

djj

DJJ

UNITED STATES SENTENCING COMMISSION

Washington, D.C.

PUBLIC HEARING ON
PROPOSED GUIDELINE
AMENDMENTS

Tuesday, March 18, 1997

9:33 a.m.

Judicial Conference Center
Thurgood Marshall Building
One Columbus Circle

MILLER REPORTING CO., INC.
507 C STREET, N.E.
WASHINGTON, D.C. 20002
(202) 546-6666

djj

BEFORE:

MICHAEL S. GELACAK, Vice Chairman

MICHAEL GOLDSMITH, Vice Chairman

WAYNE A. BUDD

DEANELL R. TACHA

MICHAEL J. GAINES

MARY FRANCES HARKENRIDER

JOHN H. KRAMER, Staff Director

djj

I N D E X

<u>ITEM</u>	<u>PAGE</u>
<u>Opening Remarks, Vice Chairman Gelacak</u>	<u>3</u>
<u>Thomas W. Hillier, II, Federal Public Defender, Western District of Washington</u>	<u>4</u>
<u>Kyle W. O'Dowd, General Counsel, Families Against Mandatory Minimums</u>	<u>28</u>
<u>Julie Stewart, President, Families Against Mandatory Minimums</u>	<u>36</u>
<u>Frederick H. Cohn, Sentencing Guidelines Committee, New York Council of Defense Lawyers</u>	<u>51</u>
<u>Steven Shaw, Federal Paralegal Services</u>	<u>66</u>

djj

P R O C E E D I N G S

VICE CHAIRMAN GELACAK: Good morning, ladies and gentlemen. Welcome to the U.S. Sentencing Commission's annual hearing with regard to the amendment process. I want to let you know that the reason that I am here is because the chairman, Judge Conaboy, is engaged in some protracted litigation in Scranton. He is involved in an environmental case that has been going on for a long, long time and promises to go on for, I guess, some considerable time longer. He will be here possibly sometime before we finish this hearing this morning, but if he's not, I want you to realize why he's unable to be here.

We have speakers on the agenda, and if there are others at the conclusion of the hearing who would like to offer some comments, we will be happy to hear from you then. For those of you who are on the agenda, we have your submitted testimony as part of the record, and we would be happy to hear from you in addition thereto or however you would like to proceed.

Mr. Hillier, the Federal Public Defender from the

djj

Western District of Washington is the first on the agenda. I have mentioned it to him that since I know he's Irish, if he would like a dispensation and would like to be moved to later in the program--[Laughter.]

VICE CHAIRMAN GELACAK: --I could fully understand, but he assures me that he is ready to go, so, Mr. Hillier, thank you for being here.

MR. HILLIER: Thank you for having me. I did behave last night, I am here to say.

[Laughter.]

MR. HILLIER: Despite the religious holy day that we were celebrating.

Thank you very much for this opportunity to talk on behalf of the Federal defenders. As you know, Commissioner Gelacak, we have submitted a full package of conversation related to the various amendments that are out there, and given the time issues and the breadth of the amendments that are out there, I am going to focus on just a couple of matters, but I am happy to answer any questions that you might have on the whole universe of the proposals

djj

that are out there and, more specifically, as I am talking on the ones that I am going to talk about, pepper me with whatever questions you might have. I would probably do better that way than trying to say what I am saying in a prepared way.

At the beginning, I want to acknowledge the assistance, in fact, the work of Tom Hutchison and Carmen Hernandez and Frances Pratt and Paula Bitterman, who actually did the real effort in terms of our written proposals with a little bit of help from Claude and myself. And but for that group, we probably wouldn't be nearly as organized as we are.

To begin with, I want to talk about proposal number nine, the acquitted conduct proposal. About a year ago, this was a real hot item, and it would seem to be something that was going to happen, and it was going to happen because it made some sense to discount the notion that somebody gets punished after they have been acquitted of a crime. And since then, there seems to have been a shift in the momentum. I am not entirely certain why, other

djj

than I have read the letter submitted by Senators Hatch and Abraham and the inertia that goes along with that and, of course, the Watts decision.

But it seems to me that as a matter of policy, the Commission shouldn't give up on this topic, but you should still speak to it. And in that regard, I think that the proposal 1B that's on the table currently is a good idea. What 1B says is that you don't count acquitted conduct under relevant conduct calculations, but the court--there is a comment to it that says a court can consider acquitted conduct in terms of a possible upward departure.

What that does, in reality, is it mirrors practice as we know it today. Judges do consider acquitted conduct in making a sentencing decision from time to time, and they do so for good reason. But what they don't do, and what they shouldn't do, is count that conduct in a sort of mechanical way that you would do under the relevant conduct guidelines. In other words, relevant conduct would say for this count that you have been acquitted of, you get 6 months in jail or 12 months in jail or 18 months in jail, and it is

djj

that notion that really caused the public outcry in the first instance.

So, what 1B1 does is it mirrors what's happening currently, and what it also does is it speaks to the whole notion of what the guidelines are all about, that is, in extraordinary situations, the court can use its departure authority to make an adjustment to an otherwise applicable sentence, and certainly, acquitted conduct, I'm sure the Government would agree, is an extraordinary circumstance. But there are, obviously, times when the court is going to want to take that into account in making a decision.

And significantly, I think, and I have read the letter from Senators Hatch and Abraham, they really don't offer any significant objection to the proposal 1B. The only time that they mention it is to say that this might create more disparity under the Sentencing Guidelines, and I think that statement overstates the possibilities. It doesn't occur very often that there are acquittals that are then used to calculate an ultimate sentence, so the notion is that disparity is an overplayed one, and obviously, just

djj

exercising departure authority, as judges do on a routine basis throughout the country, necessarily takes into account factors that aren't on the table in the usual case, so it's not really a question of disparity; what the court is doing is balancing this particular case under these particular circumstances.

In addition, I think taking this approach would not require the court in any meaningful way to take acquitted conduct into account, and that is appropriate also. And just the other day in Seattle, we had a case where there were multiple verdicts and competing verdicts, and the judge specifically said I've read Watts. I understand Watts; I understand my authority under the Guidelines and my traditional authority in addition, and I am not going to consider that conduct in making my sentencing decision, because in my view, the jury did it correctly in acquitting.

So, 1B, really, what it does is it continues the system the way it currently is, but it does talk about acquitted conduct in a way which is positive and sort of

djj

simplifies the court's consideration of the Watts decision.

I would like to move to Amendment Number 11, which I characterize as the Blake fix. What it really is talking to is when an individual, after a guideline has been adjusted, and it is made retroactive, and the court entertains a motion to reduce a sentence of imprisonment, can the court then take into account the fact that a person has spent too much time in prison in reducing the term of supervised release.

This amendment would say no, and I would ask the Commission not to pass this amendment; not to put a restriction on the court in that regard. The court is in the best position at that point in time to make whatever adjustments are necessary to the individual who is being impacted by the Sentencing Guideline change and decide whether or not supervised release should remain the same or not. And the court, in making that decision, is going to look to what the underlying offense was. The Blake decision spun out of a marijuana case, and obviously, in that kind of a case, the court can rationally consider the fact that this

djj

person is probably not a supervision risk, and this person has spent time in prison that would have been spent in freedom under supervision; I am going to give him credit for that and make that decision.

Similarly, if it was a serious or violent crime that was amended, and the court had a concern about keeping the supervised release term intact, the court could make that decision. The court does not have to reduce the term of supervised release currently. What this amendment would do, it would deprive the court of the opportunity to reduce the term of supervised release if the court felt that was appropriate, and this seems to be an unwise restriction on the court's authority in that regard. It is right for the court to make that call; I think it is wrong for the Commission to try to prevent it from doing so if sentencing purposes are furthered by making that decision.

