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DEFENDING AMERICA'S MOST VULNERABLE: SAFE ACCESS TO DRUG TREATMENT AND CHILD PROTECTION ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

H.R. 1528

APRIL 12, 2005

Serial No. 109–41

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://www.house.gov/judiciary

U.S. GOVERNMENT PRINTING OFFICE

20–527 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
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DEFENDING AMERICA'S MOST VULNERABLE: SAFE ACCESS TO DRUG TREATMENT AND CHILD PROTECTION ACT OF 2005

TUESDAY, APRIL 12, 2005

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

The Subcommittee met, pursuant to notice, at 1:05 p.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. The Subcommittee on Crime, Terrorism, and Homeland Security holds a hearing today on H.R. 1528, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005," introduced by Chairman Sensenbrenner.

Last year, you will recall, the Subcommittee considered H.R. 4547 and examined the problem of drug dealers preying on vulnerable individuals, such as recovering addicts and minors. The Subcommittee held the compelling—heard the compelling testimony of Tyrone Patterson, who was the manager of the model treatment center for the D.C. Department of Health, who graphically confirmed previous news reports highlighting this problem, which is occurring on a daily basis just minutes from where we are now here at the Capitol.

More than 1,000 addicts attend drug treatment in Northeast D.C., 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 methadone treatment center in D.C. and within three blocks of two other treatment centers. Mr. Patterson gave us a firsthand account of the availability of drugs and the daily temptations his patients face as they try to overcome psychological and physical addiction. We also heard the results of an undercover investigation conducted by the Government Accountability Office which exposed the revolving door of individual dealers arrested for dealing near these treatment centers, only to return because they faced little or no jail time for their trafficking activities.

Adult addicts are not the only victims of drug dealers. We also learned of cases in which the drug dealers knowingly exposed children, including parents who exposed their own kids to the seedy and dangerous world of drug trafficking. This includes the storage

and distribution of drugs for profit in their own homes where oftentimes small children reside.

H.R. 1528 addresses these issues by strengthening the laws regarding trafficking to minors and creating criminal penalties for individuals who traffick drugs near a drug treatment facility. The legislation examined today makes it unlawful to distribute to a person enrolled in a drug treatment program or to distribute drugs within 1,000 feet of a drug treatment facility.

I have stated previously that the opponents of mandatory minimums would have a stronger argument if they could be assured that—if they could assure Congress that all Federal judges were faithfully adhering to the Federal sentencing guidelines, and I think most of them are. But sadly, the Supreme Court's recent decision in *Booker/Fanfan* obliterated 20 years of national sentencing policy and rendered these guidelines advisory. Thus, the bills targeting mandatory minimum provisions are all the more important.

H.R. 1528, while not providing a legislative fix to these Supreme Court cases, does provide procedural mandates to ensure an adequate sentencing record for appellate courts and for Congress and the public as we consider legislation. H.R. 1528 codifies prior Congressional directives prohibiting the use of inappropriate factors in sentencing, as well as others which were prohibited or discouraged by the Sentencing Commission and the U.S. Court of Appeals that prohibits other such factors which have been abused by some sentencing judges.

I want to thank you, all of the witnesses, for being here today and we look forward to your testimony.

I am now pleased to recognize the ranking Democratic Member, the distinguished Member from Virginia, Mr. Bobby Scott, for his opening statement.

Mr. SCOTT. Thank you, Mr. Chairman, and I'm pleased to join you in convening this hearing on H.R. 1528.

The bill purports to protect drug treatment patients, children, and young adults from drug dealers. However, its primary focus is on an array of provisions increasing sentencing guideline ranges, adding new mandatory minimums, and increasing minimum ones by at least five-fold to mandatory life without parole, including a "three strikes and you're out" provision. This latter provision, as with mandatory minimum sentences, has been roundly discredited as wasteful, racially discriminatory, soundbite-based political pandering which will have virtually no impact on reducing crime.

There's a provision, section 12 of the bill, which would appear to be designed to overturn *Booker/Fanfan* decision recently decided by the Supreme Court. Professor Frank Bowman testified on last year's version of the bill and is considered an expert on this issue. He reads the provision as imposing mandatory minimum sentences through the sentencing guidelines by making the bottom of the guidelines a minimum sentence in all but the narrowest of circumstances, other than substantial assistance motions by the Government. Many, including yours truly, feel that this provision is not in keeping with the representations that the Committee would not be taking up *Booker*—the *Booker/Fanfan* issue this year.

Further, the bill provides for conspiracies and attempts to be punished in the same manner as actually committing the crime.

This will only increase disparity in sentencing. As with mandatory minimum sentencing, there is no ability to distinguish between major players and bit players in a crime. One of the primary purposes of establishing the U.S. Sentencing Guideline was to remove disparate treatment among like offenders. Giving unlike offenders the same sentence for crimes just as much—creates just as much sentencing disparity as giving like offenders different sentences.

The other provision of the bill eliminates the drug quantity sentencing cap established by the Sentencing Commission and restricts the application of the safety valve and substantial assistance to the Government sentencing reduction provisions.

I have often cited numerous studies and recommendations of researchers, academicians, the judicial branch, including the Chief Justice of the Supreme Court, and sentencing professionals reflecting the problems created by the proliferation of mandatory minimum sentences. They are cited as wasteful compared to alternative sentencing and alternatives such as drug treatment. They disrupt the ability of the Sentencing Commission and the courts to apply orderly, proportional, non-disparate sentencing. They are found to be discriminatory against minorities and transfer an inordinate amount of discretion to prosecutors in an adversarial system. They have also been cited in one of the letters we've received from the Judicial Conference as violating common sense.

Practically speaking, there's no reason to believe that H.R. 1528 will have an impact on crimes which it is purportedly aimed. In its essence, the bill simply increases 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 we enforcing the current laws that are on the books today? Adding more laws to the current ones that are not being enforced is of very little assistance to the problem.

The suggestion that current Federal illegal drug penalties are not severe enough to incentivize law enforcement is unfounded, given the long prison sentences now being served by drug offenders and the fact that they constitute a growing majority of offenders in the Federal system. Just as unfounded is the notion that access to drugs by drug treatment patients and children will be significantly affected by having harsher penalties is, as I indicated, unfounded.

Studies of drug quantities, quality, and price indicate that they are more plentiful and higher qualities and lower prices than ever before. Offenders generally have access to drugs within their neighborhoods. There is nothing to suggest that they obtained the drugs to which they are addicted near the drug treatment center at which they are being treated, and this bill would mostly affect minorities who live in urban areas where the zones will predominate as compared to suburban areas where the drug use is—where drug use is no less prevalent, but drug-free zones are. And that's, Mr. Chairman, because when you draw all the concentric circles around all the schools and drug treatment centers and everything else, in some urban areas, you will have—you would have covered the entire urban area. In suburban areas, obviously, there'll be areas that will not be included.

Having offenders who happen to violate the law within the inner edge of one zone who are not selling to children and—who are not selling to children and treatment participants receiving vastly different sentences from those who violate the law a few feet away makes no sense. Jailing parents or custodians of children for long mandatory minimum sentences for drug activities in their presence and forcing children into foster care and other makeshift arrangements is of obviously dubious value to the children.

So, Mr. Chairman, I look forward to our witnesses who can comment on this and comment on the mandatory minimums and the other initiatives that we have in the bill to see how we can actually reduce crime.

Mr. COBLE. I thank the gentleman from Virginia.

Ladies and gentlemen, it's the practice of the Subcommittee to swear in all witnesses appearing before it, so if you would, please, stand and raise your right hands.

Do each of you solemnly swear the testimony you are about to give this Subcommittee shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. AVERGUN. I do.

Mr. BROOKS. I do.

Ms. MORIARTY. I do.

Mr. BROWNSBERGER. I do.

Mr. COBLE. Let the record show that each of the witnesses has answered in the affirmative. You may be seated.

We have four distinguished witnesses with us today and my introduction is somewhat lengthy, but I think it's important for those in the audience who are not familiar with the backgrounds of our witnesses to know some of their backgrounds, which, by the way, are impressive.

Our first witness is Jodi Avergun, Chief of Staff to the Administrator at the Drug Enforcement Administration. Prior to joining DEA, Ms. Avergun served as Chief in the Narcotics and Dangerous Drugs Section at the Department of Justice. While in NDDS, she managed a staff of 47 attorneys in Washington, Virginia, and Bogota, Colombia, and exercised general oversight of all Federal narcotics prosecutions as well as national drug policy decisions. Additionally, Ms. Avergun served as an Assistant U.S. Attorney for the Eastern District of New York, where she worked as Chief of the Narcotics and Money Laundering Section. Ms. Avergun has also received more than 20 awards for excellence in law enforcement, including the Director's Award for Superior Performance as Assistant U.S. Attorney. She's an alumna of Brown University and the Brooklyn Law School.

Our second witness is Mr. Ronald Brooks, President of the National Narcotics Officers' Associations' Coalition. As President, he represents the interests of the Nation's narcotic officers with the White House, Congress, Federal law enforcement agencies, and professional associations. Mr. Brooks is a 30-year veteran law enforcement officer with more than 24 years spent in narcotics enforcement. Additionally, he is currently a captain with the San Mateo County, California, Sheriff's Office. In this capacity, he is responsible for administering a $6 million budget and overseeing grants, technical and analytical support for drug enforcement oper-

ations in the 10-county San Francisco Bay area. He was awarded a Bachelor of Public Administration degree from the University of San Francisco.

Our third witness is Ms. Lori Moriarty, Commander of the North Metro Task Force, a multi-jurisdictional undercover drug unit at the Thornton Police Department. Ms. Moriarty has been instrumental in implementing protocols for the safe investigation of methamphetamine labs and undercover drug operations. Moreover, Ms. Moriarty serves as the President of the Colorado Alliance for Drug Endangered Children, which rescue, defend, shelter, and support drug endangered children in Colorado. She also trains thousands of professionals across the State of Colorado on meth lab awareness. Ms. Moriarty was recognized by the President of the United States in 2001 when she received the Drug Commander of the Year Award. Ms. Moriarty attended the University of Colorado and Regis University.

Our final witness today is Mr. William Brownsberger, Associate Director for the Public Policy Division on Addictions at the Harvard Medical School. As Associate Director, Mr. Brownsberger develops research and education programs on social policy issues regarding addictions. Additionally, he serves as a Senior Criminal Justice Advisor at Boston University School of Public Health, where he directs a national panel on substance abuse treatment quality. Previously, Mr. Brownsberger served as Assistant Attorney General for the Commonwealth of Massachusetts. As Assistant Attorney General, he worked as the Asset Forfeiture Chief in the Narcotics and Special Investigations Division. Mr. Brownsberger is also the author of numerous publications, including "Drug Addiction and Drug Policy" and "Profile of Anti-Drug Law Enforcement in Urban Poverty Areas in Massachusetts." He was awarded his undergraduate and J.D. degrees from Harvard.

We are pleased to have you all with us today. I see we have been joined by our friend from Texas, Mr. Gohmert. It is good to have you, Mr. Gohmert, with us.

Ladies and gentlemen, as you all have previously been advised, we adhere to the 5-minute rule here. We impose it against you all. We impose it against ourselves. So if you all could, when you see that amber light illuminate in your faces, that is a warning that the ice is becoming thin on which you are skating. When the red light appears, that indicates that the 5 minutes have elapsed. We have examined your testimony. We will reexamine it. So if you could adhere to the 5-minute rule, we would be appreciative.

Ms. Avergun, we will start with you. I'm not sure your mike's on. Pull it closer to you, Ms. Avergun.

Ms. AVERGUN. I think it's on now?

Mr. COBLE. That's better.

TESTIMONY OF JODI L. AVERGUN, CHIEF OF STAFF, DRUG ENFORCEMENT ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE

Ms. AVERGUN. Okay. Chairman Coble and distinguished Members of the Subcommittee on Crime, Terrorism, and Homeland Security, on behalf of Attorney General Alberto Gonzales and Drug Enforcement Administration Administrator Karen Tandy, I appre-

ciate your invitation to testify today regarding the important issue that affects many of our Nation's children.

The men and women of DEA and many prosecutors throughout the Department of Justice spend each day fighting to protect our children from the many harms that drugs cause to each and every member of society. Drug trafficking and drug abuse unfairly, and in alarming numbers, make children victims. Drug trafficking and drug abuse steal our children's health, innocence, and security. From a drug-addicted parent who neglects a child, to a clandestine methamphetamine cook using a child's play area as a laboratory site, to a parent using a child to serve as camouflage for their stash, to a child being present for a drug transaction, the list goes on and on, but the end result remains the same: innocent children suffer from being exposed to illegal drugs.

Mr. Chairman, today, my testimony is a follow-up to that presented by Ms. Catherine O'Neil last year to this Subcommittee regarding H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004." I request that her earlier testimony be made part of today's hearing record.

We are here today to reiterate our support for key parts of the legislation that addresses drug trafficking involving minors. The 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. Sadly, horrific examples of these types of incidents are spread across our Nation.

To take just one example, a DEA investigation in Missouri occurring in November 2004 demonstrates this all too frequent occurrence. During a raid on a suspected methamphetamine lab located in a home, three children, all under 5 years of age, were found sleeping on chemical-soaked rugs. The residence was filled with insects and rodents and had no electricity or running water. Two guard dogs kept by the cooks to fend off law enforcement were also found. The dogs were clean, healthy, and well-fed.

The Department of Justice is committed to vigorously prosecuting drug trafficking in all of its egregious forms. Prosecutions range from high-level international drug traffickers to street-level predators who are tempting children or addicts with the lure of profit and the promise of intoxication. All of these prosecutions are part of the Department of Justice's mandate within the National Drug Control Strategy to disrupt the sources of and markets for drugs.

The people who target their trafficking activity at those with the least ability to resist such offers deserve not only our most pointed contempt, but also severe punishment. We stand firmly behind the intent of this new legislation to increase the punishment meted out to those who would harm us, our children, and those seeking to escape the cycle of addiction.

The Department of Justice supports mandatory minimum sentences in appropriate circumstances, such as trafficking involving minors and trafficking in and around drug treatment centers. Mandatory minimum sentences provide a level of uniformity and predictability in sentencing to deter certain types of criminal behavior,

increase public safety by locking away dangerous criminals for long periods of time, and serve as important tools used by prosecutors in obtaining cooperation from defendants.

My written testimony addresses several specific provisions within H.R. 1528. The Department agrees with the idea that individuals who intentionally endanger children, either through the distribution, storage, manufacture, or otherwise trafficking of drugs, should face appropriate punishments. However, we have some reservations about the consequences of section 2(m), titled "Failure to Protect Children from Drug Trafficking Activities."

Also, 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 requirements for the safety valve exemption in certain mandatory minimum sentences. However, we are concerned that the bill may unnecessarily exclude those who initially make a false statement or omit information but later correct those statements.

Additionally, 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 where 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.

The Department was pleased to see the addition of language asking the Sentencing Commission to make recommendations for an increase in the guideline range where there is a substantial risk of harm to the life in the manufacture of any controlled substance as opposed to simply methamphetamine. We support the proposal to widen the guidelines from including only the manufacture of meth or amphetamine to include the manufacture and distribution of any controlled substances.

The DEA and Department of Justice are committed to aggressively investigating and prosecuting drug traffickers. We support measures that will aid in the protection of children and enhance our abilities to prosecute those individuals who seek to involve them in their illegal drug activities and support the Committee's efforts to do the same.

Mr. Chairman, thank you for your recognition and assistance on this important issue and the opportunity to testify here today. I will be happy to answer any questions that you may have.

[The prepared statement of Ms. Avergun follows:]

PREPARED STATEMENT OF JODI L. AVERGUN

Chairman Coble, and distinguished Members of the Subcommittee on Crime, Terrorism and Homeland Security, on behalf of Attorney General Alberto Gonzales and Drug Enforcement Administration (DEA) Administrator Karen Tandy, I appreciate your invitation to testify today regarding this important issue that affects many of our nation's children.

OVERVIEW

The DEA has seen firsthand the devastation that illegal drugs cause in the lives of children. Children are our nation's future and our most precious resource, and sadly, many of them are having their lives and dreams stolen by illegal drugs. This theft takes many forms, from a drug addicted parent who neglects a child, to a clandestine methamphetamine "cook" using a child's play area as a laboratory site, to

a parent using a child to serve as camouflage for their "stash," to a child being present during a drug transaction. The list goes on and on, but the end result remains the same: innocent children needlessly suffer from being exposed to illegal drugs.

DRUG ENDANGERED CHILDREN

The Department of Justice and other law enforcement agencies at all levels seek to protect the most vulnerable segments of our society from those drug traffickers and drug addicted individuals who exploit those individuals least able to protect themselves. In 2003, Congress made significant strides in this area by enacting the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, better known as the PROTECT Act. This law has proven effective in enabling law enforcement to pursue and to punish wrongdoers who threaten the youth of America. Last year Chairman Sensenbrenner introduced H.R. 4547, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004," which would have taken these efforts even further by focusing on the scourge of drug trafficking in some of its most base and dangerous forms: those who use minors to commit trafficking offenses, trafficking to minors, trafficking in places where minors are present, and trafficking in or near drug treatment centers.

Mr. Chairman, today my testimony is a follow-up to the testimony presented in July of last year to this Subcommittee by Ms. Catherine O'Neil, Associate Deputy Attorney General, regarding H.R. 4547. We request that her earlier testimony be made part of today's hearing record. We are here today to reiterate our support for legislation that addresses drug-related incidents involving minors.

The 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. Sadly, the horrific examples below are just a few instances where children have been found victimized and exploited by people whose lives have been taken over by drugs:

- From FY 2000 through the first quarter of FY 2005, over 15,000 children were reported as being affected in clandestine laboratory-related incidents. The term "affected children" is defined as a child being present and/or evidence that a child lived at a clandestine laboratory site. This total reflects only those instances where law enforcement was involved. The true number of children affected by clandestine laboratory incidents is unknown, though it is surely much greater.
- In 2004, a defendant from Iowa pled guilty to conspiring to manufacture methamphetamine. Although the meth was not manufactured in the defendant's home, where the defendant's 4-year-old son also lived, was used as the distribution point for large quantities of meth. The son's hair tested positive for extremely high levels of meth, indicating chronic exposure to the drug. In this case, no enhancement could be applied because of the son's exposure, as he had not been endangered during the actual manufacture of the meth.
- In November 2004, the DEA raided a suspected methamphetamine lab located in a home in Missouri. During this operation three children, all under five years of age, were found sleeping on chemical-soaked rugs. The residence was filled with insects and rodents and had no electricity or running water. Two guard dogs kept by the "cooks" to fend off law enforcement were also found: clean, healthy, and well-fed. The dogs actually ate off a dinner plate.

Currently, investigations targeting individuals involved in the manufacture of methamphetamine or amphetamine which are prosecuted on a federal level have a sentencing enhancement available. This enhancement provides a six-level increase and a guidelines floor at level 30 (about 8-to-10 years for a first offender) when a substantial risk of harm to the life of a minor or an incompetent individual is created. Unfortunately, investigations targeting traffickers involved in the distribution of other illegal drugs, such as heroin or cocaine, do not have this same enhancement. For example:

- During October 1999, the DEA's Philadelphia Field Division initiated a heroin investigation targeting an international organization ranging from street level dealers and couriers to a source of supply in South America. This investigation resulted in "spin-off" investigations in New York and South America. Indictments and arrests stemming from the Philadelphia portion of this investigation began in early 2001, and resulted in over 20 arrests. The most significant charge filed against these defendants was Conspiracy to Distribute

Heroin (21 USC § 846). Additionally, seven subjects were charged with Distribution of Heroin within 1,000 feet of a School (21 USC § 860).

- During August 2003, fire department personnel and local law enforcement authorities responded to a hotel fire in a family resort in Emmett County, Michigan. The fire was the result of a subject's attempts to manufacture methcathinone. Authorities subsequently seized a small quantity of methcathinone, along with chemistry books, from the room.
- In an investigation initiated by DEA's Philadelphia Field Division, a subject hid approximately 400 grams of heroin under his infant during a buy/bust operation. During the course of his guilty plea in March 2004, the defendant admitted that he stored the drugs under the infant.

DRUG PROSECUTIONS

The Department of Justice is committed to vigorously prosecuting drug trafficking in all of its egregious forms. Prosecutions range from high-level international drug traffickers to street-level predators who are tempting children or addicts with the lure of profit and the promise of intoxication.

We have had some successes. Statistics maintained by the U.S. Sentencing Commission indicate that between 1998 and 2002 over 300 defendants were sentenced annually under the guideline that provides for enhanced penalties for drug activity involving protected locations, minors, or pregnant individuals. 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 the most 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.

MANDATORY MINIMUM SENTENCES

The Department of Justice 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 important, 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, often in drug cases the critical 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. Mandatory minimum sentences are needed in appropriate circumstances, such as trafficking involving minors and trafficking in and around drug treatment centers.

SPECIFIC PROVISIONS WITHIN H.R. 1528

I would now like to turn to a few of the specific provisions included in H.R. 1528. As I mentioned earlier, the Department stands behind the testimony provided last year by Ms. Catherine O'Neil.

Section 2: Protecting Children from Drug Traffickers

The Department agrees with the idea that individuals who intentionally endanger children, either through the distribution, storage, manufacture, or otherwise trafficking of drugs, should face appropriate punishments.

However, we do have some reservations about the consequences of Section 2(m), titled "Failure to Protect Children from Drug Trafficking Activities." As drafted, we have some concerns about the enforceability of the section due to the vagueness of

the language. In addition, we are concerned that it will unintentionally create an adversarial parental relationship, and discourage (rather than encourage) kids to talk openly with their parents about drug trafficking. Certainly, we want to encourage parents and other legal guardians to do the right thing, but we would encourage the Subcommittee to reconsider this section.

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 accept 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.

However, we are concerned that the bill may unnecessarily exclude those who initially make a false statement, but later correct it. We expressed this concern informally last year and look forward to working with the Subcommittee to address it.

Section 9: 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 effectively prohibited from seeking release after sentencing, if the particular circumstances of the case so warrant.

We look forward to working with the Subcommittee on this issue.

Section 10: Protecting Human Life and Assuring Child Safety

The Department was pleased to see the addition of language asking the Sentencing Commission to make recommendations for an increase in the guideline range where there is a substantial risk of harm to the life in the manufacture of ANY controlled substance. The case in the Western District of Michigan (mentioned earlier) highlights the need to expand these guidelines. We support the proposal to widen the guidelines from including only the manufacture of methamphetamine or amphetamine to include the manufacture of any controlled substance.

CONCLUSION

Children continue to be exposed, exploited and endangered by individuals involved at all levels of the illegal drug spectrum. Regardless of whether they are high-level traffickers, street-level dealers, "cooks" or addicts, they all are involved in some fashion in stealing away our nation's youth. The Department of Justice is committed to aggressively investigating and prosecuting drug traffickers. We support measures that will aid in the protection of children and enhance our abilities to prosecute those individuals who seek to involve them in their illegal drug activities, and support the Subcommittee's efforts to do the same.

Mr. Chairman, thank you for your recognition and assistance on this important issue and the opportunity to testify here today. This is an ambitious bill with important implications for the work of the Justice Department. We continue to study the

issues presented by the bill and stand ready to discuss the matter with you or the Subcommittee's staff. I will be happy to answer any questions you may have.

Mr. COBLE. Mr. Brooks?

TESTIMONY OF RONALD E. BROOKS, PRESIDENT, NATIONAL NARCOTIC OFFICERS' ASSOCIATIONS' COALITION (NNOAC)

Mr. BROOKS. Chairman Coble, Ranking Member Scott, Members of the Subcommittee, thank you for inviting me to testify on the importance of protecting America's most vulnerable citizens from the dangers posed by illegal drugs.

The problem of selling drugs to recovering addicts at or near drug treatment facilities is the cruelest side of a cruel business, preying on our most vulnerable citizens when they're at their weakest. Those brave souls who are fighting their addiction in treatment and recovery programs are often targets of drug traffickers looking for an easy sale.

Treatment providers throughout California have told me that the predatory drug sellers often lurk near drug treatment and recovery centers looking for customers who are susceptible to relapse. I've seen those predators firsthand in scores of investigations that I've conducted and supervised at or near treatment centers and methadone clinics.

Mr. Chairman, police officers are driven to face the danger that they do each day because we witness impressionable young lives ruined when they are lured into a culture of crime by adults promising quick money. The damage this causes to a child's life and collectively to society as a whole is incalculable and inexcusable.

I supervised a raid on a rural super lab that was producing more than 100 pounds of methamphetamine per production. As we approached the house to execute our search warrant, a large cloud of highly toxic gas began to vent from the house. Upon entry into the dangerous environment, I encountered four armed meth cookers and an 8-month pregnant woman with her two small children, who had been in the house during the entire 2-day reaction.

In one operation at a large rave event in San Francisco, after collecting payments—my apologies. I thought it was off. In one operation at a large rave event at San Francisco, after collecting the payment on an undercover buy, a 26-year-old gang member directed my agent to his 15-year-old girlfriend to get the drugs. The adult seller laughed, saying that if the police raided the event, the teenage girl would be the one left to face prosecution.

Another investigation conducted by my office targeted rampant drug dealing at a rural high school. At the conclusion of the investigation, we arrested 27 juveniles and nine adults for sales of methamphetamine, marijuana, LSD, and MDMA at or near the school. In a raid on a house directly across the street from the school, agents seized one-quarter pound of methamphetamine and two guns from two of the adults who were controlling drug sales at the high school.

Mr. Chairman, in my mind, there is no question that a sustained chemical attack occurs on our streets every day. Illegal drugs and their effects kill more than 19,000 Americans annually and the impact on our economy is estimated to be more than $160 billion each year. This continuous and unrelenting attack by international drug

cartels, American street gangs, meth cookers, and neighborhood drug traffickers is equivalent in terms of lost lives to a September 11 tragedy every 2 months. We must continue our commitment to fighting these criminals as aggressively as we fight terrorists who have political motives.

The heroin sold on the street corner in San Francisco began as an opium poppy seed in the Mexican highlands. From field to vein, there's a network of criminals who know exactly what they're doing. This malicious intent must be confronted directly up and down the chain.

Tough drug laws such as the proposed—as those proposed in the Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005 are essential weapons in the arsenal of every law enforcement officer. Strong penalties deter would-be sellers while providing the incentive for those arrested for drug crimes to cooperate with law enforcement, allowing investigators to reach higher into drug trafficking organizations in an effort to dismantle them. On a daily basis, State and local law enforcement use the threat of Federal charges associated with tough penalties to induce the cooperation of arrestees who are in positions to expose the chain of command of drug trafficking organizations.

The task force model fostered by Byrne and HIDTA programs has dramatically increased the effectiveness of drug enforcement strategies over the past 15 years. When combined with strong penalties, such as those proposed by the Chairman's legislation, we get quality investigations and effective deterrents.

As law enforcement officers, we know that we can't arrest our way out of the drug problem. We must do everything we can to prevent first use by young people. We must embrace efforts, such as the President's Access to Recovery Initiative, to ensure treatment is there when it's needed. All children and all people in recovery must be protected from the purveyors of poison that often lurk in or near our drug treatment centers and in our schools.

That's why the proposal in the Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005 is critical to the safety of vulnerable Americans. This legislation would strengthen deterrence and provide a potentially helpful tool for State and local drug investigators.

On behalf of the 60,000 narcotic officers that the National Narcotics Officers' Coalition represents, I want to congratulate Chairman Sensenbrenner on reintroducing this important bill, and Mr. Chairman, I want to congratulate you for inviting me here today and for taking the time to hear this issue. Thank you.

Mr. COBLE. Thank you, Mr. Brooks.

[The prepared statement of Mr. Brooks follows:]

PREPARED STATEMENT OF RONALD E. BROOKS

INTRODUCTION

Chairman Coble, Ranking Member Scott, members of the subcommittee, thank you for inviting me to testify on the importance of protecting America's most vulnerable citizens from the dangers posed by illegal drug manufacturing, sales and use. My name is Ronald Brooks and I am the President of the National Narcotic Officers' Associations' Coalition (NNOAC) representing forty-three state narcotic officers associations with a combined membership of more than 60,000 law enforcement officers across the nation.

I am an active duty, thirty-year California law enforcement veteran with more than twenty-four years spent in drug enforcement. I have witnessed the death, disease, violence and devastation that illicit drug use regularly brings to individuals, families, and communities, and based on my experiences I'm happy to share my thoughts on the importance of the "Safe Access to Drug Treatment and Child Protection Act of 2005."

Although no one is immune from drug addiction, the lives most often destroyed by heroin, cocaine, methamphetamine, marijuana, and other poisons are those persons already suffering from the disease of addiction who are in recovery, and young people who think that trying dangerous drugs is harmless. People in recovery are vulnerable because changes in neuro-chemicals brought on by prior chronic drug use make them more susceptible to relapse, and because the craving is constant—especially during the early stages of treatment.

Dr. Darryl Inaba, CEO of the Haight Ashbury Free Clinic in San Francisco told me that the euphoric recall of persons in recovery is very strong and that smells, situations, or other temptations will often lead to the re-initiation of drug use. Because all drugs of abuse are synergistic, even marijuana may serve as the catalyst for a meth, coke, or heroin user to slip back into the bonds of a drug lifestyle. Because of that danger, the Haight Ashbury Clinic and all other drug treatment programs that I am familiar with prohibit drug and alcohol use on or near their facilities and by patients who are in treatment.

Dr. Inaba and Dr. Alex Stallcup of the New Leaf Treatment Center in Concord, California have told me that predatory drug sellers often lurk near drug treatment and recovery centers looking for customers who are susceptible to relapse. I have seen these predators firsthand in scores of investigations that I have conducted or supervised at or near treatment centers and Methadone clinics.

Even more vulnerable than recovering addicts are pre-teens and teens. Initiation of drug use by young people occurs every day in all types of communities without regard for race, gender or socio-economic background. Kids are likely to be lured to drug use because they lack the perspective of adults and because they feel pressured to identify with "role models" who glorify drug use and violence. Drug-abusing older siblings, friends, and parents are often terrible influences who many times even employ young people to act as middle-men in their drug trade. The damage this causes to a child's life—and cumulatively to society as a whole—is incalculable and inexcusable.

My civilian friends often worry about the physical and emotional impact that thirty years of facing the danger of ruthless drug dealers has taken on me. The truth is, danger is not what takes a toll on America's law enforcement officers. What haunts police officers is the death, fear, economic despair, and ruined lives we see every day that is caused by drug abuse and drug-fueled violent crime.

JUVENILES IN DANGER

The most troubling events witnessed by cops involve young people suffering from addiction or who are neglected or placed in danger as a direct result of illicit drugs. Drug enforcement officers are driven in their commitment to fight the scourge of drug abuse by recurring images of children languishing in dirty diapers, living in deplorable and dangerous conditions and suffering from malnutrition because their drug-addicted parents are unable to care for them. We are driven to face danger by witnessing impressionable young lives ruined when they are lured into a culture of crime by adults promising quick money. We see kids become dealers for adults, or lookouts who facilitate the drug sales operations of adults. And a disturbing all-too-frequent image is a frightened child rescued from the highly toxic and flammable environment of a methamphetamine lab.

I supervised a raid on a rural super-lab that was producing more than 100 pounds of methamphetamine per two-day reaction cycle. As we approached the house to execute our search warrant, a large cloud of highly toxic gas began to vent from the house. Upon entry into that dangerous environment, we encountered four armed meth cookers and an eight-month pregnant woman who along with her two small children had been in the house for the entire two-day reaction cycle.

During another lab raid, I found a teenage boy, a straight-A student, who lived with his father, a meth cooker, in a home where two separate chemical fires had flashed through the house threatening their lives but which were never be reported to the fire department for fear that the meth production would be discovered. That teenager was working to survive, despite the daily danger posed by chemical exposure, explosion, fire, and armed encounters with rival drug dealers.

At a large RAVE event at the San Francisco Cow Palace, my agents were working undercover purchasing Ecstasy (MDMA) from the dealers that were preying upon

the mostly teenage attendees. This followed an earlier RAVE where two young people had died from Ecstasy overdoses. In one drug buy, after collecting the payment, a twenty-five year old gang member directed the undercover agent to his fifteen year old girlfriend to get the drugs. The adult seller laughed saying that if the police raided the event, the teenage girl would be the one left facing prosecution while he walked away. In a subsequent undercover buy, a twenty-five year old woman directed an undercover agent to her fourteen year old brother to get the Ecstasy. She told the undercover agent that if the police stopped them, her brother would only go to juvenile hall but if she was caught with the drugs, she could face prison.

In an undercover operation conducted by my agents, a man agreed to deliver Ecstasy to an undercover agent. At the time of the arrest, the suspect fled in his vehicle and led officers on a high-speed pursuit, eventually crashing his car. As officers approached to make the arrest, they discovered that the suspect had his eight-month old daughter in the car. The man was arrested with more than 20,000 MDMA tablets, cocaine, a bullet proof vest and two 9mm pistols.

One investigation conducted by my office targeted rampant drug dealing at a rural high-school. At the conclusion of the investigation we arrested twenty-seven juveniles and nine adults for sales of methamphetamine, marijuana, LSD, and MDMA at or near the school. In a raid on a house directly across the street from the school, agents seized one-quarter pound of methamphetamine and two guns from two of the adults that were controlling drug sales at the high school.

In a San Mateo County, California Narcotic Task Force investigation, a Burlingame High School groundskeeper was arrested when it was discovered that he was befriending students and bringing them to his house where he sold them marijuana and cocaine.

TREATMENT CENTERS

The problem of dealing drugs to recovering addicts at or near drug treatment facilities is the cruelest side of a cruel business: preying on the most vulnerable citizens when they are at their weakest. Those brave souls who are fighting their addiction in treatment and recovery programs are often targets of drug traffickers looking for an easy sale.

Many people in the Washington, D.C. area are familiar with the open-air drug market that existed in the parking lot of a McDonald's right next to the Model Treatment Program in Northeast D.C. A subsequent GAO investigation found that drug dealing was rampant in the immediate vicinity of treatment centers in numerous locations in Washington.

In a recent San Jose, California Police Department case, a city employee was fired after beginning to re-use methamphetamine after being enticed to do so by a person that was in her drug treatment program. This otherwise productive citizen, who was on her way to recovery, has again had her life torn apart by an amoral drug seller who cared more about making money than allowing the woman to succeed in treatment.

