

BEFORE THE UNITED STATES SENTENCING COMMISSION

IN RE:

PUBLIC HEARING REGARDING
SENTENCING DRAFT GUIDELINES.

Wednesday, October 29, 1986

Ceremonial Courtroom
United States Courthouse
75 Spring Street, S.W.
Atlanta, GA

CHAIRMAN WILLIAM W. WILKINS, JR.
COMMISSIONER MICHAEL K. BLOCK
COMMISSIONER STEPHEN G. BREYER
COMMISSIONER HELEN G. CORROTHERS
COMMISSIONER GEORGE E. MacKINNON
COMMISSIONER ILENE H. NAGEL
COMMISSIONER PAUL H. ROBINSON
COMMISSIONER RONALD L. GAINER

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P R O C E E D I N G S

CHAIRMAN WILKINS: LET ME CALL THIS MEETING TO ORDER. GOOD MORNING, LADIES AND GENTLEMEN. WE ARE DELIGHTED TO BE HERE IN ATLANTA TO CONDUCT ANOTHER IN A SERIES OF REGIONAL HEARINGS THAT THE SENTENCING COMMISSION HAS BEEN HOLDING OVER THE LAST FEW WEEKS.

LET ME INTRODUCE THE MEMBERS OF THE COMMISSION TO YOU. ON MY FAR RIGHT IS COMMISSIONER MICHAEL BLOCK. NEXT TO MICHAEL IS COMMISSIONER HELEN G. CORROTHERS. TO MY IMMEDIATE RIGHT IS COMMISSIONER PAUL ROBINSON. TO MY IMMEDIATE LEFT IS COMMISSIONER ILENE NAGEL, COMMISSIONER STEPHEN BREYER, COMMISSIONER GEORGE MACKINNON, COMMISSIONER RON GAINER.

WE ARE DELIGHTED TO BE HERE AND WE LOOK FORWARD TO WHAT WE BELIEVE WILL BE A VERY INFORMATIVE AND CONSTRUCTIVE HEARING.

FOR THE PAST 10 MONTHS, THE UNITED STATES SENTENCING COMMISSION HAS BEEN WRESTLING WITH THE MOST COMPLEX AND DIFFICULT TASK OF PREPARING SENTENCING GUIDELINES FOR SUBMISSION TO THE CONGRESS IN APRIL OF NEXT YEAR AND THEN FOR IMPLEMENTATION IN OUR FEDERAL COURTS SIX MONTHS THEREAFTER.

IN ADDRESSING THIS TASK, WE HAVE ATTEMPTED TO CONDUCT OUR BUSINESS AS OPENLY AS POSSIBLE. WE HAVE ENLISTED THE AID OF FEDERAL JUDGES AND WORKING GROUPS, U.S. ATTORNEYS, DEFENSE ATTORNEYS AND PROBATION OFFICERS WHO HAVE MET

1 PERIODICALLY WITH US IN WASHINGTON AND HELPED US WRITE POLICY
2 AND, INDEED, SPECIFIC GUIDELINES.

3 IN ADDITION TO THAT, WE HAVE HELD HEARINGS IN
4 WASHINGTON ON A VARIETY OF ISSUES, DEALING WITH FINES,
5 CORPORATE SANCTIONS, PLEA NEGOTIATIONS, AND A VARIETY OF
6 OTHER ISSUES THAT WE KNOW WE HAVE TO ULTIMATELY ADDRESS AND
7 OFFER SOLUTIONS.

8 NOW, THIS HAS BEEN MOST PRODUCTIVE. WE HAVE
9 RECEIVED RESPONSES IN WRITING FROM OVER 500 DIFFERENT
10 PARTICIPANTS AND WITNESSES, AND WE HAVE INCORPORATED MANY OF
11 THE IDEAS FOUND IN THESE SUGGESTIONS FROM THE PUBLIC AT
12 LARGE, PRACTITIONERS, JUDGES, AND OTHERS INTERESTED IN THE
13 ADMINISTRATION OF JUSTICE.

14 A FEW WEEKS AGO, WE PUBLISHED WHAT WE CALL THE
15 PRELIMINARY DRAFT. IT IS VERY PRELIMINARY IN NATURE, BUT IT
16 IS THE FIRST STEP THAT THE COMMISSION HAS TAKEN AS FAR AS
17 PUTTING OUT FOR COMMENT A CONCRETE DOCUMENT ABOUT WHAT
18 GUIDELINES COULD LOOK LIKE.

19 WE ARE NOT WED^{DED} TO THIS PRELIMINARY DRAFT AND,
20 INDEED, THE FINAL PRODUCT MAY NOT RESEMBLE IT IN MANY
21 RESPECTS; BUT ON THE OTHER HAND, IT IS ONE APPROACH THAT CAN
22 BE TAKEN, AND NUMBER TWO, IT DOES IDENTIFY VERY SPECIFICALLY
23 MANY OF THE ISSUES THAT MUST BE RESOLVED IN THE VERY SHORT
24 PERIOD OF TIME BEFORE US.

25 WE PUBLISHED THIS DOCUMENT TO GENERATE PUBLIC

1 COMMENT, PROVIDE A VEHICLE FOR PEOPLE TO RESPOND TO IN THE
2 CONCRETE, RATHER THAN FROM A THEORETICAL POINT OF VIEW, AND
3 SO, SO FAR, THE RESPONSE HAS BEEN QUITE SIGNIFICANT. I'M
4 SURE THAT WE WILL FIND A GREAT MANY NEW IDEAS AND
5 CONSTRUCTIVE CRITICISM TODAY AND WE LOOK FORWARD TO HEARING
6 FROM YOU.

7 THE QUESTION BEFORE US IS TWOFOLD. ONE, IT'S NOT
8 IF WE ARE GOING TO HAVE GUIDELINES. THE CONGRESS HAS ALREADY
9 ANSWERED THAT QUESTION. WE WILL HAVE GUIDELINES IN ONE FORM
10 OR ANOTHER. THE QUESTION THEN BECOMES WHAT WILL THEY LOOK
11 LIKE.

12 THAT'S WHAT WE ARE ALL ABOUT, AND OUR GOAL IS NOT
13 TO PROVIDE A GUIDELINE SYSTEM THAT WILL MAKE OUR JUSTICE,
14 ADMINISTRATION OF JUSTICE, A PERFECT ONE BECAUSE WE KNOW WE
15 CANNOT DO THAT.

16 OUR GOAL IS TO PROVIDE A NEW SYSTEM THAT WILL BE
17 AN IMPROVEMENT, AN IMPROVEMENT OVER THE CURRENT SYSTEM. WITH
18 THAT IN MIND, WE ARE DELIGHTED TO HAVE A NUMBER OF
19 DISTINGUISHED WITNESSES TODAY WHO WILL TESTIFY AND ALSO WHO
20 HAVE -- WILL SUBMIT WRITTEN TESTIMONY TO US.

21 WE HAVE ALSO ALREADY RECEIVED A LARGE NUMBER OF
22 WRITTEN TESTIMONY OFFERED BY THOSE WHO COULD NOT BE WITH US
23 TODAY. AT THE CONCLUSION OF THE TESTIMONY OF WITNESSES WHO
24 HAVE BEEN DESIGNATED AS WITNESSES THIS MORNING AND THIS
25 AFTERNOON, WE WILL HAVE AN OPEN MIKE SESSION FOR ANYONE WHO

1 WISHES TO TESTIFY AND WE WILL BE HAPPY TO RECEIVE THE VIEWS
2 AND COMMENTS OF ANYONE WHO WISHES TO PARTICIPATE IN THIS
3 HEARING.

4 OUR FIRST WITNESSES THIS MORNING ARE TWO UNITED
5 STATES ATTORNEYS, ONE FROM THE NORTHERN DISTRICT OF GEORGIA,
6 AND ONE FROM THE MIDDLE DISTRICT OF TENNESSEE. WE ARE
7 DELIGHTED TO HAVE WITH US ROBERT L. BARR, JR., FROM GEORGIA
8 AND JOE B. BROWN FROM TENNESSEE.

9 GENTLEMEN, IF YOU WOULD LIKE TO COME FORWARD, WE
10 WILL BE HAPPY TO HEAR FROM YOU INDIVIDUALLY AND THEN IF YOU
11 WOULD SUBMIT YOURSELF TO CROSS-EXAMINATION, WE WOULD BE MOST
12 APPRECIATIVE OF THAT.

13 MR. BARR: THANK YOU, YOUR HONOR. ON BEHALF OF
14 THE NORTHERN DISTRICT OF GEORGIA AND THE UNITED STATES
15 ATTORNEY'S OFFICE FOR THE NORTHERN DISTRICT OF GEORGIA, I
16 WOULD LIKE TO WELCOME THE PANEL AND COMMISSION TO ATLANTA.

17 I WOULD LIKE TO RESPECTFULLY DRAW THE COMMISSION'S
18 ATTENTION TO SOME PREPARED REMARKS, WHICH I HOPE HAVE BEEN
19 DISTRIBUTED TO THE MEMBERS OF THE COMMISSION.

20 RATHER THAN REPEAT THE REMARKS THAT ARE IN THERE,
21 WITH THE COMMISSION'S PERMISSION, I WOULD LIKE TO JUST MAKE A
22 FEW GENERAL COMMENTS REITERATING WHAT I CONSIDER THE HIGH
23 POINTS OR THE MOST IMPORTANT REMARKS THAT I HAVE MADE.

24 LET ME PREFACE THAT BY SAYING THAT UNLIKE MR.
25 BROWN HERE, WHO IS AN EXPERIENCED PROSECUTOR AND HAS BEEN A

1 UNITED STATES ATTORNEY AND AN ASSISTANT UNITED STATES
2 ATTORNEY FOR SOME TIME, I AM JUST SLIGHTLY NEWER TO THE JOB,
3 HAVING BEEN SWORN INTO THIS JOB HERE ABOUT A WEEK AND A HALF
4 AGO.

5 I DO HAVE EXPERIENCE AS A CRIMINAL DEFENSE
6 ATTORNEY AND I, THEREFORE, AM ABLE TO, I THINK, LOOK AT THIS
7 FROM BOTH SIDES OF THE FENCE, IF THE COMMISSION WILL, BOTH AS
8 A DEFENSE ATTORNEY, SOMEBODY CONCERNED WITH RESPECTING THE
9 RIGHTS AND DEFENDING THE RIGHTS OF THOSE WHO ARE BROUGHT
10 BEFORE THE FEDERAL COURTS AS DEFENDANTS AND WHO ARE TO BE
11 SENTENCED, AND THE CONCERNS AND THE PROBLEMS THAT ALWAYS
12 DEVELOP IN REPRESENTING CLIENTS AS A CRIMINAL DEFENSE
13 ATTORNEY AND, ALSO, MUCH MORE RECENTLY AS A PROSECUTOR, AS A
14 MEMBER OF THE FEDERAL SYSTEM CONCERNED WITH SEEING THAT THE
15 CONCERNS OF THE UNITED STATES GOVERNMENT IN CRIMINAL
16 PROSECUTIONS ARE CARRIED OUT, THAT THE RIGHTS OF THE
17 GOVERNMENT ARE RESPECTED, THAT THE POLICIES OF THE FEDERAL
18 GOVERNMENT ARE CARRIED OUT, AND IN BOTH INSTANCES TO SEE THAT
19 WHAT FINALLY ARISES FROM ALL OF THIS IS A JUST SYSTEM OF
20 SENTENCING.

21 WE ENDORSE THE GUIDELINES, DRAFT GUIDELINES. WE
22 THINK IT'S A TERRIBLY IMPORTANT TASK THAT THE COMMISSION HAS
23 BEFORE IT. IT'S A HERCULEAN TASK.

24 WHAT THE COMMISSION IS DOING IS TRYING TO BALANCE
25 FOUR OR FIVE DIFFERENT COMPETING INTERESTS THAT SOMETIMES

1 ARISE DIRECTLY AND SOMETIMES INDIRECTLY IN ANY SENTENCING
2 PROCEEDING, AND THAT IS THE RIGHTS OF THE GOVERNMENT, THE
3 PROSECUTORS, THE RIGHTS OF THE COURT, THE CONCERNS OF THE
4 DEFENDANT, AND HIS WHOLE PANOPLY OF CONSTITUTIONAL RIGHTS,
5 THE CONCERNS OF SOCIETY, WHICH IS DEFINITELY, HAS BEEN AND
6 WILL BE, AFFECTED BY WHAT HAPPENS TO THAT INDIVIDUAL.

7 WE ARE VERY HAPPY TO SEE, HOWEVER, THAT TO THAT
8 LIST OF -- OR TO THAT GROUP OF FOUR CONCERNED PARTIES IN ANY
9 SENTENCING PROCEEDING, THE COMMISSION HAS ADDED A FIFTH AND
10 THAT IS THE RIGHTS OF THE VICTIM.

11 WE THINK THIS IS VERY IMPORTANT. IT ALWAYS HAS
12 BEEN IMPORTANT, BUT WE THINK IT'S IMPORTANT AT LEAST INSOFAR
13 AS IT'S REFLECTED IN THESE DRAFT GUIDELINES THAT THE COURTS
14 WILL AND THE SYSTEM WILL BE REQUIRED TO FORMALLY TAKE INTO
15 ACCOUNT THE RIGHTS OF THE VICTIM AS WELL AS ALL THE OTHER
16 CIRCUMSTANCES, THE REALITY OF WHAT THAT PERSON WHO IS BEFORE
17 THE COURT COMMITTED, HIS ACTS, HIS BACKGROUND, MORE
18 IMPORTANTLY.

19 WE FEEL THAT WHAT THE COMMISSION THROUGH THESE
20 DRAFT GUIDELINES IS FOCUSING ON IS REALITY, NOT PERCEPTION,
21 BUT REALITY, WHAT ACTUALLY DID THIS INDIVIDUAL DO, WHAT IS
22 HIS BACKGROUND, AND WHAT HAPPENS TO THE VICTIM, AND THE
23 VICTIM DOES HAVE RIGHTS.

24 WE THINK THESE ARE VERY IMPORTANT. WE THINK THAT
25 THE FLEXIBILITY THAT IS REFLECTED IN THESE GUIDELINES IS VERY

1 IMPORTANT TO MAINTAIN. WE BELIEVE THAT THE DEGREE OF
2 CERTAINTY AND LOGIC AND CLARITY THAT THESE GUIDELINES, OR
3 SOMETHING VERY SIMILAR TO THEM, WOULD BRING TO THE SENTENCING
4 SYSTEM, TO THE SENTENCING PROCEEDINGS, IS VERY IMPORTANT.

5 THAT'S PROBABLY THE MOST IMPORTANT ASPECT, I
6 THINK, OF WHAT WILL EMERGE FROM THE COMMISSION'S WORK, IS TO
7 HAVE SOME LOGIC AND SOME CERTAINTY.

8 I KNOW AS A DEFENSE ATTORNEY, THAT IS ALWAYS VERY
9 IMPORTANT, TO BE ABLE TO DEAL WITH A CLIENT FROM A POSITION
10 OF KNOWING AND BEING ABLE TO TELL THAT PERSON WHAT IS MORE
11 LIKELY THAN NOT TO HAPPEN AS OPPOSED TO JUST SAYING OVER A
12 BROAD RANGE OF POSSIBILITIES, YOU COULD GET ANY SENTENCE
13 RANGING FROM "X" NUMBER OF MONTHS TO "X" NUMBER OF YEARS.

14 IT PUTS THE CLIENT IN A BETTER POSITION, IT PUTS
15 THE ATTORNEY IN A BETTER POSITION IN DEALING WITH THAT
16 CLIENT, AND WE THINK THAT THAT WHOLE PROCESS WILL FACILITATE
17 THE RELATIONSHIP BETWEEN THE CRIMINAL DEFENSE BAR AND THE
18 GOVERNMENT, MAKING NEGOTIATIONS MORE UP-FRONT FROM THE VERY
19 START.

20 SO, WE DO BELIEVE THAT THE CERTAINTY THAT WILL BE
21 INHERENT IN THE SYSTEM IF THESE GUIDELINES, AGAIN, OR
22 SOMETHING VERY SIMILAR TO THEM ARE IMPLEMENTED IS VERY
23 IMPORTANT, BUT WE ALSO ENDORSE WHAT THE COMMISSION HAS DONE,
24 AS REFLECTED IN THESE GUIDELINES, AND, THAT IS, TO WEAVE INTO
25 THE FABRIC OF THEM A DEGREE OF FLEXIBILITY, BECAUSE EACH CASE

1 IS DIFFERENT, EACH INDIVIDUAL IS DIFFERENT, EACH VICTIM IS
2 DIFFERENT AND EACH SET OF CIRCUMSTANCES IS DIFFERENT.

3 SO WE ENDORSE WHAT THE COMMISSION IS DOING. WE
4 THINK THESE DRAFT GUIDELINES ARE, IN ESSENCE, EXTREMELY WELL
5 THOUGHT OUT AND WILL REPRESENT A MAJOR STEP FORWARD IN THE
6 SENTENCING PROCESS IN THIS COUNTRY IF THEY ARE IMPLEMENTED.

7 THANK YOU.

8 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR. BARR,
9 AND CONGRATULATIONS ON YOUR RECENT APPOINTMENT.

10 MR. BARR: THANK YOU, SIR.

11 CHAIRMAN WILKINS: NOW, MR. BROWN, WE ARE
12 DELIGHTED TO SEE YOU. YOU'RE NO STRANGER TO THE COMMISSION.
13 MR. BROWN HAS BEEN TO WASHINGTON AND WORKED WITH US AND A
14 GROUP OF U.S. ATTORNEYS.

15 MR. BROWN, WE WILL BE GLAD TO HEAR FROM YOU.

16 MR. BROWN: JUDGE, COMMISSIONERS, I FEEL A LITTLE
17 STRANGE ADDRESSING THE COURT SITTING DOWN, BUT I WILL TRY TO
18 BEAR WITH YOU.

19 I HAVE HAD ABOUT 21 YEARS IN THE JUSTICE SYSTEM,
20 SIX YEARS WITH MILITARY AND 15 YEARS, THE LAST 15 YEARS, WITH
21 THE U.S. ATTORNEY'S OFFICE, THE LAST FIVE OF THAT AS U.S.
22 ATTORNEY.

23 I BELIEVE THAT THIS IS GOING TO BE ONE OF THE MORE
24 FUNDAMENTAL CHANGES THAT WE HAVE SEEN IN THE LAST CENTURY AS
25 FAR AS CRIMINAL JUSTICE SYSTEM GOES. THERE IS SOMEWHAT OF AN

1 OLD JOKE ABOUT THREE GREAT LIES, THE FIRST OF WHICH IS, THE
2 CHECK IS IN THE MAIL, THE LAST OF WHICH IS, I'M FROM
3 GOVERNMENT OR CONGRESS AND I'M HERE TO HELP YOU.

4 THERE IS GOING TO BE A LITTLE RESISTANCE TO THIS
5 SENTENCING COMMISSION, THE SENTENCE GUIDELINES, AND I THINK A
6 LARGE PART OF IT IS INITIALLY GOING TO COME FROM THE
7 JUDICIARY.

8 THIS IS GOING TO BE A MAJOR CHANGE FOR THE WAY
9 FEDERAL DISTRICT JUDGES DO BUSINESS. THEY HAVE BASICALLY
10 BEEN GIVEN ALMOST CARTE BLANCHE ON SENTENCING UP TO THIS
11 POINT WITH VERY LIMITED APPELLATE REVIEW.

12 THE RESULT OF THAT HAS BEEN INCREDIBLY WIDE
13 DISPARITY. I KNOW IN MY DISTRICT A FEW YEARS AGO, I SAW TWO
14 BANK TELLERS COME IN ABOUT TWO WEEKS APART, ONE OF WHOM
15 EMBEZZLED \$120,000 PLUS, THE OTHER EMBEZZLED SOMETHING UNDER
16 20,000.

17 THE \$120,000 TELLER GOT PROBATION, THE LESS THAN
18 20 GOT TWO YEARS IMPRISONMENT. IN MY VIEW, ONE SENTENCE WAS
19 SLIGHTLY HIGH AND THE OTHER ONE WAS SLIGHTLY LOW, BUT IT'S
20 VERY DIFFICULT TO EXPLAIN TO THE BANKERS, THE PUBLIC, WHY
21 THERE WAS A DIFFERENCE, BECAUSE THERE WAS NO REAL APPRECIABLE
22 DIFFERENCE.

23 SENTENCES LIKE THAT HAVE FINALLY CONVINCED ME THAT
24 WE NEEDED THE SENTENCING GUIDELINES AND I WHOLEHEARTEDLY
25 SUPPORT IT. ANY SYSTEM IT COMES UP WITH IN THIS CASE IS

1 GOING TO BE EXTREMELY COMPLEX.

2 IF PEOPLE ARE BEHIND SOMETHING, YOU CAN MAKE
3 ANYTHING WORK. THE MOST RUDE, GOLDBERG CONTRAPTION CAN BE
4 MADE TO WORK IF PEOPLE SUPPORT IT.

5 I THINK ONE OF THE MAJOR PROBLEMS THAT THIS
6 COMMISSION IS GOING TO FACE IN HAVING ITS GUIDELINES CARRIED
7 OUT IS QUITE SIMPLY THAT OF THE FEDERAL JUDICIARY BEING
8 WILLING TO WORK WITH, TO ACCEPT THE GUIDELINES FOR WHAT THEY
9 ARE, THE PURPOSE BEHIND THEM, WHAT CONGRESS HAS SAID THEY
10 WANT DONE AND NOT TRYING TO FIGHT THE PROBLEM, BECAUSE I
11 THINK THERE IS GOING TO BE AN AWFUL LOT OF FIGHTING THE
12 PROBLEM, PRIMARILY, I THINK BY THE JUDICIARY AND PERHAPS BY
13 MY COLLEAGUES AND FOR THE DEFENSE ATTORNEYS. THE DEFENSE
14 ATTORNEYS ARE PAID TO FIGHT PROBLEMS.

15 SOME OF THE CONCERNS THAT I THINK ARE RAISED ARE,
16 WILL THIS DESTROY THE ABILITY OF DEFENSE ATTORNEYS TO PLEA
17 BARGAIN? WILL IT RESULT IN MORE CONTESTED TRIALS? WILL IT
18 FLOOD THE DISTRICT COURT WITH HEARINGS ON SENTENCING
19 FUNCTIONS?

20 EVEN THOUGH THERE IS A GUILTY PLEA, WILL WE HAVE A
21 TRIAL ON SENTENCING THAT IS JUST AS LONG AS A CONTESTED
22 TRIAL? WILL IT FLOOD THE COURT OF APPEALS WITH APPEALS FROM
23 THE DISTRICT COURT DECISIONS, SINCE THE DISTRICT COURT HAS TO
24 MAKE FINDINGS OF FACT BY A PREPONDERANCE OF THE EVIDENCE?

25 AN INDIVIDUAL GOES OFF TO JAIL, VERY RARELY HAS

1 MUCH TO DO EXCEPT TO WRITE WRITS. WE HAVE VERY FINE LAW
2 LIBRARIES AT MOST OF OUR INSTITUTIONS. ARE WE GOING TO BE
3 FLOODED WITH A NEVER-ENDING SERIES OF APPEALS FROM THE
4 DISTRICT COURT JUDGE, THAT THE JUDGE DIDN'T CONSIDER THIS AND
5 THAT HE DID CONSIDER THAT, THAT IT'S NOT BY A PROPONDERANCE?

6 THESE ARE SUBSTANTIAL CONCERNS. ANOTHER CONCERN
7 IS, I GUESS ALWAYS, WILL IT REALLY HELP? WILL WE END UP WITH
8 A SET OF GUIDELINES THAT HAVE ENOUGH HOLES IN THEM THAT WE
9 END UP WITH A LOT OF VARYING SENTENCES DESPITE EVERYONE'S
10 BEST EFFORTS?

11 IN FACT, WHEN GAO COMES BACK IN FIVE YEARS AND
12 DOES ANOTHER STUDY, THEN WE ARE GOING TO STILL SHOW WIDELY
13 VARYING SENTENCES.

14 THE TEST OF THE PREPONDERANCE OF THE EVIDENCE
15 WHICH THE COMMISSION HAS ADOPTED, I BELIEVE, IS A GOOD ONE.
16 IT IS ONE THAT I THINK WILL BE WORKABLE.

17 I AM A LITTLE BIT CONCERNED, AGAIN, AS TO SOME OF
18 THE LANGUAGE IN THE COMMISSION. IT TALKS ABOUT THAT ALL
19 RELEVANT, RELIABLE INFORMATION WILL BE CONSIDERED EXCEPT THAT
20 PROHIBITED BY THE RULES OF EVIDENCE.

21 I'M NOT QUITE SURE WHAT THAT MEANS. IF WE MEAN
22 EXCLUDING EVIDENCE THAT BY LAW, SUCH AS ILLEGAL WIRE TAPS ARE
23 ILLEGAL, I HAVE NO PROBLEM WITH THAT. PRIVILEGED TESTIMONY
24 IS EXCLUDED.

25 BUT IF IT MEANS WE GET INTO SORT OF A RULES OF

1 EVIDENCE TYPE THING, I THINK THAT'S INAPPROPRIATE. PROBATION
2 HEARINGS, REVOCATIONS, MOST HEARINGS ARE CONDUCTED BY JUDGES
3 CONSIDERING WHAT EVIDENCE THEY FEEL APPROPRIATE.

4 I BELIEVE THAT'S WHAT THE COMMISSION MEANS. THE
5 LANGUAGE THERE GIVES ME A LITTLE BIT OF CONCERN WHEN THEY
6 THEY SAY, "SUCH AS PERMITTED BY THE RULES OF EVIDENCE."

7 THERE IS -- AGAIN, I'M GOING THROUGH THE DRAFT. I
8 MAY BE DOING A LITTLE BIT OF -- I HOPE IT'S NOT CALLED
9 NITPICKING, BUT, FOR INSTANCE, TALKING ABOUT THE MODIFIED
10 REAL SENTENCING, MODIFIED REAL DEFENSE CHARACTERISTICS, I DO
11 BELIEVE IT'S THE MOST WORKABLE PROCEDURE DONE.

12 ON PAGE 16, ITEM 6, WE TALK ABOUT A SHOTGUN BEING
13 FOUND IN A DRUG DEALER'S HOUSE, BUT NOT BEING CONSIDERED.
14 YET, OVER IN OUR SPECIFIC GUIDELINES, WE SPECIFICALLY PROVIDE
15 ENHANCEMENT FOR WEAPONS FOUND DURING THE COURSE OF A DRUG
16 DEAL.

17 ESSENTIALLY, WE JUST HAVE SOME INTERNAL
18 INCONSISTENCIES THERE OF A RELATIVELY MINOR NATURE.
19 PERSONALLY, I THINK IF THE DRUG DEALER'S GOT A WEAPON, IT'S
20 THERE FOR A PURPOSE AND THAT'S NORMAL IN DRUG DEALINGS, SO,
21 THEREFORE, IT'S RELATED AND THAT THE ITEM ON PAGE 6, ITEM 6
22 ON PAGE 16, IS JUST WRONG.

23 THERE ARE SOME AREAS -- AND ANY TIME YOU DRAW THE
24 GUIDELINES -- THE COMMISSION HAS SHOWN IN PROPERTY OFFENSES
25 TO GO DOWN TO A GREAT NUMBER OF CATEGORIES, BREAKING AT

1 2,000, 4,000, 10, 15, ON UP.

2 YET, WE COME TO THE STATUTORY RAPE OFFENSE, A-233,
3 WE TALK ABOUT A BASE PENALTY OF 12. YET, IF THERE IS MORE
4 THAN -- IF THE VICTIM IS UNDER 12 YEARS OLD AND THERE IS MORE
5 THAN THREE YEARS AGE DIFFERENCE, WE SUDDENLY ADD 60.

6 THAT'S A FACTOR OF FIVE FOR PERHAPS A ONE-DAY
7 DIFFERENCE IN AGE. I THINK WE NEED TO DO SOMETHING WITH
8 THAT. WE NEED TO FINE-TUNE THAT TO MAKE A LITTLE BIT MORE
9 GRADIENT.

10 THAT'S TOO MUCH OF A JUMP, THEORETICALLY OR
11 PRACTICALLY, A MONTH'S DIFFERENCE IN AGE IN TWO VICTIMS. A
12 MONTH DOESN'T MAKE THAT MUCH DIFFERENCE. THERE'S NOTHING
13 MAGICAL ABOUT TURNING 18, EXCEPT IT DOES CARRY A LOT OF
14 CONSEQUENCES.

15 IN THIS ONE IT WOULD CARRY A CONSEQUENCE OF
16 INCREASING THE SANCTION MEANS BY A FACTOR OF FIVE, FROM 12 TO
17 72, ACTUALLY. AT THE SAME TIME, WE SAY THERE IS A THREE-YEAR
18 VARIANCE TO INCREASE SANCTIONS.

19 WE COME RIGHT ALONG ON THE NEXT ONE AND TALK ABOUT
20 SEXUAL CONDUCT, AND THERE WE SAY THERE IS A FOUR-YEAR
21 DIFFERENCE. IF THERE'S MORE THAN FOUR YEAR'S DIFFERENCE, WE
22 KICK IN A DIFFERENT FACTOR.

23 I'M NOT REAL SURE I UNDERSTAND WHY IT SHOULD BE
24 THREE YEARS FOR STATUTORY RAPE AND FOUR YEARS FOR CONDUCT NOT
25 AMOUNTING TO STATUTORY RAPE.

1 ANOTHER ISSUE THAT CAUSES ME SOME CONCERN IS THE
2 PSYCHOLOGICAL INJURY. I DON'T THINK THERE IS ANY DOUBT BUT
3 THAT PSYCHOLOGICAL INJURY MAY WELL OCCUR IN MANY, MANY
4 CRIMES.

5 THE ENHANCED PUNISHMENT FOR THAT IS DIFFICULT, I
6 THINK, TO APPLY. WE TALK ABOUT IN THE CASE OF EXTREME
7 PSYCHOLOGICAL HARM THAT IT MUST BE PROVEN BY EXPERT
8 TESTIMONY.

9 THIS DOES GET US INTO A MINI-HEARING BECAUSE THERE
10 THE COMMISSION HAS SPECIFICALLY PROVIDED IT MUST BE BY EXPERT
11 TESTIMONY. THAT MEANS THE GOVERNMENT HAS AN EXPERT, HAS TO
12 HIRE IT, PAY IT, AND I'M SURE THE DEFENSE IS GOING TO HIRE
13 AND PAY ONE AND WE ARE GOING TO END UP WITH A MINIATURE
14 PSYCHIATRIC TRIAL.

15 WITH ALL DUE RESPECT TO MANY OF THE PSYCHIATRIC
16 PROFESSION, I'M NOT SURE BUT WHAT THEY ARE NOT SIMPLY GIVING
17 US GUESSES, WHICH MAY OR MAY NOT BE AS WELL EDUCATED AS
18 PROBATION OFFICERS OR THE JUDGES OR THE ATTORNEYS.

19 I JUST HAVE SOME REAL PROBLEM AS TO HOW WELL WE
20 CAN EVALUATE. I THINK IT'S GOOD THAT WE CONSIDER IT, BUT I
21 THINK IT MIGHT BE JUST FACTORED INTO THE BODILY HARM-TYPE
22 THING, RATHER THAN TO TRY TO SET IT OUT.

23 I SEE REAL DIFFICULTIES IN SIMPLY APPLYING
24 PSYCHOLOGICAL HARM, AS TO WHETHER IT WILL LAST MORE THAN 120
25 DAYS. IT'S JUST VERY DIFFICULT.

1 VERY OFTEN THE PSYCHOLOGICAL HARM, WE ALSO HAVE
2 CIVIL LITIGATION PENDING, AND I SEE SOME JUST PRACTICAL
3 PROBLEMS WITH PUTTING THAT IN.

4 THE PLEA AND COOPERATION ISSUE IS ONE THAT THE
5 COMMISSION HAS WRESTLED WITH IN SOME DETAIL. THE COMMISSION
6 PROVIDES THAT THE REHABILITATION OR THE DOWNWARD ADJUSTMENT
7 FOR TRUE REHABILITATION CAN TAKE PLACE AFTER A DEFENDANT
8 PLEADS NOT GUILTY AND GOES TO TRIAL.

9 I HAVE SOME REAL PROBLEMS WITH THAT. IT SEEMS TO
10 ME LIKE THAT ONCE THE DEFENDANT HAS SORT OF ROLLED THE DICE
11 WITH THE JURY, THAT IT SHOULD BE FAIRLY DIFFICULT FOR HIM TO
12 SAY THAT HE'S ENTITLED TO 20 PERCENT REDUCTION BECAUSE AFTER
13 HE HAS BEEN CONVICTED, HE THEN SAYS, OKAY, I WILL PAY IT BACK
14 NOW THAT YOU HAVE CONVICTED ME.

15 TO ME, IF THERE'S GOING TO BE ANY REAL SHOWING OF
16 REHABILITATION, IT NEEDS TO COME BEFORE THE TRIAL. THERE ARE
17 SOME CONSTITUTIONAL QUESTIONS OBVIOUSLY THAT CAN BE RAISED
18 THERE.

19 ESSENTIALLY, IT SEEMS TO ME THAT YOU ADJUST DOWN
20 FOR COOPERATION, YOU'RE NOT ADDING IN GOING TO TRIAL. I
21 THINK IT WOULD BE VERY DIFFICULT TO QUALIFY, SHOULD BE VERY
22 DIFFICULT TO QUALIFY, IF THE DEFENDANT PLEADS NOT GUILTY AND
23 GOES TO TRIAL THAT HE'S TRULY REHABILITATED AND WANTS TO
24 COOPERATE.

25 THE COOPERATION OF THE GOVERNMENT, THE COMMISSION

1 HAS GIVEN SUBSTANTIAL DISCOUNTS PROPOSING UP TO 40 PERCENT BY
2 A FACTOR OF .6 FOR COOPERATION IN EXTREME CASES. I BELIEVE
3 THAT IS ENTIRELY APPROPRIATE WITH THE COMPLEX CRIMES THAT WE
4 FACE TODAY WITHOUT COOPERATION IN SOME MEANS BLUNTLY TO
5 COERCE THEM.

6 WE HAVE GREAT DIFFICULTY IN SOLVING MANY CRIMES.
7 IF THE DEFENDANT GETS NOTHING OUT OF COOPERATING, YOU'RE NOT
8 GOING TO GET HIS TESTIMONY. YOU MAY WELL, IN MANY CASES,
9 BE -- HAVE TO STOP WITH THE LOWER LEVEL OF COMPLEX CRIMINAL
10 THINGS.

11 THE EXACT DISCOUNTS THERE, WE COULD PERHAPS ARGUE
12 ABOUT. I WOULD LIKE TO SEE IT PERHAPS GO EVEN TO A .5 FOR
13 EXTREME COOPERATION. AGAIN, I THINK THE COMMISSION PROCEDURE
14 OF HAVING THE U.S. ATTORNEY CERTIFY IT IS APPROPRIATE.

15 I DO BELIEVE IT DOES HAVE TO BE SUBJECT, AS MOST
16 THINGS DO, TO A SHOWING OF BAD FAITH AND THAT SHOULD BE WITH
17 THE DISTRICT JUDGE, THAT IF THERE IS A QUESTION OF BAD FAITH,
18 THAT THAT SHOULD BE -- THE JUDGE SHOULD HAVE SOME DISCRETION.
19 HE SHOULD NOT HAVE TO ABSOLUTELY ACCEPT THE CERTIFICATION OF
20 ANYBODY.

21 ON SCORING CRIMINAL HISTORY, I NOTICE THERE THAT
22 THEY ARE SCORING THE AMOUNT OF JAIL TIME AND I ASSUME THIS IS
23 FOR ADMINISTRATIVE CONVENIENCE.

24 WE BASICALLY SAY WE ASSUME THAT WHATEVER SENTENCE
25 IS RECEIVED, THE DEFENDANT -- PROBATION OFFICER PUT DOWN

1 ONE-THIRD OF IT; BUT TO INSURE THE DEFENDANT IS NOT UNJUSTLY
2 PUNISHED, HE CAN COME IN AND SHOW THAT HE ACTUALLY SERVED
3 LESS THAN ONE-THIRD.

4 I THINK THERE'S A LITTLE SAUCE FOR THE GOOSE AND
5 SAUCE FOR THE GANDER. I THINK THE GOVERNMENT OUGHT TO BE
6 ABLE TO COME IN AND SHOW THAT HE SERVED A LOT MORE THAN
7 ONE-THIRD, PARTICULARLY UNDER THE PAROLE GUIDELINES AS WE NOW
8 HAVE THEM.

9 THE OLD ONE-THIRD RULE IS NOT USED THAT MUCH.
10 MANY JUDGES SENTENCE TO FIVE YEARS WELL KNOWING THAT UNDER
11 THE PAROLE GUIDELINES THAT THE DEFENDANT IS GOING TO SERVE
12 PERHAPS FOUR, FOUR AND A HALF YEARS OF THAT.

13 SO I THINK IF WE ARE GOING TO MAKE ADJUSTMENTS UP
14 OR DOWN ON THE THIRD, IT SHOULDN'T BE A ONE-WAY STREET. IF
15 THE DEFENDANT CAN SHOW THAT HE HAS SERVED ONLY A TENTH OF IT,
16 THE GOVERNMENT SHOULD BE ABLE TO SHOW THAT HE SERVED 80
17 PERCENT OF IT, SO WE, IN FACT, COME OUT ACCURATELY. PERHAPS
18 IF NOBODY CHALLENGES IT, WE LEAVE IT WITH A THIRD AND THAT'S
19 AN ADMINISTRATIVE -- EASY ADMINISTRATIVELY, BUT BOTH SIDES
20 SHOULD HAVE THE RIGHT TO CHALLENGE IT.

21 AS TO WHAT IS CONSIDERED IN THE PRETRIAL OR IN THE
22 CRIMINAL HISTORY THING, ONE AREA THAT IS NOT ADDRESSED IN
23 IT -- AND PERHAPS SHOULD BE, PARTICULARLY IN THE FEDERAL
24 SYSTEM -- MANY U.S. ATTORNEYS HAVE A PRETRIAL DIVERSION
25 PROGRAM WHERE A DEFENDANT COMES IN, HE ADMITS CERTAIN

1 CRIMINAL CONDUCT, BUT IS PUT ON, IN EFFECT, SUPERVISED
2 PROBATION UNDER SUPERVISION OF THE PROBATION OFFICE FOR
3 PERIODS RANGING UP TO 18 MONTHS.

4 I SEE NO REASON WHY THAT SHOULD NOT BE CONSIDERED.
5 THAT INDIVIDUAL HAS HAD ONE BITE AT THE APPLE, SO TO SPEAK,
6 AND I BELIEVE THOSE PROGRAMS ARE DOCUMENTED. THEY ARE IN
7 WRITING. THEY ARE AVAILABLE THROUGH THE PROBATION OFFICE
8 NORMALLY. I BELIEVE THAT SHOULD BE CONSIDERED IN THE
9 CRIMINAL HISTORY.

10 I NOTICE AS FAR AS THE MILITARY GOES, THEY EXCLUDE
11 SOME REPORTS. SOME REPORTS ARE NOT THAT BIG A DEAL IF THE
12 DEFENDANTS ARE REPRESENTED OR CAN BE REPRESENTED BY COUNSEL
13 THERE; I SEE NO PARTICULAR REASON THAT THEY SHOULD NOT BE
14 FACTORED IN.

15 I NOTICE ALSO IT SPECIFICALLY EXCLUDES MILITARY
16 OFFENSES THAT HAVE NO CIVILIAN COUNTERPART; FOR INSTANCE,
17 DESERTION. AGAIN, I HAVE A LITTLE PROBLEM. DESERTION
18 CARRIES A VERY SERIOUS VIOLATION; IT IS A SERIOUS MORAL
19 VIOLATION.

20 I SEE NO REASON WHY IT SHOULD NOT BE CONSIDERED.
21 I SEE NO REASON WHY WE SHOULD LIMIT MILITARY OFFENSES TO ONLY
22 THOSE HAVING CIVILIAN COUNTERPARTS. THEY ARE A VIOLATION OF
23 LAWS ESTABLISHED UNDER THE CONSTITUTION AND THEY SHOULD BE
24 FACTORED IN.

25 CERTAINLY, A PERSON WHO HAS COMMITTED DESERTION,

1 THE LIKELIHOOD OF CRIMINAL CONDUCT IS, TO ME, MUCH GREATER
2 THAN SOMEONE WHO MAY HAVE A MINOR SHOPLIFTING CHARGE.
3 SHOPLIFTING WOULD BE COUNTED, THE DESERTION WOULD NOT.

4 THE RANGE OF OFFENSE CHARACTERISTICS, WHICH THE
5 COMMISSION WAS CHARGED BY CONGRESS TO TAKE INTO EFFECT, IS
6 INCREDIBLY DIFFICULT, BECAUSE SOME OF THOSE AREAS, YOU'RE
7 GOING TO HAVE REASONABLE PEOPLE DISAGREEING AS TO WHETHER
8 IT'S A PLUS FACTOR OR MINUS FACTOR.

9 NOW, SOMEONE MAY SAY THAT THE PILLAR OF THE
10 COMMUNITY HAS LIVED A EXEMPLARY LIFE AND, THEREFORE, HE
11 SHOULD BE GIVEN CREDIT. THE OTHER SAYS THIS IS A PILLAR OF
12 THE COMMUNITY, HE WENT OUT AND COMMITTED A CRIME; HE SHOULD
13 BE MADE AN EXAMPLE OF AND TREATED MORE HARSHLY.

14 I'M NOT GOING TO GIVE AN OPINION ON THAT RIGHT
15 NOW. I THINK ONE METHOD THAT THE COMMISSION MIGHT BE ABLE TO
16 HANDLE, TO TRY TO HAVE SOMETHING WORKABLE IN THIS, WOULD BE
17 PERHAPS TO ASSIGN IN THESE AREAS A PLUS OR MINUS FACTOR, THEN
18 SORT OF TOTAL THAT UP AND AT THE END HAVE A PERCENTAGE
19 ADJUSTMENT.

20 THAT MAY BE ONE WAY TO HANDLE IT. AS THE
21 COMMISSION POINTS OUT, THE OTHER WAY MAY BE SIMPLY TO SAY,
22 THE JUDGE WILL LOOK AT THOSE AND THEN ADJUST THAT WITHIN HIS
23 RANGE.

24 THE PROBLEM THERE, I THINK, DOING IT THAT WAY IS
25 YOU GET BACK INTO AN AWFUL LOT OF DISCRETION AND I CAN SEE AN

1 AWFUL LOT OF -- ONE JUDGE SAYS, WELL, I CONSIDER THAT AN
2 AGGRAVATING AND ANOTHER SAYS, I CONSIDER IT MITIGATING, AND
3 YOU REALLY DON'T HAVE ANY GUIDELINES AND WE ARE BACK TO OUR
4 DISPARITY, ALTHOUGH STILL WITHIN A NARROWER RANGE, BUT WE
5 HAVE JUST SIMPLY CONFINED OUR DISPARITY TO A NARROWER RANGE.

6 FINES ARE AN AREA THAT CAUSE THE U.S. ATTORNEYS A
7 LOT OF PROBLEMS. WE HAVE TO COLLECT THEM. I HAVE GOT FINES
8 RANGING BACK TO 1944. ONE OF THEM WAS FOR A DIME. I PAID
9 THAT ONE MYSELF JUST TO GET IT OFF THE BOOKS.

10 WE HAVE A LOT OF FINES THAT ARE UNCOLLECTED. WE
11 ARE FINALLY GETTING SOME METHOD TO GET THEM OUT OF OUR
12 DOCKETS, BUT I HAVE SEEN AN AWFUL LOT OF CASES WHERE JUDGES
13 JUST IMPOSE A FINE, I THINK BECAUSE THEY THOUGHT IT LOOKED
14 GOOD, THEY DIDN'T GIVE A REAL LONG INCARCERATION SENTENCE,
15 BUT THEY GAVE A BIG FINE. IT LIKES LIKE THEY ARE REALLY
16 DOING SOMETHING.

17 I HAD ONE JUDGE THAT GAVE AN \$8,000 FINE TO A
18 COUNTERFEITER WHO WE HAD SEIZED ALL HIS PROPERTY, HE WAS A
19 CANADIAN CITIZEN. AS SOON AS HE SERVED HIS EIGHT-YEAR
20 SENTENCE, HE WAS GOING TO BE DEPORTED BACK TO CANADA.

21 I JOINED WITH DEFENSE COUNSEL AND ASKED HIM TO
22 REDUCE THAT FINE DOWN BECAUSE ALL IT'S GOING TO DO IS CLOG UP
23 MY BOOKS FOR THE NEXT 20 YEARS. THE JUDGE SAID, NO, YOU
24 MIGHT COLLECT.

25 THE COMMISSION, I THINK, ADDRESSES THAT. FINES,

1 THERE MUST BE SOME REALISTIC ABILITY TO PAY ON A FINE; AND
2 ONCE WE DETERMINE THAT, THEN THERE SHOULD BE METHODS OF
3 COLLECTING IT.

4 THE CONDITIONAL RELEASES AND VARIOUS OTHER WAYS, I
5 BELIEVE THE COMMISSION IS HEADED IN A WAY TO ENABLE US TO DO
6 THAT.

7 ORGANIZATIONS. ORGANIZATIONS COMMIT CRIMES
8 THROUGH INDIVIDUALS. THE FINES ON ORGANIZATIONS SHOULD BE
9 SUBSTANTIAL; THEY SHOULD BE BIG. THAT'S WHERE WE SHOULD SEE
10 THE BIG FINES, IS ON ORGANIZATIONS.

11 I THINK WE ALSO, ON ORGANIZATIONS, SHOULD LOOK
12 TOWARD SENTENCES THAT ALLOW BASICALLY THE -- TO PUNISH THE
13 CORPORATION BY SAYING, IF YOUR EMPLOYEE DID SOMETHING, THAT
14 EMPLOYEE CANNOT WORK IN THAT AREA; AND IN SOME CASES WHERE
15 THE PROOF IS SATISFACTORY, THAT EMPLOYEE MUST BE TERMINATED.

16 COMPANIES DO NOT DO CRIMES EXCEPT THROUGH THEIR
17 EMPLOYEES. TOO OFTEN, YOU SEE CORPORATIONS WHERE THEY PAY
18 THE FINE. IT'S A COST OF BUSINESS, AND THE VERY
19 VICE-PRESIDENT THAT WENT OUT AND DID THE ROAD BUILDING, BID
20 RIGGING, STAYS RIGHT THERE AND CONTINUES RIGHT AHEAD.

21 THESE CRIMES INVOLVE TREMENDOUS AMOUNTS OF MONEY,
22 ANTITRUST BID-RIGGING TYPE CASES, TREMENDOUS AMOUNTS OF MONEY
23 INVOLVED. FINES, AS I SAY, I THINK SHOULD BE VERY
24 SUBSTANTIAL.

25 CONGRESS HAS CERTAINLY PROVIDED FOR MAXIMUMS

1 WITHIN THAT. I THINK THE GUIDELINES SHOULD TAKE THAT INTO
2 ACCOUNT FOR CORPORATIONS AND ALSO SHOULD SERIOUSLY CONSIDER
3 ADDITIONAL SANCTIONS ON THE CORPORATIONS AS CONDITIONS OF
4 PROBATION, BE OUT OF BUSINESS FOR A CERTAIN PERIOD OF TIME, A
5 DEBARMENT, IN EFFECT, TO TERMINATE CERTAIN EMPLOYEES, PERHAPS
6 TO DO CERTAIN PUBLIC SERVICE WORK WITH THEIR EXPENDITURE OF
7 FUNDS AND MONEY.

8 ONE OF THE MAJOR ISSUES IN THE COMMISSION -- AND
9 THE COMMISSION, I KNOW, HAS ASKED FOR SPECIFIC HELP ON
10 THAT -- IS IN THE PLEA BARGAINING AREA. OBVIOUSLY CONGRESS
11 WAS CONCERNED ABOUT THAT.

12 THEY DON'T WANT PLEA BARGAINING TO, IN EFFECT, GET
13 AROUND THE GUIDELINES AND -- HAVE AN ELABORATE SET OF
14 GUIDELINES, BUT HAVE A PLEA BARGAIN THAT, IN EFFECT, DOES
15 AWAY WITH IT. THAT PUTS US BACK TO THE SAME PROBLEM.

16 THE PRACTICE IN MY DISTRICT VERY OFTEN, AT THE
17 PRESENT TIME ON PLEA BARGAINING, IS IF THE DEFENDANT PLEADS
18 TO A COUPLE OF COUNTS, WE AGREE THE IMPRISONMENT ON COUNT ONE
19 WOULD NOT EXCEED THREE OR FOUR YEARS, SOME SORT OF CAP.

20 THE IMPOSITION OF SENTENCE WOULD BE SUSPENDED ON
21 THE SECOND COUNT, PLACED ON PROBATION, WHICH GIVES A CERTAIN
22 AMOUNT OF FLEXIBILITY FOR PRIOR CONDUCT. I BELIEVE THAT
23 UNDER THE GUIDELINES, THAT THE CAP-TYPE PLEA BARGAIN IS GOING
24 TO BE PRETTY WELL OUT.

25 THE GOVERNMENT IS NOT GOING TO BE ABLE TO AGREE

1 THAT THE SENTENCE SHOULD NOT EXCEED THREE YEARS, BECAUSE IF
2 THE GUIDELINES CALL FOR MORE THAN THAT, THAT'S WHAT THE
3 DISTRICT COURT IS GOING TO SENTENCE TO.

4 THE COUNT-TYPE THING, WHERE WE PLEAD TO A CERTAIN
5 AMOUNT OF COUNTS, I BELIEVE WE WILL SEE CONTINUE. I DON'T
6 SEE MUCH WAY TO STOP THAT, BECAUSE IT IS THE EXECUTIVE'S
7 FUNCTION AS TO WHAT THE VIOLATION WILL CHARGE.

8 I THINK THE MODIFIED REAL CONDUCT APPROACH WILL
9 MODIFY THAT TO A CERTAIN POINT. IF HE PLEADS GUILTY TO
10 POSSESSION OF DRUGS AND THE PRESENTENCE REPORT SHOWS THERE
11 WERE WEAPONS THERE, THERE'S GOING TO BE ADJUSTMENTS, EVEN
12 THOUGH HE'S NOT CHARGED WITH A WEAPONS VIOLATION, AS HE
13 PROBABLY SHOULD BE.

14 THE EFFECT THAT I SEE ON PLEA BARGAINING IS IT'S
15 GOING TO PUT A LOT OF PRESSURE ON DEFENSE ATTORNEYS TO COME
16 IN MUCH EARLIER, TO START THE PLEA BARGAINING EARLIER, ONE,
17 SO THEY CAN CONVINCE THE JUDGE THAT THEY HAVE BEEN
18 REHABILITATED, THAT THEY HAVE STARTED THEIR REHABILITATION
19 EFFORT EARLY TO GET THE REDUCTION THERE, ALSO TO TRY TO
20 COOPERATE WITH THE U.S. ATTORNEY TO GET THE REDUCTION IN
21 COOPERATION.

22 IT IS GOING TO PUT A LOT OF PRESSURE ON DEFENSE
23 ATTORNEYS TO COOPERATE EARLY. I THINK IT'S GOING TO PUT A
24 GOOD BIT OF PRESSURE ON THE U.S. ATTORNEYS AS TO WHAT THEY
25 CHARGE AND WHAT FACTS THAT COME OUT.

1 AGAIN, A DEFENDANT WHO PLEADS GUILTY IS IN A MUCH
2 BETTER POSITION TO SORT OF CONTROL WHAT FACTS COME BEFORE THE
3 JUDGE, WHAT FACTS ARE AVAILABLE FOR THE PROBATION OFFICER TO
4 COME OUT WITH.

5 AFTER YOU HAVE HAD A LONG TRIAL, A LOT OF THE
6 FACTS ARE OUT. MOST OF THE FACTS ARE OUT; AND ONCE IT'S
7 BEFORE THE JUDGE, PARTICULARLY IN A TRIAL SETTING, UNDER
8 OATH, THE JUDGE IS GOING TO HAVE TO CONSIDER THE GUIDELINES.

9 SO THE DEFENSE ATTORNEYS, I THINK, ARE GOING TO
10 LOOK MORE TOWARD PLEA BARGAINING IN TRYING TO ARRANGE A
11 STIPULATED OR AGREED SET OF FACTS. I THINK YOU'RE GOING TO
12 SEE THAT.

13 YOU SEE MANY PLEA BARGAINS COME IN AND THERE WILL
14 BE, IN ESSENCE -- IN EFFECT, A STIPULATION OR AN AGREEMENT
15 BETWEEN THE PARTIES AS TO WHAT THE FACTS ARE. IF THE AMOUNT
16 OF MONEY STOLEN WAS "X," THE AMOUNT OF DRUGS POSSESSED WAS
17 "X," AND I THINK THERE HAS TO BE A GOOD FAITH APPLIED TO
18 THAT, TOO.

19 I THINK A DISTRICT JUDGE CANNOT BE REQUIRED TO
20 SIMPLY SIT THERE AND ACCEPT THAT. THE DISTRICT JUDGE MUST
21 HAVE THE ABILITY -- AND HE CERTAINLY DOES THROUGH THE
22 PROBATION OFFICE -- TO HAVE SOME INDEPENDENT INQUIRY.

23 IF IT APPEARS THAT IT'S JUST SUBSTANTIALLY
24 DIFFERENT FROM WHAT THE TRUTH IS AND THE PARTIES ARE TRYING
25 TO GET AROUND THE GUIDELINES, I THINK THE JUDGE THEN HAS TO

1 TAKE ACTION.

2 HE MAY HAVE TO CALL HIS OWN WITNESSES, IN EFFECT,
3 OR DIRECT THE U.S. ATTORNEYS TO PRESENT ADDITIONAL EVIDENCE.
4 I BELIEVE THAT'S THE WAY THAT HAS TO BE CONTROLLED IS THROUGH
5 THE JUDGE.

6 I THINK IN GOOD FAITH THAT IT WILL HELP ALLEVIATE
7 SOME OF THE QUESTIONS I HAVE DIRECTED EARLIER AS TO
8 CONCERNING THE CONCERNS ABOUT TRIALS, MINI-TRIALS, LONG
9 APPEALS.

10 IF THE PARTIES CAN AGREE TO THE FACTS, THAT
11 SHOULD, ONE, CUT DOWN ON THE LENGTH OF THE HEARING; AND, TWO,
12 IT SHOULD HOPEFULLY CUT DOWN ON THE NUMBER OF APPEALS, IF THE
13 DEFENDANT AGREED TO IT; NOT THAT IT WON'T STOP SOME
14 DEFENDANTS FROM COMPLAINING THAT THEY JUST MISUNDERSTOOD IT
15 OR THEY THOUGHT "X" TO "AY." I'M SURE YOU HAVE ALL HEARD
16 THAT.

17 ONCE THE PRISONER GETS TO JAIL, THEIR JAILHOUSE
18 LAWYERS WILL APPEAL ON ANYTHING. IT CERTAINLY SHOULD MAKE
19 THE APPEAL PROCESS MUCH SHORTER. THE COURT OF APPEALS CAN
20 SIMPLY SAY, YOU AGREED TO IT; THERE WAS NO BAD FAITH; I'M
21 SORRY ABOUT THAT.

22 ONE OF THE LAST CONCERNS THAT I HAVE IS SIMPLY THE
23 COST. I BELIEVE MOST MEMBERS OF THE COMMISSION HAVE
24 INDICATED THAT ONE OF THE RESULTS OF THIS IS WE ARE GOING TO
25 SEE MORE INCARCERATION.

1 WE ARE GOING TO SEE MORE PEOPLE GOING TO JAIL.
2 THERE ARE GOING TO BE MORE PILLARS OF THE COMMUNITY, WHITE
3 COLLAR BID RIGGERS, TAX FAILURE TO FILE, ET CETERA. THEY'RE
4 GOING TO BE HAVING SOME JAIL TIME.

5 ONE OF THE THINGS WE HAVE TO BE CAREFUL IS THAT
6 THIS THING DOESN'T FALL UNDER ITS OWN COST. I KNOW I HAVE
7 GIVEN SPEECHES A COUPLE OF TIMES AND I HAVE ASKED PEOPLE
8 WHETHER THEY FAVORED MORE JAIL TIME, LONGER SENTENCES, WAS
9 EVERYONE TIRED OF THE CRIMINALS.

10 YOU'RE GOING TO GET A LARGE NUMBER OF HANDS THAT
11 GO UP, AND THEN YOU ASK HOW MANY OF THEM WOULD BE WILLING TO
12 RAISE TAXES AND BUILD A PRISON IN THEIR NEIGHBORHOOD, AND
13 IT'S AMAZING HOW MANY OF THOSE HANDS SUDDENLY GO DOWN.

14 I'M WILLING TO BASICALLY SAY I SUPPORT IT. I'M
15 WILLING TO PAY THE TAXES AND HAVE THE PRISON BUILT AT LEAST,
16 IF NOT IN MY NEIGHBORHOOD, CLOSE, BUT WE NEED TO LOOK AT
17 THAT, BECAUSE IF THE COST BECOMES INTOLERABLE, CONGRESS IS
18 GOING TO CHANGE THE WHOLE THING.

19 CONGRESS REACTS TO PRESSURE AND PEOPLE'S
20 POCKETBOOKS ARE VERY CLOSE TO THEM. I THINK WE DO HAVE TO
21 LOOK -- AND THE COMMISSION STARTED ON THAT -- LOOKING AS
22 TO -- WHEN WE SAY INCARCERATION, WE DON'T NEED A LEVEL 5
23 INSTITUTION.

24 WE MAY WELL BE ABLE TO DO IT WITH COMMUNITY
25 INCARCERATION, EVEN THE HOME INCARCERATION, OR SOMETHING CAN

1 BE DONE, THE MINIMUM LEVEL OF INCARCERATION THAT WILL PROTECT
2 SOCIETY.

3 OBVIOUSLY, WE DON'T PUT A FIRST-DEGREE MURDERER
4 OUT IN A PRISON CAMP; BUT ON THE OTHER HAND, WHILE A BID
5 RIGGER NEEDS TO BE DEPRIVED OF HIS FREEDOM SO THAT HE CAN'T
6 GO TO THE COUNTRY CLUB AS HE DESIRES, IT MAY BE THAT THIS
7 COULD BE DONE THROUGH A COMMUNITY HOUSE AT A VERY LOW COST
8 AND WOULD STILL HAVE THE SAME EFFECT, TO DEPRIVE HIM
9 SUBSTANTIALLY OF HIS FREEDOM.

10 I BELIEVE THE COMMISSION HAS GOT AN EXCELLENT
11 START ON THE GUIDELINES. I APPLAUD THE EFFORTS TO DATE. I
12 THINK WE ARE ON THE RIGHT TRACK AND I APPLAUD THEM.

13 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR. BROWN.

14 LET ME ASK YOU, YOU EXPRESSED CONCERN ABOUT THE
15 STANDARD TO BE USED GOVERNING THE ADMISSIBILITY OF EVIDENCE
16 AT THE SENTENCING HEARING, AND I SHARE YOUR CONCERN.

17 WHAT STANDARD WOULD YOU SUGGEST THAT WE WRITE INTO
18 OUR GUIDELINES?

19 MR. BROWN: I BELIEVE THE RELEVANT AND RELIABLE --
20 AND UNLESS IT'S BEEN EXPRESSLY PROHIBITED BY CONGRESS -- FOR
21 EXAMPLE, THE WIRE TAP STATUTE HAS A SPECIFIC PROHIBITION
22 AGAINST USE IN ANY COURT, ANY TRIBUNAL, AN ILLEGAL WIRE TAP.

23 I THINK THAT WOULD BE SOMETHING THAT'S BEEN
24 EXPRESSLY PROHIBITED TO BE CONSIDERED. IT SHOULD NOT BE.
25 OTHERWISE, I BELIEVE IF THE EVIDENCE IS IN THE JUDGE'S

1 DISCRETION, RELEVANT, RELIABLE, IT SHOULD BE, WHETHER IT
2 WOULD BE HEARSAY OR WHATEVER. SO LONG AS THE JUDGE IS
3 SATISFIED IT'S RELEVANT AND RELIABLE, IT SHOULD BE ABLE TO BE
4 CONSIDERED.

5 CHAIRMAN WILKINS: WOULD YOU AGREE WITH THAT, MR.
6 BARR?

7 MR. BARR: I THINK THAT STANDARD WOULD GET US
8 AROUND A LOT OF THE PROBLEMS THAT MR. BROWN ALLUDED TO
9 EARLIER. IT'S FAIRLY CLEAR, FAIRLY PRECISE. THERE WILL BE
10 CHALLENGES TO IT, BUT I THINK THE LEGISLATIVE HISTORY AND THE
11 HISTORY OF THE SENTENCING COMMISSION'S WORK ON THIS WOULD
12 SUBSTANTIATE THE FACT THAT THAT IS A CLEAR STANDARD.

13 IT'S A REASONABLE STANDARD AND REALLY ONE THAT HAS
14 BEEN TESTED BEFORE, BECAUSE ALL WE ARE DEALING WITH ARE
15 SPECIFIC STATUTORY EXEMPTIONS.

16 CHAIRMAN WILKINS: ANY QUESTIONS TO MY LEFT?

17 COMMISSIONER BREYER: THANK YOU VERY MUCH. THAT
18 WAS AN EXCELLENT PRESENTATION.

19 CHAIRMAN WILKINS: JUDGE MACKINNON, DO YOU HAVE
20 ANY QUESTIONS?

21 COMMISSIONER MACKINNON: YES, I HAVE A COUPLE.

22 MR. BARR, I NOTICED YOUR REPORT, YOU WANT MORE
23 THAN THE PRESENT SO FAR AS THE DEGREE OF CERTAINTY AND LOGIC
24 IS CONCERNED, BUT YET YOU WANT SOME MORE FLEXIBILITY. HOW DO
25 YOU THINK THAT THE DEGREE OF FLEXIBILITY CAN BE INCREASED?

30

1 MR. BARR: I'M NOT ASKING FOR MORE FLEXIBILITY
2 THAN IS REFLECTED IN THE GUIDELINES. I THINK THAT THE DRAFT
3 GUIDELINES DO HAVE SUFFICIENT FLEXIBILITY.

4 MY CONCERN AS A FEDERAL PROSECUTOR AND, INDEED, AS
5 A MEMBER OF THE BAR, WHICHEVER SIDE OF THE FENCE WE ARE ON,
6 IS THAT THERE BE AS MUCH CERTAINTY AS POSSIBLE BUT WITH A
7 SMALL DEGREE OF FLEXIBILITY, SO THAT IN EXTRAORDINARY
8 CIRCUMSTANCES, THE JUDGES DO HAVE THE AUTHORITY TO GO OUTSIDE
9 THOSE GUIDELINES WITHIN LIMITS.

10 WE ARE NOT ASKING FOR MORE, AND IT WAS NOT MY
11 INTENTION TO IMPLY THAT WE WOULD ENDORSE MORE FLEXIBILITY
12 THAN AS IS REFLECTED. ALL WE ARE SAYING IS WE SUPPORT THE
13 CONCEPT IN HERE, THAT THERE BE AS MUCH CERTAINTY AS POSSIBLE,
14 BUT WITH A DEGREE OF FLEXIBILITY.

15 COMMISSIONER MACKINNON: ONE OF THE OTHER FACTORS
16 THAT THE COMMISSION HAS TO CONSIDER ARE REGIONAL DIFFERENCES.
17 THIS IS THE FIRST HEARING WE HAVE HAD BELOW THE MASON DIXON
18 LINE, AND I WONDERED WHAT YOU THOUGHT MIGHT BE SOME REGIONAL
19 DIFFERENCES THAT WE OUGHT TO TAKE INTO CONSIDERATION.