Amendment Number 14 changes the language concerning the amount or how you count threatening behavior in the context of robberies and extortions. I think this proposed amendment is confusing and subjective, and it is

djj

going to create a lot of litigation, and the Federal Defenders would ask that you not pass that amendment, because it simply does not advance the goal of simplifying the guidelines and lessening the litigation that we have currently.

Number 18 is a large proposal that relates--

MR. GOLDSMITH: Excuse me; how is that confusing? How is the language of that proposed amendment confusing?

MR. HILLIER: Well, you are talking--right now, the language is if there is an actual threat, a death threat, then that can be taken into account and properly so by the court in raising the guidelines. You are turning it into the perception of the receiver, you know, whether or not that person felt threatened. Well, they're obviously always going to feel threatened, but the communication that occurred might not have been intended to provoke the concern that the receiver had, and we're going to talk about that at the sentencing hearing, and the courts are going to, of necessity, have to litigate whether or not factually, the threat here was significant enough to require more

djj

imprisonment.

MR. GOLDSMITH: I'm not sure that the language focuses so much on the listener's state of mind but on the intent of the defendant, whether the defendant intended to convey the notion of an implied threat, and if that is the case, I don't know that it is any different in this context than in any comparable context.

MR. HILLIER: I mean, I guess just conveying the notion of an implied threat is so fraught with subjectivity that--

MR. GOLDSMITH: It's done all the time in extortion cases.

MR. HILLIER: You mean within the context of the guidelines?

MR. GOLDSMITH: No, just in routine extortion prosecution. Every once in awhile, the threat is explicit: we are going to break your kneecap. Sometimes, it's an implied threat: you wouldn't want anything to happen to your family, would you?

MR. HILLIER: Well, I suppose the court is going

djj

to be able to make decisions currently, under the current guideline, in terms of making a decision within the guideline range on whether that implied threat is significant enough to require more time in prison within the range that is presently before them. What we're talking about is an enhancement for something that may not have been an implied threat.

I submit that this is going to create a lot of litigation, because my defendant is going to tell me that that is not what I meant; what I meant is this, and the reason I meant this is because I have this backlog of history with this particular person that goes to some relationship with their family that I was really concerned about. And I can see that happening. And currently, you eliminate that possibility, because you focus on whether or not there was an actual threat.

MR. GOLDSMITH: I don't mean to give you a hard time or to take up undue time with this panel, but let me ask you if you are opposed to the notion of an implied threat as the basis for an enhancement in and of itself or

djj

if the problem here really is one of confusion. Would you be able to try to suggest language that would remedy the potential confusion?

MR. HILLIER: Well, I guess I don't see how you can remedy it if you are using a term like implied threat. It is a subjective term that is going to create debate in the sentencing process. And if one of our goals here is to lessen debate and to try to simplify the guidelines, then I think that this particular amendment is counterproductive.

MR. GOLDSMITH: Thank you.

MR. HILLIER: Amendment Number 18 speaks to the important area of loss. Our recommendation is to postpone consideration of this. This is a very complicated submission, and we believe that there is probably a need to solicit more information before changes are made.

Numbers 21 and 22 relate to role in the offense adjustments, and this is an area that perhaps is ripe for some change also, we submit not the changes that are on the table now, highly complicated changes that are going to require us all to go back to school in terms of litigating

djj

under 3B. Some of the terms that are used are very subjective and are going to result in some disparate treatment of offenders.

What we would like to see and what we believe would actually advance the sentencing process under 3B1.1 would be to eliminate the phrase "otherwise extensive" for role adjustments upward. We see a lot of litigation currently under that term. One probation officer thinks that otherwise extensive means something that lasted a long time. Another probation officer believes that it is something that involved a lot of paper, so that term itself is inherently subjective and leads to a lot of litigation, and we could lessen that and focus this particular role adjustment guideline by eliminating that language.

Number 22 asks for input on whether or not there should be a downward adjustment for mules. We would like to propose changes that would allow for that, and we have proposed changes for a downward adjustment where mules are used, for all of the reasons that you have heard before.

I want to talk for a moment about the acceptance

djj

of responsibility proposals. I think you have received a lot of input on those already and properly so. Amendment Number 24 is a terribly complicated suggestion that, in my view, is very poorly drafted and doesn't really speak a whole heck of a lot to the question of acceptance of responsibility. It includes terms such as extraordinary acceptance is this, and extraordinary, of course, is a departure term, and we are using it in an adjustment context.

It also requires defendants to meet with probation officers and to talk to probation officers about matters that historically we don't allow them to talk to the officers about, and if they don't, they run the risk of losing acceptance of responsibility. So, it places defense counsel in an untenable position. We're either going to give our client bad advice, which will require them to get more time in prison, which will probably be offset by whatever acceptance adjustment comes in the long run.

It requires information about criminal history, which, again, is not the defendant's position to be giving

djj

that information. The sources for that information are elsewhere; the accurate sources of that information are elsewhere, and many defendant's really don't even know what the significance of their criminal record is, and sometimes, they misstate it, not intentionally but because they don't understand; they are poorly educated, and they can then be penalized for that misstatement under the terms of this guideline. Mostly, it is just entirely, entirely confusing and will set the whole question of acceptance of responsibility back to 1988; we're going to start all of that litigation all over again, because this just turns the concept upside down again, and we urge the Commission not to accept the proposal there.

Number 25 asks for language which tells the court that if somebody commits a crime while the current offense is under consideration, then acceptance of responsibility shouldn't apply. We submit that's unnecessary. As a practical matter, if that behavior occurs, the court probably isn't going to give acceptance of responsibility. But there are many instances where the court might, where

djj

the acceptance of responsibility for the current offense and whatever occurred out on the street later on just don't mesh up in a way, and the court may want to award acceptance of responsibility anyway. So, this again would be something that would simply impose upon the court in this particular specific case a necessity to jump through hoops that it ought not to have to jump through.

Number 26 is a big hurray from the defenders' standpoint. Finally, there is a proposal to eliminate level 16 as the triggering level for getting the third point for acceptance of responsibility. Level 16 doesn't have any real rational basis for why it's there. That extra point goes because the defendant has saved the Government time and resources by virtue of the decision to plead guilty early on or does other things that we have identified within the guideline that relate to the concept of acceptance of responsibility, so you get that extra third point. The offense level doesn't have anything to do with that. What this really does is it hurts my clients, the Federal public defender clients, a lot of low-end defendants who have

djj

reacted quickly, who have saved the Government resources but who aren't getting that extra point and who, as a result, are going to spend 4 months in jail that they ought not to have to spend in jail--the court can't make that call--or under some sort of alternative sentence that the court may have been inclined to give a straight probationary sentence if we could have gotten down to level 8, but we can't get there, and we're using that resource that could be available for another offender who more properly could benefit from an alternative sentence.

So, we very much encourage you to adopt this amendment. What it does in addition is it simplifies the process. You know, the court can look to this and make the call on the third point without looking at this level 16 and going through the hoops that are there.

Amendment Number 27 proposes changes in the career offender guideline that are intended to resolve conflicts in the circuits over what constitutes drug trafficking offenses. In addition, it would open the door for the court to consider underlying behavior in, for example, firearm

djj

offenses to decide whether or not those offenses are violent offenses for the career offender purposes. Our view is that the career offender guideline applies broadly enough and harshly enough and crudely enough already, and this particular submission would simply broaden the range of people who fall within its ambit.

And if we are going to resolve the circuit split, our view is you should resolve it by not including these additional crimes in the equation but rather say these don't come in. In fact, those particular crimes, the use of chemicals and what not to make particular drugs, score less in terms of their maximum sentences under the statutory scheme, so it makes some sense not to bring them into the equation, and in terms of looking underneath a crime that is not violent, such as possession of a firearm, to find out what really occurred, we are going to open the door to a lot of sentencing hearings on that issue. What we're doing is basically what the Supreme Court said in Taylor that we don't want to do, which is have these sort of mini-trials at the sentencing hearing to decide whether or not something

djj

was violent.

