

UNITED STATES SENTENCING COMMISSION

+ + + + +

PUBLIC HEARING ON
PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

+ + + + +

THURSDAY,
MARCH 13, 2014

+ + + + +

The United States Sentencing Commission met in the Leonidas Ralph Mecham Conference Center, One Columbus Circle NE, Washington, DC, at 9:00 a.m., Patti Saris, Chair, presiding.

PRESENT

PATTI SARIS, Chair
CHARLES BREYER, Vice Chair
RICARDO HINOJOSA, Vice Chair
KETANJI BROWN JACKSON, Vice Chair
RACHEL BARKOW, Commissioner
DABNEY FRIEDRICH, Commissioner
WILLIAM PRYOR, Commissioner
JONATHAN WROBLEWSKI, Ex Officio,
Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

ALSO PRESENT

CHRIS BOEHM, Assistant Director,
Investigations and Internal Affairs,
U.S. Forest Service

TERESA BRANTLEY, Chair, Probation Officers
Advisory Group

DAVID DEBOLD, Chair, Practitioners Advisory
Group

ALAN DUBOIS, First Assistant Federal Public
Defender, Eastern District of North
Carolina

HON. ERIC H. HOLDER, JR., Attorney General
of the United States

MICHAEL MCCRUM, Member, Practitioners
Advisory Group

RAYMOND F. MORROGH, Director at Large,
National District Attorneys
Association

VIKRANT REDDY, Senior Policy Analyst, Right
on Crime/Texas Policy Foundation

MOLLY ROTH, Assistant Federal Public
Defender, Western District of Texas

CHARLES E. SAMUELS, JR., Director, Federal
Bureau of Prisons

HON. KIRK G. SAUNOOKE, Associate Judge, The
Cherokee Court, Eastern Band of
Cherokee Indians

JULIE STEWART, President, Families Against
Mandatory Minimums

ROBERT ZAUZMER, Chief of Appeals, Eastern
District of Pennsylvania, U.S. Department
of Justice

KRISTEN ZGOBA, Supervisor of Research and
Evaluation, New Jersey Department of
Corrections

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

T-A-B-L-E O-F C-O-N-T-E-N-T-S

Panel IA Drugs: Executive Branch Views I Hon. Eric H. Holder, Jr.....	12
Panel IB Drugs: Executive Branch Views II	45
<p>Charles E. Samuels, Jr. Director, Federal Bureau of Prisons</p> <p>Chris Boehm Assistant Director, Investigations and Internal Affairs, U.S. Forest Service</p>	
Panel II Drugs: Defense Bar Views	83
<p>Molly Roth Assistant Federal Public Defender</p> <p>David Debold Chair Practitioners Advisory Group</p>	
Panel III Drugs: Community & Law Enforcement Views	123
<p>Julie Stewart President Families Against Mandatory Minimums</p> <p>Vikrant Reddy Senior Policy Analyst Right on Crime/Texas Public Policy Foundation</p>	

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

Panel IV Felon in Possession Amendment .. 175

Robert Zauzmer
 Chief of Appeals, Eastern District
 of Pennsylvania, U.S. Department
 of Justice

Alan DuBois
 First Assistant Federal Public
 Defender, Eastern District of
 North Carolina

Michael McCrum
 Member, Practitioners Advisory
 Group

Teresa Brantley
 Chair, Probation Officers
 Advisory Group

Panel V Violence Against Women Act and
 Miscellaneous Amendments 225

by Hon. Kirk G. Saunooke
 Associate Judge, The Cherokee
 Court, Eastern Band of Cherokee
 Indians

Dr. Kristen Zgoba
 Supervisor of Research
 and Evaluation, New Jersey
 Department of Corrections

Robert Zauzmer
 Chief of Appeals, Eastern District
 of Pennsylvania, U.S. Department
 of Justice

Alan DuBois
 First Assistant Federal Public
 Defender, Eastern District of
 North Carolina

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
 1323 RHODE ISLAND AVE., N.W.
 WASHINGTON, D.C. 20005-3701

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

2 (9:05 a.m.)

3 CHAIR SARIS: Good morning. Good
4 morning to everyone. I want to welcome
5 everybody to the Sentencing Commission's
6 Hearing on our proposed amendments to the
7 federal sentencing guidelines for this year.
8 I also want to welcome our witnesses and the
9 public who have come. Many of you are sitting
10 in this room, many are sitting in overflow
11 rooms, so thank you to all of you.

12 We are particularly honored to have
13 the Attorney General of the United States, Eric
14 Holder, joining us this morning. His presence
15 is an indication of the very important issues
16 in federal sentencing, particularly, in the
17 area of drug sentencing.

18 I look forward to hearing his
19 testimony and discussing key sentencing policy
20 considerations with him today. I also look
21 forward to hearing from the other distinguished
22 witnesses, judges, prosecutors, defense

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 attorneys, probation officers, senior
2 officials, law enforcement officers, policy
3 experts, and advocates who've come from all
4 over the country to share their thoughts with
5 us.

6 When the Commission identified its
7 priorities for this amendment cycle last
8 summer, we set out, as an overarching priority,
9 reducing the costs of incarceration and the
10 overcapacity of the prisons, one of the
11 purposes set out in the statute that first
12 established the Commission.

13 The Commission hopes to find ways to
14 reduce prison populations and costs without
15 endangering public safety. Since drug
16 offenders make up the majority of the federal
17 prison populations, drug sentences were a
18 logical place to start.

19 The Commission has published a
20 proposed amendment to reduce guideline levels
21 with drug quantities across all drug types. We
22 look forward to hearing from the Attorney

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 General, and many of the other witnesses today,
2 as to whether this proposed amendment will
3 reduce prison populations and costs in a way
4 that is fair and proportionate and does not
5 endanger public safety.

6 We also are examining whether
7 guidelines for drug sentences adequately
8 account for environmental and other harms from
9 the cultivation of marijuana. On these drug
10 sentencing issues we will here, first, from the
11 Attorney General, then from the Director of the
12 Bureau of Prisons, Director Samuels, and Chris
13 Boehm, an expert from the United States Forest
14 Service within the Department of Agriculture.

15 We will then hear a panel of defense
16 bar view and a panel of community and law
17 enforcement experts. We're considering other
18 important amendments today. We're looking at
19 guidelines to resolve certain circuit
20 conflicts about when and to what extent the
21 commission of other crimes should be considered
22 when sentencing offenders convicted of being

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 felons in possession of a firearm.

2 On our final panel, we are glad to
3 finally have a chance to hear from Judge Kirk
4 Saunooke, who is from the Eastern Band of the
5 Cherokee Nation, Cherokee Indians, who was
6 prevented by weather from attending, not just
7 weather, the last hearing was in the middle of
8 a snowstorm and he got stuck at the airport, so
9 he's coming in to talk to us about the Violence
10 Against Women Reauthorization Act.

11 We'll also be hearing from experts
12 on a number of other sentencing issues,
13 including how to address supervised release for
14 sex offenders. Public comment period is now
15 closed. We've received boxes of letters. We
16 hope to hear from many of you, in addition to
17 today's witnesses, about the proposed
18 amendments.

19 Welcome to all of you and we look
20 forward to a lively discussion. Now, I want to
21 introduce the other members of my Commission.
22 Seated immediately to my right is Judge Ricardo

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Hinojosa. Judge Hinojosa is the chief
2 district judge for the Southern District of
3 Texas, and has been the district judge on that
4 court since, wait, I know you won't believe it,
5 1983.

6 Judge Hinojosa has served on the
7 Commission since 2003. He's now a Vice Chair
8 and he used to be the Chair of this Commission.
9 Next to him is Judge Charles Breyer. He is a
10 senior district judge for the Northern District
11 of California. Judge Breyer has served as a
12 United States district judge since 1998.

13 He joined the Commission last year
14 and also serves as a Vice Chair. Next is Judge
15 William H. Pryor, who also joined the
16 Commission this year. Judge Pryor is a United
17 States circuit judge for the 11th Circuit Court
18 of Appeals, appointed in 2004.

19 Before his appointment to the
20 federal bench, Judge Pryor served as Attorney
21 General for the State of Alabama. Next is
22 Rachel Barkow, our other new Commissioner.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Commissioner Barkow is a Segal Family Professor
2 of Regulatory Law and Policy at New York
3 University School of Law, where she focuses her
4 teaching and research on criminal and
5 administrative law.

6 She also serves as the faculty
7 director at NYU of the center on the
8 administration of criminal law at the law
9 school. Next to me, on my left, is Judge
10 Ketanji Brown Jackson. Judge Jackson was
11 confirmed as a United States District Judge for
12 the District of Columbia last year. She has
13 served as Vice Chair of the Commission since
14 2010.

15 Next to her is Dabney Friedrich, who
16 has served on the Commission since 2006.
17 Immediately prior to her appointment to the
18 Commission, Commissioner Friedrich served as
19 associate counsel at the White House.

20 She served as counsel to Chairman
21 Orrin Hatch of the United States Senate
22 Judiciary Committee, and as an Assistant U.S.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Attorney for the Southern District of
2 California, and then for the Eastern District
3 of Virginia.

4 And finally, next to Commissioner
5 Friedrich is Jonathan Wroblewski.
6 Commissioner Wroblewski is the designated
7 ex-officio member of the United States
8 Sentencing Commission representing the
9 Department of Justice. Mr. Wroblewski serves
10 as Director of the Office of Policy and
11 Legislation in the Department's Criminal
12 Division.

13 So we begin, of course, with the
14 Attorney General. And Mr. Holder, just a
15 little bit more on him, although, everybody, of
16 course, knows who he is. He was nominated to
17 serve as the Attorney General of the United
18 States by President Barrack Obama and has
19 served in that capacity since February 3, 2009.

20 Mr. Holder was named by President
21 Clinton to be the Deputy Attorney General, and
22 prior to that, he served as the U.S. Attorney

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 for the District of Columbia. In 1988, Mr.
2 Holder was nominated by President Reagan to
3 become an Associate Judge at the Superior Court
4 of the District of Columbia.

5 And prior to become A.G., he was a
6 litigation partner at Covington & Burling in
7 Washington, D.C. So enough of the
8 introductory comments and we're thrilled to
9 have you. You have the floor.

10 HON. HOLDER: All right. Well,
11 thank you so much, Chief Judge Saris and members
12 of the Commission. Good morning, and thank you
13 for the invitation to appear before you, and to
14 discuss our shared goals, and to provide the
15 Justice Department's views on proposed changes
16 to the federal sentencing guidelines related to
17 certain drug trafficking crimes.

18 Now, in particular, I appreciate
19 the opportunity to speak in support of the
20 amendments that are under consideration today.
21 The Department strongly supports the
22 Commission's proposed change to the drug

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 quantity table.

2 If adopted, this amendment would
3 lower, by two levels, the base offense levels
4 associated with various drug quantities
5 involved in drug trafficking crimes. This
6 would have the effect of moderately reducing
7 guideline penalties for drug trafficking
8 offenses, while keeping the guidelines
9 consistent with current statutory minimums,
10 and continuing to ensure tough penalties for
11 violent criminals, career criminals, or those
12 who use weapons when committing drug crimes.

13 Now, this straightforward
14 adjustment to sentencing ranges, while
15 measured in scope, would, nonetheless, I
16 believe, send a strong message about the
17 fairness of our criminal justice system. And
18 it would help to reign in federal prison
19 spending, while focusing limited resources on
20 the most serious threat to public safety.

21 Now, let me be clear, my primary
22 obligation as Attorney General of the United

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 States is to ensure the safety of the American
2 people. The changes that I have implemented
3 over the past year are designed to do exactly
4 that, while making our system more fair and more
5 efficient at the same time.

6 This proposed amendment is
7 consistent with the Smart on Crime Initiative
8 that I announced last August. Its
9 implementation would further our ongoing
10 effort to advance common sense criminal justice
11 reforms, and it would deepen the Department's
12 work to make the federal criminal justice
13 system both more effective and more efficient
14 when battling crime in the conditions and the
15 behaviors that breed it.

16 As it stands, and as this Commission
17 has recognized, certain types of cases result
18 in too many Americans going to prison for too
19 long, and at times, for no truly good law
20 enforcement reason. Although the United
21 States comprises just 5 percent of the world's
22 population, we incarcerate almost a 1/4 of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 world's prisoners.

2 One in twenty-eight American
3 children currently has a parent behind bars.
4 State and federal governments spend a combined,
5 or spend a combined, \$80 billion on
6 incarceration during 2010 alone. And as you
7 know, of the more than 216,000 current federal
8 inmates, nearly half are serving time for
9 drug-related crimes.

10 Now, this focused reliance on
11 incarceration is not just financially
12 unsustainable, it comes with human and moral
13 costs that are impossible to calculate. And
14 that's why in recent years, under the
15 leadership of President Obama, and alongside
16 Members of this Commission, and support of
17 policymakers, as well as prosecutors, and with
18 the expertise of advocates, researchers, law
19 enforcement officials, and government leaders
20 on both sides of the aisle, we have taken
21 significant steps to improve criminal justice
22 policies and implement targeted reforms.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And I'm particularly proud of the
2 work that we did together to reduce the
3 inappropriate, and I think unjust, 100 to 1
4 sentencing disparity between crack and powder
5 cocaine. A disparity that this Commission had
6 correctly found to be unjustifiable and which
7 President Obama alleviated with the signing of
8 the Fair Sentencing Act of 2010.

9 Just over a year ago, in an effort
10 to take our collective work to the next level,
11 I launched a targeted Justice Department review
12 of the federal criminal justice system to
13 identify areas for improvement, and to seek
14 ways to make the system more efficient, more
15 effective, and more closely aligned with our
16 highest ideals, while not sacrificing our duty
17 to promote public safety.

18 Last August in a speech, I announced
19 a new Smart on Crime Initiative, based on the
20 results of this review, and it is already
21 allowing the Justice Department to make
22 critical improvements, to conserve precious

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 resources, to improve outcomes, and to disrupt
2 the destructive cycle of poverty,
3 incarceration, and crime. It traps too many
4 Americans, and that weakens entire
5 communities.

6 Now, among the key changes that I
7 mandated as part of this initiative is a
8 modification of the Justice Department's
9 charging policies to ensure that people
10 convicted of certain low-level, non-violent,
11 federal drug crimes will face sentences
12 appropriate to their individual conduct,
13 rather than stringent mandatory minimums,
14 which will now be applied only to the most
15 serious criminals.

16 The Commission's proposed
17 amendment to the federal sentencing guidelines
18 would help to further advance and to
19 institutionalize this work, controlling the
20 federal prison population and ensuring just and
21 proportional sentences.

22 I am pleased to note that this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 approach enjoys significant bipartisan support
2 on Capitol Hill, where a number of leaders,
3 including Senators Patrick Leahy, Dick Durbin,
4 and Mike Lee, along with Representatives Bobby
5 Scott and Raul Labrador, have introduced
6 legislation that would give judges more
7 discretion in determining appropriate
8 sentences for those convicted of certain
9 crimes.

10 By reserving the most severe
11 penalties for dangerous and violent drug
12 traffickers, we can better promote public
13 safety, deterrence, and rehabilitation, while
14 saving billions of dollars and strengthening
15 communities.

16 And as my colleagues and I work with
17 Congress to refine and to pass this
18 legislation, we are simultaneously moving
19 forward with a range of other reforms. We're
20 investing evidence-based diversion programs,
21 like drug treatment initiatives and veterans
22 courts that can serve as alternatives to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 incarceration in some cases.

2 We are working to reduce
3 unnecessary collateral consequences for
4 formerly incarcerated individuals seeking to
5 rejoin their communities. And we are building
6 on innovative, data-driven reinvestment
7 strategies that have, in many cases, been
8 pioneered at the state level.

9 In recent years, no fewer than 17
10 states, supported by the Department's Justice
11 Reinvestment Initiative, and led by officials
12 from both parties, have directed significant
13 funding away from prison construction and
14 toward evidence-based programs and services,
15 like, supervision and drug treatment that are
16 proven to reduce recidivism, while improving
17 public safety.

18 Now, rather than increasing costs,
19 in a report funded by the Bureau of Justice
20 Assistance, projects that these states will
21 actually save \$4.6 billion over a ten-year
22 period. Many have already seen drops in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 recidivism rates, as well as overall crime
2 rates, even as their prison populations have
3 declined.

4 And although the full impact of our
5 Justice Reinvestment policies and other
6 reforms remains to be seen, it is clear that
7 these efforts are bearing fruit and showing
8 significant promise across the country. I
9 think we can be encouraged by this ongoing work,
10 which is enabling us to better promote public
11 safety, deterrence, and rehabilitation while
12 making our expenditures smarter and more
13 productive.

14 Yet, each of us is here this morning
15 because we recognize that we cannot yet be
16 satisfied, and a great deal of work remains to
17 be done. By adopting these proposed
18 amendments to the federal sentencing
19 guidelines, this Commission can take, I
20 believe, an important step to allow judges to
21 make common sense determinations, to provide
22 legal professionals and law enforcement

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 leaders with the 21st-century solution that
2 they need to address 21st-century challenges,
3 and to build on the progress that we've already
4 seen in constructing a criminal justice system
5 that deters and punishes crime, keeps us safe,
6 and ensures that those who have paid their debts
7 have a chance to become productive citizens
8 once again.

9 As the Commission considers these
10 and other actions, and as you hear testimony
11 from a diverse group of expert panelists over
12 the course of today's hearing, I urge you to
13 seize this opportunity to make our criminal
14 justice system more fair and to keep the
15 American people more safe.

16 I look forward to continuing to work
17 closely with each of you, and with leaders in
18 Congress, and throughout our administration,
19 to strengthen America's criminal justice
20 system, and to forge the more just society that
21 everyone in this country deserves.

22 So I want to thank you once again for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the opportunity to appear before you today and
2 I would be happy to take a few questions at this
3 time.

4 CHAIR SARIS: Why don't I start it
5 off and thank you for your remarks. The
6 departments have experience with reductions in
7 the guidelines when the crack powder guidelines
8 were reduced, so what is your experience in
9 terms of public safety, cooperation, the
10 ability to go after high-level offenders?

11 HON. HOLDER: I think with the
12 reduction in the crack penalty, we have not seen
13 any falloff in the level of cooperation that we
14 have seen from those offenders, which would
15 have been a very legitimate concern, but the
16 statistics released by this Commission, the
17 Commission's data, shows that, in fact, that
18 has not occurred.

19 At the same time, I think that those
20 changes have encouraged a greater sense of
21 fairness, a greater belief in the system, which
22 ultimately encourages people to cooperate, to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 share information with police officers,
2 federal law enforcement officials, it makes the
3 system, I think, more effective, more
4 efficient, and the perception of fairness, I
5 don't know, I don't think can be
6 underestimated.

7 VICE CHAIR BREYER: General, thank
8 you very much for your time. Thanks for your
9 comments. Do you think the anticipated
10 savings of, perhaps, over a period of time,
11 maybe billions of dollars in savings by
12 reducing lengthy sentences for these offenses,
13 that some of those savings can be devoted to
14 programs such as re-entry courts, increased
15 supervision on supervised released, drug
16 testing, some rehabilitative efforts?

17 HON. HOLDER: That's precisely
18 what we want to do, Judge. Take these savings
19 and use them in, what I had described as
20 21st-century ways, to come up with good
21 prevention programs, good rehabilitation
22 programs while people are incarcerated, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 then good re-entry programs to transition
2 people from prison back into their communities.

3 The savings that we will reap will
4 allow us to do all of those things. In
5 addition, it will allow us to hire greater
6 numbers of prosecutors, greater numbers of
7 agents. There's a whole variety of positive
8 things that flow from reducing the amount of
9 money that we spend in our prison systems. Now,
10 it takes up about 30 percent, or so, of the
11 Justice Department's budget.

12 COMMISSIONER FRIEDRICH: Mr.
13 Attorney General, thank you for your testimony
14 here today. We appreciate you taking time out
15 of your busy schedule. I have a broader
16 question about sentencing disparities, which,
17 as you know, the Commission's recent research
18 shows increasing disparities in federal
19 sentencing, not just across the country, but
20 also within districts, and in some cases, even
21 within courthouses.

22 And one of the reasons for this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 disparity, although certainly, not the only, is
2 the different charging decisions that
3 prosecutors make across the country. And I
4 recognize that this problem is not unique to
5 this administration, but I am concerned about
6 whether the Department is taking adequate steps
7 to ensure that individuals who commit crimes
8 are not treated differently simply because,
9 either where they commit the crime or because
10 of the prosecutor assigned to the case.

11 And as you may know, some of our
12 recent reports highlight some areas where the
13 Commission has seen particular problems in the
14 charging decisions. I don't have time to
15 mention them all here, but I'd like to highlight
16 just a couple.

17 One relates to the filing of 851
18 enhancements in drug trafficking cases. And
19 as you know, the filing of that enhancement can
20 increase the mandatory minimum up to life
21 imprisonment for offenders who have two prior
22 felony drug offenses. And what our data shows,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and I'm basing this on 2010 data, is that,
2 prosecutors in six districts filed 851
3 enhancements in more than 75 percent of the
4 cases in which they could have been charged,
5 while prosecutors in eight districts never
6 charged the 851 enhancement.

7 Similarly, we see with respect to
8 924(c) charges, firearms offenses, we see great
9 unevenness there, particularly with respect to
10 the filing of multiple 924(c) offenses. And as
11 you know, this doubles the offense, on average,
12 for many offenders who are subject to more than
13 one 924(c) charge.

14 And according to our 2010 data, ten
15 districts accounted for the vast majority of
16 all cases involving multiple 924(c) counts,
17 while 59 districts reported no cases involving
18 multiple 924(c) counts. And I understand that
19 you, and you referred to it here today, that you
20 have increased the discretion that line
21 prosecutors have, both in terms of their
22 charging decisions as well as their sentencing

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 recommendations.

2 And in contrast to historical
3 practices, which directed the prosecutors to
4 charge the most serious readily provable
5 offense, you support a more individualized
6 assessment that encourages prosecutors to
7 consider a number of factors, many of which are
8 broad and subject to varying interpretations.

9 So my question is, and while I
10 understand that your memoranda certainly
11 emphasize the importance of having supervisory
12 approval with respect to charging, plea, and
13 sentencing determinations, I'd like to hear
14 what specific steps, if any, you are taking to
15 ensure, both, that the prosecutors across the
16 country get consistent supervisory guidance,
17 and second, that they implement that guidance
18 in consistent ways, both within districts and
19 across the country.

20 HON. HOLDER: Well, let me start by
21 answering the question this way, I don't think
22 that we should look at the past and think that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we had a uniform application or that we did not
2 see disparities, even under the prior system.
3 There is statistical evidence that shows that,
4 depending on where you were, depending on who
5 you were, you could have received a different
6 sentence from somebody who was similarly
7 situated.

8 The system was not perfect as it
9 existed before, and it is not perfect as it
10 exists now, and under the reforms that I have
11 implemented. But what we want to do is to work
12 with the Commission. Your data is really
13 important for us.

14 This is an ongoing effort and if we
15 notice that there are disparities, unwarranted
16 disparities that exist with regard to
17 sentencing or the use of certain kinds of
18 sentencing procedures, those are the kinds of
19 things that we will address.

20 There's a great deal of training
21 that goes on with regard to how we want to
22 implement these reforms. There is, as you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 indicated, supervisory responsibility for the
2 filing, or non-filing, of certain kinds of
3 enhancement papers.

4 We're trying to get to a point where
5 -- and let me say that, you know, at base, I have
6 great faith in the men and women of the United
7 States Department of Justice, and great faith
8 in the men and women who serve on a federal
9 judiciary, given all that you all have to go
10 through to get confirmed, I don't envy you for
11 that, but I do envy the fact that you provide
12 us great public service.

13 What I'm looking for is that
14 individualized determination to see what is it
15 that is just for that defendant who is before
16 a particular prosecutor, charged with a
17 particular crime. What is justice? What is
18 an appropriate sentence for that person?

19 Now, I understand that that
20 necessarily means that we are putting a human
21 element into this and that means that there are
22 going to be certain amounts of disparity. I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 think certain amounts of disparity, if we
2 achieve, overall, a more just system, can be
3 tolerated.

4 But we want to always understand
5 what the nature of that, what the amount of
6 that, disparity is like, what are the causes of
7 that disparity, and to try to minimize it to the
8 extent that we can. No system that we have ever
9 put in place has come up with a system that has
10 been free of disparity.

11 I think by focusing on more just
12 outcomes, by training, by putting in place,
13 these new, as we call them, 21st-century
14 approaches, that we can have a system that is
15 both more just and less disparate, but it is an
16 ongoing effort, and it is one that we are
17 mindful of our obligations to understand and
18 then to modify our policies where that's
19 appropriate.

20 CHAIR SARIS: Thank you.
21 Commissioner Barkow.

22 COMMISSIONER BARKOW: Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Thanks for your time this morning and your
2 testimony. I was hoping you could comment on
3 the Department's view of the relationship
4 between our proposed amendment and the pending
5 legislation in Congress that also addresses
6 sentencing reform.

7 HON. HOLDER: I think they are
8 complementary. I think that we support the two
9 proposals that are being considered in the
10 Senate, the bill that is being sponsored for,
11 I think it's, the backend reforms by Senators
12 Whitehouse and Cornyn, we have a few concerns
13 with, we want to work with them, about making
14 that bill as good as it might be.

15 But with regard to that which, I
16 guess, has been put forth by Senators Durbin and
17 Lee, we are in support of that, and we think that
18 the proposal that you are discussing today, and
19 about which I am testifying, compliments that
20 effort.

21 CHAIR SARIS: Judge Hinojosa.

22 VICE CHAIR HINOJOSA: General

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Holder, thank you so much for spending the time
2 with us today. I have to confess that
3 confirmations in 1983 were a lot easier, even
4 easier than the 2003 confirmation to be on this
5 Commission.

6 As we, for those of us who live on
7 the border, we talk about this side of the
8 border, for those of us who are from this side
9 of the border and have a great understanding of
10 our close relationship with the country of
11 Mexico, and as we talk about over-incarceration
12 and lessening penalties for drug traffickers,
13 and at the same time, we see and insist more
14 incarceration and more crackdown on that side
15 of the border with regards to the drug
16 trafficking in Mexico because of the drug usage
17 on this side of the border, and what it has done
18 to that great country, with regards to the
19 violence and the price that they had paid in
20 their cooperation with us with regards to the
21 drug trafficking.

22 What response do we have, as they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 see in our society, there's a desire for less
2 incarceration, less prosecution, legalization
3 in some states of some drugs, how do we respond
4 to them if at the same time we're insisting that
5 they continue to pay the price and continue to
6 crackdown on drug trafficking?

7 HON. HOLDER: Well, by having a
8 more sensible incarceration policy that does
9 not necessarily mean that we are being, to use
10 an old term, less tough on crime. We're being
11 smart when it comes to dealing with those who
12 commit crimes. We are holding people
13 accountable, we are getting better results, and
14 we are reducing our crime rate while spending
15 less money.

16 The message that I would send to our
17 dear colleagues south of the border is that, we
18 have to continue to work together. And the
19 United States does bear a significant
20 responsibility for the violence that we see in
21 Mexico, because of the drugs that we consume in
22 the United States, because of the weapons that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 are produced in the United States and that get
2 transported to Mexico, that iron river, that
3 they talk about.

4 These are realities that we have to
5 confront, but I do not think that the policy
6 changes that I am espousing, and that are
7 consistent with the amendment that you are
8 considering, should be viewed by our Mexican
9 colleagues as a retreat from our shared desire
10 to reduce violence on both sides of the border.

11 We still devote substantial
12 resources, we still have substantial numbers of
13 people who are in Mexico working side-by-side
14 with very brave Mexican law enforcement and
15 military officials to deal with the violence
16 problems that they are confronting, and I would
17 say more successful than they have in the recent
18 past.

19 Our joint efforts have to continue,
20 but there should not be a misunderstanding
21 about what it is that we are doing there. We
22 are not retreating from a strong, tough fight

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 against those who would engage in drug
2 trafficking and in violence.

3 What we are talking about is a
4 better approach so that we can keep this country
5 and Mexico more safe.

6 CHAIR SARIS: One of the things you
7 learn on the Commission is what a big country
8 this is, and in my neck of the woods, up in the
9 Northeast, what we hear about is heroin, and
10 heroin overdoses, and we hear about OxyContin.
11 And so will this amendment, in any way, affect
12 your ability to combat illegal trafficking in
13 those areas?

14 HON. HOLDER: No. I think, you
15 know, this heroin issue that we are
16 confronting, both regionally and as a nation,
17 is one that I spoke about, I think, about a week
18 or so ago. This is a national health problem
19 that we have to deal with, both by using
20 enforcement tools, treatment tools, and
21 educational tools. This focus on the use of
22 opioids and then the movement from opioids to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 heroin is something that we have to recognize.

2 The amendment that we are
3 considering today will not have a negative
4 impact on that ongoing effort, that holistic
5 effort, that we want to use to try to reduce
6 heroin use, which has spiked in recent years.

7 As I went around the country and
8 talked to various U.S. Attorney's Offices, I
9 was struck early on in my time to hear about this
10 rise in heroin, which I thought was a drug
11 usage, therefore, you know, needed to be looked
12 at as a significant drug, was one that was going
13 to be relegated to the past. That is clearly
14 not the case, and certainly, not the case as
15 what we've seen over the last, I'd say, 18
16 months, 2 years, or so.

17 But it is something that our DEA is
18 focused on. I think we have good policies in
19 place. I think we understand the nature of the
20 issue and the relationship of heroin usage to
21 opioids and pill factories, things like that.

22 And so we are attacking this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 problem, but doing so, I think, in a smart way,
2 by combining enforcement, as I said, with
3 treatment and with education.

4 CHAIR SARIS: Thank you.

5 COMMISSIONER JACKSON: I'll ask a
6 question. Good morning. You mentioned that
7 public safety is your primary obligation, and
8 I believe that's true, and I'm just wondering
9 what assurances you can give to the Commission,
10 and to the American people, that a reduction in
11 this area is not going to impact public safety.

12 HON. HOLDER: Well, I think we can
13 look at the state. If you look at what's
14 happened in Texas, and Kansas, and Kentucky, in
15 particular, where they have reduced the amount
16 that they have spent on their prison systems,
17 where they have put policies in place to
18 specifically reduce their prison systems.

