UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON
PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

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THURSDAY
MARCH 12, 2015

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PRESENT:

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, JR., Commissioner
JONATHAN WROBLEWSKI, Commissioner (Ex Officio)
ALSO PRESENT:

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RICHARD BOHLKEN, Chair, Probation Officers Advisory Group
FRANK O. BOWMAN, III, Floyd R. Gibson Missouri Endowed Professor of Law, University of Missouri School of Law
MICHAEL CARUSO, Federal Public Defender, Southern District of Florida
LEX A. COLEMAN, Assistant Federal Public Defender, Southern District of West Virginia
DAVID DEBOLD, Chair, Practitioners Advisory Group
JAMES E. FELMAN, Chair, Criminal Justice Section, American Bar Association
CATHERINE M. FOTI, Chair, Sentencing Guidelines Committee, New York Council for Defense Lawyers
SHARON HERTZ, M.D., Acting Director, Division of Anesthesia, Analgesia, and Addiction Products, Center for Drug Evaluation and Research, U.S. Food and Drug Administration
JOSEPH T. RANNAZZISI, Deputy Assistant Administrator, Office of Diversion, Drug Enforcement Administration, U.S. Department of Justice
JON M. SANDS, Federal Public Defender, District of Arizona
ERIC TIRSCHWELL, Vice-Chair, Practitioners Advisory Group
HON. BENJAMIN B. WAGNER, U.S. Attorney, Eastern District of California, U.S. Department of Justice
SHARON WALSH, Ph.D., College of Pharmacy, University of Kentucky
<table>
<thead>
<tr>
<th>ITEM</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>4</td>
</tr>
<tr>
<td>Panel 1</td>
<td></td>
</tr>
<tr>
<td>Drugs: Hydrocodone Enforcement Issues and Flavored Drugs</td>
<td>11</td>
</tr>
<tr>
<td>Panel II</td>
<td></td>
</tr>
<tr>
<td>Drugs: Hydrocodone Potency Issues</td>
<td>63</td>
</tr>
<tr>
<td>Panel III</td>
<td></td>
</tr>
<tr>
<td>Economic Crime: Practitioners</td>
<td>97</td>
</tr>
<tr>
<td>Panel IV</td>
<td></td>
</tr>
<tr>
<td>Economic Crime: Advisory &amp; Advocacy</td>
<td>165</td>
</tr>
<tr>
<td>Panel V</td>
<td></td>
</tr>
<tr>
<td>Various Proposed Amendments</td>
<td>225</td>
</tr>
</tbody>
</table>
CHAIR SARIS: Good morning. Thank you all for coming to the hearing today. I am particularly thankful for being here, since I come from Boston -- the snowy tundra of Boston -- and as I have mentioned to other people, we are not only competing for the Olympics, we are competing for the Iditarod.

So, there we still have two and a half feet. I saw it in this morning's Boston Globe. And here the green shoots are coming through; spring is here and so are our Commission hearings.

I want to thank our distinguished witnesses for coming. We have prosecutors, defense attorneys, probation officers, policy experts and advocates that come from all over the country to share their thoughts on the proposed amendments.

Now, let me begin with our discussing the first Panel, which will be on the drug guidelines.
Last year, the Commission took a major step to advance our statutorily mandated purpose of responding to growing prison populations and costs by reducing guidelines levels for most drug trafficking offenses. This year, we are examining the narrower and more targeted issue of the appropriate guideline level for hydrocodone, which was recently rescheduled by the Drug Enforcement Administration.

We will hear from experts from the Drug Enforcement Administration and the Food and Drug Administration, and from an Assistant Federal Public Defender, as well as pharmaceutical expert.

The following two panels on -- after those -- the two panels on drug issues, we'll turn to economic crime, which has been a major focus for the Commission for the last few years. In fact, it started almost as I became Chair.

We've conducted exhaustive outreach, consulted with experts and performed comprehensive data analysis. In September of 2013, we held a symposium in New York at the John Jay College of
Criminal Justice. Participants included stakeholders, prosecutors, defenders, probation officers from all over the country, and we discussed the fraud guidelines.

Among other things, we heard stakeholders express concerns about the impact of the loss and victim tables. Beginning in 2012, the Department of Justice acknowledged that the cumulative impact of the two can sometimes be disproportionate in fraud on the market cases.

As I explained in more detail at our public meeting in January, this extensive process has -- multi-year process -- has led us to believe that the fraud guidelines may not be fundamentally broken for most forms of fraud, but we have identified some problem areas where changes may be necessary.

So, we look forward to hearing from experts today about whether our proposed amendments would be helpful in addressing problems with the guidelines governing economic crime.

