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UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

Thursday, March 23, 2000

Judicial Conference Center
1 Columbus Circle, N.E.
Washington, D.C.

The public hearing convened, pursuant to notice, at 9:30 a.m., The Honorable Diana E. Murphy, Judge, United States Court of Appeals (8th Circuit), Chair, presiding.

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COMMISSION MEMBERS PRESENT:

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JOHN R. STEER, Vice Chair

STERLING JOHNSON, JR., Commissioner

JOE KENDALL, Commissioner

MICHAEL E. O'NEILL, Commissioner

LAIRD C. KIRKPATRICK, Ex-Officio Commissioner

TIMOTHY B. McGRATH, Staff Director

C O N T E N T S

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P R O C E E D I N G S

CHAIR MURPHY: If everybody could sit down, then we can get started. There are always a few that I am not acquainted with. I am Diana Murphy, the Chair of the Commission, and on behalf of all the Commissioners I want to welcome you here. We are very interested in hearing what you have to say.

And before we get onto the segments of the public hearing, I would like to take a few minutes to honor somebody who has contributed greatly to our work over the years, and that is Fred Bennett. Fred, could you come up to the front?

I have got a few things I would like to say before handing over a plaque that we have for Fred. I think probably most people here know him. He has been Chair of the Practitioners Advisory Group for seven years, and that covered a time period of three different Commissions. During that time he has given us valuable advice; I say "us" in the long term, on behalf of the Commission, on behalf of the Advisory Group. But also he has been very helpful working with other parts of interested groups, helping us

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arrive at the best resolution of some of these difficult problems that we deal with, with the guidelines, and searching for solutions to the problems.

In addition to his work leading the Advisory Group, Fred has an active practice. He has taught criminal law at Catholic University, and has been the Federal Public Defender for the District of Maryland. And now he is in active practice in Federal criminal law.

I would like to read the resolution we have to recognize his service, and it is in more permanent form over there that you will get to hold in a minute. It is so heavy, I didn't want to get it up here.

This is a resolution in recognition of the outstanding contribution by Fred W. Bennett as Chairman of the Practitioners Advisory Group. United States Sentencing Commission has unanimously approved the following resolution:

Whereas, United States Sentencing Commission recognizes with respect and admiration that Fred W. Bennett has served with distinction as Chairman of the Practitioners Advisory Group

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from 1993 to 2000, during the tenure of three different Chairs and Commissions; and

Whereas, Fred W. Bennett merits particular recognition because he has served the Commission, the defense bar, and the public at large with a deep sense of responsibility and commitment to the cause of justice;

Be it resolved that the United States Sentencing Commission honors Fred W. Bennett on the relinquishment of his position as Chairman of the Practitioners Advisory Group. His colleagues and the members of this Commission will miss his dogged energy and enthusiasm. We wish him continuing success in all his future endeavors.

And it is further resolved that this resolution be made a permanent part of the Commission record, and that it be suitable inscribed and be given to Fred W. Bennett as a memento of the high regard and esteem in which he is held by his colleagues and friends.

And this is done at the City of Washington this 23rd day of March in the year 2000.

And a very nice looking plaque, I think.

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MR. BENNETT: Yes, it is. Thank you very much.

[Applause.]

MR. BENNETT: I appreciate this very much, Judge, and the rest of the Commissioners. It has been truly a labor of love. It has actually been, I have been active here with the Commission since its inception in 1987, so it really spans 13 years, 3 Chairpersons, and at least I would say 18 to 21 Commissioners, depending on the turnover rate.

And the defense bar around the country, and PAG in particular, are extremely appreciative of the ear that we have had of the Commission, of the input that we have had of our efforts, in effect, to give you the defense perspective in regard to the ebb and flow of the guidelines and the tough decisions that you have had to make.

I know when the guidelines first came out, that a lot of the Federal Judges, especially at the District Court level, were very critical in terms of having their discretion taken away, but I think things have come around at this point that even the District Court Judges around the country recognize the valuable contributions of the Sentencing Commission to

the administration of criminal justice. The work that you do is critical in terms of setting the guidelines and also assisting in Congress.

And I want to thank you very much for every effort that I have had to contribute to the Commission.

CHAIR MURPHY: Well, thank you again. Don't go away. We want to--

MR. BENNETT: I will continue to stay active. I just thought it was time for a change, and get some new blood in.

[Applause.]

CHAIR MURPHY: I would like to say just a moment about the way we are going to proceed. I hope you can hear me. Then I will sit down.

I want to say again how much we appreciate the interest that you have shown by your presence here, and also by the written submissions that have been given. Unfortunately, we have so much work on our agenda when we get to Washington every time, that each thing we do seems to have to be tightly scheduled, and we are moving up against the deadline for this amendment cycle and for the temporary emergency

authority Congress has given us, some of which has to be exercised by April 6th.

So we wish we had a whole day to spend with all of you, but we don't. We only have this morning, and therefore I think Mike Courlander has talked with you about the needs of moving along. And I would like to say that we are going to have to hold to the time schedule, and depending upon how much time you take for your presentations, there may or may not be opportunity for us to ask questions.

But we think that it would be helpful for us, if any Commissioner has a question to ask as you begin your presentation or in the course of it, just the way judges may interrupt when they are really interested, if any of you go to the Supreme Court and see that, if judges are really interested in the subject matter and there is some problem or some question, the most direct way to get help or to understand your position may be to jump in with a question. So if that is done, please recognize that it is because we value your input that we are asking the questions, because we want to find out what help you can give us in that

particular area.

So I will be having to keep moving the panels through because of the time pressures, but be assured that we have read the written submissions. This group of Commissioners is amazing. I mean they are really working hard, they read everything ahead of time.

And so I won't say any more. We will be able to start with the first panel, which is going to deal with methamphetamine and also speak on the subject of crack. And that is Julie Stewart, President of Families Against Mandatory Minimums, and William Boman and Dr. Arthur Curry, also members of that same group.

MS. STEWART: Good morning, and thank you very much for the opportunity to speak to you. We are very excited to see all of you here, seven new faces. You haven't heard our shtick before--so I hope it is interesting--with the exception of John Steer. I am not sure if it is really an honor to be the first person to speak today, or whether I am the guinea pig to see how tough you will all be, and the rest of the people may leave after that.

But some of you may know what Families Against Mandatory Minimums is, and those of you who don't, I will fill you in briefly. We are a nonprofit, nonpartisan organization that is focused on educating the public and the policy-makers about sentencing policy, and we advocate for its reform, specifically the reform of mandatory minimum sentences but also sometimes the guidelines, at both the State and the Federal level.

The costs that we sort of elucidate are not just tax dollars but also the unwarranted sentencing disparity that we see, the disproportionate sentences, and the transfer of the power of sentencing from the judiciary to the prosection.

We have about 18,000 members across the country, two of whom are sitting on either side of me. We have 30 chapters, also run by volunteers, in different States.

I started this organization in 1991 after my brother Jeff was arrested for growing marijuana and received a five-year Federal prison sentence. He was sentenced in the State of Washington by Judge McNichols, and I was stunned when Judge McNichols said at sentencing he did not have the ability to

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give my brother the sentence he thought was appropriate because his hands were tied by mandatory minimum sentences. I knew nothing about it prior to that time. So his concession, really, was what motivated me to quit my job at the CATO Institute and start this organization back in 1991. During our nine years of existence, we have been very much of an ally of the Commission's. We have worked closely with other Commissioners, and we have been thrilled that the Commission has taken the position of opposing mandatory minimum sentences, so eloquently put in the 1991 report. But we support the guidelines, not just because they are the lesser of two sentencing evils but because we actually believe in the attempts to reduce the disparity in sentencing across the country and among like defendants. But we are concerned about the long term health of the Commission, because we think that it really depends on how much Congress lets you do your job.

And as you all know, the mandate of this Commission is not only to establish sentencing policies and practices but to inform Congress, both as a resource and to advise and assist

them in making crime policy. So, in other words, it is to give Congress information, not the other way around, which is what seems to have been happening in the last few years. Congress likes to tell you what to do.

But we really hope that you don't wait for Congress to tell you what to do, but of course take the lead instead, because Congress, as you all well know, doesn't understand the fine points or don't understand the fine points of sentencing. They are much more responding to it from a political perspective, and absolutely with little regard for the thousands of lives that their policies affect.

So in some ways I would argue that as a result of the congressional interference in the last five years or so, this sentencing system is really broken, and that I think that you all have an opportunity to help fix it and turn it around. I would argue that it is broken because we hear too often that judges, defense attorneys and even prosecutors are manipulating the system to get around these highly intolerable sentences, and instead end up with something that is just moderately intolerable. That spells trouble.

That spells that the system has no effect.

So I really am excited by the opportunity that you seven members have to take back sentencing policy, basically, both through your public pronouncements and your private conversations with congressional staff and the Members of Congress themselves, as well as with the Justice Department. And I know from the rumor mill that you already have been meeting with Members of Congress and their staff, and I am delighted that that process is starting to take place.

Past Commissioners and Commissions have actually done a very good job of taking the lead and setting precedents, at the same time that they have also been sort of whipped by Congress, there have been bright shining lights when they have done bold things that basically did what this Commission is set out to do.

For instance, in 1991 when they responded to a congressional directive to do a report on mandatory minimums, they did an excellent report, and it very clearly laid out the problems with mandatory minimums in relations to the guidelines. In 1995 the crack report was also very powerful. It didn't

come to any firm conclusion, but it did an excellent job of researching the information and certainly making clear that crack sentences are ridiculously out of line.

In 1993 and '95 the Commission uncoupled the LSD and the marijuana sentences from the statutes, which I think was remarkably--well, which was absolutely the right thing to do, and we fully and strongly supported it. In 1994, Judge Wilkins, who of course then was the Chair, and prior to that, in '93 and '94, he was a strong advocate for a safety valve, a statutory safety valve, and was really instrumental in helping get that through Congress.

And of course in 1995 the crack recommendation to the Congress, as well as to the guideline amendment, was very bold, and I believe history will prove that the Commission was right, especially in the face of the so-called solution that we are looking at today. Senator Abraham's amendment to raise cocaine penalties is absolutely wrong. And also in '95 the Commission tried very hard to rationalize the money laundering guidelines, and failed mostly, as I understand it, because the Department of Justice urged Congress to

oppose it.

So I am just pointing out that in fact there is historical precedent for this Commission to take a strong, bold position, and I think that you already know that but I urge you just to continue on that path. And you have the first opportunity to do that right now, before May 1st, by opposing the Methamphetamine Amendment Number 4.

And the written remarks that we have submitted, which obviously are not what I am reading, but well spell out our arguments against the methamphetamine amendment, largely--I mean, it strikes me first of all the because there is no directive from Congress to do anything, I am not sure why you are doing it. The five gram, five year statutory construction is the same one that this Commission opposes for crack cocaine.

So I hope that you will in fact avoid making those penalties worse. You will hear from Bill Boman on my right how stiff methamphetamine penalties already are.

So I know that you have read, because I was just told that by the Commission, our testimony that our general counsel,

Tyler Dodd, put together and did very eloquently lay out what is wrong with the methamphetamine amendment, so please seriously take that into consideration. And I just, again, hope that this will be the first step in your leading sentencing policy.

And I realize you don't operate in a vacuum and that Congress wields a heavy club over your heads. But, on the other hand, your mandate is to establish sentencing policy, and I think that if you are willing to take the risk to do the right thing, that you will in fact engender respect from the Congress and again put this Commission on the track that it should be, which is the sentencing body of this United States.

Thank you.

CHAIR MURPHY: Mr. Boman?

MR. BOMAN: Thank you, ma'am. Good morning, members of this Sentencing Commission. This is my first rodeo before you. My name is Bill Boman. I am from Houston, Texas, and I want to thank you for this opportunity to testify before you today about an issue that is very close to my heart.

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Although I admit I am no expert in sentencing matters, but I am an expert in loving my family, even when they make a mistake. I am here because of my niece, Terri Christine Taylor, who at age 19 became entangled in a methamphetamine conspiracy that eventually cost her 19 years and 7 months of her young life. She has already served 10 years in Federal prison for the minor role that she had in this offense. I am here today because I believe her sentence is far too long for such little involvement, and that the sentencing guidelines you are charged with to administer should be reformed so that low-level offenders like my niece are not sentenced to "kingpin" time.