Within the past three weeks, the San Francisco Police Department began investigating a convicted drug dealer who served time in San Quentin Prison on state drug charges. The dealer is now operating the Happy Days Herbal Relief "medical marijuana" clinic on the ground floor of a hotel subsidized by the city of San Francisco that is being used as a halfway house by formerly homeless persons, many of whom are in drug treatment programs. This and eight other San Francisco "pot clubs" are not far from school campuses. San Francisco Police officials tell me that it is not uncommon for them to encounter teens who have purchased marijuana from one of these pot clubs and who are re-selling the marijuana to other school age kids.

I could give more examples, and these types of stories could be multiplied by the 60,000 police officers represented by the NNOAC.

THE NEED FOR STRONG PENALTIES

On September 11, 2001, America was attacked by terrorists based in foreign lands. This attack resulted in the murder of almost 3,000 Americans. Because of the intensity and magnitude of that single attack, it is easy to lose sight of the chemical attack that occurs daily in cities and towns in every state in the nation. Illegal drugs and their effects kill more than 19,000 Americans annually and the impact on our economy is estimated to be more than $160 billion each year.

This continuous and unrelenting attack by international drug cartels, American street gangs, meth cookers, and neighborhood drug traffickers is equivalent to a September 11th tragedy every two months. We must continue our commitment to fighting these criminals as aggressively as we fight terrorists who have political mo-

tives. Tough drug laws such as those proposed in the "Safe Access to Treatment and Child Protection Act of 2005" are essential weapons in our arsenal.

Vigorous enforcement of drug laws helps to keep families and neighborhoods safe from violent criminals and serves as a deterrent to first-time drug use for most young people. It also helps many addicts reach the road to recovery through drug courts and other corrections-based treatment programs.

Strong penalties deter would-be sellers while providing the incentive to those arrested for drug crimes to cooperate with law enforcement, allowing investigators to reach higher into drug trafficking organizations in an effort to dismantle them. On a daily basis, state and local law enforcement use the threat federal charges associated with tough penalties to induce the cooperation of arrestees who are in positions to expose the chain of command of drug trafficking organizations.

The heroin consumed on the corner of a drug-addled neighborhood in Washington, D.C. started as a seed capsule of an opium poppy plant in the Andes of South America. From field to vein, there was a network of criminals who knew exactly what their activities were leading to. When the street-level seller of that heroin is arrested, tough federal penalties help us climb up the organizational ladder and frequently lead to the dismantling of local and regional drug trafficking organizations.

Indispensable components our nation's overall enforcement strategy include tough laws and the multi-jurisdictional, intelligence-based enforcement approach that has developed under the system of task forces funded through the Byrne JAG and HIDTA programs. The task force model employed by these programs has dramatically increased the effectiveness of drug enforcement strategies over the past fifteen years which, when combined with the strong penalties such as those proposed by the Chairman's legislation, leads to quality investigations and effective deterrence.

MAKING PROGRESS

The problem of drug abuse often seems insurmountable, but it is not. The proof of our ability to succeed in this important fight is the fifty percent reduction in drug use that occurred between 1979 and 1992 when America employed a balanced and comprehensive approach of drug prevention, treatment, and enforcement. We are once again on the road to achieving good results as we embrace a balanced approach and a renewed dedication to fighting against drug abuse.

Although strong penalties for dangerous criminals are important, I understand that it is impossible to arrest our way out of America's complex drug problem. A strong and consistent education and prevention message must reach or kids early and often; and because addicts often love the drugs that consume their lives more than they fear prison, effective treatment must be readily available. But we must do everything we can to prevent first use by young people. And persons in recovery must be protected from the purveyors of poison that often lurk in our near drug treatment centers and sober living environments.

That is why the proposals in the "Safe Access to Drug Treatment and Child Protection Act of 2005" are critical to the safety of all citizens. This important legislation would strengthen deterrents and provide a potentially helpful tool for state and local drug investigators. The 60,000 members of the National Narcotic Officers' Associations' Coalition congratulate the Chairman on reintroducing the important bill and we stand ready to lend our support. Thank you for inviting me to share my thoughts.

Mr. COBLE. Ms. Moriarty?

TESTIMONY OF LORI MORIARTY, THORNTON POLICE DEPARTMENT, THORNTON, COLORADO, COMMANDER, NORTH METRO DRUG TASK FORCE, AND PRESIDENT, COLORADO'S ALLIANCE FOR DRUG ENDANGERED CHILDREN

Ms. MORIARTY. Mr. Chairman and Subcommittee Members, first of all, thank you very much for the invite here.

I am a Drug Unit Commander in Colorado, and I do represent the National Alliance for Drug Endangered Children, and I am the President of the Colorado Alliance for Drug Endangered Children, and I can tell you from a Drug Task Force Commander's point of view, I've been in law enforcement for 18 years, and I can't tell you how many times I've heard people tell me that drug use is a victimless crime, and I'm here to tell you that it is the crime that

creates the most victims. In all of my time in law enforcement, I didn't recognize this until I got into the drug investigations unit.

I actually did homicide crimes and crimes against children as a detective, and it was easy to recognize the bruises and the broken bones and call that child abuse. And when I got into investigation, it wasn't until I walked into some of these drug homes and recognized the violence that was occurring day in and day out in these children's lives.

As you mentioned earlier in my introduction, I've spent the last 2 years educating people across the State and actually across the Nation on meth lab awareness and the dangers, and the award that I actually won for ONDCP and HIDTA was for protecting law enforcement officers who actually went into labs day in and day out because of the toxic environment that it created. And throughout that time, my guys were wearing chemical protective clothing gear and self-contained breathing apparatus and we pulled out children wearing diapers. And it wasn't until then that I realized that the drug endangered environment that these children were living in was just horrific.

I speak to you today by telling you that it is really critical to have penalties that are severe enough to have people change their behavior. It is never acceptable to expose children to drug endangered environments.

As I speak with you here today, my task force is out at a hotel, and we are raiding the entire hotel as an open market, and in the hotel are families that live there with their children, distributing drugs every day, and there are guns. We're also—it's a RICO case and it has three homicides associated with that environment, and at no time did any of the drug dealers ever pay attention to the children that were living in that environment. Additionally, we had a grandfather, who every day when we watched him in surveillance going to do his drug trafficking, picked up his grandson and used the grandson as a decoy during his drug trafficking operations.

So the areas where people put children in harm is—in drug trafficking is serious, and we need to pay attention to the environment that we're allowing these children to grow up in.

As a member of the National Alliance for Drug Endangered Children, we have a mission to bring disciplines together to work on these exact issues, and accountability is a huge part of making the system work. If we can hold the caregivers and the parents who traffick around their children and put their children in dangerous environments, then it will assist in the totality of what we're trying to do to protect the children.

Thank you, Mr. Chairman and Subcommittee Members.

Mr. COBLE. Thank you, Ms. Moriarty.

[The prepared statement of Ms. Moriarty follows:]

PREPARED STATEMENT OF LORI MORIARTY

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today on behalf of The National Alliance for Drug Endangered Children as a Committee Member and as the President of The Colorado Alliance for Drug Endangered Children to speak on the important issue of "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005." Though I cannot speak on all points covered in H.R. 1528, as a drug unit commander I can say that I have seen children of substance abusing parents suffer extreme neglect, physical, sexual and psychological abuse. The time

has come to take notice and take action, not only in the law enforcement community but all professionals involved in the welfare of children.

BACKGROUND

When law enforcement officers in Colorado were just beginning to appreciate the devastating effects methamphetamine was having on communities and the users, the focus was to develop safe procedures to locate and seize methamphetamine labs. As law enforcement became sophisticated in the detection, seizure and arrest of these clandestine labs and their operators, what became astoundingly apparent was that the real victims of the crime were the children. Law enforcement quickly realized they were not equipped to address the special needs of the children found in these homes where the manufacturing was taking place and realized that other agencies should be involved to address the needs of the voiceless and innocent victims. In 2002, public and private agencies in Colorado came together to discuss the unique and pressing problems facing these children. The professionals agreed the issue was a crisis and required an immediate, multi-disciplinary response. Colorado reached out to California, where the first Alliance for Drug Endangered Children committee was established. Based on the Drug Endangered Children Program developed in Butte County California, members of the private and public agencies initiated, for the first time in Colorado, a group of professionals willing to assess and establish the best methods of collectively meeting the needs of the children. In 2003, Colorado established a non-profit organization, Colorado's Alliance for Drug Endangered Children and quickly collaborated with California and several other states where similar initiatives were being developed. Through these efforts The National Alliance was formed in 2003 to promote public awareness regarding the plight of drug endangered children and to link and support the many professionals that rescue, defend, shelter and support these children including law enforcement, child protective services, first responders, medical and mental health professionals, prosecutors and county attorneys, substance abuse treatment providers, community leaders and concerned members of the public.

The National Alliance for Drug Endangered Children recognized the scope of child endangerment went beyond children living where manufacturing was taking place but also included environments where children were exposed to drug trafficking and the drug subculture associated with the use, sale and possession of illegal drugs. The desperate plight of these children left behind must be addressed. The abuse and neglect of these children is not marginal but real and significant. These children are innocent, tragic victims who require special and immediate attention.

NATIONAL ALLIANCE GOAL

The National Alliance believes drug endangered children are victims who, when discovered during law enforcement actions or recognized by others to be in danger, require immediate intervention and support. We promote the concept of using collaborative, multi-disciplinary teams whose primary interest is the health and welfare of the child found in a dangerous drug situation. Thus, our goal is to ensure long term care as the child moves from the arms of law enforcement, to child welfare services and is medically and psychologically evaluated, and thereafter placed in an appropriate and safe living situation.

Over the last eighteen months, the National Alliance has focused most of its efforts on causing everyone to understand the harm posed to children in many different drug scenarios—ranging from methamphetamine or other clandestine labs, environments in which drugs are dealt, stored or packaged and in some instances, guarded with guns and other weapons, and those which are controlled by caregivers who are addicted to or so influenced by drugs that they lose their ability to provide even a minimum standard of care often neglecting and in many instances, actually abusing children. The National Alliance supports and endorses the National Drug Endangered Children Training Program. We also provide support and guidance to states as they form individual alliances and begin to form multi-disciplinary teams in their communities.

CHILD ABUSE AND NEGLECT

There are several aspects of child abuse and neglect in drug-endangered homes. The environments themselves are frequently so dangerous that simply allowing a child to live there constitutes child endangerment. Substance abuse also affects the caregiver's ability to parent, placing the child at additional risk for abuse and neglect.

Children whose caregivers are substance abusers are frequently neglected. They often do not have enough food, are not adequately groomed, do not have appropriate

sleeping conditions, and usually have not had adequate medical or dental care. These children are frequently not well supervised, placing them at additional risk of injury. Children raised by substance-abusing caregivers are often exposed to pornographic material, often emotionally abused and have a heightened risk for sexual abuse. Additionally, they frequently do not get the appropriate amount of support, encouragement, discipline, and guidance they need to thrive.

Specific hazards to children living in these labs are numerous. The children are exposed to toxic chemicals and are at risk on inhalation of toxic fumes. Clothing and skin contact of improperly stored chemicals, chemical waste dumped in play areas, and potential explosions and fires (the specific risks of the different chemicals are outlined in the Clandestine Lab section) are also possible. They are frequently exposed to a hazardous environment which often includes accessible drugs, exposure to drug users, cooks and dealers, hypodermic needles within reach of children, accessible glass smoking pipes, razor blades and other drug paraphernalia, weapons left accessible and booby traps placed to "protect" the clandestine laboratory and its contents from intruders.

The use of illegal drugs affects the caregiver's judgment, rendering them unable to provide the consistent, supervision and guidance that children need for appropriate development. Therefore, substance abuse in adults is a critical factor in the child welfare system. With specific reference to methamphetamine, children are frequently neglected during their caregiver's long periods of sleep while "crashing" from a drug binge. The caregiver's also frequently display inconsistent and paranoid behavior, especially if they are using methamphetamine. They are often irritable and have a "short fuse" which may ultimately lead to physical abuse. Children in these homes are often exposed to violence as well as unsavory individuals. Unfortunately, these caregivers were often not parented well themselves and therefore did not learn effective parenting skills. Finally, the caregiver's ability to provide a nurturing home for a child is complicated by the caregiver's own mental health issues which may have contributed to or resulted from substance abuse.

TESTIMONY OF A CHILD

It was five o'clock in the morning on October 23, and the street was empty. The house was dark where five undercover detectives were conducting surveillance, preparing for the execution of a search warrant on a drug lab. The traffic on the police radio had been silent. Suddenly, as SWAT officers began their initial approached from several blocks away, one of the detectives watching the house keyed the microphone of his radio and yelled for everyone to stop. As he spoke, everyone could hear the uncertainty and hesitation in his voice as he tried to describe what he was seeing. When the words finally came out he stated, "There is a skeleton coming out the front door." As we processed the information, wondering if the detective was hallucinating after the long hours of surveillance, he went on to explain that the skeleton figure appeared to be the four-year-old child we knew was in this particular drug house. He further described how the boy was out onto the front porch looking up and down the street. As we discussed the child's behavior, he came back out onto the porch and began looking up and down the street again. Being narcotics officers the only explanation we could come up with was the possibility that he was counter surveillance and acting as a look out for his parents. With this information, we told the SWAT officers to move forward and execute the search warrant, using extreme caution.

After the raid was over, the SWAT team placed several adults into custody and removed the four-year-old boy and another eight-year-old girl. During my interview with the boy I explained that I was curious why he was dressed in a skeleton outfit, standing on his front porch and looking up and down the street so early in the morning. His eyes lit up and he got excited as he explained that today was his Halloween party at school. His shoulders then slumped when he went on to tell me that he really wanted to go to the party but he hasn't been able to wake his mom up for the last few days and he didn't know where the bus stop was. He said that he thought if he got up early enough in the morning and put his costume on, he could just watch up and down the street and catch the bus as it drove by. I couldn't imagine at that moment that this child could educate me any more until I realized that he couldn't count to ten, but he could draw a picture, in detail, of an entire operational meth lab. To this day, my mind cannot erase the visual this four-year-old child left me with. I realized we had a responsibility to identify these children and work with other disciplines to meet their needs. Early identification can activate a multi-disciplinary response within our communities where all of us must work together as partners to rescue, defend, shelter and support the children.

RESEARCH

In the year 2002 the National Clandestine Laboratory Database reported 8,911 clandestine laboratory seizures. Over ninety percent of these were methamphetamine production and over 2,078 incidents involved children. First responders and children alike are exposed to toxic and hazardous chemical exposure. Many of the hazards of this illicit process and the type of exposure have not been studied extensively, and are therefore unknown. According to the El Paso Intelligence Center, the increase of methamphetamine production has resulted in at least one methamphetamine laboratory in every state of the union in 2002. In January 2003, National Jewish Hospital and Research center began to study the harmful effects of methamphetamine labs to first responders and children through various methodologies, including: controlled lab studies, field controlled lab studies and surveys. The study expanded its scope throughout the year with results that may impact the way in which first responders and investigators perform their duties. Throughout the duration of this study, the spirit of collaboration and cooperation has been a predominant factor.

The initial study concerns included the potential, exposures, related health concerns, medical monitoring, and the comprehensive use of personal protective equipment. Throughout the study additional questions arose regarding the airborne properties of methamphetamine, the decontamination process and the degree of danger to children.

The standards used for measuring exposure were those utilized for an occupational setting. These guidelines and standards are formulated based on a predominantly male workforce, 20–30 years of age and healthy. These standards are not applicable to children, those with health conditions or pregnant women. To date, there are no suitable standards established regarding exposures to children during the production of methamphetamine. Therefore, a significant amount of future research is still needed in order to accurately determine the degree of dangers to children.

During the study, a teddy bear was placed in a room where chemists from DEA manufactured methamphetamine to determine the amounts a contamination produced. When the teddy bear was tested the results were alarming. The bear tested highly positive for methamphetamine and was extremely acidic. The methamphetamine levels on the bear were 3,100 ug/100 cm2 on the outer portion of the sweater and 2,100 ug/100 cm2 under the sweater, compared to the "clean" standard in Colorado, used to determine if a residence where a lab was discovered is acceptable for re-occupancy, which is .5ug/100 cm2. The pH level of the bear was 1.

For a full report on the results of the National Jewish Medical and Research Methamphetamine Study go to *www.nationaldec.org*

CONCLUDING REMARKS

For decades, law enforcement teams across America have been fighting "the war on drugs" by arresting those responsible for the use, possession, trafficking and manufacturing of illegal substances. However, at no time during these battles did we recognize the neglect, the physical, sexual and emotional abuse to include the developmental and psychosocial issues our children were suffering at the hands of their drug-abusing parents.

It is most important that we send a clear message to those that chose to endanger children: It is never acceptable to expose children to drug environments and drug dealing and that there will be an additional price to pay if they do.

Mr. COBLE. Mr. Brownsberger?

TESTIMONY OF WILLIAM N. BROWNSBERGER, ASSOCIATE DIRECTOR, PUBLIC POLICY DIVISION ON ADDICTIONS, HARVARD MEDICAL SCHOOL

Mr. BROWNSBERGER. Thank you, Mr. Chairman. Thank you, Mr. Chairman. Thank you, Members of the Committee.

Mr. COBLE. Mr. Brownsberger, a little closer to you, if you will, and activate it.

Mr. BROWNSBERGER. Let me try that again. Thank you, Mr. Chairman. Thank you, Mr. Scott. And thank you, Members of the Committee. I appreciate the invitation to be here.

I'm the father of three daughters, a 10-year-old, a 13-year-old, and a 16-year-old, and proud to tell you they're all growing up

sober. I'm a member of the governing board of the community in which I reside and I'm committed to addressing the problems of youth substance abuse. I've been an Assistant Attorney General in the Special Investigations and Narcotics Division of the Commonwealth of Massachusetts and there prosecuted drug dealers. I have done a good amount of research, and I guess that's what I owe my honor to be here today, is the research I've done on school zone sentencing and the profile of anti-drug law enforcement in Massachusetts.

I've also today practice as a defense attorney. I worked a lot in drug courts and I know what the damage of drug addiction is, what it does to people's lives, what it does to the lives of families. I'm also a defense attorney and I have the occasion to represent drug dealers who are charged with violations of these laws. All of these experiences have given me insight, and some of that insight may be helpful to the Committee.

The first issue I'd like to speak to is the issue of the geographic provisions of this bill, the provisions which would enhance penalties within certain geographic areas. You can call those areas drug-free zones. And the bill would expand the radius around zones, these zones that are protected, from 100 to 1,000 feet for some kinds of facilities, and then it would add a whole lot of new facilities in the form of drug treatment facilities, including, by the way, take note, individual drug treatment providers. So if a psychologist is providing drug treatment, there will be a 1,000-foot radius around that psychologist's facility.

Now, I understand that a lot of what we have to do in making legislative policy is to respond to rhetoric and to anecdotes because that's all we have, but this is a case, Mr. Chairman, in which we actually have the ability to put some fine numbers on what we're doing here and make a decision based on information.

I have some slides, which I guess are not available to be up on the screens, but the first slide just shows an aerial view of the town of—city of New Bedford, Massachusetts. And the second slide dots onto that using the geographic information from that community, the schools and parks. The green are the parks and the blue are the schools. As you can see, there are a number of them within this large downtown area.

When you put the 1,000-foot radii on them—that's the third slide showing the yellow—that shows the school zones, the drug-free zones around these facilities, and as you can see, they cover most of the downtown area of that community. Take note to the far left, the green plot there is a park and has a relatively small zone around it. That's because it's a 100-foot zone around parks in Massachusetts, whereas it's a 1,000-foot zone around schools. That's the way the structure of our law is in Massachusetts.

Now, you can imagine that if you add drug treatment facilities and video arcades and individual psychologists' offices to this map, the whole map will be yellow. That's a conjecture because we don't have that data. But it would be easy, in fact, for you to acquire that data before passing this legislation. It would be easy to identify a number of communities and see how this would actually work. But based on my experience, my knowledge of the density of these communities, my conjecture would be with a lot of confidence

that every major metropolitan area in this Nation would be yellow, would be covered within these drug-free zones.

So the consequence of that legislation is not to push people away from any particular place but simply to multiply the penalties. If you wanted, Mr. Chairman, to protect drug treatment facilities, you'd be much better advised to use a much narrower radius, for example, 100 feet, and then people would know where they needed to stay away from. But this legislation will just serve to elevate the penalties generally.

And I hope that's not the goal of the Committee because I do believe that these penalties are, in fact, high enough, if not too high. The impact of these penalties is, in fact, to raise the incarceration rate of young African American and Hispanic males. That's who is involved in the drug trade predominately in this country. That is, unfortunately, the reality. That's the color and the ethnicity behind that business today, just as every other business commonly may have an ethnicity that's more heavily involved in it. And if we put this law in place, you're just putting more of those young men in jail.

As a defense attorney, it's been my privilege to get to know some of these young men and they're not the animals that you might imagine. We're characterizing them as drug dealers. We're caricaturing these people. These are people that just have led into a role which they have no concept of what their other options in life are. I've talked to young defendants who say, well, it was stealing cars, robbery, or drugs, and I actually was kind of—I'm not the kind to rob people, so I went into drugs. That's the kind of conversation people have. They have no concept of where they can go.

And so this legislation is damaging legislation and I hope the Committee will study it a great deal further before taking any action on it.

Mr. COBLE. Thank you, Mr. Brownsberger.

[The prepared statement of Mr. Brownsberger follows:]

PREPARED STATEMENT OF WILLIAM N. BROWNSBERGER

TESTIMONY OF WILLIAM N. BROWNSBERGER

BEFORE THE HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
APRIL 12, 2005

Mr. Chairman, Mr. Scott, thank you for inviting me to testify today.

I understand that I owe this honor primarily to my research on the application of school zone sentencing laws in the State of Massachusetts and to related research that I have done over the past ten years on the profile of anti-drug law enforcement in Massachusetts.

Additionally, I have served as a Massachusetts Assistant Attorney General in Narcotics and Special Investigations and have enforced the anti-drug laws of our commonwealth. I presently am a defense attorney, often representing persons charged under those laws. Defense and prosecution are both roles that I am proud of and that provide me with perspective of possible value to the subcommittee.

The sections of the bill intended to protect vulnerable persons lead to universal penalty enhancement for drug dealing.

In 2001, I completed a study of 443 drug dealing incidents in three cities in Massachusetts – New Bedford, Fall River and Springfield – focusing on the use of the school zone anti-drug law in Massachusetts.

The Massachusetts statute defines enhanced penalty zones of 1000 feet around parcels enclosing schools and 100 feet around parks and playgrounds. The zones around schools create most of the impact.

One incidental finding of that study was that less than one percent of the incidents in that sample involved dealing to minors. This result stands to reason: minors typically have less money than adults and are not good customers for drug dealers. Accordingly, I believe that Sections 2(a) and 2(b) of the bill, which enhance penalties for sales to minors, are unlikely to have great practical impact.

Sections 2(c), 2(d) and 4(a) of the bill, are, by contrast, of considerable practical impact – they will expand intended drug-free zones carrying the penalty enhancements for dealing to cover most urban areas in the United States.

A second finding of the study that I mentioned before was that a large portion of the subject cities were covered by school zones – 29% for all three cities combined. It was striking that in the extreme poverty areas of the city, 56% of the neighborhoods were enclosed in school zones. And, in fact, 80% of the drug dealing in the communities occurred in school zones, reflecting the density of schools in the populated areas where people live and do business.

As shown in the figure below, the physical patterning of school zones in the downtown areas is so chaotic that it is intuitively obvious that no drug dealer would know where to stay away from. Our analysis showed that, in fact, drug dealing was denser near schools than further away from them.

Downtown Area Including 155 of 180 (86%) Sample Dealing Incidents in New Bedford

However, our work also showed that, of dealing incidents occurring in school zones, approximately three quarters occurred when school was not in session – on weekends, at night or during the summer. The density near schools did not involve sales to minors, simply the layout of neighborhoods.

The conclusion of our study was that the school zone law in Massachusetts served primarily to enhance penalty levels generally, but did little to accomplish the express purpose of the legislation – to move dealers away from schools. If the goal is to move dealers away from schools, it would be more effective to use a much smaller radius, which would give dealers a real guideline to avoid.

Certainly the same conclusions apply to the present legislation. It expands the federal 100-foot zone around youth centers, public pools and video arcades to 1000 feet and adds public libraries and day care facilities. Section 4 further adds properties comprising drug treatment facilities and programs, including individual treatment providers, to the list of entities with drug free zones around them. A moment's reflection will show the staggering breadth of this bill – any social worker or psychologist providing drug treatment may create another drug-free zone.

The bill takes a further step towards creating universally enhanced penalty exposure for drug dealers in Section 4(b) by establishing special penalties for dealing to anyone who is or has previously enrolled in a drug treatment program or facility. Given the broad

definitions of treatment facilities and programs, most drug users are likely to meet this criterion.

<u>If a universal penalty enhancement for drug dealing is intended, the indirect approach taken by this bill is very costly and inefficient.</u>

Prosecutions under this bill will require proof a number of different elements additional to the basic crimes of drug dealing.

The geographic penalty enhancements introduce four additional proof requirements – proof of the exact location of the incident, proof of the exact location of a particular facility, proof as to the nature of the facility and proof of a measurement from one to the other. In every prosecution, both law enforcement and defense investigators have to make their own measurements to verify the zone and this may be a subject of testimony at trial.

Even more problematic will be the development of proof as to the drug treatment histories of individual drug buyers, necessary for prosecutions under Section 4(b). The buyers will usually have a legitimate 5th amendment privilege to assert if called to testify (even if they have already been convicted of possession in the incident, they may have a privilege to avoid prosecution on conspiracy charges). Access to their present enrollment will be restricted by confidentiality protections, and, of course, prior treatment history will be all but impossible to ever determine.

<u>Universal penalty enhancement for drug dealing is unnecessary and ill-advised.</u>

The often documented and unfortunate truth is that most people going to prison for drug dealing offenses are young black and Hispanic men. In Massachusetts, where only 4.6% of the population was black and 4.6% Hispanic, in the mid-90s, 83% of the young men committed to state prison for drug dealing offenses were black or Hispanic.

I did the research establishing this fact in Massachusetts in 1997. I became a defense attorney a few years later, in part because I wanted to the opportunity talk to these young men and find out who they really were. What I have found is that while some are angry and violent, many are intelligent and decent-natured young men who simply never considered any lawful alternative source of income. Most of their friends and family members are involved in the criminal justice system.

In minority populations in poverty areas, the rates of experience of incarceration among males approach 50 percent by age 40. It seems highly unlikely that lengthening prison terms will enhance the deterrent effect of the law.

The worthy goals of this legislation are best accomplished by more intelligent street law enforcement and drug treatment per se.

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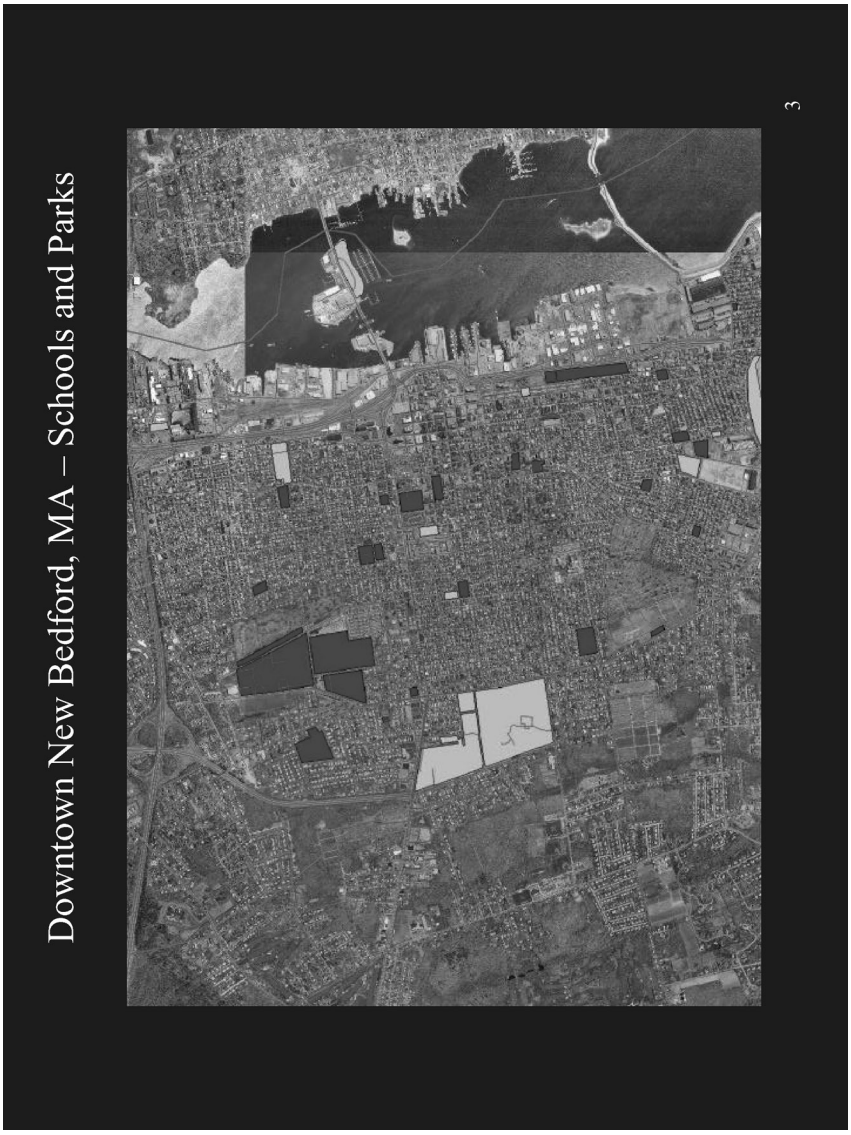
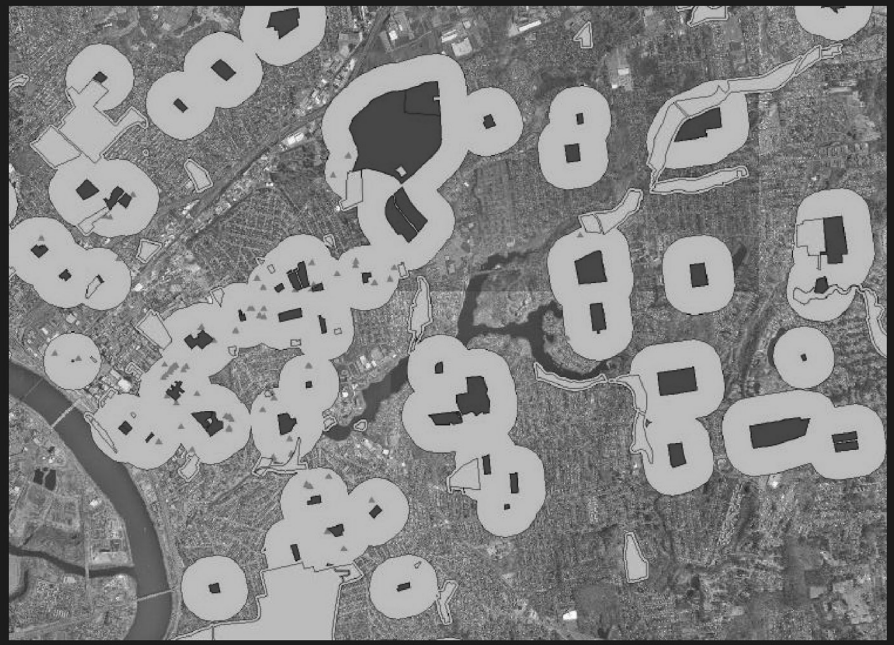
ATTACHMENT



Downtown New Bedford, MA – Drug Free Zones

Downtown New Bedford, MA – Drug Deals Marked

Springfield, MA – Drug Free Zones and Drug Deals



Mr. COBLE. And thanks to each of the witnesses.

We have been joined, ladies and gentlemen, by the distinguished gentleman from California, the distinguished gentleman from Florida, and the distinguished gentleman from Virginia. It's good to have you all with us.

As I told you all at the outset, we will begin our questioning and we comply with the 5-minute rule, as well, so if you all could keep your questions terse, we would be appreciative.

Ms. Avergun, provide the Subcommittee with additional case information, if you will, regarding the hotel fire case involving meth cat, sometimes called cat. Was there a sentencing enhancement applied, A, and B, was there a sentencing enhancement available? Pull that a little closer to you.

Ms. AVERGUN. I'll just keep it on. I can tell you a little bit more about that case. In August of 2003, at a family resort, there was a fire involving a particular hotel room. The local department responded to the hotel. They discovered the defendant had started the fire while manufacturing a substance called methcathanone. There was a lab actually in his hotel room. The hotel room—the hotel was part of a family resort. There were chemistry books and a jar of methcathanone already made.

The defendant pled guilty in that case. He was sentenced to 151 months in prison and 3 years supervised release and restitution for costs of the fire. The defendant received a significant sentencing enhancement due to his criminal history. However, he did not receive any kind of sentencing enhancement due to the fact that he had endangered children or families in the hotel room, in the hotel where he was. There were no guideline enhancements available because, right now, the law only provides for enhancements for the manufacture of methamphetamine or amphetamine. This is a completely different substance.

And any substance can be—many substances can be produced. Synthetic drugs are more prevalent now, and they can all be produced with relative ease by looking up recipes in commonly available places. This——

Mr. COBLE. Okay. I don't mean to cut you off, but I need to get to other witnesses.

Ms. AVERGUN. That's okay.

Mr. COBLE. Thank you.

Mr. Brooks, drug trafficking, as we all know, is violent business. Share with us, if you will, any experience you may have had with drug dealers employing violence, that is, that included the possession of firearms to protect the operation, to enforce the collection of drug debts, how kids may simply get in the way.

Mr. BROOKS. Mr. Chairman, I think it goes without saying that drug dealing is a violent profession. It's one where firearms, bulletproof vests, and other methods are readily employed. The biggest threat in drug dealing is in turf battles and in the collection of debts and in ensuring that people don't cooperate with law enforcement. That's frequently done by homicide or other violent means and kids do get in the way.

There is no discrimination against hurting children when there is violence in a home. We have had children caught in the crossfire of drug turf battles. And I could rely on one of my own personal

experiences. A young gal that I went to high school with, shortly after I was a narcotic officer, she had decided to live with a drug trafficker. There was a rip-off, a theft at the home. She crawled under the mattress as the rip-off was occurring. Three shotgun blasts into the bed, killing her. This wasn't a person that chose to live—and she was an adult, she had made her own choice, but it wasn't somebody that had chose to involve themselves in the drug trafficking business. That can happen just as easily to any child caught in a drug house.

