UNITED STATES SENTENCING COMMISSION
Regional Public Hearing - August 12, 1996
Byron White Federal Courthouse, Courtroom 1
1823 Stout Street, Denver, Colorado

JUDGE CONABOY: Well, good morning, everyone. And I guess we're all happy to be here in Denver, Colorado. We've all gotten here from different parts of the country and come out here to honor our distinguished member, Judge Tacha. When I got to the hotel last night, there was a young man who was helping me up with the baggage. He asked me what I did and when I told him I was a Federal judge, he said oh, we have some of the most distinguished Federal judges staying here at our hotel. I said do you remember any of the names. He said Judge Tacha. So you're -- you're really -- your fame goes before you, Judge.

We're happy that you arranged this meeting here in Denver and I want to thank you and I want to thank Ed Purdy and the other members of the staff who worked hard at putting together an agenda and getting us a place to meet and all of the other details. We do have to do a little bit more work on the breakfast, but, otherwise, everything is in great shape and we appreciate all the hard work that you've done in putting together what we hope is a -- is a -- will be a fruitful hearing and give us some more guidance and direction as we try to carry out our duties on this Commission.

I'm Judge Richard Conaboy. I'm chairman of the United States Sentencing Commission. And it's a privilege, as I said, to be here in Denver and to welcome all of you who came here either to talk to us or to listen or to give us some suggestions. We're interested, as we travel around the country, in learning what other people think of the sentencing process in the Federal courts in this country. And we're interested in hearing about what is working well and what isn't working well and suggestions that you might have for us to try to make this process the best in the world.

We on the Commission are very proud of the Federal judicial system and we are proud of the fact that we are striving along with all of you to develop in that system a sen -- a system for sentencing that will be fair and just and we'll try to be -- and which strives to get better as we learn from all of you.

I know that everyone is not familiar with the Sentencing Commission. Even though I served on the Sentencing Commission in Pennsylvania before I became a Federal judge, I was not very familiar with the sentence -- United States Sentencing Commission myself before I was appointed to it, other than to know of its existence and generally what its duties were. So I thought maybe I would just give a brief bit about the Sentencing Commission.

The Commission came about as a result of the 1984 Sentencing and Reform Act passed by the Congress in an effort to end what was perceived as significant disparity in sentencing in the various district courts throughout the United States.

One of the first duties given to this Commission was to develop and to adopt a set of Sentencing Guidelines which were to be used in every Federal court throughout the country. And that job was accomplished in 18 months as mandated by the statute. It was a significant, almost an overwhelming job and to the great credit of the Commission that they were able to get it done within that period of time.

Those Guidelines, as all of you may know, remained in full force and effect to this -- to this day and must be used by every sentencing court in the Federal system. From time to time, either the Commission on its own after receiving input from various people around the country or by legislation from time to time amends the Guidelines. As I say, the Guidelines have been and continue to be amended and changed and updated and indeed, in almost every session of the legislature, the Congress seems to pass some type of legislation which impacts on the work that the Sentencing Commission must do. Either to develop new guidelines or new -- or -- or in their judgment to ordain new criminal conduct which we then must translate into methodology of sentencing under the Guidelines.

The Commission, itself, is made up of seven voting members. Each of the seven members is appointed by the President of the United States and confirmed by the Senate. And we also have two nonvoting ex officio members named in the statute, the Attorney General and the chairman of the United States Parole Commission. Of those seven voting members, the statute also requires that at least three must be Federal judges and that no more than four can be of any one political party.

I want to introduce you to the members of the Commission and tell you just a tiny bit about their background.

As I indicated, I was appointed as chairman in 1994 by President Clinton and I serve -- in addition to my duties as the chairman of the Commission, I serve on the District Court in the Middle District of Pennsylvania in Scranton where we like to say we have the best district court in the country, but I won't say that since I'm here in Colorado.

But in addition to myself as a judge, Judge Dave Mazzone -- the name tags you can see on the bench in front of us. Judge Mazzone serves on the Federal District Court in Boston, Massachusetts, and has been a long-time member of the bench in a variety of other activities associated with judicial conduct.

And Judge Tacha, who all you know very well, serves here in this area on the appellate court for the Tenth Circuit.

And Judge Julie Carnes, another Federal District Judge serves on the District Court in Atlanta.

In addition to those judges on the Commission, Commissioner Wayne Budd from Boston is presently the senior vice-president of Ninex, the corporation in Boston and he was formerly a Deputy Attorney General of the United States and formerly United States Attorney for

Massachusetts.

Michael Gelacak, a lawyer. Michael is originally from Buffalo, New York. He practiced law there and in several other areas and also formerly served with the Senate Judiciary Committee in a variety of capacities, including staff director for Senator Joseph Biden.

Michael Goldsmith is also a lawyer who has served in a var -- practiced in a variety of capacities in various areas of the country and presently serves as a professor of law at Brigham Young University Law School in Utah.

In addition to those voting members, the chairman of the United States Parole Commission, Edward Reilly, also sits by designation under the statute.

And the attorney general has designated Mary Harkenrider, who is counsel to the Assistant Attorney --

MS. HARKENRIDER: -- General of the criminal division.

JUDGE CONABOY: -- for the criminal division in the Department of Justice. Mary Harkenrider also serves on the Commission with us.

We have a -- our offices are located in the new judiciary building in Washington, D.C. where we have a staff of about 100 people who perform a variety of capacities.

Most people, I think, when you think of the United States Sentencing Commission, are inclined to think of the Sentencing Guidelines and sometimes there's a feeling that perhaps that's all that we do. However, that's a -- an erroneous assumption or presumption because the Commission, indeed, has a wide variety of very important duties. Among those are a research obligation that we take very seriously in trying to carry out our duties. We do -- we monitor every sentence in the United States courts and we do evaluation of that sentencing process. We have a very strong training arm that goes around the country and trains a -- the judges, trial lawyers and others, probation officers, et cetera. And we serve as a general clearinghouse for sentencing information for the United States Congress, for criminal justice practitioners and for the public. However, the guideline process is at the center of our activity and most of what we do eventually translates itself in some way into the guideline process.

In 1994, when I became chairman, several other members joined the Commission and the entire Commission at that time made as one of our priorities an effort to try to simplify the Guidelines. The Guidelines have been in existence since 1987 and there is complaint over that period of time that generally centered on accusations of complexity and lack of flexibility in the mechanistic nature of the Guidelines so we have been struggling in the last year or so to try to determine some ways that perhaps we could make the Guidelines easier to work with and a -- and, in general, more responsive to the purposes for which they were initiated.

We have been involved in this process for a long time. During this -- the initial phases of

it, we studied every aspect of the Guidelines to try to determine why that part of the Guidelines came into existence, what its purpose is, how it was structured initially, and what the complaints are about it, how it's working in the field and what alternative ways there might be for us to make those sections of the Guidelines work better.

In carrying out that project, we have talked to people all over the country and we've had advice from a probation officers' advisory committee, from defense counsel advisory committee, from a judge advisory committee, and from other people such as the Criminal Law Committee of the judicial conference that have helped us and given us suggestions as we move along. And we're in a -- we're at a point now where we're trying to narrow down those areas where we feel some changes can be made and, hopefully, will be made for the better.

We realize, of course, as we're involved in this process that much of what we do as a Commission is not final. It's kind of a humbling lesson perhaps maybe for a trial judge to learn that your decisions are not final. As a district court judge, we know that and we know that your decisions are subject to appeal, but it's a different proposition on the United States Commission because when we make decisions, we must publish those and let them out for public comment and, more importantly, we must then translate or transfer it to Congress and Congress has the final say in making determinations on most of the changes that -- and most of the determinations to be made.

So it's a political process as well as a public process as well as legal process and trying to work within that framework sometimes is tedious. But it is a system we have in our country. It has worked well for 200 years and we struggle as a Commission to try to work within that framework and try to get accomplished as much as we can to make the system better.

We have recently published a number of matters in the Federal Register and other places looking for comment on those things and we hope to publish some others in the near future. There are a number of items that we are looking at in the Guidelines and I think that most of those who will be speaking to us today or are speaking with us today have received some information on those areas that we're looking at and we're hopeful that perhaps some of you or maybe all of you will address some of those areas and give us your comments on what you see in the field about the application of the Guidelines, their use and the results that come about from their use.

One of the traditional discussions that we always hear about the Guidelines is the whole issue of discretion and whether or not judges had too much discretion prior to the adoption of Guidelines and whether they have too little discretion now and whether discretion has been transferred from the judicial area to the prosecution area and whether the defense has lost or should gain more in the way of their input into the application of the Guidelines. And all of these things are important to us to hear about from you who are using the Guidelines on a daily basis. And your comments are most helpful to us as we're trying to make important decisions at these various hearings.

I'd like to move into the first panel. And each of you, I think, has been informed that we

are asking you to keep your remarks to ten minutes in length. And we do have a large number of witnesses scheduled for this morning and I would ask you if you would be careful and try to maintain that time limitation. This gadget in front here, I think, will be telling you how much time has expired and we would ask each of you if you would try to keep to that time limit.

I would also ask the members of the Commission if you would hold your questions until we have heard from all of the speakers on each panel. And then I think it would be more orderly if we would then question in that fashion unless someone feels there's something of such significance -- a significant portion they might want to break in.

On our first panel, we have sitting here before us and again, I extend my gratitude -- when I say mine, I mean of the entire Commission -- to all of you to take the time to come here this morning and to talk to us and to give us your impressions of the matters you're going to talk about.

We have Judge Lewis Babcock who is a -- on the United States District Court here in Colorado, appointed by President Reagan in 1988. Am I correct, Judge?

JUDGE BABCOCK: Yes.

JUDGE CONABOY: The judge is a graduate of the University of Denver in both its undergraduate and law school and practiced here in this area for -- since his graduation from law school in 1968 and went on the bench in 1988.

And we have Mr. Richard Miklic, who is the chief probation officer here in Denver, in Colorado and has been chief probation officer since 1989 according to my notes. Am I correct?

MR. MIKLIC: Yes.

JUDGE CONABOY: Thank you, Mr. Miklic.

We also have Mr. Michael Katz, who is the Federal Public Defender here in Colorado and has been the -- became an assistant in 1978 and the Public Defender since 1979. I don't know if those dates are correct.

And then we have Mr. Robert Litt, who is a Deputy Assistant Attorney General in the criminal division with the United States Department of Justice. Mr. Litt has been with the Department since 19 --

MR. LITT: June of '94.

JUDGE CONABOY: '94. '94. Well, thank you all for being here. And Judge Babcock, are you going to talk to us first?

JUDGE BABCOCK: Yes, sir.

JUDGE CONABOY: If you are, if you would proceed, sir.

JUDGE BABCOCK: May it please the Commission, Mr. Chairman. I confess that I haven't appeared before a bench in 20 years and the anxieties washed over as they always did before.

I was a Colorado State judge from 1976 until I assumed the Federal bench in 1988. And as such, I have a context of experience in sentencing within a wide range of discretion as well as, of course, since I assumed the bench in 1988, sentencing under the United States Sentencing Guidelines.

When I attended the Federal Judicial Center and was introduced to the Guidelines, I also confess that it was somewhat overwhelming. Fortunately, however, I always enjoyed working my way through the mazes of the Uniform Commercial Code and, consequently, I became somewhat comfortable working with the Guidelines in fairly short order.

In addition or having had the experience of the contracts, sentencing individuals where I had to exercise discretion with a wide range -- Colorado had a rather rudimentary system of presumptive ranges of sentencing -- one of the things I learned early on as a judge is that you must express a reason for a sentence imposed. You have a constituency that you're speaking to. Of course, you speak to the defendant who is going to suffer the sentence. The defendant's family, the defense counsel, the prosecution, the public needs to know a reason for a sentence. And last but not least, if you can't express a sentence in a rational fashion, articulated rationally so that you understand it yourself, you probably haven't got a handle on the decision.

Factors such as the harm caused by the conduct, the role of a defendant in committing the offense or offenses, a defendant's expression of remorse, what we now know is acceptance of responsibility, numerous of the factors constructed into the Sentencing Guidelines were always touchstones that I looked to in fashioning the sentence where I had wide discretion.

I've, in my experience, therefore, found that there is a very keen and sharp logic to the Sentencing Guidelines. The bad news is, as we all know, discretion is extremely narrow, tightly controlled. When I sentenced people within a wide range of sentences, I found myself losing sleep, suffering, struggling to articulate the reason. When I sentence under the Sentencing Guidelines, I find I sleep just fine because I have very little thinking to do. It's done for me. It's done for me by the attorneys prosecuting the case and defense counsel in structuring the proposed sentence. And it's done for me by extremely able probation officers under the guidance of Mr. Miklic. Their work and the quality of their work is exceptional. The lawyers, I find, are well schooled for the most part. There are exceptions where you have someone not familiar with the Guidelines who I see is disadvantaged in the plea negotiation process.

Basically, my sentencing hearings take about 20 minutes. I have very few contested issues. These issues are resolved largely through the negotiation process. Has discretion shifted to the attorneys, the Government and the defense attorneys? I think that discretion was always there before Sentencing Guidelines in charging decisions and in fashioned plea agreements.

But there is not much discretion on the bench. We have in Colorado General Order 1994-3 through the application of which the issues that may be in dispute at a sentencing hearing are narrowed early on. It comports with notice, due process. If there is an adverse jury verdict, the Government files a sentencing statement setting forth the Government's position with regard to the application of the Guidelines, the defense may respond. If there is a plea agreement, the parties' estimate of the application of the Guidelines is set forth in the plea agreement in advance of the sentencing hearing after all sides have had an opportunity to review the pre-sentence report.

If there are contested issues, those issues are made known. They are honed, they are narrowed. And it is not an unwieldy time-consuming process to resolve those questions either as a resolution of dispute of fact or interpretation of the Guidelines and application of the Guidelines to the facts. So I don't find myself burdened with Guidelines.

I suppose the question is should I. I sometimes long -- often long for more flexibility in dealing with first-time offenders. Criminal history category levels of a level 1 are often largely meaningless in terms of -- there are -- I mean, they have meaning, but there is not much flex in treating somebody who has never been before a court of law in their lives. And that bothers me. I have difficulty dealing with drug quantity questions. I have difficulty dealing with loss determinations in complex white collar crime cases. I have -- one of the most difficult cases I've dealt with dealt with acquitted conduct, although that doesn't appear before me frequently.

The Guidelines have achieved their purpose in resolving disparity across Federal districts. I think the areas of disparity now perhaps reside in circuit splits. And that may be a fertile ground to plow by the Commission in resolving these circuit splits. It certainly would be helpful, I think, to the integrity of the Guidelines to keep the burdens as they are. I think the burdens lie where they ought to.

I have a note of caution to sound and that's this: Change is unsettling. In my experience in watching the Colorado sentencing system change frequently, I saw most unsettling change among the bar and it impacted the defendants and prisoners greatly. We have a substantial body of appellate case law now. I'm always nervous when somebody tells me that they are going to simplify something. I wholeheartedly endorse simplification. But if simplification is a mere term and not accomplished in fact, the complexity that arises out of a simplification process may be unworkable.

Thank you for your invitation made to appear here. I appreciate that very much.

JUDGE CONABOY: Thank you, Judge, very much. I can tell you that last comment that we're very worried and concerned about that ourself, to make things less complex by trying to make them more simple.

Now Mr. Miklic, would you like to make your remarks, please.

MR. MIKLIC: Mr. Chairman and members of the Commission, I'm pleased to have the opportunity to be here today to comment on the simplification of the Federal Sentencing

Guidelines.

Complexity of the Guidelines is as serious a problem for probation officers as I think it is for others in the criminal justice system. Let me give you an example of how it's affecting our work.

When I was appointed as a Federal probation officer in 1974, one of my duties was to prepare pre-sentence reports for judges of my court. I already had considerable experience preparing these reports at the State level and I found the basic process was not that different in Federal court. I did have to familiarize myself with the Federal Criminal Code and the Federal Rules of Criminal Procedure and I also had to acquire a sound working knowledge of Federal crimes in the Federal criminal justice system. This was a challenging task, but it was a manageable one even though I had other important duties to perform. Besides preparing pre-sentence reports, I was also responsible for providing community supervision of 50 to 60 offenders who were on probation and parole.

The situation is strikingly different for someone coming into the Federal probation system today. Officers who will be preparing pre-sentence reports are given, in addition to the Federal Criminal Code and the Rules of Criminal Procedure, the current Guidelines manual consisting of two volumes and incorporating more than 500 amendments, the eight previous editions of the Guidelines manual, a 53 page document published by the Commission which provides the answers to most frequently asked questions about Sentencing Guidelines, a 1,500 page annotated handbook which provided detailed legal analysis for each Guideline and policy statement, a 450-page guide to preparing Guideline pre-sentence reports issued by the administrative office of the United States courts, an outline of appellate case law and selected cases guide published by the Federal Judicial Center of 248 pages. This is supplemented by periodic sentencing updates that provide digests of more recent decisions, an index from the Tenth Circuit Court of Appeals currently consisting of 249 pages, a computer program developed by the Sentencing Commission to help officers make our Guideline calculations, passwords to provide access to on-line legal research services, the telephone number of a Sentencing Commission hotline for probation officers, and a telephone number for obtaining legal advice from the administrative office of the United States courts.

In addition, because of the complex and highly technical nature of the Guidelines, many pre-sentence report writers are assigned to specialized units where they have no contact with the offenders in the community.

The problem is not just we're making a job more difficult and time consuming. The real problem is that we're turning probation officers who used to be valued for their judgment and experience into highly specialized technicians who are frequently expected to act as a kind of Guidelines police. We find ourselves in this situation because in the interests of uniformity, we have tried to reduce the sentencing process to a set of precise mathematical calculations and if you try to capture all the factors that go into a good sentencing decision in a set of formulas, you are going to end up with a very complex and mechanical system.

Consider, for example, the robbery Guideline section 2B3.1. Robbery is normally a fairly simple crime. Nevertheless, this Guideline contains six different specific offense characteristics that can increase the base offense level, including whether a death threat or weapon or firearm was involved, the extent of any bodily injury, the loss, whether a firearm was taken or was the object of the offense, whether the property of a financial institution or post office was taken and whether a carjacking was involved. Each of these characteristics is broken down into even greater detail as with a threat with weapon or firearm adjustment where you get 2 levels for a death threat, 3 for brandishing, displaying or possessing a weapon, 4 levels for a weapon that was otherwise used and so on up to 7 levels for a firearm that was actually discharged.

Naturally, each of these terms, weapon, firearm, brandished, displayed or otherwise used and so forth must be meticulously defined. Altogether, there are 23 different ways in which the base offense level can be increased by a specific amount, not to mention one additional provision that limits the cumulative adjustment for death threats, weapons, firearms and bodily injury.

One unfortunate result of this system is that the participants become preoccupied with the mechanics, often losing sight of the big picture. Probation officers who prepared pre-sentence reports in the pre-Guidelines era approached each case with a fresh eye and had to carefully justify each sentencing recommendation. As a result, such factors as the seriousness of the offense, the need for detention, protection of the public, and rehabilitation of the offender would be continually on their minds. I don't see much opportunity for that kind of reflection under the current system. Today's probation officers are so busy dealing with the minutiae of Guideline application and trying to police plea agreements -- the role of which incidentally many find distasteful -- that they have few opportunities to reflect on what the sentencing process is or should be trying to accomplish.

A system that tries to reduce everything to a series of complex mathematical calculations also leads little room for independent judgment and analysis. Historically, one reason for having probation officers involved in the sentencing process was that they had valuable insights to offer based on their experience working with the offenders in the community. Specialized Guideline technicians rarely have that kind of experience and those who do have few opportunities to make use of it.

The current system doesn't really produce uniformity, either. For one thing, you are always going to have circumstances that don't fit the formulas and each court is going to handle those situations differently. The very complexity of the system also makes it vulnerable to subjective interpretation which creates its own brand of disparity. This is evident from the conflicting opinions that have come out of the courts of appeal.

Finally, and most important, the more complex in fact and rule-driven the system becomes, the more dependent it is on the expression of the prosecuting attorney who has the burden in our adversarial system of proving the facts that drive the sentencing decision. A Guideline that provides a precise adjustment for possession of a firearm is useless if the prosecuting attorney is unable or unwilling to prove that the gun was there. So although a rigid mechanical system may give the appearance of strict objectivity and uniformity, in practice, it's often quite another story.

This is especially frustrating for probation officers who put a lot of time and effort into mastering the Guidelines and applying them in a particular case only to see the adversarial system take over, in the end producing results that are sometimes quite different from what Commission and Congress intended.

The complexity of the Federal Sentencing Guidelines is not an accident. And it's not the result of carelessness or lack of literary skill. It's a necessary characteristic of a rigid and mechanical system which does not necessarily promote fairness and consistency in sentencing and which may, in fact, be producing the exact opposite result. If we really want to eliminate this complexity or at least reduce it, we'll have to create a system that strikes a balance between the general and the particular, between structure and decision -- and discretion and between mathematics and common sense. In other words, we'll have to develop what are commonly known as Guidelines.

