

PUBLIC HEARING
THE UNITED STATES SENTENCING COMMISSION

IN RE: RECENTLY-PUBLISHED PRELIMINARY DRAFT
OF SENTENCING GUIDELINES FOR THE FEDERAL
COURTS.

CEREMONIAL COURTROOM
19TH FLOOR, FEDERAL BUILDING
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

TUESDAY, NOVEMBER 18, 1986
10:00 O'CLOCK A.M.

HONORABLE W. WILKINS, JR., CHAIRMAN,
PROFESSOR MICHAEL K. BLOCK
HONORABLE STEPHEN G. BREYER
HELEN G. CORROTHERS
HONORABLE GEORGE E. MAC KINNON
PROFESSOR ILENE H. NAGEL
PROFESSOR PAUL H. ROBINSON
BENJAMIN F. BAER

REPORTED BY: LAVON GRANGER, C.S.R. #1890

2 1 JUDGE WILKINS: CALLING THE MEETING TO ORDER.

2 I WELCOME YOU TO THE HEARING OF THE UNITED STATES
3 SENTENCING COMMISSION.

4 THIS IS ONE OF THE SERIES OF THE PUBLIC HEARINGS
5 WE HAVE BEEN HOLDING AROUND THE COUNTRY ON A COMPLEX
6 SUBJECT REGARDING MANDATORY SENTENCING GUIDELINES FOR OUR
7 FEDERAL COURTS, WHICH IF THE SCHEDULE IS HELD, WILL GO
8 INTO EFFECT SOMETIME IN THE FALL OF NEXT YEAR.

9 LET ME INTRODUCE THE MEMBERS OF THE UNITED STATES
10 SENTENCING COMMISSION WHO ARE HERE IN SAN FRANCISCO. TO
11 MY FAR RIGHT IS MR. BEN BAER, THEN MICHAEL BLOCK, HELEN
12 CORROTHERS.

13 TO MY IMMEDIATE RIGHT IS PAUL ROBINSON. TO MY
14 LEFT IS, IMMEDIATE LEFT, IS ILENE NAGEL, STEPHEN BREYER
15 AND GEORGE MACKINNON.

16 WE ARE DELIGHTED TO BE HERE AND WE APPRECIATE
17 YOUR ATTENDANCE AS WELL AS THE OBVIOUS WORK AND THOUGHT
18 THAT HAS GONE INTO THE SUBMISSIONS OF OUR WITNESSES WHO
19 WILL TESTIMONY LATER THIS MORNING.

20 WE HAVE CONDUCTED THE WORK OF THE COMMISSION IN
21 AN OPEN MANNER. WE BELIEVE FROM THE VERY BEGINNING IT IS
22 ABSOLUTELY NECESSARY THAT WE INVOLVE AS MANY PEOPLE AS WE
23 COULD IN THIS PROCESS.

24 WE ARE COMMITTED TO HAVING A GUIDELINE AND
25 SUBMISSION TO THE CONGRESS WHICH IS INTELLECTUALLY SOUND,

1 AS WELL AS IS PRACTICAL AND WORKABLE, AND TO DO THAT WE
2 REALIZE THAT WE NEED JUDGES AND UNITED STATES ATTORNEYS
3 AND DEFENSE ATTORNEYS AND PROBATION OFFICERS, AND ALL THE
4 OTHER MEMBERS OF THE JUSTICE FAMILY TO HELP US TO DO THIS,
5 SO THAT WE KNOW WHO DECIDES WHAT HAPPENS IN THE REAL WORLD
6 WHEN THESE GUIDELINES ARE BEING DRAFTED.

7 IN KEEPING WITH THIS POLICY OF CONDUCTING OUR
8 WORK OPENLY WE HAVE HELD HEARINGS IN WASHINGTON. WE HAVE
9 INVITED A NUMBER OF INDIVIDUALS TO COME AND WORK WITH US,
10 AND NOW WE ARE HOLDING HEARINGS ON A REGINAL BASIS SO THAT
11 WE CAN PROVIDE AN OPPORTUNITY TO EVERYONE TO ASSIST US IN
12 THIS TASK.

13 A FEW WEEKS AGO WE PUBLISHED WHAT WE CALL THE
14 PRELIMINARY DRAFT. IT IS NOT A DRAFT THAT THE COMMISSION
15 AGREED WOULD BE OUR GUIDELINES, BUT MANY OF US AGREED ONLY
16 TO PUBLISH IT SO THAT PUBLIC COMMENTS WILL BE INCREASED.

17 WE WANT A VEHICLE FOR PEOPLE TO RESPOND TO US IN
18 THE CONCRETE. WE IDENTIFY VARIOUS ISSUES THAT WE MUST
19 RESOLVE ULTIMATELY.

20 WE ALSO GAVE SOME EXAMPLES OF AN APPROACH TO THE
21 GUIDELINE SYSTEM. SO FAR WE HAVE FOUND THIS VERY
22 BENEFICIAL.

23 WE WELCOME CONSTRUCTIVE CRITICISM, AND WE HAVE
24 TAKEN THE CRITICISM AND COMMENTS WE HAVE RECEIVED,
25 ANALYZING THEM, AND IF WE AGREE WITH THE COMMENTS,

1 CHANGING THE GUIDELINE APPROACH, CHANGING THE SYSTEM TO
2 WORK THESE INTO NEW DRAFTS WHICH ARE CURRENTLY BEING
3 PREPARED.

4 SO IT'S BEEN MOST HELPFUL TO US AND WE APPRECIATE
5 VERY MUCH THOSE WHO ARE HERE AND THOSE WHO CONTINUE TO
6 WORK WITH US AS WE MOVE TO A FINAL DATE OF APRIL OF NEXT
7 YEAR.

8 WE ARE VERY DELIGHTED TO HAVE AS OUR FIRST
9 WITNESS THE UNITED STATES ATTORNEY FROM SAN FRANCISCO, MR.
10 JOSEPH P. RUSSONIELLO. MR. RUSSONIELLO IS KIND ENOUGH TO
11 GIVE US OF HIS TIME TODAY.

12 AND I KNOW, MR. UNITED STATES ATTORNEY, YOU HAVE
13 TO LEAVE SHORTLY TO ATTEND TO OTHER MATTERS, BUT WE
14 APPRECIATE YOUR ATTENDANCE TODAY.

15 JOSEPH P. RUSSONIELLO

16 THANK YOU VERY MUCH, JUDGE WILKINS, MEMBERS OF
17 THE COMMISSION. THANK YOU SO MUCH FOR COMING TO SAN
18 FRANCISCO AND FOR GIVING ME THE OPPORTUNITY TO DIRECT SOME
19 PERSONAL COMMENTS AND REMARKS TO YOU TODAY.

20 YOU WILL BE HEARING TODAY FROM A NUMBER OF
21 DISTINGUISHED LAWYERS, JUDGES AND SCHOLARS ON SUBJECTS
22 RELATING TO SENTENCING REFORM ABOUT WHICH THEY FEEL VERY
23 STRONGLY AND WITH RESPECT TO WHICH THEY HAVE FORMED VERY
24 SERIOUS VIEWS.

25 I RESPECT THEIR OPINIONS AND WILL PAY CLOSE

1 ATTENTION, AS I KNOW YOU WILL, TO WHAT THEY HAVE TO SAY.
2 BUT TO BE BLUNT ABOUT THIS MATTER, NO INTEREST IS MORE
3 SIGNIFICANTLY AFFECTED BY THE PROJECT YOU HAVE UNDERTAKEN
4 THAN IS THE PROSECUTOR'S. NOT BECAUSE HE OR SHE IS THE
5 MOST IMPORTANT ACTOR IN THE CRIMINAL JUSTICE SYSTEM. HE
6 MAYBE, BUT BECAUSE HIS DISCRETION IN CHARGING AND
7 PROSECUTING REPRESENTS, AT ITS BEST, THE EXERCISE OF A
8 JUDGMENT WHICH TAKES INTO ACCOUNT, AND ATTEMPTS TO
9 ANTICIPATE MANY OF THE FACTORS THAT YOU HAVE NOW
10 QUANTIFIED.

11 SO THAT TO THE EXTENT THAT YOU WILL BE INSISTING
12 THAT THOSE FACTORS BE INCORPORATED IN THE COMPILATION OF
13 SENTENCE, THEY SHOULD REFLECT AND BE CONSISTENT WITH THE
14 PROSECUTOR'S VIEW.

15 THIS IS NOT TO SAY THAT EVERY PROSECUTOR'S
16 INSTINCTS ARE ALWAYS RIGHT. I NOTICE THE MEANING OF AN
17 APPROPRIATE SENTENCE IS ALWAYS REASONABLE.

18 MOST OF THE TIME, HOWEVER, HIS OVER EVALUATION OF
19 THE WORTH OF THE CASE IS SUBSTANTIALLY CORRECT. IF THE
20 GUIDELINES ON SENTENCING IS FINALLY ADOPTED DO NOT REFLECT
21 THIS SO-CALLED REASONABLE PROSECUTOR'S STANDARD, NOT ONLY
22 WILL THEY SUFFER FROM LESS THAN ENTHUSIASTIC SUPPORT FROM
23 PROSECUTORS, BUT THERE IS A REAL DANGER THAT ATTEMPTS TO
24 INTERPOLATE FROM THAT OR TO SUSPEND THEIR APPLICATION
25 COULD ULTIMATELY UNDERMINE THE VIABILITY.

1 BARGAINING AWAY CERTAIN PROVISIONS OR CONTORTING
2 THE BASIC DEFENSE VALUE OF CERTAIN CRIMES IN ORDER TO
3 SATISFY THE COURTS OR OF ONE SPECIAL INTEREST GROUP OR
4 ANOTHER WILL SURELY DOOM THE INCREDIBLE EFFORTS YOU HAVE
5 UNDERTAKEN OR THE EXTRAORDINARY ACHIEVEMENT EVEN THE
6 PRELIMINARY DRAFT REPRESENTS.

7 AS THE INTRODUCTION TO THIS DRAFT CORRECTLY
8 NOTES, GUIDELINES OPENLY SUBMITTED, "MUST BE WORKABLE,
9 FAIR AND EFFECTIVE."

10 ONE REASON THE REASONABLE PROSECUTOR SHOULD BE
11 MINDED IS THAT HIS DECISION IS OFTEN THE PRODUCT OF
12 CONSENSUS FROM COLLEAGUES, INVESTIGATORS, VICTIMS, HIS
13 SUPERIORS, JUDGES FROM THEIR PAST RECORDS, PAST PRACTICES.
14 HE GETS A SENSE OF WHETHER HE HAS A BROAD OR A NARROW
15 LATITUDE IN CHARGING, IN PROSECUTING AND IN RECOMMENDING
16 SENTENCE.

17 COMPARE, FOR EXAMPLE, AN ESPIONAGE CASE AGAINST
18 AN EMPLOYEE OF A DEFENSE CONTRACTOR IN WHICH HE WOULD HAVE
19 VERY LITTLE ATTITUDE.

20 FOR INSTANCE, IN A BANK ROBBERY CASE BROUGHT
21 AGAINST A KNOWN OR SUSPECTED DRUG USER, IN WHICH CASE HE
22 WOULD HAVE GREAT LATITUDE, OR A CASE INVOLVING CRIMES
23 AGAINST CHILDREN AS VICTIMS WHERE LITTLE OR NO LATITUDE
24 EXIST, OR IN A CASE IN WHICH SOPHISTICATED INVESTORS ARE
25 DEFRAUDED BY AN UNSCRUPULOUS CON MAN. HE WOULD PROBABLY

1 HAVE WIDE LATITUDE.

2 IT SEEMS TO ME THAT THE METHODOLOGY, THE
3 GUIDELINES SUGGESTED TO USE IN FIXING SENTENCE BASELINES
4 WITH ADD-ONS AND DEDUCTIONS OF FACTORS THAT ARE PRESENT
5 REFLECTING, IN THE MAIN, THE PROSECUTOR'S ATTITUDE AND,
6 THEREFORE, SHOULD BE ACCEPTABLE TO ALL OF US.

7 FURTHERMORE, EACH OF THE COMPONENTS OF THE
8 RECOMMENDED SENTENCE THAT THE PROSECUTOR NOW TAKES INTO
9 ACCOUNT SEEM TO BE INCORPORATED INTO THE SENTENCING
10 GUIDELINES IN ONE WAY OR ANOTHER, AND THIS IS GOOD. EVEN
11 THOUGH THEY ARE NOT NECESSARILY IDENTICAL WITH THE WEIGHT
12 THAT THE PROSECUTOR MIGHT GIVE TO THEM IN ANY GIVEN CASE.

13 TRADITIONALLY WE HAVE WEIGHED FIVE FACTORS IN
14 EVALUATING OUR CASES FOR PURPOSE OF PLEA BARGAINING; A
15 DIRTY TERMS IN SOME STATES, BUT IN REALITY IT IS AN
16 ABSOLUTELY ESSENTIAL AND RESPONSIBLE WAY OF DISPOSING OF
17 CRIMINAL CASES IN THIS ERA OF EXPANDED AVAILABLE SANCTIONS
18 AND BETTER CRIMINAL REPORTS, HEMORRHAGING COURT DOCKETS
19 AND PUBLIC CLAMOR FOR MORE ACTION AGAINST DRUGS AND CRIMES
20 ASSOCIATED WITH DRUG ABUSE.

21 FIRST OF ALL, HOW SERIOUS IS THE OFFENSE?

22 SECOND, HOW SOLID IS THE EVIDENCE, OR HOW LIKELY
23 AM I TO GET A CONVICTION ON THE CHARGE THAT, AT BEST,
24 REFLECTS THE SERIOUSNESS OF THE CRIME.

25 THIRD, WHAT IS THE CHARACTER OF THE DEFENDANT?

4
1 WHAT IS HIS PRIOR CRIMINAL RECORD? WHAT HAS BEEN HIS
2 PRIOR INVOLVEMENT WITH THE LAW. HOW BIG A DANGER TO THE
3 PUBLIC IS HE LIKELY TO BE IF HE STAYS AT LIBERTY?

4 FOURTH, WAS HE SUBJECT TO ANY SPECIAL CONTROLS
5 OR RESTRICTIONS WHEN HE COMMITTED THE PRESENT OFFENSE?
6 WAS HE ON PROBATION OR PAROLE, FOR EXAMPLE?

7 AND FIFTH, WHAT WAS HIS LEVEL OF INVOLVEMENT OR
8 PARTICIPATION IN THE CRIME?

9 THE GUIDELINES SUGGESTED THAT WILL NOW BE
10 REQUIRED TO PROVE UP BY A PREPONDERANCE OF EVIDENCE IN
11 SENTENCING ANY FACTORS THAT WE SEEK TO HAVE THE COURT
12 CONSIDER IN ADDING THE BASELINES. PRESUMABLY THIS MEANS
13 THAT A HEARING WILL BE HELD. SO LONG AS STRICT
14 APPLICATION OF THE RULES OF EVIDENCE IS SUSPENDED I CAN
15 FORESEE NO INSURMOUNTABLE PROBLEMS WITH THIS APPROACH.

16 BUT IF WE ARE PUT TO PROVE THE AGGRAVATING
17 FACTORS, ALL OF THE AGGRAVATING FACTORS, IN ACCORDANCE
18 WITH THE BEST EVIDENCE AND HEARSAY STANDARDS, FOR EXAMPLE,
19 THEN THE SENTENCING HEARING WOULD LIKELY BE AS LONG AS ANY
20 TRIAL, THEREBY PROVIDING NO INDUCEMENT TO THE PROSECUTOR
21 TO FOREGO TRIAL IN THE NAME OF ECONOMY OR EFFICIENCY. WE
22 MAY BE WILLING TO DO THIS, BUT THE EXPENSE WILL BE
23 EXTRAORDINARY.

24 AS FAR AS PROSECUTORS ARE CONCERNED IF WE RUN
25 THE RISK OF SOME EXTRAORDINARY HEARING FOR PURPOSES OF

1 DETERMINING WHETHER OR NOT A PERSON SHOULD BE SENTENCED
2 ACCORDING TO CERTAIN FACTORS, LET'S HAVE THE TRIAL AND PUT
3 ALL OF THOSE FACTORS BEFORE A JURY.

4 I AM PLEASED TO SEE THAT THE GUIDELINES TEND
5 TOWARD THE ACHIEVEMENT OF CERTAINTY OF SENTENCE,
6 EQUIVALENCY AND CONSISTENCY.

7 THE TWO PERSONS WITH RELATIVELY EQUAL STATUS
8 COULD COMMIT THE SAME CRIME, OR CRIMES, CAN EACH EXPECT TO
9 RECEIVE SUBSTANTIALLY THE SAME SENTENCE.

10 SOME OF THE ENHANCEMENTS ARE IMPORTANT TO NOTE,
11 TOO, BECAUSE THEY REFLECT EITHER THE GENERAL PUBLIC'S
12 ABHORRENCE TO CERTAIN KINDS OF CRIMES, USING CHILDREN IN
13 THE DRUG TRADE OR SELLING DRUGS TO MINORS, FOR EXAMPLE,
14 WHERE THEY REFLECT A NEED TO DETER FRAUD AND INSURE THE
15 INTEGRITY OF THE MARKETPLACE IN THE AREA OF DEREGULATION;
16 JAIL, FOR EXAMPLE, FOR WHITE COLLAR CRIME DEFENDANTS.

17 AND THEY ALSO REFELCT AN ATTEMPT TO DEBUNK A MYTH
18 THAT I THINK IS EXTRAORDINARY, AND THAT IS THAT PERJURY BY
19 A DEFENDANT CARRIES NO PENALTY; THAT IT IS AN EXPECTED AND
20 PREDICTABLE WEAPON OF ANY DEFENSE STRATEGY. IN FACT, IN
21 MY OPINION, I THINK THE ENHANCEMENT FACTOR THAT YOU HAVE
22 PROPOSED IS TOO LOW.

23 AS A FINAL POINT, AS WE GET BETTER IN PENETRATING
24 DEEPLY ENTRENCHED ORGANIZED CRIME SYNDICATES OUR NEED AS
25 PROSECUTORS TO BE ABLE TO BARGAIN MINERALS FOR CARPS AND

1 CARPS FOR SHARKS AND SHARKS FOR KILLER WHALES BECOMES MORE
2 VITAL THAN EVER BEFORE.

3 TH GUIDELINES QUANTIFY COOPERATION, AND WE
4 SHOULD BE EVER CAREFUL TO INSURE THAT PROSECUTOR HAS
5 ENOUGH LATITUDE THAT IN DEALING WITH INDIVIDUALS WHO HAVE
6 COOPERATED HE WILL BE ABLE TO MAKE AN INDUCEMENT OR OFFER
7 AN INDUCEMENT TO INSURE THAT COOPERATION AND TO GIVE SOME
8 BENEFIT FOR THAT COOPERATION, ESPECIALLY WHEN COOPERATION
9 MAY HAVE INVOLVED CONDUCT DANGEROUS TO THE COOPERATOR OR
10 HIS FAMILY.

11 ANY EXCUSE REGARDING THE ENTITLEMENT TO THE
12 BENEFITS OF A BARGAINING THAT MIGHT ARISE BETWEEN
13 PROSECUTOR AND DEFENDANT THAT STEMS FROM COOPERATIVE
14 AGREEMENTS ENTERED INTO MIGHT WELL BE RESOLVED, FOR
15 EXAMPLE, IN PROTECTING THE CONFIDENTIALITY OF THE
16 DEFENDANT'S ACTIVITY IN A MANNER THAT'S SOMEWHAT AKIN TO
17 THE WAY GRADE MAIL (INAUDIBLE) IS USED TO HAVE MATTERS
18 RESOLVED OR LITIGATED.

19 I SUPPORT AND URGE INCLUSION OF THE MODIFIED REAL
20 OFFENSE SENTENCING APPROACH. THE MULTI-VICTIM INVESTMENT
21 FRAUD CASE IS A GOOD EXAMPLE OF WHY IS IT IMPRACTICAL TO
22 CHARGE OR INSIST ON CONVICTION FOR AN OFFENSE BEFORE IT
23 CAN BE CONSIDERED BY THE COURT AT SENTENCING.

24 AS TO THE RESPECTIVE AND RELATIVE POWER OF THE
25 PROSECUTOR, VIS A VIS THE JUDGE, TO INFLUENCE SENTENCE, A

5
1 CONCERNED WHICH WE HAVE BEEN ASKED DO TO COMMENT ON, IN MY
2 VIEW SO LONG AS THE PROSECUTOR'S DISCRETION IN SELECTING
3 THE CHARGES IS DEEMED INVIOLEATE, AND IN HIS PEROGATIVE TO
4 SAFEGUARD IT, SO LONG AS HE MUST PERSUADE THE SENTENCING
5 JUDGE BY PROOF THAT CERTAIN ENHANCEMENTS SHOULD BE
6 APPLIED, THEN THE FEAR THAT EXCESSIVE CHARGING ALONE MIGHT
7 RESULT IN IMPROPER SENTENCING CAN BE ELIMINATED.

8 AS TO OTHER MATTERS WHICH YOU HAVE ASKED US TO
9 COMMENT ON, AS YOU KNOW, THE CONFERENCE OF THE UNITED
10 STATES ATTORNEYS IN CONJUNCTION AND ASSOCIATION WITH THE
11 DEPARTMENT OF JUSTICE IS CONSIDERING YOUR PROPOSED
12 PRELIMINARY DRAFT, AND NO DOUBT WOULD HAVE SPECIFIC
13 RESPONSE TO MAKE AS TO ANY NUMBER OF THOSE ITEMS.

14 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR.
15 RUSSONIELLO.

16 AS I UNDERSTAND IT, THIS IDEA OF A SENTENCE
17 HEARING DOESN'T SEEM TO POSE A MAJOR PROBLEM IN YOUR MIND
18 AS SOME MIGHT IMAGINE.

19 THE REAL PROBLEM WOULD BE THE STANDARD BY WHICH
20 THAT HEARING WOULD BE CONDUCTED, AND THAT'S SOMETHING WE
21 NEED TO PROBABLY GO BACK AND LOOK AT; THAT IS, WHAT DEGREE
22 OR RULES OF EVIDENCE OR THE LACK OF THAT SHOULD BE
23 APPLIED.

24 MR. RUSSONIELLO: IT MAY VERY WELL BE, JUDGE
25 WILKINS, THAT SOME COMPROMISE BETWEEN THE BURDEN OF PROOF

1 VERSUS THE QUALITY OF THE EVIDENCE CAN BE ACCOMMODATED SO
2 THAT, FOR EXAMPLE, IF IT IS A PREPONDERANCE THAT THE RULES
3 OF EVIDENCE IS STRICTLY APPLIED, BUT IF IT IS CLEAR AND
4 CONVINCING THAT THE CASE WILL BE -- THAT THE STRICT
5 COMPLIANCE WITH THE RULES MIGHT BE SUSPENDED.

6 I JUST CAN'T CONCEIVE OF AN INCREDIBLE
7 EXTRAORDINARY EXPENDITURE IF WE WERE REQUIRED TO PUT ON
8 THE BEST EVIDENCE OF FRAUD, FOR EXAMPLE, IN A CASE IN
9 WHICH HUNDREDS OF PERSONS HAVE BEEN DUPED INTO BUYING
10 GUISMOS OR GADGETS, AND WE HAVE HAD THOSE CASES IN THIS
11 DISTRICT, THAT WE WOULD HAVE TO HAVE THOSE PEOPLE APPEAR
12 AND TESTIFY.

13 THAT IS A RULE IN THE STATE COURT IN CALIFORNIA,
14 AND IT HAS BEEN UNWORKABLE IN THE SENSE THAT I CAN
15 REMEMBER ONE CASE WHERE THE ELDERLY WERE DEFRAUDED OF
16 THEIR INCOMES THROUGH A HOME HEALTH CARE SCHEME, AND EVERY
17 SINGLE ONE OF THOSE VICTIMS HAD TO BE BROUGHT INTO COURT
18 AND REQUIRED TO TESTIFY.

19 THE HARDSHIP, NOT ONLY ON THE PROSECUTION, BUT ON
20 THOSE VICTIMS WAS EXTRAORDINARY. SOME SUBSTITUTE CLEARLY
21 COULD HAVE BEEN ARRANGED AND WOULD HAVE BEEN JUST AS
22 PROBATIVE.

23 CHAIRMAN WILKINS: ANY QUESTIONS OF ANY
24 COMMISSIONER TO MY LEFT?

25 COMMISSIONER BREYER: THANK YOU. IT IS VERY

1 HELPFUL.

2 DO YOU THINK YOUR PLEA BARGAIN -- SUPPOSED YOU
3 TOOK THE FIVE FACTORS THAT YOU MENTIONED AND ASKED THE
4 DISTRICT COURT JUDGE, SENTENCING JUDGE, TO EXAMINE A PLEA
5 BARGAIN IN LIGHT OF THOSE FIVE FACTORS, AND ASSUMING IT
6 MET SATISFACTORY STANDARDS, THE PLEA BARGAIN WOULD BE
7 ALLOWED TO STAND, THE GUIDELINES NOTWITHSTANDING?

8 MR. RUSSONIELLO: WELL, I THINK THAT'S WHAT WE DO
9 NOW, QUITE FRANKLY. WE MAY NOT DO IT IN A FORMAL WAY, BUT
10 WE BASICALLY PUT BEHIND THE PLEA BARGAINING OUR CONVICTION
11 AS PROSECUTORS THAT EACH ONE OF THOSE FIVE FACTORS ARE
12 VIABLE AND DEFENSIBLE AND CERTAINLY THAT IS PLAYED INTO
13 OUR JUDGMENT.

14 SO I WOULD HAVE NO DIFFICULTY AT ALL IN DEFENDING
15 WHY WE TAKE THE POSITION ON THOSE FIVE FACTORS BEFORE A
16 COURT THAT MAY WANT TO SUBJECT IT TO SCRUTINY.

17 CHAIRMAN WILKINS: ANY QUESTIONS FROM ANY
18 COMMISSIONER TO MY RIGHT?

19 WELL, THANK YOU VERY MUCH, MR. RUSSONIELLO.

20 MR. RUSSONIELLO: THANK YOU.

21 CHAIRMAN WILKINS: MR. JEFFREY BROWN, THE PUBLIC
22 DEFENDER OF THE CITY AND COUNTY OF SAN FRANCISCO WAS
23 SCHEDULED TO TESTIFY. AT THE LAST MOMENT HE WAS
24 JUSTIFYABLY DIVERTED FROM THIS HEARING TO ANOTHER FORUM
25 THAT HE IS PARTICIPATING IN.

1 WE ARE VERY HAPPY TO HAVE HIS DEPUTY WITH US, MR.
2 WILLIAM HECKMAN.

3 MR. HECKMAN, THANK YOU VERY MUCH FOR COMING AND I
4 KNOW YOU REPRESENT THE VIEWS OF MR. BROWN IN THE PUBLIC
5 DEFENDERS' OFFICE HERE IN THE CITY AND COUNTY OF SAN
6 FRANCISCO.

7 MR. WILLIAM HECKMAN

8 YES. THANK YOU, MR. CHAIRMAN.

9 I DO APOLOGIZE FOR MR. BROWN'S ABSENCE THIS
10 MORNING.

11 AS YOU INDICATED, HE IS BEFORE A JURY NOW IN A
12 CAPITAL CASE AND HE WAS SCHEDULED TO BE HERE, BUT IT
13 DIDN'T WORK OUT.

14 I DO HAVE A PREPARED STATEMENT WHICH I WOULD
15 SUBMIT TO THE COMMISSION WITHOUT READING IT IN ITS
16 ENTIRETY, BUT PERHAPS I CAN JUST GO OVER A FEW POINTS FOR
17 YOU.

18 IN A SENSE, WE ARE PROBABLY THE LEAST QUALIFIED
19 TO APPEAR BEFORE THE COMMISSION BECAUSE WE OBVIOUSLY DO
20 NOT PRACTICE IN THE FEDERAL COURTS. WHAT WE DID,
21 THEREFORE, WAS TO GO THROUGH THE DRAFT AND JUST PICK OUT
22 SOME THINGS THAT STRUCK US THAT MIGHT SERVE AS SUGGESTIONS
23 TO THE COMMISSION IN LIGHT OF OUR EXPERIENCE IN
24 CALIFORNIA.

25 I MIGHT SAY IN MY OWN CASE I DID SPEND SOME YEARS

1 IN WASHINGTON FROM 1973 THROUGH '76 ON THE STAFF OF THE
2 JUDICIARY COMMITTEE AND THEN LATER IN THE DEPARTMENT OF
3 JUSTICE. SO I HAVE SOME FEELINGS FOR, AT LEAST, THE
4 POLITICAL PROBLEMS THAT THIS COMMITTEE HAS BEEN FACING.

5 SO WITH THAT IN MIND, IF I COULD JUST GO OVER A
6 FEW AREAS, AND THEN I WILL BE GLAD TO ANSWER ANY
7 QUESTIONS, IF THERE ARE ANY, WITH THE UNDERSTANDING THAT
8 WE DO NOT, AS I SAY, PRACTICE BEFORE THE FEDERAL COURTS.

9 THE FIRST ONE, I BELIEVE, THE COMMISSION ASKED
10 FOR SOME COMMENTS ON WAS THE ISSUE OF SENTENCING
11 BARGAINING.

12 IN OUR JURISDICTION, AT LEAST IN SAN FRANCISCO,
13 AND THIS VARIES COUNTY BY COUNTY IN CALIFORNIA, WE DO HAVE
14 SENTENCING BARGAINING, AND IT IS SORT OF HARD FOR US TO
15 IMAGINE HOW THE COURT SYSTEM WOULD BE ABLE TO WORK WITHOUT
16 IT.

17 HOWEVER, I THINK WE DO FEEL THAT IF IT IS
18 PERMITTED UNDER YOUR PROPOSED SYSTEM THIS WOULD PROBABLY
19 TEND TO UNDERCUT WHATEVER GAINS MIGHT BE MADE FOR
20 SENTENCING UNIFORMITY.

21 SENTENCING BARGAINING REALLY TAKES AWAY FROM THE
22 COURT THE ABILITY TO SHAPE A SENTENCE AND MAY RESULT IN A
23 SENTENCE WHICH DOES NOT REFLECT SO MUCH THE COURT'S
24 OVERALL ASSESSMENT OF WHAT SIMILAR FACTS AND CIRCUMSTANCES
25 IS THE APPROPRIATE SENTENCE, BUT RATHER REFLECTS THE

1 RELATIVE SKILLS OF THE ATTORNEYS ON BOTH SIDES, THEIR OWN
2 INDIVIDUAL CASELOAD OR WORKLOAD AND THEIR OWN PECULIARS AS
3 TO APPROPRIATE DISPOSITION.

4 IF THE PROPOSED GUIDELINES ARE TO BE FOLLOWED
5 WITH ANY FIDELITY, THEREFORE, WE TEND TO THINK THAT
6 CONTROL OVER THE SENTENCING MUST REST TO THE EXTENT
7 POSSIBLE, AT LEAST, WITH THE COURT RATHER THAN IN A PLEA
8 BARGAINING PROCESS.

9 THE SECOND AREA WHICH I WOULD LIKE TO COMMENT ON
10 BRIEFLY IS THE AGGRAVATED AND MITIGATED CIRCUMSTANCES AND
11 HOW THOSE ARE HANDLED BY THE GUIDELINES.

12 I THINK IT IS OBVIOUS THERE PROBABLY SHOULD BE
13 AUTHORITY VESTED IN THE COURT, IN PART, AT LEAST IN THE
14 MOST UNUSUAL CIRCUMSTANCES FROM THE GUIDELINES THEMSELVES.

15 THE COMMISSION UNDOUBTEDLY DID WHATEVER IT COULD
16 TO TAKE INTO ACCOUNT AS MUCH AS POSSIBLE IN SETTING UP THE
17 BASE VALUE POINTS THE DISPARITIES THAT MAY ARISE FROM CASE
18 TO CASE. BUT I THINK WE STILL FEEL THAT THERE MAY BE
19 CIRCUMSTANCES IN INDIVIDUAL CASES WHERE THE POINT SYSTEM
20 THAT YOU HAVE SET UP MAY BE EITHER TOO HARSH OR TOO
21 LENIENT, AND I THINK IN THOSE SENTENCES THERE OUGHT TO BE
22 SOME MECHANISM WHERE THE COURTS COULD BE PERMITTED TO
23 DEVIATE FROM THE GUIDELINES, PERHAPS WITH A CAREFUL
24 EXPLANATION OF WHY THEY ARE DOING SO FORMALLY ON THE
25 RECORD.

1 THE THIRD AREA I WOULD LIKE TO TOUCH ON IS THE
2 AREA OF MULTIPLE CRIMES. I THINK WE WOULD FAVOR
3 LIMITATIONS AS SET FORTH IN HIS RULE 6 AT PAGE 168 IN THE
4 GUIDELINES. IT IS OUR FEELING THAT THE EXCESSIVE STATUTES
5 IN MULTIPLE CRIME SENTENCES THAT IT WOULD MAKE IT
6 IMPOSSIBLE FOR THE OFFENDER TO BE REHABILITATED WITHIN A
7 REASONABLE PERIOD OF TIME.

8 THE CALIFORNIA CRIMINAL SENTENCE LAW HAS BEEN
9 AMENDED TO ALLOW FOR THESE TYPES OF CRIMES ARISING OUT OF
10 THIS SAME COURSE OF CONDUCT.

11 IT IS OUR FEELING THAT THE RESULT HAS BEEN IN
12 CERTAIN CASES, AT LEAST, THAT ASTRONOMICAL PENALTIES HAVE
13 BEEN IMPOSED. A RAPIST, FOR EXAMPLE, COULD SPEND MUCH
14 MORE TIME IN PRISON UNDER THE CALIFORNIA SYSTEM THAN CAN
15 THE MURDERER.

16 I THINK THERE APPEARS TO BE A CONSENSUS OF
17 OPINION, AT LEAST IN THE DEFENSE PART OF CALIFORNIA THAT
18 THE STATUE OF THE CRIME TENDS TO DISTORT BOTH THE NATURE
19 OF THE CRIME AND THE DANGER IT MAY PRESENT IN THE LONG
20 TERM TO SOCIETY.

21 THE FOURTH AREA, JUST TO COMMENT ON IT BRIEFLY,
22 IS THE PERMISSIVE SATISFACTION INVOLVED WITH SANCTION
23 UNITS. WE SUGGEST THAT THE COURTS BE ALLOWED A FAIRLY
24 WIDE DISCRETION IN MIXING ORDERS FOR THE DISCHARGE OF
25 SANCTION UNITS. ATTEMPT AT CONSTRUCTING EQUIVALENCIES

1 WILL PROBABLY RESULT IN CONFUSING SENTENCING ORDERS AND
2 THE QUALITY OF SENTENCING. WE DOUBT IF JUDGES WILL
3 UNDERSTAND ONE ANOTHER'S ORDERS AND WHETHER THEY WOULD
4 APPLY THE EQUIVALENCIES IN THE SAME WAY.

5 THE FIFTH AREA IS THE WAY THAT THE GUIDELINES
6 DEAL WITH PRIOR CRIMINAL RECORDS.

7 I THINK OUR CONCERN IS THAT AS A MATTER OF
8 JUSTICE THE GUIDELINES SHOULD ALLOW FOR THE WASHOUT PERIOD
9 FOR ALL DEFENSES. WE FEEL THAT THE DELAY FACTOR AS SET
10 FORTH ON PAGE 129 UNDER YOUR GUIDELINES ARE SOUND, BUT
11 THAT IT PERHAPS SHOULD BE EXTENDED TO ALL OFFENSES, EXCEPT
12 PERHAPS VIOLENT HOMICIDES, OTHERWISE THE COURTS WOULD FIND
13 THEMSELVES TAKING MORE TIME ON THE OLD OFFENSE WHETHER OR
14 NOT THE OLD OFFENSE BEAR ANY SIMILARITY TO THE NEW
15 OFFENSE.

16 ADDITIONALLY, WE FEEL THAT THE COURT SHOULD BE
17 AUTHORIZED TO STRIKE PRIOR OFFENSES IF THE COURT FEELS
18 THEY ARE TOO REMOTE OR TOO DISSIMILAR FROM THE NEW CASE.

19 I THINK WE WOULD PERHAPS CAUTION THE COMMISSION
20 AGAINST ALSO THE USE OF JUVENILE RECORDS. IN MANY
21 JURISDICTIONS THESE ARE NOT ACCESSIBLE, AND IF THEY ARE,
22 IF JUVENILE OFFENSES ARE TO BE COUNTED, THE COURT WILL
23 TAKE INTO ACCOUNT WHEN, THEY ARE AVAILABLE AND NOT
24 COUNTING THEM WHERE THEY ARE NOT AVAILABLE. THIS COULD
25 HAVE AN EFFECT FURTHER IN QUALITY OF SENTENCING.

1 MOREOVER, JUVENILE PROCEEDINGS HAVE BEEN
2 CONDUCTED WITH VARYING DEGREES OF FAIRNESS OVER THE YEARS.
3 THE APPLICATION OF THE COURT'S DECISION IN RE: GAULT HAS
4 BEEN SLOW IN MANY JURISDICTIONS, LACK OF JURY TRIAL IN
5 MANY CASES AS A RESULT OF THAT BARGAINING OF PLEAS.

6 IT IS ENOUGH, WE BELIEVE THAT THE COURTS SHOULD
7 USE JUVENILE RECORDS WHERE THE JUVENILES HAVE BEEN TRIED
8 AS ADULTS, BUT I WOULD SUGGEST NOT OTHERWISE.

9 FINALLY, THE SECTION OF THE GUIDELINES ENTITLED
10 "OTHER OFFENSER CHARACTERISTICS," WHICH I BELIEVE IS IN
11 PART E. WE BELIEVE THAT THOSE ARE PROBABLY AS IMPORTANT
12 AS ANYTHING ELSE IN THE SENTENCING. HOW THESE FIGURE IN
13 THE POINT SYSTEM IS REALLY NOT QUITE CLEAR, BUT IT IS OUR
14 FEELING THEY SHOULD PROBABLY NOT BE GIVEN QUANTITATIVE
15 VALUE. WHETHER THEY SHOULD BE FACTORS THAT THE COURT
16 TAKES INTO CONSIDERATION IN GRANTING OR DENYING PROBATION
17 OR PERHAPS IN DISCHARGING SANCTION UNITS.

18 THOSE ARE JUST A FEW COMMENTS THAT STRUCK US AS
19 WE REVIEWED IT.

20 AGAIN I APOLOGIZE FOR MRS. BROWN NOT BEING HER,
21 AND I WOULD BE GLAD TO ANSWER ANY QUESTIONS WITH THE
22 UNDERSTANDING THAT WE REALLY ARE NOT TERRIBLY FAMILIAR
23 WITH THE DETAILS OR THE PRACTICES IN THE FEDERAL SYSTEM.

24 CHAIRMAN WILKINS: IS THERE A CASE FACTOR USED
25 HERE FOR PRIOR RECORDS IN THE STATE COURTS IN CALIFORNIA?

1 MR. HECKMAN: I BEG YOUR PARDON?

2 CHAIRMAN WILKINS: IS THERE A CASE FACTOR
3 INVOLVED HERE IN THE STATE COURTS?

4 MR. HECKMAN: IT IS DISCRETIONARY WITH THE
5 JUDGE. THE JUDGE HAS THE OPTION OF STRIKING THE OLD PRIOR
6 CASES FOR PURPOSES OF SENTENCING.

7 CHAIRMAN WILKINS: IS THERE A RULE OF THUMB
8 INVOLVED?

9 MR. HECKMAN: AS FAR AS I CAN TELL, IT VARIES
10 REALLY FROM JUDGE TO JUDGE. PERHAPS MORE SO FROM
11 JURISDICTION TO JURISDICTION, AS I AM SURE IT IS IN ANY
12 LARGE STATE. THE WAY THE COURTS ARE RUN IN THE LARGE
13 URBAN COUNTIES IN THIS STATES IS QUITE DIFFERENT THAN
14 WHEN YOU GO UP IN THE SIERRA VALLEY AND OR TO THE SMALL
15 COUNTIES.

16 THEORETICALLY, UNDER THE PROPOSITION A JUST
17 PASSED A FEW YEARS AGO IN CALIFORNIA WE ARE NOT SUPPOSED
18 TO HAVE PLEA BARGAINING BUT IN THE BIG COUNTIES WE DO.

19 CHAIRMAN WILKINS: ANY COMMISSIONER TO MY LEFT
20 HAVE QUESTIONS?

21 MR. BREYER: IT IS GOOD TO SEE YOU AGAIN.

22 MR. HECKMAN: THANK YOU.

23 MR. BREYER: I HAVE SOME QUESTIONS ABOUT THE
24 STATE SYSTEM. I AM RATHER CURIOUS, BECAUSE THEY TRIED TO
25 SOLVE SOME OF THESE SAME PROBLEMS.

1 MR. HECKMAN: YES.

2 MR. BREYER: IT IS PRIMARILY A CHARGE BARGAINING
3 SYSTEM, I GATHER. THE PUNISHMENT RELATES TO WHAT IS
4 CHARGED?

5 MR. HECKMAN: THAT IS CORRECT.

6 MR. BREYER: EXCUSE ME. WHAT WE HAVE BEEN TOLD,
7 AT LEAST, IF YOU GO TO THAT SYSTEM IT PUTS TREMENDOUS
8 POWER AGAINST THE PROSECUTOR BECAUSE THE PROSECUTOR CAN
9 DETERMINE THE SENTENCE BY DECIDING WHAT SPECIFIC CRIME TO
10 CHARGE.

