

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

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TUESDAY
MARCH 7, 2023

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The Commission met in the Commissioners Conference Room, Suite 2-500, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Washington, D.C., at 9:00 a.m. EST, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT

CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA E. MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
CLARIA HORN BOOM, Commissioner
JOHN GLEESON, Commissioner*
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex officio

*Participating virtually

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

2 9:03 a.m.

3 CHAIR REEVES: Good morning. I'm
4 Carlton W. Reeves, the Chair of the United States
5 Sentencing Commission. I welcome you all to our
6 third day of hearings on our current slate of
7 proposed amendments to the sentencing guidelines.
8 I thank each of you for joining us, whether
9 you're with us in this room or attending via
10 livestream. We appreciate your interest in the
11 work of your United States Sentencing Commission.

12 I have the honor of opening this
13 hearing with my fellow commissioners. To my
14 right we have Vice Chair Claire Murray, Vice
15 Chair Laura Mate, and Commissioner Claria Boom,
16 and ex officio Commissioner Jonathan Wroblewski.

17 To my left we have Vice Chair Luis
18 Felipe Restrepo and Commissioner Candice Wong.
19 We also have Commissioner John Gleeson who's
20 attending by phone. But he's with us today, and
21 we appreciate his presence in that capacity.

22 I must begin by noting the diligence,

1 dedication, and contributions of every member of
2 the Commission staff. Their work is hard, their
3 work is indispensable, and their work is
4 extraordinarily appreciated by each of the
5 Commissioners.

6 I speak on behalf of the Commissioners
7 and the public when I say to our employees thank
8 you for all you have done, all you are doing, and
9 all that you will continue to do.

10 I want to welcome our esteemed
11 panelists today. They come from across the
12 country to provide us with their testimony. In
13 doing so, they join the over 2,000 people who
14 have already submitted comments to the
15 Commission.

16 At our last hearing, I made a promise.
17 When you speak to the Commission, you will be
18 heard. I'm happy to report that we at the
19 Commission have kept that promise. When we have
20 read carefully researched written comments, we
21 have been persuaded.

22 When we have heard testimony grounded

1 in lived experience, we have indeed been moved.
2 And when we deliberate, we find ourselves
3 constantly citing what panelists and commentators
4 have told us. If you have spoken to this
5 Commission, I can say for a fact you have been
6 heard. And so I remind our panelists and the
7 public, you will be heard, because you must be
8 heard.

9 Commissioners and our staff are
10 committed to doing our jobs in our criminal
11 justice system with a focus on that word justice.
12 But we can't do justice without your data, we
13 can't do justice without your expertise, we can't
14 do justice without your perspectives.

15 While our hearings may be ending this
16 week, our need for your input is not. We will
17 continue to accept public comments until March
18 14th. Panelists, if you come away from today with
19 more to say, please provide us with supplemental
20 testimony before the deadline.

21 I also urge members of the public to
22 submit comments via our online portal at

1 www.ussc.gov. However and whenever you speak to
2 the Commission, you will be heard.

3 Today we will be hearing testimony on
4 proposed amendments regarding firearms offenses,
5 drug offenses and resolving conflicts among the
6 Courts of Appeals. Tomorrow we will be taking
7 testimony and proposed amendments regarding the
8 career offender guideline and how criminal
9 history is addressed in the guidelines.

10 Panelists, you will each have five
11 minutes to speak. Know that we have read your
12 written submissions. Your time will begin when
13 the light turns green. You have one minute left
14 when it turns yellow and no time left when it
15 turns red. If I cut you off, please understand
16 I'm not being rude as we have so much to cover
17 today, and tomorrow, and a limited time to hear
18 from everyone.

19 For our audio system to work, you will
20 need to make sure that your microphone is on
21 before speaking. Look for a little green light.
22 You will also need to speak close to the

1 microphone, and I mean close, inches, not feet.
2 You need to speak close and into the microphone.

3 When all the panelists have finished
4 speaking, the Commissioners may ask you
5 questions. I'm certain they will do so. Thank
6 you for joining us, and I look forward to a very
7 productive hearing.

8 But before I introduce this panel, I'd
9 like to take a point of personal privilege. See,
10 they don't know, this is my office now.

11 (Laughter.)

12 CHAIR REEVES: At our initial hearing
13 the other week, for those who know me, I always
14 find a way to mention my hometown, Yazoo City.
15 And I mentioned, at the last meeting, that we had
16 two members from our community who were on the
17 NFC championship team that, well, here I go
18 again.

19 Last week Yazoo City High School boys'
20 basketball team, they were in the semi-final
21 round of the state championship in basketball.
22 And after they won that game last Monday night,

1 Tuesday morning, a week ago today, I get a call
2 from a grandparent from one of the players.

3 She said, Judge, it will be real nice
4 if we could get our students, if they win the
5 championship, to the White House. You know
6 President Biden.

7 (Laughter.)

8 CHAIR REEVES: I said well --

9 She said they do it for the NBA teams,
10 they do it for the colleges, why not?

11 Well, I'm proud to report that they
12 did win the championship a few days later. I
13 cannot guarantee that they will be invited to the
14 White House, but I'm giving them a shout out here
15 today, the 4A champions of the state of
16 Mississippi, the coach, Anthony Carlyle, and the
17 boys at Yazoo City, a place which also is the
18 home to -- one of its largest employers is
19 actually FCC in Yazoo City, Federal Correctional
20 Complex.

21 And it's amazing what Coach Carlyle,
22 Anthony Carlyle, has done for the spirit of that

1 community with these young men in that community.
2 Between he and his father, they bring home 13, a
3 baker's dozen, of gold balls, state
4 championships. And it's good to bring so much
5 life, so much inspiration into that small
6 hometown.

7 So I congratulate the boys at Yazoo
8 City High School on their 4A championship. And
9 thank you, Coach Anthony Carlyle, for your
10 inspiration.

11 Now having said that, I'd like to
12 introduce the first panelist. Our first will
13 present the executive branch's perspective on our
14 proposed amendment on firearms offenses. We have
15 with us the Honorable Gary Restaino who currently
16 serves as United States Attorney for the District
17 of Arizona.

18 Mr. Restaino currently serves on the
19 Attorney General's Advisory Committee where he
20 elevates the voices of U.S. attorneys in the
21 Department of Justice policies. Mr. Restaino has
22 previously served as acting director of the

1 Bureau of Alcohol, Tobacco, Firearms, and
2 Explosives and as an assisting United States
3 attorney. Before beginning federal service, Mr.
4 Restaino was a civil rights lawyer with the
5 Arizona Attorney General's Office.

6 Mr. Restaino, we're ready when you
7 are, sir.

8 MR. RESTAINO: Thank you, Chair Reeves
9 and the Commissioners. There's no higher
10 priority at the Department of Justice than
11 keeping our communities safe from violent crime,
12 particularly gun violence.

13 In response to the rising gun violence
14 during the pandemic, the Department issued a
15 comprehensive violent crime reduction strategy
16 that focuses our enforcement efforts on the most
17 serious drivers of violent crime in each
18 community.

19 The Bipartisan Safer Communities Act,
20 or BSCA, has aided our efforts through new
21 enforcement tools as well as intervention
22 programs aimed at preventing violence before it

1 occurs. In BSCA, Congress also created
2 sentencing directives to the Commission, and the
3 Department appreciates this opportunity speak
4 about those directives as well as other ways to
5 help make the firearm guideline more tailored and
6 effective.

7 The Department supports expedited and
8 effective implementation of BSCA's directive to
9 increase sentences for straw purchasers and
10 traffickers to reflect the danger their conduct
11 poses to public safety, yet maintaining the
12 existing parity between these offenders and
13 prohibited possessors of firearms is also
14 critically important. Otherwise a felon who asks
15 a straw purchaser to procure a gun for him could
16 face a lower guideline range than the purchaser.

17 Congress demonstrated its commitment
18 to parity in BSCA when it raised the statutory
19 maximum from prohibited persons to the same as
20 for straw purchasers. And treating them
21 differently in the guidelines would be
22 inconsistent with that demonstrated intent for

1 parity.

2 Second, the offense level for all
3 aggravated straw purchasing offenses should be
4 increased, not just those with the statutory
5 maximum of 15 years in prison. Currently the
6 guidelines treat all straw purchaser offenses
7 with knowledge of future criminal possession the
8 same.

9 Congress instructed the Commission to
10 ensure increased penalties not only for BSCA's
11 new straw purchaser offenses but also other
12 offenses applicable to the straw purchasers, a
13 category that, as the Commission itself has
14 repeatedly recognized, includes false statement
15 offenses when committed with this heightened
16 knowledge.

17 Third, the Department requests a
18 larger offense level increase for these
19 aggravated straw purchasers rather than the
20 proposed one to two-level increase. Because
21 straw purchasers generally have no criminal
22 history, such a minor increase will often result

1 in a range only one month higher than the
2 existing guidelines which the Department contends
3 is inconsistent with Congress's directive.

4 Fourth, the Department agrees that a
5 mitigating factor reduction is appropriate for a
6 subset of straw purchasers. As potentially
7 drafted, the criteria framed in the disjunctive
8 is overly broad and will result in most straw
9 purchasers qualifying for the reduction. This
10 would wipe out the sentencing increase mandated
11 by BSCA and lead to anomalous results.

12 The Department's letter sets forth
13 several examples, including a reduction for a
14 gang member who knows that the firearm would be
15 used to further criminal activity when the
16 offense is motivated by gang loyalty rather than
17 direct compensation. The Department supports the
18 criteria but recommends that the Commission adopt
19 the conjunctive formulation.

20 The Department appreciates the
21 Commission's proposal for a four-level
22 enhancement when the offense involves a firearm

1 with no serial number, also known as a ghost gun.
2 Serial numbers are necessary to trace firearms
3 used in crime, a critical investigative tool.

4 Recent data indicates that criminals
5 are increasingly using ghost guns to commit
6 crime. A couple of years ago, for example, more
7 than 20,000 ghost guns were recovered by law
8 enforcement in criminal investigations, a tenfold
9 increase from 2016.

10 The Commission's proposed amendment
11 would close the gap in the current enhancement
12 which applies only to firearms with altered or
13 obliterated serial numbers.

14 The Department also appreciates the
15 Commission's concerns about the mens rea
16 requirement for this enhancement, and it
17 recommends the Commission create a rebuttable
18 mens rea presumption.

19 The Department also strongly
20 recommends updating Section 2K 2.1's definition
21 of a firearm. The current definition lacks cross
22 references to relevant statutory and regulatory

1 authority which has two significant consequences.

2 First, under the current definition
3 machine gun conversion devices, those that turn
4 semi-automatic guns into illegal machine guns,
5 don't qualify for trafficking or number of
6 firearms enhancements.

7 Second, part kits, used to readily
8 assemble those guns, likewise don't trigger these
9 enhancements. So given the rising popularity of
10 these dangerous devices amongst violent
11 offenders, an update to comport with existing
12 federal law is critical.

13 Finally, the Department encourages the
14 Commission to address the significant gaps in the
15 existing recidivism penalties. For nearly 30
16 years, Congress has recognized that individuals
17 who possess a firearm after a misdemeanor
18 domestic violence conviction pose a public
19 danger. They should be treated the same as an
20 offender with a prior felony crime of violence or
21 a controlled substance conviction.

22 As courts have recognized, Congress

1 enacted Section 922(g)(9) precisely because
2 existing felon and possession laws were not
3 keeping firearms out of the hands of domestic
4 abusers.

5 In the past year, Congress has
6 reaffirmed the importance of deterring domestic
7 violence both through the BSCA and the
8 reauthorization of VAWA. And the guidelines
9 should similarly treat misdemeanor crimes of
10 domestic violence the same as other crimes.

11 The current guideline also lacks
12 recidivism enhancement for many prior firearm
13 offenses, such as being a prohibited person in
14 possession of a firearm. And the Commission's
15 own data demonstrates that this population's high
16 rate of recidivism poses a danger to the public.

17 Thank you, and I'd be happy to answer
18 any questions of the Commissioners.

19 CHAIR REEVES: Thank you, Mr.
20 Restaino. He says he's happy to hear questions,
21 so I turn to my colleagues. Who wishes to go
22 first?

1 VICE CHAIR RESTREPO: So your
2 colleagues on the other side of the argument have
3 suggested that doing what you're asking us to do
4 might result in some racial disparities. Has the
5 Department thought about that?

6 MR. RESTAINO: We have, Judge
7 Restrepo. And I do appreciate the opportunity to
8 speak about this, both in terms of the racial
9 disparities that are possible with respect to
10 defendants in firearms cases but also with
11 respect to the racial disparities in communities
12 impacted by gun violence.

13 And so I'd like to address this by
14 talking about the Project Safe Neighborhoods
15 program as well as the data-driven efforts to
16 predicate investigations moving forward. We
17 don't talk enough about Project Safe
18 Neighborhoods. It's one of the best things that
19 we do in the Department. It is an effort to
20 combine focused enforcement with community
21 outreach. Because we, as prosecutors, need to
22 get out of the courthouse and into the

1 communities that surround it.

2 This program has been around for a
3 long time. When I started as a young prosecutor,
4 it was mostly enforcement, a little bit of
5 outreach. I remember giving out trigger lock
6 devices. It's really come a long way, and it's
7 been amplified by the Attorney General's Equity
8 Action Plan for under-served communities and the
9 Deputy Attorney General's comprehensive strategy
10 on gun violence.

11 And really it operates in a couple of
12 different ways. It's focused enforcement on the
13 drivers of violent crime in a community, but it's
14 also engaging with those community members
15 through a reinvigorated community relations
16 service, through listening to the community,
17 through, in some cases, academic surveys.

18 When I came on as U.S. Attorney in
19 Arizona, I was able to look at the surveys from
20 our academic partners to communities impacted by
21 violence. They certainly have suggestions for
22 us, like give us more transparency. None of

1 those surveys said get out of our communities.

2 And so we take that as a sign that
3 this is an approach that communities impacted by
4 gun violence, which are often communities of
5 color, are appreciative of the efforts that are
6 being done.

7 Moving on to enforcement, we are
8 predicating more investigations based on
9 objective criteria rather than traffic stops and
10 the like. The Commission's own data suggests
11 that little more than a quarter of the cases are
12 traffic stops which can have a racial disparity.
13 I'd like to talk about the 75 percent that are
14 really predicated on something else.

15 From my time at ATF, I know the
16 importance of the data-driven efforts to
17 predicate investigations. eTrace and tracing
18 firearms is critical to telling the story of that
19 particular gun, when it left the regulated stream
20 of commerce from a federally licensed firearms
21 dealer, where it wound up at a crime scene, and
22 what other guns were purchased by the same

1 purchaser to show the commonality.

2 It also involves efforts through
3 NIBIN, the National Integrated Ballistics
4 Information Network, which shows the fingerprint
5 of that firearm and the other casings that were
6 ejected from that firearm at various crime scenes
7 as a way of tying together various crimes. What
8 this shows us is an objective effort to go into
9 the communities where gun violence is being
10 impacted and where it's taking place.

11 Our local partners as well follow
12 along on this. I was in a meeting in Tucson a
13 couple of weeks ago where they were talking about
14 acoustic devices, shot spotters, to detect where
15 shots are being fired in communities, because
16 that too was an indicator of which communities
17 need our efforts.

18 Finally, there are efforts to work
19 with trauma centers and local law enforcement to
20 get better reporting on non-fatal shooting
21 incidents in order to drive that as an
22 investigative strategy.

1 Now, are all of these efforts going to
2 completely eliminate racial disparity? We don't
3 know. They are efforts though to engage in
4 objective data-driven policing. We encourage the
5 Commission to adopt the amendments expeditiously
6 and then for the excellent Commission staff to
7 study its impact in the future.

8 VICE CHAIR MURRAY: Mr. Restaino,
9 thanks so much for being here and for your
10 testimony. I have a question about the
11 Department's suggestion that we increase or we
12 include an enhancement for federal firearms
13 licensees.

14 And I'm wondering why you don't think
15 that those, you know, that's in the context of
16 federal firearms licensees are already well
17 accounted for in the guidelines by, for example,
18 the enhancements for numbers of firearms, stolen
19 firearms, and especially the paucity of high
20 capacity magazines. Why do we need a special
21 enhancement for federal firearms licensees?

22 MR. RESTAINO: So we agree that some

1 of the enhancements can be impacted on a 922(u)
2 conviction for a theft or burglary from an event.
3 We disagree with the probation officer's
4 statement that stolen firearms are included
5 because of the commentary in the guidelines that
6 excludes stolen firearms from 922(u) offenses.

7 We do think that a greater enhancement
8 is important to take into account what's going on
9 here. It's not just thefts from federally
10 licensed firearms dealers. It can be burglaries
11 as well.

12 There is anecdotal support in terms of
13 recent cases without strong data to support what
14 this means as a trend. But anecdotal support
15 that people are in some jurisdictions driving
16 trucks and vehicles into the sides of federally
17 licensed firearms dealers to get inside and take
18 those firearms. That's different than a theft
19 offense.

20 Right now, 922(u) is categorized as
21 more of a regulatory offense in the guidelines
22 with where it is. And we think offense level

1 conduct and what has typically happening should
2 be supported and should support a greater
3 increase.

4 CHAIR REEVES: Judge Restrepo?

5 VICE CHAIR RESTREPO: With respect to
6 the domestic violence enhancement or considering
7 those misdemeanor enhancements, I'm sure you're
8 aware of this Fifth Circuit opinion in light of
9 the Bruen decision where the Fifth Circuit took
10 the position that that was unconstitutional to
11 deprive this individual and his gun rights.

12 Should we wait and see how it plays
13 out before we move forward on that particular
14 issue?

15 MR. RESTAINO: The Department
16 certainly encourages the Commission to move
17 forward on whatever it can move forward on
18 expeditiously. As to that specific one, Judge,
19 we don't yet know how Bruen is going to shake
20 out. But we do expect that the Commission should
21 take into account current law and should take
22 into account the importance of domestic violence

1 misdemeanor convictions.

2 So we would still encourage the
3 Commission to move forward with an amendment on
4 this. The Department's letter contains just a
5 massive amount of danger that domestic violence
6 creates for the community and for victims.

7 And certainly with the passage not
8 only of BSCA, but of wonderful VAWA
9 reauthorizaton amendments as well, the time
10 really is ripe to get a greater increase for
11 domestic violence, given how much of a driver it
12 is then to the local communities for violence.

13 VICE CHAIR RESTREPO: Thanks.

14 COMMISSIONER WONG: I have a technical
15 question about the machine gun proposal the
16 Department made with respect to the definition of
17 firearms. So when you have firearm that's
18 outfitted with a Glock converter switch, the
19 switch itself is classified as a machine gun, as
20 well as the firearm with that switch together
21 could be considered a machine gun.

22 So if the definition of firearm is

1 expanded and tethered to that definition of
2 5845(a), if you have a firearm outfitted with the
3 switch, does that count as two firearms or would
4 that be one?

5 MR. RESTAINO: I hadn't really thought
6 about that particular question. I think I would
7 defer for the Department to get back to you if we
8 have any further guidance. My gut sense as a
9 prosecutor is that's going to be one firearm,
10 that what we would be looking at there is one
11 firearm with the combined devices.

12 But it's still critical to get the
13 5845 definition under the National Firearms Act.
14 Because otherwise we're just dealing with a Gun
15 Control Act definition within the guidelines.

16 VICE CHAIR MURRAY: So maybe I missed
17 it, but does the Department have commentary or
18 advice on the gang enhancement definition? I
19 didn't see that in the letter.

20 MR. RESTAINO: The Department does
21 support the gang enhancement. That is in the
22 Department. It's a little bit more than just

1 gangs, it's more of an enterprise scenario. And
2 the Department supports the increase with respect
3 to that.

4 VICE CHAIR MURRAY: And the Department
5 doesn't have a view on the factors, or the way
6 it's laid out, or the phrasing?

7 MR. RESTAINO: My recollection is that
8 that particular provision is one with which the
9 Department agrees. And that's an important
10 consideration certainly to get the increase for
11 those firearms that go to end users that are
12 going to do more danger to communities with that
13 material and with those firearms.

14 VICE CHAIR MATE: I have a question
15 for you on a different specific offense
16 characteristic that came up, and that is
17 regarding the stolen firearms, and the possible
18 addition of ghost guns to that, and the
19 rebuttable presumption on the mens rea. And I
20 was curious about the rationale for kind of
21 flipping the normal burden of proof on the mens
22 rea element there.

1 MR. RESTAINO: So it's been for years,
2 Commissioner, it's been for years the standard
3 that stolen firearms and firearms without a
4 serial number, or an obliterated serial number,
5 would get an enhancement regardless of mens rea.
6 So the Department is, in many respects, urging
7 some degree of leniency here.

8 What we're looking for is a model
9 that's been used by the Commission in the past.
10 There's a number of examples in the current
11 guidelines where rebuttable presumptions have
12 been used and work. In the mortgage fraud context,
13 Under Section 2(b), there is rebuttable
14 presumption to value the collateral that the bank
15 gets back based on the tax assessed value.

16 In child sex abuse cases, there is a
17 rebuttable presumption for the imposition of the
18 undue influence enhancement, both in the 2(a)
19 guideline and the related 2(g) trafficking
20 guideline.

21 And there is a final one in Section 8
22 for organizational sentencing with respect to

1 whether or not the benefit to the corporation for
2 corporate compliance programs applies.

3 So we think looking at those four
4 examples through the guidelines, those present a
5 good opportunity and a good way to do it that has
6 worked in the past. And that's why we recommend
7 this method for the future.

8 VICE CHAIR MATE: One follow-up to
9 that, do any of those examples relate to mens
10 rea, or are those -- I can look them up, but are
11 those all separate from mens rea issues on the
12 rebuttable presumptions?

13 MR. RESTAINO: If I were looking at
14 them, I would say that undue influence is pretty
15 close to mens rea on the 2A3.2 and 2G1.3.
16 Certainly for the corporate compliance, it is,
17 because it has to do with whether or not a
18 corporation can get a corporate compliance
19 benefit when people in positions of leadership
20 are involved in the wrongdoing.

21 COMMISSIONER BOOM: Good morning,
22 thank you for your testimony. The Department

1 urges the Commission to set the base offense
2 level three or four levels above what the current
3 base offense level is. And the Commission, I
4 think in our materials, have suggested or put out
5 for comment a two-level increase.

6 Some commentators have noted, and I
7 think it was in the Federal Defenders' materials,
8 that, even under the existing guidelines with
9 the current base offense levels, firearms
10 offenders, and certainly in particular straw
11 purchasers, receive variances in their sentences
12 with some frequency. I can't remember the exact
13 percentage.

14 So what is -- and I guess the argument
15 then is, so the guidelines as they currently
16 stand are adequately addressing, you know,
17 ultimately the conduct and the sentences.

18 Now certainly there is directive by
19 Congress, but in particular, you know, to that
20 argument that court are varying, or sentences are
21 varying at a fairly not inconsequential clip,
22 what is the justification for the three to four-

1 level increase to the base offense?

2 MR. RESTAINO: Commissioner Boom, my
3 recollection of the Commission's data suggests
4 that while firearms variations have increased in
5 recent years, there are still fewer departures
6 and variances from firearm sentences than other
7 sentences under the guidelines. So that would be
8 reason to consider an additional upward
9 adjustment to the base or specific offense
10 characteristics.

11 It also comes down to specific
12 deterrents, that is incapacitation of an
13 individual who has been a danger to the
14 community. The recidivism statistics that the
15 Commission has tallied, one can read those
16 different ways. But the way we look at it is
17 that taking someone out of the community and
18 providing them a longer sentence is something
19 that leads to less recidivism in the future.

20 And that's really what we're trying to
21 do, is get rid of drivers of violent crime in the
22 communities that are most impacted by gun

1 violence and violent crime.

2 CHAIR REEVES: There will be some who,
3 I'm sorry, there will be some who testify after
4 you who will talk, urge the Commission to delay
5 doing things right now, to study it more. What's
6 the Department's view on why that might not be
7 the best thing to do at this point?

8 MR. RESTAINO: Judge, we're coming off
9 of a summer of violence last summer. My tenure
10 at ATF as acting director spanned Buffalo, and
11 Uvalde, and Tulsa, and Highland Park. Congress
12 passed the BSCA in relation particularly to
13 Uvalde. So there is some urgency to act at this
14 point on those.

15 This Commission has also had the
16 opportunity to be studying this in depth with its
17 staff for the last six months or so. We think
18 the time is right to do it now, to address the
19 rising problem of gun violence, particularly in
20 many communities across America.

21 CHAIR REEVES: And to adopt the
22 Department's view in three to four-level increase

1 as opposed to some other level increase after
2 having studied it, I'm just curious if any
3 further study is necessary to look at all those
4 issues?

5 MR. RESTAINO: Judge, that's something
6 that you and the Commissioners obviously need to
7 decide. The Department really would like
8 decisions on this and the adjustments that the
9 Commission is prepared to make expeditiously, in
10 short order, in order to carry out the directives
11 of Congress.

12 CHAIR REEVES: Thank you.

13 VICE CHAIR MURRAY: Do we have the
14 authority, in light of our proposal, to raise a
15 base defense levels one or two levels? Do we
16 have the authority to raise them four levels, as
17 a matter of administrative law and fair notice?

18 MR. RESTAINO: That is not a question
19 I know the answer to. The Department will have
20 to get back to you on that.

21 I will say this. The Commission has,
22 in the past, raised offense levels beyond the

1 directives of a Congressional statute. The
2 defender positions talk about this. They suggest
3 it should have gone the other way.

4 But when, in 1995, high capacity
5 magazine firearms were enhanced, the directive
6 was only to enhance it for Nexus' particular
7 activity. And the Commission took the step of
8 adjusting it upward for all. So we think the
9 Commission certainly has past precedents to be
10 able to do that. I defer to any future comments
11 from the Department on the administrative law
12 question.

13 CHAIR REEVES: Commissioner Wroblewski,
14 quiet today.

15 COMMISSIONER WONG: Right, man.

16 (Laughter.)

17 CHAIR REEVES: All right. Any further
18 questions of this witness?

19 As they say in the old, I guess it's
20 the old Baptist Church back home, speak now or
21 forever hold your peace.

22 Thank you, U.S. Attorney Restaino. We

1 appreciate your testimony today on behalf of the
2 Department of Justice.

3 MR. RESTAINO: Thank you, Judge Reeves
4 and members of the Commission.

5 CHAIR REEVES: All right. Good
6 morning.

7 MS. SCOTT: Good morning,
8 Commissioners.

9 CHAIR REEVES: Our second panel
10 provides us with the Federal Public Defenders
11 perspective on this issue. To present that
12 perspective we have with us Leslie E. Scott who
13 serves as an attorney with the Sentencing
14 Resource Council for the Federal Public and
15 Community Defenders.

16 In that role Ms. Scott represents
17 defender interests before the Sentencing
18 Commission, develops litigation strategies, and
19 develops training for defense attorneys. Ms.
20 Scott has previously taught at Detroit Mercy
21 School of Law and served as a public defender in
22 the western district of New York.

1 Ms. Scott, we're ready when you are.

2 MS. SCOTT: Thank you, Judge, and
3 thank you Commissioners, for inviting me to speak
4 on this important topic.

5 Gun violence takes an incalculable
6 toll on our communities and on our country.
7 Where I grew up on the east side of Detroit, it
8 is an ever present reality. Both in my community
9 and in my legal practice, I have witnessed the
10 devastating human cost of this epidemic first
11 hand.

12 Defenders are eager to help find
13 solutions to protect our communities. But a
14 knee-jerk, punitive response to the directive in
15 the bi-partisan Safer Communities Act will not
16 make us safer. Specifically, option two which
17 would raise these defense levels blindly across
18 2K2.1 is destructive and counterproductive.

19 The Commission is uniquely situated to
20 inject empiricism, deliberation, and evidence
21 into a reactive discourse that has for too long
22 been driven by fear. We ask the Commission to do

1 so and to conduct a careful review to guide a
2 measured and to guide a targeted response.

3 Indeed, Senators Cory Booker and
4 Christopher Murphy, both lead sponsors of the
5 BSCA, wrote the Commission in December to make
6 this request. They asked the Commission to
7 engage in a, quote, thorough process of research
8 and collecting and analyzing data before
9 implementing changes to, quote, avoid any
10 unintended consequences that result in unfair or
11 unjust policies.

12 There are two primary reasons why the
13 Commission should stay its hand. First,
14 historical patterns prove that a reactive and a
15 punitive response to the BSCA would entrench and
16 expand significant and pervasive racial
17 disparities in federal firearm enforcement.

18 Criminal law enforcement in America is
19 a story of gross racialized inequities with
20 Black, Brown and poor individuals often facing
21 much harsher penalties than others. We saw that
22 with the failed war on drugs. And we saw that

1 with the racial disparities caused by the now
2 discredited 100 to one crack to powder cocaine
3 sentencing ratio.

4 We see this pattern play out today in
5 federal firearm prosecutions as well. In the
6 District of Arizona, which has a large proportion
7 of straw purchasing cases, a staggering 79
8 percent of individuals convicted under the pre-
9 BSCA straw purchasing statutes in the past five
10 fiscal years were Hispanic.

