

UNITED STATES SENTENCING COMMISSION

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2002 PUBLIC HEARING

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- WILLIAM K. SESSIONS, III, Vice Chair
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- JOE KENDALL, Commissioner
- MICHAEL O'NEILL, Commissioner
- JOHN ELWOOD, Commissioner, [ex officio]
- EDWARD F. REILLY, JR., Commissioner, [ex officio]

9:39 a.m.

Tuesday, February 26, 2002

Thurgood Marshall Federal Judiciary Building
 One Columbus Circle, N.E.
 Washington, D.C. 20002-8002

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 Office of the Special Narcotics Prosecutor
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P R O C E E D I N G S

CHAIRPERSON MURPHY: I know that the

members of the first panel are all here, and this is very important for the Commission in the course of trying to do the best job we can in this amendment cycle to get information and views from outside sources, and so we're very appreciative of the witnesses who are going to be here today.

Because, of course, we come from all over the country to meet and we have so much to do, we always have limited time, and I know that you have already been informed about the time slots.

I hope you won't be offended, but my assistant has a little timer, and you'll hear a bell at 8 minutes so that you would have a chance, if it's taking longer, to say whatever you want to say. You would have a chance to finish up with the punch line and so forth before the 10 minute bell rings.

I had suggested yesterday that the Commissioners wait until all of the panelists had spoken before asking questions unless there was

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something they really needed to clarify at the moment, but that didn't seem too attractive to them, and so I don't know whether they will or not.

But I think that the Commissioners have

read the statements that you've submitted, so if you want to speak a little off the cuff, you can do that or you can go ahead with whatever you've prepared.

I would just indicate your names here before we start. The first person will be Bridget Brennan who is a special narcotics prosecutor for the City of New York and has worked in the past with Commissioner Judge Sterling Johnson, and I told her--

COMMISSIONER JOHNSON: More than that. She took my place.

CHAIRPERSON MURPHY: And then we have William Nolan, who is the Chair of the National Legislation Committee of the Fraternal Order of Police and Ronald--is it a soft ch?

MR. WEICH: Pretty much. It's Weich.

CHAIRPERSON MURPHY: Weich, Ronald Weich

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of Zuckerman Spaeder, and he is representing the American Bar Association.

COMMISSIONER JOHNSON: And he also worked with Bridget Brennan.

MR. WEICH: That's true. We started in Trial 030 together in the District Attorney's

Office.

CHAIRPERSON MURPHY: Is that right?

Well--

MS. BRENNAN: We shared a phone for about a year.

CHAIRPERSON MURPHY: Well, we'll see if you have the same viewpoint today.

[Laughter.]

CHAIRPERSON MURPHY: Okay. Ms. Brennan, would you like to begin?

STATEMENT OF BRIDGET BRENNAN

MS. BRENNAN: Thank you very much. Good morning, members of the Commission, Judge Murphy, Judge Johnson. Thank you very much for the opportunity to address you this morning.

I'm Bridget Brennan, the Special Narcotics

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Prosecutor for New York City. As you know, Judge Sterling Johnson was head of my agency for many years, and to this day his name is linked with the Office of Special Narcotics.

I'd like to thank you for inviting me to come and share my experience in working with New York State's narcotics laws. I was an Assistant District Attorney in the Manhattan D.A.'s Office

for 8 years, and I have been with the Office of Special Narcotics Prosecution for the past decade.

During that time I've developed a perspective and some insights on the narcotics trade, the violence that's inevitably associated with it, and I'd be happy to share those insights with you.

Although I don't have any specific experience dealing with the Federal mandatory minimums or with the Federal sentencing guidelines, I know that as you're contemplating changes in the guideline and making recommendations, particularly with regard to crack and cocaine, you're looking to develop a rational correlation between the

culpability of an individual defendant, the impact of his crime on the community and punishment.

What we have struggled to do with our narcotics laws is draw those correlations frequently by determining an appropriate weight, a narcotics weight, which tends to be associated with a defendant's individual role in a narcotics trade, in a narcotics trafficking organization, and develop that kind of correlation between the defendant's role and his ultimate punishment.

The role of weights is really central in our state's narcotics laws, and it's always been thought that the more substantial the amount of drugs the defendant had with him, most likely the more culpable he would be in a narcotics organization, and there certainly is a good deal of truth to that.

The lowest level members of a narcotics organization tend to be street sellers. They tend to be probably among our most vulnerable people, addicts, who are used, employed by the high level dealers in the narcotics trade.

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Addicts are never trusted with a significant amount of the product as they call it, a significant amount of narcotics, and so there is definitely a correlation between weight and a person's culpability in a narcotics organization.

Now New York provides a unique perspective on the drug trade. It's a major importation site for cocaine and heroin. In addition, we have our own local neighborhood gangs and neighborhood organizations, frequently entrenched violent gangs that reap thousands of dollars, hundreds of thousands of dollars in profit annually.

Today I'll speak about the New York State laws governing the prosecution of crack and cocaine, the impact of crack and cocaine on New York and particularly the impact of crack trafficking, the impact the Federal sentencing regulations regarding crack have had on our local prosecutions, and finally, I'll talk a little bit about the challenges we face today.

My office was part of a set of reforms in New York in the 1970s when we were facing a

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tremendous problem with heroin, and there was escalating violence in New York and a tremendous problem with heroin addiction.

There were many reforms at that time; my agency was one of them. We were created to give a city-wide jurisdiction over the five counties that comprise New York City. Because narcotics trafficking tends to be fluid, prior to the establishment of my agency, there were jurisdictional impediments to pursuing narcotics investigations and, thus, my office was set up and give city-wide jurisdiction over serious narcotics offenses, felony narcotics offenses.

And I think that was farsighted on the

part of the state legislature because we have developed critical relationships with local organizations, with Federal law enforcement agencies and with Federal prosecutors.

Now I know your interest is very specifically on the penalties under Federal law for crimes involving crack and powder cocaine. Under New York state law, we do not treat powder cocaine

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and crack differently and, thus, there's no sentencing distinction, none whatsoever.

However, I must point out that our penal law and sentencing structure are entirely different from the Federal sentencing statutory scheme, and for the most part, our sentences for narcotics crimes are probably more substantial.

The threshold amounts that we use--that the state legislature determined for our highest level felony, the A-1 felony, is 2 ounces; that is, someone who sells 2 ounces of a narcotic drug--narcotic drug in New York is defined as heroin or cocaine--is facing a mandatory 15 to life sentence, and the 2 ounces converts into 56 grams. So as you as see, it's a very different sentencing structure than the Federal structure.

Now, of course, the prosecutor is allowed to plea bargain down; however, we are statutorily barred from offering a less than state prison sentence for somebody who is charged with the top narcotics offenses.

Because when you're looking at our entire

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state structure, it's very different. I've appended to my testimony a chart which outlines some of the specific state provisions.

We do have some specific state provisions addressing some of the concerns that the Sentencing Commission has already highlighted. We do have a specific state enhancement for dealing in drugs near to a schoolyard, within a thousand feet of a schoolyard--excuse me--a thousand yards of a schoolyard. We have a specific penalty for that, and that has generally been determined to be two city blocks.

We also have a sentencing enhancement for someone who uses a juvenile, someone under the age of 16, in the narcotics trade. That converts what would otherwise be a lower level B felony into an A-1 conspiracy, and again someone is facing that mandatory 15 to life sentence if convicted under

that charge.

But just to give you some examples of the differences. If a defendant is convicted of selling 5 grams of cocaine or 5 grams of crack

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cocaine, it makes no difference under New York state law. He still faces a minimum sentence of 1 to 3 years.

In fact, under New York state law, a defendant faces 1 to 3 years for selling any amount of a narcotic drug. It's the same felony offense even if it's less than 5 grams. However, if a defendant is convicted of selling 56 grams of powder cocaine or crack, he faces a mandatory 15 to life minimum.

Now I know one of the concerns expressed by the Commission in its 1997 report was whether the Federal crack sentencing guidelines affected local prosecutions; whether, in a sense, the Federal prosecutions would impinge on what had traditionally been local prosecutions, the focusing on the street gangs and whether resources would be diluted.

We have not found that to be the case in New York. We have worked many cases cooperatively

with Federal prosecutors. It is neither in our interest, I think, nor in the Federal prosecutor's

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interest to punish those who are not high level narcotics dealers with extremely substantial penalties.

So what we have done with the Federal prosecutors when it comes to low narcotics organizations is try to divide up targets and see where we can appropriately, most appropriately, punish those defendants; whereas, as Judge Johnson used to say, we can get the biggest bang for the buck, those who are--

COMMISSIONER JOHNSON: I said that?

MS. BRENNAN: You did many times. Those who are most culpable should face the most serious penalties. Sometimes that's under Federal law, and sometimes that's under state law, and we've tried to work those prosecutions jointly.

I think what you have to realize when you're talking about crack organizations is that they rely on heavy volume, and that creates a tremendous problem for the communities that are the sites of crack organizations. And those tend to be our most vulnerable communities because crack is a

low-priced product.

We see people selling \$3 vials, \$5 vials, \$10 vials, and we have organizations that are netting \$70,000 weekly. So you can do the math and see what kind of problems that's going to create for communities.

People can't get into their apartments because they're locked out during crack deals. There are substantial amounts of violence associated with crack organizations, each seeking to dominate a clientele and fighting with each other over the clientele. So crack organizations create unique problems for us, and we have focused many of our efforts on them.

I would also like to briefly mention that an important part of our mission is alternatives toward incarceration where we try to take those addicts or the low level street dealers and with facing the threat of incarceration, we try to get them into treatment programs.

We have found that that threat of incarceration is a very powerful inducement for

someone to get into treatment.

Again, I would like to thank the Commissioners very much for the opportunity to testify today.

CHAIRPERSON MURPHY: Judge Sessions?

COMMISSIONER SESSIONS: You said that the significance of drug quantity is that you can determine the role that a particular defendant had in a conspiracy based upon a quantity, and I guess I have a number of questions which follow from that.

First, you have a system that uses relevant conduct, and that is as a sentencing factor, can you consider other instances of criminal behavior to increase the quantity?

MS. BRENNAN: No. There are certain charges that we can bring which do consider relevant conduct and certain charges that you might consider strict liability offenses; that is, if you sell or possess X amount of drugs, you are facing this certain sentence.

Now I must say that the quantity of drugs

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is not always an indicator of a defendant's role. Obviously there is not a direct 1-to-1 correlation in every case. It is some indicator, and that is

the premise on which our sentencing statute is based--excuse me--our statutory structure is based.

COMMISSIONER SESSIONS: All right. Well, let me just follow up on that role. I think that at least you're implying that if a person had 5 grams of crack, that that probably is an indication that that is a street level dealer as opposed to a mid-level dealer, is that fair to say?

MS. BRENNAN: Yes, I would say that that's probably fair to say. Five grams of crack may translate into--I don't know--somewhere between 20 and 50 vials of crack, although, you see, you won't find the lowest level people with that much crack at any one time. They just wouldn't be trusted with it.

COMMISSIONER SESSIONS: I guess my question is based upon your experience, when does the threshold into mid-level dealer happen? I assume from what you're saying is that it probably

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happens at the 56 gram or 2 ounces and that's why they've focused in upon the increased penalty, and that is that's directed at mid-level dealers, is that--

MS. BRENNAN: It's hard to put an exact

number on it. I look at it in terms of vials more than in terms of specific amounts. I would say the way the organizations would work out, somebody wouldn't be trusted with holding the stash, as they say, the big amount, unless they're a fairly significant player.

The stash might be 100 vials, 50 to 100 vials, and again, there's no consistency in the amount of crack that's in those vials. The weight of the vials may be half a gram. It may be less than half a gram. It's anywhere probably between a tenth of a gram to half a gram.

The other thing to keep in mind is that the powder cocaine itself, we find our low level crack organizations will buy 2 ounces of powder; they might even buy less than that amount of powder and then it cooks up until probably a third more

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than that when they cook it up into cocaine, and then they break it out into vials.

So we always reach for those direct correlations, but they're very hard to come up with. Again, I look at it in terms of the number of vials somebody has.

COMMISSIONER SESSIONS: But in the Federal

system, of course, this is a relevant conduct jurisdiction. The Judge can consider all of the behavior that the defendant engaged in, and then if you try, in that situation, try to determine where that threshold is from street level to mid-level, what you're suggesting is it's sort of difficult to do that, is that correct?

MS. BRENNAN: It's extremely difficult to do that, and the other difficulty in doing that is frequently in order to determine what the defendant's role or conduct was within the organization, you need inside from those within. You need a cooperating witness.

And frequently these organizations are so violent that the insiders are very, very--extremely

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reluctant to testify, and we may have hearsay information about someone's role within that organization, but obtaining direct information is extremely difficult and sometimes impossible, which is probably why we have been reliant on the amounts rather than actually proving up the exact role of a defendant within an organization like this.

You might analogize it to Al Capone who was convicted of cheating on his taxes. We're able

to get the high level dealers for these, in a sense, strict liability crimes; whereas, we would have great difficulty convincing someone to testify as to their role within an organization.

JUDGE JOHNSON: Let me ask you this. You say you cooperate with the Federal authorities, and I know that many times they'll come to you and you'll have source information you'll give to them, and maybe you'll prosecute or maybe they will prosecute.

Have you ever had an instance or do you have them frequently where the Federal authorities will come to you with a crack situation and ask you

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to prosecute?

MS. BRENNAN: Yes, we do have those instances come up on a fairly regular basis. Sometimes they'll make a referral over to us, and frequently, if we are doing a joint targeting of an organization where we pick up lower level or they may pick up lower level dealers where they think the penalties are more appropriate on the state side, they'll make that referral over to us.

COMMISSIONER CASTILLO: When you say more appropriate, do you mean more stringent?

MS. BRENNAN: No, lower.

COMMISSIONER CASTILLO: Lower?

MS. BRENNAN: Yes, lower. I mean, most of us have--well, I don't know how to put it other--the same sense of justice that is clear that you all share, and we don't want to see--I don't want to see a low level dealer go away for 15 to life. I mean, there's no point in that. It strains the resources of the state; it's just not fair.

Federal prosecutors, most of the ones I've worked with, have the same feeling, and so they

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don't want to see those low level guys go away for 5, 10 years. It is simply not appropriate given their conduct.

So within the confines of our various laws, we work together to try to figure out the most appropriate sanction, and we charge them accordingly.

COMMISSIONER JOHNSON: So what you're saying is that if you have a low level dealer and he's doing 5 or 6 grams of crack, the Federal authorities will bring this defendant to you, he will be indicted and allowed to plea where he'll get 1 to 3 years?

MS. BRENNAN: Yes, that certainly could happen. I mean, it happens on a--we see it happen fairly regularly. I don't know; I can't give you a number of times, but it's certainly not an unusual occurrence where there will be a referral over to us.

CHAIRPERSON MURPHY: Professor O'Neill has had his hand up. So if you want to just follow up with that and then we'll go to him.

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COMMISSIONER JOHNSON: If that person--I don't know if you know or not--but if that person who had the 5 or 6 grams were prosecuted in the Federal jurisdiction, they would have a mandatory minimum of 5 years?

MS. BRENNAN: Again, I can't say. I haven't worked with the Federal guidelines specifically, so I don't know what is, in a sense, optional on the part of the prosecutor when they make their charging decision and what is not. So I can't specifically respond to that.

COMMISSIONER O'NEILL: What happens in the back end? I mean, most states, unlike the Federal Government, for example, have like two-thirds--after you serve two-thirds of your sentence--I'm

not familiar with how New York handles that, but how does New York handle it with respect to release dates?

