

TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS

TO THE SENTENCING GUIDELINES

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Pages 1 thru 221

Washington, D. C.
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UNITED STATES SENTENCING COMMISSION

Public Hearing on Proposed Amendments
to the Sentencing Guidelines

Tuesday, February 25, 1992

9:02 a.m.

United States Courthouse
Courtroom 20, 6th Floor
3rd and Constitution Avenue, N.W.
Washington, D.C.

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P R O C E E D I N G S

CHAIRMAN WILKINS: Let me call the public hearing to order. We'll go ahead and start even though Commissioner Carnes is not here. She may have run into the same problems I had this morning. My cab broke down under Rock Creek Parkway, and you can imagine trying to get another cab in the Rock Creek rush hour. I hope she'll be here soon. We'll go ahead and start. I hope this does not forecast the way this hearing will go for the rest of the day.

This is another in the series of public hearings that the Commission holds periodically on various issues and, of course, the primary topics today will be the amendments, proposed amendments that were earlier published in the Federal Register and circulated widely for public comment.

We will hear some statements from our witnesses and of course anything the witnesses would like to say, and then hopefully engage in meaningful discussion about the issues that are raised. A number of individuals have written to the Commission and asked to be put on the agenda as witnesses and all who requested are on the agenda.

In addition, if anyone is present at the conclusion of our scheduled witnesses testifying who wishes to address

the Commission, I will give you that opportunity. We will be glad to hear from anyone who has anything that he or she would like to put forth.

We'll start our hearing with two very distinguished members of the Federal Judiciary and two individuals who have worked very closely with the Commission over a number of years, Judge Vincent Broderick of the United States District Court of the Southern District of New York and Chairman of the Committee of Criminal Law and Probation Administration of the Judicial Conference. Is that the correct title, Judge?

JUDGE BRODERICK: I think it's about to be changed to the Committee and Criminal Law.

CHAIRMAN WILKINS: All right, sir. And United States District Judge, Mark Wolf from the District of Massachusetts and Chairman of the Subcommittee on Sentencing Guidelines of the Judicial Conference of the United States. We'd be glad to hear from both of you at this time.

JUDGE BRODERICK: Thank you, Mr. Chairman and Commissioners. Let me say first of all that I think while we're considering amendments here that have been published by the Commission, we can't consider them without also considering and taking note of the area of mandatory minimum

sentences.

The Commission this year published and submitted to Congress a report on mandatory minimums which certainly the Judicial Conference welcomed. It correctly analyzed the devastating impact of mandatory minimum sentences have on sentencing guidelines.

It's our judgment, in fact, that you the Commissioners of the Sentencing Commission are never going to be able to do your job effectively so long as you have to build around and account for mandatory minimum sentences. They are just inconsistent with the very concept of guideline sentencing.

We're here basically to thank the Commission for considering the recommendations of the Judicial Conference for amendments to the guidelines. Those amendments are reflected in the proposals that have been made and published and we urge their adoption. We urge it because we think that it is absolutely essential that there be more flexibility built into the sentencing process.

There is a strong feeling among the judges that all flexibility is taken away from them and to recommend to Congress and then to enact the proposals which the Judicial Conference has made will go far in my judgment to deal with

this problem of lack of flexibility in sentencing. I think it's very important for us the judges and for courts of appeals and for the Commission to remember that statutorily the judge does the sentencing.

No matter how we characterize guidelines, whether we characterize them as binding or as permissive, it is still the judge that is charged in 18 USC Section 3553(a) to sentence and he is told in that statute what to consider in sentencing. And one of the things that he is to consider, of course, is the guidelines. Now there is a tension between 3553(a) and 3553(b) because 3553(b) instructs the judge that he is to follow the guidelines unless there is a reason to depart.

I don't think that we the judges and I think maybe you the Commission have focused sufficiently on that tension and on attempts to work out some accommodation between the imperatives of 3553(a) and 3553(b), and I think this is something not today, but in the future you and we should address. For the present, however, I do urge very strongly that the Commission act favorably on the recommendations that we have made and that are reflected in your proposed changes which will give judges more flexibility at the lower end of

the guidelines which will spell out in a little more detail the area of flexibility and right to depart both up and down.

I do want to mention one more thing which is not raised by the proposed amendment, but which is a matter of tremendous concern to the judges. It's something I've raised, I think, every time I've ever been before the Commission, and that is the importance of the sentencing judges right to depart in the development of an effective guideline system.

I've said in the past that I regard this as the life blood of the guideline system. That judges depart and that the Commission studies those departures and moves by reason of that study from a heartland to a true system of qualitative guidelines. Because we are far from that true system of qualitative guidelines today, because we are still in the heartland, it is very important that judges be encouraged to depart. It is very important that judges be encouraged to depart. It is very important that courts of appeals' judges be encouraged not to discourage departures.

And I think you all know what I'm addressing, I'm addressing those provisions in the introduction to the sentencing guideline which has the effect of discouraging

departures by judges of suggesting that the Commission looks and scants departures and encourages courts of appeals' judges with the exception of those present to think that the Sentencing Commission is attempting to discourage departures. I think that's far from the truth and I think that you should exercise the power that you have when you next publish the sentencing guidelines to be sure that this discouraging language has been eliminated.

Now I'll turn it over to my colleague.

JUDGE WOLF: Thank you very much. We've submitted, although later than we wished, a lengthy written statement. And I hope you'll have an opportunity to read it because it was submitted late in large part because Judge Broderick was personally revising and it has a lot of detail that I don't think is most appropriately addressed orally.

One of the points it addresses which we raised last year is the process by which amendments are promulgated and considered and is amplified in the written statement. We would again urge you in the future to try to get a theme for each generation of amendments, rather than a large number that may seem to be piecemeal. And write a report that addresses that theme, because we think that will strike the

proper balance between being sure that these guidelines don't become ossified, out of date and unjust, but also permit some intelligent dialogue year after year on matters that are fundamental.

In addition, and I do want to spend most of my time addressing what I understand to be some questions that the Judicial Conference recommendations have suggested to the Commissioners. But as a preamble to that, I would say, as we say in the statement, we think those recommendations are moderate and modest. But they're very important. We don't think a large number of individual cases will be effected. But we think that the effect they will have on that small number of cases are important to the individuals involved and important to judges' perceptions of the justice of the sentencing system they're administering. And therefore, their confidence in the guidelines generally.

We urge the adoption of these matters on their merit. However, the reaction of this Commission to these amendments also has institutional implications that ought to be recognized. Several years ago the Federal Court Study Commission tentatively recommended that the guidelines be made advisory. Judge Becker, Judge Broderick's predecessor,

Judge Broderick and our Committee took the position with the Judicial Conference that they should not, and that we should seek to work productively with the Commission to improve the imperfections that many judges perceive in the guidelines. And we've taken that task.

When we were here last year, we expressed our disappointment that the Judicial Conference recommendations passed by the full Conference in September 1991 were not being taken up last year. We were very encouraged and reassured by the response that they would be addressed this year and Judge Wilkins' personal assurance to the Judicial Conference that they would be and we rely on that frankly.

In the sense that we have many constituents who would like to see the judiciary as an institution taken adversarial posture with the Sentencing Commission and still would wish to see the judiciary as an institution aggressively advocate the abolition of the guidelines. That's not the position of Judge Broderick, his predecessor Judge Becker or our Committee has taken, but that's not an issue that's resolved for all time. And the response to these proposals is going, I think, in meaningful measure to dictate the nature of this very important relationship.

I think our relationship, our partnership has been valuable in communicating concerns about mandatory minimum sentences. In a sense the Commission has really taken a leadership role in that, but the dialogue, since we do have different perspectives and interests. But the dialogue that's developed is not necessarily secure for all time and while we urge the adoption of the amendments on their merits, there are other implications.

With regard to what I understand to be some of the principle questions reflected in the Federal Register and communicated to us in some of our various discussions by individuals Commissioners, I'd like to focus briefly on Amendments 1, 2 and 3, the amendments that fall under the umbrella of giving more flexibility at the bottom end of the guidelines. And I would say the following, these principles apply.

First, we've worked entirely with the existing structure of the guidelines in decisions already made by the Sentencing Commission. Our Amendments 1, 2 and 3 which particularly 1 and 3 which corresponds with your Amendment 29, Options 1 and 2, I believe, affect only defendants the Sentencing Commission has already decided should be eligible

for alternative, basically defendants within that line C of your chart.

In addition, our proposed amendments in contrast to the recommendations of the Carruthers Committee create no new types of alternatives. We work exclusively with the alternatives that the Sentencing Commission has already deemed reasonable.

The concept in the proposed amendments is to allow community confinement in some cases in which sentences are now required and to permit a split sentence with only one month to be served in prison, rather than one-half the minimum guideline term. Theoretically, if you look at this on the chart, it does perhaps create a severity of, and I think some of you call the cliff, between going to prison, being required to go to prison, and not being required to go to prison.

But there's no increase in the cliff between punishment and no punishment, because the Sentencing Commission already decided that community confinement is a form of punishment and a form of punishment that can be substituted one day of community confinement for one day in prison.

In addition, we're pretty confident that any

theoretical cliff would not really exist in practice to a very large degree, because as some of you have noted, sentencing judges now are only using alternatives about 32 percent of the time that they're available. We expect that when you get to the upper end of the guideline range approaching what you call the cliff, judges are not likely to give no time in prison or to give no time in prison very often.

But there are individual compelling cases where that's the life resolution and these are some of the cases that are particularly wrenching the judges and injure their confidence in the guidelines generally.

In addition, you look at pages 11 in following of the report we sent you. We would suggest as a model for the kind of report we wish you would send us on your amendments, explaining what you've done, why you've done it, and what you rejected. You'll see that our staff has satisfied us and the statistics are there. That these amendments will not disproportionately benefit serious offenders or white collar offenders and these proposed amendments will not have an adverse despair impact on minorities. We can go into the details of that if you wish.

Finally, I'd just like to touch upon two other

things that you asked us to comment on and which we address more fully in our statement. With regard to relevant conduct, there is absolutely no question that you are seeking to address a serious and important problem. The Federal Judicial Center has recently done a study which needs a little bit of polishing which will be available to you soon that confirms what you know and what judges intuitively discern. And that is, that there can be tremendous disparity and potential for incorrect application in the relevant conduct guideline as it is now written.

We don't feel that all the language you've proposed is suitable to address the problem. The examples seem to convey pretty clearly what you wish to be covered and I apologize for not having a reaction to this earlier because we've been asked. But as I read the examples, it appeared that, and this is personal and tentative, that you might capture the relevant conduct you want to capture without giving confusing directions.

If relevant conduct was described as follows, the defendant should be held responsible for the full amount of drugs or money say of all transactions in which he or she personally participated and the full amount of all other

transactions from which he or she benefited or expected to benefit. If you use concepts like aiding and abetting, for example, that concept at least the District judges like me can undermine some of the other concepts you're talking about like the scope of an agreement and reasonable foreseeability.

But just working very quickly with your examples, I thought that the principle articulated as I just described seem to capture who you want it to capture and I would say quite appropriately, so without including people you would prefer not to include.

And finally, I'd say with regard to acceptance or responsibility, once again in response to the Judicial Conference recommendation to study this, many of us have concerns about tying discounts for acceptance or responsibility more closely to somebody's exercise of his right to go to trial or the timing of it. Because there are compelling constitutional concerns and considerations in that area.

Again, because we haven't had that much time to consult our Committee, let alone the Judicial Conference, some of this personal rather than on behalf of an institution. But with regard to resolving the question of whether somebody ought to be entitled to discount for acceptance or

responsibility if he accepts responsibility only for conduct that relay to the offence of conviction, it's my view that one should be eligible if one accepts responsibility for the conduct involved in the count of conviction. But that it should be permissible for the sentencing court to consider other possible criminal conduct.

And in fact, this is a variation on Option 3 which in your acceptance or responsibility study was discussed at page 31. And the reason for this is as follows. I think that the principle basis for giving somebody the reduction for acceptance or responsibility is that that person comments and conduct convey to the court that at least temporarily that person has got the message and is less dangerous and less in need of specific deterrents. So a lesser sentence may be appropriate. Sometimes the accepting responsibility for the offense and conviction only recognized an inevitable conviction. You have tape recordings; you have undercover agents. And the failure to acknowledge other criminal conduct conveys to me that this person hasn't learned any lesson at all; they're just trying to minimize their sentence.

And in other cases, there are genuine dispute as to whether a person committed the other conduct or whether the

Government could prove it or perhaps other legitimate reasons or at least cognizable reasons for that person not to admit. That requires the exercise of some judgment by judges. But as one of my former assistants when I was a Federal prosecutor used to say, that's why you get paid the big bucks. But as a practical matter, I think if you were to strike the balance there, which perhaps is not very far from where the balance is struck now, you would put it in the most appropriate place.

Thank you very much.

JUDGE BRODERICK: Mr. Chairman, may I just add one thing. We are here representing the Judicial Conference. I was a member of the Carruthers Committee and so was Mr. Shamble who is here, and each of us signed off on and recommended the recommendations of the Carruthers Committee. So I don't want you to think that while we're here recommending the Judicial Conference suggestions that we are opposing the Carruthers Committee.

CHAIRMAN WILKINS: Let me ask you this. What are the bases for departure, other than those now listed in the manual are approved by court decision would you suggest? We can list a bases for departure that would perhaps go a ways towards doing what you'd like to do. But what are those

bases?

JUDGE WOLF: The Judicial Conference recommendations address one principle basis, and that is to clarify. I think it would not be a change, but a clarification although perhaps it's a change, that factors can be looked at in combination as well as in isolation. And if the combination of those factors exist in such an unusual degree, that it can properly be said to be beyond what you've set, the Commission have considered. That in departure is appropriate, because we confront defendants who are each unique and sometimes there is a range of factors that it's really extraordinary to find one person.

CHAIRMAN WILKINS: Give an example of what you're talking about.

JUDGE WOLF: It may be, for example, I think there's a case in the First Circuit and it may be discussed in what we submitted to you, but you have a woman who in one transaction assists her husband who's regularly been drug dealing. She's got a child who's three months old or in that range. And she was under some compulsion from her husband to commit this offense and had concerns about her child and perhaps a degree of compulsion alone wouldn't justify a

departure, well the First Circuit said, the degree of compulsion alone didn't justify the departure. Somebody else could take care of the child. I think you could throw in illness, although I don't know that it existed in that case.

But generally we say well, if you'll ill, the prisons can take care of you. They have hospitals. You have a child, find somebody else to take care of the child. Your husbands are going to beat you up and leave you while you're pregnant, if you won't deliver the drugs, that's not an excuse or that's not a basis for departure. Because the Sentencing Commission envision there would be people like this. But they envision sort of illness, children and compulsion together. I think that would quickly be an example.

JUDGE BRODERICK: When we talk departure, we're talking departure up as well as down. I think one of the problems is that you are trying to identify too many components of what is and is not a permissible departure when the very thrust of the statute is that situations will arise that a judge finds is a circumstance that was not adequately considered or not considered to a sufficient degree by the Committee.

Let me give you an example. A judge has a trial and sentences somebody who was engaged in dumping, illegal dumping. The man happens to be not only an illegal dumper, but he is a lawyer and he is a judge. The judge says this is certainly a circumstance that the Commission has not considered and he departs upward on the theory that if a normal person should not dump, somebody who is a lawyer and judge, a force of your right, should not dump there. And of course, he gets me reversed by the court of appeals, most of whom have never sentenced anyone because this was not provided for in the guidelines. Now I think that's a shocking situation. I think that opinion was a shocking opinion.

But the problem is that judges are the ones who are given statutory discretion and they are instructed to depart, statutorily instructed to depart when they find a circumstance that the Commission has not considered.

JUDGE WOLF: Judge Wilkins, I would just add, if you look at page 8 of the report in recommendations of the Judicial Conference which addresses this recommendation. It discusses a case in the Seventh Circuit, United States v. Carey where the court of appeals looked at four discreet factors and said none of them alone justified a departure,

and therefore the judge's decision to depart was reversed. So this is some discussion of an illustration there and that report is appended to our testimony and of course has been sent to the Sentencing Commission previously.

CHAIRMAN WILKINS: Thank you. Let me ask the Commissioners to my right if they have any questions and the Commissioners to my left?

JUDGE MAZZONE: Just on departures, because I understand what my colleagues and my colleague Mark Wolf, especially was saying about departures. I'm not sure, Mark, what the language should be. For example, the Commission has already issued policy statements, 10 to 15 policy statements. Not to pick on your one example, but one of those statements does deal with duress or coercion of black male or whatever it is, your husband/wife situation. If the policy statement is there and the judge is not using it, what more do you have to do to tell them it's there, read it and use it.

JUDGE WOLF: Except, this is the point Judge Broderick was making earlier and that's explained in our written statement. That language is there, but there's other language.