We will hear on that issue from expert
practitioners, including United States Attorney and a Federal Public Defender, and a Panel of representatives from the Commission's excellent advisory groups, and from important advocates on white collar sentencing issues.

We are also considering other kinds of important amendments today. We will hear from a panel of experts to help us resolve a circuit conflict about the so-called single sentence rule, to examine whether changes are necessary to the mitigating role adjustment and to the guideline governing jointly undertaken criminal activity, as well as considering whether and how we should adjust the monetary tables in the sentencing guidelines for inflation.

Now, although we are holding the hearing today, our comment period is actually open through March 18th. So, anyone who has not submitted comments or want to submit more, we are here -- we are open to hear from you, in addition to the witnesses on the amendments today.

So, welcome to everyone. There are a
few things I'd like to say.

Please don't read your statement. I know you've all been warned about 'don't read your statement.' But as a practical matter, we've read your statements. We get them on email; we get them in hard print. We've read your statements. Just give a synopsis of what you have to say. We're sometimes -- we'll have questions for you afterwards.

The way it works is, you'll each make your statements, and then we'll ask questions. I also -- it's like -- we have these -- this little light system that goes off, and basically, I give you the hook at some point. So, I'm warning that in advance, so I don't seem rude, if I do that.

Now, I'd like to introduce the other members of the Commission. To my immediate right is Judge Charles Breyer; he is a Senior District Judge for the Northern District of California.

Judge Breyer has served as a United States District Court Judge since 1998. He joined the Commission two years ago and is now a Vice
Chair.

Now, Judge William Pryor also joined the Commission two years ago. You don't see him right now, because he's on an airplane. He comes in from Alabama, and his plane was canceled. But he will be here later this morning. He is a United States Circuit Court Judge for the Eleventh Circuit Court of Appeals, appointed in 2004.

Before his appointment to the Federal Bench, Judge Pryor served as Attorney General for the State of Alabama.

Next is Rachel Barkow, who also joined two years ago. Commissioner Barkow is a Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, where she focuses her teaching and research on criminal and administrative law.

She also serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

To my immediate left is Dabney Friedrich, who has served on the Commission since
2006. Immediately prior to her appointment to the Commission, Commissioner Friedrich served as Associate Counsel of the White House.

She previously served as Counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant U.S. Attorney, first for the Southern District of California and then for the Eastern District of Virginia.

Finally, far over to my right is Commissioner Jonathan Wroblewski. Commissioner Wroblewski is the designated ex-officio member of the United States Sentencing Commission, representing the Department of Justice.

Mr. Wroblewski serves as Director of the Office of Policy and Legislation in the Department's Criminal Division.

So, welcome to everybody again, and we're going to get going on our first panel, and I want to introduce you all and thank you for coming.

Joseph T. Rannazzisi. Did I say that
correctly?

MR. RANNAZZISI: Perfect.

CHAIR SARIS: Is the Deputy Assistant Administrator for the Office of Diversion at the United States Drug Enforcement Agency. He has served in his current position since 2006 and has been employed at the U.S. -- at the DEA since 1986, and next to him is Lex A. Coleman, an Assistant Federal Public Defender in the Office of the Federal Public Defender in the Southern District of West Virginia. He joined the office in 2006, after working in private practice for 14 years. We welcome you, and we'll start with you, Mr. Rannazzisi.

MR. RANNAZZISI: Thank you, Chief Judge Saris. Chief Judge Saris, Vice Chair Breyer and distinguished members of the United States Sentencing Commission, good morning. Thank you for the opportunity to represent the Department of Justice today, to discuss the Commission's proposed amendment for a single marijuana equivalency for all hydrocodone offenses, based on
the actual weight of the hydrocodone tablet.

In my limited time frame this morning, I'd like to highlight some of the important points outlined in the Department's position paper provided to the Commission.

As you know, almost 15 years ago -- for almost 15 years, and after 15 years of looking at the drug, we finally up-scheduled hydrocodone products from Schedule III to Schedule II, and that occurred in 2014.

My office, the Drug Enforcement Administration, the Office of Diversion Control was responsible for promulgating that change, and I can tell you, unequivocally, that the change was supported by overwhelming critical scientific and statistical information. That change righted a legal fiction.

When the Controlled Substances Act was enacted, Congress placed single entity hydrocodone products, such as Zohydro or the Hysingla ER product in Schedule II, but they placed all of the hydrocodone combination products (HCP) in Schedule
III. It was a fiction to place those Schedule --
those combination products on Schedule III rather
than Schedule II because they both present
comparable abuse liabilities.

Not only am I a sworn police officer,
but I'm also a licensed pharmacist. I studied all
the materials in support of up-scheduling, and I've
tested before the FDA public meeting on the
issue.

