

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

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WEDNESDAY
MARCH 6, 2024

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The United States Sentencing Commission met in the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE, Washington, D.C. at 9:00 a.m., 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 Member

*Present via Participating virtually

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Adjourn

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

(9:04 a.m.)

CHAIR REEVES: Good morning. I see we rearranged the room, and I'm trying to reconfigure myself and make sure we're speaking to everybody at the same time. I'm the Chair of the United States Sentencing Commission, Carlton W. Reeves, and I welcome you all to this first day of hearings on our proposed amendments for the 2023-2024 policy cycle. I thank each of you for joining us, whether you are in this room or you're attending this hearing with us via livestream.

I have the honor of opening this hearing with my fellow Commissioners. To my left is Vice Chair Claire Murray. To her left is Vice Chair Laura Mate. To her left is Commissioner Candice Wong, and to her left is ex-officio Commissioner Jonathan Wroblewski with the Department of Justice. To my right is Vice Chair Felipe Restrepo and Commissioner John Gleeson. Commissioner Claria Horn Boom is attending with

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us remotely. She had emergency dental surgery last night.

I thank you for suffering through that and still attending, Commissioner Boom. So we understand if you might have to go off at any time. Just let us know how we can best assist you and thank you so much for attending. I want to thank --

COMMISSIONER BOOM: Thank you, and greetings from Kentucky. I'm feeling way better than I did yesterday, so all is well. Thanks.

CHAIR REEVES: Okay. I want to thank all of my fellow Commissioners for their extensive contributions, their spirit of collaboration and cooperation, and their dedication to our work. I'm honored to be sitting among these great people who are doing a yeoman's task for our country and for our criminal justice system.

We're also joined by Commission employees, some of whom, of course, are in this room; many of whom are not because they are

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working, still, upstairs. They've done the research. They've drafted the policies. They've taken instructions and directions from us. They've offered many contributions to us. They have set up this room. They have done this and everything else, so much else, to make this hearing possible. And I thank each one of them.

And on behalf of the Commissioners and the public, I thank our agency staff for the amazing work that you do for us, for the country, every single day.

Today we will be hearing testimony on four of our proposed amendments. The first addresses how conduct for which a person has been acquitted is considered in sentencing. The second is a proposal to simplify the guidelines.

The third addresses a range of circuit conflicts regarding sentencing. The fourth and final proposal for the day addresses rules for calculating loss.

I want to thank the countless people who submitted comments on our proposals, whether

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you wrote to us from the halls of the Senate or the desk of a prison library through our portal, we thank each of you. And I promise you this: If you've spoken to the Commission, you will be heard.

We have posted over 800 pages of public comment on our website, www.ussc.gov. Those comments have been insightful, they've been powerful, and they will be immensely useful, just like the testimony we will be receiving today and tomorrow.

To all of you who will be speaking to us in person, I promise you that your extensive journeys and your preparations to get here will be worth it. When you speak to the Commission, you will be heard as well. And you will be read, too, as your testimony is available and will be available for the public to access on our website, www.ussc.gov.

Panelists, you will each have five minutes to speak. We have read your written submissions. Your time will begin when the light

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turns green. I have been instructed and I'm following the directions of my General Counsel. I will abide by her today because we know people have to get back to their destinations. So, we are working hard to make sure we stay on time. So, your time begins when the light turns green. You have one minute left when it turns yellow, and no time left when it turns red.

And I see my Counsel has on red today.

So, when you see her stand up --

(Laughter.)

CHAIR REEVES: But if I cut you off, please understand I'm not being rude, and we're not being rude, at all, as we have so much to cover today and tomorrow. This will be a very productive day, and we have a limited time to hear you, and please understand we have all the time we need to read any written submissions.

For our audio system to work and to make sure that Judge Boom hears everything, and that the public hears everything, please lean into your microphone if you need to. Please

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speak closely into the microphone. When all the panelists have finished speaking, Commissioners may ask you questions, and I'm certain they will do so. And so, I thank everyone for joining us and I look forward to a very productive hearing.

Now, as Chair prerogative, I do -- this is not in the script, [General Counsel] Kathleen [Grilli]. Yazoo City High School! Last year I announced that we won the state championship. We went back to the state championship this year, but we lost. We are the runner up for the state championship. But our Commission books, Jackson State blue and white. Over the weekend, Tomekia Reed, our coach at Jackson State girls' basketball team, led our girls to their fifth -- fifth -- SWAC [Southwestern Athletic Conference] Championship. For the fifth straight season. As of today, they're 16-0 in SWAC conference play. So, I'm very proud of my Jackson State Tigers and my Yazoo City Indians.

I know. You have to suffer through

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me. Okay. All right. So, our first panel -- thank you so much. I didn't hear any applause, but it's in my mind.

(Applause.)

CHAIR REEVES: Thank you so much. Our first panel that I'd like to introduce -- our first panelist, he will present the Judicial Conference of the United States' Criminal Law Committee's perspective on our proposed amendments regarding acquitted conduct and simplification. We have with us my friend, the Honorable Edmond E-Min Chang, who serves as a United States District Judge in the Northern District of Illinois and is the Chair of the Criminal Law Committee of the Judicial Conference of the United States.

Before joining the bench, Judge Chang served as an Assistant U.S. Attorney in the Northern District of Illinois. He was nominated to the bench by President Obama on April 21st, 2010, confirmed by the Senate on December the 18th, 2010. I was nominated on April 28th, 2010,

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and I was confirmed on December 19th, 2010. Judge Chang received his commission on December the 20th, and in 2010, I was so proud to sit alongside Judge Chang at our confirmation hearing. I took the bullets for him that year!

JUDGE CHANG: Sure did!

CHAIR REEVES: I never imagined that we would one day attend a hearing sitting across from each other. Judge Chang, I can tell you now, it is a much better view from this side. And, sir, we're ready to hear from you whenever you're ready.

JUDGE CHANG: Good morning, Chair Reeves. And I am thrilled that you are the leader of this enormously important Commission, and so proud that a Senate Judiciary Committee panel mate is the leader of the Commission. And good morning to all your fellow Commissioners as well, as well as Judge Boom. Been there, done that, with dental surgery on an emergency basis, so special sympathies extended out to you.

I, of course, am here to testify as

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the Chair of the Criminal Law Committee of the Judicial Conference. And I will preface my remarks that I didn't know we had a "three, one, and done" system up here in terms of the number of minutes, but please do feel free to cut me off whenever it is appropriate.

This is, of course, just amendment cycle number two with this Commission, and we're so ecstatic on the Criminal Law Committee that the Commission is up and running at full strength and now sprinting. I know that the Judiciary and all the stakeholders, and of course your tireless and excellent Commission staff, have all been very eager to address the accumulated sentencing priorities that arose during the times of the wilderness of no quorum on the Commission. So, thank you for allowing us the opportunity to comment on these proposed amendments.

In general, our committee's subject matter jurisdiction is to address issues involving the administration of criminal law. And we do also oversee the probation and pretrial

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services system, so those are the two perspectives from which I speak. And to that end, the Judicial Conference has adopted the overarching principle on the sentencing guidelines, which is that the Judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible. And so, of course, those constituent parts of that overarching policy do kind of push and pull on each other at times.

And that's why we are very lucky to have a wise and energetic set of Commissioners now to make these very tough decisions. And with regards to the proposed amendments for this cycle, I'd first like to say that the Committee does support, of course, the Commission's engagement on these many important areas of criminal justice. And we support the Commission's attempt to resolve the circuit conflicts and including its proposed amendment to clarify application of the loss rules. And we also applaud the Commission's efforts to try to

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find ways to simplify the guidelines.

At the same time, we do urge the Commission to bear in mind the limited resources of the Judiciary, including the courts and the probation officers, especially during these times of heightened budgetary constraints. Our judges and probation officers work diligently every day to apply the guidelines as well as apply retroactive guidelines and carefully supervise offenders to assist in rehabilitation and to keep the community safe.

All right. With that said, I'll just focus on two of the proposed amendments today. And the first is on acquitted conduct. And this poses, of course, the question of whether acquitted but proven conduct ought to be barred or limited in the application of the guidelines.

So overall, the Committee does not support a mandated bar or limit on consideration of acquitted conduct in applying the guidelines specifically, or even more broadly in picking an appropriate sentence. I hasten to add that the

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Committee's position is to support flexibility in sentencing both ways.

That is to say, the Committee understands the concern that a sentence that is driven by acquitted conduct could be perceived as undermining the jury's verdict. And there, of course, appears to be congressional consideration of this issue on that very basis. So, if a sentencing judge believes that a sentence ought to be mitigated because consideration of acquitted conduct would not, for example, promote respect for the law in a particular case, then it is the Committee's position that judges ought to retain the flexibility to mitigate sentences on that basis under 18 U.S.C. § 3553. So having said that, the current proposed amendments do present three issues.

And the first is that the definition of acquitted conduct lacks precise clarity, and I think will likely result in extensive litigation, particularly where the sentencing judges struggle to discern what was the basis of an acquittal.

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And at the outset, if the amendment were to be adopted without some version of the definitional text that is in brackets in the proposed amendment, that any facts that were found or established "in whole or in part" for "the instant offense of conviction," then it's likely that any attempt to calculate the offense level for the counts of conviction under Option 1, which is to remove acquitted conduct from the calculation of the guidelines range, that it would often be unworkable.

Given the rules of joinder, there often is, of course, conduct that overlaps from count to count to count. And if there is no exclusion for trial-proven facts that form the basis of a conviction, then the Committee is concerned that it would not be clear how a court would calculate an offense level in the many cases with that kind of factual overlap. And for example, a drug distribution case where there's a conspiracy to distribute count and a substantive distribution count. And if there were an

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acquittal on one or the other, it would arguably be no conduct on which to calculate an offense level for the offense of conviction unless that exclusion to the definition is implemented.

Now, just moving on from that point, the proposed definition of acquitted conduct does include some terms that are not necessarily clearly defined. The proposal currently offers either that the acquitted conduct is underlying an acquittal or constitutes an element of an acquittal. And for the term "underlying," it does not appear that that term has arisen in other doctrines of criminal law from which we might be able to adopt and follow an already existing definition. And it might be that "underlying" means "relevant to an acquitted charge," but that's not clear. And so, there is likely to be some debate over what that term means.

And that goes also for the alternative definition of "constituting an element of the charge." There are many federal offenses that

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have elements that are quite broad, like this scheme to defraud in 18 U.S.C. §§ 1341, 1343, 1344, all the fraud statutes that invoke that element. It's a broad element and it may be difficult then, given the breadth of that element, to determine what conduct was underlying or constituting an element of acquitted conduct.

And second, the committee does have some concerns that there may be anomalous results in sentencing arising from the proposed amendment. Because, of course, the proposed amendment would not bar uncharged or dismissed but proven conduct from being considered relevant conduct in calculating the guidelines.

So, the proposed options would allow courts to consider reliable information for dismissed or uncharged but proven conduct, while at the same time barring the consideration of potentially equally reliable information about conduct that was charged, but then was the subject of an acquittal. So, on both of these concerns, how to define acquitted conduct and

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what outcomes might arise from the proposed amendment, the Committee does believe it would be very helpful if the Commission would examine at least a sampling of the 286 sentenced individuals that the synopsis very helpfully identifies.

There were 286 sentenced individuals in fiscal year 2022 that were sentenced but had an acquitted count. And presumably some of these individuals appealed. And so then presumably there are trial transcripts on dockets, as well as jury instructions and verdict forms, the charging instrument, of course. And if the Commission were to examine just a sampling of those cases and then illustrate for us, like how the definitions would work, I think that would be quite helpful. And indeed, that examination might also help conceive of a definition that is more concrete.

And then lastly, I'll note, I see the red light's already on, but I'll note that there would be also a gap between the guidelines range and the section 3553 considerations, because 18

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U.S.C. § 3661 says there ought not be any limitation on the information regarding the conduct of a defendant in picking a sentence. And so, I do have that concern as well, that there'll be this gap between section 3553 and the calculated guideline range.

Now, all of that being said, and with the Chair's permission, I'll blow through the red light. All that being said, if the Commission does proceed with one of the proposed options, then it does appear to the Committee that Option 2 would be the least difficult for judges to administer and at the same time provide flexibility for sentencing judges. We would still have a guidelines range that is based on acquitted but proven conduct, just like we would have a range that is based on dismissed and uncharged but proven conduct. But then the court would maintain the flexibility to consider whether a departure is appropriate. And the committee does believe that proceeding on Option 2 would be superior to congressional action on a

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statutory amendment. Because you-all are the experts on the operation of the sentencing guidelines, and you would be able to monitor how Option 2 would play out in deciding whether there ought to be further changes.

So, I'll just end this section where I started, which is that the Committee's position is that sentencing courts already have the discretion under section 3553 to mitigate sentences if the court believes that the advisory guidelines range is too high because acquitted conduct was used in calculating it. And our hope is that we can maintain that flexibility. So, if I may pause for questions on acquitted conduct before discussing simplification, that might make the most sense.

CHAIR REEVES: Any questions? Who wants to go first this morning?

COMMISSIONER GLEESON: I have a question. Thank you, sir. Your Honor, I'm going to either break this [microphone] or move it closer to my mouth.

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CHAIR REEVES: Move it closer, otherwise you got to pay for it.

COMMISSIONER GLEESON: All right. Okay. All right. I want to respectfully push back on two concepts you mentioned. One is that it could be perceived to undermine fundamental principles if someone is punished for acquitted conduct. It's not a could be. That's a real thing. It's a real thing to tell a client that the first order of business in every sentence is to calculate a range, and the range indisputably has an anchoring effect on the sentence, and that if he's or she is acquitted of one of two counts, it simply doesn't matter in calculating the range. That's not a could be perceived thing. That's an anomaly for someone who's in the courtroom.

The other is, you mentioned we shouldn't have a world where we're barring consideration of acquitted conduct. And as you know, under section 3661, if you are right about that, and I think you are, we wouldn't have that

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world. That's not up to the Commission. So, my question is, doesn't it really boil down to whether judges would be in a position of either straying downward from a range because of the mitigating effect of an acquittal, or straying upward from a range because of the aggravating effect of the conduct underlying the acquittal? Isn't it just a matter of which of those two we choose?

JUDGE CHANG: Thanks for the question, Judge Gleeson, now Commissioner Gleeson. First, on the perception, I do think it is often the jobs of the courts to explain to the public that a perception, which is completely valid because they're perceiving it from the position of someone who is not familiar with sentencing law.

And with the long tradition of considering the maximum amount of information, reliable information that at the very least probably true, it is part of our job is to explain that to the public.

And I think there is an analogy to

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sentencing explanations when a defendant is being sentenced and I'm looking at this person and their family is in the gallery. I try to give as fulsome of an explanation as possible, because I'm quite aware that there are concepts that the public at large might not grasp, again, quite understandably, but I try to explain that to them.

So, perception is important. And part of our job, though, is to explain why that perception might not match up with the traditions of sentencing law. Also, with regard to the question about section 3661 and would we just be aggravating or mitigating up or down from the range, I think it is important where that discretion is situated. And here, the calculation of the range based on all relevant conduct, even if it is the subject of an acquittal, but is probably true, there is the value of consistency that we would have a guideline range that is based on all facts that are probably true.

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And that includes dismissed but probably true, or uncharged but probably true, and then acquitted but probably true. Now we have the advice of the guidelines and it's at least consistent on that basis. And then if it's a departure, we do have, from the perspective of sentencing judges, more discretion when it comes to deciding whether to depart or not. And I think from our point of view where we're trying to maximize flexibility, having that discretion situated there is superior than altering the guidelines range on the calculation itself.

And I'll just say from a practical standpoint, the calculation of the guidelines range and getting that right is subject to, as it should be, much more searching appellate review.

And so the litigation over the definitional obstacles that we're facing or might be facing, it would again, I think, be superior if we were dealing with that in the departure context rather than that very first important, but advisory step of calculating the guidelines range. Thank you.

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COMMISSIONER GLEESON: Thank you, Judge.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: Judge Chang, thank you so much for the CLCs incredibly thoughtful and detailed submission. One of the things we --

JUDGE CHANG: We too -- let me just interrupt. I have a terrific staff that helped us put it all together. And the Committee members were very engaged in the process as well.

COMMISSIONER WONG: One of the things that I thought was very helpful were some of the practical, real-world examples that you gave as kind of helpful illustrations to think through how this language would apply. And I was just thinking through some scenarios as well in that vein. So, let's take the second bracketed word.

So acquitted conduct means "conduct [constituting an element of] a charge of which the defendant has been acquitted."

I think what is a common scenario, let's say an 18 U.S.C. § 924(c) charge and also a

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possessory gun charge. And I'm thinking specifically, let's say it was an 18 U.S.C. § 922(n) case where receipt of a firearm while under indictment. And there was an acquittal on the receipt charge. Perhaps, you know, they couldn't show that after indictment was when they received that firearm, but there's a conviction on a section 924(c). How does that play out?

In your view, if we have applied this, acquitted conduct means conduct constituting an element of a charge of which the defendant has been acquitted. Do you think that language would address or clearly counsel in favor of how we would apply the guidelines range in that scenario?

JUDGE CHANG: Yeah, well, I think your question and example does emphasize how important it is that there ought to be an exclusion from the definition for those facts that then would underlie or constitute an element of the instant offense of conviction, right? So, in other words, when sentencing on the 924(c), which I

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mean, suppose the section 924(c) actually just sets -- the guidelines actually just set the mandatory minimum. But the point is, I think an important one, which is we need to equally respect the jury's verdict on the instant defense of conviction.

And so, if the definition does not include the exclusion, then the trial-proven facts, seems to us on the Committee, it must be part of the calculation of the guideline range. So yeah, I think that is an excellent example of the potential overlap and the need for that exclusion.

VICE CHAIR MURRAY: Thanks so much for your testimony, Judge Chang. I have a question on the definitional point, which I think is a real point, in part because defendants are not acquitted of conduct, right? And so how to define that is difficult. And I agree with you about the problems with the underlying and with the constituting element. Does the CLC have a recommendation? Do you have alternate language?

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I see the problems you pointed out, but I'm wondering if you have a third way.

JUDGE CHANG: Well, the answer to that is no, and it's not for lack of trying to conceive of one. I do think that question is where it would be helpful to take a look at that sampling of cases. Like, of actual real-world cases. And that actually might help all of us craft a more concrete definition. If we could understand what the problems are, then we can address them more directly. But yeah, I think without that you do run into the concerns that we've pointed out and that others have pointed out with overlapping charges.

And if you had a RICO charge that had patterns of racketeering activity that are based on schemes to defraud and then you have acquittal on one or the other, these becomes very, very complicated questions without more express definitions. And I think the examination of the sample would help all of us in crafting a definition. And I'll just add that I think the

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sentencing judges, we wouldn't have much more than what's on the docket for these individuals.

We would have the briefs of the parties, of course, but we would have the trial transcript, the jury instructions, verdict form, and the indictment. And that's pretty much all we would have.

CHAIR REEVES: I'll allow you to get to your simplification testimony --

JUDGE CHANG: Okay. Thanks very much.

CHAIR REEVES: -- for the last eight minutes or so, I think. So, if you will.

JUDGE CHANG: Very good. And yeah, I know your General Counsel is looking, you know, very, very closely at this. On the simplification proposal --

CHAIR REEVES: She's sweet.

JUDGE CHANG: Yeah, I certainly realize that. So let me first say on simplification, the Committee does generally applaud the Commission for its commitment to try to simplify the guidelines. And the three-step

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process does not seem to reflect the practice of many courts at this point, including in my home circuit, the Seventh Circuit. And that's either due to case law or preference at this point. It is worth noting that some judges may find that the departure step promotes transparency and uniformity in their own sentencings. And you'll be hearing from other judges on these advantages, so I won't belabor them. And one of them is one of my esteemed colleagues on the criminal law committee, Judge Altman, who will be speaking to you this afternoon.

I'll just highlight that we recognize that the advanced notice requirement in Criminal Rule of Procedure 32(h) does ensure that defendants know the grounds for potential departures. And of course, there is not that kind of concrete notice requirement for variances. It's also true that the current departure provisions do have concrete requisite elements that do give structure to those judges who still apply them and help them cross cases.

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Now, having said that, the Committee does overall support simplification to reflect the growing number of courts that approach sentencing without considering departures. And it does avoid litigation over departures that ultimately would be overridden so to speak by section 3553(a) goals and factors. But the Committee does have some concerns about how to implement the simplification. And as it turns out, simplification isn't necessarily simple, and we recognize that. The Committee does recommend some more study on this.

And I'll just note two concerns. And the first is that the proposed amendment actually comprises, I think, hundreds of pages of proposed revisions. And that's, of course, not surprising given the approach of trying to move some of the departures to a new Chapter Six, and then, and others, calling them additional offense-specific considerations. And the Commission staff no doubt poured extensive effort into that proposal.

For us on the outside, it is not readily clear

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where the edits are just mere movement of preexisting text to a new spot, a new chapter, a new provision, or instead incorporates new language. And to the extent that the language is new, even if the word changes appear to be minor, we are concerned that there will be some litigation when we don't have corresponding express definitions. Our letter identified a couple of examples of new language, so I won't repeat them here.

But overall, as a simplification effort moves forward, if you decide to move forward, it would be helpful, I think, to identify what's entirely new and what is just a paraphrase of pre-existing departures. More fundamentally, the synopsis of the proposal does raise an important and unanswered question about the statutory authority of the Commission to issue guidance on section 3553(a) in the form of a policy statement. Let me add that the Committee is not currently commenting on the legal authority issue, and we probably never will

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comment on the legal authority issue. But that open issue does raise the risk that if the proposed amendment is adopted to give this guidance on section 3553(a), that there'll be substantial litigation on that threshold question. And even if there were authority to create this section 3553(a) guidance, we do anticipate litigation over at least the proposed listing of the various personal characteristics and defense factor characteristics. We understand the goal of trying to express these personal factors and offense factors in a neutral and concise way. But again, there might very well be substantial litigation over the meaning and the scope of each of those factors.

So, our bottom line on this is that sentencing courts, we now have around 18 years of experience in the post-Booker era. And for many of those years, many courts have been picking sentences without considering departures. So, if the Booker opinion were a person, then they'd have a driver's license and be off to college

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this year. And so, we have accumulated substantial experience. So, introducing a new chapter that comprises not formal departures but is also not simply coextensive with section 3553(a) as it is written, might very well just complicate rather than simplify the sentencing process.

So, with that, I'll just say again, that the Committee really very much appreciates the work of the Commission and all the effort you've poured forth in these proposed amendments and your many other priorities. And the Criminal Law Committee looks forward to continuing to work with you. Thank you.

CHAIR REEVES: Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you very much, Mr. Chairman.

And thank you very much, Judge Chang, for testifying and for the written submission. If I can ask one question about acquitted conduct and then one question on simplification. It

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seems to me that one of the fundamental issues that the Commission has to grapple with is that in a case where there's an acquitted count and a convicted count, we don't really know what the jury found in terms of facts. And I think you mentioned that, and other Commissioners have mentioned that. And the Supreme Court has said a number of times that it's inappropriate for the court to look behind the verdict. And that seems to be the quandary. We don't know, and we're not supposed to be looking behind the verdict. At the same time, there are, I think, legitimate concerns that have been raised that animate Senator Durbin and Senator Booker's letter and their legislation.

Did the Committee consider, if the Commission were to go with Option 2, to provide that the courts can still consider, but only if they find by some sort of higher standard of proof, the conduct that might be subject from an acquitted count. So, using a beyond a reasonable doubt standard as opposed to a preponderance of

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the evidence standard?

JUDGE CHANG: Yeah, that's not something that I have vetted with the Committee.

And so, I don't want to get out in front of the Committee on that issue. I'll just point out that the sense of the Committee was that there is value in the consistency of a guideline range that is calculated based on the same burden of proof, preponderance of the evidence for acquitted conduct but proven, dismissed but proven, or uncharged but proven, and that there is value to that consistency. I recognize, and the Committee does too, the countervailing policy value of ensuring that the public respects our sentences. And it can be difficult for the public at large to understand why is it that acquitted conduct is the subject of any punishment whatsoever? That is a very valid concern.

COMMISSIONER WROBLEWSKI: Thank you very much. On simplification, you mentioned that you thought that the Commission's offense factors

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were intended to be, I think your term was, neutral and stated in a concise way. And I know the Committee indicated some concern about the Commission getting into the section 3553 analysis, and that was echoed by the submission by the Federal Public Defenders and a variety of other folks. On the other hand, section 3553(a)(5) specifically says, one of the factors in section 3553(a) is for the judge to consider the Commission's policy statements.

Is there anything that prohibits the Commission from having a policy statement on, for example, whether family circumstances should be considered and why wouldn't that be an appropriate factor for a court to consider in section 3553(a)? I'm trying to understand whether the Committee thinks it's really beyond the scope of the Commission's responsibilities to get into that analysis. And how is that consistent with section 3553(a)(5)?

JUDGE CHANG: Yeah, we quite studiously avoided trying to come to a consensus

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on, I think, a debatable proposition and not answered on what sort of either guidance or constraints that the Commission could place on courts' consideration of the section 3553(a) factors. So, the Committee has not taken a position on that. I think our concern was more along the lines that even if there were authority to do that, then this listing may itself engender additional litigation because there are not explicit definitions. Which was on purpose. It is quite understandable that the Commission would want to try to be neutral and concise about the listing of factors. But our concern is that it ends up being a constraint on court's consideration of section 3553(a) factors rather than a simplification of it.

CHAIR REEVES: Commissioner Mate may have one question, and then we'll let you go.

JUDGE CHANG: All right. Very good.

VICE CHAIR MATE: First, thank you so much for your testimony today and the work of the committee on all of these important issues. We

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appreciate it. Kind of following up on that question and leaving aside the Rule 32 concern for the moment on simplification and focusing on the section 3553(a) concern. If the Commission were to, instead of adding everything in Chapters Two through Five, listing all of these additional considerations. If the Commission were to just remove those departures in Chapters Two through Five. And then Chapter Six, either omit Chapter Six or just say section 3553(a), would that alleviate some of the Committee's concerns about that sort of gloss on section 3553(a)?

JUDGE CHANG: Again, I don't want to get ahead of the Committee because we had not considered what would be the way to actually implement this because it does require, I think, further study. So, I would just say in terms of my own practice, and not on the Committee's behalf, in the Seventh Circuit, that is essentially how we have operated since the very early times after Booker, where the Seventh Circuit held that you ought to move just from

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calculation of the guidelines range to section 3553(a). And so there has been, at least in the sentencings that I've presided over, precious little discussion of departures. And on rare occasion, one side or the other will say, well, there's this departure provision. We know that the Seventh Circuit has you skip over that, but, you know, here's a related section 3553 argument of that.

Other than those extremely rare occasions, we are just moving past that. And so again, not to get ahead of the Committee or even get ahead of myself in considering a proposal like that, we have in essence just completely moved past that. And I should add that the Commission's data collection efforts and then its expertise in analyzing the data, that we certainly, as a Committee, do not want to lose. And so, if the simplification moves forward in one form or the other, that continued collection and analysis of variances and the reasons for variances, I think, would be still of continued

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importance to courts in understanding best sentencing practices.

VICE CHAIR MATE: Thank you.

CHAIR REEVES: Thank you, Judge Chang.

We appreciate you. And safe travels back to D.C.

JUDGE CHANG: Well, thank you again.

CHAIR REEVES: To Chicago. Thank you.

JUDGE CHANG: Thank you.

CHAIR REEVES: Thank you, everyone.

Our second panel provides us with perspectives from the federal bench on acquitted conduct.

First, we have the Honorable Stephen R. Bough, my good friend who serves as a United States District Judge in the Western District of Missouri. He was nominated by President Obama on January 16th, 2014, confirmed by the Senate on December the 16th, 2014, and received his commission on December the 19th, 2014. Before joining the bench, Judge Bough was judge pro tem for the City of Roeland Park, Kansas.

Next, we'll have the Honorable Micaela

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Alvarez, who serves as a Senior United States District Judge for the Southern District of Texas. She was nominated by President George W. Bush on June 16th, 2004, confirmed by the Senate on November the 28th, 2004, and received her commission on December 13th, 2004. Judge Alvarez assumed senior status on June 8th, 2023. Before joining the federal bench, she was a district court judge in Hidalgo County, Texas.

Third, we have the Honorable Deborah L. Cook who serves as a Senior United States Circuit Judge for the Sixth Circuit Court of Appeals. She was nominated by President George W. Bush on January the 7th, 2003, confirmed by the Senate on May 5th, 2003, and received her commission on May 7th, 2003. Judge Cook assumed senior status on March 6th, 2019. Before joining the federal bench, she was a judge on the Court of Appeals of Ohio and a justice of the Supreme Court of Ohio.

Last but not least, we have the Honorable Patricia Millett, who is a United

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States Circuit Judge for the District of Columbia Circuit Court of Appeals. She was nominated by President Obama on June 4th, 2013, confirmed by the Senate on December the 10th, 2013, and received her commission on December the 10th, 2013. Before joining the bench, she was an attorney in the Department of Justice's Civil Division Appellate Section and assistant to the United States Solicitor General.

Judge Bough, we're ready to hear from you, sir.

JUDGE BOUGH: Thank you so much for having me. I appreciate how well your basketball team is doing. You may have heard of the Kansas City Chiefs. Okay.

I was told I had one minute by your General Counsel, so this is going to go really quick. If you know the words to any of this song, sing along. "We hold these truths to be self-evident that all men are created equal, and they are endowed by their creator with certain unalienable rights. That among these are life,

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liberty, and the pursuit of happiness." That's how we started this nation and our Declaration of Independence. "We the people of the United States, in order to form a more perfect Union, established justice, ensured domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America."

The Fifth and Sixth Amendments: grand jury, double jeopardy, self-incrimination, due process, speedy and public trial, impartial jury, informed of the nature of the charges, the right to confront your witnesses and to compel the attendance of witnesses, and the assistance of counsel. Those are the hallmarks of our great nation. Every U.S. citizen knows these words, including innocent until proven guilty beyond a reasonable doubt. Since the 1780s, judges have told jurors that they should find the defendant guilty only if there is proof beyond a reasonable

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doubt. Otherwise, a citizen must be acquitted. In plea agreements with the Department of Justice, we tell defendants and the whole world, this is a right. In changes of plea, we tell the defendants and all the world that proof beyond a reasonable doubt is a right. And in jury instructions, we tell defendants, and we tell jurors and we tell the world that in America, you are innocent until proven guilty.

You know, I'm exceedingly anxious that this Union, the Constitution, and the liberties of the people shall be perpetuated. I wish I had said that. Abraham Lincoln said that. But we have the chance to pause and to think about why we're here. Why is America the continued beacon of hope for the poor and the huddled masses? It is not because we equivocate on our founding principles. It's because we in America stand tall. I understand why we got here. Disputes about the pre-sentence report have to be resolved. There is confusion when there's multiple charges and there's acquitted conduct.