How long, in other words, do people actually serve?

MS. BRENNAN: It depends on what the sentence is. For example--and it depends on the

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particular status of a defendant. Many of our lowest level defendants, the ones who are facing 1 to 3, you would think that would mean they must serve a minimum of 1 year and a maximum of 3 years; however, many of them are eligible for early release under shock incarceration programs and a variety of other programs which are within the discretion of the Department of Corrections. They make a determination as to whether the defendant is eligible for early release.

In addition to that, we have statutory good time, which is a third off. We have--

COMMISSIONER O'NEILL: A third off?

MS. BRENNAN: A third off the bottom line, a third off the minimum.

COMMISSIONER O'NEILL: So do you have any statistics as to how long, for example, looking at

the lower level, even the mid-level folks, for drug use, how long they actually wind up serving in prison?

MS. BRENNAN: No, I don't have those statistics. I'm sorry.

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COMMISSIONER O'NEILL: Do you have any sort of just anecdotal impression as to how those folks compare with the folks in the Federal system?

MS. BRENNAN: Again now I can only speak for New York City.

COMMISSIONER O'NEILL: Of course.

MS. BRENNAN: Most typically, New York City, a first time offender who is convicted of selling one vial of crack, if he goes to trial, he's facing 1 to 3. If he is eligible for shock incarceration--and you have to be a certain age. There are various other criteria--he will definitely be given shock incarceration, which is a six-month, in a sense, rehabilitation program.

For those of our defendants who don't go to trial, we most typically plea bargain those cases out. Most of those cases get probation the first time out. If they're a predicate offender, that's when the mandatory sentencing provisions

really kick in.

That's when no matter what, they are facing some kind of a state sentence--

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COMMISSIONER O'NEILL: But a state sentence that may have one-third off the bottom?

MS. BRENNAN: Yes, it will have some amount of time off, and there are a number of other early release programs that are wholly within the purview of the Department of Corrections.

COMMISSIONER O'NEILL: So basically what you're saying is within the state system itself, there are a number of mechanisms built in typically to reduce what appear at the front end to be rather long sentences, but at the back end, actually wind up shortening the time someone actually serves?

MS. BRENNAN: Right. Now the bulk of our defendants are in on those low level sale cases. For those who are facing the stiffer A-1 penalties, those people are going to do a substantial amount of time. There's no question about that.

COMMISSIONER O'NEILL: But they're unlikely to do the time that they're actually--

MS. BRENNAN: Again, I'm not comfortable directly answering that question. I just don't

have the regs right off the top of my head. I'm

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sorry.

CHAIRPERSON MURPHY: Well, the media has indicated that Governor Pataki was, I think, going to propose a modification of the legislation to make the sentencing more I'm not sure quite what, but reduced penalties or at least to take out that mandatory life.

I'm just struggling here not necessarily for the specifics of it, but, you know, when a political figure like that is making noises of this type, does that reflect some sense that this hasn't worked quite the way expected or it was producing some results that weren't desired or could you speak to that?

MS. BRENNAN: It's hard to--certainly Governor Pataki has proposed revisions of the laws. The most substantial--he has proposed reducing the top sentence for the A-1 offender to 10 to life I believe it is, the mandatory minimum; keeping the range the same between 10 to life and 25 to life, but reducing that minimum sentence to 10 to life.

The other proposals he has made apply to

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primarily the predicate offenders and what kind of programs they might be eligible for, and there have been any number of proposals in recent years to change those laws.

I mean, clearly it reflects his view that the sentences are probably too severe at that level. We've had proposals to adjust the weights. We've had any number of proposals in New York. Over the past 4 years, there have been--the proposals have run the gamut of trying to, you know, more carefully correlate the punishment with the crime itself, with the kind of conduct we're trying to deter and punish.

CHAIRPERSON MURPHY: Mr. Reilly?

COMMISSIONER REILLY: Thank you. To follow up where the Chairwoman was going, I'm curious what--and you've touched a little bit on it--what the reaction of the people of New York is since it is a major import for a lot of the drugs that come into the country.

Do the people of New York feel the drug laws should be changed? Do you hear a human cry

about the fact that they're not just, they're not equal or is there--

MS. BRENNAN: There have been many, many proposals, and certainly there is a lot of talk about it. In terms of what the people of New York think, I can tell you when I go into the neighborhoods where crack dealing is rampant, they aren't saying change those drug laws and lighten them up a little bit.

The people who are directly affected by the crime just want you to do something to clean up their communities. To them, it frequently means put the people who are dealing the drugs in jail. And the last thing they want to see is them arrested, then back out on their stoop the next morning.

So that kind of human cry doesn't come from those communities, I would say, who are most affected by it when they're dealing with the reality of drug dealing in their neighborhood.

However, there are a lot of vulnerable people who are caught up in drug dealing. Most of

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our street level drug dealers come from communities where there are few economic opportunities, where drug dealing is the best game in town, you make the quickest money and the most money.

The risk, of course, is state prison, and when somebody's brother or father or close relative or friend goes to prison, that's when the impact of those laws hits home.

I would say that the biggest human cry in New York is about the 15 to life mandatory minimum penalty for the 2 ounce sale or the 4 ounce possession. That seems to be where--there seems to be greatest consensus around that issue. When you're talking about just dealing, street level dealing, I would say the consensus diminishes.

COMMISSIONER CASTILLO: Just to follow up on that, do you believe that the effectiveness of your office has been diminished by New York's failure to distinguish between the crack and the powder cocaine penalties?

MS. BRENNAN: No. Our penalties for narcotics crimes, the threshold amounts are so--they're

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small, relatively small when you compare them to the Federal statutes, that it really has had no effect.

COMMISSIONER CASTILLO: Are there instances where you might refer a case for Federal prosecution because you felt that a crack dealer

could face a more substantial penalty than the ones that New York state law was presenting?

MS. BRENNAN: It could happen. It could happen. I can't think of any instance where we've actually done that. Where we're more likely to do it is if there's a firearm found.

I mean, the high level dealers are very rarely found with the stash as we would say, with the product on their hands.

COMMISSIONER CASTILLO: Right.

MS. BRENNAN: The Feds have better laws. They might have a better conspiracy law which would enable them to take in the leader of the group. They can aggregate sales; whereas, we are not able to do that under our law.

There are other nuances under the Federal

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law which might enable the Federal prosecutors to more appropriately target and punish a leader of a group, but it tends not to be the crack distinction.

COMMISSIONER CASTILLO: As you sit here, do you have any correlation between certain indicators in a high level dealer, for example, large amounts of money, firearms? What would you

say are the indicators of a high level drug dealer?

MS. BRENNAN: I'm trying to think of the ones that we've had most recently. Again, the drug dealers, so many of them don't save their money. I mean, we'll find a big collection of boots or fancy cars or gold jewelry at the end of the day. But, I mean, it tends to be their role within the organization. How many people are they supervising?

And if you're talking about who deserves the harshest punishment, of course it's the one who employ the greatest amount of violence, both towards their own workers, to protect their turf, to protect their clientele, and frequently against

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the people to whom they're selling to.

CHAIRPERSON MURPHY: Okay. You have one more question.

COMMISSIONER SESSIONS: Just as a premise to the question, a large percentage of people who are charged with crack in the Federal system are first time offenders, and if you take all of the relevant conduct, all of the things that they've engaged in, if it arrives at 5 grams--we'll take 5 grams as an example--in the Federal system, they

face a 5 year sentence, they do 85-percent of that sentence. So they do approximately 4-and-a-half years in Federal prison.

Now compare that to what happens in New York state. A first time offender at 5 grams ordinarily, if they plea bargain, would get probation or if they don't--

MS. BRENNAN: In New York City.

COMMISSIONER SESSIONS: In New York City.

Or if they don't, they'd be receiving a 1 to 3 year sentence, but they would be serving a lot less than that. I mean, that's a wide disparity of treatment

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based upon whether you're in the state system or in the Federal system.

I guess from a social policy perspective, does that concern you at all or does it impact the way your office functions, knowing full well that there's this significant disparity in the way a person is treated at that low level based upon where they're prosecuted?

MS. BRENNAN: Well, I think we have attempted to address that disparity when we've worked with the Federal prosecutors. But, again, confining my comments to New York City, my

experience with the Federal prosecutors there, I haven't seen them targeting those kinds of low level offenders.

The crack organizations that they target tend to be violent entrenched gangs. We do a lot of undercover--as we say, undercover buy and bust cases, where an undercover will walk up and buy a crack vial from somebody; turn around and charge them.

That's not the cases I see coming out of

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the Eastern District of New York or the Southern District of New York. Now again, I'm no expert on Federal prosecutions, so I don't know whether that is, in fact, the case. It's just not what I see.

I've never worked with them on those kinds of cases, and those aren't the referrals we get. So my guess is that they use their prosecutorial discretion to target those people who are more appropriately punished by serving that kind of time.

COMMISSIONER JOHNSON: But if you have a conspiracy and they do target a large organization and caught up into this net are some of the people that you have been referring to, first time, they

will still be subjected to the harsh penalties of the Federal crack laws, right?

MS. BRENNAN: Well, again, not being an expert on the Federal laws, I can't directly comment on that. But what we try to do in our office is assure that the result, the penalty that somebody is facing is appropriate to their crime.

And I wouldn't want to see a low level

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guy--I mean, a real low level street seller who's the hand-to-hand guy in an operation doing 5 years. It would not be something that I would be comfortable with.

COMMISSIONER SESSIONS: That, you would think, would be unfair?

MS. BRENNAN: Yes. If the hand-to-hand guy is selling one vial is facing a mandatory 5 year minimum, I wouldn't be comfortable with that.

CHAIRPERSON MURPHY: Obviously there's a lot of interest in your experience, but I'm concerned about making sure that we can hear from everybody else too.

MS. BRENNAN: Sure. Thank you very much.

CHAIRPERSON MURPHY: I'm sure they would continue if they could.

MS. BRENNAN: Thank you.

CHAIRPERSON MURPHY: Okay, Mr. Nolan,
we're interested in what you have to say to us this
morning too.

STATEMENT OF WILLIAM NOLAN

MR. NOLAN: Good morning, Judge Murphy,

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and members of the United States Sentencing
Commission.

My name is Bill Nolan, and I'm currently
the Chairman of the National Legislative Committee
of the Fraternal Order of Police. I'm here today
on behalf of our National President, Steve Young,
and representing our 300,000 members throughout the
country to offer the views of the FOP on several
issues related to the sentences for crack and
powder cocaine offenses under the sentencing
guidelines.

Let me just say at the outset, I believe
this is the first time that the Fraternal Order of
Police has had the opportunity to appear before
this Commission, and we greatly appreciate your
invitation to do so today.

In addition to serving the FOP on the
national level, I am also the current President of

Local Lodge 7 in Chicago, Illinois. Like many major metropolitan areas across the nation, our city witnessed an explosion in cocaine-related drug use and violence during the 1980s, especially due

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to the emergence of crack cocaine.

During this time, Congress recognized the need to counter these rising trends with passage of sweeping new laws, establishing mandatory minimum penalties for persons convicted of offenses involving a given amount of a variety of controlled substances.

Measures such as the Anti-Drug Abuse Acts of 1986 and 1988 gave us in the law enforcement community the tools we needed to appropriately punish those often violent offenders.

Despite the progress we've made, the problem of both powder and crack cocaine have not vanished from our streets, and we, in Chicago, are still coping with this as well as the use of other illicit drugs.

In 1999, for example, the arrestee drug abuse monitoring program reported over 41-percent of adult males in our city tested positive for cocaine at the time of their arrest, posing a

dangerous situation for the brave men and women of my department.

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It is for this reason and many others that I recognize the urgent need to maintain the tough standards set forth in current law for the sentencing of those convicted of cocaine-related offenses.

The Commission has asked our organization to testify regarding the issues for comment following proposed Amendment No. 8 to the sentencing guidelines; specifically on several occasions regarding the sentencing of the defendants convicted of cocaine-related offenses.

Let me begin by telling you that the Fraternal Order of Police does not oppose addressing the disparate penalties associated with crack and powder cocaine or a cross drug type. We are, however, greatly concerned with the manner in which any such changes are put into effect.

The current penalty structure for crack and powder cocaine offenses is based primarily on the quantity of the drug in the possession of the defendant at the time of his arrest. This priority given to the quantity of illegal drugs in

determining a defendant's role in the offense and a final sentence for the offender is as important today as it was in the 1980s.

That being said, is there a need for penalties that are tougher for crack than for powder cocaine offenses or for one type of drug over another? Several sources would support such a conclusion.

In a report to Congress in 1997, a prior Commission recognized that some drugs have more attendant harms than others and that those who traffic in more dangerous drugs ought to be sentenced more severely than those who traffic in less dangerous drugs.

There's also evidence to support the fact that crack cocaine does greater harm to both the user and to the wellbeing of the communities across the nation.

The Commission's findings in the 1997 report also stated that crack cocaine is more often associated with systemic crime, is more widely available on the street, is particularly accessible

to the most vulnerable members of our society,

produces more intense effects than snorting powder cocaine, and that Federal sentencing policy must reflect the greater dangers associated with crack.

As a former police officer in one of America's largest cities, one who has witnessed first-hand the devastating impact that crack has had on my community, I agree completely with this assessment, and I believe that anyone who has ever talked to the families who are forced to live locked inside their own homes for fear of the crack dealers who rule their streets would also agree with this statement.

There are other factors which should also go into the sentencing of those convicted of crack powder cocaine offenses. We applaud the Commission for working to include additional aggravating factors within the guidelines.

However, these and other enhancements should continue to be in addition to a minimum sentence that is based first and foremost on the quantity of the controlled substance as provided

for under the current law.

We also appreciate the Commission's concern regarding the 100-to-1 drug quantity ratio

for crack cocaine and powder cocaine offenses.

We further understand that some are concerned with the disparate impact of this ratio, particularly those who have expressed concern about its impact on minority communities.

Regardless of whether or not these concerns are well-founded, the appropriate response is not to decrease the penalties for engaging in one type of illicit behavior over another. Meeting in the middle or toughening the sentencing for powder while weakening those for crack is also not a feasible solution.

While it would definitely affect the lower drug quantity ratio, any measure that decreases penalties for crack offenders would harm the overall effort to keep drugs off the street and violence out of our communities.

That is why the Fraternal Order of Police supports increasing the penalties for offenses

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involving powder cocaine through a reduction in the quantity necessary to trigger the 5 to 10 mandatory minimum sentence. This would decrease the gap between the two similar offenses, address the concerns of those who question the current ratio

and would provide law enforcement with the tools they need to further restrict the possession, use and sale of powder cocaine.

The dangers associated with crack and powder cocaine have not completely disappeared since the current tough sentences for these crimes were enacted. Although our nation has seen an across-the-board reduction in crime rates in recent years, it is still true that illegal drugs have a devastating impact on society as a whole.

It is also clear that the Federal Government, which has available resources and policies in place to effectively investigate, apprehend and punish drug offenders must continue to take the lead in providing harsh penalties for drug-related offenses.

The Administration, Congress and the

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Commission must continue to send the message to drug dealers and traffickers that the Federal Government will fiercely protect the most vulnerable members of our society and will severely punish those who seek to exploit them.

The question of appropriate sentences for crack and powder cocaine offenses have received a

great deal of attention in recent years from a variety of sources. Unfortunately, there has been too much demography and too little rational deliberation on this issue.

That is why we believe that today's hearing is an important step in the right direction. Our organization looks forward to the continuing discussion on the appropriate penalty levels for drug related offenses and welcomes the opportunity to participate in an ongoing dialogue with the Commission and others interested in this issue.