The last couple of guidelines I would like to speak to just generally and quickly are 33 and 35, which I describe as Koon fixes. I just don't think it becomes the Commission to take this sort of Band-Aid approach to decisions that some party or another is disgruntled by, and I am presuming that in this instance, it is the Department of Justice. But the Supreme Court has spoken on these issues, and the Commission, we believe, should be taking a broad-based policy approach to the departure decisions and allow the court to look at these cases on a case-by-case basis to decide whether or not, without discouragement from the Commission, this particular individual is going to be unduly threatened by a prison environment and that undue threat might result in some sort of sentencing consideration.

So, those are my general comments. I am happy to answer any questions that the Commission might have. We, frankly, there are many, many of the proposals that we agree with, and oftentimes, during the particular amendment cycle,

djj

especially when you see big batches like this, a lot of them don't get passed. Some of these, we feel, should be passed, and we would respectfully urge the Commission to look with care at the comments that we have made in terms of advancing the simplification.

VICE CHAIRMAN GELACAK: Thank you very much, Mr. Hillier.

Before we get to questions, I would like to do a couple of housekeeping matters that escaped my attention at the beginning of this hearing. The first is to introduce the folks up here. To my far right is Mary Harkenrider, who is the ex-officio member from the Department of Justice. Next to her is Commissioner Wayne Budd. To my immediate right is John Kramer, the staff director of the Sentencing Commission. To my far left is Michael Gaines, an ex-officio member and also chairman of the United States Parole Commission. We have Commissioner Deanell Tacha, and to my left is Vice-Chair Commissioner Michael Goldsmith.

I apologize as well for the sound system. We have a magnificent building that we're in. Unfortunately, we

djj

have never been able to figure out how to correct the sound system, and my apologies to those of you who keep hearing it go in and out. There doesn't appear to be anything we can do to change that.

One other thing: we're obviously not going to maintain our schedule. If anyone is on the program and has a scheduling problem later and would like to be moved up, let someone know, and we can change the order.

Having said all of that, I guess I will turn to Mary and ask you if anyone has any questions for Mr. Hillier.

MS. HARKENRIDER: Not I.

MR. BUDD: No.

MR. HILLIER: Well, thank you.

MR. GOLDSMITH: With respect to acquitted conduct, I think that the Commission would benefit from any additional information that you could provide us concerning examples of cases in which the so-called tail of acquitted conduct is wagging the dog of conviction. That has been one of the principal criticisms which has led the Commission to

djj

study this problem, but at least in our preliminary review, we have been surprised at how few cases that type of scenario, in fact, has been a problem. And so, if, for example, your organization is aware of cases where acquitted conduct has caused a greatly disproportionate enhancement in the sentence, please get us that information as soon as possible.

MR. HILLIER: I agree with you. I don't think it's out there a whole lot. The problem under the current guidelines scheme--well, actually it's not the current guidelines scheme but current practice--it has that potential that the court measures acquitted conduct as if it were convicted conduct under the guidelines, and that is why 1B seems to make a lot of sense, where the court would be exercising its current discretion to do what it wants in a departure mode and sort of justify that decision on the record and in a way which would have to be rational under current sentencing policy and case law.

But I agree with you Commissioner Goldsmith. It just doesn't happen a lot, because there aren't a lot of

djj

acquittals, and there are even fewer mixed verdicts. So, it seems that the sort of concept that is dealt with nicely in the departure area.

MR. GOLDSMITH: Doesn't Koon, to some extent, eliminate the need for an express amendment dealing with departures? I mean, I can certainly understand that you might prefer an invited or an encouraged departure, but on the other hand, Koon seems to give the district court more leeway to depart, and certainly, the court could do that in these types of cases, even without an amendment.

MR. HILLIER: That is correct. The traditional way judges handle it now would be unaffected by Koon, and Koon certainly doesn't set any limitations on or, in fact, would allow the court to consider it the way it wants. I think that the strength of 1B is as I have stated. It directs the court to consider it in a way which looks at it as it is. This is an extraordinary situation. This person has been acquitted of this, and it may be that I want to discount this conduct in terms of how I measure it rather than just straight jumping into a guideline range that might

djj

have applied had the person been convicted, because surely, the court should take into account the fact of the acquittal somehow in measuring out whatever punishment it is going to measure out if it decides the acquitted conduct should be relevant to its sentencing decision.

So, by using the word departure, it is highlighting that to the court, that this is an extraordinary situation, and deal with it in that way, and that is the reason why we favor the particular proposal that is on the board. And I think it does something for the critics that brought this to the table a year or so ago when we were talking about how we need to take care of this matter. It does tell the court that it is a significant issue that ought to be dealt with significantly.

Thank you very much.

VICE CHAIRMAN GELACAK: Thank you, Mr. Hillier, once again, on behalf of the Federal public defenders for helping this Commission in its deliberations. You and your organization have been very beneficial to us over the years, and we appreciate your taking the time to come here from

djj

Seattle.

Next on the agenda, we have Julie Stewart, who is the president of Families Against Mandatory Minimums, and Kyle O'Dowd, who is their general counsel.

MR. O'DOWD: Distinguished Commissioners, thank you for this opportunity to address this year's proposed amendments. For purposes of the hearing, I would like to focus in on two of the amendment proposals: the mitigating role proposals and the acquitted conduct proposals. These two amendments, we feel, are vital to the integrity and fairness of the guidelines.

First, FAMM is encouraged that the Commission has turned its attention to the mitigating role adjustment. It is said that there is no greater injustice than to treat unequal things unequally, and nowhere in the guidelines is this injustice--

MS. STEWART: Can we use this instead, Mike?

MR. O'DOWD: I think I've got it.

As I was saying, nowhere in the process is this injustice more apparent than in the disproportionate

djj

sentences received by low-level participants. I think it always bears repeating that drug amounts are not a talisman for determining culpability. One-step sentencing, as it were, results in similar sentences for both low and high level offenders and, for those low-level offenders, often results in grossly disproportionate sentences vis a vis their culpability and threat to the community.

In theory, obviously, determining an offense level is not a one-step process. The guidelines identify other steps, mitigating role being one of them. But the Commission's challenge, I think, and the reason that this particular amendment proposal is so important is to overcome the reluctance of the courts to use these adjustments when they are appropriate. In the past, mandatory minimums and the guidelines that have anchored sentences to the mandatory minimums have reduced the significance of adjustments, but now, we have the safety valve, and that enhances the importance of downward adjustments. So, it is time for some meaningful change with regard to the mitigating role adjustment.

djj

It has not changed substantially since 1987, even though since 1987, we have accumulated anecdotal evidence and amassed case law that reveals that courts are reluctant to apply the mitigating role adjustment for three reasons. The amendment specifically deals with two of these reasons, that is, it eliminates restrictive language in the commentary, note two specifically. It eliminates note two's presumption that the minimal role adjustment should be used infrequently, and it also eliminates the suggestion that only couriers carrying small amounts of drugs are entitled to the minimal role adjustment, and we would certainly support both of those changes.

The question is does the amendment go far enough? And we have suggested it does not, and this is with regard to the issue for comment. We believe that the Commission should remove the final barrier, the one barrier that remains and prevents a lot of mitigating role adjustments. We think that the Commission should explicitly acknowledge the appropriateness of a minimal role adjustment for two functional categories. Those are mules and couriers.

djj

Whatever logical link exists between drug quantity and culpability is certainly far less clear when you're dealing with couriers and mules.