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A burden of proof is needed. Prior criminal conviction should be considered in sentencing, but liberty and justice are gifts, and each new generation must work to preserve them. And like Lincoln, I worry about the erosion of these rights that I swore to defend when I enlisted in the Army at age 18.

The use of acquitted conduct does not strengthen our justice system. It hurts it. You have the chance to say what we all know is true and that Judge Millett has been saying for years: use of acquitted conduct violates our constitution. Persuading judges to use the very same facts that a jury rejected at trial to multiply the duration of a defendant's loss of liberty does not sound like what we teach young school kids, Army privates or University of Virginia scholars. In the third branch, when we see an erosion of our constitutional rights, we stand tall. Other branches stand for majority rule. And that's how the process works. We stand for protecting the minimums guaranteed by

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the Constitution.

So regardless of how you feel about America right now, some federal judge told a jury about our Constitution, about how we have the greatest justice system on the earth, and the juror should find each and every element of the offense beyond a reasonable doubt. The jury believed it and found somebody guilty and not guilty. As judges of this storied third branch of the federal government, to use acquitted conduct and take someone's liberty even for one additional day, it's not the story of America. And I urge you to stand tall and adopt Option 1 of the proposed amendment, prohibiting any use of acquitted conduct. Thank you, Chair.

CHAIR REEVES: Thank you, Judge Bough.
Judge Alvarez?

JUDGE ALVAREZ: Thank you. I don't know if I'm on yet. There we go. So, Paul Harvey used to say, now the other side of the story. In contrast to Judge Bough, I have some serious concerns. And I'll start out by saying,

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Chairman Reeves mentioned my background, but during my approximately 20 years on the bench, I have sentenced over 14,000 defendants. So, I think I can speak with confidence when I speak about applying the guidelines. It is a task I've taken on almost daily during my 20 years on the bench. And I have seen the difficulties just in general, in applying those guidelines in certain situations, but I can conceive of the difficulties that will come about in applying those guidelines if we do adopt Option 1 of the proposed amendments.

And I will start out by making two points that I think contrast with something that Judge Bough has said. And that is that first of all, acquittal on an offense is not the same as acquittal of conduct. They are two very distinct things. And the elements of an offense are not necessarily the facts of an offense. So, when we are applying the guidelines, we are tasked with determining factual issues to determine whether certain enhancements apply. That is what I have

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been doing for the past 20 years, to tell me what are the facts of a case. And for sentencing purposes, I do that based on a preponderance of the evidence.

In my written testimony, I gave you an example, and I will touch on that one here. And that is, I deal with many immigration-related cases, many cases involving alien smuggling. For some reason, some years ago, I started to see many of those cases that involved sexual assaults. Repeatedly, I was seeing such cases where the defendant had raped his victims. And it was not just once or twice that I was seeing these issues. These were coming up repeatedly. I do not know if it was because victims were finally speaking up or there was some new type of defendant who was stepping forward to take on these alien smuggling cases or for other reasons.

One of my cases received national attention because at sentencing, I heard from the victim, and she was terrified. She could barely speak up. She was crouched in the witness chair.

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You could barely see her over the front of the podium that the witness chair is in. And we had trouble even getting answers from her. Because she was so terrified, I did something I have never done before, and I have never done it since. And that is, I stepped off the bench, I walked to the witness chair, and I crouched down beside her to give her assurance that she was safe in the courtroom.

I had the defense attorney come up so he could hear clearly everything that I was saying. And I spoke to her in Spanish to just try to connect with her to get her to tell us her story. She did. I believed her. She was credible. I was able to use that rape in sentencing that defendant, and I don't remember now if it's a departure or a variance, but I did sentence the defendant to something more than what the guidelines provided. Now, in our district at least, the U.S. Attorney seldom charges a sexual assault in an alien smuggling case. Such an assault can be charged under the

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enhanced penalty provisions of 8 U.S.C. § 1324 that provides for an enhanced sentencing rate of up to 20 years if the defendant has inflicted serious bodily injury. Had that defendant been charged with inflicting serious bodily injury, I'm not sure the jury would've found that to be the case for a lot of reasons.

But assuming for the moment that he had been charged with having inflicted serious bodily injury and the jury had acquitted on that, I am not convinced, and I quite frankly cannot tell you right now whether at sentencing I would have been permitted to consider the rape or prohibited from considering the rape if Option 1 is adopted. Because inflicting serious bodily injury does not necessarily mean that a rape has not occurred. A rape victim does not always suffer serious bodily injury. Now, the definition in section 1324 is by cross-reference to, and I have forgotten it right now the specific statute, but it is in my written

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testimony, that defines serious bodily injury. It does include a mental component. But again, I'm not sure the jury would necessarily find that because there is a heavy burden to prove that. But I was able to find, by a preponderance of the evidence, that this victim had suffered a rape, and I was able to consider it. Had serious bodily injury been charged, the question is, would I have been able to consider that rape or not? And if I look at the definitions in the guidelines, the guidelines do provide kind of that serious bodily injury includes a sexual assault.

So, my concern is this as I have started out by saying: the elements of an offense are not necessarily the facts that are considered in determining the guideline applications. I am very concerned that if Option 1 is adopted, what will be required is that before we ever charge a jury, we must go through and determine the enhancements that may be applicable to that particular offense. The question then is, do we

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charge the jury with special interrogatories laying out those facts specifically and saying, do you, the jury, find these facts? Because again, those facts could be found, and that defendant could still be acquitted of that particular offense.

It will require a lot more work upfront. It will, in many instances I think, create more confusion with the jury than anything else. And I know I'm running out of time, but the other one part that I will touch on is that we have many multi-defendant cases. So, we will have defendants who wish to plead guilty, avoid a trial altogether, and are willing to take responsibility for their conduct. But if they have a co-defendant in the case who is proceeding to trial, then that one defendant who takes responsibility may be held liable for more than the defendant who went to trial and was acquitted on one particular count. Even though they may have been equally engaged and even though both, by the evidence at the trial and by the evidence

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at sentencing, it is clear that by a preponderance of the evidence, they both could be held accountable for that conduct.

So, I am opposed to the Option 1 amendment. If there is to be any change in the guidelines, I believe Option 2 is the better option. And while I understand some of the concerns that have been raised regarding the use of acquitted conduct, and I think Justice Sotomayor touched on it in her dissent on cert, referenced the woman on the street. And this question was raised here already about the use of acquitted conduct. I don't think it's any more difficult to explain to a defendant who is willing to plead that while you are willing to plead on this one count, keep in mind that a judge may still consider relevant conduct as set out in other counts, and that may still place some part in your sentencing. If we prohibit the use of acquitted conduct, I think that is only the first step in them prohibiting us from considering relevant conduct. And I do believe

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that is contrary to both section 3553(a) as well as section 3661. Thank you very much.

CHAIR REEVES: Thank you. Judge Cook?

JUDGE COOK: Good morning, everyone.

Thank you for --

CHAIR REEVES: Good morning.

JUDGE COOK: -- having this hearing.

Just to be transparent, which is the language everybody seems to love these days, I've never sentenced anybody in my life, as opposed to my friend here.

So, it's not on? Yes, it's on. Okay.

Julie, your Assistant General Counsel, seems to have selected me for this panel based on an opinion I wrote for the en banc court of the Sixth Circuit that upheld the use of acquitted conduct. So, I'm speaking for the affirmative. So, you have it in my written testimony, but it's the White case. Seven members of my court joined my opinion. It has a dissenting opinion with five judges joining. And I'll tell you a little bit about that for a moment.

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I know today you'll hear differing viewpoints. And as I say, I'm for the affirmative of using acquitted conduct. The important thing would be that upholding the consideration of a conduct should be within a circumscribed framework, which I think everybody acknowledges. In my White case, the result depended on the crucial feature that the underlying conduct was undisputed. So, we are talking about the burden of proof here. And it was undisputed, so the court didn't have to wrestle with that. But the fact that it depended on acquitted conduct means that it was uncontested, and it likewise hinged on precedent in the Sixth Circuit that similarly required the facts be supported by a preponderance.

The White dissenters, on the other hand, echo many of the things that are being said here today. They took the view that this getaway car driver, and that's what we had here, being sentenced for additional years for three crimes they, the dissenters say, the jury determined he

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did not commit. That's not what the jury said at all. The jury said that they couldn't find it, proof beyond a reasonable doubt. Only that. I think that the options that are presented by the Commission will complicate -- and I kind of echo Judge Chang a great deal. I echo what he said. I think it will complicate rather than simplify.

And that's very good news for full employment of courts of appeals judges. It'll be great, because we'll have plenty to do, and nobody will be bored.

Taking acquitted conduct into account unquestionably was permitted before the guidelines were instituted. A judge could sentence anywhere up to the maximum for convicted conduct for any number of unstated reasons, and including a suspicion that the defendant also committed what the jury was not convinced of beyond a reasonable doubt. The constitutional backstop remains. Enhancements based on acquitted conduct pass constitutional muster only insofar as they do not increase the sentence

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beyond the maximum penalty provided by the United States Code. We all agree on that.

Seems important to me to note here the invaluable role, and I think Judge Chang speaks, as Chairman speaks much about this, too, the invaluable role that sound discretion of district judges plays. Just as a jury remained unconvinced beyond a reasonable doubt in my case with regard to this gentleman, so too with the district judge evaluating whether the facts that the parties present met the preponderance standard.

What is more, if district judges conclude that the sentence produced in part by relevant conduct enhancement fails to reflect section 3553(a) considerations, the judge may impose a lower sentence, including, if reasonable, a lower sentence that effectively negates the consideration of acquitted conduct enhancements. And of course, if district judges fall short, we have the other backup circuit courts. I'm told by the council that I need not

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offer an opinion on the pertinent proposed amendments and its three options. I think I nevertheless, and maybe I already have strayed from the familiar territory of the judicial branch into the executive policymaking territory to suggest caution. As I say, I think it will complicate rather than simplify.

I appreciate the insight that Judge Chang offered, and also, everything we've heard from Judge Alvarez. Obviously, a great deal of thought and effort has gone into reforming the guidelines, your efforts. But as regards to the use of acquitted conduct, I think maybe the existing regime suffices, given the expertise of district judge sentencings and the ability of circuit courts to correct the unusual occurrence of error or abuse of discretion. So, there's where I stand, okay? Thank you.

CHAIR REEVES: Thank you, Judge Cook.
Judge Millett.

JUDGE MILLETT: Good morning, Chair Reeves and fellow Commissioners. His fellow

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Commissioners, not mine. Thank you for inviting me here to speak on what I think is a very important topic, and that is the use of acquitted conduct to add months and years to individuals' sentences, despite a jury's determination that the government did not meet its burden of proof.

I think we're all agree that there are extraordinary protections in our criminal justice process. We developed reasonable doubt. We require juries. We have evidentiary limitations.

Why do we require reasonable doubt? Why do we have jurors there? Is it just to help label some conduct criminal or not, or is it to protect against deprivations of liberty by the government?

Our constitutional history answers that question, and it does so quite emphatically.

John Adams thought the two most important protections in our constitutional system were the right to vote and the right of juries to stand between the government and an accused before the government exercises its most heavy and dangerous

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power, and that is depriving its citizens of liberty. We only do that in this country under extraordinary levels of protection. And look around this world. Read recent headlines, and you will see what happens when those protections against deprivations of liberty and protections from incarceration go away. That's why we have the jury system. Sentencing people based on conduct constituting an element of a criminal charge in which they have been acquitted runs against that constitutional history. It is time and again, shown to be misunderstood. Baffling, actually. Misunderstood is not the right word. Baffling, frustrating to jurors. We have up to 2 million people a year in this country who serve as jurors and put their lives and jobs on hold, for what, if not to preserve liberty?

We need to remember as we think about this, there are complexities. We have complexities built into our criminal justice system for a reason. There will be complexities.

I'm not here to tell you that I think this is an

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easy cure. But I think it's well worth it. And the fact that across the spectrum people react with shock upon learning that people can go to prison longer for something the jury said they didn't do is probably one of the reasons this is on your radar. It's also because numerous Supreme Court justices and judges and lawyers and academics, and defendants and jurors have told you, this sticks in our constitutional craw. What do I hear? This cannot be right. This cannot be right. The time has come to address this issue. I think jurors are the doorkeepers for liberty, not for criminal labels.

I favor Option 1, for reasons expressed in opinions that I have written. They weren't written about your options. And I don't mean to prescribe rules in that sense, but we need to take it off the table. Acquitted conduct needs to be off the table. Conduct constituting an element for which they've been charged and acquitted should not be considered. I would also favor not even using it as part of choosing the

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range within a sentencing guideline. I know your proposal has not done that, but I ask you and urge you to consider that, because for all the same reasons, it shouldn't be in the sentencing guidelines range itself.

It's all these same constitutional concerns, fairness concerns, public credibility concerns. And one more thing: the sentencing guidelines use of acquitted conduct has become a heavy, heavy weight against the defendant's choice to exercise their constitutional right to put the government to its proof. There are already structural headwinds against going to trial but telling them that there's actually little effect on how long you're going to be in jail makes it almost malpractice for an attorney to say, let's go to trial, unless we know we can run the table on all charges.

The role of the sentencing guidelines is not to put weight on the decision to go to trial or not. The role of the sentencing guidelines is to come in when the trial is over,

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and help judges determine the sentence. But when you bake acquitted conduct into the sentencing guidelines range, which is where judges start. 3661, 3553 come in after that. Courts are told to start with the sentencing guidelines range. That's what I'm here to talk to you about. Is the Sentencing Commission going to continue to have, or to actually formally now that you're having a hearing on it, put your imprimatur on the use of acquitted conduct?

I want to talk, if I may, about the other options and my concerns about them. Option 2, at best, it locks in the status quo. It's not changing anything. A number of courts, including my own, have recognized that in a post-Booker world, judges can make the decision to depart based on acquitted conduct, or to back it out of their consideration, actually. But in reality, I think it makes things worse. Option 2 will make things worse, because it will now require a district court judge to go through the formal departure process and find a disproportionate

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impact from the use of acquitted conduct. A little acquitted conduct is okay, not in my view.

And now regulating them and requiring them to find disproportionate. And you want to know a lot of litigation? Going to be over that disproportionate? I'm sorry, you make changes. Lawyers are going to fight about it, and we're going to have to sort it out. That's what's going to happen. But I'm very concerned about a disproportionate adjective being there. It also just invites lack of consistency. If you get a judge who doesn't like acquitted conduct, you have one answer, Judge Bough. And if you're sentenced before Judge Alvarez, you have a different. And there's always some move, but this seems too important a factor to throw into that aspect.

Option 3 requires proof by clear and convincing evidence. Again, if your concerns are complexity, having a district court judge try to figure out which evidence I have to look at through clear and convincing and which I don't,

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or even the suggestion of beyond a reasonable doubt is going to be extraordinarily difficult to segregate that out. And I know judges will do their best and I credit all these judges here and all district court judges as doing their absolute best to deal with the difficulties of sentencing questions, by varying standards of proof. And quite frankly, if I had to choose what I like beyond a reasonable doubt, I question again about, well, then does that just look like trial, too? And we just told the jury about reasonable doubt. They said they had reasonable doubt. And the judge says, I don't. There is a real structural optical problem there. And I hate to argue against it, because less is more, in my view, when it comes to the use of acquitted conduct. But I think there's some real concerns there.

I would also like to say that all these concerns about defining what is acquitted conduct. As I've said, I favor the conduct constituting an element of a charge, because I

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think that's how juries are instructed is the most favorable way to do it. But every option, unless you do nothing at all, is going to require us to identify what the acquitted conduct is and what isn't, and to sort it out. Every option. Option 1, 2, 3, all are going to require that. So, unless you're going to say, no, thank you to the justices, judges, lawyers, academics, jurors, and defendants who have asked you to act, that's going to be an issue.

I know my time is getting close to an end here. I know there are a number of counterarguments that are made I do want to react to. And I know the Supreme Court has said it, that an acquittal doesn't mean he didn't actually do it. It doesn't mean innocence. But the whole role of an acquittal is to say, you can't take away the defendant's liberty for that charge. If that is the only charge in the case, no question.

No one ever asks for a sentence, because under a different standard of proof. And if these complex cases, if we had a system, glad we don't,

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where you tried each charge one at a time, you'd never be able to then sentence for that.

But I also think we are at a point where we almost look like, in some of the cases I see, that we're forgetting the mission. And that is to punish for, to sentence for, the crime of conviction. I apologize for talking over my red light here. To punish for this sentence of conviction. And not to have the judges say, that's fine, preponderance of evidence, I think you did have that much drugs. And Judge Alvarez had a very, very powerful statement, but to add 20 years if a jury said it didn't happen under the standards we require for deprivations of liberty, that's troubling, unless there's evidence of different forms of assault that could have happened. It is time, in my view, to address this problem. I acknowledge its complexities. I think it's worth the fight. Thank you very much.

CHAIR REEVES: Thank you. Questions?

COMMISSIONER GLEESON: I have a

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statement I'd like to make, which is I do a lot of appellate work, and I can't tell you how tempted I was to cut off a circuit judge when the red light went on. But I resisted that temptation. Other than that, I'm going to stand pat with the Chair.

CHAIR REEVES: You have a question? Okay. Commissioner. VC Mate, as I call her.

VICE CHAIR MATE: Good morning. Thank you-all so much for being here and for your written testimony, in addition to your remarks today. I have two questions that get a little weedy about Option 1. And I think this is primarily directed at Judges Millett and Bough, because I want to focus on that one. Right now, it says, no guideline range based on acquitted conduct. And then there's a separate provision where it says, the court is not precluded from considering acquitted conduct in determining the sentence to impose within the guideline range or whether it's a departure. And I believe you referenced that a little bit.

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Would it be your preference on that one that we were silent, or to keep that preclude, or some other language on that kind of second part of the proposed Option 1?

JUDGE BOUGH: Since I quoted Judge Millett, I'm going to let her go first.

JUDGE MILLETT: So, I think saying that it's not to be used in the application of the sentencing guidelines, I mean, you have options. Really, any action is better than a stick in the eye at this point. Or stick in the Constitution's eye, I should say at this point. But at this point, I think the problem with you saying explicitly that's still okay is as that makes it still okay. And I don't understand if very wise people can disagree on this issue, but if you have come to the conclusion that acquitted conduct should not be a part of the weight of the sentencing guideline process, it shouldn't come in there, then I don't understand how letting the camel's nose into the tent at that point makes sense. To me, that is just as a practical

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matter. We all know that the weight that the range has is so critical in sentencing. So, is it less hurtful? Yes. Does it address the concerns that I think have been motivating justices and judges and others to object to this?

I don't know that it does. And I'm not quite sure how you would even thread that needle in explaining why it fits in one place, but not the other.

JUDGE BOUGH: So, I, of course, agree with everything Judge Millett says, and I so appreciate these two judges and the hard work that they've done. So let me tell you real life scenario. Not hypothetical. Guy was selling drugs out of his girlfriend's house. He gets arrested. He goes to pretrial detention. He breaks up with the girlfriend. She goes back to the FBI and says, oh, that gun that I told you was mine is really his. Didn't he just break up with you? Yeah. Well, too bad. We're going to give you a superseding indictment from the Department of Justice.

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Now you got the section 924(c). We go to trial. Public defender stands up. You're going to find him guilty on Count 1. He was selling drugs out of his girlfriend's house. But you're not going to find him guilty on Count 2. Because he dumped her and he got a new girlfriend, and we're going to bring both ladies in here. And you're going to hear them, and you're going to hear the story. Guess what? The jury found him guilty for selling drugs and found him not guilty for the use of a gun and furtherance of the drug conspiracy. And we still got up in sentencing, and we heard from the Department of Justice that they thought it happened. They thought he was good for it. There was no way I could look a jury in the eye and tell them, you sat through this, and you listened to the girlfriend who got her feelings hurt when you dumped her and got a new girlfriend, and she changed your story to the FBI.

And that was how that was going to

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play out. There are real scenarios out there that are tragic. And this is nothing that we've told storybooks about. I mean, this is really tragic and sad. And our justice system is really hard, because we're dealing with the worst decisions people have ever made. And it'll make you cry. And what happened with Judge Alvarez, that defendant is real. But that's why we're here. I'm not here to apply statutes. I'm not here to apply guidelines. I'm here to achieve justice. And we all are working our butts off for that. Every one of us is. And --

JUDGE COOK: I'm here to follow law --

JUDGE BOUGH: Yeah. Yeah. Yeah.

Well, yep. So, we have slightly different views, and I think this is real, and we've got a justice system and I'm doing my best to follow.

VICE CHAIR MATE: The second part of that question, I'm sort of weedy about Option 1.

Has to do right now it precludes the use of acquitted conduct from federal proceedings. Are you comfortable with that limitation? I think

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last year our proposal referred to state and tribal in addition to federal. I was curious about your thoughts on the scope of Option 1.

JUDGE MILLETT: Thank you. So, I think an acquittal is an acquittal as an acquittal, in our governmental system, in our federalist system. I also understand that you have to make decisions about how far to go at once, but in my view, an acquittal is an acquittal. And might there be some proof issues?

Yes. This already gets dealt with sometimes with use of prior convictions. So, there's going to be work. There's always going to be work at sentencing, as there should be for attorneys and judges. But it seems to me discordant with our federalist system of government to have the federal system sort of look at state acquittals as not the same, because they are done under at least at a minimum under the same constitutional rule, sometimes with even more protections.

JUDGE BOUGH: Agree.

JUDGE COOK: And we have that pesky

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section 3553(a). Hello, right? There's that.

JUDGE MILLETT: Yep.

JUDGE COOK: It's contradictory to what we're arguing.

VICE CHAIR MATE: Thank you.

CHAIR REEVES: Vice Chair Murray?

VICE CHAIR MURRAY: Thanks to all of you for being here. I guess I had a question. Again, I'm sorry to target the same folks, but for Judge Millett and Judge Bough. Judge Millett sort of talked about the jury as the bulwark to deprivations of liberty. Your statement was similar, in terms of innocent until proven guilty. And one thing that occurred to me is that acquitted conduct is not the only area where that principle is implicated. Obviously, relevant conduct implicates that issue as well. And I'm wondering if your quarrel is partly with real offense sentencing, too. It seems like obviously, acquittals are their own thing, but a huge portion of both of your statements were about the jury. And the jury is the only pathway

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to the deprivation of liberty. Thanks.

JUDGE MILLETT: So, you said acquittals are different. The Supreme Court has said acquittals are different. And our constitutional system says, the jury, when you present facts to a jury and they say to the government, no, that is very different, in my view, completely categorically different from uncharged -- I assume you're referencing your uncharged conduct, or just other sort of information that a court receives, that's a whole different level. My concern is with when I talk about the jury, the work the jury has done and how it's reflected in our sentencing process, and how its use of sentencing can stack all the cards against someone going to trial.

So, I can speak only for myself. I'm focused solely on acquitted conduct. And I have focused on the jury. Obviously, my position will be the same in a bench trial, because it's the same type of determination. I don't know if you have judges at bench trials that then turn around

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instantly, insane, but I find maybe they do. So, when I focus on juries, it's because of the structural rule that they have. And they stand as the wall the government has to climb to take away liberty. That's why it seems so relevant to me.

JUDGE BOUGH: And my problem is not with relevant conduct at all. I mean, we do this every day. Sadly, we do it every day, in that we look at a whole host of underlying facts. And most of the time, as we know from the statistics, 95 percent of people plead guilty. And there's a factual basis that's been laid out. And there's a whole bunch of other things that we consider along the way. So, I'm not advocating for a change in that.

But within the Declaration of Independence, we didn't take issue with the Sentencing Commission. We took issue with the king appointing judges. And the judge always found with the king. And people had a complaint that they didn't have jurors, citizens, or their

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peers deciding the case. And so, it's a unique thing, our system of justice, and it's a great thing. Talking with Judge Erickson, we both had the guy that I clerked for, Scott O. Wright, was a World War II veteran, and we talked about how he was a little bit crazy. Passed away. He was very lippy, but he would tell jurors, you don't want a crazy old federal judge deciding these issues. You want 12 real citizens deciding those issues. And that's a system worth fighting for.

JUDGE MILLETT: Sorry, am I allowed to just add one more sentence?

CHAIR REEVES: Yes.

JUDGE MILLETT: I think it's really important to keep in mind that within the third branch of government, this is the only direct role citizens have. They obviously have direct roles in the executive and legislative, but this is part of the credibility of the judicial branch, which makes difficult and hard decisions every day. And in every case, at least one party loses. Sometimes they both lose things. It's a

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big part of our credibility, and it's a critical check and balance that keeps this a country of ordered liberty.

CHAIR REEVES: Do you have a follow-up?

VICE CHAIR MURRAY: Maybe just a little one.

CHAIR REEVES: That's fine.

VICE CHAIR MURRAY: I don't mean this as an ideological point. It's just something I'm sort of wrestling with. But the first time I ever tried a case, one thing that really struck me was just how little of the case the jury got to see. There was this whole story, and there were many people in the room who knew the whole story. So, the defendant knew the whole story. His lawyer knew 90 percent of the story. I was the prosecutor. I knew maybe 80 percent of the story. The judge probably knew about 80 percent of the story. And then because of exclusionary rules and evidentiary rules and things like that, the jury got 25 percent of the story, right? And

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then they had this very high burden of proof.

And so, one of the things I'm just wrestling with is that there's this sort of mismatch, right, between this very high burden of proof that the government has to climb to get a conviction. And then what we'd normally think of as sentencing, where you're trying to see the whole person, right? You're trying to see the person as they are, and see them as truly as you can, and as much as you can about them, which is just a different analysis. It's a different burden of proof. It's a different set of evidentiary rules. Anyway, that's more of a statement than a question, but I wonder if that has any sort of influence on you and your thoughts about acquitted conduct.

JUDGE ALVAREZ: I wasn't asked to answer that question, but I would like to jump in and answer that question.

CHAIR REEVES: Yes.

JUDGE ALVAREZ: And I will say that in that regard, the guidelines are not aligned with

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the offense elements. And because they're not aligned with the offense elements, that is where we're going to have these very thorny issues. And I think it's much beyond just saying that there's always complexities. We're not talking here about complexities. We're talking about where we are going to be creating unwarranted sentencing disparities in cases between those defendants who choose and proceed with a guilty plea, and those who choose to proceed with a trial. And there is much to be said for a defendant who steps up and accepts responsibility and says, I will plead, and I will choose which count I plead, generally, in working with the U.S. Attorney's office.

But if we go down this route, then I think the Commission has to go back and quite frankly, revisit all of the guidelines, and try to align them with the offense conduct. And I think we will have to be submitting to the jury special interrogatories, asking them to find, element by element, what conduct either failed to

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meet that element or met that element. And I don't think anything else is going to be workable.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: I wanted to piggyback off that with a question for the district judges, which is it does seem like, or would you agree, that in a world where Option 1 were passed, that this would lead or require as a practical matter, a large number of special verdict forms that are interrogatories. But secondly, I thought, Judge Alvarez, your written submission and Judge Bough's example of the section 924(c) acquittal, I assume what you were talking about was the government requesting a gun enhancement for the drug charge on which there was a conviction. But what to do, given the acquittal on a section 924(c)? That example, both of your examples, and I think, Judge Alvarez, your example was a situation where there could be enhancement for bodily injury or serious bodily injury. But the offense that was tried

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involved a mismatch, that also was a serious bodily injury requirement.

And then I think the CLC also had a good example about the Repeat and Dangerous Sex Offender Against Minors enhancement, which had an age 18 cap. Whereas the offense that was tried involved a 16-year age limit. And it just struck me from the submissions that there are all these situations where there's some differences between the offense elements and the enhancement elements. And I wonder if not only would we have a scenario where special verdict forms are the norm, but you'd also have to provide special verdict forms on items that are not part of your elements. So even if your offense at trial involves a 16-year age limit, you'd suddenly be putting something in there about 18 years. There's a different standard for a gun bump for a drug offense in terms of the nexus, versus the nexus required for a section 924(c) element. How we would be wrestling with that in the district court world pretrial as you're wrestling with

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what kind of verdict forms there are.

JUDGE ALVAREZ: And if I may jump in on that, and I think that's a perfect point to make, and to keep in mind that there are many enhancements in the guidelines that are offense-related enhancements, as opposed to defendant enhancements. In situations where if the offense itself involves certain conduct, the enhancement applied, even if that defendant that is before you for sentencing is not the defendant -- some of those are the gun-related ones. There are some provisions in which it must be the defendant himself who personally engaged in the conduct. So how are we going to deal with that when we have an acquittal, but there's no question that the conduct in question occurred?

And my sexual assault count cases, sadly, always come to mind. I had another case where the defendant admitting to engaging in sex with the alien who was being smuggled. He claimed that having just met him two hours before he raped her, that she had fallen in love with

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him, and consented to having sex with him. Again, within two hours of having met him. So, he admitted to the conduct, just claimed it was consensual. So, we have guideline enhancements that apply when it is clear that the conduct is part of the offense, but perhaps that defendant didn't engage in that conduct. And we have guidelines that apply when it is the defendant himself who engaged in the conduct. So how do we sort that out?

CHAIR REEVES: I have a question. Oh, I'm sorry.

JUDGE MILLETT: No, you go. I just wanted to follow up at some point on --

CHAIR REEVES: You can follow.

JUDGE MILLETT: -- Commissioner Murray's --

CHAIR REEVES: You can --

JUDGE MILLETT: -- Murray's things, but I do not want to interrupt.

CHAIR REEVES: No, no, you can --

JUDGE MILLETT: I used to practice,

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and you never interrupt the judge.

CHAIR REEVES: But I yield to the Circuit Court Judge.

JUDGE MILLETT: Well, thank -- well, thank you. I apologize, but I did want to get back to that. I understand your concern. I guess my first question is, with all your different truths, I don't know how many of those agree on the same truth in the courtroom, the defendant and the government and the court. But maybe it's the same. But I want to more specifically address some of these other concerns about difference between facts and elements, and I get that. But how do you prove elements with facts? That's what witnesses do. That's what's submitted. Elements are proved with facts. And so, we can't sort of just say, facts don't matter. Juries don't rule on that. That's, in fact, exactly what they're doing. And that's how they're charged. Maybe there are nuances that can be improved, but using the formulation in your bracketed language of conduct constituting

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an element of a charge in the way that juries are charged will be more workable.

On this, how difficult it's going to be, in my written testimony, I noted that there are a number of states that don't allow acquitted conduct to be used. And there's close to a dozen under their constitutions, and there's close to a dozen who have a sentencing guideline scheme that doesn't allow it to be used. So, this can be done. And it's being done in states which have a very, very, high volume of criminal cases.

And then the last thing on the issue of guilty pleas, numerous circuit courts have held that it is not a violation of sentencing guidelines or a constitution for there to be differential sentencing outcomes for those who plead guilty and those who go to trial. Mostly, it actually ends up being worse if you went to trial because you don't get the acceptance and responsibility. My only position is that it needs to run both ways. Thank you. I am so sorry for interrupting.