Mr. COBLE. Thank you, Mr. Brooks.

Mr. Brownsberger, if I read you correctly, you seem to suggest that the goal of school zones is to move the drug dealing somewhere else. Would you not also recognize that the goal is to assure that traffickers who do engage, you know, ply their wares in a school zone will likely be awarded an active prison sentence?

Mr. BROWNSBERGER. I'm not sure, Mr. Chairman. I would assume the goal is to protect children. That's our overall goal, and the goal of punishing drug dealers is to keep them from endangering children.

Now, my work showed that about 80 percent of the cases in which the school zone statute was used involved transactions that occurred at night, on the weekend, or in the summer. They just didn't have anything to do with children, Mr. Chairman.

Mr. COBLE. Ms. Moriarty, I think I have time for one quick question. What promoted you to become a member of the Steering Committee of the National Alliance?

Ms. MORIARTY. When law enforcement started finding the children living in these environments, we realized that we couldn't do it alone, that just removing the children and then placing the caregiver in custody and, you know, holding them accountable for the position that they're putting the children in wasn't enough. We had to actually focus on the child. And so we realized that all of the disciplines need to come together—medical, psychological, the social services, just a multitude of multi-disciplines, to actually be with the child and take him through the process.

In Colorado, I can give you an example, we have 68,000 parents who are in some kind of treatment. I won't necessarily say recovery, but in treatment. And of those 68,000, there are 114,000 children. And so somewhere along the line, all of us disciplines need to come together to support the children.

Mr. COBLE. Thank you. I see my red light.

I want to recognize the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Avergun, the DEA is supporting the bill?

Ms. AVERGUN. The DEA supports certain provisions of the bill, yes.

Mr. SCOTT. And opposes certain provisions of the bill?

Ms. AVERGUN. We'd like to work with the Committee to fix certain provisions of the bill, yes.

Mr. SCOTT. Okay. Now, do you know what the prison impact would be, what the additional costs in prisons would be?

Ms. AVERGUN. Mr. Scott, there would probably be some incremental costs which are fixed based on a fixed cost that Bureau of Prisons estimates of the costs of incarceration. However, two things

that I would point out. The first is that we don't anticipate arresting entirely new classes of people as a result of this. These are people who would already be in jail. They are drug trafficking. Drug trafficking is already illegal, and much of this bill amends things that are already prohibited.

The second thing I would like——

Mr. SCOTT. Wait. On that point, so you would not be arresting any new people, you would just be giving enhanced penalties to those who you already would have arrested anyway?

Ms. AVERGUN. There are some new provisions in this bill. For instance, distributing drugs in the presence of children is a new provision. But by and large——

Mr. SCOTT. You could have gotten them for distribution of the drugs, period. If you know they've distributed the drugs in front of a child, you knew they'd distributed the drugs, so you would have gotten them anyway.

Ms. AVERGUN. Perhaps.

Mr. SCOTT. Perhaps?

Ms. AVERGUN. Yes.

Mr. SCOTT. I mean, can you prove beyond a reasonable—have you got evidence beyond a reasonable doubt that they distributed drugs and that's an offense.

Ms. AVERGUN. That is an offense, depending on the quantity and the circumstances and whether law enforcement knew about it. But——

Mr. SCOTT. Well, but if you don't know about it, you wouldn't know about it in front of a child.

Ms. AVERGUN. That's true.

Mr. SCOTT. So you've acknowledged that, basically, you're going to be giving enhanced penalties to those you would have arrested anyway. My question is, how much more is that going to cost in prisons?

Ms. AVERGUN. I don't think that the incremental costs are that great. Those are fixed costs as estimated by the Bureau of Prisons. But I would like to add——

Mr. SCOTT. Wait. Are they going to be in prison longer?

Ms. AVERGUN. May I finish my point? The costs to society for not incarcerating these people for longer sentences are far greater than the costs that it would impose on society for keeping them in jail for incrementally longer terms.

Mr. SCOTT. So I understand your answer to be, you don't know how much more we're going to be spending in prisons if the bill passes?

Ms. AVERGUN. I don't have the exact number, but that is a number that the Bureau of Prisons has estimated across the board.

Mr. SCOTT. What number?

Ms. AVERGUN. The amount that it costs, the cost of incarceration in a Federal prison across the board.

Mr. SCOTT. How much more would the implementation—if we passed the bill, how much more are we going to be on the hook for, do you know?

Ms. AVERGUN. No, I don't.

Mr. SCOTT. Does it matter?

Ms. AVERGUN. Yes, it matters, but we have to weigh the costs to society of not protecting——

Mr. SCOTT. Well, actually, we have to weigh the costs in spending it somewhere else, because all of the studies that we've seen have shown that if you put the money in prevention, you'll have less drug use going on and society will be better off than if you just increase the penalty for others. So we've got to know what our choices are.

Ms. AVERGUN. I don't think that in passing this bill or enacting legislation that imposes additional penalties that that vitiates any efforts or any spending that the Government does on prevention or treatment. There are three parts to the President's National Drug Control Strategy, each an equal part.

Mr. SCOTT. Well, let me ask you, on that hotel case that you were talking about, what penalties were available to law enforcement for the people you caught?

Ms. AVERGUN. The defendant received a sentence of 151 months based largely on his criminal history.

Mr. SCOTT. And how much would he get if this bill had passed?

Ms. AVERGUN. I don't know the quantities of the drugs involved. That would determine largely the amount of the sentence.

Mr. SCOTT. Well, he would have gotten 15 years under present law.

Ms. AVERGUN. He got 151 months, yes.

Mr. SCOTT. There's a provision in here, misprision of a felony, where you don't report a felony and you go to jail for it. That would include parents not turning in the children, if the children had purchased the drugs, they would be also guilty of a crime and they would be turned in with the rest. Has that ever been—that's present law.

Ms. AVERGUN. There is a crime called misprision of a felony and the section that you're referring to, 2(m), is one of those that the Department has concerns with and that we seek to work with the Committee to address.

Mr. SCOTT. Okay. Well, my time is just about up, Mr. Chairman.

Mr. COBLE. If time permits, we may have a second round, as well.

In order of their appearance, I recognize the gentleman from Texas, the distinguished gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Well, thanks, Mr. Chairman, and I appreciate not only being considered a gentleman but being considered distinguished. That was distinguished and not ex, wasn't it? I wasn't sure.

Mr. COBLE. If the gentleman will suspend, I even recognize myself that way sometimes, Mr. Gohmert.

Mr. GOHMERT. Thank you, Mr. Chairman.

Just curious, are they still using pseudoephedrine in the cooks for meth? Anybody?

Ms. AVERGUN. Yes, sir.

Mr. GOHMERT. Okay. I was hoping they'd found another way, because pseudoephedrine keeps me from snoring at night and it's harder and harder to get, but anyway, with regard to the drug treatment facilities and schools provision, I realize the importance

of protecting our children, the importance of drug-free zones, just like the importance of gun-free zones to protect our children. Let me direct this to Ms. Avergun.

You obviously are familiar, I'm sure, with the Supreme Court case of *Lopez* where the U.S. Supreme Court struck down the Federal gun-free zone around the school and said that that's the State right. The Feds don't have a right to come in. That's State law.

And, of course, understanding that with this Supreme Court that they have shown that they routinely may vote for something before they vote against it, or vote against it before they turn around and vote for it, they have a real problem with precedent, including their own precedent—a little editorial comment there—but I'm curious. Do you see or even anticipate any *Lopez*-type problems with a drug-free zone around the school or a drug treatment facility?

Ms. AVERGUN. I regret to tell you that I'm not familiar enough with the *Lopez* case and haven't performed an analysis of the statute vis-à-vis *Lopez*, but I would be happy to get back to you and provide our position on that.

Mr. GOHMERT. Well, I'd be very curious about your position. When we're talking about cost and passing a law like this, we don't want to be just spinning our wheels, so I'd be very curious to see if you feel there's sufficient Federal nexus.

With regard to comments about drug treatment and saving money from people being incarcerated, you folks have obviously a tremendous amount of experience, and we appreciate all your testimony. My own experience from handling thousands of criminal cases as a judge showed me that, if you just lock somebody up without any treatment and they have a drug problem or alcohol problem, you're going to probably see them again—some judge I am if I didn't. If you just treat somebody in a 30-day program, somebody was 99 percent likely to see them again as a judge, even up to 120 days.

It seemed that the most effective way to avoid my having to resentence somebody that I sentenced once, it was to make sure they were locked down for an extended period of time and forced to deal with their drug or alcohol problem. It seemed to me that the combination of those two working together were the best things we could do to ensure, number one, protection of society, children, and others being lured into that kind of life, and also punishment. You know the scenario.

But does anybody have any statistical evidence regarding these things we've been talking about to show that, in your opinion, or in your opinion, they justify not having incarceration in conjunction with drug treatment or having incarceration with drug treatment? Does anybody have any statistical evidence? I know we've been talking a lot about anecdotal evidence that each of you have.

Mr. BROWNSBERGER. Mr. Gohmert, there's good statistical evidence showing the relative cost effectiveness of a dollar spent on treatment as compared to a dollar spent on incarceration. Is that responsive to your question?

Mr. GOHMERT. No.

Mr. BROWNSBERGER. I'm sorry. Then maybe I'm not understanding the question well enough, then.

Mr. GOHMERT. Okay, thank you. But with regard to the number of people who are sent to incarceration and have drug treatment compared to the recidivism rate of someone who simply gets treatment, because what you're talking about is different.

Mr. BROOKS. I don't have all of the—probably the level of statistics that you would like, but I could tell you overall that effective treatment programs are effective at the rate of about 55 percent. Those treatment programs that we have seen to be most effective are those administered by the drug courts that use sanctions, graduated sanctions, to keep their people in treatment, to incentive treatment, and when they use the power of the bench to do so.

And so we think—my organization thinks this bill is particularly important for that regard, but it's also important for another reason, and it's a little hard to put a dollar figure on it, and that reason is that we use these tools, then, to try to compel people to cooperate with law enforcement, to try to then allow us to reach up into these organizations, very complex, multi-State, multi-national organizations that, quite frankly, even though it's a seedy side of law enforcement, the use of informants, if we didn't have the tough Federal incentive to compel these informants, we would not reach in and break drug dealing organizations.

When you go after the targets of opportunity on the street, you're cleaning up a street corner. But if you're going to really have an impact, in my 30 years of experience in drug enforcement, the way to truly have an impact is to hit the organizations, and to hit the organizations, you need information, and to get the information, you need the incentive.

Mr. GOHMERT. Carrot and a stick.

Mr. BROOKS. That's correct, sir.

Mr. GOHMERT. Okay. Thank you very much, Mr. Chairman.

Mr. COBLE. The gentleman's time has expired. I thank the gentleman.

The gentlelady from California, the distinguished Ms. Waters, for 5 minutes.

Ms. WATERS. Mr. Chairman and Members, I came in a little late, but I rushed to get here because I think this is such an important subject that we're dealing with here today. I think all Members of this Committee, both sides of the aisle, are more than frustrated with the level of drug activity and the lack of effectiveness of our laws and our policies as they relate to drugs, those who abuse drugs, and those who sell drugs.

I would like very much to be able to join with my colleagues in limiting as much as we possibly can the sale of drugs near drug treatment centers, the exploitation of children, and the sale and transport of drugs, et cetera, et cetera. However, I think we may be mixing apples and oranges here as we deal with this issue. There needs to be, I suppose, a lot more discussion about mandatory minimum sentencing and the fact that mandatory minimum sentencing has proven to be just a terribly ineffective way of dealing with the violation of drug laws.

We in California, I suppose in other places around the country, are involved with drug courts and they are proving to be extremely effective. We have learned that with mandatory minimum sentencing, we find a lot of low-level drug dealers, young people who

are not criminals, they're just stupid, and they think they're going to make some money dealing in a few rock crack cocaines. They end up in prison because the judges have no discretion, can't take into consideration first-time offense, can't divert them from the criminal justice system, cannot do anything to make sure that these young people don't become real drug dealers. And so this bill that we are discussing does not appear to take all of this into consideration.

Having said all of that, too, I suppose it's Ms. Avergun, in your written testimony, you stated that mandatory minimum sentences provide a level of uniformity and predictability in sentencing. Given what I've said, I want to address you and ask, is this what we really want in our sentencing policies? Doesn't uniformity and predictability impede on the role of the judge? Isn't it the judge's role to serve as a disinterested enforcer of justice, who at his discretion can consider mitigating circumstances and determine—determining the appropriate sentencing for defendants? We've heard from a lot of judges. They don't like mandatory minimum sentencing.

And don't you think we should be involved in prevention and diverting people away from the criminal justice system, first-time offenders, young, 19 years old, first mistake, five grams of crack cocaine? Why do they deserve to have 5 years mandatory minimum sentence in a Federal penitentiary where they'll be thrown in with hard-core traffickers who probably will certainly divert them to being involved in drugs? Can you give me some insight on why——

Mr. COBLE. The gentlelady's time has expired, but you may answer the question.

Ms. AVERGUN. Thank you, Mr. Chairman. Ms. Waters, thank you very much for your question. There are situations where drug treatment is more appropriate than incarceration, and Mr. Brooks has testified that a combination of sanction-based demand reduction, that's what we call it in the Department, coupled with the threat of incarceration is one effective way to go.

However, mandatory minimums do provide uniformity. There are studies, one recently cited by Judge Cassell in the Wilson case, that said that there are a variety of studies that suggest that a drop in crime rate is attributable to mandatory minimums, and the Department of Justice abides by that—by those studies. That is a critical part of drug enforcement, and, in the drug cases, the Department of Justice believes that mandatory minimums are appropriate.

That's not to say that judges should never have discretion. That's not to say that treatment and prevention are not both critical components of the drug control strategy of which drug enforcement is the third part. But all play a part. In the majority of cases, the Department of Justice does believe, however, that mandatory minimums are appropriate and there are studies that suggest that they do deter crime.

Ms. WATERS. Thank you, Mr. Chairman. I'd like to see those studies, if we could have a formal request for them.

Mr. COBLE. Ms. Avergun, can you respond to that and make that information available to the Subcommittee?

Ms. AVERGUN. I certainly can.

Mr. COBLE. I appreciate that.

The distinguished gentleman from Virginia, Mr. Forbes, is recognized for 5 minutes.

Mr. FORBES. No questions.

Mr. COBLE. The distinguished gentleman from Massachusetts is recognized, Mr. Delahunt.

Mr. DELAHUNT. I'll just pick up on my colleague from California. You know, that there are, I would suggest, Ms. Avergun, that there are more studies, of a substantial order of magnitude, that indicate that the relationship between minimum mandatories and their efficacy in terms of dealing with the drug issue is probably negative.

You know, I think that most people on this panel would seriously consider supporting this legislation but for, you know, implicating into this—excuse me, Mr. Ranking Member, except implicating minimum mandatory sentencing. You know, this Committee is going to have to deal, you know, at some point in time with the whole issue of sentencing guidelines. You know, a good prosecutor is able to target, you know, those at the upper level, if you will, in terms of a drug syndicate. A good police officer knows who the individual is and in terms of presenting a sentencing report that the vast majority of judges would comply with and accept. It's just part of the job.

You know, I just think it's unfortunate, you know, and I think that there's going to come a point in time when it will be opportune to take a look and see what's happened in the aftermath of *Booker*. That will give us some idea in terms of the guidelines. But, to shift everything now into minimum mandatories, I just don't think it's practical. I just really don't think it makes a lot of sense and doesn't get us anywhere in what I think is an objective that we all share.

So, you know, I think that's a message you can take back. I mean, at some point in time, Congress is going to be faced, too, I presume, with a request for more monies for the war on drugs as it is defined in Plan Colombia. What are we seeing in the—let me address this probably to Officer Brooks. How many addicts do we have in the country today, hard-core addicts that are responsible for a disproportionate number—how many hard-core addicts——

Mr. BROOKS. You know, when I was 40, I knew the answer to that question, but somehow after I turned 50, it's somewhere up in the recesses here, but I can't tell you.

Mr. DELAHUNT. Mr. Brownsberger?

Mr. BROWNSBERGER. The truth is that no one knows because this is a hidden behavior and it depends on the model that one chooses and there are parameters in that model that are very hard to estimate. But the numbers that we've seen are anywhere between two and six million.

Mr. DELAHUNT. Okay. I want to—I think we all want results, whatever the mechanism is, and I think it's really important that the Department of Justice, working with academia, give us an idea before we continue to spend a lot of money in a wasteful way. Are we making a difference in terms of reducing the number of addicts in this country?

I agree with you, Mr. Brooks. I mean, I think I have, and I would hope at some point in time to convince the Chairman to come to Cape Cod, probably around the summertime, and sit and observe

a drug court that we have there and a treatment center that we have there that is incredibly effective. We know the answers at this point in time. But you know, we need—we need some accurate data and empirical information, because we can't keep pouring money into initiatives that will not end up—will not allow us to sufficiently gauge whether we're winning. We don't know whether we're winning.

But I'm going to start asking that question on every dollar that we spend in terms of—on both sides of the equation, both the supply and the demand reduction side. We're going to start to need some good statistics. My memory was three million. Maybe it's just cocaine addicts. But, you know, we need to know that. We need to have benchmarks. And if we start to see a reduction in the number of addicts, we're going to see, I dare say, a huge reduction in terms of the incidence of drug-related crime.

Mr. COBLE. I thank the gentleman, and I thank you for your invitation to go to Cape Cod, Bill. I'll talk to you about that later.

Folks, with the indulgence of the witnesses and the indulgence of my members, let me make this proposal. We have two bills to mark up today and a reporting quorum is nine warm bodies. We have those nine. Often times, it's easier to get into Fort Knox than it is to get a working quorum—a reporting quorum here, so if no one objects, I want to go ahead and mark these two bills up while we have the nine members here, and then we'll get back to the witnesses.

Mr. LUNGREN. Mr. Chairman, reserving the right to object?

Mr. COBLE. The gentleman is recognized.

Mr. LUNGREN. Mr. Chairman, I reserve the right to object only to suggest that I understand what the Chairman is going to do. But with my experience both as Attorney General of the State of California, serving on the national commission established by the first President Bush on model State drug laws, and having, in my position as Attorney General, run the Bureau of Narcotics Enforcement of the State of California, I feel inadequately prepared to vote on the bill today. So I'm just telling the Chairman that I would have some difficulty on this.

The Chairman must proceed as he must proceed. But frankly, Mr. Chairman, when Mr. Brooks, who used to be one of my top agents, testifies that the most effective thing we have done in California is with drug courts and I'm being asked to vote on a bill that largely occupies the field with no reference to the Federal courts for drug courts, I, frankly, have grave difficulty doing that.

So with that, I'll be happy to——

Mr. COBLE. The gentleman from——

Mr. LUNGREN. I'll be happy to yield.

Mr. COBLE. Mr. Lungren, I will—let me float this out. You are referring, I presume, to the bill before us now, 1528.

Mr. LUNGREN. Yes, sir, I am.

Mr. COBLE. All right. We also have scheduled to mark up the gang bill. Do you have any problem with that, Mr. Lungren?

Mr. LUNGREN. I do not have——

Mr. COBLE. Or does anyone have any problems with that? All right, why don't we move——

Mr. SCOTT. I have problems with it, but I don't know if——
[Laughter.]

Mr. COBLE. And by the way, and this is a pertinent point that I failed to mention, I am told that there are no amendments to be submitted to either of these bills. Otherwise, I wouldn't have done this.

Well, let's move along, then, on the gang bill, and we will hold the bill before us, and I thank you, Mr. Lungren, for your comments.

[Whereupon, the Subcommittee proceeded to other business.]

[Hearing resumed after markup of H.R. 1528.]

Mr. COBLE. We can now return to business at hand and the gentleman from Florida, Mr. Keller, is recognized for 5 minutes.

Mr. KELLER. Thank you, Mr. Chairman. I have no questions.

Mr. COBLE. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you, Mr. Chairman. I'll be brief, and I want to apologize to the panel for just arriving from my district a little while ago. I will review the testimony in full. I just have one question for Ms. Avergun, if I could.

We've heard a great deal about sentencing guidelines, but in terms of deterring drug trafficking and distribution, in your opinion, do you believe the mandatory minimums included in H.R. 1528 will be more effective than the sentencing guidelines, and if so, why?

Ms. AVERGUN. Thank you, Representative Chabot. The Department of Justice is happy to use all the tools in its arsenal to deter crime. Mandatory minimums deter crime and the guidelines, advisory though they are, deter crime. The threat of high sentences causes people to cooperate. There is no two ways about it. I was a line prosecutor for 12 years in New York and the threat of both the high guideline sentences and the mandatory minimums are what worked for a prosecutor. So there is no either/or here. They are both critical tools in a prosecutor's arsenal.

Mr. CHABOT. Thank you very much. I have no further questions, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The gentleman from California, Mr.—oh, I haven't recognized you, Dan? I'm sorry. The gentleman from California is recognized for 5 minutes.

Mr. LUNGREN. Thank you, Mr. Chairman. First of all, I want to welcome all the panelists here, particularly Mr. Brooks, with whom I had a working relationship for 8 years and who's an outstanding member of the Bureau of Narcotics Enforcement in the State of California and was involved in many different law enforcement enterprises and is very knowledgeable on this subject.

I happen to agree with him that we have an effective means by which we deal with a significant number of people that we find who are violating our drug laws, and that's the drug courts. I was one of those who was not in support of drug courts initially, but after reviewing them and seeing their successes and personally visiting a number of drug courts in California, I'm convinced of their utility. And I have some concern about the bill that's before us because I don't understand, frankly, how the drug court proposition

fits into the Federal model currently, and maybe the representative from DEA could give me some advice on that.

Ms. AVERGUN. I don't think that we read this bill to preclude or exclude the applicability of drug courts. Drug courts are generally for users, people who need treatment——

Mr. LUNGREN. I understand that, but what I'm asking you is, do we have drug courts on the Federal level?

Ms. AVERGUN. There certainly are drug courts on the Federal level. There is sanction-based demand reduction as a critical component of the Federal drug strategy.

Mr. LUNGREN. And are the Federal drug courts available throughout the United States?

Ms. AVERGUN. I don't have an exact number of where they are available, but they are available throughout the country. I just couldn't tell you in which Federal districts they are currently available.

Mr. LUNGREN. Okay. Mr. Brownsberger, as I understand it from the map that you've shown us, virtually that entire community would be covered if we extended it 1,000 feet, that is, locating schools, parks, and treatment centers.

Mr. BROWNSBERGER. Yes.

Mr. LUNGREN. My question to you is, do you find a utility in us having at least some measure of additional penalty, and therefore deterrent, around such places as parks, schools, and treatment centers?

Mr. BROWNSBERGER. I think it makes sense, but it has to be at a much narrower radius.

Mr. LUNGREN. What would you suggest? You said you don't agree with 1,000.

Mr. BROWNSBERGER. A hundred feet would be reasonable. That's a——

Mr. LUNGREN. What would that take us in terms of blocks?

Mr. BROWNSBERGER. Half a block, a block. It depends on the size of the block. But that's sort of the area—that would keep people well off the premises. That would be a meaningful deterrent for preying on the people involved in those institutions.

Mr. LUNGREN. Well, if we're talking about schools, we're talking about—or parks, we're talking about young people not only there but close to there, that is, on their way to and from. Does 100 feet make more sense than 1,000 feet if what we're trying to do is protect our children?

Mr. BROWNSBERGER. It does, because 1,000 feet—this is just the schools. It doesn't include all those other things on that laundry list. But that covers most of the community. So the effect of 1,000 feet is to create the whole world as a drug-free zone, and, therefore, you're not giving any particular protection to your children. Your goal is to give particular protection to children, as I understand it.

Mr. LUNGREN. Okay. Let me ask Commander Moriarty on that. Is there something in the notion that we should give enhanced protection to children by designating certain zones in communities that will allow us to give them additional protection by virtue of our definition, or would you support such a broad scope that an entire community would be covered, as is suggested by Mr. Brownsberger?

Ms. MORIARTY. Well, I think he's right when he states that the goal is to protect the children in the areas of the schools and the drug treatment facilities, and so, when we are doing our enforcement, it's actually more of an enhancement for the penalties to actually meet some of the sentencing enhancements to put some of the people in jail that we're using it for.

Mr. LUNGREN. Right, but what I'm asking you, conceptually, do you think that's a good notion? Is that a good enforcement tool that you do have certain defined areas you're telling the drug dealers to stay out of?

Ms. MORIARTY. I do. I do believe that that's important. I don't know that 100 feet is enough——

Mr. LUNGREN. What if you have 1,000 feet and by application of the map——

Ms. MORIARTY. Then you have everything——

Mr. LUNGREN.—it covers everything. Does that defeat the proposition or do you think that still is worthy? I'm trying to figure this out and I'm trying to ask your help, because you're there doing it all the time.

Ms. MORIARTY. Well, sir, I can only answer that when we are within 1,000 feet of a school, it is a deterrence because the children are walking up and down that area. I mean, I see what we're saying as far as then the whole entire neighborhood becomes, or the whole city becomes covered under his map. But it is a tool that we use to keep people off of the property, and I do believe it is a deterrence.

Mr. LUNGREN. What do you think about drug courts?

Ms. MORIARTY. I think drug courts are an exceptional option.

Mr. LUNGREN. I don't know what that means. Does that mean good or bad?

Ms. MORIARTY. Good. In the State level for us in Colorado, I mean, there are times when we go into Federal sentencing, but more so when we get a chance to stay State and local, drug courts are a huge part of what the National Alliance is because it eventually can help the user and maybe bring the families back together.

Mr. LUNGREN. This bill has a mandatory minimum life sentence for someone who is over 21 convicted on the second time of dealing drugs to someone under 18, mandatory minimum life sentence. Ms. Avergun, is that appropriate? Would that help or not help us in our ratcheting up? I'm one of those who wants to ratchet up, but I want to know how far I should ratchet up.

Ms. AVERGUN. I think it depends on a case-by-case basis whether it's appropriate.

Mr. LUNGREN. Mr. Brooks?

Mr. BROOKS. I also agree, it is very appropriate in some instances where the person, where these drug dealers are extremely predatory and where they have a history of being predators, of using juveniles to facilitate, to be lookouts, to be sellers, putting them in harm's way, taking advantage of their vulnerability, their lack of sophistication, their lack of maturity. And so I think that's a decision for the prosecutor and the courts to decide when it's appropriate, and law enforcement, I also think it helps us.

Thinking back to many cases we did when I worked for you, where we used the threat of Federal sanctions, the threat of the

tough penalties that we can impose if the case were filed federally, to then get cooperation, to develop informants, to get people to enter into pleas and to really be effective, it's a great tool for us.

There are studies in California and New Jersey that have shown that 76 percent of the kids that choose not to use drugs consider as part of that choice the fact that there are tough drug laws and tough sanctions. When they look at that, I mean, having drug laws aren't going to keep people from using drugs that are going to use drugs anyway, but they may help make people make good choices, those people that are willing to weigh their decision. So I think it is appropriate to have those sanctions available.

Mr. LUNGREN. Mr. Brownsberger?

Mr. BROWNSBERGER. Mr. Lungren, thank you. I just wanted to add a little bit on that notion of 100 feet. These laws say 100 feet from the real property comprising the school, where comprise means enclosing the school. So you have a property in which there's a school sitting. Sitting 100 feet off of that property is pushing people off of all of the streets that surround that property. So 100 feet from the real property comprising the institution really does set people back quite a ways.

Ms. AVERGUN. May I supplement my answer on the drug courts? We were able to gather something quickly. There is one drug court in the Federal system. It is largely a State court product. However, there are 1,600 federally-funded drug courts. So the Federal involvement is on the funding level rather than on the option for incarceration——

Mr. LUNGREN. No, I understand that. My concern is if I am here as a legislator making a decision as to what I'm going to tell the courts to do and this is in the Federal system and in the Federal system, I'm saying to the judge, there is one or two things you can do, but we don't have a Federal drug court, I don't know how I work that out, how I transfer that court to State and have them work it out.

Ms. AVERGUN. That can be done. In many instances, the Drug Enforcement Administration, for instance, works with State or Federal prosecutors. It's a matter up to the agency as to which way they steer their cases. If a case is more appropriate once it's in Federal court, there are mechanisms to dismiss a complaint in favor of a drug court option.

Mr. LUNGREN. Would you object to us having more Federal drug courts? If we were to raise these penalties but at the same time have an option under certain circumstances that you could have a drug court option, would you object to that?

Ms. AVERGUN. I don't think that anybody objects to the concept of drug courts. They are proven. I think that they are good for a limited class of people——

Mr. LUNGREN. Right.

Ms. AVERGUN.—most of whom are not targeted under this statute. This statute is really targeting those who violate our kids and who prey on our kids.

Mr. LUNGREN. Thank you.

Mr. COBLE. The gentleman's time has expired, and I recognize Ms. Sheila Jackson Lee, the distinguished lady from Texas. And after her questioning, then we will go for a second round, if there

are other questions that need to be put to the panel. So the gentlelady from Texas, you are recognized for 5 minutes.

Ms. JACKSON LEE. I thank the Chairman very much for his charity and I apologize for being in another meeting or discussion dealing with our position in Iraq. I thank the Ranking Member, as well.

Let me—I was listening to my colleague from California raise a question of, I think I heard, unreadiness. I don't want to put any words in his mouth. I know that there is a degree of unreadiness certainly on my part on this—on several issues, and I know that we've already marked up the legislation dealing with the gang deterrence. Let me speak generally, Mr. Chairman, about these. I have amendments, but we may have to look toward doing these either tomorrow or on the floor.

I have supported mandatory minimums in the past on certain heinous and horrific acts against children. At the same time, I am cautious about the implementation of mandatory minimums by statute inasmuch as it does not allow the discretion that I think is appropriate to a court. It's unfortunate when the Supreme Court has questioned the mandatory minimums, which I find really wear out their welcome on non-violent criminals after a period of time, because after a period of time on non-violent criminals, all you do when you go to the Federal prisons is see individuals on 10-, 15-, 25-, 30-year sentencing based upon an action they did when they were 20 and they're now 35, 45, 55. They're filling up beds when they could be with their family, be rehabilitated. And so mandatory minimums does not cause me a great deal of excitement.

I think when we started looking at the methamphetamine issue and we were trying to clean that up in certain regions, it certainly gives us a reason to deal with that in a legislative manner.

What I see here, however, gives me pause because seemingly, what it does is if two individuals in a non-violent manner are engaging in some sort of drug trade, no matter how small it is, they wind up in a Federal system and under a mandatory minimum. And to me, that seems to be unreasonable inasmuch as we've seen crime go down. It does not respond to those who are really addicted, both the seller and the buyer, because the seller can be addicted, too, seeking to get some money. It has a heavy burden on minorities, particularly African Americans. We still have not cured, I think, the disease of incarcerating more African Americans than others as it relates to drug offenses, particularly under crack, and that's still the drug of proliferation.

I don't see the rush to go forward with this without—and I heard my colleague talk about Federal drug courts. I don't think we have any. I do know that in the Southern District, for example, the Federal court system is completely overloaded with immigration cases and criminal cases so that the civil cases in the Federal system cannot even get inside the courtroom door beyond four, five, or six years.

Crime, as I understand it, has gone down. But treatment beds have gone down, as well. So, we're not curing the problem. And we have legislation here that now adds an additional Congressional—excuse me, criminal parameter, and, therefore, does not, to me, answer the solution.

I'm going to go back with Mr. Brownsberger. You were showing us the geographics. I'm raising some points that probably have been raised by my colleagues already, and I apologize, but I really want you to pinpoint the issue of a problem and then a solution. Are we at such a heightened problem that the legislation that is before us really answers the concern, or by passing the legislation, are we now creating enhanced offenses and then more incarceration and really not getting to the problem? Are we so devastated by individual drug dealers on street corners attempting to influence either those leaving a drug location or a treatment center or school that we need to put this heavy-handed legislation in place?

Mr. BROWNSBERGER. Thank you, Representative Lee. In my view, the law is very heavy already. We have very, very heavy penalties already. You have a lot of people spending a long time in jail. We have to remember that these are children. We're talking about protecting children, but a lot of these young men are children when they get into this trouble. They are 16, 17, 18, 19 years old. They are children still. And so the law is already heavy-handed enough. That's my general view.

I've allowed as much as to say that if you targeted narrowly certain facilities, perhaps you could address a problem. I do believe it's a problem, the problem of drug dealers coming on the premises of methadone maintenance facilities, in particular. That's an issue.

By the way, I'd like to say, if the Committee were to go in this direction of passing this bill, it would have to dramatically narrow the definition of facilities involved. The definition of facilities here would include individual providers. It would be very hard to identify those and for anybody to know that they were anywhere near a psychologist's office who was providing drug treatment. So it wouldn't really have any benefit in that context.

But a methadone maintenance facility, that's something you have people lining up outside. That's something you might want to keep people away from. That's a reasonable thing to try to do.

I don't want to suggest that this is necessary to do that, though. I do believe that the task of enforcement is the task that people face and the laws are already heavy enough. They have mandatory minimums. They have heavy penalties and they can put these people in jail. The challenge is to put the police resources in place to move people away from those facilities. And I think, if you don't put those police resources in place, then you're just putting laws on the books. You're not actually doing anything. So, I think it's really a question of having the police resources in place to protect those facilities as opposed to locking people up for a longer period of time.

Ms. JACKSON LEE. May I, Mr. Chairman? Ms. Avergun, why don't you respond to that. Isn't it more reasonable, what Mr. Brownsberger has just said? It makes common sense to me. Enforcement is really the issue. What you're doing is, and you've got some outstanding staff persons down in Texas that I work with all the time. Let me applaud them, the DEA unit that's down in Houston, Texas, in particular. And they've got a big job. They're dealing with smugglers coming across the border. They're dealing with drug cartels, really major issues, and, of course, certainly they're dealing with sometimes street crime.

But, the point is, wouldn't it be more effective to give the resources to local law enforcement so that they know who is scouting out the methadone clinic, who is scouting out the school, as opposed to hampering us again with more time, more incarceration, and more one-time petty criminals selling whatever ounce it is and then they're locked up in the Federal system, which burdens the Federal system and allows them to be there for 30, 40 years?

Ms. AVERGUN. Certainly, more resources to the State and locals would be welcome to police these kinds of crimes. These people need our protection. But again, it's not an either/or proposition. There are cases where people prey on people coming out of clinics. It's not just a one-time deal. And, for those types of cases where we are dealing with organizational targets or higher-level suppliers who are taking the most opportunity of the most vulnerable victims, then that would be an appropriate Federal resource and appropriate use of the statute.