20 NOW, I AM AWARE FROM MY TIME WHEN I WAS U.S.
21 ATTORNEY, WHICH WAS A NUMBER OF YEARS AGO, WE HEARD THAT THEY
22 NEVER CONVICTED IN THE SOUTH FOR INCOME TAX VIOLATION BECAUSE
23 THEY WERE FEDERAL TAXES AND THEY COULDN'T GET JURIES TO GO
24 ALONG WITH THEM.

25 WHAT'S THE PRESENT SITUATION IN THAT RESPECT? DO

1 YOU TRY MANY INCOME TAX CASES? DO YOU GET MANY CONVICTIONS?

2 MR. BARR: JUDGING FROM MY EXPERIENCE AND THE
3 DISCUSSIONS, THE BRIEFINGS I HAVE HAD WITH PEOPLE IN MY
4 OFFICE, WHICH ARE STILL ONGOING, TO MAKE ME AWARE OF THE
5 HISTORY OF PROSECUTIONS HERE IN THIS DISTRICT, WE HAVE IN
6 RECENT YEARS -- AND I THINK THIS IS PRIMARILY A REFLECTION OF
7 THE DRUG ACTIVITY IN THE SOUTHEAST AND PARTICULARLY IN
8 GEORGIA -- WE HAVE HAD A NUMBER AND STILL DO HAVE A NUMBER OF
9 INCOME-TAX RELATED INVESTIGATIONS AND CRIMINAL PROSECUTIONS.

10 COMMISSIONER MACKINNON: IN RELATION TO OTHER
11 CRIMINAL ACTIVITY, LIKE THE AL CAPONE THING OR SOMETHING,
12 YOU'RE GETTING AT SOME OTHER ACTIVITY THAT YOU COULDN'T REACH
13 PROBABLY BY A DIRECT STATUTE AND YOU'RE GETTING AT THEM
14 INDIRECTLY?

15 MR. BARR: NO. WE ARE USING BOTH BARRELS.

16 COMMISSIONER MACKINNON: I MEAN, ARE YOU GOING
17 AFTER ORDINARY CITIZENS, AS WELL AS DRUG ADDICTS, DRUG
18 PUSHERS?

19 MR. BARR: WE ARE; WITH REGARD TO THE HISTORY OF
20 THAT AND WITH WHAT FREQUENCY, I CAN'T COMMENT YET, YOUR
21 HONOR, BECAUSE I SIMPLY DON'T KNOW, BECAUSE I HAVE NOT BEEN
22 INVOLVED WITH IT.

23 FROM MY KNOWLEDGE OF THE OFFICE, AT LEAST HERE IN
24 THE NORTHERN DISTRICT -- AND JOE'S EXPERIENCE MAY BE QUITE
25 DIFFERENT -- THE MAJOR THRUST OF THE INCOME TAX CASES, THE

1 INVESTIGATIONS IN RECENT HISTORY AND ONGOING ARE BOTH.

2 THEY ARE NOT, HOWEVER, PRIMARILY ORIENTED TOWARD
3 THE INDIVIDUAL TAXPAYER WITH VERY SMALL AMOUNTS. THEY
4 USUALLY ARE REFLECTIVE OF AND RELATED TO PROSECUTIONS FOR
5 OTHER ACTIVITY THAT INVOLVE NONPAYMENT OR HIDING OF TAXABLE
6 INCOME.

7 COMMISSIONER MACKINNON: YOU ALSO HAVE IN ATLANTA
8 ONE OF THE MAXIMUM SECURITY PENITENTIARIES AND HAVE HAD FOR A
9 TREMENDOUS NUMBER OF YEARS. WHAT WOULD YOU SAY WAS THE LOCAL
10 REACTION TO HAVING THAT PENITENTIARY IN THE CITY OF ATLANTA?

11 IS IT ADVERSE OR TO WHAT EXTENT IS IT ADVERSE? DO
12 THEY WANT TO GET IT OUT OF HERE? THEY HAVE HAD IT FOR, OH,
13 50 YEARS OR SO OR MAYBE MORE THAN THAT.

14 MR. BARR: I KNOW THEY HAVE HAD IT A LONG TIME. I
15 THINK THE GENTLEMAN YOU ALLUDED TO EARLIER SPENT SOME TIME
16 OUT THERE, MR. CAPONE.

17 YOUR HONOR, I THINK THAT PEOPLE IN THE ATLANTA
18 AREA APPRECIATE HAVING A VERY SECURE FACILITY SUCH AS THE
19 ATLANTA PEN OUT THERE AND, AT LEAST PERSONALLY, I'M NOT AWARE
20 OF ANY ADVERSE REACTION TO IT OR ANY GREAT MOVEMENT TO GET
21 RID OF IT.

22 I THINK IT IS A VERY NECESSARY FACILITY. WE NEED
23 IT HERE. THE FEDERAL GOVERNMENT NEEDS IT AND I THINK THE
24 COMMUNITY SUPPORTS IT.

25 COMMISSIONER MACKINNON: DO YOU THINK IT'S RUN IN

1 A MANNER SO IT IS ACCEPTABLE?

2 MR. BARR: FROM MY EXPERIENCE, I CERTAINLY DO.

3 COMMISSIONER MACKINNON: MR. BROWN, ABOUT
4 PSYCHOLOGICAL INJURY, I NOTICE THE POINTS YOU MADE ABOUT
5 EXPERT TESTIMONY AND THE PRESENT DRAFT THE WAY IT IS.

6 I TAKE IT THAT THAT DRAFT WAS CREATED IN THAT WAY,
7 WHICH PROVIDES THAT THERE MUST BE -- PSYCHOLOGICAL INJURY
8 MUST HAVE BEEN FOUND ON SOME BASIS OF EXPERT TESTIMONY.

9 NOW, I AGREE WITH YOU THAT I THINK THAT'S TOO
10 STRONG, BUT I DO THINK THAT IF YOU DIDN'T HAVE SOME EXPERT
11 TESTIMONY, THAT IF YOU'RE GOING TO RELY ON JUST ANY TESTIMONY
12 AS YOU CAN IN AN INSANITY CASE OR SOMETHING OF THAT
13 CHARACTER, THAT YOU WOULD HAVE ALL THE FAMILY MEMBERS COME IN
14 AND TESTIFY ABOUT HOW SO AND SO WAS AFFECTED BY THIS
15 PARTICULAR OFFENSE AND SO ON.

16 WOULD IT BE AGREEABLE TO YOU TO HAVE THAT LIMITED
17 TO SOME EXPERT TESTIMONY? YOU OUGHT TO HAVE SOME, DON'T YOU
18 THINK?

19 MR. BROWN: I GUESS I JUST DON'T HAVE MUCH USE FOR
20 EXPERTS IN THAT AREA.

21 COMMISSIONER MACKINNON: WELL, I DON'T HAVE MUCH
22 USE FOR LAY TESTIMONY EITHER IN THAT RESPECT.

23 MR. BROWN: JUDGE, I THINK THAT YOU NEED --
24 PSYCHOLOGICAL INJURY NEEDS TO BE CONSIDERED. WHETHER IT NEED
25 TO BE CONSIDERED AS A SEPARATE FACTOR, I'M NOT SURE. I WOULD

1 ALMOST RATHER SEE IT LUMPED IN WITH THE OTHER INJURY FACTOR
2 WHICH THEY HAVE.

3 IT'S JUST SO DIFFICULT TO ASCERTAIN IT. I REALLY
4 HAVE SOME PROBLEMS WHETHER IT'S WORTH THE EFFORT TO TRY TO
5 CONSIDER IT APART FROM THE OTHER. IT SEEMS TO ME THAT IF YOU
6 COVER IT UNDER BODILY INJURY, TO BROADEN THAT DEFINITION OUT
7 A LITTLE BIT, YOU DO JUST AS WELL. THAT'S THE ONE AREA I CAN
8 SEE TURNING INTO A FAIRLY LENGTHY --

9 COMMISSIONER MACKINNON: YOU WANT IT OUT
10 COMPLETELY?

11 MR. BROWN: I WANT IT OUT AS A SEPARATE
12 CATEGORY --

13 COMMISSIONER MACKINNON: I SEE.

14 MR. BROWN: -- BUT TO CONSIDER IT AT LEAST AS A
15 FACTOR OR MAYBE AS ANOTHER ELEMENT UNDER THE OTHER, THE
16 GENERAL BODILY INJURY TYPE THING.

17 COMMISSIONER MACKINNON: WELL, IF THERE ISN'T
18 ANYTHING ELSE, THAT'S ALL YOU GOT.

19 MR. BROWN: THEN YOU HAVE IT AND WE WOULD CONSIDER
20 IT.

21 COMMISSIONER MACKINNON: MY OTHER QUESTION IS: AS
22 TO YOUR SUGGESTION THAT AS A PART OF THE PUNISHMENT, PART OF
23 THE SENTENCE, THAT MAYBE IN WHITE COLLAR CRIMES OR OTHERS
24 LIKE THAT, THAT THERE MIGHT BE SOME RESTRICTIONS PLACED UPON
25 THE OFFENDER'S RIGHT TO WORK IN THAT PARTICULAR AREA.

1 NOW, THIS APPROACHES CORRUPTION OF BLOOD, AND DO
2 YOU REALLY THINK THAT YOU COULD PUT THAT IN? I WILL TELL YOU
3 THIS WITH RESPECT TO HOFFA, WHEN HE CAME UP FOR PARDON, THEY
4 PUT THAT ON AS A CONDITION TO WHICH HE AGREED.

5 I HAVE NEVER KNOWN OF ANYTHING LIKE THAT -- OF
6 COURSE, IT CAN BE DONE ON A PROBATION FOR A CERTAIN PERIOD OF
7 TIME; BUT AS TO A PERMANENT PART OF THE SENTENCE, WHAT DO YOU
8 THINK ABOUT THAT?

9 MR. BROWN: JUDGE, YOU HAVE STATUTES NOW IF YOU'RE
10 CONVICTED. IF YOU'RE A LABORER, IF YOU'RE IN THE LABOR
11 MOVEMENT AND YOU'RE CONVICTED OF CERTAIN VIOLATIONS, YOU
12 FORFEIT YOUR OFFICE.

13 COMMISSIONER MACKINNON: THAT'S RIGHT.

14 MR. BROWN: SO THAT -- WE HAVE THE BASIS FOR THAT
15 TYPE PUNISHMENT THERE. I'M NOT TALKING ABOUT A PERMANENT
16 BAR. I DON'T KNOW THAT I WAS SAYING A PERSON COULDN'T WORK
17 IN THAT PARTICULAR AREA, BUT I'M SAYING FOR THAT PARTICULAR
18 COMPANY, THAT THEY WOULD HAVE TO TERMINATE AN EMPLOYEE.

19 HE MIGHT BE ABLE TO WELL GET WORK IN ANOTHER AREA
20 OR ANOTHER COMPANY, ANOTHER LINE, BUT I DON'T NECESSARILY SEE
21 ANYTHING WRONG WITH SAYING IF THE PRESIDENT CONDONED BRIBERY
22 TO FOREIGN OFFICIALS, IT'S A CONDITION OF THE COMPANY THAT
23 THEY WOULD HAVE TO, ONE, EITHER ASSIGN HIM TO TOTAL DUTIES
24 OUTSIDE THAT AREA OR IN AN EXTREME CASE, TERMINATE HIM.

25 COMMISSIONER MACKINNON: BRING HIM BACK HOME?

1 MR. BROWN: BRING HIM BACK HOME OR FIRE HIM.

2 COMMISSIONER MACKINNON: THANK YOU.

3 CHAIRMAN WILKINS: ANY QUESTIONS TO MY RIGHT? MR.
4 BLOCK?

5 COMMISSIONER BLOCK: MR. BROWN, I HAVE A
6 CLARIFYING QUESTION. YOU SUGGESTED THAT WE TAKE SERIOUS
7 ACCOUNT OF THE COST OF GUIDELINES AND THE WAY WE HAVE THE
8 GUIDELINES IN THE DRAFT. I'M ASSUMING THAT YOU DIDN'T
9 SUGGEST THAT WE TAKE PRISON CAPACITY AS AN ABSOLUTE
10 CONSTRAINT.

11 MR. BROWN: NO, NO, I'M NOT SAYING AS AN ABSOLUTE
12 CONSTRAINT, BUT I'M SIMPLY SAYING THAT ANYTHING WE DO HAS GOT
13 A COST TO IT AND WE HAVE TO CONSIDER THE COST.

14 IF WE GET A PROGRAM THAT IS GOING TO COST SO MUCH,
15 PEOPLE ARE GOING TO BE GOING BACK TO CONGRESS TO SAY CHANGE
16 IT. I'M JUST SIMPLY SAYING WE HAVE TO BE AWARE OF IT. I
17 THINK WE NEED TO INCREASE OUR PRISON CAPACITY SUBSTANTIALLY.

18 THE STATES, MANY OF THE STATES, MY STATE, FOR
19 INSTANCE, IS UNDER SEVERE PROBLEMS WITH OVERCROWDING. WE
20 HAVE GOT TO TAKE IT INTO ACCOUNT SO THAT WE DON'T SUDDENLY
21 COME UP WITH UNCONSTITUTIONAL OVERCROWDED PRISONS.

22 WE HAVE TO THINK OF IT AND PLAN AHEAD. PRISONS
23 ARE NOT BUILT OVERNIGHT, AND ALSO WE NEED TO LOOK AT THE COST
24 OF IT BECAUSE CONGRESS CAN ALWAYS DECIDE THE COST IS MORE
25 THAN THEY ARE WILLING TO BEAR AND CHANGE IT.

1 I WOULD HATE LIKE THE DICKENS TO SEE IN TWO OR
2 THREE YEARS CONGRESS SAYING, THIS IS COSTING TOO MUCH; WE ARE
3 GOING TO CHANGE OUR MIND. THEY HAVE BEEN KNOWN TO DO THAT.
4 THAT'S MY CONCERN.

5 COMMISSIONER BLOCK: THANK YOU.

6 CHAIRMAN WILKINS: THANK YOU VERY MUCH, GENTLEMEN.
7 WE APPRECIATE NOT ONLY YOUR TESTIMONY THIS MORNING, BUT THE
8 WRITTEN SUBMISSIONS, AND WE HOPE THAT WE CAN CALL ON YOU IN
9 THE NEXT FEW MONTHS TO CONTINUE TO HELP US WITH THESE ISSUES.

10 THANK YOU VERY MUCH.

11 MR. BARR: I CONSIDER IT AN HONOR. THANK YOU.

12 MR. BROWN: THANK YOU.

13 CHAIRMAN WILKINS: OUR NEXT WITNESS IS MR. GEDNEY
14 M. HOWE FROM CHARLESTON, SOUTH CAROLINA. MR. HOWE IS
15 RECOGNIZED AS ONE OF THE LEADING DEFENSE ATTORNEYS IN THE
16 SOUTHEAST. MR. HOWE, WE ARE GLAD TO HAVE YOU WITH US.

17 MR. HOWE: THANK YOU.

18 CHAIRMAN WILKINS: I MIGHT ADD MR. HOWE ALSO HAS
19 DONE SOME WORK IN THE PAST WITH THE SENTENCING COMMISSION AND
20 WE APPRECIATE NOT ONLY THAT WORK, BUT YOUR WILLINGNESS TO
21 PARTICIPATE TODAY AND THE WRITTEN SUBMISSIONS THAT YOU HAVE
22 MADE.

23 MR. HOWE: THANK YOU, SIR.

24 LIKE MR. BROWN, I'M A LITTLE UNCOMFORTABLE
25 ADDRESSING THE COURT SITTING DOWN. I SORT OF WAS LOOKING FOR

30
1 A PODIUM, BUT THERE'S NOT ONE TO GRAB, SO I WILL STAY SEATED.

2 FIRST OF ALL, I REALLY DO APPRECIATE BEING INVITED
3 AND I AM GOING TO TRY TO MAKE SOME COMMENTS THAT FALL UNDER
4 THE CATEGORY OF CONSTRUCTIVE, AND I KNOW YOU ALL HAVE BEEN
5 LIVING WITH THIS PROBLEM AND BEEN VERY CLOSE TO THIS PROBLEM
6 FOR A LONG TIME.

7 I HAVEN'T BEEN LIVING WITH IT. I HAVEN'T BEEN
8 THAT CLOSE TO IT. I HAVE STUDIED IT MORE RECENTLY AND
9 HOPEFULLY THAT WILL GIVE ME AN OPPORTUNITY TO BE A LITTLE
10 BREATH OF FRESH AIR ON THE SAME PROBLEMS YOU ALL HAVE BEEN
11 DEALING WITH.

12 NOW, THESE GENTLEMEN BEFORE SPEAK LIKE PROSECUTORS
13 AND THAT'S HOW THEY ARE SUPPOSED TO SPEAK. I'M A DEFENSE
14 LAWYER, AND I WANT TO GIVE YOU THE CONTEXT IN WHICH I SPEAK
15 TO YOU.

16 FIRST OF ALL, THIS WHOLE CONCEPT THAT YOU'RE
17 WORKING WITH IS BRAND NEW TO ALL OF US AND IT HASN'T GOTTEN A
18 LOT OF PUBLICITY AND THE DEFENSE BAR AS A WHOLE HAS NOT HAD
19 MUCH OF A CHANCE TO GROW INTO THE CONCEPT OF THE GUIDELINE.

20 JUDGE WILKINS POINTED OUT THAT THE QUESTION IS NOT
21 IF, BUT HOW, AND I MUST ADMIT THAT MANY MEMBERS OF THE
22 DEFENSE BAR ARE STILL WRESTLING WITH WHETHER OR NOT THIS IS A
23 GOOD IDEA.

24 I THINK THAT YOU'VE HAD SOME COMMENTS FROM, IN
25 PREVIOUS SESSIONS, WHEN YOU FELT AS THOUGH THEY WERE

1 CONCENTRATING ON IF IT'S GOOD A GOOD IDEA. WELL, WE
2 RECOGNIZE THAT IT'S HERE, BUT WE HAVEN'T HAD A CHANCE TO GROW
3 INTO IT.

4 IT'S A VERY BIG THING IN OUR LIFE. REMEMBER, THE
5 REALITY FOR A DEFENSE ATTORNEY AS IT STANDS RIGHT NOW IS
6 DIFFERENT. MOST OF THE PEOPLE WHO COME BEFORE YOU AND MOST
7 OF THE PEOPLE WHO ACTIVELY PRACTICE CRIMINAL DEFENSE LAW ARE
8 PRETTY SUCCESSFUL AT IT.

9 IF THEY WEREN'T PRETTY SUCCESSFUL AT IT, THEY
10 WOULD GO DO SOMETHING ELSE AND, OF COURSE, SUCCESS GENERALLY
11 MEANS THEY ARE MAKING SOME MONEY. NOW, WE HAVE A SYSTEM
12 WHICH WE UNDERSTAND. WE HAVE A SYSTEM WHICH IS A KNOWN
13 QUANTITY FOR US.

14 NOW, THE COMMUNITY MAY FEEL LIKE THE CRIMINAL
15 JUSTICE SYSTEM IS BROKEN. THE LEGISLATURE MAY FEEL LIKE THE
16 CRIMINAL JUSTICE SYSTEM IS BROKEN. FOR MANY DEFENSE
17 ATTORNEYS, IT WORKS FINE.

18 WE UNDERSTAND IT. IT'S A KNOWN QUANTITY, SO WHEN
19 I SPEAK TO YOU, I RECOGNIZE, I CONCEDE THOSE PREJUDICES. I
20 CONCEDE THEY ARE GOING TO BE PRETTY HARD TO CHANGE, TOO.

21 NOW, I HAVE TRIED TO CONCENTRATE ON CHAPTER 3. I
22 HAVE NOT THOUGHT ABOUT OR SPENT A LOT OF TIME THINKING ABOUT
23 THE SPECIFIC SENTENCES OF THAT ASPECT OF THE GUIDELINES. I
24 HAVE DIRECTED MY ATTENTION TOWARDS CHAPTER 3.

25 THE FIRST SECTION IN CHAPTER 3 IS THE ROLE OF THE

1 OFFENSE IN THE OFFENSE. NOW, AS I SEE THE GUIDELINES, THE
2 GUIDELINES HOPEFULLY WILL GIVE SOME CULPABILITY LIST ON A
3 NATIONAL BASIS, SO THAT PEOPLE WHO HAVE A CERTAIN ROLE IN A
4 DRUG OFFENSE OR A CERTAIN ROLE IN A BANK ROBBERY OFFENSE IN
5 ARIZONA GET SUBSTANTIALLY THE SAME TREATMENT AS THEY DO IN
6 TEXAS. VERY DIFFICULT TO ARGUE WITH THAT THEORY. IT'S A
7 VERY GOOD THEORY.

8 NOW, IN LOOKING AT THE ROLE OF THE OFFENSES, IT
9 SEEMS TO ME THAT MOST OF YOUR TIME AND ATTENTION HAS BEEN
10 DIRECTED TOWARDS FIGURING OUT WHO THE BAD GUY IS, FIGURING
11 OUT WHO THE HEAVY IS.

12 I THINK THAT THE GUIDELINES FALL A LITTLE SHORT IN
13 POINTING OUT WHAT CONSTITUTES A MINOR PLAYER, BECAUSE, OF
14 COURSE, EVERY DEFENSE LAWYER CONTENDS HIS PLAYER IS THE MOST
15 MINOR OF PLAYERS.

16 SOME OF THE THINGS I HAVE JUST JOTTED DOWN IS THAT
17 A MINOR PLAYER DID NOT INITIATE THE CRIMINAL CONDUCT, THAT
18 THE CONDUCT WOULD HAVE OCCURRED WITH OR WITHOUT HIS
19 PARTICIPATION, HE WAS NOT A DECISION MAKER, LIMITED FUNCTION,
20 LIMITED TIME AND LIMITED BENEFIT.

21 ONE OF THE OTHER THINGS THAT CONCERNS ME -- AND
22 I'M GOING TO TALK ABOUT THIS WITH THE PAROLE BOARD IN A
23 LITTLE BIT -- YOU KNOW UNDER CCE NOW, THE ACTUAL KINGPIN
24 STATUTE, THERE ARE CERTAIN THINGS THAT THE GOVERNMENT HAS TO
25 PROVE TO MAKE YOU A KINGPIN AND THE BURDEN OF PROOF IS BEYOND

1 A REASONABLE DOUBT.

2 UNDER YOUR GUIDELINES, OF COURSE, YOU GO BACK TO
3 GREATER WEIGHT, PREPONDERANCE OF THE EVIDENCE, IS THE BURDEN.
4 I SEE THAT AS A CRIMINAL DEFENSE ATTORNEY, WHILE I RECOGNIZE
5 THE DIFFERENCE BETWEEN TRIAL AND SENTENCING, I SEE THAT AS A
6 CRIMINAL DEFENSE ATTORNEY AS A LOSS OF SOMETHING FOR MY
7 DEFENDANT.

8 IT'S SORT OF HARD FOR ME TO LOOK AT YOU AND SAY, I
9 THINK IT'S A GOOD IDEA. I POINT OUT TO YOU THAT AS IT STANDS
10 RIGHT NOW, TO MAKE SOMEBODY A KINGPIN, THE GOVERNMENT HAS TO
11 PROVE CERTAIN SPECIFIC THINGS BEYOND A REASONABLE DOUBT.

12 THAT IS, WITH YOUR PROPOSAL, THE BURDEN OF PROOF
13 IS MUCH LESS TO IMPOSE A HIGHER SENTENCE AND I SEE THAT AS A
14 LOSS, A CERTAIN LOSS, OF PROCEDURAL SAFEGUARDS.

15 THE POST DEFENSE CONDUCT I READ, IT SEEMS TO BE
16 FULLY COVERED TO ME. IT SEEMS TO BE APPROPRIATE. IT'S
17 PRETTY DIFFICULT TO PROPOSE ANYTHING OTHER THAN ADDITIONAL
18 SANCTIONS FOR PERJURY IN ANY CONDUCT WHICH OCCURS AFTERWARD.

19 NOW, THE ACCEPTANCE OR RESPONSIBILITY SECTION, I
20 READ WITH SOME INTEREST. I PARTICIPATED IN AUGUST IN THE
21 WASHINGTON PROGRAM THAT DEALT WITH THE ACCEPTANCE OF
22 RESPONSIBILITY QUESTIONS, AND THERE WERE A NUMBER OF
23 PROSECUTORS AND DEFENSE ATTORNEYS THERE.

24 I WOULD SAY WE KICKED THAT PROBLEM AROUND PRETTY
25 WELL, AND IN SOME INSTANCES, KICKED EACH OTHER PRETTY WELL.

1 IT IS AN IMPORTANT PART OF YOUR GUIDELINES, AND I THINK SOME
2 PARTS OF IT DEAL WITH -- DEALT WITH IT VERY SOPHISTICATEDLY.

3 NOW, THE FIRST THING I HAVE GOT SOME PROBLEMS
4 WITH, I DON'T THINK A 20 PERCENT DISCOUNT IS ENOUGH. I HAVE
5 AN EXTREME EXAMPLE FOR YOU, BUT YOU CANNOT THINK OF ROBERT
6 VESCO -- I MEAN, SOMEBODY EMBEZZLES \$10 MILLION FROM A COUPLE
7 OF HUNDRED INNOCENT PEOPLE AND LEAVES THE COUNTRY, AND HE'S
8 OUT OF THE JURISDICTION, AND YOU JUST CAN'T GET HIM.

9 I THINK THAT IF YOU WANT HIM BACK AND HE TURNS
10 HIMSELF IN AND HE BRINGS THE MONEY BACK AND HE PAYS IT TO
11 THESE PEOPLE HE TOOK IT FROM THAT OTHERWISE IT WOULDN'T HAVE
12 BEEN RECOVERED FROM, I'M NOT SO SURE YOU'RE GOING TO GET MANY
13 PEOPLE OUT OF THE CARIBBEAN FOR A 20 PERCENT DISCOUNT.

14 I THINK THAT YOU MAKE A MISTAKE LIMITING YOURSELF
15 IN THAT REGARD, AND I THINK THAT IT DOESN'T SAY THE JUDGE
16 WILL GIVE 20 PERCENT. IT SAYS THE JUDGE MAY, AND I DON'T SEE
17 WHERE IT CAUSES YOU ANY CONCERN OR DOES ANY VIOLENCE TO YOUR
18 GUIDELINES TO GIVE THE JUDGE MORE FLEXIBILITY IN THAT REGARD.
19 IT'S AN OPPORTUNITY TO HOLD OUT A BIGGER CARROT IN THE
20 INSTANCES IN WHICH IT'S APPLICABLE.

21 NOW, I DON'T WANT TO BE NITPICKY EITHER, AS THE
22 GENTLEMAN BEFORE ME POINTED OUT, BUT I DON'T LIKE THE WORD
23 SINCERELY, THAT SOMEBODY SINCERELY SAYS THEY MADE A MISTAKE.

24 I REMEMBER WHEN I WAS AT THE UNIVERSITY OF SOUTH
25 CAROLINA, THEY USED TO KICK YOU OUT OF SCHOOL FOR CONDUCT

1 UNBECOMING A UNIVERSITY STUDENT. WELL, IT DIDN'T TAKE THE
2 COURT LONG TO SAY VOID FOR VAGUENESS; THAT'S A BUNCH OF
3 BALONEY, BECAUSE ONE DEAN MAY SEE IT ONE WAY AND ONE DEAN MAY
4 SEE IT ANOTHER.

5 I KNOW YOU ALL PROBABLY WRESTLED WITH THE RIGHT
6 WORD. I DO NOT THINK THAT'S A GOOD WORD. I THINK YOU'RE
7 GOING TO HAVE TROUBLE WITH IT AT THE JUDICIAL LEVEL. I WOULD
8 SUGGEST THE WORD AFFIRMATIVE, AND I JUST THINK THAT THERE'S A
9 CERTAIN SENSE OF EMOTION ASSOCIATED WITH SINCERELY, AND I'M
10 NOT SO SURE IT'S A GOOD WORD.

11 NOW, WE DEALT WITH, IN OUR WASHINGTON MEETING, THE
12 PROBLEMS ASSOCIATED WITH, HOW DO YOU GIVE SOMEBODY CREDIT FOR
13 PLEADING GUILTY WITHOUT SAYING WE'RE GOING TO PUNISH YOU IF
14 YOU GO TO TRIAL.

15 I MEAN, IT'S THE ULTIMATE CONFRONTATION, AND IT'S
16 A VERY DIFFICULT PROBLEM. I THINK IT'S PARTIALLY RAISED WHEN
17 MR. BROWN SAID, WELL, IF YOU'RE GOING TO GET CREDIT FOR
18 ACCEPTANCE OF RESPONSIBILITY, YOU OUGHT TO DO IT BEFORE THE
19 TRIAL.

20 IF YOU GO TO TRIAL, YOU GIVE UP YOUR RIGHT, YOUR
21 OPPORTUNITY FOR ACCEPTANCE OF RESPONSIBILITY. WELL, THAT'S
22 CERTAINLY A LEGITIMATE THOUGHT, BUT I THINK THAT REALLY
23 BRINGS YOU RIGHT BACK INTO THE CONFRONTATION OF, IF YOU GO TO
24 TRIAL, ARE YOU BEING PUNISHED FOR THAT?

25 AND I THINK YOU POINTED OUT IN YOUR GUIDELINES

1 THAT THERE ARE MANY, MANY SITUATIONS WHERE THAT WOULDN'T BE
2 APPLICABLE. WE USE TO TRY, STILL TRY SOME MAJOR DRUG CASES
3 IN SOUTH CAROLINA.

4 IT'S AN EXCELLENT PORT AND EXCELLENT FOR
5 IMPORTATION GENERALLY. AND THERE WERE ALWAYS SEARCH AND
6 SEIZURE QUESTIONS. ON MANY OCCASIONS, WE WOULD HAVE A
7 FULL-FLEDGED SEARCH AND SEIZURE HEARING THAT WOULD LAST TWO
8 OR THREE DAYS, AND WE WOULD THEN STIPULATE THAT THAT WAS THE
9 RECORD AT TRIAL. THERE WASN'T ANY REASON TO HAVE A TRIAL.
10 IF THE MARIJUANA CAME IN, YOU WERE GOING TO GET CONVICTED.

11 SO I SEE THIS AS A SITUATION IN WHICH SOMEBODY
12 COULD VERY WELL SAY, YOU KNOW, I -- AND CLIENTS SAY THIS ALL
13 THE TIME -- I STAND ON MY CONSTITUTIONAL RIGHTS, THAT
14 SOMEBODY CAN SAY, I WANT TO HAVE MY SEARCH AND SEIZURE
15 HEARING.

16 I ACKNOWLEDGE THAT IF I LOSE IT THAT THERE IS
17 NOTHING NEW TO PUT IN AT TRIAL AND I HAVE GOT AN APPELLATE
18 ISSUE; BUT AT THE SAME TIME, HE HAS THE OPPORTUNITY TO BEGIN
19 HIS REHABILITATION, TO COME FORWARD, TO SAY, I DID IT, BUT I
20 THINK I HAVE GOT SOME PROCEDURAL RIGHTS DUE ME.

21 HE CAN DO THE OTHER THINGS AVAILABLE UNDER THE
22 ACCEPTANCE OF RESPONSIBILITY, AND I DON'T THINK HE SHOULD BE
23 DENIED THAT OR EVEN HAVE THE ATMOSPHERE OF DENIED THAT, IF HE
24 PARTICIPATES IN A TRIAL.

25 NOW, THE NEXT THING LEADS IN -- THE NEXT THING I'M

1 IT IS AN IMPORTANT PART OF YOUR GUIDELINES, AND I THINK SOME
2 PARTS OF IT DEAL WITH -- DEALT WITH IT VERY SOPHISTICATEDLY.

3 NOW, THE FIRST THING I HAVE GOT SOME PROBLEMS
4 WITH, I DON'T THINK A 20 PERCENT DISCOUNT IS ENOUGH. I HAVE
5 AN EXTREME EXAMPLE FOR YOU, BUT YOU CANNOT THINK OF ROBERT
6 VESCO -- I MEAN, SOMEBODY EMBEZZLES \$10 MILLION FROM A COUPLE
7 OF HUNDRED INNOCENT PEOPLE AND LEAVES THE COUNTRY, AND HE'S
8 OUT OF THE JURISDICTION, AND YOU JUST CAN'T GET HIM.

9 I THINK THAT IF YOU WANT HIM BACK AND HE TURNS
10 HIMSELF IN AND HE BRINGS THE MONEY BACK AND HE PAYS IT TO
11 THESE PEOPLE HE TOOK IT FROM THAT OTHERWISE IT WOULDN'T HAVE
12 BEEN RECOVERED FROM, I'M NOT SO SURE YOU'RE GOING TO GET MANY
13 PEOPLE OUT OF THE CARIBBEAN FOR A 20 PERCENT DISCOUNT.

14 I THINK THAT YOU MAKE A MISTAKE LIMITING YOURSELF
15 IN THAT REGARD, AND I THINK THAT IT DOESN'T SAY THE JUDGE
16 WILL GIVE 20 PERCENT. IT SAYS THE JUDGE MAY, AND I DON'T SEE
17 WHERE IT CAUSES YOU ANY CONCERN OR DOES ANY VIOLENCE TO YOUR
18 GUIDELINES TO GIVE THE JUDGE MORE FLEXIBILITY IN THAT REGARD.
19 IT'S AN OPPORTUNITY TO HOLD OUT A BIGGER CARROT IN THE
20 INSTANCES IN WHICH IT'S APPLICABLE.

21 NOW, I DON'T WANT TO BE NITPICKY EITHER, AS THE
22 GENTLEMAN BEFORE ME POINTED OUT, BUT I DON'T LIKE THE WORD
23 SINCERELY, THAT SOMEBODY SINCERELY SAYS THEY MADE A MISTAKE.

24 I REMEMBER WHEN I WAS AT THE UNIVERSITY OF SOUTH
25 CAROLINA, THEY USED TO KICK YOU OUT OF SCHOOL FOR CONDUCT

1 GOING TO TALK WITH YOU ABOUT LEADS INTO COOPERATION, AND I
2 DON'T KNOW WHETHER YOU ALL DID THIS ON PURPOSE AND I DON'T
3 WANT YOU TO CHANGE IT BECAUSE I LIKE IT, BUT I THINK IT'S AN
4 INTERESTING CONCEPT.

5 ONE OF THE THINGS U.S. ATTORNEYS HAVE DONE IN THE
6 PAST WHEN YOU WERE NEGOTIATING WITH THEM, THEY SAID, IF YOU
7 PLEAD GUILTY, YOU ALSO HAVE TO COOPERATE. IN OTHER WORDS, IF
8 YOU WANT TO COME FORWARD AND ADMIT YOUR RESPONSIBILITY AS --
9 ACCEPT YOUR RESPONSIBILITY, ATTACHED TO THAT INEXTRICABLY IS
10 AFFIRMATIVE COOPERATION.

11 NOW, THAT'S VERY DIFFICULT ON SOME PEOPLE. THE
12 BEST EXAMPLE IN THE WORLD IS WHEN TWO BROTHERS ARE IN TROUBLE
13 AND ONE BROTHER WANTS TO COME FORWARD. HE WANTS TO SAY, I
14 MADE A MISTAKE; I BROKE THE LAW AND I AM HERE TO ACCEPT MY
15 RESPONSIBILITY, BUT I DON'T WANT TO TESTIFY AGAINST MY
16 BROTHER; HE'S MY BROTHER.

17 AND I THINK THAT WHAT YOU HAVE DONE, HOPEFULLY
18 PURPOSELY -- AND I'M GIVING YOU FULL CREDIT FOR IT -- IS TO
19 IN A SOPHISTICATED WAY GIVE AN INDIVIDUAL AN OPPORTUNITY TO
20 ADMIT HIS RESPONSIBILITY.

21 NOW, IF HE WANTS TO TAKE THE NEXT STEP FOR AN
22 ADDITIONAL DISCOUNT AND COOPERATE, THAT'S FINE. THAT OPTION
23 IS AVAILABLE TO HIM, BUT IF -- AND IT SOUNDS A LITTLE CORNY,
24 TO SAY IF THE CRIMINAL, QUOTE, QUOTE, FOR MORAL REASONS
25 DOESN'T WANT TO COOPERATE ON MATTERS OF PRINCIPLE, THIS

1 FLEXIBILITY IS GIVEN TO HIM IN THE GUIDELINES. I THINK IT'S
2 APPROPRIATE AND I APPLAUD YOU FOR IT.

3 NOW, IN THE AREA OF COOPERATION, I'M BACK TO THE
4 DEFENSE LAWYER, THAT AIN'T ENOUGH. 40 PERCENT IS NOT ENOUGH.
5 NOW, 40 PERCENT IS NOT ENOUGH ON AN UNSELFISH BASIS FOR LEAST
6 SELDOM BREAK BIG CASES ON HARD WORK, GUM SHOE WORK. THEY
7 BREAK BIG CASES ON ROLLING SOMEBODY OVER.

8 ALL RIGHT. THAT'S HOW YOU BREAK A BIG CASE.
9 THAT'S HOW YOU BREAK ALL -- YOU KNOW, DRUG CASES, ALL SORTS
10 OF COMPLICATED CASES. YOU GOT TO GET SOMEBODY TO ROLL.
11 YOU'RE NOT GOING TO GET SOMEBODY TO ROLL FOR 40 PERCENT.

12 NOW, AN INTERESTING THING TO ME IS, THE U.S.
13 ATTORNEY STILL HAS THE POWER NOT TO PROSECUTE. HE STILL HAS
14 THE POWER TO GRANT IMMUNITY, AND HE STILL HAS THE POWER TO
15 NOL-PROS, BUT YOU'RE GOING TO TIE THE JUDGE'S HANDS TO 40
16 PERCENT.

17 THAT SEEMS INCONSISTENT TO ME AND DOESN'T MAKE ANY
18 SENSE. IF THE U.S. ATTORNEY STILL HAS ALL OF THAT POWER TO
19 ASSIST IN THE INVESTIGATION, I CAN'T SEE CORRESPONDINGLY
20 LIMITING THE JUDGE TO 40 PERCENT. I THINK THAT -- I THINK IT
21 SHOULD BE UP TO A HUNDRED PERCENT DEPENDING UPON WHAT THE
22 JUDGE THINKS, AND THAT IT SHOULD BE RELATIVE TO THE
23 COOPERATION.

24 NOW, YOU DO AN INTERESTING THING UNDER
25 COOPERATION. OVER AND OVER AGAIN, THROUGHOUT THESE

1 GUIDELINES, THE FIRST THING YOU DO OVER AND OVER AGAIN IS YOU
2 USE THAT GREATER WEIGHT, PREPONDERANCE OF THE EVIDENCE, WHICH
3 I'M NOT REAL WILD ABOUT, BUT THE COURTS HAVE SAID YOU CAN DO
4 IT AND YOU LOOK BOUND AND DETERMINED TO DO IT TO ME.

5 THE SECOND THING YOU DO IS, YOU LET THE JUDGE
6 DECIDE, YOU KNOW, THAT BURDEN. ALL OF A SUDDEN UNDER
7 COOPERATION, YOU GIVE THE UNRESTRICTED POWER TO THE UNITED
8 STATES ATTORNEY.

9 ONE, I DON'T THINK THAT'S A GOOD IDEA, AND, TWO, I
10 THINK THAT'S INCONSISTENT WITH WHAT YOU HAVE DONE UNDER
11 CHARACTERISTICS, IT'S INCONSISTENT WITH WHAT YOU HAVE DONE
12 UNDER ACCEPTANCE OF RESPONSIBILITY.

13 SO I THINK THAT REPRESENTS A CHANGE FROM YOUR
14 OTHER THINKING AND I THINK IT'S INAPPROPRIATE AND I THINK THE
15 ULTIMATE AUTHORITY SHOULD BE LODGED UNDER COOPERATION WHERE
16 IT'S LODGED IN ALL OTHER INSTANCES, AND THAT'S WITH THE
17 JUDGE.

18 NOW, UNITED STATES ATTORNEYS BEFORE ME TOUCHED ON
19 SOMETHING THAT I THINK IS VERY IMPORTANT AND THAT IS, YOU SEE
20 THROUGHOUT THE GUIDELINES, WE CAN'T ANTICIPATE EVERYTHING; WE
21 CAN'T ANTICIPATE EVERY CIRCUMSTANCE.

22 YOU EVEN -- SOMETHING THAT I THOUGHT WAS VERY
23 APPROPRIATE, AND THAT IS, IF WE TRY TO, WE ARE GOING TO MAKE
24 THIS THING SO COMPLEX, NOBODY CAN USE IT. SO, THERE'S THAT
25 CERTAIN AREA AT BOTH ENDS: AT THE END I LIKE, WHEN SOMEBODY

1 IS ENTITLED TO A BREAK, AND AT THE END I DON'T LIKE, WHEN
2 THERE IS A REAL BAD GUY OUT THERE.

3 NOW, LET ME TELL YOU SOMETHING ABOUT DEFENSE
4 LAWYERS. WE KNOW THE GOOD GUYS FROM THE BAD GUYS; AND WHEN
5 WE REPRESENT BAD GUYS, WE ARE DOING THE BEST WE CAN, BUT WHEN
6 YOU REPRESENT GOOD GUYS, IT PUTS A LOT OF PRESSURE ON YOU.

7 YOU'RE SUPPOSED TO HELP GOOD GUYS AND THE SYSTEM
8 IS SUPPOSED TO GIVE YOU SOME OPPORTUNITY AND WHAT I ENVISAGE
9 IS A CIRCUMSTANCE WHERE A JUDGE IS SAYING, BOY, YOU'RE A NICE
10 YOUNG MAN. I HATE TO PUT YOU IN JAIL. I DON'T THINK IT'S
11 THE APPROPRIATE THING, BUT THE GUIDELINES DON'T GIVE ME ANY
12 ALTERNATIVE.

13 THE PROBATION OFFICER IS SAYING, YOUR HONOR, THIS
14 IS JUST A VERY UNFORTUNATE THING, BUT BECAUSE OF THE WAY THE
15 GUIDELINES ARE DRAWN, THIS YOUNG MAN HAS TO GO TO JAIL, NOT
16 THAT HE OUGHT TO GO, BUT HE HAS TO GO.

17 I THINK THERE SHOULD BE SOME POLICY STATEMENT,
18 SOME AFFIRMATIVE POLICY STATEMENT, SOME GUIDELINE TO THE
19 JUDGES SAYING, NOT ONLY DO WE ANTICIPATE NOT BEING ABLE TO
20 COVER EVERYTHING, WE EXPECT YOU TO USE YOUR DISCRETION. WE
21 EXPECT YOU TO GO OUTSIDE OF THE GUIDELINES IN THOSE
22 CIRCUMSTANCES.

23 IN OTHER WORDS, YOU'RE SAYING TO HIM, YOU WANT TO
24 HAVE A PREDISPOSITION, DO WHAT WE TELL YOU TO DO AND HERE'S
25 WHAT WE ARE TELLING YOU TO DO, BUT WE RECOGNIZE THE FINAL

1 AUTHORITY AND FLEXIBILITY THAT THESE GENTLEMAN TALKED ABOUT
2 IS WITH YOU AND WE EXPECT YOU TO USE IT.

3 WE'VE GIVEN YOU SOME GUIDELINES. WE ARE NOT TYING
4 YOUR HANDS WITH SOME FINALITY. AND SO I THINK AT EITHER
5 EXTREME OF THE GUIDELINES, THE COURT OUGHT TO BE NOT JUST
6 ALLOWED, BUT ENCOURAGED TO OPT OUT IF THEY BELIEVE THAT'S THE
7 APPROPRIATE THING TO DO.

8 NOW, I HAVE LEARNED AND TRIED TO UNDERSTAND
9 MODIFIED REAL SENTENCING, MODIFIED REAL OFFENSE SENTENCING,
10 AND IT IS GOING TO LEAD TO SOME COMPLEXITY, AND I THINK
11 THAT'S ONE OF THE CRITICISMS YOU ALL HAVE HAD PREVIOUSLY.

12 ONE OF THE CRITICISMS I HAVE HEARD BEFORE IS IT'S
13 GOING TO BE SO COMPLICATED, YOU'RE GOING TO HAVE SPECIALISTS
14 AND EVERYBODY TALKS ABOUT THAT LIKE IT'S SOMETHING NEW.

15 NOW, LET ME REMIND YOU, SENTENCING RIGHT NOW IS
16 PRETTY SIMPLE. THE JUDGE SAYS FOUR YEARS, SIX YEARS, TEN
17 YEARS, BUT THE IMPLIMENTATION OF THAT SENTENCING IS EXTREMELY
18 COMPLEX.

19 I DON'T BELIEVE I KNOW ANYBODY WHO UNDERSTANDS THE
20 PAROLE BOARD GUIDELINES, PLUS IT'S JUST A BIG OLD
21 BUREAUCRATIC SYSTEM. THEY NOT ONLY GOT A SET OF RULES, THEY
22 CHANGE THEM ANY TIME THEY WANT TO.

23 THE DEFENSE ATTORNEYS DON'T HAVE ANY IDEA WHAT
24 THEY ARE CHANGED TO. EVERYBODY WHO PRACTICES CRIMINAL
25 DEFENSE LAW HAS GOT A RETIRED FEDERAL PROBATION OFFICER WHO

1 WORKS FOR HIM ON A REGULAR BASIS TO TRY TO TEACH HIM HOW TO
2 EXPLAIN TO A CLIENT HOW MUCH TIME HE'S GOING TO GET.

3 SO IT'S NOT A QUESTION OF YOU ALL MAKING A SYSTEM
4 COMPLEX. IT'S ALREADY EXTREMELY COMPLEX, AND WORSE THAN
5 THAT, IT ISN'T CONTROLLED BY THE JUDICIARY AT ALL. IT'S JUST
6 A BUREAUCRACY.

7 SO, TO THE EXTENT THAT WHAT YOU PROPOSE IS
8 COMPLEX, THAT DOESN'T SURPRISE ME. TO THE EXTENT THAT IT'S
9 BURDENSOME ON THE DEFENSE LAWYER, THAT DOESN'T WORRY ME. I'M
10 READY TO PUT UP WITH A LOT OF COMPLEXITY IN RETURN FOR SOME
11 FAIRNESS AND SOME EVENHANDEDNESS.

12 I'M READY TO PUT UP WITH A LOT TO GET IT OUT OF
13 THE HANDS OF THE BUREAUCRATS AND BACK INTO THE HANDS OF THE
14 COURT WHERE IT BELONGS.

15 NOW, THINGS REALLY HAVE CHANGED -- I HAVEN'T
16 PRACTICED THAT LONG -- BUT THINGS REALLY HAVE CHANGED, AND
17 MR. BROWN TOUCHED ON SOMETHING AND IT'S A LITTLE INTERESTING
18 THAT OUR CONCEPTS OF THIS ARE DIFFERENT.

19 HE TOUCHED ON THIS PSYCHOLOGICAL INJURY. WHEN I
20 STARTED PRACTICING LAW, IT WAS AFFIRMATIVELY -- IT WAS
21 AFFIRMATIVELY BELIEVED THAT WHAT HAPPENED TO THE VICTIM
22 REALLY WASN'T AN ISSUE.

23 YOU WEREN'T SUPPOSED TO BRING THE VICTIM INTO
24 COURT. THE QUESTION WAS: WHAT DID THE DEFENDANT DO IN SOME
25 HUMIDICALLY SEALED ATMOSPHERE, AND ITS IMPACT -- I HAVE SEEN

1 JUDGES GET MAD: WHAT HAVE YOU GOT THAT FELLOW IN HERE FOR?
2 THAT'S GOT NOTHING TO DO WITH WHAT I'M DECIDING, AND IT'S A
3 NEW DAY AND IT DOESN'T MATTER WHETHER I LIKE IT OR NOT, IT'S
4 A NEW DAY. IT'S THE VICTIM'S DAY. THAT'S SOMETHING THAT
5 YOU'VE DECIDED, OR EVERYBODY HAS DECIDED, HAS TO BE
6 CONSIDERED.

7 ON THE PSYCHOLOGICAL INJURY, I WILL PASS ALONG
8 SOMETHING TO YOU I SAW. YOU KNOW, LAWYERS ALSO REMIND ME A
9 LOT OF BASEBALL PLAYERS WHEN THEY SIT IN THE DUGOUT.

10 BASEBALL PLAYERS SIT IN THE DUGOUT AND WATCH
11 PITCHERS. LAWYERS SIT OVER IN THOSE JURY BOXES AND THEY
12 WATCH THOSE JUDGES AND WE STUDY THEM. IN SOUTH CAROLINA, THE
13 STATE COURT, OUR JUDGES ROTATE THROUGHOUT THE STATE, SO IT'S
14 JUST NOT ENOUGH TO UNDERSTAND WHAT YOUR JUDGE IS GOING TO DO,
15 YOU GOT TO KNOW WHAT ALL OF THEM ARE GOING TO DO.

16 WAS HE IN THE MARINES? DID HE SERVE IN VIETNAM,
17 ALL THAT SORT OF STUFF. WHERE DID HIS CHILDREN GO TO SCHOOL?
18 THAT'S WHAT WE DO. THAT'S PRACTICING LAW.

19 I WATCHED SOMETHING NOT LONG AGO AND WE WERE,
20 ABOUT SIX OF US, SITTING UP THERE AND WE WERE PLAYING THE
21 GAME, YOU KNOW, FOR, EVERYBODY'S TRYING TO HIT IT RIGHT, AND
22 ABOUT HALFWAY THROUGH, THIS YOUNG BLACK MAN CAME IN.

23 HE HAD BEEN CHARGED WITH STRONG-ARMED ROBBERY IN A
24 VERY GHETTOISH NEIGHBORHOOD. AND HE HAD ROBBED A DEBIT MAN.
25 YOU ALL MAY OR MAY NOT KNOW WHAT A DEBIT MAN IS. HE'S AN

1 INSURANCE MAN WHO GOES BY AND COLLECTS SMALL AMOUNTS OF MONEY
2 ON SMALL POLICIES.

3 IT WAS A PRETTY UNEVENTFUL, UNEXCITING CASE. HE
4 HAD POPPED THE FELLOW IN THE HEAD WITH A PIPE, TAKEN 20 TO
5 \$50, AND HE'D RUN AWAY. HE HAD ON HIS NIKES AND HE WAS GONE,
6 AND IT WAS A PRETTY UNEVENTFUL CASE.

7 THE FELLOW DIDN'T HAVE ANY PRIOR RECORD. YOU
8 KNOW, TWO BETS WERE DOWN ON YOUTHFUL OFFENDER, ONE WAS A
9 PROBATION, YOU KNOW, AND ONE WAS TWO YEARS. AND THEN THE
10 VICTIM CAME FORWARD.

11 THIS FELLOW WAS ABOUT 55 OR 60 YEARS OLD, AND HE
12 HAD THAT LITTLE TREMOR THAT OLDER PEOPLE SOMETIMES GET, WHICH
13 APPARENTLY HE DIDN'T HAVE PRIOR TO THIS, AND HE WAS SHOOK AND
14 HE WAS BROKEN.

15 THE WHOLE THING HAD JUST EMOTIONALLY BROKEN HIM.
16 AND HE SAID, WELL, LET ME TELL YOU WHAT HAPPENED. HE SAID,
17 THE COMPANY THINKS I'M A GOOD MAN. THEY DON'T WANT ME TO GO
18 BACK THERE ANYMORE.

19 THEY ARE NOT LETTING ANYBODY GO BACK THERE, SO
20 THEY PUT ME IN THE OFFICE AND THAT SOUNDS GOOD, BUT THEY HAVE
21 LOWERED MY SALARY \$10,000, AND I DON'T GET A BONUS. AND ALL
22 OF THE PEOPLE IN THAT AREA NOW HAVE TO MAIL IN THEIR
23 PREMIUMS, WHICH MEANS ABOUT TWO-THIRDS OF THEM ARE GOING TO
24 DROP THEIR POLICIES BECAUSE THAT'S THE NATURE OF THE PEOPLE
25 IN THAT AREA. . SO I'M RUINED. EMOTIONALLY AND FINANCIALLY HE

1 WAS RUINED.

2 WELL, ALL OF A SUDDEN, THE BETS WERE OFF AND THE
3 SENTENCES WERE GOING UP AND THEY WERE GOING UP IN THE MINDS
4 AND HEARTS OF DEFENSE LAWYERS WHO WERE SAYING TO THEMSELVES,
5 GEEZAKAREEZA, THAT THROWS A WHOLE DIFFERENT LIGHT ON THINGS.

6 I THINK THAT YOUR RECOGNITION OF VICTIM'S
7 INJURIES -- AND SOMETHING MY FATHER USED TO SAY, IF YOU THROW
8 A PEBBLE IN THE WATER, SOMETIMES IT CREATES TIDAL WAVES.

9 THIS MAN'S ASSAULT WITHIN THE CONTEXT OF CRIME WAS
10 A PEBBLE IN THE WATER AND IT CREATED A TIDAL WAVE IN THIS
11 MAN'S LIFE. IT'S A SIGN OF THE TIMES. IT'S HERE. I DON'T
12 HAVE TO PASS ON WHETHER I THINK IT'S A GOOD IDEA. IT'S HERE.
13 I THINK YOU HAVE DEALT WITH IT AS WELL AS YOU CAN.

14 NOW, I PRACTICED WITH MY FATHER FOR SEVERAL YEARS,
15 WHO WAS A WONDERFUL FELLOW, A GRAND GUY, AND WE WERE IN THE
16 OFFICE ONE DAY WHEN A YOUNG LAWYER CAME IN.

17 HE SAID, MR. HOWE, HE SAID, I'M VERY UPSET. HE
18 SAID, I HAVE BEEN MISTREATED BY THE PROSECUTOR. HE SAID, ALL
19 I WANTED WAS JUSTICE AND I DIDN'T GET IT; I WENT DOWN THERE
20 FOR JUSTICE.

21 I CAN HEAR MY DADDY RIGHT NOW. HE SAID, SON,
22 THAT'S WHERE YOU MADE YOUR MISTAKE; WHEN I GO TO THE COURT, I
23 GO FOR MERCY; I DON'T GO FOR JUSTICE; I ALWAYS WANT MERCY;
24 JUSTICE IS A LAST RESORT.

25 NOW, I'M A FIRM BELIEVER IN THAT. WITH ME,

1 JUSTICE IS A LAST RESORT. AND TO THE EXTENT THAT I CAN HELP
2 A CLIENT GET SOME MERCY, WHETHER HE'S ENTITLED TO IT OR NOT,
3 MY JOB IS TO GET IT FOR HIM.

4 BUT TO THE EXTENT THAT YOU CONFRONT ME WITH
5 JUSTICE, I SEE THESE GUIDELINES AS A STEP FORWARD. I SEE
6 THEM AS A PART OF THE EVOLUTIONARY PROCESS OF SOCIETY TO
7 WRESTLE WITH HOW TO MAKE PEOPLE DO RIGHT AND THE UNSOLVABLE
8 QUESTION THAT RAISES, AND I THINK YOU'RE DOING A PRETTY GOOD
9 JOB.

10 THAT'S ALL I GOT.

11 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR. HOWE.

12 I'M INTERESTED IN YOUR COMMENTS ON COOPERATION.
13 IF I READ YOU CORRECTLY, WHAT YOU'RE SAYING TO US IS THAT IN
14 THOSE -- IN THE AREA OF COOPERATION, WE OUGHT TO PLACE THAT
15 IN A CATEGORY THAT SAYS, ALL RIGHT, JUDGE, BASED ON THE
16 RECOMMENDATION OF THE U.S. ATTORNEY, BASED UPON WHATEVER
17 FINDINGS YOU MAKE, COOPERATION IS A SPECIAL CATEGORY AND YOU
18 MAY DISREGARD THE GUIDELINES ENTIRELY AND SENTENCE
19 APPROPRIATELY.

20 MR. HOWE: IF THAT COOPERATION RISES TO THAT
21 LEVEL, AND THAT'S UP TO THE JUDGE.

22 CHAIRMAN WILKINS: RATHER THAN FIX IT AT A CERTAIN
23 PERCENTAGE?

24 MR. HOWE: WELL, AGAIN, I GO BACK, IF THE U.S.
25 ATTORNEY HAS GOT THE RIGHT TO NOL-PROS AND IF HE'S GOT THE

1 RIGHT TO GRANT IMMUNITY, IT SEEMS INCONSISTENT THAT ONCE AN
2 INDICTMENT COMES DOWN, THEN EVERYBODY'S HANDS ARE TIED TO
3 THAT EXTENT.

4 CASES BREAK AT DIFFERENT TIMES, AND I THINK THAT
5 THE SAME THEORIES THAT MAKE NOL-PROSSING AND THE SAME
6 THEORIES THAT MAKE IMMUNITY APPLICABLE ALSO MAKE APPLICABLE
7 GOING OUTSIDE OF THE GUIDELINES ON THAT KIND OF COOPERATION.

8 CHAIRMAN WILKINS: ALL RIGHT. GOOD.

9 ANY QUESTIONS TO MY RIGHT?

10 COMMISSIONER CORROTHERS: YES.

11 CHAIRMAN WILKINS: COMMISSIONER CORROTHERS?

12 COMMISSIONER CORROTHERS: MR. HOWE, YOU INDICATED
13 EARLY ON THAT MANY PEOPLE SEE THE CRIMINAL JUSTICE SYSTEM AS
14 BEING CURRENTLY BROKEN, BUT THAT MANY DEFENSE ATTORNEYS DON'T
15 SEE THE SYSTEM AS BEING BROKEN.

16 YOU INDICATED THAT YOU FELT THAT THINGS WERE JUST
17 FINE. I'M WONDERING IF YOU ARE PERSONALLY SATISFIED WITH THE
18 DEGREE OF DISPARITY THAT OCCURS CURRENTLY WITH CRIMINALS WHO
19 ARE SIMILAR IN BACKGROUNDS, OFFENSES, AND CIRCUMSTANCES,
20 RECEIVING SOMETIMES DRASTICALLY DIFFERENT SENTENCES?

21 MR. HOWE: YOU HAVE GOT TO REMEMBER THAT AS A
22 DEFENSE ATTORNEY, WHEN I AM PURELY A DEFENSE ATTORNEY, I HAVE
23 GOT A SYSTEM WHICH IS A KNOWN QUANTITY FOR ME, AND IF I'M AS
24 GOOD AS JUDGE WILKINS SAYS I AM, IT'S SUPPOSED TO BE WORKING
25 PRETTY GOOD FOR ME.

1 SO IT WOULD BE UNREASONABLE FOR ME TO WANT TO
2 CHANGE THAT. SECONDLY, DISPARITY OF SENTENCES IS WHAT I DO
3 FOR A LIVING AND THAT'S TO GET SOMEBODY AS LOW A SENTENCE AS
4 I CAN.

5 SO, THE CONCEPT OF DISPARITY FROM A DEFENSE
6 LAWYER'S PERSPECTIVE, THAT AS AN ADVOCATE IS WHAT I'M
7 SEEKING. AND WHAT I'M SAYING TO YOU IN THE BEGINNING IS,
8 IT'S A LITTLE UNREASONABLE TO ASK ME TO BE THAT IMPARTIAL AND
9 THAT REMOVED.

10 I RECOGNIZE WHAT YOU ALL ARE TRYING TO DO IS A
11 POSITIVE STEP. I RECOGNIZE THAT IT'S HERE, THAT I HAVE TO
12 DEAL WITH IT, AND THAT IN THAT CONTEXT, YOU KNOW, I'M GOING
13 TO LEARN IT. I'M GOING TO TRY TO MAKE IT WORK FOR ME, AND
14 I'M GOING TO TRY TO GET MY CLIENT THE BEST POSSIBLE RESULT
15 OUT OF IT.

16 THE REASON I'M STUDYING THIS, THE SECONDARY REASON
17 I'M STUDYING THIS, IS TO COME TO TALK TO YOU ALL. THE
18 PRIMARY REASON I AM STUDYING IT IS SO I WILL UNDERSTAND IT
19 AND I CAN USE IT TO HELP SOMEBODY.

20 COMMISSIONER CORROTHERS: YOU DO AGREE, THOUGH,
21 THAT THERE IS A CERTAIN AMOUNT OF UNFAIRNESS IN THE SYSTEM
22 TODAY?

23 MR. HOWE: I THINK THAT -- ONE OF THE THINGS I
24 BELIEVE IN THE MOST IS THAT A CRIMINAL DEFENDANT HAS TO HAVE
25 A GOOD TASTE IN HIS MOUTH, HAS TO HAVE A SENSE OF FAIR PLAY

1 IN THE SYSTEM. AND THAT WHEN HE GOES TO JAIL, THE FIRST
 2 THING HE DOES IS START ASKING WHAT OTHER PEOPLE GOT FOR
 3 SIMILAR SENTENCES; AND WHEN HE HEARS THAT OTHER PEOPLE GOT
 4 LARGER SENTENCES, HE WANTS TO KISS HIS LAWYER ON THE CHEEK.
 5 WHEN HE HEARS THAT OTHER PEOPLE GOT SMALLER SENTENCES, HE IS
 6 MAD AS HELL. BUT IN THE BACK OF HIS MIND, UNDER EITHER
 7 THEORY, HE KNOWS SOMETHING IS WRONG WITH THE SYSTEM.

8 THAT'S THE FIRST THING THEY DO IN THE JAIL IS, I'M
 9 IN HERE FOR WHAT; WHAT DID YOU GET FOR A SIMILAR OFFENSE?
 10 AND I THINK THAT THEY ARE VERY CONSCIOUS OF IT AND THEY
 11 UNDERSTAND THE SENSE OF FAIR PLAY AND THAT TAKING OUT THOSE
 12 DISPARITIES IN SENTENCES WILL HAVE A VERY POSITIVE EFFECT ON
 13 THE SYSTEM AND THE PEOPLE INVOLVED.

14 COMMISSIONER CORROTHERS: THANK YOU, MR. HOWE.

15 CHAIRMAN WILKINS: ANY QUESTIONS FROM MY LEFT?

16 COMMISSIONER NAGEL: YES, MR. HOWE. THANK YOU
 17 VERY MUCH FOR YOUR TESTIMONY.

18 YOU MADE EXTENSIVE REFERENCE TO COOPERATION. I
 19 WANTED TO POSE A QUESTION WHICH DIDN'T COME UP IN YOUR
 20 TESTIMONY, BUT BECAUSE YOU PARTICIPATED IN THE WASHINGTON
 21 DISCUSSION, PERHAPS YOU HAVE HAD SOME CHANCE TO GIVE IT
 22 THOUGHT.

23 AT TIMES IT HAS BEEN SUGGESTED TO US BY SEVERAL
 24 PERSONS THAT WE CONSIDER TYING TO THE AMOUNT OF MITIGATION
 25 FOR COOPERATION SOME CONSIDERATION OF THE TIME AT WHICH THE

1 DEFENDANT COOPERATED, THAT IS, THE TIME AND THE PROCESS,
2 SOMETHING ANALOGOUS TO WHAT SOME PERSONS PERCEIVE TO BE FIRST
3 INVEST DOWN, ET CETERA.

4 AS A DEFENSE ATTORNEY, WHAT DIFFICULTIES, IF ANY,
5 WOULD YOU HAVE WITH THAT IF THAT WERE TO APPEAR IN THE
6 GUIDELINES?

7 MR. HOWE: THERE'S NO QUESTION ABOUT THE FACT THAT
8 IN THE DEFENSE PRACTICE, THE GENERAL RULE OF THUMB IS, FIRST
9 IN GETS A GOOD DEAL, LAST IN GETS A GOOD DEAL. YOU KNOW, IF
10 YOU'RE IN THE BAHAMAS, STAY THERE UNTIL THE CASE IS OVER AND
11 IT'S COLD AND THEY WANT TO WRAP IT UP.