JUDGE MAZZONE: Combination.

JUDGE WOLF: At the beginning of the guidelines, for example, the language and the introduction, it's not binding about how rare a departure will be. So that sends one signal and apparently a very clear one in the Ninth Circuit that has discouraged departures.

But we have proposed, if you look at Appendix A of the Judicial Conference, a report to you, it includes specific recommendations and has proposed language. In this case, what we propose is application notes of Chapter 5, part 8 that says, "Those offender characteristics that are not ordinarily relevant when determining a sentence, whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall or the type of sentence to be imposed when the guidelines provide sentencing options may be considered if the factors alone or in combination are present to an unusual degree and are important to sentencing purposes in the individual case."

We think that language would be helpful both to District judges and to courts of appeals. And since I gave Judge Wilkins my example, off the top of my head is a written example of the report if I could already do what I think the First Circuit has told us we couldn't do in that Posey case,

if I remember correctly, I would rely on what's in the written report.

CHAIRMAN WILKINS: Commissioner Carnes?

COMMISSIONER CARNES: You had indicated in the written testimony and your oral that many judges find that relevant conduct because it is defined so broadly now, creates some problems in application which necessarily creates some disparity for similar offenders. And the fact that the Commissioner has direct but fairly lengthy amendments suggest that we are making an effort to correct those foreseen problems.

My request to you would be that obviously to the extent that we have tried at this point and we're not quite there, but I would ask you if you could request of other judges and yourself if they would pay some attention to this in the next couple of months and give us the help that, I think, you give District court judges who practically have some feel for what the problem is.

JUDGE WOLF: You've asked before and as you'll soon find out when you become a District judge, sometimes the urgent pushes out the importance. Frankly, I didn't personally delve into what you've been working with until the last

several days and we do have this Judicial Conference study. But we will undertake to work with you on this because while the examples, I think, are very illuminating and helpful, there seems to be still some language--and we made the same mistake. I would consider it a mistake that we made and you'll find the same language in our report to you. But you have to get a very fine focus to appreciate where the problems come from.

But when you start talking about terms of legal art like aiding and abetting which are familiar already to judges, conspiracy, foreseeability, scope of the agreement, it's very hard to give them different definitions in the sentencing context than the definitions we use when we instruct juries. And I guess personally I'm evolving to the view that if there should be a different degree of responsibility for sentencing purposes than there is for guilt, then there may be some very good reasons.

Or for example, the jury verdict doesn't tell you whether they found a person guilty of conspiring for eight months or just three months, eight transactions or just three transactions. Because if they get three and it's within the indictment period, that's enough. You should have a finer

focus, but basically what the Federal Judicial Center very quick study since we got your proposed amendments, the finding was that around the country small minority of the districts are applying these guidelines in very different ways that could give somebody perhaps six times as much time as the Sentencing Commission intends them to get, because they sort of pick out one thread of the instructions, guidelines or applications rather than taking all the different directions of figuring out which one is most applicable.

So your request is more than reasonable and we should work on this together. But I would just suggest and it may fall apart on closer analysis, but suggest that you consider whether something that's both simpler but distinct from usual conspiracy and aiding and abetting language works and whether what you really want to do is get people for the full amounts of transactions they participated in. So if you're unloading a ship, you're not just responsible for the marijuana you took off, but all that was taken off in that transaction; and all the transactions that you expected to benefit from.

In other words, if there's another deal a week down the line and you're sick and don't go unload it, but you're

going to get your share, I think you and I would feel that that person should be criminally responsible and punished for that. But you only agree to unload once, you did, and didn't expect to get anything from the ship that was being unloaded the next week because you were just a fungible strong back, then you shouldn't be responsible for the second one. Very super-tentatively I would say. It seemed to me that that kind of distinction would capture the people you want to capture and didn't those that you think should not be netted.

CHAIRMAN WILKINS: Thank you very much, Judge Broderick and Judge Wolf. I'm sure we'll be talking to you soon.

Our next two witnesses are Mr. Robert Edmunds, United States attorney for the middle District of North Carolina and Steven Easton, United States Attorney for the District of North Dakota. These two distinguished Federal prosecutors are representing the Department of Justice today.

Good morning.

MR. EDMUNDS: Good morning, sir.

CHAIRMAN WILKINS: It's good to see you both.

MR. EDMUNDS: Thank you. Good morning, Mr. Chairman. Mr. Easton is the new secretary of the Attorney

General's Advisory Subcommittee of Sentencing Guidelines and I'll ask him to essentially help me out today. Thank you very much for the opportunity to appear.

We had several amendments that we did want to mention and discuss with you and we'll be, of course, available for questions afterwards. We appreciate very much that the Commission has been considering many of the concerns that the Department has raised over the last year.

The first amendment that I would like to discuss with you is the one regarding career offenders and armed career criminals. This is listed as Amendment 26(c) to Section 4A1.3. The Department would like to urge the Commission to adopt a proposed amendment of the policy statement of 4A1.3 to specify clearly that the adequacy of the defendant's criminal history is not a basis for downward departure. When a guideline mandates that a particular criminal history category, mandates a particular criminal history category such as that for career or offenders and armed career offenders.

For a career offender, the guidelines establish an offense level related to the statutory maximum for the offense conviction and places the defendant in Category Six,

rather than the category that would normally apply. What we're finding is that several courts of appeals have essentially undermined the career offender guideline by ruling that a sentencing court can depart downward from the guideline range, where if they find the Category Six over States, that we've set some of the cases out. I won't repeat the cites.

In our view the Commission's placement of the career offender in Category Six which is the highest criminal categories, is a course in artificiality. And it's a guideline mechanism that assures fulfillment of the statutory direction that the career offender be sentenced at or near the statutory maximum for the offense of conviction.

I don't think it was ever meant, never intended to reflect the defendant's actual criminal history as calculated under the guidelines. But the courts that have been departing have used the reasoning that the career offender whose actual criminal history category is less than six would be eligible for a downward departure on the basis of inadequate criminal history.

The Department feels that the criminal offender guideline statutory basis is essentially rendered meaningless when courts can do that, but essentially it sets aside the

statutory basis for career criminals. And we're finding a similar problem or that a similar problem could occur with respect to the armed career criminal guideline which can also place a defendant in a higher criminal history category than would normally apply.

If the defendant actual criminal history category can be used as a basis to depart below the guidelines, the factors reflected in the criminal history component of the guideline would be lost. They suggest that the Department is that we believe the policy statement of 4A1.3 should provide that a downward departure on the basis of the adequacy of a criminal history category is not warranted when the guidelines specify criminal history category in lieu of the category that would otherwise result from calculation of the criminal history points. Under 4A1.1 we believe that would be a more effective way to make sure that the statutory mandates are followed.

The second issue we'd like to deal with is the revision of the decay factor which is in Amendment 25(B). In the Department's letter to the Commission proposing guideline amendments last fall, the Department had sought the elimination of the decay factor which was applicable to the career offend-

ers. As the guidelines operate currently, a sentence of more than one year and one month that was neither imposed nor served during the 15 year and prior to the commencement of the offense at hand, is not counted as a predicate offense with the career offender guideline. And similarly a sentence of less than that, less than a year and a month, does not count unless it was imposed within 10 years of the commencement of the incident offense.

The statute, as we've said, requires that these defendants be placed at or near the statutory maximum. And the Department's position is that it really doesn't add up for these time limitations or decay factors, as they are called which otherwise applicable for the decay factor to take out of the defendant's career history offenses which we feel should be considered. The career offender is designed to look at a defendant's entire history, not just the last 10, last 15 years. So that's one of our concerns.

The Commission did not propose the simple elimination of the decay factor for the career offenders, but took a broader approach in Amendment 25(B). And the proposal excludes from the applicable time periods for the purposes of calculating the defendant's criminal history score. Periods

during which the defendant was continuously in prison, if those periods exceeded a time to be designated by the guidelines from one to five years, these periods of incarceration would be excluded from the applicable time periods, regardless of whether the defendant was a career offender.

There are options that were presented. The Department prefers the one that excludes periods of imprisonment only in the case of the 15-year decay factor for sentences of more than one year and one month and which does not effect the lesser sentence, sentences which are subject to the 10-year decay factor. The other alternative for a 12-year decay factor is frankly one we feel too short for serious offenses.

I don't want to use up too much of my time. I'll move along. The next issue, the next one that we would like to discuss is Amendment 28(B), the criminal history category, Category Seven. Category Seven has been proposed for increased sentences for those with particularly extensive backgrounds. And we strongly believe that Category Seven is a good idea for the most serious recidivist. The current guidelines in Category Six goes up to Level 13 and beyond that, the only recourse for a judge is to depart upward. No judge is bound to depart upward, so it's not a sure thing

that a person with a particularly wretched history is going to have that recognized.

Our recommendation is the third alternative that was proposed by the Commission which provides for a criminal history category of--well six would include 13 through 15 and seven would go up to 16 and 18. We feel that this option best addresses the needs of the prosecutors in the field. And we also feel that upward departures, even with this, should still be authorized for defendants with even more extreme criminal history backgrounds.

Department statistics indicate that the number of offenders with high criminal history categories is pretty substantial. Our figures indicate 39 percent of Category Six defenders had more than 15 criminal history points for fiscal year 1991. And I think almost every prosecutor has run into a case like that where you just get the defender with the enormous history. Most judges are good about departing upwards in those cases, but it's not a sure thing. And of course, we can appeal it.

The next thing I'd like to mention is one I personally have to say I feel is important. Amendment 33(A), lack of youthful guidance. The Department strongly urges the

Commission to amend the policy statements expressly to provide that a court may not consider a defendant's lack of youthful guidance as a grounds for departure from the applicable guideline range. I'm sure that everyone on the Commission is familiar with the Floyd case out of the Ninth Circuit. Frankly, there are some judges that would define a criminal as a person who has not had youthful guidance.

This case we considered to be an extensive and essentially uncontrollable invitation to depart and could lead to any quality that the guidelines were intended to replace. We would ask the Commission explicitly to eliminate this grounds for departure. I'll have to say on a personal note, both as a trial prosecutor myself and as the U.S. Attorney who now gets all the comments from the field on sentencing guideline issues, that this is a case perhaps most disturbing to the United States Attorneys of all the ones that have come down in the last few years. We feel that it is one that particularly could do a great deal of damage to the purposes of the guideline. And I would very much ask the Commission to directly address this in the next publication.

The next area that I would to address in the immigration offense is alien smuggling and that's Amendment

8. The Department supports with certain modifications the Commission's amendments to guidelines in Section 2(L)1.2. The amendment would make aliens smuggling offenses increasing in severity, depending on the number of aliens smuggling, transported or harbored.

This is an area that's been of particular interest to my colleagues that are in the Southwest Border districts--California, New Mexico, Arizona and Texas. They are very pleased and very gratified to see that the Commission is paying attention to this area. The alien smuggling problem has been a very real concern to them down there and takes up a large part of their dockets.

As presently drafted, the increase for smuggling six more aliens would apply only if the defendant committed the offense for profit. We believe the increased, based on the number of aliens' smuggled should apply, whether or not the defendant violated the law for profit. And we urge the Commission also to advise the guideline language to instruct the court to consider an upward departing cases in which the defendant is involved in smuggling, transporting of harboring unlawful aliens who commit unlawful activities once they get here. That's a continuing problem with smuggled

aliens who once they arrive get involved traditionally in the drug trade.

I have to keep an eye on the time so I will move on. Alternatives to incarceration, Amendment 29, is an area that we are also concerned with. This deals with the split sentence, probation, things of that nature. And the proposal amendments would bring about a number of changes--redefining split sentencing, authorizing probation at higher levels, and so forth. The Department feels that there's no clear justification at this point for expanding either the number of defendants available for alternative sanctions or the types of alternatives available.

One of the arguments that's made for alternative sentencing is overcrowding. First of all on a philosophical basis, we don't feel that overcrowding is a reason for addressing the type of punishment that a person should get. And second, on a more practical level, most of these people at this lower end of the guidelines when they do go to prison are going to go to a minimum security facility. And they're not the ones that are experiencing the major overcrowding problem. So we encourage the Commission not to be swayed by that particular argument.

There is written notes and examples. I went to the brevity of life. I won't go into those, but I would say they're there if the Commission would like to see how under the proposals, significant disparity at the lower end of the guidelines range could result.

We also feel as prosecutors that home detention is not the same sanction as imprisonment. It's just not that bad a deal for somebody who's committed a crime. And we would encourage that it not be overly expanded to other defendants. One of the things that Department's statistics and figures have shown is that alternative, and I believe Jude Wolf said this, the alternatives now available are somewhat under-utilized and it might be equally effective to be educating the judges and the prosecutors as to the alternative sanctions that are available.

One thing I would like to stress--again, falling on my experience as a prosecutor--one of the things that is particularly attractive about the guidelines is the Commission has specifically noticed this, is that it brings the white collar criminal into the system. Back when I started prosecuting, white collar criminals invariably got probation. Under the guidelines white collar criminals are now subject

to incarceration. And that is something that most prosecutors feel is long overdue and a very good thing.

Increasing the number of alternatives to incarceration and the possibility of creating a Category 0 essentially dilutes that feature of the Sentencing Guidelines which we found particularly attractive. White collar criminals do just as much harm, maybe more so to the community as do the drug dealers and the traffickers. And they should face some degree of incarceration, depending, of course, on the severity of their offense, just as should anyone else.

The next issue that I would like to mention is the substantial assistance proposals, Amendment 34. That's a proposal to expand 5K1.1, substantial assistance motions to allow a court to grant one and depart below the applicable range without the express motion of the prosecutor for the case. The Department strongly opposes this amendment. We believe that it would cause routine motions by defendants for departures just on the basis if they gave the prosecutor minimal information. And in many cases, it's unwarranted.

I have to be delicate in saying this because I'm dealing with members of the bench, but members of the bench often have only a limited knowledge of what's going in a

case. They're limited by the rules of evidence, by the law, in knowing what's actually come before them, while as prosecutors we know what went on in the back room.

I don't want this to sound wrong, but probably of all the parties in the case, the prosecutor has the best view of the entire case and the idea or value of a particular defendant in it. There has been to my knowledge no evidence that the prosecutors have abused the 5K1.1 motions to defendants' disadvantage. In fact, we have incentives to use it properly because we want people coming in. We want that information.

We think that expanding it and giving the judge the power to give a downward departure for substantial assistance will largely lengthen sentencing procedures and also dilute the value of 5K1 to prosecutors. It's noted in the written testimony that there is a case before the Supreme Court on that, United States v. Wade. By happy coincidence that's out of my district. I'm the very U.S. Attorney who said don't give them a 5K1.1, and I think the Supreme Court may clear up some of the issues on this. I would certainly hope so.

Mr. Chairman, this is my first time and I've used 20 minutes.

CHAIRMAN WILKINS: Let's go into some questions about that. We have your written testimony. Let me ask you this, if the prosecutor does abuse the power under 5K1, should the judge then be allowed to recognize the abuse and depart downward, even though a motion wasn't made where an abuse does occur in a particular case?

MR. EDMUNDS: I believe there needs to be some sort of procedure by which some review of a failure to file 5K1 should be in existence. I think the initial burden should be on the defendant to show bad faith by the prosecutor. A simple allegation would not be enough, that he must come forward and bring it to the court's attention. At that point, it might be fair for the prosecutor to respond, but simply for the defendant to allege it or say that you're the classic case, Your Honor, I got this stuff from Juan down in Miami and they didn't file for me. That's not enough. There's a substantial burden on the defendant to come forward.

CHAIRMAN WILKINS: There could be a case though where the judge could find bad faith and say in this case, I'm going to go ahead and depart down because the motion should have been filed. But it would have to be a pretty strong showing as you indicated on the part of the defendant.

MR. EDMUNDS: I think it would have to be a very strong motion showing, Your Honor, and I think I would ask that in some way it be appealable by either side. If there's a downward departure that the Government has strongly opposed, I would hate for the Government not to be able to--

CHAIRMAN WILKINS: I think it would be appealable, wouldn't it?

MR. EDMUNDS: I would think so, Your Honor. I'm not real sure.

CHAIRMAN WILKINS: Let me ask you about the new blue sheet that's been issued or plea bargain. That's something that concerns the Commission, of course. As you well know, plea bargaining practices can improve the guidelines or can circumvent the guidelines. Do you think this new blue sheet is going to provide the level of accountability and standards that are throughout the United States Attorney's offices that we can see a uniform application?

MR. EDMUNDS: Forgive me for smiling, Your Honor, I wrote half of it.

CHAIRMAN WILKINS: You wrote the blue sheet?

MR. EDMUNDS: About half of it. The writer of the other half is seated behind me.

CHAIRMAN WILKINS: I'm asking the question of the right people then.