11 And in the eastern district of
12 Michigan where I live, in the fiscal years of
13 2017 through 2021, an astounding 85 percent of
14 people sentenced under 2K2.1 with a 922(g) count
15 were Black.

16 The Commission's recent firearms
17 report also described a significant number of
18 2K2.1 cases that originated from traffic stops or
19 from routine street patrols with Black
20 individuals making up the majority of both of
21 those groups.

22 Defenders applaud that report and

1 applause the Commission for taking important
2 steps to understand the complex interplay between
3 firearms sentencing policies and the racially
4 uneven enforcement of criminal of criminal laws
5 in this country.

6 This is the type of information that
7 this Commission should continue to gather, build
8 upon, and address before implementing more
9 punitive measures that will undoubtedly have an
10 outsized effect on communities of color.

11 The BSCA drafters shared this concern
12 about this outsized effect in their December
13 letter. The significant cost would not be offset
14 by an improvement in community safety. Lengthy
15 and unnecessary imprisonment destabilizes
16 families and destabilizes communities, cutting
17 off the essential social and economic lifelines
18 that are most likely to thwart violence.

19 Research consistently shows that
20 higher incarceration rates are not associated
21 with lower violent crime rates. Indeed, years of
22 felon and possession prosecutions with

1 increasingly severe penalties have not curbed gun
2 violence. And there's no reason to think that
3 they will start working now.

4 The second reason to delay is that
5 another set of reactive amendments to 2K2.1 will
6 further compromise an already flawed guideline.
7 2K1.1 has seen significant increases over the
8 years, often in response to legislative changes,
9 and directives, and requests from law enforcement
10 and the DOJ.

11 But sentencing data suggests that the
12 current penalties are either too high or are high
13 enough as the majority of judges sentence within
14 or below the range in 2K2.1.

15 If you feel you cannot delay, we ask
16 you to reject, across the board, upward ratchets
17 under option two. Senators Booker and Murphy
18 have urged the Commission to reject the
19 Government's proposal of a four-level increase
20 across the board. The intent is to have the most
21 culpable players in straw purchasing targeted,
22 not the low-level individuals who have been

1 targeted in the past.

2 To conclude, we cannot punish our way
3 out of the social ills that result from decades
4 of economic, political, and social disinvestment
5 in communities of color. These are structural
6 and systemic problems that require more
7 thoughtful and nuanced methods than a back-end
8 tough on crime response.

9 We're finally starting to employ some
10 of these evidence based, public health community
11 intervention measures to drug crimes and a
12 growing consensus is calling on us to do the same
13 for gun crime prevention.

14 We ask the Commission to please
15 proceed cautiously so as not to inadvertently
16 repeat the historic policy failures from the past
17 that have led to the marginalization,
18 stigmatization, and the mass incarceration of
19 communities of color.

20 Thank you. And I'd appreciate
21 questions.

22 CHAIR REEVES: Thank you, Ms. Scott.

1 I turn to my fellow Commissioners. Commissioner
2 Mate, Vice Chair Mate?

3 VICE CHAIR MATE: Thank you, Ms.
4 Scott, for your testimony today and for, we
5 understand, pinch hitting here at the end, so we
6 appreciate you being here today.

7 You mentioned today, and it's
8 mentioned in the written submission, this
9 encouragement of careful study before we act. Do
10 you have specific ideas on the kind of study that
11 we maybe haven't done that should be done, or
12 that maybe we have done?

13 MS. SCOTT: Absolutely, thank you for
14 that question. And I think that that's an
15 important one. You know, first and foremost I
16 think it would be important for the Commission to
17 gather data about these brand new BSCA statutes,
18 and they are relatively new. The BSCA was passed
19 less than one year ago.

20 And there was a question that was
21 presented to my colleague this morning about
22 whether or not there would be sort of a

1 disproportionate impact on minority communities
2 through these penalty enhancements. And the
3 answer was we hope not, you know, but we're not
4 sure yet.

5 And I submit that that's not good
6 enough. This is an important topic, and we need
7 to be sure. And so I'd ask the Commission to
8 start by gathering data about who is currently
9 being prosecuted under these two new statutes,
10 932 and 933.

11 Look at these cases to determine, for
12 instance, whether the majority of these
13 prosecutions involve low level straw purchasers,
14 which is frankly what we've seen in the past with
15 the pre-BSCA statutes, which were fairly low
16 level, vulnerable individuals.

17 It's part of the reason why, as
18 Commissioner Boom pointed out, courts are
19 sentencing below the guidelines approximately 70
20 percent of the time in these statutes which
21 suggests that these are not sort of the upstream,
22 high level cases that the BSCA is purportedly

1 intended to target.

2 We want to avoid some of the mistakes
3 that we've seen with the Commission's drug
4 quantity table, for instance, where drug
5 quantities were set sort of as a proxy for role.
6 But as public defenders on the ground, what we
7 were seeing is that a lot of low level, excuse
8 me, drug addicted street dealers are getting
9 charged with these high quantities, despite the
10 fact that they are not major drug traffickers.

11 And so we're concerned that these new
12 prosecutions under the BSCA will sort of track
13 those same mistakes. We want the Commission to
14 gather data on demographics, what are the
15 demographics of the people who will be sentenced
16 under the new BSCA statues.

17 Senators Booker and Murphy were
18 concerned about demographics and wrote about it
19 in their December letter where they talked about
20 the Commission needing to take the time to ensure
21 that any sort of guideline enhancement will not
22 disproportionately affect low income communities

1 and communities of color.

2 Second, the Commission should review
3 its guideline to look at unwarranted racial
4 disparities more broadly in 2K2.1. And the
5 Commission has done a lot of this work already.
6 And we commend the Commission and appreciate
7 that.

8 The 2022 firearms report for the
9 summer looked at the frequency of certain SOC
10 enhancements in the 2K2.1 guideline, but it would
11 be important to look at the race breakdown of who
12 is receiving those enhancements.

13 Sentencing data also can only tell us
14 so much. And so the Commission could do a
15 special coding project to determine if there are
16 racially disparate patterns in not just
17 sentencing but also in charging, and in plea
18 bargaining.

19 Beyond race it would be important to
20 look at ethnicity and to look at gender. Many
21 straw purchase cases involve women, mothers,
22 girlfriends, wives, who are in coercive

1 relationships. And many trafficking cases
2 originate at the southwest border, but
3 prosecutions historically have targeted, as I
4 mentioned before, these low level fungible
5 purchasers.

6 In addition, we would hope that the
7 Commission would gather information to better
8 execute the Congressional directive on straw
9 purchasers without significant criminal history.
10 Congress has made it clear that it wants these
11 individuals' sentences to reflect the defendant's
12 role, and culpability, and any coercion, domestic
13 violence survivor history, or other mitigating
14 factors. And we don't think that this proposed
15 amendment sufficiently does so at this time.

16 The Commission could do a special
17 coding project to learn more about straw
18 purchasing offenses and the circumstances of the
19 people committing those offenses.

20 Fourth, the Commission could gather
21 additional information to better execute the
22 directive on gangs and cartel affiliation. The

1 commission can use its empirical prowess to study
2 current cases and to find limiting principles.

3 We know the many pitfalls and the many
4 inaccuracies of gang databases. The Commission
5 can explore data driven ways to avoid making
6 mistakes in terms of identifying affiliated
7 persons, mistakes that would be unjust but would
8 also result in unwarranted disparities and
9 lifelong consequences for the people involved.

10 Many trafficking cases in the
11 southwest involve young Hispanic American
12 individuals who are paid a small amount to
13 purchase a firearm that may eventually make its
14 way, excuse me, into the hands of the cartel.
15 But the individuals themselves are not affiliated
16 with the cartel at all. And so this enhancement,
17 it risks sort of looping these individuals in
18 with individuals who are more culpable.

19 I believe it was Vice Chair Restrepo
20 who mentioned the Rahimi case. And PAG also, in
21 their letter, suggested that the Commission needs
22 to study the effects of that Fifth Circuit

1 decision and how it might impact implementation
2 of the BSCA.

3 And also, Commissioner Wong, you
4 mentioned earlier studying the definition of
5 firearm and how the Government's proposal related
6 to incorporating machine guns into this
7 definition could potentially lead to unintended
8 consequences such as individuals being enhanced
9 for having two firearms when they really do not.

10 So this area is just ripe for study,
11 and we're happy to expand upon this and give
12 other ideas.

13 VICE CHAIR RESTREPO: Let me ask a
14 question, a potential study of this --

15 MS. SCOTT: Sure.

16 VICE CHAIR RESTREPO: And we should go
17 down this road. So in response to the question
18 about the racial disparity, your colleague
19 suggested that firearms might just have a
20 disparate impact in terms of violence in
21 communities of color.

22 Should we study that? I mean, should

1 we study who the victims of this firearm violence
2 are? And if we do, what would we do with that
3 information?

4 MS. SCOTT: Absolutely. I think it
5 would be important to study who the victims of
6 firearm crimes are. I think that there's
7 research in this area already that show that low
8 income, minority communities disproportionately
9 face firearm violence. And I think the
10 importance -

11 VICE CHAIR RESTREPO: Hypothetically
12 speaking, let's assume that's true.

13 MS. SCOTT: Correct.

14 VICE CHAIR RESTREPO: What do we do
15 with that information?

16 MS. SCOTT: I think the important
17 thing to do would be to figure out why what we've
18 done in the past hasn't worked for these
19 communities. In the past, with respect to
20 firearms, with respect to drugs, the approach
21 that the justice system broadly, I think, has
22 taken, and sentencing as well, has been to

1 enhance penalties sort of in the name of or for
2 the sake of enhancing public safety in these
3 communities.

4 But what we've seen is that that has
5 not worked. And so I think that what you do with
6 that information is you study what these
7 communities, the people in these communities
8 would like to see in terms of enhancing safety.

9 And also look at what the research
10 that's out there on deterrents already tells us
11 about why enhancing penalties does not promote
12 public safety. This idea that we can sort of
13 punish our way out of crime in these low income
14 communities is born, I think, from at least three
15 false presumptions.

16 The first false presumption is that
17 there aren't already penalties baked into the
18 guidelines, and Congressional legislation,
19 mandatory minimums, that are sufficient to
20 incapacitate people that are perceived as
21 dangerous. We know that there are.

22 With respect to firearms, there are

1 mandatory minimums that apply under 924 when a
2 firearm is possessed in drug trafficking or for
3 furthering crimes of violence. We know that
4 there are enhancements baked into the base
5 offense level, the 2K2.1, for people that have
6 certain prior convictions, both drug trafficking
7 and crimes of violence.

8 Potentially these categories will be
9 expanded if this Commission decides to abandon
10 the categorical approach. And there's the career
11 offender, there's ACCA. So we know that there
12 are enough penalties in place at this point.

13 The second false presumption is that
14 long periods of probation or supervised release
15 are somehow a walk in the park for our clients.
16 And they are not. I can't tell you how many
17 conversations I had in Buffalo with clients of
18 mine who pondered whether it might be easier to
19 go back to jail and get off papers than to remain
20 free in the community and stay on papers.

21 And that's simply because there is a
22 significant intrusion on people's privacy

1 interests, their travel interests, and their
2 liberty interests, not to mention the collateral
3 consequences that come with a felony conviction,
4 especially for somebody like a straw purchaser
5 who does not have significant criminal history.

6 Third, and this is really my last
7 point to answer your question, Judge, and that is
8 that the question presumes that we can punish our
9 way out of gun crimes and gun violence. But the
10 research simply doesn't support that premise.

11 The research suggests that lengthier
12 sentences in service of deterrence and public
13 safety don't work, just like draconian drug war
14 sentences did not do anything to decrease drug
15 crimes, or drug overdose death rates.

16 We heard this morning a discussion
17 about Project Exile, Project Safe Neighborhoods,
18 and Operation Ceasefire. And frankly, the
19 studies of those programs found little to no
20 impact of harsher gun penalties on crime rates.

21 The positive impacts were largely
22 attributed to intervention measures that were put

1 in place sort of at the front end. And that's
2 really what has a positive impact, job training,
3 social services, mental health counseling,
4 education programs.

5 Studies of mandatory minimums in
6 Michigan, Florida, Massachusetts, also found no
7 deterrent effect to mandatory minimums for gun
8 crimes. So I would suggest that we focus on
9 front end intervention and community prevention
10 measures of the post-enhanced penalties.

11 CHAIR REEVES: Commissioner Gleeson
12 has a question. So, Commissioner Gleeson, if you
13 can hear me, please ask your question.

14 COMMISSIONER GLEESON: I can, and
15 thank you, Judge Reeves, thank you, Ms. Scott.

16 MS. SCOTT: Thank you.

17 COMMISSIONER GLEESON: You know, my
18 there's no question that the racial disparity
19 issue that's already been referenced is front and
20 center, and given the sordid history of racial
21 disparities when it comes to firearm punishments.

22 But my question is kind of half

1 comment and half question. My question is what
2 does increasing the sentence length for these
3 offenders accomplish besides obviously
4 incapacitating them for a little bit longer?

5 But I'm interested in the correlation
6 between the recidivism rates and increased
7 sentence length. And it's not clear to me that
8 it might make us make some segment of the
9 community we care about, the communities we care
10 about, feel better if there are longer sentence
11 lengths. But I think there might be some data
12 out there that show that those increased sentence
13 lengths do nothing but increase recidivism rates
14 for those who serve them.

15 So is there anything, Ms. Scott, that
16 you can point us to or that we might do so we can
17 have, like, an informed, make an informed
18 decision as to whatever we might choose, four
19 levels, or two levels, what that would accomplish
20 in terms of the goals of sentencing.

21 Because I'm not sure an incremental
22 increase in the sentence lengths of these

1 offenders is a value add. Let me just stop there
2 and see if you can point us to in that regard.

3 MS. SCOTT: Absolutely. Thank you for
4 that question, Judge. I think, you know, I
5 certainly have done research in this area of
6 recidivism, and public safety, and deterrents.
7 And a lot of my scholarship focuses on these
8 questions.

9 We cite to some of the studies in our
10 written testimony that we submitted in February.
11 Certainly I could point to Daniel Nagin at
12 Carnegie Mellon. He is one of the sort of lead
13 researchers in this area. And he's pointed to
14 the fact that it's really the certainty of
15 punishment that has stronger deterrent effect
16 than the severity of any sentence length.

17 And in fact in 2016, I believe it is,
18 or it was, excuse me, the DOJ published a short
19 report called the five things about deterrents,
20 or five things you need to know about deterrents.
21 And the DOJ itself cited Daniel Nagin's research
22 for the authority that really it's the certainty

1 of punishment over and above any sort of
2 enhancement in sentence length that serves as a
3 deterrent purpose.

4 And I think that DOJ report also
5 talked about some of the significant costs that
6 are associated with increasing sentencing lengths
7 and concluded that any sort of slight or minimal
8 deterrence impact was significantly outweighed by
9 those costs.

10 In the gun context in particular, and
11 I'm happy to provide the Commission with these
12 studies, there was a report by Michael Tonry, I
13 believe his name is, also a scholar and
14 professor, who makes the same argument, that
15 lengthening punishment does little to no good in
16 terms of decreasing rates of gun crime.

17 The other suggested reading piece that
18 I have is Emily Bazelon. Her book, Charged,
19 Chapter 4 talks about gun courts. She does
20 interviews with young men, predominately Black
21 men, I believe, in the inner city Chicago area,
22 who talk about the perceived need to carry a gun

1 to feel safe because of the danger in lower
2 income inner-city communities, Black and Brown
3 communities, the danger of living there. Danger
4 that's sort of result of our policies and our
5 disinvestment in these communities.

6 So there are a number of reading
7 materials that we're happy to provide. My own
8 research has found that all of this make sense.
9 And it makes sense for a couple of reasons. One,
10 actors who commit crimes often are not
11 consciously and rationally weighing the costs and
12 benefits of their actions.

13 They're not thinking about will I get
14 caught. I think most presume they will not or
15 they would not engage in the conduct. And so
16 they're just not weighing those risks and
17 benefits. They're not thinking, if I get caught
18 will I be sentenced in federal court and subject
19 to harsher federal guidelines?

20 The fact of the matter, most people
21 are prosecuted in state court. And so they're
22 not thinking about that. They're not aware of

1 the penalties in federal court. They're not
2 aware of the federal sentencing guidelines.

3 And so really it's this sort of
4 rational calculation that I think is the
5 foundation for this belief that enhancing
6 penalties will somehow deter. It's just not
7 there. Instead it's really the certainty of
8 punishment and also increasing legitimacy in the
9 eyes of these communities.

10 If these communities feel as though
11 policing and law enforcement is legitimate, and
12 prosecutorial initiatives are legitimate, they
13 will respect the law. And that requires
14 eradicating some of these race-based differences.

15 CHAIR REEVES: I think Vice Chair
16 Murray and then Commissioner Boom, I believe.

17 VICE CHAIR MURRAY: Thank you so much
18 for being here, Ms. Scott. And I especially
19 thank you for jumping in at the last minute. We
20 really appreciate it.

21 MS. SCOTT: Thank you.

22 VICE CHAIR MURRAY: And maybe someone

1 else's written testimony that's a good thing too.

2 I had a question about the kind of
3 list of research projects that you gave in
4 response to Vice Chair Mate's comment, which was
5 helpful. It struck me that for one of those that
6 is the most new is studying the kind of
7 implementation of the BSCA, how will enforcement
8 go. Because that's something we haven't been
9 able to study before, because there was no BSCA.

10 MS. SCOTT: Correct.

11 VICE CHAIR MURRAY: But I wonder if
12 you could play out a little bit how the kind of
13 results of that sort of study would help us and
14 would kind of operationalize. I mean, it strikes
15 me that we are in a context where Congress gave
16 us a directive. And part of that directive --
17 and we can delay it for a year without violating
18 the technical terms of the directive. But, you
19 know, we have this directive that says we have to
20 increase penalties on straw purchasers, right.

21 And so 932 and 933 are part of that.

22 And what we've proposed is a one or two level

1 increase which is kind of the lowest you could do
2 as an increase. So say we were to get the
3 results of this kind of study. And it says,
4 yeah, these are all really low level people who
5 don't, you know, you should not, the national
6 inference says you should not be increasing
7 levels very much.

8 How would that leave us in a place
9 different than where we are right now, which is
10 you have to increase them by directive of
11 Congress, and we've proposed the smallest
12 possible increase.

13 MS. SCOTT: Yes. And that's a good
14 question. I think that one thing that the
15 Commission could do, and one thing that the
16 Commission has done in the past is inform
17 Congress about the results of the studies that it
18 has done. And not just inform Congress but the
19 Commission has made recommendations to Congress
20 based on its findings.

21 With respect to the career offender
22 guideline, the Commission has made

1 recommendations to Congress with respect to 924
2 and the way that that has been implemented. And
3 so we appreciate this very important role that
4 the Commission plays in sort of filling in some
5 of the gaps, frankly, for Congress.

6 I think the Commission was set up to
7 do just that. You have the skilled staff. You
8 have the expertise, you have the empirical
9 prowess to report back to Congress, to let
10 Congress know that you've asked us to implement
11 this directive.

12 We understand that we have to do that,
13 but what you intended when you asked us to
14 implement this directive was to target a certain
15 group of individuals. You intended to target the
16 more culpable, high level, I've heard people
17 refer to them as upstream, you know, people who
18 are perceived to be facilitating the gun violence
19 that occurred tragically over the summer.

20 And here's why we believe that this
21 directive misses the mark. Here's why we believe
22 that if we implement the directive in the way

1 that it's written we will not be furthering
2 Congressional intent. I think you could do that.
3 And you could wait for a response from Congress
4 to see how to move forward.

5 Certainly I think that Senators Booker
6 and Murphy, in their letter, suggested that the
7 Commission has to take a pause and think about
8 these issues, study these issues, research them
9 before taking further actions because of the
10 racial disparities that we've been talking about
11 today.

12 COMMISSIONER BOOM: Thank you for your
13 testimony --

14 MS. SCOTT: Thank you.

15 COMMISSIONER BOOM: -- and for
16 stepping in last minute. That's a difficult
17 thing to do. The federal defenders have urged
18 the Commission either to wait and study these
19 issues.

20 But if we're going to select one of
21 the options to narrow any increase in the base
22 offense level to only straw purchasers and

1 traffickers, pursuant to the, sort of the most
2 narrow reading of the Congress's, I guess
3 directive.

4 But as the Department of Justice
5 points out, at the same time Congress increased
6 the statutory maximum for prohibited persons when
7 they enacted the statute.

8 And so, you know, the argument is,
9 isn't that an indication that Congress also
10 intended that the base offense levels for
11 prohibited persons under 922(g) also increase?

12 And so, my question is, you know, to
13 address that, and then address the, you know, the
14 parity issue. Why would a trafficker, as you
15 note, often times it can be a girlfriend, it can
16 be a grandmother, it can be a relative, why
17 should that base offense level be higher than the
18 actual prohibited person? So, that's one
19 question that I had.

20 And then the other is, you certainly
21 give us a lot of great ideas on additional data
22 gathering. One of the more recent of studies, or

1 series of studies that the Commission recently
2 put out was the recidivism study.

3 And the recidivism study shows that
4 firearms offenders recidivate at the highest
5 rate, approaching 70 percent. And so, in light
6 of that, the Department of Justice argued in the
7 previous panel that increasing the offense level
8 would protect the public, and at least provide a
9 deterrent for folks who are proven to recidivate
10 at these really high levels.

11 So, I guess, I'm sorry, I just kept
12 thinking of, you know, additional questions as I
13 was sitting here. So, I have two. And that's
14 the two if we have time.

15 CHAIR REEVES: You do. You do.

16 COMMISSIONER BOOM: Okay.

17 MS. SCOTT: And feel free. I know I
18 can be long winded. So, feel free to cut me off
19 if I'm going over my time. But I appreciate both
20 of those questions. I think they are important
21 questions, so I will address them in order.

22 First is proportionality question.

1 And sort of this perceived lack of parity between
2 prohibited persons and straw purchasers. I have
3 four points that I think I want to make in
4 response to that question.

5 First is just to sort of remind
6 everybody that the Commission's overarching
7 obligation is to establish sentencing policies
8 that are proportional to the severity of the
9 conduct.

10 In other words, we've all heard the
11 saying, the punishment should fit the crime. And
12 should fit the crime that this individual
13 committed, not some arbitrary statutory norm
14 created for a crime that somebody else committed.

15 And so, the enabling act, that's for
16 one primary purpose of the Commission, which is
17 to establish sentencing policies that reflect the
18 purposes of 3553(a).

19 And in turn, 3553(a) requires courts
20 to impose a sentence that is sufficient but not
21 greater than necessary. And so, it's important
22 not to lose sight of that proportionality

1 question.

2 And so, how does the Commission know
3 whether the sentences that are anchored to its
4 guidelines are sufficient? Of course, the
5 Commission knows by looking at the data, by the
6 sort of continual feedback loop between the
7 Commission and the Court.

8 And the data for 2K2.1 show that
9 courts are either sentencing within or below the
10 guidelines, including for felon and possession
11 crimes. There are only, I believe the figure is
12 five percent of sentences under 2K2.1 that are
13 above the guideline range.

14 And so, that tells us that there is no
15 need to increase base offense levels across the
16 board, even for proportionality's sake.

17 Second, for straw purchasers with
18 mitigating circumstances who could be viewed as
19 the least culpable, Commissioner Boom, you
20 mentioned grandparents and mothers.

21 It is our hope that, and frankly it's
22 our hope and it's also the BSCA stated intention

1 that increases in punishment will be offset by
2 the mitigating role reduction.

3 The Deputy Attorney General in her
4 October letter expressed this concern that
5 sentencing ranges for straw purchasers would be
6 higher than the ranges for people they are
7 purchasing for.

8 But the reality on the ground we
9 believe is, that just isn't going to be the case.
10 And that's because straw purchasers are in
11 Criminal History Category 1, whereas felon and
12 possession, typically they are in higher Criminal
13 History Category.

14 And also, because the guideline at
15 2K2.1 compounds criminal history in so many
16 different ways with the base offense level
17 enhancement, we believe that it will be a rare
18 case where a straw purchaser will actually face a
19 higher guideline range than a prohibited person,
20 even if you don't increase across the board,
21 which we're arguing against.

22 For those straw purchasers where there

1 is sort of an outlier outsized guideline we know
2 that sentencing courts are sentencing below the
3 guidelines in these cases, and will likely
4 continue to do so.

5 Our third point is that you simply
6 don't fix something that's broken by breaking it
7 more. The straw purchasing guidelines have been
8 inflated over the years. In some instances it's
9 our belief that those have not been empirically
10 based increases.

11 And so, it's counterproductive,
12 counterintuitive, and unfound policy to anchor
13 the prohibited person guideline to an arbitrarily
14 inflated straw purchasing guideline.

15 The last point I'll make before I move
16 to your second question is, relates to the
17 intention of the BSCA, and the letter that you
18 all received in December from Senators Murphy and
19 Booker. It was the intent of the BSCA to hold
20 accountable those most culpable in the firearms
21 trafficking chain.

22 And as I've already said, it remains

1 to be seen whether the new BSCA statutes will be
2 used in this way, or if the bulk of prosecutions
3 will continue to be what we seen now, low level
4 people being prosecuted for straw purchasing.

5 Senators Booker and Murphy urged you
6 to review the data to devise evidence based
7 policies to execute this directive. And this is
8 the type of inquiry we would like to see the
9 Commission make.

10 My answer for the second question is
11 much shorter. And it's that we hear your
12 concerns related to recidivism and the recidivism
13 reports that the Commission has come out with.

14 I think it's a complex topic. It's a
15 nuanced topic. I can't, you know, do it justice
16 in this short time. So, I'll just make a couple
17 of observations about the two reports that you're
18 referring to.

19 The Commission's firearms research on
20 recidivism has been inconclusive as to the impact
21 of sentence length on recidivism. And so, while
22 there are suggestions that firearms offenders

1 recidivate at a higher level, what we're really
2 concerned with is what does this mean? What is
3 the impact of length on the likelihood of
4 recidivism down the line?

5 And so, for firearms offenses
6 generally the 2021 Firearms Recidivism Report
7 found, quote, that the data did not show a clear
8 relationship between sentence length and
9 recidivism.

10 And the 2019 report found, quote, that
11 the association between sentence length and rate
12 of recidivism among both firearms and non-
13 firearms offenders was less clear.

14 And when you look, and I won't get
15 into it. But when you look more closely at the
16 data there is even a suggestion that as you sort
17 of increase in sentence length for firearms
18 offenders that recidivism increases as well.

19 And that's something the Commission
20 should be thinking a lot about. Because it
21 suggests that the deterrent research is correct
22 that lengthening imprisonment is not a sound sort

1 of basis to cut off the risk of recidivism and
2 re-arrest.

3 COMMISSIONER BOOM: But what about
4 public protection?

5 MS. SCOTT: Public protection should
6 be sort of at the forefront of the Commission's
7 mind. And I guess the point that I've been
8 trying to make is that it does not serve the
9 public. It does not protect the public to
10 enhance sentences.

11 There are, there have been shown
12 criminogenic effects of prison. And I think we
13 need to be thinking beyond sort of the short term
14 public protection.

15 You can incapacitate somebody for a
16 few years, maybe even five years. But eventually
17 they will be released back into their
18 communities. And so we should be thinking about
19 long term public protection.

20 And when we're releasing individuals
21 back into their communities after ripping them
22 from their families, from educational

1 opportunities, from their work, we're sort of
2 destabilizing these individuals and their
3 families. And potentially leading to greater
4 public safety risks down the line.

5 This Commission is considering ATI
6 initiatives as part of, you know, this amendment
7 cycle. And so, I'd urge you to think about sort
8 of the ATI measures that you're considering, and
9 how those are sort of in tension with this
10 amendment, and in tension with the idea that we
11 can incarcerate our way out of the crime problem.

12 CHAIR REEVES: Commissioner
13 Wroblewski.

14 COMMISSIONER WROBLEWSKI: Thank you,
15 Mr. Chairman. And thank you so much, Ms. Scott.

16 MS. SCOTT: Thank you.

17 COMMISSIONER WROBLEWSKI: Can I just
18 follow up on that? What if the Commission
19 decided to focus on the increased penalties just
20 on those repeat offenders, people who have had
21 prior crimes of violence in their record?

22 And so, to try to avoid the people who

1 you're talking about, who are in the midst of an
2 educational experience, and ripping them out of
3 the educational experience which you talked
4 about, and just focused strictly on that.

5 And that's where, you know, the
6 Commission's research and the empirical studies,
7 not about deterrents, but about incapacitation,
8 that those people are the ones who really are the
9 dangerous ones.

10 And if we focused there would you
11 still have the same concerns? And then I have a
12 quick question about another slightly off topic.

13 MS. SCOTT: Yes. Thank you for that
14 question. I guess I'm still struggling to see
15 how the Commission would focus there. And again,
16 this goes back I guess to our point of the need
17 for further study and discourse on the topic.