I would like to tell you a little about myself. I am an owner of Gulf Coast Delivery Service in Houston, which is an independently owned little trucking company, and I have been in business with this company since 1986 and have worked hard to achieve the American dream by building my business to support my family.

I have been married to my wife Norma for 47 years, and I have three children. My niece Chrissy and I have been

extremely close since she was 15 years old, when her mother moved from Florida back to Texas. She was going through some typical turbulent teenage years, and I tried very hard to steer her in the right direction by giving her a job at my company, a place to stay, with unconditional love and support. Although she did things I disapproved of, including dating men twice her age, I always tried to show her that she had other options and a brighter future than she believed she had.

At age 16 she began experimenting with drugs and quickly became addicted. Between ages 17 and 18 she was arrested three times for drug use, and seemed to be spiraling out of control. I tried to get her drug treatment, and told her I would pay her tuition to beauty school or any other endeavor that she pursued, and continue to furnish her a place to live and keep her job open, if she would just participate in some educational programs.

About that time she became involved with a 37-year-old man. Of course I disapproved of this, but I had no choice of her boyfriends. I thought this was yet another stupid teenage

decision that would pass. In retrospect, I see how wrong I was.

Her boyfriend was very heavy into use and production of methamphetamines. Chrissy's addiction escalated and she became more and more distant. There were times when we didn't even know her whereabouts. It was very hard for me to watch her young life slowly dissolve before my eyes. And I knew her boyfriend was no good for her, but Chrissy was 18, and in the eyes of the law she was an adult, so I had to resign myself to the fact that despite my best intentions she was going to pursue a life of her own choosing.

That is where the nightmare really began. Her boyfriend talked her into purchasing chemicals that could be used to make methamphetamines. He reasoned that the chemicals were completely legal, that they could not get her in trouble, and that it was an easy way to make a buck. She believed him, and made the trip to Mobile, Alabama from Houston, where she entered the store and picked up an order of chemicals, went back to Houston and resumed her life again, working in my company.

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And several months later, after picking up an easy buck, she returned to Mobile and picked up another order of chemicals. When she got to the store, she found out that she didn't--or the DEA agent there posing as a salesman told her she didn't have enough money to pay for the order, and he systematically took certain amounts of the chemicals so the formula would be intact. He was actually a DEA agent operating a reverse sting at the chemical store.

A few hours later, Chrissy and her boyfriend were pulled over on their way back to Houston, and the chemicals were found. There was no evidence of equipment pointing to drug manufacture; however, Chrissy and her boyfriend were charged with conspiracy to manufacture methamphetamines.

If I had known then what I know now about the justice system, I would have forced her to plead guilty to these charges. How naive I was to think that the facts of her case would be considered. She believed she was innocent because the chemicals were legal, and decided to take her case to trial. The prosecutor asked her to provide substantial assistance to the government for a sentence

reduction, but she had no information to trade.

I well remember my confidence in the greatest justice system in the world, and my family felt secure in the fact that the punishment that she would receive would fit the crime that she did. Indeed, we were thankful in some ways that she received the wake-up call that she surely needed.

I will never forget the day of her sentencing. I sat in the court, surrounded by my family, while Chrissy stood before the judge and was sentenced to 19 years and 7 months in the Federal penitentiary. The judge explained that there is no parole, that she would have to serve her entire sentence.

It seemed like this young girl shrank before my eyes as I watched her being led away in handcuffs and chains.

I thought I was dreaming. Then I got irritated, I got mad, thought I was going to have a heart attack, and I set myself on the path of trying to do everything I could to see that justice was properly served.

Don't misunderstand me, gentlemen and lady. She needed to be punished. She needed some help to free herself from her self-destructive behavior. But almost 20 years in prison?

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This country doesn't even sentence rapists and murderers that severely. What I saw in the courtroom that day, and what I have learned about mandatory minimum sentencing and sentencing guidelines since, has made me doubt everything that I once cherished about the American justice system. These days, sentencing reform seems like it is nobody's problem. Congress refuses to even look at mandatory minimums for fear of being labeled "soft on crime." The Sentencing Commission in past years issued indictments of conflicts caused by mandatory sentencing and sentencing guidelines, and yet nothing substantial is done to address what is happening to tens of thousands of Crissys across the country each day.

Since I became involved in FAMM, at least five reports on the ineffectiveness of mandatory minimum sentences have been released, and all fell by the wayside. One begins to wonder, in this democracy of ours, what a person has to do to see that bad policies are addressed and reformed for the good of the entire system.

I tell you this because a substantial part of Chrissy's

sentence is guideline time, but also because you have the power and the authority to shape our nation's discussion of sentencing. You have the ability to revive discussions on the problems created by mandatory sentences and their impact on the sentencing guidelines. You have the power to refuse to implement politically expedient sentencing increases for methamphetamine and all other drugs. You have the power to declare a moratorium on sentencing increases for drug offenses under the guidelines until the conflict between mandatory minimums and the guidelines is resolved. You can take the bull by the horns and foster real debate on these issues instead of silence.

The question I pose to you today is, will you use your power to better our sentencing system, or will you sit by and watch 1,000, 10,000, 100,000 non-violent, low-level drug offenders sent to prison to serve unjust long sentences that you have a hand in creating?

The year 2000 marks the tenth year that this teenager has been in prison. In just a decade, we have seen our world revolutionized by technology, improved by a booming economy.

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While we have been enjoying the fruits of this prosperity, Chrissy has also seen her world change. She has watched the number of inmates double, triple, quadruple in her prison. She has seen Pell grants and educational programs eliminated. She has been stripped of the few perks given to prisoners by Congress. She has seen prisoners lose all hope of reintegrating into society.

We have a different country now, and Chrissy is a different person. I too am a different person, and I don't expect anyone to change Chrissy's situation. But I believe that the universe is on the side of justice, and that we can change our system if we have the strength and character to try.

You are new Commissioners, and as such, sentencing is your problem. I urge you to leave your mark on the administration of justice by becoming the most vocal and active Sentencing Commission in the history of the United States.

I thank you for listening to me.

CHAIR MURPHY: Thank you, Mr. Boman.

We want to get you in, too, Dr. Curry.

DR. CURRY: Thank you. Madam Chair, members of the Commission, first of all let me thank you for the opportunity to testify before you this morning.

I consider it extremely significant that you understand first why I am not here. It is not my intent to point fingers or to criticize judges or prosecutors, nor to mock the judiciary system of our country. My sole purpose today is to present my son's case to you as an example of why we must rethink the 1986 Anti-Drug Abuse Act in general, and specifically the disparity that exists between powder and crack cocaine sentencing laws.

In passing this act, we have forced prosecutors to demonstrate their toughness on drugs and drug offenders by the number of convictions they get. This has meant, in many cases, referring cases normally heard in State courts to Federal courts; changing trials to a more favorable location for conviction; and using minor participants in an undercover capacity relative to other criminal investigation.

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I must admit to you, however, that I am frustrated and sometimes angered by a democratic system that I defended and promoted as a soldier in Vietnam, as an educator, as a parent, and as a black male in America. I was raised to believe that this system worked for everyone, regardless of race, gender, age or religion. Now, for the first time in my life, when I need to use this system most, I have found it almost impossible to have any elected official to even listen.

My son, Derrick Curry, was arrested December 5, 1990, at the age of 19, and charged with one count of possession with intent to distribute crack cocaine and one count of conspiracy to distribute crack cocaine. He is the youngest of three children and my only son. His oldest sister is an accountant. His other sister is a recent graduate of Carnegie Mellon in Pittsburgh, and now is a human resources director for a very, very large company in Denver, Colorado. A complete background check was done by the FBI, and no evidence was found to support any contention that he was a minor drug dealer. In fact, the prosecutor indicated early

in the game that he was a minor participant and really had no information to give. However, they were willing to offer him the opportunity to plead guilty for 15 years in exchange and him going undercover relative to other criminal investigations in the Washington metropolitan area. Derrick turned down that plea agreement, and as a result went to trial. He was therefore convicted of three of the five counts that he was charged with.

I think it is important that you also know that he was indeed a minor participant. He owned no automobile. He had no jewelry. He had no money. He, like many other college students, borrowed money on a regular basis from his mother and myself, to get gas to get to and from college. On the other hand, despite having an IQ of 80, he was in his second year at Prince George's County Community College, working toward, of all things, a degree in criminal justice. He wanted to be a State Trooper.

The FBI had concluded an investigation involving 28 individuals over a five-year period. By the prosecutors' own records, my son was a minor participant who was only

involved in that investigation for six months.

During the ensuing months, he was offered the opportunity of a plea, and as I said before, 15 years, and especially going undercover. He found it just something that he could not do. I must say to you as a parent I thought long and hard about what the repercussions could be relative to going undercover, and maybe it was better for him to go to prison. At least at that particular time, I felt that he would be safe.

My son was sentenced on October 1, 1993, to 19 years 7 months without parole. However, he would have received a 10 year sentence at best if it had been powder cocaine.

I am reminded of an article that appeared in the Washington Post just after my son was convicted and sentenced. It was by a Federal prosecutor by the name of Jay Apperson. He said in his testimony that in many cases there are subjective practices that exist when prosecutors decide who to charge, who to hold accountable for certain amounts of drugs, or whether to provide substantial assistance or cooperation.

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According to this article, a woman was sentenced to 10 years in Federal prison for her involvement in a drug conspiracy. After deciding later to cooperate, she served only 18 months. My question, therefore, is: Does fairness and justice and equality of the law depend solely on the prosecutor that one receives?

I must admit to you that I too sat in front of the TV set several years ago and watched then former President Bush address the nation on the drug problem. Without the facts, I too believed that crack was the worst evil to confront our nation, that something had to be done.

Now we have the facts, and something still must be done. With the facts, how can the penalty for crack cocaine be 100 times greater than that of powder cocaine? Without powder cocaine, there is no crack cocaine.

I am hopeful that you at the new Commission will wipe the slate clean and finally resolve the nagging and unjust disparity that exists between powder and crack cocaine. In addition, I hope that your solution will be retroactive, not only to aid my son but to rebuild America's confidence in

our judiciary system.

I knew the son that I sent to Federal prison. I was worried and extremely concerned about what I would receive back after 19 years and 7 months. I am pleased to tell you that he has finished every course at the Cumberland institution that is available to him, both spiritually and educationally. He has changed his major and is within three courses of receiving his degree. For that, I am proud.

But I beg you, please let's stop the madness. Please find ways for non-violent offenders to take advantage of the safety valve that already exists and to eliminate the disparity between crack and powder cocaine. Thank you for your attention.

CHAIR MURPHY: Thank you very much, Dr. Curry, and Ms. Stewart, for your remarks and the good panel that you have brought to give very important testimony.

MS. STEWART: Thank you.

CHAIR MURPHY: And we will keep it in mind. Thank you very much.

MS. STEWART: Thank you.

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CHAIR MURPHY: And you know we are going to be here beyond just this amendment cycle, so--

MS. STEWART: Don't worry, you will see us again.

CHAIR MURPHY: The next panel is on the NET Act: Bob Kruger, Vice President of Enforcement, Business Software Alliance, and David Quam, who is the General Counsel for International AntiCounterfeiting Coalition. Mr. Kruger?

MR. KRUGER: Good morning, Judge Murphy, other members of the Commission. My name is Robert Kruger. I am Vice President of Enforcement at the Business Software Alliance. That is a trade association whose members include the leading publishers of productivity software.

I am honored to appear before you this morning to testify on behalf of BSA and four other associations whose members share a common interest in protecting copyrighted work from theft: the Interactive Digital Software Association, whose members publish entertainment software; the Motion Picture Association of America, whose members produce films; the Recording Industry Association of America, whose members produce sound recordings, records, CDs and audio tapes; and

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the Software and Information Industry Association, which is the principal trade association for the software and digital content industry.

As you can see, Judge Murphy, there may be only one of me sitting here, but there are a lot of people whose interests and whose livelihood are represented by my testimony today. They include programmers and song writers and actors and artists and technicians and engineers, and people who run shops who sell these various products. They also include music lovers and film buffs and really anyone who uses a computer.

All these people and many others have benefited from the explosion in creative output by the copyright community, especially over the past decade or so. These programs that the software industry has developed have, everybody agrees, revolutionized our lives. The movies and the songs have entertained us and enriched us. Together, these products have made wonderful contributions to the U.S. economy. It is no exaggeration to say that the combined copyrighted industries are America's most successful competitor in the

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global marketplace.

