UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON RETROACTIVITY

WASHINGTON, D.C.

TUESDAY, NOVEMBER 13, 2007

The Commission convened at the Georgetown University Law Center, Gewirz Student Center, 12th Floor Conference Room, Washington, D.C., JUDGE RICARDO H. HINOJOSA, presiding.

COMMISSION MEMBERS PRESENT:

JUDGE RUBEN CASTILLO

CHIEF JUDGE WILLIAM K. SESSIONS, III

JOHN R. STEER

DABNEY C. FRIEDRICH

BERYL HOWELL

MICHAEL HOROWITZ

KELLI FERRY

EDWARD F. REILLY, JR.

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Criminal Law Committee

STEPHEN SADY
LISA FREELAND
Federal Public Defenders

DAVID DEBOLD
Practitioners Advisory Group

BARRY BOSS
American Bar Association

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South Statesville, North Carolina

HILARY SHELTON
NAACP

PAT NOLAN
Prison Fellowship Ministries

MARC MAUER
Sentencing Project

PANELISTS PRESENT (Continued):

OCIE L. ACOFF, Pastor and Director
Varner Education and Training Facility
Selma, Alabama

JULIE STEWART
DE-ANN COFFMAN
FAMM

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PROCEEDINGS

(9:30 a.m.)

CHAIR HINOJOSA: I would like to welcome everyone to the United States Sentencing Commission Public Hearing on Retroactivity being held here at the Georgetown Law Center and on behalf of the Commission, I want to thank Dena Alexander (phonetic sp.), Elena Koff (phonetic sp.) and Larry Center, who are the -- Larry Center, who is the Director of Continuing Legal Education here at Georgetown Law, for their helpfulness in allowing us to meet here. We certainly appreciate their hospitality.

For those of you who may not be too familiar with the U.S. Sentencing Commission, it was created by the Sentencing Reform Act of 1984 as a bipartisan, independent agency within the Judicial Branch, whose principal purposes are to establish sentencing policies for the federal courts, including guidelines, to advise and assist in the development of effective crime policy and to collect, analyze, research and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource on federal crime policy. There are seven members of the Commission. We're all appointed by the President and confirmed by the Senate and two ex officio members.

I would like to briefly introduce each one of the members. I have enjoyed working with them and I have to say it is a very hard-working group of individuals and I enjoy being able to chair this commission with them. We have Vice Chair Ruben Castillo, who has served as a U.S. District Judge for the Northern District of Illinois since 1994 and just to strengthen himself today, he did bring his father with him, who is present and we welcome him.

We also have Vice Chair William K. Sessions III, who is the Chief Judge of the District of Vermont, where he has been a U.S. District Judge since 1995. We have Vice Chair John R. Steer, who has served from 1987 to 1999 as a General Counsel of the Commission and before that, as Deputy General Counsel to the Commission, and has served as Vice Chair of the Commission since 1999.

We have Commissioner Michael Horowitz, who is currently a partner with the law firm of Cadwalader, Wickersham and Taft here in Washington. He previously served in the Justice Department's criminal division as Deputy Assistant Attorney General and is Chief of Staff. We have Commissioner Beryl Howell, who serves as Executive Managing Director and General Counsel at Stroz Friedberg here in Washington, D.C. and she is the

former General Counsel to Senator Patrick Leahy. We also have Commissioner Dabney Friedrich, who has served as Associate Counsel at the White House from 2003 until her appointment to the Commission in December of 2006 and is a former Assistant United States Attorney. The ex officio members are Commissioner Kelli Ferry, who represents the office of the Attorney General for the U.S. Department of Justice. Ms. Ferry serves as counselor to the Assistant Attorney General for the Criminal Division. And we have Commissioner Ed Reilly, also serves as an ex officio member and he has been the chair of the U.S. Parole Commission since May 31st of the year 2001.

The purpose of today's hearing, some of you may know, is to have interested individuals and organizations and interest groups address the Commission on whether two guideline amendments recently promulgated by the Commission on crack cocaine and criminal history, which went into effect on November 1st, should be made retroactive. With regards to crack cocaine, that is an issue -- federal cocaine sentencing policy has been an issue that the Commission has worked on for a long time, promulgated amendments before that have not gone into effect, as well as sent either statements in or reports to Congress at least

four times on the issue, the latest being in the year 2007, after we promulgated the amendment, which the Commission felt was a very small step with regards to correction of a problem which the Commission identifies with regards to the 100 to one ratio between crack and powder cocaine sentencing. Along with the promulgation of the amendment, the Commission sent a report to Congress urging Congressional action because in the end, Congress is the one that can have the solution with regards to the problem concerning the mandatory minimum ratios.

With regards to criminal history, we also promulgated an amendment which may have the effect, also, of reducing sentences with regards to changing two minor offenses from the -- that count for criminal history points to do not count for criminal history points and trying to correct some confusion that might be out there with regards to cases that might be considered just as one case rather than as separate cases for criminal history points. The Sentencing Reform Act specifically authorized the Commission to make retroactive amendments that resulted in lower penalties. To facilitate this directive, the Commission has promulgated a policy statement in Section 1(b)(1.10) of the guidelines. Among the

factors which the Commission has traditionally considered as to whether a guideline amendment should be made retroactive have been the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment and the difficulty of applying the amendment retroactively. Of course, the Commission, whenever it acts, whether it's the promulgation of an amendment, as well as a new guideline, as well as decisions on retroactivity, always takes into account all of the -- Title 18, Section 3553(a) factors which it needs to consider, as has been the directive by Congress to the Commission.

I will say, obviously, one of those factors that the court considers in each one of these decisions is the interests of the defendants who have been sentenced and/or will be sentenced and/or are serving sentences, as well as the interests of the public, in general. This hearing, of course, is designed to assist the Commission in its deliberation on retroactivity. To date, the Commission has received over 33,000 letters and/or written comments from individuals on the subject. I will say that it is nice to have received so many comments from so many individuals across the country on this particular -- on issues involving both crack cocaine sentencing, as well

criminal history. We thank all of those who have taken the time to give us their comment. We thank those of the individuals who are present today who will give public statements on the issue. This will certainly be helpful to the Commission as we deliberate on these important issues, as we do on all the issues before the Commission, and so we certainly thank the public and those individuals who have taken their time to be here with us today with regards to their comments. And at this point, I would like to ask any other member of the Commission if they would like to make any statements before we start and we'll start with Commissioner Steer and then we'll go back and forth here if anybody wants to make any statements on behalf of themselves.

COMMISSIONER STEER: Mr. Chairman, I look forward to the testimony of the witnesses.

CHAIR HINOJOSA: Judge Castillo, did you want --

JUDGE CASTILLO: No. Thank you.

COMMISSIONER HOWELL: I would like --

CHAIR HINOJOSA: Commissioner Howell.

COMMISSIONER HOWELL: I want to echo the comments that you made, Chairman Hinojosa, in welcoming the witnesses here today. I think that I'm very proud of the cocaine report, crack report, that the

Commission put out. I think it helped fulfill our important mission here, that Justice Breyer commented on in the remedial opinion in Booker, that the Sentencing Commission remains in place, writing guidelines, collecting information about actual district court sentencing decisions, undertaking research and revising the guidelines accordingly.

And I think that we took a very important step with our crack amendment by fixing, to a certain extent, the guideline contribution to the crack powder disparity issue. We fixed the guidelines with the crack amendment and Congress allowed us to do that by not acting and allowing our amendment to go into effect.

But I want to make clear that we are under no false illusion that this crack amendment is a cure-all, as you said, it's only a partial remedy to the crack powder disparity and only on a going-forward basis for those crack offenders sentenced under the guidelines after November 1, 2007. Whether we make that partial remedy apply retroactively is the question before us and as you've said, we've had over 30,000 comments with strong sentiment on both sides of the issue. I just want to raise one point that's particularly important to me and since Judge Walton is sitting in front of us,

it stems from some of the testimony he gave us almost exactly a year ago when we had our crack hearing before we made our crack amendment. And what Judge Walton told us last year was, and I quote Judge Walton, "The attitudes of some of the general population about the unfairness of our drug laws has had a coercive impact on the respect many of our citizens have about the general fairness of our nation's criminal justice system," and he went on to tell us that "the failure to fix the crack powder disparity has left many to believe there is an indifference to the real and perceived unfairness of the policy because of the population disproportionately impacted by it.

As a nation that prides itself on treating all who appear before our courts of law with fairness and equality, the time has come to address a vexing problem for those of us who are entrusted to administer the system and those who suffer the consequences of the policy." Those were really powerful words and they remain uppermost in my mind as we decide on the retroactivity decision, because what we want to do is bolster respect for our criminal justice system by our actions and not undermine that. So I want to join the Chairman in thanking all the witnesses for being here and appreciate the assistance of all the witnesses who

are testifying plus the written comments in assisting us in making our decision.

CHAIR HINOJOSA: Commissioner Horowitz. Commissioner Friedrich. Commissioner Ferry. Well, we're ready to start with the first panel, which is the Judicial Perspective, and we do thank Judge Walton for being present, the Honorable Reggie Walton, who's been a U.S. District Judge for the District of Columbia since the year 2001 and was appointed by Chief Justice Rehnquist to the Criminal Law Committee of the Judicial Conference in the year 2005. From 1989 to 1991, he served as an associate director of the Office of National Drug Control Policy and is a Senior White House Advisor on crime. Judge Walton, again, on behalf of the Commission, we thank you for taking time from your busy schedule to be here with us today.

MR. WALTON: Good morning, Mr. Chairman, Your Honor, members of the Commission. It is an honor and a pleasure to have the opportunity to be here with you on behalf of the Criminal Law Committee. I first want to ask that my written statement be made a part of the record. It coincides with the letter submitted by Judge Castillo. I will try and keep my remarks brief so that I can leave as much time for questioning as you would like. I begin and end my comments with the

underlying reason for why you took the action that you took, which was very courageous on your part, because I know there has been a lot of pressure, from both sides of the aisle, as to which position you should take and I commend you for what you did because I think it is a first good step in addressing a problem that I believe does have fundamental unfairness to it and expressly from the standpoint of the African-American community, considering the disproportionate number of African-American people, primarily African-American males, who have been incarcerated for significant periods of time as a result of their involvement in crack cocaine. I don't in any way excuse the behavior.

I think that individuals who sell drugs do, in fact, perpetrate a harm on society and I think society has a right to exact a certain level of punishment as a result of that, but I think that the process, first and foremost, has to be perceived as fair and I think the step that you took at least starts to work towards arriving at that goal. I think, obviously, it's important that Congress address this issue and seek to resolve it because I do think that the disparity brings negative attitudes about the criminal justice process from a segment of our society that most needs the input of the criminal justice

system in order to address the many problems that exist in those communities that I'm talking about. I know that there are strong arguments against making this change retroactive. I struggled with whether that was the appropriate position to take, initially taking the position that maybe we should not weigh in, as a judiciary, as to what should be done, but after much debate and much soul searching on my part, I ultimately reached the conclusion that if the reason for the change, which is the reason, was to address what was perceived to be a real and fundamental problem in the fairness of the sentencing guidelines, I just don't see how, in good faith, one can say that just because someone was sentenced on October 30th, that they get a certain sentence, whereas someone who's sentenced on November 1st receives a different sentence.

I appreciate the concerns about the impact that it would have, conceivably, on the judiciary and obviously with the significant calendar that I deal with on a daily basis, that's a concern. But I don't believe that the court, as an institution, can take the position that if a change was adopted to address a fundamental unfairness in the sentencing process, that we, as judges, should say that well, we're going to be overloaded or we're going to be worked to a greater

extent and because of that, that change should not be made retroactive. I just think that that's a fundamentally unsound position for the court to take because we're in the business of trying to do justice and I think if we're going to do justice, that means not just justice in the future, but rectifying injustices that occurred in the past.

I also had concerns about the impact it would have, potentially, on our probation departments if we had a large influx of people coming back into the community who were anticipated to be back in the community at that time, and after consultation with the advisory group from the probation departments who weighed in on the issue, I'm convinced that while it would be somewhat of a burden, that they have the capacity to deal with the influx of additional individuals who they would have to supervise.

I do think that the major concern, and it's a legitimate concern, is the issue of public safety because I think, first and foremost, whenever a policy is enacted that has -- that addresses the issue of sentencing, that public safety has to be one of the most important factors that you consider and I do have concerns as to whether, if we have a significant increase of individuals coming into the community --

and we are talking about at least, in the first year and maybe the second year, a sizeable number of people coming back into the community before it was anticipated -- whether that would have a serious impact on the crime problem. And while that remains a concern that I have, and I know many other members of the Criminal Law Committee have, we ultimately reach the conclusion that since this is not an automatic retroactive application of the change and that judges are going to have to make reason, decision as to whether the reduction is afforded to individuals who qualify for it, that with that in play and with maybe some guidance from the Commission itself as to when it's appropriate to grant that two-level decrease, that while there's a concern about public safety, that the bottom line, need to address a fundamental unfairness, outweighs that concern.

And I think -- first and foremost, I think it's important that we not take the position that every crack offender is the same. They are not. I think we all we have to do is think back a few years ago to the young lady down at the University of Hampton. I can't remember her last name, but her first name, I believe, was Kimba and she got caught up in a situation that she should not have been involved in, but unfortunately,

she got involved in that situation. She came from a good family. She was basically a good girl. But she got involved with a person who was involved in drugs, who enticed her to get involved. Apparently it came out that she had been physically abused and she did things that were totally contrary to her upbringing and she received a 22-year sentence. Was a 22-year sentence necessary to address that young lady? I suggest no.

So here we have somebody who had just had a child, who now was going to be locked up until that child would become an adult. I think that's not something that should happen in our criminal justice system. Yes, punishment was appropriate, but for someone like that, punishment of a lot lesser severity, in my view, would've been adequate to punish her and to send the message that that behavior is not going to be tolerated.

And I think there are many individuals who fit that same mold, so I don't think we can group everybody together. Yes, if you're talking about an offender who was trafficking in large amounts of cocaine and that having, obviously, a very serious impact on society, if you're talking about an individual who's engaged in violence or possession of

weapons during the commission of the crime, those are legitimate factors that maybe you want to address by way of a policy statement as to whether this reduction should apply to them. But I do think that fundamental fairness, in the end, has to control the decision and should dictate whether this becomes retroactive or not and in my view, it should and in my view, we have to give the judges the credit of factoring in these various considerations and making a determination as to whether this particular individual would, in fact, pose a community if they come back into the community two years or whatever prior to when it was anticipated.

With that, I'll leave as much time as you would like to try and answer your questions, but I do think that, from the standpoint of sending the message to those in our society who sometimes believe that our society really doesn't care about them, I think it's important that we send a message that we do and that while we're not going to tolerate aberrant behavior on the part of anybody, that we're going to treat everybody who comes into our court of law equally.

CHAIR HINOJOSA: Who's got the first question?

JUDGE CASTILLO: Judge Walton, first of all, thank you for your testimony. I certainly appreciate

it. I also appreciate the fact that you are one of the few people that's testifying today that has held a position of national responsibility in our country's struggle with drug addiction. Now, our chair is trying to lead our commission in a responsible way to deal with this issue of retroactivity. One of the things that has been troubling to me is the suggestion that is being repeated in the media that we have purposely delayed addressing the issue of retroactivity for some type of political gain.

What we're trying to do is operate in a responsible way so that the people that are responsible for any reentry issues can also act in a desired way. What would you suggest to judges and probation officers and people in charge of the Bureau of Prisons in terms of dealing with the issue of retroactivity at this point? Should they be doing something or should they just be waiting to see when and if we vote on this issue?

MR. WALTON: No. We, in fact, have asked the probation people to start to look at this issue and to start to dialog with the Bureau of Prisons about what could be done if this does become a reality, in ensuring that when it does occur, that processes will be in place to address the greater influx of

individuals who will come into the system. There have been some initial analysis done as to what additional resources in certain districts may be necessary in order to address the influx, so I think that all concerned should be gearing up for the potential that conceivably this will become a reality. I don't think we should wait until it occurs and then try and scramble around and put in place a system that may not be effective in addressing the situation.

JUDGE CASTILLO: So you would suggest that action be taken now?

MR. WALTON: Yeah. I think they should start to at least have working groups and start to look at the issue and assess what the impact will be and how they can best address it.

JUDGE CASTILLO: Judge Walton, you talked about crack cocaine sentencing policy in the crack amendments. Did the Criminal Law Committee have a position with regards to the criminal history amendments?

MR. WALTON: No, we did not address that particular issue.

CHAIR HINOJOSA: Vice Chair Steer.

COMMISSIONER STEER: Judge Walton, I thank you for your excellent statement and thanks to the

Criminal Law Committee for a very helpful letter that, I think, analyzes the many aspects of this issue in a very detailed and fair manner. You've mentioned the public safety issue and I think it's one that concerns all of us. What things can a judge do and the probation office and all of the parties concerned do to best address those concerns, on an individualized basis, to try to identify those individuals who need some additional supervision and put in place those things that are needed?

MR. WALTON: Well, I think the first thing that any judge should do before he or she decides to reduce a sentence is carefully review the individual who they have before them, to assess what their prior history is, is there a history of prior violent behavior, is there a history of prior possession of weapons behavior is there a history of prior drug dealing? I think it would obviously be helpful to know what that individual's institutional situation has been, whether that individual has been a model prisoner or whether they've engaged in acts that would suggest that they would continue to engage in such acts when they come back into the community. I think that, obviously, there needs to be some period of transition, so I would hope that individuals coming back would

transition back into the community through halfway houses so that they would have that opportunity for three, four, five, six months to transition back. I think it may be important -- for example, if I had somebody who I thought there was some level of risk that I was letting back, I might be inclined, as an individual judge, to require that that person report to me every six months so that I would -- that person would know that they were going to have to face me and they were going to have to show me that they're conducting themselves appropriately. Sure, that's additional work, but that's what we're here to do. So I think there are things that we can do to let it be known to individuals who come back, that they're expected to conduct themselves appropriately and if they don't, justice will be harsh.

COMMISSIONER STEER: You're describing a process of perhaps modifying conditions of supervision.

MR. WALTON: Yeah.

COMMISSIONER STEER: Would that generally require the presence of the defendant or not?

MR. WALTON: I would think not. I don't think, if you're going to afford, in effect, a reduced sentence to an individual but you're going to impose additional conditions, I would think that you wouldn't

necessarily have to have that individual before you. At least, you wouldn't have to bring them back at the expense of the Federal Bureau of Prisons, into the courtroom in order to announce those changes. I think it probably would be prudent, however, once that individual is released, to issue an order to require that once they're back into the community that they do appear before the court so the court can directly address them and let them know what these new conditions are and what the expectations are of the court regarding their behavior once they're back in the community.

CHAIR HINOJOSA: Vice Chair Sessions.

JUDGE SESSIONS: Judge Walton, I just -- I want to express my appreciation for you coming today and also your comments about courage, because it comes from a person whom I admire for just that characteristic, the real courage that you've shown in your career. And you focused in exactly on my question and that is the burden on judges and probation officers. Some people look at this question about retroactivity and say well, there's an automatic reduction of a certain period of time for crack defendants across the country and of course, that is not what this is about. This is about giving judges

the discretion and the burden to analyze again, in light of these changes to the guidelines, again, whether or not a person should be released early and that places a very heavy responsibility on all of the judges across the country. My question is whether you think -- and particularly, in those jurisdictions, like the Eastern District of Virginia, which has a high number of cases, whether you think courts can and are willing to take on that ultimate responsibility?

MR. WALTON: I believe that's the case. I, in fact, have two friends who are judges on the Eastern District who I spoke to not long ago in reference to this issue and they know, because of their numbers, it will be an added burden to a greater extent than other districts, but they, nonetheless, both indicated that they're willing to take on that challenge.

And in my experience and in my discussions with judges all throughout the country, I believe that judges are prepared to take on that responsibility because, as I say, if judges believe, and I think most judges do, that the fix was something that needed to occur to address a fundamental fairness, I believe that most judges -- in fact, I would hope all judges -- are willing and able to step up to the plate and take on that additional burden.

CHAIR HINOJOSA: Commissioner Howell.

COMMISSIONER HOWELL: As you noted, we're all concerned about the public safety issue and you alluded to this in your testimony and in some of the written comments we've received have suggested that in the policy statements that the Commission issues along with any retroactive decision, if we decide that, we should restrict eligibility for the two points off the guideline offense level to offenders who do not have guns associated with their offense or violence associated with their offense and I was interested in the, you know, very thorough, thoughtful letter from the CLC, that the Criminal Law Committee didn't proffer that as one of their recommendations to the Commission. And I just wanted to wanted to know if you could address why it is that the Criminal Law Committee decided not to make a recommendation to the Commission to restrict eligibility for a reduction in sentence along the lines that some from state and local and federal law enforcement have suggested?

MR. WALTON: To be honest, I don't know if that was really something that came under consideration. I, in fact, thought about that last night as I was thinking about what I would say. I don't, I think, reach the point of concluding that we

should necessarily categorically exclude everybody. Now, maybe if you're talking about someone who not only was involved in drug trafficking, but also was involved in very violent behavior associated to that drug trafficking, someone -- I mean, we had an individual here in Washington who was prosecuted not long ago who was implicated in somewhere around 25, 30 murders.

For an individual like that, I could understand how it may be appropriate to conclude that he is ineligible for this reduction. But generally, I wouldn't say that that should categorically be the situation. People do change. And I think we end up, as a society -- and I don't think anybody would say I'm light on crime. I'm sort of, I guess, maybe losing the image that I've had as a top sentencer as a result of the some of the positions I've taken in this regard.

COMMISSIONER HOWELL: I think you'll always have a reputation as a thoughtful jurist.

MR. WALTON: But I do think that the reality is that we have a lot of people in our presence who have reached the point where they could be released back into society and would not be a potential threat. And we pay an astronomical amount of money to keep those people locked up for times beyond when they need to be locked up, when we could be using that money to

maybe educate our kids and put programs in our communities so those kids don't end up in the prison cells that are being occupied by those who don't need to be there. So I don't like the idea of a categorical rejection of everybody. I could see how you may want to, as I say, zero out certain people who you think do pose too great of a threat, but by and large, I think that should be exercised with caution.

COMMISSIONER HOWELL: Thank you.

CHAIR HINOJOSA: Commissioner Horowitz.

COMMISSIONER HOROWITZ: Judge, the -- first of all, thank you for coming and speaking to us. In the letter, the CLC references the possibility of the Commission thinking through the Booker issues, the Hicks decision, that's something that you've obviously not touched on in your testimony today. Do you have any thoughts about that, either formal from the CLC or as a district judge who's going to have to deal with a number of sentencings?

MR. WALTON: I mean, that's a concern. As you know, Judge Cassell, in his letter, did address that, at least to some degree, and suggested that maybe a policy statement from the Commission might address that, at least to some degree, but I think at bottom, there is going to be a legal battle that will be waged

as to whether pre-Booker sentence defendants who received the reduction are then placed in the position of a post-Booker defendant and therefore the ramifications of Booker come into play. And that, obviously, is somewhat of a concern because if that is, in fact, what the legal landscape ends up being, it would have a greater impact on the workload of the courts.

But again, I guess I just say, you know, we were hired to do this job. Nobody asked us to do it. It's a great job in a lot of ways and it's a challenge that I think most of my colleagues -- I know I would be willing to take on. Sure, it may make us work harder, but to address a fundamental unfairness and to provide the relief that you have provided to those who are deserving, I think there's a sufficient justification for doing so even though the concerns that you express and reference, the Booker, may be a reality.

COMMISSIONER HOROWITZ: Can I ask just one other question, also. The Supreme Court heard argument in October on the Kimbrough case which deals with the crack powder ratio. It's obviously unclear how that case will come out. As a district judge, would you be inclined to wait for that decision from the Supreme Court given the potential ramifications it could have

on the crack powder sentencing and your authority in that regard or do you think that's something that you would not be inclined to wait for, assuming you were doing resentencings?

MR. WALTON: You mean if you decided to --

COMMISSIONER HOROWITZ: Right. Assuming we decided to make it retroactive. Is that something you think you would additionally wait for, potentially, obviously, as late as June for Supreme Court's decision?

MR. WALTON: Probably not for those offenders who the change would have an immediate effect on. I don't think I should delay the decision as to what I do in their cases. For those whose -- you know, the retroactivity impact would not have an effect until after the Supreme Court makes its decision, in those situations, I might be inclined to wait.

COMMISSIONER HOROWITZ: Thank you.

CHAIR HINOJOSA: Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Judge Walton, thank you for coming here today. Thank you for your time and your expertise. We appreciate it very much. The Criminal Law Committee has recommended a possible policy statement would be that the court should simply consider the change in the crack guideline made by the

Commission. Some of the other points you've made here today, such as the possibility that judges like you would consider having defendants report periodically, to deal with the public safety issue or modifying conditions of release. Are those things that you think would be best captured in a policy statement by the Commission or are those things that the Criminal Law Committee would consider recommending to the individual courts?

And secondly, if I can make one -- ask you one more question related to that, to what extent do you think the modifications in supervised release, to what extent can that capture or replicate the same sort of comprehensive assessment that occurs before a release, currently, in the Bureau of Prisons? To what extent can judges, by modifying conditions for release to include home confinement or community confinement, to what extent can they replicate the same sort of comprehensive risk assessment that currently occurs in prison?

MR. WALTON: Judges probably would not be able to make that type of assessment without some input, I would think, from the Bureau of Prisons. I would think that would be necessary because the individual may not have been before the court for some

period of time. The pre-sentence report would be somewhat dated. I mean, obviously their behavior in the community would not have changed, but they've been incarcerated for a number of years and I think you would have to have some input from the Bureau of Prisons as to what the institutional adjustment of the individual has been in assessing what type of additional modifications in the conditions of supervised release would be appropriate. Your first question was?

COMMISSIONER FRIEDRICH: Was in terms -- you've recommended a potential policy statement that's relatively narrow and you've presented some other ideas, both in the testimony and here today. Should we consider a broader policy statement or are these things that you think that the courts, on their own, should do through Criminal Law Committee recommendations or the like? Or is this something we, the Commission, should consider incorporating into policy?

MR. WALTON: I've looked at some of the other submissions that were made to the Commission. I know there are some who say that you should not do anything by way of a policy statement. I, personally -- and this is not the view of the committee, because it wasn't addressed beyond what we discussed that's in the

letter, but I personally view -- I personally believe that we, as judges, take very seriously the policy statements that you issue in reference to guidelines and I think it would have greater force if it came from you and I personally would appreciate that type of assistance from the Commission in my assessment as to which individuals I thought were appropriate for the reduction. So I would personally encourage that type of guidance from the Commission.

CHAIR HINOJOSA: Commissioner Ferry.

COMMISSIONER FERRY: If I may, I have two. One is a follow-on to what you just asked, or what you just answered. And let me say good morning. It's always good to see you again, Judge. You indicated that you may like to have updated input from the Bureau of Prisons. What format would you anticipate receiving that input in, from AUSAs or report from the Bureau of Prisons, what would you anticipate doing?

MR. WALTON: I would anticipate that our probation officers would dialog with the Bureau of Prisons and serve us an updated pre-sentence report with the information about what the individual's institutional adjustment had been. Obviously, if the government wanted to weigh in -- because one of the things I emphasized as we were debating this whole

issue, which you will see in the letter, was the fact that the Justice Department would need to be notified about the fact that we were considering this issue, so if the department wanted to weigh in and express their opposition, they would have that opportunity.

COMMISSIONER FERRY: My second question relates to one that Commissioner Horowitz asked regarding the Booker question and I'm curious to know either -- whether or not the Criminal Law Committee, itself, discussed this and what its opinion was or if you have any individual opinions on the idea that if Booker applies retroactively, it could inject some unwarranted disparity in the system, that is that all courts have universally held that Booker does not apply retroactively but yet, if a court were to determine that in the context of this 3582(c) hearing that the defendant could argue the Booker factors, the idea that these defendants would get, arguably, a benefit that other defendants who had been previously sentenced were not able to get and the type of disparity that injects into the system. Did you have any discussions or does the Criminal Law Committee have any conclusions regarding that?