With respect to the robbery section I mentioned earlier, the Commission could, for example, provide a general discussion of aggravated and mitigating factors that must be considered in sentencing including those currently listed, but allow the Court to impose sentence within a specified range depending on the circumstances of the individual case. Changes like this would convert our rigid collection of rules and definitions to a true guideline system and would restore balance, fairness and a sense of humanity to the sentencing process.

Thank you, very much.

JUDGE CONABOY: Thank you, very much, Mr. Miklic.

Mr. Katz, are you ready to proceed next?

MR. KATZ: Sure. Mr. Chairman and members of the Commission. I have to start by saying I realize that as a Federal defender many years, the remarks that I'm about to have may have -- carry undue weight with the Sentencing Commission and with Congress, as well.

JUDGE CONABOY: Would you pull your microphone over a little closer, Mr. Katz.

MR. KATZ: I remember --

JUDGE MAZZONE: You should repeat.

MR. KATZ: I remember 10 or 12 years ago sitting not in this courtroom but a courtroom across the street and saying in about three pages worth of testimony that I thought the Guidelines were a bad idea and that the reason I thought they were a bad idea was it was taking discretion away from judges and placing it in a paint by the numbers type of sentencing scheme. And I think two years later, of course, we had the full blown Sentencing Guideline manual and then a couple years after that, I got a letter from then commissioner -- I guess Deputy Commissioner Nagel who wanted to come to Colorado and talk to us about the Sentencing Guidelines and how they were working and I wrote a long letter back saying I prefer not to participate in that discussion, which

that letter ultimately got published in the Federal Sentencing Reporter because somebody got ahold of it and thought it was good.

But in any event, I -- at that time, I again agreed to sit down and talk to a commissioner and some of the staff members and I don't recall any changes coming about as a result of that interchange. Or any positive ones anyway.

And so then when I got the invitation to come back from Mr. Purdy, I thought, why is it I have this sort of reluctance to do this. And perhaps I should try to pinpoint why I have this reluctance because it's certainly nothing to do with any animosity towards the Commission or any individual members of the Commission.

I guess I feel like the Sentencing Guidelines are a -- a fictional vehicle on a journey to a mythical planet called Justicia and the planet Justicia is one where there is no sentencing -- there is no -- no disparity of sentencing, that the sentences are proportionate and just and, in fact, it's a world where there is very little crime. And of course, it doesn't exist and it's not going to exist as a result of a sentencing -- the Sentencing Guideline vehicle is never going to find it.

And so when I'm asked, you know, should we bifurcate this rule or should we amend this rule or tweak this rule, I guess I feel a little bit like I've landed on a square that says you've just encountered a meteor field, go left or right two moves to avoid it. Or you have landed on another square that says go back two spaces to refuel on Mars because I really think that the -- that the mission -- that the goal is that -- is that fictional and it is that imprecise. And the problem with it is, as Mr. Miklic has sort of alluded to -- and it's what we've said all along -- you can't take all the factors that go into a just, fair sentence and you can't -- and you cannot quantify them and put them into a manual regardless of whether the manual is few hundred pages or a few thousand pages.

I also have said in the past and will say again, based on eight years of experience, that this scheme is a brilliant attempt to do that. This is very rational, well thought out. The references back and forth between different chapters and different guidelines in an attempt to avoid disparity and not have different guidelines trip over one another is really awesome in a sense. I think that if people -- if we could produce this kind of manual in some other areas, perhaps, in the Government, we could take some pride in the product.

The problem is -- I'll give you a simple example in a case, and until you can deal with this, you can't really take care of the problem with the Sentencing Guidelines. When Trigger Lock was en vogue and every Federal agent in the Alcohol, Tobacco and Firearms was tripping over themselves to go to gun and pawn shops and to find anybody who had a prior felony by cross referencing with the computer to bring them to Court to prosecute them because these were, after all potentially violent offenders, felons who had guns, what they came up with in some cases, for example -- and these are cases I actually handled -- was the 62-year-old man with a long record whose father was 90 years old, had gotten senile and gone into the Colorado State Hospital and said to his son, son, I don't need that gun anymore, so go pawn the gun. He took the gun to a pawnshop and he pawned the gun. He probably had the gun for an hour. Where is that dealt with

in the Sentencing Guidelines? Where is that dealt with under the chapter felon with a gun?

What about the young man, another felon with a gun case, who was living with a woman whose ex-husband had gone to prison and who -- she needed money and she decided she wanted to pawn her ex- husband's gun. So she has my client go with her to the pawnshop and she was trying to pawn that firearm at one pawnshop and wasn't successful, so my client said let me show you how it's done. He negotiates a better deal with the next pawnshop. $50 instead of $10 for the gun. And he signs off that he is, in fact, the owner of that firearm.

Those were two cases that were prosecuted in the U.S. District Court in Colorado. Nothing in the Guidelines to tell a judge or a prosecutor or defense lawyer or to allow us even to deal with the quality and the nature of that criminal conduct because, on paper, it is a clear-cut possession of firearm by a convicted felon.

I could -- I could give you so many examples in the cases of illegal aliens who are aggravated felons by virtue of the fact that on a street corner somewhere, they handed a dime bag to somebody for $25 and now they are going to go to prison for five or six years, although depending on what part of the country you're in, you might -- you might not even see it prosecuted in San Diego the first time they come back. The second time they come back, you might see them get a petty offense and the third time they come back, they might get an illegal reentry after deportation for a felony, leaving me in Colorado to argue to the judge well, this time -- this time, my client has the expectation that he's going to be treated the same way. And there's almost an estoppel type of argument because, in fact, in the past, the Federal Government hasn't treated this man as though that prior conviction, that minor drug distribution was, in fact, an aggravated felony. A misdemeanor one time and a -- and a two-year felony one time.

So in any event, I see every day -- every day, I see those types of problems with Sentencing Guidelines which leads me as a practitioner to be cynical about the Guidelines, to try to do my best to represent my client and try to find some sort of justice for my client despite the Guidelines and by learning and using the Guidelines scheme and trying to become as expert as I possibly can in it.

Am I manipulating it? Perhaps I am. Am I trying to reach a just result for my client? Is the prosecutor trying to reach a just result for the people? I think so. And I think the proof of that is in most of these cases where we come in with these types of departures and these types of -- of spins on the facts of the case, judges are willingly signing off on those plea agreements and sentencing the defendants accordingly because I think, in fact, the judges realize the Sentencing Guidelines are much too harsh and -- and consequently, I think they are willing to go along with these plea bargains that we fashion in some of these cases.

What has the sentencing -- what have the Sentencing Guidelines wrought in the last eight years in this district? My experience is a huge body of case law. I used to think I knew the law. I still think I know the law. It's just there is this whole tremendous segment of the law dealing with Sentencing Guidelines that you couldn't possibly master or know unless you are having cases dealing with those particular points and issues.

A lot more people are in prison. There's no question about that. Statistics bear that out.

Certainly, there's more uniformity in sentencing. There's no question about that if that's the goal.

A lot more time is spent on sentencing. I do -- offenders now do what we call timekeeper because Congress wanted to have more feedback on why defenders were spending more time in general representing their clients. And it's staggering when I look back at my week and at my month to search how much time with each individual client is spent on sentencing.

In fact, I think we could point to the fact that we have a growth in staff as a result of the Sentencing Guidelines. We've had a need to grow because we can't handle this many cases due to the Sentencing Guidelines and not so much the complexity of the Guidelines, but just the fact of the Guidelines and how many issues there are to deal with and how the plea bargaining process has been complicated.

I think also, we have fewer trials as a result of the Sentencing Guidelines, whether that's good or bad, because now, there's a much greater degree of certainty with regard to plea bargaining and, quite frankly, it doesn't take much to be able to fashion a plea agreement that will be a lot less harsh than would be the result if one went to trial under the Guidelines.

In other words, pre -- in fashioning the plea agreement, negotiating, we can probably get the benefit of the doubt on the role or more than minimal planning, acceptance of responsibility, of course, and that can have substantial impact on the ultimate sentence. So that's another byproduct of the Guidelines.

I've got only a few seconds left. How are they working generally? Well, we've adapted and, of course, we would adapt. It was inevitable. We're trying to do justice in this district, I think, despite the Guidelines, but I don't believe that there's a judge in the United States Federal judiciary who couldn't fashion a better sentence or who believes that he or she couldn't fashion a better sentence that the Sentencing Guideline book can fashion.

And finally, I just want to say this: I don't think complexity is a problem with the Guidelines. I think it takes a little time to learn the Guidelines. The problem, as Mr. Miklic indicated, is you've got by its very nature not so much complexity, but you've got a lot of factors that have to be weighed. You can put on the green eyeshade. You can work through it relatively easily and that's why the Guidelines are fairly manageable in that regard. Thank you.

JUDGE CONABOY: Thank you, Mr. Katz. Mr. Litt. When you're ready, proceed.

MR. LITT: Thank you, Mr. Chairman. Members of the Commission. I'm pleased to be here today on behalf of the Department of Justice to discuss the Sentencing Guidelines in general and in particular your efforts to try to simplify them.

Some of what I'm going to say may be somewhat familiar to you already from the

comments of our able representative on the Commission, Mary Frances Harkenrider. That's not because we're robots all set up here to toe the same line, but because the Department of Justice really takes its responsibilities in this area to the Commission, to the public, to the criminal justice system very seriously and before we take the position or express views on this matter, we make sure that they reflect the views not only of the United States Attorneys and of the criminal division, but of all other affected components of the department. And I can attest to the tremendous amount of time that we and in particular Mary spent on these issues to really try to give the questions you raised the serious consideration they deserve.

I want to begin by emphasizing that, in our view, the Sentencing Guidelines have really benefitted the criminal justice system. No longer does a defendant coming to court face a sentence that's based on the luck of the draw in the courthouse and all of us who were practicing criminal law before the Guidelines know how much of a factor the luck of the draw could be. Instead, the Guidelines have brought a reasonable degree of uniformity and certainty to sentencing. Not absolute uniformity but a reasonable degree.

Guideline sentences vary according to the seriousness of the offense and the criminal background of the offender. Proportionality of the sentence to the offense is an important goal. A defendant doesn't get a benefit because his or her socioeconomic background is similar to that of the professionals in the courtroom. Judges still under the Guidelines have the room to individualize a sentence by selecting a particular point within the Guideline, by imposing alternatives to incarceration where permitted and by departing from the Guidelines where there is a factor that the Guidelines don't adequately take into account. But in great measure, we believe that the Guidelines have achieved their paramount goal of fairness, predictability and consistency in sentencing.

There are unquestionably costs that we have incurred in implementing this system. It's much cheaper and easier to sentence without Guideline constraints and without worrying about like offenders are receiving like sentences. We all know that judges, lawyers and probation officers have had to become familiar with a brand new body of law, one that is still being fleshed out by the Commission and the courts. Sentencing under the Guidelines is undoubtedly and inevitably more complex and more time consuming than under a system of unguided discretion, but we believe that, by and large, the benefits that the Guidelines have outweigh these costs. That's not to say that we believe that the current Guideline system is perfect, but it is to say, however, that any effort at simplification or reform of the Guidelines should not by so doing sacrifice the achievement of the Guidelines.

We're very grateful that the Commission has undertaken the study of simplifying the Guidelines and, as you know, we have been participating and will continue to participate fully in this effort.

In our view, there are two steps that the Commission could take that would achieve much in terms of simplifying the Guidelines process, while minimally disrupting or changing the system. The first would be to limit the number of the amendments that are passed each year and the second would be the retroactive application of those amendments. Let me talk briefly about each

of them.

In less than ten years, there have been 536 amendments to the Guidelines. The amendments are now as lengthy as the Guidelines, themselves. The drug guideline, 2D1.1 has undergone 37 amendments since 1988. As Judge Babcock noted, these constant changes which range from minor clarifications to farreaching revisions have led to a great deal of complexity in litigation. Often just as lawyers, judges and probation officers become comfortable with one set of amendments, there's another set of amendments that we have to deal with. And so our suggestion would be that a paramount way to simplify the Guidelines process is to reduce the number of amendments.

I'd like to suggest three specific things that the Commission could look at in this area. The first is simply to amend less. This past year because of its focus on simplification, the Commission decided to consider very few amendments. And I think most of us in the criminal justice system applauded this and would ask for more of the same in the future.

Secondly, we would urge you that in studying the simplification process to take into account the complexity the change, itself, introduces and to recognize the amount of litigation and confusion that is likely to be engendered simply by a change in the Guidelines.

Finally, we suggest that the Commission might consider, for example, moving to a two-year Guideline cycle to slow down the process and give the parties an opportunity to deal with change.

Retroactivity is another issue which we think the Commission could address. Each time the Commission adds to the list of retroactive Guideline amendments, we have to devote tremendous resources to litigating cases that we all thought were over and done with. Legal issues that should have been laid to rest long ago arise again, such as the interaction between the Guidelines and the mandatory minimum sentences. The settled expectations of parties and the Court at the time plea agreements were entered into may be upset and there is, on occasion, a need to go back and litigate factual issues years after the case is long over.

Although the Sentencing Reform Act does permit the Commission to make Guideline sentence reductions retroactive, it's not compelled to do so in all circumstances. And we would urge the Commission to consider carefully the impact that decisions on retroactivity have on prosecutors, defendants and the courts as well as the increase in complexity created by the addition of retroactive amendments.

We think that there should be a presumption against retroactivity. That amendments to the Guidelines should not be made retroactive unless there is really a compelling reason to do so and we strongly urge that whether or not amendments are to be retroactive be decided at the same time the amendment is adopted. I think that would really help everybody in their expectation and their understanding of how the amendment is going to be applied.

I want -- I know that the Commission has identified a number of areas of possible

Guideline simplification as the priority for studying during the 1997 amendment cycle. I'm not going to comment specifically on these now. I will be doing so a little later on some of the other panels. And I look forward to participating in those panel discussions. But let me say in general that the Department is committed to continuing to work with you in identifying areas of complexity and in assessing the possible proposed solutions to these areas to see if we can, in fact, reduce the complexity of the system without sacrificing the fundamental goals of fairness, predictability and certainty.

In addition, there are, we think, two other sources of complexity that we suggest you should consider including in your study of simplification. The first is the multiple counts rule. In our view, the Guideline related to multiple counts is one of the most complicated and difficult to apply in the -- in the Guidelines. I can certainly say my first acquaintance with the Guidelines came when I was in defense practice and trying to assess the multiple counts rules gave me more headaches than anything else in the Guidelines. And we think that this is an area that -- that the Commission study -- this topic ought to be included.

We would also suggest that under the rubric of dealing with appellate litigation, you examine in particular whether or not it's possible to clarify what issues are open when it -- when a case is remanded for re-sentencing. This is an area in which there is a lot of confusion and frequently engenders litigation if there is a -- if one issue is -- is treated by the Court of Appeals and the case is remanded for sentencing and people try to open -- reopen the whole sentencing to litigate.

As the Commission continues its study of the Guidelines and possible simplification, you may well determine that changes are needed in some areas or that no changes are needed. Or that while changes may be needed, they are not worth the disruption that they would cause to the settled expectations of the system or, finally, you may determine it's still too early in the process to assess whether particular changes are warranted as not.

In any event, we will be pleased to work with you and hope this is a fruitful and stimulating process for all of us. Thank you, very much.

JUDGE CONABOY: Thank you, Mr. Litt. I might -- I meant to mention to all of you -- and I was just reminded to do so -- if you wished to supplement any of the remarks you've made by a written submission, we'd be glad to hear from you. We'd like you to get that to us at least by the end of the month if you would, please.

We didn't determine a time limitation for questions so supposing we just -- can you set that for 15 minutes?

MR. NELSON: Yes, sir, I can.

JUDGE CONABOY: Let's see what happens if we try to do that. We can have questions that last beyond that. Maybe they won't last that long. Can we start with Judge Mazzone.

JUDGE MAZZONE: I'd like to make a couple of -- ask a couple of questions of Judge Babcock. More or less observations rather than questions. Thank you for taking time from your very busy schedule to come here.

I'd like to ask two questions, Mr. Babcock. First, if you know, how many of your criminal cases end up in plea bargains? I know that the plea rate in Colorado to me is astonishing because it's 97 percent here and it's only 80 percent in Massachusetts. So I don't know how you do it, but what percentage do you believe of your criminal cases end up in plea bargains?

JUDGE BABCOCK: I can't give you a percentage, Judge.

JUDGE MAZZONE: Maybe Mr. Miklic can.

MR. MIKLIC: I have the most recent statistics from the most recent annual report to the Commission and it reflects that 97 percent of cases were decided by a plea in Colorado.

JUDGE MAZZONE: How much of that is reflected in a plea agreement signed by both parties?

JUDGE BABCOCK: Almost all of that.

MR. MIKLIC: I should mention also that the national average is 92 percent, so Colorado is not that much higher than the national average. 91.9 percent was the national average of conviction by plea. And yes, I think most of them are by plea agreement.

JUDGE BABCOCK: There are very few cases that are straight up pleas to the indictment absent a plea agreement. They are almost all, I would say, subject to a written plea agreement signed by both parties.

JUDGE MAZZONE: The second question I would ask of you is would it help you -- first, let me go back a step. Sometimes when you work in Washington, you tend to lose the picture outside. And when I do talk to my colleagues, I'm struck sometimes by how differently they view the process. You seem to have had -- you seem to have accepted the process and it seems not to have -- using your words -- burdened you and you've learned to live with it and work with it. The key word back ten years or so ago was evolutionary. And my question to you is how much attention, really, you pay to what we do in Washington. In other words, would it help you if we were to -- by that I mean, do you simply go on having adopted your rules and adopted your acceptance and moved along, controlling your docket your own way? Would it help you at all if we undertook to re-write, re-comment, do our commentary again, do our introductions again, just sort of give you an idea of what it is that we gathered over the past seven or eight years, sort of like a five-, six-, seven-year review on what we've learned and what we have evolved into? Would you read it if we wrote it? Is it something that would be helpful for you to know and for everybody else in the panel to know that we really do think about the issues that Mr. Litt was talking about, Mr. Katz is talking about? Would it help you for us to undertake that review and tell you about it?

JUDGE BABCOCK: Of course, I speak only for myself and not for my colleagues nor for our court as an institution. When I told you that I had an affinity for the Uniform Commercial code, it was true. I found it a very meaningful way in which people could structure their commercial transactions with certainty to cross state lines.

The Sentencing Guidelines and the review that you do propose or the review that you propose would be of interest to me because I have a -- a bent for looking at the big picture. I would -- I enjoy seeing how Colorado fits into the national scheme; whether we are skewed in some fashion one way or the other, whether it be a chart or graph. Some of the materials that Mr. Purdy sent had graphs. I wish I had more time to study them. It's a time factor.

But yes, I would personally, I think, benefit from seeing how the system has worked historically because history gives us perspective about where we're going in the future.

Your comments about Washington, D.C. are fraught with all sorts of potential for me to address in that --

JUDGE MAZZONE: Feel free. I work there.

JUDGE BABCOCK: -- one of the blessings of living in Colorado is that we are removed substantially geographically at least from all of the fallout and the intense feeling that seems to pervade the Beltway on a day-to-day basis. That has the advantage of, I suppose, sitting back and looking at what occurs in Washington, D.C. with some perspective and it also has the benefit of some insulation from the slings and arrows of the outrageous fortunes that occur within the Beltway that seems so important at the time.

My -- my sense is that what we do here in Colorado is no different from what judges do in Montana; Portland, Oregon; Phoenix, Arizona; El Paso, Texas; Columbia, South Carolina, wherever. And that is you give us the law and we try to apply it to the facts as are presented to us. It's -- and it is a matter of acceptance. It's the law. And it's our job. It's our duty. It's our oath to apply the laws to the facts as we have before us. And we accept that.

JUDGE MAZZONE: I guess I could just summarize that, my question. Should -- do you need anything further from us because --

JUDGE BABCOCK: No, sir.

JUDGE MAZZONE: -- that's what -- I think that's what the answer is -- to tell you when and where and under what circumstances you can depart? You need more from us or are you confident, do you have enough to work with right -- what you -- what you've done, what you've put into your own system?

JUDGE BABCOCK: The Supreme Court in Koon gave, I think, we trial judges a great tool to work with. My concern is that the Commission still has within your power the ability to further constrain departures by saying where I can't depart. Departures, I think, are something

that I would welcome a more expansive and expanded area of discretion in terms of application.

And in that respect, the other side of that coin is that the Commission has within its power the ability to define either areas of encouraged departure or areas where departure is prohibited. But I would welcome that expanded area in the area of departure, yes, sir.

JUDGE MAZZONE: Thank you.