But these benefits have been put at risk by the increasing incidence and scope of intellectual property crime. Piracy has long plagued the copyright community--we are kind of used to it now--depriving creators of a return on their investment and stifling growth. In recent years, however, the problem has grown much more severe. As technological advances have dramatically increased the ability to reproduce and distribute copyrighted work, it has really become open season on the copyright industry.

To give you two examples of that, physical distribution channels have been invaded by sophisticated and often dangerous counterfeiting operations. On the internet, auction sites, pirate web sites and pirate groups have distributed unauthorized copies of copyrighted works on a scale that threatens to dwarf the estimated $20 billion in revenues lost to piracy by so-called traditional means every year.

Judge Murphy, much has been done to address this problem through education and technological measures and civil

enforcement and other means. However, there is now a public policy consensus, reflected in the NET Act directive, that the deterrence available and only available through criminal prosecution is an essential component of an effective solution. Would-be infringers need to perceive and understand that meaningful sanctions will be imposed upon those who engage in activities that rise to the level of criminal violations of the law.

Our associations, the ones I represent today, have tried to be as helpful as possible as first Congress and now the Commission have sought our input on enhancing the guidelines. We have testified. We have submitted written comments, which I hope is a part of the record, in at least two letters commenting on options under consideration.

At this time I thought--

CHAIR MURPHY: They are a part of the record.

MR. KRUGER: They are? Thank you.

At this time I thought, rather than offer further specific comments on specific provisions, what I will do is just briefly summarize the principles which we believe underlie

both the policy objectives at work here and the important institutional considerations that of course you must consider when you make any change in the guidelines.

First, we believe that the retail price of the infringed-upon article should be the basis for determining the infringement amount, and we have spelled out in some detail why we think that is true. But let me just make one comment which I think illustrates the point, and that is with respect to these NET Act cases which in many ways gave rise to this process in the first place.

These are typically cases where people are out there using the internet to distribute these goods without any financial benefit or commercial advantage. In other words, they are in a sense eccentric philanthropists. They are giving away our product for free. They are not making money, at least not directly, from doing so, but in the course of doing so they are often displacing a fair percentage of our market. From the standpoint of the victim, it really doesn't matter whether they are making money or not. They are committing theft, or at least enabling other people to commit theft,

and under a valuation methodology that looked at the price of the infringing article, there would be no valuation at all in those situations.

CHAIR MURPHY: You know, I think we are very well aware, even before we got your materials, when we went through the confirmation process, about the concerns that you are talking about now. And I don't know whether you are going to address the particular options that we are looking at or some of the details, because I think that would be very helpful to us. Because we are faced with dealing with the kind of thing you are talking about, and I think we understand that those are big problems, but then the guidelines, what are we going to do about different, very different kinds of cases?

COMMISSIONER CASTILLO: Can, I Madam Chairman?

CHAIR MURPHY: Yes.

COMMISSIONER CASTILLO: In particular, we would like to know, why have you switched your support from Option 3 to Option 4, and if you could tell us anything you can about that.

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MR. KRUGER: Well, actually I will be happy to respond to questions now, and put my testimony aside and return to it if time permits or if we miss any of the issues.

Actually, I don't think we perceive there to be a dramatic difference in the way in which Option 3 and Option 4 would affect the copyright community. We think both of those are certainly an improvement over the status quo. I believe that we felt that Option 4 struck a better balance between the competing interests at stake here.

Now, one of the problems I am having is that to some extent this has become a little bit of a moving target for us, because we had commented first on the options that were published in the Federal Register. Then we were provided with a paper by the Commission staff in February, and we provided a second set of comments on those options. And now I understand, in fact, that there has been another set of options developed which in all candor we haven't seen, or at least I haven't seen.

So, you know, I wouldn't want to misstate the issue in terms of my response to your question. So in terms of specific

aspects of each of those options, I think we felt that the special offense characteristics under Option 3, old Option 3, and under new Option 4, both seem to me to satisfy our basic interests.

CHAIR MURPHY: And I would assure you we are not trying to be difficult as we are making these modifications, but it is just as we are looking into it.

MR. KRUGER: It is the process.

CHAIR MURPHY: Yes.

COMMISSIONER SESSIONS: And I think some of the modifications were as a result of input that you have given to the staff.

MR. KRUGER: Well, we very much welcomed the opportunity to work with the staff and with the Commission on this issue, we think as victims, as direct victims of intellectual property crime.

COMMISSIONER SESSIONS: So is it fair to say the thrust of your testimony is that you don't object to Option 3 or Option 4? I mean, that there is no, at least in your view with regards to copyright laws, there is no substantive

difference between those two?

MR. KRUGER: I think Option 3 as presented in the Federal Register, which we originally supported subject to minor modifications, which as you note, Judge Sessions, have in some instances actually been implemented, we would continue to support. And Option 4, though, in the second paper we think is actually an improvement in some respects and would also have our support.

COMMISSIONER SESSIONS: In your statement earlier you were talking about how someone who does not benefit financially from this crime still should be treated--at least I assume that you are suggesting this--still should be treated equally with someone who perhaps has benefited, because the impact upon the victim is the same.

MR. KRUGER: It could very well be the same.

COMMISSIONER SESSIONS: So is your position that there should not be any kind of adjustment for someone who has not gained anything commercially, in light of the fact that we are also dealing with criminal culpability here, making people criminally responsible for what they have done?

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MR. KRUGER: Certainly, again, Judge Sessions, from the standpoint of the victim, it matters not a lot whether the perpetrator is actually benefiting financially or whether he isn't, because the loss of the market displacement or the injury can in every instance still be the same. I think we acknowledge, though, that under I believe new Option 4, there is in fact a special offense characteristic that would allow for a two-level reduction in, among other circumstances, where the individual was not profiting from the infringement, and we would be willing to support that option even with that adjustment.

COMMISSIONER SESSIONS: And how about an upward adjustment for those persons who are involved in large-scale criminal enterprise and earning large quantities of money? Would you then suggest that that is not appropriate, or would you suggest that that is appropriate?

MR. KELLNER: Well, actually I think if there was one new area that wasn't reflected by the options that have been presented, it is the operation of large-scale criminal enterprises. There are in fact organized crime elements

that are recognizing that this is the place to go. The profit margins are really nice, if you don't have to pay for the research and development. In addition to that, it is a much safer enterprise than a lot of other forms of criminal activity, and there is much less risk of being criminally prosecuted, and the reason we are here, there is very little risk of going to jail.

So we actually see right now, and we believe we are going to see a migration of organized crime elements into this area. And we think the one way in which the options that have been presented actually are deficient is, they don't seem to empower the courts to deal with that situation.

COMMISSIONER O'NEILL: It seems that at least you are saying you wouldn't oppose a two-level reduction for someone who is not doing it specifically for pecuniary gain.

MR. KRUGER: We thought Option 4, at least the Option 4 that I am commenting on, dealt with that in an elegant way, because what I think it did was, it set out a series of considerations that might come into play, that might warrant a two-level reduction. That was one of them. We felt that,

you know, sort of seeing it in that manner, that would be--

COMMISSIONER O'NEILL: So you are at least willing to recognize the fact that, despite the fact that the pecuniary harm to the victim may be the same, that the idea of culpability of the offender, that something ought to be taken into account or at least might be taken into account on that basis.

MR. KRUGER: We certainly understand that the Commission has to consider a range of factors when it arrives at a guideline, and it is not solely a question of the injury to the victim, and to the extent that the criminal culpability varies based on whether or not the individual was profiting financially or not, and I think that would be a factor.

Let me mention one thing, though. Even on these sites that are mentioned, these so-called NET Act web sites, for example, there is one being operated, or has been, by a group called Pirates With Attitude, and they basically have a web site from which you can go and download copies of our products. And in many instances now these sites are not, even though they give away the software for free, they are

not exactly not benefiting financially. Many of them allow banner advertising on their sites, and the more popular the site, the more money they get from the advertisers. So there is an indirect commercial benefit.

COMMISSIONER SESSIONS: Pirates With Attitude? Well, so then if you agree that it should be, that the criminal culpability of the individual defendant should be a factor here, and there should be an adjustment of two levels if it was a non-commercial situation, would you also agree that perhaps there should be a provision for an upward and a downward departure, giving the courts some discretion based upon the individual District Court judge's assessment of harm and also culpability?

MR. KRUGER: I think that takes you off into a different area, Your Honor. Actually, I think you can both amend the guidelines to allow for situations that you identify, to affect the ultimate sentence, but we believe that the guideline that you come up with needs to be certain and predictable in every instance, and that open-ended departure provisions or qualifiers like "usually" will be at odds with

the objective of certainty and predictability.

This is a unique area, we think, because we think that the opportunity here for the deterrent effect of guidelines to have an impact is probably greater or as great as it is in any other area of the law. Patterns of behavior, about how to behave on the internet or with digital products generally, are just forming right now. We think that if you send out a clear message, it may not require a lot of prosecution, that if you send out a clear message that if you get prosecuted, you will in fact be subject to meaningful sentencing, that will resonate among the would-be infringing community.

COMMISSIONER KENDALL: But, see, here is the problem with that. You say that, but that is the same argument that was made about crack, and the reality is, the 19-year-old that is doing it doesn't even know we exist. They don't even know we exist.

So when you are setting out organized crime, yes, but the fear that you have is, if you don't have some mechanism, and help us out here, departure was one way, up and down, some

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mechanism

--were you here for the last panel?--some mechanism that prevents, in intellectual property, creating Chrissy's and Derrick's of the world. I don't know if I am articulating--

MR. KRUGER: No, I think you are, and--

COMMISSIONER O'NEILL: Part of the difficulty, I think part of the concern here, is that I mean I think we all see sort of the headline of the 19-year-old college freshman geek who uploads an $89 copy of Windows onto his web site, and people from all over the world who probably would actually buy Windows if they could, can download a perfect copy of Windows. So at $89 times a million people, suddenly a 19-year-old college geek, based upon the fraud guideline tables, is going to go to prison for the next 30 years. I think that is one of the concerns that we have, or that has been expressed at least in our deliberations as a Commission. How do we address that sort of a problem, setting aside the idea of the organized crime?

CHAIR MURPHY: I just want to be sure, we will let Mr. Kruger respond, but then I want to be sure we give Mr. Quam

some time, too. You can see we are very interested. Did you want to add on?

COMMISSIONER KENDALL: Just adding that there is a trademark question, and that is, what do you do with the $100 knock-off Rolex that there is no way on earth anyone believes that what they are buying is the real McCoy, and then you used the infringed upon value for junky watches that are counterfeits.

COMMISSIONER O'NEILL: And that the person wouldn't possibly buy and sell.

MR. KRUGER: Why don't I let David--

CHAIR MURPHY: I think that is good, and then if you have something--

MR. KRUGER: I will think of an answer.

MR. QUAM: Nice stall. We will take that. Why don't we just start there. We won't bother with testimony. We have been doing this for over three years, and I am reminded that policy in Washington is often a marathon and not a sprint, having come full circle on this issue.

From a trademark standpoint, that is a most difficult case.

What I like about what the Commission and the Commission staff has done over the last three years is, number one, to take into account the nuances of these crimes, including the $100 Rolex or the $50 Rolex. Shoot, I have got Chanel scarves right outside my office building that you can get for $10, that regularly sell for $250, and we are right next to the FBI building. You know, how are we supposed to account for that?

Fortunately, part of the process has been educating exactly what these crimes mean from a broader context, and that is well documented in some of our testimony. I think that Option 4, in allowing for a downward departure, and a recognition by industry that those are very difficult cases and that a downward departure may be warranted where, you know, the consumer certainly is not defrauded in that particular case, is a measured approach that is fair and thoughtful.

A downward departure that is endless or has, you know, no realm of consistency from case to case I think threatens the certainty that prosecutors quite often look for or law

enforcement looks for within the guidelines. And so that two-level departure provision that is in here for, right now it is price or quantity--price or quality--takes that into consideration.

That being said, the IACC and its member companies actually recommended a linking of those two, quality and price, not or price, because quite often it is the two of them together that is the most clear indicator of when you have a counterfeit good. One of the problems we are facing, and this again is an emerging market, is that of the internet. Because, as you said, a consumer who can go to a bazaar or to the street corner right outside my building, can feel that Chanel scarf, can pick it up, knows the price, knows the quality, and pretty much knows what they are getting. However, the person who does that on the web, the picture that is posted is not of a counterfeit good, it is of the real one, usually taken right out of a magazine. Your brick and mortar, your qualities are gone; all they are left with is price.

