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DEFENDING AMERICA'S MOST VULNERABLE: SAFE ACCESS TO DRUG TREATMENT AND CHILD PROTECTION ACT OF 2004

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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ON

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DEFENDING AMERICA'S MOST VULNERABLE: SAFE ACCESS TO DRUG TREATMENT AND CHILD PROTECTION ACT OF 2004

TUESDAY, JULY 6, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee on Crime, Terrorism, and Homeland Security is holding a hearing today on H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004."

The hearing will examine the problem of drug dealers preying on vulnerable individuals such as recovering addicts and minors.

Recent studies have revealed the growing problem of drug dealers targeting individuals as they are leaving drug treatment centers. A 2002 news article in the Washington Post highlighted this problem, which appears to be occurring on a daily basis just minutes from where we sit. More than 1,000 addicts attend drug treatment in Northeast Washington, receiving care at three public methadone centers in the area. Drug dealers operate out of a nearby McDonald's parking lot next to the largest meth treatment center in D.C., and within three blocks of two other treatment centers. According to the article, many addicts say the availability of drugs present daily temptations as they try to overcome psychological and physical addiction.

The General Accounting Office investigators found that this is not the only city where this problem exists. Adult addicts are not the only victims of the drug dealers. The Substance Abuse and Mental Health Services Administration estimates that approximately 6 million children under the age of 18 were living with at least one parent who abused or was dependent upon alcohol or drugs in the year 2001. Studies have found that children of addicted parents are more likely to mimic their parents' behavior.

Even more troubling are cases in which parents knowingly expose children, including their own, to the seedy and dangerous world of drug trafficking, including the storage and distribution of drugs for profit in their own homes where small children may re-

side. H.R. 4547 addresses this issue by strengthening the laws regarding trafficking to minors and creating criminal penalties for individuals who traffic drugs near a drug treatment facility. The legislation examined today makes it unlawful to distribute drugs to a person enrolled in a drug treatment center or to distribute drugs within 1,000 feet of a drug treatment facility.

Now only recently the Supreme Court in *Blakely* v. *Washington* has cast doubt upon the continued viability of the Federal sentencing guidelines. While neither Congress nor the judiciary should react in haste without thoughtful consideration of the decision, it does seem clear that mandatory minimums may well take on added importance in assuring appropriate sentences for serious Federal crimes as a result of this Supreme Court's action.

I want to thank the four witnesses who will participate today and thank you for your being here. And with that, I conclude my opening statement and am pleased to recognize the distinguished gentleman from Virginia, the Ranking Member of the Subcommittee, Mr. Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman. And I am pleased to join you in convening this hearing on H.R. 4547. The bill purports to protect drug treatment patients, children and young adults from drug dealers. That is an excellent goal. However, the primary focus of the bill is an array of provisions increasing sentencing guideline ranges, adding new mandatory minimum sentences, and increasing existing sentences by at least fivefold to mandatory life without parole, three strikes and you're out and other provisions. The latter provision, three strikes and you're out, has been roundly discredited as being wasteful, racially discriminatory, sound-bite-based, and having no impact on reducing crime. In California, where it is broadly applied, it is now slated for a referendum to eliminate it.

Also, the bill provides for conspiracies and attempts to punish in the same manner as actual—as those actually committing the crime. This will only increase the disparity in sentencing. With mandatory minimum sentencing, there is no way to distinguish between the major players and the bit players in a crime. One of the primary purposes in establishing the U.S. sentencing guidelines was to remove disparate treatment from like offenders. Giving unlike offenders the same sentence for a crime creates as much sentencing disparity as giving like offenders different sentences for the same crime.

Other provisions of the bill eliminate the drug quantity sentencing cap established by the Sentencing Commission, and strict application of the safety valve, and substantial assistance to the Government sentencing reduction provisions.

We have often cited the numerous studies and recommendations of researchers, the judicial branch, including the Chief Justice of the U.S. Supreme Court and sentencing professionals, reflecting the problems created by the proliferation of mandatory minimum sentences. They are often cited as being wasteful as compared to alternative sentencing and alternatives such as drug treatment. They also disrupt the ability of the Sentencing Commission and the courts to apply an orderly, proportional, nondisparate sentencing system, and also they are found to be discriminatory against minorities and for transferring an inordinate amount of discretion

from prosecutors—to prosecutors from the judges in an adversarial system.

Our criminal justice system is an adversarial system which anticipates a balanced, vigorous prosecution and a balanced, vigorous defense with an impartial trier of fact determining guilt or innocence. It then envisions an impartial and learned judge, after having heard all the evidence and circumstances, to determine a just sentence. To assure uniform sentencing practices amongst the various courts and judges, and to guard against disparate treatment, we provide sentences to be bounded by sentencing guidelines developed by sentencing experts.

Unfortunately this bill ignores these goals and structures—continues the recent trend in determining sentences up front through mandatory minimum sentences with virtually all discretion shifted to the prosecutor in the charge and plea bargain phase of the case.

Practically there is no reason to believe that 4547 will have an impact on crimes at which it is purportedly aimed. In its essence the bill simply increases the penalties for drug trafficking, yet the problem seems to be a law enforcement problem, not a sentencing problem.

With the GAO, the treatment centers and now the Judiciary Committee reporting illegal drug activity in and around drug treatment centers in specific detail, the question is why aren't the current stringent drug laws being enforced by local and Federal authorities rather than just being reported to us by the GAO and others? Adding more laws to the current ones that are not being enforced will be little assistance to the problem. The suggestion that current Federal illegal drug penalties are not severe enough to have the law enforcement officials incentivized to enforce them is unfounded because there are long prison terms now available for the drug offenders and the fact that they constitute a growing majority of offenders in the Federal system.

Just as unfounded is the notion that the access to drugs by drug treatment patients and children will be significantly affected by having harsher penalties within a certain distance of drug treatment and other facilities and for drug crimes around children, even by parents. Studies of drug quantities, quality and price indicate that they are even more plentiful now in higher qualities and lower prices than before. Offenders generally have ready access to drugs in their neighborhoods. There is nothing to suggest that they obtained the drugs for which they are addicted near a drug treatment center. Moreover, having drug offenders who happen to violate the law within the inner edge of a prohibited zone and ones who violate the law a few feet away receiving disparate sentences makes no sense. Jailing parents or custodians of children for longer periods for drug activities in their presence and forcing children into foster care is of dubious benefit to the children.

In light of the implications of the recent *Blakely* v. *Washington* case for the sentencing guidelines system, we should not be passing more and possibly unconstitutional sentencing provisions until we have had a chance to review the decision and determine what changes in the law are necessary to meet constitutional muster.

So, Mr. Chairman, I look forward to the testimony of our witnesses on these points and thank you for convening the hearing.

Mr. COBLE. I thank the gentleman.

Mr. COBLE. Our first witness today is Ms. Catherine O'Neil. Ms. O'Neil is the Associate Deputy Attorney General of the Office of the Deputy General at the Department of Justice. Her portfolio includes all issues relating to international and domestic drug policy, drug enforcement and money laundering. She serves as the Director of the Organized Crime Drug Enforcement Task Force program.

Prior to serving in her current capacity, Ms. O'Neil was an assistant U.S. attorney in the Northern District of Georgia and received her B.A. From the University of Virginia, a master's in public policy from the Kennedy School of Government at Harvard University, and her law degree from the Harvard School of Law.

Our second witness today is Mr. Robert Cramer, the Managing Director of the Office of Special Investigations at the United States General Accounting Office. Mr. Cramer was an assistant United States attorney in the Southern District of New York before he joined GAO in 2000. He also served as an assistant district attorney in New York County and was an attorney in private practice in New York City.

Mr. Cramer received his undergraduate degree from Brooklyn College and his law degree from Notre Dame Law School.

Our third witness is Mr. Tyrone Patterson, program manager for the Model Treatment Program within the District of Columbia Department of Health. Mr. Patterson has over 1,000 years of substance abuse training—and has over 1,000 years—hours—I know something didn't sound right. I accelerated your advancement in age—1,000 hours of substance abuse training and has worked in the field as a counselor, supervisor counselor and program manager for 28 years. He is certified and registered for addiction counseling in the State of Maryland and is CSC certified and registered in the District of Columbia.

Mr. Patterson is the president of the Mitchellville Boys and Girls Club and has coached both adult and youth sports since 1968 in Prince George's County, Maryland, and Washington, D.C.

Our final witness, Mr. Frank O. Bowman, III, a professor at the Indiana School of Law at Indianapolis. Prior to serving in his current position, he served as an academic advisor to the Criminal Law Committee of the United States Judicial Conference and as a special counsel to the United States Sentencing Commission in Washington, D.C. He further served as a deputy district attorney for Denver, Colorado, and was Deputy Chief of the Southern Criminal Division in the United States Attorney's Office for the Southern District of Florida.

Mr. Bowman was awarded his law degree from Harvard University.

It is the practice of the Subcommittee, lady and gentlemen, to swear in our witnesses who appear before us. So if you would please stand and raise your right hands.

[Witnesses sworn.]

Mr. COBLE. Let the record show that each of the witnesses answered in the affirmative, and you may be seated.

Folks, we are glad to have you all with us. We operate under the 5-minute rule here. You will not be administered 20 lashes if you violate that rule, but the light that appears before you on your

table, when the amber light appears, that is your warning that 5 minutes is imminent. When the red light appears, the 5 minutes have elapsed. So if you will keep a sharp look on that, we will be appreciative of that.

We have your statements, and they have been examined and will be reexamined. And, Ms. O'Neil, we will start with you.

TESTIMONY OF CATHERINE M. O'NEIL, ASSOCIATE DEPUTY ATTORNEY GENERAL, UNITED STATES DEPARTMENT OF JUSTICE

Ms. O'NEIL. Mr. Chairman, Representative Scott, thank you for inviting me to testify before you today.

Protecting vulnerable victims from drug dealing predators, particularly those who would exploit human weakness by preying on persons afflicted with drug addiction or on those who, because of their youth and immaturity, are particularly susceptible to influence is a laudable goal and one that the Department of Justice fully endorses. The act now under consideration focuses on the scourge of drug trafficking in some of its most base and dangerous forms, trafficking to minors or in places where they congregate, and trafficking in or near drug treatment centers.

Unfortunately, endangerment of children from exposure to drug activity, sales of drugs to children, and the use of minors in drug trafficking and the peddling of pharmaceuticals and other illicit drugs to drug treatment patients are all significant problems today. Too often law enforcement agents come upon children during raids and search warrants. We find thousands of children in methamphetamine laboratories, children being used as decoys or distributors for drug-smuggling operations, and children unable to attend school without being exposed to illegal drugs. And right here in D.C., we have seen open-air markets where heartless dealers driven only by their own greed have taken advantage of drug treatment patients, enticing them with illicit substances and undermining any progress these patients may have made on the road to recovery.

The Department of Justice is committed to vigorously prosecuting drug trafficking in all of its egregious forms, whether it be a top-level, international narcotics supplier or street-level predator who tempts a child or an addict. The people who target their trafficking activity at those with the least ability to resist it are deserving of severe punishment, and that is why the Department stands firmly behind the overriding intent of this legislation, to increase penalties for those who would harm our children and those who are seeking to escape the cycle of addiction.

The Justice Department supports the mandatory minimum sentences in this bill. In a way sentencing guidelines cannot, mandatory minimum statutes provide a level of uniformity and predictability in sentencing. They deter certain types of criminal behavior determined by Congress to be so egregious as to merit these harsh penalties by clearly forewarning the offender and the public of the minimum potential consequences of committing such an offense. In drug cases, mandatory minimums are especially significant. Drug dealers by nature are risk takers. Lack of certainty in the consequences of engaging in certain egregious conduct does not effec-

tively deter these risk takers because they can forever hold on to the hope of finding a lenient judge and getting a lenient sentence. The only possible deterrence for these dealers is to take away that cause for hope.

Equally importantly, mandatory minimum sentences are an indispensable tool for prosecutors. They provide the strongest incentive to defendants to cooperate against the others involved in their criminal activity. In drug cases, where the ultimate goal is to rid society of the entire trafficking enterprise, the offer of relief from a mandatory minimum sentence in exchange for truthful testimony allows the Government to move steadily and effectively up the chain of supply using lesser distributors to prosecute larger dealers, leaders and suppliers.

For all of these reasons, we support the provisions of this legislation which address the plight of endangered children and addicts by punishing those who would exploit them.

I must reserve opinion in light of *Blakely* v. *Washington*, a Supreme Court case decided just 2 weeks ago, on those sections of the bill which propose to directly amend the sentencing guidelines. Nevertheless, I will say that the Department of Justice supports the concepts and policies behind those proposed amendments to the extent that the amendments seek to eliminate the mitigating role cap for drug traffickers, to ensure that the scope of accountability for coconspirator conduct is consistent with conspiracy law, and to confine the application of the so-called safety valve to cases where it is clearly warranted.

The Department has concerns with the proposed amendments to rule 11 regarding plea agreements, but we are looking forward to working with the Committee to alleviate those concerns.

Finally, while the Department agrees with the principle that in almost all circumstances a defendant who has been found guilty of an offense should be immediately detained, we cannot support the proposed amendment here on detention. By foreclosing the possibility of release for circumstances other than cooperation and thereby telegraphing a defendant's intention to assist the Government, this proposal would severely diminish the value of one of our most valuable investigative and prosecutorial tools.

This legislation will reduce the availability of illicit drugs to those afflicted with drug addictions and reduce the incidence of drug activity involving young people. The Attorney General has often observed that while children are but 25 percent of our population, they are 100 percent of our future. If there is any conduct which is deserving of the penalties set forth in this bill, it is the conduct at issue here. Drug trafficking to and through children diminishes the potential of our Nation and robs this country of its future, and it cannot be tolerated.

Thank you for this opportunity to share our views with you, and I will be pleased to answer any questions that the Subcommittee may have.

Mr. COBLE. Thank you, Ms. O'Neil.

[The prepared statement of Ms. O'Neil follows:]

PREPARED STATEMENT OF CATHERINE M. O'NEIL

Mr. Chairman, Representative Scott, and Members of the Subcommittee, thank you for inviting me to testify before you today regarding the Justice Department' views on H.R. 4547, Defending America' Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004.

Protecting vulnerable victims from drug dealing predators, particularly those who would exploit human weakness by preying on persons afflicted with addictions to drugs or on those who, because of their youth and immaturity, are particularly susceptible to influence, is a laudable goal and one the Department of Justice fully endorses. Last year, Congress made significant strides by enacting the PROTECT Act, a law that has proved effective in enabling law enforcement to pursue and to punish wrongdoers who threaten the youth of America.

The Act now under consideration takes Congress'commendable efforts even further by focusing on the scourge of drug trafficking in some of its most base and dangerous forms: trafficking to minors or in places where they may congregate, and trafficking in or near drug treatment centers.

Endangerment of children through exposure to drug activity, sales of drugs to children, the use of minors in drug trafficking, and the peddling of pharmaceutical and other illicit drugs to drug treatment patients are all significant problems today. One need only consider the following few examples:

- In 2003, 3,625 children were found in the approximately 9,000 methamphetamine laboratories seized nationwide. Of those, 1,040 children were physically present at the clandestine labs and 906 actually resided at the lab site premises. Forty-one children found were injured. Law enforcement referred 501 children to child protective services following the enforcement activity.
- According to the BBC, a 12-year-old drug mule living in Nigeria swallowed 87 condoms full of heroin before boarding a flight from London to New York. He was offered $1,900 to make the trip.
- In "Operation Paris Express," an investigation led by the former U.S. Customs Service, agents learned that members of the targeted international drug trafficking organization specifically instructed couriers to use juveniles for smuggling trips to allay potential suspicions by U.S. Customs. On one smuggling trip, two couriers, posing as a couple, brought a mentally handicapped teenager with them while they carried 200,000 Ecstasy pills concealed in socks in their luggage.
- More recently, "Operation Kids for Cover," an Organized Crime Drug Enforcement Task Force (OCDETF) investigation in Chicago and elsewhere, uncovered a cocaine smuggling group that "rented" infants to accompany couriers, many of whom were drug addicts themselves, who were transporting liquified cocaine in baby formula containers.
- In Vermont, prosecutors convicted drug dealer, Michael Baker, for selling cocaine to, among others, high-schoolers. A sophomore honors student who got cocaine from Baker began using extensively and started referring friends from his peer group to Baker in exchange for drugs. This honors student never returned to high school for his junior year.
- As reported in the Washington Post, between 2000 and 2002, more than 200 persons were arrested here in Washington, D.C., for distributing diverted prescription drugs and other illicit drugs in a parking lot that abuts one of D.C.'s largest methadone clinics and is within three blocks of several other treatment facilities. The dealers in that open air market took advantage of the drug treatment patients—enticing them with illicit substances and undermining any progress that had been made on their road to recovery.

The Department of Justice is committed to vigorously prosecuting drug trafficking in all of its egregious forms, whether it be a top-level international narcotics supplier or a street-level predator who tempts a child or an addict with the lure of intoxication or the promise of profit.

We have had some successes. Statistics maintained by the Department of Justice Executive Office for United States Attorneys indicate that, in the last two years alone, we have had over 400 convictions under Title 21, Sections 859, 860 and 861, of persons engaged in drug activity involving minors. Moreover, statistics maintained by the U.S. Sentencing Commission indicate that, between 1998 and 2002, approximately 300 defendants were sentenced annually under the guideline that provides for enhanced penalties for drug activity involving minors or in protected locations. But our tools are limited. And we have no specific weapon against those who distribute controlled substances within the vicinity of a drug treatment center.

The people who would sink to the depths of inhumanity by targeting their trafficking activity at those with the least ability to resist such offers are deserving not only of our most pointed contempt, but, more importantly, of severe punishment. The Department of Justice cannot and will not tolerate this conduct in a free and safe America, and that is why the Department of Justice stands firmly behind the intent of this legislation to increase the punishment meted out to those who would harm us, our children, and those seeking to escape the cycle of addiction.

I would like to spend a few minutes talking specifically about mandatory minimum sentences and, in particular, the mandatory minimum sentence provisions of H.R. 4547.

The Justice Department supports mandatory minimum sentences in appropriate circumstances. In a way sentencing guidelines cannot, mandatory minimum statutes provide a level of uniformity and predictability in sentencing. They deter certain types of criminal behavior determined by Congress to be sufficiently egregious as to merit harsh penalties by clearly forewarning the potential offender and the public at large of the minimum potential consequences of committing such an offense. And mandatory minimum sentences can also incapacitate dangerous offenders for long periods of time, thereby increasing public safety. Equally importantly, mandatory minimum sentences provide an indispensable tool for prosecutors, because they provide the strongest incentive to defendants to cooperate against the others who were involved in their criminal activity.

In drug cases, where the ultimate goal is to rid society of the entire trafficking enterprise, mandatory minimum statutes are especially significant. Unlike a bank robbery, for which a bank teller or an ordinary citizen could be a critical witness, typically in drug cases the only witnesses are drug users and/or other drug traffickers. The offer of relief from a mandatory minimum sentence in exchange for truthful testimony allows the Government to move steadily and effectively up the chain of supply, using the lesser distributors to prosecute the more serious dealers and their leaders and suppliers.

The Department thinks that mandatory minimum sentences are needed in appropriate circumstances, and we support the specific mandatory minimum sentences proposed in H.R. 4547. These sentences are entirely appropriate in light of the plight of drug-endangered children throughout this country.

SPECIFIC PROVISIONS WITHIN H.R. 4547

I would now like to turn to some specific provisions within the proposed legislation that the Department of Justice finds particularly noteworthy and offer some comments which might prove useful as the Committee continues to consider this bill.

Before doing so, however, I must reserve opinion, in light of *Blakely* v. *Washington*—a Supreme Court case decided just two weeks ago—on those sections of the bill which propose to directly amend the sentencing guidelines, Having reserved opinion on the particular language of these sections, I will say that the Department of Justice supports the concepts and policies behind the proposed legislative amendments.