MR. WALTON: We had some discussions in reference to that, but I don't think there was any

consensus as to what the potential impact would be. I think that it is a concern of many of the members of the committee and obviously, the cases that have looked at the issue to date have taken the position that if you're going to resentence, that Booker does come into play. However, as I recall, I think it's the Hicks case, said something about maybe a policy statement from the Commission could conceivably have an impact on what factors the judge could take into account.

I think it's going engender, unquestionably, a legal battle. I think that's a reality. And where judges ultimately come out is going to, you know, I think be ultimately resolved by the courts of appeals and maybe, ultimately, by the Supreme Court. But I really, I think, can't give you a definitive perspective.

It's an issue that may come before me, so I don't want to opine, is that, you know, how I would rule on that, but it is, you know -- it does, as I say, previously raise some level of concern, but ultimately, I think, you know, the need for the perception and the reality of fundamental fairness outweighs that concern. And the other point I want to make in that regard, which I didn't indicate specifically, but I do think it's profound, also, that, for example, in reference to

LSD -- now, admittedly, the numbers were not the same. When the change in the guidelines regarding LSD became into law, it was, ultimately, made retroactive. And again, I think if this is not made retroactive, I think there will be many in the community who will say well, again, you see what happens when it affects a certain segment of our society, the benefit is awarded to them. When it affects another segment of our society, it's not. And I just think that that's a message that we can't send our society if we want all or part of our society to respect our criminal law system.

CHAIR HINOJOSA: Commissioner Reilly.

COMMISSIONER REILLY: Thank you, Judge, and thank you. It's good to see you and appreciate very much your input. I suppose that every day of the week we at the -- of what's left at the U.S. Parole Commission, make decisions with regard to the impact our decisions have on individual lives and we always look at this issue of treatment, because when we talk about the offenders that I think we are all talking about, which are the nonviolent offenders who have been put in prison for extended periods of time, we really want to know how they've programmed. We want to know the institutional record, we want to know what treatment they've had and we want to know whether they

have programmed well in that treatment. And element -- the distributors, the major distributors of drugs, looking at the individual, who you indicated, got caught up in the system -- and I think there a couple of young lawyers that I read about the other day from Howard University that got caught up in it and are doing a long sentence. You know, how do we build in, I think, into whatever we decide to do or the Commission decides to do, some sort of a statement that says that, you know, we want to know how this person has done, sure, within the institution, but if they were a user of cocaine, were they successful in the treatment they received?

And is somebody willing to sign off that that has been dealt with, because to just turn them back on the street again, as we have seen, ourselves, both with the supervisory lessees from the district, who usually let go through at least three sanctions before we revoke them, if they have not programmed, if they've not had treatment that they've been successful at, then I think it's a lost cause to put them back out there and we're obviously not talking about the violent one, we're talking about the person who just has an addiction and how do we deal with that? I mean, how do we build that into whatever's done, if it is done, that

will guarantee that when you're looking at it, the courts are looking the decision they have to make, that this has been accomplished? And I have to tell you -- and this is no criticism by anybody. I've seen the growth of this system over a period of years here, from 56,000 to 200,000 people in 214 prisons at the federal level, but treatment has been an issue and we've had so many people now in the system, you can't provide the treatment and I think that's a big question.

And if it weren't for a lot of the private sources out there who are able to extend a hand and do that, I don't know what we would do in this country. We couldn't do it because it doesn't seem that we're able to do it, at least in the government, so I guess I'm struggling -- we struggle with it every day. We just had safe surrender here in the District. We had over 530 people come in and surrender for various issues.

We were very involved in that. Many of those people, it was like a whole new world to them, that they had been -- the warrant that was on them had been lifted. Some of them was child support, some of them traffic offenses, whatever. We had 14 of our own from the Parole Commission. But it allows them to lead a new life and certainly, that's what I think all of us

who are in public service want to do and I commend you for your position as a federal judge to come forward and speak on this. And I think we're all struggling with it and certainly we're struggling -- we've got to struggle, as Americans, with this population issue. I don't see how we can continue to build prisons and take money away from other important social resources that we have and so is the treatment issue something your -- is a major concern to you in terms of whether they get it and whether they programmed and whether it was successful and whether it's even available?

MR. WALTON: I mean, that's obviously a significant problem because the reality is that we know a sizeable portion of our prison population have an addiction problem, whether it be alcohol or drugs and we don't have enough treatment capacity in our prisons. And while I think, obviously, we should seek to treat people for addiction when they're incarcerated, the -- a treatment they may receive in that setting may not really reflect their ability to adjust when they're back in the community, so if you have somebody who's had an addiction who receives treatment, I would think that you'd still want to continue some level of treatment regiment once they come back into the community because the same community pressures and

circumstances that caused him to gravitate towards that behavior, which may not exist in the same -- to the same degree in the institutional setting are going to still be in play once they come back into the community. So even if they have been successful -- and I think that's something that should be considered -- I think we still have to consider to what extent we have intervention once they come back into the community.

I mean, one of the things that I learned when I worked in the White House Drug Office is that treatment can be successful. Many times it's not successful. But the longer you keep a person in treatment, the greater likelihood you're going to be successful, but because of the large number of individuals we have who have an addiction problem and the limited resources we have to provide treatment, we've created these 30-day, these 90-day wonders.

In reality, we know -- I mean, it looks good, that we're treating all these people, but in reality we know that those type of programs, by and large, don't work. We need programs that are long-term because it takes a long time for people to change their behavior and their mindset about the use of drugs. And until we're willing to commit those type of resources, we're not going to have the level of success that otherwise I

think we can have in trying to impact the problem of addiction and even under the best of circumstances, even with the best resources that you have, unfortunately, you're going to have people who are going to go back to the use of drugs regardless of what you do, but I do think, for the population we're talking about, that we've got to think about treatment, what somebody has done in reference to treatment and having available for them treatment when they come back into the community.

JUDGE CASTILLO: Judge Walton, can I just follow up on treatment for one second. It's alluded to in the press that a whole bunch of individuals are going to be released. Will those individuals still be under criminal justice authority and have treatment available to them or not? What's your view on that, Judge Walton?

MR. WALTON: Well, they would still be on -- I would assume, still be on supervised release and --

JUDGE CASTILLO: So if they needed treatment and if treatment resources were available at the federal level, would that be something a judge would do, presuming these is retroactivity and the judge did allow for retroactivity?

MR. WALTON: Yes, I would hope so. I mean, I

think, as was indicated by Commissioner Reilly, if we're going to release individuals who we know still have an addiction propensity -- I guess you're always going to have that, but if they still have an addiction and we don't address that, I think the handwriting's going to be on the wall. They're going to be back in the process.

CHAIR HINOJOSA: Judge Walton, the chair gets the very last question. There's some allusion here in the questions and your answers with regards to a policy statement, for example, on firearms. As you know, this amendment just affects the base offense level. We have enhancements with regards to use of firearms. Many of these individuals may have been convicted with regards to the mandatory consecutive five-year minimum with regards to possession of a firearm.

There are enhancements with regards to if you have an organizing role or manager or supervisor role or leader role and so those enhancements have been built into the sentences. Would it be necessary to have a policy statement with regards to that when the only -- if you have either a system in place or a policy statement that only addresses the base offense level when there's already been enhancements and the individuals, with using firearms and/or having a major

role in the offense, have already received a higher sentence?

MR. WALTON: Well, I don't think those factors would necessarily or should be necessarily determinative as to whether the reduction is afforded, but I think they are at least things that courts should take into consideration, yes. If these factors have already been considered and had an impact on what the judge decided to do in reference to the sentence that was given on the drug charge, itself, then obviously if that was factored, it should be doubled. But I still think it's something that the judge may want to consider.

I mean, judges may have given a lesser sentence, for example, in reference to the weapons offense if there was no violence involved, especially when it comes to what the sentence was on the drug offense and may have decided well, I'll give -- because I've got to give this huge sentence, pre-Booker, regarding the sentencing guidelines of a drug offender, I'm not going to maybe give the level of sentence I would've given regarding the weapons offence. So I think, you know, judges go, as you know, through those gymnastics in making an assessment as to what the appropriate sentence is.

CHAIR HINOJOSA: In the end, that individual judge would have to make the decision --

MR. WALTON: Right.

CHAIR HINOJOSA: -- if this was retroactive --

MR. WALTON: Right.

CHAIR HINOJOSA: -- as to whether to give an effect to it.

MR. WALTON: Absolutely.

CHAIR HINOJOSA: Judge Walton, we certainly thank you for taking time from your busy schedule and for sharing your thoughts and the Criminal Law Committee's thoughts with us. As always, we appreciate our relationship with regards to the advice we receive from the Criminal Law Committee.

MR. WALTON: Thank you for having me.

CHAIR HINOJOSA: Thank you very much. Okay. If the next panel would please start coming up here. The next panel is the Practitioners Perspective. We've got five excellent practitioners before us. Mr. David Debold currently co-chairs the Commission's Practitioners Advisory Group. Mr. Debold practices in the litigation department of Gibson, Dunn and Crutcher. We've got Ms. Lisa Freeland, who currently serves as the Federal Public Defender for the Western District of

Pennsylvania. Mr. Stephen Sady, who is the Chief Deputy Federal Public Defender in the Oregon Federal Defender Office, where he has been an attorney since 1981. We've got Mr. Barry Boss, who currently is the co-chair of the American Bar Association's Criminal Justice Section Sentencing Committee and was a former co-chair of the Commission's Practitioners Advisory Group. And Ms. Carmen Hernandez, who is the president of the National Association of Criminal Defense Lawyers and past chair of the NACDL's Federal Sentencing Committee, who is in private practice here in Washington, D.C. And Mr. Debold, we'll start with you, sir. If you would like to make an opening statement, sir?

MR. DEBOLD: Yes. Judge Hinojosa and members of the Commission, I'm honored to appear on behalf of the Practitioners Advisory Group and to urge the Commission to make retroactive the crack and criminal history amendments. In our group's prepared remarks, we note how each amendment fits sparely within the time honored criteria for making an amendment retroactive. With respect to the crack amendment, in particular, first, the purpose of the amendment. The purpose is to provide relief from problems associated with the 100 to one ratio that, in the Commission's own words, are so

urgent and compelling that interim relief is warranted. Second, the magnitude of the change. This also strongly argues in favor of retroactivity. Without retroactivity, defendants sentenced within months of one another with identical offense conduct, will be sentenced using guideline ranges that are significantly different purely because of this amendment. Over 2300 defendants who could invoke this amendment were it made retroactive, were sentenced between October 1, 2006 and June 30, 2007. Fully one-third of those who might benefit from this amendment were it made retroactive, almost 7,200 were sentenced within the 30 months after the Supreme Court's decision in Booker.

Given that the amendment was prompted by problems with the ratio that the Commission has recognized for years, that is, since the vast majority of these inmates had been sentenced, consistent treatment of those sentenced before and after November 1st of 2007 is appropriate. Third, in those cases where a defendant is eligible for retroactive application of the amendment, calculation of the new range would be -- would pose no difficulty. So what are the reasons to resist retroactivity? Most that have been articulated are no more than attacks on the wisdom of the amendment for prospective purposes. Yes, those

with the longest sentences would have the strongest arguments for receiving the largest reductions, but that is merely a recognition that the 100 to one ratio has distorted sentences the most at the high end of the drug quantity table. Yes, a large number of inmates would have a strong argument for prompt release and if judges agreed, it would be a reflection of how many inmates would've received lower sentences that were sufficient but not greater than necessary to serve the purposes of 18 U.S.C. 3553(a)(2) if this amendment had been in place earlier.

As for the fear of what I'll call a jolt to the system, the immediate release of a number of -- large number of defendants, it's important to remember, as we just learned, that we are leaving the ultimate decision of how soon to release to Article 3 judges who share an interest, a strong interest, in ensuring that they will not see these defendants soon again at a supervised release revocation hearing. The courts, with assistance from probation officers in the Bureau of Prisons can easily accommodate the need to ensure that an inmate be ready for release even if it means that less than a full two-level reduction for those near the end of their terms would be warranted. Will retroactivity require an investment of time and

resources? Well, when over 19,000 inmates are eligible for a reduction, it is no small feat to process those requests. But the proper focus should be on the ease of applying the amendment on a case-by-case basis. To the extent the task here is more involved than with previous retroactive amendments, it is because the number of persons deserving of a reduced sentence is much greater than ever before.

The shortcomings of the 100 to 1 ratio have been known for many years. The Commission, with this amendment, has provided modest relief while at the same time respecting the statutory 100 to 1 ratio. There are more than 19,000 inmates for whom the statutory minimum does not require the sentence they are now serving.

There are more than 19,000 inmates for whom a lower guideline range would apply under an amendment that was adopted after more careful and studied deliberation, after more years of study and analysis than probably any other provision in the history of the federal sentencing guidelines. There are more than 19,000 inmates for whom the Commission can honestly say this sentence that these inmates are serving may not need to be as long as it is to achieve the legitimate purposes of sentencing. And there are

more than 19,000 inmates for whom the courts should have the discretion, not a mandate, but the opportunity to reconsider the sentence in light of the Commission's accumulated research and analysis. If our system of criminal justice and its participants must make a modest investment in each of these cases so that justice can be done, it will be time, money and resources well-spent. The Practitioners Advisory Group urges the Commission to make these amendments retroactive.

CHAIR HINOJOSA: Thank you. Ms. Freeland.

MS. FREELAND: Thank you, Judge Hinojosa. My name is Lisa Freeland and I'm the Federal Public Defender for the Western District of Pennsylvania and I'd like to thank you, Judge Hinojosa, and the rest of the Commission for inviting me here today to testify at this public hearing on behalf of federal and community defenders on this very important issue. You've read all of our written testimony, opening statements and all of us sitting at this table here are here to encourage you to provide retroactive application of this amendment and I don't want to be repetitive. I want to leave time for your questions, but there are a couple of points that I think, from the defender's perspective, need to be underscored even though they've

already been presented in writing. As I know you're aware, the reason that we're here today is because you have made a considered judgment that the 100 to 1 ratio should not stand. It cannot coexist in sentencing with fairness and equity and that there are tens of thousands of people who are serving excessively severe and unjustifiably long sentences, not just long sentences, but sentences in which this amendment demonstrates are longer than necessary to serve the goals of punishment and to, in fact, undermine the objectives of punishment, in the Commission's view.

All of the reasons that this Commission has cited in favor of proposing and promoting this amendment apply with equal force to its retroactive application and I'd just like to echo both what Mr. Debold has said and what Judge Walton said about many of the detractors from this amendment. It's really not an attack on retroactive application, it's an attack on the decision which has already been made, that this two-level reduction is appropriate to serve the ends of punishment and the goals of this commission. This commission has identified the amendment as a partial remedy to deal with the problems associated with the 100 to 1 ratio and I would suggest that the idea that this is a remedy contemplates retroactive application

because the only way that the Commission can even partially remedy the past injustices of more than a decade of sentencing under the 100 to 1 ratio is to apply it retroactively. There simply is no other way to provide a remedy unless your decision reaches those who are already incarcerated and are already serving the sentences which the Commission has deemed unjustifiable.

Only then, only through retroactive application, will every crack offender -- we hear a lot about consistency and disparity. The Commission has an opportunity to ensure that every crack offender receive a sentence which serves the goals of punishment and that's what we're here to talk about. No commission, no judge imposing a sentence can go beyond, can expect the sentence imposed can do any more than serve the goals of punishment as we know them and this commission's judgment is that this reduction serves those ends.

I understand that with change comes fear. There was a lot of fear about what would happen after the Supreme Court's decision in Booker in federal defenders' offices, in United States Attorneys' offices, in the courtrooms around the country, there was fear that this decision would bring federal

sentencing to its knees. Those fears were largely unjustified. But I understand that with change comes fear. What I'd like this commission to understand and I hope the Commission will be able to do is to resist the colored perception and the lack of clarity that fear brings to a decision-making process.

I pray that the Commission will maintain clarity, maintain clarity of purpose, a purpose it has demonstrated through passing this amendment and not be detracted and deterred by the predictable fears that this amendment's retroactive application will bring our criminal justice system to its knees and lead to the wholesale release of dangerous offenders to the streets of our cities and towns.

Although I am a public defender and my role in the criminal justice system is representing the individual -- the rights of the defendants, I'm also a member of the public and I am concerned with public safety, but I believe that based on decades of data collection, research, evaluation and this commission's considered judgment that a two-level reduction will not prospectively negatively impact the public safety, that its retroactive application will also not affect the public safety. Everything that the Commission has said about the 100 to 1 ratio over the last decade compels

the decision that it be applied retroactively. I agree with Judge Walton that there is an inevitable burden on the courts, but I hope this commission will maintain focus on the real issue, which is not whether there will be extra work for judges, for defenders, for prosecutors and probably officers, but whether that extra work is warranted.

We're talking about a burden on the system, it's true, but we are not talking about an undue burden, especially given the fundamental unfairness that exists in our current system and our ability to do something about it today. If this commission is concerned about burdening the courts and easing the way for the application of this amendment prospectively as well as retrospectively, it will apply it retroactively.

The only way to ease the burden on the courts is for this body to give the courts guidance on how to apply this amendment. There will be litigation about whether the amendment is retroactive, even if the Commission does not act. That's something that cannot be avoided, but what can be avoided is protracted litigation about a question that this body has the power to decide today. We can't decide today what will happen if courts choose to apply Booker upon

resentencing. We can't decide what to do about those courts that don't. We can't do anything about judges that may not want to apply the reduction because as you know, the fact that the amendment is retroactive if you make it retroactive does not compel a reduction. There will be litigation, as Judge Walton recognized, but there doesn't have to be unnecessary and needless litigation and unnecessary and needless litigation will be the result if the Commission fails to act.

Make no mistake, the question of retroactivity will be litigated. It'll be litigated by professionals, it'll be litigated by pro se prisoners, but it will be litigated and it will be an unnecessary burden, since this commission can act. Another fear that has been expressed by some that have filed comments is the fear of the wholesale release of dangerous offenders to the streets.

And I think -- I don't want to spend too much time on this because I know that everyone understands that no one will be released to the streets because every federal sentence is followed by a term of supervised release and we've talked a little bit this morning about how supervised release can help to ease the fears about dangerous individuals being returned to our streets. I have to say that because the Commission

has decided that the two-level reduction represents a just sentence, there is no just reason to keep people in prison who are serving sentences that don't take into account this reduction. People perspectively receiving the benefit of this reduction will also receive shorter prison sentences, will also be coming out of prison earlier than was previously expected by the Department of Justice, but if you are correct and this reduction reflects what must be done to serve the ends of punishment, no release from the retroactive application of this amendment will be premature, it will be precisely what's called for by justice.

The Probation Chiefs Advisory Group has told the Criminal Law Committee that it believes it can handle the influx of supervised releasees if the amendment is made retroactive. This assessment on their part means that they are not concerned that their agencies will crumble if the amendment is made retroactive, but it also represents a statement that the probation officers around this country believe that their staff is able to protect the public as it does on a daily basis with individuals released from federal prison if this commission acts and additional people are released prior to their expected date. In my district, I've already communicated with our probation

officer. I know that my colleague, Steve Sady, is going to talk about that now. We are preparing around the country for this and my experience in my district has been that there is an atmosphere of cooperation that will continue. We understand that this has the potential to burden the system, to burden the courts, and we are willing to work with our United States attorneys, our Clerks of Court, our Chief Judges and our probation officers to ensure that any burden on the courts is handled as efficiently and effectively as possible. Finally, I'd like to commend the Commission and I know that, as a federal defender, I often do not find myself in this position and those of you who know me, know this to be true. But I do.

This is an issue that's very important to me and I want to commend the Commission not only the decision to propose and promote this amendment this year, but on its decades of attempts to bring justice in this area of sentence -- in this area of sentencing. It's decades of data collection, research and evaluation that has put it in the position to be able to propose and promote this partial remedy. On behalf of the defenders, I urge the Commission not to allow its previous efforts to be diminished and to allow this amendment to be applied retroactively so that it can

bring justice to all, not just a few.

CHAIR HINOJOSA: Thank you, Ms. Freeland. Mr. Sady.

MR. SADY: Good morning. I'm Steve Sady, the Chief Deputy Federal Defender for the District of Oregon and I'd like to thank you for the opportunity to testify regarding implementation of retroactive amendments. Twelve years ago the Commission promulgated a retroactive amendment on marijuana guidelines and the District of Oregon had a disproportionate number of people who were potentially affected. The court in Oregon adopted a protocol for handling very large numbers of cases that I think have been helping us to give guidance on how we can most efficiently implement a retroactive crack amendment.

The successful implementation of the marijuana amendment depended on three basic areas. One was good communication; another, cooperation among the affected parties; and the third was good faith in the cooperation and trying to get to fair results in individual cases. Federal defenders are committed to making sure that each individual gets the maximum ability of representation, the maximum reasonable result in a retroactive context. That also does not -- permits us to act in a group manner, basically trying

to streamline procedures where it's reasonable and effective. The first step that we did in implementing the marijuana retroactive amendment was just trying to identify who the affected people were. That involved communication with the U.S. Attorney's Office, the probation office, the Bureau of Prisons, to make sure that we had the right group identified. So first we had to identify the group.

Second thing we did was move towards making sure that each individual had counsel through an appointment of counsel, generally to our office for an initial screening, and authorizations for release of information to allow conferring with whoever the prior counsel was and also to make sure that we had authorization to look at and evaluate pre-sentence report and statements of reasons, which we obtained with the cooperation of the probation office.

A third part that we did, which I think was essential and is a process that's already started in the crack retroactivity question is educating clients. So for the period of time for the month or so prior to November 1st, 1985, we sent letters, we had phone calls, we met in groups with the folks in the prisons. We would provide a general explanation of what it consisted of, what the limitations were, what the

reality was, what the potential for a retroactive amendment for individuals in a group setting. We invited general questions in the group setting so that rumors and false expectations were minimized. Through the transparency, we were able to keep rumors and wild expectations to a minimum. We then met individually with the specific client; had our worksheet, which we've already adopted for the crack retroactivity, to be able to get a basic set of how -- what, reasonably, could we expect to get maximized for this particular client.

After the gathering of information and educating of the clients, we met with the United States Attorney's office and the United States Attorney's office, my counterpart, had been consulting with the individual prosecutors in cases and basically coming up with what they thought would be a reasonable way of implementing a retroactive guideline because, of course, once the Commission has stated that this is how it should apply, that they are executing. And we got together and decided how close we were and how we computed what the results should be and how close they were. Well, there were a certain number of cases where, right from the beginning, we were on the same page. Whatever else -- and remember, back in that

epoch, there was no limitation on what we could ask for, what we could think we should do. We were trying to recapitulate what would've happened if the marijuana correct guideline had been in effect at the time of sentencing. So we were feeling fairly free about what we could ask for in terms of getting justice in the individual case. We found a remarkable number of the cases we were in agreement on.

Some, we were close and send them back to the prosecutor, send them back to the defense lawyer, come back and have some more negotiation. In a remarkable number of the cases, we were able to get to an agreement of what the client, defense counsel and the prosecutor thought was a fair disposition. On those cases, in the week before the effective date, we were able to send letters to each individual judge stating -- providing the background of that individual case and why the parties come to a certain agreement.

Attached to the letter was a motion that we requested to be filed with the coordination with the clerk's office on that day, if Congress allowed the amendment to go into effect and that document was -- attached to that document was a proposed order which simply said here's the -- amending the judgment to read the new sentence and all other parts of the judgment

remaining in effect. On November 1st, 1995, judges in the District of Oregon signed 121 orders that day and that morning, the clerk's office had coordinated with the Bureau of Prisons, who provided wonderful cooperation throughout in terms of making sure we knew projected release dates, could make sure that most people most immediately affected were treated with a priority. Those -- the clerk's office was able to send, to the right prison, to the right fax number, so that people knew exactly when that order was changed on November 1st. The Bureau of Prisons had also been copied on the proposed change.

They had already recalculated so they were able to make, if that went into effect, they knew who should go home that day, who -- they knew who should start being transferred into community corrections to start that process if they were within a certain amount of their -- the new release date. And on that morning, after that -- with that procedure, the 121 judgments went into effect. Many people met in the parking lot with their families and went home and it was with a minimum amount of dislocation for the court system. Each individual was considered -- came to a result that they were comfortable with. The number of cases that needed litigation issues, those issues were handled

separately without particular strain to the court and I think it provides a very good model for implementing the crack retroactive amendments. We have circulated, through every federal defender, a packet with the worksheets and the interview sheets and suggested procedures. I know they're being started in both informal and formal steps, certainly been adopted in Oregon that we're already -- you say the word, we're ready to move. And the -- I believe, that's at least informally it's happening in the Eastern District of Virginia and other places with large numbers of cases that need to be addressed.

As you can imagine, November 1st, 1995 was one of my best days as a federal defender. It was also one of my worst, because while the predominantly white marijuana growers were being joyously embraced by their families in the Sheridan parking lot, my African-American clients, who I knew were serving over-incarceration, sentences more than necessary to serve the legitimate purposes of sentencing, they stayed. This is a day where the Commission can remedy that, at least partially, and to do that is fair, necessary and very doable.

CHAIR HINOJOSA: Thank you, Mr. Sady. Mr. Boss.

MR. BOSS: Thank you, Judge, members of the Commission. I want to thank you on behalf of the American Bar Association for hearing us today on this extremely important issue and I will brief, because I know we have limited time and I want to make sure that Ms. Hernandez speaks her piece. I think the Commission recognizes that there is actually a very fine line between imprisoning the innocent and over-punishing the guilty. Both impact our fundamental notions of fairness and due process. It's recognized in the Brady Doctrine. We not only have to give exculpatory information that relates to guilt/innocence, but we have to do it with regard to sentencing.

This commission and the commissions that preceded you recognized, from a very early point in the process, that individuals convicted of crack offenses were being over-punished and it began in the early 1990s, culminating, I believe, in 1995 with the suggested amendment to try to right what everybody recognized was a wrong; it was an over-punishment of a certain category, a large category, of individuals. Maybe not all of them. Maybe there were some individuals who deserved the large sentence, but the judges, on an individual basis, even if the amendment's made retroactive, can make that determination because,

of course, the reduction is discretionary on the part of each individual judge. In recognizing the tremendous number of defendants who have been over-punished, we recognize that a moral imperative to correct that in this commission is to be commended for actually getting it done. But the moral imperative that so motivated the Commission and so many of us here to correct this problem also suggests and requires that the amendment be made retroactive.

Commissioner Howell, in her opening remarks, noted that this is not a cure-all. This is the first step. What is important is we communicate to other policy makers, to Congress, which has obviously slower to act than the Commission in this regard, the importance of this moral imperative. The Commission will undermine that message if it does not make this amendment retroactive.

What are we saying about the importance of this amendment if we're not willing to stand up for it and say it is so important and so essential, that it needs to made retroactive. Finally, I want to briefly touch on this issue about management because I think Mr. Sady has laid out something that we've all seen in practice will work. But I also would encourage the Commission not to try to micromanage this process in --

particularly in this very condensed process of determining retroactivity. I don't think the Commission is in a position to make specific policy suggestions about how to administer what can be a very complicated process and on an individual basis is best resolved by the individual judge.

The Commission has been somewhat reticent to overhaul the guidelines to reflect the Booker decision and now I understand there's concern that Booker may apply at these resentencings. But I would really discourage the Commission from, at this point, trying to come up with very, very complicated and sophisticated Booker policy which may impact much more than this retroactive amendment in its very limited context where we haven't had the full opportunity for study and input.