19 They have seen reductions in the
20 amount of money they have spent, but without any
21 negative impacts on public safety. And in
22 fact, you've seen, in some of those 17 states

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that I've mentioned, you've seen enhancements
2 with regard to public safety.

3 You know, when I talk about reducing
4 money spent, it doesn't simply mean cutting
5 people's sentences and letting them go. We're
6 using the money that we save to rehabilitate
7 people while they are in prison, making
8 programs available to them to deal with the
9 deficiencies that helped bring them into the
10 prison system, and then also spending money on
11 re-entry programs so that they can have skills
12 to deal with the deficits that they have, to try
13 to make them more productive once they leave.

14 So it is, in some way, I understand
15 that people feel a certain tension in this
16 notion that we're going to spend less, we're
17 going to put people in jail for smaller amounts
18 of time, and yet, you're going to tell me that
19 we're going to be more safe.

20 And yet, the empirical studies that
21 I have seen, and which I have faith in, indicate
22 that, if done appropriately, those are, in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 fact, the results that you can get. But again,
2 these are always things that we have to continue
3 to monitor. We have to adjust our approaches so
4 that if we see that a particular approach that
5 we're taking is not having that desired result,
6 will that change it?

7 COMMISSIONER JACKSON: Thank you.

8 VICE CHAIR HINOJOSA: General, I
9 have one more question. We have discussions
10 and concerns in this country about our
11 incarceration rates. When you look at the
12 numbers in the federal system and you look at
13 the number of prosecutions in the '80s, as
14 opposed to what it is now, we have doubled the
15 number of prosecutions, which is exactly
16 comparable to what we have done with the number
17 of people in prison.

18 So my question is, do you think that
19 we have prosecuted too many people and that's
20 what's causing the incarceration rates to be so
21 high at the federal level?

22 HON. HOLDER: Well, I mean, I think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we certainly have to ask some serious questions
2 about our enforcement policies. Are we
3 prosecuting the right people? Are we using our
4 limited jail space to incarcerate the right
5 people? Are we not making better use of
6 alternatives to incarceration and prosecution?

7 You know, there's a whole variety of
8 things we've done over the past 20 years,
9 including an increase in the number of people
10 we have prosecuted, that I think have led to
11 historic drops in crime and we are, again, I
12 want to emphasize, committed to maintaining
13 those historic lows when it comes to the crime
14 rate.

15 But I think that there are ways in
16 which we can do that, that encompasses more than
17 simply prosecuting significant numbers of
18 people and putting significant numbers of
19 people in jail.

20 There are people, we must
21 understand, who have to be prosecuted and who
22 deserve to go to jail for extended periods of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 time. But there are also ways in which we can
2 maintain public safety and reduce the prison
3 population, reduce the number of people we are
4 sentencing.

5 As I've done around the country and
6 seen what some federal district courts have
7 done, with regard to veterans courts, drug
8 courts, there are really creative things being
9 done by members of the federal judiciary
10 working with federal public defenders offices
11 and U.S. Attorney's offices, that I think are
12 a real guide to the kind of system we can have
13 that has a greater degree of balance than,
14 perhaps, it has in the past.

15 I'm not critical of what has
16 happened in the past. I'm not critical of the
17 decisions that were made in the past. I was a
18 United States Attorney here in Washington, D.C.
19 when this city was called the murder capital of
20 the country. And we had to have a strong law
21 enforcement response that focused, really
22 focused, on incarceration, detection and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 incarceration.

2 As time passed, we were able to
3 broaden the number of tools and approaches that
4 we were using to deal with that problem. But
5 I only mention that to say that my experiences
6 have shaped the approaches that we are
7 espousing now, being tough, for lack of a better
8 term, where that's appropriate, but being smart
9 where that's appropriate as well.

10 And it is the combination of all of
11 these things that, I think, will ultimately
12 lead to fewer prosecutions, fewer
13 incarcerations, less money spent on prisons,
14 and better outcomes, and a more safe America.

15 CHAIR SARIS: Judge Breyer and then
16 Judge Pryor.

17 VICE CHAIR BREYER: All right.
18 The decision whether to prosecute, which rests
19 exclusively with your Department, is, of
20 course, central to the question of eventually
21 what happens to all of these people. Will you,
22 as the Attorney General, encourage the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 increased use of diversion programs for
2 first-time offenders, or for small-time
3 offenders, so that they may, at the front end,
4 avoid the possibility of incarceration?

5 HON. HOLDER: Yes, I would, and I
6 think that's a very valuable tool. And I think
7 it's a tool that we need to develop so that
8 prosecutors who again, these men and women who
9 I have great faith in, and who see a particular
10 individual, and they understand, this is not a
11 reason for this person to go to jail, and they
12 need options. They need tools. They need
13 alternatives.

14 And to the extent we can develop
15 those diversion programs, I'm sure that you
16 will see our people make use of them.

17 CHAIR SARIS: Judge Pryor.

18 COMMISSIONER PRYOR: General
19 Holder, I believe I heard you say in your
20 opening remarks that you support the proposed
21 amendment, and in part, because the lowering of
22 the base offense levels for the drug quantity

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 table would still be tied to the statutory
2 mandatory minimums. Am I right in
3 understanding that that is a key element of the
4 Department of Justice's support for this
5 proposed amendment?

6 HON. HOLDER: Yes, there is still
7 that connection and I think that the way in
8 which the Commission has formulated the
9 proposal makes a great deal of sense, and so
10 that it is why I wanted to make sure that I put
11 in my remarks, that connection as one of the
12 reasons why we are supportive of the proposal.

13 CHAIR SARIS: Thank you. Anyone
14 else? Thank you very much.

15 HON. HOLDER: Well, thank you very
16 much for the opportunity and I look forward to
17 working with you on, not only this proposal, but
18 others as we try to make our system as good as
19 it can be.

20 CHAIR SARIS: Thank you. Moving
21 on to our next panelist. Director Samuels.

22 DIR. SAMUELS: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIR SARIS: Okay. Welcome.
2 Thank you for coming. The rest of the story
3 from the Executive Branch, no stranger to these
4 hearings, we want to welcome back Charles E.
5 Samuels, who has served as the Director of the
6 Federal Bureau of Prisons since his appointment
7 on December 21, 2011.

8 Director Samuels began his career
9 with the Bureau in 1988 and has served in many
10 capacities, including corrections officer,
11 case manager, associate warden, and warden.
12 And from January 2011 until his appointment as
13 Director, he served as the Associate Director
14 of the Corrections Programs Division.

15 Chris Boehm, how do I pronounce it?

16 MR. BOEHM: Boehm.

17 CHAIR SARIS: Boehm is an Assistant
18 Director of Law Enforcement for the United
19 States Forest Service, and is responsible for
20 the investigations, internal affairs, and
21 counter drug program areas. He has
22 significant experience conducting and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 supervising public land marijuana cultivation
2 investigations and eradication operations.
3 Welcome.

4 Just a few words about how we're
5 operating today, you'll both give your
6 presentations and then we'll ask questions
7 after both of you have spoken. I think we have
8 this light system, which is a rough indication
9 of timing and then the hook. We've read your
10 materials and we certainly read everything
11 that's been submitted to us.

12 And so as you can tell, we're a hot
13 bench and like to ask questions and get
14 involved, so, Director Samuels.

15 DIR. SAMUELS: All right. Thank
16 you. Good morning, Chief Judge Saris and
17 Members of the Commission. It is an honor to
18 be here today to share with you some information
19 about the Federal Bureau of Prisons.

20 I'm happy to report that for the
21 first time in decades, we're experiencing a
22 period of significant negative growth. We

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 have nearly 4000 fewer inmates than we did at
2 the end of the last fiscal year. We remain very
3 crowded and our inmate population is 32 percent
4 over capacity, system wide, and 52 percent over
5 capacity at our high security institutions.

6 While we are guarded in our
7 optimism, as to future population growth, we
8 appreciate the current trend and hope it
9 continues. The Bureau of Prisons' mission is
10 to protect the community and reduce crime. We
11 have not had any escapes during the past year,
12 nor have we had any significant disturbances,
13 despite the fact that we are the largest
14 corrections department in the country, with 119
15 federal prisons and more than 215,000 inmates.

16 Our staff works in a dangerous
17 environment. The Bureau of Prisons' staffing
18 level is significantly lower than the five
19 largest state corrections systems. Last year,
20 more than 120 staff and nearly 200 inmates were
21 seriously assaulted by other inmates.

22 In regards to re-entry, I'm pleased

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to report that 80 percent of offenders who were
2 released from our facilities do not return
3 during a three-year period following release.
4 This relatively low rate of recidivism is due
5 to the effective evidence-based treatment
6 programs we provide to inmates.

7 In November 2013, our re-entry
8 services division began overseeing and
9 coordinating the many re-entry programs,
10 services, and functions that we perform on
11 behalf of all inmates, but particularly, the
12 more than 40,000 that return to U.S.
13 communities each year.

14 I'm certain that this new structure
15 will allow us to have an even greater impact on
16 our inmate population and to work more
17 effectively with our partners in the community.

18 This past November, we hosted the
19 first ever Bureau of Prisons Universal
20 Children's Day. Nearly 8500 children came to
21 visit 4000 inmate mothers and fathers. For
22 many inmates, it was the first time they read

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a book to their child or drew a picture with
2 them.

3 The event was well-received by
4 staff and we plan to repeat the event again. We
5 continue to expand our highly-effective
6 residential substance abuse treatment program.
7 We now have 89 programs at 77 locations. By the
8 end of this fiscal year, we expect to have
9 sufficient capacity to allow all eligible
10 inmates to receive their full sentence
11 reduction.

12 We continue to increase the amount
13 of time inmates spend in our residential
14 re-entry centers and to expand our use of home
15 confinement for low risk offenders who have a
16 place to live and do not need the structure of
17 an RRC.

18 Our focus on re-entry has broadened
19 to include inmates returning to the general
20 population from a restrictive housing unit
21 within the prison. Specifically, we have
22 established a mental health unit in Atlanta for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 high-security inmates, such as those from the
2 administrative maximum facility in Florence,
3 Colorado, who are seriously and mentally ill,
4 and have demonstrated an inability to function
5 in an open setting.

6 We also opened a reintegration
7 housing unit that provides a more open
8 environment for protective-custody-type
9 offenders. And finally, we established a
10 gang-free institution for inmates who have
11 relinquished their affiliation with street and
12 prison gangs, and are devoted to taking a new
13 approach to their life in prison, and in the
14 community after they are released.

15 As part of the Attorney General's
16 Smart on Crime Initiative, we expanded our
17 criteria for sentence reduction based on
18 extraordinary and compelling circumstances.
19 We expanded the medical criteria to reach
20 inmates who have a life expectancy of 18 months,
21 rather than the 12 months, and those who are not
22 terminally ill, but have an incurable

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 progressive disease, or a debilitating injury
2 from which they will not recover.

3 Non-medical criteria was
4 established for inmates who are 70 or older, and
5 have served 30 years or more; 65 or older, and
6 have served at least 50 percent of their
7 sentence and suffer from a serious medical
8 condition; and 65 and older, and have served
9 greater than 10 years, or 75 percent, of their
10 sentence.

11 Additionally, criteria was
12 established for inmates with children where the
13 family member caregiver died, or became
14 incapacitated, and inmates whose spouse or
15 registered partner became incapacitated.

16 In calendar year 2013, I approved 61
17 compassionate release requests, up from 39 in
18 2012 and 29 in 2011. Currently, I have
19 approved 15 in the first two months of 2014,
20 which would put us on pace to reach 90 petitions
21 for the year.

22 I recently testified before the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Senate Judiciary Committee/Subcommittee on
2 Constitution, Civil Rights, and Human Rights
3 regarding our use of restrictive housing.
4 Certainly, there are times when restrictive
5 housing is an important tool for the protection
6 of staff, inmates, the general public, and/or
7 the individual, him or herself.

8 This is particularly true for a
9 system as large and diverse as ours. And given
10 that we often take the worst offenders from
11 states to provide assistance, but we understand
12 the various negative consequences that can
13 result from housing inmates in restrictive
14 housing units, such as interfering with
15 re-entry programming, and limited interactions
16 with family and friends.

17 I'm proud of the work we do in
18 federal prisons around the country, to
19 incarcerate individuals in prisons that are
20 safe, secure, humane, and cost-effective. I'm
21 equally proud of the work we do to help these
22 individuals gain the treatment, skills, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 training they need to return to their families
2 and their communities as productive,
3 law-abiding citizens.

4 Thank you again for having me here
5 today and I am happy to answer questions.

6 CHAIR SARIS: Thank you.

7 MR. BOEHM: Good morning, Madam
8 Chair, Vice Chairs, and Members of the
9 Committee, I'd like to thank you very much for
10 the opportunity to provide testimony today on
11 the environmental impacts of marijuana
12 cultivation on public lands. It's an honor to
13 be here.

14 Our nation's national forests and
15 other public lands are under attack by
16 sophisticated drug-trafficking organizations.
17 DTOs are exploiting our public lands to
18 illegally cultivate marijuana. These
19 operations present a great threat to the
20 safety, health, and sustainability of our
21 nation's national forests and other public
22 lands.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 DTOs have been found on 72 national
2 forests in 22 states. In 2013, approximately
3 80 percent of marijuana grown on federal public
4 lands was grown on national forests. Almost 90
5 percent of this DTO activity on national forest
6 lands occurs in California alone.

7 Since 2005, over 19 million
8 marijuana plants and over 5500 sites have been
9 eradicated nationally from national forest
10 lands. The estimated value of the eradicated
11 marijuana is well over \$20 billion. Typical
12 marijuana growth sites are generally in remote
13 forested areas that have access to water and are
14 near road or trail systems. Many of these
15 sites are within designated wilderness areas or
16 other pristine or sensitive landscapes.

17 They're generally occupied by three
18 to four individuals that live in or near the
19 sites. These individuals are often armed with
20 semi-automatic rifles and handguns, and will
21 protect their sites against anyone entering the
22 area. The sites have sleeping and kitchen

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 areas, and provides trail systems that connect
2 different parts of the sites, and harvesting
3 and drying areas to prepare the marijuana. The
4 growing areas are generally 10 to 20 acres in
5 size, but the total impacted area is often 50
6 or more acres.

7 To address this problem, the Forest
8 Service's goal is to identify, disrupt, and
9 dismantle DTOs operating on national forest
10 lands. This is a collaborative effort with our
11 federal, state, local, and tribal law
12 enforcement partners, and allows us to
13 implement a strategic multi-agency approach to
14 target DTOs. The strategy's focus is to
15 investigate, eradicate, prosecute, share
16 intelligence, and cleanup and reclaim the land
17 to deny its future use.

18 However, marijuana cultivation on
19 national forests is not just a law enforcement
20 or a drug problem. Marijuana cultivation also
21 poses a severe threat to the environmental
22 health of our forests. Growers clear native

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 vegetation, divert large volumes of scarce
2 water for irrigation, and use herbicides,
3 pesticides, and other chemicals that kill
4 competing native vegetation and wildlife. The
5 activity also damages native soils and creates
6 severe erosion issues. The accumulated
7 fertilizers, poisons, human waste, and trash
8 wash into streams and rivers during rain
9 events, or leech into the soil to contaminate
10 our drinking water.

11 These growth sites also have
12 significant effects on wildlife and their
13 habitat. Many of the chemicals and poisons
14 used in these sites are extremely dangerous and
15 could damage sensitive ecosystems in multiple
16 ways. Some of the chemicals we have found in
17 sites are banned in the U.S. or restricted to
18 limited commercial use only. Many are also so
19 toxic that they not only kill the wildlife
20 through direct exposure at the site, but enter
21 the food chain and can sicken or kill wildlife
22 many miles away. Some of the animals affected

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 are also sensitive or protected species, such
2 as the Pacific fish or the spotted owl.

3 The diversion of scarce water
4 resources also has its severe effects on native
5 wildlife and their habitat. Many growth sites
6 monopolize the limited sources of water in an
7 area and deny use by animals and native
8 vegetation. In drought-stricken areas such as
9 California, any diversion of water can be
10 devastating for local wildlife.

11 To help address the environmental
12 damage, the cleanup and restoration of these
13 sites is a priority for the Forest Service.
14 The typical cleanup requires cooperation and
15 assistance from other Forest Service staff
16 areas, our partners, and volunteers. The
17 removal of trash and debris, infrastructure,
18 and hazardous materials from the site, and the
19 necessary restoration activities are labor
20 intensive and extremely costly.

21 There are also significant exposure
22 issues and risk to cleanup personnel. It is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 not uncommon for personnel to encounter unknown
2 chemicals or be inadvertently exposed to a
3 chemical, or other potentially hazardous
4 substance, during operations.

5 The effects of illegal marijuana
6 cultivation and the associated environmental
7 impacts are severe and far-reaching. Although
8 I have limited my comments to national forest
9 lands, I would also like to stress that these
10 operations threaten many national parks,
11 national monuments, wildlife refuges, and
12 other public, state, and private lands. We
13 must do everything we possibly can to care for
14 our nation's treasures and protect them for
15 future generations. Madam Chair, Vice Chairs,
16 I close my statement and am really happy to
17 answer any questions. Thank you.

18 CHAIR SARIS: Thank you very much.

19 VICE CHAIR HINOJOSA: Yes,
20 Director Samuels, you talked about the 80
21 percent that don't return to the federal prison
22 system, that doesn't count anybody who might

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 have gone to the state system, right, so it's
2 not a 20 percent recidivism rate, it's just 20
3 percent to the federal system.

4 DIR. SAMUELS: Yes, 20 percent to
5 the federal system and 40 percent overall when
6 you include --

7 VICE CHAIR HINOJOSA: So it's 40
8 percent recidivism rate, the other 20 percent
9 re-violate in the state system.

10 DIR. SAMUELS: Correct.

11 COMMISSIONER JACKSON: Yes, you
12 talked about the BOP's re-entry programs and
13 the kinds of interventions that you do --

14 CHAIR SARIS: Could you speak up?

15 COMMISSIONER JACKSON: Sorry.
16 The kinds of interventions that you do in prison
17 rehab. And of course, in listening to the
18 Attorney General, those kinds of programs are
19 key to the Smart on Crime Initiative. But if
20 we shift from longer terms of incarceration, it
21 seems to me that there's going to be greater
22 need within BOP to prepare people to get back

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 into society, so is BOP ready for that?

2 I mean, do you have programs in
3 every facility and do you think that there's
4 going to be increased need for those kinds of
5 programs?

6 DIR. SAMUELS: Thank you for your
7 question, and I would respond, the Bureau is
8 ready, as always, seen as a critical part of our
9 mission. We've always stated that re-entry
10 begins on the first day of incarceration, and
11 we've been doing that for decades.

12 And my focus as Director of this
13 agency is to ensure that every facility is
14 providing cognitive behavioral therapy
15 programs, and not just within the Bureau, we
16 want to ensure that when those individuals,
17 ultimately, are being released, and they move
18 on to our RRC programs, and ultimately, to any
19 type of supervision through the course, that
20 there's continuity of care throughout the
21 entire system, and with us taking the lead for
22 that.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So for our inmate population, we are
2 addressing this issue every single day with the
3 population. And so if there are any changes,
4 it's not going to have any impact on us relative
5 to our mission to carry it out. It's something
6 that we continue to do and expect with that
7 being, again, part of our mission, which I
8 constantly tell the staff is more than just the
9 enforcement of housing, but ensuring that we're
10 doing the other part of our mission, and that's
11 ensuring that we're reducing crime.

12 COMMISSIONER JACKSON: But the
13 programs will be able to absorb the increased
14 capacity, I guess, is what I'm saying.

15 DIR. SAMUELS: Yes, with our
16 numbers right now, at 215,000, and if the
17 initiatives work, and there is a reduction, I
18 mean, if anything, it would allow us to be able
19 to take on more than less.

20 CHAIR SARIS: Judge Breyer and then
21 Commissioner Barkow.

22 VICE CHAIR BREYER: Director, I'd

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 like to find out from you a couple things.
2 First of all, with respect to your prison
3 population, what percentage of your prisoners
4 are subject to deportation or illegal entrants
5 subject to deportation?

6 DIR. SAMUELS: About 23 percent of
7 our population are criminal aliens, so it's
8 about 54,000 inmates in our system are non-U.S.
9 citizens.

10 VICE CHAIR BREYER: So when we talk
11 about re-entry, of course, we're not talking
12 about re-entry with respect to them. We're
13 talking about deportation with respect to them.
14 I mean, maybe that's another way of re-entry,
15 but it's not re-entry into the United States;
16 at least, hopefully.

17 And what I'm trying to figure out
18 is, if you have two classes of prisoners, those
19 people who will re-enter the United States and
20 those people who will be deported, and with
21 respect to the people who will re-enter the
22 United States, you have a number of programs

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 which would envision, in a number of cases,
2 early release, either a halfway house or a
3 reduced sentence, by virtue of the RDAP
4 program, and otherwise.

5 Does the Bureau of Prisons have the
6 authority to take, with respect to the
7 prisoners who are subject to deportation, to
8 take them sooner than their prison sentence and
9 the outside term of their prison sentence and
10 place them in some facility that they would be
11 then deported from?

12 In other words, if it's not clear,
13 what I'm trying to figure out, if you have two
14 people, they each have five-year sentences or
15 ten-year sentences -- with respect to group 1,
16 they actually serve four years, or three and a
17 half years, or maybe four-plus years, some
18 sort, and then you have group 2, those people
19 who are going to be deported.

20 Do those people have to serve their
21 full term of confinement or are they then sent
22 to some facility short of their full term of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 confinement in order to be deported? And I ask
2 that in the context that we have approximately
3 1/3 overpopulation, and at some point, you're
4 going to run afoul of the Supreme Court's
5 decision with respect to incarceration.

6 DIR. SAMUELS: Yes, thank you, Your
7 Honor. The response to your question, the
8 individuals have to serve their time in our
9 facilities and/or contract facility. We do
10 not have anything in place where we are moving
11 them out any sooner. And what we try to do with
12 immigration is, we have procedures in place for
13 hearings to take place, so when they are towards
14 the end of their sentence, they don't have to
15 stay any longer than necessary within the
16 Bureau of Prisons and we can actually turn them
17 over.

18 VICE CHAIR BREYER: Do those
19 people, however, actually serve longer periods
20 of confinement in the Bureau of Prisons than a
21 citizen who would be re-entered into the
22 general population of the United States?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 DIR. SAMUELS: Once their term
2 expires with the Bureau of Prisons, they fall
3 under immigration.

4 VICE CHAIR BREYER: Well, I mean,
5 what I'm trying to figure out is, who serves
6 longer; United States citizens who are in
7 prison, or non-United States citizens who are
8 in prison? Who serves the longer sentence on
9 the average, or with respect to the same given
10 sentence, as to those two classes of people?

11 DIR. SAMUELS: In that case, it
12 would be the criminal alien, without a doubt.

13 COMMISSIONER JACKSON: And that's
14 because the criminal aliens don't have access
15 to these re-entry programs that you are talking
16 about?

17 VICE CHAIR HINOJOSA: Well, they
18 can't have home confinement. They can't have
19 community confinement.

20 COMMISSIONER JACKSON: I see.

21 VICE CHAIR HINOJOSA: And so
22 therefore, they will serve more time in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 federal prison system rather than re-entry
2 through community confinement or home
3 confinement.

4 DIR. SAMUELS: They're not
5 eligible for the programs.

6 CHAIR SARIS: Commissioner Barkow.

7 COMMISSIONER BARKOW: I have a
8 question for each of you actually, if that's
9 okay.

10 CHAIR SARIS: Oh, yes. We haven't
11 even gone around to marijuana cultivation yet.

12 COMMISSIONER BARKOW: All right.
13 I'll keep with the Bureau of Prisons for a
14 minute. First, I'm curious if you at the BOP
15 track what the recidivism rates are for people
16 who are released and try to correlate it with
17 the programming that you have internally.

18 And also, if it's tracked and
19 correlated with things like the use of
20 segregated housing units or those kinds of
21 things to see what effect, if any, treatment
22 inside the facility, how it relates to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 recidivism afterwards. That's my question for
2 you.

3 DIR. SAMUELS: Okay. Thank you.
4 We are in the process, and ultimately, we will
5 have a review that we'll be releasing where we
6 are currently with our recidivism rates because
7 the number that I gave earlier for the overall
8 rate, the 40 percent, that is dated.

9 And in regards to restrictive
10 housing, we have not had a study done to look
11 at any impact from individuals being placed in
12 restrictive housing; if it has any effect on
13 recidivism when they are released, but we are
14 in the process of having an independent study
15 that's being done now, but it's generally
16 looking at procedural, operational issues, and
17 best practices within the corrections
18 profession.

19 And ultimately, at some point, I
20 mean, that would be something that I would
21 invite to include my colleagues in corrections,
22 to look at relative to recidivism.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER BARKOW: Thank you.
2 And then if I could ask you, Mr. Boehm, a
3 question. So in trying to understand what role
4 sentencing might play in the harms that you've
5 identified, I was trying to figure out if the
6 current framework adequately covers everything
7 that you had mentioned in your testimony.

8 And so to the extent, you know, the
9 people involved with this are armed, we have
10 sentencing enhancements for that. We also
11 have an enhancement for the release of toxic and
12 hazardous substances. And so I was just trying
13 to figure out if you could identify where there
14 might be a gap in current sentencing related to
15 the kinds of harms you have identified or if you
16 think that we currently have things covered and
17 it's an enforcement problem.

18 I'm just trying to get a sense of
19 where, if any, the law enforcement deficit is
20 or if this is how you see what we could be doing
21 here related to the problems that you've
22 identified or if the guidelines already

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 adequately capture it.

2 MR. BOEHM: And I apologize for --
3 it's not like I'm trying to duck the question,
4 but I would be hesitant to respond. Sentencing
5 is not really my area of expertise. Actually,
6 Robert Zauzmer will be on later today and I'm
7 sure he will address that. I apologize.

8 COMMISSIONER BARKOW: Okay.
9 Thank you.

10 VICE CHAIR HINOJOSA: A slight
11 follow-up there, Director Boehm, but is it your
12 understanding, some of the written testimony on
13 this issue has been that the people who actually
14 get arrested for this kind of situation tend to
15 be the people who do not actually own the crop
16 itself as opposed to those who might be here
17 illegally and are hired temporarily to be the
18 caretakers.

19 Is that your experience and if
20 that's the experience, do you all ever get an
21 opportunity to actually get to the people who
22 might be the ones who are growing this crop on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 federal property?

2 MR. BOEHM: I would say that is some
3 of our experience. Some of the people that we
4 encounter in there are low-level laborers
5 brought into the growth sites. However, the
6 overwhelming majority of them weren't someone
7 picked up on some corner and pressed into
8 growing marijuana in the national forest.

9 They're somewhat skilled. They're
10 equivalent to farmers. I mean, I can barely
11 grow tomatoes in my backyard and these guys are
12 growing thousands of plants out in the middle
13 of nowhere. They are skillful and we've also
14 found that, because of the nature of these
15 sites, I mean, they're extremely secretive.
16 They face a lot of threats from other rival
17 organizations, rival people.

18 These are all trusted members of
19 whatever organization or whatever group
20 they're working with. Does that mean that the
21 average person there growing marijuana on the
22 grounds knows which cartel or organization it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 works for? No, I don't think so. The majority
2 of them are generally related to each other,
3 either closely related or distantly related.
4 They often come from the same area of Mexico,
5 the same village or same area, so there's
6 obviously a level of trust which makes it
7 difficult for us to investigate. They know
8 what they're doing. The majority of the ones
9 that I've dealt with actually come to the United
10 States in the spring to grow marijuana, and then
11 return back to Mexico in the fall, to live there
12 in the fall and winter, and spend the time with
13 their family.

14 So it's difficult to say if these
15 are really low-level people. In one respect,
16 yes, they are low-level, but they're obviously
17 skilled, valuable assets of the cartel and they
18 know exactly what they're doing. They're here
19 to do it for a reason.

20 CHAIR SARIS: Commissioner?

21 COMMISSIONER FRIEDRICH: Mr.

22 Boehm, thank you for your testimony and these

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 photographs are extremely helpful and
2 enlightening. I wanted to follow-up on Judge
3 Hinojosa's question about the nature of the
4 offender here. Later testimony emphasizes
5 that, for the most part, these are farmers.
6 However, when we look at our statistics in the
7 roughly 250 outdoor grow cases we have, the
8 weapon enhancement applied in roughly 38
9 percent of those cases.

10 So I'm curious, are the growers
11 themselves armed or are there different groups
12 that are arming and protecting, and looking
13 out, and then the farmers who are working or are
14 they all one in the same, if you have a sense?

15 MR. BOEHM: It's been our
16 experience they're all one and the same. I've
17 been in hundreds of sites in my career, and I've
18 only been in one or two sites where there hasn't
19 been some evidence of some type of firearm in
20 the sites; although it's only been charged in
21 38 percent.

22 There are, generally, firearms in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the site, and those firearms may be used for
2 various, some of them are hunting implements to
3 poach local animals, but the majority of them
4 are pistols or semi-automatic rifles designed
5 to protect the millions of dollars of marijuana
6 in the growth site. So the majority of them I
7 deal with, there are actually -- and it's
8 everybody. Anybody can have a weapon.

9 COMMISSIONER FRIEDRICH: And with
10 respect to the environmental issue, and I know
11 you say sentencing is not your expertise, but
12 there is a specific offense characteristic that
13 applies when a hazardous or toxic substance is
14 involved, and yet, when we look at the
15 statistics, it's not applied in any of these
16 cases, but your materials certainly suggest
17 that there are toxic substances.

18 So I'm just curious whether that's
19 a little bit too narrow for what you're finding
20 and it needs to be broadened or do you think that
21 this is just a lack of education for the courts?
22 I mean, am I right that toxic substances -- from

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 your materials, it seems that they are a part
2 of what you find in these sites.

3 MR. BOEHM: Absolutely.
4 Absolutely, they are, and I guess I can somewhat
5 answer your question. From my experience, the
6 majority of these cases, they never go to trial.
7 They're usually going to plea to one charge and
8 one charge only. And I guess maybe that's
9 what the answer is, are they adequately taking
10 the environmental on that one track of getting
11 a conspiracy to manufacture charge, can you
12 adequately take into effect the significant
13 environmental damages under just that one
14 charge.