Section 3 : Fairness in sentencing: assuring traffickers in large quantities of drugs receive appropriate sentences and denying double sentencing benefits

The Department of Justice favors eliminating the guidelines offense level limitation that applies to drug traffickers who play a mitigating role in the offense. We believe that there is no need for such an offense level "cap" and that the federal statutes and the otherwise applicable sentencing guidelines appropriately allow for the consideration of aggravating and mitigating factors. Moreover, we believe that, in most cases, the controlled substance quantity is an important measure of the dangers presented by that offense because, even without other aggravating factors, the distribution of a larger quantity of a controlled substance results in greater potential for greater societal harm than the distribution of a smaller quantity of that substance.

We acknowledge that the Sentencing Commission has undertaken to lessen the impact of this offense level cap. Pursuant to proposed guidelines amendments submitted to Congress and published in the Federal Register in May of this year, the Commission would apply a higher cap to the initially higher offense levels. For the reasons set forth above, however, we do not believe that this proposal sufficiently addresses our concern that the significance of drug quantity be adequately taken into account and the defendant not receive multiple benefits based on his lesser role in the offense.

Section 5: Conforming guideline sentencing to conspiracy law

We agree that the scope of accountability for co-conspirator conduct under the sentencing guidelines should be coextensive with such accountability for purposes of criminal liability generally. We also agree that a conspirator can be held accountable for acts of co-conspirators, in addition to his own conduct. Defendants, therefore, should be accountable for all conduct occurring during the course of the conspiracy that was reasonably foreseeable and in furtherance of the conspiracy.

Section 6: Assuring limitation on applicability of statutory minimums to persons who have done everything they can to assist the Government

We strongly support the proposed amendment to 18 U.S.C. § 3553(f), insofar as it would require Government certification that the defendant has timely met the full disclosure requirement for the safety valve exemption from certain mandatory minimum sentences.

We certainly understand the concerns that prompted this proposal. Our prosecutors rightfully complain that courts often settle for minimal, bare-bones confessional disclosures and, in some cases, continue sentencing hearings to afford a defendant successive tries at meeting even this low standard. The Department of Justice thus is aware that some courts and defendants have too liberally construed the safety valve and have applied it in circumstances that were clearly unwarranted and where no beneficial information was conveyed. For these reasons, we strongly support the prosecutor certification requirement.

Requiring courts to rely on the Government's assessment as to whether a defendant's disclosure has been truthful and complete would effectively address the problems prosecutors have encountered with respect to application of the safety valve.

Section 9: Assuring judicial authority consistent with law in sentencings

The Department has a number of concerns with regard to the proposed amendments to Rule 11. Notably, we have been working with Committee staff to alleviate such concerns and look forward to continuing this dialogue.

Section 10: Mandatory detention of persons convicted of serious drug trafficking offenses and crimes of violence

The Department agrees with the principle that, in almost all circumstances, a defendant who has been found guilty should be immediately detained. We also acknowledge that the circumstances in which release pending sentencing or appeal is necessary are extremely limited. Nevertheless, we cannot support this proposal to the extent it requires Government certification as to a defendant's cooperation and precludes release pending appeal. Even with sealed pleadings, a defendant's intention to cooperate would be much more apparent under this provision, and this likely would have an adverse impact on a defendant's willingness to cooperate, on the value of the cooperation, and on the safety of the defendant. By foreclosing the possibility of release for circumstances other than cooperation and, thereby, telegraphing a defendant's intention to assist the Government, this proposal would severely diminish the value of one of our most useful investigative and prosecutorial tools. Moreover, this is a tool that we employ not simply post-conviction but, sometimes, pending appeal as well. A prosecutor should not be prohibited from seeking release after sentencing, if the particular circumstances of the case so warrant.

CONCLUSION

We again thank you for this opportunity to share our views. I will be pleased to answer any questions the members of the Subcommittee may have.

Mr. COBLE. Mr. Cramer.

TESTIMONY OF ROBERT J. CRAMER, SPECIAL INVESTIGATOR, UNITED STATES GENERAL ACCOUNTING OFFICE

Mr. CRAMER. I am pleased to be here today to summarize the results of our investigation of street narcotics sales in the vicinity of certain drug rehabilitation clinics. Special Agent George Ogilvie, the principal investigator in this work, is here with me today. To obtain an overview of the problem, Agent Ogilvie and other criminal investigators from the Office of Special Investigations at GAO conducted physical surveillance of five clinics in the District of Columbia. We found a significant amount of illegal drug trafficking

takes place around these clinics. In fact, patients frequently must navigate their way through a virtual bazaar of illegal drug dealing when they enter and exit the clinics.

During our visits to the clinics, investigators observed many of the typical patterns of activity on nearby streets that indicate that drug trafficking is taking place and were actually solicited to buy drugs. Groups of individuals were loitering in the vicinity of the clinics. People driving vehicles would circle the locations where these groups congregated, slowing down to speak with people on the street. The investigators observed people from the street groups repeatedly entering and exiting vehicles that pulled up to them, meeting other people on the street and engaging in hand-to-hand contact, or walking away with them to complete a sale at another location.

Some of the drug dealers were very brazen about their activities. For instance, on three occasions, dealers outside clinics asked one of our investigators if he wanted to buy drugs. There were numerous occasions when our investigators observed people exchange cash for a small bag or other objects that were too small for us to see.

One particular clinic is located in an isolated area near a bus stop. We learned from local police officials that the bus stop is known as a place in which illegal drug activity frequently takes place. We viewed a videotape made by local police of a drug transaction that took place at the bus stop in which an undercover officer purchased narcotics. The officer made the purchase from someone who, while appearing to be waiting for a bus, sold drugs to the officer from a bag that she carried. When our investigators observed the bus stop, approximately 8 to 10 people were seated there and appeared to be waiting for the bus. When a bus pulled up, however, none of the people who were sitting there got on board. As the investigators continued to watch, they observed other people approach the individuals who were seated at the bus stop, engage in conversation, followed by hand-to-hand contact, and then walk away.

Adjacent to another clinic is a McDonald's restaurant. Local police detectives reported that the area surrounding the restaurant and clinic is a magnet for persons seeking to buy and sell narcotics. As a result, Federal, State and local law enforcement agencies cooperate in investigating illegal drug sales in the area. On repeated visits to this location, our investigators observed that individuals who stood outside the restaurant were approached by others, engaged in hand-to-hand exchanges with them.

In our interviews of personnel at three clinics, they confirmed that there is extensive illegal drug activity in the vicinity of their clinics. A director at one clinic reported that it is especially difficult for these patients who are struggling with addiction to resist the temptations offered by the drug dealers who confront them on a daily basis outside the clinic.

In conclusion, patients who seek treatment must navigate their way to and from the clinics in an environment in which illegal sales of narcotics are daily occurrences. The efforts of patients who are seeking rehabilitation and the clinic professionals who serve

them are significantly undermined by the criminal activity that surrounds them.

Mr. Chairman, this concludes my prepared statement, and I would be pleased to respond to any questions that you or other Members of the Subcommittee may have.

Mr. COBLE. Thank you, Mr. Cramer.

[The prepared statement of Mr. Cramer follows:]

PREPARED STATEMENT OF ROBERT J. CRAMER

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives

For Release on Delivery
Expected at 4:00 p.m. EDT
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DRUG REHABILITATION CLINICS

Illegal Drug Activities Near Some District of Columbia Clinics Undermine Clinic Services and Patient Rehabilitation

Statement of Robert J. Cramer, Managing Director
Office of Special Investigations



GAO-04-946T

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today to summarize the results of our investigation, performed at your request, of street narcotic sales in the vicinity of certain drug rehabilitation clinics in the District of Colombia. To obtain an overview of the problem, we conducted physical surveillance of five clinics in the District of Columbia and interviewed clinic personnel and law enforcement officials. In brief, we found that a significant amount of illegal drug trafficking activity takes place around these clinics. Patients frequently must navigate their way through a virtual bazaar of illegal drug dealing when they enter and exit the facilities.

Background

From April 2003 through June 2004, criminal investigators from the Office of Special Investigations (OSI) at the U.S. General Accounting Office conducted surveillance at and around five drug rehabilitation clinics in the District of Columbia—the OASIS Clinic at 910 Bladensburg Rd., NE; the D.C. General Hospital at 1900 Massachusetts Ave., SE; the Model Treatment Program at 1300 First St., NE; the United Planning Organization Comprehensive Treatment Center at 333 N St., NE; and the Department of Veterans Affairs Substance Abuse Program at 40 Patterson St., NE. The OSI criminal investigators who conducted these surveillances have many years of experience in the investigation of criminal activity, including illegal street sales of narcotics. Most of these clinics are located in nonresidential areas and are surrounded by parking lots, vacant lots, warehouses and some stores. On a daily basis, clinics in the Washington, D.C. area treat thousands of patients for a variety of substance abuse problems. We also interviewed personnel at three of the five clinics, detectives from the major narcotics branch of the Metropolitan Washington D.C. Police Department (MPD), and prosecutors from the U. S. Attorney's office in the District of Columbia. We conducted our work in accordance with quality standards for investigations as set forth by the President's Council on Integrity and Efficiency.

Drug Trafficking Observed at Drug Rehabilitation Clinics

Certain typical patterns of street activity are commonly associated with illegal street sales of drugs. Such activity includes, for example, a group of people, consisting of one or more drug dealers and their associates, who loiter in a particular area day after day. Typically, individuals who act as "lookouts," to protect the dealers from possible law enforcement interdiction or even territorial encroachment by rival drug dealers,

occasionally walk away from the group and later walk back to re-join it. In addition, customers walk up to such groups and exchange money for drugs in hand-to-hand transactions, or walk away with someone in the group to complete a drug transaction in another location, or circle their vehicles near locations where the group congregates, slowing down to make contact with narcotics sellers. To the untrained eye, such contacts may appear to be innocent encounters between acquaintances, but in reality, the participants are engaging in illicit transactions involving exchanges of money for drugs.

During more than 50 visits to these clinics, investigators observed these types of activities and others that are indications of drug trafficking. For example, the investigators saw groups of individuals who were loitering in parking lots or near banks of telephones, stores, and at bus stops in the vicinity of the clinics. During our visits, we observed some of the same people on repeated occasions. Individuals who appeared to serve as lookouts would wander away from a group and later re-join it. In addition, people driving vehicles would circle the locations where these groups congregated, slowing down to speak with people on the street. The investigators observed people from the street groups repeatedly entering and exiting vehicles that pulled up to them, meeting other people on the street and engaging in hand to hand contact, or walking away with them, sometimes entering a store with them and subsequently leaving the store without any visible sign that either person had made a purchase in the store. Some of the drug dealers at these locations were brazen about their activities. For instance, on three occasions, dealers approached an OSI investigator and asked if he wanted to buy drugs.

On one occasion, our investigators observed an individual walking back and forth on the streets near a clinic, stopping to engage in conversation with many different people. Over a period of approximately 45 minutes, the investigators observed the same individual continue this activity on several streets with various people who were walking on the street, or who stopped to speak with him as they were driving by in automobiles. Before leaving the area that day, the investigators observed this individual open a door of a parked automobile, pull out a small brown paper bag, and hand it to another person who gave him cash. The investigators then observed this individual count the money that had been handed to him.

One clinic is located in an isolated area near a bus stop. There are no stores, residences, or other businesses in the area other than the clinic. We learned from local police officials that the bus stop is known as a place at

which illegal drug activity frequently takes place. We viewed a videotape made by local police of a drug transaction that took place at the bus stop, in which an undercover officer purchased narcotics. The officer made the purchase from someone who, while appearing to be waiting for a bus, sold drugs to the officer from a bag she carried. When OSI investigators observed the bus stop, approximately eight to ten people were sitting at the stop and appeared to be waiting for a bus. When a bus pulled up to the stop, however, none of the people who were sitting there got on board. As the investigators continued to watch, they observed other people approach the individuals who were seated at the bus stop, engage in conversation followed by hand-to-hand contact, and then walk away.

Adjacent to another clinic is a McDonald's restaurant that is known as the "McPharmacy" to local law enforcement officials who have reported that there is a high level of illegal drug activity in its vicinity. Local police detectives reported that the area surrounding the restaurant and clinic is a magnet for persons throughout the metropolitan Washington, D.C. area seeking to buy and sell narcotics. As a result, local police, federal law enforcement agencies, and police departments in Maryland and Virginia cooperate in investigating illegal drug sales in the area. In fact, a "sting" operation conducted in the area last year resulted in the conviction of several drug dealers. On repeated visits to this location, investigators saw many vehicles in the parking lot of the restaurant with tags from several different states and the District of Colombia. However, most of the vehicles' occupants remained in the lot and were not observed to enter or leave or otherwise do business with the restaurant. Also, investigators observed numerous individuals who stood around a bank of pay telephones near the restaurant. As the individuals stood there, various people walked up to them or drove up in cars. Investigators saw that many of the people who approached the individuals near the telephones handed something to, and received something back from, these individuals. Although the investigators were unable to observe what these people exchanged, on one occasion they observed that cash was exchanged for a small bag. This activity is consistent with the typical patterns of street-level illegal narcotics sales that I discussed earlier.

Clinic Personnel Confirm That Significant Drug Trafficking Takes Place Near Clinics

We also interviewed personnel at three of the clinics who confirmed that there is extensive illegal drug dealing activity in the vicinity of their clinics. A director at one clinic stated that he receives at least one complaint each day from patients who are solicited by drug dealers outside the clinic. The director reported that it is especially difficult for these patients, who are struggling with addiction, to resist the temptations offered by the drug dealers who confront them on a daily basis outside the clinic. To alleviate this situation, the clinic changed its hours of operation so that more patients can enter and leave the clinic early in the day when drug dealers are less likely to be outside. Additionally, the clinic's program director does not permit patients to remain for more than 15 minutes outside the clinic. The program supervisor at another clinic told us that each month, at least one patient reports being assaulted in the vicinity of the clinic and robbed of methadone.

Concluding Remarks

In conclusion, significant drug trafficking takes place in the vicinity of the drug clinics we visited. Although these clinics are intended to help those in need of rehabilitation, patients who seek treatment must navigate their way to and from the clinics in an environment in which illegal sales of narcotics are daily occurrences. The efforts of patients who are seeking rehabilitation, and clinic professionals who serve them, are significantly undermined by the criminal activity that surrounds them.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you or the other Members of the Subcommittee may have at this time.

Contact Information and Acknowledgments

For further information regarding this testimony, please contact Robert J. Cramer at (202) 512-7455 or George Ogilvie at (202) 512-9226.

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Mr. COBLE. We have been joined by the distinguished gentleman from Ohio Mr. Chabot.

And I now I recognize our 1,000-year-old witness Mr. Patterson. I apologize for that mistake.

TESTIMONY OF TYRONE V. PATTERSON, MANAGER OF THE MODEL TREATMENT CENTER, DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH

Mr. PATTERSON. Thank you, Mr. Chairman.

Good afternoon, Mr. Chairman, distinguished Members of Congress and the Subcommittee, colleagues, and concerned advocates and Members of the Committee. My name is Tyrone Patterson, and I am the program manager of Model Treatment at 1300 First Street Northeast. I have been the manager since 1991. As indicated in my bio. I have been involved in drug treatment for the last 28 years, but I have been affected by drug abuse for the last 52 years because I have lived in Washington, D.C., all my life.

Just starting out—and I am going to go away from my text—starting out as a counselor many, many years ago, we saw drug dealing in the many clinics we had in the city at that time, but being a counselor, there is only so much you can do. But I said after so many years, if I could get in a position to make an impact and make a difference, that I would do something about it.

In 1991, I became a manager and started to do something about it after seeing it for so long, seeing my loved ones, friends, family, virtually come through a minefield of drug dealers reaching my clinic. And right now I look out my window, and I have a great big window, picture window, that I can see blocks and blocks away. And I can see—actually see patients who are confronted on a daily basis as they come to the clinic and as they leave. This makes me very angry, and it has made me more determined to get more involved not just calling the police or calling my superiors, but me actually going out on that corner and confronting drug dealers who know me, who know me from being in the treatment programs for so many years. But sometimes they don't go, they don't move, because I don't know all of them. And at times it is disheartening to see our folks that we work with relapse over and over again because the temptation is so great.

Now, I am not a legislator. I guess I was brought here to put a human face on what we go through every day, but I am here representing our patients who struggle with this disease every day of their life. And when we can get them in the program and start that process of rebuilding their lives and doing things that we take for granted, like family outings, going to graduations, picnics, taking our families to the ballgames and going out on a date; believe it or not, things that we take for granted that we have done all our lives that these folks don't do anymore because their life is centered around drug abuse and the drug culture.

I was undecided whether or not I should appear today, because I am not a politician. I am not—I don't understand the law totally, but I know that this will help in some way to let the drug dealers know that they cannot take advantage of the most vulnerable people that we have, and that is our people who are seeking treatment. I am determined not to let it happen whether you pass this

bill or not. But I do think that the people who do sell drugs—and I said it in my testimony—that it should be a provision that the people who are selling just because they need it to maintain their own habit or just to be able to take care of their own humanly needs, there needs to be a provision in there that they receive treatment, that they are offered treatment.

I think that is very important. I think that is what is being talked about all over this country, that treatment does work versus prison. But we have to offer it to them. We have to give them that option.

Today I buried a very close friend of mine, who, after 45 years, succumbed to drug addiction and died, and we buried him today. I looked at him in that casket, and I tried to save his life on four, five different occasions by getting him into treatment and exposed to treatment, but I couldn't save him. I could not save him. I couldn't save him from what has took control of his life all these years. And it has affected his family, the people who love him. It affected what he wanted to be, because he was a good artist. And he is not the only one that we have seen, a life that has been destroyed by drug addiction.

I could stay up here really all day long and tell you about some of the stories, but I want to tell you one story what it means to really complete treatment. I had one gentleman after 25 years complete treatment, and he was off for 90 days, and he came back to talk to me after 90 days being in recovery and he was free of all drugs. And he said, Mr. Patterson, this has been the best 90 days of my life in the past 25 years, and I just wanted to thank you and your staff for providing what you did for me in this program. One week later he passed. That really hurt me. And I thought about it. But what he was telling me—the reason he came back at this particular time was to say thank you, thank you for looking out for him and his best interests.

This is what we see every everyday. This is what my staff sees. And there is so much I can tell you that 5 minutes is not really long to tell the story because I have 28 years of stories. But I am so glad and very humble to be here. All the patients that know I was going to be here, they are excited that I am getting an opportunity to tell their story, and hopefully I can tell more after this hearing is over if you want to ask some more questions and even come by the clinic. I will be glad to have you come by, and you can look out my picture window. Thank you again.

[The prepared statement of Mr. Patterson follows:]

PREPARED STATEMENT OF TYRONE PATTERSON

Good afternoon Mr. Chairman, distinguished Members of Congress and this Subcommittee, colleagues and concerned advocates and members of the community. My name is Tyrone Patterson, Program Manager for the Model Treatment Program located at 1300 First Street, NE in Washington, D.C.—only blocks away from Capitol Hill. I am testifying today on behalf of the District of Columbia government and Mayor Anthony Williams.

Through our Model Treatment Program, the Addiction Prevention and Recovery Administration (APRA) within the District of Columbia Department of Health (DOH) provides comprehensive opioid treatment, methadone medication, counseling, group education and case management activities for over three hundred patients. In addition, the Commission on Accreditation of Rehabilitation Facilities accredits the District's Model Treatment Program.

I have worked in drug treatment for twenty-eight years, including twenty-two years in Model Treatment and serving as its Program Manager since 1991.

It gives me great pleasure to testify before you today. Two years ago, when the Washington Post first interviewed me, I did not imagine that this issue would reach so far and impact so many. For that, I am truly grateful and honored. Beyond the fact that today marks my first time ever before a convened body of Congress, I remain extremely passionate and personally involved in the issues presented before us.