Price by itself is not necessarily, except at the most

extreme levels, a clear indicator of a product that is counterfeit versus maybe diverted or "gray market" goods or highly discounted for some other actual reason. That is why we say a link between those two may be a clear indicator, and why we are supportive of Option 4 and this downward departure.

Let me add real quickly, one of the reasons--it was asked why move from 3 to 4, and the IACC came out and supported, has supported Option 4 as written, and wrote some comments that may have led towards Option 4. Option 3 I am afraid sets out a double citizenship for intellectual property crimes, because when you talk about substantially similar or identical to, you are disproportionately going to affect trademarked goods.

Counterfeit goods, you know, in some cases can easily make a quality difference that, you know, you might be 90 percent of the way there. Well, is that substantially indistinguishable from or identical to? I think you can make a case that is not.

That means that trademarked items or trademark cases will

not be enhanced under Option 3, and therefore they stay at the levels they are. Meanwhile, copyright cases are prosecuted at a different level. I am afraid that that actually would engender a tendency to want to take copyright cases over trademark cases, and right now both are equally as serious problems, as far as what they do to the economy, what they do to the manufacturers, how they undermine investment, let alone how they defraud consumers.

COMMISSIONER KENDALL: But isn't that the nature of the beast, and the problem with linking you two together in this statute? Because I might go buy a 90 percent Louis Vuitton bag, but I am not going to buy a 90 percent get the job done copy of Microsoft Windows. I want the real deal, the one-to-one correspondence. The same if I buy a bootleg recording of Bruce Springsteen, I don't want to hear a guy that sounds kind of like Bruce Springsteen. So it is just the nature of the beast.

MR. QUAM: It may be the nature of the beast, and certainly technology allows for digital copies in the copyright world, virtually an absolute pure recording, a pure copy, something

that you can take off and it may be a one-for-one sale. We have always recognized that that is a difficulty for the trademark industry.

However, does that mean that trademarks, somehow trademark counterfeiting is not as serious as copyright? And I argue that it is absolutely not, and needs to be treated the same. The NET Act didn't make some distinction between copyright and trademark. It said we need to enhance based on retail value and quality--or quantity.

And I think Option 4 does that. It recognizes this trademark program and concern, and staff has done an excellent job over the last three years really listening and understanding the many nuances, as I am sure you all are now very familiar with, of these particular types of cases. They are not easy.

One other issue I have with a possible downward departure that has a lot of discretion, or at least is bottomless, is that it is very difficult in these cases at times, certainly in the civil context we run across this all the time, to measure the amount of loss. Trademark owners in a case, in

saying, "Well, exactly how much did you lose?"--counterfeiters don't keep records. They operate cash businesses. They are highly organized.

How exactly do you come up with that solid number? You can get an economist, but we have had trouble really articulating the complete, the total amount of loss. They are estimates, and they are estimates for a reason. It is one of the reasons Congress provided for statutory damages in those type of cases, because it is so hard to determine. Therefore, you know, what we have here is the retail value, which we believe is the best articulation in all cases as the starting point of what you lose, and are supportive of that downward departure in this case.

CHAIR MURPHY: Just a second. We are just about out of time here, and I will turn to you for your question, but I would like to give each of you sort of a last shot at what you think is the most important message you want to give. I mean, it's very complicated trying to balance all of this.

COMMISSIONER O'NEILL: I have actually got a question hanging out there.

MR. KRUGER: I was going to say, I think the most important thing I could probably say by way of conclusion is to try to respond to at least the questions that are hanging out there, because at least those are obviously of concern to the Commission.

So just one would be following up on what David just said. There are two variables in this equation, of course, when you are calculating the valuation. There is in fact the price, and then there is the quantity.

I think, just to echo what David was saying, it is our view that in many, many instances the quantity of the infringement will be understated, and that will favor the defendant. Because not only don't counterfeiters and pirates keep good business records, when you're talking about downloading from the internet, in many instances you can never retrieve that information, particularly if the pirate has made any effort at all to keep that information a secret.

But in response to the bigger question of, well, gee, you know, we don't want these situations where we are confronted

with having to throw people in jail for great lengths of time, I guess a couple of things on that. First of all, of course there are no mandatory minimums in this area. Secondly, as I understand some of the scenarios that have been spun out by the staff as we have tried to apply these to real world situations, we are tripping over maybe a year, in some cases possibly up to two. We are not talking, in most situations, in the great majority of the cases, about 30-year jail terms or even 10-year jail terms or 5-year jail terms. We are here, in part, to get people to have a prospect of doing a jail term if they are engaging in theft on a commercial scale of intellectual property.

Finally, along those lines, it at least occurs to me that conceptually, you know, if somebody was able to back a truck up to a store that was large enough to download all of, or to obtain from that store, out the back door, all of the copies of these products that they are able to make available and distribute to people over the internet, we might all sit around and say, you know, that person actually deserves a pretty big sentence. Because in that situation,

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he has essentially robbed that store, that publisher, blind. He has destroyed that publisher's market. He committed theft on a scale that was frankly impossible prior to the internet.

So I wouldn't want to rule out the possibility that in some situations, where someone has destroyed somebody's market entirely by making their products available without authorization for free download or distribution over the internet, that person should be punished severely.

MR. QUAM: I will wrap up just by saying that, again, over the three-year process the industry groups and the Commission have come a long way in working together, which is commendable on all sides. You have industry, copyright and trademark coming together on Option 4 and finding that to be a fair and thoughtful resolution to what has been a very long, at times tedious process. Commissioner Steer has been on this since the beginning and has watched this evolution.

COMMISSIONER STEER: I just might say I have gotten tremendously educated. The first time you came to talk to

me and you mentioned counterfeiting, I thought we were talking about currency counterfeiting, and so obviously I have come a long way in learning about this.

MR. QUAM: Yes, I remember that meeting well, and again it sort of feels like coming full circle now. But we are close, and I think the Commission and Commission staff has done a very thoughtful and reasonable job in capturing the nuances in a way that can be applied by prosecutors, can be applied evenly, consistently, and with a sense of certainty through Option No. 4.

And so I would like to commend you and just say, you know, this is a serious problem. The members of our associations are here and have worked it because the deterrent effect or the need for a strong deterrent effect cannot be understated. Civil remedies, the reason you have crimes in these areas is because civil remedies are simply treated as a cost of doing business to these folks. They are highly organized groups.

And we appreciate this opportunity.

CHAIR MURPHY: I have got to ask Judge Sessions if this is

an urgent question, and if so, go ahead.

COMMISSIONER SESSIONS: Yes, it is urgent. It will be fast, and perhaps it can call for a yes or no answer.

You analogized, under the NET Act, the trademark industry and the copyright industry, and you suggested that Congress in passing the NET Act really was making a deliberate effort to protect the trademark industry as well as the copyright industry. We have, at least I have been told in various places that really Congress was concerned with the copyright industry, not necessarily the trademark industry. Is that correct, or am I wrong?

MR. QUAM: The NET Act as a whole was certainly designed to take care of copyright type offenses, the downloading and distribution of products mainly over, obviously, the internet. However, that directive, this particular directive then talks about enhancing.

I have heard from my own sources that that was meant to apply across the board, and I believe that there is a call for it and a need for it to be applied across the board to all intellectual property crimes, not one or the other.

COMMISSIONER SESSIONS: So Congress was in fact directing the legislation toward the copyright industry, but your sources have said that it is--

MR. QUAM: My sources said that this directive that calls for an enhancement of the sentencing is meant to apply to all intellectual property, not just copyrights.

CHAIR MURPHY: You know, I have got an unpleasant task, because unless I keep us moving, we are not going to be able to hear all the panels.

COMMISSIONER SESSIONS: You want to know who the sources are?

COMMISSIONER KENDALL: No, I just want to know if your sources had talked to their sources.

MR. KRUGER: They may be on different sides of the aisle.

CHAIR MURPHY: Mr. Kruger, Mr. Quam, we really appreciate your being here on behalf of your groups, and you can see that we are engaged, and we appreciate your help.

MR. KRUGER: Thank you.

MR. QUAM: Thank you.

CHAIR MURPHY: The next panel is on cellular telephone

cloning and identity theft, and we have Roseanna DeMaria on telephone cloning. She is the Senior Vice President, Business Security, AT&T Wireless Services. We have got Mary Riley on cloning also, Assistant Special Agent in Charge of the United States Secret Service. And on identity theft we have Edward Kitlas, who is Assistant Special Agent in Charge of the Secret Service. And so we will start with Ms. DeMaria.

MS. DeMARIA: Judge Murphy, members of the Commission, thank you for the opportunity, for letting us be heard this morning.

I come to you this morning to ask you to reconsider identity theft, not as a crime as an end in itself, but as the modus operandi of the criminal entrepreneur of the millennium. He or she will use that operandi to erode our constitutional values of property and privacy. It needs to be looked at for a uniform approach in sentencing that sends a message of deterrence and zero tolerance.

To enhance that look at it, I bring with me the lessons learned in the cloning war. I have a number of the scars

with me and they will never leave me. And I bring with me the future, which is now, technological convergence.

The lessons learned in the cloning wars I learned in two places. One was in the Office of the Special Narcotics Prosecutor with The Honorable Sterling Johnson, and I learned it at the hands of the Cali cartel, the most accomplished equivalent of the dot com in the criminal world. They used cloned phones because of the anonymity those phones provided them to ply their trade and to evade the law enforcement. They weren't interested in stealing phone service. They didn't care about other people's identity. They wanted to run away from law enforcement and ply their trade.

When I joined AT&T Wireless, I learned that the industry as well as the legislatures looked at cloning as a theft of services crime; that these folks were stealing phone services. Phone theft had been around forever, and industry figures were rampant. They were in the news. We all read about it. At its height, it accounted for 3.8 percent of the revenue of the wireless phone industry.

Everyone thought it was about stealing service. To be sure, there will always be folks out there stealing phone service. In the beginning, when a service industry opened, whether it was restaurants or credit cards or banks, there was theft of services. That is not what cloning was about and it is not what identity theft is about.

You know, when these cases started to be prosecuted in the Federal Government, thanks to the innovative approach of the Secret Service and DEA, the District Courts were split on whether these cloned phones were at risk devices. Well, let me tell you, from the State perspective, try to argue to a State judge that that cellular phone is a forged instrument. It is not a pretty argument. It doesn't look like a duck, it doesn't quack like a duck. It is a cellular phone, and what was being stolen was the electronic serial number and the mobile ID number. You can't touch it, you can't smell it, you can't feel it. It is not a tangible piece of property.

Well, what it was about was anonymity. We were measuring it wrong. We were looking at it as industry losses. What that

industry loss number tells you is the scope of criminal demand for anonymity, and I suggest to you that the large majority of those criminal users were using it as an approach to ply their trade.

What is the true loss? Well, I learned that where we learn most of our things in the wireless industry, from our customers. We held focus groups, because AT&T Wireless wanted to put out billboards that said to the criminal, "The wireless phone has gotten very sophisticated now. We can track the folks who steal it," and we were concerned that that would scare our customers. When we held focus groups, our customers were outraged that there was an ESN/MIN that belonged to them, that even though they didn't pay for those losses, was being stolen.

I would analogize it to this. Imagine going on vacation, and while you were gone, a large criminal entrepreneur like the Cali cartel came in. They held business. They didn't break through your door. There was no disruption or damage to your property. They conducted business, and they left, secured your premises, and you come back home. You suffered

no monetary damage, but you were invaded. You were the last to know. You didn't even know it happened.

In fact, our customers are always the last to know. When we find it, we take it off of the bill so it doesn't disrupt their services. Their property rights are being invaded. Our notions of constitutional property and privacy are being invaded.

Loss numbers? If that one phone call on a cloned phone is to order a murder or a delivery of drugs, or to warn a confederate that there is a law enforcement officer coming up behind a fellow criminal, what is the loss of that phone call? I would suggest to you that that one phone call has a tremendous loss, and it has nothing to do with the cost of the lost opportunity on that service.

