

UNITED STATES SENTENCING COMMISSION

+ + + + +

PUBLIC HEARING ON
RETROACTIVITY OF 2014 DRUG AMENDMENT

+ + + + +

TUESDAY,
JUNE 10, 2014

+ + + + +

The United States Sentencing Commission met in the Leonidas Ralph Mecham Conference Center, One Columbus Circle, NE, Washington, D.C., at 8:45 a.m., Patti B. Saris, Chair, presiding.

PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RICARDO H. HINOJOSA, Vice Chair
KETANJI BROWN JACKSON, Vice Chair
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, Commissioner
JONATHAN J. WROBLEWSKI, Ex Officio

NEAL R. GROSS

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

ALSO PRESENT

O. QUINCY AVINGER, JR.
BOB BUSHMAN
RUSSELL BUTLER
DAVID DEBOLD
JAMES FELMAN
RICHARD FULGINITI
SARAH GANNETT
HON. IRENE M. KEELEY
J. THOMAS MANGER
JESSELYN MCCURDY
PAT NOLAN
MARY PRICE
BRANDON SAMPLE
CHARLES E. SAMUELS, JR.
KENNETH W. SUKHIA
SALLY QUILLIAN YATES

NEAL R. GROSS

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

A-G-E-N-D-A

Panel IA: Judicial Branch Views I

Hon. Irene M. Keeley 16
 Chair, Criminal Law Committee of the
 Judicial Conference

Panel IB: Judicial Branch Views

O. Quincy Avinger, Jr. 72
 U.S. Probation Office for the District
 of South Carolina

Panel II: Executive Branch Views

Sally Quillian Yates 98
 U.S. Attorney for the Northern
 District of Georgia, U.S. Department
 of Justice

Charles E. Samuels, Jr. 112
 Director, Federal Bureau of Prisons,
 U.S. Department of Justice

Panel III: Law Enforcement Views

Sergeant (Ret.) Richard Fulginiti 155
 Fraternal Order of Police

Bob Bushman 162
 National Narcotic Officers'
 Associations' Coalition

J. Thomas Manger 169
 Major Cities Chiefs Association

NEAL R. GROSS

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

Panel IV: Practitioner's Views

Sarah Gannett	188
Assistant Federal Public Defender, Eastern District of Pennsylvania	
David Debold	194
Practitioners Advisory Group	
James Felman	201
American Bar Association	
Kenneth W. Sukhia	207
Sukhia Law Group, PLC	

Panel V: Advocacy Groups' Views

Pat Nolan	245
American Conservative Union Foundation	
Jesselyn McCurdy	250
American Civil Liberties Union	
Mary Price	257
Families Against Mandatory Minimums	
Brandon Sample	264
Prisology	
Russell Butler	270
Victims Advisory Group	

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 8:47 a.m.

3 CHAIR SARIS: Good morning.

4 Welcome to the Sentencing Commission's
5 hearing on whether to make this year's
6 amendment to the Drug Guideline retroactive.

7 The Commission voted unanimously
8 in April to reduce by two levels the base
9 offense levels associated with drug quantity
10 for all drug types.

11 We are now considering whether
12 that amendment should be applied
13 retroactively in whole or in part.

14 I want to welcome our witnesses.
15 We begin with Judge Irene Keeley, chair of
16 the Judicial Conference's Criminal Law
17 Committee.

18 We'll hear from senior officials
19 from the Department of Justice and other
20 distinguished witnesses including -- can you
21 all hear me? Yes, oh good. Usually -- one

NEAL R. GROSS

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

1 time I was just shouting and I said, "Can you
2 hear me?" and everyone says yes and the mike
3 wasn't on. So it was just a little
4 embarrassing.

5 Our other distinguished witnesses
6 include defense attorneys, probation
7 officers, law enforcement officers, policy
8 experts and advocates who have come from all
9 over the country to share their thoughts on
10 this important issue.

11 An overarching theme for our
12 amendment cycle has been a focus on the
13 statute, the Sentencing Reform Act at Section
14 994(g). And that statute says that the
15 guidelines, and I'm quoting, "shall be
16 formulated to minimize the likelihood that
17 the federal prison population will exceed the
18 capacity of the federal prisons as determined
19 by the Commission."

20 So we made it a priority to work
21 to reverse the trends of increasing prison

NEAL R. GROSS

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

1 populations and costs.

2 In line with that priority the
3 Commission this year decided to address
4 prison costs and over-capacity by voting
5 unanimously in April to reduce guideline
6 levels in the drug quantity table by two
7 levels across all drug types.

8 Many factors led us to adopt this
9 amendment. Federal prisons are 32 percent
10 over capacity and federal prison spending
11 exceeds \$6 billion a year, making up more than
12 one quarter of the budget of the Department
13 of Justice.

14 We also considered the changes in
15 the laws and the guidelines over the past
16 several decades, including the addition of
17 many enhancements that help ensure that
18 dangerous offenders receive long sentences
19 and the creation of the safety valve which
20 provides a strong incentive for low-level
21 offenders to plead and cooperate.

NEAL R. GROSS

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

1 The Commission carefully weighed
2 public safety concerns and based on past
3 experience, existing statutory guideline
4 enhancements concluded that the amendment is
5 consistent with the goal of protecting public
6 safety.

7 The Commission was informed by our
8 study that compared the recidivism rates for
9 offenders who were released early as a result
10 of retroactive application of the
11 Commission's 2007 crack cocaine amendment
12 with a control group of offenders who served
13 their full times of imprisonment.

14 We found no statistically
15 significant difference in the rates of
16 recidivism for the two groups of offenders.

17 We also relied on testimony from
18 the Department of Justice that the amendment
19 is consistent with protecting public safety
20 and advancing law enforcement initiatives.

21 Today we consider an issue that is

NEAL R. GROSS

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

1 more difficult. As required by statute the
2 Commission is now considering whether the
3 amendment reducing the guideline levels
4 should apply retroactively.

5 Our public comment period on this
6 issue is opened until July 7. And we have
7 already received well over 20,000 -- in my
8 notes I have an exclamation point -- 20,000
9 comments. And phone calls.

10 We look forward to receiving many
11 more, including many from you today. We'll
12 carefully review these comments and the data
13 and consider all perspectives.

14 The Commission in making decisions
15 about retroactivity considers factors
16 including the purpose of the amendment, the
17 magnitude of the change in the guideline range
18 made by the amendment and the difficulty of
19 applying the amendment retroactively as the
20 manual sets out.

21 We consider these factors broadly,

NEAL R. GROSS

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

1 looking not only at the magnitude of the
2 change and the difficulty of applying an
3 amendment retroactively in an individual
4 case, but also the magnitude and difficulty
5 for the federal criminal justice system as a
6 whole. We hope today's witnesses will give
7 us guidance on these factors.

8 We will consider whether the
9 amendment should be applied retroactively in
10 a limited way. Our issue for comment raised
11 the possibility of limiting application to
12 offenders, for example, who received a safety
13 valve adjustment, or as another example,
14 offenders sentenced before the Supreme
15 Court's Booker decision. And we welcome
16 thoughts on these as well as other possible
17 limitations.

18 Our Office of Research and Data
19 has published a report on the estimated impact
20 should the Commission decide to make the
21 amendment fully retroactive. The Commission

NEAL R. GROSS

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

1 estimates that 51,141 prisoners, currently
2 imprisoned offenders would be eligible to
3 seek a reduction in their current sentence if
4 the amendment were to be made retroactive.

5 Those offenders currently have an
6 average sentence of 125 months. If the
7 courts were to grant full reduction possible
8 in each case the projected new average would
9 be 102 months, meaning a reduction of 23
10 months, or 18.4 percent.

11 The total estimated savings from
12 retroactive application of this year's
13 amendment would be 83,525 bed years over time.

14 Of course the sentence reductions
15 were the amendment to be made retroactive
16 would not be automatic. Would not be
17 automatic. Judges would have to consider
18 each offender.

19 The Commission estimates that
20 4,571 offenders would be eligible for
21 immediate release in November of this year

NEAL R. GROSS

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

1 when the amendment will go into effect.
2 Another 8,178 would be eligible for release
3 within the first year, though 4,787 of these
4 offenders would have been released within the
5 first year even if the amendment had not been
6 made retroactive. Eight thousand five
7 hundred and thirty-five would be eligible for
8 release within the second year, and the
9 numbers start to decrease from there. The
10 impact would vary from district to district.

11 So, we will hear first
12 from Judge Irene Keeley as I mentioned on
13 behalf of the Judicial Conference. Then from
14 Quincy Avinger of the United States Probation
15 Office in South Carolina.

16 We will hear from Sally Yates,
17 United States Attorney for the Northern
18 District of Georgia and Director Charles
19 Samuels of the Bureau of Prisons.

20 We'll hear from a panel presenting
21 law enforcement views, a panel on

NEAL R. GROSS

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

1 practitioners' views and after a break for
2 lunch a panel on advocacy groups' views.

3 Welcome to the witnesses and to
4 the public. I'm sure we will have a lively
5 and productive discussion.

6 So now let me introduce the other
7 members of the Commission. Seated to my
8 immediate right is Judge Ricardo H. Hinojosa.
9 Judge Hinojosa is the chief district judge
10 for the Southern District of Texas and has
11 been a district judge on that court since
12 1983.

13 He has served on the Commission
14 since 2003. While he currently serves as a
15 vice chair of the Commission, Judge Hinojosa
16 also served as the chair.

17 Next to him is Judge Charles R.
18 Breyer. He is a senior district judge for
19 the Northern District of California. Judge
20 Breyer has served as a U.S. district judge
21 since 1998. He joined the Commission last

NEAL R. GROSS

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

1 year and serves as a vice chair.

2 Next to him is Judge William H.
3 Pryor who also joined the Commission this
4 year. He is a United States circuit court
5 judge for the 11th Circuit Court of Appeals
6 appointed in 2004.

7 Before his appointment to the
8 federal bench Judge Pryor served as the
9 Attorney General for the State of Alabama.

10 Next to him is Rachel Barkow, our
11 other new Commissioner who came on last year.
12 Commissioner Barkow is the Segal Family
13 Professor of Regulatory Law and Policy at the
14 New York University School of Law where she
15 focuses her teaching and research on criminal
16 and administrative law.

17 She also serves as the faculty
18 director of the Center on the Administration
19 of Criminal Law at the law school.

20 Turning now to my left is Judge
21 Ketanji Brown Jackson. Judge Jackson was

NEAL R. GROSS

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

1 confirmed as the United States district judge
2 for the District of Columbia last year. She
3 has served as a vice chair of the Commission
4 since 2010.

5 Next to her is Dabney Friedrich
6 who has served on the Commission since 2006.
7 Immediately prior to her appointment on the
8 Commission Commissioner Friedrich served as
9 associate counsel at the White House. She
10 previously served as counsel to Chairman
11 Orrin Hatch of the United States Senate
12 Judiciary Committee and as an Assistant
13 United States Attorney, first for the
14 Southern District of California and then for
15 the Eastern District of Virginia.

16 And where did he go? Oh, there he
17 is. Way over to the left is Jonathan
18 Wroblewski. Commissioner Wroblewski is the
19 designated ex officio member of the United
20 States Sentencing Commission representing the
21 Department of Justice.

NEAL R. GROSS

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

1 Mr. Wroblewski serves as Director
2 of the Office of Policy and Legislation in
3 the Department's criminal division.

4 So, we begin with Judge Keeley
5 whom I mentioned before is the United States
6 District Judge for the Northern District of
7 West Virginia, chair of the Criminal Law
8 Committee of the Judicial Conference.

9 She has been a district court
10 judge since 1992 and served as chief judge of
11 the Northern District of West Virginia from
12 2001 to 2008.

13 We're very pleased to have you.
14 No time limit. No lights go off. We care
15 very much hearing your views, views of the
16 courts and thank you for coming.

17 HON. KEELEY: Thank you very much,
18 Judge Saris, and good morning to you and to
19 the members of the Sentencing Commission.

20 I would first like to thank you
21 for the opportunity to appear before you today

NEAL R. GROSS

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

1 on behalf of the Criminal Law Committee of
2 the Judicial Conference of the United States.

3 My testimony reflects the
4 Committee's views on the retroactive
5 application of the proposed amendment to
6 lower by two most of the offense levels in
7 the drug quantity table.

8 I would ask that my full testimony
9 be submitted for the record as I will focus
10 my remarks this morning on some key topics
11 discussed by the Committee.

12 As you know, on March 11, 2014 I
13 submitted a letter to the Commission on behalf
14 of the Committee supporting the proposed
15 amendment which would apply prospectively to
16 defendants sentenced on or after November 1,
17 2014.

18 In that letter I cited the
19 Committee's longstanding position that the
20 sentencing guidelines should be set
21 irrespective of any mandatory minimum to

NEAL R. GROSS

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

1 account for the full array of aggravating and
2 mitigating circumstances, not just the
3 offense of conviction.

4 The Committee's support for the
5 two-level reduction in the drug quantity
6 table reflected the judiciary's continued
7 commitment to de-linking the guidelines for
8 mandatory minimums.

9 Last week the Criminal Law
10 Committee discussed at length whether to
11 support the retroactive application of the
12 proposed amendment. Before our deliberations
13 we solicited the viewpoints of judges in many
14 of the districts most affected should the
15 amendment be applied retroactively.

16 We also received input from the
17 Administrative Office of Probation and
18 Pretrial Services' Chiefs Advisory Group.

19 In our deliberations we wrestled
20 with many difficult issues including how to
21 balance fairness and public safety, and the

NEAL R. GROSS

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

1 reality of significant financial pressures on
2 the judiciary and other components of the
3 criminal justice system.

4 After careful thought and
5 significant evaluation the Committee voted by
6 a large majority to support making the
7 proposed amendment retroactive, but only if,
8 first, the courts are authorized to begin
9 accepting and granting petitions on November
10 1, 2014.

11 Second, any inmate who is granted
12 a sentence reduction would not be eligible
13 for release until May 1, 2015.

14 And the Commission, third, helps
15 coordinate a national training program that
16 facilitates the development of procedures
17 that conserve scarce resources and promote
18 public safety.

19 As I know you are aware the
20 Criminal Law Committee has weighed in on the
21 question of retroactivity of sentencing

NEAL R. GROSS

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

1 guideline amendments several times over the
2 past 20 years. But each occurrence is unique
3 and requires a fresh review of the purposes
4 and impact of the retroactive application of
5 the amendment.

6 Here, the driving factor for the
7 Committee's decision was fundamental
8 fairness. We do not believe that the date a
9 sentence was imposed should dictate the
10 length of imprisonment. Rather, it should be
11 the defendant's conduct and characteristics
12 that drive the sentence whenever possible.

13 The retroactive application of the
14 amendment in this case will put previously
15 sentenced defendants on the same footing as
16 defendants who commit the same crimes in the
17 future.

18 In formulating its position the
19 Committee also considered that the
20 retroactive application of the amendment will
21 further reduce the influence of mandatory

NEAL R. GROSS

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

1 minimums on the sentencing guidelines and in
2 turn reduce the disproportionate effect of
3 drug quantity on the sentence length.

4 That said, the Committee is
5 acutely aware of the diminishing resources of
6 the Probation and Pretrial Services System
7 and of the very significant demands that will
8 be imposed on that system by the retroactive
9 application of the amendment.

10 In our extensive deliberations
11 about whether to support the retroactive
12 application of the proposed amendment the
13 Committee carefully considered whether the
14 courts and the Probation and Pretrial
15 Services System could effectively manage the
16 increased workload that would result while
17 protecting public safety.

18 We are mindful that the judge
19 relying on the investigation of the probation
20 officer plays an important public safety role
21 when considering whether to grant petitions

NEAL R. GROSS

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

1 for sentence reductions.

2 As Judge Reggie Walton stated in
3 response to questions from the Senate
4 Judiciary Committee in 2008 the Sentencing
5 Commission's policy statement governing
6 retroactive application of the guidelines
7 explicitly directs judges to consider the
8 sentencing factors outlined in 18 United
9 States Code Section 3553(a) including the
10 nature and seriousness of the danger to any
11 person or the community that the offender
12 might pose, and the offender's post-
13 sentencing conduct such as institutional
14 adjustment while in prison.

15 Judge Walton was confident that
16 his fellow judges would be deliberative and
17 thoughtful in making individualized
18 determinations of eligibility in accordance
19 with their mandate.

20 However, judges can only be
21 deliberative and thoughtful if they are able

NEAL R. GROSS

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

1 to rely on careful and thorough evaluations
2 by probation officers.

3 These evaluations consist of
4 recalculating the offense level,
5 investigating the inmate's progress and
6 behavior while in custody, assessing whether
7 an inmate who would be eligible for immediate
8 release has a viable release plan, and if
9 necessary, recommending any new conditions of
10 supervision such as placement in a halfway
11 house or in-home confinement that may be
12 needed to promote effective reentry.

13 In addition to relying on the
14 probation officer's evaluations judges
15 weighing the effect of a sentence reduction
16 on public safety must consider the
17 availability of supervision resources
18 including staffing and treatment.

19 Unfortunately, the federal
20 judiciary has seen a significant reduction in
21 staffing of probation officers in recent

NEAL R. GROSS

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

1 years. And it is unclear to us if additional
2 resources will be made available to keep pace
3 with any new workload.

4 Notably, in the Probation and
5 Pretrial Services System staffing and
6 workload are moving in opposite directions.

7 In the past 10 years staffing has
8 declined 5 percent while the post-conviction
9 supervision caseload has risen 19 percent.

10 Further complicating matters is
11 the intensifying criminogenic profile of the
12 offender population which has worsened in
13 terms of prior criminal involvement, level of
14 culpability in relation to their federal
15 crimes and prevalence of mental health and
16 substance abuse problems.

17 The release of thousands of
18 additional offenders to supervision when the
19 system is already dealing with diminished
20 resources and an increasingly risky offender
21 population raises several public safety

NEAL R. GROSS

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

1 concerns.

2 At our meeting last week the
3 Committee consulted with the chair of the
4 Chiefs Advisory Group which had surveyed
5 fellow chiefs across the country to determine
6 their ability to absorb the workload that
7 could be expected if they were to manage
8 should the amendment be made retroactive.

9 Candidly a majority of these
10 chiefs responded that without additional
11 resources they would not be able to
12 effectively carry out their duties if they
13 saw a surge in workload next fiscal year.

14 The Chiefs Advisory Group noted
15 that while many chiefs have funding available
16 in the current fiscal year budget they are
17 reluctant to bring on new staff until more
18 information is available about the amount of
19 funding they can expect to receive next year.

20 The chair of the Chiefs Advisory
21 Group also reported that if there were

NEAL R. GROSS

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

1 assurances that supplemental funding would be
2 available next year for chiefs who would need
3 additional staff to manage the expected
4 workload that chiefs could begin hiring this
5 year.

6 Bringing on new staff as soon as
7 possible would help with any workload
8 increases expected next year, especially
9 since it may take up to six months to fill an
10 officer position due to the requirements
11 surrounding matters such as recruiting,
12 testing, interviewing and completing pre-
13 employment medical examinations and
14 background investigations.

15 The Committee also heard from the
16 chief judges of many of the districts that
17 would be most affected should the amendment
18 become retroactive.

19 The chief judges echoed the
20 concerns raised by the chief probation
21 officers including the concerns that the

NEAL R. GROSS

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

1 Commission's impact analysis understates the
2 true workload that the courts would need to
3 manage since many inmates who would be
4 ineligible for a reduction in their sentences
5 would nonetheless petition the courts for
6 relief.

7 The Commission's own data confirms
8 this problem, demonstrating that 67 percent
9 of all of the defendants who had petitions
10 denied in connection with the 2007 crack
11 cocaine amendment were found to be ineligible
12 for sentence reduction under 1B1.10.

13 In arriving at its recommendation
14 the Committee also revisited its past
15 positions. In particular, its position from
16 2007 to support retroactivity of the crack
17 cocaine amendment.

18 At that time the Committee noted,
19 and I quote, "One possible countervailing
20 consideration to this conclusion making the
21 crack amendment retroactive is the

NEAL R. GROSS

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

1 administrative burden upon the courts that
2 would be associated with re-sentencing crack
3 offenders whose sentences have previously
4 been determined.

5 "The Criminal Law Committee
6 believes that in evaluating such
7 considerations an extremely serious
8 administrative problem would have to exist to
9 justify not applying the amendment
10 retroactively." Unquote.

11 The question before the Committee
12 last week was whether the current fiscal
13 climate coupled with the sizeable workload
14 expected on November 1, 2014 results in an
15 extremely serious administrative problem that
16 would jeopardize public safety thus
17 counseling against supporting the amendment.

18 At first blush it would appear
19 that retroactivity at this time would result
20 in an extremely serious administrative
21 problem that could jeopardize public safety.

NEAL R. GROSS

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

1 However, understanding the
2 magnitude of this decision the Committee
3 considered ways to avoid or to mitigate these
4 problems and concluded that the best solution
5 would be to give chief probation officers an
6 assurance that they will have the resources
7 they require and encourage them to begin
8 hiring the staff they need to manage the
9 expected workload.

10 Unfortunately, that is not an
11 assurance that this Committee can give to the
12 chiefs at this time. Much is still unclear
13 about the Fiscal Year 2015 appropriation
14 levels for the courts.

15 We expect to begin the new fiscal
16 year under a continuing resolution and the
17 interim financial plan that will determine
18 how resources are distributed among the
19 various court units and programs has not yet
20 been developed.

21 Because we cannot guarantee that

NEAL R. GROSS

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

1 sufficient resources will be available on
2 November 1, the Committee has determined that
3 the only way to mitigate the extremely serious
4 administrative problems would be to delay the
5 date that the amendment becomes effective
6 until May 1, 2015, but to authorize the courts
7 to begin accepting and granting petitions on
8 November 1, 2014.

9 This delay in releasing inmates
10 would allow the courts and probation offices
11 across the country to, first, manage the
12 influx of petitions and then, once the surge
13 of petitions has been addressed, pivot
14 available resources to deal with the increase
15 in the number of offenders received for
16 supervision.

17 In the Committee's opinion
18 requiring the courts and probation offices to
19 manage more than 51,000 petitions and begin
20 supervising thousands of offenders at the
21 same time would result in substantial

NEAL R. GROSS

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

1 reductions in services that would jeopardize
2 public safety.

3 The Committee recognizes that this
4 delay will result in some inmates not
5 receiving a reduction in their sentence. It
6 presumes that many of those inmates would
7 already be close to their release dates and
8 are either already or will soon be designated
9 to residential reentry centers or placed on
10 pre-release home confinement.

11 In addition to recommending that
12 no inmate should be released until May 1,
13 2015, the Committee would recommend that the
14 Commission together with the Committee, the
15 Administrative Office, Bureau of Prisons, the
16 Department of Justice and the Federal
17 Judicial Center develop a training program to
18 facilitate close coordination between
19 probation officers, Bureau of Prisons staff,
20 Assistant United States Attorneys, assistant
21 federal public defenders and the courts.

NEAL R. GROSS

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

1 Similar programs were developed in
2 connection with the 2007 amendment and proved
3 helpful in streamlining procedures,
4 prioritizing cases and allowing for careful
5 evaluation of inmates' petitions.

6 There are several reasons why such
7 a program would be warranted should this
8 amendment be made retroactive.

9 First, this amendment could have
10 an impact on districts that were not
11 significantly affected by the crack
12 retroactivity. These districts may not be
13 prepared to manage the volume of workload
14 associated with this amendment and a national
15 training program will assist in their
16 preparation.

17 Also, many of the staff who were
18 responsible for overseeing the implementation
19 of the retroactive crack amendment are no
20 longer with the courts, including many chiefs
21 and deputy chiefs who have since retired.

NEAL R. GROSS

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

1 New staff, including unit executives will
2 benefit from a program that will help them
3 plan accordingly.

4 Finally, because the fiscal
5 climate is different than it was in 2007 local
6 procedures may need to be refined further to
7 address changes in staffing or availability
8 of resources. And the national program may
9 be a useful way to exchange ideas on best
10 practices.

11 In conclusion, the Committee on
12 Criminal Law appreciates the opportunity you
13 have provided to share its views with the
14 Commission about this important issue.

15 While we support making the
16 amendment retroactive we are concerned that
17 the number of cases at a time of diminished
18 resources may jeopardize public safety.

19 We believe that the delay in the
20 effective date that we have recommended will
21 help the courts and probation offices manage

NEAL R. GROSS

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

1 the surge in workload while we try to secure
2 additional resources.

3 We are also confident in the
4 ability of judges to discern suitable
5 candidates for sentence reductions and that
6 through close coordination between staff and
7 the judiciary and in the executive branch this
8 important amendment can be implemented
9 effectively without putting public safety at
10 risk.

11 We understand the many competing
12 views that the Commission will consider and I
13 offer the Committee's continued assistance as
14 you deliberate. Thank you very much.

15 CHAIR SARIS: Thank you. I'll
16 open it up for questions.

17 I'll start. So I know that this
18 affects different districts differently.
19 Some have small numbers, some have big
20 numbers.

21 Is there a way of sharing

NEAL R. GROSS

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

1 resources within the judiciary as a whole?

2 HON. KEELEY: Directing that to
3 probation and pretrial resources. We've
4 looked at that question. We considered it
5 carefully. And at this time I think the
6 realistic answer is that's highly unlikely
7 because of the significant staffing
8 reductions and increasing caseloads that we
9 have experienced across the judiciary.

10 Nevertheless, we certainly have
11 that as a consideration for implementation if
12 this is made retroactive.

13 CHAIR SARIS: Thank you.

14 VICE CHAIR JACKSON: Hi. I'm
15 interested in the aspect of your testimony
16 that says that the judiciary's position in
17 terms of its driving factor behind its views
18 is fundamental fairness. And I wondered if
19 you could elaborate on that a little bit.

20 HON. KEELEY: All right, thank
21 you. Yes, the general sense of our Committee

NEAL R. GROSS

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

1 was that fairness was the driving factor in
2 our voting. That we were obviously very
3 aware of the number of factors that the
4 Commission considered, but if this is going
5 to be made retroactive we believe that
6 fundamental fairness required or strongly
7 suggested that the amendment apply to all
8 currently incarcerated inmates.

9 If the reasons that the amendment
10 is being reduced suggest that the former
11 amendment needed to be amended -- the former
12 guideline needed an amendment then there
13 didn't seem to be a logical reason why those
14 who are currently incarcerated shouldn't
15 benefit from that same reasoning.

16 VICE CHAIR JACKSON: Even post
17 Booker though? I mean, even the defendants
18 who were sentenced post Booker.

19 HON. KEELEY: Well, of course as
20 the individual judge considers these cases I
21 think we are going to find that post Booker

NEAL R. GROSS

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

1 and post Gall many of these inmates may not
2 be eligible for the two-level reduction.

3 For example, in districts with
4 fast tracking the variance may have already
5 taken the guidelines below what the new
6 guideline would be. And as I understand the
7 Commission's viewpoint on that they would not
8 be eligible for further reductions.

9 So I do agree that many of these
10 inmates may not be eligible. But I believe
11 the Commission's own numbers reflect that
12 assumption, correct.

13 CHAIR SARIS: Thank you. Judge
14 Hinojosa and then Judge Barkow.

15 VICE CHAIR HINOJOSA: Judge
16 Keeley, a follow-up on the fundamental
17 fairness issue here.

18 You know, Congress, it's not
19 unusual to lower penalties within the
20 statutes themselves. And I would say they
21 have been very reluctant to apply those

NEAL R. GROSS

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

1 retroactively, including in crack cocaine
2 which I think there's common agreement all
3 over the country from all segments that the
4 ratio there was inappropriate and unfair.

5 And so in light of the Booker
6 decision as has been pointed out and Congress
7 in facing the fundamental fairness issue has
8 been very reluctant whenever penalties are
9 lowered to apply their statutory authority
10 with regards to retroactivity do you think
11 that that's something the Commission should
12 consider in a situation where we are in the
13 post-Booker world with regards to this
14 particular amendment?

15 HON. KEELEY: Well, certainly,
16 Judge Hinojosa, that should be considered as
17 our Committee did. And our discussion was
18 very, very thorough on that issue.

19 But at bottom it was the view of
20 a large majority of our Committee that
21 retroactivity was the fair way to approach

NEAL R. GROSS

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

1 this guideline amendment.

2 CHAIR SARIS: Commissioner
3 Barkow.

4 COMMISSIONER BARKOW: Thanks so
5 much for your testimony. It's been very
6 helpful.

7 My question is about the lag time
8 that you suggest.

9 HON. KEELEY: Yes.

10 COMMISSIONER BARKOW: Did the
11 chiefs of probation indicate that that lag
12 time would be sufficient for them to address
13 the public safety concerns that they had
14 previously brought up as suggesting would be
15 possible?

16 I mean, was it -- were you able to
17 go back and kind of re-poll them or get an
18 assessment from them that that would be a
19 sufficient amount of time?

20 HON. KEELEY: At our meeting we
21 did have the chief of -- or the head of the

NEAL R. GROSS

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

1 Chiefs Advisory Group. For short-term
2 purposes we call them the CAG so if I call
3 them the CAG you'll know who I'm describing.

4 We did not have time to leave our
5 meeting and go and poll them again. But it
6 had been anticipated because of the way crack
7 amendments had been implemented that we knew
8 we would need more time and the chiefs had
9 been generally questioned on it.

10 There is no perfect world here.
11 But six months in the view of the members of
12 our Committee after consulting with the
13 chiefs and talking to also the staff in the
14 Administrative Office of Probation and
15 Pretrial Services it seemed to be a reasonable
16 time frame that would allow us to deal first
17 with the petitions and get over that workload,
18 and then take the new supervisees who would
19 be coming out.

20 We realize that's not a perfect
21 solution, but it seemed to be the best balance

NEAL R. GROSS

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

1 that we could achieve for the enormous
2 stresses that our system is already
3 experiencing.

4 And you know, obviously my remarks
5 reflect the great confidence that I and all
6 the judges around the United States have in
7 our Probation and Pretrial Services officers.

8 And we believe that not only are
9 they willing to do this with recognition of
10 the challenges but they're very able to do
11 it.

12 COMMISSIONER BARKOW: Thank you.

13 CHAIR SARIS: Judge Pryor and then
14 Judge Breyer.

15 COMMISSIONER PRYOR: Judge
16 Keeley.

17 HON. KEELEY: Good morning.

18 COMMISSIONER PRYOR: Good
19 morning. I wanted to ask you about
20 fundamental fairness too. I want to return
21 to that.

NEAL R. GROSS

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

1 It seems to me that fundamental
2 fairness could be viewed in a couple of ways
3 here. The common law doctrine of abatement
4 provided that if a penalty is reduced for a
5 criminal violation that the offender should
6 benefit regardless of the date of sentencing,
7 work forward and backward.

8 But that presumption changed in
9 American law about a century ago by virtue of
10 the Savings Statute that Congress and a number
11 of states enacted which reversed the
12 presumption.

13 And the presumption of fundamental
14 fairness that they adopted was that for those
15 offenders who committed an offense
16 understanding that the higher penalties were
17 in place, they should suffer the higher
18 penalties.