I take my job very personally. I view it with a great sense of commitment and determination because it is so much more than just a job—it is a daily matter of life and death. I am in the business of saving lives. What we do in Model Treatment is save human beings from the negative and destructive grips of drug addiction. It is a struggle defined by spiritual and emotional skirmishes, trenches and body bags. We are on the front line of a great war and I take that responsibility very seriously. I also take great comfort in the fact that, each day, I am doing what's best to serve the common good and the community entrusting us to do just that. At Model Treatment, we do more than serve and treat addicts—we protect communities, families and children who are greatly impacted by substance abuse and addiction.

It is heartening to know that I am on the right side of that battlefield.

But, I also lead a troubled and worried life—a life burdened by the valley of shadow and death that I must travel through each day. Although I draw immense satisfaction from the good work that I am engaged in, I cannot help but be troubled. Each day brings with it uncertainty because of what we do and who we help.

There is this notion—a stigma, in fact—that drug addiction is a behavioral problem caused by bad habits, personal sin and irresponsibility. I am here to tell you today that such a notion could be further from the truth.

Drug addiction is a disease and a debilitating dysfunction of the brain. There are people that we help, treat and counsel for addiction who believe that what they are doing is actually NORMAL. In some instances, many are convinced, after so many years, that addiction is an acceptable way of life—that it becomes a normal routine. This belief is so ingrained that many become removed from what we take for granted. Many live in a completely different world. To the full-blown, fully engaged addict, priorities dramatically shift for the worse. Some lose focus of activities that were once important in their life: raising a family, taking a vacation, buying a house or reading a good book. Sadly, addiction becomes their sole purpose in life.

This is a great challenge we face head on at Model Treatment.

To many addicts, NORMALCY consists of the next high. This mindset runs deeper for those individuals that have lived with their disease for twenty or thirty years. Many addicts have not witnessed or experienced another way of life. Model Treatment is critical because we show addicts an alternative.

People, particularly those defeated by addiction, must have access to different choices. If not, they can't understand what it's like to not be an addict. Hence, it becomes a battle for the soul since many are unaware of any other life or completely forget the life they once had. At Model Treatment, we engage addicts with a positive alternative and the potential for substantive and positive outcomes.

Treatment by itself is a tough and arduous road. But, imagine being treated and looking forward to it, taking that first major step, and then forced to walk through a virtual minefield of temptation and addiction right outside the Program doors. Imagine being preyed upon by dealers only moments after you've made that critical first decision to seek treatment and create positive change in your life.

Sometimes we win these battles. But, many other times, we don't win. Too many of our patients relapse as soon as they leave Model Treatment, finding themselves bombarded with opportunities to regress due to the overwhelming presence of drug dealers.

It has been a severe and continuing problem for many years. Dealers traffic numerous illegal and addicting substances to our clients soon after they have undergone treatment. Each day, I survey this activity right below my office window, an anxious anthill of criminal motives, unabated, in a McDonald's parking lot and the corner of First and New York Avenues, NE. It is a sight that depresses and angers me.

Fortunately, it has improved over the past several years due to coordinated planning and response with the Metropolitan Police Department (MPD). It still presents a pressing challenge, but we have found ways to fight back.

Over the years, our vigilance and determination, in partnership with the MPD, has actually diminished much of this activity. Increased police presence and increased arrests, coupled by my own personal and sometimes dangerous confrontations with dealers, have dealt a major blow to the dark industry plaguing our patients. In addition, we have taken the dramatic, but highly useful, step of opening

Model Treatment an hour earlier. We now open at 6:00 a.m. and begin medicating clients with methadone at 6:30 a.m. Many of our group sessions take place at 5:30 a.m. Clients have admitted that new hours are too early for dealers who, we find, are too tired or too lazy to wake up that early! It may seem too simple to be that effective, but it works.

You would be amazed to see how treatment works, because when it takes hold on an addict, they become alive. It's as though they're taking a breath of fresh air for the first time in their life. Suddenly, they view their addiction and the dealers much differently. We help them realize what made them vulnerable in the first place. They view the dealer negatively because they recognize that such a life has no positive influence or outcome.

Treatment works because we actually show them that addiction and the dealing outside the Program walls are barriers. I routinely invite clients into my office to look outside and watch the dealers stalk their prey. This vivid display of unadulterated addiction actually angers, offends and saddens every client who witnesses it. We tell them: *"This is what you look like."* They respond shamed and embarrassed, but they are also motivated to do something about it.

As a result of our efforts, the patients themselves are telling dealers not to traffic around *their* Model Treatment Program. Patients routinely volunteer information about drug sales occurring around the entire block, including information about illegal and discrete trafficking within the McDonalds. The increased police presence and joint surveillance have been so aggressive that dealers find other ways by which they can sell their product.

Ultimately, I want my people to feel safe and protected when entering Model Treatment. I'm also concerned that drug trafficking around our Program actually heightens the stigma attached to addicts and the places that treat them. It negates the good work that we do. This should, instead, be a peaceful and serene location where patients are undeterred in their quest for recovery and a better way of life. The comfort comes from the fact that I know the dealers and they know I'll call the police and have them chased away or locked up.

In principle, H.R. 4547 directly addresses the problem by imposing penalties severe enough to make the dealer think twice. It brings with it grave consequences for the dealers and sends a stern message that we desperately need in our fight to save lives.

My only concern is that H.R. 4547 lacks a provision that allows treatment for dealers that are addicts. There are some addicts so desperate for a hit that they will resort to dealing and endangering other addicts in order to get money for the next high. They are not really driven by profit; they too are struggling with a disease that has left them without options and no place to go. They feel the only way to survive is the next hit. The next hit, therefore, is obtained by gaining funds from drug sales. They do not recognize their faults because they are afflicted with this terrible disease, and they need treatment. In this case, I ask this body to consider an additional provision that balances increased penalties with opportunities for treatment. Such flexibility in this law would also address the concerns of advocates who have launched a nationwide movement favoring treatment over punishment.

If the culture of substance abuse is pervasive and right at your doorstep, it makes the war many times harder to fight. This is why H.R. 4547 has the potential to serve as a useful and effective resource in that fight. Model Treatment *is* an oasis of help in a desert of hopelessness. Yet, our oasis is surrounded by adversaries we confront daily. We need the necessary tools to help our clients reach that oasis safely and undeterred.

Thank you, again, Mr. Chairman for this opportunity to testify before you today. I am available to answer any questions and look forward to working closely with this Subcommittee.

Mr. COBLE. You say you bring a human face to this, and you say you are not a legislator. Your human face, day in day out, is just as important and perhaps more so than legislating it, and thank you for bringing the human face to us.

Mr. Bowman, good to have you with us. Recognize you for 5 minutes.

TESTIMONY OF FRANK O. BOWMAN, III, J.D., M. DALE PALMER PROFESSOR OF LAW, INDIANA UNIVERSITY SCHOOL OF LAW

Mr. BOWMAN. Thank you, Mr. Chairman, Ranking Member Scott and Members of the Subcommittee. It is an honor to appear before you.

I am now a teacher, but for roughly 13 years, I was a prosecutor, Federal and State. For 7 years, I was an Assistant United States Attorney in Miami, Florida. I prosecuted many drug cases, and I have helped to send many drug traffickers to prison for lengthy terms.

And becoming a teacher has not made me a wimp. I believe Federal prosecution is an important component of American antidrug efforts. I have no qualms about sending significant drug dealers to prison for significant periods. Nonetheless, the bill before you, H.R. 4547, seems to me ill advised, particularly at this moment in the history of Federal criminal justice. I have submitted extended written remarks explaining my position, and my oral presentation attempts to distill those written remarks into a couple of basic points.

First, as you all know, on June 24, the Supreme Court decided *Blakely* v. *Washington*. The Court, in an opinion by Justice Scalia, found the Washington State sentencing guidelines unconstitutional. And for reasons I explain in detail in my written statement, *Blakely* almost certainly applies to the Federal sentencing guidelines, rendering them unconstitutional. As of last night at least five or six Federal district court judges have found *Blakely* applicable to the guidelines, including noted conservative scholar and Utah district judge Paul Cassell. I expect that this trickle of opinions invalidating the current regime is going to grow to a flood over the next few weeks.

The result of *Blakely* has been chaos and paralysis throughout the Federal criminal system. Every criminal case resulting in conviction must, of course, have a sentencing, but because of *Blakely*, Federal prosecutors and judges simply don't know how to proceed. No definitive guidance will issue from the Supreme Court for months, and when that guidance comes, it may come in the form of an opinion voiding the guidelines and leaving the other branches to pick up the pieces.

For this reason alone, today seems an inauspicious time to consider legislation which would materially alter statutes and guidelines governing the sentencing of the roughly 40 percent of all Federal defendants convicted of drug crimes. Several of my academic colleagues who have seen copies of this bill suggest that H.R. 4547 amounts to rearranging the deck chairs on the deck of the Titanic, and they may not, at least in the short term, be far wrong. And thus I would strongly suggest that at a minimum, consideration of this bill be deferred and that this Committee direct its immense talents to preventing the ship of Federal sentencing law from slipping below the waves. I propose in my written remarks a simple statutory fix which might bring the guidelines into conformity with *Blakely*.

My second point, however, is even if we were not in the midst of the *Blakely* earthquake, this bill should not be enacted. Virtually all of the bill's provisions are subject to some criticism. I'm going to focus on only two: Its mandatory minimum sentence provisions

and its rollback of existing guidelines rules mitigating sentences for first-time and low-level drug offenders.

As you know, the very idea of mandatory minimum sentences, particularly quantity-based drug sentences, has long been subject to criticism. For myself, I don't necessarily oppose mandatory sentences in principle so long as such sentences meet certain commonsense preconditions. Among these are that mandatory sentences be narrowly targeted at offenders that deserve them, and that the sentences not be disproportionate to the offense.

The mandatory sentences in this bill fail to meet these commonsense preconditions. Sections 2 and 4 of the bill create what I call proximity provisions; that is, in the name of protecting children and of recovering drug addicts from drug dealers, which are certainly laudable goals, they impose 5- and 10-year minimum mandatory sentences on virtually every Federal drug crime regardless of drug type or amount committed within 1,000 feet of a long list of public and private facilities. The result, as indicated in my report, is to impose 5-year minimum mandatory sentences on virtually every Federal drug offense committed in an urban area in this country.

That result is objectionable for at least three reasons. It is widely overinclusive. It imposes high minimum mandatory sentences on literally thousands of defendants whose activities pose no threat to children or to recovering drug addicts. It is irrational in that it creates huge sentencing disparities between identically situated defendants based on the fortuity of their distance from a swimming pool, library or video arcade. And finally, if actually enforced, it would exacerbate racial and economic disparities in drug sentencing by imposing dramatically higher sentences on drug transactions in urban areas which are disproportionately inhabited by minorities and the poor.

Section 2 of the bill is directed to deterring the sale of drugs to children by imposing mandatory sentences on persons who distribute to minors and young adults. While that, too, is a laudable objective, the actual language of the bill would impose 5- and 10-year mandatory sentences on young adults who sell or exchange personal use quantities of drugs to one another. For these and other reasons, which the passage of my time precludes me from getting to at the moment, it seems to me that this bill is primarily simply unnecessary.

It seems to me that there is very little public request for a drug bill of this kind. Certainly there is no request for it from the Federal judiciary, none from the defense bar, none from the broader public. And I must say that, at least among line Federal prosecutors, I can think of none of them, or certainly very, very few, who would think that a drug bill of this type was necessary for them to do their important work.

[The prepared statement of Mr. Bowman follows:]

PREPARED STATEMENT OF FRANK O. BOWMAN, III

Testimony of Frank O. Bowman, III
M. Dale Palmer Professor of Law
Indiana University School of Law - Indianapolis
Before the Subcommittee on Crime, Terrorism, and Homeland Security,
Committee on the Judiciary
U.S. House of Representatives
July 6, 2004

Blakely v. Washington and H. 4547

I am grateful to the Subcommittee for the opportunity to testify today regarding H. 4547, which has been titled `Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004'. My testimony will address two general subjects: (1) the undesirability of proceeding with significant sentencing legislation of this type in light of the profound uncertainties created by the U.S. Supreme Court's very recent decision in *Blakely v. Washington*; and (2) what seem to me to be shortcomings in the bill itself.

I. Introduction

I am currently on the faculty of the Indiana University School of Law – Indianapolis where I am the M. Dale Palmer Professor of Law. Before becoming a teacher, I was a trial lawyer for 17 years, roughly 13 of which were spent as a federal or state prosecutor. I began my career as a Trial Attorney for the Criminal Division of the U.S. Department of Justice (1979-82), and later served as a Deputy District Attorney in Denver, Colorado (1983-87). For seven years, from 1989-96, I served as an Assistant U.S. Attorney for the Southern District of Florida (Miami), where for a period I was Deputy Chief of the Southern Criminal Division. I have prosecuted or supervised the prosecution of numerous drug cases, from small hand-to-hand drug sales in state court to complex importation schemes involving hundreds or thousands of kilograms of cocaine in Miami.

I do not favor the legalization of drugs. I believe that the criminal law has an important function to play in anti-drug strategies. I believe that federal prosecution, in particular, is a critical component of overall anti-drug efforts, particularly because of the interstate and international character of the drug trade. When I entered the academy, my first article was a defense of the federal role in drug law enforcement.[1] In a later article I wrote: "I have no truck with drug dealers. … I have prosecuted many traffickers, urged their lengthy incarceration with zeal, and witnessed its imposition with satisfaction."[2] While I suspect that my prosecutorial ardor may have mellowed somewhat in the intervening years, my fundamental position has remained the same – drug trafficking is an evil and criminal law enforcement, including the imposition of significant prison sentences in appropriate cases, plays a vital role in combating that evil.

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[1] Frank O. Bowman, III, *Playing "21" With Narcotics Enforcement*, 52 WASH. & LEE L.R. 937 (1995).
[2] Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WISC. L. REV. 679 (1996).

Likewise, I am not a proponent of unchecked judicial sentencing discretion. I have been a long-time supporter of structured sentencing systems and of the federal sentencing guidelines in particular. I have written a number of articles defending the federal sentencing guidelines as a beneficial set of constraints on judicial sentencing authority.[3]

Therefore, I come before you today entirely in sympathy with what I take to be the fundamental aims of H. 4547. Nonetheless, I urge the Judiciary Committee not to approve this bill.

First, because of the Supreme Court's decision less than two weeks ago in *Blakely v. Washington*, __ U.S. __, 2004 WL 1402697 (June 24, 2004), the constitutionality of the federal sentencing guidelines (and of sentencing systems in numerous states) is presently in grave doubt. It is not an exaggeration to say that the federal criminal justice system is in chaos.[4] As I will explain below, there is good reason to believe that congressional action may be required to provide both short and long-term solutions to the disruption caused by *Blakely*. H. 4547 would significantly modify important components of federal sentencing law. Congress should be cautious about adding new complexities to an already volatile situation, at least until the constitutional status of the federal sentencing guidelines becomes clear and the shape of the post-*Blakely* sentencing universe solidifies.

Second, even if *Blakely* had not turned the sentencing universe upside down, I would still be urging the Committee not to approve this bill. As sympathetic as I am to its laudable aims, the particulars of the legislation do not seem to me to be helpful additions to the armamentarium of those fighting drug trafficking and abuse, and would in many instances create more problems than they solve.

II. Blakely v. Washington

In this section of my testimony, I will briefly analyze the effect of *Blakely* on federal sentencing law and then outline a possible legislative response to the crisis created by that decision.

A. The Effect of *Blakely* on the Guidelines

A detailed analysis of the Blakely opinion is beyond the scope of this testimony.[5] In summary, the case involved a challenge to the Washington state sentencing guidelines. In Washington, a defendant's conviction of a felony produces two immediate sentencing consequences -- first, the conviction makes the defendant legally subject to a sentence within the upper boundary set by the statutory maximum sentence for the crime of

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[3] *See, e.g., Id.*; Frank O. Bowman, III, *Fear of Law: Thoughts on 'Fear of Judging' and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS L.J. 299 (2000).

[4] A great many states are in the same unhappy situation, but their difficulties do not bear directly on the subject of today's hearing.

[5] The best currently available judicial analysis of *Blakely's* effect on the federal system is Judge Paul Cassell's opinion in U.S. v. Croxford, Case No. 2:02-CR-00302PGC (D. Utah June 29, 2004), holding the Federal Sentencing Guidelines unconstitutional in light of Blakely. No assessment of the current state of affairs would be complete with reading this opinion.

conviction, and second, the conviction places the defendant in a presumptive sentencing range set by the state sentencing guidelines. This range will be within the statutory minimum and maximum sentences. Under the Washington state sentencing guidelines, a judge is obliged (or at least entitled) to adjust this range upward, but not beyond the statutory maximum, upon a post-conviction judicial finding of additional facts. For example, Blakely was convicted of second degree kidnapping with a firearm, a crime that carried a statutory maximum sentence of ten years. The fact of conviction generated a "standard range" of 49-53 months; however, the judge found that Blakely had committed the crime with "deliberate cruelty," a statutorily enumerated factor that permits imposition of a sentence above the standard range, and imposed a sentence of 90 months. The Supreme Court found that imposition of the enhanced sentence violated the defendant's Sixth Amendment right to a trial by jury.

In reaching its result, the Court relied on a rule it first announced four years ago in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In the years since *Apprendi*, many observers (including myself) assumed that *Apprendi's* rule applied only if a post-conviction judicial finding of fact could raise the defendant's sentence higher than the maximum sentence allowable by statute for the underlying offense of conviction. For example, in *Apprendi* itself, the maximum statutory sentence for the crime of which Apprendi was convicted was ten years, but under New Jersey law the judge was allowed to raise that sentence to twenty years if, after the trial or plea, he found that the defendant's motive in committing the offense was racial animus. The Supreme Court held that increasing Apprendi's sentence beyond the ten-year statutory maximum based on a post-conviction judicial finding of fact was unconstitutional.

In *Blakely*, however, the Court found that the Sixth Amendment can be violated even by a sentence below what we have always before thought of as the statutory maximum. Henceforward, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, supra (Opinion of Justice Scalia; emphasis in original).

Accordingly, the Federal Sentencing Guidelines seem to fall within the *Blakely* rule. A defendant convicted of a federal offense is nominally subject to any sentence below the statutory maximum; however, the actual sentence which a judge may impose can only be ascertained after a series of post-conviction findings of fact. The maximum guideline sentence applicable to a defendant increases as the judge finds more facts triggering upward adjustments of the defendant's offense level. In their essentials, therefore, the Federal Sentencing Guidelines are indistinguishable from the Washington guidelines struck down by the Court.[6] Thus, although the Court reserved ruling on the application

[6] There are, of course, many differences in the two systems, but most of those differences would seem to be either immaterial or to render the federal guidelines more, not less, objectionable under the *Blakely* analysis. For example: (1) Various observers have pointed out that the Washington guidelines are statutory, while the Guidelines are the product of a Sentencing Commission nominally located in the

of its opinion to the Guidelines, there seems little question that it does impact the Guidelines.

The question then becomes what immediate effect Blakely will have on the federal sentencing system. In the last week, federal sentencings all over the country have stopped while courts and litigants assess the situation.[7] As judges begin to rule, they face three basic options: (a) find that Blakely does not apply to the federal sentencing guidelines and proceed as though nothing has happened; (b) find that the Sentencing Guidelines survive, but that each guideline factor which produces an increase in sentencing range above the base offense level triggered by conviction of the underlying offense is now an "element" that must be pled and proven to a jury or agreed to as part of the plea; or (c) find that the Guidelines are facially unconstitutional, in which case judges can sentence anywhere within the statutory minimum and minimum sentences of the crime(s) of conviction.

Consider these options and their practical consequences:

(a) *Blakely* does not apply to the Federal Sentencing Guidelines: For the reasons sketched above, this seems an unlikely result. Of the roughly half-dozen district court judges who have so far issued opinions addressing the Blakely's impact on the Guidelines, none has found that *Blakely* does not apply.

