UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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FRIDAY
FEBRUARY 24, 2023

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The United States Sentencing Commission met in the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle N.E., Washington, DC 20002 at 9:00 a.m. EST, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT
CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
CLARIA HORN BOOM, Commissioner
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex-Officio

ALSO PRESENT
KENNETH P. COHEN, Staff Director
KATHLEEN C. GRILLI, General Counsel

AGENDA

P-R-O-C-E-E-D-I-N-G-S

9:00 a.m.

CHAIR REEVES: Good morning. Wow, good morning.

PARTICIPANTS: Good morning.

CHAIR REEVES: Okay, thank you.

It's great to be here again for our second day of our two-day hearing. I'm Carlton W. Reeves, Chair of the United States Sentencing Commission. My remarks this morning are much briefer.

I would encourage people who are watching in and those who might not have been with us yesterday, by this evening or tomorrow, if you missed any part of the hearing, you can go to our website and watch the full hearings from yesterday and today.

They're publicly available and I do encourage all of those who are interested in our federal criminal justice system to please go to the website and watch these hearings.

I thank each of you for joining us,

again, whether you're in this room or you're watching via livestream. I have the honor of opening this second day of hearings with my fellow commissioners.

To my left, we have Vice Chair Claire Murray, Vice Chair Laura Mate, and Commissioner Candice Wong. To my right, we have Vice Chair Luis Felipe Restrepo, Commissioner Claria Boom, and our Ex-Officio Commissioner Jonathan Wroblewski. Commissioner John Gleeson, because of circumstances beyond his control, cannot be with us today.

We're also joined by some of the Commission staff, again, all of whom, those who are present in this room or working elsewhere, they've all worked tirelessly for us, the Commission, and for you, the American people, in making this day possible, making yesterday possible, and filling in the gap that has occurred from the Commission during the time in which we did not have a full Commission and the time in which the Commission was operating

without a quorum.

I want to again thank every employee for all that you've been doing, all that you continue to do, and all that you will be doing for us throughout this process. We appreciate you.

Among the many things our employees have done, as I mentioned, is to launch our new online comment portal which can be found at www.ussc.gov. Again, I encourage each of you to go to the website.

I urge anyone who cares about our work to submit a comment through the portal before our March 14 deadline. We will take comments received through the portal just as seriously as the testimony received during these hearings.

Yesterday's hearings allowed us to hear from a range of perspectives on our proposed amendment regarding compassionate release. I was struck by the diversity of the panelists who spoke to us, the breadth of their knowledge, the depth of their lived experience, and their shared

commitment to ensuring the Commission issues the right policy, the informed policy, and of course, the just policy.

I assured those panelists, just as I will assure those who will speak today, your travels and your testimony will be worth it. Again, when you speak to the Commission, you will be heard.

Today, our esteemed panelists will be speaking on two of our proposed amendments. The first amendment addresses offense of sex abuse of a ward. The second proposed amendment addresses our acquitted conduct, or how acquitted conduct, excuse me, is considered in sentencing.

In reviewing the biographies and testimony of our panelists, I know that today's hearing will be as illuminating and as useful as yesterday's hearings. I know the same is true of the hearings we will hold in March to receive testimony on our other proposed amendments.

I will remind the panelists, or I will inform the panelists because some of whom

testified yesterday, some of you are new to today's hearing and I appreciate you, but you will each have five minutes to speak. We've read your written submissions.

Your time will begin when the light turns green. You have one minute left when it turns yellow, and no time left when it turns red. If I cut you off, please understand I'm not being rude. They force me to do that.

(Laughter.)

CHAIR REEVES: No, I can't play that part. We have a lot to cover today, just as we did on yesterday, and we have a limited time in which to do it. We have work to do, but we need your assistance in doing our work.

For our audio system to work, I will remind the Commissioners you must speak into the mic and you must speak loud. This is the mic business because I kept hearing from people yesterday that they were having difficulty hearing.

But I know the mics are hot when

they're green, when their button is pulled, but I'm going to advise you to assume that the mic is always hot because, again, we want to hear you and you're going to be heard, and we're broadcasting livestream all over the country, all over the world. So, just presume that the mic is always hot.

When all of our panelists have finished speaking, the Commissioners may ask questions. They have the right to ask questions. From yesterday, I'm pretty sure we will be asking questions because, again, we want answers from you all.

I look forward to another day's productive hearing and I thank you all for being here this morning, and we're about to start this day of hearings.

With that said, I would like to introduce our first panel, a panel of one, which will present the Executive Branch's perspective on our proposed amendment regarding sex abuse of a ward.

That perspective will be presented by Marshall Miller, Principle Associate Deputy Attorney General of the United States. In that role, Mr. Miller assists in the oversight of all Department of Justice components and Chairs the Department's Working Group on Sexual Misconduct by Employees of the Federal Bureau of Prisons.

Previously, Mr. Miller has served as the Principle Deputy Assistant Attorney General and Chief of Staff for the Criminal Division of the Department of Justice, as well as an Assistant United States Attorney in the Eastern District of New York.

Mr. Miller, we're ready to hear from you.

MR. MILLER: Thank you, Chair Reeves, Commissioners, and Commission staff. Last October, Deputy Attorney General Lisa Monaco urged this Commission to strengthen the guidelines applicable to offenses involving the sexual abuse of a ward.

As her Principle Deputy, I speak for

the Deputy Attorney General and for the Department when I express how grateful we are that the Commission adopted this issue as a priority item for consideration. We strongly support the Commission's proposed amendments to these guidelines.

Sexual misconduct has been a serious problem in Bureau of Prisons' facilities for many years. Whether you look at data, examine individual cases, or listen to victims and their advocates, the bottom line is clear. Far too many individuals in custody have experienced the trauma of sexual misconduct and there has been far, far too little accountability.

Given her deep concerns about this issue, the Deputy Attorney General asked me to lead a top to bottom working group review of the Department's response to sexual misconduct by BOP officials, and last fall, we published a report containing over 50 recommendations, every one of which the Deputy Attorney General adopted. That report has been made public and the Department

and the Bureau of Prisons are hard at work on implementing its recommendations.

Now, many of the group's recommendations are focused on ways to prevent these offenses in the first place, as well as ways to promote reporting and enhance investigations.

At the same time, the Department strongly believes that accountability for perpetrators is also a critical element of the solution, and to that end, the Deputy Attorney General has asked every United States Attorney across the country to treat these offenses as a priority.

At her request, I've also engaged with the United States Attorneys, as well as the leadership of our Civil Rights and Criminal Divisions, about the importance of bringing these cases and considering the full array of statutory authorities when prosecuting them.

And we also believe that the Sentencing Commission has a critical role to play

here in promoting accountability, and we strongly support the Commission's proposal to strengthen the guidelines applicable to these offenses, including most critically here, the guideline applicable to sexual abuse of a ward.

Application of the current guideline, we believe, routinely results in a sentencing range that is far too low to address the egregious conduct in these cases.

In the mine-run case, the guidelines recommend a sentencing range of 15 to 21 months for sexual abuse of a ward, ten to 16 months where the defendant pleads guilty, ranges that we believe fail to reflect the severity of the crime involved and the inherently coercive nature of the prison environment, and are out of step with the statutory maximum sentence for such an offense of 15 years in prison.

As the Department's prosecutions bear out, perpetrators exploit a deep and inherent power imbalance which enables them to abuse victims without needed to resort to physical

violence or overt coercion.

We've seen time and again that victims in these cases have been sexually abused before, or have mental health disorders, frequently they battle drug addiction, or do not speak English, and in some horrific instances, the very BOP employees who provide lifeline services like drug treatment and spiritual counsel have been the ones who commit the abuse.

One year ago yesterday, a former BOP chaplain pleaded guilty to multiple counts of sexual abuse of a ward, and in the words of the sentencing judge in the Northern District of California, this former chaplain preyed on women who could not consent and were not free to say no.

Yet even with a multi-count adjustment in that case, the guideline range for the offense was 24 to 31 months, a range the sentencing judge described as, quote, radically inconsistent with the actual nature of the harm done, unquote.

Though he could not recall a single

time he had varied upwards before in his many years on the bench, the sentencing judge determined that a dramatic variance up to 84 months was warranted.

And we've seen judges across the nation react similarly, recognizing the deep disparity between the severity of the crime and the lenity of the corresponding sentencing guideline.

In recent years, our society's understanding of the seriousness of sexual abuse has evolved. Congress has responded, repeatedly raising the applicable statutory maximum sentence for sexual abuse of a ward from one year, to five, to 15 years in prison, but to date, the guidelines have simply failed to keep pace.

We believe the Commission's proposed amendments would address that discrepancy and the Department urges the Commission to promulgate these updated guidelines.

Finally, while the focus of my testimony today is on the guidelines related to

sexual abuse of a ward, the Department also supports the Commission's proposed amendments to implement the 2022 reauthorization of the Violence Against Women Act.

That statute included critical new authorities to hold accountable officials who commit sexual abuse, including outside the prison setting, and the Department supports the Commission's common sense proposals to implement them.

And with that, I thank the Commission again for the time and consideration, and I'd be pleased to answer any questions you might have.

COMMISSIONER WONG: Good morning. I was wondering if the Department has data on approximately how many prosecutions are brought annually under 2243(b) and whether that statute is typically charged alone or whether there are other criminal charges?

MR. MILLER: We can get those statistics for you. I don't have them handy. We have seen at least, I think we're in the

neighborhood of sort of ten to 15 prosecutions a year, but I'd have to get you the exact numbers.

I do know, as I mentioned, that the Deputy Attorney General has urged United States Attorneys to bring more of these cases and is also working with the Office of Inspector General that investigates these cases to ensure appropriate resources are brought to bear.

I also know that over the last five years, there have been a significant number of upper departures in these cases, so I think something in the neighborhood of 25 percent of cases involve upper departures, which is out of step, I think, with the much lower percentage in other cases.

As to your question about whether those cases are brought with other charges, as I mentioned, the Deputy Attorney General urged prosecutors to use all statutory authorities and there are additional statutory authorities available to go after sexual abuse in the prison setting.

Many of those other statutes involve and require proof of either force or lack of consent, whereas the 2243(b) charge, consent, of course, is presumed not to be able to be provided. That's the finding by Congress that a ward cannot consent.

So, where those statutes are applicable, they can be brought. However, in the prison setting, the inherent coercion associated with a prison official in a relationship with a prisoner, it's often the case that force or actual coercion is not required, is not necessary, and is not used, and so that's why in many of our cases, we do bring it under the 2243(b) statute because the direct proof of force, for example, is not available.

VICE CHAIR RESTREPO: Mr. Miller, this might not be totally consistent with your testimony today, but we heard a lot of talk yesterday about sexual abuse of wards in the context of compassionate release.

Can you just walk me through how that

works? Somebody goes to -- how does somebody complain about sexual abuse in the prison and what happens when a complaint is lodged, and how long does it take for there to be any resolution?

MR. MILLER: Thank you, Mr. Vice Chair, for that question. Well, first of all, one of the things in our report that we put out, a number of our recommendations relate to reporting.

One of the things we found is that reporting can be difficult, of course, for someone in prison, so we are creating new opportunities for reporting, everything from the idea of putting in place a hotline where that reporting could be made.

We're also making available in all of the prisons investigators who have, as a sole job, they're investigating these offenses as opposed to folks who moonlight, for example, part time as regular prison officials and then part time as investigators.

So, we're putting in place a whole set

of different ways that folks can report, including through their family, through the course of implementing these recommendations. That is family members would have access to hotlines and reporting channels as well.

Once a report is made, that report -- all reports of sexual abuse are referred to the Office of Inspector General, and the Inspector General, as you know, of course, is a watchdog, independent, within the Department of Justice, but acting independently.

The Office of Inspector General investigates all sexual abuse allegations and can sustain those allegations and then refer them to U.S. Attorneys for potential prosecution.

Where they don't sustain an allegation, they refer it back to the Bureau of Prisons, which itself can run its own process for disciplinary action if they believe that the allegation has merit.

So, there are multiple channels by which adjudications, if you will, or

determinations are made at the criminal level. There, of course, could be civil lawsuits, but also at the administration level in the Office of Inspector General and the Bureau of Prisons.

Any of those adjudications under the directive of the Deputy Attorney General and the new approach of the Director of the Bureau of Prisons, those adjudications could be sufficient or determinations could be sufficient to warrant the Director of the Bureau of Prisons authorizing a compassionate release motion under the current process, and it would be our --

We would urge the Commission to include, if indeed part of the new compassionate release guideline includes, as we urge the Commission it should, an ability for defendants to bring motions for compassionate release based on sexual abuse. We would urge that there be a requirement of an independent determination through one of those channels.

VICE CHAIR MURRAY: And how long does that process take? I mean, it sounds like if

things have to go to the IG and then back to BOP or back to the U.S. Attorney's Office, it could be a lengthy process if the defendant is asked to wait to file a compassionate release motion until an adjudication has been finalized. Is that going to be -- can you give us a sense of how long that's going to take?

MR. MILLER: I don't have sort of a timeline statistic for you. I do know, as I mentioned, that part of the recommendations of our working group was to expedite and enhance our ability to move these investigations.

The Office of Inspector General has dedicated additional resources to that. The Department of Justice is putting more resources in restructuring the Bureau of Prisons internal process, and as I mentioned, we're doing a whole bunch of things to try to upgrade the reporting process.

I do think that it's important in these cases for any action that would be taken in connection with compassionate release not to

undermine our efforts to attain accountability, and the concern we have is while there's an investigation ongoing, if there were to be essentially sort of a mini adjudication in connection with a compassionate release motion before the investigation is complete, before all of the evidence is gathered, before we're able to determine whether or not additional steps can be taken to hold the perpetrator, if there is one, accountable, we're concerned that that kind of adjudication in the compassionate release setting could undermine our ability to achieve accountability. I don't have an exact time frame for you though and I'd have to get back to you with that.

VICE CHAIR MURRAY: Is it a matter of months, a matter of years?

MR. MILLER: I mean, each case is unique, of course, but I think my sense would be that the Office of Inspector General should be able to assess and do its part within, you know, a matter of months, but again, that depends a

little bit on the circumstances of each case and I'd have to get back to you with kind of what the data shows with respect to the timeline.

VICE CHAIR MURRAY: Thank you.

MR. MILLER: I would add one thing. I'm sorry. I do want to add that the Director of the Bureau of Prisons views this not as some hidebound administrative process, and she does view this as, that there may be many kinds of determinations that would warrant the ability to make a motion, and I already hit on a bunch of different determinations, but I think she's very much viewing this as there needs to be some sort of determination that the conduct occurred, but that she's open to different types of adjudications or determinations that would prompt the ability to bring that motion.

VICE CHAIR RESTREPO: And during the pendency of these investigations, is there any separation between the alleged perpetrator and the accuser or is the status quo maintained?

MR. MILLER: No, again, a number of

our recommendations are aimed at avoiding the status quo being maintained, so beginning with a recommendation that the Bureau of Prisons use its authorities to suspend or take other preliminary action with respect to a credible action of sexual assault, so moving the alleged perpetrator into a position where they're not in contact certainly with the complainant, but also potentially with other incarcerated individuals.

The second part of that, I think, to avoid the status quo is ensuring that while actions are taken to separate the complaining victim from the alleged perpetrator, that those actions don't harm the victim.

So, one of the things we've seen is, I think, in a good faith effort to avoid maintaining the status quo in the past, there have been situations where victims have been moved, for example, to a special housing unit or even moved to a different prison farther from their family, for example, and that's been one of the things we think that has been an inhibitor

for reporting.

So, we're looking for ways, including administrative actions, reassignments and the like, to avoid having negative impacts on the reporter because of filing the reporting, while, of course, maintaining some due process protections for the employee.

So, it's a challenging problem, but one that we're very focused on getting right so that we don't inhibit reporting, but at the same time, we don't maintain the status quo or permit the status quo to continue.

CHAIR REEVES: Does the administrative process yield to any criminal process that might be occurring? Because once a criminal act is done and you contact the U.S. Attorney's Office who opens up a criminal investigation, what does that do with the administrative process that might be occurring? Does that stunt it in any way?

MR. MILLER: Yes, I think it is standard for the administrative process to be put

on hold during a criminal investigation. I think for the same reason that we have concerns about a compassionate release adjudication, if you will, of the allegations going before a criminal prosecution or before an internal administrative effort to determine what happened, we have the same concerns about the administrative process getting out ahead of the criminal prosecution.

That said, as I mentioned, one of the recommendations in the report and one of the steps that has already been taken, I believe, by the Bureau of Prisons is to set up a process where folks who have been, who are the subject of a criminal prosecution who are BOP employees are put on suspension or otherwise removed from the prison setting so that they can be, you know, so we don't have the concern of repeat activity during the course of a criminal process, but the administrative process will follow the criminal process.