I believe the Commission should overhaul the guidelines to reflect Booker in things like 6(b)(1.2), which still have the shall language that 11(c)(1)(c) plea can only be imposed where it complies with the guidelines and needs to be changed, as do a number of other provisions. But I would encourage the Commission to do that as part of a broader overhaul and at that point, if the Commission wants to address this issue of how retroactive amendments should be promulgated and

implemented and Booker should be applied in that context, that would be the appropriate context for doing it. So I want to, as I said, give Ms. Hernandez a chance to talk. We really commend the Commission for taking this action. Nothing, I think, has been more important over the last 10 years than to correct this wrong and on behalf of the ABA, we thank the Commission.

CHAIR HINOJOSA: Thank you, Mr. Boss. Ms. Hernandez.

MS. HERNANDEZ: Good morning, Commissioners. It's a pleasure to be here once again and I agree with everything that my predecessors on this panel have stated. I, too, want to start by commending the Commission. I think -- you know, Commissioner Steer's probably the only Commissioner who was here in 1995. I was representing the federal defenders at that time.

I think the Commission, with respect to crack cocaine, has worked as what everyone who supported the Sentencing Reform Act envisioned the Commission to be, an expert body that looked at the evidence, that was able to marshal all the studies out there, all the facts, and was able to come out with a report that everyone could understand what that particular crime was about and what the appropriate sentence was about.

I think -- and you have maintained it, despite the post-1995 Congressional kickback, one might refer to it, when they were not happy with the Commission's proposal to go one-to-one. You have done -- you've looked at the evidence. You've said this is the evidence; Congress, you do with it as you see fit, but you have not changed the facts to fit the political climate and so I commend you.

I think you've been incredibly brave and I think your decision earlier this year to propose a reduction, a two-level reduction was, you know, the most brave act of all the ones you've done. And I think every commission, from the years I've been observing, every commission comes to that point in time where they have to make the real hard decision. I think Judge Murphy's commission did that with the post-PROTECT Act departure decisions that it made.

It was under a lot of political pressure to decimate, in essence, the notion of what unwarranted disparity and what guideline departure was all about and you stood your ground and said this is what our position is, this is what the evidence shows, this is what we think our obligation is, and I think you've done it again with the crack cocaine. So I commend you for doing that. You did the right thing back in 1995;

you've done the right thing throughout these years and I am absolutely certain that you will do the right think again today. Having said that --

CHAIR HINOJOSA: Can we go on to questions, then?

MS. HERNANDEZ: Let me just say a few things. No. No, Your Honor.

CHAIR HINOJOSA: You were on a roll there. I've never heard so many positive things from you, Ms. Hernandez.

MS. HERNANDEZ: I know.

CHAIR HINOJOSA: Stop now. We'd be feeling just great.

MS. HERNANDEZ: I've been often told by many judges, asked whether I really want to snatch defeat from the jaws of victory and I usually answer yes. No. You know, the one thing -- I don't think that there's -- I don't think there's an issue on administrative burden. All the parties who have -- who would suffer the administrative burden have come to you and said there is no burden. The courts, the courts have come and said when we're balancing administrative burden with what's right, they're telling you it's a no contest. What's right has got to win. The cost of this, frankly, every one-year reduction per defendant

is going to more than offset whatever it's going to cost the courts to handle this. So I think the only argument that the Department of Justice can validly present to you is the argument of the danger to the community, so let me address it. And I think the best way to address it is what happened after the Supreme Court decided the Bailey decision, which involved 924(c).

That involved every defendant in those cases, involved the defendant charged with using a firearm in connection with a drug offense or a crime of violence. So it isn't like crack, where only 25 percent of the defendants have a gun bump. And a number of those don't even -- don't involve defendants who personally carried the gun but just, you know, are part of a conspiracy.

In the 234(c) context, which I know was not a guideline context, but it was a Supreme Court context and because it was an interpretation of a statute, it was applied retroactively and every court in this country had to reassess those cases and I was an assistant federal defender in the District of Columbia at the time. There were about 500 cases in that district alone where 924(c) case came back to be reviewed. And frankly, it got resolved. The one or

two attorneys who were involved with it, I think, ended up in the hospital pulling out their hair, but that was a burden that the criminal defense bar is willing to bear. But what happened in those cases, similar to what Steve Sady described with marijuana, it was quickly resolved in conjunction and working with the U.S. Attorneys offices. They said some cases we're going to oppose.

Plus, in every one of those cases, because a 924(c) conviction was being withdrawn, the gun bump now came into play because at the time and it continues, you cannot impose a 924(c) consecutive five-year and also a two-level gun bump if it's a drug offense. So in every one of those cases involving a drug case, which was most of them, you withdrew the 924(c), but now you had to recalculate the guidelines to add the two-level gun bump.

And quickly, the prosecutors involved in those cases and the defense attorneys involved in those cases set up a pattern. In some cases, they agreed to them; in some cases, they didn't. Quickly, the courts of appeals resolved how to address the issues. You want questions. I'm being told to shut up. But I think the 924 -- the Bailey cases are the most comparable -- or the way to address what the government

is arguing about. And again, I think it's a mischaracterization in the press and by the government to say that you, the Commission, are going to release 19,000 people. No such thing. The only persons that are going to be released are going to be released after an adversarial hearing, if that is required, in front of a federal judge who will decide the merits of the case. And in the marijuana case even, cases, I remember a number of cases where -- judges said no, we're not going to release defendants even though it's a retroactive application. They want me to, you know --

CHAIR HINOJOSA: Basically, they're using their prerogative of saying we used up all your time.

MS. HERNANDEZ: All right, okay. You know, I --

CHAIR HINOJOSA: They didn't time themselves, but you are timed and so I think we're ready for questions.

MS. HERNANDEZ: Just say two things, Your Honor. I do want to support, also, retroactivity in the criminal history amendment and I want to commend the Commission, again, for its work in this area.

CHAIR HINOJOSA: Thank you, Ms. Hernandez. Who has the first question? Vice Chair Steer.

COMMISSIONER STEER: Well, all of you have been helpful. Mr. Sady, I think the Commission particularly would find the -- protocol to be helpful. It's a two-part question. Is the protocol steps written down other than you have described it? If so, could we have a copy? More importantly, with respect to the marijuana plans, you had six months to prepare because that decision on retroactivity, as you know, was made current with the submission of the amendment to Congress. I appreciate the fact that federal defenders have already been at work in the case the Commission makes this amendment retroactive. Not all districts have federal defender offices. How much time, realistically, is needed before procedures can be put in place to handle this the most efficient way possible if the Commission makes the amendment retroactive?

MR. SADY: I think that's a very important question and interestingly, although we had the six months beforehand, I don't think that we started planning it until late August and into September and in going through our archives, I was seeing that a number of the letters that we were sending to the clients were dated early October, so we needed a very short, very intense, but very short period of time in order to put

that together. Everybody, when they were all on the same page, trying to cooperate and make this happen, were able to do it in a very efficient and a short period of time because everybody knew that we needed to try to get it into effect, because there were people who should be out now and so that provided some incentive for speed and also, as far as the allocation within the offices, it was generally -- I took the lead in the defender office.

The -- I had a counterpart at the U.S. Attorney's office and we sort of funneled the information from the other, so that made it go a lot easier and faster, so the period of time that we needed to prepare was relatively short and as I've said, I think that we are already preparing, taking the steps. I think probation offices -- our probation office was right there.

We were not trying to egg them along. They were -- had their lists and we helped them by going through their list, running Inmate Locater, doing the reverse order function of Bate and all of a sudden, there we have -- you know, everybody's potential release date by who are the ones that we have to make sure we deal with first, although we did that also in the marijuana situation, we had everybody dealt with no

matter when they were within that very short period of time before the implementation date. For districts that don't have a federal defender, I -- many of them have community defenders and I believe it's very few at this point, but I'm sure the defenders would be cooperative in dealing with that and one of the things that we're doing, I met with all of the groups at Sheridan with the folks who were affected, potentially by the crack retroactivity, but we can meet with -- but I think when I'm -- this Thursday I'm hoping to meet with all the folks from other districts to help them -- make sure they have representation in their home districts because they're hearing the same things in the prison.

We want to make sure the same information is getting out so that people are not having that anxiety that they are missing out on something or that they're being taken advantage of somehow by not having representation. So we are going to be helping and I think the best part of the protocol that we've sent around to the other federal defenders with prisons to assist people getting assistance in their own district and that's, of course, something the federal defenders are great with doing as far as cooperating between the districts. As far as the protocols being in writing, I

have sent around a memo to all the federal defenders setting out what I believe are the advantages and disadvantages of the procedures. The attachments are full of the model forms that we've used, basically, the exact same letters and motions and proposed orders. Those materials are easily available. The material, as far as the protocols can easily be adapted for presenting to the Commission.

COMMISSIONER STEER: Mr. Sady, a follow-up to that question, then. With the rest of these protocols, Oregon is obviously in the 9th Circuit.

MR. SADY: Yes.

COMMISSIONER STEER: You've got the Hicks decision there. In the 4th Circuit, you've got a different circuit decision; the 3rd Circuit, possibly, also agreeing with the 4th Circuit on the issue -- Booker and its applicability to 3582(c). And so the protocol, when you meet with these clients, what discussions would you have with regards to possibilities in the 9th Circuit or --

MR. SADY: Well, since I've already met with them -- we've already met with the people and had initial interviews. I want to be careful not to betray any attorney/client secrets, however --

COMMISSIONER STEER: Well, you're a very good

lawyer, so I would --

MR. SADY: So in a more hypothetical and more general approach to folks, there are certainly -- it's the same advice I give on the marijuana, which is there are a number of things that we may be able to do here. There is not a limit. It's going to the discretion of the court. What can we reasonably expect under the facts of this case and a reasonable result that the U.S. Attorney can agree with? Perhaps -- because that gives us the element of certainty or that we may be able to convince the judge of that would be willing to sacrifice the element of certainty to.

So it's not all that different from what I do all the time with my trial-level cases. I'm trying to assess what I can possibly -- what the best for my client will be and I will want to do that in every case where the equity is warranted. I would certainly want to make sure that those facts are known to everyone and so that we can try to get the best result and hopefully by agreement because we just -- we love a sure thing, at least the agreement of the opposing party, if we can get it. If we don't have agreement and we don't think that's the fair result, we litigate. That's what we do. But it's -- I don't think it's greatly different than what we've already seen and that's also been my

experience in talking to people at Sheridan.

CHAIR HINOJOSA: Judge Castillo.

JUDGE CASTILLO: All of your testimony has been helpful, but I'm going to address my question to Ms. Hernandez to even out her time. You've referenced our reports and here's the question. We've received all kinds of letters, some opposed, some in favor. The ones that are opposed reference the fact that there is about to be this huge release of major crack dealers and the ones that are in favor reference the fact that who is being affected are low-level crack defendants. You've looked at our reports, we've issued numerous ones. We've tried not to gloss these reports. Where do you think the truth lies as to what type of offenders are really covered in this 19,000-person group?

MS. HERNANDEZ: Well, I think your statistics have always reflected the very few crack defendants are those that we would call real kingpins. For the majority, based on your statistics and certainly, it's my experience, as a criminal defense attorney, the majority are street-level dealers because five grams of crack is not, you know -- and 50 grams of crack are generally the street-level dealers or you know, addition of multiple smaller sales or you know, people

having a crack party. One judge here in the District of Columbia referred to it as it's almost like keg party. But they aggregated all the crack and therefore the people ended up looking at either five, seven, eight years. The majority of crack defendants are not kingpins and I can guarantee you that those kingpins, if those cases come up and if there was, you know, a violent gang leader, I don't know what federal judges you know, but most federal judges I know are not going to release those particular people into the community unless the facts are justified.

You know that a number -- your statistics reflect it and my experience and every criminal defense lawyer's experience reflects that most crack defendants are not that high level of people. I mean, I think, again, it comes down to in an adversarial system, let those issues be resolved in a court of law. Those are not the cases that are going to be resolved probably by cooperation. And I want to say one other thing about this. You know, Congress well knew, because you noted the fact that you were having a retroactivity hearing before November 1st. Congress well knew that this was going to happen and this was a potential and they did not reject it. In fact, there are bills before Congress, in the Senate and the House, to equalize or

to make even greater reductions than what the two-level is. So I don't -- I mean, I don't think you need to take this on your shoulders alone. These decisions will be made -- the hard cases, the cases Your Honor is talking about and that nobody necessarily wants on the streets, are going to be made on a case-by-case basis.

JUDGE CASTILLO: Thank you.

CHAIR HINOJOSA: Ms. Howell, Commissioner Howell.

COMMISSIONER HOWELL: I have a two-part question and Mr. Sady, thank you very much. And I would echo Commissioner Steer's request that if we could see a copy of whatever written protocol that Oregon's been using, that would be enormously helpful to us. This is my two-part question. First -- and this if for, you know -- I guess, everybody on the panel or the federal defenders, in particular.

The Criminal Law Committee recommended, among it's multiple recommendations, that if the Commission decides on retroactivity, that we provide a list of all of the eligible offenders whom we have identified as part of the 19,500 people through all of our research and comparison of statistics we have from the judicial -- you know, from the federal judiciary with the Bureau of Prisons, that we identify who we consider to be the

eligible offenders and provide that to the appropriate district court judges, if the sentencing judge is still sitting. So my first question is do you agree with that recommendation, that the Commission identify the eligible offenders? And my second question is more to Mr. Debold and Mr. Boss, where you have cautioned the Commission about making policy statements similar to ones that the Criminal Law Committee also recommended that we make in connection with the retroactivity decision.

And to avoid any pussyfooting around, what criticisms do you have or comments or cautions do you have specifically about the policy statement that the Criminal Law Committee recommended, which states, "In resentencing a defendant, in light of this retroactive guideline change, the courts should only consider the change in the crack guideline made by the Commission and whether this change now suggests a lower sentence in light of the factors set forth in 18 U.S.C. 3553(a) to the extent that they are applicable." Is -- what would be the problem with us adopting that policy statement? So if you want to start with the first question and then go to the second.

MR. SADY: On the first question, in 1995, the Sentencing Commission was one of the bodies that

provided input in the -- to get the list of identified potential beneficiaries and I think that happening again would be very helpful. Interestingly, all the different bodies had incomplete lists. You had to sort of combine them all to make sure you picked up everyone. But I should -- I also want to say that to the extent that that would delay implementation, that with the other safety nets, that it should not be a factor in delay of implementation of retroactivity. I think that it would be helpful.

COMMISSIONER HOWELL: My second question.

MR. BOSS: I'll start. Mr. Debold can supplement. I think that it would be unwise for the Commission to promulgate that kind of policy statement because what you'd be doing is really setting a precedent for retroactivity policy from this point forward. That is, you are going to determine, essentially, that Booker, contrary to what Hicks says, Booker is not going to apply at a resentencing pursuant to retroactivity. I think those of us on the defense panel probably have somewhat of an abysmal reaction, but regardless of what we think about the merits, I don't think that in this condensed period, where we haven't had the opportunity for full fact finding and input from the public, from practitioners, that this is

the time to make what is essentially Booker policy. For the first time, the Commission, I think is really going to take a substantive part of Booker in terms of whether it applies at this kind of resentencing, because that's what the application essentially does. It says Booker doesn't apply. You consider the 3553(a) factors only in determining whether the two point reduction would exist for this particular defendant.

In other words, you don't take into account the full 3553(a) factors in determining how much of a reduction to give. That's a pretty major step for the Commission to be taking and I think it calls into question actually whether it's legal, whether it's constitutional under our new sentencing system. And I think the notion of doing it in this very condensed period is not good policy. I think that we should -- it's something that maybe should be suggested. It should be considered over the long haul, given adequate input and consideration by a lot of other people besides Mr. Debold and myself.

COMMISSIONER HOWELL: Do you think it would be superfluous, then, because the courts are already going to consider assessing all the 3553(a) factors and the safety of the community in making an evaluation in any resentencing of an eligible offender?

MR. BOSS: Of course.

COMMISSIONER HOWELL: So that you think that having a policy statement saying don't look at the full realm of Booker, you know, Booker considerations and variances as sort of not necessary?

MR. BOSS: I think, to that extent, it's certainly superfluous because every judge is going to do that, consider the full 3553(a) factors. But what I read that application note as doing is saying you consider all those factors only in deciding whether the two point reduction applies with a particular defendant. And I think what Hicks says is you look at it much more broadly and you come back and essentially consider all the factors in determining how much of a reduction to get.

CHAIR HINOJOSA: Mr. Debold, did you want to add anything to that response?

MR. DEBOLD: Just that, you know, I think judges will want to look at the totality of the circumstances and deciding whether to give the reduction and how much of a reduction and to put in an artificial constraint there would be unwise and I see no reason why the Commission would want to sort of dictate what things the court can consider. This is a -- unlike a lot of other decisions, a decision whether

to reduce a sentence under 3553(c)(2) is an appeal to the discretion of the court. There is a lot of discretion there and I think that judges will be able to figure out the appropriate reduction ought to be in an individual case without that kind of additional constraint.

CHAIR HINOJOSA: Judge Sessions.

JUDGE SESSIONS: Well, this comes by way of a follow-up question, but maybe even stepping into a debate. One of the responsibilities of the Sentencing Commission is to make sure that there's not going to be a massive impact upon the criminal justice system and one of the arguments made by people who are opposed to this retroactive application is that because of the Booker decision, it is going to require the full hearing and transport of -- full hearing regarding all defendants and transport of all defendants back to court for a full Booker hearing.

The fact is there are a number of decisions which are directly contrary to Hicks, Hudson being the first one. There is now is, in the 3rd Circuit -- and I could ask you about that decision -- which suggests that Booker doesn't apply afterwards and now we're also told that there's an 11th Circuit case which may say the same thing. Now, why would you be opposed to the

Commission essentially giving some suggestion, as a part of retroactivity, which would essentially make sure that the guideline changes applied retroactively but did not significantly impact the criminal justice system?

MS. FREELAND: I mean, I hope you don't ask me about the 3rd Circuit's decision, because I was traveling to Washington while they were publishing it, but I think --

JUDGE SESSIONS: If you look at the footnote at the end of the opinion, I think --

MS. FREELAND: I will do that immediately after this hearing. But I think that -- I understand your concern with the impact on the courts. As an officer of the court and the head of an office, I'm concerned, as well, as the impact on my staff. But let's take it out of the retroactive application context and look at what we've seen from Booker in the past two years about the impact of Booker on the courts. The only thing that Booker has done has made the advisory guideline range that's calculated after going through the guidelines, is to make it advisory instead of mandatory. And there has not been an overwhelming or great impact on the courts by requiring judges to apply 3553(a) at sentencing. And not only

has there not been the kind of impact that should cause concern to this Commission, the results also should not cause concern, because the advisory range, in the large majority of the cases, has been followed. And so I think looking at the two years of advisory guideline sentencing, post-Booker, should quell all concerns about the impact of applying Booker at these limited resentencings. They've been applied in hundreds and thousands of cases over the last two years, without substantial impact. It's not going to make a different now.

MR. SADY: And on transportation, one of the things that we observed in the marijuana epic was that there was virtually nobody who wanted to be transported to court. I've already met with folks. One of the first things I do is if we get to a resolution or narrow the issues sufficiently, waiving any presence, that's one of the things we want to do. And remember, for most prisoners, they consider transportation diesel therapy, something to be avoided if at all possible. This is not something that folks generally want to do. In the right case, I'm certainly going to maybe be asking for that, but so far, I don't think it's going to be something that's going to be a burden.

JUDGE SESSIONS: So you're suggesting that if

you apply Booker, that would not require that each individual inmate be transferred back to court?

MR. SADY: I see the same dynamic as in the marijuana situation, where we would say, in this particular case, the fair sentence, regardless of any other factors, we come and say, you know, Booker -- here's my equities, prosecutor. This is why I think this is a fair sentence to be three months lower than the two-level would get you. I think that's right and I think that's fair, too. It's technically, probably a Booker sentence. It's certainly not anything that anybody would want to come to court to talk about. And I think that -- so that would be, I think, something that could be waived. It's certainly been waived massively in the past. And depending on the interests of the client, that's what we're always looking at. But how is this going to actually help the client? There will be some situations, but I don't think it's the overwhelming burden that the Commission may be bearing.

JUDGE CASTILLO: Mr. Sady, just pursuing that for a second. In Oregon, with regard to the marijuana experience, how many of those cases, at resentencing, were resolved by an agreed order?

MR. SADY: A hundred and twenty-one on the

day that it went into effect. There are probably some other --

JUDGE CASTILLO: So percentage-wise?

MR. SADY: We --

JUDGE CASTILLO: Overall.

MR. SADY: -- tried to look at that, trying to read --

JUDGE CASTILLO: Um-hum.

MR. SADY: -- the redWall, our archive, because we had forgotten a lot of this. But I think we probably talked to maybe a couple of dozen --

JUDGE CASTILLO: Um-hum.

MR. SADY: -- other people who ended up getting -- having individual consideration and then individual either motions or deciding not to file a motion. But it was probably about 80 percent.

JUDGE CASTILLO: Eighty percent. Okay.

MR. SADY: Really rough and anecdotal.

JUDGE CASTILLO: Is it your prediction that as many as 80 percent, or possibly even higher, of these crack cases would be resolved, nationwide, by an agreed order?

MR. SADY: I do not know and there are some differences. The marijuana involved -- well, it generally came down to a six-level difference.

JUDGE CASTILLO: Um-hum.

MR. SADY: And the -- so there was not a -- there were more people who --

JUDGE CASTILLO: Right.

MR. SADY: -- would automatically go home and so that cut down on litigation. But from my experience in talking to folks, I think that there is still going to be a significant number. There's -- how it's going to work out statistically, it's going to depend district to district. If you have a U.S. Attorney's Office that is, that is -- here's what the Commission is saying, it's trying to get to fair results. You're going to have cooperation and negotiation and a lot of the cases settled. You have folks who are -- say, we didn't think it was a good idea in the first place and we're going to fight it tooth and nail. You're going to have more disagreements and more need for litigation. But that's sort of the way it is now in any sense and context.

CHAIR HINOJOSA: Commissioner Horowitz, you had a question.

MR. HOROWITZ: Let me just follow up on the question of Judge Sessions, and any member of the panel can answer it. Assuming we decided to go with a retroactive application, every court that has

considered Booker, and whether to apply it retroactively or not to the people in jail as of that day who had final appeals considered and evaluated, has decided that it should not be applied retroactively. We're now looking at a situation where a subsection of those individuals may be entitled to resentencing on our -- as to our crack amendment. As we consider fairness issues, why should we allow that subset to have the ability to have Booker applied retroactively to them?

MR. SADY: I think it's largely a matter of context, because we have to remember that, for that group, there's people who are similarly situated, who were sentenced the day before Booker, and the people who were sentenced the day after Booker, who already had that type of disparity. For given what the Supreme Court ruled in Booker, I think that having uniform fairness is better than having disparity where that perpetuates an unfairness.

MS. HERNANDEZ: Commissioner, also -- and the bottom line is the truth is that post-Booker sentences are about the same. So even those courts -- even those courts that -- first of all, you got Federal Rules of Criminal Procedures.

MR. HOROWITZ: That I understand. I guess my

question, though, is just explain to me the fairness. I understand the fairness issue and the argument and I'm just looking for what's the best argument to say we should actually allow this group to be -- to get the benefit of Booker --

MS. HERNANDEZ: Let me --

MR. HOROWITZ: -- when tens of thousands of individuals remain in jail who don't have the benefit.

MS. HERNANDEZ: I would say 85 percent or more of crack defendants sitting in jail are street-level dealers sitting next to a kingpin or an importer who is doing either less time or -- and because your statistics reflect that crack sentences are higher than any other sentences, no matter what the category. So already you've got an unfairness. All you're going to do is balance the unfairness. All you're going to do is give them an opportunity to argue their case and give --

MR. HOROWITZ: But when we set policy, we don't do it just for one case. I mean, it's whether it's criminal history. And so that's the issue with regards to any policy statement. It isn't just on crack cocaine, it's when we set a policy statement, we're talking about all cases. And so you know, we, like judges, have to consider the 3553(a) factors, not

just based on our client, like some of you do, but on the issue of what is fair and what complies with the 3553(a) factors, including the issue of disparity. And so if we do work on policy statements, they're going to apply across the board, with regards to all matters that would ever come up with retroactivity.

MS. HERNANDEZ: Respectfully, Your Honor, I don't think the Commission --

CHAIR HINOJOSA: Respectfully always means I'm going to disagree with you.

MS. HERNANDEZ: I am. I don't think the Commission is going to decide whether 3553(a), whether a retroactive guideline will be applied with the full 3553(a), post-Booker. I think the courts are going to decide that. Whatever the Commission says on that, some court is going to say, we already know the 9th Circuit has already ruled. So whatever you say, all the 9th Circuit cases will be covered by your decision. So respectfully, I don't think -- frankly, that's another reason why I don't think you ought to go -- come out with, for some of the reasons Barry said, come out with a policy statement on this. This is a -- we know. I'm going to tell you right now, criminal defense attorneys and pro se defendants are going to challenge whatever you do on that score, and it's going

to have been decided by the Courts of Appeals and by the Supreme Court, in all the post-Booker cases that are going up there. And the Supreme Court has yet to decide the Booker retroactivity issue.

MS. FREELAND: If I could take a stab?

CHAIR HINOJOSA: Commissioner Friedrich.

MS. FREELAND: If I could just take a stab at answering your question? The limitations on retroactive application of new rules of law is based on the finality of sentences. We can't have new laws coming in and disturbing finality. There shouldn't be a concern about retroactive application, in this context, where the Commission has already determined that these final sentences should not be final, as they were.

Okay, they're going to be opened up because this Commission has decided they were wrongly imposed. They'll no longer be final, and when they're no longer final, there should be no bar to retroactivity. Retroactivity, as a legal concept, is based on finality and we don't have final sentences any longer. And any time a sentence is reversed, an individual conviction, if there's a new rule of law that the courts find should be applied retroactively, the same kind of disparity is going to appear. It's the way our system

works.

CHAIR HINOJOSA: Commissioner Friedrich.

MS. FRIEDRICH: Yes, I have one question for Mr. Boss. You're testified that you don't think additional fact finding will be necessary at resentencing hearings under 35 -- under 3582. But if you argue that Booker does apply to these resentencings and prevail, won't there be a whole host of issues ripe for adjudication, as defense attorneys make arguments for variances, relying on 3553(a) factors that weren't raised at the initial sentences?

MR. BOSS: I think the point we were trying to make was that there's not -- there doesn't have to be any reevaluation of the quantity of cocaine based at issue, and the guidelines themselves can be easily recalculated. But you're certainly correct. To the extent Booker applies, and I'm not taking the position that it does or it doesn't, I think it's going to be decided, probably, different by different courts. But obviously you're right. To the extent that Booker applies, it will be a more potentially complex fact-finding procedure. But I think also we should consider what Mr. Sady was saying, that no -- would be able to avoid that. Because of working together, we'll be able to come up with what both the defense and the

prosecutor agree is a just result.

MS. FRIEDRICH: But you really think that's realistic, that you're going to sit down with AUSAs and they're going to agree? I mean, I would think, in most if not all cases, you will be seeking more than a two-level reduction, because you will be arguing if you're --

MR. SADY: Depending on the facts of the case and what you got the first time around.

MS. HERNANDEZ: Yeah. And some percentage of cases -- is going to exceed their remaining sentence. And it's not like you're going to have 19,500 cases being argued. The Courts of Appeals are going to quickly decide which circuits will allow -- it's just like post-Booker. Within months, within a couple of weeks, each circuit had decided how Booker was going to be applied and it really came down to two or three sort of models, and that's exactly how it's going to happen here. There's going to be the 9th Circuit model, there's going to be the 4th Circuit model, and maybe that's it. So all the 4th Circuit cases aren't going to have all these arguments being made. And Rule 43 of the Federal Rules of Criminal Procedures say you don't even -- a defendant's not even entitled to come to court on a 3582(c)(2) resentencing. So some court will

have to say that that rule is unconstitutional or illegal, before any defendant will have to be brought to court.