15 COMMISSIONER FRIEDRICH: The
16 prosecutors might be pleading that specific
17 offense character stick out and not --

18 MR. BOEHM: Correct. Correct.
19 So I mean, not being an expert on sentencing,
20 then --

21 CHAIR SARIS: Stick around today,
22 you --

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER JACKSON: Director
2 Samuels -- I'm sorry.

3 CHAIR SARIS: No, go ahead and then
4 I'll --

5 COMMISSIONER JACKSON: You've
6 testified before us a number of times, and we've
7 always appreciated your information and your
8 time. This is the first time that I have heard
9 from you that there's been a significant period
10 of negative growth. You know, we've heard on
11 and on and on, upward, upward, upward on all the
12 previous times, so can you tell us when, in your
13 statistics, did this downturn begin and to what
14 do you attribute it?

15 DIR. SAMUELS: Yes, we believe a
16 lot of it has to do with the reduced number of
17 prosecutions that have occurred with
18 sequestration and a lot of other factors
19 because right now, we have a -3521 for growth
20 for the Bureau. That's unprecedented. On
21 average, typically over the years, we have
22 looked at 6500 or plus over a period of time,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 so we welcome it.

2 And we would hope that with the
3 Smart on Crime Initiative and many of the
4 comments that were made by Attorney General
5 Holder, we will continue to see that decline.
6 And we realize, you know, that a lot of it has
7 to do with the charging practices and what is
8 decided as far as the U.S. Attorney's Office and
9 what they're going to look at. But that has,
10 in our opinion, been a large part of what has
11 happened.

12 VICE CHAIR BREYER: I was curious
13 whether the experiment of legalization of
14 marijuana in Colorado has had any impact on
15 forest lands in Colorado? There's vast forest
16 lands in Colorado, isn't that correct?

17 MR. BOEHM: Correct. Correct.

18 VICE CHAIR BREYER: And it may be
19 too early to tell, but do you have any
20 preliminary indication as to whether or not
21 legalization of marijuana in Colorado has
22 impacted federal lands in Colorado?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. BOEHM: Our preliminary
2 estimate and based on similar situations in
3 California, the market will produce whatever
4 the market needs. And until a legal system of
5 growth to produce the marijuana that's needed
6 Colorado gets into place, gets up and running,
7 it took California years and years and years to
8 --

9 VICE CHAIR BREYER: Well,
10 California's a very progressive state.
11 Organic farming, so perhaps it doesn't have the
12 impact that --

13 MR. BOEHM: But if they can't
14 produce it legally, which --

15 VICE CHAIR BREYER: But they can't
16 in California. I mean, you still have problems
17 with respect to legalization for growth in
18 California, not so in Colorado. In Colorado,
19 the marijuana is legalized, so I would assume
20 that the growth is also legalized, but of
21 course, not on federal lands.

22 MR. BOEHM: It is legalized, but as

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 in most other places, the demand will quickly
2 outstrip the supply --

3 VICE CHAIR BREYER: I see.

4 MR. BOEHM: -- and the criminal
5 organizations, they're generally not eligible
6 or it would be difficult for them to get legal
7 operations, so they're going to grow as close
8 as they can to the market. We fully expect an
9 increase in activity in the Rocky Mountains of
10 Colorado.

11 VICE CHAIR BREYER: Have you seen
12 it yet?

13 MR. BOEHM: We have not seen it yet.
14 We probably will start to see it. It may be a
15 little early in Colorado, but there are
16 probably guys out right now looking for areas
17 because we have had DTO issues in Colorado in
18 the past, and we expect it again, and we expect
19 a resurgence again in Washington.

20 CHAIR SARIS: First of all, thank
21 you both for coming out. I wanted to ask Mr.
22 Samuels the following question. So if this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 guideline is adopted, the drugs minus 2, and is,
2 over five years, a decrease in beds. What
3 happens with that savings? Do you close
4 prisons? Do you have more treatment programs?
5 What do you anticipate will be the effect on
6 you?

7 DIR. SAMUELS: Good question. I
8 believe there will be a number of things, and
9 definitely, we support the Attorney General in
10 regards to looking at what can be done on the
11 front end with any cost savings to the
12 taxpayers, but within the Bureau of Prisons, I
13 mean, we still have an issue and a concern with
14 staffing.

15 Right now, our inmate to
16 correctional officer ratio is 10:1. And when
17 you look at the largest five state correctional
18 systems is right around 5:1, so we still have
19 significant crowding issues and we have to
20 ensure that we're doing everything that we can
21 to ensure, obviously, the safety of staff, the
22 inmates, and the public, and how we ensure that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the requirements we have to maintain our
2 prisons safely, that we're taking care of all
3 that.

4 And any other opportunities to use
5 funding for all of our recidivism reduction
6 programs, expanding, as I mentioned to Judge
7 Jackson, we would like to do more and it takes
8 staffing, because our programs are carried out
9 by our subject matter experts for various
10 re-entry programs. And when you're utilizing
11 psychologists and teachers, it takes a lot of
12 resources to carry those out, so we would hope
13 that any savings, again, there would be
14 consideration for expanding programs to
15 include staff.

16 CHAIR SARIS: Anything else from
17 anybody? Thank you very much to both of you.
18 Thank you for coming.

19 DIR. SAMUELS: Thank you.

20 CHAIR SARIS: A stand and stretch
21 opportunity for everybody.

22 Welcome. Another point of view.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 We begin with Molly Roth, who is an Assistant
2 Public Defender for the Western District of
3 Texas and San Antonio. In 2008 and 2009, she
4 worked in Washington, D.C. as an attorney
5 adviser to the Defender Services Office, and as
6 the visiting assistant federal public defender
7 at the Commission.

8 What year was that in?

9 MS. ROTH: 2009.

10 CHAIR SARIS: All right. Right
11 before I came.

12 MS. ROTH: Yes, that's right.

13 CHAIR SARIS: David Debold is no
14 stranger. He is the Chair of the
15 Practitioner's Advisory Group, as we call them,
16 PAG, to the Commission. He is a partner at the
17 law firm of Gibson Dunn and practices in the
18 firm's appellate and constitutional law,
19 securities litigation, white collar defense,
20 and investigations practice group.

21 And has always been willing to come
22 here and provide wise advice, so why don't we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 begin with you?

2 MS. ROTH: Thank you. Good
3 morning.

4 CHAIR SARIS: Good morning.

5 MS. ROTH: Your proposal to reduce
6 drug offense levels by two is critical.
7 Fundamentally necessary, and an example of the
8 Commission's responsiveness. Like the
9 Commission's efforts to reduce the disparity
10 between people sentenced for crack and powder
11 cocaine, your current proposal will prove to be
12 a significant step in the right direction.

13 2D1.1 is the most used guideline
14 provision of all. Your action in 2007 to
15 reduce the crack/powder disparity was
16 important and impactful, but your current
17 proposal will be far more wide-ranging,
18 affecting everyone's sentence under this
19 guideline.

20 Your action now is a fundamentally
21 necessary step in the right direction towards
22 decoupling the link between quantity and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 culpability, a link that simply does not exist
2 in the real world. It is critical now because
3 of the vast number of people positively
4 affected, defendants and defendants' families,
5 without increased risk to public safety.

6 This action could well help our
7 communities by bringing families together
8 sooner and placing defendants in the best hope
9 for rehabilitation, out of prison into programs
10 that best meet their needs for education and
11 treatment. A fair system makes our community
12 safe.

13 When reflecting on how your action
14 could positively affect defendants and their
15 families and communities, I think of my client
16 Hannah. Hannah began using methamphetamine
17 when she was 15 years old and had been addicted
18 for nearly 15 years when I represented her.
19 She sold drugs to support her habit. Her
20 father had served time in federal prison for
21 drug dealing, while her alcoholic mother tried
22 to raise Hannah and her siblings, and Hannah was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 now staring prison in the face while being the
2 sole provider for her two children.

3 She was released on bond into an
4 intensive drug treatment program, the first she
5 had ever been in, and her life made a 180-degree
6 turn because she embraced that treatment, got
7 a better job than she ever had, and felt as
8 though she were truly a part of our community.
9 For the first time, Hannah received meaningful
10 assistance for her ADHD, her depression, and
11 her anxiety. Before her sentencing hearing,
12 she told me that for the first time in her life
13 she realized that other people -- even
14 strangers like the probation officer who
15 interviewed her and the judge who released her
16 on bond -- actually cared that she did not use
17 drugs.

18 Her change was striking and noticed
19 by all she encountered, even the probation
20 officer who did her home visit, took the
21 extraordinary step of calling me to tell me how
22 impressed she was at keeping her home and caring

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 for her children.

2 Her guideline level, in Category 2,
3 was 97 to 121 months. There was no societal
4 need or purpose to incarcerate Hannah for that
5 long or even incarcerate her at all. Yet, the
6 guidelines linked to quantity called for her to
7 become one of the many people who make up a bar
8 graph that is before you, who are incarcerated
9 for non-violent offense.

10 If incarceration were working to
11 stop addiction in our families, or Hannah's
12 addiction, or drug-trafficking by Hannah and
13 people like her, maybe incarceration would be
14 a tool to consider, but it hasn't worked. It
15 has been proven not to work, and we applaud the
16 Commission for its proposed action to shorten
17 unnecessary prison terms.

18 We urge the Commission to take this
19 action at all guideline levels. We cannot
20 discern a reason why you would not want to lower
21 level 38 to 36. It seems arbitrary to retain
22 the highest base offense level at 38 when the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 other base offense levels are being lowered by
2 2.

3 In light of the fact that there are
4 16 specific offense characteristics that can be
5 used when sentencing an individual who might be
6 a high-level drug-trafficker, it is simply
7 unnecessary. A life sentence could be easily
8 obtained even starting at level 34, as we have
9 suggested.

10 An across-the-board two level
11 reduction would be in keeping with the
12 reasoning that supports the Commission's
13 decision to decrease the base offense level in
14 1994, and also in keeping with the principles
15 behind your proposed action this year. The
16 fact that Level 38 is not reserved for high or
17 even medium level of traffickers is known
18 across the country by prosecutors and line
19 defense attorneys like myself.

20 It's exemplified by my client,
21 22-year-old Oscar. He had no convictions and
22 no arrests when he was arrested. He knew he was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 transporting drugs in his truck, but he had no
2 idea the type or quantity. He agreed to
3 transport the drugs so that he could pay for his
4 vocational school and help pay for a lawyer to
5 legally emigrate his parents from Mexico.

6 He was born in the United States,
7 and at age 15, came to the United States by
8 himself, had no daily parental support from 15
9 years old to when I represented him at 22. He
10 came to work and to go to school. He kept
11 working, but never made it past the 9th grade.
12 He started vocational school, but couldn't make
13 ends meet, and succumb to the temptation of this
14 crime. His guideline level in Category 1 is
15 135 to 168 months.

16 We also urge the Commission to drop
17 the Level 12 to Level 10 -- again, consistent
18 with your action. We see no reason not to do
19 this. Doing so would afford judges the full
20 range of sentencing options within the
21 guidelines; split sentences, community
22 confinement rather than prison, no

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 incarceration, or incarceration, whatever the
2 court deemed fit.

3 The Commission should reduce the
4 minimum offense level floors in related drug
5 guidelines by 2. This is particularly
6 significant when considering the offense level
7 floor of 17 in the safety valve provision in
8 5(c)1.2. We hope that this is part of the
9 discussion of the reform to the safety valve now
10 being considered by Congress, but we urge the
11 Commission to act now by reducing this floor to
12 at least 15.

13 We have suggested, also, two
14 departure provisions that we think would assist
15 sentencing judges in their determinations in
16 these cases. One is that the weight of the
17 mixture overrepresents the actual dosage. In
18 other words, a mirror to the current upward
19 departure provision that when the drugs are
20 particularly pure, an upward departure be
21 considered. When they are particularly not
22 pure, this downward departure would allow for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the courts to consider lowering the guideline
2 range within the guidelines.

3 The second departure provision we
4 ask that the Commission consider adding is a
5 recognition that a person whose offense level
6 overrepresents his or her role should be
7 considered for a downward departure.

8 Finally, as to marijuana
9 cultivation, there are ample provisions in the
10 current guidelines and statutes to address the
11 harms to the environment associated with
12 marijuana growing. For example, deprivation
13 of government property is a very broad statute
14 that covers damage to public lands. Combined
15 with a charge for marijuana cultivation or
16 trafficking, it would provide for sufficient
17 punishment of a financier or a high-level
18 trafficker.

19 But, an increase in the guidelines
20 would result in longer sentences for very
21 low-level individuals involved in marijuana
22 cultivation; people who are just looking for

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 field work at a living wage. For every one of
2 these people who is arrested, another person in
3 need of feeding his or her family will be there
4 to fill that empty place. Imprisoning these
5 people for long periods of time separates them
6 from their families, and importantly, does
7 absolutely nothing to protect the environment.
8 We urge the Commission to make no change to the
9 guidelines in this area. Thank you.

10 MR. DEBOLD: Chief Judge Saris and
11 Members of the Commission, it's always a
12 pleasure to speak on behalf of the
13 Practitioner's Advisory Group, and it's an
14 especially distinct pleasure today. It
15 occurred to me that as you read our group's
16 written testimony, you may have been thinking
17 something along the lines of, you guys always
18 complain that we never take you anywhere nice,
19 and then when we do, it's just not good enough.

20 So I want to start by saying that,
21 although we have a few suggested tweaks to what
22 you're proposing with Drugs Minus 2, if adopted

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 as written, it would be an incredible,
2 tremendous improvement to how drug sentences
3 are handed out today.

4 In our written testimony, we say
5 that we strongly support this proposal. I wish
6 we had put it in bold with double underline and
7 yellow highlighting, and that flashing neon
8 kind of thing you can get when you look at a
9 document on the computer.

10 In the interest of time, I'll just
11 make three brief points that we think are very
12 important. One is that there is a smarter way,
13 and this proposal does it, to strike the balance
14 between mandatory minimums and the guidelines.
15 There's been a longstanding debate about how
16 the two should interact, and there's been talk,
17 certainly over the years, about the so-called
18 cliff effect; if you have the mandatory minimum
19 and the guideline range not closely aligned.

20 First, we agree with the Attorney
21 General that you will not see that kind of cliff
22 effect with this proposal, just given the way

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the numbers play out. But even if there were
2 cases where it would occur, you're never going
3 to have a perfect system. The mandatory
4 minimums basically impose that fact on you, and
5 we believe that it would be better for people
6 who are not subject to the mandatory minimums
7 because they aren't the types of people that the
8 mandatory minimums are aimed at, should not
9 necessarily have their sentences calibrated so
10 that they are consistent with what a mandatory
11 minimum penalty is.

12 Our second point is that direct
13 sentences, I think there's almost universal
14 agreement, are higher than necessary to achieve
15 all the various purposes of punishment. I
16 thought it was very helpful to hear both the
17 Attorney General and Mr. Samuels talk about the
18 need to decide, how do we best use limited
19 resources?

20 We don't have as much money as we
21 want to spend on things like criminal justice.
22 And in my 17 years as an Assistant U.S. Attorney

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 before I went into private practice, I have to
2 say, I cannot recall a single time when one of
3 my colleagues, or anybody, frankly, said, gee,
4 I wish we could have gotten a higher sentence
5 under the guidelines for this drug defendant.

6 And if anybody ever said it, I'm
7 sure it didn't happen in a case where a
8 mandatory minimum wasn't applicable because
9 the person simply was not the type of person for
10 which mandatory minimums apply. And that was
11 before, and that was more than ten years ago,
12 before a lot of the Commission's targeted
13 amendments and enhancements to deal with the
14 types of factors that do warrant a higher
15 sentence, such as violence and the use of
16 weapons.

17 My third and final point is that we
18 do have a few suggestions for better
19 integrating this amendment into the existing
20 guideline. One is to apply it also to the
21 mitigating role cap at A5. Some of the
22 defendants with the least culpability would not

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 get the benefit of a reduced sentence under this
2 amendment, and these are the people that we
3 believe are, in fact, most deserving because
4 they are the lowest level people who are getting
5 a reduction in their offense level based on
6 playing the smallest of the roles.

7 We also support the defender's
8 suggestion about applying this to the entirety
9 of the drug quantity table, meaning both the top
10 and bottom of the table, and we think that the
11 Commission ought to take that into
12 consideration. And finally, I would just like
13 to make one additional comment.

14 One of our former voting members,
15 Riley Ross, who was the 3rd Circuit
16 representative, and after his two-year term, or
17 two terms, gladly became a non-voting member,
18 was the person in charge of putting together
19 these comments and led the group very well. We
20 have a lot of support within the group.

21 Riley, when he was a federal
22 defender, represented Derrick Kimbrough, and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we thought it was especially appropriate for
2 him to take the lead and I do want to thank him
3 and the other members of the group for assisting
4 us in putting together the comments for today.
5 Thank you.

6 CHAIR SARIS: Thank you.
7 Commissioner Friedrich.

8 COMMISSIONER FRIEDRICH: Thank
9 you. Ms. Roth, if we take your suggestion and
10 drop the drug quantity table down to a Level 4,
11 won't that create proportionality problems
12 with other drug guidelines like guideline for
13 possession and regulatory offenses? Won't the
14 base of those levels for certain drugs be the
15 same level or even lower under the
16 drug-trafficking guideline if we were to take
17 that step?

18 MS. ROTH: I don't believe so,
19 although our specific comments are to not keep
20 the lower end of some of the drugs at 12. I know
21 that marijuana takes us down to 6 right now, but
22 some of the drugs are still at the Level 12 limit

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and we urge the Commission to consider strongly
2 reducing that to 10. We don't see a reason not
3 to reduce that by 2.

4 That would not impact, I think, what
5 you're talking about and overlap with the
6 possession guidelines.

7 CHAIR SARIS: Okay. Judge
8 Hinojosa.

9 VICE CHAIR HINOJOSA: Thank you
10 both for being here in this room. Welcome to
11 the second best district court in the country.

12 MS. ROTH: Thank you, Your Honor.

13 VICE CHAIR HINOJOSA: Guess which
14 is the best.

15 MS. ROTH: I think I might know.
16 Red Sox. Southern District of Texas.

17 VICE CHAIR HINOJOSA: Oscar, that
18 you mentioned, that range was before acceptance
19 and before safety valve or after?

20 MS. ROTH: After.

21 VICE CHAIR HINOJOSA: What was it
22 that he was involved in? What was the drug and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the amount?

2 MS. ROTH: He had two drugs in his
3 truck. He didn't know the quantity or the
4 type. Most was methamphetamine. It was a
5 large amount of methamphetamine.

6 VICE CHAIR HINOJOSA: How much?

7 MS. ROTH: Over 12 kilos of
8 methamphetamine and then heroin.

9 VICE CHAIR HINOJOSA: How much of
10 that?

11 MS. ROTH: Seven kilos.

12 VICE CHAIR HINOJOSA: Being from
13 the Western District of Texas and my opinion
14 from the Southern District of Texas, you and I
15 both know that there are hundreds of thousands,
16 and some people say millions, of people like
17 Oscar in this country who are here illegally.
18 Many of them are working as field workers, not
19 in the pot situation, in the forest service
20 land, but out in the fields where they might get
21 low wages and working day-in and out, most of
22 the time in the sun.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 They have not succumb to the fast
2 money that somebody might get for bringing
3 drugs across, or transporting drugs, or
4 delivering drugs. And so the question that we
5 often face in the courtroom, and those people
6 don't come in the courtroom, and there are so
7 many of them, the question is, what message do
8 we send to them for not succumbing to the fast
9 money and working their heads off, and then
10 saying, well, we're punishing someone for
11 something that they had to succumb to?

12 And that's something that we face
13 day-in and day-out, and it crosses your mind as
14 a sentencing judge. And so I'm sure that it
15 would cross your mind if you had to sit on the
16 bench also. So that's part of the problem here
17 with regards to the length of sentences; the
18 punishment versus other situations as to what
19 we should do with each one of these cases and
20 I think we can't forget that part of it.

21 MS. ROTH: Yes, and I think your
22 question, if I'm understanding it correctly, is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 about the terms. And over and over again,
2 social science continues to teach us that --

3 VICE CHAIR HINOJOSA: Well, and
4 just desserts. It's not just deterrence.
5 It's for the person who actually took this and
6 he did it as opposed to the hundreds of
7 thousands and maybe millions who don't,
8 although given the same opportunity.

9 MS. ROTH: The certainty of arrest
10 is a much greater deterrent than any length of
11 sentence. And certainly, 135 months, even at
12 the low end, is a tremendous sentence for a
13 22-year-old. In this particular example,
14 Oscar is a United States citizen. He lacked
15 parental guidance in our country because he
16 needed to work here to help his family, but his
17 parents were not in this country.

18 In any respect, he, like many other
19 22 year olds, certainly didn't have the
20 judgmental capacity, even when we're talking
21 neurologically, that a 32-year-old should
22 have. But most important, the question, I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 think, is, is 135 months necessary to send a
2 signal? I would submit, no.

3 This graph shows, and I wish we had
4 data from earlier, from the '20s, and data to
5 the present, but it shows the incredible spike
6 in incarceration after the Sentencing Reform
7 Act, and after the drug legislation in the
8 1980s. If incarceration worked to stop
9 addiction, to stop the drug flow, it would have
10 worked in these past many years, and it simply
11 hasn't.

12 Your Commission proposal for a 2
13 level reduction is a modest, but extremely
14 significant, step. I think it would make about
15 an 11-month difference, which would be an
16 incredible difference to Oscar, would make the
17 lesson of him being caught no less emblazoned
18 in his mind and in the mind of the people who
19 knew about him being caught, but would reduce
20 this tremendous over-incarceration and bring
21 him back to his family sooner.

22 CHAIR SARIS: I was going to ask

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 about your proposed departure for mixtures.
2 Are you the one who did the marijuana cookie?
3 That was somewhere. That wasn't one of the
4 brownie --

5 (Simultaneous Speaking.)

6 VICE CHAIR HINOJOSA: I have heard
7 that defense many times.

8 CHAIR SARIS: I don't know what's
9 happening on that, but in general, I've never
10 heard a challenge to that. I mean, that's the
11 one thing that I've not actually heard was an
12 issue, so I'm trying to understand how big a
13 problem that that is. In other words, is it
14 typical that the amount of the actual drug is
15 a tiny portion as opposed to the majority of it?

16 I would like to understand a little
17 bit more the data that would support the request
18 there.

19 MS. ROTH: I don't have specific
20 data for you other than what is in our written
21 testimony, but I can tell you anecdotally that
22 it is certainly the case that clients of mine

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 have had drugs of a high purity and drugs of a
2 very low purity. And because the charge can be
3 for mixture and substance, what we're proposing
4 here is a mirror to what already exists as an
5 upward departure provision in the guidelines.

6 So right now, there's an upward
7 departure provision that urges sentencing
8 courts to consider when a person is responsible
9 for a very pure drug. And our suggestion is
10 that when it is not pure, when it's the
11 opposite, and the mix, it's been cut, so to
12 speak, so much when the mixture far outweighs
13 the amount of drug, that the court also be urged
14 by the sentencing guidelines to consider
15 downward departure.

16 COMMISSIONER JACKSON: Can I just
17 ask you as a practical matter though, it's been
18 my experience that defense counsel rarely, if
19 ever, ask for departures, that we're now in a
20 world in which the sort of departure realm is
21 really not, at least in my experience, a part
22 of sentencing.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 And I'm wondering what your
2 experience is in light of the fact that we have
3 these two requests relating to departures. I
4 was surprised to see them, given the realities,
5 at least as they are in my district.

6 MS. ROTH: The Supreme Court in
7 Gall reminds us and orders us to consider the
8 guidelines as the initial benchmark. And I
9 think that when we're looking at sentencing
10 policy and seeing those guidelines as an
11 initial benchmark, they should incorporate
12 departure grounds.

13 MR. DEBOLD: If I could speak to
14 that, too, from my experience, judges in a
15 number of districts do, in fact, follow the
16 dictate of Gall and look first at what the
17 guidelines say. And quite often, the
18 arguments that I make when I'm seeking a lower
19 than guideline sentence is that the lower
20 sentence is supported, not just on variance
21 grounds, but also by the way the guidelines are
22 worded, where they encourage departures or you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 can tell by the language of the guidelines that
2 something hasn't been taken into account, but
3 would take somebody out of the hard line.

4 So I think there is a value to the
5 Commission using its voice in these types of
6 things.

7 VICE CHAIR BREYER: I want to say I
8 was pleased to see your remarks concerning
9 impurity or lack of purity as a basis for
10 departure. And the reason is that the great
11 difference that I have in my years on the bench
12 is that, if you're going to treat it as a
13 variance, or you treat it as a departure, and
14 you're interested in transparency, you're
15 interested in the accountability, you're
16 interested in finding out why is the court doing
17 whatever it's doing.

18 It's much clearer in terms of a
19 departure to recognize departure rather than a
20 variance, because a variance masquerades all
21 sorts of things that can happen. I have found,
22 in California at least, that there is this wide

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 variety of purity with respect to the drugs,
2 which, of course, is an upward departure with
3 respect to drugs of a high purity.

4 I don't know why it would be so
5 difficult to quantify the degree of purity and
6 to sort of calibrate it in some sense to the
7 quantity, because if what you're going to do is
8 set the drug sentence based upon quantity,
9 which is what this table does, which our table
10 does, then it seems to me that you have to take
11 a look, in honesty, at the ingredients that go
12 into what the quantity is.

13 And so you may have a very
14 different, may have the same quantity with
15 respect to a supplier, with respect to a
16 middleman, with respect to the third or fourth
17 person, and the ultimate seller of the good, but
18 you won't have the same purity, and that's the
19 difference.

20 And do you have some proposals with
21 respect at how these measurements are done and
22 whether they ought to be incorporated either in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the form of departure or some other way? Have
2 we seen anything like that?

3 MS. ROTH: My experience is that
4 different law enforcement laboratories test
5 the drugs that come before the sentencing judge
6 in federal court. Sometimes they test for
7 purity as part of their routine, in other cases,
8 they don't, and that might be something that a
9 prosecutor might ask, for instance, for a
10 retest of purity, or that the defense attorney
11 might ask for.

12 CHAIR SARIS: It's just this thing
13 has not been litigated, and myself, 20 years on
14 the bench this year, it's never really been
15 litigated that way, so I'm trying to understand
16 that, theoretically anyway, they may use a huge
17 amount of cut, but still sell it at the same
18 price, right?

19 MS. ROTH: Could be, or at a reduced
20 price.

21 CHAIR SARIS: So I just feel as if
22 I don't have a handle on the issue well enough,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and if there was additional information, it
2 might be useful. Because if they're selling it
3 on the street at the same street value, should
4 you get a reduction? I suppose you could
5 discount it because the stuff is cheap and
6 terrible, but I don't know that it's sold that
7 way.

8 I'm just trying to understand it
9 better and it'd be useful if you had anything
10 else. Commissioner Barkow.

11 COMMISSIONER BARKOW: So I guess
12 I'm asking about the nicer restaurant that you
13 want to go to. If we thought about de-linking
14 completely, I'd be curious what your thoughts
15 would be on how we would do that or what factors
16 we would look at. How would you advise actual
17 nuts and bolts process that would involve doing
18 something like that?

19 Because right now, when it's linked
20 to what Congress has told us to do in the
21 statutes, if that's the key on which we operate,
22 you know, you can imagine how you can

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 proportionately go from there, but if it's
2 de-linked entirely, what does that landscape
3 look like for us in terms of the actual
4 pragmatic thing you want the Commission to be
5 doing setting up the quantities?

6 MR. DEBOLD: Yes, I think it would
7 require, basically, going back to where the
8 guidelines started with drug quantities and
9 looking at the ways in which they have changed
10 over time driven by these mandatory minimums.
11 I don't think there's an easy way to approach
12 it. You know, some part of it, I think, will
13 be empirical, looking at what sentences have
14 been over time, what the guidelines have been
15 over time, and trying to get a sense of the
16 recidivism rates that may be associated with
17 particular types of sentences.

18 The main point that we're trying to
19 make with that suggestion is that, right now,
20 we are taking the mandatory minimums as a given
21 in terms of what the appropriate sentence
22 should be for all of these drug quantities up

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and down the table proportional to those
2 sentences. And, you know, it may turn out,
3 empirical research, that there's some, purely
4 by chance I would say, rationality to that, but
5 right now, the way they were set, it's not tied
6 to things like, what is really necessary to
7 deter, what is just desserts, it's just -- it
8 happens to be because that's where the
9 mandatory minimums were set.

10 And when Congress set those
11 mandatory minimums, it was to get at particular
12 offenders who were either kingpins or I think
13 they refer to the others as, sort of, mid-level
14 dealers. And so, you know, I think in
15 combination with not just drug quantity, but
16 other factors that relate to culpability, which
17 the guidelines do already, to some extent, take
18 into account.

19 I think that the objective would be
20 to look at the types of drug defendants we're
21 dealing with, what factors are associated with
22 them, what makes somebody a lesser involved

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 person, and then try to tie the drug quantity
2 and those other factors together in such a way
3 that those are producing sentences where you've
4 got the right kind of proportionality.

5 You know, I don't know that there's
6 any particular formula that goes with that, and
7 certainly, we're not suggesting that there is
8 something that we can hand to you in the short
9 term and say, this is what would work better
10 instead, but our criticism is on the approach
11 that has been taken, which starts with the
12 mandatory minimums rather than starting with,
13 what are the purposes of sentencing and what do
14 these drug quantities have to do with those
15 purpose in light of the other factors that are
16 both aggravating and mitigating?

17 CHAIR SARIS: Commissioner
18 Wroblewski.

19 COMMISSIONER WROBLEWSKI: Thank
20 you, Judge Saris, and thank you both for coming,
21 Ms. Roth and Mr. Debold. You mentioned where
22 we started and as I think you're aware, the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sentencing guidelines actually, not only went
2 to Level 38, they originally went to Level 42,
3 and we are all working within a context of
4 statutes that the Congress has put in place,
5 which do, in fact, tie drug-trafficking
6 sentencing to drug type and drug quantity.

7 Over the course of many years, the
8 Commission has tried to do precisely what I
9 think you're suggesting, Mr. Debold, which is
10 to identify aggravating and mitigating factors
11 that better differentiate those offenders who
12 need very long incarceration sentences from
13 those who need less.