18 Because straw purchasers who are sort
19 of targeted in the BSCA by virtue of being a
20 straw purchaser, they do not have a significant
21 criminal history.

22 COMMISSIONER WROBLEWSKI: Yes. That's

1 what I was, what I meant was the felon in
2 possessions, the felon possession cases that have
3 prior crimes of violence. I agree with you on
4 the straw purchasers. We're not going to see
5 those --

6 MS. SCOTT: Right. So, I guess my
7 answer to that would be that the guideline
8 already focuses its sort of the most punitive
9 measures on the individuals that you are talking
10 about.

11 So, the structure as you know of 2K2.1
12 is that the Subpart A provision have enhancements
13 baked in for people with certain types of prior
14 convictions that are deemed to be more dangerous
15 than others.

16 So, you have the, you know, people
17 with certain crimes of violence and drug
18 trafficking priors will receive higher base
19 offense levels. People who possess a large
20 capacity magazine are at heightened base offense
21 levels by virtue of that.

22 There's a four level enhancement for

1 people who commit the instant offense in
2 connection with another felony. There's up to I
3 believe a ten level enhancement for people who
4 traffic in extremely large numbers of firearms.
5 There's a enhancement for obliterated serial
6 numbers and stolen weapons.

7 So I guess my response to your
8 question would be that the defenders feel that
9 those concerns, those valid concerns that you
10 raise, they are already baked into this guideline
11 in numerous ways.

12 Not to mention the ACCA career
13 offender, 924c, all which carry a significant,
14 sometime mandatory imprisonment. So, we just
15 don't see a need to do anything more than what
16 has already been done.

17 And certainly the courts do not see a
18 need to do anything more, based on the sentencing
19 data that courts are going below the guidelines
20 in these cases.

21 And you had several judges that have
22 actually been fairly outspoken about the problems

1 with the firearms guideline. I think of Chief
2 Battalion in Nebraska, who has talked about, you
3 know, the problems with the guideline.

4 Some of these decisions to enhance
5 penalties have not been empirically based. And
6 have instead been pursuant to directives. And
7 so, you have some judges that are refusing to
8 follow the guideline for that reason.

9 And so I risk that doing what you're
10 asking or suggesting the Commission might do,
11 Judges will just continue not to follow the
12 guidelines.

13 CHAIR REEVES: Okay. thank you, Ms.
14 Scott. It's time for us, you've done well.

15 MS. SCOTT: Thank you, Judge.

16 CHAIR REEVES: It's time for us to
17 move on to our next panel. We appreciate your
18 testimony.

19 MS. SCOTT: I appreciate being invited
20 today. Thank you.

21 CHAIR REEVES: Our third group of
22 panelists will provide us with the perspectives

1 of this issue from two of our advisory groups.

2 First we will hear from Marlo Cadeddu,
3 who serves as the Fifth Circuit representative to
4 the Sentencing Commission's Practitioner's
5 Advisory Group.

6 Ms. Cadeddu is a solo criminal defense
7 practitioner who handles federal cases across the
8 nation. Ms. Cadeddu has previously served as a
9 Steering Committee Member on the American Bar
10 Association's Death Penalty Representation
11 Project.

12 Second, we will hear from Joshua
13 Luria, who serves as Vice Chair of the Sentencing
14 Commission's Probations Officers Advisory Group.
15 Mr. Luria serves as a supervisory U.S. Probation
16 Officer in the Middle District of Florida. He
17 has previously served as a U.S. Probation Officer
18 in Brooklyn, New York.

19 Ms. Cadeddu. We're ready whenever you
20 are.

21 MS. CADEDU: Thank you, Judge Reeves
22 and Members of the Sentencing Commission. I

1 appreciate the opportunity on behalf of the
2 Practitioners Advisory Group to address you.

3 As you know, the Practitioners
4 Advisory Group is composed of attorneys in
5 private practice who engage in criminal defense
6 practice. My testimony today, obviously, will
7 cover firearms.

8 Many of the Commission's proposed
9 changes to Section 2K2.1 are in response to the
10 passage of the Bipartisan Safer Communities Act,
11 which requires the Commission to both review and
12 amend its guidelines.

13 The PAG recommends against any
14 amendment of 2K2.1 at this time. And instead
15 recommends that review and study be conducted
16 before any amendment.

17 While the BSCA directs the Commission
18 to amend its guidelines it does not contain any
19 timetable for that, and directs the Commission to
20 review and amend prior to, review prior to
21 amending. Amending without review would be in
22 fact contrary to Congress's directive.

1 There are several reasons why careful
2 review is warranted here. And first, as other
3 commentators have noted, there are
4 disproportionate racial disparities in charging
5 under the current firearms statutes.

6 The PAG recommends that any amendment
7 to 2K2.1 be structured to ameliorate rather than
8 exacerbate racial disparities.

9 Second, historically courts have
10 imposed below guideline sentences at a
11 significant rate when sentencing straw purchasers
12 and other offenders under 2K2.1.

13 The Commission's statistics show that
14 a significant number of sentences imposed
15 pursuant to 2K2.1 were below the guidelines. But
16 the Commission is now considering increasing the
17 recommended sentencing ranges under 2K2.1 for
18 many defendants.

19 Implementing substantial increases
20 without first understanding and accounting for
21 the reasons for those increases, or for the
22 reasons behind the historical prevalence of below

1 guideline sentences either ensures an even higher
2 rate of below guidelines --

3 CHAIR REEVES: Has your microphone
4 gone off?

5 MS. CADEDDU: I think my microphone
6 has gone off.

7 CHAIR REEVES: Yes. Just speak
8 louder. Because I think it is off. I don't see
9 a green light.

10 MS. CADEDDU: It's blinking red.

11 CHAIR REEVES: It's blinking red.

12 MS. CADEDDU: All right. I'll do my
13 best. I'll use my courtroom voice.

14 Implementing substantial increases
15 without first understanding and accounting for
16 the reasons for those increases either ensures an
17 even higher rate of below guideline sentences in
18 the future, or guarantees that less culpable
19 individuals will be incarcerated for longer
20 periods of time.

21 Review and study would yield an
22 understanding of why courts so frequently elect

1 to depart downward, and could suggest more
2 appropriate modifications to the guidelines.

3 Third, many sentences under 2K2.1
4 arise from prosecutions under Section 922, 18 USC
5 Section 922. One provision of this statute,
6 (g) (8), criminalizes possession of a firearm by
7 persons subject to domestic violence protective
8 orders.

9 As the court is aware, recently the
10 Fifth Circuit held this portion of 922
11 unconstitutional in Rahimi. The rationale of the
12 Rahimi Court potentially calls into question the
13 constitutionality of several other portions of
14 that statute.

15 The applicability of the current
16 version of 2K2.1, and the proposed amended
17 version depends in some respects on the defendant
18 being found to be a prohibited person.

19 Likewise, some of the new offenses
20 created by the BSCA and accounted for in the
21 proposed amendments depends on the transfer of
22 firearms to prohibited persons who are prohibited

1 due to domestic violence protective orders.

2 If the Rahimi decision withstands
3 further challenge then of course it will be, it
4 seems prudent that revisions or amendments to
5 2K2.1 should await further study and review of
6 the impact of that case.

7 There are other aspects of 2K2.1 that
8 merit review and study prior to amendment. These
9 include changing the standard of proof from
10 knowingly to the ambiguous heading reason to
11 believe.

12 And I would point out that the PAG
13 certainly would oppose the Department's proposal
14 for a rebuttable presumption mens rea that is in,
15 stands for obliterated or stolen guns, or ghost
16 guns.

17 I believe that the Department of
18 Justice has advocated for a rebuttable
19 presumption. The PAG would definitely oppose
20 that. That is contrary to the way the guidelines
21 operate. It's contrary to our system of justice.
22 The Department has the burden of proof at all

1 times at sentencing.

2 In the alternative, if the Commission
3 does decide to amend 2K2.1 without further study
4 the PAG recommends Option 1, because that is the
5 more narrowly drawn.

6 The PAG recommends -- oh thank you.
7 The PAG does however recommend an important
8 change to Option 1. Because in the PAG's view
9 the current version of 2K2.1(b)(9) in Option 1 is
10 inconsistent with the BSCA in several respects.

11 First, the BSCA requires that
12 mitigating factors be considered for defendants
13 who are straw purchasers without significant
14 criminal histories.

15 However, Option 1 places a number of
16 additional limitations on the consideration of
17 mitigating factors beyond those in the BSCA.

18 Second, the BSCA does not define
19 without significant history, criminal histories.
20 But Option 1 is written to apply only to a
21 defendant who does not have more than one
22 criminal history point.

1 We believe, the PAG believes that it
2 should be left to the Court to determine what
3 without significant criminal histories means.

4 Third, the BSCA requires that any
5 guideline amendment in this area should reflect
6 the defendant's role and culpability in any
7 coercion, domestic violence, survivor history, or
8 other mitigating factors.

9 But the language of Option 1 is more
10 restrictive than the language in BSCA. Option 1
11 contemplates only consideration of a defendant
12 motivated by an intimate or familiar
13 relationship, or by threats or fear.

14 Nowhere, moreover, nowhere in Option
15 1 is the sentencing court directed to consider
16 the all-important catch all of other mitigating
17 factors that BSCA suggests.

18 Finally, the BSCA does not quantify
19 the extent of a reduction that a defendant should
20 receive. Yet, the amendment proposes a one point
21 reduction.

22 In order therefore for Option 1 to be

1 consistent with the directives of BSCA the PAG
2 recommends that 2K2.1(b) (9) be redrafted as
3 follows.

4 A downward departure may be warranted
5 for any defendant convicted under the list, the
6 requisite list of statutes if that defendant is
7 without significant criminal history.

8 The extent of the downward departure
9 may be based on consideration of the defendant's
10 role in culpability, any coercion, the
11 defendant's domestic violence survivor history,
12 or other mitigating factors.

13 Without these changes to 2K2.1(b) (9)
14 straw purchasers with these and other mitigating
15 factors risk being sentenced to longer sentences
16 than the prohibited persons for whom they are
17 purchasing. And that concept runs contrary to
18 the intent of BSCA and also common sense. Thank
19 you.

20 CHAIR REEVES: Thank you, Ms. Cadeddu.
21 Mr. Luria.

22 MR. LURIA: Good morning. On behalf

1 of the Probation Officer Advisory Group thank you
2 for the opportunity to provide testimony
3 regarding the proposed amendment to Section
4 2K2.1.

5 According to a recent study on federal
6 firearms offenses conducted by the Commission and
7 published in July of 2022, Section 2K2.1 has a
8 higher than average fidelity to within guideline
9 range sentences, with 49.6 percent in range
10 sentences compared to the 39.9 percent for all
11 other offenders.

12 Section 2K2.1 has a strong anchor
13 effect on sentencing. And POAG recognizes that
14 is at least in part due to how seriously federal
15 system takes firearms offenses, as it should.

16 Considering, the study further pointed
17 out that defendants sentenced under Section 2K2.1
18 had the highest average number of prior
19 convictions, at 9.4. And that 53.1 percent of
20 the defendants under Section 2K2.1 had a criminal
21 history category of four, five or six.

22 Additionally, 60.6 percent of the

1 firearms offenders in 2021 had at least one crime
2 of violence conviction as compared to 29 percent
3 of all other offenders.

4 I'd like to observe that this
5 guideline has been well adhered to while handling
6 offenders with the longest and most serious
7 histories. Straw purchasers account for just
8 under five percent of all Section 2K2.1
9 defendants in 2021.

10 This will likely change as a result of
11 the Bipartisan Safer Communities Act. But POAG
12 believes that many of the changes proposed will
13 continue to keep high fidelity to the outcomes
14 produced by 2K2.1.

15 POAG is in favor of Option number 1,
16 and relies heavily on our written testimony. The
17 proposed amendment on this issue has many options
18 within options.

19 While we have written in favor of some
20 options and stayed silent on others, I'm happy to
21 answer any questions about any of the options.
22 Though I'm going to focus my initial statement on

1 some of the areas that we think are the most
2 important parts for our position.

3 POAG proposes that Subsection
4 (b) (5) (A) and (b) (5) (B) be combined into a single
5 paragraph. We observe that the two issues are
6 similar enough to be contained as part of a
7 single paragraph of analysis. And we recommend
8 that the paragraph's enhancement be two levels.

9 The (b) (5) (C) section would then
10 become (b) (5) (B), and POAG would suggest that
11 this conduct result in a five level increase.

12 POAG has several recommendations
13 related to the proposed amendment to create a
14 Subsection (b) (8), the first of which is to make
15 this subsection offense based. The rationale
16 behind this was to try to include those who are
17 also receiving firearms from straw purchasers.

18 POAG also supports the use of the
19 reference to Subsection (b) (5) as part of
20 Subsections (b) (8) (A) and (b) (9) (A), mainly
21 because this will include false statement cases,
22 and make Subsection (b) (8) and (b) (9) easier to

1 navigate.

2 POAG also recommends that language in
3 Subsection (b) (8) (B) be adjusted from
4 participated to something more akin to affiliated
5 with. POAG's thinking is that showing someone to
6 be a participant may be harder than showing they
7 were affiliated.

8 POAG also recommends the removal of
9 the language of five or more persons from
10 (b) (8) (B). POAG viewed this language that would,
11 this language as reductive in terms of the
12 applicability. Often times a straw purchaser may
13 be only working directly with a single point of
14 contact for a cartel or a gang.

15 Further as it pertains to (b) (8) POAG
16 recommends that the proposed Subsection (b) (8) (C)
17 be deleted in its entirety. The mens rea
18 component in this section would be extremely
19 difficult to meet.

20 As to Subsection (b) (9) (C) POAG also
21 believes that ands rather than ors should be
22 used. And that section that deals with minimal

1 knowledge should be amended to, I quote, had no
2 reason to believe that the firearm would be used
3 or possessed in connection with further criminal
4 activity, end quote.

5 POAG favors this different standard
6 because of how devastating the outcomes can be
7 when a criminal is able to circumvent the
8 protections to obtain a firearm.

9 As for ghost guns enhancements, POAG
10 is in favor of the changes that are proposed to
11 create this enhancement.

12 However, POAG recommends the inclusion
13 of a firearm manufactured prior to the Gun
14 Control Act of 1968 as part of the other than
15 provision in the main body of the guidelines and
16 the respective commentary sections.

17 The Commission has also asked about
18 further revisions to Section 2K2.1. POAG does
19 not recommend the creation of special
20 enhancements for -- particular to a federal
21 firearms license holder. POAG observes that a
22 defendant engaged in that conduct will likely

1 face appropriate enhancement as captured under a
2 variety of other sections.

3 POAG also favors the Commission
4 implementing some method for accounting for prior
5 federal or state convictions for felon in
6 possession of firearm and ammunition offenses,
7 perhaps through the base offense level, similar
8 to a prior conviction for a crime of violence or
9 a controlled substance offense.

10 Again, thank you for the opportunity
11 to share POAG's perspective. I stand ready to
12 answer any questions.

13 CHAIR REEVES: Thank you.
14 Commissioner Wong.

15 COMMISSIONER WONG: The question is
16 for Mr. Luria.

17 MR. LURIA: Yes.

18 COMMISSIONER WONG: If you've read the
19 Department's comments here, there seems to be
20 just a disagreement on complexity, on
21 hypothesizing which of the two options is more
22 complex as an application.

1 And I was just wondering, you know,
2 the Department says that because of the
3 complicated structure that Option 1 would
4 exacerbate challenges in applying 2K2.1. And I
5 know POAG in overwhelming majority favored Option
6 1 because of ease of application.

7 So, I was hoping you could just flesh
8 that out and explain POAG's view that, about the
9 prospective merits in terms of complexity.

10 MR. LURIA: Certainly. And in our
11 discussions regarding it many of the members
12 looked at that Section (b) (5) and thought it was
13 really good to have all that in one area.

14 We were going through an analysis
15 there that's all located in one spot, versus when
16 you put that into the base offense level
17 structuring it's kind of like you're integrating
18 that into a variety of other considerations.

19 And that stratification ends up being
20 a bit more versus when you're trying to really
21 focus in on this specific issue as it pertains to
22 straw purchasers. All of that is in one

1 location. It's all in an SOC.

2 VICE CHAIR RESTREPO: Is it Cadeddu?

3 MS. CADEDDU: It is, yes.

4 VICE CHAIR RESTREPO: The question I
5 have for you is, I mean, everybody's concerned
6 about racial disparities. And you referenced we
7 should make an effort to ameliorate rather than
8 exacerbate these racial disparities.

9 What specifically should we study to
10 try go get there?

11 MS. CADEDDU: Well, in terms of racial
12 disparities obviously there are a lot of
13 intersecting factors. But one area that we think
14 ought to be studied, and that may in part at
15 least address that question is the rate of
16 departures and variances from the guidelines, and
17 why those departures and variances occur in these
18 particular cases.

19 It's not clear I think at this
20 juncture whether those variances and departures
21 occur in a way that is not, that themselves
22 exacerbate racial disparities.

1 In other words, people of color are
2 receiving higher sentences than people who are,
3 and other folks are receiving below guideline
4 sentences or variances based on factors that
5 perhaps are not clearly race based, but are sort
6 of factors that end up creating that disparity
7 itself.

8 VICE CHAIR RESTREPO: So, if I
9 understand you correctly we should study the race
10 of the defendant, and whether they were given a
11 variance or departure on a firearms offense?

12 MS. CAEDDU: Well, we certainly think
13 that certain variance, we are concerned that
14 variances and departures may be occurring in a
15 way that is racially disparate.

16 And so studying departures and
17 variances, as well as some of the other factors
18 that were suggested by the testimony of the
19 defenders we believe will assist in determining
20 why those race disparities occur.

21 VICE CHAIR RESTREPO: Thanks.

22 CHAIR REEVES: Commissioner

1 Wroblewski.

2 COMMISSIONER WROBLEWSKI: Thank you.

3 And thank you both for being here and for
4 testifying. I have one particular question that
5 I want to ask you, Ms. Cadeddu, about the
6 mitigating factors.

7 You and others have suggested that if
8 any one of the mitigating factors is present that
9 there should be a reduction. So the net effect
10 is no increase. And first of all, am I getting
11 that correct?

12 MS. CADEDDU: Well, I'm not sure. So,
13 the net effect?

14 COMMISSIONER WROBLEWSKI: The net.
15 So, if the Commission raises the penalties by one
16 or two levels for straw purchasers in conformity
17 with the directive, but then also provides for a
18 mitigating adjustment of one or two levels, also
19 pursuant to the directive, the net effect would
20 be no new increase from current penalty level.

21 MS. CADEDDU: Well, certainly for
22 those defendants who qualify under those

1 mitigating factors. I think as the defender's
2 testimony points out, the purpose of BSCA was to
3 address straw purchasers who are sort of in this,
4 who are more culpable than say the mom buying
5 the, a gun for her son to use for target
6 shooting, that sort of thing. And then that gets
7 used in a way that the mom didn't anticipate.

8 So, it's our view that those
9 mitigating factors ought to be, I mean, it,
10 essentially if we follow the Department's view
11 and make them conjunctive, such that you have to
12 have, you have to qualify under every one then
13 the application would be almost nil of the
14 mitigating factors.

15 COMMISSIONER WROBLEWSKI: Well, let me
16 ask you a specific --

17 MS. CAEDDU: Sure.

18 COMMISSIONER WROBLEWSKI: -- a
19 specific hypothetical.

20 MS. CAEDDU: Yes. Okay.

21 COMMISSIONER WROBLEWSKI: Let's say
22 your best friend comes to you and says, can you

1 go and buy me a gun? I'm going to use the gun to
2 rob a bank. Okay. So, if there's, and I'm not
3 going to pay you anything. So, there's no
4 financial remuneration.

5 Presumably it's an intimate
6 relationship. Do you think that, but he also
7 says, I'm going to use the gun to rob a bank.
8 And then does go and use the gun to rob a bank.

9 Do you think that person should be
10 getting the mitigating adjustment? Because I
11 think under your framework, which is because it's
12 an intimate relationship, because there's no
13 money changing hands, this person would get the
14 mitigating adjustment.

15 MS. CAEDDU: I'm not certain that
16 the, well, I'd say a few things. I think it's,
17 that's a, would be an unusual circumstance I
18 think, where a straw purchaser would be
19 specifically told that the gun is going to be
20 used for a particular offense.

21 So, I'm not sure how often that
22 particular scenario will occur. I also am not

1 certain that under those circumstances the
2 mitigating adjustment --

3 Well, in fact, I think I'm going to
4 ask, on the fly I think it's a little difficult
5 to answer that. I need to go back and speak with
6 the other PAG members, and perhaps answer your, I
7 think we have a couple of other of your
8 hypotheticals that we're addressing in our
9 written statement. So, I think I'll go ahead and
10 address that.

11 I don't want to speak off the cuff,
12 because my sense is that the mitigating
13 adjustment wouldn't apply under those
14 circumstances. But I want to ensure that I'm
15 correct in that, and not, not speak out of turn.

16 COMMISSIONER WROBLEWSKI: Can I ask
17 another question along the same lines. But, and
18 if you need to address it in the written
19 statement that's fine.

20 Are you familiar with the criminal
21 history proposal that the Commission has
22 published, that would provide a sentence or a

1 guideline range, guideline level reduction for
2 people who have zero criminal history points?

3 MS. CAEDDU: Yes, I am. I have read
4 that. Although that is not, I'm not --

5 COMMISSIONER WROBLEWSKI: Right. So,
6 the thing I want to ask you is, as a defense
7 lawyer there's a provision in there, there's an
8 exclusion that says, if you possess a weapon in
9 connection with the offense you don't get the one
10 level reduction.

11 And I'm curious if you have a straw
12 purchaser who walks into a gun store and fills
13 out an ATF form, that's the crime, lying on the
14 ATF form. Do you agree that that person has
15 committed --

16 And then of course, after the crime is
17 completed they presented the form, they then get
18 a gun. So, they don't actually hold the gun
19 until after they've presented the form of course,
20 because then they've purchased the weapon.

21 In that scenario do you think that
22 person would be eligible for the reduction? And

1 if so, and the reason I'm concerned about this is
2 because the interplay between these two
3 amendments, Congress said raise the penalties.

4 And if we raise the penalties here,
5 but then reduce them over there, then that effect
6 again is no increase in penalties and non-
7 compliance with the directive. Do you follow the
8 question that I'm asking?

9 MS. CAEDDU: I'm not sure. I think
10 what I'll have to do --

11 COMMISSIONER WROBLEWSKI: Okay.

12 MS. CAEDDU: -- is review it and
13 respond in our written testimony. I will say
14 that I think generally speaking our, the
15 penalties, I'm not as concerned about reductions
16 in penalties as I am about increases. Because
17 our guidelines seem to be a one way ratchet
18 upward.

19 And I think the Department's proposal
20 here with increasing base offense levels, and
21 with implementing the rebuttable presumption, all
22 of those provisions I think will have a much

1 greater increase in sentencing guideline ranges
2 than some of these interplays of sections that
3 you're discussing. But we'll address both of
4 those hypotheticals in our written statements.

5 VICE CHAIR MURRAY: First off, thanks
6 to both of you for being here, and for your
7 testimony. Our advisory groups are so wonderful
8 and so thoughtful.

9 Mr. Luria, I have a question for you
10 about your comment on application of B to the
11 ghost guns.

12 MR. LURIA: Okay.

13 VICE CHAIR MURRAY: Could you say a
14 little bit more about why POAG thinks you should
15 have the reference to the Gun Control Act of 1968
16 at all?

17 MR. LURIA: Certainly. That Act,
18 actually prior to that manufacturers were not
19 obligated to put serial numbers on firearms. So,
20 the point that, you know, that Act, it's put in
21 there.

22 Now everybody who's manufacturing for

1 distribution in a kind of a extremely market kind
2 of concept, they are having to put serial numbers
3 on.

4 So prior to that you might find guns
5 that are really ghost guns. But they weren't
6 really intended to be. They were just not serial
7 numbered because that was not the obligation at
8 the time.

9 CHAIR REEVES: Commissioner Gleeson
10 has a question. Commissioner Gleeson, if you can
11 hear me, go ahead and ask your question.

12 COMMISSIONER GLEESON: I can. Thank
13 you, Judge Reeves. Yes. It's a, I have a
14 concern. And I wonder whether it's overblown.
15 And it relates to tinkering with the mens rea.

16 There are at least two different ways
17 in which it's been suggested that we could. And
18 my concern arises out of any allocation, any
19 sense in which we allocate the burden on the
20 defendant produces the following kind of real
21 world in the well of the courtroom concern.

22 And that is, I don't know how you

1 prove the negative, except make a statement, you
2 know, the defendant, you know, articulates why he
3 or she had no reason to believe, or tries to
4 rebut a rebuttable presumption. And I don't know
5 how you do that except make a statement.

6 The fact findings associated with that
7 are kind of notoriously difficult to make. I
8 mean, it's not a science, determining whether
9 those are truthful.

10 And here's my concern. And adverse
11 credibility determination then I think has the
12 capacity to result in an instruction enhancement,
13 a deprivation of a few levels of acceptance.

14 So, between the adjustment, the
15 adjustment for not being able to prove the
16 absence of the mens rea, the other five levels, I
17 just wonder whether this in its implementation
18 would produce dramatic claims in sentence ranges
19 that, you know, tinkering with the mens rea
20 really doesn't contemplate, and really have in
21 mind.

22 I'd be curious to -- first of all,

1 thanks to our two panelists for your, for being
2 present and for your input. But I'd be curious
3 for your comment on whether that might be an
4 unintended (audio interference) in tinkering with
5 the mens rea burden.

6 CHAIR REEVES: You may proceed.

7 MS. CAEDDU: Thank you, Judge
8 Gleeson. That's a great question. And it's a
9 concern that the PAG shares. We are on the
10 ground every day in courtrooms dealing with these
11 questions. And we have to often make decisions
12 about how to proceed.

13 Sometimes decisions to concede points
14 that we believe that we can prove, because we are
15 afraid of enhancements or of losing acceptance of
16 responsibility. Or now potentially losing the
17 third point of acceptance of responsibility for
18 making objections.

19 So, we're always making these
20 strategic decisions. And I would agree that this
21 particular strategic decision about whether in
22 fact to make an effort to rebut this rebuttable

1 presumption, if there were one, would put us
2 again in a bind that would be extremely difficult
3 to manage.

4 I can see situations, I can imagine
5 clearly situations where a defendant might be
6 able to present evidence to rebut this
7 presumption, but would elect not to do so for
8 fear of exactly the collateral consequences that
9 you mention.

10 And so, aside from the fact that a
11 rebuttable presumption is, just goes in the face
12 of the way our criminal justice system works, and
13 the fact that the Government always bears the
14 burden of proof, I think that these additional
15 negative consequences certainly should be
16 considered by the Commission.

17 CHAIR REEVES: Mr. Luria, do you wish
18 to respond?

19 MR. LURIA: This kind of, you know,
20 the inquiry kind of, I want to speak to the issue
21 under the (b) (8) (C) issue.

22 So, POAG has kind of recommended that

1 this language be taken out in entirety. I've had
2 cases that I've dealt with where straw purchasers
3 were buying guns for cartel members. And I
4 wouldn't be able to make this mens rea work.

5 Because they're paid handsomely. They
6 have no real affiliation. They don't want to be
7 members of the group. They don't want to be, you
8 know, they don't want to have that maintenance of
9 their position. There is no position to
10 maintain.

11 And so, you know, I think that that
12 mens rea component under (b) (8) (C) really doesn't
13 necessarily connect too well with that group
14 that's doing this kind of thing in furtherance of
15 those criminal enterprises.

16 You know, that's just our observation
17 that mens rea aspects tend to be really hard to
18 apply. But I do think that they get well
19 balanced out through departure considerations,
20 through variance considerations by judges. They
21 do balance that well in those instances where
22 that's a factor that needs to be balanced. So --

1 CHAIR REEVES: Thank you. That
2 concludes --

3 COMMISSIONER GLEESON: Thank you.

4 CHAIR REEVES: Oh, I'm sorry,
5 Commissioner Gleeson. That concludes our
6 testimony for this part of the morning. We'll
7 take a brief break. Please, let's agree to start
8 back up about 11:05 a.m.

9 And please make sure you're in your
10 seats at that point, and we'll begin with the
11 next round of testimony. Thank you, Mr. Luria.
12 And thank you, Ms. Cadeddu, for your testimony.

13 MR. LURIA: Thank you.

14 (Whereupon, the above-entitled matter
15 went off the record at 10:49 a.m. and resumed at
16 11:05 a.m.)

17 CHAIR REEVES: All right. We're ready
18 to resume. I'm going to remind the Commissioners
19 when you're speaking to please try to talk as
20 loud as I talk.

21 Because we want to, I realize we're in
22 a real small room, and we can basically hear each

1 other we think. But please make sure we're
2 making sure that everyone hears the conversation.

3 Our fourth panel will provide us with
4 a perspective, obvious issue from academics and
5 advocates. Here to provide that perspective is
6 Rob Wilcox, who is testifying on behalf of the
7 Zimroth Center/NYU Law Working Group, which
8 consists of researchers, policy makers, and
9 advocates who focus on gun violence prevention,
10 federal sentencing reform, and the prosecution of
11 federal firearms offenses.