CHAIR REEVES: You have the benefit of being the only one here, so I'm going to take a

personal privilege of going over just a few minutes because I do have another question. I know certainly other commissioners do too.

We've been talking about Bureau of Prison employees. Now, I presume this same process applies to persons at private facilities that have contracts with the Bureau of Prisons, immigration facilities, other pretrial detaining places that might have contracts with the local United States Marshal Services, for example, who house our pretrial detainees, are these same recommendations that would apply to those organizations as well?

MR. MILLER: Well, this working group, the recommendations were targeted towards the Bureau of Prisons, but we certainly are cognizant of the fact that there are other settings in which some of the same problems may occur, and in some cases, have occurred.

And so, within the U.S. Marshal Service run facilities, certainly they're applicable to the exact same standards and we

would hold accountable and, you know, will from a prosecutorial standpoint as well as an administrative standpoint those facilities that are private run.

I don't have in front of me right now and can't speak to the exact internal administrative processes run by those facilities, but I think it's important to note also with respect to both the statutes that were recently passed and the guidelines that you all are considering with respect to sexual abuse of a ward, that the new statute does apply to non-custodial, I'm sorry, non-prison settings where there's custodial relationships between a law enforcement officer and someone in their custody and so do the guidelines.

So, these guidelines and the statutes prohibit sexual abuse of a ward outside of the prison setting as well where there is that custodial relationship.

CHAIR REEVES: Okay, and I know Commissioner Boom had a question or two.

COMMISSIONER HORN BOOM: Good morning. So, as part of the Department's efforts to ensure greater accountability, will you be tracking statistics on reports, time to adjudication, the number of reports as compared to in the past, the number of successful prosecutions or adjudications, you know, as part of your efforts to ensure accountability and sort of cleanup, you know, really the very troubling situation within the Bureau of Prisons related to these efforts, number one, and then number two, so that a year from now, if we ask the Department for statistics and data related to your efforts, will you be able to supply that to the Commission?

MR. MILLER: Yes, I believe so. One of the recommendations, again, from the working group report, and we can, if we haven't already submitted the working group report which covers a lot of the more policy and administrative discussions we've had here today, we can do so, but one of the recommendations of the report was to better gather and deploy data.

I think we should be able to give you the information a year from now that you described. I just want to pause and say for a moment though that I think the data that is needed to make a determination as to whether the guideline should be enhanced in the way that the Commission has proposed, I think we have sufficient data. I know that was raised in some of the submissions.

And again, to go back to the upward departures, which we've seen anecdotal evidence of and we submitted different transcripts and citations of cases where upper departures occurred, I think we have a situation where we have the data to see that upper departures are occurring at an unusually high rate with respect to this guideline.

So, over the last five years, 25 percent of cases have involved upper departures. My read of the last fiscal year was that three percent of overall cases triggered upper departures, so that's a pretty big difference and

I think reflects what we see in an anecdotal way, that this guideline understates the seriousness of the offense.

Certainly, we'll come back with data across the board as needed for the Commission with respect to investigations, reporting, prosecutions and the like. I just wanted to make sure that I did address the data question which was raised.

I think we do have sufficient data to see that this guideline understates the severity of the offenses and that's what's triggering the significant number of upper departures.

CHAIR REEVES: Vice Chair Murray, I think, may -- I know Vice Chair Murray had a question.

VICE CHAIR MURRAY: I actually have two questions for you, but they're both about sex abuse of a ward. The first one is just in terms of the base offense level increase for 2A3.2, obviously we've been in a 22 bracket, which means it can go anywhere up to 22. Why is 22 the right

-- I think the Department has supported 22 or even 25. Why is 22 the right number instead of 18?

I'm looking at the sort of analogous provision 2A3.2, which is statutory rape, and statutory rape has a base offense level of 18, and in some ways, statutory rape is very analogous because, again, consent cannot happen, and then it only goes up to 22 once you have custody care or supervisory control.

And in some sense, isn't statutory rape with custody care or supervisory control more than sex abuse of a ward? Because in both cases, you have the custody care element, but then in the statutory rape context, you also have the minor issue. So, should it be less than 22 is my first question.

And my second question is in terms of the new sort of Fair Housing violation, sex in Fair Housing violation, do you think that the cross reference to 2H1.1, which is to general civil rights offenses, accounts adequately for

the kind of sex component?

I know when I was in the Department, the Civil Rights Division had this big initiative on sexual abuse in Fair Housing and I think we always considered it particularly gruesome because you have both the civil rights offense and also the sex component, and so I wondered if you thought that the base offense level at 2H1.1 adequately accounts for what's going on in that new Section 250 offense? Thanks.

MR. MILLER: Thank you for those questions. I'll start with the first. We do think that 22 hits the right balance. As mentioned in the letter, right now the guideline 2A3.3 triggers the same guideline effectively for sexual abuse of a ward, so that involves, of course, penetration or oral sex, as does sexual contact.

That's the current situation, sexual contact being sort of groping or touching. That seems wrong quite clearly. Sexual abuse of a ward is a more significant offense, so we do

think a significant increase is appropriate.

The increase to 22 we also think appropriate. As I'm sure the Commission is aware, in addressing sexual abuse of a minor, there are different statutes. One of the statutes addresses -- and different guidelines.

So, one of the statutes and guidelines addresses sexual abuse of a minor under 12, which, of course, is a horrific offense, but has a different statute, different guideline.

Congress determined that folks between 12 and 16 and folks who are incarcerated, that neither category of victim can consent. They are criminalized in the same statute, 2243(a) and 2243(b).

Congress also determined that they appropriately have the same statutory maximum, 15 years, and we think that reflects that the conduct of taking advantage of someone who cannot consent is similar in nature and thus an appropriate guideline would start with at least the same level.

Now, to the extent that sexual abuse of a minor is particular pernicious, maybe that's because of, you know, a younger age, maybe it's because of other offense characteristics, deception and the like, we think those can be addressed, and some of those offense characteristics are already in specific offense characteristics within 2A3.2.

And so, we think starting with the same base offense level for the same, we think, similar conduct of taking advantage of someone who cannot consent is the right place to start with the base offense level. The particular attributes of sexual abuse of a minor can be handled through specific offense characteristics, some of which already exist.

VICE CHAIR MURRAY: But aren't minors -- don't minors start at 18?

MR. MILLER: They start at 18. They end up at 22 when they're in custody and there are additional specific offense characteristics relating to the offense in 2A3.2(a)(2) and (a)(3)

which can drive the offense higher.

With respect to the Fair Housing violations in 2H1.1, our view is that 2H1.1 does provide for not only the numeric base offense levels, but also the ability to apply the offense level appropriate to the, that's applicable to an underlying offense.

And we think that accounts in the sexual abuse scenario for the ability to cross reference to the applicable underlying offense, including some of the guidelines that we've been talking about, 2A3.1 for aggravated sexual abuse, 2A3.2 for certain kinds of other non-consensual sex.

So, we think the combination of 2H1.1 and applicable guidelines to underlying offense activity will account for, you know, making sure that the guideline is proper for the particular offense characteristics.

CHAIR REEVES: Vice Chair Mate?

VICE CHAIR MATE: I'll try to make this a quick question. First, thank you for your

testimony today. We appreciate it, and we also understand and appreciate that the Department is interested in efforts to prevent sex abuse in prison.

And it looked from the written testimony like perhaps you were hoping we could play a role in that and you mentioned helping to deter future misconduct by increasing the penalties for sex abuse.

And I'm aware of research about kind of the certainly of apprehension being an effective deterrent. If there's research you could provide us on that sentence length in this kind of context being a deterrent in changing prison culture, that would be helpful.

MR. MILLER: Certainly. Well, I don't have that handy, although I will through our ex-officio member try to submit what you're looking for, but I do think this is a special context and I want to speak to it in terms of the deterrent potential here.

So, I think where general deterrents

as opposed to specific deterrents is applicable, often you're dealing with a diffuse set of potential perpetrators. So, for robbery, for example, there's an unlimited number of folks who are out there. That's very hard to speak to about the guidelines or the penalties for robbery.

Here, we have a different scenario. We have a discrete community. Almost all of these cases involve BOP employees charged with the supervision of folks in custody.

Now, of course, I just want to say the vast majority of BOP employees are not engaged in any misconduct, sexual or otherwise, but the subset of people, the category of people who may commit this offense is a discrete one and it's one that can be communicated with directly through supervisory channels.

So, if the Commission were to raise the guidelines in this context, the Department and the BOP director would be in a position to directly communicate those changes and the likely

penalties to the work force, to the exact community that could be -- again, I want to say not every, by any stretch, or even --

You know, the subsection of people at the BOP that might be involved in this, I just want to point out, is very, very small, but we can communicate with those folks. We can communicate with them directly and we can communicate with them about the change in offense level and the change in likely sentence.

I think that's a very different scenario than most general deterrent scenarios and one that I think lends itself to an actual deterrent effect, and we would very much look forward to making those communications at the leadership level of both the Bureau of Prisons and the Department of Justice.

And the last thing I want to say about this is we know from our investigations that the perpetrators are aware of the light penalties that are out there.

As we submitted to the Commission in

connection with the Highhouse case that I mentioned earlier today, that prison chaplain told his victim that even if he were to be caught and found out, that he'd get a, quote, slap on the wrist, unquote.

So, there is an awareness in the population that there are light penalties applicable here, and we have the ability to change that awareness and make them aware of a much more significant penalty, which I think takes this out of the more general deterrence literature or data and makes it a special case.

CHAIR REEVES: I think Vice Chair Mate raised a great point. I mean, if we have statistics that show, you know, the amount of contraband that is entering into these facilities through various --

We have a prison in my hometown, so the word of who brings in contraband obviously, as a deterrent factor, it's not getting it to everybody because we have these occurring cases from correctional officers all the time.

So, I think you raise a good point of whether or not general -- even though you've trained the class of people for general deterrence purposes, the message may not be getting through.

MR. MILLER: Well, I think that's fair. I do think we are attempting to address sexual abuse of a ward as we've all been talking about, but we're also very focused on the contraband problem.

It's one that we've been speaking with the Inspector General about, the Bureau of Prisons Director is focused on, and actually I do think there is --

We've found that there's a correlation between contraband offenses and sexual abuse offenses where availability of contraband, particularly for those who are suffering from narcotics addictions, can be used as sort of a tool to then further sexual abuse of a ward.

So, actually the two problems are linked and the two problems are very much at the

forefront of the Department's efforts to root out this kind of misconduct.

Coming back to, I think, the Vice Chair's point, and yours, I think it's also the combination of more prosecutions, more potential and likelihood of being detected and some action being taken against you along with more significant penalties.

Those two have to link together and that's why we're not solely coming here to the Commission and saying we want you to solve the problem.

We're coming here with a broad plan to attack this problem which has many elements, one of which is more certainty of prosecution, more prosecutions, and another is more significant penalties, so the two go hand in hand and are part of an overall program that we have.

CHAIR REEVES: Mr. Miller, we really thank you for giving up all of this time and I appreciate it as we move toward the next panel because I've been seeing these faces of, you

know, you're going over time. I just want to make sure that we get the information we need.

We have work to do and it's going to take the information that you all provide. I am not stepping on real toes today because we want to flesh out these things and I certainly appreciate you for being in the hot seat for this long. Thank you so much.

MR. MILLER: It's been a great pleasure. Thank you and thank you to the Commission.

CHAIR REEVES: Okay.

Good morning.

MS. WILLIAMS: Good morning.

CHAIR REEVES: Our second panel consists of two attorneys whose practices provide us with, again, unique perspectives on this issue.

First, we have Heather Williams, who serves as a federal public defender for the Eastern District of California. There, she is supported by 84 attorneys and support staff

working in offices in Fresno and Sacramento. Ms. Williams previously spent decades serving as a public defense in the federal and state systems in Arizona.

Next, we have Natasha Sen, a criminal defense attorney who represents participants in federal drug court in Vermont. She has previously served as a federal and state public defender in that state. Ms. Sen chairs the Commission's Practitioners' Advisory Group and is a member of the Second Circuit's Criminal Justice Advisory Panel.

Ms. Williams, we're ready to hear from you, ma'am.

MS. WILLIAMS: Thank you so much. My office in 2018 represented a woman named Linda. She was charged with a supervised release violation for Grade B and C violations and was found in violation --

CHAIR REEVES: Speak into the -- bring the mic a little bit closer. Thank you.

MS. WILLIAMS: Thank you. And Linda

was sentenced to several years in prison. Eventually, she was designated to FCI Dublin in 2018 and she was there until 2021.

And she has reported since then that she was assigned to the food services department and quickly became aware that there were times when guards would come into their area, would take one of her fellow female inmates back to the refrigeration area, turn off the lights, and it was understood nobody was to say anything about it because they might get sent to the SHU.

She had a foreman who would rub his penis up against her bottom occasionally, and the first time it happened, she said what are you doing? And he said oh, my bad, but the behavior continued, and she understood that she'd be retaliated against any reporting of that conduct.

There was a night guard where she and her cell mate lived within the prison and he would insist that they be naked when he would come and do his nighttime rounds, and there was at least one time when he insisted that they have

sex with each other while he watched, and he told her that if she ever reported it, she'd be killed.

One of the things we have respected so much about this Commission is its dedication to evidence-based practices, and that is its dedication to collecting the data and the information, to studying it, and to analyzing it, and when warranted, to propose changes to the sentencing guidelines, but we don't have that information here as far as the base offense level increase from 14 to 22 in 2A3.3.

Between the fiscal years of '12 and '21, there were 65 cases sentenced under this guideline, 42 of which could be considered the kind of situation we're talking about here and that is involving law enforcement officers.

In those, with the base offense level of 14, excuse me, most sentences were within the guideline range, a few went below the guideline range, and a few went above the guideline range.

The previous speaker talked about some

of the cases that have been filed since 2021, again, a period of two years, and our understanding is that may be as little as ten cases, and yes, from the reading that I did, there have been upward departures, but that is not information upon which this Commission can go ahead and do an evidence-based proposal to increase the base offense level.

DOJ has said it will provide the data to this Commission. At that point, you'll have the ability to go ahead and do the analysis that you need to, to make an informed decision about any changes to 2A3.3.

But the changes, as the previous speaker noted and as you have observed, have to be much greater, and they have to be greater before any charges are filed. There has to be a change of the carceral culture within the Bureau of Prisons and the various facilities the government contracts with.

There has to be an opening of investigations. There has to be a comfortable

reporting mechanism for victims and there has to be continued training and intolerance of the behavior that you've been hearing about here.

In 1997, three women who had been housed at the federal detention center in Pleasanton filed a civil lawsuit against the Bureau of Prisons, the United States government, and select individuals at Pleasanton for a series of sexual assaults, which included women being housed in the SHU and then their doors being left open so that the male inmates as well as the guards could come into their cells and rape them.

I don't know what the outcome of that was in 1996 and 1997, but I do know that there was an interim attorneys' fee award to the plaintiffs' attorneys of over half a million dollars.

That amount of money plus probably a lot more was not enough inspiration to make any changes over the past 27 years, for in the Northern District of California just two months ago, the former warden of FCI Dublin was

convicted of the charges we're talking about that existed, that is sexual abuse of a ward, and four counts of 2244.

He'll be sentenced in a few months, but the behaviors that he engaged in and that he allowed in the very same prison that Linda was in went on for years and were egregious.

What we are asking the Commission to do is to not act now as far as increasing the base offense level. We are asking the Commission to look at DOJ and encourage them to practice and charge the offenses that really describe the kind of enhancement that they are seeking here, and that is they have full ability under 2241 and especially 2242(c), which talks specifically about coercion in prisons for sexual acts, to get the kind of sentences of up to life in prison and to get the abuse of trust enhancement that they are looking for.

It does not need to happen in 2A3.3 and we certainly ask this Commission to encourage the Department of Justice to follow through on

exactly what the previous speaker spoke about, and that is changing the culture so that you never have to hear about these cases again. Thank you.

CHAIR REEVES: Thank you. Ms. Sen?

MS. SEN: Good morning. Thank you again for the opportunity to provide testimony to the Commission on this proposed amendment. On behalf of the PAG --

CHAIR REEVES: Make sure you're speaking loud. Again --

MS. SEN: Sorry.

CHAIR REEVES: -- what you say is so important for everybody to hear.

MS. SEN: The PAG appreciates the Commission's willingness to consider the perspectives of those of us in the private sector who represent individuals and organizations charged under the federal criminal laws, and this morning, I will address an overview of the PAG's position related to this proposed amendment. The PAG will follow this in its March submission with

more detailed written comments.

The PAG appreciates the Department of Justice's request that the sexual abuse offense guideline be amended based on its investigations that revealed horrific abuse of our clients by BOP personnel.

The PAG agrees to some extent that these offenses involving BOP staff are not sufficiently punished under the current guideline regime. However, the PAG believes that the current proposal sweeps far too broadly, and as a result, it cannot support this well-intentioned proposal.