When the DEA up-scheduled hydrocodone
combination products, we looked very closely at its
abuse liability and compared it to oxycodone, and
I could tell you that the scientific data, law
enforcement data and other evidence established
that hydrocodone and oxycodone have substantially
similar potencies, abuse potential and adverse
health consequences, and public health effects.

They're also similar in their chemical
structures, meaning in their mechanism of
pharmacologic action.

The Commission proposed amending the
sentencing guidelines to conform to scheduling
parity. The Department supports the changes and specifically recommends that the Commission adopt an actual weight of hydrocodone measured at a marijuana equivalency of one gram hydrocodone to 6,700 grams of marijuana. This is purposefully and appropriately the same equivalency of oxycodone.

The proposed amendment also provides a single marijuana equivalency for all hydrocodone offenses, based on the actual weight of hydrocodone involved, as opposed to the number of pills involved, or the weight of the pills.

The Department believes that using the actual amount of hydrocodone to set offense levels best achieves the goal of proportionality. Hydrocodone is available in varying degrees and dosage strengths in varying combinations. If the number of pills or weight of an entire pill is used to set the offense levels, an offense involving a smaller actual amount of hydrocodone can be greater than the amount of the total pill.

Using the actual amount of hydrocodone
will better reflect the defendant's culpability.

The Commission has adopted this approach for offenses involving oxycodone, which is also available in varying dosage units and combinations.

The Department does not see any justification to treat hydrocodone differently than oxycodone. The Commission proposes a marijuana equivalency, under which one gram of hydrocodone actual equates to either 4,467 or 6,700 grams of marijuana. The Department recommends the Commission adopt a drug equivalency of 6,700 grams.

Of the two options, an equivalency of 6,700 grams mirrors oxycodone and reflects a close relationship between hydrocodone and oxycodone. Both drugs have caused similarly significant harm to the public health. Usage data suggests that hydrocodone abusers freely substitute hydrocodone with oxycodone and heroin, with the ebb and flow and availability and price.

Abusers take hydrocodone and oxycodone interchangeably to achieve the same high. Since
2004, both drugs have been responsible for tens of thousands of emergency room visits. On a per kilogram basis, the potential of hydrocodone products associated with death is similar to that of oxycodone.

Law enforcement investigation shows that the rates of diversion per kilogram of hydrocodone products distributed have been largely similar to those of oxycodone products, and in fact, for the rogue pain clinics, hydrocodone or oxycodone are the primary drugs distributed out of those clinics, and the only explanation appears to be geography.

I hope this brief summary has been helpful. I'm happy to answer any questions you may have to help the Commission develop an appropriate sentencing scheme for hydrocodone, and I appreciate the invitation to testify before you today. Thank you.

CHAIR SARIS: Thank you, Mr. Rannazzisi. Mr. Coleman.

MR. COLEMAN: Your Honor,
Commissioners, thank you for having me. This is my first time to the rodeo, and I appreciate the interest and invitation.

The government has written testimony, and what I've heard from my co-panelists is -- I'm hearing a lot of numbers and data.

I'm here as a line defender; I'm here as someone dealing with this daily and representing not just the defender organization, but I believe, the citizens I defend on a daily basis.

I heard rogue clinics. I hear all these big numbers suggesting that there is this huge public health impact and that geography is the only thing that distinguishes the drug involved.

I am here in part because my district was apparently -- according to two editions of Quick Facts -- the fifth highest oxycodone district for fiscal year 2012 and then 2013.

Our Judges read that before we were aware of it. They brought that up in some sentencings, and then we took a look at the raw numbers and saw 55 for fiscal year 2012 and 57 for
fiscal year 2013.

These were defendants for fiscal year 2012; that was only 31 cases. One of those cases was a Rule 20 transfer in from Virginia, who had some type of opiate conviction in that district and was going to serve her probation in West Virginia.

The people who are going to be most heavily impacted by this amendment are not going to be the big pill mills and the doctors. The ones who are going crazy with high, high volumes of opiates that are being illicitly distributed will be readily captured by a unit basis or even the 500 multiplier that exists in the drug equivalency table.

My clients have been, for example, a gentleman named Jermaine Holland. These are all from fiscal years 2013 and 2014. He was a 31 year old African American male; he was rehabing houses in Bluefield, West Virginia.

His attributable drug quantity in the case was eight hydromorphone four-milligram pills. This was done through two controlled buys of
someone coming up to the house.

He ended up with a base offense level 12, or a marijuana equivalency that actually would have been under the notes (or the “asterisks”) in the drug equivalency table.

Cayla Lindsay was a 20 year old pregnant Caucasian female; she was arrested on three controlled buys, with a total drug quantity involved of 3.5 oxycodone 30-milligram tablets and five oxycodone 15's. She again, came up with a base offense level, through the marijuana equivalency, of under 12 and had to come up.