But it's not that we only have mandatory minimums and we target the one-time seller. It is a spectrum, a broad array of enforcement options starting from State and local resources up to careful targeting at the Federal level. But we do feel that these tools are needed in our arsenal.

Ms. JACKSON LEE. I don't think we've changed any of our drug laws over the past 20 years, and my understanding is that we really have a sufficient series of mandatory minimums on drug laws. In fact, we have, a number of us for a number of years, have been trying to bring equity to the mandatory minimums between cocaine and crack. That has not changed. So, apparently, these strictures are still in place. I can't imagine that they cannot be utilized for an indictment against those who would be part of a cartel. First of all, you have conspiracy, the ability for conspiracy.

You are going to wind up roping in, looping in addicted persons who need treatment as well as the one-times along with the two times and the three times, and these persons are known to be either with no alternative, which I'm not giving as an unilateral excuse, but no alternatives in areas where the educational system is at a near collapse, that these young people are out on the streets with no educational resources and background and left to their own devices. That's what we should be looking at and funding, alternatives to—or as opposed to what we're talking about today.

Mr. COBLE. The gentlelady's time has expired.

Ms. JACKSON LEE. I yield back. Thank you.

Mr. COBLE. Ladies and gentlemen, let me divert one more time.

[Whereupon, the Committee proceeded to other business.]

[Hearing resumed for second round of questions, after markup of H.R. 1279.]

Mr. COBLE. Now we will return to regular order at the bill at hand. Folks, we're going to start a second round. I notice that Mr.—well, Mr. Green has already gone. Mr. Scott, why don't you start on our second round.

Mr. SCOTT. Thank you.

Mr. COBLE. And let me ask the Members, folks, if you will, try to adhere to the 5-minute rule because we've kept our witnesses here probably longer than they expected, but it's still good to have you.

Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Brownsberger, you had said that you had some numbers on relative cost effectiveness of investing in—the little money we have with the result of reducing drug use. Do you want to just quickly recite some of those numbers?

Mr. BROWNSBERGER. Yes. There's a study that was——

Mr. SCOTT. Just in general.

Mr. BROWNSBERGER. Thank you. There's a study that was done by Carnegie Mellon—actually, I guess it was by Rand, Jonathan Calkins, Peter Reuter, a quantitative study that came out several years ago that made an estimate of the quantitative reduction in drug use associated with a million dollars spent on incarceration, a million dollars spent on treatment and so forth, and the ratio of benefits was about 7 to 1, as I recall, the treatment benefits to the incarceration benefits.

Mr. SCOTT. And mandatory minimums came in last place in that study?

Mr. BROWNSBERGER. Well, that's right, mandatory minimums that cause incarceration.

Mr. SCOTT. You said mandatory minimums was the least cost effective, then regular sentencing came in next, and far ahead was drug treatment for heavy users?

Mr. BROWNSBERGER. Actually, I have to—as I recall the study, it didn't distinguish between mandatory minimums and incarceration generally. It just grouped those together, unless I——

Mr. SCOTT. If you could provide that study, it would be helpful.

Mr. BROWNSBERGER. I will do that. Could I just follow that just for one moment? It's been said that this bill is compatible with drug courts, but really, this bill, it poses incarcerations which are so long that they make drug courts substantially irrelevant and they do that for crimes which really may have—that may be really committed by people who should be in drug courts.

Mr. SCOTT. But we also have, I think, ascertained that there are no drug courts in Federal court, so if you use a Federal statute, you've got to be in Federal court to implement the Federal statute. So if you use the provisions of the bill, you're not going to be able to access drug courts anyway.

Mr. BROWNSBERGER. Exactly.

Mr. SCOTT. Let me—Mr. Brooks, you indicated the importance of treatment. Isn't it true there's no treatment in the bill?

Mr. BROOKS. I did not see any treatment in the bill.

Mr. SCOTT. Okay. And the present penalties that you have available to you ought to be sufficient to hold over somebody's head if they're in State court to go to a drug court, to go to rehab?

Mr. BROOKS. Well, no, I think that these more aggressive penalties do give us a greater tool to incent—as an incentive. But more importantly——

Mr. SCOTT. Yes, but if you give them that incentive, you can't use drug courts because you're in Federal court under this bill without drug courts.

Mr. BROOKS. That's correct, sir, but mostly because this bill and the Federal drug prosecution statutes don't generally—aren't generally aimed at the persons that are eligible for drug courts any-

way. Drug courts are more of a State court initiative because they are focused on drug users and persons that are on the fringe of the drug selling arena, not on persons that have met Federal thresholds and are fully involved in drug trafficking, drug manufacturing, drug smuggling.

These Federal drug laws, including the tough sentences in this bill, these are for people that are predators that put children at great risk, that put their lives at great risk, and not people that are just using or addicted.

Mr. SCOTT. If you go get some for yourself and then you go get some for your friend, and as an accommodation, no profit, that's included in this, too, isn't it?

Mr. BROOKS. You know what, I'm not a lawyer, sir. I'm not sure.

Mr. SCOTT. Okay. Ms. Avergun, there are provisions in here for second offenses?

Ms. AVERGUN. Yes.

Mr. SCOTT. Is it a second offense if you have—if you're charged with a couple of crimes? In our localities, they have a sweep, you get caught in Newport News and also in the adjoining jurisdiction in Hampton, and you're tried in Newport News, this first offense. If you're tried in Hampton without having gone to jail in between, is that a second offense?

Ms. AVERGUN. I don't know how that would work under this statute, Mr. Scott. It would——

Mr. SCOTT. Well, you've got life imprisonment if you get busted for that second offense.

Ms. AVERGUN. Yes. There are very complex rules for what counts as a prior conviction to trigger these second offense——

Mr. SCOTT. Okay. Since we're talking about life without—life imprisonment without parole, is marijuana a controlled substance under this bill?

Ms. AVERGUN. Marijuana is a controlled substance everywhere.

Mr. SCOTT. So if you're in a circle and they're passing it around, that's all distribution. Get caught twice, what happens?

Ms. AVERGUN. Theoretically, that would be—if you were convicted both times under this statute, that would be the mandatory life.

Mr. SCOTT. Well, how do you get a predicate offense to start off with that second offense? What are the predicate offenses?

Ms. AVERGUN. I can't tell you what all the predicate offenses are——

Mr. SCOTT. Is marijuana a predicate offense?

Ms. AVERGUN. Any drug felony—for purposes of the predicate felony statutes, any drug felony is an initial offense.

Mr. SCOTT. Is it other felonies? It's not a misdemeanor?

Ms. AVERGUN. Not a misdemeanor, no. It would have to be——

Mr. SCOTT. Where is that?

Ms. AVERGUN. I think it's in section 851 of title 21, not in this statute.

Mr. SCOTT. Not in this bill, because this bill just talks about controlled substances.

Ms. AVERGUN. That's what the law is.

Mr. SCOTT. Okay. So if I could, Mr. Chairman, I just want to know, if you are distributing marijuana or distributing cocaine

amongst friends and get busted, that's first offense. And, if the arrests come in two different busts or two different jurisdictions, you're not sure whether or not the second conviction would give you life without parole or not under the bill?

Ms. AVERGUN. I can't tell you under your facts whether the first counts as a conviction that would count as a first conviction to trigger the second conviction. I'm just not—I don't think that that's been thought through enough by any of us at the Department of Justice to tell you——

Mr. SCOTT. Well, you don't have to worry. What we've thought through is we took a poll, and this bill will help us get elected. That's about all we need to know.

Mr. COBLE. I thank the gentleman.

The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Thank you, Mr. Chairman.

If I understand the gentleman from Virginia's question, it's the life—mandatory life sentence——

Mr. SCOTT. Two strikes and you're out.

Mr. LUNGREN.—on two strikes. But as I understand it, as I read the bill, it would have to be the same offense. That is, a 21-year-old, someone over 21 selling to someone under 18. So not other——

Mr. SCOTT. Two fraternity brothers.

Mr. LUNGREN. Two fraternity brothers, one over 21 and one under 18. I hope we wouldn't have Federal prosecutors going after that.

Mr. SCOTT. I think they——

Mr. LUNGREN. But let me ask a question. Ms. Moriarty, you talked about meth and how it was an eye opener to you, what it meant to children. When I was out in California, we had an expression which was meth use equals child abuse. Some of the worst child abuse cases I ever saw or read about were those involving meth users.

And then the other thing was what you had mentioned was that there wasn't direct physical abuse by the parent to the child. We found great levels of exposure to methamphetamine or its predecessor elements in the children when they did physical examinations.

What have you found to be the most effective way of dealing with that? In other words, and I know this generalizes, but in these cases where you find children on the premises with their parents who are dealing meth, do you find any sense of responsibility with those parents, any remorse, any—what I'm trying to get at is what do you think, from your experience, would be the most effective means of deterrence to those parents when they're exposing their children to the meth environment?

Ms. MORIARTY. I would say, Mr. Lungren, on the onset of that, when we first arrest them, exactly what you said. We call methamphetamine the walk-away drug, that they literally walk away from everything in their life, to include their own life. They don't—I mean, incarceration at that point isn't even an issue. I have had several of those that we arrested actually thank law enforcement for taking the first step in changing their life by putting them into custody, and it does go hand-in-hand with what we're trying to do with the National Alliance, is to, you know, drug court is impor-

tant, and if they're going to be part of a family again and get clean, there needs to be consequences at the same time. So we have found that consequences have actually meant something.

But at the very beginning, I've never seen an environment that is more dangerous than those of meth users. The paranoia alone, the fact that they don't eat. I've walked into homes where they haven't fed their children for weeks, and so it's really—it's just a sad, hideous, hazardous environment. But like I said, at the beginning, there's no recognition to anything. They've literally—we've had addicts give their children away, and so that's what we see.

Mr. LUNGREN. See, my biggest concern is the kids. I would hope that we could salvage the parents, but it seems to me in those cases the chances are better that we can salvage the kids than salvage the parents. I would love to salvage the whole family unit. My question is, what tools do you think we need to have in the Federal system to try and do that, first to save the kids, and then second—well, first of all, do you think it's important, is it possible in your experience to salvage a family unit under those circumstances?

Ms. MORIARTY. I do believe that it's important to always try to salvage a family unit. I think that the children—you know, because they're not great parents, they're still their parents, and I think that that's a significant impact that we need to have on their lives is as to how to bring the family back together. I think——

Mr. LUNGREN. So what tools do we need? What tools would you recommend, based on your experience, that have been effective from the Government's standpoint to help achieve that?

Mr. COBLE. Ms. Moriarty, as brief as you can because the time has expired, but go ahead.

Mr. LUNGREN. Mr. Chairman, my red light was on as soon as I started questioning. I don't know what happened, but anyway——

Ms. MORIARTY. I think that we need to bring, I don't know if—I speak from a local level and from doing law enforcement and from the Alliance for Children, but I think bringing multi-disciplines together. These children need some psychological help. I mean, medical, they need treatment themselves. They need to understand that this is not their fault, and they're our next generation of users. And so I think that that's part of our prevention, that is, if we don't put some effort and energy into the children, we're just creating, like I said earlier, the next 114,000 that are high-risk at use for using drugs, if we don't start intervening in their lives and get them socially connected and put somebody in their lives who can help change that.

Mr. COBLE. Dan, you are correct. Your light was on, so I think you still have a couple minutes.

Mr. LUNGREN. Thank you, sir.

Mr. COBLE. I stand corrected.

Mr. LUNGREN. Mr. Brownsberger?

Mr. BROWNSBERGER. I'd appreciate the opportunity to respond to that, as well. I mean, I, as a drug court attorney, work with a lot of mothers and fathers who are addicted and have lost their children and have neglected their children and deeply regret that they neglected their children. Clearly, their children are victims.

Number one, as a response, this isn't primarily a Federal problem. This is a problem for the State and local social services, number one.

Mr. LUNGREN. But given the fact we're going to have a Federal presence.

Mr. BROWNSBERGER. Well, I'm not—if you take that as a given, I'm not sure that's the right given.

Mr. LUNGREN. Okay, but let me tell you, we're going to have a Federal presence——

Mr. BROWNSBERGER. Okay. Well, in that——

Mr. LUNGREN. —and I'd like to know what the best one is.

Mr. BROWNSBERGER. I would advocate that presence include active support for treatment for children and for treatment for parents and for treatment facilities in which children can be with their parents, because believe it or not, a lot of these children still love their parents. Ripping those parents away, sending them for 10 years for the neglect that they've committed really isn't necessarily part of the solution.

Mr. LUNGREN. Mr. Brooks?

Mr. BROOKS. I agree with Commander Moriarty. It's really important that we have the tools to intervene, and it's important that we keep the family unit together, but we're not always going to keep the family unit together. That's the ultimate goal. But, first and foremost, we have to protect those kids. So we have to get the child protective services folks in. We need to get the psychological folks in. We have to get the medical folks in and make sure that we're taking care of—I mean, these are ticking time bombs. We don't really know yet what the full effect of having these children unprotected in these toxic environments for years and years, what the full medical effect is on them. We might have sentenced them to death and not even known it yet.

And so it has to be a multi-disciplinary approach triggered by law enforcement when they enter that lab site, bringing psychological services in, bringing child protective services in, helping to reintegrate the family, but understanding that we're not always going to reintegrate the family and sometimes we just have to then salvage those children.

Mr. LUNGREN. Thank you.

Mr. COBLE. And I apologize to you, Dan. I didn't realize the clock was defective.

The gentlelady from California is recognized for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, point of personal privilege.

Mr. COBLE. The gentlelady is recognized.

Ms. JACKSON LEE. The gentlelady was kind enough to allow me just to—I was unavoidably detained when the Committee voted on, I believe, H.R. 1528, and I would like to ask unanimous consent that my vote of "no" be placed in the record at the appropriate place.

Mr. COBLE. Without objection, it will be done.

Ms. JACKSON LEE. And I was unavoidably detained on H.R. 1279, the "Gang Deterrence and Community Protection Act of 2005," and I'd like to have my vote of "present" be acknowledged and placed in the appropriate place for H.R. 1279. I ask unanimous consent.

Mr. COBLE. Without objection, it will be done.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. COBLE. And the gentlelady from California is recognized for 5 minutes. Let's get the clock working. Set that clock at 5 minutes. Thank you, Mike.

Ms. WATERS. Thank you very much, Mr. Chairman.

Sometimes, I think we really don't know what's going on out there in the streets of America, both in our cities and our towns. We talk about these children of drug-addicted parents, and I heard some references to the children of parents who are addicted on meth. But whether it is meth or crack cocaine, these children are extremely vulnerable. They are neglected. Oftentimes—well, there is nothing like seeing children who actually live in a crack house. I've seen it. There's nothing like seeing children who are living with a mother who is crack addicted. In the streets, they refer to them as strawberries, and they're capable of committing almost any unimaginable act in order to get crack cocaine, they're so addicted.

I have seen many of these children grow up in these environments, and many of them are gang members. And I think the most dangerous gang member in America is one who has experienced their mother on crack cocaine and have seen what happens to her in that environment. All the safety nets are pulled out from under them and, really, there's nowhere for the children to turn. Nobody really cares. Nobody does anything for these children.

When the mother ends up dead or in prison, and if there's a mate involved, both of them dead or in prison, if they're lucky, there is a grandmother. The grandmother gets no support from the State to help with these children, and many of the gang members end up being young people who gather together and live in vacant houses or with each other and they become the family, and they're very, very dangerous. They are capable of killing because their rejection and their pain is so profound, so difficult. But America doesn't understand any of this and does nothing about it.

So it's almost a joke as we sit here and we talk about mandatory minimum sentencing and we talk about whether or not we lock up parents who abuse their children who are drug addicts. I mean, come on. There's a great disconnect here about what really goes on out there.

I've seen it. I understand it. I'm extremely frustrated about it. And this kind of legislation does nothing to help it. There needs to be support for children whose parents are drug addicted in several ways, and you're absolutely right. Many of them love their parents until they die, until the parents die before their very eyes, are taken away to prison, and they don't know what to do about that.

Where do we see anything that will provide the kind of support for children of crack-addicted parents dealing with them while they're still in the houses with some of them, or when they have been removed, or when the parents die or go to prison? There's just nothing in the system that I see.

Foster care, maybe, when children are taken away, and when they're thrown into these foster care settings, basically, they end up perhaps still vulnerable to what is happening in the neighborhoods that they are relegated to in these foster care situations where they have these kind of problems.

So I know my time is up, but let me just try and talk about, if I may indulge for one moment, about these HIDTAs, or the drug areas that are supposed to be targeting resources to deal with drug trafficking and all of that. Can anybody here explain to me what a HIDTA is, and how it works, and how they get formed, and how they get chosen, and what they're doing? Yes, sir, Mr. Brooks?

Mr. BROOKS. Yes, ma'am, I can. The HIDTAs, there are 28 around the country. They are Congressionally designated and certified by the Director of the Office of the National Drug Control Policy. It brings together, using some Federal dollars and State and local dollars, Federal, State, and local law enforcement officers in a collocated setting with a strategy mostly to focus on drug trafficking organizations, those organizations at the upper end. But it also provides support to State and local law enforcement working street and mid-level traffickers, as well.

Every HIDTA has an intelligence center so that the law enforcement officers there work smarter and better. Every HIDTA has technical equipment available. But the biggest thing is, the HIDTAs are managed by balanced boards, eight State and local officers and eight Federal officers. That balanced approach gives the State and local law enforcement agencies the feeling of partnership, and what the HIDTA really does, what it has truly succeeded in doing is it's brought together law enforcement agencies that traditionally would never talk together, never work together——

Ms. WATERS. Are they successful in reducing drug trafficking and drug addiction in, let's say, Los Angeles, in the South Los Angeles area? You're from that area.

Mr. BROOKS. Actually, I'm from San Francisco, but I am from California——

Ms. WATERS. Okay.

Mr. BROOKS. It absolutely is.

Ms. WATERS. It is. How?

Mr. BROOKS. Because when you're able to drive price up, drive availability down, drive the social stigma, and take—HIDTAs are focused at the organizational level, not at the street level but at the organizational level, where they're able to take down cartel-based, using a partnership between DEA and the other Federal law enforcement agencies, in your area the LAPD and the L.A. Sheriffs, Hawthorne Police Department, you know, all of the 44 agencies in Los Angeles County. They come together in big initiatives like L.A. Impact, using information run through the L.A. clearing center, and are able to focus, then, on those big organizations.

Tom Constantine, who was the DEA Administrator for a number of years, 6 years, just told me over dinner the other night the biggest cases that they were able to do in the Los Angeles area, big organizations, started, although DEA often managed those cases, they started out of one of the L.A. HIDTA-run initiatives.

And so, ma'am, it brings together a disparate group of agencies. It makes them all talk the same language under the same roof with a coordinated strategy, and they truly do work, in my opinion.

Ms. WATERS. Thank you, Mr. Chairman, and I just want to tell you this. For those of us who are watching what I described to you, don't feel the effectiveness of these bureaucratic agency HIDTAs that you just described. We don't feel it. We don't see the drug

dealers being taken off the streets. We don't see you stopping the flow of drugs into these communities.

Crack cocaine has destroyed and devastated—and continues to do so—communities throughout this country, and many of the gangs survive based on dealing drugs, and you guys don't know anything about it—not you guys, but that's a generic "you guys." There's nothing happening to break it up. There's no undercover operation that's helping to identify where these drugs are coming from and how they're getting in there, and we suffer. We suffer throughout these communities. We're so damned tired of it.

Mr. COBLE. The——

Ms. WATERS. And when I sit in these Committees and listen to us talk to each other, it just blows my mind that we don't know what the heck we're doing. I'm just—I've had it up to here.

Mr. COBLE. The gentlelady's time has expired.

Mr. Brooks, there are 28, do you say——

Mr. BROOKS. Twenty-eight HIDTAs with and counting the partnerships along the Southwest border. Thirty-three divisions, but 28 designated HIDTAs.

Mr. COBLE. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. I mean, clearly, you can see the frustration that I know we all share.

I want to go back to my earlier point about the number of addicts in the country, and I think it was you, Ms. Avergun, that indicated two to six million.

Ms. AVERGUN. That was Mr. Brownsberger.

Mr. DELAHUNT. It was Mr. Brownsberger.

Ms. AVERGUN. But he's right.

Mr. DELAHUNT. But he's right, two to six million. I think that what we heard, the frustration of my friend from California, is we're operating in the dark. Let me put a premise out, that the vast majority of drug-related crime is committed by drug addicts. I don't see how we can effectively measure whether we're succeeding unless we develop a methodology that allows us to more accurately assess whether we're successful through a combined coherent strategy—supply, demand. There are great programs out there. We know that because we know it anecdotally.

But, I mean, I believe the first place to start, and I would hope that the chair and this Committee at some point in time would just simply seek to have a panel—and this is an excellent panel—that would talk about the methodologies of how we measure success or lack thereof so that we can pass and support a coherent legislative approach and appropriate the necessary funding as opposed to simply just taking a stab.

I mean, you know, heroin use is up in the Northeast. We can't use just simply the standards of availability and price. We've got to get to the heart and soul of the matter, which is reducing the number of individuals that are addicted to drugs. That's the heart and soul, in my opinion. I'd be interested in hearing—Ms. Moriarty?

Ms. MORIARTY. Mr. Delahunt, if I might, I think you bring up a great question, and that is something that the National Alliance for Drug Endangered Children and all of the States that have alliances are looking at, as well, is how are we measuring success and how

do we know if we're doing anything to change the lives of these children.

So when we sat down as a group of multi-disciplines, to include treatment, law enforcement, social services, the judicial system, psychologists, we started trying to determine how do you measure if a child is coming successfully or safely out of these environments and not growing up to be our next drug addicts and falling into the same system. And part of the measurement that we were feeling could be something that we could look into is obviously that that's being taken into consideration is the reduction of recidivism into the system.

You know, if drug courts are working, and, therefore, when they're under arrest and they've been put into a court and then they don't get back, or the education, kids that are now graduating from high school instead of dropping out in school, and the reduction of recidivism into the social services system, because social services is carrying the huge burden of all of this——

Mr. DELAHUNT. Correct, but that's the beginning of establishing a set of criteria to measure if we're effective.

Ms. MORIARTY. Correct.

Mr. DELAHUNT. Okay? I mean, that's the issue. If we have six million addicts in this country today and we can reduce that figure to 500,000, we will see a tremendous decline in the number or the incidence of all violent crime in the country.

Ms. MORIARTY. Absolutely.

Mr. BROWNSBERGER. I'd just like to endorse absolutely what you're saying. There's a strong argument that the amount of crime—if you multiply the number of crimes that drug addicts, who are interviewed, admit committing, times any estimate of the number of drug addicts, you get more than the total number of crimes that are reported in this country, and so there's every reason to believe that drug addiction accounts for the vast majority of acquisitive crimes—larceny, robbery, prostitution, all those crimes that generate income. And so they are the best community-level measure, perhaps, of the success of an anti-drug program.

Mr. DELAHUNT. Well, we have a Drug Czar, and I asked our other panelists in the—you'll indulge me just for another minute, Howard. I mean, we have a Drug Czar. We've had a series of Drug Czars under both Administrations. I'm not going to—this is absolutely non-partisan. But I would hope that within that office, there would be an effort, okay, to establish criteria, and the one that you allude to, Commander Moriarty, I think makes really good sense, the recidivism rate, and tracking. We should have long-term studies going on, and we should be able in real time, on an annual basis, we should have a report, Mr. Chairman, from the Drug Czar on an annual basis to come before this Committee to report on the number of addicts in this country. That is a single statistic that translates into so much. We can talk mandatory sentences. We can talk prevention. We can talk treatment. But you know what? We're going on our gut. We're going on our gut.

Ms. AVERGUN. May I add something?

Mr. DELAHUNT. Sure.

Ms. AVERGUN. The Drug Czar puts out the National Drug Control Strategy, and part of the National Drug Control Strategy is re-

porting results of the President's and the Administration's drug strategy. One of the important factors that is measured in the Monitoring the Future Survey, which is a survey done of eighth, tenth, and 12th graders and drug use. And, as you may know, in 2002, the President established national goals for reduction of drug use, and, in fact, we all together, working together in all our different areas—law enforcement, treatment, prevention—have achieved success in that. There is a measure of success.

The survey showed that since 2002, there's been an 11 percent decline in drug use, and this year, up to 17 percent decline——

Mr. DELAHUNT. Okay, and that's important, but again, getting back—this is the Subcommittee on Crime.

Ms. AVERGUN. Yes.

Mr. DELAHUNT. Crime—drug crime is committed by drug addicts in this country, and that has to be—if we're going to make our streets safer, let me suggest this. That has to be the target population that we deal with in terms of a substantial reduction in the level of violence. I know there's all kinds of social reasons, et cetera, for that. I mean, we can talk about future use and that.

But I would like—I would hope, okay, that the Administration, and I would hope, Mr. Chairman, that we could just have a panel on the methodologies. You know, Mr. Lungren asked some very good questions. I think this is—I mean, everybody is saying here, give us parameters. Give us some hard—because, if you listen closely to Congresswoman Waters, she's not feeling it. She wants to see hard data. We can't talk just about availability with driving the price down. We're going to be asking this Congress, what's your opinion? Should we vote to support what's happening in Colombia or should we better spend it on drug treatment programs or social services or building more prisons here? I don't know.

But I want to—you know, I spent 20-plus years myself in law enforcement, so I understand the problems of law enforcement and the need to do something on the supply side. But you know what? We don't really know, and we're not going to know until we're in a better position to ascertain the number of addicts.

Mr. COBLE. The gentleman's time has expired.

Folks, as you can tell, this hearing today has generated much interest.

Mr. SCOTT. Did you want to answer that?

Mr. BROWNSBERGER. Only if the——

Mr. COBLE. Go ahead, Mr. Brownsberger.

Mr. BROWNSBERGER. Thank you. I really just wanted to emphasize, the number of addicts is a very, very hard number to measure and it's not one that we will ever achieve consensus on because it is a hidden behavior. And I would just suggest to the Committee that the best measure of the number of addicts in a community is the property crime rate. That's how you see them, is through property crime, and so that is a very good metric and one that I have recommended to the use of the fighting back communities, the communities that had community projects to develop strategies against—to reduce drug use. I consulted those communities to develop their methodologies to measure their success, and that was my recommendation to those communities——

Mr. COBLE. Well, as I said earlier, and I thank you, Mr. Brownsberger, this has attracted much attention. Oftentimes, Mr. Scott and I will be the only Members here, and I don't say that critically because there are other hearings conducted simultaneously. But this has promoted much interest, and I'm sure it will not expire after we adjourn.

This problem, folks, and I think every Member has expressed it, I think illegal drugs has the potential of bringing this country to its knees unless we can get a firm handle on it.

I thank the witnesses for your testimony. The Subcommittee very much appreciates your contribution.

In order to assure a full record and adequate consideration of this important issue, the record will be left open for an additional submission for 7 days from you all. By the same token, if Members have written questions, they need to submit their questions also within that same 7-day time frame.

This concludes the hearing——

Ms. WATERS. Mr. Chairman?

Mr. COBLE. The gentlelady is recognized.

Ms. WATERS. I'd like to also request—I requested Ms. Avergun to give us the information from those studies. She also talked about an 11 percent success rate. It just blows my mind. I don't believe it. But I'd like to have that study, also. I want to know where that information came from.

Ms. AVERGUN. Surely, Representative Waters.

Mr. COBLE. That'll be forthcoming.

Ms. AVERGUN. Yes, that will.

Mr. SCOTT. And Mr. Chairman, we can put—do we have time to put items in the record by unanimous—do we need to do that now, or is the record open?

Mr. COBLE. The record will be open for 7 days.

The Subcommittee stands adjourned.

[Whereupon, at 3:16 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF CATHERINE M. O'NEIL, ASSOCIATE DEPUTY ATTORNEY GENERAL, AND DIRECTOR, ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES, UNITED STATES DEPARTMENT OF JUSTICE, BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY, JULY 6, 2004

Mr. Chairman, Representative Scott, and Members of the Subcommittee, thank you for inviting me to testify before you today regarding the Justice Department's 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 pre-

scription 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.

ARTICLE ENTITLED "DRUG MARKET THRIVES BY METHADONE CLINICS," SERGE F. KOVALESKI, WASHINGTON POST STAFF WRITER, *THE WASHINGTON POST,* AUGUST 12, 2002

The Washington Post August 12, 2002 Monday

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The Washington Post

August 12, 2002 Monday
Final Edition

SECTION: A SECTION; Pg. A01

LENGTH: 1629 words

HEADLINE: Drug Market Thrives By Methadone Clinics;
D.C. Patients Must Face 'McPharmacy'

BYLINE: Serge F. Kovaleski, Washington Post Staff Writer

BODY:

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 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.

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.

LOAD-DATE: August 12, 2002

Source: News & Business > News > By Individual Publication > W > **The Washington Post**
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View: Full
Date/Time: Monday, August 8, 2005 - 12:50 PM EDT

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ARTICLE ENTITLED "PROBE CONFIRMS DEALING OF DRUGS NEAR D.C. CLINICS," MONTE REEL, WASHINGTON POST STAFF WRITER, *THE WASHINGTON POST,* JULY 7, 2004

The Washington Post July 7, 2004 Wednesday

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The Washington Post

July 7, 2004 Wednesday
Final Edition

SECTION: Metro; B01

LENGTH: 555 words

HEADLINE: Probe Confirms Dealing of Drugs Near D.C. Clinics;
House Measure Seeks Stiff Penalties For Sales Outside Treatment Centers

BYLINE: Monte Reel, Washington Post Staff Writer

BODY:

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."

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 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."

LOAD-DATE: July 7, 2004

Source: News & Business > News > By Individual Publication > W > **The Washington Post**
Terms: **probe confirms dealing of drugs near d.c. clinics and date geq (08/08/2003)** (Edit Search)
View: Full
Date/Time: Monday, August 8, 2005 - 12:51 PM EDT

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ARTICLE ENTITLED "KIDS CAUGHT IN METH LAB PRESSURE COOKER," SARAH HUNTLEY, NEWS STAFF WRITER, *ROCKY MOUNTAIN NEWS,* MARCH 15, 2002

Rocky Mountain News (Denver, CO) March 15, 2002 Friday Final Edition

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Rocky Mountain News (Denver, CO)

March 15, 2002 Friday Final Edition

SECTION: LOCAL; Pg. 8A

LENGTH: 910 words

HEADLINE: KIDS CAUGHT IN METH LAB PRESSURE COOKER;
TOO OFTEN, COPS SAY, THEY FIND CHILDREN AT HOME WHEN DRUG RAIDS ARE CONDUCTED

BYLINE: Sarah Huntley, News Staff Writer

BODY:
Makeshift cookers, stockpiled chemicals, stained carpets and scorch marks from obvious, but unreported fires: These are signs methamphetamine lab investigators expect to find.

But police are stunned by what they sometimes discover within arms' reach: playpens, toys and stuffed animals. In some homes, meth processing products are stored in old juice bottles in the family fridge.

"The scariest one I had, the one that just rattled my brain, was in the basement of a single-family home," said Sgt. Mark Olin, who heads the Denver police crime analysis lab. "There were playpens and riding toys, so the children had to be little. This guy was making his dope at one end of the playroom."

The meth was being cooked just feet from the furnace room, Olin said, where a pilot light from a water heater could have ignited vapors at any time.

"I was fit to be tied, quite honestly, that someone would have that low a thought for their own children that they would put making drugs first," he said.

Olin's experience isn't unique. As more methamphetamine labs are uncovered in residential neighborhoods, investigators say Colorado children are being exposed to toxic fumes and potentially lethal fires.

Joseph Jueschke, a senior case manager with the Mesa County Department of Human Services, said he has been horrified by the information he receives.

"I've had children as young as 8 break down the process (for manufacturing meth). I've had 6-year-olds teach me how to fold the product for distribution," he said. "These are kids who don't have a say about where they live."

So far, Colorado has been slow to respond to the problem. The state does not track the number of children removed from meth-plagued homes, and there is no uniform protocol for handling kids found during lab busts.

That's in stark contrast to practices in at least two other Western states, where the statistics tell a shocking story.

In 1999, law enforcement officers in Los Angeles removed 548 children from meth-lab homes. Investigators in the state of Washington totaled more than 225 the following year.

Liz McDonough, spokeswoman for Colorado's Department of Human Services, said her agency recognizes that the threat to these children is an emerging issue.

"Obviously this is something that is happening more and more," she said. "I think we are probably getting to the point where we would like to keep records on that."

In 1993, California established its first Drug Endangered Response Team, a cooperative effort between investigators, the district attorney's office and social workers. Several counties in Washington have full-time liaisons between child protective services and law enforcement.

Only a smattering of human services departments in Colorado have attempted to address the issue.

"We have nobody here" assigned to take on these children, said Lt. Lori Moriarty who leads the North Metro Task Force in Adams County.

The task force in Mesa County is luckier. When investigators find children during raids there, they call Jueschke.

About 50 percent of the 194 children who came through Mesa County's agency last year were there because meth was a part of their lives, Jueschke said. Not all had been raised in homes with meth labs, but those that were had been deeply affected, he said.

The problems are physical and emotional, immediate and lingering.

Nearly half the children affected by meth that Jueschke has seen have been diagnosed with learning disabilities and roughly 90 percent rely upon inhalers to breathe.

"Most of the kids removed from these homes have huge respiratory problems," he said.

In most cases, parents have lied to doctors, who then treat the symptoms as part of a stubborn infection or chronic asthma.

"This stuff will corrode any standing metal surface," Jueschke said of the chemicals used during manufacturing. "The vapors are vented into huge trash bags that are closed up when they're full. They call them 'death bags.' If you were to open them and inhale the contents, it would kill you."

Often, Jueschke said, they also live with pervasive neglect, a prevalence of sex and pornography, and the frequent comings and goings of strangers. They are often malnourished and develop erratic sleeping habits. By the age of 5, they may grasp that their life is different, but it is the only life they know.

"What these kids miss out on . . . is a secure, emotionally healthy relationship with a parent," said Terri James-Banks, director of social work with the Kempe Center for the Prevention of Child Abuse. "They are pretty direct in saying, 'My mom and dad love drugs more than they love me.' "

In the past year, North Metro investigators began collecting statistics on children they encounter during raids.

Last year, there were 15. Eighteen of the 73 labs they busted were next to schools.

Many of those arrested were parents. "It was not uncommon for them not to know where their kids were," Moriarty said.