12 ALL RIGHT. BUT YOU'RE GOING TO SOMETHING A LITTLE
13 DIFFERENT HERE, AND THAT IS, YOU KNOW, WITHIN THE -- ONCE A
14 PROCEDURE HAS BEGUN, YOU KNOW, WHEN SHOULD YOU COME IN IN
15 THAT CONTEXT.

16 I THINK IT'S A BAD IDEA TO TIE A TIME TO THAT
17 BECAUSE THERE ARE MANY THINGS THAT ARE BEYOND A CRIMINAL
18 DEFENDANT'S CONTROL THAT MAY MAKE THOSE TIMES PASS. THE U.S.
19 ATTORNEY MAY BE TIED UP IN OTHER TRIALS AND NOT BE ABLE TO
20 DEAL WITH YOUR CASE.

21 YOUR LAWYER MAY BE TIED UP IN OTHER TRIALS AND SO
22 CASES HAVE DIFFERENT LIFE CYCLES. THEY HAVE DIFFERENT
23 MATURITIES. EACH ONE IN THAT PROCEDURAL PROCESS MATURES AT A
24 DIFFERENT TIME.

25 THAT'S A FUNCTION OF WHEN YOU GET THE DISCOVERY,

18

1 HOW MUCH YOU ALREADY KNOW, HOW BUSY THE UNITED STATES
2 ATTORNEY IS, HOW BUSY YOU ARE, WHAT THE JUDGE'S SCHEDULE IS,
3 AND EACH CASE'S LIFE CYCLE DEVELOPS WITHIN THAT CONTEXT.

4 TO TRY TO TIE SOME TIMES ON THAT, I THINK, WOULD
5 BE A MISTAKE. I HAVE HAD JUDGES OVER AND OVER AGAIN SAY, IF
6 YOU DON'T PLEAD TWO WEEKS BEFORE TRIAL, I'M NOT GOING TO
7 ACCEPT THE PLEA.

8 SO SOMEBODY DOESN'T PLEAD TWO WEEKS BEFORE TRIAL
9 AND HE'S LOOKING AT A THREE-WEEK TRIAL, AND THEY WANT A PLEA
10 AND HE TAKES A PLEA EVERY TIME.

11 EVERYBODY KNOWS WHEN HE SAYS I'M NOT GOING TO TAKE
12 A PLEA EXCEPT TWO WEEKS BEFORE TRIAL AND HE HAS GOT A CHANCE
13 TO GET RID OF A THREE-WEEK CASE, HE WILL TAKE THE PLEA, SO I
14 THINK THEY ARE UNREALISTIC AND THEY DON'T WORK.

15 CHAIRMAN WILKINS: ANYONE ELSE HAVE ANY QUESTIONS
16 OF MR. HOWE?

17 COMMISSIONER BREYER: I JUST WANT TO THANK YOU FOR
18 REALLY AN EXCELLENT PRESENTATION.

19 MR. HOWE: THANK YOU, SIR.

20 COMMISSIONER BREYER: I DON'T KNOW IF MR. VESCO
21 WILL COME BACK, BUT I THINK YOU DO A FINE JOB REPRESENTING
22 HIM.

23 MR. HOWE: THANK YOU, SIR. I WOULD LOVE TO HAVE
24 HIM RETAIN ME, I WILL TELL YOU THAT.

25 COMMISSIONER MACKINNON: COUNSEL, I NOTICED YOUR

1 STRONG SUPPORT FOR LOW DISPARITY. HOW ABOUT HIGH DISPARITY?
2 MY QUESTION IS: ARE YOU MINDFUL OR HAVE YOU OBSERVED ANY
3 WHAT YOU THOUGHT WERE OUTRAGEOUS SENTENCES?

4 MR. HOWE: JUDGE, I THINK SENTENCES ARE AN AWFUL
5 LOT LIKE PERSONAL INJURY VERDICTS THAT GET REPORTED. THE FEW
6 THAT GET REPORTED ARE THE VERY EXTREME ONES.

7 YOU READ ABOUT THESE MILLION DOLLAR VERDICTS AND
8 THE CLIENTS ALL COME IN AND SAY, YOU KNOW, I SLIPPED ON THIS
9 BANANA PEEL; I WANT A MILLION DOLLARS.

10 COMMISSIONER MACKINNON: YES.

11 MR. HOWE: AND YOU READ ABOUT THE EXTREMES, AND
12 MOST OF THE ONES THAT WE READ ABOUT, WE READ ABOUT IN THE
13 NEWSPAPER, TOO. WE GET OUR SAME EXTREME INFORMATION FROM THE
14 NEWSPAPER.

15 SO, GENERALLY, MY EXPERIENCE HAS BEEN,
16 PARTICULARLY IN SOUTH CAROLINA -- NOW, THE SOUTH CAROLINA
17 FEDERAL COURT HAS GOT A UNIQUE SYSTEM THAT I THINK -- IT'S
18 ONE DISTRICT; I THINK THE JUDGES TALK AND COMMUNICATE VERY
19 WELL AMONG THEMSELVES AND TRY HARD TO AVOID DISPARITY OF
20 SENTENCES ON AN INFORMAL BASIS AND DO SO VERY EFFECTIVELY.

21 IN THE STATE COURT, WHICH THIS ISN'T APPLICABLE
22 TO, BUT IN THE STATE COURT THEY ARE PASSING THOSE PEOPLE
23 THROUGH, YOU KNOW, 50 PLEAS A DAY, AND I THINK THERE IS
24 DISPARITY.

25 MY PROBLEM WITH DISPARITY IS THAT I THINK FROM A

1 DEFENDANT'S PERSPECTIVE, IT LEAVES THEM WITH A BAD SENSE OF
2 FAIR PLAY, BUT HAVE I PERSONALLY HAD EXPERIENCES WHERE I
3 THOUGHT THERE WAS TREMENDOUS DISPARITY?

4 NO, SIR, I HAVE NOT. I THINK THE FEDERAL COURTS
5 IN SOUTH CAROLINA DO AN EXCELLENT JOB IN AVOIDING THAT.

6 COMMISSIONER MACKINNON: MY NEXT QUESTION -- OR IT
7 ISN'T A QUESTION -- YOU'RE TALKING ABOUT --

8 MR. HOWE: CAN I TOUCH ONE OTHER THING WITH YOU?

9 COMMISSIONER MACKINNON: YES.

10 MR. HOWE: THE DISPARITY IN THE FEDERAL SYSTEM,
11 EVEN TO THE EXTENT THE PROBLEM IS SOLVED IN SOUTH CAROLINA BY
12 SOME SOPHISTICATED JUDGES, I WOULD SAY THAT THERE WOULD BE A
13 GREAT DISPARITY IN A CCE CASE IN SOUTH CAROLINA, WHERE A
14 JUDGE WOULD GIVE SOMEBODY 25 YEARS AND A JUDGE IN MIAMI,
15 BECAUSE OF THE CONTEXT OF THE DRUG BUSINESS DOWN THERE, MIGHT
16 GIVE TEN.

17 SO WITHIN THE STATE, WITHIN THE FEDERAL SYSTEM OF
18 THE STATE, I DO NOT HAVE A DISPARITY PROBLEM. ONCE YOU GET
19 OUTSIDE OF THE STATE, I THINK THERE IS GREATER DISPARITY
20 WITHIN THE FEDERAL SYSTEM.

21 COMMISSIONER MACKINNON: THERE USED TO BE GREAT
22 DISPARITY IN INCOME TAX SENTENCING DOWN HERE AS COMPARED TO
23 SOME OF THEM UP NORTH.

24 MR. HOWE: YOU COULDN'T CONVICT ANYBODY
25 DOWN HERE. THERE WASN'T ANY SENTENCE TO GIVE.

1 COMMISSIONER MACKINNON: THAT'S RIGHT, AND THEY
2 CONVICTED THEM UP NORTH.

3 MR. HOWE: YOU ALL HAD ALL THE MONEY. WE DIDN'T
4 HAVE ANY MONEY.

5 (LAUGHTER.)

6 COMMISSIONER MACKINNON: YOU TALKED ABOUT THE
7 RIGHT OF THE U.S. ATTORNEY TO NOT CHARGE AND TO NOL-PROS. OF
8 COURSE, THAT IS NOT AN ABSOLUTE RIGHT. IT HAS SOME
9 SUPERVISION BY THE DEPARTMENT OF JUSTICE.

10 THE STATUTE ITSELF REQUIRES THE UNITED STATES
11 ATTORNEY TO CHARGE OFFENSES IN HIS DISTRICT, AND IF HE
12 DOESN'T DO IT, HE CAN BE REMOVED SO IT'S NOT AS ABSOLUTE AS
13 YOU THINK IT IS.

14 MR. HOWE: IT FEELS PRETTY ABSOLUTE WHEN YOU'RE
15 DEALING WITH HIM AND HE HAS GOT THE POWER. UNDER THOSE
16 CIRCUMSTANCES FROM A DEFENSE LAWYER'S PERSPECTIVE, THE
17 REGULATIONS YOU'RE TALKING ABOUT ON A DAY-TO-DAY BASIS ARE
18 NOT MEANINGFUL. THAT'S PRETTY ABSOLUTE POWER.

19 COMMISSIONER MACKINNON: I WAS UNITED STATES
20 ATTORNEY UNDER THE EISENHOWER ADMINISTRATION AND I NEVER
21 EXERCISED IT IN ONE INSTANCE.

22 MR. HOWE: I HAD A LITTLE EXPERIENCE MYSELF, AND I
23 HAVE HAD IT EXERCISED ON MY HEAD A COUPLE OF TIMES.

24 YOU KNOW, THE EXAMPLE I'M THINKING OF IS -- YOU
25 KNOW, YOU'VE GOT A LOT OF PEOPLE WHO DON'T WANT IMMUNITY.

1 THEY WANT THE FIFTH AMENDMENT, YOU KNOW; THEY DON'T WANT
2 IMMUNITY.

3 THE U.S. ATTORNEY GIVES THEM IMMUNITY. YOU ASK
4 FOR IT, YOU GOT IT, TOYOTA, AND ALL OF A SUDDEN THEY ARE IN
5 FRONT OF THE GRAND JURY. SO, MY EXPERIENCE HAS BEEN WHEN I
6 DIDN'T WANT IMMUNITY, I GOT IT. I SEE IT AS PRETTY ABSOLUTE.

7 COMMISSIONER MACKINNON: I'M NOT TALKING ABOUT
8 IMMUNITY. I WAS TALKING ABOUT -- YOU MENTIONED NOT CHARGING
9 THEM, AND AN ABSOLUTE RIGHT TO NOL-PROS AN INDICTMENT THAT'S
10 BEEN VOTED BY A GRAND JURY; THAT'S A FAR DIFFERENT THING.

11 MR. HOWE: I HAVEN'T HAD -- IN NO INSTANCE HAVE I
12 HAD A UNITED STATES ATTORNEY MAKE A REQUEST TO WASHINGTON IN
13 THAT REGARD THAT WAS REFUSED. MY PROBLEM HAS BEEN GETTING
14 HIM TO MAKE THE REQUEST, NOT IN GETTING IT ACCEPTED.

15 COMMISSIONER MACKINNON: I HAVE HAD THEM REFUSED.
16 I HAVE GONE AHEAD AND TRIED THE CASE AND LOST IT, AND I TOLD
17 THEM, I SAID, WELL, I TOLD YOU YOU SHOULD HAVE DISMISSED IT,
18 BUT GO AHEAD.

19 THANKS.

20 CHAIRMAN WILKINS: ANY OTHER QUESTIONS?

21 MR. HOWE, AGAIN WE APPRECIATE NOT ONLY THE WORK
22 YOU HAVE DONE IN THE PAST, BUT THE EXCELLENT PRESENTATION
23 THAT YOU HAVE MADE. WE LOOK FORWARD TO WORKING WITH YOU IN
24 THE FUTURE. THANK YOU VERY MUCH.

25 WE ARE VERY HONORED TO HAVE WITH US NOW TWO

1 DISTINGUISHED JUDGES, GILBERT S. MERRITT, UNITED STATES COURT
2 OF APPEALS FOR THE 6TH CIRCUIT AND THE HONORABLE ALVIN I.
3 KRENZLER, UNITED STATES DISTRICT COURT FOR THE NORTHERN
4 DISTRICT OF OHIO.

5 JUDGES, WE ARE GLAD TO HAVE YOU WITH US.

6 MR. MERRITT: THANK YOU, JUDGE. I GUESS I'M
7 SUPPOSED TO GO FIRST. MY NAME IS GILBERT MERRITT. I'M ON
8 THE UNITED STATES COURT OF APPEALS FOR THE 6TH CIRCUIT, AS
9 YOU KNOW. I WAS APPOINTED BY PRESIDENT CARTER IN 1977.

10 PRIOR TO THAT TIME, IMMEDIATELY PRIOR TO THAT
11 TIME, I WAS A PRACTICING LAWYER IN FEDERAL CIVIL AND CRIMINAL
12 PRACTICE, CIVIL AND CRIMINAL DEFENSE PRACTICE AND I HAD BEEN
13 UNITED STATES ATTORNEY FOR FOUR YEARS SOME 20 YEARS AGO AND
14 WAS A PROFESSOR OF LAW AT VANDERBILT UNIVERSITY IN NASHVILLE,
15 WHICH IS MY HOME.

16 OUR COURT HAS ASKED ME TO APPEAR, SO THEY TOLD ME,
17 BECAUSE IN A COUPLE OF YEARS I WILL BE THE CHIEF JUDGE OF OUR
18 CIRCUIT AND ALL OF THESE PROBLEMS ARE GOING TO FALL IN MY
19 LAP. THAT'S THE WAY THEY EXPLAINED IT TO ME.

20 I RECOGNIZE THE DIFFICULTY THAT THIS COMMISSION
21 HAS. IT IS AN EXTREMELY DIFFICULT PROBLEM, AND I HOPE THAT I
22 CAN BE CONSTRUCTIVE IN MY BASICALLY NEGATIVE ATTITUDE
23 CONCERNING THE GUIDELINES, THE PARTIAL GUIDELINES THAT YOU
24 HAVE PROPOSED.

25 THE MAIN THRUST OF MY TESTIMONY -- AND MY

1 NEGATIVISM IS WITH GREAT RESPECT FOR THIS COMMISSION AND THE
2 DIFFICULTY OF THE JOB. THE ESSENTIAL PROBLEM, AS I SEE IT,
3 THAT YOU FACE IS THAT THE SOCIAL SCIENCE KNOWLEDGE, THE
4 SCIENTIFIC KNOWLEDGE THAT IT TAKES TO COME UP WITH THE KIND
5 OF GUIDELINES, RULE-BOUND GUIDELINES, THAT YOU ARE ATTEMPTING
6 TO COME UP WITH, THAT KNOWLEDGE IS NOT PRESENT YET.

7 THAT'S, TO ME, THE BASIC PROBLEM, SO THAT THE
8 THRUST OF MY TESTIMONY WILL BE THAT YOU MUST CHANGE YOUR
9 MODEL DRASTICALLY IN ORDER TO PRODUCE A WORKABLE SET OF
10 GUIDELINES.

11 YOU MUST DECIDE NOT TO CREATE A SET OF LEGAL
12 EQUATIONS, A SET OF FIRM RULES THAT CONTROL THE DISTRICT
13 JUDGE'S SENTENCE AND DICTATE THE RESULT INSTEAD OF THE
14 PRESENT MODEL.

15 ALONG THOSE LINES, YOU SHOULD SEE YOURSELF SIMPLY
16 AS MAKING A START, BUT ONLY A START, BY CREATING SOME GUIDING
17 PRINCIPLES AND STANDARDS THAT THE SENTENCING JUDGE CAN BEGIN
18 TO USE EFFECTIVELY.

19 YOU ARE A PERMANENT COMMISSION, AND YOU SHOULD
20 CREATE AN EVOLUTIONARY PROCESS THAT THE COURTS CAN BEGIN TO
21 USE, AN EXPERIMENTAL PROCESS THAT CAN BE IMPROVED OVER TIME;
22 IN THE BEGINNING RELY PRIMARILY ON A FEW GENERAL PRINCIPLES
23 AND THE SALUTARY NEW PRINCIPLE THAT THE SENTENCING JUDGES
24 MUST NOW GIVE THEIR REASONS, OVER TIME USE THE SENTENCING
25 JUDGE'S REASONS AND EVOLVE MORE SPECIFIC PRINCIPLES AND

1 RULES.

2 THIS IS THE COMMON LAW METHOD THAT AT LEAST THE
3 JUDGES HERE ARE FAMILIAR WITH, THE COMMON-LAW METHOD OF LEGAL
4 AND, I THINK, SOCIAL SCIENCE ADVANCEMENT.

5 THE ADVANCEMENT OF KNOWLEDGE OF THE TYPE YOU ARE
6 ENGAGED IN HERE, IT SEEMS TO ME, MUST BE AN EVOLUTIONARY
7 PROCESS, A QUANTUM ADVANCEMENT, A MAJOR QUANTUM IMPROVEMENT;
8 AND A MAJOR NEW WORKABLE MODEL FOR SOMETHING AS COMPLEX AS
9 JUSTLY PUNISHING THE CRIMINAL DEFENDANT CAN'T BE ORDAINED BY
10 LAW.

11 NOW, HAVING SAID THAT IN A GENERAL WAY, LET ME BE
12 MORE SPECIFIC. MY MAJOR PROBLEM WITH THE MANDATORY
13 GUIDELINES ARE THE FOLLOWING: I SAY MANDATORY BECAUSE THERE
14 IS NOT MUCH DISCRETION THERE.

15 THE FIRST IS THAT THEY OVER-EMPHASIZE THE IDEAS OF
16 DISPARITY OF SENTENCING AND DETERRENCE OF CRIME AT THE
17 EXPENSE OF JUST PUNISHMENT. THEY DO NOT ALLOW THE JUDGE TO
18 TAILOR THE SENTENCE TO THE CRIME AND THEY ARE, THEREFORE,
19 BASICALLY UNFAIR.

20 SECOND, THE GUIDELINES MAKE THIS MISTAKE BY
21 PUTTING THE SENTENCING JUDGE IN A STRAIT JACKET THAT DOES NOT
22 ALLOW HIM TO TAKE INTO ACCOUNT ALL THE FACTS RELEVANT TO A
23 JUST SENTENCE.

24 ALTHOUGH THE LIMITED GROUP OF FACTS WHICH NOW
25 MANDATE THE SENTENCE UNDER THE GUIDELINES ARE CLEARLY

1 RELEVANT, NO QUESTION ABOUT IT, AND WELL DONE, AND REPRESENT
2 A PRODIGIOUS AMOUNT OF WORK IN COMING UP WITH THOSE RELEVANT
3 FACTS AND IN THE ARTICULATION THAT YOU HAVE DONE, THERE ARE
4 MANY OTHER FACTS NOT PERMITTED TO BE CONSIDERED THAT MAY BE
5 EQUALLY RELEVANT, HENCE THE SENTENCE RANGE MANDATORILY
6 IMPOSED UNDER THE GUIDELINES, IN MY JUDGMENT, IS ESSENTIALLY
7 ARBITRARY.

8 THIRDLY, THE GUIDELINES AS DRAFTED WILL PRODUCE AN
9 APPEAL IN ALMOST EVERY CASE, AND I HAVE TALKED TO CRIMINAL
10 DEFENSE LAWYERS. I WAS A CRIMINAL DEFENSE LAWYER. I HAVE
11 BEEN ON -- AND I -- MY GUESS IS THAT IN MOST CASES, THERE
12 IS -- AND I HAVE TRIED TO GO OVER MANY, MANY KINDS OF CASES
13 IN MY MIND.

14 IN MOST CASES, THERE IS ALWAYS AN ARGUMENT THAT
15 THE GUIDELINES HAVE BEEN MISAPPLIED, THAT THEY HAVE NOT BEEN
16 CORRECTLY APPLIED, AND THAT IS GOING TO PRODUCE -- EVEN
17 THOUGH THE RANGE, THE JUDGE STICKS WITHIN THE RANGE, YOU HAVE
18 GOT ENHANCEMENT AND MITIGATION FACTORS THAT THE JUDGE HAS
19 EITHER RECOGNIZED OR REJECTED.

20 THAT'S GOING TO PRODUCE, IT SEEMS TO ME, APPEALS
21 BY A VERY ACTIVE CRIMINAL DEFENSE BAR, BOTH THE PUBLIC
22 DEFENDERS AND THE PAID LAWYERS. THAT'S WHAT THEY GET PAID
23 FOR, AND THEY ARE GOING TO APPEAL.

24 WE HAD ALMOST 3,000 GUILTY PLEAS LAST YEAR IN THE
25 DISTRICT COURTS OF THE 6TH CIRCUIT, WHICH CONSIST OF THE

1 STATES OF MICHIGAN, OHIO, KENTUCKY, AND TENNESSEE, AND I
2 WOULD ESTIMATE THAT WE WILL HAVE SOME 1,500 TO 2,000 NEW
3 APPEALS IN OUR COURTS UNDER THE NEW SENTENCING LAW, THAT IS,
4 18 U.S.C. 3742.

5 THESE APPEALS WILL BE PRIMARILY BECAUSE OF THE
6 ASSERTED -- AND I'M QUOTING FROM THE STATUTE -- INCORRECT
7 APPLICATION OF THE SENTENCING GUIDELINES.

8 LAST YEAR, IN OUR COURT, 15 JUDGES DECIDED 1,793
9 CASES ON THE MERITS. I WOULD ESTIMATE THAT THE GUIDELINES,
10 AS PRESENTLY CONCEPTUALIZED, WILL APPROXIMATELY DOUBLE THE
11 NUMBER OF APPEALS THAT OUR COURT WILL HAVE TO DECIDE ON THE
12 MERITS. THAT'S THE THIRD PROBLEM I HAVE GOT WITH THESE
13 GUIDELINES.

14 THE FOURTH PROBLEM THAT I HAVE WITH THE GUIDELINES
15 IS THAT THEY DO NOT MAKE CLEAR WHAT PROCESS OR PROCEDURE WILL
16 BE USED TO ESTABLISH THE LIMITED FACTS AND EVENTS THAT ARE
17 MANDATORILY REQUIRED TO BE TAKEN INTO ACCOUNT AND CONSIDERED
18 AND CALCULATED IN ORDER TO ARRIVE AT THE SANCTION UNITS AND
19 HENCE THE SENTENCE IN MONTHS IN THE INDIVIDUAL CASE.

20 MUCH TIME IS GOING TO BE SPENT BY THE DISTRICT
21 COURTS AND THE COURT OF APPEALS TRYING TO ESTABLISH
22 PROCEDURE. THE UNCERTAINTY CONCERNING PROCEDURES WILL LEAD
23 TO A LARGE VOLUME OF CASES AND ISSUES AT ALL LEVELS OF THE
24 FEDERAL JUDICIARY FOR MANY YEARS.

25 NOW, I DON'T WANT TO TAKE UP TOO MUCH TIME. I

1 WOULD PREFER TO GO THE WAY WE GO. I'M IN AN APPELLATE
2 COURTROOM HERE, AND I WOULD BE HAPPY TO BE INTERRUPTED AND TO
3 HAVE A CONVERSATION WITH YOU, AS WE NORMALLY DO AS JUDGES IN
4 THE COURTROOM.

5 THERE IS ONE OTHER POINT THAT I WOULD LIKE TO
6 MAKE. I WOULD LIKE TO -- I HAVE TRIED TO THINK OF AS MANY
7 EXAMPLES AS I CAN, AND IT TAKES A LONG TIME TO STATE EXAMPLES
8 AND TO GO THROUGH THIS PROCESS LIKE WE WERE SENTENCING
9 SOMEBODY.

10 I HAVE TRIED TO TAKE JUST A TYPICAL RUN OF THE
11 MILL, FEDERAL CRIMINAL WHITE-COLLAR CASE AND GO THROUGH IT,
12 AND IT DEMONSTRATES TO ME THE PROBLEMS WITH THESE GUIDELINES.

13 THE CASE THAT I TOOK IS ONE THAT I'M FAMILIAR
14 WITH. I HAVE SIMPLIFIED IT SOMEWHAT IN ORDER TO TALK TO YOU
15 ABOUT IT. IF YOU HAVE TIME, I WILL BE HAPPY TO GO THROUGH
16 IT.

17 I THINK THAT IT IS GOING TO BE TRUE IN MOST
18 WHITE-COLLAR CRIMINAL CASES THAT YOU'RE GOING TO HAVE THIS
19 KIND OF PROBLEM. THE CASE IS A CASE OF A REAL ESTATE
20 DEVELOPER WHO PAYS A \$220,000 BRIBE TO A BANK OFFICER FOR A
21 \$3 MILLION CONSTRUCTION LOAN FROM THE BANK.

22 THE BANK OFFICER, IN OTHER WORDS, TAKES A KICKBACK
23 FOR MAKING A LOAN, TYPICAL CASE. THE KICKBACK IS PAID IN
24 FOUR INSTALLMENTS, AND THE LOAN IS MADE IN SIX INSTALLMENTS.

25 THE BANK OFFICER IS CONVICTED UNDER THE KICKBACK

70
1 STATUTE, WHICH IS SECTION 656 OF TITLE 18 OF SIX COUNTS OF
2 MISAPPLICATION -- EXCUSE ME -- 656 IS THE THEFT STATUTE.

3 SIX COUNTS OF MISAPPLICATION OF BANK FUNDS FOR THE
4 SIX LOAN INSTALLMENTS. THOSE ARE THE SIX COUNTS OF
5 MISAPPLICATION. HE IS ALSO CONVICTED UNDER SECTION 215,
6 WHICH IS A COMMERCIAL BANK BRIBERY STATUTE, KICKBACK STATUTE,
7 OF ACCEPTING COMMERCIAL BRIBES IN FOUR INSTALLMENTS OF
8 \$220,000.

9 THAT'S FOUR COUNTS, SO HE'S CONVICTED OF 10
10 COUNTS; SIX UNDER THE MISAPPLICATION STATUTE, FOUR UNDER THE
11 COMMERCIAL BRIBERY STATUTE. THE DEVELOPER IS CONVICTED AS AN
12 AIDER AND ABETTOR UNDER ALL COUNTS.

13 IN ADDITION TO THE TEN COUNTS, THERE IS A
14 CONSPIRACY COUNT. WITH RESPECT TO THE DEFENDANTS, THE BANK
15 OFFICER IS A VERY WEALTHY MAN, THE PRESIDENT OF THE LOCAL
16 BANK.

17 HIS LARGE FORTUNE, THE PRESENTENCE REPORT
18 DISCLOSES, PROBABLY IS THE RESULT OF MANY INSTANCES OF
19 COMMERCIAL BRIBERY OVER THE LAST 20 YEARS. HE HAS NO FAMILY
20 AND HAS MADE MANY LOANS OVER THE YEARS, ACCORDING TO THE
21 PRESENTENCE REPORT, TO ORGANIZED CRIME FIGURES.

22 THE DEVELOPER IS A YOUNG MAN OF GOOD CHARACTER
23 WITH A LARGE FAMILY AND AN OUTSTANDING MILITARY RECORD IN
24 COMBAT IN VIETNAM. THIS IS HIS FIRST LARGE REAL ESTATE
25 PROJECT.

1 HE AGREED TO THE BRIBE ONLY AT THE LAST MINUTE
2 WHEN THE BANKER SPRUNG IT ON HIM, AFTER HIS COMPANY HAD
3 COMMITTED ALL ITS RESOURCES TO THE PROJECT AND STOOD TO LOSE
4 EVERYTHING IF THE LOAN WERE WITHDRAWN.

5 THE PRESENT GUIDELINES DO NOT TELL US YET WHAT TO
6 DO ABOUT THE CONSPIRACY COUNT OR THE FOUR COMMERCIAL BRIBERY
7 COUNTS UNDER SECTION 215. THESE CRIMES ARE NOT YET COVERED
8 BY THE GUIDELINES, NOR DO THE GUIDELINES TELL US WHAT TO DO
9 ABOUT THE MULTIPLE NATURE OF THE OFFENSES.

10 THEY DO NOT TELL US WHAT TO DO ABOUT THE FACT THAT
11 THE BANKER AND THE DEVELOPER WERE CONVICTED OF SIX COUNTS OF
12 MISAPPLICATION OF BANK FUNDS OR THE MULTIPLE COUNTS ON THE
13 OTHER CHARGE.

14 THE FACT IS, IT'S A 10- OR 11-COUNT INDICTMENT.
15 THE FACT IS, IN THE REAL WORLD THAT, AS YOU KNOW, THE
16 MULTIPLE COUNT INDICTMENT OR MULTIPLE PROSECUTIONS COME ALONG
17 IN ALL KINDS OF PERMUTATIONS AND COMBINATIONS.

18 THIS IS A FACT, ALONG WITH THE CRIME OF
19 CONSPIRACY, THAT THE COMMISSION IS GOING TO HAVE TO DEAL WITH
20 AND IT'S DIFFICULT TO SEE EXACTLY HOW THESE RULES ARE GOING
21 TO WORK ONCE YOU HAVE TO DEAL WITH THAT.

22 I DO NOT SEE HOW IT CAN POSSIBLY BE COVERED BY
23 IMPOSING A MANDATORY SET OF RULES OR A LEGAL EQUATION THAT'S
24 GOING TO DEAL WITH IT. BUT IN ORDER TO MAKE THIS CASE
25 COMPATIBLE WITH OUR DISCUSSION THIS MORNING, LET'S TREAT THE

1 CASE AS A ONE-COUNT CONVICTION FOR WHICH YOU GOT IN THERE,
2 WHICH IS SECTION 656, THAT IS, THE THEFT STATUTE,
3 MISAPPLICATION OF BANK FUNDS.

4 THE CASE UNDER THIS CONCEPTION WOULD BE TREATED AS
5 A SINGLE CONVICTION OF THE DEVELOPER AND THE BANKER FOR
6 PAYING AND RECEIVING A \$220,000 KICKBACK FOR A \$3 MILLION
7 BANK LOAN.

8 IN OTHER WORDS, THE TWO WOULD BE CONVICTED OF ONE
9 COUNT OF MISAPPLICATION. NOW, AS I FIGURE IT UNDER THE
10 GUIDELINES -- AND I TRIED TO GO THROUGH -- UNDER SECTION 211,
11 WE ASSESS TWO SANCTION UNITS PLUS THE OFFENSE VALUE -- THE
12 OFFENSE VALUE UNDER SECTION B-251.

13 THAT'S GOING TO BE THE 36 UNITS, IF WE USE
14 \$220,000 AS THE MONETARY VALUE; OR 54 UNITS IF WE USE 3
15 MILLION AS THE MONETARY VALUE, AND IT'S NOT CLEAR TO ME WHICH
16 ONE IS GOING TO BE USED. THE COURT OF APPEALS WILL HAVE TO
17 DECIDE THAT, I GUESS.

18 BUT LET'S SIMPLIFY THE CASE AGAIN AND HAVE NO
19 CRIMINAL HISTORY OR PRIOR CONVICTIONS ON THE PART OF EITHER
20 THE BANK OFFICER OR THE DEVELOPER, EXCEPT THAT WE KNOW THE
21 FACTS SHOW THE BANK OFFICER INITIATED THE BRIBE AND THE
22 DEVELOPER PAID IT.

23 UNDER THE GUIDELINES, IT LOOKS LIKE TO ME THAT THE
24 JUDGE MUST ENHANCE THE BANKER'S SENTENCE BY 1.2, UNDER
25 SECTION 312, BECAUSE THE BANK OFFICER HAS -- IS IN A SPECIAL

1 POSITION AND HAS SKILL.

2 HE MAY NOT REDUCE THE DEVELOPER'S SENTENCE UNDER
3 A-314 AS A MINOR PARTICIPANT, I ASSUME; AND ALTHOUGH THE
4 DISTRICT JUDGE IS UNCERTAIN, HE CONCLUDES THAT HE MUST TREAT
5 THE MONETARY AMOUNT UNDER B-251 AS 3 MILLION, RATHER THAN
6 220,000.

7 HE, THEREFORE, FINDS THE BANK OFFICER GUILTY OF
8 SANCTION UNITS IN THE AMOUNT OF TWO UNITS, PLUS 54 UNITS,
9 TIMES 1.2, OR 67 SANCTION UNITS, AND THE DEVELOPER GUILTY OF
10 56 SANCTION UNITS.

11 HE, THEREFORE, SENTENCES THE BANKER UNDER HIS VERY
12 LIMITED DISCRETION TO THE MAXIMUM OF 66 MONTHS OF
13 IMPRISONMENT AND THE DEVELOPER TO THE MINIMUM OF 44 MONTHS.
14 WELL, IN MY JUDGMENT, THAT'S AN UNFAIR SENTENCE, AND THAT'S
15 WHERE YOU HAVE TO COME OUT.

16 IT'S UNFAIR FOR THE DEVELOPER BECAUSE YOU CAN'T
17 TAKE THE SPECIAL FACTS OF THE CASE INTO ACCOUNT, CAN'T TAKE
18 THE SPECIAL FACTS OF THE CRIMINAL DEFENDANT INTO ACCOUNT, AND
19 THAT'S WHAT THESE GUIDELINES -- THAT'S THE BASIC PROBLEM, IN
20 MY JUDGMENT, WITH THESE GUIDELINES.

21 YOU CAN'T SAY, YOU CAN'T TAKE INTO ACCOUNT SPECIAL
22 CIRCUMSTANCES THAT THIS DEVELOPER HAS AND THAT -- AND
23 MULTIPLY THAT IN EVERY CASE, PRACTICALLY, MANY, MANY CASES:

24 NOT ALL DRUG CASES ARE THE SAME, NOT ALL DRUG
25 COURIERS ARE THE SAME. THERE'S A VAST DIFFERENCE, LIKE THE

1 WOMAN WHO IS HIRED, YOUNG WOMAN, 20 YEARS OLD, WHO IS HIRED
2 TO CARRY SOME DRUGS FROM SOMEBODY ELSE WHO HAS BEEN IN THE
3 BUSINESS A LONG TIME.

4 CASES COME IN ALL KINDS OF PERMUTATIONS.
5 DEFENDANTS COME IN ALL KIND OF PERMUTATIONS. THE STATE OF
6 SCIENTIFIC KNOWLEDGE IS NOT SUFFICIENT, NOT SUFFICIENT, TO
7 COME UP WITH TWO OR THREE CATEGORIES OF RELEVANT FACTORS FOR
8 SENTENCING, NOT SUFFICIENT.

9 IF YOU DO THAT, YOU ARE GOING, I BELIEVE, TO
10 REDUCE THE DISPARITY OF SENTENCING, BUT YOU'RE GOING TO DO IT
11 AT THE EXPENSE OF JUST PUNISHMENT AND YOU ARE CERTAINLY GOING
12 TO INUNDATE THE COURTS OF APPEAL WITH APPEALS.

13 NOW, THAT IS THE THRUST OF MY TESTIMONY. I'M
14 SORRY TO HAVE TAKEN SO LONG. JUDGE KRENZLER, I THINK, HAS
15 GIVEN ME A LITTLE OF HIS TIME. I WILL TURN IT OVER TO HIM;
16 OR IF YOU WANT TO GO AHEAD, IF YOU HAVE SOME QUESTIONS, I
17 WILL BE HAPPY TO ANSWER THEM.

18 CHAIRMAN WILKINS: WELL, WHY DON'T HEAR FROM JUDGE
19 KRENZLER AND THEN WE WILL COME BACK AND TALK ABOUT SOME OF
20 THE COMMENTS THAT YOU HAVE MADE.

21 MR. MERRITT: THANK YOU.

22 MR. KRENZLER: THANK YOU. MY NAME IS JUDGE ALVIN
23 KRENZLER. I'M FROM THE NORTHERN DISTRICT OF OHIO. I HAVE
24 BEEN ASKED BY JUDGE LIVELY, PEARCE LIVELY, THE CHIEF JUDGE OF
25 THE 6TH CIRCUIT, TO BE HERE TODAY TO SPEAK FOR THE DISTRICT

1 JUDGES OF THE 6TH CIRCUIT.

2 I DIDN'T HAVE AN OPPORTUNITY TO CALL OR TALK TO
3 ALL THE OTHER JUDGES, SO I'M JUST SPEAKING FOR MYSELF. I
4 HAVE BEEN A JUDGE NOW FOR ABOUT 18 YEARS. I WAS A TRIAL
5 JUDGE IN THE STATE OF OHIO AND AN APPELLATE JUDGE AND NOW I'M
6 A DISTRICT JUDGE. I HAVE BEEN A DISTRICT JUDGE FOR FIVE
7 YEARS.

8 FIRST OF ALL, I HAVE REVIEWED THE GUIDELINES AND I
9 WANT TO COMPLIMENT THE COMMISSION, BECAUSE THEY ARE VERY
10 THOROUGH AND I THINK THEY ARE REASONABLY COMPLETE. I KNOW
11 THEY ARE ONLY PRELIMINARY. YOU HAVE A LONG WAY TO GO.

12 I AM FAIRLY FAMILIAR WITH THE PRESENT LAW AND THE
13 PROCEDURES IN REGARD TO SENTENCING. I HAVE REVIEWED THE
14 SENTENCING PROVISIONS OF THE COMPREHENSIVE CRIME CONTROL ACT
15 OF 1984.

16 I HAVE REVIEWED ALL THE STATUTES IN REGARD TO YOUR
17 COMMISSION'S FUNCTIONS, YOUR DUTIES, AND YOUR
18 RESPONSIBILITIES. I READ THE CONGRESSIONAL COMMITTEE REPORTS
19 IN REGARD TO THE SENTENCING PROVISIONS.

20 I HAVE READ YOUR DRAFT OF YOUR GUIDELINES. I'M
21 ASSUMING THAT IF THE GUIDELINES ARE APPROVED FINALLY -- AND
22 YOU INDICATED THERE PROBABLY MAY BE SOME CHANGES -- I'M
23 ASSUMING THAT FOR THE FOLLOWING, THAT THEY'LL BE APPROVED IN
24 SIMILAR FASHION TO THE WAY THEY ARE NOW DRAFTED, THAT AFTER A
25 DISTRICT JUDGE EITHER TAKES A GUILTY PLEA OR A DEFENDANT IS

1 FOUND GUILTY AFTER TRIAL, THE JUDGE WOULD IN ALL PROBABILITY
2 REFER THE MATTER FOR A PRE-SENTENCE REPORT. I SAW SOME
3 LANGUAGE IN THEIR ABOUT DISCRETIONARY, BUT I'M NOT SURE ANY
4 JUDGE WOULD DO THAT; AND THROUGH THE PROBATION DEPARTMENT,
5 AND THE PROBATION DEPARTMENT, I ASSUME, WOULD HAVE THE
6 YEOMAN'S WORK IN PREPARING THE REPORT AND INCLUDE A LOT OF
7 THINGS, LIKE THE NATURE OF THE CRIME, THE CONDUCT OF THE
8 DEFENDANT IN COMMITTING THE CRIME, ANY AGGRAVATING OR
9 MITIGATING CIRCUMSTANCES, THE CRIMINAL HISTORY OR RECORD OF
10 THE DEFENDANT, AND ANY OTHER MISCELLANEOUS OR PERTINENT,
11 RELEVANT MATERIAL, AND THEN RECOMMEND A SENTENCE.

12 AFTER RECEIVING THE REPORT OF THE PROBATION
13 OFFICER, I'M ASSUMING THE JUDGE WOULD CONSIDER THE BASIC FOUR
14 PRINCIPLES OF SENTENCING: THE JUST PUNISHMENT SITUATION, THE
15 DETERRENCE FACTOR, WHAT THEY CALL INCAPACITATION, WHICH WOULD
16 PROTECT THE PUBLIC FROM FURTHER CRIMES BY REMOVING HIM
17 TEMPORARILY FROM SOCIETY AND CONSIDER THE REHABILITATION
18 ASPECTS.

19 THE COURT WOULD THEN CONSIDER ALL THESE FOUR
20 FACTORS, CONSIDER THE POLICY STATEMENTS OF YOUR COMMISSION
21 THAT ARE CONTAINED IN 994-A-2, AND THE VARIOUS KINDS OF
22 SENTENCING AND YOUR VARIOUS RULES AND REGULATIONS AND THE
23 VARIOUS CATEGORIES.

24 THEN THE COURT WOULD HAVE THE OPTION OF
25 SENTENCING, AND THERE IS ONE QUESTION I'LL TALK TO YOU ABOUT

1 LATER, EVERYBODY SEEMS TO THINK THAT THE PRISON SENTENCE IS
2 MANDATORY AND YOU SEEM TO INDICATE THAT IN YOUR GUIDELINES.

3 WHEN I READ THE STATUTE, I'M NOT SURE IT SAYS
4 THAT, BUT WE WILL LEAVE THAT ALONE FOR A MINUTE. AND I
5 RECOGNIZE THAT A COURT MUST FOLLOW THE GUIDELINES UNLESS
6 THERE IS AGGRAVATING OR MITIGATING CIRCUMSTANCES, AND THEN
7 THE COURT HAS TO DO ITS THING.

8 NOW, I'M GOING TO TALK MORE ABOUT POLICY IN A LOT
9 OF DETAIL. IT'S MY OBSERVATION THAT AFTER REVIEWING ALL OF
10 THE MATERIAL, WE ARE JUDGES AND OUR PRINCIPAL FUNCTION IS TO
11 TRY CASES, BOTH CIVIL AND CRIMINAL, AND OUR VOLUME INCREASES
12 AND WE HAVE MORE AND MORE WORK.

13 SENTENCING PRESENTLY IS RELATIVELY SIMPLE,
14 ALTHOUGH IT'S IMPORTANT, AND I DON'T HAVE STATISTICS, BUT I
15 VENTURE TO SAY THAT THE REAL PROBLEMS HAVE COME IN TWO
16 EXTREMES OF TOO TOUGH AND TOO EASY, AND PROBABLY THE MIDDLE
17 GROUND IS LIKE A BELL CURVE.

18 IN THE MIDDLE GROUND, THEY ARE FAIRLY CONSISTENT
19 AND WE OUGHT TO BE AWARE OF THAT. NOW, THE DETAIL OF YOUR
20 GUIDELINES ARE OBVIOUSLY GOING TO BE SUBJECT TO ALL KIND OF
21 DISPUTES BETWEEN PROSECUTORS AND JUDGES AND PROBATION
22 OFFICERS AND DEFENDANTS AND DEFENDANTS' LAWYERS, AND YOU'RE
23 NOT GOING TO SATISFY EVERYONE. YOU HAVE DONE ABOUT AS GOOD
24 AS YOU COULD.

25 NOW, THE CONGRESS OF THE UNITED STATES ALREADY

1 SPOKE, SO WE ARE LOCKED INTO THAT. THE SENTENCING COMMISSION
2 HAD TO FOLLOW-UP WHAT THE CONGRESS SAID AND YOU'VE DONE THAT
3 IN YOUR PRELIMINARY DRAFT.

4 THE BIG THRUST SEEMS TO BE WE GOT TO HAVE
5 UNIFORMITY AND NO DISPARITY. NOW, TO ME, SPEAKING FOR
6 MYSELF, ONE OF THE LEAST RELISHING DUTIES IS SENTENCING. I
7 DON'T LIKE IT. I'M NOT SURE HOW MANY JUDGES DO. I DON'T
8 LOOK FORWARD TO IT.

9 NOW, AFTER REVIEWING ALL OF THE MATERIAL I TALKED
10 TO YOU ABOUT, IT APPEARS TO ME THAT SENTENCING UNDER THE NEW
11 LAW AND UNDER YOUR GUIDELINES MAKES THE JUDGE MORE OF AN
12 ADMINISTRATOR, AND THE FUNCTION BECOMES MORE ADMINISTRATIVE
13 AND ADMINISTERIAL, AND I DON'T LOOK AT IT AS A REAL JUDICIAL
14 FUNCTION.

15 WHAT I'M SUGGESTING AND RECOMMENDING -- AND I'M
16 SURE IT WON'T COME TO PASS -- AND THAT IS GIVE SOME
17 CONSIDERATION TO, WHILE YOU'RE A SENTENCING COMMISSION, GIVE
18 THE JOB OF THE ACTUAL SENTENCING, TIGHTEN UP YOUR GUIDELINES
19 AND HAVE SENTENCING SPECIALISTS AND LET THEM DO THE
20 SENTENCING. TAKE IT AWAY FROM THE JUDGES, BECAUSE IF IT'S
21 GOING DOWN THE ROAD THAT I SEE, THERE IS NOT MUCH FOR US TO
22 DO AND OUR DISCRETION IS PRETTY MUCH TAKEN AWAY. YOU CAN
23 CALL IT DISCRETION, BUT IT'S SO LIMITED IT AMOUNTS TO NO
24 DISCRETION.

25 UNLESS THERE IS SOME CONSTITUTIONAL IMPEDIMENT TO

1 THE JUDGE DOING THE SENTENCING, WHICH I'M NOT SURE THERE
2 IS -- I COULD FIND NO EXPRESS STATUTORY OR CONSTITUTIONAL
3 PROVISION THAT THE JUDGE HAS TO DO IT, UNLESS YOU GET
4 INVOLVED IN SEPARATION OF POWERS, WHICH YOU GOT THAT WITH
5 YOUR GUIDELINES, SO SOMEBODY COULD CHALLENGE THE STATUTE AND
6 THE GUIDELINES UNDER SEPARATION OF POWERS WHEN YOU'RE
7 INTERFERING WITH THE SENTENCING.

8 THE WAY I LOOK AT IT IS THAT YOU COULD DRAFT A SET
9 OF GUIDELINES UNDER THE STATUTE, TIGHTEN THEM UP AND HAVE THE
10 SENTENCING BE PURE MECHANICAL.

11 YOU WOULD END UP WITH VERY LITTLE DISPARITY,
12 PRETTY GOOD UNIFORMITY, SATISFY THE MANDATES OF THE CONGRESS,
13 AND THEN THE JUDGES COULD GO ON TO DO OTHER THINGS, WHICH WE
14 HAVE A LARGE VOLUME OF, AND RELIEVE US OF A VERY ONEROUS
15 BURDEN THAT I'M NOT SURE HOW MANY OF US ENJOY DOING. SO,
16 THAT'S REALLY THE THRUST OF MY STATEMENT TO YOU. I URGE AND
17 REQUEST THAT YOU GIVE CONSIDERATION TO THAT.

18 EARLIER, I MADE REFERENCE TO THE MANDATORY
19 SENTENCING. AS I LOOK AT IT -- I THINK IT'S 3551 -- IT SAYS
20 THAT JUDGES CAN DO THREE THINGS: THEY CAN SENTENCE, THEY CAN
21 PROBATION, AND THEY CAN FINE.

22 WHEN I LOOKED AT YOUR GUIDELINES -- I THINK IT WAS
23 ON CHAPTER 4, PAGE 141 -- IT SEEMED TO INDICATE THAT IF THERE
24 WERE MORE THAN 14 POINTS, YOU HAD TO SENTENCE. MAYBE I'M
25 READING SOMETHING WRONG. THAT'S ONE OBSERVATION I HAD.

1 THE OTHER THING IS THAT YOU HAVE SO MANY DIFFERENT
2 PEOPLE INVOLVED, THE UNITED STATES ATTORNEY, THE GOVERNMENT
3 WITH THEIR POINT OF VIEW, THE DEFENSE LAWYERS, AND SOMETIMES
4 A DEFENSE LAWYER AND THE DEFENDANT HIMSELF AREN'T GOING TO BE
5 IN THE SAME PLACE, AND THEN YOU HAVE THE PUBLIC.

6 THERE WAS ANOTHER AREA IN THE STATUTE -- I THINK
7 IT'S 994C, 4 AND 5 -- IT'S IN THE STATUTE, AND YOU PICKED UP
8 IN YOUR GUIDELINES -- YOU SHOULD CONSIDER THE COMMUNITY VIEW
9 AND THE PUBLIC CONCERNS.

10 I DON'T KNOW HOW -- YOU'RE A JUDGE, YOU LOOK AT
11 THE FACTS AND LAW. I DON'T KNOW; DO YOU GO OUT AND TAKE A
12 GALLUP POLL OR HARRIS POLL TO DECIDE WHAT THE PUBLIC LIKES OR
13 WANTS BEFORE YOU SENTENCE SOMEBODY? I COULDN'T UNDERSTAND
14 WHY THAT WAS THERE, BUT IT WAS.

15 THE THRUST OF MY WHOLE THING IS THAT IF IT'S GOING
16 TO BE MANDATORY, THE WAY IT APPEARS, IT DOESN'T LOOK VERY
17 JUDICIAL. IT'S ADMINISTRATIVE, AND MAYBE WE SHOULD BE
18 RELIEVED OF THE ENTIRE SENTENCING FUNCTION.

19 CHAIRMAN WILKINS: THANK YOU VERY MUCH. I THINK
20 SOME OF THE COMMENTS BOTH OF YOU HAVE MADE ADDRESS THE
21 STATUTE UNDER WHICH WE LABOR, AND WE SHARE SOME OF YOUR SAME
22 CONCERNS WITH THAT STATUTE, ALTHOUGH WE ARE BOUND TO FOLLOW
23 ITS MANDATE AS WELL AS EVERYONE ELSE.

24 MR. MERRITT: I MIGHT SAY ON THAT SUBJECT, I DON'T
25 SEE THAT THE STATUTE DOES REQUIRE YOU TO PUT IN ABSOLUTE

1 RULES THAT LIMIT THE DISCRETION AS MUCH.

2 I MIGHT ADD TO WHAT JUDGE KRENZLER SAYS. I AGREE
3 WITH HIM, IF THERE'S NOT GOING TO BE -- IF THERE ARE GOING TO
4 BE RULES AND IF THE PRIMARY VALUE IS GOING TO BE REDUCING
5 SENTENCING DISPARITY AND WE ARE GOING TO SET UP A PROCESS
6 LIKE THAT, JUST HAVE SENTENCING SPECIALISTS, AND HOPEFULLY
7 THE APPEALS CAN COME TO THE COMMISSION OR TO SOMEPLACE OTHER
8 THAN THE COURT OF APPEALS.

9 IT DOESN'T -- IT'S NOT REALLY MUCH, AS HE SAYS,
10 MUCH OF A JUDICIAL FUNCTION THERE. I GUESS WE CAN MAKE IT
11 INTO ONE OVER A PERIOD OF TIME, BUT IT SEEMS TO ME THE MAJOR
12 THING HERE IS THAT JUDGES ARE -- THAT I HAVE TALKED TO ARE
13 UNIFORMLY OPPOSED TO PARTICIPATING IN THIS KIND OF -- IF THEY
14 UNDERSTAND IT CORRECTLY AND WHAT THEY SEE AS BEING SET UP
15 HERE.

16 EITHER THEY WANT OUT, AS JUDGE KRENZLER SUGGESTED,
17 OR THEY WANT YOU TO CHANGE IT SO THAT IT CONTINUES TO BE A
18 FUNCTION IN WHICH THEY CAN TAKE THE REAL FACTS CONCERNING THE
19 DEFENDANTS INTO ACCOUNT AND ARRIVE AT WHAT THEY CONSIDER TO
20 BE A JUST PUNISHMENT.

21 CHAIRMAN WILKINS: WELL, WE WELCOME COMMENTS AND
22 THAT'S WHAT THIS IS ALL ABOUT. YOU DID POINT OUT THAT THE
23 DIFFICULT ISSUE OF MULTIPLE COUNT INDICTMENTS, THE
24 CONSECUTIVE CONCURRENT SENTENCING, AND YOU DID NOT FIND
25 ANSWERS IN THAT PRELIMINARY DRAFT BECAUSE WE DID NOT ADDRESS

1 THAT SPECIFICALLY.

2 IT IS SO DIFFICULT THAT WE DIDN'T WANT TO TRY TO
3 COME UP WITH AN ANSWER NOW WITHOUT THE BENEFIT OF JUDGES AND
4 LAWYERS AROUND THE COUNTRY HAVING AN OPPORTUNITY TO -- AND I
5 WISH YOU WOULD GIVE SOME THOUGHT TO THAT ISSUE, BECAUSE WE
6 THINK ABOUT IT EVERY DAY. IT IS SO VERY DIFFICULT TO ANSWER,
7 SO THAT IT IS APPLICABLE ACROSS THE BOARD.

8 MR. MERRITT: I NOTICE THAT IN THE STATUTE, OR AT
9 LEAST IN THE LEGISLATIVE HISTORY, IN THE SENTENCE REPORT,
10 THAT THE SENATE SEEMED TO THINK THAT YOU JUST DROP THE
11 CONSPIRACY COUNTS AND NOT GIVE ANY EFFECT TO IT.

12 CHAIRMAN WILKINS: THAT'S WHAT THE STATUTE SAYS,
13 IF THE SUBJECT OF THAT CONSPIRACY IS COMPLETED, AND WE SHARE
14 YOUR CONCERN ABOUT THE LANGUAGE -- CALL IT THE INCORRECT
15 APPLICATION -- AS A BASIS FOR APPEAL.

16 I MIGHT ADD WE HAVE BEEN VERY ACTIVE IN TRYING TO
17 GET THAT LANGUAGE CHANGED. THE UNITED STATES SENATE'S PASSED
18 AN AMENDMENT CHANGING THAT PROVIDING FOR A CLEARLY ERRONEOUS
19 STANDARD; THE HOUSE, AT LEAST THE SUBCOMMITTEE, REFUSED TO
20 CONSIDER IT THIS TERM. SO AGAIN, THAT'S A PROBLEM THAT THE
21 CONGRESS HAS GIVEN US.

22 MR. MERRITT: THEY JUST HAVEN'T THOUGHT THROUGH
23 THE PROBLEM, BECAUSE THEY ARE NOT GOING TO WANT TO ADD 15
24 MORE JUDGES TO THE 6TH CIRCUIT. OF COURSE, WE DON'T WANT TO
25 DO IT EITHER.

1 I MEAN WE DON'T WANT A 6TH CIRCUIT OF 25 OR 30
2 JUDGES; BUT IF YOU ADD 15, 16, 1700 MORE CASES, ARISING OUT
3 OF GUILTY PLEAS TO OUR DOCKET, SOMETHING HAS GOT TO GIVE.
4 CHAIRMAN WILKINS: SOMETHING HAS GOT TO GIVE AND
5 THE CONGRESS HAS TO RECOGNIZE IT, WHATEVER SYSTEM WE COME UP
6 WITH. THAT'S, AGAIN, A PROBLEM OF LEGISLATION.
7 MR. MERRITT: OF COURSE, IF YOU MAKE IT MORE
8 DISCRETIONARY WITH THE DISTRICT JUDGE, YOU LEAVE A LOT LESS
9 TO COME UP TO THE COURT OF APPEALS.
10 CHAIRMAN WILKINS: THAT'S CORRECT. AND MY NEXT
11 REQUEST, JUDGE, IS THIS: YOU SAY THERE ARE FACTORS THAT WE
12 HAVE OMITTED -- AND I'M SURE THERE ARE -- TELL US WHAT THOSE
13 FACTORS ARE.
14 I DON'T MEAN RIGHT NOW. AND THEN TELL US HOW TO
15 BUILD MORE FLEXIBILITY INTO THIS SYSTEM. TELL US HOW TO
16 PROVIDE MORE DISCRETION WITHIN THE CONSTRAINTS OF THIS
17 STATUTE. THAT'S THE KEY TO IT, WITHIN THE CONSTRAINTS OF THE
18 STATUTE UNDER WHICH WE WORK.
19 MR. MERRITT: THE STATUTE LOOKS TWO WAYS. THE
20 STATUTE ON THE ONE HAND LOOKS TOWARD REDUCING SENTENCE
21 DISPARITY AND HAS LANGUAGE IN THERE THAT LOOKS LESS CORRECT
22 AND THEN IT HAS LANGUAGE IN THERE THAT LOOKS TOWARD THE
23 INDIVIDUALIZED SENTENCE, TAKING INTO ACCOUNT THE FACTS OF THE
24 INDIVIDUAL DEFENDANT.
25 IT HAS LANGUAGE THAT UNDER NO CIRCUMSTANCES ARE --

1 IT'S LIMITING THE DISTRICT JUDGE'S AUTHORITY TO CONSIDER ANY
2 KIND OF INFORMATION CONCERNING THE CRIMINAL DEFENDANT. I
3 MEAN, THE STATUTE LOOKS BOTH WAYS. IT DEPENDS ON WHAT YOU
4 WANT TO EMPHASIZE IN THE STATUTE.

5 CHAIRMAN WILKINS: RIGHT, BUT THE STATUTE DOES
6 PROVIDE THAT IF INCARCERATION IS TO BE A SENTENCE, THERE'S A
7 25-PERCENT RANGE, AND THAT SEEMS TO ME TO PROVIDE A
8 SIGNIFICANT LIMITATION.

9 WE ARE TRYING TO WORK AROUND IT IN BUILDING
10 GUIDELINES THAT REQUIRE FACTUAL DETERMINATIONS TO GET UP TO
11 THAT RANGE; AND BY DOING THAT, WE THINK WE CAN PROVIDE
12 SUFFICIENT DISCRETION; AND IF THE JUDGE IS A FACT FINDER
13 RATHER THAN ADMINISTOR --

14 MR. KRENZLER: DOES THE STATUTE REQUIRE A
15 MANDATORY SENTENCE OR DO YOU HAVE THE OPTION OF SENTENCING OR
16 PROBATION?

17 CHAIRMAN WILKINS: IT DOES NOT REQUIRE A MANDATORY
18 SENTENCE. IT JUST SIMPLY REQUIRES THAT IF THE INCARCERATION
19 IS TO BE A PART OF THE SENTENCE, IT MAY NOT VARY WHEN --

20 MR. KRENZLER: I THOUGHT YOU SAID ON PAGE 141 IF
21 THE FACTOR -- IF THE SANCTION NUMBER WAS 14 OR MORE, YOU HAD
22 TO PUT THEM IN JAIL.

23 CHAIRMAN WILKINS: WELL, THE STATUTE PROVIDES FOR A
24 SIX MONTHS' VARIANCE, OR 25 PERCENT, WHICHEVER IS GREATER, SO
25 THEN THAT PRELIMINARY DRAFT -- 14 EQUALS ZERO TO SIX.

1 SO IF THE JUDGE CHOSE ZERO, THEN THE JUDGE COULD,
2 OF COURSE, IMPOSE PROBATION UNDER SUCH CONDITIONS AND SUCH
3 LENGTH OF TIME AS THE JUDGE THOUGHT WAS APPROPRIATE, OR COULD
4 HAVE EVEN A SPLIT SENTENCE, AS WE KNOW IT TODAY. THE STATUTE
5 PROVIDES INTERVALS OF TIME DURING THE FIRST YEAR OF
6 PROBATION, BUT IF THE JUDGE --

7 MR. KRENZLER: SAY THE FACTOR WAS ABOUT 60, WHICH
8 MEANS 38 MONTHS OR SOMETHING LIKE THAT, 44 MONTHS, COULD YOU
9 STILL PUT SOMEBODY ON PROBATION?

10 CHAIRMAN WILKINS: IN MY JUDGMENT, THE STATUTE
11 DOES NOT ALLOW THAT, BUT IF YOU CAN TELL US HOW --

12 MR. KRENZLER: I THOUGHT 3551 SAID YOU CAN DO
13 THREE THINGS, AND THEY SAY "OR." WHERE DOES IT SAY MANDATORY
14 SENTENCE?

15 CHAIRMAN WILKINS: AGAIN, I WOULD BE HAPPY TO HEAR
16 YOUR VIEWS ON THAT BECAUSE WE'RE STRUGGLING WITH THAT ISSUE,
17 TRYING TO BUILD IN AS MUCH DISCRETION AS WE CAN.

18 LET ME ASK IF ANY COMMISSIONERS TO MY RIGHT HAVE
19 ANY QUESTIONS.

20 COMMISSIONER ROBINSON: YES, IF I COULD JUST
21 FOLLOW UP ON YOUR FIRST POINT ABOUT THE STATUTE VERSUS OUR
22 ABILITY TO MANEUVER -- AND I GUESS THIS INITIALLY GOES TO
23 JUDGE MERRITT'S POINT AND HIS SUGGESTION ABOUT THE COMMON-LAW
24 PROCESS AND THAT HAS A LOT OF APPEAL FOR ME.

25 THAT'S WHAT PART OF THE STRENGTH OF THE COMMON-LAW

1 SYSTEM IS, I SUPPOSE, THAT WE'VE TAKEN ONE STEP AT A TIME AND
2 THEN, IN A SENSE, CONSOLIDATED OUR GAINS. THERE IS A CERTAIN
3 APPEAL TO THAT, ALTHOUGHT THERE ARE SOME COUNTER-ARGUMENTS
4 ABOUT WHETHER IN THE INTERIM WE ARE GOING TO HAVE MORE
5 DISPARITY THAN WE WANT.

6 THERE ARE SOME POLICY ISSUES THERE ABOUT HOW MUCH
7 DISCRETION AND HOW MUCH CODIFICATION NOW; BUT I GUESS I
8 DIDN'T QUITE UNDERSTAND YOUR RESPONSE TO THE CHAIRMAN WHEN HE
9 TALKED ABOUT THOSE POLICY ISSUES HAVING IN A SENSE ALREADY
10 BEEN DECIDED AND NOT BEING WITHIN OUR POWER.

11 LET ME JUST POINT OUT WHAT SEEMED TO ME TO BE
12 THREE PARTS OF THE LEGISLATION THAT AFFECT WHAT WE CAN AND
13 CAN'T DO. WE HAVE THIS LIMITATION THAT SAYS FOR WHATEVER
14 CATEGORIES WE COME UP WITH OF OFFENSES AND OFFENDER
15 CHARACTERISTICS, WHATEVER, THE TERM HAS TO BE WITHIN THE
16 25-PERCENT RANGE.

17 THAT'S A STATUTORY PROVISION -- NOT OUR CHOICE --
18 WE HAVE ANOTHER PROVISION THAT SAYS JUDGES CAN ONLY GO
19 OUTSIDE THAT RANGE IF THERE IS SOME FACTOR THAT THE
20 COMMISSION HASN'T CONSIDERED; AGAIN, A STATUTORY PROVISION,
21 NOT OURS.

22 AND THEN WE HAVE A STATUTE WHICH ESSENTIALLY TELLS
23 US TO TAKE INTO ACCOUNT EVERYTHING. WE HAVE GOT THIS -- YOU
24 PROBABLY SEEN IT IN THE LEGISLATION -- THIS RELATIVELY
25 EXTENSIVE LIST OF THE FACTORS WE ARE SUPPOSED TO LOOK AT.

1 IN FACT, THERE IS A PASSAGE FROM THE LEGISLATIVE
2 HISTORY -- LET ME READ IT, VERY BRIEF -- IT IS THE
3 CONTROLLING LEGISLATIVE HISTORY. IT SAYS, "THE COMMITTEE
4 EXPECTS THE COMMISSION TO ISSUE GUIDELINES SUFFICIENTLY
5 DETAILED AND REFINED TO REFLECT EVERY IMPORTANT FACTOR
6 RELEVANT TO SENTENCING FOR EACH CATEGORY OF OFFENSE AND EACH
7 CATEGORY OF OFFENDER, GIVE APPROPRIATE WEIGHT TO EACH FACTOR,
8 AND DEAL WITH VARIOUS COMBINATIONS OF FACTORS."

9 NOW, IT'S NOT CLEAR TO ME HOW WE CAN STAY TRUE TO
10 THAT SYSTEM AS THE CONGRESS HAS GIVEN IT TO US, YET PROVIDE
11 THE COMMON-LAW PROCESS, DISCRETION THAT MAY WELL BE
12 APPROPRIATE -- YOU MAY BE RIGHT THAT IT'S APPROPRIATE, BUT
13 I'M JUST NOT SURE HOW WE CAN DO IT. MAYBE YOU HAVE SOME
14 OTHER IDEAS ON HOW WITHIN THOSE CONSTRAINTS WE CAN DO THAT.