11 FOR EXAMPLE, IF SOMEONE SENT A THOUSAND LETTERS
12 THROUGH THE MAIL EACH ONE REQUESTING TEN DOLLARS, THE
13 PROSECUTOR MIGHT DECIDE TO HAVE FOUR HUNDRED COUNTS OR
14 FOUR COUNTS OR HE MIGHT DECIDE TO HAVE A THOUSAND COUNTS,
15 WHATEVER, AND THAT WOULD DETERMINE THE SENTENCE. IS THAT
16 SO?

17 MR. HECKMAN: THAT IS CORRECT.

18 MR. BREYER: HAS THAT PROVED TO BE THE PROBLEM?

19 MR. HECKMAN: WELL, IN A WAY I DON'T THINK IT
20 HAS, AT LEAST IN A JURISDICTION LIKE SAN FRANCISCO,
21 BECAUSE WITH THE NINETY-SEVEN PERCENT OF THE CASES THAT ARE
22 PLEA BARGAINED, THE NUMBER OF -- THE PARAGRAPHS IN THE
23 COMPLAINT IS NOT REALLY THE DETERMINING FACTOR.

24 BUT IT IS TRUE THAT, GENERALLY SPEAKING, UNLESS
25 THE CASE GOES TO TRIAL, THE AGREEMENTS ON SENTENCING ARE

1 BY AND LARGE REACHED BETWEEN THE PROSECUTION AND DEFENSE
2 COUNSELS.

3 MR. BRYER: IN OTHER WORDS, THEY USE THE POWER TO
4 CONTROL SENTENCES VIA THE CHARGES AS AN EFFORT OF MAKING
5 THEIR PLEA BARGAIN STICK?

6 MR. HECKMAN: THAT'S RIGHT. AND IT IS NOT
7 UNCOMMON THAT THE COMPLAINT WILL BE AMENDED AT SENTENCING
8 TIME TO DIFFERENT CHARGES TO REFLECT THE BARGAINING
9 AGREEMENT.

10 MR. BREYER: SO, IN FACT, WOULD YOU SAY THAT
11 INHERENT IN THE PRESENT CALIFORNIA SYSTEM, THE PREVIOUS
12 SYSTEM, THAT THE PROSECUTOR HAS GAINED POWER AT THE
13 EXPENSE OF THE JUDGE?

14 MR. HECKMAN: I THINK THAT IS FAIR TO SAY, YES.

15 AGAIN I THINK THERE IS A DISTINCTION BETWEEN THE
16 HIGH-VOLUME COUNTIES IN THE STATE AND THE MORE RURAL
17 AREAS.

18 I KNOW, FOR EXAMPLE IN MENDECINO COUNTY THERE'S
19 NO PLEA BARGAINING AT ALL BETWEEN PROSECUTORS AND DEFENSE.
20 SO IN THOSE COUNTIES THE JUDGES CAN HAVE MORE CONTROL.

21 MR. BREYER: IN ANY EVENT, THE PROSECUTOR DECIDES
22 HOW MANY CHARGES TO BRING, PRECISELY HOW TO BRING THE
23 CHARGES AND THAT WOULD DETERMINE THE SCOPE OF WHAT THE
24 SENTENCE WOULD BE, BECAUSE THE JUDGE CANNOT GO OUTSIDE THE
25 RANGE FIXED BY THE CHARGE, REGARDLESS OF THE ACTUAL

1 CONDUCT; IS THAT CORRECT?

2 MR. HECKMAN: GENERALLY, I THINK THAT'S
3 CORRECT.

4 MR. BREYER: THE OTHER THING, I WONDER HOW YOU
5 SOLVE THIS PROBLEM, WHICH IS BLATANT, ABSOLUTELY, THE
6 PROBLEM OF CONCURRENT VERSUS CONSECUTIVE SENTENCES. WHAT
7 IS THE RULE IN CALIFORNIA?

8 THAT IS, SUPPOSE A PERSON DOES SEND FIVE LETTERS
9 OR HE SENDS FIFTY LETTERS OR HE HURTS FOUR PEOPLE AND HE
10 IS CHARGED FOR THOSE THINGS AT THE SAME TIME. WHAT
11 DETERMINES -- WHAT ARE THE RULES FOR DETERMINING WHETHER
12 THE SENTENCE WILL BE CONCURRENT OR CONSECUTIVE?

13 MR. HECKMAN: GENERALLY SPEAKING, WITH FELONY
14 CASES THE JUDGE IS GIVEN, AS THE COMMISSION MAY KNOW, A
15 THREE-TIER SYSTEM, LOW, MEDIUM AND HIGH. I MAY NOT BE
16 ENTIRELY CORRECT ON THIS, BUT MY UNDERSTANDING IS THAT IT
17 IS ENTIRELY DISCRETIONARY WITH THE JUDGE AS TO WHETHER HE
18 OR SHE ALLOWS EITHER CONCURRENT OR CONSECUTIVE.

19 MR. BREYER: WITH A CERTAIN SET OF RULES THAT'S
20 GUIDE JUDGES IN SOME WAY?

21 MR. HECKMAN: NO, I DON'T THINK THERE ARE ANY
22 STATUTORY RULES.

23 MR. BREYER: WHAT DO YOU DO ALSO IN THAT
24 SYSTEM -- MY THIRD QUESTION IS ANOTHER PROBLEM THAT'S
25 PLAGUING US. YOU HAVE LOW, MEDIUM OR HIGH?

1 MR. HECKMAN: PLUS YOU HAVE A SERIES OF
2 ENHANCEMENTS.

3 MR. BREYER: BUT THE ENHANCEMENTS HAVE TO BE
4 CHARGED AND PROVED SEPARATELY --

5 MR. HECKMAN: THAT IS RIGHT.

6 MR. BREYER: -- BEFORE THE JURY?

7 MR. HECKMAN: YES.

8 MR. BREYER: LET'S TAKE A MAJOR DOPE OFFENSE.
9 APPARENTLY IN FOUR KILOGRAMS OF HEROIN OR COCAINE, THERE'S
10 A LOT OF COCAINE, NOW EVEN A LOW MEMBER OF THAT
11 CONSPIRACY, EVEN A LOW SENTENCE THERE, I TAKE IT, IS GOING
12 TO BE PRETTY HIGH?

13 MR. HECKMAN: YES.

14 MR. BREYER: THEN YOU CAN GET INTO SUCH A
15 CONSPIRACY A RANGE OF PEOPLE WHO -- ONE OF THE JUDGES IN
16 NEW YORK WAS TELLING US, ARE REALLY VERY BORDERLINE
17 PARTICIPANTS IF THEY FIND A CERTAIN -- SOMETIMES SOME
18 VERY, VERY UNEDUCATED, VERY POOR PEOPLE FROM CERTAIN
19 AFRICAN COUNTRIES WHO ARE LURED INTO THIS AND THEY GET TO
20 THE AIRPORT, AND YOU KNOW, THEY ARE CLOSE TO NOT KNOWING
21 WHAT IS GOING ON, AND THE JUDGES SAY, WELL, WITH SUCH A
22 PERSON THEY PROBABLY WOULD NOT GIVE THAT PERSON A JAIL
23 TERM, AND NOW -- SO WHAT I AM WONDERING HOW DO YOU DEAL,
24 EVEN IF I HAVEN'T GOT THE RIGHT EXAMPLE, WITH THE PERSON
25 WHOSE TECHNICALLY GUILTY OF A MAJOR CONSPIRACY, BUT IS SO

9
1 BORDERLINE A PARTICIPANT THAT A JAIL TERM, EVEN AT THE LOW
2 END OF THE SCALE, SEEMS INAPPROPRIATE? IS THERE A METHOD
3 OF DEALING WITH THAT KIND OF CASE IN THE CALIFORNIA
4 SYSTEM?

5 AND YOU HAVE THE REVERSE CASE, TOO, LIKE THE KING
6 PIN. YOU COULD HAVE THE CASE THAT THE HIGH SENTENCE DOES
7 NOT SEEM HIGH ENOUGH.

8 MR. HECKMAN: LET ME SAY JUST TWO THINGS. ONE,
9 IN MY EXPERIENCE, AT LEAST, THAT SITUATION HAS RARELY
10 ARISEN BECAUSE WE DEAL, AT LEAST, IN SAN FRANCISCO WITH
11 VERY FEW OFFENDING MAJOR DRUG CONSPIRACY CASES IN THE
12 STATE COURTS. ONCE IN A WHILE, BUT GENERALLY SPEAKING
13 NINETY-NINE PERCENT OF THE DRUG CASES ARE AT THE VERY
14 LOWEST END OF THE SCALE.

15 MR. BREYER: YOU COULD FIND THE SAME PROBLEM IN
16 A FRAUD CASE?

17 MR. HECKMAN: YES.

18 MR. BREYER: WHAT I AM DRIVING AT IS THERE ANY
19 FLEXIBILITY TO GO EITHER ABOVE THE HIGH OR BENEATH THE LOW
20 WHERE YOU HAVE UNUSUAL CIRCUMSTANCES THAT SHOW VERY
21 BORDERLINE PARTICIPATION OR REALLY EVIL GENIUS, THAT TYPE
22 OF MANIPULATION; HAS THAT PROVED TO BE A PROBLEM?

23 MR. HECKMAN: FORMALLY, IT HAS NOT. TO MY
24 KNOWLEDGE, IT HAS NOT. BUT AS I SAY, THOSE KINDS OF LARGE
25 CONSPIRACY CASES ARE SO RARE AT LEAST IN THIS PART OF THE

1 UNITED STATES. I THINK IN SOUTHERN CALIFORNIA YOU HAVE
2 MORE THAN YOU DO HERE.

3 CHAIRMAN WILKINS: ANY ONE HAVE ANY OTHER
4 QUESTIONS?

5 MS. NAGEL: MR. HECKMAN, CONCERNING THE PRIOR
6 CRIMINAL RECORDS, WHAT DO YOU THINK IN YOUR OPINION
7 INDICATES FACTORS OR THE PERIOD OF TIME THAT SHOULD BE
8 UTILIZED FOR THAT?

9 MR. HECKMAN: WELL, MY OPINION WOULD BE THAT YOU
10 SHOULD LOOK AT A PERIOD OF SOMEWHERE BETWEEN -- DEPENDING,
11 OF COURSE, UPON THE SERIOUSNESS OF THE CRIME, SOMEWHERE
12 BETWEEN EIGHT AND TWELVE YEAR PERIOD WITH THE PRESUMPTION
13 THAT ANYTHING THAT EXCEEDS A TWELVE-YEAR PERIOD WOULD BE
14 PRESUMED TO DISREGARDED, AND THAT MIDDLE GROUND WOULD BE
15 DISCRETIONARY AND IN A SHORTER PERIOD IT WOULD BE
16 SOMETHING THAT YOU WOULD NOT TAKE INTO ACCOUNT.

17 MS. NAGEL: YOUR POINTS REGARDING JUVENILE
18 CONVICTIONS WERE WELL TAKEN, AND THE EXCESSIBILITY OF
19 RECORDS, ET CETERA. WHAT DO YOU THINK THAT OUR GUIDELINES
20 SHOULD SAY IN REGARD TO JUVENILE CONVICTIONS?

21 MR. HECKMAN: WELL, I THINK OUR POSITION WOULD
22 BE THAT ANYBODY WHO GOES THOROUGH THE JUVENILE SYSTEM THAT
23 THAT SHOULD NOT BE A FACTOR THAT WOULD BE CONSIDERED ONCE
24 THEY ARE AN ADULT.

25 IN CALIFORNIA, AND I AM NOT SURE HOW IT WORKS IN

1 THE FEDERAL SYSTEM, THERE'S THIS PERIOD OF BETWEEN FIFTEEN
2 AND EIGHTEEN WHERE IT IS DISCRETIONARY, THAT THERE'S -- I
3 THINK IT WOULD BE REASONABLE UNDER SOME CIRCUMSTANCES IF
4 THE COURT HAD EXERCISED THEIR DISCRETIONARY TO TRY A
5 SIXTEEN OR SEVENTEEN YEAR-OLD A AN ADULT THEN IT WOULD BE
6 PERMISSIBLE, I THINK --

7 MS. NAGEL: THE POINT BEING, THAT IF THE JUVENILE
8 WAS TRIED AS AN ADULT THAT ADEQUATE DUE PROCESS WOULD HAVE
9 BEEN INCORPORATED.

10 MR. HECKMAN: YES. YES.

11 MS. NAGEL: THANK YOU.

12 MR. BLOCK: I JUST WANT TO FOLLOW UP YOUR
13 SUGGESTION ABOUT MULTIPLE CRIMES AND FOLLOWING ON THAT
14 DISCUSSION WE HAVE IN THE GUIDELINES. WHAT WOULD YOU LOOK
15 AT AS A LIMIT IN STACKING UP SENTENCINGS FOR MULTIPLE
16 CRIMES? HOW WOULD YOU FORMULATE THAT?

17 MR. HECKMAN: WELL, I THINK IT WOULD BE HARD TO
18 FORMULATE A HARD AND FAST RULE FOR THAT. I GUESS I WOULD
19 TREAT IT SOMEWHAT SIMILAR TO THE WAY THAT THE PRIOR CRIMES
20 WERE TREATED, WHICH HAVE GOTTEN TOO OLD, AND THAT WOULD BE
21 TO DEVELOP SOME SYSTEM TO ALLOW THE JUDGE TO STRIKE THE
22 OLD CONVICTIONS AND TO PLACE A LIMIT ON -- WITHIN HIS
23 DISCRETION ON HOW YOU WOULD TREAT THE MULTIPLE CRIMES.

24 I HAVEN'T THOUGHT THROUGH EXACTLY HOW YOU WOULD
25 DO THAT, BUT I DON'T THINK IT WOULD BE A PROBLEM.

1 MR. BLOCK: YOU WOULD BE PUTTING SOME ABSOLUTE
2 CAPS ON IT?

3 MR. HECKMAN: YES.

4 MR. BLOCK: HOW IS THAT HANDLED NOW IN STATE
5 COURTS?

6 MR. HECKMAN: I BEG YOUR PARDON?

7 MR. BLOCK: HOW IS THAT HANDLED IN CALIFORNIA?

8 MR. HECKMAN: THAT'S HANDLED USUALLY NOT VERY
9 WELL. THE RESULT HAS BEEN UNDER THE DETERMINING
10 SENTENCING LAW THAT WE REALLY HAVE GOTTEN INTO
11 ASTRONOMICAL PENALTIES, AND IT IS ONE OF THE SERIOUS
12 PROBLEMS WITH OUR SYSTEM THAT NEED TO BE ADDRESSED.

13 MR. BLOCK: ARE THOSE PENALTIES THAT ARE
14 ACTUALLY IMPOSED OR PENALTIES THAT HAVE TO BE CALCULATED?

15 MR. HECKMAN: WELL, AGAIN IN MANY CASES THE ONLY
16 WAY AROUND IT IS WHAT JUDGE BREYER IS REFERRING TO IS TO
17 HAVE AN AGREEMENT REACHED BETWEEN THE PROSECUTOR AND THE
18 JUDGE TO AVOID IMPOSING PENALTIES.

19 BUT IN CASES, YES, SIR, THAT ACTUALLY GOES TO A
20 JURY TRIAL. THEY HAVE BEEN IMPOSED, AND TO A LOT OF
21 SATISFACTION CERTAINLY AMONG THE DEFENSE LAWYERS.

22 MR. BLOCK: THANK YOU.

23 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR.
24 HECKMAN.

25 OUR NEXT WITNESS IS JUDY CLARKE. MS. CLARKE IS

1 THE DIRECTOR OF THE FEDERAL DEFENDERS PROGRAM FROM SAN
2 DIEGO?

3 MS. CLARKE: GOOD MORNING.

4 CHAIRMAN WILKINS: THANK YOU FOR COMING AND WE
5 LOOK FORWARD TO HEARING FROM YOU.

6 JUDY CLARKE

7 I THANK YOU FOR COMING TO SAN FRANCISCO AND
8 GIVING US THIS OPPORTUNITY TO BE HERE.

9 I COME TO YOU TODAY FROM THE TRENCHES. I DON'T
10 COME TO YOU WITH ANY LOFTY MOTIONS OR SCHOLARLY VIEWS OF
11 SENTENCING.

12 I COME IN FROM AN OFFICE THAT PROBABLY HANDLES
13 FOUR THOUSAND SENTENCES A YEAR. I CAN SAY PROBABLY, TOO,
14 IF GIVEN AN OPPORTUNITY, I KNOW ONE WHEN I SEE IT, BUT I
15 CANNOT SAY TO YOU THAT I HAVE ANY SCHOLARLY OR ACADEMIC
16 APPROACH TO SENTENCING, AND I COME TO EXPRESS SOME SINCERE
17 AND SERIOUS CONCERNS ABOUT YOUR GUIDELINES.

18 THE PRESENT SYSTEM THAT WE OPERATE UNDER HAS A
19 NUMBER OF INEQUITIES. IT HAS HARSH COURTS. IT HAS
20 LENIENT COURTS. IT HAS THOSE THINGS THAT ARE COMMON TO
21 HUMAN NATURE. IT HAS THOSE THINGS THAT HE CANNOT DEAL OUT
22 OF IT BECAUSE WE ARE NOT ROBOTS AND WE ARE NOT MACHINES.

23 BUT I SUPPOSE GIVEN WHAT WE HAVE IN THE PRESENT
24 SYSTEM, AND I CAN QUOTE THE SCRIPTURES TO YOU. WE HAVE
25 CAST OUT ONE DEVIL AND WE HAVE SEEN SEVEN COME IN RETURN.

1 THAT'S WHERE WE ARE AT.

2 WITH ALL DUE DEFERENCE TO THE INTELLECT, FOR
3 WHICH I HAVE IS A GREAT DEAL OF RESPECT I CAN SAY THAT
4 YOUR GUIDELINES ARE INCOMPREHENSIBLE. THEY ARE
5 UNMANAGEABLE AND THEY ARE FAR TOO HASH, AND THAT'S THE
6 EXTENT OF MY DIPLOMACY FOR THIS MORNING.

7 THE CHAIRMAN OF THIS COMMISSION WHOM I HAVE KNOWN
8 AND RESPECTED FOR QUITE SOME TIME SINCE I WAS EVEN IN
9 COLLEGE IN GREENVILLE, SOUTH CAROLINA HAS BEEN QUOTED AS
10 SAYING ON BEHALF OF ALL OF THE COMMISSION, "WE ARE NOT,
11 AND I EMPHASIS NOT GOING TO HAVE A SYSTEM THAT AS FAR AS
12 WE ARE CONCERNED THAT IS NOTHING MORE THAN A SLIDE RULE
13 APPROACH TO JUSTICE JUST TO HAVE A RIGID SYSTEM WITH A FEW
14 NUMBERS IN IT AND ADD THEM UP AND MULTIPLY AND GET NUMBERS
15 DOES NOT SERVICE THE INTEREST OF JUSTICE".

16 THIS APPROACH HAS NEVER BEEN CONSIDERED AS A
17 PRACTICAL SOLUTION. OUR PERCEPTIONS OF YOUR GUIDELINES
18 COLLIDE WITH THAT COMMENT. YOUR GUIDELINES ARE A
19 MATHEMATICAL MONSTROSITY.

20 I SUPPOSE WE SHOULD NEVER SAY NEVER BECAUSE WHAT
21 WE HAVE IS A SLIDE RULE APPROACH TO JUSTICE AND A
22 MATHEMATICAL FORMULA, ONE THAT HAS NEVER BEEN CONSIDERED
23 AS A PRACTICE SOLUTION, AND I SAY, AND IN THE SPIRIT OF
24 DIPLOMACY, THAT YOUR GUIDELINES ARE NOT A PRACTICAL
25 SOLUTION. WE HAVE CREATED A MONSTER BEFORE US.

1 I CAN SEE THAT A DEFENSE LAWYER AND THE
2 PROSECUTOR WE ARE GOING TO HAVE TO BARGAIN AWAY EVERY FACT
3 THAT EITHER AGGRAVATES OR MITIGATES A SENTENCE.

4 WE ARE GOING TO HAVE TO IN THE PLEA NEGOTIATION
5 STAGE COME TO AN AGREEMENT, OR IF WE ARE UNABLE TO REACH
6 AN AGREEMENT WE ARE GOING TO HAVE PROMOTIONS FOR THE COURT
7 TO MAKE THESE FACTUAL DETERMINATIONS WHERE THERE WILL BE
8 NO WAY THAT I AS A LAWYER IN THE TRENCHES CAN ADVISE MY
9 CLIENT TO ENTER A NOTHING AND INTELLIGENT PLEA BECAUSE HE
10 OR SHE WILL NOT KNOW WHAT THEY ARE REALLY FACING.

11 A JUDGE PROBABLY COULD SAY UNDER RULE 11, GET BY
12 WITH ADVISING THE DEFENDANT PROPERLY, YOUR MAXIMUM PENALTY
13 IS FIFTEEN YEARS OR TWENTY YEARS, WHATEVER THE STATUTE
14 SAYS, BUT I AS COUNSEL MUST BE ABLE TO SAY TO HIM, "THIS
15 IS PRACTICALLY SPEAKING WHAT YOU ARE GOING TO SERVE." IN
16 ORDER FOR THE PLEA TO BE NOTHING AND INTELLIGENT WE GOT TO
17 BE ABLE TO DO THAT AND WE CAN'T DO THAT UNLESS WE CAN
18 BARGAIN THE FACTS OR THE COURT MAKES A DETERMINATION.

19 IF THE PARTIES BARGAIN THE FACTS THE COURT HAS
20 NOTHING TO DO WITH SENTENCING. IF WE DON'T HAVE SOME KIND
21 OF COURT DETERMINATION OF FACTS THEN NEITHER THE PARTIES
22 OR THE COURT HAS ANYTHING TO DO WITH THE SENTENCING AND IT
23 IS BACK IN THE LANDS OF THE PROBATION OFFICERS THAT WRITES
24 THE ALL MIGHTY PRESENTENCE REPORT.

25 THERE ARE FACTS THAT WE ARE GOING TO BE CONCERNED

1 WITH IN LITIGATING THE PREPLEA, YOUR MODIFIED
2 PRE-SENTENCING. WHAT IS THE HARM FLOWING FROM THE
3 OFFENSE? THAT NEEDS TO BE DETERMINED.

4 PSYCHOLOGICALLY -- I CAN ENVISION THE
5 PSYCHOLOGICAL EVALUATION OF THE VICTIMS, BODILY INJURIES.
6 I CAN ENVISION THE SCREENING OF MEDICAL REPORTS AND
7 DOCTORS AND TYING UP COURTS IN LITIGATIONS AND HEARINGS
8 FOR HOURS.

9 THE AMOUNT OF THE FRAUD, THE AMOUNT OF THE
10 DAMAGES, ALL OF THESE THINGS HAVE A SIGNIFICANT IMPACT ON
11 THE AMOUNT OF POINTS THAT WE ARE LOOKING AT AND,
12 THEREFORE, THE AMOUNT OF TIME IN JAIL WE ARE LOOKING AT,
13 SO WE ARE GOING TO HAVE TO LOOK AT IT VERY SERIOUSLY AND
14 LITIGATE VERY SERIOUSLY BEFORE WE CAN EVEN ENTER A PLEA OF
15 GUILTY.

16 AND IN SAN DIEGO WHERE WE ENTER MORE THAN FOUR
17 THOUSAND GUILTY PLEAS TO PETTY OFFENSES AND MISDEMEANORS
18 ON A YEARLY BASIS, I THINK, AND PERHAPS THE DEVIL IN ME
19 SHOULD BE HAPPY, BECAUSE PERHAPS THE PROSECUTION WILL NOT
20 BE ABLE TO FILE THESE CHARGES. AND PERHAPS -- ACTUALLY
21 YOU AS A COMMISSION HAS DONE WHAT I AND MY COUNTERPARTS
22 WOULD LIKE TO DO AS AN INSTITUTIONAL DEFENDER AND THAT IS
23 CALL A HALT TO THE PROGRESS OF THE COURTS.

24 AS A REAL PERSON I SUPPOSE THAT I CANNOT DO THAT
25 AND AS AN INSTITUTIONAL DEFENDER I EVEN HAVE THE INTERESTS

1 OF MY CLIENT AT HEART AND CANNOT COMPLETELY CLOG UP THE
2 WORKS. BUT MAYBE I SHOULD BE HAPPY AND MAYBE I SHOULD BE
3 HERE TODAY SAYING TO YOU, YOU HAVE DONE WHAT I IN MY
4 WILDEST DREAMS COULD NEVER DO TO THE COURT SYSTEM.

5 YOU KNOW, YOU HAVE TO PLACE A VALUE ON OFFENSES,
6 AND I ADMIRE THE ATTEMPT YOU HAVE MADE IN PLACING THE
7 VALUE ON OFFENSES, BUT LET ME SUGGEST TO YOU SOME
8 COMPARISONS. A TWENTY-FIVE-MILLION DOLLAR INSIDER TRADING
9 RIP-OFF IS EQUAL IN SEVERITY TO THAT PERSON DEALING IN TEN
10 GRAMS OF COCAINE.

11 YESTERDAY'S BOMBING IN THE GSA FEDERAL BUILDING
12 HERE WHERE TWO PEOPLE WERE INJURED IS EQUAL IN SEVERITY AS
13 TEN GRAMS OF COCAINE.

14 \$275,000 FRAUD WHERE THE VICTIMS LOSE \$275,000 IS
15 EQUAL IN SEVERITY TO DEALING IN TEN POUNDS OF MARIJUANA.

16 A \$250,000 FRAUD WHERE MULTIPLE VICTIMS SUFFER
17 LOSSES OF \$250,000 IS LESS IN SEVERITY THAN A \$25,000
18 THEFT.

19 THE ALCOHOLIC WHO WALKS INTO THE BANK AND HANDS A
20 NOTE AND RECEIVES MONEY IN RETURN IS EQUAL IN SEVERITY TO
21 THAT PERSON VICTIMIZING LENDERS OR INVOLVED IN A FRAUD
22 SCHEME OF TWENTY-FIVE MILLION DOLLARS. SOMETHING HAS GONE
23 ARYE, AND I AM SURE THAT YOUR STAFF IS CONSIDERING THE
24 INEQUITIES IN THE POINT TOTALS THAT YOU HAVE GIVEN, BUT I
25 BRING TO YOU THESE CONCERNS BECAUSE THEY ARE THERE IN A

1 REVIEW OF THE GUIDELINES.

2 DRUGS. DRUGS ARE NOT POPULAR. I DON'T COME
3 BEFORE YOU AND SAY DRUGS SHOULD BE TREATED LIGHTLY. BUT
4 EVEN IN YOUR SCHEMATIC OF HOW TO HANDLE THE DRUG
5 SENTENCINGS YOU ARE TALKING ABOUT A DETECTABLE AMOUNT OF
6 THE CONTROLLED SUBSTANCE.

7 AT PAGE 55 AS I READ YOUR LANGUAGE IN THE
8 PRELIMINARY DRAFT YOU TALK ABOUT RATING THE OFFENSE BASED
9 ON THE TOTAL AMOUNT OF SUBSTANCE SO LONG AS IT CONTAINS A
10 DETECTABLE AMOUNT OF THE CONTROLLED SUBSTANCE.

11 THEREFORE, ONE-HALF KILO OF ONE HUNDRED PERCENT
12 PURE COCAINE IS LESS SEVERE THAN TWO KILOS OF TWO PERCENT
13 PURE COCAINE.

14 CONGRESS HAS SAID THAT IN THE NEW DRUG LAW. THEY
15 GO THE DETECTABLE AMOUNT IN RANKING THE SENTENCES. BUT
16 IMPOSING SENTENCES IT SEEMS TO ME THAT A SENTENCING COURT
17 WANTS TO GIVE A HIGHER SENTENCE THE CLOSER YOU GET TO THE
18 SOURCE, AND THAT SOURCE IS GOING TO HAVE A HALF POUND OF A
19 HUNDRED PURE COCAINE.

20 PROBATION HAS BEEN IGNORED. IT HAS BEEN
21 COMPLETELY LEFT OUT OF YOUR GUIDELINES, AND I DON'T KNOW
22 WHY BECAUSE THE LAW 28 USC 994 GIVES YOU CLEAR AUTHORITY,
23 AND, IN FACT, MANDATES THAT YOU CONSIDER PROBATION AS A
24 SENTENCING OPTION.

25 AND, IN FACT, IT SAYS IN SUBSECTION J THAT FIRST

1 OFFENDERS SHOULD BE PRESUMED, ABSENT VIOLENT CRIMES OR
2 SERIOUS OFFENSES OR BODILY INJURIES, SHOULD BE PRESUMED
3 PROBATION CASES. WE NEED THAT ESCAPE VALVE IN THE
4 SENTENCING SYSTEM. WE HAVE TO HAVE IT.

5 THE STATE OF CALIFORNIA, AS I UNDERSTAND, MY
6 LIMITED UNDERSTANDINGS OF THEIR SENTENCING IS, UNLESS THE
7 STATUTE PRECLUDES PROBATION THE JUDGE CAN IMPOSE A COUNTY
8 JAIL TERM AS A CONDITION OF A PROBATION OR SENTENCE. SO
9 YOU CAN GET STATE PRISON OR YOU CAN GET PROBATION.

10 AND AS JUDGE BREYER WAS ASKING THOSE QUESTIONS
11 ABOUT WHAT DO YOU DO WITH THE MINOR PARTICIPANT IN THE
12 CONSPIRACY CASE, I THINK HE GETS PROBATION UNDER THE LAWS
13 OF THE STATE OF CALIFORNIA, BECAUSE UNLESS THE STATUTE
14 PRECLUDES PROBATION SPECIFICALLY, THE JUDGE HAS THE
15 DISCRETION THAT WITHIN IN THE COUNTY JAIL SYSTEM BUT EQUAL
16 TO THE SPLIT SYSTEM THAT WE HAVE IN THE FEDERAL SYSTEM.

17 I HAVE A CLIENT RIGHT NOW WHO WAS CONVICTED IN
18 MEXICO OF PASSING COUNTERFEIT BILLS. HE WAS INDICTED IN
19 THE UNITED STATES AT THE SAME TIME. THE BILLS WERE
20 MANUFACTURED AT THE TIME IN SAN DIEGO, TAKEN TO MEXICO AND
21 PASSED; THIRTY-FIVE YEAR OLD MAN, NO PRIOR RECORD, GOT
22 HIMSELF CAUGHT UP IN A COUNTERFEITING SCHEME. HE DOESN'T
23 DESIRE A STAR IN HIS LAPEL FOR IT. BUT HE WENT TO MEXICO
24 AND HE WAS BEATEN AND HE WAS TORTURED AND HE WAS SENTENCED
25 IN MEXICO FOR A TERM OF SIX YEARS.

1 HE SERVED EIGHTEEN MONTHS IN MEXICO AND RETURNED
2 TO THIS COUNTRY TO FACE THE INDICTMENT AFTER SERVING
3 EIGHTEEN MONTHS. HE CAME BACK TO US ALMOST IMMEDIATELY
4 AFTER HE WAS RELEASED ON PAROLE AS WELL AS HE SHOULD HAVE
5 BEEN UNDER THE GUIDELINES. HE CONFRONTED THAT INDICTMENT
6 AND ALL THE PROSECUTION REALLY WANTED OUT OF IT WAS A
7 FELONY CONVICTION ON HIS RECORD IN THE UNITED STATES TO
8 INDICATE THE SEVERITY OF HIS INVOLVEMENT IN THE CRIMINAL
9 CONDUCT.

10 HE, AS I AM SURE THE MEMBERS OF THE COMMISSION
11 WOULD PROBABLY WOULD HAVE DONE THEMSELVES, RECEIVED A
12 PROBATIONARY SENTENCE. UNDER YOUR GUIDELINES HE WOULD BE
13 SERVING TODAY SIX AND A HALF TO EIGHT AND A HALF YEARS,
14 SOMEWHERE IN THAT VICINITY.

15 I REPRESENT ANOTHER MAN CHARGED, AS HE DID, WITH
16 COMMITTING TWELVE BANK ROBBERIES. HE PLEADED TO ONE BANK
17 ROBBERY.

18 HIS SENTENCE WOULD BE FAR LESS THAN THAT OF THE
19 FIRST CLIENT THAT I JUST MENTIONED TO YOU. AND YET HIS
20 CONDUCT IN THE EYES OF SOCIETY SHOULD BE SENTENCED IN A
21 HARSHER MANNER.

22 LET ME MENTION, AND I WILL NOT TAKE UP TOO MUCH
23 OF YOUR TIME, ONE OF MY SERIOUS CONCERNS, AS I MAY THINK
24 THAT I HAVE TO, IS COOPERATION, AND I UNDERSTAND FROM
25 SUSAN CONLAN THAT PERHAPS THERE'S SOME CONSIDERATION BEING

1 GIVEN TO MODIFY THE COMMISSION'S POSITION ON COOPERATION.
2 THE AUTOMATIC DISCOUNT WITH THE UNITED STATES ATTORNEY'S
3 CERTIFICATION TO ME SERVES TO UNDERMINE THE CRIMINAL
4 JUSTICE SYSTEM COMPLETELY.

5 I DON'T KNOW IF OTHER DISTRICTS FACE THE PROBLEMS
6 THAT WE FACE IN SAN DIEGO. BUT THE NUMBER ONE BIG
7 DIFFERENCE OF THE SYSTEM OF DETAIL COOPERATION BEING
8 CERTIFIED BY THE UNITED STATES ATTORNEY'S OFFICE IS GOING
9 TO BE THE CRIMINAL DEFENSE LAWYER. I AM GOING TO BE THE
10 VICTIM OF THAT DEFENDANT WANTING TO COOPERATE AND GET HIS
11 SENTENCE DOWN, BECAUSE THE DEFENDANT TO AN UNSCRUPLOUS
12 UNITED STATES ATTORNEY CAN IMMEDIATELY SAY, "YES, MS.
13 CLARKE, SHE IS TOLD ME TO DO THIS IS. SHE SUGGESTED THIS.
14 SHE KNOWS WHERE THE DOPE IS. SHE KNOWS WHERE THE MONEY
15 IS."

16 NOW, AS A FEDERAL DEFENDER MAYBE I AM A LITTLE
17 MORE INSULATED BECAUSE OF THE KINDS OF CLIENTS I
18 REPRESENT, BUT I AM REPRESENTATIVE OF THE CRIMINAL DEFENSE
19 BAR AND I SENSE THAT THE COOPERATION IS GOING TO BE
20 AGAINST ME.

21 WE HAVE A SHADOW PANEL IN OPERATION IN SAN DIEGO
22 RIGHT NOW. TO THIS VERY DAY WHERE DEFENDANTS ARE
23 CONTACTED BY, WE SUSPECT DRUGS ENFORCEMENT AGENTS OFFERED
24 AN OPPORTUNITY TO COOPERATE IF THEY WILL GET RID OF THE
25 LAWYER HIRED BY THE HEAVY.

1 THE COURT IN SOME RULE OR FASHION WILL APPOINT
2 COUNSEL TO GO IN AND TALK TO THE DEFENDANT WITHOUT THE
3 KNOWLEDGE OF THE CRIMINAL DEFENSE LAWYER WHO ACTUALLY IS
4 APPEARING AS COUNSEL AND TO SAY COOPERATE WITH THE UNITED
5 STATES ATTORNEY WITH THAT DEFENDANT IN THE ABSENCE OF THE
6 OR THE KNOWLEDGE OF THE CRIMINAL DEFENSE LAWYER.
7 PRACTICES LIKE THAT WILL ONLY GROW UNDER THE KIND OF
8 COOPERATION SET UP IN THAT. COOPERATION CLEARLY HAS TO BE
9 CONSIDERED, BUT IT NEEDS TO BE CONSIDERED IN SOME OTHER
10 FASHION AND PERHAPS WITH A LITTLE MORE JUDICIAL CONTROL
11 OVER IT.

12 I LEAVE YOU WITH TWO SUGGESTIONS TO GO BACK TO
13 CONGRESS WITH. ONE IS THE (INAUDIBLE) 35 STATUTE. THE
14 COURTS, I THINK, NEED THE DISCRETION TO MODIFY SENTENCES
15 AFTER CONVICTION.

16 THE SECOND THING IS TO GO BACK TO CONGRESS AND
17 ENCOURAGE THEM TO REVIEW THEIR POSITION ON 28 USC 994 81
18 (E), BECAUSE IT SAYS THE COMMISSION SHALL ASSURE THAT THE
19 GUIDELINES REFLECT THE INAPPROPRIATENESS OF CONSIDERING
20 EDUCATION, VOCATIONAL SKILLS AND A VARIETY OF THINGS THAT
21 TRADITIONALLY ARE WELL CONSIDERED AND SHOULD BE CONSIDERED
22 IN SENTENCING, AND I THINK THAT THIS COMMISSION AFTER THE
23 SERIES OF REGIONAL HEARINGS THE INFORMATION THAT ITS
24 GOTTEN SHOULD KNOW THAT COURTS NEED TO CONSIDER THE
25 BACKGROUND OF THE DEFENDANTS IN IMPOSING SENTENCES AND I

1 THINK YOU WILL GO BACK AND ASK FOR SOME MODIFICATION OF
2 THAT LANGUAGE.

3 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MS.
4 CLARKE. I AM GLAD YOU POINTED OUT THE STATUTES WHICH
5 RELATE, BECAUSE IT DOES RESTRICT US MANY TIMES IN
6 DECISIONS WE MUST MAKE, SOME OF WHICH YOU POINTED OUT IN
7 YOUR TESTIMONY.

8 FOR EXAMPLE, AS YOU KNOW THE ANTI DRUG ABUSE BILL
9 WAS RECENTLY PASSED THROUGH CONGRESS PROVIDES FOR A NUMBER
10 VERY HIGH IN ANY MANDATORY SENTENCE FOR DRUG VIOLATIONS.
11 AND OUR GUIDELINES, I THINK, DO REFLECT WHAT WE ANTICIPATE
12 TO BE CONGRESS' POSITION, AND I THINK WE PROBABLY HAVE AN
13 OBLIGATION TO CARRY OUT THE CONGRESSIONAL INTENT IN LIGHT
14 OF THE GUIDELINES. SO THAT'S ONE REASON THAT YOU MAY FEEL
15 OUR GUIDELINES ARE SOMEWHAT HIGH.

16 ON THE OTHER HAND, WE ARE REFLECTING, I THINK, BY
17 AND LARGE, THE CONGRESSIONAL INTENT, AND SOMETIMES THAT
18 MAY NOT MEET WITH THE APPROVAL OF ALL, BUT I AM NOT SURE
19 IF WE HAVE TOO MUCH AUTHORITY TO CHANGE THE STATUTE. OF
20 COURSE, YOU KNOW WE DON'T HAVE THAT.

21 BUT I DO APPRECIATE YOUR TESTIMONY. I AM GLAD
22 YOU BROUGHT OUT THIS FACT OF PURITY, BECAUSE IT CUTS BOTH
23 WAYS. IT MAY HELP YOUR CLIENTS AND IT MAY HURT YOUR
24 CLIENTS, DEPENDING ON THE PURITY OF THE DRUGS FOUND. BUT
25 WE, I THINK, GENERALLY AS A COMMISSION BELIEVE THAT PURITY

1 MUST BE FACTORED INTO THE EQUATION SOMEHOW.

2 BUT IT DOES MAKE IT A LITTLE MORE COMPLICATED
3 WHEN YOU USE PURITY BECAUSE OF THE PERCENTAGES THAT ARE
4 INVOLVED.

5 SO IN THIS FIRST ROUGH CUT OF THE GUIDELINES WE
6 WOULD LIKE TO LEAVE PURITY OUT WITH THE UNDERSTANDING THAT
7 WE CAN TAKE CARE OF THE CONCERN THAT YOU JUST MENTIONED.

8 THANK YOU.

9 ANY QUESTIONS OF ANY ONE TO MY RIGHT?

10 MR. BREYER: YES.

11 CHAIRMAN WILKINS: ALL RIGHT. LET ME START OFF
12 AT MY IMMEDIATE RIGHT, MR. ROBINSON.

13 MS. CLARKE: I AM SURPRISED THAT THE COMMISSION
14 HAS ALLOWED YOU TO GET AWAY WITH QUESTIONS TO MY RIGHT AND
15 QUESTIONS TO MY LEFT. THE CONNOTATION OF QUESTIONS TO MY
16 RIGHT AND QUESTIONS TO MY LEFT --

17 CHAIRMAN WILKINS: PEOPLE WHO KNOW ME, MS.
18 CLARKE, WHEN I DESCRIBE TO MY LEFT WHY I DON'T GET A
19 CHANCE TO TALK TO.

20 MS. CLARKE: JUSTICE RENQUIST AND JUSTICE
21 O'CONNOR SAT TO THE FAR LEFT OF JUSTICE BERGER ON THE
22 SUPREME COURT, AND I THINK THAT THERE WAS A GREAT DEAL OF
23 HUMOR IN THAT.

24 MR. ROBINSON: YOU EXPRESSED SOME CONCERN THAT
25 YOU WOULD NOT BE ABLE TO IN GOOD CONSCIOUS HAVE YOUR

1 CLIENTS ENTER INTO A GUILTY PLEA UNLESS YOU HAD ALL THE
2 FACTS THAT THE COURT WOULD RELY ON IN GUIDELINES BECAUSE
3 YOU WOULDN'T BE ABLE TO TELL YOUR CLIENTS WITH ANY SORT OF
4 ACCURACY JUST WHAT SENTENCE HE OR SHE WOULD RECEIVE.
5 RIGHT? THEREFORE, YOUR POINTS WAS IT WOULD BE A GOOD DEAL
6 OF ADDITIONAL PROCEDURAL BURDENS BECAUSE YOU WOULD HAVE TO
7 SORT OUT BEFORE A GUILTY PLEA JUST WHAT FACTS THE COURT
8 WAS RELYING ON; IS THAT RIGHT?