(b) Blakely transforms the Guidelines into a part of the federal criminal code: The second possibility is that courts could find that the guidelines remain constitutional as a set of sentencing rules, but that the facts necessary to apply the rules must be found beyond a reasonable doubt by a jury or be agreed to by the defendant as a condition of his or her plea. In effect, all Guidelines rules whose application would increase a defendant's sentencing range[8] would be treated as "elements" of a crime for purposes of indictment, trial, and plea. During the last week, several district court judges have used essentially this approach to reduce the sentences of convicted defendants whose cases were awaiting sentencing or pending appeal.[9]

Judicial Branch. However, the federal guidelines were authorized by statute and amendments must be approved by Congress (at least through the negative sanction of inaction). More importantly, the institutional source of the rules seems immaterial to the Court's Sixth Amendment concern about the role of the jury in determining sentencing facts. (2) The federal guidelines are far more detailed than their Washington counterparts, but that seems only to make them a greater offender against the Sixth Amendment principle enunciated in *Blakely*. (3) The modified real-offense structure of the Guidelines, in particular their reliance on uncharged, or even acquitted, relevant conduct, is different than the Washington system, but surely much more offensive to the *Blakely* rule than the Washington scheme.

[7] Similar stoppages have occurred in many state courts, but the implications of *Blakely* for state sentencing are beyond the scope of this testimony.

[8] Probably excluding rules on criminal history, since the Court has previously held that sentence-enhancing facts relating to criminal history need not be proven to a jury.

[9] See, e.g., United States v. Shamblin, Crim. Action No. 2:03-00217 (S.D. W.Va. June 30, 2004) (Goodwin, J.).

If Guidelines adjustments were henceforward to be treated as elements of a crime to be proven beyond a reasonable doubt at trial, a host of new rules and procedures would have to be devised. At this point, no one has fully mapped out all the modifications that would be required; however, the list would seem to include at least the following:

- The government would presumably have to include all guidelines elements in the indictment. However, this is not certain. Perhaps guidelines enhancements sought by the prosecution could be enumerated in separate sentencing informations; but if so, such a procedure would presumably have to be authorized by statute and might not pass constitutional muster.
- If guidelines elements were required to be stated in indictments, grand juries as well as trial juries would have to find guidelines facts, and thus grand jurors would have to be instructed on the meanings of an array of guidelines terms of art – "loss," reasonable foreseeability, sophisticated means, the differences between "brandishing" and "otherwise using" a weapon, etc.
- Since guidelines enhancements would be elements for proof at trial, the Federal Rules of Criminal Procedure and local discovery rules and practices would have to be revised to provide discovery regarding those elements.
- New trial procedures would have to be devised. Either every trial would have to be bifurcated into a guilt phase and subsequent sentencing phase, or pre-*Blakely* elements and post-*Blakely* sentencing elements would all be tried to the same jury at the same time.[10] There is now no provision in federal statutes or rules for bifurcated sentencing proceedings, except in capital cases, and there is at least some doubt that such bifurcated trials would even be legal in the absence of legislation authorizing them.
- If a unitary system of trial were adopted, the judge would be required to address motions to dismiss particular guidelines elements at the close of the government's case and of all the evidence,[11] before sending to the jury all guidelines elements that survived the motions to dismiss.

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[10] Alternatively, perhaps only those Guidelines elements thought particularly prejudicial to fair determination of guilt on the purely statutory elements would have to be bifurcated, but that option would require a long, messy process of deciding which Guidelines facts could be tried in the "guilt" phase and which could be relegated to the bifurcated sentencing phase.

[11] Unlike other conventional "elements" of a crime, "guidelines elements" would presumably be subject to dismissal at any point in the proceedings without prejudice to the defendant's ultimate conviction of the core statutory offense. For example, in a unitary trial system, if the government failed to prove drug quantity in its case-in-chief, the drug quantity "element" could (and presumably should) be dismissed pursuant to the F.R.Cr. P. at the close of the government's case without causing dismissal of the entire prosecution. By contrast, a failure to prove the "intent to distribute" element of a 21 U.S.C. § 841 "possession with intent to distribute" case would require dismissal of the entire prosecution.

- In either a unitary or bifurcated system, the judge would be obliged to instruct the jury on the cornucopia of guidelines terms and concepts, and the jury would have to produce detailed special verdicts.

The prospect of redesigning pleading rules, discovery and motions practice, evidentiary presentations, jury instructions, and jury deliberations to accommodate the manifold complexities of the Guidelines should give any practical lawyer pause. The new system would take years to design and shake down. In the interim, uncertainty would be endemic. Even when the new system settled in, the sheer complexity of a regime that grafted hundreds of pages of guidelines rules onto the trial process would dramatically increase the potential for trial error. One of the many perverse results of such a nightmarishly complex system would be the creation of a powerful new disincentive to trials, and thus a probable diminution of the already rare phenomenon of jury fact-finding that the *Blakely* majority presumably meant to encourage.

The second consequence of treating all Guidelines sentencing enhancements as elements would be to markedly alter the plea bargaining environment. This reading of *Blakely* would transform every possible combination of statutory elements and guidelines sentencing elements into a separate "crime" for Sixth Amendment purposes. This has two consequences for plea bargaining: (a) As a procedural matter, each Guidelines factor that generates an increase in sentencing range would have to be stipulated to as part of a plea agreement before a defendant could be subject to the enhancement. (b) More importantly, negotiation between the parties over sentencing facts would no longer be "fact bargaining," but would become charge bargaining. Because charge bargaining is the historical province of the executive branch, the government would legally free to negotiate every sentencing-enhancing fact, effectively dictating whatever sentence the government thought best within the broad limits set by the interaction of the evidence and the Guidelines. The government would no longer have any obligation to inform the court of all the relevant sentencing facts and the only power the court would have over the negotiated outcome would be the extraordinary (and extraordinarily rarely used) remedy of rejecting the plea altogether.[12]

A plea bargaining system that operated in this way might benefit some defendants with particularly able counsel practicing in districts with particularly malleable prosecutors. On the other hand, making sentencing factor bargaining legitimate

[12] And even this remedy would be of little practical use. If the judge rejected a plea because she felt it was unduly punitive, she could not prevent the government from presenting its case to a jury. If a judge were to reject a plea on the ground that it did not adequately reflect the full extent of the defendant's culpability under Guidelines rules, the judge could not force the government to "charge" the defendant with additional Guidelines sentencing elements. The most the court could do is force the case to trial on whatever combination of statutory and guidelines elements the government was willing to charge a weak and self-defeating remedy because the two possible outcomes of a trial on such charges are a guilty verdict on the charges the judge thought inadequate in the first instance or a not guilty verdict on some or all of the charges, which would produce even less punishment.

would dramatically increase the leverage of prosecutors over individual defendants and the sentencing process as a whole, leading to worse results for some individual defendants and a general systemic tilt in favor of prosecutorial power.

In any case, any benefit to defendants would inevitably be uneven, varying widely from district to district and case to case. To the extent that the Guidelines have made any gains in reducing unjustifiable disparity, a system in which all sentencing factors can be freely negotiated would surely destroy those gains. (Prevention of this outcome was, after all, the point of the Guidelines' "relevant conduct" rules, see U.S.S.G. §1B1.3.) It might be suggested that the Justice Department's own internal policies regarding charging and accepting pleas to only the most serious readily provable offense would protect against disparity; however, the experience of the last decade, during which variants of the same policy have always been in place, strongly suggests that local U.S. Attorney's Offices cannot be meaningfully restrained by Main Justice from adopting locally convenient plea bargaining practices.[13] Once previously illegitimate "fact bargaining" becomes legally permissible charge bargaining, no amount of haranguing from Washington will prevent progressively increasing local divergence from national norms.

Ironically, if *Blakely* were ultimately determined to require (or at least permit) the Guidelines to be transformed into a set of "elements" to be proven to a jury or negotiated by the parties, the effect would be to markedly reduce judicial control over the entire federal sentencing process. Not only would district court judges be stripped of the power to determine sentencing facts and apply the Guidelines to their findings, but appellate courts would be stripped of any power of review. Neither jury findings of fact nor the terms of a negotiated plea are subject to appellate review in any but the rarest instances. Thus, the interpretation of *Blakely* discussed here would have the perverse effect of exacerbating one of the central judicial complaints about the current federal sentencing system – the increase of prosecutorial control over sentencing outcomes at the expense of the judiciary.

Finally, even if one likes the idea of transforming guidelines factors into elements, it is doubtful that judges alone could effect the transformation. Legislation and Sentencing Commission action would almost certainly be required to modify the Sentencing Reform Act, the Guidelines, and the Federal Rules of Criminal Procedure to accommodate the new constitutional model, a process that would take months or years to accomplish.

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[13] A number of studies have found evidence of significant local variation in plea negotiation and other sentencing practices among different districts and circuits. See, e.g., Frank O. Bowman, III, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 531-34, 560 (2002) (noting inter-district and inter-circuit disparities in average drug sentences and discussing the "stubborn localism of judicial and prosecutorial behavior").

c. *Blakely* renders the Federal Sentencing Guidelines facially unconstitutional: The third reading of *Blakely* open to judges is that it renders the Federal Sentencing Guidelines in their present form facially unconstitutional, at least within the current framework of procedural rules governing criminal trials, sentencings, and appeals. At least two district court judges have issued rulings to this effect, including an elegant and persuasive opinion by Judge Paul Cassell of the District of Utah.[14] I think Judge Cassell is right and that the Supreme Court will ultimately agree.

Blakely appears to require this result. *Blakely* finds it unconstitutional for the maximum sentence to which a defendant is exposed based purely on the facts found by a jury or admitted in a plea agreement to be increased based on post-conviction judicial findings of fact.[15] The linchpin of the entire federal sentencing guidelines system is precisely such post-conviction judicial findings. The Guidelines model has three basic components: (1) post-conviction findings of fact by district court judges; (2) application of Guidelines rules to those findings by district court judges; and (3) appellate review of the actions of the district court. Both the Guidelines themselves and important components of statutes enabling and governing the Guidelines were written to effectuate this model. Although it is intellectually possible to isolate the Guidelines rules from the web of trial court decisions and appellate review procedures within which the rules were designed to operate, doing so does such violence to the language, legislative history, and fundamental conception of the Guidelines structure that one could save them only by transforming them by judicial fiat into something that neither the Sentencing Commission nor Congress ever contemplated that they would become.[16] It is certainly true that when construing statutes facing constitutional objections that courts will attempt to save so much of the statute as can be saved consistent with the constitution. On the other hand, if the reading of a statute

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[14] United States v. Croxford, No. 2:02-CR-00302PGC (D. Utah June 29, 2004) (Cassell, J.); United States v. Medas, 2004 U.S. Dist. LEXIS 12135 (E.D. N.Y. July 1, 2004) (adopting the reasoning and conclusions of Judge Cassell in Croxford).

[15] It is not only judicial fact-finding that offends the Sixth Amendment under *Blakely*, though that alone is surely enough. Recall that under the Washington sentencing scheme, a judge who found the presence of a gun was not legally obliged to sentence the defendant in the aggravated range, but had to make the additional determination that the fact found merited an increase. Justice Scalia found that element of judicial choice present in the Washington statute did not save it from constitutional oblivion. A post-conviction judicial finding of fact that enabled the judge to exercise his judgment to impose a higher sentence was, in Justice Scalia's view, constitutionally impermissible. The fact that an increased offense level is an automatic consequence of most factual determinations under the federal guidelines certainly seems to make them more objectionable, rather than less.

[16] Time and space preclude a detailed exegesis of this point, but consider as but two examples the relevant conduct rules, U.S.S.G. §1B1.3, and the provisions of the Sentencing Reform Act (both in its original form and as amended by the recent PROTECT Act) providing for appellate review. The relevant conduct rules plainly contemplate sentences based on judicial determinations of facts not found by jury beyond a reasonable doubt. Similarly, provisions of the Sentencing Reform Act governing appellate review of guidelines determinations are effectively nullified by a guidelines-as-elements-of-the-offense application of *Blakely* because if all upward guidelines adjustments must be determined either by jury verdict or by stipulation, there is virtually nothing left to review.

> required to render it constitutional transforms the statute into something entirely at odds with its original design and conception, courts may properly strike down the statute in its entirety.
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> Not only does the reasoning and language of *Blakely* seem to require invalidation of the Guidelines, but the real world effects of the alternative Guidelines-as-elements interpretation outlined in the previous section will give thoughtful judges reason to shy away from it. Not only would such a system be remarkably ungainly, but far more importantly, it would, as noted, exacerbate those features of the current system that federal judges find most galling. If the only options facing the Court were (a) preserving a simulacrum of the Guidelines system that would make the features judges now find most objectionable even worse, or (b) striking the system down in its entirety and starting anew, it is hard to imagine that a majority of the justices would not strike down the system given a plausible constitutional argument for doing so.
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> Thus, while the Supreme Court could adopt a saving interpretation of the Guidelines which transformed them into elements of a new set of guidelines crimes, the Court could, without any violence to ordinary principles of constitutional adjudication, just as easily find the whole structure invalid.

B. What Can Congress Do?

There are certainly some who would be delighted to have the entire Guidelines regime be cast aside in the hope that something preferable will arise in its place. If one wants to destroy the whole structure more or less regardless of what might fill the gap, the preferred stance is one of inaction. On balance, however, both the short and long term consequences of such a course seem undesirable.

In the near term, the federal courts will continue in chaos as judges try to negotiate the labyrinth created by *Blakely*. In the longer term, absent congressional action, either the Guidelines will be transformed by judicial decisions into an annex to the criminal code, augmenting the power of prosecutors and decreasing the authority of judges, or more likely the whole structure will be invalidated as unconstitutional and the process of creating a federal sentencing system would have to begin anew. Such a process carries great risks for all those interested in federal sentencing. For Congress and the Sentencing Commission, seventeen years of work would be nullified. For prosecutors, the Guidelines have been a boon; acceding by inaction to the collapse of the current structure with no guarantee of what might replace it would present, at the least, a tremendous gamble. Even those who have no investment in the Guidelines and every interest in radical reform should be very concerned that any replacement could be even more punitive and more restrictive of judicial discretion than the Guidelines themselves.

Assuming that one wants to preserve the fundamental Guidelines structure or at least to avoid the risks presented by letting *Blakely* play itself out, what can be done? I

believe that the Guidelines structure can be preserved essentially unchanged with a simple modification – *amend the sentencing ranges on the Chapter 5 Sentencing Table to increase the top of each guideline range to the statutory maximum of the offense(s) of conviction.*

As written, *Blakely* necessarily affects only cases in which post-conviction judicial findings of fact mandate or authorize an increase in the *maximum* of the otherwise applicable sentencing range. To the extent that *Blakely* itself may be ambiguous on the point, the Supreme Court expressly held in *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986), and reaffirmed in *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406 (June 24, 2002), that a post-conviction judicial finding of fact could raise the *minimum* sentence, so long as that minimum was itself within the legislatively authorized statutory maximum. It bears emphasis that *Harris* was decided only two years ago, and was decided after *Apprendi* and on the very same day as *Ring v. Arizona*, 536 U.S. 584 (June 24, 2002), the case whose reading of *Apprendi* Justice Scalia found so important in his *Blakely* opinion. Thus, the change I suggest would render the federal sentencing guidelines entirely constitutional under *Blakely* and *Harris*.

The practical effect of such an amendment would be to preserve current federal practice almost unchanged. Guidelines factors would not be elements. They could still constitutionally be determined by post-conviction judicial findings of fact. No modifications of pleading or trial practice would be required. The only theoretical difference would be that judges could sentence defendants above the top of the current guideline ranges without the formality of an upward departure. However, given that the current rate of upward departures is 0.6%,[17] and that judges sentence the majority of all offenders at or below the midpoint of existing sentencing ranges, the likelihood that judges would use their newly granted discretion to increase the sentences of very many defendants above now-prevailing levels seems, at best, remote.

This proposal could not be effected without an amendment of the Sentencing Reform Act because it would fall afoul of the so-called "25% rule," 28 U.S.C. § 994(b)(2), which mandates that the top of any guideline range be no more than six months or 25% greater than its bottom. The ranges produced by this proposal would ordinarily violate that provision.

Accordingly, the following statutory language, or something like it, should serve:

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[17] U.S. SENTENCING COMMISSION, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 63 tbl. 32; 80, tbl. 45 (2002). The rate of upward departures in drug cases has historically been lower still; it was 0.6% in 1992 and declined steadily to 0.2% in 1999 and 2000. U.S. Sentencing Commission, 1992 Annual Report 120 (1993); U.S. Sentencing Commission, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80, tbl. 45 (2000); U.S. Sentencing Commission, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80, tbl. 45 (2001).

"*Notwithstanding any other provision of law to the contrary, the sentencing ranges prescribed by Chapter 5 of the federal sentencing guidelines shall consist of the minimum sentence now or hereafter prescribed by law and a maximum sentence equal to the maximum sentence authorized by the statute defining the offense of conviction, or in cases in which a defendant has been convicted of multiple counts, the sum of the maximum sentences authorized by the statute or statutes defining the offenses of conviction.*"

In addition, if such a statute were passed, Congress might think it proper to direct the Sentencing Commission to enact a policy statement *recommending* that courts not impose sentences more than 25% higher than the guideline minimum in the absence of one or more of the factors now specified in the Guidelines as potential grounds for upward departure. In order to avoid falling foul of *Blakely*, failure to adhere to this recommendation would either not be appealable at all or appealable only on an abuse of discretion standard. A few modifications to the Guidelines themselves would also be required to bring them into conformity with *Blakely* and the new statute – for example, it would have to be made clear that guideline provisions relating to upward departures were now only factors recommended to the district court for its consideration in determining whether to sentence in the upper reaches of the new ranges (or more than 25% above the bottom of the new ranges if the foregoing suggested policy statement were adopted). But otherwise, very little would have to change.

C. The Relation of a *Blakely* Fix to H. 4547

In the end, the proposal made here might only be a stopgap which would serve to prevent chaos in the near term and give everyone breathing space within which to plan the next step in the evolution of the federal sentencing system. The Supreme Court has yet to speak its final word on the constitutionality of the Guidelines as they exist today, much less on the constitutionality of judicial or legislative modifications of the Guidelines and sentencing procedures in response to *Blakely*. If the foregoing presentation has established nothing else, I hope it has convinced you that the problems created by *Blakely* are very complicated indeed and will require careful thought and sustained work by all those involved in federal sentencing. At a time like this, it seems imprudent to push forward with a far-reaching piece of drug sentencing legislation built around a sentencing structure whose future shape and very survival are now in doubt.

III. An Analysis of Provisions of H. 4547

Time and space preclude a detailed analysis of all the provisions of H. 4547. I address the mandatory sentencing provisions of the bill in detail and discuss a few of its guidelines provisions more briefly.

A. Mandatory Sentencing Provisions of Sections 2 and 4 of H. 4547

Sections 2 and 4 of H. 4547 create lengthy new mandatory minimum sentences for three classes of cases: (1) drug offenses committed within 1000 feet of a long list of public and private facilities associated with children and young adults; (2) drug offenses committed within 1000 feet of medical facilities related to drug treatment; and (3) drug distribution by adults to minors (or in one case to persons under the age of 21).