JUDGE TACHA: Let me just see if I can summarize what I've heard from this panel. It seems to me three of you saying -- at least three of you are saying complexity is not the problem. Now, Mr. Katz and Mr. Miklic sort of seem to say it's the Guidelines, friends. Mr. Miklic, you pointed to one area where it seemed to me you were saying complexity is a bit of a problem and that is in the offense characteristics.

Is that -- do I read that correctly?

MR. MIKLIC: Well, I was looking at -- at complexity more in a fundamental sense.

JUDGE TACHA: That's what I was getting at.

MR. MIKLIC: Not that it's difficult for us to apply. We can do it. And I agree with Mr. Katz in that. It can be done and it's not to say that the Guidelines are unclear or that people have to struggle to understand what is meant, but it's complexity in the sense that it's just an -- it's very mechanical complexity in that sense and that I think there's too much of a shift of balance towards the mathematical mechanistic function and not enough recognition that you have to allow some room for discretion. So to me, if you get a very mechanistic system, it's going to be very complex and involved. That doesn't necessarily mean difficult to apply.

JUDGE TACHA: We have struggled with what does it mean to simplify and I think I've heard from all of you in one way or another the problem with the Guidelines is less the complexity issue and more as I think you pointed out and you, Mr. Katz, that it's just the Guidelines and -- and the -- the fetters that have put upon the sentencing decision. I don't think you probably want to address this at this point. If we take this, given that the Guidelines are here and we take as a given we see no indication in Congress of a retreat from at least some Guideline concept, then it seems to me it might be helpful to us if you thought about specific places within them where complexity does present a problems. And keep in mind what I hear Judge Babcock saying and which, by the way, the Federal Judicial Center found out that complexity may mean more -- change may result in more complexity than any efforts to simplify and specific examples would help us greatly.

Mr. Litt, I want to ask you a question that's somewhat pedestrian in nature and self-interested, but you point out the problem of reopening a whole sentence on remand after an appellate determination on a piece of a sentence, I assume. Perish the thought, but is that more a problem of lack of precision in the appellate opinion than it is a problem in the Guidelines? It's hard for me to kind of think how that's a Guidelines problem. It seems to me it's a remand

problem.

MR. LITT: Far be it for me to criticize appellate courts.

JUDGE TACHA: Thank you.

MR. LITT: I think it's an area where the -- where the Commission could, within the scope of the Guidelines, provide guidance to the courts. I -- I think, obviously, that if in every case an appellate court was completely precise about what issues were and were not left open, it would be helpful in that regard.

JUDGE TACHA: Judge Babcock, is that your opinion? You have immunity.

JUDGE BABCOCK: No. The Tenth Circuit never reverses my sentences. And the reason why they don't is because I have such able probation officers working in our court and such able counsel working with the United States Attorneys office and in defense. As I -- I have not seen that and I read the Tenth Circuit opinions and I have not seen that to be a problem in the Tenth Circuit opinions. The issues are very narrow by the time they reach the appellate panel in the first place where there is reversals, for example, for additional findings and an expression of reason for exercise of discretion.

The remands say just where and how they are to address that. So the issue is very narrow as it goes back. I have not seen that as a problem with the Tenth Circuit.

JUDGE CONABOY: Mr. Gelacak?

MR. GELACAK: Thank you. One observation and one question if I could. Mr. Litt, by way of observation, I can't tell you how pleased I am to hear part of your testimony this morning because since I came to the Sentencing Commission, I have been on a horse about less amendments, a two-year amendment cycle and while not specifically arguing about retroactivity, the fact that this Commission ought to have some established rules in place and I've taken a fair amount of grief over the years. It's a real pleasure to hear the department take that position finally.

Judge Babcock, if I could, I was -- I too was struck by your reference to the Uniform Commercial Code because over the years, I've likened the Guidelines a little bit to the interstate highway system in a remark made by Charles Kuralt years ago when he said what we've done is constructed a wonderful system where people can go from coast to coast and see absolutely nothing of the country. And much the same can, on occasion, be said about the Guidelines.

The other thing that you said that struck me was what Judge Tacha has just referred to, that sometimes we create more problems by talking about simplification than we anticipate or that we can even envision, but it strikes me that one of the ways that we can simplify the system is the simplest one and it may be sacrilegious to ask you this question, but as we see the political atmosphere that we are involved in today where our Congress and our legislature continually

wants to get tougher on crime, yet they pay no attention to the Guideline system as they go about that search for a tougher and tougher penalties, they complicate the system as they change the laws. And as a result, the system gets more and more complex.

One of the ways, obviously, we can simplify the system is to suggest to Congress that we no longer need a Guideline system and my question to you, sir, is having functioned in the State court with a considerable amount of discretion and recognizing that only under the Guidelines have you served in the -- on the Federal bench, but are we better off -- would we be better off without the Guidelines?

JUDGE BABCOCK: Well, that's, of course, fundamental. And that -- the answer to that question depends upon one's philosophy about the role of judges in the sentencing decision. Your analogy to the interstate highway system is very apt in the area of Sentencing Guidelines because I think what we have said here on our panel today and in one faction or another is that we have dehumanized the sentencing process and when you dehumanize a function of the law, I think it has potential consequences beyond simply well, let's be tough on crime. When you dehumanize a -- a fact -- facet of our legal system, I think it -- the problem is that it undermines the very foundation of the rule of law as being a human institution in the first place. And that troubles me.

If the Guidelines existed as pure guidelines, as touchstones for judges to look at, to articulate sentences fashioned within a wide discretion, I think they would be very helpful. So what I'm saying to you perhaps is the potential for a middle ground and that has been addressed by others and that is rather than making guidelines not guidelines but mandatory law to apply to a sentencing decision. Make them truly guidelines. There for the guidance of the sentencing court, guidance to the probation officers.

Would we be better off if we didn't have even those, I probably think not because one of the reasons I think we have guidelines in the fashion we have them is that judges didn't think about the way in which to articulate sentencing decisions to the constituencies which in and of itself leads to arbitrary sentencing decisions and arbitrariness in the sentencing process, I think, led to the disparities that largely have been addressed through the Sentencing Guidelines. So the Guidelines have had the beneficial effect, I think, of lending reason to sentences imposed, but in doing so and in the way in which they have been mechanistic and dehumanized, we have lost the articulation in the process. I mean, it's there if somebody wants to read it. But it's still not articulated. So I'm troubled by that.

JUDGE CONABOY: Any other questions? Judge Carnes.

JUDGE CARNES: Let me just ask Mr. Katz. You had said that you and the Government try to strive -- both of you -- to get just results for your clients and structure plea agreements in that regard in around 97 percent of the cases in the district last year. It sounds as if you all have come up with a formula where you have adjusted fairly well and I have contrasted that to, say, other districts where the U.S. Attorneys Office is quite adamant in insisting that the Guidelines be followed to the letter and appeal judges when they think improper departure is made. I also know for years, there are some judges in the Denver District who won't even consider relative conduct

and do not allow it to be put in the pre-sentence report. It sounds like different creative things have been going on.

In that vein, while somebody in another district, another defender in another district might find the Guideline results have been too harsh and unjust, it sounds to me as if there is an adjustment here. Are things working out pretty well for you from your point of view?

MR. KATZ: As I think we said before, we've made it work and what I said at one point to the Sentencing Commission in the previous time was that give lawyers a -- give lawyers and a judge a just result and the Guidelines won't prevent us from getting there. That's my experience. And I think in this District, at the outset of the Guidelines, this District Court decided very wisely to have counsel try to resolve Guideline disputes in the plea agreement up front before pleading guilty.

I've read plea proceedings from other districts where I represented a client also convicted in another district where I've seen all of that left until sentencing and the probation officer actually getting up and speaking to each of those issues. It horrifies me when I read that. In this District, we have most of that, if not all of that worked out. Not to say that professions necessarily always agree or that something we didn't anticipate doesn't come up. I think that's one reason why this district is -- works a lot better.

I have specifically told former Area Commissioner Nagel the concept that lawyers and judges are going to seek an opportunity to have litigated sentencing proceedings so that they can fight over the meeting of more than minimum planning or two level, three level, four level role in an offense to satisfy the -- the philosophy, let's say of the Sentencing Commission is beyond my comprehension and it hasn't worked that way in this district and, frankly, we've had, I think, very reasonable -- the United States Attorneys office have been very reasonable over two or three different United States Attorneys.

We have seasoned prosecutors who have been in state court. I think that the judges in this District are reasonable people who understand that the Guidelines if you apply them --

JUDGE CARNES: It sounds like they maybe use the Guidelines and the people are adapting and doing what they think are right --

MR. KATZ: There are occasions I would just -- the bank robbery case I had two weeks ago, where we struggled -- both sides struggled to try to get this somewhat impaired get-away driver of a vehicle in a bank robbery that was sort of a Keystone comedy in itself, to get him down to what would have been a fair and reasonable sentence for this man, despite the fact that he had a fairly long record. It's difficult sometimes, I feel sometimes like the challenge is all right, we sit down and we look at it and now we've got to figure out how to make some of these things disappear, go away and mitigate and in the process, some may say that's intellectually dishonest. If that's true, I say then doing justice is subverting the intent of the Congress or Congress and that's too bad.

JUDGE CONABOY: We're running out of time.

MR. GOLDSMITH: I've got a few questions.

JUDGE CONABOY: I can't set a time limit.

MR. GOLDSMITH: Mr. Katz, you gave us examples of problematic Guideline cases, those involving the gun possession and pawnshop context. What was the result in those situations? Do you recall the type of sentence that was imposed?

MR. KATZ: I know we had departures. In one case, we had a departure. The second case, the young man was simply with the young woman. I believe I got the case dismissed. I'm not certain. We were able to demonstrate the circumstances sufficiently, but there was no legitimate vehicle in the Guideline was my point.

MR. GOLDSMITH: Would the departure concept work appropriately to resolve the problem?

MR. KATZ: Because we were able to do an 11E1C sentence bargain with that departure built in and the judge realized it was fair and was not going to torture the application of that particular departure. We've done some very creative things on both sides here and I guess I have the sense of a bad little boy that maybe we're not supposed to be able to get away with this and we have to almost do things that are outside the mainstream. I don't think the Guidelines invite that. I realize take -- taking into account something that the Sentencing Commission did not consider or, to a degree, did not consider is part of it, but now you're talking about the basic --

MR. GOLDSMITH: The Commission has asked counsel and the bench to give us examples of unjust results under the Guidelines so I'm especially grateful for you to illustrate those problems for us today. If you could give us examples in the future, as well, either in supplemental comments or at any other time, I would be grateful.

Let me ask you, now, however, in your judgment, how many cases, percentage-wise, do the Guidelines produce unjust results?

MR. KATZ: If they were applied literally in this District, I think we're basically getting to just results, of course, given the fact that crack Guideline --

MR. GOLDSMITH: How about in the whole in this District and under what you view as literal application?

MR. KATZ: I can't really answer that question. All I can say is I think we -- in this District, we come a lot closer than I think most other districts.

JUDGE CONABOY: Thank you. Ms. -- I'm sorry.

MR. GOLDSMITH: Two or three more. Mr. Litt, you expressed some concern about retroactivity. I think the Commission likewise shares some of those concerns. But could you give us an example of circumstances under which you think retroactivity would be appropriate? When would that be valid to you?

MR. LITT: I prefer not to -- I mean, I haven't thought that through and I'd prefer not to shoot something off the top of my head for fear it would come back and be used against me later on. If you don't mind, I'd like to consider that and get back to you on that.

MR. GOLDSMITH: That would be great. Mr. Miklic, you had mentioned the vast array of resources that probation officers are given at the outset of their responsibility in this context. I'm wondering in how many cases do probation officers really have to rely upon all those sources? I mean, they have got a terrific library, it seems to me, to turn to, but how often do they have to consult them?

MR. MIKLIC: They have to consult them with frequency. There's an awful lot of case law that regulates how the guidelines are interpreted.

MR. GOLDSMITH: So this is an ongoing problem?

MR. MIKLIC: Yes, I think it is.

MR. GOLDSMITH: Fair enough. Let me also ask you, in your experience, what percentage of the cases do you think the results are unjust given the -- the technicians that you stated we've now produced as the probation officer? Are the results nevertheless appropriate?

MR. MIKLIC: As far as a percentage, that's just complete speculation. I really couldn't even make a guess of that. The question was are in most cases the sentences reasonable or fair?

MR. GOLDSMITH: Okay.

MR. MIKLIC: Was that your question?

MR. GOLDSMITH: Sure.

MR. MIKLIC: I think in most -- I think in most cases, there are some -- yeah. Some -- some general conforming to what's reasonable and what's fair.

MR. GOLDSMITH: Thank you. Judge Babcock, I appreciate your presence and your remarks. I'd liken it more than the UCC to the Tax Code.

JUDGE BABCOCK: Well, I --

MR. GOLDSMITH: Hadn't thought about that?

JUDGE BABCOCK: I'm kind of a quirky character. I like the UCC but I can't stand the Tax Code.

MR. GOLDSMITH: Thank you.

JUDGE BABCOCK: You're welcome.

JUDGE CONABOY: Commissioner Budd, do you have any questions? Mr. Reilly.

MR. REILLY: I might like to ask, if I might, Chief Miklic, I appreciate some of the comments you made. In terms of the numbers of documents you have to associate with your work, and you mentioned that you were Guidelines police. Recognizing that you also have a responsibility under the statutes to serve the U.S. Parole Commission, we're deeply grateful for the wonderful work your staff and your folks do. I'm curious about what percentage of the time, in view of the fact that you're the Guidelines police that you're obviously out policing the people you're supposed to supervise -- in other words, percentage-wise, it sounds to me as if a considerable amount of time is taken today in meeting with judges and prehearings and so on and I'm curious as to just the amount of -- what amount of time is now spent actually out on the road supervising offenders.

MR. MIKLIC: I'd estimate we spend about 70 percent of our time on supervision activities as opposed to pre-sentence activities. One of the ways we have been able to keep our head above water is to specialize and bifurcate things.

It's very difficult to stay on top of people in the community when you're trying to do Guideline research reports and run legal inquiries and keep up with case law at the same time. It's about 70 percent, I would estimate.

MR. REILLY: Do you feel comfortable commenting on the fact that under the new system, more and more -- more and more of these individuals are being put under what I may call administrative supervision which is basically they are in the file, but they are really not being supervised? Is that dangerous approach in view of what --

MR. MIKLIC: Well, I think it varies, frankly, somewhat from district to district how much commitment you want to make to supervision. I think there are districts where there is such a preoccupation with Guidelines that supervision, frankly, is suffering and suffering quite a bit, but it hasn't been the case here because we've -- we have -- we see community supervision and community protection as a very important if not the most important part of our mission, so we are continuing to focus on that. We do make some use of administrative case laws, but we use it on a limited basis and it's very carefully selected for offenders who do not pose a risk to the community. People that pose the risk, we devote quite a bit of our resources to them. I wouldn't say that's necessarily true nationwide.

MR. REILLY: Thank you.

JUDGE CONABOY: Commissioner Harkenrider?

MS. HARKENRIDER: No.

JUDGE CONABOY: Thank you. The commissioners went eight minutes and 45 seconds over their time, which means there is no time for the chairman. This is what always happens. No. I do thank all of you very much and as you can see, your testimony generates a lot of interest and questions. We could go on for a long time, but I thank you very much for your provocative remarks and a -- I would like to move to the next panel if you don't mind changing seats. Thanks again, very much.

Some people are asking for a break. I exercise my own prerogative and I'm not going to give you any break. We'll move on with this panel if you don't mind.

This next panel consists of Mr. Patrick Burke, who was the public defender here in the Colorado from '78 to '82, I guess, and a -- Mr. Burke is now the coordinator of Criminal Justice Act Panel Attorneys here in Colorado.

And Mr. Frederick Bach, who is the supervising probation officer here in Colorado.

Mr. Arthur Nieto?

MR. NIETO: Nieto.

JUDGE CONABOY: Am I pronouncing it right?

MR. NIETO: That's perfect.

JUDGE CONABOY: Who is a former chairman of the criminal law section of the Colorado Bar Association.

MR. NIETO: Right.

JUDGE CONABOY: And has an extensive background in the criminal law. And served as a Colorado State Public Defender for a number of years back in 1974 to 1978.

And Mr. Michael Bender, who is a defense attorney here in Denver and was a Deputy State Public Defender in Denver until 1971 and a -- was division chief for the Denver Public Defenders Office for a number of years.

So we will begin this panel with Mr. Burke. If you don't mind going first. You can use that microphone or stand, whichever you like. I understand your panel has agreed to five minutes each.

MR. BURKE: I'll move quickly, Your Honor. I'm standing up.

JUDGE CONABOY: Reset the clock and we'll give you a full five minutes if we can.

MR. BURKE: Mr. Chairman, members of the Commission, Mr. Purdy asked me to direct my remarks to the effect that the guidelines have on panel attorneys with perhaps an additional perspective on how it's worked in this District and I have been practicing law in this District for a sufficient number of years to comment on the latter topic, as well.

The way the guidelines impact panel attorneys is perhaps best discussed by mentioning a typical case in this district. What happens with panel attorneys most often is we will get the many co-defendants in a drug case, for example, or the public defender will get a defendant and then panel attorneys will be appointed for a half dozen or dozen co-defendants. And we will begin our attorney-client relationship by meeting our client in a little teeny room with metal tables and chairs, sometimes with a piece of glass between us.

The Sentencing Guidelines are part of the triumvirate of congressional micromanaging of the Federal criminal justice system. The other two being making sure that the defendants are detained in drug cases and the other one is being minimum mandatories. And I saw that the chairman made a remark about the effect of minimum mandatories in one of the papers that I received.

So we meet our clients in little rooms. They have been detained and they are facing minimum mandatories and that's how we get started. It's almost impossible to develop a good attorney-client working relationship under those circumstances.

In one of our early meetings, we will go out to meet with the client. We will take the Federal criminal law and the Guidelines book and we will work our way through to the right point on the grid that the defendant is probably looking at because in this district, fortunately we get some discovery early.

At the end of those early meetings, our clients are almost invariably convinced that we're just part of the system. They look at us as another one of those people up on the hill with all these weapons pointing down at them. It's very, very difficult under the Guidelines and under minimum mandatories to have a good working attorney-client relationship. So one of the things that's happened with the Guidelines is the attorney-client relationship has suffered tremendously.

The next thing that has happened because of the Guidelines is -- and this was mentioned by a number of the earlier witnesses, particularly Mr. Katz -- we've turned -- and the questions were all right on target -- we've turned into plea bargainers.

The most important tool that the panel attorney has these days is not skillfully turning the phrase or being a good researcher. It's getting the knee pads out to go into the prosecutor and start working for a suitable plea bargain. The casualty is the attorney-client relationship and the casualty is we don't get to try cases that need to be tried because the risks are too great.

As far as how the Guidelines are -- have worked in this district, I did a number of cases

before they went into effect in the old days and the sentencing judge would receive an excellent pre-sentence report. That's not being synchophantic. The probation department in this district has always provided good pre-sentence reports with good personal backgrounds and a judge would just grapple with what to do. And Judge Babcock was not kidding when he said he would have sleepless nights. I could see in the faces of the judges that they had not slept in the old days. They would come and on the Friday morning docket would be sentencings and they would be haggard and they hadn't slept and they agonized. And that's how the system worked. And I'll tell you what. It was a better system. It was a better system because Article 3 judges took their jobs so seriously and they did agonize over it. The decisions were individualized, they were personalized.

And so with my 40 seconds left, I will go to the only suggestion that I think makes the most sense is to make them guidelines, not make them mandatory. Let these Article 3 judges struggle over what they will do, individualize what they will do with each of my individual clients. That's what panel attorneys would like to see.

I read some of the history and I remember it brought it back that Senator Matthias and some others said these should be discretionary guidelines, not mandatory and they should be discretionary and the Article 3 judges should be given more options and they should be given more discretion so that my clients get a sense -- and a couple of witnesses talked about it -- that they were treated humanly, that the process is humanized.

JUDGE CONABOY: Thank you, Mr. Burke. Mr. Bach, would you go next, please.

MR. BACH: Sure. My name is Fred Bach and I'm a supervising U.S. probation officer for the District of Colorado. I haven't spent my whole career into Colorado. I began my career in 1987 in the Eastern District of New York, Brooklyn and at a time when the Sentencing Guidelines were a rumor which no one really thought would become a reality. In the Eastern District of New York, I served in the special offender unit, supervising members of organized crime and career criminals. I also had the opportunity to write many old law pre-sentence reports as well as Guideline pre-sentence reports.

In late 1990, I transferred to the District of Colorado where I continued to write pre-sentence reports and also served as the district special offenders specialist. In October 1994, I became supervisor and until last month, I supervised the pre-sentence investigation unit where I was responsible for reviewing most of the pre-sentence reports prepared in this district.