MR. BOSS: And Commissioner, one other thing I didn't mention is, of course, as we all know, this is the exact same concern we had when Booker came into place in the beginning. What we all found out was judges essentially imposed guideline sentences, anyway. So despite the fact that the analysis may be somewhat more complicated, it seems like the result ultimately comes out of the same place.

MS. FREELAND: And because of that result, what we've seen is that the federal system has not turned upside down and that, in the high 90s, percentages of cases are still resolved by way of negotiated pleas.

MS. HERNANDEZ: To our dismay, I may add.

MS. FREELAND: Post-Booker. Even with all of these unlimited factual considerations available, we're still pleading cases at 97, 98 percent of the time, reaching agreements with the government.

CHAIR HINOJOSA: Commissioner Ferry.

MS. FERRY: Briefly. Mr. Sady, my question is for you. I just want to make sure that I'm clear. I believe we danced around the issue. But is it the

public defenders' position that Booker should apply at 3582(c) hearings? And if so, how do you address what Ms. Hernandez was just talking about, the right of the defendant to be present? Generally, pre-Booker case law indicates that whenever the court is making new factual determinations at a sentencing, then a defendant has a right to be present. If Booker were to apply, arguably, the court would be making new factual determinations that would require transport of the defendant. Is that your understanding as well?

MR. SADY: My understanding is that cases are best litigated based on individual facts, where the parties are presenting legal issues to judges and the judge makes a decision based on the policy and the law that applies to a certain set of facts. I think one of the real problems is trying to micromanage by hypothesizing what may happen in the future and trying to put into place a mechanism that tries to predict what might happen, so that bad things don't happen, and ending up with unintended negative consequences. The recommendation from the Federal Defenders has been to adopt a simple statement that was recommended, is that the parties cooperate to the maximum extent possible, consistent with their obligations to their clients, to impose -- to implement the retroactive amendments as

efficiently as possible. Other than that, the questions of what happens in an individual case, whether in an individual case I'm going to be advocating regarding Booker resentencing, and the scope of any sentencing, is going to depend on individual cases. There are cases where we are going to be able to reach agreements. There's one that will result in litigation. The litigation will depend on the interests of individual clients. And that is, I think, the way it should be and the way that it will be implemented with the least complexity.

MS. FREELAND: And every resentencing that's taken place after Booker, whether it was based on the Booker decision or on some other error of law, Booker has applied. I think that defendants, prosecutors and judges will expect that, at any resentencing, the Booker decision will apply, because it is the law today.

CHAIR HINOJOSA: If not, I thank you all very much for taking your time to be here. We appreciate your thoughts.

MR. SADY: Thank you.

MS. HERNANDEZ: Thank you.

CHAIR HINOJOSA: If the next panel would come up here, please? The next panel is the Executive

Branch Perspectives. We have Ms. Gretchen C.F. Shappert. Do I have your name correct, ma'am?

MS. SHAPPERT: You do. Thank you.

CHAIR HINOJOSA: Who has been the U.S. Attorney for the Western District of North Carolina since June of 2004; Mr. Sylvester E. Jones, who is the Assistant Director for Witness Security and Prisoner Operations for the U.S. Marshals Service; and we've got Mr. Joe I. Cassily, who is the President Elect of the National District Attorneys Association. And we appreciate your presence. Ms. Shappert.

MS. SHAPPERT: Thank you, Chairman Hinojosa and distinguished members of the Commission. Thank you for allowing me this opportunity to testify. It is an honor to appear before you and give my perspective from the Western District of North Carolina, with regard to retroactive application of crack cocaine and criminal history amendments, and why I and other members of the Department of Justice oppose retroactivity.

Specifically, I'm here on behalf, not only of my office, but what we believe are the communities that will be impacted by retroactivity. We believe that the retroactivity will implicate retroactive application of Booker, at least in some areas, unjustified burdens upon the criminal justice system, and most importantly

will impact fragile communities throughout the United States and disproportionately in those districts where we have the largest number of crack cocaine cases. As you indicated, Mr. Chairman, I have been an United States Attorney since 2004. Before that, I was an Assistant District Attorney and an Assistant United States Attorney. I was an Assistant United States Attorney from 1990 until 2004.

I continue to carry a caseload as the United States Attorney and indeed, I have had three jury trials involving crack cocaine conspiracies this year alone. But more than that, I was in Charlotte, in 1988, as an assistant public defender when crack cocaine first hit the Western District of North Carolina.

So crack cocaine has marked most of my professional career as a lawyer, and I have seen the ravages the addiction, the drug-related violence and the tremendous impact on communities when crack cocaine takes hold. The Western District of North Carolina is 32 counties; 2.9 million people; the second largest banking center in America; the largest native American population in the United States. I have 24 Assistant United States Attorneys who do all of the criminal law in my district, and I also am one of those, and I have

five that do all of the drug cases. As you are aware, if retroactivity applies, it will have a profound impact on my district. Last year we sentenced 118 defendants for crack cocaine offenses, and by way of comparison, that is in comparison to 123 for methamphetamine. Drug cases represent 46.2 of the entire caseload per year in my office.

We have seen, in the past year and the past three years in Charlotte, a significant rise in the murder rate, an increase in violence. Indeed, the murder rate has gone up 44 percent since 2005 and has remained at that level. I am concerned about the impact upon my office and the ability we will have to continue our responsibilities, if in fact 536 defendants in my district need to be sentenced because of retroactivity.

I've also seen the tremendous impact of crack cocaine in Charlotte. One of the first crack cocaine cases we had in Charlotte I actually handled as an assistant district attorney and then was a federal prosecutor when it was resolved. The Cecil Jackson gang. That is typical of many crack gangs. They did not have a large weight of drugs, but they enforce their turf with semiautomatic weapons, kneecap shootings and kidnappings. Ultimately the

Cecil Jackson gang was prosecuted in federal court. As an assistant district attorney, I was charging conspiracy to kidnap, knowing that we were not going to be able to hold these defendants very long. Fortunately the federal prosecutors came in; the defendants are still serving massive sentences.

That would not have happened but for federal involvement. I prosecuted in a neighbor in Charlotte called Greer Heights. Now Greer Heights, when we started in the 1990s with ATF and the Charlotte-Mecklenburg Police Department, was a Section 6/Section 8 housing neighborhood, made up largely of elderly families and families with lots of small children. That community was overrun with drug dealers, crack dealers who had turned it into an open-air drug market.

When I went into that community to begin interviewing witnesses, neighbors came out of their homes to shake my hand. We actually convicted over 70 defendants in that investigation and the average sentence served was over 200 months. When we began the trails of the defendants in the Greer Heights conspiracy, members of the community came and sat in the back of the courtroom to watch and provide moral support. I submit to you, members of the Commission, that some of the most serious victims of crack cocaine

appear in lower-income and largely African-American communities. And that is true not just in the Western District of North Carolina, it is true in many other parts of the country. For example, in Selma, Alabama, there was a crack organization known as the St. Phillips boys. They ran an open-air market. You're going to hear this afternoon from Ocie Acoff of Selma, who will talk to you of what it was like for people to have to sleep on the floors because they wanted to avoid the random violence and the random shootings that were going on in the neighborhood; it became a war zone.

In Selma, Alabama, ATF went in with local law enforcement and when they made arrests, neighbors lined up to shake hands and cheer and called the local radio stations to congratulate federal prosecutors and the law enforcement officers for going into those neighborhoods.

My point to you is this: crack cocaine is not a victimless crime. The victims are the people who are addicted to it, their neighbors and the communities. They create open-air drug markets where there is 24-hour-a-day dealing in relatively small quantities of crack that profoundly impact the community. In one of my communities, right now, Statesville, North Carolina,

the drug dealers have developed a strategy of addicting young children, eight, ten, twelve, fourteen-year-olds, and turning them into sellers, knowing that we, as federal prosecutors, typically do not go after juveniles. Drive-by shootings are systemic.

And in many areas, including Statesville, Shelby, Charlotte, Asheville and Selma, that I talked to you about, we have only been able to make great strides in fighting crack cocaine by being aggressive in our prosecutions. Now some of you may ask, since we know these individuals are ultimately going to get out of jail, what is the difference about letting them out a little bit early? Why does that make a difference? Well, I would submit to you that it makes a great difference, for several reasons.

First of all, these offenders are not low level, they are not small time addicts. If you look at your own statistics you will see that fully a third of the population that we are talking about, the 19,500 defendants who would be subject to retroactivity, had weapons or were involved with weapons, 11.7 percent had aggravating roles, and fully 65.2 percent, two-thirds of this population, was Criminal History Category 3 or higher. Your studies have shown us that individuals in the higher criminal history categories are more likely

to recidivate, particularly in the first two years. So the population that we are talking about, at retroactive application of the guidelines, will be out of prison early, more likely to re-offend, and will not have the benefit of the typical reentry programs that we associate with an efficient prison system.

The Bureau of Prisons estimates that it takes at least 30 months, ideally, to prepare a defendant to return to the community. They recommend that a defendant receive at least 250 hours of core curriculum training in six different areas of study, and that they have community confinement or home detention or a halfway house as a means of transitioning into the community.

With retroactivity, many of these defenders, probably at least 2200 at a minimum, will be eligible for immediate release. Others will have their sentences cut in such a fashion that they may not have the full benefit of these programs to prepare them to come back to their communities. You heard earlier today, from Judge Walton, about the importance of having resources dedicated to dealing with crack and for protecting our communities, and let me tell you, we currently have those resources and we are using those programs. I want to talk to you a little bit about

Weed and Seed, because Weed and Seed, in my opinion, will be profoundly impacted if we have to deal with a large population of recidivists and retroactivity, providing these recidivists with an opportunity to return to their neighborhoods.

The Weed and Seed Program is based on the premise that we go into transition in fragile neighborhoods, and Weed and Seed, if you recall, was designed to deal with the crack problem. Weed and Seed is a process by which we weed out the criminal offenders, the crack dealers, the violent offenders, and we seed in community services in transition in fragile neighborhoods. It is a five-year program. The clock is ticking on each and every one of our Weed and Seed sites.

I have five Weed and Seed neighborhoods in the Western District of North Carolina, and in four of those communities we have seen a dramatic drop in violent and drug-related crime because of our Weed and Seed initiatives. My concern is that individuals who will be released early, if you make the guidelines retroactive, will be returning to these communities and potentially interfering with our ability to complete our progress with Weed and Seed. Let me tell you a little bit about Robert. Robert lives in the Pisca

View (phonetic sp.) neighborhood in Asheville, North Carolina. Robert is formerly homeless, although he's highly intelligent. He's now married, he is raising three children, and among the other things he does in our Weed and Seed area is he runs our community garden, the very same plot of land that was an open-air drug market. As a result of Weed and Seed and community commitment, it has been turned into an open-air garden where the children play, the women hold their meetings, and Robert tends vegetables that are sold and distributed in the community.

When I was in Asheville two weeks ago, Robert showed me the garden, the compost heap and the location where they're planning to build a greenhouse, and he told me about the work he's doing explaining organic gardening to the children in public housing, and the little boy who was astonished to learn that tomatoes grew on vines and didn't grow in cans. Robert told me that even some of the crack dealers in the neighborhood have come up to him to shake his hand and comment about the changes he and Weed and Seed are making in Pisca View in Asheville. What I also think is important for you to know is that Robert, every night, props his tools along the fence in the Weed and Seed neighborhood, and those tools have not been stolen.

This is the same community that has been ravaged by crack and gun and drug-related violence. But because of the efforts that we are making with Weed and Seed, that community is changing and I don't want to see that progress interrupted.

Let me tell you about Shelby, another very small community in the Western District of North Carolina, that, in 2005, had the second highest per capita rate of violent crime in North Carolina. It was a site of growing gang activity, a lot of gun play and crack distribution. We came in with Weed and Seed, and traditional racial barriers are dropping. We have community-based policing, and violent crime has plummeted. Again, this is largely the result of Weed and Seed. And yes, Shelby also has a community garden.

I want to talk to you briefly about Statesville, but you're going to hear from the director of our Weed and Seed Program this afternoon, Wade Ikard. Statesville is better known for good barbeque and local sports rivalries. But in the past couple years this very small southern town has been ravaged by crack cocaine dealing and gangs. When we came into Statesville with an idea of putting a Weed and Seed site in, I'll never forget our first meeting in that community, where the community stood on one side of the

room and the police officers stood on the other and neither the twain shall meet. But as a result of Weed and Seed, we have been able to establish a police athletic league, Hoops for Hope, that provides not only for athletics but mentoring and tutoring for our children, and a citizens police academy, where members of the community have had an opportunity to interface with the police and go to police training, and indeed, one of our recent graduates, an African-American, has now gone to work for the police department. The crime rate is dropping in Statesville. And we've also used aggressive code enforcement to make slum landlords bring their property back up to code.

We didn't have drug treatment in Statesville and we couldn't afford it, so we asked the leaders in the faith-based community, would you provide us with a coffee pot and a place to smoke and we would come in with 12 step programs, and that's what we're now doing in Statesville. I, again, am concerned that, if indeed you make the penalties retroactive with regard to the changes in guidelines, that we are going to see in influx of the very people who are most likely to re-offend and are most likely to upset these fragile neighborhoods. As you know, the impact of 19,500 defendants in the criminal justice system will be

profound. That is 25 percent of all defendants who were sentenced in federal court in 2006 and represents 10 percent of the entire criminal population. Five hundred and thirty-six defendants that will need to be re-sentenced in my district, if this is retroactive, represents two-thirds of all the cases we prosecuted in the Western District of North Carolina in 2006.

Think about, also, the impact of 1400 defendants on the Eastern District of Virginia. That would be 80 percent of all the cases that they prosecuted in the Eastern District in 2006. And other districts have a comparable problem. I would respectfully submit to you that the 800-pound elephant in the room that my colleagues -- and I say this respectfully -- that my colleagues in the Federal Defender offices didn't want to talk about too specifically, is the potential impact of Booker and the potential disparities of the Booker application. As you know, the 4th Circuit, in an unpublished, per curium, one-page decision, has declined to follow the lead of the 9th Circuit in its published Hicks decision. But I would submit to you that Hicks is instructive and Hicks does hold that Booker does apply to 3585(c)(2) hearings, and the consequences of that are profound. Having been an assistant public defender

and understanding the responsibilities of zealous advocacy, I am confident that if you make it retroactive, every single defendant of those 19,500 will, number one, want to have a hearing, will want to be back in the district for sentencing, and will want the benefits, not only of the two-level reduction, but of a full-blown resentencing hearing.

You heard about the experience of the district of Oregon, in its program, in 1995, with marijuana. I would remind the Commission that in the entire United States, there were 536 marijuana cases implicated by retroactivity, 536 for the country versus 19,500 for crack. Likewise, you've heard about LSD. That was less than 200. And oxycodone, that was less than a hundred.

So the comparison is not even close. And likewise, the difference is that, with regard to resentencing for marijuana, or even the application of the Supreme Court decision in Bailey and the implications for resentencing there, none of those had the factors that we had with 3553(a) and Booker. So it is a very different world and a very different day. You've also heard that there will be a cost savings if we are able to free up these prison beds, and we know, as I indicated, that crack defendants represent 10

percent of the prison population. It is estimated that each prisoner in the prison system costs about $21.70, and a lot of numbers have been bandied about as to what the prison savings will be. I would respectfully submit to you that there's no price you can place on living in a safe neighborhood.

And indeed, my concern is first and foremost not the administrative costs or the administrative burdens on offices in government. My concern is the impact on communities. It will be swift, it will be sudden and it will be, in my opinion, irreversible, particular in communities with Project Safe Neighborhood and Weed and Seed, where we are under some time pressures to try to implement and complete the programs that we have in place.

As I indicated, my concern is about the future and the unforeseen consequences of releasing large numbers of convicted drug offenders into vulnerable communities, in a relatively short period of time. As I indicated, I have seen, in my own personal practice, the consequences of crack cocaine. I've also seen how difficult it is to eradicate crack once it has taken hold in a community. And on behalf of the many good people who are trying to continue the process of restoring fragile communities and neighborhoods, I

respectfully submit that the defendants who have already been sentenced should be required to serve their sentences as we move forward. Thank you.

CHAIR HINOJOSA: Thank you, Ms. Shappert. Mr. Jones.

MR. JONES: Yes, sir. Good morning, Judge, and good morning to the distinguished members of the Commission. I want to thank you for the opportunity to testify and provide the United States Marshals Service's perspective on the potential impact of -- of this amendment. First of all, let me just give a short bio on myself.

I've been in law enforcement for 25 years, four of which as a police officer back in Illinois. I'm in my 21st year with the Marshals Service. I'm currently in my position as Assistant Director of Witness Security and Prison Operations and I've been so since -- in this position since June of 2004. Prior to that, I served for about four years as the Assistant Director of Judicial Security, and before that, I served in a field office as a Chief Deputy. I've served in three headquarters divisions and four field offices for the Marshals Service. The new amendment to crack cocaine sentencing guidelines would significantly reduce the sentence of prisoners, and the Bureau of

Prisons custody will apply it retroactively. Nineteen thousand and five hundred prisoners could be eligible to be brought back into the Marshals Service's custody. This, for the Marshals Service, will result in enormous financial and workload-related costs.

Additional consequences would be new pre-trial or sentencing reports, re-designation of some prisoners, the land deed judicial process for prisoners currently in custody, which is a problem for us now in some districts. The Marshals Service has in custody, as I speak to you this morning, 55,000 prisoners. Our population has more than doubled in the past decade, going from 28,000 to 56,000, in some cases. Southwest border districts are extremely overtaxed. One-third of the Marshals Service population is located in five southwest border districts.

The Marshals Service is responsible for housing, subsistence medical care, transportation, and production for court proceedings. We spend over a billion annually for federal prison detention costs, and that does not include the costs for our deputy marshals or other administrative personnel costs. The Marshals Service, as you may know, does not own or operate any detention facilities; we rely solely on others. Sixty-seven percent of our prison population

are in state and local facilities. Twenty percent are housed in prison facilities and the final 13 percent are housed in private jails. Lack of detention space throughout the country is a problem in many areas. We have emergency detention status in several of the top 25 districts that the retroactive application could affect.

Emergency means that all bed space within a district is exhausted or terminated and the district is forced to use facilities in other districts to house their prisoners, sometimes requiring our Justice Prisoner and Alien Transportation System to land and provide air lift support. Emergency applies to Maryland, western North Carolina, South Carolina, and several Texas districts, which are southwest border districts. A district -- for example, a district has a population of 750 beds, but guaranteed bed space is only 540.

The remainder of their bed space depends on the availability in state and local facilities at any time. Districts have to juggle prisoners confidently from one facility to another. Prisoners needed in court are, of course, housed closest to the court. Prisoners moved to outlying facilities are -- they are moved to outlying facilities when they are no longer

needed in court. Just for an example, our average per diem rate that we pay for prisoners is $65 a day. For an example, ranges of the top 10 districts for retroactive resentencing hearings: for eastern Virginia it's $30 to $113, $113 -- the higher number is always the closest to the court; the middle of Florida, $35 to $80; South Carolina, $30 to $56; western Virginia, $37 to $150; western North Carolina, $30 to $110; western Texas, $35 to $60; eastern North Carolina, $30 to $80; eastern Texas, $35 to $70; northern West Virginia, $55 to $69; and eastern Missouri, $40 to $75.

Housing costs alone could be approximately $38 million, not including medical costs, should all 19,500 be brought back into our custody. The average time in custody that we project, if we did have to take prisoners back in, would be approximately one month. It takes one to two weeks to bring a prisoner from another location. Our Justice Prisoner and Alien Transportation System stops in each region only once a week or once every two weeks.

A prisoner's attorney or the AUSA may request a prisoner to be brought in early to meet with them to prepare for hearings. It'll take one to two weeks to return those individuals back to the BOP facility or origin. Additional factors may extend time in custody,

such as pre-trial services may need to complete new pre-sentence reports, prisoners may require re-designation after resentencing. The transportation costs could be as much as $42.9 million. The JPATS, or Justice Prisoner and Alien Transportation System, the average cost to transport one way is approximately $1,100. Manpower costs. The Marshals Service produces 770,000 prisoners in court each year.

Some prisoners, of course, we produce multiple times. Another 19,500 productions would require 92 additional work years or 92 additional FTEs for us to handle that. The cost will be another $13.6 million. So the sum of additional costs, should we have to produce or take into custody all of the -- a hundred percent of the 19,500, is a total of $95 million; half of that, of course, $47.5 million.

In summary, bringing 19,500 prisoners back for resentencing hearings will result in an enormous additional workload. It may require manpower and funding to be diverted from task forces, protection details, new initiatives such as the Adam Walsh Child Protection and Safety Act. It will be a huge strain on our already taxed transportation system. Prisoner housing shortage in key areas of the country will be compounded, and of course it would strain our manpower,

which is already overextended due to the high volume of drug terrorism and immigration cases.

CHAIR HINOJOSA: Thank you, Mr. Jones. Mr. Cassily, sir.

MR. CASSILY: Thank you, Your Honor. Members of the Commission, thank you for allowing me to appear today to represent the interests of state and local prosecutors who are represented by the National District Attorneys Association. A little background on myself.

I'm a 30-year state prosecutor. I've been the elected prosecutor for Hartford County, Maryland, for the past 25 years. During that time period, we have cooperated extensively with state authority -- with federal authorities, DEA, ICE, and our local U.S. Attorney's Office, in dealing with drug -- cocaine problems in my jurisdiction. My jurisdiction is about 250,000 people, with several areas which are severely impacted by cocaine.

State and local prosecutors' interests in this is both the impact on past cases that we've already investigated with the federal authorities, and with the upcoming cases that I think we'd be impacted in our ability to take them to the federal prosecutor. Let me talk first about the impact on past cases.

Generally, when we work cases and we do a lot of this with our local U.S. Attorney's Office, I'm always surprised -- I was surprised to hear people talk about the number of street-level dealers that are in the state and the federal system, because my experience is generally, with all due respect to my federal counterparts here, when they're finished cherry-picking the cases that they want, we're stuck with the street-level dealers and we get to prosecute the street-level dealer and they get the really serious people.

And I'm not being -- I'm not trying to denigrate anybody with that comment, but we're the ones that end up with the low-level, run-of-the-mill guys. They get the really scary people who tend to intimidate witnesses, who tend to have their boy show up and hang around the courthouse, and those types of things, so that the folks that you're dealing with are not the local street-level, deal-a-dime-bag, go get high for a few hours and get lost type of folk. They're the people who run those people.

So when divided these folks up, one of the things -- one of the factors that went into the choice of a forum of whether state or local prosecutors would handle this was the consideration of the sentencing at the time that we chose who was going to prosecute this

person. So we made a certain decision based on the guidelines and the fact at the time that we divided these people up, and that we looked at perhaps enhanced stated sentencing for repeat offenders or enhanced state sentences for use of a firearm. And because at that time the federal sentences would probably be more, we elected to go with federal prosecution in those cases.

And now we're coming back years after that decision has been made by the prosecutor and saying, well, we're going to change that variable, and I would ask you not to do that. I think that the state prosecutors involved in this made that decision, relied on that, gave up their prosecutorial prerogative to pursue these people, with an understanding that this decision would last and this would be the way it would go.

Moreover, my experience is that often, in cases where there were problems with prosecution, the federal prosecutors, in fact, already made adjustments and allowed people to plea out to reduce weight, so that if you're bringing these people back for resentencing, the question is are they being sentenced for the weight that the pled out to, or are they being sentenced to the weight that they actually had, and is

that evidence going to be introduced? In other words, if there was a plea agreement, the plead out to a reduced weight, for a reduced sentence, is that going to reopen that plea agreement and allow us to introduce evidence of the actual weight that the defendant involved with at this point in time?

I can see an irony, actually, that it might be the public defenders who would argue that Booker wasn't -- isn't applicable to these sentences, because all they want to do is impress on you that, just do the math calculation and reduce it by two levels, hand them their reduced sentence and let them out the door. Don't worry about the fact that there may be other evidence that could be introduced against my client, which would now be difficult to get. And this is where we get into the effect of -- on current cases. My local -- or my Maryland U.S. Attorney has a limited number of prosecutors.

State and local prosecutors handle roughly 95 percent of all criminal prosecutions in the United States, so that the cases that we're taking to the federal prosecutors that we really need them to take, often we can't get them to take because of limited resources. When these cases come back, if you make this retroactive, I think it's going to really impact

on the availability of Assistant U.S. Attorneys, because, first of all, the sentencing judge may no longer be available, so it's going to have to be resentenced. It's going to be appointed with a new judge. The Assistant U.S. Attorney that handled the case may no longer be available, so a new Assistant U.S. Attorney is going to have to relearn this case.

The investigators may no longer be available and therefore evidence is going to have to be dug out and reviewed by new investigators and by new U.S. assistants. And civilian witnesses, to the degree that they're called for, may have to be located again by investigators, interviewed by prosecutors, and called in for sentencing. This is all going to impact on the availability of those U.S. Attorneys to handle the new cases that we're bringing them that we're asking them to prosecute.

And I really think that the -- having sat in on some of these federal sentences, before Booker, when the guidelines were much more mandatory, most of the time the sentencing hearing largely turned on the weight that was involved and a lot of other evidence that might've been available for sentencing, because sentences were pretty predictable. Prosecutors didn't bring in lots of other evidence, because let's not piss

the judge off, taking a lot of extra time here. Let's just get to what we need to prove, get the guy sentenced and move on to the next case. Now if we reopen this, I think there's going to be a lot of other evidence that prosecutors are going to want to present, and because a lot of those -- that evidence is going to come from my state investigators.

Most of the cases that we send down do not involve DEA or ICE or FBI agents testifying. They involve my local police department, my sheriff's department, my state police officers, being called back in as witnesses. So you're going to impact ongoing investigations by calling my people back, having them pull out five and ten-year-old cases, to review those cases and the facts, and perhaps pulling out cases that they didn't investigate in the first place, because, again, the investigators are gone.

But I think this is going to have a serious impact on how we, as state prosecutors and state law enforcement, work in terms of dealing with our federal counterparts to put these kind of cases on. And I think in many instances, evidence that is no longer available, or witnesses that are no longer available, will not be there to give the true picture to the new federal sentencing judge to really get the appropriate

sentence that should've been handed or should be handed out in these cases when they come back. And I would ask -- and I understand the sense that there was a great inequity in the sentencing of cocaine cases. But knowing the people that we've sent to the Feds for sentencing, nobody's in there doing time unfairly.

These were people that needed to do that kind of time, and had they not gotten that kind of time federally, we very may well have pursued them in state court, for enhanced state sentencing, for repeat offenders, repeat dealing, conspiracy, all of the other types of things that we might've elected to go after them for, had we not gone with the state -- with the federal forum. So I would urge the Commission, for all of those considerations, not to make this a retroactive application. Thank you.

CHAIR HINOJOSA: Thank you, Mr. Cassily. And I do want to correct something that perhaps maybe there's a misimpression left when we hear the different panels who have spoken. The Commission has been very clear that the approximately 19,000 number that we have used is based on a model of a pre-Booker system. We don't want to leave anybody with the misimpression that we have not been clear about that, that that number is a number that would be effected if we had the

pre-Booker system with regards to making the amendment retroactive. Obviously, if we have a Booker system, that number would be different and in all likelihood higher. Judge Castillo.

JUDGE CASTILLO: Ms. Shappert, you say in your written testimony and you said here orally, "retroactive application of the crack amendment will result in serious and often violent drug dealers being returned unexpectedly early to their reviving communities."

MS. SHAPPERT: Um-hum.