15 MR. MERRITT: I WILL TRY. I'M LIKE MY
16 PREDECESSORS WHO TESTIFIED HERE. I HAVE NOT HAD, OBVIOUSLY,
17 THE TIME TO THINK ABOUT THIS THAT I WOULD LIKE, BUT, FOR
18 EXAMPLE, THIS OCCURS TO ME AS A POSSIBLE SOLUTION TO THAT
19 PROBLEM.

20 THE FIRST THING IS THAT THE COMMISSION, IT SEEMS
21 TO ME, WOULD HAVE TO -- AT LEAST THE MAJORITY -- TO CONCLUDE
22 THAT THE BASIC POINT HERE THAT I HAVE MADE AND THAT I'M SURE
23 OTHERS HAVE MADE IS A GOOD AND VALID POINT.

24 TO GIVE TOO MUCH EMPHASIS TO THE DISPARITY PROBLEM
25 AT THE EXPENSE OF TAKING INTO ACCOUNT SUBTLE NUANCES IS

1 SOMETHING THAT THE COMMISSION IS GOING TO HAVE TO DO.

2 ONCE YOU DECIDE THAT THAT IS THE CASE, THE
3 QUESTION IS THEN THE LEGAL MECHANISMS BY WHICH YOU'RE GOING
4 TO ACCOMPLISH A SIGNIFICANT CHANGE IN THE TYPE OF CONCEPT
5 THAT YOU HAVE GOT HERE. I WOULD THINK THAT YOU COULD DRAFT
6 POLICY STATEMENTS AND OTHER STATEMENTS THAT RECOGNIZE THIS
7 PROBLEM AND THAT FLEXIBILITY -- THAT STATE, THAT SAY, THAT
8 FLEXIBILITY AND THAT STATE OF SCIENTIFIC KNOWLEDGE IS SUCH
9 THAT WE HAVE GOT TO BUILD IN MORE FLEXIBILITY THAN THIS
10 RECOMMENDS.

11 THE WAY TO DO THAT IS TO SAY THAT WE ARE UNABLE TO
12 COVER EVERY PERMUTATION AND COMBINATION OF OFFENSE AND
13 OFFENDER AND COMMUNITY CHARACTERISTICS IN AN EQUATION OR IN A
14 COMPUTER PRINTOUT, THAT THAT'S IMPOSSIBLE AND STILL HAVE JUST
15 PUNISHMENT.

16 SO WE ARE GOING TO DO THE BEST WE CAN AND COME UP
17 WITH AS MANY AS WE CAN AND HERE IS THE FRAMEWORK WHEN NOTHING
18 ELSE INTERVENES, FACTORS, NO OTHER PERMUTATIONS INTERVENE,
19 AND THIS IS GOING TO BE THE SENTENCE.

20 WE RECOGNIZE THAT THE JUDGES ARE GOING TO HAVE TO
21 DEVIATE FROM THAT IN MANY, MANY, MANY CASES, AND THEN TRY TO
22 COME UP WITH SOME POLICIES, STATEMENTS, GENERAL PRINCIPLE,
23 THAT WILL GUIDE THEM IN THE DEVIATION; AND THEN ASK THEM TO
24 UNDERSTAND THAT THEY ARE STATING REASONS WHICH YOU ARE THEN
25 GOING TO TRY TO USE TO COME UP WITH MORE SPECIFIC PRINCIPLES

1 CONCERNING DEVIATION AND SET UP -- THIS IS A PERMANENT
2 COMMISSION -- SET UP AN EVOLUTIONARY PROCESS IN THAT WAY.
3 NOW, THAT'S A POSSIBILITY.

4 MR. KRENZLER: I HAVE ONE OTHER POINT. I CALLED
5 OUR CHIEF PROBATION OFFICER OVER AND I TALKED TO HIM ABOUT
6 THIS. I DIDN'T GIVE HIM MUCH TIME. I SAID, ASSUMING THERE
7 IS MANDATORY SENTENCING, CHECK SOME OF MY CASES OUT.

8 I HAD 15 CASES WHERE I PUT PEOPLE ON PROBATION;
9 AND UNDER THE GUIDELINES, THEY WOULD HAVE SENTENCING OF MORE
10 THAN 24 MONTHS, WHICH ABOUT HALF OF THEM WOULD BE
11 INCARCERATED, WHICH GOES BACK TO ONE OF THE PREVIOUS SPEAKERS
12 ABOUT TAXES AND JAIL.

13 I'M ASSUMING THAT HE PROBABLY RAN SOME STUDIES ON
14 WHAT WOULD HAPPEN TO PEOPLE ON PROBATION, HOW THE NUMBERS
15 WOULD COME TO THE CURRENT STATUS, PUTTING THEM ON PROBATION
16 VERSUS UNDER YOUR NEW GUIDELINES WE HAVE THE MANDATORY
17 SENTENCING AND THE IMPACT OF THAT. I THOUGHT YOU WOULD BE
18 INTERESTED IN THAT.

19 CHAIRMAN WILKINS: THANK YOU VERY MUCH. THESE
20 NUMBERS -- THE DRAFT IS VERY PRELIMINARY; IT IS PRELIMINARY,
21 AS WELL, BUT WE ARE RUNNING IMPACT STUDIES, BUT WE HAVEN'T
22 REACHED ANY FIRM CONCLUSIONS ON THAT.

23 I APPRECIATE YOUR REMARKS. I HAVE HAD OTHER
24 JUDGES SAY THEY RUN THEIR CASES THROUGH THE GUIDELINES -- OF
25 COURSE, THERE ARE VERY -- MANY OF THE ASPECTS, AS JUDGE

1 MERRITT POINTED OUT, ARE NOT THERE. HOW DO YOU DEAL WITH A
2 CONSECUTIVE CONCURRENT SENTENCING SITUATION?

3 I HAVE HAD OTHERS RUN THEM THROUGH THERE AND THEY
4 WERE WITHIN THE GUIDELINES. I'M NOT SURE THAT'S BY CHANCE OR
5 NOT, BUT AGAIN, IT POINTS UP THE DIFFERENT PHILOSOPHIES WE,
6 ALL JUDGES, BRING TO THE BENCH.

7 ANY OTHER QUESTIONS TO MY RIGHT? TO MY LEFT?

8 JUDGE BREYER?

9 COMMISSIONER BREYER: A COUPLE OF COMMENTS AND
10 QUESTIONS. I FIND IT HARDER TO UNDERSTAND JUDGE KRENZLER'S
11 VIEW. JUDGE MERRITT, I SYMPATHIZE COMPLETELY WITH WHAT YOU
12 SAY.

13 I HAVE A VERY DIFFERENT VIEW OF THE STATUTE THAN
14 COMMISSIONER ROBINSON. I THINK IT GIVES US ADEQUATE
15 FLEXIBILITY TO DO WHAT IS CORRECT. I THINK IT DOES NEED --
16 WHAT IS CORRECT, IN MY OPINION, INCLUDES MORE FLEXIBILITY.

17 THE QUESTION IS HOW TO BUILD THAT IN. OF COURSE,
18 I GRANT YOU IN THE FIRST CIRCUIT, MANY OTHER CIRCUITS THINK
19 WE ARE WRONG ON THE LAW, QUITE OFTEN, SO I'M NOT SAYING MY
20 VIEW IS CORRECT. THAT'S JUST MY VIEW.

21 BUT THE THING THAT I DON'T -- AS TO CONCURRENT, I
22 WOULD LIKE CONCURRENT SENTENCING, AND THERE ARE THE PROBLEMS
23 YOU RAISED IN YOUR EXAMPLE. IF YOU LOOK AT PAGE 168, THERE
24 IS AN EFFORT TO DEAL WITH THAT PROBLEM, BUT IT IS, AS THE
25 CHAIRMAN SAYS, AN EXTREMELY DIFFICULT PROBLEM. I, TOO, AM

1 VERY ANXIOUS TO HAVE YOUR THOUGHTS.

2 AS TO THE INCORRECT APPLICATION LANGUAGE, THAT, AS
3 FAR AS I KNOW, WAS SIMPLY A MISTAKE IN THE STATUTE. THE
4 EFFORT THROUGHOUT BY ALL SENATORS AND ALL CONGRESSMEN AND THE
5 DEPARTMENT OF JUSTICE WAS TO MAKE APPEALS OUTSIDE THE
6 GUIDELINE MORE READILY AVAILABLE THAN APPEALS WITHIN THE
7 GUIDELINE.

8 THOSE WORDS "INCORRECT APPLICATION" DO THE PRECISE
9 OPPOSITE. NOW, AS THE CHAIRMAN POINTED OUT --

10 MR. MERRITT: LET ME ASK YOU THIS QUESTION.

11 COMMISSIONER BREYER: -- IT WAS JUST A MISTAKE.

12 MR. MERRITT: DO YOU AGREE THAT WITH THAT LANGUAGE
13 IN THERE AND WITH THE DEFENSE BAR BEING WHAT IT IS THERE,
14 THEIR OBLIGATIONS, THEY ARE GOING TO APPEAL EVERY CASE IN
15 WHICH IT GOES AGAINST THEM ON SOME MITIGATION QUESTION?

16 COMMISSIONER BREYER: I THINK THAT YOUR PREDICTION
17 OF WHAT WILL HAPPEN, IF NOTHING IS CHANGED, IS A CORRECT
18 PREDICTION, IN MY OPINION. NOW, WHERE I DON'T THINK I DO
19 AGREE WITH YOU IS IN YOUR PESSIMISTIC VIEW AS TO WHAT THESE
20 PRELIMINARY GUIDELINES MEAN.

21 THAT IS TO SAY, I THINK IT WAS CORRECT FOR THE
22 COMMISSION TO PUT THE BLOCK OF MARBLE UP ON THE TABLE BEFORE
23 BEGINNING TO CHIP IT AWAY; THAT IS, THIS IS INDEED -- AND I
24 THINK NO ONE INTENDS THESE TO BE EITHER THE ABSOLUTE LAST
25 WORD IN WHAT THE APPROACH IS NOR ARE THEY TO BE THIS

1 INFLEXIBLE.

2 I DON'T THINK THERE IS ANYONE WHO THINKS -- WELL,
3 MAYBE -- I'M NOT SPEAKING FOR OTHERS. I'M JUST SAYING --
4 THAT'S REALLY THE TECHNICAL QUESTION NOW ON THE TABLE, AS TO
5 HOW TO BUILD FLEXIBILITY INTO IT.

6 I CAN THINK OF THREE SEPARATE WAYS. ONE THAT WAS
7 SUGGESTED TO US IN NEW YORK WAS TO GO THROUGH THESE
8 GUIDELINES AS THEY ARE WRITTEN AND TO SIMPLIFY, TO SUBSTITUTE
9 RANGES FOR ABSOLUTE NUMBERS AND TO OVERLAP THE RANGES WHERE
10 POSSIBLE SO THAT BRIGHT LINES WILL NOT PRODUCE A LITIGABLE
11 ISSUE.

12 A SECOND APPROACH WAS THE ONE THAT YOU SUGGESTED,
13 WHICH IS TO HAVE A READILY AVAILABLE DEPARTURE POLICY, INDEED
14 ENCOURAGE DEPARTURES IN THE SHORT RUN, SO THAT WE CAN COLLECT
15 INFORMATION, AND IN THE LONGER RUN PRODUCE A COHERENT,
16 SCIENTIFICALLY-BASED SET OF SENTENCES.

17 A THIRD APPROACH HAS TO DO WITH PLEA BARGAINING.
18 AS FAR AS PLEA BARGAINING IS CONCERNED, IT IS POSSIBLE UNDER
19 APPROPRIATE SUPERVISION, IF WE CAN DEVELOP THE APPROPRIATE
20 CONTROLS, TO ALLOW IN CERTAIN INSTANCES THE DIFFICULT CASES
21 TO BE AMELIORATED THROUGH A PLEA BARGAIN WHERE A DEFENSE
22 ATTORNEY AND PROSECUTOR AND JUDGE ALL AGREE THAT THAT'S
23 APPROPRIATE.

24 SO, IN OTHER WORDS, I CAN SEE METHODS OF STARTING
25 WITH THIS BASE AND DEALING WITH THE FLEXIBILITY PROBLEM AND,

1 INDEED, I WILL TRY TO SEE HOW THAT CAN BE DEVELOPED, AND I
2 HOPE THAT YOU WILL, TOO.

3 WHAT'S HARDER FOR ME TO TAKE ACCOUNT OF IS JUDGE
4 KRENZLER'S PROBLEM BECAUSE YOU'RE REALLY SUGGESTING A VERY
5 DIFFERENT DIRECTION. YOU'RE SUGGESTING A DIRECTION OF LEAVE
6 IT UP TO THE PAROLE COMMISSION, OR NOT THE PAROLE COMMISSION,
7 BUT THE PROBATION OFFICER, HAVE IT ABSOLUTELY MANDATORY.

8 ARE YOU SERIOUS ABOUT THAT? I MEAN, THE TYPE OF
9 THING THAT BOTHERS ME ABOUT THAT APPROACH IS I CAN GO THROUGH
10 THESE, FOR EXAMPLE, AND I CAN SEE THAT WE HAVE A VERY SERIOUS
11 SENTENCE OF CLOSE TO FIVE YEARS OF A PERSON WHO, WITH FIRE,
12 DAMAGES A PUBLIC BUILDING WHERE PEOPLE ARE LIKELY TO BE
13 PRESENT.

14 I THINK OF THAT SENTENCE AS PROBABLY APPROPRIATE,
15 A SEVERE ONE ANYWAY, FOR A TYPICAL CASE, BUT SUPPOSE A SCHOOL
16 BOY SETS FIRE TO A WASTEBASKET? ALTERNATIVELY, SUPPOSE WHAT
17 WE HAVE IN -- I WAS RAISED IN NEW YORK.

18 VERY OFTEN SOME OF THE DRUG COURIERS, WHO VERY
19 OFTEN SHOULD GET VERY SEVERE SENTENCES, NONETHELESS IN THIS
20 PARTICULAR INSTANCE MIGHT BE TOTALLY IGNORANT, THE WOMEN FROM
21 VERY POOR FAMILIES IN FOREIGN COUNTRIES WHO ARE SENT OVER
22 HERE ON AN AIRPLANE, WHERE NORMALLY THE PROSECUTOR WILL SEND
23 THEM BACK, OR IF THEY GO TO JAIL -- THE NORMAL PRACTICE OF
24 THE COURTS IS NOT TO GIVE THEM 10 AND 15 YEARS IN PRISON.

25 I MEAN, DOESN'T THERE HAVE TO BE FLEXIBILITY TO

1 DEAL WITH THESE EXCEPTIONAL CASES, AND, INDEED, AREN'T THERE
2 ENOUGH CASES THAT WE CAN'T FORESEE OR YOU CAN'T DEAL WITH
3 THOSE STRICT RULES, SO THAT YOU CAN'T TURN THIS OVER TO A
4 PROBATION OFFICER?

5 YOU CAN'T HAVE A SYSTEM THAT IS REALLY MECHANICAL,
6 IF IT'S DESIGNED TO BE A FAIR SYSTEM.

7 MR. KRENZLER: YOU'RE A SENTENCING COMMISSION.
8 YOU'RE EXPERTS. YOU COULD HAVE ANOTHER BODY, WHETHER IT BE
9 UNDER YOU OR UNDER THE COURT, OF SENTENCING SPECIALISTS, AND
10 YOU COULD SET UP YOUR GUIDELINES.

11 YOU DON'T HAVE TO GO MUCH FURTHER THAN THE
12 PRELIMINARIES, IF THEY ARE A LOGICAL EXTENSION OF WHERE YOU
13 HAVE GONE. YOU ARE GOING IN THAT DIRECTION. YOU DON'T HAVE
14 TO GO TOO MUCH FURTHER TO GIVE IT TO THEM.

15 IF YOU HAVE SPECIALISTS, YOU'RE TALKING ABOUT VERY
16 LITTLE DISCRETION THAT'S LEFT, SO YOU GIVE IT TO THEM.

17 COMMISSIONER BREYER: WHAT IS A SPECIALIST? A
18 SPECIALIST IS A PERSON WHO CAN FORESEE HUMAN BEHAVIOR IN
19 AWFUL PERMUTATIONS.

20 MR. KRENZLER: THERE'S NOTHING MAGIC ABOUT ME.
21 I'M A HUMAN BEING. I LOOK AT THE SAME FACTORS AND I COME UP
22 WITH IT. WHY NOT DELEGATE IT TO THEM?

23 COMMISSIONER BREYER: WHAT I WANT TO KNOW, ARE YOU
24 SERIOUSLY ADVOCATING THAT WE SHOULD HAVE GUIDELINES WITH
25 LITTLE FLEXIBILITY THAT WE DO DELEGATE OR SHOULD WE TRY, IN

1 FACT, INsofar AS WE CAN TO BUILD FLEXIBILITY INTO THIS SET OF
2 GUIDELINES? WHICH APPROACH DO YOU THINK IS THE RIGHT ONE?

3 MR. KRENZLER: I THINK, AS A JUDGE WITH A LOT OF
4 OTHER THINGS TO DO, IF THE THRUST IS GOING TO BE TO GO WITH A
5 SUBSTANTIAL AMOUNT OF MANDATORY AND ADMINISTRATIVE WITH
6 LITTLE FLEXIBILITY, THEN GIVE IT TO SOMEBODY OTHER THAN
7 JUDGES.

8 COMMISSIONER BREYER: BUT SHOULD IT BE? SHOULD IT
9 BE LITTLE FLEX THAT YOU DON'T HAVE A VIEW?

10 MR. KRENZLER: I HAVE NO PROBLEM WITH IT. BASED
11 ON THE STATUTE, I THINK YOU CAN DO IT VERY EASILY. I THINK
12 THE STATUTE LOCKS YOU INTO A LOT OF THAT.

13 CHAIRMAN WILKINS: ANY OTHER QUESTIONS?

14 COMMISSIONER MACKINNON: YES. JUDGE MERRITT, YOU
15 WERE TALKING ABOUT A CASE THAT GOT 66 MONTHS ON THAT --

16 MR. MERRITT: THAT'S THE WAY THE GUIDELINES WORKED
17 OUT. THE GUIDELINES WORKED OUT ON --

18 COMMISSIONER MACKINNON: YOU SAID YOU THOUGHT IT
19 WAS UNFAIR?

20 MR. MERRITT: I THOUGHT THE SENTENCE OF
21 44 MONTHS THAT YOU HAVE TO GIVE TO THE REAL ESTATE DEVELOPER
22 WAS UNFAIR. IN FACT, THE SENTENCE ON THAT PERSON WAS
23 PROBATION WITH A \$5,000 FINE.

24 COMMISSIONER MACKINNON: YOU DIDN'T THINK THE
25 66 MONTHS WAS UNFAIR?

1 MR. MERRITT: I DIDN'T THINK THE 66 MONTHS REALLY
2 WAS ENOUGH.

3 COMMISSIONER MACKINNON: YEAH. WELL, I WOULD SORT
4 OF GO WITH YOU ON THAT. ON THE 44 MONTHS, THAT MAN WAS A
5 VICTIM; AND IN THE HOFFA CASE, THAT MAN TESTIFIED FOR THE
6 GOVERNMENT, WAS NEVER INDICTED, AND HOFFA WENT TO PRISON ON
7 EXACTLY THE SAME CASE THAT YOU OUTLINED.

8 MR. MERRITT: THE CASE I GAVE YOU WAS A FEDERAL
9 CASE. I REPRESENTED THE DEFENDANT, THE REAL ESTATE
10 DEVELOPER, AND HE WAS INDICTED AND CONVICTED, ACTUALLY ENDED
11 UP PLEADING GUILTY BECAUSE OF THE --

12 COMMISSIONER MACKINNON: WELL, YOU CAN TIE HIM IN.

13 MR. MERRITT: BUT THERE WAS A PROBLEM. THE
14 GOVERNMENT HAD A PROBLEM WITH THE CASE. IN SOME WAYS, THE
15 REAL ESTATE DEVELOPER WAS A VICTIM, BUT THE GOVERNMENT
16 INDICTED HIM AS AN AIDER AND ABETTOR.

17 COMMISSIONER MACKINNON: WELL, OF COURSE, HE DID
18 AID AND ABET.

19 MR. MERRITT: RIGHT.

20 COMMISSIONER MACKINNON: BUT HE DID IT UNDER
21 COERCION AND HE WAS A VICTIM JUST THE SAME AS VAUGHN CONLEY
22 WAS IN THE HOFFA LOAN ON THE EVERGLADES HOTEL, WHICH IS JUST
23 SOUTH OF HERE IN MIAMI, AND HE WAS NEVER INDICTED, AND AS I
24 SAY, TESTIFIED, AND HOFFA WENT TO PRISON, ALONG WITH THE
25 FELLOW THAT COLLECTED THE MONEY. NOW, WERE WE ALSO TALKING

1 ABOUT SIX COUNTS AND FOUR COUNTS AND THE CONSPIRACY?

2 MR. MERRITT: YES, SIR.

3 COMMISSIONER MACKINNON: THAT'S ONE OFFENSE, ISN'T
4 IT?

5 MR. MERRITT: ALL OF IT IS ONE OFFENSE, SO FAR AS
6 I AM CONCERNED, BECAUSE THE MISAPPLICATION OF THE BANK FUNDS
7 AND THE COMMERCIAL BRIBERY ALL ARISE OUT OF PRECISELY THE
8 SAME TYPE, SAME TRANSACTION.

9 COMMISSIONER MACKINNON: I HAD THE SAME PROBLEM
10 WITH BANK ROBBERIES WHEN I WAS U.S. ATTORNEY. A LOT OF THEM
11 USED TO INDICT THEM FOR SIX COUNTS UNDER EACH SUBSECTION,
12 BUT -- AND I ALWAYS INDICTED THEM IN ONE COUNT. I THINK THIS
13 IS JUST ONE COUNT.

14 MR. MERRITT: I AGREE. I DID THE SAME THING AS
15 UNITED STATES ATTORNEY, BUT I WISH WE COULD GET ALL THE
16 UNITED STATES ATTORNEYS TO LOOK AT IT THE WAY YOU AND I DO,
17 JUDGE MACKINNON, BECAUSE MOST OF THEM TRY TO MULTIPLY THE
18 NUMBER OF COUNTS.

19 COMMISSIONER MACKINNON: YEAH. THEY LIKE TO HAVE
20 A LOT OF COUNTS. I LIKE TO HAVE ONE COUNT AND GET A GUILTY
21 VERDICT ON IT AND LET IT GO AT THAT.

22 JUDGE KRENZLER, YOU WERE TALKING ABOUT THE
23 SEPARATION OF POWERS AND THE GUIDELINES. THIS COMMISSION
24 SITS IN THE JUDICIAL BRANCH OF THE GOVERNMENT. THERE ISN'T
25 ANY SEPARATION OF POWERS.

1 MR. KRENZLER: I WAS ONLY MAKING REFERENCE THAT I
2 DID NOT SEE ANY CONSTITUTIONAL IMPEDIMENT UNLESS SOMEBODY
3 WOULD ARGUE THAT. I WOULD --

4 COMMISSIONER MACKINNON: I CAN THINK THEY MIGHT
5 ARGUE IT A LITTLE THE WAY IT IS NOW, BUT DON'T WORRY ABOUT
6 THAT STILL STICKING AROUND TOO LONG.

7 MR. KRENZLER: MY POINT WAS I FOUND NO IMPEDIMENT
8 IN THE CONSTITUTION TO DELEGATING IT TO AN ADMINISTRATIVE
9 AGENCY IF THE GUIDELINES WERE GOING TO BE VERY NARROW.
10 THAT'S ALL I WAS SAYING.

11 COMMISSIONER MACKINNON: WELL, THIS IS AN AGENCY
12 IN THE JUDICIAL BRANCH AND PROTECTED TO THAT EXTENT; AND TO
13 THE EXTENT THAT MEMBERS OF THE EXECUTIVE BRANCH SERVE ON IT,
14 THEY DO NOT HAVE A VOTE, ALTHOUGH WE GET THEIR JUDGMENT, WE
15 HOPE.

16 THANK YOU.

17 CHAIRMAN WILKINS: ANY OTHER QUESTIONS?

18 MR. MERRITT: I MIGHT SAY JUST IN CLOSING THAT I
19 HOPE THE COMMISSION, THE WHOLE COMMISSION, WILL GIVE VERY
20 SERIOUS CONSIDERATION AND WILL ADOPT THE PHILOSOPHY, AS I
21 UNDERSTAND IT, THAT JUDGE BREYER IS TALKING ABOUT.

22 IT GOES A LONG WAY IN ALLEVIATING THE PROBLEM THAT
23 I SEE WITH THE GUIDELINES AND INCREASES THE FLEXIBILITY. BUT
24 UNLESS THAT'S DONE, IT'S GOING TO WREAK HAVOC, IT SEEMS TO
25 ME, WITH THE SITUATION IN THE FEDERAL JUDICIARY.

1 CHAIRMAN WILKINS: I THINK THE COMMISSION DOES
2 ADOPT THAT PHILOSOPHY AND, INDEED, WE ARE STRUGGLING TO FIND
3 IT. AGAIN, WE KEEP GOING BACK TO THE STATUTE WHICH CREATED
4 US AND LIMITS OUR AUTHORITY.

5 AGAIN, I SOLICIT AGAIN YOUR COMMENTS AND PERHAPS
6 AFTER TODAY UPON REFLECTION, YOU MAY HAVE SOME CONCRETE
7 PROPOSALS THAT WOULD HELP US ACHIEVE THE GOALS THAT YOU WOULD
8 RECOMMEND, AND WE WOULD BE MOST DELIGHTED TO RECEIVE THEM.

9 MR. MERRITT: I WOULD BE HAPPY TO THINK ABOUT IT.
10 THANK YOU.

11 CHAIRMAN WILKINS: THANK YOU VERY MUCH, GENTLEMEN.

12 OUR NEXT WITNESS, TWO WITNESSES, JAMES K. HASSON,
13 JR. HE IS THE CHAIRMAN OF THE METROPOLITAN ATLANTA CRIME
14 COMMISSION, AND WITH HIM IS MR. GENE SLADE, THE EXECUTIVE
15 DIRECTOR OF THE METROPOLITAN ATLANTA CRIME COMMISSION.

16 GENTLEMEN, WE'RE DELIGHTED TO HAVE YOU WITH US.

17 MR. HASSON: THANK YOU, MR. CHAIRMAN, MEMBERS OF
18 THE COMMISSION. WELCOME TO ATLANTA. WE THANK YOU FOR THE
19 OPPORTUNITY OF MAKING A BRIEF COMMENT BEFORE YOU TODAY.

20 I AM JAMES HASSON AND TO MY LEFT IS GENE SLADE,
21 THE EXECUTIVE DIRECTOR OF THE METROPOLITAN ATLANTA CRIME
22 COMMISSION. THE CRIME COMMISSION IS A VOLUNTARY
23 NONGOVERNMENTAL MEMBERSHIP ORGANIZATION DEDICATED TO
24 IMPROVING THE ENFORCEMENT OF CRIMINAL LAWS AND THE
25 ADMINISTRATION OF JUSTICE IN THE METROPOLITAN ATLANTA

1 COMMUNITY.

2 IT IS COMPOSED OF MEMBERS FROM ALL SEGMENTS OF THE
3 METROPOLITAN ATLANTA COMMUNITY, INCLUDING COMMUNITY
4 ACTIVISTS, RELIGIOUS LEADERS, BUSINESS PEOPLE, PROFESSIONALS,
5 ALL OF WHOM ARE CONCERNED WITH CRIME IN THE ATLANTA AREA.

6 OUR EFFORTS ARE TO GIVE CONSTRUCTIVE ATTENTION TO
7 THE PROBLEMS OF LAW ENFORCEMENT AND NEEDED IMPROVEMENTS IN
8 THE CRIMINAL JUSTICE SYSTEM.

9 OUR CURRENT ACTIVITIES RANGE FROM CONDUCTING
10 INFORMATIONAL FORUMS ON CRIMINAL JUSTICE TOPICS TO
11 ESTABLISHING VICTIM WITNESS ASSISTANCE PROJECTS IN THE LOCAL
12 COURTS, TO HELPING THE CITY OF ATLANTA DEVELOP A CAREER
13 DEVELOPMENT PLAN FOR ITS POLICE OFFICERS.

14 WE ARE HERE TODAY FOR TWO REASONS. FIRST, BECAUSE
15 OF OUR GENERAL INTEREST IN THE ADMINISTRATION OF CRIMINAL
16 JUSTICE, OF THE CRIMINAL JUSTICE SYSTEM AS IT AFFECTS THE
17 METROPOLITAN ATLANTA AREA; AND SECONDLY AND PERHAPS MORE
18 POINTEDLY, BECAUSE OF THE EXPERIENCE THAT WE HAD SEVERAL
19 YEARS AGO IN ADVOCATING THE USE OF SENTENCING GUIDELINES IN
20 THE GEORGIA TRIAL COURTS.

21 ABOUT A DECADE AGO, THE COMMISSION BECAME
22 CONCERNED THAT SENTENCING PATTERNS WERE HAVING A SIGNIFICANT
23 NEGATIVE EFFECT UPON THE PREVENTION OF CRIME. WE DISCOVERED
24 THAT SOME CRIMINAL ELEMENTS IN OUR COMMUNITY, AS WELL AS
25 LAW-ABIDING CITIZENS, HAD A TREMENDOUS DISRESPECT FOR THE

1 LOCAL COURTS AND THE ADMINISTRATION OF JUSTICE BY THOSE
2 COURTS.

3 WE BEGAN AN INVESTIGATION TO DISCOVER THOSE
4 CAUSES, AND WE BELIEVE THAT THE DISPARITY IN SENTENCING, AS
5 WAS EVIDENCED THROUGH OUR STUDY, HAD A SIGNIFICANT EFFECT
6 UPON THE LACK OF RESPECT FOR THE CRIMINAL JUSTICE SYSTEM.

7 I WOULD LIKE TO ASK GENE SLADE, IF HE WOULD,
8 BRIEFLY TO DESCRIBE THE STUDY THAT THE COMMISSION UNDERTOOK
9 AND THE RESULTS OF THAT STUDY.

10 MR. SLADE: JIM, COMMISSION MEMBERS, GEORGIA'S
11 SENTENCING SYSTEM IS VERY SIMILAR TO THE FEDERAL SYSTEM,
12 WHICH YOU ARE GRAPPLING WITH AT THE MOMENT, AND PROMULGATING
13 SOME REFORM AS TO THE FORM.

14 IT PROVIDES WIDE SENTENCING RANGES, SOME AS MUCH
15 AS 1 TO 20 YEARS IMPRISONMENT FOR A SPECIFIC TYPE OF CRIME.
16 IT ALLOWS JUDGES THE DISCRETION TO SELECT A FIXED SENTENCE
17 WITHIN THAT RANGE WITH VERY LITTLE GUIDANCE AS TO WHAT SET OF
18 CIRCUMSTANCES WOULD WARRANT A GIVEN NUMBER OF YEARS
19 IMPRISONMENT.

20 IT FOCUSES ON PUNISHMENT MORE TO FIT THE CRIMINAL
21 THAN TO FIT THE CRIME. WE, THROUGHOUT THE COURSE OF THE PAST
22 DECADE, HAVE DONE SOME RESEARCH AND CONDUCTED SOME STUDIES
23 OURSELVES AND HAVE REVIEWED RESEARCH OF OTHERS WITH RESPECT
24 TO SENTENCING PRACTICES, BOTH LOCALLY HERE IN ATLANTA AND
25 STATEWIDE.

1 IN 1973, WE REVIEWED THE SENTENCING PATTERNS FOR
2 FULTON COUNTY SUPERIOR COURT JUDGES FOR SELECTED FELONY
3 CRIMES. LATER WE REVIEWED STATEWIDE SENTENCING PATTERNS
4 COVERING A PERIOD FROM 1971 TO 1979.

5 JUDGE GRIFFIN BELL, WHEN HE RETURNED TO ATLANTA
6 AFTER SERVING AS THE UNITED STATES ATTORNEY GENERAL, PULLED
7 TOGETHER A PANEL OF ATTORNEYS AND TRACKED A NUMBER OF CASES
8 THROUGH THE LOCAL JUSTICE SYSTEM IN ATLANTA AND LOOKED AT
9 THEM ON OTHER THINGS, THE SENTENCING THAT WAS IMPOSED AS A
10 RESULT OF THOSE CASES.

11 IN ADDITION, THE STATE DEPARTMENT OF OFFENDER
12 REHABILITATION IN 1982 PRODUCED A DOCUMENT ENTITLED REVIEW OF
13 SENTENCING PRACTICES AND OPTIONS.

14 THESE AND OTHER STUDIES HAVE SHOWN THAT THE
15 FREQUENCY WITH WHICH GEORGIA JUDGES HAVE IMPOSED A SENTENCE
16 OF IMPRISONMENT VARIES GREATLY AMONG JUDGES WITHIN ONE
17 CIRCUIT AND BETWEEN VARIOUS CIRCUITS THROUGHOUT THE STATE.

18 LIKEWISE, THE LENGTH OF IMPRISONMENT, WHEN
19 INCARCERATION IS THE SENTENCING SANCTION IMPOSED, VARIES
20 GREATLY FOR A SPECIFIC CRIME WITHIN JUDGES IN A GIVEN CIRCUIT
21 AND AMONG THE CIRCUITS OF THE STATE.

22 THIS VARIANCE AND THE LENGTH OF SENTENCE OR YEARS
23 TO SERVE DOES NOT SEEM TO BE CONTROLLED BY THE OFFENDER'S
24 PAST CRIMINAL HISTORY OR THE PARTICULAR BEHAVIOR OF THAT
25 SPECIFIC CRIME. IT SEEMS TO BEAR NO RELATIONSHIP TO EITHER.

1 IN SHORT, THERE SEEMS TO BE LITTLE CONSISTENCY,
2 LITTLE UNIFORMITY, LITTLE CERTAINTY, LITTLE FAIRNESS IN THE
3 SENTENCING PRACTICES IN GEORGIA.

4 THIS LED THE COMMISSION TO CONCLUDE THAT A MORE
5 DETERMINATE FORM OF SENTENCING OUGHT TO BE PUT IN PLACE, ONE
6 WHICH FIXED SENTENCES AND NARROWED THE RANGE OF JUDICIAL
7 DISCRETION TO DEVIATE FROM THAT SENTENCE UP OR DOWN, ONE THAT
8 WOULD CREATE A GREAT DEAL MORE UNIFORMITY, A LOT LESS
9 DISPARITY.

10 THE SYSTEM ENVISIONED ALSO CALLED FOR REDUCING THE
11 PORTION OF THE SENTENCE WHICH COULD BE AVOIDED THROUGH
12 PAROLE, PROVIDED FOR MANDATORY CONFINEMENT FOR EVEN FELONY
13 OFFENDERS.

14 PROBATION WAS AVAILABLE AT THE DISCRETION OF THE
15 JUDGE FOR A FIRST OFFENDER, BUT NOT FOR A SECOND AND
16 SUBSEQUENT CONVICTIONS ON FELONY OFFENSES. LEGISLATION WAS
17 DRAFTED TO ACCOMPLISH THIS END, BUT IT NEVER PASSED. WHAT IT
18 DID ACCOMPLISH WAS TO RAISE THE ISSUE, FOCUS ATTENTION ON THE
19 PROBLEM, AND STIR DEBATE.

20 CONCURRENT WITH THESE EFFORTS, GEORGIA SUFFERED
21 FROM A LONGSTANDING AND EVER-INCREASING PROBLEM OF PRISON
22 OVERCROWDING THAT HAD RESULTED IN SEVERAL MASS RELEASES OF
23 FELONS FROM THE STATE'S PRISON SYSTEM PRIOR TO THEIR
24 ANTICIPATED TIME OF RELEASE.

25 BOTH OF THESE PROBLEMS WERE ULTIMATELY ADDRESSED,

1 NOT BY COMPREHENSIVE ACTION FROM THE JUDICIARY, BUT BY THE
2 EXECUTIVE BRANCH THROUGH THE PARDONS AND PAROLE BOARD,
3 THROUGH CONSTRUCTION OF PAROLE DECISION GUIDELINES, AND A
4 GRID SYSTEM THAT INVOLVED BOTH CRIME SEVERITY LEVELS AND
5 PAROLE SUCCESS LIKELIHOOD SCORES THAT WERE STATISTICALLY
6 BASED.

7 THE GEORGIA PAROLE BOARD HAS, IN FACT, MINIMIZED
8 DISPARITY, INCREASED UNIFORMITY IN SENTENCES, AND HAS
9 CONTROLLED PRISON POPULATION LEVELS.

10 IN DOING SO, THEY HAVE STRIPPED THE JUDICIARY OF
11 WHAT HAS LONG BEEN ONE OF THEIR POWERS, THE AUTHORITY TO
12 DETERMINE THE CRIMINAL'S SENTENCE. AS IT STANDS TODAY, MOST
13 CRIMINAL SENTENCES IMPOSED BY GEORGIA JUDGES HAVE LITTLE
14 EFFECT ON THE TIME AN OFFENDER ACTUALLY SERVES.

15 OUR EFFORTS TO DOCUMENT A LONGSTANDING PROBLEM
16 HERE, BOTH LOCALLY AND IN THE STATE, AND TO OFFER A SOLUTION
17 THAT RETAINED JUDICIAL CONTROL OVER SENTENCING SEEMS PROBABLY
18 VERY CRUDE AND COARSE BY COMPARISON TO YOUR WORK, KIND OF
19 LIKE A FLINTKNIFE COMPARED TO A STEEL SCAPEL.

20 IT HAS LEFT US WITH AN UNDERSTANDING FOR AND
21 APPRECIATION OF BOTH THE PROBLEM AND VARIOUS ATTEMPTS TO
22 RESOLVE IT. IT IS MY OPINION THAT THE METHODICAL AND
23 DELIBERATIVE AND COMPREHENSIVE AND SOPHISTICATED WORK THAT
24 YOU HAVE ACCOMPLISHED TO DATE IS LAUDATORY.

25 YOU ARE TO BE COMMENDED FOR YOUR EFFORTS, WHICH

1 HAVE CULMINATED IN THE DRAFT GUIDELINES THAT WE ARE
2 COMMENTING ON TODAY. I WOULD HOPE THAT WE AND THE OTHER
3 WITNESSES THAT YOU HAVE HEARD FROM AND WILL HEAR FROM WILL BE
4 ABLE TO OFFER YOU SOME CONSTRUCTIVE SUGGESTIONS THAT WILL AID
5 YOU IN REFINING WHAT IS ALREADY AN EXCELLENT WORK, SO THAT IT
6 WILL BE FOUND TO BE ACCEPTABLE BY THE CONGRESS AND WILL
7 ACCOMPLISH THE PURPOSES FOR WHICH YOU WERE ESTABLISHED.

8 I THANK YOU FOR THIS TIME; AND THE BALANCE OF OUR
9 PRESENTATION, WHICH WILL SPEAK TO THE DRAFT GUIDELINES
10 THEMSELVES, WILL BE OFFERED BY JIM HASSON.

11 CHAIRMAN WILKINS: THANK YOU.

12 MR. HASSON: THANK YOU, GENE. BASED ON THIS
13 EXPERIENCE THAT WE HAVE HAD, WE HAVE REVIEWED YOUR PROPOSED
14 GUIDELINES; AND AS MR. SLADE JUST INDICATED, WE APPLAUD THE
15 WORK THAT YOU HAVE PRODUCED, AND WE ENCOURAGE ADHERENCE TO
16 THE BASIC PHILOSOPHICAL DECISIONS THAT ARE REFLECTED IN THE
17 PROPOSED GUIDELINES.

18 WE WOULD LIKE TO MAKE SEVERAL SPECIFIC
19 RECOMMENDATIONS AS TO POINTS IN THE GUIDELINES, BASED UPON
20 OUR EXPERIENCE THAT MR. SLADE HAS DESCRIBED. FIRST, AS TO
21 PAGE 7 OF THE GUIDELINES, WE ENCOURAGE AND SUPPORT ADHERENCE
22 AS TO THE ROLE OF REHABILITATION.

23 THE SENTENCE SHOULD PRIMARILY FIT THE CRIME, NOT
24 THE CRIMINAL, AS WE FEEL HAS TOO OFTEN BEEN DONE, IF THE
25 SYSTEM IS TO PROVIDE CERTAINTY AND FAIRNESS THAT WE DESIRE.

1 ON PAGE 10, WE ARE IMPRESSED WITH THE MODIFIED
2 REAL OFFENSE METHOD THAT YOU HAVE DEVISED. WE BELIEVE THIS
3 MEETS SEVERAL OF THE OBJECTIONS WHICH WE ENCOUNTERED IN OUR
4 EFFORTS IN THE STATE OF GEORGIA.

5 WE BELIEVE THAT THIS AVOIDS SHIFTING TOO MUCH
6 DISCRETION TO THE PROSECUTOR, WHILE AT THE SAME TIME ALLOWING
7 THE JUDGE TO TAKE AGGRAVATING AND MITIGATING FACTORS INTO
8 ACCOUNT. WE BELIEVE THIS IS A FINE BALANCE OF COMPROMISE
9 THAT YOU HAVE STRUCK IN THIS APPROACH.

10 AT PAGES 26 AND 34 OF THE PROPOSED GUIDELINES, WE
11 SUPPORT YOUR EMPHASIS UPON THE PHYSICAL AND PSYCHOLOGICAL
12 DAMAGE TO THE VICTIM. TOO OFTEN, WE BELIEVE THESE FACTORS
13 ARE MINIMIZED IN PLEA BARGAINING, IN SENTENCING, AND IN
14 PAROLE DECISIONS.

15 AT PAGE 43, THERE IS A TABLE WHICH REFLECTS
16 ESCALATING SANCTION UNITS FOR THE AMOUNT INVOLVED IN A
17 PARTICULAR PROPERTY CRIME.

18 IF THESE WERE STATE SENTENCING GUIDELINES, WE
19 WOULD HAVE SOME RESERVATIONS ABOUT YOUR FOCUS UPON THE AMOUNT
20 INVOLVED IN A PROPERTY CRIME. A ROBBERY OF \$10,000 MIGHT BE
21 A SLIGHT INCONVENIENCE TO A PARTICULARLY WEALTHY INDIVIDUAL,
22 BUT DEVASTATING TO THE ORDINARY WAGE EARNER.

23 PERHAPS THIS ELEMENT SHOULD BE RECONSIDERED.
24 PERHAPS IT'S APPROPRIATE FOR THE FEDERAL SYSTEM, BUT WE
25 ENCOURAGE A REEXAMINATION.

1 AT PAGE 136 OF THE GUIDELINES, IN PART E, YOU
2 ENUMERATE A LIST OF OTHER OFFENDER CHARACTERISTICS. YOU
3 COMMENT UPON THE DEGREE TO WHICH THOSE SHOULD BE CONSIDERED.
4 WE ENCOURAGE MINIMAL USE OF FACTORS 1 THROUGH 8 AS LISTED IN
5 PART E. WE DO BELIEVE THEY SHOULD RECEIVE SOME ATTENTION BY
6 THE SENTENCING JUDGE FOR FIRST OFFENDERS.

7 WE DOUBT THEY HAVE MUCH RELEVANCE, IF ANY, FOR
8 REPEAT OFFENDERS. WE BELIEVE THAT SUFFICIENT FLEXIBILITY
9 EXISTS WITHIN THE RANGES ALREADY PROVIDED IN YOUR GUIDELINES
10 FOR THE SENTENCING JUDGE TO TAKE THESE FIRST EIGHT FACTORS
11 INTO ACCOUNT.

12 ONE EXAMPLE FROM OUR STUDY, I BELIEVE,
13 PARTICULARLY EMPHASIZES OUR POSITION ON THESE FACTORS. AS A
14 RESULT OF OUR EIGHT-YEAR STUDY OF SENTENCES IN GEORGIA, WHICH
15 COVERED OVER 50,000 SENTENCES, WE FOUND, WITHOUT QUESTION,
16 THAT BLACK MALES WERE SENTENCED SIGNIFICANTLY MORE SEVERELY
17 THAN WHITE MALES FOR ESSENTIALLY THE SAME CRIME.

18 WE DISCOVERED THAT BLACK FEMALES WERE SENTENCED
19 SIGNIFICANTLY MORE ONEROUSLY THAN WHITE FEMALES FOR
20 ESSENTIALLY THE SAME CRIME. WE CAN'T EXPLAIN THAT, BUT WE DO
21 THINK WE HAVE SOME INFORMED GUESSES TO MAKE.

22 WE DON'T BELIEVE IT WAS BECAUSE THE JUSTICES ARE
23 RACIALLY BIASED; RATHER WE BELIEVE IT WAS A RESULT OF THE
24 FACT THAT JUDGES TOOK INTO ACCOUNT FACTORS SUCH AS THOSE THAT
25 ARE ENUMERATED HERE IN PART E ON PAGE 136, AND UNDERLINED

1 SOCIOLOGICAL AND ECONOMIC FACTORS PRODUCED THAT TYPE OF
2 RESULT.

3 WE THINK IT IS UNFAIR. WE THING IT IS OUTRAGEOUS,
4 TO USE ONE OF THE COMMENTS EARLIER, THAT A BLACK OFFENDER
5 SHOULD BE SENTENCED MORE SEVERELY THAN A WHITE OFFENDER FOR
6 THE SAME CRIME.

7 FINALLY, ON PAGE 138, WE SUPPORT YOUR ALTERNATIVES
8 TO INCARCERATION, BUT WE OPPOSE ANY ALTERNATIVE THAT ALLOWS A
9 JUDGE TO PROBATE OR SUSPEND A PRISON SENTENCE FOR REPEAT
10 VIOLENT, FELONY OFFENDERS.

11 WE ALSO SUPPORT THE REQUIREMENT OF RESTITUTION OR
12 COMPENSATION TO A VICTIM WHENEVER FEASIBLE, REGARDLESS OF THE
13 OTHER SANCTIONS WHICH MIGHT BE IMPOSED.

14 THAT WILL CONCLUDE OUR COMMENTS. THANK YOU VERY
15 MUCH FOR THE OPPORTUNITY TO APPEAR.

16 CHAIRMAN WILKINS: THANK YOU. IT'S VERY
17 INTERESTING TO HEAR ABOUT THE GEORGIA EXPERIENCE. IT SEEMS
18 LIKE IT PARALLELS THE FEDERAL EXPERIENCE AS WELL.

19 ONE THING YOU DO POINT UP, WHATEVER GUIDELINES WE
20 DO COME UP WITH, ONE THING WILL BE ACCOMPLISHED: EVERYBODY
21 IS GOING TO BE FED OUT OF THE SAME SPOON, BE THEY BLACK OR
22 WHITE OR RICH OR POOR. SO IF WE CAN ACHIEVE EVEN JUST THAT
23 GOAL, PERHAPS WE HAVE MADE SOME SIGNIFICANT PROGRESS.

24 ANY QUESTIONS TO MY RIGHT?

25 COMMISSIONER CORROTHERS: ONLY ONE QUESTION OR

1 COMMENT. I WOULD BE INTERESTED IN RECEIVING A COPY OF THE
2 STUDY THAT WAS CONDUCTED BY YOUR GROUP, UNLESS IT WOULD BE
3 INCONVENIENT TO FORWARD IT.

4 MR. HASSON: NOT AT ALL. WE WOULD BE DELIGHTED TO
5 PROVIDE THAT.

6 COMMISSIONER CORROTHERS: THANK YOU VERY MUCH.

7 CHAIRMAN WILKINS: ANY QUESTIONS TO MY LEFT?

8 COMMISSIONER BREYER: THANK YOU.

9 CHAIRMAN WILKINS: GENTLEMEN, THANK YOU VERY MUCH.
10 THANK YOU.

11 ONE OF THE IMPORTANT COMPONENTS OF OUR CRIMINAL
12 JUSTICE SYSTEM IS OUR PROBATION DEPARTMENT AND ITS OFFICERS.
13 WE HAVE TWO PROBATION OFFICERS WITH US TODAY, THE CHIEF
14 PROBATION OFFICER FROM THE SOUTHERN DISTRICT OF MIAMI, MR.
15 CARLOS JUENKE, AND ALSO THE SUPERVISING PROBATION OFFICER
16 FROM THE MIDDLE DISTRICT OF GEORGIA, MR. ROBERT C. HUGHES,
17 JR., ROBIN HUGHES.

18 GENTLEMEN, WE'RE DELIGHTED TO SEE YOU, LOOK
19 FORWARD TO HEARING FROM YOU.

20 WE ARE GOING TO TAKE JUST A COUPLE OF MINUTES SO
21 THE COURT REPORTER CAN DO WHATEVER CHANGING IS NECESSARY ON
22 HIS MACHINE, IF YOU WILL JUST BEAR WITH US.

23 (A SHORT RECESS WAS TAKEN.)

24 CHAIRMAN WILKINS: ALL RIGHT. WE WILL CONTINUE
25 NOW WITH THIS PUBLIC HEARING.

1 ALL RIGHT. GENTLEMEN, WE WILL BE GLAD TO HEAR
2 FROM YOU AT THIS TIME.

3 MR. HUGHES: JUDGE WILKINS, COMMISSIONERS, THE
4 FIRST THING I WOULD LIKE TO DO IS EXPRESS MY APPRECIATION FOR
5 THE OPPORTUNITY TO TESTIFY THIS MORNING, TO BE A PART OF WHAT
6 I CONSIDER A HISTORICAL EVENT IN THE STATE OF GEORGIA.

7 I WOULD LIKE TO AT THIS TIME COMMEND THE
8 COMMISSION FOR THEIR EFFORTS THUS FAR. I THINK YOU HAVE
9 CLEARLY DEMONSTRATED TO ALL CONCERNED THE SPIRIT OF
10 COOPERATION AND DESIRE TO MAKE THE GUIDELINES TRULY A
11 WORKABLE TOOL IN THE SYSTEM.

12 YOU HAVE DONE SO BY SOLICITING INPUT FROM
13 EVERYONE, ALL CONCERNED PERSONS, AND I THINK THAT THE UNITED
14 STATES PROBATION SYSTEM HAS HAD ITS FAIR SHARE OF THE INPUT.
15 WE DON'T LIKE WHEN WE CAN'T COMPLAIN, BECAUSE WE HAD THE
16 OPPORTUNITY TO INPUT.

17 WE FEEL THAT YOU'VE ACCURATELY QUANTIFIED MANY
18 PRACTICAL FACTORS THAT WE, AS PROBATION OFFICER, CONSIDER IN
19 MAKING SENTENCE RECOMMENDATIONS. AS DEVELOPED THUS FAR, I
20 FEEL THAT ALL UNITED STATES PROBATION OFFICERS IN OUR SYSTEM
21 ARE CAPABLE OF UNDERSTANDING AND APPLYING THE GUIDELINES. I
22 DON'T THINK THEY HAVE BEEN ENGINEERED IN SUCH A COMPLEX
23 MANNER THAT WE CAN'T WORK WITH THEM.

24 MY COMMENTS THIS MORNING WILL BE BOTH OF A
25 SPECIFIC AND A GENERAL NATURE, AND I DON'T HAVE ANY INTENTION

1 TO FLY SPECK THE GUIDELINES, BUT I DO THINK WE NEED TO RAISE
2 SOME POINTS FOR RECONSIDERATION AND REEVALUATION. HOPEFULLY,
3 I WILL FOCUS ON SOME PRACTICAL ASPECTS OF THE GUIDELINES FROM
4 THE UNITED STATES PROBATION OFFICER'S PERSPECTIVE.

5 GENERALLY, I CONCUR WITH THE THREE GUIDELINE
6 FEATURES: FIRST, MODIFIED REAL OFFENSE SENTENCING, GENERIC
7 OFFENSE DESCRIPTIONS, AND USE OF NUMERICAL OFFENSE VALUES.
8 HOWEVER, THE REAL OFFENSE SENTENCING METHOD IN ITS PUREST
9 FORM, TO ME, REPRESENTS A PROBLEM.

10 I FEEL THAT, AND ARGUE, THAT THE COURT SHOULD BE
11 ABLE TO CONSIDER ALL AGGRAVATING FACTORS, EVEN IF NOT
12 NECESSARILY RELATED TO THE OFFENSE OF CONVICTION. COURTS, IN
13 MY OPINION, HAVE HISTORICALLY DONE SO.

14 I CITE SPECIFICALLY THE EXAMPLE NUMBER 3 ON PAGE
15 16 CONCERNING THE BANK ROBBERY. WHERE WE HAVE SEPARATE BANK
16 ROBBERIES CHARGED IN VARIOUS COUNTS OF AN INDICTMENT, THE
17 OFFENDER PLEADS TO THE FIRST COUNT; AND THE OTHER BANK
18 ROBBERIES, SINCE THEY ARE NOT, NUMBER ONE, PART OF THE
19 CONSPIRACY OR DID NOT OCCUR ON THE SAME DAY, COULD NOT BE
20 CONSIDERED FOR SENTENCE PURPOSES.

21 I FEEL THAT IF WE WANT TO ASSURE THAT SENTENCES
22 REFLECT THE SERIOUS NATURE OF THE OFFENSE, PROVIDE JUST
23 PUNISHMENT, DETERRENCE, PROTECT THE PUBLIC, ALL THOSE THINGS
24 THAT ARE OUTLINED IN THE PRELIMINARY DRAFT, I THINK THAT THE
25 COURT MUST CONSIDER THE NATURE AND CIRCUMSTANCES OF THE TOTAL

1 OFFENSE BEHAVIOR AS FOUND BY A PREPONDERANCE OF THE EVIDENCE.

2 IN MY OPINION, POSSIBLY WE COULD MAYBE NOT
3 SENTENCE FOR THOSE COUNTS, BUT I THINK AN ADJUSTMENT IS IN
4 ORDER. A GENERAL ADJUSTMENT MAYBE FOR ADDITIONAL CRIMINAL
5 BEHAVIOR WOULD SUFFICE AT THIS POINT, OR IF WE COULD AT LEAST
6 CONSIDER THEM FOR JUSTIFICATION FOR GOING ABOVE THE STATED
7 GUIDELINE.

8 I CONCUR WITH THE OFFENSE CONDUCT SECTIONS OF THE
9 PRELIMINARY GUIDELINES. I FEEL THAT THE STRUCTURE AND THE
10 NARRATIVE, AS IT'S PRESENTED IN CHAPTER TWO, COMBINED WITH
11 THE STATUTORY INDEX TO THE GUIDELINE THAT WE FIND IN THE
12 APPENDIX, ENABLES A PROBATION OFFICER TO COMPUTE THE BASE
13 OFFENSE VALUE EASILY AND VERY SIMPLY.

14 THE SPECIFIC OFFENSE CHARACTERISTICS AND THE
15 CROSS-REFERENCE ARE SIMPLY AND CLEARLY STATED IN THE
16 GUIDELINES AND EASILY USED TO MAKE THE PROPER APPROPRIATE
17 ADJUSTMENT.

18 HOWEVER, THERE IS ONE AREA HERE THAT CONCERNS US.
19 WE FOCUS ON PART B OF THE GUIDELINES, THE OFFENSES INVOLVING
20 DRUGS AS OUTLINED ON PAGE 54, AND ASK THE COMMISSION TO
21 RECONSIDER SEVERAL POINTS.

22 FIRST OF ALL, LET ME APPLAUD THE COMMISSION FOR
23 NOT DEALING WITH PURITY OF DRUGS. I THINK THAT YOU HAVE
24 RIGHTFULLY SO DEALT WITH THE TOTAL WEIGHT OF CONTROLLED
25 SUBSTANCE AND WE ARE NOT CONCERNED WITH PURITY.

1 I DO DISAGREE WITH THE BASE OFFENSE VALUES WITH
2 REGARD TO COCAINE AND MARIJUANA. AS STATED IN THE
3 GUIDELINES, TWO KILOS OF COCAINE IS 180 BASE OFFENSE VALUE.
4 COMPARE THAT TO 20,000 POUNDS OF MARIJUANA, WHICH IS LESS
5 THAN 108 BASE OFFENSE VALUE.

6 THERE IS ALSO NO DIFFERENCE BETWEEN TWO KILOS OF
7 COCAINE AND A HUNDRED KILOS OF COCAINE, NOT THE FACT THAT WE
8 DEAL WITH SUCH SOPHISTICATED PEOPLE; BUT IF I'M GOING TO
9 BRING IN TWO, I MIGHT AS WELL SEE IF I CAN BRING IN A
10 HUNDRED, IF IT'S NOT GOING TO COST ME ANY MORE TIME.

11 I ALSO FEEL THAT IF WE -- A PERSON THAT BRINGS IN
12 20,000 POUNDS OF MARIJUANA VERSUS TWO KILOS OF COCAINE,
13 CERTAINLY THE 20,000-POUND MARIJUANA OFFENDER IS A MORE
14 SOPHISTICATED PERSON, SOPHISTICATED OFFENDER.

15 IT WILL TAKE EQUIPMENT. IT WILL TAKE AN
16 ORGANIZATION AND SOME PLANNING TO DO THAT, WHEREAS A TOURIST
17 IN SOUTH AMERICA MIGHT BE ABLE TO BRING IN TWO KILOS OF
18 COCAINE.

19 CHAPTER 3 DEALS AND CAPTURES MANY OFFENSE
20 CHARACTERISTICS THAT I THINK PO'S HAVE TRADITIONALLY COUNTED
21 AND CONSIDERED IN THE PAST. I WOULD LIKE TO FOCUS ON
22 POST-OFFENSE CONDUCT.

23 THE GUIDELINES FOCUS HEAVILY ON PRIOR RECORD, AS
24 WELL AS FINANCIAL SITUATION OF THE DEFENDANT. THIS IS VERY
25 EVIDENT FROM READING THE DRAFT. I THINK IT'S CRITICAL THAT

1 AS A PROBATION OFFICER CONDUCTING A PRESENTENCE
2 INVESTIGATION, I GET TRUTHFUL INFORMATION CONCERNING THE
3 OFFENDER'S PRIOR RECORD AND HIS FINANCES.

4 I THINK THE COMMISSION COULD ASSIST US IN THAT
5 ENDEAVOR. I WOULD ARGUE FOR AN AGGRAVATED ADJUSTMENT AS
6 DESCRIBED ON PAGE 123, THAT THIS ADJUSTMENT MIGHT ATTACH TO
7 AN OFFENDER WHO, WHEN PROVEN BY A PREPONDERANCE OF THE
8 EVIDENCE, FURNISHES FALSE INFORMATION TO UNITED STATES
9 PROBATION OFFICERS WHEN BEING INTERVIEWED FOR PSI PURPOSES.

10 I CONCUR WITH GRANTING A POSITIVE ADJUSTMENT FOR
11 THE ACCEPTANCE OF RESPONSIBILITY, AS WELL AS COOPERATION, BUT
12 I HAVE A PROBLEM IN THIS LINE. I HAVE A PROBLEM WITH
13 GRANTING THE POSITIVE ADJUSTMENT FOR BOTH, BECAUSE IN MY
14 OPINION IT MAY TEND TO PENALIZE SOMEONE WHO DOES NOT KNOW ANY
15 MORE.

16 LET'S TAKE, FOR EXAMPLE, A BANK TELLER THAT GETS
17 THE ADJUSTMENT FOR -- THE POSITIVE ADJUSTMENT FOR ACCEPTING
18 HER RESPONSIBILITY, WHEREAS THE BANK PRESIDENT THAT KNOWS
19 ABOUT OTHERS INVOLVED IN INSIDER TRADING OR FALSE BANK LOANS
20 AT THE BANK IS ABLE TO COOPERATE; HE GETS AN ADJUSTMENT AND
21 THE TELLER DOESN'T. I THINK THIS NEEDS TO BE LOOKED AT. MY
22 RECOMMENDATION ALONG THESE LINES WOULD BE THAT IF ONE GETS
23 THE ADJUSTMENT FOR ACCEPTANCE OF RESPONSIBILITY, THE
24 ADJUSTMENT OF COOPERATION WOULD NOT APPLY.

25 I WOULD LIKE TO OFFER SEVERAL COMMENTS CONCERNING

1 THE CRIMINAL HISTORY SCORE LOCATED ON PAGE 127. IT'S MY
2 UNDERSTANDING THAT WE ARE TO ASSUME AS PROBATION OFFICERS
3 THAT THE OFFENDER SERVES A THIRD OF HIS MAXIMUM TIME IMPOSED.

4 OF COURSE, THE OFFENDER HAS THE OPPORTUNITY TO
5 REBUT THIS TO THE COURT AND ESTABLISH THE FACT THAT HE HAS
6 SERVED LESS TIME. I VIEW THIS PERSONALLY AS FERTILE GROUND
7 FOR CONTROVERSY.

8 I SEE THIS AS BEING REFEREED, SO TO SPEAK, BY THE
9 PROBATION OFFICER. THE COURT, IN MY OPINION, WOULD TURN TO
10 THE PROBATION OFFICER AND ASK HIM TO GET THE RECORD IN THAT
11 CASE.

12 IT'S NOT SO EASY IN THE STATE OF GEORGE BECAUSE
13 THE ACTUAL PRISON RECORD THAT WOULD VERIFY HOW MUCH TIME THE
14 INDIVIDUAL SPENT IN THE INSTITUTION IS MANY TIMES IN ATLANTA,
15 MOST OF THE TIME IN ATLANTA, AND WOULD INUNDATE THE NORTHERN
16 DISTRICT OF GEORGIA WITH COLLATERAL INVESTIGATION REQUESTS
17 FROM OTHER DISTRICTS WITHIN THE STATE OF GEORGIA.

18 ALSO, THE RATIONALE, AS I UNDERSTAND IT, IN THE
19 GUIDELINES, THAT THE TIME SERVED RESULTS FROM THE JUDICIAL
20 ASSESSMENT COMBINED WITH ASSESSMENTS MADE BY PRISON AND
21 PAROLE OFFICIALS IS NOT NECESSARILY TRUE IN THE STATE OF
22 GEORGIA. MAINLY POPULATION AT THIS TIME IS DICTATING HOW
23 MUCH TIME ONE SERVES IN THE PENITENTIARY.

24 NEXT, IN REGARDS TO CRIMINAL HISTORY, I SEE THAT
25 WE ARE TO SCORE POINTS IF THE DEFENDANT HAS A POSITIVE URINE

1 TEST DURING A PRETRIAL RELEASE PERIOD OR A PRESENTENCE
2 PERIOD.

3 TO ME, THIS RIGHT AWAY, IF I'M GOING TO NOT CREATE
4 DISPARITY MYSELF, WITH THE PROBATION OFFICERS, IT REQUIRES ME
5 TO TEST EVERYONE. I DON'T THINK WE ARE SET UP TO DO THAT. I
6 THINK WE ARE LOOKING AT ADDITIONAL DOLLARS TO DO THAT.

7 I THINK THAT WE OUGHT TO CLARIFY THE LANGUAGE
8 THERE AND TO PUT IN MAYBE SOMETHING DEALING WITH SOME KIND OF
9 PROBABLE OR REASONABLE CAUSE; FOR EXAMPLE, HE HAS A PRIOR
10 DRUG CONVICTION OR FAMILY MEMBERS HAVE INDICATED THAT DRUG
11 ABUSE HAS BEEN A PROBLEM IN THE PAST.

12 I THINK WE ALSO NEED TO LOOK AT ALCOHOL ABUSE. WE
13 NEED TO FACE THE FACT THAT ALCOHOL IS JUST ANOTHER DRUG IN
14 SOME SENSE OF THE WORD, AND I THINK AN ADJUSTMENT SHOULD
15 APPLY ALSO FOR HISTORY OF ALCOHOL ABUSE.

16 I RECOMMEND THAT IN DEALING WITH THE OTHER OFFENSE
17 CHARACTERISTICS -- I CAN'T REALLY TELL YOU HOW THEY SHOULD
18 FIGURE INTO SENTENCING. I THINK THAT WE CAN VIEW THEM,
19 HOWEVER, AS AGGRAVATORS OR MITIGATORS, EITHER ONE.