MR. EDMUNDS: I hope so, Judge. I believe some of the issues in the blue sheet came up sort of in passing at one of our subcommittee conference meetings and we realized that there were areas of disparity that we didn't understand and so we started working with those. Then we got into other issues, for instance, should pleas be written? What should be the review levels? At what point should the U.S. Attorney or one of the very high supervisors get involved.

We polled the U.S. Attorneys and found that, in fact, there was a right much disparity. In some offices almost any assistant could get 5K1 and some only the U.S. Attorney. We also found some districts did not have written pleas. That cases would come before the court and it would just be orally described on the record what was to happen. So those were the issues that we tried to deal with in the blue sheet. Perhaps a little bit to my surprise was that some of the issues were controversial among U.S. Attorneys, but the Attorney General as said what is to be and it will be.

I don't think the blue sheet is an answer. We

originally went with the blue sheet because we wanted to get quick action, and I and the other members of the subcommittee have been commissioned to write, or perhaps redraft would be a better word, all of the Department's material on sentencing onto a new section for the U.S. Attorney's manual.

CHAIRMAN WILKINS: Good. Any questions to my right?

COMMISSIONER GELACAK: Yes, I have one but, Mr. Edmunds, it might take me a while to get to it, so bear with me. I have come to the conclusion that this Commission really serves two purposes or is intended to serve two purposes. One of which is to respond to direction from Congress. And the other, I think, is that at certain times we need to reply to Congress when we think they're wrong. Even though the Commission is on record against mandatory minimums, in certain instances I support mandatory minimums. I don't have a great problem with them in certain limited circumstances.

I do have a problem more and more with the indiscriminate use of long-term 20 or 30-year or life sentences where they seem to serve no recognizable purposes and are tied not to conduct, but to quantity. And I think it's time

that the Commission sent a message to Congress. I know what the politics are. Do you care to comment about it?

MR. EDMUNDS: I was hoping you would keep going, sir.

[Laughter.]

MR. EDMUNDS: Frankly, I'd rather not, sir. I'm just a component of the Department and we'd prefer to speak sort of ex cathedra rather than have one U.S. Attorney shooting off his mouth at a Commission meeting. So if I may, sir, I'd rather not deal directly with that.

CHAIRMAN WILKINS: Questions to my left?

JUDGE MAZZONE: Your position seems to be very very consistent. In the first case you want to discourage downward departures by District judges who might exercise have some discretion in the case of a career criminal offender who fits the definition, but maybe the offense was committed 10 years ago and it was a minor offense with a hunting rifle or something like that and you want to be sure the judges don't stray and perhaps come down a little bit because the criminal history category might be overstated.

In the next breath you say, we also want to be sure that the District judge will be so lax it might not depart

upward, although the Commission has given him the language to depart upward if there is a understating of the criminal history category. That's very consistent.

You just want to make sure, it seems to me, that the District judge doesn't have any ability whatsoever to move and consider any of these factors, upwards or downwards, and at the same time Mr. Gelacak, I think, was rather gentle. I will be too, but when you've got beyond career criminal, you've got a mandatory 15 years sentence under 924(B). You have all the cards on your side of the table.

Where do you give just a little in your presentation to the judge, just a little, relax? Everything from alternatives which you discouraged; overstating criminal history which you encouraged; understating criminal history which you discouraged; everything is geared to one result--your way, the Department's way.

MR. EDMUNDS: Judge, I will have to say from the start, I'm an advocate. But as far as the downward departure is concerned, our response to that is based largely on the statutory mandate that these people should be sentenced at or near the top of the range. So I believe our position there is consistent with what Congress has told us. We are

required to represent the people there and that's what we're living with.

As far as the upper end, again, that's, I think, somewhat driven by the experience of prosecutors that Category Six now stops with 13, but we will occasionally find somebody who's got a criminal history category that reaches up to 20 or so. And we feel that though, as I said, most of the judges in our experience will take such a person into account, but there's no mechanism that ensures it.

JUDGE MAZZONE: Maybe the judge ought to. You've asked us, for example, to reverse the Ninth Circuit on the Floyd case. Specifically you want specific language from us that reverses the Ninth Circuit. You weren't prosecuting pretty boy Floyd here. This was not the Floyd person you're talking about here. It was not America's 10 most wanted and yet some judge felt compelled to exercise or discretion there was in one way that was apparently written in a way to satisfy the courts of appeals and you want us to overrule that. Should we do that?

MR. EDMUNDS: I do. First of all, as to the facts of Floyd, I understand that the prior acts that he had committed which would have made him eligible for a much

higher sentence than he actually committed were quite heinous; that he burned someone alive or words to that effect. But as a U.S. Attorney who's been working with the guidelines since they were put into effect, I'm sort of committed to them and I know that the Floyd case is probably the single thing that's most likely to undermine their effectiveness. Most judges, I'm sure would not take Floyd as just a shoot license to depart downward in every case.

But I think the Commission is fully aware that there are a number of judges who are strongly opposed to the guidelines and would take advantage of it and then reinsert the type of disparity that would make the guidelines essentially ineffective.

CHAIRMAN WILKINS: Thank you very much, gentlemen. We appreciate the work that all of you are doing and I'm sure we'll have full communication in the future.

MR. EDMUNDS: Thank you, sir.

CHAIRMAN WILKINS: Ms. Henriette Hoffman is our next witness. Ms. Hoffman? Ms. Hoffman is the attorney in charge of Criminal Appeals Bureau with the New York Legal Aids Society. She's here today representing the Federal Public and Community Defenders. Ms. Hoffman, we'll be happy

to hear from you.

MS. HOFFMAN: Good morning. We have submitted a comprehensive written statement and today I will focus primarily on a few proposed amendments of broad application.

Turning first to the alternative sanctions, Amendment 29. I note that we share the Judicial Conference's concern that these options, the alternative sanctions, should be expanded. I had an opportunity to read the written proposals of the Judicial Conference. So some that I may refer to as being basically on the same wave length as ours, may not be the ones that were addressed today, but I'm referring partly to the ones that were in writing.

As the Commission knows the in-out decision is often the most crucial one, particularly for first offenders, who according to the Commission's statistics constitute 55 percent of the defendant. Our perception, the people who would have received probation and pre-guideline times are now serving sentences of imprisonment as borne out by the Commission's statistics that there's a 13 percent decrease in straight probation. And I noticed in reading the Judicial Conference report that their statistic was 17 percent.

And again, as the judges have pointed out, it's

well known that their prison overcrowding is a serious national problem of financial concern, as well as human, and the Commission's high estimate for the next 10 years is a prison population that more than doubles from the present of over 65,000 up to 160,000. Therefore, the question of alternative sanctions is not just a defender issue, it's really a national issue.

I believe you have in front of you something called Figure 1. Was that passed up to you?

CHAIRMAN WILKINS: Yes.

MS. HOFFMAN: Turning then to Amendment 29, we have made this table just to focus on several Options, 2, 3 and 5 of Amendment 29, and those all of which we favor. These would increase the availability of straight probation by extending it to levels 7 and 8. It would increase the availability of probation with conditions of employment to levels, I believe, from the existing table and would increase just one level the availability of the split sentence. We also favor the proposal to cut the prison component of the split sentence to one month.

Now additionally perhaps in a visionary way, we suggest an alternate and that's what you see on Table 2 in

front of you. There's been some reference to the cliff problem in the proposal and Amendment 29; namely, there's the--at the end of Level 8, there would be going from straight probation to a range of 4 to 10. We have suggested an alternate and that's in our written report and it's just in picture form here on Figure 2. That would avoid the cliff problem. It does admittedly extend straight probation one more level. From the statistics given, I don't think that our proposal is in any way a flood gate proposal.

The statistics are that the proposal and Amendment 29 would add something like 1,705 cases in 1990. Ours would have added another 387. And of course, as the Judicial Conference report pointed out, the increased availability doesn't mean that a judge has to use alternative sanctions in any case where it's inappropriate. Where it's crucial is for the person for whom it is appropriate, but yet it's not now available.

Turning then to Category 0, Amendment 28(A), we oppose the creation of a Category 0. We don't see any value in trying to distinguish between defendants with no criminal record and defendants with either very minimal or stale. We also know that there's nothing in the data to suggest a

different rate of recidivism between the proposed Category 0 and the Category 1.

Now then in the broad category of several different amendments in guidelines two and three that effect individual participation, the one that we most strongly urge upon the Commission--and I note also that we are again on the same wave length as the Judicial Conference--is Amendment 19. That sets a cap on the offense level of marginal drug defendants. And I believe that you also have a chart, Figure 3 which is Option 1 from your amendments and you'll see and I'll discuss it.

In our experience, guideline sentences have been most inappropriately harsh for the marginal defendant in a large-scale drug case. And this proposal, Amendment 19, would go a long way to solving that problem. You'll see, perhaps you won't be surprised to see that we are suggesting the lower cap, both for the minimal and the minor participant, because as far as we can figure out, the higher figure is geared to the mandatory minimum. And as you know in Chapter 5 of the guidelines, there is the rule that a guideline mandatory minimum always trumps a guideline.

Therefore, if this amendment, this 19, is going to

do the job or if it's going to help, where it seems to be the need for help, it should have a lower cap rather than the higher cap. And the defendant whose offense puts him in the mandatory minimum will not in any way be helped by this.

I'd like to give you an example of a case of mine where I wish this amendment had been in effect. A young single mother, high school graduate, not only had she no criminal history, no one in her entire family had a criminal history, but she was nevertheless under the influence of a sibling-like older man. He wasn't actually related. She acted as a courier for him on one occasion. She borrowed his car in exchange for doing a personal errand. She carried a bag of cocaine, of crack, excuse me, weighing 159.6 grams. There's no indication that she even inquired as to whether it was cocaine or crack. Her level was 34. With the reductions, she came down to 30 and she had a guideline range of 97 to 121 months.

If Amendment 19 were put into effect, Option 1 or I assume some of the other versions, as well, her guideline range would have been reduced to 22 and her range would have been 41 to 51 months. I submit that a range within four years would have been more than adequate punishment for this

woman, who incidently has been in prison less than three years and has had an extraordinary record of rehabilitation in so far as that's still a goal of incarceration.

I'd like to turn next to amendments effecting the aggravating and mitigating role guidelines. Amendment 17(A) which deals with the aggravating role guideline redefines participant to include law enforcement officer. This, of course, is relating to the rule that a defendant has to supervise a certain number of participants in order to get the aggravating role adjustment.

First of all, we believe there's less threat to any criminal organization that's been penetrated than one that hasn't. The whistle can be blown at any point. But more important is to define a law enforcement officer as a participant which is a change, a reversal of the prior rule, really opens the door to the kind of manipulation of the guidelines by law enforcement officers which we all know exists. It's been noted in case law. We know that they are trained, I believe even by Commission staff and guideline application. Now I'm not suggesting that everyone who's trained manipulates.

Let me just give you two brief examples of the kind

of manipulation that the inference of manipulation is so strong that I don't think it can be avoided. Most of our cases increasingly involve reverse buys. The agents are doing the selling. The agents will set up a deal and the defendant may originally have wanted a smaller quantity. When the deal finally goes through the defendant is only able to come through with enough money for the smaller quantity. When he comes to sentencing, the question is does he get sentenced on the sum of money that he came up with or the deal? Well of course, you know the officer's testimony will be important and it only had to meet a preponderance standard.

Another example from a case of my own involving a regular sale. An agent wanted to purchase two kilos of cocaine and the defendant was repeatedly unable to come up with anything. He finally came up with a marginally lesser amount. The difference between the two kilos and the lesser amount--and by the way the agent was furious. He upbraided him, but nevertheless he delivered it and was then arrested. The difference only has significance with respect to the guideline. The amount was way above the five-year mandatory cutoff and it was nowhere near the 10-year mandatory cutoff.

Now the inference that that deal was being set up

to jack up the offense level is really so strong. I will refer you respectfully to the opinion of Judge Silverman in United States v. McCrory where he talks about guideline manipulations in the context of the use of illegally seized evidence in guideline sentencing, pointing out that officers now have very little deterrent effect to not seize evidence illegally because even if it's not used in the Government's main case; it can be used in sentencing.

Turning then to the mitigating role guideline, we again find ourselves in agreement with the Judicial Conference in that we appreciate the Commission's concern about giving greater guidance to the court in determining the appropriateness of a mitigating role, but we are also equally concerned about avoiding a laundry list of conduct that automatically excludes someone from the possibility of any mitigating role reduction. The reduction should be really based primarily upon the defendant's conduct during the offense and any relevant conduct.

For example, Option 2 in Amendment 18 says that anyone who possessed a gun should not qualify for any mitigating role adjustment. Well that sounds reasonable at first blush, but then, first of all, that gun is probably

going to figure into the Chapter 2 guideline and then what would you say--what was an example--again, not an unusual fact scenario. A female defendant who knowingly permits her boyfriend to sell drugs from her apartment and knows that he keeps a gun there. That woman will be most likely in constructive possession of that gun. But is it a foregone conclusion that she should not get a minor role adjustment?

Again, I urge you to find the narrow line between enough guidance and yet having a list that mechanically excludes people so that judges don't have the discretion which they need in according these mitigating role deductions.

We have a more detailed analysis of each of the seven proposed application notes, 3B1.2, in our full report at 17 to 20.

CHAIRMAN WILKINS: Thank you.

MS. HOFFMAN: I'm not finished yet. May I have a few more minutes?

CHAIRMAN WILKINS: You certainly may. I didn't mean to cut you off. We have a number of questions, I think, we'd like to ask you. Go ahead.

MS. HOFFMAN: There are just a few more amendments that are, again, a broad application that concern us, two

effect the lost tables for larceny and fraud. One we favor and one we oppose. Amendment 5 we favor. Amendment 5 would eliminate the two level increase for more than minimal planning and feed it gradually into the table. We favor that. It's difficult to administer fairly. Quite frankly, it will help some of our defendants in the lower range. It will hurt some in the upper range, if their offense was sort of a one-shot deal. But we definitely agree that that should be done. And we favor alternative one of that group. But in general, even if it's not that option, we favor that approach.

However, we strongly oppose the across the board four-level financial institution enhancement to three guidelines. It's the theft, the larceny and the bank and commercial bribery. Granted the savings and loan defendant should be sentenced near the top of the guideline or should get a departure. But we see many cases of low level in bank embezzlement. Bank tellers who have worked for years who will get involved for personal reasons in an embezzlement; they lose their jobs, their pension. The four-level enhancement is just inappropriate.

Again, if I may a quick example from my own experience. A young epileptic, Vietnamese, immigrant bank

teller, a very fragile woman of limited intelligence embezzled \$10,000 to help her poverty stricken family. In the pre-guideline days that woman would never have gone to prison. She had an offense level of 7 and a prison range, I believe 1 to 7 and she did go to prison. Now to slap her with four levels and make her guideline range eight to 14 months would be inappropriately harsh.

So that the four-level enhancement should be used-- perhaps it should be, but with the higher sums, but a \$10,000 embezzlement is not a threat to the integrity of the nation's banking; \$10 million or maybe even \$1 million is.

Returning to the acceptance of responsibility guidelines, Amendment 23, again like the Judicial Conference, we favor the amendment. There's three aspects of it that we favor. We believe the defendant who pleads guilty should almost always get the acceptance; 12 percent of the defendants are not getting it. This will make for certainty plea bargaining and for honesty which is certainly a goal of the Commission.

We also favor the two-tier system whereby the defendants in the upper range will get more than the defendants in the lower range. Although we note the Judicial

Conference suggests an across the board three. We also favor retaining the option of some minimal decrease for the defendant who goes to trial, but otherwise affirmatively accepts personal responsibility for the offense of conviction.

Now we've taken the liberty of submitting our own proposals on page 6 of our full report. It's a little bit more generous. It proposes a three level increase going up to four at around the range of five years which I believe is 23. But in any event, if that's too visionary, we support Amendment 23 as it exists.

With respect to the substantial assistance to authorities, this is an area where I think the judiciary--I was looking at the charts in your Executive Summary--this is an area where judges perceive a great deal of unfairness. I have to disagree with the prior speaker in saying that there aren't many disputes. The case law, the appellant case law is full of real disputes between the Government and the defendant as to whether substantial subsistence has been given.

I won't take the time to give you examples that I could just reel off. I would rather, because I think you know the criticisms concerning the fairness of not permitting

the court to resolve a dispute if the departure would effect the guideline, but not the statute.

I'd like to rather focus on two aspects of unfairness that have been really uncovered by the Commission's statistics. One is the disparity and the frequency with which this is given. It ranged from 2.4 percent in one district to 14.5 percent in another district. This is hiding the very disparity that the sentencing guidelines are supposed to eliminate under the rug, because it never gets to the court. And most disturbing was the fact that the statistics indicated a racially disparate impact in which Hispanics received--blacks and Hispanics, but particularly Hispanics received far fewer 5K1 departures.

I'm sure the Commission shares our view that any indication of racially discriminatory impacts of any aspect of any guideline casts a shadow on the entire system that no one wants to have there.