JUDGE CASTILLO: Isn't there a good chance that your office, led under your great leadership, will be able to convince colleagues of mine to keep in violent and serious drug dealers? Isn't there a good chance that you could win those battles?

MS. SHAPPERT: That will be their marching orders. But here's the problem.

JUDGE CASTILLO: No, I'm not saying they're marching orders. I'm saying, don't you think that judges would keep in violent and serious drug offenders? That's my question to you.

MS. SHAPPERT: I think they will in some instances, but I think there are a couple things that are coming --

JUDGE CASTILLO: So you're saying -- hold it.
MS. SHAPPERT: Okay.
JUDGE CASTILLO: In some instances --
MS. SHAPPERT: Yes, I think --
JUDGE CASTILLO: So in some instances --
MS. SHAPPERT: Yes.
JUDGE CASTILLO: -- which I would assume to be a minority of the time, judges will make the right decision.
MS. SHAPPERT: No, I would not say in a minority of the time. That would be unfair to our judges. I think --
JUDGE CASTILLO: Well, I think it would be too, so --
MS. SHAPPERT: I would not --
JUDGE CASTILLO: -- why don't you quantify --
CHAIR HINOJOSA: I think --
JUDGE CASTILLO: Why don't you quantify how many --
CHAIR HINOJOSA: Could I just --
JUDGE CASTILLO: Yes, I will.
CHAIR HINOJOSA: We need to go ahead and let the witness finish and then we can proceed with the next --
JUDGE CASTILLO: Well, I just had to defend

our colleagues, in terms of in some instances. Go ahead.

CHAIR HINOJOSA: Well, we --

MS. SHAPPERT: I would tell you that we have, in my opinion, exceptionally good judges --

JUDGE CASTILLO: Um-hum.

MS. SHAPPERT: -- in the Western District of North Carolina, who try to follow the law to their best ability. I have great confidence in them and if I suggested otherwise, that was not my intention. I think judges will attempt to make findings and apply the law as it's written. I, at the same time, believe that there will be disparity across the country, because there are many different judges.

The prosecutors who originally handled the cases will not be available. The witnesses who were involved in the case will not be available. Cases where there was a plea agreement and no appeal, transcripts from the original proceedings will not be available. They will have to be re-transcribed. So my concern is not the integrity of the bench. My concern is the tremendous strain upon the system and the inability of prosecutors to present all of the information that needs to be presented.

JUDGE CASTILLO: Thank you.

CHAIR HINOJOSA: Commissioner Howell.

COMMISSIONER HOWELL: To follow up a little bit on what Judge Castillo said, I have to say that, you know, we're all concerned and we're interested in what you have to say and what the Department has to say about the administrative burdens of processing for the 19,500 eligible offenders who we've identified, which may be both an overstatement and an understatement, but in terms of recalculating their sentence if we make the amendment retroactive.

But I have to say that I have been quite troubled by the Department's letter, where they talk about "the unexpected release of 20,000 prisoners or more," because it's not going to be a release. It gives the impression that 20,000 crack offenders are going to be put out on the streets in one fell swoop, and I think you would agree that that is a totally wrong impression to give.

MS. SHAPPERT: If anybody has that impression, I agree with you, that is wrong. That is not what we are suggesting.

COMMISSIONER HOWELL: And in addition, you have talked about the 536 offenders identified by the Commission, which again may be an over and an understatement.

MS. SHAPPERT: Yes.

COMMISSIONER HOWELL: And those 536 people are also not going to be released in one fell swoop. It's over probably 30 years.

MS. SHAPPERT: Well, here's the thing. We know that 536 people will be eligible for resentencing. We know that each of them is probably going to want to have a sentencing hearing of some variation or another. Notwithstanding Rule 43, they're going to want to be in the district, that if possible, they're going to want an appointed counsel, and if possible, they're going to want to talk about rehabilitation in prison, any changes in their family circumstance or situation, and we will have, if Booker does apply, a lopsided Booker proceeding where we consider all of the minimizing factors but not the aggravating factors that would've been available at the original sentencing.

COMMISSIONER HOWELL: And I understanding the administrative issues with the resentencing for the --

MS. SHAPPERT: Yes.

COMMISSIONER HOWELL: -- 536. But by our, you know, estimate, the most number from your district --

MS. SHAPPERT: Um-hum.

COMMISSIONER HOWELL: -- out of the 536 who

might even be eligible, if a judge decides that a reduction in sentence is appropriate, would be about 40, 42, maybe, people in your district alone, which is a far different subset of the 536 that would be released.

MS. SHAPPERT: The problem is going to be those same people who will be getting out early would not have had the same services in the Bureau of Prisons, would not have the same transition into society that we think is optimal or that we in the federal system aspire to. It increases the chances of recidivism and the Commission has identified that this population is more inclined to recidivate, based upon the aggravated criminal histories.

COMMISSIONER HOWELL: Well, let me ask you the same question that I asked the panel before you from the defenders, which is that the Criminal Law Committee, that gave an awful lot of thought in their submission to us, suggested a policy statement.

MS. SHAPPERT: Um-hum.

COMMISSIONER HOWELL: And if the Commission decides to make the crack amendment retroactive, can you speak for the Department as to what the Department's position would be on the Criminal Law Committee's policy statement proposal?

MS. SHAPPERT: Speaking for the department, as you know, we believe Booker should not be retroactive or applied to 3582(c)(2). If the Commission is going to apply the guidelines retroactively, we would encourage the Commission to make a policy statement as clear and specific and as refined -- and I don't have the specifics and we would be -- we would endeavor to assist in any way we can. But we would encourage you to be clear. We think that is more conducive to an efficient administration of justice.

CHAIR HINOJOSA: Judge Sessions.

JUDGE SESSIONS: I appreciate your comments, Ms. Shappert. I think it's probably fair to say that your comments could also have been relevant to our initial decision to apply two-level reduction to crack cocaine cases in the future. I would assume, from the nature of your comments, that that would've been your position because of your feeling about crack in the communities. The issue before us now, of course, is not that. It's a question of retroactivity. And you've heard Judge Walton testify about respect in the community for the criminal justice system, particularly involving those communities that are impacted by crack cocaine. We have reduced penalties for marijuana. We

have reduced penalties for oxycodone. We have reduced penalties for LSD. All of those defendants primarily -- those offenses primarily involve white defendants. Here we have a situation, an offense which involves predominantly African-American defendants. And to what extent do you think our refusal, if we were to refuse to apply it retroactively, would impact the community respect, or lack thereof, of the criminal justice system within the African-American community?

MS. SHAPPERT: Let me preface it by saying, first of all, the Department of Justice opposed retroactivity in all of those other situations, with regard to LSD, marijuana and the other drugs. So the Department has been consistent. Secondly, I think that it's important to remember that we need to remember that we focus on conduct in prosecution. We prosecute conduct. We don't prosecute based upon race.

The other thing is, with regard to the modification of penalties and retroactivity in the LSD and marijuana situation, you did not have the Booker effect looming out there, and I do believe it will -- it will potentially harm the criminal justice system if large numbers of individuals who are likely to damage poor, largely African-American communities, are in fact released early, people who are most likely to

recidivate. That's what I'm concerned about.

JUDGE SESSIONS: So if we pass a policy statement which in some ways modified or mollified the impact of Booker and resentencing, then I would expect that at least the severity of your statements would be reduced or mollified as well.

MS. SHAPPERT: The Department continues to believe that the guidelines should not be retroactive because of the consequences of letting people out who don't have the benefits of treatment and training in prison. But I would encourage the Commission, if the Commission is going to make them retroactive, to make the clearest policy statement it can, understanding, as we do, that Hicks and Forty Estremera call into question how binding the policy statements of the Commission will be.

MR. CASSILY: Can I just comment, too, that -- I mean, having listened to the panel before us, no one on that panel, none of the defense counsel, was prepared to just say, oh, we'll accept that and that won't be a basis for litigation. So I think that that will create just as much litigation and they're all saying that, in the best interest of the client, they're going to fully litigate their client's right to Booker, anyway. So I'm not clear that the Commission's

desire to limit that will have an effect whatsoever.

CHAIR HINOJOSA: Does anybody else have any questions?

COMMISSIONER FRIEDRICH: I have one question. Ms. Shappert, the courts have estimated that they will need to add approximately, I think they said, 95 new probation officers to account for the surge in cases that retroactive application of the amendment would cause. Has the Department done any similar sort of analysis? And I pose the same question for Mr. Jones, whether you all had a chance to try to calculate to what extent you would need to add prosecutors or marshals, in order to continue to be proactive in the areas of violent crime and terrorism and other important initiatives.

MS. SHAPPERT: Well, as you know, over half of the individuals implicated are in the 5th, the 11th and the 4th Circuit, so we're talking about a disproportionate impact on certain circuits. The Department has not offered any additional resources and I seriously doubt, though I don't know this for a fact, I doubt that I would be getting additional prosecutors, because this is going to be a temporary problem of a span of years, probably within -- whatever the decision, we're talking a one to ten-year period as

opposed to a systemic situation where I would be entitled to additional prosecutors. So would I like more help? Yes. Am I aware of any plans to provide additional help to districts that would be impacted? I am not.

MR. JONES: In response, Commissioner, to the question as far as the Marshals Service, as I mentioned in my summary of the testimony, which I provided a written copy, we just -- our analysis shows that we would probably need 92 people to offset the call to produce that amount of prisoners, notwithstanding that it'll be that amount. I'm not certain what that amount would be. But if it was 19,500, we'd look at 92. And we have not factored that in as far as any -- you know, within the President's budget call.

And so that's what we're saying that if we have to tap into existing resources, that it may affect some of the other initiatives that we have underway, such as the Adam Walsh sexual offender act. I do want to add that, within the 4th Circuit and specifically South Carolina and North Carolina, there was a couple -- the districts in those circuits are hurting right now, as far as the bed space. We are moving -- in South Carolina we're moving prisoners. We're housing their prisoners as far away as Tennessee. And we're

working, definitely, with the districts in North Carolina to house their already taxed prisoner load. And the only thing I wanted to mention was I heard earlier, in testimony, that prisoners may not want to get involved and be transported back, you know, for the hearing, but I would -- from my experience of moving prisoners, as a deputy marshal, they always enjoy a chance to get out of jail and take a ride and get some different food and have some other things in place, a chance of scenery and --

CHAIR HINOJOSA: Mr. Jones, sometimes the complaint is that they have been taken away from a drug care program or some other, or from their working program, that they may be involved in the prison system and that, therefore, they're taken away and go to the county jail system and that it takes a long time. And then to try to get back into the drug program or the workforce, or any of the other programs that they're involved in, that it would cut into it. Those are the complaints that we hear in the courtroom when we do call prisoners in for resentencings or other matters.

MR. JONES: Yes, sir.

CHAIR HINOJOSA: Or sometimes when there are witnesses in cases.

MR. JONES: Sure. And I'm aware of those

complaints.

COMMISSIONER FRIEDRICH: I have one additional question to Ms. Shappert. You've expressed some legitimate concerns about early reentry of prisoners should this amendment be made retroactive, and I'm wondering if you -- the Department has any reaction to the Criminal Law Committee's recommendation that probation officers seek to modify conditions of release for offenders, so that there would be a period of time where they would be at a halfway house or home confinement, where some of the reentry types of things that occur in prisoner could occur in this instance. Do you think those would be effective or do you still have concerns?

MS. SHAPPERT: I have not seen any position by the Department on that. I do know the Bureau of Prisons says that to prepare someone for a halfway house usually takes 11 to 13 months, but it can be truncated to a period of five to six months, but it does require some planning time, and my concerns about the lack of planning time continue.

COMMISSIONER FRIEDRICH: Um-hum.

CHAIR HINOJOSA: I have the last question. Mr. Cassily, you made the point about how if someone was brought back and there had been a plea agreement,

but it would certainly be understood that certainly you couldn't reopen the sentencing hearing to give somebody a higher sentence based on another weight. You meant in relationship to whether the reduction would be granted at all or --

MR. CASSILY: Well, I think my point was, then, is the evidence that the -- in fact, the amount that was involved was greater than that which he pled to. The defendant pleads to a certain amount. Is he going to then object to the fact that because it was understood, basically, that this would result in this specific type of sentence. Now that he's being brought back to be resentenced, based on the fact that, for that amount, he might get less time, will the prosecutor be able to introduce evidence of the actual amount that was seized, or involved in that specific criminal case, to keep the sentence from being reduced?

CHAIR HINOJOSA: If there's no other questions, thank you all very much. And we're ready for the next panel. Have a seat, please. Next we have the Academic Perspective. We've got Anne Piehl, who joined the faculty at Rutgers in 2005. Professor Piehl is an associate professor in the Department of Economics, and a member of the Rutgers Criminal Justice Program, research associate at the National Bureau of

Economic Research. And we've got Professor Steven Chanenson, who is a professor at Villanova University School of Law. Professor Chanenson was a law clerk to Judge Kravitz of the 11th Circuit, as well as Supreme Court Justice William Brennan, Jr.
Ms. Piehl.

MS. PIEHL: Thank you, Judge and commissioners, for the opportunity to appear before you today, regarding the issue of crack cocaine guideline amendments and its retroactivity. In my academic work, I assess policies from the perspective of a representative citizen. I've heard already that we've had representatives from various agencies that would be impacted by such a policy change. But what I want to do is take a slightly broader perspective, thinking about society at large. And the way I'm going to do this is by the framework of benefit cost analysis. Okay.

Benefit cost analysis is a widely accepted approach to totaling up all of the consequences of a proposed policy change. Benefit cost analyses are required in many areas of federal government work, and OMB has many circulars on how it's to be done, and it's often required of grantees, et cetera, by the federal agencies. The purpose of this kind of analysis is to

aid decision making by comparing the impacts of proposed policies. Its particular value as an analytic frame is that it incorporates all the consequences of a policy choice and emphasizes the tradeoff. And the way this is done is by putting things into a common metric, money. Now some people are offended sometimes by economists' willingness to monetize certain costs and benefits, but I find it is useful to think about these tradeoffs simultaneously and make it explicit where the tradeoffs are and that's what I want to do today.

Now, one thing that benefit cost analysis is not very good at is thinking about fairness or distributional concerns, and you've had a lot of input in that regard already, so I don't need to repeat that. But it is important to recognize that any benefit cost analysis should be accompanied by a discussion of fairness and distributional concerns and it should be considered just one input into a decision-making process.

Now, I didn't have time nor the access to the necessary data to do a complete cost benefit analysis for my testimony today, but what I'd like to do is make a couple of highlights of what a thorough analysis would look like. So the bottom line, as has been discussed earlier, from the Commission's research is,

you know, for our purposes today, thinking about 19,500 people being resentenced perhaps at a reduction of 27 months. This impact is staggered temporarily and dispersed geographically. So what the policy does is move up the release dates. What's the impact of that, if it were to be adopted? Well, what it saves is 16 million bed days. Okay. So that's the 19,500 inmates times 27 months times 30 days per month.

So the question is how do you value the savings of those 16 million bed days for society? In technical terms, what we want to think about for benefit cost is what's the incremental, incremental change to social costs of no longer using that resource in that way? Now, we heard earlier an estimate of $20 per day and that really comes from just the incidental costs of incarcerating an inmate for a day. So that would be extra food, some healthcare, that kind of thing.

Okay. That's the appropriate number if you're thinking about sentencing a single inmate for a single day. But when you think about a broader-scale change, you want to use a much larger number, because you would be able to avoid certain construction costs. You might be able to delay hiring, et cetera, if you had a smaller prison population. So what's an

appropriate measure of that? One way to get a measure is to take the federal prison system's budget and divide by the number of inmates there. That gives you an estimate of about $63 per inmate day. That's not an unreasonable number, but I still think that that's too low because it ignores capital construction costs.

Okay. So in the academic literature, when people are doing benefit cost analyses, they're not necessarily trying to get the right number but they're trying to get in the right ballpark, and about $40,000 a day -- $40,000 a year, or $110 per day, is the one that is sort of favored by researchers now. All right. So if you multiple that out at $110 per day, you end up with $1.7 billion of social cost savings. If you prefer a lower number like $70, you would end up with something close to $1 billion.

All right. So we've heard a lot of about some of the costs of the impacts on the administrative units, but those will obviously be much smaller in magnitude than this particular cost of incarceration. So on the other side, what -- so it's a benefit to your representative citizen, a reduction of tax dollars. What is the primary cost? Well, it think the primary cost would be a potential increase in crime. You have people being released differentially. What are the

crime impacts? Well, we mostly tend to think of the consequences of sentencing as effecting deterrents and incapacitation. There are other purposes of sentencing, but they don't have the same kind of impacts that I'm measuring here. Deterrents will be unaffected by retroactivity, right, because you've already -- the new amendment has already gone into place, so well-informed inmates are -- well-informed potential offenders are already responding to that circumstance.

So deterrence is not an issue here. So let's turn to incapacitation. It's a little bit more complicated. We will be letting people out, but one of the incapacitation benefits from sentencing, say, a drug dealer, usually is that you remove them from the community. These people have already been removed and whatever their slot was in the business of crack distribution has long ago been filled.

So the incapacitation loss from moving up release dates is really that incremental extra time that people will be on the street, that they wouldn't under the status quo. All right. So to me, the most interesting impact is that if people are released 27 months earlier than scheduled, they're going to be younger than they would otherwise, right, and we all

know that crime is very strongly associated with age. So I did some calculations from the Bureau of Justice Statistics' recidivism study and found that we expect, when people age a couple of years, there'd be a one to two percent increase recidivism over a three-year period. Now, I consider that to be an overestimate of the additional crime that would happen, because of what was just being discussed in the last panel.

Judges will have an opportunity, at resentencing, to not provide this relief to people who are -- have shown themselves to be of high risk of recidivating. So by my calculations, this results in an overestimate again, but a projection of maybe 390 additional crimes. Okay. So that has to be traded off against the one to two billion dollars in cost savings, if you were doing this as -- you know, in the framework that I, that I propose.

So if you want to value those crimes, each of those crimes would have to be valued at a social cost of about $4 million to make this be a breakeven, right, which is higher than we would use for any crime other than murder. And it's important to recognize that recidivism rates are much higher for property crimes than they are for violent offenses. Finally, you might want to consider what impact there might be of a mass

release of inmates, this kind of suddenness of a group of a releases. As has been noted, we're really thinking about moving up the bulge of releases and having 2500 extra releases in the first year, and then having a lower rate after that. So this should be -- you know, it's a large number in terms of an increase, denominated by certain values.

But relative to the 45,000 that are released every year from the Federal Bureau of Prisons, it doesn't seem like anything that's kind of out of the ordinary. And for communities who are receiving inmates daily from state prisons and from jail facilities, I don't think it's going to be noticeable. Not that it won't have an impact, but it's not going to be kind of a very large impact. And with the social cost savings from the incarceration, it might be possible to reallocate those to some kind of other prevention efforts.

So in conclusion, I want to say that benefit cost analysis shows that the proposed retroactivity will substantially reduce the cost of incarceration on the order of one to two billion dollars, and this is particularly important in the context of the high levels of overcrowding in the federal system. So it is not unreasonable to think that this could defer some

prison construction or hiring. So I think this could actually be a realized savings. So from the perspective of an American citizen, there will be small, perhaps, increases in crime across the country, but the consequences I think favor -- represent a win if you think about the taxpayer savings. It's not always true that economic efficiency and fairness considerations operate in the same direction, and policymaking is particularly difficult when they conflict, right? In this case they go together and I urge you to support the retroactivity.

CHAIR HINOJOSA: Thank you, Professor Piehl. Professor Chanenson, sir.

MR. CHANENSON: Chairman Hinojosa, members of the Commission, I find myself in the unenviable position of being between all of you and lunch, but I will -- I will, keeping that in mind, try to be as brief as a law professor can. In my comments today --

CHAIR HINOJOSA: Just don't call on us.

MR. CHANENSON: Yeah. The fact that you're all sitting in the front row is something unheard of. In comments today, I hope to convince you that simple justice, both real and perceived, counsel in favor of making Amendment 706 retroactive in some form, and that there are several ways to achieve that goal, all of

which involve the Commission doing what it does best, providing guidance. The United States Sentencing Commission, as you well know, is facing this very important issue. It is one that combines both pure policy and practical procedure, implicating matters of both equity and efficiency. But as I said, you know that already.

You have known that since at least 1995 and for more than a decade this Commission, constituted with different members appointed by different presidents, confirmed by Senates of different parties, has all endorsed the idea that something, at least up until last week, was amiss and still is amiss with respect to our sentencing for cocaine base or crack. In fact, each of your many thorough reports on crack cocaine sentencing has emphasized that a faithful commitment to the principles of the Sentencing Reform Act demands modification.

And while passing Amendment 706, you stated clearly that, while justice demands further reforms and explained that what you're taking is a partial action, you stressed, "the problems associated with the 100 to 1 drug quantity ratio are so urgent and compelling, that this amendment is promulgated as an interim measure to alleviate some of those problems." As you

know well, by your own guidelines, 1B1.10, the Commission looks at three things in deciding whether or not to make a guideline change, a reduction, retroactive; the purpose of the amendment, the magnitude of the change, and the difficulty involved, rather, in applying that change. The first two of those, in my opinion, clearly support a retroactive amendment -- application, rather, of Amendment 706.

The third is more complicated, but taken together, I believe they all counsel in favor of retroactive application. The purpose of this amendment is to take a step toward righting a significant and longstanding wrong that was depriving many defendants of their liberty well beyond what was justified by Congress' statement of valid sentencing purposes. The Commission cannot fully realize and effectuate the purpose of righting that wrong, unless there's at least a possibility for retroactive application in the appropriate cases.

Concerning the magnitude, the Commission has adopted the benchmark from the Senate report accompanying the Sentencing Reform Act of 1984, focusing on around six months as being big enough to be worth the effort. This average change of approximately 27 months is certainly well above that. Difficulty --

it was a little difficult for me to try and sort it out. One logical concern, when you think about difficulty of application, is the ability of the judge to reevaluate the defendant's sentence in light of the newly revised guideline. On that basis alone, Amendment 706 should not be too difficult to apply, because the sentencing judge originally had to come to some conclusion about the amount of crack involved.

Let me take one moment just to comment on something that Mr. Cassily mentioned with respect to cases being pled out. And there was some -- a somewhat puzzling reference to this in Assistant Attorney General Fisher's letter as well. It is not, to my knowledge, the policy of the Department of Justice, it was certainly not my practice when I served as an Assistant United States Attorney, to engage in fact bargaining.

So while there may be other things that were swirling around that may be of some relevance to the judge, positive or negative, whether to exercise the judge's discretion under 3582, I would be surprised to learn that the judge was not aware of all of the quantity of crack that the government felt it had enough evidence to bring forward. That kind of information is not supposed to be kept from the court

and in fact, as we all know, the Department of Justice takes a strong stand on that, so I think that really should not be a concern. But difficulty can be looked at more broadly. We have to ask ourselves whether we're thinking about some of the practical details that you've heard about today, and to get to that, I'd like us to pretend, perhaps, that we're in law school for a moment and go back to the statute.

When we look at 3582(c), what you see is Congress providing a few situations, and just a few, in which a sentencing judge may make changes after imposing a sentence. It seems to me, contrary to some of the loose language in a variety of opinions, and I respectfully disagree with the panel's opinion in Hicks, that a 3582(c)(2) proceeding is not a sentencing. 3582(c) proceedings are not mentioned, or course, in the Federal Rule of Criminal Procedure 32, the standard rule for sentencing.

And in fact, Rule of Procedure 43(a)(2) requires defendants to be present at sentencings, but a few lines down the page, 43(a)(2) -- 43(b)(4) -- pardon me -- states, the defendant need not be present when the proceeding involves the correction or reduction of a sentence under Rule 35 or 3582. This would be a peculiar resentencing indeed, if it could happen sua

sponte, as 3582(c)(2) proceedings could. So what exactly is the congressional vision of 3582(c)? In my opinion, it is an equitable mitigation device granted by Congress to the judiciary, subject to significant regulation and control by this Commission. It's a form of equitable sentencing relief that Congress authorized the Commission and the District Court, acting separately, to grant.

The District Court is authorized, but not required, to grant equitable sentencing relief in the form of an imprisonment reduction if three conditions are satisfied. First, the defendant must've been sentenced to a term of imprisonment based on the sentencing range subsequently lowered by the Commission; second, either the defendant, the director of the Bureau of Prisons, or the court must move to lower the sentence; and third, the contemplated reduction must be consistent with applicable policy statements issued by the Commission.

Without all three of these conditions, the District Court has no authority to reduce the imprisonment term at all. Congress provided even more specific guidance on this power that the Commission has to authorize sentence reductions, when it promulgated -- pardon me -- 28 U.S.C. 994(u). That provision

states in part that the Commission shall specify in what circumstances and by what amount the sentences of prisoners may be reduced. Thus it appears to me that this Commission has not only the express authority, but an expressed statutory duty to regulate with specificity the circumstances in which terms of imprisonment may be reduced.

Many courts have acknowledged, to one degree or another, that 3582(c)(2) proceeding is not a "do-over sentencing, " though few courts have really attempted to articulate the full contours and implications of these sentencing reduction proceedings. And no court admittedly has apparently adopted what seems to me to be the obvious interpretation of 3582(c). And before United States versus Booker, that ambiguity was arguably harmless enough, facing more mandatory guidelines as a default position.

The is, in my opinion, no longer so harmless. As you know, United States versus Hicks has held that Booker applies to 3582(c) proceedings. It seems inappropriate for many reasons to me, primarily, as I said, because 3582(c) is not a resentencing in which guidelines apply. It is a clemency-like, equitable sentencing reduction proceeding where a minimum nature and maximum extent of the reduction is, according to

statute, regulated by the Commission. So Hicks, in short, concludes that once the Commission deems a guideline to be retroactive, a fairly normal Booker resentencing follows. But presumably even Hicks would not allow, as Judge Hinojosa pointed out correctly, for an increased sentence, given the express language of 3582(c).

Curiously, in my opinion, Hicks also rejects the idea that the Commission's policy statements could provide a hard limit on the District Court's power to reduce a sentence consistent with Booker, although arguably that portion of Hicks is dicta. Even if Booker somehow applies to 3582(c), the Commission should have the power to place an absolute ceiling on the amount of the sentencing reduction. This is not making guidelines, so called, mandatory again. It is, rather, limiting the extent of the clemency-like, equitable sentencing reduction that the District Court can bestow. That's a law professor's view.

We all know how many people listen to law professors. So what happens if all of the courts decide contrary to my truly compelling argument that Booker applies? Well, what can the Commission do then and what should it do? Well, I believe that the Commission can and should provide more specific policy

statements, no matter what level of legal force they carry. Even if they are simply deemed to be advisory, these policy statements can be helpful. The Commission can make clear, I think, as it has already, but it could stand to be made even more blunt, that the Commission, I believe, would not want a retroactive amendment -- application, rather, of Amendment 706 to yield a sentence lower than two full levels below the sentence previously imposed.

It can at least discourage judges from granting reductions for certain offenders. I agree completely with Judge Castillo that experienced judges know what they're doing. But part of what our entire structured sentencing system is about, is trying to provide guidance and interaction between the trial court and the Commission and the Court of Appeals and Congress.

So I think there is nothing inappropriate with the Commission providing that kind of guidance, and of course, in a post-Booker world, if Booker somehow applies, the District Court can reject it. I think the Commission would be well served to also promulgate procedural policy statements along the lines that either the Criminal Law Committee or the defenders have talked about encouraging working with each other,

as well as encouraging judges to solicit the views of the Bureau of Prisons concerning an individual's specific reentry needs. The Department of Justice, though, highlights a potential problem, when it notes there may be uncertainty and a lack of uniformity concerning the applicability of a legal standard if some courts follow Hicks and others do not.