9 MS. CLARKE: YES.

10 MR. ROBINSON: COULD YOU DESCRIBE WHAT YOUR
11 CURRENT PROCEDURE IS IN SAN DIEGO IN ENTERING A PLEA AND
12 SENTENCING? DO YOU HAVE SENTENCE BARGAINING? DO YOU JUST
13 SIMPLY ENTER A PLEA AND THEN THE JUDGE HAS DISCRETION TO
14 RENDER A SENTENCE THAT MAY NOT BE SPECIFIC IN TERMS OF
15 YOUR PLEA BARGAINING? WHAT ARE YOUR CURRENT PRACTICES?

16 MS. CLARKE: THE CURRENT PRACTICE IS ANYTHING
17 GOES BASICALLY. THERE IS A GENERAL POLICY IN THE UNITED
18 STATES ATTORNEY'S OFFICE NOT TO SENTENCE BARGAIN, BUT THAT
19 IS, AS MOST RULES DO, FOLLOWED BY MOST EXCEPTIONS.

20 WE HAVE A RULE 1181 (C) AGREEMENTS WHERE THE
21 COURT IS BOUND BY THE SENTENCE SUGGESTED BY THE PARTIES.

22 WE HAVE HAD A GOOD NUMBER OF CHARGE BARGAINING
23 SITUATIONS. WE HAVE A GOOD NUMBER OF "I WILL RECOMMEND IF
24 YOU PLEA WITHOUT ANY KIND OF BARGAINING AUTHORITY;" THAT
25 THE JUDGES GENERALLY KNOW WHAT MAKES THE SYSTEM TICK, AND,

1 YOU KNOW THE JUDGES THAT ARE GOING TO RELY -- THAT'S GOING
2 TO GO WITH THE RECOMMENDATION OF PROBATION AND WHO IS NOT.

3 WE HAVE BARGAINING FACTS FROM THE PROBATION
4 DEPARTMENT FOR THE PRESENTENCE REPORT. WE CERTAINLY ARE
5 ABLE TODAY TO LOOK AT THE PAROLE GUIDELINES AND DISCUSS
6 WITH YOUR CLIENT IF THE JUDGE GOES COMPLETELY CRAZY THERE
7 IS AN ESCAPE VALVE, NOT ONLY GOOD TIME, STATUTORY GOOD
8 TIME, BUT CONTROL WITH THE PAROLE GUIDELINES TODAY.

9 I KNOW WHAT YOU ARE AIMING FOR AND THAT'S THE
10 INCONSISTENCIES AND WHY DO WE HAVE TO DETERMINE THE FACTS
11 UNDER THIS SYSTEM WHEN WE DON'T DETERMINE THE FACTS UNDER
12 THE EXISTING SYSTEM. WE DO IN A SENSE DETERMINE SOME OF
13 THE FACTS. BUT YOU HAVE THE OPPORTUNITY TO GO BEFORE A
14 JUDGE WITH THE CREDIBILITY OF YOUR CLIENT, AND THE
15 CREDIBILITY OF HIS FAMILY OR HIS EMPLOYER AND YOU EQUALIZE
16 THE SYSTEM. YOU KNOW THAT THE JUDGE IS GOING TO CONSIDER
17 THE FACT THAT THE VICTIM WAS INJURED. BUT AT THE SAME
18 TIME YOU KNOW THAT THE JUDGE WILL CONSIDER THE TEN YEARS
19 THAT YOUR CLIENT HAS WORKED IN THE SAME FACTORY AND THE
20 FIVE KIDS THAT HE HAS SUPPORTED AND THE FACT THAT HE
21 ATTENDS CHURCH ON A REGULAR BASIS. YOU HAVE FACTORS THAT
22 YOU CAN BALANCE THE INJURY TO.

23 UNDER THE SYSTEM PROPOSED BY THIS SENTENCING
24 COMMISSION YOU HAVE POINT TOTALS THAT GO WITH THE
25 NEGATIVES, AND NO POINT MINUSES THAT GO WITH THE

1 MITIGATING FACTORS, IN REALITY, OTHER THAN MINOR
2 PARTICIPANTS OR ACCEPTANCE OF RESPONSIBILITY OR SOMETHING.
3 BUT YOU ARE ABLE UNDER THE PRESENT SYSTEM TO GO TO THE
4 COURT WITH THE CREDIBILITY OF YOUR CLIENT AND HIS
5 BACKGROUND WHICH YOU ARE NOT ABLE TO DO, I DON'T THINK,
6 UNDER THIS SYSTEM THAT YOU ARE SUGGESTING.

7 YOU ARE ABLE, ALSO, TO CONVINCE THE UNITED STATES
8 ATTORNEY TO REMAIN SILENT AT SENTENCING, OR TO NOT TAKE A
9 POSITION THAT YOUR CLIENT HAS X, Y, Z IN HIS PAST, OR
10 WHATEVER. YOU CAN BARGAIN THAT AWAY, WHICH I DON'T THINK
11 THAT YOU CAN DO UNDER YOUR SYSTEM.

12 MR. ROBINSON: IF YOU HAD A SENTENCING SYSTEM
13 THAT HAD MORE MITIGATING FACTORS, AND EVEN IF THE
14 MITIGATING FACTORS WERE STATED IN PERHAPS BROADER TERMS
15 THAT WAS NOT BASED ON PURELY OBJECTIVE FACTS, BUT CALLED
16 FOR SOME SORT OF JUDGMENT BY THE SENTENCING JUDGE, WOULD
17 YOUR OPINION BE THAT THAT SORT OF SYSTEM WOULD GIVE THE
18 JUDGE THE SORT OF FLEXIBILITY THAT TO SOME EXTENT YOU HAVE
19 IN A LESS STRUCTURED WAY UNDER THE CURRENT SYSTEM SO YOU
20 WOULD BE LESS CONCERNED ABOUT GETTING THE FACTS DOWN
21 BEFORE YOU PLEAD?

22 MS. CLARKE: I DIDN'T NOTICE THAT YOUR QUESTION
23 CONTAINED DISTRUCTION OF THE POINT TOTALS ON THE
24 AGGRAVATING SIDE. IF THE AGGRAVATING FACTORS THAT A JUDGE
25 SHOULD CONSIDER AND THE MITIGATING FACTORS THAT A JUDGE

1 SHOULD CONSIDER ARE BOTH DISCRETIONARY, I THINK WE ARE
2 ALMOST BACK TO THE PRESENT SYSTEM, WHICH, AS I SAY, MAY BE
3 ONE DEVIL, BUT I AM NOT SURE THAT IT IS THE SEVEN DEVILS
4 WE MAY BE GETTING. YOU ARE BACK TO THE WEIGHING PROCESS.

5 THE COMMISSION HAS DONE PROBABLY A VERY GOOD JOB
6 IN THE COMMENTARIES TALKING ABOUT WHAT JUDGES REALLY
7 CONSIDER IN SENTENCINGS. BUT THEN ARBITRARY POINT TOTALS
8 ARE PLACED ON THOSE CONSIDERATIONS, AND THAT IS THE SYSTEM
9 THAT I HAVE THE MOST DIFICULTY WITH.

10 MR. ROBINSON: THANK YOU VERY MUCH.

11 MS. CORROTHERS: MS. CLARKE, THERE WAS A COMMENT
12 IN A QUESTION CONCERNING YOUR APPROACH THAT YOU UTILIZED
13 IN THE REVIEW OF THE GUIDELINES, IT IS APPROPRIATE FOR YOU
14 TO TAKE A PRACTICAL APPROACH AS COMPARED TO A SCHOLARLY OR
15 ACADEMIC APPROACH, BECAUSE WE HOPE THAT THE GUIDELINES
16 WILL NOT BE CONSIDERED A BOOK TO BE READ AND DISCUSSED BUT
17 RATHER A BOOK TO BE READ AND UTILIZED IN THE REAL WORLD.

18 ASIDE FROM THAT COMMENT, I WOULD REQUEST THAT WE
19 RECEIVE A COPY OF YOUR TESTIMONY IN WRITING SO THAT WE MAY
20 REVIEW YOUR VIEWS ON THE SEVERITY OF OFFENSES.

21 MS. CLARKE: I WILL BE MORE THAN HAPPY TO SUBMIT
22 IT IN WRITING.

23 I HAVE GIVEN TO YOUR EXECUTIVE DIRECTOR THIS
24 MORNING A LETTER I HAVE WRITTEN TO JUDGE NEILSON WHO IS A
25 JUDGE IN SAN DIEGO, CHAIRMAN OF THE ADVISORY COMMITTEE ON

1 THE RULES. I DID NOT MODIFY THAT FOR SUBMISSION TO THIS
2 COMMISSION, BUT IT SEEMS WE HAVE A LOT TO READ BUT I WILL
3 BE MORE THAN HAPPY --

4 MS. CORROTHERS: THOSE ARE THE EXAMPLES YOU GAVE
5 ON THE SEVERITY OF THE OFFENSES?

6 MS. CLARKE: NO. BUT I WILL WRITE THOSE DOWN
7 AND SEND THEM TO YOU.

8 MS. CORROTHERS: THANK YOU.

9 MS. CLARKE: THANK YOU VERY MUCH.

10 CHAIRMAN WILKINS: MR. BLOCK?

11 MR. BLOCK: YES.

12 I WANTED TO FOLLOW UP YOUR DISCUSSION OF
13 PROBATION FOR A MOMENT AND ASK WHETHER YOU -- FOR SERIOUS
14 CRIMES, AGAIN RECOGNIZING THE STATUTES THAT WE OPERATE
15 UNDER, IF WE SET A MINIMUM TERM OF EIGHT YEARS AND THE
16 MAXIMUM WOULD HAVE TO BE TEN YEARS WITH THAT TWENTY-FIVE
17 PERCENT, WOULD YOU SERIOUSLY PROPOSE THAT PROBATION BE AN
18 OPTION FOR A CRIME AND A SET OF BLANK CHARACTERISTICS THAT
19 GOT EIGHT TO TEN YEARS; WOULD YOU SERIOUSLY SAY THAT
20 PROBATION SHOULD BE IN GUIDELINE OPTIONS AND THAT WE
21 SHOULD PUBLISH -- WE SHOULD PUBLISH IN A BOOK THE
22 CHARACTERISTICS THAT ENABLE YOU TO GO FREE FOR COMMITTING
23 A SERIOUS CRIME?

24 MS. CLARKE: THAT'S SORT OF LIKE ASKING A
25 PERSPECTOR JUROR, "YOU CAN BE FAIR, CAN'T YOU." IT IS THE

1 MANNER -- THE TONE OF YOUR QUESTION IS WOULD I SERIOUSLY
2 PROPOSE -- YES, ABSOLUTELY I WOULD, UNLESS THE STATUTE
3 WHICH CONGRESS SAYS, NO PROBATION -- WHICH THEY DO IN A
4 VARIETY OF STATUTES THIS VERY DAY. -- IN WHICH THE
5 STATUTE PRECLUDES PROBATION, I THINK IT IS AN OBLOGTION OF
6 THIS COMMISSION TO GIVE THE SENTENCING JUDGES THE
7 DISCRETION TO IMPOSE PROBATIONARY SENTENCES.

8 MR. BLOCK: THE DISCRETIONS WILL GO OUTSIDE THE
9 GUIDELINES. THE QUESTION I AM ASKING UP YOU, WOULD YOU
10 PUT IT IN THE GUIDELINES? WOULD THERE BE A GUIDELINES
11 THAT SAY IF YOU HAVE THESE CHARACTERISTICS YOU, IN FACT,
12 ARE ELIGIBLE FOR PROBATION AND NO PUNISHMENT? IT IS NOT
13 THE QUESTION OF WHETHER YOU CAN GO OUTSIDE THE GUIDELINES
14 OR NOT, THAT'S OUTSIDE --

15 MS. CLARKE: IT IS INTERESTING THAT YOU WOULD PUT
16 TOGETHER IN THE SAME SENTENCE NO PUNISHMENT, BUT
17 PROBATION. PROBATION QUITE FRANKLY IS NOT A PIECE OF
18 CAKE, PARTICULARLY IN THE SOUTHERN DISTRICT OF CALIFORNIA.
19 WE CALL IT DOWN THERE A TRICK WIRE PROBATION. YOU BLINK
20 THE WRONG WAY AND YOU ARE BACK IN JAIL.

21 YES, I WOULD SERIOUSLY GIVE THE SENTENCING JUDGES
22 THE OPTION IN ANY CASE THAT CONGRESS DID NOT PRECLUDE IT
23 TO INVOKE PROBATION.

24 IN MY VIEW --

25 MR. BLOCK: AGAIN, THAT OPTION IS ALWAYS THERE.

1 IT IS NOT THE QUESTION OF THE OPTION. YOU DON'T HAVE THE
2 POWER TO REMOVE THAT OPTION. WHAT I AM ASKING YOU, WOULD
3 YOU PUBLISH CONDITIONS UNDER WHICH A PERSON WOULD NOT GO
4 TO PRISON WHERE ANOTHER INDIVIDUAL WOULD HAVE TO SPEND
5 EIGHT TO TEN YEARS FOR THAT SAME CRIME?

6 MS. CLARKE: I DON'T SEE IT AS AN OPTION IN YOUR
7 GUIDELINES.

8 I HAVE SOME PROBLEM GRAFFLING WITH WHERE IN THE
9 GUIDELINES THERE IS THE OPTION FOR THE SENTENCING JUDGE TO
10 IMPOSE A PROBATION IN A SENTENCE IN ANY CASE OTHER THAN
11 THOSE THAT PROPOSE LESS THAN FOURTEEN SANCTIONS.

12 YES, I WOULD PUT IT IN THE GUIDELINES THAT THE
13 SENTENICNG COURT HAS THE OPTION TO IMPOSE A PROBATIONARY
14 SENTENCE IN ANY CASE NOT OTHERWISE RESTRICTED.

15 THE COURT SHOULD CONSIDER AMONG THE FACTORS IT
16 WANTS TO CONSIDER THE FOLLOWING: AND I WOULD LIMIT IT
17 BECAUSE THE EXAMPLE I GAVE YOU OF THE MEXICAN TRANSFERRING
18 PRISONER COMING ACROSS, HE COULD BE SERVING UNDER YOUR
19 GUIDELINES AT LEAST SIX AND A HALF TO EIGHT AND A HALF
20 YEARS, AND IF HIS ROLE IN THE COUNTERFEITING OFFENSE WERE
21 VIEWED AS ONE OF SUPERVISORIAL OR MANAGERIAL, THEN WE ARE
22 TALKING OVER EIGHT YEARS.

23 SO WE ARE RIGHT AS TO THE EXAMPLE THAT YOU GIVE,
24 AND, YES, I THINK THAT THAT MAN IS DESIRING OF A
25 PROBATIONARY SENTENCE AND SHOULD BE WELL CONSIDERED FOR A

1 PROBATIONARY SENTENCE. SO, YES, I WOULD PUT THAT --
2 MAYBE I AM NOT GETTING WHERE YOU ARE GOING.

3 MR. BLOCK: WELL, THE JUDGES CAN GO OUTSIDE THE
4 GUIDELINES IF THEY FIND THE FACTS ARE NOT ADEQUATELY
5 CONSIDERED IN THE GUIDELINES, AND THE FACT THAT THAT CASE
6 CONTAINS A FACTOR THAT IS NOT ADEQUATELY CONSIDERED LIKE
7 SERVING TIME SOUTH OF THE BORDER, I ASSUME THE JUDGE CAN
8 GO OUTSIDE THE GUIDELINES.

9 AGAIN I AM ASKING YOU THE FACT WHETHER WE PUT IN
10 A CATAGORY IN THE GUIDELINES THEMSELVES THAT SAYS -- THAT
11 ACTUALLY STATES THAT UNDER THESE CONDITIONS THERE'S NO
12 PUNISHMENT?

13 MS. CLARKE: I DON'T CALL PROBATION NO
14 PUNISHMENT, BUT, NO, IMPRISONMENT, YES, I WOULD PUT IT IN
15 THE GUIDELINES.

16 MR. BAER: I HAVE ONE SHORT QUESTION AND THEN A
17 GENERAL QUESTION. DID I HEAR YOU SAY IN REFERENCE TO PLEA
18 BARGAINING AND PRESENTENCE REPORT THAT YOU COULD BARGAIN
19 AWAY SOME FACTS THAT ARE KNOWN THAT WOULD NOT BE IN THE
20 PRESENTENCE REPORT? DID I HEAR YOU SAY THAT?

21 MS. CLARKE: YES, YOU HEARD ME SAY THAT.

22 NOW, I CAN SEE THAT ALL OF THE PRESENTENCE
23 REPORTS OF THE SOUTHERN DISTRICT OF CALIFORNIA MAINTAIN A
24 GREAT DEAL OF SUSPICION BY THE PAROLE BOARD. BUT, YES.
25 YES.

1 MS. CLARKE: THAT REALLY BOTHERS ME. IF MARK
2 FISHER WERE HERE HE WOULD AGREE WITH YOU?

3 MS. CLARKE: HE WOULDN'T KNOW ABOUT IT.

4 MS. CLARKE: THAT REALLY BOTHERS ME, AND IF I
5 WERE A JUDGE IT WOULD BOTHER ME A GREAT DEAL MORE. THAT
6 WAS A SPECIFIC QUESTION.

7 A MORE GENERAL QUESTION IS, YOU KNOW, YOUR
8 REMARKS OBVIOUS --

9 MS. CLARKE: IT DOESN'T HAPPEN NEARLY AS MUCH AS
10 I WOULD LIKE FOR IT TO HAPPEN.

11 MR. BAER: I BEG YOUR PARDON?

12 MS. CLARKE: IT DOESN'T HAPPEN NEARLY AS MUCH AS
13 PERHAPS I WOULD LIKE FOR IT TO HAPPEN.

14 MR. BAER: I CAN UNDERSTAND WHERE YOU ARE COMING
15 FROM.

16 THE GENERAL QUESTION, IT IS OBVIOUS FROM YOUR
17 REMARK THAT YOU ARE NOT EXACTLY HAPPY WITH THESE
18 GUIDELINES --

19 MS. CORROTHERS: UNDERSTATEMENT.

20 MR. BAER: UNDERSTATEMENT.

21 AT THE BEGINNING YOU MADE SOME REFERENCES TO THE
22 FAULTS OF THE PRESENT SYSTEM.

23 WHAT WOULD BE YOUR SUGGESTION TO IMPROVE THE
24 PRESENT SYSTEM CONSIDERING PARTICULARLY THE DISPARITIES
25 THAT EXIST IN THE PRESENT SYSTEM?

1 MS. CLARKE: YOU KNOW, I AM NOT SURE THAT
2 DISPARITIES IS REALLY OUR PROBLEM.

3 I KNOW THAT CONGRESS HAS REALLY TAKEN THAT OUT
4 OF YOUR HANDS AND MY OUT OF MY HANDS AND HAS SAID THAT WE
5 SHOULD HAVE SIMILAR PENALTIES FOR SIMILAR OFFENDERS.

6 I THINK COMMUNITIES NEED MORE CONTROL OVER THE
7 SENTENCES THAT ARE IMPOSED THAN THAT KIND OF SYSTEM DOES.
8 MAYBE THIS IS NOT A VALID EXPENDITURE OF YOUR TIME BECAUSE
9 THAT IS A BASIC DISAGREEMENT OF WHAT CONGRESS SAYS.

10 IN SAN DIEGO WE HAVE A SERIOUS ALIEN PROBLEM. IN
11 WAUHOO, NEBRASKA THEY HAVE PROBABLY NEVER SEEN AN ILLEGAL
12 ALIEN, AND I THINK THAT PERHAPS THEY MAY SENTENCE AN ALIEN
13 SOMEWHAT DIFFERENTLY AND FEEL THEY SHOULD THAN IN SAN
14 DIEGO, CALIFORNIA THAT HAS TO GRAFFLE WITH THE PROBLEM ON
15 A REGULAR BASIS. BUT THAT GOES TO A DISAGREEMENT WITH
16 CONGRESS.

17 IF I COULD SUGGEST TO YOU IMPROVEMENTS IN THE
18 PRESENT SYSTEM AND CURE THE FOOTBALL PLAYER'S KNEES I
19 WOULD NOT BE BEFORE YOU TODAY. I WOULD BE WRITING BOOKS.

20 I DO NOT HAVE A GREAT DEAL OF FAULT. I HAVE
21 FAULTS ON INDIVIDUAL BASIS WITH THE PRESENT SYSTEM. I
22 WOULD RATHER BE BEFORE JUDGE X THAN JUDGE Y. THE PAROLE
23 COMMISSION WILL USUALLY TAKE CARE OF THOSE PROBLEMS IF
24 JUDGE X IMPOSES A GREATER SENTENCES THAN JUDGES Y DOES,
25 BECAUSE THEY, WITH THEIR OWN RANGE AND GUIDELINES, WILL

1 EQUALIZE THINGS OUT.

2 I AM SORRY. I CANNOT GIVE YOU -- THAT IS MY
3 GENERAL RESPONSE TO YOUR QUESTION.

4 I AM GLAD I DON'T HAVE TO DRAW --

5 CHAIRMAN WILKINS: DO YOU HAVE ANY QUESTIONS?

6 MR. BREYER: FAR BE IT FOR ME TO SUGGEST THE WAY
7 YOU STATE YOUR CASE.

8 MS. CLARKE: DO YOU KNOW WHO MY PREDECESSOR WAS?
9 I DON'T KNOW WHETHER YOU KNOW HIM, JOHN CLEARY. BUT I
10 SUPPOSE I AM A MILD CASE.

11 MR. BREYER: WHAT YOU MAY NOT REALIZE, AND I
12 DON'T KNOW THE EXTENT TO WHICH YOU DO, IS THAT THIS
13 PRELIMINARY DRAFT IS WHAT IT MEANS TO SAY, IT'S
14 PRELIMINARY.

15 IT IS PRELIMINARY TO GETTING SOMETHING OUT FOR
16 PEOPLE TO BEGAN TO CRITICIZE, BECAUSE IT IS A CONSIDERABLE
17 JOB TO GET OUT ANYTHING, AND I THINK THE QUOTE YOU READ
18 FROM THE CHAIRMAN GOES WITH THAT IDEA, AND I THINK THAT IF
19 YOU SUBMIT YOUR PRESENTATION THAT THE NEXT DRAFT WHICH
20 WILL BE OUT IN JANUARY MUST BUILD CONSIDERABLE FLEXIBILITY
21 INTO THE DRAFT THAT IS NOW BEFORE YOU.

22 I THINK THAT THAT IS WHAT THAT QUOTES SAID. SO
23 THE INTERESTING QUESTION IS NOT WHETHER, THE QUESTION IS
24 HOW.

25 NOW, AS FAR AS THE NUMBERS ARE CONCERNED, THAT

1 DRAFT SAYS NON-STOP THAT THOSE NUMBERS ARE NOT TO BE TAKEN
2 AS REFLECTING THE VIEWS OF THE COMMISSION AS TO THE
3 APPROPRIATE LENGTH OF IMPRISONMENT. WE HAVE NOT DISCUSSED
4 THEM. I HAVE NEVER VOTED ON THEM. THEY DO NOT REFLECT MY
5 VIEW, AND I THINK THAT IS GENERALLY TRUE OF THE
6 COMMISSION.

7 THAT IS THE PROBLEM WHAT NUMBERS WILL COME AFTER
8 WE GET THE APPROPRIATE FRAMEWORK, THE FLEXIBILITY, WHERE
9 WE GET THE APPROPRIATE NAMES OF THE CRIMES THAT ARE GOING
10 TO BE CONNECTED WITH SENTENCES. THAT IS OUR FIRST CHOICE.

11 SO I AM TRYING TO APPROACH AT THIS MOMENT WHAT IT
12 IS WE ARE INTERESTED IN, HOW THAT FLEXIBILITY ENTERS INTO
13 IT, AND WHAT KIND OF SYSTEM THIS SHOULD REFLECT AND
14 WHETHER WE HAVE THE NAMES OF THE CRIMES RIGHT. SO NOW LET
15 ME ASK YOU QUESTIONS ABOUT THAT.

16 FIRST, YOU ARE WORRIED ABOUT PLEA BARGAINING.
17 YOU WANT THE CALIFORNIA SYSTEM. DO YOU WANT A SYSTEM THAT
18 IN FACT, LIST THE FOUR -- TWO THOUSAND SECTIONS OF THE
19 UNITED STATES CODE THAT SAY IF YOU VIOLATE 18 USC, 1954
20 (B) THE PUNISHMENT IS THREE YEARS OR FIVE OR TWO? DO YOU
21 WANT THAT?

22 NOW, WE HAVE BEEN TOLD CONSISTENTLY, AND OUR
23 GUIDELINES SAY THAT A MAJOR OBJECTION TO THAT IS THAT IT
24 TAKES POWER FROM THE JUDGE AND GIVES IT DIRECTLY TO THE
25 PROSECUTOR, BECAUSE THE PROSECUTOR DETERMINES THE LENGTH

1 OF THE SENTENCE BY THE CHARGE THAT THE PROSECUTOR DECIDES
2 TO FILE. BUT IF YOU DO NOT WANT THAT, THEN YOU ARE AT A
3 SYSTEM SUCH AS WE DEVELOPED IN THAT BLUE PAPER, OR AN
4 ALTERNATIVE SYSTEM THAT LEANS EVEN MORE IN THE DIRECTION
5 OF REAL TOUCH SENTENCES.

6 SO WHAT IS IT YOU WANT? DO YOU THINK WE ARE
7 ON THE RIGHT TRACK? YOU HAVE EXPERIENCE IN CALIFORNIA,
8 AND, THEREFORE, I THINK I CAN ASK YOU IN FAIRNESS IF YOU
9 WANT THAT SORT OF SYSTEM WHICH WILL BE VERY DETERMINATIVE,
10 AND IT WILL BE A SYSTEM THAT CONNECTS DIRECTLY THE
11 SENTENCE WITH THE CRIME CHARGED. IS THAT WHAT YOU TOLD US
12 WE OUGHT TO HAVE?

13 MS. CLARKE: NO. I AM NOT TELLING YOU YOU OUGHT
14 TO HAVE THAT. WHAT I AM DOING IS REACTING TO THE ONLY
15 THING THAT I HAVE BEFORE ME.

16 MR. BREYER: OR THE REACTION HAS TO BE WHAT IS IT
17 WE ARE SUPPOSED TO DO. AFTER ALL, WE ARE CHARGED BY
18 CONGRESS WITH THE DEVELOPMENT OF A SYSTEM THAT WILL TEND
19 TO LESSEN THE DEGREE OF SENTENCING DISPARITIES, AND WE ARE
20 OPERATING WITHIN THE CONFINES OF THE STATUTE, AND I THINK
21 IF I WAS THE SENATOR -- AND MR. HECKMAN SAID THAT HE HAS
22 WORKED ON A JUDICIAL COMMITTEE, AND SO HAVE I, AND I THINK
23 IF WE WENT AND SUGGESTED TO CONGRESS TO HEAL THE STATUTE,
24 OR MODIFY IT ON ITS FACE, IF I WERE A SENATOR I THINK THE
25 REACTION WOULD BE THANK YOU VERY MUCH. I THINK THAT'S A

1 VERY INTERESTING SUGGESTION. AND NOW I WOULD LIKE TO KNOW
2 IF WE DON'T MODIFY THE STATUTE WHAT IS THE BEST SYSTEM YOU
3 CAN DEVELOP UNDER THAT STATUTE?

4 MS. CLARKE: I DON'T KNOW WHY UNDER 994 THIS
5 COMMISSION COULD NOT COME UP WITH A SYSTEM SOMEWHAT
6 SIMILAR TO THAT OF THE PRESENT PAROLE SYSTEM WHERE THERE
7 IS A RANGE OF MONTHS. THEY HAVE A STANDARD OF FACTORS, A
8 SCORE, AND THAT TAKES INTO ACCOUNT PRIOR RECORD, THAT
9 TAKES INTO ACCOUNT --

10 MR. BREYER: SO YOUR RECOMMENDATION IS TO HAVE A
11 SYSTEM VERY SIMILAR TO THE PRESENT PAROLE GUIDELINES? I
12 UNDERSTAND.

13 MS. CLARKE: I WOULD WORK WITH THE EXISTING
14 SYSTEM FIRST AND SEE WHAT KIND OF IMPACT IT HAS AND THEN
15 IMPROVE UPON IT RATHER THAN COME IN WITH A COMPLETELY NEW
16 JOB.

17 MR. BREYER: THEN I UNDERSTAND NOW WHAT YOU ARE
18 SUGGESTING, AND I THINK THAT'S A SENSIBLE SUGGESTION.
19 THERE ARE PROS AND CONS ABOUT IT.

20 MY SECOND QUESTION IS, AND THIS HAS COME UP
21 SEVERAL TIMES. THE DEFENDANTS -- I KNOW YOU SPEAK TO EACH
22 OTHER ON THE TELEPHONE FROM TIME TO TIME, AND THAT IS THE
23 OFFENDERS --

24 MS. CLARKE: NOT AT ALL. NO CONSPIRACY INVOLVED.

25 MR. BREYER: NO CONSPIRACY. I HOPE YOU WOULD,

1 BECAUSE THERE SHOULD BE MORE COMMUNICATION GOING BACK AND
2 FORTH AS AMONG INTERESTED PEOPLE IN THE LAW ENFORCEMENT
3 COMMUNITIES THE MORE LIKELY WE ARE TO END UP WITH A
4 RATIONAL SET OF GUIDELINES. I WOULD ENCOURAGE YOU TO
5 SPEAK TO OTHER PEOPLE. I WOULDN'T SAY THERE IS ANYTHING
6 WRONG WITH THAT.

7 BUT THE ISSUE THAT HAS COME UP BEFORE US
8 FREQUENTLY IS YOUR SUGGESTION WHICH YOU MADE TO
9 COMMISSIONER BLOCK.

10 YOU SAID WHAT WE OUGHT TO SAY THROUGHOUT IS,
11 "JUDGE, YOU DO NOT HAVE TO GIVE THIS SENTENCE. YOU CAN
12 GIVE PROBATION INSTEAD."

13 NOW, THE PROBLEM WITH THAT, AND I WILL PUT IT
14 PERSONALLY SO YOU CAN SEE I AM NOT MEANING TO INJECT
15 MYSELF INTO IT, BUT I THINK OF MYSELF SITTING BEFORE A
16 SENATE JUDICIAL COMMITTEE DEFENDING THESE GUIDELINES, AND
17 I THINK OF THE COMMITTEE SAYING TO ME THE FOLLOWING: "YOU
18 KNOW, THERE IS SOMETHING I DON'T UNDERSTAND ABOUT THIS.
19 WHAT THIS SAYS IS IF A PERSON ROBS A BANK WITH A GUN AND
20 SHOOTS ONE PERSON AND HAS ONE PRIOR CONVICTION AND THERE
21 IS NOTHING ELSE SPECIAL ABOUT IT, NOTHING SPECIAL, IT'S A
22 MAINLINE CASE -- ALL RIGHT? -- HE GETS TEN TO TWELVE
23 YEARS IN PRISON AT THE OPTION OF THE JUDGE, OR -- OR THE
24 JUDGE CAN GIVE HIM PROBATION."

25 NOW, I FIND IT HARD TO THINK OF MYSELF DEFENDING

1 THAT BECAUSE SOMEONE MIGHT SAY THAT'S A BIT WEIRD THAT THE
2 JUDGE CAN EITHER GIVE HIM PROBATION OR GIVE HIM TEN TO
3 TWELVE YEARS, BUT CAN'T GIVE HIM TWO, THREE, FOUR, FIVE,
4 SIX OR SEVEN YEARS, AND IT IS THE ODDNESS OF THAT, IT IS
5 THE ODDNESS OF THAT RESULT THAT MAKES IT HARD FOR MANY OF
6 US TO THINK OF HOW WE ARE GOING TO TRANSLATE THAT
7 RECOMMENDATION INTO A SET OF GUIDELINES.

8 MS. CLARKE: I THINK THAT THE JUDGE SHOULD HAVE
9 THE OPPORTUNITY TO SENTENCE TO THAT TWO, THREE, FOUR,
10 SEVEN YEARS.

11 MR. BREYER: THEN YOU ARE FIGHTING THE STATUTE?

12 MS. CLARKE: OR PROBATION.

13 MY RESPONSE TO THAT CONGRESSMAN OR SENATOR WOULD
14 BE YOU CANNOT SHIRK YOUR RESPONSIBILITY BY PLACING IT UPON
15 ME. IF YOU WANT TO LIMIT -- USE A GUN, GO TO PRISON.
16 HAVE A LAW IN THE STATE OF CALIFORNIA. CONGRESS, YOU TAKE
17 CARE OF IT. DO NOT PUSH TO ME, THE SENTENCING COMMISSION,
18 WHAT YOU ARE RESPONSIBLE FOR."

19 MR. BREYER: THAT'S IT. THAT'S IT. I MEAN WE
20 ARE ALWAYS FREE TO SAY THAT, AND, OF COURSE, THE SENATORS
21 ARE FREE TO SAY, "THANK YOU VERY MUCH, I WILL TAKE YOUR
22 SUGGESTION UNDER ADVISEMENT AND THEN IN THE MEANTIME I
23 HOPE YOU WILL GET ALONG WITH THE JOB OF WORKING WITH THIS
24 STATUTE AND WE MIGHT CHANGE IT AND WE MIGHT NOT."

25 MY FINAL QUESTION, OF COURSE, IS RELATED TO THE

1 STATUTE WE SAID WE SHOULD RECOMMEND CHANGING WHICH THE
2 COMMISSION HAVE THE GUIDELINES THAT REFLECT THE GENERAL
3 INAPPROPRIATENESS OF CONSIDERING EDUCATION, SKILLS,
4 EMPLOYMENT RECORDS, FAMILY LIFE AND RESPONSIBILITIES. I
5 BELIEVE, ALTHOUGH I AM NOT POSITIVE, THAT THE REASON THAT
6 APPEARS IN THE GUIDELINES IS BECAUSE MANY PEOPLE FELT IT
7 WAS A HIGH CORRELATION BETWEEN THINGS LIKE A CRIMINAL
8 RECORD AND RACE.

9 FOR EXAMPLE, HISPANICS OR BLACKS FREQUENTLY HAVE
10 A FAR HIGHER UNEMPLOYMENT RECORD THAN OTHER MEMBERS OF THE
11 COMMUNITY, AND THAT'S IN NO SENSE THEREFORE -- THEREFORE
12 IF ONE BRINGS INTO THE SENTENCING PROCESS IN A FORMAL WAY
13 THAT THE JUDGE WILL TAKE THAT CORRELATION INTO ACCOUNT,
14 YOU MIGHT DISCOVER CONSIDERABLE UNFAIRNESS THAT WOULD NOT
15 BE INTENDED.

16 AND THEREFORE, THE OBJECT OF PUTTING THAT
17 SENTENCE IN THE STATUTE WAS TO TRY TO CUT THAT
18 CORRELATION, WHICH COULD BE A DISCRIMINATORY CORRELATION
19 AND, OF COURSE, THE PRICE YOU PAY FOR THAT THEN YOU WILL
20 BE NOT ABLE TO TAKE INTO ACCOUNT AS WELL AS IN A CASE
21 WHERE THERE WOULD BE NO DISCRIMINATION?

22 I WANTED TO BE CERTAIN THAT YOU FOCUSED ON WHAT I
23 THINK WAS THE RATIONALE FOR THAT PARTICULAR PROVISION.

24 MS. CLARKE: YES. AND HOW ABOUT CONGRESS SAYING
25 THAT NATIONAL ORIGIN OR RACE SHOULD NOT HAVE AN IMPACT?

1 MR. BREYER: YES, OF COURSE. AND WHAT YOU
2 DISCOVER IS -- THIS SENTENCE DOES NOT REFLECT RACE?

3 WHAT IT REFLECTS IS UNEMPLOYMENT AND THEN YOU
4 HAVE TO FACE THE FACT THAT THE UNEMPLOYMENT RATE AMONG
5 POORER BLACKS IS FAR HIGHER THAN AMONG POOR WHITES.

6 MR. CLARKE: IN FACT, I THINK UNEMPLOYMENT IS A
7 CONSIDERATION IN WHY SOMEBODY COMMITTED A CRIME. IF I GO
8 OUT AND COMMIT A CRIME I SHOULD BE SLAMMED A LITTLE BIT
9 HARDER THAN A PERSON WHO DID NOT COME UP WITH THE
10 ADVANTAGES THAT I HAD.

11 MR. BREYER: THAT WAS THE DISTINCTION.

12 MS. CLARKE: I UNDERSTAND.

13 MR. MAC KINNON: I THINK IN YOUR REMARKS THAT WE
14 OUGHT TO GO BACK TO CONGRESS AND SAY THAT YOU HAVE A VIEW
15 ON THE PARTICULAR GUIDELINES, IS THAT VIEW THAT YOU THINK
16 THAT THE GUIDELINES DO REPORT TO THE (INAUDIBLE)?

17 MS. CLARKE: NO, BECAUSE I DON'T THINK THAT
18 PROBATION IS CONSIDERED. I THINK THE GUIDELINES GO WELL
19 BEYOND WHAT THE STATUTE REQUIRES THIS COMMISSION TO DO.

20 MR. MAC KINNON: IN WHAT RESPECT?

21 MS. CLARKE: IN CREATING A MATHEMATICAL FORMULA
22 FOR SENTENCING AND LIMITING COMPLETELY THE DISCRETION OF
23 THE TRIAL JUDGE IN IMPOSING SENTENCES.

24 AND FOR ME TO SAY THOSE WORDS IS VERY DIFFICULT,
25 BECAUSE IT IS VERY RARE THAT THE JUDGES AND I ARE IN

1 AGREEMENT THAT THEY SHOULD EXERCISE DISCRETION.

2 MR. MAC KINNON: EVERY SENTENCING SYSTEM IN
3 AMERICAN HAS HAD THE SAME OBJECTION; THAT IT IS LIMITING
4 THE DISCRETION OF THE JUDGES, AND THAT'S WHAT IT DOES, AND
5 THAT'S WHAT IT WAS INTENDED TO DO. DON'T YOU YOU REALIZE
6 THAT?

7 MS. CLARKE: I AM NOT SURE -- THE DISCRETION IS
8 LIMITED IN TERMS -- IN THE PRESENT SYSTEM THAT THE JUDGE
9 CAN'T IMPOSE MORE THAN THE MAXIMUM AMOUNT BY THE LAW, BUT
10 OTHER THAN THE DISCRETION IS UNLIMITED UNDER 18 USC. 3577.

11 ALL FACTORS CAN BE CONSIDERED. IT IS VIRTUALLY
12 UNLIMITED IN DISCRETION IN IMPOSING SENTENCES TODAY. IT
13 IS CONDITIONED UPON THE RELIABILITY OF THE INFORMATION.

14 MR. MAC KINNON: THE PRESENT GUIDELINES IN THE
15 VARIOUS STATES HAVE ALWAYS MET THE OPPOSITION OF THE LOCAL
16 BAR AND OF THE LOCAL -- MANY LOCAL BARS, AND THE JUDGES
17 PARTICULARLY THAT IT INTERFERES WITH THEIR DISCRETION, AND
18 THAT'S EXACTLY WHAT THE GUIDELINES WERE INTENDED TO DO,
19 BECAUSE THEY DIDN'T THINK THAT THE JUDGES WERE IMPOSING
20 CORRECT SENTENCES.

21 NOW, IT ISN'T ANYTHING THAT'S LOCAL TO THE UNITED
22 STATES. YOU CAN GOES OVER TO GREAT BRITAIN AND THE THING
23 IS THE SAME. THEY WANT -- THEY ARE GOING TO IMPOSE, I
24 THINK, IN GREAT BRITAIN LARGER SENTENCES BECAUSE THEY
25 THINK THE JUDGES ARE NOT EVEN AUTHORIZED TO IMPOSE MAXIMUM

1 SENTENCES.

2 MS. CLARKE: JUDGE MAC KINNON, I THINK THAT THIS
3 COMMISSION CAN LIMIT THE DISCRETION OF THE JUDGES
4 IN A FAR LESS ONEROUS WAY. THE DISCRETION OF THE JUDGES
5 IS ALMOST REMOVED BY THE CONCEPT BEHIND THE PRESENT SYSTEM
6 OF MATHEMATICAL SENTENCING.

7 I THINK THAT THE DISCRETION CAN BE LIMITED SUCH
8 AS THE COMMENTARIES DO. THE COMMENTARIES ARE WELL THOUGHT
9 OUT IN TERMS OF CONSIDERATIONS THAT GO INTO THE SENTENCING
10 PROCESS AND THOSE KINDS OF LIMITS CAN BE HELPFUL ON THE
11 JUDGE'S DISCRETION.

12 MR. MAC KINNON: WELL, I TELL YOU, IT IS AWFULLY
13 HARD TO PROVIDE WITH CERTAINTY THAT CONGRESS INDICATES AND
14 REQUESTS AND ALSO PROVIDE FOR THE LENIENCY AND THE
15 VARIATIONS AND DISCRETION ALONG WITH IT.