20 THEY MAY SERVE AS REASONS FOR THE COURT TO GO TO
21 THE UPPER OR THE LOWER LIMITS OF THE GUIDELINES. CERTAINLY
22 THEY HAVE GOT TO BE CONSIDERED IN CRAFTING THE APPROPRIATE
23 SPECIAL CONDITIONS OF PROBATION.

24 IN CHAPTER FOUR, DEALING WITH THE ACTUAL
25 SENTENCES, THE GUIDELINE TABLE AS DEPICTED IN THE DRAFT AT

1 PAGE 140 APPEARS TO ME TO BE A WORKABLE METHOD OF CONVERTING
2 SANCTION UNITS INTO IMPRISONMENT.

3 I SUGGEST THAT THE COURT IMPOSE A SENTENCE THAT
4 SATISFIES ALL SANCTION UNITS, AND I THINK THIS IS COVERED
5 UNDER OPTION TWO IN THE GUIDELINES, THE PERMISSIVE
6 SATISFACTION OF ALL SANCTION UNITS APPROACH.

7 I THINK THAT WE SHOULD ASSIGN SANCTION UNIT WEIGHT
8 TO OTHER ALTERNATIVES ALSO, TO INCLUDE SUPERVISED RELEASE,
9 COMMUNITY SERVICE, PROBATION OR WHATEVER, AND LET THE COURT
10 HAVE SOME MORE OF THE DISCRETION THAT WE HEARD SO MUCH ABOUT
11 THIS MORNING.

12 I WOULD LIKE TO COMMENT THAT I FEEL THAT THE
13 CONDITIONS OF PROBATION AND THE CONDITIONS OF SUPERVISED
14 RELEASE THAT ARE OUTLINED ARE VERY WORKABLE. I THINK THEY
15 ARE SENSIBLE AND I THINK THEY ARE ENFORCEABLE AND I DON'T
16 THINK WE WOULD HAVE A PROBLEM WITH THEM.

17 I THINK, THOUGH, THAT IN LIGHT OF THIS, WE NEED TO
18 DEFINE THAT OUR NUMBER ONE GOAL IN PROBATION IS PROTECTION OF
19 SOCIETY AND THAT THE PROBATION OFFICER'S RESPONSIBILITY IN
20 THE AREA OF SUPERVISION IS TO INSURE COMPLIANCE WITH THE
21 CONDITIONS OF PROBATION OR SUPERVISED RELEASE. I THINK WE
22 NEED TO MAKE THAT STATEMENT IN THE GUIDELINES.

23 I WOULD LIKE TO STATE THAT I CONCUR WITH THE FACT
24 THAT THE COMMISSION ESTABLISHED MINIMUM STANDARDS OF
25 COMPLIANCE FOR THE CONDITIONS OF SUPERVISION.

1 I FEEL THAT THIS WILL ELIMINATE PAST DISPARITY
2 AMONG PROBATION OFFICERS IN THE AREA OF SUPERVISION AND
3 PROVIDE DIRECTION TO PROBATION OFFICERS IN WHAT HAS
4 HISTORICALLY BEEN A GRAY AREA.

5 I WOULD ALSO LIKE TO ENDORSE THE THREE CATEGORIES
6 OF VIOLATIONS THAT ARE OUTLINED IN THE GUIDELINES: LESSER
7 VIOLATIONS, SERIOUS TECHNICAL, AND SERIOUS VIOLATIONS. I
8 FEEL THAT THE PROBATION OFFICER SHOULD HAVE TOTAL DISCRETION
9 UNTIL WE REACH THE SERIOUS TECHNICAL VIOLATION CATEGORY.

10 I ALSO CONCUR WITH SENTENCES FOR REVOCATION, AS
11 OUTLINED ON PAGE 155, AND I RECOMMEND THAT AN OFFENDER NOT
12 RECEIVE JAIL-TIME CREDIT FOR PROBATION TIME UPON REVOCATION.

13 IN CHAPTER SIX, CONCERNING FINES, I THINK THAT WE
14 HAVE TWO APPROACHES, AND I LIKE BOTH APPROACHES DEALING WITH
15 INDIVIDUALS AND ORGANIZATIONS, AND I DON'T THINK WE OUGHT TO
16 CONFINE THE COURTS TO EITHER APPROACH. I THINK BOTH ARE GOOD
17 AND I THINK THE COURT CAN USE EITHER ONE, DEPENDING ON THE
18 SITUATION.

19 SEVERAL MISCELLANEOUS COMMENTS IN CLOSING. I NOTE
20 THAT THERE IS NO DISTINCTION BETWEEN COMPUTATION OF
21 SENTENCING GUIDELINES FOR FELONY AND MISDEMEANOR CASES. IN A
22 NUMBER OF DISTRICTS, WE ARE DEALING WITH MISDEMEANOR
23 PRE-SENTENCES, MISDEMEANOR OFFENSES.

24 I UNDERSTAND, THE WAY I SEE THE GUIDELINES NOW,
25 THIS WILL HAVE TO BE -- THE GUIDELINES WOULD HAVE TO BE

1 COMPUTED FOR THOSE SIMPLE POSSESSION OF MARIJUANA, 21 U.S.C.
2 844 CASES, ASSAULT CASES ON MILITARY RESERVATIONS, AND SO
3 FORTH.

4 I DON'T THINK THE UNITED STATES MAGISTRATE SYSTEM
5 IS AWARE OF THIS AT THIS POINT. I SAY THAT ONLY IN PASSING.
6 WE ANTICIPATE GREAT CHANGES IN OUR SYSTEM. I THINK MR.
7 JUENKE WILL ADDRESS SOME OF THIS IN A MOMENT.

8 I WOULD STATE FOR THE RECORD THAT WE NEED, AS A
9 SYSTEM, THE UNITED STATES PROBATION SYSTEM NEEDS TO GO AHEAD
10 AND ADDRESS THESE CHANGES NOW. I ALSO RECOMMEND THAT ONCE
11 THE GUIDELINES BECOME EFFECTIVE, WE MAINTAIN A HOTLINE WITH
12 THE SENTENCING COMMISSION FOR USE BY U.S. PROBATION OFFICERS.

13 AGAIN, I WOULD LIKE TO SAY THAT THE GUIDELINES
14 THUS FAR ARE SIMPLE AND USABLE. I ASK THE COMMISSION THAT
15 ANY CHANGES THAT COME, WE KEEP IT SIMPLE. THE UNITED STATES
16 PROBATION OFFICE IS GOING TO BE TAXED WITH THE RESPONSIBILITY
17 OF EXPLAINING THESE GUIDELINES TO DEFENDANTS, DEFENSE
18 ATTORNEYS, AND MANY TIMES COURTS. THE SIMPLER WE CAN KEEP
19 THEM, THE EASIER THEY ARE TO EXPLAIN.

20 I THANK YOU FOR YOUR ATTENTION, AND THIS CONCLUDES
21 MY REMARKS.

22 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR.
23 HUGHES.

24 MR. JUENKE?

25 MR. JUENKE: I EXPECT THAT THIS IS PROBABLY THE

1 FIRST TIME IN THESE HEARINGS YOU HAVE HEARD A WITNESS TESTIFY
2 AS TO THE SIMPLICITY OF THE GUIDELINES. THAT VALIDATES A
3 BELIEF I HAVE HAD FOR A LONG TIME THAT IN THE COURT FAMILY,
4 THE PROBATION OFFICERS PROBABLY HAVE THE HIGHEST IQ OF
5 ANYONE. (LAUGHTER.)

6 DURING MY 20 YEARS OF EXPERIENCE IN FEDERAL, STATE
7 CRIMINAL JUSTICE SYSTEMS, I HAVE WITNESSED THE DEFENDANT AND
8 INMATE RIGHTS ERA OF THE '60'S AND '70'S; THE VICTIM RIGHTS
9 CONCERNS OF THE '80'S AND THE PRESENT MORASS OF THE CRIMINAL
10 JUSTICE SYSTEM.

11 THROUGH IT ALL, THE PERSISTENT CYCLICAL INCREASE
12 OF CRIME AND OUR INEFFECTUAL RESPONSE HAS BEEN CONSTANT. I
13 BELIEVE, AS TWO OF THE WITNESSES TESTIFIED EARLIER THIS
14 MORNING, THE PRIMARY CULPRITS ARE THE DISPARITY AND FALSITY
15 OF SENTENCING.

16 I THINK THESE TWO FACTORS HAVE FUELED SOCIETY AS
17 WELL AS THE CRIMINAL'S PERCEPTION THAT CRIME PAYS AND NOTHING
18 WORKS IN DETERRING, INCAPACITATING, REHABILITATING THE
19 CRIMINAL.

20 DURING MY TENURE AS CHIEF PROBATION OFFICER IN THE
21 SOUTHERN DISTRICT OF FLORIDA THESE PAST THREE YEARS, I HAVE
22 HAD A RATHER UNIQUE EXPERIENCE. THE GOVERNMENT, IN ITS
23 ATTEMPTS TO HALT THE FLOW OF DRUGS INTO THE UNITED STATES,
24 POURED ALMOST UNLIMITED RESOURCES INTO SOUTH FLORIDA.

25 AS A CONSEQUENCE, WE HAVE IN THE SYSTEM VISITING

1 CRIMINALS FROM ALL OVER THE WORLD, VISITING FEDERAL AGENTS
2 FROM ALL OVER THE UNITED STATES TO CATCH THE CRIMINALS,
3 VISITING ASSISTANT U.S. ATTORNEYS TO PROSECUTE THEM, VISITING
4 FEDERAL JUDGES TO TRY THEM, AND VISITING FEDERAL PROBATION
5 OFFICERS TO DO THE PRESENTENCES. THE ONLY CONSTANT FACTOR
6 WERE THE DEFENSE ATTORNEYS.

7 DURING THESE THREE YEARS, I HAVE RECEIVED NUMEROUS
8 IRATE PHONE CALLS FROM FEDERAL JUDGES, SOME COMPLAINING ABOUT
9 THE LAXITY OF OUR RECOMMENDATIONS, OTHERS COMPLAINING ABOUT
10 THE SEVERITY OF OUR RECOMMENDATIONS; THE BOTTOM LINE BEING
11 THAT ALTHOUGH WE ARE ALL PART OF A FEDERAL CRIMINAL JUSTICE
12 SYSTEM, IT, INDEED, SEEMED THAT NONE OF US WERE PLAYING THE
13 SAME BALLGAME.

14 YOUR EFFORTS AND PROGRESS IN ADDRESSING THE BASIC
15 INJUSTICE AND UNCERTAINTY OF PRESENT SENTENCING PRACTICES AND
16 DEVELOPING A TRUTH IN SENTENCING SYSTEM ARE LAUDATORY. I
17 UNDERSTAND FROM OTHER PROBATION OFFICERS IN NEW YORK AND
18 CHICAGO, IN LISTENING THIS MORNING, THAT IN YOUR PREVIOUS
19 HEARINGS, THERE HAS BEEN CONSIDERABLE DEBATE, OBJECTIONS, AND
20 CRITICISMS OF THIS PRELIMINARY DRAFT.

21 I URGE YOU NOT TO WAVER FROM YOUR CONGRESSIONAL
22 MANDATE, FOR YOUR WORK IS THE LIGHT AT THE END OF THE TUNNEL.
23 WE, IN PROBATION, WILL HAVE THE PRIMARY RESPONSIBILITY FOR
24 INTERPRETING AND APPLYING THE COMMISSION'S GUIDELINES.

25 AFTER REVIEWING YOUR DRAFT, THERE ARE THREE AREAS

1 THAT I WOULD LIKE TO COMMENT ON. THE FIRST IS PROBATION AS A
2 SENTENCE; SECOND, IMPLEMENTATION OF THE GUIDELINES,
3 PROCEDURES, TRAINING AND PERSONNEL; AND FINALLY, MONITORING
4 THE EFFECTS OF THE GUIDELINES.

5 PROBATION AS A SENTENCE: IT IS IMPERATIVE, I
6 THINK, THAT THE COMMISSION DEVELOP GUIDELINES CONVERTING
7 PROBATION AND SUPERVISED RELEASE INTO SANCTION UNITS AS HAS
8 BEEN DONE FOR SENTENCES OF IMPRISONMENT.

9 THOSE THAT OBJECT TO SUCH A CONVERSION ARGUE THAT
10 THE UNDERLYING PURPOSE OF PROBATION IS FUNDAMENTALLY
11 REHABILITATIVE. IN FACT, YOU MAKE THAT VERY SAME STATEMENT
12 ON PAGE 142 OF THE DRAFT.

13 I STRONGLY DISAGREE. PROBATION AS A SENTENCE HAS
14 NEVER TRULY BEEN GIVEN THE OPPORTUNITY TO FULFILL THE OTHER
15 OBJECTIVES OF SENTENCING, AND I THINK CONGRESS CLEARLY, BY
16 LEGISLATING PROBATION AS A SENTENCE IN ITS OWN RIGHT,
17 PERCEIVED IT AS HAVING THE ABILITY TO FULFILL THE OBJECTIVES
18 OF SENTENCING AS DESCRIBED IN TITLE 18, SECTION 3553.

19 PROBATION CAN PUNISH, CAN DETER, CAN PROTECT THE
20 PUBLIC AND CAN PROVIDE TREATMENT. THIS CAN BE ACCOMPLISHED
21 THROUGH A STRICT ENFORCEMENT OF THE PROPOSED CONDITIONS OF
22 PROBATION THAT THE COMMISSION DESCRIBES ON PAGE 143 AND 144
23 OF THE DRAFT.

24 UNLESS, HOWEVER, THESE CONDITIONS OF PROBATION AND
25 SUPERVISED RELEASE ARE MONITORED AND ENFORCED BY PROBATION

1 OFFICERS IN A FASHION THAT IS MEANT TO ACCOMPLISH ALL OF THE
2 GOALS OF SENTENCING, NOT JUST REHABILITATION, PROBATION WILL
3 CONTINUE TO BE ONLY A DILUTED ALTERNATIVE TO INCARCERATION.

4 FOR EXAMPLE, PERMISSION TO TRAVEL OUTSIDE OF THE
5 DISTRICT WOULD BE SELDOMLY -- A SELDOMLY-INVOKED PRIVILEGE
6 VERSUS THE PRESENT FREQUENTLY-GRANTED REQUEST. IN SUCH A
7 MANNER, PROBATION CAN PROVIDE PUNISHMENT.

8 HOWEVER, UNLESS THE COMMISSION ISSUES STATEMENTS
9 AS TO HOW PROBATION SUPERVISION MUST CHANGE, SERIOUS PROBLEMS
10 LIE AHEAD. SPECIAL CONDITIONS OF PROBATION PROVIDE THE
11 PERFECT OPPORTUNITY TO CONVERT PROBATION OR SUPERVISED
12 RELEASE INTO APPROPRIATE SANCTION UNITS.

13 FOR EXAMPLE, CONFINEMENT IN A HALFWAY HOUSE AND
14 HOUSE ARREST PROVIDE GREAT POTENTIAL FOR DETERRENCE AND
15 PUNISHMENT. TO US PROBATION OFFICERS, RESIDENCE AND
16 COMMUNITY TREATMENT CENTERS, FOR A LONG TIME, HAS BEEN A
17 LONGSTANDING AND SUCCESSFUL EFFORT AT ACHIEVING GOALS OF
18 SENTENCING WITHOUT THE COST OF THE EXPENSIVE JAIL-TYPE
19 INSTITUTIONS.

20 HOUSE ARREST: A SENTENCING ALTERNATIVE IN WHICH
21 STATE AND COUNTY PROBATION DEPARTMENTS THROUGHOUT THE COUNTRY
22 ARE LIGHT YEARS AHEAD OF FEDERAL PROBATION, HAS TREMENDOUS
23 POTENTIAL IN ACHIEVING PUNISHMENT AND CONTROL IN THE
24 COMMUNITY.

25 USING ELECTRONIC MONITORING DEVICES, OFFENDERS ARE

1 CONFINED IN THEIR HOMES ON A CURFEW-TYPE PROGRAM. AGAIN, THE
2 COST IS MINIMAL COMPARED TO TRADITIONAL INCARCERATION. YET,
3 THIS SPECIAL CONDITION PROVIDES PUNISHMENT AND DETERRENCE,
4 ALLOWING THE OFFENDER TO CONTRIBUTE TO SOCIETY IN A
5 CONSTRUCTIVE MANNER THROUGH MAINTENANCE OF GAINFUL
6 EMPLOYMENT.

7 THERE ARE A WIDE VARIETY OF ADVANTAGES IN PLACING
8 A SANCTION UNIT VALUE ON PROBATION AND SUPERVISED RELEASE. IF
9 THIS WERE INCORPORATED INTO THE GUIDELINES, THE BASE OF
10 OFFENDERS THAT COULD BE SENTENCED TO PROBATION WOULD BE
11 ENLARGED.

12 ADDITIONALLY, THE SENTENCING JUDGE WOULD HAVE MORE
13 LATITUDE, FLEXIBILITY, IN DEVELOPING A SENTENCE TO BE IMPOSED
14 ON THE OFFENDER. AS PRESENTLY CONSTRUCTED, THE GUIDELINES,
15 ESPECIALLY FOR THOSE OFFENDERS AT THE LOWER END OF THE
16 SANCTION UNIT SPECTRUM, ARE SO NARROW THAT A SIGNIFICANT
17 NUMBER OF JUDGES, I FEAR, WILL SIMPLY REJECT THE GUIDELINES.
18 CONSEQUENTLY, PROBATION WITH OR WITHOUT SPECIAL CONDITIONS
19 WILL NOT BE A VIABLE ALTERNATIVE.

20 SUMMARILY, I AM DISAPPOINTED, THOUGH NOT
21 SURPRISED, IN THE COMMISSION'S APPARENT NEGLIGENCE IN
22 ADDRESSING SUPERVISION ISSUES.

23 THE PROPOSED GUIDELINES FOR VIOLATION OF
24 POST-CONVICTION SUPERVISION REFLECT LITTLE CHANGE IN THE
25 HISTORICAL PAPER-TIGER IMAGE OF COMMUNITY SUPERVISION.

1 IMPLEMENTATION OF THE GUIDELINES: ON PAGE 17 OF
2 THE DRAFT, YOU ALL STATE, "A RELATED ISSUE IS PROCEDURAL.
3 FACTUAL DISPUTES ARE UNLIKELY IN THE VAST MAJORITY OF CASES."
4 YOU FURTHER ON STATE, "IF A HEARING IS NECESSARY, IT WILL BE
5 LESS FORMAL THAN A TRIAL."

6 FINALLY, "THE HEARING PROCEDURE PRODUCES A
7 WORKABLE SENTENCING SYSTEM THAT AVOIDS FULL-FLEDGED TRIALS AT
8 THE SENTENCING STAGE." THROUGH MY EXPERIENCE, THE COURT IN
9 SOUTH FLORIDA, THE BUSIEST CRIMINAL COURT IN THE UNITED
10 STATES, AND HAVING PREVIOUSLY SUPERVISED COURT SERVICE UNITS
11 IN THE NORTHERN DISTRICT OF TEXAS, I STRONGLY DISAGREE WITH
12 THIS ASSESSMENT.

13 UNLESS RULE 32 IS AMENDED TO STREAMLINE DISCLOSURE
14 AND THE RESOLUTION OF FACTUAL DISPUTES PRIOR TO SENTENCING, I
15 SUSPECT THERE WILL BE CHAOS. I FEAR THAT THE OVERWORKED
16 JUDICIARY, ALREADY UNDER THE GUN OF SPEEDY TRIAL REGULATIONS,
17 WILL BE FORCED TO SUBTERFUGE THE WORK OF THE COMMISSION.

18 I RECOMMEND THE AMENDMENT OF RULE 32, THAT
19 PROSECUTION AND DEFENSE UNDER THE RULE BE GIVEN COMPLETE AND
20 MEANINGFUL ACCESS TO THE PSI 10 DAYS BEFORE SENTENCING.

21 IF THERE ARE FACTUAL DISPUTES WITH THE REPORT OR
22 GUIDELINE APPLICATION, THESE MUST BE SUBMITTED IN WRITING
23 FIVE DAYS PRIOR TO SENTENCING, ALLOWING THE PROBATION
24 DEPARTMENT TIME FOR DISPUTE RESOLUTION.

25 IF THE PARTIES FAIL TO COMPLY, THEY ARE TO STAND

1 MUTE AT TIME OF SENTENCING. ONLY UNRESOLVED DISPUTES WOULD
2 THEN BECOME ISSUES FOR SENTENCING HEARINGS.

3 TRAINING AND PERSONNEL: THE COMMISSION'S PROPOSED
4 GUIDELINES ARE NECESSARILY COMPLEX IN HAVING TO ADDRESS THE
5 MULTIPLICITY OF ISSUES FORMULATING A SENTENCE. THIS
6 COMPLEXITY MANDATES THE NEED, AS I'M SURE THE COMMISSION IS
7 AWARE, FOR EXTENSIVE TRAINING AND ADDITIONAL RESOURCES.

8 THE MAJOR THREAT IN MY CONVERSATIONS WITH THE
9 JUDGES IN THE SOUTHERN DISTRICT OF FLORIDA, TO THE EFFECT OF
10 IMPLEMENTATION OF THESE GUIDELINES WILL BE A LACK OF TRAINING
11 AND THE RESOURCES TO GET THEM IMPLEMENTED.

12 IF JUDGES, PROBATION OFFICERS, PROSECUTORS,
13 DEFENSE ATTORNEYS ARE UNABLE TO THOROUGHLY UNDERSTAND THE
14 GUIDELINES AND DEVELOP SOME FACILITY IN THEIR APPLICATION,
15 THE COMMISSION'S GREAT BODY OF WORK WILL HAVE BEEN FOR
16 NAUGHT.

17 I JUMP TO THIS NEED: IT'S A NEED FOR REVIEWING
18 THE WORKLOAD FORMULA FOR PROBATION STAFF, IN THE SENSE THAT
19 THESE CRITICAL PERSONNEL IN THIS PROCESS WILL BE AVAILABLE.
20 WILL IT BE POSSIBLE FOR US TO SUPERVISE OFFENDERS IN THE
21 MANNER THAT PROVIDES PUNISHMENT, DETERRENCE, PROTECTION, AND
22 SERVICES UNDER THE PRESENT WORKLOAD ASSIGNMENT SYSTEM?

23 DOES THE PRESENT WORKLOAD FORMULA USED BY THE
24 ADMINISTRATIVE OFFICE ALLOW US THE TIME, THE RESOURCES TO THE
25 ARBITRATORS AND HEARING OFFICERS IN APPLYING THE GUIDELINES

1 FOR THE COURT?

2 I SUSPECT THAT YOUR COMPLIANCE WITH THE
3 CONGRESSIONAL MANDATES TRANSLATES INTO A WORKABLE SENTENCING
4 SYSTEM HINGES ON THESE SYSTEMS.

5 FINALLY, I WOULD LIKE TO ADDRESS THE NEED TO
6 MONITOR THE EFFECTS OF THE GUIDELINES. A REVIEW OF THE
7 EFFECTS OF PRISON OVERCROWDING AGGRAVATED BY SENTENCING
8 GUIDELINES GIVES CAUSE FOR CONCERN.

9 FEDERAL PRISONS ARE ALREADY DRASTICALLY
10 OVERCROWDED AND, DESPITE NUMEROUS NEW INSTITUTIONS, WILL SO
11 REMAIN. MANDATORY SENTENCING GUIDELINES CREATES A STRONG
12 POSSIBILITY OF A DUPLICATION OF THE CHAOS EXISTING IN MANY
13 STATES, INCLUDING MY STATE, THE STATE OF FLORIDA, WHERE
14 TRAGICALLY THE SENTENCING DECISIONS ARE BEING NOW MORE
15 GOVERNED BY THE AVAILABILITY OF RESOURCES THAN APPROPRIATE
16 PUNISHMENT, INCAPACITATION AND DETERRENCE.

17 MY CONCERN AS A PROBATION ADMINISTRATOR IS THAT
18 THE HISTORICAL RESPONSE TO THIS DILEMMA HAS BEEN TO ASSIGN TO
19 PROBATION DEPARTMENTS WHO, DURING THE PAST DECADE HAVE HAD
20 THEIR RESOURCES AND BUDGETS DECREASED BY 25 PERCENT WHILE THE
21 WORKLOAD HAS INCREASED BY 75 PERCENT, THE SUPERVISION OF
22 THESE EXCESS DEFENDANTS.

23 AS IS VALIDATED BY THE RAND REPORT, GUTTED AND
24 ANEMIC COMMUNITY SUPERVISION AGENCIES HAVE GENERALLY NOT BEEN
25 ABLE TO EFFECTIVELY DEAL WITH THE INCREASED SOPHISTICATED AND

1 DANGEROUS WORKLOAD THAT THEY ARE NOW BEING ASSIGNED.

2 TO PREVENT THIS, I PLEAD WITH YOU TO MONITOR AND
3 PLAN CAREFULLY. IT IS IMPORTANT THAT YOU UNDERSTAND THAT
4 UNDER THE PRESENT RESOURCE ALLOCATION PROCEDURE OF PROBATION
5 IN THE COURTS, IN THE FEDERAL SYSTEM, MY AGENCY SIMPLY IS NOT
6 CAPABLE OF VIABLY RESPONDING TO RAPID INCREASES OF WORKLOAD.
7 IN THE SOUTHERN DISTRICT OF FLORIDA, THE PERSONNEL THAT I
8 NEED TODAY, I WILL GET A YEAR FROM NOW.

9 IN CONCLUSION, THE IDEALISM, THE ENTHUSIASM, THE
10 COMMITMENT THAT IS EXEMPLIFIED BY THIS COMMISSION IN ITS
11 BRIEF TWO-YEAR HISTORY HAS BEEN INDEED A BREATH OF FRESH AIR
12 TO US IN THE BUREAURACY.

13 YOUR OPENNESS AND RESPONSIVENESS TO EVERY FACET
14 OF THE CRIMINAL JUSTICE SYSTEM VOTES WELL FOR THE SUCCESS OF
15 YOUR WORK. I, LIKE MR. HUGHES, THANK YOU FOR THE OPPORTUNITY
16 TO TESTIFY AND CONGRATULATE YOU ON A JOB WELL DONE.

17 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR.
18 JUENKE. THANK YOU FOR THOSE VERY CONSTRUCTIVE REMARKS.

19 ANY QUESTIONS TO MY RIGHT?

20 ANYONE HAVE ANY QUESTIONS OF MR. HUGHES OR MR.
21 JUENKE TO MY LEFT?

22 COMMISSIONER MACKINNON: MR. JUENKE, DID I TAKE
23 YOU TO ASSUME THAT HOUSE ARRESTS INCLUDED THE OPPORTUNITY TO
24 WORK IN YOUR EMPLOYMENT?

25 MR. JUENKE: WE ARE ATTEMPTING TO GET STARTED A

1 PILOT PROJECT IN THE SOUTHERN DISTRICT OF FLORIDA WHERE A
2 PERSON -- YOU CAN SET IT UP WHATEVER WAY YOU WANT TO -- WHERE
3 THE PERSON WILL BE UNDER CURFEW FROM 9:00 AT NIGHT UNTIL 6:00
4 IN THE MORNING, AND BE UNDER ELECTRONIC SURVEILLANCE DURING
5 THAT TIME AND THEN DURING THE DAY WILL BE ABLE TO WORK.

6 OF COURSE, THE COURT CAN STRUCTURE ANY WAY THAT
7 THEY WOULD WANT TO. WE HAD ONE CASE IN THE SOUTHERN DISTRICT
8 OF FLORIDA WHERE A BOND CASE WAS PUT UNDER HOUSE ARREST WITH
9 ELECTRONIC SURVEILLANCE 24 HOURS A DAY.

10 COMMISSIONER MACKINNON: MR. HUGHES, WHAT DID I
11 TAKE YOU TO SAY, THAT YOU DID NOT ADVOCATE CREDIT FOR
12 PROBATION TIME ON SENTENCING?

13 MR. HUGHES: NO, SIR, I ADVOCATED ASSIGNING
14 SANCTION UNITS TO PROBATION AND MAKING THAT A PART OF WHAT
15 THE JUDGE -- IN OTHER WORDS, IF THE JUDGE SPENDS, FOR LACK OF
16 A BETTER TERM, SANCTION UNITS, THEY MAY INCLUDE CREDIT FOR
17 PROBATION.

18 COMMISSIONER MACKINNON: THANK YOU.

19 CHAIRMAN WILKINS: THANK YOU VERY MUCH. OUR LAST
20 WITNESS BEFORE WE BREAK FOR LUNCH IS MR. JAY ROBERT COOPER.

21 MR. COOPER?

22 MR. COOPER IS A PRACTICING ATTORNEY HERE IN
23 ATLANTA. WE ARE DELIGHTED TO HAVE YOU WITH US.

24 MR. COOPER: THANK YOU, JUDGE. MY COMMENTS WILL
25 BE BRIEF. I KNOW THAT YOU'RE PRESSING FOR THE LUNCH HOUR. I

1 HAVE ALREADY HAD MINE, ANTICIPATING THAT YOU WOULD HAVE
2 ALREADY HAD YOURS, THAT I WOULD BE COMING BACK.

3 LET ME FIRST STATE THAT I APPEAR HERE IN PERHAPS
4 TWO CAPACITIES: ONE AS A REPRESENTATIVE OF THE NACDL. MR.
5 LYONS CALLED YESTERDAY AND STATED THAT HE WAS MOMENTARILY
6 CALLED TO COURT IN FLORIDA AND COULD NOT MAKE IT AND ASKED ME
7 TO EXPRESS HIS REGRETS TO THE MEMBERS OF THE COMMISSION IN
8 NOT BEING ABLE TO ATTEND.

9 HE ASKED ME TO STATE HIS APPRECIATION, AS I DO IN
10 MY OWN CAPACITY, AT THE COURTESIES EXTENDED NOT ONLY TO THE
11 ORGANIZATION, BUT TO THE MEMBERS OF THE ORGANIZATION WHO ARE
12 WORKING IN CLOSE LIAISON WITH YOUR GROUP.

13 THEY FEEL, I FEEL, WE FEEL THAT THE MEMBERS OF THE
14 DEFENSE BAR ARE BEING HEARD AND THAT IS SO IMPORTANT IN THE
15 WORK THAT YOU ARE DOING. PERHAPS FOR THE BENEFIT OF THE
16 OTHER COMMISSIONERS WHO MAY NOT BE AWARE, I CUT MY TEETH
17 RIGHT HERE IN ATLANTA AS AN ASSISTANT U.S. ATTORNEY
18 REPRESENTING THE FEDERAL BUREAU OF PRISONS AND THE UNITED
19 STATES PAROLE COMMISSION.

20 IN 1974, THEY WENT TO THE REGIONAL SYSTEM -- SOME
21 OF THIS, I'M SURE, IS WELL-KNOWN TO YOU -- AND I BEGAN TO
22 REPRESENT AS PORTFOLIO CASES THE BUREAU OF PRISONS AND THE
23 PAROLE COMMISSION.

24 IN 1976, IT WAS MY PLEASURE TO BE APPOINTED TO THE
25 PAROLE COMMISSION. BY THEN, PRESIDENT FORD HAD SERVED THE

1 BALANCE OF AN UNEXPIRED TERM, SO I'M NOT UNFAMILIAR WITH THE
2 INTERNAL WORKINGS, PERHAPS, OF THE COURT WITH THE FEDERAL
3 BUREAU OF PRISONS, WITH THE PAROLE COMMISSION; AND NOW
4 BASICALLY I'M WALKING THE OTHER SIDE OF THE STREET ON BEHALF
5 OF CRIMINAL DEFENDANTS.

6 LET ME SAY THAT MY ATTITUDE HAS TAKEN A DRAMATIC
7 CHANGE IN WALKING THE OTHER SIDE OF THE STREET TO GET A
8 DAY-TO-DAY TOUCH WITH PEOPLE WHOSE LIVES YOU ARE AFFECTING
9 WITH THE DECISIONS THAT YOU ARE MAKING ON THIS COMMISSION.

10 ONE OF THE THINGS I WOULD ASK THE COMMISSION TO
11 CONSIDER IS THAT YOU DON'T NECESSARILY NEED TO THROW OUT THE
12 BABY IN THE BATH WATER, THAT A LOT OF GOOD WORK HAS GONE
13 BEFORE, AND I KNOW THAT IT IS VERY HELPFUL TO YOU.

14 WHILE WE READ A LOT ABOUT AND HEAR A LOT ABOUT THE
15 DISPARITY IN SENTENCING, ALL THE HARD THINGS THAT ARE
16 HAPPENING IN THE DISTRICT COURTS ACROSS THE NATION, 99
17 PERCENT OF THE WORK THAT THOSE JUDGES ARE DOING IS EXCELLENT
18 WORK.

19 THERE IS AN OLD SAYING HERE THAT YOU DON'T NEED TO
20 FIX SOMETHING IF IT AIN'T BROKE. THERE IS SOMETHING THAT
21 NEEDS FIXING IN THE SENTENCING SYSTEM; OTHERWISE, YOU WOULD
22 NOT EXIST.

23 THE SAME THING HOLDS TRUE FOR THE RULES AND
24 REGULATIONS OF THE UNITED STATES PAROLE COMMISSION. A LOT OF
25 WORK WENT INTO THOSE. COMMISSIONER CORROTHERS WELL KNOWS THE

1 WORK THAT'S GONE IN.

2 SHE KNOWS THE PRIVILEGE THAT YOU FOLKS HAVE OR YOU
3 PEOPLE HAVE HERE. I WILL SAY FOLKS, I'M NOT SURE WHERE ALL
4 OF YOU HAIL FROM. I SPOKE WITH THE LEGAL -- MR. REID, AND HE
5 PRONOUNCED BY NAME COOPER CORRECTLY, AND I THANKED HIM FOR
6 THAT. THERE ARE NOT MANY PEOPLE THAT DO THAT.

7 BUT IN ANY EVENT, YOU MEMBERS OF THE COMMISSION
8 HAVE DUG IN FOR A YEAR NOW IN THIS WORK, WHERE THE MEMBERS OF
9 THE PAROLE COMMISSION HAVE TO DIG IN AND DO 200 CASES A DAY
10 AND THEN GET AROUND TO THIS WORK. SO, IF YOU HEAR
11 COMMISSIONER CORROTHERS COMPLAINING ABOUT IT, YOU'LL KNOW
12 THAT SHE'S JUSTIFIED IN DOING SO.

13 THERE'S NOT REALLY A GREAT DEAL THAT PERSONS IN
14 THE POSITION THAT I NOW SHARE WITH MY FELLOW DEFENSE LAWYERS
15 CAN ADD TO WHAT YOU'RE DOING.

16 I SERVED AS A MEMBER OF THE GENERAL ASSEMBLY HERE
17 IN THE STATE OF GEORGIA A COUPLE OF TERMS. SOMEBODY WOULD
18 COME UP TO YOU AND ASK YOU TO HELP SPONSOR A BILL AND SPEAK
19 ON A BILL AND YOU WOULD, AND YOU WOULD GET UP THERE AND BE
20 CROSS-EXAMINED BY OTHER MEMBERS OF THE ASSEMBLY. YOU WONDER,
21 MY GOD, HOW DID I EVER GET DUMB ENOUGH TO SPEAK ON A SUBJECT
22 LIKE THIS, TO SPONSOR THIS LEGISLATION?

23 THAT'S GOING TO HAPPEN TO YOU, GENTLEMEN AND
24 LADIES, WHEN YOU GET OVER TO THE CONGRESS NEXT MAY, WHEN
25 THOSE CONGRESSMEN GET OVER THERE AND BEGIN TO CROSS-EXAMINE

1 YOU ABOUT THE POSITION YOU HAVE TAKEN IN YOUR FINAL DRAFT OF
2 YOUR SENTENCING GUIDELINES. AND JUST BE FOREWARNED.

3 THERE IS A LOT OF INFORMATION THAT HAS COME TO YOU
4 THAT WE HERE IN THE PUBLIC ARE NOT AWARE OF, AND IT'S AWFULLY
5 DIFFICULT TO SPEAK BECAUSE OF THAT LACK OF KNOWLEDGE.

6 I HAVE BASICALLY TWO CONCERNS, AND, THAT IS, THAT
7 THE PHILOSOPHY OF THIS COUNTRY SEEMS TO BE THE QUICKEST WAY
8 TO RESOLVE A CRIMINAL MATTER IS TO PUT SOMEBODY IN JAIL. OUR
9 OVERCROWDED JAILS IN EVERY STATE ACROSS THE NATION ARE LIVING
10 TESTIMONALS TO THAT PHILOSOPHY.

11 I THINK WE NEED TO GET AWAY FROM THAT AS MUCH AS
12 WE CAN, AND HOPEFULLY YOU MEMBERS OF THE COMMISSION WILL KEEP
13 THAT IN MIND IN THE WORK THAT YOU ARE DOING.

14 TO BE MORE SPECIFIC, A COUPLE OF AREAS THAT I HAVE
15 FOUND PROBLEM WITH IN THE RULES AND REGULATIONS THAT NOW
16 EXIST, ONE OF THE THINGS THAT CAME TO US IN THE LITERATURE
17 THAT'S BEEN DISSEMINATED IS THAT THE COMMISSION, YOUR BODY,
18 IS CONCERNED WITH THE FACT THAT OFFENDERS ARE LIKELY TO
19 VIOLATE THE LAW IN THE FUTURE.

20 WHILE THAT'S A VIABLE ISSUE FOR A PAROLE
21 COMMISSION TO CONSIDER, IT'S MY PERSONAL OPINION THAT WHAT
22 SOMEONE MIGHT DO IN THE FUTURE, IN THE SENTENCING PROCESS, IS
23 NOT REALLY A CONCERN OF THE SENTENCING JUDGE.

24 WHILE THOSE MATTERS THAT HE HAS DONE IN THE PAST,
25 THAT HE'S NOT A FIRST OFFENDER, ARE IMPORTANT TO THE PAROLING

1 AUTHORITY BECAUSE THAT TENDS TO RELATE TO HIS SALIENT FACTOR
2 SCORE, HIS SUCCESS ON PAROLE, IT'S NOT REALLY SOMETHING THAT
3 THE TRIAL COURTS SHOULD CONCERN THEMSELVES WITH BECAUSE HE'S
4 NOT HERE FOR SENTENCING FOR WHAT HE MIGHT DO IN THE FUTURE.
5 IT'S ONLY THOSE THINGS THAT HE HAS PRESENTLY DONE AND THE
6 INFLUENCE OF WHAT HE HAS DONE IN THE PAST.

7 SECONDLY, WE ARE GETTING CONCERNED WITH, PRIMARILY
8 IN THE AREA OF DRUGS, NARCOTICS, PILLS, AMPHETAMINES, WITH
9 THE WAY IN WHICH THE COMMISSION WILL DEAL WITH THAT.

10 TOO OFTEN WE GET DOWN INTO AREAS WHERE IT'S
11 AWFULLY DIFFICULT TO DIFFERENTIATE WHO HAS DONE WHAT; THE
12 AMOUNT OF DRUGS, THE PURITY, THE MONEY VALUE, THINGS OF THIS
13 NATURE, THE CONSPIRACY LAW.

14 IT'S AWFULLY DIFFICULT ON AN INDIVIDUAL WHO HAS
15 COME UP BEFORE THE BAR OF JUSTICE TO SAY, WELL, THIS IS ALL
16 THAT I DID, AND I FIND THIS SPILLOVER EFFECT FROM ALL OF THE
17 CO-CONSPIRATORS NOW BEING DUMPED OVER ONTO ME.

18 IT WAS MY EXPERIENCE AS A PAROLE COMMISSIONER THAT
19 VERY EARLY ON YOU WOULD DEAL WITH THOSE LESSER CULPABLE
20 INDIVIDUALS BY PLACING THEM IN A LOWER OFFENSE CATEGORY
21 LEVEL, MORE APPLICABLE TO THEIR ACTUAL INVOLVEMENT.

22 HOWEVER, THE COMMISSION GOT INTO A LOT OF
23 LITIGATION BECAUSE THEY WERE DEALING WITH THEM SEPARATELY;
24 AND AS A RESULT, THE EASIEST WAY WAS TO JUST DUMP EVERYBODY
25 IN.

1

1 THE HARD THING IS THE GUY WHO IS LESS CULPABLE
2 GETS TREATED VERY, VERY DIFFERENTLY BECAUSE HE GETS THE
3 HIGHER GUIDELINES. THIS IS AN EXCELLENT OPPORTUNITY FOR THIS
4 COMMISSION TO PERHAPS AVOID THAT KIND OF TREATMENT AND TO GET
5 BACK INTO THE MORE SELECTIVE TREATMENT OF AN OFFENDER, AS
6 OPPOSED TO CONSIDERING HIM BECAUSE OF HIS INVOLVEMENT IN A
7 CONSPIRACY.

8 WE THANK YOU FOR YOUR TIME AND ATTENTION. I KNOW
9 THAT ONE OF OUR MEMBERS WILL BE BEFORE YOU IN THE WASHINGTON
10 MEETING. WE LOOK FORWARD TO HAVING A FORMAL PRESENTATION AND
11 A WRITTEN HANDOUT AT THAT TIME.

12 CHAIRMAN WILKINS: THANK YOU VERY MUCH. WE
13 APPRECIATE THE DEFENSE BAR AND THE INTEREST IT HAS SHOWN IN
14 OUR WORK AND THE CONTRIBUTIONS DEFENSE LAWYERS AROUND THE
15 COUNTRY HAVE MADE. I KNOW THAT WILL CONTINUE.

16 WE AGREE WITH YOU, THAT EVERY CONSIDERATION MUST
17 BE GIVEN TO ALTERNATIVES TO INCARCERATION, FOR THAT IS
18 CERTAINLY A VIABLE METHOD OF ACHIEVING SUBSTANTIAL JUSTICE IN
19 MANY CASES.

20 ANY QUESTIONS TO MY RIGHT?

21 ANY QUESTIONS TO MY LEFT?

22 COMMISSIONER MACKINNON: COUNSEL, YOU MADE THE
23 POINT THAT JUDGES SHOULD NOT BE FORCED TO CONSIDER
24 RECIDIVISM, THE POSSIBILITY OF RECIDIVISM, BUT THE PAROLE
25 COMMISSION IS BEING WIPED OFF THE BOOKS.

1 THE JUDGE NOW -- THE FUNCTION OF THE PAROLE
2 COMMISSION WHO DID LOOK INTO THAT, AS YOU NOTED, IS NOW BEING
3 ASSIGNED TO THE JUDGE, AND HE'S GOING TO HAVE TO DO THAT.

4 THE JUDGE IS NOW GOING TO FIX A SENTENCE THAT IS
5 GOING TO BE SERVED, AND IT WILL WORK OUT AUTOMATICALLY TO
6 STATE, IN EFFECT, THE RELEASE DATE THAT THE COMMISSION IS NOW
7 HAVING TO FILL BECAUSE THE PAROLE COMMISSION IS NOW BEING --
8 WHO PREVIOUSLY HAD THAT PARTICULAR FUNCTION, ARE NOW BEING
9 ABOLISHED.

10 SO THERE ISN'T ANY WAY THAT I THINK THAT THE
11 JUDGES CAN AVOID GETTING AWAY FROM HAVING TO LOOK AT
12 RECIDIVISM, SINCE THEY ARE THE ONLY ONES THAT ARE GOING TO BE
13 FACED WITH IT. THERE ISN'T GOING TO BE A PAROLE BOARD
14 ANYMORE.

15 MR. COOPER: YES, I FULL WELL UNDERSTAND THAT.
16 PEOPLE ASK ME WHAT I'M GOING TO GO DO FOR A LIVING AFTER
17 THEY'RE ABOLISHED, AND I SOMETIMES WONDER MYSELF. I WOULD
18 DISAGREE WITH YOU, SIR, ABOUT -- THERE ARE FOUR BASIC
19 PURPOSES FOR WHICH PERSONS ARE CONSIDERED FOR SENTENCING.

20 AS I UNDERSTAND YOU, YOU WOULD ADD TO THAT A FIFTH
21 ONE, AND THAT IS THE POSSIBILITY OF RECIDIVISM. I DON'T
22 THINK THAT'S A PROPER THING FOR THE SENTENCING COURT. I
23 THINK THE COURT, IN MY OPINION --

24 COMMISSIONER MACKINNON: WELL, WHO'S GOING TO DO
25 IT, NOBODY?

1 MR. COOPER: NO, SIR. I THINK THAT IF HE BECOMES
2 A VIOLATOR IN A FUTURE CASE, THEN THAT'S THE TIME THAT THAT
3 JUDGE SHOULD CONSIDER THAT NEW CASE AND NOT THE LIKELIHOOD --
4 AS IS NOTED IN THE MATERIALS, IT'S AWFULLY, AWFULLY
5 DIFFICULT.

6 THE SALIENT FACTORS SCORING DEVICE HAS BEEN A
7 VERY, VERY RELIABLE, PREDICTIVE DEVICE AS IT RELATES TO
8 PAROLE, AND IT WOULD VERY LIKELY, PHILOSOPHICALLY, BE ABLE TO
9 BE USED FOR THE SAME PURPOSE BY THE SENTENCING COURT.

10 HOWEVER, TO ME, I THINK YOU HAVE TO MAKE A
11 DISTINCTION BETWEEN THE SENTENCE THAT'S TO BE IMPOSED FOR THE
12 CONDUCT FOR WHICH HE'S ACCUSED, PLED GUILTY, FOUND GUILTY OR
13 WHATEVER, AND THE THING THAT HE MIGHT LIKELY DO IT IN THE
14 FUTURE.

15 COMMISSIONER MACKINNON: IT'S THE SENTENCE BEING
16 IMPOSED UPON THE OFFENDER --

17 MR. COOPER: YES, SIR.

18 COMMISSIONER MACKINNON: -- AND WHAT HIS
19 PARTICULAR BACKGROUND AND RECORD AND EVERYTHING ELSE
20 INDICATES. OF COURSE, JUDGES HERETOFORE HAVE ALWAYS TAKEN
21 THAT INTO CONSIDERATION, BUT NOT TO THE EXTENT THAT THE
22 PAROLE COMMISSION DID SO FAR AS RECIDIVISM IS CONCERNED.

23 MR. COOPER: THAT'S CORRECT, SIR.

24 COMMISSIONER MACKINNON: AND SO UNLESS IT'S NOT
25 GOING TO BE A FACTOR THAT'S CONSIDERED AT ALL, NOBODY IS

1 GOING TO TAKE IT INTO CONSIDERATION.

2 MR. COOPER: ONLY IF HE DOES, IN FACT, VIOLATE
3 AGAIN, SIR, YES.

4 COMMISSIONER MACKINNON: YOU WOULD RULE OUT THE
5 MAN'S PRIOR RECORD AND WHAT THE JUDGE THINKS ABOUT IT --

6 MR. COOPER: NO, SIR.

7 COMMISSIONER MACKINNON: -- AS HIS CONDUCT FOR THE
8 FUTURE, AS A SENTENCING CONSIDERATION?

9 MR. COOPER: MY COMMENT, SIR, WAS THAT I WOULD
10 CONSIDER HIS RECORD IN THE PAST FOR THE PURPOSE OF
11 IMPOSITION -- THE IMPOSITION OF SENTENCE PRESENTLY.

12 COMMISSIONER MACKINNON: YOU DON'T THINK YOU CAN
13 JUDGE THE FUTURE BY THE PAST?

14 MR. COOPER: I THINK YOU CAN, BUT I DON'T THINK
15 YOU SHOULD.

16 COMMISSIONER MACKINNON: OKAY.

17 CHAIRMAN WILKINS: MR. GAINER?

18 COMMISSIONER GAINER: MR. COOPER, LIKE JUDGE
19 MACKINNON, I WAS CURIOUS ABOUT YOUR INTERPRETATION. ARE WE
20 TO UNDERSTAND THAT YOU BELIEVE THAT THE PURPOSE OF
21 INCAPACITATION, WHICH THE COMMISSION IS BOUND TO FULFILL, IS
22 NOT A PURPOSE WHICH IN ATTEMPTING TO FULFILL, THE COMMISSION
23 COULD SUGGEST LIKELIHOOD OF FUTURE CONDUCT WOULD BE RELEVANT
24 TO?

25 IN SHORT, HOW DOES THE COMMISSION AND HOW DO

1 SENTENCING JUDGES MEET THE REQUIREMENT OF SATISFYING
2 INCAPACITATION IF THEY CANNOT, THROUGH ONE MECHANISM OR
3 ANOTHER, ATTEMPT TO ASCERTAIN WHAT A PARTICULAR INDIVIDUAL
4 MAY DO IN THE FUTURE BASED IN PART UPON HIS PAST CONDUCT?

5 MR. COOPER: IT WAS NOT MY UNDERSTANDING THAT
6 INCAPACITATION, AS USED PERHAPS IN THE PAROLE ENVIRONMENT OR
7 IN THE SENTENCING ENVIRONMENT, WOULD BE LIMITED TO PERHAPS
8 INCAPACITATION FOR THE PROTECTION OF THE COMMUNITY FROM HIS
9 PRESENT ACT, THE FACT THAT HE'S A VIOLENT PERSON, AND BECAUSE
10 HE IS A VIOLENT PERSON NOW HE SHOULD BE LOCKED UP NOW.

11 IT'S NOT BECAUSE HE'S GOING TO DO SOME VIOLENT ACT
12 IN THE FUTURE. HE'S A VIOLENT PERSON NOW. HE HAS
13 DEMONSTRATED THAT, SO LOCK HIM UP NOW FOR THAT, IF THAT'S THE
14 DECISION OF THE COURT IN THE SENTENCING PROCESS.

15 THE FACT THAT HE MIGHT DO SOMETHING IN THE FUTURE
16 BEYOND SHOULDN'T ENHANCE HIS SENTENCE. YOU SHOULDN'T SAY,
17 GIVE A GUY FIVE YEARS, WHEN YOU'RE NOW GOING TO GIVE HIM
18 THREE YEARS FOR THE VIOLENT ACT HE'S JUST DONE.

19 YOU DON'T NEED TO ADD TWO MORE YEARS. YOU'RE
20 LOCKING HIM UP NOW. YOU'RE GIVING THE COMMUNITY PROTECTION
21 NOW FOR THAT ACT. YOU JUST DON'T NEED TO ENHANCE IT TWO MORE
22 YEARS.

23 COMMISSIONER MACKINNON: BUT WHAT A PERSON MIGHT
24 DO IN THE FUTURE AS YOU EVALUATE HIM IS SOMETHING THAT IS
25 INHERENT AND PRESENT IN THE PERSON TODAY WHEN YOU SENTENCE.

1 HIM.

2 MR. COOPER: IF WE ALL HAD A CRYSTAL BALL, WE
3 COULD VERY WELL UNDERSTAND AND APPLY THAT AND DIVIDE BETWEEN
4 THOSE THAT WILL AND WON'T. THIS IS WHAT'S SO DIFFICULT.
5 YOU'RE GOING TO PUNISH SOMEBODY WHO MIGHT NOT EVER.

6 COMMISSIONER MACKINNON: YOU CAN TAKE CERTAIN
7 OFFENSES, THOUGH, THAT ARE GENERALLY RECIDIVATED; FOR
8 INSTANCE, LIKE FORGERY, COUNTERFEITING, AND THINGS OF THAT
9 CHARACTER, AND PEOPLE HAVE NEVER, EVER HAD ANY OTHER ACTIVITY
10 EXCEPT, SAY, GAMBLING.

11 I REMEMBER I HAD A GAMBLER ONCE AND, OF COURSE,
12 THE MINUTE HE GOT SENTENCED, HE FIGURED WHAT THE ODDS WERE;
13 AND THEN AFTER HE SERVED IT, HE WENT RIGHT BACK IN RUNNING
14 GAMBLING TICKETS.

15 THAT'S ALL HE HAD EVER DONE IN HIS LIFE. THAT'S
16 THE ONLY THING HE KNEW. YOU CAN'T IGNORE THE FACT THAT THAT
17 MAN IS GOING TO GO BACK TO GAMBLING.

18 MR. COOPER: WE ARE BLESSED IN THIS AREA WITH
19 BOOTLEGGERS, YOUR HONOR, AND TIME AND AGAIN YOU SEE THESE
20 GENTLEMAN BACK. BUT AT SOME POINT, THEY CROSS FOOL'S HILL
21 AND REACH THAT POINT WHERE THEY JUST SAY, I'M NOT GOING TO DO
22 IT ANY MORE.

23 THIS IS THE DIFFICULT THING, TO ENHANCE HIS
24 PENALTY PRESENTLY BECAUSE OF SOMETHING THAT HE MIGHT DO IN
25 THE FUTURE. OBVIOUSLY IT'S IN THERE, BUT I DON'T THINK, IN

1 MY OPINION, THAT HE SHOULD HAVE ADDITIONAL TIME TACKED ONTO
2 IT.

3 COMMISSIONER MACKINNON: WOULD YOU GO FOR THE FACT
4 THAT IT MIGHT BE CONSIDERED SOMETIMES?

5 MR. COOPER: ONLY IN THE MONDAY MORNING
6 QUARTERBACKING. (LAUGHTER.)

7 COMMISSIONER MACKINNON: THANK YOU.

8 CHAIRMAN WILKINS: MR. COOPER, THANK YOU VERY MUCH
9 FOR YOUR REMARKS.

10 MR. COOPER: THANK YOU, JUDGE.

11 CHAIRMAN WILKINS: WE WILL STAND IN RECESS NOW
12 UNTIL 2:00. WE REALIZE THAT SOME OF THE WITNESSES AFTER
13 LUNCH HAVE PLANE SCHEDULES AND OTHER TRAVEL ARRANGEMENTS, SO
14 WE WILL START BACK PROMPTLY AT 2:00 AND STAY ON SCHEDULE.

15 THANK YOU VERY MUCH.

16 (WHEREUPON, A LUNCHEON RECESS WAS TAKEN.)

17 CHAIRMAN WILKINS: WE CALL THE HEARING TO ORDER.

18 OUR NEXT WITNESSES ARE MS. MIRIAM SHEHANE AND MS.
19 GERI O'BYRNE. MS. SHEHANE IS A VICTIM ADVOCATE FROM ALABAMA.
20 MS. O'BYRNE IS A VICTIM WITNESS COORDINATOR, ALSO FROM
21 ALABAMA.

22 WE ARE DELIGHTED TO HAVE YOU WITH US. WE HAVE
23 MADE SPECIAL EFFORTS NOT TO OVERLOOK, AS SOMETIMES HAS
24 HAPPENED, THE RIGHTS OF VICTIMS IN DRAFTING GUIDELINES, AND
25 WE WOULD BE MOST INTERESTED TO HEAR YOUR REACTION TO THESE

1 GUIDELINES AND TELL US HOW WE CAN MORE COMPLETELY INTEGRATE
2 INTO ANY JUSTICE SYSTEM WITH A GUIDELINES SYSTEM, THE RIGHTS
3 OF VICTIMS.

4 MS. O'BYRNE: IF I MIGHT SPEAK FIRST.

5 CHAIRMAN WILKINS: CERTAINLY.

6 MS. O'BYRNE: I'M GERI O'BYRNE. I AM THE VICTIM
7 WITNESS COORDINATOR FOR THE U.S. ATTORNEY'S OFFICE IN THE
8 NORTHERN DISTRICT OF ALABAMA, WHICH IS IN BIRMINGHAM.

9 THE VICTIM WITNESS PROTECTION ACT THAT WAS CREATED
10 BACK IN 1982 CREATED VICTIM WITNESS POSITIONS FOR THE U.S.
11 ATTORNEY'S OFFICES ACROSS THE COUNTRY. SO THERE ARE 94 U.S.
12 ATTORNEY'S OFFICES, AND SUPPOSEDLY THERE ARE THOSE POSITIONS
13 IN EVERY OFFICE.

14 A VICTIM WITNESS UNIT HAS BEEN SET UP TO
15 PROMULGATE THE REQUIREMENTS OF THE ACT, SO WE ARE TRYING TO
16 FOLLOW THOSE AND, AS SUCH, HAVE INCORPORATED VICTIMS INTO THE
17 PROCESS. THE CREATION OF A VICTIM WITNESS PROTECTION ACT WAS
18 TO GIVE VICTIMS CONSIDERATION IN THE LEGAL PROCESS.

19 THE PROPOSED SENTENCING GUIDELINES, AS I HAVE READ
20 THEM, SEEM TO CARRY FORTH THAT INTENTION AND I WAS VERY
21 PLEASED TO READ SEVERAL ASPECTS IN THOSE GUIDELINES THAT
22 MENTIONED VICTIMS SPECIFICALLY.

23 I HAVE BEEN SITTING HERE ALL MORNING LISTENING TO
24 SOME OF THE COMMENTS THAT WERE MADE PARTICULARLY WITH REGARD
25 TO THE PSYCHOLOGICAL INJURY ASPECT OF THE SENTENCING PROCESS,

1 AND I AM SORT OF CONCERNED AT THIS POINT THAT MAYBE THERE
2 MIGHT BE A CONTENTION TO MAYBE GET RID OF THAT.

3 I'M WORRIED THAT THE EFFORT THAT YOU HAVE MADE MAY
4 NOT BE -- MAY NOT BE LOOKED UPON AS IT SHOULD BE. IT'S A
5 VERY IMPORTANT ISSUE TO ME PARTICULARLY AND TO VICTIMS ACROSS
6 THE COUNTRY.

7 SO I HOPE THAT THERE -- IF SOMETHING IS MAYBE NOT
8 AS GOOD AS IT COULD BE -- I KNOW THAT 48 OFFENSE VALUE, BASIC
9 OFFENSE VALUE, IS RATHER HIGH; AND IF THERE IS A PROBLEM WITH
10 THAT, MAYBE A REDUCTION IN THAT AMOUNT, PERHAPS WE COULD LOOK
11 AT IT A LITTLE BIT DIFFERENTLY WITH REGARD TO THE EXPERT
12 TESTIMONY THAT IS PART OF THAT CONSIDERATION.

13 I UNDERSTAND THAT -- I WOULD LIKE TO UNDERSTAND A
14 LITTLE BIT BETTER ABOUT THAT PSYCHOLOGICAL INJURY ASPECT,
15 BECAUSE THERE IS EXPERT TESTIMONY THAT MUST BE INVOLVED THAT
16 IS GOING TO CREATE A LITTLE BIT EXTRA WORK, BRINGING IN MORE
17 PEOPLE, WHO IS GOING TO PAY FOR THIS, FOR THE EVALUATION OF A
18 VICTIM, WHETHER A VICTIM WOULD LIKE TO BE EVALUATED. THOSE
19 ARE ALL THINGS THAT NEED TO BE CONSIDERED.

20 I WOULD -- I COULD MAKE A COMMENT MYSELF ABOUT
21 HAVING A VICTIM TESTIFY AT THE SENTENCING HEARING. I KNOW
22 THAT THE VICTIM WITNESS PROTECTION ACT SAYS THAT YOU'RE NOT
23 SUPPOSED TO UNDULY PROLONG THE SENTENCING PROCESS.

24 HOWEVER, WHEN A DEFENDANT IS ABLE TO BRING IN HIS
25 MENAGERIE OF CHARACTER WITNESSES, I THINK IT IS ONLY FAIR

1 THAT A VICTIM BE ABLE TO MAKE THOSE SAME STATEMENTS,
2 ESPECIALLY, YOU KNOW, WITH REGARD TO THE PSYCHOLOGICAL IMPACT
3 THAT IT HAS MADE ON THEM. I THINK WHO BETTER TO DO THAT THAN
4 THE VICTIM.

5 I UNDERSTAND WHY YOU WOULD WANT EXPERT TESTIMONY
6 IN CERTAIN CASES AND I THINK WE ARE TALKING ABOUT SERIOUS
7 OFFENSE CASES HERE. I'M GETTING AWAY FROM MY OUTLINE A
8 LITTLE BIT HERE.

9 I WANTED TO KIND OF TRACK THE GUIDELINES
10 THEMSELVES AND TELL YOU HOW I FELT AS I WAS READING THEM WITH
11 REGARD TO THE VICTIM ISSUES. I HAVE BEEN ASKED TO TALK ON
12 HOW I PERCEIVE THE VICTIM ISSUES, GUIDELINES WILL AFFECT THE
13 VICTIMS.

14 PARTICULARLY WHEN I GOT INTO THE CHAPTER 2 PART OF
15 IT ON OFFENSES AGAINST PERSONS, I NOTICED THAT THERE WAS,
16 UNDER THE HOMICIDE LEVELS 1, 2, AND 3, THERE WERE
17 CONSIDERATIONS FOR VICTIM PSYCHOLOGICAL INJURY, BUT ON
18 HOMICIDE LEVELS 3 -- 4 AND 5, THERE WERE NOT.

19 I DON'T KNOW WHAT YOUR INTENTION FOR NOT DOING
20 THAT, EXCEPT THAT I NOTICED IN THE COMMENTARY THERE WAS A
21 STATEMENT THAT SAID A VICTIM -- LET'S SEE -- SHOULD NOT
22 MATTER -- BECAUSE THE DEFENDANT HAD NO MOTIVE AND WAS
23 INDIFFERENT TO THE IDENTITY OF THE VICTIM.

24 THOSE PARTICULAR LEVELS, I THINK, ARE TOWARD THE
25 PEOPLE WHO DRIVE, DRIVING UNDER THE INFLUENCE OF ALCOHOL,

1 BECAUSE I NOTICED THAT THOSE ASPECTS WERE PUT INTO THOSE TWO
2 LEVELS.

3 A PERSON WHO IS KILLED IN AN AUTOMOBILE ACCIDENT
4 WHERE A DRIVER WAS INTOXICATED, THE FAMILY OF THAT PERSON
5 SUFFERS NO LESS THAN THE FAMILY OF SOMEONE WHO IS SHOT COLD
6 BLOOD, SHOT IN COLD BLOOD, AND I REALLY THINK THAT YOU SHOULD
7 RECONSIDER PUTTING THOSE PSYCHOLOGICAL INJURIES INTO THE
8 LEVELS 4 AND 5 OF THE HOMICIDE LEVELS, BECAUSE A VICTIM -- I
9 THINK ANY TIME A PERSON IS MURDERED IN ANY WAY OR FASHION,
10 THAT PSYCHOLOGICAL INJURY TO THE VICTIM SHOULD BE CONSIDERED.

11 I MIGHT GIVE YOU -- I THOUGHT WHAT I MIGHT DO HERE
12 IS GIVE YOU A FEW EXAMPLES OF SOME CASES THAT I HAVE HAD IN
13 OUR DISTRICT WHERE YOU MIGHT SEE THE PSYCHOLOGICAL IMPACT AS
14 IMPACTED ON THE PEOPLE THAT I DEALT WITH.

15 A PARTICULAR CASE IS A DUI HOMICIDE WHERE A YOUNG
16 34-YEAR-OLD NURSE, WHO WAS COMING HOME FROM WORK, 3:00 TO
17 11:00 SHIFT AT MIDNIGHT, WAS INVOLVED, WAS HIT BY A DRUNK
18 DRIVER.

19 HE WAS GOING IN EXCESS OF 80 TO 90 MILES AN HOUR,
20 HAD BEEN SEEN DOING WHEELIES IN A PARKING LOT BEFORE THE
21 ACCIDENT OCCURRED. HER FAMILY HAD TO ENDURE THE
22 IDENTIFICATION OF A BODY THAT WAS NOT IDENTIFIABLE EXCEPT FOR
23 THE NAME BADGE THAT SHE HAD ON.