Prosecutors are starting to add charges of child abuse to cases in which children have been at laboratories, Moriarty said.

She worries that it is only a matter of time before disaster strikes.

"Children were dying in meth labs but no one knew they were meth labs. There have been reports of children drinking chemicals. We're going to see that (in Colorado)," she said. "These children are our future. If we don't figure out the whole complexity of this issue, we're missing the boat."

NOTES:
Contact Sarah Huntley at (303) 892-5212 or huntleys@RockyMountainNews.com.;
SERIES: THE METH LABYRINTH / A ROCKY MOUNTAIN NEWS SPECIAL REPORT

GRAPHIC: Photo, Police officer C.J. Heck watches as crews remove evidence in early, February from 370 S. Stuart St. after a fire believed to have been caused by a, meth lab. By Barry Gutierrez , Rocky Mountain News

LOAD-DATE: March 16, 2002

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View: Full
Date/Time: Monday, August 8, 2005 - 1:11 PM EDT

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SUPPLEMENTAL MATERIAL FROM WILLIAM N. BROWNSBERGER, ASSOCIATE DIRECTOR, PUBLIC POLICY DIVISION ON ADDICTIONS, HARVARD MEDICAL SCHOOL

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AN EMPIRICAL STUDY OF THE SCHOOL ZONE ANTI-DRUG LAW IN THREE CITIES IN MASSACHUSETTS

WILLIAM N. BROWNSBERGER, SUSAN E. AROMAA, CARL N. BROWNSBERGER, SUSAN C. BROWNSBERGER

This study reviewed the role of a law providing enhanced penalties for drug dealing within 1,000 feet of a school in 443 drug-dealing cases in three cities in Massachusetts: Fall River, New Bedford, and Springfield. We reviewed district attorneys' case files and mapped drug-dealing incidents using a combination of geographic information systems and location visits with a hand-held geographic positioning system. School zones – the areas within 1,000 feet of schools – cover 29% of the areas of the study cities and 56% of the high-poverty areas within the cities. Although less than 1% of the drug-dealing cases involved sales to minors, approximately 80% of the cases occurred within school zones, apparently because of the density of schools in high-poverty/high-drug-dealing areas. Most school zone cases are "broken down" – defendants plead to lesser charges and receive less than the two-year mandatory minimum sentence for dealing in a school zone. Decisions to "break down" charges are not influenced by proximity to schools or time of day. Most drug dealers commit their offenses close to home, and most dealers charged with dealing in school zones reside in school zones. Overlapping school zone boundaries are chaotic and confusing in the inner city areas studied. The school zone statute fails to push drug dealing away from schools: the density of dealing within 250 feet of schools is similar to the density of dealing at greater distances.

William N. Brownsberger is a defense attorney and a former Massachusetts Assistant Attorney General in Narcotics and Special Investigations. He is Associate Director for Public Policy of the Division on Addictions at Harvard Medical School and past chair of Harvard's interdisciplinary Working Group on Drugs and Addictions. He serves as senior criminal justice advisor to Join Together, a project of the Boston University School of Public Health. He teaches and writes on issues of drug policy and criminal justice. **Susan E. Aromaa** is the web content manager for Join Together, a project of the Boston University School of Public Health. She has a master's degree in communication research from the Boston University College of Communication. **Carl N. Brownsberger** is a Distinguished Life Fellow of the American Psychiatric Association. Before retirement he was a clinical psychiatrist and also served on the faculties of Harvard, Tufts, and the University of Washington medical schools. **Susan C. Brownsberger** is a translator and editor.

JOURNAL OF DRUG ISSUES 0022-0426/04/04 933-950

INTRODUCTION

At the height of national concern about crack during the late 1980s and early 1990s, Massachusetts and many other states created an enhanced penalty for drug dealing in proximity to areas where children play (Bateman, 1995). In Massachusetts, the legislature provided for a minimum mandatory two-year incarceration for dealing within 1,000 feet of a primary, secondary, or vocational school.[1] The two years are additional to any other punishment imposed. The present study essentially focuses on two questions: (1) Are charging and sentencing in school zone cases shaped by the legislative goal of keeping drug dealing away from schools? (2) Is the law successful in moving drug dealing farther from schools?

LITERATURE REVIEW

Much has been written about the expansion of incarceration for drug-related offenses in the United States over the past two decades. Some have questioned the use of prison resources to house low-level or nonviolent drug offenders (for example, Brownsberger, 1997; King & Mauer, 2002). Many have been troubled by the heavy overrepresentation of minorities among those incarcerated for drug offenses (for example, Brownsberger, 2000; Human Rights Watch, 2000; Tonry, 1995). However, these larger issues are beyond the scope of the present study.

Our study focuses empirically on the operation of the school zone law in Massachusetts. In Massachusetts, as quantified in this study, most retail drug-dealing cases are charged as school zone offenses. Over 20 states and the federal government have enacted similar statutes (Bateman, 1995). The Massachusetts Supreme Judicial Court has generally upheld the school zone law, stating in *Commonwealth v. Taylor*, 413 Mass. 243, 250, 596 N.E.2d 333 (1992), that the law "furthers a legitimate State interest of protecting children and adolescents by establishing a drug free school zone." Yet, we are unaware of any empirical research looking at how school zone laws have been implemented in the courts or whether they have been effective.

METHODS

The basic steps of our study were (1) to select counties for study, and cities within them; (2) to define a set of drug-dealing cases for study in the selected cities; (3) to review district attorneys' case files for the selected cases and extract selected data items (primarily from the police reports); (4) to map schools, parks, and incident locations in the cities; (5) to compute distances from the locations of drug-dealing incidents to schools and parks; (6) to analyze geographic and time/date factors influencing case outcomes; and (7) to analyze the geography of drug dealing with reference to the school zone law.

We conducted our study in two Massachusetts counties: Bristol and Hampden. This was a "convenience sample." Although we approached all of the district attorneys in the eight largest counties in Massachusetts, only those from Bristol and Hampden counties were willing to participate. We selected the largest cities in each county: Fall River and New Bedford in Bristol County and Springfield in Hampden County. In each county, the selected cities included just over one third of the total population, most of the population in concentrated poverty areas, and roughly two thirds of the drug charges (see Table 1).

TABLE 1

POPULATION AND POVERTY FOR CITIES IN BRISTOL AND HAMPDEN COUNTIES (SELECTED CITIES HIGHLIGHTED)

City	Population in high-poverty areas (1990)	City high-poverty areas* as % of county	Total population (1990)	City total population as % of county	District court drug charges (FY1998)**	District court drug charges as % of county
Fall River	19,667	44	92,703	18	1,205	23
New Bedford	24,848	56	99,922	20	2,589	50
Rest of Bristol County	0	0	313,700	62	1,410	27
Total Bristol County	44,515	100	506,325	100	5,204	100
Holyoke	17,950	21	43,704	10	1,630	24
Springfield	65,692	79	156,983	34	4,220	62
Rest of Hampden County	0	0	255,623	56	910	13
Total Hampden County	83,642	100	456,310	100	6,760	100

* Defined as areas in which more than 20% of the households have incomes below the poverty line (Brownsberger, 1997).

**Including both possession and dealing charges – a larger universe than the one we defined for study

We selected cases according to the following rules:

- Cases should involve charges that would create legal exposure to a school zone penalty if they occurred in a school zone – essentially, drug-dealing charges. Cases were included whether or not school zone violation was actually charged.
- Cases should have been entered in the courts in fiscal year 1999 (between July 1, 1998 and June 30, 1999). This time selection was based on three objectives: (1) to obtain a full year to avoid any seasonality effect, (2) to select a year whereby most cases would have been disposed of, and (3) to use a year recent enough that case files would not have been transferred to archival facilities.

- Cases should not include trafficking charges, charges of dealing under Chapter 94C, Section 32E – generally higher-weight dealing, which carries mandatory penalties. We expected that these mandatory penalties, frequently higher than the school zone mandatory penalties, would be the dominant factors in negotiating settlements in trafficking cases.
- Cases should involve adult defendants. Juvenile cases do not generally lead to incarceration, and the school zone charge is less relevant.
- Cases should originate in the district court as opposed to superior court. Cases originating in the superior court generally involve strategic activities directed against high priority dealer targets by the police and prosecutors. We did not exclude cases that originated in district court and were subsequently indicted to superior court.

Aside from geographic mapping data, our case data were entirely derived from review of district attorneys' case files (see Table 2). In Fall River and New Bedford, the district attorney allowed us to access archives directly, and we were able to screen 231 (90%) of 257 drug-dealing cases for fiscal year 1999. In Springfield, the district attorney provided what appears to have been a convenience sample consisting of approximately 40% of the school zone cases from fiscal year 1999. Dealing cases not related to school zones were not reviewed in Springfield. There did not appear to be any other study-relevant selection bias (seasonality or disposition) in the Springfield convenience sample (see Brownsberger & Aromaa, 2001).

We collected and compared geographic data from diverse sources. Our goal was to derive the best possible position estimates for drug-dealing incidents and school zone boundaries (short of interviewing arresting officers and retaining surveyors). In general, we believe that the mapping and measurement process did not introduce error sufficient to influence our conclusions. Our full project report provides a detailed discussion of our geographic measurement techniques and the limits on error in them (Brownsberger & Aromaa, 2001).

RESULTS

CASES, CHARGING, AND DISPOSITION

In fiscal year 1999, 78% of drug-dealing incidents in the selected cities occurred within school zones; 29% of incidents occurred in daytime hours on school days. Only a few (5%) occur in park zones. In reviewing Table 3, the reader should note that our sample in New Bedford and Fall River includes all drug-dealing incidents in the subject period, regardless of whether there was a school zone charge. By contrast,

TABLE 2
SUMMARY OF MAJOR DATA SOURCES FOR PARK/SCHOOL/CASE MAPPING

Mapping Target	Public Address Lists	Aerial Photography	Geographic Positioning by Visit	Planning Department Geographic Information Systems	Commercial Geographic Data
Fall River Schools	Y	Used to touch up GPS results	Core data source to locate boundaries	N/A	N/A
Fall River Parks	Y	Used to derive boundaries based on address and surrounding streets in public list	N/A	N/A	Used to locate parks in photos with reference to surrounding streets
Fall River Cases	N/A	N/A	Primary source	N/A	Selected additional cross-street cases
New Bedford Schools	Y	Used to confirm decisions about parcel inclusions	Used to locate and verify parcels to include	Primary source for parcel boundaries	N/A
New Bedford Parks	Y	Used to confirm decisions about parcel inclusions	N/A	Primary source for parcel boundaries	N/A
New Bedford Cases	N/A	N/A	Primary source	Add locations for 2 cases	N/A
Springfield Schools	Y	Used to confirm decisions about parcel inclusion	Used to locate and verify parcels to include in high frequency locations	Primary source for parcel boundaries	N/A
Springfield Parks	Y	Used to confirm decisions about parcel inclusion	N/A	Primary source for parcel boundaries	N/A
Springfield nonschools included in police reports (day care centers, etc.)	Y	Used to confirm decisions about parcel inclusion	Used to locate and verify parcels to include in high frequency locations	Primary source for parcel boundaries	N/A
Springfield Cases	N/A	N/A	Primary Source	N/A	N/A

our sample from Springfield includes only persons actually charged with school zone offenses. Figure 1 shows the concentration of drug-dealing incidents in school zones in downtown New Bedford.

In Bristol County, we could compute the rates at which offenders in different circumstances were charged with school zone offenses because we had access to drug-dealing incidents whether or not the offenders were charged with school zone offenses. Table 4 presents these results. Most, but not all (74.2%), of those dealing in school zones are charged with school zone offenses. Note that although a material share of those dealing outside school zones are charged with school zone violations, most incidents do occur within school zones.

TABLE 3
CHARACTERISTICS OF DRUG-DEALING INCIDENTS IN SAMPLE CITIES

	Fall River	New Bedford	Springfield (School Zone Cases)	Total
Sample size (N)	103	180	160	443
Percent (%)				
Within a school zone	84	78	74	78
Within a park zone	3	2	11	5
Within either a school or park zone	84	79	79	80
Outside any school or park zone	16	21	21	20
Weekday	88	87	88	86
Weekend	12	18	13	14
Day (6AM - 6PM)	46	43	33	40
Evening (6PM-10PM)	33	42	44	41
Night (10PM-6AM)	21	15	23	19
School session (September-June)	83	82	86	84
School summer (July-August)	17	18	14	16
Weekday day in school session	36	29	24	29
No school. One or more of summer weekend or after 6PM	64	71	76	71
Heroin and other Class A	49	29	23	32
Cocaine and other Class B	34	41	61	47
Marijuana and other Class D	15	26	16	20
Class E, miscellaneous minor	1	2	0	1
Unspecified drug	2	2	0	1

FIGURE 1
DRUG-DEALING INCIDENTS (DOTS) AND SCHOOL ZONES (SHADED) IN DOWNTOWN NEW BEDFORD

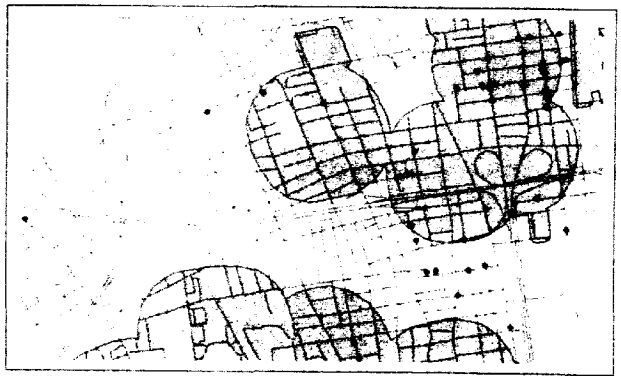


TABLE 4

PERCENT OF DRUG-DEALING INCIDENTS CHARGED AS SCHOOL ZONE VIOLATIONS IN BRISTOL COUNTY CITIES (NEW BEDFORD, FALL RIVER, N = 283)

	N	Percent Charged With School Zone	Statistical Significance
Overall (N = 103, 180) (100%, 100%)	283		2x2 χ^2, df=1
Not within a school or park zone	54	38.9	$p < .001$
Within either a school or park zone	229	74.2	
Among those within school or park zone:	229	74.2	*
Weekday	191	77.0	NS
Weekend	38	60.5	
Day (6AM - 6PM)	98	76.5	NS
Evening/night (6PM—6AM)	131	72.5	
School session (September-June)	184	75.5	NS
School summer (July-August)	45	68.9	
Weekday day in school session	69	72.5	Composite
One or more of summer, weekend or after 6PM	160	75.0	Omitted
Classes A and B, heroin, cocaine, etc.)	169	81.1	$p < .001$
Marijuana and other drugs	60	55.0	

*Dependent variable is whether or not charged with school zone offense, Cox and Snell R^2 = .078, df = 4, model chi-square = 18.612, $p < .001$ Binary logistic regression using SPSS version 11.0.1.

Among cases that are, in fact, within school zones, Table 4 shows that only the drug sold makes a significant difference in the decision to bring school zone charges. Dealers of all illegal drugs are equally liable under the law, but heroin and cocaine dealers are more likely to be charged with a school zone violation than marijuana dealers. Timing factors related to the presence of children in a school zone – time of day, day of week, month of year – show no statistically significant predictive effects in a multivariate regression analysis, as shown in Table 4.

Perhaps the most striking fact about district court dispositions of school zone charges is that most do not involve convictions. Compromise dispositions are the rule, generally involving a plea of guilty to simple dealing charges and dropping the school zone charges. Table 5 shows that the percentage of school zone charges leading to conviction averaged only 22% in the selected cities and that, as is true for charging, case disposition is not significantly affected by the timing factors related to the presence of children. As for charging, the class of drug sold does have a statistically significant effect in predicting disposition: hard drugs are more likely to result in school zone convictions.

TABLE 5

PERCENT OF DEALING INCIDENTS OCCURRING IN SCHOOL ZONES AND CHARGED AS SCHOOL ZONE VIOLATIONS THAT LEAD TO SCHOOL ZONE CONVICTIONS* (FALL RIVER, NEW BEDFORD, SPRINGFIELD – N = 296)

	N	Percent Convicted	Statistical Significance
Among those within school or park zone**	296	22.0	***
Weekday	254	20.9	NS
Weekend	42	28.6	
Day (6AM—6PM)	124	24.2	NS
Evening (6PM—6AM)	172	20.3	
School Session (September - June)	243	21.8	NS
School Summer (July - August)	53	22.6	
Weekday day in school session	85	24.7	Composite
One or more of summer, weekend or after 6PM	211	20.9	Omitted
Classes A and B, heroin, cocaine, etc.)	243	24.7	$p < .05$
Marijuana and other drugs	53	9.4	

* Cases indicted to superior court have been treated as "convictions." All cases in the sample originated in district court and most were resolved there. Cases indicted to superior court are generally more serious cases on which the district attorney has strong evidence. We did not have access to data regarding superior court dispositions and so treated them all as convictions. This assumption is conservative with respect to the finding that most school zone charges do not result in school zone convictions.

** In the sample of 443 cases studied, only four cases in which the incident occurred outside school/park zones actually led to conviction on school zone charges in district court.

***Dependent variable is whether or not "convicted of" school zone offense; Cox and Snell $R^2 = .031$, df = 4, model chi-square = 9 299, $p = .054$. Binary logistic regression using SPSS version 11.0.1.

One might speculate that, even though the law does not distinguish degrees of proximity within a school zone, the degree of closeness to a school might play a role in the disposition of school zone charges. Our analysis suggests that it does not. Under Massachusetts law,[2] distances to a school are to be measured "as the crow flies." All distances in this paper are computed on that basis, except in the right hand side of Table 6. Experience and anecdotes indicate that in most school zone trials, the evidence of distance presented is a wheel measurement of a pedestrian path from the incident to the boundary of the school property. A wandering pedestrian path is necessarily longer than or equal to a straight line. Table 6 presents both straight-line and pedestrian-path distances[3] and shows that neither has any effect on the probability of school zone conviction. Correlation analysis confirms that for

TABLE 6

PERCENT OF DEALING INCIDENTS OCCURRING IN SCHOOL ZONES AND CHARGED AS SCHOOL ZONE VIOLATIONS THAT LEAD TO SCHOOL ZONE CONVICTIONS* BY STRAIGHT-LINE AND PEDESTRIAN-PATH MEASUREMENTS (FALL RIVER, NEW BEDFORD, SPRINGFIELD, N = 275)

	Straight-line Measurements				*Pedestrian-path Measurements (Rough)*			
Ranges in feet	N	% of Cases	% Convicted	Correlation of Measurement with Conviction	N	% of Cases	% Convicted	Correlation of Measurement with Conviction
0	5	1.8	20.0		7	2.5	14.3	
0 to 100	19	6.9	21.1		17	6.2	23.5	
100 to 200	11	4.0	27.3		11	4.0	27.3	
200 to 300	40	14.5	27.5		27	9.8	29.6	
300 to 400	40	14.5	25.0		15	5.5	6.7	
400 to 500	34	12.4	17.6		15	5.5	33.3	
500 to 600	26	9.5	19.2	Pearson r = -.104, NS	29	10.5	6.9	Pearson r = -.073, NS
600 to 700	29	10.5	24.1		27	9.8	22.2	
700 to 800	26	9.5	15.4		20	7.3	20.0	
800 to 900	30	10.9	10.0		45	16.4	35.6	
900 to 1000	15	5.5	13.3		18	6.5	11.1	
Over 1000	0	0.0	NA		44	16.0	9.1	
Total	275	100.0	20.4		275	100.0	20.4	

Note: Analyses are limited to cases more than 100 feet from a park.

* Cases indicted to superior court are treated as "convictions." All cases in the sample originated in district court, and most were resolved there. Cases indicted to superior court are generally more serious cases on which the district attorney has strong evidence. We did not have access to data regarding superior court dispositions and so treated them all as convictions. That assumption is conservative with respect to the finding that most school zone charges do not result in school zone convictions.

cases within 1,000 straight-line feet, there is no significant relationship between closeness to a school (by either measure) and the probability of conviction.[4] In other words, offenders dealing on or near the premises of a school are not more likely to take a school zone conviction than those dealing 900 feet away from it.

GEOGRAPHY OF THE SCHOOL ZONE LAW

As noted at the outset, a core purpose of the school zone law is to keep drug dealing away from schools. Figures 2 through 4 show the school and park zones in the downtown areas of our sample cities, which account for most of the dealing. One can see that penalty zones are irregularly shaped and that offenders are unlikely to be able to tell whether they are in them.

Drug dealers tend to offend in the vicinity of their own homes. As shown in Table 7, 34% of incidents are within 500 feet of the dealer's home, and only 21% are more than 10,000 feet away or in another city.[5] In 73% of the incidents that occur in a school zone, the offenders also reside in a school zone (although the incident is not necessarily connected with the school closest to the dealer's home).

Given the chaotic patterning of school zones, and the fact that dealing frequently occurs close to the homes of dealers resident in school zones, one would not predict that the school zone law would be effective in steering drug dealers away from

FIGURE 2
DOWNTOWN AREA INCLUDING 100 OF 103 (97%) SAMPLE DEALING INCIDENTS IN FALL RIVER

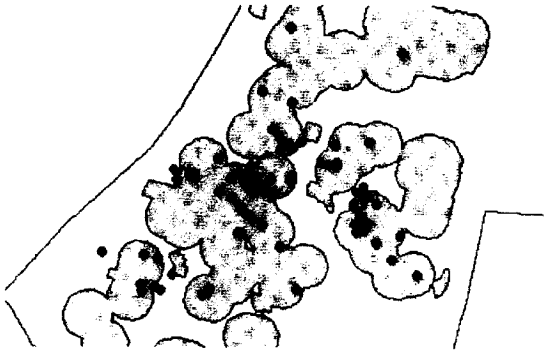


FIGURE 3
DOWNTOWN AREA INCLUDING 155 OF 180 (86%) SAMPLE DEALING INCIDENTS IN NEW BEDFORD

FIGURE 4
DOWNTOWN AREA INCLUDING 155 OF 160 (97%) SAMPLE SCHOOL-ZONE-CHARGED DEALING INCIDENTS IN SPRINGFIELD

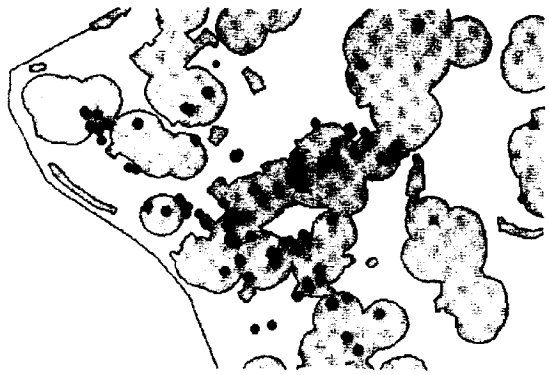


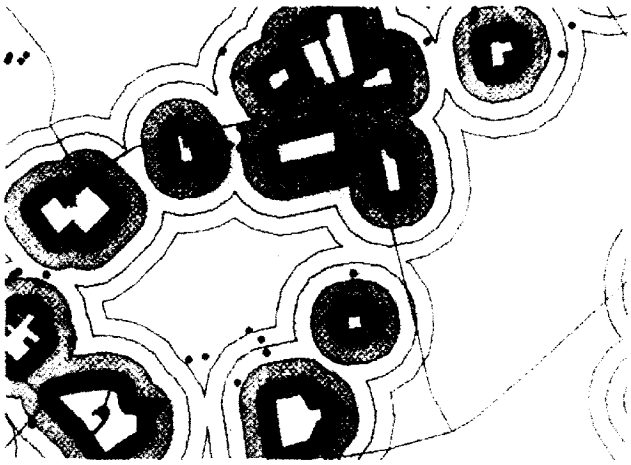
TABLE 7
DISTANCES BETWEEN DRUG-DEALING INCIDENT ADDRESS AND OFFENDER ADDRESS (FALL RIVER, NEW BEDFORD, SPRINGFIELD SAMPLE)

	N	%
In Same City		
In home or within 500 feet of home	150	34
In same census tract (neighborhood), but over 500 feet from home	46	10
Different census tract and from 500 to 10,000 feet from home	152	34
Different census tract and over 10,000 feet from home	49	11
Other cities	44	10
Unknown residence	2	0
TOTAL	443	100

schools. Figure 5 illustrates the mapping scheme we used to test the apparent effectiveness of the school zone statute in steering dealing away from schools.

Table 8 shows that at all distances fewer than 1,000 feet, except on school premises per se, drug dealing is denser than it is at distances greater than 1,000 feet -- the precise opposite of what we would hope to find if the law were effective. The table shows, for example, that in poverty areas in Fall River, there were 11 drug-

FIGURE 5
SCHOOLS IN DOWNTOWN SPRINGFIELD SURROUNDED BY 250- TO 1,000-FOOT RINGS
(DRUG DEALING INCIDENTS CHARGED AS SCHOOL ZONE VIOLATIONS MARKED AS DOTS)



dealing incidents per square mile in the area zero to 250 feet from a school, but only one incident per square mile in the area over 1,000 feet from a school. For Springfield, results over 1,000 feet are not applicable because drug-dealing cases that were not charged as school zone cases were not provided to the study. The data for Springfield, however, confirm that within school zones there is not a drop-off in the density of incidents closer to schools, as we would hope to see if the law successfully deterred dealing near schools. For example, in extreme-poverty areas in Springfield, the chart shows that the area within 250 feet of schools has a density of 44 incidents, while in the 750 to 1,000 foot area the density is only 31.

It is often said that the school zone law has a particularly harsh impact on poverty areas in the centers of older cities, where there are many small neighborhood schools, making school zones a higher percentage of the land area. Within these three selected cities, the effect is real, but modest. Poverty areas do have two to three times more

TABLE 8
DRUG-DEALING INCIDENTS PER SQUARE MILE

Areas by City and Poverty Level	Subdivision of Areas by Distances from Schools						
	On School	0 to 250 Feet	250 to 500 Feet	500 to 750 Feet	750 to 1000 Feet	Over 1000 Feet	All Distances
Fall River nonpoverty	6	13	7	11	6	0	2
Fall River poverty	0	11	47	39	23	1	11
New Bedford nonpoverty	0	9	23	6	13	2	4
New Bedford poverty	7	34	44	44	51	14	29
Springfield nonpoverty	0	2	4	2	2	n/a	1
Springfield poverty	8	28	24	8	4	n/a	8
Springfield extreme poverty	0	44	72	50	31	n/a	33
All areas together	3	15	21	15	12	2	5
N for all areas together	6	55	112	90	77	103	443

Note: "Poverty" areas are census tracts with poverty rates between 20% and 40%. Extreme-poverty areas are those with poverty rates over 40%. This table is not intended for cross-country comparison (see Methods section).

schools per unit area than do nonpoverty areas in the three cities in our study. However, the schools in nonpoverty areas are on larger parcels. On average, the school and park zones cover roughly twice as much of the territory in poverty areas as in nonpoverty areas (Table 9). Drug dealing is far denser in poverty areas, but this reflects a combination of higher rates per capita and higher population density in poverty areas (Table 9).

TABLE 9
CHARACTERISTICS OF NONPOVERTY, POVERTY, AND EXTREME POVERTY AREAS COMBINED ACROSS FALL RIVER, NEW BEDFORD, AND SPRINGFIELD

	Population	Area in square miles	Population per square mile	Drug-dealing cases	Drug-dealing cases per square mile	Drug-dealing cases per 100,000 people	Number of schools*	Schools per square mile (with overlaps)	Merged area of school/park zones in square miles	Merged school zones as % of merged school/park zones	Merged school/park zones as % of area
Nonpoverty	223,047	75.1	2,969	136	2	61	116	1.5	18.5	86	25
Poverty	96,143	13.3	7,206	205	15	213	53	4.0	6.2	91	47
Extreme poverty	30,418	3.1	9,722	102	33	335	14	4.5	1.7	91	56
All selected cities	349,608	91.6	3,817	443	5	127	167	1.8	26.4	87	29

* Note that 14 school parcels that lie on the boundaries of nonpoverty and poverty areas are counted in both areas, so that the detail does not add to the total in this column.

DISCUSSION

We started with two questions: (1) Are charging and sentencing in school zone cases shaped by the legislative goal of keeping drug dealing away from schools? (2) Is the law successful in keeping drug dealing away from schools? The data presented here suggest a negative answer to both questions.

As to the first question, the answer seems clear in our sample data: Charging and sentencing decisions using the school zone law do not appear to reflect the goal

of keeping drug dealing away from schools. The majority of drug-dealing cases occur within school zones. The majority of school zone charges are reduced to lesser charges, eliminating the mandatory sentence. Time of day, day of week, month of year, and nearness to schools within the zone have no statistically significant effect on charging and sentencing decisions. Of course, the law does not require that they should. However, given that 1,000-foot zones cover so much territory, one could argue that it would be consistent with legislative purpose to prioritize drug-dealing incidents closest to the places children play. It is worth noting that very few drug-dealing cases actually involve children. In our combined sample, only four cases involved charges of dealing to minors or using minors in sales.

As to the second question, the data in this study show that in three Massachusetts cities, dealing is as prevalent near schools as it is farther away. Zones are so close together that it is impossible for either drug dealers or children to distinguish "drug-free" zones from the rest of the city. However, this cross-sectional result is not definitive. A longitudinal study comparing results before and after the imposition of school zone penalties might show a change in patterns that is invisible in our cross-sectional results. Unfortunately, such a study appears virtually impossible to conduct at this time because of the likely loss or destruction of relevant incident records from the period surrounding the enactment of the law in 1989.

Local law enforcement authorities strongly support the school zone law, although none have made the argument that dealing was more prevalent on school properties before the law was imposed. In our many conversations on this issue, authorities have consistently expressed support for it. When pressed as to why, authorities usually say that it provides a substantial incremental penalty with which to punish especially undesirable drug dealers. The data in this study show practices consistent with this explanation: cocaine and heroin dealers are more likely than marijuana dealers to face and be convicted of school zone charges.

The argument that the law creates stronger penalties is questionable, however, given the high rate at which school zone charges are bargained away. Certainly, the charge creates a bargaining chip: Police can threaten to charge a school zone violation initially if a defendant is uncooperative. Prosecutors can offer to drop the school zone violation in return for cooperation or as part of a plea bargain induced by the threat of the mandatory minimum. It is uncertain whether judges would offer more lenient deals than the prosecutors, given the high rates at which prosecutors drop school zone charges. The deeper reason that law enforcement officials like the school zone statute may be that it puts the discretion in their hands, which is intrinsically desirable for them (Rasmussen & Rasmussen, 2003, p. 721), whether or not it leads to higher average penalties. A critical empirical question is how well law

enforcement officials use the great discretion afforded to them by mandatory minimum statutes.

Similar mapping studies should be conducted in other jurisdictions to determine the operation of differently crafted school zone statutes in differently designed cities. The laws of many other states paint as broadly as Massachusetts in defining school zones (or even more so – up to three miles in Alabama). It may be that school zone statutes should be generally reexamined. A statutory structure that gave more sensible guidance to both offenders and law enforcement officers might be more effective in protecting schools and the general public. One might, for example, enhance penalties by an even greater margin, but within a much smaller radius around the schools. This might more effectively push offenders away from schools. By reducing the number of cases that the enhancement applies to, such a change would moderate overall penalty levels and reduce the number of cases in which law enforcement may have excess discretionary power.

NOTES

1 The Massachusetts legislature first enacted a school zone penalty in 1989. In 1993, the legislature expanded the law to also cover dealing within 100 feet of a park. In 1998, after a court decision determining that preschools were not elementary schools subject to the law as worded, the legislature added 1,000 foot protection for accredited preschool and head-start programs. As it has read since July 1, 1998, M.G.L. c. 94C s. 32J provides that:

> Any person who violates the provisions of section thirty-two [class A (primarily opiates) sales], thirty-two A [class B (primarily cocaine) sales], thirty-two B [class C (primarily prescription drug) sales], thirty-two C [class D (primarily marijuana) sales], thirty-two D [class E (other) sales], thirty-two E [trafficking], thirty-two F [sales to minors] or thirty-two I [paraphernalia sales] while in or on, or within one thousand feet of the real property comprising a public or private accredited pre-school, accredited head-start facility, elementary, vocational, or secondary school whether or not in session, or within one hundred feet of a public park or playground shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years. A fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum two-year term of imprisonment as established herein. In accordance with the provisions

of section eight A of chapter two hundred and seventy-nine such sentence shall begin from and after the expiration of the sentence for violation of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two I. Lack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section.

2 *Commonwealth v. Robert F. Spano*, 414 Mass. 178, 605 NE2d 1241 (Mass. 1993).

3 The pedestrian-path measurements were based on aerial photos and street maps and were generated by tracing distances along apparent pathways from incident to school, using the distance-length measurement function of Arcview 3.1.

4 This statement is based on regression analysis of conviction/indictment (quantifying this variable as a 0 if no conviction and no indictment or a 1 if either) against raw distance by each measure, separately or with other variables. Some statistically significant coefficients emerge, but have the wrong sign (higher probability of conviction further away from the school).

5 Qualifying this point, note that among those arrested within 500 feet of their homes, three fifths (92 of 150) were arrested in conjunction with the execution of a search warrant. Forty-three of the 249 cases more than 500 feet from home but in the same city are also pursuant to a search warrant. We located incidents at the point of sale where defendants were charged with actual distribution, and at the point of arrest where defendants were charged with possession with intent to distribute.

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APRIL 12, 2005

SUPPLEMENTAL COMMENTS OF WILLIAM N. BROWNSBERGER

PURSUANT TO HEARING OF THE HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY

APRIL 12, 2005

I write first to thank you for the opportunity to testify before you today.

I wish to underline my comment that the "Defending America's Most Vulnerable" Act. needs more before careful study before enactment. The goals are worthy, but the language of the bill will not accomplish those goals.

With the geographic information technology available today it would be quite straightforward for the subcommittee to develop an informed view of the specific consequences of alternative definitions of drug free zones. As currently drafted, it seems clear that the language would sweep in most urbanized areas in the United States.

I wish to commend Mr. Lungren and Mr. Gohmert for wrestling with the question of how this legislation would dovetail with efforts to expand the partnership between the treatment system and the criminal justice system. I misunderstood Mr. Gohmert's question on this issue. I would have responded as follows: The empirical evidence establishes that criminal justice compulsion can be very helpful in causing persons with addictions to engage in and remain in treatment. If they do so, the evidence suggests that they sustain the same valuable benefits as other treatment participants.