12 The mission of the Zimroth Center is
13 to promote good Government practices in criminal
14 matters, with a special focus on the exercise of
15 prosecutorial power and discretion.

16 Mr. Wilcox is an expert on gun safety
17 who currently serves as Senior Legal Director at
18 Everytown for Gun Safety. Mr. Wilcox has
19 previously worked as a private practitioner and
20 at the Brady Center to Prevent Gun Violence.

21 Mr. Wilcox, we're ready when you are,
22 sir. We're getting the red signal. But speak in

1 it and let's see if this works.

2 MR. WILCOX: All right. Thank you,
3 Judge Reeves. I appreciate this invitation to
4 appear before the Commission. I don't know that
5 the mic is working.

6 CHAIR REEVES: You can have mine. I'm
7 not talking. You can have mine. It's more
8 important that we hear you.

9 MR. WILCOX: We're good. So, as you
10 said, an expert in gun safety, not on microphone
11 technology.

12 You know, I do want to mention our
13 group members at the Zimroth Center/NYU Law,
14 because it really is a distinguished group that I
15 get to present on behalf of.

16 In includes United States, former
17 United States Attorneys, Brady United, Everytown
18 for Gun Safety, Giffords, Community Justice
19 Action Fund, and academics at Johns Hopkins and
20 Loyola University of Chicago.

21 As the Chair said, I'm the Senior
22 Director at Everytown, and draw on about 20 years

1 of experience in the policy and litigation space.
2 Proud son of Brooklyn who had a family member be
3 shot and killed from gun violence. And have
4 honestly met way too many survivors than I care
5 to count who were victims of this public health
6 and public safety crisis.

7 I've been a key advisor on gun
8 violence prevention legislation and executive
9 action. And was incredibly deeply involved in
10 the negotiation and passage of the bipartisan
11 Safer Communities Act.

12 But I do think that the Acts overall
13 context and substance is incredibly useful as you
14 undertake your work. Because this Act created
15 several new tools and programs across multiple
16 policy areas to take a novel approach to address
17 the complexity of gun violence.

18 For instance, the Act targets
19 unlicensed sellers, and creates enhanced
20 background checks for individuals under 21. The
21 Act invests hundreds of millions of dollars in
22 implementing state extreme risk laws and

1 community violence intervention programs.

2 And the two new federal offenses, the
3 subject of today's hearing, that prohibits straw
4 purchasing and gun trafficking shifts federal
5 enforcement upstream into the up deal legal gun
6 pipeline.

7 Congress's approach last session
8 matched this administration's efforts to
9 establish gun trafficking strike forces in their
10 efforts to crack down on rogue gun dealers, while
11 also increasing investment in community violence
12 intervention programs.

13 Data show why this upstream approach
14 is so important. A 2000 report from ATF showed
15 that crime guns come from a highly concentrated
16 set of gun dealers.

17 And Everytown study showed that 75
18 percent of likely trafficked crime guns that
19 cross state lines came from states without
20 background check laws.

21 And an ATF trafficking report released
22 just last month, the first major report in 20

1 years, showed that guns are moving from dealers
2 to crime at alarming speed.

3 From 2017 to 2021 46 percent of crime
4 guns were recovered less than three years after
5 purchase, a significant sign of gun trafficking.

6 And this Act now finally addresses the
7 straw purchasers, gun traffickers, and rogue gun
8 dealers that all feed this diversion of illegal
9 guns, but have rarely been subject to federal
10 prosecution.

11 The straw purchasing and gun
12 trafficking provisions, as well as the addition
13 of Subsection 10 and 11 to Section 922(d) provide
14 enforcement mechanisms that go up and down each
15 link of the gun trafficking chain.

16 The law applies to any seller,
17 including federal firearms licensees. It's
18 important because licensed gun dealers hold a
19 position of public trust. They're on the front
20 line to keep firearms from being diverted into
21 the legal market.

22 But some gun dealers do have a strong

1 connection to crime guns. ATF data showed that
2 ten percent of one Georgia gun dealer's average
3 monthly sales were traced crime guns. Ten
4 percent of the average monthly sales were traced
5 crime guns.

6 So Congress didn't just create this
7 new tool to target significant gun trafficking
8 operations. But also to reflect the complexity
9 of the different links in that chain.

10 The licensed gun dealer who's
11 willfully blind, the girlfriend coerced into
12 acquiring firearms as a straw buyer, the person
13 directing the buys, the person securing the
14 funding, the person finding the buyers, and the
15 guy who's delivering straw purchases up the iron
16 pipeline.

17 The sentencing directive itself is a
18 balanced approach reflecting this complexity.
19 And we believe Option 1 best reflects Congress's
20 intent to bake the complexities into the
21 guidelines, because it requires specific findings
22 by the sentencing judge.

1 We recommend that Option 1 be further
2 refined to take into account the different mens
3 rea of the person being sentenced. That we treat
4 knowing and reasonable cause to believe
5 different, and give each different weight.

6 We think that approach reflects the
7 Congressional directive for the Commission to
8 take into account, as they say, role and
9 culpability.

10 The Commission should also make clear
11 how federal firearms licensees fit into the
12 guidelines, and how a violation of that public
13 trust should be handled.

14 I do want to spend my last moment just
15 talking about the mitigation language, which I
16 believe is novel and deliberate. It shows
17 Congress's intent for the Commission to strike
18 the right balance and make sure people lacking
19 culpability are not caught up in sentencing
20 increases for those the law wants to target.

21 Most importantly, and potentially
22 different from some of the prior witnesses, the

1 reduction should apply broadly, because the key
2 sentence in the directive has two coequal
3 instructions based on the use of the word reflect
4 in that sentence.

5 First, the Commission is to reflect
6 deterrents. Second, it's to reflect fairness.
7 The reduction should not require all the
8 mitigating factors to be met in order for the
9 departure to apply.

10 Because Congress is clearly using or
11 language in the directive, and provides a list of
12 circumstances that don't necessarily all have to
13 be met in order to apply.

14 And finally, if you look at the very
15 end of the sentence, other mitigating factors.
16 Congress clearly is leaving it to the Commission
17 to capture additional un-enumerated factors that
18 are equally important when considering
19 culpability.

20 Congress's approach to address gun
21 trafficking established new crimes to address the
22 severity and danger of gun trafficking. And make

1 no mistake how critically important that is to go
2 upstream.

3 But it explicitly recognized different
4 levels of culpability and other mitigating
5 factors.

6 To be clear, the gun safety
7 organizations that advocated for this law were
8 not seeking an across the board enhancement
9 without nuance to the sentencing guideline.

10 I truly appreciate the opportunity to
11 represent this working group, represent Everytown
12 for Gun Safety, and look forward to your
13 questions.

14 CHAIR REEVES: Thank you, Mr. Wilcox.
15 Vice Chair Murray.

16 VICE CHAIR MURRAY: Thanks so much for
17 your testimony, for being here. We appreciate
18 your expertise and willingness to share. I
19 wondered if you had thoughts on Commissioner
20 Wroblewski's hypothetical from before.

21 So, a friend comes to you and says,
22 can you buy me a gun? I'm a prohibited person,

1 and I want to accomplish a burglary. I'm not
2 going to pay you, but we're friends. And you
3 say, yes and buy the gun. So there's no
4 remuneration.

5 So, under a disjunctive theory of the
6 mitigating factors you would qualify for the
7 mitigating factors. Do you think you should
8 qualify for the mitigating factors?

9 MR. WILCOX: I think remuneration on
10 its own is too limited way to look at kind of
11 role and culpability. I think it is about kind
12 of understanding who the ultimate buyer is, and
13 what their intent is.

14 And if the hypothetical's true where
15 an individual knows that there is a potential
16 violent crime that is to be committed that is a
17 serious factor that I don't think we should,
18 anyone should be taking lightly.

19 And if you look at the directive
20 itself it asks coercion. And in the hypothetical
21 we didn't hear that. Domestic violence survivor
22 history, we didn't hear that.

1 Role and culpability, which I just
2 said, we heard knowledge of the future crime.
3 And so, in some cases the lack of remuneration
4 can be incredibly important, especially in cases
5 of domestic violence or other cases of coercion.

6 So, I'm not saying to take it off the
7 table. But I don't think it's a simple binary
8 choice, where that fact alone would lead to an
9 outcome where we don't see kind of the
10 seriousness of the crime reflected in the
11 guideline.

12 VICE CHAIR MURRAY: So, you're not
13 advocating for our proposal in the disjunctive,
14 the or version of our proposal. You're
15 advocating for maybe a third, like a third way.

16 MR. WILCOX: I think it is clearly a
17 disjunctive. I think that it, the language in
18 the directive is a disjunctive. And to read
19 coercion and domestic violence history together
20 means that you have to have both, which I do not
21 think could have been Congress's intent at
22 including that.

1 And if you have a broad term at the
2 end, other mitigating factors, well if it is a
3 conjunctive how does a broad term like that ever
4 be met in connection with any of the other
5 specific terms?

6 So, I think certainly it's a
7 disjunctive. I'm just not sure that I agree that
8 the lack of remuneration would be sufficient to
9 escape culpability in the hypothetical.

10 VICE CHAIR MURRAY: All right. I was,
11 you're not advocating for the, you don't, you,
12 okay. You're not advocating for the conjunctive
13 version of ours?

14 CHAIR REEVES: Commissioner Mate, VC
15 Mate.

16 VICE CHAIR MATE: Thank you. First I
17 want to echo our appreciation for you coming
18 today, and for your written testimony. Really
19 appreciate your expertise and thoughts.

20 An issue that's come up a couple of
21 times today is the issue of parity. And whether
22 the increased penalties for straw purchasers,

1 whether we should do that for illegal possession
2 as well. And I was wondering if you could
3 address that point a little bit.

4 MR. WILCOX: I think the directive was
5 heavily focused on the need to address gun
6 trafficking channels, both straw purchasing
7 crimes and the larger networks that are funneling
8 guns into the hands of prohibited purchasers.

9 I think the prior testimony
10 articulated well that to enhance the penalties
11 for those crimes doesn't require an enhancement
12 for the possession crime. And we haven't seen a
13 need for that in how the guidelines have been
14 applied to date.

15 And so, I think our position is that
16 those are separate issues. And the directive
17 should truly focus on looking at the gun
18 trafficking and straw purchasing crimes, both the
19 enhancements and the mitigating and fairness
20 factors.

21 VICE CHAIR RESTREPO: Mr. Wilcox,
22 there's been a lot of talk today about inequities

1 with respect to racial disparities in this
2 context. Has your group looked at that? Or is
3 that not within your purview?

4 MR. WILCOX: Our group's looked at
5 that. And it's quite concerning. I think, you
6 know, we certainly agree with Senators Booker and
7 Murphy in their letter when they tried to, when
8 they explained the intent behind this new
9 provision.

10 And I think if you take a step back
11 it's important to look at the law in context, the
12 entire law, where yes, we had a provision on
13 straw purchasing and gun trafficking that gets to
14 the source of illegal guns. But we also saw a
15 \$250 million dollar investment in community
16 violence intervention programs.

17 The first witness, the U.S. Attorney,
18 spoke about some of those efforts to work with
19 communities. And Congress clearly sees that it's
20 part of the solution with the significant
21 investment in this law.

22 They also put investment in state

1 crisis intervention programs, extreme risk laws,
2 enhancing background checks, cracking down on
3 unlicensed sellers.

4 Taking that all together what you see
5 is Congress not looking to exacerbate the racial
6 disparities that we've seen in the enforcement of
7 the law as it existed pre-BSCA.

8 What I believe they're looking for,
9 and Senator Booker and Murphy articulated, is the
10 next chapter, the next verse, which does truly
11 look upstream, and looks at how guns are getting
12 to the hands of people who shouldn't have them.

13 And for the guidelines to reflect that
14 I think will go a long way towards both reducing
15 racial disparities and increasing public safety.

16 VICE CHAIR RESTREPO: Thank you.

17 CHAIR REEVES: You've heard some of
18 the other witnesses talk about delaying, you
19 know, doing some more research, more study I
20 guess. What is the Zimroth Group's thoughts on
21 that?

22 MR. WILCOX: I think one area that

1 certainly could have increased study is other
2 mitigating factors. That is intentional language
3 offered by Congress. And we know the Supreme
4 Court has said time and again that they don't
5 offer language in surplus.

6 And what are the other mitigating
7 factors that truly should be considered as part
8 of the downward departure?

9 I think Congress, as I said, in its
10 directive really is laying out two coequal
11 directives, you know, to think about the straw
12 purchasers without significant criminal histories
13 that are getting sufficient to deter, and the
14 mitigating factors.

15 And so, I think to really understand
16 that balance and have it reflect in the
17 guidelines is an area to study, to make sure that
18 the Commission gets it right.

19 CHAIR REEVES: Commissioner
20 Wroblewski, I think you had a question.

21 COMMISSIONER WROBLEWSKI: Yes. I just
22 want to, can I just make --

1 CHAIR REEVES: Make sure you're
2 speaking up.

3 COMMISSIONER WROBLEWSKI: I'm sorry.
4 Can I just follow-up on the directive? What do
5 you think the words sufficient to deter mean?
6 Because there's been a lot of testimony already
7 about deterrents, and about what it means, and
8 how effective it is. What do you take that
9 specific language to mean?

10 MR. WILCOX: Well, I think as
11 mentioned previously a straw purchaser often
12 won't have prior criminal history, at least
13 sufficient to keep them from purchasing a
14 firearm. And we know that there's, you know,
15 nine specific prohibitions.

16 And I think Congress does want to
17 ensure that those individuals see this as an
18 incredibly serious crime. And it goes to the
19 fact that Congress, to the Chair's point, is
20 looking upstream.

21 They're looking away simply from
22 illegal possession, especially legal possession

1 that may not be connected to violent crime or
2 violent conduct, but are looking to the sources
3 of illegal guns.

4 So, I think that is what Congress is
5 getting at, is they want to make sure the
6 Commission is addressing the source of illegal
7 guns, and so the individual straw purchaser.

8 But honestly the gun trafficker and
9 operations, and those who are directing it, as
10 well as the licensed gun dealers. All are within
11 the ambit of the guidelines.

12 But because the sentence is written in
13 two parts that has to be balanced with the second
14 reflect. Like, they used reflect twice in that
15 sentence, which I believe does separate the two
16 halves of the sentence.

17 So yes, sufficient to deter is in the
18 first part. But then we have a reflect in the
19 second part that honestly isn't limited just to
20 straw purchasers with limited criminal history.

21 But that sentence in fact to me
22 applies to the appropriate amendment.

1 COMMISSIONER WROBLEWSKI: I get it.
2 So you're suggesting there are two sides to this.
3 One is provide the mitigating factors for those
4 who are low-level, but then provide something
5 which we say is sufficient to deter, which at
6 least I interpret as the Congress saying what you
7 have now is insufficient to deter. Am I reading
8 that wrong and do you think a one- or two-level
9 increase, for that side, recognizing that there's
10 another side as well for the mitigating people.

11 But for the people upstream, the
12 people that you're concerned about, do you think
13 that's complying with the -- reflects
14 Congressional intent that the Commission provide
15 increased penalties to sufficiently deter these
16 particular straw purchasers and traffickers?

17 MR. WILCOX: I think looking at the
18 prior guidelines and the code that was used to
19 enforce the law is a bit of apples and oranges
20 because the code that was being enforced for
21 straw buyers was the paperwork violation of lying
22 on the federal form.

1 And now what we have is Congress
2 specifically authorizing prosecution for those
3 who know or have reasonable cause to believe
4 they're buying a gun for someone who's
5 prohibited. And so, I think it's very
6 challenging to compare those two since they're
7 quite different crimes, and so I do think what
8 Congress is asking the Commission to undertake is
9 how do you really look at someone in their
10 entirety who is the straw buyer? So that they
11 can be deterred, in their words, but also you can
12 recognize what may have put them in the position
13 of being a straw buyer in the first place.

14 The other big advantage that we now
15 have with the code is lying on the form was very
16 challenging to get at who was directing the
17 network, who was arranging multiple straw buyers,
18 and so many of the prosecutions for straw
19 purchasing were about just that individual. This
20 new section of the code does allow you to go
21 deeper and get to the person who was arranging
22 and conspiring to set up the entire network, as

1 well as, as I mentioned, the licensed dealer
2 who's willfully blind to the straw purchase
3 that's occurring in the store.

4 So I think this is a new tool that has
5 broad application to a number of links in the
6 straw purchasing chain, and I think that's the
7 challenging work that the Commission has.

8 CHAIR REEVES: Anyone else has any
9 questions for Mr. Wilcox?

10 VICE CHAIR MATE: I have one more. I
11 just wanted to follow up and make sure I was
12 clear and understanding one thing regarding the
13 mitigating factors. Your suggestion is that we
14 include a reduction for a subset of individuals
15 and then a broader departure as well. So kind of
16 a two-part approach to mitigating circumstances.
17 Am I understanding that correctly or not?

18 MR. WILCOX: That's a great question,
19 and I apologize for any lack of clarity. I read
20 that sentence as really having two ideas in it
21 that the Commission then has to take up. It's an
22 appropriate amendment to reflect the intent of

1 Congress and then you have the enhanced language.
2 And then an appropriate amendment to reflect the
3 defendant's role and culpability, which is one.

4 Then we have a conjunctive and, any
5 coercion, domestic violence survivor history, or
6 other mitigating factors, a disjunctive. I
7 actually think it's a quite complicated sentence,
8 but it does I think, require, for any of the
9 amendments that relate to trafficking and straw
10 purchasing to look at role and culpability, and
11 then the other factors, coercion, domestic
12 violence, and other mitigating factors.

13 As I would be thinking about the
14 amendments, I would be really trying to parse
15 this language carefully, apply it broadly, and
16 give full weight to what Congress was quite novel
17 and deliberate in doing, which is -- for I think,
18 one of the first times, instructing the
19 Commission to look specifically at these type of
20 mitigating factors. They certainly didn't list
21 them all, and they certainly didn't get it all
22 right. And I think that is the value of the

1 Commission, is that to dig deep and really give
2 meaning to these terms.

3 CHAIR REEVES: Thank you, Mr. Wilcox,
4 for your testimony. We're ready for our next
5 panel.

6 MR. WILCOX: Thank you so much.

7 CHAIR REEVES: Now we're about to move
8 to our next panel. I'd like to introduce our
9 fifth panel, which will present the Executive
10 Branch's perspective on our proposed amendments
11 regarding what we define as fake pills and First
12 Step Act drug offenses. To present their
13 perspective we have with us the Honorable Carla
14 Freedman, who is the first woman to serve as
15 United States Attorney for the Northern District
16 of New York.

17 Ms. Freedman is chair of the
18 Controlled Substances Subcommittee of the
19 Attorney General's Advisory Committee. Ms.
20 Freedman has over 30 years of experience
21 prosecuting organized crime, violent crime, and
22 drug offenses as a state and federal prosecutor.

1 Ms. Freedman, we're ready when you are.

2 MS. FREEDMAN: Chairman Reeves and
3 members of the Commission, thank you very much
4 for the opportunity to appear before the
5 Commission to discuss the problem of fake pills.
6 I want to thank the Commission for working with
7 the Department, including the DEA, to address the
8 ongoing crisis of deaths from fentanyl poisoning.

9 As you know, Subsection b(13) of
10 Section 2D2.1 currently provides a four-level
11 enhancement when the defendant knowingly
12 misrepresented or knowingly marketed as another
13 substance, a substance that in fact contained
14 fentanyl or a fentanyl analog. In response to
15 concerns over the usefulness of this enhancement,
16 the Commission has proposed an alternative to
17 level enhancement with a lower mens rea.

18 That is, where the defendant had
19 reason to believe that a substance that the
20 defendant represented or marketed as a legitimate
21 drug was not legitimately manufactured, and the
22 substance in fact contained fentanyl. The

1 Commission has also published as an issue for
2 comment application of this enhancement to other
3 synthetic opioids.

4 First, regarding the mens rea
5 requirement, the current enhancement applies so
6 infrequently in part because it requires proof
7 that the defendant had actual knowledge that the
8 substance contained fentanyl or a fentanyl
9 analog. This actual knowledge standard is higher
10 than the mens rea required for a Section 841 drug
11 trafficking conviction.

12 Although it is common knowledge that
13 among drug traffickers that most fake pills
14 contain fentanyl, it is often difficult to prove
15 if the defendant knew the specific pills that he
16 or she trafficked contained fentanyl because
17 defendants claim ignorance of the pills' contents
18 and because they use vague, coded language when
19 discussing the drugs.

20 Even when fentanyl was sold in
21 baggies, the enhancement rarely applied. Now
22 that fentanyl is so often sold in pill form, the

1 enhancement is even harder to apply. To reflect
2 this reality, we recommend a rebuttable
3 presumption, that is the enhancement should apply
4 presumptively, but a defendant can show that he
5 lacked actual or constructive knowledge, with the
6 defendant bearing the burden of such proof.

7 Such a rebuttable presumption would
8 properly reflect the fact that drug traffickers
9 should know that there is an extremely high
10 probability that the black market pills they are
11 selling contain deadly fentanyl. And that any
12 proof that the defendant had no reason to believe
13 they contained fentanyl lies primarily with the
14 defendant.

15 If the Commission instead adopts a
16 reason to believe standard, it would be helpful
17 to define that term. One option would be to
18 define the term to require specific and
19 articulable facts combined with reasonable and
20 common-sense inferences from those facts that
21 provide an objective basis for believing that the
22 pills are not legitimately manufactured. The

1 Department also recommends that the Commission
2 amend the requirement that the defendant market
3 or represent the drug as legitimate.

4 Unfortunately, this formulation does
5 not reflect the reality of a market flooded with
6 pills that look like legitimate prescription
7 drugs, such as pills in various colors that are
8 marked M30 to look like oxycodone. And as
9 currently written, the enhancement might apply
10 more regularly to street level dealers, rather
11 than to the high-level traffickers who distribute
12 fake pills without making any representations
13 about their content.

14 We thus recommend that the enhancement
15 apply not just when a defendant represents or
16 markets the drug as legitimate, but also when the
17 offense involved a substance that would appear to
18 a reasonable person to be legitimately
19 manufactured. Finally, the Commission is asked
20 whether (b) (13) should be broadened beyond
21 fentanyl and fentanyl analogs to include
22 synthetic opioids. It should. Although the vast

1 majority of fake pills contain fentanyl, the DEA
2 has seen an increasing number of fake pills with
3 other synthetic opioids.

4 If, however, the Commission elects to
5 focus on fentanyl and fentanyl analogs for the
6 time being, we ask that you monitor the situation
7 during the 2023-24 amendment cycle and propose
8 additional changes to address all synthetic
9 opioids as appropriate. Thank you.

10 CHAIR REEVES: Thank you, Ms.
11 Freedman. I turn now to my fellow Commissioners.

12 VICE CHAIR RESTREPO: Ms. Freedman,
13 following up on -- I don't know if you heard
14 Judge Gleason's question earlier, the same
15 question really with respect to this rebuttable
16 presumption and the impact it would have on
17 individual -- jeopardizing acceptance points, a
18 judge finding obstruction points, any Fifth
19 Amendment concerns. Has the Department thought
20 this through in terms of putting the burden on
21 the defense?

22 MS. FREEDMAN: We have, Vice Chair

1 Restrepo, and I appreciate the question. I would
2 point out as my colleague, US Attorney Gary
3 Restaino, pointed out the concept of a rebuttable
4 presumption is not due to the guidelines. It
5 exists in four separate areas, and the
6 Department's position focuses on the fact that
7 this is such a well-known concept now, that these
8 pills that mimic legitimate prescription drugs
9 oftentimes, most times now, in fact, are
10 containing fentanyl.

11 To put the burden on the government to
12 establish whether or not the defendant knew is
13 really in many ways unfair and impossible. As
14 I'm sure Your Honor is aware, frequently in drug
15 trafficking, particularly at higher levels, there
16 is no conversation. I can't tell you the number
17 of wiretaps that I've listened to where the most
18 you hear is a number and a meet up. So it's very
19 difficult to apply this enhancement where the
20 government bears the burden of establishing the
21 mens rea. We're not suggesting that there be no
22 mens rea.

1 We're giving the defendant, who's in
2 the best position to have a defense, an excuse, a
3 reason why he or she had no idea that the pills
4 contained fentanyl, to provide that to the court
5 and for a judge to be able to consider that.

6 COMMISSIONER WONG: Ms. Freedman, one
7 of the comments from the Practitioner's Advisory
8 Group argued that the reason to believe standard
9 here is akin to strict liability. The concern
10 generally would be that this language could
11 encompass anyone based on strict generalized
12 risks, generalized knowledge in the community
13 about the risks of fentanyl.

14 What is your response to that? Do you
15 think the current proposal does sweep in the
16 entire universe here, and are there ways to
17 tailor the language that you think would
18 sufficiently target a more nuanced recklessness
19 standard here than what's currently drafted?

20 MS. FREEDMAN: Thank you, Commissioner
21 Wong. I appreciate the question. I would say
22 that first of all it's actually not strict

1 liability. I would also point out that there are
2 several enhancements currently in the guidelines
3 that are offense-based or more particularly,
4 strict liability.

5 For example, we've heard this before,
6 under 2K2.1 if a firearm is stolen or the serial
7 numbers obliterated. There's also examples with
8 respect to drugs. The distribution of a
9 controlled substance in a prison setting is an
10 automatic enhancement. The distribution -- I had
11 to look this one up -- steroids with a masking
12 agent also. I don't know that we see that that
13 often, but there are, in other words, prior
14 examples in the guidelines currently for strict
15 liability.

16 This really isn't. This is providing,
17 it's taking what's so widely known now about
18 pills that look like legitimate drugs but in fact
19 contain fentanyl and are killing people at
20 alarming rates, and it recognizes that tragic and
21 scary fact and still allows for defendants who
22 are perhaps wrongly caught up and really had no

1 knowledge the ability to not be strictly liable
2 but to present their evidence. Again, only by a
3 preponderance. That's the standard to present it
4 to a judge for consideration.

5 Quite frankly, the proposal that the
6 Department is putting forth, you talked about or
7 asked the question about encompassing people who
8 shouldn't be encompassed. The goal here is
9 really to get at higher level drug traffickers,
10 and quite frankly, as written -- and I appreciate
11 the Department very much appreciates the
12 Commission's recognition that the current
13 four-level enhancement is not addressing the
14 problem that we have now.

15 And in recognizing that, you've
16 proposed a two-level enhancement to make that a
17 workable and functional enhancement that actually
18 reaches out to the people who are higher level,
19 the true drug traffickers that the government
20 believes that our proposal would encompass that.
21 While still, I should say, offering protection
22 since I say with a rebuttable presumption for

1 those who should not get the enhancement.

2 COMMISSIONER BOOM: Good morning.

3 Thank you for your testimony. In thinking about
4 this mens rea component and how the government
5 would prove the knowing standard, is there --
6 this is a fairly technical question. Is there, I
7 would think, a pretty significant difference
8 between the street value of a real oxy 30 and a
9 manufactured synthetic one that contains
10 fentanyl? I presume the latter is significantly
11 less expensive? I'm just presuming, so I don't
12 know for sure. If you know.

13 MS. FREEDMAN: I think the DEA would
14 be in a better position to answer the price point
15 variance, but I would say this. One of the
16 things that is so frightening, and I think that
17 has led to us being in what is clearly a crisis,
18 nobody can deny this, is the fact that fentanyl
19 is so cheap and easy to make. Unlike heroin
20 obviously, which is a plant and so you can only
21 have so much of it because it is plant-based,
22 there seems to be an endless supply of the

1 ability of in particular, Mexican cartels to
2 manufacture this.

3 So I'm not sure whether in fact a fake
4 oxycodone pill that contains deadly amounts of
5 fentanyl is in fact cheaper than the black market
6 true M30 or oxycodone pill. But I think that's
7 what makes this so frightening right now, is that
8 there are people from teenagers and kids to the
9 elderly trying to get a black-market oxycodone
10 and instead they're ending up with a pill that in
11 fact looks like oxycodone but contains deadly
12 amounts of fentanyl.

13 CHAIR REEVES: Yes?

14 VICE CHAIR MURRAY: Thanks so much for
15 being here, Ms. Freedman. I had a question about
16 your written testimony regarding guideline 5C1.2
17 and in particular, the floor. You know there's
18 this issue about whether the floor to 5C1.2
19 should be set at base offense level 17 or it
20 should be set to the guidelines range.

21 The Department's position seems to be
22 that you need to keep it at base offense level 17

1 in order to make that that floor applies in a
2 kind of graduated way to people with lower and
3 higher fentanyl history. I'm wondering why the
4 guidelines themselves, apart from the floor,
5 don't already do that work?

6 MS. FREEDMAN: Vice Chair

7 Murray, I very much appreciate the question, and
8 while I could spitball the Department would
9 probably be not happy. I have been focused on
10 addressing the fake pills. I do believe that one
11 of my colleagues, Carmen Mitchell, who is going
12 to be speaking about the circuit split may be
13 able to address that.