19 And those who committed an offense
20 at a later date after the law had changed and
21 with lower penalties should be the only ones

NEAL R. GROSS

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

1 to benefit from those lower penalties.

2 To what extent was that
3 perspective considered as a matter of
4 fundamental fairness by your Committee?

5 HON. KEELEY: I can't say that we
6 considered it in exactly that context.
7 However, the Committee looked at this from
8 the perspective that Congress has given this
9 Commission the power to make amendments such
10 as this retroactive.

11 And therefore I believe that we -
12 - our discussions in a sense actually assumed
13 that the reasons to consider making this
14 retroactive would be considered in a broader
15 context and would take into consideration a
16 number of factors.

17 In other words, I think I would
18 say that we didn't necessarily consider that
19 the Savings Clause precluded the application
20 of retroactivity here. And our consideration
21 of fundamental fairness went to probably more

NEAL R. GROSS

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

1 -- issues that were more concerned with
2 viewing the impact on this, the view of the
3 judges that if the system can handle it
4 historically we have supported retroactivity.

5 And our wrestling was really not
6 around that issue so much as it was around
7 how are we going to make this work effectively
8 so as not to impact public safety in a
9 negative way.

10 COMMISSIONER PRYOR: So, do you
11 read the --

12 HON. KEELEY: I will say we had
13 one member of our Committee, if I may, who I
14 think would agree with you entirely. I
15 shouldn't say agree with you, but who did
16 express the view that retroactivity was not
17 something that that member of the Committee
18 could support from a perspective of
19 jurisprudential thought as opposed to other
20 considerations. That it's not necessary.

21 COMMISSIONER PRYOR: So, do I

NEAL R. GROSS

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

1 understand, you read the authority that
2 Congress gave the Commission to make
3 guideline amendments retroactive to work as a
4 presumption --

5 HON. KEELEY: No.

6 COMMISSIONER PRYOR: -- that
7 amendments should be retroactive? No.

8 HON. KEELEY: No. No, not at all.

9 COMMISSIONER PRYOR: There's
10 really not a presumption either way, as I
11 find.

12 HON. KEELEY: No, but I believe
13 there's an authority to consider reasons why
14 it ought or ought not to be, correct?

15 COMMISSIONER PRYOR: Right.

16 HON. KEELEY: Yes.

17 COMMISSIONER PRYOR: Right. And
18 well, what I was wondering, then, is if there
19 are two competing views of fundamental
20 fairness that have been at work in American
21 law since the founding of the Republic, why

NEAL R. GROSS

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

1 choose one over the other? Which one is it?
2 How should we choose one or the other? This
3 isn't like the crack amendment, right, where
4 we were reducing what everyone recognized was
5 an unfair disparity. What should guide us in
6 choosing one view of fundamental fairness
7 over another?

8 HON. KEELEY: Well, I will agree
9 that there's a lack of what we described in
10 2007 as a corrosive effect of the disparity
11 in the crack powder sentences. Our general
12 sense of fairness on this one considered the
13 factors I believe this Committee is looking
14 at, the impact on the inmates, including
15 reducing overcrowding in the Bureau of
16 Prisons.

17 The fact that, if made retroactive
18 there would be no -- history tells us that
19 this would be consistent with the prior
20 position that our Committee and the judiciary
21 had taken. And as well, we believe that we

NEAL R. GROSS

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

1 could moderate any negative impacts on the
2 system. And if the system could handle it,
3 and it was consistent with the reasons given
4 for the amendment to begin with, there was no
5 compelling reason not to make it retroactive.

6 Had public safety been an issue
7 that could not be managed we probably would
8 not have recommended this, okay? But, the
9 purpose of the amendment in total and our
10 historical policy of supporting
11 retroactivity, where the administrative
12 resources can handle it, was the -- I think
13 would summarize the viewpoint of the
14 Committee in our deliberations.

15 CHAIR SARIS: Thank you. Judge
16 Breyer.

17 VICE CHAIR BREYER: First, Judge
18 Keeley, let me thank you and your Committee
19 for addressing this so efficaciously. It's
20 a difficult subject and I think that your
21 report is very thoughtful, the Committee's.

NEAL R. GROSS

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

1 When we get into discussions about
2 fundamental fairness which has, as you have
3 reported, motivated the Committee in its
4 recommendation, I'm always concerned that
5 because I have a particular view of
6 fundamental fairness, another person may have
7 a different view. And that view may be not
8 only defensible, it may even be superior to
9 my view.

10 So, I'm asking the question as to
11 whether or not, in your Committee's
12 deliberations, one of the factors was that
13 the individual judge who will be examining
14 the issue as to whether or not to give
15 retroactive application may take all those
16 considerations into effect in adjudicating
17 his or her response to it.

18 That is, as I understand it, in
19 testimony that your Committee contemplates,
20 that while this Commission may take a position
21 with respect to retroactivity, that is, it

NEAL R. GROSS

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

1 may, as a policy matter, advise judges that
2 they can apply it retroactively, we're not
3 mandating it.

4 HON. KEELEY: Oh no, obviously
5 that's not --

6 VICE CHAIR BREYER: And any judge
7 who looks at it and says, look, you know, I
8 have this particular view of the law, and I
9 have this particular view of the facts that
10 gave rise to this particular sentence. And
11 in light of all of these considerations I
12 choose not to adjust the sentence. That's
13 one of the factors -- is it one of the factors
14 that your Committee considered in making its
15 recommendation?

16 HON. KEELEY: Yes, of course.
17 And we were informed by the manner in which
18 the crack cocaine amendments were made
19 retroactive in 2007. Indeed, we on the
20 Committee recognized that this is, and as I
21 said in my remarks, this is an individual,

NEAL R. GROSS

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

1 judge by judge, decision and the burden of
2 these initial petitions falls on us.

3 We receive the information from
4 Probation and Pretrial Services, but at the
5 end of the day every district judge in the
6 country is going to be required to consider -
7 - if it's made retroactive, will be required
8 to consider whether retroactivity is
9 reasonable and appropriate in the individual
10 inmate's case. And that will be a carefully
11 considered decision that may differ depending
12 on the judge and the inmate.

13 One of the comments we heard, from
14 a number of judges, was about what happened
15 to finality. And I'm sure that's an issue.
16 Because, didn't we already sentenced this
17 person. And certainly I would be less than
18 candid if I didn't acknowledge that there was
19 not unanimity within the judiciary on this
20 question.

21 Nevertheless, the judges that did

NEAL R. GROSS

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

1 respond were essentially most concerned about
2 the administrative issue. Fundamental
3 fairness was not a significant factor for
4 those, in my opinion, in what I read from the
5 responses, it was not a fundamental concern
6 of those judges who were worried about
7 retroactivity, were outright opposed to
8 retroactivity.

9 It was far more likely the stress
10 on the system that is already stressed. The
11 lack of resources in a system where we have
12 in the last 10 years, as I said 5 percent
13 fewer staff -- lower staffing I should say,
14 and 19 percent higher caseload on the post-
15 supervision side, or post-conviction, post-
16 release side with supervision where we have
17 an increasing criminogenic risk.

18 So, were there judges who were
19 concerned about are we throwing finality out?
20 What about the principle of the Sentencing
21 Reform Act? No. There were judges who were

NEAL R. GROSS

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

1 concerned about that. On balance, however,
2 that was not a concern that we heard over and
3 over again. What we heard over and over again
4 was the one we tried to address here, which
5 is the administrative and public safety
6 matters.

7 CHAIR SARIS: Thank you.
8 Commissioner Friedrich?

9 COMMISSIONER FRIEDRICH: Judge
10 Keeley, thank you for your testimony today.
11 The Senate Committee report that discussed
12 this extraordinary power the Commission's
13 been given to make amendments retroactive
14 talked about the unusual cases in which
15 reduction could be justified. And it talked
16 about extraordinary and compelling
17 circumstances.

18 And as I understand your
19 discussion of fundamental fairness, what
20 you're saying is the Committee thought it was
21 important, critical that offenders be put on

NEAL R. GROSS

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

1 the same footing as defendants who commit the
2 same crimes in the future. So regardless of
3 the date of the sentencing, they should be
4 treated alike.

5 HON. KEELEY: Right.

6 COMMISSIONER FRIEDRICH: But of
7 course, that logic would apply to any
8 amendment the Commission ever did that
9 lowered penalties. So I'm curious. You also
10 mentioned in your testimony the Committee's
11 longstanding position that the Commission
12 should de-link the guidelines from the
13 mandatory minimums. I'm curious as to what
14 extent that was one of the driving forces
15 behind the Committee's recommendation. Given
16 that you've always, as far as linking the
17 guidelines, been in that position.

18 HON. KEELEY: Yes, certainly that
19 was a consideration of the Committee. And
20 because it's such a longstanding principle
21 position of not just our Committee, but of

NEAL R. GROSS

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

1 the judiciary we didn't linger long on it.
2 It was just so fundamental, candidly. And we
3 were aware as well of the other matters,
4 systemic matters that we believed had led the
5 Commission to its decision to recommend the
6 amendment to the guidelines.

7 We looked at that and on balance,
8 when we considered all of it we -- our
9 perception was that, were this not made
10 retroactive, there could be enormous systemic
11 consequences. And that you all would
12 obviously carefully consider those as we did.

13 And that we felt that, again, if
14 the administrative and public safety aspect
15 of this were manageable that the overarching
16 fairness of applying this guideline to all
17 currently incarcerated inmates, who would
18 otherwise be eligible in the view of the
19 individual judge, was the right decision.

20 COMMISSIONER FRIEDRICH: Thank
21 you.

1 CHAIR SARIS: Commissioner
2 Wroblewski?

3 COMMISSIONER WROBLEWSKI: Thank
4 you, Judge Saris. And thank you, Judge
5 Keeley, for being here and also for inviting
6 the Justice Department to speak with your
7 Committee. I heard -- I want to talk about
8 the budget constraints very very briefly. I
9 read your testimony and then I listened
10 carefully today. And I hear two pieces to
11 your plan, to the Committee's plan to address
12 the budget constraints. And I just want to
13 make sure I'm hearing this correctly.

14 The first is a delay. And then
15 the second you've said, I think both in your
16 written testimony and here today, that there
17 would be also an attempt to seek new
18 resources.

19 HON. KEELEY: Yes.

20 COMMISSIONER WROBLEWSKI: Of
21 course, what happens if those resources are

NEAL R. GROSS

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

1 not forthcoming? What should the Commission
2 do? The Commission is going to be voting in
3 July. What happens then? And given the two-
4 year budget agreement that Congressman Ryan
5 and Senator Murray negotiated six or eight
6 months ago, and the levels that are likely to
7 be in place which I think will be roughly the
8 same for '14 and for '15. How should the
9 Commission address that, given that
10 uncertainty that you're putting forth?

11 HON. KEELEY: Well, obviously our
12 Committee wishes that you could write a check.

13 (Laughter)

14 CHAIR SARIS: We do too.

15 HON. KEELEY: Short of that,
16 obviously, what our Committee wishes is that
17 you will consider that we carefully weighed
18 this and that we have an opportunity, as Judge
19 Hinojosa recognizes, to apply to the Budget
20 Committee of the Judicial Conference with
21 regard to this issue should it be -- for the

NEAL R. GROSS

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

1 need for resources should the amendment be
2 made retroactive.

3 Whether there is a need to ask
4 Congress for an anomaly to the '15 budget I
5 don't know. I'm not a budget expert. I
6 don't know how it would actually work. But
7 I know that we have alerted the budget
8 staffing within the Administrative Office
9 that we have taken this position and made this
10 recommendation to the Commission, that we
11 will begin discussing with them what we can
12 possibly do to alert Congress to this and to
13 our needs on the issue of public safety.

14 Let me go back and say one other
15 thing. Because of the action the Commission
16 has already taken inmates are going to come
17 out with increasing frequency, all right?
18 There are going to be inmates coming out more
19 frequently than otherwise would have
20 happened. We have those stresses to deal
21 with anyway. The numbers will be greater if

NEAL R. GROSS

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

1 it is made retroactive, and we looked at that.
2 But it was not an either-or situation. We
3 are going to have to deal with the
4 consequences of the decisions amendment -- of
5 the Commission's amendment in any case.

6 And that it might be a heavier
7 burden if it was in support of fundamental
8 fairness was something that we felt was the
9 judiciary's burden to bear, and that we can
10 do it. And we will do it, with the
11 understanding that it will, as I said, it will
12 take all branches of government to address
13 the question of public safety and make sure
14 that as these inmates reenter the community
15 that they come out with a plan, with adequate
16 supervision and with adequate programming.

17 You know, we know that the two
18 most important factors benefitting an inmate
19 on reentry are a new social network. They
20 don't go back to the former criminal behavior
21 with the same population that they engaged in

NEAL R. GROSS

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

1 before. And secondly, that they have a job
2 that will provide them with the ability to
3 support themselves.

4 There is pending legislation in
5 Congress, as I'm aware, that attempts to
6 address, among others these two issues. The
7 Probation and Pretrial Services staff will
8 have to deal with these questions should that
9 legislation pass. Therefore, it informed our
10 Committee's judgment that these were all
11 issues that we have to deal with in pretrial
12 and probation as a matter of our mission, not
13 merely as a matter of retroactivity here.

14 So it's a far broader question
15 that you're asking, and Congress is aware and
16 has always been very -- thankfully very
17 responsive to the concerns of public safety
18 and to the increasing caseload.

19 All of this demonstrates that
20 there is no part of our criminal justice
21 system that isn't impacted by another part of

NEAL R. GROSS

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

1 it. It's a cohesive whole and it is the --
2 I think the only rational way to deal with it
3 is with that viewpoint. Whether it's
4 Director Samuels, from whom you'll hear
5 later, or the executive chief probation
6 officers from the District of South Carolina
7 you are going to hear that we are a community
8 of interest and we have to deal with this.

9 CHAIR SARIS: Thank you.

10 VICE CHAIR HINOJOSA: Yes, Judge
11 Keeley. I guess it's a two-pronged question.
12 I obviously come from one of the districts
13 that would be very affected by this. And
14 there's two Texas districts -- all four Texas
15 districts would be pretty high up on the list
16 and two of them extremely high on the list,
17 one and two on the list.

18 And it appears to me that the
19 feeling of the judges in those districts in
20 visiting with them and hearing from them,
21 sometimes unrequested hearing from them --

NEAL R. GROSS

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

1 (Laughter)

2 VICE CHAIR HINOJOSA: -- is that
3 they do not have a strong feeling on the
4 public fairness issue, as to that this
5 particular reduction is a public fairness
6 issue, like they did with crack. That a
7 serious concern about retroactivity not
8 because of the volume of the work that it
9 would put on them but because of the fact that
10 the reasoning behind this amendment is very
11 different than it has been with regards to
12 crack.

13 The other issue that those two
14 districts face, many of us have grown up on
15 the border with Mexico. And there is no doubt
16 that a percentage of these, maybe one quarter
17 to one-third of the defendants in these cases,
18 if released, are going to be deported. They
19 eventually will be deported when they finish
20 serving their long prison term or their short
21 prison term, but in due course.

NEAL R. GROSS

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

1 And anybody who lives on the
2 border knows the violence that exists in
3 Mexico and the number of killings that happen
4 on a regular basis as well as kidnappings.
5 And that these defendants would be released -
6 - as that country struggles within their own
7 resources to grab a hold of their criminal
8 justice situation they would be receiving
9 individuals much sooner and quicker than
10 would normally be the process.

11 And giving them less time to grab a
12 hold of a very difficult situation in their
13 countries with Mexico and Central America,
14 for example. And the question is, did that
15 play into your thinking with regards to your
16 vote on this matter?

17 I mean they don't have the
18 probation system that we have. Eventually
19 these defendants will be going back to their
20 country of origin, but at the same time many
21 of them will be tempted to come back, and

NEAL R. GROSS

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

1 maybe quicker, because of the fact that many
2 of them have families on this side of the
3 border. And we will see them as illegal
4 reentry cases, to some extent, sooner than
5 one would normally see them. And I guess the
6 question is was that discussed within the
7 Committee.

8 HON. KEELEY: The Committee was
9 well aware of the unique situation in the
10 southwest border states, particularly in
11 Texas with the four districts in Texas leading
12 the list for the number of cases to be managed
13 if this be made retroactive.

14 To the question of what would
15 happen after inmates are released and
16 deported and then coming back, we did not
17 address that in depth. We recognized it. We
18 knew it was an issue. Again, we saw this as
19 an issue that crosses the branches. And that
20 the executive branch, the legislative branch,
21 our branches that are aware of this and need

NEAL R. GROSS

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

1 to address it as they view it to be
2 appropriate.

3 The judicial branch has to deal
4 with the realities of the situation as you're
5 pointing out. Did we think we could solve
6 that problem? Whether this was made
7 retroactive or not, no. So, I mean I guess
8 at bottom did we think retroactivity was going
9 to have such a dramatic impact that it should
10 be the reason why we would not support
11 retroactivity? Judge Hinojosa, we did not
12 specifically address that question.

13 CHAIR SARIS: Thank you. Judge
14 Breyer?

15 VICE CHAIR BREYER: I'd like to
16 return to fairness again, because I think this
17 discussion highlights the fact that people
18 view fairness very differently based upon
19 their experiences and other considerations.

20 Obviously one kind of fairness, I
21 think one of the Commissioners mentioned, is

NEAL R. GROSS

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

1 that with the crack powder disparity it seemed
2 appropriate to have it retroactive, because
3 of the inappropriateness of the high levels
4 of disparities between the drugs. And that
5 seemed to be fair then to apply it
6 retroactively. That's one kind of fairness.

7 Another kind of fairness is that
8 having decided that sentences for drug
9 offenses are simply too long, and having
10 looked now at defendants who are sentenced a
11 particular way which is less stringent, or
12 less punitive than they were before, some
13 people could look at that and say therefore
14 it's unfair to have people sitting in prison
15 who would get a lighter sentence if in fact
16 they had committed the same offense the same
17 way today. That's another way of approaching
18 fundamental fairness. My question is did
19 that factor, that approach at all play a role
20 in some judges' decision or in the Committee's
21 role as a whole.

NEAL R. GROSS

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

1 HON. KEELEY: Yes, as I believe I
2 stated in my comments that it absolutely did.
3 When we looked at it, we realized that the
4 statement of the Commission seems to be on
5 the amendment there are compelling reasons
6 why these drug guidelines even in the post-
7 Booker age ought to be lowered by two levels.

8 That if that was the Commission's
9 view and wisdom on this issue, other than
10 workload or the principles articulated by
11 Judge Pryor, why would you not make this
12 retroactive? What would -- we know from the
13 recidivism studies post-crack cocaine that
14 there's no significant difference in the
15 outcomes for those inmates who have been
16 released under crack cocaine reductions.

17 So we're not expecting -- even
18 though we have stresses in the system, even
19 though we see an increasing criminogenic risk
20 profile it's not because of retroactivity,
21 it's not because amendments were made

NEAL R. GROSS

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

1 retroactive. This is the offender population
2 with whom we are working.

3 And the solutions to that -- the
4 problems of that population don't rest in the
5 longer criminal sentences that this
6 Commission has now decided are no longer
7 appropriate for drugs, but rather in a proper
8 programming and supervision to address the
9 social networks and the employment issues
10 that we know are critical to improving
11 outcomes on supervision.

12 So, fairness, I come back to it
13 again. It's a very complicated question. It
14 involves many factors, and a larger view of
15 the impact on our society, that we felt was
16 appropriate to consider, if the resources are
17 available.

18 CHAIR SARIS: I wanted to ask for
19 a second about public safety. I understand
20 that you didn't have the Department of
21 Justice's statement or testimony at the time

NEAL R. GROSS

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

1 --

2 HON. KEELEY: We did not.

3 CHAIR SARIS: -- that the Criminal
4 Law Committee met and had this discussion.
5 Did anyone talk about the possibility of a
6 limited form of retroactivity, along the
7 lines of what was recommended, for example,
8 not having people with guns, or not extending
9 it to people who had supervisory roles,
10 aggravating roles. Was that part of the
11 decision-making at all?

12 HON. KEELEY: We did look at that
13 and, Judge Saris, we rejected those,
14 essentially the points on the spectrum for
15 the reason of fairness, that we couldn't find
16 or articulate a reason why you would look at
17 pre-Booker or pre-Gall and say we'll only
18 apply it to these other than the numbers.

19 But if you look at those pre-Gall
20 numbers, and I believe the Commission
21 provided us with those, there were some very

NEAL R. GROSS

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

1 long sentences that would be -- so those
2 people would be the sole beneficiaries of the
3 reduction or the reduction from the
4 retroactivity. Why would you not apply this
5 across the entire population affected by
6 this?

7 So there to me you're looking at
8 an issue of -- a moral issue, a fairness
9 issue. If you're going to apply it to some
10 who arguably, are maybe the more dangerous
11 because of the length of the sentences, why
12 would you exclude those with shorter
13 sentences, a sentence under guidelines that
14 we have decided to change. Because you
15 believe that they -- you now have considered
16 and concluded that they're no longer
17 appropriate in length.

18 COMMISSIONER PRYOR: Of course,
19 the Committee, I guess, really did adopt a
20 proposal that would be limited retroactivity.
21 Because the Committee's recommendation is

NEAL R. GROSS

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

1 there be a timing delay, right? That some
2 offenders would not -- some inmates would not
3 benefit, so for them there would not be,
4 effectively, retroactive application.

5 HON. KEELEY: Judge Pryor, if I
6 may respond to that. In my remarks I did
7 recognize that likely those inmates who would
8 not walk out on November 1 are already in the
9 BOP's program for community reintegration,
10 right, or a halfway house, or a community
11 confinement center, or some form of pre-
12 release home detention. And I'm sure that
13 Director Samuels will be addressing some of
14 that.

15 But candidly, while we didn't have
16 the exact numbers in front of us, because we
17 could not in the time we had to deliberate
18 this, from what we know from Probation and
19 Pretrial Services we're aware that most of
20 those inmates would not be in the prison
21 itself during this delay time, or most of them

NEAL R. GROSS

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

1 would not be. So if there is some aspect of

2 --

3 COMMISSIONER PRYOR: Does that
4 mean that they are lower-level offenders?

5 HON. KEELEY: No, not
6 necessarily. It just means as their release
7 date approaches --

8 COMMISSIONER PRYOR: Right.

9 HON. KEELEY: -- the Bureau of
10 Prisons has a program for moving them out into
11 the community in stages.

12 And this is wanted to avoid with
13 this six-month delay, not only the
14 opportunity to get through the petitions and
15 to get staffing geared up to deal with this,
16 but also to make sure that there are not
17 inmates who are released on November 1 with
18 no programming, with no plan for reentry.
19 Because that would be -- that would almost
20 guarantee a failure.

21 COMMISSIONER PRYOR: Right.

NEAL R. GROSS

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

1 Well, if we're going to make those kinds of
2 tradeoffs why wouldn't we make the tradeoff
3 one of choosing lower-level offenders versus
4 higher-level offenders? If we're going to
5 make a tradeoff one way or another why
6 wouldn't that one make more sense?

7 HON. KEELEY: I could only tell
8 you that, in the view of our Committee, it
9 did not, and we considered it. It's -- really
10 the Committee viewed this as, if you will, an
11 all-or-nothing in that respect. We didn't
12 see any --

13 COMMISSIONER PRYOR: But you
14 didn't choose an all-or-nothing proposition.
15 You chose --

16 HON. KEELEY: Well, I would
17 respectfully disagree with you. I think it's
18 an all-or-nothing proposition as to the
19 concept and in the implementation, because of
20 the realities. There will be some who will
21 not get the benefit on November 1. That will

NEAL R. GROSS

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

1 be reality.

2 COMMISSIONER BARKOW: Can I ask
3 you a question? I know that you didn't have
4 a chance to see DOJ's proposal, but there's
5 one thing about it that's related to something
6 you did talk about which is that assuming we
7 did any kind of retroactivity, it sounds like
8 it's not so finely calibrated among those who
9 would ask for it, or folks are going to apply
10 whether they're eligible or not.

11 And so my question is about the
12 Department has suggested we limit it to
13 certain types of people, certain criminal
14 histories and whatnot. How did the judges,
15 in terms of just a front-level workload
16 analysis for the judges and probation is that
17 something that can be easily screened by them?
18 To go through and say, okay, these folks don't
19 meet the criteria.

20 Or is it in fact, that is just as
21 much workload as if you had a blanket

NEAL R. GROSS

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

1 retroactivity decision and the judges were
2 looking case by case themselves to decide is
3 this someone who should be let out? I'm just
4 trying to get a handle on how much time that
5 Department proposal would actually save.

6 HON. KEELEY: Thank you. I don't
7 believe it would save any. I don't think
8 that there's any difference in the way in
9 which we would look at these petitions, the
10 amount of time and effort that would go into
11 a team approach as we had adopted under the
12 crack amendments to reviewing these
13 petitions.

14 And again, one of the driving
15 factors there will be that inmates who are
16 not eligible will not realize that, or will
17 reject that and therefore will petition. And
18 we will be -- and this was a concern of many
19 chief judges. We're going to have to deal
20 not with 51,000 nationally, but rather many
21 more, because these petitions will come in.

NEAL R. GROSS

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

1 But I said to you no matter how
2 you try to limit it that will happen anyway.
3 All right? And that is one of the -- that's
4 just a reality. We know that from the crack.

5 CHAIR SARIS: Thank you very much.
6 I know how much work your Committee put into
7 this, with your surveying all the probation
8 offices in the heavily impacted districts.
9 And thank you for your input.

10 HON. KEELEY: Thank you very much
11 for listening. Thank you.

12 CHAIR SARIS: Thank you. I'd
13 like to introduce -- I'm hoping I'm saying
14 this correctly, O. Quincy Avinger.

15 MR. AVINGER: Correct.

16 CHAIR SARIS: Junior. Deputy
17 Chief U.S. Probation Officer from the U.S.
18 Probation Office for the District of South
19 Carolina. Quincy Avinger is the Deputy Chief
20 United States Probation Officer, a position
21 he's held for over 20 years, including when

NEAL R. GROSS

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

1 the Commission's two prior amendments
2 regarding crack cocaine offenses were made
3 retroactive in 2008 and 2011.

4 Before joining the Probation
5 Office he was a program coordinator of the
6 Parole and Pardon Services at the South
7 Carolina Probation Department.

8 Now, I want to make it clear here
9 that Judge Keeley was speaking for the courts,
10 and Probation Officer Avinger is here because
11 he is going to share his experiences with how
12 his district procedurally handled the various
13 instances of retroactivity in order to inform
14 us about what worked well, what might not have
15 worked well. But he's not here to state
16 policy for the courts. So, thank you for
17 coming.

18 MR. AVINGER: Thank you, Judge
19 Saris and Commissioners of the Sentencing
20 Commission. Again, my name is Quincy Avinger.
21 I have been a U.S. Probation Officer in the

NEAL R. GROSS

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

1 District of South Carolina since 1991, and
2 served as Deputy Chief since 2003.

3 It's a privilege to be here today
4 at the Commission. South Carolina has had
5 strong ties to the Commission since its
6 inception, and I can assure you that few
7 places are held in such high esteem by United
8 States probation officers, especially pre-
9 sentence investigators as the United States
10 Sentencing Commission. Please know that we
11 support the Commission in its continued
12 efforts to provide a sentencing system that's
13 still striving to achieve the original
14 objectives of honesty, uniformity and
15 proportionality.

16 I'm here before you today to
17 discuss some of our experiences implementing
18 retroactive application of Amendment 706
19 addressing the longstanding 100 to 1 ratio of
20 crack cocaine to powder cocaine. The
21 preparation of pre-sentence investigations

NEAL R. GROSS

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

1 and recommendations are a task that's taken
2 very seriously by the United States Probation
3 Office.

4 In 2007, the initial discussion on
5 possibly having to re-sentence up to one
6 thousand offenders in our district created a
7 high degree of anxiety and many questions as
8 it did in other districts as well. To address
9 these concerns several chiefs coordinated two
10 districts to host events to determine the
11 practice on it. I had never been invited to
12 the summit before.

13 On January 2, 2008, two weeks
14 prior to our scheduled summit, I was forwarded
15 a report generated by your office that listed
16 753 offenders that had been sentenced in South
17 Carolina that would actually be impacted by
18 the amendment. Seeing that list for the
19 first time gave me pause for several reasons.
20 First, it became very personal at that point.
21 As a native South Carolinian, these were our

NEAL R. GROSS

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

1 citizens and many of them had been in prison
2 for a long time. Their demographic was well
3 known. It had been observed over and over
4 again and again.

5 To reflect on our attitude at the
6 time, it's important to know that it did not
7 take this guideline amendment for many of us
8 to recognize this group of offenders had been
9 dealt with very harshly through the years.
10 While not deliberately intended, this may
11 have been especially true in South Carolina
12 and in the Fourth Circuit.

13 The District of South Carolina,
14 like many districts of the Fourth Circuit had
15 a history of strictly applying and following
16 the sentencing guidelines, especially during
17 the nineteen nineties and the early two
18 thousand era. Absent general departures for
19 substantial assistance, there were very few,
20 if any, reduced sentences for this large
21 group.

NEAL R. GROSS

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

1 Second, I felt we had a lot more
2 offenders out there than the 753 that appeared
3 on that initial list. South Carolina had
4 been sentencing hundreds of crack dealers
5 since the inception of the guidelines. A
6 week later, we received another report
7 listing the names of offenders potentially
8 affected by the amendment. This report was
9 prepared by the Administrative Office. Our
10 district had over 1,500 names on this list.

11 During 2007, the previous year,
12 our district had conducted almost 1,200 pre-
13 sentence investigations. Understanding and
14 supportive of the amendment the idea of re-
15 sentencing 1,500 offenders was a daunting
16 thought. We certainly needed some direction
17 in sorting it all out.

18 A week later, on January 18, our
19 chief judge at the time, David Morton, Public
20 Defender Parks Small, Chief United States
21 Probation Officer David Johnson, myself and

NEAL R. GROSS

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

1 Assistant U.S. Attorney Nancy Wicker attended
2 the first practice summit in Charlotte, North
3 Carolina. It was also attended by others in
4 similar positions from other districts that
5 were going through a similar situation.

6 The summit was very well organized
7 and helpful, and included presentations from
8 member of your staff, Bureau of Prisons, U.S.
9 Marshal Service, a panel of judges and a
10 separate panel of probation officers.

11 Our district did not finalize a
12 plan at the summit. We did agree that we
13 would work together to establish a
14 streamlined process that would ensure cases
15 were addressed in an efficient manner. The
16 concerns of having an automated process in
17 addressing these cases while continuing to
18 address our normal workload were on a lot of
19 our minds.

20 Beyond addressing the process, on
21 the whole coming out of the summit two

NEAL R. GROSS

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

1 questions came to the forefront for us. The
2 first was were each of these sentencing
3 adjustments going to require a court hearing?
4 The second question was were the offenders
5 going to be able to re-argue previously
6 disposed objections?

7 By answering the second question
8 first, we knew they were not going to be able
9 to re-argue prior objections, the first
10 question became easier to answer. A hearing
11 is not going to be necessary, at least in
12 South Carolina. Circuit court cases later
13 affirmed this practice to be allowed.