Again, on behalf of the membership of the Fraternal Order of Police, let me thank you again for the opportunity to appear here today. Thank

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you.

COMMISSIONER JOHNSON: As I understand it, you're saying that they should keep the 100-to-1 ratio, but raise the penalty for powder cocaine, is that the position of the organization?

MR. NOLAN: That is correct, yes.

COMMISSIONER JOHNSON: Now when they set out the penalty for crack cocaine in the '80s, there were several reasons why the Congress said

that this would be appropriate. If these reasons no longer exist--and there is some evidence that it no longer exists--do you think that that is the appropriate thing to do at this particular time, to keep those penalties?

MR. NOLAN: Well, we have been dealing with narcotics for years, cocaine and heroin and all that. When the crack cocaine came on the scene many years ago, it seemed to change; it became more violent.

In a lot of the areas, the users and the sellers of crack cocaine are more violent people than the drug dealers that we've normally been

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dealing with over the past several years. So there is something with the crack cocaine that does tend to have more violence--

COMMISSIONER JOHNSON: But there is statistics and evidence to show that the violence associated with the crack cocaine no longer exists or no longer exists to the extent it did in 1985, 1986. Do you still think that there should be a 100-to-1 ratio?

MR. NOLAN: Well, we believe that the ratios in the powder cocaine, if it was dropped a

little bit, it may help some of the arguments that we've had that some of the other communities are being assessed more--maybe more stricter than others. So maybe that is a reason. We're not sure; we don't have all the reasons.

But we do like to see some of the sentencing guidelines take effect that would help the people out there in the street now, the men and women that are working out there. We seem to have more violence against police officers on people that are using crack cocaine or under the influence

of crack cocaine, and that seems to be a very big problem.

COMMISSIONER JOHNSON: Now what the Commission is looking at and thinking about is enhancing penalties for violence against police officers, possession of guns.

Would that help the Fraternal Order of Police or the people that think--

MR. NOLAN: Sure, absolutely.

COMMISSIONER JOHNSON: And you still think there should be a 100-to-1 ratio?

MR. NOLAN: In some instances, we believe that. I don't have all the statistics to be able

to bring that out right now, but just in our overall view from interviewing our members and talking to them and getting their feelings on it.

CHAIRPERSON MURPHY: Commissioner Steer has a question and then Professor O'Neill.

COMMISSIONER STEER: Mr. Nolan, I want to thank you and your organization for participating in this process. I think it is the first time, and we hope it certainly won't be the last.

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I'm trying to understand sort of the organizational and political basis for your views. First of all, do you have Federal law enforcement members or is it--

MR. NOLAN: Oh, yes, we have Federal officers--well, in Chicago, each lodge is different, but we do have Federal officers and Federal lodges throughout the country.

COMMISSIONER STEER: According to what we've learned, only some 16 of the states distinguish at all between crack and powder in their penalty structure, and only one has a 100-to-1 ratio, and we're not sure that it quite mimics the Federal penalty ratio in all respects.

Federally we sort of deal with the tip of

the iceberg. In a given year, probably the Federal Government prosecutes, convicts and sentences less than 10-percent of all the drug traffic and offenders, probably something closer to 6-percent. The rest are dealt with at the state level.

So looking at it from that standpoint and if there is a basis for--is it your position that

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the penalties once set by Federal Government can never be adjusted downward; that they can only be adjusted upward, is that--

MR. NOLAN: No. I think the current statutes and the penalty structure do what they're intended to do, and that's to keep the drug offenders out of the communities. And I think that the so-called low level who traffics in the smaller quantities of either powder or crack is no less a danger than those participating in large amounts. So you do have that problem.

COMMISSIONER STEER: But even the states--like New York is considered to be one of the toughest with its so-called--some people refer to it as the Rockefeller era, the drug laws--and we've just heard testimony that even they don't treat small time crack dealers as harshly as do the

Federal penalty structure.

In fact, there may be a state out there that does--

MR. NOLAN: Right.

COMMISSIONER STEER: But the overwhelming

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evidence seems to be that it is not--it is the crack structure that is too harsh. I think there are some who, like your own organization, that say that powder penalties may be too lenient, but we haven't heard a whole lot of testimony to that effect.

So, again, it seems to me that maybe where a change is needed, first of all, is in the penalties for crack, wouldn't you think?

MR. NOLAN: Despite the fact a lot of these individuals represent the bottom line of the drug distribution doesn't necessarily translate into decreased behavior and all that, and so there just seems to be that correlation between the crack user as opposed to the marijuana smoker, the heroin user and people like that.

So we see there is a need to do something for the crack period.

COMMISSIONER STEER: Well, thank you for

your perspective.

MR. NOLAN: Thank you.

CHAIRPERSON MURPHY: Professor O'Neill?

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COMMISSIONER O'NEILL: Just a brief couple of questions. It's my understanding from your testimony--and correct me if I'm wrong--that part of the reason that you think that it's important to maintain this differentiation between the treatment of crack and powder is sort of twofold.

One concern is that the drug itself is worse on the individual, and the other is that there's a lot more violence associated with crack cocaine than there is powder cocaine, is that a fair--

MR. NOLAN: That's a fair statement.

COMMISSIONER O'NEILL: That's fair. If you knew that studies that had been updated since the 1980s and 1970s, when some of these original studies were looked at, that it's not a matter of the nature of the drug itself, but rather drug delivery systems that make the difference between whether somebody uses crack as far as its harm on the individual and whether someone uses powder and its harm on the individual, that distinction really

doesn't make sense anymore based upon more recent

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scientific and pharmacological evidence, then probably what you'd still say is that it's important to main this distinction because of the harm that's involved, the violence that's involved; that crack is a more violent drug, is that a fair thing to say?

MR. NOLAN: Yes.

COMMISSIONER O'NEILL: Let me ask you this. In D.C., we had a problem a number of years ago with the Jamaican Posse. These guys almost exclusively distributed marijuana, but out of all the various drug organizations in D.C., they were probably the most violent organization in D.C.

Do you think it's better to decide to base our penalties, a heightened penalty, on the nature of the drug itself, i.e. being marijuana, or is it better to base it on the violence that's associated with the drug?

MR. NOLAN: Probably the violence I would say because that's a big problem that we're having. In Chicago, for example, it is so predominant that we have some areas where 10, 11 and 12-year-old

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kids are making more money than somebody that has gone to college and had several degrees and working on LaSalle Street. They can make upwards of \$200-\$300 a day just by being lookouts.

COMMISSIONER O'NEILL: So do you think that we're probably better off, rather than differentiating between, say, Tennessee marijuana and Jamaican marijuana, that we're better off differentiating on whether or not there's violence associated with the distribution of that particular drug? Is that probably a better way to do it?

MR. NOLAN: Yes, I would say it probably is. Excuse me. Yes.

COMMISSIONER CASTILLO: Mr. Nolan, it's always good to see a fellow Chicagoan, and I'm well aware of all the work you do, and I know that you've gone to too many hospitals and too many funeral homes with regard to your members.

But let me ask you this. Nationally we're seeing a decrease in violence. Are you saying, in Chicago, you haven't seen a decrease in violence with regard to crack dealing?

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MR. NOLAN: Unfortunately, in Chicago last year, we became number one. It's a title we didn't

like. It was the number one in homicides. But a lot of those homicides had to do with drug-related gangs. Between domestic violence and the drugs, if we could have eliminated both of them, we would have probably been the lowest in homicides. But that's where it comes in.

We have had too many young kids killed in Chicago, innocent kids, standing out front of the same funeral homes of other members of their community that were killed in drug activities, and this is the thing that we're trying to stop in the Chicago area.

It is a problem. There is an awful lot of violence. Years ago, the police would be able to stop somebody or holler, "Stop. Police," and they stop. Today they turn around and they come out with every type of weapon imaginable.

And it's to protect their turf, it's to protect their incomes that they have, and they don't care about who they involve in this because

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we have these young kids, as I've said, and they're out there making the money so that the bigger cogs in the wheel can get away because these kids are out there just as lookouts. But to give a 10-year-old kid a

hundred dollars at the end of the day,
that's something that's very hard to turn down.

COMMISSIONER CASTILLO: Has this been
specifically tracked to crack cocaine?

MR. NOLAN: Well, it's narcotics in
general. It's not only crack; it's all narcotics.

COMMISSIONER CASTILLO: Thank you.

CHAIRPERSON MURPHY: Are there any other
questions for Mr. Nolan? Mr. Elwood, since he
hasn't had a chance, and then we'll get to you
again, Judge--

COMMISSIONER ELWOOD: Well, we heard from
Commissioner Steer that only 16 states
differentiate between crack and powder, but it's my
understanding that a lot of local enforcement
effectively distinguishes by sort of importing
Federal standards by asking the Feds to come in and
help them on local enforcement efforts. I don't

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know if this is the case in Chicago.

MR. NOLAN: Yes, we do.

COMMISSIONER ELWOOD: But I understand
that in a lot of places they have the Feds come in
to help them break up local violent gangs; in part,
using these stricter Federal sentences for crack

and for drugs generally.

In your opinion, will it harm local enforcement efforts to break up violent gangs if Federal sentences or if the triggers are increased?

MR. NOLAN: No, I don't think so. No.

COMMISSIONER ELWOOD: You're saying if the penalties for crack are decreased, that is not going to harm your efforts to break up gangs?

MR. NOLAN: Oh, if it's decreased? Yes, I think it would. I think what we have to do is let the drug dealers out there know that if you're going to deal in drugs, if you want to take the chance and deal in one vial of crack or a couple kilos of heroin, you're going to go to the penitentiary, and that's the message that we have to send to them.

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CHAIRPERSON MURPHY: Okay. Judge Johnson?

COMMISSIONER JOHNSON: We have spoken to a lot of people, law enforcement, treatment officials, corrections, legislators, and the consensus that we have had was that there should be a change in this disparate sentencing structure, 100-to-1.

As I recall, when they were formulating

these laws, one party said that "There's a lot of violence associated; we have to be tough on this crack situation. We're going to make it 50-to-1. "

And the other party, whether it's Republican or Democrat or Democrat or Republican say, "We're not going to be outdone. We're going to make it 100-to-1." So, therefore, we have this 100-to-1 situation.

We, in the Commission, have been very, very concerned, and we feel that maybe we have to do something about this situation. If something is done, there's a bill before Congress now, and it's a 20-to-1 ratio. If it had to be changed, what do

you think would be a fair ratio?

MR. NOLAN: I really couldn't say, Judge. I really don't know what the fair ratio would be. I'm really not that much involved in the day-to-day arrest and prosecution of narcotics offenders, and I would leave that up to the State's Attorney and the U.S. Attorneys to determine what they feel is best.

CHAIRPERSON MURPHY: Okay. I just want to remind the Commissioners that we've spent an hour

on the first two witnesses, and we've got four sets here this morning and plus you know about the rest of the agenda.

I'm sorry to remind, but anyway, with that nice introduction, Mr. Weich.

STATEMENT OF RONALD H. WEICH

MR. WEICH: Good morning, Judge Murphy, and members of the Commission. My name is Ronald Weich. I'm a partner in the law firm of Zuckerman Spaeder, and I appreciate the opportunity to offer comments on behalf of the American Bar Association.

I'm appearing today on behalf of the ABA,

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but I also bring several other relevant professional perspectives to the hearing. I began my career as an Assistant D.A. in Manhattan. I then served for 2 years as counsel to this Commission, and then I worked on Capitol Hill for several years and was chief counsel to Senator Kennedy at the time that the Congress considered the Commission's 1995 proposal on cocaine sentences.

Now in private practice I serve as an advisor to several organizations interested in sentencing laws, including the Leadership

Conference on Civil Rights, whose Executive Director we heard from yesterday.

Having disclosed all of that, I want to emphasize that I'm speaking strictly on behalf of the ABA today.

The principal source of the ABA's views on proposed Amendment 8, which is the amendment we've been asked to focus on, is the ABA standards for Criminal Justice Sentencing Chapter, the Third Edition, which was published in 1994.

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My written testimony explains at some length why the current system for sentencing Federal drug offenders substantially deviates from these standards. We recognize that many of the criticisms of the Federal system in my testimony are more properly directed to Congress because Congress has control over the statutes, and the statutes are so much at the root of the problem here.

But I want to take a few minutes of my time to discuss these big picture concerns because they put into perspective the ABA's views on Amendment 8 and because structural problems in Federal sentencing are, of course, a concern to

this Commission, and I think it's important to step back from the tree sometimes and not just look at this particular quantity or that ratio or this specific offense characteristic and instead look at the whole system.

I think it has to be said that the tangled morass by which Federal defendants, Federal drug defendants in particular, are sentenced today is

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deeply, deeply flawed.

MR. WEICH: Amendment 8 is, on balance, a step in the right direction, and the Commission should implement a portion of that amendment and also raise the threshold quantity for crack cocaine.

But even if the Commission moves forward with those proposals, there's so much more that needs to be done to make Federal sentencing less complex, less arbitrary and more rational.

The standards, the ABA standards, endorse a flexible guideline system, one in which an expert body develops general rules to govern the ordinary cases, but in which Judges are free to depart in cases that are different than the norm.

And the standards acknowledge the tension

between individualized sentencing on the one hand and standardized sentencing and advocate a system that--it's a balanced system that guides judicial discretion without eliminating it.

The current Federal system deviates from that model in at least six ways. First of all,

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Congress continues to rely on mandatory minimum sentences. This is contrary to three decades of ABA policy. The mandatory minimums are inconsistent with the guideline system. They undermine this Commission's work.

This Commission reported to Congress 10 years ago that mandatory minimums cause unwarranted racial disparity. It's long past time for Congress to abandon that sentencing system and put its eggs in the basket of Federal sentencing guidelines.

Secondly, both the laws and the guidelines are overly complex, rigid and mechanistic. On the back of my written testimony, I appended 21 USC 844, the possession statute, which is very rarely used, but it illustrates, I think, the complexity and the arbitrary nature, the layered nature.

Each Congress comes along and has a new drug that it wants to say it's really tough about,

and so there's a new mandatory minimum, a new graduated system of penalties, and you find that the drug trafficking statutes, which are widely used, are even more dense and layered, but I didn't

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append them because they take up 15 pages of the last compilation. And I think that the Commission and the Congress need to address this complexity because it's driving practitioners, prosecutors, defense attorneys and Judges crazy, and I know that members of the Commission share that frustration.

Third, Federal drug sentences are determined to an unreasonable degree by a single factor, drug quantity, and here, of course, proposed Amendment 8 is going to take a step away from that reliance.

Fourth, Federal drug sentencing is not a product of empirical scientific evidence. The 1986 determination by Congress to set these ratios was devoid of any scientific considerations.

The Commission did undertake a very empirical, thorough scientific analysis in 1995. Congress, unfortunately, rejected that proposal, and frankly, you just need to go back--and you have a stronger record now in light of the testimony

yesterday and I think even some of the testimony so far today--to go back to them and say, "The current

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system is unfair and needs to be revised."

Fifth, there's widespread that Federal drug sentences are more severe than necessary to achieve societal purposes for which they are authorized which is a provision both of 18 USC 3553 and the ABA standards.

I don't know if you're aware that Bureau of Prisons Director, Cathy Hawke Sawyer, testified before Congress that "Seventy-some percent of our female population are low level, non-violent offenders. The fact that they even have to come into prison is a question mark for me. I think it has been an unintended consequence of the sentencing guidelines and the mandatory minimums."

In an extraordinary letter from Judge Martin, John Martin in New York, and 26 of his colleagues, judicial colleagues, all former United States Attorneys, Judge Martin and his colleagues complained that crack cocaine sentences are unjust and do not serve society's interest.