The central problem with the bill before the committee is that it subjects low-level offenders to substantial mandatory penalties instead of taking advantage of the new treatment approaches like drug courts which seem to be very cost-effective.

I also wish to respond to the inquiry that was placed to me by Member Scott as to the study that I cited comparing the relative cost-effectiveness of

enforcement and treatment. The study that I was referring to was authored by Susan S. Everingham and C. Peter Rydell and was titled "Controlling Cocaine: Supply Versus Demand Programs." It was published by the Rand Corporation in 1994. It found that treatment was 7 times more cost effective than domestic law enforcement.

Finally, I wish to lament the overly punitive approach to drug addicted parents embodied in Section 2(m) of the bill. No one can defend the neglect of children. However, as Commander Moriarty pointed out, persons addicted often completely abandon their own lives. The threat of long incarceration will mean nothing to them as long as they are actively addicted. They need criminal justice intervention to begin sobriety. But subjecting them to long mandatory incarcerations may only serve to further damage their children.

Again, I am grateful to the committee for giving me the opportunity to testify and I stand ready to respond to any additional questions that the committee might pose.

Respectfully,

William N. Brownsberger
(617) 489-2612

SUPPLEMENTAL MATERIAL FROM LORI MORIARTY, THORNTON POLICE DEPARTMENT, THORNTON, COLORADO, COMMANDER, NORTH METRO DRUG TASK FORCE, AND PRESIDENT, COLORADO'S ALLIANCE FOR DRUG ENDANGERED CHILDREN

Testimony

Before The House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security

Legislative hearing on April 12, 2005, at 1:00 p.m. in room 2141, Rayburn House Office Building

H.R. 1528, the "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005."

Statement of Lori Moriarty
Thornton Police Department, Thornton, Colorado
Commander of the North Metro Drug Task Force
President of Colorado's Alliance for Drug Endangered Children
Committee Member of The National Alliance for Drug Endangered Children

PRESS RELEASE FROM HOTEL RACKETEERUNG CASE MENTIONED DURING TESTIMONY ON APRIL 12, 2005

ADAMS COUNTY MOTEL MANAGERS AND RESIDENTS INDICTED BY A FEDERAL GRAND JURY IN DENVER FOR RACKETEERING CRIMES

ORGANIZATION DEALT CRACK OUT OF ALPINE ROSE MOTEL USING INTIMIDATION AND MURDER TO MAINTAIN POWER

During testimony on April 12, 2005 in front of the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security, committee members asked the following question:

Can you share with us your experience with drug dealers employing violence (including the use of firearms) to protect the operation, enforce the collection of drug debts, etc., and how kids can simply get in the way?

I mentioned a case the North Metro Task Force was working that same day and described the violence associated with the drug trafficking trade. Below is the Press Release from the events that occurred in Colorado while I was testifying in Washington, DC on H.R. 1528, "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005." This is a clear description of how drug trafficking is a violent business and how kids sometimes get in the way and suffer the consequences.

NEWS RELEASE

FOR IMMEDIATE RELEASE April 13, 2005

ADAMS COUNTY MOTEL MANAGERS AND RESIDENTS INDICTED BY A FEDERAL GRAND JURY IN DENVER FOR RACKETEERING CRIMES

ORGANIZATION DEALT CRACK OUT OF ALPINE ROSE MOTEL USING INTIMIDATION AND MURDER TO MAINTAIN POWER

DENVER - Bill Leone, Acting United States Attorney for the District of Colorado, Lori Moriarty, Commander of the North Metro Drug Task Force, Jeffrey Copp, Special Agent in Charge of the Denver office of the U.S. Immigration and Customs Enforcement (ICE), Jeffrey Sweetin, Special Agent in Charge of the Rocky Mountain Division of the Drug Enforcement Administration, Lester D. Martz, Special Agent in Charge of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and Don Quick, District Attorney for Adams County, announced today that 14 individuals have been named in a 29 count federal indictment for racketeering, including murder, related to crack cocaine distribution at the Alpine Rose Motel, located at 6251 North Federal Boulevard in Adams County, Colorado.

The investigation was conducted over the past year and a half by officers with the North Metro Drug Task Force in cooperation with federal agents.

On Tuesday, April 12, 2005 at 7:00 am a multi-jurisdictional task force of over 150 law enforcement officers executed simultaneous arrest warrants at four locations in Westminster and unincorporated Adams County. The service of these warrants included activity by the Westminster Police Department's SWAT

team near 96th Avenue and Federal Boulevard and a pursuit lead by Adams County Sheriff's Deputies, which started near the White Rock Hotel at 3600 West 55th Place, ending near 38th Avenue and Dahlia. Other arrests were made at the Alpine Rose Motel and at 7131 Hooker Street.

"The goal of this operation was to instantaneously and completely stop the unlawful and dangerous activities of the THOMPSON Drug Distribution Organization by arresting as many of that organization's members as possible," said North Metro Drug Task Force Commander Lori Moriarty.

Of the 14 named in the federal racketeering indictment, 13 have been arrested. Authorities are searching for one other persons. Twenty-one secondary arrests were made during this operation for charges including drug possession, weapons violations, and various outstanding warrants. Those offenders will be charged in State Courts.

In addition to the arrests, agents and officers recovered $20,218.56 in cash, 422.16 grams of cocaine, 2.10 grams of methamphetamine, 198.74 grams of marijuana, 10.43 grams of Oxycodon, 1.23 grams of ecstasy, and 2 9 mm handguns.

"Thanks to the outstanding investigative efforts of the North Metro Drug Task Force, and the cooperation and professionalism demonstrated by the many police officers and agents involved in today's arrests is reflected by the fact that no officers, arrestees, or bystanders were injured during any of the days arrests," said Acting United States Attorney Bill Leone.

Those arrested include:

LEE ARTHUR THOMPSON, aka "LT", age 49, charged in counts 1, 2, 3, 4, 8, 15, 29
ALVIN HUTCHINSON, aka "Big Al", age 35, charged in counts 1, 2, 3, 7, 9,11, 12, 14, 26, 27
JORGE BANUELOS, age 43, charged in counts 3, 10, 13
CECILIA LOZANO, age 31, charged in counts 3, 10, 13
DENISE GUTIERREZ, age 39, charged in counts 3, 18, 22, 23, 24, 25
KENNETH PRIEN, aka "Kenny", age 47, charged in counts 3, 16, 17, 19, 22, 23, 24, 25
RONALD DEAN DeHERRERA, aka "Dino", age 57, charged in counts 1, 3, 20, 21, 29
STEVEN LAMONT ELLIS, age 32, charged in counts 3, 6
JUNIOR RAY MONTOYA, aka "Jr. Ray", age 23, charged in counts 3, 4, 5
JESSICA CRUTHERS, age 19, charged in counts 3, 20
PAUL ROSE, JR., age 38, charged in counts 3, 8
DAVID ZAMORA, age 54, charged in counts 3, 28, 29

STEVE ZAMORA, age 56, charged in counts 3, 28, 29

Those indicted but not yet arrested include:

WILLIAM L. GLADNEY, aka "L", age 47, charged in counts 1, 3, 21

BACKGROUND

According to the indictment returned by a federal grand jury in Denver on April 4, 2005, from November 2003 through April 2005 the THOMPSON Drug Distribution Organization, run by LEE ARTHUR THOMPSON, aka "LT", used the Alpine Rose Motel in unincorporated Adams County as its base of operations. Count 1 of the indictment alleges that four of the defendants violated the Racketeer Influenced Corrupt Organization (RICO) Act by working in concert with the other defendants, engaging in acts of violence, including murder, attempted murder, assault, and narcotics distribution to further the criminal enterprise.

Assisting THOMPSON in running the organization was ALVIN HUTCHINSON, aka "Big Al". The 12 other defendants worked with the two leaders in conducting the criminal enterprise's affairs. Members of the enterprise and their associates allegedly trafficked crack cocaine, methamphetamine and prostitution utilizing hotel rooms at the Alpine Rose.

Among the 16 predicate acts alleged in the racketeering count of the indictment was the October 23, 2004 murder of Marlo Earl Johnson, a customer of the THOMPSON Drug Organization. The murder was allegedly committed by WILLIAM L. GLADNEY and RONALD DEAN DeHERRERA at the Alpine Rose.

THOMPSON is alleged to have used Room #39 at the motel for the purpose of manufacturing, distributing and using crack cocaine, including converting powder cocaine into crack. HUTCHINSON is alleged to have used Room #25, and DeHERRERA and GLADNEY used Room #26 for the purpose of manufacturing, distributing and using crack. Other predicate acts alleged in the RICO count include conspiracy to distribute crack, distribution and possession with intent to distribute crack, establishment of a place for the manufacture and distribution of crack, and money laundering.

In count 2 of the indictment, THOMPSON and HUTCHINSON are charged with operating a Continuing Criminal Enterprise (CCE), also know as the drug king pin statute. To operate a Continuing Criminal Enterprise, the defendants were to have continually violated federal and state law while acting in concert with at least 5 others, and thereby obtained substantial income and resources.

In the remainder of the indictment all of the defendants are charged with conspiracy to distribute and possess with the intent to distribute more than 50 grams of crack cocaine as well as possession with intent to distribute and to

distribute crack cocaine. HUTCHINSON, GUTIERREZ, PRIEN, DeHERRERA, and GLADNEY are also charged with possession of a firearm in relation to a drug trafficking crime.

The operators of the Alpine Rose Motel, DAVID and STEVE ZAMORA, were also charged with establishment of a place for the manufacture and distribution of crack. THOMPSON, DeHERRERA, and DAVID and STEVE ZAMORA are also charged with money laundering the proceeds of the crack cocaine sales into payments for rooms at the motel.

"I am very proud of the hard work of the North Metro Drug Task Force and the terrific partnership with the United States Attorney's Office on this effort to make the streets of Adams County safer," said Don Quick, District Attorney for Adams County.

"These indictments and arrests represent an Independence Day for the people in the local neighborhood," said Jeffrey Copp, Special Agent in Charge of the Denver Office of Investigations for U.S. Immigration and Customs Enforcement (ICE). "Thanks to a partnership of many law enforcement agencies, the innocent residents no longer have to live in a state of fear and intimidation created by violent and corrupt drug dealers."

The charges contained in the indictment include:

Count 1: Racketeer Influenced Corrupt Organization (RICO), which carries a penalty of up to life in federal prison.

Count 2: Continuing Criminal Enterprise, which carries a penalty of not less than 20 years and up to life in federal prison.

Count 3: Conspiracy to distribute and possession with intent to distribute more than 50 grams of crack cocaine, which carries a penalty of not less than 10 years to life in federal prison.

Count 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23: Distribute and possession with intent to distribute less than 5 grams of crack, which carries a penalty of up to 20 years in federal prison.

Count 6: Distribute and possession with intent to distribute more than 5 grams but less than 50 grams of crack, which carries a penalty of not less than 5 years and up to 40 years in federal prison.

Count 21, 25, 27: Use, carry, or possess a firearm during and in relation to a drug trafficking crime, which carries a penalty of not less than 5, 7, or 10 years mandatory consecutive to any other sentence, depending on the circumstances surrounding on the use of the firearm.

Count 24, 26: Distribute and possession with intent to distribute more than 5 grams of crack, which carries a penalty of not less than 5 years and up to life in federal prison.

Count 28: Establishment of a place for the manufacture and distribution of crack, which carries a penalty of not more than 20 years in federal prison.

Count 29: Conspiracy to commit money laundering, which carries a penalty of not more than 20 years in federal prison.

The North Metro Drug Task Force investigated this case. North Metro Drug Task Force member agencies include the Adams County Sheriff Office, Broomfield Police Department, Brighton Police Department, Commerce City Police Department, Federal Heights Police Department, Northglenn Police Department, Thornton Police Department, and the Westminster Police Department.

Special Agents from the U.S. Bureau of Immigration and Customs Enforcement (ICE), the Drug Enforcement Administration (DEA), the Bureau of Alcohol and Tobacco, Firearms and Explosives (ATF) assisted in the investigation as well as the apprehension of the defendants. The Adams County Sheriff's Office also assisted with the arrests. The investigation and prosecution is being aided by the Adams County District Attorney's Office.

Assistant United States Attorneys Jaime Pena and Gregory Rhodes are prosecuting this case.

These charges are only allegations and the defendants are presumed innocent unless and until proven guilty.

United States Attorney's Office Press Releases are also on the Internet
Visit <http://www.usdoj.gov/usao/co>

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Rocky Mountain News
Thursday, April 14, 2005

Motel from Hell

Out of control' inn thieved on drugs, prostitution; 14 indicted; murder suspect at large.

Cops: Adams motel was haven for crime

Police round up 13 linked to drug deals, prostitution, murder

By Karen Abbott, Rocky Mountain News
April 14, 2005

An accused drug kingpin lived in Room 34, cooking powder cocaine into crack and ordering his henchmen to beat up people who crossed him.

A prostitute, sometimes offered as a free incentive to customers who bought hefty quantities of narcotics, worked in Room 38.

The upstairs balcony served as an execution site after one drug deal went bad.

Court documents portray the Alpine Rose, at Federal Boulevard and West 62nd Avenue, as a motel from hell.

It was the scene of metro Denver's most recent major sting - an undercover operation that has resulted in the arrests of 13 people and a manhunt for a 14th, who is said to be armed and dangerous.

Those in custody appeared in Colorado U.S. District Court on Wednesday. They are charged with racketeering and a long list of other crimes.

Federal agents and local police rounded up the group on Tuesday, catching at least one after a high-speed chase that spanned more than 20 blocks.

One of the accused, William Gladney, remained at large Wednesday. He is accused of shooting Marlo Earl Johnson to death on the upstairs balcony of the Alpine Rose on Oct. 23.

A detailed 16-page affidavit, filed as part of the court case, outlines the alleged day-to-day operations of a motel largely taken over by crime.

A room at the Alpine Rose cost $35 a night or $180 a week, but the owners would accept drugs - and sometimes a stolen computer - in lieu of rent.

Only six or seven of the 29 rooms were not devoted to the drug trade, or prostitution, or both, the affidavit says. A manager told police that upwards of 100 customers a day cruised into the Alpine Rose parking lot.

"He stated that he could tell if the customer was there for prostitutes rather than drugs because they were normally older, drove nicer cars and stayed longer," wrote a detective.

Adams County sheriff's deputies had three words for the motel: "Out of control."

It's not unusual for drug dealers and prostitutes to rent motel rooms, but the operation at the Alpine Rose went beyond that, said a detective who worked on the case. He agreed to talk to reporters if his name was withheld because he frequently works undercover.

Court documents describe what happened when two fellow undercover detectives, secretly wired with audio and video gear, asked if they could rent a room to deal drugs.

Documents say the managers, brothers David and Steve Zamora, told the two detectives they had to be approved by "the powers that be" - two men known as "L.T." and "Big Al" who allegedly ran the drugs and prostitution operation.

The Zamoras wanted the detectives to go right away to talk to "Big Al."

"You had to sort of pass an interview process with the two main drug dealers before you were allowed to move into the motel to deal drugs," a detective said.

"David and Steve Zamora explained that they (L.T. and Big Al) run their enterprise, that they (the Zamoras) run the motel, and they both take care of each other," court documents say.

Room 27 at the Alpine Rose was pocked by shotgun pellets, fired from a car full of men who drove into the motel parking lot one day last September. Someone reportedly fired back from Room 26.In a drawer in one room, authorities found a jar of crack cocaine lying next to a Gideons Bible.

A confidential informant told officers that the operations at the Alpine Rose were organized in three tiers.

The informant said "L.T.," Lee Arthur Thompson, brought powder cocaine to the motel every morning - sometimes making several trips during the day if the supply ran out - and converted it to crack cocaine in Room 34.

No. 2 in the hierarchy allegedly was "Big Al," Alvin Scott Hutchinson. Thompson is accused of selling the crack cocaine to Hutchinson and two others, Steven Lamont Ellis and Denise Gutierrez.

They, in turn, allegedly sold the drug to lower-level dealers and to some customers who wanted to buy larger amounts.

Court documents say the lower-level dealers would be evicted from the motel if they failed to bring in enough customers to provide sufficient income to "L.T." and to Jorge Banuelos, who owned the Alpine Rose when the undercover investigation began.

Drug dealers who didn't want rooms at the motel could pay $10 to roam the premises selling drugs.

Methamphetamine also allegedly was available at the motel.

Once, when an undercover officer was sitting in a car across the street from the Alpine Rose, two women walked out of the motel and approached him. One of the women asked through the car window if he wanted to buy something.

"He asked her what she was selling and she replied that it would be $40 for her and $20 for the rock of crack that was in her hand," court documents say.

Undercover officers say they bought hundreds of dollars' worth of drugs from people at the Alpine Rose beginning in late 2003.

They say they saw piles of drugs, drug paraphernalia and money all over the business - including one bag of cocaine on the owner's washing machine that was handed over by a resident instead of rent.

They say they heard numerous accounts of beatings from witnesses, including one man who lived with his daughter at the Alpine Rose after being evicted from his Lakewood home. The man said he was beaten unconscious with a steel pipe because he had learned too much about the operation.

But after Johnson was murdered, the motel's inhabitants scattered.

Some went to another motel, where they were arrested Tuesday.

Officers tracked two others, Kenneth Prien and Denise Gutierrez, to a trailer home where undercover agents allegedly bought drugs from them. When the police went back with a search warrant, they found a baby girl asleep in a car seat surrounded by dirty laundry and trash on the floor, court documents say.

They also found two 3-year-olds, a boy and a girl, who tested positive later at a local hospital for the presence of cocaine in their bodies.

"L.T." and "Big Al" turned up at a gas station on Federal Boulevard, allegedly dealing drugs from their cars - a Cadillac and a Mercedes SUV - to customers who called on the station's pay phone.

In federal custody Wednesday were:

- Lee Arthur Thompson, also known as "L.T.," 49.

- Alvin Hutchinson, also known as "Big Al," 35.

- David Zamora, 54, Alpine Rose co-manager and son of the owner, Paul Zamora, who has not been charged.

- Steve Zamora, 56, Alpine Rose co-manager and brother of David Zamora.

- Jorge Banuelos, former owner of the Alpine Rose, 43.

- Cecilia Lozano, 31, companion of Banuelos.

- Denise Gutierrez, 39.

- Kenneth Prien, also known as "Kenny," 47, companion of Denise Gutierrez.

- Ronald Dean DeHerrera, also known as "Dino," 47.

- Steven Lamont Ellis, 32.

- Junior Ray Montoya, 23.

- Jessica Cruthers, 19.

- Paul Rose Jr., 38.

The Colorado U.S. Attorney's Office said in a press release that authorities also arrested 21 other people when they rounded up the alleged Alpine Rose ring.

The 21 others will be charged in state court with crimes including drug possession and weapons violations.

abbottk@RockyMountainNews.com *or 303-892-5188*

Testimony of: Cmdr. Lori Moriarty

Thornton Police Department, Colorado

April 12, 2005

House Judiciary Committee's Subcommittee

on Crime,Terrorism, and Homeland Security

Washington, DC

Parents, Drugs, and Child Abuse

Parents and caregivers who use, traffic or manufacture illegal drugs victimizing their children in the most horrific ways.

- Physical Abuse
- Sexual Abuse
- Emotional Abuse
- Psychological Abuse
- Exposure to Toxic Chemicals
- Hazardous Lifestyle
- Neglect

Rescue. Defend. Shelter. Support.

Colorado's Introduction to DEC

NATIONAL ALLIANCE
FOR DRUG ENDANGERED CHILDREN

Rescue. Defend. Shelter. Support.

October 11, 2002: Meet Kayla, 4 year old girl who greets SWAT officers at the door of her home as it is raided.

- **The girl is completely calm as the SWAT team secures the house.**

Rescue. Defend. Shelter. Support.

Kayla stated she slept with her grandmother.

NATIONAL ALLIANCE FOR DRUG ENDANGERED CHILDREN

Investigators found methamphetamine in the headboard of the bed.

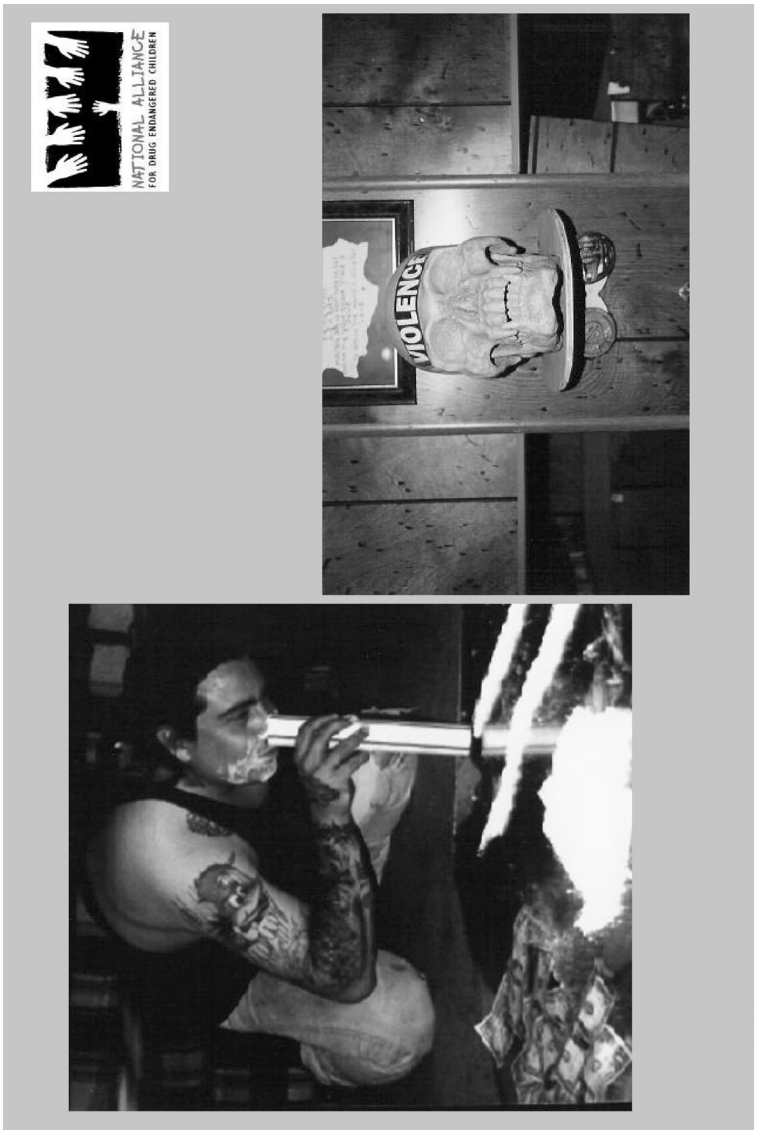
Rescue. Defend. Shelter. Support.

Kayla stated she got her own breakfast that morning which included ice cream from the freezer

Investigators found unknown liquids stored in the freezer

NATIONAL ALLIANCE FOR DRUG ENDANGERED CHILDREN

Rescue. Defend. Shelter. Support.



Rescue. Defend. Shelter. Support.

October 23, 2002: Meet Romeo…

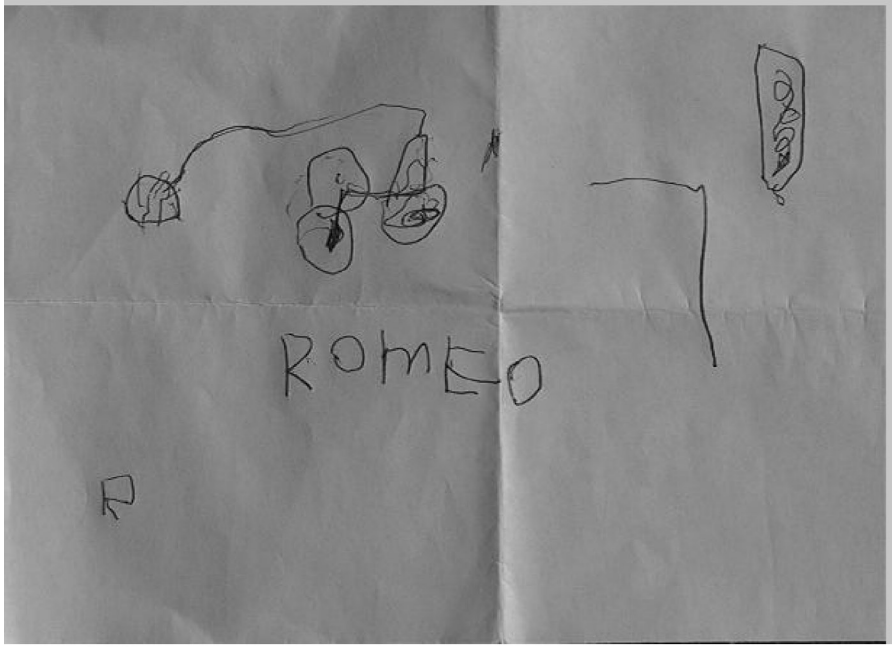
NATIONAL ALLIANCE
FOR DRUG ENDANGERED CHILDREN

Rescue. Defend. Shelter. Support.

The Interview

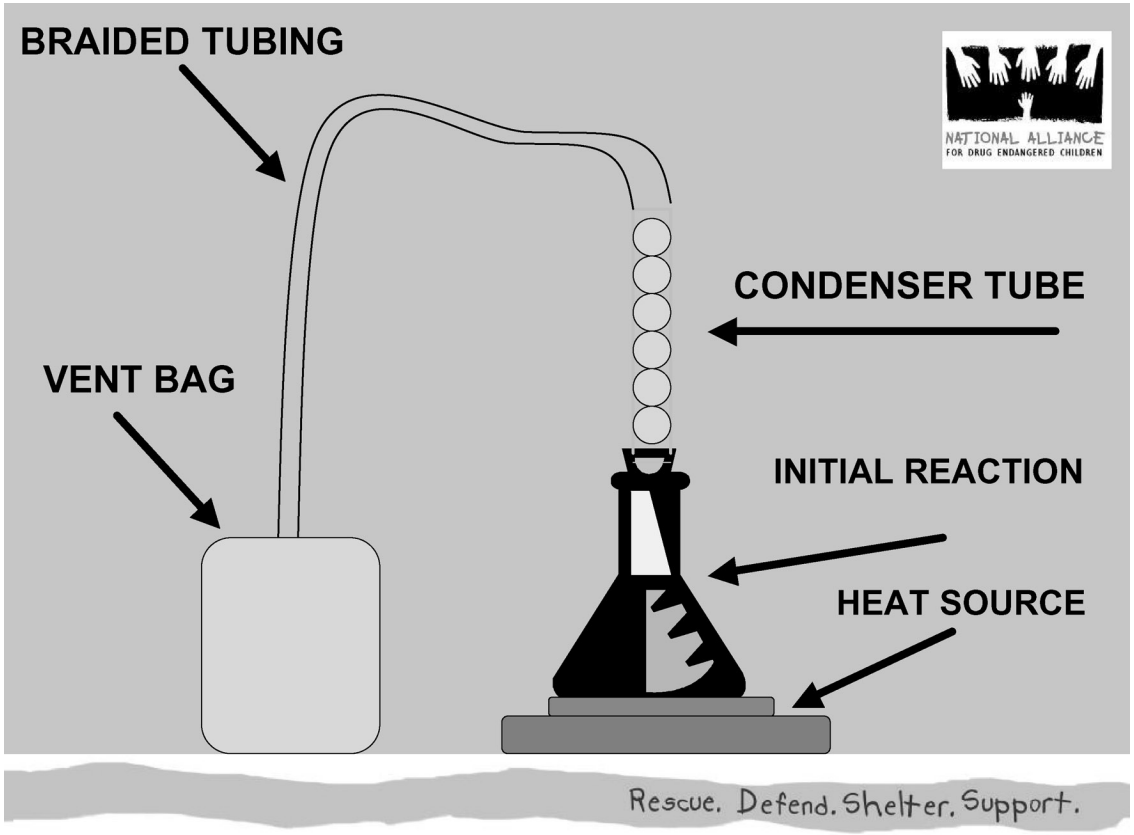
Rescue. Defend. Shelter. Support.

The Drawing



NATIONAL ALLIANCE
FOR DRUG ENDANGERED CHILDREN

Rescue. Defend. Shelter. Support.


BRAIDED TUBING
VENT BAG
CONDENSER TUBE
INITIAL REACTION
HEAT SOURCE
NATIONAL ALLIANCE
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BROCHURE SUBMITTED BY THE NATIONAL ALLIANCE FOR DRUG ENDANGERED CHILDREN

NATIONAL ALLIANCE
FOR DRUG ENDANGERED CHILDREN

Rescue. Defend. Shelter. Support.

"Youth comes to us wanting to know what we propose to do about a society that hurts so many of them."

Franklin Delano Roosevelt, 1936

Prepared for the U.S. House of Representatives Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security

April 12, 2005—Washington, D.C.

www.nationaldec.org

Who are America's Drug Endangered Children and What is Being Done to Assist Them?

Drug endangered children (DEC) are those children who suffer physical or psychological harm or neglect resulting from exposure to illegal drugs, to persons under the influence of illegal drugs, or to dangerous environments where drugs are being manufactured or chemicals used to make drugs are accessible. These harms may include: injury from explosion, fire or exposure to toxic chemicals found at clandestine lab sites; physical abuse; sexual abuse; medical neglect and; lack of basic care including failure to provide meals, sanitary and safe living conditions or schooling. Drug endangered children are part of a very large population of children whose lives have been seriously and negatively impacted by dangerous drugs.

Today, most drug endangered children are discovered or "rescued" during law enforcement actions involving their parents or caregivers. That event may be one of the most defining moments of their lives. If ignored and left unmonitored, these children continue to be victims caught in a cycle of drug abuse. The ***National Alliance for Drug Endangered Children*** advocates intervention on behalf of these children and urges communities to build collaborative, effective teams to provide coordinated services and support for these child victims. DEC teams include first responders, child protective services, law enforcement, medical and mental health professionals, prosecutors and county attorneys, child advocates, substance abuse treatment providers, and other community leaders, as well as the general public. Upon removal from a dangerous environment, drug endangered children need the immediate attention of child welfare services and assessment by medical and mental health professionals. If parents have endangered children, their actions may necessitate prosecution, termination of parental rights or court supervision of family reunification. DEC teams seek the long-term goal of providing safe, supportive and drug-free environments which permit children to prosper.

Communities in more than twenty states have formed DEC Alliances dedicated to rescuing, defending, sheltering and supporting drug endangered children. In the last year, more than 3,000 people across the nation have received DEC awareness or DEC Team implementation training. Protecting drug endangered children is an idea whose time has come!

The National Alliance for Drug Endangered Children

The ***National Alliance for Drug Endangered Children*** promotes the DEC team concept and public awareness for the problems faced by these children. In collaboration with the National DEC Training Program operated through the U.S. Department of Justice, the ***Alliance*** provides multi-disciplinary training for communities interested in starting or expanding DEC programs. The ***Alliance*** supports a nationwide network of professionals serving drug endangered children by providing referrals to experts, updated research on topics concerning drug endangered children, and best practice information. In June 2004, the ***Alliance*** held a very successful national conference dedicated to discussion of important medical, psychosocial, scientific, legal, social service and data collection topics concerning drug endangered children. A second national conference will be held in Washington, D.C. on October 4 & 5, 2005.

The ***National Alliance for Drug Endangered Children*** was formed in October 2003. We are a growing organization and seek to expand our network of professionals dedicated to solving this problem. If you are interested in learning more about our organization or joining the ***National Alliance for Drug Endangered Children*** or one of its working groups, please visit our website at: ***WWW.NATIONALDEC.ORG.*** You may also contact us by e-mail at: **national.dec@usdoj.gov.**

The ***National Alliance for Drug Endangered Children*** has formed four working groups to address discipline specific-research and resource issues. These working groups are:

- Medical and Scientific Research—A group of physicians, scientists and other professionals representing more than 30 hospitals, universities, government agencies and other institutions coordinating, sharing and prioritizing needed medical and scientific research relating to drug endangered children topics. In June 2004, this working group issued a draft national medical protocol for drug endangered children.

- Child Welfare Services- Recently formed, this group is addressing issues specific to providing services for DEC.

- Drug Treatment—Beginning in April 2005 this group will address substance abuse treatment issues which impact DEC.

- DEC Database Development—A multi-disciplinary group addressing database design and national data collection issues.

National Alliance for Drug Endangered Children Contacts

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Gage Garby, Occupational Health Link, Boulder, CO
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John Martyny, Ph.D., National Jewish Research & Medical Ctr, Denver, CO
Lori Moriarty, North Metro Task Force, Denver, CO
Ron Mullins, National DEC Training Coordinator, San Diego, CA
Richard Rosky, Tri-State Precursor Committee, Phoenix, AZ
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Lana Taylor, Salt Lake County Attorney General's Office, Salt Lake City, UT
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POSITION PAPER OF THE AMERICAN BAR ASSOCIATION (ABA)

AMERICAN BAR ASSOCIATION

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Position Paper of the American Bar Association
Regarding Section 12 of HR 1528[1]

Section 12 of HR 1528 is a response to the Supreme Court's decisions in *United States v. Booker* and *Fanfan*. In those cases, the Court ruled that the Sixth Amendment prohibits increasing a defendant's guideline range on the basis of facts found only by a judge rather than a jury. The Federal Sentencing Guidelines passed Constitutional muster under this ruling only after striking their mandatory nature, rendering them advisory factors to be considered along with a number of other statutory purposes of sentencing. HR 1528 would effectively eliminate the advisory nature of the guidelines on the low end by virtually prohibiting a Court from imposing a sentence below the applicable guideline range. This would fundamentally alter federal criminal sentencing law in a manner that is both poor policy and quite possibly unconstitutional.

1. HR 1528 eliminates virtually all downward departures.

- HR 1528 eliminates virtually all downward departures or other sentences below the guidelines range except for those sought by the government for substantial assistance or participation in an authorized "fast track" program.

- Even the grounds for departure expressly *encouraged* by the guidelines are eliminated by HR 1528.

2. HR 1528 raises significant constitutional concerns.

- By eliminating virtually all downward departures, the guidelines are effectively converted from advisory to mandatory with respect to the low end of the sentencing range. In many cases this would, solely on the basis of judicial fact-finding, *mandate* a sentence above the range determined by the jury's verdict. ***It is quite possible if not likely that a majority of the Supreme Court would find this statute inconsistent with its rulings in Blakely, Booker, and Fanfan.*** And if the Court's tenuous 4-1-4 decision in *Harris* is no longer good law, HR 1528 is without question unconstitutional.

