferred the
5 power given to judges by the United States
6 Constitution to prosecutors. And we have to do
7 something to fix it.

8 One of the things that we have done as
9 part of the legislative work of the National
10 Association of the Criminal Defense lawyers is to
11 draft a proposed piece of legislation that would be an
12 amendment to 18 USC Section 3555 3(E). It has already
13 been endorsed by two members of the Federal judiciary.
14 Judge Hadder from the Central District of Los Angeles
15 and Judge Powter from the Western District of Texas.
16 Both of those judges traveled to Washington, D.C. in
17 May and agreed and did participate on a panel on
18 mandatory minimum sentencing. And what they told us
19 was that 88 percent of the judges in this country have
20 said no more mandatory minimum sentences. Sentencing
21 statutes should be enacted. 85 percent said judges
22 should have more discretion in imposing Federal
23 sentences. 88 percent said that the current Federal
24 system gives too much discretion to the prosecutors.
25 And 70 percent of the Federal judges opposed

Page 157

1 maintaining the current system of the mandatory
2 minimum sentences.
3 Our legislative proposal would allow
4 the judges to depart from mandatory minimum sentences
5 for extraordinary circumstances. Not only upon motion
6 by the prosecutor because of substantial assistance,
7 but because of a motion by the Court on its own motion
8 and because of a defendant's motion.

9 And we -- what I am asking this
10 Commission here today is for each and every one of you
11 to assist us in finding sponsors among the members of
12 Congress and supporters for this measure so that we
13 can reempower the Federal judiciary to make the
14 sentencing decision that should be done in this case.
15 In all cases.

16 With respect to the specific issues of
17 relevant conduct and as to role in offense, with
18 respect to relevant conduct, I would submit that
19 relevant conduct must be limited to the count of
20 conviction. I would submit that the burden of proof
21 with respect to relevant conduct should not only be
22 clear and convincing, it should be beyond a reasonable
23 doubt. I would disallow increases for relevant
24 conduct based upon the uncorroborated testimony of
25 former co-conspirators who are getting a sentence

Page 158

1 reduction for testifying at a sentencing hearing
2 against their former co-conspirators. I would mandate
3 notice to the defendant of the intent of the
4 prosecutor for the court to rely on uncharged conduct
5 or conduct outside the count of conviction.

6 And for all drug offenses, I would get
7 away from quantity, as Mr. Moore said, as a means of
8 determining the guideline offense level in drug cases.
9 Quantity is not the best yardstick. It creates
10 disparity.

11 I think that the Commission should
12 establish more alternatives to incarceration,
13 particularly for nonviolent drug offenses.

14 We should be increasing the range under
15 the Sentencing Guidelines for persons convicted of
16 drug offenses in which no guns, no weapons, no
17 violence is used should be allowed to serve part of
18 their sentences on home detention or in community
19 correction facilities.

20 Instead of having all of these 43
21 levels or 38 levels or whatever the levels are for
22 drug offenses, we should go to a flat level and based
23 upon that level, the judge should be free to depart in
24 the instances of heavy residivism, guns, violence or
25 extreme quantities.

Page 159

1 There are unjust cases that happen
2 every day with the application of the Federal
3 Sentencing Guidelines and most of them are because of
4 the charging discretion given to the prosecutors.
5 Some of the worst abuses are in cases of historical
6 conspiracies, cases in which former co-conspirators
7 testified against the current defendant. We have to
8 do something to change that system.

9 With respect to role in the offense, it
10 is noted in the materials that that is the issue that
11 is most frequently appealed out of all the Sentencing
12 Guidelines decisions in this country. There is a
13 tremendous variation by districts around the country,
14 particularly with respect to mitigating role in the
15 offense. For example, 71.3 percent of the defendants
16 in the Eastern District of New York are awarded
17 downward departures for mitigating role, while only 21
18 percent in the Southern District of Florida. I
19 thought for a minute well, maybe that was because
20 Kennedy Airport is located in the Eastern District of
21 New York, but then I looked at the statistics for New
22 Mexico and they are up at 54 percent, so that isn't
23 it, either.

24 There is too much disparity and a
25 change in the entire system must be worked and it must

Page 160

1 be started soon. There are too many people
2 languishing in our prisons who do not need to be
3 there. Thank you.

4 JUDGE CONABOY: Thank you, Ms. Merritt.
5 Mr. Litt.

6 MR. LITT: Thank you. I don't envy the
7 Commission for taking on the task of trying to deal
8 with drug guidelines. On the one hand, the testimony
9 this morning has made clear that to the extent that
10 there are perceived problems with the guidelines,
11 particularly from the defense bar, they focus on the
12 drug cases. This is the area of greatest irritation.

13 On the other hand, as we all know, this
14 is also an area where the political constraints upon
15 our ability to act are very severe. That is a major
16 problem in the country today and there's not a lot of
17 enthusiasm in the political sphere for lowering drug
18 sentences. The Commission has already taken some
19 steps in recent years to address some of the problems.
20 You have lowered the cap on the quantity. You've
21 changed the definition of relevant conduct. And in
22 large part, through your efforts, the Congress enacted
23 the safety valve which hopefully will in the future be
24 able to take care of the cases such as those Judge
25 Weinsheink was talking about. You've also lowered the

Page 161

1 Guideline sentences for many offenses involving
2 marijuana plants and we understand that you're still
3 studying the effect that these changes have had and
4 will have in the future in dealing with the drug
5 guidelines.

6 But we don't think that the -- that
7 this is an appropriate time or appropriate
8 circumstances and that there's a need for wholesale
9 rewriting of the drug guidelines.

10 From the point of view of simplicity, I
11 think everybody agrees that quantity is about as
12 simple and straightforward a measure as you -- as you
13 can get for making a sentencing assessment. We've
14 heard just a short while ago that role in the offense
15 is a much more difficult concept to apply and is going
16 to lead to much more litigation and complication.

17 The other factor in this regard is that
18 if you do try to dramatically change the structure of
19 the drug Sentencing Guidelines, you're going to run
20 smack into the mandatory minimum sentences that
21 Congress has out there and it's not going to
22 accomplish anything to lower the drug guidelines if
23 you're going to submit people to mandatory minimums.
24 You also run the risk that Congress will respond to
25 changes in the Guidelines by enacting more minimums

Page 162

1 and, of course, the minimums are themselves quantity
2 driven.

3 Your -- your commentary, your list
4 suggests that one of the topics that you may consider
5 is looking at the role in the offense guidelines to
6 see if it actually reflects actual experience and to
7 respond to some of the concerns that people have that
8 the definitions in the standards in the role in the
9 offense guideline are not sufficiently clear and --
10 and the courts need more guidance. We think that it's
11 a good idea to study this. We'd like to work with you
12 to see whether we can -- whether it's necessary and
13 possible to get a -- a crisper and more precise and
14 clearer definition of role in the offense, but we need
15 to bear in mind that any changes in the role in the
16 offense guideline affect not only drug cases but apply
17 across to the board and to the extent we're making
18 these changes, we have to make sure they are
19 appropriate for fraud cases, theft cases and any other
20 case that is we have to deal with. Not only drug
21 cases.

22 I think that's all I have. Thanks.

23 JUDGE CONABOY: Thank you, very much.
24 Any questions? Commissioner Gelacak?

25 MR. GELACAK: One observation and one

Page 163

1 question if I could. Ms. Merritt, I'd be happy to
2 take a look at your legislative proposal, if it's as
3 you represented. I'll also be happy, speaking for
4 myself personally, to assist you in getting
5 co-sponsors on the Hill.

6 MS. MERRITT: I appreciate that and I
7 will submit it at the conclusion of the hearing.

8 MR. GELACAK: Mr. Litt, I take it by
9 your comments about the politics of drug sentencing
10 because I -- I've been concerned about this area for
11 quite a while and, in fact, a long time before I was
12 ever on the Sentencing Commission, but it strikes me
13 that there's always more than one way to skin a cat
14 and I recall sending over a proposal to the Department
15 that when something like this -- if mandatory minimums
16 are the problem -- and we all agree that they do drive
17 the system in the drug area -- and concern over the
18 politics of lowering penalties is the reason why we
19 cannot deal with that issue, then why don't we
20 approach it by suggesting to Congress that we increase
21 the penalties in the drug area, but that we do it by
22 changing the mandatory minimum statutes so that they
23 do not focus on quantity, they focus on role in the
24 offense. And we then prosecute the people that
25 Congress says they want to prosecute, to-wit those

Page 164

1 kingpins, those major players in the drug area who are
2 out there rather than the lowest common denominator
3 that Mr. Moore refers to. Because I, in large part,
4 agree with everything that he said.

5 And if we were to -- if we were to
6 suggest to Congress that we could put forward a
7 proposal where they could increase penalties for the
8 bad folks, we could prosecute those people that we
9 ought to be spending our financial resources
10 prosecuting rather than chasing the small time dealers
11 on the street. That we might be able to make some
12 inroads.

13 I'll agree -- I think we all will --
14 I'll go so far as to agree on the politics. We
15 couldn't do anything this year. I wouldn't even
16 attempt to do anything in a presidential election
17 year. I think we could make some inroads and impact.
18 And I never heard back from the Department. Not a
19 word.

20 MR. LITT: If I could make a couple of
21 observations in response. When I was referring to
22 politics, I wasn't speaking only of Congress. I'm
23 speaking also of the public at large and, frankly, of
24 the mood within the Department of Justice. I think
25 there is a perception that this is a -- that drugs are

Page 165

1 a serious problem and one that has to be addressed at
2 least in part through substantial law enforcement
3 effort.

4 Contrary to what Mr. Moore said, I
5 think we are making an effort to try to focus on the
6 major kingpins and the major distributors. That this
7 is our --

8 MR. GELACAK: I didn't mean to suggest
9 that you're not.

10 MR. LITT: That's not so much a
11 response to you as a response to him. But I question
12 whether there is an -- a need or even an opportunity
13 to do a lot to increase the penalties for them. Most
14 of those people -- most of the kingpins, by the time
15 we get them, they are up at the top of the sentencing
16 scale anyway. They are going to jail for life. The
17 cartel leaders, the people who are bringing across
18 multi hundred kilograms of the cocaine from Mexico, if
19 we get them and prosecute them, we have got the
20 sentences on them.

21 MR. GELACAK: I agree with you. We're
22 communicating on two levels. I didn't mean to suggest
23 we can't hammer those people down. We can. The
24 purpose of my suggestion for a change in the wording
25 of the mandatory minimum statutes is to take the focus

Page 166

1 off the people on the low end of the spectrum. We
2 don't need to hammer those people. We can deal with
3 them in our system and we have dealt with them for
4 years. But when we focus on the mandatory minimum
5 based only on quantity, people who -- everyone, even
6 the Department agrees, in some instances that we've
7 got the wrong people, people who could receive --
8 could and perhaps should receive a break, but we're
9 not able to give it to them.

10 The purpose of changing the -- the
11 standard from quantity to role would be to give some
12 assistance to people on the lower end, not the -- we
13 can always get people on the upper end.

14 MR. LITT: Can I just make one more
15 comment? I don't think that we would support a -- a
16 system that is totally divorced from quantity. I
17 think that the quantity --

18 MR. GELACAK: We could make it a
19 factor.

20 MR. LITT: -- is an important measure
21 of the harm to the community. Somebody who is
22 distributing an ounce of crack cocaine a week or over
23 a long period of time, it should be attributable for
24 that harm done to the community.

25 JUDGE CONABOY: Commission Goldsmith.

Page 167

1 MR. GOLDSMITH: I've got two questions,
2 I suppose. First, Ms. Merritt, earlier, I asked Mr.
3 Litt to comment about whether discretion under the
4 Guidelines had been transferred to prosecutors from
5 judges and I believe he, in essence, said no for a
6 variety of reasons. You touched upon that issue in
7 brief in your testimony. Would you care to elaborate
8 further? Could you give specific examples of why you
9 believe that the discretion has been transferred to
10 the prosecutors?

11 MS. MERRITT: The discretion has been
12 transferred to the prosecutors because of their
13 ability to choose the charges that are going to be
14 brought. For example, in some cases, if you are -- we
15 as defense lawyers would be retained to represent
16 people pre-indictment. An offer will come down
17 pre-indictment and we will be told it will be a
18 nonmandatory minimum offer, but if we do not take that
19 offer pre-indictment, there will be a charge after
20 indictment and the person will be indicted for a
21 mandatory minimum quantity.

22 MR. GOLDSMITH: That's not a Guideline
23 problem. That's a mandatory minimum.

24 MS. MERRITT: But it becomes a
25 Guideline problem, as well, and the reason it does is

Page 168

1 because you know the sentence your client is going to
2 get under the first scenario and not under the second.
3 It's the prosecutor that has the power instead of the
4 judge who looking at the entire spectrum of the
5 defendant's activities at sentencing can say I believe
6 this is the appropriate sentence based upon your
7 conduct and based upon this offense.

8 MR. GOLDSMITH: But that kind of
9 example, it seems to me, really fits more within Mr.
10 Litt's view. It's always been that way. The
11 prosecutor has always had control over the charge and
12 so if it's simply a matter of the prosecutor having
13 control over the charge, it's always been that way so
14 there's been no transfer in that respect. So that
15 reflects the prior practice.

16 MS. MERRITT: Except for relevant
17 conduct. Except for when the prosecutor will tell you
18 I will only indict for this offense and the relevant
19 conduct will never get before the judge because the
20 judge is not going to know about these other
21 transactions. I think that affects the Guidelines, as
22 well.

23 JUDGE CARNES: That's a prosecutor who
24 is essentially cheating or lying. How can a guideline
25 system protect against somebody like that?

Page 169

Page 171

1 MS. MERRITT: First of all --
 2 JUDGE CARNES: If he's not going to
 3 tell the judge, you don't think that's a lie?
 4 MS. MERRITT: No. Because I think
 5 there are some instances in which the prosecutor could
 6 say based upon what I know at the present time, I
 7 could say this other count, which is not readily
 8 provable --
 9 JUDGE CARNES: In your hypothetical, if
 10 you didn't deal with the prosecutor, it was going --
 11 MS. MERRITT: That's the --
 12 JUDGE CARNES: I don't how to you
 13 design a system to ward off people who don't tell the
 14 truth.
 15 MS. MERRITT: Again, I do not want to
 16 say anybody is not telling the truth. They may be.
 17 It's essentially what gamble are you going to take.
 18 Again, if you're pre-indictment, you have not seen the
 19 discovery in the case, you haven't seen how strong a
 20 case the Government has against a client.
 21 To me, that is one of the worst, the
 22 worst of the elements of the system with respect to
 23 charging by the prosecutor.
 24 JUDGE MAZZONE: Yet some of your
 25 predecessors have told us they want to go to charge of

1 life and this young man is doing life in prison and
 2 has lost his appeal.
 3 MS. HARKENRIDER: It was the judge who
 4 found that co-defendant credible.
 5 MS. MERRITT: That's correct. It was
 6 uncorroborated. My suggestion to the Commission is we
 7 not allow people to be sentenced based on
 8 uncorroborated testimony.
 9 JUDGE TACHA: I just have a quick
 10 question. You pointed out, Mr. Perez, I believe what
 11 we have heard in a number of circumstances and that is
 12 that the Chapter 3 guidelines are based on a model
 13 of -- sort of the big organized crime model and that
 14 many of the drug markets are -- are quite different
 15 and quite loosely organized. In your experience --
 16 and I think you sort of affirmed the quantity-based
 17 Guidelines. In your experience, is quantity at least
 18 a representative proxy for how the organization works?
 19 MR. PEREZ: That's a difficult question
 20 because the scenarios do -- do vary so greatly. One
 21 of the problems that we see here are just the -- not
 22 the structure, but the way these things are
 23 associated. The way the defendants act in these type
 24 of associations. What I think of just off the top of
 25 my head is -- and this is a scenario that I see

Page 170

Page 172

1 conviction. You're saying just the opposite. The
 2 Federal Defenders before us have said they would
 3 rather go strictly with what you can prove in court,
 4 the charge conviction offense system.
 5 MS. MERRITT: I agree post-indictment.
 6 The example I was giving was when I said -- as I said,
 7 when you retain pre-indictment and the prosecutor --
 8 the first time the prosecutor has the opportunity to
 9 sway the system is at the pre-indictment level. After
 10 indictment, I agree again, but, again, I think at that
 11 point, you can only or you should only count the
 12 offense of conviction. You should not be counting
 13 uncharged conduct. Particularly again, it's with
 14 respect to the former co-conspirators who now agree to
 15 assist the Government and become testifying witnesses
 16 for the Government. Based upon their uncorroborated
 17 testimony, I think it is extremely unfair to be able
 18 to bump a defendant's sentence up.
 19 I represented on appeal a young African
 20 American 26-year-old first offender with no violence
 21 whose sentence, based upon the offense of conviction,
 22 would have been about seven years. Based upon the
 23 testimony at sentencing of a former co-defendant who
 24 took the Fifth Amendment and wouldn't even testify at
 25 this defendant's trial, he bumped this defendant up to

1 frequently -- there's an individual who is so-called a
 2 supplier. But he's only a supplier because he knows
 3 where to get the cocaine from. Let's just use
 4 cocaine.
 5 JUDGE TACHA: But it's not a kingpin
 6 situation. It's out there, circles of --
 7 MR. PEREZ: Often, it seems the
 8 supplier, it's a cousin. I mean, he knows a cousin in
 9 Mexico that gets him cocaine. He buys the cocaine,
 10 brings it across the border, gives it to a
 11 distributor, who then in turn distributes to a
 12 multitude of other people who this central supplier
 13 may never know about, the guy got it from the cousin
 14 and it's really hard to say well, this individual
 15 should be held responsible. You know, one of the
 16 other distributors should be held responsible for the
 17 entire quantity.
 18 And -- and what I see in the District
 19 is they -- the charging decision will charge just the
 20 defendant for his -- for his scope of his conduct.
 21 The conspiracy doesn't really encompass everybody
 22 else's behavior that they are aware of. And
 23 therefore, then the role guideline is less important
 24 because they are only charging the scope of his
 25 conduct. And I see that used as a remedy for the

Page 173

1 larger expansive problem, charge everybody with the
2 larger drug amount and then get into the role
3 adjustments which, again, like I said, the mitigating
4 role seems somewhat confusing. It's easier to stay
5 away from that issue and just charge just their
6 conduct.

7 MS. HARKENRIDER: So the Commission's
8 changing of relevant conduct a few years ago to make
9 it clear that relevant conduct should only apply to
10 that among those jointly undertaken helped to some
11 extent?

12 MR. PEREZ: I think it did. I think it
13 narrowed the focus.

14 JUDGE CONABOY: Commissioner Goldsmith.

15 MR. GOLDSMITH: One final question for
16 Mr. Litt. As you know, Mr. Litt, the Commission has
17 been studying the question of crack cocaine and the
18 appropriate ratio between crack and powder. And I
19 know that we are anxious to receive input from the
20 Department on a specific ratio that you think would
21 further both prosecution policy and -- and justice in
22 this context. The Department acknowledged that the
23 problem needed to be studied, but has not been
24 forthcoming with any recommended ratio. When, if
25 ever, do you think we can expect the Department to

Page 174

1 take a position on that, if you know?

2 MR. LITT: I can't give you a specific
3 date. I mean, we've -- we're continuing to be willing
4 to work with you and with Congress on this because
5 Congress is now a player in this as well, to try to
6 assess whether there is another ratio that can meet
7 the law enforcement need. Obviously, I don't have to
8 run through our views on this. You've heard them.

9 MR. GOLDSMITH: Actually, we haven't
10 heard views. We have heard the Department is studying
11 the problem. I guess I'm saying we would like to get
12 some input from the Department as soon as possible.
13 Thank you.

14 JUDGE CONABOY: Thank you all, very
15 much and we'll go to the last panel now and I
16 appreciate everybody being so patient. Thank you all,
17 very much.

18 On the last panel, we'll be talking
19 somewhat about departures. For instance, it would
20 bring back the Professor Reitz with us before and also
21 Mr. Litt will be staying with us again for the last
22 panel. And the two new members are Ms. Suzanne Wall
23 Juarez, who is a probation officer here in Denver.
24 Began your career in New Mexico, as I understand it,
25 and transferred here in 1996 and there are now a

Page 175

1 probation officer here in Denver. Happy to have you
2 with us.

3 And Ms. Virginia Grady, who is also a
4 an Assistant Public Defender here in the -- in Denver.
5 Let's see. You've been working here as an Assistant
6 Fed -- I see. You were a State Public Defender from
7 1984 to 1990. And now you're with the Federal Public
8 Defenders office.

9 MS. GRADY: That's right.

10 JUDGE CONABOY: Thank you for being
11 with us. Suppose we start with you, Ms. Grady.

12 MS. GRADY: Thank you, Mr. Chairman and
13 members of the Commission. As you just heard, I
14 started off my career as a lawyer working for the
15 State Public Defender in the Denver trial office and
16 came to the Federal Defenders office after practicing
17 State law, which is, of course, very different, for
18 about seven and a half years.

19 So I've had the pleasure of comparing
20 the Federal Sentencing Guidelines to the State
21 sentencing system where you are walking in with a
22 client having virtually no idea what -- where the
23 sentence could end up as opposed to the Federal
24 sentence where you have basically a range of about 10
25 to 15 months in most cases.

Page 176

1 I'd like to begin with the suggestion
2 in the staff discussion paper that the language in
3 Section 5(h) needs to be clarified and specifically
4 with reference to the ordinarily, not ordinarily
5 relevant language. The problem that I experienced as
6 a practitioner with this language is that it seems to
7 mandate at least to some judges that certain
8 characteristics which Justice Kennedy identified as
9 discouraged grounds for departure, it seems to me to
10 least mandate to some judges that these are not
11 particularly good grounds for departure at all. And
12 in cases where you have a sentencing judge who is, in
13 fact, considering these discouraged grounds for
14 departure that are identified in 5(h), I think that
15 there is a clear suggestion with the language that the
16 defendant is beginning this argument with a handicap,
17 which I don't think is what the Commission intended
18 when it drafted this section of the Guidelines. You
19 can replace this not ordinarily relevant language with
20 other language which clarifies it or as the -- the
21 paper -- discussion paper suggests, you can replace it
22 with specific examples of how particular
23 characteristics might justify a ground for departure,
24 but I think that you'll just find that simplifying or
25 attempting to clarify this language is simply going to

Page 177

1 create a more complicated scenario and area for
2 discussion.

3 I think that the particular reasons
4 that a court may depart downward are endless and the
5 point is that every case is different. And there is
6 never one particular factor which is going to be used
7 to justify a motion for downward departure and if
8 there is a defense lawyer who is standing there,
9 arguing that there's one particular factor such as age
10 or education or socioeconomic status as a basis for a
11 motion for downward departure, then something's wrong
12 and that's easily identifiable. And the problem that
13 I see with the -- with all motions for downward
14 departure and with the -- and with the discouraged
15 grounds for departure that are identified in Section
16 5(h) is not with the particular current or historical
17 factors that might be considered mitigating.

18 The problem that I see is that once the
19 defense lawyer or the judge or the prosecutor or the
20 probation officer is able to identify a particular
21 factor which would justify a motion for downward
22 departure or a variety of factors which is more usual,
23 I think, which would justify a motion for downward
24 departure, nobody seems to know what to do with it.
25 And I think the reason for that is because the -- the

Page 178

1 players are all so concerned with whether or not the
2 particular factors are, as Justice Kennedy phrased it,
3 discouraged factors or encouraged factors or if they
4 are not in the list at all, should we even be talking
5 about them or looking at them and when you start
6 making a list, you get a short list or a long list,
7 somebody is going to read it as a suggestion that
8 you're excluding particular areas for departure or
9 that this is an all-inclusive list or that this is the
10 only list. And as all of us know who have argued and
11 considered particular grounds for departure, the
12 variety is -- of examples that you could come up with
13 is exponential.

14 So I think where the problem that --
15 that we have here and what I would suggest to the
16 Commission is please don't make the list longer. I
17 don't know about making the list shorter, but perhaps
18 the suggestion that you could certainly make it more
19 abundantly clear or put it in a more positive light
20 that you're not -- this is not an exclusive list and
21 that there are many other. You can certainly invite
22 any court to consider any ground for a downward
23 departure. What I think that we are all missing is a
24 logistical model. Something that lawyers can use and
25 that prosecutors and probation officers and the courts

Page 179

1 can use to ask certain questions that will answer the
2 question how is a particular set of potentially
3 mitigating factors related to the current offense.

4 For example, you could have a bank
5 robber defendant who is confined to a wheelchair. But
6 the fact that that person is confined to a wheelchair
7 is not necessarily, in and of itself, going to be
8 considered a ground for departure. Although it may be
9 mitigating, it does not necessarily -- it's not
10 necessarily going to constitute a ground for
11 departure, unless the story which explains how that
12 person got into a wheelchair is somehow related to the
13 reason that that person committed the bank robbery in
14 the first place or if you look at that situation from
15 the other end of sentencing, the question may be how
16 does the sentencing impact this person's ability --
17 ability to continue basic -- basic living.

18 In other words, is the person's health
19 so poor that a sentence to imprisonment would severely
20 impact it or is that person -- or is a sentence of
21 imprisonment outweighed more by this person's variety
22 of health reasons that may be associated with why he's
23 in a wheelchair in the first place.

24 Another example I give you is -- this
25 is from a case that is in the Tenth Circuit that you,

Page 180

1 Judge Tacha, may be familiar with. There is a Vietnam
2 vet who had a lengthy history of having post-traumatic
3 stress syndrome and is also the sole caretaker of his
4 child and had a variety of particular reasons. That's
5 the Webb case, Judge Tacha, and had a variety of
6 different grounds -- of different circumstances which
7 would justify a motion for downward departure and that
8 motion was denied by the trial judge at sentencing.

9 And what you often see is that the people aren't
10 discussing at the district court level in the
11 sentencing how these particular circumstances are
12 related to why that person is in Federal court in the
13 first place. And so I would suggest that if we're
14 going to attempt to achieve commonality in downward
15 departures which, you know, by definition downward
16 departures mean you're not going to have
17 commonality -- you're going to have disparity in
18 sentences because you're talking about a case which
19 simply cannot -- is not a heartland case and cannot be
20 quantified, but if you want to achieve commonality, I
21 suggest we achieve commonality in logic and that a
22 logistical model be formulated in the form of a policy
23 statement, nothing more, but that invites us to ask a
24 certain number of questions every time we're looking
25 to get a motion for downward departure. I'm sorry I'm

Page 181

1 going beyond the time I set for myself. The first --

2 JUDGE CONABOY: I won't have to say
3 that now. I'm glad you said it.

4 MS. GRADY: Pardon me?

5 JUDGE CONABOY: I said I'm glad you
6 said it.

7 MS. GRADY: The first question that I'm
8 asked --

9 JUDGE CONABOY: You're way over.

10 MS. GRADY: Pardon me. May I go on or
11 do you want me to stop?

12 JUDGE CONABOY: Would you try to wrap
13 it up? I don't -- it is an interesting point, but
14 we're just running out of time. I know you're from a
15 Syracuse, but I --

16 MS. GRADY: Don't hold that against me.
17 I have nothing to do with basketball. The questions
18 that I would ask are, 1, are the circumstances which
19 are cited by the defendant as potentially mitigating
20 circumstances, are they unusual or exceptional and,
21 number 2, if so, are they causally related to the
22 offense conduct or if you're approaching the downward
23 departure from the other end -- that is, whether or
24 not the sentence itself is going to impact an ongoing
25 or unusual situation -- a common logistical model

Page 182

1 should ask whether the usual goals of imprisonment are
2 outweighed by the need for a downward departure.

3 If you would invite all of us to ask
4 some basic questions, I think in addition to inviting
5 more discretion with downward departures, I think that
6 would be a great improvement to the Guidelines.

7 JUDGE CONABOY: Thank you, Ms. Grady.
8 And Ms. Juarez, will you go next.

9 MS. JUAREZ: First of all, I'd like to
10 thank the Commission for allowing us to address these
11 issues. And I hope that it will result in
12 simplification, which is why we're here.

13 My experience with the Federal
14 Guideline Sentencing process in two districts within
15 the Tenth Circuit spans a five-year period. The
16 general attitude of probation officers was that there
17 was a legitimate need for reform in the Federal system
18 to deal with disparity in an attempt to achieve
19 uniformity. While officers understand that the
20 Guidelines are here to stay, officers believe that the
21 Guidelines somewhat restrict the sentencing process.

22 Probation officers in the Federal
23 system are responsible for preparing a pre-sentence
24 report. Our goal is to present the Court with the
25 facts of the case and correctly interpret it and apply

Page 183

1 the Guidelines. This task is often misrepresented or
2 viewed with skepticism. Prosecutors protect a plea
3 agreement that they have negotiated and the defense
4 attorney is to represent his client in the best way
5 possible. As the only party without an agenda or a
6 deal to preserve, we are often placed in the awkward
7 position of being an adversary to both sides.

8 In general, I'd just like to say that I
9 know that the Commission recognized that there would
10 be some problems with the Guidelines in general and
11 that one of them identified as a potential problem was
12 the ability of the prosecutor to influence sentences
13 by increasing or decreasing the number of counts in an
14 indictment. Manipulation of the indictment may not be
15 as prevalent as manipulation of Guideline applications
16 related to adjustments for role in the offense and
17 downward departures for substantial assistance.
18 Officers face this problem every day. Prosecutors
19 have the discretion to present these Rule 11's which
20 essentially precludes the Court from being able to
21 consider any additional information uncovered in
22 pre-sentence investigation. After such a plea
23 agreement has been accepted by the Court, the
24 pre-sentence report is rendered inconsequential and
25 unaffected as it accomplishes little more than

Page 184

1 fulfilling the statutory requirement.