14 VICE CHAIR MURRAY: Great, thanks.

15 CHAIR REEVES: Has Congress asked us
16 to do anything with the fake pills issue
17 specifically?

18 MS. FREEDMAN: Chairman Reeves, I'm
19 not aware of them doing that specifically, but I
20 will say this. And I was thinking about this a
21 little bit earlier with all the conversation
22 about Congress and firearms and where their

1 priorities are.

2 In my role as chair of the Controlled
3 Substances Subcommittee, one of the many tasks
4 that I am tasked with is reviewing proposed
5 legislation, both from the House and from the
6 Senate. I am struck with how many potential
7 bills are coming from both sides of the chamber.
8 Both House and Senate trying to address the
9 fentanyl crisis. I've seen legislation where
10 they -- and none of them are looking for a less
11 severe punishment.

12 I've seen proposed legislation -- I
13 mean, we currently, as the Commission is well
14 aware, we have mandatory minimums for certain
15 thresholds of fentanyl and fentanyl analogs. And
16 obviously even from death resulting from these
17 drugs or other drugs. The proposed legislation
18 that we've reviewed is looking to increase the
19 penalties.

20 I've seen things wanting to label the
21 cartels as terrorist organizations. So
22 certainly, the mood that I'm seeing from the

1 legislation that's making its way across my desk
2 talks about a recognition by Congress about how
3 severe the problem is with fentanyl and fentanyl
4 analogs, but in particular fentanyl, and trying
5 to address that is the best way possible.

6 I know the Commission has proposed a
7 two-level enhancement that didn't previously
8 exist, and the Department endorses that as at
9 least a small measure that may address one
10 particularly dangerous and insidious aspect of
11 the fentanyl crisis, which is not just selling
12 fentanyl in baggies where the consumer may think
13 that he or she is getting heroin and that I
14 believe, was one of the issues that the
15 Commission confronted in 2018 when they
16 promulgated the four-level enhancement.

17 Who could have envisioned that five
18 years later we are now seeing -- whereas I
19 believe DEA's latest statistics were there were
20 three million pills seized in 2019. Last year,
21 there were 61 million. From 3 million to 61
22 million fake pills seized. These numbers are

1 astronomical, and obviously, as the Commission is
2 well aware, the number of people dying because
3 they thought they were taking Percocet and
4 instead they were taking a pill with a deadly
5 amount of fentanyl, and it takes just so little.

6 This is something that clearly if a
7 two-level enhancement will help save some lives
8 and properly punish those people involved in this
9 insidious conduct -- I haven't heard Congress
10 speak about it, but clearly the impression that
11 I'm getting is that this is a serious problem
12 that Congress wishes to address.

13 VICE CHAIR RESTREPO: Do you see any
14 parallels between this and Congress' efforts
15 years ago to address the crack epidemic, and how
16 did that work out?

17 MS. FREEDMAN: That's an excellent
18 question, and obviously, I didn't sit in Congress
19 then, didn't sit now. I'm aware of some of the
20 discrepancies that have happened. I'd like to
21 point out that as the Commission is well aware,
22 the discrepancies among the black and brown

1 community with respect to crack is well
2 recognized. And although there was legislation
3 proposed, the Equal Act, that in fact has not
4 passed Congress.

5 The Department has handled this, and
6 regardless of the fact that legislation didn't
7 pass -- and quite frankly, the guidelines right
8 now still have the disparity between powder
9 cocaine and crack cocaine. The Department no
10 longer recognizes a distinction. The Department
11 is aware of the empirical evidence.

12 The Department is aware of the racial
13 disparity and is taking it upon themselves under
14 the direction of Attorney General Garland to the
15 entire Department that we now treat powder
16 cocaine and crack cocaine the same. So we are
17 aware and to the extent that there is
18 evidence-based reasoning -- and certainly issues
19 of racial disparity I believe that the Department
20 tries to address that.

21 One of the things that's so, I think,
22 fundamentally different about fentanyl is number

1 one, even based on the statistics that the
2 Commission has, the racial disparity is not the
3 same as it is for powder cocaine or crack
4 cocaine. When we think about the victims, they
5 cut across all races and ethnicities and ages.
6 There is not a state that has not been affected
7 by this opioid crisis, and in particular, the
8 opioid crisis in the form of deadly, poisonous
9 pills.

10 VICE CHAIR MURRAY: So I understand
11 the Department prefers a rebuttable presumption
12 mens rea. If we were to keep the mens rea the
13 way it is in terms of reason to believe and
14 perhaps flush it out with examples the way you
15 suggest, do you think that that would end up
16 being helpful, significantly helpful in terms of
17 the Department's efforts to fight this scourge?
18 It was relatively minimal unless we adopt the
19 rebuttable presumption.

20 MS. FREEDMAN: Vice Chair Murray,
21 obviously the Department will welcome anything to
22 help us in this fight, and anything we can do to

1 make some sort of an impact on this crisis. We
2 certainly believe that we would have a greater
3 impact and a better ability to hold these people
4 accountable, particularly the higher-level people
5 that really should be held accountable, if the
6 Commission adopts the proposal that we've given
7 with a rebuttable presumption.

8 But if for whatever reason the
9 Commission felt that that was not appropriate,
10 obviously a reason to believe standard is more
11 likely to at least encompass the ability to prove
12 some of these drug traffickers and pill pushers
13 pushing deadly fentanyl than the current
14 standard, which I would point out, since this was
15 promulgated I believe there have been 5,700
16 fentanyl drug traffickers sentenced. Of that
17 5,700, that four-level enhancement, the only
18 enhancement we currently have, applied 57 times,
19 which I think comes out to one percent though
20 math is not my strong suit.

21 CHAIR REEVES: I'm looking back at
22 your written testimony, I believe. When you talk

1 about Section 2D1.1 (b) (13), it should be
2 broadened, and I see some language where you say,
3 "But the most critical data point on which the
4 Commission should base its decision is the CDC
5 estimate." I think this is some good testimony,
6 and you go on to say, "We ask the Commission to
7 monitor the situation during the next amendment
8 cycle and propose additional changes if
9 appropriate."

10 I may be reading from the wrong
11 testimony. I thought it was yours. I'm just
12 going to ask is it any need for the Commission to
13 sort of look at this issue, get more empirical
14 information about its fanning or broadening with
15 fake pills, something beyond fentanyl or
16 whatever?

17 MS. FREEDMAN: I appreciate the
18 question, Chairman Reeves. The Department would
19 certainly ask and believes that there is enough
20 empirical data so far provided by the DEA and
21 other agencies to demonstrate that not only
22 fentanyl and fentanyl analogs but other synthetic

1 opioids should be included. I'm not a chemist,
2 and I'm sure I'll pronounce this wrong, but
3 things such as nitazines, which are other
4 synthetic opioids, are being included in many of
5 the prescription pills, although clearly the vast
6 majority still contain fentanyl.

7 So to solve the problem in a holistic
8 way, we would certainly ask that you include the
9 language of other synthetic opioids. Again, as a
10 fallback position, sort of as I said before with
11 respect to the reason to believe standard.

12 Something needs to be done, so if at this point
13 the Commission isn't comfortable in including all
14 synthetic opioids, we certainly would appreciate
15 the enhancement, the two-level enhancement as
16 written by the Department that includes at least
17 fentanyl and fentanyl analogs.

18 CHAIR REEVES: Thank you.

19 VICE CHAIR MATE: I have one follow-up
20 question as it's kind of related to the crack
21 question earlier. Congress and the Commission
22 for years have tried to solve various drug crises

1 within this country by increasing sentences, and
2 I think we can look to recent overdose deaths and
3 the rate of those as indication that we've failed
4 in that regard. Is there some reason to think
5 that this particular change would be different
6 and bring success that we haven't seen in the
7 past?

8 MS. FREEDMAN: I think the critical --
9 it would be ridiculous for me to argue that this
10 is going to fix the problem, and that we'll
11 immediately see overdoses go down. I know from a
12 Department standpoint, we understand you're not
13 going to prosecute and arrest and jail our way
14 out of this problem, and prevention and
15 deterrence is equally important to the
16 Department. We are trying as best we can to do
17 that.

18 What I would say about this, unlike
19 the current problem with respect to fake pills,
20 unlike all the other drug problems that we've
21 seen is that these are pills that are designed to
22 look like something else, like oxycodone. Is it

1 right for somebody to be buying a black market
2 oxy pill? No, it's not. Is it a crime to sell a
3 black market oxycodone pill? It is. The problem
4 is that we are masking -- these drug traffickers
5 are masking what looks like oxycodone, Percocets,
6 Xanax, Adderall with deadly fentanyl, and it
7 takes so little for it to be deadly. It looks
8 appealing to children. Sometimes it looks like
9 candy. They're colorful pills. For people that
10 might have been reluctant to inject something
11 into their body or snort something into their
12 body, this is a pill.

13 And we're hearing every single day
14 about another teenager or youngster, and I don't
15 mean to just focus on them, but the entire age
16 range of people who think that they're getting
17 black market oxycodone pills -- I keep focusing
18 on that because that's the majority, when in fact
19 they're getting fentanyl. And that's the
20 difference.

21 CHAIR REEVES: I take it no additional
22 questions for U.S. Attorney Ms. Carla Freedman?

1 Thank you so much for your testimony.

2 MS. FREEDMAN: Thank you.

3 CHAIR REEVES: Oh, oh, I'm sorry.

4 Judge Gleeson, Commissioner Gleeson has a
5 question.

6 COMMISSIONER GLEESON: Thank you,
7 Judge. My question is whether -- you can't help
8 but feel the increased culpability of offenders
9 of the sort just described. Thank you for your
10 remarks by the way. My question is whether there
11 are insufficient tools already in the toolbox of
12 sentencing judges to mete out sentences that are
13 commensurate with that increased culpability?
14 And the degree to which there's a need to tinker
15 with the guideline ranges in order for that to
16 happen?

17 Obviously, the Department feels there
18 is, but I'm just curious whether, by way of
19 departures or variances or other tools that
20 judges have whether there's a felt need for the
21 guideline ranges to be higher as well?

22 MS. FREEDMAN: Thank you, Judge

1 Gleeson, for the question. I guess my first
2 answer is that we cannot ever have enough tools
3 in the toolbox, so we appreciate even one more.
4 But that being said, I would make this important
5 distinction. There are, of course, tools to
6 prosecute fentanyl and fentanyl analog
7 trafficking, like all drugs.

8 The difference here is that we are
9 not, and judges are not able to treat the person
10 who knowingly sells a pill that looks like
11 oxycodone that has fentanyl in it, any
12 differently than the drug trafficker who's got a
13 little bag of heroin or fentanyl and even
14 indicates that he or she is selling fentanyl to a
15 willing buyer of fentanyl. That person, where to
16 some degree both the seller and the buyer
17 understand the transaction and the danger that
18 they're engaged in.

19 Now, when someone is selling a pill
20 and marketing it or representing it or saying
21 nothing at all, but just from the way that the
22 pill looks, the buyer believes that he or she is

1 getting a Percocet, but in fact they're getting
2 fentanyl. And that is a huge difference that
3 right now there's nothing that a judge can do,
4 unless somehow the government is able to show
5 that the trafficker -- and in this case it would
6 likely have to be street-level trafficker.

7 We can't get at the suppliers to those
8 traffickers. Knowingly misrepresented and
9 knowingly marketed that, that's a standard that
10 even though this is happening day in, day out in
11 all 50 states, I think the numbers bear it out.
12 That application, that enhancement has been able
13 to be applied one percent of the time, while the
14 number of pills have gone from 3 million to 61
15 million.

16 COMMISSIONER GLEESON: Thank you.

17 MS. FREEDMAN: Thank you, Judge.

18 CHAIR REEVES: Thank you, Ms.

19 Freedman.

20 MS. FREEDMAN: Thank you.

21 CHAIR REEVES: Thank you for your
22 testimony. We're ready for our next panel. Our

1 sixth panel provides us with the federal public
2 defender's perspective on this issue. To present
3 that perspective, we have with us Michael Caruso,
4 who has worked as a federal defender for nearly
5 30 years and currently serves as a federal public
6 defender for the Southern District of Florida
7 since 2012, when the 11th Circuit Court of
8 Appeals appointed him to that position. In that
9 capacity, Mr. Caruso supervises over 50 assistant
10 defenders to handle a wide range of cases,
11 including those involving narcotics.

12 Mr. Caruso also serves as chair of the
13 Federal and Community Defenders Sentencing
14 Guidelines Committee. Mr. Caruso, we're ready to
15 hear from you, sir.

16 MR. CARUSO: Thank you, Chair Reeves,
17 Vice Chairs, and Commissioners for inviting me to
18 testify today on First Step implementation and
19 counterfeit pills. While the three proposed
20 amendments addressed today are distinct in many
21 ways, our position for each of them shares the
22 same bottom line. Do not promulgate amendments

1 that will unnecessarily increase sentences for
2 drug offenses and unnecessarily complicate the
3 guidelines.

4 Section 2D1.1, as you know, is one of
5 the most highly criticized and consistently
6 rejected federal sentencing guideline. Sentences
7 imposed within the guideline range produced by
8 2D1.1 are diminishing. Last year, only 28
9 percent of cases under this guideline were within
10 the range, with nearly all cases sentenced below.
11 For more than a decade, federal judges nationwide
12 have called for 2D1.1 to do a better job at
13 recommending sentences that satisfy 3553(a).

14 For example, courts around the country
15 have recognized the unwarranted disparity between
16 the methamphetamine mixture and purity
17 guidelines. In the Third Circuit, a lawyer is
18 ineffective not to request a Kimbrough variance
19 from the MDMA guideline. And even in the face of
20 the opioid addiction crisis, the fentanyl and
21 analog guidelines are so severe that in 2021
22 courts imposed below guideline sentences in 36

1 percent of fentanyl cases and almost 50 percent
2 in analog cases.

3 Above guideline sentences, by
4 contrast, were rare. In the face of the
5 sustained criticism, 2D1.1's unwarranted
6 harshness. Defenders oppose any amendment that
7 would increase penalties under this guideline any
8 further. Such amendments would be contrary to
9 the spirit of the First Step Act and would be
10 contrary to our lived experience that we cannot
11 punish our way out of a public health crisis.

12 Turning to the specific proposals the
13 Commission is considering. First, safety valve
14 implementation. The Commission should not
15 substantively limit safety valve relief in 2D1.1
16 and 2D1.11. This is particularly true given the
17 Supreme Court's decision last week to resolve the
18 conflict as to how the circuits have been
19 interpreting each new law. The Commission should
20 not take any action that would appear to weigh in
21 on this litigation and should instead wait for
22 the Supreme Court.

1 Second, 2D1.1 enhanced-base offense
2 levels. The Commission does not need to
3 promulgate the proposed amendment to account for
4 the new statutory definitions for serious drug
5 felony and serious violent felony. Instead, we
6 ask the Commission to delete those provisions
7 that we submitted in our written testimony
8 entirely and let the few cases that would
9 normally be assigned those base offense levels
10 play themselves out.

11 The Guidelines and statutes already
12 provide sufficient increases for when a person
13 commits a drug crime resulting in death after
14 previously sustaining a prior conviction. These
15 base offense levels are frequently misapplied and
16 deleting them would be the simplest way to
17 account for the new First Step Act definitions
18 and would better ensure that people are only
19 being subject to enhanced base offense levels if
20 they are also subject to the enhanced statutory
21 penalties.

22 Third, counterfeit pills. We urge the

1 Commission to reject the proposed two-level
2 enhancement. Defenders do not dispute that our
3 country faces a public health crisis and that
4 drug addiction and overdoses pose critical public
5 health challenges. We have learned, however, as
6 Ms. Freedman just said, that ratcheting up
7 criminal penalties in response to such challenges
8 does not remedy them. It does however result in
9 unjust punishment that takes years to unwind.

10 As the Commission recognized last
11 cycle when it rejected a strikingly similar
12 proposal, the proposed enhancement lacks an
13 adequate mens rea requirement that we've talked
14 about today. This standard proposed, which
15 failed to distinguish between different
16 gradations of conduct and culpability. As DOJ as
17 recognized in its letter to the Commission, the
18 reason to believe standard has already proven
19 difficult to apply and will likely spawn
20 confusion, litigation, and unwarranted disparity.

21 The proposed amendment would also
22 entrench broad negligent-based sentencing in the

1 guidelines right as the Supreme Court has
2 repeatedly re-emphasized the fundamental
3 importance of mens rea in our criminal legal
4 system. Indeed, the Department's most recent
5 letter to the Commission has already foreshadowed
6 the government's litigation strategy should this
7 proposed amendment be promulgated. The
8 government would argue that the presence of
9 fentanyl in counterfeit pills is so well-known
10 that this enhancement should apply in every
11 single counterfeit case.

12 The dangerousness of fentanyl and its
13 analogs is already more than captured in the drug
14 guidelines and the statutes, and history and data
15 confirm that increasing penalties in these cases
16 would not reduce the availability of counterfeit
17 pills or mitigate our country's increasingly
18 tainted drug supply. I heard Ms. Freedman
19 concede today that adding a plus-two level upward
20 adjustment would not cause one overdose death to
21 be avoided. For these reasons, the Commission
22 should not promulgate this amendment. I welcome

1 your questions.

2 CHAIR REEVES: Thank you, Mr. Caruso.
3 Turn to my fellow commissioners. Yes, Ms. Laura
4 Mate?

5 VICE CHAIR MATE: Thank you, Mr.
6 Caruso. I found your testimony, as I always do,
7 very helpful. I had a question about 2D1.1. I
8 mean, as you know, we are not required to tether
9 2D1.1 to statutory safety valves. We have the
10 query of the wisdom, but we have the power to
11 tether or untether 2D1.1's safety valve to
12 whatever the Supreme Court decides in Pulsifer.
13 I guess one question I have is, in terms of kind
14 of implementing Congressional intent. Maybe
15 there was a scrivener's error or something, but
16 is there any real way that we can think that
17 Congress intended for the safety valve factors to
18 be conjunctive.

19 The reason I ask that is -- you
20 probably saw in the preamble, it's our amendment.
21 We kind of lay out the numbers there. Of
22 17,500-ish drug traffickers, if the factors are

1 conjunctive, only 300 people don't qualify for
2 the safety valve. Like everybody qualifies for
3 the safety valve. It almost seems like an
4 elephant in a mouse hole right now. Obviously,
5 Congress intended for it to be broader, right?
6 But I think the numbers are -- the old safety
7 valve would be 4,000 would not qualify and
8 disjunctive 2,000 would not qualify, and then
9 300. It just seems so low. Does Congress intend
10 to get rid of mandatory minimums in the drug
11 context altogether? Wouldn't we have seen more?
12 So I guess I'd love your thoughts on that.

13 MR. CARUSO: Yes, and I appreciate the
14 question by Chair Murray. One, I'm not in a
15 position to say that Congress makes scrivener's
16 errors in important statutes like this. Two, I
17 think we should also step back and recognize -- I
18 think you have been or the Commission has, that
19 the spirit of the First Step Act was to reduce
20 the severity of the guidelines, as almost
21 everybody, including this one, has recognized.
22 While we might debate other terms of art and

1 whether Congress had made a mistake. When we're
2 talking about the words and or or, I think we're
3 in a completely different category.

4 For better or for worse, I'm a product
5 of Florida State public schools, and for me and
6 has always meant conjunctive and or has always
7 meant disjunctive. And I don't see how Congress
8 could think otherwise. As you know, I practice
9 in the 11th Circuit, so any time I have an
10 opportunity to stand shoulder to shoulder with
11 Chief Judge Prior on an issue, I embrace that
12 opportunity. I think -- obviously he was the
13 author of the on bond Garcon majority case, and I
14 think he, in our mind, presents a compelling
15 statutory construction pace as to why and means
16 and -- I can go through those if I need to, but I
17 think you're well familiar with that opinion and
18 all the canons of statutory construction that he
19 discussed.

20 Thankfully, the 4th Circuit recently
21 in Jones essentially provided an executive
22 summary of the issue, which is also been helpful.

1 So I think we should wait and see what the
2 Supreme Court does. That being said, if the
3 Commission does not want to wait and see for all
4 the reasons Chief Judge Prior set forth, we do
5 think and is the superior reading. The one final
6 point I would put to the Commission as to how to
7 approach this issue.

8 Under an advisory scheme, and I'm not
9 telling you anything that you don't know, the
10 Commission's power is in its legitimacy and
11 credibility. I'll compliment today in this
12 public hearing the research and data explanation
13 that this body does, it's tremendous and helpful
14 to practitioners and to judges, I believe. But I
15 think weighing in on this issue certainly now
16 once the Supreme Court has decided to take up
17 this case, probably to be argued in October, a
18 decision shortly after that. We think the most
19 prudent course is for the Commission to wait and
20 see.

21 COMMISSIONER WROBLEWSKI: Can I follow
22 up on that?

1 CHAIR REEVES: Yes, you may.

2 COMMISSIONER WROBLEWSKI: Can I follow
3 up?

4 MR. CARUSO: Of course.

5 COMMISSIONER WROBLEWSKI: Implicit
6 though in your answer is that the Commission has
7 the authority. You may not think it's wise, but
8 I just want to clarify that. Am I reading it
9 right that the Commission -- that you believe the
10 Commission has the authority in 2D1.1, not in
11 Chapter 5, but in Chapter 2 to give its own
12 policy judgment and reflect that within its
13 decision whether to use and or whether to use or.
14 Within its decision whether to use and or whether
15 to use or.

16 Am I getting that right? And then if
17 I am getting that right, what does it matter what
18 the Supreme Court says? So the Supreme Court
19 says Congress meant and. They said and. They
20 meant and. Okay, then it still comes back here
21 and doesn't the Commission still have a policy
22 judgment to make as to what is the right policy

1 for the two-level adjustment in Chapter 2?

2 MR. CARUSO: To answer the first part
3 of your question, I think we do believe that
4 under your broad-based powers this body has the
5 authority to make policy under the guidelines.
6 But to answer the second part, I'm going to refer
7 back to my answer to Vice Chair Murray. Why you
8 wouldn't want to do that because imagine -- and
9 we've talked a lot today about disparity.

10 Well, think about the disparity that
11 would occur if the Supreme Court decided that and
12 means and, but this body decided that and means
13 or. We would have circuit conflicts about who
14 would be eligible for the mandatory minimum
15 versus who would not get this benefit under the
16 guidelines.

17 I think that would just cause chaos
18 and I do wonder what the judges in my circuit
19 would do with regard to not only is the Supreme
20 Court weighed in and said and means and, but also
21 the circuit previous had done and. There would
22 be a real dissonance between ordinary canons of

1 statutory construction and the Commission's
2 policy making. I think if I were a Commissioner,
3 I'd be very worried about the perception of this
4 body's legitimacy if you do go down that road.

5 COMMISSIONER WROBLEWSKI: Okay.

6 There's one other question on a different
7 subject.

8 CHAIR REEVES: Yes.

9 COMMISSIONER WROBLEWSKI: So you're
10 suggesting that the Commission strike from the
11 guidelines the recidivist provision? And you say
12 that the statutes can take care of it. I'm sure
13 you're well aware that Attorney General Garland
14 directed prosecutors not to charge mandatory
15 minimums, including recidivist provisions in most
16 situations.

17 I'm curious. Do you really want the
18 government to be charging those? Do you want
19 them to be stricken from the guidelines, and then
20 the government would be charging those
21 enhancements, the statutory enhancements that
22 would apply? Is that really your preferred

1 policy?

2 MR. CARUSO: That is not my preferred
3 policy, but I'm old enough to remember the Holder
4 memo, and in my district how that memo was not
5 strictly followed by line AUSAs. I think this is
6 a real issue, and Ms. Freedman referred to by the
7 part of the charging memo regarding crack
8 cocaine. Attorney General Garland issued these
9 memos, and we're very pleased with the provisions
10 of those memos. In particular, the not charging
11 mandatory minimums.

12 It's yet to be seen how that plays out
13 district from district and whether that guidance
14 is followed because I think we all can agree
15 there's no mechanism in my district that if the
16 U.S. Attorney is not following the Garland memo
17 that I can take an appeal to Main Justice. While
18 I agree with what Attorney Garland said is good
19 policy, I think it's too soon to say how that's
20 going to play out on the ground.

21 CHAIR REEVES: Vice Chair Mate?

22 VICE CHAIR MATE: Thank you. Thank

1 you for your testimony today. We appreciate it.
2 I have a follow-up question on the 2D and the
3 striking. If we didn't strike 1 and 3, but 1 is
4 made clear that those enhanced base offense
5 levels only apply based on offense conduct. Is
6 the language we have in our proposed amendment
7 adequate to accomplish that, or is there
8 different language we should be looking to?

9 MR. CARUSO: Thank you for that
10 question. I think the language you should be
11 looking to is found in 1(b)1.2(a), and that
12 provision provides -- you determine the offense
13 guidelines section in Chapter 2 applicable to the
14 offense of conviction, i.e., the offense conduct
15 charged in the count of the indictment or
16 information of which the defendant was convicted.

17 We think that type of language will
18 present more clarity because as you know in our
19 statement -- while we say on the one hand that
20 the work that these base offense levels do is
21 contained in other guidelines and statutes. They
22 are misapplied, and we would want to -- if you

1 don't eliminate that to make clear that it's
2 based on the offense of conviction.

3 CHAIR REEVES: Commissioner Wong?

4 COMMISSIONER WONG: Mr. Caruso, to
5 shift gears back to the pills. U.S. Attorney
6 Freedman painted the contrast for the need to
7 differentiate between two scenarios, and she
8 talked about where there's sort of a knowing
9 buyer and seller of an illicit substance and
10 what's very predominant in the fentanyl context,
11 which is this misrepresentation idea where two
12 milligrams is a lethal dose. But it's packaged
13 in non-lethal form of controlled substance in
14 pill form, and of course, what's interesting is
15 we're not writing a blank slate.

16 The Commission, with the currently
17 drafted enhancement, appear to be trying to get
18 at some kind of that differentiation. I'm
19 curious if you think the fact that it's only been
20 applied at a one percent rate because it is very
21 difficult to qualify. Is that sufficiently
22 getting at that compelling interest and

1 differentiating between those two scenarios?

2 MR. CARUSO: I think my answer to you
3 may sound like questions to you, and I don't mean
4 that. On the one hand, I haven't seen the data
5 about how many times the government has sought
6 this enhancement and failed. I would like to
7 know that information because just knowing in the
8 abstract if a probation officer hadn't
9 recommended that enhancement, if line AUSA hadn't
10 asked for that and it was denied because of a
11 lack of evidence, I would want to know that.

12 But also, I think we don't -- as a
13 trial lawyer, when I hear Ms. Freedman's
14 testimony, when I read the Department of
15 Justice's written testimony, I just think that
16 there is a fundamental disagreement about if the
17 fact was true how hard this would be to prove.
18 Prosecutors all across the country every day have
19 to prove up knowledge in a variety of contexts.
20 I know Ms. Freedman talked about wiretaps and
21 drug traffickers being wily and not talking them
22 about on the phone. To be clear, those are not

1 my clients. I have not seen a fentanyl or an
2 analog case that is dependent on wiretaps.

3 What I do know is my clients often
4 carry iPhones and other cell phones and do to
5 their detriment. Text frequently with the people
6 that they're conspiring with and selling with.
7 They also have that source. Prosecutors would
8 have that source of evidence to present to a
9 court. Also, for better or for worse, when my
10 clients are arrested, most of them waive Miranda
11 and speak to the police.

12 These are certainly questions that can
13 be asked in interrogation, along the lines of did
14 you know what you were selling? Was it real or
15 fake? That's another avenue for the government
16 to marshal proof to get this adjustment.

17 Finally, with regard to -- I believe this was in
18 the Department's written testimony and Ms.
19 Freedman represented it earlier today, the use of
20 coded words and again, for all the lawyers here
21 and judges we know that the government frequently
22 employs experts, usually in the form of law

1 enforcement agents to decode the code our clients
2 think they're using.

3 I think prosecutors do have all those
4 avenues to prove up knowledge, whether they're
5 trying that and being rejected or just not
6 trying, I don't know. I would want the answer to
7 that question before we embark on a new
8 adjustment.

9 VICE CHAIR MURRAY: On the pills, I
10 very much took your point about the point of the
11 enhancement should not be just that oh, it's in
12 here. Everyone knows that every oxy could be
13 fentanyl at this point. I know you don't think
14 we should go forward with the pills enhancement,
15 but if we were to go forward and we were to stick
16 with the reason to believe standard, are there
17 factors you think it would be useful for us to
18 kind of flesh out as examples in an application
19 node or -- the Department has a list. I don't
20 know if you have thoughts on what would be
21 useful.

22 MR. CARUSO: First and thank you for

1 -- you've noted sort of the cognitive dissonance
2 of Ms. Freedman's testimony where she said,
3 "There are unsuspecting buyers coupled with
4 everybody knows that counterfeit pills have
5 flooded the market." I think that's a real issue
6 that the Commission has to grapple with and
7 whether this is going to make any appreciable
8 difference.