Sixth, mandatory sentencing laws and the guidelines exacerbated by the indefensibly harsh

treatment of crack result in unwarranted and inequitable disparities that the standard said must be avoided.

In 1995, the Commission said that. Virtually every member of the House and Senate Judiciary Committee acknowledged it. The Attorney General of the United States said as much. But here we are 7 years later and it seems as though these rules, these laws are impervious to change. It's time for the Commission and Congress to act, and we strongly urge you to do so.

Proposed Amendment 8 would generally bring Federal drug sentencing closer to the principles embodied in the standards. The ABA has no institutional position on many aspects of the amendment, but in broad strokes, we support the Commission's efforts to reduce the dominant role of quantity in Federal drug sentencing and permit Judges to take greater account of the relative culpability of different defendants. I think both Mr. Nolan and Ms. Brennan endorse that basic concept.

Drug quantity is an unsatisfying ultimate

sentencing factor because it's variable that's subject to manipulation by law enforcement officers, it's a poor proxy for culpability in conspiracy cases and under the relevant conduct guidelines as Judge Sessions pointed out.

The Commission's proposal to restrain the sentence of defendants who qualify for a mitigating role is a sensible effort to restore proportionality to the guidelines, and there's no reason, we think, to limit the scope of that provision to defendants who qualify for only some mitigating role adjustments. It should for anybody who qualifies for a mitigating role.

You also propose enhancements for violence and other circumstances of the offense. That makes sense, of course, if you also substantially increase the threshold quantities for crack cocaine. As we've discussed today, the current threshold levels have been defended on the grounds that the crack market is inherently more violent, but the Commission's own statistics show that that

has changed to some extent.

If you're going to add the violence enhancements to the guidelines, you should take it

out of the base offense level so as not to double count.

On the other hand, we have practical concerns about the proposals to incorporate in the drug guideline the criminal history factors. It's in Chapter 4. It adds unnecessary complexity to put those factors as specific offense characteristics in Chapter 2.

Turning to the question of crack cocaine, we endorsed your 1995 proposal to equalize crack and powder. We relied on your empirical analysis. We are aware of no empirical evidence that's developed since then to call in to question your conclusions. Indeed, there's substantial evidence that things have made that position more defensible.

But where my--Public Law 104-38, we understand that Congress has constrained this Commission from proposing 1-to-1. On the other

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hand, Congress explicitly said, "Change the ratio. Everybody knows that it's wrong."

A fair reading is that the Commission should return to Congress with a ratio between the discredited 100-to-1 and the rejected 1-to-1, and

we urge the Commission to raise the crack penalties to achieve a ratio as close as possible to the previous 1-to-1 proposal.

We strongly urge that you not increase penalties for powder cocaine. It's completely unjustified by the empirical evidence. If you lower the threshold, you bring more low level defendants into the reach of the mandatory minimums or the guidelines and then the mandatory minimums by extension, and as Judge Martin and his colleagues wrote, "The penalties for powder cocaine should not be increased. The disparity should be remedied only by raising the amount of crack cocaine that would trigger the application of the mandatory minimum."

I would welcome any questions from the Commission.

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CHAIRPERSON MURPHY: Judge Sessions?

COMMISSIONER SESSIONS: All right. You've talked about the Commission's responsibility to act, and you are certainly in a perfect position to answer this query. You were affiliated with the Sentencing Commission as legal counsel for a period of time. You also were on Senator Kennedy's staff

in 1995 when that piece of legislation was passed by Congress.

The Commission's responsibility to act, there is some question about whether we should act by way of making a recommendation to change mandatory minimums or--and I will say on the record that this is my view and my belief, a view of many here--that we have the responsibility to change the guidelines to be fair to those persons who are in this system of justice.

My question is if we take on that responsibility to change the guidelines, does that offend in any way the spirit of the legislation that was passed by Congress in 1995 or does it, in fact, follow that directive?

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MR. WEICH: First of all, Judge Sessions, I hope there's no question about the Commission's legal authority to propose guideline amendments.

Public Law 104-38 asks for the Commission's recommendations, but in no way limited the organic authority of the Commission under 28 USC 994 to amend the guidelines. So there's a legal matter. You can move forward with guideline amendments.

I think it's preferable for you to do so for the following reason. I think--

COMMISSIONER JOHNSON: --say to "do so," does that mean which one?

MR. WEICH: I'm sorry, Judge.

COMMISSIONER JOHNSON: Recommend or--

MR. WEICH: I think it's preferable to propose amendments. As you know, when the Commission sends up its guideline amendments on May 1st of each year, they lay before Congress for 6 months before becoming law in November.

So even when you amend the guidelines, it is, in effect, a recommendation, a proposal to the

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Commission. I think you should take that step of formally sending amendments to the Congress, and if the Congress doesn't act, they would become effective on November 1st.

I think that's important for several reasons. First of all, we're 7 years past the Commission's 1995 report which demonstrated so conclusively that these sentences are unfair, unjust and, indeed, racially discriminatory.

We're 15 years since they were enacted. So we've had 15 years of injustice. The Congress

is, in my view, ready to consider this matter today. We have the bill introduced by Senators Sessions and Hatch.

We have lots of statements by members of Congress to indicate that it's time--I'm familiar, for example, with the letter from Chairman Leahy and Ranking Member Hatch to the Commission asking the Commission to take up this matter.

Our conversations with congressional staffers suggest the Congress is wanting to address this matter. If the Commission proposes guideline

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amendments and at the same time recommends changes in the mandatory minimums, you frame the issue for congressional resolution by November 1st of this year, by the end of the congressional session, and I think that's appropriate.

I think that you will give Congress the necessary impetus to act this year as I think they actually want to.

CHAIRPERSON MURPHY: Mr. Steer?

COMMISSIONER STEER: Let me follow up on that issue since I take the other side and draw you out a little bit more about that.

Let's suppose that Congress did not see

fit to change the statute, but allowed the guideline amendments to go into effect. Now our data show that one effect of that would be--let me just pick a--I have to give you a figure. I have to pick a hypothetical number that we might change the crack number too.

Let's say we made the threshold 50 grams for the 5 year mandatory minimum. The effect of that would basically be that whereas now mandatory

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minimums trump the guidelines 10-percent of the time. If the Commission made that change in the guidelines and Congress did not act to change the mandatories, the mandatories would trump the guidelines in one out of three cases.

How can you square that result with ABA standards that call for eliminated, unwarranted disparities? The Commission has just, of its own accord, manufactured a disparity that will exist solely depending on how the offense is prosecuted, not based on its characteristics at all? So that's one part of my question.

Then I want to come back to the political aspect of it and ask you about--

MR. WEICH: Commissioner, it's obviously

not desirable for that disparity to be there.

You're quite right that that is contrary to our standards.

I think that it is more likely that we will see a global resolution of this issue if the Commission proposes the changes to the sentencing guidelines and, in effect, spurs the Congress to

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address the long overdue problem of the mandatory minimums.

Indeed, this may be an occasion for addressing the applicability of mandatory minimums generally. Nobody thinks we're going to repeal them this year, but I think that there are a number of proposals floating around in the Senate especially to limit the reach of the mandatory minimum.

So I think that you're more likely to achieve the result that everybody wants, which is to solve this intractable problem once and for all in the mandatorys and in the guidelines if the Commission tees up this issue for congressional resolution.

But if Congress chooses not to change the mandatory minimums, it could, of course, alter,

modify or block the Commission's recommendation if it did that. If it did so under those circumstances, it would not, in my view, duplicate the 1995 situation where, in effect, Congress was rebuking the Commission. Instead, it would

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Congress saying, "We need more time to work on this, so we're going to hold up your guideline changes while we work on the mandatories."

Finally, if it works out that the changes in the mandatories--in the guidelines go into effect before the mandatories are changed, while that's not desirable from a theoretical perspective, it's not unprecedented.

The marijuana guidelines and the LSD guidelines both are, in effect, decoupled from the statutes. And again, I think that is just more of an incentive for Congress to finally rationalize these absurd rules.

COMMISSIONER STEER: You are an experienced insider with respect to Congress, and I value your perspective on that. But it is a calculated risk, is it not?

Recalling the 1995 situation, my recollection of it is that there was a great deal

of animosity in the Congress that the Commission had taken the action that it did and forced the issue and put the Congress in the position of

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having to vote on an issue in order to stop something from happening before the Congress apparently was willing to act, and that was not in an election year.

Now times have changed, but this is an election year, and I think the consequences long term, if that were to happen again, could be very deleterious for the whole guideline system.

Congress might, for example, decide that "Enough of this. The Commission has done it once too often, and we're going to stop this process of amending the guidelines without congressional action" and just change the statute so that instead of the Commission being able to force it by sending up an amendment, that the Commission can change the guidelines only when Congress affirmatively acts, as is the case in some state systems.

MR. WEICH: Well, I was working on the Senate Judiciary Committee staff at the time that the proposal came up. I think there was a serious problem at that time with consultation.

I think that members of Congress were

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surprised; not as much by the fact that the Commission was making proposals in this area because people knew that it was under consideration, but the substance of the recommendation took a lot of us, including me and Senator Kennedy, by surprise.

And I know that this Commission is not repeating that mistake. I'm aware that there's extensive consultation now. I think you need to work closely with the Chairman of the two judiciary committees, the ranking members, other interested members like Senator Sessions; make them aware that this is what you intend to do; solicit their views, as I know you have.

I mean, I could imagine if you received personal assurances from the two chairmen and the ranking members that this is an issue that the Congress is going to address this year and that the Commission's recommendations would somehow be more favorably viewed if not in the form of guideline amendments, you know. If the assurances were airtight and not the assurances that I've seen some

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members of Congress give to others, that would be one situation.

But I don't hear that, frankly. I hear Senator Sessions saying that he wants to address this subject once and for all. I've heard him say he wants to offer his bill as a floor amendment just to get some consideration of this.

I know that Senator Leahy and Senator Hatch are anxious to have the Judiciary Committee consider this matter. So I really think you would be facilitating the debate and the discussion that they want to have if you were to put this forward.

I'm as concerned as you are, Commissioner, about the reputation of the Commission. The Commission has done much to restore its luster on Capitol Hill. That should not be squandered. But its reputation is not an end in itself.

Having done much to restore the Commission's standing in this field with Congress, you now, I submit, need to lead in this important area.

COMMISSIONER JOHNSON: I happen to agree

with you, and I stand in the camp of those who should think we should have an amendment as opposed

to a recommendation, and although Congress' consideration--I don't think that's the end--all because we on the Commission have taken an oath, and we have to do what we think is right.

If Congress feels that what we have done is not wrong, let them do what they have to do, but we have to do what we have to do.

CHAIRPERSON MURPHY: Are there any other questions for Mr. Weich?

COMMISSIONER ELWOOD: Yes.

CHAIRPERSON MURPHY: Mr. Elwood.

COMMISSIONER ELWOOD: Now one of the strong emphasis of your testimony was the empirical nature of it, but you acted as though the Commission hadn't said anything about the guidelines since 1995 which just isn't the case.

Now in 1995, the Commission voted 4-3 to equalize, even after recognizing in its statement that crack cocaine was more dangerous than powder cocaine.

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Now, admittedly, more recently people seem to take a dimmer view of things that are decided by one vote, particularly by the Judicial Branch, but that's an entirely different matter.

[Laughter.]

COMMISSIONER ELWOOD: In 1997, the Commission said unanimously that it should be moved to something more like a 5-to-1 ratio with the trigger moved for crack to between 25 and 75 grams and for powder, to 125 to 375.

Given that that is a more recent empirical assessment, what is your view of the 1997 recommendation?

MR. WEICH: Well, Commissioner, I reject the idea that it was empirical. Empirical is this. This is the 1995 report from the Commission which I think is unassailable in its reliance on science, on economics--

COMMISSIONER JOHNSON: This being? For the record, what are you--

MR. WEICH: I'm sorry. I'm holding up the Commission's Special Report to Congress, Cocaine in

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Federal Sentencing Policy, from February 1995.

I've looked at the 1997 document that the Commission forwarded to Congress. It's approximately 20 pages. It contains no empirical evidence, and I think what it reflects, frankly, is that that Commission--and I say this with respect

for former Chairman Conaboy, who is here today--I think that Commission was cowed by the reception that the 1995 proposal received in Congress, and I think the Commission overreacted.

There is certainly nothing in that 20-page document which explains why the Commission chose to increase penalties for powder cocaine. It's simply an assertion that the--and, of course, all it says is that Congress might consider it, and it proposes ranges, and I think there was some negotiation with the Justice Department and members of Congress to try and arrive at a political solution to it.

But I just don't think in terms of the science, that you can compare the 1995 report with that 1997 document. I banished the 1997 document to a footnote in my testimony because, frankly, I

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just saw it as ill advised and unsupported by the evidence.

CHAIRPERSON MURPHY: Okay. Well, we really appreciate your coming here to speak, and I think you can tell the interest that your testimony has produced on the part of the Commission. Thank you very much.

And with that, we'll call forward Judge

Conaboy. This is a very good introduction to Judge Conaboy's testimony. Judge Conaboy. Judge Conaboy, welcome to the other side of the table here.

We know that you worked very hard on the issue that we're focusing on today, and we're looking forward to what you can help us with.

STATEMENT OF RICHARD P. CONABOY

JUDGE CONABOY: Well, as I said before, Madam Chairman, it's, I think, relatively easier to be on this side, and as I sit here today in the back of the room, I'm reminded of Yogi Berra's old saying about de-ja vu all over again, and it seems as though that almost could have turned the hearing

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around aimed in the other direction, and we're still hearing much the same arguments. I guess that's because we're talking about human conduct that doesn't change.

I'm also reminded of a recent comment of Yogi Berra's. Well, I heard it recently. It was an old comment of his. When somebody asked him why he continued to go to funerals, and he said, "Well, if I don't go to theirs, they won't come to mine."

[Laughter.]

JUDGE CONABOY: And that one seemed to be more appropriate for me today. I felt if I didn't come here--

[Laughter.]

JUDGE CONABOY: If I don't come down here to help you, maybe you won't help me. So I have a couple of comments to make today. It was somewhat short notice for me. I expected that maybe this hearing might be later in March, and I had talked to some of your staff members and had tried to make more preparation to come here today and giving you some benefit of history and comments from a

sentencing Judge.

And certainly I don't come here to try to tell anybody at all what you should do because it's obvious that you have a very difficult job. But I did prepare a few remarks, and I did go back to the 1995 report, and I excerpted from that what I thought was a fair summary of what that report said to the Senate.

I also excerpted a number of the remarks that I made when I presented it to the Senate on behalf of the Sentencing Commission at the time, and I'll make those available to all of you. You

might want to just look at those because I think there was some significant misunderstanding--and the reasons for that are many-fold--as to exactly what was done in that report and at that time.

I also have prepared a listing of some of the things that we on the Commission back in 1994 and 1995 did that I perhaps think maybe were errors of judgment and errors of procedure, errors of naivete I think in large measure. And I'd be glad to talk to you a little bit about those.

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But I will take just a minute or two to mention some of the formal remarks that I tried to prepare for today. I was reading these a minute before and I want to change them a little bit.

I said I came here to Washington before you today not as a protagonist for any particular cause or any action of this Commission. Indeed, I come here more out of empathy for your positions as members of the Sentencing Commission. I'm going to change that now to say I come out of sympathy for your positions.

You have been especially designated and appointed to perform one of the most difficult of all human tasks, passing judgment on the comment of

others, and you're entitled, I think, to serve with great pride and to have--and you, indeed, do you have, I think, the highest respect from all the members of society who rely on you to guide them in this most difficult area.