14 The group as a whole agreed with
15 the intention of the amendment. The common
16 sentiment was the relief that was due to many
17 was appropriate and deserved. Through
18 further discussions things started to fall in
19 place. Several agreements were made to aid
20 the process.

21 The Public Defender's Office

1 volunteered to represent and contact every
2 inmate sentenced in South Carolina that may
3 have been impacted by the amendment. This
4 was a tremendous gesture and task on their
5 part. They sent letters to thousands of
6 offenders in the Bureau of Prisons to let them
7 know that they would be represented and that
8 no other action would be required on the part
9 of the offender.

10 The U.S. Attorney's Office, which
11 for years had its bread and butter being crack
12 cocaine prosecutions, also came forward and
13 agreed not to oppose new sentences that were
14 at the low end of the newly established
15 guideline range. With few exceptions, they
16 did not object to sentences of this group
17 being adjusted downward.

18 Rather than waiting for the
19 individual offenders to make a motion or write
20 a letter before taking action, our court was
21 insistent that no case be overlooked. We

NEAL R. GROSS

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

1 would not only use the provided reports, we
2 of course ran our own reports in an attempt
3 to identify all affected offenders. We also
4 went through every hard file, every file
5 cabinet and every office to make sure we
6 didn't miss anyone.

7 The U.S. Probation Office created
8 a single-page sentence reduction report that
9 outlined the adopted drug quantities and
10 original guideline ranges and sentences. Of
11 course it also contained the newly
12 established guideline imprisonment ranges.

13 In this particular process we did
14 not make specific recommendations to the
15 court of what the new sentences should be.
16 Given the volume of cases we assigned the task
17 of assembling and reviewing the cases with
18 our most experienced officers and
19 supervisors.

20 The courts then were very well
21 acquainted with the calculated drug

NEAL R. GROSS

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

1 quantities and making conversions of
2 different substances. It was not uncommon
3 for them to seek out quarantined workspace
4 away from their offices to work on this high
5 volume of cases.

6 The sentence reduction reports
7 were sent to the attorneys similar to the
8 regular pre-sentence process with which we're
9 familiar. Given the agreements in place,
10 luckily, there were few objections. The ones
11 that did occur were professionally addressed
12 and resolved by the court if necessary. If
13 the case was ineligible, and we had many that
14 were, or didn't meet the criteria, of course
15 we communicated that as well.

16 In those circumstances where the
17 Public Defender's Office agreed with our
18 assessment they would write the offender and
19 explain that they were not eligible for the
20 reduction. These cases were forwarded to the
21 court in some cases, and other times they were

NEAL R. GROSS

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

1 not. It became just a judicial preference.

2 For hundreds of the reports that
3 were sent to the court the judges were
4 appreciative to be able to handle the
5 sentencings in an administrative manner that
6 didn't require a hearing. Upon granting a
7 reduction new JNCs were filed and channeled
8 through the normal routing back to the U.S.
9 Probation Office, and then of course to the
10 Bureau of Prisons. The Bureau of Prisons
11 would set new release dates.

12 Initially, we had a number of
13 offenders that through their reductions were
14 eligible for immediate release. With this
15 they would bypass regular de-escalation
16 reentry planning that typically comes with
17 inmate release that Judge Keeley had spoke
18 of.

19 Some, despite our efforts and the
20 Bureau of Prisons' efforts did literally hit
21 the streets without a release plan. Time

NEAL R. GROSS

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

1 would just not allow some of these tasks to
2 be completed due to their immediate release.

3 As the Commission has documented,
4 and has been stated several times here today,
5 to many's surprise this group fared very well
6 under supervision, and have revocation rates
7 lower than that of the general population that
8 has been released. Since 2008 our district
9 has conducted over 2,600 sentence reduction
10 reports. Many of those were nowhere close to
11 being eligible for the consideration, but
12 made application just the same.

13 I appreciate each of your efforts
14 and your leadership in addressing these
15 important issues. Thank you for your
16 invitation to appear before you here today.
17 I'd be happy to try to answer any questions
18 if you have any.

19 CHAIR SARIS: I think I'm just
20 going to jump start. How many hearings did
21 you actually have before a court, as opposed

NEAL R. GROSS

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

1 to having the re-sentencing handled on paper?

2 MR. AVINGER: Before our process
3 became solidified, a couple of judges to get
4 started did actually hold hearings. And I
5 think some offenders were actually brought
6 in. We quickly learned that that process was
7 not going to be an efficient way of doing it.
8 Other judges, they decided we didn't need to
9 do that. So almost, I want to say, it became
10 a copycat system. But it was just a handful
11 at first.

12 And if there were some issues that
13 were objected to by, likely the Public
14 Defender's Office, it wouldn't be a hearing.
15 It might be a meeting with the court. The
16 offenders at that point would not be brought
17 back.

18 CHAIR SARIS: So, once you got
19 going, you didn't have many hearings?

20 MR. AVINGER: No, ma'am.

21 VICE CHAIR JACKSON: I just wanted

NEAL R. GROSS

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

1 to ask about something you said at the end.
2 I want to make sure that I heard you
3 correctly. You talked about a group of
4 offenders who bypassed the de-escalation
5 stage, because they were immediately
6 released.

7 MR. AVINGER: Correct.

8 VICE CHAIR JACKSON: And I'm just
9 wondering whether your office studied that
10 population particularly. Because I don't
11 know that the Commission has looked at that
12 particular group. We looked at recidivism in
13 general among people who were released
14 earlier than they otherwise would have, but
15 I'm just trying to isolate those who were
16 immediately released and did not go to a
17 halfway house or anything else.

18 MR. AVINGER: There was a
19 significant group that did bypass the halfway
20 house. They did not get the traditional
21 services, and perhaps downgraded their risk

NEAL R. GROSS

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

1 level as they were getting closer to release.
2 We as an individual district have not studied
3 that group, no ma'am.

4 VICE CHAIR JACKSON: Thank you.

5 CHAIR SARIS: Judge Breyer?

6 VICE CHAIR BREYER: I wanted to
7 make sure I got the numbers. You said in
8 your district you had about 1,500 eligibles
9 or 1,500 applications?

10 MR. AVINGER: I'm sorry.

11 VICE CHAIR BREYER: No, no, that's
12 the question. It just didn't end with a
13 question mark. I apologize.

14 (Laughter)

15 CHAIR SARIS: Would you like to
16 object?

17 (Laughter)

18 VICE CHAIR BREYER: I sometimes
19 object to my own questions. And believe me,
20 they're objectionable.

21 MR. AVINGER: The numbers were

NEAL R. GROSS

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

1 scattered. To go back, we had the initial
2 report with 753. A week later we got a
3 different report, 1,550. So that number
4 doubled very quickly.

5 We went through thousands of cases
6 on our own. I think the Commission's data
7 suggests that almost one thousand actually
8 were properly re-sentenced. So we still had,
9 what, 1,600 on top of that, that were either
10 denied, maybe they were eligible and just they
11 were denied for other reasons. Maybe high-
12 risk, maybe their conduct in prison. And
13 others just were the, "I'm a bank robber who
14 was high on crack, do I get my two-level
15 reduction?"

16 (Laughter)

17 MR. AVINGER: And we had to treat
18 those with the sense of urgency that we treat
19 the others in terms of examining the
20 information available.

21 VICE CHAIR BREYER: So the number

NEAL R. GROSS

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

1 seems to be large. I mean we're talking about
2 literally thousands. Of that number, as I
3 understand your process was that there would
4 be some, as it evolved, some initial meeting
5 with the U.S. Attorney, a defense lawyer and
6 certain guidelines were set as to what would
7 be done without objection. And as to those
8 cases you would simply prepare a proposed
9 order and send it to the judge? Would you do
10 it? Would a counsel do it?

11 MR. AVINGER: No, sir. The
12 probation officer would prepare it just like
13 the traditional process. It would go to the
14 lawyers to let them look at it. Of course,
15 if the folks qualified there was very little
16 discussion and it would then be forwarded to
17 the court, who would make the determination
18 of whether reduction would be granted and if
19 so where, or whether it was going to be
20 denied.

21 VICE CHAIR BREYER: But would it

NEAL R. GROSS

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

1 go with a recommendation? That is to say
2 would it state in the document this
3 recommendation has been -- is the joint
4 recommendation of the government and defense
5 counsel?

6 I'm trying to figure out -- in
7 other words I'm trying to figure out how a
8 judge who looks at something can look at it
9 and say, well, the parties don't object,
10 therefore I'm not going to either have a
11 hearing or I'm not going to listen to any
12 further argument if the parties are in favor
13 of it. I don't have any fundamental reason
14 not to be in favor of it. I'll sign it.

15 On the other hand it may be
16 contested. That is, one side may think it
17 ought to result in a modification. Another
18 side may think no, it doesn't. And as to
19 that maybe you have to either have a hearing
20 or a further discussion.

21 My question is in your experience

NEAL R. GROSS

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

1 how do the numbers break down in terms of
2 whether it was contested or whether it was
3 not contested?

4 MR. AVINGER: The large, large
5 majority in South Carolina were uncontested.
6 The parties agreed that the reductions were
7 proper and there was -- or why it was ever
8 contested.

9 And there were a handful out of
10 2,600. There may have been some informal
11 discussion back and forth with the court.

12 I would say that the other
13 districts tried other processes and tried to
14 have hearings. And the workload really, it
15 really creamed them for a lack of a better
16 way to put it.

17 And I think there were other
18 districts that tried to spread their cases
19 out to the CJA panel and found that that
20 became a rather cumbersome process as well.
21 And they in turn dropped back and decided to

NEAL R. GROSS

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

1 let the Public Defender's Office take a
2 leadership role in the process.

3 CHAIR SARIS: Thank you.
4 Commissioner Wroblewski?

5 COMMISSIONER WROBLEWSKI: Thank
6 you very much, Mr. Avinger, for being here.

7 I've got two questions. First, on
8 this question of identifying those who are
9 not eligible, how long would it take you to
10 identify, for example, back in 2007 there were
11 a lot of people who applied who were not
12 eligible.

13 Like, for example, a bank robber
14 who was high on crack, that's one. Might be
15 career offenders who might apply and not be
16 eligible. How long would that normally take?

17 Because it was suggested here a
18 little bit ago that that case would take just
19 as long as a case where somebody actually was
20 eligible in determining how long -- or whether
21 that person should get the reduction.

NEAL R. GROSS

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

1 MR. AVINGER: For us the process
2 worked the same. We had to pull the same
3 documents. We had to examine the same
4 documents. Of course, if there were no
5 recalculations we were spared some time
6 there. But a report would still be created,
7 indicating reasons that the person weren't
8 eligible. Those reports are still sent to
9 both parties just to keep everybody in the
10 loop so to speak.

11 And in many cases our judges
12 wanted those reports to come to them as well
13 so they could formally, I guess, deny them
14 rather than having the letter-writing and
15 petitioning continue.

16 COMMISSIONER WROBLEWSKI: And so
17 Judge Keeley, for example, mentioned before
18 that for each case, that if we're going to
19 properly consider public safety that we have
20 to be, for example, she mentioned a release
21 plan thought through for each offender.

NEAL R. GROSS

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

1 There would have to be a
2 consideration of all the different kinds of
3 conditions that would apply for each
4 offender. There would have to be an
5 examination of the prison record. You would
6 do all that even if the person was convicted
7 on a robbery?

8 MR. AVINGER: Not necessarily, no
9 sir. That would not be accurate. If we knew
10 for sure or felt for sure they were not going
11 to be coming out that there would be no
12 further coordination of a release plan
13 because they would not have a release date so
14 to speak.

15 The government took the
16 responsibility for checking prison conduct
17 records. I do not think that they themselves
18 check records for folks that were that far
19 out of bounds of being qualified.

20 COMMISSIONER WROBLEWSKI: Okay.
21 And then one last question I have. What I

NEAL R. GROSS

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

1 was looking at just here was the Commission's
2 data on retroactivity of that 2007 amendment.
3 And it indicated that in the District of South
4 Carolina between 75 and 80 percent of those
5 who applied were granted the reduction.

6 What's really interesting if you
7 look at that data is that some districts
8 granted 90-plus percent of applications.
9 Some granted in the 30 percent.

10 Do you have any insight as to why
11 there were such big differences among
12 districts? Because I'm curious whether the
13 process that you undertook in South Carolina
14 was the kind of process that was applied
15 pretty consistently across the country, or
16 whether there were very, very different
17 processes, some with greater examination of
18 prison records and all the rest and public
19 safety issues and some with less.

20 MR. AVINGER: That's a good
21 question. I don't have a certain answer. I

NEAL R. GROSS

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

1 do know that South Carolina had a lot of
2 career offenders, armed career criminals that
3 were disqualified that were also involved
4 with drug cases.

5 I do know that the government,
6 while they were very agreeable about not
7 opposing the low end, they certainly did run
8 the Bureau of Prisons' conduct records. And
9 they were opposed to some that they felt were
10 bad characters so to speak.

11 I cannot account for why ours
12 would be that much lower.

13 CHAIR SARIS: Just following up on
14 that a bit. The process you describe in South
15 Carolina seems fairly similar to what
16 happened in Massachusetts.

17 Do you have a sense of how many
18 districts across America use that triage
19 approach which essentially had probation,
20 federal defenders and prosecutors triage it
21 first so that basically for most cases the

NEAL R. GROSS

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

1 judge was just working off of a report? Was
2 that the predominant approach?

3 MR. AVINGER: It would have to be,
4 especially for the districts that had a large
5 volume. Certainly some of the districts that
6 evidently don't have a crack cocaine problem
7 were able to perhaps take a different approach
8 because the workload was not such an issue
9 for them.

10 CHAIR SARIS: One difference for
11 us, it seemed to me the probation actually
12 handled the relationship with the Bureau of
13 Prisons. Maybe I've got that wrong.

14 So did you find at least in your
15 district that getting the records was handled
16 by the U.S. Attorney's Office? Is that to
17 make sure the person wasn't dangerous from
18 prison?

19 MR. AVINGER: I think the
20 government in our district was really more
21 interested in that. We know these folks are

NEAL R. GROSS

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

1 coming out with whatever kind of record
2 they've got and we're used to taking them as
3 they come to us.

4 So they were more interested in
5 making sure, at least in their mind, to oppose
6 the folks that either the first time they were
7 sentenced had some very aggravating things
8 about them, or that had done some things in
9 prison.

10 We did work closely with the
11 Bureau of Prisons as time allowed and
12 especially as time went on to make sure we
13 had proper reentry programming available.
14 And knowing what the offenders' conditions
15 were and perhaps needs were upon release.

16 CHAIR SARIS: My sense, I don't
17 know if it was true, that if somebody was a
18 bad actor in prison and you got that report
19 from SENTRY that the judge took -- at least I
20 did and I think many judges would take that
21 as one of the signals that there may be a

NEAL R. GROSS

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

1 public safety problem. Did you see that in
2 your district?

3 MR. AVINGER: That's correct.
4 And that is how it worked. If the U.S.
5 Attorney's Office found such and felt that
6 way they would communicate that to the court.
7 And that would perhaps be one of the reasons
8 some of these cases were denied.

9 CHAIR SARIS: Anything else from
10 anyone? Thank you very much for coming.

11 MR. AVINGER: Thank you. It was
12 a pleasure to be here.

13 CHAIR SARIS: And thank you for
14 all the work that you do.

15 MR. AVINGER: Well, you're quite
16 welcome.

17 CHAIR SARIS: So, welcome. I
18 want to thank you all for coming. Our next
19 panel is -- the other panels went a little
20 bit over what we'd been planning so I'm
21 getting very strong hints from my fellow

NEAL R. GROSS

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

1 Commissioners that maybe a break is in order.

2 So I thought what we would do is
3 start with you, Ms. Yates, and then we may
4 take a break depending on how jumpy everybody
5 is.

6 So let me just start with
7 introducing you. Sally Quillian Yates was
8 confirmed as a United States Attorney for the
9 Northern District of Georgia in 2010.

10 Prior to her appointment Ms. Yates
11 served within the Northern District as an
12 Assistant United States Attorney, Chief of
13 the Fraud and Public Corruption Section, and
14 First Assistant United States Attorney.

15 Following law school she joined
16 King & Spalding's Atlanta office as an
17 associate. Ms. Yates earned both her
18 undergraduate and law degrees at the
19 University of Georgia.

20 I think we talked beforehand and
21 you've been before us twice before I guess?

NEAL R. GROSS

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

1 MS. YATES: That's right.

2 CHAIR SARIS: So despite it all
3 you've returned.

4 (Laughter)

5 MS. YATES: It's been awhile so
6 I've forgotten the experience.

7 CHAIR SARIS: So it's just like
8 riding a bike. Just instead of a bicycle
9 we've got an amendment cycle. I'm sorry.

10 (Laughter)

11 CHAIR SARIS: So Charles Samuels
12 is also a repeat testifier. Thank you for
13 returning. Director of the Federal Bureau of
14 Prisons. He was appointed director of the -
15 - he received his BS in Social and Behavioral
16 Sciences in 1987 from the University of
17 Alabama at Birmingham.

18 In addition he graduated from the
19 Harvard University Executive Education
20 Program for Senior Managers in Government in
21 August 2007. Thank you and welcome back.

NEAL R. GROSS

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

1 MS. YATES: Well, thank you, Judge
2 Saris and members of the Commission. Thank
3 you for the opportunity to appear before you
4 today and share the Department's views on
5 whether and to what extent the Sentencing
6 Commission should apply retroactively the
7 recently promulgated sentencing guidelines
8 amendment for drug offenses.

9 I am particularly pleased to be
10 here today with my colleague, Bureau of
11 Prisons Director Charles Samuels.

12 Let me say at the outset that
13 there has been extensive discussion of this
14 issue within the Department of Justice.
15 After considering the various policy
16 interests at stake including public safety,
17 individual justice for offenders and public
18 trust and confidence in the federal justice
19 system, the Department supports limited
20 retroactivity of the pending drug guideline
21 amendments.

NEAL R. GROSS

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

1 As I'll discuss further in a few
2 minutes, we think that the approach that we
3 are recommending here today strikes the right
4 balance of policy interests that can be
5 effectively implemented across the federal
6 criminal justice system within our existing
7 resource constraints.

8 The Commission identified several
9 objectives of the amendment when you
10 unanimously voted to reduce the base offense
11 level for drug crimes, including re-
12 calibrating the guideline range to include
13 terms below the applicable mandatory minimum
14 sentences, decreasing the emphasis on drug
15 quantity relative to the other more specific
16 sentencing factors, and reducing the prison
17 overcrowdedness resulting from long prison
18 sentences.

19 The Department believes that this
20 amendment is also consistent with the
21 assessment that previous drug offense levels

NEAL R. GROSS

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

1 produced sentences in some cases that were
2 longer than necessary to accomplish public
3 safety goals.

4 When the Attorney General
5 testified before the Commission supporting
6 the amendment, he testified that this modest
7 reduction would yield more proportional
8 sentences for some drug offenders, while also
9 helping to rein in federal prison spending
10 and focusing limited resources on the more
11 serious threats to public safety.

12 Assessing whether the amendment
13 should be applied retroactively requires a
14 balancing of factors.

15 In that analysis the primary
16 factor driving our position to support
17 retroactive application of the amendment,
18 albeit limited retroactive application of the
19 amendment, is that the federal drug
20 sentencing structure in place before the
21 amendment resulted in unnecessarily long

NEAL R. GROSS

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

1 sentences for some offenders.

2 While we believe that finality in
3 sentencing should remain the general rule, we
4 also recognize that when sentences are longer
5 than necessary, this creates a negative
6 impact on both the public's confidence in the
7 criminal justice system and in our prison
8 resources.

9 Twenty-eight years ago, Congress
10 passed the Anti-Drug Abuse Act of 1986 to
11 address illegal drug trafficking and to put
12 in place a stringent sentencing policy that's
13 helped us to disrupt and dismantle drug
14 trafficking organizations.

15 As you know, the Commission in
16 turn set guideline penalties for drug
17 offenses linked to but slightly above the
18 mandatory penalties.

19 The sentencing policy created by
20 the act and the guidelines certainly played a
21 significant role in the two-decade long

NEAL R. GROSS

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

1 decline in violent crime.

2 But our growing experience in
3 prosecuting these cases and carrying out
4 these stringent drug sentences in our prisons
5 has taught us that the same act and guidelines
6 also create sentences that were unnecessarily
7 long in some cases.

8 About half of the federal prison
9 population is incarcerated for drug offenses,
10 and 55 percent of those offenders are serving
11 sentences in excess of 10 years.

12 As the Attorney General noted when
13 he testified before the Commission, 1 in 28
14 children has a parent behind bars. He
15 observed that this level of incarceration is
16 not just unsustainable financially, but comes
17 with, in his words, "human and moral costs
18 that are impossible to calculate."

19 In supporting the underlying drug
20 amendment the Attorney General testified that
21 the amendment is consistent with other

NEAL R. GROSS

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

1 Department initiatives aimed at, again in his
2 words, "controlling the federal prison
3 population and ensuring just and proportional
4 sentences."

5 More specifically, the Attorney
6 General noted that he has modified the
7 Department's charging policies to ensure that
8 people convicted of certain low-level non-
9 violent federal drug crimes will face
10 sentences appropriate to their individual
11 conduct, rather than the stringent mandatory
12 minimums which will now be applied only to
13 the most serious criminals.

14 Limited retroactive application
15 of the drug amendment in the manner we are
16 recommending, today, would further these
17 objectives.

18 Foremost among the other policy
19 considerations to be weighed in the
20 retroactivity analysis is public safety.
21 Because of public safety concerns that arise

NEAL R. GROSS

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

1 from the release of dangerous drug offenders,
2 and from the diversion of resources necessary
3 to process over 50,000 inmates, we believe
4 that retroactivity in the drug amendment
5 should be limited to lower-level non-violent
6 drug offenders without significant criminal
7 histories.

8 Limited retroactivity will ensure
9 that release decisions for eligible offenders
10 are fully considered on a case-by-case basis
11 as is required, and that sufficient
12 supervision and monitoring of released
13 offenders will be accomplished by probation
14 officers, and that the public safety risks to
15 the community are minimized.

16 Release dates should not be pushed
17 up for those offenders who pose a significant
18 danger to the community. Indeed, we believe
19 that certain dangerous offenders should be
20 categorically prohibited from receiving the
21 benefits of retroactivity.

NEAL R. GROSS

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

1 In making the retroactivity
2 determination, the Commission should also
3 consider the resources necessary to
4 effectuate retroactivity and the
5 corresponding negative impact on public
6 safety for the resultant diversion of these
7 criminal justice resources.

8 The Commission, as we've discussed
9 this morning, estimates that full
10 retroactivity would apply to approximately
11 51,000 inmates.

12 Based on past experience, we can
13 anticipate that a substantial number of
14 ineligible offenders will also apply.

15 In 2007, for example, the
16 Commission estimated about 20,000 offenders
17 would be eligible for the crack reduction.
18 According to the Commission's last report
19 over 25,000 motions were filed seeking
20 reduced sentences. Therefore, we think that
21 we can fairly anticipate that 60,000 or more

NEAL R. GROSS

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

1 offenders will file motions for sentencing
2 modification, should the 2014 amendment be
3 made retroactive.

4 This is a striking number in light
5 of the fact that in all of Fiscal Year 2013
6 only 80,000 offenders were sentenced across
7 the entire country.

8 Resolution of these 60,000 motions
9 will require the input and participation of
10 federal prosecutors, probation officers, BOP
11 counselors and even federal defenders or
12 appointed counsel, as well as review and
13 ruling by the courts.

14 There are real and serious
15 resource limitations for all of these
16 entities in implementing any retroactivity
17 decision.

18 This diversion of resources within
19 the criminal justice system would have a
20 substantially negative impact on public
21 safety.

NEAL R. GROSS

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

1 Not only would 60,000-plus
2 petitions divert prosecutors, judges and
3 probation officers from their normal
4 caseloads, but the thorough, individualized
5 assessment required in each petition will
6 also add to this burden in a significant way.

7 When considering the petition for
8 re-sentencing our foremost consideration is
9 ensuring public safety. It's a simple fact
10 that many federal drug offenders are
11 dangerous. Many were involved in violent
12 conduct. Many used a weapon in their offense
13 and many are repeat offenders. This is part
14 of the reality surrounding this policy
15 decision.

16 Section 1B1.10 of the guidelines
17 provides that even if a guideline amendment
18 is made retroactive, its application must be
19 limited if it poses a significant risk to
20 public safety.

21 Indeed, Section 1B1.10 requires

NEAL R. GROSS

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

1 judges to perform a case-by-case basis
2 assessment of the public safety
3 considerations before awarding any requested
4 reduction.

5 These case-by-case basis
6 assessments, if done properly, would not only
7 be costly in the short term but will divert
8 prosecutors, judges, probation officers and
9 others away from working on cases that are
10 necessary to keep our community safe.

11 Further, especially in light of
12 the Supreme Court's Booker decision we
13 continue to believe that retroactive
14 application of the guidelines amendment
15 should be rare.

16 Indeed, both Congress and the
17 Supreme Court in Sections 3582 and the Savings
18 Statute and in Teague they repeatedly
19 recognized the importance of finality of
20 criminal judgments as essential to the
21 operation of our criminal justice system.

NEAL R. GROSS

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

1 So, in balancing all of these
2 factors the Department supports limited
3 retroactive application of the 2014 drug
4 guidelines amendment but only for those
5 offenders who do not pose a significant public
6 safety risk.

7 We believe the Commission should
8 limit retroactive application to offenders in
9 criminal history categories 1 and 2 who did
10 not receive a mandatory minimum sentence for
11 a firearms offense pursuant to Section 924C,
12 an enhancement for possession of a dangerous
13 weapon pursuant to Section 2D1.1, an
14 enhancement for using, threatening, or
15 directing the use of violence pursuant to
16 Sections 2D1.1(b)(2), an enhancement for
17 playing an aggravating role in the offense
18 pursuant to Section 3D1.1, or an enhancement
19 for obstruction of justice.

20 With these limitations, all of
21 which should have been determined in the prior

NEAL R. GROSS

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

1 court action and should be documented in a
2 court file in most cases, courts will be able
3 to determine eligibility for retroactivity
4 based solely on the existing record and
5 without the need for transporting the
6 defendant or holding any intensive fact-
7 finding.

8 Retroactivity would be limited to
9 a class of non-violent offenders who have
10 limited criminal history, that did not
11 possess or use a weapon and this will only
12 apply to the category of drug offender who
13 warrants a less severe sentence. And who
14 also poses the least risk of re-offending.

15 While the factors we suggest are
16 not a perfect proxy for dangerousness they
17 are a reasonable proxy based on the
18 Commission's own research and identifying
19 them will not require new hearings.

20 Judge Saris, members of the
21 Commission, our goal in the Department of

NEAL R. GROSS

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

1 Justice is to ensure that our sentencing
2 system is tough and predictable, but at the
3 same time promotes trust and confidence in
4 the fairness of our criminal justice system.

5 Ultimately we all share the goals
6 of ensuring that the public is kept safe, in
7 reducing crime and in minimizing the wide-
8 reaching negative effects of illegal drugs.

9 We believe that the policy we are
10 suggesting on retroactivity strikes the
11 proper balance of policy interests at stake
12 here. It addresses an issue of
13 proportionality but does so in a way that will
14 promote public safety.

15 Thank you for the opportunity to
16 share the views of the Department of Justice
17 on this important topic. We look forward to
18 working with the Commission on this issue and
19 to working with all in the criminal justice
20 system to achieve equity and fairness under
21 the law. Thank you.

NEAL R. GROSS

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

1 CHAIR SARIS: Director Samuels,
2 welcome back.

3 MR. SAMUELS: Thank you. Good
4 morning, Chair Saris and other members of the
5 Commission. Thank you for inviting my
6 colleague Sally Yates and me to testify today.

7 I will provide information from
8 the Bureau of Prisons in the context of their
9 decision on whether to apply retroactively
10 the recently passed sentencing guideline
11 amendment for drug offenses.

12 The Commission's recent decision
13 to reduce the base offense level for drug
14 offenses has the potential to significantly
15 impact the size of the federal prison
16 population in the years ahead.

17 Retroactive application of the
18 amendment even if limited also has the
19 potential to immediately impact the size of
20 the federal prison population as well as our
21 day-to-day operations. For these reasons I

NEAL R. GROSS

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

1 greatly appreciate the opportunity to discuss
2 two aspects of retroactivity that are
3 specific to the Bureau of Prisons.

4 First, I will discuss the public
5 safety and reentry implications of releasing
6 potential thousands of inmates shortly after
7 the November 1 effective date.

8 Secondly, I will note our plan to
9 provide courts and prosecutors with inmates'
10 prison disciplinary records for
11 consideration during re-sentencing.

12 We have experience regarding the
13 retroactive application of a guideline
14 provision. In both 2007 and 2011, we
15 assisted in the processing and release of
16 inmates whose sentences were reduced by
17 decreases in the drug quantity tables for
18 crack cocaine.

19 However, none of those instances
20 was of the scale contemplated for
21 retroactivity of the most recent amendment.

NEAL R. GROSS

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

1 As you know, about half of the
2 sentenced prison population are incarcerated
3 for drug-related offenses. A great many of
4 them would be eligible to receive sentence
5 reduction if you were to make the base offense
6 level reduction apply retroactively.

7 As described in the report
8 prepared by the Commission's research staff,
9 over 4,500 inmates could be eligible for
10 immediate release from custody after November
11 1, 2014 if the Commission decided to make the
12 reduction applicable to all drug offenders
13 and judges awarded the full reduction to each
14 defendant.

15 Generally, we start formulating
16 release plans for inmates 180 days prior to
17 release, and the residential reentry center
18 referrals and other specific plans 90 days
19 prior to release.

20 At any given time we have
21 approximately 9,384 individuals in

1 residential reentry centers and another 3,216
2 on home confinement.

3 While we know that the Commission
4 estimates one quarter of those eligible for a
5 reduction are non-U.S. citizens who are
6 likely to be deported, we will still be adding
7 as many as 3,500 inmates to our community
8 programs in the first year alone if the
9 amendment were made retroactive to all
10 eligible drug offenders.

11 We will certainly face challenges
12 in making residential reentry center places
13 for these offenders. In some regions we do
14 not have empty beds and we would need to
15 reduce lengths of stay for all offenders in
16 residential reentry center custody, or try to
17 expand our contracts on an emergency basis.

18 We're going to continue to make
19 the greatest possible use of home confinement
20 but we are limited by statute in terms of the
21 duration of such to 10 percent of the sentence

NEAL R. GROSS

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

1 not to exceed six months.

2 We are also limited by the number
3 of inmates who have a residence and other
4 resources suitable for home confinement.

5 If a decision is made to make the
6 reduction retroactive either in full or for a
7 limited subset of the population, we hope to
8 work with Commission staff to identify the
9 specific inmates likely to qualify for
10 immediate release.

11 We work to compile rosters by
12 institutions to allow case managers and other
13 staff to begin making the necessary plans for
14 the inmates in the event their sentence was
15 reduced.

16 These efforts will include
17 coordinating with the United States Probation
18 Offices around the country to establish
19 appropriate release preparation plans.