9 The standard that the Department of
10 Justice has proposed, I think in addition to be
11 contrary to recent Supreme Court cases like Ruan
12 and Rehaif, is also unworkable because as I
13 understand the standard there are two parts. One
14 is present with regard to every sensing issue
15 that the party has to prove by preponderance of
16 evidence. So that means more likely than not.
17 Now, this new rebuttable presumption involves
18 reason to believe. Defense lawyers would be in
19 the position of having to prove that it's more
20 likely than not our clients did not have a reason
21 to believe --

22 VICE CHAIR MURRAY: Oh, I'm sorry.

1 Can I interrupt you?

2 MR. CARUSO: Yes.

3 VICE CHAIR MURRAY: I was saying in
4 the -- maybe that wasn't it. In the event that
5 we reject the government's proposal, we stick
6 with the reason to believe with the burden of
7 proof on the government proposal, that we had
8 initially promulgated. Not the government's
9 proving the burden.

10 MR. CARUSO: I apologize for
11 misunderstanding. I don't believe that there can
12 be any factors that the Commission could flesh
13 out. Again, because I think if this adjustment
14 goes forward, there would be a default in an
15 almost automatic plus-two in all of these cases.
16 Again, because as we heard, as the defenders
17 acknowledge, as the Department acknowledges, this
18 is so commonplace that everyone knows.

19 So for our clients not to receive this
20 adjustment would just be nearly impossible, and
21 it would essentially just be a new base offense
22 level for counterfeit pills.

1 VICE CHAIR MURRAY: You think in
2 general your clients do know that they're
3 probably marketing fentanyl?

4 MR. CARUSO: You know I can't --
5 obviously I'm not here to break attorney-client
6 privilege, but I think you don't have to be a
7 lawyer, a judge, or a commissioner to know that
8 we're in the midst of a significant public health
9 crisis. It's in the newspaper. It's on TV
10 nearly every week. I think the public is well
11 aware that our drug supply has been tainted, and
12 that there is a risk that whatever pill they're
13 buying on the black market may not be what they
14 think they're buying.

15 COMMISSIONER BOOM: So I mean, I guess
16 your point there then it's sort of adopts part of
17 the Department of Justice's reasoning, which is
18 everybody knows, and so it's just buyer beware?
19 Because some of the data demonstrates that 70
20 percent, I think, of all overdose deaths in the
21 United States are fentanyl deaths, and so how do
22 you -- you've acknowledged, I think everyone will

1 keep generalizing. Everyone knows there is a
2 public health crisis, so what do we do about
3 that?

4 MR. CARUSO: I think there is what the
5 big we and what the small we does. So the big we
6 -- I know I listened to President Biden's State
7 of the Union address and I'm appreciative that he
8 raised the point about this crisis. I think we
9 also know that this is a public health crisis, so
10 when you look to federal government agencies like
11 the Centers for Disease Control and what they're
12 doing, when you look to state and local health
13 agencies to see what they're doing. That is us
14 trying to tackle this problem.

15 I got from Ms. Freedman's testimony
16 today -- and I feel it too. It's not just her.
17 A sense of helplessness. People are dying. This
18 is a serious issue, but it's a multifaceted
19 problem that the criminal legal system really
20 cannot address. But we know that from decades of
21 experience, again in the last 10 years I've been
22 part of a national and local efforts to unwind a

1 lot of these unwise Trump policies. For example,
2 President Obama's clemency and commutation
3 initiative, Drugs Minus Two, First Step
4 litigation.

5 So we believe that the federal
6 government as a whole needs to work on this
7 issue. What we're saying is that history has
8 taught us, and my colleague, Ms. Scott, spoke
9 eloquently about that this morning, that we can't
10 punish our way out of this crisis. I heard Ms.
11 Freedman to concede that earlier today. Again,
12 your fentanyl report issued recently is an
13 amazing piece of work. In Pages 10 to 12, you
14 all set forth all the statutory and guideline
15 provisions that are out there, are ready to
16 punish fentanyl and fentanyl analog traffickers.

17 At the end of the day, it is up to
18 each AUSA and each defense lawyer to advocate
19 under 3553(a) for a sentence, and it's up to the
20 judges who have been appointed and confirmed, and
21 we trust to reach those decisions. In addressing
22 this issue, I would also ask you to look at the

1 racial disparity of the people who are being
2 sentenced under these guidelines.

3 I do disagree with Ms. Freedman when
4 I thought I heard her say that there was not a
5 disparity issue here. I think the data will show
6 that the defendants prosecuted in fentanyl and
7 fentanyl analog pieces are primarily people of
8 color. We know that judges are bearing downward
9 in those cases, but ultimately at the end of the
10 day, the Department of Justice and U.S. Attorneys
11 have adequate tools to address this problem from
12 a criminal legal standpoint.

13 CHAIR REEVES: Any further questions
14 for Mr. Caruso? Thank you, Mr. Caruso, for your
15 testimony.

16 MR. CARUSO: Thank you.

17 CHAIR REEVES: Our seventh group of
18 panelists will provide us with perspectives on
19 this issue from two of our advisory groups.
20 First, we will hear from Marlo Cadeddu, who
21 serves as the 5th Circuit's representative to the
22 Citizen Commission's Practitioners Advisory

1 Group.

2 Ms. Cadeddu is a solo criminal defense
3 practitioner who handles federal cases across the
4 nation. Ms. Cadeddu has previously served as a
5 steering committee member of the American Bar
6 Association's Death Penalty Representation
7 Project.

8 Second, we will hear from Jill Bushaw,
9 who serves as chair of our Probation Officers
10 Advisory Group. Ms. Bushaw serves as Deputy
11 Chief, United States Probation Officer for the
12 Northern District of Iowa. She joined the U.S.
13 Probation Office in 2003, and has previously held
14 positions as a citizen gatherer and specialist
15 and as a supervisory and assistant deputy chief
16 in the Presentencing Investigation Unit. Ms.
17 Cadeddu, we're ready to hear from you.

18 MS. CAEDDU: Thank you, Judge Reeves,
19 and thank you, Commissioners. I'm afraid you're
20 going to be seeing me three times today.

21 CHAIR REEVES: That's not enough.

22 MS. CAEDDU: Oh, I think it's plenty.

1 I represent the POAG, as you know, which is a
2 group of private practitioners who represent
3 criminal defendants. We very much appreciate the
4 opportunity to present our views to POAG on these
5 issues. Today, I'll be talking about fake pills
6 and First Step Act drug offenses.

7 I'll start with fake pills. The POAG
8 understands the DEA's concern about the
9 proliferation of fake pills that contain fentanyl
10 and the public's concern about the sharp increase
11 in deaths related to these synthetic opioids
12 containing fentanyl. Based on POAG members'
13 experiences with the drug guidelines, however, we
14 cannot support the new two-level enhancement
15 proposed in 2D1.1(b) (13).

16 First, it is unclear what evidence
17 supports the creation of this new enhancement
18 with its reduced mens rea standard. Other than
19 increases in the availability of fake pills and
20 the increase in overdose deaths, which are, we
21 all agree, horrifying and certainly a public
22 health crisis.

1 There does not appear to be any
2 evidence-based reason or empirical basis for
3 establishing this new two-level enhancement. The
4 Commission has not explained what correlation
5 there is between this new enhancement and the
6 DEA's concerns.

7 Second, the proposal sweeps far too
8 broadly. In POAG's experience, this enhancement
9 could apply in any case where a defendant
10 provided pills that were not directly obtained
11 from a pharmacy. I think you mentioned earlier,
12 we do believe that this reason to believe
13 standard is akin to a strict liability standard
14 that would apply essentially in any case where a
15 pill was not obtained through legitimate legal
16 source, such a pharmacy, and perhaps even where
17 it was obtained from, for example, a Mexican
18 pharmacy or from a friend who claimed that they
19 had obtained it from a pharmacy. Each of those
20 persons could be subject to the new two-level
21 enhancement.

22 With regard to the mens rea standard,

1 the Department is once again proposing a
2 rebuttable presumption, which I addressed earlier
3 today in the context of firearms. The government
4 proposes that this enhancement doesn't apply
5 unless the defendant can prove by a preponderance
6 that he or she did not know or had no reason to
7 believe the substance contained fentanyl or a
8 fentanyl analog.

9 Our criminal justice system, again, is
10 based on the government bearing the burden of
11 proof and the POAG would strenuously disagree
12 with the government seeking to shift its burden
13 of proof in this manner. We believe that that's
14 improper and without legal foundation. We
15 believe that the existing four-level enhancement
16 adequately addresses the concerns regarding
17 fentanyl pills using an appropriate mens rea
18 standard, and for that reason, we oppose this
19 amendment.

20 With regard to the First Step drug
21 offenses and the safety valve, the POAG supports
22 the Commission's amendment of 5C1.2 to reflect

1 the provisions contained in the First Step Act,
2 including the proposed amendments, to the
3 commentary, and conforming changes to 4A1.3. As
4 the Commission is aware, since the date of
5 submission of our written testimony, the court
6 has granted cert. and Pulsifer.

7 Although we initially requested that
8 the Commission consider amending the commentary
9 to provide that the criteria should be read
10 conjunctively. Obviously, we now all await the
11 Supreme Court's determination.

12 However, with respect to amendments to
13 2D1.1(b)(18) and 2D1.1(b)(6), the POAG continues
14 to endorse option 1, and asks the Commission to
15 consider providing guidance in the commentary to
16 these guidelines. That as to the applicability
17 of the specific offense characteristics, the
18 criminal history criteria of 3553(f)(1) that are
19 referenced therein should be read conjunctively
20 rather than disjunctively.

21 As the Department of Justice pointed
22 out in its written testimony, the two-level

1 reductions in those Sections of 2D1.1 are
2 available in narcotics prosecutions whether or
3 not the defendant is subject to a
4 statutory/mandatory minimum and can avail himself
5 of the safety valve. Those provisions serve
6 arguably different purposes than the safety
7 valve.

8 It's the position of the POAG that
9 those reductions should apply as broadly as
10 possible. In addition, the POAG believes the
11 Commission should provide guidance on what
12 constitutes one-point, two-point, or three-point
13 offenses to make clear that those offenses for
14 the purposes of those sections of 2D1.1 should
15 not include old or otherwise uncountable
16 sentences. If the court or if rather, the
17 Commission -- sorry. I'm used to doing arguments
18 so I'm just not used to calling you the
19 Commission.

20 If the Commission were to do so, that
21 would make these terms consistent across the
22 guidelines and provide uniformity in application.

1 Thank you very much for the opportunity to
2 provide our testimony.

3 CHAIR REEVES: Thank you, Ms. Cadeddu.
4 Ms. Bushaw?

5 MS. BUSHAW: Good afternoon. Not sure
6 of the microphone again.

7 CHAIR REEVES: I believe you might be
8 able to use that one.

9 MS. BUSHAW: Okay, I'll just go with
10 that. Thank you again for the opportunity to
11 testify before the Commission today on behalf of
12 the Probation Officers Advisory Group. I'm going
13 to talk to you today about safety valve and fake
14 pills, starting first with the topic of safety
15 valve. Due to unforeseen delays since the First
16 Step Act was signed in 2018, districts have been
17 employing different methods to account for the
18 fact that the sentencing guidelines have not yet
19 been amended to correspond with the current
20 version of 18 U.S.C. 3553(f).

21 The initial issue districts had to
22 address was whether they should continue to apply

1 the guidelines as they appear in the 2018 and
2 2021 Guidelines Manual, follow that same process
3 but then account for the reduction by way of a
4 two-level variance, or apply the two-level
5 reduction, treating the current version of 18
6 U.S.C. 3553(f) as being incorporated into 5C1.2.

7 POAG supports the proposed amendment
8 as it will resolve that initial ongoing issue.
9 POAG also discussed the possibility of Congress
10 further amending the statutory language under
11 3553(f), leaving again that period of
12 interpretation between statutory changes and
13 guideline changes. Therefore, POAG inquired if
14 the best format moving forward would be to
15 instead refrain from citing the statutory
16 language within the guidelines and simply refer
17 to the statute instead.

18 However, as you are well aware,
19 another application issue remains, and that is
20 the conjunctive and disjunctive analysis in
21 relation to the criminal history criteria
22 established by the First Step Act. POAG's

1 discussions regarding this matter largely focused
2 on the results and districts where case law
3 follows the conjunctive analysis of the statute.

4 In those districts, examples were
5 discussed in which defendants who have a serious
6 and lengthy criminal history were eligible for
7 safety valve relief, meaning that the reduction
8 essentially no longer applied to defendants who
9 had a reduced criminal culpability. These
10 results are counterintuitive to the intent of
11 safety valve and resolving that issue was the
12 primary basis that POAG recommended option two.
13 Some members of POAG expressed concerns that
14 procedurally this may become very complicated.

15 With option two in some circuits,
16 defendants wouldn't be eligible for statutory
17 relief or the guideline reduction, but in other
18 circuits defendants would be eligible for
19 statutory relief, but not eligible for the
20 guideline reduction. However, with option two
21 the guideline application would at least be
22 consistent, regardless of the circuit within

1 which the defendant was charged.

2 POAG maintains the recommendation for
3 option two, but we also recognize now that the
4 Supreme Court will soon weigh in on the statutory
5 matter. Now that proposed amendment under 2D1.1
6 addresses the recidivist penalties pertaining to
7 definitions of serious drug felony, felony drug
8 offense, and serious violent felony, there have
9 also been questions in prior cases regarding the
10 term a similar offense. This amendment clearly
11 resolves that issue moving forward.

12 Finally, another proposed amendment
13 under 2D1.1 is set forth under Subsection (b) (13)
14 to add an alternative two-level enhancement for
15 drugs that are represented or marketed as a
16 legitimately manufactured drug. POAG believes
17 that a strict liability-type approach is
18 appropriate, given the extreme risks associated
19 with having the fentanyl pressed into pill form.
20 The dealer should receive a higher total offense
21 level because of the risks he or she has
22 introduced into the market.

1 Without the proposed amendment, those
2 distributing those kinds of pills aren't being
3 held accountable for the fact that they ignored
4 the potential dangers of distributing such a
5 substance. For a victim to suffer overdose or
6 death, the result is the same regardless if the
7 dealer who sold the pill knew it contained
8 fentanyl. The dealers who distribute these pills
9 take advantage of the fact that the users are
10 under the impression that the pills are safe and
11 legitimate.

12 Along those same lines, POAG also
13 advocates for this enhancement to be
14 offense-based rather than defendant-based,
15 meaning Subsection (b) would begin with "if the
16 offense involved" so those who manufacture these
17 pills for distribution are held accountable for
18 their role in the process as well. Then we also
19 inquired if there could be some clarification to
20 the terms represented and marketed and how
21 they're intended to apply.

22 For example, is the fact that the pill

1 resembles a legitimately manufactured pill, is
2 that sufficient or is more information needed?
3 Regardless of the final decision regarding this
4 amendment, POAG recognizes the harm these pills
5 have on our communities and appreciate the
6 attention to this matter. Thank you.

7 CHAIR REEVES: Thank you. Any
8 questions from my fellow commissioners? Yes?

9 VICE CHAIR MURRAY: Thank you so much
10 for your testimony. I had a question for Ms.
11 Bushaw about the minimum offense level 17 and
12 Section 1.2. I know POAG took the position that
13 the minimum offense level should be kept at 17 in
14 order to keep the gradation between defendants
15 that's lower from a higher criminal history.

16 Why don't the guidelines take care of
17 that on their own regardless? You know what I
18 mean? So Congress didn't want the total
19 punishment to fall below a certain threshold.
20 This used to correspond to 17, but no longer
21 would. Why can't we just keep that floor there
22 and allow for the guidelines to take care of

1 predations?

2 MS. BUSHAW: Just keep the 17? Why
3 can't we just keep the base level 17 or are you
4 asking should we just create a 24-month minimum?

5 VICE CHAIR MURRAY: Right, exactly.
6 Different month minimum.

7 MS. BUSHAW: Okay, yes. We discussed
8 that. We just didn't see that there was a need
9 to change. We thought the way it was working now
10 was fine. Obviously, more people are going to be
11 eligible for safety valve with the new
12 provisions, and some of them are going to have
13 higher criminal history categories, but keeping
14 it at a minimum offense level of 17 would just
15 account for that and the varied criminal history
16 categories that could present.

17 CHAIR REEVES: V.C. Mate?

18 VICE CHAIR MATE: Thank you. Thank
19 you both for your testimony today. We really
20 appreciate it, but I had one little tiny
21 technical question for you, Ms. Bushaw. On the
22 2D1.1 height and base offense levels -- kind of

1 the same question I asked at the last panel,
2 which is -- it sounded like POAG was in favor of
3 us adding the language that's there. If we're
4 wanting to make clear that we're capturing the
5 conduct of the charged offense and the 851
6 context.

7 Do you think we need additional
8 language to clarify that, or is what we've
9 proposed sufficient to capture that?

10 MS. BUSHAW: For the recidivist
11 penalties?

12 VICE CHAIR MATE: Correct.

13 MS. BUSHAW: It's always been my
14 understanding it was offensive conviction-based
15 based on how the guidelines are currently
16 written. There has been case law on that issue
17 though, so I think that in order to resolve that
18 issue and make it more clear it would probably be
19 a good idea to clarify that a little bit more
20 within the current language.

21 VICE CHAIR MATE: Thank you.

22 VICE CHAIR MURRAY: A question for

1 both of you. If we wanted to clarify that our
2 reason to believe -- and this is in the fake pill
3 context. Our reason to believe mens rea
4 standard, we were to reject the government's
5 suggestion that we shift the burden of proof. We
6 stick with our proposal and use reason to
7 believe. Are there specific ways you think that
8 we could flesh it out in an application node to
9 make clear that we are not trying to capture --
10 I understand POAG's recommendation, but we, with
11 that recommendation or not, trying to capture
12 everyone.

13 See what I'm saying? So I understand
14 that it is well-known in the press, et cetera,
15 that many or the most oxy, Adderall, et
16 cetera, pills that are available on the black
17 market contain fentanyl. If we're not trying to
18 capture everyone because of that general
19 knowledge, but we're trying to capture people
20 who, for example, have had sold part of a batch
21 of pills with adverse results and then continued
22 to sell the rest of the pills. Are there

1 specific factors you think that we could outline
2 to avoid capturing everyone?

3 MS. CAEDDU: I think that that
4 determination would be so fact-intensive that it
5 would be very difficult to set out a set of
6 factors to say that this would be an acceptable
7 -- this would not constitute a reason to believe
8 and this wouldn't constitute. You'd sort of have
9 to end up having a laundry list of the types of
10 facts that would constitute reason to believe.

11 It's our position at POAG that that is
12 just unworkable and it's going to apply too
13 broadly to everyone, and so we advocate, as you
14 know, for maintaining the current mens rea. I
15 think the prior panel has noted, the Department
16 of Justice has a lot of tools in its arsenal, and
17 there are a lot of enhancements that it can
18 apply. I'm not sure why that particular
19 enhancement hasn't been utilized, but it
20 certainly is available and it can elect to pursue
21 the existing enhancements already. We don't see
22 the need for an additional one.

1 MS. BUSHAW: POAG's position, and this
2 has actually evolved a little bit as we've
3 discussed further, and we are leaning towards the
4 reason to believe isn't needed to be included in
5 the guideline itself. When we talked about this
6 enhancement, first what we talked about was do we
7 even need this enhancement in the guideline?
8 Yes, or no? POAG supported it being included for
9 the very reasons the DOJ stats indicated and how
10 dangerous it is and defendants who were selling
11 these drugs need to be held more culpable than
12 the ones who aren't.

13 After we thought that this definitely
14 was an enhancement, we would support then we
15 focused on how it should be written, and then we
16 just have to think about what kind of facts do we
17 usually have when we see these cases. I mean, it
18 gets manufactured, it goes from dealer one to
19 dealer two, dealer two to dealer three, dealer
20 three to user, who has an overdose. What facts
21 do we have when we write the report? So when
22 reason to believe is in there, we need knowledge

1 on what the defendant knew and what they were
2 doing when we write the report.

3 It's not likely we're going to have
4 that, so I think that's part of the reason
5 Subsection (a) is not applied very often as well.
6 If Subsection (b) is intended to capture this
7 type of conduct, we're leaning towards it doesn't
8 need to be in there. This would just score in
9 circumstances where a drug was sold. It had the
10 appearance of being legitimately manufactured,
11 and it contained fentanyl, and then the two-level
12 increase applies.

13 COMMISSIONER WONG: Sorry. What was
14 that language look like? Can you say that one
15 more time? You're leaning towards the --

16 MS. BUSHAW: Of not including the
17 reason to believe provision.

18 COMMISSIONER WONG: And the language
19 would now be --

20 MS. BUSHAW: It would be if the
21 offense involved a representation or marketing as
22 a legitimate known manufactured drug or mixture

1 of substance containing fentanyl, fentanyl
2 analog, and it was not a legitimately
3 manufactured drug. Then increase by two levels.

4 That's the only two things we would
5 consider when we scored it. Did it appear to be
6 legitimately manufactured and did it contain
7 fentanyl? Because honestly when we write these
8 cases, the Department of Justice testified to it
9 earlier, they use code words. You don't have a
10 lot of the information, so if this is intended to
11 account for that behavior it needs to be written
12 in such a way that we can apply it. I don't know
13 that we would know defendant's position until we
14 scored it. Maybe they objected to it, and it was
15 addressed at sentencing.

16 COMMISSIONER BOOM: Just to follow up
17 and clarify then, POAG's position is essentially
18 a two-point enhancement based on the offense, no
19 mens rea. It's essentially a strict liability.
20 If fentanyl is in the pill or whatever it was,
21 there's two points.

22 MS. BUSHAW: Yes.

1 VICE CHAIR MURRAY: And if it looks
2 like a --

3 COMMISSIONER BOOM: And if it looks
4 like --

5 MS. BUSHAW: If those two prongs are
6 met, then we would recommend a score.

7 CHAIR REEVES: Would that include
8 anybody who sells it? I mean, anybody who passes
9 it on from one person to the other? Either for
10 sale or for whatever? I could imagine young
11 people giving it to someone, a friend, because
12 they got it from someone, and they all thought it
13 was Percocet. And they've used Percocet before,
14 but this is not Percocet. This has fentanyl in
15 it. So you have one high school kid give it to
16 another high school kid, and the second high
17 school kid dies because of the fentanyl. Would
18 that two-level enhancement that you've been
19 speaking of automatically apply to the person A
20 who gave it to person B?

21 MS. BUSHAW: Yes. I think that's
22 probably a pretty standard practice of how it

1 works. They just keep getting passed on. If we
2 believe the people putting these in the market
3 are accountable, then we think it's essential to
4 be written that way.

5 CHAIR REEVES: Commissioner Wong?

6 COMMISSIONER WONG: Ms. Bushaw, can
7 you talk about when you're scoring or when you're
8 preparing presentence reports, maybe you alluded
9 to this a little bit. But why it's difficult for
10 a probation officer to assess that four-point
11 enhancement that's currently in the guideline?
12 Our previous speaker said there's all kinds of
13 evidence in the case. Maybe there's a custodial
14 interview where they've acknowledged it. What
15 kind of difficulties or challenges on the ground
16 level have you encountered?

17 MS. BUSHAW: It's just such a
18 fact-based enhancement. If they knowingly
19 misrepresented and knowingly marketed the
20 substance -- I think with Subsection (a)
21 specifically, they're dealing drugs that they
22 don't necessarily know have been laced with

1 fentanyl. Whereas with Subsection (b), they're
2 dealing a legitimate pill.

3 Again, they may not know it's got
4 fentanyl in it, but the harm is a little bit
5 greater with Subsection (b) because (a) is you're
6 buying drugs and you intend to use drugs. (b),
7 you're buying what you think is a safe pill that
8 maybe was manufactured, and you have that level
9 of trust in the pill that it has a certain amount
10 of drug in it. That's the aggravating factor
11 under Subsection (b). Like the Department of
12 Justice mentioned before, the amount of
13 information we have on each case varies quite a
14 bit. But with Subsection (a) specifically,
15 that's a case where defendants might not know
16 what they distributed had fentanyl in it.

17 COMMISSIONER BOOM: I know this is a
18 very fact-specific question. What if the POAG's
19 proposal also included a caveat that unless the
20 purchaser was aware that the drug contained
21 fentanyl?

22 MS. BUSHAW: They received what they

1 were looking for in terms of purchasing it?

2 COMMISSIONER BOOM: Right. Right.

3 MS. BUSHAW: Is that a less serious
4 offense?

5 COMMISSIONER BOOM: Right, because you
6 were acknowledging Subsection (b) addresses a
7 greater harm when someone who unknowingly
8 purchases a pill that contains fentanyl, and they
9 thought it was a really cheap oxy30. Do you
10 think POAG's position would change if that was
11 the case? If there was clear evidence.

12 Sometimes there is a wiretap, and the dealer
13 says these are great. These are loaded with
14 fentanyl, and the buyer says oh, great. I know
15 that's a very specific factual question, but do
16 you think the harm is a little different there?

17 MS. BUSHAW: Yes, yes. And that's
18 what we focused on when we were discussing this
19 was the harm is different when you're selling
20 what looks like a legitimately manufactured pill.
21 It's absent when the circumstance that you
22 discussed, when they knowingly purchased the

1 fentanyl, and that's what they were looking for.
2 So that type of caveat makes sense for this kind
3 of buying.

4 CHAIR REEVES: Any further questions
5 from this panel? Well, thank you. That
6 concludes our morning. We'll take a brief break
7 for lunch. We will resume testimony at about an
8 hour and 15 minutes or so. Please let's be in
9 our seats at 2:00, and we'll begin the next round
10 of testimony. Thank you all so much for your
11 patience with us today. We're recessed, as the
12 court would say.

13 (Whereupon, the above-entitled matter
14 went off the record at 12:46 p.m. and resumed at
15 2:03 p.m.)

16 CHAIR REEVES: Now, our eighth panel
17 will present the executive branch's perspective
18 on our proposed amendments that seek to resolve
19 conflicts among our federal circuit courts.

20 To present that perspective, we have
21 Carmen Mitchell, who serves as appellate chief
22 for the United States Attorney's Office in the

1 Southern District of Texas.

2 Ms. Mitchell serves as chair of the
3 Department of Justice's Appellate Chiefs Working
4 Group and as a member of the Sentencing Policy
5 Group. Ms. Mitchell has over 25 years of
6 experience as a prosecutor at the state and
7 federal levels in Texas.

8 Ms. Mitchell, we are ready when you
9 are, ma'am.

10 MS. MITCHELL: Thank you.

11 Chairman Reeves and distinguished
12 Commissioners, thank you for the honor of
13 appearing before you and for the opportunity to
14 present the Department of Justice's views
15 regarding proposed amendments to Sentencing
16 Guidelines 3E1.1 and 4B1.2 to resolve circuit
17 conflicts.

18 First, as to 3E1.1, acceptance of
19 responsibility, we urge the Commission to resolve
20 the disagreement among the circuits by preserving
21 the government's discretion to withhold a
22 third-level reduction.

1 The guideline currently provides that
2 a court may grant an additional one-level
3 reduction only upon motion of the government.
4 That language came directly from Congress, in
5 2003, through the PROTECT Act.

6 As Congress emphasized, the government
7 is in the best position to determine whether the
8 defendant has assisted authorities in a manner
9 that avoids preparing for trial and permitting
10 the government and the courts to allocate their
11 resources efficiently.

12 The Department supports amending
13 3E1.1(b) to include the framework provided by the
14 Supreme Court in *Wade*. In accordance with that
15 standard, the government retains the discretion
16 to withhold a motion based on any reason that is
17 rationally related to any legitimate government
18 end but may not withhold a motion based on an
19 unconstitutional motive.

20 But the Commission should decline to
21 define preparation for trial as it would not
22 resolve the existing conflict amongst the

1 circuits. Section 3E1.1(b), as amended by the
2 PROTECT Act, does not focus exclusively on the
3 government's interest in avoiding preparing for
4 trial. Instead, it more generally recognizes the
5 government's interest in allocating its resources
6 efficiently. Again, the government is in the
7 best position to determine whether the defendant
8 has timely and sufficiently assisted authorities.

9 Lastly, amending 3E1.1(b) to constrain
10 the government's discretion afforded by Congress,
11 is unnecessary. If a district court disagrees
12 with the government's decision not to recommend a
13 third-level reduction, the court has discretion,
14 under 3553(a) to vary below the advisory
15 guideline range.

16 I'll next turn to the definition of
17 controlled substance offense in 4B1.2. The
18 Department urges the Commission to adopt the
19 definition in Option 2, that is, controlled
20 substance refers to substances that are either
21 included in the federal Controlled Substances Act
22 or otherwise controlled by applicable state law.

1 First, Option 2 is faithful to the
2 current section 4B1.2(b) language, which defines
3 controlled substance offense as an offense under
4 federal or state law. Because 4B1.2(b)
5 specifically refers to state law in defining the
6 offense, it follows that 4B1.2(b)'s definition of
7 controlled substance offense covers offenses
8 involving substances controlled under federal or
9 relevant state law.