2 When a sentence has been determined at
3 the time of the plea, probation officers often
4 question why a report was prepared because it was of
5 little value in the sentencing process.

6 Perhaps most importantly, this practice
7 greatly limits the sentencing judge's authority to
8 sentence the defendants appropriately based on factors
9 that may not be considered at the time of plea.

10 With regard to offender
11 characteristics, I think it's a very good idea that
12 the Commission consider eliminating unnecessary or
13 redundant commentary and combine certain sections
14 together to create a little bit more simplification
15 and generalization. However, I don't believe that
16 expanding the reasons or the list would be a good
17 idea. I think it would just create more confusion.
18 It is difficult not to consider certain offender
19 characteristics in the decision to depart downward
20 because each individual is unique and their situation
21 is different. These characteristics should be
22 considered on an individual basis and consideration
23 should include extraordinary circumstances or
24 characteristics.

25 I believe that the current method of

Page 185

Page 187

1 determining validity of the downward departure
2 addresses the pertinent issues and allows for judicial
3 discretion. The courts are required to consider the
4 basis for downward departure and make the ultimate
5 decision, but I think perhaps judges should be
6 imparted with even more discretion to depart downward
7 for reasons that they believe are critical to
8 rendering an appropriate decision. The Commission may
9 achieve real simplification by allowing the judges
10 discretion to determine if a defendant qualifies for a
11 downward departure based on a variety of criteria that
12 would be applied to each case to help determine the
13 defendant -- to determine if the defendant's
14 particular circumstances warrant a departure. Thank
15 you.

16 JUDGE CONABOY: Thank you, very much.
17 Professor Reitz.

18 PROFESSOR REITZ: Thank you. I'd like
19 to begin by joining in a number of comments I heard,
20 particularly in the morning, applauding the decision
21 of the United States vs. Koon. I think it will have a
22 beneficial impact at least in the appellate practice
23 that is generated by guidelines and that's going to
24 filter down to, I hope, new attitudes of -- of -- in
25 the district courts to a clear discretionary power.

Page 186

Page 188

1 One question that I would predict would
2 be on the mind -- on the minds of the Commission
3 members would be whether in light of Koon it is -- it
4 would be wise simply to wait a while and see what the
5 effect of that decision was going to be on this
6 difficult issue of departures and the standard of
7 review of -- of Guideline decisions at the district
8 court level. I don't think the issue is -- is clear-
9 cut.

10 My inclination and my recommendation I
11 think for today is that it would be a shame if the
12 Commission would just short circuit the simplification
13 process, at least consideration of what could be done
14 at the Commission level about the departure standard
15 perhaps in conjunction with Koon.

16 Now, what I would like to do in the
17 short time I have is make two suggestions for actions
18 that the Commission may consider. Although I have to
19 say I'm impressed with the extent to which I agree
20 with what Virginia Grady has said about the
21 advisability or desirability of an overarching logic
22 to departure decisions that might be promoted and
23 encouraged by the Commission. Although you'll see as
24 I proceed through my two suggestions, they are
25 somewhat different.

1 My first order of recommendation, I'm
2 afraid, would require legislative change. I know the
3 Commission can't accomplish that, but it can recommend
4 it.

5 The second order of recommendation I'll
6 make will have to do with how closely the Commission
7 could approach the effect of a legislative change I
8 would recommend.

9 The departure standard in Section 3553,
10 itself, seems to me to be the source of some problems
11 that will probably continue even after Koon. The
12 wording of the departure standard that draws attention
13 to whether or not factors have been adequately
14 considered by the Commission, I think probably does
15 not resemble what a trial judge ought to be thinking
16 about in the departure decision.

17 To my way of thinking, a Commission
18 that performs all of its tasks, even in an exemplary
19 manner, let alone in an adequate manner is going to
20 produce a general statement of sentencing policy that
21 will still need in the occasional case some
22 flexibility in application. So that the standard
23 of -- of review of the guidelines at least in the
24 first instance for departure decisions that or -- is
25 oriented towards the adequacy of Commission

1 consideration is -- is a bit off the mark. As a
2 suggested redraft, the Commission may think about a
3 standard that has been in use in a number of state
4 systems, the, quote, substantial and compelling reason
5 standard that expresses a sense that there is
6 substantial and compelling reasons that some sentence
7 other than the Guideline sentence is appropriate in a
8 given case with the understanding that there will be
9 few of those cases, not many of those cases.

10 Now, the second change that would be
11 ideal legislatively would be to draw attention in the
12 departure standard not simply to principles that can
13 be derived from the Guidelines in the Guideline manual
14 as the statute currently states, but that draws
15 further attention to the underlying purposes of
16 sentencing and the sentencing process that Congress
17 has addressed in 3553(a). I think Ms. Grady, again,
18 was getting at some of this.

19 Now, this -- these sorts of ideas again
20 are for Congress, not the Commission. The Commission
21 can recommend. It can't act legislatively. However,
22 it occurs to me that in Guideline amendments, some of
23 this work can be done if the Commission were to
24 consider it desirable.

25 So my second order of recommendation is

Page 189

1 addressed to that. The Sentencing Commission, if it
2 chose to, could say in the guideline manual there are
3 certain offender characteristics, for example, in the
4 5(h) section of the Guidelines that resist
5 quantification and are difficult in advance to
6 consider, quote, adequately within the meaning of the
7 statutory language.

8 Therefore, the Commission could, I
9 think, direct sentencing judges in cases where such
10 factors are present in substantially compelling degree
11 to consider departure in that case. The Commission,
12 in effect, could, through its own prerogative, do some
13 of the work that I have suggested legislatively.

14 Further, I think the Commission could
15 direct a sentencing court in thinking through such a
16 process to the underlying statutory purposes of
17 sentencing that Congress adopted in 3553(a), which one
18 would hope would be both a fount of the Commission's
19 work and the -- as well as the foundation of a
20 district court discretionary decision built upon the
21 guidelines. Thank you.

22 JUDGE CONABOY: Thank you, Professor.
23 Mr. Litt, again.

24 MR. LITT: Thank you. I think I can be
25 relatively brief this time because I think the

Page 191

1 much. Are there any questions of the panel? I
2 appreciate it very much. Thank you all, very, very
3 much for some of your thoughts.

4 If any of you wish or maybe you have
5 already given us copies of your written statements
6 even if you had them read, we'd like to add copies of
7 those if you haven't already given those to us.

8 MS. GRADY: I would prefer to edit mine
9 just a little bit.

10 JUDGE CONABOY: You can send those in.
11 We would appreciate that. Thank you, very much.

12 Is there anyone else here in the
13 audience who has any comment or wishes to be heard?
14 If not, we thank all of you very much for your
15 patience and for your determination.

16 We'll conclude the meeting.

17 (The meeting was concluded at 1:30
18 p.m.)
19
20
21
22
23
24
25

Page 190

1 Department's view on this is that the Koon decision is
2 likely to substantially change the practice with
3 respect to departures or at least has the possibility
4 of substantially changing the practice with respect to
5 departures and we don't think it would be a wise thing
6 to -- at the same time that the courts are trying to
7 deal with the effect of Koon, to go and be changing
8 the underlying guidelines that are being dealt with
9 this in process.

10 I think that we need to give the courts
11 time to evaluate the increased discretion that Koon
12 has given the district courts to depart before we
13 determine whether anything more is needed. I would
14 only note in addition the necessary tension between
15 the calls for increased flexibility in departures and
16 what I have identified as the primary goals of the
17 Sentencing Reform Act, which are to eliminate
18 disparities in sentencing and make sentencing fair and
19 more predictable and more uniform. The more you open
20 the field for departures, the more -- the less you can
21 achieve uniformity and predictability. And so I think
22 that that -- that's another reason to wait and see
23 what happens with Koon before attempting to tinker
24 with the underlying structure on this.

25 JUDGE CONABOY: Thank you all, very

INDEX



-S-			1991 [2] 107:23 123:2	40 [2] 71:5 154:2	60:11 64:18 114:7	121:25
\$10 [1] 31:2			1992 [3] 79:8 107:23	43 [2] 128:8 158:20	116:16 128:14 137:24	acknowledged [1]
\$25 [1] 31:15			123:4	45 [1] 66:3	160:24 164:11 166:9	173:22
\$50 [1] 31:1			1993 [1] 123:4	450-page [1] 21:2	170:17 177:20 183:20	acquaintance [1]
-I-			1994 [6] 5:23 8:20	4A1.3 [1] 125:13	above [1] 64:18	42:6
			72:13 107:23 123:2		absent [1] 45:6	acquire [1] 20:7
			143:6	-5-	absolute [1] 37:1	acquittal [2] 109:1
'78 [1] 66:18			1994-3 [1] 17:1	5 [4] 176:3 176:14	absolutely [1] 53:12	110:25
'82 [2] 66:18 142:22			1995 [2] 123:6 143:6	177:16 189:4	abundantly [1] 178:19	acquittals [2] 111:8
'86 [1] 142:22			1996 [4] 1:2 79:10	50 [1] 20:13	Abuse [1] 143:21	112:12
'88 [1] 93:18			79:10 174:25	500 [1] 20:21	abused [1] 129:6	acquitted [21] 18:8
'94 [3] 13:25 14:1			1997 [1] 41:13	53 [1] 20:22	abuses [1] 159:5	92:20 103:25 104:12
			1:30 [1] 191:17	536 [1] 38:25	accept [1] 48:6	105:7 108:10 108:11
			1B1.1 [1] 105:18	54 [1] 159:22	acceptable [1] 78:7	108:15 108:17 108:22
			1B1.3 [6] 99:21	548 [1] 81:16	acceptance [9] 15:18	108:24 109:4 109:12
-1-			102:21 103:17 103:20	5K's [2] 153:3 153:14	34:20 45:23 48:4	109:16 109:17 109:25
1 [10] 1:3 17:25			105:12 105:18	5K1 [4] 79:2 83:8	77:7 77:15 78:9	110:9 110:10 111:13
103:25 105:12 105:16			1presentence [1]	134:5 135:7	79:17 145:10	116:15 122:11
121:11 122:5 123:6			72:22	5K1's [1] 134:21	accepted [2] 45:15	acquitting [1] 109:20
144:11 181:18			-2-	5K1.1 [10] 81:9	183:23	act [14] 4:5 22:3
1,500 [1] 20:25			2 [6] 22:23 100:8	81:25 82:16 89:15	access [2] 21:13	40:18 66:19 74:23
10 [5] 27:6 110:5			122:5 126:12 148:1	89:19 90:1 128:17	119:14	81:10 120:5 121:20
144:6 144:11 175:24			181:21	128:21 129:5 129:14	accident [1] 25:17	123:1 143:5 160:15
100 [1] 7:23			20 [6] 14:9 16:18	-6-	accommodations [1]	171:23 188:21 190:17
11's [1] 183:19			125:21 150:23 154:2	60 [1] 20:13	113:23	Act's [1] 143:21
11-1/2 [1] 124:19			155:9	62-year-old [1] 30:10	accomplish [4] 24:3	actions [1] 186:17
11:06 [1] 92:15			200 [1] 10:21	-7-	86:24 161:22 187:3	activities [5] 6:10
11:17 [1] 92:16			21 [2] 125:21 159:17	7 [1] 23:1	accomplished [3]	64:16 64:17 126:4
11:20 [1] 92:14			22 [1] 150:23	70 [4] 64:16 64:23	4:13 10:23 19:4	168:5
11E1C [1] 60:6			22-year-old [1] 126:25	126:8 156:25	accomplishes [1]	activity [2] 8:17
12 [2] 1:2 27:6			23 [1] 23:6	71.3 [1] 159:15	183:25	140:22
120 [4] 136:6 136:6			248 [1] 21:6	-8-	accordance [2] 99:21	actors [2] 78:19
136:17 141:20			249 [1] 21:10	80 [1] 44:9	137:13	96:6
13 [2] 79:13 155:9			25 [1] 131:13	85 [1] 156:21	according [2] 13:13	actual [2] 109:17
135 [1] 136:1			26-year-old [1] 170:20	871 [1] 130:17	37:3	162:6
15 [2] 43:19 175:25			27 [1] 85:22	88 [2] 156:19 156:23	accordingly [2] 32:23	adamant [1] 56:15
16 [1] 86:4			2B1.11 [1] 144:17	-9-	121:23	adamantly [1] 114:25
18 [2] 4:13 156:12			2B3.1 [1] 22:12	90 [2] 30:11 137:4	account [8] 37:15	adapt [1] 35:1
1823 [1] 1:4			2D1.1 [1] 39:2	91.9 [1] 44:25	39:22 60:15 107:17	adapted [1] 34:25
19 [1] 13:24			-3-	92 [1] 44:24	109:5 111:3 112:3	adapting [1] 58:17
1964 [1] 123:12			3 [12] 22:24 71:2	924 [1] 109:12	119:3	add [3] 140:3 141:17
1968 [1] 13:8			71:8 71:16 79:17	97 [6] 44:9 44:18	accountable [1] 116:13	191:6
1971 [1] 67:13			81:16 81:19 100:8	56:11 77:9 84:16	accountant-like [1]	added [1] 147:22
1974 [2] 19:25 67:10			103:17 145:21 156:12	84:17	145:5	adding [1] 150:18
1976 [1] 14:11			171:12	981 [1] 130:17	accounted [1] 102:5	addition [17] 5:24
1978 [2] 13:18 67:10			30 [6] 86:8 89:22	-A-	accounts [1] 131:20	6:5 6:17 7:9
1979 [4] 13:19 94:8			131:12 131:13 141:25	ABA [1] 92:25	accuracy [1] 74:2	14:24 20:18 21:18
123:11 123:13			154:2	ability [10] 48:21	accurate [1] 146:16	40:25 41:24 96:13
1980 [1] 93:17			3553 [3] 187:9 188:17	49:3 75:20 125:16	accurately [3] 126:13	96:23 100:6 102:4
1984 [2] 4:5 175:7			189:17	132:16 160:15 167:13	148:3 148:12	102:14 104:6 182:4
1986 [3] 76:12 76:20			3555 [1] 156:12	179:16 179:17 183:12	accusations [1] 9:1	190:14
79:22			360 [1] 141:24	able [20] 4:16 16:10	accuse [1] 74:12	additional [8] 23:8
1987 [3] 8:25 72:1			37 [1] 39:2	34:13 36:2 52:3	accused [1] 155:7	52:11 68:2 100:15
73:12			38 [1] 158:21	52:4 59:25 60:5	achieve [13] 38:17	102:5 104:6 138:24
1988 [7] 13:2 13:9			3C1.1 [1] 130:15		84:9 113:3 113:8	183:21
14:12 14:15 39:3			-4-		119:23 119:24 120:3	Additionally [1] 100:13
93:19 107:23			4 [2] 22:25 148:1		180:14 180:20 180:21	address [11] 11:9
1989 [2] 13:13 107:23					182:18 185:9 190:21	40:6 47:9 50:17
1990 [3] 72:10 107:23					37:16 120:12	52:14 72:19 75:6
175:7					achievement [1]	143:18 144:3 160:19
					38:10	182:10
					achieving [2] 84:12	addressed [6] 55:8
						55:22 108:7 165:1
						188:17 189:1

addresses [1]	185:2	African [4]	86:2	Alcohol [1]	30:2	64:13	74:16	89:5	148:15	148:16	155:13																																																												
adds [1]	40:7	126:25	140:9	170:19	aliens [1]	31:12	109:21	119:4	135:20	159:2	187:22																																																												
adept [1]	148:10	African-American [2]	127:14	135:13	all-inclusive [1]	178:9	150:10	151:25	173:2	applications [4]	74:3	74:5	89:10																																																										
adequacy [1]	187:25	afternoon [1]	143:16	again [26]	12:20	alleviate [1]	88:24	amounts [1]	127:7	183:15	applied [5]	41:9																																																											
adequate [1]	187:19	27:25	29:13	40:11	alleviated [2]	88:21	115:15	analogous [1]	109:22	61:3	102:21	112:11																																																											
adequately [3]	37:15	46:1	46:2	66:11	alleviates [1]	88:23	24:7	77:14	analysis [3]	21:1	185:12																																																												
187:13	189:6	89:8	92:20	93:21	allow [7]	26:9	85:8	139:4	24:7	77:14	applies [1]	109:14																																																											
adjust [4]	116:20	98:7	110:2	132:6	31:7	50:6	56:20	anecdotal [3]	81:3	Angeles [1]	156:14	42:4																																																											
128:1	128:14	142:11	143:10	147:5	120:8	157:3	171:7	85:8	139:4	animosity [1]	28:9	48:2	48:5	49:23																																																									
adjusted [2]	56:13	169:15	169:18	170:10	allowed [1]	158:17	allowing [3]	128:1	anniversary [1]	123:7	20:25	50:9	55:10	58:15																																																									
128:13		170:10	170:13	173:3	182:10	185:9	allows [2]	156:3	annotated [1]	20:25	100:8	102:25	109:16	112:15																																																									
adjustment [7]	22:23	174:21	188:17	188:19	189:23	against [10]	41:2	185:2	annual [1]	44:17	44:17	116:7	120:20	155:6																																																									
23:9	25:4	62:1	75:18	104:12	152:21	158:2	159:7	Allstate [1]	82:17	answer [6]	48:13	161:15	162:16	173:9																																																									
118:3	145:23	168:25	169:20	181:16	age [1]	177:9	agenda [3]	2:17	54:14	61:10	104:13	182:25	applying [5]	25:12																																																									
adjustments [3]	144:15	173:3	183:16	administrative [6]	21:4	21:16	65:3	127:4	183:5	138:22	179:1	103:2	125:3	144:21																																																									
144:15	173:3	183:16	21:4	21:16	65:3	130:9	130:10	almost [12]	4:14	102:15	102:15	148:11	3:25	5:11	5:22	13:2																																																							
admit [1]	144:25	admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	45:6	60:12	69:4	69:4	19:24	68:13	88:23	122:24	124:4																																																							
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	69:14	89:22	91:13	92:17	103:21	alone [1]	187:19	along [7]	3:15																																																							
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	92:17	103:21	alone [1]	187:19	along [7]	3:15	9:24	29:6	33:1																																																							
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	45:24	88:7	143:9	alternative [1]	9:14	alternatives [2]	37:12	158:12	altogether [2]	23:5																																																						
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	147:3	always [18]	11:14	14:10	14:20	15:20	16:22	19:1	24:16	57:21	66:5	70:16																																																				
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5]	8:6	18:23	96:25	157:11	173:10	amongst [1]	92:1	amount [16]	23:7	36:13	39:23	53:2	54:9	64:10	64:12
admits [1]	120:15	admitted [1]	116:14	adopt [1]	4:10	adopted [4]	41:7	89:23	109:7	119:4	163:13	166:13	168:10	168:11	168:13	amend [2]	28:22	39:15	amended [2]	4:25	107:22	amendment [7]	41:6	41:9	41:13	52:23	88:20	156:12	170:24	amendments [17]	20:21	38:20	38:22	38:25	38:25	39:2	39:8	39:9	39:12	39:17	40:8	40:25	41:2	41:5	52:23	103:9	188:22	amends [1]	4:24	American [5]	86:3	97:13	127:1	140:10	170:20	among [5															

42:24 49:3 49:4	Association [5] 67:5	August [1] 1:2	bangers [1] 144:12	102:18
178:8	93:4 123:3 155:15	authority [3] 89:18	bank [18] 58:20	believes [1] 35:5
arena [1] 123:25	156:10	90:12 184:7	58:23 96:17 121:8	below [1] 138:25
argue [1] 31:23	Association's [1] 97:13	automatically [1] 117:22	121:9 121:13 121:13	Beltway [2] 47:16
argued [1] 178:10	associations [4] 146:4 146:6 146:15	available [6] 79:18	131:16 131:16 131:17	47:21
arguing [3] 52:24	171:24	85:4 94:3 106:20	132:24 134:9 134:10	bench [10] 6:7
83:10 177:9	assume [4] 51:8	118:25 119:10	134:11 134:15 134:19	6:9 13:9 14:9
argument [2] 32:1	88:7 121:4 121:5	average [3] 44:24	179:4 179:13	14:12 14:15 17:1
176:16	assumed [3] 14:12	44:25 45:1	bankrupt [1] 155:24	54:11 60:19 124:4
arise [1] 40:11	14:15 105:13	avoid [3] 28:25	bar [5] 18:23 67:5	Bender [15] 67:11
arises [2] 19:5	assumes [1] 105:16	29:17 114:21	97:13 123:3 160:11	80:2 80:3 83:23
146:11	assumption [2] 8:4	avoiding [1] 77:24	bargain [4] 60:6	85:12 86:25 87:12
Arizona [2] 47:25	144:12	award [2] 89:19	70:7 82:6 104:8	87:16 87:21 88:3
127:8	assumptions [1] 144:16	90:14	bargainers [1] 70:2	88:22 89:15 89:20
arm [1] 8:11	astonishing [1] 44:8	awarded [2] 138:14	bargaining [5] 34:8	90:16 104:16
armed [2] 121:9	athlete [1] 135:24	159:16	34:12 76:5 84:21	beneficial [3] 55:24
121:13	athletic [1] 135:22	aware [6] 87:18	121:5	101:18 185:22
arranged [1] 2:14	Atlanta [1] 6:16	87:25 101:13 109:24	bargains [4] 33:1	benefit [6] 34:19
arrangement [1] 82:7	atmosphere [1] 53:22	135:18 172:22	44:7 44:12 77:10	37:7 47:4 47:19
array [1] 62:5	attempt [5] 29:14	away [7] 27:11 59:5	base [3] 22:15 23:6	79:2 106:11
arrive [1] 129:9	29:17 164:16 180:14	60:12 79:9 90:9	97:15	benefits [1] 38:5
arriving [2] 120:16	182:18	158:7 173:5	based [27] 24:10	benefitted [1] 36:19
128:22	attempted [2] 120:19	awesome [2] 29:19	29:13 36:21 77:1	bent [1] 46:22
arrows [1] 47:20	120:20	83:21	83:13 100:9 102:17	best [7] 3:11 6:2
Arthur [1] 66:23	attempting [3] 100:11	awful [1] 62:13	113:16 115:19 126:20	32:11 68:8 94:8
article [6] 71:2	176:25 190:23	awfully [1] 101:16	128:22 144:11 144:11	158:9 183:4
71:8 71:16 81:16	attended [2] 14:17	awkward [2] 75:25	145:24 157:24 158:22	better [23] 3:18
81:19 94:23	124:7	183:6	166:5 168:6 168:7	9:16 10:2 10:24
articles [1] 93:1	attention [6] 45:20	-B-	169:6 170:16 170:21	31:1 35:5 35:6
articulate [3] 16:4	53:25 112:24 187:12	B [1] 135:14	170:22 171:7 171:12	54:11 54:12 55:14
55:5 55:18	188:11 188:15	Babcock [28] 12:25	184:8 185:11	57:24 71:1 71:1
articulated [2] 15:12	attest [1] 36:12	13:4 14:2 14:4	basic [7] 20:3 60:17	76:6 77:14 82:12
56:4	attitude [1] 182:16	14:7 39:3 44:2	88:24 98:2 179:17	84:1 86:13 89:1
articulation [2] 56:2	attitudes [2] 74:9	44:6 44:13 44:22	179:17 182:4	93:14 97:16 107:24
83:19	185:24	45:4 46:12 47:12	basis [12] 11:24	148:5
ascertain [1] 100:11	attorney [18] 5:14	48:11 48:18 50:24	47:16 65:18 81:15	between [18] 25:25
aspect [5] 9:10	6:21 6:22 7:13	51:24 52:1 53:5	86:2 97:6 99:25	26:1 26:2 29:16
78:11 81:9 82:20	7:15 13:22 25:1	54:13 63:11 63:13	114:6 117:17 177:10	40:12 68:17 80:23
89:17	25:5 67:12 70:4	63:16 63:20 70:19	184:22 185:4	87:17 98:1 115:7
assess [4] 42:7	93:17 93:18 101:20	82:4 83:18 91:16	basketball [1] 181:17	115:9 121:12 124:15
43:4 147:24 174:6	114:16 134:13 142:8	baby [1] 135:16	bear [3] 33:13 95:6	127:5 128:23 131:25
assessing [1] 41:19	142:22 183:4	Bach [5] 66:21 71:22	162:15	173:18 190:14
assessment [1] 161:13	Attorney's [1] 88:6	71:23 71:23 76:9	became [7] 3:23	beyond [11] 43:23
assigned [2] 21:20	attorney-client [5] 68:14 69:4 69:19	background [4] 5:21	8:20 13:18 14:22	54:22 58:7 83:13
99:16	69:21 70:8	37:5 37:8 67:8	72:14 93:18 142:24	89:14 96:20 116:6
assist [3] 157:11	attorneys [29] 16:8	backgrounds [1] 70:18	become [14] 23:12	116:9 138:25 157:22
163:4 170:15	16:21 16:21 36:10	bad [17] 15:25 27:10	32:14 37:25 39:7	181:1
assistance [15] 77:8	52:5 56:15 58:10	27:11 34:11 59:9	72:4 73:13 74:5	bifurcate [2] 28:22
78:13 78:15 79:3	58:11 66:20 68:2	60:10 87:8 89:25	74:23 75:9 100:21	64:19
79:21 81:8 85:21	68:8 68:10 68:13	103:22 135:15 149:25	101:23 108:1 148:10	big [6] 23:13 46:22
86:6 90:14 129:1	71:11 73:1 73:12	150:7 153:9 153:9	170:15	133:23 151:25 153:7
129:4 135:8 157:6	74:1 74:12 75:13	153:10 154:6 164:8	becomes [2] 24:24	171:13
166:12 183:17	75:14 91:10 99:4	bag [1] 31:14	167:24	bigger [1] 79:4
assistant [12] 7:14	99:5 107:15 113:2	baggage [1] 2:8	becoming [2] 120:18	bit [15] 2:19 4:3
13:18 13:22 72:25	113:10 113:19 118:19	bags [1] 153:10	155:24	5:20 28:23 49:15
93:16 93:16 93:18	128:25	balance [3] 25:25	began [2] 72:1	53:8 65:12 65:21
142:21 142:22 142:24	attorneys' [1] 74:9	26:14 50:4	174:24	92:7 123:10 154:10
175:4 175:5	attracted [1] 117:19	balanced [1] 145:8	begin [7] 36:17	154:11 184:14 188:1
associate [2] 64:1	attributable [1] 166:23	Baltimore [3] 129:24	67:16 68:14 93:23	191:9
92:23	audience [1] 191:13	130:1 130:4	95:9 176:1 185:19	bite [1] 110:14
associated [3] 6:10		bang [1] 153:25	beginning [1] 176:16	bites [1] 110:11
171:23 179:22			begun [1] 124:14	blessings [1] 47:12
			behalf [1] 35:22	blown [1] 27:14
			behavior [4] 75:21	board [2] 144:16
			78:3 78:7 172:22	162:17
			belief [2] 98:4	Bob [1] 143:11