In light of my experience, I'd like to address my remarks to the impact that the Sentencing Guidelines have had on the probation officer's role during the sentencing process.

During pre-Guideline presentence investigation in most districts, the probation officer interviewed and reviewed the files of the investigating agents and Assistant United States Attorneys and wrote the prosecution version of the section of the report. The defendant was also interviewed regarding the nature and circumstances of the offense and that information was included in a defendant's version section of the report. These sections, combined with an in-depth

description of the defendant's character, personality and relationships were presented to the sentencing judge in an organized objective report so that the judge could evaluate the information and impose an appropriate sentence.

When the Guidelines went into effect in November of 1987, prosecutors, defense attorneys and judges looked to Federal probation officers to become the experts on Guideline sentencing and, much to their credit, Federal probation officers rose to the challenge of mastering the intricacies of guideline sentencing. However, the Guidelines also imposed upon the probation officer the duty of evaluating the defendant's relevant conduct in determining a tentative range. This duty essentially forces the probation officer to take a position in this adversarial proceeding to which the probation officer is not a party.

Because of the importance of case facts and the correct application of Guidelines to those facts, attorneys for opposing sides often aggressively contest the accuracy of the probation officer's facts and Guideline applications. Probation officers are now placed in a position where they must defend their Guideline applications and become familiar with case law in the issues in dispute.

Since the implementation of Guideline sentencing, I have seen both defense and Government attorneys' attitudes towards probation officers shift from cooperative to adversarial. The probation officer's role in Guideline sentencing has sometimes led attorneys on both sides to accuse probation officers of busting plea agreements and practicing law without a license.

Probation officers now expend an excessive amount of time responding to objections, which often lead to lengthy and complicated hearings in both the district courts and the courts of appeals. The more time probation officers spend dealing with objections and lengthy hearings, there's less time spent supervising offenders in the community.

Since the implementation of the Sentencing Reform Act, sentencing has become a more generally cumbersome and expensive process than it ever was before, with the probation officer frequently caught in the middle of disputes. In the early days of Guideline sentencing, the probation officer's expertise was welcomed. However, in recent years, many probation officers have come to feel like an uninvited guest at the sentencing table.

I would also like to address the problems probation officers now have obtaining information for inclusion in the pre-sentence report. Because the pre-sentence report has become a more heavily litigated document than it ever was in the past, probation officers are less likely to obtain important information from defendants, as many defense attorneys now screen the information provided to the probation officer. Attorneys regularly advise defendants not to discuss their offense, criminal history, drug use, or finances with the probation officer out of a fear that the information will be used against them. This results in a more sterile, less informative report, which sometimes compromises the Court's ability to get a comprehensive picture of the defendant and his behavior.

I believe that the Commission's proposals which consider simplification of relevant

conduct and other issues would help remove probation officers from the awkward role they often find themselves in. Most Guideline disputes are related to relevant conduct issues which potentially could be ironed out before a guilty plea is entered. Simplification of the Guidelines would also be more consistent with the plea bargaining process, which, for better or for worse, drives our criminal justice system. Thank you.

JUDGE CONABOY: Thank you, very much, Mr. Bach. Mr. Nieto, will you go next, please.

MR. NIETO: Thank you for inviting me. Please the Commission and Mr. Chairman. Mr. Purdy supplied me with a copy of my testimony from the 1986 hearings. I was struck at the difference in outlook that the last ten years has wrought as far as my approach to the Guidelines. I practiced criminal law in the Federal courts for about ten years before the Guidelines were enacted and then since then, I've continued to practice in Federal court.

Many of my concerns after having read the initial drafts in 1986 actually didn't come to fruition. What I have observed is that the process changed basically in regard to the participation of the defendant, whereas before the Guidelines were enacted, we received an indictment, we did the discovery, we planned pretrial motions, we did some discussion based on the strength or weakness of the Government's case with the Guidelines in effect, the defendant is immediately put in the middle of the process.

The two issues that -- that come up fairly immediately, long before litigating pretrial motions, are acceptance of responsibility and substantial assistance. I was surprised to hear that 97 percent of the cases in Colorado end up in plea bargains. My perception has been that since the enactment of the Guidelines, fewer of my cases go to trial than before the Guidelines, but I wasn't sure if that was because of the Guidelines or my maturity or my better analysis of cases.

But what acceptance of responsibility does is certainly puts a -- an incentive on the defendant to -- to make a deal and make a deal as soon as possible. Is that good? Well, to the -- to the degree that it -- it relieves docket pressure and it results in fewer trials and more deals, it's probably good.

I -- I happen to believe in the -- the right to trial by jury, not only as a means of avoiding punishment or potential punishment on the part of the defendant but as a societally meaningful process. It not only educates the defendant, but it educates the public about what is civilized and what is uncivilized behavior and what is punishable and what is okay. And by fewer cases going to trial, I think that society has fewer opportunities to -- to participate in that sort of cleansing process of -- of societally acceptable behavior.

On the other hand, the Guidelines are here so we deal with acceptance of responsibility and we deal with it very quickly.

The other aspect of the Guidelines that I see often in my practice is the matter of substantial assistance. My perspective -- and I see my time is running out more quickly than I

expected. My perception of substantial assistance is it really penalizes the little guy. It penalizes the first offender, the person with fewer criminal contacts.

Particularly in Government sting type operations where the -- the actors in a criminal enterprise are -- are Government agents, a defendant can't snitch on anybody because they are all Government agents. A first offender doesn't know other criminals. A person at a lower level of -- of a large conspiracy can't give the Government information that it should have and the first offenders and the lower level criminals are really, I would submit, the defendants that should have the benefit of the 5K1 departure for substantial assistance and not the -- not the bigger crooks.

I -- one case in particular that was really problematic was a child pornography case that I did about six months ago. And this fellow had been the subject of a Government sting in 1992. He didn't buy it. The Government put away its file and revived it in 1996. He did buy some child pornography in 1996 and because he doesn't know anybody in child pornography except for Government agents, he is looking at a solid level 13. This man is a hard working State employee, frankly, with a family and with no criminal history and he's going to jail.

I see that there's some consideration being given to making 3 point acceptance of responsibility credit available to everybody. I endorse that. I think that would be one way of correcting the inequities in the substantial assistance part of the guidelines.

I -- in 1986 and today, I agreed with one part of the Commission's work and that is to continue to refine the Guidelines and to tinker with them and I applaud your efforts to tinker with them and make them more workable. Thank you.

JUDGE CONABOY: Thank you. Mr. Bender.

MR. BENDER: Your Honor, members of the Commission. Mr. Chairman, I mentioned about finality. In my opinion, there was a saying that my excellent high school math teacher said, there's only three things in life that you know for sure, death, taxes, and homework. So with that in mind, I'm going to take Mr. Purdy and his death, taxes and homework and I'm going to take Mr. Purdy's comments and talk philosophically. I understand the guidelines are here to stay. I understand public opinion is what it is. But I think you heard from persons other than defense lawyers who have told you that there is much more to respect for the law than simply punishment and that one of these things is the whole concept of fairness and due process.

The things that occur to me as a practitioner in the field, the first is obvious, the Commission has spoken about it, the crack penalties. The second is one disparity. That may not only be true in this district, but there is an enormous difference in sentencing between State and Federal court systems, particularly in the drug area. We have in Denver a drug court which I think is very forward looking and very successful and it's causing a lot of the resources on cases to be brought into the Federal system. I can give you some anecdotal evidence later.

But probably the most important thing is the guidelines in my view, as Mr. Katz said, are draconian. We talked about a mythical journey. I couldn't agree more. But the most and worst

example of that, in my view, is the substantial assistance aspect. 5K1.1. I'd say that in our district, I believe I've never met a prosecutor who didn't act in good faith and didn't make a judgment. It's not a personal thing at all.

This is an area which breeds enormous sentencing disparities and even though it may be on a national basis, the districts are similar. Here you have a situation where instead of having 548 Article 3 judges making independent sentencing decisions, you have thousands of Federal prosecutors replacing the judgment of an Article 3 judge. You have historical conspiracy, which we call no dope dope cases. Little guys and loners receive harsh sentences while Mr. Nieto pointed out organized people in the business of crime receive less harsh ones, but probably more importantly is the impact that the Guidelines as a whole and the 5K1.1 have specifically on the role of the defense lawyer, a transformation, in my view, of fundamental jurisprudence by limiting or reducing the role of the defense lawyer as well as the judge.

You heard Judge Babcock say now he sleeps well. And what is usually said is what the lawyers -- the lawyers bring the plea bargain and bring the arrangement to the Court. That's true. The lawyer, though -- as Mr. Katz alluded to, candidly speaking, you don't have to be a rocket scientist or a great criminal defense lawyer or a good legal researcher or do a lot of factual homework to get something that's better than what the Guidelines Draconionally insist in terms of mandatory minimum sentence. So what the job of the defense lawyer is is to get any kind of deal they can.

5K1.1 is -- is the ultimate, if you will. It sort of reminds me of the Allstate ads. Put your life in the hands of the good people. And they are good people. I'm not criticizing them. But they just represent one aspect of the tripartide adversarial system. And as far as the constitutional defense advocate, he is getting on knee pads is a polite way of saying it in the overall scheme of the system. Less cases are litigated on constitutional issues. Less cases are investigated. And instead, you have a huge body of case law developed about application of the Sentencing Guidelines. And the vast majority of the cases in this district, while there's cooperation and it's good, it's well done, I have no quarrel with it, the prosecutor determines the sentence that the person gets.

And I, for one, would ask you to eliminate 5K1 period. If you want -- if you like, make it a grounds for departure. Think about that. Really, what I'm arguing for is a return to the good old days where there is no penalty for exercising your constitutional right of trial. An individual, a citizen is sentenced based on proof beyond a reasonable doubt on the conduct that has been charged and except for the most heinous crimes, people have -- the judge has the option of placing the person on probation.

There should be, as Judge Babcock said, an articulation of the conscience of the community in the specific case where sentence is handed down and the guidelines, as intellectually awesome as they are, don't do it. Thank you.

JUDGE CONABOY: Thank you, Mr. Bender, very much. As we go to questions on this one, if we can, can we set that for ten minutes this time and see if we can do a little better since

we're getting pressed for time.

And Commissioner Budd, since you didn't ask any questions before, we'll start with you.

MR. BUDD: Well, thank you, very much, Mr. Chairman. And I'd like to ask a question of all of the panelists. I'd like to -- I listened very carefully to what you had to say and you know as I do that the purpose of the Guidelines is to achieve some measure of consistency in fairness in sentencing and I'm wondering in your view, with respect to this how far have the Guidelines gone in achieving these goals of consistency and fairness? Overall fairness and consistency. And I have in mind what has been mentioned by a number of the panelists this morning and that is, in the State of Colorado, 97 percent of the cases are pled out and of those -- in that 97 percent, as I understand it, the vast majority had agreed upon plea agreements.

MR. BURKE: I think it's failed for that exact reason. Plea bargaining is different in different districts and, therefore, sentences are different in different districts. It's not because the prosecutors here are lenient. They are a little more fair-minded. The question about this district seems to be reaching out for some sense of rough justice where some prosecutors in another district will hammer on the Guidelines, take advantage of all the piling on points that are available in the guidelines and you end up with different sentences for the same conduct.

So it's really failed and I have lots of anecdotal information about that, too, people calling from prison and this person and so forth. So it really has failed. It's a good idea, but it failed.

MR. BENDER: I want to reply to one narrow area. The Denver drug court, we're -- there's a presumption that you've -- if it's a first offender, you're going to get a diversion, placed in a diversion program. It's incredibly inconsistent as to which jurisdiction you find yourself involved in committing a minor drug offense, a Federal -- Federally or not.

Secondly, I think there's a huge disparity internally just in what constitutes substantial assistance. I mean, for example, a famous case, I'm sure you heard testimony where they had 27 Government informants. Each one of those individuals had enormous drug involvement and I know they were given all kinds of deals. I mean, how do you square that with the case of where I have -- I represent a -- I represent on a court-appointed basis an African- American who sold in, I think, a three-month period of time 16 grams of crack. First offender. He's now doing -- and I had a sympathetic judge, sympathetic prosecutor. They called it substantial assistance, but he didn't have anybody to really snitch on and he's now doing 30 months in a Federal prison. Everybody thought the case should not be brought in Federal court, but there we were. So I don't think it's been successful.

MR. NIETO: Not successful. Drug cases come to mind. I think in Colorado, you're in better shape if you're the wife of a kingpin smuggling multiple grams of cocaine in the United States than if you're a first offense single time fellow who sells a kilogram of cocaine to an undercover officer. The wife walks. The first time offender, I know one that's doing nine years.

MR. BUDD: Just given the presumption -- that we should have talked for these purposes

-- at least that the Guidelines are going to remain in effect, then what should be done to accomplish those goals?

MR. BENDER: I'll jump in. I think a lot of the -- the questions that you are asking are very helpful, very positive. I applaud the whole issue of relative conduct and how that should be dealt with. I think it's wonderful. I'm in favor of it. If this is simplification, I applaud it. I mean, certainly, there are problems with simplification that you all know, but, to me, the thing that you're doing is making a bad system a little more digestable and it's certainly useful.

JUDGE CONABOY: What would you do with relevant conduct?

MR. BENDER: If I were writing the law, I would only consider relevant conduct in terms of conduct at conviction. Period.

MR. GELACAK: Just one quick one, Mr. Bender. I think everyone on this Commission has been struck by the disparity between State sentencing and Federal sentencing particularly. Are you aware of any studies that have been done here to -- to demonstrate how that decision is made?

MR. BENDER: You know, I'm not specifically. You mean the law enforcement decision whether to come to Federal court or State court?

MR. GELACAK: Yes. That may be an unfair question. If you are aware or if there is some work being done, we would appreciate seeing the results.

MR. BENDER: You know, I -- I don't. I know that I talked to the chief of the Mountain States Drug Task Force last week who advised me that he was having a meeting with the Denver District Attorney's Office. I assume it was something along the lines you're saying. The only thing that I know that statistically is true is in the drug area in Denver, Denver County. Not in the other counties. And there's no question about the difference in treatment. And there's no question if you talk to narcotics detectives who actually do both Federal and State prosecutions, they will tell you that when they want to cause someone more problem, they will bring them in the Federal system. There's just no doubt about that.

JUDGE TACHA: I just quickly want to ask, the question of the first time offender is one that we hear all over the country. It's one that's expressed a lot. Has the safety valve amendment alleviated that somewhat?

MR. BENDER: I have another court- appointed case where the safety valve alleviates the mandatory minimum, but it doesn't alleviate the basic harshness, for instance, of the crack cocaine penalties. So sure, it's better than nothing, but it's certainly -- and it's nothing like it would have been eight or nine, ten years ago. The Court has no discretion but to give a mandatory minimum sentence of a substantial amount of time.

JUDGE CONABOY: Any other?

MR. GOLDSMITH: First, I would like to invite members of the panel again in your supplemental comments, if any, to advise us about any cases that you think demonstrate unjust applications of the guidelines. Just cases where someone obviously was -- the trial judge ought to be thinking about those cases as being terribly unfair.

Beyond that, I wanted to clarify, Mr. Bender, your concern or criticism of 5K1.1. Was your criticism aimed at that provision in general or simply to the aspect of it that you first get the Government authority to make the decision about whether to award 5K1.1?

MR. BENDER: I think that the Government -- as far as I'm concerned, prosecution is -- I've been involved for almost 30 years -- the Government always has the decision whether to prosecute someone or not or make deals, so to speak. I certainly think that's fine. What I think is bad is that the way it is structured in 5K1.1 is a philosophical matter. It pronounces the impacted effect of the prosecution. So I wouldn't say it should be eliminated for that reason. I think all the Guidelines do is have that shift as Mr. Nieto explained to you. You don't look at a case and determine -- when you get a case, you don't determine what kind of legal issues are here, what are the facts. You look right away at the defendant.

MR. GOLDSMITH: The sense then is it is more fundamental than simply with the fact that the Government has authority to make the decision about whether to file that motion. Even if we said that the Court has discretion to award substantial assistance points, you would object?

MR. BENDER: Well, no, I wouldn't. I say that would be a proper role for departure within a guideline system. But the problem I have is that what the Government says is usually followed, as a practical matter, and so they are determining the whole matter and judges and defense lawyers, we don't know how to evaluate the information that somebody has given.

I don't have enough time to explain this. I don't have the experience to know who are the proper targets and what information is and how truly valuable the information can be that's given. That's really the role of the prosecutor. It's used as a means to -- to get out of a draconian system. Sometimes in a very just way. But I don't think in terms of an overall system, it's a healthy thing.

MR. GOLDSMITH: Thank you. Mr. Burke, a question for you. Are you satisfied overall with the level of understanding demonstrated by panel attorneys with respect to the Guidelines? Do they know the Guidelines well enough, in your judgment?

MR. BURKE: Most of the time -- we have mailings that go out almost once a month and we conduct four seminars a year and so there's a lot of information being disseminated.

I heard Judge Babcock say every once in a while, you get an inexperienced lawyer that comes in and is not doing a great job for their client. When I heard that, I thought it was probably a younger retained lawyer, seriously. The information gets out from the AO, from our panel and from the Federal Public Defenders office.

MR. GOLDSMITH: It gets out and it gets read?

MR. BURKE: I think most of the time, it does get read. We talk about it a lot amongst ourselves in the seminars.

MR. GOLDSMITH: Thank you.

MR. BURKE: You're welcome.

JUDGE CONABOY: All right. Thank you, very much. Judge Weinshienk, I see in the courtroom. We're going to take a bit of a break here. Would you like to make some comments either now or right after the break, Judge, or --

JUDGE WEINSHIENK: After the break is fine.

JUDGE CONABOY: After the break. Okay. Thank you. All right. Let's take a ten-minute break. We'll resume at 11:20.

(There was a recess taken from 11:06 p.m. to 11:17 p.m.)

JUDGE CONABOY: Almost everyone is here. Let me at least introduce the panel. The next panel is intended to talk principally about relevant conduct and acquitted conduct. And again, we have asked the speakers to limit their comments here to five minutes and then I'll ask for some questions.

Professor Kevin Reitz is an associate professor of law at the University of Colorado Law School and served as a reporter for the ABA Standards for Sentencing and has written a number of articles and does considerable speaking on sentencing matters throughout the country. He was with us just recently in Madison at the National Association of State Sentencing Commissions.

And Mr. Kurt Thoene --

MR. THOENE: Thoene.

JUDGE CONABOY: Thoene?

MR. THOENE: Yes.

JUDGE CONABOY: -- is a senior probation officer also here in the -- in Denver and has spent, likewise, some of his time in trying to work with others around the country and in developing better sentencing processes.

And Mr. David Connor is the assistant -- Assistant Public Defender here in Denver. Served as Chief Deputy District Attorney from 1980 to '88 and then became Assistant U.S. Attorney in Denver here in 1988.

Then now and finally, Mr. Robert Litt is with us again on this panel to help us with these topics, also.

So let's begin, if we can, with Professor Reitz.

Judge Weinshienk, I want you to know something. Every one of the commissioners has asked me why I'm not calling on you.

JUDGE WEINSHIENK: I'll be available after this panel.

JUDGE CONABOY: I keep telling them that, but they don't believe me. I just want you to know how popular you are. Just because you came out of the great 1979 class of district judges. Best ever, they tell me.

JUDGE MAZZONE: And you're buying lunch.

JUDGE CONABOY: Professor, would you go first.

PROFESSOR REITZ: Sure. Judge Conaboy and members of the Commission, thanks for inviting me here.

I think that I am called upon to testify not so much as an expert in the Federal Guidelines, which I'm not in particular, but as someone who has spent time around various sentencing guideline systems around the country, particularly at the State level. I have written, I think, the only article on real offense sentencing that concentrates on issues at a State level rather than Federal level. I haven't spoken before in any detail about the Federal relevant conduct provision.

So what I'd like to try to do today is perhaps provide some perspective in terms of policy choices or design choices different sentencing systems have faced in terms of real offense sentencing and bring them to bear on the relevant conduct in the provision of real offense features of the Federal guidelines.

I would begin by saying I think your staff discussion paper is very good on this issue. That there is no such thing as a pure offensive conviction sentencing system in the country, at least to my knowledge, just as I think there is no such thing as a pure or ideal real offense sentencing system, either. What tends to happen in different jurisdictions, particularly in guidelines jurisdictions, is that the system as a whole leans more heavily towards one side of the continuum or other, so that either more or fewer real offense elements are incorporated into the eligible factors at sentencing.

So it's -- it's a misnomer or unless we understand that the term "conviction offense" tends to signify a -- a system that leans towards conviction offense sentencing rather than an ideal system. If we can agree on that sort of approximate terminology, then I think, definitionally, understanding is improved.

Now, in terms of the Federal system and where the Federal system lies on this continuum, I see two different types of real offense actors or elements entering into the Federal guidelines; one of which is very common and is shared with other systems around the country and the second of which is not so common and is more controversial.