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CHAIR REEVES: No problem. I just have a question for Judge Alvarez. When you were speaking about your particular case, some of the readings or comments that we received talked about prosecutors withholding and not bringing certain cases or certain issues, because they cannot prove it beyond a reasonable doubt. And waiting to decide to use it as an enhancement where there's only a preponderance of the evidence that they'd have to prove. And the other part of that is we were talking about federalism and federalist, and all that. We do have dual sovereigns here. And if the state wanted to prosecute, in your example, the state of Texas wanted to prosecute, if they could prove the rape in any sort of lesser form than what the federal system might require, those executive branches and agencies are working together. And why can't they do that? So, two-prong question, if you will.

JUDGE ALVAREZ: So obviously, I am not involved in the charging decision.

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CHAIR REEVES: Yes.

JUDGE ALVAREZ: I take what comes to me, but it is true, I think, that in some instances the U.S. Attorney's Office, you will look at what they think they can prove. And if they don't think they can prove it, they won't charge it. However, the cases that I referenced involving sexual assault, often, it is not so much, or at least in my assumption, is not so much because they don't think they can prove it necessarily. But because many times these victims do not speak up initially. They are not always interviewed initially, looking towards whether there was any offense committed other than the alien smuggling. The focus when they are caught, and most of these are caught in the act, so the focus generally is, can we prove the alien smuggling charge? And so, they proceed on the alien smuggling charge, depending on how the case develops.

If those aliens in our district -- many times depositions move forward for the

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aliens. And that is sometimes when that is discovered, or sometimes because we appoint attorneys to represent the aliens who are held as material witnesses. And many times, they relay that to their counsel. So often it comes about after the case is well-developed on the smuggling charge.

And the state certainly can charge in some of these instances. Now, our local district attorney does charge. Because of their incredible volume of work, oftentimes, if they believe how the case is proceeding in the federal system and our cases proceed much faster than the state system, they will say, well, he's going to be sentenced in the federal system. We will dismiss our charges. I do not see many charges that are charged by the state. When I have a case as well on the same conduct proceed to the trial, the majority of the time, they hold off until we proceed. Once we have sentenced the defendant, often time they let their charges go.

They dismiss rather than proceed to trial or

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plea.

CHAIR REEVES: Well, thank you. Thank you all so much.

COMMISSIONER WROBLEWSKI: Mr. Chairman, can I ask a just two questions quickly? I know we're behind.

CHAIR REEVES: Let me hear from DOJ. You will --

COMMISSIONER WROBLEWSKI: Thank you. And I'll try to be brief. Judge Bough, just so you know, I love your eloquence, and I share your love for the founding documents, but your eloquence suggests that this is a very, very simple issue. And you talk about acquittals. But in every one of these cases, there's also a conviction. And sometimes the conduct underlying the conviction overlaps perfectly with the count for which the person was acquitted.

I don't know if you're familiar with *McElrath v. Georgia*, 601 U.S. 87 (Feb. 21, 2024), a case that the Supreme Court just decided just a few weeks ago. Judge Cook mentioned it in her

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testimony. Two counts, aggravated murder, felony murder. One count, the jury acquits. One count, they convict. I'm curious if you think the guideline range for the convicted count should be zero following the principle that you laid out, or if there should be consideration.

And, Judge Millett, sometimes the overlap is not perfect. So let me give you an example. In Koon v. United States, this is the case involving the beating of Rodney King, there was an acquittal at the state level, and then a conviction at the federal level. Not perfect overlap, but of course, the Supreme Court has said, as Judge Reeves points out, that there's the doctrine of dual sovereignty. And so, the federal government has the ability to bring the case consistent with the double jeopardy clause.

I'm curious, because it sounds like under your principle, if we follow it, the guideline range in that case is also zero, because there was an acquittal at the state. So, I'm just curious if you can respond to those.

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JUDGE BOUGH: I'll disagree that it's simple just because I used Founding Father language. I think it's really complicated. And we see that because lots of nations don't have these basic principles and are willing to fight through those bigger issues, and to step back and see it as is what it is. So obviously, in our case, to answer your question, Commissioner Wong, the U.S. Attorney, didn't argue for an enhancement, just wanted to talk about the gun the entire time. And so, as things for a reason for a section 3553 sentence. And so not everything is under the guidelines, as we've already heard. We calculate the guidelines, and we do section 3553.

I'm not familiar with that case. I apologize. But there are times when it perfectly aligns. And that's when we stand up and say, we're not going to consider the acquitted conduct. You're going to have whatever other criminal history you have. And as you know, in almost every one of our cases, we have the

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majority of people are criminal history three or above that show up in federal court, with or without acquitted conduct. And so, nobody's coming out of this with a criminal history category of zero, in reality, for the majority of our cases.

And when they don't align perfectly, judges have a really tough job. I mean, this sentencing is difficult, and I don't care where you're at in this perspective. And every one of the judges I know will tell you, it's the hardest part of this job. And if it ever gets easy, that's when you know you're supposed to quit. So, it's going to continue to be enormously difficult. If the conduct mirrors or it doesn't mirror, it's still a really, really tragic thing for everybody that they're in that courtroom at that point with the sentencing. Judge Millett?

JUDGE MILLETT: So, I think it's important to distinguish the two situations. Mostly what we've been talking about is a single

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jury with different verdicts and sorting that out. And conduct constituting an element of a charge for which we are acquitted should not be factored into sentencing. The sentencing guidelines, I should say. Excuse me. When you're talking about two different juries from necessarily two different sovereigns, what you really can do is sentence someone based on conduct constituting an element of a charge they were convicted of. Now, oftentimes, in the Rodney King situation, even the factual conduct may be the same, but the elements can be quite different. Civil rights charges, for examples, versus, you know, assault and battery charges. If you have a jury that has said, the gold standard of justice has been satisfied in this case, and we find this conduct satisfied the elements of that charge, you can be sentenced on that.

And so, I think there will be a difference when you've got separate juries, separate sovereign situation, because you will

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have a different jury deciding different law and applying to it. And so, will there be some optical confusion in the public? Perhaps that is a federalist system, but the test of the jury standing there and performing its role and its role being respected will still be preserved by recognizing what they found the person did do.

So, I think that's completely addresses the sort of Rodney King or the there's other situations where there's dual prosecutions in this area. Where I think where it has been most problematic is when you have one jury, and suddenly all the work they did back at trial, whether it's because they come in with all kinds of stuff they didn't bother to charge. And they can do that. I'm not opposing. That is not what I'm here for. But for many other reasons, it just looks like trial number two. And then when you throw onto that, by the way, what you were acquitted of, you're going to prison for, that is, I think, the straw that breaks the camel's back, in my view. But I wouldn't worry about the

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separate sovereign situation, because you're going to have separate juries.

CHAIR REEVES: Thank you so much. Unlike your Senate Judiciary Questionnaire, there will not be any follow-up questions.

JUDGE MILLETT: Thank you. Thank you, thank you. We're not getting any younger. Great.

CHAIR REEVES: Ms. Taibleson, you may be in luck, because some of your time may be reduced because Commissioner Wroblewski asked that last question beyond time.

Our third panel will provide us with the Executive Branch's perspective on acquitted conduct. That view will be presented by Rebecca Taibleson, who serves as an Assistant U.S. Attorney and the Appellate Chief in the U.S. Attorney's Office for the Eastern District of Wisconsin. In that role, Ms. Taibleson handles or oversees criminal and civil appeals, and also charges and tries criminal cases. Previously, she served as an assistant to the Solicitor

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General, handling Supreme Court litigation on behalf of the United States.

Ms. Taibleson, we're ready to hear from you, ma'am. Thank you so much.

MS. TAIBLESON: Thank you so much, Chairman. I'll try to talk fast, but not too fast. Taking acquitted conduct out of sentencing is an idea that has a lot of theoretical appeal.

And the Department of Justice has absolutely no interest in prosecuting or punishing people for crimes that did not happen. But we are no longer talking about the idea in general. We are here today, talking about its specific practical implementation through the guidelines. And it turns out, that implementation is very difficult because criminal statutes overlap, and because the guidelines are predicated on relevant conduct. Ultimately, we just do not think the Commission can cleanly distinguish what it's calling acquitted conduct from other relevant conduct under the guidelines. We already have a system in which judges can and do sentence

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defendants based only on what they're responsible for. And we agree with the criminal law committee that judges are best positioned to identify and weigh relevant conduct at sentencing.

When a defendant is convicted of some charges and acquitted of others, his statutory sentencing range is based only on the counts of conviction, never acquitted counts. But sometimes, the very same real-world conduct underlies both convicted and acquitted counts. In those cases, the Commission's proposals could make it hard for judges to sentence defendants for what they did do and were convicted of. That's why we agree with the Criminal Law Committee, the Probation Officers Advisory Group, and the Victims Advisory Group, that these proposals are ill-advised.

That being said, if the Commission proceeds, it should define the term acquitted conduct as clearly as possible. We appreciate the changes to improve the definition, but we

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agree with many of the commentators, including the criminal law committee, that it remains unclear and unpredictable. Under that definition, we expect litigation over what specific facts the jury found proven or unproven, and how those facts then relate to the offenses that they did convict on. Those types of findings are not something that judges do every day. To the contrary, the Supreme Court has long and very recently discouraged speculation about the basis for mixed jury verdicts. This will be especially hard in cases where the acquitted and convicted counts are related.

Let me give you an example from a real case. For me, it's very hard to think this through without concrete examples. Real case: defendant is a corrections officer. He and another corrections officer allegedly assaulted and physically beat juvenile incarcerated offenders. He's charged with conspiracy to violate constitutional rights through excessive force and substantive assault. The jury convicts

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him of conspiracy but acquits him on the substantive assaults count. Under Option 1 as the Commission has defined acquitted conduct, if there are no exceptions, especially if you use the broader underlying language to define acquitted conduct, there is really almost no conduct left here to base a sentence on. And it becomes literally impossible to imply the guidelines, right?

So, we're supposed to start at §2H1.1 (Offenses Involving Individual Rights), which provides the base offense level for these offenses. The first question under §2H1.1 is what guideline is applicable to the underlying offense, which, of course, is the assault. But he was acquitted of the assault, and that of the Commission's definition, that's off the table. We can't get past "Go" in working on the guidelines here. I want to be clear that as currently drafted, the Commission's definition, even the exceptions to it, do not fix this problem in a case like this one. We have the

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same result. The Commission's exceptions would not reach the physical beatings of these incarcerated children. They would still be called acquitted conduct, and you could still not get past "Go" in the calculation of the guidelines.

We proposed some edits that we think fix that problem, although they're not perfect. First, currently, only Option 1 has a definition with exceptions. We believe any definition needs exceptions. Without those exceptions, judges just will not be able to sensibly use the guidelines in cases where the same conduct is relevant to counts of acquittal and conviction.

Second, we've tried to refine some of the language in the definition. Acquitted conduct, like Judge Millett was saying, should be limited to conduct that constitutes an element of an acquitted count, not conduct underlying an acquitted count. "Underlying" is amorphous. I actually think this is illustrated by the example in the Federal Defender's letter at Pages 32 to

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33.

Next, the exception should focus on what the evidence at trial proved, not the totally inscrutable question of what the jury found. The exception should also exclude conduct that the defendant himself admitted to under oath. We're not talking about guilty plea cases here. So, the exception's referral to guilty plea colloquies just doesn't make much sense.

We've made some other suggestions to avoid litigation about the guidelines commentary and avoid compromising victims' rights. We recommend combining this revised definition with Option 2 for precisely the reasons that the Criminal Law Committee also recommends. While we think our edits are an improvement, they are not perfect. We, like the Commission, have not found the best way to carve out acquitted conduct from relevant conduct and leave a system that actually works in place. We support all efforts to achieve equal justice. We appreciate the Commission taking on this tricky issue. We just

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don't think these proposals are workable or wise.

Thank you.

CHAIR REEVES: Thank you.
Commissioner Gleeson?

COMMISSIONER GLEESON: Yes. And thank you so much for being here. We're really grateful.

Coming up out of the weeds for a minute, I regard this decision as way, way more about tone and attitude and signaling what our criminal justice system holds dear, than what's going on in the weeds. I went to law school because I'm not good at this stuff, but I was listening to the first witness, who said there were 286 of these cases. And if I'm right, in fiscal year 2022, that's four-tenths of 1 percent of the caseload. So, there's not a great deal of actual impact in this.

Second, you said it's hard for judges to sentence defendants for what they did in these cases where it gets difficult to decide. But I'm not sure that's right. I mean, we do have an

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advisory system. We have section 3661. And maybe you can't get past "Go" in calculating the range, but the judge is free to consider the conduct. I guess what I'm trying to say is if we err on the side of not including acquitted conduct in calculating the range in those cases where it becomes difficult, what's the big deal?

Because prosecutors can still tell judges, you can consider that. Judges can still consider it.

Judges can sentence them for what they did, and we have a system that pays more attention to the fact that there was an acquittal than it does now.

MS. TAIBLESON: Thank you. A few answers. First, at sort of the high level, rather than the weeds, we are aware the Supreme Court in Watts and Williams and Congress in sections 3661 and 3553 are, which is to say sentencing, is a holistic endeavor in which judges are entitled to and must consider the entire context of the defendant's actions, and who the defendant is, harm to the victims, et

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cetera. And that is what judges are currently doing. And we don't think there's a reason to sort of hamstring that process with these really technical and difficult-to-apply efforts to carve out so-called acquitted conduct.

As you suggested, if the guidelines range is simply impossible to calculate in these cases and is sort of de facto zero, yes, sections 3553(A) and 3661 still require the judge to consider everything that happened in the case. We fully agree with that. What that will really mean is the guidelines just become irrelevant and the guidelines just don't reflect what happened in the real world and provide no help to courts.

And given that we think the guidelines serve an important institutional role in avoiding undue variation up between judges, helping to standardize sentences, making sentences predictable to defendants and to victims and to the public, we don't want the guidelines to be irrelevant.

That being said, another option that's

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a bit simpler here to get us a little bit out of the weeds, and this could complement what the Commission is currently doing, is whichever proposal you choose, apply it to acquitted conduct that can reasonably be distinguished from the offenses of conviction. That doesn't solve all the problems here by any stretch, but it would at least allow judges who know the case to figure out, is this a case where the acquitted conduct can sensibly be carved out and set aside at sentencing? If so, then apply whatever rule the Commission selects to that carved-out conduct. If not, then proceed in a sort of rational and sensible way to consider what the jury actually convicted the defendant of doing what he really did do in the real world.

CHAIR REEVES: Thank you.
Commissioner Wong, did you have a question?
Commissioner Mate?

VICE CHAIR MATE: Thank you so much for being here today and for testifying. We appreciate it. Just following up on what you

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just said, and you kind of mentioned the difficulty in applying this definition. And it seems like the difficulty of applying this definition is actually in the exceptions to it. And so, if we were to go the direction of Option 1 and kind of shift the burdens on this a little bit for -- or not burdens, but shift the place that this is happening and recognition of the role of acquittals in our system, would it be preferable to not have those exceptions and just kind of admit this is in section 3553-land? That we're precluding acquitted conduct for purposes of the guidelines. Of course, judges can consider everything in section 3553(a). If the concern is with, we're going to be litigating these things, would that help resolve that issue?

MS. TAIBLESON: Let me give you an example where I think the Commission's exceptions might actually help, and it's a case in which you have inconsistent verdicts, sort of like McElrath. And this is a case from my district, very recent. Menominee Indian reservation,

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defendant beat a victim to death with a short-barreled shotgun. He's charged with manslaughter, assault, and brandishing a short-barreled shotgun during a crime of violence. There's no dispute. And defendant testifies under oath that he beat the victim to death with a short-barreled shotgun. He just asserts self-defense. Jury convicts of manslaughter, convicts of assault, convicts of using a firearm, but answers no to two special verdict questions: was it brandished, and was it a short-barreled shotgun?

At that point, if there are no exceptions to the Commission's definition, it's impossible to reconcile those aspects of the verdict, right? The entire conduct is beating someone to death with a short-barreled shotgun, right? But if the gun wasn't brandished and it wasn't a short-barreled shotgun, there's just nothing left to look at. And so again, we're in a situation where you just can't calculate the guidelines at all, and they become irrelevant.

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Now, with the Commission's exceptions, it could work here. The defendant admitted this conduct, although just under oath at trial, not a guilty plea colloquy. So that part of the Commission's exception doesn't work. But the other part, the court could find that the jury actually did determine that he brandished a short-barreled shotgun through its conviction on manslaughter and assault. So that exception could work here and allow the judge to apply the guidelines in a sensible way.

So, I guess what I'm saying here is, and again, I don't want to repeat myself, we want a guideline that works and that judges can actually use. And that prosecutors and defense attorneys can use when defense attorneys are saying to their client, "hey, this is what you're going to face." And if the guidelines range is just, like, zero or not applicable, then we don't think that serves anybody in the system.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: Ms. Taibleson, I

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had a question about Page 7 of the government's letter where there's the line edits suggested for Part B. And I had a question. So, this was where instead of the suggested language was determined by the court to have been established at trial beyond a reasonable doubt. I think Judge Alvarez's testimony earlier seemed to envision a scenario where she had supplemental testimony at a sentencing hearing, where she actually heard from the victim. And as the trier of fact was able to make her assessment by a preponderance of facts that were not even aired at the trial. And I wonder if that was a scenario that was intended to be excluded by this revision, or just not contemplated.

MS. TAIBLESON: I don't think this revision gets it precisely, that scenario. I'm pretty sure that's right. What this revision tries to do is avoid focusing on, as originally drafted, it said something found by the trier of fact beyond a reasonable doubt. So that requires trying to figure out what the jury specifically

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found beyond a reasonable doubt, which, as we've discussed, might require a special verdict form, special interrogatories, scrutinizing inconsistent verdicts. All of this is, we think, undesirable system-wide.

So, we are trying to avoid that by instead of refocusing the inquiry on what the judge can determine was proven at trial beyond a reasonable doubt. Those edits to exception be also attempts to carve out technical acquittals on Rule 29 motions, based on jurisdiction, statute of limitations, venue, which say nothing about factual innocence. So those are the primary motivations behind our rewrite of that particular section. I think in this scenario described by Judge Alvarez, I think by hypothesis, if the defendant had been charged with a rape and acquitted of it by a jury, then the rape would be acquitted conduct. And I don't think it would fall under either of these exceptions, even as rewritten by the government.

I'm speaking slowly, because it's

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honestly very tricky to apply these. But I think I'm pretty confident that's right, because the defendant doesn't admit the rape, and if a jury acquitted on it then the judge would have a hard time finding that it was established beyond a reasonable doubt at trial. Unless the rape was also the factual predicate for a different convicted count, right? Which is often what does happen. I know it's a very complicated answer. I'm sorry. It's a very complicated situation.

CHAIR REEVES: Okay. I think that concludes your testimony. I thought you probably get off a little easy! We will now take our first break for about 15 minutes. I ask everybody to be in their seats in about 12 or 13 minutes so that we can get started immediately. Thank you so much, Ms. Taibleson.

MS. TAIBLESON: Thank you.

CHAIR REEVES: All right. Thank you.

(Whereupon, the above-entitled matter went off the record at 11:12 a.m. and resumed at 11:27 a.m.)

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CHAIR REEVES: Welcome back. I'd like to introduce our fourth panel, which will present the Federal Public Defenders' perspective on our proposed amendment on acquitted conduct. To present that perspective, we have Michael Holley, who serves as an Assistant Federal Public Defender in the Middle District of Tennessee. He has served as a trial lawyer for eight years, and as an appellate and post-conviction lawyer for about 12 years. He is also a co-chair of the Amicus Committee for the National Association of Federal Defenders.

Mr. Holley, we're ready to hear from you whenever you are, sir. Make sure your microphone is on. Is it? Is it green? There you go. Here we go.

MR. HOLLEY: Ah. It was off for the break. Thank you, Chair Reeves, and Commissioners, for inviting me here today. And the Federal Defenders joined the many voices calling for change to acquitted conduct sentencing. Now, I became a defender about 20

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years ago, just before Blakely and Booker came out, which set up the case, the United States v. White, that Judge Cook talked about this morning, where Mr. White's sentencing range was tripled by conduct that he was acquitted for. And the Sixth Circuit declined to reign in acquitted conduct sentencing then. And so as federal defenders, we were left with a rule that is anomalous. No states follow it. The Model Penal Code rejects it. It's a rule that requires judges to consider acquitted conduct in the guideline range calculation. And that aberrational rule has made federal trials an all-or-nothing proposition.

It's sometimes affected charging practices. It's definitely affected plea negotiations, sometimes trial and sentencing strategies, and continues to undermine our client's trust in the system and in us, who bring them this bizarre news about acquitted conduct sentencing. Now, because this rule is so harmful, at the National Association of Federal Defenders we've sought Supreme Court review as

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amicus several times. And those cases are described at the beginning of our commentary in Cabrera-Rangel, Osby and McClinton, all clear cases of acquitted conduct sentences.

Now many Justices are suggesting that the Commission can and should change the rule. And our comment on the proposed change follows three principles. First, as Justice Sotomayor explained recently in the McClinton order, a verdict has special weight. And it has that special weight because the Constitution gives the jury the role of limiting the judiciary's power.

And that's why massively enhancing the sentencing range based on acquitted conduct strikes so many as unfair: defendants, jurors, the public at large and, apparently 84 percent of federal judges, according to the survey.

And only Option 1 addresses that aberrational rule. And there's also no principled reason to treat a state, local or tribal acquittal any differently than a third one. An acquittal is an acquittal, which is what

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Justice Jackson said in McElrath. An acquittal is acquittal, and courts are not to look behind it. They're not to second-guess the jury. They're not supposed to think, well, "I know the jury made a mistake. I know better than the jury." And so there should be no exception made for acquittals that are based on or thought to be based on statute of limitations, venue, jurisdiction. In fact, those rules are there to prevent convicting innocent people.

By the same token, judges should not be encouraged to upwardly depart based on acquitted conduct, because that's just enhancing the sentencing range through the back door. It is wrong, plainly, allowing judges to second-guess the jury.

Finally, we appreciate that some say that Option 1 might not be workable. In fact, they say it's not going to be workable. But, you know, two things will make it workable. One is this flexible standard about underlying conduct, and the other is the caveat for convicted

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conduct. And indeed, I believe it's easy to apply in the real-life cases we've seen, like in White, in Watts, in the cases we've presented to the Supreme Court as amicus, and the many cases in our commentary.

With respect to the acquitted charge, we think the judge will basically just look at it and say, what was the factual basis of that charge? And then the judge will exclude it. Same for the convicted counts. What's the factual basis? Well, if it's the factual basis of the convicted count, then it's going to be in. And it's really pretty much that simple. It's a simple principle that this rule sets forth.

And in application, I think it looks like this: You exclude drug quantities for acquitted drug counts. The same for fraud amounts. You exclude firearms if acquitted of a firearm count. The same if acquitted of obstruction of justice. You exclude a cross-reference to a death or a violent crime if acquitted of that crime.

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And now let's consider, there's the situation of non-elemental enhancements, like leadership and things like that. The judge looks at it and decides, does this apply to the convicted conduct or the acquitted conduct? If only to the acquitted conduct, then the judge won't apply it. It's a very, like, pragmatic approach that the rule sets out, and I think it it's what Judge Merritt did in his dissent in White. I see I'm out of time. I'm not a judge, so I'm not going over.

CHAIR REEVES: Thank you, Mr. Holley.

Any questions?

COMMISSIONER GLEESON: I have one.

Thank you for being here. Some think that the principle reason to perhaps treat state convictions differently is the dual sovereignty doctrine. They can actually be re-prosecuted for the same conduct in federal court without incurring a double jeopardy problem.

Would you agree that might be a principled reason not to embrace within Option 1

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state convictions?

MR. HOLLEY: Thank you, Your Honor. So, if I understand correctly, if the person is acquitted in state court, and then you come over here and say, well, that acquittal doesn't count because we could have re-prosecuted you. I still think the starting point needs to be that you don't count the acquittal. And I think the dual sovereignty power is all the more reason to exclude the state acquittal as the starting point because they could prosecute them again. If they think they can convict him of it, they could prosecute. So, I think that's all the more reason to --

COMMISSIONER GLEESON: I actually thought that would be your answer.

MR. HOLLEY: Okay.

COMMISSIONER GLEESON: Thank you very much.

MR. HOLLEY: Thanks for that.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: Thank you so much

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for being here and we appreciate the defenders' perspective. You said earlier, you don't count an acquittal as a starting point, which is your view. And we heard earlier, Judge Millett say acquittal kind of should be off the table. And there's a sense in which we hear these arguments.

And what I'm wrestling with is, is what we are ultimately able to accomplish here, given the section 3553(a) factors here, is this just heading towards an unsatisfying outcome for everybody? In the sense that we've been hearing about implementation problems from some of the commentators, and the answer to that is even in that scenario, which I think everyone would agree, there's a degree of absurdity depending on what the example is given. The judge can consider that at the section 3553(a) factors.

And at the end of the day, we have distinct phases of the sentencing process, the guidelines of range calculation, and then the 3553(a) factors. And I don't understand you to be saying this could be taken off the table in

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any sense in that latter phase. And I just wonder if, at the end of the day, this is important symbolism, but also practically kind of a lot of -- we're inviting some conceptual difficulties here towards really kind of the same practical world outcome.

MR. HOLLEY: Yeah. I think there's two parts to that. One is the outcome. I think it is very important for a client and for the system, what the guideline range is. We've seen the graph of the anchoring effect. I mean, it's real, and that is a big difference. And none of the states do this practice where they say, okay, well, you can count acquitted conduct to set the range. No one does that. The federal system is the outlier in that, and it looks bad and, practically, is bad for our clients, too.

So, when you're talking, for example, the CLC had their second scenario about the 13 drug counts. And if you have a defense on some of those drug counts, under the current system there's no reason to go to trial. Under Option

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1, there would be. I think people would exercise that right more. And in that scenario, someone pleads guilty and gets held responsible for all 13 counts of drugs. The government is probably familiar with this scenario, since it was written out. But there's no real unfairness there because that person did not exert their Sixth Amendment rights, all right? There's a principle line to be drawn there between uncharged or dismissed conduct and acquitted conduct.

But anyway, I think this will make a difference in practice, and it's worth doing for most symbolic reasons and practical reasons. I also don't think it's going to be all that unworkable. The judges have to figure out relevant conduct every day. They have to look at common scheme and plan, same course of conduct, reasonably foreseeable. All these principles decide how big is this universe of relevant conduct?

So, this is another standard that they're going to be applying when drawing that

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scope. And right now, the way the system works is it says, well, just ignore the fact there's an acquittal. It doesn't even matter. It's going to business as usual. As Judge Millett said, it's a mere speed bump. The jury trial, right, becomes a speed bump rather than the liberty-protecting bulwark, right? So, I think it would be an important difference.

CHAIR REEVES: VC Mate?

VICE CHAIR MATE: Thank you. Thanks so much for being here and for your written testimony as well. This is maybe, if you've had a chance to look at it, sort of question. If you haven't, it would be completely understandable. But the Department of Justice submitted in their written testimony some alternative versions of the carve-outs from the definition of acquitted conduct. And I don't know if you've had a chance to look at those, whether you have any thoughts on those versus the proposed carve-outs.

MR. HOLLEY: Yes. Yes. I've looked at those. I think their proposal is definitely

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just -- they really got the proposal. They say, for example, there's a provision. They're proposing -- let's see. I don't think I have it right here, but if the evidence at trial was beyond reasonable doubt that the defendant was guilty of this conduct. I mean, that is inviting the judge to do exactly what the case is saying not to do, which is second-guess the jury.

Now, the judge isn't even applying a lower standard of proof to justify coming at the opposite result. The judge is going in there and saying, well, I'm going to apply the same standard, and I disagree. Now, you don't necessarily know which grounds the jury relied upon, but it invites the judge completely to second-guess and not even have the defense of saying, I'm applying a lower standard of proof. So, I thought that was very problematic.

There's the provision about, the defendant agrees that the defendant admits to this under oath. I mean, I think that serves an important purpose when a defendant might plead to

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one count and go to trial on the others. I assume that's why that's there. If you take out that aspect of it being tethered to the plea hearing, then it could go to, like, testimony of suppression hearing or just maybe a trial, and it's going to chill someone's rights to testify. And also, again, it's going to be inviting the judges to second-guess the jury's conclusion.

VICE CHAIR MATE: Thank you.

CHAIR REEVES: VC Murray, and then Commissioner Wroblewski.

VICE CHAIR MURRAY: Thanks so much for being here. Your testimony has been very helpful, but I have a question about the underlying standard. I think I'm more worried about it being amorphous than you are. And part of my question is, what would count as underlying? Would the fact that the person was at the scene of the crime be underlying?

I guess I have a hypo. So, here's my hypo, is the person has been charged with conspiracy to distribute some drug and also

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distribution of the drug. And this is not part of the charged conduct, but it happens in a drug-free school zone and says that that's some sort of sentencing factor. That's not an element of the crime. The person is convicted of conspiracy and acquitted of the underlying.

Now, you could very easily argue that underlying that crime of distribution is all kinds of things, right? The fact they were wearing a blue shirt. They were in the drug-free school zone. But you can't really say that they were convicted of being in the school zone because it wasn't an element, and you're only convicted of elements.

So, I mean, I don't want to say that you're stopped, you and all of your colleagues are stopped forever from arguing this. But your answer here -- no, I'm just kidding. But --

MR. HOLLEY: Yeah.

VICE CHAIR MURRAY: -- I mean, are --

MR. HOLLEY: Yeah.

VICE CHAIR MURRAY: -- are defenders

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going to be arguing that the fact that he was in the school zone underlies the acquitted conduct?

MR. HOLLEY: In that case, I would think so. But I think this underlying standard is good because it's flexible now, because there's a mismatch between the elements and the guideline book. The guideline has all sorts of enhancements. Some are totally different than elements. Some are very similar to elements. And the judge is going to have to draw the line between what element went with the acquitted account and what conduct went with the acquitted account, and what conduct went with the convicted accounts.

And so, I think in your example, if the person is acquitted of the actual drug sale in the school zone but convicted of the conspiracy, I would guess the proof would look more like, well, the sale was in the drug-free zone, so that enhancement would go with the actual sale. And the conspiracy evidence was probably more about just the agreement to sell

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wherever.

VICE CHAIR MURRAY: So there, you're saying it would be underlying where the sale took place, where the conduct took place, even though it's not an element. What if it was flipped? What if he was convicted of the sale and acquitted of the conspiracy? They decided that the co-conspirator was an informant or something. Yeah.

MR. HOLLEY: Yeah. Well, then probably the enhancement would count, I would think.

VICE CHAIR MURRAY: Would still count?

MR. HOLLEY: I would think so, yes.

VICE CHAIR MURRAY: So, either way -- wait, sorry. Spell it out.

MR. HOLLEY: No, no, no, no, no, no.