bodily [2] 22:17 23:10	body [4] 18:25 33:5 37:25 83:1	bogus [1] 131:16	book [2] 35:7 69:8	border [1] 172:10	Boston [4] 6:8 6:18 6:20 124:7	bothers [1] 18:4	bottom [4] 115:8 118:20 136:2 149:2	box [1] 131:18	boy [1] 60:11	boyfriend [2] 140:23 141:19	brand [2] 24:20 37:25	brandished [1] 23:4	brandishing [1] 22:24	break [9] 12:18 66:12 66:14 92:7 92:9 92:10 92:12 92:13 166:8	breakfast [1] 2:20	breath [1] 152:10	breeds [1] 81:13	brief [7] 4:2 123:17 130:3 133:2 133:7 167:7 189:25	briefly [2] 38:23 108:9	Brigham [1] 7:7	bright [2] 135:24 140:1	brilliant [1] 29:14	bring [12] 30:5 82:6 82:7 88:15 95:6 126:14 145:9 145:12 153:23 153:24 154:1 174:20	bringing [3] 139:11 153:7 165:17	brings [1] 172:10	broadly [1] 109:17	broken [2] 22:21 155:22	Brooklyn [1] 72:2	brother [5] 134:17 134:22 134:23 134:25 153:23	brought [7] 36:25 71:13 81:2 86:9 107:9 153:22 167:14	buck [1] 154:1	Budd [8] 6:18 63:21 84:3 84:5 86:20 138:12 139:1 139:8	buddies [1] 134:16	buddy [2] 137:1 139:12	Buffalo [1] 6:24	building [1] 7:22	built [3] 60:6 97:22 189:20	bullet [1] 149:20	bump [1] 170:18	bumped [1] 170:25	bunch [2] 126:5 128:6	burden [2] 25:1 157:20	burdened [3] 17:20 45:16 99:7	burdens [2] 18:18 18:18	buried [1] 114:12	Burke [11] 66:17 66:18 67:17 67:20 67:24 71:21 84:20 91:7 91:12 91:25 92:4	business [1] 81:22	buster [1] 101:11	busting [1] 74:13	busy [2] 23:23 44:4	butts [1] 154:16	buy [2] 79:9 79:10	buying [1] 94:10	buys [1] 172:9	Byden [1] 7:3	byproduct [1] 34:22	Byron [1] 1:3	-C-		c [1] 109:12	calculating [1] 103:6	calculation [2] 97:3 97:5	calculations [4] 21:12 22:7 24:6 101:9	California [1] 127:8	calls [1] 190:15	candidly [1] 82:8	cannot [5] 29:8 108:17 163:19 180:19 180:19	cap [3] 150:22 150:23 160:20	capacities [3] 7:2 7:6 7:24	capture [1] 22:7	car [1] 134:18	card [1] 154:6	cards [2] 130:7 130:8	care [3] 29:25 160:24 167:7	career [5] 71:25 72:1 72:7 174:24 175:14	careful [1] 12:7	carefully [4] 23:16 40:22 65:19 84:8	carelessness [1] 25:18	caretaker [1] 180:3	carjacking [1] 22:20	Carnes [9] 6:14 56:6 56:7 58:16 114:14 168:23 169:2 169:9 169:12	Carolina [1] 48:1	carries [1] 105:25	carry [3] 2:24 8:8 26:24	carrying [3] 9:17 109:13 147:16	cartel [1] 165:17	case [98] 16:8 18:25 21:5 23:15 25:12 26:11 29:24 30:19 32:21 33:6 40:17 42:15 42:19 51:20 58:20 59:22 59:22 59:24 62:13 64:23 65:13 65:18 68:9 68:11 73:24 74:5 77:2 79:5 79:6 83:1 83:20 85:22 86:1 86:9 88:23 90:6 90:7 96:16 97:24 99:16 100:1 100:14 101:21 104:6 105:3 105:15 105:20 110:9 110:11 110:16 110:17 111:6 111:6 111:8 111:16 111:20 112:4 113:5 115:18 116:19 117:14 118:2 118:7 120:9 126:7 126:25 127:6 129:17 130:16 130:17 131:2 131:11 134:18 135:6 135:10 136:10 136:10 137:19 138:2 138:25 139:10 150:6 151:20 153:20 157:14 162:20 169:19 169:20 177:5 179:25 180:5 180:18 180:19 182:25 185:12 187:21 188:8 189:11	case-by-case [1] 148:5	cases [68] 18:7 18:8 21:5 30:8 30:9 31:4 31:12 32:19 33:2 33:10 34:4 40:9 44:7 44:11 44:18 45:5 56:11 59:17 61:1 62:8 62:20 63:2 63:7 68:22 70:9 70:12 77:9 77:11 77:14 78:4 81:2 81:20 82:24 82:25 83:3 84:17 86:12 89:9 89:11 89:12 108:20 113:20 116:24 125:11 125:12 131:7 132:8 137:24 137:25	150:25 151:17 157:15 158:8 159:1 159:5 159:6 160:12 160:24 162:16 162:19 162:19 162:21 167:14 175:25 176:12 188:9 188:9 189:9	casualty [2] 70:7 70:8	cat [1] 163:13	category [2] 17:25 126:12	caught [2] 75:1 137:4	causally [1] 181:21	caused [2] 15:15 125:10	causes [1] 125:5	causing [1] 81:1	caution [1] 18:20	center [4] 8:17 14:18 21:6 50:25	centered [1] 9:1	central [4] 106:6 146:8 156:14 172:12	certain [12] 59:24 119:4 120:1 120:1 129:7 129:8 176:7 179:1 180:24 184:13 184:18 189:3	certainly [18] 18:16 28:8 33:15 42:5 77:16 87:6 87:9 89:2 89:25 112:24 114:11 116:1 118:18 137:20 139:21 150:4 178:18 178:21	certainty [5] 34:12 37:1 41:23 46:17 106:2	certiorari [1] 108:18	cetera [1] 8:13	chain [1] 153:4	chair [1] 155:14	chaired [1] 143:5	chairman [20] 3:2 5:14 5:23 5:24 7:10 8:20 14:8 19:16 26:21 35:20 66:5 67:4 67:24 68:23 76:11 80:4 84:6 98:22 155:3 175:12	chairs [1] 68:16	challenge [3] 59:3 73:16 126:23	challenging [1] 20:9	chance [1] 107:25	change [23] 18:21 18:22 18:23 39:22 39:25 40:4 51:1 54:2 97:1 103:7 107:21 110:2 129:21 131:22 143:24 159:8 159:25 161:18 165:24	187:2 187:7 188:10 190:2	changed [4] 5:1 76:22 144:1 160:21	changes [14] 10:1 10:15 26:12 28:2 39:4 42:24 42:25 42:25 43:5 143:22 161:3 161:25 162:15 162:18	changing [7] 38:19 66:11 163:22 166:10 173:8 190:4 190:7	channel [1] 116:21	chapter [8] 30:17 100:8 100:8 103:17 105:12 105:16 145:21 171:12	chapters [1] 29:16	character [2] 63:17 73:7	characteristic [1] 25:19	characteristics [14] 22:14 22:21 49:16 147:12 150:2 150:17 151:1 176:8 176:23 184:11 184:19 184:21 184:24 189:3	charge [18] 103:8 105:1 106:15 106:16 107:6 117:1 119:8 122:12 125:23 153:25 167:19 168:11 168:13 169:25 170:4 172:19 173:1 173:5	charged [6] 83:14 125:23 126:2 127:1 127:10 135:20	charges [8] 105:1 107:9 117:2 126:5 126:6 126:14 126:21 167:13	charging [8] 16:23 118:24 119:1 119:5 159:4 169:23 172:19 172:24	Charles [1] 53:9	chart [1] 46:25	charts [2] 133:15 133:18	chasing [1] 164:10	cheaper [1] 37:21	cheating [1] 168:24	check [1] 131:19	checks [1] 131:17	chief [6] 13:11 13:12 63:24 67:14 88:4 93:17	child [6] 79:6 79:10 79:11 135:19 139:19 180:4	children [2] 141:3	choice [1] 109:15
----------------------------------	--	-------------------------	---------------------------	--------------------------	--	-------------------------	---	-----------------------	----------------------	---------------------------------------	---------------------------------	----------------------------	------------------------------	---	---------------------------	--------------------------	-------------------------	--	-----------------------------------	------------------------	-----------------------------------	----------------------------	--	--	--------------------------	---------------------------	-----------------------------------	--------------------------	---	--	-----------------------	--	---------------------------	----------------------------------	-------------------------	--------------------------	---------------------------------------	--------------------------	------------------------	--------------------------	---------------------------------	----------------------------------	---	-----------------------------------	--------------------------	---	---------------------------	--------------------------	--------------------------	----------------------------	-------------------------	---------------------------	-------------------------	-----------------------	----------------------	----------------------------	----------------------	------------	--	---------------------	------------------------------	-------------------------------------	--	-----------------------------	-------------------------	--------------------------	--	--	---------------------------------------	-------------------------	-----------------------	-----------------------	---------------------------------	---------------------------------------	---	-------------------------	--	-------------------------------	----------------------------	-----------------------------	--	--------------------------	---------------------------	------------------------------------	---	--------------------------	--	-------------------------------	---	---	----------------------------------	-----------------------	-------------------------------------	---------------------------------	----------------------------	-----------------------------------	-------------------------	-------------------------	--------------------------	--	-------------------------	---	--	---	---	------------------------------	------------------------	------------------------	-------------------------	--------------------------	--	-------------------------	---	-----------------------------	--------------------------	---	-----------------------------	--	--	---	---------------------------	--	---------------------------	------------------------------------	---------------------------------	--	--	---	--	--	-------------------------	------------------------	------------------------------------	---------------------------	--------------------------	----------------------------	-------------------------	--------------------------	---	---	---------------------------	--------------------------

choices [2] 95:4	91:18 168:1 169:20 175:22 183:4	combination [1] 145:22	143:24 145:15 148:14 149:1 157:10 158:11 160:7 160:18 163:12 166:25 171:6 173:16 175:13 176:17 178:16 182:10 183:9 184:12 185:8 186:2 186:12 186:14 186:18 186:23 187:3 187:6 187:14 187:17 187:25 188:2 188:20 188:20 188:23 189:1 189:8 189:11 189:14	19:4 19:20 24:18 25:16 25:23 34:5 35:9 35:13 39:6 39:22 40:24 41:19 41:21 41:25 49:11 49:14 49:19 50:2 50:3 50:13 50:23 51:1 51:2 103:10 145:18
choose [2] 97:25 167:13	clients [6] 33:22 56:10 69:1 69:14 71:10 71:18	combine [1] 184:13	Commission's [5] 75:22 79:23 107:18 173:7 189:18	complicate [1] 54:2
chose [1] 189:2	climate [1] 152:11	combined [1] 73:6	commissioner [10] 6:18 27:16 27:17 27:25 58:1 63:21 65:24 84:3 162:24 173:14	complicated [4] 34:8 42:4 74:17 177:1
chosen [1] 135:22	Clinton [1] 5:23	comedy [1] 58:24	commissioners [3] 66:3 94:1 142:13	complication [2] 109:22 161:16
Christopher [1] 142:16	clock [1] 67:22	comfort [1] 98:14	Commissions [1] 93:5	component [1] 127:22
circ [1] 111:7	close [1] 152:3	comfortable [4] 14:22 39:7 64:25 99:13	commitment [1] 65:9	components [1] 36:12
circles [1] 172:6	closely [3] 113:3 118:5 187:6	coming [5] 20:16 28:2 36:20 104:2 137:2	committed [4] 41:18 109:7 111:17 179:13	comports [1] 17:4
circuit [15] 6:13 18:14 18:16 21:9 52:1 52:7 52:8 52:16 104:24 105:2 108:16 111:6 179:25 182:15 186:12	closer [2] 27:3 61:12	commence [1] 124:5	committing [3] 15:16 85:17 100:4	comprehension [1] 58:7
circuits [1] 155:9	closing [1] 148:7	comment [11] 10:12 11:2 19:10 19:18 41:13 68:5 141:18 149:1 166:15 167:3 191:13	common [6] 26:2 96:8 96:9 152:24 164:2 181:25	comprehensive [1] 75:20
circumstances [23] 24:16 26:11 40:21 48:14 59:25 61:20 69:5 73:3 110:23 112:4 116:18 120:1 129:10 138:19 157:5 161:8 171:11 180:6 180:11 181:18 181:20 184:23 185:14	co [1] 144:8	commentaries [1] 145:25	commonality [4] 180:14 180:17 180:20 180:21	compromises [1] 75:19
circumventing [1] 154:24	co-conspirators [4] 157:25 158:2 159:6 170:14	commentary [5] 46:1 146:21 147:23 162:3 184:13	commonly [1] 26:4	computer [2] 21:10 30:5
cited [3] 117:16 139:4 181:19	co-defendant [2] 170:23 171:4	commenting [1] 65:1	communicating [1] 165:22	computing [3] 104:1 105:7 105:8
citizen [3] 83:13 98:6 98:6	co-defendants [2] 68:11 68:14	comments [27] 11:10 11:24 36:1 47:7 60:23 63:24 80:10 89:9 92:8 92:21 98:24 99:14 103:1 112:22 113:13 113:15 114:12 124:24 132:5 132:12 132:14 133:2 133:25 142:11 142:12 163:9 185:19	community [12] 20:13 21:22 24:11 64:21 65:14 65:14 65:20 74:21 83:19 158:18 166:21 166:24	Conaboy [72] 2:1 3:1 7:18 13:5 13:15 14:1 14:5 19:9 26:17 27:2 35:18 43:10 43:21 52:17 56:5 59:10 59:14 61:14 63:21 65:24 66:2 66:25 67:3 67:7 67:22 71:21 76:8 80:2 83:23 87:10 89:6 92:5 92:12 92:17 93:8 93:10 94:5 94:12 94:14 98:19 103:12 105:21 110:4 112:8 118:8 118:17 122:15 122:21 123:8 123:20 133:4 138:5 142:3 142:7 143:14 148:18 154:25 160:4 162:23 166:25 173:14 174:14 175:10 181:2 181:5 181:9 181:12 182:7 185:16 189:22 190:25 191:10
citizens [1] 141:17	co-equals [2] 131:24 131:25	commercial [4] 14:21 46:15 46:17 53:7	comparing [1] 175:19	conceive [3] 110:8 110:12 110:16
city [1] 113:14	co-sponsors [1] 163:5	Commission [127] 1:1 2:25 3:2 3:13 3:21 3:22 3:24 4:3 4:4 4:10 4:15 4:22 5:4 5:9 5:15 5:20 5:25 6:18 7:10 7:20 8:1 8:5 8:21 8:22 10:5 10:10 10:22 12:13 12:21 14:8 18:15 19:17 20:23 21:11 21:14 25:15 26:6 26:22 26:25 28:9 28:10 35:21 36:2 36:6 38:1 38:12 38:17 39:14 39:16 40:1 40:6 40:7 40:19 40:21 41:10 42:10 42:22 44:18 48:20 49:2 51:18 52:22 52:25 57:6 58:7 60:15 60:18 61:18 64:4 67:25 76:11 80:4 80:20 87:16 94:15 97:12 97:25 102:15 103:15 103:24 104:4 112:24 116:1 116:2 117:10 119:24 120:21 133:3 139:2 143:17	compelled [1] 40:20	concentrates [1] 94:23
civil [2] 123:1 123:25	code [8] 14:21 20:6 20:19 46:15 53:7 63:12 63:18 126:4	Commission [127] 1:1 2:25 3:2 3:13 3:21 3:22 3:24 4:3 4:4 4:10 4:15 4:22 5:4 5:9 5:15 5:20 5:25 6:18 7:10 7:20 8:1 8:5 8:21 8:22 10:5 10:10 10:22 12:13 12:21 14:8 18:15 19:17 20:23 21:11 21:14 25:15 26:6 26:22 26:25 28:9 28:10 35:21 36:2 36:6 38:1 38:12 38:17 39:14 39:16 40:1 40:6 40:7 40:19 40:21 41:10 42:10 42:22 44:18 48:20 49:2 51:18 52:22 52:25 57:6 58:7 60:15 60:18 61:18 64:4 67:25 76:11 80:4 80:20 87:16 94:15 97:12 97:25 102:15 103:15 103:24 104:4 112:24 116:1 116:2 117:10 119:24 120:21 133:3 139:2 143:17	compelling [4] 41:4 188:4 188:6 189:10	concept [8] 50:21 58:1 60:4 80:16 106:4 108:6 108:24 161:15
civilized [1] 78:2	coin [1] 49:2	commenting [1] 65:1	complain [1] 107:4	concern [7] 48:20 61:17 89:15 106:14 125:10 125:24 163:17
clarification [1] 103:6	collar [1] 18:7	comments [27] 11:10 11:24 36:1 47:7 60:23 63:24 80:10 89:9 92:8 92:21 98:24 99:14 103:1 112:22 113:13 113:15 114:12 124:24 132:5 132:12 132:14 133:2 133:25 142:11 142:12 163:9 185:19	complaint [1] 8:25	concerned [8] 19:11 89:21 113:4 115:12 117:8 126:11 163:10
clarifications [1] 39:4	collateral [1] 109:22	commercial [4] 14:21 46:15 46:17 53:7	complaints [1] 9:13	
clarified [1] 176:3	colleague [2] 124:23 137:21	Commission [127] 1:1 2:25 3:2 3:13 3:21 3:22 3:24 4:3 4:4 4:10 4:15 4:22 5:4 5:9 5:15 5:20 5:25 6:18 7:10 7:20 8:1 8:5 8:21 8:22 10:5 10:10 10:22 12:13 12:21 14:8 18:15 19:17 20:23 21:11 21:14 25:15 26:6 26:22 26:25 28:9 28:10 35:21 36:2 36:6 38:1 38:12 38:17 39:14 39:16 40:1 40:6 40:7 40:19 40:21 41:10 42:10 42:22 44:18 48:20 49:2 51:18 52:22 52:25 57:6 58:7 60:15 60:18 61:18 64:4 67:25 76:11 80:4 80:20 87:16 94:15 97:12 97:25 102:15 103:15 103:24 104:4 112:24 116:1 116:2 117:10 119:24 120:21 133:3 139:2 143:17	complete [6] 62:25 121:21 121:23 138:18 139:5 144:5	
clarifies [1] 176:20	colleagues [2] 45:13 46:13	commentary [5] 46:1 146:21 147:23 162:3 184:13	completed [1] 123:19	
clarify [3] 42:15 89:14 176:25	collection [1] 26:12	commenting [1] 65:1	completely [1] 51:21	
clarifying [1] 103:8	college [3] 136:24 137:7 143:4	comments [27] 11:10 11:24 36:1 47:7 60:23 63:24 80:10 89:9 92:8 92:21 98:24 99:14 103:1 112:22 113:13 113:15 114:12 124:24 132:5 132:12 132:14 133:2 133:25 142:11 142:12 163:9 185:19	complex [9] 18:6 19:12 21:18 22:9 24:5 24:24 38:3 50:8 54:4	
clarity [2] 108:2 108:5	colleges [1] 135:23	commercial [4] 14:21 46:15 46:17 53:7	complexity [26] 9:2	
class [1] 94:8	color [1] 156:1	Commission [127] 1:1 2:25 3:2 3:13 3:21 3:22 3:24 4:3 4:4 4:10 4:15 4:22 5:4 5:9 5:15 5:20 5:25 6:18 7:10 7:20 8:1 8:5 8:21 8:22 10:5 10:10 10:22 12:13 12:21 14:8 18:15 19:17 20:23 21:11 21:14 25:15 26:6 26:22 26:25 28:9 28:10 35:21 36:2 36:6 38:1 38:12 38:17 39:14 39:16 40:1 40:6 40:7 40:19 40:21 41:10 42:10 42:22 44:18 48:20 49:2 51:18 52:22 52:25 57:6 58:7 60:15 60:18 61:18 64:4 67:25 76:11 80:4 80:20 87:16 94:15 97:12 97:25 102:15 103:15 103:24 104:4 112:24 116:1 116:2 117:10 119:24 120:21 133:3 139:2 143:17		
cleansing [1] 78:6	Colorado [42] 1:4 2:3 6:4 13:1 13:12 13:17 14:11 15:2 17:1 18:22 27:17 30:12 31:5 31:23 44:8 44:19 44:24 46:23 47:13 47:24 66:18 66:20 66:22 67:4 67:9 71:25 72:1 72:11 77:9 84:16 86:13 92:24 99:24 100:7 103:4 122:25 123:3 125:24 127:8 137:2 139:11 143:6	combination [1] 145:22		
clear [15] 108:21 112:12 112:16 116:3 130:25 139:8 147:11 157:22 160:9 162:9 173:9 176:15 178:19 185:25 186:8	Columbia [1] 48:1	combine [1] 184:13		
clear-cut [1] 31:9		combined [1] 73:6		
clearer [1] 162:14		comedy [1] 58:24		
clearinghouse [2] 8:14 130:5		comfort [1] 98:14		
clearly [2] 108:14 148:14		comfortable [4] 14:22 39:7 64:25 99:13		
client [15] 30:22 30:24 31:24 32:11 32:12 32:16 33:24 57:15 68:15 69:7		coming [5] 20:16 28:2 36:20 104:2 137:2		

Index Page 6

92:6		criteria [3]	120:2	153:1	153:2	153:7	defendants [15]	18:24	113:13	114:18	139:12
courts [26]	3:8	147:12	185:11	153:11	153:18		32:23	40:23	142:17	142:19	142:25
4:8	8:9	critical [2]	105:25	dealers [3]	106:18		75:12	75:15	143:3	143:4	174:23
21:17	24:22	185:7		149:11	164:10		104:11	109:9	175:1	175:4	175:15
40:24	51:15	criticism [4]	89:15	dealing [9]	17:24		127:7	146:5	depart [11]		48:14
74:18	74:18	89:16	107:10	18:5	18:6	23:23	171:23	184:8	48:22	110:23	115:14
108:12	109:18	criticize [1]	51:15	33:8	33:10	42:13	defended [1]	155:7	115:19	157:4	158:23
114:7	123:12	criticizing [1]	82:19	74:19	161:4		defender [15]	13:17	177:4	184:19	185:6
162:10	178:25	crooks [1]	79:4	deals [5]	77:20	85:25	13:19	26:23	190:12		
185:25	190:6	cross [2]	30:5	89:24	126:21	135:19	66:17	67:9	departed [2]		136:4
190:12		crushing [1]	152:7	dealt [7]	18:8	18:8	68:12	93:16	136:5		
cousin [3]	172:8	culpability [3]	145:10	30:16	30:17	87:3	142:21	142:25	departing [2]		37:13
172:8	172:13	146:17	147:25	166:3	190:8		175:6	175:15	135:9		
crack [20]	61:6	culpable [3]	134:15	death [5]	22:24	23:9	defenders [6]	33:21	department [26]		7:19
80:20	86:4	134:24	135:4	22:24	23:9	80:7	67:14	91:22	13:23	13:24	35:22
127:1	127:5	cumbersome [1]	74:24	80:9			175:8	175:16	36:5	36:12	41:17
135:19	136:20	cumulative [1]	23:9	decide [2]	137:25		defense [41]	9:20	53:3	70:16	113:7
144:2	144:3	curious [3]	64:6	150:6			11:20	15:8	113:17	120:22	126:1
144:8	144:8	64:12	138:13	decided [7]	30:21		16:21	17:8	126:14	130:4	142:8
150:18	166:22	current [14]	20:19	39:17	41:6	44:19	42:7	52:6	143:10	163:14	164:18
173:18		23:22	24:14	57:11	135:16	138:18	73:12	74:8	164:24	166:6	173:20
create [6]	25:24	102:25	103:4	decides [1]	149:12		80:13	82:1	173:22	173:25	174:10
53:17	103:10	148:1	156:23	deciding [2]	120:24		82:10	82:14	174:12		
184:14	184:17	159:7	177:16	133:13			90:21	99:4	Department's [2]		
created [1]	40:24	184:25		decision [24]	15:14		113:3	113:18	114:3	190:1	
creates [2]	24:20	cut [3]	140:25	22:8	25:3	26:1	114:16	143:8	departure [48]		49:4
158:9		186:9	141:1	50:16	54:16	55:11	152:5	152:6	49:4	49:6	56:18
creating [1]	116:25	cute [1]	130:11	87:20	87:22	89:18	154:20	154:21	59:22	60:3	60:6
creative [3]	56:22	cycle [3]	40:3	89:23	90:12	119:5	155:19	156:10	60:9	79:3	83:9
60:9	145:13	41:13	52:24	135:25	157:14	172:19	167:15	177:8	90:17	115:16	117:6
credible [1]	171:4	cynical [1]	32:10	184:19	185:5	185:8	183:3		117:13	117:17	145:12
credit [4]	4:15			185:20	186:5	187:16	define [1]	49:3	154:6	176:9	176:11
73:15	79:18			189:20	190:1		defined [4]	23:5	176:14	176:23	177:7
cries [1]	150:12			decisions [19]	10:7		96:14	97:8	177:11	177:14	177:15
crime [15]	18:7			10:8	10:11	11:25	defines [1]	149:25	177:22	177:24	178:8
22:13	28:17			16:23	21:8	40:22	definition [4]	97:2	178:11	178:23	179:8
54:23	72:6			55:18	55:20	71:3	160:21	162:14	179:11	180:7	180:25
96:22	98:7			81:17	118:24	119:2	definitionally [1]		181:23	182:2	185:1
133:16	145:25			119:6	137:24	159:12	96:2		185:4	185:11	185:14
151:8	171:13			186:7	186:22	187:24	definitions [3]	26:13	186:14	186:22	187:9
crimes [6]	20:8			decline [1]	129:1		121:4	162:8	187:12	187:16	187:24
83:15	97:2			decrease [1]	148:2		defrauded [1]	131:19	188:12	189:11	
121:12	155:8			decreases [1]	132:11		degree [9]	34:12	departures [16]		32:20
criminal [56]	5:6			decreasing [1]	183:13		36:25	37:2	48:22	48:23	59:21
7:17	7:18			deeply [1]	64:4		77:19	119:21	134:21	159:17	174:19
9:22	13:22			defend [2]	74:4		141:7	189:10	180:15	180:16	182:5
19:22	20:6			104:12			dehumanize [2]	54:21	183:17	186:6	190:3
20:8	20:18			defendant [43]	15:7		54:23		190:5	190:15	190:20
31:8	36:7			15:16	36:20	37:7	defhumanized [2]		dependent [1]		24:25
36:19	36:22			68:12	69:10	73:2	54:20	56:1	depending [2]		26:11
39:18	44:7			75:21	76:23	77:3	deliver [1]	137:1	31:16		
66:19	67:4			77:17	77:25	78:1	demand [1]	146:10	deportation [1]		31:22
68:20	69:8			78:20	90:9	100:3	demonstrate [3]		depositories [1]		
76:6	76:15			101:7	101:19	104:7	59:25	87:20	131:16		
78:19	79:15			109:1	109:6	109:12	89:10		Deputy [6]		6:20
97:8	97:14			109:20	111:13	115:2	demonstrated [1]		13:22	27:16	67:12
99:3	105:3			120:15	125:5	129:20	91:9		93:17	142:7	
121:18	123:17			129:25	130:6	130:18	denied [1]	180:8	derived [1]		188:13
125:10	125:11			132:3	146:24	147:25	denominator [2]		derringer [1]		149:20
125:25	126:12			158:3	159:7	170:25	152:24	164:2	description [1]		73:6
127:18	127:22			172:20	176:16	179:5	Denver [31]	1:4	deserve [1]		36:16
143:5	143:8			181:19	185:10	185:13	2:3	2:15	deserved [1]		141:22
156:10				defendant's [12]			13:6	13:11	design [2]		95:4
criminals [3]	72:7			15:8	15:17	73:5	67:12	67:13	169:13		
78:23	79:1			73:7	73:19	99:16	80:25	85:13	designated [1]		7:13
crippled [1]	153:22			128:23	157:8	168:5	88:9	88:10	designation [1]		7:11
crisper [1]	162:13			170:18	170:25	185:13	93:16	93:18			

designed [1]	143:20	45:14	97:8	106:8	117:11	144:4	147:23	148:9	151:23	Draconionally [1]	
desirability [1]	186:21	difficult [18]	18:8	176:2	176:21	177:2	154:12	156:14	156:15	82:13	
desirable [1]	188:24	21:24	42:4	discussions [2]	11:13		159:16	159:18	159:20	draft [1]	156:11
desires [1]	122:3	50:9	59:2	41:16			172:18	180:10	185:25	drafted [2]	100:7
despite [3]	32:12	69:18	101:17	dishonest [1]	59:7		186:7	189:20	190:12	176:18	
35:3	59:1	138:13	143:23	dismissed [1]	59:24		districts [19]	18:13		drafts [2]	76:20
detail [2]	22:22	161:15	171:19	disparate [1]	120:11		56:14	57:15	61:13	117:11	
94:25		186:6	189:5	disparities [5]	55:22		65:10	72:23	81:15	dramatically [1]	
detailed [2]	21:1	difficulties [1]	102:23	81:14	121:15	127:5	84:22	84:23	113:5	161:18	
100:8		difficulty [2]	18:4	190:18			114:4	114:22	114:24	draw [5]	36:21 36:24
details [2]	2:19	18:6		disparity [18]	4:7		114:25	115:7	115:9	115:2	115:3 188:11
151:21		digestable [1]	87:8	18:12	18:13	24:21	155:8	159:13	182:14	drawn [1]	137:22
detained [2]	68:21	digests [1]	21:8	28:15	29:17	80:21	diversion [2]	85:15		draws [2]	187:12
69:2		dilemma [1]	120:7	85:20	87:17	113:6	85:15			188:14	
detectives [1]	88:13	dime [2]	31:14	114:22	115:6	136:21	division [5]	7:17		drive [4]	25:2 134:18
detention [2]	23:18	direct [3]	67:25	150:13	158:10	159:24	7:19	13:23	36:11	139:13	163:16
158:18		189:9	189:15	180:17	182:18		67:14			driven [2]	145:1
determination [3]		directed [1]	146:1	displayed [1]	23:4		divorced [1]	166:16		162:2	
51:8	148:5	direction [1]	2:24	displaying [1]	22:24		docket [3]	45:24		driver [1]	58:22
determinations [5]		director [1]	7:2	dispute [4]	17:3		70:23	77:19		driver's [1]	131:14
10:14	10:16	disabled [2]	134:17	17:18	74:6	151:25	document [2]	20:23		drives [1]	76:6
147:22	148:4	134:22		disputed [1]	102:10		75:10			driving [2]	103:18
determine [19]	9:4	disadvantaged [1]	16:15	disputes [3]	57:12		documents [2]	63:25		147:16	
9:11	42:24	disagree [1]	137:21	75:1	76:1		117:10			doesn't [18]	18:9
43:17	90:7	disallow [1]	157:23	disrupting [1]	38:19		24:14	28:18	34:13	24:14	28:18 34:13
96:16	96:21	disappear [1]	59:5	disruption [1]	43:1		37:7	50:9	57:22	37:7	50:9 57:22
99:20	100:16	discharged [1]	23:2	disseminated [1]	91:15		78:22	79:11	88:24	78:22	79:11 88:24
116:8	125:17	discipline [2]	130:9	91:15			98:13	106:13	110:13	98:13	106:13 110:13
185:12	185:13	130:10		distasteful [1]	24:1		114:18	118:1	118:23	114:18	118:1 118:23
determined [3]	97:18	discourage [1]	147:2	distinction [1]	97:20		151:8	172:21		151:8	172:21
126:17	184:2	discouraged [4]	176:9	distinguish [1]	150:14		dog [3]	110:11	110:14	124:11	
determines [4]	83:5	176:13	177:14	distinguished [2]	2:5 2:10		124:11			dollars [1]	131:19
99:18	107:9	discovery [6]	69:11	distinguishing [3]	150:11	150:24	done [28]	2:22		done [28]	2:22
determining [7]	73:19	76:25	100:15	150:11	150:24	153:6	4:16	16:7	16:7	4:16	16:7 16:7
90:20	102:24	101:5	169:19	distributed [1]	97:12		16:9	30:25	40:10	16:9	30:25 40:10
146:24	158:8	discretion [56]	11:15	distributes [1]	172:11		48:17	49:24	53:10	48:17	49:24 53:10
detract [1]	111:14	11:16	11:17	distributing [1]	166:22		60:9	83:4	86:23	60:9	83:4 86:23
detrimental [1]	106:6	14:14	15:1	distribution [1]	32:4		87:19	88:1	96:19	87:19	88:1 96:19
develop [5]	3:16	16:1	16:20	distributor [2]	151:4		97:10	127:19	137:17	97:10	127:19 137:17
4:10	5:5	16:25	26:2	172:11			139:5	139:16	154:22	139:5	139:16 154:22
69:4		38:4	48:25	distributors [2]	165:6		154:22	156:8	157:14	154:22	156:8 157:14
developed [3]	21:11	52:12	54:9	172:16			166:24	186:13	188:23	166:24	186:13 188:23
83:1	102:19	71:17	89:4	district [79]	4:8		dope [2]	81:20	81:20	81:20	
developing [1]	93:13	116:21	118:12	5:25	6:1	6:2	doubt [7]	34:19		83:14	88:16 109:3
device [1]	121:10	128:1	128:19	6:8	6:15	6:15	83:14	88:16	109:3	116:6	116:9 157:23
devote [2]	40:8	133:14	134:2	10:7	13:1	31:5	116:6	116:9	157:23	down [17]	9:25
65:21		137:9	137:9	33:5	35:2	56:12	22:22	27:25	40:3	22:22	27:25 40:3
Diego [1]	31:18	137:23	137:25	56:19	56:24	56:24	58:24	59:3	69:17	58:24	59:3 69:17
difference [5]	76:13	138:18	138:24	57:10	57:11	57:16	83:20	104:21	125:23	83:20	104:21 125:23
80:23	88:11	139:7	147:21	57:19	57:23	58:8	137:2	149:12	150:1	137:2	149:12 150:1
151:15		154:8	156:22	58:14	61:4	61:8	153:15	165:23	167:16	153:15	165:23 167:16
different [36]	2:4	159:4	167:3	61:12	65:8	65:8	185:24			185:24	
10:9	20:4	167:11	182:5	68:3	68:4	68:9	downward [22]	110:23		159:17	177:4 177:7
22:14	23:6	185:3	185:6	69:11	70:12	70:16	177:11	177:13	177:21	177:11	177:13 177:21
29:16	29:17	190:11		71:25	72:2	72:5	177:23	178:22	180:7	177:23	178:22 180:7
47:24	56:22	discretionary [4]	71:14	72:11	72:12	72:17	180:14	180:15	180:25	180:14	180:15 180:25
84:21	84:22	71:16	185:25	74:18	80:22	81:9	181:22	182:2	182:5	181:22	182:2 182:5
84:23	85:5	189:20		83:3	84:25	85:2	183:17	184:19	185:1	183:17	184:19 185:1
95:15	96:6	discuss [2]	35:23	88:6	93:17	94:8	185:4	185:6	185:11	185:4	185:6 185:11
98:17	113:1	75:15		99:23	100:7	103:3	dozen [2]	68:13		68:13	
115:9	135:23	discussed [1]	68:8	115:19	122:24	122:24	68:13			68:13	
140:5	171:14	discussing [1]	180:10	122:25	123:2	123:11	Draconian [2]	81:6		91:4	
177:5	180:6	discussion [10]	26:7	123:13	127:23	127:24					
184:21	186:25	27:20	77:1	133:16	143:6	146:3					
differently [3]	24:18										