The first, the Federal system incorporates a number of real offense elements and by that I mean facts in addition to the statutorily defined elements of the offense for what I would call grading purposes in order for the judge of sentencing to determine how serious the case of mail fraud, of bank robbery or so on is before the Court. And this, in fact, is something in terms of extra offense fact finding that is done in every state system that I know of. Every state considers facts beyond the offense to determine where on the possible scale of seriousness a particular crime lands.

Now, in addition to that, the Federal system does something that, to my knowledge, is unique among guideline systems and that is it incorporates a real offense sentencing to actually change the definition of crimes, which is the foundation of the sentence calculation as you move through the Guidelines, so that it's possible in the Federal system for the Guideline calculation to proceed on the basis of three counts where the count of -- where there's only one count of conviction or perhaps a differently defined criminal offense than the count of conviction.

Now, that is something that is not done in state-wide systems, to my knowledge, and I have distributed, I think, to Commission members an excerpt of the American Bar Association's recently published criminal justice standards which includes as a matter of policy that as a base predicate for sentencing consideration, the offense of conviction is a better, more just starting place than perhaps a different set of offenses as determined at sentencing.

Now I should say after having made that distinction that both types of real offense sentencing for grading and for selection of the crimes that will be built upon for sentencing purposes -- both types of real offense sentencing, I think, are constitutional under existing case law and are eligible for the Commission within its policy judgment to choose between.

The principle or the -- the basic philosophy of those of us who prefer a conviction offense orientation is simply this: The belief that if Government is going to impose a criminal punishment on a citizen, it should first convict that citizen of a crime for which punishment will be imposed. Again, this is not a constitutional principle. It's not a principle that everyone agrees with. When I speak to someone whose experience primarily is in the Federal system, they often tell me, Professor, you're right as a matter of idealism or principle, but the real world doesn't work that way. I continue to take some comfort in the fact that the State guideline systems work that way. It at least gives me some sense that there is a real world possibility here that is somewhat different than I see under the Federal relevant conduct provision.

JUDGE CONABOY: Thank you. Mr. Thoene, if you will proceed next, please.

MR. THOENE: Good morning, Mr. Chairman. I'm not as polished a speaker as some of the other panelist members so I was going to confine my comments strictly to my written notes.

However, after hearing some of the other panelists already this morning, I do have an observation and that is my observation is that the majority of us, I think, in the criminal justice system, probation officers, Federal judges, U.S. Attorneys and defense attorneys who didn't experience the evolutions of -- the so-called evolution of the Guideline process, I don't feel that we are as burdened as some of the people that have lived through that evolution process and have experienced what the system was like before the Guidelines. And I think that we have an easier time, even though we may have reams of information to go through to help us to determine the Guidelines. I think that we feel more comfortable with that.

Comments on relevant conduct. After a finding of guilt by -- either through a jury or by the entry of a guilty plea, a defendant's case is assigned to a U.S. probation officer to prepare the pre-sentence report. The officer determines the appropriate offense guideline and then is instructed to determine the applicable guideline range in accordance with Section 1B1.3. That's the relevant conduct guideline.

The local rule for the District of Colorado requires that plea agreements contain a stipulation of factual basis. That is, the plea agreement must set forth the facts of the case. How much the loss was, how much the quantity of drugs -- the quantity of drugs involved, the role the defendant played in committing the offense and any pertinent information that would affect guideline application.

In addition, the plea agreements drafted in the District of Colorado also contain detailed Chapter 2 and Chapter 3 guideline annotations based upon the stipulation of facts. The probation officer uses the stipulation of facts as a starting point when attempting to ascertain the real offense conduct.

Additionally, the probation officer reviews the investigating case agent's reports, grand jury testimony and additional discovery materials to determine if all the relevant conduct has been asked for in the plea agreement.

It is when the probation officer sets forth the real offense facts gleaned from the discovery materials that the application of the relevant conduct provisions become problematic for the probation officer. Not problematic in the sense of what is to be considered relevant conduct for Guideline application, but problematic in how the inclusion of this information has an effect on the plea negotiation process.

On occasion, the probation officer learns that the stipulation of facts contained in the plea agreement does not correlate with the information contained in the discovery materials. For example, there may have been more drugs involved in the offense or the defendant may have possessed a weapon. All of these factors may have an impact on Guideline calculations. By including this information as relevant conduct, probation officer is often seen as a plea buster. The Government will say well, that information -- both the Government and the defense counsel are most likely aware of that information; however, the information may not have been included in the plea because of -- of plea negotiation processes. This leaves the probation officer in an awfully difficult and frustrating situation. On one hand, you have a plea agreement which is beneficial to

the defendant. On the other hand, there is a prosecuting attorney who wants to uphold the plea to prevent the case from proceeding to trial.

The probation officer has essentially become a third-party adversary in the sentencing process. However, if the Government is not known to support the application of what appears to be applicable relevant conduct, the probation officer is not in a position to put on evidence or call witnesses at the sentencing hearing.

In addition, the application of additional relevant conduct not accounted for in the plea agreement often results in Guideline range overlaps and these overlaps can -- the Court can often make a finding that this is not an issue that will actually affect the guideline range and, therefore, he will not make a finding on the disputed issue.

I've been a United States probation officer for six years and my job duties involve the reviewing of other probation officers' reports. In addition, I have served a temporary tour of duty on the Sentencing Commission hotline, answering numerous probation officers' questions on the application of the Guidelines. Based upon this information, it is my belief that over the past eight years, U.S. probation officers have developed a good understanding of how the present relevant conduct provisions found in Section 1B1.3 are to be applied. My personal experience indicates that officers preparing pre-sentence reports resolve many of the difficulties in determining what is relevant conduct and how to apply the current relevant conduct provisions.

Although my previous comments have reflected upon procedural problems in applying the relevant conduct guidelines in the District of Colorado, I believe that the current guideline provision for the way relevant conduct is used in calculating sentences does not need clarification or modification unless a major substantive change is made to the charge offense system. Any clarifying amendments to the relevant conflict guideline may create new confusion and complexity to this issue. Thank you.

JUDGE CONABOY: Thank you, Mr. Thoene.

Mr. Connor.

MR. CONNOR: Thank you, Your Honor. May it please the Commission.

The relevant conduct Guidelines Section 1B1.3 and then related sections in Chapter 3 are the driving engine of the Sentencing Guidelines. And while some of what has been good about the Sentencing Guidelines stem from the purview in Section 1B1.3 of the relevant conduct guideline, almost all of what is bad about the Sentencing Guidelines stem from that particular Guideline.

I would urge the Commission to consider that, number 1, no acquitted conduct should be used in computing the applicable Sentencing Guideline -- in coming up with the applicable Guideline range.

Likewise, I would strongly urge the Commission to consider limiting the relevant conduct to the offense or offenses of the conviction in a given case or, in addition to that, any additional conduct to which the defendant agrees or stipulates is part of a plea bargain or in the post-conviction phase prior to sentencing.

This weekend, I thought about this issue and thought about defendants basically having to defend against conduct that they have been acquitted of, then in a sentencing proceeding having to answer to conduct that was not part of the offense of conviction and the term "recumbent" came to mind and I won't ride that horse any further since Mr. Bender made such use of it in the previous panel. The term "Kafkaesque" came to mind as well. But as I was listening to some of the proceedings here earlier this morning, I did some of what lawyers do sometimes. I sat down and was working on another legal issue and was reading various appellate opinions and I came across a line in the United States vs. Villano, which is a Tenth Circuit opinion which states, I think, pretty much what my position is about relevant conduct and why it should only be the charge or charges of conviction. And the Tenth Circuit said, "The imposition of punishment in a criminal case affects the most fundamental of human rights, life and liberty."

Fundamental fairness mandates that acquitted conduct should not be used in computing relevant conduct and computing the sentencing range. And likewise, that it be limited to the count or counts of conviction.

I think one of the problems that exists in this area is in Chapter 1, in 1B1.3, the -- all facts for sentencing purposes are assumed to be equally as provable as all other facts and, in reality, that's just not the case.

Likewise, in Chapter 1, it assumes that all facts or any facts that may fall under the purview of Section 1B1.1 -- or excuse me -- 1B1.3 are as easily provable as any other facts and that just as well simply is not the case. That's all.

JUDGE CONABOY: Thank you, Mr. Connor, very much. Mr. Litt.

MR. LITT: Thank you. The relevant conduct guideline and the real offense approach that it carries out in our view is critical to the goals of the Sentencing Guidelines which I mentioned earlier, being predictability, certainty, uniformity and fairness in sentencing.

We believe that if the concept of relevant conduct were significantly limited, it could have a very detrimental effect on the central purposes of the sentencing format.

There was some discussion in the last panel of the unfairness of some of the drug sentences wherein you have a kingpin who can -- who can cooperate, sometimes getting the benefit for a sentence that the mule who can't cooperate in any significant manner doesn't have. And I think people expressed concern about that. I think you're going to find the same thing if you go to a charge -- more to a charge offense system or something that's limited to the offense of conviction. You can have two drug dealers who look very similar, but one of them, for whatever reason, be it that the witnesses are intimidated or evidence is not available, is convicted of far

lesser counts than the other and yet these two people who to all intents are -- are engaged in the same conduct, one of them will get a significantly lower sentence than the other.

I don't think that that, in the long run, will be productive of confidence -- public confidence in the sentencing system. I also find it somewhat ironic that many of the same people who complain about the supposed increase in prosecutorial control of the system are advocating moving towards a charge offense system because that will undoubtedly be seen as further increasing the control the prosecutors have, since it is the prosecutor and not the Court who determines what charges are brought.

Finally, one criticism that -- that's made is the -- it was referred to before -- is the idea of these upsetting the expectation -- that relevant conduct can upset the expectation of the parties in guilty pleas. I think that by now, eight years into the Guidelines, the attorneys should know at this point that relevant conduct is going to be taken into account in sentencing.

The Commission's listing of the priorities suggests the possibility of considering a simplifying of the relevant conduct guideline without making any substantive change in it. We would urge you not to do that. This guideline has been amended in 1988, 1989, 1990, 1991, 1992, and 1994 and we think it would be better to let this guideline rest for a while, let people have a chance to interpret it, become familiar with it. We really don't think that a shorter version would provide greater clarity.

I think that the problems that people have with the relevant conduct guideline are not on -- in the area of clarity, but I think what we've heard is sort of fundamental objections to the concept of relevant conduct that I don't think can be addressed by trying to simplify.

Let me talk briefly about the issue of acquitted conduct. This has, of course, long been traditional in sentencing that acquitted conduct could be considered by courts in imposing a sentence and we don't think that that long tradition should be reversed at this stage. In our view, there is clearly no legal problem with the consideration of acquitted conduct. There is only one circuit that has held that acquitted conduct cannot be considered and we have a pending certiorari petition before the Supreme Court to try to get that conflict resolved.

But in -- in our view, the prior cases really make it fairly clear that, as a legal matter, acquitted conduct can properly be considered. As a matter of policy, we think there are excellent reasons to include acquitted conduct within the concept of relevant conduct. Of course, a jury's verdict of acquittal does not mean that the defendant is, in fact, innocent; but only that the jurors found a reasonable doubt.

Before a court can take acquitted conduct into account at sentencing, it has to find by a preponderance of the evidence that the defendant committed the crime and this standard has always been held to afford sufficient procedural protection for defendants at sentencing.

Moreover, the elements of the offense may not actually match the Guidelines factor. The defendant may be acquitted under 924(c) of using or carrying a weapon, whereas the Guideline

standard applies only to possession. You're then faced with a choice of either saying well, you have -- you have to either apply the acquitted conduct prohibition more broadly than the actual acquitted conduct or the courts are going to have to make an effort to try to determine exactly what facts were found by the jury in acquitting the defendant. And that, I think, is going to lead to a tremendous amount of litigation and complication analogous to what you get in collateral estoppel issues.

In general, we're not aware that the current system of incorporating acquitted conduct has resulted in significant unfairness and we urge you again not to change this settled mode of sentencing. Thank you.

JUDGE CONABOY: Thank you, Mr. Litt. I'm going to take about 10 minutes for questions, please.

JUDGE MAZZONE: Just one question to Mr. Litt. Mr. Litt, can you conceive of any situation, any case in which acquitted conduct actually -- I should say the tail of acquitted conduct actually bites the dog? Is there any case that you can conceive of in which it might be necessary for a judge to use in order to see that the tail doesn't bite the dog?

MR. LITT: I would think that if -- obviously, one can conceive of such a case. You can construct a case like that.

JUDGE MAZZONE: You don't have to construct it. It exists. LaBonte.

MR. LITT: I would say that given the right set of facts that a judge could -- that fell sufficiently outside the heartland, the judge could depart downward under those circumstances if he felt the facts were sufficiently established justifying a acquittal.

The judge still does have to find by a preponderance of the evidence that the conduct did take place before the judge can take that into account at sentencing.

JUDGE MAZZONE: Okay. LaBonte is a First Circuit case in which -- a life sentencing case in which state circ -- the state court had murder acquittals. That case is now, I believe, on appeal. I believe it's on appeal. But there's no question but a very good, very conscientious judge found by a preponderance of the evidence that the murders had been convicted of, although the state court jury acquitted the defendant. Now, should that judge ignore the standard and detract --

MR. LITT: Is this an underlying narcotics case where the murders were convict -- committed in the course of the narcotics conspiracy?

JUDGE MAZZONE: No. LaBonte.

MR. LITT: I don't know the particular case. I mean, presumably, the murders fell within relevant --

JUDGE MAZZONE: No matter.

MR. LITT: Presumably, the murders fell within relevant conduct as it's defined within the guidelines. Part of the offense of conviction. I must say that I don't find a fundamental unfairness if the judge is, in fact, persuaded that conduct did occur in taking into account sentencing. There are a wide variety of circumstances in which a state case might not have resulted in a conviction. The fundamental question is for the judge to be satisfied as to whether or not the conduct occurred.

JUDGE CONABOY: Any other questions?

MR. GOLDSMITH: Mr. Litt, I may have misunderstood you. I thought you said that the standard applied with respect to relevant conduct in the context of acquittals as clear and convincing. More recently, you said that it was a preponderance of the evidence which is the standard that I think does apply.

MR. LITT: If I said clear and convincing, I misspoke.

MR. GOLDSMITH: Preponderance, you think that's the appropriate standard, as well?

MR. LITT: Yes.

MR. GOLDSMITH: The other questions I have, I think, reflect comments made by other panel members throughout the day. I think it's come to the attention of the Commission, certainly, that the practice in Denver with respect to the guidelines may be quite different from practices elsewhere. Here, for example, there seems to be the U.S. Attorneys work more closely with defense counsel and achieve results that perhaps all concerned are satisfied with; whereas that's not the case necessarily in other districts. That suggests a problem of potential disparity and I'm wondering what, if anything, the Department of Justice might do to achieve greater uniformity by virtue of perhaps greater control over the practices of local U.S. Attorneys offices.

MR. LITT: I'm actually glad you asked that question because I had noted the people's comments that were made and while I do think Denver is a wonderful city, I think it's less exceptional in that regard than some of the comments here may have indicated. My impression both based on my experience in the Department and when I was in private practice is that, by and large, most prosecutors and defense attorneys do try to work and courts do try to work for just results in individual cases.

They may use different routes to get there, but, by and large, I think that in most places in the country, people are working out accommodations within the system to deal with it.

If -- what -- what I'm more interested in hearing as you have asked about instances where guidelines lead to an unjust result, I would be -- and from the Department's point of view would be interested in hearing about districts where people feel that the system is producing seriously unjust results on a systemic basis because the parties and the courts are not able to work through

these issues.

MR. GOLDSMITH: I should say I've been making this request for unjust results for years and I've been underwhelmed by the results I've received. Neither defense counsel nor judges have certainly buried me with comments or examples of that type of problem.

JUDGE CARNES: But it is -- unjust results is a fairly useless phrase. Unjust means something to a defense attorney. Unjust may mean something else to a prosecutor. So to use those terms doesn't help. And the results in Denver may be something that if I knew what they were, I'd think they were great, but it does seem to me if the main notion of this sentencing system was to avoid unwarranted disparity, if you have some districts where everybody is just sort of ignoring the guidelines and other districts -- and I know those other districts exist -- where they are adamantly enforcing the guidelines, then you have a situation where a defendant, not by the luck of the draw of the judge, but by the luck of the draw where he lives, has now got a harsher sentence.

MR. LITT: We haven't seen any indication of tremendous disparity in sentencing between districts. We do try to look for these things and the -- the bottom line results don't appear to be tremendously different between districts from what we can tell.

JUDGE TACHA: Let me just ask those of you who are concerned about the relevant conduct and this real offense system, if -- and this is only a hypothetically, if the power to depart is somewhat expanded, could some of your concerns be alleviated by greater departure?

MR. CONNOR: If the question is what is a fair sentence in a given case, then -- and if the district court determines to depart based on that, then yes, but I think that what is at question here, Your Honor, is the fundamental underpinnings of the criminal justice system and what it's about. Are you innocent until or unless you're proven guilty of it, for example. And if so, by what standard. I thought that the -- I read some of the materials and I thought that the, you know, Commission or -- or certainly, people who work for the Commission have had some concerns on this about the idea of going to clear and convincing evidence as opposed to -- as opposed to preponderance of the evidence. Why not make it proof beyond a reasonable doubt? The Rules of Evidence still don't apply at the sentencing hearing. And then let the Court determine whether or not it can be proven beyond a reasonable doubt before using it to enhance somebody's sentence.

However, I think that what is at the core of what we're talking about here is whether or not you're accountable for conduct that you have not been convicted of, have not admitted. And while some of what Mr. Litt says is true in terms of acquitted conduct has previously been able to be considered by a sentencing court -- in other words, the Court can look at all the surrounding facts and circumstances as to what went on in a given case, what we're talking about here is there being guidelines which adjust that sentence and basically channel a court's discretion upward -- and so I -- I would basically say to you that in terms of looking at results in individual cases, yes, that might help.

In looking at creating respect for the system and those sorts of things, it should be charge of conviction or charges of conviction.

PROFESSOR REITZ: It seems to me the relevant conduct provision has appropriately been referred to as a cornerstone of the guideline system and it seems to me that the departure power which you hope will be used very infrequently would not be -- would not be a remedy if you were concerned about the way the cornerstone was operating. I should say and I noted in some of the Commission documents or discussion drafts that one idea under consideration was to move relevant conduct considerations into the departure power so that a judge may say in a given case that a conviction offense does not substantially lead to a just sentence and so that the relevant conduct considerations may be cited as a ground for departure rather than as the basis for sentencing in the first place.

I'm attracted to that suggestion in some respects. It -- it strikes me as resembling what I see as -- as traditional pre-Guidelines practice where judges did not automatically fix sentences to some personal view or view of reality established at the sentencing hearing, but would often modify their sense of what the -- the -- I'm not saying that very well. But would often say the conviction doesn't reflect in this case what I see as happening. I will make some adjustment in sentence for that.

That -- that logic, I think, more closely tracks the traditional pre-Guideline scheme than a mandated relevant conduct provision that really tells judges you should start here in every case.

JUDGE CONABOY: All right. Anything else?

MR. GOLDSMITH: Judge. Mr. Litt, do you agree with the criticism of the guidelines that, for the most part, they have transferred discretion from the judges to the prosecutors?

MR. LITT: No.

MR. GOLDSMITH: Why not?

MR. LITT: It's --

JUDGE CONABOY: That's a surprise.

MR. LITT: Certainly, most of the existent U.S. Attorneys who I speak to don't feel that way. The bottom line is that the sentence is imposed by the judge and the judge has to make the appropriate findings.

MR. GOLDSMITH: Doesn't the prosecutor have control by virtue of charging decisions and facts that are made available to the probation officer?

MR. LITT: Well, in terms of charging decisions, of course, that's what the relevant conduct is supposed to account for. Obviously, there's -- the prosecutors always have a certain

amount of influence over the sentencing decision by virtue of charging decisions.

The most obvious example is the number of counts you charge limits the maximum possible sentence.

In terms of information made available to the probation officer, our policy is we're not supposed to withhold information from the probation officer. The probation officer and the Court is supposed to be given full access to all the relevant facts for sentencing.

MR. GOLDSMITH: Thank you. For Professor Reitz and Mr. Connor, it seems to me that the problem is that prior practice before the Guidelines, of course, was that relevant conduct could be considered by judges and some did and some didn't and the degree to which they considered it varied considerably. The Guidelines reflect an effort to achieve uniformity and so the system established by the Commission sought to achieve that uniformity by mandating the Court must consider relevant conduct under certain circumstances providing that certain objective criteria have been satisfied.