So I come here today specifically to salute your dedication, and I welcome this chance to do that. And I hope that you will find in the

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work and in the suggestions that you make the necessary support in other areas of the system to establish and to maintain what we all hope is a fair and a just sentencing process in the Federal Court system in this nation.

So in the context of today's hearing, and hopefully without imposing on your time, I would presume to accomplish just two things. One is to bring you perhaps a brief history of the prior Commission's actions on that exquisitely important issue of crack and powder cocaine sentencing that you've been hearing so much about this morning and secondly, to submit a brief commentary on your present suggestions and the proposed amendments that you have put out for comment.

I talk about the history or I will if you

wish me to and submit that not with any intention at all of influencing your own deep and important consideration of this most troubling area of sentencing. But, rather, I would hope, if I can, to help you to flush out past actions on this issue for your own knowledge and your own review and

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perhaps to help in presenting it again to the Congress.

On the second issue, I submitted some commentary on some of your suggested changes in the context of what I look at as a continuing effort to sustain and hopefully to reinvigorate a deep sense of responsibility in every Federal Judge to impose a just and a proper sentence in every criminal case.

After this commentary, I'll happily engage in discussions with you or take some questions if you have them and if you wish me to respond to any of them.

Federal Judges, as all of you know, are called upon to preside over many types of cases that are often complex and many times very difficult. But no duty is tougher or no duty is more demanding than sentencing.

I've been a Judge now almost 40 years, and I can tell you in talking to other Judges who have served that long and longer, they say to me and say to others over and over again, "No duty we have is

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tougher than sentencing."

As an individual Judge and one who has worked with many others, I've always supported the concept that it is necessary to have some guidelines to be used by sentencing Judges in trying to determine a proper sentence in a given case.

I think it's absolutely necessary to have some type of guidelines, and I served on the days when there were none and can tell you it was a task that gave us great concern, and we were never sure that we were trying or ending up doing the right thing.

No direction at all, as you know, can--and it did lead to many problems, and it lead sometimes to great disparity in sentences when we were without direction or guidelines at all.

But like all legislation, like any laws or any guidance that comes out of governmental units like your own, we have to continue to try to

balance the precious rights of freedom and individual action with the need for some type of

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centralized direction.

Our nation, as all of you know I'm sure--and we're reading much more about this lately, thank heavens, and I hope we'll hear more about it in the teaching of history in our schools--that our nation is the longest existing republic in the history of the world. No other republic ever lasted even half as long as our nation, and there has to be some reason for that.

Many writers and historians attribute that success to the great foresight and the intelligence of our founding fathers and their meticulous attention and their efforts to maintain individual and state freedom in tandem with the concept of a centralized form of government, but they knew that both had to exist.

They knew that a centralized government was not the answer to everything, and they knew that centralized regulation of human freedom could not long exist because it never did before in the history of man.

And the more centralized power became, the

more certain the republic was going to reach its demise, and that's what history has taught us. And so we have to try, I think, to emulate that concept that was so important to the founding fathers of this nation.

JUDGE CONABOY: I say to you this continuing success in this kind of endeavor has to be maintained in large measure by people like yourselves, people who are willing to give your time and your talent and your thoughts to making our government work well, and that's what you should be all about.

Few I think would dispute in this day and age that a sentencing guideline system is necessary, and few I think would dispute the fact that it can work well. But the concept of an ideal guideline sentencing system is nebulous at best and almost impossible to reach.

In our Federal system, as all of the originators agree, and you see this in all the writings in the beginnings of this systems, all the originators of this system agreed that continued

attention and continued change were going to be

necessary to make it work better.

So we shouldn't be afraid. We shouldn't shy away from the concept of changing the system, especially when we learn that it needs change and it can be made to work even better.

That's where your devotion and that's where your determination to do the right thing-- your determination to do the right thing--becomes a solemn obligation and at the same it, it's very, very imposing and very difficult.

Like all of the citizens of this great nation, I commend your efforts on the proposed amendments that you now have put out in such areas as terrorism, career offenders and your recognition that in some areas establishing values, like where there's a cultural value, is a difficult thing, but should be faced, and your attention to victims' rights, along with many of the other items that are in your proposed amendments are deserving of great support and great consideration.

But I especially today come here to

commend you for addressing again this drug sentencing problem and especially the crack and powder cocaine problems. And your suggestions, I

also want to commend very strongly your suggestions of endorsing a broader area of potential alternatives to imprisonment.

Those are two items that I think cry out for attention, and I'm happy to see that you are responding to that cry and to that request by everyone for attention to those two areas.

I don't know of anyone who disagrees with the need to change the disparate sentencing requirements between crack and powder cocaine, and I think it was a good thing today that you heard from someone like Mr. Nolan as well as others who talked about this and tells us of the problems that are on the street and that the police face in these areas.

But even in those areas, they know and we all know that disparate sentencing requirements are not good and do not serve the sentencing process well.

The arguments that favor change in the disparate system and change between crack and powder cocaine are too abundant for me to try to even summarize for you. You've heard lots of that this morning, and I won't even try to go into them.

But your determination, I think, that the time has come for a change is courageous and is unassailable. The time has come.

CHAIRPERSON MURPHY: Judge Conaboy, could I ask a question at this moment?

JUDGE CONABOY: Sure.

CHAIRPERSON MURPHY: You heard Mr. Elwood's question about the 1997 report of the Commission back to Congress, and I know a number of other people in Washington refer to that report. And it does have a number of options that are reported back as possibilities, but there are ranges in that, and that was your Commission and now it's our turn to be looking at this, but we respect the history of it.

I wonder could you tell us a little about what process was used to come up with that '97

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report back to Congress?

JUDGE CONABOY: Sure, I can try to, and I was going to try to address that, if I could, Judge Murphy.

CHAIRPERSON MURPHY: I apologize then.

JUDGE CONABOY: No, not at all, because most of that is more important than any of these

other general comments that I would make.

I was interested in listening to the discussions, as you might know, about the difference between recommendations and proposed amendments. I don't think anybody ever heard of that before 1995 because there's nothing that I know of in the statutory framework that makes up the Commission that tells us we should be making recommendations.

They do tell us--they do tell you, rather, that you have a very serious obligation to make amendments, suggested amendments, by the 1st of May every year so that the Congress can then consider them and determine by the 1st of November whether they want them to go into law.

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Now it may be that it's a good thing, and I have no objection at all to the difference or to the concept of making recommendations and amendments. And I think maybe that's part of what happened in the past; that perhaps we didn't work as closely with some people as maybe we should have in that area.

But after our proposal was rejected essentially and we began to realize that there was

some feeling that even if there was to be a change in the ratio, that abolishing it was not acceptable to a majority in Congress, what I did on the Commission, for better or worse, is I called together both sides of the people who served on the Commission; those who, in my judgment, kind of represented one extreme and those who represented the other.

I said, "We've learned apparently that abolishing the ratio is not going to work, and the Congress is now saying to us in return, 'Give us some other suggestions.'" So I asked those people, since they represented the extremes to sit down and

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try to work out a variety of other possibilities that could be done in the way of ratios.

And they did and put some extensive work in on that, and my recollection is that that work of those people made up the recommendations that were then submitted in 1997 that provided some potential ranges in the ratios rather than abolishing them.

CHAIRPERSON MURPHY: So would the underlying work or material have been what was referred to by Mr. Weich in that 1995 report--and

as I understand what you've just said, then you went back and tried to come back with some other options for Congress, but you didn't gather more information or do more studies?

JUDGE CONABOY: No, we did not, not to my knowledge, because we felt the--I was going to tell you a little bit--and maybe it's a good time to move to that now--about how we worked on the first 1994 recommendation, and this not a commentary at all on how anybody voted or why we voted one way or the other, but just some of the background.

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First of all, that study was here when we, in the 1994 Commission, arrived. It had already been completed, and on my desk when I arrived up here, upstairs, was this big book that was some 200 pages long, a total study of this problem. And we were told that by the end of that year, we had to send recommendations and amendments to Congress consistent with the report.

So that frightened us naturally, and one of the first things I did was ask for an extension of that time, could they let us make it towards the end of February because we needed more time to study it. And they did agree to that.

But we did really have very little time to review the entire thing as thoroughly as if we had done it ourselves. We did, in fact--and I have to go back and commend the people who served with me--go over it almost line by line, but it was really working on other people's work.

And again, the recommendations were essentially based on studies done by others and at a different time than under the direction of that

particular Commission.

So in 1994 then, when the recommendations were made, we were in an era, perhaps without maybe realizing it, although I don't think that's fair, but it was an era of being tough on crime. And even though we were led to believe that those in other parts of the government were ready to agree to abolish that ratio or at least dramatically change it, perhaps we didn't give enough thought to the political parts of that recommendation.

We made what I would like to refer to as more of a judicious decision. One that we looked at the facts and we made the study and we made a decision as to what we thought was right, both on the majority and the minority votes.

But perhaps if we had it to do over again
--and I think perhaps you've been involved in this
--we might have decided that the recommendation,
the report that we made was perhaps too ambitious
because here's what we were faced with.

We were faced with the statute that we
found out and came to realize that many people in

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Congress felt they had worked on a long time and
come up with the right answer, and we were asking
them to agree that it was wrong and to completely
change what they did. And that's not easy for any
human being to do.

So I suppose it might follow that we would
say that we needed to do more work in communication
and extensive work with the Congress, and it was
following some of that happening that we did, in
fact, try to bolster the area of the Sentencing
Commission staff that has to do with relations with
Congress and try to instill in all of our work a
bigger effort to relate more to Congress and to ask
them to relate with us.

Many times when I went over myself and
visited with many, many Senators and many
Congressmen, I found that there was either, a, a

misunderstanding of what we did as a Commission or really a total lack of knowledge of what our obligations were as a Commission.

Now it was nobody's fault. It was a fairly new endeavor, and I don't think--and this to

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me is maybe one of the most important things. I don't think that everybody understood when that report went over to Congress in 1994 that we were saying much more than just abolish the ratio.

I have excerpted from the report a whole list of items of aggravating factors and mitigating factors that we said the Commission felt had to be done in order to make this sentencing process work right because there are differences sometimes in the conduct of parties who commit what seem to be similar crimes.

So we wanted to add enhancements for possession or use of a dangerous weapon, murder of a victim in the course of a crime, death or serious bodily injury, drive-by shootings, involvements of juveniles or street gangs, sales of drugs to juveniles or pregnant women, drug crimes in protected locations and significant prior records.

We were recommending changes in the

guidelines, but what we were saying to the Congress and what I think you're saying, what I think is the important thing, that to make the guideline system,

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which they initiated, to make it work well, you cannot start out at the wrong base level.

If you start out at a base level that's unfair or unjust, you're going to get an unjust result. So if you start out equally and you allow the probation officers and the people who investigate the case and the sentencing Judge to enhance or to mitigate the conduct with all these directions that the Commission would give, that's the way the guideline system is supposed to work.

The guideline system, as all of you know, and every report that any Commission has made, cannot work properly in tandem with mandatory minimums. As some of you have just said and some of the other witnesses or people testifying here today have commented that there's an inherent conflict in those two concepts.

I think the guideline system is great. I'm one of those people who believes our Federal system is a little too complicated, but I think you can work at that. And I think you're trying your

best to work at that, and I think this crack and

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cocaine and drug sentencing area is one of the most important ones that you can attack because there is probably the most disparate results in that area of any other part of the sentence.

What I did, by the way, in this area, I asked our Probation Office and I asked our public defenders and I asked our United States Attorney's Office to give me some information and their comment on it.

The U.S. Attorney's Office sent me back a letter--and by the way, I had to compress their time that I gave them for doing this, and they did try to get something back to me last week even though I was out of the office for a few days.

The U.S. Attorney's Office says they were somehow constrained by the Department of Justice to speak with one voice, and they didn't want to comment specifically.

The Probation Office made a suggestion of a 2-to-1 ratio that they thought would be more important than the present 1-to-1 that they say would recognize some inherent differences in the

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powder and in the crack areas.

The Public Defender's Office pretty well mimicked some of the commentaries that were made here by a prior witness, Mr. Weich, and I won't repeat those because you've heard all of those things so often.

But the important thing is to decide what change has to be made. That's the tough job you had. And just let me comment briefly, if you will, and I know you're compressed for time.

The other matter that I think is so important--and that's the expansion of alternatives to incarceration. I think change in that area, perhaps expanding the zones as you suggest, I think that's so basically important again, and I think it would go a long way, not so much to expand judicial discretion. I don't even like that term. I've come to dislike it completely because it raises hackles in areas where they don't belong.

I think what it would do much more importantly, it would renew and rekindle judicial responsibility and judicial obligation at the time

for sentencing. I think Judges should pain over every sentence, and I think they should work very

hard and very close with all those who are involved, the prosecutor, the defense counsel, the probation office, to impose a just and a fair sentence and to be sure that the sentence fits within the concepts of the guidelines of aggravating and mitigating circumstances.

In this area, by the way, I think it's very fair and very important to require that Judges put on the record the reasons that they impose a sentence. And it's interesting to note in Pennsylvania, where they have long had a guidelines system, as you know, that allows for mitigating and aggravating circumstances, but in a decision just last week, the Supreme Court of Pennsylvania has once again reasserted the necessity for the Judge, the sentencing Judge, to put on the record the reasons why he or she goes up or down from a suggested sentence.

CHAIRPERSON MURPHY: Judge, I hate to interrupt, but I think as an experienced District

Judge and as a former Chair, you understand. We're almost at the point where the hearing was supposed to be concluded, and we haven't reached the half point of the people that are going to testify.

So I wonder if I could see if there are any other questions that Commissioners have, if you don't mind, because--

JUDGE CONABOY: You can cut me off at any time because when I get in this area, I'm inclined to say a lot because I think it's so important.

CHAIRPERSON MURPHY: Well, you've got a lot to say. It's just that--

JUDGE CONABOY: --concern about your time, so I'll be happy--

COMMISSIONER CASTILLO: Judge Conaboy, we don't want to cut you off, and I really appreciate you coming here. I want to tell you, Judge to Judge, Sentencing Commissioner to Sentencing Commissioner, we all owe much to those who came before us, and a lot of whatever it is that we've accomplished in these two years are due to your efforts and the fine staff that you left us, and I

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want you to know that before you head back to Pennsylvania.

JUDGE CONABOY: Thank you.

COMMISSIONER CASTILLO: You started out by mentioned Yogi Berra and funerals and I hope you don't come back to our political funeral, but I

really believe that this is an important issue and that we have an obligation, as I think the majority of this Commission does, to act.

I know it's hard to go over what might have been, errors or as the old saying goes, "Hindsight is always the best sight, 20/20." It seems to me three key things arise from the 1995 report.

One was the closeness of the vote at the Commission, the 4 to 3 vote. The second thing was the reaction of the Department of Justice, and then the third thing being your relationship with Congress.

Are those the three areas that you would advise us to really keep an eye on as we proceed on this controversial issue?

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JUDGE CONABOY: Absolutely. As I went around the country when I was Chairman to talk to people who imposed sentences, I tried to make a point that I think is important to them; that sentencing is no longer confined to just the Judges. Many other parts of the Government have a say, a very important say in sentencing anymore, and we have to be aware of that.

And we have to cooperate with the legislature and with the prosecutors, with the defense, to make sure we all are on the same page, at least trying to be. So I think those are three important things.

The split on the Commission I think represented, probably more than anything else, the reality of what you are talking about here today; that perhaps you can't just eliminate the ratio, at least the first time you try.