Finally, just a word or two--on criminal history Category Seven, we oppose that for much the same reasons that--to some extent the same reasons that we oppose Category 0. No empirical evidence that it has an impact on recidivism but more important we note 2.4 percent of judges have

departed upward from six. That's a small number, as far as we know that judges who want to do it, know how to do it. It's not a problem.

And lastly, there are several career offender amendments--this is Amendments 27(A) through (F). We, of course, recognize that Congress intended the defendants with the most serious records to get sentences at the maximum or near it. But we favor those aspects of Amendment 27 that try to limit the application. There are four suggestions for limiting the application and we endorse them all. We believe that less serious crimes should be excluded from the definition. Our report refers to a case, I believe, it's the Seventh Circuit in which extending a threatening communication was a predicate.

Second of all, we feel that the suggestion that the predicate offenses should be limited to those punishable by more than two years, but we suggest five. But more than two would certainly be better. Prior crimes that could have been consolidated under Rule 8 be considered when predicate. And finally, that all prior convictions that are counted as predicates have occurred sequentially. That, of course, focuses on failure of the defendant to have benefited from

the incarceration experience.

So in conclusion, we hope that the Commission in this guideline cycle will give precedence to those amendments that lessen prison overcrowding by providing additional alternative sanctions; that cap somehow or other the offense level of marginal drug defendants; that increase the level of acceptance, particularly for people who plead guilty, would make it almost a certainty for people who plead guilty; avoid across the board enhancements for offenses effecting financial institution that sweep the small person in with the savings and loan executive; modify the substantial assistance; and narrow the scope of the career offender.

Now Judge Wilkins, I really am through.

CHAIRMAN WILKINS: Let me ask you this, we hear this a good bit--and it's a criticism of the guideline system--it's a defendant whose residence is searched and a quantity of cocaine is found and his automobile is search and another quantity is found and the judge rules that the residence search was a violation of the Fourth Amendment and he excludes the evidence. But the defendant is convicted of the cocaine in the automobile. At sentencing the cocaine in the residence can be used in calculating the guideline

sentence.

But that's the way it always was. I mean, judges always did that and the guidelines have limited the degree to which and extent to which that excluded evidence can be used in the sentencing stage. The way it was before, the judge could use that and run the sentence all the way to the statutory maximum.

MS. HOFFMAN: Your question goes to the issue in a pending case which I have handled. It's still in the Second Circuit. But your absolutely right, the judge had the option before and in most Circuits that have ruled on this so far, they have continued to say that the judge had the option. Those judges who have felt that now there is a greater need for a deterrence rule--this is really not a guideline issue so much as a law issue.

But that the judges who have felt that now there's a greater need for deterrence point to the fact that now there's a much greater impetus on the part of law enforcement officers to violate the Fourth Amendment because they know as a matter of course that it will be used. Whereas before the Fourth Amendment violation was a wire tap, you know something to do with wire taps. The court's reason, well there's no--

officer's don't violate the wire tap regulations with their eye toward sentencing.

The view of those judges and of the defenders who favor applying the exclusionary rule to sentencing is that now there's a greater need for a deterrence. So far, actually we have a case in the Second Circuit where for some reason or other the two defendants went to different judges. One judge said, I'm going to apply an exclusionary rule. As a matter of fact he said, I think there should be an exclusionary rule and the other judge said, well of course I'm going to consider it. The case is still pending. My guess is that they're going to come down as you suggest saying, the judge has the discretion to suppress but may consider it.

CHAIRMAN WILKINS: I didn't suggest that.

MS. HOFFMAN: I thought your question suggested that that was the appropriate resolution, but in any event--

CHAIRMAN WILKINS: In the pre-guidelines a judge certainly could or could not consider it and could give a reason or not give a reason. The guidelines, I think, would say that even if it is suppressed, it should be considered if falls within the relevant conduct of definition.

MS. HOFFMAN: I don't think it's a guideline issue.

If it comes out the other way, it will be a Fourth Amendment issue and not a guideline issue. I would agree with you. Also by statute 3661, a judge should be able to consider it.

CHAIRMAN WILKINS: What was the sentence to the Vietnamese teller you had mentioned?

MS. HOFFMAN: Her range was 1 to 7 and her sentence was six months. We were horrified.

CHAIRMAN WILKINS: Of course, that wouldn't change. The numbers you suggest would not affect that sentence than would it?

MS. HOFFMAN: Oh yes, the four-level enhancement would have put her up to 11.

CHAIRMAN WILKINS: Not four-level, but the alternative options that you have suggested would not have affected her sentence, had they been in effect at her sentence, had they been in effect at the time. Because the judge would have had the option to sentence her for six months any way?

MS. HOFFMAN: Right. In this case, I didn't cite that as someone who would have benefited by the expansion of one the zones. No, the judge could have shown greater leniency towards this young woman.

CHAIRMAN WILKINS: Let me ask my colleagues to my

right, questions? Paul?

COMMISSIONER MALONEY: If we abolished the requirement in 5K for a Government motion, would you care to speculate on the percentage of cases in which the judge would be faced with a defense assertion that there has been assistance to the Government, and therefore that issue which is now off the table in the absence of a motion would now be on the table in sentencing for the District judge? Would you speculate as to what percentage of the cases the judge will be hearing some assertion by the defense that there's been substantial assistance?

MS. HOFFMAN: I really don't have at my finger tip statistics to speculate on percentage. But let me just say that the kinds of disputes that have arisen are real. I think some of them, for example, have been a defendant giving information about someone who's inside. A defendant who gives information and fortuitously the Government then got that information from somewhere else or the Government takes the case. Perhaps we can get those statistics. Mr. Hutchison, I see, is making a note and we'll be happy to give them to you. I couldn't give you the statistics. I would that hope that it's a narrow number. I would point out that

another, whether that's stealing a loaf of bread or stealing enough money from a bank so that you could make your mortgage payments or pay your wife's hospital bills. And the only thing that distinguishes that in the guidelines presently and it's very generally, is that more than minimal planning.

Because I think if you look at it for a second, you will see that the person who steals not out of greed, not out of venality, but because of necessity, takes a target of opportunity and there isn't much planning. And that distinguishes the other to whom more than minimal planning should apply. The fact that judges are not applying that test is not a fault of the system, but is a fault perhaps of advocacy of the United States Attorneys' offices. But you make no distinction anywhere for a person who falls into a trap and many times that's driven by Congress. But in this particular situation, I don't believe that's true.

Now all the other guidelines and comments that we've addressed and we haven't addressed all the comments; we've only addressed the ones we thought were important and that we thought we had an opportunity to have some impact on, really deal with our ability to form an agreement and to predict. Because look, we have taken the position that we

don't like the guidelines but they're here. And you've said that and that's what we're dealing with. And if there is anything to be gained from the guidelines, it is that ability to predict with some area of specificity what it is your client is going to face if he or she pleads guilty.

An area where we think that is currently hampered is in 5K1 and we endorse the proposition that it should be taken out of the total control of the prosecutor.

Let me give you two examples of cases that are pending. By the way, I allege all good faith to most prosecutors. The problem is that a prosecutor when you make your proffer agreement in most cases can't say to you, you will get a 5K letter. They will say if it turns out that it's substantial cooperation, you will. And you are left at that prosecutor's assessment of whether or not it has and substantial cooperation is a floating benchmark. I don't know that there's any quantification of it anywhere. I'm not sure even if I know it when I see it.

But let me give you an example of how it works from the other way around. And Commissioner Nagel made an illusion to the fact that it's often--5K1 letters are often given where there's no substantial cooperation. There's a

case now pending in the Southern District of New York where under a guideline assessment, somebody faces a 30-month minimum, whatever that grit is. 5K1 is being offered where in the assessment of the defense lawyer, it was parlance at best as to whether they would get it. Asked about it, a very decent U.S. Attorney said well, we're offering it here because we think that the penalties that you're going to get under the guidelines are too harsh.

Now look, if you can do that on the good side, you can do that on the bad side. And I welcome this assistance intervention on my client's behalf, but I also know there are times when they don't.

There's another case pending in the District of New Jersey in which somebody is accused of possessing a large amount of precursor materials. You've just added those guidelines this year. The litigation is going on as to whether or not the guidelines apply to a crime committed in 1990. The only issue, because a cooperation agreement has been entered into, is whether or not given what is likely to come from an extended investigation, whether or not the assistant will be able to say within his conscience, I think that he gave substantial cooperation, where there may be no

arrests, where there may be no convictions and where it may turn out to be a dry well.

If the guidelines don't exist, then the judge can take regular cooperation into consideration. What we've got essentially is that place, the hole between the mandatory minimums and higher sentences where, in fact, people make good faith efforts, after a 5K offer to comply; and because of some reason or other based on an assistance assessment, even guided by his or her bureau chief, they are unable to say in good faith that they have gotten substantial assistance.

And yes, Commissioner Maloney that will cause hearings and better a two-hour hearing--most of them will be decided on papers anyway--better a two-hour hearing than a one-week trial in which people don't get the benefit of true contrition of truly trying.

I think that the tradeoff that you have in that regard is one well worth it and well within the design of the guidelines. We are not suggesting that you roll back the clock. I understand that we can't get you to do that. But what we are suggesting is that wherever we can tell a client that we can predict that you will be in a certain range or no higher or we can say that a judge has discretion.

You know, criminal defendants are like anybody else. They are human beings and many of them don't think they're evil. They think that there is a reason that they have which mitigates their guilt to some degree. They want to adjust the court about that. They are comfortable if you tell them that a judge who they recognize implicitly are often men or women of good spirit who are trying to do the best with the job they really don't want to start with. I mean, it's not the guidelines that judges object to as I talk to them; it's the fact that they're uncomfortable with the notion of sentencing people which is part of their constitutional mandate. And they do it and they do it reluctantly in most cases and they accept that responsibility and they want to have the where with all to do and they're rational and sympathetic in a human way, but recognizing their responsibility to the rest of society.

Where you tell somebody that they're getting 10 months, therefore you can't get probation is very different in inducing a plea where you have somebody who is unlikely to get serious time in any event, where it says the judge may consider probation for you; and it is, I cannot tell you whether or not he or she will give it to you, but they're

judges. They've been around and this is not the crime of the century.

Everything that we have taken including our support of the Judicial Conference's recommendations is geared toward that. We are not suggesting to you that you go back to what you consider or Congress considers the bad old days when judges did what Congress thought was what they wanted. I don't believe that judges ever did what they wanted. I think they did what they felt they had to do and ought to do under the constitution and under the laws it was, and to suggest for a minute that judges will let people who are life time criminals with heinous crimes walk away if you don't have Category 7 is silly. I mean, they put away bad people when they have to put them away to protect society from them.

But if judges have discretion within the minimal confines that you are suggesting and some of your proposals for this one, it will enhance the system, help the humane part of the sentencing and not insignificantly, as my predecessor here alluded to, impact on the criminal justice system and on the prison system in a serious way.

I don't know what's going on in the rest of the country, but in the Eastern and Southern District of New

York, jail overcrowding is a serious problem, not from a humane point of view, although that clearly. But because we can't find our clients. Our client is arrested on Thursday, arraigned on Friday and on Saturday, he or she is gone, hopefully to only a five-hour drive away. But quite often and we have problems where our chief judge had to intervene. We were finding our clients being held for pending charges in Texas. You cannot represent somebody that way. It is very difficult. They don't have access to long distance phones, and that was because the prisons are so crowded, that they cannot house them.

Part of that would be solved, I believe, by your amendment of allowing other forms of sentencing on the lower order of the guideline ranges. That concludes my statement.

CHAIRMAN WILKINS: We appreciate your stepping in at the last minute and sharing with us your experiences and your thoughts. I'm sure that from your perspective, it appears that criminal justice is docketous. They're crowded and increasing in the number of trials and that's my perception too, if I only looked at one court. But I think really the sheer numbers are increasing so much. There's so many more numbers of trials that we think the percentage of trials

is increasing.

MR. KAHN: That may be true, Chairman Wilkins, but then you should be looking at ways to increase the number of dispositions, not just keep them constant, I mean, in percentage terms.

CHAIRMAN WILKINS: I don't suggest that's not a good idea. I'm just trying to suggest to you that we try to take more of a national view and, of course, you're taking a regional view or at least a--

MR. KAHN: The only view that I have any expertise at all on.

CHAIRMAN WILKINS: Sure. So I agree that because of the sheer numbers, something may have to break to adjust for that. In any event, let me ask my colleagues to my right if they have any questions or comments they'd like to make? Anyone? No. How about to my left? Commissioner Nagel?

COMMISSIONER NAGEL: I just want to thank you for coming and your group for being so helpful over the years. I know that the NYCDL has continued to participate and give thoughtful comments and we appreciate that.

MR. KAHN: Thank you.

CHAIRMAN WILKINS: Thank you very much, sir.

Mr. Paul Kamenar is the Executive Legal Director of the Washington Legal Foundation. You're no stranger to this Commission and we welcome you again, Mr. Kamenar.

MR. KAMENAR: Thank you very much, Mr. Chairman. I know the lunch hour here is approaching and you have to go, so I'll try to be as brief as possible. As you know, we have been involved with the Commission since its inception. We're helping it with its work here. Today I would like to make some specific comments on the changes with respect to the environmental guidelines and in doing so I would like to incorporate by reference all the prior testimony and submissions I've made to the Commission which goes into greater detail.

The Commission in Amendment 10, I believe it is, proposes to change Section 2Q1.2 to solve what we think is a serious problem and I'm glad the Commission is recognizing what this problem is and I'd like to just describe that briefly. The current sentencing guidelines for environmental offenses are fundamentally flawed in that they mandate offense levels of 16 or higher for minor regulatory environmental offenses. Those levels translated to minimum sentences of 21 to 27 months for first time offenders were little, if

any harm to the environmental as occurred.

In some cases, first time offenders are given the maximum statutory sentence because the guidelines exceed the statutory maximum forcing the judge to impose in one case, for example, three years under the Clean Water Act for a first time offender and the guidelines dictated, I think was a 39 to 42 month sentence.

These statutory maximum sentences as the mandatory minimum under the guidelines are clearly unjust and I think Commissioner Gelacak pointed out a similar problem with the fine level that the environmental division of the Justice Department proposed last year in that it reduces the Commission's credibility to the courts and everyone else in Congress to have guidelines that dictate mandatory minimums that exceed the statutory maximum.

Now what is the problem that is with these guidelines that are causing these draconian, a word used before at this table, draconian sentences in the environmental area. The problem we see it or at least one major problem is the double counting that's built into the offense characteristics. To give a quick illustration, a person who places his top soil or clean building sand on their property without a

permit which the EPA deems to be a wetland is charged with "discharging pollutants without a permit" under the Clean Water Act.

That person receives a base level of six for discharging the pollutant without a permit. Then they receive an additional four to six more points for discharging the pollutant and they get another four points for not having the permit. That sentence is not only clearly unjust; it is inconsistent with Congress' command that the guidelines "reflect the general appropriateness of imposing a sentence, other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime or violence or otherwise serious offense."

And as you know, we're representing a client, Mr. John Posgar who was given a 27-month sentence, a first offender for putting clean fill and top soil on his property that the EPA deemed to be a wetland.

Now we believe the environmental guidelines need a major revision and this Commission is at least partially addressing that problem by excluding the four point increase for not having a permit where the underlying offense already includes the failure to have the permit as an element of the

offense. The Commission makes a further inquiry in the Federal Register as to whether this Section 2Q1.2 which deals with toxic substances should also have the same amendment with respect to the permit issue applied to 2Q1.3 which deals with nontoxic substances.

As I've stated at the Commission's meeting in December and I'll state here again, we believe the changes should apply to both sections to be consistent. There's no principle reason by a double counting flaw should be eliminated in one section but not the other. The Commission further seeks comment as to whether there should be any adjustments to B1(a) or B1(b) upward of two to four levels each.

We strongly oppose any adjustments in this regard. The Commission has not introduced or shown any evidence that these offense characteristics are too low. If anything, as we've stated in prior testimony in other cases, those levels are much too high. As it now stands, a typical environmental case involving a discharge of a pollutant, regardless of whether any harm to the environment occurred, automatically result in a score of at least 12 to 14 under 2Q1.2 and 10 to 12 under 2Q1.3, and that's excluding the double counting

problem with the permit. There's no reason why these already high levels should be increased further to yet higher levels of 14 to 16 or 16 to 18 as the Commission seems to propose in the comments requested.

Indeed one would argue and we do argue that even these current offense levels are still a further example of double counting. As I stated in my illustration, if the base offense in your document is discharging a pollutant without a permit, you get six points for that and then you get another four to six for discharging a pollutant and four more for not having the permit. There is indeed triple counting going on here. So if there should be another problem that should be addressed, it should be to take care of that particular double counting problem then exacerbate it or hide the cure that you're taking by building up offense levels in another part of the guidelines.