E [1] 156:12	employee [1] 79:14	especially [2] 25:10	excellent [3] 70:14	128:18
early [8] 15:4 17:4	en [1] 30:1	60:20	80:5 108:23	explained [1] 90:6
43:4 69:6 69:12	enacted [4] 76:17	essence [1] 167:5	except [4] 79:12	explains [1] 179:11
69:13 75:1 135:5	76:24 156:21 160:22	essentially [6] 73:20	83:15 168:16 168:17	exponential [1] 178:13
easier [4] 9:5	enacting [1] 161:25	101:22 142:10 168:24	exception [2] 126:20	express [3] 15:4
37:21 99:10 173:4	enactment [1] 77:11	169:17 183:20	144:2	15:11 36:8
easily [4] 35:15	encompass [1] 172:21	establish [2] 143:22	exceptional [4] 16:12	expressed [4] 61:17
105:19 121:6 177:12	encounter [1] 121:14	158:12	113:14 138:24 181:20	88:20 106:14 141:8
East [1] 135:14	encountered [1] 28:24	established [4] 53:1	exceptions [1] 16:13	expresses [1] 188:5
Eastern [4] 72:2	encouraged [3] 49:3	110:24 117:23 119:23	excerpt [1] 97:12	expression [3] 15:17
72:5 159:16 159:20	178:3 186:23	estimate [3] 17:9	excessive [1] 74:16	24:25 52:11
easy [1] 152:5	end [18] 4:6 22:9	64:15 64:24	excluding [1] 178:8	extend [1] 12:20
echoed [1] 141:4	25:13 43:15 44:7	estoppel [2] 32:1	exclusive [1] 178:20	extensive [1] 67:7
Ed [1] 2:16	44:12 69:13 77:9	109:23	excuse [2] 105:18	extent [7] 22:17
edit [1] 191:8	85:5 141:23 149:4	et [1] 8:13	131:17	128:18 137:22 160:9
editions [1] 20:22	149:5 166:1 166:12	evaluate [3] 73:9	executed [1] 145:4	162:17 173:11 186:19
educates [2] 78:1	166:13 175:23 179:15	90:22 190:11	exemplary [1] 187:18	extra [1] 96:18
78:2	181:23	evaluating [2] 73:18	exercise [3] 15:1	extraordinary [2] 157:5 184:23
education [1] 177:10	ended [2] 127:17	124:14	52:12 66:13	extreme [2] 140:18
Edward [1] 7:11	130:24	evaluation [1] 8:10	exercising [1] 83:11	158:25
effect [18] 4:19	endless [1] 177:4	event [6] 27:24	exist [3] 28:18 28:18	extremely [3] 16:1
55:24 68:1 68:24	endorse [2] 19:3	32:7 43:6 126:22	114:25	16:10 170:17
70:13 73:11 77:2	79:19	127:17 151:10	existed [2] 55:3	eye [1] 23:16
86:23 90:3 100:25	endorsed [1] 156:13	eventually [1] 8:18	124:2	eyes [1] 136:25
106:6 121:20 150:22	enforcement [4] 87:22 126:16 165:2	everybody [12] 41:7	existence [3] 4:1	eyeshade [1] 35:14
161:3 186:5 187:7	174:7	46:8 79:18 86:9	8:24 9:12	
effort [9] 4:6	enforcing [1] 115:1	114:23 151:11 152:23	existent [1] 118:19	
8:23 25:11 38:9	engage [1] 126:4	153:22 161:11 172:21	existing [2] 97:24	
38:15 109:18 119:22	engaged [2] 106:22	173:1 174:16	150:18	
165:3 165:5	131:13	everywhere [1] 151:5	exists [2] 105:11	
efforts [5] 35:24	engendered [1] 39:24	evidence [10] 81:3	110:19	
51:2 79:25 148:13	engenders [1] 42:17	102:2 106:20 109:6	expand [1] 151:10	
160:22	engine [1] 103:18	111:2 111:11 112:14	expanded [3] 48:24	
eight [13] 20:21	enhance [1] 116:10	116:4 116:5 116:6	49:5 115:15	
29:13 33:4 46:4	enjoy [1] 46:23	evident [1] 24:21	expanding [1] 184:16	
66:3 89:3 102:18	enjoyed [1] 14:20	evidentiary [1] 144:22	expansive [2] 48:24	
107:14 127:10 127:13	enormous [3] 80:22	evolution [2] 99:6	173:1	
127:16 127:17 155:11	81:13 85:24	99:8	expect [1] 173:25	
either [18] 3:4	entered [2] 40:14	evolutionary [1] 45:19	expectation [4] 31:24	
4:21 5:4 17:17	76:3	evolutions [1] 99:5	41:8 107:12 107:13	
24:15 49:3 60:23	entering [2] 96:7	evolved [1] 46:5	expectations [2] 40:13 43:2	
92:8 95:15 95:19	123:12	ex [2] 5:13 30:21	expected [2] 22:3	
99:15 109:15 109:16	enterprise [1] 78:20	ex-husband [1] 30:20	78:14	
120:25 129:13 138:10	enthusiasm [1] 160:17	exact [2] 25:22	expend [1] 74:15	
138:22 159:23	8:22	84:21	expensive [1] 74:24	
El [1] 47:25	12:21 159:25 168:4	exactly [2] 109:19	experience [25] 14:13	
elaborate [1] 167:7	172:17	149:22	14:25 15:23 18:21	
election [1] 164:16	entry [1] 99:16	examine [1] 42:14	20:2 22:1 24:10	
elemental [1] 146:9	envision [1] 53:19	22:11 26:6 29:24	24:12 29:13 33:5	
elements [6] 95:20	envy [1] 160:6	30:9 40:2 52:11	57:9 62:19 72:18	
96:6 96:12 96:14	equalize [1] 152:22	61:19 68:11 81:7	90:25 98:10 99:5	
109:10 169:22	equally [1] 105:14	85:21 101:5 113:2	102:22 113:16 120:17	
eligible [2] 95:20	equate [1] 149:14	115:24 119:7 121:8	148:10 150:5 162:6	
97:24	equating [2] 149:15	125:19 134:9 135:12	171:15 171:17 182:13	
eliminate [3] 25:23	149:19	151:20 159:15 167:14	experienced [3] 99:9	
83:8 190:17	equation [1] 143:1	168:9 170:6 179:4	128:20 176:5	
eliminated [1] 90:4	era [1] 23:15	179:24 189:3	expert [2] 32:14	
eliminating [1] 184:12	erased [1] 133:22	examples [11] 31:12	94:18	
elsewhere [1] 113:1	erroneous [1] 8:4	51:3 59:17 60:19	expertise [1] 75:3	
emphasis [2] 143:21		60:22 114:12 135:13	experts [1] 73:14	
143:24		145:17 167:8 176:22	expired [1] 12:9	
emphasizing [1] 36:17		178:12	explain [2] 90:24	

-F-

F.3rd [1] 130:17
face [4] 36:20 120:7
137:11 183:18
faced [4] 95:5
109:14 135:25 140:23
faces [1] 70:21
facet [1] 54:24
facilities [1] 158:19
facility [3] 140:7
140:13 140:13
facing [3] 69:2
134:23 137:5
fact [38] 3:15 17:18
19:4 24:24 25:22
28:16 31:3 31:13
32:1 32:4 32:23
34:1 34:2 34:6
41:21 52:25 54:24
59:1 61:5 64:7
65:1 90:11 96:18
96:18 98:14 109:2
112:2 121:6 121:7
124:6 130:14 136:23
139:22 142:15 146:25
163:11 176:13 179:6
faction [1] 54:19
factor [9] 36:23
37:14 47:2 109:11
161:17 166:19 177:6
177:9 177:21
factors [23] 15:15
15:19 22:7 23:17
26:8 29:7 35:13
95:20 101:8 127:23
144:15 145:11 146:23
147:15 177:17 177:22

178:2 178:3 178:3	fear [2] 61:25 75:17	field [5] 9:14 11:11	153:18	58:8 65:8 65:12
179:3 184:8 187:13	features [1] 95:7	28:25 80:19 190:20	five-year [2] 137:5	79:14 135:1 164:23
189:10	Fed [1] 175:6	Fifth [1] 170:24	182:15	fraud [2] 96:16
facts [29] 17:20	Federal [87] 1:3	fight [1] 58:3	fix [2] 117:22 156:7	162:19
25:2 32:21 48:3	2:9 2:10 3:8	fighting [2] 151:12	flat [1] 158:22	fraught [1] 47:8
48:6 73:24 74:1	3:14 3:23 4:12	151:16	fleshed [1] 38:1	Fred [1] 71:23
74:2 90:9 96:13	4:21 5:17 6:8	figure [6] 59:4	flex [1] 18:2	Frederick [1] 66:21
96:20 100:1 100:9	6:14 11:1 13:17	125:6 130:13 130:15	flexibility [6] 9:2	free [2] 47:10 158:23
100:10 100:19 101:3	14:12 14:17 18:12	131:2 146:9	17:23 125:16 127:24	frequency [1] 62:13
105:13 105:14 105:17	19:19 19:24 20:4	file [5] 65:4 79:9	187:22 190:15	frequently [10] 18:10
105:17 105:19 109:19	20:5 20:6 20:8	90:13 126:15 134:5	Florida [1] 159:18	18:23 20:24 22:2
110:21 110:24 116:18	20:8 20:16 20:18	filed [3] 127:11 128:21	focus [13] 39:16	42:17 74:25 132:8
118:24 119:15 130:13	21:6 25:16 26:23	135:7	65:17 127:21 143:22	145:21 159:11 172:1
182:25	27:22 30:2 32:2	files [2] 17:5 72:24	147:5 148:14 160:11	fresh [1] 23:16
factual [3] 40:16	35:4 50:25 54:11	filter [1] 185:24	163:23 163:23 165:5	Friday [1] 70:22
82:11 99:25	68:20 69:8 73:13	final [6] 10:5 10:7	165:25 166:4 173:13	friends [1] 49:13
failed [4] 84:20	73:15 76:16 76:18	10:14 131:9 132:14	folks [2] 64:5 164:8	front [7] 6:7 12:8
85:7 85:10 85:11	80:23 81:2 81:18	173:15	follow [3] 125:3	57:13 125:20 127:15
fair [15] 3:17 29:8	85:18 86:8 86:10	finality [1] 80:4	133:18 137:14	138:8 138:9
53:2 58:25 60:7	87:18 87:23 88:13	finally [7] 24:23	followed [2] 56:16	fruitful [2] 2:23
62:18 63:2 63:9	88:16 91:21 94:18	35:8 40:1 43:3	90:19	43:7
115:18 125:4 125:15	94:24 95:1 95:7	53:4 93:20 107:10	force [2] 4:19 88:5	fruition [1] 76:21
135:2 135:7 135:9	96:4 96:5 96:7	finances [1] 75:16	forces [2] 73:20	frustrating [3] 25:10
190:18	96:11 96:23 97:4	financial [3] 22:19	146:9	101:17 136:18
fair-minded [1] 84:25	98:10 98:17 99:4	131:21 164:9	form [2] 145:11 180:22	fulfilling [1] 184:1
fairly [8] 14:23	120:18 126:6 133:10	finding [9] 96:19	format [1] 106:7	full [5] 4:19 27:14
22:12 35:16 56:13	142:21 142:24 155:8	99:15 102:8 102:10	former [7] 57:25	67:23 119:14 136:17
59:1 77:6 108:21	155:21 155:23 156:13	130:23 130:24 131:3	67:3 157:25 158:2	fully [1] 38:15
114:15	156:22 156:23 156:25	141:15 157:11	159:6 170:14 170:23	function [2] 50:5
fairness [10] 25:21	157:13 159:2 170:2	findings [6] 52:11	formerly [3] 6:20	54:21
26:14 37:17 41:22	175:7 175:16 175:20	118:22 125:14 126:22	6:21 6:25	functionally [2]
80:16 84:10 84:13	175:23 180:12 182:13	131:6 132:5	formula [1] 56:13	149:4 149:25
84:13 105:6 106:3	182:17 182:22	fine [3] 16:6 89:25	formulas [2] 22:9	functioned [1] 54:8
faith [1] 81:11	Federally [1] 85:18	92:11	24:17	fundamental [11]
fall [2] 105:17 140:6	feedback [1] 33:20	firearm [11] 22:16	formulated [1] 180:22	41:22 49:19 54:14
fallen [1] 139:19	feeling [2] 8:3	22:18 22:23 23:1	forth [9] 17:6 17:10	82:2 90:11 105:4
falling [1] 135:15	47:15	23:4 25:4 30:23	23:5 29:16 85:9	105:6 108:6 112:1
fallout [1] 47:15	feels [2] 12:16 148:20	31:3 31:10 121:9	100:1 100:19 120:21	112:6 115:21
false [2] 130:19 130:20	fell [3] 110:21 111:20	151:2	147:11	fundamentally [1]
fame [1] 2:13	111:23	firearms [2] 23:10	forthcoming [1]	131:21
familiar [9] 3:20	fellow [4] 79:7	30:3	173:24	future [8] 11:3
3:23 16:14 36:1	86:16 129:23 142:13	firing [1] 128:12	fortunately [2] 14:20	39:19 47:6 60:22
37:25 74:5 108:1	felon [3] 30:17 30:18	first [48] 4:9 12:2	69:11	137:16 139:24 160:23
142:9 180:1	31:10	12:19 14:3 31:19	fortunes [1] 47:20	161:4
familiarize [1] 20:5	felons [2] 30:7	38:20 39:15 42:2	forward [3] 41:16	
family [2] 15:8	31:13	42:5 44:6 45:10	80:25 164:6	-G-
79:14	felony [4] 30:5	52:10 55:2 67:17	found [15] 15:24	gadget [1] 12:8
famous [1] 85:21	31:22 32:4 32:5	78:16 78:22 78:25	16:3 20:3 46:16	gain [1] 11:20
far [11] 51:14 62:24	felt [3] 110:23 125:11	80:19 85:14 86:4	50:25 102:20 109:2	gamble [1] 169:17
70:11 76:14 82:21	127:18	86:16 86:18 88:18	109:19 111:10 130:2	gang [2] 144:12 144:13
84:12 89:21 106:21	female [2] 140:10	89:7 89:17 94:13	130:4 130:12 132:5	gangs [1] 144:9
136:9 145:19 164:14	141:5	96:11 98:6 111:6	134:12 171:4	gathered [1] 46:3
farreaching [1] 39:5	fertile [1] 18:14	117:18 122:23 134:10	foundation [3] 55:1	Gelacak [11] 6:23
fashion [9] 12:16	fetters [1] 50:15	134:13 134:19 150:17	97:2 189:19	52:17 52:18 87:15
15:11 33:2 34:14	few [13] 16:18 24:1	167:2 168:2 169:1	fount [1] 189:18	87:24 162:24 162:25
35:5 35:6 35:7	24:13 29:10 29:10	170:8 170:20 179:14	four [4] 5:17 58:5	163:8 165:8 165:21
46:24 55:16	34:24 39:17 45:4	179:23 180:13 181:1	91:14 153:1	166:18
fashioned [2] 16:24	59:12 133:8 146:22	181:7 182:9 187:1	framework [2] 10:19	general [22] 5:14
55:5	173:8 188:9	187:24	10:22	6:21 7:13 7:16
fashioning [2] 15:21	fewer [8] 34:9	first-time [1] 17:24	Frances [1] 36:3	8:14 9:6 13:22
34:17	77:11 77:20 78:4	fit [1] 24:16	Francisco [2] 124:9	17:1 25:25 26:7
father [1] 30:11	78:5 78:17 95:19	fits [2] 46:23 168:9	140:6	33:21 35:23 41:17
faulty [1] 130:22	fiancee [1] 137:7	five [12] 31:16 46:4	frankly [7] 34:13	63:8 89:16 109:24
favor [2] 87:4	fictional [2] 28:12	67:19 67:23 92:22		
139:13	29:4	138:16 139:2 142:12		
		146:15 147:14 151:12		

142:8 144:17 182:16 183:8 183:10 187:20 generalization [1] 184:15 generally [4] 4:1 9:1 34:25 74:24 generated [1] 185:23 generates [1] 66:7 gentleman [3] 125:20 131:24 138:15 gentlemen [1] 122:16 geographically [1] 47:14 Germany [1] 130:7 get-away [1] 58:22 girlfriend [1] 150:9 girlfriends [2] 152:7 153:22 given [30] 4:9 9:23 20:18 50:18 50:19 61:5 62:6 62:20 71:16 71:17 79:17 85:25 86:20 90:23 91:2 104:6 110:20 115:18 116:19 117:13 119:14 134:20 139:20 150:6 156:5 159:4 188:8 190:12 191:5 191:7 giving [6] 124:11 127:24 132:25 138:3 141:16 170:6 glad [4] 43:14 113:11 181:3 181:5 glass [1] 68:17 gleaned [1] 100:19 goal [7] 29:3 33:17 37:6 37:17 120:4 128:9 182:24 goals [8] 41:22 84:12 86:24 105:25 132:15 133:19 182:1 190:16 goes [3] 2:13 8:11 52:15 Goldsmith [37] 7:4 59:12 59:16 60:3 60:18 61:7 61:16 62:4 62:15 62:18 63:3 63:5 63:10 63:14 63:19 89:7 90:10 91:7 91:23 92:3 112:9 112:18 112:21 114:8 118:10 118:15 118:23 119:16 121:17 122:14 166:25 167:1 167:22 168:8 173:14 173:15 174:9 gone [4] 30:11 30:20 84:12 139:2 good [30] 2:1 22:8 27:23 34:11 69:4 69:19 70:5 70:17 70:17 77:18 77:21 81:11 82:10 82:18 82:19 83:4 83:10 85:10 95:10	98:21 102:19 103:19 111:10 121:2 134:20 143:16 162:11 176:11 184:11 184:16 Government [27] 16:21 17:5 29:21 32:2 56:8 74:8 78:18 78:20 78:22 78:24 79:8 79:9 79:12 85:23 89:18 89:21 89:23 90:12 90:19 98:5 101:11 101:12 101:24 149:12 169:20 170:15 170:16 Government's [2] 17:6 77:2 grading [2] 96:15 97:21 graduate [2] 13:5 143:4 graduation [1] 13:8 Grady [12] 175:3 175:9 175:11 175:12 181:4 181:7 181:10 181:16 182:7 186:20 188:17 191:8 grams [4] 86:4 86:15 151:13 151:13 grand [1] 100:14 graph [1] 46:25 graphs [1] 47:1 grapple [1] 70:18 grateful [4] 38:12 60:21 60:24 64:4 gratitude [1] 12:20 great [13] 2:20 4:15 37:15 39:5 48:19 62:4 70:10 82:10 91:18 94:8 114:20 151:19 182:6 greater [8] 22:22 34:11 108:2 113:8 113:9 115:16 132:10 135:4 greatest [1] 160:12 greatly [4] 18:24 51:3 171:20 184:7 green [1] 35:14 grid [1] 69:10 grief [1] 53:2 ground [7] 18:15 55:8 117:16 176:23 178:22 179:8 179:10 grounds [7] 83:9 176:9 176:11 176:13 177:15 178:11 180:6 group [4] 123:2 146:1 146:18 147:25 grow [1] 34:3 growth [1] 34:2 guess [9] 2:2 27:16 28:11 28:23 48:8 60:10 63:1 66:18 174:11 guest [1] 75:5	guidance [7] 2:24 16:11 51:19 55:12 55:12 131:1 162:10 guide [3] 21:2 21:5 151:10 guided [1] 146:8 guideline [101] 8:17 8:19 21:2 21:3 21:12 22:12 22:13 23:23 24:11 25:3 26:13 27:14 28:20 35:7 37:3 37:12 37:21 38:7 39:2 40:3 40:7 40:19 41:11 42:3 50:20 53:25 54:7 56:25 57:12 59:17 60:1 61:6 64:22 72:9 73:14 73:16 74:3 74:5 74:7 74:11 75:2 76:1 90:18 94:21 96:25 97:5 98:14 99:6 99:19 99:20 99:22 100:5 100:8 100:24 101:8 102:6 102:9 103:4 103:9 103:21 103:23 104:1 104:2 105:24 107:20 107:22 107:24 108:4 109:13 117:5 122:4 136:3 143:25 144:6 144:7 144:21 144:24 146:13 146:20 146:21 146:22 147:2 147:3 147:5 147:19 148:17 158:8 161:1 162:9 162:16 167:22 167:25 168:24 172:23 182:14 183:15 186:7 188:7 188:13 188:22 189:2 guidelines [286] 4:11 4:18 4:24 4:25 5:5 5:8 8:2 8:24 8:24 9:3 9:5 9:10 9:11 9:16 11:5 11:11 11:14 11:16 11:21 11:23 14:16 14:18 14:23 15:20 15:25 16:5 16:15 16:23 17:8 17:10 17:19 17:19 17:21 18:11 18:17 19:19 19:20 20:20 20:22 20:25 21:19 22:3 25:11 25:17 26:4 27:9 27:18 28:12 29:17 29:18 30:1 30:16 31:6 32:9 32:10 32:12 32:13 32:24 33:4 33:9 34:3 34:5 34:6 34:6 34:10 34:16 34:23 35:3 35:10 35:11 35:16 35:23 36:18 36:23 36:24 37:10 37:13 37:14 37:16 38:2 38:6 38:9 38:11 38:13 38:18 38:25 39:1 39:11	39:25 40:12 41:3 42:5 42:6 42:9 42:23 46:19 49:13 49:25 50:13 50:15 50:18 51:11 51:12 51:19 53:8 53:14 54:10 54:12 54:18 55:3 55:4 55:9 55:10 55:11 55:16 55:23 55:23 56:16 57:8 57:10 58:15 58:17 60:14 60:20 61:2 62:14 64:2 64:7 65:11 68:1 68:7 68:18 69:8 69:18 69:21 69:24 70:11 71:7 71:15 72:3 72:20 73:11 73:17 73:25 76:4 76:15 76:17 76:23 77:2 77:11 77:12 77:13 78:8 78:11 79:21 79:24 80:11 81:5 81:24 82:12 83:2 83:21 84:9 84:12 85:3 85:5 86:22 89:11 90:5 91:10 91:11 94:19 95:8 95:16 96:7 97:4 99:10 99:12 102:17 103:3 103:16 103:18 103:20 103:22 106:1 107:15 109:11 111:25 112:25 114:2 114:24 115:1 116:20 118:11 119:19 119:22 120:20 120:22 122:6 122:9 124:2 124:12 124:15 124:18 125:1 125:4 125:8 128:4 128:16 129:11 130:25 132:12 132:20 133:9 133:10 133:11 133:14 133:20 133:23 134:1 136:8 137:14 137:16 138:23 139:10 140:14 140:25 142:19 143:19 143:20 144:1 145:2 145:7 145:8 145:8 145:11 145:16 145:19 145:20 145:21 145:22 145:24 147:7 147:8 147:9 147:10 148:9 148:11 148:16 148:22 149:2 149:22 150:3 151:6 154:23 155:5 155:10 155:13 158:15 159:3 159:12 160:8 160:10 161:5 161:9 161:19 161:22 161:25 162:5 167:4 168:21 171:12 171:17 175:20 176:18 182:6 182:20 182:21 183:1 183:10 185:23 187:23 188:13 189:4 189:21 190:8 guilt [1] 99:15 guilty [5] 57:13 76:3 99:16 107:14 115:23 gun [14] 25:6 30:3	30:13 30:14 30:14 30:15 30:15 30:17 30:19 30:22 31:2 59:18 125:23 134:11 guns [3] 30:8 158:16 158:24 guy [7] 78:16 126:17 149:25 150:7 153:10 153:18 172:13 guys [6] 81:21 149:22 152:7 153:9 153:9 153:19 -H- h [4] 176:3 176:14 177:16 189:4 Hadder [1] 156:14 haggard [1] 70:23 half [3] 68:13 153:23 175:18 hammer [3] 85:3 165:23 166:2 hand [6] 78:8 101:17 101:19 149:16 160:8 160:13 handbook [1] 20:25 handed [2] 31:14 83:20 handicap [1] 176:16 handle [3] 15:13 24:17 34:4 handled [1] 30:9 hands [1] 82:18 happening [2] 118:2 154:3 happy [8] 2:2 2:14 123:8 123:14 143:8 163:1 163:3 175:1 hard [7] 2:17 2:21 51:11 79:13 129:12 154:22 172:14 Harkenrider [8] 7:14 7:16 7:20 36:3 65:25 66:1 171:3 173:7 harm [3] 15:15 166:21 166:24 harsh [6] 32:25 34:14 56:25 81:21 81:23 140:15 harsher [1] 115:4 harshly [2] 121:1 121:1 harshness [1] 88:25 head [3] 61:25 64:18 171:25 headaches [1] 42:8 health [2] 179:18 179:22 healthy [1] 91:6 hear [11] 11:14 11:22 43:14 50:24 52:21 53:3 77:8 88:19
--	---	---	--	---