16 MS. CLARKE: VERY HARD.

17 MR. MAC KINNON: VERY DIFFICULT.

18 MS. CLARKE: VERY HARD.

19 MS. CLARKE: AND IT IS SORT OF INCONSISTENT.

20 MS. CLARKE: I JUST DON'T THINK WE HAVE DONE IT
21 YET.

22 MR. MAC KINNON: BUT THAT'S WHAT THE STATUTE AND
23 THE HEARINGS CALL FOR. THEY CALL FOR CERTAINTY AND THEY
24 CALL FOR DISCRETION, TO A CERTAIN EXTENT.

25 MS. CLARKE: THEY ALSO --

1 MR. MAC KINNON: NOW, COMMISSIONER BAER -- I WAS
2 FLABBERGASTED AT YOUR STATEMENT THAT YOU WOULD PLEA THE
3 FACTS AND THAT THE COURT HAS NOTHING TO DO WITH
4 SENTENCING. THOSE ARE YOUR WORDS.

5 NOW, DOES THAT FIT INTO YOUR DESCRIPTION OF AN
6 UNSCRUPULOUS UNITED STATES ATTORNEY, WHICH YOU ALSO SAID?

7 MS. CLARKE: I SUGGESTED TO YOU THAT THE
8 CREATION -- THE FACT OF COOPERATION CAN BE SUBJECT TO A
9 GREAT DEAL OF MANIPULATION BY AN UNSCRUPULOUS UNITED
10 STATES ATTORNEY, AND I WOULD HATE TO SEE THE GUIDELINES
11 THEMSELVES PROMOTE THAT KIND OF POTENTIAL FOR UNSCRUPULOUS
12 BEHAVIOR.

13 MR. MAC KINNON: WELL, ISN'T THAT DONE IF YOU
14 PLEA BARGAIN FACTS WHERE THE COURT HAS NO DISCRETION ON
15 SENTENCING? ISN'T THAT UNSCRUPULOUS?

16 DID YOU EVER READ THE UNITED STATES STATUTE OF
17 WHAT THE BURDEN OF THE UNITED STATES ATTORNEY IS? THAT IS
18 NOT PERMISSIBLE, AND I WANT TO TELL YOU THAT FOR ONE ON
19 THIS COMMISSION, FOR MY MONEY, IT IS NOT GOING TO BE
20 POSSIBLE AFTER THESE RULES GET INTO EFFECT FOR A UNITED
21 STATES ATTORNEY AND DEFENSE COUNSEL TO BARGAIN AWAY FACTS
22 WITHOUT DISCLOSING THEM -- WITHOUT DISCLOSING THEM.

23 I THINK IT IS A VERY SIMPLE THING TO ACCOMPLISH,
24 AND I THINK THAT IS ONE THING THAT SHOULD BE GURANTEED.

25 I WAS INTERESTED IN YOUR COUNTERFEITING OFFENSE

1 AND THE DETAILS OF IT. WERE THEY COUNTERFEITING AMERICAN
2 MONEY OR MEXICAN MONEY?

3 MS. CLARKE: AMERICAN DOLLARS.

4 MR. MAC KINNON: AMERICAN DOLLARS. WELL,
5 COUNTERFEITING IS A VERY SERIOUS CRIME, REGARDLESS OF HOW
6 MUCH YOU COUNTERFEIT OR WHERE YOU --

7 MS. CLARKE: OH, AND I SUSPECT HAD THAT CRIME
8 NOT BE COMMITTED IN MEXICO AND BEEN COMMITTED ONLY IN THE
9 UNITED STATES AND SUBJECT TO ONLY PUNISHMENT IN THE UNITED
10 STATES THERE WOULD HAVE BEEN MORE THAN A PROBATIONARY TERM
11 IMPOSED.

12 MAC KINNON: THANK YOU.

13 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MS.
14 CLARKE.

15 MS. CLARKE: THANK YOU.

16 CHAIRMAN WILKINS: WE APPRECIATE YOUR TESTIMONY
17 AND YOUR SUBMISSION.

18

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1
2
3 PUBLIC HEARING
4 THE UNITED STATES SENTENCING COMMISSION
5

6
7 IN RE: RECENTLY-PUBLISHED PRELIMINARY DRAFT
8 OF SENTENCING GUIDELINES FOR THE FEDERAL
9 COURTS.

10 CEREMONIAL COURTROOM
11 19TH FLOOR, FEDERAL BUILDING
12 450 GOLDEN GATE AVENUE
13 SAN FRANCISCO, CALIFORNIA 94102

14 TUESDAY, NOVEMBER 18, 1986
15 10:00 O'CLOCK A.M.

16 PART 2

17 HONORABLE W. WILKINS, JR., CHAIRMAN,
18 PROFESSOR MICHAEL K. BLOCK
19 HONORABLE STEPHEN G. BREYER
20 HELEN G. CORROTHERS
21 HONORABLE GEORGE E. MAC KINNON
22 PROFESSOR ILENE H. NAGEL
23 PROFESSOR PAUL H. ROBINSON
24 BENJAMIN F. BAER
25

26 REPORTED BY: LAVON GRANGER, C.S.R. #1890

1 ***

2 OUR NEXT WITNESS IS THE UNITED STATES ATTORNEY
3 FOR LOS ANGELES, ROBERT C. BONNER.

4 WHILE MR. BONNER IS COMING AROUND WE WILL SUSPEND
5 FOR JUST A MOMENT SO THE COURT REPORTER CAN CHANGE HER
6 TAPE IN HER MACHINE.

7 CHAIRMAN WILKINS: MR. BONNER, WE ARE DELIGHTED
8 TO HAVE YOU WITH US TODAY AND DELIGHTED TO HEAR FROM YOU
9 AT THIS TIME?

10 MR. BONNER: YES, MR. CHAIRMAN. I WANT TO THANK
11 YOU AND THE COMMISSION FOR INVITING ME AND GIVING ME AN
12 OPPORTUNITY TO MAKE SOME COMMENTS AND OBSERVATIONS ON THE
13 PRELIMINARY DRAFT THAT HAS BEEN DEVELOPED BY THE
14 COMMISSION.

15 I WANT TO NOTE PRELIMINARILY, AS I BELIEVE THE
16 COMMISSION IS AWARE OF, I HAVE MADE A WRITTEN SUBMISSION
17 TO THE COMMISSION IN WHICH I CAN MAKE COMMENTS AND
18 OBSERVATIONS ON AT LEAST CERTAIN ASPECTS OF THE
19 PRELIMINARY DRAFT, GUIDELINES DEVELOPED BY THE COMMISSION,
20 AND I DON'T PROPOSE TO REITERATE WHAT I HAVE SET FORTH IN
21 THE WRITTEN SUBMISSION I MADE IN ANY DETAIL THIS MORNING.

22 I WOULD LIKE, HOWEVER, TO TAKE JUST A FEW MOMENTS
23 BEFORE INVITING ANY QUESTIONS THE COMMISSION MIGHT HAVE OF
24 ME TO MAKE A FEW OBSERVATIONS WITH RESPECT TO THE
25 PRELIMINARY DRAFT.

20

1 FIRST OF ALL, MR. CHAIRMAN, I WANT TO SAY THAT
2 WITH RESPECT TO THE PRELIMINARY DRAFT, FAR FROM IT BEING A
3 MONSTROSITY, AS I BELIEVE WAS CHARACTERIZED, OR I BELIEVE
4 THAT WAS THE CHARACTERIZATION GIVEN TO IT BY THE PREVIOUS
5 WITNESS, I WANT TO EXPRESS MY ADMIRATION TO THE COMMISSION
6 FOR WHAT IS, I BELIEVE, EXTRAORDINARY AND THOUGHTFUL
7 EFFORTS THAT HAVE RESULTED IN THE PRELIMINARY DRAFT.

8 THE DRAFT, OF COURSE, IS, AS I THINK HAS ALREADY
9 BEEN NOTED, ALTHOUGH IT DOES LEAVE CERTAIN QUESTIONS
10 UNANSWERED OR UNRESOLVED AT LEAST AT THIS POINT IN TIME,
11 IT CERTAINLY DEMONSTRATES THAT THE COMMISSION -- EITHER
12 DEMONSTRATES THAT THE COMMISSION IS WELL ON ITS WAY TO
13 ACHEIVING THE EXTREMELY CHALLENGING DUNKING, IF YOU WILL,
14 THE VERY DIFFICULT TASK OF CREATING, AS CONGRESS MANDATED,
15 A MOST INTELLIGENT AND INTELLIGIBLE GUIDELINES FOR
16 SENTENCING JUDGES, FEDERAL SENTENCING JUDGES, TO FOLLOW.

17 LET ME ALSO NOTE THAT THE CONGRESSIONAL INTEREST
18 THAT APPARENTLY DID GIVE RISE TO THE SENTENCING REFORM
19 PROVISIONS OF THE COMPREHENSIVE GUIDELINES WERE IN LARGE
20 PART BASED UPON NOT ONLY PRECEPTIONS, BUT ACTUAL
21 DISPARAITIES THAT EXISTED BETWEEN AND AMONG FEDERAL
22 DISTRICTS AND EVEN WITHIN FEDERAL DISTRICTS, AND FROM MY
23 OWN EXPERIENCE I MIGHT NOTE THAT NOWHERE IS THAT MORE
24 GRAPHICALLY INDICATED THAN BETWEEN THE CENTRAL DISTRICT OF
25 CALIFORNIA, WHICH I REPRESENT, WHICH INCLUDES, AMONG

1 OTHERS, LOS ANGELES METROPOLITAN AREA, LOS ANGELES-ORANGE
2 COUNTY AREAS, AND THE SOUTHERN DISTRICT OF CALIFORNIA FROM
3 WHICH THE PUBLIC DEFENDER WHO PREVIOUSLY TESTIFIED
4 REPRESENTED WHICH IS MADE UP OF SAN DIEGO AND SEVERAL
5 COUNTIES.

6 LET ME SAY IT IS SOMEWHAT IRONIC, BUT THERE IS NO
7 QUESTION THAT IF, FOR EXAMPLE, A FEDERAL OFFENSE IS
8 COMMITTED, LET'S SAY, A SIGNIFICANT MAIL FRAUD IS
9 COMMITTED IN ORANGE COUNTY, CALIFORNIA, A FEW MILES NORTH
10 OF THE SOUTHERN DISTRICT OF CALIFORNIA, THE CHANCES ARE
11 EXTREMELY GREAT THAT A DEFENDANT IN MY DISTRICT IS GOING
12 TO GET SUBSTANTIALLY LESSER SENTENCE FROM THE FEDERAL
13 DISTRICT JUDGES, BY AND LARGE, TAKING AVERAGES, DEPENDING
14 ON WHICH JUDGE YOU DRAW, THAT THAT DEFENDANT WOULD RECEIVE
15 HAD HE COMMITTED THE CRIME A FEW MILES SOUTH IN SAN DIEGO,
16 COUNTY WHERE, BY AND LARGE, AS I SAY, THIS IS SOMEWHAT
17 IRONIC, BUT BY AND LARGE THE REPUTATION OF THE DISTRICT
18 JUDGES IN THE SOUTHERN DISTRICT OF CALIFORNIA, BEING ONE
19 OF BEING TOUGHER -- IN FACT THEY ARE TOUGHER, BY AND
20 LARGE, THAN THEY ARE IN THE CENTRAL DISTRICT.

21 NEEDLESS TO SAY, NOT ONLY ARE THERE DISPARITIES
22 WITHIN A FEW MILES FROM ONE FEDERAL DISTRICT TO ANOTHER
23 FEDERAL DISTRICT OF CALIFORNIA, BUT NEEDLESS TO SAY, THERE
24 ARE SIGNIFICANT SENTENCING DISPARITIES THAT OCCUR WITHIN
25 THE CENTRAL DISTRICT OF CALIFORNIA BETWEEN ONE FEDERAL

1 DISTRICT JUDGE AND ANOTHER FEDERAL DISTRICT JUDGE. I DON'T
2 THINK I NEED TO DOCUMENT THAT. IT IS A FACT.

3 THERE IS A LEGITIMATE PROBLEM, OR THERE IS A
4 LEGITIMATE CONCERN IN THE INACCURACIES THAT IS INVOLVED IN
5 THE SENTENCING PROCESS IN THE FEDERAL CRIMINAL JUSTICE
6 SYSTEM.

7 WHILE I SAY THAT, LET ME NOTE THAT I AM CONCERNED
8 THAT WITH THE POTENTIAL BURDENS ON THE FEDERAL CRIMINAL
9 JUSTICE SYSTEM THAT CAN RESULT OR CAN ARISE, AT LEAST IF
10 ONE ASSUMES A WORSE CASE SCENARIO, SO TO SPEAK, OF THE
11 SENTENCING GUIDELINES AS THESE HAVE BEEN PRESENTLY
12 FORMULATED IN THE PRELIMINARY DRAFT.

13 WHAT I MEAN BY THAT IS, IT SEEMS TO ME IT IS
14 IMPORTANT AND NECESSARY, AND I AM NOT SURE I HAVE A
15 SOLUTION TO IT, BUT IT IS CERTAINLY IMPORTANT AND
16 NECESSARY TO CALCULATE, AS BEST WE CAN, THE TYPES OF
17 EVIDENTIARY PROBLEMS AND EVIDENTIARY DISPUTES THAT WILL
18 REQUIRE OR POTENTIALLY REQUIRE AN ADJUDICATIVE HEARING AT
19 THE TIME OF SENTENCING THAT IS MUCH MORE INVOLVED, MUCH
20 MORE LENGTHY AND PROTRACTED THAN WE HAVE UNDER THE
21 EXISTING SYSTEM.

22 I DON'T I THINK I NEED TO TELL YOU UNDER THE
23 EXISTING SYSTEM THE SENTENCING IN FEDERAL DISTRICT COURTS
24 THAT FOLLOW A PLEA OF GUILTY OR FOLLOW A JURY TRIAL
25 CONVICTION THAT IT IS A PROCESS THAT IN TERMS OF THE

1 EXPENDITURE OF THE FEDERAL DISTRICT COURTS' TIME AND
2 EFFORT, LEAVING ASIDE THE STUDY OF THE PRESENTENCE REPORT
3 BY THE DISTRICT JUDGE AND SO FORTH AND FORMULATIONS AND
4 THE TIME TAKEN BEFORE SENTENCING HEARING ITSELF.

5 THE SENTENCING HEARING, AND THE PRESENTENCE
6 REPORT, AT LEAST IN LOS ANGELES TAKES SOMETHING ALONG THE
7 LINES PERHAPS OF THIRTY MINUTES TO AN HOUR, WHICH IS
8 PRIMARILY CONSUMED BY USUALLY -- BY SOME FAIRLY VIGOROUS
9 ORAL ADVOCACY OF THE CRIMINAL DEFENSE ATTORNEY AND SOME --
10 USUALLY SOME STATEMENT OR POSITION BY THE GOVERNMENT'S
11 ATTORNEY AND THE RIGHT OF ELOCUTION BY THE DEFENDANT IF HE
12 WISHES TO EXERCISE IT.

13 WHAT WE HAVE, AND WHAT CONCERNS ME IS THAT GIVEN
14 THE PRICE OF OFFENSE CHARACTERISTICS THESE COULD HAVE A
15 SIGNIFICANT DIFFERENCE -- OR MAKE A SIGNIFICANT DIFFERENCE
16 IN TERMS OF THE NUMBERS OF SANCTION UNITS. THE DIFFERENT
17 OFFENDER CHARACTERISTICS AND HOW YOU ARE GOING TO ASSESS
18 THEM, THESE COULD HAVE A SUBSTANTIAL IMPACT ON THE NATURE
19 OF THE SENTENCE THAT A DISTRICT COURT WILL IMPOSE UNDER
20 THE GUIDELINES.

21 GIVEN THE FACT THAT A GOOD MANY OF THOSE OFFENSE
22 CHARACTERISTICS AND OFFENDER CHARACTERISTICS, THE RELATIVE
23 ROLE OF THE OFFENDER WITHIN THE SCHEME OF THE CONSPIRACY
24 AND SO ON, GIVEN THE FACT THAT A GOOD MANY OF THOSE FACTS
25 ARE NOT GOING TO HAVE BEEN ADJUDICATED EITHER BY A GUILTY

1 PLEA BY THE DEFENDANT OR BY A TRIAL BY JURY ON THE COUNTS
2 CONTAINED IN AN INDICTMENT.

3 IT SEEMS TO ME THAT WE ARE HEADING, AT LEAST TO
4 THE WORSE CASE SCENARIO, TO INNUMERABLE FACTUAL DISPUTES,
5 AND EVENTUALLY A GREAT DEAL OF TIME AND EFFORT AND
6 EXPENDITURE IMPOSED ON THE WHOLE FEDERAL CRIMINAL JUSTICE
7 SYSTEM, THE DISTRICT COURT ITSELF AND THE PROSECUTOR OF
8 THE U. S. ATTORNEY'S OFFICES, THE PUBLIC DEFENDER'S
9 OFFICES, THE CRIMINAL JUSTICE SYSTEM ACT AND SO FORTH.

10 WHAT I WOULD REALLY SUGGEST IN THIS REGARD IS
11 THAT WHEN ULTIMATELY THE FINAL DRAFT IS, PRELIMINARY --
12 THE FINAL DRAFT OF THE GUIDELINES IS BEING SETTLED UPON
13 THAT IT BE CAREFULLY REVIEWED WITH A VIEW IN MIND OF HOW
14 ONE MIGHT MAXIMIZE OR --

15 LET ME PUT IT DIFFERENTLY. HOW ONE MIGHT
16 ELIMINATE TO THE MAXIMUM, TO THE EXTENT POSSIBLE, THE
17 NECESSITY FOR WHAT COULD BE VERY LONG, LENGTHY SENTENCING
18 HEARINGS.

19 THERE IS ANOTHER ASPECT TO IT AND, OF COURSE,
20 THAT 'IS, NOT ONLY ARE WE LIKELY TO FACE IN A WORSE CASE
21 SCENARIO VERY PROTRACTED SENTENCING HEARINGS THAT
22 CONCEIVABLY COULD TAKE DAYS AND POSSIBLY WEEKS IN CERTAIN
23 CASES TO ADJUDICATE, BUT WE ARE ALSO FACED UNDER THE --
24 NOT SO MUCH THE GUIDELINES BUT BY THE CONGRESSIONAL
25 ENACTMENTS THAT GO INTO THE SENTENCING GUIDELINES WITH THE

1 SPECTER OF A GREAT DEAL MORE APPELLATE LITIGATION WITH
2 RESPECT TO THE SENTENCING PROCESS AND HOW THE GUIDELINES
3 ARE DEVELOPED, HOW THE FACTUAL DETERMINATIONS ARE MADE,
4 QUESTIONS OF WHETHER EXPLICITLY THE GUIDELINES SHOULD
5 PROVIDE FOR THAT, AMONG OTHER THINGS, HEARSAY EVIDENCE,
6 PERHAPS, IN MY VIEW SHOULD BE ADMISSIBLE AT A SENTENCING
7 HEARING; THESE KINDS OF FACTORS ARE GOING TO HAVE TO BE
8 TRANSLATED INTO THE EQUATION.

9 THE REASON IS THIS, AND THAT IS IF YOU DEVELOP A
10 SYSTEM WE ULTIMATELY END UP WITH A SYSTEM HERE IN WHICH
11 SUBSTANTIAL, INTOLERABLE AMOUNTS OF TIME, ENERGIES AND
12 EFFORTS GO INTO SENTENCING HEARINGS AND INTO APPELLATE
13 LITIGATION FROM SENTENCING HEARINGS, WE ULTIMATELY MAY
14 HAVE DEVISED A SYSTEM THAT OUTWEIGHS THE SOLITARY
15 OBJECTIVE THAT CONGRESS HAS MANDATED THIS COMMISSION, AND
16 THAT IS THAT THE OBJECTIVE OF ELIMINATING DISPARITIES
17 EVENTUALLY CAN BE OUTWEIGHED IF WE CREATE A SYSTEM THAT IS
18 WEIGHED, SO CUMBERSOME, SO TIME CONSUMING THAT ONE WOULD
19 HAVE TO CONCLUDE THAT IT OUTWEIGHS THE DESIRABILITY OF
20 HAVING PERFECT, MORE UNIFORMED SENTENCES.

21 SO THAT ESSENTIALLY IS ONE POINT I WANTED TO
22 MAKE. AND I WANT TO MAKE ONE OTHER POINT AND THEN I WILL
23 INVITE ANY QUESTIONS THAT THE COMMISSION HAS.

24 I DID NOTE A NUMBER OF THINGS IN MY WRITTEN
25 SUBMISSION, ONE OF WHICH IS THAT I DO THINK THERE NEEDS TO

1 BE SOME GREATER FLEXIBILITY IN THE AMOUNT OF TIME THAT CAN
2 BE PRODUCED OFF A GUIDELINE SENTENCE FOR A COOPERATING
3 DEFENDANT, DEPENDING ON THE NATURE AND DEGREE AND
4 SIGNIFICANCE OF THAT COOPERATION.

5 LET ME MAKE ONE POINT WITH RESPECT TO THE SUBJECT
6 THAT WAS RAISED WITH THE PREVIOUS WITNESS AND THAT IS
7 THE -- WHETHER IT IS DESIRABLE TO MAKE PROBATION A WITHIN
8 GUIDELINE OPTION, PARTICULARLY WHEN YOU ARE GETTING -- AND
9 I FOUND THAT CUT-OFF TO BE FOURTEEN SANCTIONS OR EIGHTEEN
10 SANCTIONS, BUT WHEN YOU ARE GETTING INTO A SIGNIFICANT
11 TYPE OF NUMBER OF SANCTION UNITS WHICH WOULD TRANSLATE
12 INTO A SIGNIFICANT AMOUNT OF TIME. I THINK AN EXAMPLE
13 THAT WAS GIVEN WAS A SITUATION WHERE IN THE WITHIN
14 GUIDELINES SENTENCE WOULD BE A RANGE OF EIGHT TO TEN
15 YEARS.

2 16 AND IT SEEMS TO ME THAT IF YOU MADE IN THAT
17 CONTEXT THAT A PROBATION OFFICERS TO BE WITHIN GUIDELINES
18 FOR THE COURT TO EITHER IMPOSE AN EIGHT OR TEN YEAR
19 SENTENCE OR IMPOSE A PROBATIONARY SENTENCE THAT WHAT YOU
20 END UP WITH IN THAT SITUATION IS A SYSTEM THAT WILL CREATE
21 EVEN GREATER DISPARITIES THAN THE PRESENT SYSTEM HAS, AND
22 THE REASON IS, THE JUDGES WILL BE FACED WITH THESE TWO
23 EXTREME CHOICES OF EITHER A LOWER RANGE OF YEARS OR A
24 PROBATIONARY TYPE SENTENCE, AND FRANKLY YOU MIGHT BE
25 BETTER OFF WITH THE EXISTING SYSTEM THAN CREATING A SYSTEM

1 THAT INVITES THAT KIND OF DISPARITY, AND I THINK FOR
2 ANYBODY, AND I HAVE NOT BEEN IN THAT POSITION, BUT ANYBODY
3 WHO HAS BEEN A SENTENCING JUDGE YOU ARE LEFT IN THIS VERY
4 AWKWARD SITUATION THAT IF YOU DISAGREE WITH THE
5 GUIDELINES, LET'S SAY EIGHT TO TEN YEARS, AND YET YOU
6 THINK A THREE TO FOUR YEAR SENTENCE IS APPROPRIATE, YOUR
7 TENDANCY IS GOING TO BE, AT LEAST IF ONE HAS A SMALL
8 ELEMENT OF COMPASSION HERE, IS TO GIVE THE PROBATIONARY
9 TYPE SENTENCE.

10 SO IT DOESN'T SEEM TO ME THAT THAT SYSTEM IS
11 GOING TO BE -- THAT THAT KIND OF PROPOSAL WOULD BE
12 DESIRABLE AT ALL.

13 LASTLY LET ME JUST SAY WITH RESPECT TO
14 COOPERATION THAT IT OCCURS TO ME THAT IF WE ARE NOT IN A
15 POSITION -- WHEN I SAY, "WE," I MEAN FEDERAL PROSECUTORS
16 OR UNITED STATES ATTORNEYS ARE NOT IN A POSITION TO
17 ADEQUATELY RECOGNIZE COOPERATION, IT SEEMS TO ME THAT
18 CERTAIN TYPES OF -- WHAT I THINK ARE BROADER VIEWS AS
19 SERIOUS KINDS OF CRIMINAL VIOLATIONS IN WHICH THE -- THERE
20 IS A SIGNIFICANT PUBLIC INTEREST IN HAVING THE OFFENSES
21 FULLY EXPOSED AND PROSECUTED MAYBE, AND I THINK IN SOME
22 CASES WOULD GO UNPROSECUTED, AND ONE, I SUPPOSE, EXAMPLE
23 OF THAT WOULD BE THE SITUATION THAT WOULD BE POSED, LET'S
24 SAY, UNDER THE PRESENT SENTENCING GUIDELINES WHERE
25 COOPERATION COULD NOT BE TREATED SIGNIFICANTLY.

1 WITH RESPECT TO PERHAPS THE WHOLE WATERGATE
2 SITUATION, AND THAT IS TO SAY THAT IF A JUDGE SIRIKA BACK,
3 I BELIEVE, IN 1972 OR THEREABOUTS, WAS FACED PERHAPS EVEN
4 UNDER THE GUIDELINES AS THE PRELIMINARY DRAFT STANDS
5 FOR A BURGLARY ATTEMPT AND LOOKED IT UP WHAT A BURGLARY
6 OFFENSE WAS WHERE THERE WAS NOTHING, NO PROPERTIES AT ALL,
7 OR NO ACTUAL LOSS, NOTHING REMOVED, NOTHING STOLEN AND
8 IGNORED OR WOULD TEND TO IGNORE THE GUIDED COOPERATION IN
9 THAT CASE ONE REALLY WONDERS AND QUESTIONS WHETHER IT
10 WOULD HAVE BEEN POSSIBLE FOR THE SPECIAL PROSECUTOR BACK
11 IN THOSE DAYS OR ANY PROSECUTOR TO HAVE FULLY EXPLORED,
12 DEVELOPED AND PROSECUTED THE WATERGATE BURGLARY AND THE
13 OBSTRUCTION OF JUSTICE CASE THAT FOLLOWED FROM IT.

14 AND I THINK THAT THERE MAY BE CASES IN, FOR
15 EXAMPLE, IN THE PUBLIC CURRUPTION AREA, THERE MAYBE CASES
16 IN WHICH A FEDERAL DISTRICT JUDGE LIKE JUDGE SIRIKA SHOULD
17 BE PERMITTED WHEN THERE APPEARS TO BE AN OVERRIDING PUBLIC
18 PERHAPS TO IMPOSE A SENTENCE THAT IS ABOVE GUIDELINES.

19 THERE'S NO AGGRAVATING FACTORS HERE, WHERE THERE
20 IS A STRONG OVERRIDING PUBLIC INTEREST IN SEEING THAT A
21 CRIME DOES NOT GO UNDETECTED AND UNPUNISHED; THAT THERE
22 MAY BE SOME CONSIDERATION GIVEN TO THAT BY THIS
23 COMMISSION.

24 WHATEVER ELSE, I WOULD SUBMIT TO THE COMMISSION
25 IT WOULD BE THAT THIS IS AN AREA IN WHICH THERE NEEDS TO

1 BE, I THINK, A GREAT DEAL OF LATITUDE GIVEN TO THE
2 PROSECUTOR, TO THE UNITED STATES ATTORNEYS IN ORDER TO
3 MAKE SURE THERE ARE SUFFICIENT INCENTIVES IN APPROPRIATE
4 CASES TO BE ABLE TO PERSUADE OR GIVE A SENTENCE TO CERTAIN
5 DEFENDANTS IN CERTAIN INSTANCES TO COOPERATE WITH THE
6 GOVERNMENT IN AN ACTIVE WAY.

7 THOSE ARE ESSENTIALLY THE REMARKS I HAVE, MR.
8 CHAIRMAN. I AM HAPPY TO TAKE ANY QUESTIONS THAT THE
9 COMMISSION MIGHT HAVE.

10 CHAIRMAN WILKINS: THANK YOU VERY MUCH. YOU
11 BRING UP A GOOD POINT. SOMETHING WE NEED TO CONSTANTLY
12 REMIND OURSELVES OF AND THAT IS WE CAN'T WRITE GUIDELINES,
13 I DON'T THINK, FOR THE EXTREME CASE, ONE THAT HAS
14 EXTREMELY AGGRAVATED CIRCUMSTANCES, OR AS MS. CLARKE
15 POINTED OUT, ONE THAT HAS EXTREMELY MITIGATING
16 CIRCUMSTANCES. THE CHARACTER BEING TORTURED IN JAIL IN
17 MEXICO AND IS BROUGHT BACK TO FACE THE SAME CHARGES HERE.
18 PERHAPS THAT WOULD BE AN AREA WHERE THE JUDGE WOULD DEPART
19 FROM THE GUIDELINES.

20 THE WATERGATE BREAK-IN, THAT WOULD BE THE ONE
21 WHERE WE NEED TO SPECIFICALLY SAY, "JUDGE, THIS IS AN
22 UNUSUAL CASE WHERE YOU NEED TO DEPART FROM THE GUIDELINES.
23 DON'T WORRY ABOUT THE GUIDELINES."

24 SO IF WE TRY TO WRITE THEM TO THESE TWO EXTREMES,
25 YOU SOMETIMES MISS A LOT. BUT IT IS HARD TO DEFINE WHERE

1 THE EXTREMES SHOULD BE DEFINED, AND I APPRECIATE THAT
2 THOUGHT VERY MUCH.

3 ANY QUESTIONS FROM ANYONE ON MY LEFT?

4 JUDGE MACKINNON.

5 JUDGE MAC KINNON: YOU WERE TALKING ABOUT
6 DISPARITIES. HOW WIDE A DISPARITY DO YOU ENVISION OR HAVE
7 YOU SEEN IN YOUR BACKGROUND OR CURRENT POSITION?

8 MR. BONNER: WELL, I THINK ONE WAY TO
9 DEMONSTRATE IT IN THE FEDERAL DISTRICT COURTS IN LOS
10 ANGELES THERE ARE THE ARRAIGNMENTS OF THE DEFENDANTS ON
11 MONDAY MORNINGS, EVERY MONDAY MORNING. ANYWHERE FROM
12 BETWEEN TWENTY AND PERHAPS FIFTY DEFENDANTS ARE ARRAIGNED.
13 THEY ARE ARRAIGNED BEFORE A MAGISTRATE.

14 AT THAT TIME THE MAGISTRATE DRAWS -- IT IS A
15 RANDOM SELECTION -- ONE OF THE FEDERAL DISTRICT JUDGES IN
16 LOS ANGELES IN WHICH THEY ARE NOW BEING APPOINTED ACTIVE
17 DISTRICT JUDGES --

18 LET ME STARTS OFF BY SAYING ANYBODY THAT HAS GONE
19 DOWN AS I HAVE TO THE ARRAIGNMENTS WHERE THE MAGISTRATE
20 DRAWS A CARD YOU SEE ONE OF TWO REACTIONS FROM THE
21 DEFENDANT AND THE COUNSEL, ONE CARD CAN BE DRAWN FOR A
22 CERTAIN JUDGE AND YOU WILL HEAR A GRASP. IT IS AWFUL AND
23 THEY KNOW THAT THAT'S BAD.

24 THE DEFENDANT, HIMSELF, KNOWS ENOUGH ABOUT THE
25 JUDGES THROUGH HIS ATTORNEY TO KNOW THAT HE HAS DRAWN THE

1 JUDGE WHO IS VERY LIKELY TO GIVE HIM A FAIRLY HEAVY
2 SENTENCE OR HAMMER HIM.

3 ON THE OTHER HAND, I HAVE ALSO WITNESSED AS
4 ANYBODY WHOSE VISITED THE MAGISTRATE'S COURTROOM ON MONDAY
5 MORNINGS IN LOS ANGELES IN FEDERAL COURT LITERALLY CRIES
6 OF JOY, A HUGGING BETWEEN ATTORNEYS AND THEIR DEFENDANTS
7 BECAUSE THEY HAVE DRAWN JUDGE SO-AND-SO AND THEY KNOW
8 THAT -- FOR THAT -- BY THE WAY, WHATEVER THE EVENT IS, BUT
9 THAT THAT PARTICULAR JUDGE IS AN EXCELLENT PROSPECT FOR A
10 PROBATIONARY TYPE SENTENCE.

11 SO FROM THAT DEMONSTRATION ALONE I THINK WE KNOW
12 THAT THERE ARE SOME DISPARITIES IN THE FEDERAL DISTRICT
13 COURTS IN THE SOUTHERN DISTRICT OF CALIFORNIA. YOU CAN
14 ALSO SEE IT, IF YOU WANTED TO MAKE AN ANALYSIS, YOU COULD
15 SEE DISPARITY TREATMENTS IN --

16 WELL, LET ME PUT IT THIS WAY. WE ARE, IN TERMS
17 OF A LOT OF FEDERAL CRIMES, IT SEEMS TO ME WE HAVE A LOT
18 OF MAJOR FEDERAL CRIMES IN THE CENTRAL DISTRICT OF
19 CALIFORNIA, BUT WE ALSO HAVE MORE BANK ROBBERIES. I THINK
20 ONE THIRD OF ALL OF THE BANK ROBBERIES IN THE UNITED
21 STATES ARE COMMITTED IN OUR DISTRICT. THERE MAY BE GOOD
22 REASONS FOR IT, BUT THEY ARE.

23 WE HAVE A LOT OF BANK ROBBERY PROSECUTIONS AND A
24 LOT OF ROBBERY PROSECUTIONS, AND YOU CAN SEE A LARGE
25 SPECTRUM BETWEEN WHAT APPEARS TO BE ALMOST IDENTICAL

1 CONDUCT, USE OF A WEAPON, DEFENDANTS ABOUT THE SAME AGE,
2 SAME CRIMINAL RECORDS, YOU CAN SEE A FAIRLY LARGE
3 FLUCTUATION BETWEEN SENTENCINGS, DEPENDING ON WHAT FEDERAL
4 DISTRICT JUDGE YOU HAVE. YOU CAN GET FROM A PROBATIONARY
5 TYPE SENTENCE TO TWENTY YEARS IN PRISON.

6 THERE USED TO BE A DAY IN THE LATE 1960'S IN
7 WHICH THE FEDERAL DISTRICT JUDGES IN MY DISTRICT HAD A
8 PRETTY UNIFORM SENTENCING POLICY ON BANK ROBBERIES AND IT
9 WAS EIGHTEEN YEARS FOR UNARMED AND TWENTY-ONE YEARS FOR
10 ARMED. BUT WHEN THEY MOVED AWAY FROM THAT SYSTEM WE
11 STARTED DEVELOPING REALLY SUBSTANTIAL DISPARITIES BETWEEN
12 AND AMONG JUDGES.

13 JUDGE MAC KINNON: ACTUALLY THE SIX TO SEVEN
14 YEARS ACTUALLY TO SERVE TIME OR EIGHTEEN OR TWENTY-ONE
15 YEAR SENTENCE?

16 MR. BONNER: THAT WOULD PROBABLY BE TYPICAL.
17 I MEAN AGAIN UNDER THE PRESENT SYSTEM IT WOULD DEPEND ON
18 WHERE THEY FALL WITHIN THE PAROLE GUIDELINES AND THAT SORT
19 OF THING. THEY WOULD SERVE ON A EIGHTEEN YEAR SENTENCE
20 BETWEEN SIX AND PERHAPS UP TO ELEVEN OR TWELVE, DEPENDING
21 ON WHERE THEY FALL WITHIN THE PAROLE GUIDELINES.

22 JUDGE MAC KINNON: I KNOW WHAT YOU ARE TALKING
23 ABOUT BETWEEN DISPARITIES BECAUSE I HAD TWO JUDGES WHEN I
24 WAS UNITED STATES ATTORNEY. ONE COULDN'T PUT ANYBODY IN
25 PRISON AND THE OTHER ONE COULDN'T SLEEP IF HE DIDN'T PUT

1 SOMEONE IN PRISON.

2 BUT DO I UNDERSTAND YOU TO SAY THAT THE DEGREE OF
3 DISPARITIES THAT YOU ARE ENVISIONING TODAY RANGES FROM
4 PROBATION TO TWENTY YEARS FOR ROUGHLY THE SAME OFFENCE?

5 MR. BONNER: I AM SAYING THERE ARE INSTANCES OF
6 THAT. I DON'T THINK THAT'S COMMON.

7 I THINK IN TERMS OF THE REALITY THAT THE SPREAD
8 IS PROBABLY SOMEWHAT NARROWER THAN THAT. YOU USUALLY CAN
9 FIND AN ARTICULAR BASIS IN A FAIRLY UNUSUAL CASE WHERE AN
10 ARMED BANK ROBBER WOULD GET PROBATION. BUT THERE ARE
11 DISPARITIES THAT GO FROM PROBATION TO TWENTY YEARS IN
12 PRISON. THAT IS THE CASE.

13 ON VIRTUALLY IDENTICAL FACTS THE DISPARITIES
14 PROBABLY ARE CLOSER TO AN AVERAGE RANGE OF LOW SENTENCING
15 JUDGES OF PERHAPS IN THE FIVE TO EIGHT YEAR RANGE AND HIGH
16 SENTENCING JUDGES IN THE FIFTEEN YEAR RANGE.

17 JUDGE MAC KINNON: WHAT IS THE JUSTIFICATION FOR
18 THE DISPARITIES? NOW, I RECOGNIZE THAT THERE ARE
19 JUSTIFICATIONS, BECAUSE WHEN I WAS UNITED STATES ATTORNEY
20 I HAD TWO BANK ROBBERS WITHIN A COUPLE MONTHS OF EACH
21 OTHER AND ONE OF THEM GOT TWENTY-FIVE YEARS AND THE OTHER
22 ONE GOT PROBATION AND I THOUGHT THAT BOTH WERE PERFECT
23 SENTENCES FOR THE INDIVIDUALS.

24 BUT WHAT DO YOU SEE AS THE BASIS FOR THE
25 DISTINCTIONS THAT THEY ARE PRESENTLY EMBODYING IN THOSE

1 CASES?

2 MR. BONNER: WELL, AGAIN, THAT IS DIFFICULT TO
3 SAY. I AGREE WITH YOU THAT THERE CERTAINLY ARE CASES IN
4 WHICH THERE ARE OBJECTIVE BASIS. WE CAN SEE WHY CERTAIN
5 DISTINCTIONS ARE MADE BY SENTENCING JUDGES, AND THAT MIGHT
6 RANGE AND IS AS BROAD AS A PROBATION TYPE SENTENCE OR
7 TWENTY YEARS IN PRISON.

8 BUT THE -- LET ME PUT IT THIS WAY: THE REASONING
9 OF THE DISTRICT JUDGE IS SUFFICIENTLY MYSTERIOUS OR
10 ESOTERIC THAT IT IS DIFFICULT FOR ME TO SAY FROM MY
11 STANDING IN THE CASE BY ANALYZING, LET'S SAY, THE
12 PRESENTENCE REPORT OF THE PROBATION OFFICER, KNOWING WHAT
13 THE EVIDENCE IS, HEARING THE ARGUMENTS OF COUNSEL.
14 SOMETIMES IT IS NOT READILY APPARENT, SHALL WE SAY, WHAT
15 THE BASIS IS FOR THE SENTENCE IN ONE CASE AS OPPOSED TO A
16 LOWER OR HIGHER SENTENCE IN ANOTHER CASE.

17 JUDGE MAC KINNON: OF COURSE, THAT'S WHAT RAISES
18 THE PUBLIC'S CONCERN.

19 MR. BONNER: OF COURSE.

20 JUDGE MAC KINNON: YES. I HAVE A COUPLE OF
21 OTHERS QUESTIONS.

22 DO YOU ORDINARILY ELOCUTE THE SENTENCE, YOUR
23 OFFICE?

24 MR. BONNER: AS A GENERAL RULE WE DO, EXCEPT AT
25 LEAST -- ONE FEDERAL DISTRICT JUDGE DOES NOT PERMIT THE

1 GOVERNMENT TO SPEAK AT THE TIME OF SENTENCING. BUT
2 ORDINARILY WE WOULD PRESENT THE SENTENCING POSITION TO THE
3 DISTRICT COURT AT THE TIME OF SENTENCING. THAT WOULD BE
4 FAIRLY RARE. THERE WOULD BE A SPECIFIC NUMBER THAT WOULD
5 BE GIVEN TO A JUDGE. WE OCCASIONALLY DO THAT, BUT WE DO
6 GENERALLY INDICATE WHERE WE STAND GENERALLY, WHETHER WE
7 BELIEVE IT IS A CASE THAT REQUIRES OR WARRANTS SUBSTANTIAL
8 IMPRISONMENT AS OPPOSED TO IMPRISONMENT, AS OPPOSED TO
9 SOME OTHER TYPES OF PROBATIONARY SENTENCES.

10 JUDGE MAC KINNON: MY NEXT QUESTION IS: DO YOU
11 PROSECUTE ANY WHITE SLAVE OFFENSES?

12 MR. BONNER: ACTUALLY, WE HAVE USED THE MAN ACT
13 TO PROSECUTE SOME CASES. THESE CASES HAVE USUALLY
14 INVOLVED -- THE RECENT CASES, AND THERE HAVE BEEN SEVERAL,
15 RELATIVELY INVOLVED MINORS THAT HAVE BEEN TRANSPORTED
16 ACROSS INTERSTATE LINES THAT HAVE BEEN SEXUALLY ABUSED,
17 BUT WE HAVE USED THE STATUTE WITH A CERTAIN DEGREE OF
18 FREQUENCY IN THAT SITUATION IN THE LAST COUPLE OF YEARS.