As the Committee is doubtless aware, mandatory minimum sentences have been the subject of widespread criticism from the bench,[18] the bar,[19] the academy,[20] public advocacy organizations,[21] and the press. The United States Sentencing Commission has also repeatedly opposed mandatory minimum sentences as inconsistent with a system of guidelines sentencing.[22] I am not necessarily opposed to mandatory minimum sentences in principle. Such sentences are certainly within the power of Congress to adopt, and it seems absurd to suggest that no minimum sentence should ever be set for any crime, as for example a minimum period of incarceration for a homicide, an aggravated assault, or a very serious drug trafficking offense. That said, it seems equally clear that mandatory minimum sentences are a legislative and law enforcement tool to be used sparingly and only when certain common sense conditions are met. These include:

- Mandatory minimum sentences should be imposed only on carefully defined categories of crime. When Congress creates a mandatory minimum sentence, it defines a set of circumstances which it believes should *always* result in a preset prison sentence for every person whose conduct falls within the statutory definition, and it precludes judicial evaluation of whether any individual defendant is truly one of those at whom the statute was aimed or whether a defendant's personal circumstances should, in justice, mitigate the penalty. Particularly when the mandatory term is long, Congress should exercise the utmost care in

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[18] Judicial disapproval of mandatory minimum sentences is close to universal and includes even staunchly pro-law enforcement jurists otherwise supportive of structured sentencing. See, e.g., Address of Justice Anthony Kennedy to the American Bar Association, August 9, 2003 ("By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."); Paul G. Cassell, *A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums*, 56 STANFORD L. REV. 1017 (2004); John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 *Notre Dame J. of Law, Ethics & Public Policy* 311 (2004).

[19] The American Bar Association has long been on record as opposing minimum mandatory sentences.

[20] See, e.g., Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AMER. CRIM. L. REV. 87 (2003).

[21] One entire public advocacy organization, Families Against Mandatory Minimums (FAMM), is devoted to this subject.

[22] U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991); William W. Wilkins, Jr., Phyllis J. Newton, and John R. Steer, *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 317 (1993) ("Now that the Commission is in place, Congress must begin to reassess the manner in which it sets sentencing policy. Mandatory minimum penalty statutes are inconsistent with the guidelines system.")

ensuring that all those who fall within the statute's terms deserve the mandated sentence.

- A proposed statute mandating a minimum mandatory sentence should be rejected if it is over-inclusive, in the sense that its language applies to a substantial number of defendants who are not engaged in the kind of conduct against which the statute is primarily directed.
- A proposed statute mandating a minimum mandatory sentence should be rejected if it likely to create irrational sentencing disparities between similarly situated defendants.
- A proposed statute mandating a minimum mandatory sentence should be rejected if it is likely to require disproportionately harsh penalties for a significant proportion of the persons to whom its language applies.
- Congress should be cautious about enacting minimum mandatory sentences which are likely to be applied selectively or to be bargained away by prosecutors.
- Congress should be particularly cautious about enacting minimum mandatory sentences which seem likely to have a racially or economically disparate impact, at least in the absence of compelling evidence of the necessity for such sentences.

Each of the mandatory minimum sentence provisions of Sections 2 and 4 appear to offend some or all of the foregoing conditions.

a. The Proximity Provisions

Section 2(c) of H. 4547 provides for a minimum mandatory five-year term of imprisonment for any person who distributes, possesses with intent to distribute, or conspires or attempts to distribute or possess with intent to distribute any quantity of any controlled substance (excepting five grams or less of marijuana) "in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or a public or private youth center, public swimming pool, or video arcade facility, or a public library or public or private daycare facility." Any person convicted of this crime who has one prior federal or state felony drug conviction would receive a minimum mandatory ten-year sentence.

Section 4 of H. 4547 imposes the same five and ten-year mandatory minimums on drug offenses committed within 1000 feet of a "drug treatment facility," which is defined as virtually any hospital, clinic, or other location which either performs drug treatment or refers patients for drug treatment. Section 4 is directed at deterring dealers from lurking near drug treatment facilities with the specific intent to tempt recovering addicts going to and from treatment back into chemical bondage. However, as drafted it would apply to

any drug crime within the protected zone regardless of whether the drug recipient was in drug treatment or even needed drug treatment.

The entirely laudable purposes of Section 2(c) are, first, to deter the sale of drugs to minors and, more generally, to protect minors from collateral harms incident to drug sales such as inter-dealer violence by deterring drug sellers from engaging in their trade in places where children congregate. The evils that the bill's proponents undoubtedly have in mind are images of pushers selling drugs to kids on the playground or drug gangs shooting it out at the neighborhood youth center with bullets whizzing around the ears of innocent young bystanders. Such deplorable activities should be punished severely (and are under existing law). However, H. 4547 would apply equally to a pair of grizzled 40-year-old addicts selling a gram of heroin in an alley at 2 a.m., a defendant caught storing a few ounces of cocaine in a bus station locker, or a defendant meeting with an undercover policeman in a parking lot to discuss a future sale of a half-pound of marijuana, so long as the alley, bus station, or parking lot was within 1000 feet of any of the facilities listed in the statute. Indeed, because the list of facilities is so comprehensive and the size of the exclusionary zone is so large, the actual effect of Section 2(c), particularly when considered together with Section 4, is to impose five-year minimum mandatory sentences on virtually any drug offense committed anywhere in an urban area.

The foregoing assertion is not mere hyperbole. In 2001, the Connecticut legislature considered the real world effects of several state statutes similar in design to H. 4547. Connecticut law at the time imposed minimum mandatory sentences on a variety of drug offenses committed within 1500 feet of elementary and secondary schools, a licensed child day care center identified as such by a sign posted in a conspicuous place, or public housing projects.[23] Connecticut's legislative research organization prepared maps of various Connecticut cities to determine which areas fell within the geographical reach of these laws. They found that their laws covered the urban core of every city they examined, and in the case of New Haven reached virtually every square foot of the city excepting parts of the Yale golf course and a swamp. After viewing these maps and considering other information, the Connecticut legislature amended their laws to provide greater judicial discretion in the application of drug statutes. Copies of the maps of New Haven, Hartford, and Stamford, Connecticut appear below.[24]

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[23] See CGS § 21-278a(b) (2001) (imposing three-year minimum mandatory sentence for certain drug sales or possession with intent to sell); CGS § 21a-279(d) (2001) (imposing two-year minimum mandatory sentence for certain possessory drug offenses; and CGS § 21a-267(c) (2001) (imposing a one-year minimum mandatory sentence for possession of drug paraphernalia by a non-student on or within 1500 feet of a school).

[24] The Hartford and Stamford maps are from George Coppolo, Dan Duffy, and Jack Burrieschi, Drug Crimes Near Schools, Day Care Centers and Public Housing, OLR Research Report 2001-R-0330 (March 20, 2001).

Map 1: New Haven – 1500 ft Buffer for Schools, Daycare Centers, and Housing Authority Projects[25]



Public, Private, Charter, and Head Start Schools

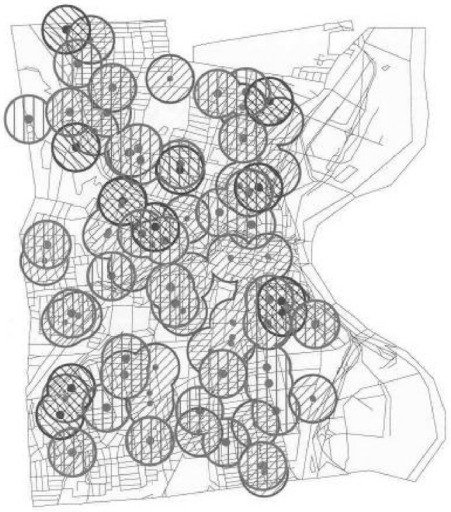
New Haven Housing Authority Projects

Daycare Centers (More than 12 children)

Streets

[25] From George Coppolo, Drug Sales Near Schools, Day Care Centers, and Public Housing Projects, Connecticut OLR Research Report 2001-R-0016 (Jan. 19, 2001).

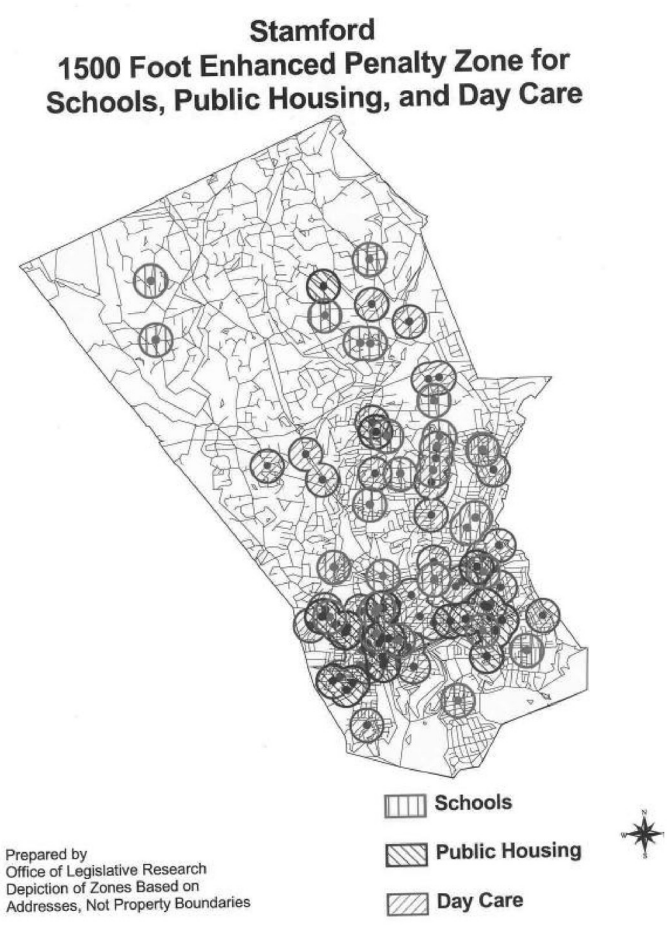
Hartford
1500 Foot Enhanced Penalty Zone for
Schools, Public Housing, and Day Care Centers



Prepared By
Office of Legislative Research
Depiction of Zones Based on
Addresses, Not Property Boundaries

Schools
Public Housing
Day Care




Stamford
1500 Foot Enhanced Penalty Zone for
Schools, Public Housing, and Day Care
Schools
Public Housing
Day Care
Prepared by
Office of Legislative Research
Depiction of Zones Based on
Addresses, Not Property Boundaries

These maps provide a fair visual approximation of the combined reach of Sections 2 and 4 of H. 4547. Under Connecticut law, the radius of the protected zone around each individual facility is larger than would be the case under H. 4547 (1500 feet vs. 1000 feet). On the other hand, H. 4547 lists far more protected facilities than does Connecticut law, adding colleges and vocational schools, playgrounds, public or private youth centers, public swimming pools and libraries, video arcades, private day care facilities not identified as such with any sign, and all health care facilities connected with providing drug treatment.

Because of their sheer geographic reach, Sections 2 and 4 of H. 4547 violate every one of the conditions suggested above for acceptable mandatory minimum statutes:

a. Sections 2 and 4 are not narrowly drawn, but are instead markedly over-inclusive. Although they are intended to combat a narrow subset of drug activities affecting children and persons in drug treatment, they cover virtually all drug crimes committed in urban areas. They would even apply to drug crimes committed by persons who took special precautions to avoid contact with or impact on children or persons in drug treatment.
b. Sections 2 and 4 would create irrational sentencing disparities between similarly situated defendants. Under Section 2 of H. 4547, a 35-year-old man who sold 6 grams of marijuana to a 40-year-old man at 2:00 a.m., while standing 999 feet from a locked and shuttered urban video arcade, would receive a mandatory five years in prison, while the same man conducting the same sale to the same customer on a suburban street or country road would be eligible for probation under the Sentencing Guidelines.[26] At the edges of the protected zones, the sentence for a drug crime would vary by five years or more based not on the mental state of the defendant, the identity of other participants in the offense, or any other meaningful indicator of the inherent seriousness of the crime, but on whether the defendant was standing 999 or 1001 feet from the local swimming pool.
c. Sections 2 and 4 impose disproportionately harsh penalties on many of the persons to whom their provisions plainly apply. Pursuant to these provisions, every on-campus sale of six or more grams of marijuana from one college student to another, every sale of one tab of Ecstasy at a downtown club that happened to be 1000 from the main branch of the public library, and every sale of a single rock of crack in a public housing project would be subject to a *mandatory* five-year federal prison sentence.

[26] U.S.S.G. §2D1.1(c)(19). The base offense level for less than 250 grams of marijuana is 6, and for a first-time offender the sentencing guideline rage is 0-6 months; at this level, even a repeat offender would eligible for a non-prison sentence. U.S.S.G. §5B1.1. As a practical matter, given the de minimis penalties currently prescribed for such an offense, it would almost certainly never be federally prosecuted. As noted below, passage of H. 4547 might well alter that reality.

Even if one agrees that these and similar transactions should be criminal, a five-year mandatory sentence is plainly disproportionate to the offense.

d. Given the obvious overbreadth of Sections 2 and 4, they would surely be only selectively enforced. Prosecutors would decline to bring charges under the newly amended mandatory provisions in many, probably most, of the cases to which those provisions apply, and would bargain away charges under these provisions in many cases they did bring in order to secure expeditious pleas. By enacting Sections 2 and 4 of H. 4547, Congress would be approving harshly punitive mandatory sentences for a group known in advance to be too broadly defined and then relying on prosecutors to apply the penalties only to the "right" defendants. I yield to no one in my admiration for federal prosecutors, and I view prosecutorial charging discretion as an important component of a well-balanced criminal justice system. Nonetheless, while unfettered judicial sentencing discretion is undesirable, placing unreviewable power in the hands of prosecutors to impose or refrain from imposing lengthy mandatory sentences is probably even less so.
e. Sections 2 and 4 present a substantial risk of creating racial and economic disparities in sentencing. As the Connecticut maps illustrate, Sections 2 and 4 would apply disproportionately to the most densely populated cores of urban areas. Not only is an urban-suburban disparity between drug penalty levels facially inappropriate, but such a disparity would inevitably, even if entirely unintentionally, fall most heavily on minorities and the poor who are to a disproportionate degree the inhabitants of urban centers. It is fair to say that, at least among African-Americans, the single most bitterly resented provision of federal drug law is the crack cocaine-powder cocaine sentencing differential.[27] It is by no means unreasonable to expect that Sections 2 and 4 would have a similarly disparate racial impact and would thus exacerbate the impression that federal criminal law discriminates based on race and class. Congress should be reluctant to pass criminal statutes that are likely to have racially disparate effects in the absence of the most compelling public necessity. As great a danger to public order and tranquility as drug trafficking may be, a widespread loss of faith in the basic fairness of American criminal justice is surely a greater one.

It will doubtless be noted that Sections 2 and 4 of H. 4547 are merely amendments to an existing statute, 21 U.S.C. § 860, which already provides for minimum mandatory sentences for certain drug crimes committed within specified distances of many of the same facilities and which has not so far inspired widespread outrage or caused the negative effects I have foreshadowed for H. 4547. However, this fact is not an argument in favor of H. 4547.

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[27] In 2002, 81.4% of all crack defendants in federal court were black, while only 30.9% of powder cocaine defendants were black. U.S. SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 34 (2004). A similar pattern has persisted since the advent of the enhanced crack penalties.

First, the current law is already subject to most of the objections noted above. Fundamentally, it makes little sense to impose enhanced penalties on drug crimes based purely on the fortuity of their proximity to such a long list of public and private facilities. The existing 21 U.S.C. § 860, therefore, ought at a minimum to be redrafted to focus on drug transactions that really do involve or pose some particular risk to minors.

Second, the currently specified mandatory sentence for a first offense under 21 U.S.C. § 860 is one year, not the five years called for by H. 4547. Thus, the current penalty is not so obviously disproportionate to the seriousness of many of the covered offenses as a five-year penalty would be.

Third, and most importantly, the current relatively mild statute is rarely applied, but there are good reasons to believe that a new harsher version would be employed far more frequently, sometimes in earnest and even more often as a bargaining chip. At present, U.S. Attorney's Offices rarely prosecute drug cases calling for sentences as low as one year, viewing such cases as being of insufficient importance to merit the expenditure of scarce prosecutorial resources. Cases presently accepted for prosecution will almost certainly involve charges that, if proven, would require a prison sentence longer than one year either under the Guidelines or other existing minimum mandatory sentences. However, prosecutors tend to measure the value of cases in part by the sentence the legislature prescribes; if Congress signals that any low-level urban drug crime merits a five-year sentence, at least some U.S Attorney's Offices will begin prosecuting a lot more of such cases. The crack experience provides an instructive example. It is indisputable that federal prosecutors now pursue many low-quantity crack cases they would never pursue in the absence of the five and fifty gram quantity thresholds for mandatory crack sentences.

b. The Distribution to Minors Provisions

Section 2(a) of H. 4547 would amend 21 U.S.C. § 859(a) to impose a five-year minimum mandatory sentence on any person 18 years old or older who distributes any quantity of any controlled substance (excepting five grams or less of marijuana) to any person 21 years old or older. If the distributor is 21 years old or older and the recipient is under 18, the mandatory minimum sentence would double to ten years. By way of illustration, under H. 4547, if an eighteen year-old college freshman sells six grams of marijuana (a few marijuana cigarettes) to a 20-year-old college junior, she must serve five years in federal prison. And if a 21-year-old college senior sells six grams of marijuana to a 17-year-old freshman, the older girl must serve ten years in federal prison. Finally, under Section 2(b) of H. 4547, if the 21-year-old college junior happened to have one prior felony drug conviction, even (it appears) for felony possession, her sentence for selling six

grams of marijuana to her 17-year-old friend would be mandatory life imprisonment. Or putting it another way, the penalty for selling drugs to a person under 18 for any defendant with a prior felony drug conviction would henceforth be mandatory life imprisonment.

Sections 2(a) and 2(b) are subject to a number of the same objections as the proximity provisions of Section 2(c), but their central problems are two: overbreadth and overpunishment. The evil against which these provisions are directed is adult drug dealers preying on vulnerable kids. The image in the minds of the drafters is presumably that of greasy grownup pushers hanging around the schoolyard, but the language of the bill would extend its coverage to tens of thousands of people who look nothing like this image. In the name of "Protecting Children From Drug Traffickers," the bill would impose mandatory prison terms on young adults of college and military age who sell personal use quantities of drugs to each other. Moreover, the length of the sentences prescribed, while perhaps defensible for adult defendants dealing heroin to twelve-year-olds, would be facially unreasonable for most of the defendants to whom the bill's language actually applies.

3. H. 4547, the PROTECT Act, and the Ashcroft Memo

In addition to the other difficulties described above, the mandatory sentencing provisions of H. 4547 are in tension with important components of the PROTECT Act of 2003 and the ensuing memorandum on prosecutorial charging and plea bargaining policy issued by Attorney General Ashcroft. One objective of the PROTECT Act was to ensure that prosecutors prosecute all defendants for the most serious offense provable on the evidence and that judges sentence all defendants in conformity with the expressed wishes of Congress by applying, with only rare departures, the most serious applicable sentencing law. As written, H. 4547 imperils this objective. The bill prescribes mandatory penalties for tens of thousands of persons whom most of us would agree should not be subject to them, as well as for some much smaller number who perhaps should. If federal prosecutors were to prosecute everyone who violated this statute and judges were to impose the sentences it requires, the result would be frequent individual injustices, public outcry, and widespread revulsion against the entire federal anti-drug program. If instead, as would surely be the case, prosecutors employed the statute only rarely and selectively, it would become merely a bargaining lever used to induce pleas and pressure defendants to cooperate in the prosecution of others.

Congress should not enact sentencing laws whose sole purpose or primary real world effect is to give bargaining leverage to prosecutors. This is not to say that prosecutors should not plea bargain to facilitate expeditious processing of criminal cases or offer sentence reductions to criminals as an inducement to cooperate against their fellows. Indeed, I "flipped" many defendants when I was

a prosecutor and have written articles defending the necessity of the practice.[28] Nonetheless, there are limits. Inducing cooperation from defendants by offering reductions from otherwise applicable sentencing levels is entirely proper *if* the sentence with which the defendant is being threatened would be a just punishment for the crime he committed. In many instances covered by the language of H. 4547, that would not be so.

B. Sections 3 and 5

As a long-time drug prosecutor, I am sometimes in disagreement with those who argue that drug sentences should not be based on drug quantity. In principle, I think drug quantity does serve as a decent rough proxy for offense seriousness in drug cases. However, quantity is not an invariably accurate proxy for offense seriousness or for the blameworthiness of individual offenders. In particular, it tends to overstate the culpability of persons, especially first-time offenders, who play minor or transient roles in drug transactions or organizations.