Short of -- well, how can we achieve the goal of uniformity which is the cornerstone of the Sentencing Reform Act in a manner that gives a judge discretion whether or not to consider relevant conduct. But that's a potential dilemma that we face here. To the degree we allow the court to make up its mind in each case whether to consider relevant conduct, that may produce an outcome that oftentimes will be systemically disparate from what we presently have achieved.

MR. CONNOR: I think that's why I'm saying make it a count of conviction plus anything else that the -- the defendant admits during the course of -- of plea -- or in the course of arriving at a plea. My experience as a prosecutor before becoming a Federal defender was that, basically, in terms of prosecuting someone, that you attempted to apply the guidelines and you attempted to do it the way the Sentencing Commission set forth in conjunction with Department of Justice guidelines which were promulgated and that is basically what occurred. You don't have a situation where prosecutors are deciding that it's either too much trouble to prosecute someone more harshly or someone less harshly or for some other -- for some other reason that's not a good reason. The problem with the relevant conduct definitions now are that they assume and the impact on plea bargaining is that they assume that basically you can prove -- you can prove any fact just as easily as you could prove any other fact.

Take a bank robbery example. That it was an armed bank robbery. That it was a firearm as opposed to a dangerous weapon or device or things of that nature. And -- and that can, number 1, be the difference between being convicted of the crimes of, say, armed bank robbery or simple bank robbery. And so I think that you will not encounter large disparities of sentencing in sentences if what you do is you limit it to the counts or count of conviction.

MR. GOLDSMITH: Wouldn't that even be a more radical transformation of our criminal justice system than we have in mind by virtue of the Sentencing Reform Act? In effect, you're telling the court the court may not consider the complete picture. Under prior practice, the judge could consider the complete picture and sentence accordingly. Now, the judge may not consider

any relevant conduct at all. That seems to be achieving uniformity at the risk of producing outcomes that are inappropriate.

MR. CONNOR: Of course, the Court can probably consider any conduct that it desires in sentencing within the applicable sentencing guideline range, number 1. Number 2, what you have now, though, is a situation where the Guidelines themselves mandate consideration of the things which are not part of a count of conviction.

In other words, the Guidelines, themselves, tell a court that you must consider something that was acquitted conduct. That you must consider something which is not a charge of conviction.

MR. GOLDSMITH: Thank you.

JUDGE CONABOY: Anything else? All right. Thank you, very much, gentlemen. We'll call the -- I see Judge Daniel is here now. So we'll call Judge Daniel and Judge Weinshienk next, please. I think this is the only panel that you're not on.

MR. LITT: Okay. I'm out of here.

JUDGE CONABOY: I understand, Judge Daniel, that you have some prepared remarks and we're going to hear from you first. Judge Daniel is appointed to the District Court here in the District of Colorado, serves here in this district and he served as a member of the Civil Justice Reform Act Advisory Group in this district from 1991 to 1994 and was president of the Colorado Bar Association from 1992 to 1993. And just recently -- what was the date of your appointment?

JUDGE DANIEL: September 1, 1995. So I'm approaching my one-year anniversary.

JUDGE CONABOY: We're happy to have you here with us today. Judge Weinshienk, who we talked a little bit about several times earlier today, has been a member of the District Court since 1979 and served since 1964 on various other courts before entering onto the United States District Court in 1979 so we're happy to have both of you here with us. And Judge Daniel, if you want to proceed with your remarks.

JUDGE DANIEL: I will. My remarks will be relatively brief in that I've got a criminal trial I started this morning and so if I have to leave before this is completed, that's the reason why.

JUDGE CONABOY: Sentencing?

JUDGE DANIEL: Not yet. Not yet. My perspective on this is probably one that I think may be useful to you in that I've been a judge for less than a year. And when I was a practicing lawyer, I practiced in the civil rather than criminal arena so I had virtually no contact with the Sentencing Guidelines. I knew they existed, but I never had to use them as an advocate.

So when I got appointed to the bench, obviously, I knew what they were and I had to

commence some reading on them. In fact, I saw some of you at the program in Boston last summer. I attended that before I actually was sworn in. But we had a very, very intensive program in San Francisco last October as part of a videotaped presentation and Rusty was there and he was giving us the dog and pony show on the Guidelines.

But at or about that same time, I had begun the process of taking pleas, evaluating the Guidelines and between now and then, I have taken a number of pleas and I've sentenced a number of people and what I want to do is share with you some impressions I have of the Guidelines for someone who's been a judge for about 11-1/2 months. I will give you some things that have been confusing to me and some concerns that I have with the recognition that I don't have the judicial tenure and oversight that my colleague Judge Weinshienk has, but perhaps my comments may be of use to you.

What my overall reaction to the Guidelines is sometimes I feel like I'm in a straitjacket in the sense that it's -- I took an oath to follow the law, but sometimes, applying the guidelines in the way that's fair and just in individual defendants -- defendant causes some conflict. And what I've tried to do is figure out a way to reconcile that conflict without doing violence to the Guidelines.

And one area in particular that has caused me concern is this whole issue of criminal history. I've had cases where I felt the criminal history was underrepresented and other cases where it was overrepresented and I have utilized Section 4A1.3 to try to come up with some findings that I believe were proper and fair. But I would hope that you try to put some more flexibility into the judge's ability to determine what a representative criminal history is.

I'll give you an example. Most recently, I had a gentleman in front of me and he was 20, 21 and he had a pretty substantial juvenile record. Of course, that didn't count. And he was charged with a weapons and gun charge down in the Colorado Springs area. Well, I had a concern about whether or not his criminal history as recommended by the probation department was -- was high enough because he had been charged substantially with kidnapping, with robbery, and with basically using a code name to engage in drug activities and he had a whole bunch of pending charges in State court. And those State charges were pending until the Federal case got resolved. And now we're talking about the sentencing stage because I had taken his plea 70 days before.

But when we got to the sentencing phase, I was very concerned about whether or not the criminal history, which I think was a category 2, was accurately reflective of the seriousness of these charges because I had the probation department bring me in the State court file and I reviewed it, I saw the affidavits from the local law enforcement officials and I determined that this guy has some serious problems.

And so I took it up to the next higher level and I took it up based upon the exception that deals with pending criminal charges and I tried to make findings that would protect me in the event there was a challenge on that.

But then I have had it the other way. I had a very serious case where a 22-year-old

African- American male was charged with crack cocaine -- and by the way, I've got to say this because this has been the other reaction I've had. I've been very troubled -- I know that's not on your agenda today -- about huge disparities between crack cocaine, cocaine and marijuana. I've got a case right now where defendants transported huge amounts of marijuana from California through Arizona through Colorado to Minnesota. Approximately, oh, sixteen were indicted and eight were charged and -- and all of them had filed pleas and when I look at the range of penalties there, some of which ranged from a recommended probation up to maybe eight months in jail, I'm troubled when I had this African-American male in front of me and the issue was whether or not I sent him to jail for eight years or nine years. In any event, I ended up sending him to jail for eight years because I felt his criminal history overrepresented the seriousness of what he had done.

So I see some need there to try to give some more focus, thoughts as to sort of what the criminal history component of the sentencing should be, what factors should be looked at by the district judge and giving the district judge more flexibility so that if you see a situation that isn't right, that you can adjust it without allowing total discretion to return.

A related point has to do with the offense levels. I've looked at the Guidelines tables a number of times and what I realize is you've got a whole bunch of numbers in here and I understand how they work now. I think it would be wonderful if you could reduce the 43 offense levels to something that's fewer in number because I think the whole goal here should be to come up with some ranges that perhaps suggest some minimums and maximums, but I think, really, since we're on the firing line, when we see things that we believe need to be adjusted, we ought to be able to adjust them more than we can adjust them right now without being reversed for just violating the Guidelines. So anyway, that's one area.

I'm very troubled about the 5K1.1 motion. Let me explain. I think, to a large extent, sentencing discretion has been transferred to the prosecutors because what I've experienced is I think sometimes 5K1.1 motions are filed for the simple reason of arriving at a predetermined result based on a negotiations between the defendant's counsel and the prosecution. And I -- I require the prosecuting attorneys to show that there has been some substantial assistance rendered or I will decline them. And I'll even require them to give me things under seal if they don't want to reveal in the public record what the substantial assistance has been.

But I think the 5K1.1 motion has been abused and that's something you ought to look at. And it ought to be limited to certain narrow situations because what certain prosecutors and counsel do, I think, is use that as a vehicle to arrive at a sentence that would under other circumstances be incompatible with the Guidelines. But once we get it that way, it's hard for us to do much about it. That is, I either reject the motion or I don't reject the motion. And so I think you need to look at this 5K1.1 and whether or not it's being used for the purpose for which it was intended.

I had an interesting case recently and these are some continuations of my observations involving obstruction of justice. The particular defendant, I think, perhaps lied to me under oath at his change of plea. And the reason -- the way it was set up was there was a reference in the pre-sentence report to the fellow having been convicted while in the military in Baltimore,

Maryland, and I asked the defendant about that and he said I was never in Baltimore, Maryland and I was never convicted of anything. What we found out later, because I just had a brief printout from our pretrial services department, we found out it wasn't in Baltimore. That was a clearinghouse for military records and what had really happened was the defendant, while serving in the military in Germany, had used some credit cards improperly. Calling cards. And so he had been subject to some administrative discipline. And of course, the administrative discipline isn't the same as a conviction. But he was playing cute with me.

And so when I found out what the real facts were, then I was trying to figure out if, in fact, obstruction of justice was warranted under Section 3C1.1, but in trying to figure out what all that meant, I had to go to a recent case, U.S. vs. Medina-Estrada, 981 F.3rd 871. And that case holds that a defendant, while testifying under oath or affirmation, if he gives false testimony concerning material matters with willful intent to provide false information rather than as a result of confusion and mistake or faulty memory, then I can make an obstruction of justice finding. So anyway, I took a record and ended up not taking a finding because the record wasn't clear enough. Really, the Guidelines didn't give me a lot of insight and guidance on that issue. I just sort of had to figure out what the case law was and make a finding that -- that made some sense.

That's the other thing I've learned. I need to make findings that make sense, so Judge Tacha, when she sees my cases, can understand why I ruled the way I ruled.

The final observation I want to make has to do with role in offense. I had a very interesting case where this young man -- older man, he was in his mid-twenties to thirties, 30 -- he was -- well, he was 25 to 30, but, anyway, he engaged in a scheme with a minor whereby they somehow got driver's licenses from some people and then they set up some bogus bank depositories and then they had some bank statements -- excuse me -- bank checks mailed to this phony post office box. They proceed to write thousands of dollars off the check. They defrauded both the individuals who had the accounts and, more fundamentally, the financial institutions.

So at the change of plea hearing -- actually, it was at the sentencing, the older gentleman said no, we were all co-equals. This was a co-equals plan between myself and this person. And so you should not -- you should not give a two-level increase because of the -- because the defendant was an organizer, leader, manager or supervisor. And, of course, I read that and looked at the comments and made some findings. And I found that he was a supervisor, but, again, I think this role in the offense is something that comes up quite frequently in our cases and if there's a way to give more meaning to what the terms "organizer, leader, manager, supervisor" mean in a greater range of context so that increases or decreases are more supported by comments in Guidelines, that's another area I'd like you to at least think about.

So my final comments sort of have to do with just some overall goals that I think are warranted. One is more ability to individualize sentences. Whatever you do, you should give us more discretion to individualize sentences so they meet the problems that we see. I already mentioned the application of the criminal history guidelines should be simplified and reduce the number of offense levels.

So those are kind of some things that I have observed and I tried to go through my -- my memory bank and pick those things that stood out in my mind rather than just giving you the things you know already know.

So those are some brief comments and I hope they will be useful to the Commission.

JUDGE CONABOY: Thanks, Judge, very much. Judge Weinshienk.

JUDGE WEINSHIENK: Thank you. I, too, will be brief.

I was one of the few judges that was here before the Guidelines and I sentenced both as a State judge before the Guidelines and as a Federal judge before the Guidelines. And, indeed, as one of the panel members stated, sometimes we lost sleep deciding what we were going to do because we did have discretion before the Guidelines, but we also did have tables and charts which told us how the sentencing had been for a particular crime in the district and nationally. And I think we were very conscientious in trying to follow those charts and to keep the sentencing within those goals.

After the Guidelines, I am enough of a realist to know that they are here and they are not going to be erased and I have learned to live with the Guidelines. There are some big problems, though, that do cause me loss of sleep. And I would second the comments of the very -- various panel members who say try to make them more guidelines and let the judge have some more discretion. We do not have the discretion that I think we should have. And it is very difficult to try to -- what can I say, lean on the prosecutor to file a 5K1 when we feel that that's the only way we can give a lower sentence. Sometimes it works. But it's not the way that it should be working.

Let me give you an example. Bank robbers. The first bank robber is the one who went into the bank with the gun. And the other young man that came with him was someone they found out about because they talked to him first. His attorney had them -- had him give substantial information to the prosecutor. So with the most culpable bank robber, he gave the information about his two buddies, one of whom was his disabled younger brother who he convinced to drive the car. The way the case came to me was that I had sentenced the first bank robber who had given the information who had gotten a very good deal with 5K1's, with departures and then, all of a sudden, I was getting the younger brother, the disabled brother, who was talked into it and who was facing a much longer sentence than the more culpable older brother, even though there was much more mitigating.

And frankly, I said to the prosecutor at that point, this just isn't fair. It isn't right and I just don't see how I can sentence someone who is much less culpable to a greater sentence just because he was -- he didn't get in there early to give his information. In that case, the prosecutor agreed. It wasn't fair. And he filed a 5K1 not because of any assistance, but just to give me the vehicle for departing and trying to issue a fair sentence. I think that's the type of case that the judge really struggles with and loses sleep over.

And just one more example because I think there are examples. A young African-American woman, A and B student at East High School, made the bad mistake of falling in love with a young man, having his baby, who decided that the way for him to succeed would be in drugs, in crack. And was living with him and was aware of his very large -- his very large deals in crack. She had a little child. She knew about it. She was charged. The amount of the drugs was -- was weighed in. She was a young woman who had opportunity, had she chosen, to have athletic scholarships at two different colleges. She was bright. She was talented. She was an athlete. She made a wrong decision because of love. And she faced months minimum.

That was the -- that was the bottom of the Guideline schedule that I could give her. I departed. I thought for a while there was going to be an appeal on it. It wasn't appealed, but I departed to 120 months mandatory minimum. She is serving 120 months.

Had that been before the Guidelines, this would have been a far different situation. That was a case where the case went to trial and, therefore, because it went to trial, there was no deal and I don't know if there was a deal even offered before the trial.

But I do lose sleep over it. And I still to this day think about whether there's some way that this young woman could get out of prison earlier than serving the full 120 months. Those are the types of things that are very frustrating to the judge.

And as Judge Daniel said, we're not talking about crack and powder, but the crack and powder disparity is a real serious problem for the judge.

The other problem is the fact that we just weigh the drugs. A young college student from Minnesota stood before me with tears in his eyes because a buddy had asked him to deliver a package from Minnesota to Colorado. He was coming down on vacation. Told him it was cocaine but said if you get caught, it won't be more than 90 days. Don't worry. Well, he was facing the five-year mandatory minimum and he stood there with tears and said, you know, my life is totally ruined. My college, my fiancee. He was going to be married. And there he is. And I have no discretion. No discretion.

So these are the problems that the judges face and we worry about them and wish there were ways that we could give a sentence which was more in accordance with justice. But I do live with the Guidelines. I follow them.

I hope you will give us a little more discretion under the Guidelines in the future. I hope that something can be done about mandatory minimums. I know that the safety valve has helped. Yes, we appreciate that because in the proper case, that certainly helps.

I would disagree with my colleague to one extent. I don't want more tightly drawn constrictures. I would like to have the discretion in some of these cases to be able to make decisions. I'd like the discretion in some cases to decide whether it is or is not relevant conduct because that gives me a little more discretion in a proper case.

Thank you for the opportunity of giving you my remarks.

JUDGE CONABOY: Well, we thank both of you for taking the time to come in. As we said earlier this morning, it's very important for us to hear from people who are on the front lines and working on the front lines every day.

Are there any questions for either of the judges?

MR. BUDD: Well, Judge Weinshienk, just curious. You mentioned the very difficult situation you had with the young woman to whom you awarded a sentence of ten years. The gentleman who came before you, you gave him five years because that's what was required as you saw the law. How would you have decided had you had complete discretion in -- in those circumstances?

JUDGE WEINSHIENK: Both of those situations involved mandatory minimums, so I think the answer to the mandatory minimum is either get rid of it and -- let me deal with the Guidelines or else give me some additional discretion to find an exceptional case and go beyond the -- below the mandatory minimum.

MR. BUDD: I think you know the Commission has gone on record about five years ago as being opposed to mandatory minimums, but I was asking in these two anecdotal situations you cited, what would you have done had you had complete discretion?

JUDGE WEINSHIENK: Had I had discretion --

MR. BUDD: I'm sorry. I wasn't clear.

JUDGE WEINSHIENK: All right. A similar case before the guidelines of a young man from Minturn, Minturn, Colorado, who was bringing a lot of drugs into Denver for a buddy because he asked him, you know, would you do me a favor and drive these drugs in. I gave him six months plus some long term of supervised release and probation after. He had not been in trouble before. I would have done the same thing with the young man from Minnesota.

With the young woman with the small child who had gotten -- who had fallen in love with the drug dealer, some time -- I would have given her some time, but certainly not ten years. She didn't need ten years to make the point that she -- in fact, she was never -- I was never going to see her in the future. I think this -- I will never. I hope. I don't know what prison is going to do to her. But she's bright, she's -- she has everything to live for and she's spending ten years in prison.

JUDGE DANIEL: I'd like to add a supplement to what Judge Weinshienk said and it's from a different perspective. When we had our orientation session in San Francisco last fall, we visited the prison facility in Pleasanton and we met with some inmates and we asked them their reaction to their sentencing and I happened to talk to an African- American female who had been sentenced by Judge Weinshienk. But her reaction and the reaction of other women on the panel

because that's a women's facility and we were in the facility and we asked them to tell us what they thought about the guidelines, the uniform response was that they are too harsh. That we realize we did something wrong, we realize that we need to go to jail. But the length of our sentence is so extreme that it gives us no incentive to retool, reskill and be prepared to reenter society.

And that left an impression on me because there was the person who had been sentenced by Judge Weinshienk. She was involved in drug activity, but it was because of a boyfriend and she was faced with some huge, huge minimum sentence under the guidelines and so, therefore, she cut a deal, but the deal she cut was for a very, very long period of time and this woman was relatively young. She was in her thirties. And she had young children.

And this was echoed by some other relatively young female prisoners who had children, who realized they had made a mistake. They needed to go to prison, but there was a degree of hopelessness expressed by them because of the total length of their sentences.

I'm not here to try to second-guess the sentence and judge who did that, but I think it's worth noting sort of what inmates tell you about what they need to get motivated to reenter society because, hopefully, that is an ingredient of what this is all about. That it is finding people, sentencing them, but also giving them some hopes that they can reenter society and be productive citizens. I wanted to add that comment.

JUDGE WEINSHIENK: The boyfriend of the woman that I sentenced to 120 months received a life sentence and I also had problems with that, too. He deserved a long sentence, but a life sentence means there's no light at the end of the tunnel. Nothing. I would have much preferred to give him 360 months. I would give -- rather give him 30 years and just let him know that he's going to get out than to give him life.

JUDGE CONABOY: Any other questions? All right. Thank you, very much.

JUDGE WEINSHIENK: Thank you.

JUDGE DANIEL: Thank you.

JUDGE CONABOY: We have a Deputy Attorney General from the Department of Justice. Does that sound familiar? All right. This panel is on drugs and role in the offense and essentially any other comments you wish to make. Again, we're asking you to try to limit your comments to five minutes and I'll ask my fellow commissioners to try to limit the questioning, if there is some this time, to ten minutes, because we are, in fact, running out of time.

We have Mr. Christopher Perez, who is a senior probation officer here in the -- in Denver and at one time, he was promoted to the Sentencing Guidelines specialist here in the -- in Denver.

And we also have Mr. Raymond Moore, who is an Assistant Federal Public Defender. Mr. Moore was an Assistant U.S. Attorney here from '82 to '86, I believe, and then after being in

private practice for a number of years became the Assistant Federal Public Defender here in Denver. So he's been on both sides of the equation.

And we have Ms. Jeralyn Merritt. Ms. Merritt is a practitioner here in Denver and a graduate of the University of Denver College of Law. She chaired the committee on the Criminal Justice Act for this District here in Colorado from 1994 to 1995. And she limits her practice, as I understand it, pretty much to criminal defense. So we're happy to have all of you here, along with Mr. -- what's his name again -- Mr. Litt from the Department of Justice. We appreciate your staying with us, Bob, for all of these panels.

MR. LITT: Thank you.

JUDGE CONABOY: Let's see. We'll start, if you don't mind, with Mr. Perez.