- At best, ***the constitutional issues presented by HR 1528 will mire federal***

[1]This position paper addresses only Section 12 of HR 1528. The ABA will be addressing numerous other provisions in this legislation in more detailed future correspondence.

- ***sentencing in litigation from day 1 and result in chaos and uncertainty in a criminal justice system still recovering from the uncertainty between Blakely and Booker.***

3. HR 1528 eliminates rehabilitation as a purpose of sentencing.

- HR 1528 not only eliminates the need for educational and vocational training as a factor the sentencing court *must* consider, it goes further to *prohibit* a court from considering such needs for rehabilitation.

4. The summary of HR 1528 prepared by some of its supporters is inaccurate and misleading.

Supporter summary: "Booker eliminated the de novo appellate review. This bill does NOT restore it."

Response: **The de novo appellate review eliminated by *Booker* was of downward departures. HR 1528 does not restore such appellate review because *it virtually eliminates the departures themselves.***

Supporter summary: "Booker created a new reasonableness appellate standard of review. This bill does NOT alter that."

Response: **As noted above, HR 1528 does not alter such appellate review. But, it remains only for sentences within or above the guidelines range because *the downward departures to be reviewed under this standard are virtually eliminated by the Bill.***

Supporter summary: "Booker declared the sentencing guidelines are advisory - not mandatory. This bill does NOT alter that ruling.

Response: This statement is true only in the most literal sense that the bill does not explicitly state that the guidelines are now mandatory. ***By prohibiting consideration of virtually every factor other than the guidelines, however, HR 1528 accomplishes essentially the same result and transforms the guidelines into a complex set of mandatory minimums.***

5. Downward departures are an essential component of a just sentencing system

- Departures have always been a critical component of the guidelines because it is impossible to foresee and capture in a single set of guidelines the vast range of human conduct potentially relevant to a sentencing decision.

LETTER FROM COALITION OF ORGANIZATIONS EXPRESSING THEIR VIEWS ON H.R. 1528, "DEFENDING AMERICA'S MOST VULNERABLE: SAFE ACCESS TO DRUG TREATMENT AND CHILD PROTECTION ACT OF 2005," TO THE HONORABLE F. JAMES SENSENBRENNER, JR., AND THE HONORABLE JOHN CONYERS, JR.

April 22, 2005

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U. S. House of Representatives
Washington, D.C. 20515

Re: Sentencing Guideline Provisions of HR 1528, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005.*

Dear Mr. Chairman and Mr. Conyers:

The undersigned organizations, which together represent millions of businesses, officers, directors and general counsel across the United States, do not frequently express their views on issues of sentencing. Unquestionably, we strongly support the efforts of Congress, the Department of Justice, and the Courts to maintain a justice system that protects public safety, encourages fair competition in the marketplace, and adheres to our country's constitutional principles.

However, we believe that Section 12 of HR 1528 would have a sufficiently negative impact on this country's sentencing system that we must express our concern. Section 12 has the operative effect of imposing a system of mandatory minimum sentences because it would eliminate, by statute, 36 grounds for downward departures that are currently available to judges under the now-advisory Guidelines. At the same time, Section 12 provides that these factors *could* be considered when sentencing a defendant within or above the Guideline range. The bill goes so far as to prohibit judges from basing a sentence below the Guideline range on factors currently allowed by the Guidelines (for example, the possibility of a downward departure in a fraud case under Section 2B1.1 if "the offense level determined under these guidelines substantially overstates the seriousness of the offense"). In this regard, we would like to voice the following concerns:

- ***First***, and most important, we believe that the ***advisory Guidelines are working***. Statistics compiled on a nearly real-time basis by the United States Sentencing Commission indicate that judges are applying the Guidelines with the same consistency as before the Supreme Court's decision in *United States v. Booker* and *Fanfan*. The American Bar Association in February formally recommended that Congress allow the USSC to continue to collect data for at least a year so that all stakeholders may properly evaluate whether and how to reform this complex system. What are its strengths and weaknesses? What is the proper role of judicial

discretion? What are the parameters of *Booker* and *Fanfan*? With respect, this is an issue that we believe everyone must study carefully and conscientiously as we reflect on how we can best fulfill criminal sentencing's twin goals of consistency and justice.

- ***Second***, the federal criminal laws exert substantial influence over the nation's economy and the conduct of U.S. commerce. Congress certainly recognized this through passing legislation such as Sarbanes-Oxley to encourage certain kinds of corporate executive behavior and discourage inappropriate and illegal behaviors. Before you begin any effort to re-legislate criminal sentencing, we strongly urge you to take the time and steps necessary to gather data from the business community regarding the current sentencing system and its ability to influence meaningfully the corporate behaviors that the Sentencing Guidelines are intended to affect. We suggest that as a part of that process, you should receive expert input from a wide range of sources, including the business community, regarding the likely impact of any new proposal. Changes as important as this one deserve open and frank debate; they should not be last-minute additions that have not had the benefit of comment and discussion by all affected parties.

Fortunately, the current sentencing system is not in legal disarray after *Booker* and *Fanfan*. Most litigation that has taken place after these decisions has concerned the weight to be given the Guidelines and the standard for appellate review. These are important, but manageable, legal questions. By contrast, Section 12 of HR 1528 directly raises issues not answered by *Booker* and *Fanfan* — in particular, whether it is still good law that judicial fact-finding alone can raise a minimum sentence (*United States v. Harris*). Enacting Section 12 into law would result in widespread litigation challenging the legality of a large proportion of federal sentences. This would neither benefit the public nor provide prosecutors with useful tools. We therefore ask that the Committee give careful consideration to the impact of any broad sentencing reform effort before it proceeds.

We look forward to providing the views of business as you turn your attention to this complex issue.

Sincerely,

U.S. Chamber of Commerce	National Petrochemical and Refiners Association
Association of Corporate Counsel	American Chemistry Council
Business Civil Liberties, Inc.	Corporate Environmental Enforcement Council

cc: Members of the House and Senate Judiciary Committees

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LETTER FROM FORMER UNITED STATES ATTORNEYS AND DEPARTMENT OF JUSTICE OFFICIALS EXPRESSING THEIR VIEWS ON H.R. 1528, "DEFENDING AMERICA'S MOST VULNERABLE: SAFE ACCESS TO DRUG TREATMENT AND CHILD PROTECTION ACT OF 2005," TO THE HONORABLE F. JAMES SENSENBRENNER, JR., AND THE HONORABLE BOBBY SCOTT

April 22, 2005

The Honorable Jim Sensenbrenner, Jr.
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House Judiciary Committee
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The Honorable John Conyers, Jr.
Ranking Minority Member
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Re: Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005 (H.R. 1528)

Dear Mr. Chairman and Mr. Conyers:

We, the undersigned former United States Attorneys and Department of Justice officials, write to express our concerns regarding H.R. 1528 (Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005), particularly section 12 of that bill. This legislation contains many new mandatory minimum sentences, restricts the authority of judges to mitigate punishment for low-level offenders, and transforms the Sentencing Guidelines into a system of complex mandatory minimum sentences. Having served as federal prosecutors, we know firsthand that our criminal justice system functions best when it appropriately allocates decision-making authority between the judicial and executive branches. In this respect, H.R. 1528 is dangerously off the mark.

Much has been written about the ways in which mandatory minimum sentences fail to achieve their central purpose of ensuring uniformity in sentencing. By shifting discretion from judges to prosecutors, mandatory minimum sentences result in hidden disparities based on charging decisions that are largely exempt from review. As stated in the Sentencing Commission's fifteen-year report, "Research over the past fifteen years has consistently found that mandatory penalty statutes are used inconsistently in cases in which they appear to apply." United States Sentencing Commission, Fifteen Years of Guidelines Sentencing 89 (2004).

Serious criminals deserve substantial punishment, but mandatory minimum sentencing laws too often result in excessively long prison terms for low-level, non-violent criminals. In 1994, Congress sought to ensure that mandatory minimums are reserved for the most culpable defendants by enacting a "safety valve" provision (28 U.S.C. 3553(f)) that permits certain first-time, non-violent drug offenders to be sentenced without regard to the mandatory minimums. Because eligibility for the safety valve is determined according to strict statutory criteria, many minor offenders still receive disproportionately harsh mandatory sentences. Without justification, section 6 of H.R. 1528 would further limit availability of the safety valve, blunting an essential tool for achieving proportionate sentencing.

Finally, we write to express our strong opposition to section 12 of the bill, which would prohibit courts from relying on virtually every ground heretofore recognized for issuing a

sentence below the guidelines range. It puts the federal sentencing scheme once again at risk of the same constitutional infirmity that made the previous guidelines unconstitutional. Re-introducing such constitutional uncertainty leaves every new conviction and sentence subject to challenge and judicial review and is thus very detrimental to the orderly administration of justice.

This provision would overhaul the advisory guidelines system left in place by *Booker* & *Fanfan* without any evidence that that system is broken. As stated in a March 1, 2005, letter signed by 43 former U.S. Attorneys and Department of Justice official, including many of the undersigned, any changes to the current system of advisory guidelines should be undertaken only after significant deliberation and input from experts and interested persons and groups.

The current functioning of the federal sentencing system belies the need for immediate legislation. According to Sentencing Commission statistics, courts continue to follow the Sentencing Guidelines at a rate comparable to pre-Booker practice. And appellate courts continue to issue decisions that provide additional guidance to sentencing courts, prosecutors and defense lawyers. There is no reason to throw this system into disarray with another dramatic and potentially unconstitutional reworking of federal sentencing law.

In conclusion, we recommend that Congress (1) reject this bill and any other "quick fixes" and permit federal courts to use the advisory guidelines, (2) direct the Sentencing Commission to assemble and analyze post-*Booker* sentencing data and submit a report to Congress within 12 months, and (3) conduct hearings and solicit broad input from sentencing experts and others with knowledge and experience.

Sincerely,

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cc: Members of the House and Senate Judiciary Committees

LETTER FROM THOMAS W. HILLER, II, CHAIR, LEGISLATIVE EXPERT PANEL, FEDERAL PUBLIC AND COMMUNITY DEFENDERS, TO THE HONORABLE HOWARD COBLE, AND THE HONORABLE BOBBY SCOTT

FEDERAL PUBLIC DEFENDER
Western District of Washington

Thomas W. Hillier, II
Federal Public Defender

April 21, 2005

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

The Honorable Bobby Scott
Ranking Member
Subcommittee on Crime, Terrorism and Homeland Security
Judiciary Committee
United States House of Representatives
Washington, D.C. 20515

Re: Safe Access to Drug Treatment and Child Protection Act of 2005 (H.R. 1528)

Dear Chairman Coble and Representative Scott:

I write on behalf of the Federal Public and Community Defenders to provide further information about H.R. 1528.[1] I believe it is important for Congress to understand that this legislation would radically alter federal sentencing and mire the system in constitutional litigation for years. Section 12 would create a mandatory minimum for every federal conviction, and prohibit a sentence below the guideline range for virtually any reason, including time-honored grounds for departure, other than a government-filed substantial assistance or "fast track" motion. As such, it would be subject to serious challenge under the Fifth and Sixth Amendments, the Separation of Powers Clause, and the *Ex Post Facto* Clause. Moreover, Section 12 is completely contrary to the goals of the Sentencing Reform Act, and would produce inhumane results.

Section 2(m), which would criminalize the failure of innocent citizens to report and assist federal law enforcement in imprisoning their families and neighbors, would be unconstitutional for a host of reasons, antithetical to a free society, destructive of families and communities, and unsafe.

[1] I wrote quickly last Monday to express our strong opposition to this legislation before the hearing on Tuesday.

Finally, in the name of protecting children and the drug-addicted, this legislation would imprison parents and the drug-addicted for years while providing no treatment or social services. Moreover, because child protection and drug treatment are matters of traditional state concern, we believe that this legislation is of dubious constitutionality as an exercise of congressional power under the Commerce Clause.

I. Section 12 of H.R. 1528 is a Legislative "Fix" for *Booker* that Would Make Federal Sentencing Even More Mandatory than the Pre-*Booker* Mandatory Guidelines.

Just a few months ago, the Supreme Court held in United States v. Booker, __ U.S. __, 125 S. Ct. 738 (2005) that the Guidelines were unconstitutional because they were mandatory, and that they could continue to be used only if the guideline range was not mandatory:

1. The merits majority reaffirmed the Court's prior holdings that "[a]ny fact (other than a prior conviction) necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id. at 756. It held that Guideline sentencing violated the Sixth Amendment because the Sentencing Reform Act mandated that courts increase the guideline range based on judicial factfinding above the maximum guideline sentence authorized by the jury's verdict or the defendant's admission. Id. at 750, 757.

2. The remedial majority intended to fix the problem by excising two provisions of the Sentencing Reform Act that made the guideline range mandatory.[2] Id. at 756-57, 764, 765. As modified, the Act would make the Guidelines "effectively advisory" by "requir[ing] a sentencing court to consider Guidelines ranges, see 18 U.S.C. § 3553(a)(4), but . . . permitting the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a)." Id. at 757. The remedial majority made clear that it was this duty to evaluate the guideline range in light of all of the other factors and purposes set forth in section 3553(a) and the authority to impose a different sentence in light of those factors, that would spare Guidelines sentencing from unconstitutionality. Id. at 764-65.

We understand that it has been claimed that Section 12 of H.R. 1528 is not a legislative "fix" to Booker and does not make the Guidelines mandatory because it does not explicitly restore the excised sections. Congress should not be misled by this description. Section 12 would both effectively restore the excised sections, and make the Guidelines even more mandatory than before Booker. It would:

[2] See 18 U.S.C. § 3553(b)(1) (providing that the court "shall" impose a sentence within the guideline range) and § 3742(e) (the appellate review section "which depends upon the Guidelines' mandatory nature," and made "Guidelines sentencing even more mandatory than it had been").

1. Prohibit a sentence below the guideline range for any reason identified or to be identified by the Sentencing Commission in its guidelines or policy statements, and for virtually any reason identified thus far in the caselaw. (By prohibiting downward departures, this goes well beyond restoring pre-Booker law.)

2. Prohibit a sentence below the guideline range for any other reason except a government motion stating that the defendant provided substantial assistance in the investigation or prosecution of another, or a government motion pursuant to an early disposition program established by the Attorney General.

3. Prohibit a sentence below the guideline range based on consideration of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," where such disparity was created by the prosecution's choices, or reflected in reports or recommendations of the Sentencing Commission to Congress.

4. Eliminate the provision of "needed educational or vocational training, medical care or other correctional treatment," as both a fundamental purpose of sentencing and a reason for a sentence below the guideline range.

Were any grounds for a below guideline range sentence still available – and we have been unable to identify any -- Section 12 provides for a cumbersome procedure, which appears designed to be so burdensome that it would never be invoked, would impose a higher burden of proof for a sentence below the guideline range than one within or above it, and would make inadmissible compelling evidence of unwarranted disparity.[3]

In sum, Section 12 seeks to make an end run around Booker by prohibiting sentences below the guideline range for virtually any reason other than a government substantial assistance or "fast track" motion. This would have the effect of creating a mandatory minimum for every federal conviction. Moreover, by removing the ability to depart downward no matter how compelling the circumstances, it would make federal sentencing even more mandatory than the pre-Booker mandatory Guidelines.

The result in some instances would be inhumane. A judge could not reduce a sentence to permit a parent to provide *essential and irreplaceable* medical care or financial support to his or her children or elderly parents, no matter how harmful the

[3] The court would be required to (1) give twenty days' notice of an intention to impose a sentence below the range along with specific reasons, if indeed such reasons still exist; (2) hold a full evidentiary hearing on whether the proposed sentence is reasonable and avoids unwarranted disparity, in which evidence of disparity stemming from prosecutorial decisionmaking would be inadmissible, although it is well-documented that prosecutorial discretion is the primary source of unwarranted disparity; and (3) find that any sentence below the range is supported by clear and convincing evidence, while one within or above the range up to the statutory maximum need be supported by facts that are merely more likely than not.

effect on them, and no matter how unlikely the defendant is to recidivate. See U.S.S.G. § 5H1.6.

A person with a life-threatening or extremely painful illness who proved that he could not receive necessary treatment from the Bureau of Prisons could not be sentenced to home or community confinement where he could receive necessary treatment. While the Bureau of Prisons regularly claims that it offers full medical services, it actually does not adequately treat serious medical conditions in some instances. See United States v. Martin, 363 F.3d 25, 49-50 & n.39 (1st Cir. 2004); United States v. Derbes, 369 F.3d 579, 582 (1st Cir. 2004); United States v. Gee, 226 F.3d 885, 902 (7th Cir. 2000). Recent cost-cutting measures have further eroded the provision of even essential medical services in BOP facilities. Obviously, this can result in extreme pain, lifelong disability, and even death.

II. Section 12 of H.R. 1528 Would Face Serious Constitutional Challenges.

A. Fifth and Sixth Amendment Challenges

By making the Sentencing Guidelines effectively mandatory, Section 12 would be subject to challenge under the Fifth and Sixth Amendments. At best, it is a legislative evasion of constitutional requirements, which the Supreme Court repeatedly has warned against. See Blakely v. Washington, __ U.S. __, 124 S. Ct. 2531, 2539-40 & 2542 nn.10 & 13 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490 n.16 (2000); McMillan v. Pennsylvania, 477 U.S. 79, 89-90 (1986); Patterson v. New York, 432 U.S. 197, 210 (1977).

By creating a system of mandatory minimums for every conviction, Section 12 would generate widespread litigation and make it more likely than ever that the Supreme Court will overrule Harris v. United States, 536 U.S. 545 (2002). In Harris, a four-member plurality including Justice Scalia, with Justice Breyer concurring in part and concurring in the judgment, upheld the use of judicial factfinding by a preponderance of the evidence of facts that raise or trigger a mandatory minimum sentence. The plurality acknowledged that mandatory minimum statutes dictate the precise weight the sentencing judge must give particular facts, but said that because the legislature had designated those facts as sentencing factors and not elements, Fifth and Sixth Amendment protections were not required. Id. at 549, 558, 559, 567.

Justice Breyer candidly acknowledged that he could not logically distinguish facts that increase the minimum from facts that increase the maximum, id. at 569, and sharply criticized mandatory minimums in terms fully applicable to Section 12:

> Mandatory minimum statutes are fundamentally inconsistent with . . . a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. . . . They

> rarely reflect an effort to achieve proportionality – a key element of sentencing fairness that demands that the law punish a drug "kingpin" and a "mule" differently. They transfer power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate.

See Harris, 536 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment) (internal citations omitted).

Justice Breyer did not "yet" accept Apprendi at that time, but has accepted it now as the very premise of the Booker remedy he created. It is most unlikely that Justice Breyer would vote to uphold a law that transformed that remedy into the mandatory minimum system he denounced, and made it applicable to all cases.

Justice Scalia, too, is likely to vote the other way when the Harris question next arises. He has since made clear that "facts essential to punishment" must be charged and proved to a jury beyond a reasonable doubt, Blakely, 124 S. Ct. at 2536-37 & n.5, and explicitly rejected the notion, which was key to the Harris plurality's reasoning, that the jury need only find whatever facts the legislature chooses to label elements, while those it labels sentencing factors may be found by the judge. Id. at 2539-40 & 2542 n.13.

Furthermore, it is questionable that Section 12 is constitutional even now under Harris. Harris permits judicial factfinding to increase the minimum lawful sentence only if that minimum is below the maximum authorized by the jury verdict or the defendant's admission, which in Harris was the statutory maximum. However, Booker (and Blakely) held that the maximum lawful sentence in a binding guideline system is the top of the guideline range based solely on the facts found by the jury or admitted by the defendant, and that the court may not increase the sentence above that range (through guideline adjustments or upward departure) based on judicial factfinding. The remedial majority sought to fix the constitutional problem by requiring courts to calculate the guideline range under 18 U.S.C. § 3553(a)(4) based on judicial factfinding, but then to consider it in light of all of the factors listed in 18 U.S.C. § 3553(a), and impose a sentence which could be within, below or above the guideline range. Thus, the use of judicial factfinding to increase the guideline range beyond that authorized by the jury verdict would not violate the Constitution because the resulting range would be advisory. Nothing in the remedial majority's opinion changed the constitutional holding that the maximum lawful sentence in a binding system is that authorized by the facts established by a jury verdict or guilty plea.

Section 12 would re-install a binding system by requiring courts to calculate the guideline range based on judicial factfinding under 18 U.S.C. § 3553(a)(4), and then prohibiting a sentence below that range for virtually any reason under 18 U.S.C. § 3553(a)(1), (2), (3), (5), (6) or (7). Because courts would be compelled to impose a

sentence higher than the lawful maximum in this binding system, it would violate the Constitution.[4]

To illustrate, suppose a defendant with no criminal history was convicted by a jury of mail fraud. In that event, the guideline range authorized by the facts established by the guilty verdict would be 0-6 months. Under 18 U.S.C. § 3553(a)(4), the judge would be required to find the loss amount and increase the guideline range accordingly. If the judge found that the loss was $500,000, s/he would be required to increase the guideline range from 0-6 months to 37-46 months. Under Section 12, the court would be prohibited from sentencing below 37 months for any conceivable reason under 18 U.S.C. § 3553(a)(1), (2), (3), (5), (6) or (7). The resulting mandatory sentence of 37 months would exceed the maximum constitutional sentence of 6 months, and thus violate Booker's constitutional holding that "[a]ny fact (other than a prior conviction) necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Booker, 125 S. Ct. at 756.

B. Separation of Powers Challenges

By assigning to the prosecution the sole power to approve a sentence below the guideline range in virtually every case, Section 12 would violate Separation of Powers. It would unite the power to prosecute and the power to sentence within one branch, and would aggrandize the functions of the Executive while encroaching upon the Judiciary's constitutionally assigned sentencing function. See Mistretta v. United States, 488 U.S. 361, 382, 391 n.17 (1989).

C. *Ex Post Facto* Challenges

The *Ex Post Facto* Clause would prohibit Section 12 from being applied in any case in which the offense was committed prior to its enactment because it would prohibit the discretion that was allowed under both the mandatory Guidelines and the Booker remedy.

III. Section 2(m), Criminalizing the Failure of Innocent Citizens to Affirmatively Assist Federal Law Enforcement, Is Unconstitutional.

This section would make it a crime for a person who witnesses or learns of any of a number of offenses created or broadened by this bill (including distribution to persons under 21, distribution in or near schools or colleges, distribution within 500 feet of a person under 18, distribution within 1,000 feet of drug treatment facilities) to fail to

[4] In terms equally applicable to Section 12, the Sixth Circuit recently declined to uphold a statutory mandatory minimum penalty for type of firearm which was incorporated in the applicable guideline for the offense, observing that: "Given the severe constraints on imposition of [the statutory maximum] in the pre-Booker world, it would seem strikingly at odds with the principles set forth in Booker to hold that the sudden advisory nature of the Guidelines prevents the (still mandatory) provisions of § 924(c) from violating the Sixth Amendment." See United States v. Harris, 397 F.3d 404, 412 (6th Cir. 2005).

report the offense to law enforcement officials within 24 hours, and then provide full assistance in the investigation, apprehension, and prosecution of the alleged perpetrator. Violators would be subject to a mandatory minimum sentence of two years, three for parents and caregivers.

This goes well beyond "misprision" of a felony, a crime under 18 U.S.C.A. § 4 punishable by not more than three years, which requires as an element taking affirmative steps to conceal the offense. No different than the laws of totalitarian regimes, it would force ordinary citizens on pain of imprisonment to report and assist in imprisoning their neighbors and families. We believe that this legislation would be destructive of American families and communities, and that it shows an appalling disregard for their safety.

We hope that Congress recognizes this as an assault on liberty, as well as specific constitutional rights, including the First Amendment right not to speak, Wooley v. Maynard, 430 U.S. 705, 713-17 (1977), West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943), the Thirteenth Amendment prohibition against involuntary servitude, U.S. Const., Amdt. 13, § 1, and the Tenth Amendment prohibition against compelling local law enforcement to assist in the execution of federal laws. See Printz v. United States, 521 U.S. 898 (1997). This provision, like Section 12, would invite significant constitutional litigation.

IV. H.R. 1528 May Exceed Congressional Power Under the Commerce Clause.

H.R. 1528 creates a variety of new crimes, new penalties, and increased penalties that hinge on the proximity, presence or involvement of a person who is under the age of 18, is incompetent, or is in drug treatment. This includes drug trafficking "within the visual sight of [a person who is under 18 or incompetent], within any dwelling, automobile or other vehicle, or boat, in which such person is present, or within 500 feet of such person," or within 1,000 feet of any drug treatment facility, and failing to report and assist in the prosecution of numerous offenses that occur near or with such persons or places. Parents, guardians and caretakers are singled out for special mandatory minimum sentences even higher than those for other persons. In many instances this would harm, not protect, children and families.

Though Congress has made generalized findings that local possession and distribution of controlled substances affect interstate commerce sufficient to permit the federal government to control drug trafficking,[5] those findings do not address the stated purpose of this legislation, which is "*to protect vulnerable persons from drug*

[5] See 21 U.S.C. § 801 (finding that local distribution or possession of controlled substances has a "direct and substantial effect" on interstate commerce because the substances usually flow through interstate commerce before or after they are locally distributed or possessed, and that it is "not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate" because the two cannot be differentiated). But see United States v. Morrison, 529 U.S. 598, 614 (2000) (existence of congressional findings is not dispositive).

trafficking." While drug trafficking usually involves economic activity, this statute does not criminalize drug trafficking *per se*. Instead, it criminalizes doing so near or with "vulnerable persons," which is not economic and occurs intrastate.

The Supreme Court has never addressed Congress's findings, the limits of the commerce power over controlled substances generally, or over any particular type of offense related to controlled substances. It has, however, held that possession of a firearm within 1,000 feet of a school, United States v. Lopez, 514 U.S. 549 (1995), arson of a private residence, Jones v. United States, 529 U.S. 848 (2000), and gender-motivated violence, United States v. Morrison, 529 U.S. 598, 614 (2000), are beyond the reach of the commerce power. The Court in each case emphasized that the States have primary authority to define and enforce criminal law. Importantly, in Morrison and Lopez, the Court made clear that matters of family and education are areas in which the States are sovereign. See Morrison, 529 U.S. at 613-14; Lopez, 514 U.S. at 564. This would seem to extend to the protection of children, the disabled, and the drug addicted.

On behalf of the Federal Public and Community Defenders, I thank you for your consideration of our views, and respectfully urge you to oppose this legislation for these additional reasons.

Very truly yours,

Thomas W. Hiller II
Federal Public Defender
Chair, Legislative Expert Panel, Federal Public and Community Defenders

cc: Members of the House Judiciary Committee
Members of the Senate Judiciary Committee

LETTER FROM TEACHERS OF LAW EXPRESSING THEIR VIEWS ON H.R. 1528, "DEFENDING AMERICA'S MOST VULNERABLE: SAFE ACCESS TO DRUG TREATMENT AND CHILD PROTECTION ACT OF 2005," TO THE HONORABLE F. JAMES SENSENBRENNER, JR., AND THE HONORABLE JOHN CONYERS, JR.

April 18, 2005

The Honorable F. James Sensenbrenner, Jr., Chairman
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United States House of Representatives
2449 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
United States House of Representatives
2426 Rayburn Building
Washington, DC 20515

RE: H.R. 1528, The Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005

Dear Chairman Sensenbrenner and Congressman Conyers:

As law teachers, most of whom specialize in criminal law and procedure, we write to express our deep concerns regarding H.R. 1528, the Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005. We respectfully urge you to oppose the Bill.

In particular, we believe that the Bill should be rejected for at least three reasons. First, the Bill contains an over-hasty and ill-considered response to the Supreme Court's recent decision on the federal sentencing system in *United States v. Booker*. Quietly inserted into the Bill just days ago, on the eve of Subcommittee markup, the "*Booker* fix" has received almost no independent analysis or public debate. Such an important restructuring of federal sentencing laws should not be adopted in such a rushed and ill-informed manner. Second, apart from these procedural concerns, the *Booker* fix should also be rejected on the merits because it would transform the United States Sentencing Guidelines into a rigid system of mandatory minimum sentences. The Guidelines were not intended to operate so inflexibly, and should not be recast in that mold now. Third, in addition to the *Booker* fix, the Bill also contains a host of clumsy new drug-specific mandatory minimums. These provisions of the Bill would give rise to dramatic and wholly unnecessary disparities in drug sentencing, and should also be rejected.

These concerns are discussed in greater detail below.

I. Section 12: The "*Booker* Fix"

Handed down just three months ago, the Supreme Court's decision in *United States v. Booker* changed the mandatory nature of the United States Sentencing Guidelines.[1] While unprecedented in federal courts, the new *Booker* regime of advisory guidelines coupled with appellate review of sentences has long operated quite effectively in many state court systems.[2] Accordingly, many criminal justice experts, as well as professional organizations like the American Bar Association, recommended caution by Congress in responding to *Booker*. A headlong rush to jerry-build a new mandatory system around the Supreme Court's decision might lead to regrettable and unnecessary mistakes. Instead, Congress should give the advisory system a chance to prove itself at the federal level, while engaging in a careful and well-informed consideration of the alternatives.

Section 12 of H.R. 1528 represents just the sort of over-hasty *Booker* "fix" that should be avoided. Section 12 would restore the mandatory nature of the Guidelines by prohibiting judges from sentencing below a prescribed Guidelines range on just about all of the most common grounds for doing so, as well as by erecting new procedural barriers to below-Guidelines sentences.[3] Although they were written with the intent that some flexibility would be preserved for truly exceptional cases, the Guidelines would effectively become a system of rigid mandatory minimum sentences.

Introduced so soon after *Booker* was decided, Section 12 cannot have arisen from any meaningful effort to evaluate the advisory system or consider the full range of alternatives. Indeed, buried in a bill that otherwise purports to be about protecting children from drug crimes, Section 12 actually seems designed to discourage the sort of public scrutiny and debate that should accompany the enactment of any such far-reaching changes to the federal sentencing system. It is troubling, for instance, that Section 12 was quietly inserted into the Bill on the eve of Subcommittee markup, without input from concerned institutions and agencies like the United States Sentencing Commission, the very expert agency that Congress has charged with administering the Guidelines.

Apart from these procedural concerns, Section 12 should also be rejected on the merits. First, the *Booker* system actually seems to be operating reasonably well. Sentencing Commission data indicate there has only been a slight decrease (less than four percentage points) in the rate of within-Guidelines sentences since *Booker*.[4] *Booker* mandated that judges "consider" the Guidelines at sentencing,[5] and all signs indicate that judges are indeed "considering" the Guidelines in a most serious and thoughtful fashion.

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[1] 125 S.Ct. 738 (2005).
[2] Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post*-Blakely *Era*, 17 FED. SENT. RPTR. __ (2005).
[3] H.R. 1528, 109th Cong. § 12(a)(3) (2005).
[4] Memo from Linda Drazga Maxfield, U.S. Sentencing Comm'n Office of Policy Analysis (April 13, 2005) [hereinafter Maxfield Memo].
[5] 125 S.Ct. at 764.

Compliance with the Guidelines remains the norm,[6] and, to the very limited extent that variances have increased, perhaps the most notable increase has been in sentences *above* the Guidelines.[7] *Booker* has not in any meaningful sense increased the lenience of the federal sentencing system.

Second, Section 12 would not merely restore the pre-*Booker* system, but would produce a new system that, in many important respects, would be substantially more inflexible than the old regime. Perhaps most importantly, Section 12 would eliminate from consideration a host of factors that, in exceptional circumstances, have long been treated as appropriate grounds for sentencing below the Guidelines range. These factors include: family ties and responsibilities, mental and emotional condition, employment record, military service, prior good works, aberrant behavior, and age.[8] The Sentencing Commission has explicitly recognized all of these factors as potential grounds for a below-Guidelines sentence.[9]

Congress reconsidered these sentencing factors just two years ago in connection with the Feeney Amendment to the PROTECT Act, and chose to limit use of these factors only in the context of certain child and sex crimes.[10] Nothing has happened in the past two years to warrant a change in approach. Moreover, in a bill that purports to be about protecting children, there is something odd about a provision that essentially forbids judges from considering the interests of a criminal defendant's innocent children at sentencing.[11]

Third, Section 12 substantially increases the power of prosecutors relative to judges. While eliminating nearly every conceivable basis on which a judge might seek to impose a below-Guidelines sentence, Section 12 specifically preserves the ability of prosecutors to seek a below-Guidelines sentence based on a defendant's assistance to the authorities or "fast-track" plea-bargain.[12] In essence, Section 12 says that only a prosecutor can release a defendant from a Guidelines sentence. Such an enhancement of prosecutorial power not only undermines the traditional checks and balances in the criminal justice system, but also raises concerns about disparate sentencing, based on the important variations in the practices of individual prosecutors and United States Attorney's Offices. Indeed, the vast majority of below-Guidelines sentences before *Booker* were made at the behest of prosecutors, not judges.[13]

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[6] Maxfield Memo, *supra* note 4, at 1 (noting that, since *Booker*, 61.4 percent of sentences have been within the Guidelines range). Notably, a majority of the post-*Booker* below-Guidelines sentences (58 percent) have been imposed at the behest of prosecutors. *Id.*

[7] *Id.* (noting that, since *Booker*, the percentage of above-Guidelines sentences has more than doubled from 0.8 percent to 1.8 percent).

[8] H.R. 1528, 109th Cong. § 12(a)(3) (2005).

[9] In the Guidelines, these factors are generally identified as "not *ordinarily* relevant" to sentencing below a Guidelines range. *See* U.S.S.G. §§ 5H1.1, 5H1.3, 5H1.5, 5H1.6, 5H1.11, 5K2.20.

[10] Relevant portions of the PROTECT Act are codified at 18 U.S.C. § 3553(b)(2).

[11] H.R. 1528, 109th Cong. § 12(a)(3) (2005) (prohibiting use of "family ties and responsibilities" and "effect of defendant's incarceration on others" as grounds for below-Guidelines sentence).

[12] *Id.*

[13] Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT. RPTR. 310, 314 (2003).

Fourth, after *Booker* and the Feeney Amendment, Section 12 would amount to a third dramatic change in federal sentencing law in little over two years. Each such major change produces waves of litigation and uncertainty as the legal system struggles to interpret and implement the new rules. Such turbulence is not only an unfortunate drain on the criminal justice system, but also contrary to the congressional goals of predictability and uniformity in sentencing. Indeed, the uncertainty resulting from Section 12 might be especially great, for it is far from clear that Section 12 would withstand constitutional scrutiny.[14] If a *Booker* fix were held unconstitutional, we would doubtless see further rounds of legislative and judicial responses, with all of the attendant disruptions. Congress should be hesitant to impose a new round of major changes on the system so soon after *Booker*, and more cautious still about imposing major changes that may run afoul of the Constitution.