10 Second, Option 1 is unduly narrow and
11 would lead to unnecessary complexities at
12 sentencing. If the Commission were to limit the
13 definition to that of the federal Controlled
14 Substances Act, litigants and courts would have
15 to resort to the complicated categorical or
16 modified categorical approach to determine
17 whether a state drug statute sweeps more broadly
18 than its federal counterpart.

19 Courts have grappled with slight
20 difference between the federal and state drug
21 schedules for cocaine and methamphetamine, for
22 example. Some courts have even determined that

1 prior state convictions involving cocaine did not
2 qualify as a controlled substance because the
3 state definition was categorically broader than
4 the federal definition of cocaine. Adopting
5 Option 2 would avoid such complex litigation.

6 The Department urges the Commission to
7 add language to Option 2's definition to address
8 timing. The Commission should clarify that the
9 substance at issue must have been controlled at
10 the time the defendant committed the predicate
11 offense. This will resolve the circuit conflict
12 on the issue.

13 Finally, if the Commission amends
14 4B1.2(b) to include Option 2's definition of
15 controlled substance, the Department recommends
16 that the Commission add the same definition to
17 2L1.2 Application Note 2, without otherwise
18 changing Application Note 2's definition of drug
19 trafficking offense. This would promote
20 consistency in the Guideline's manual.

21 And with this, I welcome your
22 questions.

1 CHAIR REEVES: Thank you, Ms.
2 Mitchell.

3 I now turn to my colleagues who've
4 just had lunch too.

5 (Laughter.)

6 VICE CHAIR RESTREPO: One example of
7 a problem I see on the horizon would be the
8 marijuana laws, so are changing all the time
9 in different states.

10 So, if we were to incorporate the
11 definition including state predicates, wouldn't
12 that lead to some disparities in terms of folks
13 who may have been convicted of marijuana offenses
14 in one state when it was legal then or another
15 state where it wasn't legal now, as opposed to
16 just sticking to the federal definition of a
17 controlled substance?

18 MS. MITCHELL: Thank you for the
19 question.

20 It would create unwanted disparities
21 if we didn't include state law offense, and
22 that's because there are very minute distinctions

1 from one state to the next or from one state to
2 the federal drug schedules. In that, there have
3 been instances where courts have determined that
4 for example, a state includes ioflupane in
5 their drug schedules and since 2015, I believe it
6 was; the federal Controlled Substances Act
7 excluded ioflupane in the cocaine definition
8 because it is medically used to diagnose
9 Parkinson's.

10 And so, there are some states, and
11 there's a case law that we have cited in our
12 Department letter including, out of the Eighth
13 Circuit, where a defendant, who actually was
14 trafficking in cocaine, does not receive an
15 enhancement in the Eighth Circuit because that
16 particular state statute included ioflupane, and
17 the federal court definition or Controlled
18 Substances Act definition no longer includes
19 that. There are several other examples.

20 And that is, out of the Second
21 Circuit, there, the New York Statute holds or --
22 I'm sorry, the New York Statute defines

1 trafficking in cocaine to include several
2 substances that are not included in the federal
3 Controlled Substances Act, such as the drugs HCG
4 and naloxegol. Those were included in the state
5 definition but not included in the federal
6 Controlled Substances Act, and so, the Second
7 Circuit held that the defendant, while convicted
8 of cocaine trafficking offense, actually did not
9 get the enhancement under the guidelines.

10 CHAIR REEVES: Yes.

11 VICE CHAIR MURRAY: Thanks very much
12 for your testimony. I found them very helpful.

13 But, I guess, one question I have
14 about the Government's fallback argument on
15 3E1.1, which is that there's no real need to --
16 that courts can be a backstop, basically, when
17 prosecutors are stingy about the third point. Is
18 -- would that be reversible error?

19 I mean, do you think that courts have
20 -- if prosecutors have withheld the third point
21 for something other than an unconstitutional
22 Wade-type factor, do you think that courts --

1 would courts be abusing their discretion if they
2 accord the third point when it hasn't been moved
3 for?

4 MS. MITCHELL: So, I --

5 VICE CHAIR MURRAY: Before the part
6 based on that -- yeah.

7 MS. MITCHELL: Right. So you're
8 saying if the court were to vary downward, would
9 that be an abuse of discretion in appeal from
10 that decision?

11 It would not because, under 3553(a),
12 the courts and, in fact, the Department looks at
13 the defendant who's standing before the district
14 court for sentencing, and, of course, all of
15 those 3553(a) factors can be looked at to see
16 what the defendant's actual conduct was, at what
17 point was the -- with regard to the 3E1.1, at
18 what point was the motion to suppress litigated
19 or the pretrial matters litigated; how lengthy
20 were they?

21 And so, again, as you mentioned, in
22 the Department's letter, we urge that the

1 Congress, through the PROTECT Act, provided the
2 government with the discretion to determine when
3 to move for that third level.

4 And we have to remember that a
5 defendant who pleads guilty still receives, under
6 3E1.1(a), receives the two-level reduction for
7 that acceptance, and so, here, we're merely
8 talking about the third-level reduction and the
9 government determining did the defendant plead
10 guilty with sufficient time to allocate the
11 resources correctly for -- or appropriately for
12 the government and the courts.

13 VICE CHAIR MURRAY: But what if the
14 Court says, on the record, I'm varying downwards
15 solely for one reason: because the government
16 withheld that third point because of a special
17 motion -- because they had to prepare for a
18 special motion?

19 MS. MITCHELL: You know, I think,
20 there, the circuits would look at what kind of
21 record evidence did the district court place,
22 with regard to its decision, on 3553(a). I'm not

1 sure how the circuits would go if it said that
2 was the sole reason. Of course, right now, the
3 majority of circuits hold that it's appropriate
4 because it's not an unconstitutional motive for
5 the government not to move for that third-level
6 reduction.

7 And so, in the majority of circuits,
8 that would be okay, and it -- for the government
9 not to move because it's not based on an
10 unconstitutional motive, rather it's a legitimate
11 governmental reason for legitimate government,
12 and then, again, that's the allocation of
13 resources.

14 CHAIR REEVES: Yeah.

15 COMMISSIONER BOOM: Thank you for your
16 testimony.

17 What guidance does the Department of
18 Justice give to your US Attorneys' Offices
19 related to accept -- at the third level for
20 acceptance of responsibility? Is there a policy?
21 Is there some kind of, you know, guidance? Is it
22 a memo?

1 MS. MITCHELL: Thank you for the
2 question.

3 There's currently not a
4 Department-wide guidance memo with regard to the
5 third-level reduction. Again, so, if that
6 person's in a circuit that holds one way or the
7 other, they're going to, of course, follow their
8 circuit law, but once this Commission, if it
9 determines the decision -- makes the decision on
10 this third level, there could be, ultimately,
11 guidance in the end.

12 But what we would -- do have our
13 district guidance, right? And so, there could be
14 in place, in certain US Attorney's Offices, some
15 district guidance on how to proceed. Just
16 currently, there's not Department-wide guidance
17 because there is -- the circuit is split on the
18 issue right now.

19 COMMISSIONER BOOM: I guess it -- as
20 a follow-up question, you know, the -- I believe
21 it was in the Defenders' submission -- state that
22 it varies widely, district to district, whether

1 the Department moves for the third level decrease
2 for acceptance of responsibility. And so,
3 therefore, it's important for the Commission to
4 set some parameters or try to give some
5 structure.

6 And so, what would be your response to
7 that, where, let's just say, if you're in the,
8 you know, Eastern District of Kentucky, where I
9 am, you know, they routinely, even if you get to
10 the eve of trial -- this is just hypothetical --
11 will move for the third level, or let's say,
12 versus the Western District of Kentucky, where I
13 also sit, that they, you know, almost never --
14 they sort of have a, you know, a rule -- and,
15 again, this is purely a hypothetical.

16 But the argument is -- I think that it
17 was made in the Defenders' submission -- that it
18 really varies widely district to district, and
19 so, that creates a lot of disparity.

20 So how do you respond to that?

21 MS. MITCHELL: Well, we urge -- the
22 Department urges the Commission to include the

1 Wade standard by the Supreme Court, again, just
2 saying that it's okay if the government withholds
3 that third level, so long as it's rationally
4 related to legitimate government end, and also -
5 - and not in an unconstitutional motive.

6 And to that -- answer to that question
7 as well, is, you know, the Department urges --
8 it's going to be based on the specifics of a
9 particular fact. And so, I think it would be
10 difficult line drawing should the Commission
11 adopt a definition of preparing for trial.

12 I think that would be difficult line
13 drawing because it's going to depend, case to
14 case, and it's going to depend at -- if, for
15 example, we're litigating a motion to suppress.
16 There, it depends on the case, where we might
17 have to call victim -- witnesses, and you're
18 getting the victims involved early in pretrial
19 litigation, or you might be prepping and
20 providing testimony by expert witnesses, and so,
21 there's that -- all that preparation to prepare
22 those witnesses to testify; you're doing the

1 legal research and writing for those.

2 And so, again, I do think that, so
3 long as we rely on the Wade standard, it's
4 constitutional, and it would depend by the
5 defendant standing before trial, before the
6 sentencing court, and the court itself, the
7 district court.

8 COMMISSIONER BOOM: And I think,
9 certainly, it's very fact-driven, but I don't
10 think the Wade standard necessarily supplies a
11 standard, other than so long as it's not
12 unconstitutional, right? I mean, so there's
13 still no specific guidance from the Department to
14 the various districts, US Attorneys' Offices. Do
15 you understand my --

16 MS. MITCHELL: I do.

17 COMMISSIONER BOOM: I mean, that's
18 pretty wide open, right? I mean, it's,
19 basically, as long as it's not -- there's no
20 unconstitutional motive. That's not really
21 guidance, but I certainly get your -- you know, I
22 understand the point that it is very fact-driven

1 in many circumstances, but I'm just curious to
2 see if there's any guidance that's provided by
3 the Department of Justice.

4 MS. MITCHELL: You know, certainly,
5 Congress, again, provided that discretion, so
6 it's a Congressionally afforded discretion to the
7 government, and that's why they expressly stated
8 upon motion by the government. And so, that's
9 been since 2003, and it's been -- it's been
10 workable since then.

11 COMMISSIONER BOOM: Thank you.

12 COMMISSIONER WONG: Just a follow-up

13 --

14 MS. MITCHELL: Yes.

15 COMMISSIONER WONG: -- on Judge
16 Boom's question. Is there -- I'm trying to
17 figure out -- is there any kind of middle ground,
18 here, at all? The government doesn't really
19 provide a fallback option to the Wade standard,
20 which is really an unbridled government
21 discretion standard, because it's really stating
22 what's obvious, right? The government can't act

1 unconstitutionally.

2 Is there some fallback formulation of
3 preparing for trial that would provide more
4 guidance but in a way that's still -- perhaps
5 more so than the proposal for what that
6 definition would look like -- afford sufficient
7 discretion for the government, while also some
8 parameters and uniformity?

9 MS. MITCHELL: I do think it would be
10 difficult line drawing. So, for the proposal,
11 when it talks about early, you know -- again,
12 define early or the term that's used ordinarily,
13 and so, I think, the proposal still makes
14 difficult line drawing on where is that line.
15 And it just would provide more opportunity for
16 district courts to interpret it differently.

17 And so, I think, you know, mostly,
18 we're looking at allocation of resources, not
19 simply pretrial matters. And so, I think it
20 would be difficult to draw the line between what
21 is early preparation and one of the counter --
22 the counterproposals to the proposal, I think,

1 perhaps, by the Defenders', was to make it,
2 instead of time intensive question, to make it
3 more of a purpose-driven, and I think that, too,
4 is an unworkable solution because, there, you're
5 getting into the specifics of the confidential
6 preparations that the government is making.

7 COMMISSIONER WONG: What about -- and
8 just thinking of some ideas -- but the
9 government, in some contexts, has proposed
10 rebuttable presumptions, and is there a way that
11 you can provide some guidance and uniformity
12 among courts with a presumption that would still
13 leave opportunity for exceptional circumstances,
14 where not every case is the same and you don't
15 have that fixed, rigid definition of early, but
16 there's some guiding principles there? And then
17 the government could justify it based on some
18 extraordinary circumstances. I don't know. Is
19 there -- is there some middle ground at all
20 between the Wade standard and the proposal?

21 MS. MITCHELL: I appreciate the
22 question and the Department would be happy to

1 follow up with written testimony on that.

2 However, it really is just about the
3 not constraining the government to parameters,
4 such as the defining of the amount of time
5 they've spent on the preparation and at what
6 point -- again, district court's dockets vary,
7 and so, litigating some of these pretrial
8 proceedings are going to vary from one courtroom
9 to the next.

10 And so, we would just lean back,
11 certainly, on the discretion provided us by
12 Congress, but, certainly, I could follow up with
13 some Department testimony if there was some
14 middle ground there between the Wade standard and
15 the proposal.

16 VICE CHAIR MURRAY: What about pre and
17 post-trial? I mean, you could -- you could -- it
18 would make sense of the preparing for trial
19 language, and arguably, everything pretrial
20 happens in the shadow of trial, if you're heading
21 to trial, whereas, you know, sentencing appeals
22 really don't.

1 MS. MITCHELL: Right.

2 VICE CHAIR MURRAY: With a white line,
3 it'd be easier to administer.

4 MS. MITCHELL: Right. And so, as the
5 Commission knows, there's a circuit conflict on
6 that as well, with regard to sentencing and what
7 about when there's objections to enhancements and
8 the like, or relevant conduct.

9 And so, really, the Department urges
10 the Commission to adopt the majority of circuits
11 that hold that, still, an allocation of
12 resources, that it's still within the
13 government's discretion to determine how much
14 resources it has allocated in preparing for that
15 challenged sentencing hearing.

16 Oftentimes, let's say, for example, in
17 a fraud case, if there's a -- there's a guilty
18 plea, but there's a challenge to the loss amount
19 or the actual amount, the government is still
20 having to bring victims into the courtroom to
21 testify in a fraud offense. And so, it could be
22 that even though there was a guilty plea at

1 sentencing, that could add days, with regard to
2 proving up the amount of loss. Likewise, with
3 relevant conduct, or some of the case law I read
4 on the circuit conflicts, was where a defendant
5 might plead guilty to a drug trafficking but
6 challenges the amount of the drug, right? Of
7 course. Or perhaps, was it tested accurately?

8 And so, one of the cases in the
9 Department's letter is a case where the defendant
10 challenged the type of drug and the weight, and
11 so, the government had to expend resources in
12 getting an expert witness, following the chain of
13 custody to go get it independently tested, and
14 so, therein, the government is still allocating
15 its resources and spending time on that.

16 So the Department urges the position
17 that the majority of the circuits have taken on
18 that issue.

19 CHAIR REEVES: Is there any additional
20 questions?

21 Maybe you didn't have the hot seat
22 after all.

1 (Laughter.)

2 CHAIR REEVES: Well, thank you for
3 your testimony, Ms. Mitchell.

4 MS. MITCHELL: Thank you very much.

5 CHAIR REEVES: For those who are just
6 tuning in, we have with us on this ninth panel,
7 the Federal Public Defender's perspective. It
8 would be presented -- again, we're joined by
9 Michael Caruso, who serves as Federal Public
10 Defender for the Southern District of Florida.

11 In that capacity, Mr. Caruso
12 supervises over 50 assistant defenders who handle
13 a wide range of cases, including those involving
14 narcotics. Mr. Caruso also serves as chair of
15 the Federal and Community Defenders Sentencing
16 Guidelines Committee.

17 Welcome back, Mr. Caruso.

18 MR. CARUSO: Thanks for having me
19 back.

20 (Laughter.)

21 MR. CARUSO: Thank you, Chair Reeves,
22 Vice Chairs, and Commissioners, for inviting me

1 to testify again, today, on two important issues
2 that require Commission action.

3 First, the definition of controlled
4 substance offense in 4B1.2. The phrase
5 controlled substance offense appears nowhere in
6 the career offender directive or anywhere else in
7 the Sentencing Reform Act.

8 In identifying prior offenses that
9 must trigger a near maximum sentence, 994(h)
10 refers generally to crimes of violence, then
11 lists five specific federal drug trafficking
12 felonies. The phrase controlled substance
13 offense was a shorthand the Commission chose in
14 attempt to capture the offenses listed in
15 994(h) (1) (B) and (2) (B) .

16 Over the years, the Commission
17 expanded the list of controlled substance
18 offenses and explain that even though 994(h) did
19 not mandate a near maximum sentence for these
20 other offenses, the Commission was acting under
21 its general guideline promulgating an amendment
22 authority. If the Commission has the authority

1 to expand the list of offenses that trigger
2 extreme federal penalties, it also has the
3 authority to contract them, all the way down to
4 what is required by the mandate.

5 We are gratified to see that the
6 Department of Justice acknowledges the legitimate
7 concerns about the severity levels associated
8 with the guideline's recidivist provisions, that
9 the career offender guideline, in particular, has
10 been the subject of considerable criticism for
11 producing overly long sentences, and that decades
12 of research show that the career offender
13 guideline produces a clear racial disparity in
14 its application. We stand together on these
15 issues.

16 Based, in part, on these joint
17 concerns, the Commission, in 2016, called on
18 Congress to amend 994(h) to narrow the categories
19 of individuals that come within the directive.
20 While the Commission waits for Congress to narrow
21 the directive, nothing prevents this body from
22 dialing the career offender guideline back to the

1 current directive.

2 Given the data and the moral
3 imperative of the guidelines not impose
4 punishments that are unduly harsh and exacerbate
5 racial disparities, the Commission must not wait
6 to contract the definition of controlled
7 substance offense. And the simplest and the most
8 parsimonious way to do so would be limit it to
9 those offenses the phrase was originally designed
10 to capture: the federal felonies listed in the
11 directive.

12 We do recognize, however, that this
13 proposal, if adopted, would significantly narrow
14 the reach of the guideline, but, as the
15 Commission acknowledged in its 2016 report, the
16 evidence plainly supports this restriction. To
17 do less would be to continue to maintain the
18 unsupportable status quo.

19 If the Commission insists as retaining
20 state drug offenses as predicates, it must limit
21 the definition of controlled substances to
22 federally controlled substances. As we set forth

1 in our written statement, controlled substance
2 has a clear definition under federal law.
3 Expanding the definition to any substance a state
4 elects to regulate would not only vastly expand
5 the reach of this unjustifiable guideline, but it
6 would do so with no clear limiting principle and
7 spawn litigation.

8 The second guideline that requires
9 Commission attention is 3E1.1, acceptance of
10 responsibility. We ask the Commission to clarify
11 two aspects of this guideline. First, we agree
12 with the Commission that you should clarify the
13 term preparing for trial. Second, the Commission
14 should slightly revise the existing commentary at
15 Application Note 6 to clarify that the government
16 should not withhold the third level for interests
17 not identified in 3E1.1(b).

18 I just described in my written
19 statement how the 3E1.1(b) motion is being used
20 some by some prosecutors on the ground, how,
21 despite the guideline's plain language and the
22 Commission's clarifying efforts, some prosecutors

1 still withhold or threaten to withhold the
2 3E1.1(b) motions for reasons far beyond obtaining
3 a timely plea and avoiding a trial, for leverage.
4 The reasons include for legitimate and critical
5 conduct that occurs post-plea, such as insuring a
6 person's right to be sentenced on accurate
7 information by challenging unreliable or
8 incorrect information in the PSR.

9 Prosecutors also threaten to withhold
10 the 3E1.1(b) motion for pretrial litigation that
11 has nothing to do with trial and seeks to
12 vindicate our client's constitutional rights,
13 including for motions to dismiss for lack of
14 jurisdiction, to move to suppress for evidence
15 unlawfully obtained, and for ask for discovery
16 regarding exculpatory evidence. This conduct is
17 critical to ensuring that our client's rights are
18 protected and that any subsequent conviction,
19 whether by plea or trial, is warranted.

20 We've asked that the Commission focus
21 its examples of pretrial work that does not
22 constitute preparing for trial on the purpose of

1 that work and not on its timing, in other words,
2 a functional approach. And I want to offer some
3 additional context on why that is important.

4 As public and community defenders, our
5 clients never choose us. A judge appoints our
6 clients to us. We meet them on one of the worst
7 days of their lives, invariably, in court or in
8 jail. Our clients must get to know us, to trust
9 us, have confidence in us, and be able to discuss
10 the details of their case and life-altering
11 options with us. In many of our case, it's about
12 our clients choosing the least worst option for
13 them. If we are doing our job right, that takes
14 some time.

15 None of the changes Defenders propose
16 would alter the meaning of 3E1.1(b) or amend the
17 scope of the government's discretion to move for
18 the third level. These changes would merely
19 confirm what should already be clear: that the
20 government's discretion to withhold the third
21 point must be exercised within the guideline's
22 limits and should not be used to prevent good

1 faith litigation unrelated to timely pleas.

2 I welcome your questions. Thank you.

3 CHAIR REEVES: Thank you, Mr. Caruso.

4 Commissioner Wroblewski?

5 COMMISSIONER WROBLEWSKI: How are you?

6 It's good to see you again.

7 MR. CARUSO: Good to see you again.

8 COMMISSIONER WROBLEWSKI: I've got a
9 couple questions. Have -- I just want to clarify
10 what I -- just clarify what you said.

11 Were you suggesting that you're asking
12 the Commission to say that any -- that for a
13 prior controlled substance offense, that the
14 person must be convicted of a federal statute?
15 Is that -- is that sort of your lead position,
16 and then, your fallback is just described in the
17 federal law?

18 MR. CARUSO: So our lead position is
19 that the plain language of the statute and
20 ordinary canons of construction dictate that only
21 federal offenses count and not state offense, and
22 we could walk through that if you'd like.

1 COMMISSIONER WROBLEWSKI: I kind of
2 would, just for a second, because the Congress
3 didn't say that you were -- you were in 994, I
4 think it's (h), that the person was convicted of
5 these statutes. It says it was convicted of an
6 offense described in these statutes.

7 So, yes, walk me through how that
8 becomes the

9 MR. CARUSO: Right. So, earlier this
10 morning, I described my simple education and
11 maybe this is part of that as well as the way I
12 read this statute.

13 So you know 994(h)(2)(B) uses the same
14 described in language as (1)(B), and (1)(B) is
15 the federal triggering conviction, correct? So,
16 in (1)(B), it uses a described in to clearly
17 delineate only federal convictions. So using the
18 same phrase in the same statute, the canon of
19 consistent usage means, to me, that they mean the
20 same things, right? So using it -- described in
21 to refer to only federal convictions in one
22 subpart and using that same phrase in the

1 subpart, indicates to me that Congress meant the
2 same thing.

3 And if you look further down in the
4 statute, after (h) comes (i), of course, and in
5 (i), Congress specifically denoted state --
6 federal, state, and local offenses. So my memory
7 is not great, but what I generally can remember
8 is the sentence I wrote immediately preceding the
9 one I'm writing now. So it seems odd to me that
10 Congress would write (h) in a way that conforms
11 with only federal convictions, and then, in the
12 very next sentence, spell out federal, state, and
13 local, if they meant the same thing as described
14 in.

15 COMMISSIONER WROBLEWSKI: Got it.
16 Okay. Can I ask one other question? And that is
17 if the Commission sticks with the policy that it
18 has had up until now, which is that state
19 convictions, in some respect -- whether that's in
20 the career offender, which is the statute that
21 we're talking about, or elsewhere in the
22 guidelines, like 2K that uses prior convictions

1 for controlled offense -- it seems to me that the
2 problem that we're having is because of this
3 intersection between the definition of controlled
4 substance but, also, the categorical approach.

5 So if you have someone who was
6 convicted in state court of selling cocaine,
7 which is on the federal list, but because the
8 state list may include something else that's not
9 on the federal list, all of a sudden, that
10 doesn't count as a prior because of the
11 categorical approach, not necessarily because of
12 the definition.

13 First of all, am I getting that right?
14 And is there a way for the Commission to say,
15 okay, we'll focus on the state -- on the federal
16 crimes and this federal controlled substances,
17 but we'll get rid of the categorical approach so
18 that if, in fact, you've trafficked in cocaine or
19 heroin or fentanyl or anything on the federal
20 system, regardless of what the state law
21 encompasses, that's going to count? I know
22 that's a two-parter.

1 MR. CARUSO: So, and, yes. I'm going
2 to do this thing where, as to your first part,
3 hopefully, we can address that in our
4 post-hearing comments, but as for the second
5 part, I can forcefully say the Defenders are
6 believers in the categorical approach.

7 You know, as a long-time trial lawyer
8 now, my experience tells me that the only -- the
9 only thing we can determine by a plea or
10 conviction are what the elements showed, right?
11 Because even in -- even in federal court, when
12 the assistant United States attorney proffers
13 something to the court out of a change of plea
14 hearing, there are always these strategic and
15 tactical decisions to make as, like, do I push
16 back up against that? Do I not? You know,
17 ultimately, keeping our eye on trying to get our
18 sentences a fair and -- fair and just sentence.

19 So we would continue to ask the
20 Commission to rely on the categorical approach
21 and not deviate that.

22 VICE CHAIR MURRAY: So you think we

1 should import the categorical approach here? So
2 for, like -- the Department had, what I thought,
3 was a compelling example about cocaine being
4 amended in 2015 to no -- federal cocaine -- to no
5 longer include ioflupane.

6 MR. CARUSO: Right.

7 VICE CHAIR MURRAY: And a vast number
8 of state statutes -- apparently, cocaine is still
9 including ioflupane. And so, in those states,
10 you think that cocaine should not be considered a
11 controlled substance?

12 MR. CARUSO: Right. Our first
13 position is that no state conviction should
14 count.

15 (Simultaneous speaking.)

16 MR. CARUSO: But, of course, if the
17 Commission decides state offenses should count,
18 then, yes, we would ask the Commission to adhere
19 to the categorical approach.

20 VICE CHAIR MURRAY: And do you think
21 it makes policy sense for cocaine not to count as
22 a -- in a large number of states, not to count as

1 a controlled substance?

2 MR. CARUSO: So, I think -- and I'm
3 not trying to be flip -- I think the answer is
4 that no drug conviction should count under the
5 career offender guideline. I mean, this body's
6 own research has shown that. You wrote a pretty
7 blunt assessment to congress to undo that, and I
8 think, at bottom, what the Defenders are saying,
9 like, every problem is an opportunity in
10 disguise. And I think that's -- I think that's
11 what we can do here.

12 If we consider a circuit conflict a
13 problem, then I think -- as I said in my, you
14 know, written testimony and my statement today --
15 I think the Commission can use this opportunity
16 to narrow the career offender guideline, which,
17 as you know, judges vary 80 percent of the time,
18 that it's not a good indicator of recidivism,
19 that it goes far beyond what the Senate
20 originally intended for drug offenders. So I
21 think it does make good policy.

22 COMMISSIONER WONG: Mr. Caruso, can we

1 go back to what you had said earlier? Can you
2 just repeat what you had said about attempts to
3 get Congress to -- you said something about
4 amending 994(h), and --

5 MR. CARUSO: So, my understanding, I
6 mean, the staff here is in the best position to
7 know this, but my understanding is that this
8 Commission has urged Congress to amend the career
9 offender directive to be able to exclude at least
10 a certain category of drug offenders from its
11 reach.

12 COMMISSIONER WONG: And, within the
13 backdrop -- I appreciate the candor of your
14 testimony because you were, sort of, laying forth
15 that what the Defenders are proposing now, would
16 be a significant narrowing of what has been the
17 reach for a long time.

18 I guess, absent some kind of
19 Congressional change here, what would be -- you
20 know, we've had this status quo for a long time,
21 and Congress has not made these changes, and what
22 are we to make of that?

1 MR. CARUSO: So, I think we have to go
2 back to first principles, and in -- like in my
3 answer to Mr. -- Commissioner Wroblewski's
4 question about 994(h), I mean, I think it's a
5 simple statutory construction issue.

6 I don't know what led the Commission
7 to have these -- have these rules that have been
8 the status quo, but I know time and time again in
9 our nation's history, like, we have stepped back
10 and looked at past practices and said is that the
11 best practice? Is this the best reading of this
12 law or statute? We know the Supreme Court has
13 recently overruled cases that had been
14 long-standing precedent.

15 So, I think, if you go back to 994(h)
16 and just look at the statutory construction of
17 that statute, how they used the same terms, and
18 how that's been interpreted to mean different
19 things, how another subpart of that statute is
20 more explicit about describing when Congress
21 wanted state, federal, and local offense used, I
22 think you can rationally come to the conclusion

1 that the statute has been wrongly read in this
2 context for a very long time.

3 VICE CHAIR MATE: Thank you for your
4 second round of testimony today. I appreciate
5 it.

6 MR. CARUSO: Be gentle.

7 (Laughter.)

8 VICE CHAIR MATE: I'm going to go back
9 to acceptance of responsibility for a second.

10 Our data show that the vast majority
11 of individuals, who receive acceptance of
12 responsibility, get the three levels, so it's a
13 small handful of people who are, kind of, in that
14 range who aren't getting it.