MR. PEREZ: Good afternoon. The Commission has asked the members of this panel to address the issues of the drug offense and role in the offense guidelines. Historically, the drug Sentencing Guidelines were designed to reflect the Anti-drug Abuse Act's emphasis on the use of drug quantity to establish penalties. Until Congress changes the focus of this statute, I think it would be difficult for the Commission to change the drug quantity emphasis of the guideline. Still I'm not convinced that the nature of the Guidelines, itself, should be changed anyway.

That is with the exception of the crack ratio. And I'll go ahead and address the crack ratio. No discussion of the drug and offense would be complete without it. Still it's my understanding that Congress views the crack cocaine guideline as being 10 times worse than the powder cocaine guideline, primarily because the crack co -- the crack traffic involves the -- the use of street gangs and violence. To me, it seems kind of a presumption to send those crack offenders based on a 10 to 1 ratio based on the assumption that they are all violent gang bangers. It seems to me it would be more appropriate to make gang affiliation and use of violence, those type of factors, variable specific offense adjustments than simply to make across the board assumptions, but, in general, I find that 2B1.11 represents an objective measured approach to determining the severity of an offense.

In practice, I find that the majority of the problems in applying the drug guideline involves evidentiary relevant conduct related issues. That once drug type quantity issues have been resolved by the Court, the application of the guideline is relatively simple and very mechanical and I do admit that the use of the quantity driven nature of the Guidelines in itself is a mechanical approach to sentencing. And I have been told in the past that I have executed my duties as a probation officer with accountant-like precision.

But I think that the mechanical approach to Guidelines using these quantities is one balanced by the other Guidelines, the Guidelines which bring into consideration the role in the offense, acceptance of responsibility, other culpability related factors. Still other Guidelines in the form of departure policy statements bring a subjective creative and humanistic approach, I think, to sentencing.

Now, I've heard the Commission pretty much put to us that the Guidelines are here to stay and you're looking for specific examples where we can make suggestions on reducing the complexity and simplifying Guidelines. I'll try to do so as far as they relate to the role in the offense guidelines.

Chapter 3 Guidelines most frequently used in combination with drug guidelines involve the role in the offense adjustment. The problem with the Guidelines is they appear to be based on an organized crime model. Even the language of the commentaries seem to be directed at standard organized group dynamics. In reality, however, what I find in this district is more drug traffic conspiracies are loose- knit relatively unorganized associations of participants. More often than not, the defendants involved in these associations are independent contractors who obtain and sell their drugs on consignment. They are not guided by some central kingpin figure, rather by the more elemental forces of supply and demand.

One significant problem that arises from this organized crime approach involves the aggravating role guideline. Specifically, because most drug trafficking conspiracies are loose-knit associations of independent contractors, the five or more participant adjustment is no longer an accurate way to measure a person's relative culpability in a group.

Now, the application of the mitigating role guideline I find to be even more problematic. Unlike the aggravating role guideline, the commentary for the mitigating role guideline identifies few factors for probation officers and judges and others to consider in determining whether a defendant is, in fact, a minor player or a participant.

Application to -- application to the guideline even seems to suggest or discourage the use of the guideline altogether. It would seem to me that any simplifications to the role in the offense guideline should focus on several things and, again, I'm suggesting this as maybe a model for the simplification of other guidelines, as well, but in simplifying the role in offense guidelines, I would suggest that both these guidelines, the aggravating and mitigating guidelines, should be made more symmetrical, each setting forth clear and simple criteria to identify the characteristics of those that are mitigating offenders and those that are aggravating offenders. This five or more participant standard should be reduced to one of these factors rather than carrying its own offense level driving weight.

The second thing that I think would help would be the role in the offense guideline should be redesigned to provide the courts with an increased level of judicial discretion in making role determinations. Language could be added to the commentary that would recognize each district court is in a unique position to assess the role and culpability of each defendant within a group. Then rather than using the current 2 to 4 level increase, decrease scale, a sliding scale approach would more accurately reflect the Court's increased level of discretion in making these role determinations and lend itself better to a case-by-case determination approach.

Now, in closing, I would like to say that I believe most probation officers in this District are no longer intimidated by the Guidelines, but, through experience, have become more adept in interpreting the Guidelines and applying them both accurately and reasonably.

I think that any simplification efforts by the Commission should now focus on clearly identifying the principles underlying the application of the Guidelines rather than the application of the Guideline process in itself. Thank you.

JUDGE CONABOY: Thank you, Mr. Perez. And Mr. Moore, would you proceed next, please.

MR. MOORE: Yes, sir. It feels somewhat ironic to be talking about simplification of the drug guidelines because I don't know that there's a scale where you put your drugs on the scale on one side and your sentence comes off on the other.

Not surprisingly, having made that comment, I would ask this Commission to consider revamping the drug guidelines from top to bottom. I have a tremendous problem with the notion of quantity being the be all and end all -- functionally the be all and end all of the drug sentence. I understand that part of that is because of mandatory minimums and the relationship there. Ms. Merritt is going to talk more about mandatory minimums.

I have problems. I have problems with an ounce dealer who over time gets up to a kilo and is treated the same as the kilo dealers who the Government decides to take down after that one transaction. I have problems with those rules that equate those two people. I have problems with equating a -- a drug dealer who comes to his transactions with an Uzi in his hand and comes to his transaction with a prior conviction for drugs and for which he got probation and didn't get the message and equating him with an ounce dealer who may have a derringer in his back pocket with or without a bullet and he's got a prior shoplifting conviction. But under the Guidelines, those guys are exactly the same because all you look at is the quantity.

I just don't think that that functionally defines who is a bad guy, who needs to be taken down and who is more serious and I think you can do it with specific offense characteristics like you do in the other guidelines.

It has certainly not been, in my experience, difficult for prosecutors and defense lawyers pretty quickly to decide in a given case whether they have got a problem bad guy or whether they have got somebody who seems to stagger in, girlfriend or something else. But in this system, all that matters is the amount of drugs. And there's no distinguishing them. And that's what leads judges to these concerns and moans and cries about the sentencing disparity. They don't have tools to distinguish them when all you look at is drugs.

I don't have much time. Let me tick off some things that I think need to be offense characteristics, but let me say this first: If you're thinking of just adding offense crack to the existing quantity table, well, kill it twice. Basically quantity tables are so high that I don't think there's much sense in that. I think what I'm suggesting is lower the effect or the range or the hit. Cap it at 20, 22, whatever you want, but cap it at some reasonable levels so there's some distinguishing of offenders within drug cases. What might be offense characteristics? Prior convictions for drugs, role and type of firearm, size of transaction, the nature of the offense, whether you're a manufacturer, a distributor, courier, whether there's violence.

I mean, everywhere else in the Guidelines, what you see is violence is an important point. Prior drug convictions is an important point. When you get to a drug crime, it doesn't matter. All that matters is quantity. I think you should, in any event, expand the quantity guide -- the ranges within these quantity tables, give everybody a little more room. Right now, you have people fighting over five grams, six grams because the ranges are so tight and the stepping increments, levels of two, are so severe that it makes a major difference and that leads to strange results. It leads to unnecessary fighting more in drug cases over relevant conduct issues or some of these other things that you've talked about because the ramification is so great.

Simple example. There's a case in our office that I won't get into the details because Judge Tacha is here and she's going to hear about it later where a judge -- district court judge -- and not whom you might think -- refused to take a plea because there was a big dispute about the amount involved and the judge said you're going to trial. You -- I just think it's too heavily slanted.

Let me close, because my time is running out, by saying a couple of things. It's real easy to sit here as the defense lawyer and take the defense lawyer position of saying people, please, you're crushing little guys or girlfriends or what have you that don't need the hits that they are getting. And I personally believe that that is a waste of my breath. I think in this political climate, with the way things are going, both in the public and in the Congress and in the newspaper, people might listen to that, but they are not going to be moved by it.

I think if you want to look at what's a sensible way of going about it is whether these quantity tables, these heavy quantity hits for drug offenses makes sense. I'll give you another way. Are you really getting what you want? I'll tell you that I've been a prosecutor, I've been a defense lawyer, I've been with agents, I've been against agents. I've been on all sides of this thing and if you equalize everybody, people being human, agents are going to go and investigate the lowest common denominator. If I'm an agent, I'm not going to spend two years trying to find a kilo dealer when I can spend four months getting a one ounce dealer up to a kilo and have him be the same. If you think that these 5K's and all the rest of it are going to lead you up the chain, with this system, it won't because it provides no means of distinguishing drug offenses and provides no incentive for bringing in the big dealer, whether it be a trophy or advance or pay raise or promotion to say I got the really bad guys because they are all bad guys. The guy on the street corner selling dime bags is as bad as the kilo dealer and people aren't going to take the time, the investment to go after who you believe they are going after.

5K's can be used to go sideways or down. Why? Because they are all the same. If you want them to go up, why should an agent spend two years of his time getting a conviction of a kilo dealer while the guy next to him is nailing the five guys on the street corner who happen to know each other and it is the case that these things are all related. Years ago, you didn't see conspiracies where everybody was brought in, the girlfriends and crippled brother who is half retarded and bring them in. They didn't bring them in not because they didn't know how to charge conspiracy, but because they didn't get bang for the buck. Now they bring them in. Conspiracy, you can get 20, 30, 40 years.

So you see this happening. I've used up my time. Let me just quickly throw in two things. Unrelated to anything I've said before, I'd like to see a two level wild card departure. Bad name for it, I know. But give the judge some of this -- some of this discretion back and whether two levels is too much or one level is too much, who knows.

Lastly, a minor point, I'm a little bit offended, a little bit touchy over the notion that maybe we're doing something weird in this district. Whether you think we are or not, well, that's life. I mean, I tend to see it from the inside, from the trenches. What I know is we have lawyers who keep each other informed. We work our butts off. We make sure, Mr. Katz does, that he hires people who know what they are doing. As you can see, he's taken people from both sides of the -- there's no -- you don't have to be a dyed in the wool defense lawyer. People who know the defense law, know the law, know the agent. What we get done, we get done from hard work and understanding these Guidelines, not from circumventing them.

JUDGE CONABOY: Thank you, Mr. Moore. Ms. Merritt.

MS. MERRITT: I'm going to stand. Mr. Chairman, members of the committee. I appreciate the opportunity to be here today, to appear before you and give you my views on Sentencing Guidelines as they apply to drug offenses.

I have defended persons accused of drug trafficking crimes in this and other Federal districts and circuits for over 20 years. 13 of those years were before the United States Sentencing Guidelines and the last eight of them, of course, have been since then. I've lectured to lawyers around the country on the use and application of the Sentencing Guidelines and I serve as a chair of the legislative committee for the National Association of the Criminal Defense Lawyers.

And as I listen here today to what I've been hearing from the judges, from all of the counsel -- the defense counsel and from the probation officers who have testified is we need to find a way to reempower the Federal judiciary. This system is not working. The system has broken. My opinion of what is going on with the Federal sentencing system today is that it's becoming morally bankrupt.

There is something wrong with a system that unfairly targets minorities and persons of color and women. There is something wrong with a system that allows the use of purchased testimony. There is something wrong with a system that has transferred the power given to judges by the United States Constitution to prosecutors. And we have to do something to fix it.

One of the things that we have done as part of the legislative work of the National Association of the Criminal Defense lawyers is to draft a proposed piece of legislation that would be an amendment to 18 USC Section 3555 3(E). It has already been endorsed by two members of the Federal judiciary. Judge Hadder from the Central District of Los Angeles and Judge Powter from the Western District of Texas. Both of those judges traveled to Washington, D.C. in May and agreed and did participate on a panel on mandatory minimum sentencing. And what they told us was that 88 percent of the judges in this country have said no more mandatory minimum sentences. Sentencing statutes should be enacted. 85 percent said judges should have more

discretion in imposing Federal sentences. 88 percent said that the current Federal system gives too much discretion to the prosecutors. And 70 percent of the Federal judges opposed maintaining the current system of the mandatory minimum sentences.

Our legislative proposal would allow the judges to depart from mandatory minimum sentences for extraordinary circumstances. Not only upon motion by the prosecutor because of substantial assistance, but because of a motion by the Court on its own motion and because of a defendant's motion.

And we -- what I am asking this Commission here today is for each and every one of you to assist us in finding sponsors among the members of Congress and supporters for this measure so that we can reempower the Federal judiciary to make the sentencing decision that should be done in this case. In all cases.

With respect to the specific issues of relevant conduct and as to role in offense, with respect to relevant conduct, I would submit that relevant conduct must be limited to the count of conviction. I would submit that the burden of proof with respect to relevant conduct should not only be clear and convincing, it should be beyond a reasonable doubt. I would disallow increases for relevant conduct based upon the uncorroborated testimony of former co-conspirators who are getting a sentence reduction for testifying at a sentencing hearing against their former co-conspirators. I would mandate notice to the defendant of the intent of the prosecutor for the court to rely on uncharged conduct or conduct outside the count of conviction.

And for all drug offenses, I would get away from quantity, as Mr. Moore said, as a means of determining the guideline offense level in drug cases. Quantity is not the best yardstick. It creates disparity.

I think that the Commission should establish more alternatives to incarceration, particularly for nonviolent drug offenses.

We should be increasing the range under the Sentencing Guidelines for persons convicted of drug offenses in which no guns, no weapons, no violence is used should be allowed to serve part of their sentences on home detention or in community correction facilities.

Instead of having all of these 43 levels or 38 levels or whatever the levels are for drug offenses, we should go to a flat level and based upon that level, the judge should be free to depart in the instances of heavy residivism, guns, violence or extreme quantities.

There are unjust cases that happen every day with the application of the Federal Sentencing Guidelines and most of them are because of the charging discretion given to the prosecutors. Some of the worst abuses are in cases of historical conspiracies, cases in which former co-conspirators testified against the current defendant. We have to do something to change that system.

With respect to role in the offense, it is noted in the materials that that is the issue that is

most frequently appealed out of all the Sentencing Guidelines decisions in this country. There is a tremendous variation by districts around the country, particularly with respect to mitigating role in the offense. For example, 71.3 percent of the defendants in the Eastern District of New York are awarded downward departures for mitigating role, while only 21 percent in the Southern District of Florida. I thought for a minute well, maybe that was because Kennedy Airport in located in the Eastern District of New York, but then I looked at the statistics for New Mexico and they are up at 54 percent, so that isn't it, either.

There is too much disparity and a change in the entire system must be worked and it must be started soon. There are too many people languishing in our prisons who do not need to be there. Thank you.

JUDGE CONABOY: Thank you, Ms. Merritt. Mr. Litt.

MR. LITT: Thank you. I don't envy the Commission for taking on the task of trying to deal with drug guidelines. On the one hand, the testimony this morning has made clear that to the extent that there are perceived problems with the guidelines, particularly from the defense bar, they focus on the drug cases. This is the area of greatest irritation.

On the other hand, as we all know, this is also an area where the political constraints upon our ability to act are very severe. That is a major problem in the country today and there's not a lot of enthusiasm in the political sphere for lowering drug sentences. The Commission has already taken some steps in recent years to address some of the problems. You have lowered the cap on the quantity. You've changed the definition of relevant conduct. And in large part, through your efforts, the Congress enacted the safely valve which hopefully will in the future be able to take care of the cases such as those Judge Weinsheink was talking about. You've also lowered the Guideline sentences for many offenses involving marijuana plants and we understand that you're still studying the effect that these changes have had and will have in the future in dealing with the drug guidelines.

But we don't think that the -- that this is an appropriate time or appropriate circumstances and that there's a need for wholesale rewriting of the drug guidelines.

From the point of view of simplicity, I think everybody agrees that quantity is about as simple and straightforward a measure as you -- as you can get for making a sentencing assessment. We've heard just a short while ago that role in the offense is a much more difficult concept to apply and is going to lead to much more litigation and complication.

The other factor in this regard is that if you do try to dramatically change the structure of the drug Sentencing Guidelines, you're going to run smack into the mandatory minimum sentences that Congress has out there and it's not going to accomplish anything to lower the drug guidelines if you're going to submit people to mandatory minimums. You also run the risk that Congress will respond to changes in the Guidelines by enacting more minimums and, of course, the minimums are themselves quantity driven.

Your -- your commentary, your list suggests that one of the topics that you may consider is looking at the role in the offense guidelines to see if it actually reflects actual experience and to respond to some of the concerns that people have that the definitions in the standards in the role in the offense guideline are not sufficiently clear and -- and the courts need more guidance. We think that it's a good idea to study this. We'd like to work with you to see whether we can -- whether it's necessary and possible to get a -- a crisper and more precise and clearer definition of role in the offense, but we need to bear in mind that any changes in the role in the offense guideline affect not only drug cases but apply across to the board and to the extent we're making these changes, we have to make sure they are appropriate for fraud cases, theft cases and any other case that is we have to deal with. Not only drug cases.

I think that's all I have. Thanks.

JUDGE CONABOY: Thank you, very much. Any questions? Commissioner Gelacak?

MR. GELACAK: One observation and one question if I could. Ms. Merritt, I'd be happy to take a look at your legislative proposal, if it's as you represented. I'll also be happy, speaking for myself personally, to assist you in getting co-sponsors on the Hill.

MS. MERRITT: I appreciate that and I will submit it at the conclusion of the hearing.

MR. GELACAK: Mr. Litt, I take it by your comments about the politics of drug sentencing because I -- I've been concerned about this area for quite a while and, in fact, a long time before I was ever on the Sentencing Commission, but it strikes me that there's always more than one way to skin a cat and I recall sending over a proposal to the Department that when something like this -- if mandatory minimums are the problem -- and we all agree that they do drive the system in the drug area -- and concern over the politics of lowering penalties is the reason why we cannot deal with that issue, then why don't we approach it by suggesting to Congress that we increase the penalties in the drug area, but that we do it by changing the mandatory minimum statutes so that they do not focus on quantity, they focus on role in the offense. And we then prosecute the people that Congress says they want to prosecute, to-wit those kingpins, those major players in the drug area who are out there rather than the lowest common denominator that Mr. Moore refers to. Because I, in large part, agree with everything that he said.

And if we were to -- if we were to suggest to Congress that we could put forward a proposal where they could increase penalties for the bad folks, we could prosecute those people that we ought to be spending our financial resources prosecuting rather than chasing the small time dealers on the street. That we might be able to make some inroads.

I'll agree -- I think we all will -- I'll go so far as to agree on the politics. We couldn't do anything this year. I wouldn't even attempt to do anything in a presidential election year. I think we could make some inroads and impact. And I never heard back from the Department. Not a word.

MR. LITT: If I could make a couple of observations in response. When I was referring to politics, I wasn't speaking only of Congress. I'm speaking also of the public at large and, frankly, of the mood within the Department of Justice. I think there is a perception that this is a -- that drugs are a serious problem and one that has to be addressed at least in part through substantial law enforcement effort.

Contrary to what Mr. Moore said, I think we are making an effort to try to focus on the major kingpins and the major distributors. That this is our --

MR. GELACAK: I didn't mean to suggest that you're not.

MR. LITT: That's not so much a response to you as a response to him. But I question whether there is an -- a need or even an opportunity to do a lot to increase the penalties for them. Most of those people -- most of the kingpins, by the time we get them, they are up at the top of the sentencing scale anyway. They are going to jail for life. The cartel leaders, the people who are bringing across multi hundred kilograms of the cocaine from Mexico, if we get them and prosecute them, we have got the sentences on them.

MR. GELACAK: I agree with you. We're communicating on two levels. I didn't mean to suggest we can't hammer those people down. We can. The purpose of my suggestion for a change in the wording of the mandatory minimum statutes is to take the focus off the people on the low end of the spectrum. We don't need to hammer those people. We can deal with them in our system and we have dealt with them for years. But when we focus on the mandatory minimum based only on quantity, people who -- everyone, even the Department agrees, in some instances that we've got the wrong people, people who could receive -- could and perhaps should receive a break, but we're not able to give it to them.

The purpose of changing the -- the standard from quantity to role would be to give some assistance to people on the lower end, not the -- we can always get people on the upper end.

MR. LITT: Can I just make one more comment? I don't think that we would support a -- a system that is totally divorced from quantity. I think that the quantity --

MR. GELACAK: We could make it a factor.

MR. LITT: -- is an important measure of the harm to the community. Somebody who is distributing an ounce of crack cocaine a week or over a long period of time, it should be attributable for that harm done to the community.

JUDGE CONABOY: Commission Goldsmith.

MR. GOLDSMITH: I've got two questions, I suppose. First, Ms. Merritt, earlier, I asked Mr. Litt to comment about whether discretion under the Guidelines had been transferred to prosecutors from judges and I believe he, in essence, said no for a variety of reasons. You touched upon that issue in brief in your testimony. Would you care to elaborate further? Could

you give specific examples of why you believe that the discretion has been transferred to the prosecutors?