24 THEY HAD TO ENDURE THE FUNERAL AND SEE HIM WALKING
25 AROUND ON THE STREET WHILE HE WAS ON BOND. THEY HAD TO GO

1 THROUGH THE HEARINGS THAT THEY COULD BARELY UNDERSTAND --
2 WHEN YOU GET INTO THE COURT PROCEDURE FOR SOME OF THESE
3 PEOPLE WHO HAVE NEVER BEEN IN A COURTROOM BEFORE, IT IS VERY,
4 VERY UPSETTING.

5 ALSO THE TRIAL OF THE CASE WAS VERY TRAUMATIC FOR
6 THEM BECAUSE THEY HAD TO SIT THERE AND LISTEN TO THE OFFENSE,
7 THE DETAILS OF THE ACCIDENT, AND LISTEN TO HOW SHE HAD TO,
8 YOU KNOW, WHAT ACTUALLY HAPPENED.

9 THAT WAS VERY TRAUMATIC FOR THEM ALSO. I WOULD
10 HAVE TO SAY THAT THIS FAMILY SUFFERED NO LESS THAN SOMEONE
11 WHO HAD TAKEN A GUN AND JUST SHOT SOMEONE, SOMEONE ELSE, SO I
12 WOULD REALLY LIKE TO BE SURE THAT YOU ARE AWARE THAT THOSE
13 ARE MY FEELINGS ABOUT THAT, BECAUSE I REALLY THINK THAT YOU
14 SHOULD CONSIDER PUTTING THOSE INTO THE GUIDELINES.

15 I STARTED TO TRY TO COMPUTE WHAT THIS PERSON WOULD
16 HAVE GOTTEN UNDER THE NEW GUIDELINES; AND IF HE WERE
17 CONVICTED OF THE LEVEL 4 HOMICIDE, THEN HE WOULD HAVE GOTTEN
18 THE BASE VALUE OF 30.

19 HAVING BEEN INTOXICATED, HE WOULD HAVE RECEIVED AN
20 ADDITIONAL 24 BASE OFFENSE VALUE, FOR WHICH THROWS IT TO 54,
21 BUT THAT DOESN'T TAKE INTO CONSIDERATION THE 20 TO 40 PERCENT
22 THAT HIS SENTENCE COULD BE REDUCED BY.

23 I AM NOT SURE RIGHT AT THIS MOMENT WHAT HIS PRIOR
24 RECORD IS. HE HAS NOT BEEN SENTENCED. HE WILL BE SENTENCED
25 PRETTY SOON, BUT, YOU KNOW, IF WE GO BY THE 54, HE WOULD

1 RECEIVE BETWEEN 40 AND 50 MONTHS CUSTODY.

2 IF WE GO BY THE 20- TO 40-PERCENT REDUCTION, IT
3 WOULD BE BETWEEN 32 AND 40 MONTHS CUSTODY, AND I CAN TELL YOU
4 RIGHT NOW THAT THE VICTIM'S FAMILY WOULD NOT BE VERY HAPPY
5 WITH THAT, AND SO I REALLY THINK THAT PSYCHOLOGICAL INJURY
6 FACTORS NEED TO BE INVOLVED IN THOSE PARTICULAR KINDS OF
7 CASES.

8 I WILL MOVE ON A LITTLE BIT NOW ON THIS. ON THE
9 ASSAULT AND BATTERY CHARGES, IT PRETTY MUCH COVERED EVERY
10 ASPECT OF VICTIM PSYCHOLOGICAL IMPACT, AND I WAS PLEASED TO
11 SEE THAT.

12 WITH REGARD TO THE CRIMINAL SEXUAL CONDUCT, I WAS
13 VERY PLEASED TO SEE THAT THERE WERE ADDITIONAL FACTORS
14 INVOLVED WITH CHILD VICTIMS. WE RECENTLY HAD A CASE WHERE A
15 18-YEAR-OLD DEFENDANT HAD SEXUALLY MOLESTED HIS
16 SIX-AND-A-HALF-YEAR-OLD SISTER.

17 HE WAS IN -- SHE WAS IN HIS CARE AND CUSTODY AT
18 THE TIME. THE PARENTS HAD GONE OFF AND LEFT HIM IN CHARGE,
19 AND THERE WERE -- IT WAS MORE THAN ONE INCIDENT, WHEN WE
20 FINALLY FOUND OUT ABOUT IT.

21 WE HAD TO DEAL WITH THAT CHILD, YOU KNOW, GETTING
22 HER THROUGH, EXPLAINING TO HER THE PROCESS THAT YOU HAVE TO
23 GO THROUGH. WE HAD TO INTERVIEW HER A COUPLE OF TIMES
24 GETTING HER READY FOR THE TRIAL.

25 AS IT TURNED OUT, HE PLED GUILTY. IN THOSE

1 INSTANCES, I WOULD HAVE TO SAY THAT IT PROBABLY -- WITH
2 REGARD TO WHETHER IT WOULD BE ADVISABLE TO GIVE A DEFENDANT
3 MORE LIKE, YOU KNOW, TAKE AWAY SOME OF THE BASE OFFENSE VALUE
4 FROM A DEFENDANT IF HE PLEADS PRIOR TO TRIAL, THAT PERHAPS IN
5 A RAPE CASE OR SEXUAL ASSAULT CASE THAT MIGHT BE -- I FEEL
6 LIKE MAYBE THAT OUGHT TO BE -- THE VICTIM OUGHT TO BE
7 CONSIDERED IN THAT.

8 PERHAPS THEY SHOULD -- THE VICTIM SHOULD BE ASKED
9 HIS OPINION ABOUT IT. I KNOW UNDER THE VICTIM WITNESS
10 PROTECTION ACT, THAT IS TAKEN INTO ACCOUNT. THE U.S.
11 ATTORNEY'S OFFICES ARE NOW REQUIRED TO CONSULT WITH THE
12 VICTIMS ON SERIOUS CRIME CASES OF THAT KIND. SO THAT IF --
13 YOU KNOW, IF THE VICTIM IS AGREEABLE THAT THAT WOULD BE THE
14 KIND OF CASE THAT I THINK A BASE OFFENSE VALUE MIGHT BE
15 REDUCED TO KEEP THAT VICTIM FROM HAVING TO GO THROUGH THE
16 TRAUMA OF HAVING TO TESTIFY AND TO HAVE TO -- THE
17 EMBARRASSMENT THAT WOULD RESULT FROM THAT SORT OF TESTIMONY.

18 I WANTED TO REITERATE THAT I THINK THAT YOU MIGHT
19 CONSIDER REQUIRING THE JUDGES TO CONSIDER HAVING VICTIMS
20 TESTIFY AT SENTENCING HEARINGS, BECAUSE MOST VICTIMS -- I
21 SHOULDN'T SAY MOST -- SOME VICTIMS WOULD LIKE THE OPPORTUNITY
22 TO TESTIFY.

23 I DON'T KNOW THAT ALL OF THEM WOULD, AND I THINK
24 THAT IN THAT INSTANCE, THEN MAYBE A REPRESENTATIVE OF THE
25 VICTIM MIGHT. SURELY IN A HOMICIDE CASE OR IN A CASE OF

1 SERIOUS VIOLENT CRIME, A VICTIM'S FAMILY SHOULD BE CONSULTED
2 AND THAT THEY SHOULD BE GIVEN THE OPPORTUNITY TO ADDRESS THE
3 COURT. I HAVE HAD -- BECAUSE I FEEL LIKE WHO BETTER TO
4 ADDRESS THAT PSYCHOLOGICAL INJURY REALLY THAN THE VICTIM.
5 MAYBE THE VICTIMS WOULD NOT BE AGREEABLE TO TESTIFYING, BUT I
6 FEEL LIKE IF THEY WERE GIVEN AN OPPORTUNITY AND MORE VICTIMS
7 DID TESTIFY AT SENTENCING HEARINGS, THAT MORE VICTIMS -- THAT
8 OTHER VICTIMS WOULD COME OUT AND WANT TO MAKE STATEMENTS OF
9 THAT KIND.

10 A FATHER OF A VICTIM OF A DUI HOMICIDE THAT I
11 TALKED TO STATED TO ME THAT HE WOULD HAVE LIKED TO HAVE THE
12 OPPORTUNITY TO TELL HOW HIS DAUGHTER -- HIS DAUGHTER'S
13 STANDING IN THE COMMUNITY.

14 THIS DEFENDANT GOT UP AND WAS ABLE TO, YOU KNOW,
15 TO GIVE TESTIMONY ABOUT HOW HE WAS GOING TO CHURCH AND HIS
16 WONDERFUL STANDING IN THE COMMUNITY. THE FATHER SAID, I WISH
17 I HAD HAD THE OPPORTUNITY TO SAY THAT ABOUT MY DAUGHTER. HE
18 ACTUALLY SAID THAT TO ME. I NEVER MET THE MOTHER IN THAT
19 PARTICULAR CASE, BECAUSE SHE COULDN'T BEAR TO COME TO THOSE
20 PROCEEDINGS.

21 I WILL MOVE ON TO OFFENSES INVOLVING PROPERTY. I
22 THINK THAT THERE ARE SOME OFFENSES THAT ARE NOT CONSIDERED
23 THAT COULD CONCEIVABLY HAVE A PSYCHOLOGICAL IMPACT ON A
24 VICTIM, PARTICULARLY WITH REGARD TO THEFT OF PROPERTY.

25 I HAD A PARTICULAR CASE OF -- A CASE WHERE A

1 FAMILY WAS MOVING FROM THE STATE OF FLORIDA AND HAD ALL OF
2 THEIR POSSESSIONS IN A U-HAUL TRAILER. THEY PARKED OUTSIDE
3 OF A HOTEL IN TENNESSEE TO SPEND THE NIGHT AND THE NEXT
4 MORNING THE TRAILER HAD BEEN STOLEN.

5 EVERY ONE OF THEIR POSSESSIONS HAD BEEN TAKEN.
6 THE WOMAN WAS IN HER LATE 60'S AND SHE WAS HAVING A DEFINITE
7 PROBLEM WITH THE FACT THAT SHE HAD LOST ALL OF HER --
8 EVERYTHING SHE OWNED.

9 SHE HAD TO GO BACK TO WASHINGTON WITH NOTHING.
10 THEY WERE FORTUNATE IN THE FACT THAT THE LAW ENFORCEMENT
11 OFFICERS WERE ABLE TO FIND THE PROPERTY WITHIN 48 HOURS; BUT
12 BEFORE THAT TIME OCCURRED, HER REFRIGERATOR AND STOVE HAD
13 BEEN PLUGGED IN, HAD BEEN USED, AND A LOT OF HER PERSONAL
14 EFFECTS, HER SENTIMENTAL BELONGINGS WERE JUST TRASHED,
15 IRREPLACEABLE.

16 SO, I THINK THAT THAT IS A CONSIDERATION THAT
17 SHOULD BE GIVEN ALSO TO -- I THINK THE SECTION ON THAT WAS
18 A-211, THEFT OF PROPERTY. MAYBE YOU MIGHT CONSIDER PUTTING
19 THAT AS AN ASPECT OF THAT OFFENSE.

20 ALSO, WITH REGARD TO FRAUD AND DECEPTION, I THINK
21 THAT IT'S IMPORTANT TO CONSIDER THE FINANCIAL STATUS OF THE
22 VICTIM. YOU HAVE GOT THIS TABLE THAT SAYS AS FAR AS HOW MUCH
23 WAS TAKEN, YOU KNOW. I THINK THAT IS MORE OR LESS FOR
24 INSTITUTIONS AND CORPORATIONS, LIKE BANKS, THAT IF \$50,000
25 WAS EMBEZZLED, THEN IT'S THIS CERTAIN AMOUNT. WHEN YOU'RE

1 TALKING ABOUT AN INDIVIDUAL, \$50,000 TO SOMEONE WHO HAS A LOT
2 OF MONEY MAY NOT BE SO MUCH.

3 WELL, I SHOULDN'T HAVE USED \$50,000, MAYBE I
4 SHOULD SAY \$250, TO SOMEBODY WHO HAS, YOU KNOW, A SUBSTANTIAL
5 AMOUNT OF MONEY, BUT TO A PERSON WHO -- THIS MIGHT BE THEIR
6 LIFE SAVINGS. THAT SHOULD VERY DEFINITELY BE CONSIDERED IN
7 FRAUD AND DECEPTION CASES, WHAT THE STATUS, FINANCIAL STATUS
8 OF THE VICTIM IS.

9 WITH REGARD TO CHAPTER 3, OFFENDER
10 CHARACTERISTICS, UNDER PART 2, ACCEPTING RESPONSIBILITY, WHEN
11 A DEFENDANT VOLUNTARILY MAKES RESTITUTION OF A SUBSTANTIAL
12 NATURE BEFORE SENTENCING, THIS COULD HAVE A DEFINITE IMPACT
13 ON VICTIMS.

14 I THINK THAT MOST VICTIMS, IF THERE IS NO
15 PSYCHOLOGICAL OR BODILY INJURY, WOULD MORE THAN LIKELY BE
16 WILLING TO ACCEPT THAT. I'M SURE THEY WOULD BE WILLING TO
17 ACCEPT ANY -- A SUBSTANTIAL AMOUNT OF RESTITUTION PRIOR TO
18 THAT PERSON GOING TO TRIAL.

19 I WONDER, THOUGH, WHAT SUBSTANTIAL AMOUNT,
20 SUBSTANTIAL NATURE OF RESTITUTION -- IF THAT COULD BE
21 CLARIFIED, I WOULD APPRECIATE THAT, BUT I THINK THAT ON THE
22 WHOLE, I CAN FORESEE SOME VICTIMS WHO WOULD RATHER SEE,
23 THOUGH, A DEFENDANT PUT IN JAIL THAN TO SEE THE RESTITUTION.

24 SO THERE AGAIN, I THINK THAT VICTIMS' NEEDS SHOULD
25 BE ADDRESSED. VICTIMS SHOULD HAVE THE OPPORTUNITY TO HAVE A

6
1 SAY IN ANY PLEA AGREEMENTS OR SOMETHING LIKE THAT, THAT
2 MIGHT OCCUR PRIOR TO A TRIAL.

3 ANOTHER THING I WOULD LIKE TO SAY ABOUT PROBATION
4 IS THAT IF IT IS GOING TO BE MORE DIFFICULT -- FROM READING
5 THE GUIDELINES, THEY ARE SO COMPLEX. TO BE HONEST ABOUT IT,
6 I'M NOT SURE THAT I UNDERSTAND A LOT OF IT.

7 BUT READING THE GUIDELINES, IF IT IS GOING TO BE
8 MORE DIFFICULT FOR A PERSON TO OBTAIN PROBATION IN THOSE
9 INSTANCES THAT WE HAVE NOW WHERE PROBATION IS MADE A PART OF
10 THE SENTENCE, OF THE -- WHERE RESTITUTION IS MADE A PART OF
11 THE PROBATION, IT IS MORE EASILY AT THIS POINT TO COLLECT
12 PROBATION WHEN IT IS MONITORED BY -- COLLECT RESTITUTION WHEN
13 IT IS MONITORED BY A PROBATION OFFICER.

14 SO I WOULD LIKE FOR YOU TO CONSIDER THAT ASPECT OF
15 IT, TOO, WHEN YOU'RE TALKING ABOUT PROBATION, WHETHER ANY
16 RESTITUTION THAT'S ORDERED WOULD BE A CONDITION OF PROBATION.
17 IT IS EASIER IN THAT REGARD.

18 WE HAVE MORE LEVERAGE OVER THE DEFENDANT. I DON'T
19 KNOW WHAT THE CONSEQUENCES OF NOT PAYING AN ORDER OF
20 RESTITUTION WOULD INVOLVE. I UNDERSTAND RIGHT NOW THE WORST
21 THAT COULD PROBABLY HAPPEN IS THEY COULD BE HELD IN CONTEMPT
22 OF COURT.

23 I DON'T PRETEND TO UNDERSTAND ALL OF THAT, EXCEPT
24 THAT I THINK THAT THAT SHOULD BE CONSIDERED AS FAR AS WHEN
25 SOMEBODY IS BEING PLACED ON PROBATION, RATHER THAN TO --

1 RATHER THAN TO ORDER RESTITUTION SEPARATE AND APART FROM A
2 PROBATIONARY TERM.

3 IN THOSE CASES WHERE THE DEFENDANT IS PLACED IN
4 CUSTODY FOR A TIME AND NOW YOU SUPERVISE RELEASE, THE LENGTH
5 OF THE TERM, I UNDERSTAND THE LENGTH OF THE TERM SUPERVISED
6 RELEASE IS GOING TO BE LESS THAN FIVE YEARS PROBATION.

7 I THINK THE MOST THEY CAN PROBABLY GET FOR A CLASS
8 A TO B TESTIMONY IS THREE YEARS. A LOT OF THE TIMES, IF
9 THERE IS A SUBSTANTIAL AMOUNT OF RESTITUTION, THREE YEARS IS
10 NOT ENOUGH TIME TO PAY IT BACK, AND THOSE THINGS ARE GOING TO
11 HAVE TO BE CONSIDERED WHEN RESTITUTION IS ORDERED, IF THERE
12 IS AN ORDER THAT IT BE MADE COMPLETE AT THAT TIME. IT WOULD
13 EITHER HAVE TO BE EXTENDED, OR THAT SHOULD BE CONSIDERED
14 ALSO.

15 I ALSO THOUGHT IT WAS A GOOD IDEA ON SECTION A-14,
16 IT WAS GOOD TO SEE THAT UNDER THE THREE CONDITIONS OF
17 PROBATION, FINE, RESTITUTION AND COMMUNITY SERVICE, THAT
18 RESTITUTION WOULD HAVE A GREATER IMPACT; THAT THAT WOULD BE
19 CONSIDERED BEFORE FINE, SO I THINK THAT THAT IDEALLY IMPACTS
20 ON THE VICTIM ALSO.

21 THE SECTION A-40, WHICH SAYS NOTICE TO VICTIMS, IF
22 I UNDERSTAND THAT CORRECTLY, IT'S IN REGARD TO THE MAIL FRAUD
23 CASES. I THINK THAT SOUNDS LIKE A GOOD IDEA, IF A VICTIM
24 WERE ABLE TO GET A LETTER FROM A DEFENDANT, IF A DEFENDANT
25 HAD TO MAKE NOTICE TO THE VICTIM HE WAS GOING TO PAY HIM

1 BACK, THEN I THINK THAT VICTIMS WOULD LOOK FAVORABLY ON THAT
2 ALSO.

3 I APPRECIATE HAVING HAD THE OPPORTUNITY TO ADDRESS
4 YOU. I WILL BE GLAD TO TRY TO ANSWER ANY QUESTIONS.

5 CHAIRMAN WILKINS: THANK YOU VERY MUCH. WE'LL
6 HEAR FROM YOU, MS. SHEHANE. DID I PRONOUNCE YOUR NAME
7 CORRECTLY?

8 MS. SHEHANE: YES.

9 THANK YOU. LET ME FIRST STATE I DO APPRECIATE YOU
10 ASKING ME TO APPEAR BEFORE THE COMMISSION AND I COMMEND THE
11 COMMISSION FOR DRAWING UP THE GUIDELINES, MAKING THEM A
12 POLICY FOR SENTENCING, BECAUSE TO VICTIMS, THAT IS VERY
13 IMPORTANT.

14 I WOULD LIKE TO SAY THAT I BECAME A VICTIM
15 ADVOCATE ON A PERSONAL EXPERIENCE. I AM A VICTIM. I REALIZE
16 SOCIETY LABELS ME THE MOTHER OF A VICTIM, BUT I SAY I AM A
17 VICTIM.

18 I WOULD LIKE -- I DON'T THINK I COULD APPEAR
19 BEFORE YOU WITHOUT TELLING YOU MY STORY. I SIMPLY DO THAT TO
20 MAKE YOU AWARE OF HOW VERY IMPORTANT THAT IT IS WHEN IT COMES
21 TO THE SENTENCING. BECAUSE THE VICTIM THROUGHOUT THE
22 JUDICIAL SYSTEM, TO MY WAY OF THINKING, IS TREATED IN A VERY
23 CALLOUS MANNER, FROM THE VERY BEGINNING UNTIL THE END; AND
24 WHEN YOU COME TO THE SENTENCING PART, HOW VERY IMPORTANT IT
25 IS THAT YOU HAVE -- THE VICTIMS KNOW WHAT TO EXPECT.

1 MY VICTIMIZATION STARTED ON DECEMBER THE 20TH,
2 1976; AND WHEN WE START TALKING ABOUT PSYCHOLOGICAL INJURY, I
3 WOULD LIKE TO SAY THAT MY INJURY JUST -- IS JUST AS REAL
4 TODAY AS IT WAS TEN YEARS AGO.

5 OUR DAUGHTER, GWENNETTE, WAS ABDUCTED, RAPED, AND
6 MURDERED ON DECEMBER THE 20TH, 1976, BY THREE COLLEGE
7 STUDENTS. SHE WENT TO A CONVENIENCE STORE TO PURCHASE A
8 BOTTLE OF SALAD DRESSING, SHE AND HER FIANCE WERE GOING TO
9 HAVE STEAKS THAT NIGHT.

10 SHE WAS REPORTED MISSING BY HER FIANCE AFTER
11 SEVERAL HOURS. WE LIVED THREE AND A HALF HOURS AWAY FROM
12 BIRMINGHAM. SHE HAD JUST GRADUATED FROM COLLEGE AND HAD --
13 AND WAS GOING TO GRADUATE SCHOOL AT AUBURN, ON JANUARY THE
14 4TH.

15 WE HAD TO DRIVE THREE AND A HALF HOURS TO
16 BIRMINGHAM. WE WENT TO THE POLICE DEPARTMENT, THE ONLY PLACE
17 WE KNEW TO GO TO GET HELP, AND THE POLICEMAN THAT WAS ON DUTY
18 DID NOT EVEN TRY TO LOOK FOR HER.

19 WE KEPT ASKING AND ASKING AND HE, NOT ONLY ONCE,
20 NOT ONLY TWICE, BUT THE THIRD TIME, HE TOLD ME WHERE TO LOOK
21 FOR HER MYSELF. IT WAS A STRANGE CITY TO ME, OTHER THAN
22 VISITING MY DAUGHTER.

23 AFTER THE THIRD TIME, I LOOKED AT GWENNETTE'S
24 FIANCE AND SAID, WHERE IS HE TALKING ABOUT? AND HE SAID,
25 SOME BAR. AND THIS IS A MATTER -- AND I PREFACE EVERYTHING

1 I'M GOING TO SAY, THERE ARE GOOD POLICEMAN, THERE ARE GOOD
2 JUDGES, AND THERE IS GOING DEFENSE ATTORNEYS, GOOD ATTORNEYS.

3 I'M GOING TO TELL YOU WHAT HAS HAPPENED IN MY -- I
4 WENT THROUGH SEVEN TRIALS. THE FIRST ONE WAS HELD IN
5 BIRMINGHAM. THE SECOND ONE WAS IN MOBILE, BECAUSE THEY
6 REQUESTED A CHANGE OF VENUE BECAUSE OF PUBLICITY.

7 THE THIRD ONE WAS IN BIRMINGHAM AGAIN. ALL RIGHT.
8 AT THAT TIME, IF THEY WERE FOUND GUILTY, THEY AUTOMATICALLY
9 GOT THE DEATH PENALTY. THE FIRST ONE WAS FOUND GUILTY. THE
10 SECOND, WHEN WE GOT IN MOBILE -- THIS WAS SOMETHING THAT WAS
11 VERY SCARY TO ME.

12 I FOUND OUT WE HAD TO GO TWO TO ONE JURY STRIKE,
13 JEFFERSON COUNTY WAS THE ONE -- FEW COUNTIES, MAYBE TWO HAD
14 IT IN ALABAMA, COULD NOT PICK THE JURY. THE PROSECUTION GOT
15 ONE STRIKE. THE DEFENSE ATTORNEY JUST GOT TWO STRIKES.

16 WE WENT IN AT A DISADVANTAGE THERE, BUT THAT -- HE
17 WAS FOUND GUILTY AND THAT WAS THE DEATH SENTENCE. OKAY, WE
18 GOT BACK TO BIRMINGHAM FOR OUR THIRD TRIAL. I HAD ALREADY
19 BEEN THROUGH TWO TRIALS.

20 I HAD LISTENED TO ALL THE AGONIZING EVIDENCE, AND
21 IT WAS AGONIZING, AND I DID GET TO SIT IN THE COURTROOM, BY
22 THE WAY, AND THIS IS SOMETHING -- I WAS NOT A WITNESS -- AND
23 THIS IS SOMETHING THAT NOT ALWAYS HAPPENS.

24 I HAVE A FRIEND WHOSE DAUGHTER WAS MURDERED JUST
25 ABOUT LIKE OURS WAS. SHE WAS SUBPOENAED TO BE A WITNESS,

1 MERELY TO IDENTIFY -- THAT SHE IDENTIFIED HER DEAD DAUGHTER'S
2 CORPSE. SHE WAS DISALLOWED IN THE COURTROOM.

3 THIS WAS THE SAME JUDGE FOR OUR THIRD TRIAL. I
4 DID NOT REALIZE WHAT THIS JUDGE HAD DONE PREVIOUSLY, BUT AS I
5 SAT IN THE TRIAL, I WAS MORE COMPOSED IN THIS TRIAL BECAUSE I
6 HAD HEARD ALL THE EVIDENCE TWICE.

7 I WAS SITTING THERE PATTING MYSELF ON THE BACK
8 BECAUSE I FELT LIKE I WAS MORE COMPOSED; AND AS A 15-MINUTE
9 BREAK WAS CALLED, THE DISTRICT ATTORNEY APPROACHED ME AND
10 SAID THAT THE JUDGE SAID IF I COULD NOT CONTROL MY EMOTIONS,
11 THAT HE WOULD HAVE TO ASK ME TO LEAVE THE COURTROOM.

12 WELL, MY HUSBAND HAS REPEATEDLY SAID THAT I WAS
13 BREATHING AND THAT WAS ABOUT ALL I WAS DOING. WELL, I
14 CONTAINED MYSELF UNTIL I GOT OUT OF THE COURTROOM AND THEN I
15 FELL APART. THE CAMERAS CAUGHT ME AND AT THE 6:00 NEWS, THIS
16 WAS MADE TO APPEAR THAT THIS WAS THE WAY I WAS ACTING IN THE
17 COURTROOM, WHICH I WAS NOT.

18 I WAS DETERMINED TO SIT IN THAT COURTROOM, AND I
19 DID. I DID WITHOUT SHEDDING A TEAR AND THE DEFENSE ATTORNEYS
20 EVEN HAD COURT WATCHERS. THEY WATCHED ME, EVERY MOVE, TO SEE
21 THAT I DID NOT SHED A TEAR, AND I DIDN'T.

22 WELL, AFTER THAT TRIAL, THE SENTENCE WAS COMMUTED.
23 HE WAS FOUND GUILTY, BUT THE JUDGE COMMUTED THE SENTENCE AND
24 IT WAS COMMUTED TO LIFE WITHOUT PAROLE. I UNDERSTAND THE
25 DISTRICT ATTORNEYS WERE NOT SURPRISED.

1 IT WAS DEVASTATING TO ME, BECAUSE I DIDN'T EXPECT
2 IT, BUT I FOUND OUT THIS SAME JUDGE COMMUTED EVERY SENTENCE
3 THAT CAME BEFORE HIM THAT GOT A DEATH SENTENCE, WAS FOUND
4 GUILTY.

5 WITHOUT KNOWING IT -- I HAVE TWO OTHER LIVING
6 CHILDREN, A DAUGHTER AND A SON -- WITHOUT KNOWING WHAT THE
7 OTHER WOMAN WAS DOING, WE ALL SAT DOWN AND WROTE THIS JUDGE.
8 HE DID NOT ANSWER MY LETTER BECAUSE I DON'T THINK HE KNEW
9 HOW, BUT HE ANSWERED MY CHILDREN'S LETTER.

10 HE SENT THEM A PAGE OUT OF A PSYCHOLOGY BOOK THAT
11 SAID THE DEATH PENALTY WAS NOT A DETERRENT TO CRIME. THIS
12 LET ME KNOW THAT HE DID NOT BELIEVE IN THE DEATH PENALTY.
13 WELL, EVEN THOUGH I WAS DISILLUSIONED WITH THE SENTENCE, WITH
14 THE WHOLE SYSTEM, I WAS -- I THOUGHT THAT WAS THE END OF MY
15 TRIALS.

16 AFTER COMING BACK FROM MOBILE, I THOUGHT, WELL,
17 HOW UNFAIR THIS IS TO THE VICTIM TO HAVE TO HAVE A
18 DISADVANTAGE GOING INTO COURT, AND I WAS THINKING WHAT I
19 COULD DO. I THOUGHT MY TRIALS WERE OVER.

20 I WAS THINKING, WHAT CAN I DO TO HELP OTHER
21 VICTIMS? AND I ASKED MY REPRESENTATIVE TO INTRODUCE IN THE
22 LEGISLATURE TO EQUALIZE THE SELECTION OF THE JURY. HE DID,
23 TO NO AVAIL.

24 I COULDN'T UNDERSTAND THAT BECAUSE MOST PEOPLE
25 DIDN'T KNOW HOW THE JURY WAS SELECTED IN THE FIRST PLACE, AND

1 EVERYONE I COULD TALK TO WAS IN FAVOR OF IT, BUT I REALIZED
2 WHAT WAS HAPPENING, THAT OUR LEGISLATURE WAS FILLED WITH
3 DEFENSE ATTORNEYS AND THAT'S HOW THEY MAKE THEIR LIVING.

4 IT COULDN'T GET OUT OF COMMITTEE. THE CHAIRMAN
5 WAS A DEFENSE ATTORNEY, BUT NONETHELESS IT WAS INTRODUCED.
6 THIS WAS A MIRIAM ONE-PERSON CRUSADE THAT I WAS TRYING TO GET
7 PASSED.

8 BEFORE WE COULD DO ANYTHING ELSE, I FOUND OUT HOW
9 UNFAIR OTHER THINGS -- WE HAVE LITTLE TECHNICALITIES AND IT'S
10 NOT A MATTER OF WHETHER THEY ARE INNOCENT OR GUILTY. I FOUND
11 OUT THAT THE VERDICT OF THE FIRST TRIAL WAS SET ASIDE BECAUSE
12 THE FORM THAT THEY USED ON THE VERDICT, THAT THE JURY USED,
13 HAD A LITTLE TECHNICALITY. I THINK THEY -- THE WORDING OF
14 IT. I DON'T KNOW EXACTLY HOW IT WAS WORDED, BUT WE HAD TO GO
15 BACK AND HAVE ANOTHER TRIAL BECAUSE OF THIS LITTLE
16 TECHNICALITY.

17 AS THE VICTIM'S FAMILY, WHEN YOU HEAR ALL OF THIS
18 EVIDENCE, IT'S JUST LIKE MURDERING THEM ALL OVER AGAIN. AND
19 I HAD A LOT OF PEOPLE TO ASK ME, WHY WOULD YOU WANT -- WHY
20 WOULD YOU WANT TO GO TO THE TRIALS? AND ALL I COULD SAY IS,
21 WHY DON'T YOU ASK THE DEFENDANT'S FAMILY WHY THEY WANT TO GO
22 TO THE TRIAL? SHE WAS MY DAUGHTER.

23 WE HAD THE TRIAL AGAIN. HE WAS FOUND GUILTY,
24 AUTOMATIC DEATH, AND IT WAS UPHELD, AND THEN WE THOUGHT IT
25 WAS OVER AGAIN, BUT BEFORE OUR -- I KNEW THAT MY EDUCATION IN

1 THE JUDICIAL SYSTEM WAS VERY LIMITED, AS I FOUND OUT MOST
2 CITIZENS' ARE.

3 I KNEW THEY HAD APPEALS. THEY HAD AUTOMATIC
4 APPEALS, BUT I THOUGHT THAT IT WAS A MATTER OF WHETHER THE
5 COURTS FOUND THEM INNOCENT OR GUILTY. I DIDN'T KNOW OF ALL
6 THESE LITTLE TECHNICALITIES.

7 BEFORE OURS COULD GET TO THE UNITED STATES SUPREME
8 COURT, WE FOUND OUT THAT ALABAMA'S DEATH PENALTY HAD BEEN
9 RULED UNCONSTITUTIONAL, AND I WAS INFORMED THAT WE WOULD HAVE
10 TO GO BACK THROUGH THE TRIALS AGAIN.

11 HERE I AM, AND OUR FAMILY, ARE GOING TO THE COURT,
12 TO THE TRIALS. I WORK FULL TIME AND I WAS TAKING MY VACATION
13 TIME. THIS WAS THREE YEARS THAT I NEVER KNEW WHAT TO EXPECT.
14 AND WE HAD TO GO OUT OF TOWN, SPEND A WEEK IN MOTELS AT OUR
15 EXPENSE.

16 WE DIDN'T HAVE A COMPENSATION BOARD AT THAT TIME,
17 BUT WE GO THROUGH THREE MORE TRIALS, BUT WHEN I THOUGHT --
18 NOT ONLY DID I KNOW THAT WE HAD TO HAVE THE THREE TRIALS, BUT
19 I FOUND OUT WE HAD TO HAVE THE SAME JUDGES.

20 WELL, WE HAD SIX GOOD JUDGES, BUT THIS ONE JUDGE
21 FRIGHTENED ME, AND IT WAS -- I WAS JUST SICK THAT I WOULD
22 HAVE TO SIT IN HIS COURTROOM AGAIN. I IMMEDIATELY WROTE THE
23 PRESIDING JUDGE TO PLEASE ASSIGN ANOTHER JUDGE TO THIS CASE.

24 HE WROTE ME BACK THE COLDEST LETTER THAT I HAVE
25 EVER RECEIVED, JUST SIMPLY STATING THAT HE WOULD BE THE

1 JUDGE, BUT I THOUGHT, WELL, MAYBE WE WON'T HAVE TO GO THROUGH
2 THIS TRIAL.

3 HE'S ALREADY COMMUTED IT TO LIFE WITHOUT PAROLE,
4 AND THIS DEALS WITH THE DEATH PENALTY. HE'S NOT GOING TO GET
5 DEATH, BUT I FOUND OUT WE DO HAVE TO HAVE THIS TRIAL AGAIN.
6 WE HAD EVERYTHING TO LOSE; THEY HAD EVERYTHING TO GAIN.

7 THEY COULD GET LESS, BUT THEY SURELY -- IT'S NOT A
8 NEW BALLGAME. IT'S NOT A NEW BALLGAME. IF IT HAD BEEN A NEW
9 BALLGAME, I COULD HAVE UNDERSTOOD WHY WE HAD TO HAVE THIS,
10 WHEN THEY DID NOT GET THE DEATH SENTENCE ANY WAY.

11 WE HAD THE FIRST TRIAL AGAIN AND THE JURY CAME
12 BACK WITH A VERDICT, LIFE, AND THAT WAS ALSO DEVASTATING TO
13 ME. I WILL NEVER BELIEVE TO MY DYING DAY THAT THAT JURY KNEW
14 WHAT "LIFE" MEANT.

15 I DO NOT BELIEVE THAT THEY COULD HAVE POSSIBLY
16 KNOWN THAT HE WILL BE ELIGIBLE FOR PAROLE THIS FEBRUARY. I
17 DO NOT BELIEVE THAT -- EVEN THOUGH HE MIGHT NOT GET PAROLE
18 THIS FEBRUARY, THAT HE WILL BE ELIGIBLE IN THREE-YEAR
19 INTERVALS FOR PAROLE AGAIN.

20 NOW, I HAVE TO GO THROUGH MY LIFE WONDERING WHEN
21 HE IS GOING TO GET PAROLED, AND I THINK HE WILL BE IN MY
22 LIFETIME, AND I DON'T THINK THAT'S -- I THINK THEY COULD NOT
23 BE -- THEY WERE NOT INSTRUCTED THAT LIFE DID NOT MEAN LIFE.
24 I HAVE KNOWN -- I DO KNOW THAT SOME OF THE JURORS SAID THAT
25 THEY DID NOT KNOW THAT LIFE DID NOT MEAN LIFE.

1 THE SECOND ONE IS IN MOBILE AGAIN, AND BY THIS
2 TIME -- BY THE WAY, WE DID HAVE IT ON AN EQUAL BASIS. WE HAD
3 PASSED THE ONE-TO-ONE JURY STRIKE. I FELT BETTER ABOUT THAT.

4 HE WAS FOUND GUILTY AND THE JURY DID GIVE HIM --
5 RECOMMEND DEATH AND WAS UPHELD BY THE JUDGE. WE STILL HAD
6 THE ONE CASE WHERE ONE WAS COMMUTED TO LIFE WITHOUT PAROLE.

7 INCIDENTALLY, WE DID NOT HAVE THE SAME JUDGE. HE
8 COMMUTED ONE DEATH PENALTY TOO MANY, AND UNDER -- THIS
9 JURY -- SO MUCH PUBLICITY UNTIL HE RESIGNED UNDER PRESSURE.
10 SO WHEN WE WENT BACK TO MOBILE FOR THE THIRD TRIAL, WE DID
11 NOT HAVE THE SAME JUDGE.

12 THE JURY FOUND HIM GUILTY AND HE GOT LIFE WITHOUT
13 PAROLE PREVIOUSLY. I THOUGHT IT WAS ALL OVER AGAIN. AUGUST
14 ONE YEAR AGO, THE ONE THAT GOT THE DEATH SENTENCE REQUESTED A
15 NEW HEARING FOR ANOTHER TRIAL.

16 HE CLAIMED THAT THERE WAS A PSYCHOLOGICAL
17 EVALUATION THAT WAS NOT USED. HE HAD A -- IN HIS FIRST
18 TRIAL, HE HAD A REPRESENTATIVE FROM SOUTHERN PROPERTY LOSS
19 CENTER THAT REPRESENTED HIM ALONG WITH HIS APPOINTED
20 ATTORNEY, AND HE DIDN'T USE THIS PSYCHOLOGICAL EVALUATION
21 EITHER, BECAUSE THE PSYCHIATRIST NEVER SAW HIM.

22 HE WAS DENIED A NEW TRIAL, BUT WHAT I DIDN'T
23 REALIZE, HE HAD ALREADY GONE THROUGH HIS APPEAL SYSTEM. IT
24 GOES THROUGH THESE APPEAL SYSTEMS, IT STARTS ALL OVER AGAIN
25 ON THIS ONE TECHNICALITY.

1 THEN I ASKED, HOW LONG CAN THIS GO ON? AND THEY
2 TOLD ME THEY DIDN'T KNOW; ANY TIME THAT HE COULD COME UP WITH
3 A LITTLE TECHNICALITY AND THEN IT GOES THROUGH THE APPEAL
4 SYSTEM.

5 I SAY SOCIETY WILL NOT LET ME BURY MY DAUGHTER.
6 THEY'LL NOT LET ME BURY MY DAUGHTER. IT HAS BEEN 10 YEARS,
7 AND I DO NOT BELIEVE THIS IS WHAT OUR FOREFATHERS INTENDED.

8 GWENNETTE DID NOT DESERVE THIS. I DIDN'T DESERVE
9 THIS. AS I SAY, I THINK WHEN IT COMES TO THE SENTENCING,
10 PLEASE GIVE US SOME INDICATION OF WHAT TO EXPECT. I THANK
11 YOU.

12 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MS.
13 SHEHANE. YOUR APPEARANCE AND TESTIMONY IS MOST IMPORTANT,
14 FOR YOU REINFORCE THIS COMMISSION'S BELIEF THAT WE NEED TO
15 EMPHASIZE THE RIGHTS OF VICTIMS IN ANY JUSTICE SYSTEM AND
16 CERTAINLY WITHIN ANY GUIDELINE SYSTEM THAT WE ARE WRITING.
17 THANK YOU SO MUCH FOR COMING.

18 MS. SHEHANE: I APPRECIATE YOU ASKING ME. THANK
19 YOU SO MUCH.

20 CHAIRMAN WILKINS: THANK YOU. MS. O'BYRNE, IT'S
21 OBVIOUS TO US THAT YOU HAVE STUDIED OUR GUIDELINES AND I
22 APPRECIATE YOUR COMMENTS. I THINK YOU'RE RIGHT ABOUT LEVEL
23 3 -- LEVEL 4 AND 5 IN HOMICIDE. WE WILL GO BACK AND TAKE
24 ANOTHER LOOK AT THAT.

25 THAT'S WHAT THIS HEARING IS ALL ABOUT, TO POINT

1 OUT THINGS THAT WE HAVE OVERLOOKED. WE APPRECIATE IT VERY
2 MUCH.

3 ANY QUESTIONS TO MY RIGHT? ANY QUESTIONS TO MY
4 LEFT?

5 COMMISSIONER BREYER: I JUST HAVE ONE COMMENT.
6 YOUR VERY MOVING AND EFFECTIVE TESTIMONY POINTS UP TO ME ONE
7 OF THE PROBLEMS THAT WE HAVE. IF I COMPARED THE TWO OF YOU
8 TOGETHER AND IT'S A DIFFICULT -- IT'S A TECHNICAL PROBLEM,
9 BUT IT'S A PROBLEM.

10 I DON'T THINK ANYONE DOUBTS THAT WE OUGHT TO TAKE
11 INTO ACCOUNT PRECISELY WHAT YOU ARE TALKING ABOUT. THE
12 PROBLEM IS HOW. THE REASON THAT'S A PROBLEM WAS REALLY
13 POINTED OUT TO ME VERY MUCH BY YOUR TESTIMONY.

14 A PERSON WHO IS GUILTY -- IMAGINE A PERSON WHO IS
15 GUILTY. A PERSON WHO IS GUILTY SHOULD BE PUNISHED. IT'S
16 QUITE SIMPLE. UNDER OUR SYSTEM ALREADY, THERE MAY BE
17 SUPPRESSION HEARINGS. THERE MAY BE PROCEDURAL MATTERS.
18 THERE MAY BE TRIALS. THERE MAY BE APPEALS. THERE MAY BE
19 REVERSALS.

20 THERE MAY BE NEW TRIALS, AND NOW HOW CAN WE BOTH
21 TAKE YOUR PROBLEMS INTO ACCOUNT AND NOT CREATE A WHOLE NEW
22 SET OF PROCEDURES WHERE THERE ARE GOING TO BE SENTENCING
23 HEARINGS, AND THEN FACT FINDING, AND THEN APPEALS FROM THE
24 FACT FINDING, AND THEN REVERSALS OF THE FACT FINDING, AND
25 THEN NEW EXPERTS ON BOTH SIDES.

1 NOW, YOU SEE, I POINT THAT OUT BECAUSE, OF COURSE,
2 WE SHOULD TAKE INTO ACCOUNT THIS IMPACT ON THE VICTIM; AND
3 WHAT YOU HAVE BEEN HEARING THIS MORNING, I THINK, IS LESS OF
4 DISAGREEMENT WITH THAT THAN IT HAS BEEN CONCERNED WITH HOW TO
5 TAKE IT INTO ACCOUNT WITHOUT DISRUPTING THE EFFECTIVENESS OF
6 THE PROCEEDING AND CREATING A WHOLE LOT OF NEW PROCEDURAL
7 PROBLEMS.

8 THAT'S WHY I SAY NONE OF THESE PROBLEMS ARE EASY.
9 THAT'S THE KIND OF DILEMMA I THINK YOU HAVE HEARD. |

10 MS. SHEHANE: IF I MAY SAY ONE THING -- I DON'T
11 KNOW WHETHER THIS DEALS WITH SENTENCING OR NOT -- BUT ONE
12 THING THAT HAS OCCURRED TO ME, I DO NOT WANT TO TAKE ANY OF
13 THE RIGHTS AWAY FROM THE DEFENDANT. I THINK HE SHOULD BE
14 GIVEN A FAIR TRIAL.

15 SOMEWHERE DOWN THE LINE I THINK THERE SHOULD BE A
16 NUMBER OF YEARS SET; AND IF HE DOESN'T COME UP WITH CONCRETE
17 EVIDENCE THAT HE NEEDS A NEW TRIAL, THEN 10 YEARS DOWN THE
18 LINE, HE SHOULD NOT BE ALLOWED TO.

19 I THINK IN A CERTAIN PERIOD OF TIME THEY SURELY
20 KNOW WHAT THEY CAN -- BUT THIS DRAGGING OUT YEARS AND YEARS
21 AND YEARS IS AGONIZING.

22 CHAIRMAN WILKINS: THANK YOU SO MUCH. THANK YOU.
23 GO AHEAD.

24 MS. O'BYRNE: LET ME MAKE A STATEMENT REGARDING
25 JUDGE BREYER. UNDER THE VICTIM WITNESS PROTECTION ACT, AND I

1 STATE THAT BECAUSE I HAVE STUDIED IT IMMENSELY WITH RELATION
2 TO MY JOB; I CAN'T SAY I HAVE DONE IT AS WELL WITH THESE
3 GUIDELINES -- BUT THERE IS A VICTIM IMPACT STATEMENT THAT IS
4 NOW REQUIRED BY THE PROBATION OFFICE. I DON'T HAVE THE
5 SUGGESTION AT THIS POINT.

6 THE THOUGHT COMES TO MIND THAT, YOU KNOW, THAT
7 INFORMATION THAT THOSE VICTIMS ARE ABLE TO PORTRAY TO THE
8 JUDGE, EVEN AT THIS POINT IN THE PROCESS, EVEN BEFORE THESE
9 GUIDELINES WERE PASSED, SHOULD HAVE AN IMPACT AND I WONDER IF
10 WE -- PERHAPS IF IT WAS EVEN CONSIDERED AS AN AGGRAVATING
11 FACTOR --

12 COMMISSIONER BREYER: THAT'S POSSIBLE.

13 MS. O'BYRNE: -- AND MAYBE THE JUDGES WERE ABLE TO
14 MODIFY THE SENTENCE ABOVE THE GUIDELINES, EVEN IF THERE IS SO
15 MUCH CONTENTION OVER THE PSYCHOLOGICAL IMPACT AND THE EXPERT
16 TESTIMONY ASPECT OF IT, THEN MAYBE THAT WOULD BE A
17 CONSIDERATION.

18 COMMISSIONER BREYER: I THINK THAT'S A --

19 MS. O'BYRNE: AS FAR AS ALL OF THE OTHER SO ON AND
20 SO ON AND SO ON, I DON'T REALLY HAVE AN ANSWER AT THIS POINT.
21 I DON'T GUESS ANYBODY DOES, BUT THAT'S SOMETHING THAT I THINK
22 REALLY NEEDS TO BE CONSIDERED.

23 CHAIRMAN WILKINS: THANK YOU VERY MUCH. THANK
24 YOU. YOU'RE EXCUSED, MA'AM.

25 OUR NEXT TWO WITNESSES ARE TWO DISTINGUISHED

1 ATTORNEYS FROM HERE IN ATLANTA, MR. LARRY D. THOMPSON, FORMER
2 UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF GEORGIA,
3 MR. MICHAEL DOYLE, ATTORNEY PRACTICING HERE IN ATLANTA WITH
4 THE FIRM OF ALSTON & BYRD. MR. THOMPSON IS NOW WITH KING &
5 SPALDING.

6 GENTLEMEN, WE ARE DELIGHTED TO HAVE YOU. WE
7 APPRECIATE YOU TAKING YOUR TIME FROM YOUR PRIVATE PRACTICE TO
8 ASSIST US IN IMPORTANT TASK.

9 MR. THOMPSON: I HAVE A WRITTEN STATEMENT. SHOULD
10 I GIVE IT TO SOMEONE?

11 CHAIRMAN WILKINS: MR. STEER, COME AROUND AND PICK
12 IT UP, MR. THOMPSON. WE APPRECIATE THAT VERY MUCH.

13 MR. THOMPSON: MEMBERS OF THE COMMISSION, I AM
14 LARRY THOMPSON. I WOULD LIKE TO TAKE THIS OPPORTUNITY TO
15 CONGRATULATE YOU FOR COMPLETING THE PRELIMINARY DRAFT OF THE
16 SENTENCING GUIDELINE AS REFLECTED BY THE OVERWHELMING VOTE IN
17 CONGRESS FOR THE PASSAGE OF THE COMPREHENSIVE CRIME CONTROL
18 ACT OF 1984, WHICH CREATED THE COMMISSION, I THINK THE
19 GUIDELINES ARE MUCH NEEDED.

20 DURING MY TENURE, JUDGE WILKINS, AS UNITED STATES
21 ATTORNEY, I HAD THE OPPORTUNITY TO MEET MANY PEOPLE
22 THROUGHOUT THIS DISTRICT, 46 COUNTIES IN NORTH GEORGIA, AND
23 NOTHING WAS MORE PERPLEXING TO THE AVERAGE CITIZEN OR SERVED,
24 I THINK, TO UNDERMINE THE CRIMINAL JUSTICE SYSTEM MORE THAN
25 THE PROSPECT THAT THE CITIZENS HAD -- INDIVIDUALS WHO WERE

1 SENT -- WHO HAD SIMILAR CRIMINAL RECORDS OR WHO WERE
2 CONVICTED OF THE SAME GENERAL CRIMINAL CONDUCT RECEIVING
3 DISPARATE SENTENCES. THAT SERVED MORE THAN ANYTHING TO
4 CONFUSE THE AVERAGE CITIZEN AND TO UNDERMINE RESPECT FOR THE
5 LAW AND OUR CRIMINAL JUSTICE SYSTEM.

6 I WELCOME THE SENTENCING GUIDELINES, I THINK,
7 WHICH ARE DESIGNED TO INCREASE CERTAINTY AND FAIRNESS IN THE
8 SENTENCING PROCESS.

9 I BELIEVE THAT WITH THIS INCREASED CERTAINTY, WE
10 WILL HAVE IMPROVED DETERRENCE, AND IT IS EXTREMELY IMPORTANT
11 FOR AVERAGE CITIZENS TO BELIEVE THAT OUR CRIMINAL JUSTICE
12 SYSTEM IS WORKING FOR THEM AS OPPOSED TO CRIMINALS AND
13 HELPING TO IMPROVE DETERRENCE.

14 NOW, I HAVE HAD -- NOT HAD AN OPPORTUNITY TO
15 REVIEW IN DETAIL AND FULLY CONSIDER ALL THE PROVISIONS OF THE
16 GUIDELINES, AND AS ONE WOULD EXPECT IN A PROJECT OF THIS
17 MAGNITUDE, SOME PROVISIONS HAVE, AS I REVIEWED THEM, CAUSED
18 ME TO PAUSE.

19 I WAS AN ANTITRUST PRACTITIONER BEFORE I TOOK THE
20 POSITION OF UNITED STATES ATTORNEY, AND I AM NOW AN ANTITRUST
21 PRACTITIONER. I WILL BRING TO THE ATTENTION OF THE
22 COMMISSION ONE CONSIDERATION THAT I HAVE WITH RESPECT TO
23 PRICE-FIXING OFFENSES.

24 I WILL NOT ELABORATE ON THEM IN MY ORAL COMMENTS,
25 BUT WILL REFER YOU TO MY WRITTEN COMMENTS. I DO BELIEVE THAT

1 WE NEED TO CONSIDER ESTABLISHING SOME BASE OFFENSE VALUE TO
2 THE PRICE-FIXING OFFENSE AND NOT USE THE CONSIDERATION OF THE
3 AMOUNT OF COMMERCE INVOLVED SOLELY AS THE DETERMINATION OF
4 THE BASE OFFENSE VALUE.

5 I WOULD COMMEND THE COMMISSION TO LOOK AT MAKING
6 SOME KIND OF DETERMINATION AS TO THE NATURE AND STRUCTURE OF
7 THE PRICE-FIXING AGREEMENT ITSELF, AS WELL AS TO CONSIDERING
8 OFFENDER CHARACTERISTICS WITH RESPECT TO THE INDIVIDUAL
9 PARTICIPANTS IN ANY GIVEN PRICE-FIXING CONSPIRACY.

10 I DO NOT THINK THAT IT'S APPROPRIATE TO CONSIDER
11 JUST THE NATURE OF THE COMMERCE INVOLVED IN DETERMINING THE
12 BASE OFFENSE VALUE FOR PRICE-FIXING OFFENSES.

13 I WOULD ALSO LIKE TO POINT OUT THERE HAS BEEN SOME
14 CONTROVERSY WITH RESPECT TO THE GUIDELINES IN THAT THE
15 GUIDELINES DO PROVIDE FOR SOME TERM OF IMPRISONMENT UNDER
16 APPROPRIATE CIRCUMSTANCES AFTER CONSIDERING BASE OFFENSE
17 VALUES AND OFFENDER CHARACTERISTICS.

18 THEY DO CONSIDER SOME TERM OF IMPRISONMENT FOR
19 MOST VIOLATIONS OF FEDERAL LAW AND THERE IS SOME CONTROVERSY
20 AS TO WHETHER OR NOT A TERM OF IMPRISONMENT SHOULD BE
21 CONSIDERED FOR NON-VIOLENT OFFENSES.

22 I BELIEVE THAT THE GUIDELINES SHOULD NOT
23 COMPLETELY RULE OUT IMPRISONMENT FOR NON-VIOLENT CRIMINAL
24 OFFENSES. FOR EXAMPLE, DURING MY TENURE AS UNITED STATES
25 ATTORNEY, MY OFFICE ALONG WITH THE FBI AND AN AGENCY HERE IN

1 THE STATE OF GEORGIA CALLED THE GEORGIA DRUGS AND NARCOTICS
2 AGENCY, UNDERTOOK AN IMPORTANT NATIONWIDE INVESTIGATION INTO
3 AN ILLEGAL DIVERSION OF PRESCRIPTION PHARMACEUTICALS.

4 SEVERAL OF THE DEFENDANTS IN THAT INVESTIGATION
5 RECEIVED JAIL SENTENCES, AND I THINK THAT THESE SENTENCES
6 SERVED AN ALL-IMPORTANT FUNCTION OF DETERRENCE. I WILL REFER
7 TO YOU THE STATEMENT IN MY WRITTEN COMMENTS FROM THE
8 HONORABLE RICHARD FREEMAN OF THE NORTHERN DISTRICT OF GEORGIA
9 CONCERNING A SENTENCING OF ONE OF THE DEFENDANTS AND HOW THAT
10 I THINK THAT STATEMENT THAT HE MADE DURING THE SENTENCING
11 HEARING SERVED AN ALL-IMPORTANT FUNCTION OF DETERRENCE IN
12 THAT PARTICULAR INVESTIGATION.

13 HOWEVER, BECAUSE I BELIEVE THAT IMPRISONMENT
14 SHOULD NOT BE RULED OUT, I URGE YOU TO CONSIDER VERY
15 CAREFULLY, ESPECIALLY IN THE NON-VIOLENT OFFENSES, TO
16 CONSIDER VERY CAREFULLY THE DETERMINATION OF BASE OFFENSE
17 VALUES AND THE DETERMINATION OF HOW THE APPLICATION OF THE
18 VARIOUS OFFENDER CHARACTERISTICS WILL WORK.

19 YOU HAVE ASKED FOR COMMENTS ON SEVERAL AREAS. I
20 WOULD BRIEFLY LIKE TO RESPOND TO TWO OF THEM. I THINK A
21 GUILTY PLEA, ESPECIALLY PURSUANT TO A PLEA AGREEMENT, SHOULD
22 ALWAYS BE CONSIDERED AS A MITIGATING FACTOR IN SENTENCING
23 UNLESS THE COURT DETERMINES THAT THE PLEA WAS MERELY
24 SELF-SERVING OR WAS ENTERED IN BAD FAITH OR IF THE PLEA
25 AGREEMENT BETWEEN THE GOVERNMENT AND THE DEFENDANT WAS

1 SOMEHOW TAINTED.

2 IN MANY INSTANCES, AND ESPECIALLY IN WHITE-COLLAR
3 CRIME CASES INVOLVING ORGANIZATIONS, THE GUILTY PLEA, I
4 THINK, PURSUANT TO A PLEA AGREEMENT IS AN IMPORTANT FIRST
5 STEP FOR THE DEFENDANT ACCEPTING RESPONSIBILITY FOR THE
6 OFFENSE.

7 I THINK IT DOES SERVE THE IMPORTANT FUNCTION TO
8 CONSERVE THE LIMITED RESOURCES OF THE CRIMINAL JUSTICE
9 SYSTEM, ESPECIALLY IN MANY OF THESE WHITE-COLLAR CRIME CASES
10 IN WHICH THEY ARE COMPLEX AND LENGTHY.

11 I THINK THIS APPROACH DOES NOT PRECLUDE A COURT
12 FROM FURTHER REDUCING A SENTENCE PURSUANT TO THE GUIDELINES,
13 IF THE OTHER INDICIA CONTRIBUTED ARE DETERMINED BY THE
14 SENTENCING COURT.

15 YOU HAVE ALSO REQUESTED COMMENTS CONCERNING
16 ALTERNATIVE APPROACHES TO ORGANIZATIONAL SANCTIONS, AND BASED
17 UPON MY EXPERIENCE AS A PRACTITIONER, AS WELL AS MY
18 EXPERIENCE AS UNITED STATES ATTORNEY, I DO BELIEVE THAT THE
19 JUST PUNISHMENT APPROACH THAT YOU OUTLINE IN THE GUIDELINES
20 IS A MORE APPROPRIATE APPROACH TO ORGANIZATIONAL SANCTIONS,
21 AND I THINK PROPERLY REFLECTS THE ROLE OF A CORPORATION IN
22 TODAY'S SOCIETY.

23 A CRIME, OF COURSE, MAY BE THE RESULT OF A
24 CONSCIOUS PLAN OF A CORPORATION'S TOP MANAGEMENT, BUT MANY
25 TIMES, AND MOST TIMES, IN MY EXPERIENCE WITH RESPECT TO LARGE

1 CORPORATIONS, IT MAY ALSO BE THE RESULT OF INDEPENDENT
2 ACTIONS OF LOWER-LEVEL EMPLOYEES.

3 THE CORPORATION, FOR EXAMPLE, MAY NOT EVEN HAVE
4 BENEFITED FROM THE ILLEGAL ACTIONS OF THE EMPLOYEES, AND THE
5 CORPORATION MAY HAVE TAKEN TOUGH MEASURES TO DISCIPLINE ITS
6 ERRANT EMPLOYEES.

7 I THINK THESE ARE ALL IMPORTANT FACTORS THAT
8 SHOULD BE CONSIDERED IN THE SENTENCING PROCESS, ESPECIALLY
9 WITH RESPECT TO THE DETERMINATION OF ORGANIZATIONAL SANCTIONS
10 AND, THEREFORE, I THINK THE JUST PUNISHMENT APPROACH, AS YOU
11 CALL IT IN THE GUIDELINES AND AS OUTLINED IN THE GUIDELINES,
12 IS THE PREFERABLE APPROACH TO ORGANIZATIONAL SANCTIONS.

13 I ALSO COMMEND TO YOU THE CASE AUTHORITY LISTED IN
14 THE OUTLINE, WHICH I THINK SUPPORTS THE APPLICATION OF THE
15 JUST PUNISHMENT APPROACH FOR ORGANIZATIONAL SANCTIONS,
16 ESPECIALLY THE STANDARD OIL OF TEXAS CASE.

17 I WILL BE HAPPY TO ANSWER ANY QUESTIONS ANY OF THE
18 MEMBERS OF THE COMMISSION MAY HAVE AFTER MY COLLEAGUE, MR.
19 DOYLE, HAS MADE HIS PRESENTATION.

20 CHAIRMAN WILKINS: THANK YOU. MR. DOYLE?

21 MR. DOYLE: JUDGE WILKINS AND MEMBERS OF THE
22 COMMISSION, I AM PLEASED TO BE HERE. YOU HAVE LABORED AND
23 BROUGHT FORTH A MIGHTY SENSE OF ORDER TO WHAT TO ME, AS A
24 PRACTITIONER, HAS BEEN A VERY CONFUSING AREA.

25 I WILL IN RESPONSE BE VERY MUCH RIFLE SHOT DRAWING

1 ON MY EXPERIENCE PRIMARILY AS AN ANTITRUST PRACTITIONER HERE
2 IN ATLANTA, WHICH IN RECENT YEARS HAS INVOLVED CONSIDERABLY
3 MORE CRIMINAL LAW EXPERIENCE, CRIMINAL ANTITRUST EXPERIENCE
4 BECAUSE OF THE ENFORCEMENT POLICIES OF THE ANTITRUST
5 DIVISION.

6 MY READING OF THE GUIDELINES AS THEY DEAL WITH
7 SHERMAN ACT AND ANTITRUST PRICE-FIXING VIOLATIONS INDICATES
8 TO ME THAT ALL PRICE FIXING VIOLATIONS, ALL MARKETING
9 RESTRICTIVE PRICING AGREEMENTS, ARE TREATED THE SAME BUT FOR
10 THE ONE VARIATION OF DOLLAR VALUE OF COMMERCE.

11 IT HAS BEEN MY EXPERIENCE FROM A CLOSE-UP VIEW
12 THAT THERE ARE A MYRIAD OF DIFFERENT KINDS OF PRICE-FIXING
13 CASES, WITH MYRIADS OF DISSIMILARITIES; AND IN THE
14 COMMISSION'S INTEREST OF TREATING SIMILARLY, SIMILAR CRIMES,
15 THOSE DISSIMILARITIES SHOULD BE ACCOUNTED FOR.

16 THE KINDS OF THINGS I THINK OF ARE THOSE
17 CONSPIRACIES ON THE ONE HAND WHICH TAKE PLACE CONSCIOUSLY IN
18 SMOKE-FILLED ROOMS ON A RECURRING AND REPETITIVE BASIS. THAT
19 IS AT THE HARDEST OF THE HARD CORE.

20 WHILE THE REPETITIVE ASPECT OF THAT CRIME WILL, IN
21 FACT, INCREASE THE OFFENSE VALUE UNDER YOUR SCHEME BECAUSE OF
22 THE INCREASED COMMERCE, NONETHELESS THAT IS AT THE HIGH END,
23 WHETHER OR NOT THE COMPANIES INVOLVED OR THE INDIVIDUALS
24 INVOLVED ARE LOCAL BRANCHES OF NATIONAL COMPANIES OR WHETHER
25 THEY ARE INDEPENDENT OPERATORS IN A SMALL LOCAL MARKET.

1 IT'S CLEAR IN THOSE CIRCUMSTANCES THAT THE
2 OFFENDERS KNEW WHAT THEY WERE ABOUT WAS ILLEGAL, TOOK STEPS
3 TO PROTECT SECRECY AND WERE VERY CONSCIOUS AND DELIBERATE
4 ABOUT IT.

5 FOLLOW-UP IN POLICING OF THE PRICE-FIXING
6 ACTIVITY, ALL OF THOSE KINDS OF THINGS TO BRING INDEPENDENT
7 ACTION INTO LINE, THIS IS AT THE EXTREME END OF THE SCALE,
8 BUT AT THE OTHER END, BECAUSE OF THE VERY BROAD LANGUAGE OF
9 THE SHERMAN ACT, EQUALLY CULPABLE AND APPEARING AS CONVICTED
10 OR CONVICTED FELONS WILL BE THE BUSINESSMAN WHO ANSWERED ONE
11 TELEPHONE CALL WITH, YEAH, I GUESS I AGREE WITH THAT, AND
12 AT THE END OF IT ALL REALIZES OR IS TOLD OR PERHAPS KNEW THAT
13 WHAT HE HAD AGREED WITH WAS A PRICE-FIXING CONSPIRACY ON A
14 ONE-TIME PRICE MOVE.

15 I HAVE REPRESENTED INDIVIDUALS WHO WERE CONVICTED
16 ON THE BASIS OF TWO AND A HALF MINUTES OF TELEPHONE
17 CONVERSATIONS, THREE OR FOUR TELEPHONE CONVERSATIONS, A
18 SPUR-OF-THE-MOMENT REFLEXIVE KIND OF ACTIVITY, WHICH STRIKES
19 ME AS SOMETHING QUITE DIFFERENT FROM THE PLANNED RECRUITMENT
20 OF HORIZONTAL COMPETITORS INTO A COLLUSIVE CONSPIRACY.