To suggest that loss is relevant in this context is the equivalent of using a tape measure to measure a (inaudible). It is not worthy. The lesson that I take from that is, (inaudible) ESN/MIN numbers, should we consider losses--

CHAIR MURPHY: I think that, you know, we have been studying the submissions and the concerns, and Congress has indicated

concerns to us. We are aware of those, and what we are dealing with now is, well, what is the best way to address this? And are you going to speak to that? Because here again we have limited time, we have got three people, and while it is fine to address the overall concern and you do it in a very striking way, what should we do specifically here, you know?

MS. DeMARIA: I think you have a unique opportunity, Judge Murphy, to look at identity theft for a uniform sentencing approach that is not technology specific. What we are talking about in the Wireless Telephone Protection Act is a technology-specific approach.

That becomes meaningless in the world of the future which involves technological convergence, with the explosion of the internet, with e-commerce, with the coming of the virtual customer, we will morph to a world in telecommunications and broad band where we will never see our customer. It will be anytime, anywhere, voice and data, mobile and fixed. You won't be able to touch it.

Identity theft then expands like a toxic gas to fill the

container of that technological opportunity. I think if identity theft were studied in that context, you would be able to put together a grid of factors that could be calculated in terms of its true impact, not only to the big risks that are currently existing in technological-specific crimes like you have here but in the context of the risk to the future. If customers do not have confidence in the system, they won't empower it, and then the world of on-line banking, on-line trading, e-commerce, the world of technological convergence and all the promise and value it brings to the American consumer--

COMMISSIONER JOHNSON: Let me say first, nice to see you again. I have fond memories of our work together. But these options we have to consider, are you saying that you favor none of these options?

MS. DeMARIA: No, Your Honor. We endorse Option 3, and the reason we endorse Option 3 is, it recognizes the nexus between the Identity Theft Act and the Wireless Telephone Protection Act, which I believe was its intent. It gives a broad definition of access divides, and it increases law.

What I am suggesting to you, it is not enough. The criminal personality moves at the speed of internet crime. I think if we go with the limited approach here, we are not sending the necessary message. I think the changing criminal frontier demands a re-look at this and a uniform sentencing approach with gradations across all crimes. We need to address this. I think our constitutional values mandate it, and I think the American consumer--

COMMISSIONER JOHNSON: So from the industry's point of view, Option 3 is a first step?

MS. DeMARIA: Option 3, yes.

COMMISSIONER KENDALL: One other question, and you can address it. I am a little surprised to hear an AT&T Wireless person say that the greater harm is the criminal using a cloned phone, rather than the loss that occurs from the usage of that phone.

MS. DeMARIA: That's fair.

COMMISSIONER KENDALL: Is that fair? One thing we talked about, although staff didn't address specific language for it but it has been discussed, is a general enhancement for

use of a cloned phone in any criminal activity, and that would be maybe an adjustment in Chapter 3, just like to get points for other specific conduct across a broad spectrum of offenses. What would be your comment with regard to that? I assume you are supportive of that?

MS. DeMARIA: Enthusiastically. We have supported that in a number of State legislative initiatives. But again, the proper math is, we are talking about the phone. The phone will morph in the very near future into your connection to the internet, your connection to the bank. I think you have to move away from the clone-specific approach and think about it in the context of technological conversion.

COMMISSIONER KENDALL: To what?

MS. DeMARIA: Just briefly, the phone that gives you the internet, that also reads bar codes in supermarkets so that you can indicate what you want to the cashier. The broad definition of access device that is endorsed by Option 3, I would suggest that you stop talking about ESN/MIN. I think we have defined an ESN/MIN as an access device. Broaden it to meet the speed of technology.

CHAIR MURPHY: I would like to move on, and we may be able to get back with some questions with you, Ms. DeMaria. We really appreciate your presence here, but I would like to get to the Secret Service.

COMMISSIONER JOHNSON: I just want to say one thing.

CHAIR MURPHY: All right, Judge Johnson.

COMMISSIONER JOHNSON: Ms. DeMaria is one of the best prosecutors I ever had. You can order a transcript.

CHAIR MURPHY: Ms. Riley, you are next.

MS. RILEY: Good morning. Thank you. I appreciate the opportunity to address this phase of the process to make amendments to 1029. As an agent involved in these offenses for the last 13 years, I have been very close to this issue throughout, and now serving at our headquarters, have the opportunity to review these cases as they come in throughout our 165 field offices.

One of the top concerns we had in working on the drafting that occurred as a joint initiative between industry and law enforcement in this case was the issue of the source of the types of fraud that were occurring, and that is plainly

adopted into at least Option 2, where a two-level increase is identified when we identify people with device-making equipment itself.

A goal of the average law enforcement officer out there is not just to arrest somebody for committing an offense, but to arrest the person who is back at the source of that offense. When we grab somebody that either has counterfeit credit cards or stolen access devices in any manner, whether it is related to wireless telephones or access devices, our goal is not to stop with that first arrest. It is to get back to the person who is originally stealing the information or originally has the equipment that is providing for that type of fraud.

CHAIR MURPHY: You feel that is not addressed in Option 3?

MS. RILEY: Actually, what we would like to support, and we do see it in Option 2 and in Option 3, is to stay with the enhancement for the device-making equipment rather than a presumptive loss amount tied to device-making equipment. We feel that it's very important to increase the sentencing level for that source of the fraud.

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And that was one of the problems that we had in working specific cases, for example, in Miami, Florida. We would go out and arrest the person who had the embossers or the encoders and hundreds and hundreds of account numbers; or in the telecommunications arena they would have the boxes that could actually perform the cloning operation on the phones, and again, hundreds of account numbers. But if we couldn't show a loss amount on those specific account numbers, many times they hadn't been used yet, there was little or no sentencing to attach to that. We always started with a base offense of 6.

We had formerly used, as we cited in the letter to you from Under Secretary Johnson, a counterfeiting analogy that tided us over, gave us a higher base offense level for device-making equipment. Once that was removed from the guidelines, we felt that it was very important in this whole process of amending 1029 to get back to the issue of adding an offense level when the person or the source of this crime is identified and brought forward, whether or not we can show specific account number losses that person.

In the case of telecommunications crime, specifically the area of cloning, but now that is actually evolving, and we certainly support Ms. DeMaria's statement that we need to keep this as technologically broad as we possibly can, because-- COMMISSIONER JOHNSON: Does that mean that you support Option 3?

MS. RILEY: Yes, we do support Option 3, absolutely. We certainly support the issue of increasing the base offense for device-making equipment, rather than tying a presumptive loss amount to the specific account numbers when it comes to device-making equipment.

We find that it is also very important to pay close attention to, as Option 3 goes, throughout the definitions and throughout the language of Option 3 there is constantly a pull-out of mini ESN pairs. We feel that we should stick to just the term "unauthorized access device" or "counterfeit access device." Mini ESN pairs are included in the definition in 1929, but if we constantly single out that one small portion or that type of crime, then we could actually limit some of the times that we are bringing these

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telecommunications cases forward.

And we are incredibly frustrated in the telephone arena. Every time we came forward with either the original 1029 offense or the sentencing, the defense attorneys were constantly saying, "Look, we don't see in here where it specifically says this type of"--that mini ESN cloning, for example, is a problem.

So one of the things that was specifically done within the 1029 amendment was increase the 1029 definitions to say any means of gaining unauthorized access to telecommunications services. So we didn't focus just on mini ESN pairs. They were certainly included.

But we would appreciate within Option 3, as well, continuing along with that broader definition, staying within the access device definition as currently exists in 1029 and not singling out one specific type of telecommunications fraud in a mini ESN pair crime. As technology keeps changing, we are seeing that crime is keeping up with that. Everybody wants to find a new way to exploit vulnerabilities in the new technologies.

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We feel that the definition stays very close to that, in trying to actually plan for the new types of crimes as they come out. In fact, in 1029 when it was originally passed back in 1986, Congress in the legislative history said that the definition of this term is broad enough to encompass future technological changes and not limit that. We feel that that should be done in the sentencing guidelines as well. It would help us a lot when people are trying to draw that line between types of offenses in 1029.

Finally, I just want to address and certainly support AT&T's position on the use of these telecommunications fraud devices associated with other types of criminal offenses. We have worked a great deal with a number of other agencies in trying to identify the types of telecommunications devices and the way that they were defrauded, in order to help other agencies work other types of crimes. Specifically DEA, for example, when they testified in front of the House Judiciary Committee on this 1029 violation, they came forward to state, the Deputy Director stated that 80 percent of the drug dealers that were arrested that

year--that was 1997--had been found in possession of some type of fraudulent telecommunications device, and it was most certainly the anonymity that it provided to them. They were not always charged with a 1029 offense or any offense related to the telecommunications fraud itself. They were normally charged with the narcotics offenses, in this case, or with the greater criminal acts that they were charged with.

CHAIR MURPHY: Ms. Riley, I am concerned about your colleague having an opportunity.

MS. RILEY: I appreciate that. Okay.

MR. KITLAS: Just another day, Judge.

CHAIR MURPHY: I don't know if I pronounced your name correctly. Kitlas, is that--

MR. KITLAS: Edward Kitlas. Good morning.

Historically, within the Secret Service financial criminal investigations, we have seen all too often the victim being identified as either the financial institution or the bank, with regard to areas of bank fraud and credit card or access device fraud, or in some cases a government agency. All too

often the true victim whose identity was compromised, taken away from them, is not even recognized.

We fully support Option 2 with respect to raising the minimum offense level to 12 regarding persons who have had their credit damaged or destroyed completely, and also their reputation.

COMMISSIONER O'NEILL: Let me just jump in there for a second. Do you think it is worth, then, having a distinction who is harmed like that, where one's identity is actually stolen, vis-a-vis a fictitious individual that someone creates for criminal purposes, but there is no reputational damage done because there is no actual person being violated?

MR. KITLAS: I think there should be more concentration placed on one whose reputation and credit has been destroyed. All too often there has been in the aftermath, after the investigation has been concluded and the persons have been sentenced, these victims are left with the fact that they have to now work with the credit reporting agencies, the banks and other collection agencies as well,

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in trying to repair all the damage that has been done to them. This is quite different than someone whose identity may have been taken away for a brief moment with no damage done to them.

Additionally, with regard to Option 2, we would also support the areas with regard to the transfer of six or more identification documents. We would also suggest that this could also be even further enhanced to include the unlawful possession of six or more identification documents.

Quite honestly, in our investigations, and a case in point would be a recent investigation conducted by our New York Field Office and our Richmond Field Office involving some people involved with car dealerships, who were getting access to credit reports, providing this information to individuals who were then using desktop publishing, computer scanners and what have you, to produce false identification documents for the purpose of purchasing high dollar motor vehicles such as BMWs. These vehicles were then sold out-of-state, where they could be retitled legally in the State. Dollar amounts in fraud involved in this

investigation were in excess of $3 million.

What we have seen is that as a result of this investigation and the sentencing, these individuals were given--although they were given high dollar fines, they were given very little incarceration. And we feel that with the enhanced levels, that a higher level of incarceration would have been given to these individuals with this investigation.

COMMISSIONER O'NEILL: Is it difficult under these circumstances to prove harm and to prove the amount of loss?

MR. KITLAS: Obviously you need the victim to come forward and to explain their situation and everything that they have gone through. It requires quite a bit of leg work, depending on the number of victims.

CHAIR MURPHY: We have reached our time limit. It is very frustrating. These are all such important areas that we have got on our plate. It is very interesting, I think, how the cloning and the ID theft has grown together, and the comments have been very helpful for us. Thank you very much.

MR. KITLAS: Thank you.

CHAIR MURPHY: All right. The next panel is on circuit splits. Jon Sands, Assistant Federal Public Defender from Phoenix, on behalf of the Federal Public and Community Defenders, and also A.J. Kramer on behalf of the same group. Mr. Kramer is a Federal Public Defender in Washington.

So there is a lot to be said on these Circuit Courts, too. I am curious what you are going to highlight.

MR. SANDS: What we are going to do is to be brief, as we have learned. I am John Sands. I am Assistant Federal Public Defender from the District of Arizona. With me is A.J. Kramer, who is the FPD from this district. We thank the Commission for the opportunity to address you about the guidelines and about these important issues.

As the Commission knows, our mission is to provide the Commission with information, observations and guidance in drafting and implementation of guidelines. We take our mission seriously. As Federal Public Defenders, we represent the vast majority of defendants. They can range from the usual, the familiar crimes of drug trafficking, fraud, down to the fairly rare crimes such as crimes on the

reservation, cactus theft, and other matters. Our crime ranges from the street to the suite. In this case we have a broad experience. We take our charge seriously.