Since leaving private practice a few months ago, I am just now getting used to speaking without having a client directly next to me. But if I were making this argument to a court, the person next to me, instead of Julie Stewart, would likely be a young adult from a foreign country, perhaps a woman, perhaps with children chosen because of her ability to avoid suspicion. She may not know the quantity, value or type of drugs she is carrying. She received direction from someone else and did not know that person's full name, and her sketchy knowledge of the other participants in the offense and sketchy knowledge with regard to the scope of the offense will probably result in her not receiving a departure for substantial assistance.

VICE CHAIRMAN GELACAK: Mr. O'Dowd, I am sorry to interrupt, but can you all hear him at the back of the room?

[Audience responds affirmatively.]

MR. O'DOWD: She is also probably compensated by a

djj

flat fee. In every respect, this person is a fungible and minimal participant who should receive the four-level reduction. Some courts, however, have declined the reduction, stating that transportation of drugs is an indispensable part of the distribution network. We believe that this begs the question. These people are prosecuted because of their participation. The question with regard to role is whether or not they played a minimal role. These people are tools, just like the suitcase or the airplane, and taken to its logical conclusion, the logic that is employed by the courts would prohibit this role adjustment for many defendants.

Lastly, I would submit that recognizing couriers and mules as minimal participants would have two other benefits. One, it would reduce the documented, disproportionate sentences received by non-citizens, because these people are more likely to be mules and couriers, and that is according to a DOJ report. Second of all, it would reduce the wide disparity among jurisdictions in application of the mitigating role guidelines to mules and couriers.

djj

The second issue of concern for Families Against Mandatory Minimums is the acquitted conduct amendments. Having read Senators Hatch and Abraham's letter, they seemed to dismiss the concern as plebeian or untutored, so I thought I would accumulate the views of some others whose opinions cannot simply be written off as the product of ignorance regarding the standard of proof at sentencing. Justice Stevens, from United States v. Watts: "The notion that the charge may give rise to the same punishment as if it had been so proved is repugnant." Even Justice Breyer: "To increase a sentence based on conduct underlying a charge for which a defendant was acquitted does raise concerns about undercutting the verdict of acquittal." Judge Oakes, from the Second Circuit: "This is jurisprudence reminiscent of Alice in Wonderland. As the Queen of Hearts might say, acquittal first, sentence afterwards." Judge Pregerson: "We would pervert our system of justice if we would allow a defendant to suffer punishment for a criminal charge for which he or she was acquitted." Judge Bounds: "The guidelines' apparent requirement that courts sentence for

djj

acquitted conduct utterly lacks the appearance of justice." And Judge Hall from the Fourth Circuit: "The use of acquitted conduct mocks the themes of fair trial and fair sentence that resound in the Fifth, Sixth and Eighth Amendments."

Certainly, the Commission has addressed issues provoking less outcry. True, as it has been argued, in pre-guidelines practice, courts were free to ratchet up sentences based upon acquitted conduct. But the difference is that the courts also had discretion to disregard such evidence. The problem is that some of the unstructured, flexible aspects of pre-guidelines sentencing are incompatible with policy that assigns a specific price to a particular unconvicted conduct.

Based on that reasoning, we would submit that the use of acquitted conduct in the current sentencing regime, after the Sentencing Reform Act, results in sentencing perversity. Therefore, FAMM commends option 1B, as was suggested by the Federal defenders, of Amendment Proposal Nine for Commission approval.

djj

Thank you.

VICE CHAIRMAN GELACAK: Thank you, Mr. O'Dowd.

Ms. Stewart?

MS. STEWART: Good morning. It's nice to be here again. This is about the sixth or seventh year I have testified before you. I feel that if I don't make my annual trek, my life isn't complete. So, my comments are going to be much more general, because Kyle has covered the specifics of the amendments that we are concerned about this year. My concerns are for the future of the Sentencing Commission, and so, my comments are directed at that.

During the last 6 or 7 years that I have been following the Commission, I have observed it undergo a number of internal changes. In fact, every one of the faces in front of me, except for Mike Gelacak's, is new in the time that I have been following the Commission. There have been new priorities; there have been new alliances formed within the Commission; there is a new chairman.

But while I have been focusing on the internal dynamics of this body, I don't think I have been as tuned in

djj

to the outward perception, the external perception, of the Commission until the last year or so, and as I have been watching it in the recent past, I am very troubled by what I'm seeing.

Over the years, it has been clear to me that, from my own lobbying, most members of Congress do not know that a Sentencing Commission exists, and if they do know, they don't know what you do. And I've always thought that if Congress only knew about you and could understand what it is that you're trying to accomplish that they would support it. But I'm beginning to feel that that's no longer the case. I'm really not confident of that.

Instead, I'm finding that even among members of Congress who know you and the administration and specifically the Department of Justice, people who know what this Commission is supposed to be doing, there is an overwhelming willingness to ignore the Commission and to bypass the Commission to keep sentencing policy in the hands of Congress. Ignorance of the Commission can almost be excused, but willful avoidance of the Commission cannot, and

djj

that is the growing trend that I see going on in Congress and the administration today.

For instance, why is it that the Department of Justice, on behalf of the administration, has submitted a crime bill that forces the Commission to tie its Sentencing Guidelines to the mandatory minimum statutes that will be passed and have been passed by Congress? Why does the administration's crime bill have any new mandatory minimum penalties in it at all? Both of these questions are really troubling to me, given that at least one of the ex-officio members on this Commission is from the Department of Justice and, I hope, is trying to stop these provisions at the door and advocating on behalf of the Commission and its role to make sentencing policy.

Last week, there were a group of us who were briefed at the ACLU by three members of the Department of Justice on the administration's crime bill, and during Q and A, they were asked the two questions that I just brought up, and they couldn't answer them. In regard to mandatory sentences, they simply said that there are some crimes that

djj

Congress believes are so heinous that they must make mandatory penalties. Of course, that seemed like an odd response when, in fact, the bill we were talking about was an administratively-driven bill, not by a member of Congress.

But when I asked them why they didn't trust the Commission to establish tough penalties. They couldn't answer it. When they were asked directly why have a Commission, they couldn't answer it. So, this exchange, combined with the Washington Post's big article last fall and all of the new crime bills that are out there right now that have new mandatory sentences in them and very specific directives to the Commission that micro-manage you, as well as some recent lobbying that I've done, all give me the sinking feeling that the Commission is on its way to extinction, and I am here to urge you to try to prevent that from happening by taking a much more aggressive role and an active public role to retain the mandate that you were given in 1984 to develop and monitor sentencing policy that is appropriately severe and that avoids unwarranted sentencing

djj

disparity. And I have a couple of suggestions.

First, I really urge you to take a much more active role in the public debate. The Sentencing Commission is the nation's clearinghouse for sentencing. You have an incredible database of resource information here from your computer system. You should use those resources to publish three to five short reports, short research reports and press releases each year about different aspects of Federal sentencing. I know that some of you are familiar with a nonprofit organization called the Sentencing Project, and they do this periodically and take information that is much harder for them to gather than your information that's already available, and they publish short sentencing reports on specific areas, and they get tremendous press.

The Commission could do the same thing and double the attention given to sentencing policy by publishing some short, reader-friendly reports that really get the facts out there. You have such a wealth of information, even in your annual report, but very few people are going to nerd out on it like I do to pull out all of the information that is

djj

valuable when you guys could do it for us.

And those are the kinds of reports that lead to TV and radio talk shows, where I think you should be out there; somebody from the Commission should be putting forth your case to the average citizen, so that they begin to understand what sentencing policy means in this country. It will also help them begin to debate sentencing policy from an informed perspective instead of a kneejerk reaction.