14 And of course, part of what we're
15 doing now is further along that same
16 trajectory, and some of that's being considered
17 in Congress. But I'm curious because the way
18 the system is supposed to work now, in the case
19 of someone like Oscar, is, if you're involved
20 in very, very, very large quantities of drugs,
21 I'm talking about under the Commission's
22 proposal, it would take 90 kilograms of heroin,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 which is 90 times the amount that would trigger
2 the ten-year mandatory minimum, to get you to
3 Level 38.

4 But even someone like Oscar, who's
5 a first-time, non-violent, low-level offender,
6 the way the guidelines are supposed to work is
7 that person is supposed to get a reduction based
8 on the mitigating role cap, a reduction based
9 on mitigating role, a reduction based on the
10 safety valve, a reduction based on acceptance
11 of responsibility that would drive that
12 sentence far lower than 135 months.

13 One-hundred and thirty-five months
14 is a Level 30 and criminal history Category 1
15 is a Level 33 Category 1. I'm not saying that
16 the guidelines work exactly the way the policy
17 is written, but that's the way the policy is
18 written and it's the policy that we're
19 supporting, which is, again, to identify those
20 low-level, non-violent offenders and bring
21 their sentences way down, but staying within
22 the context of the mandatory minimums.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Explain to me why that didn't work
2 for Oscar and why that's not the right approach.

3 MS. ROTH: Well, I looked at the
4 pre-sentence report again and -- to make sure
5 that I had the numbers right --

6 CHAIR SARIS: Excuse me, do you
7 want a Guidelines Manual?

8 MS. ROTH: I think I'm okay right
9 now.

10 CHAIR SARIS: Okay.

11 MS. ROTH: But in Category 1, that
12 135 to 168 month range was with two levels off
13 for safety valve and three levels off for
14 acceptance of responsibility. The role
15 adjustment was not included in that because he
16 was a single defendant. And in many parts of
17 the country, that is, indeed, the way the
18 guidelines are applied.

19 In that case, the court sentenced
20 him significantly below that, but that was not
21 how the guidelines came out. The judge needed
22 to do that on his own.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 COMMISSIONER WROBLEWSKI: The
2 Commission has tried a number of times to tweak,
3 to make a direction to courts to apply it. If
4 that was applied correctly though, the sentence
5 would drop significantly below that 135.

6 MS. ROTH: It would drop, but it's
7 still linked to quantity, and that link is still
8 not a real-world link. So if we're talking
9 about punishing people for their actual roles
10 in this crime, in drug-trafficking in our
11 country, linking it to quantity still starts us
12 at an incredibly high level.

13 CHAIR SARIS: Judge Hinojosa and
14 then anybody else.

15 VICE CHAIR HINOJOSA: Right.
16 Well, I just want to echo Commissioner
17 Wroblewski's comments about how the guidelines
18 are written so that somebody should have
19 considered overall adjustments here. And
20 that's certainly the view of the Commission and
21 we've tried to make that as clear as possible,
22 so maybe the guidelines weren't properly

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 determined here.

2 The idea that weight is not the
3 process that should be used with regards to a
4 gradual increase or decrease seems odd to me.
5 I did five years without the guidelines and if
6 somebody told me that weight didn't matter, in
7 my mind, with regards to how I determined a
8 sentence in a drug case, I would have thought
9 that was an odd thought, because the arguments
10 before the guidelines and before the mandatory
11 minimums were always the amount of weight and
12 the type of drug. Of course that was a big
13 discussion at the sentencing process without
14 the guidelines and without the mandatory
15 minimums, because it certainly would be logical
16 that the damage to society is much different
17 when you've got 5 pounds versus 1000 pounds.

18 The usage, the type of harm that
19 comes to society with regard, the number of
20 users that would be using the drugs, I just have
21 always found the comment that weight shouldn't
22 matter in a drug case a little odd because I did

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 five years of sentencing without the
2 guidelines, and it certainly was a huge part of
3 the discussion at the sentencing hearing, and
4 certainly, in the pre-sentence report.

5 MS. ROTH: One of the striking
6 things that we found in reviewing the data
7 preparing for our testimony was that it seems
8 that the lower a person's role, the higher the
9 quantity he or she had. So I'm looking now at
10 Page 5 of our written testimony, and note that
11 19 percent of couriers had amounts below the
12 five-year level, 27 percent of them had amounts
13 exposing them to five-year minimums, and 54
14 percent of them had amounts exposing them to ten
15 years or more.

16 So certainly, we don't want drugs
17 coming into our country or on our streets, but
18 when we're talking about punishing the
19 individual before us who was caught, it seems
20 that the lower the level that individual has,
21 the higher the quantity he or she's going to be
22 caught with.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So if we continue at a
2 quantity-based scheme, we're not accounting
3 for that person's actual culpability.

4 VICE CHAIR HINOJOSA: But we do in
5 the guidelines. We do. We talk about the role
6 adjustment, we talk about the safety valve, and
7 so if somebody qualifies for that and you have
8 a proper determination of the guidelines, that
9 is going to be accounted for just as if the
10 person was an aggravator as far as you go up.

11 That's the argument that you all
12 make with regards to how factors get
13 considered.

14 MR. DEBOLD: You had a point there
15 that, I think if you take the data that Ms. Roth
16 just mentioned, all of the things being equal,
17 I would agree that the courier who brings in 10
18 kilos is more culpable than the courier that
19 brings in 1 kilo. The whole issue here is not
20 whether weight is a significant factor. The
21 question is, how much, or the discussion on how
22 much weight should weight play in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sentencing process?

2 I'm sure we're going to have this
3 discussion when we talk about the fraud
4 guidelines in the next year or so, where we talk
5 about how dollar amount is definitely a way of
6 distinguishing people who are otherwise equal.
7 But the question is, how much of a role in the
8 overall sentence should that play?

9 I think the point here is that
10 Congress, in setting the mandatory minimums,
11 treated weight as a, I would submit, very rough
12 proxy for culpability. And we all know,
13 because you have a guideline system that has a
14 whole bunch of other factors that you take into
15 account before somebody's sentence is
16 determined, that the drug quantity is a proxy,
17 but it's rough.

18 The issue is, how do we take a
19 big-time dealer who has the same drug quantity
20 as the mule and figure out how their sentences
21 should be proportional to one another? And
22 that's the challenge here and one that I'm glad

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the Commission is engaged in.

2 COMMISSIONER PRYOR: Ms. Roth, you
3 mentioned that this is the one most widely used
4 guideline and I wondered whether you think it's
5 also the most widely respected guideline in the
6 sense that we see a lower percentage of
7 non-government-sponsored below-range
8 sentences with this guideline than we do with
9 other guidelines and how that should play in our
10 consideration.

11 MS. ROTH: I think judges across
12 the country would welcome your proposal to
13 reduce the base offense levels by two; embrace
14 it.

15 CHAIR SARIS: Anything else?
16 Thank you very much. We're going to take a
17 15-minute break. Maybe 11:10, 11:15, that'd
18 be great.

19 (Whereupon, the foregoing matter went off the record at 10:58
20 a.m. and went back on the record at 11:14 a.m.)

21 CHAIR SARIS: Order. So now we
22 have our panel of community and law enforcement

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 views. We start with Julie Stewart. Ms.
2 Stewart is president and founder of Families
3 Against Mandatory Minimums. Prior to
4 establishing FAMM, she worked at the Cato
5 Institute for three years as Director of Public
6 Affairs. Welcome back, I should say.

7 MS. STEWART: Thank you.

8 CHAIR SARIS: Mr. Reddy is a policy
9 analyst at the Texas Public Policy Foundation
10 Center for Effective Justice, where he
11 coordinates the Right on Crime Campaign. He
12 previously worked as an attorney in private
13 practice and as a law clerk to a justice of the
14 Texas Court of Appeals. Thank you for coming
15 such a distance.

16 CHAIR SARIS: Raymond Morrogh is a
17 director-at-large for the National District
18 Attorneys Association. He has served as the
19 Commonwealth's attorney for Fairfax County
20 Virginia since 2007.

21 Mr. Morrogh first joined that
22 office in 1983 and was appointed as Chief Deputy

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Commonwealth's Attorney in 1988. He also has
2 served on the Board of Governors of the Virginia
3 State Bar Criminal Law Section. Welcome. Ms.
4 Stewart.

5 MS. STEWART: Thank you so much,
6 Judge Saris, and Commissioners. It is a
7 pleasure to be here again. As you noted, I
8 started FAMM in 1991 shortly after my brother
9 was arrested for growing marijuana and
10 sentenced to five years in federal prison. He
11 was arrested in Washington State, which, I have
12 to say, is just a little ironic given that they
13 legalized marijuana there now.

14 But his offense and conviction
15 certainly started me on a career that I never
16 knew I would be doing still 23 years later.
17 Although, I have to say, where it was a
18 third-rail issue in 1991, sentencing reform is
19 pretty much mainstream today and it feels so
20 good, so very good.

21 But I'm pleased to be able to say
22 that FAMM supports your proposed amendment

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 wholeheartedly. We believe that the
2 Commission got it wrong when they created
3 guidelines that were above the mandatory
4 minimum sentence. We do view this proposal
5 though as a very modest proposal. It's
6 definitely not a major shift in policy or policy
7 change.

8 My testimony gives you other ways in
9 which we support the amendment and why, but I
10 think the most compelling one is the human
11 reason. And because I'm not burdened with a
12 law degree, I don't have to give you all the
13 legal reasons that we have to change this
14 amendment, or support this amendment, but I do
15 very much feel that one of the things that often
16 gets lost in the discussion of sentencing
17 guidelines, and grids, is that it becomes this
18 arcane process by which the human being gets
19 forgotten.

20 And I know that you try very much to
21 keep them in mind, and you hear from other
22 witnesses who talk about the individuals they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 represent, and I'm just here to add that voice
2 to this discussion. I think that the average
3 sentence reduction of 11 months seems very
4 small, and yet, at the same time, 11 months
5 makes an enormous difference in people's lives.

6 A friend of mine started a 20-month
7 prison sentence two months ago, and he had to
8 leave his children. He was a primary caretaker
9 of him. Twenty months sounds so small to
10 people who don't work in this world every day,
11 and yet, 20 months is a very, very long sentence
12 and a lot can happen in that time.

13 So an average sentence reduction of
14 11 months can make a huge difference in many
15 people's lives. One of the people whose cases
16 I talk about in my testimony is Dana Bowerman,
17 and she was a methamphetamine addict from a very
18 young age who was engaged in a conspiracy that
19 involved her father and a lot of family members.

20 She was sentenced at age 30 to 19
21 years and 7 months. That's 235 months in
22 prison. And if this amendment had been in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 place at the time that she was sentenced, she
2 would have received a sentence of 188 months,
3 about 15 years and 6 months, so about four years
4 less than she received.

5 She has been in prison for a very
6 long time. She will be released in 2018 at the
7 current rate if this minimum does not go through
8 and is not made retroactive. But she's an
9 example of someone whose life would have been
10 changed dramatically had this been in place at
11 the time she was sentenced.

12 And then more closer to home,
13 yesterday I went to a memorial service for the
14 uncle of two young men who served prison time,
15 Lamont and Lawrence Garrison, you've heard
16 their mother testify here before, Karen
17 Garrison.

18 The boys, Lamont and Lawrence, each
19 received sentences of 15 years and 19-1/2 years
20 in prison for a crack cocaine offense in 1998.
21 When you dropped the crack cocaine guidelines
22 in 2007, and then made them retroactive, they

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 both received reductions, one of three years
2 and one of four years.

3 So each of these gentlemen were able
4 to be present yesterday at their uncle's
5 funeral service. One of them would not have
6 been able to be there. He would still be in
7 prison if not for the reforms that you passed
8 in 2007.

9 And it was such a strong reminder of
10 the real human element; the living, breathing
11 embodiment of these sentencing guidelines, to
12 see these young men paying tribute to the uncle
13 that raised them, pretty much, as sons.

14 So I urge you to continue along this
15 path that you have taken so boldly since 2007,
16 and even before, to continue to offer drugs
17 minus 2 to everyone serving a drug offense.
18 It's not an enormous reduction in sentence. It
19 does correct the problem that we think needs to
20 be corrected. The guidelines should capture
21 the mandatory minimums, not give up them.

22 And we're really very delighted

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that you're taking this modest change and
2 support you every step of the way. Thank you.

3 CHAIR SARIS: Thank you. Mr.
4 Reddy.

5 MR. REDDY: Thank you very much,
6 Judge Saris. It's a real honor to be before you
7 and the Commissioners today. I do work with
8 Right on Crime. Since our watch in 2010, we
9 have been focused almost exclusive on
10 state-level criminal justice reform, but that
11 doesn't mean that we're uninterested in federal
12 criminal justice issues.

13 In fact, we're all familiar with
14 Louis Brandeis' conception of the states as
15 laboratories of democracy. He said that the
16 states should learn from one another. I think
17 you could extend that a step further and say
18 that the Federal Government could learn from
19 the very best practices of the states also.

20 I think that today's amendment
21 follows in the footsteps of some of the very
22 best work that the states have done over the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 last ten years. You have seen several states
2 throughout the United States, states that we've
3 been involved in, look at adjusting penalties
4 for drug offenses, and they have seen
5 outstanding results.

6 They have found that crime rates,
7 which have been climbing for about two decades
8 in this country, have continued to decline even
9 after they have made these sentencing
10 adjustments. They have found terrific support
11 from all components of government, from both
12 parties, from all sorts of stakeholders across
13 the spectrum, and that support is coming in
14 large part because the crime rates keep
15 dropping.

16 I think we're finding that the
17 reason the crime rates are dropping, even after
18 these penalty adjustments have been made is
19 that, incarceration is something that has
20 diminishing returns. Now, a certain level of
21 it is obviously necessary, but at a certain
22 point, I think you start to realize that each

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 additional dollar that is spent on
2 incarceration can be better allocated towards
3 law enforcement and other prevention
4 techniques, and that you get better results
5 that way.

6 I want to, today, speak
7 specifically about four states that we've
8 worked in and reforms they've implemented:
9 South Dakota, in 2013; Georgia, in 2012; South
10 Carolina in 2010; and Texas in 2007. I want to
11 focus on these states because they are, plainly
12 stated, conservative states.

13 These are states that are dominated
14 by conservative legislatures. The
15 governorships are conservative. I don't think
16 that any of these states could be considered
17 states with political cultures that are soft on
18 crime, and yet, every one of these states has
19 made reforms that would be similar to the kinds
20 of reforms we're talking about with today's
21 amendment, and I think we can learn a lot from
22 their successes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So briefly, beginning with South
2 Dakota, in South Dakota's Senate Bill 70,
3 passed in 2013, the penalty for drug possession
4 was reduced from a Class IV felony, which
5 carried a maximum penalty of ten years in
6 prison, to a Class V felony, which carried a
7 maximum penalty of five years in prison.

8 Also, the state established
9 presumptive probation for all of their Class V
10 felonies, also, their Class VI felonies.
11 Those reforms are expected to save South Dakota
12 \$207 million in prison construction and
13 operating expenses over the next ten years.

14 In Georgia, which implemented its
15 reforms in 2012, the state created degrees of
16 seriousness for simple drug possession. This
17 is based on the weight of the drugs. Amounts
18 below 1 gram can now be charged as simple felony
19 possession so that they can better identify and
20 treat offenders whose conduct is most likely
21 due to addiction.

22 The Georgia reform bill passed

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 unanimously in both Senate chamber and the
2 House chamber. And a poll conducted by the key
3 charitable trusts revealed that Democrats,
4 Republicans, and Independents support the
5 legislation by at least 79 percent or above. I
6 think the lowest figure was among the
7 Republicans. That was 79 percent. That's
8 still 4 out of 5 Republicans supporting the
9 bill.

10 The legislation is expected to save
11 Georgia about \$264 million in prison costs.

12 South Carolina provided for persons
13 convicted of a first or second drug offense to
14 be eligible for probation or a suspended
15 sentence, or parole, work release, or good
16 conduct, and other sorts of credits.
17 Additionally, persons in South Carolina who are
18 convicted of a third or subsequent drug offense
19 were made eligible for probation, for parole,
20 and for credits, and other loaded
21 circumstances.

22 The South Carolina bill, because it

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 passed a little bit longer ago, has actually
2 provided us with some results that we can look
3 at. The prison population in the state has
4 decreased by 8.2 percent and crime has dropped
5 in the state by 14 percent.

6 I'll now turn to Texas, and I'll
7 spend an extra moment on Texas because, as Judge
8 Hinojosa said, they do contain the best
9 district in the country, probably the best four
10 districts in the country, Judge.

11 Texas, in 2007, is also worth
12 spending a moment on because just this weekend,
13 a few days ago, our governor, Rick Perry, was
14 here in Washington, D.C. at the Conservative
15 Political Action Conference. He was just a few
16 miles away from where we're sitting right now,
17 and participated in a panel on drug policy in
18 Texas.

19 He made some really remarkable
20 comments. He was on a panel with Grover
21 Norquist, the prominent tax reform crusader,
22 and he said there are very few things that I

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 agree with Barrack Obama and Eric Holder on, but
2 this issue is one of them. And at that moment,
3 there was applause throughout the room. I was
4 in the gallery, there were thousands of people
5 there, and yet, it was Rick Perry and Grover
6 Norquist. I think it's a sign of a real culture
7 shift.

8 In 2007, Texas instituted a cite and
9 summons program for marijuana offenses. I'll
10 briefly say that it was a bit of a myth that
11 marijuana offenses were causing people to be
12 locked up for very lengthy sentences, but what
13 is true, even though these people were
14 receiving probation, is that, while they were
15 awaiting their trial, they were sitting behind
16 bars, and Texas taxpayers were paying for that.

17 So the Texas legislature and the
18 governor said, well, if you could just issue a
19 cite and summons where the officer can issue a
20 ticket and have this person arrive in court for
21 their court appearance, you wouldn't have to
22 pay for those costs. This is something that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 passed very easily with Texas legislature, and
2 again, was signed into law by the governor.

3 That same year, Texas also capped
4 probation terms for drug offenders of five
5 years instead of ten years. You've seen a 25
6 percent drop in recidivism in the State of Texas
7 since these changes took place in 2007. The
8 state has its lowest crime rate since 1968.
9 And Texas, of all places, has closed three
10 prisons in the last three years.

11 The commonalities in all four of the
12 states I just described come down to the buy-in.
13 They got significant buy-in from the governors,
14 from the legislators, from the judiciary, from
15 prosecutors, whom they included in the process
16 at the earliest stage, and from prominent
17 thought leaders and think tanks, such as ours,
18 the Texas Public Policy Foundation in Texas.

19 But on a final note, I'll just
20 conclude by saying that in each of those states
21 I identified today, the penalty adjustments
22 were coupled with expansions of drug and mental

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 health treatment, rehabilitation, and
2 community supervision programs. That, I
3 think, is what Americans want, not just
4 modified drug sentences, but real action to
5 replace the long drug sentences with more
6 accountability for drug offenders.

7 Accountability does not just mean
8 sitting in a cell. It means getting treatment,
9 paying restitution to any victims, and being
10 forced to maintain steady employment upon
11 release. Now, I realize that the sentencing
12 Commission is not empowered to ensure that
13 those improvements are made to federal drug
14 treatment and re-entry, but I do hope that the
15 Commission will be a strong champion for these
16 changes if Congress considers today's
17 important and excellent amendment. Thank you.

18 MR. MORROGH: Judge Saris,
19 distinguished Judges, Counsel on the
20 Commission, thank you also for allowing me to
21 be here today to speak. It is indeed an honor
22 and I thank you for your important work that you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 do for Americans.

2 I'm here, obviously, representing
3 the National District Attorneys Association,
4 which represents approximately 39,000 state,
5 local prosecutors across the nation. And it so
6 happens that the local prosecutors, such as
7 myself and my brother in that organization,
8 prosecute approximately 95 percent of the crime
9 in the country.

10 In my jurisdiction, which is
11 Fairfax County, not far from here across the
12 river, we have about 1.3 million citizens.
13 Most of the big drug cases go federal. If it's
14 a big quantity, it goes to the federal
15 authorities, because they have the manpower,
16 the resources, and truly, the hammer of these
17 mandatory sentences, and some strict
18 sentences, I'd say, with respect to some of
19 these drug cases, which allow them to sort of
20 attack these organized drug organizations,
21 whether it's violent gangs, which we go have in
22 Fairfax County, which is a pretty suburban

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 jurisdiction, but they can dismantle those
2 entities using these tools, which we simply
3 just don't have.

4 Now, I will tell you that in my
5 jurisdiction, Fairfax, I haven't tried a drug
6 case in 30 years, and I'm an active trial
7 lawyer. I try murders and you name it, all the
8 time because we're busy, but no one tries them
9 because the jurors give out such
10 extraordinarily high sentences.

11 The jury sentence, in Virginia,
12 judges can reduce, so you almost never try a
13 drug case. I think that's, maybe, unique to
14 Virginia, but I think it kind of says something
15 about where the public is on this. We're here
16 to consider these amendments, and I have to tell
17 you, I'm not a federal expert.

18 I don't know beans about the
19 guidelines. They gave me the guidelines, I
20 read them, now I know why I'm a lawyer, it's a
21 lot of math involved in that. I'm getting my
22 usual D that I got in high school, but I think

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I appreciate, generally, where they are and
2 I've been schooled by others wiser than I.

3 I guess what we're saying is, we
4 want to try to balance the budget, which is
5 necessary, and here's a way we might be able to
6 do it without really harming anyone because
7 we've heard a lot of people talk about public
8 safety and so forth.

9 And one of the things that's cited
10 is a study that says, I think it was in 2007,
11 that it was a reduction in the minimums for
12 crack sentenced individuals and the study
13 showed that they did not recidivate at a higher
14 level than anyone else who served the full
15 sentences.

16 But I wonder, what is the recidivism
17 rate there? Is it 5 percent? And what are the
18 crimes they committed upon recidivism? I
19 mean, are they serious crimes? I heard some
20 stories today about Oscar and other people, and
21 certainly, they pull at your heart strings to
22 a certain extent, but I want to tell you about

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 last summer, I tried a case, and the victim's
2 name was Vanessa Pham, and she was a beautiful
3 19-year-old college student that attended VCU.

4 She went to get her nails done
5 before she could go on a job interview over in
6 Seven Corners, just about 12 miles from here.
7 A man approached her carrying a baby in a baby
8 carrier, and asked her for a ride to the
9 hospital because his baby was sick. She got in
10 the car, he abducted her, forced the car off the
11 road, and stabbed her almost 20 times; killed
12 her.

13 The defense, I came over to the
14 District, I bought PCP, I was smoking it, I'm
15 sorry. He's serving 49 years in prison and
16 Vanessa Pham will never see her family again.

17 The last murder case I tried before
18 the one -- not the last one, but the last
19 drug-related case a few years before that,
20 Jenny Orange, a beautiful 29-year-old woman,
21 lived in the Crestwood Apartments, again, about
22 15 miles from here. Hard-working young woman,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 only child of her mother, and she was in her
2 apartment watching "Heroes", the television
3 program ", when a man broke into her apartment
4 and beat her 47 times with a hammer, disrobed
5 her, and raped her; killed her.

6 Now, he's on death row. The
7 defense, I came over to the District, I bought
8 PCP, I smoked it, and he had witnesses to it,
9 they were all smoking PCP, and I just lost it.
10 It's not me. You know, I'm sorry. And he's on
11 death row and Jenny Orange is never going to see
12 her mother again, and her mother is disabled now
13 as a result of what happened.

14 So I say that not to shock you, and
15 I know as federal judges you probably see it
16 all, just like I do, but just to sort of be one
17 of the voices here, maybe the only voice, to
18 remind us all that things like that are not
19 reflected in the statistics. A box isn't going
20 to get checked on anyone's sentencing
21 guidelines because we didn't find out who did,
22 we don't know where the drugs came from, but we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 know that drugs are pernicious substances and
2 that they're fungible.

3 And once they're introduced into
4 the community, they have a ravaging effect upon
5 the populace, especially in the inner-city and
6 minority areas, where African-American males
7 are five times more likely to be murdered than
8 White males. That's why these laws are tough.

9 And I remember one of the judges
10 mentioned the 1980s, and I'm old enough to
11 remember that, when we had open-air drug
12 markets, crack markets in Fairfax County, which
13 is, as I say, a suburban jurisdiction, and it
14 was horrible. We toughened the sentences, we
15 put people away, and now we have safer
16 communities.

17 Homicides are down 50 percent in the
18 last 30 years. I just ask you all just to keep
19 that in mind when making these difficult
20 decisions. Thank you.

21 CHAIR SARIS: Thank you.

22 COMMISSIONER FRIEDRICH: Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Reddy, you mentioned a number of state reforms
2 that have occurred, and correct me if I'm wrong,
3 but is Texas the only one where you mentioned
4 a recidivism study?

5 MR. REDDY: I think Texas is the
6 only one in which I mentioned a recidivism
7 study, but that doesn't mean that it's the only
8 state in which we can point to some of those
9 figures. I think that in South Carolina, you
10 know, some of the figures show that recidivism
11 has declined.

12 I will say that in South Dakota and
13 Georgia, which I mentioned, we wouldn't have
14 those figures because recidivism rates are
15 calculated three years out and they're too
16 soon.

17 COMMISSIONER FRIEDRICH: Well,
18 with respect to Texas, I'm not familiar with all
19 the specifics, but you mentioned two. You
20 mentioned that there were summons issued for
21 minor marijuana offenses, and there was
22 reduction probation for certain offenses.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 It's hard to tie those changes to reduction in
2 recidivism. Were there broader scale reforms
3 that are connected to recidivism?

4 MR. REDDY: Yes, there were
5 actually far broader reforms. I didn't
6 mention them because I didn't know how germane
7 they were to today's amendment, but as long as
8 I get the chance to brag on these terrific
9 reforms, I will do it.

10 In 2007, the state had a budget
11 surplus but was told that a large portion of
12 that surplus was going to need to be directed
13 towards prison expansion. I think the exact
14 figure was 17,000 extra prison beds at a cost
15 of \$2 billion. And that these beds would be
16 needed by the year 2012.

17 The legislators did not want to
18 spend all of those funds, so they put \$240
19 million, a much smaller amount than \$2 billion,
20 into expanding drug courts, to better
21 monitoring and parole and probation, and they
22 really, really improved community supervision

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 in the State of Texas. And I think the results
2 speak for themselves.

3 As I said, 2012 rolled around, and
4 rather than needing those extra 17,000 prison
5 beds, the state found that it could actually
6 shutter a prison. One year later, the state
7 legislature shutdown another two. So I didn't
8 mention them at first because those moves
9 towards improving community supervision
10 policies are probably not things that we can
11 work on today.

12 But I do think that they're within
13 Congress' purview, and I do think that, in a
14 sense, today's amendment is step one, and some
15 of the bills that are being considered by
16 Congress are step two. I think Attorney
17 General Holder had said, they complement each
18 other. I think I would agree with that.

19 COMMISSIONER PRYOR: I have,
20 really, a question that can be answered by any
21 or all of you and it involves two sides of what
22 we have to consider, Mr. Reddy, you mentioned

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 what has happened in Texas, where, apparently,
2 they have great courts, but not as good of a
3 football team.

4 MR. REDDY: We never cheat.

5 VICE CHAIR HINOJOSA: I'm in the
6 middle of this.

7 COMMISSIONER PRYOR: But doesn't
8 the experience of the states really tell us very
9 limited information for what we have to
10 consider with the federal system? Mr. Morrogh
11 was mentioning so many of the big cases were
12 prosecuted on the federal side, and they really
13 involved different kinds of offenders, and far
14 more serious kinds of offenders.

15 Ninety-five percent of the cases he
16 was mentioning are prosecuted on the state
17 side, and the far-lower risk offenders,
18 lower-level offenders, the ones who might
19 expect not to be as great a risk if penalties
20 are reduced, are going to be on the state side.
21 That's one side of the equation, and then the
22 other side is, what we're really talking about,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Mr. Morrogh, is, the starting point for a
2 district court's calculation of the
3 appropriate sentencing guideline.

4 And since this issue was last
5 visited by the Commission, there have been a
6 great number of enhancements added to the
7 federal sentencing guidelines that can bring
8 that sentence a lot further up and help the
9 district court differentiate between lower and
10 higher risk offenders.

11 So what I wanted to know is your
12 reaction to those two sides of what we have to
13 look at.

14 MR. MORROGH: From my perspective,
15 I think, you know, I am both generally aware of
16 the guidelines, of course, and I know that there
17 are enhancements now for firearms and levels of
18 involvement, and it's more subtle than it used
19 to be. So some might say, well, quantities,
20 isn't it sort of less important to the calculus?

21 But to me, it's just sort of from a
22 common sense standpoint as a state prosecutor,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 quantity, to me, is one of the big indicators
2 of the level of criminal involvement, and the
3 greater the quantity, the greater the potential
4 harm to the community.

5 It's one thing to sell a small
6 amount of drugs to your neighbor. It's another
7 thing to have kilos of heroin in a truck and
8 deliver them here. So I think quantity is just
9 a very important factor, just in my opinion.

10 CHAIR SARIS: Judge Breyer.

11 VICE CHAIR BREYER: Yes, I'd like
12 to thank all of you for your remarks, and
13 certainly, even though you were the only
14 speaker today to address the particular issues
15 of victimization, I think we are all well-aware
16 of it. My own career, I started as a district
17 attorney in San Francisco in the "Summer of
18 Love", and in the beginning, in 1966, '67, drugs
19 were sold everywhere.

20 No one viewed, and when I say no one,
21 I would say that the population as a whole,
22 didn't view them as particularly pernicious

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 until the next year or so when we saw the
2 increase in homicides, the destruction of
3 lives, and especially young children who came
4 out to California. I, myself, prosecuted a
5 triple homicide caused by PCP.

6 I am keenly aware of the terrible
7 harm that drugs can cause, the devastation it
8 can cause, to victims, the families of victims,
9 and the community-at-large. So I am mindful,
10 and I know we all are mindful, of that.

11 I wanted to ask you a question about
12 your last response, because I do think quantity
13 matters. And I think that's shared by a number
14 of us, maybe all of this quantity, certainly,
15 does make a difference, but when you start
16 looking at quantity, the interesting thing
17 about quantity may be its component parts.

18 And it may be that the purity may
19 make the real difference in connection with the
20 harmful effect that a drug can cause. So in
21 your career as a district attorney, do you take
22 a look at the purity? Does that make a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 difference in your charging decisions? Do you
2 view it as a significant component in the
3 decision as to how to prosecute and what to ask
4 for?