19 JUDGE MAC KINNON: ROUGHLY HOW MANY CASES DO YOU
20 THINK YOU HAVE?

21 MR. BONNER: I WOULD SAY THREE, FOUR, FIVE. I
22 MEAN IT IS NOT A LARGE NUMBER OF CASES, BUT IT IS --
23 PERHAPS AS MANY AS A HALF DOZEN.

24 JUDGE MAC KINNON: AND MOSTLY MINORS?

25 MR. BONNER: YES. I DON'T RECALL ANY RECENT CASE

1 IN THE CENTRAL DISTRICT OF CALIFORNIA THAT INVOLVES
2 TRANSPORTING A WOMAN ACROSS STATE LINES, AN ADULT WOMAN
3 ACROSS STATE LINES FOR CRIMINAL PURPOSES.

4 JUDGE MAC KINNON: ANOTHER FACTOR WE ARE
5 CONCERNED ABOUT ARE REGIONAL DIFFERENCES IN SENTENCING.
6 YOU SPOKE ABOUT DIFFERENCES FROM THE CENTRAL DISTRICT TO
7 OTHER DISTRICTS. HOW WIDE IS THAT VARIATION?

8 MR. BONNER: I DON'T HAVE -- I CAN'T SAY I HAVE
9 EMPIRICAL DATA ON THAT. MOST OF IT IS ANTIDOTAL. BUT I
10 DON'T THINK THERE IS ANY QUESTION IF YOU TALK TO ANY
11 CRIMINAL PRACTITIONER, ASSISTANT U. S. ATTORNEY OR DEFENSE
12 LAWYERS WHO HAVE PRACTICED IN BOTH THE SOUTHERN DISTRICT
13 OF CALIFORNIA, LOS ANGELES, AND THE SOUTHERN DISTRICT OF
14 SAN DIEGO WHICH IS PROBABLY ABOUT A HUNDRED TWENTY MILES
15 APART OR A TWO-HOUR DRIVE THAT THERE'S AN EXTRAORDINARY
16 DIFFERENCE.

17 NOW, THIS IS BY AND LARGE. YOU ARE TALKING ABOUT
18 WHAT MIGHT BE AN AVERAGE TYPE SENTENCE FOR A FEDERAL
19 DISTRICT JUDGE IN LOS ANGELES VERSUS A FEDERAL DISTRICT
20 JUDGE IN SAN DIEGO. BUT MY SENSE OF IT IS, AND I THINK I
21 SPEAK FOR EVERYBODY WHO IS FAMILIAR WITH BOTH OF THOSE
22 DISTRICT COURTS, IS THAT THE FEDERAL DISTRICT COURT IN SAN
23 DIEGO IS A TOUGHER SENTENCING COURT, BY AND LARGE.

24 JUDGE MC KINNON: DESPITE MS. CLARKE?

25 MR. BONNER: DESPITE MS. CLARKE. SHE SHOULD

1 COME TO LOS ANGELES.

2 JUDGE MAC KINNON: I AM SURPRISED. THANK YOU.

3 CHAIRMAN WILKINS: ANY OTHER QUESTIONS?

4 THANK YOU VERY MUCH, MR. BONNER. WE APPRECIATE
5 YOUR APPEARING AND WE LOOK FORWARD TO CONTINUING TO WORK
6 WITH YOU.

7 MR. BONNER: I APPRECIATE IT, YOUR HONOR.

8 CHAIRMAN WILKINS: THANK YOU.

9 OUR NEXT WITNESS IS JUDGE ANTHONY KLEIN. JUDGE
10 KLEIN IS THE PRESIDING JUDGE OF THE CALIFORNIA COURT OF
11 APPEALS. WE ARE HONORED TO HAVE JUDGE KLEIN WITH US.

12 HONORABLE J. ANTHONY KLEIN

13 I WANT FIRST TO THANK THE MEMBERS OF THE
14 COMMISSION FOR THIS INVITATION. I CONSIDER IT AN HONOR TO
15 GIVE MY VIEWS TO YOU.

16 I SHOULD EXPLAIN AT THE OUTSET THAT I DO NOT
17 CONSIDER MYSELF AND DO NOT BELIEVE THAT I AM HERE BECAUSE
18 I HAVE ANY EXPERTISE IN CRIMINAL SENTENCING IN FEDERAL
19 COURTS, AND I THINK I SHOULD STATE AND PERHAPS MAKE IT
20 EXPLICIT WHY I THINK I WAS INVITED AND WHY I AM HAPPY TO
21 BE INVITED.

22 I AM VERY FAMILIAR WITH SENTENCING IN THE STATE
23 OF CALIFORNIA. IN THE EARLY 1970'S I WAS A SELF-STYLED
24 PUBLIC-INTEREST LAWYER ENGAGED PRIMARILY IN SUING THE
25 CALIFORNIA DEPARTMENT OF CORRECTIONS ON BEHALF OF THE

1 CLASS ACTIONS ON BEHALF OF PRISON INMATES CHALLENGING WHAT
2 WAS THEN THE CALIFORNIA INDETERMINATIVE SENTENCING ACT.
3 THAT WAS, AMONG OTHER THINGS, IN A CASE IN RE: RODRIGUEZ
4 REGARDING DETERMINATIVE SENTENCES IN CALIFORNIA.

5 IN 1975 I BECAME LEGAL COUNSEL TO THE GOVERNOR OF
6 CALIFORNIA. HE WAS, AS YOU MIGHT IMAGINE, A RATHER
7 UNCONVENTIONAL GOVERNOR. IN THAT CAPACITY I SERVED AS
8 LEGAL COUNSEL TO THE GOVERNOR FOR SIX YEARS.

9 I WAS HIS CHIEF REPRESENTATIVE TO THE LEGISLATURE
10 WITH RESPECT TO SENTENCING ISSUES, AND I WAS THE
11 GOVERNOR'S REPRESENTATIVE IN THE LOBBYING OF WHAT BECAME
12 THE DETERMINATIVE SENTENCING ACT OF 1976, WHICH IS A
13 DRAMATIC DEPARTURE FOR CALIFORNIA. WE HAVE HAD
14 INDETERMINATIVE SENTENCING SINCE 1970 UNTIL TEN YEARS AGO.

15 IN 1979 SEE BECAME SUPERIOR COURT JUDGE HERE IN
16 SAN FRANCISCO AND ACTUALLY SENTENCED PEOPLE UNDER THE ACT
17 THAT I HAD HELPED TO WRITE.

18 AND IN 1980 I BECAME THE PRESIDING JUDGE OF THE
19 CALIFORNIA COURT OF APPEALS.

20 LET ME SAY YOU HAVE AN IMPOSSIBLE TASK. THERE IS
21 NO WAY THAT YOU ARE GOING TO COME UP WITH GUIDELINES THAT
22 WILL SATISFY EVERYBODY OR EVEN MOST PEOPLE. IT IS SIMPLY
23 NOT IN THE CARDS. AS ONE ENGAGED IN THAT ENTERPRISE, I CAN
24 SAY THAT WITH VIRTUAL CERTAINTY.

25 THE STATUTE THAT DEFINES YOUR PURPOSE, THE

1 PURPOSES OF THE GUIDELINES YOU ARE CHARGED WITH DRAFTING,
2 IS A SELF CONTRADICTION. SECTIONS 901 OF TITLE 28 OF THE
3 UNITED STATES CODE, SUBSECTION 1 (A), PROVIDES THAT THE
4 PURPOSE OF THESE GUIDELINES ARE FIRST TO PROVIDE CERTAINTY
5 AND FAIRNESS IN MEETING THE PURPOSES OF SENTENCING AND
6 AVOIDING SENTENCING DISPARITIES AMONG DEFENDANTS WITH
7 SIMILAR RECORDS.

8 THAT'S THE FIRST PURPOSE.

9 THE SECOND PURPOSE IS TO MAINTAIN SUFFICIENT
10 FLEXIBILITY TO PERMIT INDIVIDUALIZED SENTENCES. THAT
11 REALLY DESCRIBES THE INTERNAL CONFLICT BETWEEN LAW AND
12 EQUITY. IT IS A CONFLICT THAT HAS NOT AND CANNOT BE
13 RESOLVED. IT IS THE YINGS AND YANGS OF OUR JUDICIAL
14 SYSTEM. ALL I THINK YOU CAN DO IS THE BEST YOU CAN.

15 I HAVE INTENDED -- I UNDERSTAND THE COMMISSION
16 RUNNING LATE, AND I HAVE SOME PREPARED REMARKS THAT ARE
17 GOING TO FOCUS ON ENTIRE DISPARITIES IN SENTENCING. .
18 WHAT I INTENDED TO DO IS TO STATE WHAT I BELIEVE IS A
19 VACUUM IN THE GUIDELINES, IN THE PROPOSED -- NOT PROPOSE A
20 SOLUTION, BUT TO DESCRIBE TO YOU THE CALIFORNIA MECHANISM
21 FOR REVIEWING FOR DISPARITIES.

22 BUT I WANT TO TAKE A FEW MOMENTS TO ADDRESS
23 SOMETHING MORE FUNDAMENTAL WHICH I DON'T THINK IS ENTIRELY
24 UNRELATED, AND I FORMULATED THIS IN MY MIND OVERNIGHT.

25 IN READING THE GUIDELINES, PARTICULARLY THE EARLY

1 SECTION OF THE GUIDELINES, ONE DISCERNS ON THE PART OF
2 THOSE WHO DRAFTED THOSE GUIDELINES, THE REAL AMBIVALENCE
3 ABOUT THE ROLE OF REHABILITATION.

4 FOR EXAMPLE, THE DRAFT REPORT STATES ON PAGE 7,
5 AND I QUOTE, "TO THE EXTENT CONSISTENT WITH THE OBJECTIVES
6 OF PROTECTING THE PUBLIC AND PROVIDING JUST PUNISHMENT AND
7 DETERRENCE. THE PURPOSE OF THE PROPOSED GUIDELINES IS TO
8 PROMOTE REHABILITATION OF THE OFFENDER IN THE MOST
9 EFFECTIVE MANNER."

10 LATER ON THE SAME PAGE THE REPORT ALLOWS FOR THE
11 "GOAL OF REHABILITATION AS SECONDARY TO OTHER GOALS AND
12 THAT REHABILITATION IS A PRIMARY SENTENCING CONSIDERATION
13 ONLY FOR RELATIVELY MINOR OFFENSES.

14 I WOULD URGE YOU TO EXTRICATE THE WHOLE CONCEPT
15 OF REHABILITATION FROM THE SENTENCING GUIDELINES. I SAY
16 THAT NOT FROM THE POINT OF VIEW OF ONE WHOSE ATTITUDE
17 ABOUT SENTENCES IS POINTED. I SAY THAT FROM THE POINT OF
18 VIEW OF FAIRNESS. I THINK THAT THE CONCEPT OF
19 REHABILITATION, I BELIEVE IT BELONGS IN OUR PENAL
20 SENTENCE, BUT I DON'T BELIEVE IT BELONGS IN OUR SENTENCING
21 AND I THINK IT IS A POTENTIAL SOURCE OF UNFAIRNESS.

22 NOW, LET ME EXPLAIN WHAT I MEAN. UNFAIRNESS IN
23 SENTENCING FROM MY POINT OF VIEW CAN BE DESCRIBED FROM TWO
24 SEPARATE POINTS OF VIEW. THERE IS THE INTRINSIC FAIRNESS
25 IN A SENSE, DOES THE SENTENCE FIT THE CRIME THAT THE

1 DEFENDANT COMMITTED.

2 I DON'T WANT TO TALK ABOUT THAT ASPECT OF
3 FAIRNESS. I CAN TELL YOU WHAT WE DO IN CALIFORNIA. THAT
4 IS NOT ASPECTS OF FAIRNESS I AM TALKING ABOUT. I AM
5 TALKING ABOUT THE FAIRNESS OR LACK OF IT THAT ARISE FROM
6 UNIFORMITY OR ITS OPPOSITE DISPARITIES. IT IS THAT
7 ELEMENT OF FAIRNESS THAT I INTEND TO ADDRESS AND I BELIEVE
8 THE SENTENCE REVIEW HELPS ACHIEVE, AND IT IS THAT ELEMENT
9 OF FAIRNESS THAT I THINK IS THE PRINCIPAL PURPOSE OF THE
10 STATUTE THAT THIS COMMISSION IS CHARGED --

11 I MIGHT NOTE THAT THE WORD REHABILITATION APPEARS
12 ONLY ONCE IN THE SENTENCING REQUIREMENTS, AND THAT IS NOT
13 IN SECTION 991. IT IS IN SECTION 994 WHERE IT STATES,
14 "REHABILITATION MAY NOT BY ITSELF PROVIDE EXTRAORDINARY
15 AND COMPELLING REASONS FOR SENTENCE REDUCTION." SO THAT
16 THE ONLY PLACE THAT REHABILITATION IS IS IN THE NEGATIVE
17 SENSE AND NOT A POSITIVE SENSE.

18 I DON'T KNOW IF I CAN GIVE YOU COPIES OF IT. I
19 WILL BE HAPPY TO HAND TO THE CLERK, XEROX COPIES OF THE
20 FIRST SECTION OF THE CALIFORNIA DETERMINATIVE SENTENCE
21 ACT. THAT FIRST SENTENCE OF THAT STATUTE STATES, AND I
22 QUOTE "THE LEGISLATIVE FINDS AND DECLARES THAT THE PURPOSE
23 OF IMPRISONMENT FOR CRIME IS PUNISHMENT."

24 NOW, THAT SENTENCE WAS NOT INSISTED UPON BY THE
25 GOVERNMENT. THAT SENTENCE WAS NOT INSISTED UPON BY

1 ANYBODY IN THE LEGISLATURE. THAT SENTENCE WAS NOT
2 INSISTED UPON BY THE DISTRICT ATTORNEY OR BY ANYBODY IN
3 LAW ENFORCEMENT. THAT SENTENCE WAS INSISTED UPON BY THE
4 CALIFORNIA PRISONERS UNION. IT WAS PRISON INMATES WHO
5 WANTED TO MAKE IT ABSOLUTELY CLEAR THAT REHABILITATION WAS
6 NOT THE MODEL FOR SENTENCING, AND IT IS BECAUSE OF THE
7 PRISONERS UNION IT IS IN 1970, ACTIVE ORGANIZATION IN THIS
8 STATE, VERY EFFECTIVE LOBBYIST, INCIDENTALLY, WHO KNEW
9 BETTER THAN ANYONE OF THE PERNICIOUS IMPLICATIONS OF THE
10 REHABILITATIVE MODEL OF SENTENCING?

11 I WANT TO BE CLEAR. I AM NOT SAYING THAT
12 REHABILITATION SHOULDN'T BE INVOLVED IN THE WAY WE
13 ADMINISTER OUR SYSTEM.

14 I BELIEVE THAT THIS UNFORTUNATE CONFLICT BETWEEN
15 PUNISHMENT AND REHABILITATION IS A RED HERRING. ANY
16 SYSTEM THAT PUNISHES WITHOUT REHABILITATION IS IMMORAL.

17 ANY SYSTEM THAT PURPORTS TO BE REHABILITATIVE
18 WITHOUT PUNISHMENT IS INEFFECTIVE. WE HAVE TO HAVE BOTH.
19 I AM ONLY TALKING ABOUT AS A CRITERIA FOR SENTENCING.

20 I MENTIONED EARLIER THE RODRIGUEZ CASE. THERE
21 ARE CASES IN CALIFORNIA THAT HAVE BEEN INSTRUCTIVE. MR.
22 RODRIGUEZ HAD DONE TWENTY-TWO YEARS IN SAN QUINTON AS A
23 MAXIMUM SECURITY PRISON FOR VIOLATION OF PENAL CODE
24 SECTION 288. IT WAS NOT A CASE OF ANY AGGRAVATION. IT
25 WAS SIMPLE VIOLATION OF THE CHILD MOLESTER ACT. THERE IS

1 NO PENETRATION. HE WAS CHARGED WITH FUNDLING THE PRIVATE
2 PARTS OF A SIX YEAR OLD GIRL IN AN AUTOMOBILE IN THE
3 PRESENCE OF HIS WIFE. THAT WAS HIS DEFENSE. TODAY -- AND
4 THAT WAS HIS FIRST OFFENSE, I BELIEVE.

5 HE DID TWENTY-TWO YEARS IN A MAXIMUM SECURITY
6 PRISON. THE REASON HE DID TWENTY-TWO YEARS -- THIS IS NOT
7 DISCERNIBLE FROM READING THE OPINION. HE WAS MY CLIENT.
8 I CAN TELL YOU THE REASON HE DID TWENTY-TWO YEARS. HE WAS
9 BORDERLINE MENTALLY RETARDED. HE DID NOT SPEAK ENGLISH
10 VERY WELL, AND WHEN HE ANNUALLY APPEARED BEFORE PAROLE
11 BOARD HE REFUSED TO EXHIBIT ATTRITION. THAT'S WHY HE DID
12 TWENTY-TWO YEARS.

13 NOW, I WAS RATHER AMAZED TO HEAR A FEDERAL
14 DEFENDER EARLIER IN EFFECT SEEK TO JUSTIFY DISPARITIES.
15 SHE GAVE YOU AN EXAMPLE OF ILLEGAL ALIEN CONVICTED IN SAN
16 DIEGO AND COMPARED IT TO SOME ILLEGAL ALIEN IN NEBRASKA,
17 AND PROPOSED THAT SOME DISPARITIES OUGHT TO BE ALLOWED TO
18 REFLECT THE DIFFERENCES NORMS THOSE TWO COMMUNITIES.

19 WELL, CAN YOU IMAGINE IF THE DEFENDANTS IN THOSE
20 TWO CASES WERE CONFINED IN ADJOINING CELLS AND BOTH
21 CONTRIBUTED TO THE SAME OFFENSE AND ONE HAD DONE TEN YEARS
22 AND THE OTHER FIVE? THE ONES THAT RECEIVED TEN YEARS THAT
23 WAS NOT THE ONE CONVICTED IN SAN DIEGO WOULD HAVE A VERY
24 GENUINE AND VERY REAL SENSE OF INJUSTICE.

25 JUDGE MAC KINNON ASKED ANOTHER WITNESS WHETHER HE

1 FELT THAT REASONABLE DIFFERENCES OUGHT TO BE ALLOWED. I
2 WOULD SAY NO. THIS IS NOT A MUNICIPAL ORDINANCE THAT YOU
3 ARE CONSIDERING. THIS IS NOT A STATE LAW THAT YOUR ARE
4 CONSIDERING. THIS IS A FEDERAL STATUTE.

5 YOU ARE SPEAKING, THE CONGRESS IS SPEAKING AND
6 THIS COMMISSION IS SPEAKING AND FEDERAL JUDGES ARE
7 SPEAKING AS AGENTS, NOT OF THE LOCALITIES, BUT OF THIS
8 NATION.

9 AND THE EFFECT OF ILLEGAL ALIENS IN OUR SOCIETY
10 ARE IN A VERY REAL SENSE AND A VERY FUNDAMENTAL SENSE, I
11 BELIEVE, NO DIFFERENT THAN NEBRASKA THAN THEY ARE IN SAN
12 DIEGO.

13 AND ONCE YOU PERMIT REGIONAL DIFFERENCES TO PLAY
14 A ROLE OR ONCE YOU PERMIT THE DISTINCTION AS THE UNITED
15 STATES ATTORNEY FROM LOS ANGELES SUGGESTED, THAT THE CASE
16 THAT JUDGE SIRIKA TRIED IN SPECIAL INSTANCES, ONCE YOU
17 PROVIDE JUSTIFICATION FOR DISPARITIES WITH RESPECT TO
18 CRITERIA THAT ARE FUNDAMENTALLY SUGGESTED AS IT IS IN THE
19 CONCEPT OF REHABILITATION, THAT THE REASON IT IS SO
20 PERNICIOUS IT CANNOT BE OBJECTIFIED. ONCE YOU DO THAT YOU
21 WILL HAVE A SYSTEM THAT WILL BE SO DISPARATE, SO
22 IRRETRIEVEABLY DISPARATE THAT IT WILL BE FUNDAMENTALLY
23 INIMICAL TO THE PURPOSE THAT CONGRESS SET BEFORE THIS
24 COMMISSION. YOU SHOULD NOT DO IT IN MY OPINION.

25 BEFORE I GET ENTIRELY CARRIED AWAY WITH THAT, LET

1 ME RETURN TO THE SUBJECT, AND REALLY GIVEN THE TIME
2 CONSTRAINTS, I HAD INTENDED TO FOCUS UPON.

3 THERE IS A PROVISION IN THE CALIFORNIA
4 DETERMINATIVE SENTENCE ACT. SECTION 11 AND WHAT IT STATES
5 IS THIS, AND I WILL READ THE STATUTE TO YOU, AND IT WAS AN
6 IMPORTANT PROVISION IN THE ENACTMENT OF THE LAW HERE IN
7 CALIFORNIA. "WITHIN ONE YEAR AFTER COMMENCEMENT OF THE
8 TERM OF IMPRISONMENT THAT THE BOARD OF PRISON TERMS," THAT
9 ESSENTIALLY OUR PAROLE BOARD, "SHALL REVIEW THE SENTENCE
10 TO DETERMINE WHETHER THE SENTENCE IS DISPARATE IN
11 COMPARISON WITH THE SENTENCES IMPOSED IN SIMILAR CASES.
12 IF THE BOARD OF PRISON TERMS DETERMINES THAT THE SENTENCE
13 IS DISPARATE, THE BOARD SHALL NOTIFY THE JUDGE, THE
14 DISTRICT ATTORNEY, THE DEFENSE ATTORNEY, THE DEFENDANT AND
15 THE JUDICIAL COUNCIL. THE NOTIFICATION SHALL INCLUDE A
16 STATEMENT OF THE REASONS FOR FINDING THE SENTENCE IS
17 DISPARATE.

18 WITHIN ONE HUNDRED TWENTY DAYS OF RECEIPT OF THIS
19 INFORMATION THE SENTENCING COURT SHALL SCHEDULE A HEARING
20 AND MAY RECALL THE SENTENCE AND COMMITMENT PREVIOUSLY
21 ORDERED AND RESENTENCE THE DEFENDANT IN THE SAME MANNER AS
22 IF THE DEFENDANT HAD NOT BEEN SENTENCED PREVIOUSLY
23 PROVIDED THE NEW SENTENCE IS NOT GREATER THAN THE INITIAL
24 SENTENCE."

25 NOW, THE SYSTEM THAT THE CALIFORNIA BOARD OF

1 PRISON TERMS USES TO DETERMINE WHETHER THE SENTENCE IS
2 DISPARATE IS A HIGHLY ELABORATE SYSTEM. ALTHOUGH WITH THE
3 ADVENT OF COMPUTERS, AND IT IS ONE OF THE VERY REASONS I
4 AM TOLD, TO IMPLEMENT --

5 BEFORE I DESCRIBE THAT, I SHOULD SAY, HOWEVER,
6 THAT ALTHOUGH YOUR STATUTE REFERS TO DISPARITIES AS DOES
7 YOURS, THERE IS NO DEFINITION OF DISPARITIES AS I BELIEVE
8 THERE'S NOT IN YOURS.

9 HOWEVER, THE ATTORNEY GENERAL OF CALIFORNIA HAS
10 PROVIDED THE BOARD OF PRISON TERMS A DEFINITION, AND THAT
11 DEFINITION HAS BEEN ACCEPTED BY THE COURTS OF THIS STATE,
12 AND THE DEFINITION IS AS FOLLOWS: "SENTENCING DISPARITIES
13 IS THE RESULT OF THE EXERCISE OF JUDICIAL DISCRETION.
14 THERE'S A SUBSTANTIAL DIFFERENCE BETWEEN THE SUBJECT
15 SENTENCE AND THE SENTENCES IMPOSED ON OTHER DEFENDANTS
16 COMMITTING THE SAME OFFENSE UNDER SIMILAR CIRCUMSTANCES."

17 THE CALIFORNIA BOARD OF PRISON TERMS HAS
18 BASICALLY DEVELOPED A FOUR-STEP REVIEW PROCESS FOR
19 DETERMINING DISPARITIES, AND THIS PROCESS IS APPLIED TO
20 EVERY DEFENDANT WHO IS DETERMINATIVELY SENTENCED IN THE
21 STATE OF CALIFORNIA. UNDER OUR SYSTEM WE HAVE RETAINED
22 INDETERMINATIVE SENTENCES FOR A VERY SMALL NUMBER OF
23 VARIOUS SERIOUS CRIMES, INCLUDING HOMICIDES.

24 WITH RESPECT TO ALL OTHERS, WHICH IS AN
25 OVERWHELMING MAJORITY, THE FOUR-STEP PROCESS IS AS

1 FOLLOWS: FIRST, THAT THE BOARD UTILIZES AN AUTOMATED
2 COMPUTER SCREENING PROCEDURE WHICH SORTS CASES ACCORDING
3 TO THE PRINCIPLE OFFENSE, IDENTIFIES THE POSSIBLE
4 SENTENCES FOR A PARTICULAR OFFENSE GROUP, AND MOST
5 IMPORTANTLY COMPUTES THE RELATIVE LIKELIHOOD THAT EACH OF
6 THE POSSIBLE SENTENCES WILL OCCURS. THE RELATIVE
7 LIKELIHOOD OF THE SENTENCE IS CALCULATED ON THE BASIS OF
8 SOMETHING CALLED OBSERVED SENTENCING PRACTICES; THAT IS
9 PAST SENTENCES ACTUALLY IMPOSED BY JUDGES IN ALL
10 DETERMINATIVE SENTENCING LAW CASES PRIOR TO THE IMPOSITION
11 OF THE SENTENCE IN QUESTION."

12 THAT IS TO SAY TODAY THE COMPUTER ANALYSIS WOULD
13 INCLUDE ALL SENTENCES THAT HAVE BEEN IMPOSED SINCE 1976,
14 THE BASE IS INCREASING ALL THE TIME. THIS IS ACCOMPLISHED
15 BY COMPUTER ASSIMILATION TECHNIQUES THAT PRODUCES TEN
16 THOUSAND THEORETICAL SENTENCES FOR THE PARTICULAR OFFENSE
17 GROUP, MANY OF WHICH ARE IDENTICAL.

18 IF THE DISTRIBUTION SHOWS THAT FEWER THAN TEN
19 POINT FIVE PERCENT OF THESE REPEATED ASSIMILATED SENTENCES
20 RESULTED IN A SENTENCE AS HIGH AS OR HIGHER THAN THE
21 ACTUAL SENTENCE IMPOSED IN THE CASE UNDER REVIEW THAT
22 SENTENCE IS IDENTIFIED AS QUOTE "BEARING." IT THEN
23 BECOMES THE SUBJECT OF CLOSER SCRUTINY BY THE BOARD
24 SENTENCE REVIEW UNIT.

25 THAT FIRST STAGE IS CLEARLY THE MOST CRITICAL AND

1 THE MOST ELABORATE.

2 THE SECOND STAGE THE SENTENCE REVIEW UNIT, WHICH
3 IS A CIVIL SERVICE EMPLOYEES PRISON BOARD WHO ARE EXPERTS
4 IN THESE MATTERS, REVIEWS THE CHARGING DOCUMENT, THE
5 ABSTRACT OF JUDGMENT, THE PROBATION OFFICER'S REPORT, THE
6 CONVICT'S RAP SHEET AND THE TRANSCRIPT OF THE SENTENCING
7 HEARING. IF AFTER THE SECOND REVIEW THE BEARING NATURE OF
8 THE SENTENCE REMAINS UNEXPLAINED, THEN THE THIRD REVIEW
9 OCCURS. THE CASE IS REFERRED TO A CASE ANALYSIS COMMITTEE
10 FOR COMPARISON OF THE SUBJECT GROUP OF OTHER CASES WHICH
11 THE FACTS ARE MOST SIMILAR TO THAT ON REVIEW.

12 IF AFTER THIS CLOSE COMPARISON THE COMMITTEE
13 FOUND NO JUSTIFICATION FOR THE VARIANT SENTENCE THEN IT
14 DECLARES A SENTENCE DISPARITY AND REFERS THE MATTER TO A
15 PANEL BEFORE ITSELF.

16 WHAT INVARIABLY HAPPENS AT THAT LEVEL, THE BOARD
17 OF PRISON TERMS AUTHORIZES ITS COUNSEL TO NOTIFY THE
18 SUPERIOR COURT WHO SENTENCED THE DEFENDANT AND TO FILE A
19 MOTION TO RECALL SENTENCE.

20 NOW, THE CALIFORNIA SUPREME COURT IN A CASE LAST
21 MONTH, A CASE ENTITLED PEOPLE VERSUS MARTIN, AND I BELIEVE
22 THAT IS IN -- THAT'S AT 42 CAL. APP. 3RD, AT PAGE 437, --
23 ESSENTIALLY TOLD THE TRIAL JUDGES OF THIS STATES THAT
24 ALTHOUGH THE STATUTE USES THE WORD "MAY" IN OTHER WORDS,
25 THE SUPERIOR COURT JUDGE MAY RECALL SENTENCE UPON A MOTION

1 TO DO SO BY THE BOARD OF PRISON TERMS THAT THAT
2 ADMINISTRATIVE DETERMINATION IS ENTITLED TO GET WEIGHT.

3 IN THE PAST SINCE THE STATUTE WAS ENACTED
4 CALIFORNIA JUDGES HAVE GRANTED MOTIONS TO RECALL IN I
5 WOULD GUESS FIFTEEN TO TWENTY PERCENT OF THE TIME. I
6 BELIEVE AT THAT TIME OPINION THEY WANT, AND I BELIEVE MOST
7 JUDGES WOULD AGREE WITH ME, IS GOING TO CHANGE THAT
8 DRAMATICALLY.

9 I NOTICE IN THE LOS ANGELES TIMES THIS MORNING
10 THERE IS AN ARTICLE ON PAGE 3 BY PHIL HAGEN ON --
11 DESCRIBING THIS PANEL'S WORK. AND IT QUOTES YOU, JUDGE
12 WILKINS, AS FOLLOWS: "NOW, SENTENCES" -- THAT MEANS
13 SENTENCINGS UNDER THE PROPOSED GUIDELINES. "NOW,
14 SENTENCES WILL BE MANDATORY IN NATURE. SIMILAR DEFENDANTS
15 WHO COMMIT SIMILAR CRIMES WILL BE SENTENCED IN SIMILAR
16 FASHION REGARDLESS OF THE JUDGE OR WHAT AREA OF THE
17 COUNTRY IT IS."

18 WITH ALL DUE RESPECT, SIR, I HOPE YOU ARE RIGHT,
19 BUT I THINK YOU ARE WRONG. AND I THINK YOU WOULD BE WRONG
20 NO MATTER HOW WELL YOU DISCHARGE YOUR RESPONSIBILITIES AND
21 NO MATTER HOW CONSISTENT YOU ARE WITH THE DECLARED
22 INTENTION OF CONGRESS TO DIMINISH, IF NOT WHOLLY
23 ELIMNINATE DISPARITIES, AND THE REASON IS THAT JUDGES ARE
24 HUMAN BEINGS, AND THERE ARE NO -- THERE ARE NO FACTORS
25 THAT ALL JUDGES WITH SENTENCING CONSIDERATIONS, THAT ALL

1 JUDGES WHO ARE HUMAN BEINGS WILL SEE THE SAME. THAT'S ONE
2 OF THE THINGS THAT WE HAVE LIMITED IN CALIFORNIA, AND THAT
3 IS ONE OF THE REASONS THAT I BELIEVE A PROVISION FOR
4 DISPARATE SENTENCE REVIEW OUGHT TO BE INCORPORATED IN YOUR
5 GUIDELINES.

6 JUDGES MAC KINNON SAID EARLIER, AND I BELIEVE IT
7 IS ABSOLUTELY RIGHT, THAT THE OVERWHELMING NUMBER OF
8 PEOPLE WHO HAVE INTELLIGENTLY WRITTEN ABOUT THE URGE TO
9 REFORM THE CRIMINAL SENTENCING ARE TALKING ABOUT TAKING
10 DISCRETIONS AWAY FROM JUDGES.

11 AND INCIDENTALLY I MIGHT ADD THAT IT IS THE
12 JUDGES WHO HAVE BEEN THE MOST AGGRESSIVE IN THAT
13 ENTERPRISE, NOT USUALLY THE TRIAL JUDGES, BUT JUDGES.

14 ALTHOUGH, MARTIN FRANKLIN IS A FORMER TRIAL JUDGE
15 THAT CERTAINLY WAS CHIEF IN HIS TIME; DISTINGUISHED
16 FEDERAL AND STATE JUDGES. THE DISPARITIES -- THE SENTENCE
17 REVIEW THAT CALIFORNIA ADOPTED IS TO TAKE THAT
18 DISCRETION -- IS TO LEAVE THE DISCRETION WITH THE JUDGE,
19 BUT ENGAGE AN ADMINISTRATIVE BODY IN URGING
20 RECONSIDERATION.

21 I SEE NO REASON WHY A STATE LEGISLATURE OR THIS
22 COMMISSION CONSISTING OF YOUR OWN STATUTE COULD NOT TAKE
23 IT ENTIRELY AWAY FROM THE JUDGE. YOU COULD GIVE AN
24 ADMINISTRATIVE BODY WITHIN THE FEDERAL SYSTEM THE RIGHT TO
25 REDUCE A SENTENCE. IT IS MORE DIFFICULT WHERE THE

1 DISPARITY IS ON THE LOW END. INCIDENTALLY WHICH IS MUCH
2 RARER IN CALIFORNIA, ALTHOUGH IT DOES OCCUR. UNDER
3 CALIFORNIA STATUTE THE SENTENCE CANNOT BE LENGTHENED EVEN
4 IF THERE IS A DISPARITY INVOLVED. BUT I BELIEVE THAT THE
5 CONSTITUTION HAS TO BE ADHERED TO AS WELL AS IN THE
6 FEDERAL SYSTEM.

7 I CAN SPEAK ABOUT THIS LONGER, BUT LET ME CLOSE
8 BY EMPHASIZING THAT THERE ARE NUMEROUS FACTORS IN THESE
9 GUIDELINES THAT ARE HIGHLY SUBJECTIVE. WAS THE VICTIM
10 VUNERABLE? DID THE VICTIM SUFFER PSYCHOLOGICAL INJURY?

11 WHAT IS THE DIFFERENCE BETWEEN PSYCHOLOGICAL
12 INJURY, SIGNIFICANT PSYCHOLOGICAL INJURY OR EXTREME
13 PSYCHOLOGICAL INJURY. DIFFERENT JUDGES WILL SEE THAT IN
14 DIFFERENT WAYS. THE ADVANTAGE THAT AN ADMINISTRATIVE BODY
15 HAS IS THAT IT IS DETACHED FROM THE INDIVIDUAL CASE AND
16 CAN LOOK AT ALL CASES, AND IS IN A MUCH BETTER POSITION
17 THAN AN INDIVIDUAL JUDGE TO UNDERTAKE THE FUNCTION OF
18 PREPARING SENTENCES.

19 THANK YOU VERY MUCH.

20 CHAIRMAN WILKINS: THANK YOU VERY MUCH.

21 ANY QUESTIONS TO MY RIGHT?

22 TO MY LEFT?

23 JUDGE BREYER: I HAVE A LOT OF QUESTIONS. I
24 MEAN, IT IS VERY, VERY HELPFUL, YOUR TESTIMONY, AND I SEE
25 THAT WE ARE SHORT OF TIME.

1 ARE YOU GOING TO BE AROUND?

2 JUDGE KLEIN: JUDGE BREYER, I WOULD BE HAPPY TO
3 COME BACK AFTER LUNCH. MY OFFICE IS RIGHT ACROSS THE
4 STREET.

5 JUDGE BREYER: I THINK THAT THE CHAIRMAN IS
6 AGREEABLE THAT THAT WOULD BE VERY HELPFUL.

7 AND YOU HAVE HEARD THE QUESTIONS BEFORE, I THINK.

8 JUDGE KLEIN: YES.

9 JUDGE BREYER: I AM QUITE INTERESTED, TOO, IN THE
10 QUESTION OF CHARGE OFFENSE AND THE WAY YOU DEAL WITH PLEA
11 BARGAINING AND WHETHER THIS ATTORNEY OR PROSECUTOR --

12 WERE YOU HERE BEFORE?

13 JUDGE KLEIN: I WAS HERE. I CAME LATE IN THE
14 TESTIMONY OF MS. CLARKE.

15 JUDGE BREYER: WELL, IF YOU ARE GOING TO BE
16 BACK --

17 CHAIRMAN WILKINS: I WILL GIVE YOU A CONVENIENT
18 TIME FOR THIS AFTERNOON.

19 JUDGE KLEIN: IT WOULD BE MOST CONVENIENT FOR ME
20 TO SET THE TIME RIGHT NOW, JUDGE.

21 CHAIRMAN WILKINS: IT WOULD APPEAR THAT IT MIGHT
22 BE BEST TO CALL THE JUDGE BACK AT THE END OF THE DAY SO WE
23 CAN TAKE THE TIME NECESSARY RATHER THAN WORRY ABOUT HOW
24 MUCH TIME FOR EACH WITNESS.

25 HOW ABOUT -- WE MIGHT PLAN TENTATIVELY AT 4:00

1 O'CLOCK.

2 JUDGE KLEIN: THAT WILL BE FINE.

3 CHAIRMAN WILKINS: I WILL HAVE SOMEONE CALL YOU
4 TO DETERMINE THAT AS WE GET CLOSER TO THAT HOUR.

5 JUDGE KLEIN: I CAN BE REACHED IN MY CHAMBERS AT
6 557-3006.

7 CHAIRMAN WILKINS: THANK YOU VERY MUCH. THANK
8 YOU AGAIN, JUDGE.

9 JUDGE KLEIN: THANK YOU.

10 CHAIRMAN WILKINS: OUR NEXT WITNESS, MR. WILLIAM
11 BROCKETT. MR. BROCKETT IS A MEMBER OF THE FIRM OF KEKER
12 AND BROCKETT HERE IN SAN FRANCISCO.

13 WE APPRECIATE YOUR ATTENDANCE. I KNOW YOU HAVE A
14 VERY BUSY SCHEDULE TODAY, MR. BROCKETT, AND THANK YOU
15 AGAIN.

16 WILLIAM BROCKETT, ESQ.

17
18 AS I WALKED OVER TO THIS HEARING I REALIZED
19 THAT -- I IDENTIFIED THIS AS A GOLDIE LOCK QUEST, A SEARCH
20 FOR SENTENCES THAT ARE NOT TOO BIG, NOT TOO SMALL, NOT TOO
21 HOT OR NOT TOO COLD. A DIFFICULT QUEST IT IS.

22 MY BACKGROUND IS VERY -- I WAS A DEFENDER IN SAN
23 DIEGO ON THE FEDERAL SIDE, STATE DEFENDER IN SAN DIEGO,
24 AND THEN CAME HERE AND WAS A FEDERAL DEFENDER.

25 ONE OF MY FIRST EXPERIENCES AS A FEDERAL DEFENDER

1 WAS INHERITING A PORTFOLIO FROM MY PREDECESSOR WHICH
2 INCLUDED TEN BANK ROBBERS WHICH WERE PLED GUILTY NO DEALS.
3 SO I LEARNED A LOT ABOUT DISPARATE SENTENCINGS IN A BIG
4 HURRY, BECAUSE I GOT TEN OR TWENTY YEAR SENTENCES IN THAT
5 SHORT TIME. IT WAS A HARROWING EXPERIENCE, AND I WAS VERY
6 MUCH INTERESTED IN THE DISCUSSION ABOUT THE CRIMES LIKE
7 BANK ROBBERIES. AS DEFENSE COUNSEL YOU THINK SOMEHOW YOUR
8 CLOSING ARGUMENT OR YOUR ELOCUTION CAN MAKE A DIFFERENCE.
9 AS THE YEARS PASSED I REALIZED USUALLY IT DIDN'T.

10 SO I WAS FACED WITH THE SITUATION WHERE THE
11 SENTENCES SHOULD BE PROBATION OR TWENTY YEARS. AND IT WAS
12 A TERRIBLE THING FOR ME OR MY CLIENT OR AN ASSISTANT TO GO
13 THROUGH.

14 I THINK, HOWEVER, THAT THAT PROBLEM HAS BEEN
15 ALLEVIATED IN LARGE PART BY THE ADDITION OF THE SALIENT
16 FACTORS SCORE, AND THE POWER THE PAROLE BOARD HAS NOW TO
17 EVEN OUT THE DISPARITIES, AND SO YOU FIND BEFORE YOU
18 ANOTHER DEFENDER WHO IS ARGUING FOR DISPARITIES TO SOME
19 EXTENT.

20 THE PROBLEM I SEE WITH THE AMBITIOUS SCHEME WHICH
21 IS BEGINNING TO FORM WITH THIS COMMISSION IS A PROBLEM NOT
22 SO MUCH WITH THE HIGHEST, BECAUSE I THINK PERHAPS DEFENSE
23 LAWYERS MORE THAN ANYONE ELSE WILL AGREE THAT THERE ARE
24 CERTAIN PEOPLE WHO SHOULD BE PUT IN PRISON AND THE KEY
25 THROWN AWAY AND JUDGES SHOULDN'T HAVE THE FLEXIBILITY TO

1 GIVE PROBATION OR VERY SHORT SENTENCES IN THOSE KINDS OF
2 CASES.

3 TO MAINTAIN PUBLIC CONFIDENCE IN THE SYSTEM,
4 THAT'S NECESSARY. IF YOU WILL, TO CARRY OUT THE -- AIM
5 THE PUNISHMENT FOR VENGEANCE. I THINK THERE'S A CERTAIN
6 CATHARSIS WHICH COMES FROM SEVERE SENTENCES IN CERTAIN
7 KINDS OF CASES.