20 There will be some cases that will
21 require careful planning such as those

NEAL R. GROSS

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

1 inmates who are completing the residential
2 substance abuse treatment program.

3 We also note that in 2007, to
4 minimize the impact of a large-scale release,
5 some courts delayed release dates for days or
6 weeks in order to provide sufficient time for
7 appropriate release planning.

8 Judicial orders that impose a new
9 term require staff to recompute the sentence
10 and establish a new projected release date.
11 This is likely to be a substantial task
12 considering the Commission's estimate that
13 there are as many as 51,000 inmates
14 potentially eligible for a sentence
15 reduction, although if there is limited
16 retroactivity the number will be more
17 manageable.

18 We are prepared to use overtime
19 and make other arrangements to detail
20 additional staff as needed. The more time we
21 have, the better.

NEAL R. GROSS

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

1 Finally, we stand ready to provide
2 information to the courts regarding inmates
3 adjustment in prison, including disciplinary
4 records like we did in 2007. We do not
5 anticipate having issues with providing these
6 records.

7 Chair Saris, Vice Chair Hinojosa,
8 Jackson and Breyer and Commissioners, I look
9 forward to hearing of the Commission's
10 opinion decision that I know will be based on
11 a thorough and thoughtful consideration of
12 the main relevant factors.

13 I'm pleased to answer questions
14 you may have or provide further information
15 in the weeks ahead as the Commission makes a
16 decision.

17 CHAIR SARIS: So, any questions?
18 I'm getting a strong hint. Why don't we take
19 a 15-minute break and we'll come back for
20 questions afterwards, all right? Thank you.

21 (Whereupon, the above-entitled

NEAL R. GROSS

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

1 matter went off the record at 10:43 a.m. and
2 resumed at 11:00 a.m.)

3 CHAIR SARIS: So let me start off.
4 We heard the statements before. Thank you
5 from the Department of Justice and the Bureau
6 of Prisons.

7 And let me just start off with a
8 question on resources. As I understand it
9 what is the current cost of a prisoner, say,
10 in the Bureau of Prisons? Per prisoner.

11 MR. SAMUELS: The average cost is
12 \$29,000 per year.

13 CHAIR SARIS: And I forget the
14 exact number, but as I understand it the
15 probation office to supervise someone is in
16 the vicinity of, say, \$3,500. Is that what
17 your understanding is? Neither of you know.

18 Let's say there's a huge
19 differential along that order of magnitude.
20 There's always some concern as you've heard
21 from the courts about the resources that would

NEAL R. GROSS

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

1 be necessary to implement it.

2 So let me just understand, what
3 would you do with the savings that the Bureau
4 of Prisons would have from the number of
5 prisoner beds. And could any of it be shared?

6 (Laughter)

7 MR. SAMUELS: Well, Your Honor,
8 for the Bureau of Prisons which is well known,
9 we have significant concerns relate to
10 staffing with the inmate to staff ratio.
11 Therefore, any savings that could be gained
12 for the Bureau of Prisons we would definitely
13 see it as a request at least from our part
14 for us to utilize those savings for additional
15 staffing.

16 CHAIR SARIS: So that's like more
17 -- what kinds of staffing? Prison guards as
18 well as --

19 MR. SAMUELS: Correctional
20 officers.

21 CHAIR SARIS: And what about

NEAL R. GROSS

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

1 treatment programs?

2 MR. SAMUELS: Well, for treatment
3 programs, again, depending on the complex
4 issues with the number of inmates we have in
5 our system and to ensure that we're providing
6 the programs consistently throughout the
7 agency there's always the need for program
8 staff or for treatment.

9 But our primary concern would be
10 the safe and security facility. So any
11 increases we can have with improving the
12 number of staff who have direct contact with
13 inmates within our institutions would be our
14 primary focus.

15 CHAIR SARIS: And just in terms of
16 we just put online we, the federal government,
17 what, two new prisons?

18 MR. SAMUELS: Yes. I had the
19 honored distinction last week to bring on the
20 121st institution for the Bureau of Prisons
21 in Yazoo City, Mississippi, which is a United

NEAL R. GROSS

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

1 States penitentiary. And the week prior we
2 activated another facility in West Virginia.
3 And so now we've brought on two so that has
4 helped us as far as alleviating some of the
5 crowding concerns.

6 CHAIR SARIS: And to the extent
7 that there's any retroactivity or reduction
8 in the prison population does that mean no
9 more prisons are necessary?

10 MR. SAMUELS: At this point I mean
11 we would be able to manage the inmate
12 population. But considering the fact that
13 over the years as we all know that our
14 population has literally exploded.

15 And we're doing our best to try to
16 manage the individuals within Bureau
17 institutions but we still have contract
18 prisons as well. And we have a total of 14.

19 CHAIR SARIS: Thank you very much.

20 VICE CHAIR JACKSON: Good
21 morning, Ms. Yates. I wanted to hear a little

NEAL R. GROSS

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

1 bit more about the DOJ's suggested carve-outs
2 which I'm concerned about to this extent.

3 It seems to me that it would
4 impose higher administrative costs, the more
5 conditions you impose. Maybe I'm wrong about
6 that so you might respond.

7 In other words, you know, with
8 everybody in or everybody out you're going to
9 have less to do I suppose as a judicial
10 officer or a probation officer we heard the
11 amount of work that goes into screening.

12 And it seems to me that the more
13 conditions and caveats and carve-outs you
14 have within your screening process, the
15 harder it's going to be administratively.
16 So, what would be your reaction to that
17 thought?

18 MS. YATES: Well, my reaction
19 would be I think it's sort of a two-step
20 process in terms of what the administrative
21 burden would be.

NEAL R. GROSS

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

1 And with our proposal, the factors
2 that would screen out some defendants are
3 readily apparent from both the J&C, or the
4 PSR or the sentencing transcript. Usually it
5 would be I think the J&C and the PSR.

6 And so we would be able to see,
7 for example, on the face of that if someone
8 has a criminal history category in excess of
9 2. And they would be automatically
10 disqualified. We don't have to go any
11 farther than that. So there would be some
12 screening on the front end.

13 But what this saves is the
14 individualized public safety assessment that
15 is absolutely required under Section 1B1.10
16 and that is really the critical screening
17 process that makes sure that we're not
18 releasing defendants back into the community
19 before they should be released.

20 That is a much more detailed
21 analysis that we would submit should take a

NEAL R. GROSS

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

1 lot more time than just going through and
2 looking at the face of the PSR or the J&C.

3 VICE CHAIR JACKSON: And so one of
4 your carve-outs has to do with the weapon SOC
5 which in my note is through relevant conduct
6 can be applied to people who didn't even carry
7 a weapon. But the government's position is
8 that they would still be carved out.

9 MS. YATES: Yes, and that really
10 addresses I think the first concern that you
11 raised would be the administrative burden.

12 Certainly there's a possibility
13 that you could say, for example, if someone
14 who had constructively possessed a weapon,
15 that they are less dangerous than someone who
16 had actually possessed that weapon. That
17 would go precisely to your first point though
18 and would require a tremendous amount of
19 administrative assessment.

20 And in the cost and benefit
21 analysis, and in weighing these factors we

NEAL R. GROSS

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

1 don't think that that's an appropriate use of
2 resources.

3 COMMISSIONER BARKOW: So I had a
4 couple of questions along that same lines for
5 you.

6 The first is -- just in terms of
7 the factors you listed are these going to be
8 comparably applied at the Department for
9 purposes of the clemency project that's also
10 taking place? Because there's some
11 similarities here and I'm just curious if
12 these are being defined in the same way in
13 both contexts.

14 Because if we're thinking about
15 folks that might also get relief on that side
16 of things, there's also been some discussion
17 about violence, use of a weapon. Is it
18 consistent across the board at the Department
19 in terms of how you're defining these?

20 MS. YATES: It's certainly
21 consistent in terms of our approach, to give

NEAL R. GROSS

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

1 relief to low-level non-violent drug
2 offenders.

3 There are additional criteria that
4 we are proposing here that would further
5 define who is or is not a low-level non-
6 violent drug offender.

7 For example, the clemency
8 initiative does not necessarily eliminate
9 someone who had a weapon. But if they were
10 dangerous, if they had actually used that
11 weapon then that would eliminate that person.
12 So there's a bit of a more detailed analysis
13 in that.

14 COMMISSIONER BARKOW: I guess I'm
15 kind of curious why the variance then in the
16 two approaches. And I know that's also
17 raising similar concerns with public safety
18 and also administration. So why are they not
19 the same?

20 MS. YATES: Well, certainly the
21 goal is the same. But when you are -- the

NEAL R. GROSS

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

1 number of petitions that we will be examining
2 for the clemency initiative will be far fewer
3 than the number of defendants that we are
4 looking at here. And are in a position to do
5 a more detailed analysis of the specific facts
6 and circumstances underlying the case than we
7 would be here.

8 COMMISSIONER BARKOW: And that
9 brings up my related question which is that
10 to the extent that the judiciary is telling
11 us it's about a wash whether they have to do
12 this case by case on their own versus taking
13 into account -- from the first panel -- taking
14 into account these criteria.

15 We know from the way that the
16 crack retroactivity analysis was handled the
17 judges did a very good job in terms of
18 assessing who was dangerous and who wasn't in
19 terms of what we see in terms of recidivism
20 rates for the folks who got it.

21 I'm just curious why the

NEAL R. GROSS

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

1 Department -- so the Department's position on
2 this -- is it to save Department resources?
3 To save judicial resources? Probation
4 resources? Or some subset? All of them?

5 I'm just kind of -- where is the
6 resource savings actually being -- where will
7 we actually see the resources being saved?

8 MS. YATES: Well, from the
9 Department perspective it's not a wash for
10 us. There is a significant difference in our
11 assessment as to whether someone meets the
12 individual criteria to be considered for
13 retroactive application and whether they are
14 someone who should receive the benefit of
15 retroactive application.

16 We strongly believe that courts
17 should be engaged in a detailed and thorough
18 analysis of each individual defendant and
19 make a public safety assessment.

20 And that would include not only
21 what their conduct had been while they were

NEAL R. GROSS

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

1 in the custody of the Bureau of Prisons, but
2 they should look at their underlying conduct
3 as well and make assessments there about
4 violence and the likelihood of recidivism.

5 So, from our perspective for both
6 us and for the courts, it shouldn't be a wash.
7 There should be a much more detailed analysis
8 going on about whether the court would
9 actually grant retroactivity than rather
10 whether they qualify for retroactivity.

11 Also, from our perspective with
12 respect to -- and I had to say, you know, the
13 Department has not considered -- had the
14 opportunity to consider the submission from
15 the Criminal Law Committee.

16 And while we certainly appreciate
17 the efforts to reduce the number of defendants
18 who would be eligible and consequently make
19 this a more manageable process, from our
20 perspective I'm not sure that that really
21 meets our public safety goal here.

NEAL R. GROSS

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

1 And again, I'm kind of giving you
2 my gut reaction to this rather than the
3 Department's considered judgment of this.
4 For a couple of reasons.

5 One, while there will be some
6 defendants who will be excluded because of a
7 timing factor here, it's open to everyone.

8 And for the Department of Justice
9 the timing issue here really doesn't help us
10 at all, because we have to immediately begin
11 considering motions for the reduction on the
12 front end. So that takes prosecutors away
13 from handling cases they would otherwise be
14 handling.

15 We'll have victims of new crimes
16 and cases that will be unaddressed because
17 prosecutors will be addressing those. So the
18 sort of two-step process really doesn't help
19 the Department of Justice in that sense.

20 One other aspect to this is that
21 it doesn't reduce the number of petitions

NEAL R. GROSS

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

1 other than those who might sort of -- would
2 be released before they would ever be
3 considered.

4 It instead just sort of extends
5 the period of time that courts would have to
6 consider these.

7 We're still talking around 60,000
8 petitions. That is a huge number when you
9 consider 80,000 people a year are sentenced.
10 So, we have concerns from that perspective.

11 And we would have concerns that
12 this, again, would apply to that class of
13 defenders that we think by definition are more
14 dangerous. People with significant criminal
15 histories, who were violent, who had weapons,
16 who were leaders or organizers, those people
17 are by definition more dangerous.

18 And consequently the courts should
19 particularly be engaging in a more detailed
20 analysis of the public safety aspects in
21 making those decisions.

NEAL R. GROSS

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

1 And then finally I'd say one
2 concern I have about that proposal, not being
3 of this city, but relying on Congress to do
4 anything to make it work makes me very
5 nervous.

6 And if it requires that Congress
7 has to allocate more money for a budget for
8 that process to work, that makes me a bit
9 uneasy, which is why I would have some
10 concerns about that. I may have gone farther
11 than what you were envisioning.

12 COMMISSIONER BARKOW: No, that was
13 helpful. Can I ask one last quick one?
14 Which is just the obstruction of justice.
15 How is that inherently related to dangerous?

16 You know, the category of folks
17 who typically get that and the range of kinds
18 of behaviors that might be included that lead
19 the Department to conclude that to be one of
20 the factors.

21 MS. YATES: And, you know, that -

NEAL R. GROSS

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

1 - I wouldn't say that that's the most
2 important factor in this analysis, but I think
3 the feeling is that if you have someone who
4 not only has not accepted responsibility but
5 who has gone to trial and lied or tried to
6 get other witnesses to lie, that that is
7 someone that is somewhat more likely to
8 recidivate. They haven't learned their
9 lesson.

10 VICE CHAIR BREYER: Thank you very
11 much for testifying. I had the same
12 questions of you and also the Director. But
13 I don't want to get into a discussion on the
14 resources only because I think your
15 observation tells it all.

16 Which is that the question isn't
17 can we depend on Congress to allocate enough
18 funds to carry out whatever the policy is.
19 That's something we can't answer.

20 The question of allocation of
21 resources is really up to the Congress to

NEAL R. GROSS

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

1 decide as a matter of policy, how do they want
2 to do X, Y and Z.

3 What is clear I think from this is
4 that every year you don't have somebody
5 serving in a penal institution from the point
6 of view of resources is a savings there of
7 approximately \$29,000.

8 Now, I think the Bureau of Prisons
9 may have very good needs with respect to how
10 that money should be allocated, but it's not
11 up to the Bureau of Prisons, it's not up to
12 the Department of Justice. It's up to
13 Congress to allocate appropriately. So I
14 don't want to get into that discussion because
15 I don't think any of us have the answers to
16 that particular discussion.

17 I'm interested in your public
18 safety argument. Because you say your carve-
19 outs are designed for public safety concerns.
20 And I would say, right across the board,
21 that's really right at the top, or close to

NEAL R. GROSS

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

1 the top of all the considerations of the
2 Commission.

3 But I'm puzzled a bit, not just by
4 the obstruction, as to how these carve-outs
5 really address that from the point of view of
6 whether they ought to be considered for a
7 retroactive application.

8 And let me say it this way. As a
9 result of the reduction in the drug quantity
10 table which was endorsed by the Department of
11 Justice you can have an individual who is
12 sentenced in November with all of these
13 characteristics, every one, the gun
14 characteristic, the instruction
15 characteristic, category number 6
16 characteristic, all those characteristics.
17 And will get a sentence of X. Okay?

18 There will be a person in prison
19 who has all these characteristics and his
20 sentence will be X plus 2.

21 So the question is if it's safe to

NEAL R. GROSS

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

1 give a person -- say, in some sense to give a
2 person today a sentence of X, why is it unsafe
3 to allow a person who is already serving the
4 same kind of sentence to get the same type of
5 sentence? Instead of X plus two he gets the
6 sentence X.

7 In other words, I hope it's clear
8 I'm asking you the public safety. And what
9 I don't understand is if the Attorney General
10 has said that sentence of X is appropriate
11 for today's criminal, why would he say that
12 the sentence of X plus two is the appropriate
13 sentence in terms of public safety. Not in
14 terms of finality, not in terms of all those
15 other things. Just in terms of public
16 safety. And I'd like you to explain the logic
17 to that.

18 COMMISSIONER PRYOR: That was my
19 question also.

20 MS. YATES: Well, that's an
21 excellent question that actually we spent a

NEAL R. GROSS

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

1 great deal of time debating within the
2 Department of Justice.

3 Our assessment that this category
4 of defendant should be excluded from
5 retroactive application is not based solely
6 on their inherent dangerousness because of
7 those specific offense characteristics.
8 That's the first step.

9 But we are comfortable, as you
10 just noted, Judge Pryor, going forward that
11 applying this prospectively that courts can
12 do the kind of individualized determination
13 in making the sentencing decision there that
14 will assure that those dangerous defendants,
15 by their nature, receive appropriate
16 sentences.

17 The public safety calculus to us
18 is that in applying it retroactively,
19 particularly when you have 60,000 defendants
20 to be considering that it puts the courts,
21 the probation officers and the prosecutors in

NEAL R. GROSS

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

1 a very difficult position to be able to do
2 the kind of thorough analysis there
3 retroactively going back.

4 Particularily when it can be years
5 after the event, after the offense. You
6 don't have the same prosecutor. You may not
7 even have the same judge. To try to recreate
8 all of that for that category of by definition
9 more dangerous offenders is difficult.

10 And then there's a second reason.
11 Although you're nodding. Maybe I should stop
12 now while I'm ahead.

13 VICE CHAIR BREYER: I'm nodding
14 because I understand your reasoning.

15 MS. YATES: Not that you agree.

16 VICE CHAIR BREYER: I appreciate
17 it. It was very articulate. But go ahead,
18 please.

19 MS. YATES: But the second reason
20 also is a resource issue but I would submit
21 it's not just resources but resources for us

NEAL R. GROSS

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

1 at the Department of Justice, that is policy.

2 When I as a U.S. Attorney have to
3 take AUSAs to be able to process a huge volume
4 of re-sentencings that we would have here,
5 that's an AUSA who's not doing a new case.
6 That means there is a defendant out there
7 who's not being prosecuted because my AUSA is
8 processing this re-sentencing. That's a
9 public safety issue for us.

10 So when you combine these factors
11 that's what led us to make the recommendation
12 that we did.

13 VICE CHAIR BREYER: Could I ask
14 Director Samuels? I promised not to say
15 anything about resources but of course I'm
16 violating my promise.

17 Those defendants -- and first of
18 all, do you have a sense of the number of
19 defendants who are presently incarcerated who
20 at the conclusion of their sentence will be
21 deported? What number is that approximately?

NEAL R. GROSS

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

1 MR. SAMUELS: Well, our criminal
2 alien population, Your Honor, is right around
3 55,000.

4 VICE CHAIR BREYER: Okay. And
5 some subset of that, though a very large
6 subset of that would be affected by the
7 retroactivity, right? If it were made fully
8 retroactive, if it were, a substantial number
9 of that, of the 55,000.

10 MR. SAMUELS: Yes.

11 VICE CHAIR BREYER: And my
12 question is as to those individuals you don't
13 need, do you, a reentry plan, a halfway house,
14 any of those things? Isn't that person
15 simply sent to, at the conclusion of his or
16 her sentence, sent to a -- I don't know what
17 they're called. What are they called? Thank
18 you, a detention center for the purpose of
19 deportation.

20 They're not released in the
21 community. There is no plan for them. Many

NEAL R. GROSS

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

1 of them don't have supervised release
2 pursuant to Commission policy. So as to
3 those people that doesn't pass, does it, the
4 Bureau of Prisons with respect to a resource
5 matter?

6 MR. SAMUELS: You're correct,
7 Your Honor. However, I would add that for
8 any inmate within the Bureau of Prisons we do
9 expect for those individuals to participate
10 in reentry programs.

11 But for any individual released
12 into the communities within the United States
13 as you've described we would not be utilizing
14 resources, working with probation such as
15 what we would be for American citizens.

16 VICE CHAIR BREYER: Thank you.

17 CHAIR SARIS: Judge Hinojosa?

18 VICE CHAIR HINOJOSA: Well, Judge
19 Breyer has already asked a good question I
20 had.

21 But I guess having sat through

NEAL R. GROSS

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

1 almost 11 years on this Commission, or 11
2 years on the Commission and had different
3 Departments of Justice and Attorney Generals
4 present their views here I've been from no
5 reduction to crack, no retroactivity to
6 crack, and as recently as this Attorney
7 General a year or so ago no drugs minus two
8 yet.

9 And then all of a sudden it's
10 these are unfair sentences. We're sending
11 people to prison for longer periods than they
12 deserve. And hadn't heard that before from
13 the Justice Department here. And not a
14 willingness to say it's okay to proceed with
15 drugs minus two.

16 So what has happened in the last
17 year that has made the Justice Department
18 start with this thinking? Because I've heard
19 from judges who say, you know, we've been
20 sentencing people and we've had
21 recommendations from the Justice Department

NEAL R. GROSS

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

1 for these kind of sentences.

2 So then all of a sudden the
3 Justice Department is out there through the
4 Attorney General saying these are unfair long
5 sentences. And so did something happen in
6 the last year that maybe has been missed by
7 the AUSAs across the country that now has
8 changed this whole situation?

9 And also this follow-up of the
10 Justice Department through the Attorney
11 General immediately sent before the
12 Commission even voted and before Congress has
13 had the opportunity to even express their
14 dislike for drugs minus two the idea that this
15 should apply right now to everybody without
16 carving out anyone.

17 And so -- or is this just a
18 question of we want to save money in the
19 prison system because we're -- it's like we're
20 somewhat overcrowded? I mean, is this a save
21 money type thing as opposed to all the other

NEAL R. GROSS

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

1 issues that are brought up here all of a
2 sudden?

3 MS. YATES: Well, let me try to
4 answer the last question first. And that is
5 no, it's not just a save money kind of thing.
6 I too have seen the evolution of --

7 VICE CHAIR HINOJOSA: I think
8 you've had to represent different views here.

9 MS. YATES: And I was an AUSA for
10 20 years before becoming U.S. Attorney. So
11 it'll be almost 25 years that I've been in
12 the Department of Justice.

13 And I certainly have seen an
14 evolution in velocities. And each Attorney
15 General under whom I've worked I believe
16 sincerely believed that his or her policies
17 were the right and just approach to addressing
18 drug prosecutions. And we've seen a change
19 in those policies over the years.

20 And so this is not to suggest that
21 the prior policies of other Attorneys General

NEAL R. GROSS

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

1 were unfair or unjust.

2 VICE CHAIR HINOJOSA: -- or of the
3 state Attorney General for that matter.

4 VICE CHAIR BREYER: I don't think
5 you have to answer that.

6 MS. YATES: Okay, thank you. I
7 appreciate. Thank you for saving me.

8 In this instance with respect to
9 the fairness issue I understand. And
10 certainly AUSAs across the country I think
11 have bristled at the notion that the changes
12 recommended now are a statement that what they
13 have done in the past was unjust. That is
14 not the position of the Department of Justice.

15 But I do think that the new
16 policies are a reflection of an evolved view
17 of how much time somebody needs to serve for
18 a drug offense. Not counting all of the other
19 aggravating factors, but how much time is
20 enough.

21 And I would submit that that's an

NEAL R. GROSS

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

1 entirely appropriate thing for the Department
2 of Justice to be considering.

3 And when this Commission
4 unanimously voted to reduce sentences for
5 drug offenses it seems to me that implicit in
6 that decision was an acknowledgment that the
7 sentences for some drug offenders under the
8 prior guideline were longer than necessary.

9 Now, under Section 3553 courts are
10 required to fashion a sentence that meets the
11 purposes of punishment but is not more than
12 is necessary to achieve the purposes of
13 punishment. And that is behind, I believe,
14 the Attorney General's recalibration of our
15 approach in drug cases.

16 Now, to your point about the
17 Department directing AUSAs before the
18 Sentencing Commission had voted on the two-
19 level amendment. And I understand that some
20 of you may have been uncomfortable with that.
21 And I understand why. But let me try and

NEAL R. GROSS

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

1 tell you a little bit --

2 VICE CHAIR HINOJOSA: I don't know
3 that I would just describe it as
4 uncomfortable.

5 MS. YATES: Okay. You might have
6 been angry about that. And I can understand
7 why. But let me try to give you a little bit
8 of the thinking behind that.

9 And this is that our AUSAs have an
10 obligation to correctly calculate the
11 sentencing guidelines. And they were
12 directed in the memo that went out to continue
13 to correctly calculate the sentencing
14 guidelines under the guidelines in effect at
15 the time.

16 But our AUSAs also have an
17 obligation to make a sentencing
18 recommendation utilizing the 3553 factors.

19 And once our Attorney General has
20 testified and has said that he believes that
21 the drug guidelines are too high and that they

NEAL R. GROSS

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

1 should be reduced by two levels it puts our
2 AUSAs in an untenable position to then go into
3 court and to have to be telling a judge that,
4 yes, our Attorney General has said that
5 they're too high and they should be lowered
6 by two levels but we object to a variance down
7 two levels.

8 And so while I can understand you
9 may not agree with that there was an analysis
10 that went behind that of what was the
11 appropriate approach for our AUSAs to be
12 taking in courts after this public position.

13 VICE CHAIR HINOJOSA: Well, would
14 you direct the AUSAs whenever the Justice
15 Department did this time ask for increases in
16 some of the penalties to therefore ask for
17 variances higher up in those cases?

18 MS. YATES: Well, I hope that
19 AUSAs are asking for upward variances in cases
20 where the facts would support it. And that
21 may very well be in cases where we're asking

NEAL R. GROSS

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

1 for increases in the guidelines.

2 CHAIR SARIS: Thank you.
3 Commissioner Friedrich.

4 COMMISSIONER FRIEDRICH: So, Ms.
5 Yates, I just want to make sure I understand
6 both the written testimony and the oral
7 testimony you've given us.

8 One, you've said finality is an
9 appropriate general rule.

10 Two, you've said --

11 CHAIR SARIS: Go into the mike
12 because I think people are losing you.

13 COMMISSIONER FRIEDRICH: --
14 retroactivity should be rare.

15 Three, you've said the prior drug
16 penalties weren't unfair or unjust. I think
17 you just testified. Is that correct?

18 MS. YATES: I hate to put a label
19 on it as whether something is unfair or
20 unjust. I think Judge Breyer may have
21 captured it more eloquently than I could.

NEAL R. GROSS

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

1 It's not the same kind of
2 situation like we had in crack retroactivity
3 where we were going back and we were
4 correcting a sentencing disparity there that
5 I think everybody agreed was unfair and
6 unjust.

7 But I do think there is a fairness
8 factor. If we have determined that a
9 sentence is longer than necessary there's a
10 fairness element to that.

11 COMMISSIONER FRIEDRICH:
12 Understood. So the language from your
13 written testimony is, "The Department
14 supports this because sentences are longer
15 than necessary."

16 Well, that's the case in any
17 instance in which the Commission lowers
18 guideline penalties. The Commission, based
19 on all the input it's received has determined
20 that the sentence could be lower. It's
21 longer than necessary.

NEAL R. GROSS

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

1 So under that logic we should
2 apply every guideline amendment
3 retroactively. And that simply can't be the
4 case because the Commission has never acted
5 that way nor has the Department. In fact,
6 the Department has only supported
7 retroactivity on one occasion.

8 So how do we reconcile on the one
9 hand the fact that this is an extraordinary
10 power that should be applied rarely with your
11 view that the sentences are longer than
12 necessary? There's not -- that can't be the
13 standard by which the Commission makes
14 decisions on retroactivity.

15 MS. YATES: Well, I think that
16 it's in a balancing of factors. Finality is
17 certainly an important factor to consider.
18 But from my perspective it's not a trump card.
19 It is a factor to consider.

20 The Commission has in other
21 instances made retroactive determinations

NEAL R. GROSS

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

1 that would lower offense levels, and
2 specifically with respect to drug offenses,
3 and not just necessarily crack cocaine.

4 Going back to mid-nineties when
5 the LSD quantities were raised that would
6 trigger certain offense levels. That was
7 applied retroactively.

8 In '95 when the weight for
9 marijuana plants was changed, that was
10 applied retroactively.

11 More recently in 2003 when there
12 was a change in the guidelines for oxycodone,
13 and specifically Percocet, that was applied
14 retroactively.

15 I think one of the things you have
16 to look at is the magnitude of the change. I
17 think there have been a lot of amendments that
18 made very small differences in sentences.

19 Here, the average difference is
20 approximately 23 months, about 18 percent of
21 the average sentence. That's a significant

NEAL R. GROSS

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

1 enough change from our perspective to be
2 something that then is where fairness kicks
3 in. And that we should balance those
4 factors.

5 COMMISSIONER FRIEDRICH: But in
6 addition to the drug amendments you mentioned
7 there are others, over half a dozen that the
8 Commission did change drug penalties, whether
9 it's safety valve or Lee Gabel and others
10 where the Commission did not make it
11 retroactive.

12 MS. YATES: That's right.

13 COMMISSIONER FRIEDRICH: And the
14 magnitude arguably from your testimony cuts
15 both ways. On the one hand, a two-level
16 reduction is substantial. On the other hand,
17 you've suggested 50,000-plus is too much.
18 Right? For you as a resource matter.

19 MS. YATES: It's too much because
20 of the public safety implications a resource
21 matter. That's right.

NEAL R. GROSS

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

1 COMMISSIONER FRIEDRICH: So we
2 have to weigh the magnitude is both -- a
3 certain level is necessary for it to justify
4 retroactivity, and too much is something we
5 need to consider as well, right? So it's --

6 MS. YATES: Now you see why we
7 talked about it so long in the Department.

8 CHAIR SARIS: Well, I think that's
9 it. Thank you very much to both of you. And
10 I thank you for struggling, wrestling with
11 the issue. And I'm sure we'll be seeing both
12 of you again at another hearing sometime so
13 thank you for coming back.

14 MS. YATES: Thank you for having
15 me.

16 CHAIR SARIS: And I know we're
17 going to move right onto -- we're a little
18 behind but we will finish what we're supposed
19 to before lunch for those who have planes to
20 catch. So the other panels I'm going to hold
21 pretty tightly to five minutes a person and

NEAL R. GROSS

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

1 come on up. Thank you.

2 Welcome. Thank you for coming.
3 This panel, not that you couldn't have
4 guessed, the law enforcement views.

5 So we have Sergeant Richard
6 Fulginiti, the chairman of the National
7 Legislative Committee of the Fraternal Order
8 of Police.

9 Mr. Fulginiti is a retired
10 sergeant in the homicide unit of the Prince
11 George's County, Maryland, Police Department.
12 He is also past president of the Fraternal
13 Order of Police Lodge No. 89 and is currently
14 the national trustee for the Maryland State
15 Lodge. Welcome.

16 Mr. Bushman is president of the
17 National Narcotic Officers' Associations'
18 Coalition. He's currently a leadership
19 consultant at law enforcement leadership
20 strategies. He's a former special agent of
21 the Minnesota Bureau of Criminal Apprehension

NEAL R. GROSS

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

1 and the former statewide gaming and drug
2 coordinator of the Minnesota Department of
3 Public Safety.

4 And J. Thomas Manger, Chief
5 Manger, is the chief of police, Montgomery
6 County. And he serves on the board of
7 directors of the Major Cities Chiefs
8 Association. He also serves as the chief of
9 the Fairfax County Police Department.