VICE CHAIR MURRAY: Yeah.

MR. HOLLEY: If he's convicted only of the actual sale, then I think, yes, it would count because the jury's finding he went in that school zone, and he made that sale.

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VICE CHAIR MURRAY: Okay. Even though it's not an element, it would still count, like the --

MR. HOLLEY: Yes. I believe so. It's the conduct underlying the conviction. Yes.

VICE CHAIR MURRAY: Well, does the underlying standard apply to both the conviction and the acquittal? We will have written in the underlying standards of the acquittal.

MR. HOLLEY: Uh-huh.

VICE CHAIR MURRAY: But I think a conviction is still just that elements, right? Am I wrong?

MR. HOLLEY: Well, it's true that the standard is a little narrower for the convicted elements. So, it's true that it probably would not count, yes. Thank you for --

VICE CHAIR MURRAY: It's tricky. Thank you.

MR. HOLLEY: -- being on my side here on this, but yes. Yes. But no, I mean, there's a slight difference in the standards. And so

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yes, it would have to go to an element because the conviction only goes, you can only assume, as far as the elements prove, right? Yep.

CHAIR REEVES: Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you very much. I just want to again try to clarify this because you suggested in your testimony that this is pretty simple. Judges do this every day.

They determine what's relevant conduct. They look at facts. They make these kinds of determinations. And you said that they'll look and see what conduct underlies the convicted counts, and they won't count those. And they'll look at conduct that underlies the -- I'm sorry, the acquitted counts and won't count those. And they'll look at the convicted counts and they will count those.

So, is that what you're suggesting, that it's a pretty straightforward thing? That if a judge finds that conduct underlies a convicted count, then it will be counted? In

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other words, it won't be acquitted conduct that will be removed from the guideline calculation.

MR. HOLLEY: I mean, generally speaking, we're just talking about how the definition of convicted conduct is a little bit narrower, yes. Yeah.

COMMISSIONER WROBLEWSKI: Right, but that's a big difference from Option 1. I mean, Option 1 asks judges to figure out what the jury has found, and it has all kinds of other elements here. And if a judge finds that some piece of conduct underlies the convicted count, that's a much more straightforward process. Do you agree with that?

MR. HOLLEY: Is it more straightforward?

COMMISSIONER WROBLEWSKI: Yeah.

MR. HOLLEY: It may be easier to apply that way.

COMMISSIONER WROBLEWSKI: Okay. Thank you.

MR. HOLLEY: My personal view. Yeah. And, you know, in terms of those hypotheticals, I think we're the only ones who have identified

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real-life cases. And I don't think any of the real-life cases are all that hard to draw the lines on.

The Department of Justice mentioned some cases that they thought might start at an offense level of zero. I don't think that's ever the case. There's always some convicted conduct, and that convicted conduct is going to give you an offense level, even in an inconsistent verdict. An inconsistent verdict, the law is that the inconsistent verdict, the conviction will trump the acquittal. Just the basic law on that.

COMMISSIONER WONG: That would only be the case, though, if our exclusions in that overlapping inconsistent verdict scenario, if we come up with the right language to capture that, right? I think that concern with spelling out, if you have inconsistent verdicts and there is a kind of conviction, you only get the offense level for that. If that scenario falls within our exclusions, because the fear is that the

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overlap with the acquitted count would lead to offense level of zero. So, I think it's very much contingent on us striking the right balance or finding the right words for an exclusion.

MR. HOLLEY: Yes. I think as written, there's no way someone's going to end up with an offense level of zero. Under the government's conspiracy example, there's still the civil rights violation, and there's still an offense level of 12 for the agreement or whatever it is.

Even if there were no assault, there would still be an offense level for entering the agreement to violate civil rights.

So, there would still be an offense level. I don't think there's ever going to be a situation where the government is suggesting you're going to come to a situation where you just can't calculate the guideline range, but there's always going to be an offense level. There's always going to be a crime that's going to give you the base offense level.

CHAIR REEVES: Thank you. Thank you,

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Mr. Holley. We appreciate your time. Thank you so much.

MR. HOLLEY: Thank you.

CHAIR REEVES: Our fifth panel provides us with perspectives from the Commission's advisory groups on this issue. First, we have the Honorable Ralph Erickson, who serves as the United States Circuit Judge for the Eighth Circuit Court of Appeals and currently serves as chair of the Commission's Tribal Issues Advisory Group. Judge Erickson was nominated by President Trump on June 7, 2017, confirmed by the Senate on September the 28th, 2017, and received his commission October the 12th, 2017. Before his elevation to the Court of Appeals, he was a United States District Judge in the District of North Dakota.

Second, we have Susan Walsh, who serves as Second Circuit Representative for the Commission's Practitioners Advisory Group. Ms. Walsh is a partner at the law firm of Vladeck, Raskin & Clark, P.C. in New York City, and she

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serves as an adjunct professor of law at the New York Law School. And as a trial lawyer, Ms. Walsh represents individuals in employment and criminal defense cases.

Third, we have Jill Bushaw, who serves as Deputy Chief United States Probation Officer for the Northern District of Iowa and is a chair of the Commission's Probation Officers Advisory Group. She began her career with the Iowa Department of Corrections in 1998 and joined the United States Probation Office in 2003, where she has previously held positions as Sentencing Guidelines Specialist as well as Supervisor and Assistant Deputy Chief, overseeing the pre-sentence investigation unit.

And finally, we have Christopher Quasebarth, who is Staff Attorney for the Maryland Crime Victims Resource Center, Incorporated, serving crime victims in Frederick and Montgomery counties, Maryland, and is a member of the Commission's Victims Advisory Group. He previously served as Chief Deputy

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Prosecuting Attorney for Berkeley County, West Virginia.

Judge Erickson, we're ready when you are, sir, and then followed by Ms. Walsh, Bushaw, Quasebarth.

JUDGE ERICKSON: Thank you very much for the opportunity to appear here and testify on behalf of TIAG. The Tribal Issues Advisory Group comes to the table as a relatively mixed advisory group in that there's one federal judge, there's three law-trained people including a tribal judge, and then one at-large member who's law-trained. The rest of the membership is not law trained.

And one of the things that our non-law-trained members are frequently amazed at is to the extent to which acquitted conduct may be considered in the sentencing guidelines. Now, there are a couple of reasons for that, but I think one of the primary reasons is just the sort of crime that is prosecuted in Indian country. It's just different than what you see in most

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federal courts, right? Because what we're dealing with are cases that involve charges being brought under the Major Crimes Act and charges being brought under the Assimilative Crimes Act.

And these are ordinary street crimes.

The usual and customary street crimes that may range from something as unusual in federal courts as a felony DUI charge all the way up to the things that you might ordinarily see in Indian country, murders and also a death as a result of drug trafficking cases, right?

So, we have federal crimes that are prosecuted there, mostly drug offenses and sex offenses. And then we have a lot of sex offenses that are only prosecuted in Indian country because they're under the Major Crimes Act. And we have a bunch of state crimes that are being prosecuted in Indian country because of the Assimilative Crimes Act, right?

And so, what happens in the charging documents is that they will bring forth a panel plea of charges, and it's not unlike what happens

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for all those of you who have prosecuted or defended in state courts. What happens there is that there are really a number of options that really are presented to the jury. The jury acquits on some, convicts on others. It's entirely expected. And then it comes as something of a shock that the acquitted conduct comes back in as relevant conduct.

And so, the TIAG really would strongly just urge the Commission to move away from including acquitted conduct in any manner, shape, or form in the guidelines other than a policy statement that conduct is more appropriately considered under sections 3553(a) and 3661, right? In the end, the trial judge is going to be able to consider acquitted conduct as long as law remains the law and those two statutes remain on the books.

But it seems more appropriate to us that the question becomes, at least as TIAG is concerned, where do you start anchoring? If you take the acquitted conduct into consideration

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within the guidelines, you anchor higher, and then we look for variances downward under the sentencing statutes. And the TIAG feels very strongly that that's the wrong way that the judge should be looking at it. That we should anchor with the guideline calculation without taking into consideration the acquitted conduct. And then the judge believes that the acquitted conduct is necessary and is important and should drive the sentence that it comes back in under sections 3553 and 3661.

Now, I know that that would be a sea change from where we've been. I know that there are people that will say, well, that sort of undermines the purpose of the guidelines. I don't believe that it really will. I just think it really just changes where we start the discussion at when we get to the sentencing factors under the sentencing statutes.

But be that as it may, I would be remiss if I didn't note that there's been a long-standing belief in Indian country that people who

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are being convicted of what are primarily state crimes applying state criminal codes are being sentenced to longer sentences in federal courts.

And our group is probably not the greatest advocate of the guideline-sentencing regime as it exists today. I'll be happy to take your questions. Thank you very much.

CHAIR REEVES: Thank you, Judge Erickson.

Ms. Walsh?

MS. WALSH: Thank you, Judge Reeves. Thank you very much for having me. I'm grateful to be here. As the Commission knows, I'm the representative from the Practitioners Advisory Group, and we are practitioners in the courts across the country, all districts in all circuits. And we experience the guidelines, as no surprise to many of you, in many different ways as practitioners throughout this country. But our group is unanimous in opposing the use of acquitted conduct at sentencing. We've presented to this Commission before, and that remains our

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position for a number of reasons.

That said, notwithstanding our opposition to the use of it, of the options presented, we endorse Option 1. We reaffirm our position that acquitted conduct should not be considered because of several well-recognized reasons, some that have been talked about here earlier today, so I'll curtail my remarks, but some of which haven't been touched on.

Fundamentally, it's the Sixth Amendment, and the jury's verdict is inviolate. And that is the fundamental reason why the PAG opposes it across the board. It also prevents from providing prosecutors undue influence over charging decisions and sentencing hearings. It enhances public confidence through notice and transparencies and ensures actual as well as perceived fairness in the system.

As Justice Sotomayor stated in McClinton, the use of acquitted conduct raises important questions that go to the fairness and perceived fairness of the criminal justice

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system. To that end, we underscore that juries are the representatives of the community, and they are, quote, "the bulwark between the state and the accused." And because specifically, acquittals reflect the jury and therefore the communities' rejection of the government's request to punish, they should be afforded special weight.

Treating the acquittal as a nullity for sentencing purposes gives no special weight to the jury's determination. And instead, it places acquitted conduct on the same category as other sentencing considerations. As Justice Sotomayor said in McClinton, so far as the criminal justice system is concerned, the defendant has been set free or judicially discharged from an accusation and released from the charge or suspicion of guilt through an acquittal.

Fundamentally, the use of acquitted conduct at sentencing discourages people from going to trial. Why is this a bad thing? The

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vanishing trials in our federal system and across the country because of the use of acquitted conduct and other factors really undermines the fairness of the system in a number of ways.

First, without access to sworn public testimony by government officials who bring the charge, bad actors are not ferreted out in our trial courts every day. Mistakes are not ferreted out in our trial courts every day. The lack of cross-examination of accusers weakens the strength of the government's case when they do bring charges. Acquitted conduct sentencing encourages prosecutors, or at least the perception that prosecutors overcharge, withhold, or bring weaker charges with stronger charges, knowing that there's an opportunity for a second bite at the apple at sentencing, even if there's an acquittal on certain charges.

Depressing the use of a jury trial in our system also depresses civic participation in our democracy. You know, the John Adams quotes are, to those of us that practice in the wells of

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the courtrooms across the country every day, somewhat hackneyed, but not for the American public. There's truth to the lungs and heart of the American system. The lungs and the heart of the American system are jury trials and voting and depressing the rights of defendants and jury trials and reducing the number of jury trials cuts to the quick of the heart and lungs of our system.

In the synopsis, the Commission states that there are 286 -- and I think Judge Gleeson mentioned earlier that there are tons -- 286 of sentenced individuals in fiscal year 2022 were acquitted of at least one offense. This statistic could be read to say that a change in the guidelines, and would it affect a relatively few?

But the PAG sees it much differently.

We see that the real statistic is that in fiscal year 2022, nearly all sentenced individuals, 97.5 percent, were convicted through a guilty plea. And telling your client that regardless of

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whether you have a defense to five of six counts or one of two counts or regardless, you will face punishment even if you are acquitted of those counts is anathema to our system. It's anathema to the concept of the community standard, stands between the government and the accused. And it is within this Commission's power to say, we will not permit that, or we will do our best to discourage it, at least in the guidelines' context.

It very well may be against the Sixth Amendment. And I see I'm out of time, and that is for another day. And that's for another body to decide. But for certain, this Commission has the authority and should speak clearly and loudly that acquitted conduct should not be baked into the starting point of where a judge should determine the sentencings. Thank you very much.

CHAIR REEVES: Thank you, Ms. Walsh.

Ms. Bushaw?

MS. BUSHAW: Okay. Thank you, Chairman Reeves and the Commission, for the honor

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and opportunity to provide the Probation Officers' perspective on matters related to acquitted conduct. As we indicated in our written testimony, we remain unanimously opposed to the adoption of any amendment to create an acquitted conduct exception to relevant conduct.

However, if the Commission decides to adopt some form of consideration for acquitted conduct, POAG seeks to provide our analysis related to the various options.

I'd like to start off by clarifying that in taking this position, POAG does not want to give the impression that we are insensitive to those charged or give the appearance that we have a disregard for a jury's verdict when, in fact, the opposite is true. Our focus is based less on the use of acquitted conduct specifically and more on the process of relevant conduct generally. Our position is primarily embedded in the fact that our system of sentencing was purposely designed to be based upon conduct rather than the number of counts charged or

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convicted. At the sentencing stage of our process, the fact of an acquittal on one count and the dismissal on another count are equally irrelevant when determining what factors should be included as relevant conduct. Instead, the focus is on the conduct related to and underlying the counts of conviction.

Acquitted conduct comes into play only for cases where expanded relevant conduct is applied. POAG continues to maintain that acquitted conduct is the most vetted type of relevant conduct, given that the evidence was sufficient enough that the matter was taken to trial. Regardless, acquitted conduct, dismissed conduct, and uncharged conduct are equally reliable at sentencing when there is the same due process, same right to object, and same burden of proof. Further, relevant conduct is a core feature of how the United States sentencing guidelines customize the recommended range for each defendant within the statutory minimum and maximum.

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If the Commission does intend to adopt one of the proposed options, POAG remains opposed to any type of approach addressed in Option 1. POAG continues to maintain our several concerns with the workability issues and identified several hypotheticals within our written testimony. Those hypotheticals are reflective of our experience and represent actual issues the court would need to address if Option 1 were adopted.

The majority of the feedback we received favored Option 2. If Option 2 were adopted, the current processes would largely remain intact. The process would be the same when the pre-sentence report is prepared, when the parties file objections and present evidence, and when the court makes a finding on those objections. Up to that point, the process is the same. However, on a case-by-case basis, if the court determines that the acquitted conduct met the preponderant standard, yet had a disproportionate effect on the guideline range,

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the court would then have the option to depart downward to remove that conduct from consideration.

POAG believes that Option 2 would resolve some of the workability concerns, as departures involve more of a generalized finding and are less mechanical than the offense level computations. Option 2 also recognizes the role our judges play in relying on their discretion to determine if and to what extent the sentence should reflect acquitted conduct in rendering a just outcome.

Those who favored Option 3 did so because it largely tracks with POAG's ongoing position that acquitted conduct should continue to be included as relevant conduct. However, probation officers were overwhelmingly not in favor of the introduction of a clear and convincing standard into the process when the preponderant standard is the benchmark for all other guideline matters.

In closing, POAG would note the fact

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that the Commission is continuing to address this matter speaks to your message that you listen to our collective, yet opposing voices and opinions.

In reviewing the public commentary, we note it's apparent how many others also care about this issue and we acknowledge the difficult effort in striking the right balance between a system that is fair, appears fair, but also produces a just outcome that accounts for the seriousness of the offense and protects the public from the crimes of the defendant.

CHAIR REEVES: Thank you.

MS. BUSHAW: Thank you.

MR. QUASEBARTH: Good afternoon and thank you for the opportunity to address acquitted conduct on behalf of the Victim Advisory Group, VAG. Responding to the Commission's issues for comment, VAG finds that Option 1, prohibiting the use of acquitted conduct, and Option 3, raising the standard of proof beyond the preponderance of the evidence currently allowed, are plainly inconsistent with

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the broad language of 18 U.S.C. § 3661 and plainly contradict the U.S. Supreme Court's decision in Watts allowing the use of acquitted conduct at a preponderance of the evidence standard. Consequently, VAG believes that adoptions of Options 1 or 3 would be outside the Commission's authority under 28 U.S.C. § 994(b)(1).

Now, VAG does not read Watts as requiring the use of acquitted conduct, but just authorizes it. And as the Commission heard from Judge Bough today, judges exercise, at least in his experience, discretion on when to use that under the law as it is right now. Justice Scalia's concurrence in Watts points to the Commission's direction. And he said, if the Commission believes that the rules of evidence and proof established by the Constitution and laws are inadequate, it may, of course recommend changes to the Congress, citing to 28 U.S.C. § 994(w).

And Congress is acting. Since the

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Supreme Court denied cert in McClinton last year, Senate Bill 2788 and House Bill HR-55430 were introduced, each of which would bar the use of acquitted conduct evidence at sentencing.

Now, VAG does not believe that Congress should prohibit the use of acquitted conduct or that the Supreme Court should overrule Watts, since the use of acquitted conduct or prohibiting the use of acquitted conduct at sentencing undermines the sentencing judge's duty to make fully informed decisions, which decisions directly affect victims. Prohibiting or limiting the use of acquitted conduct undermines the victim's right to be heard under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, and their ability to describe the harm caused by the offender.

Crime victims are baffled and frustrated if they can't speak the truth of what happened to them. The criminal conviction requires the checking off of boxes of the statutory elements of an offense. But the actual

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offense on a victim is not so carefully tailored, and the credibility of the system to victims hinges upon their ability to speak the truth of what happened to them.

As has been mentioned here today, the Supreme Court recognizes that acquittal does not mean the harm did not occur. It only means that the government failed to meet the burden of proof beyond a reasonable doubt. At sentencing, victims can provide critical contextual information often known only to the offender and the victim, addressing how the offender executed the offense and the gravity of the impact on the victim. Limiting a victim's impact statement because some counts were acquitted, especially if the underlying facts are part of the convicted offense, denies victims the right to speak the whole truth of the harm that they suffered.

And we provided an example on Page 29 of our comments of how excluding acquitted conduct from an acquitted child sex trafficking count, tried together with a convicted child sex

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abuse material count, gives the court a false context for sentencing and denies the child victim the right to speak the whole truth of that harm.

Now, if the Commission has heard comments that clarity of a definition is going to be important. And certainly, the VAG agrees with that. The VAG recognizes the DOJ's thoughtful consideration of a definition and fully supports the proviso that would not limit the victim's ability to be heard under 18 U.S.C. § 3771.

If I may have just another moment, Option 2, providing for a downward departure, does not encounter the same inconsistency trouble that's fatal to Options 1 and 3, but the Commission should wait for Congress and the Supreme Court to act, because the Commission should be following the law from the Congress and the Supreme Court, and not leading in that regard. VAG asks the Commission to wait for Congress and wait for the Supreme Court before moving forward on these issues. Thank you very

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much.

CHAIR REEVES: Thank you, Mr. Quasebarth. Any questions? Oh, VC Murray.

VICE CHAIR MURRAY: I thank you. All of you for your testimony.

I have two quick questions for Mr. Quasebarth. The first one you sort of touched on, which is does the DOJ's caveat about the CVRA and so forth resolve your concerns? And the second one is, and I don't mean to at all, I take very seriously the victim's rights to speak in a victim impact statement, et cetera, but maybe I'm misunderstanding. Doesn't that normally occur at the section 3553(a) stage? Would even Option 1 stop them from doing that? Couldn't the guidelines be calculated and then they would still be able to speak and say what had happened, and the judge could take that into consideration when applying the section 3553(a) factors, or am I getting that wrong? Thanks.

MR. QUASEBARTH: On your first question about the proviso, I think the

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Commission and VAG hasn't had an opportunity to look at all of the comments and discuss all of the comments that came in. But I think that we would be in agreement that there is some question about the clarity of the definition that is proposed. And certainly, I reference I think was some thoughtful consideration of the DOJ as to what a definition might look like. But the Commission is going to have to go back and work on those issues.

I don't think that the proviso alone fixes those problems. I think it is a good flag.

Because otherwise, in our estimation, judges are going to say, that's not relevant, we can't hear that. And victims are going to be cut off from speaking. And that's going to be a challenge for victims because they're suffering the harm. They don't understand the little checkboxes that have to be made. They just know I've been harmed and want to convey that.

Similarly, with section 3553(a), there's a broader sense of what judges can hear,

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but if judges are going to be directed that acquitted conduct is not relevant, I think it's still going to impair the victim's ability to speak and they might be cut off by the sentencing judge for that very reason. I know Commissioner Wong has been asking questions about section 3553(a) is if the Commission decides to take some action, aren't we just talking about working with that area? If there's some clarity in that, maybe that fixes the problem, but I don't see that in the Commission's proposals right now. Thank you.

VICE CHAIR RESTREPO: My questions are really to addressed Officer Bushaw and Mr. Quasebarth. I understood Judge Erickson's suggestion or proposal is that, look, if you take acquitted conduct off the table, the judge can still consider it in all its aspects under sections 3553(a) and 3661. So, it sounds like a fairly pragmatic path forward, and I was curious as to what's wrong with that approach?

MR. QUASEBARTH: Well, I think that

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Judge Erickson was speaking of his very diverse group of people for his group.

VICE CHAIR RESTREPO: It's the same model though, in that, if you took acquitted conduct off the table, what it would do is prevent the anchoring effect that he referred to.

So, he does represent a unique group of constituents, but the concept is the same. It would just prevent anchoring based on acquitted conduct, but the judge could bake it into the equation so to speak either through sections 3553(a) or 3661.

MR. QUASEBARTH: Well, you still run into the problems as has been discussed here this morning about how that's going to be defined, how it's going to work, how you're going to work with overlapping convictions and acquittals. And our concerns continue to be that if it seems to be a broad stroke of acquitted conduct is not being allowed, that it's not going to be allowed for victims to be able to speak that way. I don't think that that gives a clear path for victims to

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be able to be heard as they're allowed to be under section 3771 by the sentencing court. It's just not direct enough, I believe.

VICE CHAIR RESTREPO: So, what's the solution? If we included language making it clear that this does not impact the victim's ability to present their testimony to the sentencing judge, would that satisfy your concerns?

MR. QUASEBARTH: Well, VAG believes that the Commission should wait for Congress and the Supreme Court.

VICE CHAIR RESTREPO: I understand --

MR. QUASEBARTH: -- the Commission wants to move forward --

VICE CHAIR RESTREPO: What would you propose as a solution, is what I'm asking you.

MR. QUASEBARTH: Certainly, the DOJ's proviso helps, but VAG, I can't speak for VAG in addressing a workable definition that the Commission can come up with at this time. I'm sorry.

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VICE CHAIR RESTREPO: All right. Fair enough. We struggled with this for two years now.

Officer Bushaw, same kind of question?

MS. BUSHAW: Yeah, and so what you're asking almost feels like why wouldn't Option 1 work? Take it out and then the court could figure it in under the section 3553(a) factors if the court wanted to?

VICE CHAIR RESTREPO: Reduced to its essence, yeah.

MS. BUSHAW: Right. I think that goes back to the court issue that a lot of what we've raised in other commentary, and it's just the workability of it because it's just not that easy to just take it out of the report when it's so intertwined with other types of relevant conduct.

But the other issue that we would bring up is if the Commission were to state acquitted conduct just should not be included in the pre-sentence report, the next --

VICE CHAIR RESTREPO: I don't think

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that's what we're saying here. You're not taking it out of the language, out of the report. You're just not factoring it into the guidelines.

MS. BUSHAW: Not scoring it, okay. So, keep it in the pre-sentence report, but don't score is the question? But --

VICE CHAIR RESTREPO: The judge is agreeing with me over there.

MS. BUSHAW: Okay. All right. So, we go back to if the position is taken that acquitted conduct should not be scored in the pre-sentence report, the next, I think, criticism or argument that we're going to hear is, well, then dismissed conduct also shouldn't apply either. We were never even convicted. That was never even taken to trial. It's less strong evidence. So, if acquitted conduct shouldn't be included, dismissed conduct should not be included, which would then lead to uncharged conduct. So, we're just taking the position, if you take out acquitted conduct, we feel like it's harder to defend the other types of relevant

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conduct. And all three of them are relevant in determining the history and characteristics of the defendant and the seriousness of the offense.

Relevant conduct I think without that information and without scoring it, the guideline range then doesn't represent the true harm. And so, we would advocate the court, or the Commission continue as they have now, but the court can then just figure that in at the section 3553(a) stage after the guidelines have been computed.

JUDGE ERICKSON: If I may just comment on that just very briefly.

CHAIR REEVES: Yes, sir.

JUDGE ERICKSON: Here's the way I see this. The information stays in the report. It's not subject to objection on the part of Counsel that really, we should pay any attention to, because it is still conduct that could be considered to the evidentiary standard, which is required under section 3553(a) and under section 3661. So it stays in. Once it's in the report,

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the government is going to make a decision as to whether or not they intend to present any additional evidence and to argue for a variance under section 3553(a), at which point the defendant is on notice and they have the right to put on whatever evidence they want to contest it, and then the judge is going to make a decision.

And as for myself, I usually started off sentencing hearings saying, I'm considering a variance for this reason or that reason, and if somebody needs more time to address those reasons, we can continue the sentencing hearing to give you a chance to marshal your evidence. Now, really, what we really ought to look at is probably amending the rule to require the judge to give notice of an upward variance or even a downward variance, just variances generally, so that the parties are aware of it, right? And that can be addressed.

But I'm not suggesting that the information isn't placed before the judge and that we don't have an evidentiary hearing to lay

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the evidence in. What I am suggesting is it all fits more neatly with our legal traditions in the sentencing statutes. Congress is free to do what they will with them. I think the Supreme Court has indicated an unwillingness to revisit Watts or reinterpret the statute at this point. And so, I think that the system, as TIAG proposes would work.

CHAIR REEVES: Commissioner Gleeson?

COMMISSIONER GLEESON: Yes. Mr. Quasebarth's comments about the proposed legislation anticipated the question that I had actually for you, Judge Erickson, and that I understood and I think you've made it clear that implicit in your view is we're limited in what we can do. We're not in charge of section 3661. We couldn't take acquitted conduct off the table if we wanted to, but Congress can. They're in charge of section 3661 and this bill prohibiting punishment of Acquitted Conduct Act of 2023 does a very succinct way of doing that.

My question is this, should we,

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assuming for argument's sake, the Commission goes with Option 1, should it say to the Congress, and this is all we can do, but the job isn't done, we recommend that you not table that legislation because we've done what we've done; you should finish the job and take it off the table entirely.

JUDGE ERICKSON: I don't believe I can speak for TIAG on that. We never discussed that, and I'd be getting out ahead of where they likely are. But speaking for myself and sort of predicting what I think they might say is, you know, reserving the right to object to my own statement later, is I think that they would think that informing Congress that they should continue to look at it and make such decisions as they deem are prudential, that they would support that.

COMMISSIONER GLEESON: That was very diplomatically put.

JUDGE ERICKSON: I hope now that everybody is still on my side back home.

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CHAIR REEVES: Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you very much.

Thank you all for being here.

Ms. Walsh, I have a quick question. As you know, in all of these cases, there are convicted counts and acquitted counts, and I've -

CHAIR REEVES: Make sure your microphone is on.

COMMISSIONER WROBLEWSKI: -- and I've asked a couple of questions before that suggests that I think the real hard thing is figuring out what's underlying the convicted counts and what's underlying the acquitted counts. Do you agree with the assistant federal public defender from Nashville who testified earlier that that process of figuring out what conduct underlies the convicted counts and what conduct underlies the acquitted counts to be relatively simple and that it's basically asking a judge to determine that

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conduct and what underlies or relates to each of the counts?

MS. WALSH: Well, in the adversarial system, I would dare to say that nothing is particularly simple and there will be litigation, there is no question. Otherwise, Commission adjourned. I'm not sure that I agree that it's a simple prospect, but I think identifying the convicted conduct is fairly straightforward. And for that reason, I think cabining the guidelines, the relevant guideline calculation under Option 1 to include only the convicted conduct is a more straightforward process. So, I don't see that it's particularly difficult. I don't see in real world scenarios, it's as complex as the hypotheticals that we can think of as academics or advisory committees or otherwise.

COMMISSIONER WROBLEWSKI: Can I take it from that, that you think it's, again, as the assistant federal public defender suggested, it is what judges do all the time and this is something for a judge to determine rather than to

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try to peek behind what the jury determined? The language in Option 1 that was published asks the judge to figure out what the trier of fact, what the jury determined. And I take it that is hard, and that what you're suggesting is for the judge to determine what are the facts and what is the conduct underlying the counts of conviction? What's the conduct underlying the counts of acquittal? And only take into consideration that conduct that underlies the counts of conviction.

Am I getting that right?

MS. WALSH: Well, the PAG has endorsed congress's proposed definition of acquitted conduct under Option 1 as the better alternative.

And we also endorse the concept that state court acquittals and tribal acquittals should be included as well. We don't see any principled reason why there should be a differential. So, we haven't endorsed the language directly in Option 1. But to be clear, of the options, that is the one that the PAG endorsed.

Judges do make decisions all of the

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time. That I will agree with and that I will endorse. I think unfortunately and nevertheless, this still plays a role in the section 3553(a) analysis. Although in the world where I practice, ideally, that wouldn't be the case. And I also think that the Commission should wholeheartedly and within its authority under 28 U.S.C. § 994(w)(3) tell the Congress to address this. But I don't think that you're inviting more complication by amending the guidelines to exclude acquitted conduct. Commissioner Wroblewski, I hope that answers your question.

CHAIR REEVES: I have a couple of questions and then I think let's close out right before lunch. It is directed, one of them I believe, is directed to Mr. Quasebarth, and the second one is you, Judge Erickson.

But you mentioned we should wait on Congress or the Supreme Court or someone. What does your group say about the Supreme Court sort of spoke when they denied cert on McClinton last year with the dissent or with the concurrent

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opinions or statements or opinions by some of the justices saying directly that the Sentencing Commission should take this up?

MR. QUASEBARTH: Well, we didn't read those statements in McClinton as saying the Sentencing Commission should take this up or provide any direction for the Commission. They certainly referenced Justice Sotomayor and Justice Kavanaugh indicated the Sentencing Commission is taking these issues up, and perhaps we will wait to see, I'm paraphrasing here, wait to see what they do. And if they don't act expediently, then we may have to take a case up.

And certainly, there were, what, four circuits, I think, citing McClinton that had those constitutional issues and they declined to take those cases because McClinton and Watts are still good right now. So, I'm certain there's going to be plenty more opportunity for those cases to be knocking on the Supreme Court's door if the Commission waits.