5 MR. MORROGH: It certainly is a
6 factor, Your Honor. I mean, we look at the
7 purity for sure, but again, when it's really
8 large quantities, like kilos of drugs, at least
9 in our jurisdiction, the federal prosecutors
10 step in and take it. But prosecutors across
11 the country in other states, maybe, Boston and
12 places like that, they probably do really big
13 cases because they're better staffed and
14 whatnot. I say big cases, large quantities.

15 We do look at it, but it was an
16 interesting discussion earlier about how you
17 can step on the drugs and how much, you know,
18 cut you put in there. I actually had that issue
19 come up in a case, and I went to the lab and asked
20 them, can you separate out? And they looked at
21 me like I was crazy. And they said, we'd have
22 to go through every grain to figure that out.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 So I don't know if it's literally
2 impossible, but it may be virtually impossible,
3 at least from what I was told, but I do think
4 purity matters to a certain extent. If you've
5 got someone with a lot of very pure drugs, that
6 indicates they've got a good source and they're
7 probably major dealers.

8 But on the other hand, if you have
9 somebody with kilos that's been stepped on two
10 or three times, it's still going to be sold and
11 it's still going to put harm out there, and hurt
12 families and people, so again, it's a factor.

13 CHAIR SARIS: Everybody's talking.
14 Hold on a second. Judge Jackson?

15 COMMISSIONER JACKSON: Well, thank
16 you all for being here. I wanted to follow-up
17 on Judge Pryor's comments and, Mr. Reddy, do you
18 agree that the experience of the states is not
19 something that is easily translatable to the
20 federal system? That's one question, and then
21 the other was, you mentioned in your comment
22 that there was a lot of buy-in in the states that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you mentioned from all across the political
2 spectrum, and I'm just wondering whether you've
3 seen that same sort of buy-in at the Federal
4 Government level.

5 MR. REDDY: Sure. Well, to go back
6 to Judge Pryor's question, you know, it's not
7 a perfect analogy, but I do think that,
8 ultimately, the experiences of the states are
9 useful, and the reason I would say that is
10 because I think what we're getting at is kind
11 of a question of human psychology, that it
12 wouldn't matter whether it was at the state or
13 federal level, and here's what I mean by that.

14 The question is, if a sentence for
15 any sort of a crime increases from one year to
16 two years, does the likelihood of committing
17 that crime drop by half, or do the number of
18 people committing it, does that drop in half?
19 And if the answer to that is simply, no, we've
20 learned something there.

21 We've learned that we need to do
22 other things than incarceration when

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 addressing these kinds of crimes. And I think
2 these are the kinds of things we've seen at the
3 state level, that sentences are being reduced,
4 and yet, they're still seeing that crime is
5 falling.

6 And so I think that you can see
7 something of that human psychology there, that
8 for a long time, we were increasing, or
9 ratcheting up, penalties year, after year,
10 after year, and it's not clear to me that that
11 is what got us the results we wanted.

12 I would secondly say, talking about
13 buy-in, yes, there's terrific buy-in at the
14 federal level. Actually, I'll go back and
15 mention Texas briefly here and tell you why that
16 relates to the federal level. We conducted a
17 poll at the Texas Public Policy Foundation on
18 attitudes among Texans on the 2007 reforms.

19 And we found that the highest levels
20 of support came from people who self-identified
21 as Liberals, and who self-identified as Tea
22 Party-leaning Republicans. That was very

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 interesting, and I think if you look at the
2 federal level to see where the buy-in is coming
3 from, you just look at some of the bills that
4 we talked about today.

5 The alliances are Senator Leahy and
6 Senator Rand Paul, and you can't conceive of two
7 people with more different world views in the
8 U.S. Senate right now, but they're the ones who
9 are sponsoring the bill together.

10 You see the same kind of thing with
11 a prominent bill that's being pushed by Senator
12 Mike Lee. He's considered a member of the Tea
13 Party, a caucus of Republicans, that bill is
14 co-sponsored by Senator Ted Cruz of Texas. And
15 so I do think that political buy-in is coming
16 from both sides. I think that, across the
17 three branches in the Federal Government, you
18 have buy-in.

19 I mean, you're obviously getting it
20 from the legislatures, who are obviously
21 getting it from the Executive Branch, Attorney
22 General Holder was here this morning, and we're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 getting it from the judiciary, apparently,
2 because you are proposing this amendment to the
3 guidelines, and considering it, so I'm very
4 optimistic about the buy-in that's occurring at
5 the federal level.

6 MS. STEWART: Can I just add one
7 thing to that? I totally agree. I also want
8 to mention that Senator Durbin is on the Senator
9 Lee and Senator Cruz bill as far as sentencing
10 act. That's the bipartisan piece. Also, to
11 quantity, I think quantity should be a factor,
12 it shouldn't be the driving factor, and I think
13 that's what we all complain about with the
14 guidelines; that the quantity starts you at the
15 bottom of the guidelines, and you can go up from
16 there, and that the guidelines are so high.

17 And I'm curious, Judge Breyer, if I
18 can turn the tables on you, do you remember how
19 much time your triple homicide person got?

20 VICE CHAIR BREYER: No.

21 MS. STEWART: Because I contend
22 that in the time that you were prosecuting cases

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to today, sentences have escalated so
2 ridiculously that what used to satisfy the
3 public safety need and everything 20 to 30 years
4 ago, today, no longer does.

5 VICE CHAIR BREYER: Well, we have
6 the indeterminate sentence in California --

7 MS. STEWART: I understand.

8 VICE CHAIR BREYER: -- and those
9 here, so it was set, ultimately, by the Parole
10 Commission.

11 MS. STEWART: Right, but let's say
12 he got 30 years assuming that's what
13 non-violent drug offenders get. It's just
14 that the escalation of punishment is so high
15 today.

16 VICE CHAIR HINOJOSA: And, Julie --

17 CHAIR SARIS: That's fine. We'll
18 go down and then --

19 VICE CHAIR HINOJOSA: A follow-up
20 to that question, and I should have said Ms.
21 Stewart --

22 MS. STEWART: No, that's fine.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIR HINOJOSA: The response
2 from the other side is, but crime rates are so
3 much lower, and, you know --

4 MS. STEWART: Then I turn you to Mr.
5 Vikram, who can tell you that, in fact --

6 VICE CHAIR HINOJOSA: Well, I was
7 going to turn next to him.

8 MS. STEWART: And that's why the
9 state experiment is so valuable, because, in
10 fact, they have lowered -- you know, they've
11 changed -- made reforms, lowered penalties,
12 done all these various things, and crimes keep
13 dropping in those same states.

14 VICE CHAIR HINOJOSA: Right. And
15 so my question is really a follow-up to -- and
16 I need to respond to Judge Pryor, Texas is
17 bigger than France, so therefore, big enough to
18 have many good football teams, not just one.

19 COMMISSIONER PRYOR: Just no great
20 ones.

21 VICE CHAIR HINOJOSA: All play
22 within the rules. The four states that you

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 mentioned, and I listened to what kind of crimes
2 you talked about, and that's, also Judge
3 Jackson has mentioned this, they seem to be
4 simple possession-type of crimes. I mean, as
5 Mr. Morrogh pointed out, a big enough case, it
6 goes to the federal system.

7 And so this same thing happens in
8 Texas. Department of Public Safety, big
9 enough case with regards to drugs and quantity,
10 type of drug and quantity, goes to the federal
11 system. And so my question is, in any of these
12 four states, did we have -- and I don't even
13 remember ever having a possession case, except
14 during the Reagan administration when there was
15 a very limited policy that everybody, even for
16 simple possession, would come into the federal
17 system, and that was a long time ago. It didn't
18 last very long.

19 And I haven't seen a possession case
20 since then; just simple possession. Any of
21 these four states that actually involve
22 drug-trafficking and drug-trafficking of

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 certain drugs and in certain quantities where
2 there have been reductions? Is Texas one of
3 them?

4 South Dakota and Georgia, you
5 specifically mentioned possession, but are any
6 of those states that we can look at as people
7 setting national policy for federal cases where
8 we could find some correlation to the type of
9 case that we have in the federal system?

10 MR. REDDY: The honest answer,
11 Judge, is that it's hard to know the answer to
12 that, because as you're indicating, and as
13 Judge Pryor pointed out, the amounts are so much
14 larger and so the trafficking cases are
15 different, but I still maintain that the
16 example of the states is useful.

17 And the reason I would say that is
18 that, although I focused exclusively on drug
19 crimes during my testimony, these states, they
20 reduce sentences across the board for all kinds
21 of things; for burglary, they changed offense
22 thresholds; they reduced penalties for certain

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 assault crimes.

2 So it's clear that, on a whole host
3 of crimes, you are seeing that even though
4 penalties were reduced, you, nevertheless, saw
5 gains in public safety. So I think you could
6 extrapolate from that that the question is not
7 just the specific crime. It's that we just
8 reached a point where, across the board in the
9 United States, we had ratcheted up the
10 penalties far too high and we weren't getting
11 the results we deserved.

12 CHAIR SARIS: Thank you. I feel
13 like I should state, being from New York, where
14 there's no claim to having the best football
15 team, but we have big traffickers and New York
16 did lower the drug penalties quite
17 substantially, and our homicide rates are at
18 record lows, and we're experiencing great
19 public safety there.

20 So a little plug for New York, which
21 actually brings me to my question for you, Mr.
22 Morrogh, which is, I think we all share the goal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 of public safety and crime reduction, and doing
2 so on limited budgets. And hearing from the
3 Federal Government and the Attorney General
4 about what the best crime fighting strategy is,
5 is, you know, we've been told repeatedly that
6 with the limited federal budget and more and
7 more of it getting eaten up by the Bureau of
8 Prisons, there have been a hiring freeze on
9 enforcement agents, on prosecutors, that's
10 actually hampered the Department's ability to
11 fight crime and be a partner to the states in
12 this effort.

13 And so I guess my question is, if you
14 have a reason to doubt his assessment as to what
15 the best allocation of the resources would be,
16 because he seems to think spending less on the
17 terms of incarceration and shifting those
18 resources towards, you know, a combination of
19 more law enforcement plus these alternatives,
20 like, community supervision treatment kind of
21 thing, that that package, overall, would reduce
22 public safety better than the current setup

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that we have right now.

2 MR. MORROGH: Thank you. I'm from
3 New York as well. I was born in Queens. How
4 can I say it? I guess on behalf of NDAA, I
5 respectfully disagree with Attorney General
6 Holder. You know, NDAA doesn't believe the
7 system is broken. We don't believe that the
8 federal prisons are packed with low-level drug
9 possessors and low-level people. They're
10 either people who have offended four, five, six
11 times or dealing in large quantities of drugs.

12 Drug possession crimes aren't even
13 really treated very seriously at the state
14 level anymore. Most people are diverted, and
15 rightly so. We've moved to things like Project
16 Hope. Even at the state level we're looking at
17 the veterans. All sorts of diversionary
18 programs, that component is important.

19 It's just that, to cut sentences of
20 what looks like it could be 70,000 people who
21 are in prison for drug dealing-related offenses
22 is going to have an impact on public safety. It

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sort of seems to us that we learned that lesson
2 in the '80s, and now it seems like we're doomed
3 to repeat history.

4 I mean, and again, it goes back to,
5 what's the recidivism rate of these people who
6 are in there and what crimes do they recidivate
7 with, because one more Jenny Orange is too many,
8 and one more Vanessa Pham is too many. And to
9 see people in neighborhoods, you know,
10 hard-working people, have to deal with people
11 selling drugs on the street is just, we don't
12 think, in the interest of public safety.

13 And treatment is important but
14 people have to want to get treatment, and we
15 should divert as many people as possible, but
16 we should be strong when it comes to serious,
17 and we think drug dealing is a serious crime.
18 We should treat it seriously and we shouldn't
19 try to balance the budget on the back of the
20 criminal justice system, because victims are
21 involved, and public safety is involved, and we
22 think that the prime duty of government is to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 protect the public.

2 CHAIR SARIS: All right. Thank
3 you. Commissioner Friedrich.

4 COMMISSIONER FRIEDRICH: Mr.
5 Morrogh, I had a question relating to crack
6 cases. We've seen a pretty significant drop in
7 the federal crack docket following the Fair
8 Sentencing Act and our 2007 amendments, as well
9 as the 2011, and I'm wondering, have you seen
10 a corresponding increase in Fairfax County in
11 the number of crack cases, and if so, how do the
12 sentences, average sentences, imposed in those
13 cases compare to what they would get in the
14 federal system?

15 MR. MORROGH: Well, like I say,
16 nobody tries crack cases to juries in my county
17 because juries would give you a very, very
18 severe sentence, in the dozens of years. So we
19 don't try them, we make people plead guilty and
20 they get, compared to the federal system,
21 comparatively light sentences, but they're
22 always low amounts of crack. We're talking

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 about several grams.

2 When we get kilos or even a kilo,
3 typically, it would go federal because the
4 federal prosecutors could use that person to
5 penetrate a larger drug empire and maybe divert
6 that person, or do something with them, if they
7 were lower level, to get at the real big
8 cheeses, I guess you could say.

9 But, no, I don't see an increase in
10 crack cases in my county, and I don't think
11 there is one around the country. I see an
12 uptake in heroin recently.

13 COMMISSIONER JACKSON: Can I just
14 ask, Ms. Stewart, in your testimony, you
15 mentioned that the guidelines should capture
16 the mandatory minimums and not be above them.
17 And I'm just wondering whether or not FMM has
18 a position on something we discussed in a
19 previous panel, which was whether the
20 guidelines should be completely divorced from
21 the mandatory minimum.

22 MS. STEWART: Well, that would be

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 my preference, and I testified in 1994 to, or
2 1993 perhaps, to change LSD penalties and in
3 '94, I think it was marijuana penalties, to
4 de-link them from the mandatory minimums, and
5 the Commission did that.

6 So the Commission, I mean, no one is
7 prosecuted for LSD anymore, practically, but
8 the Commission made a standard dosage weight
9 for each hit of LSD, instead of weighing the
10 paper or the sugar cube that the LSD is
11 transferred on, which is how it's done under the
12 statute, so those were de-linked.

13 And in 1994, the Commission
14 established a standard weight for marijuana
15 plants, 100 grams per weight; whereas, under
16 the statute, it's 1000 grams per weight. So
17 it's been done before. Those may have been the
18 easier ones to de-link, but it certainly has
19 been done, it's possible, and those have been
20 in effect since the '90s and there certainly has
21 been no uproar about it.

22 VICE CHAIR BREYER: Well, I asked

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Mr. Morrogh, but I wanted to ask you as well,
2 do you think that if there was an analysis as
3 to the purity of the drug, that that would be
4 significant in terms of sentencing; that we
5 ought to consider that in terms of sentencing?

6 MS. STEWART: Well, you do that
7 already with methamphetamine, meth versus ice,
8 those are different sentences. I think it --
9 I mean, I certainly am no expert in this.
10 There's probably no reason not to. If you can
11 determine the purity of the drug, why not make
12 a distinction between them and give the lower
13 sentence to one that's the mixture.

14 But again, I think it's focusing a
15 little too much on the drug and less on the
16 culpability of the defendant, so if the drug
17 wasn't driving the starting point, and if the
18 starting point wasn't so high, I think that we
19 would end up with sentences that are more
20 applicable to each defendant.

21 MS. STEWART: Anything else from
22 anybody? Just one last question for you, Mr.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Reddy, because you're the one who knows the
2 numbers from the states, and someone asked this
3 before. We're all worried about recidivism.
4 Am I right, Mr. Morrogh? Everyone's worried,
5 is the person going to go out and hurt somebody
6 and, sort of, doing something stupid and ending
7 up back in jail?

8 So when you look at all of these
9 states, what are the -- in particular, not just
10 the possession cases, that's not as much our
11 issue, but the people who traffic, have there
12 been recidivism programs that stand out for you
13 that we can learn from the states as
14 laboratories of experience, in Texas, say?
15 That great state that's bigger than France.

16 MR. REDDY: I suppose the programs
17 that stand out the most at the state level are
18 the problem solving courts, and they've come up
19 several times in the testimony of other
20 witnesses today who have mentioned the veterans
21 courts, they've mentioned the drug courts.
22 There are prostitution courts. There's a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 prominent one in Dallas. There are mental
2 health courts.

3 These are really terrific programs
4 that get right to the heart of some of these
5 problems. They're great diversion programs.
6 We're able to address a lot of these problems
7 without having to utilize very expensive
8 incarceration-oriented solutions, and they've
9 been some of the most effective.

10 CHAIR SARIS: And do they prove up?
11 Do you have numbers for us?

12 MR. REDDY: I can get you numbers,
13 but I'm afraid I wouldn't be able to quote those
14 off the top of my head.

15 CHAIR SARIS: Okay. I would love
16 to see them because that's the pushback you get,
17 which is --

18 MR. REDDY: Of course.

19 CHAIR SARIS: -- I'm sure everybody
20 here is interested in having effective, the new
21 term is, evidence-based programs. We're
22 studying recidivism on the Commission. It's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 one of our big initiatives is to actually track
2 people to answer some of these questions. And
3 you're right, that'll be at least three years.
4 We're going to track for more years than that,
5 so it's very useful for us. And the questions
6 that we always get asked is, and then what?

7 And so it'd be very useful if we can
8 get that information.

9 MS. STEWART: I do think you might
10 want to say though that the recidivism rates
11 from the 2007 crack cocaine retroactivity were
12 30 percent, which was lower than the non --

13 CHAIR SARIS: The other cohort.

14 MS. STEWART: Right. Exactly.

15 CHAIR SARIS: Yes.

16 MS. STEWART: And I'm just saying
17 this for Mr. Morrogh, because I think he was
18 asking what the percentage was. It was 30
19 percent.

20 CHAIR SARIS: About 30 percent.
21 That's exactly right. Anything else from
22 everyone? Lunch. All right. Thank you very

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 much. We'll see you back at around 1:15.

2 (Whereupon, the foregoing matter went off the record at 12:01
3 p.m. and went back on the record at 1:18 p.m.)

4 CHAIR SARIS: Well, welcome back.
5 I hope you had a nice lunch. Some of you come
6 back here many times. Others are probably
7 brand new, so for those who weren't here this
8 morning, we have our little light system here,
9 with the red light, green, yellow, the hook.
10 We ask a lot of questions for those of you who
11 weren't here this morning.

12 You have the unenviable position of
13 grabbing everyone after lunch. On the other
14 hand, it's a really, really important subject,
15 so thank you for coming. We have, and I hope
16 I'm going to pronounce this right, Robert
17 Zauzmer. That's right. Who is the appellate
18 chief in the United States Attorney's Office
19 for the Eastern District of Pennsylvania, and
20 has served in that office since 1990.

21 He was an active participant on the
22 team of Department of Justice attorneys that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 oversaw the Department's response to the
2 Commission's crack cocaine amendments to the
3 guidelines. Thank you for all that work.

4 Alan DuBois or DuBois?

5 MR. DUBOIS: I'll answer either
6 one, but DuBois.

7 CHAIR SARIS: DuBois. All right.
8 I took French. Mr. DuBois is the First
9 Assistant Federal Public Defender for the
10 Eastern District of North Carolina, and has
11 served in that office since 1989. He
12 previously served as a staff law clerk at the
13 United States Court of Appeals for the Fourth
14 Circuit, and in 2005, was the Visiting
15 Assistant Federal Public Defender at the
16 Commission, and also served as the visiting
17 attorney with the Legal Policy Branch of the
18 Office of the Federal Defender in Washington,
19 D.C. Welcome.

20 Mr. McCrum is a member of the
21 Practitioner Advisory Group to the Commission.
22 Thank you for your service on that. His

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 litigation practice in San Antonio focuses on
2 white collar criminal defense, federal and
3 state government investigations, and federal
4 commercial litigation.

5 Mr. McCrum previously served as an
6 Assistant United States Attorney for the
7 Western District of Texas. Welcome.

8 And Teresa Brantley, well-known to
9 us all, welcome back for more. She's the Chair
10 of our Probation Officers Advisory Committee to
11 the Commission. She is the Supervisory United
12 States Probation Officer in the Pre-Sentence
13 Unit of the Central District of California, and
14 has worked for the United States Probation
15 Office for 12 years.

16 She previously practiced as a civil
17 law attorney for five years and worked as a
18 manufacturing engineer for ten years. And we
19 want to thank you and all the probation officers
20 who do such a good job guarding the guidelines,
21 so thank you. We always love hearing your
22 comments about how they're really working out

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 there in the field, so thank you. So we start
2 with you.

3 MR. ZAUZMER: Thank you very much,
4 Your Honor. I'm here to talk about the felon
5 in possession proposed amendment. My
6 understanding is that I have five minutes and
7 that we'll have a second panel on all the other
8 amendments, and I'll talk about those then if
9 that's all right.

10 CHAIR SARIS: It's speed dating.
11 You just keep going to panels.

12 MR. ZAUZMER: Right. So if that's
13 all right, I'll focus now on felon in
14 possession. On behalf of the Department of
15 Justice, thank you very much for having us here
16 and considering our views. We appreciate it
17 very much and it's an honor for me, personally,
18 to appear before the Commission.

19 With regard to the proposed felon in
20 possession amendment, the Department supports
21 Option 2 in the materials that were presented,
22 which would amend the felon in possession

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 provision to make clear how relevant conduct
2 works.

3 As you all well know, there have
4 been different decisions from different courts
5 that vary quite a bit with regard to how
6 relevant conduct is applied, both in
7 considering other weapons that may be involved
8 in the offense, and also, most particularly,
9 with regard to the other offense that is
10 committed with the firearm, or in connection
11 with, as it is said in the guideline.

12 And so we think that Option 2 is very
13 helpful in clarifying matters, that it's very
14 important to consider relevant conduct and to
15 consider other offenses that are committed with
16 a gun that's the subject of a felon in
17 possession offense. Now, I've read very
18 carefully, my new friend, Mr. DuBois'
19 commentary on behalf of the defenders, which
20 really is an attack that is considered, and
21 we've all seen it before, on relevant conduct
22 in general.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 As we all know, relevant conduct,
2 the notion of real offense sentencing,
3 permeates the guidelines. It's not unique to
4 this provision. It would be a radical change,
5 and it would start here, to not look at relevant
6 conduct. And we think it's very important,
7 still, to consider relevant conduct.

8 What it comes down to with the felon
9 in possession amendment is the question of
10 dangerousness. It's a question of, how
11 dangerous is this particular felon who has
12 violated the law by possessing a firearm? And
13 there's no question that there are different
14 levels of dangerousness with different felons.

15 If you could have a felon who's
16 guilty of the offense because he keeps a weapon
17 in his living room in a case, maybe for
18 protection, maybe for some other reason, and
19 you could have a felon who goes out on the street
20 with three or four guns and opens fire. Those
21 are very different people, and the court will
22 always consider that fact.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 When I've always thought about
2 relevant conduct over the years, and really, a
3 lot of guidelines provisions, it comes back to
4 what I think is the purpose of the guidelines,
5 which is to help a judge, guide a judge, in
6 categorizing, quantifying, the different types
7 of conduct that come before him or her, that if
8 we take away the guidelines, before there were
9 guidelines, or if there were no guidelines now,
10 there's no doubt that a judge who is sentencing
11 those two people I just described, one felon
12 with the gun in the living room, one out on the
13 street opening fire, there's no doubt that that
14 judge would consider those facts and give
15 different sentences, recognizing how different
16 the dangerousness is of these two felons.

17 And so what the relevant conduct
18 provisions do, and particularly, the other
19 offense enhancement, is it channels that and it
20 gives the court guidance. Doesn't have to
21 follow it now, as we know. We know the
22 guidelines are advisory, but we think it's so

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 very important in serving the function of this
2 Commission, and for that reason, we endorse it.

3 This Option 2 does appropriately
4 corral relevant conduct. If we're talking
5 about another gun that's possessed by the
6 felon, it has to be part of the same course of
7 conduct under (a)(2) of 1B1.3, relevant
8 conduct. If we're talking about another
9 offense, we already have the limitation there.
10 It has to be in connection with the felon in
11 possession offense.

12 For example, I think there was a
13 reference in the materials somewhere, someone
14 suggested, well, boy, this could sweep in
15 someone who committed the other offense, even
16 before they were a felon. And of course,
17 that's not true. It has to be in connection
18 with the felon in possession offense, with the
19 unlawful possession of the firearm.

20 Besides that, one other quick
21 comment about relevant conduct. As I said, it
22 permeates the guidelines, it permeates this

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 guideline. If you look at 2(k)2.1, there are
2 many other factors other than the charged
3 conduct that are considered, whether the gun is
4 stolen, whether there was trafficking, the
5 number of guns.

6 Every circuit has held that the
7 number of guns rests on relevant conduct and can
8 result in an enhancement, all for the same
9 reason, to quantify the dangerousness of the
10 offender.

11 The last thing I'll say, and of
12 course, I'll welcome your questions, but the
13 last thing is that we hear these scary
14 hypotheticals, that you're going to charge
15 somebody only as a felon in possession, and then
16 sentence them for murder, or for some other
17 heinous offense.

18 By and large, it doesn't happen, and
19 there are a number of reasons that it doesn't
20 happen. One, of course, is that it doesn't
21 really vindicate society's interests, for a
22 crime as serious as murder, to prosecute it in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 this fashion.

2 But the other very important thing
3 to consider is the statutory maximum here.
4 We're talking about felon in possession.
5 Generally, it has a ten-year statutory maximum,
6 and the judge has the authority to sentence
7 anywhere within that range. And again, I
8 submit he's going to give, or she's going to
9 give, a different sentence for somebody who's
10 more dangerous than another.

11 But I've yet to meet the prosecutor
12 who said, you know, I'm not going to prosecute
13 this murder because I'd rather do it by a
14 preponderance of the evidence at sentencing and
15 only get a ten-year statutory maximum sentence.
16 It doesn't happen that way.

17 What appropriately happens is that
18 the judge particularly considers the nature of
19 the felon in deciding what sentence is
20 appropriate, and that's where the suggestion in
21 Option 2 is very helpful and clarifies the law.
22 Thank you.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 CHAIR SARIS: Thank you.

2 MR. DUBOIS: Thank you,
3 Commissioners, and again, I would like to thank
4 you for giving me the opportunity to testify,
5 and it really is my pleasure to be here. As Mr.
6 Zauzmer said, the defenders are troubled by the
7 use of uncharged, dismissed, or acquitted
8 conduct to increase the defendant's
9 punishment. And we, therefore, would like to
10 see its use limited wherever possible,
11 especially in cases where that conduct
12 threatens to become the primary driver of
13 punishment.

14 And accordingly, we support the
15 elimination of the (c)(1) cross-reference and
16 the (b)(6)(B) enhancement found in the felon in
17 possession guideline; both of which, in many
18 cases, relegate the defendant's actual offense
19 conduct to little more than an afterthought in
20 the determination of his punishment.

21 However, if the Commission is
22 unwilling to delete these provisions

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 altogether, we support, with some caveats, the
2 amendment set out as Option 1, as a means of
3 ensuring that a meaningful connection between
4 the offensive conviction and the punishment
5 imposed is preserved.

6 While Option 1 doesn't completely
7 resolve all our concerns about the use of
8 uncharged, dismissed, or acquitted conduct,
9 it's definitely a step in the right direction.
10 Option 2, on the other hand, in our view, would
11 be a huge step backwards. It would,
12 essentially, eliminate the relevant conduct
13 rules in felon in possession cases, and expose
14 the defendant to greatly enhanced punishment
15 for conduct only minimally related to his
16 offensive conviction.

17 And to address Mr. Zauzmer, let me
18 illustrate this with a real-world example from
19 our office. We had a case not too long ago
20 where a defendant in April of 2013 was found in
21 possession of two weapons and was charge with
22 two counts of 922(g). He was also arrested by

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the state in connection with a shooting that had
2 occurred in December 2012, five months later,
3 and involved a completely different gun.

4 Under current Fourth Circuit law,
5 law that Option 2 would eliminate, or
6 aggregate, the Chapter 2 Part K enhancement in
7 the cross-reference did not apply to our
8 defendant because the state offense didn't
9 group. As a result, our defendant was punished
10 in federal court for the conduct supporting his
11 federal conviction of unlawful possession of a
12 firearm, and he's currently facing trial in the
13 state court for the state offense of attempted
14 murder, and faces punishment for that offense
15 if he's found guilty beyond a reasonable doubt,
16 after a trial, in which he would receive all the
17 procedural protections that he's entitled to.

18 We submit this is how the system
19 should work and we further submit this is how
20 the system would work if Option 1 were adopted.
21 The outcome under Option 2, however, would be
22 really very different. There, as long as there

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 was some minimal connection shown between the
2 firearms possession in December of 2012 and
3 those possessed months later in April 2013, the
4 attempted murder would be relevant conduct, per
5 se, no further connection between the offensive
6 conviction and the state offense would be
7 required.

8 The Federal Government can then
9 punish the defendant as if he had been convicted
10 of the attempted murder based on proof by
11 nothing more than a preponderance of the
12 evidence and with no core Constitutional
13 protections. No right to confrontation, no
14 right to call -- no jury trial rights, no rules
15 against hearsay.

16 And because Option 2 allows the
17 Federal Government to reach out and punish any
18 offense, however tangentially related to the
19 federal offensive conviction, without
20 affording any of these procedural protections,
21 the state actually does have little incentive
22 to maintain their prosecution, and in fact, in

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 many cases, it would likely not pursue it.

2 And this is not supposition. This
3 is actually what happened in a case out of my
4 circuit, United States v. Horton, where the
5 state did drop a murder prosecution in favor of
6 the federal felon in possession of firearm
7 prosecution.

8 We really don't believe that this
9 type of shortcut is how the Founding Fathers
10 envisioned that the system would work. Though
11 Option 2 purports to place limits on the
12 application of the enhancement and
13 cross-reference by requiring the uncharged gun
14 and the charged gun to bear some relation to one
15 another, given the continuing possessory
16 nature of the felon in possession offense, we
17 fear this limitation is really likely to prove
18 toothless.

19 If Option 2 were adopted, any
20 defendant convicted of possessing a firearm
21 would be subject to punishment for any offense
22 he was alleged to have committed which involved

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 a firearm with very little limitation.