122:23 138:8 151:22	heard [19]	12:14	49:9 50:11 80:13	82:4 85:22 91:16	91:19 108:5 145:15	161:14 164:18 171:11	174:8 174:10 174:10	175:13 185:19 191:13	hearing [15]	1:2	2:23 3:9 17:3	17:11 98:25 102:3	114:1 114:4 116:7	117:24 131:22 155:18	158:1 163:7	hearings [5]	12:1	16:17 74:17 74:20	76:13	heartland [2]	110:22	180:19	heavily [3]	75:10	95:18 152:2	heavy [2]	152:17	158:24	heinous [1]	83:15	held [4]	108:16 109:8	172:15 172:16	help [14]	21:11 41:7	45:10 45:21 45:25	46:10 51:3 75:24	93:21 99:12 114:18	116:24 147:19 185:12	helped [3]	9:23	137:18 173:10	helpful [7]	11:24	18:16 46:7 50:21	51:22 55:6 87:2	helping [1]	2:7	helps [1]	137:20	high [4]	80:6 126:1	135:14 150:20	higher [2]	44:25	126:19	highly [2]	21:19	22:2	highway [2]	53:8	54:17	hill [2]	69:16 163:5	hires [1]	154:17	historical [3]	81:19	159:5 177:16	historically [3]	24:7	47:5 143:19	history [14]	17:24	47:5 71:12 75:16	79:15 125:11 125:12	125:17 125:25 126:12	127:18 127:22 132:20	180:2	hit [1]	150:22	hits [2]	152:8 152:17	hold [2]	12:13 181:16	holds [1]	130:17	home [1]	158:18	homework [3]	80:8	80:9 82:11	honed [1]	17:15	honor [5]	2:5	67:21 80:3 103:14	115:21	hope [12]	2:22	11:2 43:7 117:7	125:15 133:3 137:15	137:16 139:24 182:11	185:24 189:18	hopeful [1]	11:8	hopefully [3]	10:1	141:14 160:23	hopelessness [1]	141:7	hopes [1]	141:16	horrifies [1]	57:19	horse [2]	52:23	104:16	Hospital [1]	30:12	hotel [2]	2:6 2:11	hotline [2]	21:14	102:15	hour [1]	30:15	huge [7]	33:5 83:1	85:19 127:5 127:7	140:24 140:24	human [3]	55:1	105:4 152:23	humanistic [1]	145:13	humanity [1]	26:15	humanized [1]	71:20	humanly [1]	71:20	humbling [1]	10:5	hundred [2]	29:10	165:18	husband's [1]	30:22	hypothetical [1]	169:9	hypothetically [1]	115:14	-I-			idea [11]	27:10 27:11	46:2 85:10 107:12	116:3 117:11 162:11	175:22 184:11 184:17	ideal [3]	95:14 95:25	188:11	idealism [1]	98:12	ideas [1]	188:19	identifiable [1]	177:12	identified [6]	41:11	176:8 176:14 177:15	183:11 190:16	identifies [1]	146:22	identify [2]	147:12	177:20	identifying [2]	41:19	148:15	ignore [1]	111:14	ignoring [1]	114:23	illegal [2]	31:12	31:21	illustrate [1]	60:21	immediately [2]	77:3 77:6	immunity [1]	51:25	impact [12]	34:21	40:22 68:7 72:19	81:24 101:8 121:4	164:17 179:16 179:20	181:24 185:22	impacted [2]	18:24	90:2	impacts [1]	5:3	impaired [1]	58:22	imparted [1]	185:6	implementation [2]	74:7 74:22	implementing [1]	37:20	importance [1]	73:24	important [17]	8:6	11:22 11:25 20:10	24:23 37:6 47:21	65:15 65:16 70:3	75:12 81:4 138:7	151:6 151:7 166:20	172:23	importantly [3]	10:12	81:24 184:6	impose [3]	26:10	73:10 98:5	imposed [6]	15:5	55:25 59:20 73:17	98:7 118:20	imposing [3]	37:12	108:12 156:22	imposition [1]	105:3	impossible [1]	69:4	imprecise [1]	29:4	impressed [1]	186:19	impression [2]	113:16	140:20	impressions [2]	12:23	124:18	imprisonment [3]	179:19 179:21 182:1	improper [1]	56:17	improperly [1]	130:8	improved [1]	96:3	improvement [1]	182:6	in-depth [1]	73:6	inappropriate [1]	122:1	incarceration [2]	37:12 158:12	incentive [3]	77:16	140:18 153:6	incidentally [1]	23:25	inclination [1]	186:10	inclined [1]	8:1	include [2]	108:24	184:23	included [3]	42:11	73:4 101:14	includes [1]	97:14	including [5]	7:2	22:15 26:9 42:1	101:9	inclusion [2]	75:8	100:25	incompatible [1]	129:11	inconsequential [1]	183:24	inconsistent [1]	85:16	incorporated [1]	95:20	incorporates [2]	96:12 96:25	incorporating [2]	20:21 109:25	increase [8]	22:15	40:24 107:4 132:2	148:1 163:20 164:7	165:13	increased [5]	23:7	147:20 148:3 190:11	190:15	increases [2]	132:11	157:23	increasing [3]	107:7	158:14 183:13	incredibly [1]	85:16	increments [1]	151:14	incurred [1]	37:20	indeed [3]	5:1	8:5 133:11	independent [4]	24:6 81:17 146:6	146:15	index [1]	21:9	indicated [3]	5:22	35:11 113:16	indicates [1]	102:22	indication [2]	50:19	115:6	indict [1]	168:18	indicted [2]	127:9	167:20	indictment [6]	45:5	76:24 167:20 170:10	183:14 183:14	individual [12]	26:11	28:9 33:24 71:10	83:12 113:20 116:23	125:5 172:1 172:14	184:20 184:22	individualize [4]	37:10 71:9 132:16	132:18	individualized [1]	71:4	individuals [4]	14:25	65:2 85:23 131:20	inequities [1]	79:20	inevitable [1]	35:1	inevitably [1]	38:3	inexperienced [1]	91:17	influence [2]	119:4	183:12	informants [1]	85:23	information [32]	8:14 11:7 73:4	73:10 75:8 75:12	75:13 75:17 78:24	85:8 90:22 91:1	91:2 91:15 91:20	99:11 100:5 100:25	101:4 101:9 101:12	101:13 101:14 102:17	119:10 119:12 130:21	134:14 134:16 134:20	135:6 183:21	informative [1]	75:19	informed [2]	12:3	154:16	infrequently [1]	117:7	ingredient [1]	141:14	initial [2]	9:9	76:20	initiated [1]	9:7	injury [2]	22:17	23:10	inmates [2]	140:8	141:12	innocent [2]	109:2	115:23	input [4]	4:22	11:21 173:19 174:12	inquiries [1]	64:22	inroads [2]	164:12	164:17	inside [1]	154:14	insight [1]	131:1	insights [1]	24:9	insist [1]	82:13	insisting [1]	56:16	instance [3]	88:25	174:19 187:24	instances [4]	114:1	158:24 166:6 169:5	instead [6]	31:1	36:24 81:16 82:25	158:20 168:3	institution [3]	22:19	46:14 55:2	institutions [1]	131:21	instructed [1]	99:19	insulation [1]	47:19	integrity [1]	18:17	intellectually [2]	59:6 83:21	intended [4]	25:15	92:19 129:16 176:17	intense [1]	47:15
---------------------	------------	-------	------------------	------------------	--------------------	----------------------	---------------------	----------------------	--------------	-----	---------------	-------------------	-------------------	----------------------	-------------	--------------	------	-------------------	-------	---------------	--------	--------	-------------	-------	-------------	-----------	--------	--------	-------------	-------	----------	--------------	---------------	-----------	------------	-------------------	------------------	--------------------	----------------------	------------	------	---------------	-------------	-------	------------------	-----------------	-------------	-----	-----------	--------	----------	------------	---------------	------------	-------	--------	------------	-------	------	-------------	------	-------	----------	-------------	-----------	--------	----------------	-------	--------------	------------------	------	-------------	--------------	-------	------------------	---------------------	----------------------	----------------------	-------	---------	--------	----------	--------------	----------	--------------	-----------	--------	----------	--------	--------------	------	------------	-----------	-------	-----------	-----	-------------------	--------	-----------	------	-----------------	---------------------	----------------------	---------------	-------------	------	---------------	------	---------------	------------------	-------	-----------	--------	---------------	-------	-----------	-------	--------	--------------	-------	-----------	----------	-------------	-------	--------	----------	-------	----------	-----------	-------------------	---------------	-----------	------	--------------	----------------	--------	--------------	-------	---------------	-------	-------------	-------	--------------	------	-------------	-------	--------	---------------	-------	------------------	-------	--------------------	--------	------------	--	--	-----------	-------------	-------------------	---------------------	----------------------	-----------	-------------	--------	--------------	-------	-----------	--------	------------------	--------	----------------	-------	---------------------	---------------	----------------	--------	--------------	--------	--------	-----------------	-------	--------	------------	--------	--------------	--------	-------------	-------	-------	----------------	-------	-----------------	-----------	--------------	-------	-------------	-------	------------------	-------------------	----------------------	---------------	--------------	-------	------	-------------	-----	--------------	-------	--------------	-------	--------------------	------------	------------------	-------	----------------	-------	----------------	-----	-------------------	------------------	------------------	------------------	--------------------	--------	-----------------	-------	-------------	------------	-------	------------	-------------	------	-------------------	-------------	--------------	-------	---------------	----------------	-------	----------------	------	---------------	------	---------------	--------	----------------	--------	--------	-----------------	-------	--------	------------------	---------------------	--------------	-------	----------------	-------	--------------	------	-----------------	-------	--------------	------	-------------------	-------	-------------------	--------------	---------------	-------	--------------	------------------	-------	-----------------	--------	--------------	-----	-------------	--------	--------	--------------	-------	-------------	--------------	-------	---------------	-----	-----------------	-------	---------------	------	--------	------------------	--------	---------------------	--------	------------------	-------	------------------	-------	------------------	-------------	-------------------	--------------	--------------	-------	-------------------	--------------------	--------	---------------	------	---------------------	--------	---------------	--------	--------	----------------	-------	---------------	----------------	-------	----------------	--------	--------------	-------	------------	-----	------------	-----------------	------------------	--------	-----------	------	---------------	------	--------------	---------------	--------	----------------	-------	-------	------------	--------	--------------	-------	--------	----------------	------	---------------------	---------------	-----------------	-------	------------------	---------------------	--------------------	---------------	-------------------	-------------------	--------	--------------------	------	-----------------	-------	-------------------	----------------	-------	----------------	------	----------------	------	-------------------	-------	---------------	-------	--------	----------------	-------	------------------	----------------	------------------	-------------------	-----------------	------------------	--------------------	--------------------	----------------------	----------------------	----------------------	--------------	-----------------	-------	--------------	------	--------	------------------	-------	----------------	--------	-------------	-----	-------	---------------	-----	------------	-------	-------	-------------	-------	--------	--------------	-------	--------	-----------	------	---------------------	---------------	-------	-------------	--------	--------	------------	--------	-------------	-------	--------------	------	------------	-------	---------------	-------	--------------	-------	---------------	---------------	-------	--------------------	-------------	------	-------------------	--------------	-----------------	-------	------------	------------------	--------	----------------	-------	----------------	-------	---------------	-------	--------------------	------------	--------------	-------	---------------------	-------------	-------

August 12, 1990

intensive [1] 124:9	129:19 161:1	44:14 44:15 44:20	5:17 6:17 8:12	26:19 26:21 27:3
intent [3] 59:8	ironed [1] 76:3	44:22 45:4 45:9	11:15 20:1 27:11	27:4 27:6 35:18
130:20 158:3	ironic [2] 107:3	46:12 47:10 47:12	32:21 32:24 37:9	46:10 49:11 49:24
intents [1] 106:22	148:21	48:8 48:11 48:12	37:24 39:7 47:24	50:14 56:8 57:4
interaction [1] 40:11	irritation [1] 160:12	48:18 49:7 49:8	48:19 54:16 55:4	58:19 59:16 59:21
interchange [1] 28:2	issue [23] 11:14	49:20 50:10 50:24	55:17 56:17 56:19	60:5 61:3 61:10
interest [2] 46:21	40:5 42:18 50:13	51:16 51:24 51:24	58:1 58:13 64:11	70:1 81:5 82:8
66:7	52:14 87:3 95:10	52:1 52:17 53:5	70:21 71:2 71:8	154:17
interested [5] 3:6	102:8 102:10 103:10	53:16 54:13 56:5	71:16 73:13 81:17	keen [1] 15:24
3:9 51:6 113:25	104:11 104:21 108:9	56:6 56:7 57:7	90:21 94:8 99:4	keep [9] 12:4 12:10
114:4	125:10 127:15 131:2	58:16 59:10 59:14	114:11 117:22 118:7	18:17 50:23 64:18
interesting [3] 129:17	135:9 159:10 163:19	60:7 61:14 63:10	118:13 119:20 133:8	64:23 94:5 133:18
131:11 181:13	167:6 173:5 186:6	63:13 63:16 63:20	137:11 138:11 146:23	154:15
interests [1] 22:5	issued [1] 21:3	63:21 65:24 66:2	150:11 155:18 156:5	Kennedy [3] 159:20
internally [1] 85:20	issues [31] 16:18	66:25 67:3 67:7	156:16 156:19 156:21	176:8 178:2
interpret [2] 107:25	16:19 17:2 17:14	67:22 70:14 70:18	156:25 157:4 167:5	Kevin [1] 92:23
182:25	17:15 33:11 34:7	70:19 71:21 73:8	176:7 176:10 185:5	key [1] 45:18
interpretation [2] 17:18 24:20	36:14 40:10 40:16	73:9 76:8 80:2	judgment [8] 5:6	Keystone [1] 58:23
interpreted [1] 62:14	42:15 46:9 51:21	81:19 82:3 82:4	22:1 24:7 61:1	kidding [1] 70:19
interpreting [1] 148:11	52:8 57:18 74:6	83:16 83:18 83:23	81:11 81:19 91:11	kidnapping [1] 126:3
interstate [2] 53:8	75:24 76:2 77:5	86:5 87:10 88:17	97:25	kill [1] 150:19
54:17	82:25 90:8 94:24	89:6 89:12 91:16	judicial [10] 3:14	kilo [6] 149:10 149:11
interviewed [2] 72:24	109:23 114:7 143:18	92:5 92:6 92:9	6:10 9:22 11:19	153:1 153:2 153:11
73:3	144:22 144:23 151:17	92:10 92:12 92:17	14:17 21:6 50:25	153:17
intimidated [2] 106:20	157:16 182:11 185:2	93:8 93:10 93:25	124:22 147:21 185:2	kilogram [1] 86:17
148:9	items [1] 11:4	94:12 94:14 96:15	judiciary [6] 7:1	kilograms [1] 165:18
intricacies [1] 73:16	itself [12] 5:9	98:19 103:12 105:21	7:22 35:4 155:21	kind [12] 10:5
introduce [2] 5:19	8:18 39:22 55:19	110:4 110:7 110:13	156:13 157:13	22:3 23:21 24:12
92:18	58:24 144:1 145:2	110:18 110:21 110:22	Julie [1] 6:14	29:20 51:11 63:16
introduced [1] 14:18	148:5 148:17 179:7	111:1 111:3 111:5	jump [1] 86:25	82:15 90:8 132:22
introduces [1] 39:22	181:24 187:10	111:10 111:13 111:18	June [1] 13:25	144:10 168:8
introductions [1] 46:2	-J-	111:22 112:2 112:6	jurisdiction [1] 85:17	kinds [1] 85:25
invariably [1] 69:14	jail [6] 79:15 127:13	112:8 114:14 115:3	jurisdictions [2] 95:16 95:17	kingpin [4] 86:14
investigate [1] 152:24	127:16 127:17 140:17	115:11 117:13 118:8	jurisprudence [1] 82:2	106:10 146:9 172:5
investigated [1] 82:25	165:16	118:10 118:17 118:21	jurors [1] 109:2	kingpins [3] 164:1
investigating [2] 72:25 100:14	Jeralyn [1] 143:2	118:21 120:5 121:22	jury [6] 17:5 77:23	165:6 165:14
investigation [3] 72:15 72:23 183:22	job [7] 4:12 4:15	121:24 122:15 122:17	99:15 100:15 109:19	knee [2] 70:6 82:22
investment [1] 153:12	21:24 48:5 82:14	122:18 122:18 122:21	111:12	knew [5] 33:6
invitation [2] 19:7	91:18 102:12	122:21 122:23 123:6	jury's [1] 108:25	114:19 124:2 124:5
28:4	jobs [1] 71:2	123:8 123:9 123:14	justice [35] 7:19	135:20
invite [4] 60:14	joined [1] 8:21	123:16 123:20 123:21	8:15 13:23 19:22	knit [1] 146:4
89:8 178:21 182:3	joining [1] 185:19	127:24 127:24 131:6	20:9 32:12 35:2	knowledge [4] 20:8
invites [1] 180:23	jointly [1] 173:10	133:4 133:4 133:5	35:22 36:5 36:7	95:13 96:24 97:11
inviting [3] 76:10	Joseph [1] 7:3	133:6 133:10 133:11	36:19 39:18 59:7	known [3] 17:15
94:15 182:4	journey [2] 28:12	134:1 135:10 136:18	66:19 68:20 76:6	26:4 101:24
involve [2] 102:12	81:6	136:19 136:22 138:5	85:2 97:14 99:3	knows [3] 154:9
145:22	Juarez [3] 174:23	138:12 138:20 139:6	113:7 115:22 120:22	172:2 172:8
involved [15] 9:8	judge [249] 2:1	139:9 140:3 140:4	121:18 123:1 129:19	Koon [9] 48:19
10:4 22:16 22:21	2:5 2:9 2:12	140:10 140:22 141:11	130:14 130:23 137:13	185:21 186:3 186:15
24:8 50:8 53:23	2:13 3:1 3:23	141:19 142:3 142:5	142:8 143:5 143:10	187:11 190:1 190:7
85:17 89:22 100:3	6:5 6:6 6:7	142:6 142:7 143:14	164:24 173:21 176:8	190:11 190:23
101:6 138:21 140:22	6:11 6:14 6:15	148:18 151:21 151:23	178:2	Kuralt [1] 53:9
146:6 151:25	7:18 9:20 10:6	151:23 152:1 154:7	Justicia [2] 28:13	Kurt [1] 93:6
involvement [1] 85:24	10:8 12:25 13:3	154:25 156:14 156:15	28:14	-L-
involves [3] 144:9	13:4 13:5 13:5	158:23 160:4 160:24	justify [6] 23:16	LaBonte [3] 110:19
144:22 146:12	13:15 14:1 14:2	162:23 166:25 168:4	176:23 177:7 177:21	111:5 111:18
involving [3] 59:18	14:4 14:5 14:7	168:19 168:20 168:23	justifying [1] 110:24	lack [3] 9:2 25:18
	14:11 15:4 19:9	169:2 169:3 169:9	juvenile [1] 125:21	51:9
	19:9 26:17 27:2	169:12 169:24 171:3		laid [1] 40:10
	27:5 31:6 31:23	171:9 172:5 173:14	-K-	landed [2] 28:24
	35:4 35:18 39:3	174:14 175:10 176:12	Kafkaesque [1] 104:18	29:1
	43:10 43:21 43:24	177:19 180:1 180:5	Katz [23] 13:16	lands [1] 96:22
	43:25 44:1 44:13	180:8 181:2 181:5		
		181:9 181:12 182:7		
		185:16 187:15 189:22		
		190:25 191:10		
		judge's [2] 125:16		
		184:7		
		judges [54] 2:10		

language [10] 145:25 147:22 176:2 176:5 176:6 176:15 176:19 176:20 176:25 189:7	learn [3] 3:18 10:6 35:10 learned [5] 15:4 45:17 46:5 131:5 133:22 learning [2] 3:7 32:13 learns [1] 101:3 least [20] 5:16 15:10 25:24 43:15 47:14 49:10 50:20 86:22 92:18 95:12 98:15 132:13 165:2 171:17 176:7 176:10 185:22 186:13 187:23 190:3	147:21 148:1 148:3 154:6 154:9 158:8 158:22 158:23 170:9 180:10 186:8 186:14 levels [14] 17:25 22:23 22:25 23:1 128:4 128:8 132:21 150:24 151:14 154:8 158:21 158:21 158:21 165:22 Lewis [1] 12:25 liberty [1] 105:5 library [1] 62:10 license [1] 74:14 licenses [1] 131:15 lie [2] 18:18 169:3 lied [1] 129:20 lies [1] 96:5 life [12] 80:7 82:18 105:4 111:6 137:7 141:20 141:22 142:2 154:13 165:16 171:1 171:1 light [4] 72:18 141:23 178:19 186:3 likely [4] 39:24 75:11 101:13 190:2 liken [1] 63:12 likened [1] 53:7 likewise [5] 61:18 93:12 104:3 105:9 105:16 limit [7] 12:11 38:20 59:15 92:21 121:16 142:12 142:13 limitation [2] 12:8 43:17 limited [6] 65:18 105:9 106:5 106:16 129:7 157:19 limiting [2] 82:2 104:4 limits [4] 23:8 119:8 143:7 184:7 line [5] 36:4 104:23 115:8 118:20 128:12 lines [4] 46:18 88:7 138:8 138:9 list [12] 40:7 162:3 178:4 178:6 178:6 178:6 178:9 178:10 178:16 178:17 178:20 184:16 listed [1] 26:9 listen [3] 3:5 152:13 155:17 listened [1] 84:7 listening [1] 104:19 listing [1] 107:18 literal [1] 61:8 literally [1] 61:4 literary [1] 25:18 litigate [2] 40:16 42:21	litigated [3] 58:2 75:10 82:24 litigating [2] 40:9 77:6 litigation [6] 39:6 39:23 42:13 42:18 109:21 161:16 Litt [52] 13:21 13:24 13:25 35:19 35:20 43:10 46:9 51:4 51:14 51:17 52:19 61:17 61:23 93:20 105:22 105:23 110:4 110:8 110:8 110:15 110:20 111:15 111:19 111:23 112:9 112:16 112:20 113:11 115:5 116:15 118:10 118:14 118:16 118:18 119:1 122:20 143:10 143:13 160:5 160:6 163:8 164:20 165:10 166:14 166:20 167:3 173:16 173:16 174:2 174:21 189:23 189:24 Litt's [1] 168:10 live [4] 45:17 133:22 137:13 140:1 lived [1] 99:8 lives [2] 18:4 115:3 living [4] 30:19 47:13 135:17 179:17 local [3] 99:23 113:9 126:16 located [2] 7:21 159:20 Lock [1] 30:1 logic [4] 15:24 118:4 180:21 186:21 logistical [3] 178:24 180:22 181:25 loners [1] 81:21 long-time [1] 6:9 longer [6] 36:19 54:7 134:24 146:16 148:9 178:16 look [19] 33:23 39:14 41:15 55:4 59:3 69:15 90:6 90:9 106:18 115:7 116:17 127:11 129:6 129:14 149:23 150:14 152:15 163:2 179:14 looked [6] 15:21 73:13 127:23 128:4 132:4 159:21 looking [16] 11:2 11:4 11:8 46:22 47:17 49:18 69:10 79:13 81:1 116:23 116:25 145:17 162:5 168:4 178:5 180:24 loose [1] 146:3 loose-knit [1] 146:14 loosely [1] 171:15 Los [1] 156:14	lose [2] 45:12 136:14 loses [1] 135:11 losing [2] 16:3 23:13 loss [4] 18:6 22:17 100:2 133:24 lost [4] 11:20 56:2 133:12 171:2 lots [1] 85:7 love [3] 135:15 135:25 139:19 low [1] 166:1 lower [7] 78:23 79:1 106:24 134:6 150:22 161:22 166:12 lowered [2] 160:20 160:25 lowering [2] 160:17 163:18 lowest [2] 152:24 164:2 luck [4] 36:21 36:23 115:2 115:3 lunch [1] 94:11 lying [1] 168:24
-M-				
last [19] 2:6 9:4 15:10 19:10 33:4 43:22 43:23 56:12 72:14 76:14 88:5 106:8 124:7 124:9 140:6 155:11 174:15 174:18 174:21 Lastly [1] 154:10 late [1] 72:10 latter [1] 68:5 law [47] 6:24 7:7 7:8 9:22 13:7 13:8 18:3 18:25 21:5 33:6 33:6 33:7 33:8 36:22 37:25 48:2 48:4 54:21 55:1 55:10 62:13 64:23 67:4 67:8 68:4 69:8 72:8 74:6 74:13 76:15 80:15 83:1 87:12 87:22 92:24 92:24 97:24 125:3 126:16 131:3 138:17 143:4 154:21 154:21 165:2 174:7 175:17 laws [3] 48:5 54:3 65:18 lawyer [18] 6:23 7:4 31:7 82:1 82:3 82:8 82:10 82:14 91:17 91:20 123:24 152:5 152:6 152:20 154:20 175:14 177:8 177:19 lawyers [19] 8:12 16:12 37:24 39:6 57:7 57:7 58:1 80:14 82:6 82:6 90:21 104:20 150:6 154:15 155:12 155:16 156:10 167:15 178:24 lead [6] 74:17 109:21 114:2 117:15 153:4 161:16 leader [2] 132:3 132:9 leaders [1] 165:17 leads [6] 24:6 32:9 55:19 150:11 151:15 151:16 lean [1] 134:4 leans [2] 95:17 95:24	leave [1] 123:18 leaves [1] 101:16 leaving [1] 31:22 lectured [1] 155:12 led [3] 39:5 55:21 74:12 left [6] 28:25 34:24 51:22 57:16 71:5 140:20 legal [12] 10:18 21:1 21:13 21:16 40:10 54:24 64:22 82:10 90:8 104:21 108:15 108:21 legislation [3] 4:23 5:3 156:11 legislative [6] 155:14 156:9 157:3 163:2 187:2 187:7 legislatively [3] 188:11 188:21 189:13 legislature [2] 5:2 53:24 legitimate [2] 60:1 182:17 lend [1] 148:5 lending [1] 55:24 length [3] 12:5 140:17 141:8 lengthy [4] 39:1 74:17 74:20 180:2 lenient [1] 84:24 less [19] 19:12 34:14 38:24 39:15 44:2 50:13 52:23 74:20 75:11 75:19 81:23 82:24 82:25 113:14 121:1 123:23 135:4 172:23 190:20 lesser [1] 106:21 lesson [1] 10:6 letter [4] 27:16 27:19 27:21 56:17 level [28] 17:25 20:3 22:15 23:7 58:4 58:5 58:5 78:23 79:1 79:13 91:9 94:22 94:24 94:24 126:20 147:16	147:21 148:1 148:3 154:6 154:9 158:8 158:22 158:23 170:9 180:10 186:8 186:14 levels [14] 17:25 22:23 22:25 23:1 128:4 128:8 132:21 150:24 151:14 154:8 158:21 158:21 158:21 165:22 Lewis [1] 12:25 liberty [1] 105:5 library [1] 62:10 license [1] 74:14 licenses [1] 131:15 lie [2] 18:18 169:3 lied [1] 129:20 lies [1] 96:5 life [12] 80:7 82:18 105:4 111:6 137:7 141:20 141:22 142:2 154:13 165:16 171:1 171:1 light [4] 72:18 141:23 178:19 186:3 likely [4] 39:24 75:11 101:13 190:2 liken [1] 63:12 likened [1] 53:7 likewise [5] 61:18 93:12 104:3 105:9 105:16 limit [7] 12:11 38:20 59:15 92:21 121:16 142:12 142:13 limitation [2] 12:8 43:17 limited [6] 65:18 105:9 106:5 106:16 129:7 157:19 limiting [2] 82:2 104:4 limits [4] 23:8 119:8 143:7 184:7 line [5] 36:4 104:23 115:8 118:20 128:12 lines [4] 46:18 88:7 138:8 138:9 list [12] 40:7 162:3 178:4 178:6 178:6 178:6 178:9 178:10 178:16 178:17 178:20 184:16 listed [1] 26:9 listen [3] 3:5 152:13 155:17 listened [1] 84:7 listening [1] 104:19 listing [1] 107:18 literal [1] 61:8 literally [1] 61:4 literary [1] 25:18 litigate [2] 40:16 42:21	litigated [3] 58:2 75:10 82:24 litigating [2] 40:9 77:6 litigation [6] 39:6 39:23 42:13 42:18 109:21 161:16 Litt [52] 13:21 13:24 13:25 35:19 35:20 43:10 46:9 51:4 51:14 51:17 52:19 61:17 61:23 93:20 105:22 105:23 110:4 110:8 110:8 110:15 110:20 111:15 111:19 111:23 112:9 112:16 112:20 113:11 115:5 116:15 118:10 118:14 118:16 118:18 119:1 122:20 143:10 143:13 160:5 160:6 163:8 164:20 165:10 166:14 166:20 167:3 173:16 173:16 174:2 174:21 189:23 189:24 Litt's [1] 168:10 live [4] 45:17 133:22 137:13 140:1 lived [1] 99:8 lives [2] 18:4 115:3 living [4] 30:19 47:13 135:17 179:17 local [3] 99:23 113:9 126:16 located [2] 7:21 159:20 Lock [1] 30:1 logic [4] 15:24 118:4 180:21 186:21 logistical [3] 178:24 180:22 181:25 loners [1] 81:21 long-time [1] 6:9 longer [6] 36:19 54:7 134:24 146:16 148:9 178:16 look [19] 33:23 39:14 41:15 55:4 59:3 69:15 90:6 90:9 106:18 115:7 116:17 127:11 129:6 129:14 149:23 150:14 152:15 163:2 179:14 looked [6] 15:21 73:13 127:23 128:4 132:4 159:21 looking [16] 11:2 11:4 11:8 46:22 47:17 49:18 69:10 79:13 81:1 116:23 116:25 145:17 162:5 168:4 178:5 180:24 loose [1] 146:3 loose-knit [1] 146:14 loosely [1] 171:15 Los [1] 156:14	lose [2] 45:12 136:14 loses [1] 135:11 losing [2] 16:3 23:13 loss [4] 18:6 22:17 100:2 133:24 lost [4] 11:20 56:2 133:12 171:2 lots [1] 85:7 love [3] 135:15 135:25 139:19 low [1] 166:1 lower [7] 78:23 79:1 106:24 134:6 150:22 161:22 166:12 lowered [2] 160:20 160:25 lowering [2] 160:17 163:18 lowest [2] 152:24 164:2 luck [4] 36:21 36:23 115:2 115:3 lunch [1] 94:11 lying [1] 168:24