Secondly, I think the Commission should constantly be making the case against mandatory minimums. In 1991, you published an excellent report on mandatory sentencing policy, but it is not enough. It is 6 years old. There is no reason you couldn't update at least sections of it and republish them today. Mandatory minimums are really not democracy in action; they are demagoguery in action, and the Commission understands this better than anybody. Yet, you have been eerily silent on it for the last several years. I know that when Judge Wilkins was chairman, he regularly spoke out against mandatory sentencing policy, and I feel that this Commission has the responsibility to make that

djj

strong case against mandatory minimums, because in my mind, the Commission really is democracy in action. You were established and approved by the Congress for the very purpose of carrying out sentencing policy recommendations.

I also think this Commission should continue to make recommendations for statutory changes to Congress. I know that the last time this happened, Congress stopped you cold. But it is in your charter that you have the right and even the responsibility to make recommendations for improving sentencing policy, both statutorily and under the guidelines, and recommendations from you, accompanied by short reports and press releases, build your case. I know that this takes sort of a new and bold leadership role, and it takes one that you have to do repeatedly, because if you don't, Congress is going to walk all over you, as I think they did with the crack cocaine debate.

That doesn't mean that you're going to win every time that you go out there for taking a leadership role on a controversial issue, but it does mean that you're doing what you were mandated to do, to be the voice of reason in

djj

sentencing policy. And my feeling is if the Commission doesn't stand up for sane sentencing, nobody will, and there really won't be any.

So, I urge you to think long-term and remake the Commission's image. The establishment of a Federal Sentencing Commission in 1984 was a bold, new initiative. It now requires a bold, new Commission, and at this point, I think that means reinventing yourselves. I see the Commission's image as badly scarred but not beyond redemption. You are an independent agency of the Judicial Branch of Government. Don't let Congress kick you around. I urge you to take bold, new stands on sentencing policy and see what happens, because in my mind, the outcome can't be any worse than what is currently happening, which is I see the erosion of this Commission and allowing Congress to simply circumvent you at every opportunity.

Now, I know my comments sound simplistic in the light of the heavy hand of Congress, but I think it's time for really drastic measures. All I'm doing is trying to prevent the Commission from becoming completely irrelevant

djj

in sentencing policy. I don't want to see this body fold, and I don't think it has to, but I do think we have to make a lot of substantial changes in the near future, or you might go the way of the dinosaurs.

MS. TACHA: Let me ask you a question about that, Julie. Even if, at least, I agree that you're right, that the Commission needs to kind of think about its role in the process, also, we are confronted with your group and many others who want just a plethora of amendments every year. There is only so much that can be done, given, this year, five Commissioners. And if you could answer the question of how the Commission should prioritize its time, how would you answer that question?

MS. STEWART: Well, I don't think that you Commissioners need to be involved in publishing short reports and promoting them. I think--

MS. TACHA: But we have to take the leadership role in reading them, seeing what our priorities are. It is very simplistic to take the view that we can do it all.

MS. STEWART: I understand that. I would rather

djj

see you take fewer amendments every year and promote them heavily or put your opinion out there in the public forum than to take 30 amendments that are so damn technical very few of us can understand what they're all about. I mean, I really feel that the public and Congress needs to understand what this body is, and they don't, and I don't think that they are going to with all of these kind of minutia amendments that are involved in this year's cycle--not to say that they're not good; we have just supported several of them. But the point is the average citizen, it's going to go zoom, right over his head.

And granted, you are going to have a lot of those, or you're going to have those, but there are probably three or four that you could have explained or that you could explain. Acquitted conduct is something that I think the average public would completely relate to, the average member of the public, if you explained it right, if you did a short report on it. I just feel that the resources here are being wasted.

MS. TACHA: Let me see if I understand what I

djj

think you have said to me. I think what you have said is pick one or two--maybe five, whatever--amendments and give it your best shot; support them with whatever data we can derive. If that were the tack that we would want to take, how willing do you think the groups that look to us for lots of fixes--and a lot of you do--and frankly, it gets hard to respond both to the fixes and to the bigger picture, and frankly, I don't think it's any secret here that the big picture of one thing that we've been trying to work on this year is trying to go back on crack.

And that takes a lot of effort and a lot of careful consideration. If we are to do any amendments, then we need the groups that respond to help us prioritize what we do.

MS. STEWART: Well, I would be happy to sit down and talk to you about priorities at any time. I think that you should ask for input on priorities for any given year, but I also think that it is a judgment call for the Commission. I would even argue that it doesn't have to be an amendment issue. If you look at your annual report,

djj

there is great information in there about--well, even if you just take the crack issue, but, you know, how many people between--I think you do it October 1995 to October 1996--were sentenced for crack? What was their average sentence? How much drugs were involved? That sort of information.

You can do a two or three page report on that. You don't have to take a position one way or the other. It's simply factual. And that helps get the information out. But yes, I don't know how you're going to prioritize, but I certainly think that it's worth talking to the organizations like ours that care, and we would be happy to work with you.

MS. TACHA: A lot of this has to do with the process that the Commission uses to go from year to year or 2-year to 2-year or whatever it is we decide to do, and I don't think any of us disagree that we need to do that--I guess I should speak only for myself--but a lot earlier and get groups involved in some of the generic prioritizing--

MS. STEWART: Right.

djj

MS. TACHA: --before we get to the specifics.

MS. STEWART: Exactly.

VICE CHAIRMAN GELACAK: I don't think that I'll be talking out of school here. I really, for myself, appreciate your comments and your suggestions, because it is my opinion that the Commission itself is going through an evolutionary process in its own deliberations. For the vast majority of the time that this Commission has been in existence, it has been an amendment-driven Commission, and part of the evolution is to get away from focusing everyone's attention purely on amendments, because there are some other things that are as important or, perhaps, more important.

So, it's my hope that this Commission will go through that evolutionary process and come out better on the other end as one that is engaged in extensive, in-depth research and gets in front of criminal justice issues instead of chasing them down the road. That is where we intend to go, and I think our credibility will be increased as we do that, and I hope that is what happens. But as I

djj

say, I speak only for myself; I hope I'm not talking out of--but I appreciate your comments and will now ask for other questions.

Commissioner Gaines?

[No response.]

VICE CHAIRMAN GELACAK: Any other questions?

MS. HARKENRIDER: I have no questions, but I would like to thank you for your testimony, and I also agree that the Commission--I think everybody recognizes that the Commission has the best data in town, and little, short factual snippets can't hurt, for people to know at least what the facts are--

MS. STEWART: Yes.

MS. HARKENRIDER: --without taking a position, perhaps, or whatever, as an informational source, there isn't one that's better.

MS. STEWART: Great. Thank you.

VICE CHAIRMAN GELACAK: Thank you again for your testimony, and you as well, Mr. O'Dowd.

MR. O'DOWD: Thank you.

djj

VICE CHAIRMAN GELACAK: Next on the agenda is Frederick Cohn, member of the Sentencing Guidelines Committee of the New York Council of Defense Lawyers.

MR. COHN: Good morning.

VICE CHAIRMAN GELACAK: Good morning, Mr. Cohn, and thank you for taking your time to appear here this morning.

MR. COHN: I am going to try to dispense with this. If I can't be heard, I'll speak louder.

I am not going to address, point-by-point, our submission to you. I suspect that you and/or your staff will read it carefully. It pretends to some scholarship, which I don't pretend to here. but what I thought I would try to do is to synthesize our outlook as to this year's proposed amendments and tell you why we've gotten where we've gotten with, perhaps, a couple of examples coming out of an anecdotal case that I regard as particularly apt.

It seems to the council that at least in certain regards--and I'm excluding acquitted conduct from this discussion, which I think is sui generis and talks about a

djj

fairness in a way that we tend not to try to do here. It will come as a shock, I suppose, to some people listening that although we are a defense organization, we are not opposed to the notion that bad people should get bad sentences.

The question is how you define who is bad, and it seems to us that in terms of micromanaging the sentencing process, you are making the divisions too small, and you're ignoring the passage of time and what it should teach us. The most striking example of that is the proposed amendments to the fraud and larceny tables, where the proposal, as I understand it, is to remove the enhancement for more than minimal planning and to raise the guidelines tables in one of three ways.