2 At a time when the wisdom, fairness,
3 and practicality of real offense sentencing is
4 increasingly being questioned, Option 2 would
5 be a dramatic lurch in the opposite direction,
6 largely eliminating the modest protections the
7 relevant conduct rules provide, and further
8 untethering a defendant's punishment from the
9 actual conduct supporting his conviction.

10 In this instance, Option 1 is
11 clearly preferable. It preserves the link
12 between defense conduct and punishment, is
13 simpler, easier to administer, and far less
14 likely to result in many trials over the
15 defendant's involvement in uncharged crimes,
16 which he may or may not have committed, and
17 which may or may not have involved a gun.

18 Finally, Option 1 returns to the
19 original understanding of the guideline, which
20 contained the precise limitation that Option 1
21 reinstates, limiting it to the gun of
22 conviction. However, Option 1, in our view,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 can be improved. We see no need to eliminate
2 the existing requirement that there be a
3 relevant conduct link between the offensive
4 conviction and the uncharged offense, even in
5 cases involving one gun.

6 The current relevant conduct rules
7 are familiar and basically cover every
8 situation where it would be right and fair to
9 take the uncharged offense into account.

10 Accordingly, we see no need to
11 resort to 1B1.4 and establish a per se rule that
12 any offense involving a gun brings the
13 enhancement or cross-reference into play.
14 This would really represent a novel expansion
15 in the use of (a)(4) and deprive the defendant
16 of even the minimal protections of the relevant
17 conduct rules for no good reason that we can
18 see.

19 This seems to us to be a dramatic
20 shift into uncharted waters to address the
21 issue that really doesn't appear to be a
22 problem. I'd be happy to answer any questions

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 you guys might have about these issues. Thank
2 you.

3 CHAIR SARIS: Thank you.

4 MR. MCCRUM: Commissioners, thank
5 you very much for the opportunity to be here on
6 behalf of the Practitioners Advisory Group, and
7 I personally also am honored to be here for the
8 first time. The Commission has proposed two
9 options in the amendment of section 2K2.1. The
10 Practitioners Advisory Group joins with the
11 defenders in stating that Option 1 is clearly
12 more appropriate and consistent with the
13 fundamental principles of sentencing.

14 It limits the sentencing as all
15 other sections in the guidelines do, to the
16 factors related to the offensive conviction as
17 opposed to reaching outside to uncharged,
18 acquitted, or unrelated conduct. Contrary to
19 what my former colleague with the Department of
20 Justice says, Option 2, or the choosing of
21 Option 1 does not eliminate consideration of
22 other factors, of other unrelated conduct.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 The guidelines already provide that
2 in 1B1.4, consideration of those factors both
3 within guideline, within range sentencing, as
4 well as departure and variance considerations.
5 And so it doesn't eliminate consideration of
6 those factors.

7 Our position continues to be that we
8 have strong issues with respect to whether or
9 not relevant conduct should be considered, or
10 the extent to which it should be considered
11 under 1B1.3, but that being said, if
12 subsections (b)(6)(B) and (c)(1) remain, the
13 PAG recommends two revisions to the proposed
14 amendment to the commentary.

15 First, we recommend that
16 application of subsections (b)(6)(B) and
17 (c)(1) be limited to the standard set out in
18 section 1B1.3(a)(1) and (a)(2) alone, and not
19 allow an enhancement based on section
20 1B1.3(a)(4). As this Commission is aware, the
21 language of subsection 1B1.3(a)(4) is
22 circular.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 It directs the parties back to
2 section 2K2.1 and its broad phrase, in
3 connection with another offense. The current
4 problem of inconsistency by courts would remain
5 by not providing clarity or limitation as to
6 what offenses are to be concluded in that
7 phrase, in connection with.

8 Effectively, the reference to
9 1B1.3(a)(4) would create an unclear per se rule
10 of enhancement for non-charged conduct.
11 Second, we recommend revision of Section E in
12 the commentary to specify that 1B1.3 must be
13 applied if the enhancements of (b)(6)(B) or
14 (c)(1) are considered.

15 The proposed language that this
16 Commission put out in Section E of the
17 commentary directs courts to consider, but not
18 necessarily apply, relevant conduct provisions
19 of 1B1.3. This permissive language continues
20 to leave open the possibility of application of
21 these subsections to conduct unrelated to the
22 offense of conviction.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 As we know, different courts have
2 not only applied, different subsections of
3 1B1.3, but also applied their own standards in
4 coming up as to what should -- how this
5 uncharged conduct should be applied. This has
6 led to inconsistent application of (b)(6)(B)
7 and (c)(1).

8 Accordingly, we strongly recommend
9 that the proposed language of Section E direct
10 courts to consider as opposed to leave it
11 permissive. An important issue, though, is
12 the Commission's question put out as to whether
13 or not the cross-reference in subsection (c)
14 should even be deleted.

15 Clearly, application of subsection
16 C, the cross-reference section, leads to the
17 most disparate sentencing possible. As the
18 Commission is aware, cross-references to other
19 guideline provisions are included in many other
20 parts of the guidelines. We all know that.

21 In these other sections, however,
22 there's a reasonable relationship between the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 offense of conviction and the conduct that is
2 a natural consequence of that offense. For
3 example, in offenses against persons in Part A
4 of the guidelines, the cross-references
5 address the degree of harm caused to the person.

6 In the drug offenses in Part D, or
7 the racketeering offenses in Part E, the
8 cross-reference sections also address crimes
9 that naturally are associated with, or flow
10 from, the offenses of conviction. In the case
11 of felon in possession, however, courts have
12 applied the cross-reference subsection C1 to a
13 wide range of offenses that often have had no
14 reasonable relationship to the offense of
15 conviction.

16 An immigration document,
17 possession of an immigration document, for
18 example, and a felon in possession. There is
19 an added problem, however, though, even if you
20 revise subsection C1 to limit its application
21 to closely related conduct under or (a)(2),
22 that does not adequately address the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 fundamental problem that a person is being
2 convicted of a possessory-type offense, but
3 will be sentenced under a sentencing structure
4 of a completely, wholly different type of
5 crime.

6 This is vastly different from other
7 cross-reference sections in the guidelines. A
8 felon in possession, as we all know, is a
9 possessory crime. In contrast with those
10 crimes which contain cross-references to
11 conduct naturally flowing from the conduct of
12 the offense of conviction, it is unjust to apply
13 a different crime sentencing structure where
14 the offense of conviction is a possessory
15 crime. I thank you for this opportunity to be
16 here.

17 CHAIR SARIS: Thank you. Ms.
18 Brantley.

19 MS. BRANTLEY: Good afternoon,
20 Judge Saris and Commissioners. Thank you so
21 much for allowing me to come here and talk to
22 you today. POAG asked if we could comment on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 this particular proposed amendment. We look
2 at these things, as you know, from an
3 application point of view. What kind of
4 application issues might arise, intended or
5 otherwise, under some of these proposals?

6 In this one, we could not reach
7 consensus as to Option Number 2. The majority
8 of the folks on POAG liked Option Number 2
9 because they felt like that was the way that we
10 should be applying them in terms of the relevant
11 conduct analysis that we do all the time across
12 cover to cover of the guidelines.

13 But there were a couple who still
14 felt and expressed concerns that you've already
15 heard from other members of this panel, about
16 bringing in conduct wholly unrelated to the
17 possession charge, and having a person charged
18 with felon in possession end up being sentenced
19 for something different.

20 Now, we make no comment as to
21 whether or not it should or should not be that
22 way, but for that reason, we couldn't reach

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 consensus on Option Number 2. However, we did
2 reach consensus on Option Number 1, in that, as
3 a group, we rejected it. We asked you to
4 consider some of the consequences of that that
5 may not be intended.

6 We see, in cases like this where we
7 start to carve out exceptions to the way the
8 guidelines operate, in this case, in the way
9 relevant conduct would operate, for this
10 particular part of this particular Chapter 2
11 offense, and we anticipate, or fear, that what
12 will happen is, the first argument will be,
13 well, if this exception to the way you're going
14 to interpret relevant conduct applies to the
15 cross-reference in 2K2.1, well, then, maybe it
16 should apply to determining the base offense
17 level as well.

18 And if that happens, then maybe it
19 should apply to other 2K offenses, and maybe
20 then other Chapter 2 offenses. And we worry,
21 then, that we will end up with case law and
22 application procedures in various districts

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that are applying the relevant conduct in a way
2 that, perhaps, was not intended by this
3 well-intentioned proposal, and that was what we
4 asked you to consider when looking at whether
5 or not you would want to impose Option Number
6 1 to carve out an exception to relevant conduct
7 for this cross-reference.

8 In fact, we did feel so strongly
9 about it that if you were to ask us, we would
10 say, rather than carve out an exception, don't
11 do the cross-reference. And that was the main
12 comment that my colleagues asked me to come in
13 here and make to you today. Thank you very
14 much.

15 CHAIR SARIS: Thank you.
16 Questions?

17 VICE CHAIR BREYER: I think we're
18 all in agreement that it's very important in
19 sentencing any defendant to try to ascertain
20 level of dangerousness, which is how you start
21 with it. While that's the goal, the way you get
22 to the goal is to be satisfied with the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 evidence, support whatever you conclusion you
2 would come to with respect to the level of
3 dangerousness.

4 And that's the devil in the details,
5 which is that, does one simply accept a
6 preponderance of evidence test in looking at
7 the relevant conduct in determining whether or
8 not it ought to be considered in order to
9 ascertain the appropriate level of
10 dangerousness.

11 For example, one circuit has held
12 that where this is a great disparity between the
13 base offense level and the enhancements that
14 can occur as a result of relevant conduct where
15 there's a great disparity. The evidence of the
16 relevant conduct must be established by clear
17 and convincing evidence as distinct from
18 preponderance of the evidence, because then
19 you're more convinced than ever that the person
20 is dangerous in uncharged or even acquitted
21 conducted.

22 So I'd like to hear your comments on

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that aspect of the test.

2 MR. ZAUZMER: Yes, Your Honor, the
3 preponderance standard is used for all facts
4 found under the guidelines now that the
5 guidelines are advisory, for mitigating
6 factors, for aggravating factors. There are
7 many things -- now, here, we have to be talking
8 about what could be and likely is other criminal
9 conduct, and thus, our senses are sharpened and
10 we're focused on it.

11 But judges are considering good
12 things and bad things about defendants, are
13 allowed to consider any fact that comes up at
14 sentencing, and finds those facts by a
15 preponderance standard.

16 In terms of the case you're
17 addressing, unless there's another case I'm not
18 familiar with, I'm intimately familiar with the
19 original case that applied that clear and
20 convincing standard, which was Kikumura, which
21 was a case in the 3rd Circuit, where I live, I
22 think it was in 1991, and that was one of these

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rare instances of a dramatic enhancement.

2 The person was convicted of
3 possession of an explosive device that was in
4 his trunk while he was driving up the New Jersey
5 Turnpike, and he got an enormous enhancement
6 based on the fact that it was in connection with
7 a terrorist act because he was a terrorist, and
8 that's what he was doing was planning to do
9 something nefarious in New York City.

10 The Third Circuit held in Kikumura
11 what Your Honor described, which is that, for
12 an enhancement like that, I think it was 30
13 levels, that you needed clear and convincing
14 evidence. Two things, first, we've never seen
15 an enhancement since like that in the 3rd
16 Circuit, but second, the 3rd Circuit has
17 withdrawn the Kikumura holding after Booker,
18 because Booker made the guidelines advisory.

19 And, so, since Booker pretty much
20 held, and every court has since confirmed, that
21 now we have a preponderance standard in
22 determining the facts that will guide a judge,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 but not bind a judge. And so since Booker, the
2 3rd Circuit held that the Kikumura clear and
3 convincing standard is moot. It doesn't
4 apply. Preponderance applies across the
5 board.

6 And we don't see a reason that this
7 should be different, because again, at the end
8 of the day, once the judge has made all these
9 findings by a preponderance, the good and the
10 bad, at the end of the day, this is advice, and
11 the judge then decides, within the statutory
12 maximum allowed by the conviction for felon in
13 possession, what the sentence will be. I hope
14 that answers your question.

15 MR. DUBOIS: Can I?

16 CHAIR SARIS: Go ahead.

17 MR. DUBOIS: That's fine. I just
18 wanted to try to point out a couple of reasons
19 why this particular guideline is different than
20 many other guidelines and why, Judge, your
21 concerns are especially well-taken in this
22 context. Chapter 2 Part K, when we're talking

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 about it, especially in the context of two
2 different guides, we're talking about two
3 completely unrelated episodes.

4 So at the time that the defendant is
5 charged with the possessing of the one gun, he
6 may very well not know that he is even,
7 potentially, on the hook for some completely
8 unrelated criminal activity that may have taken
9 place at a different time, years before.
10 There's an issue of notice and the issue of
11 preparation that you can plead guilty to this
12 one gun and you don't know until the
13 pre-sentence report comes in that they're going
14 to try to cross-reference you to some wholly
15 unrelated episode.

16 That really puts the defendant at a
17 disadvantage and it's a problem that's easily
18 solved. To the extent that you want to link the
19 dangerousness to the actual criminal activity
20 that brings a person into federal court, charge
21 that gun, and if you can't charge that gun for
22 some reason, maybe that's a sign that you don't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 have enough evidence to apply the
2 cross-reference.

3 We had a case in our district not too
4 long ago similar to this. Felon charged with
5 one gun, they attempted to cross-reference him
6 based on a separate home invasion-type episode
7 involving a different gun, but the evidence in
8 that case was only that there was a home
9 invasion, the victim thought the person had an
10 object that appeared to be a gun, the gun was
11 never recovered, the gun was never described,
12 but the judge, in our case, made the finding
13 that that was a gun and applied the enhancement.

14 That's the type of disconnect
15 between offense, conduct, and punishment that
16 really, I think, implicates some very real due
17 process concerns and I think concerns that
18 would be alleviated under Option 1 where there
19 is at least involving the gun of conviction in
20 the same, you know, or similar criminal
21 episode.

22 COMMISSIONER JACKSON: Yes, that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 was going to be part of my question and perhaps
2 even to Ms. Brantley or whoever can answer.
3 The cross reference, or (c)(1), is very
4 troubling to me because I view it as a different
5 scenario. You said this is sort of like the
6 same as other relevant conduct in that the
7 probation officers are worried about having
8 this work differently, but it seems to me that
9 this is almost two layers.

10 We're talking about double relevant
11 conduct, right, because it's the first layer of
12 relevant conduct that gets you to the other gun,
13 I think, or in a situation in which there is a
14 gun and then that gun, the one that's charged,
15 is used for the commission of another offense.
16 That's one layer of relevant conduct.

17 But it seems to me that when you are
18 using relevant conduct Level 1 to get you to
19 another gun and then using relevant conduct
20 related to that gun to get you to another
21 offense, we're talking about something totally
22 different.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I mean, did you all discuss that and
2 was that any concern for the probation office?

3 MS. BRANTLEY: Yes, we did discuss
4 that. And first, let me back up a minute and
5 say that if we limit, as Option 1 suggest, to
6 the weapons that are charged in the indictment
7 or charging instrument, we're not only talking
8 about a cross-reference issue, but we're also
9 talking about another specific offense
10 characteristic within that particular
11 guideline for the number of weapons.

12 So that was our main focus in our
13 comments, at least intended to be, and I
14 apologize if it was not, but if we limit it to
15 what's charged in the indictment, whatever
16 weapons are found on the premise that might
17 otherwise be included in that specific offense
18 characteristic under a relevant conduct
19 analysis are now eliminated, and that's most of
20 our concern.

21 The reason we could not reach a
22 consensus on Option 2, when we looked at that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 cross-reference, we were thinking there are so
2 many other reasons why it would limit bringing
3 in other conduct to those of us who disagree.

4 For example, if you have a prior
5 offense, a prior felony possession, that was
6 charged and sentenced the relevant conduct
7 guideline tells you, you can't bring that in.
8 It doesn't say felon in possession, it just
9 says, generally, there's an application note,
10 application note eight, that says, if something
11 was already prior conduct that was already
12 sentenced before the conduct at issue happened,
13 you treat that as a prior sentence and not
14 relevant conduct.

15 We also felt that the Horton
16 analysis that it went through with going
17 through 1B1.3(a)(2) saying, well, murder
18 doesn't group with felon in possession. We
19 thought that was a good enough block, a stop,
20 the way that the relevant conduct analysis
21 already works.

22 So that was kind of the focus that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we took, that if you follow the letter of what's
2 in there and the instructions in the
3 guidelines, that we would get to the Horton end
4 result most often.

5 MR. MCCRUM: May I add something to
6 her response? Are you finished? I didn't
7 want to interrupt you. The way I like to refer
8 to it is, you said it was one step removed. It
9 is. It's two degrees of separation, is the way
10 I think of it, is not only is the unlawful
11 possession or possession of another firearm,
12 and then you piggyback and you go back to leap
13 up to the robbery, or whatever the other offense
14 is.

15 Actually, it's even one degree
16 further than that that's problematic, is the
17 proposed Option 2 language refers to two
18 1B1.3(a)(2), but it doesn't refer to the
19 grouping requirement in there. It indicates
20 that under these circumstances the threshold
21 question for the court is whether the two
22 unlawful possession offenses, not the robbery,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 were part of the same course of conduct or
2 common scheme, and it says, see 1B1.3(a)(2),
3 but it doesn't refer to the grouping
4 requirement of (a)(2).

5 So that gets even a third degree of
6 separation is the problem. And I think the
7 underlying issue, is that there's an
8 implication that if you don't do Option 2 you're
9 not going to be able to consider all of this
10 conduct, as it's been said, and yet, there are
11 numerous provisions in the guidelines that
12 already account for that.

13 This Commission and Congress has
14 passed these guidelines, or recommended and
15 passed these guidelines, such I'd refer to
16 1B1.4, the commentary in there isn't
17 instructive. It says, if the defendant
18 committed two robberies, but as part of plea
19 negotiation, entered a guilty plea to only one,
20 the robbery that was not taken into account by
21 the guidelines would provide a reason for
22 sentencing at the top of the guideline range,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 or it may provide a reason for upward departure.

2 This section already accounts for
3 other conduct. It's not as if the guidelines
4 don't account for that type of thing. In Ms.
5 Brantley's situation, it's already accounted
6 for in criminal history reports, the situation
7 that she referred to, and so this language is
8 flawed in two or three respects, the proposed
9 language that's in Option 2.

10 CHAIR SARIS: I was going to ask
11 this. You said it's hardly ever used, is what
12 you're saying at the cross-reference in ways
13 that would be problematic, I forget exactly how
14 you worded it, from the government's point of
15 view.

16 And so I was trying to think it
17 through. I think no one's disagreeing, maybe
18 I'm wrong, that if you had a gun and you were
19 a felon in possession, and you had used that gun
20 in a robbery or a home invasion that day, I
21 didn't hear huge amounts of disagreement that
22 you could count that. Alright. Am I wrong

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 about that? Nobody's disagreeing you should
2 be able to do the enhancement.

3 So the cross-reference, though,
4 brings you to another gun, a different gun, at
5 a different point in time, and a crime that
6 wasn't connected with the offense of
7 conviction. So when you think about this from
8 a government point of view, you say it's hardly
9 ever used, or it's not that big, when would you
10 use it?

11 What is your thought process,
12 because it does seem as if you're expanding one
13 conviction into another?

14 MR. ZAUZMER: Well, first, let me
15 clarify, as I understand what the Commission
16 advanced here. There are really two separate
17 issues. One is, how far do you look at other
18 conduct with regard to the gun of conviction.

19 CHAIR SARIS: The gun. Yes.

20 MR. ZAUZMER: And the other is,
21 other guns. Even with regard to the gun, a
22 question was presented of should we discard the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 (c)(1) cross reference, and I think you've
2 effectively just had a concession that maybe
3 that's not as big a dispute as I thought it might
4 have been, which is a good thing. That's where
5 it comes up most often is involving the gun.

6 CHAIR SARIS: The gun.

7 MR. ZAUZMER: And where it starts
8 is with (b)(6), which gives you a four-level
9 enhancement if it's committed in connection
10 with another felony offense, and/or Level 18 if
11 it's less than 18. So right there, you're up
12 to Level 18. So the cross reference (c)(1)
13 only comes into play when you're looking at a
14 cross reference offense that would be above
15 Level 18. So already, you've limited the field
16 and the answer to your question is, it happens
17 less often, that you're looking to the cross
18 reference.

19 The Commission may have the data on
20 this, I don't have the data on my fingertips,
21 but it just doesn't come up as often as the
22 (b)(6) enhancement is applied. When would we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 do it? There are instances involving violent
2 conduct that the person engaged in, an assault
3 or an attack, where there is a cross reference
4 that's above Level 18, where often, there's no
5 federal jurisdiction of that offense in
6 particular, but it's necessary to bring that in
7 front of the sentencing court to know about it.

8 And the main point that I'm making
9 here today is that what we see is that, this
10 fulfills the normal function of the Commission.
11 You could say to judges out there, look, you're
12 on your own. Maybe do a departure, as one of
13 my colleagues here just suggested, maybe do a
14 variance, because you see that this felon is
15 using the weapon in a particularly dangerous
16 way, or you channel and guide what a judge
17 should be thinking about in this situation,
18 which I think is the normal function of the
19 Commission, and say, look at the cross
20 reference, look at what that other offense
21 would entail, and use that as guidance in
22 evaluating the dangerousness of this felon and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 his or her possession of a gun.

2 But in terms of numbers, I can't
3 give you the numbers right now.

4 COMMISSIONER JACKSON: Okay. But
5 that was Option 1. So go to the scenario in
6 which the gun, it's not the gun, but it's the
7 other gun.

8 MR. ZAUZMER: Oh, sure. Where
9 it's the other gun is the situation where you've
10 charged and you normally will get a plea to one
11 gun with everyone knowing that the sentencing
12 issues are going to be resolved in sentencing,
13 but you have a case in which the person had an
14 arsenal. You know, they had four guns in their
15 trunk, or they had a whole wall of
16 semi-automatic weapons.

17 The elements of the offense require
18 that there be a conviction for one felon in
19 possession, but I don't think it's a stretch in
20 the least, particularly with regard to what Ms.
21 Brantley referred to with regard to the number
22 of gun enhancements. This is a standard

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 approach, which is to convict for a gun, but
2 then look at what was immediately connected
3 there.

4 This (a)(2) restriction, which was
5 what's suggested in Option 2, is significant.
6 It has to be part of the same course of conduct
7 or common scheme. We're not saying, what guns
8 did you ever possess in your life, and you're
9 now going to be sentenced for every crime you've
10 committed with those other guns. It's
11 connected to exactly the conduct of conviction
12 and that's already done under the guidelines.

13 COMMISSIONER JACKSON: Right.
14 But maybe I'm confused. I'm now in another
15 world, which is, he has an arsenal and then
16 there's an allegation that with one of the guns
17 in the arsenal, he committed a robbery and we're
18 somehow cross-referencing through C1 to the
19 robbery guideline. Is that not when that
20 works?

21 MR. ZAUZMER: No, that's right, and
22 I think the two-step process you've broken

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 down, Your Honor, is exactly right. I mean,
2 first, the other gun has to be relevant conduct
3 under (a)2, pursuant to the proposal, and then
4 second, there has to be an offense committed in
5 connection with that other gun, so it is a
6 two-step process, but not a difficult one, and
7 one that, again --

8 COMMISSIONER BARKOW: Can I just
9 ask a clarifying on that?

10 MR. ZAUZMER: Sure.

11 COMMISSIONER BARKOW: If the crime
12 you're charged with, though, is felon in
13 possession, is the thing that will link all the
14 things together that you had a felony status
15 while you possessed all those guns? I'm just
16 trying to figure out what the limiting
17 principle in your mind would be for that
18 additional crime that's committed with the
19 other gun.

20 So if you have a defendant who,
21 let's say, is picked up and you find one gun at
22 that time, and then you go to the house and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 there's another gun, and then you make an
2 allegation that with that other gun, the
3 defendant committed some other crime. What,
4 if any, link does there have to be with that
5 second gun-related crime to the first crime,
6 because isn't the first crime just that he's a
7 felon in possession?

8 MR. ZAUZMER: Right. Well,
9 certainly, the status as a felon is required to
10 link all of these things, and what's proposed
11 here is the 1B1.3(a)(2) limitation, which is
12 the same course of conduct or common scheme,
13 meaning that he, as a felon, possessed the
14 multiple guns as part of a common scheme or
15 course of conduct.

16 COMMISSIONER BARKOW: But is the
17 common scheme just being a felon? I guess
18 that's what I'm trying to get at. What's the
19 scheme that --

20 MR. ZAUZMER: Sure. It's being a
21 felon and it's being in possession. Probably,
22 courts, in applying this, as they always have

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 applied (a)(2), are going to look at it
2 temporally. It needs to be, roughly, at the
3 same time, it needs to be part of the same goal,
4 which is to possess weapons, here purposefully
5 as opposed to accidentally. Generally, you're
6 dealing with situations where a number of guns
7 are possessed at the same time, usually in the
8 same place.

9 VICE CHAIR BREYER: See, that's the
10 inherent problem. Go ahead.

11 MR. DUBOIS: Yes, I think the
12 (a)(2) problem is really an issue. The
13 proposal certainly doesn't give any guidance
14 and what does it mean? Does it mean that the
15 guns were obtained at the same time? That they
16 were possessed at the same time? That they
17 were used at the same time, or would it be enough
18 that they were possessed serially, solely based
19 on the guy's status as a felon?

20 I certainly think that, given the
21 expansive language of (a)(2) and the nature,
22 continuing nature, of the felon in possession

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 offense, that it, essentially, would give
2 courts license to find that type of connection
3 in any case that they so wanted.

4 And so I think it would be really no
5 limitation at all. It would be a free-for-all.
6 Any gun could be linked to any other gun and by
7 then, piggybacking on to whatever offense. I
8 mean, I think all these problems can be solved
9 by Option 1 and then charging the gun that was
10 involved in the crime that you want to link to
11 that gun.

12 It seems to me that that really
13 slices through pretty much every issue that the
14 government would have with this proposal.

15 MR. MCCRUM: And if I may clarify a
16 response to your question, Your Honor. When
17 you said, does anybody really have an issue
18 with, when you have a gun, if he uses that gun
19 in connection with something else that we can
20 consider that. And I agree, I don't think
21 there's much of an issue, generally speaking,
22 but my response would be limited to (b)(6)(B)

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 as opposed to (c)(1).

2 That goes back to when you apply
3 (c)(1), you get into a whole different
4 sentencing structure for a robbery, or a
5 murder; a structure that was never intended to
6 apply in the guidelines. You just don't see
7 that in other types of guidelines where there's
8 cross references.

9 And so while it's certainly
10 reasonable to conclude that you can consider
11 that other conduct under relevant conduct
12 provisions of (a)(1) and (a)(2), 1B1.3, cross
13 referencing back to (b)(6)(B), but not under
14 (c)(1), where it takes it to a whole different
15 dramatic change.

16 CHAIR SARIS: Thank you for the
17 clarification.

18 MR. ZAUZMER: And I would just
19 make, if I could, one clarification, which is
20 that, again, (b)(6) is one-size-fits-all, top
21 of Level 18, and that may not capture the full
22 nature of the conduct of the felon, and that's

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 why the cross reference was put in there, I
2 believe.

3 CHAIR SARIS: Yes. Okay. I think
4 we understand where everyone is. Any other
5 questions? Thank you very much, panel. You
6 kept us going right after lunch. Thank you. I
7 know some folks are on the same panel and Judge
8 Hinojosa just had to run up and get something
9 for a second, so take a two-minute stretch.

10 (Whereupon, the foregoing matter went off the record at 2:01
11 p.m. and went back on the record at 2:06 p.m.)

12 CHAIR SARIS: Alright. We're
13 ready for our last panel of the day, so welcome
14 back to some of you who I think need no further
15 introductions, so thank you for coming back,
16 Mr. Zauzmer and Mr. DuBois. But next, is the
17 Honorable Kirk G. Saunooke.

18 HON. SAUNOOKE: Yes.

19 CHAIR SARIS: As I was saying to him
20 privately, I gave him an extra special thanks
21 for coming because he was supposed to come at
22 the last panel, got snowed out, and has made the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 effort to come back the second time on the
2 Violence Against Women Act, so thank you for
3 making that extra effort.

4 Judge Saunooke is a tribal member of
5 the Eastern Band of Cherokee Indians and serves
6 as an associate judge at the Cherokee court.
7 He has been affiliated with tribal justice
8 since 1996 when he became a magistrate judge at
9 the Court of Indian Offenses under the
10 authority of the Bureau of Indian Affairs.

11 The tribe took over the Cherokee
12 court in 2000. Judge Saunooke is also the
13 chairman of the American Bar Association's
14 Tribal Courts Council. I should have, while I
15 was standing there talking to you, asked how to
16 pronounce -- Dr. Kristen Zgoba, correct?

17 DR. ZGOBA: Correct. Very good.

18 CHAIR SARIS: So thank you for
19 coming. Dr. Zgoba is the supervisor of
20 Research and Evaluation at the New Jersey
21 Department of Corrections and serves as
22 Co-Chairperson for the Department's Research

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 and Review Board. She's received the National
2 Institute of Justice grant to be the first to
3 test the effectiveness of New Jerseys' Megan's
4 Law and to examine the utility of the SORNA
5 guidelines, so welcome and thank you.

6 So I guess what we're going to do
7 right now is start again here.

8 MR. ZAUZMER: All right. Well,
9 this time we have a basket of other amendments
10 to talk about and so in my introduction, I'll
11 just go quickly through our points on that and
12 then welcome any questions. Yesterday, I met
13 with the Attorney General and others, and I
14 offered to trade with them, where I would handle
15 the Drug Minus Two and he could talk about
16 undischarged terms of imprisonment, but with
17 characteristic wisdom, he turned down my offer,
18 and so here I am.

19 But again, it's a pleasure to do
20 this and to address you on these issues. With
21 regards to the marijuana grower that was talked
22 about this morning, I think, Commissioner

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Friedrich, you had questions about that, we
2 have stated in our papers what our concern is
3 and how the current 2D1.1, which does, as you
4 mentioned, address some environmental harms,
5 and also, in particular, with regard to
6 methamphetamine, we don't think captures
7 everything involved that you heard about this
8 morning from Director Boehm.