8 BUT I AM CONCERNED ABOUT THE LOW MAN CRIMINAL,
9 AND BELIEVE ME, IF YOU ARE A DEFENDER OR IF YOU ARE A
10 JUDGE OVER A TIME YOU BEGAN TO SEE THAT WHAT YOU READ
11 ABOUT IN THE PAPER IS NOT QUITE THE FULL STORY OF THE
12 TYPES OF PERSONS THAT COME BEFORE THE COURTS FOR
13 SENTENCING IN FEDERAL CASES.

14 I REMEMBER EARLY ON CASES INVOLVING -- FEDERAL
15 CASES INVOLVING SOMEBODY WHO TOOK A CASE OF (INAUDIBLE)
16 FROM THE PRESIDIO, THEFT FROM A FEDERAL RESERVATION. I
17 REMEMBER THE STUFF WAS TAKEN FROM THE SHIP STORE. THAT
18 WAS THEFT.

19 I REMEMBER THE BANK ROBBERS. BANK ROBBERS ARE
20 AMONG THE MOST PATHETIC CRIMINALS AROUND. THE TYPICAL
21 BANK ROBBERY CASE, IF YOU ARE ON TRIAL AND SOMEBODY ASK
22 YOU WHAT IT IS ABOUT, AND THE ANSWER IS THINK OF THE PRIST
23 GOING TO CONFESSION.

24 TYPICALLY MY CLIENT HAD LEFT HIS FINGERPRINTS AND
25 HIS PHOTO FULL FACE AND HAD CONFESSED. IF YOU WANT TO GET

1 RICH QUICKLY, YOU DON'T ROB BANKS. THE PROBLEM WITH THE
2 SYSTEM IN THIS AREA, IN THE DRUG AREA, AND OTHER AREAS,
3 THERE ARE MINIMAL SENTENCES WHICH DON'T GIVE THE COURT THE
4 OPTION OF GIVING PROBATION OR SHORT SENTENCES. BY THAT I
5 MEAN I HAVE REPRESENTED MORE THAN ONE BANK ROBBER WHO
6 STUMBLED INTO A BANK DEAD DRUNK, HANDED OVER A NOTE AND
7 PASSED OUT ON THE FLOOR AND WAS CAPTURED WALKING OUT THE
8 DOOR, NO WEAPON INVOLVED.

9 AS I READ THE GUIDELINES THE MINIMUM SENTENCE FOR
10 THAT DEFENDANT WOULD BE OVER FIVE YEARS. WHAT DOES THAT
11 DO? FOR ONE THING, IT OFFENDS YOUR SENSE OF WHAT JUSTICE
12 SHOULD BE. FOR ANOTHER, IT CAN ENCOURAGE IN SOME CASES
13 PLEADING THESE PEOPLE GUILTY.

14 I HAVE LECTURED ON ETHICS AT SOME OF THE LAW
15 SCHOOLS AROUND THE AREA AND PEOPLE HAVE ASKED ME ABOUT MY
16 BIGGEST ETHICAL DILEMMA OVER THE YEARS, AND THAT WAS IN
17 SAN DIEGO WHEN I PLED PEOPLE GUILTY THAT I FELT, AS FAR AS
18 I COULD TELL, WERE INNOCENT. I DID THAT, BECAUSE AT THAT
19 TIME, IN THE EARLY '70S, BECAUSE OF SOMETHING CALLED THE
20 HARRISON ACT WHICH SOME OF YOU RECALL WHERE FOR BRINGING
21 DRUGS ACROSS THE BORDER ONE FACED A FIVE-YEAR MANDATORY
22 MINIMUM SENTENCE. THE DRUGS INCLUDED AMOUNTS OF MARIJUANA
23 IN THE GLOVE COMPARTMENT.

24 SO I WOULD HAVE A CLIENT WHO WAS A PASSENGER IN
25 THE CAR CROSSING A BORDER WITH MARIJUANA IN THE GLOVE

1 COMPARTMENT, AND THE DRIVER HAS PRETTY CLEARLY PUT THE
2 MARIJUANA IN THE GLOVE COMPARTMENT. BUT THE PROSECUTOR
3 WAS NOT PREPARED TO PLEA BARGAIN. MY CHOICE WAS TO GO TO
4 TRIAL, TO HOPE I COULD PERSUADE A SAN DIEGO JURY THAT THE
5 PASSENGER DID NOT KNOW ABOUT THE DRUGS AND I GOT TO ALSO
6 FACE A MANDATORY MINIMUM OF FIVE YEARS.

7 I SUGGEST WHEN YOU REVIEW YOUR GUIDELINES, YOUR
8 INDIVIDUAL GUIDELINES, YOU WILL FIND AREAS WHERE YOU HAVE
9 SIMILARLY SET, IF YOU WILL, MANDATORY MINIMUMS THAT DON'T
10 TAKE INTO ACCOUNT THIS EITHER PATHETIC OR MARGINAL OR
11 BORDERLINE KIND OF SITUATION. SO YOU SHOULD LOOK HARD AT
12 THAT.

13 I ALSO THINK IN FRAMING A PLATONIC IDEAL THAT IT
14 WOULD BE A BIG HELP TO HAVE BEFORE THE PUBLIC THE CURRENT
15 AVERAGE SENTENCES FOR THE OFFENSES INVOLVED.

16 I KNOW I READ JUDGE WILKINS' REMARKS. I REALIZE
17 IT WAS A RECENT DECISION NOT TO HAVE THIS OUT ON THE
18 TABLE, AND I ALSO REALIZE THAT THERE ARE PEOPLE THAT DROWN
19 IN RIVERS THAT HAVE A DEPTH OF THREE FEET. SO THAT THE
20 AVERAGES DON'T ALWAYS TELL THE WHOLE STORY.

21 BUT THEY WOULD BE VERY USEFUL BOTH TO GIVE US
22 SOME IDEA OF THE IMPACT ON THE PRISON SYSTEMS AND ALSO
23 SOME KIND OF ROUGH ROCK AND ROLL CONSENSUS WHAT ALL JUDGES
24 IN THE COUNTRY ARE DOING ABOUT CERTAIN OFFENSES.

25 I WOULD SUGGEST ALSO THAT YOU OUGHT TO TABULATE,

1 AND YOU MAY EVEN HAVE THIS DATA, THE DETERMINATION OF WHAT
2 CRIMES REALLY ARE THE CRIMES THAT ARE COMING INTO FEDERAL
3 COURTS DAY IN AND DAY OUT, BECAUSE THE AMBITIOUS SCHEDULE
4 YOU HAVE HERE COVERS OFFENSES I HAVE NEVER SEEN, EITHER
5 PERSONALLY OR SECONDARILY, OR NEVER WILL SEE. BANK
6 ROBBERIES, DRUG OFFENSES, FALSE STATEMENTS AND MAIL FRAUD,
7 AND THEN YOU PROBABLY HAVE EIGHTY PERCENT OF THE OFFENSES
8 THAT ARE IN FEDERAL COURTS, AND THEN YOU COULD FOCUS YOUR
9 EFFORTS ON PERHAPS FINE TUNING THOSE UP.

10 I REALIZE THAT ONCE YOU -- I HAVE SOME SPECIFIC
11 COMMENTS WHICH PERHAPS HAVE NOT OCCURRED TO YOU ABOUT SOME
12 OF THE COMPLAINTS. ONE SPECIFIC COMMENT HAS TO DO WITH
13 FINING CORPORATIONS.

14 THERE WAS A CASE IN THIS CIRCUIT CALLED U.S. V.
15 BUSH WHICH I TRIED IN JUDGE BREYER'S COURTROOM, AND REALLY
16 THAT NINTH CIRCUIT SETS THE LAW ON THE LIABILITIES OF
17 CORPORATIONS FOR CRIMINAL CONDUCT OF ITS EMPLOYEES. IT IS
18 A SURPRISE RESULT I THOUGHT THEN AND I THINK NOW, BECAUSE
19 WHAT IT SAYS IS EVEN IF THE CORPORATION HAS WRITTEN
20 INSTRUCTIONS AND HAS SPECIFICALLY TOLD THE CRIMINAL
21 DEFENDANT NOT TO DO THE ACT WHICH IS CHARGED, THE
22 CORPORATION CAN STILL BE FOUND GUILTY. THAT'S THE LAW.
23 THE LAW HAS ALSO BEEN ADOPTED IN OTHER STATES.

24 SO I SUGGEST AS TO THE CORPORATE FINES ASPECT YOU
25 SHOULD BUILD INTO THE MITIGATION PORTION SOME KIND OF

1 CONSIDERATION THAT THE EFFORTS WHICH HAVE BEEN MADE BY THE
2 CORPORATION TO PREVENT THE CRIMINAL ACTIVITIES BEFORE IT
3 OCCUR. I DON'T MEAN THE PROSECUTION BUT BEFORE IT OCCURS.
4 THAT WOULD ENCOURAGE JUST THE KIND OF CORPORATE, GOOD
5 CITIZENS BEHAVIOR YOU WANT.

6 I DIDN'T SEE ANYTHING IN THE PROPOSED GUIDELINES
7 THAT DEALT WITH ENTRAPMENT. IN MY EXPERIENCE, WHICH NOW
8 TENDS MORE AND MORE TO WHITE-COLLAR CRIMES, ABOUT FIVE
9 PERCENT OF THE CASES I DEFEND INVOLVE EITHER ENTRAPMENT OR
10 ACT OF GOVERNMENT ENCOURAGEMENT, AND AGAIN THE JUDGES HAVE
11 SAID IN TRIAL IT IS A NECESSARY EVIL, BUT NONE OF US LIKE
12 IT AND SOMEHOW IT OUGHT TO BE PUT ONTO THE SCALES OF
13 JUSTICE WHEN IT COMES TO SENTENCING, BECAUSE THE
14 ENTRAPMENT DEFENSES ARE GETTING HARDER AND HARDER TO
15 SUCCESSFULLY HANDLE. THAT OUGHT TO BE A CONSIDERATION.

16 WHAT ABOUT THE DIFFERENCE BETWEEN COMMITTING A
17 CRIME AND ATTEMPTING TO COMMIT A CRIME?

18 ONCE AGAIN I AM IN TRIAL RIGHT NOW, SO YOU
19 HAVEN'T READ THIS WITH THE CARE OF A SCHOLAR, BUT I DIDN'T
20 SEE ANY DISTINCTION BETWEEN THE ATTEMPT AND THE ACT.

21 I DON'T SEE AIDING AND ABETTING SPREAD OUT AND
22 TREATED ANY DIFFERENTLY, AND MY QUESTION TO YOU IS,
23 SHOULDN'T IT BE?

24 I THINK MAIL FRAUD AND THE SECTION CALLED 1001,
25 WHICH IS VERY PREVALENT, NEED -- ARE SO AMORPHOUS AND IT

1 IS SO HARD TO PIN THEM DOWN IT'S LIKE NAILING JELLY TO THE
2 WALL, THAT MAYBE YOU OUGHT TO THROW UP YOUR HANDS IN THAT
3 AREA AND ALLOW THE JUDGES A WIDE DISCRETION, BECAUSE NO
4 CASE IS QUITE LIKE SOME OTHER CASE.

5 SOME OF THE SPECIFIC PROBLEMS WHICH I HAVE
6 ADDRESSED MORE IN DETAIL IN MY WRITTEN REMARKS WHICH I
7 KNOW THIS COMMISSION WILL PAY ATTENTION TO, BUT I THINK IT
8 IS NOT NECESSARY TO CHANGE. MAYBE IT IS NECESSARY NOT TO
9 CHANGE. MY SENSE NOW AS A DEFENSE LAWYER, AND NOT AS A
10 PERSON WHO IS CRYING OUT FOR SHORT SENTENCES, WITH THE
11 ADDITION OF THE SALIENT FACTORS SCORE THAT WE HAVE A
12 SYSTEM THAT WORKS, AND WHAT THE COMMISSION MIGHT CONSIDER
13 DOING IS USING ALL OF ITS WISDOM AND DATA AND COLLECTIVE
14 EXPERIENCE TO FINE TUNE THAT AND THEN PROVIDE SPECIFIC
15 GUIDELINES AS TO OFFENSES THAT ARE SO HEINOUS THAT THE
16 JUDGES SHOULD HAVE NO FLEXIBILITY.

17 THANK YOU.

18 CHAIRMAN WILKINS: THANK YOU VERY MUCH, MR.
19 BROCKETT.

20 WHAT WOULD YOU SUGGEST WE WRITE IN THE GUIDELINES
21 TO TAKE CARE OF THE DRUNK BANK ROBBER? ASSUMING THAT IS
22 AN EXTREME EXAMPLE OF A BANK ROBBERY, BUT I UNDERSTAND
23 YOUR EXAMPLE. WHAT DO WE SAY OTHER THAN IN THOSE EXTREME
24 CASES DEPART FROM THE GUIDELINES?

25 MR. BROCKETT: I CAN'T GIVE YOU A QUICK ANSWER.

1 I DON'T KNOW.

2 BUT THE FIRST THING COMES TO MIND IS LOWER THE
3 MINIMUM FROM THIRTY-SIX TO ZERO. THAT DEFEATS THE PURPOSE
4 OF MAKING BANK ROBBERY A SERIOUS OFFENSE.

5 I THINK THE ANSWER IS YOU GOT TO HAVE SOME SORT OF
6 ESCAPE CLAUSE WHICH WILL BE REVIEWED BY THE COURT OF
7 APPEALS TO DEAL WITH THAT SITUATION.

8 CHAIRMAN WILKINS: ALL RIGHT. THANK YOU.

9 ANY QUESTIONS TO MY LEFT?

10 JUDGE MAC KINNON: HOW DOES IT LOOK IN
11 CALIFORNIA?

12 MR. BROCKETT: CALIFORNIA HAS -- YOU HAVE HEARD
13 SOME TESTIMONY ABOUT THAT, BUT THEY HAVE A SYSTEM WHICH
14 YOU MIGHT CONSIDER.

15 JUDGE MAC KINNON: THE SAME EXAMPLE; JUST TO
16 FOLLOW UP ON YOUR EXAMPLE.

17 MR. BROCKETT: THERE IS A SPECIFIC PENAL CODE
18 SECTION IN CALIFORNIA. IT IS LIKE THE IRS CODE. IT IS
19 TERRIBLE TO READ. IT IS A STATUTORY FRAME THAT HAS A MID
20 TERM, HIGH TERM AND LOW TERM, AND THEN ANOTHER STATUTE
21 TELLS YOU WHEN THE JUDGE CAN NEVER GRANT PROBATION AND
22 WHEN THE JUDGE CAN GRANT PROBATION ONLY IN EXTRAORDINARY
23 CIRCUMSTANCES.

24 NOW, WHETHER AN ARMED ROBBERY -- I CAN'T TELL YOU
25 WHERE THE ARMED ROBBERIES WOULD FIT IN THAT STATUTE. I

1 THINK THEY MIGHT.

2 SO YOU WOULD HAVE TWO KINDS OF -- YOU WOULD HAVE
3 ONE SITUATION WHERE THERE'S NO ESCAPE CLAUSE AND YOU WOULD
4 HAVE ANOTHER ONE WHICH SPELLS OUT WHEN THE JUDGE CAN GRANT
5 PROBATION IN EXTRAORDINARY CIRCUMSTANCES, AND YOU CAN
6 LIST, AS CALIFORNIA DOES, THE SPECIFIC FACTORS THE JUDGES
7 MUST LOOK TO IN MAKING SUCH A FINDING. SO I SUGGEST THAT
8 MAY BE A BETTER SOLUTION.

9 JUDGE MAC KINNON: COUNSEL, YOU TALKED ABOUT
10 ATTEMPTS. WHAT WOULD YOU DO ON BRIBERY, FOR INSTANCE?
11 DON'T YOU THINK THAT THE ATTEMPT TO BRIBE A PUBLIC
12 OFFICIAL IS JUST AS BAD AS THE ACTUAL BRIBING? IN OTHER
13 WORDS, IT COMES IN AND OFFERS HIM \$10,000 AND THE FELLOWS
14 SAYS, "I WON'T TAKE IT." WELL, ISN'T THAT THE OFFENSE?

15 MR. BROCKETT: IN YOUR HYPOTHETICAL IT IS. IN
16 MY HYPOTHETICAL SOMEBODY TALKS ABOUT POSSIBLY GIVING A
17 PUBLIC OFFICIAL MONEY OR SOMETHING ILLEGAL AND NEVER
18 FOLLOWS UP ANY FURTHER --

19 JUDGE MAC KINNON: THAT'S NOT AN ATTEMPT?

20 MR. BROCKETT: IN SOME CASES I HAVE DEFENDED --

21 JUDGE MAC KINNON: IT MAY BE TWO PEOPLE TALKING
22 TOGETHER IN A CONSPIRACY; IF THEY DID SOME OVERT ACT TO
23 IMPLEMENT IT, IF THEY CALLED THEM UP ON THE PHONE AND MADE
24 A DATE OR SOMETHING OF THAT CHARACTER, THAT'S NOT AN
25 ATTEMPT. THAT'S CONSPIRACY?

1 MR. BROCKETT: IT DEPENDS WHEN THE LAW SCOOPS IN.
2 IN OTHER WORDS, IT MAY BE A CONVERSATION,
3 ASASSINATION SET AND MONIES EXCHANGE HANDS, AND THE POLICE
4 OR THE FBI DECIDES THEY WANT TO NIP THIS IN THE BUD, SCOOP
5 IN BEFORE IT HAPPENS.

6 OFTEN -- SO THAT IS ONE HYPOTHETICAL.

7 I AM THINKING MORE IN TERMS OF ATTEMPTED BANK
8 ROBBERIES THAT FOR REASONS IT NEVER GOT TO FRUITION THE
9 PEOPLE WAS INCOMPETENT, DIDN'T HAVE THE HEART TO GO
10 THROUGH WITH IT WAS DIFFERENT THAN THE PROFESSIONAL
11 CRIMINAL THAT WOULD GO TO THE BANK AND --

12 JUDGE MAC KINNON: WHAT CONSTITUTES AN ATTEMPT?
13 THERE ISN'T ANY CRIME OF ATTEMPTED BANK ROBBERY.
14 THERE'S -- THE OFFENSE STATUTE PRESCRIBES THAT ANY PERSON
15 WHO SHALL ENTER A BANK WITH AN INTENT TO COMMIT A BANK
16 ROBBERY IS GUILTY OF AN OFFENSE?

17 MR. BROCKETT: RIGHT. YOU WALK IN THE BANK AND
18 YOU CHANGE YOUR MIND.

19 JUDGE MAC KINNON: AND THE PENALTY ON THAT --

20 MR. BROCKETT: I AM SUGGESTING THAT IT SHOULD
21 BE IN THE FUTURE. THAT'S A GOOD EXAMPLE.

22 JUDGE MAC KINNON: THE OTHER THING IS THAT THERE
23 ARE SEVERAL STATUTES SUCH AS AN ATTEMPT TO OBSTRUCT
24 JUSTICE. THAT IS THE CRIME. THE CRIME IS THE ATTEMPT,
25 AND IT IS A SUBSTANTIVE ACT?

13 1 MR. BROCKETT: IT SHOWS IF YOU DEAL WITH
2 ATTEMPTS IN A DISCRIMINATING FASHION IT IS GOING TO BE
3 HARD WORK. I QUITE AGREE WITH YOU. THERE ARE CASES AND
4 THERE ARE CASES. I QUITE AGREE WITH THOSE EXAMPLES.

5 CHAIRMAN WILKINS: THANK YOU. ANY QUESTIONS?

6 THANK YOU VERY MUCH, NOT ONLY FOR YOUR TESTIMONY,
7 BUT FOR YOUR VERY INTERESTING WITNESS SUBMISSION. WE
8 ENJOYED READING IT. THANK YOU VERY MUCH.

9 MR. BROCKETT: I THANK THE COMMISSION AS WELL.

10 CHAIRMAN WILKINS: WE NOW STAND IN RECESS UNTIL
11 2:00 O'CLOCK P.M. SHARP.

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UNITED STATES SENTENCING COMMISSION
TUESDAY, NOVEMBER 18, 1986
2:00 O'CLOCK P.M.

Public Hearing - San Francisco, California
Ceremonial Courtroom - U. S. Courthouse

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6 JUDGE WILKINS: We'll continue now with
7 the proceeding testimony. We are very
8 privileged to have as our first witness this
9 afternoon Mr. James T. Lassart.

10 Mr. Lassart, come around? He is a former
11 Assistant District Attorney of San Francisco,
12 California. Also, in the U. S. Attorney's
13 Office and while there, as Chief of the Drug
14 Task Force team. He is now in private practice
15 with the law firm of Roper and Majeski, here in
16 San Francisco.

17 Delighted to see you.

18
19 +++

20 SPEAKER JAMES A. LASSART, ESQ.
21 LAW FIRM OF ROPER & MAJESKI
22 SAN FRANCISCO, CALIFORNIA

23 MR. LASSART: Thank you, Mr. Chairman.
24 Good afternoon, public, commissioner. I had an
25 opportunity to hear some of the testimony this

1 morning and being that I am the first person
2 after lunch I know that rule and I'll be brief.

3 I'd like to make some general remarks.
4 First of all with the change of the Federal
5 sentencing rule that are long needed and long
6 overdue, very welcome event, the need for a
7 truth in sentencing system is so far long
8 overdue and so difficult to explain and takes so
9 long to get here that I can tell you that when
10 put into effect it will be something that we can
11 all discuss in our community and keep our heads
12 high.

13 Right now, it's so difficult to tell
14 someone out there who we live with in our
15 neighborhood when the Judge says fifteen he
16 means really five and then try to come up with
17 an adequate explanation of why it is that way
18 and then in the middle of your explanation
19 decide you don't want to join that troop because
20 it really don't make any sense.

21 Now, I was a prosecutor with the San
22 Francisco District Attorney's Office for about
23 12 years and during that time I specialized
24 quite a bit in the Homicide area and it was
25 during that period of time that California

switched from the indeterminate sentencing rules to the determinate sentencing.

And considering what I observed in that period of time, I would suggest to you that you learn from California but you surely don't adopt them as a model. Their idea is very good but the performance because of the various district negotiations, created a system that still has something in it that I will inform you of and ask you not to fall into.

When they say "a year" in California it still doesn't mean a year. That's one of the problems. It's really nine months. California has a thing that some of us have discussed and some, myself being a critic, have called it the "cheaper by the dozen rule".

California now has a system of -- a series of offenses that are committed -- the first offense is given the full accord of the term. The next offenses thereafter are only sentenced to the third base term.

So, if you commit three robberies it's cheaper as you commit those offenses. Those offenses don't have to be in the same transaction. So, thus far, as you put through

1 the guidelines we've avoided that and I suggest
2 that you continue to avoid that because that is
3 very difficult to explain.

4 And when we step outside these programs
5 in things like all the rest of you people out
6 there who become victims of these offenses, I
7 think it's important for the integrity of this
8 system that we be able to hold our heads high
9 and say that, when we sentence somebody to the
10 three years it means three years. They do it
11 with two people it means six or at least we
12 consider the possibility of giving them six.

13 Now, I'm sure the attorneys have informed
14 you that these guidelines will create senseless
15 hearings, and a backlog that will destroy the
16 calendar system. These are old arguments and
17 they're not borne out in the test of time.

18 Well-structured sentencing limitations in
19 serious felonies, which in many cases even
20 mandate incarceration, won't by definition
21 create a backlog. The defendants and their
22 counsel have always been realists. I think
23 that's important for us to understand.

24 They operate within the parameters of
25 raised and lower expectations and it's in the

1 defendant's interest, in his interest, to
2 operate within that particular narrow range,
3 whatever it may be. After all, we're dealing
4 with sentencing, we're not there discussing
5 guilt. That's all we can determine.

6 Once the expectations are set forth,
7 defendants will be just and they'll adjust to
8 the realm of possibility. If we decide the
9 penalty should be higher, they're going to have
10 to play the game and maybe that's really what
11 we're talking about when we are changing these
12 particular rules. We're talking about sentences
13 on an overall nationwide basis. It is perhaps a
14 little difficult to explain.

15 Now, there are two specific areas I'd
16 like to address within the guidelines. They are
17 the area of plea agreement and the area of
18 cooperation and credit.

19 In the past I've heard some comment that
20 the plea agreement situation is now out of
21 control and Rule 11 may not apply. That is, you
22 didn't hear that here but that's the kind of the
23 discussion that you hear outside.

24 As I re-read these guidelines, Rule 11
25 means "still remains in tact". The new

1 sentencing act just formed is the body of law
2 written, within which the Court must now
3 exercises its discretion. Rule 11 must now
4 begin forming -- or plea agreements of Rule 11
5 must now begin to conform to the rules and
6 guidelines. The Court always had and still has
7 the power to reject any pro-offer of sentencing
8 disposition.

9 However, I think that the area which has
10 the greatest problem within the area of plea
11 agreements is the concept of the integrity of
12 the stipulation of counsel offered to the court
13 regarding factors of adjustment and factors of
14 characteristics. I feel that that particular
15 area is one in which the guidelines is somewhat
16 devoid of direction.

17 It is extremely important that the Court
18 must order and accept that stipulation as to
19 those factors of adjustment and factors of
20 characteristics and the Court must examine those
21 factors and the Court is in a perfect position
22 to examine those factors because according to
23 what it had before the presentencing report and
24 then must make a determination whether or not if
25 the Court feels those factors are for the

1 purposes of gaining a plea or for the purpose of
2 the fact that they are there and that rules are
3 the facts.

4 If the Court is dissatisfied with those
5 factors and that stipulation, then there are a
6 couple of other avenues the Court can take. It
7 can reject the plea -- the factors. They can
8 accept them if they agree with them or the Court
9 can look back at those two attorneys who happen
10 to put together that stipulation and say:

11
12 "You got together on the stipulation, now
13 let's understand the underpinings, the
14 basis of this stipulation. Satisfy this
15 Court that those are correct required
16 sentences".

17
18 I think that is a part of the sentencing
19 system that must be strongly enforced. It will
20 maintain its integrity and extreme requirement
21 for the Judge plays that important part, because
22 basically, you're the fact finder in that one
23 regard in this area and that's the one place
24 that you're afraid of losing discretion and
25 that's the one place the Court's afraid of

1 losing discretion, that's the one place they
2 must exercise to maintain its integrity.

3 Now, with regard to cooperation here:
4 The fact that Part 331 and 322, and 333 is in
5 existence is a very powerful statement.

6 These guidelines signal a statutory
7 regulation that cooperation is not only
8 acceptable but it deserves merit. That
9 philosophy hasn't necessarily been pervasive in
10 the justice system for a long time.

11 The system of justice will truly benefit
12 by it. The recognized policy of cooperation is
13 the accepted conduct and will assure more,
14 rather than less cooperation, especially on the
15 part of the organized defendants. And will
16 place their counsel in a position where they're
17 going to be required to talk to the prosecution
18 and you're going to be get a lot more
19 communication between both sides, because then
20 they'll have a duty to communicate offers
21 because those offers now mean something.

22 In the past, justice wasn't properly
23 served and they really weren't encouraged. They
24 were told "if you help us out we'll tell the
25 Court and maybe the Court will do something.

1 Maybe the Court won't do something".

2 That's not necessarily a very comfortable
3 position to be if you're charged with a serious
4 matter.

5 Now, the Court has to take into
6 consideration efforts of cooperation and weigh
7 those and measure those and the United States
8 Attorney has to serve by it. And that's very
9 important because that kind of cooperation helps
10 to remove the criminal defendant and the element
11 and organization from this society, No. 1.

12 No. 2. It adds some integrity to the
13 negotiations with the defense side because you
14 can say the Court has to take into
15 consideration -- the Court will consider it and
16 it encourages people to distort their profits,
17 to distort their information. We're all
18 benefactors of that.

19 Now, there's one small point I'd like to
20 make. Coming from the Drug Task Force Service
21 the reports indicating the drug portion of the
22 guidelines that concerns me, it doesn't appear
23 that there is a consideration of the strength of
24 the drugs being involved in the determination of
25 penalty. There are pros and cons on that issue

1 and I happen to be one of the people that
2 believes that the factors of strength of the
3 particular narcotic controlled substance is very
4 credible in determining whether or not an
5 additional sentence or additional facts --
6 should be additional fact that does add impact
7 to the sentence.

8 The reason being that the greater the
9 purity close to the top. Rather simplistic
10 explanation of things but also the people on the
11 defense side -- by that I mean the criminal
12 defense, understand that because that's how the
13 price of the value starts. The higher the
14 purity the higher the profit. The weaker the
15 purity the lower the value down the chain.

16 I think that the closer to the purity
17 merits a higher factor or at least higher
18 factors in aggregation. I think to disregard
19 that loses us an opportunity to place these
20 persons in a position -- places people in a
21 higher position to cooperate and you don't have
22 to go as far with someone who's cooperating with
23 maybe penalty from drugs of a higher purity.

24 Now, I said I would be short and
25 reasonably short. Are there any questions?

1 Anything I might be able to add to it?

2 JUDGE WILKINS: Thank you, very much, Mr.
3 Lassart. I think we all agree with you on the
4 issue of purity. We're now struggling with how
5 it should be factored into the guidelines
6 without making it an unnecessary mathematical
7 application and if you would give some thought
8 to that we would greatly appreciate it. It's
9 not something that we have just glossed over in
10 the past. We value your opinion very much.

11 In addition to that, wish you would give
12 some thought to what worth you would write in
13 the area of drugs to capture that situation
14 where the individuals are arrested with the
15 seizure of the amount of drugs involved does not
16 actively reflect the seriousness of the level of
17 involvement of that type of activity.

18 And you can, I'm sure, from your
19 experience and number of the examples where
20 significant drug dealers were arrested but not
21 the drugs seized for one reason or another, did
22 not reflect they're criminal activity now.

23 How do we capture that situation in
24 guideline form so that the sentence, on these
25 sentences, would be on a proportion to the

1 small-time drug dealer who got captured and
2 arrested with a small amount of drugs. I'm not
3 necessarily seeking answers today because it is
4 very difficult to deal with past experience in
5 this field.

6 Would you give some thought to it?

7 MR. LASSART: I would do that. I have as
8 a result of passing activity given thought in
9 this area and I agree with the premise that
10 because you happen to be arrested with eight
11 pounds doesn't mean that you're necessarily an
12 eight pound person. And by the same token, I
13 guess the circumstances surrounding the events
14 of the arrest dictates your probability of
15 cooperation. I will give extra thought to that
16 and be more than happy to communicate.

17 JUDGE WILKINS: Thank you, very much.
18 Any questions to my right? Any questions to my
19 left?

20 JUDGE BREYER: The point that you brought
21 up in talking to judges who sentence seems to me
22 whether ut;s the top sentence, lenient
23 sentencing, they all tend to think that you just
24 don't add up the harm to these victims.

25 I mean, I can give you a lot of examples,

1 but a person that hits somebody in the nose and
2 it hurts him seriously that may be worth six
3 months in prison. If he gets into a barroom
4 brawl and breaks 20 noses, he gets more of a
5 sentence but he doesn't get ten years.

6 And similarly, if I get drunk and drop
7 the -- drive into another car which goes off the
8 edge of a cliff and seriously hurts the driver
9 maybe I deserve three years. If it's a bus and
10 you kill 20 or 30, say I deserve more of a
11 sentence but not ten times the sentence.

12 And that's seems to be a principle that
13 exists in sentencing across the board regardless
14 of the sentencing philosophy. It tends to be
15 reflected in the fact that judges sometimes give
16 concurrent sentences and sometimes give
17 consecutive sentence. And it doesn't have to do
18 with the fact that the tenth victim is hurt any
19 worse or isn't as serious. It's just as serious
20 and is hurt as worse or as badly and it has
21 something to do with deterrents and it may have
22 something to do with notions of culpability.

23 When you lump a lot of crimes together
24 they're culpable. Just as culpable, ten times
25 as culpable. You don't punish them quite as

1 much, at least 10 times as much.

2 And if you take seriously your report
3 we're going to say when the guy who's gets
4 drunk, bumps into the bus he goes to jail for
5 the rest of his life. If he bumps into a car
6 he's in jail for a year. A person in a barroom
7 brawl is going to jail the rest of his life. A
8 person who hits one person will go to jail for
9 six months or a year. Now that contrary to
10 people's ordinary persons wishes. That's what's
11 given us the problem how to reflect that.

12 MR. LASSART: Your Honor, it's a matter
13 of where you stand when you make that decision.

14 JUDGE BREYER: You want to say you will
15 just add it up.

16 MR. LASSART: I think you look at it two
17 ways with the split of the hypothetical. First
18 of all, you described a single transaction.
19 That has a good deal of merit to the fact that
20 you don't add things up. How would you stand on
21 the other side of those that are hurt.

22 JUDGE BREYER: That's true.

23 MR. LASSART: Now, the other concern I
24 have is that you don't do what California did in
25 that limiting to multiple acts in multiple

1 transactions are given the value of -- or
2 devalue -- in other words, if you have a person
3 who goes out and hits the bus on consecutive
4 weeks then I think that that person ought to
5 suffer the advantages of the penalty of each one
6 of those events.

7 JUDGE BREYER: I thought so. Judge Green
8 (sic) was saying in his experience -- he thought
9 a lot about sentencing. -- he finds even that
10 unrelated cases Judges just don't add it up. I
11 don't know what your experience -- you've had
12 quite a lot of it. What you do you think
13 haven'ts in fact ought to be.

14 MR. LASSART: If I took the crime that
15 you used, battery, and switched that to an armed
16 robbery, the other two who I particularly like
17 in the manner in which they handle these
18 matters, do give consecutive sentences. And
19 it's not as if the penalty is totally
20 determinate on the fact of whether or not you
21 can give consecutive time.

22 In other words, you can set up with a
23 combination of concurrent and consecutive
24 sentences with various penalty factors added in.

25 So, I guess to answer your question,

1 sure, you have to look at the circumstances, you
2 never lump in multiple transactions into one
3 sentence. Always separate those and then within
4 those particular transactional activities then I
5 believe you're right, you could use consecutive
6 sentence to concurrent sentencing to lessen the
7 penalty would be an overreaching sentence.

8 JUDGE BREYER: Have you thought something
9 out about this in terms of specific rules? I'd
10 be awfully interested in because I found the
11 single most difficult conceptual problem.

12 MR. LASSART: The example I would follow
13 is California's law, under 654 of the Penal
14 Code. The other one is their multiple
15 sentencing activities laws.

16 In other words, they have haven't amended
17 that in the last few years. In sex crime, where
18 you can have actually -- a single transaction,
19 be sentenced consecutively for rape, forceable
20 oral copulation and a few other sex crimes.
21 Appropriately so.

22 They haven't done that necessarily in the
23 multiple transaction robbery situation. And I
24 know that they use the third base term on that
25 and there's some good question and I'm not

1 really up to date on the California Supreme
2 Court last time around on this, but there's some
3 concern whether or not that's a multiple
4 sentence as multiple transactions.

5 JUDGE MACKINNON: Don't you think in
6 those cases where you have multiple offenses if
7 you added them all up it would be twenty years
8 beyond life in prison. In those cases you look
9 at the prisons and you say: "Well, too much is
10 too much".

11 And I remember having a boy in the Navy,
12 came into me on proposition one day and I took a
13 look at his record and he had the most horrible
14 record I'd ever seen in the Navy. And I said:
15 "You don't need any time in the brig you need
16 something to change you around here".

17 And that is about where you get with your
18 ordinary sentence. Isn't it, when you're
19 multiplying these tremendous things? If you're
20 going to impose for a mail fraud, time for every
21 single solitary event you're going to run out of
22 time. You're not going to have enough time for
23 any person to serve during this century. And
24 those are considerations that a judge really
25 looks at.

1 He looks at it and says: "Ten years or
2 15 years for this man would be the maximum of
3 any benefit that any person in society could
4 ever get from"

5 And he says: "That's my limit. That's
6 what I think is the limit".

7 Is that about the way they add those
8 things up?

9 MR. LASSART: That's the way I think they
10 do.

11 JUDGE MACKINNON: On the strength of -- I
12 was interested in your "strength" argument and I
13 had another slant to it.

14 Would you think this would have a
15 different sentence for drugs depending upon
16 their potency? For instance, Marijuana isn't as
17 serious a drug -- I don't think, although I
18 think it's serious -- as Heroin. And grouping
19 them together isn't exactly a fair proposition.
20 Is it?

21 MR. LASSART: The way I look at the
22 guidelines, the opiates, cocaine, heroin and in
23 terms of importance, how I see it. Now, within
24 those particular groups that's where the
25 strength is. In other words, once you broken

1 out the categories of penalty for each type of
2 drug then the strength of that particular drug
3 is important.

4 Quite frankly the strength of Marijuana,
5 I don't think that becomes a big factor in
6 determining value. When we're talking about
7 strength we're really talking more than anything
8 else you're talking heroin and cocaine.

9 JUDGE MACKINNON: And PCP.

10 MR. LASSART: And PCP.

11 JUDGE MACKINNON: And they ought to be
12 in a different category you would think, than
13 Marijuana.

14 MR. LASSART: As far as strength goes, I
15 don't think there is any necessity for 80 or 90
16 percent.

17 JUDGE WILKINS: Thank you.

18 PROFESSOR NAGEL: In some of the hearings
19 in the past we have been urged to consider
20 jurisdictional differences in sentencing for
21 drug offenses. Given your own experience, what
22 would your response be given the drugs perceived
23 to be a national problem? Would that be
24 something that you would advocate?

25 MR. LASSART: Not at all. I've asked --

1 we have that now. That's here. The penalties
2 for same amounts of the same posture throughout
3 the little counties are very different from
4 district to district.

5 If I were to get caught with a kilo of
6 cocaine in Idaho within a thousand feet of a
7 school and get caught for that same amount say
8 in Florida a thousand feet from the school I can
9 guarantee you there would be a different
10 penalty. That doesn't help the problem. The
11 penalties ought to be uniform and people
12 shouldn't be able to shop jurisdictions because
13 the last time someone cracked down on money in
14 this country they were from California.

15 So, you don't want people to be able to
16 shop based on penalty. It's a better place to
17 do business. Frankly, I agree these arguments
18 are a major problem. You probably -- longer
19 than I -- know sophisticates could do that --
20 shop the market.

21 JUDGE WILKINS: Thank you again. We
22 appreciate not only your testimony but the work
23 you have given the commission. Thank you.

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4 JUDGE WILKINS: Our next witness is Mary
5 Woods. Miss Woods is from Victim Advocate of
6 Los Angeles. Miss Woods, we're delighted to
7 have you with us.

8 MISS WOODS: Thank you.
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13 SPEAKER MARY WOODS,
VICTIM ADVOCATE, LOS ANGELES

14 MISS WOODS: Good afternoon. I'm pleased
15 to be part of this fine and necessary effort to
16 create a consistent and enforceable guideline
17 for the sentencing laws.

18 In looking over the agenda for today's
19 hearing I realize I'm probably the only
20 participant who does not speak legalize.

21 My knowledge of the subject is something
22 I have learned from my heart and from my soul
23 and from the hearts and souls of other crime
24 victims of which I have come into contact.

25 Four years ago I woke up at 3:00 o'clock

1 in the morning to see a man standing in my
2 bedroom. He proceeded to rob and rape me in my
3 home. He returned a month later with a friend,
4 a young man recently out of the Marines who was
5 training in the arts of rape and pillage, and
6 let the friend into the apartment.

7 When he found out I was no longer there
8 he went in the next room and attempted to rape
9 my former roommate. She later testified how
10 lucky she was after he ran away he left behind
11 several pieces of solid evidence. Real smart
12 guy he thought his sock wouldn't leave
13 fingerprints. We saw that his name was
14 stenciled on it and in fact an important medium
15 for his later conviction.

16 Both men were apprehended the night after
17 the second attack in which there was another
18 rape and robbery. Both my former roommate and I
19 participated in conviction of the two men. I
20 also made an impact statement at the time of
21 sentencing. Both men received maximum penalty
22 on all counts. The man who attacked me received
23 15 years and 4 months. The second man got nine
24 years and ten months.

25 I'm here to address the impact of

1 psychological injury on the victim as it applies
2 to sentencing. I was speaking primarily of
3 offenses against the person but from what I
4 understand, offenses involving property also
5 reflect similar emotional response from the
6 victim.

7 Following my victimization I felt -- if
8 you'll indulge me an analogy -- at the time
9 somebody had taken me by arm and leg and flung
10 me into the deep dark gravity pit. Felt that I
11 had no choice but to lie down and make a nice
12 little bed for myself at the bottom of that pit
13 or I could start to climb, slowly fingernail by
14 fingernail up until I could see the light again.

15 Every line up or hearing or a thoughtless
16 remark by a coworker or a cruel joke heard in
17 public or every noise I heard outside my door, I
18 slipped back a little bit into the darkness
19 again.

20 But as time continued and with the help
21 of Crisis Intervention, psychological counseling
22 and support of a few support friends and family
23 members, I finally was able to climb out of that
24 pit, stand in the open and let my face absorb
25 the sunlight. It was a year and a half

1 following my attack that I woke up in one
2 morning and realized that I was on the other
3 side of that experience.