10 Welcome to all of you. Thank you.
11 Mr. Fulginiti?

12 MR. FULGINITI: Good morning.

13 CHAIR SARIS: Sergeant. I'm
14 sorry.

15 MR. FULGINITI: Mister. Retired.
16 Thank you. Good morning, Madam Chair, Vice
17 Chair and distinguished members of the
18 Commission.

19 My name is Rick Fulginiti, the
20 National Legislative Committee chair for the
21 Fraternal Order of Police.

NEAL R. GROSS

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

1 The FOP is the largest law
2 enforcement labor organization in the United
3 States representing more than 330,000 rank
4 and file police officers in every region of
5 the country. I want to thank the Commission
6 for allowing me today to express their views.

7 You all have a copy of my text and
8 what I'd like to do is just hit a couple of
9 pieces within the text and then share with
10 you a story.

11 Today we are considering whether
12 or not the revised lower levels should be
13 retroactively applied to offenders currently
14 serving the just sentences they received from
15 the courts.

16 It should come as no surprise that
17 the rank and file officers who put themselves
18 in harm's way to arrest and convict these drug
19 offenders oppose Amendment 72.

20 While the FOP believes that the
21 new guidelines will certainly weaken the

NEAL R. GROSS

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

1 overall fight against drug traffickers,
2 retroactive application of the guidelines
3 would have an immediate and deleterious
4 effect on public safety and the crime rates
5 in our communities.

6 Let me put it into perspective as
7 a former law enforcement officer in Prince
8 George's County, Maryland.

9 In 2009 we arrested 1,102
10 individuals for manufacturing and selling
11 drugs. Using the Commission's own data if
12 the retroactive sentencing guidelines are
13 applied 629 convicted traffickers will be
14 coming home to Maryland, and another 225 will
15 be released to the District of Columbia.

16 At a time when law enforcement in
17 my county is making real strides in its fight
18 to reduce violent crimes it seems at variance
19 with common sense and good public policy to
20 release en masse more than 800 drug offenders
21 in our area.

NEAL R. GROSS

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

1 I know one of the driving forces
2 behind the reduction of sentences for drug
3 offenders is driven by costs associated with
4 incarceration.

5 The FOP acknowledges that the
6 federal person system is operating above
7 capacity. However, if sentences are not real
8 and not meaningful, if criminals begin to
9 accept that short stays as guests of the
10 government are just part of the cost of
11 conducting illegal drug sales then the
12 recidivism rates will go up, not down.

13 Any savings realized by early
14 releases is likely to be lost with re-
15 offenders.

16 As I stated earlier I put in 31
17 years with Prince George's County. Twenty-
18 two of those years was in the homicide unit.
19 All too often a lot of our cases were drug-
20 related.

21 And having such cases you often

NEAL R. GROSS

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

1 found a lack of witnesses and you ended up -
2 - what you did was used a participant,
3 hopefully small-time participant within the
4 case. And maybe they went ahead and plead to
5 a lesser offense, a drug charge, because they
6 were mostly drug-related.

7 These are the people that I'm
8 concerned will be released and may get to
9 where they should have spent the rest of their
10 lives in jail for committing a murder.

11 I want to tell you about a
12 particular instance that happened relatively
13 recently in 2010, Prince George's. It was on
14 August 6 of 2010. Police were called to an
15 assault call. And they responded to the 6800
16 block of 3rd Street in Lanham, Maryland.

17 When they arrived they were taken
18 to a detached garage and above this garage
19 was a makeshift apartment. And in that
20 apartment when they went to the door they
21 found a Dawn Brooks, a 41-year-old Black

NEAL R. GROSS

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

1 female who was laying at the door and she had
2 been shot to death.

3 When they searched the apartment
4 they found in a rear room a Wasita Silica.
5 And Wasita is a 38-year-old Black female.
6 They found her 3-year-old daughter Shayla and
7 her 4-year-old son Shakur, all shot to death.
8 So now we had a quadruple murder we were
9 working.

10 We had one witness, thank
11 goodness, who was able to go ahead and point
12 out several other people that may be involved.
13 And through investigation we found that they,
14 in fact, were the ones that committed this
15 crime.

16 The story goes they had just
17 delivered 40 to 50 pounds of marijuana to this
18 residence from Texas. They placed it in the
19 garage portion of this dwelling and left.
20 When they returned the marijuana was gone.

21 They reached out to their source

NEAL R. GROSS

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

1 in Texas and told the source what had happened
2 and he said either someone in Maryland would
3 be dead or when they returned they would die.

4 The one suspect, the individual
5 who decided this is what he was going to do,
6 he blamed the folks upstairs and he killed
7 four people.

8 He didn't just kill them. He then
9 took his cell phone and spent quite a bit of
10 time taking very nice photographs of the dead
11 bodies and then sent them back to Texas so he
12 could show his distributor what he had done
13 so that he could save his own soul.

14 Because of that link we were able
15 to effect an arrest in Texas also, but
16 unfortunately the only thing that that
17 individual got was a short sentence for a
18 distribution charge.

19 And that's the type of case that's
20 not atypical. That happens all the time.
21 And that's the individual that I'm concerned

NEAL R. GROSS

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

1 that the retroactivity of this would go ahead
2 and help and release onto the streets.

3 I appreciate the time that you
4 gave me today and that's the view of the
5 Fraternal Order of Police rank and file.
6 Thank you.

7 CHAIR SARIS: Thank you.

8 MR. BUSHMAN: Madam Chair,
9 members of the Commission, thank you for the
10 opportunity to appear before you today.

11 My name's Bob Bushman. I am
12 president of the National Narcotic Officers'
13 Associations' Coalition. We represent 40
14 state narcotic officers associations.

15 Like me, the men and women of our
16 associations have experienced the devastating
17 consequences that result from illegal drugs
18 that pour into our neighborhoods.

19 Some claim that our efforts to
20 keep drugs off our streets have been fruitless
21 and that our time, money and effort should be

NEAL R. GROSS

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

1 spent elsewhere. I strongly disagree and the
2 numbers support me.

3 Violent crime and drug use rates
4 have declined substantially over the past
5 couple of decades. I believe that much of
6 that success can be attributed to the tough
7 on crime approach which has included
8 aggressive enforcement, strong prosecution
9 and serious sentencing policies.

10 Drug dealers prey on their own
11 family members and neighbors and especially
12 our young people. Drug traffickers use
13 violence as a tactic of intimidation to ensure
14 success of their business.

15 They don't pay taxes on their
16 earnings, yet their illicit activities cost
17 taxpayers dearly as we pay for the law
18 enforcement, medical and social services that
19 are required to clean up the carnage and
20 destruction left in their wake.

21 It's true that aggressive

NEAL R. GROSS

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

1 enforcement of our nation's drug laws has led
2 to an increase in incarceration numbers.
3 Many of the people we arrest are not strangers
4 to the criminal justice system. They've been
5 arrested before.

6 And while many argue that
7 recidivism rates have decreased we know that
8 those rates only reflect criminals who are
9 re-arrested. They do not account for those
10 who continue to commit crimes upon release
11 but now evade arrest because during their
12 previous trips through the criminal justice
13 system they became educated about law
14 enforcement tactics and how to insulate
15 themselves to avoid being caught again.

16 We also know that a small number
17 of people commit a majority of the crimes in
18 many neighborhoods. When we arrest, convict
19 and sentence those offenders to prison the
20 crime rates drop.

21 There are some who believe that we

NEAL R. GROSS

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

1 lack fairness in the sentencing process but
2 the facts show a different story. Most
3 offenders plead guilty and plead to lesser
4 charges than the actual offenses that were
5 committed. And most defendants have already
6 taken advantage of the provisions in the law
7 that reduce their sentences.

8 The question that is before us
9 here today is whether your recent
10 recommendations to reduce the sentencing
11 guidelines for drug traffickers should be
12 applied retroactively.

13 According to your own analysis,
14 and we've heard this several times already
15 today, if these recommendations were made
16 retroactive more than 51,000 inmates will be
17 eligible for sentence reductions.

18 United States Attorney's Offices
19 are already inundated with cases and our
20 courts' calendars are already full. If
21 they're required to process the myriad of

NEAL R. GROSS

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

1 cases that are sure to be filed for review
2 how can you expect them to keep up with
3 current workloads or take on new
4 prosecutions? Because crime is not going to
5 stop.

6 The cost in time and money that
7 will be expended on criminals that have
8 already been given leniency based upon the
9 sentence reduction options that currently
10 exist is offensive to law-abiding citizens.

11 Many of the proponents of
12 sentencing reductions and a retroactive
13 application portray those who have received
14 prison sentences as victims. They're not.

15 The real victims are the law-
16 abiding citizens who live in the
17 neighborhoods that have been ravaged by drug
18 crime and its collateral consequences.
19 Drive-by shootings, assaults, property
20 crimes. They have also experienced the loss
21 of value of their homes and properties located

NEAL R. GROSS

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

1 in undesirable high-crime neighborhoods.

2 Many of us have loved ones and
3 acquaintances that have battled with
4 substance abuse or addiction. But how do you
5 justify to the families of addicts and
6 abusers, or to those who have lost family
7 members and children to drug addiction and
8 drug-related violence that the so-called low-
9 level non-violent drug trafficker, the one
10 who is profiting off their pain, deserves more
11 leniency?

12 It should be our law-abiding
13 citizens that are the focal point of these
14 discussions, not the convicted criminals who
15 by their own selfish actions have proven that
16 they have little regard for the law or for
17 their neighbors.

18 In the end, these criminals are
19 rarely held accountable for all their crimes
20 or the damage they've inflicted. Plea
21 bargains and pretrial negotiations already

NEAL R. GROSS

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

1 save most defendants from ever being exposed
2 to the maximum penalties allowed by the law.

3 Those who receive the severe
4 sentences have lengthy criminal histories,
5 have committed violent crimes, or been
6 involved in large-scale drug trafficking
7 organizations. They've already had several
8 opportunities to reform but have decided not
9 to and it's their hard work at a life of crime
10 that's led them to their prison sentence.

11 In my experience most are sorry
12 that they were caught, not that they committed
13 crimes against their neighbors.

14 Let me leave you with one final
15 thought. During my 30-year career I spent
16 several years working undercover where I was
17 embedded in drug rings. And I listened to
18 drug dealers and their minions plan their
19 illegal deals, working their illegal
20 business.

21 I've also interviewed thousands of

NEAL R. GROSS

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

1 suspects and defendants and witnesses, and
2 I've quickly learned one thing. It's that
3 they all fear getting arrested and being sent
4 to prison.

5 So from a very informed point of
6 view I can tell you that the more you reduce
7 prison sentences the more incentive you'll
8 give drug dealers to continue committing the
9 crimes that help their businesses grow while
10 they poison our young people and destroy our
11 communities.

12 So on behalf of our nation's
13 narcotic officers who face great risk on the
14 front lines as they respond daily to calls
15 for help from these communities I want to once
16 again our association's strong objection to
17 expanding or implementing the Commission's
18 proposed drug sentencing reductions
19 retroactively.

20 I appreciate the opportunity to
21 address you and I'll be more than happy to

NEAL R. GROSS

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

1 answer any questions that you may have.

2 CHAIR SARIS: Thank you.

3 MR. MANGER: Madam Chair,
4 Commissioners. My name's Tom Manger. I'm
5 the Chief of Police in Montgomery County,
6 Maryland, former chief of the Fairfax County
7 Police Department in Virginia.

8 I'm here today on behalf of the
9 Major Cities Chiefs Association representing
10 the 66 largest police departments in the
11 United States. So I'm privileged to serve as
12 the chairman of the Legislative Committee and
13 a member of the board of directors for the
14 Major Cities Chiefs.

15 Thank you for allowing law
16 enforcement and the Major Cities police
17 chiefs to testify today. We commend you for
18 this opportunity because it demonstrates your
19 concern for public safety.

20 I'm pleased to be here today to
21 set forth the position of the agencies that

NEAL R. GROSS

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

1 police the country's largest metropolitan
2 areas on these measures on the question of
3 retroactivity.

4 The urban areas our membership
5 encompasses will most be affected by the
6 sentencing reform and it's absolutely
7 essential to our public safety mission to
8 ensure these reforms are implemented with
9 caution and not just with cost in mind.

10 Without certain steps in place to
11 put it bluntly these released offenders will
12 have a great deal of trouble reintegrating
13 into the community and there is a likely
14 chance that they will become our problem
15 again.

16 Whether it's a violent crime, a
17 theft to support a drug habit, or an overdose,
18 we are the ones that will answer the 911 calls
19 and we are the ones investigating the crimes,
20 making the arrests and providing services to
21 crime victims.

NEAL R. GROSS

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

1 Whether retroactive or going
2 forward with further reforms, let me
3 articulate the principles that comprise our
4 position.

5 First, we support the individual
6 review of each person's sentence. Sentencing
7 reform must not be a one size fits all
8 approach. Actions to simply cut sentences
9 across the board because prison costs have
10 soared is irresponsible policy that threatens
11 the safety of the communities we are sworn to
12 protect.

13 Secondly, we support reentry
14 services for those that are released. Major
15 Cities Chiefs calls upon the federal
16 government to ensure that prisoners
17 transition into communities with the support
18 of reentry services that include drug
19 treatment, supervision and other support.

20 We have an opportunity to slow the
21 revolving door of our criminal justice system

NEAL R. GROSS

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

1 with this critical support.

2 Third, we believe that repeat
3 offenders present the highest danger to our
4 communities. Many years of solid research
5 show that repeat offenders commit the vast
6 majority of crimes. We urge the Commission
7 to further study how to address this highest-
8 risk category of inmates.

9 Fourth, we believe that dangerous
10 offenders should serve their full sentences.
11 Major Cities Chiefs strongly opposes any
12 measure that reduces the punishments for
13 offenders who are violent, target minors for
14 drug sales, use a firearm or other weapon,
15 are members of cartels, or are in any way
16 considered to be serious drug traffickers.

17 In my written testimony I've
18 quoted the language from the Smarter
19 Sentencing Act which directs the Sentencing
20 Commission to retain current mandatory
21 minimum sentences for these dangerous

NEAL R. GROSS

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

1 offenders.

2 If these considerations are put
3 into place I believe that it's possible to
4 begin the reintegration process for inmates
5 who through reduced sentences find themselves
6 back in our communities.

7 I hope that the Commission will
8 agree that it is through this comprehensive
9 approach that we will give these inmates the
10 best chance to succeed once they are released.

11 Police experience firsthand the
12 horrors drugs inflict. Our officers in our
13 communities have to deal with youth
14 dependence and abuse issues, violence, drug-
15 related crimes and overdose deaths.

16 And we have watched as offenders
17 go in and out of the prison system because
18 they do not receive the help that they need
19 for reentry.

20 Until we treat the abuse and
21 addiction recidivism rates will remain high

NEAL R. GROSS

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

1 no matter what the length of sentence.
2 That's why sentencing reform by itself is not
3 enough.

4 In order to ensure that offenders
5 who receive shorter sentences are able to
6 successfully integrate back into our cities
7 and communities across the nation sentencing
8 reform must be completed in a comprehensive
9 manner to include education, prevention and
10 treatment.

11 I want to thank the Commission for
12 once again having the opportunity to testify
13 and I encourage you to keep the law
14 enforcement community and Major Cities Chiefs
15 actively involved in this important
16 discussion. Thank you.

17 CHAIR SARIS: Thank you.

18 VICE CHAIR JACKSON: Good
19 morning. Thank you for being here. You
20 know, we have some experience with
21 retroactivity at least with respect to a

NEAL R. GROSS

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

1 certain subgroup of drug offenders and that
2 being crack offenders from a few years ago.

3 And I'm wondering whether any of
4 you work in areas in which there is a
5 significant crack offender population. And
6 whether you saw any of the problems that you
7 have articulated or worried about with
8 respect to the return to the community of some
9 of the crack offenders.

10 MR. BUSHMAN: I'd be happy to
11 address that, ma'am.

12 At one time I lived in the highest
13 crime area of our Twin Cities. The busiest
14 crack house in the city was located across
15 the alley outside my window and we did
16 surveillance there and watched in a short
17 period of time 100 different people come and
18 buy crack. Sometimes the same people back
19 two or three or four times during the hour.

20 Drive-by shootings, assaults.
21 That whole area of town was unsafe for

NEAL R. GROSS

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

1 everybody and anybody.

2 As we talk about sentencing, as we
3 talk about the effects of policies,
4 retroactivity, I've been a cop my entire life.
5 I'm not as smart as you folks. I am not a
6 student of the mechanics of the law like you
7 are.

8 But during my entire career, and
9 I think both these gentlemen would back me
10 up, we've seen the effects of what the
11 policies do or don't do on the street.

12 Drug addiction is a terrible,
13 terrible thing. It's a terrible thing for
14 the people that experience it, it's a terrible
15 thing for the families and it's a terrible
16 thing for the community because it takes away
17 opportunities for economic success. It takes
18 away opportunities for personal success. It
19 affects the schools. It affects everything.

20 And help it as they may, these
21 people are coming and going from the system,

NEAL R. GROSS

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

1 they just can't stay out of trouble. That
2 doesn't mean to say that they're all bad or
3 wicked people, but they've made choices that
4 have pretty much doomed them to any
5 opportunity for success.

6 As law enforcement officers our
7 federal courts and our prosecutions were
8 saved for the worst of the worst because very
9 frankly they had better justice, they had
10 quicker justice and in many cases it was
11 longer justice.

12 That crack house that I told you
13 about, one group would move out, another group
14 would move in. It was a revolving door.
15 When they went to the state courts or the
16 local courts it was the same people.

17 In my career I've arrested people
18 with five pending cases in state courts.
19 They finally went to federal court where there
20 was a long sentence waiting for them. Took
21 them out of the community and gave us

NEAL R. GROSS

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

1 opportunities to use resources other places.

2 I and the people I work with, we
3 think about the other ramifications. I can
4 remember many times responding to a shooting
5 on a street corner that happened because of
6 drug dealing, battles over turf, getting
7 involved with the gangs. Using that
8 intimidation and fear to protect the
9 business.

10 Watching the life drain out of
11 young people on a street corner while we're
12 frantically trying to stop a sucking chest
13 wound, hoping the ambulance will get there.
14 Even knowing though that if they were in the
15 emergency room right now they're not going to
16 make it.

17 And then have to turn around and
18 deal with the grieving families. Trying to
19 put together an investigation where everybody
20 was watching but nobody saw anything. Trying
21 to deliver justice to those folks.

NEAL R. GROSS

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

1 As we talk about sentence
2 reductions and we talk about retroactivity I
3 think about some of these young people or some
4 of these people that have been victims of that
5 type of crime. Where is the justice for their
6 families?

7 The offender may go to prison
8 maybe for murder, maybe for some other crime,
9 has a chance to live and get out. This person
10 is gone forever and that's something their
11 family deals with.

12 When I talked about the law-
13 abiding citizens being the real victims I mean
14 it. There are people trapped in these
15 communities that nobody wants to buy their
16 house. They've raised their kids. But
17 they're not free to go out and enjoy the front
18 porch and visit with their neighbors because
19 of drive-by shootings.

20 Week in and week out we see these
21 cases from around the country where kids are

NEAL R. GROSS

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

1 sleeping in their own beds and a stray bullet
2 comes through and kills them or injures them.
3 That's the type of crime we're dealing with.

4 We talk about the serious
5 criminals. Everybody that participates in
6 the drug business has a hand in this. So I
7 realize I've probably gotten far off from your
8 question but this is all -- this is what we
9 see. This is what we live.

10 VICE CHAIR JACKSON: And I
11 appreciate that. Can I follow up by asking
12 on the issue of public safety? And I know
13 both you and Sergeant Fulginiti focused on
14 this.

15 Does it give you any comfort at
16 all to know that if there was some
17 retroactivity available a judge would be
18 screening. You know, it's not a situation in
19 which people would be released immediately to
20 the street, but there would be a careful
21 review of whether or not this particular

NEAL R. GROSS

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

1 individual was dangerous or posed additional
2 danger to the community beyond the original
3 drug crime.

4 MR. MANGER: Does that include
5 some reentry services for that person if the
6 decision is made to put them back? Because
7 that's the key.

8 And I think, you know, I'm here
9 representing cities like New York, Chicago,
10 Los Angeles, Atlanta. There's going to be a
11 lot of folks going back into those
12 communities.

13 And to -- even if a judge is very
14 discerning and makes a decision that this
15 individual is right for being released to just
16 release them and then keep your fingers
17 crossed, gee, I hope this works out for them
18 I think is shortsighted.

19 I think that what Mr. Bushman
20 describes is very accurate in terms of the
21 kinds of offenders, the kinds of living

NEAL R. GROSS

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

1 situations many of these folks go back into.

2 And unless we ensure that they
3 have the appropriate supervision, that they
4 have the appropriate wraparound services to
5 help them succeed with their reentry I think
6 it's just going to come back to that revolving
7 door.

8 COMMISSIONER BARKOW: What would
9 be your assessment of current federal reentry
10 processes? Because assume they had enough
11 time where they could go through whatever the
12 normal BOP adjustment to society programs
13 would be. Do you have a sense of how well
14 those work?

15 MR. MANGER: My assessment of that
16 is based on very limited information. And
17 that is the percentage of people that
18 recidivate. And it's pretty high. So
19 clearly we've got work to do.

20 CHAIR SARIS: As I understand some
21 of the debate is not just about over-

NEAL R. GROSS

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

1 incarceration but under-policing. You know,
2 exactly the kinds of neighborhoods you're
3 talking about, Officer Bushman, about these
4 neighborhoods that just don't have enough to
5 protect the safety of the people.

6 And I understand one of the
7 theories or at least the goals would be is to
8 shift some of the money from the prisons to
9 the local and state police officers to protect
10 the communities better, and also to deal with
11 what you're saying absolutely spot on which
12 is proceed with caution. You need to have
13 the reentry programs to manage this process.

14 So if there were some slight shift
15 and you sort of carved out the really violent
16 people you were all describing would that kind
17 of a system work? More boots on the ground,
18 slightly fewer people in jail and better
19 reentry? Is that the right -- the way to be
20 going here?

21 MR. MANGER: Well, I'll say that

NEAL R. GROSS

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

1 I think it's -- I'm a big believer that
2 additional boots on the ground if they're
3 deployed appropriately and they're targeting
4 the right things can be a very effective
5 measure to increase public safety.

6 My concern is that I'm not sure
7 that -- it's not just more policing that we
8 need to do. I mean, it's got to be a more
9 comprehensive approach in terms of increasing
10 the public safety in our neighborhoods.

11 And the kind of folks we're
12 talking about here, drug offenders, it's easy
13 -- it's actually very easy to lock them up
14 again because most of them will recidivate
15 and we can lock them up again. But that's
16 not solving the problem.

17 If we're trying to keep them out
18 of prison and keep them from committing more
19 crimes that's more than just more cops.

20 MR. BUSHMAN: Just two quick
21 things. In some areas more cops on the street

NEAL R. GROSS

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

1 is going to result in more people being
2 arrested because in a lot of places they can't
3 handle all the calls and get to things now
4 quick enough, so that's going to happen.

5 The other thing, when we talked
6 about retroactivity, when we talked about the
7 judicial part of this, I think one of the
8 things that's important is consistency.
9 That's one thing we've always battled.

10 And I remember having defendants
11 out on supervised release. Some judges would
12 follow the rules to the letter. If you have
13 a dirty UA you're going to get revoked. Other
14 judges would give them four or five bites at
15 the apple.

16 CHAIR SARIS: UA is urinary?

17 MR. BUSHMAN: The test.
18 Urinalysis. Yes. Drug test. And
19 consistency is very important.

20 And one thing that I have always
21 liked about the federal system with the

NEAL R. GROSS

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

1 mandatory sentencing, the sentences in place,
2 you know, they didn't have to hear it from
3 us.

4 These defendants could talk to
5 their defense attorneys and say you know what,
6 you are in the big leagues now. You're
7 looking at a serious sentence. And many
8 times that compelled information that helped
9 us move that investigation up the chain to
10 get to the people that were really the impetus
11 behind all the crime and things we've
12 discussed during this segment.

13 CHAIR SARIS: Thank you. Anyone
14 else? Thank you very much, all of you, not
15 only for coming here but really all that you
16 do to keep our communities safe. Thank you.

17 MR. BUSHMAN: Thank you for the
18 opportunity.

19 CHAIR SARIS: So our fourth panel
20 involves practitioners. Thank you to all of
21 you for coming. Again, anybody here need to

NEAL R. GROSS

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

1 go in a specific order? Don't be shy. All
2 right. I think we're actually going to be
3 roughly on time. So let me introduce
4 everybody.

5 Let me start with Sarah Gannett.
6 Ms. Gannett is an assistant federal defender
7 in the Appellate Unit of the Federal Community
8 Defender Office for the Eastern District of
9 Pennsylvania.

10 Before joining the Federal
11 Community Defender Office Ms. Gannett was
12 employed by the Federal Public Defender for
13 the district of Maryland and the Public
14 Defender Service for the District of
15 Columbia. Thank you.

16 Someone who's no stranger. David
17 Debold who's the chair of the Practitioners
18 Advisory Group. He is a partner at the law
19 firm of Gibson Dunn and practices in the
20 firm's appellate and constitutional law,
21 securities litigation and white collar

NEAL R. GROSS

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

1 defense and investigations practice groups.

2 James Felman, also well known to
3 us who's the chair-elect -- congratulations,
4 I guess -- of the Criminal Justice Section of
5 the American Bar Association is a partner in
6 the firm of Kynes, Markman & Felman in Tampa,
7 Florida and chair-elect of the Criminal
8 Justice Section of the American Bar
9 Association.

10 He previously co-chaired the
11 Sentencing Commission's Practitioners
12 Advisory Group.

13 And last but by no means least --
14 I'm going to not say this right -- Kenneth
15 Sukhia? Sukhia. Mr. Sukhia has been an
16 attorney in private practice in Tallahassee,
17 Florida since 1993.

18 Before entering private practice
19 Mr. Sukhia worked for 10 years as a prosecutor
20 in the U.S. Attorney's Office in the Northern
21 District of Florida and then served as United

NEAL R. GROSS

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

1 States Attorney for the Northern District of
2 Florida from 1990 to 1993.

3 So, welcome to all of you and why
4 don't we start with you. Thank you.

5 MS. GANNETT: Thank you. We
6 appreciate the opportunity to speak -- thank
7 you also for the opportunity to speak with
8 you today about the possible retroactivity of
9 the 2014 amendment to the drug quantity
10 tables. The defenders are for retroactivity
11 of the amendment without limitation.

12 The Commission has already
13 concluded in adopting the amendment in the
14 first place that the drug quantity table
15 produces sentences that are greater than
16 necessary to fulfill the purposes of
17 punishment.

18 The amendment does not undo the
19 length of sentences completely. It's a
20 modest step. It leaves in place enhancements
21 for things like violence, or weapons

NEAL R. GROSS

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

1 possession, or criminal history.

2 But it would serve justice, be
3 fiscally responsible and promote the
4 Commission's mission under Sections 994A and
5 G of the Sentencing Reform Act to apply the
6 amendment retroactively.

7 There are two things that should
8 not be controversial here, that it is the
9 right thing to do and that it has the
10 potential to produce substantial savings.

11 It is the right thing to do
12 because of the fairness issues at stake.
13 Congress has authorized this body in the
14 Sentencing Reform Act and in Section 3582C(2)
15 to right wrongs in sentencing policy.

16 The amendment as discussed in our
17 statement meets all of the Commission's
18 traditional reasons for retroactivity.

19 Doing the right thing itself has
20 power and we should not underestimate the
21 power that taking even a modest step to reduce

NEAL R. GROSS

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

1 unfair sentences can have for an inmate, for
2 his family and also for our communities.

3 In my work on the retroactive
4 crack amendments I've had a chance to see
5 firsthand what it means when a client can
6 return home to a graduating child, to a sick
7 parent, even to live out his own last days
8 outside of prison.

9 More than that I've seen what kind
10 of an impact a change in policy can have on a
11 person's beliefs, on his sense of fairness,
12 of justice, on his understanding of second
13 chances.

14 When we have the courage to do
15 what's right no matter how hard it is, no
16 matter how much work it's going to take then
17 it empowers our clients to believe that they
18 can do the right things too.

19 Adopting this amendment
20 retroactively also has the potential to
21 create great savings in the millions or even

NEAL R. GROSS

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

1 billions of dollars by placing on supervision
2 offenders who would otherwise be incarcerated
3 for terms that they no longer need to serve
4 according to the data at a fraction of the
5 cost which would free up those resources to
6 attack other problems that we're facing in
7 the criminal justice system.

8 What makes this decision difficult
9 or apparently more difficult is the volume of
10 cases at issue. But that is what should spur
11 us to act. There's been so much injustice
12 over so many years to so many people.

13 Making this amendment retroactive
14 will no doubt require processing and
15 supervising many cases. But as Commissioner
16 Hinojosa remarked in 2011 about the 2007 crack
17 amendment that process was simpler and worked
18 better than we expected. And that was true
19 of the 2011 process as well.

20 And it's because of the experience
21 that we've gained over the bold decisions that

NEAL R. GROSS

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

1 this Commission made about crack
2 retroactivity. And that experience will help
3 us make this process work as well. And we'll
4 have a head start if the Commission votes as
5 planned in July to make this amendment
6 retroactive as well.

7 The testimony about South
8 Carolina's process I thought was very
9 informative and it's indicative also of what
10 happened in other small districts like the
11 Eastern District of Virginia where thousands
12 of cases were processed.

13 If small districts like that can
14 make a process like this work then large
15 districts like the districts in Texas that
16 are going to be facing the greatest caseloads
17 can surely make the process work this time
18 around.

19 Fifty-one thousand cases will not
20 drop on day one in November. What will happen
21 is what we did in 2011. We'll prioritize

NEAL R. GROSS

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

1 them by the dates of release of the offenders
2 so that all the motions will not land on the
3 court, so that all the analyses will not land
4 on the desks of probation officers on the date
5 that the Commission decides to make this
6 retroactive, or even between now and November
7 1.

8 Instead, we'll organize the files
9 in the defender offices and in the U.S.
10 Attorney's Offices based on the years of
11 anticipated release.

12 The parties can also help the
13 court identify which cases are going to be
14 ineligible for relief. In the District of
15 Maryland, for example, when courts received
16 motions they referred them to the defender
17 office to provide input on whether those
18 defendants would be eligible for relief or
19 not eligible for relief.

20 So that probation didn't have to
21 do an analysis that would turn out to be

NEAL R. GROSS

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

1 unnecessary when, for instance, the bank
2 robber who had been using crack at the time
3 was applying, petitioning the court for
4 relief that was going to obviously be
5 unnecessary.

6 And even in the closer cases the
7 defender office could assist in providing
8 that kind of input.

9 Those kinds of collaborative
10 approaches can save resources both of the
11 courts and of probation and make this process
12 efficient and effective to the benefit of the
13 defendants who are serving time now, the same
14 way that the fairness will be applied for
15 those defendants that the Commission has
16 already acted on behalf of. Thank you.

17 MR. DEBOLD: Thank you, Chief
18 Judge Saris and members of the Commission.
19 The PAG also fully supports retroactive
20 application of this amendment without
21 exceptions.