While this concludes our specific comments on these environmental guidelines, I'd like to make one general comment with respect to the environmental grounds as a whole and some of the other proposed revisions here. One is whether or not past misconduct by a defendant should be included as a specific offense level. I know of the Commis-

sion's latest drafts has that in there.

However, that issue has already been addressed by the Commission in Commentary 9 in 2Q1.2 which cross references into Section 4A1.3. That section allows the court to depart if the criminal history score does not adequately represent the criminal background of the defendant before the court. And indeed we note in your Food and Drug options that you have proposed here in 2N2.1, you have an option too here that proposes to increase the base level by at least two levels for a prior conviction, and under B2 by at least two additional levels or more like in four, for a single violation of administrative order.

Putting aside the anomalous result that a person can receive an additional four points for a technical violation of some administrative FDA order, whereas that same person would only get two points for a prior felony criminal conviction. Putting aside that disparity there, we believe any consideration of criminal conduct should properly be left to the sentencing court to decide where within the range dictated by the guidelines should the court set the sentence.

We think that the Commission is perhaps trying too hard in the environmental area, especially to try to conceive

and put into the guidelines every conceivable, possible offense characteristic into the guidelines. However, if you do that, once those higher levels are reached, you really take away the discretion from the sentencing judges to decide where within the range of the level reach should the judge impose the sentence. If all of his work has been done for him, then really I can understand the problems and the dissatisfaction many judges have with being simply bean counters in this whole process.

And indeed by building in these alleged aggravating factors to drive these offense levels to ever higher altitudes, those aggravating factors may indeed be used by some judges to impose a higher sentence on the higher range and the level ultimately reached thereby causing it a more sinister kind of double counting problem.

We think past miscounted for regulatory offenses should not be considered, and in any of your guidelines, a specific offense and characteristic, because for another reason. And that is the Government has already taken that into account presumably into deciding whether to apply the civil laws or administrative law or to engage the machinery of the criminal laws. As it now stands, it's totally arbitrary

the way the Justice Department decides when to use a civil or criminal justice system.

And the same U.S. Attorney's office, for example, that prosecuted our client for putting top soil on his property with no real environmental harm thought it completely sufficient to use the civil laws to go after BP Oil for dumping major pollutants in the Delaware River. They issued a big press release saying that this was a major contributor to pollution, six years of past violations, 10,000 violations or more of their EPA permit limits and so forth. And yet the Justice Department thought the civil law was sufficient to handle that problem.

What I'm getting at is that you don't have that kind of discretion for bank robbers, rapists, and those kinds of offenses. You can't have a civil remedy against a rapist or a bank robber which means that as a society, we recognize that there are other ways to deal with a problem with these regulatory offenses. And because we have these civil enforcement, this Commission should take that into account that once the Justice Department decides to put it into the criminal mode so to speak, that past misconduct or other offense, prior misconduct by the defendant, presumably has

already been taken into account. It should not be again double penalized by driving the offense levels higher.

The major problem as we think what the environmental guidelines and many of others have stated them just as well is that you have a one size fits all approach. You have basically one or two environmental guidelines. You have a dozen or more environmental statutes, ranging from maximum statutory penalties of 60 to five years or more, and that is driving another problem where you have the statutory maximum of being used as mandatory minimums.

There's, I guess, two ways to try to solve that. One is to have a guideline for each environmental statute. You have some 20 guidelines for the drug laws, why can't you have a dozen or more guidelines for the various environmental statutes that you have. I guess there could be a problem with that, and I think Commissioner Gelacak pointed out, well you might start having more of a tax code type of a manual here. And I appreciate that problem.

The other solution is to have one general guideline, eliminate all the clutter with trying to think of every conceivable offense characteristic you can think of and give some discretion to the judge. And then maybe have some kind

of a multiplier factor at the end, so that if the ultimate level reached by the guidelines is at our near the maximum given by the statute and the offense is a relatively minor one or one in the mid-range to maybe a multiplier you can have at the end that corresponds with the maximum given by the statute.

That basically concludes my testimony. I'd just like to comment briefly on the category of offender level. I haven't studied that indepth but I think at least the Commission is on the right track here in being consistent with Congress' mandate that it should consider the general appropriateness of other than a prison term to those who are first offenders. And Category 0 definitely at least recognizes you're at least focusing on offenders who are first offenders. But nevertheless there may be some problems with that category as it applies to those who are convicted of serious crime and again having more disparate sentencing where you'll have, and I think it's been expressed before of those convicted of more serious crimes and getting a probation and walking free and those with minor regulatory offenses are spending two and three years in jail.

CHAIRMAN WILKINS: Who is walking free, I'm sorry?

MR. KAMENAR: In many cases you have examples where you have lower offense levels and an option for the court to post probation where you would have normally considered a serious offense. For example, in the 27 months that our client received that sentence is greater than the average sentence, according to the Commission's own statistics for those convicted of fraud, prison escape, larceny, many drug offenses and so forth. And I think not only should the Commission reduce the disparity among environmental offenses, you have those who don't have a criminal violation dumping toxic chemicals, getting less time than those who discharge nontoxic materials like building sand and clean fill, but they didn't have a permit. So you're having disparity between the same category of offenses and disparity between that and other, what people would consider more serious crimes like fraud, larceny, drug offenses, and so forth.

CHAIRMAN WILKINS: Thank you very much, Mr. Kamenar. Any questions from the Commissioners to my right?

COMMISSIONER GELACAK: Only to point out if Mr. Kamenar is well aware that the Commission is in the process of looking at the entire environmental area.

MR. KAMENAR: I'd be glad to work with the

Commission.

CHAIRMAN WILKINS: I know you have a very strong interest in this area and we appreciate your efforts and your thoughts and your assistance to the Commission in the past. I'm sure we'll call on you in the future. For your thoughts, it's a difficult area and one that we may not always agree about, but it is one that we need to work together and we are attempting to do that. Any questions or comments from my left?

Thank you very much. Let me ask the remaining witnesses if you're developing--I know that I have one witness that I've notified. He was put last on the agenda, but has a conflict developed so he needs to testify as soon as possible. I wanted to find out, are there any other witnesses here who have pressing schedules. We're running a little bit behind. We're going to continue on. We should be through before 2:00 o'clock it appears. Do we have other witnesses who have obligations this afternoon and anticipated you'd be out of here by 1:00 o'clock? If we could move one out of order with your permission of the other witnesses, I'll do that at this time.

That's Judge Smalkin from the District of Maryland,

a United States District Judge in Maryland. Judge Smalkin, we're glad to see you. We understand that a conflict has developed and you need to get back to court or some other obligation in Maryland.

JUDGE SMALKIN: I appreciate that very much, Mr. Chairman. I had some things to do this morning which kept me in Baltimore, but I got here as soon as I could and I appreciate your taking me out of turn. In gratitude for that, I'll keep my remarks short. I abhor redundancy in the court room and I'm sure you abhor it here in the hearing room, so I'll try not to be redundant.

I'd mention first that I'm here on my own and not representing the Judicial Conference or any other group. I'm not representing my colleagues except to a limited extent that I'll get to in a moment. I'm here because I think that the judges have, the individual judges in this country, should have some ability to have some input into this system. After all the Commission is a group within the judiciary and there are judges on it and have been from the very beginning. So I don't think it's inappropriate to make some comment.

The first thing I would point out is, since I was not here earlier, I'm not sure the extent to which other

witnesses have mentioned this, but there is a general concern over the amendatory process in general and it is in terms of the growth complexity or the growth in complexity and the growth and complexity of guidelines.

Getting to the point, I had a sentencing recently where the four participants in it, the U.S. Attorney, the defense attorney, myself, and the probation officer were working with four different versions of the sentencing guideline and we got to comparing the colors of the covers of our books and the ultimate question is whether the one in the maroon book governed or the one in the blue book, as opposed to the red book which the probation officer used. And you're sort of calling the plays by colors now instead of being able to easily find the governing law. It's difficult enough to interpret the constant, what seems to us growth, in the guidelines themselves and the amendments to them, make it even more difficult to find the law, much less to interpret it.

But that's a process that, I suppose at least in the shake-out period, and I view these guidelines still as in the shake-out period to some extent. The amendatory process has to be more rapid here and to encompass more things, I

suppose. Now turning to some specific amendments, I will not repeat my endorsement, even though it was in the written statement of what the Judicial Conference has proposed. I'm sure that Judge Broderick and his colleagues cognizably brought that to your attention.

I am basically in support of the amendments that the Judicial Conference Committee has proposed and specifically Amendment 29, Option 6; Amendment 33; Amendment 23, Option 3. And there are some other things though, I want to take a minute to address. The problem has been raised by some previous speakers in connection with the relevant conduct amendment which is Amendment 1. And I'm not sure what the better approach is or if there is a better approach. The current language seems to have been working to some extent; that is, I haven't seen a whole lot of circuit court opinions that have found it troublesome.

And the difficulty with looking with the language in Amendment 1, regarding relevant conduct, particularly in conspiracy offenses, is that the factual record can be developed in real life about what somebody reasonably could foresee at the time he or she entered into a conspiracy is practically not existent. It's very difficult in real life

to come up with a factual record that will support by preponderance of reliable evidence a factual finding on what the agreement was.

In fact, I think if you go to many of the people who have engaged in conspiracies and you ask them was there any agreement, they'll say no. I didn't make any agreement. I just went along with this, et cetera, et cetera. Sure there's a tacit agreement there, but trying to find the scope of that in terms of what the person could reasonably foresee at the time he or she entered into it, is extremely difficult. And I'm not sure that the current language really helps any. I don't know that there's any other language, so long as you're quantity driven it will help, other than to take the Pinkerton kind of approach.

If you take the Pinkerton kind of approach, that can be ameliorated by looking at the role that the individual has played in a conspiracy and of course you would get into that in connection with the other amendment, Amendment 19 in terms of capping the offense levels for conspirators at various levels according to the role they play in the conspiracy to plant the two-level, three-level minor or minimal role adjustment now which at the high end means

practically nothing. At the high end, if you're in the guidelines base offense levels let's say above a two level or three level adjustment here or there is practically meaningless. It's not terribly useful, I think, in differentiating people who play different roles in conspiracy.

So I am hesitant to endorse any change to the relevant conduct language now in terms of Amendment 1. I think it's better left alone and to be developed by case law, rather than to get into the kind of language here, particularly, for example, in determining the scope of criminal activity that a particular defendant agreed to jointly undertake, the court may consider any explicit or implicit tacit agreement, including any agreement fairly imputed, et cetera, et cetera, which is, as I would suggest rather difficult in real life.

Of course one kind of evidence and perhaps the only reliable evidence that can be brought to bear on that point is the testimony of cooperators. And there are cooperators in many cases who will cooperate and will say, well I told so and so we're going to deliver 500 kilos, but one questions what you do in a case where that kind of evidence is not there.

The other things I would mention briefly are

Amendment 10 in connection with pollution, environmental matters and I won't echo what Mr. Kamenar said. I don't have a particular, obviously carry a brief for anybody, except having had experience sentencing in one rather difficult environmental case. And I've got one coming up to be sentenced on Friday, neither which I will talk about directly because one's still on appeal and the other one hasn't been sentenced yet. But suffice to say that the problems with the (b)1 and (b)4 adjustments in 2Q1.2 and 2Q1.3 in terms of double counting are real and I think really do need to be addressed.

The other thing that I do want to take a little bit of time on is Amendment 19. In terms of capping the levels for drug offenders, I realize that we're dealing with statutory and mandatory minimums to some extent and that hinders the flexibility of the Commission. But I think most of the judges, certainly in our district feel, and I have the particular concurrence of Judge Harvey and Judge Black who met with members of the Commission's working group.

Unfortunately, Commissioner Carnes, you were ill. You couldn't come to Baltimore, but you sent some people to talk to us and at that time I think I proposed a tiered

scheme in connection with drug cases which I gather is reflected more or less in proposed Amendment 19, Option 2. And the reason I think there is some necessity for this is that you have often fringe players who really can have a great deal of knowledge of the quantity imputed to them in terms of having taking messages for their boyfriends, et cetera, and wind up looking at a big sentence, a quantity driven sentence and to whom this knowledge can be imputed but who for purposes of either specific or general deterrents or incapacitation do not necessarily need long incarcerated treatment.

So I think there is a feeling that if it can be done in a rational way, establishing caps by tier related to degree of participation in the drug conspiracy is a good and worthwhile amendment and ought to be pursued.

That's all I have to say. I hope I haven't reneged on my promise to keep it short and to the point.

CHAIRMAN WILKINS: No, you haven't. We appreciate your testimony. Judge Smalkin, if you have defendant, Category 1 at a level 30, and that individual is looking at a sentence within the guideline range of the maximum, 121 months, if you chose the top end of the range--

JUDGE SMALKIN: Maximum is 120. Well, that's 10 years.

CHAIRMAN WILKINS: That's right. Not maximum sentencing, the top of the guideline. I want to get to this minimal and minor participant. But if you find, based on the evidence presented, this is a minor participant, then you reduce it to level 28 and that allows you to sentence at 78 months. So we're looking at a difference between a top being of 121 down to 78 which is just five month short of four years. I just don't understand why that's not a pretty major deal as far as sentencing is concerned.

JUDGE SMALKIN: I think, Judge Wilkins, my reaction to that is that there are simply a number of people that we see in drug cases who, even 78 months is--78 is what you said; isn't it?

CHAIRMAN WILKINS: 78.

JUDGE SMALKIN: That's over six and a half years.

CHAIRMAN WILKINS: That's right. I say it's the difference between--by getting the minor participant role which you found as a fact, that's the difference of almost four years. The sentence of this defendant could receive under the guidelines; that is, you can reduce the sentence by

almost--

JUDGE SMALKIN: I understand that, but I still think that six and a half years in many cases is simply too much for the fringe player. And so long as it can be done within the mandatory minimums--I'm not suggesting that the mandatory minimums be evaded, but so long as it can be done within the mandatory minimums, the sentence for these people ought to be as near the mandatory minimum as can be done. And I think in the case that you're positing, the mandatory minimum would probably be around 60 months. So we're talking another year and a half beyond that. And the offense levels that you're talking about here, I think the lowest one runs for 16, doesn't it, in this scheme of Amendment 19, Option 2.

CHAIRMAN WILKINS: I think so.

JUDGE SMALKIN: I think it's 16 is where you'd find your bottom and we're not talking about the major players and the major conspiracies at offense level 16.

CHAIRMAN WILKINS: Right. Thank you very much. Any questions from the Commissioners to my right? Left?

JUDGE SMALKIN: All right. Thank you, ladies and gentlemen.

CHAIRMAN WILKINS: Thank you, Judge Smalkin.

Dr. Edward Burger, Jr. is the Chairman of the Criminal Justice Committee of the Council for Court Excellence. Dr. Burger, do you want to introduce your colleague, please?

DR. BURGER: Yes, indeed. Thank you, Mr. Chairman. I'm pleased to have the opportunity to be with you this morning. I am a member of the Board of Directors of the Council for Court Excellence in the District of Columbia and my colleague to my right is Mr. Sam Harahan who is the Director of the Council for Court Excellence. I'm a member of the Board of Directors and the Chairman of the Criminal Justice Committee of the Council.

The Council for Court Excellence is a nonprofit civic organization in the District of Columbia brought about 10 years ago to work to improve the administration of justice in the local and the Federal courts and related agencies in Washington and to the extent possible, abroad and the Nation. The Council for Excellence embraces by design several groups interested in seeking improvements in the courts--jurists, U.S. Attorneys, practicing lawyers, members of the business sector and the general community of its citizenry.

My remarks this morning should not be understood as

necessarily representing the opinions of the separate institutions from which some of the council members come. The Council for Court Excellence has from near its beginning 10 years ago, contributed to the discussions of sentencing and sentencing reform. The Council early in its history has played an important role in bringing the attention of the local courts, prosecutors and defense lawyers and the District legislative council in a systematic fashion the experience across the Nation concerning sentencing reform efforts and the relationship of sentencing practices to broader matters, including parole and prison capacity.

In December of 1986, we testified before your Commission on aspects of what were then the preliminary drafts of sentencing guidelines. Our position at that time was to commend the Commission both for the concept and for then the emerging guidelines process. We applauded and associated ourselves with the Commission's goals of moving the Federal courts towards reducing sentencing disparity; preserving sentencing authority in the court; increasing the correspondence between the sentence imposed and the sentence served; and as a result enhancing public confidence in the criminal justice system.

At that time we commented on eight specific features of the then draft guidelines. We expressed concern that the draft guidelines were highly detailed and overly specific. We observed that it was not clear how the proposed guidelines were linked to past sentencing practices and experience. We applauded the adoption of the concept of modified real offense sentencing.