The proposed amendment, as the Commission knows, raises this guideline offense level by eight levels from 14 to 22, and the reason for the proposed change is to target this specific conduct by specific actors.

The amendment, however, is not targeted to just these actors and these people who are assaulting our clients in their custody. This proposed guideline, if adopted, will apply

to defendants convicted of all kinds of other offenses that are covered by this guideline and the impact is dramatic.

For individuals in criminal history category one, the bottom of the guideline range would currently be level 14, which would be 15 months. An increase to level 22 would make that guideline range 41 months, which more than doubles the current guideline range.

So, an actor who is not a BOP employee who is charged with a crime that is indexed to this guideline is going to have their guideline range automatically increase, not because of any specific characteristic based on their offense, but based on this desire to target this particularly egregious conduct.

The PAG suggests in the alternative that the Commission consider a narrower approach that addresses the specific conduct here perhaps through a specific offense characteristic that would enhance the sentences of those actors who commit these particular crimes.

Part B of the proposed amendment also proposes a cross reference to 2A3.1. The impact of a cross reference here would also be dramatic. It would raise the guide offense level from 14 to a minimum of 30 provided that those certain aggravated factors are found.

However, in criminal history category one, again where the guideline offense level is 14, the lowest range of the guideline would be 15 months. The cross reference applied would raise that to 97 months. That is more than a six-fold increase in the guideline range.

It may be warranted based on the conduct and the application, but at this stage, as I think Ms. Williams noted, there is simply not enough evidence to determine whether this guideline indiscriminately should be used for all of the offenses and to increase the base offense level in this manner.

There are also qualitative differences between crimes that are targeted under 2A3.2 which does contain the cross reference in 2A3.1,

and the Commission already recognizes those differences because 2A3.2 which targets minors has a base offense level of 18, whereas 2A3.3 has a base offense level of 14.

The PAG strongly believes that additional guidance would be necessary if 2A3.3 is amended to include the cross reference as well. Thank you.

CHAIR REEVES: I know Jonathan Wroblewski started us off yesterday.

COMMISSIONER WROBLEWSKI: I'm happy to if you want me to.

CHAIR REEVES: You may.

COMMISSIONER WROBLEWSKI: Thank you very much, Mr. Chairman, and thank you so much Ms. Williams and Ms. Sen for being here and for your testimony about this.

Ms. Williams, I have a question for you. First of all, I really appreciate you bringing your experience and the experiences of your clients here, but I heard a little bit of a disconnect between a couple of things that you

said that I just want you to speak to if you could.

First, you laid out a number of just horrific examples of sexual abuse in prison and the descriptions that I heard were cases where there were no witnesses, no explicit use of force, no explicit coercion, and yet, and this is where the disconnect is, and yet you suggest that the Department should charge these people under 2241 and other statutes that require proof of use of force and require proof of coercion, and I'm curious how do you square that? And then I have one other question just about the data you suggest that the Commission still needs.

MS. WILLIAMS: Well, first of all, part of the reason I went ahead and laid out what Linda's descriptions were is some of them I'm not sure there is a statute under which to charge them except perhaps the civil rights violation statute as egregious as they are and they feel.

I mean, only one of the ones that I described actually described any kind of sexual

contact and not actually a sexual act, so there is a question whether or not the situation with the night guard in the cell was some kind of coercion to engage in a sexual act with another individual being forced by the coercion.

It is 2242(c) which talks about the coercion and it's something that the previous speaker said inherently exists in the prison setting, and while that may be a factual matter for the trier of fact, there still has not been any test of that, but they do have the ability to go ahead and charge it, especially if they are seeking the kind of sentences that they say that they want to be able to have imposed.

COMMISSIONER WROBLEWSKI: But you recognize that that, it's all implicit, right, that it's implicit coercion, and you know as a defense lawyer, because, of course, without any witnesses, you know the --

(Simultaneous speaking.)

MS. WILLIAMS: I would attack that. I would attack that. I would also talk about --

you know, I mean, I've defended people who have been charged with sexual assault and rape throughout my entire career, and yes, that's something that a defense attorney is going to go ahead and light on.

But I think that it is also something that, with the use of experts and by encouraging an environment of reporting, there will be more witnesses. There will be more evidence that then DOJ can rely on to go ahead and do these prosecutions.

COMMISSIONER WROBLEWSKI: Let me ask you just one other question and that is about the data. You're suggesting that there is an insufficient amount of data.

In addition to the 65 cases I think you described that you're aware of over the last number of years with this particular statute, as you point out, there is a lot of experience over the last 30 years with prosecuting law enforcement officers.

This is basically a case of law

enforcement misconduct and the Commission has always had very, very strong penalties against officers who were prosecuted for law enforcement misconduct.

In 2H1.1, the Commission provides for a six-level enhancement in addition to the guidelines and the penalties for the underlying offense, so the penalties are almost doubled for anyone who is a law enforcement officer and commits misconduct in whatever way they do.

And I'm curious if you're satisfied with that and why isn't that sufficient experience to bring to bear here where it's law enforcement committing misconduct in a particular setting?

MS. WILLIAMS: Well, you're asking somebody who's a little bit torn as any defender would be in that we represent people who are potential victims of law enforcement conduct as well as being potential defense counsel for law enforcement who are charged.

What we hope to see, and I'm not sure

that this is going to entirely answer your question, is this may not be the guideline to go ahead and address those concerns.

2243(c) may not be the statute under which to go ahead and address these concerns, and it may be that the actual sexual abuse statutes, the abusive sexual conduct statutes of 2241 and 2242 are the ones that, while they still describe offenses that occur in prisons, could be used and should be used to go ahead and address the concerns that you've expressed here, and that again is the responsibility of DOJ to go ahead and make the determination about which statute should be charged against these offenders. I don't know if that answered your question though.

COMMISSIONER WROBLEWSKI: Yeah, I think it does, and the only point of my first question is obviously those determinations have to be made based on the available evidence, and your descriptions, I think, are pretty apt about the way these occurred, which is someone walks into food services and all of a sudden, the guard

takes them back to a refrigerator and they come out of the refrigerator, and that's the evidence.

It's those two human beings, and whether that can end up in a conviction and a charge under 2241 or 2243 or some other statute is a difficult question.

MS. WILLIAMS: It is a difficult question, but honestly, with any accusation of sexual assault, or rape, or sexual conduct, whether it happens in the civilian setting or it happens in the carceral setting, the same issues apply, and yet state, local, even federal law enforcement prosecuting, for instance, accusations off of the reservations, don't have any problem in going ahead and taking the word of an individual if there is perhaps some other evidence, some motivation. I mean, they look at the entire situation. That analysis should not be any different when the accusations happen in the carceral setting.

VICE CHAIR RESTREPO: Good morning, Ms. Williams.

MS. WILLIAMS: Morning.

VICE CHAIR RESTREPO: You referenced this change in the carceral culture and the intolerance. By not doing anything with respect to this guideline, would be buying into this?

MS. WILLIAMS: No. And I have to say, you know, I've represented literally thousands of people during my time as a federal defender, calculated it this last summer for a speech I was giving. Not one of those individuals ever said, you know, before I committed this crime, I thought about the sentencing guidelines and what the enhancement might be, and I still decided to commit the crime. Nobody's talked about the sentencing guidelines except to say, "What are you talking about?"

VICE CHAIR RESTREPO: What about the chaplain referenced who acknowledged that he was just going to get a slap on the wrist, wouldn't that be -- if a message was sent to folks that look, there are real consequences here, you think it would have any impact?

MS. WILLIAMS: Well, again, I don't know the context in which he made that statement, but it could be that the heard that when there'd been accusations made throughout the Bureau of Prison system that, you know, people just, they had a reprimand, they had a slip on the fist -- the wrist without any commentary about there actually being criminal charges filed against them. That's apples and oranges because as we know, when somebody has been found to have engaged in misconduct in the Bureau of Prisons, there has been a employment consequence. They have lost their job. They have lost their careers, and that's a pretty significant consequence in and of itself.

We can certainly feel like a slap on the wrist when a lot of these cases probably have not been prosecuted. And I mentioned the one just back from 1976 -- 1996, 1997, I don't know if the individuals who were accused in those circumstances were ever prosecuted criminally. I just know about the civil lawsuit.

VICE CHAIR RESTREPO: Thanks. Commissioner Wong.

COMMISSIONER WONG: Both Ms. Williams and Ms. Sen, thank you for being here. One of the things that the Commission grapples with is this concept of proportionality, and that can be proportionality to the harm, proportionality to the statutory maximums. And I wanted you to respond to one specific point that the Department made in its submission, which is talking about the need for the guidelines to reflect some proportionality or account for the difference between sexual contact and sexual actions. And right now the guidelines do recommend the same sentencing range even for touching and groping as for some of these sexual acts. How do you respond to the argument that that does not -- that the guidelines do need to reflect some kind of distinction between those given the very different nature of harm.

MS. WILLIAMS: I think that it does but I don't think the cross-reference is what

should be happening here. If the Department of Justice wants to have that proportionality of sentence, then the Department of Justice has the ability to go ahead and charge appropriately the offense that would bring that kind of sentence about without forcing a cross-reference in a guideline that really doesn't address that kind of a situation. And that is to go ahead and charge the 2241, the 2242 so that the appropriate guideline, in their minds, creating the proportional sentence should be happening.

VICE CHAIR RESTREPO: Ms. Sen?

MS. SEN: Thank you. Just to add to that, in terms of proportionality, the court, of course, always has discretion to depart to reflect the nature of the offense, and if there are specific offense characteristics that would address certain types and the manner in which the offense is committed, I think the PAG would support an approach that is more narrowly tailored than just increasing the level across the guideline.

VICE CHAIR MURRAY: I have a question for Ms. Sen. Thanks to both of you for being here. You mentioned in your testimony that you were concerned that there were other statutes that are also the 283.3 applies to that you didn't think merited a sort of increased base offense level. Could you spell out what some of those are, what -- which ones give you pause?

MS. SEN: So for example, even under 2243(b), which is abuse of a ward in 18 U.S.C. 113(e)(2), which is assault with intent to commit another felony would be indexed to that. And I think that the data that the defenders submitted in the written statement actually support that this guideline is being appropriately used, because I think what that shows and I think that what Ms. Williams just testified to is that the vast majority of cases where this guideline is applied fall within guideline, some below, a few above, and that's probably about the right way to look at how appropriate the guideline is operating. If it looks like there are not a huge

number, for example, of upward departures, then it doesn't seem like this guideline needs to be amended upward to account for this very small group of offenses.

CHAIR REEVES: Additional questions of this panel?

Ladies, thank you so much for your testimony.

All right. Our third panel will provide us with perspectives from two of the Commission's advisory groups. The first panelist is Jill Bushaw, who serves as Chair of our Probation Officers Advisory Group. Ms. Bushaw serves as a Deputy Chief United States Probation Officer for the Northern District of Iowa. She joined the United States Probation Office in in 2003 and has previously held positions as a Sentencing Guideline Specialist and a Supervisory and Assistant Deputy Chief in the Presentence Investigations Unit.

The second panelist is Professor Mary Graw Leary, who serves as Chair of our Victims

Advisory Group. Professor Leary is a Senior Associate Dean for Academic Affairs and a professor of law at Catholic University of America. Professor Leary has previously worked in a range of positions in the criminal justice system including as an Assistant United States Attorney for the District of Columbia, as the Director of the National Center for Prosecution of Child Abuse, and as a Deputy Director in the National Center for Missing and Exploited Children's Office of Legal Counsel. Ms. Bushaw, we're ready to hear from you, ma'am.

MS. BUSHAW: Good morning and thank you again for the opportunity to testify on behalf of the Probation Officers Advisory Group. The testimony I have for you today is very technical in nature given our role, the nature of the proposed amendments, and these issues for comment.

But I'd first note with regard to the amendments to address new legislation under 18 U.S.C. 250, POAG acknowledges the complexity

involved in determining which guideline will best capture the conduct that new legislation is intended to address and fully account for the varied ways in which such an offense could be committed.

POAG concurs with the proposed amendment to refer convictions under the newly enacted statute at 18 U.S.C. 250 to 2H1.1, particularly because the manner in which the base offense level under that guideline is structured. Specifically, under 2H1.1, the base offense level provides the option to apply the offense level from the guideline applicable to any underlying offense which flexibility is essential when the statute criminalizes such a wide variety of conduct.

POAG further notes this format provides for ease of application. As we noted in our written testimony, we believe the penalty provisions under 18 U.S.C. 250 all reference statutory provisions that correspond to conduct addressed under 2A3.1 or 2A3.4. With regard to

the newly enacted statutory penalty under 18 U.S.C. 2243(c), which involves incidents in which a federal law enforcement officer knowingly engages in a sexual act with an individual under arrest, under supervision, or in detention, or in federal custody, we also concur that the applicable guideline for that offense should be 2A3.3 as the offense conduct is comparable to 18 U.S.C. 2243(b).

One of the more significant changes pertaining to this guideline is the proposed amendment to increase the base offense level under 2A3.3. In other cases where the conviction is under 18 U.S.C. 2243(a) and involves a minor, the applicable guideline is 2A3.2, and that guideline has a base offense level of 18. These victims are vulnerable due to their age and the harms at such a developmental stage in their life have an ongoing ripple effect. However, we do not seek to distinguish the comparable severity of sexual acts with victims who are in custody as they are similarly vulnerable given their custody

status and the correctional officer assumes a significant position of authority in relation to the inmate. Therefore, the majority of POAG recommended that 2A3.3 be amended to reflect a base offense level of 18, which is comparable to the base offense level under 2A3.2 with the understanding that relevant conduct will then account for any applicable factors depending on the facts and circumstances of the case.

Along those same lines, POAG also concurs with the option for a cross-reference to 2A3.1 if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse including aggravating circumstances in which 2241(a) or (b) applies whether the victim was in custody, and it also accounts for cases in which the victim suffered from bodily injury.

Only for reference and to note the impact of this change, POAG notes the defendant could be charged and convicted under 2243(c), which carries a statutory maximum of up to 15 years but could be held accountable by way of the

cross-reference to 2A3.1 based upon relevant conduct for a more serious conduct such as that associated with violations of 18 U.S.C. 2241. POAG doesn't think that's an appropriate application to the cross-reference, just pointing a note out as the potential impact. But we would also point out that this type of scenario has also operated to benefit defendants in situations where the parties agree the defendant will plead guilty to the lesser penalty under 2243 but agree they will be held accountable for the aggravating circumstances under relevant conduct by way of the cross-reference to 2A3.1. So and in such instances, the guideline range then will be capped at that lower statutory maximum.

Further, with regard to the proposed language regarding the cross-reference at 2A3.3C, we note the narrative indicates if the victim had not attained the age of 12 years, 2A3.1 shall apply for inmates -- or 2A3.1 shall apply regardless of the consent of the victim. We inquired if the same standard should apply for

inmates who are in custody and subject to correctional authority given the DOJ has indicated that consent is not a defense under 2243(b). We believe clarification of consent for 2243(b) and (c) convictions would contribute to consistent application of this cross-reference and reduce litigation at the time of sentencing. Thank you.

MS. GRAW LEARY: Thank you. Thank you, again for inviting the Victims Advisory Group to offer a victim perspective on these proposed amendments. We will not offering a technical read but more of trying to channel the perspective of the people that our group serves. We thank the Commission for addressing this important issue and finding that it underscores the inherent dignity of all victims of sexual violence.

As we comment in our written testimony, we support the proposed amendments in this area, and we do so for really two background reasons; the purpose of the criminal law, to put

it bluntly, and the purpose of sentencing. Let me first talk about the first. Maybe I'm channeling my inner law professor. So if you think back to your first year of criminal law class, we teach our students what? We teach them what's a crime. A crime is a voluntary act that causes a social harm. And we talk to them a lot about what is the social harm and how can one act lead to multiple criminal charges. Well, it can because the social harm is different. Someone is sexually assaulted, that is different than someone is sexually assaulted and photos were taken; someone is sexually assaulted and someone is sexually assaulted in a custodial circumstance, that is different.

The social harm matters and that is really important, and we think the act of the sexual assault is one of the most egregious criminal acts, Inherent in the crime is the reality that offenders often seek particularly vulnerable victims and at times, that vulnerability is so apparent, it's not just the

characteristic of the victim survivor but the very reason that the offender had targeted this particular victim. And that reason is both the vulnerability that comes with being unable to protect oneself, such as a child, etcetera, but also being unable to report because of the level of control the offender has over their lives. And in such a case, the social harm of this devastating offense is amplified creating a different and more egregious social harm, and that is needed a different more significant punishment.

With regard specifically to sexual abuse offenses while committing civil rights offenses, the new statute addressing this context is a vast range of punishments. A base offense level that reflects the seriousness of such an offense is appropriate, and it should be similar to the base offense levels in other types of offenses addressing those not legally able to consent.