NEAL R. GROSS

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

1 You have my written testimony.
2 I'd like today in my oral testimony to focus
3 on the line-drawing issue that the Department
4 of Justice has proposed in their testimony.
5 And for that I have really three points I want
6 to cover.

7 The first is what I will call the
8 double-counting and indeed the double
9 standard point.

10 As you know the Department has
11 proposed certain categorical limits based on
12 criminal history category, role in the
13 offense, the presence of a firearm, the
14 involvement of violence and the like.

15 Every single one of those factors
16 that the Department would use to disqualify a
17 defendant who is currently serving a sentence
18 from eligibility is a factor that the
19 sentencing court was required to consider at
20 the time of the original sentencing, and by
21 virtue of the sentencing guidelines

NEAL R. GROSS

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

1 calculation and the guidelines manual that
2 this Commission has promulgated, resulted in
3 a meaningful increase of the sentencing
4 guideline range.

5 To disqualify these defendants
6 from eligibility for consideration, not
7 automatic sentence reduction, but eligibility
8 for consideration for a sentence reduction
9 based on this amendment would in effect be to
10 say that the criminal history category, that
11 categories that apply to these defendants, or
12 the role enhancement, or the gun enhancement,
13 or the obstruction enhancement, were in
14 hindsight at least two levels too low to
15 adequately punish those individuals.

16 The Commission has already made a
17 determination that the drug quantity table
18 should be reduced by two levels across the
19 board and that will adequately take into
20 account the seriousness of the offense in
21 combination with other factors such as the

NEAL R. GROSS

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

1 ones I just mentioned.

2 This is not a concern that I've
3 ever heard the Department of Justice or other
4 law enforcement agencies voice, that somehow
5 the enhancements that already exist for these
6 types of factors were and are inadequate.

7 In fact, our experience tells us
8 otherwise. I'd like to draw the Commission's
9 attention to the eight sentences that the
10 President commuted in December for
11 significant drug trafficking offenses.

12 If you were to look at those eight
13 cases these are cases that went through the
14 DOJ Pardon Attorney and that the President
15 commuted.

16 You will find for at least one of
17 those eight defendants at least one of the
18 following factors: an obstruction increase, a
19 criminal history category greater than 2. In
20 fact, there are at least four of those
21 defendants who I believe had a higher criminal

NEAL R. GROSS

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

1 history category than 2 including career
2 offenders.

3 You will find multiple 851
4 enhancements, in fact. You will find gun
5 enhancements including one defendant who had
6 a conviction at the time he received the drug
7 offense for a felony possession of a firearm.
8 And in at least three of the cases you will
9 find leadership enhancements were applied.

10 Yet, and we have heard as
11 practitioners when we apply for clemency
12 petitions how overburdened the Pardon
13 Attorney Office is and how difficult it is
14 for them to process all these applications
15 coming from around the country.

16 Yet the Pardon Attorney does not
17 categorically exclude people based on these
18 kinds of factors. And in fact, in these cases
19 where the President actually commuted
20 sentences we have specific examples of where
21 the Pardon Attorney apparently did not view

NEAL R. GROSS

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

1 those factors as disqualifying the person
2 from actually receiving the relief.

3 If the Pardon Attorney's Office as
4 overburdened as it is can do this kind of
5 individualized assessment, hundreds of U.S.
6 federal judges can do the same.

7 The second point I'd like to raise
8 is the benefit of categorical exclusions. In
9 our view the benefits are highly overstated
10 or questionable, and in fact the analysis
11 that's being done in this situation is
12 incomplete.

13 And you've heard quite a bit about
14 the process for weeding out the ineligible
15 and whether making it more complicated on the
16 front end by having these various
17 exclusionary factors is necessarily going to
18 save resources for the lawyers, the judges
19 and the probation officers.

20 What I want to focus on is how the
21 benefit analysis that the Department is

NEAL R. GROSS

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

1 advocating is incomplete.

2 You heard, for example, the
3 testimony today about how Assistant U.S.
4 Attorneys will be diverted from spending time
5 on new cases by having to devote their
6 attention to older cases.

7 I think that's an incomplete
8 analysis because for every defendant who's
9 going to get the relief, for every additional
10 eligible person who actually qualifies for
11 relief there is going to be a net resource
12 savings not just for the government as a whole
13 but the Department of Justice individually by
14 savings that will occur in less prison time
15 for those individuals.

16 The Department can certainly
17 allocate those resources to take care of its
18 need for additional prosecutors to prosecute
19 new offenses.

20 My final point is that I want the
21 Commission to remember that for every

NEAL R. GROSS

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

1 argument you hear against retroactivity you
2 should ask yourself is this an argument
3 against the wisdom of the amendment in the
4 first place. Or putting it another way,
5 would the same point be made to undermine
6 prospective application.

7 In our written testimony I pointed
8 out how the Booker exception would not make
9 sense because that -- we are not going to
10 assume that when people are sentenced in the
11 future after November 1 that judges are going
12 to say, ah, I'm going to give you the same
13 sentence I would have given you before.
14 They're going to give the lower sentence
15 because this guideline provision clearly
16 calls for a different analysis of the effect
17 of the drug quantity.

18 The same is true for other
19 exceptions. The same is true for a number of
20 the things you heard from the law enforcement
21 officers.

NEAL R. GROSS

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

1 So we strongly urge the Commission
2 to apply this amendment retroactively without
3 introducing any additional exclusions or
4 exceptions. Thank you.

5 MR. FELMAN: Good afternoon,
6 Chief Judge Saris, distinguished members of
7 the Sentencing Commission.

8 Since 1998 I've been engaged in
9 the private practice of federal criminal
10 defense law with a small firm in Tampa,
11 Florida. I am a former co-chair of your
12 Practitioners Advisory Group and I'm
13 appearing today on behalf of the American Bar
14 Association for which I serve as the liaison
15 to the Sentencing Commission and as chair-
16 elect of the Criminal Justice Section.

17 The American Bar Association is
18 the world's largest voluntary organization
19 with a membership of nearly 400,000 lawyers
20 including a broad cross-section of
21 prosecuting attorneys, criminal defense

NEAL R. GROSS

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

1 counsel, judges and law students.

2 The ABA continuously works to
3 improve the American system of justice and to
4 advance the rule of law in the world.

5 I appear today at the request of
6 ABA President James Silkenat to present to
7 the Sentencing Commission the ABA's position
8 of the retroactivity of the 2014 drug
9 guideline amendments.

10 We've got too many people in
11 prison in this country. A large part of the
12 reason for that is that there are too many
13 people in federal prison in this country.
14 And a significant reason there are too many
15 people in federal prison in this country is
16 because they are there for federal drug
17 offenses where the sentences are too long.

18 I was reflecting this morning,
19 this year is the 20th anniversary of my
20 joining the Practitioners Advisory Group and
21 beginning to appear before this Commission

NEAL R. GROSS

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

1 and the 20th anniversary of my beginning to
2 organize the national training program on the
3 guidelines.

4 And in all those 20 years the one
5 thing that I think virtually everyone that I
6 ran into recognized is that the severity
7 levels of the mandatory minimum penalties in
8 federal drug crimes may represent the single
9 worst and least advised policy decision of
10 federal sentencing law in our history. They
11 were aimed at kingpins but they missed the
12 mark.

13 The Commission didn't make that
14 judgment, but it hampered the Commission's
15 efforts to peg the severity levels of the
16 guidelines to existing sentencing practices.
17 They understandably felt a need to peg the
18 guidelines to the mandatory minimums to avoid
19 cliffs.

20 It has catapulted us into an age
21 of over-incarceration the likes of which have

NEAL R. GROSS

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

1 not been seen in the history of human society.

2 This is the opportunity for the
3 Commission to do something about that. It is
4 so exciting to appear before you at such a
5 time.

6 The Commission has been able to
7 unanimously chip away at that going forward.
8 It's able to support bipartisan efforts in
9 the Congress to do so much more.

10 But you and this time is the only
11 opportunity that there will ever be to help
12 those who have already been sentenced under
13 these sentences which even the Department of
14 Justice comes before you and says in some
15 cases are too long.

16 It is a moral imperative. It's
17 easily satisfied by your considerations of
18 purpose, impact and ease.

19 And I also want to look at
20 history. There was a suggestion earlier
21 today that it's not unusual for Congress to

NEAL R. GROSS

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

1 lower the penalties in a statute.

2 I respectfully disagree. I
3 believe they have done it once in 2007. I
4 don't believe they've ever done it before in
5 the history of our Republic.

6 Now, true enough, they didn't make
7 that one retroactive. But this Commission
8 has the authority to make amendments
9 retroactive and it has done so at least with
10 respect to the drug guideline in 1993, in
11 1994, in 1995, in 2003, in 2007 and in 2011.
12 In no instance has the Congress ever rejected
13 such a step by the Commission. And those are
14 just the amendments to the drug guideline
15 which I believe are every amendment to the
16 drug guideline. So there has never been an
17 amendment to the drug guideline that was not
18 made retroactive.

19 And I understand that the
20 mitigating role adjustment wasn't made
21 retroactive and the safety valve wasn't made

NEAL R. GROSS

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

1 retroactive, but they're not a part of the
2 drug guideline. So I would suggest that
3 history would suggest that this would also be
4 consistent if made retroactive.

5 The other thing that I see is that
6 this Commission acts on data. We don't have
7 to guess. Unlike other actors you have the
8 data and the data here is really quite
9 remarkable.

10 In every -- I understand we're
11 saying it's not significantly significant,
12 but in every criminal history category the
13 recidivism rate of those released was lower.

14 This cohort would fare even better
15 if the same trends continue. This cohort is
16 older and unlike the last cohort that was
17 measured where only 27 percent were in
18 criminal history category 1, 40 percent, just
19 about 40 percent of this cohort are in
20 criminal history category 1. Now, that
21 suggests that we're going to do even better

NEAL R. GROSS

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

1 this time around.

2 And I only note that I see the
3 Department of Justice today says, well, don't
4 count categories 3, 4 and 5. The gap between
5 how those released early and those who serve
6 their full sentence is actually greatest in
7 criminal history category 4. There's like an
8 8 percent lower rate of recidivism among the
9 crack releasees who have category 4 as
10 compared to the control group.

11 So I don't think that that's a
12 good way to do it for the reasons that Dave
13 said. These people have already been hit for
14 all that.

15 So this is the right thing to do.
16 Please do it.

17 MR. SUKHIA: Madam Chairman, my
18 name's Ken Sukhia. I was the U.S. Attorney
19 in the Northern District of Florida. During
20 my tenure as an Assistant U.S. Attorney from
21 1980 to 1990.

NEAL R. GROSS

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

1 And during my term as United
2 States Attorney I think it could be fairly
3 presented, represented that that was a time
4 when we were dealing with I think the drug
5 scourge in our nation.

6 Both the increase in cocaine
7 distribution and also the issue we dealt with
8 with the crack cocaine, the epidemic that we
9 were dealing with.

10 At the time when I started federal
11 prisoners typically served about one-third of
12 their term. By the time I left in 1993 as
13 you know the incidence of those serving most
14 of their time in federal prison was fairly
15 significant. It was something like 93
16 percent I think of the time that they served.

17 I know that reasonable people take
18 different positions on this. Obviously
19 people from both sides of the political
20 spectrum support it.

21 And I don't know that I can

NEAL R. GROSS

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

1 contribute a great deal when it comes to the
2 data before the Commission. But I do have a
3 hard time separating my own experience in
4 prosecuting during that period from what I
5 think is the wisdom or lack thereof in
6 reverting, in going back, in stepping in a
7 direction which takes us back to at least in
8 the direction of where we were.

9 I know it's been said here this
10 morning that this is arguably the most
11 draconian sentencing structure in the history
12 of humankind I believe it was just said.

13 I would say that the reduction in
14 our nation's crime rate over the last 20 years
15 has been certainly the most significant
16 reduction in violent crime and crime across
17 the board in our nation's history.

18 And yet, at a time when -- and let
19 me share at least some of the statistics with
20 you. In 1991 the murder rate in the country
21 was 9.7 per 100,000. We had 252 million

NEAL R. GROSS

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

1 people living in the country at that time.
2 We had something like 25,000 murders,
3 homicides, intentional homicides.

4 By 2012, the last UCR report, we
5 had a 4.7 murder rate per 100,000. We had
6 14,000 murders that year.

7 We had 3.2 million burglaries in
8 1991. That was reduced to 2.1 million in
9 2012. That was a reduction of over half of
10 -- when it comes to the burglary rate per
11 100,000.

12 We had 675,000 robberies in 1991
13 and today we have three hundred and sixty or
14 something like that. It's in my statement.
15 More than half, or reduced by more than half.

16 Our population now is 317 million.
17 So you can't do it based purely on those
18 numbers, you have to look at the rate per
19 100,000, the crime rate.

20 Now, that is an astounding
21 reduction in major crime in the country. The

NEAL R. GROSS

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

1 same situation with violent crime throughout
2 the nation.

3 Now, when the sentencing
4 guidelines were first enacted in the
5 Sentencing Act in 1986 was first enacted it
6 was passed on a bipartisan basis by people
7 who predicted that this -- or who knew that
8 we were in this type of epidemic. There was
9 a problem.

10 Now, you might say, well, okay,
11 how is this -- I know there are some tricky
12 issues here because I think it was a very
13 prescient point that Mr. Felman just made that
14 many of these arguments could have been made
15 and relate to both issues, both the initial
16 issue of the reduction across the board and
17 also to retroactivity. I think there's
18 something to say for that.

19 But it's difficult for me to
20 separate the philosophic issue here and from
21 the pure, quote, "fairness" issue.

NEAL R. GROSS

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

1 I was surprised, or not really
2 surprised but I did note that during the
3 Department of Justice spokesman's statement
4 some six times it was said that, well, these
5 reduced sentences that were longer than
6 necessary was the phrasing. Unnecessarily
7 long. Longer than necessary. Greater than
8 necessary. Unnecessarily long. Stringent
9 mandatory minimums resulting in greater than
10 necessary penalties.

11 And I think that's an extremely
12 subjective assessment here to say that they
13 were greater than necessary when you're
14 looking at a reduction in crime of such a
15 dramatic nature.

16 Now, why is it related necessarily
17 to drug offenses? I was totally shocked when
18 I was preparing for this message at the recent
19 statistics from the ADAM Report which I'm sure
20 the Commission is aware of which was reported
21 by the ONDCP Chairman. And even she had to

NEAL R. GROSS

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

1 acknowledge that drugs are fueling most of
2 the crime in our nation.

3 Eighty percent of those arrested,
4 roughly 80 percent of those arrested for
5 violent crime in Sacramento, for instance,
6 tested positive for a controlled substance in
7 their system.

8 The average of the 10 cities that
9 were surveyed by the ADAM Report -- this is
10 in 2012 -- the average was over 60 percent of
11 those arrested for violent crimes had drugs
12 in their system, controlled substances.
13 We're not talking alcohol, we're talking
14 controlled substances.

15 The surveys that are conducted,
16 national and state, of prisoners throughout
17 the country show that some 30 percent of those
18 arrested for burglary, 30 percent, admitted
19 that they committed their crimes for the
20 purpose of procuring money to obtain drugs.
21 The same statistics, virtually the same hold

NEAL R. GROSS

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

1 up for burglary.

2 Now, we heard a lot of discussion
3 about the cost here, an astounding cost to
4 the system. But the cost in pure dollars,
5 not to mention the untold cost in human misery
6 and pain and trauma associated with the drug
7 culture, it far, far outstrips the some \$2
8 billion that the prison -- and that's the top
9 number that the prison chief just discussed.

10 Now, I don't know about these
11 numbers, and I don't know, the Commission may
12 already have a sense of whether they have
13 validity or not. But the New York Times
14 reported that -- it was the most comprehensive
15 study of its kind by Iowa State University in
16 determining what the cost of each crime was.

17 Now, I mentioned earlier that
18 there were 674,000 robberies in the country
19 in 2012. If you look at the statistics they
20 show that 30 percent of those were committed
21 by those seeking money to obtain drugs, you've

NEAL R. GROSS

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

1 got about two hundred and some plus thousand
2 of those robbery offenses.

3 This study, the most comprehensive
4 study, said that the cost in human, the
5 societal cost from each robbery is some
6 \$331,000. Now if you add that up that comes
7 out to about \$32 billion and that's in 2012
8 alone.

9 If you add to that the burglaries
10 you're looking at 2.1 million burglaries 30
11 percent of which were committed by those
12 seeking money to purchase drugs. If you add
13 that up based on the statistics showing
14 \$41,000 -- and I'll end right here -- \$41,000
15 --

16 CHAIR SARIS: See the red light?

17 MR. SUKHIA: Yes, I'm sorry. If
18 you multiply that you come up with a total of
19 \$59 billion in 2012 alone in the cost to
20 society for these crimes.

21 Now, if I might I'd just like to

NEAL R. GROSS

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

1 conclude because I want to say that I've
2 represented folks who are in federal prison.
3 And I have a great empathy for what they've
4 gone through.

5 If you hone it down to the
6 individual case it's difficult not to. In
7 fact, I did when I was prosecuting. I'm fully
8 aware of my own frailties so I would always
9 look at it as Benjamin Disraeli did when he
10 said that there but for the grace of God go
11 I.

12 I completely and totally empathize
13 and I feel a sense of conflict about this
14 issue.

15 But I would want to say that
16 someone had once said that mercy to the guilty
17 can be cruelty to the innocent. And I have
18 to say in balance, and when I was called by
19 the staff I had to take a double take and say
20 well, what would my position be on this.

21 Because when I look at the

NEAL R. GROSS

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

1 dramatic decrease in crime over the course of
2 the last 28 years I don't think it's the right
3 thing to do as has been said here.

4 Those who -- and I just conclude
5 with my remarks -- but those who argue that
6 the war on drugs has failed would do well to
7 stop and consider what our nation would look
8 like if there had been no law enforcement
9 efforts to combat the onslaught.

10 As I noted at the outset which I
11 didn't hear but because drug offenses are so
12 wide-ranging and indiscriminate, the many
13 victims of the illicit drug trade are not
14 easily identified.

15 Ironically, many of the
16 beneficiaries of the war on drugs will also
17 never be known. They're the untold millions
18 who were able to avoid being victimized by
19 drugs and their inherent violence because of
20 the many drug lords and traffickers who served
21 the better part of their time in the war

NEAL R. GROSS

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

1 behind bars.

2 Proponents have argued that the
3 amendment and its retroactive application
4 will save money, but this argument seems to
5 overlook the enormous human cost inherent in
6 stepping back from a sentencing formula that
7 has contributed to the largest sustained
8 decrease in crime in our nation's history.
9 Thank you.

10 CHAIR SARIS: Thank you.
11 Questions?

12 VICE CHAIR JACKSON: So, Ms.
13 Gannett, I heard you say at the outset that
14 the Commission has already determined that
15 the drug guideline produces sentences that
16 are greater than necessary. And I am a little
17 concerned about the framing of the issue in
18 that way.

19 MS. GANNETT: The drug quantity
20 table.

21 VICE CHAIR JACKSON: The drug

NEAL R. GROSS

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

1 quantity table. So, thank you, I misheard
2 you.

3 MS. GANNETT: If I said the wrong
4 thing I apologize. What I meant to say is
5 the drug quantity table reduces sentences.

6 VICE CHAIR JACKSON: And let me
7 just follow up by saying, and this sort of
8 segue-ways into a question I think for Mr.
9 Debold, that at least my understanding
10 speaking for one Commissioner is that there
11 was a significant concern about the fact that
12 quantity was sort of driving the guideline.
13 And that by lowering the quantity other
14 factors related to the crime could be taken
15 into account. And there would be better
16 differentiation.

17 And so it's possible I think that
18 under those circumstances there will be
19 sentences that judges have already imposed in
20 cases that the court might upon retroactivity
21 determine were perfectly appropriate given

NEAL R. GROSS

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

1 the other factors in the case that perhaps
2 may not have been able to come to full flower
3 in a situation in which we had so much
4 emphasis on drug quantity.

5 So my question I guess, Mr.
6 Debold, is that you said you believe that
7 judges would change their sentences upon
8 retroactivity in I guess the vast majority of
9 cases if not all the cases.

10 And I'm not so sure that's so. So
11 I'm just wondering what your reaction is.

12 MR. DEBOLD: Yes, and I didn't
13 mean to suggest that that will happen across
14 the board.

15 What I was doing, and I was
16 probably rushing through it, was I was
17 addressing I think at that point the idea of
18 there being an exception or an exclusion for
19 defendants who were sentenced after Booker,
20 for example, that they would not get the
21 benefit of this.

NEAL R. GROSS

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

1 Under the assumption that judges
2 since Booker have been under an advisory
3 regime and they've been able to take into
4 account the ways in which the drug quantity
5 table may overstate the seriousness of the
6 offense in relation to the other factors.

7 My point is I don't think judges
8 have been uniform in how they have reacted to
9 Booker in general or in the drug guidelines
10 in particular.

11 And I think to have an exclusion
12 on the assumption that, well, after Booker
13 judges could already take into account the
14 ways in which they might disagree with the
15 drug quantity table.

16 I think some judges may have done
17 that and they may honestly say to a defendant
18 after retroactivity is put through I actually
19 already took that into account in your
20 sentence so I'm not going to lower it.

21 But I think a large number of

NEAL R. GROSS

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

1 judges who will be sentencing people after
2 November 1 will be giving them a lower
3 sentence than they would have given them
4 before November 1.

5 I think if you look at it that way
6 you can see the ways in which retroactivity
7 is going to result in judges imposing
8 sentences that are more tailored to the
9 particular facts and the particular nature of
10 the offense in those cases.

11 I think putting an artificial
12 limit on when judges can do that is not the
13 way to go in light of that.

14 MS. GANNETT: Judge Jackson, if I
15 could address that question as well.

16 The specific statistics are in our
17 written statement, but I think that the
18 numbers that we looked at suggest that the
19 majority of the eligible defendants if the
20 amendment is made retroactive are going to be
21 post-Booker defendants.

NEAL R. GROSS

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

1 And that post Booker the
2 Commission's statistics demonstrate that
3 something like four-fifths of these
4 defendants were sentenced to within-
5 guidelines sentences.

6 And that even among those the
7 majority who received any reduction sentence
8 received a government sponsored reduction in
9 sentence. So that the number who received a
10 variance sentence is very small.

11 And if my memory serves correctly
12 which it may not it's something like only 10
13 percent received a non-government sponsored
14 reduction in sentence at their original
15 sentence.

16 And so I think the numbers will
17 actually turn out to be greater than you might
18 suspect post Booker. I think that the
19 guidelines still provide a real anchor to most
20 judges in sentencing. And so that the
21 retroactive amendment will still provide a

NEAL R. GROSS

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

1 real possibility for relief for a lot of
2 defendants.

3 Of course, judges will still take
4 a very close look at those cases where there
5 may be a defendant who presents a public
6 safety risk, or a danger to the community and
7 will make appropriate decisions about who
8 should be entitled to those reductions.

9 But I don't think it's a safe
10 assumption to make that the sentences have
11 been appropriately calibrated based on drug
12 quantity.

13 CHAIR SARIS: I think it was
14 Officer Manger from the Major Chiefs
15 Association, who said -- I took it down
16 because I liked the way he said it which is
17 don't just think about costs. Move
18 cautiously to think about public safety. And
19 he came up with a series of measures that he
20 thought were essential so that the violence
21 wouldn't return.

NEAL R. GROSS

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

1 And one of the concerns of course
2 we're all grappling with which I think only
3 merited a footnote in some of the testimony
4 were resources, to make sure that there were
5 significant enough resources to handle the
6 huge numbers of people we're talking about.

7 And I wondered whether in light of
8 that, whether it's a carve-out, or whether
9 it's a delayed implementation, whether any of
10 you could comment on whether or not you
11 thought that that would be a fair balance
12 between public safety and fairness.

13 MR. FELMAN: Well, I'll say that
14 I thought that the judiciary suggestion of a
15 slightly delayed implementation seemed pretty
16 well considered.

17 And I guess it's also consistent
18 with what the Commission did in 2007 where it
19 took a little while for the Commission to do
20 the vote on retroactivity, and then it took a
21 little while to implement it.

NEAL R. GROSS

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

1 And I think that it's -- I mean,
2 this I have to say I guess is my personal
3 reaction. The ABA doesn't have a policy on
4 that point. But my sense was that that was
5 a pretty fair balancing of the resource issue.

6 VICE CHAIR HINOJOSA: I guess I'm
7 always puzzled by the discussion of drug
8 penalties are driven by type of drug and the
9 quantity of drug. Because I don't care what
10 the system is, guidelines or no guidelines,
11 of course that would be the major concern and
12 discussion I think of any sentencing judge,
13 certainly the type of drug and certainly the
14 amount of the drug.

15 Having done five years of
16 sentencing without guidelines it certainly
17 was a huge factor in how I approached a case.

18 But so far nobody today has
19 addressed the issue of should it make a
20 difference as to what the type of drug is.
21 Are there some drugs that this should be

NEAL R. GROSS

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

1 eligible for and others not eligible for.
2 Nobody's commented on that and I guess there's
3 no distinction made by anyone on that
4 particular point.

5 MR. FELMAN: I looked at it
6 because I was ready to make the argument,
7 well, surely the propaganda at least is that
8 crack dealers are the worst. And I was ready
9 to be able to come in and say well, these
10 people are all better.

11 And then I looked and I saw that
12 there are a lot of meth, the meth was pretty
13 high. And I don't know whether there's any
14 data on whether meth dealers are more or less
15 dangerous than crack dealers so I didn't go
16 there.

17 But certainly there's a whole lot
18 of marijuana which may be less. But I looked
19 at it.

20 It just struck me that if we did
21 it with crack and the retroactivity data for

NEAL R. GROSS

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

1 those people showed that letting them out
2 earlier resulted in lower rates of recidivism
3 that there isn't any real reason to think
4 there would be a difference. I know it says
5 statistically significant, but in every
6 criminal history category it's a lower rate.

7 It just struck me if it wasn't a
8 difference in recidivism and public safety
9 impact for crack there isn't any reason to
10 limit it to the other drugs.

11 MR. DEBOLD: I come back to my
12 third point in my oral testimony which is this
13 is really an argument for not making the
14 change for certain categories of drugs
15 prospectively.

16 I mean, if we are satisfied with
17 a minus two across the table for all drug
18 types and there isn't concern that meth or
19 whatever drug it is, you know, that we're
20 going to have problems going forward I don't
21 see why we would apply that kind of an issue

NEAL R. GROSS

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

1 for the purpose -- if we're going to do it
2 retroactively I don't see why we would draw a
3 line that way. That's been my sort of view
4 of it on a lot of these issues.

5 CHAIR SARIS: Judge Breyer and
6 then Commissioner Barkow.

7 VICE CHAIR BREYER: I wondered
8 along with Commissioner Saris in light of our
9 concerns about public safety going forward,
10 in light of the chiefs' concern about not just
11 individualized evaluations, but also a
12 network out there, some type of safety network
13 that would include such things as monitoring
14 during release and so forth whether there is
15 some potential marriage to the effective date
16 of the release in terms of the decision being
17 made whether or not this person should be
18 released.

19 For example, if you say that the
20 effective date of the retroactivity is March
21 or May or some date next year does that mean

NEAL R. GROSS

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

1 that you cannot, a judge cannot make that
2 determination as to whether or not the person
3 to be released in March or May in November or
4 December or January.

5 I'm trying to see, because I am
6 very concerned about, one, resources over
7 which we don't control. I mean, that was the
8 -- there couldn't have been a truer statement
9 made today that we don't control resources.
10 It's a question of appropriations. It's a
11 question of the Congress of the United States.

12 Maybe to some extent it's a
13 question of how DOJ or some other Department
14 allocates their given resources. That's
15 another issue.

16 But for us to have some comfort at
17 all in the system I think at least one
18 Commissioner would like to see whether or not
19 there can be some intelligent -- when I say
20 intelligent I'm arguing the result -- some
21 type of allocation of a decision, or a making

NEAL R. GROSS

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

1 of a decision, and an effective date for
2 implementation of that decision.

3 Does that create problems? Does
4 it answer some problems? So it really is
5 sort of what you people are the experts in.
6 You're the Practitioners Group or the public
7 defender and so forth. Is that doable? Is
8 it not doable?

9 MS. GANNETT: I would like to
10 address that. I think from the defender's
11 perspective obviously some retroactivity is
12 better than no retroactivity.

13 But I think we need to be careful
14 about speculating as to what solution would
15 solve an indisputable question about
16 resources. We are guessing about the
17 resource problem to some degree.

18 I mean, there is a resource
19 problem but we're guessing about the degree.
20 And I don't know how we know whether
21 implementing this as of November, as of March,

NEAL R. GROSS

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

1 as of May would be the right result.

2 And our concern is that we're
3 deciding that somewhere between 4,500 and
4 12,000 depending on how the data work out, I
5 don't know after November 1 how the next 8,000
6 people get released over year one -- may not
7 get the benefit of this amendment based on
8 questions that we have about resources and
9 how those resources will be allocated.

10 And that seems like a very
11 slippery slope to be walking on.
12 Particularly because those four to twelve
13 thousand people are probably the people for
14 whom we have the best pre-release planning in
15 place since as the judge pointed out those
16 people are the closest to the end of their
17 sentences. And as BOP pointed out we begin
18 pre-release planning somewhere between 180
19 and 90 days before the sentence is coming to
20 a close.

21 I was encouraged that BOP just

NEAL R. GROSS

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

1 based on the potential that this might become
2 retroactive is already planning for the
3 prospect that it would be and had some ideas
4 and some offerings about, you know, this is
5 what we're doing already in case it does.

6 And it sounds like Probation is
7 also being thoughtful about that, and the
8 Criminal Law Committee is also being
9 thoughtful about that.

10 It seems to me that the right
11 thing to do is for all of us to start being
12 thoughtful about what things we can do to
13 streamline the process, to shift resources
14 where they need to be shifted, to use the
15 plans that we have in place in 2011 to teach
16 folks from districts that didn't have to
17 grapple with this before how to do that.

18 And to use every day of the next
19 three and a half, four months between the
20 Commission's decision-making and November 1
21 to provide the benefit of the retroactive

NEAL R. GROSS

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

1 amendment to every person to whom it can be
2 provided.

3 Probation certainly has
4 demonstrated in the past as has every agency
5 seated around this room an ability to juggle
6 tight resources. And certainly the last two
7 years all of us have had to do that in our
8 respective agencies.

9 This will be undoubtedly a burden,
10 but the most positive kind of burden, the kind
11 of burden that we should all embrace because
12 it does justice.

13 CHAIR SARIS: Thank you.
14 Commissioner Barkow?

15 COMMISSIONER BARKOW: Thanks, and
16 I'll keep this quick. I'm just curious from
17 your experience with the crack decisions from
18 the hearings that judges had made how often
19 was it the case that someone who had some of
20 these factors that the Department of Justice
21 has identified was nevertheless given the

NEAL R. GROSS

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

1 two-level reduction by judges?

2 I'm just trying to get a sense of
3 when -- let's say you had before when there
4 wasn't a categorical prohibition a judge had
5 before him or her someone who had a violent
6 SOC, or someone who had an aggravating role,
7 or a weapon.