21 AT THE END OF THAT, MY POINT WOULD BE THAT THE
22 GUIDELINES SHOULD PERMIT COURTS TO PROVIDE ZERO JAIL TIME
23 WITHIN THE GUIDELINES AS JUDGES ARE NOW DOING. TO ACCOMPLISH
24 THAT, I WOULD MECHANICALLY THINK FROM MY VANTAGE POINT THAT
25 THE DISSIMILARITIES IN THE DESCRIPTION OF THE PRICE-FIXING

1 CRIME CAN BE POINTED UP IN, I BELIEVE, IT'S CHAPTER 2.

2 AT THE SAME TIME, MITIGATING FACTORS IN A-314, I
3 WOULD SUGGEST COULD BE EXPANDED, AND THEREBY TO TAKE ACCOUNT
4 FOR A NUMBER OF OFFENDER CHARACTERISTICS, PERHAPS THEIR
5 DEFINITION OF CRIME CHARACTERISTICS, OFFENDER CHARACTERISTICS
6 THAT ARE DIFFERENT.

7 THERE ARE FELONS WHO WOUND UP IN THE CONSPIRACY
8 BECAUSE OF COERCION FROM A SENIOR OFFICER IN THE CORPORATION,
9 WITHIN THE CORPORATION. THERE ARE FELONS WHO WOUND UP IN THE
10 CONSPIRACY BECAUSE OF INDUSTRY STRUCTURE.

11 THEY WERE TOLD THAT THERE WAS A CLOSED CLUB, IF
12 THEY WANTED ANY BUSINESS AT ALL BY WAY OF SUBCONTRACT OR
13 WHATEVER, THAT THEY HAD TO PLAY THE GAME. NOW, THE INVITOR
14 AND THE INVITEE STRIKE ME AS ENTIRELY DIFFERENT KINDS OF
15 PEOPLE, ENTIRELY DISSIMILAR KINDS OF OFFENDERS, AND ARE
16 WORTHY OF ENTIRELY DIFFERENT KINDS OF SENTENCES.

17 AND THAT REFINEMENT, I BELIEVE, WOULD ADD
18 CONSIDERABLY TO THE JUST RESOLUTION OF THESE KINDS OF CASES.
19 IT HAS BEEN MY IMPRESSION THAT DISTRICT JUDGES AROUND THE
20 COUNTRY CONTINUE, IN THE FACE OF ANTITRUST DIVISION PRESSURE,
21 CONTINUE TO SENTENCE PRICE-FIXING INDIVIDUALS WITH NO
22 PREVIOUS RECORD, TO SENTENCES THAT DO NOT INVOLVE JAIL TIME.

23 AND I BELIEVE THAT THOSE JUDGES ARE DOING THAT
24 BECAUSE THEY ARE DOING IT WITH GOOD SENSE AND INTELLIGENCE
25 AND NOT BECAUSE THEY ARE SOFT-HEARTED AND NOT BECAUSE THEY

1 ARE SOFT ON CRIME.

2 WHERE I BELIEVE THAT THESE GUIDELINES CAN BE SO
3 EFFECTIVE AND USEFUL IS THAT THEY PROVIDE COMMON GROUNDS FOR
4 ARTICULATION OF THESE REASONS, SO THAT INDIVIDUALS WILL
5 UNDERSTAND WHY THIS CASE IS DIFFERENT FROM THAT CASE.

6 LET ME BE VERY CLEAR. I'M ENTIRELY CERTAIN THAT
7 JAIL AND SIGNIFICANT JAIL IS APPROPRIATE FOR THOSE WHO DO PUT
8 TOGETHER THE CONSPIRACY, WHO DO USE COERCION ON THOSE WHO
9 DON'T WANT TO, WHO DO FORCE OTHER PARTICIPANTS.

10 WE COME NEXT TO THE QUESTION OF DOLLARS AND THE
11 WAY IN WHICH YOU TREAT DOLLARS. I SEE THAT THE COMMISSION IS
12 CONCERNED ABOUT WHETHER ITS DOLLAR PUNISHMENT RELATES TO THE
13 HARM DONE OR -- OR WHETHER YOU ARE IMPOSING A DOLLAR AMOUNT
14 OF FINE AS PROPORTIONATE TO WHAT THE OFFENDER CAN PAY.

15 PERHAPS THAT NEEDS AN ULTIMATE RESOLUTION,
16 ALTHOUGH I WOULD SUGGEST NOT. IN ANY EVENT, IT STRIKES ME
17 THAT WHEN YOU'RE DEALING WITH BUSINESSMEN WHO HAVE ENGAGED IN
18 PRICE-FIXING ACTIVITIES, THOSE PEOPLE ARE, BY THE NATURE OF
19 THEIR -- BY THE FACT THAT THEY ARE IN BUSINESS, ARE RISK
20 TAKERS AND THEIR RISKS INVOLVE DOLLARS.

21 IF YOU ERR, THIS IS THE PLACE TO ERR ON THE LARGE
22 SIDE, TO INCREASE ON THAT RISK. THE ANTITRUST DIVISION
23 THROUGH THE YEARS HAS MADE THE POINT -- AND IT IS AN
24 EXTRAORDINARILY GOOD POINT -- THAT THEY ARE UNABLE TO UNEARTH
25 ONLY A SMALL PERCENTAGE OF ALL CRIMES THAT OCCUR.

1 IN ADDITION TO THAT, GOVERNMENT PROSECUTORS FOR
2 VERY SOLID, TACTICAL REASONS WILL NOT INDICT AND PUNISH THE
3 ENTIRETY OF THE CRIME THAT THEY KNOW ABOUT. THEY WILL PUNISH
4 ONE OR TWO DISCREET FELONIES, BUT NOT ALL THAT THEY ARE AWARE
5 OF.

6 WHEN IT COMES DOWN TO PUNISHING, PARTICULARLY
7 IMPOSITION OF FINES, IT IS IN THAT DOLLAR AMOUNT THAT THE
8 RISK CAN BE PUT BACK TO THE VIOLATOR, TO THE CRIMINAL, ALWAYS
9 KEEPING IN MIND, AS YOUR COMMENTS NOTE, THAT IT PROVIDES NO
10 ULTIMATE SOCIETAL BENEFIT TO SO PUNISH A CORPORATE ENTITY AS
11 TO BANKRUPT AND PUT IT OUT OF BUSINESS. THEN YOU HAVE NOT
12 ACHIEVED ANY OF THE PRO COMPETITIVE PURPOSES OF THE SHERMAN
13 ACT.

14 BASICALLY, THEN, THOSE ARE MY MAJOR PROPOSITIONS,
15 THAT IN TERMS OF IMPOSITION OF JAIL TIME, THAT JUDGES OUGHT
16 TO BE ABLE TO IMPOSE NO JAIL TIME, ALTHOUGH IN MANY INSTANCES
17 IT WILL BE APPROPRIATE THAT THEY IMPOSE SIGNIFICANT JAIL
18 TIME, AND, SECONDLY, WHEN WRESTLING WITH THE ISSUES OF HOW
19 MUCH BY WAY OF DOLLAR FINE ERR ON THE HIGH SIDE.

20 THOSE ARE MY PREPARED COMMENTS. I WOULD WELCOME
21 QUESTIONS.

22 CHAIRMAN WILKINS: FINE. THANK YOU BOTH FOR THOSE
23 VERY THOUGHTFUL COMMENTS. I WONDERED IF YOU WOULD SEND US,
24 MR. DOYLE, THOSE SUGGESTED FACTORS THAT YOU THINK WE SHOULD
25 CONSIDER, PARTICULARLY IN THE SHERMAN ACT AREA, THAT WE MAY

1 HAVE OVERLOOKED IN OUR PREPARATION OF THIS PRELIMINARY DRAFT?

2 MR. DOYLE: IT WOULD BE MY PLEASURE, JUDGE.

3 CHAIRMAN WILKINS: THANK YOU VERY MUCH,
4 AGGRAVATING AND MITIGATING, OF COURSE.

5 DO YOU THINK THAT, GENERALLY SPEAKING, IF WE
6 PROVIDED A TERM OF INCARCERATION FOR SHERMAN ACT VIOLATIONS,
7 ALBEIT SHORT TERMS AS OPPOSED TO TODAY'S PRACTICES, WHERE
8 ONLY 15 PERCENT OF SHERMAN ACT VIOLATORS GET ANY TIME
9 WHATSOEVER AND THEY SERVE LESS THAN FOUR MONTHS OF THOSE WHO
10 DO GET TIME, DO YOU THINK THAT WOULD PROVIDE A MEANINGFUL
11 DETERRENCE TO THAT TYPE OF ACTIVITY?

12 IF YOU KNEW UP FRONT, THE CORPORATE EXECUTIVE,
13 MIDDLE MANAGEMENT OR WHEREVER, IF YOU VIOLATE THIS ACT,
14 YOU'RE GOING TO HAVE TO DO SOME TIME, DO YOU THINK THAT'S A
15 MEANINGFUL AND WORTHWHILE AVENUE FOR US TO PURSUE?

16 MR. DOYLE: I'M AFRAID MY ANSWER WILL TELL YOU
17 MORE ABOUT MY CYNICISM THAN WHAT IS REALLY IN THE WORLD.
18 IT'S BEEN MY EXPERIENCE -- AND LARRY ALLUDED TO THIS -- THAT
19 FREQUENTLY IT'S THE WEAKER PEOPLE IN AN ORGANIZATION OR IN AN
20 INDUSTRY WHO WIND UP FALLING BACK ON STRENGTH BY COLLUSION.

21 IT IS SELDOM THOUGHTFUL. WHENEVER IT IS DONE, IT
22 IS DONE WITH A CERTAIN AMOUNT OF FEAR, BECAUSE I HAVE SEEN
23 THE RECURRENCE OF PRICE-FIXING ACTIVITY IN CERTAIN BUSINESSES
24 IN THE FACE OF, IN THE STATE OF, AND AT THE SAME TIME AS AN
25 ONGOING FEDERAL INVESTIGATION, I BECOME VERY SKEPTICAL ABOUT

1 THE ULTIMATE DETERRENCE.

2 IT'S NOT TO SAY THAT JAIL OUGHT NOT TO BE IMPOSED
3 AND THAT CERTAINLY SOMEBODY LIVED, IS LEARNING FROM THAT, BUT
4 EVERYBODY DOESN'T LEARN.

5 CHAIRMAN WILKINS: ALL RIGHT, MR. THOMPSON?

6 MR. THOMPSON: NOT ONLY DO YOU HAVE THE COMMENTS
7 THAT MR. DOYLE -- THE CONCERNS MR. DOYLE JUST RAISED, BUT YOU
8 ALSO HAVE THE CONSIDERATION THAT THE SHERMAN ACT -- AND I
9 WILL COMMEND YOU TO THE SUPREME COURT'S DECISION IN UNITED
10 STATES V. U.S. GYPSUM -- THE SHERMAN ACT IS UNLIKE OTHER
11 CRIMINAL STATUTES IN THAT IT DOES NOT PRECISELY DEFINE OR
12 DESCRIBE THE CONDUCT WHICH IT PROSCRIBES. I THINK THE
13 COMMENT IN THE GUIDELINES WITH RESPECT TO THE CURRENT
14 SENTENCING PRACTICES REGARDING THE SHERMAN ACT, I THINK,
15 REFLECTS A CAREFUL CONSIDERED JUDICIAL EVALUATION. NUMBER
16 ONE, OF THE NATURE OF THE SHERMAN ACT ITSELF, NO OVERT ACT IS
17 REQUIRED TO PROVE IT. YOU SIMPLY HAVE THE AGREEMENT. THAT'S
18 WHY I THINK IT'S SO IMPORTANT THAT YOU CONSIDER THE FACTORS
19 THAT I OUTLINED IN MY PREPARED -- MY WRITTEN COMMENTS, AND
20 LOOK AT THE NATURE AND STRUCTURE OF THE PRICE-FIXING
21 AGREEMENT ITSELF AND NOT JUST THE DOLLAR AMOUNT OF COMMERCE
22 FORECLOSED.

23 LOOK AT THAT AND LOOK AT THE SORT OF AMBIGUOUS
24 NATURE OF THE SHERMAN ACT. I THINK THE JUDGES, INSTEAD OF
25 BEING SOFT-HEARTED, I THINK THEY ARE CAREFULLY CONSIDERING

1 THE NATURE OF THE CRIMINAL CONDUCT.

2 I THINK IMPRISONMENT IS IMPORTANT, BUT YOU HAVE
3 GOT TO LOOK AND CAREFULLY CONSIDER THE BASE OFFENSE VALUES.
4 OTHERWISE, I THINK IN THESE KIND OF CASES YOU'RE GOING TO
5 FIND THE DISTRICT JUDGES TRYING TO FIND EVERY REASON UNDER
6 THE SUN TO ESCAPE THE GUIDELINES AND YOU'RE NOT GOING TO GET
7 THE CERTAINTY.

8 CHAIRMAN WILKINS: THANK YOU VERY MUCH. ANY
9 QUESTIONS TO MY RIGHT?

10 COMMISSIONER BLOCK: MR. DOYLE, I THINK YOU DID AN
11 ADMIRABLE JOB OF SKETCHING OUT WHAT I MIGHT REFER TO NOW AS
12 SOFT CORE PRICE FIXING, IN OPPOSITION TO WHAT IS COMMONLY
13 REFERRED TO AS THE HARD CORE OR TRADITIONAL PRICE-FIXING.

14 I'M WONDERING ABOUT THE LOGIC OF THAT. I WOULD
15 LIKE YOU TO GO BACK OVER THE LOGIC OF SEPARATING OUT THESE
16 TWO TYPES OF PRICE FIXING, OTHER THAN THE FACT THAT WHAT YOU
17 DESCRIBED AS SOFT CORE SOUNDS LIKE SOME WORTHY OFFENDERS.

18 WHAT IS THERE IN TERMS OF LOGIC IN NOT PUNISHING
19 THAT AS SEVERELY AS WHAT WE TRADITIONALLY CALL HARD-CORE
20 PRICE FIXERS?

21 MR. DOYLE: TO GO BACK TO THE LOGICAL FOUNDATIONS
22 GOES BACK IN MY MIND TO THE PHILOSOPHICAL FOUNDATIONS, WHICH
23 THEN GOES BACK TO THE WHOLE PURPOSE OF SENTENCING, WHICH IS
24 MORE THAN I CAN TACKLE.

25 I CAN SAY IN THE FIRST INSTANCE THAT THERE IS THE

1 GUT FEEL THAT THE INDIVIDUAL WHO FREQUENTLY -- A BUSINESSMAN
2 WHO HAS NOT BENEFITED FROM A SIGNIFICANT EDUCATION, HAS
3 DEVOTED HIMSELF TO A NARROW LINE OF BUSINESS, AND WHO IS
4 ROPED IN OR WHO STUMBLES IN AS A METHOD OF ECONOMIC SURVIVAL
5 INTO A LOOSE KIND OF MAYBE IT IS, MAYBE IT ISN'T KIND OF
6 CONSPIRACY; THERE ARE THE KINDS OF THINGS THAT ARE CALLED,
7 WELL, PRICE EXCHANGE KINDS OF SITUATIONS. "I WILL GIVE YOU
8 MY PRICE BOOK AND YOU GIVE ME YOURS, AND YOU WILL NOTICE WE
9 PUT IN A 15-PERCENT CHANGE. YES, I NOTICE THAT. I AGREE.
10 IT'S HARD TIMES."

11 THAT JUST IS A DIFFERENT KIND OF CIRCUMSTANCE AND
12 EVENT. GUILTY. THOSE PRICES GO UP AND THOSE PEOPLE HAD AN
13 AGREEMENT ABOUT PRICE PRIOR TO THE EVENT. UNDER THE LANGUAGE
14 OF THE NUMBER OF CASES, THEY WILL BE PROSECUTED AND WILL BE
15 FOUND GUILTY IN MANY INSTANCES.

16 IT IS QUITE DIFFERENT FROM THE SALESMEN WHO SAY,
17 "WE KNOW THERE ARE THESE HIGH SCHOOL STUDENTS WHO ARE GOING
18 TO BUY RINGS, CLASS RINGS, AND WE ARE ALL GOING TO AGREE ON
19 THE PRICE. WE ARE GOING UP THIS YEAR AND WE ARE NOT GOING TO
20 TELL ANYBODY ABOUT IT, AND WE ARE GOING TO MAKE THE PRICE
21 CHANGES DIFFERENT SO NOBODY WILL EVER CATCH US. WE WILL
22 COMPETE AT THESE MEETINGS FOR DIFFERENT SCHOOLS."

23 THERE IS SOMETHING THAT ULTIMATELY IN MY MIND
24 DOESN'T SOUND SO MUCH IN LOGIC AS IN THE NOTION OF THE
25 CRIMINAL INTENT. I EXPECT THERE ARE A LOT BETTER WAYS TO

1 RESPOND TO YOUR VERY PROVOCATIVE QUESTION, BUT THAT'S, OFF
2 THE BAT, THE FIRST CRACK I CAN DO WITH IT.

3 CHAIRMAN WILKINS: ANY QUESTIONS TO MY LEFT?

4 COMMISSIONER MACKINNON: MR. THOMPSON, YOU SAID
5 THERE WAS NOTHING MORE THAT CONCERNED THE PEOPLE GENERALLY
6 THAN DISPARITY IN SENTENCING. COULD YOU GIVE US SOME
7 EXAMPLES OF DISPARITY THAT YOU CONSIDER GENERALLY, HAVE
8 EXPERIENCED?

9 MR. THOMPSON: A RECENT EXAMPLE WAS A LARGE-SCALE
10 INVESTIGATION INTO FENCING ACTIVITIES IN NORTH GEORGIA, IN
11 WHICH WHEN I WAS U.S. ATTORNEY, MY OFFICE ALONG WITH THE FBI
12 WAS INVOLVED IN THAT INVESTIGATION.

13 SEVERAL INDIVIDUALS WERE ARRESTED, CHARGED IN
14 SEPARATE INDICTMENTS, SO THE CASES WERE ASSIGNED TO DIFFERENT
15 JUDGES THROUGHOUT THIS DISTRICT. IN SOME OF THE CASES,
16 INDIVIDUALS WERE ARRESTED WITH DRUGS ON THEM, IN THEIR
17 POSSESSION.

18 THERE WAS SOME EVIDENCE OF TRAFFICKING IN
19 NARCOTICS, ALL INVOLVING THE SAME OFFENSE. THE SENTENCES
20 RECEIVED BY THOSE DEFENDANTS BY DIFFERENT JUDGES WAS WIDELY
21 DISPARITE. CITIZENS WERE VERY CONFUSED.

22 COMMISSIONER MACKINNON: LIKE WHAT? FROM WHAT TO
23 WHAT?

24 MR. THOMPSON: FROM PROBATION TO --

25 COMMISSIONER MACKINNON: HOW MUCH DISPARITY?

1 MR. THOMPSON: FROM PROBATION TO SUBSTANTIAL JAIL
2 TERMS.

3 COMMISSIONER MACKINNON: HOW MUCH TIME?

4 MR. THOMPSON: UP TO THREE YEARS, AS I BELIEVE,
5 OFF THE TOP OF MY HEAD.

6 COMMISSIONER MACKINNON: AND WHAT WERE THE
7 CHARACTERISTICS OF THE OFFENDERS THAT RESULTED IN THE
8 DISPARITY THAT YOU KNOW OF?

9 MR. THOMPSON: I DON'T KNOW. I THINK WE -- MY
10 OFFICE ADVOCATED JAIL TIME FOR ALL OF THE DEFENDANTS.
11 I DON'T KNOW WHAT WENT INTO THE JUDGE'S -- THE CONSIDERATION
12 OF THE INDIVIDUAL JUDGES WITH RESPECT TO THE SENTENCING.

13 FROM APPARENT -- FOR ALL APPARENT PURPOSES, I
14 BELIEVE, MR. COMMISSIONER, THE DEFENDANTS HAD VERY SIMILAR
15 CRIMINAL RECORDS AND CERTAINLY THE OFFENSE WAS VERY SIMILAR,
16 AND IT WAS VERY CONFUSING TO THE AVERAGE CITIZEN,
17 ESPECIALLY --

18 COMMISSIONER MACKINNON: THEY DIDN'T ALL HAVE
19 DRUGS, DID THEY?

20 MR. THOMPSON: PARDON?

21 COMMISSIONER MACKINNON: THEY DIDN'T ALL HAVE
22 DRUGS? YOU MENTIONED SOME DRUGS.

23 MR. THOMPSON: THE DEFENDANTS I'M TALKING ABOUT
24 WERE ALL INVOLVED WITH THE DRUG ASPECT OF THIS INVESTIGATION.

25 COMMISSIONER MACKINNON: OKAY. THE NEXT QUESTION

1 IS, YOU MENTIONED THAT GUILTY PLEAS OUGHT TO ALWAYS GET SOME
2 CREDIT. YOU WOULDN'T EXTEND THAT TO THE CINCH CASE WHERE THE
3 MAN CAME IN AND PLED GUILTY BECAUSE THEY REALIZED THAT THEY
4 JUST HAD HIM AND THERE WASN'T ANYTHING HE COULD DO ABOUT IT?

5 MR. THOMPSON: I QUALIFIED THAT STATEMENT BY
6 INDICATING THAT I THINK GUILTY PLEAS SHOULD RECEIVE -- SHOULD
7 ALWAYS BE A MITIGATING FACTOR UNLESS THE COURT FINDS THAT IT
8 WAS ENTERED IN BAD FAITH, OR WAS -- OR IF IT WAS A PLEA
9 PURSUANT TO A PLEA AGREEMENT THAT SOMEHOW THE AGREEMENT
10 BETWEEN THE GOVERNMENT AND THAT DEFENDANT WAS TAINTED.

11 I DO THINK THAT THAT'S A MITIGATING FACTOR AND THE
12 GUIDELINES SEEM TO SUGGEST, OR THE COMMENTS ACCOMPANYING THE
13 GUIDELINES SEEM TO SUGGEST, THAT GUILTY PLEAS -- A GUILTY
14 PLEA WOULD NOT RECEIVE ANY CREDIT WHATSOEVER IN THE OFFENDER
15 CHARACTERISTICS.

16 I THINK THAT'S IMPROPER UNLESS THE COURT FINDS
17 THAT IT WAS SIMPLY A SELF-SERVING -- WHICH MAY BE YOUR
18 EXAMPLE. IT MAY BE SIMPLY A SELF-SERVING GUILTY PLEA OR A
19 PLEA THAT WAS ENTERED IN BAD FAITH.

20 COMMISSIONER MACKINNON: MR. DOYLE, IN THE CASES
21 WHERE THEY GET NO TIME IN ANTITRUST CASES, DO YOU THINK THAT
22 RESULT -- AND I HAVE OBSERVED THIS FOR MANY YEARS -- DO YOU
23 THINK THAT RESULTS FROM THE FACT THAT ANTITRUST VIOLATIONS
24 ARE RELATIVELY FEW?

25 THEY AREN'T A BIG FACTOR IN ANY DISTRICT, AND

1 THERE AREN'T MANY JUDGES THAT I SEE AROUND THE COUNTRY THAT
2 INDIVIDUALLY GET A LOT OF ANTITRUST CASES, AND SO YOU GET A
3 LOT OF INDIVIDUAL DISPARITY OF PEOPLE SENTENCING IN ANTITRUST
4 CASES THAT HAVEN'T HAD A LOT OF ANTITRUST DEFENDANTS BEFORE
5 THEM.

6 NOW, IN SOME OF THE LARGER METROPOLITAN AREAS,
7 THERE IS A LITTLE VARIATION IN THAT, BUT AROUND THE COUNTRY,
8 THEY ARE PRETTY WELL-DISPERSED. DO YOU THINK THAT'S A
9 FACTOR?

10 THEY DON'T REALIZE THE IMPACT THAT THEIR SENTENCE
11 MIGHT HAVE ON THE PRACTICE GENERALLY. THEY DON'T REALIZE
12 THAT IT'S A PROBLEM THAT IT IS.

13 MR. DOYLE: JUDGE, I THINK THE FACTOR THAT YOU
14 POINT TO, THAT THESE CASES DO COME BEFORE TRIAL JUDGES
15 RELATIVELY INFREQUENTLY HIGHLIGHT IT, THE RESULTS OF THAT
16 FACTOR, COUPLED WITH MR. THOMPSON'S OBSERVATION, WHICH IS
17 VERY TRUE, THAT A TRIAL JUDGE WHO COMES TO AN ANTITRUST
18 VIOLATION AND BEGINS TO READ THE SHERMAN ACT AND THEN THE
19 ZILLIONS OF CASES THAT THE LAWYERS, THE DEFENSE LAWYERS WILL
20 CITE TO HIM, BEGINS TO WONDER WHERE THE BRIGHT-LINE TESTS
21 ARE.

22 IN CIRCUMSTANCES WHERE YOU HAVE GOT THE HARD CORE,
23 THERE IS NO DOUBT. SOFT CORE WAS NOT MY TERM. I'M NOT SURE
24 I ULTIMATELY WON'T ADOPT IT, BUT IN THAT CERTAIN SITUATION OF
25 A LOOSE OFFENSE, A TELEPHONE CALL OR TWO, COUPLED WITH THE

1 MIND BOGGLING CONFUSION OF THE CASES THAT DEFENSE LAWYERS CAN
2 AND WILL CITE, SUGGESTS TO A JUDGE THAT IN SOME
3 CIRCUMSTANCES, NOT THAT THE HARM WASN'T THERE, BUT THAT THIS
4 INDIVIDUAL'S CULPABILITY ON AN OVERALL SCALE FROM 1 TO 100
5 DOES NOT WARRANT JAIL TIME.

6 I THINK THAT'S WHAT DEFENSE COUNSEL HAVE TO USE
7 WHERE THEY HAVE A RELATIVELY UNEDUCATED, IN THE BROADEST
8 SENSE, CLIENT BEFORE THE BAR.

9 COMMISSIONER MACKINNON: THANK YOU.

10 CHAIRMAN WILKINS: AGAIN, THANK YOU -- DID YOU
11 HAVE A COMMENT, MR. THOMPSON? GO AHEAD.

12 MR. THOMPSON: I WOULD JUST LIKE TO RESPOND TO,
13 FURTHER RESPOND TO THE QUESTION THE JUDGE ASKED ME.

14 I THINK IF YOU TAKE AWAY THE GUILTY PLEA,
15 ESPECIALLY PURSUANT TO A PLEA AGREEMENT, IT SORT OF DISCOUNTS
16 THE ROLE OF THE GOVERNMENT ITSELF WHO KNOWS A GREAT DEAL
17 ABOUT THE CULPABILITY OF THE PARTY INVOLVED.

18 IT DISCOUNTS THE ROLE OF A PROSECUTOR FOR MAKING
19 THE DETERMINATION THAT THIS DEFENDANT CERTAINLY ACCEPTS
20 RESPONSIBILITY FOR HIS OR HER OR ITS ACTIONS, AND NOT TO GIVE
21 CREDIT FOR GUILTY PLEA PURSUANT TO A PLEA AGREEMENT THERE, I
22 THINK, REMOVES --

23 COMMISSIONER MACKINNON: THE PROBLEM IS MAKING IT
24 MANDATORY IN A CASE, MAKING SOME CREDIT MANDATORY IN A CASE
25 WHERE HE REALLY PLED GUILTY BECAUSE HE HAD A CINCH CASE

1 AGAINST HIM.

2 MR. THOMPSON: I THINK THAT WOULD FIT INTO THE
3 BAD-FAITH CATEGORY.

4 CHAIRMAN WILKINS: I THINK WE ARE SAYING THE SAME
5 THING ON THAT. WE APPRECIATE YOUR COMMENTS VERY MUCH. THANK
6 YOU AGAIN.

7 WE ARE VERY PLEASED TO HAVE WITH US TWO FEDERAL
8 PUBLIC DEFENDERS, ONE FROM THE NORTHERN DISTRICT OF GEORGIA,
9 ONE FROM THE WESTERN DISTRICT OF TEXAS, MS. STEPHANIE KEARNS
10 AND MR. LUCIEN B. CAMPBELL.

11 MS. KEARNS AND MR. CAMPBELL, WE APPRECIATE SO MUCH
12 YOU TRAVELING TO ATLANTA TO SHARE YOUR THOUGHTS AND COMMENTS
13 WITH US AND WE HOPE THAT WE WILL HAVE A CONTINUING WORKING
14 RELATIONSHIP OVER THE NEXT FEW MONTHS.

15 THE FEDERAL PUBLIC DEFENDERS AND ITS ORGANIZATION
16 HAS PROVIDED A GREAT DEAL OF INPUT AND ASSISTED US IMMENSELY
17 IN OUR WORK OVER THE PAST 10 MONTHS, AND WE HOPE TO CONTINUE
18 THAT. I WOULD BE GLAD TO HEAR FROM YOU.

19 MS. KEARNS: THANK YOU, YOUR HONOR. I'M GOING TO
20 MAKE SOME BROAD COMMENTS THAT YOU HAVE ALREADY HEARD BEFORE,
21 BUT I JUST FEEL THAT OUGHT TO BE REAFFIRMED, SO THAT YOU KNOW
22 THAT THEY ARE NOT THE SOLE VOICES OUT THERE THAT FEEL THAT
23 THE GUIDELINES, FOR INSTANCE, ARE TOO HARSH, AND I AM ONE OF
24 THOSE.

25 I THINK THAT THEY ARE, GENERALLY SPEAKING, IN THE

1 EXAMPLES THAT I HAVE RUN THROUGH THE MANUAL, THAT THE RESULTS
2 ARE HARSHER THAN WHAT WE GENERALLY SEE. I THINK THAT IT
3 MIGHT BE THE RESULT OF SOME DISPARITY IN SENTENCING THAT DOES
4 EXIST AND THAT WHAT I FEAR IS THAT THE GUIDELINES TEND TO
5 REFLECT THE HARSH END OF THE SPECTRUM WHEN IT COMES TO
6 DISPARITY.

7 I ALSO DO DISAGREE WITH SOME OF THE WITNESSES THAT
8 TESTIFIED EARLIER TODAY THAT IT IS A SIMPLE -- THAT THE
9 MANUAL IS NOW SIMPLE TO USE. I FIND IT COMPLEX. IT TAKES --
10 I HAVE READ IT IN ITS ENTIRETY AND THEN RUN EXAMPLES, AND IT
11 STILL TAKES ME ABOUT 30 TO 40 MINUTES TO CALCULATE A
12 SENTENCE.

13 I COMPARE THAT TO WHEN I CALCULATE THE GUIDELINES
14 IN THE PAROLE MANUAL, WHICH TAKES ME ABOUT 5 TO 10 MINUTES.
15 I DO EXPECT THAT IT WOULD TAKE MORE TIME THAN IT WOULD TO USE
16 THE PAROLE MANUAL.

17 HOWEVER, I THINK THAT IT HAS TO BE SOMEWHAT
18 SIMPLER SO THAT WHEN WE ARE IN A SENTENCING HEARING AND A
19 QUESTION COMES UP AS TO, WELL, IF WE PLUG IN THIS VARIABLE OR
20 IF I AGREE WITH THE GOVERNMENT ON THEIR CONTENTION, NOW WHAT
21 HAPPENS TO THE SENTENCE?

22 ALSO, BECAUSE IF WE ARE ATTEMPTING TO ACHIEVE THE
23 GOAL TO MAKE DEFENDANTS UNDERSTAND THAT IT IS A JUST SYSTEM,
24 THEY HAVE GOT TO BE ABLE TO FIGURE IT OUT ALSO, AND IT OUGHT
25 NOT TO HAVE TO TAKE A LAWYER AN HOUR TO EXPLAIN TO THEIR

17

1 CLIENT WHY THIS IS THE SENTENCE THEY ARE GOING TO GET.

2 I THINK THAT THOSE -- AGAIN, I THINK CONSIDERING
3 THAT THIS IS A PRELIMINARY DRAFT, I'M CERTAIN THAT THAT'S A
4 PROBLEM THAT WILL BE WORKED OUT, BUT I JUST DIDN'T -- I FELT
5 THAT GIVEN THE FACT THAT YOU HAVE BEEN TOLD THAT IT WAS A
6 SIMPLE MANUAL, I JUST WANTED TO VOICE AN OBJECTION TO THAT.

7 I WANTED TO GIVE YOU SOME EXAMPLES, SINCE YOU HAD
8 REQUESTED THAT, OF HOW YOUR MANUAL IS TRANSLATED INTO
9 SENTENCES FOR CLIENTS THAT I HAVE SEEN. ONE COMMON CASE WE
10 HAVE IS A FELON IN POSSESSION OF A FIREARM.

11 I'M TALKING ABOUT THE VERY SIMPLE CASE WHERE
12 THERE'S NO AGGRAVATING CIRCUMSTANCES. HE PROBABLY IS PICKED
13 UP TWO OR THREE YEARS LATER AFTER THE COMPUTER -- ATF RUNS IT
14 THROUGH THE COMPUTER AND FINDS OUT THAT HE HAS PAWNED OR
15 PICKED OR BOUGHT OUT OF PAWN A FIREARM. SO THERE ARE NO
16 OTHER AGGRAVATING CIRCUMSTANCES.

17 IN THIS DISTRICT, MY EXPERIENCE IN MY OFFICE HAS
18 BEEN THAT USUALLY THAT WOULD BE A BORDERLINE PROBATION CASE,
19 DEPENDING ON HOW BAD THE PRIOR RECORD WAS, WHETHER THERE WAS
20 NO VIOLENCE, WHETHER HE WASN'T A VIOLENT FELON.

21 IT WOULD MORE LIKELY BE PROBATION. IF THERE WAS
22 ANY JAIL TIME WARRANTED, IT WOULD PROBABLY BE IN THE
23 NEIGHBORHOOD OF SIX MONTHS. I CALCULATE THEY WOULD DO A YEAR
24 UNDER THE GUIDELINES.

25 I THINK THAT'S HARSH. I THINK THAT MIGHT, THOUGH,

1 REFLECT A DISPARITY THAT JUDGE MACKINNON REFERS TO IN
2 DISTRICTS, REGIONAL DISPARITIES.

3 I THINK THAT PROBABLY IN THIS DISTRICT, YOU HAVE A
4 FELON IN POSSESSION OF A FIREARM, ANYWHERE IN THE SOUTHEAST,
5 ALL RURAL AREAS, IT'S NOT THAT BIG A DEAL, BUT IN CALIFORNIA,
6 NEW YORK, IT'S TREATED MUCH MORE SERIOUSLY, AND PERHAPS A
7 YEAR IN THOSE DISTRICTS OR IN THOSE STATES, THE YEAR WOULD,
8 IN FACT, BE BETTER THAN THOSE --

9 CHAIRMAN WILKINS: IF I MAY INTERRUPT, I WISH
10 YOU'D -- BUT NOT RIGHT NOW, THOUGH, PERHAPS SEND ME A LETTER
11 AND TELL ME HOW YOU CALCULATE THAT, BECAUSE I'M VERY AWARE OF
12 THE PROBLEM YOU JUST PRESENTED.

13 I HAVE SENTENCED A LOT OF PEOPLE IN THAT CATEGORY.
14 THE COMPUTER PICKS THEM UP ABOUT A YEAR OR SIX MONTHS LATER,
15 AND I TRIED TO MAKE THESE GUIDELINES, SO THAT IT WAS NOT
16 MANDATORY JAIL TIME FOR THAT TYPE OF PERSON, SO IF WE MADE
17 THAT ERROR, I NEED TO KNOW IT, AND I WANT TO FIX IT.

18 MS. KEARNS: OKAY. I WILL DO THAT.

19 ANOTHER TYPICAL CASE THAT WE HAVE THAT I RAN
20 THROUGH THAT POINTED UP SOME OTHER PROBLEMS WITH THE MANUAL
21 WAS AN ARMED BANK ROBBER, FIRST OFFENDER, AND HE'S INDICTED
22 FOR THE ARMED ROBBERY, AS WELL AS THE 924-C, USE OF A FIREARM
23 IN COMMISSION OF A FELONY.

24 THEN THE PROBLEM BECAME -- BECOMES IN USING THE
25 MANUAL, IS THE 924-C COUNT A SEPARATE OFFENSE? THERE ARE

1 PARTS OF THE MANUAL THAT WOULD SUGGEST THAT IT IS, AND IF IT
2 IS, THEN THERE ARE -- ALSO YOU HAVE TO TAG ON THE -- LET'S
3 SAY IT WAS \$10,000 THAT WAS TAKEN AND YOU HAVE TO PLUG IN THE
4 POINTS FOR THE FACT THAT THERE WAS A LOSS, ALSO ASSUMING
5 THAT, AGAIN, THERE WAS A PSYCHOLOGICAL INJURY. I'M ASSUMING
6 THE MINIMAL PSYCHOLOGICAL INJURY, THAT WOULD ALSO ADD ON
7 POINTS. DO YOU USE THE POINTS TWICE FOR THE ARMED ROBBERY,
8 THE PSYCHOLOGICAL INJURY AND THE ARMED ROBBERY, AS WELL AS
9 THE 924-C?

10 THERE IS ALSO AN ARGUMENT TO BE MADE UNDER PART
11 E-5 OF THE MANUAL THAT IT IS CONDUCT THAT IS PART OF THE SAME
12 TRANSACTION AND SHOULDN'T BE, IN FACT, ADDED ON. HOWEVER,
13 THE DIFFICULTY IS THAT IT IS CLEAR FROM THE INTENTION OF
14 CONGRESS WHERE THEY REENACTED 924-C IN 1984, THAT THEY INTEND
15 IT TO BE AN ENHANCEMENT PROVISION.

16 SO, THEN, WHEN YOU LOOK AT ALL THESE CONFLICTING,
17 YOU KNOW, INTERPRETATIONS OR POSSIBLE INTERPRETATIONS OR
18 GUIDELINES, THAT IS AN AREA THAT DEFINITELY NEEDS SOME
19 CLARIFICATION.

20 OF COURSE, WHEN I RAN THE NUMBERS, IF YOU ASSUME
21 THAT THE 924-C IS NOT A SEPARATE OFFENSE, BUT THAT YOU SIMPLY
22 USE THE 60 POINTS THAT YOU PUT IN FOR USE OF THE FIREARM AND
23 THE ARMED ROBBERY, THEN YOU COME OUT WITH FOR THE FIRST
24 OFFENDER, I FIGURED, IT WAS AN EIGHT AND A HALF YEAR, YOU
25 KNOW, BOTTOM OF THE GUIDELINES WOULD BE EIGHT AND A HALF

1 YEARS.

2 THAT IS PROBABLY WHAT WE CAN EXPECT OUR CLIENTS TO
3 GET IN THIS DISTRICT; HOWEVER, THIS IS, ACCORDING TO MY
4 UNDERSTANDING, THE HARSHTEST DISTRICT IN THE COUNTRY FOR ARMED
5 ROBBERIES, OR ANY TYPE OF BANK ROBBERY.

6 FOR BANK ROBBERY, WE HAVE ALWAYS SEEN FIRST
7 OFFENDERS GET A RANGE 15 TO 20 YEARS, AND I KNOW THAT'S
8 VASTLY DISPROPORTIONATE TO OTHER DISTRICTS WHERE FIRST
9 OFFENDERS COULD BE LOOKING AT 5 TO 10 YEARS. SO THAT'S AN
10 EXAMPLE OF WHERE I THINK WE HIT THE TOP OF THE SPECTRUM.

11 THERE WAS ALSO ANOTHER STATUTE THAT WE HAVE HAD
12 SOME PROBLEM WITH BECAUSE WE HAVE AN AIRPORT HERE,
13 INTERFERENCE WITH A FLIGHT ATTENDANT, WHICH IS TITLE 49,
14 SECTION 1492-J, AND IT IS A 20-YEAR OFFENSE.

15 SO, ITS A CLASS B FELONY, AND IN OUR DISTRICT, WE
16 SEE THAT STATUTE USED FOR SPITTING AT PASSENGERS OR A
17 BELLIGERENT DRUNK ON AN AIRPLANE, REFUSING TO MOVE OUT OF THE
18 SMOKING SECTION AND CURSING THE STEWARDESS, WHICH ARE REALLY
19 NOT INTENDED, IN MY OPINION, TO BE COVERED BY THE STATUTE,
20 BUT BECAUSE THERE IS NO OTHER -- THERE ARE NO LESSER
21 INCLUDED IN THE STATUTE, I HAVE NEVER HAD ANY SUCCESS IN
22 CONVINCING THE U.S. ATTORNEY'S OFFICE OF THAT. THESE ARE
23 PROBATION CASES OR VERY, VERY SHORT PERIODS OF INCARCERATION.

24 BECAUSE IT'S A CLASS B FELONY, THAT WOULD NOT BE
25 POSSIBLE. I THINK THAT'S AN AREA THAT MIGHT REQUIRE

1 RECOMMENDATION IN CONGRESS THAT THEY PASS SOME LESSER
2 INCLUDED OFFENSES UNDER THE STATUTE.

3 I WOULD LIKE TO VOICE MY OPPOSITION, YOU HAVE
4 HEARD IT OVER AND OVER AGAIN, TO ANY AUTOMATIC DISCOUNT FOR
5 PLEA BARGAINING. I THINK THAT THE SECTION, PART B-2, THE
6 ACCEPTANCE OF RESPONSIBILITY SECTION OF THE MANUAL, IS THE
7 APPROPRIATE WAY TO COVER THAT.

8 I THINK THAT THERE ARE -- ALREADY I KNOW IN ALL
9 THE WRITTEN POSITION PAPERS YOU HAVE GOTTEN, THERE ARE
10 NUMEROUS EXAMPLES OF WHY IT IS NOT APPROPRIATE TO REWARD
11 SOMEBODY NECESSARILY FOR PLEA BARGAINING -- NOT PLEA
12 BARGAINING, BUT PLEADING GUILTY, THE CINCH CASE EXAMPLE BEING
13 ONE.

14 BUT ON THE OTHER SIDE OF IT, I THINK THERE ARE
15 ALSO OTHER REASONS WHY YOU OUGHT TO BE ABLE TO GET A -- UP TO
16 A 20-PERCENT DISCOUNT -- 20 PERCENT, I THINK, IS AN
17 APPROPRIATE AMOUNT -- 20 PERCENT DISCOUNT, EVEN AFTER YOU
18 PLEAD NOT GUILTY AND GO THROUGH A TRIAL. IT IS NOT THAT
19 UNCOMMON FOR PEOPLE TO GO TO TRIAL ACCEPTING RESPONSIBILITY
20 FOR SOMETHING LIKE POSSESSION OF COCAINE, BUT NOT
21 DISTRIBUTION OF COCAINE.

22 THE JURY AGREES WITH THEM AND THEY ARE ULTIMATELY
23 ACQUITTED ON THE MORE SERIOUS OFFENSES, BUT CONVICTED ON THE
24 MINOR OFFENSES. I THINK IT IS ALSO POSSIBLE -- WE HAVE
25 CLIENTS THAT WHEN THEY ARE ARRESTED, FULLY COOPERATE.

1 BUT THEN WE BREAK DOWN IN PLEA BARGAINING AND WE
2 GO TO TRIAL BECAUSE WE FEEL THEY ARE BEING OVERPROSECUTED OR
3 UNFAIRLY PROSECUTED. THE PLEA BARGAIN WASN'T GOOD ENOUGH.

4 BUT THEY HAVE, IN FACT, GIVEN SUBSTANTIAL BENEFIT
5 TO THE GOVERNMENT, AND THAT IS ANOTHER REASON WHY I BELIEVE
6 THAT IT IS NOT PROPER UNDER THE COOPERATION SECTION TO MAKE
7 IT ONLY AT THE INSTANCE OF THE GOVERNMENT.

8 I THINK THAT THE DEFENDANT SHOULD ALSO BE ENTITLED
9 TO MOVE THE COURT FOR CONSIDERATION, FOR COOPERATION, IF THE
10 GOVERNMENT -- EVEN IF THE U.S. ATTORNEY DOES NOT BELIEVE THAT
11 IT WAS SUFFICIENT FOR THEM TO WARRANT IT.

12 NOR DO I BELIEVE IT SHOULD BE BASED ON THE
13 CERTIFICATION OF THE U.S. ATTORNEY. I THINK THAT THE
14 DEFENDANT SHOULD HAVE A RIGHT TO ESTABLISH FOR THE COURT
15 HIMSELF WHETHER OR NOT HE HAS COOPERATED WITH THE GOVERNMENT.

16 LASTLY, I WOULD LIKE TO URGE THE COURT, ALTHOUGH
17 THIS -- NOT THE COURT, BUT THE COMMISSION -- ALTHOUGH YOU
18 HAVE NO AUTHORITY OVER IT, I THINK THAT CONGRESS SHOULD BE
19 URGED TO CONTINUE RULE 35 AS IT PRESENTLY EXISTS.

20 I THINK THE SUGGESTED -- OR THE AMENDMENT, NOT
21 SUGGESTED -- THE AMENDMENT THAT WOULD BECOME EFFECTIVE
22 TOGETHER WITH THE GUIDELINES WHICH BASICALLY AGGREGATES RULE
23 35 SERVES NO PURPOSE.

24 I THINK ITS INCONSISTENT WITH THE POLICIES AND THE
25 PURPOSES OF THE GUIDELINES. I ALSO WOULD SUGGEST THAT ALL --

1 A LOT OF THE CONCERNS THAT WE HAVE BEEN HEARING ABOUT THE
2 PROLIFERATION OF APPEALS BECAUSE OF THE GUIDELINES WOULD BE
3 HANDLED OR AT LEAST AMELIORATED IF WE CONTINUED TO HAVE RULE
4 35, BOTH TO CORRECT SENTENCES BUT ALSO TO EXERCISE
5 DISCRETION.

6 I FULLY AGREE WITH THE RESOLUTION THAT THE COURT
7 RECEIVED FROM THE NINTH CIRCUIT AS TO THE REASONS WHY IT
8 OUGHT TO REMAIN INTACT FOR DISCRETIONARY REDUCTIONS, BUT ALSO
9 IT SEEMS TOTALLY ABSURD TO NOT HAVE RULE 35 TO CORRECT
10 INCORRECT SENTENCES, ILLEGAL SENTENCES.

11 IT IS INEVITABLE THAT AS THE CIRCUIT COURTS START
12 TO RESOLVE THE CONFLICTS AND INTERPRET WHAT THE STATUTE
13 MEANS, IT'S ABSURD TO REQUIRE EACH DEFENDANT TO GO UP TO --
14 TO APPEAL UP TO THE CIRCUIT COURT.

15 IF THEIR NOTICE OF APPEAL TIME HAS LAPSED, THEN
16 WHAT WE ARE GOING TO SEE ARE 2255'S TO CORRECT THE SENTENCES.
17 WHY NOT JUST HAVE A SIMPLE MOTION FOR RULE 35?

18 IT ALSO, ALTHOUGH AT LEAST FOR THE ILLEGAL
19 SENTENCES, WE WOULD HAVE THE MECHANISM OF HAVING 2255'S. I
20 SUBMIT THAT ALL DISTRICT COURT JUDGES KNOW IT'S A LOT EASIER
21 TO DEAL WITH A RULE 35 THAN IT IS A 2255.

22 THANK YOU.

23 CHAIRMAN WILKINS: THANK YOU VERY MUCH.

24 MR. CAMPBELL: JUDGE WILKINS, MEMBERS OF THE
25 COMMISSION, THE FEDERAL DEFENDERS APPRECIATE THE OPPORTUNITY

1 TO PARTICIPATE IN THIS PROCESS AND TO COMMENT ON THESE
2 MATTERS OF IMPORTANCE TODAY.

3 I HAVE FOCUSED MY ATTENTION ON CHAPTER 4 OF THE
4 DRAFT, THAT IS DETERMINING THE SENTENCE WHERE THE COMMISSION
5 HAS IDENTIFIED CERTAIN ISSUES AS BEING PARTICULARLY
6 APPROPRIATE FOR COMMENT, NAMELY CONVERSION OF SANCTION UNITS
7 INTO A TERM OF IMPRISONMENT OR INTO A TERM OTHER THAN
8 IMPRISONMENT.

9 I HOPE THAT PERHAPS MY VIEWS MAY BE RESPONSIVE TO
10 THE CONCERNS RAISED BY SOME OF THE COMMISSION MEMBERS TODAY
11 ABOUT THE QUESTION OF FLEXIBILITY AND HOW MAY IT BE ACHIEVED
12 WITHIN THE SYSTEM.

13 I HAVE A FEW GENERAL COMMENTS. FIRST, THE NUMBERS
14 IN THE DRAFT. I'M NOT GOING TO DWELL ON IT. I UNDERSTAND
15 THESE ARE TENTATIVE, THAT IMPACT ANALYSIS IS PREMATURE, BUT I
16 DO WANT TO REGISTER MY PERCEPTION THAT THE DRAFT NUMBERS ARE
17 VERY HARSH, EVEN WHERE I COME FROM, IN MY PART OF THE
18 COUNTRY.

19 I DO NOT BELIEVE THAT THE COMMISSION HAS ANY
20 MANDATE TO RAISE AVERAGE SENTENCES GENERALLY. I THINK THE
21 994-M LANGUAGE THAT SAYS THAT IN MANY CASES SENTENCES ARE TOO
22 LOW WAS NOT INTENDED TO RAISE ALL SENTENCES.

23 I BELIEVE THE SENATE REPORT SPEAKS TO THAT, IN
24 SAYING THAT THE COMMISSION MAY FIND THAT SOME SENTENCES ARE
25 TOO HIGH AND SAYING EXPLICITLY THAT THE COMMITTEE EXPECTS

1 THAT THE COMMISSION, AFTER THE COMMISSION'S WORK, THAT
2 AVERAGE SENTENCES WILL REMAIN PRETTY MUCH THE SAME AS THEY
3 ARE NOW.

4 THE HARSH RESULTS THAT I SEE IN THE DRAFT NOW, I
5 BELIEVE, ARE PARTICULARLY ACUTE AT THE TOP AND THE BOTTOM.
6 AT THE BOTTOM, MORE PERSONS ARE GOING TO BE IMPRISONED FOR A
7 LITTLE TIME, AND AT THE TOP, MORE PERSONS ARE GOING TO BE
8 IMPRISONED FOREVER.

9 THIS IS A PRETTY POWERFUL NOTION WHEN WE ARE
10 MOVING AWAY FROM A SYSTEM WHERE ALMOST ALL SENTENCES ARE AT
11 LEAST LEGALLY PAROLABLE AFTER 10 YEARS, BUT MERELY LOWERING
12 THE NUMBERS IN THE GUIDELINE IS NOT THE SOLUTION TO WHAT I
13 SEE HERE.

14 I, TOO, AM CONCERNED WITH THE COMPLEXITY OF THE
15 DRAFT, BECAUSE DIFFERENT PARTICIPANTS IN THE SYSTEM ARE GOING
16 TO BE WORKING WITH IT INDEPENDENTLY IN EARLY STAGES OF THE
17 CASE.

18 I THINK ITS IMPORTANT THAT IT LEAD TO REPRODUCIBLE
19 RESULTS, AND I WOULD SUGGEST, NOT TO SAY THAT WHAT HAS BEEN
20 ACCOMPLISHED UP TO NOW HAS BEEN EASY, BUT, NEVERTHELESS, THAT
21 THERE IS VIRTUE IN A SYSTEM, WHICH ALTHOUGH HARD TO CREATE
22 AND SET UP, IS EASY TO IMPLEMENT AND CARRY OUT IN THE FIELD.
23 I THINK IT COULD APPLY TO THIS SYSTEM ALSO.

24 ALSO, I AGREE WITH THE OTHER SPEAKERS TODAY, THAT
25 I FIND NO REQUIREMENT THAT GUIDELINE SENTENCING BE HATCHED

1 OUT FULL GROWN.

2 THE CONCEPT CERTAINLY IS REVOLUTIONARY TO THE
3 FEDERAL SYSTEM, AT LEAST, BUT THAT IS NOT TO SAY THAT IT MAY
4 NOT DEVELOP IN AN EVOLUTIONARY FASHION. THE PRESUMPTIVE
5 GUIDELINE SYSTEM, THE KIND THAT WE WILL HAVE IN THE FEDERAL
6 COURTS, IS A VERY POWERFUL MECHANISM.

7 I THINK IT'S CLEAR NOW THAT WE HAVE A DRAFT TO
8 LOOK AT, AND I BELIEVE THIS POWERFUL NATURE OF IT ARGUES FOR
9 GREAT CARE AND GREAT CIRCUMSPECTION IN IMPLEMENTING THE
10 SYSTEM.

11 SPEAKING TO THE CHAPTER 4 ISSUES OF INCARCERATION
12 VERSUS PROBATION DECISION, THE DECISION TO INCARCERATE UNDER
13 THE DRAFT HAS LARGELY BEEN REDUCED TO A FORMULA OF NUMBERS.
14 IN MANY INSTANCES, IT SEEMS THAT A VERY SMALL DIFFERENCE OR
15 DIFFERENCE THAT IS NOT SIGNIFICANT IN ITSELF CAN RESULT IN A
16 CHANGE IN THAT DECISION BETWEEN IMPRISONMENT AND
17 INCARCERATION; THAT IS, WHETHER THERE ARE FOUR OR FIVE ALIENS
18 IN THE CAR OR 10 OR 11 WITH A 20 PERCENT DISCOUNT, WHETHER
19 \$5,000 OR 5,001 IS STOLEN, WHETHER A POUND OF MARIJUANA
20 HAPPENS TO BE A FEW GRAMS OVER OR UNDER.

21 NOW, I QUESTION WHETHER THIS DEGREE OF DETAIL IN
22 THIS KIND OF GUIDELINE SYSTEM IS DESIRABLE. IF THIS WERE A
23 PREPARATORY GUIDELINE SYSTEM RATHER THAN A MANDATORY
24 GUIDELINE SYSTEM, IT MAY BE DIFFERENT.

25 IN NON-CAPITAL CASES WHICH CARRY IMPRISONMENT, THE

1 PRIME DECISION IS WHETHER TO INCARCERATE, AND THAT PRIME
2 DECISION HAS BEEN REDUCED LARGELY TO A CIPHER UNDER THE
3 DRAFT.

4 THAT IS BECAUSE THE COMMISSION HAS PLACED
5 PROBABLE SENTENCES AT THE BOTTOM END OF THE IMPRISONMENT
6 GUIDELINE TABLE, THAT IS, THE TABLE WHERE THE RANGES MAY NOT
7 EXCEED 25 PERCENT, EXCEPT FOR THE EXCEPTION AT THE TOP AND
8 THE BOTTOM.

9 WHAT I WOULD LIKE TO SUGGEST IS THAT THE PROBATION
10 DECISION DOES NOT BELONG IN THE IMPRISONMENT GUIDELINE AT
11 ALL, BUT INSTEAD SHOULD BE THE SUBJECT OF ITS OWN GUIDELINE.
12 I THINK THAT GUIDELINE WOULD NECESSARILY BE MORE SUBJECTIVE
13 IN NATURE THAN THE ONES WE SEE IN THE DRAFT.

14 I THINK IT WOULD HAVE TO PARTAKE NECESSARILY MORE
15 OF A NARRATIVE FORM THAN WHAT WE SEE IN OTHER GUIDELINES IN
16 THE DRAFT. I DO RECOGNIZE THAT THERE MUST BE A GUIDELINE.

17 IT'S CLEAR FROM THE STATUTE THAT THERE MUST BE A
18 GUIDELINE THAT SPEAKS TO THE SELECTION OF THE TYPE OF
19 IMPRISONMENT. IN FACT, 994-J, AND IN MANY INSTANCES IN THE
20 SENATE REPORT, SEEMS TO CONTEMPLATE THAT THERE WILL BE
21 GUIDELINES THAT CALL FOR A SENTENCE OF PROBATION.

22 NOW, THE COMMISSION HAS NOT DONE SO IN THIS DRAFT.
23 THE LOWEST RANGE WHICH IS PROBABLE IS ALSO PUNISHABLE BY UP
24 TO SIX MONTHS IMPRISONMENT.

25 TO ME, THIS SEEMS A DISTINCT DEPARTURE FROM

1 CURRENT PRACTICE, BECAUSE WHEN YOU COMPARE THE CURRENT
2 PRACTICE, IT IMPLIES THAT ONLY IN A CASE WHERE A DEFENDANT
3 MIGHT BE CONSIDERED FOR NO MORE THAN 18 MONTHS SYMBOLIC
4 PAROLABLE SENTENCE MAY HE BE CONSIDERED FOR PROBATION.

5 I SUBMIT THE REAL SENTENCING -- BY THAT, I MEAN
6 NOT UNWARRANTED DISPARATE SENTENCING, BUT GOOD SOUND
7 SENTENCING, SIMPLY DOES NOT OPERATE IN THAT FASHION, AND I
8 DON'T BELIEVE THIS SET OF LAWS INTENDED FOR IT TO OPERATE IN
9 THAT FASHION.

10 SENTENCES ARE PROBABLE UNLESS THEY ARE A OR B
11 FELONY OR SPECIFICALLY EXCLUDED, OR THE DEFENDANT OTHERWISE
12 IS SENTENCED TO IMPRISONMENT. NOW, TO CHANGE IT TO MATCH
13 CURRENT SOUND PRACTICE, IT WOULD BE NECESSARY TO MOVE THE
14 PROBABLE SENTENCE RANGE FURTHER UP THE GUIDELINE, BUT, OF
15 COURSE, THIS IS IMPOSSIBLE BECAUSE OF THE MATHEMATICAL
16 NATURE.

17 ONLY THE RANGE WITH THE SIX MONTH CEILING CAN HAVE
18 A ZERO FLOOR. NOW, IT MAY BE THAT THE COMMISSION CONSIDERED
19 AND RESISTED THE NOTION OF HAVING THE GUIDELINE OR GUIDELINES
20 WHICH CALL FOR A TERM OF PROBATION BECAUSE OF THE FEAR THAT
21 THEY MAY DIMINISH THE DETERRENT EFFECT OF THE CRIMINAL
22 STATUTES.

23 IT MAY BE THAT THAT WAS A CONSIDERATION, BUT I DO
24 NOT THINK THAT THAT IS AN UNAVOIDABLE PROBLEM IN BUILDING
25 MORE FLEXIBILITY INTO THE SYSTEM, BECAUSE ALL OF THESE

1 CONSIDERATIONS TAKEN TOGETHER SUGGEST TO ME THAT THE
2 PROBATION DECISION DOES NOT BELONG IN THE IMPRISONMENT
3 GUIDELINE TABLE.

4 THIS LEAVES THE QUESTION OF WHERE IT DOES BELONG,
5 AND I BELIEVE THAT IT SHOULD BE THE SUBJECT OF A SEPARATE
6 THRESHOLD GUIDELINE, AND I BELIEVE THAT IN MANY WAYS, THE
7 STATUTES VERY STRONGLY REQUIRE IT.

8 WE SHOULD NOT LOSE SIGHT OF THE FACT THAT THE
9 FIRST STATED PURPOSE OF THIS COMMISSION IS TO ESTABLISH
10 POLICIES AND PRACTICES THAT WILL ASSURE THE MEETING OF THE
11 PURPOSES OF SENTENCE.

12 THE PURPOSES ARE SET OUT IN 3553, JUST PUNISHMENT,
13 DETERRENCE, INCAPACITATION, REHABILITATION, AND IT'S
14 INTERESTING TO NOTE THAT THERE IS NO PREFERENCE DRAWN AMONG
15 THOSE PURPOSES OF SENTENCE.

16 IT IS RECOGNIZED THAT ONE MAY BE IMPORTANT THAN
17 THE OTHERS IN A GIVEN CASE. THERE MAY EVEN BE CASES WHERE
18 ONE OF THOSE PURPOSES IS THE ONLY IDENTIFIABLE PURPOSE THAT
19 CAN BE SERVED BY IMPOSING SENTENCE.

20 BUT THE COURT IS REQUIRED TO CONSIDER THOSE
21 PURPOSES PRIOR TO IMPOSING SENTENCE, AND IT IS NOT POSSIBLE
22 TO REDUCE THOSE PURPOSES OF SENTENCING WHICH LIE AT THE HEART
23 OF THIS SYSTEM IN A MATHEMATICAL COMPUTATION.

24 TO PUT IT ANOTHER WAY, I DON'T BELIEVE IT IS
25 POSSIBLE FOR THE COMMISSION TO SUBSUME ALL OF THOSE MANDATORY

1 GOALS INTO A FORMULA OF NUMBERS. ONE OF THE FOUR PURPOSES OF
2 SENTENCING, WHICH CARRIES EQUAL WEIGHT IN THIS SCHEME, EVEN
3 THOUGH ITS LISTED FOURTH, IS REHABILITATION.

4 THE REFERENCES IN THE SENATE REPORT AND OTHER
5 LEGISLATIVE HISTORY TO THE OUTMODED REHABILITATION MODEL, OF
6 COURSE, REFERS TO THE IDEA OF IMPOSING AN INDETERMINATE
7 SENTENCE AND LETTING THE PAROLE COMMISSION DECIDE WHEN THAT
8 PERSON HAS BEEN LOCKED UP LONG ENOUGH TO BE REHABILITATED.

9 IT IS NOT A REJECTION OR REPUDIATION OF USING
10 REHABILITATION AS ONE OF THE PURPOSES OF SENTENCE, BUT IT IS
11 THE SENSE THAT THE REPORT, THAT REHABILITATION IS A PURPOSE
12 THAT IS TO BE SOUGHT AND ACHIEVED OUT OF THE PRISON SETTING.

13 WHAT I BELIEVE IS THAT THE SENTENCING JUDGE'S
14 ASSESSMENT OF A GIVEN DEFENDANT'S REHABILITATIVE DETENTION,
15 BASED ON FACE-TO-FACE CONTACT WITH THAT PERSON, A DISCOURSE
16 IN OPEN COURT, CANNOT BE REPLACED BY A NUMBER CALCULATED IN
17 ADVANCE.

18 I BELIEVE THE CONVERSE IS TRUE ALSO, WHICH TOUCHES
19 UPON THE THIRD PURPOSE OF SENTENCING OF INCAPACITATION. I AM
20 NOT SATISFIED THAT PREFABRICATED GUIDELINES CAN DETERMINE
21 MORE RELIABLY IN ADVANCE WHETHER A GIVEN DEFENDANT NEEDS TO
22 BE ISOLATED THAN THE JUDGE PASSING SENTENCE ON THAT PERSON
23 CAN DECIDE.

24 THE SECOND PURPOSE OF SENTENCING IS SUMMARIZED AS
25 JUST PUNISHMENT, ALSO INCLUDES THE COMPONENT OF PROMOTING

1 RESPECT FOR THE LAW. THE SENATE REPORT GIVES AN EXAMPLE OF
2 AN OFFENSE OF LITTLE NOTORIETY, NOT FREQUENTLY COMMITTED,
3 LITTLE LIKELIHOOD OF RECIDIVISM, WHICH THAT THUS PRESENTS
4 COMPELLING CASE, THE PARAMOUNT PURPOSE OF REHABILITATION, AND
5 SUGGESTS THAT IT MAY ALMOST MANDATE A SENTENCE OF PROBATION.
6 I WOULD SUGGEST THAT ALL OF THOSE FACTORS THERE ARE THE KINDS
7 THAT DO NOT LEND THEMSELVES TO NUMERICAL QUALIFICATION.

8 THE SECOND PURPOSE OF DETERRENCE BRINGS TO MIND
9 ANOTHER EXAMPLE, THAT IS, THAT IT MAY BE WITHIN THE KNOWLEDGE
10 OF THE SENTENCING JUDGE THAT A PARTICULAR OFFENSE, PARTICULAR
11 CRIME IS RAPIDLY INCREASING IN A PARTICULAR AREA, DISTRICT,
12 DIVISION, PLACE OF COURT IN A PARTICULAR TIME.