4 During that period I went to work, I
5 performed the necessary tasks for survival
6 including going through trial and all it's
7 attendant activities. But I felt bad inside. I
8 felt that my soul had been taken along with my
9 jewelry and my wallet and it took a lot of hard
10 work to get it back.

11 The problem is, as it's difficult to
12 understand unless you've been there that being a
13 victim of crime is a lifelong sentence. No
14 matter how sane and happy I am today I work very
15 hard to be. This is something I have to live
16 with every day of my life. I didn't ask for it.
17 It's not my fault. Now that I got it I really
18 know what to do with it.

19 Many people today live in a constant
20 state of fear and paranoia, baracade themselves
21 in their own homes. They don't go out at night.
22 I have lived through what they are afraid of. I
23 have felt death at my neck and yet still I have
24 to walk around my work, and interact in an
25 increasingly violent society. I have seen the

1 world as a violent place and I can never go back
2 to the way I was before. My feelings are not
3 unique.

4 As a member of the Board of Directors of
5 Victims for Victims I have spoken to victims who
6 expressed the same sentiment. This is victims
7 of assaults, armed robbery, rape, kidnap,
8 hijacking, loss of a loved one through homicide.
9 They talk of fears which can take years out of
10 them, how their relationships are affected. How
11 many marriages are broken up. How jobs are
12 lost.

13 The power over one's own life and death
14 is an issue that has been taken away by the
15 criminal. It is a long and arduous struggle to
16 gain back that control.

17 The problem is: How do you apply
18 numerical offense values to these long ranging
19 and deep-seated effects? I don't think you have
20 a number that could go high enough to reflect a
21 just punishment in the eyes of the victim who
22 has to live with the consequences for the rest
23 of his or her life.

24 I'd like to ask specifically to a couple
25 of things I've heard hear today as well as the

1 proposals outlined in your sentencing
2 guidelines. You talk about the issue of
3 disparity. I'd like you to consider that issue
4 of disparity, the impact on the victim whose
5 assailant receives a light sentence or even
6 probation for their crimes.

7 I think there's a general feeling in the
8 public, they know that the chances of receiving
9 fairness from something called criminal justice
10 system is rather slim. You have the opportunity
11 there to prove them wrong.

12 In the guidelines, I'd like to ask that
13 you re-evaluate the offense value of twelve
14 units added for victim whose vulnerable because
15 age or mental or physical condition. The
16 psychological impact of a violent crime on a
17 defenseless and/or dependent person is extreme.
18 The criminal should have to truly answer to such
19 an act of brutal cowardness.

20 Secondly, I support and applaud the same
21 base offense value applicable in attempted
22 sexual assault cases as well as if the act had
23 been completed. Certainly, the intent of the
24 criminal is clear and the impact on the victim
25 is comparable.

1 Thirdly, your guidelines acknowledge --
2 this is where I have the problem -- acknowledge
3 the assumption that in crimes of violence at
4 least the minimal level of psychological injury
5 occurs and it states that and I quote here:

6
7 "The offense value for the lowest level
8 of such injury has therefore been
9 factored into the base offense value for
10 an offense involving a person and in this
11 instance in which psychological injury
12 has been significant or extreme and
13 appropriate increase in the penalty will
14 result".

15
16 End quote. What is the offense value for
17 the lowest level of psychological injury? What
18 are the numbers? Is that enough? Who is to
19 determine when extreme or significant
20 psychological injury has occurred and who will
21 give the expert testimony, as is indicated?

22 With each victim of a violent crime be
23 thoroughly examined by a psychiatrist trained in
24 victimology. I must tell you in my experience I
25 have never seen a victim of a violent crime

1 whose level of psychological injury was not
2 significant or extreme.

3 In my view, a significant level of
4 psychological injury should be assumption. A
5 minimum level the exception. At any rate these
6 classifications and determinations must be
7 clarified. I implore you, learn to look beneath
8 the physical scars and see the emotional and
9 psychological wounds which never heal. Reflect
10 this acknowledgement not only in your sentences
11 but in your demeanor. Treat the victim who
12 comes before your court with respect and
13 compassion due a person performing such a brave
14 task.

15 Understand that each victim that you see
16 stands for a hundred more who are unable to
17 come forward or whose assailants are never
18 captured. The length of time it takes for
19 a case to come to sentencing guarantees that
20 most of the psychological and physical signs of
21 trauma will be gone but the brutality of our
22 society with the daily onslaught of violent
23 crimes continues to rip open the clinicial
24 wounds endured by the victim. The
25 responsibility is enormous. Tough, consistent,

1 and certain sentencings provide a deterrent as
2 well as just punishment and more importantly as
3 a legal application. Show the people as well as
4 the perpetrators that violence no longer will be
5 tolerated in our society

6 JUDGE WILKINS: Thank you.

7 MISS WOODS: I'd be glad to answer any
8 questions.

9 THE COURT: Thank you, very much, Miss
10 Woods. On behalf of the commission, wish to
11 express our appreciation to come to this hearing
12 and provide this important information to us. I
13 think re-enforces what we have felt, what we
14 need to do with the psychological injury.

15 On the other hand, you see, there is
16 nothing in the law anywhere that says a judge
17 should -- psychological injury although we know
18 most responsible judges do that. So, you're
19 groping for words that provide for the
20 imposition of a summons that reflect the
21 psychological as well as the other injuries in
22 terms of the victim and it's been very helpful I
23 think this idea of presumption of psychological
24 injury in the crimes of violence may go a long
25 way to accomplishing that. I think that's an

1 excellent idea.

2 Any questions to my right?

3 JUDGE MACKINNON: I was wondering, you
4 had to go to Court whether you had to testify or
5 what?

6 MISS WOODS: Yes. I testified at three
7 preliminary hearings and then finally at the
8 Superior Court trial.

9 JUDGE MACKINNON: What would you say that
10 added to your psychological --

11 THE WITNESS: Well, it's a two-edge
12 sword. Facing my assailant in court was singly
13 the most difficult thing that I had to do in
14 that whole process and I had to do it four
15 times. Being as far away as I am from you from
16 the man who attacked me so brutally was an
17 indescribable horror. Things that I had to
18 testify about were as well horrific.

19 However, I think this really came with my
20 impact statement. I'd like to emphasize how
21 much power that gave me to be able to do that
22 and how that should be emphasized to other
23 victims to take advantage of their rights as
24 they have in California to make such a statement
25 at the time of sentencing.

1 When I was able to make that impact
2 statement, I wasn't under the gun, I wasn't
3 under oath, I wasn't on the witness stand. I
4 was standing behind the DA's desk saying my own
5 words straight to the Judge, exactly what it
6 felt like to be me in that situation at this
7 time.

8 Gave me to a great deal of internal
9 power. I remember when I came out of that
10 courtroom after the men had received the maximum
11 sentences I felt like the strongest woman in the
12 world. I felt like I truly made a difference in
13 that situation, that I prevented countless
14 other victims from -- from going through what I
15 had been through. The trial was extremely
16 difficult and I do understand why victims balk
17 at doing it, yet the impact statement gave me
18 back everything

19 JUDGE MACKINNON: The statement that you
20 made to the Judge in open court?

21 MISS WOODS: Yes.

22 JUDGE MACKINNON: At the time of
23 sentencing?

24 MISS WOODS: At the time of sentencing.
25 Which was covering four months after the

1 conviction.

2 JUDGE MACKINNON: That was what court?

3 MISS WOODS: Superior Court of Los
4 Angeles.

5 JUDGE MACKINNON: Is that their general
6 practice to permit statements?

7 MISS WOODS: Well, it was unusual. I had
8 received a piece of paper, which is a standard
9 thing, telling me when my assailant was to be
10 sentenced and at the bottom -- I just happened
11 to read everything that came my way about the
12 case because I was fairly active in it and cared
13 a lot about each of the elements. And in little
14 tiny letters along the bottom of it, said: "By
15 the way, as a victim, you have a right to appear
16 that day...."

17 So, I called the DA and said: "What is
18 that?" And although she was a DA in the Sexual
19 Assault Task Force, said: "Frankly, no one has
20 ever taken advantage of that". "Well, you found
21 someone who will".

22 So, I prepared a statement and not really
23 knowing what to expect. And it was an unusual
24 situation. The courtroom was packed with people
25 because they understood that something unusual

1 was going to occur and in all of my speaking and
2 work in Los Angeles I try to encourage other
3 victims to take advantage of this and I would
4 like to encourage people over the nation that
5 they have a right to make such a statement to do
6 so.

7 JUDGE MACKINNON: You're the only one in
8 Los Angeles that you know of?

9 MISS WOODS: At that particular point --
10 this was four years ago. I have heard of other
11 cases since then where victims have made such a
12 statement. I fully intend when my assailant
13 comes up for parole to travel of course at my
14 own expense to Folsom to make a similar
15 statement at his parole hearing if I get the
16 opportunity to do so.

17 JUDGE MACKINNON: He was sentenced before
18 the new law indeterminate? He can be paroled?

19 MISS WOODS: He can be paroled, I
20 believe, in '89.

21 JUDGE BREYER: When was he sentenced?

22 MISS WOODS: '82.

23 JUDGE BREYER: He'd have to serve seven
24 years.

25 MISS WOODS: Yes.

1 JUDGE MACKINNON: Fine. Thank you, very
2 much.

3 We're delighted to have with us as our
4 next witness, the Honorable Arthur L. Alarcon.
5 Judge Alarcon is a member of the United States
6 Court of Appeals of the Ninth Circuit.

7 Judge, we appreciate you taking your time
8 to be with us today.

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12 HONORABLE ARTHUR L. ALARCON
13 U. S. COURT OF APPEALS, NINTH CIRCUIT

14 JUDGE ALARCON: Thank you, Judge
15 MacKinnon. I must say, everyone of your speaker
16 seems to be very brief for reasons of having
17 been here this morning and heard appearance and
18 comments I'm going to be brief because I did not
19 know I was on the program. And Judge Burns is
20 the Chairman of our group, the Ninth Circuit and
21 he will be following. I was going to be here to
22 make sure that he did reflect the consensus of
23 our group.

24 There are three things that I would like
25 to comment on. One, Commissioner MacKenna just
asked about the rights of the victims in

1 California to speak at sentencing. That is as a
2 result of the Amendment to the California
3 Constitution. It's called Proposition "P".
4 Victims in criminal matters of the State of
5 California must be given notice, have the right
6 to be present and speak at sentence.

7 The three areas that I want to comment
8 briefly on are as follows: First of all, from
9 an Appellate standpoint, and I'll speak as one
10 of the 28 Appellate Judges in the Ninth Circuit,
11 I would appreciate if the Commission would
12 consider finding if possible, more carefully,
13 the modified real offense sentencing standard
14 with reference to "other criminal conduct".

15 Judge Burns will be making our report to
16 you and he will discuss with you two alternative
17 suggestions that he will offer to you. I refer
18 you to the concern the Commission has that
19 elements can partly be bound up in conduct that
20 constitutes a crime charged, should be
21 considered.

22 As an Appellate Judge I worry about
23 language like that. I see a fertile field --
24 properly so, from attorneys who would challenge
25 concepts such as that.

1 Either of the alternatives offered by Mr.
2 Burns in his remarks that you limit the other
3 criminal conduct to conduct which is really
4 admissible under the Federal Rules of Evidence,
5 Rule 404. Or, conduct which would form the
6 basis for a count and indictment joinable under
7 the Federal Rules of Criminal Procedure, Rule 8.
8 Would be something that all of us in the system
9 are familiar with and can deal with and might
10 toughen the possible elements.

11 The second thing I want to speak to you
12 about is a concern I have, not as Appellate
13 Judge because I think a lot of these things
14 never get to us and that is the problem which
15 may follow if, from what appears to be a
16 recommendation for guidelines which will result
17 in harsher or stiffer or stricter sentences.
18 And what appears to be a down-playing of the use
19 of probation by the District Judges.

20 I fear that while reducing disparity in
21 sentencing by Judges, this may lead to a greater
22 disparity in sentencing because of plea
23 bargaining between lawyers, of charged
24 reductions, and of fact-bargaining in order to
25 prepare for the sentencing hearing.

Harsher sentences, if that is the result of the guidelines may precipitate more charged, more charged reduction to avoid greater punishment.

And I also encourage the overcharging to reduce the plea of guilt. I'm delighted that you apparently are concerned with the same things I am because that's one of the questions that I have heard this morning.

Finally, in the later matter and the second concern, is the need that you have pointed out in the evidentiary hearing to try to specific issues of the facts under the modified real offender sentencing concept. I cannot quarrel with your concerns that you are bringing out in the open and providing some kind of a process for things that, in the past, things that now appear only in presentencing reports and where there's less process in what you're suggesting.

What concerns me is that perhaps Congress -- this is not your responsibility -- Congress has not given sufficient concern to the judicial impact of what may be a greater load on our District Courts in conducting the kind of

1 hearings that we're suggesting and that may be
2 necessary for the guidelines.

3 To avoid -- unless Congress takes that
4 into consideration -- unless Congress provides
5 the sufficient personnel in the probation
6 officer's reports, investigations of that, in
7 judges to try the cases where I believe there
8 will be a greater need, we may see if we don't
9 have that consistence, we may see prosecutors
10 and defense lawyers taking care of the problem
11 by stipulating to the facts as to the proper
12 elements the Court should consider.

13 This in turn could lead to bargaining as
14 to which facts will be presented and which facts
15 may not be presented. If my concern is valid,
16 the result will be disparity in sentencing no
17 longer based on judicial discretion or where you
18 are in the United States, who is the sentencer,
19 but may well be based on the skill of
20 negotiating lawyers and the facts exposed to the
21 court?

22 The Rand Corporation in Los Angeles has
23 done an excellent study on disparity in the
24 sentence. One of the reports -- that turned out
25 about 1977 -- one of the conclusions that they

1 reached is that plea bargaining charged
2 reduction in bargaining has a tremendous impact
3 even within one county, Los Angeles County,
4 because we have about eight divisions of the
5 Superior Court. They saw differences depending
6 upon the policy of the DA charged that
7 particular division in terms of charged
8 reduction and in term of sentence work.

9 Delighted the commission is concerned
10 about the impact of guidelines in the area of
11 plea bargaining. I would hope that you come up
12 with or recommend to Congress their
13 consideration given to the impact of the statute
14 and guidelines that you have to come up with on
15 this problem.

16 I also hope that in the final report
17 there will be more concern expressed in the
18 report about the alternative probation. Judge
19 Burns will speak more to that. This may be an
20 unfair criticism. May be you are as concerned
21 as we are about giving the Judge the continued
22 option where the statute permits it to put
23 people on probation.

24 However, of view of your proposed
25 guidelines, seem to indicate to us that you

1 downplay the value of the importance of leaving
2 it to the judges discretion to put people
3 probation. That constitutes my remarks, Judge.
4 Surprise to me until about 1:45 this afternoon.

5 JUDGE MACKINNON: Thank you, very much.
6 I wonder if you would consider this, perhaps by
7 analogy, in the future. We provided a summary
8 draft approach, in view of the sentencing
9 hearing we set up a suggestion proceeding
10 meeting with your approval. I wonder whether we
11 have the power to do that?

12 JUDGE ALARCON: All right. I'd like to
13 think about that.

14 JUDGE MACKINNON: I would appreciate
15 that. I just don't know whether we have as a
16 commission the authority in fact to do what
17 maybe the Legislature or Congress should be
18 doing and of course, that will determine greatly
19 the answer to that question in terms of the
20 sentencing?

21 JUDGE ALARCON: Sure.

22 JUDGE MACKINNON: Thank you, very much.
23 Any questions to my right? Anyone to my left
24 have any question?

25 JUDGE BREYER: There seems to be in the

1 report there are persons are at fault who wrote
2 this Page 17 "modified rules of sentencing".
3 Seems to be there's been some confusion about
4 whether or not refers to. There is no standard
5 such as the one you just described.

6 What the modified rule of that section
7 says and what it intended to say is that what
8 that Judge does is he looks to the guideline and
9 the guideline tells him what conduct to look at.
10 Some guidelines will refer to "other conduct".

11 For example, the guideline for bank
12 robbery refers to "physical harm". He never
13 applies the standard that you mentioned. The
14 standard that you mentioned dealt with
15 permission to decide which specific cross
16 references should be made.

17 In other words, we decided in the
18 preliminary draft that a person who robs a bank,
19 if he's charged with bank robbery and convicted
20 and he happens to pistol-whip the teller, even
21 though that crime of pistol-whipping the teller
22 was not charged, the Judge, who chooses to
23 sentence him for bank robbery, if the Judge
24 finds that he pistol-whipped the teller, looks
25 to the harm of physical injuries listed in Part

1 "A".

2 So, it's very specific what happens.
3 When a person is convicted for tax evasion, the
4 guideline on tax evasion says that the Judge
5 does not look at the personal harm. Even if, in
6 the course of tax evasion, the tax evader
7 happens to hit the IRS man on the head.

8 All right. Now, the reason that we said
9 "go and look up physical harm when you rob a
10 bank. But don't go and look up physical harm
11 when you evade your income tax," is because by
12 and large physical harm can be bound up with
13 bank robbery. But it's a very unusual case in
14 which physical harm is bound up with tax
15 evasion.

16 In other words, that vague instruction
17 that you read is not an instruction to you or me
18 as Judges, it is an instruction to me as a
19 commissioner so that I would then write a
20 specific guideline which would then instruct the
21 Judges.

22 Now, that's the way the Modified Rule of
23 Sentencing is supposed to work and is supposed
24 to be reflected in this particular document.

25 JUDGE ALARCON: It's reassuring to hear

1 that. I'm a little concerned however, about the
2 specifity which sounds to a Judge like hands
3 tied. Why shouldn't a judge consider that
4 somebody reached over and hit the tax collector
5 on the head with his pistol?

6 JUDGE BREYER: The reason for that is the
7 following: If the Judge is going to consider
8 these "other things", remember these "other
9 things" were not charged and therefore, when the
10 judge considers whether they happened he will
11 consider them at a sentencing hearing after the
12 trial and the standard will be perhaps a
13 preponderence of the evidence and the Rules of
14 Evidence if they do apply, if they will, will
15 not apply with full force.

16 And therefore, although that's an
17 enormous procedural improvement over the
18 present, where there are no protections to the
19 defense, none the less he is less protected than
20 if the crime's charged secondly and therefore,
21 the IRS agent who is hurt, if the government
22 wants to punish the person on the basis of the
23 tax evader having hit the IRS man on the head,
24 the government can't do it. The government
25 simply charges that offense. And then since

1 that person has been convicted of having
2 committed that offense he gets some support.

3 And then you say: "Well, why not do the
4 same with the bank robbery?" And the answer
5 predominantly is for not doing the same thing
6 with the bank robbery is that if we do that same
7 thing with the bank robbery we were worried
8 about putting too much discretion in the hands
9 of the prosecutor where the prosecutor can then
10 control the sentence by deciding whether or not
11 to charge that extra element.

12 You see? Under those considerations,
13 some of which cut for and some of which cut
14 against charged offense sentencing. Some of
15 which cut for, some of which cut against, real
16 offense sentencing, our balance on Pages 15
17 through 17, when we tried to spell them all out
18 and explain how we reached the great compromise.

19 The compromise being substantive of what
20 I described this modified rule of that
21 sentencing, and being procedurally a sentencing
22 process that provides more protection for the
23 defendant than at present, but still somewhat
24 less procedural protection than if in fact, it
25 were a full-fledged trial. I mean that's the --

1 JUDGE ALARCON: I appreciate that.

2 JUDGE WILKINS: Just a note -- I'm sure
3 Judge Breyer intends -- my understanding of the
4 preliminary draft is not a requested compromise
5 that this commission has reached, but is rather
6 one view of the public reaction --

7 JUDGE BREYER: -- public reaction.

8 JUDGE WILKINS: And in fact, there are
9 many people on this Commission who might have a
10 slightly different viewpoint than Judge Breyer
11 does. Some of us have a very different view.

12 JUDGE BREYER: I didn't mean it as a
13 compromise on the Commission. Because I have a
14 theory as a compromise of consideration.

15 JUDGE ALARCON: In your estimation --
16 maybe this is because I've been a Judge too
17 long, I could read the brief on the appellate in
18 the bank case saying "why am I not being treated
19 the way a person in tax cases"?

20 JUDGE BREYER: You would not have the
21 power to appeal, have anything to say about
22 that.

23 JUDGE ALARCON: -- challenge the
24 statute.

25 THE COURT: Yes. Yes. They could

1 challenge the statute.

2 JUDGE ALARCON: Will be equal treatment.

3 JUDGE BREYER: The reason I was
4 addressing myself to the problem you were
5 concerned with is that I do have a definite
6 standard. I think the standard is fairly
7 definite. I think the standard is served very
8 well by that. I don't know why this is put out
9 for comment. That is a standard which is a
10 theory which I think represents a compromise of
11 considerations. Is put out for comment because
12 the question in my mind as it's put forward for
13 comment, is it the correct approach?

14 California, we have learned, has much
15 more of a charged offense based system.

16 The Department of Justice at one point
17 proposed to us a system that was far more real.
18 So, I'm not saying it's the right system, but
19 I'd be happy to look through it again and see
20 why that system is put forward.

21 JUDGE MACKINNON: I presume Judge Burns
22 is going to discuss the other criminal conduct
23 in greater detail?

24 JUDGE ALARCON: Yes. He's the real show.
25 I'm just here to -- you.

1 JUDGE WILKINS: Thank you, again.

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8 JUDGE WILKINS: We have with us now
9 another representative from the Ninth Circuit.
10 The Honorable James M. Burns, United States
11 District Judge from Portland, Oregon. His
12 reputation precedes this Commission for long
13 before I met him. He was known as "James the
14 Just, from Portland, Oregon". Delighted to have
15 you with us, Judge Burns.
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19 HONORABLE JAMES M. BURNS
20 UNITED STATES DISTRICT JUDGE,
PORTLAND, OREGON

21 JUDGE BURNS: Thank you Mr. Chairman,
22 members of the Commission. Appreciate very much
23 the kindness to listen to me again and to begin
24 with I want to assure you that I am not going to
25 quote the scriptures.

1 In the first place, I have been handed a
2 a controlled exercise agreement of three judges
3 by virtue of the First Amendment and stipulation
4 that I'm not entitled to quote the scriptures.

5 Secondly, considering the effects it had
6 I would prefer to open with a quote from
7 Aristotle which is: "Absolute equality is
8 absolute inequality." And that, in a way,
9 capsulizes I guess really, what my view is of
10 the statute itself as suggested for a method by
11 which we will eliminate sentencing disparity.

12 Also, I want to quote a sign which is
13 over a store in Vermont as to the material that
14 I have put together in a hurry and didn't really
15 have much time to give sufficient thought to the
16 detail and comments. But, the sign over the
17 store in Vermont says: "Our best is none too
18 good."

19 And I feel that way about the quality of
20 today's presentation. I don't intend to go over
21 it. I just want to get a couple, three points
22 and then I'll answer any questions.

23 First, I have a cartoon that I generally
24 show, it shows the Judge on the bench and it
25 says: "Now, I have arrived at the job of

1 sentencing, the fun part of being a Judge."

2 And then, I have another cartoon which I
3 show ususally in conjunction with that and it
4 shows the Judge banging his gavel. Says: "99
5 years, justice triumphs again".

6 Be that as it may, NROS is a baffling
7 problem you have sketched beautifully in view of
8 the commentary and I'm frank to say I'm sorry,
9 but I have to nit-pick or criticize the
10 formulation that you end up with which is set
11 forth in the text.

12 We have offered rather tentatively a
13 couple of alternative formulations. We don't
14 claim very much for either one of them though
15 the first one, we claim at least familiarity by
16 the practioneers by formulating the standards
17 wherein more than charged with conviction would
18 be looked at.

19 The other one, the alternative the
20 defendants, I think is less injury. There is
21 perhaps a third area and I simply am not aware
22 of enough of the details of it, but I rather
23 think the U. S. Attorney's Manual Service by the
24 Department of Justice and various offices, but
25 some of the standards that they employ with

1 respect to where the prosecutor is to charge or
2 not, as the case may be. Where for example, if
3 the file charges as opposed to diversion and so
4 on. Those various prosecutorial judgment calls
5 that must be made, probably take into account a
6 variety of conduct associated with the punitive
7 defendant and what the criminal episodal affects
8 on he or she may be involved in. That might be
9 another place to locate the standard.

10 But I don't have anything more specific
11 than that. And I don't really claim that the
12 alternative we are proposing in the written
13 material are necessarily that helpful. They do
14 have some problems. I do think they're worthy
15 at least of some study by you folks and by your
16 staff.

17 Secondly, and this was referred to
18 somewhat earlier today by some of the other
19 questions and some of the other people -- an
20 in-house decision is one that on the present
21 number -- and we appreciate that the present
22 number simply says "number", they're not cast in
23 stone but that's what we're reacting to as if
24 that is what they're going to be, you
25 understand, intellectually and emotionally and

1 among other things. But on those numbers what
2 you have done is to eliminate a vast share of
3 offenses in which I would at least consider
4 probation.

5 And as I read the Statute, I am not
6 entitled to grant probation on "A" or "B" felony
7 and you folks are probably not entitled to allow
8 probation on serious or violent felonies because
9 the Statute says be sure the guidelines reached
10 have had to reach the maximum.

11 But, I'm not aware of anything that the
12 Statute forbids consideration of probation
13 except "A" and "B". And there are cases where I
14 have put a bank robber on probation and I did
15 not do so -- not very many, but there are rare
16 cases, almost universally done, it has been one
17 in which there's probation plus, perhaps the
18 split, perhaps specified period of time in a
19 residential alcohol treatment program and the
20 like. But I have felt that those were proper
21 cases.

22 Now, I agree that under the Statute I
23 won't be able to do that anymore so long as the
24 charge itself is 2113A or 2113B. But, for other
25 reasons the charges -- I think it's an in-house

6
1 decision and broad in nearly the 14. -- as you
2 know. And, third is the problem I see of
3 warning a pleading defendant who comes to you
4 without knowing all the facts which would add up
5 to the sanction units imposed in the sentence
6 and there is some other material in there that
7 you might well want to consider.

8 Maybe the answer really is: So long as I
9 tell him the maximum is 20 or the maximum is 25,
10 that that's all I need tell him. I am not so
11 sure. I'm not sure that the present requirement
12 of Rule 11 have to tell him the maximum
13 sentence, have to tell him the other direction.

14 I'm not so sure that isn't a reflection
15 of a constitutional requirement or requirement
16 that has constitutional undertones.

17 Needless to say, personally, I would feel
18 very uncomfortable telling the defendant in a --
19 let us say, an unarmed bank robbery -- telling
20 him only the maximum is 20, when I know
21 perfectly well, given the various defense values
22 that would add up to, let us say, a range of 15
23 to 18 years. And I know he's going to serve 85
24 percent of it unless he saves a woman's life,
25 seems like you can aggregate one year, he's

1 going to serve 85 percent of whatever I say.

2 I would feel personally very
3 uncomfortable, because I think it's personally
4 wrong. It's his right. I think the defendants
5 are human beings just like judges are human
6 beings. I know victims are. So are police. So
7 are prosecutors. So are defendants and so is
8 everybody in the system.

9 And it's either their strength or their
10 weakness, I'm not sure which. And where I think
11 the Statute ultimately becomes a problem in
12 administration to the extent our statement is
13 critical, we're not critical of you folks.
14 We're critical, if at all, really of the Statute
15 and our job is to try as best we know to help
16 you make a workable set of guidelines, because I
17 think that's required on the whole just as much
18 as we are here.

19 But, there are four great purposes in
20 that sentence, even though they don't really
21 call it "rehabilitation" in the Statute we know
22 that's the intent and there's a fifth great
23 purpose, "preparing". But, Congress has not and
24 so far as I see it, these guidelines do not
25 always and everywhere identify the specified

1 time or specified criminal that the predominant
2 purpose is deterrent or response or diversion or
3 is rehabilitation. And so long as that remains
4 I think there will be uncertainty. One or two
5 rather technical items. Your definition of
6 psychological injury is very troubling to me. I
7 don't have a better method to word it. All I
8 know is that it engenders endless controversy in
9 almost every bank robbery case that I have ever
10 had because it would generate the argument of
11 the psychiatrist. And if you have ever had as
12 many psychiatrists as I've had in 20 years of
13 sentencing you don't want to hear anymore and
14 that's all they're doing come November a year
15 from now. I hope to add some wording, send it
16 to you that I think would be helpful.

17 And then this problem of the role in the
18 offense or relative culpability is a tough,
19 tough, tough problem. One that we wrestle with
20 all the time and I think most of you have
21 wrestled with. Three large-scale
22 methamphetamine conspiracy cases with a total of
23 9 defendants, 11 defendants or 12 defendants.

24 And trying to sort them out in terms of
25 the relative culpability. And it is a tough

1 proposition. I don't think the present wording
2 of your role in the defense is as tight and
3 precise and tidy as it could be. I'd like to
4 offer some suggestions to you. It can never be,
5 never be, as good as it should be in my
6 judgment. Those are areas where I think, to the
7 extent you think you can under the Statute you
8 must allow me some discretion and you must
9 tolerate therefore the disparity that would stem
10 from my exercise which is different than any
11 other way that judges from the Central District
12 of California view it.

13 Thank you, very much. Sorry to trespass
14 on your time. I was interested in Judge
15 Breyer's remark about the great compromise
16 because it struck me on studying this, I
17 anticipated reading Bolan's record of the
18 meeting in Philadelphia which is very
19 interesting.

20 And I saw this as I was coming on the
21 plane here, the comparability here of the role
22 that you folks play and the role that the ten
23 weeks the residents of Philadelphia played in
24 the way -- this is not as grandiose and doesn't
25 affect the whole civil government, but it's a

1 tremendous important development and I hope you
2 have the time between now and January or April,
3 whenever it is you must -- I hope you have the
4 time for the nine of you to sit behind doors by
5 yourselves for an extended period and thrash it
6 out and thrash it out the way they did in
7 Philadelphia.

8 I'm satisfied of the quality of the folks
9 have here consistent by the comments that you
10 have from the others that you will in fact
11 produce a darn good document. I hope so and I'm
12 going to do everything I can to see that you
13 attain that goal.

14 JUDGE WILKINS: Thank you, very much,
15 Judge Burns. Not only is your testimony today a
16 submission for what you have given the
17 Commission in the past, we look forward to
18 receiving the submission that you talked about.

19 We agree you hit it right on the head.
20 We, in the Commission don't want examples of the
21 area of psychological harm to turn the
22 sentencing hearing into a battle of the
23 testimony of psychiatrists.

24 JUDGE BURNS: We absolutely don't want
25 that.

1 JUDGE MACKINNON: On the other hand, we
2 want psychological harm to be a factor in the
3 appropriate cases. How do you find that
4 balance? That's what we keep searching for in
5 this and all the other issues.

6 JUDGE BURNS: Just about two weeks ago,
7 three weeks ago I sentenced a bank robber which
8 was in fact an armed robbery in which the
9 defendant was armed in which the weapon was
10 discharged and the teller and the manager and
11 others were absolutely terrified out of their
12 skins.

13 The government, unfortunately, or
14 otherwise, has stipulated that the weapon when
15 fired had been accidentally discharged,
16 discharged from a robbery of -- went like this
17 (indicating) with his arm to assist the lady
18 customer who just came in the bank to get on the
19 floor as he had instructed her to do and his arm
20 went up and the gun discharged.

21 In any event, the teller in the bank
22 wrote a letter. I asked them to come in for the
23 hearing and so I asked them to testify or
24 testify rather than make statements and
25 conducted a rather lengthy inquiry of them and

1 asked them how long I should sentence him for
2 and I asked them how long they wanted me to
3 sentence -- this was a 39 year old man with an
4 absolutely clear record, no priors of any kind.
5 And a lot of other mitigating factors; chronic
6 confession and restoration of procedures and all
7 kinds of others.

8 Be that as it may, neither one could tell
9 me how long they thought he ought to stay in,
10 actually stay in behind bars. And so I finally
11 said to them: "Well, gee whiz, I shouldn't ask
12 you to do my job." And I should thank them for
13 participating. Both of them obviously suffering
14 from the events of the episode.

15 I think it most important that we have
16 the benefit of comments from the victims
17 wherever they feel comfortable in coming in and
18 appearing, otherwise the comments they -- they
19 don't care to come in and comment to us and we
20 take them with what we have.

21 JUDGE WILKINS: Thank you, very much.
22 Any questions to my right. To my left?

23 JUDGE MACKINNON: You suggested some
24 possible consideration be given the guidelines
25 that might be put out by the United States

1 Attorneys. They are definite. They apply.

2 "The attorneys for the government should
3 commence or recommend Federal prosecution
4 if he believes that the person's conduct
5 constitutes a federal offense and that
6 the admissible evidence would probably be
7 sufficient to obtain and sustain
8 conviction unless in his judgment
9 prosecution should be declined because of
10 no substantial federal interest would be
11 served by prosecution, the person is
12 subject to effective prosecution in
13 another jurisdiction or there exists an
14 adequate non-criminal alternative to
15 prosecution..."

16
17 That's the present standard and which
18 there are some more refinements beyond that.
19 But that's the present standard. I don't know
20 how the Court standard is being applied.

21 You know, I read the statement of the
22 Ninth Circuit on what they were talking about
23 on: "Other criminal conduct". And I thought
24 you were going to dwell on that more and what
25 you propose to do is limit the Judge in the

1 imposition of a sentence to other criminal
2 conduct to evidence that was rather minimal.
3 Yes. It's Rule 404 of the Federal Rules of
4 Criminal Procedure. And -- well, the elements
5 of Rule 404 are limited rather and "other crimes
6 is not admissible to prove the character of a
7 person in order to show that he acted with
8 conformity therewith".

9 "It may however, be admissible for other
10 purposes".

11
12 That was one of the things that dealt
13 relatively with character evidence. Now, in
14 contrast to that however -- and that was your
15 suggestion -- that the criminal -- Title 183577
16 provides:

17
18 "No limitation shall be placed on the
19 information concerning the background,
20 character and conduct of a person
21 convicted of an offense which a Court of
22 the United States may receive and
23 consider for the purpose of imposing an
24 appropriate sentence".
25

1
2 So, the two are sort of at loggerheads.
3 And I just make a comment on that, what would be
4 your particular observation on that? In other
5 words, as far as the Ninth Circuit's
6 recommendation was concerned?

7 JUDGE BURNS: Judge MacKinnon, I guess we
8 didn't make ourselves too clear. Our problem
9 with NROS (sic) was bottomed on the change of
10 venue proceeding. If I rob five banks a week
11 apart, standard stuff, bank robberies are
12 apparently unrelated, they're a week apart and
13 different parts of town. Now, under NROS as it
14 is presently phrased, I could consider the other
15 report. They're not inferred in some and they
16 don't result from it.

17 Now, one way of getting that is, if he
18 agreed to be tried on Bank Robbery No. 1 and the
19 government could bring in evidence on Nos. 2, 3,
20 4 and 5 under 404-B then I could consider as
21 part of the grieving offense alternatively if
22 those bank robberies were separately indicted
23 and if you joined in the Rule 8 as a matter of
24 "joined-in-the-trial". Then, when he pleads
25 guilty to one I can look at it and know about it

1 and act upon the other four.

2 JUDGE MACKINNON: You think they have to
3 be charged?

4 JUDGE BURNS: I don't think they have to
5 be charged, Judge MacKinnon. But, unless they
6 are inferred or result from under the present
7 standards you have, I would have to ignore those
8 other four and I shouldn't have to.

9 JUDGE MACKINNON: Well, I agree with that
10 because I think it's Greyson and Roberts that
11 say that even though they were charged and
12 dismissed you could still take them into
13 consideration on the sentencing.

14 JUDGE BURNS: Not as I read NROS.

15 JUDGE MACKINNON: You say, our --

16 JUDGE BURNS: The present formulation.
17 The present formulation. I will read -- I will
18 read the commentary on the formulation of NROS
19 to aim for that kind of result, but this is real
20 life and this is what we get and we struggle on
21 this stuff because of the way these --

22 JUDGE MACKINNON: You want to have
23 available the right that the Supreme Court gives
24 you in those cases to consider those other
25 offenses.

1 JUDGE BURNS: You can't have truth in
2 sentencing without truth in the charging of it.
3 If the prosecutor and defendant don't tell me
4 those then I can't evoke the truth at the time
5 of imposing sentence.

6 JUDGE MACKINNON: As I said earlier here
7 today and I happen to be on that part of the
8 assignment, I think it's going to be possible to
9 assure that you get all the facts and if you
10 don't somebody is going to be guilty of a crime.

11 The lawyers, the United States Attorney.
12 And that's very easy to do. And, I think you're
13 entitled to it in sentencing. And you don't
14 have to come up where somebody, as they say,
15 "swallowed the gun" and you don't know anything
16 about a gun and it's a bank robbery and they're
17 going to have to show it.

18 JUDGE BURNS: Thank you, very much.

19 JUDGE WILKINS: Judge --

20 JUDGE BURNS: Running over my time.

21 JUDGE WILKINS: We, I think, all agree
22 with what you're saying. The problem, I haven't
23 been able to figure out, Judge, when you say you
24 want to consider the other bank robberies in
25 sentencing today. You do that.

1 JUDGE BURNS: You bet.

2 JUDGE WILKINS: How much do you consider?
3 You see, you don't have to say how much you
4 consider today, but under our guideline system
5 we're going to have say how much because some of
6 these numerical scores, maybe as you think about
7 it for us to say those multiple crimes that you
8 would sentence for the crime and conviction.
9 And as far as the others are concerned we would
10 specifically say: I got it, Judge. This is a
11 good example and we encourage that part to
12 encompass these other things."

13 JUDGE BURNS: Part of the problem comes
14 from the fact that the example that you have
15 used in developing the commentary in NROS tends
16 to be less realistic than many of what we, in
17 the trenches think of as regular recurring
18 episodes.

19 So, that's why we have struggled to
20 accomplish this. I was hoping you wouldn't ask
21 me questions that Judge Breyer has asked me
22 earlier about concurrent and consecutive
23 sentences. I don't have an answer on that.

24 JUDGE BREYER: The box that I put your
25 problem in sometimes half-baked brain, the box I

1 put it in, the one about the bank in that
2 concurrent/consecutive sentence because the --
3 and see why I put it there, because, see what
4 good the bank tellers are toward banks and that
5 happens all the time. In other words, you
6 repeat the same conduct four or fives times.
7 How do we punish him for that and you come up
8 with an interesting idea.

9 JUDGE BURNS: Our committee isn't through
10 yet. We intend to continue working and develop
11 any material in the way of alternative
12 suggestions. We intended to get them to you by
13 the 3rd or 4th of December.

14 JUDGE BREYER: See, your 404 point. 404
15 point, you say "Gee, that's arbitrary". Because
16 404 point turns on relevance and relevance is
17 important to the facts of the individual case.
18 I mean, sometimes those three banks really tend
19 to show a common scheme in which case in our
20 Circuit decision will say --

21 JUDGE BURNS: Sure --

22 JUDGE BREYER: Whether or not they shown
23 the common scheme is relevent to the facts of
24 the individual case.

25 JUDGE BURNS: If you had the advantages

1 of the Appellate Court and I would like to think
2 I had here, but I know better than that. And if
3 the Court would say that the fact that the
4 robbery's one because he's hooked on heroin and
5 each was sufficient enough "relatedness" to
6 include them under the form, that's fine. I
7 don't see this Circuit doing that. I don't see
8 most of the Circuits doing that under your
9 policy.

10 I do promise, Judge Breyer, that if at
11 all possible our group can help you with
12 concurrent, consecutive problems which you've
13 already discussed here, we're going to help you.
14 We're going to try are best to help you.

15 JUDGE WILKINS: Thank you, Judge Burns.
16 Appreciate your work and support and all of your
17 assistance.

18 JUDGE BURNS: I ran over -- my rate,
19 Judge Wilkins, is at \$5 a minute.

20 JUDGE WILKINS: Sorry about that. Send
21 us a bill. Our next witness is Professor Curtin
22 from the University of Southern California Law
23 School, Los Angeles. Professor Curtin, we're
24 delighted to have you with us.
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15 PROFESSOR DENNIS CURTIN
16 UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL
17 LOS ANGELES, CALIFORNIA
18
19
20

21 PROFESSOR CURTIS: Thank you. I have
22 been for the last 16 years running a criminal
23 program here, either at Yale or USC where I now
24 am and my students have represented federal
25 prisoners in all sorts of problems that they've

1 had and we have had a lot of experience with
2 sentencing and parole.

3 And so, I have some knowledge about that
4 area and you can say I have a worm's eye view of
5 the system because I see it through the eyes of
6 my clients who are already in prison.

7 I think I probably should tell you at the
8 beginning a little bit about my biases. I am
9 probably more process-oriented than I am worried
10 about abstract notions of justice.

11 I think also from contacts with the
12 prisoners and my contacts with people who guard
13 the prisoners, the staff at the institutions
14 that I've been involved in, I think they tell
15 me -- and I think they're probably right, that
16 we have lots of incarceration now in the Federal
17 system. Enough incarceration now in the Federal
18 system, maybe even too much incarceration now in
19 the Federal system.

20 And I worry when I read these guidelines
21 that perhaps the guidelines either advertantly
22 or inadvertantly are going to raise the level of
23 incarceration quite significantly.