55:10 71:8 71:15	81:14 87:24 99:11	26:22 28:1 28:10	mind [16]	50:23	modification [1]
82:13 88:24 89:4	101:6 101:7 101:8	35:21 67:24 72:6	62:2 66:10 66:15	103:7	103:7
136:6 137:5 137:17	101:14 103:9 103:15	80:3 89:8 94:15	67:17 80:8 84:14	modify [1]	117:24
138:21 138:22 138:25	105:17 109:11 109:12	97:12 98:23 112:23	86:13 104:15 104:18	money [1]	30:21
139:3 149:6 149:8	112:9 112:25 113:15	133:12 133:25 143:17	120:9 121:19 132:25	monitor [1]	8:8
156:18 156:20 157:1	113:21 114:16 114:18	155:3 156:13 157:11	143:15 162:15 186:2	Montana [1]	47:25
157:4 161:20 161:23	117:13 117:16 120:10	174:22 175:13 186:3	minds [2]	month [4]	33:23
163:15 163:22 165:25	121:21 121:24 123:22	memory [2]	186:2	43:15 72:14 91:13	91:13
166:4 167:21 167:23	124:24 149:19 156:17	132:24	mine [2] 12:21 191:8	months [14]	4:13
manipulating [1]	162:4 169:16 172:13	mention [3]	minimal [1]	79:7 86:8 124:19	124:19
32:15	177:4 179:8 179:15	43:11 44:23	minimally [1]	127:13 136:1 136:6	136:6
manipulation [2]	179:22 180:1 181:10	mentioned [9]	minimum [26]	136:7 136:17 139:14	139:14
183:14 183:15	183:14 184:9 185:8	62:5 64:1 69:24	58:4 68:22 68:24	141:20 141:24 153:1	153:1
manner [4]	186:18 188:2	80:4 84:15 106:1	69:2 69:18 82:13	mood [1]	164:24
120:5 187:19 187:19	mazes [1]	132:19 138:13	88:24 89:4 136:1	Moore [8]	142:20
manual [8]	Mazzone [19]	mentioning [1]	136:6 137:5 138:22	142:21 148:19 148:20	148:20
20:22 27:15 29:9	6:7 27:5 43:24	mere [1] 19:4	138:25 140:24 156:18	154:25 158:7 164:3	164:3
29:10 29:20 188:13	43:25 44:15 44:20	Merritt [18]	156:20 157:2 157:4	165:4	
189:2	45:9 47:10 48:8	143:2	161:20 163:22 165:25	morally [1]	155:24
manufacturer [1]	48:12 49:7 94:10	143:3 149:7 155:1	166:4 167:18 167:21	Moreover [1]	109:10
151:3	110:7 110:18 111:5	155:2 160:4 163:1	167:23	morning [13]	2:1
marijuana [3]	111:18 111:22 169:24	163:6 167:2 167:11	minimums [10]	12:6 12:22 52:21	52:21
127:7 161:2	mean [25]	167:24 168:16 169:1	137:17 138:21 139:3	70:22 84:15 98:21	98:21
mark [1] 188:1	18:1 45:22 50:9	170:5 171:5	149:6 149:8 161:23	99:1 104:20 123:18	123:18
markets [1]	50:11 51:1 56:2	message [1]	161:25 162:1 163:15	138:7 160:9 185:20	185:20
married [1]	61:23 62:9 85:21	met [2] 81:10 140:7	Minnesota [4]	most [53]	2:10
Mars [1] 29:2	85:25 87:5 87:22	metal [1]	136:25 137:2 139:17	7:25 8:18 10:15	10:15
Mary [4]	96:13 109:1 111:20	meteor [1]	minor [6]	10:15 11:5 11:24	11:24
7:19 36:2 36:14	114:16 132:10 151:5	method [1]	39:4 85:18 131:14	16:13 18:7 18:23	18:23
Maryland [2]	154:14 165:8 165:22	methodology [1]	146:25 154:10	20:24 24:23 32:19	32:19
130:1	172:8 174:3 180:16	5:7	minorities [1]	39:18 42:4 44:16	44:16
Massachusetts [3]	meaning [3]	methodology [1]	Minturn [2]	44:17 45:2 57:20	57:20
6:8 6:22 44:10	132:9 189:6	metaculously [1]	139:11	61:12 63:2 63:6	63:6
master [1]	meaningful [2]	23:5	minute [1]	63:7 65:15 68:10	68:10
mastering [2]	77:25	Mexico [4]	minutes [11]	70:3 71:6 72:16	72:16
73:16	18:1	165:18 172:9 174:24	16:18 43:19 66:3	72:23 76:1 81:4	81:4
match [1]	means [7]	Michael [5]	67:19 67:23 83:25	81:7 83:15 91:12	91:12
material [1]	77:23 91:4 114:15	6:23	92:22 110:5 142:12	91:25 101:13 105:4	105:4
materials [6]	141:22 153:5 158:7	67:11	142:15	113:18 113:22 118:12	118:12
100:15 100:20 101:5	meant [3]	micromanaging [1]	minutiae [1]	118:18 119:7 125:19	125:19
115:25 159:10	50:1 130:16	68:19	misdeemeanor [1]	134:15 145:21 146:14	146:14
math [1] 80:6	measure [6]	microphone [2]	32:5	148:8 159:3 159:11	159:11
mathematical [3]	84:10 146:17 157:12	67:18	misnomer [1]	165:13 165:14 175:25	175:25
22:6 24:5 50:5	161:12 166:20	mid-twenties [1]	misrepresented [1]	184:6	
mathematics [1]	measured [1]	131:12	183:1	motion [16]	90:13
26:2	mechanical [7]	middle [4]	missing [1]	128:18 129:5 129:13	129:13
matter [13]	25:7 25:20 50:3	55:8 75:1 77:3	mission [2]	129:14 157:5 157:7	157:7
48:4 78:12 90:2	144:25 145:2 145:6	might [24]	65:16	157:7 157:8 177:7	177:7
90:20 90:21 97:14	mechanics [1]	9:15 12:18 31:17	misspoke [1]	177:11 177:21 177:23	177:23
98:12 108:21 108:23	mechanistic [4]	31:18 31:20 31:21	mistake [3]	180:7 180:8 180:25	180:25
111:22 151:8 168:12	50:5 50:7 56:1	40:2 43:11 50:21	135:15 141:6	motions [4]	76:25
matters [6]	Medina-Estrada [1]	56:24 63:23 63:24	misunderstood [1]	77:7 128:21 177:13	177:13
12:24 93:2 130:20	130:17	110:12 112:5 113:8	112:10	motivated [1]	141:13
150:10 151:9	meet [5]	116:24 150:25 151:24	mitigate [1]	Mountain [1]	88:4
Matthias [1]	69:7 132:18 174:6	152:13 164:11 176:23	mitigating [12]	move [7]	9:23
maturity [1]	meeting [7]	177:17 186:22	146:19 146:22 147:10	12:2 66:10 66:14	66:14
maximum [1]	58:4 64:11 68:15	Miklic [25]	147:13 159:14 159:17	67:20 97:3 117:12	117:12
maximums [1]	88:6 191:16 191:17	13:14 13:15 16:11	173:3 177:17 179:3	moved [2]	45:24
may [61]	meetings [2]	19:14 19:16 26:18	179:9 181:19	152:14	
4:18 14:7	69:13	29:5 35:11 44:15	mitigation [1]	moves [1]	28:25
17:2 17:8 18:14	member [4]	44:16 44:23 49:12	moans [1]	moving [2]	40:2
19:5 25:7 25:21	6:9 123:1 123:11	49:13 49:18 49:22	mode [1]	107:5	
26:24 35:25 40:15	members [31]	62:5 62:12 62:17	model [7]	Ms [37]	7:16 61:14
42:23 43:1 43:3	5:10 5:10 5:13	62:24 63:4 63:6	147:6 171:12 171:13	66:1 143:2 143:3	143:3
51:1 51:1 53:21	5:15 5:19 7:9	63:24 64:15 65:7	178:24 180:22 181:25	149:7 155:1 155:2	155:2
59:6 65:3 80:21	8:21 12:12 19:16	military [3]			

160:4 163:1 163:6	70:9 103:6 127:20	98:24	obstruction [3] 129:19	161:14 162:5 162:9
167:2 167:11 167:24	128:13 129:14 131:6	nothing [8] 28:8	130:14 130:23	162:14 162:16 163:24
168:16 169:1 169:4	139:22 140:17 141:13	31:6 53:12 89:1	obtain [2] 75:11	168:7 168:18 170:4
169:11 169:15 170:5	150:16 152:8 155:20	89:2 141:23 180:23	146:7	170:12 170:21 179:3
171:3 171:5 173:7	160:2 161:8 162:10	181:17	obtaining [2] 21:16	181:22 183:16
174:22 175:3 175:9	162:14 165:12 166:2	notice [2] 17:4	75:7	offenses [11] 15:17
175:11 175:12 181:4	174:7 182:2 182:17	158:3	obvious [2] 80:19	97:18 104:5 152:18
181:7 181:10 181:16	187:21 190:10	noting [1] 141:12	119:7	153:6 155:6 158:6
182:7 182:8 182:9	needed [7] 30:20	notion [3] 114:21	obviously [8] 51:20	158:13 158:16 158:22
188:17 191:8	42:24 42:25 43:1	149:3 154:11	54:5 64:8 89:11	161:1
mule [1] 106:12	141:6 173:23 190:13	November [1] 73:12	110:16 119:3 124:5	offensive [1] 95:11
multi [1] 165:18	needs [3] 15:9	now [59] 9:24 11:17	174:7	offer [4] 24:9 167:16
multiple [4] 42:2	149:25 176:3	15:18 18:13 18:25	occasion [3] 40:15	167:18 167:19
42:3 42:7 86:15	negotiated [1] 183:3	19:14 31:15 33:19	53:13 101:2	offered [1] 136:12
multitude [1] 172:12	negotiates [1] 30:25	34:11 39:1 41:14	occasional [1] 187:21	office [14] 21:4
murder [1] 111:7	negotiating [1] 34:18	49:11 59:4 60:17	occasions [1] 58:19	21:16 22:20 52:5
murders [4] 111:11	negotiation [4] 16:16	60:25 62:21 64:13	occur [3] 47:21	56:15 58:10 67:14
111:16 111:20 111:23	16:20 101:1 101:15	66:19 74:4 74:15	80:18 112:3	88:7 91:22 131:18
must [18] 4:20	negotiations [1] 128:23	75:7 75:13 82:4	occurred [2] 112:7	151:21 175:8 175:15
5:4 5:7 5:16	Neither [1] 114:11	86:4 86:8 92:8	120:23	175:16
10:11 10:13 15:4	NELSON [1] 43:20	93:20 96:4 96:23	occurs [2] 47:18	officer [37] 13:11
23:5 26:8 74:4	nervous [1] 19:1	97:10 97:19 107:14	188:22	13:12 19:25 57:17
100:1 112:1 119:25	never [14] 18:3	111:8 111:13 115:4	October [2] 72:13	62:22 66:22 71:24
122:10 122:11 157:19	28:20 52:2 81:10	121:4 121:23 122:5	124:9	72:23 73:18 73:21
159:25 159:25	124:2 129:25 130:1	122:17 124:15 126:7	off [15] 31:2 32:22	73:22 74:25 75:14
mythical [2] 28:13	139:23 139:23 139:24	127:6 128:7 128:15	54:11 54:12 55:14	75:17 86:17 93:11
81:6	164:18 168:19 172:13	145:15 146:19 148:7	61:25 131:19 148:24	99:17 99:18 100:10
-N-	177:6	148:14 151:12 154:1	150:16 154:16 166:1	100:13 100:18 100:22
Nagel [2] 27:17	nevertheless [2] 22:13 62:23	170:14 174:5 174:15	169:13 171:24 175:14	101:2 101:10 101:16
58:1	new [16] 5:5 5:5	174:25 175:7 181:3	188:1	101:22 102:1 102:12
nailing [1] 153:18	5:6 6:24 7:22	186:16 188:10 188:19	offended [1] 154:11	118:25 119:11 119:13
name [5] 6:6	37:25 65:1 72:2	number [33] 10:25	offender [13] 23:20	119:13 142:17 145:4
71:23 126:4 143:10	72:5 103:10 159:16	11:4 12:5 21:14	37:5 72:6 78:17	174:23 175:1 177:20
154:6	159:21 159:21 174:22	21:15 38:20 39:11	78:22 85:14 86:4	officer's [4] 72:20
named [1] 5:13	174:24 185:24	41:11 67:9 67:15	86:18 88:18 170:20	74:2 74:11 75:2
names [1] 2:11	news [1] 15:25	68:5 69:25 70:12	184:10 184:18 189:3	officers [41] 8:13
narcotics [3] 88:12	newspaper [1] 152:12	84:15 93:1 96:12	offenders [16] 17:24	16:10 19:21 20:17
111:16 111:17	next [14] 26:20 31:1	103:25 119:7 121:11	20:13 21:22 24:10	21:12 21:15 21:25
narrow [6] 9:25	66:10 66:16 69:23	122:5 122:5 124:16	30:7 33:19 37:22	23:14 23:22 24:8
16:1 52:9 52:14	71:22 76:9 92:18	124:16 128:5 128:9	64:14 65:19 72:13	25:10 37:24 39:7
85:13 129:7	98:20 122:18 126:19	132:21 142:24 171:11	74:21 78:25 144:11	52:3 55:13 62:6
narrowed [3] 17:3	148:19 153:18 182:8	180:24 181:21 183:13	147:13 147:14 150:25	62:8 73:13 73:15
17:16 173:13	Nieto [10] 66:23	185:19 188:3	offense [90] 15:17	74:3 74:9 74:13
national [8] 44:24	66:24 66:24 67:2	numbers [3] 27:12	22:14 22:15 22:18	74:15 74:19 75:4
44:25 45:1 46:23	67:6 76:9 76:10	63:25 128:6	23:6 23:18 31:20	75:7 75:11 75:25
81:15 93:4 155:15	81:22 86:12 90:5	numerous [2] 15:19	37:4 37:6 49:15	99:4 102:19 102:22
156:9	night [1] 2:6	102:15	58:5 73:4 75:15	146:23 148:8 155:20
nationally [1] 133:17	nights [1] 70:20	oath [4] 48:5 125:2	85:18 86:16 94:23	178:25 182:16 182:19
nationwide [1] 65:22	nine [3] 86:19 89:3	129:20 130:18	95:5 95:7 95:14	182:20 182:22 183:18
Naturally [1] 23:3	127:16	object [2] 22:18	95:19 95:23 95:25	184:3
nature [10] 9:3	Ninex [1] 6:19	90:15	96:6 96:12 96:14	officers' [3] 9:19
21:19 31:8 35:12	nobody [1] 177:24	objections [3] 74:16	96:18 96:20 97:1	102:13 102:16
51:5 73:3 121:11	nonmandatory [1] 167:18	74:20 108:6	97:8 97:16 97:20	offices [2] 7:21
143:25 145:1 151:2	nonviolent [1] 158:13	objective [3] 73:9	97:23 98:4 99:19	113:10
near [1] 11:3	nonvoting [1] 5:13	120:2 144:17	100:4 100:11 100:19	officials [1] 126:17
necessarily [8] 25:20	nor [2] 46:13 114:11	objectivity [1] 25:8	101:6 103:8 104:5	officio [1] 5:13
50:9 57:21 65:22	normally [1] 22:12	obligation [1] 8:7	104:14 105:24 106:16	often [23] 17:23
113:5 179:7 179:9	note [2] 18:20 190:14	observation [6] 52:19	106:17 107:6 109:10	17:25 23:13 25:9
179:10	noted [4] 39:3	52:20 99:1 99:2	111:25 115:13 117:14	39:6 62:11 68:10
necessary [4] 25:19	113:12 117:10 159:10	131:9 162:25	128:4 128:8 131:10	74:1 74:17 75:25
110:12 162:12 190:14	notes [2] 13:13	observations [3] 44:2 129:18 164:21	132:7 132:21 142:10	78:12 98:11 101:10
need [30] 23:18		observed [2] 76:21	143:18 143:19 144:4	102:6 102:7 117:24
30:13 34:3 40:15		132:23	144:15 144:19 145:9	118:1 146:5 172:7
48:9 48:15 54:7			145:20 145:23 147:4	180:9 183:1 183:6
			147:8 147:16 147:19	184:3
			150:2 150:16 150:18	oftentimes [1] 120:10
			150:25 151:3 157:17	old [5] 30:11 70:13
			158:8 159:9 159:15	70:21 72:8 83:11

August 12, 1990

older [3] 131:11 131:23 134:24	opposite [2] 25:22 170:1	-P-	177:6 177:9 177:16 177:20 178:2 178:8 178:11 179:2 180:4 180:11 185:14	165:23 166:1 166:2 166:5 166:7 166:7 166:12 166:13 167:16 169:13 171:7 172:12 180:9
on-line [1] 21:13	option [1] 83:16	p.m [3] 92:16 92:16 191:18	particularly [12] 69:25 78:18 80:24 87:18 94:21 95:16 158:13 159:14 160:11 170:13 176:11 185:20	people's [1] 113:12
once [5] 91:13 91:16 129:11 144:23 177:18	options [1] 71:17	package [1] 137:1	parties [6] 40:4 40:13 44:21 45:8 107:14 114:6	perceived [2] 4:6 160:10
one [107] 4:9 5:18 8:22 11:13 15:3 18:7 19:25 20:10 23:8 23:11 24:7 24:15 28:14 29:18 30:24 32:5 32:6 34:15 37:25 39:8 42:3 42:18 46:24 47:12 49:13 50:12 52:18 52:19 53:19 53:20 54:5 54:19 55:15 57:5 57:23 59:22 64:17 68:22 68:24 69:6 69:16 69:20 72:4 79:5 79:19 79:23 80:16 80:21 82:20 83:7 83:24 85:12 85:23 86:18 87:15 87:15 88:18 88:19 94:1 95:18 96:7 97:7 101:17 105:11 106:18 106:23 107:10 108:16 110:7 110:16 117:11 123:22 125:9 128:16 132:16 133:8 133:11 134:10 134:16 135:12 137:22 142:18 145:7 146:11 147:15 148:23 149:12 153:2 154:9 156:8 157:10 160:8 162:4 162:25 162:25 163:13 165:1 166:14 169:21 171:20 172:15 173:15 177:6 177:9 183:11 186:1 189:17	ordain [1] 5:6	pads [2] 70:6 82:22	party [3] 5:18 73:23 183:5	percent [18] 44:9 44:9 44:18 44:24 45:1 56:11 64:16 64:24 77:9 84:16 84:18 156:19 156:21 156:23 156:25 159:15 159:18 159:22
	order [7] 14:23 17:1 96:15 110:13 187:1 187:5 188:25	page [2] 20:22 20:25	Paso [1] 47:25	percentage [5] 44:11 44:14 62:19 62:24 64:6
	orderly [1] 12:15	pages [5] 21:6 21:10 27:8 29:10 29:11	pass [1] 5:2	percentage-wise [2] 61:1 64:9
	ordinarily [3] 176:4 176:4 176:19	paint [1] 27:12	passed [2] 4:5 38:21	perception [3] 77:10 78:15 164:25
	Oregon [1] 47:25	panel [4] 12:2 12:14 12:19 41:16 46:8 49:9 52:10 54:19 66:10 66:14 66:16 66:19 67:16 67:19 68:2 68:7 68:10 68:12 70:3 71:10 89:8 91:9 91:21 92:18 92:19 93:21 94:4 104:17 106:9 112:22 122:19 133:12 133:25 140:12 142:9 143:17 156:17 174:15 174:18 174:22 191:1	parties' [1] 17:9	Perez [8] 142:16 143:15 143:16 148:18 171:10 171:19 172:7 173:12
	organization [1] 171:18	panelist [1] 98:23	patient [1] 174:16	perfect [2] 38:8 67:2
	organized [8] 72:6 73:8 81:22 145:24 146:1 146:12 171:13 171:15	panelists [3] 84:7 84:15 98:25	Patrick [1] 66:16	perform [2] 7:23 20:11
	organizer [2] 132:3 132:9	panels [2] 41:15 143:12	pawn [4] 30:4 30:13 30:21 30:23 30:14	performs [1] 187:18
	orientation [2] 98:4 140:5	paper [5] 31:9 95:10 176:2 176:21 176:21	pawned [1] 30:14	perhaps [24] 8:3 9:5 10:6 11:8 18:13 28:6 29:21 32:15 55:7 68:2 68:8 95:3 97:7 97:17 113:4 113:9 124:23 128:10 129:20 166:8 178:17 184:6 185:5 186:15
	oriented [1] 187:25	papers [1] 68:24	pay [3] 45:20 53:25 153:8	period [8] 4:16 8:25 83:8 86:3 87:14 141:1 166:23 182:15
	originally [1] 6:24	paramount [2] 37:17 39:10	pedestrian [1] 51:5	periodic [1] 21:7
	otherwise [3] 2:20 23:1 23:4	Pardon [2] 181:4 181:10	penalizes [2] 78:16 78:16	Perish [1] 51:9
	ought [9] 18:19 42:10 52:25 89:12 128:13 129:6 129:7 164:9 187:15	parole [4] 5:15 7:10 20:14 64:4	penalties [9] 54:2 80:20 89:1 127:11 143:22 163:18 163:21 164:7 165:13	permit [1] 40:19
	ounce [4] 149:10 149:19 153:2 166:22	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	pending [4] 108:18 126:5 126:6 126:21	permitted [1] 37:13
	ourself [1] 19:11	papers [1] 68:24	Pennsylvania [2] 3:22 6:1	person [13] 78:17 78:23 83:6 83:16 85:9 132:1 140:21 167:20 179:6 179:12 179:13 179:20 180:12
	ourselves [2] 22:4 92:2	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	penalty [1] 83:11	person's [4] 146:17 179:16 179:18 179:21
	outcome [1] 120:10	participant [3] 146:16 146:25 147:14	pending [4] 108:18 126:5 126:6 126:21	personal [4] 70:17 81:12 102:21 117:23
	outcomes [1] 122:1	participants [2] 23:12 146:5	Pennsylvania [2] 3:22 6:1	personality [1] 73:7
	outline [1] 21:5	participate [4] 27:20 38:15 78:6 156:17	people [68] 3:7 4:23 7:23 7:25 9:18 9:21 16:2 29:20 32:18 33:12 42:20 46:16 49:25 53:11 58:14 58:17 64:8 64:21 65:20 66:12 69:16 81:22 82:18 82:19 83:15 85:8 99:8 106:13 106:22 107:3 107:25 108:3 113:23 114:4 116:2 124:16 131:15 138:8 141:15 149:14 151:12 152:6 152:13 152:23 153:11 154:17 154:19 154:21 160:1 161:23 162:7 163:24 164:8 165:14 165:17	personalized [1] 71:4
	outlook [1] 76:13	participating [2] 38:14 41:16	penalize [2] 78:16 78:16	personally [3] 47:3 152:9 163:4
	outrageous [1] 47:20	participation [1] 76:22	people [68] 3:7 4:23 7:23 7:25 9:18 9:21 16:2 29:20 32:18 33:12 42:20 46:16 49:25 53:11 58:14 58:17 64:8 64:21 65:20 66:12 69:16 81:22 82:18 82:19 83:15 85:8 99:8 106:13 106:22 107:3 107:25 108:3 113:23 114:4 116:2 124:16 131:15 138:8 141:15 149:14 151:12 152:6 152:13 152:23 153:11 154:17 154:19 154:21 160:1 161:23 162:7 163:24 164:8 165:14 165:17	persons [4] 80:13 155:7 156:1 158:15
	outset [2] 57:10 62:7	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	penalty [1] 83:11	perspective [7] 47:5 47:18 68:2 78:13
	outside [4] 45:12 60:13 110:22 158:5	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	pending [4] 108:18 126:5 126:6 126:21	
	outweigh [1] 38:6	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	Pennsylvania [2] 3:22 6:1	
	outweighed [2] 179:21 182:2	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	people [68] 3:7 4:23 7:23 7:25 9:18 9:21 16:2 29:20 32:18 33:12 42:20 46:16 49:25 53:11 58:14 58:17 64:8 64:21 65:20 66:12 69:16 81:22 82:18 82:19 83:15 85:8 99:8 106:13 106:22 107:3 107:25 108:3 113:23 114:4 116:2 124:16 131:15 138:8 141:15 149:14 151:12 152:6 152:13 152:23 153:11 154:17 154:19 154:21 160:1 161:23 162:7 163:24 164:8 165:14 165:17	
	overall [6] 82:23 84:13 91:6 91:8 124:25 132:15	participant [3] 146:16 146:25 147:14	penalty [1] 83:11	
	overarching [1] 186:21	participants [2] 23:12 146:5	pending [4] 108:18 126:5 126:6 126:21	
	overlaps [2] 102:7	participate [4] 27:20 38:15 78:6 156:17	Pennsylvania [2] 3:22 6:1	
	overrepresented [2] 125:13 127:18	participating [2] 38:14 41:16	people [68] 3:7 4:23 7:23 7:25 9:18 9:21 16:2 29:20 32:18 33:12 42:20 46:16 49:25 53:11 58:14 58:17 64:8 64:21 65:20 66:12 69:16 81:22 82:18 82:19 83:15 85:8 99:8 106:13 106:22 107:3 107:25 108:3 113:23 114:4 116:2 124:16 131:15 138:8 141:15 149:14 151:12 152:6 152:13 152:23 153:11 154:17 154:19 154:21 160:1 161:23 162:7 163:24 164:8 165:14 165:17	
	oversight [1] 124:22	participation [1] 76:22	penalty [1] 83:11	
	overwhelming [2] 4:14 14:19	particular [30] 25:12 26:1 33:11 35:24 36:13 37:11 42:14 43:4 60:8 79:5 94:19 96:22 103:23 111:19 125:9 129:19 133:16 176:22 177:3	penalty [1] 83:11	
	own [8] 4:22 24:20 45:24 48:17 66:13 147:16 157:7 189:12	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	penalty [1] 83:11	
	owner [1] 31:3	part [23] 9:11 16:13 31:17 52:21 60:16 65:16 68:18 69:15 77:25 79:21 79:23 104:8 104:14 111:25 118:12 122:7 124:10 149:6 156:9 158:17 160:22 164:3 165:2	penalty [1] 83:11	
opposed [7] 64:17 116:4 116:4 121:10 139:3 156:25 175:23				
opposing [1] 74:1				