13 THAT JUDGE MAY WELL WISH TO GIVE MORE WEIGHT TO
14 DETERRENCE THAN GUIDELINES WOULD OTHERWISE PERMIT. I THINK
15 MY FUNDAMENTAL OBJECTION TO REGULATING THE PROBATION DECISION
16 BY THE MATHEMATICAL FORMULA IS THAT IT FAILS TO CONSIDER ANY
17 NON-NUMERICALLY QUANTIFIABLE FACTORS, BECAUSE BY DEFINITION,
18 THEY MAY NOT BE CONSIDERED IN THE DRAFT GUIDELINES THAT WE
19 HAVE RIGHT NOW.

20 MOST OF THESE FACTORS, ACHIEVEMENT OF THE GOALS OF
21 SENTENCING, WHICH LIE AT THE CORE OF THIS ACT, ARE THINGS
22 WHICH MUST BE ADDRESSED, BUT THEY DO NOT LEND THEMSELVES TO
23 THAT KIND OF TREATMENT.

24 I THINK THE PURPOSES OF GUIDELINE SENTENCING CAN
25 BE ACHIEVED BY A GUIDELINE THAT INFORMS THE DETERMINATION OF

1 THE TYPE OF SENTENCE, THAT IS, AS BETWEEN INCARCERATION AND
2 PROBATION IN THE FIRST INSTANCE.

3 IT SHOULD EXPLICATE THESE PURPOSES OF SENTENCING
4 AS SET OUT IN THE STATUTE. IT SHOULD EMPHASIZE THAT NO ONE
5 GOAL IS PARAMOUNT, THAT, INSTEAD, THE SELECTION OF A TYPE OF
6 SENTENCE REQUIRES THE JUDGE TO IDENTIFY WHICH GOAL OR GOAL OF
7 SENTENCING IS MORE IMPORTANT, WHICH CAN BE SERVED IN A
8 PARTICULAR CASE, AND HOW THEY SHOULD BE RANKED AS TO
9 PRIORITY.

2
10 OF COURSE, THIS COULD BE AUGMENTED BY ONE OR MORE
11 POLICY STATEMENTS PROVIDING MORE DETAILED GUIDANCE AS TO ITS
12 APPLICATION. NOW, SUCH GUIDELINE WOULD NOT PRODUCE A NUMBER
13 RESULT, BUT IT IS NOWHERE WRITTEN THAT ALL OF THE GUIDELINES
14 MUST PRODUCE A NUMBER OR MUST HAVE --

15 COMMISSIONER BREYER: I THINK IF YOU WANT TO KNOW,
16 THERE WAS NO COMMISSION DECISION ON THIS ONE WAY OR THE
17 OTHER. THE KINDS OF FACTORS THAT YOU'RE GIVING REALLY -- THE
18 MAIN PROBLEM AGAINST IT IS THE STATUTE, 994-B, WHICH SEEMS TO
19 SAY YOU CAN'T DO IT.

20 THE OTHER THING THAT WAS -- THAT IS RELEVANT IS
21 THE FACT THAT IF YOU SOMEHOW GET AROUND THAT STATUTORY
22 PROVISION, YOU WOULD STILL HAVE A STATUTE WHICH SAYS, "LOOK,
23 JUDGE," ON YOUR THEORY, "YOU DECIDE WHETHER TO PUT THIS
24 PERSON IN JAIL OR TO GIVE HIM PROBATION. IF YOU PUT HIM IN
25 JAIL, HE HAS TO GO TO JAIL FOR 10 YEARS, BUT YOU HAVE THE

1 OPTION OF NOT SENDING HIM TO JAIL AT ALL." THAT'S A LITTLE
2 WEIRD THAT HIS CHOICE IS EITHER 10 YEARS OR NOTHING, BECAUSE
3 YOU WOULD THINK IF YOU COULD SEND HIM TO JAIL FOR NOTHING,
4 YOU SHOULD BE ABLE TO SEND HIM TO JAIL FOR ONE YEAR INSTEAD
5 OF 10.

6 IN OTHER WORDS, IT'S THE STATUTE THAT CAUSES THE
7 PROBLEM IN LIGHT OF THE PRACTICAL PROBLEM I JUST MENTIONED,
8 NOT THE THINGS THAT YOU'RE GIVING SOME GOOD REASONS FOR AND
9 AGAINST IT. THAT'S FINE.

10 I DON'T THINK RIGHT NOW YOU PROBABLY COULD ANSWER
11 THAT, BUT IF YOU COULD GO TO THE STATUTE, LOOK AT THAT
12 PARTICULAR PROVISION AND TELL US HOW TO DEAL WITH THAT
13 PROBLEM, I THINK THAT WOULD BE USEFUL.

14 MR. CAMPBELL: JUDGE BREYER, I THINK IT IS
15 IMPORTANT TO RECOGNIZE THAT 994-B, IN PARTICULAR THE
16 25-PERCENT RANGE, APPLIES TO ONE THING ONLY, SENTENCES OF
17 IMPRISONMENT.

18 COMMISSIONER BREYER: THAT'S RIGHT. IT SAYS, IF
19 YOU PROVIDE A SENTENCE OF IMPRISONMENT, THE UPPER PART OF THE
20 RANGE HAS TO BE WITHIN 25 PERCENT OF THE LOWER PART. SO,
21 YOU'RE SAYING, OKAY, YOU CAN LITERALLY COMPLY WITH THAT BY
22 DOING THE FOLLOWING: SAY, JUDGE, DON'T SEND HIM TO PRISON AT
23 ALL. I'M SAYING THAT PRODUCES THE FOLLOWING DILEMMA. THE
24 JUDGE IS TOLD, YOU EITHER SEND HIM TO PRISON NOT AT ALL, OR
25 YOU SEND HIM, SAY, FOR EIGHT YEARS.

1 NOW, THAT'S A RATHER ODD ANOMALY BECAUSE YOU WOULD
2 THINK THAT A SYSTEM OF GUIDELINES THAT TELLS THE JUDGE,
3 "JUDGE, YOU HAVE THE RIGHT NOT TO SEND HIM AT ALL," WOULD BE
4 LIKELY TO SAY, "LOOK, SEND HIM FOR FOUR YEARS, IF YOU WANT,
5 OR TWO YEARS. YOUR CHOICE HAS TO BE ALL OR NOTHING, EITHER
6 EIGHT YEARS OR NOTHING."

7 THAT'S THE KIND OF INTERPRETATION YOU'RE URGING ON
8 US AND THAT'S AN ODD INTERPRETATION OF THIS PROVISION.
9 THAT'S THE PROBLEM.

10 MR. CAMPBELL: I BELIEVE, JUDGE BREYER, THAT THE
11 GUIDELINES SHOULD RECOGNIZE THE IMPORTANCE AND THE GRAVITY OF
12 THAT DECISION. IN OTHER WORDS, IN A NON-CAPITAL CASE, IF IT
13 IS NOT A LIFE OR DEATH DECISION, IT IS THE MOST GRAVE
14 DECISION THAT IS MADE IN THE CRIMINAL JUSTICE PROCESS,
15 WHETHER TO DEPRIVE SOMEONE OF LIBERTY.

16 I BELIEVE THAT IT IS A DECISION THAT IS BETTER
17 MADE WITH A MORE SUBJECTIVE GUIDELINE THAN IT IS --

18 COMMISSIONER BREYER: I'M NOT ARGUING THE MERITS
19 WITH YOU. I'M SAYING YOU COULD GIVE ME SOME STATUTORY HELP.
20 I FIND IT DIFFICULT TO READ THAT PARTICULAR PROVISION TO MEAN
21 WHAT YOU SAY IT MEANS.

22 WHAT YOU SAY IT MEANS IS THE JUDGE IS TOLD BY US,
23 YOU SEND HIM TO JAIL FOR EIGHT YEARS OR YOU DON'T SEND HIM AT
24 ALL. WE ARE FORBIDDEN TO TELL THE JUDGE, YOU CAN SEND HIM
25 FOR LESS THAN EIGHT YEARS.

1 WE HAVE TO GIVE HIM THAT ALL OR NOTHING CHOICE.
2 IT'S THAT ODDNESS OF THE RESULT THAT LEADS SOME OF THE
3 COMMISSIONERS TO FEEL THE STATUTE CANNOT MEAN THAT. NOW, I'M
4 SAYING ITS A PURELY LEGAL PROBLEM. IT HAS NOTHING TO DO WITH
5 POLICY.

6 NOW, IF AT SOME POINT YOU CAN ADDRESS YOURSELF TO
7 THAT PURELY LEGAL PROBLEM OF THE MEANING OF THAT PHRASE --
8 AND I DON'T THINK YOU CAN DO IT NOW -- I THINK YOUR
9 ADDRESSING YOURSELF TO THAT PARTICULAR LEGAL PROBLEM WOULD BE
10 HELPFUL TO ME.

11 MR. CAMPBELL: JUDGE, AS I READ TITLE 28 AND TITLE
12 18, THE INTENT OR THE EXPECTATION IS NOT TO ELIMINATE ALL
13 DISPARITY, BUT TO ELIMINATE THE UNWARRANTED --

14 COMMISSIONER BREYER: WELL, YOU ARE CONTINUOUSLY
15 BRINGING BACK POLICY. I'M NOT TALKING ABOUT POLICY. I'M
16 TALKING ABOUT A NARROW LEGAL QUESTION. AS YOU SAID, IF YOU
17 WOULD LIKE TO -- YOU CAN GO ON AND SAY WHAT YOU LIKE.

18 MR. CAMPBELL: WELL, I'M NOT AWARE OF A STATUTORY
19 PROHIBITION, BUT I UNDERSTAND THAT MY SUGGESTIONS ARE AT
20 VARIANCE WITH THE CONCEPT AS EXPRESSED IN THE DRAFT THAT WE
21 HAVE BEFORE US HERE NOW.

22 I WOULD MENTION ALSO IN CLOSING THAT CERTAINTY AND
23 FAIRNESS IS ONE OF THE GOALS THAT'S MENTIONED TWICE, AND I
24 THINK THE REASON THEY ARE MENTIONED TOGETHER IS THAT IT IS A
25 TRADING-OFF PROCESS, THAT ONE CANNOT BE ACHIEVED EXCEPT AT

1 THE EXPENSE OF THE OTHER IN THE CONTEXT THAT THEY ARE APPLIED
2 HERE.

3 COMPLETE CERTAINTY COULD BE APPROACHED, BUT IT
4 WOULD ONLY BE AT THE EXPENSE OF FAIRNESS. I BELIEVE THE
5 COMMISSION MUST STRIVE FOR FAIRNESS, EVEN IF IT IS NECESSARY
6 TO SACRIFICE SOME MEASURE OF CERTAINTY IN THE PROCESS.

7 CHAIRMAN WILKINS: MR. CAMPBELL, THANK YOU VERY
8 MUCH. IT'S OBVIOUS YOU HAVE GIVEN A GREAT DEAL OF THOUGHT TO
9 THE PROBLEM THAT WE ARE STRUGGLING WITH, AND THAT'S TRYING TO
10 DEVELOP THE VERY BEST SYSTEM THAT WE CAN.

11 I WOULD ECHO WHAT JUDGE BREYER SAID. GIVE SOME
12 THOUGHT TO THE LEGAL CONSTRAINTS OF THAT SECTION AND TELL US
13 HOW WE CAN WORK WITHIN THE CONSTRAINTS OF THE LAW; AND IF YOU
14 HAVE ANY ADDITIONAL THOUGHTS ON IT, I WOULD APPRECIATE YOU
15 SENDING IT TO US IN WRITING.

16 MR. CAMPBELL: I WILL DO SO.

17 CHAIRMAN WILKINS: THANK YOU VERY MUCH.

18 MS. KEARNS, IF YOU WOULD GIVE SOME THOUGHT, TOO,
19 TO HOW DO WE DEAL WITH THE BELLIGERENT PASSENGER THAT YOU
20 BROUGHT UP. IT'S A GOOD POINT.

21 MS. KEARNS: WELL, I THINK THERE COULD BE A
22 DISORDERLY CONDUCT PROVISION.

23 CHAIRMAN WILKINS: WITHOUT CONGRESSIONAL ACTION?

24 MS. KEARNS: OH, WITHOUT CONGRESSIONAL ACTION?

25 CHAIRMAN WILKINS: BECAUSE WE CAN'T CONTROL THE

1 CONGRESS.

2 MS. KEARNS: I THINK IT'S THE SAME PROBLEM. IT'S
3 A CLASS B FELONY, AND YOU CANNOT PERMIT PROBATION.

4 CHAIRMAN WILKINS: IT IS A DIFFICULT THING.

5 MS. KEARNS: I WILL GIVE IT SOME THOUGHT.

6 CHAIRMAN WILKINS: THERE MAY BE SOME LANGUAGE
7 SOMEWHERE ALONG THE LINE THAT WE COULD PUT IN THE GUIDELINE
8 THAT WOULD GIVE THAT ESCAPE VALVE FOR THAT OBVIOUS SITUATION
9 THAT CONGRESS DID NOT INTEND TO DEAL WITH.

10 AS FAR AS RULE 35 IS CONCERNED, TOO, IF YOU HAVE
11 TIME YOU MIGHT SEND US A LETTER SAYING WHAT YOU WOULD LIKE TO
12 SEE HAPPEN TO RULE 35 AND WHY BECAUSE IT WILL BE A VERY, VERY
13 DIFFICULT THING FOR THIS COMMISSION TO GET THE CONGRESS TO
14 CHANGE IT.

15 I'M NOT SURE WE ARE GOING TO DO IT, BUT WE ARE
16 GIVING IT A LOT OF THOUGHT ON WHAT OUR POSITION WILL BE; AND
17 THE MORE SUPPORT WE GET FOR THAT MOVE, THE BETTER OFF WE ARE,
18 IF WE DETERMINE IT'S THE RIGHT THING TO DO.

19 I SHARE YOUR CONCERN VERY MUCH, BUT MANY IN THE
20 CONGRESS WANT TO SEE -- DON'T WANT TO SEE ANY CHANGES IN IT,
21 AND SO THE JUDGES AND LAWYERS CAN HAVE A GREAT IMPACT ON THAT
22 DECISION.

23 WE NEED TO HEAR FROM YOU. THANK YOU SO MUCH. ANY
24 QUESTIONS TO MY RIGHT? COMMISSIONER BLOCK?

25 COMMISSIONER BLOCK: MS. KEARNS, WE HAVE HEARD

1 TESTIMONY IN OTHER AREAS THAT A 20 PERCENT DISCOUNT MIGHT NOT
2 BE ENOUGH, ESPECIALLY WITH LONG SENTENCES. YOU TALKED ABOUT
3 A 15-YEAR SENTENCE; THREE YEARS OFF OF A 15-YEAR SENTENCE MAY
4 NOT BE ADEQUATE. WOULD YOU ADDRESS YOURSELF TO THAT QUESTION
5 WITH YOUR OWN EXPERIENCE?

6 MS. KEARNS: 20 PERCENT FOR ACCEPTANCE OF
7 RESPONSIBILITY?

8 COMMISSIONER BLOCK: RIGHT.

9 MS. KEARNS: AGAIN, I FEEL THAT THE SENTENCES
10 THEMSELVES ARE VERY LONG AND ASSUMING THAT THE GUIDELINES,
11 WHEN THEY FINALLY COME OUT IN FINAL FORM ARE GOING TO MORE
12 ACCURATELY REFLECT WHAT THE PRESENT SENTENCES ARE, YOU KNOW,
13 I THINK THAT 20 PERCENT IS WARRANTED. I THINK THE DIFFICULTY
14 IS IF YOU HAVE SOMETHING LIKE 40 PERCENT OR 50 PERCENT THAT
15 HAS BEEN SUGGESTED, IT DOES INHIBIT YOUR FUNDAMENTAL RIGHT TO
16 GO TO TRIAL.

17 I DON'T THINK THAT THAT WOULD BE AN APPROPRIATE
18 USE, PLUS THERE'S ALSO BEEN -- IT'S NOT CLEAR WHETHER OR NOT
19 YOU ARE GOING TO BE ABLE TO GET DISCOUNTS FOR COOPERATION, AS
20 WELL AS ACCEPTANCE OF RESPONSIBILITY.

21 SO I THINK THAT SINCE THERE ARE PROBABLY GOING TO
22 BE OTHER WAYS YOU CAN ALSO REDUCE YOUR SENTENCE, I DO BELIEVE
23 20 PERCENT IS SUFFICIENT.

24 COMMISSIONER BLOCK: THE MAJOR PROBLEM IS THE
25 LENGTH OF YOUR PERSPECTIVE, IS IT NOT?

1 MS. KEARNS: RIGHT.

2 CHAIRMAN WILKINS: ANY QUESTIONS TO MY LEFT?

3 COMMISSIONER MACKINNON: MR. CAMPBELL, YOU TALKED
4 ABOUT REHABILITATION. DEFINITELY, OF COURSE, THE STATUTE
5 DOESN'T OUTLAW IT, BUT DON'T YOU THINK THAT THE GENERAL
6 RESULT OF EVERYTHING THAT CONGRESS HAS DONE IS A REALIZATION
7 THAT REHABILITATION WAS A FAILURE AS THE PRIME OBJECTIVE OF
8 INCARCERATION, AS IT WAS GENERALLY BEING APPLIED, AND THAT IT
9 WAS PLACED AT ONE OF THE LOWEST CONSIDERATIONS IN THE
10 SENTENCING FACTOR? ISN'T THAT THE EFFECT OF THE STATUTE?

11 MR. CAMPBELL: I AGREE THAT CONGRESS MADE THAT
12 RECOGNITION AS TO THE INDETERMINATE SENTENCING PROGRAM, BUT I
13 DO NOT UNDERSTAND THE FACT THAT IT'S LISTED AS FACTOR NO. 4,
14 PURPOSE NO. 4, REFLECTS ANY INTENT AS TO WEIGHT.

15 I FIND EXPRESSIONS IN THE SENATE REPORT THAT THE
16 PURPOSES ARE TO BE WEIGHED EQUALLY.

17 COMMISSIONER MACKINNON: THE OTHER THING I WANTED
18 TO POINT OUT IS, I DON'T KNOW THAT THIS IS A COMPLETE ANSWER
19 AND I DON'T KNOW HOW FAR IT WILL GO, BUT YOU'RE TALKING ABOUT
20 FACTORS THAT WERE NOT ADDRESSED.

21 GENERALLY IF FACTORS AREN'T ADDRESSED, THERE'S
22 SOME WEIGHT FOR THE POSITION THAT IT CAN GO OUTSIDE THE
23 GUIDELINES. IF IT ISN'T IN THE GUIDELINES, IT ISN'T
24 ADDRESSED IN THE GUIDELINES, THEN IT'S SOMETHING YOU CAN
25 RAISE OUTSIDE. SO THAT GETS TO THE POINT WE HAVE TO INCLUDE

1 IT IN THE GUIDELINES OR IT'S OUTSIDE.

2 MS. KEARNS, I WAS INTERESTED IN YOUR STATEMENT
3 ABOUT THE GUILTY PLEA ON POSSESSION AFTER THE -- OR AFTER THE
4 NOT-GUILTY PLEA ON DISTRIBUTION. THE WAY I HAVE SEEN THAT
5 HANDLED, I DON'T KNOW WHETHER YOU HAVE, IS GO IN FIRST AND
6 PLEAD; TELL THE JUDGE, I'M WILLING TO PLEAD TO POSSESSION,
7 BUT I'M NOT WILLING TO PLEAD TO DISTRIBUTION.

8 NOW, IF HE WANTS TO WAIT AND GET A BITE AT THE
9 APPLE AND FIND THAT HE'S GUILTY ON ONE OF THEM, HE'S SORT OF
10 NOT DOING TOO MUCH TO BE HELPFUL TO THE COURT OR TO THE TRIAL
11 OF THE CASE.

12 MS. KEARNS: JUDGE, BY GOING IN AND PLEADING
13 GUILTY ON ONE COUNT AND PLEADING NOT GUILTY ON THE OTHER
14 COUNT, IT DOESN'T RESOLVE THE DILEMMA FOR THE COURT THAT THEY
15 HAVE TO CONDUCT THE TRIAL.

16 COMMISSIONER MACKINNON: DOESN'T WHAT?

17 MS. KEARNS: IT DOES NOT RESOLVE THE DILEMMA FOR
18 THE COURT THAT THEY HAVE TO CONDUCT A TRIAL ON THE OTHER
19 COUNTS.

20 COMMISSIONER MACKINNON: THEY DON'T HAVE TO.

21 MS. KEARNS: MAYBE THIS DISTRICT DOESN'T OPERATE
22 AS LOOSELY AS THE DISTRICT COURTS --

23 COMMISSIONER MACKINNON: I BET YOU YOU WILL FIND
24 MANY JUDGES, IF THEY ARE PLEADING GUILTY TO THE POSSESSION
25 COUNT, WILL BRING SOME PRESSURE TO TRY THEM ON THE -- TO NOT

1 TRY THEM ON THE DISTRIBUTION COUNT.

2 MS. KEARNS: YOUR HONOR, WE HAVE GOT ENOUGH U.S.
3 ATTORNEYS, ASSISTANT U.S. ATTORNEYS IN THIS COURTROOM, THAT
4 THEY KNOW THAT THEY ARE NOT PERSUADED BY THE JUDGE, YOU KNOW,
5 SUGGESTING TO THEM, WELL, GO AHEAD AND LET THEM PLEAD TO ONE
6 BANK ROBBERY AND DON'T MAKE IT TWO. THEY ARE VERY
7 STRONG-MINDED IN THIS DISTRICT.

8 COMMISSIONER MACKINNON: THEN HE CAN GET CREDIT
9 FOR THE PLEA, FOR A VOLUNTARY PLEA, IF HE DOES IT --

10 MS. KEARNS: I SEE YOUR POINT. WELL, I FEEL THAT
11 THERE ARE SITUATIONS WHERE IT ISN'T WARRANTED THAT MY CLIENT
12 SHOULD GET DISCOUNTS FOR PLEADING GUILTY. I THINK YOUR
13 EXAMPLE OF THE CINCH SITUATION IS A PERFECT EXAMPLE, AND I
14 DON'T THINK THAT YOU CAN CONSIDER THAT AS A BAD FAITH PLEA
15 EITHER JUST BECAUSE SOMEONE DOES NOT WANT TO GO TO TRIAL.

16 COMMISSIONER MACKINNON: IT ISN'T A BAD FAITH
17 PLEA, BUT IT'S SOMETHING IN HIS OWN SELF-INTEREST.

18 MS. KEARNS: WELL, IT IS IN HIS OWN SELF-INTEREST,
19 YOUR HONOR, BUT I THINK THAT THE MORE POSITIVE APPROACH TO IT
20 IS NOT JUST TO DETERMINE WHETHER IT WAS IN HIS OWN
21 SELF-INTEREST, BUT RATHER FOR THE COURT TO DECIDE IN EACH
22 SITUATION WHETHER OR NOT THE PERSON HAS ACCEPTED
23 RESPONSIBILITY UNDER THE FIVE FACTORS THAT ARE LISTED.

24 COMMISSIONER MACKINNON: THANK YOU.

25 CHAIRMAN WILKINS: THANK YOU VERY MUCH. AGAIN, I

1 WANT TO TELL YOU, YOUR COMMENTS ARE MOST CONSTRUCTIVE, AND WE
2 APPRECIATE IT VERY MUCH.

3 HOPEFULLY WE CAN CALL ON YOU IN THE NEXT FEW
4 MONTHS WITH SOME OTHER SPECIFIC ISSUES, IF WE COULD IMPOSE ON
5 YOUR TIME AND EXPERTISE. WE MAY GIVE YOU A CALL AND ASK YOU
6 TO HELP US WITH SOME OF THESE TOUGH PROBLEMS WHEN WE GET
7 CLOSER TO MAKING A FINAL RESOLUTION.

8 MS. KEARNS: THANK YOU.

9 CHAIRMAN WILKINS: THANK YOU. THIS CONCLUDES THE
10 LIST OF WITNESSES WHO WERE SCHEDULED TO TESTIFY, BUT IT HAS
11 BEEN OUR PRACTICE, ANYONE WHO HAS ANY INFORMATION OR COMMENTS
12 TO BRING TO THE COMMISSION IS CERTAINLY ENCOURAGED TO DO SO.

13 SO AT THIS TIME, IF ANYONE HAS ANY COMMENTS,
14 PLEASE RAISE YOUR HAND AND COME FORWARD.

15 YES, SIR.

16 MR. ARBES: THANK YOU. MY NAME IS JAKE ARBES,
17 A-R-B-E-S. I'M WITH THE LAW FIRM OF ABBOTT AND ARBES. WE DO
18 PRIMARILY CRIMINAL LAW AND A LARGE PART OF OUR PRACTICE DEALS
19 WITH PAROLE WORK. WE DEAL WITH A LOT OF INMATES.

20 PRIOR TO GETTING INTO DEFENSE PRACTICE, I WAS WITH
21 THE U.S. ATTORNEY'S OFFICE HERE AND CLERKED ON THE ELEVENTH
22 CIRCUIT WITH A FEDERAL JUDGE THERE, SO I FEEL AS THOUGH I
23 HAVE A RIGHT TO THROW IN MY TWO CENTS WORTH HERE AND I
24 APPRECIATE THE OPPORTUNITY THAT YOU HAVE GIVEN ME TO DO THAT.

25 I HAVE BEEN HERE THE WHOLE DAY AND I HAVE LISTENED

1 WITH SOME PUZZLEMENT AS MANY PEOPLE HAVE DECRIED THE
2 PURPORTED DISPARITY IN SENTENCING, AND WHAT STRIKES ME AS
3 PUZZLING ABOUT THAT IS THE DISPARITY OF SENTENCING TO ME
4 ISN'T THAT IMPORTANT.

5 WHAT IS IMPORTANT IS THE DISPARITY IN
6 INCARCERATION, AND I THINK THAT THERE IS A GIGANTIC
7 DIFFERENCE THERE. FOR INSTANCE, IT IS VERY POSSIBLE THAT AN
8 INDIVIDUAL COULD BE GIVEN A 10-YEAR SENTENCE AND ANOTHER
9 INDIVIDUAL COULD BE GIVEN A FOUR-YEAR SENTENCE, BUT IN TERMS
10 OF THE PRACTICAL OUTCOME OF THE CASE, THEIR INCARCERATION
11 WOULD BE EXACTLY THE SAME.

12 SO WHAT IF THERE IS A DISPARITY OF SENTENCE UNDER
13 THOSE CONDITIONS? THE INCARCERATION IS THE SAME. WHAT
14 BOTHERS ME IS THE MIRROR IMAGE OF THAT OR THE FLIP SIDE OF
15 THAT, IN WHICH YOU HAVE PEOPLE THAT WERE GIVEN AN IDENTICAL
16 SENTENCE BUT IN WHICH THEIR INCARCERATION IS DISPARATE, IF
17 THAT'S THE CORRECT WORD.

18 THAT HAPPENS ALL THE TIME. AND WHAT BOTHERS ME,
19 IN READING OVER THE PROPOSED REGULATIONS AND GUIDELINES, IS I
20 DON'T KNOW WHETHER THE PROCESS THAT YOU'RE WORKING ON NOW CAN
21 REALLY CORRECT THAT PROBLEM, WHICH, TO ME, IS THE KEY
22 PROBLEM.

23 AS A PRACTICAL MATTER, LOOKING AT THE WAY THE
24 PROCESS REALLY WORKS, THE PROSECUTOR WILL HAVE A CASE, WILL
25 INDICT ON A NUMBER OF COUNTS, SOME OF WHICH MIGHT BE THERE,

1 SOME OF WHICH MIGHT NOT BE THERE.

2 HOPEFULLY THE PROSECUTOR AT THE TIME HE INDICTS
3 WILL THINK THAT HE HAS THEM ALL. I'M NOT SAYING THAT THEY
4 ARE OVERINDICTING. I'M JUST SAYING THAT THAT'S THE WAY IT
5 GOES.

6 THEN THE CASE IS EITHER TRIED OR PLED OUT. IN ANY
7 EVENT, WHEN IT COMES TO SENTENCING, WHAT WILL HAPPEN
8 FREQUENTLY IS, THE PROBATION OFFICER WILL COME DOWNSTAIRS TO
9 THE ASSISTANT'S OFFICE.

10 THE ASSISTANT MIGHT HAND HIM THE FILE, HIM OR HER
11 THE FILE, OR MIGHT SPEAK TO HIM OR HER ABOUT THE CASE, AND
12 THEN THE PROBATION OFFICER WILL WRITE THE PRESENTENCE REPORT.
13 THE PRESENTENCE REPORT WILL BE GIVEN TO THE JUDGE. THE JUDGE
14 WILL MAKE THE DETERMINATION AFTER FIRST, UNDER RULE 32,
15 ALLOWING THE DEFENSE ATTORNEY TO QUESTION THINGS IN THE PSI.

16 WHAT WILL FREQUENTLY HAPPEN UNDER THE PRESENT
17 SYSTEM IS THAT THE JUDGE -- EVEN IF THE DEFENSE ATTORNEY IS
18 BRIGHT ENOUGH TO MAKE, OR KNOWLEDGEABLE ENOUGH TO MAKE A RULE
19 32 OBJECTION, HE MIGHT WELL SAY -- THE JUDGE MIGHT WELL SAY
20 THAT, WELL, THAT'S ALL FINE AND GOOD, BUT IT'S NOTHING THAT I
21 CONSIDERED IN MAKING MY SENTENCE; THEREFORE, I WILL NOT TOUCH
22 THE PRESENTENCE REPORT.

23 IT THEN GOES TO A PAROLE HEARING, AS YOU ALL KNOW,
24 AND AT THE TIME OF THE PAROLE HEARING, YOU WILL HAVE THIS
25 INCREDIBLE CONTROVERSY ABOUT WHETHER THE AMOUNT OF THE FRAUD

1 WAS \$3,000 OR \$130,000, OR WHETHER THE AMOUNT OF THE
2 MARIJUANA WAS 18,000 POUNDS OR 75,000 POUNDS. OF COURSE, YOU
3 HAVE THE PROBLEMS WITH THE CONSPIRACY THAT WE HAVE ALREADY
4 TALKED ABOUT TODAY.

5 NOW, UNDER THE PRESENT SYSTEM -- TO JUMP BACK,
6 UNDER THE PRESENT SYSTEM, THE POWER, AS I SEE IT, IS WITH THE
7 PROBATION OFFICE, REALLY.

8 THE PROBATION OFFICE DOES THE PSI. THE PSI IS THE
9 MOST IMPORTANT ITEM IN THE FINAL DETERMINATION OF HOW LONG
10 THAT PERSON IS INCARCERATED. I DON'T THINK THERE IS ANY
11 QUESTION ABOUT THAT AT ALL.

12 I THINK THE PROBATION OFFICER PROBABLY HAS MORE OF
13 AN EFFECT ON THIS, ON THE PROCEDURE, THAN THE SENTENCING
14 JUDGE, AND I THINK WHAT YOU ALL ARE RECOMMENDING NOW IS NOT
15 THAT MUCH DIFFERENT FROM WHAT WE HAVE NOW, IN THE SENSE THAT
16 THE PROBATION OFFICER WILL WRITE A PSI AND IN THE PSI,
17 THEY'LL TAKE ALL THESE ITEMS THAT YOU HAVE GIVEN THEM AND
18 WILL SCORE IT, AND THEN WILL GIVE THE JUDGE -- I IMAGINE THIS
19 IS THE WAY IT WILL WORK IN REAL LIFE -- WILL GIVE THE JUDGE
20 WHAT THEY CONSIDER TO BE THE POTENTIAL SCORE.

21 THEN THE JUDGE WILL SAY -- MIGHT WELL SAY, THIS IS
22 THE SCORE THAT WE HAVE COME UP WITH AND DO YOU HAVE ANY
23 COMMENTS OR ANYTHING LIKE THAT. THERE MIGHT BE A LOT OF
24 DISPUTES IN THE PSI.

25 HERE IS THE KEY POINT, IF YOU WILL BEAR WITH ME.

1 THE DISPUTES ON THE PSI, AS TO THE AMOUNT OF THE FRAUD, THE
2 AMOUNT OF THE DRUGS, OR OTHER CRIMES THAT WERE CHARGED, BUT
3 FOR ONE -- FOR, SAY, A PLEA AGREEMENT, WERE NOT -- YOU WERE
4 NOT ACTUALLY CONVICTED ON THOSE CHARGES; THOSE STILL COULD BE
5 CONSIDERED, I BELIEVE, UNDER THE PRESENT -- UNDER THE SYSTEM
6 THAT, AS IT'S PROPOSED. YOU WOULD HAVE A SITUATION WHERE YOU
7 WOULD STILL BE -- YOU WOULD BE GETTING SENTENCED ON THE BASIS
8 OF A PSI, AND I AM TERRIBLY TROUBLED BY THE PREPONDERANCE OF
9 THE EVIDENCE STANDARD, AND GOD WILLING, MAYBE I CAN DO A
10 CONSTITUTIONAL ATTACK ON THIS SOME DAY, BECAUSE HERE IS THE
11 WAY THE ARGUMENT WOULD GO.

12 IN THE SYSTEM THAT WE --

13 CHAIRMAN WILKINS: MR. WITNESS, I HAVE GOT TO
14 LEAVE THE COURTROOM. I DON'T WANT TO CUT YOU OFF. I DIDN'T
15 WANT YOU TO THINK I WAS WALKING OUT ON YOUR TESTIMONY. I
16 WILL GET YOUR WRITTEN TESTIMONY AS WELL.

17 GO AHEAD AND CONTINUE. I HOPE TO BE BACK. I WILL
18 TURN THE CHAIR OVER TO COMMISSIONER NAGEL.

19 MR. ARBES: I WILL BE VERY BRIEF.

20 CHAIRMAN WILKINS: YOU GO AHEAD. I JUST HAVE TO
21 WALK OUT RIGHT NOW.

22 MR. ARBES: THAT HAPPENS TO ME ALL THE TIME.

23 TO CONTINUE, IN TERMS OF THE PREPONDERANCE OF THE
24 EVIDENCE STANDARD, I HAVE REAL PROBLEMS WITH THE
25 CONSTITUTIONALITY OF THAT, AND THE PROBLEMS ARE ALONG THESE

1 LINES.

2 IN THE PRESENT SYSTEM, WHEN YOU GO BEFORE THE
3 PAROLE BOARD -- AND THEY USE PREPONDERANCE OF THE EVIDENCE AS
4 WELL -- AND WHEN THEY ARE USING PREPONDERANCE OF THE
5 EVIDENCE, THEY CAN DETERMINE THAT YOUR SENTENCE IS EITHER
6 GOING TO GO ABOVE OR BEYOND THE GUIDELINES OR WHERE -- OR
7 SOMEWHERE WITHIN THOSE GUIDELINES.

8 YOU KNOW, WE ARGUE ABOUT THAT, BUT THAT'S THE WAY
9 IT IS, AND BECAUSE WHATEVER YOU'RE GOING TO GET IS GOING TO
10 BE LESS THAN YOU'RE SENTENCED, THEN -- SUPPOSE YOU HAVE A
11 10-YEAR SENTENCE, AND BECAUSE OF THE GUIDELINES, YOU'RE GOING
12 TO GET 40 TO 52 MONTHS, SOMETHING LIKE THAT.

13 BECAUSE OF THE PSI REPORT AND THE PREPONDERANCE OF
14 THE EVIDENCE STANDARD AND ALL OF THAT, IT'S DETERMINED THAT
15 YOU SHOULD GET 52 MONTHS OR EVEN THAT YOU SHOULD GO OVER YOUR
16 GUIDELINES.

17 WHATEVER, YOU'RE STILL WITHIN THE 10-YEAR SENTENCE
18 THAT YOU WERE GIVEN; BUT UNDER THE NEW PROPOSAL, WHAT YOU'RE
19 DOING IS SAYING THAT FOR THE OFFENSE WHICH YOU WERE -- OF
20 WHICH YOU WERE CONVICTED, WHEN YOU ADD UP YOUR POINTS, YOU
21 GET FIVE YEARS, OR WHATEVER.

22 BUT SINCE WE HAVE THESE OTHER FACTORS, THESE
23 SPECIAL OFFENSE CHARACTERISTICS OR OTHER THINGS THAT ARE IN
24 YOUR PSI, BY A PREPONDERANCE OF THE EVIDENCE, WE ARE GOING TO
25 HOLD YOU RESPONSIBLE FOR THAT ALSO. WE ARE GOING TO GIVE YOU

1 A SENTENCE THAT IS LARGER, THAT IS GREATER THAN WHAT YOU HAVE
2 GOTTEN WHEN YOU WERE CONVICTED BY A JURY ON A STANDARD OF
3 BEYOND A REASONABLE DOUBT.

4 SO IT SEEMS TO ME THAT THERE'S A REAL PROBLEM
5 THERE, THAT ON THE ONE HAND, YOU HAVE BEEN CONVICTED OF A
6 PARTICULAR CRIME. THE STANDARD IS BEYOND A REASONABLE DOUBT,
7 BUT FOR REASONS THAT ARE NOT PROVEN BEYOND A REASONABLE
8 DOUBT, YOU ARE GOING TO GET A LONGER SENTENCE. I JUST HAVE A
9 LOT OF PROBLEMS WITH THAT.

10 ALSO, IN TERMS OF THE APPEALS INVOLVED HERE, I
11 THINK THAT YOU HAVE ALREADY HEARD MANY OF THE JUDGES BELIEVE
12 THAT THIS WILL BE A REAL NIGHTMARE.

13 WHAT MIGHT BE PROPOSED IS SOMETHING LIKE A
14 NATIONAL SENTENCING REVIEW COMMISSION, SOMETHING LIKE THAT,
15 IN WHICH -- IF THE PROBLEM IS SIMPLY AN APPEAL OF HOW THE
16 NUMBERS WERE ADDED UP, HOW THE POINTS WERE ADDED UP, POSSIBLY
17 IT CAN GO TO THE SENTENCING REVIEW COMMISSION, SOMETHING LIKE
18 THAT, AS OPPOSED TO HAVE TO BE APPEALED STRAIGHT TO THE COURT
19 OF APPEALS.

20 FINALLY, I HAVE SOME CONCERN ABOUT WHAT HAPPENS TO
21 THE PEOPLE THAT ARE -- THE INMATES THAT ARE PRESENTLY
22 INCARCERATED. MY UNDERSTANDING IS THAT THIS WILL -- THE NEW
23 REGULATIONS, THE NEW GUIDELINES, NEW PROPOSALS, ONCE THEY ARE
24 PASSED, WILL REALLY HAVE NO EFFECT ON THE INMATES IN JAIL
25 NOW.

1 I WAS JUST HOPING THAT SOMEBODY COULD GIVE ME SOME
2 CLARIFICATION ON THAT. IT'S MY UNDERSTANDING THAT THEY JUST
3 WON'T BE AFFECTED, THAT THE PAROLE COMMISSION WILL CONTINUE,
4 BUT MAYBE IN A STRIPPED-DOWN VERSION AND WILL CONTINUE TO
5 DEAL WITH THESE PEOPLE.

6 I APPRECIATE THE OPPORTUNITY TO SPEAK.

7 COMMISSIONER NAGEL: MR. ARBES, WE APPRECIATE VERY
8 MUCH YOUR COMMENTS AND I WOULD ENCOURAGE YOU TO SEND A LETTER
9 TO THE COMMISSION INCLUDING ANY OF YOUR TESTIMONY HERE TODAY,
10 AS WELL AS ANYTHING ELSE YOU WOULD LIKE TO MENTION.

11 ANYONE HAVE A QUESTION TO MY RIGHT? QUESTIONS TO
12 MY LEFT?

13 COMMISSIONER MACKINNON: MR. ARBES, JUST TO
14 ALLEVIATE YOUR CONCERN A LITTLE ABOUT THE BRINGING IN OF
15 OTHER FACTORS, YOU DON'T HAVE TO LOOK VERY FAR BEYOND
16 MCMILLAN VERSUS PENNSYLVANIA DECIDED ON JUNE 19, 1986,
17 MCMILLAN VERSUS PENNSYLVANIA, CASE NUMBER 85-250 IN THE
18 SUPREME COURT.

19 THE STATE OF PENNSYLVANIA PROVIDED IN A SIMILAR
20 SENTENCING GUIDELINES THING THAT WE HAVE THAT, NOT IN THE
21 OFFENSE, BUT AS A SENTENCING FACTOR, WHETHER THE MAN HAD A
22 GUN COULD WARRANT AN ADDITIONAL SENTENCE.

23 SO, HE'S FOUND GUILTY OF THIS OFFENSE OVER HERE
24 BEYOND A REASONABLE DOUBT, AND THE SENTENCE THAT HE GOT ADDED
25 ON SOMETHING FOR THE FACT HE GOT THE GUN, WHICH WAS NOT

1 PROVED BY A REASONABLE DOUBT, BEYOND A REASONABLE DOUBT.

2 I WILL JUST READ THE FOOTNOTE OR THE HEAD NOTE TO
3 YOU BRIEFLY. IT WAS BY THE PREPONDERANCE OF THE EVIDENCE.
4 THE HEAD NOTE SAYS, "THE PREPONDERANCE STANDARD SATISFIES DUE
5 PROCESS. SENTENCING COURTS HAVE TRADITIONALLY HEARD EVIDENCE
6 AND FOUND FACTS WITHOUT ANY PRESCRIBED BURDEN OF PROOF AT
7 ALL."

8 I THINK THAT ANSWERS YOUR QUESTIONS.

9 MR. ARBES: I APPRECIATE THAT, YOUR HONOR. THANK
10 YOU.

11 COMMISSIONER NAGEL: THANK YOU VERY MUCH. IS
12 THERE ANYONE ELSE WHO WISHES TO BE HEARD? PLEASE COME
13 FORWARD.

14 MS. SHEIN: THANK YOU, COMMISSIONER. MY NAME IS
15 MARCIA SHEIN. I THINK I MET WITH MOST OF YOU, OR ALL OF YOU,
16 IN WASHINGTON WHEN I WAS TESTIFYING FOR NACDL. I AM NOW HERE
17 TO JUST GIVE YOU SOME BRIEF COMMENTS FROM ME PERSONALLY, AS
18 THE DIRECTOR OF NATIONAL LEGAL SERVICES.

19 I AM A FORMER FEDERAL AND STATE PROBATION OFFICER.
20 I'M A THERAPIST. I WORKED OUT OF THE SOUTHERN DISTRICT OF
21 FLORIDA, WHERE THE PREVIOUS SPEAKER, MR. JUENKE, WAS THE
22 CHIEF AFTER I LEFT, THANK GOODNESS. HE USED SOME HARD-LINE
23 TACTICS, BUT I DO RESPECT HIM VERY MUCH.

24 I WANTED TO TELL YOU ABOUT MY BACKGROUND BRIEFLY
25 BECAUSE WHY I STARTED THIS BUSINESS WAS AS A RESULT OF THE

1 REHABILITATIVE MODEL THAT I SEE BEING PUSHED OFF TO THE SIDE
2 A LITTLE BIT TOO MUCH IN THE NEW GUIDELINES.

3 I THINK YOU HAVE DONE A GREAT JOB COMING UP WITH
4 GUIDELINES. THIS HAS BEEN AN ONEROUS TASK CHANGING THE WHOLE
5 SYSTEM AROUND, TURNING IT UPSIDE DOWN.

6 A YOUNG WOMAN SMOKED A MARIJUANA JOINT IN 1980.
7 THE RESULTING EFFECTS OF HAVING GOTTEN CAUGHT IN HER CAR
8 SMOKING THAT MARIJUANA JOINT SCARED THE DAYLIGHTS OUT OF HER
9 SO BADLY THAT SHE TURNED HER LIFE AROUND RIGHT THEN AND
10 THERE, HAVING NOT YET EVEN MET THE JUDICIAL SYSTEM AND THE
11 GODS THAT SIT IN THE COURTROOM.

12 ONCE THAT OCCURRED, OF COURSE, THERE WAS NO
13 QUESTION SHE WOULD NEVER HAVE DONE ANYTHING AGAIN IN HER
14 LIFE. I HAVE SEEN THAT IN A COUPLE OF OTHER CASES. AS A
15 PROBATION OFFICER, I WAS THE PERSON WHO WROTE THE PSI'S ON
16 THOSE PEOPLE AND HAD TO RECOMMEND PROBATION OR WHATEVER
17 RECOMMENDATION I GAVE.

18 I REALLY BELIEVE THAT THERE ARE PEOPLE IN THE
19 SYSTEM WHO DESERVE THAT KIND OF CONSIDERATION AFTER THEY HAVE
20 MADE ONE SINGLE MISTAKE. ONE ERROR IN JUDGMENT DOESN'T
21 WARRANT INCARCERATION, SOMETIMES REGARDLESS OF THE SEVERITY
22 OF THE CRIMES.

23 I SEE YOUNG PEOPLE, 18 YEARS OF AGE, DRIVING VAN
24 LOADS OR EVEN 60 KILOGRAMS OF COCAINE FOR FATHERS, BROTHERS,
25 UNCLES OR OTHER FAMILY MEMBERS, GETTING 10 YEARS IN JAIL.

1 I HAVE PREPARED SOMETHING I WILL LEAVE WITH YOU,
2 WHICH I WILL NOT READ FROM BECAUSE I KNOW HOW MUCH YOU HAVE
3 TO READ, WHILE READING THESE DIFFERENT THINGS.

4 I DO HAVE SOME POINTS I WOULD LIKE TO RAISE FROM
5 WHAT I HEARD TODAY, BUT ALSO FROM WHAT MY TWO CONCERNS ARE
6 FROM THE COMMISSION'S DRAFT. THERE ARE A LOT OF THINGS I
7 REALLY LIKE.

8 IT'S NOT QUITE AS SIMPLE AS WE NEED TO GET IT TO
9 SO EVERYBODY UNDERSTANDS IT AND CAN REALLY TAKE A LOOK AT IT,
10 TURN TO ONE PAGE, SAY HERE'S WHAT I GOT, HERE'S WHAT IT IS,
11 LOOKS LIKE WE ARE IN TROUBLE, BUT SOMETHING MORE SO IN THE
12 WAY OF BEING ABLE TO GUIDE EACH OF US THROUGH A STEP-BY-STEP
13 PROCESS.

14 SOME OF THE MAIN CONCERNS ARE THAT THE SENSE OF
15 THE SENATE RESOLUTION, WHEN THIS THING STARTED, DON'T SEEM TO
16 BE COMING THROUGH.

17 THAT SENSE OF THE SENATE BY MR. ARMSTRONG WAS TO
18 PRESERVE THE SCARCE PRISON SPACE FOR THOSE WHO REALLY NEEDED
19 IT. WE ALSO HAVE TO GET AWAY FROM A LITTLE BIT OF THE
20 OVERHYSTERICAL REACTIONS WE ARE HAVING IN OUR SYSTEM ABOUT
21 DRUGS.

22 I REALLY BELIEVE THAT DRUGS IS A PROBLEM IN THIS
23 COUNTRY, BUT I BELIEVE THAT 90 PERCENT OF THE PEOPLE IN THIS
24 COUNTRY ARE NOT INVOLVED IN DRUGS, AND ARE INHERENTLY GOOD
25 AND CAN OVERCOME A PROBLEM THAT IS UNFORTUNATELY IN OUR

1 SYSTEM AND INUNDATING OUR SYSTEM AND OUR YOUNG PEOPLE.

2 BUT MY MAIN EMPHASIS IS THAT IF WE THING WE'RE
3 SOFT ON CRIME, THEN WHY DO WE HAVE SO MUCH OVERCROWDING? I
4 DO NOT BELIEVE WE ARE SOFT ON CRIME AS OF THIS DATE. IN
5 FACT, I BELIEVE THAT THE NEW GUIDELINES INCREASE THE
6 HARSHNESS OF SOME OF OUR CRIMINAL SANCTIONS FURTHER THAN THEY
7 NEED TO GO.

8 WE HAVE ELIMINATED SOME THINGS THAT I THINK CAN BE
9 REINCORPORATED. YOU TALKED BRIEFLY ABOUT ALTERNATIVES SUCH
10 AS PROBATION, BUT YOU DON'T GIVE US ANY KIND OF CLEAR-CUT,
11 CLEAN GUIDELINES OF WHY, WHEN, WHERE AND WHAT CASES COULD BE
12 PLUGGED INTO PROBATION WITH THE USE OF HOUSE ARREST,
13 COMMUNITY SERVICE, RESTITUTION, ANY OF THESE OTHER OPTIONS,
14 IN ADDITION TO JUST BEING ON PROBATION.

15 JUST BEING ON PROBATION MAY BE SOME PUNISHMENT,
16 BUT ADD A FEW OTHER THINGS TO THAT, SUCH AS HOUSE ARREST,
17 CURFEWS, RESTITUTION, COMMUNITY SERVICE, AND YOU'RE GOING TO
18 FIND THAT THE PUNISHMENT IS ENHANCED EVEN FURTHER THAN JUST A
19 SIMPLE, I'M NOT GOING TO JAIL STORY.

20 I GIVE YOU A VERY GOOD EXAMPLE OF A CASE THAT JUST
21 REEKS OF INJUSTICE. THIS YOUNG MAN PICKED UP -- THIS IS A
22 1986 CASE -- HE WAS SITTING IN LEXINGTON, KENTUCKY. HE STOLE
23 SIX BAGS OF DIRT FROM A FEDERAL NATIONAL FOREST. HE GOT SIX
24 MONTHS IN JAIL.

25 NOW, I HAVE TO SIT HERE BEFORE YOU AND SAY, IS

1 THAT A CASE THAT SHOULD GO TO JAIL OR IS THAT A CASE THAT
2 SHOULD GET PROBATION AND MAYBE CLEAN UP OUR NATIONAL PARKS
3 FOR US AND SAVE US A LITTLE BIT OF MONEY?

4 NONE OF THAT IS BEING APPLIED AS TO HOW DO YOU
5 DEFINE WHAT CASES WOULD APPLY, WHERE YOU PUT IT IN, HOW YOU
6 PLUG IT IN. I ALSO WISH TO RELATE THAT YOU COULD CATEGORIZE
7 THIS UNDER ONE SIMPLE CATEGORY. ALTERNATIVES. LIST THE TYPE
8 OF OFFENDERS WHO WOULD BE ELIGIBLE FOR ALTERNATIVES,
9 REGARDLESS OF THE SANCTION UNITS INVOLVED. LIST THE NUMBER
10 OF POINTS THAT YOU WOULD GIVE TO PARTICULAR AREAS WHERE
11 ALTERNATIVES COULD BE APPLIED AND WHY THEY MIGHT BE APPLIED
12 IN THOSE AREAS.

13 GIVE THE COURT, GIVE THE PEOPLE, THE DEFENSE
14 BENCH, SOMETHING TO WORK WITH WITH ALTERNATIVES. RIGHT NOW,
15 ALL I SEE IS THE MAJORITY OF SANCTION UNITS BEING ADDED UP TO
16 INCARCERATION.

17 THERE IS A VERY LOW END THERE THAT SHOWS THAT
18 THERE'S A PROBATION TENDENCY, BUT IT DOESN'T GIVE ANY SUPPORT
19 FOR THAT. IT DOESN'T GIVE ANY OPEN LATITUDE TO THOSE
20 SANCTION CASES WHERE YOUR UNITS ARE GOING TO GIVE
21 INCARCERATION, TO, "HEY, MAYBE IF IT SHOWS THAT THE
22 GUIDELINES ARE INCARCERATION, GIVE ME A SHOT AT PROBATION AND
23 HERE'S WHY."

24 HERE ARE SOME OF THE THINGS THAT CAN BE USED FOR
25 THAT CONSIDERATION -- THEY ARE KIND OF SMATTERED IN THE

1 DRAFT, BUT THEY ARE NOT OUTLINED IN ONE SECTION -- JUST A
2 THOUGHT THAT MIGHT HELP SIMPLIFY UNDERSTANDING WHERE
3 INCARCERATION VERSUS ALTERNATIVES COMES INTO PLAY. I DON'T
4 SEE IT AS MUCH AS I WOULD LIKE TO SEE IT. THERE'S ONE THING
5 THAT'S REALLY MISSING IN OUR SYSTEM IS MORE EMPHASIS ON THAT.

6 THE OTHER THING, SINCE I PRESENTED MATERIALS ON
7 MANY OCCASSIONS, I'M NOT GOING TO PRESENT ANYTHING EXCEPT
8 WHAT I DON'T SEE THAT I REALLY WANT TO SEE PERHAPS IN THE
9 FUTURE OR WHATEVER THE NEXT STAGE IS FOR YOU.

10 THAT ONE THING WAS THE ALTERNATIVE -- LISTING THE
11 ALTERNATIVES AND EMPHASIZING THEM, AND FINDING WAYS TO PLUG
12 OFFENDERS INTO THEM, JUST LIKE YOU FIND WAYS TO PLUG
13 OFFENDERS INTO JAIL.

14 THE OTHER IS THERE IS ABSOLUTELY NO PROVISIONS FOR
15 YOUTHFUL OFFENDERS. IT IS INCONCEIVABLE TO SUGGEST AN 18 TO
16 21 YEAR OLD SHOULD BE SANCTIONED IN THE SAME FORMAT AS AN
17 ADULT OFFENDER.

18 YOU KNOW, THE OLD SYSTEM HAD A YCA CONSIDERATION
19 THAT WOULD OFFSET SOME OF THEIR INCARCERATION SANCTIONS.
20 THEY HAVE ABOLISHED ALL OF THAT, BUT WE HAVE LEFT IT INTO
21 TOTAL ADULT STANDARDS.

22 I DON'T KNOW ABOUT ANY OF YOU WHEN YOU WERE 18,
23 19, 20, 21, BUT I KNOW ABOUT ME AND I SURE DIDN'T SEE THE
24 FOREST FOR THE TREES WHEN I WAS DOING SOME THINGS THAT WERE A
25 LITTLE SHADY OR I LIED TO MOTHER. I NEVER THOUGHT WHAT THAT

1 MEANT ON THE OTHER END.

2 SOME KIDS THAT I KNOW THAT HAVE GOTTEN IN TROUBLE
3 WHO DROVE A CARLOAD OF COCAINE SOMEWHERE FOR SOMEBODY FOR A
4 THOUSAND BUCKS NEVER LOOKED ON THE OTHER SIDE OF THE FENCE
5 AND SAID, WHAT WOULD THAT MEAN IF I GOT 10 YEARS IN JAIL, AT
6 18 YEARS OF AGE?

7 WE HAVE NO SAFEGUARDS WHATSOEVER FOR OUR YOUNG
8 PEOPLE, THE VERY ESSENCE OF OUR SOCIETY, TO GIVE THEM A SHOT
9 AT LEARNING A LESSON AT 18 OR 19, AND GIVING THEM THAT ONE
10 EXTRA SHOT TO NOT GO TO JAIL FIRST AND SEEING IF THEY CAN
11 MAKE IT BY BEING SCARED TO DEATH BY GOING THROUGH OUR
12 JUDICIAL SYSTEM.

13 THAT JUDICIAL SYSTEM IS VERY SCARY, BELIEVE ME.
14 WORKING IN IT AND SEEING SOME YOUNG PEOPLE FALL APART AS I
15 CARRIED THEM THROUGH THEIR SENTENCING, I CAN TELL YOU THAT IS
16 REHABILITATIVE ALL BY ITSELF, ESPECIALLY FOR A YOUNG PERSON.

17 I WOULD LIKE YOU TO REALLY LOOK AT FINDING A
18 SECTION THAT YOU CAN FOCUS JUST ON THE YOUTHFUL OFFENDER, NOT
19 TO FOCUS THAT ONE STATEMENT WHERE YOU CAN APPLY SOME
20 MITIGATING POINTS TO A PERSON OF A CERTAIN YOUTH, BUT
21 APPLYING SOME FACTUAL POSITIONS TO WEIGH A YOUTHFUL OFFENDER
22 SENTENCE IN A LESS SEVERE STANDING THAN THAT WHICH IS
23 EVIDENCED BY THE PRESENT GUIDELINES.

24 I HAVE JUST A FEW OTHER THOUGHTS. WE ARE MISSING
25 SOME SAFEGUARDS. PEOPLE HAVE BEEN TALKING ABOUT RULE 32 AND

1 RULE 35. WE ARE MISSING A SAFEGUARD FOR PRISON OFFICIALS,
2 AND I HAVE TALKED TO A WHOLE LOT OF PRISON OFFICIALS. THE
3 BUREAU OF PRISON GUARDS ARE TELLING ME EVERYDAY, WHERE ARE WE
4 GOING TO PUT THEM? WE ARE ALREADY OVERCROWDED AND WE STILL
5 HAVE PROBATION AND ALL THESE OTHER ALTERNATIVES. WE STILL
6 HAVE PAROLE SO WE CAN RELIEVE THE SYSTEM A LITTLE BIT,
7 RELEASE SOME OF THESE OFFENDERS?

8 WHAT'S GOING TO HAPPEN TO THESE GUARDS WHO ARE
9 ALREADY PRESSED ON OVERCROWDED CONDITIONS IN EVERY PRISON
10 SYSTEM IN THE COUNTRY, STATE OR FEDERAL, WHEN THEY ARE ASKED
11 TO GO FURTHER THAN THAT ON A MORE INCARCERATION STANDING TYPE
12 OF SYSTEM?

13 I WORRY ABOUT THOSE PEOPLE, TOO, BECAUSE THEY HAVE
14 GOT TO BE CONSIDERED. WHEN YOU HAVE PRISONERS IN CUSTODY WHO
15 HAVE NOTHING TO LOOK FORWARD TO, WHO HAVE NOTHING TO WORK
16 FOR, THINGS BECOME AGITATED AND UNCOMFORTABLE OVER LONG TERMS
17 OF IMPRISONMENT AND THE GUARDS ARE THE ONES WHO HAVE TO PAY
18 THE PRICE FOR DEALING WITH THAT.

19 ONE EXAMPLE I CAN GIVE YOU IS SIMPLY, WHAT HAPPENS
20 IF YOU HAVE A MURDER IN A PRISON? YOU HAVE AN OFFENDER WHO
21 WANTS TO TALK ABOUT THAT, TO TELL THE PRISON OFFICIALS WHAT
22 WOULD HAPPEN.

23 SO THEY TELL THE PRISON OFFICIALS. SO WHAT
24 HAPPENS TO THAT PERSON? HE'S TRANSFERRED TO ANOTHER PRISON,
25 THEY GET THE GUY WHO KILLED THE PRISONER IN CUSTODY, AND IN

200

1 THE MEANTIME THAT PRISONER GETS NO REWARD FOR PUTTING HIS
2 LIFE ON THE LINE.

3 WE HAVE NO SAFEGUARDS FOR RELIEVING OVERCROWDING,
4 FOR RECONSIDERING AN OFFENDER AFTER LONG PERIODS OF
5 INCARCERATION. WE CANNOT ELIMINATE THE REHABILITATIVE
6 PROCESS OF INCARCERATION, ESPECIALLY ON FIRST OFFENDERS.

7 I DON'T CARE IF IT IS 100 POUNDS OF COCAINE. YOU
8 THROW SOMEBODY IN JAIL FOR 20 YEARS, YOU GOT TO HAVE SOME
9 OPPORTUNITY TO RECONSIDER. THE PERSON CAN COME OUT OF THIS
10 THING AND STILL BE A FUNCTIONAL HUMAN BEING IN SOCIETY.

11 I'M ASKING YOU TO EXAMINE THAT PARTICULAR ASPECT
12 OF THE GUIDELINES AND FIND A WAY TO HAVE A SAFEGUARD, A
13 SYSTEM TO GIVE ANOTHER LOOK AT THE CASE OR ANOTHER LOOK AT A
14 PRISONER, WHO IS STUCK IN THE PRISON SYSTEM WHO WANTS TO DO
15 BETTER, TO PROVE THAT THEY CAN DO BETTER AND YET HAS NO
16 REWARD FOR THAT.

17 OUR WHOLE LIVES ARE BUILT ON REWARD SYSTEMS. YOU
18 WOULDN'T BE DOING THE JOB YOU'RE DOING UNLESS THERE WAS SOME
19 SATISFACTION IN IT, AND I THINK IT'S THE SAME THING ONCE YOU
20 INSTITUTIONALIZE SOMEBODY. GIVE THEM SOME LIGHT AT THE END
21 OF THE TUNNEL.

22 THANK YOU.

23 COMMISSIONER NAGEL: THANK YOU, MS. SHEIN.

24 I THINK YOUR COMMENTS ARE ESPECIALLY IMPORTANT, PARTICULARLY
25 YOUR COMMENTS ON YOUTHFUL OFFENDERS AND THE OPPORTUNITIES FOR

1 CONSIDERATION OF SENTENCE REDUCTION.

2 I'M SURE THAT THE COMMISSION WOULD LIKE TO HEAR
3 FROM YOU AGAIN AS WE HAVE IN THE PAST.

4 QUESTIONS TO MY RIGHT? QUESTIONS TO MY LEFT?

5 COMMISSIONER MACKINNON: AND ON ALTERNATIVE
6 PUNISHMENT.

7 I'M CONCERNED ABOUT YOUR STATEMENT THAT YOU SAID
8 90 PERCENT OF THE PEOPLE WERE NOT INVOLVED IN DRUGS. DO YOU
9 THINK THAT 10 PERCENT ARE?

10 MS. SHEIN: I TOOK THAT STATISTIC OUT OF MY HEART.
11 I BELIEVE THAT MOST OF THE PEOPLE IN THIS COUNTRY ARE GOOD
12 AND DON'T DO DRUGS. THEY DO THEM MAYBE SOCIALLY EVEN, BUT I
13 DO NOT BELIEVE THAT OUR SOCIETY --

14 COMMISSIONER MACKINNON: WELL, THAT'S INVOLVEMENT.

15 MS. SHEIN: YES, BUT I DON'T BELIEVE THAT OUR
16 SOCIETY IS GOING TO BE RESOLVED IN THEIR DRUG PROBLEMS
17 THROUGH LENGTHY INCARCERATION.

18 COMMISSIONER MACKINNON: THAT'S 22 MILLION PEOPLE.

19 MS. SHEIN: THAT'S A LOT OF PEOPLE. I AGREE, BUT
20 THERE'S A LOT MORE THAT DON'T.

21 COMMISSIONER MACKINNON: I WOULD BE VERY
22 INTERESTED TO GET YOUR COMMENTS ON THE THINGS YOU HAVE LISTED
23 AND WHICH COMMISSIONER NAGEL HAS POINTED OUT.

24 MS. SHEIN: THANK YOU. YOU HAVE ALL BEEN VERY
25 KIND. THANKS FOR LETTING ME SPEAK.

1 COMMISSIONER NAGEL: THANK YOU VERY MUCH. IS
2 THERE ANYONE ELSE WHO WISHES TO BE HEARD?

3 IF NOT, THIS HEARING NOW STANDS ADJOURNED. THANK
4 YOU.

5 (HEARING ADJOURNED.)

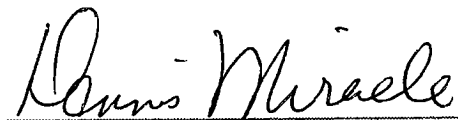
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C E R T I F I C A T E

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA

I, DENNIS MIRACLE, OFFICIAL COURT REPORTER OF
THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
GEORGIA, DO HEREBY CERTIFY THAT THE FOREGOING 232 PAGES
CONSTITUTE A TRUE TRANSCRIPT OF THE PROCEEDINGS HAD BEFORE
THE SAID UNITED STATES SENTENCING COMMISSION HELD IN THE CITY
OF ATLANTA, GEORGIA, IN THE MATTER THEREIN STATED.

IN TESTIMONY WHEREOF I HEREUNTO SET MY HAND ON
THIS 31ST DAY OF OCTOBER, 1986.



DENNIS MIRACLE
OFFICIAL COURT REPORTER
NORTHERN DISTRICT OF GEORGIA