CHAIR REEVES: All right. And for

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you, Judge Erickson, I sit in a district where there's Indian Country, a Choctaw reservation. If the Commission continues to bless the use of acquitted conduct in sentencing, what do you think will happen to the faith in the federal courts of people who are in Indian Country?

JUDGE ERICKSON: You know, I don't think the situation can get much worse. I mean, I hate to say this, but the people in Indian Country have kind of a widespread mistrust of the federal courts. Mainly because they look at the sentences that are being handed down that are quite disparate from sentences that are handed down to white people who commit - well, non-Indian people who commit crimes in Indian Country and are prosecuted by the state courts. And so, at the end of the day, the question that the people in Indian Country ask fairly frequently of their judges is, why is my grandson going to prison for five years, and Mr. Smith's son went to prison for two years for exactly the same burglary offense? And there's not a very good

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answer for that. But I can tell you this. Taking into consideration acquitted conduct aggravates that situation.

CHAIR REEVES: Thank you. Thank you all so very much for your time and thank you for submitting your testimony and your other work into this. We certainly appreciate each one of you. We appreciate everyone who's come before us this morning. It is now for us time for us to take our lunch break. We will start up at about 1:45 p.m., I think, and we'll see everyone there. Thank you so much.

(Whereupon, the above-entitled matter went off the record at 12:33 p.m. and resumed at 1:45 p.m.)

CHAIR REEVES: Before we begin our sixth panel, of course over the break, I hope everyone enjoyed the lunch. I received a text, batches of people praising the music that is playing right now. So, I thank my video/audio team for that. I'm giving you some shout out, special shout out. Because I imagine not being

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here in person and listening to this can be tedious.

But our sixth group of panelists will provide us the victim's perspective on our proposed amendment on acquitted conduct. First, we will hear from Dr. Sharon Cooper, the founder of the MACE Foundation, an organization that supports the advancement and implementation of public health initiatives, that promote the health and wellbeing of Black, Brown, and Indigenous women and their children in the United States, and the CEO of Developmental & Forensics Pediatrics, PA, a consulting firm providing medical care, research, training, and expert witness experience in child maltreatment cases, as well as children with developmental disabilities.

Dr. Cooper holds a faculty position at the University of North Carolina Chapel Hill School of Medicine and is a forensic pediatrician for the Womack Army Medical Center at Fort Bragg, North Carolina. She served for 15 years as a

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consultant and board member for the National Center for Missing and Exploited Children.

Second, we will hear from James R. Marsh, who is a founding partner of the Marsh Law Firm in New York City and a former member of the Commission's Victims' Advisory Group. He has over 30 years of experience advocating for children, victims, and survivors of sex abuse across the country. Mr. Marsh founded the Children's Law Center in Washington, D.C., that has helped over 50,000 at risk and vulnerable children receive free legal advocacy. And he is a board chair of CHILD USA, a think tank which engages in research based public policy advocacy for children.

Dr. Cooper, we are ready to hear from you when you are.

DR. COOPER: Thank you very much. Thank you very much, Commissioner Chair Reeves.

The Adverse Child Experiences Study has endorsed the fact that over the world, when

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children have had significant types of child maltreatment, polyvictimization, sexual abuse, neglect, physical abuse, they develop a significant problem with toxic stress that will cause them to become ill over their lifespan. And this is a dynamic that is really relevant when we talk about technology-facilitated crimes against children. What we know is that the stress reaction related to child sexual abuse material, or "CSAM," what we used to call child pornography, but we do not anymore because the term pornography infers voluntary modeling, and the kinds of children who have also been victims of what used to be called juvenile prostitution until we realized that these were not prostitutes, because that's sex between consenting adults, we now call now child sexual exploitation of children, or "CSEC" crimes, have something in common. And that is that they share a polyvictimization nature of different kinds of things that are happening to them. Not only are they sexually assaulted, not only are they

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usually beaten into submission with respect to what's going on with their victimization, but they also are children who have had experiences with photography and many times computer technology as an aspect of their victimization. If they're not sold via technology, they are photographed and are used to advertise themselves for the purpose of sexual exploitation.

So medical care is extremely important for survivors of sexual exploitation. And this is particularly the case when children have been victimized by sex trafficking, by domestic minor sex trafficking. And it's very sobering that most healthcare systems are not trauma informed enough to really look carefully at the kinds of problems that these survivors have.

In criminal trials involving sex trafficking of minors, it's common, in fact routine to see online ads depicting the minor victim who is being sold as if they are selling themselves. And all attendees at the trial, which is another aspect of shaming and demeaning

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a survivor, are sensitive to the fact that this is something that needs to be advocated for by the prosecutors to avoid. In a like manner, when a survivor of online sexual exploitation with images is made aware of the extraordinary high number of convicted collectors of the victim's images of rape, subjugation, and in many cases, torture, untold harm occurs again to the survivor, causing significant elevated cortisol levels, which will be toxic in many systems in the survivor's anatomy. These types of survivors routinely have no health insurance, have not been able to traverse the obstacles for government healthcare, such as Medicaid, and are not recognized as potential -- as a potential physical time bomb for severe inflammatory autoimmune and even oncologic diseases.

Child sexual exploitation remains an out-of-control crime and youths across the United States and the world continue to be victimized. I travel in many different countries and continue to hear about how frequently this is a rising

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amount of victimization. It's the one type of crime that continues to increase exponentially. And it doesn't just have mental health outcomes.

These children end up not being able to complete school. They have significant long-term medical problems. And the nature of this type of crime pushes survivors into the shadows of non-disclosure to healthcare providers, primarily because of fearfulness of prejudicial judgment.

They're very fearful that someone would know that there are images of their sexual abuse online. So, therefore, they deny or don't disclose at all whenever they are able to go to a doctor. What we do know is that when the impact of child sexual exploitation is thought about, it's significantly greater than many other types of child maltreatment because for the survivor, there's never a point that the individual feels that there is no potential threat to them any longer. To compare sexual abuse to child sexual exploitation reveals that the former victimization usually entails one victim and one

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offender, even if the offender is continuously sexually assaulting the victim over a long period of time.

But in sexual exploitation, there's one victim and multiple offenders. This multiplicity of offense may be committed with hands-on sexual assaults against the victim. They may be abusing the child or adolescent as a voyeur or there may be child sex trafficking with or without images. The latter of which the majority of victims with whom I have worked have to have a quota of sexual encounters over a 24-hour period. Generally speaking, 10 to 12 assaults a day, seven days a week.

The challenges for these types of survivors are very significant, primarily because of lack of health insurance. Typically, incomplete secondary education, marginal training for economic independence, stigmatization, significant psychological disability, and result in poverty. Toxic levels of stress hormones dramatically increased the risk for autoimmune

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disorders, such as arthritis and chronic pain syndromes. The elevated levels of cortisol in these patients will cross, now we know, even though the maternal fetal circulation, which will result in significantly elevated risk of having a baby with a neurodevelopmental disorder.

Finally, child sexual exploitation is now recognized as another form of polyvictimization, because there are so many different ways individuals can be harmed online.

Sextortion with blackmail, familial sex trafficking by a parent who is making a child available to others, sometimes for sex, sometimes for sex with photography and videography so that you have a mixture of CSEC as well as CSAM victimization. Many other aspects of this.

Child maltreatment has already been documented to cause in fact chromosomal abnormalities that lead to erosion of the chromosomes of a child causing them to age earlier. And this will make the risk for their outcomes as far as their health is concerned

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associated with much earlier onset of senior citizen types of problems, including hypertension, and most importantly earlier onset of dementia.

Restitution is not always available for these survivors in part due to the meager means of offenders and unfortunately occasional judicial decisions to deny these survivors restitution at all. Restitution for such a denial is typically not provided for the victim or the victim -- and the -- sorry. The rationale for that denial of restitution is typically not provided to the victim, nor the victim's advocates. The victim impact of sexual exploitation from a health and wellbeing perspective is severe and results in a significantly increased risk for chronic poor health in the face of minimal employment opportunities, a permanently poor quality of life, and an increased risk for an earlier death.

Thank you for your attention.

CHAIR REEVES: Thank you, Dr. Cooper.

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Mr. Marsh?

MR. MARSH: Thank you very much for inviting me here today. And I'm always honored to appear with my friend and colleague, Sharon Cooper, who I've been doing this with her for 20 years. So, she's really an outstanding luminary in the field and I pale in comparison to all of her well-developed notes.

I think it was a Supreme Court justice that said that procedure, the things that we do here, the tabbed books that we have, I've been in these meetings five hours, you have two days and it seems tedious at best sometimes, but it actually does result in justice, especially for victims of crime. I've been doing this work for 30 years. I've really been doing the work of child pornography and online exploitation for the last 20 years. And as you'll see in my prepared statements, I stumbled -- really it wasn't very hard to find. And I like to highlight this, and Footnote 9 for the Commission, of this case of the United States v. Hayward. It's 20 years old.

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So, I'm not getting anyone in trouble in terms of who decided what, when. The Third Circuit decision. Actually, two Third Circuit decisions, that really to me exemplifies the impact of what we're talking about to here today with acquitted conduct.

This was a case where you can read it.

I also recommend reading the dissent that really talks about the impact on these really six victims of this crime, of this coach's crime, which was a sex crime. That is, I think, as Footnote 9 says, it would be very interesting to find out where acquitted conduct is implicated in the 2.5 percent of the cases that go to trial in the federal system.

So, it's actually likely to be a very small number, but I would imagine that many of those involve sex crimes and the inherent nature, especially with juvenile sex crimes, as the Hayward decision was, of really determining exactly what happened and who was a victim. Because the acquitted conduct in this case, the

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Hayward case, involved a girl who was masturbating her coach in England, along with another girl who was masturbating her coach in England. They were apparently both masturbating him together. One was acquitted and one was subject to guilty conduct. That's really what we're talking about here. And it's the rare case where we have physical evidence like we do in this one. So, it's like the easy argument for acquitted conduct because you're like, well, she had semen on her dress. She had semen on her dress. One was acquitted. One was convicted. I think the judge could consider both. The other thing about this case, though, there were three other girls that the coach was involved with, and they weren't even charged at all in terms of criminal conduct.

And the reason that this is so important, I think, to really sort of make it real, I'll use two vignettes from my own experience. My first vignette was representing a young woman who had been raped by her uncle and

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her images were recorded and shared. And that is the victim, Amy, who eventually became, plaintiff is the wrong word, but the lead individual in the Paroline case in the United States Supreme Court that I helped argue.

And we had turned the clock back from the Supreme Court to a district court in Connecticut. And I was doing this work at a time when children were not ever seen in federal court. Very few crime victims were ever seen in federal court, at least victims of, you know, non-financial crimes, the Bernie Madoffs and those people.

And so once upon a time, about 15 years ago, my client decided that she wanted to go attend a criminal sentencing. This is practically impossible for victims of child pornography as it is in the law. We're calling it CSAM now, thank you to Dr. Cooper for that, because she's implicated in dozens, if not hundreds of cases every month. But this is a case that she wanted to attend. And certainly,

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it was up to her, and I didn't pressure her. And this was something that she wanted to do herself.

When we got to the federal courthouse in, I think it was in Stamford, Connecticut. You'd think that the people there had seen a ghost when the actual victim walked into the room, right? It was really sort of a transformative experience, not only for my client, but also for the people there in the machinery of the federal justice system.

Not trying to be controversial, but here she was in the flesh, the real victim, the girl behind the images and the federal judge who was a very senior judge, very experienced, sat down in that courtroom that day, knowing that my client was in the back row, with a very wealthy man, he'd been the vice president of Pfizer. So, he was not a street criminal by any means. He had his family, his wealth, his friends, his letters of recommendation, everything that criminal defendants are entitled to in the process. Very well represented. And the first

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thing that judge said, and I doubt that it happens in many cases, not to criticize the judges, but because of this atmosphere, he said, today we're going to engage in a criminal sentencing of this defendant, but this is going to be about the victim who was in the courtroom.

And that changed the tenor of the proceeding, not only for that individual, but for my client, because for once, the victim was present, the victim was acknowledged, and the sentencing really considered that person behind the picture that was now in the room. That nameless, faceless person. And she got the affirmation from a very powerful -- you may not think you have power. We're all, you know, sit behind the desk a lot and we don't think what we do is significant, but you do have power. And you especially have power over the victims, not only the defendants. And for that proceeding, yes, he got downward departure and yes, he got full representation. I'm not sure that he got any more time based on my client's presence, but

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certainly my client was vindicated in that process, and it really helped her psychologically. And it also helped, I think, the people in the room understand that there were real victims behind these crimes.

And so, I see I have my red light, but the point I want to make today about acquitted conduct is that those victims are not in the room, 99 percent of the time, okay? And the victims read the Hayward case. Two girls were, you know, conduct that was convicted. There were three girls that we don't even hear about in the decision that he was in bed with. And then there was a fourth girl who got semen on her hands that was acquitted conduct.

So, when you're looking at these crimes, at least from a perspective of sex crimes and a lot of what Dr. Cooper was talking about, is there is acquitted conduct. Yes, there is going to be conduct that is not proven at trial, but judges have the discretion in this country to look at something like Hayward and say, this girl

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had semen on her hands and this girl had semen on her hands. I'm considering both of these people victims. I'm going to sentence the defendant for the totality of the conduct here, which also involves three girls that aren't even in the record. I mean, they're in the record, but they're not even charged conduct and we don't know what went on with them.

So that is really the point that I want to make today. And I appreciate you for tackling this issue. It's a hard issue and certainly want to respect the rights of defendants and justice to be served. But there's also the voice of the victims who are going to be adversely impacted by limiting judicial discretion to consider the totality of the circumstances.

I welcome your questions. Thank you.

CHAIR REEVES: Any questions?

Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you.

Thank you, Judge. And thank you, Dr. Cooper.

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And thank you, Mr. Marsh, for testifying.

I don't know if you've had a chance to see the submission from the Justice Department, but it included some additional language about ensuring that the rights of victims are not in any way implicated by the amendment or something like that. I don't know if you had a chance to look at it, but if you have, can you tell us if you think that would be helpful, if you have any suggested changes to that language? If you haven't looked at it, you might later and just perhaps submit something in writing, please.

MR. MARSH: Yeah, no, I haven't looked at it, but I can imagine what it says and in a positive light because Mr. Wroblewski and I have tangled on other issues, but I'm glad to see him here again today.

Here's what I think is the most important thing from a victim perspective. And again, the victims do not get a copy of the PSR, right? We don't get those documents and I know there's been a great deal of discussion when I

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was on the VAG and there's a great deal of discussion in the victim community. And of course, in the justice system on who should have access to those very personal files. And be that as it may, and that's not our discussion today, but we do not have access to those. So, a rule like this is really necessary because we don't know if we're in there or not as a practical matter.

And if you remove acquitted conduct or you sort of reverse the calculation, which is, you know, you take it out as part of determining the sentencing guidelines, but then you can put it back in, you know, before the judge or, you know, you put it in and then the judge can take it out. From a victim perspective, we don't know if we're in there or not, you know? And at least if you maintain the status quo, we know that acquitted conduct is going to be part of the guidelines. And we know that the defendants are going to argue to remove it from the guide. You know, the sentence and are going to move for

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variations and reductions. That is sort of a given. If you change the calculation and basically say, well, you know, we're going to take it out, but we can put it back in, and for clients, like my clients or victims of child pornography and online exploitation, they're not going to be in the courtroom.

And quite frankly, I don't have the time or ability to monitor, you know, 5,000 criminal sentencings from my clients across the country. And you may say, well, you know, Mr. Marsh, you're getting a little weak and a little lazy in your old age, but you know, that is the nature of the crime. I mean, that is the problem here. We don't want to be involved in 5,000 cases. That is a lot of what Sharon is talking about.

And so having the victim consideration in terms of victim impact statement, vitally important. We file them in every case. It's vitally important to have that victim voice there. Again, we're not going to be there like

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we were in Connecticut to change the atmosphere in the room. That's why I get back to the point that I originally made, that process is so incredibly important in this particular instance.

Because justice cannot come unless there is a process that ensures that the rights of the victims, many times silent, and many times in sex crimes drunk, drugs, hospitalized, incoherent, unable to even articulate what happened to them.

That's very important why we get this process right and allow an expansive consideration of the defendant's conduct. Not in a way to necessarily increase the penalties on defendants. But just so that the victim voice, whether in the PSR, added, reduced, however you get it in there, we need to be at the table. And especially in terms of sex crimes, there's a lot of reasons why we aren't at the table.

And that is the nature of the crime itself.

DR. COOPER: And if I could add to that, I evaluate many survivors of child sexual

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abuse material for the purpose of restitution. I don't know if that's going to be an updated phenomenon, but I hope that that's not going to be the type of outcome that is not necessarily mandatory. To me, these patients really do need any money that they can get because so often they're going to be permanently disabled in their lives when there are abusive images of them online.

And I just recently had a case in the middle part of the United States where the evidence was extraordinarily positive. We knew who the victim was, the victim was 14 years old, and the evidence was very well known, not just in that courtroom, but in the city and in the country and restitution was denied to that victim. And it's very hard for me to be able to explain to that particular victim why it is that she could not receive restitution when so many other victims do.

So I'm hoping it will not be hit or miss. I'm hoping it's going to be mandatory.

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CHAIR REEVES: Thank you-all for your testimony. We appreciate it.

MR. MARSH: Thank you very much.

CHAIR REEVES: Our seventh group of panelists will provide us with perspectives of formerly incarcerated people on this issue. First, we will hear from Jessie Ailsworth, who is a resident of Kansas, Mr. Ailsworth served 25 years of a 30-year sentence before he was released under our First Step Act. In June 2022, his unopposed Motion for Early Termination of His Supervised Release was granted. Since his release, he has worked as a truck driver and a construction worker.

Second, we'll hear from Allen Peithman. Mr. Peithman grew up in a family of merchants that includes jewelers who operate the oldest family-owned jewelry store in the Midwest, Elder jewelry. Since his recent release from incarceration, Mr. Peithman has worked in building renovation to support himself as he studies to obtain his commercial driver's

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license.

Mr. Ailsworth, we're ready when you are, Sir.

MR. AILSWORTH: Good afternoon, Chairman Reeves and all the Commission. Thank you for inviting me to this panel that has impacted me. For a long time, I felt the system was corrupt. The jury in my case did their job.

I was accused of being involved in a far-reaching drug conspiracy. Not knowing any better, I decided to exercise my right to trial.

The jury came to court, they sat in the courtroom for days and they listened to the prosecution present the evidence they had against me. After everything the prosecution had to say, the jury came back with not one not two, but 28 not guilty's. They had rejected most, but not all, of the charges against me. And when I heard those not guilty's, I was relieved because I really thought I had a fair trial. The jury saw the evidence for what it was. They didn't believe I've done everything I've been accused

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of, and they tried to be fair and get it right.

But when I got to sentencing, fairness went out the window. Without presenting any other evidence or calling any other witness, the government argued that the judge sentenced me as though I'd been found guilty on everything despite my not guilty's. And that shocked me.

But even more shocking was the fact that the judge agreed with them to sentence me to 30 years in prison; 25 years longer than any of my co-defendants, based on my acquitted conduct.

After I was sentenced, I was very angry with the system for a long time. I felt like my entire trial had been a sham. What was the point of having a jury just to ignore that verdict? What was the point of exercising my right just to ignore my rights? It was an ultimate betrayal. I felt that the system had not only betrayed me, but also my jury. And sentencing me based on acquitted conduct, what I heard loud and clear was that the jury verdict does not matter. I felt like I had been tricked into thinking that a

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not guilty verdict was different than a guilty verdict, when in my case it wasn't.

For a long time, my anger prevented my rehabilitation. I was so angry I wouldn't work; I wouldn't participate in any program. I figured I've been given so much more time than anyone else charging in the conspiracy, that there was no point.

But with each year it got easier. I adapted to prison life. Each prison had its own politics, so I focused on staying out of trouble and staying alive. With time, I accepted responsibility for my role that I played in my incarceration and focused less on the things outside of my control, like the acquitted conduct sentence. I began to participate in programming, focused on moving from a high to a medium from a medium to a low from a low to a camp, and eventually being reunited with my family.

And in 2019, after serving 25 years in prison, I was reunited with my family. Having faith in God and having my family support made

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all the difference in my life. I wouldn't have survived my sentence if I hadn't had them. I've always had money on my commissary. I always had someone to call. I got frequent visits even when I was far away, and I had something to look forward to when I returned home. I knew even before I was released that I was going to be successful because I had my faith, and I had my family support. When I was finally released, I was happy to be home. My family was happy to have me home. I had a job within a month. My probation officer was consistent. My family helped set me up with housing and transportation.

And I came home with the desire to live a law-abiding life.

I even put some of my programming to use when I got my CDLs, which I use for my job. The only real obstacle I faced was learning how to use technology. And honestly, I still don't know how to. I'm blessed to be supported by family and friends who really care about me. But I missed out on a lot while I was serving those

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25 years. I missed out on having kids, on getting married, or starting a business, or creating memories with my family.

I've taken full responsibility for the fact that I broke the law, that I've done wrong, but two wrongs don't make a right. Acquitted conduct sentence is wrong. A jury verdict should have meaning. A person's right to trial should be protected.

I hope that after these hearings, you will have the information you need to finally ban the use of acquitted conduct sentencing.

Thank you.

CHAIR REEVES: Thank you, Mr. Ailsworth. Mr. Peithman?

MR. PEITHMAN: Thank you. I thank the U.S. Sentencing Commission for extending me the privilege to be here and talk about my experience. Even more, I thank you for the hope this invitation has given my now 77-year-old mother.

It is our sincere wish that the

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hearing -- how acquitted conduct sentencing affected us, that it may play a role in ending this unfair practice. I was brought up believing in hard work, taught to respect law enforcement and the idea that truth and justice prevail. My mother Sharon grew up in a small town and had never been in legal trouble her entire life. By August 24th, 2015, my mother and I had been running a smoke shop for nearly nine years. We kept regular hours, paid taxes, and purchased products from U.S. vendors, many of which were made at public trade shows.

Through the course of running the business in question, we worked closely with law enforcement on many occasions. The police were always welcome, a value consistent with my upbringing. We never had any red flags or indicators that what we were doing was against the law. Not until August 25th, 2015, when armed federal agents came smashing in. Suddenly, the government was accusing us of horrible crimes that we were absolutely innocent of. We were

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facing 14 counts plus forfeitures of everything we had. Soon after, the government offered us what is known as a "cash for freedom deal." We would've had to plead guilty to several of these terrible accusations and agree to the absolute forfeitures in exchange for this to all stop.

There were two glaring problems with the offer. One, we were innocent of what they wanted us to plead guilty to. And the other, a portion of what the government looked to seize was never part of the business in question. The assets were paid for with a modest inheritance. We made a counteroffer agreeing to plead guilty to the counts that lacked the element of intent and agreed to give up all the assets tied to the business in question. The government rejected that offer.

So, we went to trial to prove our innocence and let the jury decide. We trusted in the system as we understood it to work. We would present our defense and the jury would decide. And the jury did just that. They found us not

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guilty of the majority of the counts, including all of the most serious charges. Even more exciting, the jury returned to us all of our significant assets, all of them. I remember the moment vividly. The jury had spoken, justice had prevailed, we felt exonerated. Goliath had been defeated and our faith in the system had been rewarded by an honest verdict. Finally, we could take a deep breath. The nightmare was over.

However, to our horror, we learned that is not how it works in federal court. Even though we had proven our innocence, having stood before a jury of our peers, faced judgment, and been cleared of all that we maintain our innocence of, it simply didn't matter. It didn't matter because we were sentenced to acquitted conduct.

To make matters even worse, the government seized the very same assets the jury had returned to us and has left us owing a million dollars on top of losing everything. To us, it felt like a show trial. Nothing we had

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fought so hard to prove mattered. The counts of conviction carried a collective maximum penalty of 36 months. My mother's guidelines had her well within the range of probation. She, as a true first-time offender, was given 64 months.

Me, I was given more than 120 months.

We were aghast. To this day, my mom doesn't understand how all this happened. She has had her entire retirement, her golden years, stolen from her. The consequences of trial have to apply equally in order for justice to exist. Mom got out on the CARES Act after serving nearly three years.

I've been out for a little while now and with a grateful heart, I can say that my uncle, my fiancée, and both our families have all been very supportive. I'm taking advantage of some of the programs available to recent released felons. One in particular is helping me cover the cost of getting my commercial driver's license. We have been moving on.

The most important message to come out

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of today's hearing shouldn't be the stories coming from this panel or knowing that there are souls in prison now serving time for acquitted conduct. The most important message today should be the unspoken victims of acquitted conduct. The truly innocent, like my now 15-year-old daughter. Kids who have grown up, like her, through a brief window of a daily phone call from prison, knowing that their parent is locked away for something they're innocent of. That is not the country we all grew up in and it can't be the country we want for our children. It is my sincere hope that this esteemed Commission will take the steps to end acquitted conduct sentencing. Not guilty means not guilty. Thank you.

CHAIR REEVES: Thank you, Mr. Peithman.

Any questions?

I have one, Mr. Ailsworth. You mentioned that when you went to prison, one of your goals was to stay out of trouble?

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MR. AILSWORTH: Yes, sir.

CHAIR REEVES: And stay out and staying alive, I believe is what you said?

MR. AILSWORTH: Yes.

CHAIR REEVES: And I know most of the time, whether your time that you were spent in prison was in the custody of the Bureau of Prisons, correct?

MR. AILSWORTH: Yes.

CHAIR REEVES: Okay. You mentioned staying alive and I'm just curious. We had hearings last year. We're looking at things this year with respect to things in BOP. Did you ever feel in harm's way while you were --

MR. AILSWORTH: Yes.

CHAIR REEVES: Okay.

MR. AILSWORTH: Yes. When I was Florence Penitentiary, they killed the guy in the hole. I'm sure you heard about it. They were eating his organs, and that was in the hole. So, you can imagine what goes on in the yard from time to time. You know, so you have to serve

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there.

CHAIR REEVES: What other institutions did you serve your time in, Mr. Ailsworth?

MR. AILSWORTH: Leavenworth Penitentiary, Florence Penitentiary, Lompoc, low. El Reno, medium. Texarkana, low. Seagoville, low. And Florence Camp.

CHAIR REEVES: So, you did succeed in working your way down?

MR. AILSWORTH: Yes, Sir.

CHAIR REEVES: Good for you.

Thank you both so much for being here.

And Mr. Peithman, you're still taking advantage of the programs? Is that through the probation office that you're getting?

MR. PEITHMAN: Well, there's a program in Omaha called Re-entry Program 180 or RAP 180.

And I believe they focused primarily on federal recently released, but I believe their scope may go beyond that. And it was my probation officer, Megan Davis, who's been real supportive, recommended them to me. And I'm taking advantage

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of that.

CHAIR REEVES: Well, I'll let you know, one of the other things that we're looking at is there's alternatives and other sort of programs through prison. And it's good to hear that there is one that's --

MR. PEITHMAN: Yeah.

CHAIR REEVES: -- working out in Omaha.

MR. PEITHMAN: I can tell you having a plan helps a lot.

CHAIR REEVES: Okay. Thank you. Did you have something else there?

VICE CHAIR MURRAY: Yes. Thanks so much to both of you for being here.

Mr. Peithman, how do you think you caught the attention of the sort of FBI? I mean, I think 2015 -- yeah.

MR. PEITHMAN: It's a valid question and without going down any rabbit holes --

VICE CHAIR MURRAY: Yeah.

MR. PEITHMAN: -- I think most people

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that look at my situation would agree that, you know, we were one of at the time, today there's probably three or four dozen shops like mine, but at the time we were one of about six in town. Where my shop was, we were one of three.

What separated me from the others is that I had actually gotten out of the business in 2012. I'd gotten into a little bit of trouble and just wanted to basically change direction. And I took the money that I had earned and the partial inheritance from my grandfather and I began to buy real estate. And I believe that probably made me, I think, most people look at my case. And if I hadn't had those assets, I probably wouldn't have caught the attention, but it became basically low hanging fruit.

It was mortgage free assets. And, you know, from the beginning it was clear that's what they wanted. And I understand that smoke shops are kind of a gray area. And I -- at the time we were willing to accept the consequences of the elements that didn't have the offenses that

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didn't have the element of intent. I mean, we understand that ignorance of a crime is not an excuse from a crime and we, you know, that's fine. Take all the money, take all the two buildings that the shops were in, take the cars.

But there was a small property that was paid for by something my grandfather left me, and a small house and we were like, just let us keep those and we'll plead guilty. And we were ultimately convicted of those counts that lack the element of intent. But I believe that without becoming too cynical or going down a rabbit hole, I believe that may be what caught the attention.

Thank you for your question.

CHAIR REEVES: Gentlemen, thank you-all so much for your testimony. Safe travels back to your destination.

MR. PEITHMAN: Appreciate the opportunity. Thank you.

CHAIR REEVES: Our next set of panels will provide us with testimony regarding our

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proposed amendment on simplification of the guidelines.

We've now left acquitted conduct and we're headed to simplification of our guidelines.

Our current panel will provide us with perspectives on this issue from the federal bench. First, we have the Honorable Roy Altman who serves as the United States District Judge in the Southern District of Florida and a current member of the Criminal Law Committee of the Judicial Conference of the United States.

Judge Altman was nominated by President Trump on January 23rd, 2019, confirmed by the Senate on April 4th, 2019, and received his commission on April 9th, 2019. Before joining the bench, Judge Altman served as an Assistant United States Attorney in the Southern District of Florida.

Second, we have my friend, the Honorable Robert W. Pratt who serves as a senior United States District Judge in the Southern District of Iowa. He was nominated by President

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Clinton on January the 7th, 1997, confirmed by the Senate on May 23rd, 1997, and received his commission, May 27th, 1997. He served as a Chief Judge of the Southern District of Iowa from 2006 to 2011 and assumed senior status on July 1st, 2012. Before joining the bench, Judge Pratt was a staff attorney for the Polk County, Iowa Legal Aid Society.

Judge Altman, we're ready to hear from you.

JUDGE ALTMAN: I was hoping he was going to go first. All right. Well, thank you all for having me.

CHAIR REEVES: Alphabetically.

JUDGE ALTMAN: Say again?

CHAIR REEVES: Alphabetically.

JUDGE ALTMAN: Alphabetically. All right. I thought it was by age. Well, thank you all for having me. It's nice to be here. It's a real honor and a privilege to have been called to testify.

As I said in my letter, I was as

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surprised as anybody to discover that I use these non-5K guidelines departures about as much as anybody in the country. And I was surprised because even I use them very infrequently, usually only in a couple of circumstances. One, when I think that the defendant suffers from a mental or physical disability that significantly differentiates him or her from the vast majority of other defendants that I see. And second, when the defendant's criminal history computation significantly under or over represents his actual criminal history record or her actual criminal history record.

And I do that for three reasons. One, I think it adds some transparency to the system to be able to tell the defendant in advance either in the PSI or in a notice, if I see the PSI and have concerns that I will file to tell the defendant that there's a possibility of a departure one way or the other. Second, because I think that it provides a certain structure that sometimes can be missing from section 3553.