95:3 123:22 140:5	84:21 99:16 99:24	possessed [1] 101:7	72:9 72:12 72:15	pretrial [3] 76:25
persuaded [1] 112:2	99:25 100:6 100:17	possessing [1] 22:25	72:16 75:8 75:9	77:6 130:3
pertinent [2] 100:4	101:1 101:4 101:11	possession [4] 25:4	99:18 102:23 129:22	pretty [6] 57:2
185:2	101:15 101:15 101:18	31:10 59:18 109:14	182:23 183:22 183:24	104:25 125:21 143:8
pervade [1] 47:15	101:20 102:6 104:8	possibility [3] 98:16	precise [4] 22:6	145:15 150:6
petition [1] 108:18	120:16 120:17 121:5	107:19 190:3	25:4 51:21 162:13	prevalent [1] 183:15
petty [1] 31:20	126:8 129:21 131:22	possible [11] 41:11	precision [2] 51:10	prevent [2] 57:8
phase [2] 104:8	151:24 183:2 183:22	41:20 42:14 42:23	145:5	101:20
126:11	184:3 184:9	77:18 96:21 97:4	precludes [1] 183:20	previous [4] 20:22
phases [1] 9:9	pleading [1] 57:13	119:8 162:13 174:12	predecessors [1] 169:25	57:6 103:1 104:17
philosophical [1] 90:2	pleas [5] 45:5 107:14	183:5	predetermined [1] 128:22	previously [1] 116:16
philosophically [1] 80:11	124:14 124:16 127:11	possibly [2] 32:14	predicate [1] 97:15	pride [1] 29:22
philosophy [3] 54:15	Pleasanton [1] 140:7	33:9	predict [1] 186:1	primarily [2] 98:10
58:6 98:3	pleased [4] 19:17	post [2] 22:20 131:18	predictability [4] 37:17 41:23 106:2	primary [1] 190:16
Phoenix [1] 47:25	35:21 43:6 52:20	post-conviction [1] 104:8	190:21	principally [1] 92:19
phony [1] 131:18	pleasure [2] 53:3	post-indictment [1] 170:5	prefer [5] 61:23 61:24 98:3	principle [4] 98:2
phrase [2] 70:5	175:19	post-traumatic [1] 180:2	191:8	98:8 98:9 98:12
114:15	pled [1] 84:17	potential [7] 47:8	preferred [1] 141:24	principles [2] 148:15
phrased [1] 178:2	plow [1] 18:15	54:22 55:7 77:24	prehearings [1] 64:11	188:12
pick [1] 132:24	plus [2] 120:14 139:14	113:6 120:7 183:11	preoccupation [1] 65:11	printout [1] 130:3
picture [6] 23:13	pocket [1] 149:20	potentially [4] 30:7	23:12	priorities [2] 8:23
45:12 46:22 75:20	point [23] 9:24	76:2 179:2 181:19	prepare [2] 20:1	107:19
121:21 121:23	34:1 37:11 50:17	powder [4] 136:20	99:17	priority [1] 41:12
piece [3] 51:8 68:17	51:6 57:3 57:5	136:21 144:7 173:18	prepared [5] 23:14	prison [11] 30:20
156:11	60:2 69:9 79:17	power [8] 48:21	72:17 122:22 140:19	31:16 33:12 85:9
piling [1] 85:4	100:11 107:16 114:3	49:2 115:14 117:6	184:4	86:8 136:16 139:25
pinpoint [1] 28:7	128:3 135:2 139:22	117:13 156:5 168:3	preparing [6] 20:2	140:2 140:7 141:7
place [10] 2:18	151:7 151:7 154:10	185:25	20:11 20:17 21:3	171:1
52:10 53:1 55:2	161:10 170:11 177:5	Powder [1] 156:15	102:22 182:23	prisoners [2] 18:24
97:17 111:3 117:18	181:13	practical [1] 90:20	preponderance [6] 109:6 111:2 111:11	141:5
179:14 179:23 180:13	pointed [4] 49:13	practice [17] 25:9	112:13 112:18 116:5	prisons [1] 160:2
placed [3] 74:4	50:14 81:22 171:10	42:7 76:18 78:12	189:12	private [2] 113:17
85:15 183:6	pointing [1] 69:17	112:25 113:17 117:21	present [6] 50:23	142:23
places [3] 11:1	points [3] 33:11	119:18 121:22 142:23	102:20 169:6 182:24	privilege [1] 3:3
50:22 113:22	85:4 90:15	143:7 144:20 168:15	183:19 189:10	probation [86] 8:13
placing [2] 27:12	police [4] 22:3	184:6 185:22 190:2	presentation [1] 124:10	9:19 13:11 13:12
83:16	23:24 64:2 64:7	190:4	presented [2] 48:3	16:10 19:21 19:25
plan [1] 131:25	policing [1] 64:8	practiced [5] 6:24	73:8	20:14 20:16 21:15
planet [2] 28:13	policy [10] 21:2	7:5 13:7 76:15	presently [3] 6:19	21:25 23:14 23:22
28:13	95:3 97:15 97:25	123:25	7:7 120:11	24:8 25:10 37:24
planned [1] 76:25	108:23 119:11 145:12	practices [2] 113:1	preserve [1] 183:6	39:7 52:3 55:13
planning [2] 34:20	173:21 180:22 187:20	113:9	5:23 13:2 123:3	57:17 62:6 62:8
58:4	polished [1] 98:22	practicing [5] 36:22	presidential [1] 164:16	62:22 66:22 70:16
plants [1] 161:2	polite [1] 82:23	68:4 74:13 123:24	pressed [1] 84:2	71:24 72:20 72:23
played [1] 100:4	political [6] 5:18	175:16	pressure [1] 77:19	73:13 73:15 73:18
player [2] 146:25	10:17 53:22 152:10	practitioner [4] 32:9	presumably [2] 111:20	73:21 73:22 74:2
174:5	160:14 160:17	80:19 143:3 176:6	111:23	74:3 74:9 74:10
players [2] 164:1	politics [4] 163:9	practitioners [1] 8:16	presumption [5] 8:5 41:2 85:14	74:12 74:15 74:19
178:1	163:18 164:14 164:22	pre [1] 34:17	86:21 144:10	74:25 75:2 75:4
playing [1] 130:11	pony [1] 124:11	pre-Guideline [2] 72:22 118:5	presumptive [1] 15:3	75:7 75:11 75:14
plea [58] 16:15 16:24	poor [1] 179:19	23:15 117:21		75:16 75:24 83:17
17:9 17:10 23:24	popular [1] 94:7	pre-indictment [6] 167:16 167:17 167:19		93:11 99:3 99:17
32:22 33:1 34:8	pornography [3] 79:6 79:10 79:12	169:18 170:7 170:9		100:9 100:13 100:18
34:12 34:14 34:18	portion [1] 12:18			100:22 101:2 101:10
40:14 44:7 44:8	Portland [1] 47:25			101:16 101:22 102:1
44:12 44:19 44:21	pose [2] 65:19 65:20			102:11 102:13 102:16
45:2 45:2 45:6	position [11] 17:7			102:18 118:25 119:11
45:7 56:10 57:12	36:8 53:3 73:21			119:12 119:13 126:1
57:14 70:2 70:7	74:4 102:2 104:25			126:14 127:13 139:15
74:13 76:3 76:5	147:24 152:6 174:1			142:17 145:4 146:23
77:9 82:6 84:19	183:7			148:8 149:18 155:19
	positive [3] 28:3			174:23 175:1 177:20
	87:2 178:19			178:25 182:16 182:22
				184:3
				problem [48] 19:21

August 12, 1996

21:23	21:25	39:5	productive [2]	107:1	168:23	169:5	169:10	purchased [1]	156:3	quickly [6]	67:20	
29:23	29:25	35:9	141:17		169:23	170:7	170:8	Purdy [6]	2:16	78:10	78:14	88:17
35:11	49:11	49:15	professionals [1]		177:19	183:12		28:5	47:1	150:6	154:4	
50:12	51:6	51:9	37:9		prosecutorial [1]			76:11	80:9	quirky [1]		63:16
51:11	51:12	51:13	professions [1]	57:21	107:4			Purdy's [1]	80:10	quite [11]		25:9
52:8	52:15	54:25	professor [13]	7:7	prosecutors [23]			pure [3]	55:3	25:14	34:13	56:15
60:4	62:16	88:15	92:23	92:24	40:23	58:12	73:12	95:14		65:12	65:21	113:1
90:18	108:15	113:6	94:12	94:14	81:18	84:24	85:2	purpose [6]	9:12	132:7	163:11	171:14
114:13	119:18	121:3	117:3	119:17	107:7	113:18	118:13	18:12	84:9	171:15		
136:21	136:23	145:23	185:17	185:18	119:4	120:24	128:20	165:24	166:10	quote [2]		188:4
146:11	149:3	150:7	program [4]	21:10	129:8	150:5	156:6	purposes [8]	9:7	189:6		
160:16	163:16	165:1	85:16	124:7	156:24	159:4	167:4	86:22	96:15			
167:23	167:25	173:1	prohibited [1]	49:4	167:10	167:12	178:25	105:13	106:6			
173:23	174:11	176:5	prohibition [1]	109:16	183:2	183:18		189:16				
177:12	177:18	178:14	project [1]	9:17	protect [3]		126:22	purview [2]	103:20			
183:11	183:18		promote [1]	25:20	168:25	183:2		105:17		radical [1]		121:18
problematic [6]	59:17		promoted [2]	142:18	protection [3]		23:19	put [16]	25:10	raise [1]		153:8
79:6	100:21	100:22	186:22		65:15	109:8		35:14	48:17	raised [1]		36:15
100:24	146:20		promotion [1]	153:8	proud [2]		3:13	56:21	65:3	ramification [1]		
problems [24]	32:8		promulgated [1]	120:23	3:14			79:9	82:17	151:19		
50:23	53:17	60:21	pronounces [1]	90:2	provable [3]		105:14	125:16	145:16	range [17]		14:14
75:7	87:6	103:2	pronouncing [1]	66:25	105:19	169:8		164:6	178:19	15:2	16:3	26:10
105:11	108:3	126:18	proof [4]	32:18	prove [5]		25:6	puts [1]	77:16	39:4	73:20	99:20
132:19	133:23	137:10	83:13	116:5	121:6	121:6	121:7	putting [2]	2:17	102:6	102:9	104:2
141:21	144:21	149:9	91:1	125:15	170:3			2:22		105:8	122:5	127:11
149:9	149:13	149:14	proper [5]	90:17	proven [2]		115:23			132:10	150:22	158:14
160:10	160:19	171:21	138:2		116:9					175:24		
183:10	187:10		properly [1]	108:22	provide [8]		21:8	-Q-		ranged [1]		127:12
procedural [2]	103:2		property [1]	22:19	21:13	26:7	51:19	qualifies [1]	185:10	ranges [4]		15:3
109:8			Proportionality [1]	37:5	95:3	108:2	130:20	quality [2]	16:11	128:10	151:10	151:13
Procedure [2]	20:7		proportionate [1]	28:16	147:20			31:8		rarely [1]		24:12
20:19			proposal [4]	157:3	provided [3]		21:1	quantification [1]		rate [1]		44:8
proceed [9]	14:6		proposals [1]	75:23	70:17	75:13		189:5		rather [17]		15:2
26:19	35:19	97:5	propose [2]	46:20	provides [4]		20:23	quantified [1]	180:20	44:2	55:9	94:24
98:20	123:15	131:18	46:21		25:3	153:5	153:6	quantify [1]	29:8	95:25	117:17	123:25
148:19	186:24		proposed [3]	16:9	providing [2]		20:12	quantities [2]	145:7	130:21	132:25	141:25
proceeding [3]	73:22		41:20	156:11	120:1			158:25		146:9	147:16	148:1
101:21	104:13		proposition [1]	10:10	proving [1]		25:2	quantity [29]	18:5	148:16	164:2	164:10
proceedings [3]	57:14		propose [2]	46:20	provision [8]		23:8	100:2	100:3	170:3		
58:3	104:19		46:21		89:16	95:1	95:7	143:24	144:23	ratio [7]	144:3	144:3
process [55]	3:8		proposed [3]	16:9	98:18	103:5	117:4	149:3	149:23	144:11	173:18	173:20
3:11	8:10	8:17	41:20	156:11	118:6			150:20	151:9	173:24	174:6	
8:19	9:8	10:4	propose [2]	46:20	provisions [3]		100:21	151:11	152:17	rational [2]		15:11
10:17	10:18	10:18	proposals [1]	75:23	102:20	102:25		158:7	158:9	29:15		
16:16	16:20	17:4	propose [2]	46:20	provocative [1]		66:9	161:11	162:1	rationality [1]		15:12
17:17	19:5	20:4	46:21		proxy [1]		171:18	166:5	166:11	Raymond [1]		142:20
22:6	24:2	24:9	proposed [3]	16:9	public [28]		1:2	166:17	167:21	re-comment [1]		46:1
26:15	34:8	38:18	41:20	156:11	8:16	10:12	10:18	172:17		re-sentencing [1]		
39:11	39:21	40:3	propose [2]	46:20	13:17	13:18	15:9	quantity-based [1]		42:16		
43:4	43:8	45:14	46:21		23:19	36:7	66:17	171:16		re-write [1]		45:25
45:15	54:21	55:21	proposed [3]	16:9	67:9	67:13	67:14	quarrel [1]	83:5	reach [3]		32:16
56:2	59:6	71:20	41:20	156:11	68:12	78:2	80:12	questioning [1]	142:14	32:17	52:9	
72:21	74:24	76:5	propose [2]	46:20	91:22	93:16	107:1	questions [32]	12:13	reaching [1]		85:1
76:21	77:4	78:1	46:21		129:3	142:21	142:24	17:17	18:5	reaction [5]		124:25
78:6	80:17	99:6	proposed [3]	16:9	152:12	164:23	175:4	36:15	43:18	127:3	140:8	140:11
99:8	101:1	101:24	41:20	156:11	175:6	175:7	175:15	44:1	44:3	140:11		
124:14	148:17	182:14	propose [2]	46:20	publish [2]		10:11	56:5	59:13	read [14]	46:6	49:17
182:21	184:5	186:13	46:21		11:3			66:7	70:1	52:6	56:3	57:14
188:16	189:16	190:9	proposed [3]	16:9	published [5]		10:25	84:4	87:1	57:19	71:12	76:19
processes [2]	93:14		41:20	156:11	20:23	21:6	27:21	102:16	110:5	91:24	92:1	115:25
101:15			propose [2]	46:20	97:13			112:21	138:10	132:4	178:7	191:6
produce [5]	24:15		46:21		pull [1]		27:2	162:24	167:1	readily [1]		169:7
29:20	61:2	120:10	proposed [3]	16:9	punishable [1]		78:3	180:24	181:17	reading [2]		104:22
187:20			41:20	156:11	punishment [6]		77:24	191:1		124:6		
produced [1]	62:22		propose [2]	46:20	77:24	80:15	98:5	quick [2]	87:15	ready [2]		26:19
producing [4]	25:13		46:21		98:7	105:3		171:9		35:19		
25:22	114:5	122:1	proposed [3]	16:9								
product [1]	29:22		41:20	156:11								

Reagan [1] 13:2	recognition [2] 50:6	56:11 76:22 113:15	51:13	21:13 64:22
real [22] 21:24 53:2	124:21	161:17 184:10	remanded [2] 42:16	researcher [2] 70:5
94:23 95:5 95:7	recognize [2] 39:23	regarding [1] 73:3	42:20	82:11
95:14 95:19 96:6	147:23	regardless [1] 29:9	remands [1] 52:13	resemble [1] 187:15
96:12 97:1 97:20	recognized [1] 183:9	Regional [1] 1:2	remark [2] 53:9	resembling [1] 117:20
97:23 98:12 98:16	recognizing [2] 54:9	Register [1] 11:1	68:23	Reset [1] 67:22
100:11 100:19 105:24	64:2	regularly [1] 75:14	remarks [12] 12:4	reside [1] 18:14
115:13 130:12 136:21	recommend [3] 187:3	regulates [1] 62:14	19:15 26:24 43:13	residivism [1] 158:24
152:4 185:9	187:8 188:21	rehabilitation [1] 23:19	63:11 66:9 68:1	resist [1] 189:4
realist [1] 133:21	recommendation [5] 23:17 186:10 187:1	Reilly [5] 7:11	72:19 122:22 123:15	reskill [1] 140:19
reality [4] 72:4	187:5 188:25	63:22 63:23 64:25	123:16 138:4	resolution [1] 17:18
105:15 117:23 146:2	recommended [3] 125:25 127:12 173:24	65:23	remedy [2] 117:8	resolve [4] 17:17
realize [7] 10:3	reconcile [1] 125:7	Reitz [8] 92:23	172:25	57:12 60:4 102:23
26:23 32:24 60:14	record [7] 30:10	93:24 94:14 117:3	remember [4] 2:11	resolved [4] 16:19
128:5 140:16 140:16	59:1 125:22 129:3	119:17 174:20 185:17	27:4 27:6 71:13	108:19 126:7 144:23
realized [2] 60:7	130:24 130:25 139:2	185:18	reminded [1] 43:12	resolving [2] 18:12
141:6	records [1] 130:5	reject [2] 129:13	reminds [1] 82:17	18:15
really [38] 2:12	recumbent [1] 104:15	129:13	remorse [1] 15:18	resources [5] 40:8
24:14 25:23 29:2	redesigned [1] 147:20	relate [1] 145:20	remove [1] 75:24	62:6 65:21 81:2
29:19 29:25 36:5	redraft [1] 188:2	related [12] 42:3	removed [1] 47:13	164:9
36:14 36:18 41:4	reduce [7] 22:5	76:1 103:17 128:3	rendered [2] 129:1	respect [18] 26:5
41:7 45:20 46:8	24:4 25:24 39:11	144:22 145:11 153:21	183:24	49:1 80:15 84:11
61:10 62:9 62:25	41:21 128:8 132:21	179:3 179:12 180:12	rendering [1] 185:8	91:10 112:11 112:25
65:5 72:4 78:15	reduced [1] 147:15	181:21 183:16	reopen [1] 42:21	116:25 157:16 157:18
79:1 79:6 83:10	reducing [2] 82:2	relationship [6] 68:15	reopening [1] 51:6	157:21 159:9 159:14
85:7 85:10 86:7	145:18	69:5 69:20 69:22	repeat [1] 27:5	168:14 169:22 170:14
91:3 108:1 108:21	reduction [1] 158:1	70:8 149:7	replace [2] 176:19	190:3 190:4
118:6 128:12 130:6	reductions [1] 40:20	relationships [1] 73:7	176:21	respects [1] 117:20
130:25 135:10 152:19	redundant [1] 184:13	relative [3] 56:20	replacing [1] 81:18	respond [3] 17:8
153:9 168:9 172:14	reempower [2] 155:21	87:3 146:17	reply [1] 85:12	161:24 162:7
172:21	157:13	relatively [7] 35:15	report [17] 17:13	responding [1] 74:16
reams [1] 99:11	reenter [3] 140:19	123:17 141:2 141:5	21:20 27:22 44:17	response [4] 140:15
reason [24] 15:5	141:13 141:16	144:25 146:4 189:25	56:21 70:15 73:2	164:21 165:11 165:11
15:10 16:4 24:7	reentry [1] 31:22	release [1] 139:15	73:5 73:9 75:8	responsibilities [1] 36:6
27:10 41:4 52:2	reference [3] 53:6	relevant [67] 73:19	75:9 75:19 99:18	responsibility [9] 15:19 34:20 62:7
52:12 55:24 57:23	129:22 176:4	75:23 76:2 87:11	129:23 182:24 183:24	64:3 77:7 77:15
84:21 90:4 106:19	references [1] 29:15	87:13 92:19 95:1	184:4	78:9 79:18 145:10
121:2 121:3 123:19	referencing [1] 30:5	95:6 98:18 99:14	reporter [1] 92:25	responsible [5] 20:12
128:22 129:21 163:18	referred [3] 53:16	99:21 100:16 100:21	reports [15] 20:1	72:16 172:15 172:16
167:25 177:25 179:13	107:11 117:5	100:23 101:10 102:1	20:3 20:12 20:18	182:23
188:4 190:22	referring [1] 164:21	102:5 102:20 102:24	21:3 23:14 64:22	responsive [1] 9:6
reasonable [14] 36:25	refers [1] 164:3	102:25 103:3 103:5	70:17 72:8 72:9	rest [3] 40:11 107:24
37:2 58:9 58:10	refine [1] 79:24	103:9 103:16 103:21	72:12 72:17 100:14	153:4
58:14 58:25 63:2	reflect [7] 24:2	104:4 104:25 105:8	102:13 102:23	restore [1] 26:14
63:8 83:14 109:3	36:9 112:22 118:2	105:23 106:5 107:13	represent [6] 32:11	restrict [1] 182:21
116:6 116:9 150:24	119:22 143:20 148:3	107:16 107:20 108:4	82:20 86:1 86:2	result [20] 4:4
157:22	reflected [2] 44:21	108:7 108:25 111:21	167:15 183:4	23:11 23:17 25:18
reasonably [1] 148:12	103:2	111:24 112:11 115:12	representative [3] 36:2 125:17 171:18	25:22 28:2 28:19
reasons [9] 55:16	reflection [1] 23:21	117:4 117:12 117:15	represented [3] 57:15	32:16 32:17 34:2
108:23 167:6 177:3	reflective [1] 126:13	118:6 119:2 119:14	163:3 170:19	34:10 34:15 51:1
179:22 180:4 184:16	reflects [3] 44:18	119:19 119:25 120:6	representing [1] 33:22	54:3 57:8 59:19
185:7 188:6	162:6 168:15	120:9 121:3 121:24	represents [1] 144:17	114:2 128:22 130:21
receive [6] 70:14	reform [9] 4:5	138:1 144:22 151:17	request [1] 114:9	182:11
81:21 81:23 166:7	38:9 40:18 74:23	157:17 157:18 157:19	require [3] 128:24	resulted [2] 110:1
166:8 173:19	120:5 121:20 123:1	157:21 157:23 160:21	129:2 187:2	112:5
received [5] 11:7	182:17 190:17	168:16 168:18 173:8	required [2] 138:17	results [23] 11:12
68:25 76:24 114:10	refuel [1] 29:2	173:9 176:5 176:19	185:3	25:14 56:9 56:25
141:20	refused [1] 151:24	relieves [1] 77:19	requirement [1] 184:1	60:20 61:2 61:5
receiving [2] 4:22	regard [9] 17:7	reluctance [2] 28:6	requires [2] 5:16	62:20 62:22 75:18
37:23	34:12 35:17 51:23	rely [2] 62:9 158:4	99:24	77:20 88:2 102:6
recent [6] 21:8		remain [1] 86:23	research [3] 8:7	113:3 113:20 114:6
44:16 44:17 75:3		remained [1] 4:19		114:9 114:10 114:15
130:16 160:19		remand [2] 51:7		114:18 115:8 116:23
recently [7] 10:25				
93:3 97:13 112:13				
123:4 125:20 129:17				
recess [1] 92:15				

151:16	93:20	148:2 148:23 148:23	190:22	sentenced [9]	16:2	
resume [1]	92:14	165:16	seeing [3]	46:23	83:13 124:16 133:9	
retain [1]	170:7	scenario [3]	47:4 88:1		134:19 140:10 140:21	
retained [2]	91:20	171:25 177:1	seek [1]	58:2	141:20 171:7	
167:15	role [46]	scenarios [1]	seem [6]	45:14 45:15	sentences [30]	16:3
retarded [1]	153:23	schedule [2]	49:12 114:20 146:1		28:16 37:3 37:23	
retool [1]	140:18	136:3	147:3		40:13 52:2 55:5	
retreat [1]	50:20	scheduled [1]	sees [1]	131:7	55:25 63:2 81:21	
retroactive [6]	38:22	scheme [7]	segment [1]	33:8	84:22 85:5 103:6	
40:7 40:20 40:25	145:9 145:20 145:23	29:14 32:13 46:24	selected [2]	21:5	106:9 117:22 121:15	
41:3 41:6	146:13 146:20 146:21	82:23 118:5 131:14	selecting [1]	37:11	132:17 132:18 141:9	
retroactivity [6]	146:22 147:4 147:8	scholarships [1]	selection [1]	97:21	156:20 156:23 157:2	
40:5 40:23 41:2	147:19 147:21 147:24	135:23	self [1]	51:5	157:4 158:18 160:18	
52:25 61:17 61:20	148:4 151:1 157:17	school [6]	sell [1]	146:7	161:1 161:20 165:20	
return [2]	159:9 159:14 159:17	13:7 13:8 80:6	selling [1]	153:10	sentencing [229]	
128:2	161:14 162:5 162:8	92:25 135:14	sells [1]	86:16	1:1 3:2 3:7	
revamping [1]	162:14 162:15 163:23	schooled [1]	seminars [2]	91:14	3:17 3:21 3:22	
149:2	166:11 172:23 173:2	scientist [1]	92:2		3:24 4:3 4:5	
reveal [1]	173:4 183:16	scope [3]	sen [1]	3:16	4:7 4:11 4:20	
reversals [1]	room [5]	172:20 172:24	Senate [2]	5:12	5:4 5:7 8:1	
52:10	50:6 68:16 151:12	Scranton [1]	7:1		8:2 8:10 8:14	
reversed [2]	rooms [1]	screen [1]	Senator [2]	7:3	14:13 14:15 14:16	
108:14	69:1	seal [1]	71:13		14:25 15:3 15:20	
128:15	rose [1]	search [2]	send [2]	144:10 191:10	15:25 16:5 16:17	
reverses [1]	73:15	54:1	sending [2]	127:17	16:23 17:3 17:6	
52:2	rough [1]	seasoned [1]	163:14		17:11 18:22 19:19	
review [7]	85:1	seats [1]	senile [1]	30:11	20:25 21:7 21:11	
17:12	routes [1]	66:11	senior [3]	6:19	21:14 22:6 22:8	
46:5 46:11 46:20	113:21	second [12]	93:10 142:17		23:16 24:2 24:8	
46:20 186:7 187:23	rubrick [1]	38:21 45:9 59:22	sense [21]	26:2	25:3 25:17 25:21	
reviewed [2]	42:13	80:21 96:9 133:24	26:14 29:19 47:23		26:9 26:15 26:25	
72:24	rudimentary [1]	147:18 168:2 187:5	49:19 50:2 50:3		27:13 27:14 27:18	
126:15	15:2	188:10 188:25	60:10 71:7 71:18		27:22 28:11 28:14	
reviewing [2]	ruined [1]	second-guess [1]	85:1 90:10 98:15		28:15 28:19 28:19	
72:16	137:7	141:10	100:22 117:25 125:2		30:1 30:16 32:9	
102:13	rule [7]	Secondly [2]	131:4 131:6 150:21		32:22 32:24 33:3	
reviews [1]	28:22 28:22 55:1	85:19	152:18 188:5		33:4 33:8 33:16	
100:14	99:23 183:19	seconds [3]	sensible [1]	152:16	33:18 33:25 34:3	
revisions [1]	rule-driven [1]	66:3 71:5	sent [2]	47:1 127:15	34:5 34:10 35:7	
39:5	24:24	section [18]	sentence [72]	3:24	35:23 36:18 37:1	
revived [1]	131:7 131:8	26:5 67:4 73:2	8:9 15:5 15:8		37:18 38:2 40:18	
79:9	rules [8]	73:5 99:21 102:21	15:10 15:11 15:21		42:20 42:21 46:19	
rewriting [1]	20:6 20:19	103:16 103:20 105:18	16:5 16:9 26:10		50:16 52:22 54:16	
161:9	26:13 42:8 45:23	125:13 130:15 156:12	29:8 34:22 35:5		54:18 54:20 55:10	
Richard [2]	53:1 116:6 149:13	176:3 176:18 177:15	35:6 36:20 37:6		55:12 55:18 55:20	
3:1	rumor [1]	187:9 189:4	37:11 37:21 40:19		55:21 55:23 57:6	
13:10	72:3	sections [4]	51:7 51:8 58:25		57:17 58:3 58:6	
rid [1]	72:3	73:6 103:17 184:13	59:20 60:6 73:10		60:15 68:18 70:14	
138:22	run [5]	see [57]	82:14 83:6 83:20		72:3 72:19 72:21	
104:16	64:22 107:1	6:6 11:10	89:4 97:3 106:12		73:8 73:14 73:17	
right [27]	161:19 161:24 174:8	16:15 23:21 25:12	106:24 108:12 115:4		74:8 74:11 74:23	
28:25	running [5]	31:18 31:20 32:7	115:18 116:10 116:21		74:23 75:2 75:5	
48:16 58:18 59:3	78:14 142:15 152:4	32:8 41:20 43:21	117:15 118:3 118:20		80:23 81:14 81:17	
67:1 67:6 69:9	181:14	49:8 50:19 53:12	119:9 121:23 129:10		83:2 84:10 87:17	
70:2 77:23 83:12	Rusty [1]	53:22 65:14 66:6	134:6 134:24 135:3		87:18 93:1 93:2	
90:9 92:5 92:8	124:10	70:20 71:11 78:12	135:4 135:9 137:12		93:5 93:14 94:20	
92:13 98:11 110:21		78:13 79:16 83:25	138:15 140:17 140:24		94:23 95:4 95:5	
118:8 122:16 127:6		92:6 96:5 98:17	141:11 141:21 141:22		95:12 95:14 95:21	
127:25 128:15 135:2		110:13 117:21 118:2	141:22 148:24 149:5		95:25 96:15 97:1	
139:9 142:4 142:9		122:17 127:20 127:25	157:25 168:1 168:6		97:15 97:18 97:20	
151:12 175:9		128:12 132:19 135:3	170:18 170:21 175:23		97:22 97:23 101:23	
rights [1]		139:23 143:14 151:6	175:24 179:19 179:20		102:3 102:15 103:18	
105:4		153:21 154:3 154:6	181:24 184:2 184:8		103:19 103:22 104:1	
rigid [3]		154:14 154:18 162:6			104:9 104:13 105:8	
25:7 25:19		162:12 171:21 171:25			105:13 106:1 106:3	
26:12		172:18 172:25 175:5			106:7 107:2 107:17	
risk [4]		175:6 177:13 177:18			108:11 109:5 109:9	
65:20 65:20		180:9 186:4 186:23			110:2 111:4 111:6	
121:25 161:24					112:3 114:21 115:6	
risks [1]					116:7 116:17 117:17	
70:10						
road [1]						
64:13						
robber [4]						
134:15 134:19 179:5						
134:10						
robbers [1]						
22:11						
22:12 26:5 58:20						
58:23 96:17 121:8						
121:9 121:13 121:13						
126:3 179:13						
Robert [2]						
13:21						