Now of course there is going to be uncertainty with any retroactive application of a guideline in a post-Booker world. It is arguably a larger problem in the context of Amendment 706 because the volume of cases is so high. Misapprehension, not ungrounded, should not though spark paralysis and do retroactivity. I go back to my initial position with respect to the purpose that is involved here. You've set that out clearly and I think the Commission should not break from its longstanding position.

There are other options. I'll touch on them briefly because, admittedly, they do wander into the realm of academia. You can provide a more muscular response, or at least call an inter-branch collaboration to provide a more muscular response to the Department of Justice's considerations and concerns. For example, with the help of Congress, Congress can reduce this uncertainty and lack of

uniformity in several ways. First, as I have written elsewhere and bored literally dozens of people who've read it, Congress can and should create a Court of Appeals for sentencing. This would afford greater consistency and guidance for all aspects of federal sentencing, not to handle every last sentence, but to help provide a unified judicial voice on matters of sentencing.

By speaking with one appellant analytic voice, the judiciary would communicate more effectively with the Commission. And Congress, on a more targeted basis, Congress could direct that all 3582(c) appeals, assuming they are appealable, and there's a disagreement about that, but most courts believe that they are, can go to a specific Court of Appeals, either an existing one, or a special court staffed with existing federal judges on a staggered term basis could be created.

Another possibility would be for Congress to direct that all such motions be heard in the first instance by a special trial court, and if transportation issues are that serious, the court could move to large institutions in order to minimize that. All of these possibilities would serve to make the retroactive application of the guidelines more uniform,

while maintaining an individualized determination of how to proceed in each case. There is, of course, an even simpler method to bring reasonable uniformity and procedural ease to the process of resolving these claims. It still requires the guidance of the Commission, but Booker would not be an issue. Even if you agree with Hicks, hard limits on who would receive a reduction could still be established in advance, and individualized determinations could still be made. Drawing inspiration from President Ford's clemency board, the President could issue an executive order directing the Parole Commission -- there's still enough of you left, sir --

COMMISSIONER REILLY: Right.

MR. CHANENSON: -- the Parole Commission to review the cases of defendants sentenced under the former guidelines for crack. This is not inconsistent with what the Parole Commission still does and would obviate many of the procedural discussions and issues that we have had today. No matter what the Commission chooses to do concerning retroactivity of Amendment 706, it has the opportunity to improve the overall state of criminal sentencing by how it does what you choose to do. We ask United States District judges to explain their reasoning so we can better understand the

federal sentencing structure. Greater understanding can lead to substantive improvements, increased public respect for as well as acceptance of the criminal justice system. While much remains to be done to improve transparency at the trial court level, including, in my opinion, the provision of greater access to data, including judge-specific information on sentencing, the Commission has an opportunity here to lead by example.

The Commission should clearly and publicly explain its reasoning, regardless of whether it makes the crack amendment retroactive. Especially in light of this broad public interest in the crack amendment, this is the perfect time to begin a new and rigorous tradition of explanation. I have great faith in all of you, that you take your responsibilities seriously and will continue to give this issue deep thought toward whatever decision you make.

Tell us about it. Tell us in a manner acceptable to all -- accessible -- pardon me -- to all, why one argument was persuasive over another and help us understand what this signals for the future. You can serve as a shining example to the hundreds of federal judges who must make equally challenging individual sentencing decisions every day. I guess I'd

like to, before I get peppered with questions, which law professors don't like, I want to just address two other things that came up in earlier questions. There was an issue raised by Judge Castillo, about the fact that the Commission has kind of bifurcated this process, passing the amendment and now dealing with retroactivity.

Of course, as you know, this has been the practice in a number of previous instances, not all, and admittedly I think your internal procedures encourage you to decide it as a package. There are reasons to take this on a step-by-step basis. And most importantly, this was not a surprise to anyone. This hearing was announced long before November 1. Your statistical data was set out there, indicating that in the neighborhood of 19,500 people could be considered for application of a retroactive amendment, so I don't think that's anything that should give you pause.

Finally, Commissioner Horowitz mentioned, and he asked Judge Walton, as I believe, whether the Commission should wait for the Supreme Court to decide Kimbrough. In my opinion, you should not. No one knows what the Supreme Court is going to do. They no longer have the tradition of re-listing and re-listing that they did years ago. But I am reminded of

something and you'll see this as a blatant suck-up that it is. But years ago I appeared before Judge Castillo in a very different capacity, as an Assistant United States Attorney, at several sentencings, and I was always struck by how Judge Castillo, in many ways, articulated and embodied the parsimony provision of 3553, where he would tell a defendant -- and you would always get a fair sentence from Judge Castillo.

But he would tell a defendant that you've done something wrong, this is what the punishment is, but I am not going to be responsible for you serving one more day in prison than you deserve. This Commission has determined that crack offenders do not deserve to be sentenced for as long as they have been. If it is your determination to apply this retroactively, you should do it now. With that, I thank you for your time.

CHAIR HINOJOSA: Thank you very much, Professor. Vice Chair Steer.

COMMISSIONER STEER: Thank you both for your testimony. Professor Chanenson, I'm very pleased that your -- with your analysis on the applicability of Booker. It certainly is in accord with my thinking and I think probably the thoughts of most of us who have

looked at the law and the legislative history and thought about it. You mentioned a number of possible things that could be done. One, of course, would to be strengthen the Commission's policy statement. I wonder if you would be willing to work with the Commission and its staff, in the case the Commission wants to go in that direction.

Secondly, what would you think about legislation that the Commission might Congress to enact that would make it clear, even clearer, if that is necessary, that Booker does not apply for these kind of remedial limited -- I think you're absolutely right. They're not a resentencing of these remedial actions.

MR. CHANENSON: Of course I always stand ready to help in any way that I can and I would be honored to work with Commission staff on any of these matters. As far as the possibility of new legislation, I think that, again, I agree with you. It seems fairly clear to me what 3582(c) is and it's not a bad idea at all. But if the courts are going to disagree over it, I'm not sure. I mean, it's certainly possible to make it clearer. I think it's a viable option. But if Congress is going to get involved, which I know is a big step, perhaps there would be additional things that the Commission might ask Congress to do in addition to

clarifying this.

CHAIR HINOJOSA: Judge Castillo.

JUDGE CASTILLO: Thank you both for being patient and standing by for your testimony. It was very helpful. Professor Chanenson, good to see you in a different capacity. It strikes me that we've been talking all morning to some members of the general public about this Hicks issue without really explaining it. Hicks would entitle a criminal defendant at retroactivity, if retroactivity is decided upon, to argue at resentencing that they're entitled to an entire new, fresh look at all of the sentencing factors. But there have been some courts that have rejected Hicks, including the 4th Circuit, right?

MR. CHANENSON: That's my understanding, although the 4th Circuit was not expansive in its reasoning and --

JUDGE CASTILLO: Um-hum.

MR. CHANENSON: -- I hope I was traveling when the 3rd Circuit issued its opinion. No matter where I was, I haven't seen it.

JUDGE CASTILLO: To your knowledge, has any court accepted Hicks as binding precedent? Any Circuit Court?

MR. CHANENSON: No, no Circuit Court of which

I am aware of. There are some isolated District Courts that have found it at least persuasive, being outside the 9th Circuit.

JUDGE CASTILLO: So it's only precedent in the 9th Circuit?

MR. CHANENSON: To my knowledge.

JUDGE CASTILLO: And the 9th Circuit happens to be a circuit with about maybe 500 of these affected crack cases, is that about right?

MR. CHANENSON: That's my recollection, yes, sir.

JUDGE CASTILLO: And the 4th Circuit, which has rejected Hicks in this one-page opinion, has about over 5,000 of these 19,000 cases, right?

MR. CHANENSON: Yes.

JUDGE CASTILLO: What does that tell you about what we should be doing on retroactivity, and is it a situation where Hicks is sort of the tail wagging the dog?

MR. CHANENSON: It tells me that you should not allow Hicks to be the tail that wags the dog. I think that Hicks is wrongly decided, but both the facts, from a practical standpoint, that the 4th Circuit does not follow that rule and that the Commission still has the ability to promulgate policy

statements that could even guide 9th Circuit -- the overwhelming balance of the equities, in my opinion, advocates in favor of retroactivity. And let's not forget Rita, Rita versus United States, where of course the guidelines are still effectively advisory, but the Supreme Court has provided a tremendous incentive to district judges to pay attention to what the Commission has to say, creating a safe harbor of sorts. And if you make that harbor more welcoming for the issue of resolving of these kinds of cases, I think certain issues of the concerns that the Department has with respect to disparity of individuals, where Amendment 706 would apply, can be reduced.

JUDGE CASTILLO: Thank you.

CHAIR HINOJOSA: Commissioner Horowitz.

COMMISSIONER HOROWITZ: Yeah. Let me just follow up on what Professor Chanenson said. I appreciate your testimony. Let me also just clarify. The question I asked, or so meant to ask, Judge Walton this morning, wasn't that we wait for the decision of retroactivity, until the Supreme Court decision in Kimbrough, but whether District Courts should then wait, if we did decide to make the guideline amendment retroactive, before sentencing. And his answer, I think obviously was the right answer, which is, for

those individuals who would be released anyway, there's no reason to wait. And so let me just ask the question to you, then. If a district judge decides to wait, in an appropriate circumstance, and the court reverses the Kimbrough decision of the 4th Circuit, do you see that having any impact on a decision to make the guideline retroactive? Does Kimbrough overlay at all with the decision we're making?

MR. CHANENSON: It impacts it, certainly. It impacts -- again, if I understand the question, and I apologize for misunderstanding it before, but it gave me a chance to say something nice about Judge Castillo.

COMMISSIONER HOROWITZ: That's right. And we all try to do that occasionally, on the Commission.

JUDGE CASTILLO: Occasionally.

COMMISSIONER HOROWITZ: Occasionally.

MR. CHANENSON: If I understand the scenario correctly, what you're positing is a situation where judges are freer than some of the Circuit Courts have up to this point allowed to disagree with the 100 to 1, or now whatever it is, ratio embedded in the guidelines, and that Booker would apply on these 3582-type proceedings. It makes the promulgation of policy statements all the more important. But again, I think that the retroactivity of this issue, to me, still is

the appropriate course to follow on the simple justice of it. So yes, this will make life more complicated. It raises issues of serious concern as to disparate treatment from judge to judge, as we have not seen too big of an issue after Booker, but it's the -- you know, the monster hiding under the bed of Booker. But I think that we can mitigate that or the Commission can mitigate that through the promulgation of greater policy statements.

COMMISSIONER HOROWITZ: Thanks.

CHAIR HINOJOSA: Commissioner Ferry.

COMMISSIONER FERRY: Let me echo the thanks of my colleagues. I found your presentation extremely helpful and thank you for the thoughtfulness given to the policy statements. On that note, would you -- what's your reaction or what your recommendation be to whether or not the Commission should enact a policy statement indicating that the court should not consider new factual arguments that may be raised under 3553(a), that is essentially arguing that new facts and things which aren't relevant to the two-level reduction should not be part of the 3582(c) hearing? Would that be helpful to the District Courts and do you think that would be wise for the Commission to do?

MR. CHANENSON: I've struggled with this

because 3582(c)(2) proceedings are different, at least in my mind. Again, no, I don't think that they are resentencings, but they're not exactly Mr. Reilly's bailiwick, either. I think it probably would be best not to promulgate a policy statement in that regard, in part because we don't want to -- within limits and guidelines provided by the Commission, I am reluctant to tell a District Court judge that an individual's misconduct while in an institution is not relevant.

I'm reluctant to tell a District Court judge that something, you know, wonderful that's happened to a defendant is not relevant. Again, by providing guidelines focusing on specific concerns, if you want to identify a population that the judge should look at with a particularly jaundiced eye, and by providing the hard limit that I think already exists, I think within that range of those two levels, I do think that the judge can make that determination.

Otherwise, if I understand what you're saying correctly, we're looking purely at historical matters. And while there's certainly -- it's certainly a plausible position and truthfully, I did struggle with it. I think, on balance, I would encourage the judges to, within the limit of the two levels, consider everything.

MS. PIEHL: Can I add to that, because I would make the same argument. I think it would mitigate some of the reentry concerns that we heard earlier, if the conduct while in prison, whether it be to the inmate's benefit or detriment, would be helpful and mitigate some of the concerns about shifting the release date when the Bureau of Prisons hadn't planned for that particular progression.

So it would be nice for the Bureau of Prisons to be able to contribute the information that they would otherwise have contributed at a parole hearing, for example. That would perhaps allow for conditions of release or some effort to even determine the particular length of release. For the first group to be released very soon, you might want to make sure they had several months left of a sentence that would allow for halfway house placement before completion of the sentence.

CHAIR HINOJOSA: There being no other questions, we thank you all very much. Professor Chanenson, on behalf of all us, we do thank you for the nice things you said about Judge Castillo. And his father also thanks you.

MR. CHANENSON: Thank you all very much.

JUDGE CASTILLO: Thank you very much. Call

this first panel with regards to different member of the community expressing their perspectives with regards to the issues before the Commission involving the decision with regards to the retroactivity of new guideline amendments, both in the crack cocaine sentencing matters, as well as criminal history.

We have Mr. Wade Ikard, who currently serves as the Weed and Seed Coordinator for the South Statesville, North Carolina community, where he has been involved in community development and outreach through quite a few organizations in the community and we certainly appreciate his presence here today. We also have Mr. Chuck Canterbury, who is the National President of the Fraternal Order of Police, having served in quite a few capacities within the organization, both at the local level, where he was local lodge president for 13 years and state lodge president for eight years and we certainly also appreciate your presence and your willingness to share your thoughts with us today, Mr. Canterbury.
Mr. Ikard, sir.

MR. IKARD: Good afternoon. My name is Wade Ikard. It's a pleasure to be here today to share my testimony before the Sentencing Commission. Again, I am a native of Statesville, North Carolina, father of

three and married. I'm a graduate of Statesville High School and also attended Mitchell Community College. As a community activist, I serve on several boards in my community in South Statesville; the Boys and Girls Club, I Care, Human Relations Council, the 115 Corridor Statesville Redevelopment Community. All these programs are involving helping restore our community. My job is currently the Weed and Seed Coordinator, South Statesville.

Weed and Seed is a Department of Justice base program whose goal is to prevent, control and reduce crime, drug abuse and gang activity in target high-crime neighborhoods. Weed and Seed strategies follow a two-prong process; local law enforcement agencies and prosecution weeding out criminals as they engage in criminal activities. Weed and Seed, I can say, has been the best that has happened in South Statesville. We have numerous goals that we have set.

One of the most important goals was building bridges, relationships, with our local law enforcement. At one time, community meetings, all of our meetings were our police was on one side of the room and our community sat on the other side of the room. No counter-communication, whatsoever. But now, through Weed and Seed, we build great bridges, great

relationship with our local law enforcement. Numerous of community events are being held, National Night Out, fall festivals, back to school rallies, Community Watch and more. Also, with the assistance of Weed and Seed initiative, we have a fully functional police substation in our Weed and Seed target area also, which -- this gives the residents to have police at their disposal.

Also housed in our substation is a full-time code enforcement officer who focuses just on our Weed and Seed target area. Fifteen to 20 years ago, South Statesville was a very vibrant community, but over the 15 to 20 years, we have seen crack cocaine devastate our community. South Statesville was, at one time, a very mid-class community but now, I guess you can call it what some would say a ghetto. Crack cocaine has broken our neighborhoods.

The violent crimes that are now being committed due to crack cocaine has skyrocketed. Gang activity has flooded our communities and terrorized the residents, especially the elderly, who are frightened for their lives because they have been threatened by these gang members, not mentioning the young, from the age of 11, that are selling crack, been forced and pushed into selling crack because they feel like this

is the way out, this is the only way out. Why? Because of the lack of education and not having parents in the home. Also allow me to share a few testimonies, which are personal, with you today. These are real people, but for confidentiality purpose, I'm going to pursue another name. I want to speak on Morris. Morris and I, believe it or not, were once -- at one time, enemies.

We worked in the same neighborhood, but as I separated from my wife, he dated my wife and you can understand, when you have someone else dating your ex-wife, but Mark (sic) was a very vibrant young man, worked very hard, had quite a few things going for himself, but over a period of time, a change came in Morris's life. Excuse me. I was confronted by Mark one evening and Mark asked me could he have a ride and I said sure, so I gave him a ride. And we got to a certain location, he asked me to borrow some money and I declined.

He said well, can I borrow $5? And I'm thinking, you know, Mark is asking me for money and we don't even get along. But then, excuse my language, but I'm going to say it the way Mark said it to me, Mark said give me $5 and I'll suck your dick. What caused a man, 30 years old, to lower his standards to

say give me $5 to perform such an act? Now, Kim, Donna and Janet, all three of these are close friends and classmates of mine. All have been physically quickened in age, rotting teeth, body deterioration, loss of hair, blotchy skin, constantly in jail for theft, prostitution, in and out of courts for neglect and child abuse.

What would make an A-plus student, a talented singer, an artist, a possible college graduate, a mother, abandon her children and begin to sell her body on the streets for just a few dollars? Again, to support the habit of crack. Now, this name I'm not going to make up because this is personal. Charles, my uncle, whom I funeralized (phonetic sp.) due to crack cocaine. Our family members knew that Charles was addicted to crack and we tried very hard to get Charles into some rehab programs. He would go to rehab, get out of rehab, go back into a program, go into 12-step programs, all to no avail.

Charles' crack habit got so intense that he owed hundreds of dollars to a dealer. He couldn't pay it off. What happened to my uncle? Shot, run down, bullet lodged into his pelvic. The next day Charles died because he wasn't able to pay off his crack dealers. These criminals that we are here talking

about today, they know what they do. They know the harm that crack does to people, but do they care that mothers are taking their money they should feed their children to buy crack? No. They don't care at all. They just continue to do it. They need to make the best of their sentences to help themselves to be revitalized while they are incarcerated.

I feel that very strongly. In April, the Commission voted to lower recommended sentencing for those caught with distributing crack cocaine, sent to Capitol Hill on May the 1st and was passed as of November 1st after Congressional review. Today's hearing is focusing on 2,000 convicted prior felons. In analysis, the Commission has estimated the change to lower the prison population to reduce the size of federal population within the next 15 years, estimated 3800 drug dealers, if not all, from the majority of crack cocaine and saving about $87 million, according to the Sentencing Commission.

I read where a private organization is tracking the issue. I have a question to ask. Who's tracking the issue of where these individuals will reside and a rehabilitation process while they're incarcerated? Who's tracking the jobs that would be available for them, even the transition back into the

community? Who's tracking the Morris, Leslie, Kim, Donna, Jack, Janets and the Charles that may be affected in the community that are trying to be revitalized? Who is tracking the crack babies and the increase of gang violence in our communities? $87 million may have saved, but what about the millions that will and could be affected by this retroactive sentencing, if passed?

And the millions that would be used to take the cases back to court when the U.S. Attorneys already got pending cases? Last year, four-fifths of those federal courts were African-American, a message to African-American women, African-American men, stop selling drugs. Stop selling crack. Stop distributing. This is not a black issue or a white issue. It's reality. You are contributing drugs to what is killing your own race. Thank you for having this opportunity to speak before you today.

CHAIR HINOJOSA: Thank you, Mr. Ikard. Mr. Canterbury, sir.

MR. CANTERBURY: Good afternoon, Mr. Chairman, Vice Chairman, distinguished Commissioners of the U.S. Sentencing Commission. I think that you all remember me from my previous testimony and I'd like to thank you this opportunity to

be here today to present the rank and file practitioner's view of retroactivity. As you know, this Commission voted earlier this year to reduce the penalties for crack cocaine and at that time, my testimony was that even if there was a disparity, we believed that maybe powder cocaine should've been increased rather than crack cocaine reduced and we still feel that way.

Regrettably, this time Congress failed to act and the amendment lowering the penalties for crack cocaine were adopted November 1st. With these changes already in place, the issue before us today is whether these recent changes to the sentencing guidelines should be applied retroactively and I'm here this afternoon to urge you, in the strongest possible terms, on behalf of practitioners, not to do this.

To begin with, at least 19,500 crack dealers will have their sentences reduced and that in addition to any other reduction that that offender may have already received for cooperating with the government for good time credits. It's important to realize that these criminals are not low-level dealers or first-time offenders. Eighty percent of them have previously been convicted of a crime. A majority of them have multiple prior convictions and 35 percent of them possess the

firearm in connection with their drug dealing operations. Further, more than 15 percent of these offenders are in the highest criminal history category. Projections show that at least 2500 additional crack dealers will be released into the community either immediately or within the first year of retroactive application and another 5,000 could be released into the community within two years.

Some offenders, those who are the most likely to be high-level dealers with significant criminal histories, could see their sentences reduced in excess of 49 months. At a time when law enforcement is seeing an increase in crime rates that have fallen for more than a decade, it seems at variance with common sense and good public policy to release, en masse, crack dealers and drug offenders back into our neighborhoods.

Let me give you some concrete examples as to how the retroactive application of these new guidelines may affect real communities. I'd like you to consider the case of Leonard Brown. Mr. Brown, before his arrest, conviction and sentencing, was the main drug supplier for Sandersville, Georgia, a rural community with approximately 10,000 residents. Mr. Brown, prior to being selected by a jury of his peers, to serve a sentence that this Commission now deems to be too

lengthy, had an impressive, long criminal history, which includes crimes of violence and drug dealing. Yet despite this impressive body of work, the best efforts of local and state law enforcement authorities were not sufficient to remove Mr. Brown from the community. The state judicial system had become a revolving door that resulted in placing this violent drug dealer back into the community after a very brief period of incarceration. Obviously, this frustrated local and state law enforcement officers, as well as the residents of Sandersville, Georgia, whose safety was at risk while Mr. Brown's business was in operation. However, the federal prosecution and sentencing of Mr. Brown had a ripple effect in Sandersville.

Admittedly, the actual amounts of crack cocaine possessed by Mr. Brown at the time of his arrest, which he's currently incarcerated for, were not particularly high, but for a community that size, he was a drug kingpin and supplied the community a substantial amount of drugs. As befits a person of his standing, he employed minors to do the actual legwork, exposing them to the risk, while he reaped the rewards. It was not until he was prosecuted by federal authorities, however, that he was held accountable for

his crimes. His conviction, the significant sentence he received and the fact that he would not be eligible for parole, sent a clear message that there were serious consequences for drug dealers if they were prosecuted by federal authorities. It also sent a message to the residents and the children of Sandersville that the criminal justice system was not completely broken and that a long-time drug dealer, like Brown, could and would go to jail.

If the changes in the sentencing guidelines were made retroactive, Mr. Brown's sentence will be reduced by approximately three years, making him eligible for immediate release. This sends a clear message that we're not serious about getting and keeping drug dealers out of our community. The residents of Sandersville, Georgia should be outraged because they knew how long it took to put Mr. Brown in prison.

This one example of how the retroactive application of the new rules will just be multiplied by the number of 10,000 member communities there are in our country. It's important to remember that the incalculable devastation wrought by our nation by crack cocaine and the millions of lives that were damaged and families that were wrecked by this drug in many of our

cities have never fully recovered. And as you know, the crime rate in the United States is on the rise again and I believe it's directly correlated to the crack cocaine and the methamphetamine in the country. I'd like to thank the Commission for the opportunity to give you the rank and file perspective from the people on the streets that are dealing with the crack dealers and I'll be glad to sit for any of your questions. Thank you very much.

CHAIR HINOJOSA: Thank you, Mr. Canterbury. And the panelist, the third panelist, has just walked in at a very appropriate moment. Mr. Hilary Shelton, who's the director of the Washington bureau of the NAACP. Prior to that, of course, he has served as the Federal Liaison and Assistant Director of the Government Affairs Department of the United Negro College Fund and Mr. Shelton, we appreciate your presence and you would like to give us your opening remarks, sir.

MR. SHELTON: Thank you, sir. I'd like to thank the Commission for inviting me here to today on behalf of the NAACP, our nation's oldest and largest grass roots based civil rights organization. As you mentioned, my name is Hilary Shelton. I'm the Director of the NAACP's Washington bureau. The Washington

bureau is a federal legislative and national public policy arm of our nation's oldest and largest grass roots organization. I'd also like to begin by thanking the United States Sentencing Commission for your steadfast efforts to eliminate the racially discriminatory sentencing laws, mandating that a conviction for possession for five grams of crack cocaine is equivalent to 500 grams of powder cocaine, despite the fact that the two drugs are pharmacologically indistinguishable.

The result of this 100 to 1 ratio has been the incarceration of a vastly disparate number of African-Americans and Americans of Hispanic origin. As such, the NAACP would like to commend the Sentencing Commission for its May 2007 amendments to sentencing guidelines for crack cocaine, which will have the effect of lowering the guideline sentencing range for certain categories of offenses and offenders.

While it is not all that we have been advocating for, it is an important first step. The NAACP strongly supports making the amendments retroactive in those currently incarcerated for crack cocaine convictions. It has been a year almost to the day since I last testified before you in opposition to this injustice. At the time, I told you that despite

the fact that cocaine use is roughly proportionate among the different populations of our nation, the vast majority of offenders who are tried, convicted and sentenced under federal crack cocaine mandatory minimum sentences are African-American. Our people in our communities continue to be disproportionately devastated by the law. Almost 83 percent of those convicted of federal cocaine offenses are African-American, while according to the 2000 census, only 12.9 percent of the entire U.S. population is African-American. Furthermore, according to the federal government's most recent survey, less than 18 percent of our nation's crack cocaine users in 2005 were African-American.

Few people today argue that policy makers could have foreseen, 20 years ago, the vastly disparate impact the 1986 law would have on communities of color, yet the fact that African-Americans and especially low-income African-Americans continue to be disproportionately and severely penalized at much greater rates than white Americans for drug use and that the policy of the federal government is having a devastating effect on our communities and that these laws continue to be maintained show, at the very least, a callous disregard for our people in our communities.

And it is the disregard for the fate of our people in our community that we continue to erode our confidence in our nation's criminal justice system. How can African-Americans trust or respect policy makers perpetuate a law that clearly has such a racially discriminatory impact?

And because it is only human nature to punish the messenger, the resulting distrust, disrespect and anger that African-American communities feel often result in a lack of necessary cooperation with law enforcement representatives and the criminal justice system, as well. Reform of our nation's cocaine laws have been a priority to NAACP since the resulting disparities in incarceration became evident and it is now a rallying point for our members and the communities we represent.

And so I would like to reiterate the NAACP's support and appreciation for the Sentencing Commission's continued call for a repeal of the mandatory minimum crack cocaine sentences. I would also again like to extend our gratitude for the Commission's recent amendment which will, on average, trim over 15 months from current crack sentences. And I would like to strongly repeat the NAACP's strong support for making this amendment retroactive. As you

know, a decision to make this amendment retroactive will impact roughly 19,500 men and women currently in jail, approximately 86 percent of whom are African-American. It only makes sense that a person who was sentenced between October 1st, 1991 and June 30th, 2007, should not have to spend more time in prison than those sentenced after November 1st, 2007, simply because they had the misfortune of being sentenced at the wrong time. As I have said earlier, the continuation of the 100 to 1 sentencing ratio and the disparate impact it has on our communities exacerbates our mistrust of the American criminal justice system.

It is my hope that the November crack cocaine amendments will help again in addressing this problem and failure to apply them retroactively, however, as it has been done in the past relative to LSD, marijuana and oxycodone, all which benefit other groups more so than African-Americans, would perpetuate and perhaps even intensify the image of injustice. I would like to thank the Commission again for all of your work on this issue. Together, we can hopefully persuade members of the Congress, as well as the American public at large, for a dire need to reform crack cocaine sentencing. In the meantime, please note that the NAACP supports and appreciates your recent amendment to crack cocaine

sentencing guidelines and strongly urge you to apply these changes retroactively. This is indeed a matter of fairness and simple justice. At this time, I'd be delighted to take any questions you have.

CHAIR HINOJOSA: Thank you, Mr. Shelton.