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There are elements that need to be met to satisfy each of the departure provisions as you know, and it's not just the elements of the substantive law that must be met.

Typically, when I impose departures, I do so by a numerical adjustment of either the criminal history category or the total offense level. So, it's not just from my gut, it comes from something approaching a mathematical approximation of the actual alteration that's required.

And then, third, I think that to the extent we're always concerned about the discrepancies in sentencing for similarly situated defendants. I find that there is a little bit of fairness baked in. Not only to treating like alike over time, especially as an individual judge who's been there for five years and tries to remember what he's done four or three or two years ago.

It's easier when I can go back and remember the few cases that I've given departures

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to and compare them to the person who's asking for the departure now. But also because again, I can, for example, look at a defendant who has stage four metastatic cancer and AIDS and say, here, I have another defendant with stage four metastatic cancer and AIDS.

And I can say, again, I'm not going to pull it out of a hat and say, I'm going to give you 24 months, or whatever it is. I'm going to take your total offense level and adjust it a certain number of levels based on the maladies that you're suffering from. So, there's a structure, both horizontally to meeting the elements of the actual departure and the way I see it vertically to the number of levels that you will be adjusted by virtue of the departure provision.

So that's when I use it. That's how I use it. That's why I think it makes sense. All that being said, as I suggested, I use even those provisions very infrequently and I used the others, I think, not at all. I'm sure Kathleen

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Grilli will have looked at the data and told me that I'm not telling you the truth, but I'm not under oath. And so, I don't remember. But I will say I used them so infrequently that I don't remember.

And I do see the benefits of streamlining the process in particular for two reasons. One, I know that there are circuits in our country that have directed sentencing courts not to consider departure provisions at all. I just had lunch with Judge Chang, and I know you're deeply sorry for me about that, and he told me then in the Seventh Circuit, the circuit court has basically said to the district judges, you don't even consider sentencing departures. And so, lawyers don't file them.

In our circuit, it's totally different. You don't consider them when they're filed. That's a procedural error. So, there's a disparity in the way these are being applied countrywide. And then I think probably there are other reasons why judges don't apply them as a

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matter of practice. And I don't need to tell you why, but there's a difference in the standard on appeal.

And so, I think a lot of judges are gun-shy. And not me, obviously, evidently, but most judges are gun shy about applying departures, because if you want to try to meet the elements of a sentencing departure and you get it wrong, that's subject to de novo review on appeal. If you do the same thing under section 3553, obviously we're talking about an abuse of discretion and you're not trying to fit the facts of the case into the elements of a particular departure provision.

So, for that second reason, I think whatever you do here, the vast majority of judges will continue just to ignore departure provisions altogether. I can talk more in response to questions about what I think about the proposal, and I'm happy to do that, but I think I've probably said enough, so I'll leave it to my distinguished colleague and tell you again that

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I'm honored that you took the time to hear what I had to say.

CHAIR REEVES: Thank you, Judge Altman. Judge Pratt?

JUDGE PRATT: Chairman Reeves. First of all, thank you --

CHAIR REEVES: Second of all, turn on your mic.

JUDGE ALTMAN: Yeah, you got to press the button.

CHAIR REEVES: Your mic. There you go.

JUDGE ALTMAN: There you go.

JUDGE PRATT: Yeah, I get that. Okay.

Chairman Reeves and fellow Commissioners, thank you for asking me to come and testify. I think that it's good that we finally have a Sentencing Commission after all of these years and the policy and the research and all the aid that we district judges have gotten from the Commission over all these years is a great tribute to the staff here and to you Commissioners. And I think

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it's in keeping with what the Congress decided 40 years ago is that this is supposed to be an ongoing process and we're supposed to learn whether we call that the common law development of sentencing or whatever we call it. What you're doing here, I think, is towards the goal of getting better sentences.

And certainly, we all know what a difficult job sentencing is. And I think your work on the proposed amendment reflects the reality of what's happened and has happened since Booker and the other appellate cases have come down. And I've taken particular note of the Judicial Conference Committee on Criminal Law and the Justice Department position, and I think they make good points about perhaps slowing down.

They say that it'll breed too much litigation. Litigation is good, okay? And finding out what the courts of appeal and the Supreme Court and other district judges think is good. So, I don't think you're going too fast. And I didn't really get part of the Justice

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Department saying that eliminating step two would take away from the policy statements of the Congress in Parts H and K of the Guidelines Manual. I was around in '03 when, without any discussion from probation officers, judges, prosecutors, defense counsel, they came up with this. You can't depart in child pornography cases.

And I think that's still in Parts H or K somewhere as a policy statement. So, I think what we've done over the years is, and I know that it's too simplistic to say the facts are everything, but the facts are everything. And I think that we district judges, if you look up the definition of lodestone, it's something of attraction that pulls you to it. And I think anchoring, particularly in circuits that have the appellate presumption, we can do a better job if we get away from the idea of anchoring. And I was talking to Alan Dorhoffer of your staff, and I've worked with wonderful trainers here, and we can repeat over and over again that the guideline

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is just one of the section 3553(a) factors.

But I think we'll do a better job as judges if we try to focus on section 3553(a) and I think your new proposed Chapter Six doesn't do anything except tell us what judges across the country have done and what they've addressed. It's as unique as every other case. Every case you have, you can develop sentencing law and it's a unique experience that you have in every one of the cases. On the statistical matters, I looked at the supplemental data and I was fascinated by the chart about -- and perhaps this is Judge Altman's point as well, I think, it's 92 point some percent of the sentences of the 63,000 sentences last year, other than \$5K1 and \$5K3, only 4,000 of those cases had been impacted by the departure and even some of those were also addressed in a variance manner.

So, I think your simplification is a good thing. I think it can make a difference in the way we district judges approach things. And so, I think it reflects what's going on in the

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country as well. So, I'd be open to discuss anything that you think is appropriate.

CHAIR REEVES: Thank you, Judge Pratt.
Any questions? VC Mate?

VICE CHAIR MATE: Thank you both so much for being here and traveling to be here. And for your written comments as well. I have a question for each of you, but there's a little bit of a windup that goes with both of those.

JUDGE ALTMAN: Oh, god. I don't have a notepad.

VICE CHAIR MATE: It's not that long, but just fair warning.

To eliminate that second step in the three-step process, the way the proposed amendment goes about it, is it takes a lot of the things that were departures in Chapters Two through Five and converts them to additional considerations. And then takes a lot of what was in Chapter Five, Parts H and K, and puts them in new Chapter Six as kind of things to consider under section 3553(a). And some commenters have

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raised concerns about that, adding a gloss to 3553(a). And some commenters have suggested that we, instead of doing that, simply remove those departure provisions, the ones that are less frequently used in Chapters Two and Three and not do the lists in the proposed Chapter Six and really simplify it. So basically, just remove departures from the manual.

And so, here's where you get to your questions and maybe Judge Pratt for you first, whether doing that approach would achieve some of the benefits that you talked about. And then Judge Altman, if we were to go about it, doing it that way, whether there are certain provisions or certain that are current departures that are so important, we should think about retaining them, not as departures, but as additional considerations, if we generally want that?

JUDGE PRATT: I still think of departures in the unusual outside the heartland more proof than I have to come up with in a variance analysis. So, I don't see why I should

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have to or the defendant or the government, if the government wants an upward departure, I don't see why they have to show it's outside the heartland.

I think heartland is still a part of the analysis that you have in a variance, and I tried to say this in my testimony, that you don't have in a variance that I think is there in the departure. All you're telling us in the new Chapter Six is that you should concentrate on other considerations. And if that happens to be a consideration that's quote, outside the heartland, and maybe this isn't responsive, but we used to, it seemed to me, in the early aughts, tens, that there was fear, well, that Congress is going to come in and they're going to change this. So, give departures because that way you can put on your statement of reasons form and in your statistical reports that you're sentenced within the guidelines. That's not what's happening. And again, I'm back to why should I have a defendant, or the government have to put

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on testimony that it's unusual or outside the heartland?

Does that come close to what you're asking?

VICE CHAIR MATE: I think a little bit. I guess, and if I could focus in a little bit more on right now in the proposed amendments, everything that used to be a departure --

JUDGE PRATT: Right.

VICE CHAIR MATE: -- is recast as an additional consideration.

JUDGE PRATT: Right.

VICE CHAIR MATE: And some comments have suggested just to just remove those. You don't have to recast them, just remove them. And I was curious whether that approach serves the goals that you're talking about?

JUDGE PRATT: Yeah. I would just as soon have other considerations and eliminate the whole idea of the district judge having to find something is outside the heartland.

VICE CHAIR MATE: Thank you.

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JUDGE ALTMAN: I wasn't sure about the last point there, but I think I disagree with it.

I would say that if you're going to simplify the process, it should just all be removed for a variety of reasons, and there should be no other considerations section in Chapter Six, if I understood the question correctly. Because there are like an infinite number of things that go into the fabric of every sentencing. And for those of you who've been in the sentencing, you know that if the Commission decides to, to your question for me, highlight a few of them as being specially important, the lawyers are going to glob onto them as suggesting that they have some special meaning over and above all of the other considerations that play a role in sentencings all across America over the last, whatever it's been, 18 years.

And I think there'd be a real danger that inadvertently we'd be telling lawyers and judges that certain considerations, which I guess are implicit in section 3553 over others. So, to

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your direct question to him, which I know I'm not supposed to be answering, I would just be in favor of getting rid of all the other considerations in Chapters Two, Three, Four, Five, and Six. If you're going to simplify step 1 and step 2 by eliminating step 2 and moving straight to what's now step 3. I hope I answered your question.

VICE CHAIR MATE: Yes, you did. Thank you.

CHAIR REEVES: Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: Thank you very much. And thank you both for being here. Can I just follow up just a little bit? The Sentencing Reform Act contemplates something called policy statements. I'm not sure exactly what they mean. Sometimes we say departures and the Commission puts in parentheses policy statements. In the proposal it has new additional considerations, and those are called policy statements.

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JUDGE ALTMAN: But if you don't know exactly what they mean, I was going to ask you. Like Chapter Seven, isn't that just a policy statement?

COMMISSIONER WROBLEWSKI: Well, yes, it is. And Congress seems to contemplate that and that the Commission has some sort of role beyond the guidelines. That the guidelines are there and that there's something additional called policy statements. Those have been, as I said, labeled departures, what we're contemplating is something else. And also Congress said that in writing those policy statements, the Commission should indicate that certain considerations are generally inappropriate and then ask the Commission to decide whether other considerations are appropriate or inappropriate.

And it seems what you're saying is that we should just forget about all of that. And I understand how it's simpler for the system and simpler for the judges, but I'm curious if

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you think that I'm right, that Congress seemed to indicate that there's a role for the Commission to play in these areas that you're suggesting that we just wipe away clean.

JUDGE ALTMAN: There's certainly a role to play. Was that for me? All right, you mind if I jump in? I'd rather you answer that question, but there's certainly a role to play, I think, for the Commission. You know better than I do. For example, I think §5K2.16 (Voluntary Disclosure of Offense (Policy Statement)) is one of these scenarios where the Commission says, voluntary reporting of your crime before you're found out and before you're in danger of being found out or arrested. That's a consideration that a judge should get into. That's in there.

It seems to me though that when we come up with like a compendium of things that aren't just policy statements about how the guidelines should be interpreted, like for example, Chapter Seven. And aren't specific departure provisions, like Chapter Five, but are

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simply interpretations of the nature and severity of the offense factor under section 3553(a)(1), or the history and characteristics factor under section 3553(a)(2). And I understand that there's a fine line there and we can debate where that line is drawn.

But now we seem to be doing separate work and we seem to be almost supplanting both the congressional role and the judge's individual role in deciding what's truly important under section 3553 in any particular case. So, my fear would be that -- and I'm not suggesting because I haven't seen the briefing. I know this has been a matter of some discussion. I'm not suggesting that there would be something unconstitutional say about the Commission giving us some gloss or considerations in a new Chapter Six on what section 3553 means.

But I am saying that as a practical matter, that gloss will get a finger on the scales in courtrooms across the country in a way that neither you nor we really intend or want.

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And that's something that I would be hesitant to advocate for. I'm not sure if I answered your question.

JUDGE PRATT: I'm curious because, if you take for instance, §5H1.10 has those five factors. It's a policy statement, but we've already been told by the Congress in section 994 we cannot consider those five things. I think like the rest of them, the Part H in the case, when you have the Supreme Court saying in Spears and Kimbrough, yes, those are the positions of the Sentencing Commission, and you can take them or leave them. I think that's the law.

And so, should they stay there? Yes, because I think they're the statements of the Commission. Seemingly they're based on research and experience. And so, they're certainly helpful to judges. I'd rather have you remind me in §5H1.10 of the five things that I'm not supposed to consider. Race, sex, national origin, religious, socioeconomic conditions.

So, I don't think they're harmful in

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any way. I don't think they clog it up. But I do think after Spears and Kimbrough, I don't know if you agree with this, but I think we can take it or leave it. I think that's the law. And so that's my answer.

COMMISSIONER WONG: I am curious to what extent you think this proposal would just bring judges to where they already are anyway? Because I think we have an interest in simplification, but just not just simplification in and of itself, but simplification that would ultimately bring some kind of net good.

And I'm curious if you think, Judge Altman, you mentioned that maybe one benefit of the current regime is that there's a way to kind of quantify and structure in a way that would create some more uniformity among how judges consider particular factors. Although, of course you can't control whether other judges apply those departures. But there's at least a sense of quantification that's associated with that, that would promote some uniformity.

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Just wondering if you think this proposal ultimately simplifies in a way that changes anything for the better?

JUDGE ALTMAN: It probably does not. I think what we've seen based on what I've just told you that I use them tremendously infrequently and that Ms. Grilli told me, I'm like in the top 25 or something, which I played football at Columbia, so I've never been in the top 25. But it's not going to change a thing because for very practical reasons, which Judge Pratt and I think I have relayed, judges are just loathed to go into the miasma of departure provisions ever. And so, whether you eliminate them or not, they're just not going to be applied.

But there is something to your question on an individualized basis. Because for me, I do find some comfort in departure provisions sometimes. Because as I said, sentencing is hard. It's really hard and it weighs on you. But if you can compare to other

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departures that you've done and cases that you think are similar and you can go back, four years back, and you can look at a case that you think is similar and say, this is how many levels I gave for AIDS. This is how many levels I gave for stage-4 cancer. Then, you know, that -- I mean, and you're always going to treat different cases based on their own facts. I'm not suggesting that it would be rote, but there's a comfort in going back and seeing some structure to the sentencing process that I think implicitly in section 3553, we recognize enhances fairness. I hope that answered your question.

VICE CHAIR MATE: Doesn't that same reasoning militate in favor of having these extra factors that used to be departures that lawyers can glom onto, right? I mean, assume you make the language really precatory. So, it's very clear that the judge may consider this among other factors. There are many factors that go into the fabric of a sentencing. They don't feel bound, but these are some things they might want

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to look at that are sort of time tested that are honed by expertise over time.

Wouldn't that bring some uniformity the same way the departures do?

JUDGE ALTMAN: There's a couple of things to say about that. The first is that as I read the list of things that would go into Chapter Six, the vast majority of them, frankly don't play a role in the vast majority of sentencings around the country.

So, if we were trying to aggregate a kind of common law of sentencing to your point that we can create a compendium for that would guide judges on the kinds of things that we typically use in sentencing people, the list as, I've seen it, isn't helpful in that regard.

But second and more importantly, that even as I was suggesting, even I use those things very infrequently and the vast majority of judges use them not at all. And so, by definition, almost the things that actually matter at sentencing, the things that are salient to the

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small differences between someone who gets low end and someone who gets middle of the guideline range or whatever, are things that are not included there at all. And that I think would be minimized in a way that's maybe dangerous if there were a compendium of the things that you're proposing to include with respect in Chapter Six.

VICE CHAIR MATE: And to flesh that out. I agree with you about Chapter Six. Chapter Six is super vague, but I don't know if you've got a chance to look at this because obviously the draft amendment is like seven chapters long, but after each sort of individual crime, in Chapter Two and things, we've moved what used to be departures --

JUDGE ALTMAN: Above the line, right?

VICE CHAIR MATE: -- super specific.

JUDGE ALTMAN: Yeah.

VICE CHAIR MATE: They're like, oh, in a terrorism offense that's also causing environmental damage. Look at how many particles. They're not like Chapter Six.

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Do you feel differently about those or the same way?

JUDGE ALTMAN: I guess I had a question about, I wasn't sure whether those would be like mandatory or not, and they wouldn't. And so, I think that would create some of the same difficulties that we're already talking about. Like some of the ones that I think I've looked at are like mitigating role or I mentioned before in response to your question, sir, about the voluntary cessation. Which before had been voluntary reporting, but now includes voluntary cessation without taking the added step of actually identifying the crime for law enforcement.

I think there would be problems between district courts about whether they should be seen as mandatory, whether there should be a finger on the scale for them or not. And I think, again, if we're trying to simplify the process, they should probably, if they're merely precatory considerations, be removed.

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VICE CHAIR MATE: Is that true for you, too, Judge Pratt?

JUDGE PRATT: Yes. Yeah. The one thing I don't really understand is, and this is not the simplification amendment, but we have a system where half of the circuits have appellate presumptions, and the other don't. Talk about going against the statute and so I think maybe simplification can help that, but I think that's perhaps a broader subject than we have heard today. But I'm very bothered by the idea that you can land anywhere in the guideline and require no analysis. They said we don't have to recite every factor, and so I think maybe simplification can help on that end. But I hope, at some point, the appellate presumption is addressed.

CHAIR REEVES: Any more questions? See, Judge Altman, you did it, man.

JUDGE ALTMAN: I didn't even have to stand. Chair, thanks so much, man.

CHAIR REEVES: No. No. Thank you-all

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so very much. We appreciate you guys.

JUDGE PRATT: Well, Mr. Chairman, as long as we're talking about discretion, if I had known that a member of my court of appeals was going to be here, I would have exercised more discretion. Let me just put that way.

CHAIR REEVES: Judge Erickson is a fine guy.

Our ninth panel provides us with the executive branches perspective on this issue. Presenting that perspective is Katie Stoughton who serves as Chief of the Appellate Asset Forfeiture and Financial Litigation Division at the United States Attorney's Office for the District of South Carolina.

She coordinates appellate strategy, briefing and preparation for oral arguments for all the district's cases before the Fourth Circuit Court of Appeals. She also advises the United States Attorney Criminal Chief and Civil Chief on novel areas of law and assists in developing litigation strategy in both criminal

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and civil practice.

Ms. Stoughton, we're ready to hear from you when you are.

MS. STOUGHTON: Thank you, Chair Reeves and members of the Commission for the opportunity to testify on behalf of the Department of Justice on the Commission's proposal to simplify the sentencing process.

The Commission proposes to eliminate departures from the sentencing guidelines and create a new Chapter Six that would restrict a court's sentencing discretion under 18 U.S.C. § 3553(a). The Department supports simplification of the guidelines, but as discussed in greater detail in our letter, simplification must be done in a thoughtful, deliberative and fully researched process to ensure both its legality and its effectiveness.

We're concerned with the speed at which this proposal is moving and that it is happening without adequate consideration of the numerous legal and policy issues that it raises.

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We're especially concerned that portions of the Commission's proposal may conflict with express congressional directives and will cause confusion over a judge's authority to fashion an appropriate sentence under all of the section 3553(a) factors.

Given the scope of the amendment and its legal vulnerabilities, we agree with the Criminal Law Committee, the Tribal Issues Advisory Group, and the Victim's Advisory Group that more time is needed to research and study the amendment. And we encourage the Commission to defer consideration of the proposal until it can carefully and fully review its effects and the implicated legal issues.

First, portions of the proposal may conflict with express congressional directives and other legislative enactments. For example, the proposed amendment doesn't mention or analyze section 401(b) of the PROTECT Act, which amended the guidelines addressing departures and below guideline sentences for crimes against children

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and sexual offenses. We've also identified conflicts with respect to rules of procedure that reference departures.

Second, we're concerned that the Commission's proposed amendment will create confusion and intrude on sentencing judges' authority to fashion an appropriate sentence under section 3553(a). Since Booker, judges have enjoyed broad discretion in evaluating and accounting for the section 3553(a) factors based on the statute's requirement that the sentencing judge consider the nature and circumstances of the offense and the history and characteristics of the defendant. As the National Association of Criminal Defense Lawyers notes, Congress in section 3661 provided that no limitation shall be placed on the information concerning the background, character, and conduct of a defendant that a court may receive and consider for purposes of imposing an appropriate sentence. And the Supreme Court has recognized the wide discretion that courts have in considering

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evidence at sentencing.

The new Chapter Six mandates and limits the factors a judge may consider as part of the section 3553(a) analysis. But as the Federal Public Defenders note, the Commission cannot reduce the section 3553(a) analysis to a list. The amendment would impose new obligations on the sentencing Judge, that may exceed the Commission's authority and will sew confusion. Listing factors that a judge may consider as part of the section 3553(a) analysis also intrudes on the court's authority to determine the sentence and directly conflicts with the statute.

We agree with the defenders and with the Practitioner's Advisory Group that the proposal runs the risk of merging the guidelines' calculation process with the section 3553(a) analysis. These are serious legal questions that go to the Commission's authority and the constitutional balance that the Supreme Court reached in Booker, and they demand serious legal analysis by the Commission before effectuating

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the proposal.

Similarly, the proposed revisions are not content neutral when compared with the current guidelines manual. For example, the proposals have removed or at least de-emphasized the specifics of a defendant's prior convictions.

Those specifics, which are separate from the criminal history calculation, may suggest whether a defendant has committed similar offenses over and over again or whether he tends to use violence when committing those offenses. Those details are often critical to understanding the history and characteristics of a defendant under section 3553(a)(1). But the proposed Chapter Six doesn't appear to mention these considerations and the criminal history commentary in Chapter Four has been edited to no longer refer to such circumstances explicitly. Those sentences seem to have been removed entirely.

These proposed changes and the resulting questions will create confusion at the pretrial, plea negotiation, sentencing, and

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appellate stages. And the resulting litigation, which the criminal law committee discusses will impose additional burdens on litigants and on courts. Judges and practitioners understand the concept of departures and how they fit into the sentencing process. Case law has developed for decades to ensure that departures are handled uniformly. Although the guidelines can be tailored and adjusted to address changes in the law and other needs, such a wholesale restyling of the guidelines, particularly in such a short period of time, should not proceed without far more extensive legal and operational consideration.

Thank you again, Mr. Chairman, for the opportunity to testify and I welcome the Commission's questions.

CHAIR REEVES: Thank you. She welcomes your questions.

Go ahead, Claire. VC Murray?

VICE CHAIR MURRAY: If you were going to hang your hat or your PROTECT Act argument on

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a specific bit of text, which text is it that bothers you the most?

MS. STOUGHTON: Well, I don't know that it's necessarily a bit of text. I think that the defenders have raised a fair point about section 401(j) and the work that it's doing either to prohibit or to not prohibit the Commission from amending the guidelines' text that Congress wrote in the PROTECT Act. But we have more of a policy consideration there, which is that in the PROTECT Act, Congress made its express intent clear that it wanted to limit the use of departures and below guideline sentences for child exploitation and sexual offense crimes.

Congress has not revisited or revoked any of those policy decisions, any of those provisions.

And so, we just want to make sure that the Commission is carefully analyzing that law and considering whether or why it can set aside those statutory requirements before it moves forward.

VICE CHAIR MURRAY: But do you think

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that this proposal allows for departures in those cases? It doesn't allow for departures at all?

MS. STOUGHTON: This proposal or the PROTECT Act's language? I don't understand the question. I'm sorry.

VICE CHAIR MURRAY: Sorry. The Commission's proposal I don't think allows for any departures in these cases.

MS. STOUGHTON: Well, so in section 401(j), Congress has directed the Commission to limit the use of departures in these cases. But I don't think that eliminating departures entirely is consonant with Congress's intent there, because of course the PROTECT Act was passed at a time when the guidelines were still mandatory and departures were the only avenue to a below guideline sentence. And so, I don't think that Congress was so much concerned with departures as the mechanism, as it was allowing for below guideline sentences in those cases.

VICE CHAIR MURRAY: So, the devil's advocate would say, well, then Booker did it,

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right? It isn't this proposal. It's Booker and its progeny that makes it so any Judge can sentence below guidelines for almost any reason, right? I mean, is it really this proposal that does that?

MS. STOUGHTON: Well, again, I think that the issue is with the proposal that is perhaps intention with Congress' expressed intent, which is to carefully limit -- and I understand Booker, of course, took away or made these all advisory. But Congress' intent is to ensure that people who are convicted of crimes against children and sexual offenses are adequately punished for those offenses.

And so, if the Commission is doing anything that's sort of intention with that, such as by taking away from the guidelines, noting to judges, that they should perhaps be limiting downward departures or even considering upward departures based on specific conduct, it may be going against Congress' intent in enacting the PROTECT Act in the first place.

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VICE CHAIR MURRAY: Thanks.

COMMISSIONER GLEESON: Thank you for being here. And for your written testimony as well. You mentioned that case law has developed over the decades regarding the departure power and proponents of this simplification would say that that's true, but that ended. Those decades ended in 2005 because once Booker came along, as we've learned, that this three-step process prescribed by the manual is certainly apparently honored by Judge Altman, but not by very many others. And is that your understanding as well, that the case law surrounding departures kind of -- the brakes were put on those in 2005? I hang out in the Second Circuit and pay attention to the case law. And there hasn't been a single case that tinkers with the contours of the departure power now in almost 20 years.

Is that your experience as well in the Fourth Circuit?

MS. STOUGHTON: So, I think the data is clear that judges are relying on variances

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significantly more than they're relying on departures. And so, there's just not as much use of departures and therefore, not as much litigation regarding departures. But departures are still used in a number of cases in the source book that came out yesterday with last year's fiscal year data, I think it was over 2,700 cases that relied on non-§5K1.1 departures. And so, there are judges that are using them, judges who think that they're bringing clarity and consistency and transparency to the sentencing process.

So, while I don't dispute at all that they are much less utilized, and variances are post-Booker. They are still an important part of the sentencing process in a lot of courts.

COMMISSIONER GLEESON: Is there any appellate, the precious few government appeals we know from our data, is there any fleshing out of the case law, or is it simply a matter of your exercising your discretion as a prosecutor not to bring the appeal because something that doesn't

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satisfy the case law surrounding the contours of a departure power will just be upheld as a variance, or is there any litigation in the Fourth Circuit over this?

MS. STOUGHTON: So, we've litigated in our district going below guidelines for reasons other than substantial assistance, relying on that departure. But it's just it's not litigated very often, at least in my experience. And I'm not familiar with Fourth Circuit cases on the scope of departures, because again, they're not often utilized. I think a lot of judges, at least in our district, use the departures often as cues of when a variance would be appropriate.

But for the reasons that Judge Altman explained earlier, because at least in most circuits, the standard of review is going to be vastly different and more differential to the district court. If it's a variance then it is. If it's a departure, the court may use the departure provisions as a queue that perhaps a variance is appropriate. Does that make sense?

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COMMISSIONER GLEESON: Yes. Thank you.

CHAIR REEVES: You wowed us. Thank you for this stuff.

MS. STOUGHTON: Well, thank you for having me. I very much appreciate the opportunity and your consideration of our position.

CHAIR REEVES: Thank you.

Our tenth panel provides us with the Federal Public Defender's perspectives on this issue. Presenting that perspective is someone we know quite well, Mr. Michael Caruso, who currently serves as an Assistant Federal Public Defender in the Southern District of Florida.

Mr. Caruso is a former Federal Public Defender for that district and a former chair of the Federal and Community Defenders Sentencing Guidelines Committee. Mr. Caruso, we're ready to hear from you, sir.

MR. CARUSO: Thank you, Chairman Reeves. And thank you for inviting the defenders

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to speak on this important issue. I'm obviously here today because I have an AARP card. But seriously, I did begin my practice after Koon but before Booker, and I think that that was a very important period in my practice, and I think in the unfolding of the sentencing process in federal court. And I'm going to read the words because I think they're very important. Before I ever stepped into a courtroom, I had read Koon and was inspired by Justice Kennedy's words that, "The federal judicial tradition is for the sentencing judge in federal court to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify the crime and the punishment to ensue."

So of course, those were words on a page, written eloquently as was Justice Kennedy's style. But when I actually walked into a courtroom to defend a client, that wasn't the tradition I saw. In my district, again, in this period between Koon and Booker, I saw judges

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explain to my clients that the guidelines were a point system. You got points going up. You got points going down. I told my clients privately, the points mostly go up. They go down very little. The judge of course also explained to my client that in certain cases there could be departures from the guidelines. I explained to my clients privately, in theory, that was true. But in my district, downward departures were very, very rare and that they should expect a guideline sentence.

Now, at that time and still to this day, we had clients with powerful and heartbreaking mitigation stories, especially mental health issues, which I think have been discussed on a number of panels today. And despite our practice in the district, nevertheless, we persisted and asked for a departure on those grounds. But ultimately, the judge nearly always said no. And by the way, also couched it as a discretionary decision from which we could not appeal.

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So the matter ended there. But many judges would hear our client's stories from the clients themselves, from their lawyers, from friends and family members and then tell everyone in the courtroom that they wished that there was something that they could do, but the mandatory guidelines bound their hands or tied their hands.

And of course, Booker and Fanfan doesn't really get the publicity that Mr. Booker gets. And I think post-Booker, all the stakeholders, although we may have differences with regards to specific cases, have seen the way our federal sentencing has evolved as a healthy process. And our tradition today is much, much closer to Justice Kennedy's words in Koon than it ever has been.

And while much has changed post-Booker, many things have stayed the same. The guidelines are still in our view, overly complex, I think. I looked at this yesterday, the guidelines have actually added 50 pages of directions, post-Koon. In our view, and I know we have differences on this with other

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stakeholders, the guidelines are still unduly severe. So those parts of our process have stayed the same, but what has also stayed the same is the manual, right? And so, I know your proposal touches on some of the areas that have stayed the same, but are actually counter to our practice over the last nearly 20 years.

For example, as we point out in our comments, Chapter One is outdated. We agree with the Commission's proposal with regard to deletions Chapter One. We have suggested some additional language to insert in Chapter One, to reinforce section 3553(a)'s language and the Supreme Court's interpretation of that statute in a number of cases. We've also asked as you know, that the departures in Parts 5K2 and 5H be deleted. And I know this has come up in the prior panels about the legal authority to do that. We think that the Commission is on solid legal ground in doing that.

That being said, and I think this came up briefly in Judge Altman's presentation, we do

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think that there are four special and unusual departure provisions in the book that in our view are the result of systemic issues within the book that need to be retained. That's the downward departures and the illegal reentry guideline §4A1.3, §5C1.1, and §5G1.3, the related sentence provision. And again, we think those are do special and unusual work, and that is much needed in the courtroom each and every day.