8 In your experience did those folks
9 still get two-level reductions by judges? Or
10 does the Department pretty much have -- is
11 the Department reflecting what judges were
12 actually doing when they were doing the case-
13 by-case approach with crack offenders?

14 MS. GANNETT: I would say this.
15 In many cases they did get reductions. In
16 some cases they didn't.

17 But what happened was a very
18 cooperative process where prosecutors and
19 defense lawyers came together and figured out
20 who are the people who are safe to release
21 into the community and who are the people who

NEAL R. GROSS

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

1 are not. And then made a recommendation to
2 judges.

3 And attached to our testimony you
4 have examples of the kind of motions and
5 agreed-upon orders that were submitted to
6 judges to make that process effective and
7 efficient for judges.

8 There were very few actual
9 litigated public safety motions where there
10 was a dispute about who was okay to release
11 early and who wasn't.

12 And when there was a community
13 safety issue that was litigated before the
14 judge. But those cases were few and far
15 between.

16 And I think that's reflected in
17 what you heard from Probation about the number
18 of hearings that occurred. There were very
19 few.

20 But when they needed to happen
21 they did. And when courts needed to deny

NEAL R. GROSS

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

1 those motions they did and those people served
2 out the remainder of their sentences.

3 It's important to note though that
4 the recidivism study demonstrates that even
5 in those higher categories, 3, 4, 5, 6, there
6 are not higher rates of re-offending. Even
7 for people who had weapons there are not
8 higher rates of re-offending.

9 Even for people that have
10 mandatory minimums because of gun possession.
11 A lot of those cases are gun possession, not
12 brandishing or use of a weapon.

13 So they're really broad categories
14 that the Department is proposing be applied
15 here that aren't necessarily going to well
16 measure who's safe to release into the
17 community or not.

18 COMMISSIONER WROBLEWSKI: But,
19 Ms. Gannett, if you were correct that this in
20 fact was a robust process the last time we
21 went through this in 2007 and 2011, wouldn't

NEAL R. GROSS

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

1 the recidivism rate be significantly lower
2 for the people who went through that process
3 than for the people who didn't go through that
4 process?

5 Yes, it was lower, but by a
6 smidge. It was basically the same. So how
7 can you conclude -- I'm just curious how you
8 come to the conclusion that that process was
9 a robust process identifying public safety.

10 MS. GANNETT: Because community
11 safety is not -- the danger to the community
12 is not the only thing that affects recidivism.

13 When people return to the
14 community they face all kinds of challenges
15 that can't be estimated based only on their
16 record. I think that's just the reality that
17 we have to confront. These people are often
18 returning to communities where they face
19 significant challenges that are unrelated to
20 the kind of factors the Department has
21 identified.

NEAL R. GROSS

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

1 The Department didn't identify
2 their socioeconomic condition. The
3 Department -- and we can't identify that.
4 But returning to a community like that creates
5 issues for people. And that's not something
6 that we can control for.

7 There's going to be some
8 recidivism. Just like when these people are
9 released at the end of a full-term sentence
10 there's going to be some recidivism. That's
11 just a fact.

12 But all of these individuals that
13 we're talking about today are going to be
14 released someday. It's just when. Are they
15 going to be released at a time that we think
16 is sufficient but not greater than necessary
17 to fulfill the purposes of punishment? Or
18 are they going to be released at a later date?

19 CHAIR SARIS: One more question
20 and then everybody can have lunch. So a quick
21 response.

NEAL R. GROSS

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

1 MR. SUKHIA: One thought. On the
2 crack cocaine level of recidivism at least in
3 our community and I think in our state and
4 probably across the country we had a crack
5 cocaine wave. And it came and it's still an
6 issue but it's far less of an issue now.

7 I don't know to what extent that
8 should factor in in determining how
9 recidivism rates among those who got caught
10 up in the crack cocaine epidemic, their
11 recidivism rates versus those who are
12 involved in across the border offenses that
13 you've identified here.

14 CHAIR SARIS: Thank you. One
15 last question and then lunch.

16 VICE CHAIR JACKSON: We've heard
17 a lot about fairness, the moral imperative,
18 et cetera, et cetera. And I have to say that
19 I saw that very clearly in the crack cocaine
20 retroactivity.

21 Here it's not as clear. And I'm

NEAL R. GROSS

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

1 wondering is crack retroactivity a different
2 animal or not? From your perspective.

3 MR. DEBOLD: To me they're
4 different but I'm not sure they're really
5 different in kind. They may be different in
6 degree. And I think there are factors for
7 each that are important.

8 I think the common theme is with
9 the current amendment the Commission is
10 considering is the extent to which a statutory
11 provision, mandatory minimums, has skewed in
12 some fashion the penalties that apply up and
13 down the drug quantity table because of the
14 effort to try to avoid the cliffs that Jim
15 referred to.

16 And although I think there is a
17 difference when you're talking about the
18 racial disparities that a number of people
19 were concerned about between crack and
20 powder, the common theme is that you've got a
21 statutory provision that was not written in a

NEAL R. GROSS

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

1 very circumscribed and careful manner in our
2 view.

3 And I think that view is now
4 pretty widely held, that that was resulting
5 in sentences that were greater than necessary
6 to achieve the purposes of sentencing as a
7 general matter. And that if you apply those
8 in individual cases that you're going to come
9 out with different outcomes after you've made
10 that fix.

11 And so I think that is a common
12 theme. I understand the arguments, there
13 were some more compelling arguments in crack,
14 but it doesn't meant that just because there
15 were stronger arguments in the crack context
16 that there isn't a strong argument in this
17 case albeit based on some different factors.

18 But all coming back to the
19 question of whether the guidelines were
20 properly calibrated in light of what was
21 influencing them and how they were

NEAL R. GROSS

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

1 promulgated in the first place.

2 MR. FELMAN: I think they're
3 slightly different arguments but equally
4 strong given the number of human beings that
5 we're talking about that are sitting in
6 federal prisons right now that maybe don't
7 need to be there. And that would be my last
8 effort to stand between everyone and lunch.

9 CHAIR SARIS: Thank you very much.
10 Thank you for -- you represent the people in
11 the courts who -- fighting every day to do
12 the just thing. So thank you very much for
13 your testimony. Fighting us every day.

14 (Laughter)

15 CHAIR SARIS: Thank you very much.
16 Enjoy lunch. One hour. Thank you.

17 (Whereupon, the above-entitled
18 matter went off the record at 12:54 p.m. and
19 resumed at 2:00 p.m.)

20 CHAIR SARIS: Okay, here we go.
21 All right. So we're here. Thank you very

NEAL R. GROSS

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

1 much for coming to this meeting. This is the
2 group from all of you who work so hard on
3 policy issues in this area.

4 I begin with Pat Nolan who is the
5 director of the Criminal Justice Reform
6 Project of the American Conservative Union
7 Foundation.

8 He is the former president of the
9 Justice Fellowship, the public policy arm of
10 Chuck Colson's Prison Fellowship Ministries.
11 Mr. Nolan served for 15 years in the
12 California State Assembly, 4 of those years
13 as the Assembly's Republican leader.

14 So, the next person is Jesselyn
15 McCurdy. Welcome. Senior legislative
16 counsel for the American Civil Liberties
17 Union.

18 Ms. McCurdy previously served as
19 counsel for the House Subcommittee on Crime,
20 Terrorism and Homeland Security. She co-
21 directed the Children's Defense Fund's

NEAL R. GROSS

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

1 Education and Youth Development Division and
2 served as a staff attorney for the American
3 Prosecutors Research Institute.

4 Mary Price -- I think, Ms.
5 McCurdy, you've been here before, right? And
6 Mr. Nolan, have you? Yes? All right. So
7 repeat testifiers.

8 Mary Price certainly has as
9 general counsel for the Families Against
10 Mandatory Minimums. She's been general
11 counsel since 2000. She directs the FAMM
12 Litigation Project and works on federal
13 sentencing reform.

14 And prior to joining FAMM she was
15 associated with the firm of Feldesman,
16 Tucker, Leifer, Fidell & Bank handling
17 appeals of court martials and has conducted
18 administrative advocacy on behalf of United
19 States servicemembers.

20 Brandon Sample, the Executive
21 Director of Prisology, has worked as a client

NEAL R. GROSS

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

1 affairs coordinator at the Federal Legal
2 Center, a Florida law firm, and is currently
3 involved at the Vermont Law School.

4 And last but by no means least is
5 Russell Butler who's the chair of the
6 Commission's Victims Advisory Group as well
7 as the executive director of the Maryland
8 Crime Victims Resource Center.

9 He serves as an adjunct professor
10 at the University of Baltimore Law School.
11 Welcome.

12 For those of you who were not here
13 before lunch we have this -- I think most of
14 you know this, you've testified here before.
15 This light symbol. And then when the light
16 goes off I start jumping up and down and so
17 please don't ignore me because I think I need
18 to be more aggressive about enforcing the
19 lights.

20 (Laughter)

21 CHAIR SARIS: So thank you very

NEAL R. GROSS

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

1 much, Mr. Nolan.

2 MR. NOLAN: Judge Saris and
3 distinguished Commissioners, thank you for
4 the chance to comment on this. As Judge Saris
5 said I served in the legislature and I was a
6 leader on criminal issues, especially crime
7 victims, on behalf of crime victims.

8 I was an original co-sponsor of
9 the Victims Bill of Rights and I received the
10 Parents of Murdered Children Victims Advocate
11 Award.

12 During the course of my service
13 there, however, I was prosecuted for a
14 campaign contribution I received that turned
15 out to be part of a federal sting. And so I
16 was convicted and pleaded to one count of
17 racketeering and served 29 months in federal
18 custody. So I've had a chance to see the
19 criminal justice system from both sides of
20 the bars.

21 I'm a conservative Republican and

NEAL R. GROSS

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

1 I would note to you that there's a growing
2 movement among conservatives to rethink the
3 long sentences and the excessive costs not
4 only in human terms but in fiscal terms for
5 the states.

6 I'm part of a group called Right
7 on Crime which includes among its signatories
8 former Attorney General Ed Meese, former
9 Speaker of the House Newt Gingrich, former
10 drug czar Asa Hutchinson among dozens of other
11 prominent conservatives.

12 None of them would anyone accuse
13 of being soft on crime but they do think we
14 need to rethink the way we handle crime.

15 Texas led the way in efforts to do
16 this, and substantially reducing the prison
17 population based on dangerousness. There's
18 a rubric we use which is prisons are for
19 people we're afraid of, but we've often filled
20 them with folks we're just mad at.

21 And by diverting those folks we're

NEAL R. GROSS

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

1 just mad at to other punishments but that
2 don't include incarceration it takes less of
3 a toll on their lives and far less toll on
4 the public pocketbook.

5 Because of those reforms Texas is
6 able to scrap plans for three new prisons and
7 in fact close an existing prison and diverted
8 that money, a substantial part of the money
9 into drug treatment and mental health
10 treatment.

11 The results have been phenomenal.
12 The crime rate is now the lowest it's been
13 since 1968. And they've saved literally
14 billions of dollars for the taxpayers.

15 Texas was followed by South
16 Carolina, Georgia, Pennsylvania, Missouri,
17 Kentucky, there's a longer list than that of
18 states that have had adopted these reforms.

19 And it's shown that we can keep
20 the public safe, saving taxpayers money and
21 frankly put people back on the road to

NEAL R. GROSS

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

1 reforming and restoring their lives more
2 quickly than by the lock them up and throw
3 away the key methods.

4 There are two points I would make
5 about this. One is where the sentence
6 reduction which this Commission adopted not
7 made retroactive it would cause great
8 resentment within the prison.

9 While I was in prison there was
10 the disparity, the tremendous disparity
11 between crack and powder cocaine. And the
12 friction among cellmates and among other
13 prisoners between those who had relatively
14 significantly lighter sentence for powder
15 than for crack even though pharmacologically
16 there's no difference was -- it was palpable.

17 To not make this retroactive would
18 mean people would go into prison under the
19 new sentence, serve their sentence and leave,
20 while someone convicted before would remain
21 in prison. And that is a basic unfairness

NEAL R. GROSS

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

1 that I don't think the system should tolerate.

2 Now, there are Cassandras that
3 have predicted that the streets will run riot
4 with violent prisoners if you make this
5 retroactive.

6 Frankly, those same voices
7 repeatedly have told this Commission and
8 Congress that any reduction in sentences will
9 result in a crime wave. I can quote chapter
10 and verse of their testimony.

11 The fact of the matter is they've
12 misled this Commission for years. Those
13 things never happened. There was not a crime
14 wave after you made the crack/powder
15 disparity retroactive. The recidivism rate
16 of those who were reduced was no greater than
17 the average population.

18 The second point I'd make is the
19 average person under this proposal would
20 serve eight years. That's a long sentence by
21 any stretch. And if they still pose a danger

NEAL R. GROSS

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

1 after that point the prosecutor can make that
2 point to the judge.

3 Lastly, I'd say the Bible tells us
4 that sentences should be measure for measure
5 and pound for pound. That's the balance in
6 our system. And I just strongly urge you to
7 adopt this reform retroactively so that we
8 have that equality of sentencing. Thank you.

9 CHAIR SARIS: Thank you. Ms.
10 McCurdy.

11 MS. MCCURDY: Thank you. I want
12 to thank Judge Saris and the other
13 Commissioners for inviting the American Civil
14 Liberties Union to testify today on the
15 retroactivity of the amendment that would
16 revise guidelines applicable to drug
17 trafficking offenses.

18 The ACLU is a nationwide non-
19 partisan organization with more than 500,000
20 members dedicated to the principles of
21 liberty and equality embodied in our

NEAL R. GROSS

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

1 Constitution.

2 We believe the Commission should
3 apply this amendment to the drug quantity
4 table retroactively because it would be an
5 important step toward improving the fairness,
6 proportionality of the guidelines, racial
7 disparities in sentencing and an
8 unsustainable and costly explosion in the
9 number of people in the custody of the Bureau
10 of Prisons.

11 In testimony before the Commission
12 on March 13 the Attorney General endorsed the
13 Commission's amendment and in his testimony
14 he stated that it would help to rein in
15 federal prison spending while focusing
16 limited resources on the most serious threats
17 to public safety.

18 The Commission's own data further
19 proves Attorney General Holder's point
20 because it indicates that BOP would save over
21 83,000 bed years if the amendment were applied

NEAL R. GROSS

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

1 retroactively.

2 Currently, 50 percent of the
3 federal prison population is comprised of
4 drug offenders. In the more than 25 years
5 since the enactment of the guidelines one of
6 the most important indications that the
7 guidelines for drug trafficking offenses are
8 excessive is the dramatic impact it has had
9 on the federal prison population.

10 In 1984 when the Sentencing Reform
11 Act was passed the federal prison population
12 was over 34,000. By 1994 it was more than
13 95,000. By 2004 it was approximately
14 180,000. And as of June 5 there are almost
15 217,000 inmates in the custody of BOP.

16 The guidelines' severity has been
17 one of the driving causes of the federal
18 prison population that has grown at an
19 astonishing rate of almost 800 percent since
20 1980 resulting in BOP operating at about 35
21 percent over capacity.

NEAL R. GROSS

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

1 While the amendment lowering the
2 base offense levels in the drug quantity table
3 is a critical step forward, it would be an
4 unfortunate step backwards and a drastic
5 dilution of its potential impact if the
6 Commission were to decide not to apply the
7 amendment retroactively.

8 This is particularly true in light
9 of the fact that the underlying concerns with
10 ensuring fairness, proportionality and
11 rationality in federal sentencing that
12 motivated the Commission to promulgate the
13 amendment in the first place apply as equally
14 to old sentences as they do to new sentences.

15 The Commission's Office of
16 Research and Data estimates that over the
17 course of 30 years over 51,000 people
18 sentenced between 1991 and 2014 would be
19 eligible to see a reduction in their current
20 sentence if the Commission were to make the
21 amendment retroactive.

NEAL R. GROSS

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

1 Of these people about 4,500 would
2 gain immediate release while 25 percent of
3 the people who appear to be eligible for
4 sentencing reductions are projected to be
5 released over the first five years.

6 Another 25 percent would remain
7 incarcerated for the first five years after
8 implementation. And the average sentence for
9 offenders who would be eligible for
10 retroactivity is 10 years and 5 months.

11 Over one-third of eligible people
12 would receive a sentence reduction of less
13 than one year. Sixty-nine percent of those
14 eligible would receive a sentence reduction
15 of less than two years, and only 3 percent
16 would be eligible for a sentence reduction of
17 more than five years.

18 Almost 40 percent of the eligible
19 offenders fall into the lowest criminal
20 history category.

21 Third, the impact on racial

NEAL R. GROSS

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

1 disparities in drug sentencing will be
2 profound. The data analysis of racial impact
3 on retroactive reduction indicates that over
4 74 percent of the people whose sentences would
5 be reduced or could be reduced under the law
6 are Black or Hispanic.

7 This effort, like retroactivity of
8 the crack cocaine amendments, is important to
9 restore much needed confidence in the
10 criminal justice system, especially in
11 communities of color.

12 The Commission has amended the
13 drug guidelines with the effect of lowering
14 sentences several times before. In each
15 instance has made the amendments retroactive.

16 For example, with LSD, marijuana,
17 oxycodone, all have been made retroactive
18 without incident.

19 More recently, the Commission
20 elected to apply the 2007 and 2011 crack
21 amendments again without difficulty.

NEAL R. GROSS

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

1 After the Commission voted to
2 authorize courts to apply the 2007 crack
3 cocaine amendment by 2011 courts had decided
4 over 25,000 motions for retroactive
5 application.

6 Of those motions, over 16,000 or
7 64 percent were granted and more than 9,000
8 were denied. But among those 9,000 more than
9 7,000 of those were filed on behalf of people
10 who were not eligible for the sentencing
11 reduction.

12 The courts denied 14 percent of
13 the motions on the merits, but no more than 6
14 percent of all motions were denied for reasons
15 that may be related to public safety.

16 Between 2008 and 2011 courts
17 across the country reviewed and were able to
18 decide half as many re-sentencing motions as
19 the Commission estimates are eligible under
20 the recent drug quantity table amendment.

21 This proves that courts are more

NEAL R. GROSS

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

1 than able to review the potential number of
2 motions that may be filed as a result of the
3 current amendment.

4 Considering the more than 51,000
5 people the Commission estimates could be
6 eligible under the current amendment have
7 release dates that span over 30 years
8 retroactive implementation of the amendment
9 could be staggered such that courts could
10 prioritize the motions of people who are
11 eligible for release within the first few
12 years.

13 The relatively smooth application
14 of courts of the two other reductions over
15 2007-2008 demonstrates that retroactivity of
16 sentencing reducing amendments in addition to
17 being just can be implemented practically.

18 The ACLU appreciates the
19 opportunity to testify on retroactive
20 application of the amendment. We urge the
21 Commission to seize this historic opportunity

NEAL R. GROSS

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

1 to correct the injustices of the past.

2 CHAIR SARIS: Perfect. Thank
3 you.

4 MS. PRICE: Judge Saris and
5 Commissioners, thank you for the invitation
6 to testify before you today.

7 I'm grateful for this. I'm here
8 on behalf of the staff, the board and the
9 75,000 members and supporters of FARM. These
10 are members who are directly affected in the
11 most profound and personal ways by many of
12 the decisions that you make. For them, on
13 their behalf we urge you to make the 2014 drug
14 guidelines amendment retroactive.

15 In our written testimony we
16 explain why retroactivity meets the core
17 considerations the Commission applies,
18 purpose, magnitude and ease of application.

19 It's certainly warranted in light
20 of these factors, but it's required in the
21 interests of justice.

NEAL R. GROSS

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

1 I was going to treat you today to
2 a treat that I had received was to talk with
3 a number of ex-prisoners who had been released
4 years early because of the two past decisions
5 on retroactivity.

6 I wanted to bring you their
7 stories and their messages about how they've
8 spent the years that they got back.

9 But after hearing this morning
10 from the Department of Justice about the
11 exclusions that the Department is urging you
12 to adopt, should you adopt retroactivity, I
13 thought I ought to maybe treat you to those
14 stories in my written submission and take a
15 moment to talk about those exclusions.

16 I'm pleased, first of all, in fact
17 delighted that the Department is supporting
18 retroactivity. But, of course we're
19 concerned about the exclusions. And we feel
20 that the Department's position is both
21 curious but also insupportable.

NEAL R. GROSS

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

1 The DOJ witness told us that in
2 the interest of efficiency and public safety
3 that the Commission should limit
4 retroactivity to the Department of Justice's
5 definition of lower-level non-violent
6 offenders without significant criminal
7 history. But this is wrong for many, many
8 reasons.

9 First and foremost is the
10 Department's own commitment to this amendment
11 brought to you by none other than the Attorney
12 General himself who cited fairness and the
13 need to get a grip on the overburdened federal
14 prison population as reasons to lower all drug
15 sentences by two levels.

16 He said to you this sent a strong
17 a message on the fairness of our criminal
18 justice system to the public.

19 The Department came under fire at
20 the meeting where you voted on drugs minus
21 two because the Attorney General had just the

NEAL R. GROSS

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

1 night before directed Assistant U.S.
2 Attorneys to not object to defense
3 recommendations for a drug sentence reduction
4 of two levels.

5 Commissioner Wroblewski launched
6 a spirited defense citing the requirement in
7 law that sentence be sufficient and no greater
8 than necessary to serve the interest of
9 sentencing and the Department's obligation to
10 uphold the law.

11 If the Department agrees that
12 drugs minus two is -- and its retroactivity
13 is required in the interest of justice there's
14 no principled way it can argue for justice to
15 be sliced and diced in the manner that the
16 Department now argues for when it comes to
17 retroactivity.

18 In fact, the Department supports
19 crack retroactivity unreservedly in the
20 Smarter Sentencing Act. So, this is a
21 curious decision.

NEAL R. GROSS

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

1 A number of you were here, not all
2 of you but a number of you were here four
3 years ago when you considered retroactivity
4 of the Fair Sentencing Act compliant
5 amendments.

6 And at that time the Department of
7 Justice also argued the carve-outs. In fact,
8 I think they've asked for more carve-outs this
9 time than they did that time. I haven't done
10 a count but you will, I'm sure.

11 The Commission roundly rejected
12 the guidance from the Department then and I
13 ask that it do so today.

14 The reasons that the Commissioners
15 gave at that meeting are as fresh today as
16 they were then and relevant and I want to
17 share some of them with you.

18 One Commissioner pointed out that
19 as to the public safety considerations that
20 the Department has cited, quote, "Judges have
21 proven that they are now up to the task. We

NEAL R. GROSS

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

1 know from experience that not all will receive
2 reduced penalties when the circumstances of
3 their cases are reviewed and the
4 retroactivity analysis is applied.

5 "This in my view," she said, "is
6 precisely why the Justice Department's
7 position on retroactivity need not be
8 sustained.

9 "In this context there's simply no
10 need to employ imperfect proxies, imperfect
11 proxies for dangerousness when an actual
12 judge with an actual case can make that
13 whole."

14 Another Commissioner pointed out
15 the time-consuming and administratively
16 difficult work of applying factors for courts
17 to look at on a retroactive basis.

18 A third told us that the data from
19 the earlier crack amendment process showed
20 how admirably the parties had worked together
21 to help judges exercise appropriate

NEAL R. GROSS

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

1 discretion. And we heard today from the
2 Criminal Law Committee and Probation on that
3 point as well.

4 Two of the same Commissioners
5 pointed out the double-counting aspect of the
6 Department's position. "Offenders," they
7 said, one of them said, "who fall within
8 higher criminal history categories and those
9 who receive enhancements are subject to
10 higher penalties. Any reduction of sentence
11 that these offenders may receive will in no
12 way negate the extra prison time they're
13 required to serve as a result of the
14 aggravating factors.

15 "To be sure, reductions in
16 sentences pursuant to 3582(c)(2) are not
17 automatic. Judges must consider the risk to
18 the public in each and every case."

19 As to efficiency, I think that the
20 Judicial Conference probation witnesses
21 addressed those concerns and made thoughtful

NEAL R. GROSS

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

1 suggestions none of which involved
2 categorical carve-outs.

3 I was most concerned though to
4 hear the Department witness assert that as a
5 matter of convenience any prisoner who had
6 received a gun bump should be excluded even
7 if she had nothing to do with gun.

8 Specifically, she said, it would
9 not be, quote, "appropriate use of resources"
10 to figure out if a co-defendant had the gun
11 rather than the prisoner.

12 And that's precisely why we want
13 judges to assess these cases rather than to
14 subject them to categorical carve-outs ahead
15 of time. It's precisely because judges ought
16 to be able to make those determinations, is
17 the gun integral to the person's
18 dangerousness, or was it incidental to the
19 offense.

20 I'll stop there. My time's up.
21 Please don't adopt these enhancements. The

NEAL R. GROSS

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

1 carve-outs. Thank you.

2 CHAIR SARIS: Mr. Sample?

3 MR. SAMPLE: On behalf of
4 Prisology, Judge Saris, I would like to thank
5 you for the opportunity to appear and provide
6 testimony.

7 Prisology is a relatively new
8 organization. I come to the Commission with
9 some unique experience. Like Mr. Nolan I was
10 in federal prison myself for over 12 years
11 for a series of non-violent offenses. I was
12 a high school dropout before I went to federal
13 prison. I earned my bachelor's degree while
14 I was there and I'm now presently in law
15 school having completed my first year at
16 Vermont Law School.

17 So, people can change if they're
18 given the opportunity to do so. And there
19 are a lot of people in federal prison that I
20 believe and our organization believes would
21 seize this opportunity if the Commission were

NEAL R. GROSS

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

1 to make the amendment retroactive.

2 In terms of public safety the
3 Commission has heard a lot of testimony today.
4 But one of the things that I have not heard
5 is the effect of public safety on children
6 and the family unit.

7 As we indicated in our written
8 testimony according to a 2008 report from the
9 Bureau of Justice Statistics nearly 60
10 percent of federal prisoners are parents of
11 children.

12 The adverse effects of
13 incarceration on children is well documented
14 and includes but is not limited to increased
15 risk of drug or alcohol abuse, depression,
16 antisocial behavior, withdrawing from school
17 and aggression.

18 And we believe that through
19 retroactive application of this amendment the
20 Commission is uniquely situated to restore
21 broken family units with their parents that

NEAL R. GROSS

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

1 so desperately need that father figure or
2 mother figure in their life.

3 Apart from that there have been
4 other concerns that have been expressed about
5 the lack of resources to be able to properly
6 implement retroactive application.

7 And one of the potential areas to
8 help mitigate the effects of implementing
9 this amendment on U.S. Probation that we
10 identified in our written testimony is for
11 the Commission to perhaps give instruction to
12 U.S. probation officers with regard to early
13 termination of supervised release.

14 When we looked at the relevant
15 data according to Fiscal Year 2013 there were
16 131,869 offenders that were on some type of
17 federal supervision, whether probation or
18 supervised release.

19 The vast majority of the offenders
20 each year terminate their supervised release
21 through full-term expiration. And according

NEAL R. GROSS

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

1 to the data a mere 13 percent were terminated
2 by early termination.

3 Yet, while we have these very
4 large supervision caseloads approximately 40
5 percent of the people according to 2012 data
6 were on what's called low-intensity
7 supervision.

8 And according to the probation
9 monograph low-intensity supervision is
10 something that is given to a defendant when
11 they are, quote, "is likely to remain crime
12 free, to appear in court and to comply with
13 all other conditions without further
14 interventions by the officer."

15 So we respectfully submit that
16 there is an opportunity to help mitigate some
17 of the effect of retroactive application of
18 the amendment on supervision caseloads
19 through early termination of supervised
20 release for appropriate offenders that
21 individual U.S. probation officers are

NEAL R. GROSS

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

1 already familiar with and most likely the
2 district judges have been receiving
3 appropriate reports on their progress
4 throughout their period of supervision.

5 Apart from that we would also
6 suggest that in implementing the amendment
7 the Commission consider making a requirement
8 that for persons who do not have a family unit
9 to return to, they don't have a place to live
10 or something along those lines, to require
11 the district court to either amend the
12 conditions of supervised release or lower the
13 period of reduction that would be granted in
14 order to give the Bureau of Prisons the
15 opportunity to allow the person to transition
16 through normal pre-release procedures.

17 If that was to occur that would
18 give the Commission the opportunity to be able
19 to allow persons to receive the effect of the
20 amendment come November 1.

21 In addition, we would also suggest

NEAL R. GROSS

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

1 that perhaps with cooperation from the
2 Department of Justice that the Bureau of
3 Prisons could create a survey as they have
4 done in implementing the Clemency Project
5 that would allow offenders to go online there
6 in the Bureau of Prisons and submit their
7 request if they believe that they might be
8 eligible for this retroactive amendment.

9 And from there with coordination
10 with DOJ, perhaps FPDs, appropriate USPO
11 officials, then take the information and
12 process the request for retroactive
13 application. As opposed to dealing with this
14 perhaps influx of some 50,000 motions or
15 things like that. It would create an
16 additional screening mechanism.

17 And with that and based on the
18 other written testimony that we submitted we
19 strongly urge retroactive application of the
20 amendment.

21 CHAIR SARIS: Thank you. Mr.

NEAL R. GROSS

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

1 Butler, welcome back.

2 MR. BUTLER: Thank you, Judge.
3 Thank you, members of the Commission for
4 allowing me on behalf of the Victims Advisory
5 Group to address you today.

6 A couple of points I want to
7 emphasize from our written statement. First,
8 the Victims Advisory Group is not taking a
9 position whether the guidelines should be
10 applied retroactively or not.

11 We are, however, concerned that if
12 the Commission does decide to make these
13 retroactive that these are not all cases where
14 there are no victims.

15 And we believe that in some of
16 these cases, we don't know how many, that
17 there are identifiable victims. There may be
18 various -- different guidelines are applied
19 and the drug guidelines may have been applied
20 over assault guidelines, for example, or some
21 other victim enhancements.

NEAL R. GROSS

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

1 So, first, we believe that there
2 are and we would encourage the Commission to
3 have the staff run some queries to find out
4 exactly how many of these cases there are.

5 We think that they are
6 ascertainable. You know, perhaps it's 1
7 percent but 1 percent of 50,000 cases is 500
8 cases. So there may be some cases.

9 We are concerned primarily with
10 the process, perhaps how this has been handled
11 in the past. And we are concerned that
12 victims' rights will be denied unless the
13 Commission issues some directives.

14 Unless there's a public hearing we
15 don't believe that victims will be notified.
16 We don't believe that they will be notified
17 until the offender is released and then will
18 be told why the sentence was reduced.

19 We think that is contrary to the
20 spirit of the federal law both in terms of
21 statutes and rules.

NEAL R. GROSS

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

1 We've heard a lot about, and I've
2 read the comments that these are -- public
3 safety is required to be considered. These
4 are individual determinations. And at a
5 sentencing a victim would have the
6 opportunity to present a victim impact
7 statement.

8 And it should be no different in
9 these circumstances that public safety could
10 be affected in a particular person who might
11 know what happened to that victim because the
12 defendants act as the victim.