The Sentencing Commission, and indeed Congress itself, have long recognized the potential for unfair overpunishment of minor players in drug transactions. Congress sought to mitigate the effects of pure quantity-based sentences when in 1994 it enacted the "safety valve," 18 U.S.C. § 3553(f), relieving certain first-time non-violent offenders from the strictures of mandatory sentences. The Sentencing Commission followed suit in 1995 with a guidelines safety valve, U.S.S.G. §2D1.1(b)(6), which provides a two-offense-level reduction for persons who qualify for the statutory safety valve and whose guideline range is 26 or greater. Several years ago, the Commission reacted to continuing concern among front-line sentencing professionals about overpunishment of minor players by enacting the so-called "mitigating role cap," U.S.S.G. §2D1.1(a)(3). This guideline caps the offense level of a defendant who is determined by the court to have been a "minor" or "minimal participant" at 30, which is to say a guideline range of 97-120 months. Finally, the Commission responded to the potential for overly expansive applications of conspiracy law to peripheral conspirators by modifying the relevant conduct rules to restrict (to a modest degree) the inclusion of co-conspirator conduct in calculations of relevant conduct.

Sections 3 of H. 4547 would eliminate both the two-level guidelines safety valve adjustment and the mitigating role cap. Section 5 would re-expand conspiratorial liability for sentencing-enhancing conduct to the fullest possible extent. These provisions are objectionable on two grounds. First, they are unjustifiably harsh and would abandon without justification years of efforts to make drug sentences conform more closely to the real culpability of individual defendants. Second, by directly amending the Sentencing Guidelines and prohibiting the Sentencing Commission from revisiting these issues in the future, the Bill exhibits a corrosive disrespect of the

[28] See, e.g., Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L.R. 7 (1999).

important function of the Sentencing Commission as an independent body of sentencing experts.

C. General observations

The provisions of H. 4547 that I have not analyzed in detail are much of a piece with those examined above. They raise sentences, decrease judicial discretion, and denigrate the role of the Sentencing Commission. The primary objection to the entire package is that it is simply not necessary. There is no groundswell of public opinion demanding higher drug sentences. Indeed, the nearly universal trend in the states is for lower sentences, less mandatory sentences, and more attention to non-incarcerative approaches to drug crime. Nor is there any demand for this bill among line federal prosecutors. The Department of Justice may support it, but I submit that few, if any, line prosecutors would contend that its provisions are necessary to their work.

Not only is the bill of doubtful necessity, but this Committee should be concerned about its probable costs. Incarcerating more people for longer periods costs money. Given the budgetary pressures facing the country, some estimate of the likely cost of the bill ought to be obtained before the Committee proceeds.

CONCLUSION

Let me repeat my thanks for having been given the opportunity to address the Committee. As noted, I have the deepest personal and professional sympathy with the objectives of H. 4547. Nonetheless, for all the reasons enumerated above, I recommend that the Committee not act favorably on this legislation at the present.

Mr. COBLE. With two of us here, I think time will permit for a second round of questioning. Ms. O'Neil, we impose the 5 minutes against us, too, so if you could make your answers terse, we would appreciate that.

Mr. Patterson in his testimony, Ms. O'Neil, indicated that there are some traffickers who are feeding their own habit by selling drugs. Are there different ways of addressing low-level offenders in the District of Columbia that allow the option of the treatment first prior to sentencing, A; B, are there treatment options available for traffickers who are sentenced to an active Federal prison sentence; and how is the decision made with regard to sentencing someone to an active prison sentence versus drug court?

Ms. O'NEIL. Mr. Chairman, as you just alluded to, there are several ways to deal with drug traffickers. And though I am not an expert in the State system, I have practiced my entire career in the Federal system, I am aware here in Washington, D.C., that they do have a drug court program, and that is a system whereby you are able to, in lieu of prison time, move a person into a treatment program that has very specific limits, goals and targets for the person that they must complete. They do extensive treatment, they have retraining efforts, and they are constantly monitored by the court. And if they fail to complete their treatment successfully, then they actually go into a more incarceration program, a prison program.

Drug courts can be very successful. As I said, since I am not an expert of the State system or the D.C. System, I don't know what exact processes are used by the District of Columbia or other States to decide whether they will recommend candidates for the particular drug court programs at issue.

With regard to the Federal court system, we offer a number of programs through the Federal Bureau of Prisons for Federal inmates who are incarcerated for drug offenses and for other sentences. They are able to get drug abuse education where they receive information about alcohol, drugs and the physical, social and psychological impact of their addiction. Fifty of the BOP institutions in the country offer what is known as the residential drug abuse treatment program. This is a program that is designed to provide inmates with very intensive 500 hours of drug abuse treatment, 4 hours a day, 5 days a week for 9 months. We find that the likely use of drugs after completing this program is severely diminished.

We also have informal group therapy within the Bureau of Prisons and what is called a transitional drug abuse treatment program, which provides the general population with information about drug treatment and effective transition from the prison institution to the community.

Mr. COBLE. Thank you.

Mr. Cramer, you may not know the answer to this, but I am interested in knowing what comes first, the trafficker or the treatment center? Do your studies reflect on that?

Mr. CRAMER. No. Our study doesn't really reach that question.

Mr. COBLE. I was just thinking aloud now whether the need is in the X section of the city, so we will locate the center here, as opposed to traffickers already there, or after the center is located

and the traffickers are attracted to the center and the vulnerable activity that is forthcoming.

Let me ask you this: Were there instances where you observed children involved or being exposed to these drug-trafficking activities?

Mr. CRAMER. During our observations that we were there many, many times, we did not actually see children among the groups of people who were—appeared to be selling drugs. We did not make observations of that kind ourselves.

Mr. COBLE. Mr. Patterson, I am going to get to you on my next round, but let me put this question to Mr. Bowman. Given the *Blakely* decision—and it has recently been handed down, and I have not read it—what other choice does Congress have besides mandatory minimums if we wish to ensure that these individuals who are preying on America's most vulnerable receive active sentences?

Mr. BOWMAN. Mr. Chairman, I believe there is a way to essentially restore the viability of the Federal sentencing guidelines with a relatively simple statutory fix, which is outlined in my written remarks, but it is a little too complicated to talk about in this short period of time.

I would go beyond that, however, and I think to respond to what I take to be a more particular question, the difficulty that I see in general with much of this bill is simply its overbreadth. No one can argue with the objective here that is preventing sale of drugs to children, preying on addicts. But it would be simple, I think, to draft statutory provisions that are narrowly directed at those who do those activities, who actually sell to addicts, who actually sell to children, rather than drafting what we have here, a bill which imposes 5- and 10-year minimum mandatory sentences on virtually everybody who commits a drug crime in an urban area.

Mr. COBLE. I see my time has expired.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. O'Neil, you said some nice things about drug courts and how effective they are. Of course, this is a Federal bill in the Federal system. Is there anything in the bill that makes an activity that is legal now illegal, or all the activities in the bill already illegal?

Ms. O'NEIL. Well, certainly drug trafficking is illegal, period. What the bill does effectively is to increase the penalties for conduct when it is in its most egregious forms, either involving addicts or children.

Mr. SCOTT. There is nothing in here that has any diversion—there is no diversion possibility. If you go to court under this and get prosecuted under this, then you get the increased sentence; is that what I understand?

Ms. O'NEIL. You will get the increased sentence, although like all other mandatory minimum provisions, offenders who are subject to mandatory minimums have the opportunity to cooperate, for example, and to provide information about the other individuals who were involved in the activity and to be relieved from those mandatory minimum sentences. And that is, of course, a very important aspect of this bill, because it is one of the ways that we are most

effective in drug enforcement, by obtaining information from individuals involved in drug activity.

Mr. SCOTT. Has the Department of Justice suggested draconian penalties for securities fraud and other things where life without parole and those kinds of things would be available unless you told everything you knew?

Ms. O'NEIL. The Department of Justice enforces the laws that Congress passes, and we believe it is up to Congress to determine what is egregious. And if securities fraud were determined to be sufficiently egregious, then we would seek mandatory minimums. We would enforce them, and we would encourage people to cooperate.

Mr. SCOTT. Are you testifying in favor of the legislation?

Ms. O'NEIL. In favor of a number of the provisions in the legislation, yes.

Mr. SCOTT. Are you testifying against any of the provisions in the bill?

Ms. O'NEIL. As I have put forth in the written remarks that I have submitted, we do have some concerns with certain provisions of the bill, and we are hoping that we will have the opportunity to work more fully with the Committee to address some of those concerns and those provisions.

Mr. SCOTT. You indicated the mandatory minimums were good in appropriate cases. Are you aware of any case in which the Department of Justice has testified against mandatory minimums; this Department of Justice and this Administration has testified against any mandatory minimums?

Ms. O'NEIL. I am not aware of all of the people who have testified on behalf of the Department of Justice.

Mr. SCOTT. In terms of the age in dealing with children, is the age of the defendant a relevant factor; that is, if a person is 17, is it relevant whether the defendant is 17 or 18?

Ms. O'NEIL. With regard to what is proposed in the legislation or with regard to the general impact of drug trafficking?

Mr. SCOTT. In the imposition of mandatory minimums, if you deal to somebody who is 17 years old, does it matter whether the person who is dealing is 40 years old or 17 or 18 himself?

Ms. O'NEIL. With regard to this legislation, there are some distinctions made with regard to individuals over 21 who deal to individuals who are under the age of 18, and in those cases have more harsh mandatory minimums.

Mr. SCOTT. If you are in a fraternity or a sorority, for personal use going back and forth, the seniors in college would be at severe risk if they are dealing with freshman fraternity members.

Ms. O'NEIL. That would be the case, and they ought to know better.

Mr. SCOTT. Do you know how much this bill will cost to implement?

Ms. O'NEIL. I do not. I would be happy to try to obtain that information, but I don't have that information.

Mr. SCOTT. You are testifying in favor of the bill, and you don't know how much it is going to cost?

Ms. O'NEIL. I personally don't know how much it would cost.

Mr. SCOTT. Mr. Bowman, you indicated that there were areas that the legislation might cover, a significant area of a particular city. Do you have any charts to demonstrate that?

Mr. BOWMAN. Yes, I do. If we could have the Power Point, please?

Essentially—if we go to the second slide, please. Next slide. Next slide. Next slide.

What this slide shows is a chart of the city of New Haven, Connecticut. Turns out that several years ago, Connecticut had a series of laws not dissimilar from the one being suggested here today in that these laws created minimum mandatory sentences for drug sales and other transactions within 1,500 feet of a variety of facilities involving children and schools and so forth. As part of the Connecticut Legislature's consideration of these bills and their minimum mandatory effect, they had their legislative research office proceed to map all the areas of New Haven and other Connecticut cities where the law would actually apply. This is a map of New Haven, Connecticut, and as you can see, the Connecticut legislation would have covered virtually the entire city of New Haven. I am told by reliable sources that it covers the entire city of New Haven except the Yale golf course and a swamp.

Now, this Connecticut legislation is dissimilar from the Federal legislation being proposed here today in that the circle around the affected area is somewhat larger, 1,500 feet rather than 1,000. The Federal legislation is dissimilar from the Connecticut legislation in that the list of protected facilities is much, much, much longer. So this map that you see in front of you is, I think, at least a reasonably fair approximation visually of the effect of this legislation in any major American city. And everywhere in which you see one of those circles, any drug transaction, any quantity or amount except marijuana transactions less than 5 grams would draw a minimum mandatory penalty under this legislation of 5 years.

Mr. COBLE. Mr. Chabot was coming back. Let us have a second round.

Mr. Patterson, we oftentimes hear that drug trafficking is a nonviolent offense. I am sure you probably heard that. You have seen it up close. As you say, you are the human face. You have seen what drugs and drug addiction can do to victims, destroying lives or disrupting families. I suspect—strike that. I shouldn't speak for you. Let me ask you, do you conclude that drug trafficking is, in fact, a violent offense? And how about sharing some observations with the Subcommittee.

Mr. PATTERSON. Mr. Chairman, in the sense of how you are phrasing that as far as a violent offense, it is a violent offense to the person who is using. The problems that they experience after becoming addicted with the loss of their families, loss of their goals and loss of who they are, the purpose of trying to get a chance to experience things that we experience every day, in that sense, yes, I think it is—you could phrase it that way. I don't know if I would phrase it that way, but it does have a damaging effect on all of us because it affects our communities. It affects the people we love. You have to excuse me. I am reflecting on my friend who passed.

Mr. COBLE. Let me ask you this: We live in a very violent era now, as you know. And you mentioned about your picture window

that affords you a very advantageous vantage point to observe various activities that go on. I hope you have not been targeted for any threat or anything along that line. Have you been? Or if you want to decline to answer that, you may do so as well.

Mr. PATTERSON. I have gotten angry looks, but other than that, not directly. I guess it is because of my association with so many people in the District, being involved with families, and at some point in time, drug traffickers have been in one of our programs over the 28 years I have been involved. I have worked in three different programs, so I even know them or know their families or have been in some kind of contact with them.

Mr. COBLE. Well, you, probably more than anybody in this hearing room, know the drastic and terrible effects of drugs. I started to say, when Mr. Scott and I were young, but since I'm about two decades older than he, that would not be appropriate. But when I was a youngster, I guess smoking a cigarette or consuming a bottle of beer was about the closest thing to what would be drugs today. Someone asked me the other day if I ever did drugs. Well, I did not do drugs; they weren't available.

But I think—well, I'm going to get to that. They weren't available. But Mr. Scott wanted to know, would I have if I could. I would like to think that I would not have. I think I would have had the requisite discipline to have avoided that. But, you know, that's easy for me to sit here and conclude that. But I appreciate you all being here, folks.

And I want to recognize Mr. Scott for another round, for his second round.

Mr. SCOTT. Thank you.

Mr. Cramer, one of the things we want to look at is how the provisions in the bill will actually reduce the illegal activities. Sometimes it will state a problem and then present a bill without connecting how the bill will actually deal with the problem. Were there any activities that you saw that we are complaining about that are legal now that would now be—would be illegal under the bill? Or is everything that you saw that we are complaining of already illegal?

Mr. CRAMER. I haven't done a complete study of the bill in preparation for this hearing, so I can't speak with any authority to the actual provisions of the bill. Of course, all of the illegal drug trafficking that we saw would certainly be illegal today.

Mr. SCOTT. Well, if it's illegal and they are prosecuted and convicted and get the time that is presently available, is the problem that people are getting out too soon?

Mr. CRAMER. Well, some might argue that.

Mr. SCOTT. But you didn't see any of that? That's not your testimony?

Mr. CRAMER. No, that is not my testimony. You know, we have come here today basically to provide the Committee with the information about our observations.

Mr. SCOTT. And that you saw the drug activity going on?

Mr. CRAMER. Yes.

Mr. SCOTT. And without any suggestion that the passage of the bill will make that any more or less likely?

Mr. CRAMER. I'm not speaking to that issue, sir.

Mr. SCOTT. Okay. Mr. Patterson, you know, we have choices to make in how we deal with problems. Is it your opinion that there would be less drug use going on, less drug use going on if we spent money jailing people longer or if we gave you more funding for drug treatment?

Mr. CRAMER. Well, let me just say this. It would act as a deterrent from—as a deterrent from drug dealers being able to sell drugs in front of my program or in a—within a thousand feet.

Mr. SCOTT. Wait a minute. They can't do that now legally; can they?

Mr. PATTERSON. What's that?

Mr. SCOTT. Sell drugs within a thousand feet.

Mr. PATTERSON. Well, yes. But what happens is——

Mr. SCOTT. And what's the penalty for them selling drugs right now within a thousand feet of your facility?

Mr. PATTERSON. I'm not sure what the D.C. Law states.

Mr. SCOTT. Well, this isn't going to change D.C. Law.

Mr. PATTERSON. Or the Maryland law.

Mr. SCOTT. Or the Federal law. Now, after we pass it, are people going to know?

Mr. PATTERSON. Yes, we will, because we will get the word out.

Mr. SCOTT. Well, you didn't get the word out the last time we passed the bill.

Mr. PATTERSON. What? About——

Mr. SCOTT. What the penalty is.

Mr. PATTERSON. Yes, we did. But when you are addicted or when you are out there selling drugs for profit, they don't read these bills, they don't really understand what's going on.

Mr. SCOTT. You are absolutely right.

Let me ask you. If you had—if we had, you know, one person going from 5 to 10 years would cost about $100,000. If we took one person off the street instead of for 5 years for 10 years, left everything the same, that would cost us about $100,000. Would we be better off spending that $100,000 in drug treatment?

Mr. PATTERSON. Yes, of course. I mean, any more money that——

Mr. SCOTT. Of course?

Mr. PATTERSON. Of course, any more money that you can give us to treat people who have the disease of addiction would always be—we would be grateful for. But I can't answer that law, whether or not providing a maximum minimum provided in this bill would have an effect. I can't tell you that. I don't know whether or not, you know, that.

Mr. SCOTT. Do you have a waiting list for services?

Mr. PATTERSON. No.

Mr. SCOTT. Anybody that wants treatment can get it now?

Mr. PATTERSON. Yes.

Mr. SCOTT. And are you able to treat people as—what kind of recidivism rate do you have? When people come to you, how successful are you?

Mr. PATTERSON. I don't have that figure. I guess we could give that back to you later.

Let me just say this. You know, I'm not really familiar with all the legislation, and I'm just here to put a human face on what we see every day. I don't know whether or not the bill would have a

major effect or not because I don't—because that's something that's on a broader picture.

But what I do know is what I see. And I see my folks, after they receive treatment, after they receive hope, walk out my door—right outside my door on a—and are almost accosted by the drug dealers as they leave my facility.

Mr. SCOTT. That's illegal now. Right?

Mr. PATTERSON. Yes, it is.

Mr. SCOTT. It will be illegal after this bill passes.

Mr. PATTERSON. Yes, it is. But I can only address what it does to my patients and how it affects them. And let me just say this, my patients, what we have talked about, this bill and what it would do, a lot of them are in favor of having this bill pass because it will give them an opportunity to come to the clinic and instead of going through a mine field——

Mr. SCOTT. Wait a minute. And if it's illegal now, what assurance do we have that it's going to be—what is the penalty for those drug dealers dealing right in front of your facility today? They are facing 5 years mandatory minimum. If the police would come arrest them and prosecute them, they would be gone for 5 years right now.

Mr. PATTERSON. Well, I can't answer that. I cannot answer that.

Mr. COBLE. Mr. Goodlatte, does the distinguished gentleman from Virginia have a question, Bob?

You are recognized.

Mr. GOODLATTE. Thank you, Mr. Chairman. I appreciate your holding this hearing.

Mr. Patterson, will all the drug treatment in the world be effective if drug traffickers prey on people coming out of these clinics or waiting early in the morning to get their treatment to go into the clinic? We have had this issue come up in my own hometown. The question is, will these facilities work if they are a magnet for the drug traffickers who know that that's a place that they can go to find people to buy drugs and will entice them to get the real thing rather than the substitute that's being offered by the drug clinics trying to wean them away from the hard core drugs?

Mr. PATTERSON. Yes, I'm in agreement with that. What we have done at Model Treatment, we started opening up an hour early. That has made a difference, because many drug dealers are not up at that early in the morning. We open up at 6:30 and start medicating at 6:30. It has increased much upon the police presence in our area.

But, again, I'm talking about the person who doesn't really look at all that. All they know is that when they come out of my facility, people are pushing that—all the drugs that they sell—right up into their face. The temptation is great, especially when you are just coming into a facility, especially when you start to receive the benefits of the treatment, of somebody caring for you.

Mr. GOODLATTE. You want to keep those other people away from them.

Mr. PATTERSON. Absolutely. I mean, you have got to realize that people have been doing this for 20 and 30 years. They don't know any other life. And when they see that drug dealer right outside the door once they come out of treatment, it's—it's disheartening to me to have to see them have to go through that every single day.