24 Seems to me the burden ought to be on
25 those who plan to increase the incarceration to

1 show how increased incarceration is going to be
2 more just than the system we have right now.

3 I have -- I mean more just in the
4 aggregate. I'm not talking about -- I
5 understand that one of your purposes is to
6 reduce disparities in the system and I have
7 absolutely no quarrel with that. Seems to me we
8 see them everyday, I have clients who have
9 gotten one year, six years and 50 years for
10 kidnapping, for example, the same crime and
11 somewhat the same circumstances.

12 I have two reservations that I basically
13 want to talk to you about today from my reading
14 of the guidelines. One of them is, what I
15 perceive to be a tremendous decrease in the
16 amount of probation that is going to happen
17 under the new guidelines and;

18 Second, of course, is the increase in the
19 quantum of punishment that's going to be meted
20 out under the guidelines as currently written
21 and neither increase in revenue has been
22 justified.

23 I think what I would urge that you do is
24 to develop more flexible guidelines on
25 probation, first. And second, take into

1 consideration as part of your deliberations
2 about guidelines the capacity in the Federal
3 system.

4 I have heard that you have decided that
5 it's -- that you will develop your system first
6 and then try to figure out what the impact of
7 the system will be on the Federal -- on the
8 system. Now, I'm not sure that's a correct
9 understanding on my part, I'd be happy to find
10 out that that's not true.

11 But nevertheless, I think that's in your
12 analysis of what is just, what we have been
13 doing in the past is certainly relevant to your
14 considerations.

15 Sixty percent, I think, of the sentences
16 that are now handed out are probationary
17 sentences. It seems to me that any departure
18 from that -- I might be wrong. Say it's fifty
19 percent, say it's 40 percent, say it's 35
20 percent. But whatever percent it is, seems to
21 me it would be unwise to depart immediately from
22 roughly the same percentage of probation.

23 Probation is described in your draft as
24 rehabilitation oriented. From my perspective,
25 it isn't rehabilitation oriented. It's

1 punishment. Probation is punishment just
2 like -- it's not just like incarceration is
3 punishment, but it is punishment. It's
4 punishment of a different sort and it comes
5 after a lot of punishment for -- or a lot of
6 pain for being convicted of things that have
7 already happened.

1
8 I think that there should be a way to
9 give probation in almost any sentence except the
10 ones that you are forbidden to give probation.
11 Judge Alarcon said he had given or he had seen a
12 case where the bank robber got probation and
13 another bank robber got 25 years. Judge Burns
14 was just talking about giving the bank robber
15 probation.

16 It seems to me that under the guidelines
17 as now promulgated -- not promulgated, as
18 drafted -- that it would be extremely difficult
19 to see instances like those and I think there
20 will always be instances like those that I think
21 you should provide for.

22 You should find a way to get zero time as
23 well as to give 20 years time even in cases in
24 which have laid out the high number of points.

25 One way that you might do that -- I might

1 say I'm extremely defident, I've been involved
2 in the system for so long that I'm extremely
3 defident about talking to you because I know
4 that you've been thinking really hard about it
5 and it's an extreme, extreme, difficult subject
6 to deal with. And I know that you've been
7 working very hard at it and thinking about it a
8 lot longer than I have and so I have a lot of
9 respect for the solutions that you come up with.

10 On the other hand I think that along the
11 way we've gone wrong in two important respects.

12 One way to put it, one way to simply take
13 care of the probationary problem is to say
14 "alright, whatever, say 35 percent of the people
15 get probation now, say, okay, whatever 35
16 percent of the grades fall under the numbers
17 fall under, that is presumptively a probationary
18 sentence and that's what we're going to do. Or,
19 at least we'll consider probation first and if
20 that's not the case then we consider if there's
21 some aggravating factor".

22 Of course, as now structured you have a
23 heck of a time doing that because there's lots
24 of harms that you would not encompass by
25 incarceration.

1 On the other hand, you wouldn't be true
2 to the system that we now have, you would not be
3 increasing the prison population or you would
4 not be increasing punishment in the aggregate.

5 The other thing that I really -- the
6 other way to do it is simply give Judges more
7 authority if they need reasons to decrease the
8 numbers.

9 You have, and I think it's on Pages 314
10 on Page 123 of your guidelines, the Judges need
11 a little more participation in certain crimes to
12 enable to multiply the number by .5 to .7

13 In my view, you might be able to give a
14 little bit more discretion than that, remember
15 you're going to have to give reasons for every
16 multiplication factor. You might think of
17 saying: "All right, you can have from .1 to .7
18 or, if you can justify it, No. 1 or you might
19 say can think of more reasons than simply lesser
20 participation in the crime such as some moral
21 reasons for going below the guidelines than
22 simply lesser participation of the crime than
23 they have.

24 And there, I think some sort of mental
25 state, departure from the guidelines, claim of

1 right. Chairman Breyer can fill you in on those
2 better than I can.

3 But, basically, I would try to give the
4 Judges a lot more flexibility in their dealing
5 with the probationary sentences because I think
6 it's extremely important both for the system of
7 justice and not to increase the aggregate of
8 punishment that we have now.

9 The other thing is, I think that you
10 overtly should take the capacity of the system
11 into account in setting up your guidelines. I
12 see a nod from Judge Breyer. So, maybe I better
13 not say anymore.

14 But it seems to me you can't -- what I
15 would hate to see is some tying up of harms.
16 Some adding up of harms which I see as I was
17 going through your guidelines and attempting to
18 kind of replicate the job that you must have
19 done. And everytime I saw harms I could always
20 think of three or four harms to consider even as
21 I sit in my room, can think of more harms than
22 you thought of, because you have them down on
23 paper and that's a very seductive thing. And I
24 think a very dangerous path because at the end
25 of that you have to put numbers on those harms

1 and you have to say: "All right. How much does
2 somebody deserve?"

3 What I'm really afraid of when you do
4 that you cast loose all of your wards (sic).
5 (inaudible) You're not bound to anything.
6 You're just sitting in your room: "What do you
7 think this crime deserves?".

8 Of course, you're seven people who are
9 who are expressly -- supposed to be, on the
10 other hand, I would feel much more comfortable
11 and I think the American people would feel much
12 more comfortable if you said: "All right, what
13 have you done in the past?" What's the medium
14 of the sentences that have been handed out in
15 the past? What is the average? How do they
16 break down?

17 Why should we go outside of what we have
18 done before? Should we increase it anymore and
19 for what reason? Maybe we should go under. At
20 least you're starting with some number that has
21 some basis and practice in your history and
22 acceptance not from everybody, at least from
23 some portion of the room -- of the public.

24 So, I think in addition to the fact that
25 Congress has told you to take into account --

1 told you, suggested to you, also suggested in
2 the sentencing Judge's interim period, take the
3 capacity into account. Should be a very
4 significant part of it. I think that's the
5 problem.

6 If you get away from some sort of
7 capacity system what's going to happen? You're
8 going to have the system itself avoiding your
9 guidelines.

10 I can tell you when you talked today
11 about several ways to do that, one of them is
12 fact bargaining which goes on. I don't myself,
13 and Judge MacKinnon I think, sometimes it's not
14 as bad as you think it might be. There are
15 reasons to do it.

16 That the charge bargaining that's going
17 on in some cases, I think might be transferred
18 to State prosecution. That's happening all over
19 the country now with cross reference of U.S.
20 Attorneys, State District Attorneys.

21 You find cases being tried back and forth
22 to Federal Courts and State Courts and easy way
23 to avoid the guidelines is to simply shuttle
24 something over to State Court when you want to
25 make a deal that would give the prosecutors a

1 lot of power that they don't now have.

2 I think there are other advantages (sic)
3 that says that it might be put into effect, not
4 to mention, which could grow into the
5 guidelines' system. So, basically, what I'm
6 worried about is losing control. You're losing
7 control of the process if the process is getting
8 out of your hands and getting into the people
9 before you or after you in the criminal justice
10 system and if that happens then you'll have more
11 discrepancies. Then we can even trim off -- or
12 maybe we'll have the same discrepancies that we
13 have now in the system that we're trying to
14 correct.

15 I think it would be terrible in my
16 judgment if we ended up with unnecessary
17 punishment as a result of your efforts.

18 I'd be glad to answer questions you might
19 have.

20 JUDGE WILKINS: Thank you. Let me assure
21 you that we share your concern about handling
22 the detailed analysis. We do not have that in
23 detail and will have it in the next few months.

24 It is more that we understand what the
25 current practice is, although, as you probably

1 know it is not easy to find out exactly what the
2 current practice is. You can't go to any agency
3 and detail what we need to do.

4 PROFESSOR CURTIN: The kind of research
5 that you actually need to have done because it's
6 been gone over decades. It's a very difficult
7 thing to do. Any numbers that mean anything
8 especially in the Federal system, some States
9 are far more easy to get it in, in the U.S.--not
10 the Federal system. I hope to do that.

11 JUDGE WILKINS: It's not completed.
12 Would have to be completed before we submit
13 anything. Any questions to my right?

14 JUDGE MACKINNON: I find one of your
15 suggestions interesting but perplexing. The
16 question of keeping the same percentage of
17 probation. You make that suggestion. Following
18 the suggestion or at least the enforcement of a
19 higher reduction in disparity. Do you see any
20 contradiction in that?

21 PROFESSOR CURTIN: You do it without --
22 well, if you assume that every probationary
23 sentence is a disparity sentence then you short
24 out different points.

25 JUDGE MACKINNON: I'm not saying that.

1 PROFESSOR CURTIN: What I would like to
2 try to do, I think for any client is --
3 absolutely all I could do is, you base a lot of
4 things that you're not going to be able to do
5 but keep the same percentage if possible of
6 probation that you have now.

7 JUDGE MACKINNON Keep the same average
8 which means the only thing I can do for
9 disparity?

10 PROFESSOR CURTIN: One way you can do it
11 is to say: "We are going to have a system in
12 which certain people down at the lower end of
13 our guideline range get probation."

14 And that cuts you off - going to be in
15 the 35 percent mark. So that you can surely
16 predict with the guidelines that you have now,
17 how many points somebody's going to be where
18 the 65 percentile -- 35 percentile is going to
19 fall on the point system. If you say
20 everyone, presumptive basis, you won't do
21 anything, the fact that you raise --

22 JUDGE MACKINNON: I'm still perplexed.
23 If you leave the same percentage at zero in
24 terms of probation, keep the average the same
25 and you wanted to eliminate disparity there's

1 only one place you can get it from, are those
2 who are apparently in prison.

3 PROFESSOR CURTIN: No. Maybe I'm not
4 making myself clear. I guess I'm not. If you
5 have 65 -- say you have fifty percent. Let's
6 take a number. Let's say you have fifty percent
7 of the people getting probation. Fifty percent
8 going to prison. I suggest you keep that same
9 percentage in your guidelines.

10 One way that you do that without reducing
11 disparity in the system is to say that anybody
12 who has a point score in the lower 50 percent
13 gets probation. There's a lot of ranges where
14 you obviously don't want to do that, if you do
15 it any other way. On the other hand, reducing
16 that from a disparity is better than not having
17 any amount of probation. To that effect, I'm
18 being consistent.

19 JUDGE MACKINNON: Disparity is coming
20 upon the positive sentence. Keeping it to
21 fifty. Taking your example, who gets probation,
22 now, half of all those sentences have to still
23 get probation. So, there's no disparity between
24 giving fifty percent probation and fifty percent
25 sentences. The only disparity is that those are

1 actually sentences in prison. I find that a
2 strange notion of reducing disparity. Don't
3 you? Disparity has nothing to do with the
4 proportion of getting probation, only to do with
5 the length of sentencing of those who are
6 incarcerated.

7 PROFESSOR CURTIN: I think, if I add --
8 if I presume -- suppose your factors go up from
9 zero --

10 JUDGE MACKINNON: I think I understand
11 the technique.

12 PROFESSOR CURTIN: Everyone in the fifty
13 percent, presumptively get probation. Then you
14 have, in essence, a similar system that you have
15 right now. The only way you could so that the
16 guy with the knife and the guy with the gun gets
17 probation. So you have disparity there. If
18 that's what you're saying. But we have a one --
19 we had -- worthy enough to be in prison
20 (inaudible) and in that case there's nothing
21 wrong with continuing. Only way to avoid it, it
22 seems to me, is to give everyone except people
23 who are almost innocent some --

24 JUDGE MACKINNON: No.

25 PROFESSOR CURTIN: Otherwise, if you want

1 to do away all you can have is people down at
2 the very low end with 6 points or less getting
3 probation.

4 COMMISSIONER HELEN G. CORROTHERS:

5 Professor Curtin, I think you indicated that our
6 commentary reflected the idea that probation is
7 not punishment. I was not aware of that and I
8 only think we intend to say that probation is
9 not punishment.

10 PROFESSOR CURTIN: Some were.

11 COMMISSIONER CORROTHERS: Is punishment
12 simply a matter of discretion if we didn't do
13 that?

14 PROFESSOR CURTIN: In my notes, I recall
15 saying for the purpose of rehabilitation. I
16 think that that's not true. I think there are
17 probation lots of times imposed and under our
18 system I think this is punishment.

19 COMMISSIONER CORROTHERS: Yes, with that
20 point.

21 JUDGE WILKINS: Any other questions.

22 JUDGE MACKINNON: Depends on the
23 individual, hardened criminal, rather than spend
24 an extra year in prison then three years on --

25 PROFESSOR CURTIN: That's right. Some

1 people can't stand probation.

2 JUDGE MACKINNON: And others -- somebody
3 like that is just a brief, as I indicate, what
4 you're really advocating, in an action or except
5 as we have a practice (inaudible). How are you
6 going to -- we have a thousand judges throughout
7 around America. Can't come up with any
8 proceeding that you're going to guarantee that
9 you have, just as many probation cases, prison
10 cases that you had.

11 PROFESSOR CURTIN: You can come close,
12 Judge. The other thing is my point is really
13 this: I would say rather you say: "Look, this
14 is essentially what we have been doing in the
15 past. It has some validity because it is the
16 (inaudible) of a group of judges thinking hard
17 about crime and there's some solid reality to
18 it.

19 Now, the Judges are distant. They give
20 distance sentences. But this bank robber gets
21 five years in time. Seems to me it's telling
22 us. That's all I'm saying, If you want to do
23 ten years seems to me you ought to say we
24 thought it ought to be ten years instead of five
25 years." But that's a very difficult judgement

1 for me to make. That's my point.

2 The other point in the guidelines that
3 you have in your possession and the tools that
4 you have in your possession I think you can
5 pretty well, you can pretty well design
6 guidelines that are out there with your thousand
7 Judges sitting out there, are going to be able
8 to put eight thousand people in jail or ten
9 thousand.

10 JUDGE MACKINNON: How do you think about
11 probation for income tax offenders.

12 PROFESSOR CURTIN: You know, Judge it
13 seems to me your better at that than I am. I
14 don't want -- I don't want to dodge the
15 question. If I where a Judge I would say I
16 might be a little more conservative than members
17 of this panel. I think that crimes of violence
18 I would say incarceration is necessary. Income
19 tax violations, I think are probably not,
20 depending on what I know about residivism. I
21 don't know much about residivism in income tax
22 cases.

23 Really insensitive there. In terms of
24 giving time, as far as I think that for the
25 first offense in an income tax case, I certainly

1 would give probation. I hope you don't think
2 the worst of me for that.

3 JUDGE MACKINNON: When I was a U. S.
4 Attorney I had an income tax investigator come
5 in to see me after I'd been there about a year.
6 He said: "You don't realize the kind of work
7 we're getting. Some of the kinds of prosecution
8 that you have been bringing in", he said,
9 "they're coming in evading taxes in the
10 hundreds".

11 It isn't that we see so many of the
12 individuals, it's the continuance of the effect
13 there and I think there's a wide -- I'm only
14 speaking for myself, but certainly doing a lot
15 of -- consideration going to be given to
16 providing the income tax violations in
17 reasonably, substantial amounts -- might get
18 some time, not five years or two years but some
19 time.

20 PROFESSOR CURTIN: Let me just say one
21 thing: If you give somebody three months you're
22 doing that person -- you're giving him a shot,
23 certainly. On the other hand, you're making a
24 heck of a lot of trouble for prison people just
25 to process that guy in and out if you try to.

1 We're getting paid for that.

2 You're also making -- you're putting that
3 person in a place he's going to take up for
4 three months and it seems to me that when you
5 try to cross all these things out you might end
6 up, in our judgment, we think it's a --
7 (inaudible) to run these people through in
8 lighter cycles.

9 On the other hand, you certainly might --
10 not because you fit it in. We have six -- six
11 bank robbers waiting for a place in this prison.
12 We have got 250 million people in the United
13 States. When you factor out the juveniles, you
14 got 150 million filing income tax returns and if
15 they see that they've got to file an honest tax
16 return the number of cases that you're going to
17 prosecute in the future, if they don't or if
18 they file an honest tax return as a result of
19 the imposition of some time for a few offenses
20 in the next couple of years, I wouldn't be
21 discouraged, Judge, that you couldn't look upon
22 prison as a source of resource -- not a resource
23 that we can spend with complete impunity and if
24 it turns out that income tax people are very
25 important to put in jail, remember they're

1 occupying scarce space.

2 JUDGE MACKINNON: They're depriving the
3 government of millions of dollars and they're
4 just the tip of the iceberg. And the fact that
5 they get off as easily as they do a lot of them
6 feel it's just a business proposition or a
7 business risk that they continue to underpay
8 their taxes.

9 Now, I don't know whether you have ever
10 prosecuted any tax evaders, but the general way
11 that the ordinary tax evader is discovered he
12 goes down and talks to the Internal Revenue and
13 a lot of this is pure avoidance of the law.

14 A lot of people feel something has to be
15 brought home to those people and they are most
16 repentant, they are not repeaters. Once you get
17 a person for income tax evasion he's generally
18 not going to repeat it. But somebody else is
19 going to repeat it because he got off easy.

20 I think that some person along the
21 line -- I don't know about my colleagues might
22 bear, something that might bear a little time,,
23 I'm not saying going to make a career criminal
24 out of him but again, he ought to get some time,
25 maybe.

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2 MR. COOK: My name is Michael Cook. I'm
3 with the Federal Offenders.

4 JUDGE WILKINS: Have a seat, Mr. Cook.
5
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7
8

9 MICHAEL COOK

10 FEDERAL JUDGES OFFICES

11 NORTHERN DISTRICT OF CALIFORNIA
12
13 ---
14

5
15 MR. COOK: All right. I'm with the
16 Federal Judges Offices, Northern District of
17 California. I sat through this hearing all
18 today. I appreciate the opportunity to be a
19 member of the public, also to have the input in
20 listening to what's happening today and the
21 comments I heard.

22 There were a couple of thoughts I had.
23 First, it was interesting to see the clearcut
24 contrast between prosecutors who seem very
25 satisfied with the number at least in terms of

1 sanctions and what that equates to in terms of
2 length of sentence in the preliminary draft and
3 the defense seems very concerned about the lack
4 of flexibility from the lower-end sentence where
5 there's a lot of limiting factors, we should all
6 agree upon, doesn't seem to be included in the
7 potential draft before us now.

8 I think it's very important to have the
9 flexibility before the lower end. I practice in
10 front of three Judges in San Jose. I don't
11 consider them to be soft nor do I consider them
12 hardened sentencers to me when I get -- because
13 there's some people that maybe the case is
14 different than the recent bank robbery cases
15 that we have to deal with. And so my concern
16 really is to allow the present system we have
17 now full discretion. The Commission seems to
18 deal fairly effectively with the high end
19 sentence outside the normal -- what we would
20 expect. I appreciate the Commission's concern
21 about how you can hurt those mitigating factors.

22 There's one thought I had, was one of the
23 areas that you left quite wide open is how does
24 one convert non-custodial type of sentence, be
25 it probation, house arrest, fines, into

1 equivilents that are inconsistent to be used.

2 It seems to me if the concern really is
3 for the low end sentence and that seems to be
4 certainly the public concern, though in my
5 experience in representing clients who are
6 people who I don't want to see treated as though
7 this is an appeal, this is an average in terms
8 of time.

9 So, I have to present that it's important
10 that that flexibility be there and if the
11 concern is whether one includes that within the
12 guidelines or takes it outside of the
13 guidelines, if your concern is some control over
14 that process, I guess it ends up within the
15 guidelines and ends up with some sort of
16 procedure of conversion factor of one year of
17 probation, would be the equivilent to six months
18 in custody.

19 Whatever it is, it seems to me that's the
20 Commission's concern and Congress' concern is
21 limiting discretion. That's one way of doing
22 it, still allowing flexibility for those
23 mitigating factors. I think we all realize it's
24 important.

25 I'm very concerned also about the

1 question of the standard of proof. Whether, to
2 what extent the Rules of Evidence apply. Seems
3 to me, if you deal with a standard of proof we
4 ought to be applying or formalizing particular
5 rules. Be it Rules of Evidence if you're
6 talking about a clear and convincing evidence
7 standard. Maybe there is more justification for
8 applying a lesser standard.

9 Seems to me there's some flexibilities
10 there in terms of the applicability, in terms of
11 Rules of Evidence and the standard of proof
12 that's going to be required ultimately when we
13 have appeals. That will happen, certainly.

14 I think there will be a tremendous number
15 of appeals. Certainly, the defense or the
16 government who may be disputing the application
17 for what they contend to be wrongful application
18 in the first place, sense it's going to be a
19 factor-down type of determination by the
20 sentencing judge.

21 And I can envision a lot of sentencing
22 judges are going to be having the Appellate
23 Courts reviewing, mostly clearly erroneous
24 standards which is an extremely sentencing Judge
25 which to me is all the more reason why there

1 should be the higher quantum of proof, higher
2 degree of evidence in our determining the exact
3 factors that the Judge must produce, must
4 consider in imposing sentence.

5 So specifically, our comment of Rule 32,
6 which is going to be modified, fits correctly
7 the portion that will now require the Probation
8 Department to disclose as part of the
9 pre-sentence in terms of what they believe the
10 guidelines the Judge should follow will be what
11 they should apply.

12 However it, still leaves open the
13 ultimate recommendation by the probation officer
14 still has not been exposed to the defendant.
15 And I'm not clear whether that's intended for
16 the probation officer making a recommendation
17 below the guidelines or above the guidelines.
18 Even though they have made their computation,
19 whether that's going to be a part of that
20 confidential recommendation that I don't think
21 he'll receive, whether it's going to apply to
22 recommendations within, whatever the guidelines
23 that the Judge may have, to impose sentence.
24 Doesn't seem to me that's clear what the change
25 to Rule 32 is going to be.

1 That's certainly very important to, I
2 think, any defense attorney. Quite frankly,
3 there are some judges who disclose what those
4 recommendations are, some are apparent and I
5 think it's a good idea to have sentences as open
6 as is contemplated by the Statute by this
7 Commission's mandate.

8 If it's going to be I think those
9 recommendations where the probation officer may
10 indicate to the judge that the factors should be
11 below the guidelines or above, ought to be
12 disclosed also to the prosecution or defense.

13 I'm really troubled about what's going to
14 happen to all my clients I have represented in
15 the past and who keep asking me "what's going to
16 happen to me when the Commission is out of
17 existence?" That certainly is not clear at this
18 point nor do your guidelines seem to agree
19 except in this one case.

20 I had one of these cases that my client
21 was convicted of First Degree Murder whose
22 appeal is pending and as I read the commentary
23 of your guidelines on Homicide you propose to
24 convert the sentence which is now eligible for a
25 parole, ten years mandatory release, 30 years

1 with life without possibility of parole.

2 I have some great problems with that and
3 really concerned that I don't think the
4 Commission has dealt with those. How you
5 propose to deal with converting sentencings
6 ultimately.

7 Another problem I see with Rule 32, every
8 sentencing Judge are mandated to consider all of
9 the factors that can be set out effectively.
10 Eliminate that section of Rule 32, will not
11 consider disputed factual information for
12 purposes of sentencing. If that happens are
13 going to be lot of sentencing. What is
14 practically happening now. Most Judges have
15 decided not to consider that disputed factual
16 matters in the pre-sentence report.

17 What happens? Judges no longer have that
18 discretion. He's going to have a lot more
19 sentences and ultimately my reading of these
20 guidelines, they get enacted in a fashion
21 similar to, they don't have included the
22 mechanism to deal with mitigating factors.

23 Lot of my clients are going to say to
24 me, "what happens if I plead guilty?"
25 (inaudible) Must have very definite idea as I do

1 not. I have a lot of uncertainty in that. If I
2 end up telling them "it really makes no
3 difference what mitigating factors are available
4 because the judge wouldn't be able to take into
5 consideration..." as it will actually affect
6 upon me of getting to trial.

7 Quite frankly, I don't see another
8 rational thing I can say if you're going to be
9 treated as a certain individual charged with a
10 certain offense if important factors such as
11 background and drug abuse and other relative
12 factors of my client are not going to be
13 available as mitigating factors.

14
15 I don't see what, if any motivation there
16 is for a client not to take his chances and go
17 to trial. I'd like to thank the Commission for
18 the opportunity for allowing me to be heard. We
19 ask for compassion for our work you now consider
20 for purposes of the system today. (inaudible)

21 JUDGE WILKINS: I was a little surprised
22 to read complaints about the studies suggesting
23 ways of protecting your client's rights. Just
24 as I'm not going to consider -- I don't know
25 whether you consider that or not, so you have to

1 give a reason.

2 MR. COOK: I understand that. And I
3 guess my response in part to that is the way the
4 system is presently structured now, the parole
5 commission with its guidelines roughly cleans
6 out that process. Whatever standard in the
7 Parole Commission instead of by statute is by
8 preponderance of the evidence.

9 JUDGE WILKINS: Review proceedings.

10 MR. COOK: -- just came out. Isn't
11 clear, enough discretion. Their calculations of
12 guidelines, nor is it a violation of the expo
13 facto law to apply through guidelines to deal
14 with previously sentenced under older
15 guidelines.

16 JUDGE WILKINS: Any questions to my left?

17 JUDGE BREYER: You make it to accommodate
18 sentencing in terms of proceedings. Then you
19 can slow down the system to the point where you
20 might as well say: "Charging -- that's the
21 charged offense sentence, get rid of it." But
22 then the power goes to the prosecutor.

23 I think you're absolutely right on the
24 right track, trying to figure out some kind of
25 negotiable criteria to work with.

1 From that point, would you think the same
2 thing -- I think you heard Professor Zimring
3 (sic) and Commissioner Baer say it was a
4 technical point. You're bringing that out.
5 You're trying to suggest what we should do in
6 order to make it easier for a Judge to give
7 probation. Easier than in the --

8 MR. COOK: That's true. It becomes a
9 function of to what extent you want to bring in
10 discretion and to what extent to do that.

11 JUDGE BREYER: You're making some
12 conversion of guidelines. This is what I'd like
13 to think about. All the suggestions come down
14 to three. For the first time each has a fault
15 and one of them -- I think -- one thing you can
16 do, you can raise the floor to 14, 16, 18.
17 You're floor is too low. It's 14 points now.

18 Now, the floor in raising is that we have
19 the statute that ties the ceiling to six months.
20 You know what I'm talking about?

21 MR. COOK: Yes.

22 JUDGE BREYER: So, if we raise it to 18
23 or 20 that means that whatever category the
24 Judge has the right to give probation whatever
25 that category of offenders. If the Judge can't

1 give more than six months in prison to that
2 person in that category who he would like to
3 send to prison, that's a flaw. That doesn't say
4 you should do it. Each method has a flaw.

5 The second method is the one, kept
6 proposing all day, the threshold. Decide
7 whether to look at probation or not. If you do
8 that as a threshold, the category of guys like
9 bank robbers, bad guys for the most part in that
10 category -- wasn't so very bad, but what you're
11 asking the Judge is, you either give him
12 probation or 25 years. There's no in between,
13 and that's sort of weird.

14 MR. COOK: There, the Judge could still
15 say there's some factors not really covered
16 adequately.

17 JUDGE BREYER: If you say only that you
18 produce that weird result. If you say that --

19 MR. COOK: Ultimately, the sentencing
20 Judge doesn't consider anything literally.

21 JUDGE BREYER: The third one is, you say
22 judging outside the guidelines, that's what
23 you're saying right now, if you think he needs
24 probation go outside of the guidelines. The
25 flaw in that these are not key flaws. I'm just

1 saying that too often people tell us "you got to
2 use guidelines".

3 And now, you suggested a fourth, which
4 I'd like you to think about, which is there some
5 way of increasing the encouragement to go
6 outside the guidelines when the sentencing of
7 prison that otherwise would be relevant is low
8 but less encouragement when it's high.

9 In other words, if the sentence of
10 imprisonment for people in this category were
11 normally a year, the Judge would somehow be
12 inclined to look more closely at the possibility
13 of no sentence at all. In a sense, in this
14 category is 20 years.

15 You say, not -- if you're going to
16 depart, not send him to prison at all, that's
17 better than if your flaws are few and far
18 between for very, very, good reasons.

19 MR. COOK: Seems to me, too and it's
20 surprising the limitations, you handle five
21 years maximum probation imposed, seems to me the
22 possibility if one is concerned about the lack
23 of flexibility that most longer periods of
24 probation is an alternative to assert. All of
25 the traditional prison sentences, the types of

1 probation in bank robbery cases, I think
2 everyone is concerned from the defense point of
3 view, that there needs to be some flexibility in
4 the system to accomplish that other than what I
5 see now, which is the Judges can do it, but the
6 onness is putting all to the --

7 JUDGE BREYER: I can think of two things
8 to be helpful. One is both the technical
9 problem, trying it as a technical problem. How
10 to do it on probation, not as an average policy
11 problem. Technically, what there is (inaudible)
12 and secondly, as you pointed out in Murder,
13 Section 1111, that's a problem. What happens is
14 that that Statute U.S.C-1111 imposes a penalty.
15 It says: "Penalty is life." And that didn't
16 mean life prior to this new law but this new law
17 parole, appeals, bank robberies.

18 MR. COOK: Bank robbery is five years for
19 people who are going to be getting dates before
20 they allow disposition.

21 JUDGE BREYER: You're pointing out
22 something of policy. I'm not talking about
23 policy. I'm talking about something that the
24 law says if I agree in terms of policy I still
25 have to pay this statute which for technical

1 reasons says whoever is guilty of Murder in the
2 First Degree shall be sentenced to prison for
3 life.

4 MR. COOK: We have that problem of the
5 statute and there I think it would be useful for
6 people like yourself who see these analogies to
7 make a point to call it to the attention of
8 Congress.

9 JUDGE BREYER: I'm glad that you call it
10 to our attention but we are operating under the
11 status, as far as I know, there's no way out
12 that. You see the statute says "life" and the
13 provision which allows the parole authorities to
14 grant parole is gone.

15 MR. COOK: That's true for the armed bank
16 robber. 15 years. Your guidelines don't tell
17 somebody. Seems to be intimating is the --

18 JUDGE BREYER: Statute says that it will
19 be a minimum number of five years. That's the
20 maximum number.

21 MR. COOK: No, it doesn't -- that's
22 right.

23 JUDGE BREYER: We can't say less. Any
24 statute that has a minimum. We can't go beyond
25 any statute that has a maximum number. We don't

1 go above the maximum. The Murder statute does
2 not provide minimum or maximum.

3 MR. COOK: Based on -- it is truly the
4 way it's written, a discretionary life
5 sentence --

6 JUDGE BREYER: That's base --

7 MR. COOK: Unfortunately, it's not
8 published?

9 JUDGE BREYER: You ought to get it
10 published.

11 MR. COOK: Asked him to write an opinion,
12 unfortunately, he didn't.

13 JUDGE BREYER: It calls for decision by
14 the jury too. Doesn't it? And the Department
15 of Justice -- have to go to the jury. Let me
16 ask you this: You realize the contents in which
17 these sentences are going to be imposed. Now,
18 they're going to specify the exact reasons and
19 that the exact reasons enumerated in open court
20 are going to be the sentence. Have you focused
21 on that?

22 MR. COOK: I think that's an improvement.

23 JUDGE BREYER: They have to support the
24 sentence either aggravation or mitigation.

25 MR. COOK: Seems to be still steeped

1 (sic) with the standards the Appellate used
2 also. The fact that the process of determining
3 is this factor proved by the preponderance of
4 the evidence or isn't it. I think we're going
5 to have a great deal of lengthy review of that.
6 I think we're going to have clearly
7 erroneous --

8 JUDGE BREYER: I agree with you entirely.

9 MR. COOK: I think it is a much better
10 process of opening all -- that's why I think
11 it's important the process or whatever the
12 probation officer's recommendations are either
13 within the guidelines or outside which appears
14 in every way, Rule 32 is going to read 1976 as
15 part of the process of open --

16 JUDGE BREYER: Let me ask you how you
17 feel on it tax evasion cases?

18 MR. COOK: Public Defender's Office
19 rarely defend people. But they do as a favor --
20 I have represented some people in tax evasion
21 cases. Quite frankly, I can think of a case
22 specifically where the fellow was convicted --
23 imposed probation with a condition that returns
24 of the past be filed at a certain time and all
25 returns are filed within a limited probationary

1 period, timely fashion and that's the fraud,
2 late filing, of fines to be paid in a timely
3 fashion.

4 And those I think are genuinely fair
5 sentences. The problem is, most of the case
6 that get prosecuted for tax evasion fail to file
7 tax returns and quite frankly, that's deterring
8 the rest of the world out there related the
9 defendants I don't think it really happens.

10 There's a tremendous amount of penalty
11 for people that I represent who are indigent by
12 definition of the crime that justifies acts the
13 penalties of administrations imposed the IRS..
14 Themselves are very open be ~~INTER~~ just .

15 Of I'm,

16 JUDGE BREYER: I'm not talking about
17 Substantial tax evader. Not your protest a
18 number of them might stand trial. Many of them
19 plead guilty. You think they ought to get time
20 or some small amount of time or.

21 MR. COOK: Your largest --

22 JUDGE BREYER: All right. I'm talking
23 about evasion cases.

24 MR. COOK: I guess my answer to you is
25 one you find that satisfactory in the sense it

1 depends on the circumstances. To me what is
2 important in representing that person would be
3 the individuals mitigating factors.

4 JUDGE BREYER: Like what you got three
5 years for instance the average case, three years
6 tax evasion. Substantial. With mitigation. It
7 depends. Got two wives. His business was going
8 down the tubes. Maybe he had really financial
9 Pressures. His motivation to do it, other than
10 sheer greed. For example, See, he do sentence
11 from the other end of it I have an individual
12 who I didn't represent being in front of those
13 three same Judges in San Jose who make the same
14 in every case, look to the person I present and
15 was it that got them to the position where
16 they're at. We got a lot in terms of sentence
17 not only trying to deal, what happened with that
18 but also trying to convince the judge of some of
19 the things we have done. So that Judge wills ay
20 I wouldn't be coming back in the system. I
21 can't say that every one of those people should
22 get jail time. No.

23 JUDGE BREYER: Would you think that they
24 did not all of them but most of them that it
25 might reduce tax evasion substantial it tax

1 evasion.

2 MR. COOK: Quite frankly in my experience
3 it is the rare case that I have had my client
4 who actually has fought in terms of the
5 deterrants rational that a plea across the board
6 in simply a part of the process that they have
7 gone through. It is now, but there'll be
8 additional factors if somebody begins to get
9 time. In my experience most people, even bank
10 robbers that really hasn't been part of the
11 calculation.

12 JUDGE BREYER: At least I know the bank
13 robber --

14 MR. COOK: People who know they were
15 going to get caught never thought about the
16 process. "If I get caught what will happen to
17 me?"

18 JUDGE WILKINS. Neither of us will be
19 able to decide today. Will the guidelines make
20 a difference? We'll have to find out through
21 the next few years. We appreciate not only your
22 input but all the public defenders. Most
23 helpful in this Commission's proceedings. Great
24 assistance to us during the past six or eight
25 months.

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4 JUDGE WILKINS: Anyone else wish to
5 speak? I'm informed that Mr. John Conrad is in
6 the audience. Mr. Conrad--we're delighted to
7 have you -- among other things has spent a
8 number of years with the California Department
9 of Corrections, Director of Research of the
10 Federal Bureau of Prisons.

11 Thank you for coming.
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19 MR. JOHN CONRAD
20 DIRECT OF RESEARCH
21 FEDERAL BUREAU OF PRISON
22 CALIFORNIA DEPARTMENT OF CORRECTIONS
23 ---
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25 MR. CONRAD: Thank you. Had a long day.
Hope not to detain you unduly. I want to focus

1 entirely upon guidelines. The way in which they
2 might affect the correctional system of the
3 United States Government.

4 Any major change in the system of
5 sanctions cannot fail to affect on the
6 correctional system that are affected by it. So
7 that I will give you some idea, by me,
8 California -- in 1977, adopted -- changed the
9 entire system of sanctions from indeterminate
10 sentence to a determinate sentence.

11 The result has been a drastic -- drastic
12 increase in the population of California prisons
13 which are grossly overcrowded now. Millions of
14 dollars invested will be necessitated and the
15 extension of the budget program, budget
16 foreseeable in the future exceed a billion
17 dollars a year which the Department of
18 Corrections worked many years ago -- total
19 budget was less than hundred thousand a year.

20 Similar situation occurred in the State
21 of Ohio. Indeterminate sentence was adopted.
22 Pretty complicated. Had some very unfortunate
23 side features which resulted in an increase in
24 the populcation of Ohio from around nine
25 thousand in the late 70's to over 20 thousand.

1 Over time, there was a substantial
2 increase of available space. This is a very
3 serious situation from the standpoint of the
4 safety of the inmates, also safety of the staff.
5 It's important that in my view, that any change
6 in the system, that the government should take
7 into account the probably impact on both the
8 system, of changes upon the Bureau of
9 Corrections, and the probation system.

10 The system of guidelines is a well buffer
11 between the legislature and the judiciary. The
12 system of guidelines can insure that the
13 legislature is not increasing the delay. Any
14 increase in the sanctions between the present
15 situation -- I'd note the guidelines are only as
16 good as their capability for modification in the
17 light of experience.

18 The best example of the successful use of
19 guidelines is the State of Minnesota which has
20 managed to maintain a little prison population
21 in the last eight or nine years during which the
22 guidelines were in use.

23 The guidelines of Minnesota are regularly
24 reviewed by the sentencing commission for that
25 State and the Minnesota Statute requires the

1 Sentencing Commission to be impacted of any
2 changes in the guidelines.

3 For a prison population this has been a
4 very successful arrangement and I recommend that
5 some of the provisions be arranged for the
6 program that you adopt.

7 I have four recommendations to make to
8 you. First: I think that it is merely
9 practical and very desirable -- for
10 guidelines -- to make a preliminary analysis of
11 the impact of the guidelines which you adopt on
12 the prison population. This is a personally
13 practical thing to do and shouldn't take you
14 much more time to do it.

15 Following that, there should be an annual
16 review by the Sentencing Commission of the
17 impact of the guidelines on the prison
18 population, the population on probation.

19 And I remind you of the severe stress on
20 an over-populated probation system which is
21 worse then no probation at all in my view and I
22 think I should remind you that it's essential
23 that if probation is to make any sense at all it
24 does require a staff which is capable of
25 maintaining regular and future contact with the

1 probationee.

2 The second -- third recommendation I make
3 to you has to with the question of intensive
4 probation. A number of your witnesses this
5 afternoon referred to the desirability of
6 strengthening the probation system -- at least
7 maintaining a stronger emphasis on probation and
8 guidelines, prison draft seems to apply. I
9 would like to add that it would be very
10 desirable to consider a system of intensive
11 probation such as that now in the State of
12 Georgia. And I would want more relief of prison
13 population.

14 And the fourth recommendation, in dealing
15 with the guidelines program, there should be
16 some explicit provision for the allowance of
17 good time in long term -- good time is a
18 judicial way of regaining some time for the
19 purpose of behavior and that is the secondary
20 purpose of making possible some reduction
21 including the prison population.

22 Good time has unjustly, historically been
23 abused by prisoners and by those in authority.
24 Often, the good time, when extended to anybody
25 who has not had similar favor, unless the system

1 of good time is very carefully administered and
2 supervised by the sentencing commission itself
3 abuses occur and those are my four
4 recommendation.

5 Preliminary review of the impact of the
6 present proposed guidelines system upon the
7 present prison population followed by annual
8 review of the impact on the prison population
9 and various other impacts that might apply.

10 The incorporation of intensive
11 probation -- probation, that is for those
12 programs and finally probation for a program of
13 good time. Thank you, Commissioners.

14 JUDGE WILKINS: Thank you, very much, Mr.
15 Conrad, for the suggestions that you make. Any
16 questions to my left?

17 PROFESSOR NAGEL: Mr. Conrad, I would
18 just like to assure you on your four
19 recommendations, your first one, the
20 accomplishing, we have been directed by the
21 Congress to do an impact analysis.

22 Your second recommendation, also been
23 assigned the mission, the monitory mission by
24 the Congress subject to the development and
25 promulgation of the guidelines.

The third: Intensive probation, I wouldn't be surprised if you'd see that.

And the fourth: We are limited by the Congress concerning the good times provisions in that 54 days per year is all that is committed.

MR. CONRAD: I only say 54 days a year or whatever is allowable by law be very carefully administered and supervised, so is not automatically guaranteed to anybody and prisoners earn good time.

JUDGE MACKINNON: Clear that you go to one year, get that good time, that from that point on that's personally done. Feel that's a good idea. That's the law.

JUDGE WILKINS: Any questions to my left. Thank you, very much much. Anyone else wish to appear and testify? None coming. We thank all of you for attending today. We stand in recess

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