At the Commission's specific request, we commented on the proposal to reflect other offender characteristics, such as age, education, and community ties, as mitigating or aggravating factors in reaching sentencing judgments. We observed that the draft guidelines at that time seemed to give little focus to alternatives to incarcerations, such as fines or restitution. We noted our concern that at that time there appeared to be no provisions for analysis of the effects of the operation of the guidelines on prison use in the face of pressures on prison capacity.

And finally, the draft guidelines at that time were silent as to the procedures for departures from the prescribed guidelines. The institution of the Federal sentencing guidelines process four years ago was unquestionably a bold step conceived by Congress and developed by the members of

the Sentencing Guidelines Commission. Development of the Federal sentencing guidelines followed in time the introduction of other sentencing guideline systems in State courts. The results and effectiveness of the Federal guidelines in practice, I think, are only now beginning to be understood.

There is still little empirical information of recognized quality, and what data there are reflect only a portion of the periods as the guidelines' process was introduced. At the same time the institution of the Federal guidelines' process has been accompanied by proffered appraisals from many corners, including a very large number of severe criticisms.

The evidence thus far to us does seem to indicate that since the U.S. Sentencing Commission's guidelines' process was put into effect, disparity of sentence among similar offenders and similar offenses has been reduced. Further, there is strong indication that there is now greater certainty in sentencing. And finally as the Commission itself reports with the abolition of parole, there is correspondence between the sentence awarded and the sentence actually served.

I must qualify these judgments by pointing out that

empirical data to support the conclusion of reduced disparity pre-guidelines versus post-guidelines are still quite limited. The only real data bearing on this subject comes from the Commission itself and they cover only two and a half years of experience and are drawn from relatively few cases.

In our view there are two features of the present system which threaten to compromise the ability of the guidelines' process to achieve its intended goals. One derives from the combining of the guidelines' system with a series of statutory mandatory minimum sentences. The other concerns the highly mechanical and formulaic character of the guidelines themselves. As the Commission's own reviews have noted the evolution of the Federal sentencing guidelines corresponded in time with the Congress enactment of a large number of statutory mandatory minimum sentence laws directly especially at drug and weapons offenses.

In our view and in the opinion of others, this enforced admixture has compromised the intended workings of the guidelines, has contributed to a number of perverse outcomes, and may be a principle factor provoking criticism in the guidelines themselves. The Commission's challenge when crafting the guidelines of incorporating the statutory

minimums into the guidelines framework has led to numerical values for base case categories which in the view of some at least may not be justified in all sentencing instances.

In some instances undesirably harsh sentences have said to have emerged from the resulting combined numerical values. The mandatory minimum sentences appear to be further exaggerated an unwanted transfer of sentencing discretion from judges to prosecutors who are able to craft charges to match intended sentencing outcomes.

And finally, the mandatory minimum sentencing values appear to have compromised the intended operational real offense sentencing to some extent. It is this latter process as we understand which was designed by the Commission as a mechanism intended to provide a balance to the findings of the prosecutors. The Commission staff have also pointed to the fact that statutory, mandatory minimum sentence penalties have tended to diminish the achievement of the principle goal of the guidelines' process, reduction in disparity of sentencing.

As the Commission's own analysis has shown, patterns of prosecutors' selection of charges to bring to the court have varied among geographic regions and among racial

groups of offenders. The Commission's assertion that lack of uniform application creates unwarranted disparity in sentencing is a serious matter to the extent it may undermine the singular goal of the guidelines' process.

The second issue I'd like to underline for the Commission is the highly mechanical structured process that is the character of the Federal guidelines. The determination of numerical values in the Federal guidelines' system is supposed to be a process which anticipates all possible factors which could shape the character of both the offender and the offense. The Federal process appears highly complex, overly mechanical, and highly specific. Judicial discretion appears to have been substantially reduced to a point which exceeds what the Commission originally intended.

As you know, if a plea for more flexibility in the structure and operation of the guidelines was the sense of the recommendations of the Judicial Conference, as it represented here this morning. Again, I would note that this statement is consonant with our testimony on this matter in 1986. The Commission should examine again the perhaps perverse and undesired effects of the high degree of attempted specification in the guidelines and the constraining formu-

lated character of the process of determining sentences.

In doing so, the Commission would do well to consider the experience and character of some of the mandatory State guideline systems designed around more conceptual structures. For example, Minnesota's 10 year experience is a worthy example.

Finally, as we did in our earlier testimony, I would urge the Commission to put in place mechanisms for keeping track of the effect of sentencing practices under the guideline system among other factors on prison use. Burdens on prison capacity and on public expense for incarceration will continue to be important issues raised by the public and by its legislators. And understanding of these relationships, I think will be important in future support for sustaining the confidence in the elements of the criminal justice system.

CHAIRMAN WILKINS: Dr. Burger, thank you very much for your very thoughtful comments. Let me see if any Commissioners have any questions.

COMMISSIONER GELACAK: Yes, just one. The Commission is on record and issued a rather lengthy and extensive report on mandatory minimums.

DR. BURGER: I read it.

COMMISSIONER GELACAK: I don't think there's much question that we have--we finally found a point where we and the judges tend to agree for the most part. What else can we do to get that message to Congress? I mean, they're the ones that are going to have to change the attitudes in this country about mandatory minimums.

DR. BURGER: I appreciate the question and I understand the challenge, I understand the magnitude of the challenge. My understanding is that a number of judges have themselves made representation on this matter publicly for Congressional action. The criminal justice system, like the Defense Department, are matters that are generally out of the public's view. We tend to think of these affairs as running on their own track and by themselves and running well. It takes an extra special effort, I think, to bring the mechanics and the quality of the system, the criminal justice system, to the attention of the public.

So I think the answer to your question is it will not happen easily. I think it will take extra special creative measures in order to bring to the public a view or a series of views on these matters so that there is a broader constituency frankly for change. It's the sort of thing that

our Council, the Court Excellence, in fact tries to do. But it's a large job.

COMMISSIONER GELACAK: That's all I have.

CHAIRMAN WILKINS: Comments or questions from the left? Again, thank you very much, both of you.

DR. BURGER: Thank you.

CHAIRMAN WILKINS: Our next witness is Peter Vaira and George Cotsirolis, representing the American College of Trial Lawyers. After these two witnesses, Professor Jonathan Turley from George Washington University will testify and anyone who is here will be given an opportunity to testify.

I'm going to ask Commissioner Nagel, if she will chair this hearing for the remainder of the witnesses, and I must tell you that I regret very much that I must leave to become a witness myself in just a few minutes. But we do have your written testimony, I believe, and certainly the transcript will be available of the rest of the witnesses and I'll have that available to me, as well as the comments of my colleagues. So please excuse me and it's not for a lack of interest in what you have to say, but just because of another matter that will require me to leave at this time.

Thank you very much.

COMMISSIONER NAGEL: [Presiding] Mr. Vaira?

MR. VAIRA: Yes, ma'am. Ladies and gentlemen, I'm Peter Vaira. I'm the chairman of the Criminal Procedure Committee of the American College of Trial Lawyers. To my right is an old friend and a very fine defense man from Chicago, George Cotsirolis. I have been a prosector--I'm a defense man now--I was a prosecutor for 15 year. I was the head of the Chicago and Philadelphia strike forces and organized crime. I was the United States Attorney in Philadelphia. For 15 years I have total experience. I have put more people in jail than anybody you saw this morning and maybe anybody up there on the podium. So I've come from another side and I've been there.

George Cotsirolis was a former prosecutor and has been a defense man, a very fine defense man, in Chicago for a number of years. We represent the American College of Trial Lawyers. It is a proud organization dedicated to trial excellence. And I say that for this reason. It is that we come to support the Judicial Conference recommendation, because we like, infantry men, believe the other infantry men are the ones who can give you the best evaluation of what occurs in the courtroom. We come to support the Judicial

Conference and their recommendations because they're the men and women who are there and see it every day.

You have our recommendations and I'm not going to go over them. I'm not going to go over them piece by piece. But I will just make these comments concerning them, is that the Judicial Conference has asked for discretion generally at the lower end of the spectrum, the place where they're dealing with first offenders. Persons whose lives are still valuable persons who may need some punishment but a chance to get back into society. And I speak specifically of 5B1.1, 571.7 and Chapter 5, Part B. These are the split sentences permitting the probation at two levels higher.

I believe that this is necessary. These are the persons who have that discretion. Judging is a craft. If I could just harken to the State system for one. If you watch a good State judge who's in the lower level, spends a great deal of his or her time trying to craft sentences, wrestling with the problems. That's where, I think, the Federal judges are coming from. Should they have the discretion? Let me put it this way. We pay out over \$100,000, I think it's over \$140,000 a year, if we can't trust those folks to decide whether they should give one month or three months in jail,

we ought to go back and drop that salary to about \$22,500. Because if we give that much money, we expect you to use it.

On the other hand, I'll give you another example. The Congress and the President of the United States is urging the courts to get into the civil matter and have absolute discretion, beating lawyers over the head, clients, forcing settlements, giving them absolute discretion. I think some place there's got to be some sort of a way. Let's back the judges and give them discretion.

You heard one who just was here. I think he's living example. Judge Wilkins asked him what about that? Isn't that a good deal? He said, it doesn't sound that way to me. I still think it's too much. Maybe you disagree with him. You've got to listen to that. You've got to listen to men and women who are in that bull ring.

I'm going to move on and talk about some personal observations I have outside the Judicial Conference recommendations. You have one recommendation in which you urge the prosecutor to turn over. It's what I call grading material, prior to sentencing, prior to negotiation, so the offender and offense characteristics are known. I think it's got to be done and you've got to do it more. Because prosecutors hate

that. Prosecutors just absolutely hate to deal with turning over that information that will make differences in the sentences.

I'm in a case right now and I asked for that material specifically. It has to do with some loss. The prosecutor refuses to do so, and then one of the so-called victim companies came up and gave me some information. It's just completely changed the picture. If the Commission is going to have any effect, it's got to get into the pre-trial discovery area. I'll remind you that's the area of Congress, but there's some places that you can insist that there be disclosure earlier. You'll have pleas faster and the system will move forward. I can't give you all the details now, but the spirit of that, I think, is what you're looking for. The spirit of that is what you're talking about.

We didn't talk about 5K1 departures. However, my question is this. What's the harm? What are we afraid of? If I were the Attorney General of the United States, I would simply come in and say let's take it back and let the defendant make that motion. These folks we pay \$140,000 a year for are going to see it. They're going to deny what should be in their denied; they're going to grant what's

going to be granted. Maybe one percentage of the time, it's going to make a difference. But I'm saying it will be a perception. Perception that the Commission has adopted and it's fair.

I think that's what you're finding this morning, some of the perception. When I was a prosecutor, I never had any problem with anybody begging a motion and saying that they had cooperated. If I thought they did, I agreed, and if I didn't, I said, I didn't; and the judges, 99 percent of the time went along with me. So I say, what's the harm. What's the harm. Let's just look at it practically and realistically.

One other observation I have and that is the problems that's coming and I touched on it earlier. The assistants hate sentencing hearings. They do not like them. They try to avoid them and in doing all that they possibly can to structure it. I'm in a case right now negotiating a fairly sensitive situation in which the prosecutor is insisting that I agree to three adjustments. I said, look, you know, it doesn't matter if I agree. It's up to the judge. It's his call. The prosecutors' absolutely insisting upon it because they don't want to wait into it.

Another place they're uncomfortable with is profit and loss, the losses. They just are not prepared for that. And I'm telling you if your system is such that it is to be a genuine system as I believe one of the Commissioners spoke about this morning, where the judge has to articulate, and he has to make these findings. The prosecutors are not happy about that at all. I just ask you to watch and study. Study the information that's coming forward, because you'll see that happening.

In summary, the American College of Trial Lawyers has not been in this area. We are wading into this area. We are advocates and we will continue to do this and we'll be into criminal law seriously and be watching. What I may ask you, if you want our help, we're very practical and we're very good about it and we'd enjoy talking to you and making a discourse in this area.

I turn it over to my esteem colleague, George Cotsirolis.

MR. COTSIROLIS: Thank you, Peter. Peter was head of the strike force as he told you in Chicago at a time when I was extremely active in the defense of cases. I still am to some extent and Peter has just become head of the Criminal

Law Committee of the American College of Trial Lawyers. When the publicity was given that you would conduct these hearings, Peter then went to Philadelphia and Peter called me and he said the College ought to take a position. I said that's a fine idea. Why don't you prepare something and he did. And we put it before the executive committee. I happen to be on the executive committee of the College and our presentation to you in writing and what we're doing today has been approved by the executive committee.

More importantly, I haven't seen Peter for a while. It was an opportunity for us to fly down here last night and have dinner together. We caught up on old times. I have sat here and listened for about an hour, an hour and a half. It's an interesting and fascinating hearing that you are conducting. I am sorry we did not hear Judge Broderick and Judge Wolf this morning, because we're here to support the Judicial Conference. And I think had we gotten up earlier and not talked so long, Peter, at breakfast we might have heard them and our little speeches would have shortened to some extent.

But what I have heard causes me to point up just two matters. One is I don't think the role of the prosecutor, since the implementation of the guidelines as talked about by

several of the speakers is exaggerated. And I don't think that we can quantify or anybody can quantify how great the role of the prosecutor has become. Because in the way things work from day to day, when a case arises, the first thing a defense lawyer does is call the prosecutor, even at the investigative stage when a grand jury subpoena is issued, and he sits down with the prosecutor and talks. And immediately the prosecutor will bring up the potential punishment that your client can get by way of the chart which is known as the guidelines. And that is used only too often as a threat to cooperate or to knuckle under and perhaps plead guilty to some lesser charge or fewer charges than the huge indictment that that prosecutor can bring.

So I don't think that the role of the prosecutor as it has developed since the beginning of the guidelines is exaggerated. So why we are supporting the Judicial Conference is based upon that as a development in the law. We think, as the judges do, that the discretion should go back as much as possible within something reasonable within the guidelines to the judges, rather than leave it with prosecutors.

I will sort of disagree with my colleague a little bit on why judges should have that power. Whether they're

paid \$140,000 or \$500,000 or 5 cents, we pick our judges very very carefully, particularly in the Federal court. These judges, at least in the Chicago area where I come from, first are subjected to public scrutiny; they have to go through various bar association committees, including the local bar association; they have to go through the ABA Judiciary Committee; and ultimately have to be approved by the U.S. Senate. These are seasoned lawyers who have reached the top of their profession. They are by and large men with sagacity, wisdom and experience. They should have in the sentencing process the largest role, and that is the role. They're the referees between the prosecutor and the defense lawyer, and that has been taken away from them, in my opinion, to a large extent.

What the Judicial Conference is asking is just an increase in two levels as I understand it. The more discretion you can give the judges, I think, the better the guidelines will work and the public will be satisfied and the criticisms will be satisfied.

I want to add one more story, and as Peter said, I was a prosecutor 40 years ago for four years and I have been a defense lawyer for 40 years since then. And I think just

because of my age, I ought to be able to tell one more story. I have used it many many times before judges. I have used it in social environments and it goes as follows. About 30 years ago, 35 years ago, I represented a young man who was charged with a series of serious charges. And we went before a State court judge and the judge found him to have no prior record. He seemed to be a nice young man. He was most contrite. The judge gave him 30 days in jail and five years probation. About two to three years later, I was walking into the criminal court building and this young man stopped me and re-introduced himself. And I asked him how he was getting along and he said, I've since gotten married, had a child and I have my own business. He was running a gas station. I said, gee that's wonderful. What caused you to take that new path? He said, that 30 days in jail. I never want to be on the inside of a jail again.

Now I cite that story because first of all I think that the judge has the ability to do what he did. He was a wise man and experienced man. But also it shows you that what the Judicial Conference is seeking on the split sentence that they suggest, rather than give half the time in jail and half on probation, just 30 days is more than enough in many many

instances. But that takes judgment; that takes experience; and we should rely on our Federal judges to be able to do that.

I think that about includes what I have to say. On behalf of the College, we appreciate your permitting us to be here and we wish you well in your enterprise. One more thought, I agree with you. We shouldn't have a tax code. My God, it's complicated enough, as the judge who just proceeded us by two speakers. He talked about the red book, the blue book and so on. It's complicated enough. General guidelines are fine. Give the discretion to the judge and give it to them as much as possible and this may evolve over the years. You may not be able to do it today, but evolving over the years should be directed in that direction. I agree disparity of sentences throughout the country and even within districts was not a good thing.

But that's been corrected and it's being corrected. So I say give it back to the umpire or referee where it belongs. Thank you.

COMMISSIONER NAGEL: We appreciate very much the comments of the American College of Trial Lawyers and we welcome you to the expanding group to comment on the guide-

lines. So we're delighted to have you here. Comments to my right?