We maybe gave them too much to chew on over in Congress. Congress doesn't act fast. That was one of my frustrations here. As a Judge, you're used to looking at facts, deciding and go on

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to the next case. Congress takes things under consideration, looks at them year in and year out, and I think this is a good example; that they're now coming back saying, "Help us with this." And so I think your three points are very important.

COMMISSIONER CASTILLO: Was the reaction of the Department of Justice something that surprised you?

JUDGE CONABOY: Yes, there were a lot of surprises in it.

[Laughter.]

JUDGE CONABOY: I was personally led to believe, and I don't blame anybody for this. I have no ill feelings towards anyone about my services as the Chairman of the Commission.

I have to be candid, and I'd be less than honest to say--I would be less than honest if I said I wasn't surprised at a lot of things that happened.

I was led to believe that Congress was ready, and the other phases of Government, to abolish that ratio. I may have been naive about

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it. I may have been anxious about it and maybe too imbued with listening to my own reasoning, but whatever it was, I was very shocked at the reaction.

The day I went over to the hearing was one of the major shocks of my life. One of my 48 grandchildren, by the way, was there with me, one of my oldest ones, and he said to me when we got outside, he said, "Papa, I don't think you're used to being talked to like that, are you?"

[Laughter.]

JUDGE CONABOY: That summarizes it better

than I could.

[Laughter.]

CHAIRPERSON MURPHY: Well, does anybody have a further question? Professor O'Neill.

COMMISSIONER O'NEILL: I'd just like to say, Judge Conaboy, that back when this--sort of when the Commission had made its decision back in 1995 and all this was going on, I was actually, at that time, as you'll recall--

JUDGE CONABOY: Yes.

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COMMISSIONER O'NEILL: --a staffer. I worked as a general counsel for the Senate Judiciary Committee for Senator Hatch.

JUDGE CONABOY: You're one of the first I met.

COMMISSIONER O'NEILL: That's right, and I just have to say that, boy, it's a heck of a lot easier being on that side of this whole question than it is on being on this side. And I've come to appreciate to a much greater degree not only the political complexity with which you had to approach that decision, but just with the fact that the Committee or the Commission at that time was truly interested in doing what it thought was

appropriate, what it thought was right and what it at least had been led to believe was the right time to do it.

So I'd just like to thank you both for your testimony today and for the good work that you performed for the Commission in the past.

JUDGE CONABOY: Thank you very much, and I appreciate that.

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CHAIRPERSON MURPHY: I think we all share that.

JUDGE CONABOY: Well, it's nice to be with you, and you have my constant prayers and my constant thought, and I still hear lots of complaints about guidelines and guideline systems, but I think those of you who give your time and effort and every day to make it better deserve a great deal of our thanks.

I think the Judges out in the field now are working harder to try to make the system work better.

COMMISSIONER O'NEILL: I certainly hope you brought your 48th grandchild along today to see how you were treated by the--

JUDGE CONABOY: I should have done that.

He's a law student now, by the way, here at Catholic University, and I was afraid to ask him over for fear of what would happen.

[Laughter.]

CHAIRPERSON MURPHY: Judge, if you would leave with my assistant the papers that you've

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brought--

JUDGE CONABOY: Yes, I will.

CHAIRPERSON MURPHY: --I'll see that all the Commissioners get them. Thank you very much for coming.

JUDGE CONABOY: Thank you.

[Applause.]

CHAIRPERSON MURPHY: We'll proceed then with the next panel, Julie Stewart and Jamie Fellner.

Julie Stewart is a familiar face, a frequent visitor to the Commission public meetings. She's President of the Families Against Mandatory Minimums.

And then Jamie Fellner is also a well known figure at the Sentencing Commission. She's the United States Program Director and Associate General Counsel for Human Rights Watch.

So, Ms. Stewart, do you want to start us out?

MS. STEWART: Yes, thank you.

STATEMENT OF JULIE STEWART

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MS. STEWART: Well, good morning, Judge Murphy and Commissioners. Thank you for inviting me to testify today. I believe this is the first time in the 10 years that I've testified here that I've actually been invited and haven't just hoisted myself on you.

But I am happy to be here to represent the 25,000 members of FAMM, many of whom are crack defendants or who have family members who are in prison for crack cocaine.

As many of you are aware, I have appeared here every year for the past 10 years to urge you to amend the sentencing guidelines in ways that I had said increased judicial discretion, but after Judge Conaboy's testimony, I will say increase judicial obligation while providing appropriate penalties that fit the offense and the offender.

Each time I testify I try to bring something to the Commission that you have not or will not hear from any of the other experts who

testify before you, and that's a very tough thing to do at the end of two days' worth of testimony,

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which has been, I believe, very informative and helpful for you.

So sometimes I have been referred to as the conscience of the Committee, and perhaps that's what I bring today as every other time. I'm not a doctor; I'm not a lawyer; I'm not a law enforcement person; I am the sister of a former prisoner; and I have run an organization for the past 12 years that has heard from family members of people serving time for drug offenses; and I bring that unique perspective to this forum today.

I'm very impressed with what you are trying to accomplish. Crack cocaine penalties are unconscionable, and I believe this Commission knows that. You've stated so in your issues for comment, and the 1995 Commission's report also said that.

But to be honest with you, I'm very worried about how strongly politics will influence the decision that you must make or that you plan to make.

In 1995, when the Commission voted to equalize crack and powder cocaine, it was in this

very room, and I was here, and I remember afterwards stepping outside and going, "Well, that was a very brave moral vote, but I don't know how it's going to play in Congress." And I think a lot of us shared that concern.

I'm not naive about the need for the Commission to--I mean, you must pay attention to what Congress is wanting to do. You must be in line with them, and you clearly are. But I am worried about to what degree politics will influence your decisions in the areas of what the crack penalty should be, whether to raise powder cocaine penalties and whether to submit a recommendation or an amendment to Congress.

As previous speakers have said, equalizing crack is not even an option today given the congressional directives to you. So now the question is how do you decide what the penalties should be.

As FAIMM totally opposes weight-based sentencing as I'm sure most of you know, but if weight is the primary factor, if it must be the

primary factor for now in establishing sentencing,

we feel that there has to be some sort of justifiable process, some organizing principle by which to determine what that sentence should be, what that weight should be.

And I know that that's exactly what you're attempting to do; you're not going to pick a number out of the blue, which I see happens in Congress all the time, to create a fairer ratio. They just choose a new number without a lot of foundation to that figure.

So what we have been thinking about and I have been talking about widely for the last year or so to civil rights groups all over the country as well as our own membership is to try to focus on who the mid-level dealers are and who the high level dealers are, and I know that's something that you addressed in your earlier comments, Judge Sessions, to Bridget Brennan.

And it's difficult to determine that I realize, but the Commission has 15 years' worth of data to extract from what quantities represent mid-level

dealers, what quantities represent high level dealers. Your pretty blue briefing slides show the numbers for '95 and for 2000.

I think that both of those--just those two years that are cited in those charts show the numbers that are significantly larger than the 5 and 50 grams that are used today to currently trigger the 5 and 10 year penalties.

So I really urge the Commission to do the analysis that would somehow help identify what quantity constitutes a mid-level dealer and what quantity constitutes a high level dealer because I think that those are terms--that's a principled way to establish a new quantity for crack that I could take back to our membership and say, "This makes sense. This is what they've done with all the other drugs. They've tried to achieve the quantities that represent mid-level and high level dealers."

Along that line I would urge the Commission not to change powder cocaine penalties. Again, back in 1995 when the Commission did vote to

equalize the two drugs, Commissioner Tacha, Deanell Tacha, wrote a very excellent dissent in which she recommended ratios of 5-to-1, 10-to-1 or 20-to-1, and provided really very reasonable explanations for each of those ratios.

But she did not propose raising powder cocaine penalties; no one did. And it's fascinating to me that 7 years ago that wasn't even on the table, and today that seems to be a very viable option both at the Commission level and in Congress and a discouraging one.

I would refer again to Ron Weich's comments about the 27 Federal Judges who wrote the letter to Congress in '97 urging not to raise powder cocaine penalties.

MS. STEWART: Powder cocaine penalties are not a problem. I believe the majority of this Commission recognizes that. Instead of lowering a ratio, it would merely lead to the incarceration of greater numbers of largely minority defendants as you heard yesterday.

Also, it's been pointed out to me that--both by Senator Sessions' staff as well as the even Commission staff--that raising powder penalties a little would only affect 27-percent of the powder defendants coming into the system, into the Federal system.

But I interpret that as basically one in four powder defendants would be getting a higher

sentence. It's hard for me to hear that without thinking to myself, well, let's ask prisoner Marty Sachs if he would rather be out in time to see his son Bar Mitzvah'd or if he'd rather miss it.

I mean, a year or 14 months, which is about the difference in the sentence of the powder cocaine penalties, would make a difference in the sentence, and it would put people behind bars for an extra year or so. So I urge you not to raise powder cocaine penalties.

Regarding the issue of whether or not the Commission send a recommendation or an amendment to Congress, I strongly urge that you send an amendment. I know that you need to be sensitive, and I saw what happened in the aftermath of 1995

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when the crack cocaine amendment was sent forward.

But I think that this Commission has done a very good job of repairing relationships with Congress. I believe that it is a very different climate today. I think there's much more awareness of crack cocaine penalties and the injustice of them.

I mean, in 1995, it was difficult for me to get some of the civil rights communities to even

understand this issue. Today everybody understands that crack penalties are too stiff, and I think that there is a very genuine interest in Congress to address these issues and to try to do something this year even or within the next couple of years.

I would sort of underscore that by saying, as you all know, that LSD and marijuana have been dealing from the guidelines, and there has been no fallout from that. LSD was dealing when Judge Wilkens was the Chair and marijuana, of course, when Judge Conaboy was the Chair.

I assume--and this came up in an earlier question--but that the mandatory minimum sentence

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must trump in each of those drug cases in almost every case. The mandatory minimum for LSD must be tougher than the--I mean, would be trumping the guideline in every case and pretty much the same for marijuana growers.

There's certainly no legal bar to the coupling the amendments as has already been stated, and if Congress didn't like that concept, they would have stopped it back in '93 or '95.

Plus, I would just say from, again my perspective as a FAMM person who talks to family

members all the time, I speak to parents whose children are serving 24-and-a-half years in Federal prison for crack cocaine all the time, and I'll say to them, "Well, you understand that 10 years of that is the mandatory minimum sentence, and the 14 years on top of that is really under the guidelines," and then they turn to me and they say, "Well, why does FAMM support the sentencing guidelines again?"

It's hard to explain. It's hard to explain to a grieving mother why we support such a

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harsh system. Of course, what I try to tell them is it's the lesser of the evils and that sentencing guidelines do allow some judicial discretion and allow culpability to be taken into account. But when the sentences are driven so high by the guideline, it's very hard to explain that this is fair.

Finally, I think I just want to say that--and I really feel it in this room today, and I'm sorry I wasn't able to be here yesterday--but I really know you're trying to come up with a recommendation or an amendment that reassures the public that you have fulfilled your mandate in a

very rational and justifiable way, and I applaud you for that because I was asked by the chief counsel of a senior Senator recently, "If the Sentencing Commission comes up with a recommendation for crack cocaine, will FAMM and the civil rights community support it?"

And I really had to pause because I said to them, "The Ecstasy proposals that were put forth last year did not garner my support," and the

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process was very flawed, and I believe that you recognize that and made many changes to address that. And I definitely don't want to feel like that about the crack proposal, and at this point I don't.

I feel like you're putting a lot of effort into it, but I think that that's a \$60,000 question, will the civil rights communities and will FAMM and some of the sentence reform groups respect the decision that you come to, and I think that we all will if there is a truly justifiable basis at the end of the day, if you can explain to us in plain language how you came to the decision that you came to.

I will just close by saying that the

guideline and the process you use must be of unassailable quality so that all Americans can trust the penalty you chose was a product of informed judgment and not just political expedience.

CHAIRPERSON MURPHY: You've thrown down a big challenge, plain language.

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MS. STEWART: Yes, that's true. Thank you.

CHAIRPERSON MURPHY: Are there any questions at this point?

MS. STEWART: Come on, I have a bet. Somebody has to ask me a question. Okay.

COMMISSIONER SESSIONS: I'll ask a question.

CHAIRPERSON MURPHY: Okay. I think what's happening is that the realities of the time and the fact that we're going to be shortly--

MS. STEWART: I understand.

CHAIRPERSON MURPHY: --advisory group and we have a lot of agenda items is--

MS. STEWART: Besides, I don't tend to present things that require a question. As I said, I'm the conscience of the Commission.

CHAIRPERSON MURPHY: Okay, Judge Sessions.

COMMISSIONER SESSIONS: I mean, I do have a question. You've seen in the publication that we are considering a number of enhancements, and those enhancements for weapons, for injuries to persons

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during the course of drug transactions, prior felonies, drug felonies or perhaps even violent felonies, would be applied, and that would necessarily increase penalties.

And what is your reaction to that, knowing full well that in addition to increasing penalties, it also shifts, in a philosophical way, the penalty structure away from drug quantities to other factors?

MS. STEWART: Philosophically I like it. I'm not particularly happy with the specifics of those enhancements and certainly not on top of current drug sentences at the levels that they're at.

But, yes, I like the idea of focusing on culpability of the defendant rather than weight of the drug to determine culpability.

COMMISSIONER O'NEILL: I mean, I think that that's important because we talked about--and

you made sort of the offhand remark about being the conscience of the Commission.

And it is important that we look at the

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absolute fairness of sentences. But it's also the case we have to think about the communities and the individuals who are victimized by these crimes as well.

I mean, obviously there are people who--there are many grieving parents and many grieving families and many grieving communities who not just have people who are in prison for a long time, but whose sons and daughters have been victimized because somebody chose to sell them drugs as well.

So we have to make sure that we consider those folks as well. We can't remove the victims from the equation as well.

It's true ultimately what we're seeking to do, obviously, is to come up with fair sentences given the conduct that's been committed. But we shouldn't also at the same time forget about the fact that, well, let's face it; it's drug selling. This is not appropriate conduct. This has destroyed communities and destroyed many people's lives, and there's certainly people whose lives and

whose careers have been damaged by these things.

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We can't forget that either.

MS. STEWART: I totally agree.

COMMISSIONER SESSIONS: Can I make a guess?

MS. STEWART: Please.

COMMISSIONER SESSIONS: That what you're suggesting to us, although you're doing this in an implicit way, is that we should use the delineation of mid-level dealer, between a mid-level and a street level dealer as what seems to be appropriate for the 5 year threshold. Is that--

MS. STEWART: Yes.

COMMISSIONER SESSIONS: You didn't say so, but that--

MS. STEWART: Yes.

COMMISSIONER SESSIONS: --is my--

MS. STEWART: My written testimony says so, yes.

CHAIRPERSON MURPHY: Thank you very much, and we'll turn now to Ms. Fellner.

STATEMENT OF JAMIE FELLNER

MS. FELLNER: First, I want to say how

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grateful Human Rights Watch is to be here. We have communicated with the Commission in other years, and we have followed very closely the sentencing policies both at a Federal level as well as in many states, concerned with the extent to which those policies comply with the United States' human rights obligation.

I want to apologize, however, that I don't have a written statement prepared because of the short notice and that I was traveling. I will get it in as quickly as possible, and I can expand on my remarks then.

I would like to have some questions, so I will make this short. Like Julie, I'm going to try and avoid saying things you already know.

The data that the Commission has collected and the staff has put together I think of itself tells such a powerful story that it's hard for you, I would think, to ignore that, and almost our work now is on top of that, and I won't repeat the data.