II. Drug Sentencing Provisions

Other than Section 12, the remaining provisions of the bill focus on the expansion of mandatory minimum sentences for various drug crimes. These provisions are no less troubling than Section 12. As many distinguished commentators have demonstrated, mandatory minimums are typically unnecessary and unjust.[15]

For one thing, mandatory minimums fly in the face of Section 12's purported concern over "unwarranted sentencing disparities."[16] By making sentences essentially dependent on the existence of just one factor, mandatory minimums draw unwarranted distinctions among defendants. For instance, Section 2 of the Bill would impose a stiff mandatory minimum on a person dealing drugs 999 feet from a video arcade, but not on another dealer working just a few feet further down the same block.[17] These sorts of distinctions are made without regard to a host of considerations that, in general, probably matter far more in determining what punishment is appropriate, such as quantity of drugs involved, type of drugs, defendant's role in an organized drug trafficking operation, a prior record of violent crime, and so forth.

Mandatory minimums also fly in the face of the Bill's purported concern with protecting children. Long mandatory prison terms tear families apart. To be sure, some children may be better off with a parent locked up for a long time, but this is a complicated question that needs to be considered on a case-by-case basis, not decided categorically in advance.

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[14] In *Harris v. United States*, 536 U.S. 545 (2002), four Justices would have held unconstitutional mandatory minimum sentences that depend on judicial fact-finding, while a fifth (Justice Breyer) expressed an inability to square mandatory minimums with the Court's precedents on jury-trial rights.

[15] *See, e.g.*, 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. L., ETHICS & PUB. POL'Y 311 (2004); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003).

[16] H.R. 1528, 109th Cong. § 12(a)(3) (2005) (requiring judges to explain how below-Guidelines sentences avoid "unwarranted sentencing disparities").

[17] H.R. 1528, 109th Cong. § 2(c) (2005).

Particularly troubling in this regard is the Bill's mandatory minimum three-year sentence for parents who "fail[] to protect children from drug trafficking activities."[18] Parents who learn that their children, or their children's friends, or their neighbors, have become involved in drugs may face extraordinarily difficult choices about how to respond. Their choices may put themselves or their children in grave peril. Yet, no matter the circumstances, the Bill would require parents to make a quick decision to report all covered drug crimes to the police and "provide full assistance in the investigation, apprehension, and prosecution" of the criminals.[19] We may certainly question the good judgment of parents who fail to take these steps, but this has never before been thought an appropriate matter for federal criminal law. Indeed, traditionally, it is the states who have had responsibility for deciding when bad parenting decisions require that parents be separated from their children. The Bill thus marks an extraordinary incursion into matters of traditional state control.

Finally, we note that the Bill's superabundance of "protected zones" – where drug dealing would trigger new mandatory minimums[20] – would effectively create important disparities between drug sentencing in cities and elsewhere. Simply put, cities have few areas outside the crucial 1000-foot radius from protected facilities. For instance, when the State of Connecticut adopted a similar law, one city discovered that it had only three plots of land that were outside the protected zones: a golf course, a marsh, and a "park" surrounding a sewage treatment plant.[21] By contrast, in less densely developed suburbs and rural areas, it is a simple matter for drug dealers to set up shop outside a protected zone. Thus, a bill that would generally impose harsh new sentences on urban drug criminals would at the same time give something of a free pass to suburban and rural drug dealers. Moreover, by targeting city-dwellers, the Bill would have a disproportionately harsh effect on the racial and ethnic minority groups who live disproportionately in cities.

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[18] H.R. 1528, 109th Cong. § 2(m) (2005).
[19] *Id.*
[20] H.R. 1528, 109th Cong. §§ 2(c), 4(a) (2005).
[21] Michael Lawlor, *Reforming Mandatory Minimums Sentences in Connecticut*, 15 FED. SENT. RPTR. 10, 11 (2002).

III. Conclusion

For these reasons, we respectfully request that you oppose H.R. 1528. At a minimum, we request that Section 12 be severed from the rest of the Bill and considered independently. Section 12, the *Booker* fix, addresses developments in federal sentencing that are still unfolding. It is much too early to consider *Booker* a problem in need of a "fix," much less to conclude that Section 12 represents the most appropriate response.

Sincerely,

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LETTER FROM FRANK O. BOWMAN, III, M. DALE PALMER PROFESSOR OF LAW, INDIANA UNIVERSITY SCHOOL OF LAW, TO THE HONORABLE HOWARD COBLE, AND THE HONORABLE BOBBY SCOTT

Frank O. Bowman, III
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April 11, 2005

The Honorable Howard Coble, Chairman
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
2468 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert Scott, Ranking Member
U.S. House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
2464 Rayburn House Office Building
Washington, DC 20515

Re: HR ____, *Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005*

Dear Chairman Coble and Congressman Scott:

As you may recall, you did me the honor of inviting me to testify before the Subcommittee on July 6, 2005, when you were considering H. 4547, an earlier version of the bill referenced above. I also had the honor to appear before the Subcommittee on February 10, 2005, to testify regarding the effect of the U.S. Supreme Court's recent decision in *United States v. Booker*, __ U.S. __, 125 S.Ct. 738 (Jan. 12, 2005), and the nature of an appropriate congressional response to that decision. I have been asked by several persons and entities to supplement the remarks I made on those occasions with some observations on the new version of the bill now scheduled for hearing on April 12, 2005.

The first eleven sections of the proposed bill are, in substance, a modest reworking of H. 4547. Accordingly, I will not reiterate here the detailed critique of H. 4547 that I submitted to the Subcommittee on July 6, 2004, and will instead incorporate my written testimony on that occasion by reference. See Testimony of Frank O. Bowman, III, Before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, July 6, 2004 (available at http://judiciary.house.gov/media/pdfs/bowman070604.pdf). I should add, however, that the changes made to the bill since its last appearance have not improved it. To the contrary, all the myriad flaws of the original H. 4547 laid out in my earlier testimony

remain and have, if anything, been made worse by the new provisions. In short, the portions of the bill devoted to drug crime are profoundly undesirable and should not be enacted.

The newly added Section 12 requires separate comment. As written, Section 12 of the Bill transforms the Federal Sentencing Guidelines into a complex system of mandatory minimum sentences. Section 12(a)(3) of the Bill amends 18 U.S.C. § 3553 by adding a list of thirty-six factors which a sentencing judge *could* consider in sentencing a defendant within or above the range called for by the Sentencing Guidelines, but which the judge *could not* consider when setting a sentence below the guideline range. The list includes virtually every commonly invoked ground for downward departure, except government motions for downward departure based on cooperation or on a defendant's participation in an early-disposition program established by the Attorney General pursuant to section 401(m)(2)(B) of the PROTECT Act (Public Law 108-23). As written, the Bill even seems to prohibit judges from basing a sentence below the guideline range on factors currently enumerated in the Guidelines as warranting a downward departure, e.g., the possibility of a downward departure in a fraud case under 2B1.1 if "the offense level determined under this guidelines substantially overstates the seriousness of the offense." A system in which judges may freely consider a wide array of factors in setting sentences above the bottom of the guideline range, but may not consider any factor except government motions in setting a sentence below the bottom of the range is, *de facto*, a system of mandatory minimum sentences.

I have been informed by a member of the Committee's staff that those drafting the Bill may not have intended to bar judges from considering all downward departure factors actually enumerated in the Guidelines themselves. Regardless of the intention, as now written the Bill would have that effect. Even if the Bill were amended to eliminate the clause referenced in footnote 1 below, such an amendment would make little practical difference. The specific list of banned factors in Section 12(a)(3) of the Bill includes virtually every ground for downward departure commonly relied upon by sentencing judges but not enumerated in the Guidelines, and also includes some departure grounds currently permitted by the Guidelines themselves. In particular, Guidelines Sections 5H1.1-5H1.7 list a number of factors such as age, educational and vocational skills, mental and emotional conditions, physical condition including drug or alcohol dependence, employment record, family ties and responsibilities and community ties, and role in the offense, which are "not ordinarily relevant" in determining whether a departure is warranted, but which may be considered as grounds for departure in exceptional cases. Section 12(a)(3) of the Bill would allow a judge to take all of these factors into account in setting a sentence within or above the guideline range, but would *prohibit* the court from considering them when setting a sentence below the range. Outside of the factors listed in 5H1.1-5H1.7, the Sentencing Commission has enumerated a mere handful of offense-specific encouraged grounds for downward departure. Even if Section 12 of the Bill were amended to permit continued judicial reliance on that handful, the modification would be more cosmetic than real and the Bill would still transform the Guidelines into a system of mandatory minimum sentences.

Accordingly, Section 12 of the Bill is regrettable for at least three reasons:

First, as I and many others told the Subcommittee at its February 10, 2005 hearing on the effects of *Booker v. United States*, the constitutional and policy challenges presented by that decision call for caution, consultation, and careful deliberation on the part of Congress. See Testimony of Frank O. Bowman, III, before the Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, Feb. 10, 2005 (available at http://judiciary.house.gov/media/pdfs/Bowman021005.pdf). As I and others suggested would be the case, the system of advisory guidelines created by *Booker* seems to be working acceptably, at least for the moment. Statistics compiled by the Sentencing Commission suggest that judicial compliance with the Guidelines remains virtually identical to the levels that prevailed before *Blakely* and *Booker*. Congress is not faced with an emergency calling for immediate legislation. Moreover, any legislation that would fundamentally transform a system as complex as the federal sentencing guidelines requires time and careful thought. It had been my understanding that many, perhaps most, members of this Subcommittee were of the view that a legislative response to *Booker* should await data on the operation of the advisory system and should be the product of careful development and wide consultation. Section 12 of the present Bill does not meet these criteria. It is premature, poorly conceptualized, and imprecisely drafted. And far from being the product of careful consultation with interested and knowledgeable persons and institutions, it was inserted into the present Bill mere days before the Subcommittee markup with no notice to or consultation with anyone.

Second, although Section 12 of the Bill is, in my view, probably technically constitutional under existing precedent, its constitutionality depends on the continuing validity of *Harris v. United States*, 536 U.S. 545 (2002), which held that a post-conviction judicial finding of fact could raise a minimum sentence, so long as that minimum was itself within the legislatively authorized statutory maximum. The viability of *Harris* was subject to frequent question even before *Booker*. As I told the Subcommittee in February, the *Booker* decision casts additional doubt on *Harris*'s continued viability.

Booker authorizes guideline ranges, with tops, determined by post-conviction judicial fact-finding. If the Court ultimately accords those ranges at least some measure of legally presumptive effect (which the lower courts seem to be doing post-*Booker*), then the distinction between constitutional and unconstitutional guideline systems becomes the degree of presumptiveness of the tops of the guideline ranges. Put another way, the constitutional distinction between a "statutory maximum" which must be determined by a jury under *Blakely* and the top of a presumptive guideline range that can be determined by a judge under *Booker* can only be the degree of discretion afforded the judge to sentence above the top of the range. If the Court decides that presumptive limits on maximum sentences are constitutionally acceptable, it is hard to see why the same reasoning should not apply to minimum sentences.

Those who doubted the continued viability of *Harris* have noted that Justice Breyer was the fifth vote for preserving statutes that set minimum sentences through post-conviction judicial fact-finding, and that he expressed doubt about how *Harris* could be

squared with *Apprendi*. Before *Booker*, it seemed plausible that Justice Breyer and other members of the Court who favor keeping the Constitution hospitable to structured sentencing systems would hold on to *Harris* because it provided at least one tool of structured sentencing. A system that constrains judicial discretion only by setting minimums is awkward and asymmetrical, but not wholly useless. After *Booker*, it is no longer clear that the weird asymmetry of *Blakely* and *Harris* is necessary. It would make far greater sense for the Court to hold that real, hard, impermeable statutory maximum *and minimum* sentences can only result from facts found by juries or admitted by plea, while at the same time permitting structured sentencing systems that use judicial fact-finding to generate sentencing ranges, presumptive at both top and bottom, inside the statutory limits. Such an approach would appeal to many members of the Court because it treats minimum and maximum sentences consistently, gives a meaningful role to juries in setting the actual minimum sentences that matter more to defendants than theoretical maximums, preserves the accomplishments of the structured sentencing movement, and confers constitutional status on judicial sentencing discretion. If this is the direction the Court is heading, then *Harris* is in danger and the system of de facto mandatory minimum sentences that Section 12 of this Bill would create could be found unconstitutional in short order. The last thing anyone should want at this point is sentencing reform legislation that is itself found unconstitutional.

Finally, transforming the Guidelines into a comprehensive system of de facto minimum mandatory sentences is simply bad public policy. Section 12 of this Bill would change the "guidelines" into an annex of the federal criminal code supervised in every detail by Congress. Congress has the undoubted power and responsibility, subject to broad constitutional limits, to set federal criminal sentences. However, Congress does not use that power wisely if it acts unilaterally or attempts to micromanage the details of the system. Sentencing systems work best when the responsibility for making sentencing rules and for imposing sentences in individual cases is sensibly shared between the interested institutions. Congress lacks the expertise to supervise every detail of a complex set of sentencing rules and it cannot anticipate the particular circumstances of every defendant who appears for sentencing.

Many observers see the current crisis in federal criminal sentencing as largely a product of an inter-branch struggle for control over sentencing. One can, therefore, view the *Booker* opinion as nothing more than an incident in an ongoing brawl, a blow struck by the judiciary that somehow requires a legislative counterpunch. I would respectfully suggest that we all take a different view and see the *Booker* opinion as an opportunity for reflection, consultation, and reevaluation of the current federal sentencing system. The country will be best served if all the interested institutions thoughtfully and patiently consult with one another before advancing significant changes in the existing federal sentencing regime. Section 12 of this Bill is not the product either of patience or consultation. It ought to be rejected.

Respectfully,

Frank O. Bowman, III
M. Dale Palmer Professor of Law
Indiana Univ. School of Law - Indianapolis

RESPONSE TO POST-HEARING QUESTIONS FROM LORI MORIARTY, THORNTON POLICE DEPARTMENT, THORNTON, COLORADO, COMMANDER, NORTH METRO DRUG TASK FORCE, AND PRESIDENT, COLORADO'S ALLIANCE FOR DRUG ENDANGERED CHILDREN

QFR – Response submitted by Lori Moriarty, National Alliance for Drug Endangered Children

Questions for Witnesses who testified during House Judiciary Crime, Terrorism and Homeland Security Subcommittee on H.R. 1528, Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection

From Ranking Minority Member rep. Bobby Scott

Mandatory minimum provisions

In response to the following question:

Professor Brownsberger has convincingly demonstrated that this bill would cover most urbanized areas in the United States. As you know, there is widespread drug distribution and addiction in suburban and rural areas in the United States, notably with respect to methamphetamine. Do you agree that persons, who live in urban areas, where the population is overwhelmingly poor and Black or Hispanic, should be subjected to serve uniform penalties, and that those who live outside of urban areas, where the population is overwhelmingly while, should not be subjected to severe uniform penalties? Why or why not?

First, the impact on urban settings is one relating to density, not ethnicity. We have many urban communities in Colorado that are predominately white. In addition, the 1,000 feet rule may impact more people in urban areas because of denser populations; however, in the case with methamphetamine labs, they present greater health and environmental risks to more people in these densely populated areas. This is the very reason why we should have stiff penalties – and hopefully deter criminals from setting up labs – in areas with schools and high populations.

Second, methamphetamine use and manufacturing in our state is done predominately by whites. These offenses certainly are not committed disproportionately by minority offenders. (This is different than the crack cocaine sentencing laws enacted in the 1980's that did have a disproportionate impact on a particular group.) In fact, we have seen numerous labs in the suburbs and rural areas of Colorado. These offenders are also overwhelmingly white.

Finally, if followed, Mr. Brownsberger's "urban setting" arguments could be used to always ban any special offender statutes from ever being applied in an urban setting. This would be both unfair and wrong. People in densely populated cities have the right to the same protections - not to have methamphetamine labs or drug distribution near their schools and treatment centers - as citizens who live in suburbs, small towns or in rural areas. Offenders, who feed this plague and create serious health safety risks, should face the same penalties and deterrence regardless of their ethnicity or their neighborhood.

RESPONSE TO POST-HEARING QUESTIONS FROM RONALD E. BROOKS, PRESIDENT, NATIONAL NARCOTIC OFFICERS' ASSOCIATIONS' COALITION (NNOAC)

Questions for Witnesses who testified during House Judiciary Crime, Terrorism and Homeland Security Subcommittee on H.R. 1528, Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection
From Ranking Minority Member Rep. Bobby Scott

Misprision questions

Is it the DEA's position that proposed Section 425 of the bill is constitutional? If yes, please explain why. (Avergun)

Is it the DEA's/NNOA's position that it should be a crime (subject to a mandatory minimum of two years or three years for a parent or caretaker) for any person who witnesses or learns of a violation of 21 U.S.C. " 856(b)(2), 858, 859, 860, 860a, 861, or 865 to fail to report the offense to law enforcement officials within 24 hours of witnessing or learning of the violation and further providing full assistance in the investigation and prosecution of the offender?
(Avergun, Brooks)

Answer of Ronald Brooks

Yes: effective law enforcement depends to a great extent on the cooperation and help of members of the community to report and substantiate wrongdoing. If crimes are allowed to go unreported, neighborhood safety is compromised.

Would juveniles who fail to so report their parents, caretakers, or others the juveniles witness (or learn of that) violate these provisions be subject to prosecution as juveniles or as certified adults?

Cooperation questions

The Department of Justice recently testified before the House Judiciary Committee that it is concerned about the ability of Assistant U.S. Attorneys to be able to guarantee cooperation under the advisory federal sentencing guidelines that resulted from the decision in U.S. v. Booker. Please provide the DEA's position and your explanation of that position on whether Section 9 better enables prosecutors to guarantee cooperation than the current guideline provisions providing sentencing relief in exchange for substantial assistance. Please provide the committee with statistics addressing the rate of substantial assistance motions since the Booker opinion. (Avergun)

Drug courts/ Drug treatment

You discussed what appears to be the DEA's support of the concept of drug courts during your testimony on H.R. 1528. How will individuals prosecuted in the federal system be able to benefit

from drug courts that, while funded by federal grants, do not exist in the federal court system? Would you agree it is better to prosecute people who are eligible for drug court in state courts? (Avergun)

In your testimony, you explained that federal agents can steer federal defendants to state drug courts. Has any federal defendant been diverted to a state drug court? If so, please provide the details of each such instance so that we may investigate the circumstances of the diversion and the outcome, including the names and contact information of the persons we can contact to inquire. (Avergun)

President Bush proposed expanding funding for drug courts and increasing funding for SAMHA in his FY 2006 budget request. Please evaluate the provisions of HR 1528, in light of President Bush's obvious support for increased resources for drug courts and alternative approaches to the problems of addicted defendants for defendants in state courts. How is HR 1528 consistent with those goals? (Avergun)

Please explain why, in light of the benefits of drug courts, the federal government does not promote them for federal offenders? (Avergun)

Several witnesses testified that substance abuse has terrible consequences for families, communities, crime and violence. Mr. Brooks testified that drug courts are the most effective way of breaking the addiction cycle by providing a structured series of incentives and sanctions. Please provide specific examples of cases that have proceeded through drug courts. Please describe in more depth the benefits of drug courts. (Brooks, Avergun)

Answer of Ronald Brooks:

One recently reported success story came out of Baltimore where a long-time alcohol and drug addict successfully completed a drug court program and now runs a small business. There are scores of success stories I could cite, but generally the Drug Court Model uses courts that are specifically designated to help those suffering from the disease of addiction who are arrested for charges of drug use or possession, to participate in court ordered drug treatment programs. The court and other participating agencies such as probation and social services provide adequate support and encouragement to the client during treatment to provide the client a chance of successfully completing treatment and avoiding incarceration.

The Drug Courts have been successful in many instances because they are able to use the power of the bench and a series of graduated legal sanctions to encourage clients (defendants) to fully participate in treatment and other social programs designed to help the drug user avoid jail and become productive, drug free members of their communities.

Clients that continually fail to participate in treatment or who otherwise violate conditions imposed by the courts are subject to receive the maximum sentence for their original offense. I have been involved in drug law enforcement for more than 22 of my 30 year law enforcement career and I have witnessed many times the success of the drug Court Program. Drug courts should only be used for persons caught using or possessing drugs and should not be used for predators that sell, transport or manufacture illicit drugs.

Given your experience and that of the other members of NNOA, what combination of sanctions and incentives are most effective with first-time offenders who are addicted? Are such programs more or less effective with first-time offenders who have never before been incarcerated? In your experience, on average, is it more effective for the initial criminal justice system response for this class of offenders to be placement in a full-time drug treatment facility or incarceration for a multi-year sentence with part-time drug treatment? (Brooks)

Answer by Ronald Brooks

Treatment, when offered as an alternative to incarceration for persons arrested for drug use or possession has proven to be very effective in many instances. Although the cycle of addiction is difficult to break, well-trained court professionals, treatment specialists, probation officers and others who work together to support the recovery efforts of an addict have a greater chance of success when that addict is facing the sanction of incarceration that may be imposed by the Drug Court judge. I believe in structured treatment programs with the potential of court ordered sanctions and believe that, in most instances, full time drug treatment is preferable to incarceration for addicts arrested for use or possession of drugs as long as they continually demonstrate their willingness to participate in treatment.

If first-time offenders who are convicted of possession or use are able and willing to participate in a treatment program, then this is a logical first step for them. If they see the treatment program as a way out of punishment and do not complete the program, then incarceration should be a second alternative. As stated previously, treatment in lieu of incarceration should not be an alternative to those predators who sell, transport or manufacture illicit drugs. However, I do believe that effective treatment options should be available in prison if that trafficker has an addiction.

According to a 2002 Report by the Office of National Drug Control Policy, court systems were referring a larger number of people to treatment services than other referral sources. "Pulse Check: Trends in Drug Abuse, April 2002," Office of National Drug Control Policy. What are the most recent figures regarding the number of individuals in the federal justice system who are drug-addicted, who are referred for treatment at their initial sentencing, and who are sentenced to incarceration at their initial sentencing. (Avergun)

Please provide and explain what research has been performed at the direction of or with the

cooperation of the federal government concerning effective addiction treatment of offenders? (Avergun)

Please provide and explain what research, studies or findings the Department of Justice relied upon to develop any internal guidelines, direction or guidance pertaining to the Department's position in cases where drug treatment programs are being considered as an alternative or as an adjunct to incarceration. (Avergun)

Department's statistics, from 1980-1997 people entering prison for violent offenses doubled, non-violent offenses tripled, but drug-related offenses increased 11-fold, which is a 1040% increase. Murnola, Christopher J. and Beck, Alan. Trends in U.S. Correctional Populations, 1997, Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics. Has this trend continued or has it peaked? Please provide the current figures. (Avergun)

In addition, please provide the corresponding figures for the number of drug treatment slots from 1997 to the present. Does the Bureau of Prisons at present have the same number of long-term drug treatment slots as it does drug-addicted inmates, as identified in the Presentence Investigation Report? Does the Bureau of Prisons at present have enough long-term drug treatment slots to meet the demand? (Avergun)

This legislation targets low-level drug dealers that sell drugs to people in treatment. Please describe the NNOA's position about the relative merits of treatment versus incarceration. Please describe the NNOA's position on how this bill will increase enforcement and the safety of people in drug treatment. (Brooks)

Answer of Ronald Brooks

It is my position based upon my experience as a narcotic officer – and it is also the position of the NNOAC – that treatment is an effective alternative to incarceration when backed by the potential of court imposed sanctions and when used to help addicts who are involved with the simple possession or use of illicit drugs. Neither the Drug Court Program nor any other treatment programs as an alternative to incarceration should be considered for persons who manufacture, sell or transport narcotics or dangerous drugs.

Is it the NNOA's position that the increased penalties will deter drug addicted dealers from operating near drug treatment facilities? Please explain how and evidence you have to support your conclusion. (Brooks)

Answer of Ronald Brooks

Law enforcement has learned from experience that crime can be deterred when the target is hardened. That has long been the model used for the prevention of burglary and other property crimes. In this instance, increased penalties would "harden the target" around treatment centers and would protect those persons who are struggling with recovery and

who are most vulnerable to predatory drug sellers. While increased penalties may not end all drug sales, it will most likely cause drug dealers to think twice about plying their deadly trade near schools, treatment centers and other locations where vulnerable persons are found.

Is it the NNOA's position that the drug market is demand driven? If so, how does this bill address the phenomenon that many criminologists observe, removing one drug dealer opens the way for another to move in. Is that your officers' experience and if so, how does this bill address the demand component? (Brooks)

Answer of Ronald Brooks

There is no question that the illegal drug market is partially demand driven, but no person is born with an innate physical or psychological demand for illegal substances – if there is no availability, there will be no use. Increased enforcement can dramatically reduce drug sales and the violent crime that is often associated with the drug trade. In 1994-1998, when New York City doubled their drug arrests from 64,000 to 130,000, reported violent crimes dropped from 432,000 to 213,000. At the same time, the per-capita homicide rate dropped to that of Boise, Idaho. At the same time, the City of Baltimore embraced a policy of "harm reduction" and reduced their drug enforcement efforts. Baltimore's violent crime rate during that same time period jumped to six times that of New York.

In 1992 the City of East Palo Alto, CA was the per-capita murder capital of the nation. I participated in a program of dramatically increased drug and gang enforcement and the murder rate was reduced to only three murders a year later. Clearly, drug enforcement along with a strong prevention message and court supervised treatment applied in a comprehensive strategy can reduce drug abuse and violent crime.

This bill is not intended to explicitly address the demand component, but when coupled with effective prevention and treatment programs that already exist, it offers a strategy to combat a particularly destructive practice that destabilizes our towns and cities.

Costs

The White House Office of National Drug Control Policy has established cost estimates attributed to substance abuse. It estimates a total cost of $143 billion, with 62% related to crime-related costs. The Physician Leadership on National Drug Policy National Project Office has estimated that the average long term residential drug treatment program costs $7,000 while federal incarceration costs upwards of $26, 000. Please provide the current average cost of incarceration for a federal inmate and the average cost of a federally-contracted long-term residential drug treatment program. (Avergun)

Please provide a cost analysis of HR 1528. (Avergun)

Safety Valve

Is it DEA's position that the Safety Valve, which has long provided judges the opportunity to resort to the more nuanced treatment afforded defendants by the federal sentencing guidelines, should be altered in the manner proposed, so that only defendants who cooperate fully in the investigation or prosecution of others, will be eligible for a sentence without respect to the mandatory minimum sentence?
If yes, please explain why and what evidence supports the elimination of the federal Safety Valve. (Avergun)

Mandatory minimum provisions

You mentioned that under certain circumstances, a mandatory minimum sentence is "appropriate." Please discuss to what extent prosecutors may determine what is and is not an appropriate use of mandatory minimum sentences, particularly in light of the Department's prohibition against charge bargaining. See John Ashcroft, Memorandum to All Federal Prosecutors, "Department Policy Concerning Charging Criminal Offenses, Disposition of Charges and Sentencing" (September 22, 2003). (Avergun)

How does the Department express its judgment that charging a mandatory minimum sentence is not appropriate in a given case? (Avergun)

Which mandatory minimums, under what circumstances, are not appropriate? (Avergun)

Professor Brownsberger has convincingly demonstrated that this bill would cover most urbanized areas in the United States. As you know, there is widespread drug distribution and addiction in suburban and rural areas of the United States, notably with respect to methamphetamine. Do you agree that persons who live in urban areas, where the population is overwhelmingly poor and Black or Hispanic, should be subjected to severe uniform penalties, and that those who live outside of urban areas, where the population is overwhelmingly white, should not be subjected to severe uniform penalties? Why or why not?) (Avergun, Moriarty, Brooks)

Answer of Ronald Brooks

Drug penalties should be uniform throughout the country. This bill allows all persons who are arrested for the same crime to be punished the same. If the geographic coverage of certain laws were to be made equal based on density, most of the United States would be covered by the laws, and the specific disincentive to sell drugs around schools and treatment centers would be lost. Population density is an uncontrollable factor, but any drug seller who sells to students or addicts in treatment *near* schools or treatment centers – whether in a tough inner city or a plush suburb – should be punished equally. In fact, I believe that this bill would improve protection for law-abiding persons (particularly poor, Black and Hispanic persons) in densely populated urban areas because of the high

concentration of protected zones. At the same time we would support any actions Congress might take to increase penalties for trafficking in rural areas as well – especially trafficking in methamphetamine, which is sinking its teeth into rural America – if those penalties created specific disincentives for drug sellers in vulnerable areas.

You testified about a defendant who was manufacturing methamphetamine which caused a fire in a hotel room. You said that he pled guilty and received a sentence of 151 months. You stated that he received no enhancement for endangering families. You stated that under this bill, the defendant would receive a mandatory minimum sentence of 15 years (whether or not he endangered families), rather than the 12 ½ years he received.

Section 2D1.1(b)(6) of the United States Sentencing Guidelines provides for an increase of at least 3 levels if human life was endangered and at least 6 levels if the lives of minors or incompetents were endangered. If three levels were added to this defendant's sentence, it would result in an additional 59 months, or almost 5 years. If 6 levels were added it would add 141 months, or almost 12 years. Furthermore, Part 2 of Chapter 5 provides for upward departure for a variety of aggravating circumstances including death, physical injury, psychological injury and property damage. Please advise the subcommittee if the prosecutor or probation officer in this case requested any such increase or departure? If so, did the judge grant or deny any such increase or departure? (Avergun)

Please describe how mandatory minimum sentences help the children of addicted drug dealers who are prosecuted under the provisions (Brooks, Avergun)

Answer of Ronald Brooks

It is my experience that the parenting abilities of many drug addicts suffer terribly, and that they often place their desire for drugs and the drug lifestyle ahead of the needs of their children. Addicted parents often subject their children to the threat of violent crime from rival drug gangs or persons intent on stealing drugs or property. Unreported home invasion robberies are a common occurrence for drug sellers and children that are in the home during those robberies are at risk. Small children are also at risk of accidentally ingesting drugs are getting needle sticks from HIV- or Hepatitis-tainted hypodermic needles. Children are also at risk because the persons that are their role models are their parents who are drug users, drug sellers and are often involved in other drug lifestyle crimes such as prostitution, weapons offenses and thefts.

While I am a strong supporter of keeping the family together whenever possible, I am also a stronger supporter of removing children from dangerous living environments when their guardians are incapable of providing adequate care. Sometimes the best thing that happens to the child of an addict is for them to be removed from that dangerous lifestyle until their parent receives treatment and is in a position to provide a safe a productive environment for the child to live.

It is true that some drug dealers and addicts manage to keep their children isolated from their business or addiction. However, I believe that parents who knowingly expose their kids to drug trafficking activities should be punished with longer sentences. Those parents should also receive effective treatment while in prison. From a crime prevention perspective, mandatory minimums provide an incentive for convicts to assist law enforcement and in return receive a lesser sentence. Those who cooperate will be less likely to return to their drug dealing activities when they are released from prison because their relationships and reputation in the drug selling world would be severely compromised.

In light of significant evidence that mandatory minimums produce unwarranted racial disparity in sentencing, under what circumstances is such disparate treatment appropriate in light of your statement to the subcommittee that the Department of Justice "supports mandatory minimum sentences in appropriate circumstances"? (Avergun)

Ms. Moriarty and Mr. Brooks stated in their testimony that not all defendants convicted of a second offense under the provisions of this bill deserve a life sentence. Which second offenders do not deserve life in prison? (Avergun, Brooks)

Answer of Ronald Brooks

It is not my recollection that this bill would provide for a minimum life sentence for all second offenders. As I understand the bill, it provides for life imprisonment for a second offense only in the case of distribution to a person under the age of 18 by a person 21 or older, and in the case of a person 21 or older using or employing a person under the age of 18 in drug trafficking. I understand that similar provisions were included in the "D'Amato Amendent" to S. 1607, the "Violent Crime Control and Law Enforcement Act of 1993", which was approved by the United States Senate (58 to 42) on November 9, 1993. It was included in the final bill – HR 3553 – which passed the United States Senate on November 19, 1993 by a vote of 95 to 4.

In your testimony you expressed the concerns of the National Narcotics Officers Association about the "problem of dealing drugs to recovering addicts . . . preying on the most vulnerable citizens when they are at their weakest." In light of the fact that many drug dealers are themselves addicted to drugs, please explain how this bill will accommodate the treatment needs of addicts, recovering or otherwise, who are sentenced to lengthy mandatory minimum sentences without access to drug treatment? Is it the NNOA's position that such first or second strike addicts will be effectively deterred by the penalty? Is it the NNOA's position that such addicts are better served by strict mandatory minimum sentences in lieu of drug treatment?

Answer of Ronald Brooks

In my experience, while there are certainly many addicts who sell drugs, there are also many persons who are involved in drug sales who are not addicts. In fact, I have seen

many people sell drugs as a lucrative business and rarely if ever use their own product because they understand how dangerous the drugs are. I believe that many of those persons who are committing crimes, including the crime of drug sales, to support their habit would be deterred from selling to vulnerable persons at locations where penalties are increased and would engage in sales activities at locations where the risk of lengthy incarceration is less.

As I stated in a previous response, drug sellers that are arrested and incarcerated should have access to treatment opportunities while incarcerated if they are addicted. Most convicted addicts do have access to treatment in prison, contrary to the statement in your question that they are "sentenced to lengthy mandatory minimum sentences without access to drug treatment." The Federal Bureau of Prisons provides drug treatment for prisoners, and I understand that this treatment is often more effective than some outpatient treatment programs where the patient is exposed to the same environment and temptations that led to the addiction in the first place. One of those temptations - drug dealers who prey on those in treatment centers -- is one of the central evils dealt with in HR 1528. This bill assures safe *access* to treatment and that is essential in *any* successful treatment.

As I previously noted, mandatory minimums provide an incentive for convicts to assist law enforcement and in return receive a lesser sentence. Those who cooperate are less likely to return to their drug dealing activities because of the incentives to cooperate that mandatory minimums provide. I believe this bill will help break the cycle of the revolving door of both addition and trafficking.

Crime statistics/ enforcement

Please provide the Committee with research studies or other findings to support the contention, suggested in your testimony, that increased incarceration and lengthening sentences at the federal level have reduced the national crime rate in violent and property offenses. (Avergun)

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