VAG supports the amendment to reflect

a higher base offense level in order to reflect crimes involving sexual abuse will be treated with the understanding that those who prey on uniquely vulnerable victims should pay a higher penalty than those who do not. Additionally, offense characteristics and enhancements should include the higher penalties for serious bodily injury and threat of force, and as the POAG pointed out, also use of restraint as they again indicate the social harm is magnified.

The second sort of fundamental reason has to do with our purposes of sentencing, which I don't have to tell this Commission that the seriousness of the offense is relevant in analyzing the appropriate guideline, promoting respect for the law, and deterrence. All of those deserve to be recognized.

With regard to sexual abuse of a ward, the VAG agrees with the statutory penalty for 2243(c) is not reflected appropriately in the guidelines. The current cause for -- the current base offense level equals barely a year in

custody yet the statutory maximum is 15 years. We support raising that offense level as it reflects the seriousness of the sexual violence the victim experienced. Widening this gap, there are also no enhancements for especially egregious cases effectively conveying to the court not only that there might be no reason to sentence the offenders to longer sentences but the Victim Advisory Group would suggest the lack of this important language suggests that this class of victims is less worthy of protection than other victim survivors. And we think the sentencing guidelines should absolutely not reflect that.

In contrast, other federal sexual abuse crimes have far higher base offense levels. And while those offenses do have an element of coercion, as was discussed at the earlier panels, anyone already a wad or in custody, the coercion is, as has been discussed, not only implied but is absolute in these circumstances. The change -- - this change would be a recognition of the unique social harm of sexual assault crimes in

these situations. Not only would it convey a lack of tolerance, but it would also convey this unique harm.

The Commission, we agree, should also consider -- we agree with the Department of Justice's position to consider an abuse of trust enhancement under 2A3.3, and this will ensure that courts properly evaluate that power differential. Thank you.

CHAIR REEVES: Any questions from any of the Commissioners? Vice Chair Mate.

VICE CHAIR MATE: Morning. Thank you both for your testimony. We really appreciate it. I had a question. One of the other advisory groups, the Practitioners Advisory Group recommended that we address this issue with 2A3.3 through a specific offense characteristic rather than increasing the base offense level. And I was curious whether either of your groups discussed that as a possibility and had thoughts on that.

MS. BUSHAW: We did discuss the base

offense level or the specific offense characteristic option. Generally, if it's intended to categorically apply to all convictions, we say base offense level, just it's for ease of application rather than doing the base offense level in a specific offense characteristic. But honestly, the other statute that the defenders mentioned wasn't something that we were aware of at the time we made the decision to recommend the base offense level. So we would agree to maybe just a four-level specific offense characteristic instead of increasing the base offense level of 18. You would get to the same location but not increase it for every statutory that pertains to that guideline.

MS. GRAW LEARY: We did not discuss that specifically. However, we do think that, as the amendments point out, sort of that comparison on base offense level matters. What does that say about the value of the victims with the base offense level. And we think that that should --

I would suggest that's the more appropriate avenue to pursue.

CHAIR REEVES: Yes. Vice Chair Murray and then Commission Wroblewski.

VICE CHAIR MURRAY: Ms. Bushaw, could you walk us through your proposal with regards to 18 U.S.C. 250(b)(3) in the second paragraph of your submission? I see what you're saying with there not being a good cross-reference of an underlying offense under 2A1.1, but what is your recommendation?

MS. BUSHAW: The commentary to include an applicable guideline when the penalty provision is under 250B3, I think our position was just the rest of the penalty provisions under 250 directly lined up with another statute which then directly lined up with another guideline. And so we just thought maybe that's the only one that might be a little unclear, and we thought if the Commission agreed that 283.4 was mostly closely aligned with that penalty provision, that we -- it should just be clearly stated in the

commentary to reduce any litigation on that issue.

VICE CHAIR MURRAY: Okay, thanks.

CHAIR REEVES: Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Yes. Thank you so much and thank you both for your testimony today. Ms. Bushaw, I just have -- I just want to clarify the position of POAG on the offense level. My understanding, from your testimony, is that POAG agreed that the offense level should be comparable whether it's a minor in custody or whether it is someone in prison in custody; is that right?

MS. BUSHAW: You didn't want to distinguish and be insensitive to one or the other but generally, child victim offenses have a higher base offense level. And if this went up to 22, as some have suggested, then the inmate offense level would be higher than minors. And so we thought -- they have enough similarities, we thought it would be fair to recommend a

comparable base offense level of 18.

COMMISSIONER WROBLEWSKI: Okay. And then -- but at the same time, am I correct -- so I'm looking at 2A3.2. I just want to make sure I've got the numbers right. So 2A3.2 on the minors is 18 but then there is a specific offense characteristic of 4 if you're in custody, which gets you to 22?

MS. BUSHAW: Correct.

COMMISSIONER WROBLEWSKI: And 2A3.3 does not have the same specific offense characteristic so the way -- if we're looking at parity, the way you get to 22 is you have to raise the base offense level, or you have to add a specific offense characteristic for being in custody. Am I getting that right?

MS. BUSHAW: You are correct. So there is no custody enhancement under 2A3.3. So if you just looked at those two factors if you were scoring an offense, the 2A3.3 would be 18, so the minor at 18 plus 4, there's still a four-level increase distinguishing those two.

COMMISSIONER WROBLEWSKI: Okay. Thank you. I just wanted to clarify.

CHAIR REEVES: Any additional questions of this panel?

VICE CHAIR MURRAY: I guess I have a sort of opposite or the inverse of that question for Professor Leary. Am I right you recommended a base offense level of 25; is that because you think that these offenses are more serious than offenses against minors?

MS. GRAW LEARY: Well, the Victim Advisory Group, of course, as I think everyone in this room, is really not comfortable sort of distinguishing who's harmed worse, right. I realize it's not the question of the Vice Chair. So we found it difficult to sort of rank them but of course, it's a relevant data point, etcetera.

And the discussion around 25 was essentially we thought it was still consistent with the statutory maximum. The really aggravated role of the offender in this particular instance, we think the absolute

control, right, absolute control not only at the time of the offense, as the previous panelist -- previous two panels have talked about, but afterward, really amplified this harm, I hate to say, even more but in a different way than it does for children who are not in custody, who are not -- or situations like that. So that was where we landed with that number.

CHAIR REEVES: Any additional questions?

All right. Thank you ladies for your testimony. We appreciate you. That concludes our panel testimony on our proposed amendment regarding sex abuse of a ward. Before we turn to our proposed amendment to acquitted conduct, we will take a brief break. We will resume our testimony in approximately 15 minutes at about 10:45 or so. Please make sure you're in your seats before we start up again. Thank you so much for your attention.

(Whereupon, the above-entitled matter went off the record at 10:27 a.m. and resumed at

10:49 a.m.)

CHAIR REEVES: Hope everybody had a great break.

Today's fourth panel will provide us with the Executive Branch's perspective on our proposed amendment regarding acquitted conduct. That perspective is being provided by Jessica D. Aber, who serves as United States Attorney for the Eastern District of Virginia.

In that role, Ms. Aber leads a staff of approximately 300, supervising the prosecution of all federal crimes in a district that serves over 6 million people.

Ms. Aber previously serves -- served as an Assistant United States Attorney and as counsel to the Assistant Attorney General for the Criminal Division at the Department of Justice.

Ms. Aber, thank you for coming. We're ready to hear from you.

MS. ABER: Honorable Chair Reeves, vice chairs, and commissioners, my name is Jessica Aber, as you said, and I have the honor of

serving as the United States Attorney for the Eastern District of Virginia. Thank you very much for this chance to discuss the Department of Justice's views on its views of acquitted conduct sentencing.

The Department understands the Commission's concerns and appreciates its goals. But curtailing a court's discretion to consider conduct related to acquitted counts would be a significant departure from longstanding sentencing practice, Supreme Court precedent, and the principles of our guidelines.

The Commission's proposal will unduly restrict judicial fact finding; it will create unnecessary confusion in litigation; and it will result in sentences that fail to account for the full range of a defendant's conduct.

Two initial points are worth noting:

The first is that juries do not acquit defendants' conduct. They acquit on particular charges and for many reasons. Sometimes it's because they reject an allegation about the

defendant's conduct, sometimes they do not.

Second, and this issue only arises when the defendant is convicted on one or more charges after a trial. This is important, because when such a defendant is sentenced, it is only for the count for which he was convicted. And the sentencing court is naturally limited by the penalty range for the count of conviction.

The Commission's proposal would unduly restrict judicial fact finding and curtail juridical discretion.

Section 3553(a) requires, as we know, a judge to impose a sufficient but not greater than necessary sentence based on the nature and circumstances of the offense and the history and characteristics of the defendant. And Congress expressly provided in section 3661 that there are no limitations on the information that a defendant's conduct -- about a defendant's conduct that courts may consider in sentencing.

The Commission's proposal is, unfortunately, inconsistent with both of those

statutory provisions, as it would limit the information a sentencing court could consider and lead to sentences that fail to account for the full range of a defendant's conduct.

The Commission's proposed definition of acquitted conduct will make it difficult for court's to parse the defendant's acts or omissions that they can and cannot consider.

An acquittal, as we know, does not necessarily mean that the defendant did not commit a specific act. Triers of fact decide charges, not conduct. And conduct may, and often does, underlie both a count of conviction and a count of acquittal.

And although the Commission has very much tried to address such a circumstance in this proposal, there will be difficult questions if left as is.

What happens, for example, when the conduct underlying a count of acquittal is relevant to the count of conviction but does not satisfy the elements of that count?

Or when all of the same conduct underlies both a count of acquittal and a count of conviction?

Or when the jury returns an inconsistent verdict?

Guideline amendments should be workable and should not overly burden the courts or invite excessive litigation. And limitations on judicial discretion should be clearly defined.

We are particularly concerned about complex cases, and those in which charges are linked together such as cases involving conspiracy, obstruction, or false statements, civil rights, sexual abuse, and firearms charges.

The Commission's proposal also fails to account for acquittals unrelated to the defendant's conduct, such as failure of proof on a technical element like venue, statute of limitations, or jurisdiction. These circumstances often arise in civil rights cases, sexual misconduct cases, child exploitation cases, and other cases involving particularly

vulnerable victims who may not report a crime until long after the offense is committed.

For these reasons, and for those in our written testimony, we do not think that Commission's proposal to exclude acquitted conduct is workable or wise. If the Commission does adopt this exclusion, we respectfully request several amendments to, first, include specific exceptions and clarify the definition of acquitted conduct;

Second, we recommend moving language from the commentary to the text;

And, finally, we recommend adding additional language to ensure that we protect victims' rights.

While these changes will not fully resolve our workability concerns, our changes would better account for split, overlapping, or inconsistent verdicts.

And with that I thank you again. And I am happy to take your questions.

CHAIR REEVES: Thank you, Ms. Aber.

Now I turn to my fellow commissioners.

Vice Chair Mate.

VICE CHAIR MATE: Thank you for your testimony today and coming to be with us. We appreciate it.

A quick question, I think, for you is are you aware of any state guidelines that consider acquitted conduct when determining the guideline range?

MS. ABER: Vice Chair Mate, that is an excellent question and one I'm not prepared here to address. I'd be happy to have the Department file something in writing in response.

VICE CHAIR MATE: Great. Thank you. I'd appreciate it.

MS. ABER: Thank you.

VICE CHAIR RESTREPO: Good morning.

If I understood you correctly, you said that individuals are sentenced based on the conduct for which they were convicted. Correct?

MS. ABER: They are sentenced --

VICE CHAIR RESTREPO: Charges.

MS. ABER: Charges of which they were convicted and then sentenced on the totality of the conduct.

VICE CHAIR RESTREPO: So, in your world view then acquitted conduct would fall within a number of conduct they can be held accountable for at sentencing?

MS. ABER: Yes, Commissioner. Because the case law and 3553(a) invite and require a sentencing court, as Your Honor knows, to consider the totality of the conduct of the, the offense. And for that reason, that is why acquitted conduct would fall within, I believe you used the word penumbra, within the penumbra of that, that definition.

COMMISSIONER HORN BOOM: I have a question. Good morning. Thank you.

So, let's just assume that I agree with the Department's technical argument that judges should be allowed to consider acquitted conduct based on 3661. And, you know, the courts, your argument that the jury is the finder

of charges that ultimately the sentencing judge determines the appropriate sentence based on all the information.

Is there, is there a public confidence component, though, that would still support the proposed amendment?

You know, I think most folks in the public have a real recoil at the idea that a judge, notwithstanding the importance of, you know, the jury's verdict, that notwithstanding that acquittal, the court can nevertheless turn around and use that information and those facts to ultimately increase the defendant's sentence. And so, even if I agree with your technical arguments, isn't there a public confidence component that could be served by the amendment?

MS. ABER: That is an excellent question, Commissioner, and one that I, frankly, grappled with as I prepared to testify here today.

When I advised my assistant or my family members who are not lawyers and wondered

what was going to happen here today, and I explained the topic, they were a little surprised that this is something that is permitted and actually welcomed under federal law.

And I will be totally candid in that way.

But the truth is, once the matter is examined from a legal perspective, that outweighs any potential difficulty at first blush. Once we get beyond the first sentence of how could we, how could we consider acquitted conduct when one is sentenced, we then go to the legal basis for sentencing.

And as I said to Vice Chair Restrepo, the truth is we want district judges to be considering the totality of the person, their history, their characteristics, and the totality of the offense, not only in favor of justice but in favor of ensuring the victim's rights are adjudicated.

While I am sensitive to what you are saying, I think, I think we have to go beyond

that to do what is legally correct and, on balance, probably more correct to ensure that a just, no longer -- sufficient but not greater than necessary sentence is imposed on a defendant.

CHAIR REEVES: Yes. Commissioner Wong.

COMMISSIONER WONG: Ms. Aber, thank you for being here.

I've got a question about the victim suggestions that you provided. And, for instance, in the scenario let's say it's a, there was a Hobbs Act conspiracy that a jury were to acquit on, for whatever reason, on one particular robbery. Do you understand the Commission's current proposed draft to bar the judge from considering a victim's, a victim's allocation at sentencing or victim impact statement at sentencing as to that acquitted robbery?

MS. ABER: I, I don't believe that the text of the amendment as written is clear on that point. And so, the Department's perspective is to ensure that we are coming out in favor clearly

and explicitly to permit victims to be in that circumstance to provide whatever testimony a judge deems appropriate and relevant to the determination of the ultimate scope of the crime for which the defendant's being sentenced.

So, I, I don't suggest that the Commission intended to omit victims here, it was more that we felt like it was important to clarify that.

VICE CHAIR MATE: Can I go back to the public confidence issue for a second, and balancing that with, you know, under 3661 the court's ability to consider a wide range of evidence.

In our proposal there's not a suggestion that acquitted conduct be entirely banned from a court's considerations at sentencing, but just a more narrow proposal that way. And I'm curious on your thoughts on whether that appropriately balances the public confidence component and saying that generally we have, you know, there's some concerns with acquitted

conduct but still leaving room when the judge is making the ultimate sentence determination to consider a wider range of conduct.

MS. ABER: And that is the reason why the Department is not here, Vice Chair, saying, you know, please make no amendments. Leave relevant conduct just as it is.

That is the preliminary position we are in. But we recognize, I think practically, that there is a public confidence program -- or problem, if I can use the terminology the Commissioners have used. And that is why if we are going to go this route, or if the Commission is going to go this route we think the current iteration is unworkable.

And we would respectfully ask that you, that you both narrow and more carefully define what is and is not relevant conduct that may be considered at a sentencing.

VICE CHAIR RESTREPO: Do you have any suggestions?

MS. ABER: I do, yes. Yes,

Commissioner.

We had proposed in our letter probably a handful of changes. So, we are narrowing, as we proposed, the definition of acquitted conduct with specific exceptions, and clarifying the definition to reduce administerability concerns.

And so what that means is, first, I understand that some circuits they questioned the authority and validity of certain provisions in the guideline commentary, so we recommend moving from the commentary to the text itself the explanation of when acquitted conduct is permitted to be used.

So, if, even if it's not permitted to be used in calculating guideline range, it could in fact be used in assessing the correct sentence within the statutory maximum period -- range.

The second part of our suggestion, and our revised definition include adding a subsection (a) to refocus on the evidence and the elements specifically, clarifying that the Commission's proposal is not intended to prevent

defendants in court from considering, as I said, conduct underlying the elements of the charge for which the defendant was convicted and a jury necessarily found beyond a reasonable doubt.

Because the red line version of what we propose is on page 16 of the Department's letter.

We also propose a subsection (b) which clarifies in cases where there is a special verdict form or judge's statement of a non-jury trial is to reflect fact findings that could be used as relevant -- or acquitted conduct as relevant conduct.