And again, this has come up in prior panels, we do not believe that the Commissions should insert the manual into the section 3553 analysis. I think, I'm very happy to say, there's a broad consensus on this issue. Both Judges Pratt and Altman had the same view, my colleague, Ms. Stoughton, had that same view on the panel right before me.

So, I think given that very rare consensus among these three groups should definitely make this body cautious for all the reasons that were articulated today and all the reasons that are in our comments about the

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hazards of list making, elevating certain considerations or over others, perhaps being subject to shifting priorities. We don't think the Commission should insert that analysis into the book.

With regard to Ms. Stoughton's comments about, we need to slow down, this is coming much too fast, I do note that the children born to federal judges, prosecutors, defense lawyers, and probation officers in the year Booker was decided are now in college. So, I think in that perspective, we're not going too fast. We have been going too slow and I think this body needs to look very hard at conforming the book to the actual practice in federal courts. So, defenders say the time is now.

Thank you, and I welcome your questions.

CHAIR REEVES: VC Murray?

VICE CHAIR MURRAY: Thanks so much, Mr. Caruso. I'm definitely intrigued by the defender's proposal overall. One concern I have

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about it, which I would just kind of love to hear your thoughts about or just having gone through only one amendment cycle, but my experience of crafting a departure is that so much more goes into it than I would have realized. So, there's so much more crafting and compromising and debating, and it feels a little bit like we've been here for five minutes and we've --

MR. CARUSO: It's a long five minutes, though.

VICE CHAIR MURRAY: It was a very busy five minutes. But during those five minutes, we made like one or two departures and during the last decades, the Commission made a lot of departures. And it feels like almost a little hubristic for us to just say, eh, let's just throw them all out, who needs them, right? I mean, there are these apocryphal stories of these two Commissioners were best friends and then they started to work on this departure, and then now they won't talk to each other again. I mean, it's like --

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MR. CARUSO: That's sad.

VICE CHAIR MURRAY: Very sad and like lots of them. But lots of them are like very specific and go to areas of law, like how do you identify synthetic cannabinoid. They're about very specific things and I worry about just sort of like losing the expertise and wisdom and like the number of charts that go into like every departure.

MR. CARUSO: Is that a pro or con to eliminating?

VICE CHAIR MURRAY: You could sort of argue it either way, but I guess what I'm trying to say is there's a lot of like cataloging of pieces and they're not just thrown out there. And so, I don't know. I'm wondering if you think that this is a well-founded fear or throw caution to the wind and get rid of all but your favorite four.

MR. CARUSO: So, I'm not saying throw caution to the wind. What the defenders are saying, one, we don't think that it's hubristic

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at all. Because after all, I believe that the simplification process is the result of Supreme Court precedent and the actual practice of federal judges. You know, like I said, I have an AARP card. I've been around a while, and I know this Commission has talked about the feedback loop that you get from all stakeholders. And I think the feedback loop that you have received from nearly all stakeholders, is that really no one, even Judge Altman, who's in the top 25, I think his words were, he uses these tremendously rarely. So, I think the feedback loop is that we are already using a two-step process.

We need to recognize that, accept that, and reconfigure the manual in light of that reality. To your point, that departures have been a long part of the book, and they were often compromised positions between Commissioners and other stakeholders. My guess is that, if next year's book doesn't have departures, this year's book is going to be enshrined in every judge's chamber, prosecutor's office, PD's office, and

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private practitioner's office to go through if they need some help in trying to determine what or what not may be relevant to a particular guideline. But I think there's also, of course, through study and training and your reports that the Commission can do to elucidate the sentencing process that goes forward without departure. So, I think you're on solid ground and not throwing caution to the wind.

COMMISSIONER GLEESON: Judge, I have a question, if that's all right?

CHAIR REEVES: Yes.

COMMISSIONER GLEESON: Were you finished, please, VC Murray?

I think you're right. That if next year's manual doesn't have departures in it, this year's manual will be like a source of advocacy for years to come. And as you know, we wanted this to be content neutral. And that makes me wonder whether you want it both ways by retaining some of these grounds and why we shouldn't, if we do go with the ultra-simplification, which

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doesn't have lists, why if we want to be content neutral, we shouldn't relegate you to arguing from this year's book when it comes to §5G1.3 and §4A1.3 and the like?

MR. CARUSO: Yeah. So, I think that's a fair concern, Commissioner. I think and as you know, our comment strives mightily to be also outcome neutral in our suggestions. Why we have chosen these particular four, is that based on our experience, these provisions were put in the manual, again in our view, as a recognition with the exception of §5C1.1, with regard to guidelines that didn't really work correctly.

So, for example, in the illegal reentry guideline, I think this Commission has noted that using sentence length as a proxy for seriousness is not always spot on. So, we needed that type of safety valve and the same thing for the arbitrariness of when ICE picked up one of our clients in the state facility to determine whether they should face charges in federal court, and there were issues of getting credit

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for the sentence. And the same thing for criminal history and related sentences.

COMMISSIONER GLEESON: Don't you think it'll kind of come out in the wash in the practice post an amendment such as the one we're talking about?

MR. CARUSO: Well, that's the great unknown, right? With this proposal. What exactly comes out in the wash? Like what I saw in the supplemental dating briefing that the Commission released last month, was that, if you look -- and that wasn't the same fiscal year as the source book that came out yesterday, I think.

But if you look at the downward departures in the supplemental briefing from last month, I think like over half the departures came from three border districts, right? Southern Texas, New Mexico, and Southern California. If you add in the other border districts, Western District, Texas, Arizona, and Central District of California, the number is even higher. And that briefing also showed that half the departures

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were in immigration cases and drug cases.

So that seems to indicate to me, when more than half of the departures are clustered in very few districts in almost only two kinds of cases, there are systemic issues with those particular guidelines, and that's why we identify them. That being said and to Commissioner Wong's point about the net good, we think simplification is a net good even if you don't adopt our four special and unusual provisions. We think you should, but as defenders, it's always we can't let perfect be the enemy of the good.

COMMISSIONER GLEESON: Thank you, Mr. Caruso.

CHAIR REEVES: VC Mate.

VICE CHAIR MATE: Thank you so much for your testimony today. I have a, I think, smallish question. The criminal law committee raised the concern that eliminating departures risks losing the notice requirement with Rule 32 for, if we deleted that second step. Are you concerned about that second step not existing,

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there not being noticed about departures and everything happening in the context of 3553(a)?

MR. CARUSO: So, from my personal perspective, I'm not concerned. I don't believe the defenders are concerned. As I hope you could see by our briefing on this issue, when we practice, we generally leave no stone unturned. Very rarely are we surprised coming into court with an argument that we hadn't considered or vetted. So, I'm not concerned with lack of notice from a court. Ordinarily, in the cases that are highly litigated, there are dueling sentencing memos. So, we get notice in that way.

Most judges require notice if witnesses are going to be called, so we get notice in that way.

So, I am personally and, I think, on behalf of the defenders, not concerned with the notice provisions.

MS. MATE: Thank you.

CHAIR REEVES: Mr. Wroblewski?

MR. WROBLEWSKI: Thank you so much for coming, Mr. Caruso.

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MR. CARUSO: Thanks for having me.

MR. WROBLEWSKI: Just a couple of things. It strikes me that the guidelines are very sort of concrete rules and that you point out a number of places where those rules work sometimes, in some cases, and sometimes don't. And there are departure provisions that say these aren't that precise, so you might want to go up or down, and you point out criminal history. Isn't that true all through the book? So, for example, we're going to talk about loss in a little bit. There's been a lot of concerns about the imprecision of loss. And so, in §2B1.1, there are pages of upward and downward policy statement provisions to put the thumb on the scale, so to speak, and say when this happens, you might want to think about going down or you might want to think about going up.

And it seems like we have to decide do we want to stick with just the rules, or do we want to have these things called policy statements? So, a couple of questions. Number

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one, and this I asked before, do you think that Congress envisioned something called policy statements? It's all through the Sentencing Reform Act and --

MR. CARUSO: Absolutely, they did. It's in the -- right. It's in the statute.

MR. WROBLEWSKI: Right. And do you have any concerns about us just abandoning those, saying, we're not going to do that? We're just going to go with guidelines. And then, going to some of the specifics, for example in section 994(e), Congress said, the Commission shall assure that the guidelines and policy statements in recommending a term of imprisonment and so forth reflect the general inappropriateness of considering education, vocation, and anyway and so forth. Does the Commission have an obligation to have a policy statement that says that? Isn't that what Congress wanted? So, I know that's one sort of general and one more specific.

MR. CARUSO: Right. And if I wander, you might have to remind me if I'm not hitting

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both your questions. So, I think our bottom line is that, yes, because those words are used, Congress contemplated that there would be policy statements. But I don't think they at all dictated to the Commission how those policy statements would play out in the calculus. So, while I think the Commission might have the power to include this or that in a policy statement, no pun intended, as a policy matter based on our unfolding case law and our current practice, I don't think that the Commission should do that.

And again, to what Commissioner Gleeson had asked me earlier, I hope very much that the Commission doesn't believe that the defenders are sort of cherry-picking certain provisions. The guidelines are very complex, as you know. We picked out this four, where one is due to last year, and you have to deal with that.

But the other three, are in our view, systemic issues that we think should remain. But again, we're not going to die on that hill, for lack of a better phrase. I don't know if I answered both

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your questions.

MR. WROBLEWSKI: I think the first question. On the second question, do you think that the Commission can abandon section 993(e)? It says, the Commission shall assure that the policy statements -- I mean, I know you could -- if you're really hyper-technical lawyers, as we all are, you can say, well, if we don't have policy statements, you don't have to assure that there's anything in the policy statements.

But I'm curious if that's sort of your interpretation, or do you think that the Commission has this obligation to have a policy statement that says these are inappropriate as a policy matter for the Commission? It's not that it's illegal because, as you know, section 3553(a), other than five, include other things to consider.

MR. CARUSO: But I don't know how you can have a policy statement that says, a factor or circumstances inappropriate under Booker or section 3661. I don't believe you could have a

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policy statement like that. But at the end of the day, our concern is with, and different panel members have expressed this in different ways, the Commission putting their thumb on the scale with regard to individual circumstances that the judge who is in the courtroom and the parties that are litigating the case know better than anyone because they're on the ground.

CHAIR REEVES: All right.

MR. GLEESON: Can I ask a follow-up question?

CHAIR REEVES: Yes.

MR. GLEESON: Thank you.

This follows up on Commissioner Wroblewski's question and reflects my kind of idiosyncratic concern about what would the case be if we retained suggested departures, and this is in §2B1.1. There may be cases where the offense level determined under this guideline substantially understates the seriousness of the offense, a fraud offense. In such cases, an increased sentence, here called an upward

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departure, may be warranted.

Are you generally familiar with it?

MR. CARUSO: More than generally.

MR. GLEESON: And my understanding of what this simplification proposal does is the reality is the offense level doesn't need to substantially understate the seriousness of the offense. Even if it understates it only in a minor way, since Booker, a judge is authorized to increase the sentence.

Do you agree with that?

MR. CARUSO: Yeah. Of course, I do. And especially with fraud or economic crime offenses, which, as you know, are prevalent in the Southern District of Florida, there's not a prosecutor or a judge in our district who doesn't consider the seriousness of what our clients have been convicted of in fashioning a sentence. So that's a provision that would be considered every day under section 3553(a), regardless of any language in the manual.

MR. GLEESON: Thank you.

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CHAIR REEVES: Thank you, Mr. Caruso.
I appreciate your testimony.

MR. CARUSO: Thank you, Judge.

CHAIR REEVES: Ladies and gentlemen,
we're going to take an afternoon break. We
should be back here in about 15 minutes.

(Whereupon, the above-entitled matter
went off the record at 3:36 p.m. and resumed at
3:58 p.m.)

CHAIR REEVES: Ten down, two to go.
This is our eleventh panel for today. We are
here to have the perspectives from our advisory
groups on this issue. First, we have the
Honorable Ralph Erickson, who serves as the
United States Circuit Judge for the Eighth
Circuit Court of Appeals. And he currently
serves as chair of the Commission's Tribal Issues
Advisory Group. He spoke earlier to us this
morning. Judge Erickson has been a judge since
about 1994 within the state system of North
Dakota, I think, and he was appointed to the
Federal District Court in 2003 and made his way

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up to the United States Court of Appeals for the Eleventh Circuit in 2017.

Second, we have Susan Walsh, who's also been with us earlier today. She serves as our Second Circuit representative for the Commission's Practitioners Advisory Group. She's a partner at the law firm of Vladeck, Raskin & Clark, P.C., in New York City. And she serves as an adjunct professor of law at the New York Law School. And as a trial lawyer, Ms. Walsh represents individuals in employment and criminal defense cases.

Next, we'll have Joshua Luria, who serves as a supervisor and U.S. probation officer from the Middle District of Florida and is vice chair of the Commission's Probation Officers Advisory Group. He began his career in the Eastern District of New York as a United States probation officer, working in the Supervision Division in Brooklyn, New York. Mr. Luria transferred to the Middle District of Florida in Tampa and later transitioned to the Pre-sentence

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Investigative Unit where he was promoted to Sentencing Guideline Specialist and Supervisor.

And finally, on this panel, we have Mary Graw Leary, who is a professor at the Catholic University of America in Washington, D.C., and currently visiting at the University of Georgia School of Law. She serves as the Chair of the Commission's Victims Advisory Group. Professor Leary is a former assistant U.S. Attorney for the District of Columbia, a former policy consultant and Deputy Director in the Office of Legal Counsel at the National Center for Missing and Exploited Children, and the former director of the National Center for the Prosecution of Child Abuse.

Judge Erickson, we're ready to hear from you when you are.

MR. ERICKSON: Thank you, Chairman and Commissioners. I want to start off by saying that the TIAG is generally in support of the simplification of the three-step process, and we generally support the idea of conforming the book

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to look more like what judges are actually doing on the ground. But we urge that the Commission move more slowly and that we push final determination in this area to the next amendment cycle. And the reason for it, to us, is that, in Indian country, we confront a number of unusual things. Like, if you look at the commentary that's in §4A1.3, we set forth a series of factors that you are to consider, if you're a United States district judge, when you are deciding whether or not to score a tribal court history, okay?

Now, those factors have to find a home somewhere within the guidelines, we believe. You know, we spent ten years kind of fighting over that particular issue, trying to get that position into the book. And our reason for it is really, life is complicated when we look at what do Tribal court judgments look like. So, whenever you say, let's count tribal court judgments. Well, hold on, wait a minute, folks.

There are 574 federally recognized Tribes, in

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the United States. There are 400-plus different operating judicial systems in the United States.

They do not all look the same. Some of them are very traditional, Western-style courts in which everyone's law-trained and they look very much like the highest functioning state court. Some are very traditional courts where they are operating using very traditional Tribal practices. They may have sentencing circles. They may have sweats that they work. They have all sorts of restorative justice models, all of which I think are very important for us to study and learn about because I think we could benefit from incorporating some of those practices into our own practices.

But for us to say wholesale we're just going to take whatever that conviction is and just treat them all the same? It's just not appropriate because we've got zebras and antelopes and oranges and apples. And it's complex.

I will tell you this as well. There

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are problems in Indian Country sentencing that are being driven by resources. Now, if you think about it, Tribes may be very small. The smallest recognized federal Tribe in the United States has 19 enrolled members, right? Very commonly, you'll have a Tribe on a reservation with a population of less than 10,000 people. They're a sovereign nation. They're trying to operate their own government, their own judicial system, but they don't have resources. And so, quite commonly in the Dakotas and Montana and parts of Arizona and New Mexico, juvenile offenders are convicted of felonies so that they can access treatment facilities and acquire federal funding for that. Okay?

And so, you've got to be the judge who knows that, in your system, we're convicting people, oftentimes both adults, young adults, and juveniles, to access systems that we can't otherwise operate on the reservation, right? There's no way for them to just move them just into the state systems. And so, they have to

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find a way to access such federal funding as exists out there, right? And so, that complicates our system of justice in Indian Country.

And the reason why we want more time is we would like the opportunity to appoint a subcommittee of our group and really just go through the book provision by provision, knowing exactly what it is. And I know that there's still re-drafting and a lot of continuing thought on this particular draft, but we'd like to go through it piece by piece to make sure we haven't missed something that might have an unforeseen consequence in Indian country. Thank you.

CHAIR REEVES: Thank you so much, Judge Erickson.

Ms. Walsh?

MS. WALSH: Thank you very much, Judge. On behalf of the PAG, thank you again for your time this afternoon. The Practitioners Advisory Group comment on each of the individual points in the simplification process, but we do

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endorse simplification, to put it quite simply. There's no question that it's impossible to find a guideline that fits every conceivable wrinkle in every case. We also think it's unworkable, and we commend the Commission's efforts at simplification, quite frankly. As practitioners that have been doing this, most of us. For as long as the guidelines have been around, if not longer. Simplification is particularly due, and it's due now in our estimation. We've had 18 years at least, plus some, since Booker, of extraordinary statistical analysis and data collection by the Commission and its staff, and there is enough information available for the Commission to make some simplification moves now.

In particular, the cabined-in departure policies reflected in Chapter Five that run counter to some of the statutory obligations and case-specific factors that impose a sentence sufficient but not greater than necessary is what our comments are aimed towards. This is the area that's ripe for simplification.

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Notwithstanding our issues of commonality, we don't support the proposal to simplify the three-step process by reclassifying departures as factors that may be relevant to the statutory analysis under section 3553(a). The PAG agrees with Judge Altman's comments earlier, with the defenders, and, in large measure, also, with some representatives from the Department of Justice that this is far from simplifying. It confuses it by conflating the guideline calculation with the separate and distinct section 3553(a) analysis. And it also, perhaps inadvertently, elevates certain areas within the guidelines that are not meant to be elevated, by listing them.

We think, also, that that proposal ignores some of the empirical data that guidelines departure divisions are just not ordinarily found and to be relevant in individual cases. We believe that any effort to identify and list only certain factors inherently risks elevating those considerations. We agree, as are

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laid out in our written remarks, about deleting Chapter One. But we recommend that because of the historical analysis that we find is no longer appropriate in the post-Booker world and in modern sentencing practice, beyond the proposed changes to Chapter One. The PAG considers that the proposed changes -- that reclassifying the departure grounds -- forgive me. I'm rushing, given the hour. Reclassifying the departure grounds that may be relevant to the court's determination in a new chapter is something that we just simply cannot support.

Probably because the departure provisions have developed over time and their disjointed provenance, these provisions are not neutral. And instead, our findings show that they skew very heavily towards consideration of aggravating circumstances. The PAG's analysis shows that there are approximately 182 departure provisions set forth in the first five chapters.

I say approximately because some of them have subparts. We wanted to be careful in how we

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discuss the data, particularly with this Commission. But we count up approximately 182. Of these, 122, fully two-thirds of them, are upward departure provisions. Only approximately 16 percent are downward departure provisions. The remaining 17 authorize both, either upward or downward.

In marked contrast to the manual's emphasis on upward departures, courts do not find any reason to depart or vary upward in the vast majority of the cases. As our colleagues have testified here today, courts aren't doing that. Our proposal, after a five-year review, shows that the statistics show upward departures, as percentage of total cases, have ranged from 0.4 percent at the low to 0.6 percent at the high. Upward variances are 1.8 to 2.3 percent of the total cases. In no year did the percentage of defendants receiving an upward departure adjustment in the form of either a departure or a variance exceeds 2.9 percent.

By contrast, during the past five

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years, between 46 and 55 percent of defendants receive some sort of downward departure or variance. Even when you take out the \$5K1.1 and \$5K government-sponsored departures, between 19 and 23 percent of defendants, more than one in five, receive a non-government sponsored departure. The vast majority of federal judges believe the guidelines to be too harsh. That's what the statistics show. Upward departures are vanishingly rare and applied in fewer than half a percent of all the cases that we've seen in sentencing. Yet, fully two-thirds of the departure provisions in the guidelines provide for an upward departure.

For this reason alone, the PAG cannot endorse the current proposal. There's no empirical reason for the guidelines to call out these specific considerations, above others, as potentially relevant to the section 3553(a) analysis, given that they are skewed towards upward departures. Further, any attempt to list some of the infinite possibilities risks

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elevating these listed factors above all others.

We submit that the streamlined simplification approach, as Commissioner Mate stated earlier, is to do away with the departures. Our proposal is to delete the departure provisions in Chapters Two, Three, Four, and Five.

And should the Commission consider that it should move departures into a Chapter Six or an additional chapter for consideration under section 3353(a), only use the departures that have been used by the courts in the last five years. Why are we elevating departure provisions that have not been applied by the courts in any capacity in the past ten years? Such an approach would serve the purpose of streamlining and simplifying it. And most importantly, it would be reflexive of what's really happening in the courtrooms and what the experiments of the courtrooms has been showing for the past close to 20 years. It's not Draconian to delete these provisions as it is to maintain or elevate ones that aren't actually being used or applied by our

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courts for over a decade. Thank you very much for your time.

CHAIR REEVES: Thank you, Ms. Walsh.
Mr. Luria?

MR. LURIA: Thank you to the Commission for the opportunity to provide POAG's perspective on the proposed amendments related to the simplification of the three-step method. Many who work in the federal system, from judges to attorneys to probation officers, weren't in their current roles prior to Booker in 2005. Those who were around prior to that time focused on departures because they were the only avenue to impose a sentence outside of the guideline range and were reserved for cases that were outside of the heartland. Departures were part of the analysis in every case. After the case law had fully evolved after Booker, the relevance of departures decreased as the relevance of the section 3553(a) factors increased. Those who currently work in the system have shifted their

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practices accordingly, and the section 3553(a) analysis has replaced the former departure analysis. There are notable exceptions related to substantial assistance departures, under- or over-representation of criminal history departures, early disposition program departures, and occasionally mental health departures. However, generally, what can be done through departure can be more easily accomplished through a variance with a higher degree of procedural flexibility.

18 U.S.C. § 3553(a) is extremely broad, and it gives the court a lot of autonomy to consider all the factors associated with the departures and more. We have seen many instances where the parties and the court look at the departures as a framework for how to structure a variance. POAG views the proposed changes as adopting and formalizing that approach. These departures that had a direct function would now become something that solicits a specific thought process about the nature of the offense or the

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defendant. The departures currently in the manual exist for a reason. Some were included to address specific problems or concerns that were being observed in the system. Some were the basis of Congressional directives.

POAG appreciates the Commission's effort to integrate all the work that went into those provisions into the new methodology. As the public comment noted, some of the new considerations are more expansive than the original departure language. POAG is not concerned about this expansion and attributes it more to the amalgamation of different departures and the section 3553(a) factors. Some have voiced concerns that this place is limits on what the judge may consider or puts an extra emphasis on certain factors. POAG believes that the additional offense specific care considerations are just that, a list of considerations that may aid the court and parties in how to approach the statutory sentencing factors. POAG believes it doesn't place a limit on what a judge may

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consider or how they can balance the various section 3553(a) factors. The judge can look at the various lists associated to get a sense of some of the areas of common consideration that frequently impact that type of offense, thereby retaining the analysis that would have been done on a departure.

Under this proposed amendment, judges can also look at a list of common considerations when looking to balance the defendant's personal history against other factors. It doesn't prevent them from considering something new and outside of the list, as the judge retains their authority to consider anything and to balance these factors as they believe appropriate. POAG trusts the judges to use their discretion to balance all these competing factors, and we believe these changes, though not perfect, move towards supporting the type of considerations that are already happening in federal courtrooms around the country.

While POAG supports this amendment,

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there were several members of POAG whose initial inclination was to suggest this change be delayed and vetted more rigorously. While we understand that inclination, we also believe the Commission can make appropriate adjustments, now and in the future, to make the new methodology workable and efficient. In our written public comment, POAG provided some suggestions for how to accomplish this. As we noted, post-Booker, the system has already informally changed. POAG believes the Commission should take the next step in adopting this methodology and that the rules will shift to interact with the new approach. In a complex system such as this, the dynamic will only shift if something changes. Booker recalibrated the system nearly 20 years ago. And now, the Commission is in the best position to initiate a more formal change. Thank you for the opportunity to share our thoughts.

CHAIR REEVES: Thank you, Mr. Luria.

Ms. Leary?

MS. LEARY: Thank you. And thank you

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to the Commission for hearing the comments of the Victim Advisory Group. As a threshold matter, like TIAG, VAG doesn't oppose simplification as a concept. Simplification can lead to a fair, transparent process, which is good for all of the stakeholders, offenders and victim-survivors alike. And it can be particularly useful to victim-survivors and their rights to be reasonably heard, to reasonably confer with the government to be protected from the offender, and to dignity and respect. But the VAG cannot support the proposal in its current form and urges more study because, frankly, it does not seem to advance the goals that the Commission stated they had. It doesn't seem to make it more simple. It doesn't seem to actually reflect the Commission's stated intention to, quote, retain the guidance and considerations provided by the deleted guidelines and to be neutral as to the scope and content of the conduct covered. And it does raise serious issues, in our view, with regard to the Commission's authority.

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Now, given the breadth of the proposed changes the VAG has identified in its written commentary, some issues it saw. It saw that the Department of Justice and the Criminal Law Committee also identified others. So, there's a lot of examples of what appear to be substantive changes, perhaps unintended, in the new version.

And therefore, our bottom line would be we would encourage further study to figure out if this is the most effective way of engaging in simplification. And should the Commission decide this is, this elimination of Step 2, then to engage in a much more thorough review of the language, if to truly be neutral, to retain what the current departure provisions provide.

The most concern is this lack of neutrality. There's been a -- well, the VAG -- excuse me. The Commission stated, in its 500-page amendment, that its goal is not to, quote, "expand or contract the scope or content of the provisions." It repeatedly does this with this new draft. Departures have a context and

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direction. They guide courts in how to increase or decrease the sentence. And yet, in some, albeit not all, the revisions have removed all of that language and simply replaced it with a list.

That changes its meaning. That is not neutral.

And not only is it not neutral, but we believe that will lead to a great deal of litigation. As the Criminal Justice Committee noted, there are 18 years of litigation to help us understand what these terms mean. When we remove these terms, then there is not.

For example, the Department of Justice has pointed out language authorizing an upward departure when a defendant's conduct was, quote, exceptionally heinous, cruel, brutal, and degrading to the victim. That was removed. It simply listed, this may be relevant. That is a substantive change. The Criminal Law Committee has identified factors with specific offenders. Same thing. Context was taken out of that, and it's just may be relevant. And yet, as we lay out in our written comment, while the Commission

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has deleted many guidelines that would provide seemingly an upward departure, it's retained some that would be seemingly a downward departure. And that is simply not neutral.

Turning to the issue of authority, we focused our written comments on the PROTECT Act, which, among other things, specifically addresses a problem that Congress saw, of courts sentencing below what is appropriate for crimes involving children and sex crimes. And Congress drafted some of that language. And we think there's a real question whether or not the Commission can delete essentially Congressional statutes. And far from simplifying, it will create further litigation.

Additionally, the Commission provides itself in being data-driven. And I think we've all really valued so much of the data that has come out of the Commission over the years. And we feel that it would be important that, before engaging in this, there be more study about how it will impact crimes involving victims. And

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oftentimes, in the Commission's data, there's the violent crime section and then sort of everything else, which we totally understand why that is, and we're not saying that's not appropriate. But we often think that under-counts what a victim will experience because there are other crimes that we would say are victim impacted, including burglary, narcotics crimes, firearms, other sexual offenses, alien smuggling. So, what we would suggest, if you would engage in this period of study, to really figure out how will this impact victim survivors would be doing the data on these crimes and how this change in language might affect them. As we noted in our written testimony, of the nine reasons that are the most primary sentencing guidelines listed and the most frequently departures, seven of them involve victim survivors. And if you've changed the meaning of those, that in our view is not neutral.

And then we just raised the question, we do feel there are potential conflicts with the

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Crime Victim Rights Act. A victim cannot meaningfully confer with the government if they don't have any idea what the sentence will be. And if this is all left up to some sort of list with 3553, then that will be hard. They cannot meaningfully be heard if they aren't aware what issues the judge is or is not considering.

So, I would say that there is two last points. There's been much concern about the Commission putting their thumb on the scale. And the concern of the VAG that they would request more study on is that is what is happening with this proposal. The thumb is on the scale. Language for upward departures is stripped away, and a judge is sold. Just think about these things. That changes the meaning of the departure language, and is not simply moving something from one section to another.

So, we would suggest a delay to look at the impact on victim survivors, to look at the language, and to truly be non-neutral and to truly fulfill what the Commission said it was

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trying to do. To really do an examination of this is what it says now, this is how we've changed it for each provision, and this is why the meaning has not changed. Thank you.

CHAIR REEVES: Thank you, Ms. Leary. Any questions from the Commissioners?

Commissioner Wroblewski and then VC Murray.

COMMISSIONER WROBLEWSKI: Thank you very much. Thank you-all for testifying.

Mr. Luria and Ms. Leary, did your groups have a chance to consider what we've been talking about a little bit over the course of the afternoon, the idea of wiping away all departures from the manual? Or I know that's not what was published, but did you-all have a chance to talk about that?

MS. LEARY: Our group -- my mic is on, so I guess I have to answer first.

No. Our group did not discuss it initially. I can offer thoughts on my own. I think I can speak with regards to the VAG. To

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us, that would be even worse, right? That would be even worse. Well, I shouldn't say even worse.

That would be equally as bad.

I guess I'll say this: it is not surprising that some would take the position that we should just get rid of all of these things when, as my able colleague has pointed out, many of them could lead to increased sentences. So of course, then that would seem attractive to remove that language. I don't think it would elevate those anymore. It would at least be including some remnants of what is left from the departures.

MR. LURIA: Our group did not get the chance to discuss that at the time, but I've had subsequent conversations with Chair Shaw about this issue. It seems to us that all of those departures are representing compromises that have made at times. A lot of times those compromises were intended to -- you know, to give voice to some issue, but not necessarily bring it in as a specific offense characteristic or a base offense

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level adjustment.

One of the concerns that we also discussed is if we remove all of these departures and remove even the concept of considerations like this, a situation that arises and you're trying to figure out how to account for it within the guidelines. It might more likely end up as a special offense characteristic, or some kind of change to the base offense level. And it doesn't give that room for compromise where the Commission has made it something that the judges will be willing to consider and decide whether or not it is something that does make the offense more serious or does reclassify that defendant as somebody who maybe needs less of a sentence.

So, we like the fact that you guys are drawing these into this method. A lot of work went into those and a lot of compromise and a lot of effort and consideration of the various things that come into these types of offenses, and it would be a real shame to lose a lot of that work.

COMMISSIONER WROBLEWSKI: If I can do

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one more.

Ms. Walsh, we've heard, over the years, many, many criticisms of the guidelines as being very blunt. The blunt instruments. And especially, for example, the economic crimes guideline §2B1.1. And it includes a number of upward and downward departure provisions, so just as one example, it says a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse with relatively small amounts suffered by relatively large number of victims. In such cases, the loss table may overstate to the seriousness of the offense, and so a downward departure may be appropriate. All of that kind of language.