9 And so what we've suggested is some
10 addition that would address the particular
11 harms involved with marijuana groves involving
12 the use of pesticides, use of pollutants that
13 pose a danger to human life, and to the
14 environment, and that are not specifically
15 addressed in that part of 2D1.1. I'll talk
16 about it in more detail, if you'd like, when we
17 get into the questions, but we do spell out that
18 we do think that those enhancements should be
19 tweaked to capture all of the harm that's
20 involved in that conduct.

21 With regard to the Violence Against
22 Women Act, you've heard from other experts from

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 our department about that a few weeks ago. I
2 don't have anything new to add, I can answer any
3 questions, but I think you heard fully. I'll
4 look forward to hearing what Judge Saunooke has
5 to say on that subject.

6 1B1.10 is related to crack, but it's
7 really any amended guideline and the
8 application to someone who was previously
9 subject to a mandatory minimum sentence, but
10 did not receive a mandatory minimum because of
11 substantial assistance.

12 The proposal is to carve that out
13 and allow that person to get the benefit of a
14 retroactive amendment. We support that. I
15 don't think there's any disagreement on this
16 panel about that, but I'll answer questions
17 about that if you have any.

18 2L1.1 is the suggestion of amending
19 the commentary regarding the threat to human
20 safety involved in illegal alien trafficking
21 and making clear that transit through a
22 dangerous location without adequate food,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 water, or shelter is an example of the type of
2 conduct that should get a two-level
3 enhancement.

4 We agree with that. We suggest one
5 tweak to it. The words that are used there is
6 dangerous terrain, and we've suggested
7 dangerous terrain or remote geographic area,
8 because we do see alien smuggling that's
9 dangerous that's not just on terrain, that
10 certainly involves on the ocean, and in other
11 circumstances where people are held in pretty
12 appalling circumstances that do warrant the
13 enhancement.

14 And so while we're making this
15 application clearer, that was our suggestion
16 with regard to that. Then we get to the
17 undischarged terms of imprisonment, and that's
18 the one area in which the Department does have
19 a couple of objections to what's been proposed
20 in the Commission's materials.

21 The first suggestion was that an
22 undischarged term of imprisonment should lead

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 to credit where it involves relevant conduct.
2 Currently, the guideline says relevant conduct
3 and if the conduct was counted in calculating
4 the offensive conviction. And the proposal is
5 to take out the latter part of that, and we agree
6 that certainly, any time a sentence is imposed
7 for relevant conduct that was also the subject
8 of an undischarged term of imprisonment, there
9 should be credit for it in the federal sentence.

10 The other two proposals we had more
11 difficulty with. The second one was directing
12 courts to give credit for an anticipated state
13 sentence and the problem there that we see is
14 just predicting an anticipated state sentence.

15 All of us are practitioners, or
16 judges, and we all know that nothing can be
17 anticipated in the criminal justice system, and
18 the sentence that you think will be imposed,
19 won't, or the case will be dismissed, or it'll
20 be different than you anticipate.

21 We have no objection to the basic
22 concept that a federal sentence should run

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 concurrently to a state sentence for relevant
2 conduct, and the way to accomplish that, we
3 think, is to inform the judge to impose his or
4 her sentence to run concurrently with any
5 future state sentence, thus, there is no need
6 to anticipate what that state sentence will be,
7 and then reduce it from the federal term.

8 Another problem in doing it the
9 latter way is that, you have to become an expert
10 on state sentencing law. You have to know,
11 what is that state sentence going to be? It's
12 all solved by simply directing that the
13 sentence run concurrently.

14 The Supreme Court in Setser
15 approved a federal court, prospectively
16 ordering its sentence to run consecutively to
17 a state sentence. Its reasoning fully
18 supports doing the same thing and ordering a
19 concurrency with regard to an anticipated
20 sentence for relevant conduct. So that's the
21 suggestion we make there.

22 And the last one, the undischarged

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 term of imprisonment, involves someone subject
2 to deportation, suggesting that a person should
3 get credit for an undischarged term of
4 imprisonment for any offense, not just for
5 relevant conduct. And in fact, if the person
6 has completed the sentence for the
7 undischarged, it's not even undischarged, it's
8 a completed term, and if the person is subject
9 to deportation, the person should get credit.
10 We object to that.

11 The problem with that is twofold.
12 One is, again, the problem of predicting the
13 future. You're predicting that someone will
14 be deported, which we all know is not always
15 necessarily the case.

16 The second problem is, we're giving
17 credit here only to aliens for unrelated
18 criminal conduct. They're getting a free pass
19 now for the federal offense of illegal re-entry
20 because they had this other conduct, which is
21 not afforded to a citizen who's in the exact
22 same situation, so we do object to that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 proposal.

2 I look forward to your questions.
3 Thank you for hearing me out on these.

4 CHAIR SARIS: Thank you.

5 MR. DUBOIS: Thank you again,
6 Commissioners. I hope I'm not going to wear
7 out my welcome and you get tired of hearing from
8 me, but I'm going to try to speak to the Chapter
9 5 Part G amendment in this portion of the
10 hearing. It appears that Amendment A is,
11 essentially, unopposed, so I'll just say that
12 we support this amendment for the reasons
13 outlines in our written testimony.

14 I would like to discuss Amendment B
15 a little bit, particularly in regard to the
16 DOJ's opposition to it, which seems to us to be
17 based on maybe a bit of understanding of the
18 intent and scope of the amendment.

19 As we understand it, Amendment B
20 deals with a very particular situation that
21 arises when a federal court imposes a sentence
22 to run concurrent with an anticipated state

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sentence. Setser, of course, makes clear that
2 the court has the power to do this, however, a
3 federal sentence commences on the day it's
4 imposed. From that day forward, it can run
5 along with the state sentence, but it doesn't
6 look backwards.

7 This means that a defendant who was
8 in state pre-trial detention prior to the
9 imposition of his federal sentence would not
10 get any credit for time spent in state pre-trial
11 detention, even if the federal court ordered
12 the sentences to run concurrent.

13 So if the federal court wanted the
14 sentence to run wholly concurrent, day for day,
15 it must adjust the federal sentence to account
16 for that pre-trial detention, even in the case
17 of an anticipated sentence.

18 And we just simply think that this
19 is what this amendment would do, and basically,
20 we think that's all it would do. We don't see
21 it as an adjunct. We see it as, like, more of
22 an adjunct or gap-filler to Setser. We don't

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 see it as a substitute for Setser in any way.

2 As a matter of fact, we don't think
3 the amendment would give the court the
4 authority to do what the government suggests,
5 which is just to run -- or to make an adjustment
6 to the federal sentence based on an anticipated
7 state sentence whenever there is the
8 possibility such a sentence might exist.

9 The reason for that is, the
10 amendment limits its scope to situations where
11 the Bureau of Prisons wouldn't otherwise credit
12 the time. Well, of course, any time a court
13 runs a sentence concurrent, BOP will credit
14 that time from the moment the sentence is
15 imposed.

16 So Amendment B, in our view, is
17 backward-looking to the state pre-trial
18 detention issue and we thought about it as much
19 as we could, that's the only situation we
20 thought it would apply in. And if that is the
21 case, if our understanding is correct, it does
22 nothing more than tell the judge it has the same

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 authority to do it in the case of an anticipated
2 state sentence as it would in the case of an
3 undischarged sentence, and it just brings the
4 two situations into parity.

5 We also support Amendment C, far
6 from granting illegal entry defendants a
7 windfall, this amendment provides a mechanism
8 to ensure that non-citizen defendants don't
9 receive unfairly disparate punishment, either
10 in relation to defendants who were citizens or
11 in relation to similarly situated non-citizen
12 defendants.

13 The first source of disparity, of
14 course, is what Judge Breyer recognized this
15 morning: non-citizen defendants are not
16 eligible for many of the programs that can
17 reduce time spent in prison, or indeed, time
18 spent in custody overall, that are available to
19 citizen defendants.

20 They're not eligible for RDAP,
21 they're not eligible for halfway house, home
22 detention, or any other early release program.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Also, while in prison, they are not eligible for
2 minimum security and are often housed in
3 private contract facilities that have fewer
4 programming resources, educational/vocational
5 training, and that sort of thing.

6 The time that the alien defendants
7 spend in prison is much harder time and much
8 longer time than comparable citizen
9 defendants, and this amendment would give the
10 judge a mechanism to make that adjustment in the
11 appropriate case; for instance, where he felt
12 like a reduction for rehabilitation, or
13 something that he might have achieved in
14 prison, would be appropriate.

15 The amendment also provides me an
16 opportunity to address a particular type of
17 disparity that exists among non-citizen
18 defendants or offenders. Illegal entry is a
19 status offense that continues as long as the
20 defendant is in the country illegally.

21 Many times, the defendant's
22 immigration status is first discovered

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 following his conviction on state charges. So
2 while the offenses are not necessarily related,
3 one often leads to the discovery of the other.
4 This discovery may happen near the beginning or
5 near the end of the state sentence, and the
6 prosecution on the immigration offense could
7 happen near the end or the beginning of the
8 state sentence.

9 This can lead in different outcomes
10 for identical defendants based on a fluke of
11 timing as to when the prosecution occurred
12 rather than any difference in culpability
13 between the defendants. And so absent a
14 court's ability to make an adjustment to
15 account for this disparity, a defendant
16 prosecuted near the end of his sentence is very
17 likely going to spend more time in prison than
18 a defendant who has fortune to be prosecuted
19 near the start of his state sentence.

20 And again, this amendment simply
21 provides a means to adjust this disparity. It
22 would allow, for instance, a judge who would

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 have run both sentences concurrent had the
2 federal prosecution come promptly near the
3 start of the state sentence to achieve the same
4 outcome by making an adjustment if, for
5 whatever reason, the prosecution didn't occur
6 until a later time.

7 And basically, all it does is ensure
8 the defendant's punishment is based on their
9 relative culpability rather than on the timing
10 of their prosecution. And to the extent that
11 there's any concern about incremental
12 punishment issues, that can be addressed by the
13 court calibrating the extent of the adjustment
14 to achieve whatever incremental punishment it
15 sees fit in a particular case. I would be happy
16 to answer any questions the Commission might
17 have.

18 CHAIR SARIS: Thank you. Judge
19 Saunooke.

20 HON. SAUNOOKE: Well, thank you
21 very much for this opportunity and the last one
22 when I was scheduled to be here. But I was snowed

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 out, so I thought, well, I've dodged a bullet,
2 then the judge said, you're going next week, or
3 next month, so I'm happy to be here.

4 Just to give you a little background
5 about myself, I'm a member of the Eastern Band
6 and I started out in '96 as a lowly little
7 magistrate in the tribal court, and in the last
8 17 years I've watched the tribal courts go from
9 a one-room schoolhouses to, now, these massive
10 justice centers with law-trained judges, as I
11 am law-trained, and all of our court at home,
12 I'm happy to say, is law-trained. So we're
13 coming of age, it looks like, and now I'm
14 getting the opportunity to address the
15 Sentencing Commission.

16 Basically, what I look at when I'm
17 addressing these, at least in tribal court, is
18 the severity of the crime, criminal history of
19 the defendant, and substance abuse issues. I
20 don't know if many of you are aware, but
21 substance abuse issues are quite, in some
22 cases, extraordinary on Indian reservations.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 I see that if I could take alcohol
2 out of my docket, I wouldn't have much of a
3 docket; alcohol and drug abuse. Economic
4 conditions of the parties, I take a strong look
5 at it. You know, reservations are often
6 economically depressed areas, however, that
7 has changed somewhat on our reservation. As
8 I'm sure you know, we have a casino that is quite
9 successful.

10 The casino employs just over 2,000
11 people and I think we're building another
12 casino, so put another 300 or 400 people to
13 work. That has helped considerably. As for
14 the VAWA amendments, I say, I don't deal much
15 with the sentencing guidelines, so I've asked
16 our Special Assistant U.S. Attorney to help me
17 out here, and we've done some consultation
18 together, so we're going to offer this to you.

19 First of all, 18 USC Section
20 113(a)(8), Congress has passed that, by
21 criminalizing assault by strangulation and
22 suffocation, is clear that these types of DV

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 crimes are considered more serious. The
2 Eastern Band itself has recently passed
3 legislation as well, specifically
4 criminalizing assault by strangulation and
5 suffocation, making the violation felony level
6 crime pursuant to authority granted by the
7 Tribal Law and Order Act.

8 At one time, under the Indian Civil
9 Rights Act, we were limited up to a year in
10 prison. Now, through TLOA, it's a three-year
11 prison term, with those individuals can be
12 resent, under the pilot program now, to a
13 federal penitentiary. Our court has two
14 people in the federal penitentiary system at
15 this moment. Therefore, the EBCI, of course,
16 supports the specific guideline and has for
17 offenses involving strangulation,
18 suffocating, or attempting to strangle or
19 suffocate.

20 And the EBCI would support applying
21 such enhancements separately from other
22 enhancements for bodily injury. Furthermore,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 we would recommend representing the new offense
2 in Section 113(a)(8), to both the aggravated
3 assault guideline and the domestic violence
4 guideline. The domestic violence guideline
5 should be amended to include strangulating,
6 suffocating, or attempting to do so as a
7 separate aggravating factor, independent of
8 the bodily injury factor.

9 Generally, the EBCI would support
10 lengthy terms of supervised release following
11 incarceration in cases involving domestic
12 violence and based on my experience alone,
13 we've had more success in dealing with DV crimes
14 the longer we can maintain either on probation
15 or supervision over individuals who have been
16 convicted of domestic violence. It's less
17 likely that they're going to commit again.

18 We've got an extensive batterers
19 treatment program we send most of our people
20 through so they can go to that. And then, like
21 I said, it decreases the chance that they're
22 going to commit a domestic violence crime in the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 future.

2 Like I said, the EBCI would
3 generally be opposed to application of
4 cross-references on the guidelines.
5 Generally, those convicted of any particularly
6 crime should be punished in accordance with the
7 guideline referenced. Therefore, instead,
8 enhancements for higher base level offenses,
9 more permanently provide for increased
10 punishment in connection with the targeted
11 behavior.

12 As far as specific, the majority of
13 the domestic violence crimes occurring on
14 Cherokee land, which, our reservation is 56,000
15 acres, split among two counties, and a few other
16 counties, so an hour or so away, are
17 predominantly misdemeanor level offenses.

18 We find examples where there have
19 been cases of domestic assault on Cherokee
20 lands, which have only been punishable as petty
21 offenses in federal court, due to the language
22 of 18 USC 113, this is unacceptable even if the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Eastern Band is able to implement a special DV
2 jurisdiction, there are several hoops we have
3 to jump through to even get special
4 jurisdiction, the EBCI hope that the Sentencing
5 Commission can not only make appropriate
6 amendments to the guidelines to account for
7 violence, but also that the Commission would
8 consider generally increasing punishment
9 provisions in cases of misdemeanor level
10 domestic assaults and recommended more
11 stringent supervision for those offenders who
12 are not sentenced to incarceration.

13 We've had instances where people
14 have been charged in federal court, basically
15 a petty offense, that they don't see -- well,
16 most of them are going to receive probation,
17 even though it's a truly domestic violence
18 crime. We've had an Indian victim and a
19 non-Indian defendant.

20 The EBCI is also -- the repeated
21 perpetrators of crimes of domestic violence as
22 well as those who violate DV protective orders

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 pose special dangers to the community and their
2 victims for this fact that Cherokee court
3 routinely imposes different sentences in those
4 cases and would recommend that the Commission
5 consider creating enhancements at all of these
6 guidelines for offenders who have been
7 convicted of domestic violence, previous
8 domestic violence crimes, and all those who
9 repeatedly violate their protective orders,
10 which we see quite a bit.

11 I see my red light's on, so I thank
12 you for your time. I'd be happy to answer any
13 questions that you have. Thank you.

14 CHAIR SARIS: Thank you.

15 DR. ZGOBA: I'd like to thank the
16 Commission for inviting me to speak today about
17 failure to register, the statutes for sexual
18 offenders. I think that my commentary will be
19 a little bit of a deviation from what you've
20 seen here, since I'm a researcher.

21 So what I'd like to do is provide a
22 little bit of context before I go on to the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 number of predictors, or correlates, for
2 failure to register as a sex offender. As we
3 all know, sexual offenders are considered one
4 of the more heinous types of offenses in the
5 United States.

6 We've seen a series of state and
7 federal laws since the 1990s, most recently, we
8 saw the Adam Walsh Act signed into effect in
9 2006. The National Center for Missing and
10 Exploited Children has estimated that there are
11 approximately 750,000 registered sex offenders
12 across the United States.

13 The Adam Walsh Act has ultimately
14 taken those sex offenders and tiered them into
15 one of three tiers, Tier 1 through 3, increasing
16 in the risk factors. Each of those tiers
17 carries different designations for
18 registration statutes.

19 Only one year after the Adam Walsh
20 Act was passed in 2007, there were immediate
21 accounts that there were approximately 100,000
22 registered sex offenders that had absconded and

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 gone missing. U.S. Marshals released
2 statements about the sex offenders that had
3 gone missing, the National Center for Missing
4 and Exploited Children, as a matter of fact, the
5 previous director of the SMART Office, under
6 the Department of Justice, has indicated that
7 the riskiest sex offenders are those that do not
8 register at all.

9 However, the empirical research
10 that has been published to date does not support
11 this supposition, and that's what I'm really
12 here to speak to you about. Most specifically,
13 the Commission's own numbers indicate that
14 since failure to register became a federal law
15 in 2007, there have been approximately 1400
16 cases.

17 And there are a number of variables
18 that I'd like the Commission to consider when
19 thinking about those sentencing guidelines for
20 those failure to register cases, and there are
21 four specific things, and I'm going to speak
22 about two of them more extensively than the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 other two.

2 The first is the conflation of the
3 term failure to register, and the second that
4 I'm going to speak most extensively about are
5 the tier designations for the Adam Walsh Act,
6 and it's linked to recidivism. And then I'll
7 touch very briefly on age and sexual recidivism
8 and length of sentence and its correlation to
9 sexual recidivism.

10 The first thing I'd like to speak
11 about is the conflation of the term failure to
12 register. There's concern over failure to
13 register, understandably, because most people
14 presume that failure to register means that a
15 sex offender has an intent, some sort of
16 malintent that they intend to go underground to
17 abscond with the hopes of continuing to have
18 more victims.

19 However, as I stated previously,
20 the supposition has not really panned out in the
21 research. What we have found is that the
22 majority of sex offenders over numerous

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 studies, over numerous states, both federal and
2 state research, that most failure to register
3 offenders are not willful violators, that most
4 of them are ordinary parole supervision
5 violations, many of them are probation
6 violations, or very similar to them.

7 Most of them are similar in some
8 capacity to general rule-breaking behavior.
9 Most research indicates that failure to
10 register will happen within a one-year time
11 frame, if it, in fact, does happen at all. And
12 there have only been a number of studies that
13 have looked at the failure to register concept
14 and its link to sexual recidivism.

15 Our study in New Jersey, with
16 numerous other states, was one of them, but
17 there also have been studies in Minnesota, New
18 York, and South Carolina. All of these
19 studies, I've indicated in my written
20 testimony, but will also highlight here, are
21 that sex offenders who fail to register are not
22 more sexually dangerous and not more generally

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 dangerous than their compliant counterparts.

2 The common findings across the
3 studies suggest that failure to register is not
4 in any way related, either causative fashion or
5 correlated, with sexual recidivism. What most
6 research has looked at is the fact that failure
7 to register seems to tap a different construct
8 and it's not related to sexual deviance. It
9 happens to be related most frequently with
10 general rule-violating behavior, sort of this
11 defiance to authority.

12 Failure to register offenders also
13 were shown to have different types of victims
14 than compliant offenders. They were not the
15 victims that the laws were previously
16 identified to help, so meaning that the failure
17 to register sex offenders did not have more
18 children victims and as I stated also, it was
19 not predictive of more general recidivism.

20 There was a study out of Florida
21 that looked at how failure to register and
22 absconding sex offenders were looked at in a

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 profile sense to regular sex offenders, and
2 absconders, as a group, were less likely than
3 compliant registrants to be listed as predators
4 and were less likely to have minor victims, and
5 also, were to be considered repeat sex
6 offenders.

7 To go to my second point very
8 quickly, I want to discuss, and I know the
9 Commission was interested in the Adam Walsh
10 Act's tier classifications and its link to
11 sexual recidivism. The Department of Justice
12 was generous enough to give us a federal grant
13 to study the effectiveness of the tier
14 designations to see how they relate to sexual
15 recidivism.

16 It encompassed a number of states,
17 but what we found across these four states, and
18 then numerous studies after the fact, found
19 that the Adam Walsh risk tiers were unrelated
20 to sexual recidivism, except in Florida, where
21 it was actually inversely correlated with
22 recidivism.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 What that ultimately meant was that
2 our Tier-2 sex offenders, once they were
3 re-tiered into Adam Walsh tiers, were actually
4 more sexually dangerous than the Tier-3 sex
5 offenders. The result indicates that the use
6 of the Adam Walsh classification schemes are
7 likely to result in a system that is less
8 effective in protecting the public and
9 ultimately, less useful in identifying those
10 high-risk offenders.

11 And the reason I bring this up, and
12 I believe the reason that the Commission is
13 interested in this, is because those tier
14 guidelines are linked to the sentencing
15 guidelines for the failures to register in
16 terms of that base level offense.

17 When I've looked through the
18 literature from the Sentencing Commission, I
19 saw that the majority of failure to registers
20 that you have data on, were listed as a base
21 level Tier 16, which was showing that they were
22 Tier 3 sex offenders. The reason that is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 important is because, according to all of the
2 studies out there, it shows that those are the
3 sex offenders that are turning out to be the
4 least dangerous based on this new
5 classification scheme.

6 This new classification scheme
7 being based on sexual crime of conviction. The
8 other two components that I said I will touch
9 on very briefly, and I'll just breeze through
10 them, are age and its relation to sexual
11 recidivism. Sex offenders are like any other
12 type of offender, they age out of crime.

13 The reason that's important for the
14 Sentencing Commission to hear is simply because
15 the registration standards under the new
16 federal laws seek to impose registration
17 statutes for 25 years to life, as well as the
18 tier guidelines for FTRE are going up to a
19 ceiling of ten years, I believe.

20 And then the second and the last
21 thing that I breezed quickly through are the
22 sentence lengths and their link to recidivism.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 There currently stands to be no research that
2 supports that lengthier sentences, either in
3 the community or in prison, reduce recidivism
4 moving forward.

5 Sex offenders are no different from
6 general offenders in that point. Thank you for
7 hearing me.

8 CHAIR SARIS: Thank you.

9 MS. BRANTLEY: Thank you again,
10 Judge Saris and Commissioners --

11 CHAIR SARIS: Go ahead.

12 MS. BRANTLEY: -- for allowing me
13 to address you. My colleagues asked me to
14 touch briefly and talk to you a little bit about
15 the Proposed Amendment Number 7 for the 5G1.3
16 amendment. Part A of that amendment would take
17 out of 5G1.3 the requirement that the
18 undischarged term of imprisonment would have
19 caused an increase in the offense level
20 calculation, and we support that.

21 We have not had any problem
22 determining whether or not a prior sentence was

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 for conduct that is relevant to the incident
2 offense, but we do have application problems in
3 determining whether or not it caused an
4 increase in the offense level, for example,
5 prior drug offenses.

6 Often, the state sentences do not
7 indicate how much the drug was, just that it was
8 the exact drug, the exact same cohorts, so we
9 don't know if it would have increased the
10 offense level, and it just seems fair that that
11 person should get credit for that sentence;
12 that time he's already served.

13 So we're able to determine the
14 relevant conduct, the relevance of it, but
15 we're not able to determine whether or not it
16 would cause an increase, so we think, from an
17 application point of view, that Part A proposed
18 amendment, it would be an easy thing to apply,
19 and kind of what's already going on.

20 Part B, as you've heard, talks about
21 the anticipated state term of imprisonment, and
22 from an application point of view, we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 wholeheartedly ask you to think hard about that
2 one because trying to determine an anticipated
3 state term of imprisonment would probably fall
4 on our shoulders, and it would become somewhat
5 problematic for us to determine that from state
6 to state, particularly for convictions that are
7 not within the district that we're familiar
8 with, and a lot of states have indeterminate
9 sentencing, and that sort of thing, and we just
10 think that that would cause an application
11 problem for us that would be tough to rectify.

12 And then finally, with Part C, we
13 see, again, the language here that we objected
14 to before with regard to the supervised
15 released amendment, which is, we're talking
16 about deportable aliens who are likely to be
17 deported.

18 We've found, from an application
19 point of view, that we simply cannot define
20 that. We cannot find that person because we
21 don't know, at sentencing, whether or not
22 someone is going to be deported. That decision

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 is often made much later, and we find once in
2 a while that a person who is being looked at for
3 deportation now, may not, ultimately, be
4 deported for other reasons that we never learn.
5 It's just that they come back out and they're
6 on our supervision caseload.

7 And with regard to Part C, we just
8 want you to remember that when we're talking
9 about deportable aliens likely to be deported,
10 we probably mean undocumented people, and they
11 don't only commit immigration offenses. They
12 also commit drug offenses, fraud offenses, just
13 every kind of offense across the board.

14 So talking about the timing issue of
15 this founding date, as to when someone is being
16 processed federally and losing the opportunity
17 to serve a concurrent sentence, we're not only
18 looking at that within the structure of a
19 deportation offense, but also, all other kinds
20 of offenses as well. And so sometimes that
21 becomes -- when we forget that we're looking at
22 drug dealers, that we're looking at murderers,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that we're looking at fraudsters. We're not
2 just looking at someone who's looking at a
3 federal deportation charge.

4 So we would ask that you not
5 consider the anticipated state sentence
6 proposal, and that we ask that you not consider
7 the deportable alien, likely to be deported
8 proposal. Thank you very much.

9 CHAIR SARIS: Thank you. Judge
10 Jackson.

11 COMMISSIONER JACKSON: Thank you
12 all for being here. I have a question for Mr.
13 Zauzmer about 1B1.10, and I guess it also
14 relates to 5G1.1, which is the section of the
15 guidelines that a court is looking at when you
16 have a statutory minimum that's coming into
17 play.

18 I guess my question is that, in a
19 situation in which a person is facing a
20 statutory minimum that is above the guideline
21 range, the court would, I think the way that
22 5G1.1 operates, consider the guideline

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sentence to be the mandatory minimum and do the
2 substantial assistance reduction from there.
3 Is it the Justice Department's position that
4 the court should be taking the reduction from
5 the guideline range that would be otherwise
6 calculated without 5G1.1?

7 MR. ZAUZMER: Yes, that's our
8 position. The court are split on -- without
9 this amendment, the courts have split on what
10 the current guideline means. It was our view
11 as the Department, the Commission amended
12 1B1.10 in 2011, and we think addressed this, and
13 said that a person who was subject to 5G1.1,
14 mandatory minimum above the guideline range,
15 that his or her departure for substantial
16 assistance --

17 COMMISSIONER JACKSON: Right.

18 MR. ZAUZMER: -- was taken from
19 that mandatory minimum.

20 COMMISSIONER JACKSON: Right, and
21 1B1.10, my question is, what I'm worried about
22 is that that policy, in my view, and maybe I'm

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 wrong, creates a disparity between the person
2 who is getting their sentence pursuant to a
3 guideline change through the mechanism of
4 1B1.10, whereas, the person who does the exact
5 same crime today, under the operation of 5G1.1,
6 is having their reduction taken from the stat
7 max.

8 So my question is whether the
9 Justice Department would be encouraging me, as
10 a judge, in sentencing the person today
11 without, you know, any sort of guideline
12 amendment 1B1.10 scenario, would you say I'm
13 supposed to be taking a reduction from the
14 amended guideline range, rather than the
15 statutory minimum?

16 MR. ZAUZMER: Well, if you were
17 sentencing somebody today, we're not talking
18 about reductions.

19 COMMISSIONER JACKSON: Right.

20 MR. ZAUZMER: We're talking about
21 the guidelines as they exist. Maybe this helps
22 and I would suggest there shouldn't be major

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 disparity, and here's why. Under the people
2 who were sentenced before the crack amendment,
3 they were subject to a mandatory minimum. Say
4 his guideline range, absent the mandatory
5 minimum, was 51 to 63, and now it's 37 to 51,
6 the view we're taking that this person should
7 be given the benefit of consideration of the new
8 range is that the judge, at that original
9 sentencing, probably at least had in his or her
10 mind that it was 51 to 63, absent the mandatory
11 minimum.

12 When considering, and when
13 presented with a 3553(e) motion that said you
14 don't have to follow the mandatory minimum, at
15 that point, the judge has to decide, what am I
16 going to do, and how am I going to reward the
17 substantial assistance?

18 So our position is, it's fair now
19 for a judge, given a 1B1.10 motion, to say, I'm
20 going to also consider what the new lower range
21 is. If you're sentencing this similar person
22 today, and using that frame of mind, then you're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 already considering the reduced range.

2 COMMISSIONER JACKSON: Well, no,
3 I'm not, really. Under 5G1.1, I consider the
4 range to be the stat minimum, because that's
5 what the guidelines tell me to do. Now, maybe
6 other judges do different things, and perhaps
7 they do, but I just wanted to know the
8 Department's position would be, in that
9 situation, that the person who cooperates
10 should be getting a sentence below the amended
11 guideline range calculated without
12 consideration to the statutory minimum.

13 MR. ZAUZMER: Well, our position is
14 that under Option 1, the person who gave
15 substantial assistance should have the
16 benefit, or the opportunity, to get a
17 sentencing reduction, and that that
18 opportunity would be, if your original sentence
19 after the substantial assistance reduction was
20 a certain percentage below the range without
21 the mandatory minimum, you should at least be
22 entitled to consideration of a similar

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 percentage below the new range, and we think
2 that's important to recognize substantial
3 assistance.

4 We think, in 2011, that's not what
5 the Commission did, but courts, you know, took
6 different views on it.

7 CHAIR SARIS: Commissioner Barkow.

8 COMMISSIONER BARKOW: Yes, I
9 wanted to ask the question that I had brought
10 up this morning to the Department, which is, I'm
11 trying to figure out, for the environmental
12 harms from the marijuana growth, whether it's
13 accurately taken into account as it exists or
14 what we would need to do to change it, and I
15 guess if you could just walk me through.