And then we add a subsection (c) which accounts for circumstances in which trial evidence otherwise establishes that a defendant committed acts or was committed of a count because of technical or non-substantive information. So, it would allow a court to consider underlying acquittal counts for which the court decides the acquittal was unrelated to factual innocence.

So, if the court makes a finding that it was due to a venue problem, a statute of limitations problem for which the jury acquitted, then the court could use that count or that conduct in assessing the relevant conduct.

CHAIR REEVES: So, you believe that there are certain technical things that a jury could -- that a judge could sort of set aside that a jury did not, and then look it and then it would be left up to the judge to maybe it's jurisdiction or its statute of limitations, for example, and the judge should disregard whatever the Government has failed to prove, or whatever the jury has rejected. You know, 12 people in that particular community.

So, the judge could supplant what the eye witnesses, that is the people of the community who are there to protect, stand in the breach between the Government and the accused, that the court should sort of supplant what the jury has found, and reject all that, and take into consideration for sentencing purposes the

things that the jury has already rejected, or that the jury did not find?

MS. ABER: Chair Reeves, that is a totally -- and I appreciate where you're coming from. What the Department's proposal says or permits is for a judge to have the discretion to decide that count was only -- the jury acquitted on that count because of a statute of limitations issue, or because of some technical proof when it came to a child exploitation case and some technical aspect of proving all the elements.

The judge could say, you know, I would like to consider that. I found the evidence beyond -- at a preponderance level. And I will use that as relevant conduct in assessing the guidelines.

But under the Department's proposal a judge is absolutely free to disregard that for all the reasons you've just described as well.

I think, also, though, I would direct the Commission's attention to the number of cases with inconsistent verdicts. I think we've all

probably seen this at some point where you have an acquittal on a conspiracy but a conviction on a series of substantive counts, or vice versa. Something that really doesn't make sense but reflects a compromise verdict.

And that's the kind of instance in which we want to give a judge the opportunity to, to sort that out and properly apply the guidelines as they see fit to cover that conduct.

CHAIR REEVES: So, the judge becomes a super jury?

MS. ABER: No. Respectfully, that's not, that's not the intention here. But that said, to some extent a judge does become a super juror at every sentencing in assessing one's criminal history, the scope of the conduct, assessing relevant conduct.

This particular definition is not intended to give any sort of, you know, undue weight to the judge's fact finding missions but, rather, impose some sort of strictures so that the judge can have the discretion to decide if

the, if the acquittal was for a reason that -- if the acquittal was for a reason that's not, if the acquittal was for a reason that is technical in nature.

CHAIR REEVES: Okay. But what if the acquittal is because the Government did not prove a very -- a point of jurisdiction for example? And that's the Government burden to do, that the crime occurred in a particular place. Sounds technical and sounds non-substantive, but the Government has the burden to prove that. And if they don't prove it, the jury finds the person not guilty.

That's, I mean, that's how the system is designed to operate; right?

MS. ABER: Respectfully, every judge may, and it's very case-specific, very fact-specific, very judge-specific. The Department's definition seeks to authorize and give discretion to judges to make those decisions if in a particular case the judge believes it to be proper.

CHAIR REEVES: I know Judge Restrepo has a question. But I do have one follow-up.

Okay. Could that lead to greater disparity?

What if there is a group of judges who just won't consider acquitted conduct to enhance sentences, whereas there are many other judges who say it might be appropriate if this Commission doesn't define it in a way, and they always do it. Could that not lead to greater disparity between districts, between circuits, between whatever?

MS. ABER: I don't think that's of a great concern here for two reasons:

The first being, you know, as the comment -- or, excuse me, as the proposal notes, this is a fairly rare circumstance. We're talking about instances in which the defendants go to trial, which is very rare in the federal system, and get acquitted of one or more counts. And so, that's pretty rare. So, that's the first thing.

But the second thing is that there, unfortunately, as someone who practiced the guidelines, ample options throughout the guidelines for judges to make these kinds of determination that they will or won't do something.

And this is no different. This is just an opportunity to provide the court with the discretion to make a choice, and ensure that all of the relevant conduct that the court believes proper is used to assess a sentence.

CHAIR REEVES: I know that earlier you said that this might happen a lot in a different other context. We see it all the time.

So, I don't know if it's rare.

MS. ABER: I apologize for my poor choice of words.

CHAIR REEVES: No, no, that's fine.

MS. ABER: As I sit here slightly nervous.

The truth is, statistically we know this is not happening every day. But I can say

anecdotally, and I can provide an example, and based on the case law I read in preparation for this to assess when acquitted conduct can be used, this is if you're going to have an acquittal, more often than not if there was some count of convictions it doesn't always make sense why some of the counts were convictions and some were acquittals. And that's in part because we don't -- we trust the jury to do what they believe is right.

CHAIR REEVES: Thank you.

Commissioner Restrepo.

VICE CHAIR RESTREPO: Yes.

If I could segue on this question, so, your suggestion that a jury may acquit on a technicality, or a venue issue, or a jurisdictional issue, the judge will never know that. Because we don't use interrogatories. I'm not familiar with too many criminal cases where there are interrogatories. They're strictly guilty or not guilty. Did they prove the case or not?

So, how would the judge know why somebody was acquitted of particular counts that would then allow them to say, oh well, that was a venue issue, and that was a jurisdictional issue?

How? How would that work?

MS. ABER: How would that work? That is a good question.

I think you identify that it would be a matter that the United States would have to demonstrate some evidence of. Presumably there were motions regarding those issues, the statute of limitations, the venue as an affirmative defense, something along those lines that would provide a clue.

But if the judge can find, in his or her discretion, that the Government had met that burden at a sentencing then, absolutely, under this definition the court would be free to disregard that.

CHAIR REEVES: Vice Chair Murray.

VICE CHAIR MURRAY: I was going to ask if you thought sentencing and trial serves the

same purpose, considering that we have a lot of evidentiary rules, reasons that we exclude evidence from trials that we permit at sentencing? And I wondered if you thought that there was a reason for that?

MS. ABER: Well, I mean, I think the objective for, for everyone, and I can only speak on behalf of the Department, is to have fair and just proceedings that help public confidence, and as the commissioners have noted, and achieve just and consistent results as best we can.

So, as to, as to specifically, like, whether trials, whether pretrial rulings bear on, you know, the out -- I'm not sure I'm prepared to say any more than that here today.

CHAIR REEVES: Any other questions?

Thank you, U.S. Attorney Aber. We appreciate you so much.

MS. ABER: Thank you, Chair Reeves.

CHAIR REEVES: Our fifth panel consists of two attorneys whose defense side practices provide us with very unique perspectives on this

issue.

First we have Melody Brannon, who serves as the federal public defender for the District of Kansas. In that role she oversees three offices, a staff of 42, and a Criminal Justice Act panel of approximately 80 attorneys.

Ms. Brannon has spent over 30 years as a public defender in state and federal systems, and currently serves on the Federal Defender Sentencing Guidelines Committee.

Next we have Natasha Sen, who has been with us on a carousel a couple of different times. And I hope you don't -- your success is not intimidating at all. Where the chair of this advisory group gets intimidated by not accepting that position because you've been there so much for that. And I appreciate you though.

She's a criminal defense attorney, again who represents participants in federal drug court in Vermont. She has previously served as a federal and state public defender in Vermont.

Ms. Sen chairs the Practitioners'

Advisory Group, and is the member of the 2nd Circuit Criminal Justice Act Advisory Panel.

Ms. Brannon, we're ready for you next.

MS. BRANNON: Thank you very much. And I'm very happy to be here to talk with you about acquitted sentencing conduct.

I think we all know about the plummeting rate of jury trials in our system. And I find that very disturbing. And I think back to John Adams talking about the right to testify and the right to a jury trial are the heart and lungs of our liberty.

We should be doing everything we can to preserve and to revive jury trials in our system. And this amendment moves us towards that. And that is why I am very happy that the Commission is considering this.

We recognize that there aren't a lot of people that necessarily find themselves in the crosshairs of acquitted conduct sentencing. For those who do, it can be devastating.

I've talked about Jesse Ellsworth in

my written testimony. And I'll talk about him again in just a minute.

But I want to talk about the fact that the power of this amendment really has to do with all of the people who chose not to go to trial because of the specter of acquitted sentencing conduct. And that's where Jesse Ellsworth sort of comes in for me.

In 1996 he went to trial on 35 counts of gun and drug charges. He was acquitted of 28 of them, which should have been a resounding victory for him. But at sentencing the judge came back and considered all of the acquitted conduct related to the drug, drug weight, and sentenced him to 30 years in prison.

His six co-defendants all got less than 5 years.

I think that Jesse probably would have gotten 10 years had the judge not considered that. And so, it was a devastating case.

And when I came to the federal system a couple of years later I was told immediately,

it was drilled into my head, federal court is no place for jury trials because it is an all or nothing game.

And I turned around and told my clients that: it's an all or nothing game. And so, you can't risk suffering what Jesse Ellsworth did.

And that's why talking about acquitted sentencing conduct and the fact that the Commission is considering this that sort of the terms of it are so important to me.

Thirty years after Jesse was tried, and convicted, and sentenced, we still have the same problem and the same rule. What is sort of shocking is that there seems to be pretty near consensus among some arenas that this is not appropriate, that we shouldn't be doing this.

We talked about the academic studies. We talked about the advocates. But in 2010, the Commission did a study of district court judges, and 84 percent of them did not like acquitted sentencing conduct, and thought there was a

problem with it. 84 percent.

So, we have a pretty consistent chorus of people saying there is a problem with this. There is a problem for the defendants, there is a problem for people who are deciding to go to trial, and there is a problem for the public, especially the jurors who serve who are not told that, basically, your acquitted verdicts, your not guilty verdicts are sort of advisory in our system.

Again, the power of this to me has to do with being able to advise my clients about fairness, about certainty, about reliability and what happens in a jury trial. And that's important to the calculus in their decision about whether to go to trial or not.

I've been a public defender my entire career. And I deeply believe in the jury system. And I really think we should return to the jury trial being the norm, instead of that increasingly rare option of the rare defendant who is willing to take those risks.

So, it is with great relief that I talk about this. And we are asking the Commission not just to limit it, but to prohibit the use of acquitted conduct. That is a simple, straightforward, and unequivocal approach to this.

We are asking you to remove the limitations in proposed, proposed in C-1, to not encourage or suggest upward departures or even with the range based on acquitted conduct, and not to exempt acquittals that are unrelated to the substantive evidence.

Thank you.

CHAIR REEVES: Thank you, Ms. Brannon.

Ms. Sen.

MS. SEN: Good morning once again. Thank you on behalf of PAG for listening to my testimony regarding this proposed guideline amendment.

The PAG supports the Commission's proposal to revise the relevant conduct guideline. We believe that this proposal

comports with the principles of due process and fundamental fairness, which is enshrined in the Constitution.

While the PAG recognizes that the Commission is not currently reviewing a wholesale revision to this guideline, the PAG strongly urges the Commission to also consider the use of uncharged conduct at sentencing.

The use of acquitted conduct in sentencing is repugnant to the 5th Amendment right to due process of law and the 6th Amendment right to have one's guilt or innocence proven beyond a reasonable doubt by a jury of one's peers. Arguably, the use at sentencing of uncharged conduct that no juries have seen and that no independent has challenged that goes through a trial, the kind of rigors that occur at trial, is even more constitutionally infirm.

A lodestar tenet of our democracy is that the jury is the great bulwark of our civil and political liberties. And treating a jury acquittal as a nullity, or sidestepping the jury

altogether by sentencing on uncharged conduct, is contrary to our constitutional principles, and it is fundamentally unfair. And, significantly, the use of acquitted conduct at sentencing has resulted in sentences that can only be described as unjust.

As reflected in the pending petition before the Supreme Court in the case of McClinton vs. The United States, the defendant there was charged with robbing a drugstore and robbing a co-defendant using a firearm, causing death. At trial, the jury found him guilty of robbing the drugstore but acquitted him of the charge of robbing the co-defendant and causing death with the firearm.

The guideline sentencing range on the robbery was 5 years.

At sentencing, the Government recommended a sentence of 30 years. And the court, reviewing the evidence, and relying on the preponderance of evidence standard, sentenced the defendant to 20 years, which is four times above

the applicable guideline language.

Certainly amending the relevant conduct in that situation to preclude the use of acquitted conduct would have a huge impact on the fairness of a sentence in those circumstances.

The PAG further requests that the Commission not include in its proposal language in the commentary under 6(A)-1.3 that acquitted conduct be allowed to be considered when determining where a sentence should fall within the guideline range, or whether an upward departure is warranted.

The PAG believes that the use of acquitted conduct in that manner undermines the entire purpose of doing this revision. Permitting an upward departure on the basis of acquitted conduct would render the Commission's current proposal almost meaningless.

In a similar vein, acquittals on the grounds of jurisdiction, venue, or statutes of limitations are permitted in our system of jurisprudence because these due process

protections ensure the fairness of the proceedings. Permitting the use at sentencing of acquitted conduct that is based upon these technical issues signals that these principles of fairness do not matter.

With regard to whether courts ought to be permitted to consider overlapping conduct at sentencing, as a practical matter this seems like an unworkable task to go behind the jury's deliberations to determine what elements may have been found, what elements weren't to be found.

The PAG's position is that a bright line rule precluding the use of acquitted conduct in determining a defendant's sentence addresses this concern and will eliminate the need for many trials and sentencing to determine what should or shouldn't be considered in terms of acquitted conduct.

Finally, revising this guideline as the Commission proposes is consistent with parallel efforts to preclude the use of acquitted conduct at sentencing. In additional to

potential Supreme Court review, Congress has introduced a bill that addresses this very issue.

We hope that the PAG -- we hope that the Commission adopts this proposal.

Thank you.

CHAIR REEVES: Thank you, Ms. Sen.

Any questions from commissioners?

VICE CHAIR MURRAY: I have a question for Ms. Brannon. Thank you very much for your testimony.

Do you have any concern about parallel state/federal prosecutions? I'm thinking a case like Rodney King where the state tried to put to trial the police for police brutality. They were acquitted. And then later the feds came in and were able to convict them.

I think you called for an end to the kind of exception we have for overlapping prosecution. Am I right that under the system you're advocating the Rodney King officers would not have been able to be sentenced?

MS. BRANNON: I think there would

probably be a question about what they were tried for in federal court.

VICE CHAIR MURRAY: Let's assume, yes.

MS. BRANNON: Yes, if they were acquitted in state court, that state court conduct should not be used to sentence them in federal court; that we should still honor the state court's not guilty verdict just as much as we would a federal.

VICE CHAIR MURRAY: Even if they were subsequently convicted by a federal court?

MS. BRANNON: I think then we would get into a question about, obviously, Ashe vs. Swenson, double jeopardy and so forth, and whether it was the same conduct. Those are probably outliers.

But, yes, our proposal is because we're asking you to prohibit it, it would apply to state court convictions -- or state court acquittals, including the idea that a court could come in and use a state court acquittal to drive up criminal history. Right?

And so, thinking through all of those scenarios, it seems like the easiest, most straightforward approach would be the prohibition.

VICE CHAIR MURRAY: Do you have any concern that that would change the Department of Justice's behavior in terms of how they treat state prosecutions?

I know that when I was at the Department, the Civil Rights Division, for example, had a policy and would often in big civil rights matters, in very important matters, sit back and let the state prosecute first. And then based on how things had gone in the state prosecution, determine whether or not the federal interests had been vindicated.

I can imagine a world in which if there was only one bite at the apple, right, if we have the two sovereigns don't both get to prosecute, the feds might jump in much earlier. And do you have any concerns about that?

MS. BRANNON: Let me first say that I

think under the current system where government can use acquitted conduct, it already affects their charging. I think it already leads to overcharging. Because they only need to get that one conviction. So, they're already overcharging within those cases.

I don't think that our proposal would lead to more overcharging. I think it would reduce the overcharging and perhaps give a little bit more contemplation of how they approach certain cases. I don't think it would lead to an onslaught of earlier federal prosecutions.

Even in that scenario, however, a client needs to have some finality to what, what is happening to them. And so, if there's more coordination between the state and the federal prosecutors on how to approach it, that would be a good thing as well, I think, instead of waiting to see if they're acquitted in state court. And if they are acquitted, hey, the Federal Government's going to pick it up and try to prosecute them on different grounds.

VICE CHAIR MURRAY: If the state botches a prosecution there's not always coordination. Right? So, say the state comes in, goes first. They typically don't investigate as much as they'd like to. The state comes in, prosecutes, botches the prosecution. And the feds are just kind of out of luck, right, the public just can no longer be vindicated by the Federal Government?

MS. BRANNON: Again, whether they could charge on something different or find other charges that sort of captured that conduct, under the dual sovereignty I think they could still do that. And it would be a question of what could be used.