And I recognize two-thirds may be up, and one-third may be down. All of that's lost and all that's left in what you're suggesting is the blunt instrument, the loss table, and we're about to go into a discussion about the loss table.

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Are you comfortable with that? And where do you think the guidelines go if we end up with just the blunt instrument?

MS. WALSH: Well, I think if you've been hearing that it's a blunt instrument for a really long time, I think then we need to listen very closely to what's being said. And our position is that we haven't taken each individual guideline. And as my very respective colleagues at the defender's office have, we've looked at for purposes of today's discussion, the oversimplification process. What we're suggesting here, Commissioner Wroblewski, is simplification would recognize the reality on the ground. Judges are taking that into consideration when they apply the section 3553(a) factors at every sentencing. They are, in fact, applying a two-step process. And so, the Commission resuscitating the second step is actually not using the data, the experience, and the information that the Commission has gathered to effectively advance the change in sentencing

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and guide how the courts apply the guidelines.

So, I'm not afraid of it, necessarily.

There may be unintended consequences in everything that we do. But I think that the . . . what is happening in the data and in the comments by my smarter than I colleagues that have testified here all day is what's happening on the ground. It's a two-step process, whether you're in the Southern District of Florida or you're in Illinois. It sounds to me like even the Honorable Judge Chang from the Seventh Circuit says it's a two-step process.

So, I think that the Commission needs to recognize that that's the reality in what's happening. And that the reality also is that the vast majority of these are more punitive, and perhaps that is why they're not being applied. Perhaps there's an institutional recognition by the judiciary that they are too punitive, and that's why we're not seeing those upward departures utilized.

COMMISSIONER WROBLEWSKI: I understand

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that technically, they're not being as departures, but are you confident that these provisions are not being referenced to judges in these kinds of securities fraud cases and that they're using them to vary downward, recognizing that they don't want to depart, whether it's because of the different level of deference at the appellate court level or otherwise?

MS. WALSH: Based on the data that I've seen, we're confident of that. And we do know that some of it's being noted in a variance context, but that's not a departure context. So, we think that some of the concerns that you may have about judges not being able to depart when the loss amount is overstated will be met in the district courts with the variance under section 3553(a).

CHAIR REEVES: VC Murray?

VICE CHAIR MURRAY: My question was the same.

CHAIR REEVES: Okay. All right.

VC Mate?

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VICE CHAIR MATE: Yeah. I have a different question. And this question is for you, Mr. Luria, and it is from your written testimony. It didn't come up on what you mentioned, but I was really curious. You suggested that the Commission should provide guidance in the guidelines about how we would want to see mitigating and aggravating factors reported in the statement of reasons. And if we were interested in the statement of reasons providing information on reliance of aggravating and mitigating circumstances, both for within the guidelines and outside the guidelines, do you have thoughts on what language we would put in the guidelines manual to get it -- what kind of information we were wanting in the statement of reasons?

MR. LURIA: There's been a lot of discussion about departures being something that needs to be provided in advance. I think that around the country, there's a bit of difference in terms of how variances get treated in this

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way. A lot of times the report gives you enough of a sense of what considerations are there and having some sense if the Commission wants us to be more uniform in the way that we do that. As far as the SOR, having things be where we're only looking at variances and checking through the variety of different considerations. We're not certain what that looks like yet. So I think if the Commission was intending to delay a year, getting a little bit more of a sense of those two issues where the Commission is looking for our feedback on that.

VICE CHAIR MATE: Okay. Thank you.

CHAIR REEVES: Any further questions of this great panel? Thank you all so much, and thank you for your testimony.

Our final panel for the day provides us with perspectives from our stakeholders regarding our proposed amendments on circuit conflict and loss. First, we have the Honorable Leigha Simonton, who serves as the U.S. Attorney for the Northern District of Texas. She was

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nominated by President Biden on November the 14th, 2022, confirmed by the Senate, December 6th, 2022, and sworn into office on December 10th, 2022. Ms. Simonton began her career with the Department of Justice as an Assistant U.S. Attorney in the Northern District of Texas, practicing in the office's appellate division and serving in several leadership roles within the office.

Second, we have Deirdre von Dornum, who serves as an Assistant Federal Defender in the Eastern District of New York. She previously served as an Assistant Federal Defender in the Southern District of New York, the Deputy Attorney in charge of the Eastern District of New York, and as an attorney in charge in the Eastern District of New York.

Ms. Von Dornum was previously in private practice, engaged in pro bono, death penalty, and litigation with the Capital Defenders of New York, and serves as an assistant dean for public service at NYU School of Law.

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Ms. Von Dornum will be speaking to our amendment on circuit conflicts.

Third, we have Daniel Sebastian Dena, who serves as an Assistant Federal Defender with the Federal Community Defender for the Eastern District of Michigan. He represents the indigent community at the trial and appellate level, including arguments before the Sixth Circuit Court of Appeals. Before joining the Federal Community Defender, Mr. Dena worked for the Federal Defender's Office in the Southern District of Texas in Brownsville, Texas, and as a state public defender in Texas. Mr. Dena will be speaking on our amendment regarding loss.

Ms. Simonton, we're ready when you are.

MS. SIMONTON: Thank you, Chairman. I must say this is an incredible honor to get to speak to you today, so thank you for having me.

I'm here to discuss the department's views on the Commission's proposals on loss and the definition of altered or obliterated serial

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number. We understand the Commission's concerns and appreciate its goals with both of these proposals. Of course, we have recommendations on both.

First, I'll start with loss. We support the Commission's proposal to move the definition of loss from the commentary into the text of §2B1.1. Doing so will resolve a circuit conflict over whether the commentary's inclusion of intended loss is authoritative, and will ensure consistency in the application of loss as a benchmark for determining the relative culpability of fraud defendants, both across federal courts and within the guidelines themselves.

We also do not oppose the proposal to conduct a comprehensive examination of §2B1.1 during an upcoming amendment cycle. We further support a legislative fix that would preserve the commentary. But while that fix is pending, we urge you to ensure that §2B1.1 operates consistently and uniformly immediately.

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In United States v. Banks, the Third Circuit held that the commentary's definition of loss in §2B1.1 is not entitled to deference because it includes intended loss, whereas the guideline itself is limited to actual loss. Other courts of appeals have reached a different conclusion, finding that the word loss in the guideline is not restricted to actual loss, and therefore, deferring to the commentary's definition and its inclusion of intended loss.

Notably, the Banks court reached its conclusion based on application of the Supreme Court's decision in Kisor and its consideration of the role of commentary in clarifying a guideline provision. The Banks court did not reach its conclusion based on a value or policy judgment that intended loss should not be considered in §2B1.1.

In fact, in a later decision, United States v. Upshur, the Third Circuit held that loss in a related guideline, §2T1.1 (Tax Evasion) encompassed intended loss, because that

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guideline's text, as opposed to its commentary, defined loss as including loss that would have resulted, had the offense been successfully completed.

The Commission's proposal to move the definition into the text of §2B1.1 would accomplish the same results here. And doing so is necessary for several reasons. First, the Commission has restructured and reconsidered §2B1.1 several times, and the Commission has always kept intended loss as one measure of harm.

That is because it is a more accurate gauge of a defendant's culpability than actual loss, which is often dependent on factors outside of a defendant's control, like when law enforcement intervene to stop a scheme.

Second, the Commission, like the judges who impose sentences, are guided by the sentencing factors in 18 U.S.C. § 3553(a). One of those factors is the need to avoid unwarranted sentencing disparities between similarly situated defendants. If defendants in the Third Circuit

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can only be held accountable for actual losses they caused, this means that within that circuit, defendants who engaged in conduct of equal complexity or severity are currently subject to different guideline ranges, based only on the fortuity of whether their misconduct was detected in time. And those defendants would also have a disparity with defendant's sentence in all other circuits for whom intended loss is still factored into their §2B1.1 offense level.

Third, defining loss in §2B1.1 to mean only actual loss creates unnecessary tension with other guidelines provisions, such as the guideline at issue in Upshur, §2T1.1, along with the relevant conduct guideline and other guidelines applicable to fraud offenses. For example, a defendant convicted of attempt or conspiracy to commit fraud is subject under §2X1.1(a) to the base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with

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reasonable certainty.

Finally, the Commission's proposal also appropriately resolves this particular conflict while deferring to Congress on broader questions related to the deference due to guidelines commentary generally. And it is consistent with Congress's expectation that the Commission will resolve circuit conflicts over the meaning and application of the guidelines without the need for Supreme Court intervention.

For these reasons, we support resolving the circuit conflict over the meaning of loss in §2B1.1 by moving the commentary's longstanding and existing loss definition into the text of the guideline, resolving uncertainty over whether that definition is binding.

I'll now discuss the Commission's proposal for addressing the circuit split related to defining altered or obliterated serial numbers. We appreciate the Commission's implementation of the Bipartisan Safer Communities Act last cycle, but substantial work

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remains to address critical issues of national public safety. This need to continue our efforts of stopping violent crime is coupled with the fact that as the Commission found in its 2022 federal firearms report, federal firearms offenders often had extensive and serious criminal histories, were prohibited from having a gun, and engaged in aggravated criminal conduct when they possessed the gun.

Within this context, we support amending §2K2.1(b)(4)(B) to define altered or obliterated serial number to include a number that has been changed or modified in some way that makes it less accessible, even if it is still legible. This definition Option 2 is consistent with the Fourth, Fifth, and 11th Circuit's definitions.

We advance this approach for three reasons. First, it is consistent with the Commission's longstanding precedent that serial numbers are vital to regulating and tracing firearms and to investigating and holding

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defendants accountable who commit crimes while using firearms. This is why whenever the Commission previously addressed this issue, it shows to raise penalties for this conduct.

In 1989, the Commission increased the enhancement to two levels for firearms that were stolen or had altered or obliterated serial numbers to better reflect the seriousness of this conduct. And in 2006, the Commission determined, despite concerns that the enhancement applies even where a serial number can still be identified, that a four-level enhancement was appropriate because of the difficulty in tracing firearms with altered or obliterated serial numbers and the increased market for these types of weapons.

Second, we share the views of the Probation Officers Advisory Group and Victims Advisory Group that Option 2's definition of altered or obliterated is the most appropriate, and it is consistent with the ordinary meaning of those terms. The ordinary meaning of altered is

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straightforward. The term altered, according to Webster's and the American Heritage dictionaries, means to cause to become different in some particular characteristic without changing into something else, or to change or make different, modify. The Fourth, Fifth, and 11th Circuits have applied the straightforward definition of altered, and held that a serial number that is less legible is made different and is therefore altered for purposes of §2K2.1(b)(4)(B).

The term obliterated already embraces a situation where a serial number is rendered illegible. If the Commission interprets both altered and obliterated to mean the same thing, that the serial number must be illegible, then one of those terms in the guideline text would have no meaning.

Finally, retaining the scope of the four-level enhancement is consistent with the seriousness of possessing or using a firearm that has a tampered with serial number. The Gun Control Act of 1968 created a comprehensive

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scheme to assist law enforcement by requiring manufacturers and importers of firearms to mark them with a serial number and maintain records of any transactions involving those firearms. These requirements were designed in part to enable law enforcement to trace firearms used in crimes. As the Fourth Circuit noted in *Harris*, the regulations reflect the government's interest in having serial numbers placed on firearms that have a minimum level of legibility. A less legible serial number frustrates the purpose of serial numbers and tracing.

We support retaining the Commission's existing four level enhancement to include using a firearm with a serial number that has been altered, even if still legible to the naked eye.

But we recognize that some view a four-level enhancement as inappropriate where law enforcement can still determine the serial number with an unaided eye despite the alterations.

If the Commission adopts Option 1's definition, where altered and obliterated mean

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the same thing, we recommend that you consider a lower two-level enhancement, where a still legible alteration would be considered altered or obliterated under the view of the Fourth, Fifth, and 11th circuits. A two-level enhancement would continue to further the enhancement's purpose of preventing criminal use of guns that have had serial numbers that have been tampered with in any way, just as the two level enhancement for a stolen firearm furthers the purpose of deterring the criminal use of firearms. Second, possessing a gun that has an altered or obliterated serial number is oftentimes an effort to thwart law enforcement tracing or investigation and can embolden the possessor to use the firearm in dangerous crimes or in gun trafficking.

Thank you for the opportunity to express our views.

CHAIR REEVES: Thank you.

Ms. Von Dornum?

MS. VON DORNUM: Thank you, Chairman Reeves, and thank you, Commission. I'm afraid

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this one's not going to be as collegial in tone as some of our earlier panels. I appreciate you inviting the defenders to talk about the obliterated or altered serial number enhancement.

CHAIR REEVES: That's a great way to end the day.

MS. VON DORNUM: Right? Exactly. Got to keep you awake.

CHAIR REEVES: I like it.

MS. VON DORNUM: The Defenders, like DOJ and like this Commission, are invested in building safer communities, but we can only do so through effective, empirically-based policies. Decades of federal firearms enforcement with ever-increasing penalties have shown that much like the war on drugs, we cannot punish our way out of gun violence. We have not and we will not achieve safer communities by increasing sentences in the mine run §2K2.1 cases for possessing guns with altered serial numbers.

As an initial matter, out of the two options under discussion today, defenders support

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Option 1, whether it's still legible to the naked eye, because unlike Option 2, supported by DOJ, Option 1 provides a clear, bright-line rule for applicability of the enhancement, which will reduce disparity in sentences. Option 2, on the other hand, contains language that is open to interpretation, namely the phrase less accessible, which is likely to aggravate the circuit split and continue the disparities we already see.

And just taking the textual analysis point that my colleague raised, I couldn't disagree more. Altered by must mean a material change in the number. Otherwise, as the Sixth Circuit pointed out in Sands, you could get the enhancement if you made the serial number easier to read. So it can't be that it's any change.

And this is, of course, consistent with how we use altered in our everyday lives. When I go to the tailor and say, can you alter my suit? I don't mean, will you clip off a thread?

I mean, will you let out the waist? I've eaten

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too much. Will you change it in a material way?

And that is consistent with the Second Circuit in St. Hilaire and with the Sixth Circuit in Sands, but also ties in to what this Commission has said the policy rationales are for this enhancement, which is traceability.

You cannot raise someone's sentence by two years, the same enhancement you give if someone has eight to 24 guns. Four-level enhancement based on a number that is still clearly traceable. At least Option 1, while it doesn't solve all the problems with the enhancement, has some grounding in the idea that someone could know it was altered if it wasn't clearly legible to the naked eye. By contrast, Option 2 would permit this enhancement for even the smallest scratch on a serial number. So, with no connection to either knowledge or traceability.

Now, DOJ, both in its written comments and today, have said they support Option 2 because it claims, and it provides no empirical

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support for this claim, that even a scratch on a serial number shows an intent to evade accountability and thwart law enforcement. But without a mens rea requirement, that claim is pure conjecture. And of course, a damaged but legible serial number does not in fact impair traceability or thwart any prosecution for gun possession.

Furthermore, I was confused and uncertain as to how this assertion in this year's cycle by DOJ, that a scratch on a serial number evinces the intent to evade could be consistent with its support just last year of adding a rebuttable presumption, mens rea requirement, to all of §2K2.1(b)(4). And these are the words DOJ used just last year, it may not be equitable to apply an enhancement when the defendant reasonably believed in good faith that the gun was not stolen or did not have an altered, obliterated, or missing serial number.

What was inequitable one year ago remains inequitable today. No one should receive

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this enhancement unless the serial number is not legible to the naked eye.

Now, DOJ's alternative proposal to add an entirely new two-level enhancement for serial numbers that are still legible suffers from the same problems, no evidence of intent to evade and no connection at all to traceability. But as I think I've already alluded to in this discussion of this enhancement, we can't ignore the bigger picture. No matter the wording of the enhancement, this is one that sounds good in theory. A messed up serial number must make it a more dangerous offense. But that has little grounding in either the data or real life. And as we urged last year in discussing gun policy, we believe the Commission should take the opportunity to craft policy based on empirical evidence, not fear and not conjecture.

So, what does the available evidence tell us? First, the Commission's own data do not support the connection drawn by DOJ between an obliterated or altered serial number and an

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intent to use the firearm to commit additional crimes. ATF data on traced firearms with successfully recovered serial numbers don't support those claims either. Also, ATF itself has noted the limited value of tracing a serial number to investigations, because the trace provides no information about what are frequently many steps between the last recorded transfer and the instant possession. And in the typical prohibited possessor case, as you know, the vast majority of §2K2.1 cases, an illegible serial number does not make proving the offense more difficult, nor does it allow an individual to evade arrest or conviction.

The data also shows that application of this enhancement leads to unjust sentencing disparities in two primary ways. First, it treats dissimilarly situated people the same. A person who has no idea that one serial number, one number in the series, was removed faces the same increased guidelines range as the person who scratched off all the serial numbers

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intentionally, due to the lack of any scienter requirement in this enhancement. This is unjust.

It is disconnected from the statutory purposes of sentencing. We urge you to add a mens rea requirement in the future.

Second, it treats similarly situated people dissimilarly. As a 2022 Commission firearms report found, a majority of those convicted of §2K2.1 offenses were Black. And the data showed that this specific enhancement disparately impacts Black individuals, too. In my district, the Southern and Eastern Districts of New York, from fiscal years 2018 to 2022, only three percent of people who received this enhancement were white. Almost two-thirds of those who received it were Black. And among those who received it, the median sentence for Black individuals was double that for white individuals.

In closing, the Department of Justice has provided no evidence that the decades of expanding this enhancement has deterred the

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possession of firearms with defaced serial numbers or that it has made us safer. The enhancement does not effectively promote the purposes of sentencing set forth in section 3553(a) and the Commission should narrow this enhancement by adopting Option 1's unaided eye test and not expand it further by adopting Option 2 or DOJ's Alternative Proposal. Thank you.

CHAIR REEVES: Thank you so much.

Mr. Dena?

MR. DENA: Good afternoon. I'm humbled to testify on behalf of the Federal Public and Community Defenders about the role of law in the fraud guidelines. Defenders join other stakeholders in welcoming a much-needed study and overhaul of §2B1.1, the guideline's over-reliance on loss is a primary measure of culpability result in severely punitive sentencing ranges. Consequently, judges routinely impose below guideline sentences in over half of fraud sentences. This is judges telling the Commission that there's something

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seriously wrong with §2B1.1. In most cases, there's a disparity between §2B1.1's suggested sentencing range and section 3553(a)'s sentencing purposes. The Commission needs to engage in real structural reform to fix its disparity. And we stand ready as partners to embark on that effort.

In the meantime, we recognize that the Third Circuit in Banks has done away with intended loss altogether, causing the Commission to be concerned about a disparity between loss calculations in the Third Circuit and the rest.

But the Commission's proposed fix for the bank's issue, it entrenches the core disparity, the one between §2B1.1 sentencing ranges in section 3553(a) by reinforcing this over-reliance on loss as the primary proxy for culpability, a huge factor in judges rejecting the guidelines in over half of fraud sentences. As a defender in the trenches, I can attest that the loss amount is the whole ball game in every fraud case, but all loss is not the same. And in

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any given case, there's so much more going on beyond the loss amount that tells us about culpability. I once represented a client named Warren. Before the pandemic hit, Warren was a social worker with no criminal history. But when the world shut down, Warren was without a job. He was depressed. He was desperate and he started going down a rabbit hole of watching Sovereign Citizen videos on YouTube. One day, he's helping veterans apply for benefits and the next he's making multimillion dollar requests for PPP loans based on a totally fanciful understanding of the Uniform Commercial code.

Unlikely as his scheme was, he was successful in receiving about \$90,000, but only after making more than \$15 and a half million dollars in loan requests. For Warren, the difference between actual and intended was the difference between 15 to 21 months and 63 to 78 months, even more had he lost a trial. Either sentence calls for significant prison time, but it's really the fear of intended loss controlling

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that gives pause because five years at the low end did not adequately represent his culpability.

He's already going to lose his livelihood as a social worker. So a case that initially might have felt triable suddenly became a question of, well, do we want to risk five years or more for a first-time, nonviolent, mentally ill client. And the answer of course, is no.

Warren's case, it's not some outlier.

He's not Bernie Madoff or Sam Bankman-Fried. He's one of the everyday clients we see where §2B1.1 fails to give courts an appropriate sentencing recommendation because of the over-reliance on loss. The real question here is, how do we fix this guideline? The answer is not by codifying the commentary's loss definition into the guidelines text. All that would do is entrench a much larger problem with §2B1.1 and its overemphasis on the loss amount. The Third Circuit's decision in Banks is not the problem here. I mean, the foundational problem is that

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the guideline isn't producing appropriate sentencing ranges in most cases. §2B1.1 is used for an estimated 300 different types of offenses, from collecting a deceased spouse Social Security to full-blown Ponzi schemes, and it's impossible to fit this diverse range of conduct into a punitive one size fits all loss table and loss definition. So only a comprehensive review of the guideline and significant restructuring will resolve §2B1.1's foundational problems. But in the short term, if the Commission is feeling compelled to address the Banks issue, it should remove the requirement that loss is the greater of actual or intended loss from the definition.

Now, that doesn't resolve the harshness of the loss table, the over-reliance on loss, but it at least allows the courts flexibility to decide which loss amount is the better measure of culpability on a case-by-case basis. And as a result, it's going to help lower that disparity between the guidelines that are recommended and the sentences that judges are

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actually finding appropriate.

To conclude, defenders look forward to working with the Commission to reexamine the fraud guidelines. We too want simpler, fair, empirically-based guidelines that judges can actually rely on. The proposed amendment doesn't address the core problem and as written would exacerbate it. So, we defenders oppose it. Thank you.

CHAIR REEVES: Thank you, Mr. Dena.

Any questions?

Commissioner Wong and Commissioner VC Murray.

COMMISSIONER WONG: Thank you all for being here. I've got a question about the altered and obliterated serial number question for all of you. I wonder if there's something a little unique in this particular context where in previous situations, we've had with the safety valve or the categorical approach, situations where there's a legal question as well as sort of

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the para line guidelines interpretation question, and we've been able to kind of address the guideline question, knowing that it's distinct from whatever may be happening in terms of disagreements on the legal question. And here, from what our understanding is in section 922(k), you have the identical language of altered and obliterated. And courts to the extent they have in some opinions chimed in, have kind of just jumbled them all together, both the guidelines question and the statutory question. And I wonder if that should give us some pause here in terms of kind of just deciding the issue given how courts have melded the two together and the statutory question appears to still be percolating. Something that your comment just now about giving courts the flexibility in addressing this day to day, it just appears to still be percolating among the courts on the statutory interpretation question.

MS. SIMONTON: Yes. I'm happy to address that. That statute is not used very

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often. And so, if you wait to have a court determine it based on the language and the statute, I think we'll be waiting a long time. The guideline is used more often. And so, I think it's important because we have a circuit split that's involving multiple circuits, and then the litigation itself is a cost. It's a resource suck on everyone involved, including courts. It's easier at this point for the Commission to resolve it. And it doesn't actually have to be identical to what a court would decide when it comes to the statutory definition. But it is true that the court would kind of not distinguish it because of the fact that it seems to be inspired by that statute.

MS. VON DORNUM: I agree with Ms. Simonton. I think it's very important to address it now, because people every day are receiving different sentences in different districts or circuits, depending on who is applying the enhancement. And frankly, depending on the prosecutorial charging policy, I think in some

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districts, they're also not asking for this enhancement unless it's clearly illegible in other districts. They're asking for it anytime there's a scratch. So I think having a clear policy that applied across the country is extremely valuable. We've never seen a section 922 case in New York, or at least not in the 21 years I've been here, so I don't think we should wait for the courts to resolve that question as to the statute.

VICE CHAIR RESTREPO: Mr. Dena?

MR. DENA: Yes.

VICE CHAIR RESTREPO: So, this is a little off-topic, but where would you begin to restructure? How would you begin to restructure §2B1.1?

MR. DENA: Well, I think that's a question that is far above my pay grade. However, certainly what we need to do is strip the blunt and the over-reliance that we have on loss as the primary proxy for culpability. Because there are just so many other factors in

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including like what actual harm was done or whether, for instance, the scheme was predatory in nature. Whether it was a legitimate issue, but turned into something else. Whether the person would've been entitled to a loan, but for some cost-cutting measures that they tried to sidestep. There are all of these other factors that can go into determining culpability that are not just what is the loss amount and how high can we calculate that loss amount to set us the anchoring point for what judges are going to look at when they decide what sentence is appropriate.

COMMISSIONER GLEESON: Commissioner Wroblewski was on an ABA task force about ten years ago that proposed a very thoughtful, more culpability-oriented restructuring of \$2B1.1, which this Commission ignored and it had some very useful observations about things like predatory nature of the crime, a de-emphasis on the on the on the loss table.

And I don't mean to put you on the spot. I commend it to you because it's an

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alternative and you recognize that one reason for this proposed amendment is just to bring all the circuits in line. It's not intended, if adopted, to put the Commission's imprimatur on actual or intended loss. So, I commend to you for the next step that ABA task force on which Commissioner Wroblewski served.

MR. DENA: Yeah, I know that the ABA had recommended reform since 2015, I believe.

COMMISSIONER GLEESON: Yes.

MR. DENA: And that's what we had cited in our in our statement. And so yes, I think this sort of structural reform is just long overdue. And I understand that there may not be any intent to make any decision about actual intended loss just by moving the guideline text and the definition into the text. But at the end of the day, we already know from pre-Banks data, we know what the result is going to be. We can see into the future because we already see it right now that having a consistent application loss doesn't actually result in consistent

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sentencings.

Over half of these sentences are resulting in downward variances. And the magnitude of those variances is larger than when compared to the magnitude of variances in other cases. So, we know something has to be done and we'd be remiss to sort of endorse or entrench a rule that overemphasizes loss and that we know is going to result in continued disparities in sentencing and we want something that judges can rely on.

COMMISSIONER GLEESON: Understood.

Thank you, sir.

CHAIR REEVES: VC Murray?

VICE CHAIR MURRAY: Thanks to all of you for your testimony. I have an altered or obliterated question. Can you do either of you have any texture you can add to what these cases look like? So, I mean, are we are these cases mainly cases with a scratch, or are they cases where someone tried to turn a three into an eight and it didn't work? What are you hearing in

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proper sessions and from your clients? And --

MS. SIMONTON: Yes, I'm very happy you asked that question because I think that would shed a lot of light on how this is applied and the proper tests that should be administered by district courts at sentencing to determine if something's been altered or obliterated. They are not being applied in incidental damage cases.

And in fact, the department does not interpret Option 2 as applying to incidental damage. We interpret the words as being purposeful damage to a serial number.

And I point you specifically to two cases that are in the circuit split. Harris is one of them, the Fourth Circuit case where there is discussion of the gun and that there were gouges and scraping only on the serial number area. And the court explicitly found, the district court, that it was not an accidental thing. And that is the basis for application of the enhancement in that case.

Also, Millender in the Eleventh

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Circuit, the court reached the same conclusion, that it was not a casual scratch mark. It was a purposeful degrading of the serial number area. So, district courts are making the right decisions right now. I've not seen a stray mark case and also our law enforcement officers have the skills and experience to determine an alteration versus incidental damage in terms of even deciding if it applies. And on the idea of what type of test given that, this is going towards purposeful damage to a serial number. It does affect the legibility of the serial number.

Whether it's technically illegible or not, it affects the legibility. It makes it less likely to be read correctly, which means the tracing cannot occur properly. And that was noted in the ATF 2001 final rule.

Also in Harris, for example, the police could read the serial number on the gun. The judge couldn't read it. Who wins in that scenario? Well, in that case, it actually wasn't important. Why? Because they were applying the

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less accessible definition, not the illegible definition of altered. And in Sands, I point you to the dissent. So, there are only two cases that are interpreting altered in the way that Option 1 interprets it. And Sands, which is really the seminal case on it, has a very strong dissent. And I point you towards that dissent because the judge there criticizes the majority for adding a naked eye test to discern whether this enhancement should be applied. Because in the judge's estimation, you can't really tell whether something's legible or not.

In fact, the judge attached pictures of the gun and serial number. So please look at that dissent. There are photographs that the judge included and there are three serial numbers in the photographs. Two of them were deemed by the probation officer to be barely legible. One was deemed to be illegible. So, the dissent provides the pictures of that. And I challenge you to decide what is legible and illegible, looking at those photos. And if it falls on the

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legible side, the person gets no enhancement. If it falls on the illegible slide, maybe they just were using a slightly better tool. They get a four-level enhancement. That, to me, is not fair.

MS. VON DORNUM: I think my colleague's comments bear directly on my larger point, which is we seem to agree that what's important here is mens rea. And I know we're not considering that this cycle, but at each stage, Ms. Simonton has pointed out that what DOJ is concerned about is not incidental damage, but purposeful damage. And that makes sense. Obviously from a section 3553(a) and deterrence basis, I think where we differ, is when a firearm has been purposefully defaced, you don't know whether it's this defendant, the current possessor, who did that or not. Or even if that possessor knew that it had been defaced?

And again, if we take the example of, if one number in the series is removed, which is an instance we frequently see in New York where

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one of the numbers is taken out. But looking at it, unless you're a real gun expert, you don't know how many numbers there're supposed to be in the series for a particular model or year. So, there's no way to tie that to the particular possessor. So, I agree, we don't usually see scratch cases in the sense of a cat scratched my gun, but we do see cases and we do see the government seeking the enhancement in my circuit.

Because I'm in the Second Circuit, we don't see it applied, but we do see the government seeking it where it's still clearly legible, which doesn't obviously affect traceability.

And I think if you look at the First Circuit in Adams, you know, that is a case, even though it's not really on the other side of the split because the First Circuit put its own mens rea requirement in. But there the serial number was just scratched. So, I think in other circuits outside of New York, you are seeing people seeking this enhancement and sometimes the courts giving it where it is just a scratch.

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But I think the bottom line is that as with all crimes and all enhancements, the person who's committing more serious conduct needs to know that happened at the least. And the Department of Justice seems to agree with us on that. And that was certainly what they said in the ghost gun context last year. Option 1's test at least makes it more likely that the person would know or not know because it's either clearly legible or it's not. Less accessible, I don't even know what that means. And certainly, courts across the country are going to interpret that differently. So, I think you just invite greater disparity and a greater move away from culpability and the purpose of traceability if you adopt Option 2.

CHAIR REEVES: Any final question?

Ladies and gentlemen, thank you for wrapping up our first day of our hearings. We're ready to adjourn for the day to return tomorrow morning at 9:00 a.m. to begin our next day of hearing on some very exciting topics as we've had

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today.

Again, I commend the staff for preparedness as they have for today. I commend the participants, the public and everyone else for offering their comments for the discussion today. I look forward to seeing everyone tomorrow morning. Thank you so much.

(Whereupon, the above-entitled matter went off the record at 5:18 p.m.)