Some general observations. One is that Congress, when it passed the guidelines, never intended to divest Federal judges of sentencing discretion. That is an important aspect that was stressed by Koon. The purpose was never to turn Federal judges into calculators, but rather to vest them with the traditional discretion that they had, and discretion is important, is key in the issue of departures. The Commission, in deciding departures, should look at and focus on giving guided discretion, a framework that a judge can look to and can operate from. That is different than shackling him or her or providing a straitjacket. The Commission should keep this in mind, and should follow the Supreme Court in its pronouncement in Koon, that a district court's decision to depart from the guidelines embodies the traditional exercise of such discretion.

In addition, the Commission should look toward its own history. It has a past practice now of over 10 years of

sentencing, getting close to 15. During this time, judges have been sentencing at the bottom of the guideline ranges. Down departures are much more frequent than upward departures. This tells the Commission that the guidelines are too high, and that discretion is a way of relieving that. The Commission should not handcuff the judges in this respect.

The Commission should proceed with deliberation. Past practice and research indicate that there are dangers in moving without adequate basis for acting. You can sweep too broadly. You bring in groups that you never intended. You bring in offenses that you didn't think were possible, such as a case of money laundering, there is always that concern with groups such as Native Americans, so you go to deal with one thing and you bring in another group.

Against this background and with this history, the Commission should proceed with deliberation. It should be a guardian of sentencing policy, working with Congress, working with the Justice Department, and working with the defense bar to promote sound sentencing practice. It should

provide guidance, promote flexibility, and above all, not to straitjacket.

There is no departure more important or embodies more of these considerations than aberrant behavior, and A.J. Kramer will discuss that.

MR. KRAMER: The circuit split in aberrant behavior is rather dramatic. It is, as a result of the spontaneous act test in a number of circuits, is essentially precluded in those circuits. I don't know of any case in those circuits that have the single act spontaneous test, where a downward departure has been upheld on appeal, so it is essentially precluded in a number of circuits.

We obviously think that the better test, and I think I was chosen to address this issue because I argued the case in the D.C. Circuit that resulted in the spontaneous test in the D.C. Circuit, at least, which was a case where clearly I think should have been--

CHAIR MURPHY: Gives you a second shot at it.

MR. KRAMER: Right. That's good. I will tell you just briefly the facts of that case.

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What happened, it was a woman with no prior record, a mother of at the time two children, who had a boyfriend in North Carolina. He made her a train reservation to take the train from D.C. to North Carolina and said "It's two days from now."

He called her that morning--the facts were not disputed, by the way--he called her that morning and said, "Oh, by the way, when you go to the train station, I want you to go in the bathroom, meet somebody, get a package and bring it down to me, and then when you come down here, somebody will meet you at the train." She said okay, and did it. So it was done the morning of the--she was told about this the morning she went down on the train.

And the D.C. Circuit said that it didn't appear to them to qualify as a spontaneous act because she had a chance to back out, so I think that almost nothing would qualify as a spontaneous act under that test. And, as I said, in the circuits where it exists, I don't know of any departures on that basis.

We espouse a totality of the circumstances test that we have

sent to the Commission, which I think is similar to Option 1 that the Commission in the March 9th draft has sent out. It contains more factors, however, and we take it directly from a 2nd Circuit case, or at least major parts of it from a 2nd Circuit case, Zecevic v. Parole Commission, which is at 13 F.3d, page 731, which said that courts should look at a totality of the circumstances, including the singular nature of the act.

I think obviously there is a limit that we recognize, that if somebody is back there planning for months and has to take a number of steps preliminary to committing the offense, that that is not going to be a singular act of aberrant behavior. On the other hand, as I talked about that Dyce case in the D.C. Circuit, there is almost no offense you can commit just as a spontaneous event without doing something.

Even somebody who all of a sudden, whatever, gets drunk, robs a bank, hands the teller--with no violence at all, gets drunk, is down and out, hands the teller a note, has a piece of paper at the bar and decides "I'm going to walk across

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the street," writes "This is a robbery, give me your money," and hands it to the teller. He has obviously taken a series of steps. He wrote the note out, he walked across the street.

So I think the "spontaneous act" would be a big mistake, because it would essentially be a preclusion of departure for singular acts, whereas the "totality of the circumstances" case trusts the District Court Discretion. As the Supreme Court said in Koon, "We trust our District Courts, who see this every day, to be a better position to determine when a departure is relevant."

And the number of factors that are addressed in the Zecevic case, the nature of the act, how much planning was involved, whether the defendant had a prior criminal record, the psychological disorders, any pressures under which the defendant may have been operating, and the motivations for committing the crime, are all relevant factors that I think we can trust our District Courts with in determining whether this really is unique.

And we understand that obviously not--that it would be too

broad to apply it to all first offenders, obviously, but--

COMMISSIONER JOHNSON: Is the totality of the circumstances the only method of giving judges discretion to do what you say they should be doing?

MR. KRAMER: I think it is. Well, let me put it this way. Of the options the Commission has put out, I think that Option 3 of the March 9th, which just talks that it has to be a singular act, precludes discretion of the District Court. The first option comes closest, I think, to the totality, but it doesn't include a number of things that the courts who have used the totality test address.

I think it is the only way, the totality of the circumstances test, and I think it is consistent with the 5(k)(2) language of there is a combination of factors that maybe, in an extraordinary case, that warrant a departure. So I think it's consistent with that, and I think it's consistent with Congress' intent in 99(4)(j) that there should be some appropriateness. Although that talks about probation, it is certainly consistent with that to say that a single act of aberrant behavior on the part of somebody--

COMMISSIONER JOHNSON: Well, of the options, you prefer Option 1?

MR. KRAMER: Of the Commission's options, yes, Option 1 in the March 9th draft that I have. We have submitted an Option 2 that I think has more factors that are consistent with the case law, which I think is better, is a better--

COMMISSIONER JOHNSON: Better than the Commission's?

MR. KRAMER: Yes.

MR. SANDS: What we want to avoid is any disqualification from the judges. Think of it as the option of trusting judges, not fear of judges but trusting judges in this case. You were saying that these are men and women who have seen a variety of cases, who have struggled with the issues and know the framework of guidelines. Any option that disqualifies groups or classes are options that the Federal Defenders fear will shackle judges.

A framework says, "These are the factors you should consider, these are the factors that we give weight to, and these are the factors that a judge can be trusted in exercising his or her discretion." We would ask the

Commission to go that route.

COMMISSIONER SESSIONS: I have gone over all the statistics, in fact I think probably we all have now, about the frequency of departures for aberrant behavior. And what is most striking is that there is not a significant difference, in fact there is a minimal difference between jurisdictions which have a totality of circumstances test versus a single spontaneous act test.

For instance, in our district it was only used twice in a year. In the Southern District of New York I think it was only used four times. This is in the 2nd Circuit. But, ironically, where it is used most often is in the District of Arizona. In fact, the District of Arizona and the District of Southern California are the areas where they are used, and I assume--well, I guess what I would like to ask is, how is it that they are used so frequently in the District of Arizona, or this ground is used so frequently? And then, if we in fact adopted the approach in Option 1 that you are advocating, could those departures continue, or would we be sending a directive to the judges in Arizona

that they cannot use aberrant behavior in those circumstances?

MR. SANDS: It's not because of the sun.

COMMISSIONER SESSIONS: It's not because of the sun?

MR. SANDS: It's not because of the sun.

COMMISSIONER STEER: Judge Sessions and I have both asked for the numbers, and I think they are rather striking. Arizona, this is FY '98, 189 downward departures for isolated incidents of aberrant behavior. Our data analyst put those two together. Southern District of California, 187. The next closes is Mr. Johnson's district, 36, and then there are three districts that come in with 10. All the rest are less than that.

MR. SANDS: There are a number of reasons. One is, obviously those are districts that have a high incidence of drug trade. You have situations on a border, with the airports, especially international flights, in which people are forced by a variety of circumstances to make aberrant behavior.

In addition to the other district, Arizona, has a number of

Indian Reservations, 13, and that is a different type of case, too. So you have sort of a dacro analysis, which is, reservations are somewhat different.

Finally, what you have is, you may have a combination of factors, so while your data may show just aberrant behavior, there may be other situations like victim's conduct or diminished capacity. If you went with an approach that precluded classes, you would be taking out violent crime or you would be taking out someone who may be in a criminal history category that is different than one, through driving on a suspended license, for which there are criminal history points.

What you want to do is structure a departure, say these are things you should consider, but by precluding you are sending a message, saying no to a district.

COMMISSIONER CASTILLO: In addition to the offenses you mentioned, are there any immigration offenses that aberrant behavior departures are being used for?

MR. SANDS: In my experience, no, Judge, because there is a cultural assimilation departure which is used now and then

in the 9th Circuit, which says if you have a culture tie here. It is rare that it is used, but there may be situations in which someone is brought back or they come back for a family member is ill. We recently had a case in which a person came back to donate his kidney to a family member, and that was the exceptional case.

MR. KRAMER: I think you have picked two of the busiest districts in the country, too, with the highest case loads in the country, so that may be one factor that addresses it.

COMMISSIONER CASTILLO: How would that impact? Let's just stop right there. How does that impact?

MR. KRAMER: Well, on a--

COMMISSIONER CASTILLO: Are you saying because they're busy, judges want to then use aberrant behavior as a quick way to dispose of cases?

MR. KRAMER: No, what I am saying is, while it may be high in an absolute number, on a percentage basis it may not be that striking. A second reason is, I think those two districts have an inordinate number of "mules" that come across the border with drugs, that may not be in a lot of

other districts. We get almost--we get mules on the trains here. We have no airports here in D.C., so we don't have very many mule cases. Those two districts have people come across the border all the time as mules, who are used by people much higher up, so I think that may be one reason.

The second thing, aberrant behavior departures, and I am not saying never, but often are in a combination circumstance with other--there's oftentimes other factors. So I think that aberrant behavior is often not alone, the sole factor of departure. It is usually used in a combination. In fact, in the Dyce case it was one of four factors the District Judge cited, all of which, I am sad to say, were reversed on appeal.

But it is often one factor, so it is not usually the case that aberrant behavior alone is the sole factor of departure. So I think you would not be opening up to this huge new class of cases by using the totality of the circumstances.

CHAIR MURPHY: How do you--I just want to find out--I don't want to cut it off, but I am wondering whether there are

other of these conflicts that you want to address. I think it was very wise, in any event, to start with this one, because it is a very leading area of concern.

Could we just find out whether there are any other ones they want to talk about, Bill? Because it may be a very important one and you can use up the rest of the time on it.

COMMISSIONER SESSIONS: All right.

MR. SANDS: We want to talk about all of them, but we will rest on our submissions, which we feel address our approach. Aberrant behavior is symbolic for a lot of reasons, and we will be happy to spend all of our time and the next panel's time on--

CHAIR MURPHY: Yes, especially considering the next panel has five minutes extra.

MR. SANDS: Absolutely, absolutely.

COMMISSIONER CASTILLO: On that note, I do want to commend you, Mr. Sands, for the submission that you have made in writing. The breadth of it says a lot for all the work that you did, and I do want to tell you there are a lot of judicial fans on this Commission, so your argument about

giving discretion to the judges I think is like preaching to the choir in many instances. But I don't want to cut off my colleague.

COMMISSIONER SESSIONS: Well, you have decided to take a position that you don't want to foreclose this departure for any class of people or any, I guess, group of people who are charged with particular offenses. We live in the real world here. This is obviously a significant issue. The issue has to be--could very well go before Congress.

Are there not certain classes of offenses that, by the nature of the offense, would suggest that they should not receive an aberrant behavior departure, or politically might be a wise course for this Commission to follow? As an example, number one, violent offenses, because obviously Congress and this Commission has great concern over violent offenses.

The second, drug offenses, perhaps limited to those persons who have role enhancements either for a manager or organizer or supervisor. Perhaps that might be a way of limiting the aberrant behavior departure ground which would make it clear

that persons who are engaged in significant drug activity or violent behavior activity would not receive this.

COMMISSIONER CASTILLO: And let me just add a third one. What about the amount of loss? What if the amount of loss exceeds whatever amount, $1 million or $500,000, what do you think about those type of--

MR. KRUGER: Maybe I can address the last first. I think that is easier. I think that most times when the amount of loss is that high, it takes a significant number of steps to get there, and it would be precluded under the totality of circumstances in any event.