But that gets to something that I think is really driving acquitted conduct sentencing, and that's the idea of wrongful acquittals, that that really is the heart of this. And to go back and say we think the state court botched it in this way, and had they done it our way they would have obtained a conviction,

I don't think that's what we get to do.

We need to honor a state court or a state jury or a federal jury's acquittal. And we should not be going behind that to say did they botch it, would the jury have done something different.

With all of these proposals particularly of the Department of Justice, the idea of going behind the verdict and trying to speculate and guess what would have happened in other circumstances, and why did they make this decision, is extremely problematic.

COMMISSIONER WONG: My questions for Ms. Brannon.

Ms. Brannon, I didn't understand your testimony to go as far as Ms. Sen's in that Ms. Sen argued that all, you know, whether discharged or not, uncharged relevant conduct shouldn't factor into the guideline range, not simply acquitted relevant conduct.

And I think one way to conceptualize this issue is we're really only, when you talk

about acquitted conduct that can matter for provisions of the guideline range, we're only talking about facts that can be proven by a preponderance of evidence. And right now there is an established control that all facts that can be proved by a preponderance of evidence that are relevant to the judge's sentencing decision could be factored in for purposes of the guideline range.

So, the question really is should there be a carve-out for that category of facts that can be proved by a preponderance that were acquitted in trial, separate from all those other facts?

And just to be practical here, I think of things like an obstruction of justice, enhancements. That might not come on, that might not be a charge, you might not be presenting evidence about that at trial. For that sentencing you could get that two-level enhancement potentially for obstruction, should you be able to prove that, you know, the

defendants deleted all those emails, or wiped his phone, by a preponderance that would factor into the guideline range, but that would not have been something that was proved at trial or even attempted to be proved at trial.

Or, for instance, let's say it was a someone in possession conviction, but you're not putting on evidence specifically that it was an obliterated serial number. But at sentencing should be proved that that gun had an obliterated serial number, there's an enhancement that affects the guidelines range should you prove that by a preponderance.

So, I guess my question is, is the logical endpoint, is the natural endpoint of your logical argument that no fact that has not been proved in the context of a trial beyond reasonable doubt should factor into the guideline range? And if not, how do you distinguish the two?

MS. BRANNON: Well, I would love that world. I certainly, we agree with the idea that

we need to address relevant conduct on a broader basis. But we understand, too, that that's not really what's before the Commission right now.

We think there in terms of acquitted conduct as opposed to uncharged or dismissed conduct there is a difference. There is a significant -- there is a significance to a jury finding someone not guilty as opposed to just the absence of a conviction. Right? There's a difference qualitatively and constitutionally between those two things.

And so in dealing with acquitted conduct there can be a distinction made between that and uncharged and dismissed conduct for that reason. It has a jury coming in and saying, we find them not guilty on this particular information.

We should honor that in a way that we can't really analyze and charge their dismissed conduct in that way. I think it's all on a continuum, and I think it's all problematic. But we need to look at acquitted conduct in this way,

which is honoring and understanding the constitutional significance of that acquittal.

As to your question about sort of the continuum of proof, you know, certain things can be proven, you know, by a preponderance as opposed to what a jury is considering beyond a reasonable doubt. There are going to be overlapping matters. There are going to be things that were presented at trial that perhaps did not fall within the ambit of the jury's verdict on something.

And I think we always are going to have outlier cases and sort of those unique circumstances that the parties and the court are going to have to sort through. Our prohibition on the use of acquitted conduct across the -- you know, a prohibition, not just exceptions or limitations, would not limit the court or the parties from sort of talking about those other things, certainly not 3553(a) context, or in terms of whether a variance was appropriate.

I have a little -- I want to talk

about this because I have a little bit of a problem with this idea of this all being sort of on a simple continuum.

If the judge can find it by a preponderance of the evidence but a jury of 12 people chose not to convict on something, a jury of 12 people found that the Government had failed that, there seems to be a lack of symmetry between those two things.

We ought to have some quantitative and qualitative weight to the fact that 12 people came in and acquitted a person of certain conduct as opposed to one judge coming in and finding it beyond a -- you know, by a preponderance of evidence.

And so, that's why I'm struggling a little bit with the question. I don't think that substituting a judge's, a single judge's judgment for what the jury heard and ruled upon is an appropriate way to sentence someone. And that's why we think that the prohibition is a better approach.

VICE CHAIR MURRAY: Just to follow up briefly, though, is that really a substitution if the inquiry is different? There's a different standard?

MS. BRANNON: If the inquiry is different it's about facts that the jury did not rule upon.

VICE CHAIR MURRAY: Sorry. I meant inquiry in that whether the proof has been beyond reasonable doubt versus whether it has been proved by a preponderance. They're a different question.

MS. BRANNON: There are different questions. But when it is the same factual basis, when it is the same conduct and a jury of 12 has come in and said and found that that person is not guilty of that beyond a reasonable doubt, it offends that verdict, it goes behind that verdict for a judge to come in and say, I still find it by this lesser burden of proof, if it's the same conduct that we're talking about.

That's what has constitutional

implications. That's what offends the right to a trial by jury. That's what invades the province of the jury.

COMMISSIONER WROBLEWSKI: Mr. Chairman.

CHAIR REEVES: Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you very much.

And thank you both for being here and for your testimony.

Ms. Brannon, I just have a question about your letter. And then two examples for both of you that I just want you to answer, which are slightly different than the examples that you've heard so far.

So, in your letter, Ms. Brannon, you seem to recognize that there are these issues around overlapping conduct. And you say, well, they will be rare. You say in most cases the preclusive effect of the jury's verdict will be clear.

I'm not sure what that means. So, if you can explain that.

And then you go on to say if anomalies occur, courts are in the best position to decipher the parameters of the jury's guilty and not guilty verdict after hearing arguments for both sides, and to sentence accordingly under 3553(a).

That seems to suggest to me that you're okay if a judge considers acquitted conduct, just in an unguided way under 3553(a), which is what you said just a few minutes ago. That's my interpretation of what you're saying.

So, I don't really understand how the preclusive effect of a jury verdict will be clear. And then that the judge is supposed to decipher between guilty and not guilty verdicts.

So, that's one, that's a couple of questions. And there are a couple more.

Two specific examples. Let's say someone is charged with a hate crime. So, they're charged with a civil rights conspiracy. And in that civil rights conspiracy they're charged with burning a woman's house down because

of her race.

And then charged in Count 2 with arson, burning the house down.

And the jury brings back a not guilty verdict on Count 1, on the conspiracy, but a guilty verdict on the arson.

Am I correct that in that case you would say the guideline range is zero because they're acquitted on arson, and even though there's overlapping -- and this does not -- the reason I think this is different is because it's not anybody saying there was a wrongful acquittal. Let's assume it's a rightful acquittal; it wasn't a hate crime, but there was an arson. So, I want to hear about that.

And the second example is this doesn't just address acquittals by a jury, it addresses Rule 29 decisions. So, let's say a judge, Rule 29s a case, explicitly because, in a gun case, explicitly because an interstate commerce element was not proven. So, we don't have to go behind a jury verdict, we know exactly why the judge Rule

29ed the case.

Would it be okay if the Commission wrote a guideline that said in that particular circumstance that the judge, in a Rule 29 circumstance, if a judge found the facts that the person had a gun and used it in a crime, that the judge could sentence under the guidelines based on those facts?

So, I know that's a lot of questions. I apologize. I'd be curious about your answer.

MS. BRANNON: So, I'm going to take it in reverse order.

COMMISSIONER WROBLEWSKI: Sure.

MS. BRANNON: The Rule 29 should be treated -- is an acquittal, and it should be treated the same as a jury acquittal.

And we tried to think about times when a judge would give you an acquittal on a Rule 29 and then still want to sentence you for that conduct. And that's probably going to be a very rare case.

But because we should have consistency

in how we treat acquittals, it should include that Rule 29 as much as anything else.

And that also touches on the idea that there's a difference between acquittal because you were not there, and didn't do anything, and have a solid alibi over here, or you can have a different defense to it. Those are both defenses, and they both result in acquittals, and they should garner the same respect from the courts in terms of how they are used.

In regard to the arson, I hope I followed your hypothetical exactly, but if someone was still convicted of arson they could still be sentenced for that arson. And I know that there are always going to be outliers about sort of inconsistent verdicts and how the court would handle that. But we do believe that the court is in the position to sort of divide that.

If there is a prohibition on the use of acquitted conduct, that does not mean they cannot sentence for the conduct for which they were actually convicted.

The Commission, the parties can't anticipate all of the possible scenarios. But it seems like the easier and more straightforward approach is for the full prohibition on this, rather than suggesting that we need to talk about overlapping conduct, we need to talk about inconsistent verdicts.

And because we're talking about the construct of the guidelines, the court still has some authority outside on 3553(a) to look at conduct, to look at things and see if it needs to be the basis of a variance of some sort.

COMMISSIONER WROBLEWSKI: Could we delve into the definition of what is acquitted conduct, something that addresses that? And that's some of the concerns that we've raised.

And the reason I ask is because, as you're aware, in the federal system we have all of these weird charges that we may not have in state court, like racketeering, or conspiracy, or civil rights crimes. And then you have underlying crimes, and they intersect with one

another. And so right now, one definition which I thought you were pushing forward which is any conduct underlying a count of acquittal shall not be considered.

Well, what is the acts, what are the acts or omissions underlying a count of a civil rights conspiracy that charges these two people worked together to violate this woman's civil rights by burning their house down because of her race?

And the jury says, acquittal.

So, what are those underlying acts or omissions that cannot be considered in deciding the guideline range?

MS. BRANNON: It sounds like another hypothetical, the difference between the two charges was the race. And so, and so being sentenced for the arson, which they were convicted of, does not seem to touch on what appears to be the basis for the acquittal.

But I understand --

COMMISSIONER WROBLEWSKI: But aren't

you being the super jury that the judge, that the chair is concerned about? Right there you just said you're going to decide which one.

And that, I understand what you're doing because -- and that's what we're suggesting has to be done occasionally, not all the time but occasionally.

MS. BRANNON: And that's why I think that that is something for the court to sort out with the parties in those unique circumstances rather than the Commission trying to anticipate all the possible outliers and the overlapping conduct and try to solve that within the guidelines. There are certain things that are just going to be hashed out.

You know, I want to solve that problem as an advocate. And I'm sure the prosecutor wants to solve that problem, too.

But the Commission is not charged with that. It's to give clear, concise guidelines to the parties, to the court in trying to sort through this, rather than taking up every

possible scenario that might come up.

COMMISSIONER WONG: I have a question for Ms. Sen.

Ms. Sen, I don't know if you read the comments by the Victims Advisory Group on acquitted conduct. But there was one thing that I wanted you just to respond to.

The Victims Advisory Group said that they sense that there was a contradiction between arguments that we heard yesterday on compassionate release -- and since you were here both days I thought I'd throw this to you -- that were very much about affording judges -- trust judges. We can trust judges to make, give appropriate weight where in their discretion make wise decisions based on the totality of circumstances, a constellation of factors, and arguments today that judges should be prohibited from considering acquitted conduct.

I just wanted you to respond to that.

MS. SEN: Well, I think the difference is that when we're talking about acquitted

conduct, this is evidence that has been presented to 12 members of the community, to a jury, and they have unanimously decided that, for whatever reason, since we don't go behind the jury's verdict, that the elements were not met, and so that this person is acquitted of that crime.

And I think that is a very different situation.

And then the judge after that saying, well, maybe I could see that this was committed by a preponderance of evidence standard.

I think that is a completely distinct scenario than, for example, what we were talking about yesterday with respect to the fact that judges have the discretion and the ability to look at records in a compassionate release situation and to be able to evaluate those.

CHAIR REEVES: That concludes the time for this panel.

We certainly appreciate you. Thank you so much for your testimony.

Our next and sixth panel will provide

us with perspectives from two of the Commission's Advisory Groups.

The first panelist is Jill Bushaw who serves as Chair of our Probation Advisory -- Probation Officers Advisory Group. Ms. Bushaw serves as Deputy Chief U.S. Probation Officer from the Northern District of Iowa in the Probation Office.

She has previously served as a sentencing guideline specialist and as a supervisor and assistant deputy chief overseeing the Pre-Sentence Investigations Unit.

The second panelist is Professor Mary Graw Leary, who serves as chair of our Victims Advisory Group. Professor Leary is the Senior Associate Dean for the Academic -- Dean for Academic Affairs and a Professor of Law at the Catholic University of America.

Professor Leary has previously worked in a range of positions in the criminal justice system, including as an Assistant United States Attorney for the District of Columbia, as the

Director of the National Center for Prosecution of Child Abuse, and a Deputy Director in the National Center for Missing and Exploited Children's Office of Legal Counsel.

Ms. Bushaw, we are ready to hear from you again.

MS. BUSHAW: Thank you. And thank you again for the opportunity to appear before you today.

My testimony today regarding acquitted conduct is based upon feedback we received from probation officers from around the country in every circuit.

Probation officers are unique stakeholders in this process, as our primary involvement is between the plea and sentencing stage.

On a daily basis we apply the guidelines, study the case law, respond to objections, and identify for the court which issues need to be addressed at sentencing. Our focus is on our role, rather than the outcome.

Our role is to provide the judge with an impartial summary of the facts and explain the basis for our recommendation.

It is now our role to provide that same service to the Commission and share what we believe are the applicable factors to consider and the basis for our recommendation.

I'll largely rely on our written testimony today, because this issue has more layers than the initial question would suggest. Should acquitted conduct be used to determine the guideline range?

This isn't a question that can be met with a simple response. Our system of sentencing is complex but we couldn't put forth a better effort at seeking to determine a sentence that is customized to the facts and circumstances of each case and each defendant.

If I had to highlight the two main points that POAG believes weighs in favor of using acquitted conduct at sentencing, it would be the relevant conduct process itself and

judicial discretion.

We understand the narrow issue of this proposed amendment is acquitted conduct. However, what we found when we read the public comments was that in several instances the concerns were presented as acquitted conduct issues, but the issue actually pertained to a disagreement with the concept of expanded relevant conduct under 1B1.382.

Guidelines that apply expanded relevant conduct constitute 83 percent of the cases in federal court, and this includes drug firearm fraud and immigration offenses.

Without expanded relevant conduct, the focus is narrowed to the facts underlying the elements of the offense of conviction.

There's a story behind every federal crime and that story is told applying the rules and limits of relevant conduct.

To put a limit on the use of acquitted conduct would feel like part of that story has been removed. But not really removed, because it

could be added back into the analysis at the end of the sentencing hearing, when the court determines if a departure should apply, and in deciding on the final sentence.

If the proposed amendment to preclude the use of acquitted conduct is adopted, as we noted in our written testimony, it becomes more difficult to defend other types of relevant conduct, such as uncharged and dismissed conduct.

So, expanded relevant conduct really consists of three main forms: acquitted, dismissed, and uncharged.

If I had to rate each type of conduct, I'd say there's an argument that acquitted conduct is more reliable than dismissed conduct, because the grand jury already found it met the preponderance threshold, and there was enough evidence to take the matter to trial. However, dismissed conduct is used to determine the sentencing range.

I'd say there's an argument that dismissed conduct is more reliable than uncharged

conduct, because also the grand jury found that it met the preponderance threshold, and there was enough evidence to file the charge.

However, uncharged conduct is routinely used to determine the guideline range.

But they all become equally reliable at the time of sentencing, when the due process associated with each is the same.

The right to object is the same. The right to have the matter addressed at the sentencing hearing is the same. The right to present evidence and confront witnesses are all the same.

In each instance, the Government is required to present evidence and prove the conduct based upon a preponderance of the evidence.

As I indicated earlier, probation officers are in court every day, all day, fulfilling their role at the stage of sentencing.

We watch our judges address disputed issues, listen to testimony, decide the weight of

the evidence, determine witness credibility, and make a thorough record detailing the basis for their findings.

Our judges' credibility expertise in familiarity with the case serves as the primary basis that POAG believes they should retain the discretion to make a finding on this issue, like all other matters at sentencing.

It allows the sentencing process to fully capture the story behind the elements of the offense in determining a sentence within the statutory range, and it ensure the sentence reflects the history and characteristics of the defendant, the nature and circumstances of the offense, and serves to protect the public from further crimes of the defendant. Thank you.

CHAIR REEVES: Thank you, Ms. Bushaw. Professor Leary, good to see you again.

MS. GRAW LEARY: Thank you. The VAG, once again, thanks the Commission for inviting us to comment on this issue.

Many other witnesses will comment and

have commented on the legal obstacles of the proposed amendment, and the Victim Advisory Group joins those groups opposing the proposed amendment.

But I want to devote most of my time to add the voices of those who are uniquely harmed by the proposal. And that would be, in our view, victim survivors of crime.