Now, I don't know whether or not the law is going to make a difference in that or not. I just don't know. But at least I don't have to see that drug dealer. And once the word gets out, that drug dealer is going to know that he cannot sell drugs in front of my facility. He is going to know that he is going to get stiffer penalties if he sells drugs outside my facility.

Mr. GOODLATTE. Thank you.

Ms. O'Neil, do you believe that this legislation will help deter drug traffickers who choose to use children to deliver drugs because of the perception that children will receive lesser sentences?

Ms. O'NEIL. I do believe that this bill will have an impact on people who choose to use children for several reasons. Number one, as you noted, there is a perception among drug trafficking organizations, or actually a knowledge, that a number of juveniles do not get prosecuted, particularly in the Federal system. And so, for particular reasons, they will use youngsters and juveniles in connection with their drug trafficking activity.

They also know that juveniles make very good decoys. If they have an infant traveling with them while they smuggle drugs, they are much more likely to get through Customs quicker or to draw less attention than if they do not. And right now, it's a win-win for the drug dealer. The drug dealer can entice the juvenile to become involved in the trafficking activity with the suggestion that they won't receive stiff penalties, and there is no additional penalty for the trafficker who employs him. The penalty is a minimal one, and to a large extent, the traffickers believe that that is not going to have any major impact on them. This legislation will change that perception.

Mr. GOODLATTE. As a former U.S. attorney, have you seen many cases where children are exposed to drug manufacturing or dealing inside their own homes? Besides the danger of these children becoming addicts themselves, what other dangers does this activity pose to children?

Ms. O'NEIL. I am sad to say, I guess, that I have during my career as an Assistant United States Attorney seen several examples of children being involved in drug trafficking. While I was in Georgia—though it was not a case I prosecuted personally—we had a methamphetamine laboratory in north Georgia explode. An infant was living there with its parents, and when the lab exploded, the infant was left to burn in the laboratory. The child subsequently died. That is probably one of the most extreme examples of a child being involved.

But the Drug-Endangered Children's Program has numerous other examples of raids and arrests where they have recovered children crawling around in the floors of methamphetamine laboratories with their toys scattered next to the dangerous chemicals that are being used. So that is a very severe problem.

In addition, I have personally worked on investigations where we have found children at the time of a search warrant or at the time of an arrest of their parent in the proximity of drugs, drug paraphernalia, guns, because those are all tools of the trade.

We have also had a case in the Organized Crime Drug Enforcement Task Force Program that I am involved with, an operation that was done called Kids for Cover, where they used infants to

smuggle liquefied cocaine into the country. They carried the cocaine in the infant baby formula cans, the same identical baby formula cans they used to feed the infants. And had they made a mistake, it would have been dreadful for the child.

In addition, I am aware that, in one case, the courier who had an infant with her was an addict herself and left the child in the arms of a stranger while that courier went to get her own heroin fix.

So these are very serious problems, and unfortunately, this is the type of conduct that we must deal with, and it's the type of conduct that we are happy this bill will address.

Mr. GOODLATTE. Thank you.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

Mr. Scott has one last question.

Let me mention one subject very quickly to the professor, and then I will recognize Bobby.

Professor, alluding to your diagram of New Haven, the various sectors of New Haven. If you could shut down the trafficking in one or more of those sectors, that appears to me to be a good purpose and been served. Would you not agree?

Mr. BOWMAN. That assumes, of course, that passage of a bill that would impose minimum mandatory penalties on the entire city would achieve the targeted result that you are attempting to achieve. I mean, that, I suppose, Mr. Chairman, is the difficulty that I have with the entire tenor of this hearing, with the greatest respect to my fellow witnesses.

It's all very well to talk about drug dealers preying on drug addicts. It's all very well to talk about children who are affected by drug trafficking. Those things are terrible. And it—but it would be and is quite easy—first of all, all those things are already illegal. But if you want to enhance the penalties, it would be quite easy for this Committee to draft and forward to Congress, as a whole, targeted provisions that deal with those evils. But that is not what this bill does.

I am a great admirer of Justice Scalia, Mr. Chairman, who doesn't think much of congressional intent. Justice Scalia says to all of us, "Look at what the legislation says." And the legislation that you propose or that is proposed before this Committee is not focused on the conceded ills which the other witnesses have talked about here. The legislation that this Committee is considering would throw a net over every urban area and every drug transaction in this country involving urban areas regardless of whether those transactions had the slightest thing to do with drug treatment, the slightest thing to do with children. And that, Mr. Chairman, it seems to me is what's wrong with this legislation.

Mr. COBLE. Thank you, sir.

I recognize Mr. Scott for his final question.

Mr. SCOTT. Thank you.

Ms. O'Neil, dealing with children is already illegal now. What is the additional penalty for dealing with children?

Ms. O'NEIL. Well, what this does is increases the mandatory minimum that exists for some of the——

Mr. SCOTT. What is the present penalty for dealing with children?

Ms. O'NEIL. For some of the statutes there is a 1-year mandatory minimum sentence.

Mr. SCOTT. Wait a minute. What is the penalty?

Ms. O'NEIL. Well, the penalty would be driven by the quantity of drugs that is involved. So it's impossible to determine——

Mr. SCOTT. Is it not twice the normal sentence with a 1-year minimum?

Ms. O'NEIL. That's correct.

Mr. SCOTT. Twice the normal penalty with the 1-year minimum?

Ms. O'NEIL. Right. Which would be driven by the quantity involved in the offense.

Mr. SCOTT. Twice the normal penalty for dealing with children.

Ms. O'NEIL. But that would be the maximum penalty. That would not be the penalty imposed necessarily under the sentencing guidelines.

Mr. SCOTT. Twice the maximum penalty.

Ms. O'NEIL. That's right.

Mr. SCOTT. Okay. And you are not enforcing the law with that. Why would we expect you to enforce the law if we passed the bill?

Ms. O'NEIL. Well, Mr. Scott, with all due respect, we are enforcing the law. The Justice Department has had a number of successful cases——

Mr. SCOTT. Mr. Patterson says that people, right outside his door every day, that people can't leave his facility without running into drug dealers.

Ms. O'NEIL. The difference is that when you set mandatory minimum sentences, you send a clear message that this is important, this is egregious conduct, this is conduct that will not be tolerated. What that translates to——

Mr. SCOTT. Are there not minimums now?

Ms. O'NEIL. But they are very weak mandatory minimums. As I said in my opening statement, what we have are people involved in the drug business who are risk takers. Going to jail is a cost of doing business. The potential, perhaps, of a 1-year mandatory minimum is a cost of doing business which a number of these drug dealers are willing——

Mr. SCOTT. You're talking about deterrent effect. I'm talking about enforcement of the law. Are you more likely to enforce the law if this bill passes than you are now?

Ms. O'NEIL. We enforce all of the laws. But as I said, this sends a clear message that this is a priority for Congress and for the American people, and we will treat it as such.

Mr. SCOTT. Are you more likely to enforce the law if this bill passes than you are now? And I think I'm hearing, no, you are going to enforce it the same way.

Ms. O'NEIL. What we will do is that, there may be cases where it becomes appropriate to make use of—more appropriate to make use of this particular statute than it is currently.

Mr. SCOTT. Well, this is a sentencing statute. It's not an allocation of resource statute. Are you going to allocate more resources to Mr. Patterson's front door if this bill passes than you are now?

Ms. O'NEIL. I personally can't decide how the resources will be allocated. But I can tell you, as I said, that, by sending a clear message, that this is important and that this is conduct that we are going to take very seriously, our resources tend to follow those crimes.

Mr. SCOTT. We can send you a message with a resolution. We don't have to change the statute.

Let me ask Mr. Bowman a question. Do you have any evidence that increasing penalties has a significant deterrent effect on crime? And a follow-up question: Can you talk about the overbreadth in terms of how this bill deals with young people, college students, fraternity and sorority members? But the deterrent effect. If you increase the penalty, what kind of deterrent effect, if it's already a 5-year mandatory minimum, what deterrent effect would a 10-year mandatory minimum have on the—on behavior if there is no increased enforcement?

Mr. BOWMAN. Well, if there is no increased enforcement, I think the likely additional deterrent effect is nearly zero. But even if there were increased enforcement, I think it depends on the additional increment of punishment.

One of the points that strikes me about Mr. Patterson's situation is that, I presume, though I certainly do not know, that one of the substances which is which is regularly trafficked in front of his door is crack cocaine. And if that is true, the mere possession of 5 grams of that substance already draws a 5-year minimum mandatory penalty. It seems a little hard to understand how creating an additional 5-year minimum mandatory for essentially the same conduct is going to do much.

Now, with respect to the question of the effect on children and minors, one of the significant provisions of this proposed bill is that it's at least titled as being directed at the sale of drugs by adults to children. But in fact, once again, if we, with Justice Scalia, actually look at the text of the bill, what we find is something rather more striking.

Could we have the—could I have the PowerPoint once again? Could you—next slide.

Mr. COBLE. Mr. Bowman, if you can sort of accelerate? Because I was supposed to be somewhere 5 minutes ago.

Mr. BOWMAN. Mr. Chairman, I will be finished in—if you can give me 30 seconds.

All right. Keep going. Another. Another. Another. Another. Okay.

This is what I call rush time at the Delta House. Imagine a sorority—this is a little facetious, Mr. Chairman. I hope you will forgive a little facetiousness on a serious topic. But let's assume a college sorority in which Muffy, an 18-year-old freshman, sells 6 grams of marijuana, three or four marijuana cigarettes to Sally, who is a 20-year-old junior. Under this law, Muffy's mandatory minimum sentence would be 5 years. If we assume Buffy, a 21-year-old senior, were to sell one tab of a party drug, Ecstasy, to Missy who happens to be 17 years old at the time, she is a freshman, Buffy, the 21-year-old, draws a minimum mandatory sentence of 10 years.

Next slide, please.

And if it were to happen that Buffy just happened to have some kind of felony, prior felony drug conviction, like, for example, felony possession of marijuana—if she sold that one tab of Ecstasy to Missy, the 17-year-old, Buffy's mandatory sentence under this bill would be life imprisonment without parole. She goes out of prison in a box.

Now, that, I think, is overbroad legislation.

Mr. COBLE. Okay. I think we are about to wrap up here, folks. I think it has been a good hearing.

Ms. O'Neil, for my information, is there currently additional penalties outside drug treatment centers?

Ms. O'NEIL. No. The penalties that I was addressing for Mr. Scott's question involved various penalties involving distribution to minors. We have no additional penalty for distribution within the vicinity of a drug treatment center.

Mr. COBLE. Folks, we appreciate you all being here.

Mr. SCOTT. I ask unanimous consent that a letter from the ABA opposing the mandatory minimums and this particular legislation in particular be introduced for the record.

[The information referred to follows in the Appendix:]

Mr. COBLE. Without object. And I want to thank each of you for being here, folks. We may be visiting with you again.

The record, by the way, will be open for 1 week, 7 days.

This concludes the legislative hearing on H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004." Thank you again for your cooperation. The Subcommittee stands adjourned.

[Whereupon, at 5:23 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, N.E.
SUITE 2-500, SOUTH LOBBY
WASHINGTON, D.C. 20002-8002
(202) 502-4500
FAX (202) 502-4699

July 12, 2004

Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security
House Committee on the Judiciary
207 Cannon House Office Building
Washington, D.C. 20515-6223

Honorable Robert C. Scott
Ranking Member
Subcommittee on Crime, Terrorism,
and Homeland Security
House Committee on the Judiciary
B-351-C Rayburn House Office Building
Washington, D.C. 20515-6216

SUBJECT: H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004"

Dear Chairman Coble and Ranking Member Scott:

We, the voting members of the United States Sentencing Commission, write to express our desire to assist Congress in combating the serious problems of drug trafficking and abuse generally, and the specific issues that are the focus of the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004," H.R. 4547, 108th Cong. (2004) (hereinafter "H.R. 4547"). In that spirit, the Commission has reviewed H.R. 4547 and now provides the following data and information for your consideration.

Much of H.R. 4547 is targeted at the problem of drug distribution involving minors, which the Commission agrees is a serious concern. With respect to drug distribution involving minors specifically, the existing statutory penalty structure, when utilized, already results in significant increases in sentences for drug trafficking involving such aggravating conduct. Commission sentencing data indicate that the average sentences for defendants sentenced in fiscal year 2002 for violations of 21 U.S.C. §§ 859 (Distribution to person under age twenty-one), 860 (Distribution or manufacturing in or near schools and colleges), and 861 (Employment or use of person under 18 years of age in drug operations) were 132 months, 101 months, and 186 months, respectively. These average sentences are significantly longer than the average sentence of 74 months imposed for drug trafficking in fiscal year 2002.

Drug defendants, however, are rarely subjected to the heightened penalties provided by these statutes. Combined only 240 defendants were sentenced for violations of 21 U.S.C. §§ 859, 860, and 861 in fiscal year 2002, although Commission data indicate that the conduct proscribed by these statutes is more prevalent. These data suggest that a more effective way of achieving the increased penalties desired for such conduct is through guideline sentencing enhancements as opposed to increased statutory mandatory minimum penalties. For example, as part of a comprehensive recommendation regarding federal cocaine penalties, the Commission has suggested consolidating the guideline covering 21 U.S.C. §§ 859, 860, and 861 into the general drug trafficking guideline as a sentencing enhancement that could be triggered without a conviction under these specific statutes.[1] *See* Report to Congress: Cocaine and Federal Sentencing Policy, May 2002, at A-2, A-8-9.

H.R. 4547 also would direct the Commission to provide specific sentencing enhancements for drug trafficking offenses involving firearms, drug trafficking resulting in bodily injury, and repeat felony drug trafficking. The Commission recognizes this conduct warrants increased punishment and, in the context of a comprehensive recommendation regarding federal cocaine penalties, previously proposed similar enhancements. *See, id.* at viii, 2, A-8-9.

The Commission cautions, however, that in the absence of a modification to the existing quantity-based penalty structure for crack cocaine offenses, the enhancements called for by H.R. 4547 will exacerbate the sentencing disparity between crack and powder cocaine. Although the conduct covered by the proposed enhancements occurs only in a minority of crack cocaine offenses, data suggest such conduct does occur more frequently in crack cocaine offenses than in powder cocaine offenses. For example, Commission data indicate that in fiscal year 2000, 7.9 percent of crack cocaine offenses resulted in death or bodily injury compared to 4.8 percent of powder cocaine offenses. Similarly, crack cocaine offenders tend to have more extensive criminal histories. *See, id.* at 57, 59. Because the proposed enhancements likely will apply more frequently in crack cocaine offenses, the gap between crack and powder cocaine sentences can be expected to widen without modifying the quantity-based sentences.

In addition to targeting specific conduct for heightened penalties, H.R. 4547 would significantly modify 18 U.S.C. § 3553(f) and USSG §5C1.2, which often are referred to as the "safety valve" provisions. The existing prerequisite in 18 U.S.C. § 3553(f)(5) regarding required disclosures by the defendant "not later than the time of the sentencing hearing" has given rise to a great deal of litigation and concern, particularly regarding the timing of the required disclosures. The Commission would welcome the opportunity to work with Congress to develop an

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[1]This recommendation was made prior to the U.S. Supreme Court's decision in *Blakely v. Washington*, __ U.S. __, 2004 WL 1402697 (June 24, 2004), and its continued viability rests on the ability to distinguish the Federal sentencing guidelines from the Washington state sentencing guidelines at issue in that case, or alternatively, a legislative solution to the guideline enhancement issue.

appropriate statutory and/or guideline mechanism to improve the timeliness of these required disclosures.

The changes proposed in H.R. 4547, however, sweep more broadly. By requiring the the Government to certify that the defendant has "done everything possible to assist substantially in the investigation and prosecution of another person," the bill effectively would transform the nature of the safety valve from a relief mechanism for certain low-level, non-violent drug offenders into something more akin to a substantial assistance motion. But unlike the determination of whether the defendant has provided substantial assistance, a determination of whether the defendant has truthfully provided all information and evidence known to the defendant turns largely on the defendant's credibility, and sentencing courts are best situated to assess the credibility of the defendant. Therefore, this proposed transfer of discretion from the sentencing court to the prosecution does not seem appropriate.

In addition, H.R. 4547 would require potentially sweeping changes to the relevant conduct rules in §1B1.3 of the sentencing guidelines. Specifically, the bill would expand the conduct for which a drug defendant is held accountable at sentencing to include "the conduct of members of the conspiracy before the defendant joined the conspiracy that was known to the defendant before joining the conspiracy." The relevant conduct rules are a primary concern of the Commission as they are a fundamental component of the guideline sentencing structure, and we are not aware of any information suggesting that the existing relevant conduct rules are too narrow or unduly hamper prosecutors.

We hope you find this information helpful and look forward to working with Congress on this important matter.

Sincerely,

Ruben Castillo
Vice Chair

William K. Sessions, III
Vice Chair

John R. Steer
Vice Chair

Ricardo H. Hinojosa
Commissioner

Michael E. Horowitz
Commissioner

Michael E. O'Neill
Commissioner

ROBERT D. EVANS
Director, Washington Office

AMERICAN BAR ASSOCIATION
740 Fifteenth Street, N.W.
Washington, D.C 20005-1022
Telephone: (202) 662-1765
FAX: (202) 662-1762
Internet: rdevans@staff.abanet.org

July 6, 2004

The Honorable Howard Coble
Chairman, Subcommittee on Crime Terrorism
and Homeland Security
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

RE: Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act (H.R. 4547)

Dear Chairman Coble:

On behalf of the American Bar Association, I am writing to oppose the *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004* (H.R. 4547) and to urge that, at a minimum, your Subcommittee defer consideration of this bill pending development of federal case law in light of the United States Supreme Court's recent landmark decision in *Blakely v. Washington*, - - U.S. - - (June 24, 2004).

In light of *Blakely*'s holding that "a judge may impose [a sentence] *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*," (emphasis in original), many of H.R. 4547's provisions raise serious constitutional questions and merit reassessment. Indeed, since *Blakely*, at least three federal district court judges have held the Federal Sentencing Guidelines unconstitutional while numerous others have refused to follow historic guidelines' practices. Beyond the judiciary, the Department of Justice, the defense bar, the U.S. Probation Office and even the U.S. Sentencing Commission appear uncertain about *Blakely*'s ultimate ramifications for the federal sentencing process and the courts' criminal dockets. Now is not the time, therefore, to consider such far-reaching legislation as H.R. 4547.

Apart from *Blakely*-related concerns, H.R. 4547 expands the roundly criticized use of mandatory minimum penalties to 'combat' crime. Such schemes have demonstrated little effect on reducing crime or recidivism, but have led to the continued growth of the overcrowded federal prison system, filling cells with countless nonviolent and first-time offenders for whom tempered leniency may not only be more appropriate but also more just. The unyielding nature of these mandatory schemes, along with the associated racial and socioeconomic disparities and the heavy financial toll on taxpayers, have prompted condemnation from jurists, academics and legal and human rights organizations from across the political spectrum.

The proposed legislation would further undermine the judiciary's historic role in sentencing, and erode the Sentencing Commission's ability to promulgate and amend the guidelines in a manner consistent with the statutory purposes of sentencing, as articulated in 18 U.S.C. § 3553(b). The Commission has long recognized that mandatory minimum penalties are fundamentally at odds with a guidelines structure and a range of graduated sanctions, which are closely tied to the severity of the offense and an individual's criminal history.

Moreover, H.R. 4547, like the PROTECT Act of 2003, engages in wholesale re-drafting of key guidelines provisions that will undoubtedly wreak havoc on the guidelines' coherency.

With the above in mind, the ABA respectfully submits that the following areas represent the major deficiencies of HR. 4547:

- Creates new, or increases existing, mandatory minimum sentences — in some instances 1000% more than the current applicable minimum. In *Blakely*'s wake, factors specified as triggering mandatory penalties will now likely have to be treated as elements of aggravated crimes and charged accordingly.