The theory, I gather, is that more than minimal planning has become so axiomatic to any part of the criminal process that it has lost its usefulness as an enhancement, and so, it ought to be removed, since it doesn't do anything. But to make up for that, you want to raise the guidelines accordingly so that people will be penalized for

djj

it no matter what.

It seems wrong to me. I believe that the Commission is right that more than minimal planning or using unusual means, sophisticated means, to hide your crime are things that, had they been used properly, would teach us about who is bad and who is not. The primary--and I'm talking now in economic crimes only, but I think it cuts across the board--the primary focus of punishment has been driven by, traditionally, as I see it, and, I suppose, one could argue with it, and people have, the notion of how much the person intended to steal. And if they stole a certain amount--and that involves attempts as well as completed crimes--and if they stole a certain amount, there are certain things which would indicate that they were better than people who had just stolen it in other ways.

So, more than minimal planning seemed to be a good idea at the time, and sophisticated means seemed to be a good idea at the time, but as the Commission has noted in its comments to this year's amendments, more than minimal planning happens virtually all the time, and it is an

djj

enhancement whose time, I believe, has passed.

But that doesn't mean that you ought to raise the guidelines accordingly. What you ought to do is find another way to find enhanced behavior. Let me give you an example of a case that cuts across a number of these lines that happened a few years ago. A young woman, who was, at the time she committed the crime, about 18, was a sort of supervisory teller. And the reason I say she was a supervisory teller is because one of the things that came into this was abuse of a position of trust, which would not have applied to a teller. She wasn't much more than a teller.

And over the period of about 8 or 9 months--she was young; she was in what she considered to be financial trouble--she stole, over that period of months, a little less than \$18,000 in about 13 or 14 events--\$700 here; \$500 there, small amounts, and she then left her job on the West Coast, married, moved to the East Coast, and she got a letter from the FBI or contacted by the FBI, and they said we believe that you stole money when you were this

djj

supervisory teller in this West Coast bank. Would you come talk to us?

And, so, she first decided that she ought to talk to a lawyer, which is not unreasonable under the circumstances, and she did. And the lawyer determined that, given the facts, the best thing to do was to fess up, get the case transferred to the East Coast for sentencing and to proceed with the rest of her life. So, the first thing she did was she went to New Jersey with her lawyer from Brooklyn and was interviewed by the FBI, in which she fully confessed her crimes, with the benefit of counsel there, absolutely unassailable Constitutionally.

And I will tell you: at the end, she got no extra credit for acceptance of responsibility. She accepted responsibility virtually immediately. She accepted it in a way that many defendants do not, which is wholeheartedly. Acceptance of responsibility is not synonymous with contrition; but, in fact, she was contrite.

The case languished for a long time, and finally, a plea was entered in the Eastern District of New York under

djj

Rule 20. She got more than minimal planning. If someone had walked into--if one of her colleagues had merely lifted \$18,000 in one event out of the till, they wouldn't have gotten more than minimal planning. Much worse crime, as far as I was concerned, than this woman who peculated in little bits and pieces, not as an excuse but because she was weak. She wasn't evil. But the evil person who steals an amount that's \$18,000, they get credit for not more than minimal planning, because they just acted impulsively and took a hell of a lot of money to buy a Mercedes, to do whatever one does with \$18,000.

She got abuse of a position of trust, although I tell you that she was not any more than a teller. But because she was not a teller, she got abuse of a position of trust.

In the intervening 4 years, she had a child. No credit could be gotten for her family circumstances, because the case took 4 years to do it, and it was not unanticipated that she would have a child. When all was said and done, there were two judges in the Eastern District who wanted to

djj

give her probation and could not because of all of these circumstances that you have anticipated in this round of amendments. You have talked about getting rid of more than minimal planning, and that would have helped her. But it wouldn't had you raised the guidelines.

Remember: if you're raising the guidelines, you ought to contemplate raising the amounts that go with it. \$2,000, if you steal it, doesn't go as far as it used to. Ten years ago, \$2,000 may or may not have been a lot of money. Today, it isn't. Now, I'm not suggesting that you should build in an inflationary spiral into this thing, but there seems to be no recognition of the fact that, at least at the lower levels, I mean, somebody steals \$10 million; it's still \$10 million more or less. It's a lot of money. But if somebody steals \$5,000, it's not what it was 10 years ago. And if you're going to raise the guidelines, you ought to think of raising the triggering amounts with it.

But what you've done is essentially, in micromanaging this area particularly, and I believe you've done it across the board and propose to do it in many ways

djj

across the board, is to take out--and I know that it's part of the goal, but it doesn't have to be this much of the goal, to take out any judicial and prosecutorial discretion in dealing with the person the distinction of somebody who's bad or merely someone who has done a bad thing and that you do it in ways which are irreversible and cannot be handled by way of adjustments.

Your Schedule Three for the proposed schedule changes in larceny is the only thing that takes any of this into account. There, you have--I think the jump is from \$20,000 to \$60,000 in one leap. And that--although I don't know whether it was intentional as a cliff effect, is a cliff effect. It distinguishes--somebody who steals \$20,000 is substantially different in quality from somebody who steals \$60,000. I mean, New York is the land of opportunity. There, you can steal \$105 million in a second, but aside from that, at the lower end of these things, I mean, that is a substantial difference.

We would suggest that any adjustment in the guidelines for larceny and fraud take those kind of cliff

djj

effect differences into account, that it is necessary because that distinguishes in some regards to, in this mechanistic sort of way that we seem to have fallen into, the difference between people who steal what we regard as relatively small amounts of money, considering the involvement of the Federal courts.

None of the comments that we make about the proposed guidelines, with the exception, again, of the consideration of acquitted conduct, which we oppose the changes as they are set forth, really is any different in outlook in our view, and while we understand that micromanagement is the stated goal as set forth by Congress, we suggest that there is a possibility that it has gone too far, and that you are losing the baby with the bath water and that unjust results like the one that I have just talked about--and you would know, because you have the database, as we're told--are more common than they are uncommon; that if you intend to change the guidelines to get rid of these pro forma enhancements, you don't just substitute them for additional time.

djj

I have nothing further.

MR. BUDD: What happened to the woman in the anecdote? [Laughter.]

MR. COHN: Do you really want to know?

MR. BUDD: Yes. I have a bet going with my colleague here.

MR. COHN: The first judge who had the case, who is a prosecution judge, was so uncomfortable with it that he suggested to me that the guidelines were unconstitutional and that the rulings of the Supreme Court had not taken the amount into effect. So, he invited me to make a motion to the Constitutionality, which I thought, being that I am not a scholar, that maybe if a Federal judge said there was an opening, I ought to do. So, I said that I would like more time, and then he disqualified himself. [Laughter.]

MR. COHN: And I did the research and found that, quite candidly, he didn't know what he was talking about; the Constitutional issues had been resolved by the Second Circuit, which is my circuit. And so, we went to the second judge, who took a look at it and said to the prosecutor she

djj

shouldn't go to jail, and he said but the guidelines are--this was not on the record; this was where things really happen, in chambers--so, he said, well, if I depart downward and give her probation, are you going to say anything about it, and the guy said no.

So, she didn't go to jail; she got house arrest for whatever the requisite amount of time was. But that is absolutely lawless. I mean, to require judges and prosecutors to engage in lawless behavior in order to achieve a desired result shouldn't be what we're about. It's what I'm about when I'm a defense lawyer if I can get it done, but it shouldn't be what the guidelines force. So, all I am saying to you is that at least in certain areas of the guidelines, as you propose amendments, you are going to be increasing the desire of right-thinking judges to break the law and us to aid and abet them. And so, I would suggest that you reconsider.