I just want to make some points. The bottom of line of where we come out, Human Rights

Watch, is that you need to lower the sentences for low level crack offenses; that you need to reduce

the disparities in the sentencing of crack and powder offenses; and that you should be urging Congress to eliminate mandatory minimums.

Now Human Rights Watch is an independent and non-partisan organization with the mandate of promoting respect for internationally recognized human rights. I suspect it's probably--nobody is going to contradict me when I say that respect for human rights has not been foremost certainly in Congress' mind when it enacted the drug laws that established the mandatory minimums, and it's been somewhat missing from the debate over the impact of drug sentences.

And I personally, as a U.S. citizen, happen to believe that the opponents of the current structure when they talk about that drug sentences aren't deterred, that low level offenders are primarily sent and all the adverse consequences have the better of the argument; that the facts support them.

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But I want to restrict my comments here to the human rights argument. Now as you know, the Government's use of penal sanctions is subject to important human rights constraints.

Since World War II, the international community, including the United States, has repeatedly and consistently affirmed the right of all people to humane and just treatment at the hands of their governments.

Now a primary goal of the universal declaration of human rights and subsequent international treaties has been to define rights protecting the individual citizen against the coercive and penal power of the state.

And of course, sentences, the decision whether or not someone should go to prison or to alternative, is the most drastic penal exercise of penal power by the state short of capital punishment.

Now the treaties that are relevant here today are the international covenant on civil and political rights, the convention against torture

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and other cruel, inhuman or degrading treatment or punishment, and the convention on the elimination of all forms of racial discrimination.

Under the supremacy clause of the U.S. Constitution, these treaties are part of the law of the land, and you, as public officials, are bound

to give effect to them, even though the treaties are not self-executing, meaning that nobody can go to court and sue for violation of the rights affirmed by those treaties.

In our judgment, the current crack cocaine Federal sentencing structure violates two of the key human rights principles contained implicitly in those treaties: proportionality and non-discrimination.

Now the international human rights underpinning for the proportionality arises from respect for the inherent dignity of each individual, the prohibition on inhuman or degrading punishment and the right to liberty. In my written comments, I'll expand on that.

When we look at proportionality in drug

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sentences, we need to keep in mind three things. The principle of proportionality requires that punishment not exceed the gravity of the offender, the individual offender specific conduct, and that it reflects the individual offender's personal responsibility and culpability.

Second, the principle of proportionality is violated if punishment exceeds that which is deserved by that individual based on his or her

particular conduct.

Punishment must reflect the individual defendant, not the conduct of others with whom he's not connected in a common enterprise.

And third, the sentence for a particular drug offender should not incorporate penalties for other crimes or other conduct that the offender, in fact, did not commit.

Applying those notions to drug sentences under the Federal system, what do we see? One, we believe sentences for low level crack offenders are disproportionately harsh. You know, the United States is so addicted to prison over the last 20

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years as a remedy for almost any social ill. Sentences are given out like cough medicine almost.

And I don't mean to be glib, but if you look from Europe perspective, it's astonishing the difference in sentences and the harshness with U.S. sentences compared to for similar conduct in Europe.

Now somebody might say, "Well, yes, and in Indonesia, you could get your head cut off for the same offenses." But I don't think we want to look over there. I'd prefer to look to countries with

long traditions of respect for human rights and systems of justice similar to ours to say, well, how do they treat these offenses, and I will give you some data on that.

Now prison is an extremely serious punishment and should be reserved for the most serious offenders. So if we look at the gravity of the criminal conduct, we have to look at the harm caused or threatened by that act.

And I will walk through this again more in my written remarks, but I think there's been an

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exaggeration and a lot of hyperbole about the problems caused by drugs in any given offender's conduct.

I think we need to remember not just that many individuals have been hurt, but many individuals, in fact, consume drugs and they don't have their lives destroyed. And we cannot say that any individual seller of drugs at a retail level--and my comments are really focused at the lowest level--has harmed someone the same as we can say that if somebody murders someone, obviously they've injured that person's right to life. If somebody takes something, they've injured that right to

property.

But any given drug transaction does not necessarily cause a serious injury. What we have is the social injury from thousands and thousands and thousands of repetitions of that conduct. But we would posit that it is not proportionate to impose a sentence on any given individual based on the cumulative conduct of many thousands of other people.

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And it's not done, by the way, in any other system. If you look, for example, at environmental harms or other harms where any specific harm is small, but cumulatively can add up to very serious impact, you don't see sentences that are the same kind of sentence that you would get for rape or assault or murder which takes the other principle of violence.

Now we know that the distribution of crack has been historically accompanied by a lot of violence as markets are being established, and your report in '95 lays that out very well. It's not inherent in the drug. It's been systemic violence.

I would argue that while it is appropriate for the Commission to be concerned about violence

and certainly Congress should be concerned about violence and laws on the use of violence and possession of illegal weapons should be substantially changed, it is not proportionate to incorporate into any individual drug offender's sentence penalties that actually reflect concerns about violence that that individual offender may

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not have engaged in. In fact, the Commission's own statistics indicate that most of your low level offenders have not, in fact, engaged in violence.

Let me turn quickly to discrimination. No discussion of the crack powder cocaine sentencing structure can avoid the issue of race. I would argue that race--concerns about impact on minority communities has certainly influenced the determination of those sentences.

A certain indifference, oddly enough, to the impact of those sentences on minority communities has contributed to their perpetuation. So I think we certainly have--and I would disagree with those court decisions which say intent has not played a role.

But what's interesting from your perspective should be under international human

rights treaties is that intent is irrelevant or can be irrelevant. Human rights non-discrimination principles are violated when you have an unjustified disparate impact on a basis of race. And your statistics show unquestionably--and I

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don't think anybody would deny the disparate impact.

So the question is are those warranted? Does it make sense? Are they justified? And I think, again, whatever the merits or arguments would have been in 1986, they do not apply now. The findings of your 1995 report fully have been validated by more and more data over the years.

Concern for the impact of drugs on minority communities, concern for those people who don't want drug dealers on their stoops, who don't want their children hustled, who want to be free of the scrimmage of drugs can be met by many social policies. You don't need to use penal sanctions and harsh prison sentences as a way of dealing with those broader social problems.

I'll stop now because my time is up. You know, I thought it was someone's cell phone. I thought, gee, why don't they have that cell phone

turned off.

CHAIRPERSON MURPHY: I hate to say that
I've just gotten to know it, but the battery died

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in it.

[Laughter.]

CHAIRPERSON MURPHY: But because of the
lateness of the hour, I would have to try to
replicate the noise.

MS. FELLNER: Does that mean my time is up
or not? I'd love to take some questions. Again, I
apologize for not having anything in writing.

CHAIRPERSON MURPHY: You're the first one
that's brought up the treaties. That's
interesting.

MS. FELLNER: Yes. Well, the
international human rights treaties tend to get
overlooked. But as I say, they are part of the law
of the land, and they are part of your obligation
as public officials.

CHAIRPERSON MURPHY: Any questions? Judge
Sessions.

COMMISSIONER SESSIONS: I guess I want to
say I'm sensitive to your organization and
supportive of your organization, and I also just

spent time speaking with Judges in England about

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the system.

But I do want to say that I disagree in a real fundamental way with your concept which I think you were suggesting, and that is that drug offenses are almost victimless in nature.

I guess I'd invite you to come to a courtroom in Vermont, and even though you can't necessarily say that the drugs relate to this particular person, to this particular harm, the human misery that is caused by drug distribution is extensive.

MS. FELLNER: You know, I'm well aware that the notion of victimless and victim has become very polemic, so everybody shies away from it. But in so doing, I think we have distorted some fundamental notions of responsibility and proportionality in sentencing.

If somebody chooses to buy drugs and that life is, therefore, harmed, that is a very different kind--and someone sells them, it's a voluntary transaction, even though cumulatively that transaction can have a lot of adverse social

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consequences which I don't think anybody denies.

But when you judge what is a proportionate sentence for that specific transaction, I think it is very difficult to equate it in any reasonable way with assault, which nobody would say would be a voluntary transaction; with murder or with rape.

You know, you were talking earlier about the--and the sentences that are being given under the Federal guidelines are extremely severe sentences. Five years is a long sentence.

So I don't want to get in the polemic of victimless or not victimless. I'm saying when you think that is proportionate, the low level dealer may or may not have caused any of that kind of harm.

Mid-level and high level, I think serious punishments are entirely proportionate, and I think your effort to try and identify through the proxy of quantity or through--I would prefer to see through role, you know, identifying other ways of getting that role, but if it has to be through the proxy of quantity, so be it--an effort to put

serious penalties where they should lie, which is with the high and mid-level dealers.

One other comment. You were talking earlier about the--when Ms. Brennan was talking about the New York drug laws, which we have written about, and I will send you copies of our report on the New York drug laws--a lot of the concern about them has been precisely because of low level offenders are being swept up in prison terms, many of them addicted, and not the high terms, but just even two, three, four years, which, again, is a serious sentence.

We tend to think, oh, two years, three years, four years, and we almost forget prison is a terrible place to put anybody, and as someone who does a lot of work in prisons, I mean, it's a terrible place to send someone.

You should only do it as a last resort. The principle of parsimony should apply here. If there are alternatives to incarceration to which you can send, for example, addicted low level offenders, you certainly should be exploring those,

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and I welcome the beginning discussion now of using alternatives to incarceration.

CHAIRPERSON MURPHY: We are looking at that. I'm sorry to interrupt. It's just that--

MS. FELLNER: Time's up.

CHAIRPERSON MURPHY: Right, and we have one more topic away from drugs that's going to be covered. So you have the disadvantage of being at the end--the last speaker the way it's worked out.

I know you said that you were going to submit something further in writing.

MS. FELLNER: Yes, I will send it in writing.

CHAIRPERSON MURPHY: So we will all get that, and we certainly will attend to it, and we appreciate very much your coming here.

MS. FELLNER: All right.

CHAIRPERSON MURPHY: It's really helpful for us to get these different perspectives. A tough area.

Okay. Then if we can get the cultural heritage speakers, and I believe Mr. Dance is going

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to sit at the table too.

If you could perhaps sort of raise your hand as I introduce you so I know who is who. Paul Warner, who is the United States Attorney from Utah, and I know that you're also the new Chair of the Attorney General's Advisory Council. You might

well have been or in the future talk on these drug issues.

We did try to get people from the government for this hearing, but apparently people aren't ready yet. So we'll hear from those perspectives next month.

John Fryar, who is a criminal investigator in the U.S. Department of the Interior, the Bureau of Indian Affairs, and we're very glad to have him here with the kinds of practical experience you've had in this. And there are other things we're looking at in our agenda right now in developing a Native American Advisory Group that it would be nice to talk about too, but we won't have time.

Then Mr. Wayne Dance, who is Chief of the Appellate Section of the U.S. Attorney's Office in

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Utah, and I'm not sure why we have the Appellate Branch here. We haven't done anything bad yet I don't think. But thank you very much.

Mr. Warner, we'll turn to you.

STATEMENT OF PAUL M. WARNER

MR. WARNER: Thank you. Honorable Judge Murphy and distinguished Commissioners, thank you for giving me the opportunity and privilege of

appearing before the Commission today to testify concerning the proposed cultural heritage guideline.

I respectfully request that my full written statement be incorporated as part of the record of this hearing. My testimony today is taken from the full statement.

I'd like to say at the outset that the adoption of this guideline is not only necessary and appropriate, but, indeed, is long overdue. The cultural heritage guideline will, in my opinion, prove to be one of the most important of all the sentencing guidelines for the long term benefit of our nation. Consequently, I commend the Commission

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for considering this urgently needed cultural heritage guideline.

Before addressing the specifics of the proposed guideline and recommending several additional revisions to improve its effectiveness, some background may be helpful.

The United States Attorney's Office for the District of Utah is uniquely qualified to address the proposed cultural heritage guideline. During the past decade, the District of Utah has

led the nation in the enforcement of the Archaeological Resources Protection Act, commonly called ARPA, whose noble purpose is "to secure for the present and future benefit of the American people the protection of archaeological resources and sites which are on public lands and Indian lands."

During this 10-year period, 38 defendants in Utah were convicted of ARPA offenses, which included 32 ARPA felony convictions. My office has successfully prosecuted the largest case under the ARPA statute. In another case, we obtained the

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longest ARPA prison sentence for a notorious looter of archaeological resources.

Last year the Society for American Archaeology presented its public service award to Assistant U.S. Wayne Dane from my District of Utah for his exemplary ARPA prosecution record and his nation-wide training efforts.

I am pleased to have Mr. Dance accompany me here today, and I want to acknowledge all of his outstanding work on ARPA cases and particularly his efforts on the new proposed guideline.

Based on our experience in prosecuting

ARPA cases, and particularly in dealing with the sentencing issues, we and our colleagues in the Justice Department throughout the nation became convinced that the current sentencing guidelines were wholly inadequate for ARPA as well as other cultural heritage resource offenses.

These crimes cause devastating and irreparable harm to the nation's cultural heritage; yet, there is no specific treatment of them in the sentencing guidelines.

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Consequently, in December of 2000, I wrote a letter to the Commission, then through Commissioner ex officio Larry Kirkpatrick, pointing out this serious problem and strongly urging the Commission to adopt a specific guideline for archaeological resources and other cultural heritage resources.

We are gratified that our letter was the genesis of the cultural heritage guideline now under consideration by the Commission. I commend the staff of the Commission for their dedicated and sustained efforts in drafting and revising the proposed guideline to bring it to its present excellent form.

In particular, I'd like to extend my praise and gratitude to Deputy General Counsel Paula Desio for her outstanding efforts for more than a year furthering this worthy effort.

The proposed cultural heritage guideline was published for comment in the Federal Register last November and effectively addresses the multitude of deficiencies in the current sentencing

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guideline concerning cultural heritage resources.

As a result of extensive public comment and suggested revisions, including those from my office, the Department of Justice, the Commission staff has prepared a revised draft of the guideline for your consideration.

We appreciate the staff's responsiveness to the public comment. The proposed guideline, with this latest revision, greatly strengthens the sentencing guidelines for cultural heritage crimes.

I offer only comments to inform the Commission of additional revisions which will add to the guideline's effectiveness. First, I want to emphasize that the provision addressing the valuing of the cultural heritage resource is the heart of this guideline because it measures the degree of

harm associated with the cultural heritage offense.

In *United States v. Shumway*, an ARPA case prosecuted by AUSA Dance, the 10th Circuit upheld the use of archaeological value, plus cost of restoration and repair, as the appropriate method "to gauge the severity of a particular ARPA

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offense."

It is essential to an effective cultural heritage guideline that the *Shumway* value methodology be explicitly required for archaeological resource offenses.

The latest draft guideline before the Commission, a revision of the published draft, accomplishes this important requirement by what is termed "the special rule for archaeological resources."

The published draft also met this essential requirement by equating the value of an archaeological resource with its archaeological value or commercial value, whichever is greater.

I strongly encourage the Commission in deciding upon the language of the value determination provision to maintain the requirement that archaeological value be utilized in

determining the value of archaeological resources.

MR. WARNER: The value determination provision of the guideline has a serious flaw concerning the valuing of cultural heritage

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resources which are not archaeological resources by statutory and guideline definition.

For these resources, the draft guideline provides for a value determination based only on commercial value plus cost of restoration and repair where applicable. For some types of cultural heritage resources which are not archaeological resources, commercial value may well be an adequate means of gauging the severity of the offense.

An example would be an object of cultural heritage which, by statutory and guideline definition, must have a threshold commercial value; however, there are various types of cultural heritage resources covered by this guideline for which commercial value is simply not applicable or difficult to ascertain or wholly inadequate to fully assess the harm caused by the offense.