117:24	119:5	119:15	seven-year [1]	46:4	186:12	140:19	141:13	141:17	82:9	93:2	163:3
120:5	120:21	121:15	several [4]	6:25	simplifications [1]	socioeconomic [2]			164:22	164:23	
121:20	122:4	122:4	8:21	123:10	147:4	37:8	177:10		special [2]		72:5
123:20	124:1	126:8	severe [2]	151:14	simplified [1]	sold [1]	86:3		72:13		
126:10	127:22	128:19	160:15		simplify [9]	sole [1]	180:3		specialist [2]		72:13
131:23	133:15	133:19	severely [1]	179:19	19:2	solid [1]	79:13		142:19		
140:9	141:15	142:18	severity [1]	144:18	19:2	solutions [1]	41:20		specialize [1]		64:19
143:19	145:3	145:14	shame [1]	186:11	50:11	someone [14]	12:16		specialized [3]		21:21
150:13	155:5	155:10	shape [2]	2:21	54:6	16:14	20:16		22:2	24:11	
155:13	155:23	156:18	86:14		38:18	89:11	89:24		specific [14]		22:14
156:20	157:14	158:1	share [1]	124:17	147:8	98:10	120:19		23:7	39:13	50:22
158:15	159:3	159:11	shared [1]	96:8	176:24	121:1	124:18		51:2	83:20	144:15
161:13	161:19	163:9	shares [1]	61:18		135:3			145:17	150:2	157:16
163:12	165:15	168:5	sharp [1]	15:24		something's [1]	177:11		167:8	173:20	174:2
170:23	175:20	175:21	shift [3]	50:4		177:11			176:22		
176:12	179:15	179:16	90:5			sometimes [20]	8:2		specifically [7]		41:14
180:8	180:11	182:14	shifted [1]	16:20		10:19	17:23		52:24	57:25	81:25
182:21	184:5	184:7	shoot [1]	61:25		45:11	45:13		87:22	146:13	176:3
187:20	188:16	188:16	shoplifting [1]	149:21		59:2	59:2		specified [1]		26:10
189:1	189:9	189:15	shops [1]	30:4		74:11	75:19		spectrum [2]		166:1
189:17	190:17	190:18	short [6]	14:23		104:20	106:11		168:4		
190:18			161:14	178:6		125:3	128:21		speculation [1]		62:25
sentencings [1]	70:23		186:17			134:6			spend [5]		64:15
September [1]	123:6		shorter [2]	108:2		somewhat [15]	14:19		74:19	152:25	153:1
series [1]	24:5		178:17			14:22	36:1		153:16		
serious [8]	19:21		show [3]	30:25		58:22	65:8		spending [3]		33:21
36:15	96:16	126:18	128:25			98:17	107:3		140:2	164:9	
126:25	136:21	150:1	165:1			148:21	173:4		spent [8]		33:18
seriously [5]	8:7		seriously [5]	8:7		182:21	186:25		33:24	36:14	64:13
36:8	71:2	91:20	37:4	96:21		somewhere [1]	31:14		71:25	74:21	93:12
114:5			127:19			son [2]	30:12		94:20		
seriousness [5]	23:18		serve [6]	5:23		soon [3]	77:17		sphere [1]		160:17
37:4	96:21	126:13	8:13	64:3		174:12			spins [1]		32:20
127:19			158:17			sorry [3]	61:15		splits [2]		18:14
serve [6]	5:23	5:25	served [12]	3:21		180:25			18:16		
8:13	64:3	155:14	7:1	7:5		sort [18]	28:6		spoken [2]		80:20
158:17			67:8	72:5		32:11	46:2		94:25		
served [12]	3:21		92:25	93:17		49:12	58:23		sponsors [1]		157:11
7:1	7:5	54:10	123:1	123:11		82:17	96:1		Springs [1]		125:24
67:8	72:5	72:12				114:23	127:21		square [3]		28:24
92:25	93:17	102:14				132:14	141:12		29:1	85:25	
123:1	123:11					171:16			staff [8]		2:17
serves [6]	6:7					sorts [3]	47:8		7:23	28:1	34:2
6:12	6:15	7:7				188:19			64:5	95:10	176:2
7:20	122:25					sought [1]	119:24		stage [2]	108:14	126:8
services [2]	21:13					sound [3]	18:20		stagger [1]		150:8
130:3						20:7	142:9		staggering [1]		33:22
serving [3]	130:6					sounds [5]	56:12		stand [3]		63:17
136:6	136:17					56:21	57:1		67:18	155:2	
session [2]	5:2					64:10			standard [18]		109:7
140:6						source [1]	187:10		109:13	111:14	112:11
set [18]	4:10	17:10				sources [2]	41:25		112:14	112:19	115:24
22:6	22:8	36:4				62:9			146:1	147:15	166:11
39:8	39:8	43:18				South [1]	48:1		186:6	186:14	187:9
59:14	83:25	97:17				Southern [1]	159:18		187:12	187:22	188:3
100:1	110:21	120:21				spaces [1]	29:2		188:5	188:12	
129:22	131:15	179:2				spans [1]	182:15		standards [3]		92:25
181:1						speak [5]	15:7		97:14	162:8	
sets [1]	100:18					118:19			standing [2]		67:21
setting [2]	17:6					speaker [1]	98:22		177:8		
147:11						speakers [2]	12:14		start [8]		26:22
settled [3]	40:13					92:21			70:6	84:4	118:7
43:2	110:2					speaking [9]	11:6		143:15	175:11	178:5
seven [6]	5:10	46:3				11:6	15:6		started [4]		69:3
5:10	5:15										
170:22	175:18										

123:18 160:1 175:14	stop [1] 181:11	78:15 79:3 79:20	supplement [2] 43:12	106:16 107:2 107:5
starting [2] 97:17	story [2] 25:9 179:11	81:8 85:21 86:6	140:4	107:6 109:25 113:24
100:10	Stout [1] 1:4	89:5 90:14 125:21	supplemental [2]	114:5 114:21 115:13
state [33] 14:11	straight [1] 45:5	128:25 129:4 134:14	60:23 89:8	115:22 117:1 117:5
20:3 30:12 46:18	straightforward [1]	157:6 165:2 183:17	supplemented [1]	119:23 121:19 150:9
54:8 58:13 67:9	161:12	188:4 188:6	21:7	153:5 155:21 155:22
67:12 79:14 80:23	straitjacket [1] 125:2	substantially [6]	supplied [1] 76:12	155:23 155:25 156:2
84:16 87:17 87:23	strange [1] 151:16	47:14 117:14 126:2	supplier [4] 172:2	156:4 156:24 157:1
88:13 93:4 94:22	street [7] 1:4	189:10 190:2 190:4	172:2 172:8 172:12	159:8 159:25 163:17
94:24 96:19 96:20	27:8 31:14 144:9	substantive [2] 103:7	supply [1] 146:10	166:3 166:16 168:25
98:14 111:7 111:7	153:10 153:19 164:11	107:21	support [2] 101:25	169:13 169:22 170:4
111:12 112:4 126:5	strength [1] 77:1	subverting [1] 59:8	166:15	170:9 175:21 182:17
126:6 126:15 133:10	stress [1] 180:3	succeed [1] 135:17	supported [1] 132:12	182:23
175:6 175:15 175:17	strict [1] 25:8	successful [4] 30:24	supporters [1] 157:12	systemic [1] 114:6
175:20 188:3	strictly [2] 98:24	81:1 86:11 86:12	suppose [4] 17:22	systemically [1] 120:11
state-wide [1] 97:11	170:3	such [18] 9:21	47:17 167:2 175:11	systems [8] 80:24
statement [4] 17:6	strikes [4] 25:25	12:17 14:13 15:15	supposed [6] 60:11	94:21 95:4 96:8
21:2 180:23 187:20	53:19 117:20 163:12	23:17 40:11 52:3	64:8 107:4 119:3	96:25 97:11 98:14
statements [3] 131:17	strikingly [1] 20:15	52:4 65:10 95:11	119:12 119:14	188:4
145:12 191:5	strive [1] 56:9	95:13 104:17 110:16	supposing [1] 43:18	
states [34] 1:1	strives [1] 3:18	160:24 177:9 183:22	Supreme [2] 48:18	
3:2 3:24 4:8	striving [1] 3:15	189:9 189:15	108:18	
5:11 5:14 6:21	strong [2] 8:11	sudden [1] 134:21	surprise [1] 118:17	
6:22 7:10 8:1	169:19	suffer [1] 15:7	surprised [1] 77:8	
8:9 8:15 10:10	strongly [2] 41:5	suffered [1] 69:22	surprisingly [1] 148:25	
13:1 13:23 14:16	104:3	suffering [3] 16:4	148:25	
21:4 21:17 35:4	struck [5] 45:13	65:12 65:12	surrounding [1] 116:18	
36:10 52:5 58:9	53:6 53:16 76:13	sufficient [2] 68:4	Suzanne [1] 174:22	
58:11 72:25 86:15	87:17	109:8	sway [1] 170:9	
88:4 102:11 104:23	structure [6] 26:1	sufficiently [4] 59:25	sworn [1] 124:8	
104:24 123:13 155:10	46:17 56:10 161:18	110:22 110:24 162:9	symmetrical [1] 147:11	
156:5 185:21 188:14	171:22 190:24	suggest [14] 39:13	sympathetic [2] 86:5 86:5	
statistically [1] 88:9	structured [2] 9:12	40:1 41:25 42:12	synchophantic [1] 70:15	
statistics [3] 33:13	90:1	54:6 128:11 147:2	syndrome [1] 180:3	
44:17 159:21	structuring [1] 16:9	147:9 164:6 165:8	Syracuse [1] 181:15	
status [1] 177:10	struggle [3] 10:21	165:22 178:15 180:13	system [113] 3:14	
statute [6] 4:14	50:1 71:8	180:21	3:16 3:16 4:21	
5:13 5:16 7:12	struggled [3] 50:10	suggested [2] 188:2	10:20 10:24 15:2	
143:23 188:14	58:21 58:21	189:13	18:22 19:22 20:9	
statutes [4] 64:3	struggles [1] 135:11	suggesting [3] 147:6	20:16 22:10 23:11	
156:21 163:22 165:25	struggling [2] 9:3	150:21 163:20	23:22 24:4 24:14	
statutorily [1] 96:13	16:4	suggestion [9] 39:10	24:19 24:24 25:2	
statutory [3] 184:1	student [2] 135:14	71:6 117:19 165:24	25:7 25:13 25:20	
189:7 189:16	136:24	171:6 176:1 176:15	25:24 26:13 36:7	
stay [5] 64:20 80:12	studied [2] 9:10	178:7 178:18	36:19 37:20 38:4	
145:16 173:4 182:20	173:23	suggestions [6] 3:5	38:8 38:19 39:18	
staying [3] 2:10	studies [1] 87:19	3:10 9:23 145:18	41:21 43:3 47:4	
143:11 174:21	study [6] 38:13	186:17 186:24	48:17 50:8 53:9	
stem [2] 103:20 103:22	42:1 42:10 42:22	suggests [4] 107:19	53:11 53:20 53:25	
step [1] 45:11	47:2 162:11	113:6 162:4 176:21	54:2 54:3 54:6	
stepping [1] 151:14	studying [5] 39:21	suitable [1] 70:7	54:7 54:17 54:24	
steps [2] 38:16 160:19	41:12 161:3 173:17	summarize [2] 48:9	65:1 68:20 69:15	
sterile [1] 75:18	174:10	49:9	70:25 71:1 71:1	
still [14] 33:6 37:9	subject [4] 10:9	summer [1] 124:7	76:7 81:3 82:21	
38:1 43:3 48:20	45:7 79:8 130:9	supervise [1] 64:9	82:24 87:8 88:16	
56:4 111:1 116:7	subjective [2] 24:19	supervised [3] 65:5	90:18 91:4 91:6	
136:15 143:25 144:5	145:12	72:14 139:15	95:12 95:15 95:17	
145:11 161:2 187:21	submission [1] 43:14	supervising [5] 64:14	95:24 95:25 96:4	
stimulating [1] 43:8	submit [5] 79:1	66:22 71:24 72:6	96:5 96:11 96:19	
sting [2] 78:18 79:8	157:18 157:20 161:23	74:21	96:24 97:5 98:11	
stipulates [1] 104:7	163:7	supervision [6] 20:13	99:3 99:9 103:8	
stipulation [4] 99:25	substantial [21] 18:25	64:16 65:4 65:9		
100:9 100:10 101:3	34:21 77:8 78:13	65:11 65:14		
stood [3] 132:24		supervisor [4] 72:14		
136:25 137:6		132:4 132:6 132:10		

83:25 89:3 138:15	191:2 191:11 191:14	tiny [1] 5:20	transferred [9] 11:18	181:12
139:21 139:22 140:2	thanks [4] 66:11	to-wit [1] 163:25	72:10 118:12 128:19	trying [23] 8:8
142:14	94:15 133:4 162:22	Tobacco [1] 30:2	156:4 167:4 167:9	9:25 10:18 11:25
ten-minute [1] 92:13	theft [1] 162:19	today [20] 11:6	167:12 174:25	19:12 23:24 24:3
tend [2] 45:12 154:14	themselves [6] 30:3	11:6 19:18 20:17	transformation [2]	30:23 32:13 32:16
tends [2] 95:15	39:1 76:1 122:6	35:22 53:23 54:19	82:1 121:18	32:17 35:2 42:7
95:23	122:10 162:1	60:22 64:11 79:22	translate [2] 5:7	64:21 93:12 108:8
tension [1] 190:14	therefore [7] 15:23	95:2 123:9 123:10	10:13	130:13 130:15 133:18
tentative [1] 73:20	84:22 102:9 136:11	127:4 155:4 155:17	translates [1] 8:18	135:9 152:25 160:7
Tenth [10] 6:13	140:25 172:23 189:8	155:24 157:10 160:16	transported [1] 127:7	190:6
21:9 52:1 52:7	thinking [6] 16:6	186:11	travel [1] 3:6	tunnel [1] 141:23
52:8 52:16 104:24	89:12 150:18 187:15	Today's [1] 23:22	traveled [1] 156:16	turn [2] 62:11 172:11
105:2 179:25 182:15	187:17 189:15	toe [1] 36:4	treated [5] 31:25	turned [2] 70:1
tenure [1] 124:22	third [1] 31:21	together [3] 2:17	32:2 42:19 71:19	70:2
term [5] 19:4 95:23	third-party [1] 101:23	2:22 184:14	149:11	turning [2] 21:25
104:15 104:17 139:14	thirties [2] 131:12	too [20] 11:15 11:17	treating [1] 18:2	70:4
terminology [1] 96:1	141:3	32:24 43:3 50:4	treatment [1] 88:11	tweak [1] 28:23
terms [19] 18:1	Thoene [8] 93:6	53:6 56:25 59:9	tremendous [7] 33:8	twice [1] 150:19
23:3 38:18 48:25	93:7 93:7 93:8	70:10 85:8 120:25	36:13 40:8 109:21	two [35] 5:12 20:20
63:25 82:13 87:13	93:9 98:19 98:21	133:6 140:15 141:21	115:6 149:3 159:13	27:13 28:25 29:2
91:6 95:3 95:5	103:12	152:2 154:8 154:9	tremendously [2]	31:4 38:16 41:24
96:4 96:18 114:17	thought [22] 4:2	156:24 159:24 160:1	69:22 115:9	44:5 58:4 58:10
116:15 116:23 119:1	27:9 27:10 27:23	took [7] 30:14 71:2	trenches [1] 154:15	58:20 61:16 68:20
119:10 120:19 132:9	28:5 29:15 40:9	125:2 126:19 126:20	trial [19] 8:12 10:6	77:5 96:6 106:17
terribly [1] 89:13	50:22 51:9 61:24	130:23 170:24	34:15 48:19 77:12	106:21 134:16 135:23
terrific [1] 62:10	63:14 72:4 86:9	tool [2] 48:19 70:3	77:23 78:4 83:12	139:4 149:14 151:14
testified [2] 155:20	91:19 104:10 104:11	tools [1] 150:13	89:12 101:21 123:17	152:25 153:16 154:4
159:7	112:10 115:24 115:25	top [5] 61:25 64:20	136:10 136:11 136:13	154:6 154:8 156:13
testify [2] 94:18	136:4 140:14 159:19	149:2 165:15 171:24	152:1 170:25 175:15	165:22 167:1 174:22
170:24	thoughts [2] 127:21	topic [2] 42:10 68:5	180:8 187:15	182:14 186:17 186:24
testifying [3] 130:18	191:3	topics [2] 93:22	trials [2] 34:9 77:20	two-level [1] 132:2
158:1 170:15	thousand [1] 29:10	162:4	125:6 126:21 132:23	two-year [3] 32:5
testimony [14] 27:9	thousands [2] 81:18	torture [1] 60:8	tried [5] 22:5 70:9	40:2 52:23
52:21 66:7 76:12	131:19	total [2] 128:1 141:8	125:6 126:21 132:23	type [11] 5:3 27:12
85:22 100:15 130:19	threat [3] 22:16	totally [2] 137:7	tries [1] 24:4	32:1 59:20 78:18
156:3 157:24 160:8	22:22 22:24	166:16	Trigger [1] 30:1	114:12 135:10 144:14
167:7 170:17 170:23	threats [1] 23:9	touched [1] 167:6	trip [1] 29:18	144:23 151:2 171:23
171:8	three [10] 5:16	touchstones [2] 15:20	tripartide [1] 82:20	types [7] 32:8
Texas [2] 48:1	27:8 39:13 49:10	55:4	tripping [1] 30:3	32:20 32:20 96:6
156:15	49:10 58:5 58:11	touchy [1] 154:11	triumvirate [1] 68:19	97:20 97:22 136:17
thank [79] 2:15	61:16 80:6 97:6	tough [1] 54:23	trophy [1] 153:7	typical [1] 68:9
2:16 13:15 14:1	three-month [1] 86:3	tougher [3] 53:24	trouble [2] 120:25	
19:7 19:9 26:16	through [22] 14:21	54:1 54:1	139:16	-U-
26:17 35:17 35:18	16:19 17:2 35:15	tour [1] 102:14	troubled [4] 56:4	U.S [13] 31:5 56:15
35:20 43:8 43:10	55:22 61:24 69:9	towards [7] 28:9	127:4 127:14 128:17	64:4 71:24 93:18
44:3 49:7 51:16	97:3 99:8 99:12	50:4 74:9 95:18	troubles [1] 55:2	99:4 99:17 102:18
52:18 61:14 63:10	99:15 114:7 127:8	95:24 107:5 187:25	true [8] 26:13 46:15	113:2 113:10 118:19
63:19 65:23 66:2	127:8 132:23 148:10	tracks [1] 118:5	59:7 65:22 80:22	130:16 142:22
66:6 66:8 71:21	160:22 165:2 174:8	tradition [1] 108:13	82:7 88:9 116:15	UCC [2] 63:12 63:17
76:7 76:8 76:10	186:24 189:12 189:15	traditional [4] 11:13	truly [2] 55:11 91:1	ultimate [3] 34:22
80:1 80:2 83:22	throughout [4] 4:8	108:11 117:21 118:5	truth [2] 169:14 169:16	82:16 185:4
83:23 84:5 91:7	4:12 93:3 112:23	traffic [2] 144:8	try [42] 2:24 3:11	ultimately [1] 27:21
92:3 92:5 92:13	throw [1] 154:4	146:3	3:17 8:23 9:4	unable [1] 25:5
98:19 103:11 103:12	tick [1] 150:15	trafficking [2] 146:14	9:10 10:22 10:23	unaffected [1] 183:25
103:14 105:21 105:23	tight [1] 151:13	155:8	12:7 12:10 22:7	uncharged [2] 158:4
110:3 110:4 119:16	tightly [2] 16:1	training [1] 8:11	28:7 32:10 32:11	170:13
122:14 122:16 133:6	137:22	trains [1] 8:12	35:24 36:14 42:20	uncivilized [1] 78:3
138:3 138:5 142:4	time-consuming [1] 17:16	transaction [3] 149:13	43:22 48:2 56:9	unclear [1] 49:25
142:5 142:6 143:13	timekeeper [1] 33:19	149:17 151:2	57:11 58:21 70:9	uncorroborated [4]
148:17 148:18 154:25	times [3] 123:10	46:17 149:16 168:21	95:2 108:19 109:18	157:24 170:16 171:6
160:3 160:4 160:6	tinker [3] 79:24	transfer [2] 10:13	113:19 113:19 115:7	171:8
162:23 174:13 174:14	79:25 190:23	168:14	125:14 125:15 127:20	uncovered [1] 183:21
174:16 175:10 175:12			134:1 134:4 141:10	under [43] 5:7
182:7 182:10 185:14			142:12 142:13 145:19	7:11 14:16 16:5
185:16 185:18 189:21			161:18 165:5 174:5	16:10 23:21 30:17
189:22 189:24 190:25				

August 12, 1991

34:15	37:9	38:2	13:1	13:23	14:16	103:25	105:7	117:7	38:16	42:2	45:14	69:17	125:23	158:16
38:4	42:12	48:14	21:4	21:17	35:4	129:15	130:7	145:22	57:3	61:8	64:6	Webb [1]		180:5
54:10	60:20	61:8	36:10	52:5	58:9	153:14	154:3	158:17	65:6	81:5	81:8	week [3]	33:23	88:5
61:20	64:3	65:1	58:11	72:25	86:15	172:25	177:6		82:1	84:11	105:25	166:22		
65:3	69:5	69:18	102:11	104:23	123:13	useful [3]		87:9	108:14	108:20	114:3	weekend [1]		104:10
69:18	97:24	98:17	155:10	156:5	185:21	123:23	133:3		117:23	117:23	161:10	weeks [1]		58:20
105:17	109:12	110:23	units [1]	21:21		useless [2]		25:5	168:10	190:1		weigh [1]		136:24
117:11	120:1	121:22	University [4]		7:8	114:15			viewed [1]		183:2	weighed [2]		35:14
129:2	129:10	129:20	13:6	92:24	143:4	uses [1]	100:10		views [6]		36:9	135:21		
130:14	130:18	137:16	unjust [12]		57:1	using [8]		11:23	36:10	144:6	155:5	weight [2]		26:25
140:24	149:22	158:14	60:20	61:2	62:20	32:13	45:16	109:12	174:8	174:10		147:17		
167:3	168:2	168:2	89:10	114:2	114:5	116:9	126:3	145:7	Villano [1]		104:23	Weinsheink [1]	160:25	
underage [1]		131:25	114:9	114:14	114:15	148:1			violating [1]		128:15	Weinshienk [18]		
undercover [1]		86:17	114:16	159:1		usual [2]		177:22	violence [8]		125:7	92:6	92:10	93:25
undergone [1]		39:2	unless [7]		12:16	182:1			144:9	144:14	151:4	94:3	122:18	123:9
undergraduate [1]			33:10	41:3	95:22	usually [2]		82:5	151:6	158:17	158:24	124:23	133:5	133:6
13:6			103:7	115:23	179:11	90:19			170:20			138:12	138:20	139:6
underlying [6]	111:15		Unlike [1]		146:21	Utah [1]	7:8		violent [2]		30:7	139:9	140:4	140:11
148:15	188:15	189:16	unnecessary [2]			utilized [1]		125:13	144:12			140:22	141:19	142:5
190:8	190:24		151:16	184:12		Uzi [1]	149:16		Virginia [2]		175:3	weird [1]		154:12
undermines [1]	54:25		unorganized [1]						186:20			welcome [5]		3:4
underpinnings [1]		115:21	146:4						virtually [2]		124:1	48:24	49:5	63:20
underrepresented [1]		125:12	unquestionably [1]		37:19				175:22			92:4		
understand [16]	15:12		Unrelated [1]		154:5				virtue [5]		31:13	welcomed [1]		75:3
50:1	58:14	67:19	unsettling [2]		18:21				113:8	118:24	119:5	Western [1]		156:15
80:11	80:12	84:18	18:23						121:19			wheelchair [4]		179:5
95:23	122:21	128:6	unusual [2]		181:20				visited [1]		140:6	179:6	179:12	179:23
131:7	143:7	149:5	181:25						vogue [1]		30:2	whereas [3]		76:23
161:2	174:24	182:19	unwarranted [1]						volumes [1]		20:20	109:13	113:4	
undertake [1]		46:11	114:22						voting [3]		5:10	whereby [1]		131:14
undertaken [2]	38:13		unwieldy [1]		17:16				5:15	7:9		wherein [1]		106:10
173:10			unwilling [1]		25:6				vs [3]	104:23	130:16	wherever [1]		48:1
undertook [1]	45:25		unworkable [1]		19:6				185:21			whichever [1]		67:18
underwhelmed [1]		114:10	up [43]	2:7	5:9				vulnerable [1]		24:19	white [2]		1:3
undoubtedly [2]		38:3	22:9	23:1	30:8							18:7		
undue [1]	26:24		36:4	44:7	44:12				-W-			whole [15]		11:14
unfair [3]	87:25		45:5	56:13	57:12				wait [2]	186:4	190:22	33:7	42:21	51:7
89:13	170:17		57:18	57:22	64:23				walking [1]		175:21	61:7	71:25	80:16
unfairly [1]	156:1		67:21	69:16	77:5				walks [1]		86:18	81:25	87:2	90:21
unfairness [3]	106:9		77:9	85:5	104:2				Wall [1]	174:22		95:17	125:10	126:5
110:1	112:1		120:8	125:14	126:19				wants [3]		53:24	128:6	128:9	
unfortunate [1]	23:11		126:20	127:13	127:17				56:3	101:20		wholeheartedly [1]		19:2
unguided [1]	38:4		128:10	129:22	130:24				ward [1]	169:13		wholesale [1]		161:8
uniform [5]	14:21		131:15	132:7	149:10				warrant [1]		185:14	wide [7]	8:5	14:14
46:15	53:6	140:15	153:2	153:4	153:16				warranted [3]		43:5	15:1	15:22	16:2
190:19			154:4	159:22	165:15				130:14	132:16		55:5	112:4	
uniformity [14]	22:5		170:18	170:25	175:23				washed [1]		14:10	wife [2]	86:14	86:18
24:15	25:8	33:15	178:12	181:13					Washington [6]	7:22		wild [1]	154:6	
36:25	37:1	106:2	updated [1]		5:1				45:12	45:21	47:7	willful [1]		130:20
113:8	119:23	119:24	updates [1]		21:7				47:18	156:16		willing [2]		33:1
120:4	121:25	182:19	uphold [1]		101:20				waste [1]		152:10	174:3		
190:21			upper [1]		166:13				watching [1]		18:22	willingly [1]		32:21
uninvited [1]	75:5		upset [2]		40:15				water [1]		64:18	wise [2]	186:4	190:5
unique [3]	96:24		107:13		107:12				Wayne [1]		6:18	wisely [1]		57:11
147:24	184:20		upsetting [1]		116:22				ways [7]	9:4	9:14	wish [4]	47:1	137:11
unit [2]	72:6	72:15	upward [1]		116:22				23:6	53:19	54:5	142:11	191:4	
United [31]	1:1		urge [7]	39:20	40:21				64:18	137:12		wished [1]		43:12
3:2	3:24	4:8	41:5	103:24	104:3				weakness [1]		77:1	wishes [1]		191:13
5:11	5:14	6:21	107:21	110:1					weapon [8]		22:16	withhold [1]		119:12
6:22	7:10	8:1	USC [1]	156:12					22:23	22:25	22:25	within [29]		4:16
8:9	8:15	10:10	used [21]		4:11				23:3	101:7	109:13	10:19	10:22	14:14
			4:20	22:1	23:1				121:10			16:2	26:10	37:11
			23:4	33:6	62:1				weapons [4]		23:9			
			75:18	91:3	103:5									

47:21	48:21	49:2	156:4	166:7	177:11
50:22	51:18	55:5	wrote [3]		27:19
90:17	97:25	108:24	46:6	73:1	
111:20	111:24	111:24	wrought [2]		33:4
113:24	122:4	133:19	76:14		
147:25	150:25	151:10			
164:24	168:9	182:14			
189:6					
without [12]	37:21				
37:22	41:22	54:12			
74:14	107:20	125:7			
128:1	128:15	144:5			
149:20	183:5				
witnesses [6]	12:5				
69:25	71:19	102:2			
106:19	170:15				
woman [9]	30:19				
59:23	135:14	135:21			
136:16	138:14	139:18			
141:2	141:20				
women [2]	140:12				
156:2					
women's [1]	140:12				
wonderful [5]	53:11				
64:5	87:4	113:14			
128:7					
wondering [3]	62:8				
84:11	113:7				
wool [1]	154:20				
word [2]	45:18	164:19			
wording [2]	165:24				
187:12					
words [8]	26:3				
34:17	45:16	45:21			
64:9	116:17	122:9			
179:18					
workable [1]	80:1				
worked [9]	2:17				
10:21	47:4	57:20			
58:8	68:3	70:12			
70:25	159:25				
works [3]	57:24				
134:7	171:18				
world [4]	3:12				
28:17	98:12	98:16			
worried [1]	19:11				
worry [2]	137:4				
137:11					
worrying [1]	37:22				
worse [2]	76:6				
144:7					
worst [4]	81:7				
159:5	169:21	169:22			
worth [3]	27:9				
43:1	141:12				
wrap [1]	181:12				
write [3]	72:8	72:11			
131:18					
writers [1]	21:20				
writing [1]	87:12				
written [6]	43:13				
45:7	93:1	94:22			
98:24	191:5				
wrong [7]	135:25				
140:16	155:25	156:2			

156:4 166:7 177:11
wrote [3] 27:19
46:6 73:1
wrought [2] 33:4
76:14

-Y-

yardstick [1] 158:9
year [8] 9:4 38:21
39:15 56:12 91:14
123:24 164:15 164:17
years [53] 10:21
14:9 26:23 27:6
27:13 27:15 29:13
30:11 31:16 33:5
38:24 40:16 45:18
46:4 53:2 53:7
53:9 56:18 67:9
67:15 68:5 75:3
76:14 76:16 86:19
89:3 89:22 102:12
102:18 107:15 114:9
127:16 127:16 127:17
138:15 138:16 139:2
139:21 139:22 140:2
141:25 142:24 152:25
153:17 153:21 154:2
155:9 155:9 160:19
166:4 170:22 173:8
175:18
yet [5] 53:25 106:21
123:21 123:21 169:24
York [5] 6:24 72:2
72:5 159:16 159:21
young [21] 2:7
7:8 30:18 59:23
59:23 131:11 134:11
135:13 135:15 135:21
136:16 136:24 138:14
139:10 139:17 139:18
141:2 141:3 141:5
170:19 171:1
younger [3] 91:19
134:17 134:22
yourself [2] 15:13
85:17