MS. HARKENRIDER: What would the sentence have been had the judge not been lawless?

MR. COHN: She would have been required to spend a

djj

jail term of 10 months, I think, a minimum of 10 months.

MS. HARKENRIDER: A split sentence?

MR. COHN: I'm trying to recollect, but I think that it was a 10-month mandatory jail sentence under the guidelines. Because of the congruence of the abuse of the position of trust and the more than minimal planning, it pushed her up there.

MS. HARKENRIDER: It would still have been in one of the zones.

MR. COHN: Yes, yes.

MS. HARKENRIDER: And the judge found the abuse of trust.

MR. COHN: We sort of fudged it. I mean, the answer is yes; the answer is nobody contested it; the law was clear on it. It never got contested that way. It got handled in the back room. I mean, I applauded his conduct. I'm all for it. I just think it's wrong.

VICE CHAIRMAN GELACAK: Other questions?

MR. GOLDSMITH: Yes.

One of the concerns that this Commission has heard

djj

about in the area of fraud is that the penalties, if anything, are too low, and I think that the premise underlying the proposed amendment is if you are going to take out the more than minimal planning component that you ought to integrate it into the tables in a manner that responds to the criticism of the guidelines as being too low with respect to fraud penalties. We survey Federal judges, for example, and for the most part, they felt that white-collar offenders were not receiving sufficiently severe penalties.

Your statement at the beginning of your presentation was that your group agrees that bad people should get bad sentences. And so--

MR. COHN: I haven't talked about the penalties at the upper end, I mean, where you steal serious--but fraud--we think of fraud in terms of massive fraud. I think if you just say Federal case fraud, you're thinking of six or seven figure kinds of frauds when you come right off the bat, and the guidelines--I mean, the numbers are astronomical, I mean, and I don't know--this is supposed to

djj

be a heartland sentencing model, and I think New York is the only place you can steal \$500 million, so I don't know about the heartland.

But the fact is that I'm not talking about that. If you want to adjust the standards at the upper end for what judges regard as too low, I don't know what the numbers--although I will say this, that the proposed guidelines at the upper end rival violent crime, rival those guidelines for violent crime, and I think there is a distinction. I'm not one who is really, you know, terribly fond of white collar criminals. In the days when jail was supposed to be a deterrent, I believe that jail, amply applied, would deter only white criminals and no others.

But, you know, I am not a bleeding heart for white collar criminals, but there is a difference between people who use guns and who use terror in order to steal and who injure people and people who do not. And if you take a look at your proposed guidelines at the upper end, they rival violent criminals.

Now, I am not suggesting by that that the

djj

penalties are too low for violent criminals. I am suggesting that there reaches an upper limit in what we can do with our jails and that a comparison isn't always, well, if it's too low for them, we'll raise it for everybody. But I am saying that I am not particularly objecting to raising the guidelines to some degree for fraud at the upper end.

But there really isn't fraud at the lower end, except if some Federal court decides to get involved over something very, very small, and it's to those people that I think the fraud guidelines are not, in fact, low enough and that there should be an adjustment downward if one really thinks about it and that some sort of cliff effect ought to be built in.

MR. GOLDSMITH: Thank you.

VICE CHAIRMAN GELACAK: Other questions?

[No response.]

VICE CHAIRMAN GELACAK: Thank you, Mr. Cohn.

MR. COHN: Thank you.

VICE CHAIRMAN GELACAK: Next is Steven Shaw, from Federal Paralegal Services.

djj

Mr. Shaw, good morning, welcome.

MR. SHAW: Good morning, Commissioners.

VICE CHAIRMAN GELACAK: Thank you for taking your time.

MR. SHAW: If you could just give us one second, please.

Commissioner, with your permission, I would just like to stand for just one second.

VICE CHAIRMAN GELACAK: If you would be good enough to introduce the lady with you also.

MR. SHAW: My name is Steven Shaw. I am with the Federal Paralegal firm in Coral Springs, Florida, and this is Ms. Betty J. Bass. She is my assistant.

VICE CHAIRMAN GELACAK: Thank you.

MR. SHAW: Ladies and gentlemen, we have a problem in the field, and it's a big problem, and it needs to be corrected as soon as possible, because there is a storm that is coming, and I am going to tell you about it. I agree, I echo what FMM has said. I believe that the role of the Sentencing Commission must be adjusted so that we can

djj

compensate for this problem that we have seen in the field.

As I said before, my name is Steven Shaw. I am with Federal Paralegal Services. We are a firm that represents the Federal incarcerated inmate, and primarily, we do post-conviction relief, popularly known as the Motion 2255. We have discovered over the years problems that have happened, and they need to be brought to your attention immediately.

But first, let me tell you a little story about a man named Preston Gary. Preston was born in Fort Myers, Florida. He worked there; he got married there; he had children there. Although most people would say that Preston is a warm-hearted person, and he is a kind person, Preston had a problem: he got involved in drugs. In the year 1986, he was arrested by the Fort Myers Police Department for possession of crack cocaine. Of course, he went before the state court. He entered a plea of guilty. He was sentenced to probation; subsequently violated and was then sentenced to Florida prison.

After that, of course, he was released. Again, in

djj

May of 1990, Preston was arrested again by the Fort Myers Police Department for sales and delivery of one rock of crack cocaine. By then, Preston was smoking. He didn't earn enough money from work, so what he did, he sold crack cocaine for consumption purposes. After that arrest in 1990, he entered a plea of guilty before the court. Again, he was sentenced to house arrest. He violated that and was sent back to prison all over again. And, of course, he was released.

Even though Preston had been punished for his crime, he hadn't been cured of his ailment. In 1993, he sold crack again, but this time, the story changes. This time, the Fort Myers Police Department and the Lee County Sheriff's Office got together with the Drug Enforcement Administration, and they put together combined law enforcement to sweep the streets clean of drugs in that area.

Well, Preston was charged in a conspiracy, and the conspiracy said that at least until January 1990, up until the time that he got arrested in May of 1993, he was

djj

involved in a conspiracy. Now, when the probation office was--of course, Preston entered a plea of guilty. The probation officer was, of course, ordered by the court to prepare a PSI. And when they prepared that PSI, they reviewed his criminal history, and they scored him as a career offender under Section 4B1.1 of the United States Sentencing Guidelines. They used those two prior convictions against him.

Preston's lawyer didn't object, and the court adopted the PSI recommendation, and Preston was sentenced to 22 years. End of story.

The problem: Preston should never have been sentenced as a career offender. Section 1B1.3(1)(a) of the United States Sentencing Guidelines states as follows: "All acts and omissions committed, aided, abetted, counseled, commanded, induced, procured or willfully caused by the defendant, and (b) in the case of a jointly-undertaken criminal activity, a criminal plan, scheme, endeavor or enterprise undertaken by a defendant in concert with others, whether or not charged as a conspiracy, all reasonable,

djj

foreseeable acts and omissions of the offense of commission and preparation for that offense or in the course of attempting to avoid detection or responsibility for that offense." In short, if it's related, then it should be taken into account.

Now, Commissioners, I am not here to try to retry the case of Preston Gary. I am simply using that as an example to bring before you today. This is what is typically happening out there. The probation office or the probation department, they are not considering--they are using the prior history and using the device of Section 1B1.3 of the Sentencing Guidelines to enhance a defendant to criminal status or to increase their time. And what I am saying here today, that should not be.

Now, your Commission has done things, and you do have a device built into the Sentencing Guidelines, and it does say something under Section 4A about related offenses should be counted as one offense. But the problem is for some reason, it is not getting across. The United States Attorney's office, in concert with the United States

djj

Probation Office and with the court are using prior criminal history; they are counting it, scoring it, and they are enhancing the defendant to either career status or to a statutory enhancement under Section 841. And that is a big problem.