I think picking--and there may well be a single act that for whatever reason results in a large amount of money. I think precluding it on the basis of an amount is just an arbitrary point to take, where the totality of circumstances would many times preclude that in any event.

MR. SANDS: Judge, the best way to deal with that is a situation of an armored car driver that is handed an extra bag of cash, of $80,000. That may be an amount that would be above what was set by the Commission. With the violent

crime, you may have a bank robber who writes a note, says "Please," and gives it to the bank teller. That would be a violent crime. Or someone that reacts when his daughter is sexually abused, and he reacts against the abuser.

Do you really want to say absolutely no, or do you want to trust the judges to factor in what is appropriate, and the Commission can always stress and judges understand the safety of the community. The Commission tried to preclude violent crimes for diminished capacity, and saw the error of its ways and has expanded that, and that is where the danger is, is when you preclude.

COMMISSIONER O'NEILL: What if you have a situation, though, where--because the Arizona cases strike me, that perhaps in part what is going on here, you have got a proxy for illegal aliens. You have no knowledge of the criminal history background. And should criminal history, the fact that somebody has got criminal history points, or the criminal history two or three, should that be an automatic preclusion of anyone from getting an aberrant behavior departure?

MR. KRAMER: I don't think it should be an automatic

conclusion, but certainly under totality of circumstances it is a main factor, not just a factor but a main factor, the lack of a criminal record or a criminal history. But certainly I think if you just preclude certain circumstances where, even though somebody might have a criminal history, it might be just on the edge of many years ago, just on the edge to be counted, and they have been--had no problems for a number of years, and something happens in an unusual circumstance.

So I don't think the preclusion, the absolute preclusion is a good idea, but again it is a main factor of the totality test and the violent crime sections. I mean, there's certainly manslaughter cases where the force was not reasonable, involuntary manslaughter, which I think many people agree that warrant a downward departure, or even probation. In a number of State manslaughter cases people are put on probation because of the victim's conduct. So I think the preclusion of violent offenses per se--but clearly, again, it is a factor in the totality test.

COMMISSIONER SESSIONS: Again, we are dealing with the real

world situation, and my view is, having read your long submission, you take a very balanced approach. And would not a balanced approach in the aberrant behavior situation suggest that perhaps there might be some limitations set by the Commission? But I don't want to put you back, put you in a position of having to go back and write limitations, but that might be helpful.

MR. SANDS: Well, what we could do is submit to the Commission further thoughts on this. We have endless reams of paper.

In dealing with immigration, aberrant behavior is not with illegal aliens, because most of the cases we are seeing is reentry after deportation, so they have been deported and they come back. That doesn't sound like a spontaneous or a single course, and that is not where the departures are being given. They could be given in drug situations where a person makes a bad decision, such as Mr. Kramer's situation.

MR. KRAMER: I see where you have just a couple of minutes left. I do want to talk about one other, which is post-conviction rehabilitation, having been successful on

that one in the D.C. Circuit, at least.

The argument, the main argument against it, as I understand it, is that it's fortuitous who gets resentenced, but I think that that really misstates the premise. It's not fortuitous who gets resentenced. There was some reason why the initial sentencing was legally incorrect, and the person is back for sentencing, and precluding the District Judge from considering a period of time I think is inconsistent with the statute that says the District Judge should favorably consider everything about the person's background and history.

So I think preclusion of that time, it is not just fortuity that gets people back into court. It is the fact that there was some error at the original sentencing, and who knows how that affected the court's thinking at that time? And when it is sent back, I think to preclude what may sometimes be a long period of time from the consideration of the District Judge would not be a proper thing to do.

COMMISSIONER SESSIONS: Well, the circuit (inaudible) was based on the Simms case out of the 8th Circuit, that great

8th Circuit that Judge Murphy is a part of, and if you read the most recent--

CHAIR MURPHY: Do you want to keep talking?

COMMISSIONER SESSIONS: --have you read the most recent 8th Circuit case, which says that post-sentence rehabilitation can be considered in situations in which the person comes back as a result of a change in the guidelines? So essentially they have modified their position.

MR. KRAMER: Somewhat, at least somewhat. I mean, a change in the guidelines, but a lot of cases come back where there was an error at the original sentencing, or like the Bailey 2255 cases all came back. It is an unusual circumstance, it is a tiny percentage of people, but I think preclusion of something wonderful that somebody has done in prison, if they saved a prison guard's life, I think that the District Court ought to be able to take that into consideration.

COMMISSIONER SESSIONS: And if they escaped and were arrested, could the judge upwardly depart?

MR. KRAMER: I would have to know the circumstances, but we are not here asking you to preclude that.

CHAIR MURPHY: Judge Kendall?

COMMISSIONER KENDALL: Tell me how someone who has been arrested and convicted, and gets any points whatsoever committing another offense, could be engaging in conduct that is aberrant?

MR. KRAMER: I think if somebody had a couple of drunk driving offenses, say right back at the period where they were counted originally, that they are still counted in that person's criminal history, or even reckless driving or whatever it is, very minor offenses, and gets the criminal history points for those, and then 9 or 10 years later, right on the cusp, on the edge, has some pressures on them or does something like--if Ms. Dyce had something in her background like that, and then all of a sudden gets this from her boyfriend to "come down and bring me the drugs," I think that's an example of where, even though somebody is not in Criminal History Category 1, she didn't have a prior record but if she did, I think that is an example.

CHAIR MURPHY: Well, Mr. Sands and Mr. Kramer, you can see we are real interested in what you have submitted, and thank

you very much for coming today.

MR. KRAMER: Thank you.

CHAIR MURPHY: Our final panel this morning is to get the views of the Department of Justice on a number of topics of concern, and we may still have Assistant Attorney General Robinson, who has gone over to testify on the Department's budget. And we understand very much, since we are concerned with our budget, why he has had to go there first.

But we have got with us Charles Tetzlaff, who is U.S. Attorney, District of Vermont, and four of us and our staff director went over to see Senator Leahy yesterday, and Senator Leahy and Judge Sessions were talking about the fact that you were up here, and so we are glad to welcome you.

COMMISSIONER SESSIONS: And he was concerned that you hadn't stopped by and spoken with him recently.

MR. TETZLAFF: He mentions that to me when I am here in Washington.

Good morning, Judge. Good morning, members of the Commission. My name is Charles Tetzlaff. I am the United States Attorney in the District of Vermont. As the Judge

pointed out, Jim Robinson was going to make this presentation, and I learned yesterday afternoon that he had to appear on the Hill. I was going to accompany him to address the aberrant behavior issues, and I am really much more prepared to do that than I am some of the other issues that Jim was going to address.

I should say that I am sure a lot of you are aware that the United States Attorneys--there are 93 of us--the Department I am sure feels many times that we are like trying to herd cats. We operate through the Attorney General's Advisory Committee, which is composed of approximately a dozen United States Attorneys from throughout the country, and our job is to advise the Attorney General on various matters that come before her.

I am privileged to be a member of the Attorney General's Advisory Committee at the moment, and that committee in turn operates through subcommittees. And one of those subcommittees is the Sentencing Guidelines Subcommittee, of which I am a member and have been since I have been a U.S. Attorney. But I must tell you, you are getting third string

here. Not only is Jim Robinson not here, but Jay McCloskey, who is the U.S. Attorney in Maine, is the Chair of that subcommittee.

COMMISSIONER JOHNSON: It's your turn in the barrel, huh?

MR. TETZLAFF: It's my turn in the barrel, and the reason I am prefacing this is because I understand, because I suspect the composition of this group as being a lot of judges, you don't want to hear something read. And that is familiar to me, I have heard that before, but I have to tell you, I was told that all I had to do was read Jim Robinson's statement.

COMMISSIONER JOHNSON: Jim Robinson owes you.

MR. TETZLAFF: Yes, he does.

I wanted to start with, Amendment 1 is the implementation of the No Electronic Theft Act, and I think what I will do is to not read this statement in full. My understanding is that the Commission has a copy of the written submittal from the Department which sets it forth much better than I can. I understand also what the Commission has been seeking today is wanting to know what option is supported, and I think in our submittal we have clearly indicated to the Commission

that the Department favors Option 2 in the implementation of the No Electronic Theft Act. It is our view that this provides the clearest guidance to prosecutors, defense counsel, and the courts, compared with those other options. We think Option 1 would establish some enhancements in the copyright and trade--

CHAIR MURPHY: Perhaps it would help if you knew that we really are focusing on Options 3 and 4.

MR. TETZLAFF: And then you are telling me, if you reject Option 2, where would be the precipe with respect to Options 3 and 4?

CHAIR MURPHY: You would only have to worry about Option 1.

MR. TETZLAFF: Well, I think I can comfortably leave out Option 1. I believe the Department, yes, we would favor Option 4 as the best of those two, as between 3 and 4, if that were the direction that the Commission were going.

COMMISSIONER SESSIONS: Do you have any strenuous objection to 3?

MR. TETZLAFF: I would not say strenuous objection. All we can do is to give you our best advice and counsel based on

the review that we have done, keeping in mind our perception. In other words, we are coming from a particular point of view, and in that review that has been done, surprise, surprise, because the Department submitted Option 2, we were supportive of that, but I think our second choice would be Option 4.

With respect to Amendment 2, the repromulgation of the temporary and emergency telemarketing fraud amendment, I did want to say here this is part and parcel of an area that the United States Attorney Community has been concerned with ever since I became a United States Attorney, which is adjustment, revision of the fraud law guidelines, which we as a group have felt for some time are too low and are out of sync with respect to, for instance, the drug guidelines. And we hope, the Department hopes that the Commission will be able to get around to taking a look at those white collar crime guidelines, and to the extent that you agree that adjustments are appropriate, that that be addressed.

With respect to the Amendment 3, the Sexual Predators Act amendment, I would just say that obviously this whole area

is one that I feel Congress, the administration and Federal prosecutors in the country as a whole are concerned with addressing this issue. The one area, I think, that the Department is concerned with is taking a look at the problem presented for those convicted of transporting a minor with intent to engage in illegal sexual activity, or traveling with the intent to engage in a sexual act with a minor. Those cases are being sentenced much less severely than those who commit other similar offenses, and the reason is, there is a cross-referencing that brings in the statutory rape guidelines. And we feel that these types of crimes dealing with minors and sexual predators is not a statutory offense type of culpability that you are involved with, and that needs to be looked at and addressed.

With respect to the Identity Theft and Assumption Deterrence Act, there again I can say precisely that the Department favors Option 2 that the Commission is looking at. It takes into account, and our concerns are taking into account the harm to an individual's reputation or credit standing and related difficulties, and it takes into account the

potential harms associated with producing multiple identification documents.

The other thing is being concerned with what we refer to as the breeder kind of activity that takes place, which is where you use identification documents without authorization to breed other means of obtaining false documentation. For example, a person who obtains someone else's Social Security number and uses it to acquire a credit card in that person's name creates serious harm to the individual whose name and Social Security number were used. We feel that that is a particular thing that needs to be addressed by whatever option the Commission opts for.

Now, the area that I was prepared to deal with today was the area of aberrant conduct. There are a number of areas where there are circuit conflicts.

CHAIR MURPHY: Were you able to be in the room when the last panel was here?

MR. TETZLAFF: I just heard the tail end of it.

CHAIR MURPHY: Because that was the main focus, and it is too bad you can't respond, so to speak, but you probably

have similar concerns.

COMMISSIONER SESSIONS: You will probably get asked the same questions.

MR. TETZLAFF: Okay. Well, that's fine. It is just, there are a number of problems that are presented when we have these circuit conflicts. We support the majority view on those circuit conflicts, and I do that with all due deference to the 2nd Circuit, Your Honor.

The Department feels that this ought to be tightly viewed. I think we have proposed that if the--wording along the lines that if the offense consisted of a single act of aberrant behavior, a downward departure may be warranted. Incidentally, I think the Department feels that that is a very appropriate provision. However, it needs to be controlled, and we feel fairly tightly controlled.

COMMISSIONER JOHNSON: What do you call "controlled"?

MR. TETZLAFF: Well, we do not agree with those views that talk about the totality of the circumstances. We feel that it should be limited to a single act of aberrant behavior, and that means one act, spontaneous, involving little or no

thought given to it, rather than one that was the result of planning or deliberation.

COMMISSIONER JOHNSON: The other panel said that if you use that definition, there would be no aberrant behavior.