COMMISSIONER GELACAK: I can see why you describe yourself as advocates. You're both very good and it really is interesting and a pleasure to have you here today. But I'd like to point out, I think, some figures that you may not really be aware of and we'd be happy to provide you with. If you look at sentencing under the guidelines and you remove the mandatory minimum provisions from the sentences that have been meted out in the Federal courts while the system has been operational, in all but a very very few instances, the sentences that have been imposed are less than they were under past practices.

The guidelines have not increased the punishment of people convicted of crimes in this country, with the exception of certain white collar offenses at the low end and with the exception, I believe, of murder which is not a real--this is not the proper way to say this--but it's not a real concern to the Federal system. Past practices were higher in almost every instance with the exception of the mandatory minimum provisions. And we are troubled by mandatory minimums as is the entire system and have been searching for an answer and

haven't been able to find one. And we will continue to search for an answer.

I'll give you the other side of the concern about taking cooperation, a motion for substantial assistance away from the Government. And I agree with you that the Federal benchers are good people for the most part, well intentions, have great experience, and are selected from a very select group of people. But the concern is that there has been so much of an uproar in the Federal system at the bench level with regard to the discretion that Congress took away from them, and that we through the implementation of our guidelines, took away from them. That if you take the motion away from the Government, that the bench will drive a truck through whatever is left.

And they will do that because they're concerned about whether or not substantial assistance existed or not. But because they feel they can't exercise discretion, what they believe to be appropriate discretion in regard to the individual in front of them, so they will use whatever they have, whatever tools are placed at their disposal. I don't know that that's necessarily true, but that is the concern that leads people not to support giving a substantial

assistant motion, since it's a motion to the defense.

With regard to unfettered discretion, I hate to bring this old saw out, because I don't believe it's saw; I believe it was absolutely true that when these well meaning and well intentioned gentlemen on the Federal bench had unfettered discretion, the end result was, in fact, disparity of sentencing. And that disparity endured to the detriment of the under class and minority members of our society. If that had not been true, we would not be here today. There would be no guideline system. Congress would not have exercised and expressed the concern over disparity through Federal judicial discretion.

I would like to find a way to give back as much of that discretion as possible. I think it's important for judges to look at individuals. I think it is outrageous for there to be 20 and 30 and lifetime sentences handed down indiscriminantly with regard to individuals. I don't think that serves any useful purpose other than punishment and we can all argue about what's enough punishment.

But that concern about the under class and the minority members of society is very genuine and it's very real, both here on this Commission and up the street in

Congress. And until you can provide them with some sort of evidence that it's not going to just be the same way it was, it's going to be very very hard to ever get it back because they want people to be treated in similar circumstances similarly. That's all I have and I'm sorry I've made a speech on it, but--

MR. VAIRA: Fine, we welcome the speech. I have to tell you about statistics. The man who has the statistics usually has the upper hand. I don't have the statistics, so I don't put much credibility in just saying numbers, that they're longer or shorter. I just set that aside because that's an argument that if I had statistics, we could battle it.

The question you raised, the issue you raised that the minorities--what you're saying is the white colored guy gets to walk and the black and Hispanic gets tossed in the can.

COMMISSIONER GELACAK: Not necessarily.

MR. VAIRA: Not necessarily, but overall. And you say well the judges, they're going to have a lot more discretion in this area. But keep in mind right now, I think in our prison system, the percentage of blacks is far higher

than in the percentage of the population. In other words, there's no answer to that. So what I'm saying is what you're saying is it's a social problem too.

The minorities, the first of the lower income tend to cause more crime for whatever reason than ones--so you can't exactly place it on that. And I don't know if the Commission can begin to engage in a lot of social questions because we're talking about crime and punishment. And when you begin to do that, you take on what I call the Asian land war. You've never going to come out of it. You're never going to satisfy anybody. The ideas that make it fair and to proceed to be fair. So, I'm saying that's just an area where I don't--

COMMISSIONER GELACAK: I guess if I could just briefly respond. I think we're on common ground here. The reason I believe that the system is unfair is because of mandatory minimums. And a lot of what you say about prison population in this country is directly, in my opinion, a result of mandatory minimums, because we enforce the drug laws in the ghettos and in the barrios. We do not enforce them in the suburbs. But that's neither here nor there with regard to whether the Commission is being fair. There's very

little we can do about mandatory minimums. We have tried. Judge Mazzone issued a report that was, I think, fantastic on the dead center on point on the issue, sent it up to Congress and there it sits. What else should we do?

MR. COTSIROLIS: May I make a comment? If I lead anyone to believe that I advocated unfettered discretion on the part of--

COMMISSIONER GELACAK: No, I didn't mean to suggest that you did that.

MR. COTSIROLIS: I'm sorry. I do think that the discretion that the judges seek in their recommendations which is some added discretion is most appropriate. And I also think it's most appropriate in the example that I gave, that 30 days is certainly adequate if you're trying to teach a lesson to a young man or a person, even an older man who's never served time before. So I just wanted to set the record straight on that.

COMMISSIONER NAGEL: Mr. Vaira, let me make one point to add to Commissioner Gelacak because I always worry about the comment you just made which is that under the present system there are more minorities there than were previously there.

MR. VAIRA: Percentage-wise.

COMMISSIONER NAGEL: Percentage-wise. I think that's probably the case. On the other hand, what you have to remember is that unfortunately the sad terrible fact was in the pre-guidelines you found people convicted of the same offense who were similarly situated, the same criminal history, same role in the offense, whose sentence was different on the basis of race. So that the disadvantage in some parts of the country, not in all, would be sentenced to a higher sentence on the basis of their race. In some parts of the country they would be sentenced to a lower sentence on the basis of the same racial consideration.

But you had your racial differences, independent of the events for which the defendant was convicted and his or her circumstances. Under the guidelines this is what you hopefully have and this is not definitively being shown or what you hopefully have is persons who are convicted of the same events who are similarly situated and sentenced to the same sentence and race has no factor. Now that doesn't mean it can't creep into some areas where there is discretion, and the Commission is of the view as was Congress that it doesn't want to limit all discretions so as to ensure that there's no

offense.

But there's a big difference between having more blacks because they're there because they're black versus having more blacks because they've been convicted of a crime which Congress has determined or the Commission under its guidelines deserves imprisonment. And I think you ought to keep that difference in mind.

MR. VAIRA: I'll keep that in mind. Here's my suggestion. You said how do you get somebody's attention about these mandatory minimums? And I understand judgment is only set up with--report. Take one letter and write it to the President of the United States and say, Mr. President, the result of our system right now, there's more black men in jail than are whites. It shouldn't be that way. Put a couple of statistics and send it to everybody up there and announce it in the New York Times that this where the letter is going and watch it fly. You're get your attention.

Sending a report up there and buried someplace, ain't going to do it. But if you put it this way and say it like it is, which I think I've said it--that mandatory minimums are unfair and Congress better change them. Congress will respond. They respond to, though you sometimes

have to hit them over the head. This being election year, I think those with constituents of minorities might respond to that. Thank you.

COMMISSIONER NAGEL: Comments to my left? Thank you very much.

MR. VAIRA: Thank you.

COMMISSIONER NAGEL: I'd like to ask Professor Jonathan Turley, Professor of law at George Washington University and National Law Center. Professor Turley is also the Director of The Project for Older Prisoners and most recently, stage and screen star. Professor Turley? Formerly on the Donahue show, Oprah Winfrey, you've seen him on TV.

MR. TURLEY: That's right I'm bigger than Elvis.

COMMISSIONER NAGEL: Professor Turley, we're delighted to have you with us.

MR. TURLEY: Thank you, Commissioner Nagel. I'd like to thank the Commission for the opportunity of letting The Project for Older Prisoners and myself address it this morning on the relationship of age to recidivism. I know that you've had a long day already and it's only getting longer with my remarks. So I will do my very best as a good citizen to keep my remarks short and not to repeat material

that is already submitted to you in written form.

I would like, however, with the permission of the Commission to give you an updated copy. We noted that one of our textual quotations was wrong and we have an updated version with only that change in the textual quotation. With your approval, I'd like to distribute that to the Commission at this time?

COMMISSIONER NAGEL: Yes.

JUDGE MAZZONE: What page is it on?

MR. TURLEY: I believe it's on page 10. This ties into what Judge Smalkin noted. We have a quote from the blue book and the red book and we have corrected that by quoting the red book.

I'd first like to start out by mentioning from where I come and what The Project for Older Prisoners is all about. The Project is unique in this country as an organization that deals exclusively with problems of geriatric and older offenders. We have an office in New Orleans and an office in Washington, D.C. and we work in about a dozen States in legislative work as well as individual cases of paroles and pardons.

The Project for Older Prisoners began with the case

of Quentin Norcrist Brown. To give you an idea the type of prisoner that we work with, Quentin came before me in a case that the Fifth Circuit asked me to represent on appeal. Quentin's case involved an issue that had not been resolved, an issue of constitutional criminal procedure dealing with Miranda rights in psychiatric interviews. I was amazed to discover that Quentin Brown was 67 years old.

He had been incarcerated for an odd offense. He had worked into a bread store in Franklin, Louisiana and stolen a 15 cent pie and a handful of cash. He then walked across the street and ate the pie underneath the house in front of witnesses. Apparently in Franklin, this was a major social event and everyone gathered around the house waiting for the police to show up. They did and arrested Quentin Brown and ultimately gave him 30 years without parole for the offense.

Quentin Brown is one of a number of prisoners across this country that is indicative of what is possibly the greatest challenge to the Federal and State systems nationwide. To put it quite simply, America's prison population is gray. It's getting older and the consequences of that demographic shift upward is being felt not only in

the State system, but in the Federal system as well.

Although we have primarily worked with State systems and this is one of our first ventures into the Federal system, it is the problem that the Federal Bureau of Prisons is well aware of and we have worked with them in the past in addressing what significance this will have for the Federal system. We have also presented it to the U.S. Parole Commission and we want to continue our efforts in this regard.

Across this country there is a large population of older offenders. In 1987, the number of older offenders in this country was put at about 20,000. As you well know, precise figures when it comes to those type of demographics are often hard to get. But the population of older offenders by year 2000 has been projected at around 125,000. The significance of that figure I'll be getting into soon.

But I should note that the older offender population is occurring at a time when the Federal system like many of the State systems is dealing with chronic overcrowding. Thirty-eight (38) States today are under court order for overcrowding. The Federal system alone has seen one of the fastest rises in its population. In 1986, there were 33,000 inmates in this system. In January 1992, there are over

65,000. That means that the Federal system has virtually doubled in six years. There is a growth rate now of conservatively around 10 percent per year.

Now as that is the back drop, one has to realize that the problem with older offenders is a problem that is both shared at the sentencing stage and at the incarceration stage. Older offenders are throwing many State systems and this Federal system out of whack. The reason is an older offender is on average two to three times as expensive to incarcerate. The reason is that an older offender will suffer on average three chronic illnesses while incarcerated. That increase in medical and maintenance cost is one of the primary reasons that systems, State and Federal, are in counting shortages and resources.

When we've looked at States like California and Florida and Pennsylvania, we've seen a hidden ballooning cost that is threatening to shut those systems down. To give you an idea of the type of cost that this population puts on a system, you can look at Florida where they have as many as 10 percent of their system now older or geriatric and another 7 percent HIV-positive. You're talking about a system that is in fact being shut down by rising health costs and overcrowd-

ing. On top of that, these are offenders occupying needed cells, even though in a very short period the Federal system has increased its cell capacity by 118 percent. It is still falling significantly short of the cells needed. It is now over 60 percent beyond capacity.

So we have 125,000 people that we're going to have to deal with that are occupying cells that we need. Now that doesn't necessarily mean that these are 125,000 people that we should find some other address for. Many of those prisoners should not and cannot be released. But many of them can. And the reason is, and this Commission is more aware of it than any part of the United States Government, the reason is that our knowledge about recidivism is at an all time high. It increases by the day. We've become very good at predicting recidivism, with the use of computers, with the use of historical studies.

Now that's not to say that we can look into the heart of every inmate and know whether this person will go and sin no more. What it does mean is that we can predict within a reasonable likelihood of whether somebody is going to be a low or high recidivist.

What we are asking this Commission to do in support

of the suggested changes to Part 5 to Part H and Part K of Chapter 5 is that it can use those recidivist studies, those high and lower predictor characteristics to deal with overcrowding at a time when our system is in badly need of some assistance. An older offender is statistically lower risk than a younger offender. We know that. You've had a lot of experts come forth and tell you age is the most reliable predictor of recidivism. Very few people disagree with that. The degree of the difference is controversial, but it is a major difference. And I'll doubt you'll find many people that would say otherwise.

Many of the prisoners that we work with, and we have over 600 prisoners in this project, are in their 60's and 70's and 80's. Many of these individuals have recidivism rates that are lower than the students I ride to prison with. We don't quite understand it, but an adult recidivism drops around age 30. All studies show that. We're not quite sure why, but as you get older you become less dangerous. You also become more expensive.

If we're talking about 125,000 prisoners in the Federal system, if you just assume that they are twice as expensive as younger offenders, you're talking about 250,000

prisoners to maintain. That's a type of population that we no longer have the ability to ignore. This Commission is part of its mandate. It's suppose to maximize Federal resources. That mandate is never more relevant than it is today.

What we do in POPS is we work with legislators in the State system to study their systems and try to suggest to them where their populations will be at a conservative rate of growth; what the problem of older offenders will do for their system; that is, who the older offender population will feel the costs and diminish the resources of the system. And then we argue and we've argued very effectively for reforms to take in consideration overcrowding and recidivism data.

Now I should note at this point, if you'll permit an aside, that this project is non-ideological. We are not a project that argues for releases. We don't believe as Father Flanagan that there's no such thing as a bad boy. In fact, we pride ourselves on being conservative in the recommendations that we make. In fact, when we go into State systems, we will generally go to the most conservative legislator in the State's system to argue in our favor for prison reform. We operate under the assumption that if we can get the most

conservative legislator, we can get the remainder of the legislature to support us. And we've been very successful in that regard.

In Louisiana, which you would not necessarily consider a Ho Chi Minh jurisdiction politically, we passed a package of prison reform to deal with older offenders. Recently one of the senators in that State said that those reforms helped them save \$1 million within the first two years. They included things like prison nursing homes for those prisoners that are high risk or mid-risk that we do not want to recommend even for alternative forms of incarceration. It included an electronic bracelet program, a pilot program. Older offenders are ideal for such a program. They have a very good history in alternative programs. And it included changing the laws to allow age to be considered, in this case by the parole and pardon boards.

So we are not what you would consider a knee-jerk liberal organization. We are based on the philosophy that in a time of overcrowding we have to make a reasonable and a rational decision about the prison resources available. And we would like that decision to be made on the basis of risk assessment, something that this Commission has made one of

its primary functions.

In terms of the amendments themselves, we noted in Federal Register the interest of this Commission in Chapter 5. We have put together some changes, and I should mention that they are very general, of how this Commission can incorporate the growing body of literature on the relationship of age to recidivism. The first amendment that I discuss is the amendment to 5H1.1 which is on page 10. That amendment is very limited in its scope in that we argue that the provision that refers to elderly and infirm be changed to elderly or infirm to allow courts to consider a geriatric prisoner who might not be classified as infirm.

We also support changes to Part K which will allow departure on the basis of someone who is elderly and low risk for recidivism. Both of these changes and I won't ask for you to listen through what we've already submitted, but both of these changes are meant to link age with recidivism. We do not argue, we have never argued that age should be a sole determinant. We do not argue that every older offender is by his or her nature low risk. What we are arguing is that we can identify a group here within our population, a growing group, that we should make eligible for further consideration.

That is for them simply to trigger the attention of the court as to whether a departure should be allowed.

We recommend to this Commission in making those changes that it carefully structure the recidivistic elements needed to make use of this change. That is to carefully structure to make sure that recidivism is not fueled in any way by these amendments.

We have a second change that we point the Commission to where they can incorporate this new data on age and recidivism. I should mention it's not particularly new, I mean since the Code of HaNarabi, we have been trying to predict recidivism, so the relationship of age to recidivism itself is not new. The second change that we have suggested comes in the extraordinary and compelling provision for a post-sentence change, a reduction.

We understand that the primary attention of this Commission should be on 5H1.1 and that is what we would like to emphasize in our remarks. It is possible for this Commission also to define extraordinary and compelling in terms of age and recidivism. We would be very happy to assist the Commission in that regard.

Our comments to this Commission in written form and

with an offer; and that is, The Project for Older Prisoners is prepared to assist this Commission in any regard in pursuing changes dealing with age and recidivism. We have at this point the longest pedigree in this area in terms of working with older offenders. And we are willing to give whatever resources this Commission would call upon and whatever expertise we have to explore these changes and other changes dealing with geriatrics and recidivism.

Two of the things that we did not discuss in our written remarks but we note at the end is that we would be particularly interested in a study with the Commission on the importance of the rising geriatric population within the Federal system, how it's affecting sentencing and how this Commission can deal with it further. We would also be willing to pursue the possibility of a Federal home monitoring program specifically geared for older offenders.