The Supreme Court has noted that it is, quote, essential to the judges' selection of an appropriate sentence that he possesses the fullest information possible concerning the defendant's life and characteristics, and there's no basis for courts to invent blanket prohibition against considering certain types of evidence.

The proposed amendments regarding acquitted conduct would deprive the court from considering, with the appropriate weight and context evidence, the essential evidence that would be able to put forth a complete picture for the court and allow it to do a comprehensive sentence.

Secondly, during federal prosecutions, a crime victim has the right to be reasonable heard at any proceeding in the district court involving a sentencing.

Currently, 3661 provides, no limitation shall be placed on information concerning the background character and conduct of the person convicted.

The consideration of acquitted conduct fits within this and is not without a safeguard for the accused. The VAG requests the Commission to consider the impact on victim impact statements.

If the guidelines are amended to preclude the consideration of acquitted conduct in determining the appropriate sentencing range, the right of the victim to be reasonably heard at sentencing may be severely limited.

A victim who has standing may have information relating to the emotional, physical and financial harm that they have endured due to the criminal conduct.

But this proposal might deny them the ability to include that information in their victim impact statement.

As our written documents discuss, a victim impact statement provides information to the sentencing judge or jury about the true harm of the crime, information the sentencer can use to craft an appropriate penalty, and the victim impact statement may have therapeutic aspects, helping the victim of crime recover from crimes committed against them.

These statements help educate the defendant as well, about the full consequences of their crime, perhaps leading to a greater acceptance of responsibility and rehabilitation.

Consequently, the risks that this relevant information could be excluded from these impact statements, even though it could be found by a preponderance of the evidence, is unfair to victim survivors.

And this is even more acute with crimes with particular victims. And many types

of crimes -- sexual violence, child victims, sexual exploitation cases -- a defendant may in fact be acquitted from some charges due to the statute of limitations, the delay in reporting, the volume of child sexual abuse material, the ability to establish what is a real child, etc.

Excluding from the court to even consider, with the appropriate limits, such information, denies the court the ability to holistically understand the offenses and the offender.

And as was noted, the Victim Advisory Group observes the juxtaposition between the implications of this proposal and that regarding extraordinary and complying release.

In the former, this proposal assumes, to the benefit of offenders, that a sentencing court cannot give appropriate weight to acquitted conduct, even though there are stated limits, and thus considers it necessary to remove that conduct entirely from the judge's consideration.

However, the discussion yesterday

regarding the proposed amendments for extraordinary and compelling release arguably take the opposite position, to the benefit of offenders, not victim survivors, providing broad discretion, with very little guidance to the courts, to properly weigh any situation brought before it for earlier release without the benefit of the victim survivor's perspectives.

It is not a believe consistent with the case law, that when judges have sufficient guidance, as they do through the WATTS case, the law presumes they are able to follow the law, especially where, as here, the Supreme Court precedent on the issue allowing them to do so when it's property weighted, is relevant.

Because this prohibition on acquitted conduct may infringe on a victim's right to be heard at sentencing and limit what can be said, possibly hindering emotional recovery of victim survivors, we opposed the proposed change. Thank you.

CHAIR REEVES: Thank you, Professor

Leary. Any questions from our Commissioners? Ms. Bushaw, I do have a question.

You indicated that in the grand jury process, for example, the government proves something at least by preponderance. I think you sort of analogized to that. Is that correct?

MS. BUSHAW: Yes.

CHAIR REEVES: But even in that context, you're only hearing the word and words of the prosecutor. The prosecutor is only someone who's in there with the grand jury. And the prosecutor is determining what evidence is heard, what evidence is reviewed, and, more importantly, what evidence is not heard. Right?

MS. BUSHAW: Correct, Your Honor. At the time the charge is filed, the preponderance threshold is met but the defense perspective hasn't weighed in yet at that stage.

CHAIR REEVES: So, we shouldn't give that sort of any real weight then. Right?

MS. BUSHAW: I think it has some weight. But based on what you've said, I agree

that it shouldn't have maybe as much weight as I originally attributed to it.

But again, we believe if there's enough evidence to file the charge, it's still a stronger type of relevant conduct than something that was never even considered to be charged. The level of evidence was a little bit higher for that type of conduct.

CHAIR REEVES: Thank you.

VICE CHAIR MURRAY: Do you think that there is expressive value, either to victims or in your role as someone who sees the process so intimately and tries to help the judge tell that story, to the notion that sentencing tries to view an offender as he or she really is? Tries to view the truth about the offender and what happened? I'm thinking about Commissioner Long's question before about the different inquiries. How at trial the question is, did the government carry its burden to demonstrate that every element, including jurisdictional and other procedural elements, have been proved beyond a

reasonable doubt, taking into account certain evidentiary rules that may serve non-truth-seeking functions.

I'm thinking of, for example, exclusionary roles about police misconduct, which try to serve the purpose of making law enforcement do their jobs better, rather than serving a truth-seeking function, versus -- and that's an area where society has made the decision that there are some things other than just pure truth-seeking.

Some are due process rights, some are other, like exclusionary roles, other sort of policy goals are worth sort of changing the truth-seeking nature of a trial.

And sentencing, so far, hasn't really been like that, right? Sentencing has been about who is this defendant and what are they like, based on all the evidence that we can look at based on using a standard that doesn't put a finger on the scale either way.

Is there value in that? And is there

anything lost if we take away from that in the interest of other values? Thanks.

MS. BUSHAW: I would say value in the entire process of sentencing, that's the entire point of what we're doing is, under the 3553A factors, the pre-sentence report covers everything about that case, about the criminal history, and the information about the history and characteristics of the defendant is because we're trying to give the judge as much information as we can to make that difficult determination on how long someone should go to prison.

And so, I just think that is the strongest point. The evidentiary and the processes at play for conviction, and the evidentiary issues and the process of that play at the time of sentencing, are so very different.

And that's why we've been open to considering all of these factors, rather than restricting factors that might be restricted at trial.

MS. GRAW LEARY: Yes, is the short answer. And so often, when I'm teaching my criminal law classes, we'll be discussing something and we'll say, that's not about guilt or innocence, that's about sentencing. Right?

That's when the judge should consider that. And I think that the determination of guilt or innocence is a unique circumstance and it is very competing, truth-seeking functions, as you say.

To the defendant's benefit mostly, I would say the sentencing procedure and the requirements of 3553A require a much more wholesome view of the offender and the circumstances around this, both to understand the offender, and to put in context the actions that the court is wrestling with, and the impact to victim survivors.

There's a reason it's a bifurcated system, and there's a reason why we have to have pre-sentence reports and be thorough. Because this is a different question, and those are

important different questions.

COMMISSIONER HORN BOOM: Thank you both. Ms. Bushaw, I think that you both make a number of very good points. In particular, that the U.S. probation office is a unique stakeholder on this particular issue, because your job is to assist the court in presenting a full picture of the defendant, including history and characteristics.

And I think, to your point, Professor Leary, oftentimes that 3553A inquiry does go to the benefit of the defendant based on facts that the court will find by a preponderance of the evidence, whether that is lack of a security net as a child, mental health issues, substance abuse issues, things like that.

And I know I'm jumping between the two of you. But back to another point that you made, Mr. Bushaw, is that you fear that this proposed amendment in prohibiting consideration of acquitted conduct could undermine other relevant conduct.

And frankly, what the court does every day at sentencing, whether it's uncharged conduct, dismissed conduct, or, as I said, conduct that is not charged or uncharged, but rather is simply information about the history and characteristics of the defendant that in many cases is often mitigating, I guess the difference -- and it sort of goes back to my public confidence question -- the different, I think, intellectually, it's difficult to reconcile all of those things and say, acquitted conduct is different than uncharged or dismissed conduct.

But if there is a difference, perhaps that difference is in this public confidence aspect? That after a jury of someone's peers has determined that the defendant is not guilty, is that a way to reconcile excluding that information from the court's consideration, at least under the guideline calculation, versus all the other things that the judge considers under 3661, that's uncharged, dismissed, or just, as I

said, mitigating factors about a defendant's history and characteristics? Is there a way to reconcile that?

MS. BUSHAW: I think it would be difficult. And on your point of what the judge may consider or can consider at sentencing, if this amendment is adopted and acquitted conduct can't be used to determine the guideline range --

COMMISSIONER HORN BOOM: I'm sorry, you said can or can't?

MS. BUSHAW: Can't. Can't be used to determine the guideline range but it can come into play for departure, or under 3553A we're almost creating more disparity.

Because we're going from a rule that it always does apply, to a provision that says you can consider it kind of if you want to. So, I think the disparity would increase with that type of a scenario.

But I do understand the concerns that we've been talking about today with, it's unfair. Federal systems are unfair. You use acquitted

conduct to determine people sentences, but you can't just stop there, because it's a complex system.

So, if someone says, that's unfair, I don't doubt that that's hard for defense attorneys to explain to their clients. Yeah, you were acquitted of this but it's going to be used to determine your guideline range.

But I've also wondered how hard it is to explain to defendants, you were charged on five counts. You're going to plead to one but the other four are going to be used to determine your sentence.

I don't think it's any more difficult to explain to them, your count of convictions said you did this act on this date but everything you did over the last eighteen months is going to be used to determine your sentence because it's part of the common scheme or plan.

We also hold them accountable for conduct that they didn't even do, under the reasonable foreseeable relevant conduct

provision, as long as it's within their scope.

So, I think if we resolve this because we are afraid it looks unfair, other issues claiming it's unfair will just rise to the top.

I think it's a complex system. And either we approach relevant conduct -- it's 83 percent of the cases that we sentence in federal court -- use all of this conduct, either we fully embrace that process of real offense conduct determines your sentence, or we proceed with an alternative approach.

But in our minds the acquitted conduct just fits within all of the relevant conduct provisions based on the preponderance at sentencing. Thank you.

COMMISSIONER WROBLEWSKI: So, can I just suggest maybe that there might be a third way? Not necessarily that the Commission can do this amendment here but maybe in the future.

So, your suggesting -- again, it actually goes back to a previous witness who just spoke about all-or-nothing. And that's what I

just heard coming from you, Ms. Bushaw. It's all-or-nothing.

Isn't there a way -- again, perhaps in the future -- it's all-or-nothing now because of the way our guideline system is structured. There are 43 levels. No matter where you start, you can go all the way up to 43. You can go all the way down to one. You can move all over the place.

Isn't it possible that you could consider it but only in a limited way? Wouldn't that be a third way? Rather than just, you have to throw it all out for everything, or you have to consider it and everything else related to relevant conduct?

MS. BUSHAW: We have that third option here with it being considered. But in a third way was only a departure, or in determining the final sentence.

But that's one of the things we noted in our written testimony, is if we do adopt this amendment and maybe just narrow it down a little

bit -- not the all-or-nothing, but the DOJ has suggested some different definitions.

But when I first read those, I was thinking, I don't know if we have all the information to determine the type of acquitted conduct that they were recommending at the time we start the pre-sentence report.

And this needs to be very clear at the very beginning. It drives everything. It drives all the computations, it drives criminal history scoring and whatnot.

So, if we did get to that, I think it would need to be very, very clear and very well defined, so there is no different interpretation. Because it would make for a very complicated sentencing process if that wasn't.

CHAIR REEVES: Ms. Leary, I do have another question. I've been trying to think to glide that, or at least maybe a poor one.

But imagine someone charged with Hobbs Act robbery. That's basically taking something from a store, I guess, that would have been

circulated through interstate commerce, basically.

And I realize maybe there is a federal crime of sexual assault. But somebody came into the store, was charged with some sort of sexual assault charge or rape, and the Hobbs Act charge.

The victim testifies and there's no evidence to support the rape part. Acquitted on that. But the camera shows the person and he's convicted of taking stuff out of the store. Hobbs Act robbery.

Should that conduct for that person who has been acquitted on the other stuff be used as relevant conduct, should it anchor any portion of that person's subsequent sentence? Should the judge look at that at all?

MS. GRAW LEARY: Well, in the hypothetical that you gave me, you said there was no evidence. So, no. I think what we're dealing with is a situation in which the judge has sat through the entire trial and has recognized that at the time of sentencing, when he or she is

supposed to consider the manner of the offense of which he is convicted, he or she understands the context in which that took place and finds, by a preponderance of the evidence, this is part of the manner in that offense that's taken place, the court should be able to consider it.

In the hypothetical you've given me, it wouldn't meet that standard.

CHAIR REEVES: Let me change the hypothetical then. Not that there was no evidence, but the jury made the conclusion that the testimony of the defendant, the testimony of the witness -- we talked about that yesterday in the sexual abuse context of award. I think we talked about that in the prison context.

So, if the jury has heard that information and the jury made a conclusion that it was not proven beyond a reasonable doubt, then should the court be able to say, well, it would meet the burden by a preponderance, which we know is nowhere close to a reasonable doubt, and then that information is used to sentence the person?

MS. GRAW LEARY: And I think in that instance the answer is, it depends. And why I say it depends is, as this Commission knows better than probably anyone in the room, trials are messy. Right? And facts are messy. And verdicts come out. And of course, verdicts matter as to what is the crime to which the defendant has been convicted?

But we trust our judges when they have sat through the evidence as well, and perhaps in your hypothetical, or in a hypothetical, the entire defense has been, this one jurisdictional element is missing. Or something of that nature. As opposed to, this eyewitness cannot be believed at all.

We trust that our judges, who the law tells us can follow the law, will follow the Supreme Court precedent, will follow the guidelines, and be able to decide, when is it a situation where that is appropriate relevant conduct, and when is it not?

And I think that that's the

difference. So, there isn't a bright-line answer to this. And I think the suggestion that there be a bright line carve-out is exactly that.

It's a carve-out from what we let judges do all the time, and what we want them to do in order to achieve the holistic goals of 3553.

CHAIR REEVES: Thank you so much. Any additional questions of these witnesses? Looks like we're ready to get to our last panel. That's what that sounds like.

Thank you so much for your testimony. Our seventh and final panel consists of two attorneys whose practices provide us with unique and, I suspect, very different, perspectives on this issue.

Our first panelist is Steve Wasserman, who serves as the president of the National Association of Assistant U.S. Attorneys.

The association represents more than 6,000 federal prosecutors and civil attorneys across the country. Mr. Wasserman serves as an

assistant U.S. attorney in the District of Columbia, where he has spent the last thirteen years prosecuting violent and drug-related offenses.

Our second panelist is Michael Heiskell, who serves as president-elect of the National Association of Criminal Defense Lawyers.

The association as thousands of members in 28 countries, along with affiliate organizations that represent 40,000 criminal defense lawyers, public defenders, military defense counsel, professors, judges, and other attorneys.

Mr. Heiskell is a former state and federal prosecutor whose current practice focuses on white-collar criminal defense.

Ms. Wasserman, thank you for coming, again, and we're ready to hear from you.

MR. WASSERMAN: Thank you. Good afternoon, Commissioners.

My name is Steven Wasserman and I'm a current assistant U.S. attorney in Washington,

DC. I'm here today speaking in my capacity as the president of the National Association of Assistant U.S. Attorneys, which represents the interests of the over 6,400 AUSAs that work around the country.

My comments and statements here today are not made on behalf of the Department of Justice or the U.S. Attorney's Office, but in my capacity as the president of NAAUSA.

NAAUSA cannot support the proposed inclusion of Section 1B1.3(c).

Currently, when conduct or evidence has not been proven beyond a reasonable doubt, or is not admitted to by a defendant, the judge may still consider the conduct when proved by a preponderance of evidence, to determine an appropriate sentence for a convicted individual.

Judicial discretion to consider, quote, acquitted conduct, acknowledges the realities of federal prosecutions and the high burden of proof required to convict an individual.

Protections are already in place to ensure individuals are not improperly held responsible for unrelated conduct.

Allowing some consideration of conduct an individual has either not formally admitted to as part of a guilty plea, or which has not been proven beyond a reasonable doubt, ensures the court has a full picture of the individual's conduct.

The proposed amendment would impermissibly obstruct judges from conducting the statutorily required analysis for imposing sentence under Title 18, of U.S. Code, Section 3553A, and constitutes really a springboard to the eventual elimination of the consideration of relevant conduct and sentencing.

It's important to note that acquitted conduct is not synonymous with notions of actual innocence. Rather, the term refers to conduct that was determined by the fact-finder to not have been proven beyond a reasonable doubt.

Acquitted conduct is also rarely

considered at sentencing because of the infrequency of acquittals after trial at the federal level.

NAAUSA's members also understand that judges are more than capable of appropriately exercising their discretion when deciding to consider acquitted conduct or conduct not otherwise admitted to by the defendant in sentencing.

Indeed, the law requires that such conduct be proven at sentencing by a preponderance of the evidence, to even be considered.

This burden of proof ensures that the defendant is not held responsible for conduct based on insufficient evidence. It also enables the court to understand the full scope of the defendant's criminal activity.