Well, now, why are we here today? Why do we want to say something to you today? Why did we make the trip up here from Florida today to speak to you about this? Well, I am going to skip through my brief, and I am going to say that just last year, in April of 1996, there was a bill signed, and it was the Antiterrorism and Effective Death Penalty Act. And what that legislation had built into it, it had legislation limiting the habeas corpus, the Motion 2255, and it essentially says that there is going to be a deadline on 2255s from now on, and there is going to be a deadline one year from a specific date.

Ladies and gentlemen, the problem is that we have men who have been locked up for 10 years; some for 5 years; some even more, and we are just finding out the problem. Now, what will happen after April 24, 1997, which is one

djj

year from the date that President Clinton signed this legislation? What happens when we run across a client, say in June of this year, with a case that is similar and blatant as Preston Gary's case? And by the way, Preston Gary's case is in district court now to be resentenced.

But what happens, say, in June of 1997 when we have a client who approaches us or when we discover indirectly that a man has been enhanced to career status because his prior criminal history, which is similar to the instant offense and part of the instant offense, has been enhanced not just under 4B1.1, the career offender but also statutorily? And we all know that, of course, under Section 21 U.S.C. 841, it says, now, if you don't have a prior drug conviction, then you can have, in some cases, a minimum mandatory sentence of 10 years to life. But if you have at least one, then, it's 20 years to life. But if you have at least two, then, it's a mandatory life.

What happens then? Well, under the habeas corpus reform, those people will be out of luck. There are no vehicles available for them to come back, even when we know

djj

that there was a mistake done. Now, the years that we are finding these mistakes are the years 1988, 1989, early 1990. And I would guess the reason why we are finding the mistakes in 1988 and 1989 is simply because the guidelines were new, and people were being trained, and there was a conservative atmosphere in this country, and the focus of the law was to punish and punish hard, although there was language written into the guidelines for this.

But my concern, and I know the concern of the Commission is the same, is that justice will be served. We don't know of a better organization that can get this point across, that can let the Congress know, the public know, what is happening out there. When the Founding Fathers wrote up the Constitution, they said the writ of habeas corpus shall not be denied. But all of a sudden, we are going to find ourselves with men--and we don't know how many; there are approximately 100,000 men and women who are in Federal custody, and I am not even counting the state--but what happens if there are 5 percent of those who, although they enter a plea of guilty or took it to trial and

djj

lost, and they accepted their punishment, as they are supposed to, they find out later you know what? The probation office made a mistake.

MS. TACHA: Mr. Shaw, could I just interrupt you there?

MR. SHAW: Yes, ma'am.

MS. TACHA: Could you articulate precisely--let's just take your case--precisely what the problem was there. You said it was that the defendant was sent into the career criminal category; is that right?

MR. SHAW: Yes, ma'am.

MS. TACHA: So that the other criminal offenses were used as criminal history.

MR. SHAW: Yes, ma'am; let me explain to you. In 1990, he had a drug conviction for selling crack cocaine. He was arrested first by the state, the Fort Myers Police Department and punished. Then, in 1993, he was arrested again and indicted by the Federal Government. Now, look at this date, for example. The indictment said Preston Gary, you have been involved in a drug conspiracy to sell crack

djj

cocaine at least from January of 1990 up until the day we arrested you, in May of 1993. That is what happened.

So, now, logic tells us well, if the conspiracy began in January of 1990 and ended in May of 1993, then all related drug activity is part of the instant offense, even though he was previously arrested by the state. It doesn't matter, because that charge is part of the instant offense, and the court agrees. The court agrees. But the problem is there are more people out there like that. We have other clients now that we have to do, of course, a 2255, and we imagine that they will win that.

But what happens down the road? It is not a hard 2255 to win, and everybody knows that. Of course, to win a 2255, you have a better chance of winning the lottery. But in this particular instance, it is not a hard 2255 to win. It's relatively easy. The only difference is rather than a man doing a 20-year sentence, it is corrected to a 10-year sentence. That is the minimum mandatory and so forth and so on.

But our concern is what happens when the deadline

djj

goes into effect, and we suddenly find ourselves with American citizens who have been locked up for 5 or 6 or 7 years, and we find out that there is a mistake? What do we do about it? Do we say this to them: sorry, you are out of luck? Or do we come up with language, do we use the prestige of our office, and do we say wait a minute: just in case there is a legitimate problem here, maybe we ought to give these people a chance in court to be heard?

This is what we're saying. I am ready now to answer any questions.

MS. TACHA: I guess I'm still having difficulty with where, specifically, the guidelines are incorrectly applied.

MR. SHAW: The guidelines were incorrectly applied under Section 4B under the career offender. They counted the two prior state arrests--

MS. TACHA: Convictions.

MR. SHAW: --and they enhanced them to career whereas--

MS. TACHA: But why is that an incorrect

djj

application?

MR. SHAW: Because the prior arrest in May of 1990 was part of the Federal instant offense, and the guidelines are clear. Under Section 4A, it says any related offense should not be held against a person. That is in the Sentencing Guidelines book. And when the court sees it and examines it, they normally say that's correct. Even the United States Attorney's office, they will agree and say you're right; no problem; we'll go back and change it.

MS. HARKENRIDER: Is this pending right now? Is that what you're talking about?

MR. SHAW: This particular case is pending right now, but we have other cases that are even clearer than this one.

MR. BUDD: Question: Mr. Shaw, the example of Preston Gary is given just as an example of an underlying problem, which is the habeas corpus limitation.

MR. SHAW: Yes.

MR. BUDD: What would you propose that this Commission do with respect to that? That was passed; it's

djj

statutory as the result of an act of Congress, correct?

MR. SHAW: It's an act of Congress signed by the President last year.

MR. BUDD: What would you propose that we do?

MR. SHAW: I would propose that the Commission--well, first of all, that the Commission should alert the Congress and let them know of this type of impending problem. There is no such thing as black and white, really. There are situations out there where there have been mistakes made by the law. It is just as simple as that. And it is not the fault of the defendant; it is not necessarily the fault of the Government. It's just a mistake.

MR. BUDD: So, you're saying justice can't be served if there's a time limitation, because these might be discovered further down the road.

MR. SHAW: Exactly.

MR. BUDD: And hence, once they reach the light of day, they shouldn't be barred by virtue of a statute.

MR. SHAW: Exactly. And at Federal Paralegal, we

djj

have no problems with providing the Commission real names and real cases and put them in a format so that you can see them and also study them using the guidelines, and you will see that it is very simple and very plain, and it happens, especially from at least the years 1988, 1989, 1990, the early nineties.

MR. BUDD: Thank you.

VICE CHAIRMAN GELACAK: Other questions?

[No response.]

VICE CHAIRMAN GELACAK: Mr. Shaw, if you would identify the lady sitting next to you again; I apologize; I did not catch your name when you first mentioned it.

MS. BASS: My name is Betty Jean Bass, and I am an assistant to Mr. Shaw.

VICE CHAIRMAN GELACAK: Ms. Bass, do you have comments for the Commission this morning?

MS. BASS: Just only to say I would like to thank you all for taking the time to listen to what we have to say.

VICE CHAIRMAN GELACAK: Well, thank you.

djj

Other questions?

[No response.]

VICE CHAIRMAN GELACAK: If not, thank you, Mr. Shaw and Ms. Bass for taking your time to come here from Florida and bring to the Commission's attention an issue which I am sure troubles you and others.

MR. SHAW: Thank you.

MS. BASS: Thank you.

VICE CHAIRMAN GELACAK: That is the last of our scheduled witnesses for this hearing. If there is anyone else who would like to testify, we will take the opportunity to hear from you now.

[No response.]

VICE CHAIRMAN GELACAK: If not, thank you all for being here, and we will declare this Commission hearing over.

[Whereupon, at 11:02 a.m., the hearing was concluded.]