13 So we believe that if there is
14 retroactivity that there needs to be a process
15 for the victim to be informed so that they
16 can be heard. That may be not necessarily -
17 - if there's no hearing not necessarily heard
18 in person, but to submit a written statement.
19 And we've cited a case from a federal habeas
20 where the similar analysis was applied.

21 And without the victims being

NEAL R. GROSS

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

1 heard they're basically, they're not
2 reasonably heard at all because they're not
3 heard, because they don't even know this is
4 happening.

5 So we believe that especially for
6 those cases where there may be violent contact
7 on victims fairness dictates that the process
8 -- that victims be included in the process.

9 Last but not least, many members
10 of the VAG were particularly concerned about
11 when cases are retroactively changed because
12 the retroactivity is always in the offender's
13 favor.

14 And they are concerned
15 particularly because they believe that having
16 such actions taken, especially without the
17 victim knowledge, will re-victimize the
18 victim.

19 Crimes cause serious emotional,
20 financial, economic, mental issues on
21 victims. And one of the things that the

NEAL R. GROSS

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

1 members of the VAG are particularly concerned
2 about is that the process do not re-victimize
3 those victims. So in accord with
4 their rights to be heard I would just conclude
5 with the fact that we encourage strongly the
6 Commission if it moves forward with any
7 retroactivity to provide that victims be
8 informed and allowed to be heard. Thank you
9 very much.

10 CHAIR SARIS: Thank you.

11 VICE CHAIR BREYER: I want to
12 thank all the panel members but particularly
13 Mr. Butler because I hadn't thought about it
14 in the way that you've suggested.

15 And I think it's crucial that we
16 have some sort of process to advise victims
17 as to what is being contemplated. I mean,
18 that was behind the Sentencing Reform Act.
19 It was to encourage transparency, to
20 encourage honesty, to make sure that the
21 sentence was imposed was the sentence that

NEAL R. GROSS

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

1 was served. And this is a change in those
2 circumstances. So, and that is if
3 retroactivity is applied.

4 So, I'd be interested in whether
5 you thought it was satisfactory since judges
6 don't want to have a lot of hearings if they
7 can avoid it. If it was satisfactory simply
8 to notify the victim and then give the victim
9 the opportunity to write a statement. Maybe
10 you give the victim a form. I think that's
11 now on probation reports if I'm correct.
12 Where -- a victim witness impact statement.
13 And that victim then has the opportunity to
14 write whatever the victim feels about the
15 situation and submit it to the court.

16 Is that adequate from your point
17 of view? Does something more have to be done?
18 Or do you think that that would be
19 satisfactory?

20 MR. BUTLER: I think that is
21 satisfactory unless the court does hold a

NEAL R. GROSS

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

1 hearing. I think if the court holds a hearing
2 and the court allows defendant's counsel, the
3 government to be heard, I think it's only fair
4 and reasonable that to be reasonably heard
5 would also be -- to be heard orally. Or have
6 the option of either in writing or orally or
7 both.

8 But yes, I think that the case law
9 would support that reasonably heard in those
10 cases since there wouldn't be any hearing to
11 be heard in writing. Yes, we would agree.

12 CHAIR SARIS: Thank you. Judge
13 Jackson?

14 VICE CHAIR JACKSON: Yes. Good
15 afternoon to all of you. Ms. Price, I do
16 understand FAMM's resistance to the
17 Department's carve-outs. But I heard in a
18 previous panel the defender representatives
19 say at one point some retroactivity is better
20 than no retroactivity. And I wanted to know
21 what FAMM's position was and whether you would

NEAL R. GROSS

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

1 agree.

2 MS. PRICE: You know, certainly
3 whatever you can do is welcome. I cannot
4 think, however, of a principled way to make
5 the cuts that are being contemplated, or are
6 being suggested rather.

7 For all the reasons that you
8 considered those proposals four years ago,
9 you, some of you, because the Commission
10 considered and rejected such concepts four
11 years ago. They are as true today. It's not
12 necessary, I think, to make those
13 determinations.

14 And I mean, really the
15 partnerships that were developed among the
16 U.S. Attorney's Offices, Probation, Office of
17 the Defenders and ultimately the courts in
18 examining each of these cases closely to
19 determine whether or not somebody would
20 present a public safety risk or otherwise not
21 be eligible worked well for that.

NEAL R. GROSS

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

1 And when you begin to have
2 categorical exclusions you're going to miss
3 people who otherwise would be deserving by
4 even the Department's own bias in deserving
5 of retroactive application. So I think it
6 would be a shame to let somebody sit any
7 longer in prison than necessary because they
8 didn't quite make the cut. And I don't think
9 you have to.

10 CHAIR SARIS: Mr. Nolan?

11 MR. NOLAN: It's a Hobson's
12 choice. I figure it would be so unfair to
13 categorically and arbitrarily impose those
14 restrictions the Department of Justice asked
15 for.

16 Justice should be individual.
17 And Chuck Colson with whom I've worked for 15
18 years was appalled at the mandatory minimums
19 and the one size fits all sentencing that
20 removes the individual defendant and the
21 individual acts of the crime from

NEAL R. GROSS

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

1 consideration. The automaton process of just
2 a chart.

3 And these arbitrary exclusions by
4 the Department of Justice, and they are
5 arbitrary, would be essentially an extension
6 of that type of mandatory minimum thesis that
7 deprives judges of their right to consider
8 all the factors in the crime.

9 I would -- if I could also say I
10 strongly agree with Mr. Butler. To surprise
11 a victim by finding out that the offender has
12 been released before they even knew about it
13 really does re-victimize them. So I think
14 some process like has been discussed here I
15 think is really essential.

16 The victim is the real party in
17 interest after all, not the government. And
18 we should remember that in this process.

19 VICE CHAIR HINOJOSA: I guess some
20 of these points were made by some of you all
21 here today. And those of us who live in

NEAL R. GROSS

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

1 communities hear them on a pretty regular
2 basis.

3 One is with regards to the impact
4 of family members of individuals who are in
5 prison. But after reading thousands of pre-
6 sentence investigation reports sometimes, and
7 it's not unusual, the family structure of the
8 person committing the offense has already
9 been hurt and is a serious factor in
10 contributing to the commission of the offense
11 to some extent.

12 And it's a socioeconomic issue
13 with regards to something that probably
14 should be addressed before somebody gets to
15 the prison system rather than after the prison
16 system. And the effect, it will always be
17 there, before or after unless the country as
18 a whole decides to do something about that
19 which is beyond the criminal justice system.

20 The other point that we also see,
21 and Ms. McCurdy pointed out the racial makeup

NEAL R. GROSS

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

1 of the defendants in the drug trafficking
2 offenses.

3 And the knowledge in the
4 sentencing system as judges that we see that
5 drugs are different in the sense that the
6 victims normally don't appear in the
7 courtroom. It's society as a whole. It is
8 somebody's family member, somebody's son or
9 daughter, father or mother, brother or
10 sister, or somebody in the community that's
11 affecting society because -- and then the drug
12 treatment costs that come in. And the fact
13 that it's not unusual for somebody who becomes
14 a drug addict then to violate the law in a
15 certain way.

16 And that the victimization of
17 society as a whole rather than individual
18 victims. What factor, if any, should that
19 play on the Commission with regards to having
20 a lot of people come out at the same time
21 without the usual process of trying to have

NEAL R. GROSS

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

1 done the rehabilitation aspects right before
2 they're let out of prison.

3 And the effect on communities. It
4 tends to be -- I live in an Hispanic community
5 in South Texas. It's a high percentage
6 Hispanic. But the drug trafficking has
7 victimized the community as a whole. And it
8 tends to be an Hispanic community.

9 And so the question is those
10 factors affect I guess our decision. We've
11 done it for the future. The question is, as
12 has been explained before, that a lot of
13 people would be coming out right now without
14 having gone through the usual process.

15 So what, if any, effect should
16 these factors have in us considering the
17 retroactivity aspect? We obviously have
18 considered them for the future by going
19 through the reduction here, but should they
20 have an effect on retroactivity?

21 MS. PRICE: I know it's obnoxious

NEAL R. GROSS

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

1 to answer a question with a question, but --

2 VICE CHAIR HINOJOSA: Well, I'll
3 be glad to answer the question.

4 MS. PRICE: I'd be curious how you
5 resolved that the last two times. Because
6 those questions were paramount before, yet -
7 -

8 VICE CHAIR HINOJOSA: The last two
9 times was not as difficult because there was
10 a common understanding I think nationally
11 from all segments that the crack powder of
12 100 to 1 was very unfair.

13 I have to say the reaction after
14 drugs minus two in some of our communities
15 has been there isn't a problem with drug
16 trafficking to the point that -- drug
17 trafficking sentences to the point that the
18 Commission should have acted like this like
19 there was with crack.

20 And so my question is do we
21 consider these different for that particular

NEAL R. GROSS

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

1 reason. I'm just basing it on reactions that
2 one gets.

3 MS. PRICE: But the Commission
4 wasn't --

5 VICE CHAIR HINOJOSA: The panel
6 never just hears really the general public.
7 That doesn't mean that we don't hear from
8 them.

9 MS. PRICE: Of course. Since
10 1991 the Commission has recognized the
11 inherent unfairness and poor reasoning behind
12 the establishment of mandatory minimums.

13 What the Commission did when it
14 established the corresponding base offense
15 levels was unfortunately to anchor them so
16 that they're higher than the mandatory
17 minimums.

18 So right now what you're doing,
19 you're making a correction going forward in
20 the interest of justice and to serve the
21 interest of sentencing that you should have

NEAL R. GROSS

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

1 every comfort in doing. And you've been
2 supported in doing.

3 I can't see why you wouldn't apply
4 that --

5 VICE CHAIR HINOJOSA: Mary, I have
6 to make a correction here. And I'm doing
7 this because I've looked into it in the past.

8 The Commission has never come out
9 against mandatory minimums. What the
10 Commission used to say under the, quote,
11 "mandatory" system that was never totally
12 mandatory is that the sentencing guidelines
13 took out the necessity of mandatory minimums
14 because we had the guidelines.

15 Post Booker our statements have
16 been that we as a Commission cannot come to a
17 -- we have a spectrum of views as to whether
18 we should have mandatory minimums or not.

19 But that we all agree that we have
20 some mandatory minimums that are a bit too
21 high in certain crimes and that the safety

NEAL R. GROSS

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

1 valve possibly might be extended.

2 And so I don't think it's a fair
3 statement to say the Commission is opposed to
4 mandatory minimums.

5 MS. PRICE: But you are unanimous
6 in your belief that the sentencing guidelines
7 are too high. It serves the interest of
8 justice to lower them by two levels. That
9 you are unanimous in.

10 VICE CHAIR BREYER: Well, I would
11 put it differently because I just sort of feel
12 that that's not necessarily what everybody is
13 saying.

14 I think that what people are
15 saying is they believe that the drug quantity
16 which drives the sentence is disproportionate
17 to the appropriate length of the sentence that
18 results from the high drug quantity.

19 And I think that -- in other
20 words, it's a recognition that the drug
21 quantity was playing a paramount and perhaps

NEAL R. GROSS

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

1 too large a role in terms of the sentencing
2 length.

3 I think there's agreement as to
4 that because I heard that -- there's almost
5 agreement as to that.

6 (Laughter)

7 CHAIR SARIS: I don't know how you
8 get that in the record.

9 VICE CHAIR HINOJOSA: He's taking
10 care of it by saying almost in agreement. We
11 have never -- we've never --

12 VICE CHAIR BREYER: Maybe it's
13 simpler to say that the Commission was
14 unanimous in recommending the change, an
15 amendment which would effectively have
16 reduced by two levels the role that the
17 quantity of drugs plays in the overall
18 sentence.

19 I think that's -- I can get away
20 with that I think because I think that's
21 exactly what we did. We did that and we did

NEAL R. GROSS

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

1 that unanimously.

2 Where the parallel between the
3 crack cocaine and the disparity, the crack
4 and powder disparity fails in this case is
5 that we're -- in that case we talked about
6 proportionality.

7 That is, we talked about the
8 disparate impact it had on two individuals as
9 a result of a very high disproportionate
10 measure which was then translated into a
11 sentence.

12 In this case we're saying
13 something different. We're talking about the
14 length of sentence as distinct from the
15 proportional effect or impact upon a
16 sentence. So that's a different type of
17 measure. That's what I think we're saying
18 now.

19 VICE CHAIR HINOJOSA: I just want
20 to say something. At least from my
21 standpoint the statement I would make about

NEAL R. GROSS

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

1 the weight is I voted for it because it still
2 gives Congress their due respect with regards
3 to the weight factor because what we voted
4 for is still within the mandatory minimums of
5 Congress and their decision as to what the
6 weight factor should be with regards to
7 sentencing.

8 I'm sure we all had possible
9 different reasons as to why we voted for it.
10 But I certainly felt strongly that the
11 congressional statutes were due the respect
12 that they deserve from the standpoint of
13 weight. And that they considered weight
14 important and this was still giving them the
15 weight factor that the statutes require.

16 CHAIR SARIS: Thank you.

17 MS. MCCURDY: Can I respond?

18 CHAIR SARIS: Sure.

19 MS. MCCURDY: Judge Hinojosa,
20 your question raised to mind a call I got in
21 my office yesterday from Dorothy Gaines who

NEAL R. GROSS

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

1 is a person who received a commuttee from
2 President Clinton. She was here in
3 Washington, D.C. recently for an event the
4 ACLU and FAMM had put together for commutees.

5 But she called me yesterday and
6 she had called me last week because she is
7 struggling with her son who is now sitting in
8 jail accused of robbery and credit card fraud,
9 but who has struggled because she was away
10 from him in his formative years in prison.

11 She was a low-level girlfriend
12 type of drug offender. She was lucky enough
13 to receive a commutation from President
14 Clinton. But the six or so years that she
15 was in prison destroyed her children's lives,
16 or just -- she was just not there for their
17 formative years.

18 And one of the things that she
19 called me about yesterday was that she wanted
20 to send the message to people here in
21 Washington that these drug sentences and the

NEAL R. GROSS

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

1 time that people are being taken away from
2 their family is really affecting the children
3 in the generations to come.

4 And that while we all are
5 concerned about our communities that we live
6 in. I live in Prince George's County,
7 Maryland. We're all concerned about the
8 crime and drug-related crime in our
9 communities.

10 We're also concerned about the
11 families that are being destroyed by these
12 long harsh sentences that just in some cases
13 don't make any sense. And the collateral
14 consequences are the children such as Dorothy
15 Gaines' children who Dorothy has struggled in
16 her years out of prison and her children have
17 struggled also in that same time and while
18 she was in prison.

19 And so that is -- it's a balance,
20 I get it. But I want to make sure that we
21 remember those people as well.

NEAL R. GROSS

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

1 CHAIR SARIS: Thank you. I'd
2 just like to go on and let me jump to
3 Commissioner Wroblewski here.

4 COMMISSIONER WROBLEWSKI: Thank
5 you very much, Judge Saris. I have two
6 questions.

7 First, to Mr. Nolan, I want to
8 take advantage of the opportunity that we have
9 to have a Republican legislator here.

10 Tell me why you think that despite
11 the Right on Crime movement that's been around
12 for a little while, despite the tremendous
13 success of justice reinvestment across the
14 country including in many red states, we're
15 having significant problems with the Smarter
16 Sentencing Act moving in Congress.

17 And do you have any
18 recommendations as to how to get that moving?
19 In particular in the House where there has
20 been less interest in this and frankly no
21 movement on the Smarter Sentencing Act. So

NEAL R. GROSS

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

1 that's question number one.

2 And then for Ms. Price, you
3 discussed the idea of individualized
4 determinations. Mr. Nolan also talked about
5 that. Of course every offender who's been
6 sentenced within the last 10 years has had an
7 individualized assessment without regard to
8 the sentencing guidelines.

9 You also suggest that the 3582
10 process can effectively weed out dangerous
11 offenders. If that were the case wouldn't we
12 expect that the recidivism rate of offenders
13 who went through the 3582 process would be
14 significantly lower than offenders who didn't
15 go through the 3582 process?

16 And interestingly enough the
17 Commission has done this analysis and has
18 found no, they're virtually identical.

19 And I ask for a hypothetical. If
20 we excluded everyone who had -- every offender
21 who is in criminal history category 3 through

NEAL R. GROSS

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

1 6, and every offender who had a gun or was
2 involved in violence, and we used that rather
3 than the 3582 process do you really think that
4 the recidivism rate would be the same as for
5 the general population we'll release?

6 So in other words, what I'm saying
7 is right now we have this comparison, 3582
8 process without carve-outs and people who
9 went through the entire sentence. They have
10 roughly the same recidivism rate. Do you
11 really think that would be true if we had the
12 carve-outs, the people who are just criminal
13 history 1 and 2, that their recidivism rate
14 would be the same as the general population
15 coming out? Those are my two questions.

16 CHAIR SARIS: So, you got it?

17 MR. NOLAN: Yes, I do. I support
18 the Smarter Sentencing Act. Politically it
19 was a torpedo amid ships when President Obama
20 announced his clemency policy. It was part
21 of the telephone and pen -- part and parcel

NEAL R. GROSS

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

1 of the telephone and pen initiatives by the
2 President.

3 And as I think very ably stated by
4 Steve Hayes and Charles Krauthammer on the
5 Fox Report that evening the substance is
6 probably good and he certainly has the
7 authority to. But Congress was in the
8 process of dealing with this in a bipartisan
9 way and the President preempted it. And
10 politically that literally took the wind out
11 of our sails on the Hill.

12 And I'm not sure we can recover
13 this year. I think we probably have to have
14 the midterm elections and get this beyond us.
15 But literally the effect was palpable among
16 my friends.

17 Again, the President has that
18 authority. And it's been used far too little
19 by him. President Nixon, President Reagan
20 had far more commutations than he has. But
21 it's the way it did.

NEAL R. GROSS

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

1 And part of the language of
2 basically I now do my will. Forget about
3 Congress and the public.

4 And I think that has damaged us to
5 the point where if I could just sneak in an
6 answer to Judge Hinojosa, politically this
7 has been damaging to us.

8 There's reaction to the minus two
9 not because of the substance of minus two but
10 it looks like this oh my goodness, soft on
11 crime, fuzzy heads are at it again.

12 And lastly, as far as the impact
13 on families, the devastation on families of
14 imprisonment is palpable. But no person can
15 replace a mother or father. They're the
16 people God gave us to raise children.

17 And if you talk to anybody in
18 corrections they'll tell you that a prisoner
19 whose family comes and visits and retains ties
20 to their family is probably the best behaved
21 prisoner there because they don't want to lose

NEAL R. GROSS

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

1 that right to see their family.

2 And all the studies show that when
3 they leave the family is the greatest factor
4 in their ability to get back on their feet.

5 CHAIR SARIS: Thank you. Ms.
6 Price?

7 MS. PRICE: I had thought we'd all
8 taken comfort in those recidivism numbers. I
9 think we had that discussion actually.

10 I have a couple of thoughts. I
11 mean, you can run that to its logical
12 conclusion and say that everybody who has
13 criminal history category 3 or higher, or a
14 gun bump, or, I don't know all of your
15 exclusions, shouldn't get out at all because
16 ultimately they may add to the recidivism
17 rate.

18 I don't know what happens to the
19 recidivism rate if you do -- for people who
20 are released early. I assume that it goes
21 down if you exclude certain people.

NEAL R. GROSS

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

1 But really and truly what you're
2 also doing is in such categorical exclusions
3 you're leaving a lot of people behind that
4 absolutely don't deserve to be treated in a
5 sort of one size fits all exclusion.

6 And I -- for example, criminal
7 history. We know that one of the factors
8 that judges just deplore is how criminal
9 history is counted. And judges depart and
10 vary based on the fact that criminal history
11 overstates the actual danger that the person
12 posed to the community in the prior offenses.
13 It's the number one reason.

14 And yet you -- the Department
15 would say we're going to exclude everybody
16 from doing basically the right thing because
17 they happen to fall into criminal history
18 category 3 or higher.

19 Similarly with obstruction of
20 justice. You know people who get the
21 obstruction enhancement sometimes didn't do

NEAL R. GROSS

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

1 anything really wrong or bad necessarily or
2 dangerous, they simply didn't necessarily
3 tell the truth.

4 Are they truly a danger? Well, by
5 the exclusion they would all be of course kept
6 behind.

7 I don't think that it's worth
8 taking that decision and that judgment away
9 from judges. Remember, a number of these
10 were also the result of consent motions,
11 right? I mean, I assume that there were
12 prosecutors consenting to motions for some of
13 the folks who eventually reappeared in court
14 as they might have been expected to.

15 I still think it's the right thing
16 to do and I think you ought to do it
17 unreservedly.

18 CHAIR SARIS: Let me ask you all.
19 You know, Judge Keeley talked about the
20 balance, she said it correctly, the balance
21 between fairness, between public safety, and

NEAL R. GROSS

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

1 between what you can fiscally afford. That's
2 not always coming up with the perfect answer.

3 You're all focusing on fairness.
4 Fair enough. You know, we also have to
5 consider resources.

6 So, the question that I have is if
7 you did anything like a six-month extension
8 or a carve-out or something to sort of bring
9 into balance all these very important values
10 how would that -- what would be the reaction
11 in the prisons?

12 I'm looking at you, Ms. Price and
13 Mr. Sample, and really all of you who deal
14 with people in the prisons. What would the
15 reaction be? What are people expecting?
16 What's happening there?

17 MR. SAMPLE: Well, I'll give you
18 two perspectives, one being from the family
19 members who follow us like on Facebook. And
20 I think that there is great anticipation and
21 angst amongst the family members with regard

NEAL R. GROSS

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

1 to this hearing and to the upcoming vote
2 because they badly want to see their family
3 members come home.

4 You know, they have children.
5 They have people. They need that other
6 person in their life for a support structure.

7 In terms of individuals that are
8 incarcerated, I mean we receive hundreds of
9 emails a week from federal prisoners
10 discussing the amendment. You have so many
11 people who are already not subject to the
12 amendment because they either have a
13 mandatory minimum, or they're a career
14 offender.

15 And I mean, I will give you -- if
16 this was not made retroactive my personal
17 sense having been someone that's been there
18 in federal prison, you know, lived it 24 hours
19 a day, 365 days a year, there's of course
20 probably the potential that there's some
21 prisoners that may do some things that they

NEAL R. GROSS

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

1 shouldn't do because they are expecting there
2 to be retroactivity.

3 There were problems back in the
4 mid-nineteen nineties when the Commission had
5 supported retroactivity and Congress
6 ultimately decided to disapprove that. And
7 I think that there's the possibility that that
8 would happen.

9 I mean, of course, I don't suggest
10 that that should be the reason why the
11 Commission should or shouldn't take action.
12 But the question was asked and I think that
13 there is that possibility.

14 And I'm sure that that's probably
15 a concern that the Bureau of Prisons is
16 thinking about in how do they mitigate or
17 address those kinds of things.

18 COMMISSIONER PRYOR: But that
19 doesn't answer the question about carve-outs.
20 That doesn't answer the question about what
21 the reaction would be if, for example,

NEAL R. GROSS

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

1 retroactivity were limited to those in
2 criminal histories categories 1 or 2.

3 MR. SAMPLE: There would be
4 disappointment. There would be severe
5 disappointment.

6 COMMISSIONER PRYOR: There would
7 be disappointment for those who are denied
8 the sentencing reductions as there would be
9 if it were fully retroactive?

10 MR. SAMPLE: That's true, that's
11 correct.

12 CHAIR SARIS: Ms. Price?

13 MS. PRICE: Yes. I mean, we hear
14 from prisoners all the time.

15 CHAIR SARIS: Have you managed
16 expectations in terms of that --

17 MS. PRICE: We certainly try. We
18 don't have control over hope. Hope is, you
19 know, it's a huge, huge thing.

20 And you can't, you know, as often
21 as you say repeatedly this decision hasn't

NEAL R. GROSS

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

1 been made yet, and they're grappling with this
2 decision, they're struggling with hard
3 issues, and they're worrying about resources.

4 And they are aware -- we talk
5 about you to the prisoners. We say they're
6 aware that prisons are overcrowded. They're
7 aware. So aware that the guidelines have
8 contributed phenomenally to overcrowding.

9 I mean, what you did at the
10 beginning of the cycle to -- was commendable
11 to talk about -- to make us all talk about
12 the impact on public safety that prison
13 overcrowding has done. And to explain to you
14 why we think -- what we think you can do to
15 make our communities a better place and to
16 make the prisons a better place. How do we
17 look at these amendments in light of the
18 mandated 994G I think with respect to prison
19 overcrowding?

20 I mean, we tell them all of these
21 things. And we explain to them your efforts.

NEAL R. GROSS

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

1 But you know, I do a Facebook
2 forum. People write in and ask questions. I
3 answer the questions. And people ask the
4 same questions over and over again. You can
5 tell them this and you can tell them this.
6 But hope is a powerful force.

7 MR. NOLAN: And as far as the
8 impact on the prisoners of the carve-outs for
9 those that benefitted from it they would
10 obviously be joyed. For those that don't
11 they I think would puzzle over the difference.

12 But I think it's also important to
13 say we can always guarantee public safety if
14 we just lock up everybody and never let them
15 out. I mean that's the certainty.

16 The question is, and you posed it
17 well. How do we balance public safety which
18 is a primary function of government with
19 justice and with the societal impact of the
20 solutions we made.

21 And I think those carve-outs are

NEAL R. GROSS

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

1 so arbitrary. Yes, it puts it so low probably
2 nobody or few would recidivate. So yes,
3 there's a way to do that.

4 But the cost is there are that
5 many more that would probably be able to make
6 it successfully on the outside, be back with
7 their family, become taxpayers and earners,
8 and we're denying them that chance on the
9 basis that, well, we aren't sure.

10 Because those risk factors are
11 arbitrary. That's why the states have moved
12 much more to risk assessments, looking at the
13 factors.

14 Virginia has done a terrific job.
15 So, assessing the individual risk of the
16 prisoner as opposed to categories like DOJ
17 does.

18 VICE CHAIR BREYER: So if there is
19 a carve-out, and I know you're against them,
20 but if there is a carve-out it might be a
21 carve-out looking at the criminal history

NEAL R. GROSS

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

1 category like a 6 or a 5.

2 Because if -- and of course it's
3 where you draw the line. But I'm trying to
4 figure out from a public safety point of view
5 that if you were going to apply it unevenly
6 maybe that would be the category that you
7 might exclude, the 6's and the 5's.

8 I think in answer to Commissioner
9 Wroblewski's point about, well, when we ran
10 it with the -- in the crack powder disparity
11 isn't it odd that you had the same rate of
12 recidivism for the group that was kept in and
13 the group that was eliminated earlier. Isn't
14 that -- you know, how do you account for that.

15 Of course, one might simply say
16 well, you account for it because the length
17 of the sentence doesn't necessarily dictate
18 the rate of recidivism. That there can't be
19 argument about because that's exactly what
20 that shows.

21 It doesn't necessarily show the

NEAL R. GROSS

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

1 public safety factors, but it does show that
2 length doesn't necessarily correlate on a
3 one-to-one basis with recidivism.

4 My question is different which is
5 if you carved out anything could you give --
6 and not look at the argument about fairness.
7 But if you carved out anything could you carve
8 out category history 6 or 5? Do you have any
9 views on that? Maybe you don't. Anyone.

10 MR. SAMPLE: I will say that if
11 there was a carve-out for category 6 that
12 those individuals probably would of course be
13 disappointed, but that's a carve-out that
14 would be more understanding because of the
15 criminal history that they have.

16 They already actually expect that
17 they're probably not going to get anything
18 because they have such a great criminal
19 history.

20 I think there is that talk, there
21 are those emails that come in from the

NEAL R. GROSS

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

1 prisoners where they pretty much figure
2 already that they're going to get excluded.

3 And so I think in terms of
4 managing expectations that it's much more
5 easy to do that when you have someone that is
6 in a category 6 in comparison to somebody
7 who's in a category 3 that maybe is there
8 because, you know, for a variety of reasons
9 minor offenses.

10 CHAIR SARIS: Thank you.
11 Commissioner Barkow?

12 COMMISSIONER BARKOW: Yes, I
13 wanted to ask you about -- Mr. Nolan and Ms.
14 Price in particular had mentioned was this
15 idea of the Department's prior positions and
16 they kind of raised the public safety issue.

17 But I wasn't here for the prior
18 decisions and what has struck me today was
19 the Department's point argument that if they
20 allocate folks to work on these petitions
21 those are people who can't be prosecuting

NEAL R. GROSS

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

1 current cases. And it's just the sheer
2 numbers of it.

3 And so I'm just curious if there
4 were any parallel arguments previously, or
5 any other experiences that you can draw upon
6 to help me at least figure out whether or not
7 that could raise a safety concern going
8 forward.

9 MS. PRICE: I'm looking at
10 Jonathan. I don't know and I don't remember,
11 and I'm happy to go back and look.

12 I will say that the Department has
13 been in the forefront of expressing extreme
14 concern about the public safety problem that
15 is posed by the fact that one out of every
16 four dollars that the Department of Justice
17 spends, I think it's one out of every three
18 when you take in the Marshal Service, is spent
19 on keeping people locked up.

20 And that's a dollar that cannot be
21 spent in the prevention and protection of

NEAL R. GROSS

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

1 crime, in grants to state and local
2 governments to do the kinds of reentry
3 services and prevention services that they
4 do.

5 The Inspector General of the
6 Department of Justice has been particularly
7 one on this point. I'll send you or attach
8 his testimony when I send in our final
9 comments.

10 But I think that we need to look
11 at public safety much more broadly as you
12 helped us to do at the beginning of this year
13 when you asked us to comment on the
14 overcrowding issues in our comments. And I
15 encourage you to do that.

16 VICE CHAIR HINOJOSA: So the
17 written testimony will point out the
18 arguments that were made on those issues?
19 Because I went back and reviewed some of it
20 and you'll find the units for expense some of
21 which ended up not applying.

NEAL R. GROSS

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

1 Bureau of Prisons talked about
2 it's going to be terribly expensive to bring
3 the prisoners to all these hearings. And
4 it'll cost so much marshal time, so much hotel
5 time. Of course that ended up not happening
6 nearly to the level envisioned.

7 And the Justice Department had
8 other expenses. And you'll find that --
9 you'll see the arguments if you look at that.

10 MR. NOLAN: They predicted this
11 would absolutely gum up the whole system. It
12 would grind to a halt if the crack powder
13 disparity was made retroactive. And it
14 didn't happen.

15 The DOJ and public defenders,
16 everybody got together and the judges worked
17 out a system that worked flawlessly. There
18 wasn't a bump in it.

19 So, again, the Cassandras have
20 always warned this parade of horrors and
21 they haven't eventuated.

NEAL R. GROSS

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

1 CHAIR SARIS: All right, thank
2 you. Anything else? I want to thank you
3 all. You kept us awake, lively and full of
4 beans after lunch which is an amazing
5 testament to you all.

6 Our link to understanding people
7 who are -- some of the people anyway who are
8 directly affected by what we're doing. And
9 I very much appreciate the work that you all
10 do. Thank you very much.

11 (Whereupon, the above-entitled
12 matter went off the record at 3:05 p.m.)