- Adds specific new offense characteristics to the Federal Sentencing Guidelines that, under *Blakely*, should probably be treated as elements of aggravated offenses.

- Expands the scope of "relevant conduct" to include co-conspirators' conduct before the defendant joined the conspiracy so long as the conduct was known or "reasonably foreseeable" to the defendant, and regardless of whether a conspiracy is actually charged. Such an unprecedented expansion of the law of conspiracy seems constitutionally suspect, especially following *Blakely*.

- Restricts the "safety-valve" (18 U.S.C. § 3553(f)) by requiring, *inter alia*, that the Government certify that a defendant "has done everything possible to assist substantially in the investigation and prosecution of another," thus rendering use of this limited relief provision entirely dependent upon a prosecutor's discretion.

In sum, many of H.R. 4547's key provisions are of doubtful constitutionality in light of *Blakely*, which fact alone counsels deferment pending development in case law. Moreover, this proposed legislation would increase strain on our over-burdened court and prison systems. Finally, H.R. 4547 places unacceptable limits on judicial discretion in sentencing, and undermines the ability of the Sentencing Commission to carry out its statutory tasks.

Sincerely,

Robert D Evans

Robert D. Evans

cc: Members of the Subcommittee

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Washington, DC 20548

July 23, 2004

The Honorable Howard Coble
Chairman, Subcommittee on Crime,
Terrorism, and Homeland Security
Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

I am forwarding to you my responses to the followup questions that you included in your July 20, 2004, letter. As you stated in your letter, these questions are related to your July 6, 2004, legislative hearing concerning the proposed legislation entitled "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004" (H.R. 4547). As shown in the enclosure, my responses to your questions appear in italicized, bold type.

If you have any questions about my responses or need further assistance, please contact me on (202) 512-7455.

Very truly yours,

(signed)

Robert J. Cramer
Managing Director
Office of Special Investigations

Enclosure

Enclosure

Questions for Robert Cramer, General Accounting Office

A. *The Washington Post* ("Drug Market Thrives by Methadone Clinics," Aug.12, 2002) quotes D.C. Police Sergeant John Brennan as stating that despite over 200 arrests near the northeast Washington drug treatment clinic "the impact has been minimal," in part, because "many of those convicted receive sentences that do not involve jail time."

1. Did your interviews with D.C. Police or task force officers confirm the existence of a "revolving door" in which traffickers who had been arrested near treatment centers received little or no jail time and thereafter returned to this location to continue trafficking?

   Response: In our interviews with D.C. Police officers, we were told that individuals who are arrested for drug sales in the vicinity of treatment centers often receive little or no jail time and subsequently resume drug trafficking near the centers.

2. Similarly, did your interviews with D.C. Police or task force officers indicate that persons arrested for drug trafficking near the treatment centers had been previously arrested for such activities in the past?

   Response: In our interviews, we learned that repeat offenders have been arrested for drug trafficking near the treatment centers.

3. Did the D.C. police or task force officers confirm that traffickers often had only small quantities of drugs which they distributed or possessed when they were arrested which do not trigger greater sentences?

   Response: During our investigation, we were advised that there were many instances in which traffickers were arrested with small quantities of drugs. We also learned that there were other instances where traffickers who were arrested with large quantities were sentenced to little or no jail time.

B. The Chairman sought at the hearing to determine whether or not drug treatment centers were simply located in high drug trafficking areas or whether the placement of treatment centers attracted drug trafficking in areas previously free of such activities. What has been the experience of other cities or communities across the country with respect to this question?

Response: During our investigation, we learned of one small community in the Midwest where the size of the local police force doubled from 6 to 12 officers due to an increase in drug trafficking and other crimes after a drug treatment center was erected in that community.

The Washington Post

August 12, 2002

Drug Market Thrives By Methadone Clinics

D.C. Patients Must Face 'McPharmacy'

By Serge F. Kovaleski
Washington Post Staff Writer

In a sullen ritual played out each day, more than 1,000 drug addicts descend on a Northeast Washington neighborhood off New York Avenue to receive treatment at the three public methadone programs in the area.

They are a primed clientele for the drug dealers who operate out of a nearby McDonald's parking lot. Brazenly hustling in broad daylight, the dealers sell a jumble of pharmaceuticals to an unrelenting stream of buyers—an operation that D.C. police describe as the largest open-air pill market in the region.

Many addicts in the midst of treatment say that the availability of so many drugs, also including heroin and crack, presents daily temptations when they are grappling with the physical and psychological complexities of trying to overcome substance abuse.

The McDonald's parking lot abuts the District government's largest methadone clinic and is within three blocks of the two other treatment centers.

On a recent morning, a dealer who goes by the name King Bad swiftly made $2,500 in sales, mostly from hard-core drug users eager for painkillers and sedatives such as OxyContin, Xanax and Percoset, as well as antibiotics for infected needle lesions and blood pressure medication to ease withdrawal symptoms.

"This is *the* place for pills, any pills you want, man," boasted King Bad, 52, a longtime heroin addict who unsuccessfully tried methadone rehabilitation at one of the nearby facilities.

"More than half my customers are in and out of those clinics. This is a way for me to survive," said the dealer, who declined to give his real name out of fear the police

See DRUGS, *A5, Col. 1*

'McPharmacy' Entices Patients at D.C. Clinics

DRUGS, *From A1*

would track him down.

Dubbed "McPharmacy" by police narcotics investigators, the prescription-drug bazaar on New York Avenue and First Street NE is a formidable obstacle for those seeking help at the methadone clinics, D.C. health officials say.

"I get a complaint at least once a day from patients who say they have to walk through that maze of drug dealers," said Tyrone V. Patterson, manager of the Model Treatment Program, which has almost 500 patients a day and is adjacent to the McDonald's. Patterson has a clear view of the illicit activity: The large windows in his office overlook the parking lot.

Also affected are a second D.C. Department of Health clinic, part of the agency's $6.2 million methadone program, and a $725,000 methadone treatment service run by the U.S. Department of Veteran Affairs.

The clinics, with the assistance of police and private security guards, have managed to keep drug activity away from the entrances of their buildings, but the market continues to thrive and has spilled onto surrounding streets.

"It's like walking through a minefield. At one time, I couldn't get in or out without being accosted or succumbing to the drug trade," lamented Philip, 46, a recovering heroin addict who withheld his last name. "If you can make it through this test, you can probably make it through most tests."

The dealers said they are merely exploiting a market that guarantees robust returns and enables many of them to support their own drug habits.

Drug dealers have been a presence for years at the two-story McDonald's at 75 New York Ave. NE, but police have recently noticed greater activity at the site, coinciding with a surge in heroin use in the city. And Cmdr. Alan J. Dreher of the 1st Police District said his office has been receiving more community complaints about the open-air market, which also caters to well-heeled customers from the District, Maryland and Virginia.

John Brennan, a sergeant with the D.C. police major narcotics branch, said that a citywide strike force has made more than 200 arrests at the drug market in the past two years but that the impact has been minimal. Brennan said that new dealers emerge almost as quickly as the police can make arrests and that many of those convicted receive sentences that do not involve jail time.

Ron Keiper, a detective in the narcotics branch, said many of the addicts showing up at the methadone clinics are there because of court orders rather than out of choice, which contributes to the area around the McDonald's being "a haven of bad guys."

William Edwards, who owns the McDonald's, declined to be interviewed. In two written statements, he said he has been working vigilantly with police and the community to control the drug dealing.

"At my own expense, there is a constant presence of uniformed off-duty Metropolitan Police officers in my store. In fact, 21 off-duty police officers work on the premises on a weekly basis," one of the statements said.

On a weekday morning late last month, no police officer was visible at the restaurant while dealers in the parking lot openly handled large wads of cash and dispensed copious amounts of pharmaceuticals. "They [McDonald's] don't mess with us because we spend money with them," King Bad said.

That morning, a man who identified himself only as Rodney, 39, illustrated another dimension to the drug dealing at the McDonald's: Not only do some addicts in treatment continue to buy drugs there, they also sell. Soon after receiving his regular dose of liquid methadone at the Model Treatment Program on First Street NE, Rodney made his way to the parking lot to hawk OxyContin.

"You looking for Oxy? I got it here, right here," he said to a passerby who declined his offer of an 80-milligram pill for $40 or a 20-milligram tablet for $20.

Standing by a trash bin a few steps away, a gaunt woman waved a $20 bill at another dealer who obliged by furtively giving her Catapres, a prescription drug used for high blood pressure.

Capitalizing on their New York Avenue locale near Union Station, the dealers also cater to upscale customers from across the metropolitan area. At one point last week, five cars, including a Mercedes, a BMW and a Pathfinder sport-utility vehicle, idled in the McDonald's lot as the drivers gave their orders to several attending dealers.

"I need some more Percoset," the driver of the BMW, which bore Maryland tags, told a dealer before slipping $60 through the window and motoring away with a dozen pills. Within seconds of that transaction, the driver of the SUV stepped out of his vehicle, which displayed Virginia tags, and handed the dealer $40 for 20 Xanax.

Soon after, a man behind the wheel of a rickety Honda pulled up alongside King Bad and announced that he was selling methadone pills for the "wholesale price" of $5 apiece. King Bad quickly accepted the deal, snapping up a dozen or so pills, which he planned to sell for the market price of $10 per tablet.

Patterson said his clinic "is supposed to be a symbol of help and hope and not a symbol of open drug-dealing." But he also noted that he has used his second-floor office view of the McDonald's parking lot to stress a lesson to recovering addicts: What they see happening in the lot is something they must reject outright if they are to succeed in treatment.

The clinic has moved up its schedule by an hour, giving out methadone from 6 a.m. to 3:30 p.m., to reduce the concentration of patients who come to the facility before going to work. The three methadone programs also offer bus service to and from their facilities.

James T. Speight Jr., director of the second D.C. Health Department clinic, the UPO Comprehensive Treatment Center, said his facility strongly urges the 380 methadone patients it sees each day not to linger in the neighborhood.

"We view the pushers as predators, because the individuals we work with are sick and vulnerable people who are being preyed on," Speight said.



BY JAHI CHIKWENDIU—THE WASHINGTON POST

The McDonald's lot on New York Avenue NE is busy with drug customers from three clinics within three blocks.

Debbie Jackson, who runs the Veteran Affairs Community Clinic—which treats about 180 patients daily in its methadone program—said the drug dealers are ruthlessly trying to cash in on the fact that recovering addicts are susceptible to relapses. "You are not going to sell umbrellas in the desert," Jackson said.

Narcotics investigators said the dealers are getting their pharmaceuticals largely through people who have illegally obtained prescription pads, often through connections at hospitals, clinics or doctor's offices. They sometimes make huge numbers of photocopies to last them long periods. Others sell drugs that have been prescribed to them legitimately by doctors, or they find doctors who will knowingly write fraudulent prescriptions.

Some of the individuals involved in illicit pill distribution also have been found to have prescription cards from several stores so they can get many prescriptions filled without drawing suspicion at any one pharmacy.

Some dealers also buy people's Medicaid prescription cards for up to $100 apiece, allowing the dealers to fill prescriptions at little or no cost.

Law enforcement authorities said that compared with the dozens of other open-air drug markets across the District, the one at the McDonald's generally draws an older crowd of buyers and sellers and has not experienced the violence associated with turf wars in the crack cocaine and marijuana trades.

Brennan said that although there have been isolated situations in which doctors have been busted for writing illegal prescriptions for drugs that are then sold on the street, winning a case is a formidable undertaking. "One of the hardest things to do is to get the doctors," he said. "They are generally intelligent people who know how to cover their tracks and hire the best lawyers."

Without providing details, Dreher said police officers will be more visible around the McDonald's as part of a two-pronged approach aimed at reining in the dealing. "Arresting your way out of the problem is one thing, but you need some decent outreach from social services, and we are looking at getting that going," he said.

Staff researcher Bobbye Pratt contributed to this report.

The Washington Post

WEDNESDAY, JULY 7, 2004

Probe Confirms Dealing of Drugs Near D.C. Clinics

House Measure Seeks Stiff Penalties For Sales Outside Treatment Centers

By MONTE REEL
Washington Post Staff Writer

Frequent and often blatant narcotics dealing outside several Washington drug treatment centers regularly undermines the efforts of addicted patients and those working to help them, according to a federal investigation released yesterday during a congressional subcommittee hearing.

Newspaper coverage of rampant drug dealing near the D.C. government's largest methadone clinic prompted the House Judiciary Committee to call for the probe. During the past 14 months, investigators with the U.S. General Accounting Office made more than 50 visits to five D.C. treatment clinics to conduct surveillance. They did not have to look hard to find illegal dealing, according to the report, describing the areas surrounding the city's treatment centers as "a virtual bazaar of illegal drug dealing."

"Some of the drug dealers at these locations were brazen about their activities," the report stated. "For instance, on three occasions, dealers approached [an investigator] and asked if he wanted to buy drugs."



Tyrone V. Patterson, program manager for a methadone clinic, says drug dealing hasn't stopped.

A Washington Post article in 2002 described unrelenting dealing in a McDonald's parking lot at New York Avenue and First Street NE. The drug market, dubbed "McPharmacy" by police narcotics investigators, abuts the Model Treatment Program, a methadone clinic that treats

See DRUGS, *B5, Col. 4*



BY MICHAEL WILLIAMSON—THE WASHINGTON POST

Tyrone V. Patterson, program manager of the Model Treatment Program, a methadone clinic in Northeast Washington, looks out his window into a restaurant's parking lot, where illegal drugs are being sold.

House Bill Seeks Stiff Penalty For Drug Dealing Near Clinics

DRUGS, *From B1*

more than 300 patients a day and is within three blocks of two other treatment centers.

"It makes it so much harder for our folks who face a daily struggle just to stay clean, to get their lives back to some resemblance of normalcy," said Tyrone V. Patterson, program manager for the Model Treatment Program.

Patterson said police crackdowns have slowed trafficking near his clinic in recent months, though he said it hasn't stopped completely. He was among those who testified yesterday before a House subcommittee to support stiffer penalties for those caught selling drugs near treatment clinics and in areas where children are regularly present.

A bill sponsored by Rep. F. James Sensenbrenner Jr. (R-Wis.) would impose a five-year mandatory minimum sentence on anyone caught dealing within 1,000 feet of drug treatment centers or to those undergoing treatment. A second offense would prompt a mandatory 10-year sentence.

"This will send a message [to dealers] that you can't sell drugs around places where people are trying to get help," Patterson said. The bill requires approval at several levels before it can be enacted.

The GAO investigators visited five drug clinics: the Oasis Clinic at 910 Bladensburg Rd. NE; the D.C. General Hospital facility at 1900 Massachusetts Ave. SE; the Model Treatment Program at 1300 First St. NE; the United Planning Organization Comprehensive Treatment Center at 333 N St. NE; and the Department of Veterans Affairs Substance Abuse Program at 40 Patterson St. NE. Investigators also interviewed city detectives, who said they were aware of the persistent problems at the clinics. Staff members of the clinics told investigators that they witness drug dealing regularly.

"A director at one clinic stated that he receives at least one complaint each day from patients who are solicited by drug dealers outside the clinic," the report stated. ". . .The program supervisor at another clinic told us that each month, at least one patient reports being assaulted in the vicinity of the clinic and robbed of methadone."

INTEROFFICE MEMORANDUM

UNITED PLANNING ORGANIZATION – COMPREHENSIVE TREATMENT CENTER
33 N STREET, NE, 2ND FLOOR
WASHINGTON, DC 20002

TO: MR. KEENEN R. KELLER, ESQ., SENIOR DEMOCRATIC COUNSEL – HOUSE JUDICIARY COMMITTEE

FROM: EDWIN C. CHAPMAN, M.D., AND JAMES T. SPEIGHT, JR.

SUBJECT: HR4547

DATE: 8/2/2004

PLEASE CIRCULATE THE ATTACHED STATEMENT TO

CHARIMAN F. JAMES SENSENBRENNER AND THE COMMITTEE

Dear Mr. Chairman,

It has come to our attention through the media that the Subcommittee on Crime has begun hearings on bill, HR4547, "Defending America's Most Vulnerable", to address drug dealing around treatment centers. Dr. Chapman and I operate the United Planning Organization's Comprehensive Treatment Center at 33 N Street, NE. We were interviewed by the General Accounting Office (GAO) investigation team for input, about which, we gladly discussed. UPO is a not for profit agency and does not lobby; therefore, Dr. Chapman and I are *personally* submitting some comments on behalf of the patients who primarily wish to maintain their anonymity/confidentiality. The patients and neighbors have discussed the need for protection from the predators and hope that the committee can accept some of the advice they offer. We have attempted to summarize their thoughts.

First, they agree with Chief of Police Charles Ramsey that emphasizing frequent arrests and longer sentencing for (street-level) drug dealers is ineffective. The patients see the drug business as a multi-step operation including (1) production cycle, (2) supply cycle (outside suppliers), (3) distribution cycle (street dealers), and (4) product demand (buyers). In the past, longer sentencing at the street level has done little to lessen the problem because arrest and prosecution of the suppliers is difficult, costly, and proportionately small while the frequently arrested street-level dealers and buyers are often drug-dependant, themselves, and easily replaced by other seller/users.

If we cannot arrest and sentence our way out of this dilemma then, by implication, an analysis of the other side – the demand side – may prove to be more humane and cost effective. Interviews with our patient committees and direct observations reveal that the demand "traffic patterns" outside of the Methadone Clinics fall into three general categories: (1) the above mentioned untreated local addicts who loiter, buy, and sell drugs to support their own habits, (2) automobile traffic (often from Virginia and Maryland), and (3) a relatively few, often, mentally impaired patients from the treatment clinics themselves.

The loitering user/sellers frequently act as street level go-betweens ("mules"), protecting the (outside) suppliers from actual hand-to-hand transactions and arrest. It is this group of addicted street-level-sellers that so frustrates the judicial system since they are the ones usually caught, processed, and released within 24 hours, while having no impact on the continued supply cycle. When apprehended, they generally are released to court ordered treatment as an option to jail.

However, categories 2 & 3 are the real driving forces (demand) behind the booming activity surrounding the Methadone clinics. Detainment, stiff fines, and confiscation of their autos may be an affective way of discouraging the drive-thru buyers (old signage: **DRUG-FREE ZONE**; new signage: **DRUG-FREE ZONE – *THE CITY WILL TAKE YOUR VEHICLE*!**).

Most importantly, however, improvements in treatment "choices" should and could be provided for the mentally impaired patients (category 3) with a sincere expansion of long-term residential options, protecting these patients from their own uncontrolled inhibitions. Ambulatory Methadone (out-patient) treatment is a great tool (70-80% effective) but it is of diminished value when approximately 30% of the patients are homeless, 20-30% functionally retarded (no income, limited transportation, intellectually limited), and 10% too mentally ill to make logical, daily, life-sparing decisions. These patients buy drugs while in treatment because they do not have the life-skills to negotiate a complex system of out-patient clinics, under-supplied city pharmacies, and temporary shelters. We can and should provide these patients (estimated to be greater than 100 and less than 1000) supervised psychiatric, long-term residential treatment with Methadone and/or Buprenorphine capability.

The cost of protecting and treating this limited few will clearly be less than trying to incarcerate a never ending stream of self-addicted street distributors. By relegating this relatively fixed nexus of patients to safe-treatment sites (reducing daily access to their drug dependant distributors… what about a renovated portion of the St. Elizabeth Hospital Compound or the proposed new D.C. General Campus?) we could creatively interrupt our endless cycle of re-supplying easy-prey clients to the next generation of easily replaceable distributors.

We realize that some of the points made in this statement may not fall under the jurisdiction of the Sub-Committee but believe they are important for a comprehensive understanding of the problem. We earnestly encourage you to share your understanding and interest with the appropriate committee.

If you think we can be of further assistance, please feel free to contact us at (202) 535-1793.

Edwin C. Chapman, M.D.
Medical Director
UPO Comprehensive Treatment Center

James T. Speight, Jr.
Center Director
UPO Comprehensive Treatment Center