16 I was trying to figure out under
17 2D1.1, I'm in paragraph 13, when we already have
18 an increase of two levels if the offense
19 involved a hazardous discharge into the
20 environment that's hazardous or toxic, and then
21 you have an application note that if that two
22 levels isn't enough, if it doesn't adequately

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 capture it, we should go up even further in No.
2 18.

3 And I guess I'm trying to get a sense
4 of what else the Department would want to do,
5 or is the Department already using this and
6 finding it to be insufficient?

7 MR. ZAUZMER: Well, apparently,
8 from the data, the Department is not using it,
9 and perhaps that's an issue, but what I've been
10 told informally by my colleagues in the West who
11 deal with this quite a bit is that, (b)(13)(A),
12 which is two levels for unlawful discharge,
13 emission, or release of hazardous or toxic
14 substances, that some have seen those as terms
15 of art and are difficult to apply.

16 And that it would be easier, and
17 they think it would facilitate things better,
18 to look at what is done for meth. If you then
19 look at the next section, which simply deals
20 with a substantial risk of harm to persons or
21 the environment, it results in a three-level
22 enhancement for methamphetamine production.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Our suggestion is, that same
2 language would work very well for the very
3 comparable activity, that if it's shown that a
4 marijuana grove in the outdoors posed a
5 substantial risk of harm to life or the
6 environment, that the same three-level
7 enhancement's appropriate. Now, I know that
8 also has a minimum Level 27. We're not
9 suggesting --

10 COMMISSIONER BARKOW: But even
11 before that -- I'm sorry, could you just explain
12 why the Department, though, feels like (13)(A)
13 doesn't do that? In fact, I would think that's
14 more favorable to the Department because you
15 don't have to make a showing that it endangers
16 life or the environment. It's just assumed by
17 virtue of the release of the toxic substance.

18 I mean, this is a question for you
19 and whether or not it's been applied in the
20 field and rejected by judges. I'm just trying
21 to present if the problem is as it's currently
22 written, or maybe folks aren't aware of the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 ability to use this to get at these kinds of
2 harms.

3 MR. ZAUZMER: Well, two things, the
4 concern we've heard is that pesticides and
5 other pollutants may or may not fall within the
6 category of hazardous or toxic substances, and
7 that that presents an extra issue to litigate
8 that nothing really should be litigated.

9 If somebody's using a large amount
10 of pesticide that may go into a water stream or
11 something like that, then that warrants an
12 enhancement, and so it takes away that issue.
13 But the second thing is that what is not
14 captured here at all is the other damage to
15 federal property that's often involved.

16 When you have these people growing
17 marijuana groves, and you saw a very graphic
18 example in the pictures of the Forest Service,
19 and they chop down, you know, part of an
20 old-growth forest in order to grow marijuana,
21 that's not a discharge, emission, or release of
22 hazardous or toxic substances, so what we're

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 looking for is a broader application of harm to
2 the environment or to people.

3 So there are many more things
4 happening that these marijuana growers,
5 unfortunately, are doing, than is captured just
6 by that limited case.

7 COMMISSIONER BARKOW: I'm going to
8 ask you one final question about this, for the
9 people that you're picking up, so we have some
10 testimony in here that they're really low-level
11 folks who don't have information to get you
12 higher up. Is it the Department's position
13 that the people that you are picking up for this
14 are the appropriate ones to give the
15 enhancement to, or is it that it's really people
16 higher up in the chain who should get this
17 enhancement?

18 MR. ZAUZMER: Yes, thank you for
19 that question. We do believe that it
20 appropriately applies to the people doing the
21 work. It's been suggested, well, you should
22 apply it to the leaders, but they're subject to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 the two, three, or four-level leadership
2 enhancement.

3 This is the same thing, I think, if
4 a leader told me to go assault somebody; I'm
5 responsible for my actions. I'm going to be
6 punished for the assault. He or she is going
7 to be punished for the assault plus the
8 leadership. If someone tells me, take this
9 canister of chemicals and dump it on a piece of
10 land where it runs off to a common stream used
11 by campers and local communities, I'm
12 responsible for my actions.

13 CHAIR SARIS: Thank you. Yes.

14 VICE CHAIR BREYER: I wanted to
15 address your comment that, in our 5G proposals,
16 it seemed to be giving a non-citizen a free
17 ride. Of course, that's not the way I would
18 look at it. I was trying to figure out, first
19 of all, when you talk about a undischarged term,
20 and when you talk about how you have to meld the
21 federal sentence with an undischarged term,
22 you're talking about, for the most part, people

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 who are citizens, because the issue with
2 respect to a non-citizen is whether or not he
3 or she has an undischarged term at all.

4 If you have two people who are in the
5 state system who are awaiting federal
6 prosecution, one a citizen, and one a
7 non-citizen, who decides when those two
8 individuals should be brought into federal
9 court and prosecuted? Who makes that
10 decision?

11 MR. ZAUZMER: Well, the federal
12 prosecutor --

13 VICE CHAIR BREYER: Exactly, the
14 federal prosecution. And the federal
15 prosecutor may be forced to make that decision
16 because of the Detainer Act, is that correct?

17 MR. ZAUZMER: That's correct.

18 VICE CHAIR BREYER: And the
19 Detainer Act applies only to United States
20 citizens, doesn't it?

21 MR. ZAUZMER: I believe that is
22 true.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 VICE CHAIR BREYER: So with respect
2 to non-citizens, they don't have the right, do
3 they, to insist on a prosecution while they are
4 serving an undischarged term, because Congress
5 hasn't given them that right.

6 MR. ZAUZMER: That's right.

7 VICE CHAIR BREYER: So they may be
8 sitting in jail for three years on their state
9 court prosecution, and then at the conclusion
10 of which, they are then brought over to the
11 federal court for the prosecution as being an
12 illegally entry, and there is no undischarged
13 term to determine, to meld with, whatever the
14 federal sentence is, is there?

15 MR. ZAUZMER: Well, it's often the
16 case, Your Honor, that even aliens are brought
17 to the federal system while their state
18 prosecutions are still pending.

19 VICE CHAIR BREYER: It's often, but
20 it's often the case that years have elapsed, at
21 least that's true in the 9th Circuit; years have
22 elapsed before they're brought over.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. ZAUZMER: Well, if I can answer
2 what you're suggesting, Your Honor?

3 VICE CHAIR BREYER: Yes.

4 MR. ZAUZMER: Certainly, I think a
5 court should have the ability to address that
6 situation. If a court finds that an alien,
7 because he is an alien, sat for three years
8 serving a state sentence before getting to
9 federal court and would have gotten to federal
10 court sooner if not for an alien, that should
11 be addressed, but this proposal here is a
12 blunderbuss approach that gives every alien
13 credit for a term of imprisonment that's
14 unrelated to the federal offense.

15 So I don't know, I can consult with
16 my colleagues, but I doubt we would have an
17 objection to a specific proposal that focused
18 on the concern that Your Honor is expressing.

19 VICE CHAIR BREYER: I appreciate
20 that.

21 MR. ZAUZMER: Thank you.

22 VICE CHAIR BREYER: That's very

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 helpful.

2 CHAIR SARIS: Let me ask, Judge
3 Saunooke, thank you, again, for coming. We got
4 a request to have an advisory council on Indian
5 matters involving Indian law, in particular, to
6 focus on perceived disparities between the
7 federal and state way of sentencing, and
8 whether there are disparities, I think I'm
9 getting this correctly, whether or not the
10 sentences are fair if you look at the
11 differences between what's happening in Indian
12 territory and what's happening on the state
13 side.

14 And I was wondering what you've
15 perceived. I mean, you're in North Carolina.
16 Do you think such a committee is a good thing?

17 HON. SAUNOOKE: Yes. If you're
18 asking, do I have an opinion on the disparity
19 in sentencing?

20 CHAIR SARIS: Yes.

21 HON. SAUNOOKE: Generally, I think
22 it's not been a problem with my tribe. The

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 Eastern Cherokees have had a great working
2 relationship with the State of North Carolina
3 and the district attorney, both district
4 attorneys, or one district attorney for our
5 district. So I mean, if we run into situations
6 where we can't do anything because of
7 jurisdiction and they take a defendant --

8 CHAIR SARIS: They, the state?

9 HON. SAUNOOKE: Yes, the state, I
10 don't recall a specific instance where there's
11 been a great disparity. They've generally
12 been very cooperative.

13 CHAIR SARIS: Do you see an issue
14 when the Federal Government takes it federal?
15 Do you see any concerns about there being unfair
16 sentences compared to what you'd get in the
17 state or the tribal courts?

18 HON. SAUNOOKE: Well, yes, just the
19 one example we've had earlier in the year where
20 the guy could only be charged with a petty
21 offense in federal court; it was a DV crime. I
22 believe he was found not guilty though, but then

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 some of the instances where people would just
2 get probation, this would have been several
3 years ago, whereas, I think if they were tried
4 in the tribal system, they'd probably get --
5 well, a little more than probation. Is that
6 what you're asking?

7 CHAIR SARIS: Suppose we were to
8 increase some penalties for assault, for
9 example, and strangulation, and suffocation;
10 all the kinds of things the Violence Against
11 Women Act asked us to take into account, and
12 we're going to be looking at that. Would that
13 put domestic assault, for example, sentences
14 out of sync with what's happening at the state
15 level?

16 HON. SAUNOOKE: I don't think so.
17 No, I don't think so.

18 CHAIR SARIS: And how would the
19 tribe react to that? I mean, would that be a
20 good thing from their point of view?

21 HON. SAUNOOKE: Yes. I think the
22 tribe's position is, if someone comes on the

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 reservation and commits a crime, for years,
2 nothing ever happened to people. If they can
3 get active time, however much can happen out
4 there, we would be glad to see that.

5 CHAIR SARIS: All right.

6 COMMISSIONER FRIEDRICH: Two quick
7 questions. First is for Mr. Zauzmer and Ms.
8 Brantley. As I understand your testimony with
9 respect to the proposed amendment under
10 5G1.3(b), which is the adjustment for an
11 anticipated state term of imprisonment. As I
12 understand your testimony, neither of you
13 object to a federal judge running the sentence
14 concurrently to an anticipated state sentence,
15 future imposed state sentence, am I correct?

16 MR. ZAUZMER: For relevant
17 conduct. That's correct.

18 COMMISSIONER FRIEDRICH: And as I
19 understood Mr. DuBois' testimony, it seemed
20 that he was concerned about the situation where
21 a defendant has been in state custody and served
22 some amount of time, not yet been sentenced,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 comes to federal court to be sentenced, and will
2 never get credit for, say, the year he's been
3 in state custody.

4 So my question is, would you have
5 any objection to a court, or can a court even
6 do this, reducing the federal sentence by a year
7 and saying the rest of the sentence runs
8 concurrently. Is that an issue?

9 MR. ZAUZMER: It's not and thank
10 you for the question. I wanted to address
11 that. I think Mr. DuBois and I have common
12 ground on that, and it's addressed in our letter
13 as well. Our problem is with trying to
14 anticipate and predict. If someone has been in
15 pre-trial custody for relevant conduct in a
16 state facility, we have no objection to getting
17 credit off of the federal sentence, because
18 it's not going to be credited by the Bureau of
19 Prisons.

20 COMMISSIONER FRIEDRICH: Right.

21 MR. ZAUZMER: Our problem is
22 predicting the future. And now, Mr. DuBois

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 said, well, that's not an issue. It actually,
2 I think, respectfully, it is. For example,
3 very common situation is, it's a question of who
4 asserts jurisdiction of course. If the state
5 takes the person back after sentencing, and the
6 person then sits in state prison serving the
7 sentence, he or she will not get credit from the
8 Bureau of Prisons for that, because it's being
9 credited to another sentence.

10 That's the spirit of this
11 amendment. This amendment says, anticipate
12 what that'll be, because he won't get credit for
13 it, and give him credit. And we say, don't give
14 him credit because we don't know what it'll be;
15 just order that it would run concurrently.
16 It'll have the same effect, without having to
17 guess it.

18 COMMISSIONER FRIEDRICH: But do we
19 need to add some provision to the guidelines as
20 they now exist, so that the court knows that it
21 can reduce it for the amount of time that's
22 already been served in state custody?

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 MR. ZAUZMER: Yes. Yes,
2 certainly. It's basically an amendment
3 implementing Setser, you know, in a very recent
4 Supreme Court decision, and yes, I think that
5 would be appropriate.

6 COMMISSIONER FRIEDRICH: The
7 second is for Ms. Zgoba. You've mentioned a
8 lot of research that indicates that a failure
9 to register is not a significant predictor of
10 sexual recidivism, but I just wanted to ask you
11 about a study in New Jersey that appears on the
12 bottom of Page 4 of your testimony, where you
13 say that the failure to register offenders were
14 more likely to have sexually assaulted a
15 stranger, and to have adult female victims.

16 DR. ZGOBA: Correct. It doesn't
17 mean that it's a significant predictor for
18 sexual recidivism, it just means that when you
19 look at the type that actually do fail to
20 register and commit a sexually violent act
21 after that, they tended to have those victims.
22 So it doesn't mean that it was a significant

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 predictor, it still happens, it happens very
2 rarely, and it doesn't happen statistically
3 different than the opposing group. However,
4 when it does happen, that is the victim profile.

5 COMMISSIONER FRIEDRICH: Are you
6 saying there's no greater risk or is it not
7 significant?

8 DR. ZGOBA: It's not significant.

9 COMMISSIONER FRIEDRICH: But your
10 research shows that they are more likely to
11 commit maybe not crimes against children, but
12 to have been involved in sexual assault.

13 DR. ZGOBA: Failure to register is
14 not linked in terms of predicting sexual
15 recidivism, statistically, so it's not
16 considered a predictor variable. When it does
17 happen, this is a totally different statistical
18 question, when, in fact, it does happen, those
19 are the victims. The victims tend to be
20 strangers and they tend to be adult females.
21 Am I clear?

22 COMMISSIONER FRIEDRICH: Yes.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 DR. ZGOBA: Okay. So I'm not
2 saying, ultimately, the research doesn't
3 indicate that sexual victimization post
4 failure to register never occurs --

5 COMMISSIONER FRIEDRICH: But
6 there's no link.

7 DR. ZGOBA: No. Statistically.
8 But when, in fact, it does happen, they tend to
9 be stranger victims, and they tend to be
10 females.

11 CHAIR SARIS: Is that an answer to
12 the same question?

13 MS. BRANTLEY: I wanted to comment
14 on --

15 COMMISSIONER FRIEDRICH: I'm
16 sorry. Yes.

17 MS. BRANTLEY: Yes, on the earlier
18 question on 5G1.3. It is my understanding, and
19 that's why I qualify it, my understanding, it
20 seems every time a question of credit and will
21 the Bureau of Prisons give somebody credit for
22 something, I start at step one and have to

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 figure that out for every single case.

2 And it is my understanding that if
3 a person spent time in pre-trial detention in
4 state custody, and ultimately, are federally
5 sentenced for that, if they do not go on and get
6 convicted in the state, then that pre-trial
7 custody is considered by the Bureau of Prisons,
8 because it is relevant and it is not something
9 that is being credited against another
10 sentence.

11 And I have to qualify and say,
12 that's my understanding, because I imagine a
13 Bureau of Prisons person could come up here and
14 tell me I'm wrong --

15 CHAIR SARIS: We should get
16 Director Samuels back.

17 MS. BRANTLEY: And now I'm sorry I
18 didn't hear that testimony earlier.

19 CHAIR SARIS: And we didn't ask.

20 MS. BRANTLEY: So here would be the
21 issue with the Part B proposal under 5G1.3, one
22 of them that we're concerned about, which is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that we recommend that the court adjust a
2 sentence for an anticipated term, let along set
3 aside the problem of what anticipated means.
4 The court does that, and then the person isn't
5 sentenced.

6 So now they've gotten a break on
7 their sentence, and the Bureau of Prisons is
8 going to give them credit for the time they've
9 served. Now, whether or not they should or
10 shouldn't, I don't comment on that. I'm just
11 commenting on the difficulty of applying it and
12 that would be one problem I would see.

13 CHAIR SARIS: Judge Breyer.

14 VICE CHAIR BREYER: Yes, and
15 actually, I wanted to ask you a question. Your
16 testimony was very significant today. I'm
17 just trying to figure out the mechanics, and I
18 appreciate your comments that the last thing
19 you want to do is try to figure out what are the
20 mechanics of an unanticipated sentence. I
21 certainly understand it.

22 But I think there's basically

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 agreement today that under Setser, which I was
2 unaware of until I started getting in to this,
3 a judge has a right to impose a sentence
4 concurrent with a yet to be imposed sentence
5 from the state court judge. I never realized
6 that was the case.

7 I don't think it was, at least we've
8 been operating from many, many years, that we
9 didn't have the power to run sentences
10 concurrent with a yet to be imposed sentence.
11 Nevertheless, that's taken care of by the
12 Supreme Court.

13 So the unanswered question is, how
14 can we be sure if we thought that it was
15 important, and I think we do, to give credit for
16 time served before conviction, that is,
17 pre-trial custody; it is something, number one,
18 that's readily, easily ascertainable by the
19 probation department. Can you figure out when
20 the person went into custody in state court, and
21 what the state court rule is with respect to
22 credit for time served, or at least the federal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rule with respect to credit for time served, and
2 can that then be incorporated in the federal
3 judge's sentence, so that there's simply no
4 misunderstanding as to what the appropriate
5 credit is?

6 MR. ZAUZMER: Yes, Your Honor, the
7 reason there's no problem with time already
8 served in our deal, is that you're dealing with
9 known facts. The federal sentencing judge has
10 it all in front of him or her, knows this person
11 was in pre-trial custody for a year, now we're
12 here, the federal sentence is going to start
13 from today, and decide what's the appropriate
14 sentence.

15 And it almost doesn't matter
16 whether the state ultimately sentences or not.
17 The federal judge will decide, I want this
18 person to serve a total of ten years. I want
19 it to include the one year that he's already
20 served. I'm doing a nine-year sentence
21 concurrent to anything that's imposed in the
22 future starting today.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 We're fine with that, because it's
2 based on known facts.

3 COMMISSIONER FRIEDRICH: But she's
4 saying BOP is going to knock another year off,
5 if the case doesn't go forward in state court.

6 MR. DUBOIS: I think the
7 Commission, though, has sort of anticipated
8 that. I don't think that problem will arise
9 very often, but to the extent it does, the judge
10 could make a notation on the judgment that, I
11 have made this adjustment in anticipation of
12 the defendant not getting credit, this
13 pre-trial time credited, by the Bureau of
14 Prisons.

15 And the reason you do it that way is,
16 you can't fix it later. If you do it the other
17 way, and don't give him credit because the state
18 sentence may not occur, then he will never get
19 that credit. Here, you have to do it at the
20 front end, tell the BOP you've already given him
21 that credit in the off chance that the state
22 sentence doesn't materialize, and I think that

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 solves the problem.

2 VICE CHAIR HINOJOSA: I'm not sure
3 that that's what the Bureau of Prisons will do
4 because sometimes you can't get an answer from
5 them, and Ms. Brantley is correct. Those cases
6 are extremely difficult because a lot of times,
7 the state, after they see the federal sentence,
8 decides, well, we're not going to prosecute,
9 because this is enough for us, but you've
10 already given them the credit, so they will
11 spend six months less than you actually thought
12 they were going to, because it wasn't credited
13 to the state system.

14 We have something in these
15 materials from the Bureau of Prisons that I
16 question, Mr. Zauzmer, whether you think this
17 is really the way it is. When you give a
18 sentence and they've received some time, and
19 they're on a writ, and then we sentence them in
20 the federal system, they were in state custody,
21 and then they serve both sentences, and the
22 federal sentence is concurrent, the federal

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 sentence is longer, there's material here that
2 says that because it's longer, the Bureau of
3 Prisons is going to go back and pick up that time
4 that wasn't credited, because somehow, that was
5 not credited to another case, because they're
6 actually serving a longer federal sentence.

7 I had never heard that till I saw
8 these materials, and I was wondering if that's
9 really accurate.

10 MR. ZAUZMER: I've only heard that
11 in the context, again, of where the state
12 sentence does not get a concurrence. And I
13 think that's what Ms. Brantley --

14 VICE CHAIR HINOJOSA: Well, let me
15 show this to you.

16 MR. ZAUZMER: I'm happy to look at
17 them more carefully, and we can write to the
18 Commission, if you'd like, on exactly how that
19 works. I do want to say briefly that, my
20 experience is that the Bureau of Prisons is very
21 responsive to federal judges. If a judge gives
22 a direction as to what should happen, what we

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 do on the district level is, we communicate with
2 the regional counsel's office where a concern
3 does come up, and we get a response, and we get
4 satisfaction from that.

5 It would be extraordinary, I think,
6 if a federal judge said, I'm structuring my
7 sentence this way with the anticipation of no
8 credit for this, and then the Bureau of Prisons
9 did something that resulted --

10 VICE CHAIR BREYER: It probably
11 will not come as a surprise to you that federal
12 judges get, perhaps, 40, or 50, or 100 letters
13 from the Bureau of Prisons explaining why this
14 person can't go into an RDAP program. That
15 probably wouldn't come as a surprise.

16 MR. ZAUZMER: That does not come as
17 a surprise.

18 VICE CHAIR BREYER: Because they
19 certainly have been responsive, but not quite
20 the way --

21 CHAIR SARIS: I was going to ask Dr.
22 Zgoba, we're struggling with what the correct

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 term of supervised release should be for people
2 who fail to register. You're telling us the
3 tiers aren't significant, but is there data
4 that could help us in making this decision?

5 DR. ZGOBA: I'm telling you that
6 the tiers aren't predictive of future
7 re-offending patterns the way they stand now.
8 The Federal Government has devised them based
9 on the crime of conviction. Previous to the
10 Adam Walsh Act, the states, under Megan's Law,
11 had the ability to construct their tiers
12 however they imposed.

13 So for example, Florida had broad
14 community notification, where they just had sex
15 offender versus predator statute. New Jersey,
16 we tier sex offenders based on a risk assessment
17 tool, so we tiered them one through three on a
18 hierarchy system. So prior to the
19 implementation of the Adam Walsh Act, which is
20 only in effect in 16 states, many states still
21 keeping their version of Megan's Law, the
22 states did it differently and the Adam Walsh Act

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 now removes all of those options and states must
2 oblige, must utilize, these tiers based on
3 crime of conviction only.

4 That crime of conviction has been
5 shown not to be a predictor of future
6 recidivism. For the failure to register, what
7 the research has shown is that failure to
8 register is not linked to sexual deviance,
9 sexual recidivism. However, when we do see
10 that there are multiple failure to registers,
11 once there is more than one failure to register,
12 we see that the pattern somewhat changes.

13 Those offenders are very few and far
14 between. Failure to register does not occur
15 very frequently, but when it does occur on
16 multiple occasions for one offender, we sort of
17 see that pattern change around that offender.
18 Now, statistically, they still don't have more
19 sexual recidivism, but they tend to be more
20 criminogenic in general.

21 COMMISSIONER WROBLEWSKI: Just a
22 quick follow-up, am I correct that the tiers,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 though, by stacking, determine the length of
2 time during which the sex offender has to
3 register, is that correct?

4 DR. ZGOBA: Correct. So Tier 3 is
5 25 years to life.

6 COMMISSIONER WROBLEWSKI: Right.
7 So regardless of what the Commission says,
8 they're going to have to register for the
9 statutory period of time.

10 DR. ZGOBA: If the state has
11 accepted the Adam Walsh Act, yes.

12 COMMISSIONER WROBLEWSKI: Right.
13 And you describe these folks as less of a sexual
14 recidivism threat and more as, I think your term
15 is, general rule-breakers.

16 DR. ZGOBA: Well, they would be
17 more akin to parole violator, in essence, so
18 more general rule-breaking behavior, yes, more
19 deviance to authority behavior, so more
20 technical violations.

21 COMMISSIONER WROBLEWSKI: Right.
22 And I think your testimony was that,

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 irrespective of the fact that, yes, there's no
2 increased risk of sexual recidivism, according
3 to your research, that monitoring for the
4 period of time that they are subject to this
5 requirement --

6 DR. ZGOBA: Registration. Yes.

7 COMMISSIONER WROBLEWSKI: -- this
8 registration requirement, makes some sense.

9 DR. ZGOBA: Yes, absolutely.

10 COMMISSIONER WROBLEWSKI: Okay.
11 Thank you.

12 MR. ZAUZMER: And can I just add one
13 thing, which is that the purpose of the
14 registration law, as I'm sure you know, is not
15 just to avoid or reduce the risk of sexual
16 recidivism, though certainly it is. It's also
17 to provide some comfort and safety to
18 communities that many legislatures have
19 decided want to know and have a right to know,
20 who's living in the community, so that they can
21 be on guard against, even if it's that one time
22 that somebody does recidivate and commit some

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 horrible act.

2 And that's the reason, in our
3 papers, we advocate extensive terms of
4 supervised release and compliance with the
5 registration requirement.

6 COMMISSIONER JACKSON: Let me ask
7 you about that though, because it seems to me
8 that the obligation to register, which is what
9 continues under the tier system for 15, 20, 30,
10 whatever, however many years to life, is
11 substantially different than supervised
12 release. Registering could be one component
13 of a supervised release monitoring program, but
14 supervised release involves a lot more.

15 And so I'm worried a little bit
16 about conflating statistics. Even though you
17 might have a period of registering for the
18 purpose of community notification, to have a
19 similar 15 or 20-year period of supervision, it
20 seems to me someone might say that could be
21 excessive, especially if the failure to
22 register folks aren't showing any increased

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 rate of recidivism.

2 MR. ZAUZMER: Well, sure, they are
3 different, but what's important is supervised
4 release can be at different levels of
5 supervision. Once a person is on supervised
6 release for such a long period of time, as you
7 know, they go much lower in the amount of groups
8 that are being supervised, but they're still
9 subject to some supervision and some punishment
10 for breaking the rules, to use the same term
11 that we've heard here.

12 So failure to register is relevant
13 to compliance with supervised release. It's
14 not the same. A judge still has to scratch it
15 in, as in all these matters, I think the minimum
16 is five years, but a judge, we think should be
17 able to look at the circumstances, the history
18 of the individual, see the recommendation of
19 the Commission, but at least there should be
20 some supervision structure in place during the
21 period of registration.

22 CHAIR SARIS: So your thought is

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 that, let's say you were to make, 25 years,
2 whatever it is for a tier --

3 DR. ZGOBA: Tier 3 is 25 years to
4 life.

5 CHAIR SARIS: Twenty-five years to
6 life, and your theory is that the level of
7 supervision is reduced. My experience is that
8 you have these huge supervision requirements;
9 everything from lie detectors, to computer
10 screens, to that word, I don't want to --

11 DR. ZGOBA: GPS monitoring and
12 notifications.

13 CHAIR SARIS: Whatever that is,
14 and, basically, all of that continues the
15 entire time. You think no.

16 MR. ZAUZMER: No, it doesn't, Your
17 Honor, and probation could speak to this better
18 than I can, but they have different tiers
19 themselves, if you want to use that word,
20 getting all the way down to what I believe they
21 call the low-intensity caseload.

22 CHAIR SARIS: So even on the sex

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 offenders.

2 MR. ZAUZMER: It would be on
3 anybody subject to supervised release. At
4 some point, the probation officer has the
5 discretion, dealing with the judge if
6 necessary, to reduce the requirements down to
7 --

8 VICE CHAIR BREYER: But that's not
9 the way the judgment amendment reads. I mean,
10 I'm pleased to hear that, but that comes to me
11 as a surprise because the way the judgment
12 amendment reads is, I place you on supervised
13 release for a term of X years, here are the ten
14 conditions of supervised release, including
15 the tests, and the this, and the that, the thing
16 about the thing, and the polygraph. I mean,
17 that presents a whole other set of issues with
18 respect to self-incrimination and so forth.

19 But be that as it may, because
20 that's not what we're talking about, we're
21 talking about whether, really, if a probation
22 department, unilaterally, can eliminate

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 conditions of supervised release over a
2 lifetime?

3 MR. ZAUZMER: No, definitely not.
4 Any condition that's expressed by the judge
5 cannot be eliminated unless the judge agrees to
6 it, which can be done, but the judge's
7 conditions do not embrace everything that's
8 involved in daily supervision.

9 CHAIR SARIS: Mr. Brantley, do you
10 have anything you'd like to add? Do you keep
11 this up unless there's a motion to change it?

12 MS. BRANTLEY: Well, yes. We do
13 what the conditions say. We enforce the
14 conditions that are imposed until there are no
15 longer conditions.

16 COMMISSIONER WROBLEWSKI: Dr.
17 Zgoba, am I correct again, I'm trying to just
18 make sure I understand the statutory scheme,
19 that there are these long periods of time for
20 registration, but they can be reduced. Is that
21 correct?

22 DR. ZGOBA: To my knowledge, only

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 through litigation, so I'm unaware of any
2 instance where a sex offender has been tiered
3 under the statute and has, in some way, been
4 decreased. There is no incremental decrease,
5 to my knowledge, in supervision over time, in
6 any capacity.

7 COMMISSIONER JACKSON: And it
8 seems to me that registration and supervision
9 have two different goals. As you pointed out
10 Mr. Zauzmer, the registration is because the
11 community wants to know, because the community
12 feels that it's necessary for them to have this
13 information in order for protection, et cetera,
14 but it would seem that the supervision is not
15 necessarily toward that same end, and so --

16 DR. ZGOBA: People often
17 interchangeably refer to them that way because
18 supervision often includes the registration
19 and notification, because what you're
20 referring to is actually notification, not the
21 registration process. They're often used
22 interchangeably, because that supervision

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 takes place during the registration and
2 notification process, but they can varying
3 levels of that supervision.

4 So it seems to me that the research
5 indicates that incremental decreases over time
6 would be a good thought for these particular
7 offenders because a 25-year timeframe to life,
8 while it makes sense for the community to feel
9 safe, it doesn't necessarily turn into the
10 reality of the situation.

11 So we've done numerous tests on
12 whether or not people feel safe because of the
13 Adam Walsh Act and Megan's Law, and everybody
14 says they feel safe, but quantitatively, they
15 are no safer.

16 CHAIR SARIS: That's a very dower
17 note.

18 VICE CHAIR BREYER: I think today,
19 a whole group of us are going to walk out not
20 feeling very safe.

21 CHAIR SARIS: Thank you very much
22 to everyone for coming.

NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

1 (Whereupon, the hearing in the
2 above-entitled matter was concluded at 3:13
3 p.m.)
4