15 On -- you know, the Government has
16 suggested this, kind of, fallback argument of
17 relying on variances. Are variances sufficient
18 in this context with acceptance of responsibility
19 and that third point?

20 MR. CARUSO: So, you know, as a trial
21 lawyer for over 20 years -- and I have to say,
22 most of my cases have resolved by plea and, of

1 course, led to sentencing. Most of my trials
2 have also led to sentencings, so I -- so, I
3 think, this is, you know, an area that not only
4 am I familiar with, but every defender is
5 familiar with.

6 And I think, to answer the first part
7 of your question about -- and I haven't seen that
8 data, but I assume it to be true that there is a
9 small percentage of people who don't get the
10 third point. And, like the Commission, our
11 Defenders are believers in data, but I think
12 there is a data gap in this particular
13 circumstance because, as I alluded to in my
14 opening remarks, this is about leverage, right?
15 We're all lawyers here, and, in the civil
16 context, and certainly in the criminal context,
17 lawyers seek to exert leverage to get the
18 resolution they want.

19 And, you know, I think you know, I
20 pointed out a -- an example from my district in
21 these maritime drug trafficking cases, where the
22 AUSA, who prosecutes those cases, was fairly

1 straightforward. If you file a motion to dismiss
2 for lack of jurisdiction -- which, again, Chief
3 Judge Pryor wrote that decision, giving us that
4 framework -- and go to an evidentiary hearing, he
5 would not file the motion for the third point
6 and, in addition to that, would not agree to a
7 conditional plea. I think that's just wrong.

8 I mean, you know, again, a lot of
9 these pretrial matters are lawyer-driven
10 decisions, right? You know, my clients don't
11 generally have a knowledge of criminal court's
12 jurisdiction, Fourth Amendment law, Brady/Giglio,
13 discovery, due process law. You know, these are
14 issues that we assert on behalf of our clients
15 that are constitutionally based.

16 And part of that also harkens back to
17 what I said earlier about developing this
18 relationship with your client, so your client can
19 trust you, so when you're saying I know, like,
20 both door A and door B are bad, but I think you
21 should go through one of those doors, they know
22 that we worked exhaustively to try to get them the

1 best outcome.

2 That being said, lawyers, and our
3 clients, are risk averse. So, when standing in
4 the face of a threat to withhold the third point,
5 a lawyer may -- I don't want to be derogatory
6 here but -- cave. Because, you know, as I think
7 Justices Sotomayor and Gorsuch said recently in
8 the Fifth Circuit case, that one point can mean a
9 tremendous difference in our client's life. You
10 know, at the low end, it might mean the
11 difference between going to prison and not going
12 to prison; at the higher end, it can mean -- it
13 could mean years in prison.

14 So -- and I don't think a judge's
15 decision to vary down should really -- I mean,
16 this -- I think this law and this guideline is
17 fairly straightforward, and we shouldn't have to
18 rely on the judge to, sort of, undo what the
19 government has chosen not to do.

20 CHAIR REEVES: Is there a point where
21 the Defenders may agree or concede that the
22 government has been pushed too far to give the

1 point? I mean, jury selection maybe? But, of
2 course, a defendant can learn a lot, during their
3 jury selection, about his case. So is there a
4 point?

5 MR. CARUSO: Right. I -- and I'm not
6 going to dodge your question. You know, all of
7 these are fact-driven. But I think, of course,
8 there can be cases where, you know, under our
9 reading of what the guideline should be, that the
10 government could legitimately withhold the third
11 point, certainly. We're not asking for a sort of
12 strict liability ruling that the government
13 always has to file the third point if the client
14 pleads, but we want more -- you know, we want more
15 clarity. We want a functional approach to this
16 that, you know, sort of -- we're putting the
17 government to their burden of specifically
18 preparing for trial. And I think, you know, the
19 examples given, motions and limiting jury
20 instructions and matters like that, come much,
21 much closer than filing a motion to dismiss or a
22 motion to suppress.

1 CHAIR REEVES: But nothing requires a
2 party to wait 14 days to file their motions in
3 limine, right? Motions in limine can be filed
4 whenever, right? Can't they?

5 MR. CARUSO: Right. That's why --
6 right, that's why. And, you know, in my
7 experience, you know, well, you know, sort of, I
8 think, one of the secrets about, you know,
9 criminal law is that there are various categories
10 of cases, and the various categories have, you
11 know, certain defenses that we raise, and the
12 prosecutors have certain rebuttals. So most of
13 the time, there's not a tremendous amount of work
14 because the prosecutor in this type of case knows
15 this motion in limine should be filed; these jury
16 instructions should be filed.

17 In fact, in my district -- I'll give
18 Judge Middlebrooks a shout-out. He was a
19 proponent of this jury instruction builder. I
20 don't know if that's -- if that's in any other
21 districts, but, generally, you just start
22 checking boxes, and it emails you a set of jury

1 instructions, so that, even in our district, that
2 doesn't take much time.

3 But we would -- we wouldn't want to
4 focus on the early preparation that could be seen
5 relevant for trial for two reasons. You know,
6 districts vary in the pace in which they operate.
7 You know, I come from a rocket docket, so we have
8 to move very quickly. But, you know, just
9 because a prosecutor, because he or she wants to
10 get ahead of the game, drafts a motion in limine,
11 you know, two weeks after arraignment; we also
12 don't think that should that bear on, you know,
13 either the government's decision to file for the
14 third point or the judge awarding the third
15 point.

16 Okay. And I haven't been asked a
17 question about this, so -- but I know a previous
18 witness had been asked about the Wade standard.
19 You know, Defenders absolutely disagree that this
20 -- the Wade standard should be used, and if there
21 are no questions about that, we'll fully brief
22 that in our post-hearing comments.

1 (Simultaneous speaking.)

2 CHAIR REEVES: Thank you, Mr. Caruso.

3 Do we need to get you some more water?

4 PARTICIPANT: I think they're --

5 CHAIR REEVES: We'll make sure we get

6 you it, okay?

7 PARTICIPANT: I got some, but I may

8 not have left my compatriots with enough.

9 (Laughter.)

10 CHAIR REEVES: Our tenth and final
11 group of panelists for today will provide us with
12 the perspectives on this issue from two of our
13 advisory groups.

14 First, we will hear from Marlo
15 Cadeddu, who serves as the Fifth Circuit
16 Representative to the citizen -- commissioners --
17 Practitioners Advisory Group. Ms. Cadeddu is a
18 solo criminal defense practitioner who handles
19 federal cases across the nation.

20 Ms. Cadeddu has previously served as
21 a Steering Committee member of the American Bar
22 Association's Death Penalty Representation

1 Project. I say all that again for those persons
2 who are just joining us.

3 Second, we'll hear from Ms. Jill
4 Bushaw, who serves as chair of our Probation
5 Advisory Group. Ms. Bushaw serves as deputy
6 chief United States probation officer for the
7 Northern District of Iowa.

8 She joined the US Probation Office in
9 2003 and has previously held positions as a
10 citizen guideline specialist and as a supervisory
11 and assistant deputy chief in the presentence
12 investigative unit.

13 Finally, we'll hear from Professor
14 Mary Graw Leary, who serves as chair of our
15 Victims Advisory Group. Professor Leary is the
16 senior associate named for academic affairs and a
17 professor of law at the Catholic University of
18 America.

19 Professor Leary has previously worked
20 in a range of positions in the criminal justice
21 system, including as an assistant US attorney for
22 the District of Columbia, as the director of the

1 National Center for Prosecution of Child Abuse,
2 and as deputy director in the National Center for
3 Missing and Exploited Children's office of legal
4 counsel.

5 We have these ladies before us, and
6 we'll begin with Ms. Cadeddu.

7 MS. CAEDDU: Thank you, Judge Reeves,
8 Vice Chairs, and Sentencing Commission. We
9 appreciate, very much, the opportunity to provide
10 the PAG's views on circuit conflicts. The PAG,
11 as we've discussed, is comprised of private
12 practitioners who represent criminal defendants
13 in the federal criminal system.

14 I'm going to start, with your
15 permission, with 4B1.2 and the definition of
16 controlled substances offenses because I have
17 more to say, I think, for 3E1.1, so I'll -- I
18 don't want to run myself out of time.

19 The PAG supports the Commission's
20 proposed Option 1, which defines controlled
21 substance as those substances identified under
22 the federal Controlled Substances Act 21 USC 801.

1 This definition provides a straightforward
2 framework for analyzing whether a defendant's
3 prior conviction is a predicate offense for
4 purposes of the career offender guideline, and it
5 will promote uniformity in sentencing law across
6 the country.

7 In contrast, the PAG believes that the
8 second option's use of inconsistent state law
9 definitions of controlled substances offenses
10 will increase unwarranted sentencing disparities
11 among similarly situated defendants nationwide.

12 Under Option 2, two vastly -- two
13 defendants convicted of the same offense, with
14 similar criminal records, may be subject to
15 vastly different guideline ranges depending on
16 the state in which he or she is prosecuted, and
17 we have a couple of examples.

18 Can -- I never can say this.
19 Cannabidiol, CBD, cannabidiol has been legal in
20 Wisconsin since 2014; thus, the defendant's
21 pre-2014 CBD distribution conviction would serve
22 as a career offender predicate, even though CBD

1 is legal, both in Wisconsin and federally. Such
2 a conviction is not a proxy for dangerousness or
3 recidivism, given that state and federal
4 governments have legalized CBD.

5 Hemp is another good example. In
6 2018, the government removed hemp from the list
7 of controlled substances, and as of 2020, all
8 states, except for Idaho, have legalized hemp.
9 If state law is used to determine the definition
10 of controlled substance for purposes of the
11 career offender guideline, an Idaho conviction
12 for hemp manufacturing, prior to 2021, would be
13 characterized as a predicate offense. This is
14 so, even though this conduct is now legal in
15 Idaho and was legal across the country at the
16 time. Whether a defendant is subject to the
17 enhanced penalties under the career offender
18 guideline should not depend on an accident of
19 geography.

20 The sentencing implications for the
21 second option are especially troubling given the
22 astronomical increases in sentences for career

1 offenders and the fact that between 2016 and
2 2021, 75 percent of defendants sentenced as
3 career offenders were people of color. The PAG
4 believes that adopting the second option will
5 undermine the uniformity that the guidelines
6 strive to promote and could exacerbate
7 unwarranted race-based disparities.

8 Now, with regard to acceptance of
9 responsibility, the PAG endorses the Commission's
10 proposed amendment to resolve the circuit
11 conflict that has arisen regarding whether the
12 government may withhold the third point for
13 acceptance of responsibility, with one addition
14 that I'll mention in a moment.

15 The PAG's experience with this issue
16 varies widely across the country. In some
17 districts, the government rarely, if ever,
18 withholds motions for the third point of
19 acceptance. In other districts, practitioners
20 face a dilemma over how to advise clients who may
21 have grounds to file a motion to suppress or file
22 sentencing -- substantive sentencing objections,

1 but by doing so, may face a penalty at
2 sentencing, namely the loss of the third point.

3 Importantly, requiring defendants to
4 forego filing suppression motions in order to
5 obtain the third point insulates law enforcement
6 misconduct from judicial oversight, and, of
7 course, it has constitutional implications.

8 This amendment, thus, will serve the
9 important salutary purpose of promoting the
10 integrity of the criminal justice system.

11 Accordingly, the Commission -- accordingly, the
12 PAG welcomes the Commission's proposal to clarify
13 the circumstances when the third point may be
14 withheld by defining the term preparing for
15 trial, but we do have one request regarding that
16 definition.

17 The PAG suggests that this definition
18 be further modified by replacing the term
19 drafting, in the second sentence, with filing.
20 The PAG believes that this minor modification
21 will limit litigation about whether an action is,
22 in fact, preparation for trial and will

1 facilitate district courts' ability to make this
2 determination since the docket sheet will reflect
3 what has been, in fact, filed.

4 I wanted to mention, for a moment, the
5 Department of Justice's statement said something
6 about how the court can -- if the court disagrees
7 with the decision to withhold the third point,
8 the court can vary from the guidelines. And I
9 would contend that this, what they call in film,
10 fixing in post is really not the way that we
11 should go about taking care of this -- of this
12 issue. That will lead to disparate impacts.

13 In my circuit, for example, 60 percent
14 of guidelines are with or -- 60 percent of
15 sentences are within guideline sentences, and
16 those guidelines are, in fact, the default. And
17 so, this idea that judges willy-nilly will depart
18 to fix this issue is just simply not going to be
19 the experience in every -- in every circuit.

20 So, with that, I will -- I see that my
21 time is up, and I will pass the floor.

22 CHAIR REEVES: All right, Ms. Bushaw.

1 MS. BUSHAW: Good afternoon, again,
2 and thank you for the opportunity to speak on
3 behalf of the Probation Officer's Advisory Group.
4 I'll start with the acceptance issue.

5 There are numerous issues before the
6 Commission this amendment cycle, but the proposed
7 amendment to acceptance of responsibility is
8 capable of having the broadest impact. Whether
9 an acceptance reduction is applicable is a
10 guideline finding the court makes in every single
11 federal case. Ideally, straightforward
12 application principles would be characteristic of
13 such a universally applied guideline.

14 The Commission heard testimony during
15 2018 regarding whether objections at sentencing
16 jeopardize the defendant's eligibility for a
17 two-level reduction for acceptance of
18 responsibility under subsection (a). The issue
19 before the Commission today is how those exact
20 same objections can impact the defendant's
21 eligibility for the additional one-level
22 reduction under subsection (b), as well as the

1 issue of pretrial suppression motions.

2 POAG observed the overlap of this
3 issue and believes such an amendment to this
4 guideline would help clarify if issues such as
5 suppression motions and sentencing objections are
6 a relevant factor under subsection (a) and/or
7 subsection (b). POAG believes such a
8 clarification is essential as the parties have
9 indicated they rely on the potential impact of a
10 sentence reduction early in the case and prior to
11 the plea but also at the time of sentencing and
12 will need sufficient notice of how this guideline
13 is intended to operate.

14 With regard to whether suppression
15 motions and sentencing challenges impact
16 eligibility for acceptance of responsibility,
17 POAG observes there are opposing positions on
18 this issue.

19 On the one hand, POAG defers to the
20 Government's position regarding the amount of
21 resources required to prepare for a suppression
22 hearing or address sentencing challenges. The

1 government is in the best position to articulate
2 that issue.

3 On the other hand, POAG defers to the
4 defense's position regarding the suppression
5 motions and sentencing challenges that they did
6 not pursue after discussing with their client the
7 potential risk of losing an acceptance reduction.
8 The defense is in the best position to articulate
9 that issue.

10 But how does our system handle
11 instances where there are opposing positions
12 regarding suppression motions and sentencing
13 challenges? We present the issue to the court.
14 The court holds a hearing on the contested
15 matter. The parties present their evidence and
16 make their arguments, and the court makes a
17 finding.

18 POAG believes it's essential that both
19 parties have the same opportunity to argue their
20 position with the same amount of aggressive
21 effort and without the concern for collateral
22 consequences. Therefore, POAG supports the

1 proposed amendments to 3E1.1.

2 The other circuit conflict the
3 Commission is seeking to resolve is the
4 definition of controlled substance. POAG, first,
5 observes that the pending amendment related to
6 the listed offense approach is an alternative
7 process to this pending issue.

8 But, in relation to this issue,
9 though, Option 2 includes state controlled
10 substances, but the means and elements of those
11 state offenses may not be covered by a chapter 2
12 guideline under the listed offenses approach
13 because those guidelines only pertain to offenses
14 covered by the Controlled Substances Act.

15 Therefore, POAG inquires if the listed
16 offense approach effectively adopts Option 1 as
17 the definition of controlled substance or if
18 there is, at least, an argument that such is the
19 case?

20 The members of POAG who favored Option
21 1 had concern that Option 2 does invite some
22 disparity into the federal process by relying on

1 the various controlled substances that could be
2 charged in each state. Those state offenses will
3 still qualify as prior criminal convictions in
4 determining their criminal history category, but
5 under Option 1, they wouldn't be used as a basis
6 for career offender or an increase to the base
7 offense level.

8 Given the variance rate related to
9 career offender, especially when the predicates
10 aren't based on a crime of violence, some members
11 of POAG thought this would be a good opportunity
12 to address that issue while staying true to the
13 perceived intent of 28 USC 994(h), but the
14 sentencing guidelines provide for an increased
15 sentence when the predicate involves substances
16 involved in the federal system.

17 However, a majority of POAG favored
18 Option 2, as the identified goal of this proposed
19 amendment is to resolve a circuits conflict.
20 Option 2 maintains the current practice within a
21 majority of the circuits. It accounts for the
22 defendant's increased level of culpability for

1 knowingly distributing an illicit substance. It
2 resolves concerns that a state controlled
3 substance offense would be deemed overly broad
4 and categorically wouldn't qualify, and most
5 importantly, it relies on the long-standing
6 definition that controlled substance includes
7 both state and federal law.

8 Thank you.

9 MS. LEARY: Good afternoon. The VAG
10 appreciates the Commission inviting us to discuss
11 on the one issue that we are going to address:
12 the circuit conflict regarding 3E1.1, acceptance
13 of responsibility.

14 Let me begin by saying the VAG really
15 appreciates what the Commission seems to be
16 trying to do to, sort of, on the one hand,
17 balance the -- Congress's directive that the
18 government is in the best position to determine
19 whether a defendant has assisted authorities in a
20 manner that avoids preparing for trial and
21 allocating resources efficiently, as well as
22 Congress's directive that an adjustment under

1 this subsection may only be granted by the
2 government's formal motion, and the idea that, of
3 course, we don't want prosecutors to refusing to
4 make this motion for unconstitutional motives.

5 However, the VAG opposes the method
6 that the Commission is using to address this
7 issue for three reasons: first, the proposed
8 amendment does not achieve the stated purpose of
9 clarity; second, its language is so broad that it
10 categorically precludes appropriate withholding
11 of 3E1.1(b) reduction, which is a decision best
12 left to a case by case analysis; and third, the
13 breadth of this language fails to consider the
14 victim experience of several pretrial motions,
15 and it risks harm to victims' interests.

16 First, the proposed amendment does not
17 serve the purpose it states. It doesn't provide
18 clarity. The purpose of 3E1.1(e) -- (b), excuse
19 me -- is to allow the government the discretion
20 to move for a one-level reduction if the
21 defendant has been timely, permitted the
22 government to avoid preparing the trial, and

1 permitted the government and the courts to use
2 its resources efficiently.

3 The amount of work necessary for trial
4 or a motion preparation varies from case to case,
5 as has been discussed already. And only the
6 prosecution knows the work that it's done in
7 preparing for these motions or preparing for
8 trial. The proposed amendment denies the
9 government this discretion -- congressionally
10 mandated discretion, in direct opposition to
11 Congress's text and purpose, and it doesn't
12 provide clarity.

13 It doesn't provide clarity because the
14 definitions proposed are too broad, and they
15 propose a categorical approach to a case-specific
16 issue. Whether the government had to
17 inefficiently allocate resources to prepare for
18 motions turns on substantive questions: the type
19 of case, the type of motion, the witnesses
20 involved, the legal research necessary, the
21 preparation needed.

22 But the proposal suggests that this

1 determination is best made, not by a
2 fact-specific inquiry, but by applying phrase
3 such as actions taken close to trial or early
4 pretrial proceedings, and that's unworkable, in
5 our view, for two reasons.

6 First, it's vague and subjective, but
7 secondly, it's choosing a temporal measure for
8 determining whether a pretrial motion demands
9 similar resource expenditure to preparing for
10 trial, and that's simply not an accurate measure.
11 How many resources were expended and the measure
12 of this can happen early in the process or later
13 in the process, something could not require a lot
14 of preparation.

15 But most importantly, to the VAG, is
16 our third reason that we oppose this motion, and
17 that is it ignores the victim experience. Some
18 pretrial motions involve the direct participation
19 of victims or witnesses. They might have to
20 prepare to testify themselves or work with the
21 prosecutor to prepare for the motion or be
22 retraumatized by the very fact that the motion is

1 being filed, all of which require resources of
2 the government, prosecutors, advocates, law
3 enforcement.

4 The more troubling, certain kinds of
5 cases, sometimes, we regret to say, our
6 observation has been the defense is simple: put
7 the victim through retraumatizing pretrial
8 motions, which are designed to dissuade the
9 victim from continuing to participate in the
10 trial process. Examples of this could include
11 discovery of personal medical records, seeking
12 psychological records, et cetera. And let me be
13 clear, we're not saying that's always the motion,
14 but our experience in working with
15 victim-survivors across the country is sometimes
16 it is.

17 And should the prosecution
18 successfully keep the victim survivor on board
19 through all of these retraumatizing motions to be
20 ready for trial, the defendant should not, then,
21 be able to claim acceptance of responsibility.
22 And in our view, the government is well within

1 what Congress intended: to refuse to file the
2 motion for an additional deduction because of the
3 trauma the victim or witnesses have experienced,
4 which required significant expenditure of
5 resources on the part of the government to
6 continue to trial.

7 This is a matter that, by design, is
8 for the prosecutor to determine, and because the
9 proposal does not add clarity, it is a blunt
10 instrument, and it ignores the victim experience.
11 The VAG opposes it.

12 Thank you very much.

13 CHAIR REEVES: Thank you.

14 I now turn to my fellow Commissioners
15 to see if there are any questions of this group.

16 Commissioner Mate.

17 VICE CHAIR MATE: Thank you all for
18 your testimony again, every single one of you. I
19 appreciate you coming back. I have one question.

20 Ms. Bushaw, in your written testimony,
21 you talked a little bit about the relationship
22 between this proposed amendment and the acquitted

1 conduct proposed amendment. Could you address
2 that a little bit more? I just want to make sure
3 I understood what the POAG's position was on
4 those two together.

5 MS. BUSHAW: Sure. I'd be happy to.

6 I testified on February 4th of 2023,
7 that POAG didn't have any concerns about
8 acquitted conduct being used against a defendant
9 at the time of sentencing, just like any other
10 type of relevant conduct, because there's due
11 process available at the time of sentencing. And
12 the type of objections that they're going to have
13 to relevant conduct, acquitted conduct is most
14 likely going to be disputed at the time of
15 sentencing compared to others. And then, so --
16 and -- but that testimony was based on probation
17 office perspective and experience.

18 So we sit through hearings. We talked
19 about this at our meeting, and it's our
20 observation of the process that everybody gets to
21 kind of object to what they want to. We see
22 plenty of objections from defense. We've seen

1 plenty of objections from the government, and so
2 I was comfortable with that.

3 But the next morning, started working
4 on my testimony for today, and then, when you
5 start reading cases, there's case after case
6 after case where a defendant loses acceptance for
7 doing that very thing and asking for acquitted
8 conduct to be approved at the time of sentencing
9 or any other type of relevant conduct.

10 So just the interrelation to these
11 two, we just thought it would be appropriate to
12 point it out. It doesn't change our position on
13 acquitting conduct because we still think it's
14 largely -- defense are largely able to prove that
15 or -- have the government prove that at
16 sentencing, but it just became apparent that
17 maybe that body of case law out there, that says
18 that they could lose that, has an impact on
19 defense that probation wouldn't necessarily be
20 aware of. We wouldn't be aware of what they
21 would have done had that case law not existed.

22 COMMISSIONER WROBLEWSKI: Can I follow

1 up though?

2 So you see many, many presentence
3 reports.

4 MS. BUSHAW: Mm-hmm.

5 COMMISSIONER WROBLEWSKI: Are most of
6 those -- did most of those include some defense
7 objection, very few of them include a defense
8 objection? Because most -- because the data that
9 we see shows that there -- that the vast majority
10 of cases where a defendant pleads guilty gets
11 three points.

12 And I get it. I -- and I get,
13 especially, Mr. Caruso's concerns that you're, I
14 think, reflecting, which is, if no one was
15 objecting, there might be a chilling effect. So
16 everybody's getting a third point, but they're
17 not objecting because they're afraid that they
18 won't get the third point.

19 But I'm curious, in the cases that you
20 see, the presentence reports that you write and
21 then circulate and then bring back, did most of
22 those include objections or not include

1 objections?

2 MS. BUSHAW: Several objections from
3 both parties, and we talked about this at our
4 POAG meeting just to make sure because -- and of
5 course, you can't testify to what happens in
6 every case, and in every federal court, there are
7 always exceptions -- but we went around the room,
8 and generally, as long as there weren't
9 objections to plea agreement stipulations or
10 elements, there was a perception that defense
11 could object to as much as they needed to at the
12 time of sentencing.

13 But, again, that would be our
14 perspective because we aren't aware of what would
15 have been objected to or what would have been
16 brought forth to the court to address.

17 COMMISSIONER WROBLEWSKI: Thank you.

18 VICE CHAIR MATE: I actually have a
19 follow-up on that.

20 (Laughter.)

21 VICE CHAIR MURRAY: Bounce back and
22 forth -- and maybe this is too long a time period

1 because it's been a while since the Commission
2 last amended that acceptance of responsibility
3 provision, and you addressed that, and that kind
4 of went to some of those non-frivolous -- I can't
5 remember what the words were at the time, but
6 those challenges.

7 Has POAG noticed a change in
8 objections since the Commission amended that
9 guideline in 2018?

10 MS. BUSHAW: Yeah, it was 2018. That
11 was one of the comments we had in 2018 was if --
12 to make sure whatever is changed in this
13 guideline, it's significant enough that it has an
14 impact on the case law.

15 I -- we didn't discuss that as a
16 group, but just the fact that it's on the agenda
17 again makes me think it didn't have the effect of
18 making a big change on the case law, that edit
19 from 2018.

20 CHAIR REEVES: Any other questions for
21 this panel?

22 Ms. Leary, I do have just a couple of

1 questions. You indicated that you thought the
2 language that we've put out there is too broad,
3 and I know, in other instances, panelists have
4 come back with different language or suggested
5 language.

6 Is there language that you can provide
7 that might narrow it, and the same question with
8 respect to attempt -- doing it temporally as
9 we've done it? Is there a suggestion as to --
10 well, how should we do it?

11 MS. LEARY: I'm going to take the
12 second question first. Just say -- I just think
13 temporally doesn't get you where it seems that
14 the Commission wants to go just because every
15 case is so different, you know, and a -- in front
16 end.

17 You know, we've heard discussion about
18 building trust. Try building trust with a victim
19 who's been traumatized by violent crime, you
20 know? That has to happen early and takes a long
21 time in order to get to the place where they can,
22 in front of 12 strangers, describe the worst

1 thing that's ever happened to them. So that
2 starts really, really early as well. So I don't
3 think temporally is the way to go.

4 I'm happy to submit to writing some
5 alternative language, at the invitation of the
6 Commission, after talking with my -- our advisory
7 group. I would offer a way of thinking about it,
8 but if I could put on my law professor hat and
9 take off my chair hat, which means everyone's
10 going to fall asleep and start getting on their
11 phones, but hopefully that won't happen.

12 And I think that it's very clear from
13 the text that Congress intended this discretion
14 to be for the government. That was what it was
15 intended for, and I think, if the Commission
16 wanted to reframe this to think about what's
17 called -- what I've labeled -- again, I'm
18 speaking almost individually -- as structured
19 discretion, right? So guiding principles but the
20 discretion is still with the government, I think
21 that is an avenue to go.

22 I'm happy to bring it back to the

1 Victim Advisory Group to get through the group
2 sign-on on that, but it's a principle --
3 academics are the worst because they, like, hawk
4 their own wares -- but this is a principle that
5 I've written about in a couple law review
6 articles, and I don't mean to talk about just
7 myself, but that's sort of the idea is
8 discretion. But, if there's agreed upon, sort
9 of, points to consider beforehand, it can limit
10 something wide open or, like Commissioner Wong
11 was discussing, something between Wade and
12 absolute discretion.

13 So I'm happy to -- I'm not dodging
14 your question. I'm happy -- but I'm hesitant to
15 speak from the whole group on that specific
16 alternative language because we didn't reach any
17 to suggest to the Commission.

18 CHAIR REEVES: Thank you.

19 All right. I guess, tomorrow,
20 everybody's going to want to be on the afternoon
21 panel.

22 (Laughter.)

1 CHAIR REEVES: Ladies and gentlemen,
2 here, and those who are online, we appreciate you
3 for spending this day with us because this, here,
4 closes our third day of testimony. And on behalf
5 of my fellow Commissioners, I want to thank each
6 of our panelists, those who remain here, those
7 who have gone on to your other duties. I do
8 thank each of you immensely for spending this day
9 with us, providing your testimony, and where
10 needed or where desired, if you wish to
11 supplement your testimony, we just ask that you
12 do so by March 14th.

13 We will be back tomorrow at 9:00 a.m.
14 to receive testimony on our proposed amendments
15 regarding the career offender guideline and the
16 use of criminal history scores. I look forward
17 to seeing every one of you then and hearing those
18 who might be on the line.

19 But thank you so much for spending
20 this day with us. We are now adjourned.

21 (Whereupon, the above-entitled matter
22 went off the record at 3:17 p.m.)

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Public Hearing

Before: US Sentencing Commission

Date: 03-07-23

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