MR. TETZLAFF: I mean, I am not--that remains to be seen. I am not sure I would agree with that. I would agree that it would be less, particularly if you--

COMMISSIONER KENDALL: Could you give us an example of when it would apply?

MR. TETZLAFF: Of the type of thing that--

COMMISSIONER KENDALL: Just give us a hypothetical, real life crime that occurs in the real world, where it would be a single act of aberrant behavior.

MR. TETZLAFF: I think, is there a Teco case out of, I believe California? That was one that I recall reading, and it seemed to me that that was a classic case where, because of the circumstances that were involved--and I apologize because I don't remember the facts of that case--

COMMISSIONER O'NEILL: Can you create one? Just create one. Give us a hypo.

MR. TETZLAFF: Umm--

COMMISSIONER O'NEILL: Let me ask you this, then: How do you feel about, consider the totality of the circumstances and that being too broad and maybe giving judges too much discretion, what about the idea of allowing totality of the circumstances but, as Judge Sessions said in front of the last panel, limiting it to non-violent offenses, maybe taking out drug offenses, maybe taking out sort of offenses committed by illegal aliens where you don't know the criminal history, and simply cabining either the type of defendant or the type of offense that is available for the judge to exercise his or her discretion?

MR. TETZLAFF: I know this has been an issue, in other words, whether to remove violent offenses from it. I don't think that the Department feels that that is--that that necessarily needs to be a requirement. Although queried, could I conjure up an example of a violent crime where I would say an aberrant departure would be appropriate, I think if I thought about it, I could give you an example.

COMMISSIONER O'NEILL: In fact, that might be the easiest

case in many respects.

MR. TETZLAFF: I think you are right.

CHAIR MURPHY: Yes, the traditional one where the husband--this is sexist, of course--but the husband comes home and there is the wife in bed with somebody, and he had a prior history that is wonderful. I mean, if that were a Federal crime, maybe that would be an example.

COMMISSIONER SESSIONS: Well, it would be on reservations or--that would be the situation. It would be a violent kind of offense.

COMMISSIONER KENDALL: But, see, here is the problem with all this, and it is how you define "act". Because let's take the catching someone in bed with someone else hypothetical. Usually there is going to be more than one act that gets you there.

In the previous panel they talked about a robbery. You write the note, you get the gun, you go to--there are a series of acts that pretty much, if you go with the majority view, it x'es it out, and that is part of the problem why you don't really--I didn't think it was a trick question.

But it is really difficult if not impossible to conjure up a real, live crime that really happens, where there can only be one single act, if you define "act" as something other than a count in an indictment, the crime itself. If you're calling that the act, then maybe. But if you're calling "act" those series of events or conduct that is engaged in, that causes you to complete the offense charged, then there is always going to be more than one so it is not going to be single. Do you--

MR. TETZLAFF: If it were more than one, I at least think it ought to be very limited in time, like days or weeks. In other words, if we expand it, it seems to me you still have to localize it, if you will. And I would focus on the spontaneity, the unplanned aspects of it, the thoughtless--

COMMISSIONER KENDALL: A chance to retreat, the sort of a chance to retreat kind of thought, is that what--

MR. TETZLAFF: Do you mean--

COMMISSIONER KENDALL: A chance to change your mind and not do it.

MR. TETZLAFF: You mean if you had that, then we would not

fall within this?

COMMISSIONER KENDALL: Right.

MR. TETZLAFF: I would agree.

CHAIR MURPHY: Of course, we aren't the Congress and can't expand the safety valve all by ourselves, but some have suggested, the people who are wanting to put factors into this, you know, more discretion into the single act of aberrant behavior, that maybe that is not the vehicle to consider some of these cases that should have some benefit in some way. I mean, what do you think about the possibility of expanding the safety valve in some way?

MR. TETZLAFF: In the drug area? Or just even an expansion of the safety valve?

CHAIR MURPHY: It could be in that case, right, but I mean because there is--perhaps where the courts are using this single act of aberrant behavior departure, it is because they feel that there is something in this whole set-up that really doesn't merit what you would get under the guidelines. And the safety valve was passed, you know, to remedy that certain kind of circumstance. So my question

really is, would that be a better vehicle for those who want to expand opportunities to look at what is really happening here and what-

MR. TETZLAFF: It may be, but I think that gets us into the whole philosophy of the purpose of the guidelines and the frustration that perhaps may exist in the judiciary on wanting more latitude and more discretion, and feeling penned in by the guidelines. To me, that gets us into that discussion, and one of the objections on aberrant behavior, it seems to me, is that it is being utilized as a tool to expand that discretion.

COMMISSIONER O'NEILL: Well, discretion isn't necessarily a part--and this I guess is more philosophical than we probably want to get into, but I mean part of the difficulty, there is "good" discretion, right, and there is "bad" discretion. There is things that we shouldn't take into account, like race or gender or whatever, that is simply inappropriate for judges to take into account with respect to sentencing.

It seems to me at least part of the aberrant behavior

discussion is really using aberrant behavior as a proxy for the first-time offender, the person we really don't think is going to engage in a criminal--you know, going to be a career criminal, for example, and that is really at least what some of these decisions are trying to get at. And part of the difficulty, of course, as Judge Kendall was trying to point out, I think, is what are the series of steps that have to be taken?

I mean, a lot of these first-time offenders may in fact be white collar criminals, maybe their first criminal act, but that may be an act that takes a lot of planning, a number of weeks, a number of years. Maybe it is an embezzlement situation. That is sort of where the difficulty comes in, I think.

COMMISSIONER SESSIONS: Can I follow up with your comments on aberrant behavior? We have looked at the statistics about how often it is used, and what we have learned is that it is used extraordinarily rarely, and in fact it is used extraordinarily rarely almost uniformly across the country, including the totality of circumstances jurisdictions. So

the 2nd Circuit is a perfect example. It is very, very rarely used, and that is true nationwide.

And I think what is being raised here is perhaps something for the Department to think about, because I for one would like to work with the Department on issues like this. By the way, Laird is terrific, I should say.

And that is, it reminds me of a comment that I just heard, that was made by a 4th Circuit judge to John Steer, and that is, can you develop something for first-time offenders that would be what is, in quotes, called the "quick dip." That is taking a first-time offender and providing some level of discretion for the court so that that offender can be given some short period of incarceration which would be an education, and then release him.

It is essentially something similar to a safety valve, and it could be fashioned in particularly limited ways so that it would really address one of the greatest concerns that judges have across the country, at least that they have expressed to us, and that is the first-time offender who is facing much more time than necessary. And I wonder if the

Department has thought of safety valves in the first-time offender context like this, as an alternative to aberrant behavior or with aberrant behavior?

MR. TETZLAFF: Yes. Really the answer is we have not. I think we have thought in terms of expanding the safety valve--

COMMISSIONER SESSIONS: The quick dip?

MR. TETZLAFF: The quick dip theory. I think the Department would be pleased to take a look at that concept. I think all of us who work in the criminal justice system have seen cases where that kind of response is appropriate, in other words, where you have perhaps a first-time offender, there may be some other issues, such as deterrence of others involved, that you want to impose some jail time but you don't want to be locked into something that most of us would say is unreasonable and not needed in that particular case. I think what you are suggesting is that we come up with a vehicle to accomplish that. I think the Department would be receptive to giving you our thoughts and comments on any such proposal.

COMMISSIONER SESSIONS: And that could be an alternative to this whole debate over aberrant behavior, because aberrant behavior is really addressing that particular problem.

MR. TETZLAFF: But wouldn't that approach, say we are going to deal with perhaps the reason for this aberrant behavior and totality of the circumstance approach in another manner, but hopefully tighten up the aberrant behavior part.

COMMISSIONER KENDALL: Let me ask this, and I think it is good if we come back to--I can't remember--1(4)(d) where the language is found, and aberrant behavior sits in a paragraph. And we can debate linguistically what it means, but at the end of the day we are charged with the responsibility-- not married to anything that has gone before us, and I don't think it requires any new independent act of Congress--we are charged with the responsibility of defining what a single act is, what the act is, as well as what is aberrant.

And it speaks to probation. If you read the sentence, it talks about there is a recognition that the guidelines themselves, starting out at fairly low offense levels,

causes people to go to jail. There may be those situations--and I am thinking, you know, as a judge doing it on a weekly basis.

Usually when you will see this, you know, and I am sure you have prosecuted people that will come in at a 15, a 16, an 18. Everyone in the room pretty much has serious doubts about whether this really a person that needs to go to prison, that probation would probably get the job done just fine, but you can't do it. And it is usually, when you have those situations, it is almost always non-violent, non-drugs, the person's first time at the plate, never had any problem before, and just the fact that they are there, their just being there and all that goes with that, would indicate that it is probably a person you may not see again. Can you speak, and maybe just as a prosecutor, about what guidance you would give us on how to wrestle with that issue? Because I think if we were really honest, probably a fair amount of these departures are happening because some people may be dissatisfied with the result that the guidelines take them to, and so they look for reasons to get

there.

MR. TETZLAFF: One of the things I would say ought to happen is that there ought to be a discussion between the U.S. Attorney's Office and the judiciary about that kind of philosophy, as far as what kinds of cases are brought. What are the concerns of say the Department of Justice with respect to those cases that it does bring?

What I am suggesting is, Federal prosecutors know the guidelines and know, when they bring a case, what a defendant is likely to be looking at with respect to a sentence. And most U.S. Attorneys take their job very seriously, and when they bring a charge like that, they have thought about it carefully, and whether one agrees with them or not, they have made a determination that the result in this case is appropriate.

Now, there may be a lot of reasons for that, whether it is deterrence of this particular individual, deterrence of others. It may be an area that is a significant problem in the country.

After that discussion takes place, I don't have any answers

to respond to your question. In other words, where you have a situation where a U.S. Attorney brings a charge and you have a result that--see, what bothers me is when you say everyone else in the courtroom thinks that this is not the right result. I am suggesting somebody does think it is the right result.

COMMISSIONER KENDALL: All I can speak to is my anecdotal life experience, and let me just give you a for instance.

MR. TETZLAFF: Well, I--

COMMISSIONER KENDALL: When we were talking about disparity nationwide, have you ever indicted an illegal alien for coming back to give his brother a kidney transplant?

MR. TETZLAFF: I can't say that--I recall that--

COMMISSIONER KENDALL: You weren't here earlier when we heard the story. But that is part of, I guess, part of the philosophical debate that is going on.

MR. TETZLAFF: Right, and your point is well taken, because what I am suggesting, sure, that may be a nice thing to do, but you are still going to have those cases, as an example, that you have just cited, where the shoe is going to pinch.

And then the question is, is there any way to deal with that kind of a case?

And maybe this is where we go back to a provision such as the safety valve. Again, I don't want to commit the Department, obviously, on that concept, but I think those are the kinds of ideas it is well worth all of us, including the Department of Justice, to review and consider.

CHAIR MURPHY: Mr. Tetzlaff, we have had a very tight schedule trying to get all of the testimony in this morning, because we have got a huge agenda now for ourselves. And we have reached the point where we are going to have to quite, but I wonder if there is anything else you would like to touch on before--

MR. TETZLAFF: I appreciate the opportunity very much, Judge. I really would have nothing to add. I know Mr. Kirkpatrick is on the Commission, and he is much more qualified than I to comment on the position of the Department in the deliberations. Incidentally, Todd Jones said to give you his best.

COMMISSIONER JOHNSON: He still owes you.

COMMISSIONER SESSIONS: And can I just put something on the record? I have known Mr. Tetzlaff for many years, and he is a phenomenal lawyer, a phenomenal U.S. Attorney, and has not just my highest respect but throughout the State.

CHAIR MURPHY: Moreover, that was said behind his back yesterday.

COMMISSIONER SESSIONS: That's right.

COMMISSIONER KENDALL: What are you trying to do, keep him from appealing you?

COMMISSIONER SESSIONS: No, he finds a way to do that, actually.

CHAIR MURPHY: Well, thank you very much.

MR. TETZLAFF: Thank you very much, Judge. Thank you very much, members of the Commission.

CHAIR MURPHY: At this point we would close the hearing. I know we have got a lot of staff people. We have other people I recognize that are interested in the guidelines, and thank you all for being here. We are going to try to do the best job we can in this cycle, but a lot of what was said today, we are going to be working on as we go into the

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next cycle. Thank you.

[Whereupon, at 11:55 a.m., the hearing was concluded.]

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