COMMISSIONER FERRY: Mr. Ikard, you've heard others indicate, as Mr. Shelton did, that the current crack penalty structure has a disproportionate impact on African-Americans. Can you speak a little bit to what the impact of retroactivity will be upon the African-American community in Statesville?

MR. IKARD: To allow -- I don't know the number of offenders that would be released back into the community if this is passed, but our communities would be devastated if this law was to pass. I mean, we're currently trying to revitalize, enhance the quality of life of families in these areas and to allow criminals to come out of prison early, at this particular time, our work -- I mean, it's just going to be like well, you know, where do we go from here? Do we start at ground zero again? My thing is they come out, where are they going? They're coming back to the same place, the same community, and if not -- if they have not yet been revitalized or getting their life straightened out while they're in prison, what are they

going to come back and do? Jobs are going to be scarce. I can tell you what they're going to do. I know for a fact. I have family members, I have a brother and I'm going to say this, I have a mother that was convicted for it and what did they go back to do again? Selling. So to me, what do they do? They go right back sometimes to selling drugs again, to home.

The people that I testified about, those are the ones that are hurting and yes, their numbers are high. I agree a little with what the gentleman said, but it's going to affect the community. So what's going to be for the community to allow this to come back, that African-American people can continue to have to go through this process of not -- being able to possess all these drugs, this crack cocaine? Crack, you can get if for $5. What would a woman do for $5 to get it? What will she do? I told you earlier what a gentleman would do to get it. These are things that need to be taken into consideration. Thank you.

CHAIR HINOJOSA: Vice Chair Steer.

COMMISSIONER STEER: I guess I want to wade into a little bit of a thorny issue that bothers me. I think all of the members of the Commission are aware of the disproportionate racial impact of the crack cocaine sentencing policies. One of the themes that permeates

the public comment and the testimony, including your testimony, Mr. Shelton, is that the Commission should make this amendment retroactive because it made several other amendments retroactive in the past; not this commission, but previous commissions. And those amendments that are mentioned are the marijuana plant, oxycodone and you know, the -- you know, that list is incomplete because there were a few other amendments, one involving the definition of what, under the guidelines, constitutes crack -- constitutes cocaine base where the Commission said it's only crack cocaine and that amendment was also made retroactive.

And then the Commission, as you may know, lowered the top level of the drug quantity table, Level 42 to 38. I frankly don't know what the ratio of impact of those two amendments were, but I suspect it was different from those three that are mentioned. I guess my basic question is this. Why shouldn't this be decided on the merits of the -- what does the impact of the race of the offender have to do with whether or not a commission that is charged, under the law, to be entirely racially neutral in its decision making, what does it have to do, what does it add to the decision making process?

MR. SHELTON: If I understand your question,

you're asking what difference it makes that we actually introduce the issue of the racial disparities and how this particular sentencing guideline has been utilized. And very well, crack cocaine is clearly the cheaper of the drugs of the two, powder cocaine, crack cocaine. It's much easer to get at a lower cost, yet it has a much higher price in our criminal justice system.

So what we're saying is that those people who happen to be poor, those people who happen to be African-American or Hispanic, which of course, the largest demographics prosecuted for the drug and incarcerated for possession of the drug are those that are going to be most affected, though even the Commission -- I shouldn't say even the Commission -- the Commission had the foresight to see that this will be a problem further down. It was the Commission that said there should have been no difference between the two drugs initially.

It was the Commission that recommended to the Congress that indeed, we do a one-for-one. It was the Commission that was right then and it's the Commission that's right now. Very clearly, if even the Congress would be able to have the foresight to see the disparate impact this would have on African-Americans and other racial and ethnic minorities in a scenario,

our universe in which race becomes a determinate of whether is someone is going to be discriminated and be punished more harshly or whether they're going to be treated fairly in this country. And indeed, we recognize that over the course of years, indeed, those who happen to be black and brown are to be more heavily penalized for utilizing the same drug, though even the Department of Human -- Health and Human Services says that we use illegal drugs at about the same rate.

Now, don't get me wrong. The NAACP's not suggesting that anyone should use illegal drugs at all, but in these, we talk about equal protection under the law and -- very well that if you commit the same crime, you should do no more than the same time. And indeed, when we have these drugs that are pharmacologically indistinguishable, that have no other affect, indeed, we should treat them the same way.

I think it's really problematic, quite frankly, when you end up with a scenario where African-Americans, the poorest of the poor in our country and in this particular case, are those who spend the most time in jail. And quite frankly, if you want to find a better use that $25,000 a year plus that it takes for someone to spend time in prison over the course of a year, then program to provide a road to full

participation in our society, like job training, drug assessment, drug counseling, other programs like that are a much utilization of that money then keeping people in prison one year or more longer, which is exactly what would happen if we don't make this retroactive.

JUDGE SESSIONS: I'm going to expand a little bit on that question. For others, the real question is the perception of the criminal justice system within, well, the entire country, but also within the African-American community. And to what extent does the disparity, the 100 to 1 ratio, impact the view, among the African-American community members, that the system is unfair and therefore essentially result in bringing disrespect on the criminal justice system?

MR. SHELTON: May I begin by saying that this is not in a vacuum and that quite frankly, there was a time when we had different laws on the books for African-Americans that committed the same crimes as white Americans in our society. I still look and almost want to laugh, if it weren't so seriously, about African-American men being brought up on charges of rape and the category of rape is malicious ogling and only African-American men looking at white women would be sentenced for malicious ogling, that form of rape.

It's almost funny when you think about it, but there are men that have spent time in prison for just that particular offense in our society. So that being part of the context that we're having this conversation, we know that there have been many circumstances where African-Americans were committing the same crime, ended up being punished much more harshly in terms of time spent in prison and even the utilization of the death penalty. So we're not talking about a discussion that's outside the context of a history that we have in this country that's been extremely troubling.

CHAIR HINOJOSA: Commissioner Howell.

COMMISSIONER HOWELL: I just want to talk a little bit with Mr. Canterbury and also Mr. Ikard to both frame a question, but also just to try and address some of what I view as some of the more alarmist statistics that you may have heard without the appropriate caveats. And sometimes that's difficult in the media, but here, I think it's really important to make it clear that, for example, Mr. Canterbury, in your example of the drug dealer who, after, you know, the enormous effort of law enforcement, put away a violent drug dealer and put him in jail. I think it's worth noting, if you weren't here for the earlier morning or I think many of my fellow commissioners

brought this out, that the two-level reduction in our crack amendment, if we do make it retroactive, really isn't automatic reduction in prison time for anybody who's currently in prison. It really is an opportunity for a judge, if the appropriate motions are filed, to consider whether a reduction in the sentence is appropriate.

So I think the facts relating to that particular person's offense conduct would probably be something that a judge -- I'm confident the judge would look at that. So I just want to allay your concern that, you know, violent drug offenders are automatically going to have the key unlocked from the door of their prison cell. That's not exactly how it's going to work.

Mr. Ikard, also, you also heard and you've used some of the statistics about the numbers of defendants who may be released should a judge, evaluating each of those individual cases, decide the reduction is necessary, talked about the numbers who might be released into your community and I commend you on the time and the effort that you're spending to put your community and hold your community together and it's -- I think we're all very impressed by that. I think, although numbers of 19,500 people have been

discussed, I just want to make sure you understand that that's over the course of over 30 years, so it's not going to be all at once and in fact, from the district, I think, that you're in, in the first year it would only be about 42 people who would be released, so it's not a huge influx of individuals.

Nonetheless, you know, the Commission is very cognizant of the fact that, you know, people who are -- who have been incarcerated, this population consist of people who may have criminal history scores, and those are all things that we have enormous confidence that the federal judges in this country will be able to evaluate on making the particular decisions and particular cases as to whether a reduction in sentences is reduced.

And so I just want to make sure that, to the extent that there is public listening to your comments and your very legitimate concerns, that those are not concerns that the Commission has ignored, we're well aware of them, but I also wanted to make sure that you understood that in the context of how this is actually going to operate, that alarmist concerns are not really appropriate.

MR. CANTERBURY: I don't want 42 more drug dealers in my city.

MR. IKARD: May I?

COMMISSIONER HOWELL: Um-hum.

MR. IKARD: Whether it be 42 in the Western District and 42 in the next city and the next state, releasing them, having the U.S. attorneys having to go back to court and try these cases over or whomsoever and there are already pending cases, it's just going to delay things and give other people opportunity that are like well, I've got -- now I got to go court, but now I have another year and a half on the streets.

What are they going to do? I can tell you what they're going to do because I deal with them every day. They continue to do what they were doing. And to allow 42 to come out early, all right, 42. That's an impact in the South Statesville community, that's an impact in North Carolina. That's detrimental to us. That will hurt us. My thing is this and I stand firm on this, I have a young lady to tell me I don't have crack, crack has me. To hear someone say it has me, that's hurting. I want off, I can't get off. And for one or whether it be two or 42, to come out and possible enhance that, no.

CHAIR HINOJOSA: Well, I guess this question is both to anybody who wants to answer it, but is there -- let's leave aside the issue of retroactivity, but is

there no prison sentence that, when someone comes out, they're going to go right back to doing the same thing? I mean, is it the length of the sentence or what is it that you think would, at some point, when someone's released, they're not going to back to be --

MR. IKARD: Well, let's look at the fact that you're already reducing the time, so now they know, if they come out and have not yet been rehabilitated, well, if I get caught again, I'm out early, five or six years now, to go back. Sometimes you have to think like a criminal, so sometimes you have to think like them and that's how a lot of them think. I work with them every day. I walk the streets with them. I visit the prisons. I do ministry in the prisons. I do ministry in the communities.

I try to minister to these people, but when I go to jail and I hear that some of these offenders are still running the streets from the prison, from the phone, through letters, telling their boys how to still do what they were doing before they came in and no change, my thing is this, use your time, use it wisely, rehabilitate yourself, come out to be a better citizen to help us better our communities, because that's what we're trying to do. Thank you.

MR. SHELTON: If I might -- I'm sorry. I

didn't want to interrupt. I feel like I've dominated the conversation. But if I might add that all we're doing is taking steps to bring crack cocaine sentencing ranges a step closer to being in compliance or in line with powder cocaine sentencing ranges. It's not giving anyone a pass or anyone a buy. They still get punished.

The issue is should they be punished more than if they were taking powder cocaine, the more expensive, the more luxurious drug? The sure answer that most Americans would say is absolutely not. In these cases, you still have the opportunity for judges to review these particular inmates to find out if, indeed, they should be able to take advantage of the reprieve they're giving, the 15 month or longer reprieve they'll be given and get it a little bit sooner than they would for crack cocaine.

But again, the crack cocaine sentencing guidelines are out of alignment with the powder cocaine sentencing guidelines. I'd like to again commend the Commission for their first decision that said that powder cocaine and crack cocaine were indistinguishable in many ways and the sentencing range should be much the same. You're making the right step in the right direction. The problems that are being raised at the

table are not problems of the issue of how long you're in prison, they're problems of how we deal with people who are reentering our society and our communities. That's why organizations like the NAACP is working on bills like the Second Chance Act because we know that we're not providing enough assistance to our local communities to provide what they need to help these people come back into society and not commit the same crimes that ended them in prison in the first place. We all agree.

We all know that the definition of insanity is when you do the same thing over and over again in the same way and expect a different result. We need a different result here, but we need it in a way that it is also under the grounds of fairness and justice for all Americans regardless of race, gender, ethnicity or other differences and this is the right move in the right direction.

CHAIR HINOJOSA: Mr. Canterbury, you wanted to say something? Well, I guess it would also be helpful, Mr. Canterbury, with regards to this example of -- I think it was Mr. Brown, is that right? What was his total sentence, originally?

MR. CANTERBURY: I don't think I have that information, but I can get it.

CHAIR HINOJOSA: Did you want to respond or make comments on --

MR. CANTERBURY: Yeah. You know, I agree with Mr. Shelton on the Second Chance Act. We know, from practitioner's sake, that when these people are released, the majority of them have nothing when they get home and the system, themselves, puts them back into the only lucrative market they've ever known in their life and we, as practitioners, would agree with that. The problem is, we're putting people back into the same scenario that are convicted criminals, people that did a criminal -- committed a criminal act and the difference between -- and we talked about this before.

The difference between crack and powder cocaine may chemically not be different, but I can tell you the results on the individuals are much different. The violence associated with crack cocaine is much higher than with powder cocaine and that's from a street practitioner. I don't care what the scientists say, I can tell you, dealing with somebody that snorted cocaine versus somebody that's been smoking rock, it's a lot different on the street, a lot different. And so, you know, we're not talking about people that are victims, we're talking about people that committed crimes, got caught, got prosecuted and if my figures

are right, in the federal sector, about 98 percent of them pled guilty and -- after a plea -- a one-chance plea agreement. So we're not talking about people that didn't know the consequences of their actions.

CHAIR HINOJOSA: Does anybody else have any questions? Commissioner Reilly.

COMMISSIONER REILLY: I'd kind of like -- excuse me -- like to go to Mr. Ikard and recognizing that you've been engaged in your human relations commission, Boys and Girls Club and all of those community activities, I suppose -- and I've been on the Commission off and on here for 10 or 12 years now, so I've heard the arguments. I've supported the fact that we do need to do something to remove the disparity, whether that was brining powder up to the same level, which I just was handed an article a moment ago that the state senate of Ohio has done.

It has raised cocaine powder level to the same as the crack, in other words, increasing the penalties by a minority of leadership in the Ohio senate. But my question to you, I guess, as someone very involved in the Boys and Girls Clubs and you obviously are quite street smart about things, is what is the message we do send to our young people and what is the message you would carry back if, indeed, we did

make it retroactive, to the young folks and how you would approach them and explain to them what we have done?

MR. IKARD: Well, as you say, serving on the boards that I do serve on and working with some of the children that I work with on a day-to-day basis and -- and it's just so that you asked me that, just a few days ago I had, I guess, a blood -- I guess I can say that, to visit my home, currently trying to get him into a program and I told him about some of the things that I was involved in, trying to do and they tell me I'm still swinging, I'm still doing the same thing. I know you got this going on and you got this and you got this program going on, but you'd rather still do this.

And then to take the message back to say well, one law has already passed and your homies (phonetic sp.), as you call them, are going to get out early now, possibly one, maybe 42, just give them the incentive to say well, I think I'll continue to do what I've been doing. It's not as bad anymore. They roll for the bling-bling, the $200 tennis shoes, the high lifestyle, the 22's on the escalades, these are what the kids see and how do they think they can achieve to get it? A lot of them, by selling drugs. By selling drugs. To whom? Their friends, their uncles, their

aunts, their cousins, anybody that will buy it. And to go back and have to tell these children, share with them this or whether it be aired or however they found out, you know, if -- which way it goes, I think it would be devastating to some of the efforts that we're trying to do in our community, very much so.

COMMISSIONER REILLY: Thank you.

CHAIR HINOJOSA: Thank you all very much.

MR. IKARD: My pleasure.

CHAIR HINOJOSA: We appreciate your time.

MR. CANTERBURY: Thank you.

CHAIR HINOJOSA: If the next panel would please step forward. Our next panel, already seated, consists of Mr. Marc Mauer, who has been the Executive Director of Sentencing Project since the year 2005, having joined that organization in 1987. Prior to working with the Sentencing Project, Mr. Mauer served as the National Justice Communications Coordinator for the American Friends Services Committee. And we also have Mr. Pat Nolan, who is the President of Justice Fellowship, the Criminal Justice Reform Division of the Prison Fellowship Ministries, and Mr. Nolan served for 15 years in the California State Assembly. Mr. Mauer, sir.

MR. MAUER: Well, thank you so much. I'm

delighted to be here and I appreciate all the hard work the Commission has done over the years, on this issue. We have previously submitted a letter to the Commission, on this issue, and I've submitted testimony today, too. It seems to me, given the discussion so far today and I've heard a good deal of it, it might make more sense for me to focus on some of the public safety concerns that have been covered here, and to try to lend some perspective on what we know about that from a sort of criminological perspective and how we can sort of put some of that into context.

And it seems to me, you know, if we look at the testimony this morning from the U.S. Attorney from the Western District of North Carolina, we have some real issues here. So we have potentially 536 offenders who might benefit from a retroactivity proposal and get out of prison, as she said, unexpectedly early. I don't think it'll be unexpected too many people. But first, you know, as you all have pointed out, this is over a period of 30 years that we're talking about.

So during the first year, we're looking at possibly a hundred people coming out who would not have gotten out that year. This drops off rapidly after that in that district, so we're looking at, at most, 30 or 40 people a year. In the tail-end years it declines

much more rapidly than that. Now, to put some perspective on that, you know, as we've discussed recidivism issues and the potential for some of the crack offenders to become involved in crime again, we don't want to lose sight of the fact that when we think about reentry, obviously the federal court system, the federal prison system, are a relative drop in the bucket of the criminal justice system.

As you well know, 90 percent of the people housed in prison are in state prisons around the country. In North Carolina, for example, there are 9,000 people who are released from state prison each year, roughly one-third of them, 3,000, released to the Western District of North Carolina. So we're looking at 3,000 people coming out of state prison and generally speaking, about 30 or 40 people getting out unexpectedly early on one of these crack retroactivity sentence reductions.

So we do want to monitor these 30 or 40 people who get out. We want to make sure that there's effective supervision of them. We want to do all the right things to prepare them for getting out. We are talking about a very small drop in the overall bucket. Now, we have serious issues of reentry in this country and this is being dealt with on Capitol Hill this week

and elsewhere. We want to address that. This is not -- you know, as much as we need to supervise these people appropriately, this is not going to affect the crime rate in Charlotte, or any place else in that district, to any significant degree. It doesn't mean we're happy if anyone recidivates, but this is not the crux of the problem.

The Department of Justice, in its testimony, was concerned. They look at a group of offenders, crack offenders, between 1993 and 1995 and they point out correctly that these -- this group of people has a higher rate of weapons involvement in their crime, a higher rate of obstruction of justice, and so they're concerned about the release of this group of people. At the very least, if these people get whatever retroactive benefit that might accrue to them, they will have served at least 13 to 15 years, in many cases, 20 years or more in federal prison before they're released.

Now whatever reentry services go on in federal prison, it would seem there is more than sufficient time to do whatever can be done to prepare this group of people for release. Another aspect of the issue that I think was not addressed very well is that, particular for the long-term offenders who the

Department is most concerned about, we're looking a group of people who in many cases will be well into their 40s and 50s, and criminological research over many years has demonstrated the best way to reduce crime is to wait until people reach middle age, and by the time people reach 40, 45 and 50, they're rates of re-involvement in crime drop dramatically.

This is true both for people who have never been in crime -- involved, and people who have been involved in crime. It doesn't mean it gets down to zero, it doesn't mean there's no concern, but it drops significantly. In the federal system we know, for example, recidivism rates for this age group are about one-third lower than they are for a group of offenders from their mid-20s to their mid-30s. So we have the aging process working in our favor, if you think of it that way. We also have -- this is true both in the federal system and in state prisons as well.

We're dealing with drug offenders and for a variety of reasons drug offenders typically have lower recidivism rates than people convicted of other offenses. In the federal system, drug offender recidivism rates are about 20 percent lower than those persons convicted of fraud or larceny; 38 percent lower than people convicted of a burglary offense. Again, I

don't say this to minimize the scope of the problem, or suggest that none of these people recidivate, or that there aren't supervision issues, only that the scale of the problem, as it's -- I hear it defined by the Department of Justice, I think is very much overblown in many ways.

On this issue, of course, too, as you -- many of you have pointed out today, of course, you know, any given individual has no absolute guarantee of getting out early or late or anything like that. And obviously this is up to a judge to decide. A somewhat related issue that has been raised in some of the testimony today and previously to you, has to do with some of the cost issues involved, to the federal courts and to the Federal Bureau of Prisons. And on the one hand I don't think we've seen very much in the way of hard figures here.

There's one figure. The Department of Justice estimates something like $9 million in additional District Court costs to process the cases that would come through. On the one hand, you know, it seems to me that the cost issue should be fairly irrelevant. You know, as you've suggested, we want to evaluate the issue on the merits and that's clearly the most important thing to do. But we're living in a real

world and the cost will enter into it to certain extent. $9 million is nothing to laugh at, but the Department makes absolutely no attempt to estimate what this would mean for the federal prison system. After all, we're talking about potentially releasing more than 19,000 people roughly two years sooner than they would otherwise. Well, just in very round terms and using conservative cost estimates for the cost of incarceration, two years early release is going to be a little more than $50,000 per person in the federal prison system. If we're looking at 19,500 people, if in fact all of them got out, we're literally looking at something in the range of $1 billion over the course of 30 years, in terms of reduced prison costs.

Now, I'm very well aware that when you calculate prison costs, you have fixed costs and marginal costs and it doesn't mean that you save this entire amount if you actually release people from prison, but there's no question that there'd be a very dramatic cost savings, either in being able to close some federal prisons, in fact, or at least not build new federal prisons, as a result of a policy like this. Now if this was a policy that was going to produce very bad results for crime, very bad results for deterrence or send a bad message to the public, it seems to me the

cost factor should not be a concern. The taxpayers should be willing to pay that cost and do the right thing. In this case, the right thing to do is to use the policy of retroactivity, and as bonus benefit there is also a substantial potential cost saving that the Federal Bureau of Prisons will achieve.

There may be some additional upfront costs at first, but the long-run savings would be very significant. Finally, let me just close by saying the issue of racial justice has come up repeatedly on this issue and this goes back 21 years as well as today. I would agree that, again, the issue should be addressed on the merits. The crack cocaine sentencing policy, giving people a mandatory five years in prison for five grams of crack, is not a very rationale policy and it doesn't matter if every offender is white, black or Latino. It doesn't serve the interests of crime control very well.

In addition, though, of course we've had these terrible racial disparities that have been sued. I think there's certainly an argument to be made that when Congress passed these laws initially in the 1980s, it was very difficult to separate out the racial imagery and racial -- racial ideas about crime from the policy itself. Whether this was intentional or

unconscious, we could debate it for quite some time. The point is I think there was no question that the image of a crack offender was a young black male in the minds of the cover of Newsweek Magazine, on the television news and things like that. So it's been very much a part of this issue ever since day one. It seems to me that we could do the right thing, in terms of criminal justice goals, by enacting retroactivity. And in addition, we would save money and we would take some small but significant steps towards reducing unwarranted racial disparities in the system. Thank you.

CHAIR HINOJOSA: Thank you, Mr. Mauer. Mr. Nolan.

MR. NOLAN: Mr. Chairman and members, my name is Pat Nolan and I'm a Vice President of Prison Fellowship and lead their criminal justice reform arm, Justice Fellowship. And I'm also a member of both the Prison Rape Elimination Commission and the Commission on Safety and Abuse in America's Prisons. I served 15 years as a member of the California State Assembly, four of those as the assembly Republican leader. I was a leader on crime issues, particularly on behalf of victims. I was one of the original sponsors of the Victims' Bill of Rights and received the Victims

Advocate Award from the parents of murdered children. I also authored several mandatory and minimum bills and voted for every one that came before me. I was then prosecuted for a campaign contribution that I accepted, which turned out to be part of an FBI sting. I pleaded guilt to one count of racketeering and served 29 months in federal custody.

I sit before you as a conservative Republican, a former legislature, and former prisoner who's convinced that this country needs a more rationale approach to apprehending, prosecuting and sentencing those who traffic in cocaine. Prison Fellowship applauds the Commission to move us closer to a more rationale policy, with the amendments that went into effect on November 1st. We respectfully now ask that you take the next important step, to apply those changes retroactively.

I know you've heard from legislatures, both in support and in opposition to retroactivity, but I'd particularly like to address the concerns of several Republican members of the House and Senate who argue against applying this retroactively. I have a very high regard for each of those members and worked very closely with them on criminal justice issues, and I probably would've signed a similar letter, if it had

come before me when I was in the legislature. However, as a result of my experiences in prison, and as a member of the two commissions studying violence in our prisons, I would not sign it now. I strongly disagree with the letter's predictions about the impact that retroactivity would have.

When I was a state legislature I thought that locking up people for long sentences made us safer, but I know differently now. Long sentences are not an end in themselves, but merely a means to make the public safer. In the case of crack cocaine sentences, Congress specifically sought to give prosecutors the tools they needed to get at the large traffickers. The theory was that huge sentences would encourage street dealers to rat on their suppliers, who would then rat on their providers, and so on up the chain until the kingpins were nailed. In practice, the opposite has occurred.

Instead of ratting up the chain, offenders rat down the chain. They're afraid of those above them in the flow of cocaine, but are glad to offer up small fish in return for a shorter sentence. In reality, those that have the smallest involvement in the movement of crack generally serve the longest terms because they have no one to rat out. While

incarcerating these small dealers may make prosecutors' win/lose percentages look good, it doesn't stop the flow of cocaine into our cities. The small dealers are easily replaced with other young people gullible enough to think that they can rich quick dealing in crack. The real life stories related by Mr. Ikard serve as reminders of the horrible toll that crack takes on our people in our communities daily.

We must have effective policies to stop the flood of that poison into our cities. But those same stories he told also demonstrate the utter failure of the current crack policies. Every one of those people he described became a crack addict while this absurd -- absurdly long sentences were in place. We had what we told would get rid of the crack problem, and yet those lives were still being destroyed.

If these policies had worked, we would see a reduction in crack traffic, but we don't and we owe it to our people to come up with more effective strategies for helping them stop the flow of this poison into our cities. I served time with plenty of crack dealers in prison for long sentences under the mandatory minimums. Typical of these was a small-time dealer. It was the kid in the bunk above me. Jody was a 19-year-old and doing a 10-year stretch for crack. We were at the

federal prison camp at Pleasanton, together. He was no Mr. Big. He could hardly organize a two-car funeral, let alone a massive crack conspiracy. Each prison cell costs about a hundred thousand dollars to build and each felon costs about $30,000 a year to house and care for. Add that to the cost of arresting and prosecuting Jody and it'll cost the taxpayers about $500,000 for this minor player in the crack trade.

Are we any safer spending half a million dollars to lock up Jody for 10 years? In my 29 months in custody I met plenty of small-time dealers, but I never met a kingpin. And the numbers confirm my observation. Only seven percent of federal crack cocaine cases are directed at the high-level crack dealers. Only seven percent. Instead, federal authorities squander huge amounts of resources on small cogs in the cocaine distribution network.

One-third of all federal cocaine cases involve an average of 52 grams, the weight of a candy bar. A third of the cases are for that tiny amount. This is a terrible misuse of the time and talent of federal law enforcement and prosecutors. Plus, it has filled our prisons to overflowing. Prisons are for people who we're afraid of, but we've filled them with people who we're just mad at. If we're to stop the

flow of cocaine into our cities, federal resources should be focused on the high-level traffickers. Making the amendment retroactive will help target our resources on those who are causing the greatest harm, freeing up the resources being spent on these low-hanging fruit. I'm not alone as a Republican who feels that crack cocaine sentences are horribly out of balance.

You heard earlier from Judge Reggie Walton; certainly not a soft-on-crime Republican. Former Congressman J.C. Watts recently joined me in an op-ed in the Washington Times. In that article, we wrote, "If we're to stop the flood of cocaine coming into the country, federal resources should be focused on the networks that bring in boatloads of cocaine, and on people who shoot and kill, the large and violent operators that the local and state authorities cannot effectively combat.

This would be good for the taxpayers and more effective in stopping the flow of cocaine. After almost 21 years, the 100 to 1 crack and powder cocaine sentencing disparity has resulted in federal resources being misdirected on small-time drug dealers and not stopping the flow of drugs into the country." The letters from the Republican legislatures warn that

retroactivity will significantly shorten the sentence or result in the release of, in their words, "major crack dealers with long criminal records, including firearms offenses." The letters go on to say, "Yet, these -- those convicted of simple possession will see little, if any, reduction." These claims are partially correct.