MS. MERRITT: The discretion has been transferred to the prosecutors because of their ability to choose the charges that are going to be brought. For example, in some cases, if you are -- we as defense lawyers would be retained to represent people pre-indictment. An offer will come down pre-indictment and we will be told it will be a nonmandatory minimum offer, but if we do not take that offer pre-indictment, there will be a charge after indictment and the person will be indicted for a mandatory minimum quantity.

MR. GOLDSMITH: That's not a Guideline problem. That's a mandatory minimum.

MS. MERRITT: But it becomes a Guideline problem, as well, and the reason it does is because you know the sentence your client is going to get under the first scenario and not under the second. It's the prosecutor that has the power instead of the judge who looking at the entire spectrum of the defendant's activities at sentencing can say I believe this is the appropriate sentence based upon your conduct and based upon this offense.

MR. GOLDSMITH: But that kind of example, it seems to me, really fits more within Mr. Litt's view. It's always been that way. The prosecutor has always had control over the charge and so if it's simply a matter of the prosecutor having control over the charge, it's always been that way so there's been no transfer in that respect. So that reflects the prior practice.

MS. MERRITT: Except for relevant conduct. Except for when the prosecutor will tell you I will only indict for this offense and the relevant conduct will never get before the judge because the judge is not going to know about these other transactions. I think that affects the Guidelines, as well.

JUDGE CARNES: That's a prosecutor who is essentially cheating or lying. How can a guideline system protect against somebody like that?

MS. MERRITT: First of all --

JUDGE CARNES: If he's not going to tell the judge, you don't think that's a lie?

MS. MERRITT: No. Because I think there are some instances in which the prosecutor could say based upon what I know at the present time, I could say this other count, which is not readily provable --

JUDGE CARNES: In your hypothetical, if you didn't deal with the prosecutor, it was going --

MS. MERRITT: That's the --

JUDGE CARNES: I don't how to you design a system to ward off people who don't tell

the truth.

MS. MERRITT: Again, I do not want to say anybody is not telling the truth. They may be. It's essentially what gamble are you going to take. Again, if you're pre-indictment, you have not seen the discovery in the case, you haven't seen how strong a case the Government has against a client.

To me, that is one of the worst, the worst of the elements of the system with respect to charging by the prosecutor.

JUDGE MAZZONE: Yet some of your predecessors have told us they want to go to charge of conviction. You're saying just the opposite. The Federal Defenders before us have said they would rather go strictly with what you can prove in court, the charge conviction offense system.

MS. MERRITT: I agree post-indictment. The example I was giving was when I said -- as I said, when you retain pre-indictment and the prosecutor -- the first time the prosecutor has the opportunity to sway the system is at the pre-indictment level. After indictment, I agree again, but, again, I think at that point, you can only or you should only count the offense of conviction. You should not be counting uncharged conduct. Particularly again, it's with respect to the former co-conspirators who now agree to assist the Government and become testifying witnesses for the Government. Based upon their uncorroborated testimony, I think it is extremely unfair to be able to bump a defendant's sentence up.

I represented on appeal a young African American 26-year-old first offender with no violence whose sentence, based upon the offense of conviction, would have been about seven years. Based upon the testimony at sentencing of a former co-defendant who took the Fifth Amendment and wouldn't even testify at this defendant's trial, he bumped this defendant up to life and this young man is doing life in prison and has lost his appeal.

MS. HARKENRIDER: It was the judge who found that co-defendant credible.

MS. MERRITT: That's correct. It was uncorroborated. My suggestion to the Commission is we not allow people to be sentenced based on uncorroborated testimony.

JUDGE TACHA: I just have a quick question. You pointed out, Mr. Perez, I believe what we have heard in a number of circumstances and that is that the Chapter 3 guidelines are based on a model of -- sort of the big organized crime model and that many of the drug markets are -- are quite different and quite loosely organized. In your experience -- and I think you sort of affirmed the quantity-based Guidelines. In your experience, is quantity at least a representative proxy for how the organization works?

MR. PEREZ: That's a difficult question because the scenarios do -- do vary so greatly. One of the problems that we see here are just the -- not the structure, but the way these things are associated. The way the defendants act in these type of associations. What I think of just off the

top of my head is -- and this is a scenario that I see frequently -- there's an individual who is so-called a supplier. But he's only a supplier because he knows where to get the cocaine from. Let's just use cocaine.

JUDGE TACHA: But it's not a kingpin situation. It's out there, circles of --

MR. PEREZ: Often, it seems the supplier, it's a cousin. I mean, he knows a cousin in Mexico that gets him cocaine. He buys the cocaine, brings it across the border, gives it to a distributor, who then in turn distributes to a multitude of other people who this central supplier may never know about, the guy got it from the cousin and it's really hard to say well, this individual should be held responsible. You know, one of the other distributors should be held responsible for the entire quantity.

And -- and what I see in the District is they -- the charging decision will charge just the defendant for his -- for his scope of his conduct. The conspiracy doesn't really encompass everybody else's behavior that they are aware of. And therefore, then the role guideline is less important because they are only charging the scope of his conduct. And I see that used as a remedy for the larger expansive problem, charge everybody with the larger drug amount and then get into the role adjustments which, again, like I said, the mitigating role seems somewhat confusing. It's easier to stay away from that issue and just charge just their conduct.

MS. HARKENRIDER: So the Commission's changing of relevant conduct a few years ago to make it clear that relevant conduct should only apply to that among those jointly undertaken helped to some extent?

MR. PEREZ: I think it did. I think it narrowed the focus.

JUDGE CONABOY: Commissioner Goldsmith.

MR. GOLDSMITH: One final question for Mr. Litt. As you know, Mr. Litt, the Commission has been studying the question of crack cocaine and the appropriate ratio between crack and powder. And I know that we are anxious to receive input from the Department on a specific ratio that you think would further both prosecution policy and -- and justice in this context. The Department acknowledged that the problem needed to be studied, but has not been forthcoming with any recommended ratio. When, if ever, do you think we can expect the Department to take a position on that, if you know?

MR. LITT: I can't give you a specific date. I mean, we've -- we're continuing to be willing to work with you and with Congress on this because Congress is now a player in this as well, to try to assess whether there is another ratio that can meet the law enforcement need. Obviously, I don't have to run through our views on this. You've heard them.

MR. GOLDSMITH: Actually, we haven't heard views. We have heard the Department is studying the problem. I guess I'm saying we would like to get some input from the Department as soon as possible. Thank you.

JUDGE CONABOY: Thank you all, very much and we'll go to the last panel now and I appreciate everybody being so patient. Thank you all, very much.

On the last panel, we'll be talking somewhat about departures. For instance, it would bring back the Professor Reitz with us before and also Mr. Litt will be staying with us again for the last panel. And the two new members are Ms. Suzanne Wall Juarez, who is a probation officer here in Denver. Began your career in New Mexico, as I understand it, and transferred here in 1996 and there are now a probation officer here in Denver. Happy to have you with us.

And Ms. Virginia Grady, who is also a an Assistant Public Defender here in the -- in Denver. Let's see. You've been working here as an Assistant Fed -- I see. You were a State Public Defender from 1984 to 1990. And now you're with the Federal Public Defenders office.

MS. GRADY: That's right.

JUDGE CONABOY: Thank you for being with us. Suppose we start with you, Ms. Grady.

MS. GRADY: Thank you, Mr. Chairman and members of the Commission. As you just heard, I started off my career as a lawyer working for the State Public Defender in the Denver trial office and came to the Federal Defenders office after practicing State law, which is, of course, very different, for about seven and a half years.

So I've had the pleasure of comparing the Federal Sentencing Guidelines to the State sentencing system where you are walking in with a client having virtually no idea what -- where the sentence could end up as opposed to the Federal sentence where you have basically a range of about 10 to 15 months in most cases.

I'd like to begin with the suggestion in the staff discussion paper that the language in Section 5(h) needs to be clarified and specifically with reference to the ordinarily, not ordinarily relevant language. The problem that I experienced as a practitioner with this language is that it seems to mandate at least to some judges that certain characteristics which Justice Kennedy identified as discouraged grounds for departure, it seems to me to least mandate to some judges that these are not particularly good grounds for departure at all. And in cases where you have a sentencing judge who is, in fact, considering these discouraged grounds for departure that are identified in 5(h), I think that there is a clear suggestion with the language that the defendant is beginning this argument with a handicap, which I don't think is what the Commission intended when it drafted this section of the Guidelines. You can replace this not ordinarily relevant language with other language which clarifies it or as the -- the paper -- discussion paper suggests, you can replace it with specific examples of how particular characteristics might justify a ground for departure, but I think that you'll just find that simplifying or attempting to clarify this language is simply going to create a more complicated scenario and area for discussion.

I think that the particular reasons that a court may depart downward are endless and the point is that every case is different. And there is never one particular factor which is going to be

used to justify a motion for downward departure and if there is a defense lawyer who is standing there, arguing that there's one particular factor such as age or education or socioeconomic status as a basis for a motion for downward departure, then something's wrong and that's easily identifiable. And the problem that I see with the -- with all motions for downward departure and with the -- and with the discouraged grounds for departure that are identified in Section 5(h) is not with the particular current or historical factors that might be considered mitigating.

The problem that I see is that once the defense lawyer or the judge or the prosecutor or the probation officer is able to identify a particular factor which would justify a motion for downward departure or a variety of factors which is more usual, I think, which would justify a motion for downward departure, nobody seems to know what to do with it. And I think the reason for that is because the -- the players are all so concerned with whether or not the particular factors are, as Justice Kennedy phrased it, discouraged factors or encouraged factors or if they are not in the list at all, should we even be talking about them or looking at them and when you start making a list, you get a short list or a long list, somebody is going to read it as a suggestion that you're excluding particular areas for departure or that this is an all-inclusive list or that this is the only list. And as all of us know who have argued and considered particular grounds for departure, the variety is -- of examples that you could come up with is exponential.

So I think where the problem that -- that we have here and what I would suggest to the Commission is please don't make the list longer. I don't know about making the list shorter, but perhaps the suggestion that you could certainly make it more abundantly clear or put it in a more positive light that you're not -- this is not an exclusive list and that there are many other. You can certainly invite any court to consider any ground for a downward departure. What I think that we are all missing is a logistical model. Something that lawyers can use and that prosecutors and probation officers and the courts can use to ask certain questions that will answer the question how is a particular set of potentially mitigating factors related to the current offense.

For example, you could have a bank robber defendant who is confined to a wheelchair. But the fact that that person is confined to a wheelchair is not necessarily, in and of itself, going to be considered a ground for departure. Although it may be mitigating, it does not necessarily -- it's not necessarily going to constitute a ground for departure, unless the story which explains how that person got into a wheelchair is somehow related to the reason that that person committed the bank robbery in the first place or if you look at that situation from the other end of sentencing, the question may be how does the sentencing impact this person's ability -- ability to continue basic -- basic living.

In other words, is the person's health so poor that a sentence to imprisonment would severely impact it or is that person -- or is a sentence of imprisonment outweighed more by this person's variety of health reasons that may be associated with why he's in a wheelchair in the first place.

Another example I give you is -- this is from a case that is in the Tenth Circuit that you, Judge Tacha, may be familiar with. There is a Vietnam vet who had a lengthy history of having post-traumatic stress syndrome and is also the sole caretaker of his child and had a variety of

particular reasons. That's the Webb case, Judge Tacha, and had a variety of different grounds -- of different circumstances which would justify a motion for downward departure and that motion was denied by the trial judge at sentencing. And what you often see is that the people aren't discussing at the district court level in the sentencing how these particular circumstances are related to why that person is in Federal court in the first place. And so I would suggest that if we're going to attempt to achieve commonality in downward departures which, you know, by definition downward departures mean you're not going to have commonality -- you're going to have disparity in sentences because you're talking about a case which simply cannot -- is not a heartland case and cannot be quantified, but if you want to achieve commonality, I suggest we achieve commonality in logic and that a logistical model be formulated in the form of a policy statement, nothing more, but that invites us to ask a certain number of questions every time we're looking to get a motion for downward departure. I'm sorry I'm going beyond the time I set for myself. The first --

JUDGE CONABOY: I won't have to say that now. I'm glad you said it.

MS. GRADY: Pardon me?

JUDGE CONABOY: I said I'm glad you said it.

MS. GRADY: The first question that I'm asked --

JUDGE CONABOY: You're way over.

MS. GRADY: Pardon me. May I go on or do you want me to stop?

JUDGE CONABOY: Would you try to wrap it up? I don't -- it is an interesting point, but we're just running out of time. I know you're from a Syracuse, but I --

MS. GRADY: Don't hold that against me. I have nothing to do with basketball. The questions that I would ask are, 1, are the circumstances which are cited by the defendant as potentially mitigating circumstances, are they unusual or exceptional and, number 2, if so, are they causally related to the offense conduct or if you're approaching the downward departure from the other end -- that is, whether or not the sentence itself is going to impact an ongoing or unusual situation -- a common logistical model should ask whether the usual goals of imprisonment are outweighed by the need for a downward departure.

If you would invite all of us to ask some basic questions, I think in addition to inviting more discretion with downward departures, I think that would be a great improvement to the Guidelines.

JUDGE CONABOY: Thank you, Ms. Grady. And Ms. Juarez, will you go next.

MS. JUAREZ: First of all, I'd like to thank the Commission for allowing us to address these issues. And I hope that it will result in simplification, which is why we're here.

My experience with the Federal Guideline Sentencing process in two districts within the Tenth Circuit spans a five-year period. The general attitude of probation officers was that there was a legitimate need for reform in the Federal system to deal with disparity in an attempt to achieve uniformity. While officers understand that the Guidelines are here to stay, officers believe that the Guidelines somewhat restrict the sentencing process.

Probation officers in the Federal system are responsible for preparing a pre-sentence report. Our goal is to present the Court with the facts of the case and correctly interpret it and apply the Guidelines. This task is often misrepresented or viewed with skepticism. Prosecutors protect a plea agreement that they have negotiated and the defense attorney is to represent his client in the best way possible. As the only party without an agenda or a deal to preserve, we are often placed in the awkward position of being an adversary to both sides.

In general, I'd just like to say that I know that the Commission recognized that there would be some problems with the Guidelines in general and that one of them identified as a potential problem was the ability of the prosecutor to influence sentences by increasing or decreasing the number of counts in an indictment. Manipulation of the indictment may not be as prevalent as manipulation of Guideline applications related to adjustments for role in the offense and downward departures for substantial assistance. Officers face this problem every day. Prosecutors have the discretion to present these Rule 11's which essentially precludes the Court from being able to consider any additional information uncovered in pre-sentence investigation. After such a plea agreement has been accepted by the Court, the pre-sentence report is rendered inconsequential and unaffected as it accomplishes little more than fulfilling the statutory requirement.

When a sentence has been determined at the time of the plea, probation officers often question why a report was prepared because it was of little value in the sentencing process.

Perhaps most importantly, this practice greatly limits the sentencing judge's authority to sentence the defendants appropriately based on factors that may not be considered at the time of plea.

With regard to offender characteristics, I think it's a very good idea that the Commission consider eliminating unnecessary or redundant commentary and combine certain sections together to create a little bit more simplification and generalization. However, I don't believe that expanding the reasons or the list would be a good idea. I think it would just create more confusion. It is difficult not to consider certain offender characteristics in the decision to depart downward because each individual is unique and their situation is different. These characteristics should be considered on an individual basis and consideration should include extraordinary circumstances or characteristics.

I believe that the current method of determining validity of the downward departure addresses the pertinent issues and allows for judicial discretion. The courts are required to consider the basis for downward departure and make the ultimate decision, but I think perhaps judges should be imparted with even more discretion to depart downward for reasons that they

believe are critical to rendering an appropriate decision. The Commission may achieve real simplification by allowing the judges discretion to determine if a defendant qualifies for a downward departure based on a variety of criteria that would be applied to each case to help determine the defendant -- to determine if the defendant's particular circumstances warrant a departure. Thank you.

JUDGE CONABOY: Thank you, very much. Professor Reitz.

PROFESSOR REITZ: Thank you. I'd like to begin by joining in a number of comments I heard, particularly in the morning, applauding the decision of the United States vs. Koon. I think it will have a beneficial impact at least in the appellate practice that is generated by guidelines and that's going to filter down to, I hope, new attitudes of -- of -- in the district courts to a clear discretionary power.

One question that I would predict would be on the mind -- on the minds of the Commission members would be whether in light of Koon it is -- it would be wise simply to wait a while and see what the effect of that decision was going to be on this difficult issue of departures and the standard of review of -- of Guideline decisions at the district court level. I don't think the issue is -- is clear- cut.

My inclination and my recommendation I think for today is that it would be a shame if the Commission would just short circuit the simplification process, at least consideration of what could be done at the Commission level about the departure standard perhaps in conjunction with Koon.

Now, what I would like to do in the short time I have is make two suggestions for actions that the Commission may consider. Although I have to say I'm impressed with the extent to which I agree with what Virginia Grady has said about the advisability or desirability of an overarching logic to departure decisions that might be promoted and encouraged by the Commission. Although you'll see as I proceed through my two suggestions, they are somewhat different.

My first order of recommendation, I'm afraid, would require legislative change. I know the Commission can't accomplish that, but it can recommend it.

The second order of recommendation I'll make will have to do with how closely the Commission could approach the effect of a legislative change I would recommend.

The departure standard in Section 3553, itself, seems to me to be the source of some problems that will probably continue even after Koon. The wording of the departure standard that draws attention to whether or not factors have been adequately considered by the Commission, I think probably does not resemble what a trial judge ought to be thinking about in the departure decision.

To my way of thinking, a Commission that performs all of its tasks, even in an exemplary

manner, let alone in an adequate manner is going to produce a general statement of sentencing policy that will still need in the occasional case some flexibility in application. So that the standard of -- of review of the guidelines at least in the first instance for departure decisions that or -- is oriented towards the adequacy of Commission consideration is -- is a bit off the mark. As a suggested redraft, the Commission may think about a standard that has been in use in a number of state systems, the, quote, substantial and compelling reason standard that expresses a sense that there is substantial and compelling reasons that some sentence other than the Guideline sentence is appropriate in a given case with the understanding that there will be few of those cases, not many of those cases.

Now, the second change that would be ideal legislatively would be to draw attention in the departure standard not simply to principles that can be derived from the Guidelines in the Guideline manual as the statute currently states, but that draws further attention to the underlying purposes of sentencing and the sentencing process that Congress has addressed in 3553(a). I think Ms. Grady, again, was getting at some of this.

Now, this -- these sorts of ideas again are for Congress, not the Commission. The Commission can recommend. It can't act legislatively. However, it occurs to me that in Guideline amendments, some of this work can be done if the Commission were to consider it desirable.

So my second order of recommendation is addressed to that. The Sentencing Commission, if it chose to, could say in the guideline manual there are certain offender characteristics, for example, in the 5(h) section of the Guidelines that resist quantification and are difficult in advance to consider, quote, adequately within the meaning of the statutory language.

Therefore, the Commission could, I think, direct sentencing judges in cases where such factors are present in substantially compelling degree to consider departure in that case. The Commission, in effect, could, through its own prerogative, do some of the work that I have suggested legislatively.

Further, I think the Commission could direct a sentencing court in thinking through such a process to the underlying statutory purposes of sentencing that Congress adopted in 3553(a), which one would hope would be both a fount of the Commission's work and the -- as well as the foundation of a district court discretionary decision built upon the guidelines. Thank you.

JUDGE CONABOY: Thank you, Professor. Mr. Litt, again.

MR. LITT: Thank you. I think I can be relatively brief this time because I think the Department's view on this is that the Koon decision is likely to substantially change the practice with respect to departures or at least has the possibility of substantially changing the practice with respect to departures and we don't think it would be a wise thing to -- at the same time that the courts are trying to deal with the effect of Koon, to go and be changing the underlying guidelines that are being dealt with this in process.

I think that we need to give the courts time to evaluate the increased discretion that Koon

has given the district courts to depart before we determine whether anything more is needed. I would only note in addition the necessary tension between the calls for increased flexibility in departures and what I have identified as the primary goals of the Sentencing Reform Act, which are to eliminate disparities in sentencing and make sentencing fair and more predictable and more uniform. The more you open the field for departures, the more -- the less you can achieve uniformity and predictability. And so I think that that -- that's another reason to wait and see what happens with Koon before attempting to tinker with the underlying structure on this.

JUDGE CONABOY: Thank you all, very much. Are there any questions of the panel? I appreciate it very much. Thank you all, very, very much for some of your thoughts.

If any of you wish or maybe you have already given us copies of your written statements even if you had them read, we'd like to add copies of those if you haven't already given those to us.

MS. GRADY: I would prefer to edit mine just a little bit.

JUDGE CONABOY: You can send those in. We would appreciate that. Thank you, very much.

Is there anyone else here in the audience who has any comment or wishes to be heard? If not, we thank all of you very much for your patience and for your determination. We'll conclude the meeting.

(The meeting was concluded at 1:30 p.m.)