Although troubling to contemplate, we must recognize that offenses may occur involving our

national monuments and memorials, historic
properties and resources, Native American cultural

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items and other resources covered by this guideline
which will not be fully and appropriately valued
for sentencing purpose by simply using commercial
value plus cost and restoration and repair in some
cases.

How can a meaningful commercial value be
placed on a national monument, for example, which
is covered by this guideline and yet is not an
archaeological resource and valued as such simply
because it is less than a hundred years of age?

If the U.S.S. Arizona memorial were
vandalized, who would daresay that the mere cost of
restoration and repair for removing the graffiti
would fully gauge the severity of the offense?

This serious problem can be addressed in
one of two ways. First, distinguished
archaeologists have submitted public comment to the
Commission expressing their expert opinion that
many cultural heritage resources which are not
archaeological resources under the guideline since
they are less than a hundred years old nevertheless
could be appropriately valued by the archaeological

value method in the same manner as archaeological resources. We recommend that the value provision be revised accordingly.

If the Commission elects not to revise the value provision in this manner, the commentary should specifically urge an upward departure to correct the inaccuracy of assessing value solely on commercial value and cost of restoration and repair for any cultural heritage resource which does not meet the definition of an archaeological resource where the commercial value of that resource is inappropriate or difficult to ascertain or inadequate to fully assess the harm caused by the offense.

My third point is that the upward departure provision which is essential to the overall effectiveness of the cultural heritage guideline needs some revision. Because this cultural heritage guideline may, on occasion, apply to cultural heritage resources which have profound uniqueness and significance to our nation's history and culture, the upward departure provision should

emphasize this important point by specific

reference.

Consequently, we recommend replacing the language--excuse me--replacing the example in the current draft with language set forth in my written testimony.

My fourth and final point concerns the sentencing enhancements for commercial advantage or private financial gain and a pattern of misconduct involving cultural heritage resources. Unfortunately, the proposed guideline sets forth these two valid and appropriate aggravating factors as alternative enhancements.

Consequently, although each enhancement appropriately addresses an aggravating factor deserving separate sentencing consideration and both could factually apply to an individual defendant, the guideline as currently drafted limits the sentencing court to applying one of the two appropriate enhancements.

For example, a commercial looter with a history of such misconduct should be subject to

both enhancements on the basis of these distinct aggravating factors. Such an offender should not get a pass on one of the enhancements.

Accordingly, we recommend that these two enhancements be made independent of one another so that both can be applied in an appropriate case.

In conclusion, I repeat what I stated in my December 7th, 2000, letter to the Commission. Amending the sentencing guidelines to fully address the irreparable harm caused by ARPA offenses and other heritage resource crimes will truly manifest to the present and future benefit of the American people as Congress intended.

Few undertakings by the Sentencing Commission could be of greater significance to our nation. Thank you for this opportunity to address the Commission on such a vital matter as the proposed cultural heritage guideline. I'll be happy to respond to questions or--

CHAIRPERSON MURPHY: What I'd like to do because of the time and also because of the identity of the next speaker in terms of who you

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represent, I'd like to have your testimony first and then we'll open it for questions. So, Mr. Fryar, you can proceed.

STATEMENT OF JOHN FRYAR

MR. FRYAR: Good morning, members of the

Commission. My name is John Fryar. I'm an enrolled tribal member from the Pueblo of Acoma in New Mexico. I'm also a criminal investigator with the Bureau of Indian Affairs.

I first became involved--aware of these types of crimes, the Archaeological Resource Protection Act or ARPA, and the Native American Graves Protection Act and Repatriation Act, NAGPA, approximately 15 years ago while working with the U.S. Forest Service in New Mexico.

I worked for the Forest Service for a little over 15 years, the last five of that as a uniformed law enforcement officer. In the early 1990s, I transferred to the Bureau of Land Management as a special agent and was assigned to what was then the Four Corners ARPA Task Force based out of Santa Fe, New Mexico.

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We were primarily an undercover unit working ARPA and NAGPA crimes in the Four Corner states, and we were very successful at prosecuting some of these crimes that were committed during that period of time.

After the task force was disbanded, I was able to transfer to the Bureau of Indian Affairs in

1995 and have become the only criminal investigator within the Bureau of Indian Affairs, and with the Department of Interior at this present time, the only criminal investigator working these crimes nationally.

I travel all around the country helping tribes with these types of crimes and presenting classes to them. And I've seen firsthand the devastation and the anger and frustration that individual tribal members are experiencing as well as tribal entities.

ARPA is over 20 years old now. The NAGPA crime is over 10 years old now. There has been a variety of newspaper articles, magazine articles. We've had television programs, such as National

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Geographic and Nightline had segments talking about the looting and plundering of archaeological resources and ceremonial items from public lands and Indian reservations.

With that, we have seen a marked decline in what I call the mom and pop type violators, the people out for Sunday picnics; the casual Boy Scouts causing damage if you will; and the casual hiker type damage.

But what we are seeing are what I call the professional looter, the people who go out of their way not to get caught. They are aware of the laws. They are very proud people, if you will, in the types of crimes that they commit.

They will educate themselves about the resources in their area, what types of grave goods, what types of artifacts can be found at the sites that they're looking at. They go out of their way to do that.

They have even taken college courses in archaeology and anthropology. We have seen them volunteer with land management agencies. And this

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only seems to foster their "braggability," if you will, to other looters.

They become very good at what they do, and they do document their crimes. They will take photographs, they will take videos, which adds more and more to their bragging rights.

A lot of these professional type looters work pretty much the same way. A lot of them will use the cover of darkness to mask their activities. We have seen the professional type looter use inclement weather because they know that law

enforcement officers traditionally, in these rural type areas, are not in the back country during those periods of time.

We have seen and heard looters on the Indian reservations, for instance, get to know what the ritual schedules are, what the ceremonial schedules are, because they know about the manpower that's there.

Most of the time if there's a ceremony, they pull in all the law enforcement officers and the tribal rangers to help with the ceremonies,

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leaving the back countries open. These are the times that these people are out there.

A lot of times they will park a mile or so away, hike in to a site so that they're not associated with it, their vehicles are not associated with this. They've become very good at camouflaging, both clothing and vehicles, that type of thing. They operate in a manner that they can elude law enforcement.

These professional looters, not only are the bragging rights what they're after, but they're also there for the monetary value of these ceremonial items, the cultural items and the

artifacts and human remains from these sites.

If human remains are really hidden, a big area right now too on the Internet and on the black market. Numerous times here in the past few weeks we have encountered these type of things for sale.

I want to give you one example of a professional looter, if you will. I first met a person by the name of Rodney Tidwell in 1992. A tribal member from the Zuni Pueblo in New Mexico

had turned himself in because he got to where he couldn't sleep at night because of the types of crimes he was committing.

He was stealing cultural patrimonial items from his own people and selling them to this man from Pason, Arizona. We went over there, we talked with the person, and he agreed to cooperate with us.

A phone call was placed to Rodney Tidwell that night, and an item was put up for sale. He came over; he met the tribal member at 4:00 in the morning. This tribal member was a sheepherder by trade, didn't make much money, but he also had an alcohol problem, which is a lot of what these professional looters do is seek out these type of

people, people with alcohol and drug abuse type problems in their history.

I watched the sale go down at 4:00 in the morning of that night in a room that had dirt floors, no insulation in the walls and bare wires holding a light bulb.

I watched this man browbeat this tribal

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member down in price and, in fact, tell him, "I want more, but I want them fully dressed," which means all of the parts to the item, feathers, the whole works.

At the same time this went down in Zuni, we had a search warrant team in place in Pason, Arizona, and the search warrant was executed on his house there, which led us into more looters and into an expanded network.

During the course of this investigation, the tribal member was also prosecuted in tribal court and actually spent a year at what we call hard labor, where he was taken out on a daily basis and chopped wood with an ax, and the wood was donated to the elders of the Pueblo.

But before the Federal trial, which he was also indicted in and was going to stand trial as

well, he did not make it; he passed away. As a result of that, we dropped seven of the nine charges we had on Mr. Tidwell.

That case started in 1992. He was finally sentenced in 1995, October of '95, with a NAGPA

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count and a conspiracy. At this time, I had already transferred to the Bureau of Indian Affairs and had started an undercover operation in Arizona that was working on some of the reservations trying to curtail some of this.

In April of 1996, less than six months after he was sentenced, I was introduced to Rodney Tidwell through an informer and began another year-and-a-half of operation on him, where I was buying the same type of items that he had just been prosecuted for.

During this period of time, he taught me how not to get caught by tribal officials or other police officers, what to do if I was caught and how to watch for body wires just like what he called in drug stings. These are the type of people that I was dealing with.

In the trial of the second case that I was working, he was convicted on 20 felony counts. We

executed search warrants where I could track him by paper, other cases where he had been convicted of ARPA in Arizona in the '80s. He had citations from

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the White Mountain Apache tribe in Arizona and the National Forest Service for digging in Indian ruins. But it continued.

The 20 felony counts that he was convicted on netted him--even after that history of almost 30 years--a total of 33 months in jail. That's with enhancements for tampering with witnesses and this type of thing.

These are very serious crimes when it comes to Native American people, and I am always, always touched by some of the attitude of these professional type looters.

And I do want to--I realize I'm out of time, but I do want to close with a poem that was taken from one of the scrapbooks from one of these looters. They are very proud of what they do, and they keep everything.

This poem is called "Diggings," and it was written in 1991 about Rodney Tidwell.

"An Indian walks softly, holds his head up high, the world has treated him badly, yet he seems

too proud to cry."

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"He remembers his Indian ancestry which he desperately wishes to save, returns to talk with his grandfather chief, but there's a ghoul in his grave."

"His grandfather's legs are thrown on the ground, his head lies there in a sack, and some man stands from his pelvic bone, stealing big beads from his back."

It's not the mom and pops that we're having problems with out there with these type of crimes; it's these professional looters who are out for the money and the bragging rights.

I appreciate your time and patience with us today. Thank you.

CHAIRPERSON MURPHY: Okay. It goes to you and then--

COMMISSIONER CASTILLO: I want to thank all three of you for the work that you're doing in this area, and I will say, Mr. Warner, that in the years that I've been here nobody has made the type of focused recommendations that you've made to a guideline. And I, for one, will push to make sure

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some of your suggestions are fully adopted. So I just want you to know that. Thank you--

MR. WARNER: Thank you very much.

COMMISSIONER O'NEILL: The only question that I would ask is--and again, I also thank you for your willingness to appear before the Commission today and to provide this very thoughtful testimony--is that in either of your experiences, have you been involved in a case in which you believe that the value that was assigned probably overstated the culpability of the individual being prosecuted?

MR. FRYAR: Not at all, from my perspective.

MR. WARNER: The simple answer is no. I say simple answer, I was just looking to Wayne as we tried to quickly think of all of the cases we've seen. In almost every instance, it's been a battle to try and get an appropriate value assessed.

CHAIRPERSON MURPHY: On that question, I'd like to just follow up with--maybe both of you could respond because when we first started to talk

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about this, some of the Commissioners were thinking, well, maybe the value of restoring the

item, but I take it from especially some of the specific things that you're talking about, Mr. Fryar, that the idea isn't to restore something necessarily just the way it was.

I'm not talking about the archaeological things now, but it could be 99 years old, but to be able to preserve it. Would you talk about how we should value something like that?

MR. FRYAR: The value of a cultural patrimonial or ceremonial item, for instance, is--by using commercial value doesn't even start to really express the true value of that item.

There's spiritual value that's involved there. There's a humanistic value. One way I might be able to characterize and put it a little bit more in focus, some of these cultural patrimonial items, to the tribes, are living, breathing entities.

They go through a birthing process, if you will, much the same way as a child would. From the

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time that you start gathering materials, it starts that birthing process. There's a whole series of ceremonials and doings, if you will, that take this through the process. It goes through like a

gestation period to such a time where it actually takes this life, and there's caretakers who will ceremonial feed this item and caretake for this item.

If you lose that, it's just like losing a child. I have heard different defense attorneys talk about these things as art. "Well, why can't they go just make another one and do their thing?" Well, it doesn't work that way.

If you lose a child, just because you have another one doesn't make it the same. It's the same principle in some of these cultural patrimonial items. They are living, breathing entities, and even if you do make another one, it is never going to be the exact same as it was.

Those are some of the issues that I see out there on a regular basis.

CHAIRPERSON MURPHY: Mr. Steer?

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COMMISSIONER STEER: I have one question for each of you, for Mr. Warner and maybe assisted by Mr. Dance. I wonder if you've had an opportunity to sort of model the revised guideline draft against some of the cases that you've dealt with and just if you would comment on whether you

think we're getting closer into the right ballpark
as far as where the sentences should be?

MR. WARNER: I'm going to let Wayne
respond to that. I have to tell you that how
committed we were to coming, leaving Salt Lake City
the day after the Olympics--

CHAIRPERSON MURPHY: With thousands of
others trying to get on those planes.

MR. WARNER: Yes. We fought our way
through some substantial crowds to get here, and I
think Wayne ought to have an opportunity to say
something. So I'll let him address that.

MR. DANCE: I've not gone back to
recompute specifically what sentences may have
been. Instead, our focus has been on what are the
most important factors in a sentencing for a

cultural heritage crime.

From the very beginning, with our December
2000 letter and the work that I've done with the
staff and others since then, we have continued to
focus on those most important factors.

Even with the latest revised version, as
you see in our testimony, that we have again tried
to fine tune it so that it will be as complete and

comprehensive to make the sentencing appropriate in these types of cases.

COMMISSIONER STEER: For Mr. Fryar, as a result of your comments and those of some others who reviewed an earlier draft, I think staff have presented us with a revised draft that provides an enhancement for items of cultural patrimony over and above the offense level otherwise.

But what about sacred objects that are used in religious ceremonies? As I understand it, they have a definition in the law. Should they be treated the same as items of cultural patrimony or are they a lower valued category of items that, while they are cultural heritage resources, don't

rise to the level of importance of cultural patrimony items?

MR. FRYAR: In my personal opinion, sacred items should be covered also. But the difference that I see in some sacred objects, if you will, items of cultural patrimony cover most of those sacred objects anyway; that is, most of those items belong to the tribe themselves or a tribal entity. They're not owned by one individual.

The difference in some of that, though, is

there are certain sacred objects that are personally owned by an individual, and all tribes are different. There's item that, for my reservation--Kachina dolls, for instance. From where I'm from, it is very adamant--you do not sell these, you do not give these away, that type of issue.

Whereas, some of the other tribes, their Kachina dolls aren't held as near or as high as they are on our reservation, for instance. So that's some of the differences that we run in to when we talk about sacred objects.

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CHAIRPERSON MURPHY: Are there any other questions?

[No response.]

CHAIRPERSON MURPHY: I think I'd say that the Commission--many of us feel that this is one of the most important things that we're working on this year, and we did work on it last year too, but we were going to have a hearing, we knew we were going to have a hearing in South Dakota on how the Federal guidelines affect those Native Americans who are sentenced for what would, in other circumstances, be state crimes.

And we also asked for testimony on cultural heritage, but the people there had so much to say on these other guidelines issues, that they just said--well, other than that cultural heritage is important; they didn't really go into it. So it's very helpful for us to get your input. Thank you very much.

MR. WARNER: Thank you. We appreciate the opportunity.

CHAIRPERSON MURPHY: We'll adjourn the

hearing and go upstairs for more work.

[Whereupon, at 12:26 p.m., the public hearing was adjourned.]