Yes, those convicted of simple possession will receive shorter reductions than offenders serving longer sentences, but that's merely a result of the function of the two-level limitation in the guidelines. And the letters are right that some people sentenced for simple possession will not see any reduction, but that's not the result of anything the Commission will do. That's the result of statutes passed by Congress and only Congress can change them, the mandatory minimums.

One assertion in the letters is flatly mistaken: major dealers will not be set free if you apply this retroactively. In fact, not a single offender will be set free automatically. Retroactivity will merely permit certain offenders, who have already served long sentences, to request a reduction in their sentence. The decision to grant a sentence reduction can only be made before -- by a judge, the sentencing

judge. If there's reason to believe that the offender remains a danger to the community, the government can present that evidence to the judge. In fact, the statute that allows you to do the amendment retroactively, directs the courts to take public safety into account.

Prison Fellowship believes that public safety is a top priority in our justice system, and making the Commission's policies retroactive would be consistent with protecting the public. In fact, I would assert that not making the policy retroactive will endanger the public. Let me explain why. Our prisons are bursting at the seams. Overcrowded prisons contribute to a toxic environment that results in horrible violence, endangering both correctional officers and inmates.

As I mentioned earlier, I serve on the Prison Rape Elimination Commission and the Commission on Safety and Abuse in America's Prisons. In dozens of hearings around the country, corrections officials testified to the Commissions that prison crowding makes it almost impossible to manage their institutions. Former California Corrections Secretary Rod Hickman managed a system that confines twice as many people as his facilities were designed to hold. He listed

overcrowding as the first among the significant factors contributing to prison violence. The report of the Commission on Safety and Abuse found that "the majority of prisons and many jails hold more people than they can deal with safely and effectively, creating a degree of disorder and tension almost certain to erupt into violence."

Reducing prison crowding was the Commission's number one recommendation on how to do deal with prison violence. Retroactivity would help address that goal. By applying your policy retroactively, the Commission will help reduce prison crowding and violence in a very intelligent way, by allowing offenders, who have already served long sentences, to be released unless the judge finds they pose a risk to security. With an average sentenced served of over 21 -- 27 months, no one's getting off easy.

By lessening prison crowding, retroactivity will also increase safety in our communities, by creating a better environment in which inmates can prepare to healthy, contributing lives after they're released. As the Commission stated, "What happens in prison doesn't stay in prison." The skills inmates develop to survive inside violent prisons make them antisocial when they come home. Lessening the crowded,

violent environment in prisons will allow the institutions to prepare inmates to be better neighbors when they're released. The shear number of inmates has forced corrections officials to turn every available areas of prisons into housing for inmates, thereby squeezing out space for programs that prepare inmates for release.

I serve on Governor Schwarzenegger's Rehabilitation Strike Team. One of the largest hurdles we have is that every classroom, chapel, hallway and closet has been converted into bed space. This means that there's nowhere to hold GED courses, drug treatment classes, life skills training, Bible studies or other programs. Sending inmates home without preparation only increases the risk for all of us. Now let me turn to the fairness of your policies.

The Commission has concluded that the sentences for crack offenders are so harsh, that they will no longer be imposed on people who commit that offense in the future. The Commission's policies are correct and they are just as correct for those sentenced before November 1st, as they are for those after. I thank you so much for this opportunity to address you and express our concerns. Our ministry is devoted to helping prisoners and their families

successfully return from time in prison, with a changed heart and changed habits. The crack disparity has been so destructive of the order and discipline in prisons, and it's caused such disrespect for the law, it makes our ministry significantly more difficult. And I commend you for changing the policy looking forward, and urge you to make it retroactive. Thank you.

CHAIR HINOJOSA: Thank you, Mr. Nolan. Does anybody have any questions? Yes, Judge Sessions.

JUDGE SESSIONS: Could I just follow up on that last thing that you said? What do you mean the disrespect for the community or the impact --

MR. NOLAN: Disrespect for the law.

JUDGE SESSIONS: -- on discipline within -- within the prisons?

MR. NOLAN: First overcrowding and secondly, the inherent unfairness of it. You know, here I'm a fat old white guy coming to the prison and you can't but notice the racial disparity. It's overwhelming. I don't know anybody that did time in the federal prison that isn't smacked in the face by that reality. And the you talk to them about their situations. And again, I didn't see any kingpins. They were all small fries and yet doing long stretches. Jody would lay in his bunk every day, staring at the ceiling. Nineteen

years old. He wasn't getting out until he was 29. He's not going to have dated anybody. He's not going to have a college education. He's not going to work for anything in his life. And he'd lay there staring at the ceiling, feeling betrayed. Sure he did a stupid thing. But you know, one of the things is they predicted -- Chuck Cole (phonetic sp.) and I talked about this.

Conservatives say that, well, if we ratchet up sentences, prisoners -- offenders will take that into account and not commit the crime. That presumes that offenders are rational calculators, that they say, well, I would do this but gee, the sentence is higher and all of that. The fact of that matter is most inmates never think they'll get caught. They think they're smarter than the system. It doesn't occur to them in what they do, what the sentence will be.

And then they're shocked to find out they've got 10 years out of their lives as young people. So it creates a disrespect for the law. They see people in for violent crimes getting out sooner than they do. Across the street from the first prison I was in was a lady who had taken phone messages for her boyfriend drug dealer. He of course dropped the dime on her. He got a short sentence; she got a five-year sentence.

She was in prison talking to her mother on the phone when her mom began to scream. Her mother -- someone had broken into their home and her mother was being raped. She got the attention of a correction officer, who called the local police, who went out and rescued her mom.

This man was arrested, tried and convicted for rape and walked free, while the young lady, who had had a boyfriend that was a drug dealer, remained in prison because of the crack sentences. That shows the absurdity. A rapist does less time than this girlfriend of a small-time drug dealer. That's absurd. And situations like that breed a disrespect for the law. You see it from the folks inside. They see the system, they feel the system is rigged against them, that it makes it no sense, and they have no hope, because nothing's done inside.

Less than 20 percent of the inmates receive any drug treatment while they're in prison. Joe Califano, Former Secretary of Health, Education and Welfare under President Johnson, said, to lock up an addict for a period of years and do nothing about the underlying addiction and then release them is a fraud on the public. It is. You know, does just warehousing somebody help deal with their addictions? Does it make

them a better person? Does it prepare them to be a good citizen when they get out? I don't care if it's 27 months or 43 months. If nothing's been done to change them while they're in, they're not going to be a good neighbor.

JUDGE CASTILLO: Mr. Nolan, I agree with many of your statements about our flawed drug policy, in particular not focusing in on drug kingpins. In the 13 1/2 years of being a federal judge, after prosecuting drug cases, I've yet to see the appropriate defendants with the control over large amounts of drugs or control over large amounts of assets, and from what you're telling me, you didn't see them in the federal prisons, either.

MR. NOLAN: Um-hum.

JUDGE CASTILLO: What I fail to see is exactly how do you see the retroactivity decision that we're about to make, linking up with sort of waking up the Department of Justice in focusing on the right drug defendants?

MR. NOLAN: Um-hum.

JUDGE CASTILLO: How does that play together?

MR. NOLAN: I'm not sure that will. I think Congress has to.

JUDGE CASTILLO: Um-hum.

MR. NOLAN: I've had to think about what the proper role of the federal government is in the drug trade, and the reason you don't see many kingpins is there aren't crack kingpins, there are only cocaine kingpins.

JUDGE CASTILLO: Um-hum.

MR. NOLAN: Crack is an inherently unstable drug, so it's sold close to where it's cooked and it's the powdered cocaine that flows across borders, and across state lines, that's the real problem. That's what the federal government needs to be concentrating on. But the guy cooking a small amount of crack, he can't carry it very far, it's so unstable. It's a danger to him and everybody else. So it's really a local boutique drug.

JUDGE CASTILLO: Um-hum.

MR. NOLAN: And so we need to shift federal policy. I don't think retroactivity will necessarily do that, but it will -- for those prosecutors, and there are some who only look at notches on their belt and running up the score, it'll take away some of the incentive for those low fish. I think the biggest benefit will be the impact on prisons, lessening the crowing, freeing up space so that -- and federal prisons are horribly overcrowded and very little is

done. One of the previous witnesses said, well, these guys are going to be released with no preparation. Preparation doesn't start years before you get out. My preparation for release started about three months before I was released and it was a very one-sided process. It didn't involve my family. It didn't -- you know, it was going through the motions. We're trying to change that, and the BOP is trying to change that. To their credit, they really are. But the fact of the matter is these people haven't been prepared and keeping them another 24 or 46 months probably wouldn't anyway, unless we change those policies.

JUDGE CASTILLO: Thank you.

CHAIR HINOJOSA: Does anybody else have any questions? Well, thank you all very much. The next panel. We're ready for our last panel. We've got Ocie L. Acoff, who is a minister and currently serves in Selma, Alabama, as the Director of the Varner Education and Training Facility, which is an educational and training center for troubled youths. Prior that, he served as a probation -- juvenile probation officer for more than 20 years. Ms. De-Ann Coffman is a member of Families Against Mandatory Minimums. At the age of 21 years, Ms. Coffman was convicted of distribution of crack

cocaine in '91. She sentenced to life plus five years for her role in the offense. That sentence was later reduced to 85 years and in 2001 she was released from prison, after her sentence was commuted by President Clinton. And we have Ms. Julie Stewart, who is the President of Families Against Mandatory Minimums, which she founded in 1991. And prior to that, Ms. Stewart worked at the Cato Institute for three years as the Director for Public Affairs. Mr. Acoff.

MR. ACOFF: First of all, I'd like to say good afternoon to the Commission and to the Chairman. My name is Ocie Acoff. I'm from Selma, Alabama, born and raised there, educated there. I currently serve as the Executive Director of the Varner Education and Training Facility. I also served on boards and worked in affiliation with Habitat for Humanity, the National Kidney Foundation, ICARE (phonetic sp.), and also served on the YMCA.

I come before you all today to share with you all some experiences that we have encountered in Selma, Alabama. Most people know Selma, about the civil rights, the march from Selma to Montgomery. As a matter of fact, I was one of the ones that participated on that Sunday. I marched all the way from Selma to

Montgomery, the original march, and understand the plight of people that have felt discriminated against and so forth. But I come today to publicly thank the fellow agencies that worked together to shut down the 1400 block of St. Phillip in Selma, Alabama, which held the citizens there in hostage for years. The local law enforcement officers were not able to go in on account of the situation.

The drug dealers openly conducted business. They did not care and had no regard for law, no respect for the people of that community. Elderly people were unable to even enjoy the civil liberties of sitting on their porch to fellowship with one another. Children were not able to play in that community, in the streets. I had an elderly citizen, who had served in World War II, share with me that he had to sleep on the floor at night, for fear of stray bullets coming through his house.

I know of a man, who was elderly, whose son beat him to death because of the fact that he would not give him his Social Security check anymore, that he can go out and purchase crack. I come before you today to just share with you those things. I want you to know that crack has created so many problems in Selma, especially in that community, that I don't know if we

ever will recover. It seems like crack, it's like a fungus, like a wildfire. It destroys everything in its path. It is something like -- in that community. You don't hear laughter, you don't hear the joy. Now even after those agencies came in and shut those individuals down, their work was still following them by way of the addicts who had gone in now, burglarizing homes and going in to strip the wire out of houses, the copper and so forth.

They are even bold enough to go into your yard and put a chain behind your car and pull it out and take it to a recycling company and just destroy your car. Our law enforcement situation in Selma is at an all-time low, I would say. I talked with our district attorney about two weeks ago and shared with him some of the concerns about some of the property owners, of how their property is being vandalized and burglarized, and he sympathized with me.

He said, well, you got to realize that Selma only has 32 police officers now. And I said what? And so to release people back into the community -- and I'm not trying to infringe upon anybody's civil liberties, but I hear argument about someone wants their loved ones to come home, and I want to share with you about a young man that's in the facility of which I am the

Director. He's about 14 years of age. He has two sisters. His mother is avid crack addict. She's deserted him. She prostitutes in the streets. And this young man is bitter. Her daughters, who happen to be a member of the church of which I pastor, they have the father there to embrace them and they have a chance, but the young man is bitter. He's bitter with society, he's bitter with himself, and he's waiting for his mother to come home from being addicted to drugs. I have a young nephew. Well, he's not young anymore. He's started on crack when he was 15 years of age. He's 37 now and he still acts like he's 15 years old. He's been in and out of prison for the past 22 years. Well, the last 20 years.

I have an occasion when he got of prison and he wasn't out six hours before he was back in jail. Yes, they say there's a difference in the sentences for crack, in comparison to cocaine, but I think crack has a more severe effect on our community and our citizens than cocaine does. And I'm not saying to lessen the penalty for selling cocaine, but I'm just talking about what the devastation of crack has done to the black communities, since we want to talk about race. It has taken, I would say, the essence of life out of our communities. The communities are not the same. It's

just like it's been ravaged by a wildfire, just tear up the community. You go through there now, it's -- the neighborhoods are not the same. You don't have laughter. You don't have people playing, the kids, like were growing up in my days. All of that's gone because of the fear of drug pushers that's placed on the citizens there, of Selma, Alabama.

I would ask that you would do what you're doing. I feel that -- I have confidence that you all are going to do the right thing, but I just want you to take into consideration those people that are not here to speak for themselves, those individuals that you probably do not have contact with. As the reverend from North Carolina shared with you, those things -- those things are happening and we talked about blacks doing it to blacks.

So it's not a point, if we were talking about putting a color on this, I think we just need to deal with the drug issue at large, regardless of what type of it is. I just found out the other day that they have a new drug out and it's going to be cheaper than crack. It's killing young people in Texas right now. It's going to have a mix of heroin in it. So what's that going to do when it's the streets? What's it going to do for us? We need to address that. Thank

you.

CHAIR HINOJOSA: Thank you, Mr. Acoff. Ms. Coffman. Or did you want to go first, Ms. Stewart?

MS. STEWART: We'll leave the best until last. Although I was told that we are the best panel and that's we're last. I may have been placated. Good afternoon, Commissioners, and thank you for your attention this late in the day. And thank you for allowing me to testify today on behalf of FAMM's 13,000 members, many of whom have loved ones serving crack cocaine sentences and who are passionate about this issue, as I know you know, because you've received something like 30,000 letters from a lot of them.

So I'm sure you're aware that we have a very interested constituency. First, I just do want to add my voice to those that have come before me, to thank you for sending the guideline forward on May 1st, to make the crack cocaine guideline change, reduced by two levels. I have participated in and observed the efforts of this Commission, or the Sentencing Commission, not you, Commissioners, and in Congress for 15 years, around crack cocaine, and until now, nothing has been done successfully. So I applaud you for accomplishing that feat. It's not small feat. Last spring each of you, when you voted on the guideline

amendment, you each voted, saying sort of at the same time, that it was a modest step forward. And I remember that each of you pretty much repeated the same word and it struck me as, yes, it is a modest step forward, perhaps, but it's still a very critical one and as I just said, the first one that's actually done anything, and it's really broken the legislative logjam around crack cocaine sentencing bills.

And we can attest to that by seeing at the Senate, there are now three crack cocaine bills. In the House there's one and perhaps another one the way. So your step really did make a big difference. Now you have the opportunity to turn that modest step into a really significant one. There is, as you heard earlier today, no legitimate argument against making the crack cocaine amendment retroactive. In fact, there's a moral imperative to do so.

And as a former chief judge for one of the U.S. Courts of Appeals told me, what's right is right. And I don't doubt that each of you share that sentiment. If a sentence is sufficient to serve the purposes of punishment for defendants in the future, it's sufficient for those who were sentenced under unjust rules in the past. And clearly, I think it's been well expressed here, justice should not turn on

the date that an individual was sentenced. I know that of greater concern to you is how to apply the guideline retroactively, the mechanics of the process, and that's what this morning's panels, I think, were able to hopefully answer some of those questions and give you some guidance. I know that it can be done because I was here in 1993 and 1995 with Mr. Steer, when crack -- when LSD and marijuana guidelines were made retroactive.

So it's certainly been possible and Steve Sady did a good job of explaining that to you. The commissioners, then, who made those decisions were also under pressure not to appear soft on crime, but they made the tough but fair decision to remedy the injustice and I think that -- I hope that this Commission will do the same. And whether or not race should be a determining factor in the decision to make this retroactive, I do think that making this guideline retroactive does help underscore that at least justice can be colorblind.

It is not the only reason that this should be done, however. The Commission has determined that nearly 20,000 prisoners would potentially be affected by retroactivity. I think that often those numbers have been abused and I believe some of the questioning

earlier today was getting at the point that 20,000 prisoners are not going to be released on the streets tomorrow, if you make this retroactive. That number is over quite a period of time, as I understand, and that all of those people are going to be released at some point. They just might have the possibility of having their sentences come down a couple of year, a year or something.

But also, when we use a figure like 20,000 or 19,500, I think it's easy to forget that each of them is a human being and that, for their own complicated economic and social and personal and psychological reasons, they broke a law and as a result they ended up in prison. It's easy to paint them as the -- some members of the House and Senate Judiciary Committee members have, as major crack dealers with long criminal records.

I think that when you hear from De-Ann Coffman in a moment, you'll see that that's in fact not always true. What members of Congress ignore is that even if the Commission makes these crack guidelines retroactive, the eligible prisoners will still serve a very long time in prison. The people deserve to be punished for breaking the law, but their punishment needs to not be excessive or gratuitous.

And because sentences have become so inflated in the past two decades, a 10-year sentence for a nonviolent offender no longer sounds harsh, but 10 years is an extraordinarily long period of time. It's a long time to be away from society. It's 10 years of missed Thanksgiving dinners with your family. It's 10 years of missed birthday celebrations, the prisoner's and his family; missed marriages and child births and even funerals.

My dad died while my brother was in prison and it was -- it was devastating for Jeff, because it's time that cannot be recaptured, those last days with dad. There are certainly people in this room today who know all too well what I'm talking about. Some of them have traveled from a great distance to be here today. One person flew up from Florida this morning to be at this hearing today and is returning later on this evening; to be here at this moment because her child is serving a crack cocaine sentence.

We have people from Kansas, Georgia, Texas, southern Virginia, here as well. And they're here because they are really desperate to find any hope for their loved ones. They want to understand how this decision is going to be made and this -- today's input is part of what will help you make your decision. And

I think they also want to see the seven people who will make that decision that will impact their loved ones. Unlike members of Congress, where there's 535 faces to look at and it's confusing, this is pretty straightforward. There are seven of you who will make the decision.

I don't want to take a lot of time, but I would ask -- like to ask that everyone who has come today, who has a loved one in prison, would stand up just so that you can see their faces, please. Thank you. And many of them are holding photographs of the loved one that they have in prison. Thank you very much. I'll close simply by saying that, as you well know, the power is in your hands to positively affect not only the lives of nearly 20,000 individuals in prison, but thousands of lives more, the mothers, the fathers, the daughters, the sons, who wait for them to return home. I know you will consider this enormous responsibility and this opportunity, with care and deliberation, and I think you for that.

CHAIR HINOJOSA: Thank you, Ms. Stewart. Ms. Coffman.

MS. COFFMAN: I am De-Ann Coffman and I want to thank you for giving me the opportunity to speak to you today. When I was 21 years old, I was sentenced to

life and five years in federal prison for my role in my boyfriend's drug operation. After numerous appeals and many years in prison, my sentence was lowered to 85 years. Well, that still sounds like a very long time. I saw it as I had a release date. Were it not for President Clinton's commutation of my sentence, I would not have left prison until I was 95, if I were to live that long in there.

I was freed in January of 2001, after serving nearly 10 years in federal prison. To be clear, the crack cocaine amendment would not have helped me. I am really here to speak for the many women serving sentences for crack cocaine that I know from my time in prison. I will try to tell you what I think they would say if they were given the opportunity to be here as I have today. If they were here, I believe they would tell you how much it means to them that you've lowered these crack cocaine sentences.

The Commission has provided important leadership to challenge this terrible sentencing law and take a meaningful step towards reform. I ask you, for the sake of the women I served with, to now take the next step. The Sentencing Commission has been in the forefront of exposing the severity of crack cocaine penalties. You have explained how crack sentences do

not fit the crime, how they condemn low-level participants such as street dealers, girlfriends and couriers to kingpin-sized sentences, and how they result in racial disparity. People serving sentences for crack cocaine are immensely heartened by your efforts. You have helped others raise their voices against this injustice.

You have given judges and lawyers, and advocates like FAMM, the information they need to fight to change these laws. You know all of this already. What I think you don't know is how it feels like to serve a sentence that the Commission and all these others know is unjust and say is unjust and yet are unable to correct. I woke up every day for five years with my first thought being I may never leave here. It is profoundly frustrating.

By any assessment, my sentence was too long and yet no one in the criminal justice system could do anything to shorten it. People convicted of crack cocaine offenses serve years longer in prison than they would serve if they were sentenced to powdered cocaine. They keep hearing how wrong it is and can't understand if so many people, even the Sentencing Commission, feel this way, why nothing changes. So the years stretch one. It is intolerable and times unbearable. As

someone who has spent time in prison, I can testify that every day and every month is hard. It puts a strain on the person in prison. It puts a strain on the people outside of prison, waiting for a loved one to come home. To those who are not in prison, reducing a sentence by 10, 15, 20 or 25 months may not seem worth the trouble of extra court proceedings or paperwork.

But to someone in prison, it means making it home before you get that phone call that one of your parents is dead, that one of your children has resorted to the streets because their mother and father are both in prison for what seems like a lifetime. Every day counts. Every second counts. Once lost, neither that time nor those people can ever be replaced. So you can imagine, while you're taking this first step that correct that injustice, it means so much to me and women I have left behind. I feel their pain each and every day.

Today, you are considering whether to permit people serving guideline sentences for crack cocaine, the opportunity to apply for a sentence reduction. To declare the guideline amendment retroactive would be an act of justice. I was the beneficiary of an act of justice. When President Clinton commuted my sentence,

I was literally handed my life back. Certainly being released from prison was enormous, but the clemency meant something else as well. That day, I was important. That day, I counted. That day, I was no longer just a number. I cannot begin to tell you what that means. It meant that someone who had the power to correct an unjust sentence cared enough to do so for me. I had almost given up believing that such a thing could happen. You have that same power. You have the power to correct unjust sentences in thousands and thousands of cases.

If you exercise it, you are telling nearly 19,500 people, not only that their sentences are indefensibly long, but that you will not tolerate this injustice. By doing so, you are telling these prisoners that what happens to them matters to you, that they matter to you. And in the process, you may even help restore some of the lost faith in the criminal justice system and mankind. I speak for every women I served with. May you hear my voice thousands of times today, in my effort to convince you of your power to do justice in these cases. I thank you for letting me speak in front of you today.

CHAIR HINOJOSA: Thank you, Ms. Coffman. Does anybody have a question? Commissioner Horowitz,

did you have a question?

MS. STEWART: We persuaded you.

JUDGE SESSIONS: I have a question for Ms. Stewart. I shouldn't let her off entirely. Thank you all for your testimony. Very moving. Ms. Stewart, your organization is, I think, in an almost unique position to be helpful with respect to one of the concerns that has been raised about making this amendment retroactive, and that is that, although we estimate some 19,500 offenders might be eligible for release if the amendment is made retroactive, many more may apply, hoping that lightening will strike and that they will get lucky.

And that creates a potentially significant additional burden on the courts and the Justice Department, and everyone, to ferret through those, what would be unmeritorious applications. And while we can't say exactly what the parameters of the eligible would be, because, as you've heard, there's some legal uncertainty, we do know that some are not going to be eligible and they are the ones that are stuck with the mandatory minimums that your organization focuses on, in addition to the sentencing guidelines issues. So it seems to me that what your organization is in the position to do is to communicate to families, and to

inmates themselves, that it's not going to be in the best interest of this process if the Commission makes it retroactive for this amendment, and it's not going to be in the best interest of keeping that process in the future, and I think that the ability of the Commission to make amendments retroactive is something that was a very good part of the Sentencing Reform Act, that regardless of how this issue comes out, ought to be -- ought to be maintained and I don't want Congress to take it away. So I just hope that your organization will, if the Commission does make this decision the way you want it to, will do everything that you can to help to communicate the acceptable parameters of the eligible.

MS. STEWART: Yes, we definitely will. We already have a one-pager, which is maybe two pages, but of all the, you know, sort of questions and answers that prisoners and their families have about the guideline going forward, as well as retroactive -- retroactively. So no, absolutely. When the marijuana guideline was made retroactive, it only applied to growers or people that had plants. It did not apply to people had pounds of marijuana already processed. That was a good example of saying to those people, I'm sorry, it doesn't help you. But we are always wanting

to be helpful. I've already had conversations with the Bureau of Prisons about how we can help them to even diffuse current tensions, because people think that, after today, the guideline will be retroactive. There's a lot of rumor out there, of course, and so we are trying to help people understand that, you know, maybe in January the decision will be made. It's not going to happen right away. So it's -- we're very willing and wanting to be of help.

CHAIR HINOJOSA: Does anybody else have any? Well, we thank you all very, very much. We appreciate it. And I want to say, on behalf of the Commission, today has been very helpful. We have heard, as we have said this morning, from over 30,000 individuals, in writing. We have heard from 19 individuals today, in person, with different perspectives.

And I will say, at the end of the day, that I judged things in the last several months, based on the Anacrecina Baker (phonetic sp.) standard, who is my two-and-a-half-year-old godchild who, when recently I told her she needed to share something with her younger sister, she turned to me and she said, you be quiet. And I have to say that every single one of you didn't deserve a you be quiet, because all of the individuals today, with different perspectives, were very helpful

to what we needed to do and none of you needed to be quiet. And at the same time, I have to say that when we make decisions -- and crack is a hard decision, but I have to say that every single decision that a judge makes with regards to sentencing, and every single decision that the Commission makes with regards to sentencing, is a difficult one.

We didn't hear much about criminal history today, but that's also a difficult decision. They're all difficult. But hearing from individuals is important and it's also important -- we also have to keep in mind, from those we don't hear, that this affects the entire public and each one of the defendants, whether we ever hear from a defendant or not, as well as from the general public. And so we make those decisions under the law and we certainly take into consideration everything that we hear.

And we realize many of you have come from far and many of you have brought different perspectives and they all will be taken into account. And so on behalf of the Commission, I thank all of you. I also thank the Georgetown University Law Center for letting us use their facilities, as well as Larry Center, who has been with us today, who is the head of the Continuing Legal Education Department here at Georgetown University,

with regards to his help. And certainly to the staff of the Commission, every single one of them. Judy Shoner (phonetic sp.), our Staff Director, and every member of the Commission staff who has worked on this, has worked on this tirelessly, and we certainly appreciate the help that they gave us in setting this hearing up, as well as all the help we get from them on every issue before the Commission. And at this point, I also would like to give the opportunity to any other commissioner who would like to say something before we close here today.

JUDGE CASTILLO: I just wanted to thank you, on behalf of my fellow commissioners, for holding this hearing. In particular, I thank the family members for coming. And even though they didn't all get to testify, we certainly will take this matter seriously.

JUDGE SESSIONS: And I want to say I appreciate your courage.

COMMISSIONER HOROWITZ: And just to the people who watched in the audience, who didn't get a chance to testify, I think all of us up here certainly appreciate your listening to us and communicating your views through various speakers today. So we certainly appreciate your coming and speaking to us through your representatives and directly through your written

submissions.

CHAIR HINOJOSA: Well, thank you all very much, and this hearing is adjourned.

(Whereupon, at 4:30 p.m., the foregoing public hearing was adjourned.)

CERTIFICATE

This is to certify that the attached proceeding before

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON RETROACTIVITY

PLACE: Washington, D.C.

DATE: November 13, 2007

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

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SEAN WILLIAMS, Court Reporter

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DAVID MARTINI, Transcriber