I should note that I think the pilot program for electronic bracelets or home monitoring has a great deal of promise for the Federal system. There are limited studies of the success of home monitoring. As you've seen recently there has been an explosion of the use for the electronic bracelets by jurisdictions under court order. The numbers of

people under electronic monitoring will peak, we believe, at about 12,000 in the coming year or so. I believe that's in the coming three years.

The remarkable thing for us, as we deal with State legislators is how they generally miss this pocket of prisoners that has an outstanding record of alternative incarceration. As you look at the figures that we have which are very limited, you'll notice that the Federal figures show that age does have an impact, not only in recidivism as we know, but also recidivism on home monitoring programs. In fact, it's interesting that the recidivism rate crosses over neatly from general recidivism to the home monitoring.

You'll have to forgive me if--I'm half Italian so I can't speak sitting down, so if I flail about, you'll have to forgive me. But in the home monitoring studies, we have seen that as you get into the group of 30 and older, the failure on home monitoring programs is slashed in half. That's reflective of other recidivism studies. We would suggest that that recidivism rate is probably smaller when you push the age up, as we do to 50 or 55. That study was just 30 years and older. So we'd be more than willing to help assemble a pilot program that remains faithful to the

recidivistic mandate. That is to tie any releases to a risk assessment.

Then finally, we would be also willing to look at a possible guideline dealing with overcrowding. The Federal system is not under court order. But we would be willing to look at ways in which courts can consider something extraordinary and compelling or I would prefer not to use language. A provision that allows courts to consider overcrowded circumstances and going for a later reduction.

One of the problems that we have and this is a mystery only in the sense that it makes little law enforcement sense. It makes a lot of sense politically. It's a mystery to see States releasing people under court order who have 70 percent chance of recidivism, young offenders who we can predict with some accuracy are going to commit a new offense.

I remember when I was down in Louisiana that I was addressing the parole board there and we spent all day showing them how they can incorporate recidivism. It took me six hours. Finally I came and in that same period of time a young offender was released with hundreds of others from OPP prison, after spending only a month there. He walked directly to the French Quarter and shot at a tourist. I sat

there and I listened to the news and I wondered why. Why with all of the knowledge we have on recidivism with the growing population of older offenders are we ignoring this reality. Unfortunately the answer is politics.

Many governors, many State legislators contemplated the fallen body of Michael Dukakis and said but for the grace of God, go I. And when you ask for a system of release in State systems often somebody's signature has to be at the bottom of the paper. What we try to show these legislators as we have in some conversation States, is that they can incorporate recidivism. They can make rational choices as to who to even incarcerate, because today the question is not whether someone will be released, but who under court order. And they can do that with a high degree of accuracy with a 3 to 4 or 5 percent of likelihood of recidivism in the categories of citizens of prisoners that we're talking about instead of 50 to 70 percent.

I'd like to stop now with my general remarks and I'd be perfectly willing to answer any questions the Commission may have.

COMMISSIONER NAGEL: Your proposals are most provocative and interesting and certainly the Commission

would like to avail itself of the opportunity to have your assistance. So we will call on you. Let me raise, Mr. Turley, four questions that you might consider in the event that you will submit additional materials to us.

First, as you know the Sentencing Reform Act had as its central feature of the legislation the abolition of parole because of all of the negative consequences attended to the parole system. Now whether that decision was wise or not, it was a decision of Congress. That is where it is and so the first question I think is if you can reconcile for us how your proposal would be consistent with the Sentencing Reform Act and not reintroduce all the problems that led to that decision.

Second, can you make the recidivism decision at the outset and that's something I don't know from your program. But perhaps you can comment on that.

Third, do you distinguish between persons who are elderly at the time of the commission of the events versus persons who are elderly by virtue of having grown so while in prison. And that leads to the concern for white collar offenders, in particular who are often older at the time of the commission of the offense. I think people think about

savings and loan fraud, procurement fraud, et cetera.

So that no one wants to see this as an opportunity to provide another version of a special benefit for the white collar offender, and I take it your focus is on the defendant who grows elderly in prison. If that's the case, then how much growing do they have to do, if you will? Should they serve two-thirds of the sentence, et cetera? How do we work that into our statute which provides for a departure mechanism rather than a parole mechanism.

And finally fourth, you want to keep in mind--again this is an issue for reconciliation between your proposals and our system--that we operate under a 25 percent rule. So if the sentences in prison with the maximum cannot exceed the minimum by more than 25 percent, that confines the degree to which we can leave discretion open ended. So again, to the extent you can reconcile those, that would be helpful.

I'm going to turn for questions to my right.

COMMISSIONER GELACAK: Just one quick one. After a person has been in jail or in prison for a lengthy period of time, whatever that period of time might be, there is at least a strong likelihood upon release he or she will remain a substantial drain on community resources. How much of your

cost allocation analysis takes that into account?

MR. TURLEY: That's a question that concerned us early on when we created this program. In fact, POPS is the acronym as it is now, is unique in another sense. And that is, we do not argue for the release of any individual unless we confirm where the person will live and what the person will live on. We supply all that information to the board. In doing that, we've come face to face with the problem of relocating what are often geriatric prisoners, particularly in getting them employment.

Many of them are not infirm and it's tough enough to get a job in a recession and you add on to that someone in Louisiana whose been--what all the prisoners do in Angola is pick cotton all day long. So this guy's been picking cotton, you know, for 20 years. He probably has less than a sixth grade education. You get \$10 when you leave Angola and all of a sudden he's supposed to sort of paddle his own canoe and we've been dealing with that.

What I can say is first of all we've been successful from our standpoint in locating prisoners. We've had about 50 releases. No one has committed an act of recidivism and we have found jobs or positions for all of them. It's

particularly easy in the South. We have a strong kin network and you can place these people with families. But to answer more directly your question. What I tell legislators is that the way to solve a social problem is not to spend more money in prison; that is, prisons make lousy nursing homes. And if you're spending \$60,000 on an older offender and you can instead put them in a public nursing home or housing or a public system and slash it down to \$12,000 which was the case in Florida, it added a lot of savings that you can use for whatever purpose; whether you want to use it for a prisoner or you want to use it for old people.

But I hear a lot when people come and say, listen, we can barely support our old people as it is. You know and you're saying you're going to put some geriatric out there that's going to put more demands on us. Well that geriatric can save you by putting you into the State system, \$30,000, \$40,000 that you can use for better purposes.

I'd like to note that I omitted something that's horrible. Behind me is a team that helped put together this report which should be noted. They worked very very hard. And behind me is Peg O'Brien, Lisa Rosenberg, and Adam Perlman. And over in the corner is Michael Millstein who's

embarrassed because he wasn't dressed appropriately for the Commission. And he's probably aghast that I mentioned it.

COMMISSIONER GELACAK: I can relate to that comment for reasons that I won't get into.

COMMISSIONER NAGEL: Thank you very much. Any more comments?

COMMISSIONER CARNES: This is very interesting. I have a lot of questions. This may not be the best forum. I am interested. You defined the prisoners that you focus on as 50 years or older; is that what you said?

MR. TURLEY: Yes, it's 55 and older, actually.

COMMISSIONER CARNES: Do you have some ideas to handle the S&L people or Don Corleone--I mean people such as that who have lived a life of crime or have done something that's so--isn't so damaging to society that home confinement wouldn't be appropriate?

MR. TURLEY: Yes, Commissioner, we do. One of the keys about recidivism is that if you have a late bloomer, you know, somebody who isn't a viable recidivist in the case of someone who has a long history of a long and criminal pattern or you have someone who committed an offense late in life. You know, we've got some guy who's 60 years old and just

killed somebody. It's pretty hard to say that he's already sown his wild oats and he's not likely to do this again. Well certainly not this particular one, but he's probably a high recidivist. So we take into consideration the crime and when the person arrived in making predictions. And we'd be more than willing to give you additional information on that.

COMMISSIONER NAGEL: Commissioners to my left?

JUDGE MAZZONE: I think it's interesting too and I think if you're inclined to answer the questions that Commissioner Nagel has put to you in some brief form, they would be very helpful. I'm not sure what the Commission can do with someone who goes to jail at age 30 for 30 years or 40 years, matters which happen to be concerning me right now. But I'm not sure how we do it. I always thought of the Bureau and the Department as sort of being a mini parole commission with the section of the Code which allowed them for extraordinary circumstances to petition a release. How they do it or what they do, I'm not sure. But I always thought of that as the safety valve, so to speak. Don't you?

MR. TURLEY: I do and one of the things that the Commission can do is to reinforce that safety valve to add a policy statement in showing the relationship of age to

recidivism. There's a limit obviously what the Commission can do. It can do more. I can, for example, make age more relevant at the initial sentencing stage and it can make age more important at the reduction stage.

If I can take and make the brief comments that you requested on Commissioner Nagel's questions. The first question dealt with the abolition of parole. We don't feel in any way that our suggestions conflict with that purpose. We're not talking about a parole system. We're not talking about somebody who has a right to be released at a set time. We're not even talking about a person that can material a fact their release. We're talking about a release based entirely upon the institutional population in certain recidivist elements. It is not going to be a program that is going to radically increase the numbers being released, but it will release high cost offenders in numbers that can make a difference.

We can in response to the second question make a decision at the outset. When you have somebody who is going to grow older in prison with a long term sentence, you can take into consideration the likely recidivism of the person at given age some time in the future. You can consider it

when you set the length of the sentence, the fact that this individual's recidivism may be dropping. And we would be more than willing to pursue that and support it. If you would like to focus on the outset, the sentencing stage, as where we would consider age and recidivism.

COMMISSIONER NAGEL: Let me add something to that since you're going to focus on it for the future, and I take it that this is going to be the beginning of a continuous dialogue.

MR. TURLEY: I would hope so.

COMMISSIONER NAGEL: And I want to be careful about the time. But years ago in the State of California they issued a guideline, if you will, that said that welfare mothers would be given probation when convicted of drug offenses. And what apparently happened is the leaders of the drug trade recruited welfare mothers. And what we don't want to do is have a system where we say that the elderly will be given this discount up front such that there's a change in the trade of recruitment, so that all of a sudden we see senior citizens recruiting to be these scouts on the lookout to the mules and the mopes and the couriers.

MR. TURLEY: Pretty old mule.

COMMISSIONER NAGEL: But I think that's a realistic fear that you will have shuffling new couriers. Because it seems to me that's something you want to think about. It's the kind of thing that seriously we have to think about. So you might want to put that in your response.

Let me in the interest of time and also the fact that probably everyone in the audience has still not had lunch, and because I think this is such an important idea and we would like to begin a dialogue. Let me ask that when we get back to the Commission, we will hope to set up a time when you and the members of your group can come and address in greater length with the Commission, since there seems to be a great deal of interest.

And perhaps we can also make data available to you so that you could determine something more precise about the nature and number of offenders who would be eligible under your--even if you used your current recidivism formula, would that be--

MR. TURLEY: We would be delighted to participate.

COMMISSIONER NAGEL: Thank you very much.

COMMISSIONER GETTY: It's good to see you again. The Parole Commission did visit with Professor Turley and we are opened

to using POPS since we still have about 20,000 people in prison and 20,000 out. So we have been in touch with him.

COMMISSIONER NAGEL: We will look forward to a full presentation.

MR. TURLEY: Thank you very much.

COMMISSIONER NAGEL: I thank you and I thank all the students, including Mr. Millstein, with or without your tie.

If there is anyone else in the audience who now wishes to testify, would you please identify yourself?

COMMISSIONER MALONEY: Commissioner Nagel, I apologize but I have to return to the Department.

COMMISSIONER NAGEL: Would you please state your name?

MS. STEWART: My name is Julie Stewart. I'm the president of Families Against Mandatory Minimums which as you can tell is a group which opposes the mandatory minimum sentences that you all also oppose. My comments are very brief and I just want to say that I am here on behalf of FAMM's 4,000 members, most of whom are family members of someone serving a mandatory minimum sentence today.

We support the Judicial Conference's recommendations

for improving the sentencing guidelines. I won't go into detail about that. That's certainly been clarified by all the speakers who are more qualified than I am to talk about it. But we do support the increased flexibility of sentencing of young and old and first time offenders, using alternatives to incarceration and increasing adjustments for acceptance of responsibility. Each of these recommendations are improvements that will help maintain the American tradition of justice. That judges provide sentences that are designed to fit the crime and the capability of the offender which is, I understand, exactly what you are trying to achieve.

It's obvious that our concern is primarily focused on mandatory minimums which as we've been told over and over again, it's really not your responsibility. It's the responsibility of Congress. We very much approved and applauded your report that came out in August. It was exactly what we needed. We are very young and just a group that's just getting started and certainly having the stamp of approval from the Sentencing Commission was exactly what we needed to be taken seriously.

It's been brought up too many times what more can you do, and I think that the gentleman that sat here and

suggested that you add a letter to President Bush and send a copy to the New York Times isn't too far off base. I realize that as Commissioners you have to have some sort of neutrality in this issue. I mean, you've done a serious study and you presented it to Congress and I don't know exactly what your limitations are and that's something that you can maybe help me understand. But it seems to me that members of Congress opened their eyes for first time in five years to the Sentencing Commission report and really looked at mandatory minimums again. I think the evidence for that clearly comes from the 1991 Crime Bill. The Senate put together their version before your report came out. It had about two dozen mandatory minimums in it. The House did their version after the report and it only had four mandatory minimums in it. The final bill had three.

So clearly they listened, they reacted in a serious and rational way to what you had to say. I think that whenever it's possible, again, I don't know what your limitations are, but at any point that there is an opportunity to bring up the fact that mandatory minimums are not working, fire a letter off to the chairmen of the committees, of the Senate and House Judiciary Committees. I mean you all are so

much more powerful than we can be. I mean, we are the victims. My brother is serving five years on a mandatory minimum sentence for growing marijuana, that's how I know about this boondoggle.

But our voices are much smaller and much less important than yours, unfortunately. So whatever support you can lend us, I certainly encourage you to do so. I know that the Minnesota Supreme Court recently ruled that there was a racial discrimination, that crack cocaine and regular cocaine difference was unconstitutional because it was racial discriminatory. That's a perfect opportunity for someone on the Commission to send a letter off to Senator Biden or Senator Hughes or Schumer or any of the Committee members who really are involved in this issue, and again reiterate how important minimums are to obscuring justice.

I guess in addition to that, I don't know again whether or not you can go as public as I'd like you to with the media, but I certainly approach the media at all times. In fact, yesterday CBS news interviewed me for a segment they're doing on mandatory minimums that's supposed to air in the next two weeks. I believe they're also talking to Chairman Wilkins. I encourage that. The New York Times or

anyone that calls me for information about mandatory minimums, if I could feel free to recommend that they talk to the Commission, I certainly will and hope that you would say the right thing.

In addition to that, I really don't think that it's a bad idea to write the President. I think that you all are quite aware that we had mandatory minimums in the past, and George Bush, as a Congressman then in 1970, was among the members who supported the repeal of mandatory minimum sentences for the very reason that they're wrong today. So you know, he's flip flopped on other issues, but I think it's something to certainly remind of. You are a very respected Commission and I think that he would listen to you.

So I encourage you to help FAMM and we will help you in whatever ways we can to see this law returned. We do have almost 4,000 cases on file, so we have plenty of examples to use and would be happy to provide them for you at any time. I'm open to questions.

COMMISSIONER NAGEL: Thank you very much. We're delighted to have you here. Comments to my right?

COMMISSIONER GELACAK: I suspect if I ask you any more questions, I may be drummed off the Commission.

MS. STEWART: Let me ask you a question. Did I answer any of your questions about what more you can do to get Congress involved?

COMMISSIONER GELACAK: Yes, you did to the extent you're not aware of a lot of the efforts that people on this Commission make though with regard to Congress.

MS. STEWART: I'm sure that's true.

COMMISSIONER GELACAK: I would say that in my past as the staff director of the Senate Judiciary Committee, I meet with those gentlemen on a rather regular basis, as well as other people on both Houses trying to get their attention on the issue. Unfortunately, I wish I could offer you more encouragement than we can at the present time. The politics are all wrong.

MS. STEWART: I understand that. Actually, I'm surprisingly optimistic. I'm not sure why. Although I do know that the Senate Judiciary Committee has agreed to hold hearings on mandatory minimums sometime in mid-March.

COMMISSIONER GELACAK: Absolutely.

MS. STEWART: So that's a very big step forward, I think.

COMMISSIONER NAGEL: Comments to my left?

COMMISSIONER GELACAK: Thank you.

COMMISSIONER NAGEL: Thank you very much.

MS. STEWART: Your welcome.

COMMISSIONER NAGEL: Is there anyone else who wishes to testify? If not, this hearing is concluded.

Thank you.

[Whereupon, at 2:00 p.m., the hearing concluded.]