This proposal would essentially bar the court from considering any evidence not resulting in a guilty verdict at trial, or admitted at plea.

This severely and unfairly limits the court's view on the defendant's conduct, given the frequent overlapping nature of evidence applicable to different offenses charged within a single case.

There is a significant likelihood that the proposed amendment will generate massive amounts of litigation, disparate results among similarly situated offenders, and a lack of predictability at sentencing.

The proposed guideline would also result in illogical and unjust outcomes. For example, consider a case of a defendant who's charged with five counts of being a felon in possession of a firearm, for being in constructive possession of five firearms found in his vehicle.

The defendant could be acquitted of all but one count because there was DNA found on only one gun. However, under the proposed amendment, the court could not consider the four additional firearms recovered from the

defendant's vehicle for purposes of enhancing the defendant's base offense level, because he was acquitted of possessing the four other firearms.

Such a result effectively nullifies provisions accounting for relevant conduct that exists throughout the sentencing guidelines.

Finally, this proposal seems to rely on misconceptions about the role-of-conduct history in charging, plea-bargaining, and sentencing.

Charging and plea-bargaining are steps in the criminal justice process, which are distinct from sentencing.

During the sentencing phase, the prosecution seeks to achieve a variety of objectives, such as seeking imposition of punishment, restoration to victims, facilitating rehabilitation, and deterring unlawful conduct.

While charging is crime-specific, the unique goals in sentencing require a fuller picture of an individual's conduct, including all aspects of an offender's characteristics,

background, and offense conduct.

Conduct that can be proved by a preponderance of evidence is critical to this picture, even if the individual was acquitted on certain offenses, or did not specifically admit guilt to certain facts as part of the plea.

The proposed amendment does nothing more than allow defendants to cherry-pick those facts that reflect positively on the offender at sentencing, while hamstringing the court from giving relevant conduct its due weight in calculating the offender's sentencing range.

For these reasons, NAAUSA opposes the proposed inclusion of Section 1B1.3(c), and I thank you for the opportunity to speak.

CHAIR REEVES: Thank you, Mr. Wasserman. Mr. Heiskell.

MR. HEISKELL: Thank you, Your Honor. Good afternoon, Judge Reeves and members of the Commission.

Thank you for inviting me to testify on behalf of the National Association of Criminal

Defense Lawyers.

As noted, we are the preeminent legal organization in the United States, represented criminal defense counsel from all over, and that can ensure that those people accused of crimes have the due process accorded to them under our Constitution.

We are the preeminent organization in the United States advancing this mission, and we are very proud of that fact. And, Judge, you mentioned the many thousands of members that we have, and we are certainly proud of that fact as well.

I am president-elect and will assume the presidency in August of this year. And I have been a federal prosecutor, a state prosecutor, and now criminal defense attorney.

From that vantage point, I believe I have a good eye, if you will, from looking at how jury service has impacted the communities that I've served, and also looking across the nation, how important jury service is to this country.

You know, I was brought up in a country in which all of us have been brought up in this manner, in which you're told that two specific areas of involvement in our democracy would be the right to vote and the right to serve on a jury.

And any diminution or dilution of those rights is regrettable, and should be resisted at all levels. So, I am here to report the high honor to a right to a jury trial.

A few years ago in this city, three defendants sought a jury trial in the U.S. v. Jones case I cited in my written testimony, to contest the allegations contained in a multi-count indictment charging federal drug distribution, conspiracy, a RICO conspiracy, firearms violations, and the substantive counts of distribution of crack cocaine.

This trial took eight months to complete. And at the end of that trial the jury found the defendants -- the three defendants who went through trial -- guilty of only the

distribution counts.

Yet, the government sought to increase the sentencing, during the sentencing hearing, anywhere from a range of 324 months to 480 months, based upon the acquitted conduct.

The judge eventually sentenced those three defendants to a range from 180 months to 235 months.

The jury foreperson got wind of this and wrote the judge a letter, in which he essentially said, it appears that our jury service was not accorded the respect that it deserved.

And I can understand that jury foreperson's frustration. Because they had spent eight months out of their lives, came back with a verdict after reviewing all of the specific evidence and reviewing the government's burden of proof, and determined that only the distribution counts should survive.

Instead of the 57, the 71-month range, they eventually received 180 to 235 months.

So, ACDL is unequivocally opposed to the use of acquitted conduct to increase a defendant's sentence.

Permitting the use of acquitted conduct at sentencing undermines the defendant's right to trial. It also violates the defendant's right to due process. Particularly, the principle that the facts necessary to authorize punishment must be proven beyond a reasonable doubt.

Now, that comes from the Apprendi vs. New Jersey decision. That Apprendi decision, I've not heard anyone discuss it yet. That decision in 2000 was a key decision concerning the guidelines.

And it seems as though we've gotten away from that; that Supreme Court decision.

Yes, the U.S. v. Watts decision, which the government's relied upon over the years in many courts, seems to have neglected that Apprendi decision from that aspect, that logical reasoning behind how sentences should occur based

upon facts supported by the conviction beyond a reasonable doubt.

The right to a jury trial is extremely important to our nation's founders. We heard Ms. Barron -- I believe that was name -- talk about John Adams' quote -- I love that quote -- representative government and the right to trial are the heart and lungs of our liberty.

So, we have to be careful so that we do not abrogate this right to a jury, or dilute it in any way.

Even today, our constitutional legal system places a paramount value on jury service. But the trials are important to the defense for obvious reasons. They're also important to the public.

Judge Boom mentioned the confidence of the public in our system. It emanates from our jury service. People who show up, who go through that jury selection process, who sit for up to eight months? And then, to have the nullification process by a court or probation

officer? That's what it is, a jury nullification.

And is that fair? No, it's fundamentally unfair. By undermining the jurors' carefully considered verdict, permitting sentencing based on acquitted conduct, it undermines the legitimacy and public aspect or respect for the legal system.

It gives the jury the message that their decision was wrong, and that their jury service was unimportant.

It gives the public the message that verdicts in favor of the accused not be respected.

This understanding will feel in love and fairness and loss of legitimacy, is particularly felt in impacted communities, which have also unfairly borne the brunt of many inequities in our system.

NACDL is particularly concerned that acquitted conduct sentencing contributes to the trial penalty. The trial penalty is broadly

defined as a massive difference between the sentence a defendant typically receives if convicted at trial, versus the much lower sentence a defendant typically receives after a plea.

The huge difference between post-trial and post-plea sentencing has virtually eliminated trials from our federal criminal system, with less than two percent of federal convictions today resulting from trials, as contained in the Sentencing Commission data from 2021.

When I was a prosecutor years ago in the Dallas Division of the Northern District of Texas, we had, on average, eight to ten percent of cases that went to trial.

Our courtrooms were busy. Today, you can go to that courthouse and throw a rock down the hall and not hit anyone.

There's no trials going on. They're all pleas. NACDL's report on the trial penalty from 2018 talked about the sentencing guidelines and the Commission data to show that the post-

trial sentences were, in fact on average, triple the length of sentences handed down after a plea.

Ms. Brannon mentioned that Jesse went to trial -- I think I'm torturing that pronunciation -- and how that exponentially went up as a result of that trial.

That was a trial penalty. Where he could have received maybe ten years on a plea, but in fact received 30 years because he's exercised his right to a trial.

For some types of crimes, these exponentially higher rates for trial people were eight times higher. This enormous difference in sentences has coursed thousands of defendants into pleas, as even those with a strong case understandably choose not to risk the often exponentially higher sentence that they may receive if convicted at trial. For this reason, the trial penalty --

CHAIR REEVES: I was going to say, Mr. Heiskell, we want to leave time for our Commissioners to ask you questions.

MR. HEISKELL: All right. The ABA's plea bargain task force addressed some of this issue. If I may, we are certainly in line with the prohibition of acquitted conduct in all respects, whether it be procedural acquittals, or jury acquittals.

We think it is fundamentally unfair that the position taken by the Supreme Court in Apprendi, that of course will now be revisited with the McClinton case coming up with the certiorari, and our Congress considering changes in acquitted conduct, we want the Sentencing Commission in this cycle to put down the letter of the law, a bright-line rule, no more acquitted conduct being considered at sentencing.

CHAIR REEVES: Thank you, sir.

MR. HEISKELL: Thank you.

CHAIR REEVES: Any questions from our Commissioners? Oh, no, we haven't exhausted it.

COMMISSIONER WROBLEWSKI: I know, I'm sorry --

CHAIR REEVES: Mr. Wroblewski.

COMMISSIONER WROBLEWSKI: -- I'm standing in the way of lunch. Mr. Heiskell, thank you for being here. Mr. Wasserman, thank you for being here.

Am I correct that there are very few states that have the kind of prohibition on consideration of acquitted conduct that you're asking for? So, that's one question.

Two, the examples that you've put forward, and that some of your colleagues from previous panels put forward, is troubling -- and I completely understand why they put these forward -- are cases where the acquitted conduct drove the sentencing. Drove the final outcome.

So, someone was convicted of one count that would normally result in five years, but they were acquitted on 20 counts and they ended up getting a 20-year sentence. That was the example before.

The example you point out, 180 months if they were acquitted. If the acquitting conduct was considered, 360 months.

So, we're talking about acquitted conduct not just being considered, but driving the sentence.

And you also mentioned Apprendi. Apprendi, of course, requires -- and it's a constitutional rule, so there's nothing we can do about that -- it limits a judge to the statutory maximum based on what's proved beyond a reasonable doubt to the jury.

It seems to me that the unique problem in the federal system -- and I'm just curious if you think this is right or wrong -- the unique problem in the federal system is we have statutory ranges that are very wide.

You sell a tiny little bit of drugs, your statutory range is zero-to-20. You commit some other crime, zero-to-fifteen. Very wide ranges.

And then, there's a second structural element that seems to be at play here, which is that under the federal sentencing guidelines, whether your base offense level is ten or fifteen

or twenty, anything else can drive your sentence all the way up to 43. There are no limits based on the offense of conviction.

So, you can end up in the situation that you are concerned about, which is your conviction gets you to a five-year sentence, but your uncharged acquitted conduct can get you to a 20-year sentence.

MR. HEISKELL: Yes.

COMMISSIONER WROBLEWSKI: First of all, am I correct about my premises? That's the first question. And the second, do you think my diagnosis of the problem is correct?

MR. HEISKELL: I agree that it is correct, Commissioner. And again, by looking at it in that manner, I always go back to consideration of the jury's verdict of the acquitted conduct.

And that's why it's very troublesome to say you would consider that for any purpose whatsoever. Because to me, we have a Supreme Court case that states we should give substantial

weight to acquittals. That comes from the U.S. v. DiFrancesco case. And I can provide the cite later.

And from that, we seem to have reversed course, if you will, by not giving and according that due respect.

But you're correct about the range. But I certainly feel that any acquitted conduct should never be factored into whether that range goes up, or variance, or some type of departure. Because now, you are really, again, abrogating the jury's verdict by virtue of taking into consideration, for any purpose whatsoever.

COMMISSIONER WROBLEWSKI: But am I correct that in most states, under most state law, judges can consider it, it just can't -- there are limits.

I'm not saying in all, because, for example, in some of the testimony, there was the description of what the Michigan Supreme Court said, and so forth.

So, I'm not saying that's true in all

states. But in most states, there's not this categorical prohibition.

MR. HEISKELL: I read briefly, because I heard earlier that question being addressed to one of the witnesses, I do know that approximately ten or more states have outlawed acquitted conduct from being considered. But that remains with the other states.

Now, there are certain states, like Texas, where jurors determine the sentences in state court, not the judges, unless the defendant opts to do so.

But nevertheless, yes, those state courts that do have that acquitted conduct sentencing is similar to what the federal court system is, from my research into that.

However, again, I think what is done here by this Commission would eventually trump, and would eventually bleed down, to the state level, in which they would recognize that this is unconstitutional and, again, is a diminution of the right to trial by jury.

CHAIR REEVES: Commissioner V.C. Mate, please.

VICE CHAIR MATE: I have two questions. But first, thank you very much for your testimony today. We appreciate you coming back today, Mr. Wasserman. And it's good for you to be here today, Mr. Heiskell.

MR. HEISKELL: Thank you.

VICE CHAIR MATE: My first question is following up on the state question, and whether there are any states that allow consideration of acquitted conduct for purposes of calculating the guidelines?

MR. HEISKELL: I'm not aware of that, ma'am. And that's something we'll have to get back with you on. The state procedures vary, obviously. And there are different standards, I understand, as well. Not just the preponderance of evidence standard.

I'm not sure what else would be applicable in those states that don't even apply that. So, I'd have to do some further deep

diving to that issue and get back with you on that.

VICE CHAIR MATE: Okay, thank you. Appreciate that.

MR. HEISKELL: Thank you.

VICE CHAIR MATE: And then, Mr. Wasserman, in your written testimony, and again today, you raise concerns about massive amounts of litigation stemming from the Commission's proposal in this regard.

And I was wondering if you'd had a chance to look at the department's suggested revisions, and whether you think that you have the same concerns, different concerns, with that proposal.

MR. WASSERMAN: I have the same concerns as the department about the amount of litigation that would be generated by the existing proposal.

And while I think the department's attempt at trying to mitigate those potential problems is laudable and may have some effect,

I'm still concerned that it's not going to appreciably reduce the amount of litigation that would result in trying to decipher what relevant conduct can be considered and what can't, particularly in those cases where the evidence is overlapping between counts.

I would say, to go a little bit beyond your question, this debate, I think overall, misses one important point, which is that the current state of the law allows for the consideration of acquitted conduct that's proven by a preponderance of the evidence.

The Supreme Court has upheld this time and again. It's permitted under federal law, under Title 18.

So, to the extent that the guideline seeks to achieve limiting the consideration of acquitted conduct, until the law is changed I don't think it's going to achieve that objective.

Because, ultimately, particularly given the voluntary nature of the guidelines, you may say that we're not going to use that to

create the suggested range.

But ultimately, the government, absent a change in department policy, can argue it and a judge can consider it under existing law.

So, that brings me to, I think, my concern here is that this is an area that the Commission is wading into that, at this point at least, it probably shouldn't. And that's particularly so given that Congress is considering addressing this at the federal level through legislation, which I think is where the more appropriate place to deal with that is.

So, while we can have the sort of more esoteric discussions about whether this is fair, ultimately, current law says that it is. And any statements, with all due respect to the people that support this amendment, those are really ultimately opinions, aspiration, as the law as currently written allows for acquitted conduct to be considered.

Obviously, from my viewpoint, I think it's the correct position that we should be in.

I think judges have the discretion, and exercise that discretion appropriately.

The defense has the opportunity to challenge that evidence at sentencing, through cross-examination. So, there are guardrails in place to prevent acquitted conduct from being considered when it shouldn't be.

And then, I think there are a lot of layers to this. The other issue is transparency. As I think Commissioner Wroblewski alluded to, we have very wide ranges of sentencing. A judge can sentence up to the statutory maximum.

If we start to limit what a judge can consider in calculating the range, a judge can still ultimately sentence all the way up to the max.

And I think you invite uncertainty as to a judge's decision that may end up being above what the sentencing range comes out to, assuming that you have an amendment that passes like this.

And I think that's a problem for public confidence in the legitimacy of, and

transparency of, a court's decision about the sentence.

The overwhelming majority of judges I think are transparent in their decisions. But I think as you start to restrict what judges can consider, you start to invite speculation as to why a judge came down to where he or she did, whereas I think the current system puts it all out there.

VICE CHAIR MATE: Thank you.

CHAIR REEVES: Any other questions? Well, that concludes our first set of hearings by this Commission.

I think we've had a great day-and-a-half. Our work is continuing. Our work is still going.

On behalf of my fellow Commissioners, I want to again thank each of our panelists. I want to again thank our staff. I want to again thank all of you who have come into this room, either personally or through livestream, and listened in.

Again, our work continues. For those who want to go back and review any of this information, it will be up on our website in the next day or so. We expect the live recording -- won't be live, of course -- for you to go back and listen to in the coming day or days.

If you want to read any person's testimony, it's already on our website at www.ussc.gov.

For those of you who wish to supplement your testimony, you may do so. For those of you who wish to offer any comments, you may do so. Our comment period remains open until March 14, 2023.

We, however, will be back with you on March 7th and March 8th for our hearings to receive testimony on our other proposed amendments.

Again, I encourage all of you to return. I encourage those of you who are watching, to tune in.

Thank you. This has been an

incredible day, an incredible couple of days, for all of us.

We heard you, we're listening, and we're going to do what we can do to do our jobs. So thank you, ladies and gentlemen, so much. This hearing is now adjourned.

(Whereupon, the above-entitled matter went off the record at 12:45 p.m.)

C E R T I F I C A T E

This is to certify that the foregoing transcript

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Before: U.S. Sentencing Commission

Date: 02-24-23

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.

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