Robert Black was a 49 year old divorced Caucasian male in Huntington, who did have a record, but then was arrested and prosecuted for 10 30-milligram Roxicodone tablets.

David Embrey was a 42 year old Caucasian male, visiting Raleigh County from Maryland, coming to see his grandchild his son had had. They found 7.5 Morphine Sulfate 30-milligram tablets in his car, and he was indicted for that in Federal Court.
Without the asterisks on the drug equivalency note, all of these people would have had under base offense level 12 guideline ranges in terms of seriousness. Had all of these tablets been HCP's or hydrocodone, we would have been down toward a base offense level of six.

With the shift of Schedule II now, they would have immediately been subjected to 12 levels. They were anyway, because of the drugs involved, but had it been hydrocodone, they would have been subjected to the worst punishment, and if we go to a multiplier of 6,700 grams, even at active ingredient weight, we're looking at substantially higher sentences for them.

It's been frustrating enough as a line defender, when I have so many of these types of cases -- and we have some of the big ones, too -- but these by far as a higher proportion in my district, that you know, I'm going to them and explaining how they're -- you can't have the benefit of the drugs minus two. You've got a base offense level 12 stuck in your drug equivalency
They see that all their buddies who were doing heroin at five grams or more -- or even lower levels pre-guidelines -- getting this two level break and writing in and getting the motions, and we get countless letters from other clients going, "Why doesn't that affect me?" and I have to send them a copy of the drug equivalency table and with that, it's like, "Yes, that's why you still have to do your year and a day."

So, this change, while I read the government's testimony and there are certainly statistics out there. If you look at the top five pill districts that have been identified in the country, three of them for fiscal 2013 involved Appalachia. They involve Eastern Kentucky, Eastern Tennessee and the Southern District of West Virginia.

You need to understand the demographic of who is there. These are not big-time drug traffickers; these are people who have not had adequate education, who have always had some
economic struggle from them because of the dynamics of West Virginia's economy.

The large majority of them are honest people who work very, very hard, and they ruin their knees, their shoulders, their backs in the mines. They're put on pain medication when they're clinically disabled and they have chronic pain issues, and in these poor communities -- oh gosh, I got a red light. I'm sorry.

CHAIR SARIS: Finish your sentence.

MR. COLEMAN: I'll quickly wrap up.

CHAIR SARIS: Get a little of his time. You didn't quite --

MR. COLEMAN: Okay, thank you. But in these communities, you already have a type of barter system. "You know, my doctor was gone. My car was broken down. I couldn't get in to Beckley to get my prescription refilled," and they share.

Then later, they sell because they need some gas money or they want to buy something to eat, and it -- there are plenty of cases where that expands, but when you see two, three, four levels
transaction -- four pill transactions, these are the ones who are going to be swept up if you leave the HCP's in the drug quantity table, and our position -- to sum that up quickly -- is put the Schedule II hydrocodone combination products (HPCs) back out as a separate part of that advisory note in the drug equivalency table. Change the Schedule II to Schedule III, but make HCPs separate.

For the actual single entity, while the defender organization believes we need to restructure this whole thing for reasons that are set forth in our written testimony, certainly in the interim, this year is a stop gap.

It is beyond me, how justice has gotten from 1,675 in 2009, to now a full-blown 6,700 because we're just like oxycodone.

We've cited studies -- nine different studies in our written testimony -- that show the abuse liability is not the same. The market structure is not the same. You do not see -- my question, I guess is -- from the Federal
My last hydrocodone case was the first year I got with the Public Defender Officer here in 2006. It was a pharmacist. She was in a six by eight area working and self-medicated. So, she didn't distribute. So, thank you for your time.

CHAIR SARIS: Well, thank you. Questions?

COMMISSIONER BARKOW: Mr. Rannazzisi, my question. We have comments. You might not have seen them because it's for another Panel actually.

But our Probation Officers' Advisory Group had told us that it was their experience in the field and with their contract treatment providers that it turns out hydrocodone really isn't the drug of choice. That, you know, if you -- just in terms of actual usage and practice.

They called it a maintenance opiate and an introductory one, but it's not -- you know, they suggested that, if we were to actually look at real-world market dynamics, that they're not...
equivalent.

So, the probation officers had supported the other ratio -- not the 6,700, but the 4,467 -- and I'm just wondering if you comment on why their experience might be different from some of the things that you had cited.

MR. RANNAZZISI: Absolutely. Thank you. I deal in real-world market values too. To say that there are different marketplaces for these drugs is not actually accurate. There are different geographic locations where these drugs are dispensed.

But if you look back to the early 2000's, the number one drug of abuse, the number one in the pharmaceutical realm, the number one drug that was being diverted was hydrocodone.

How was it being diverted? It was being diverted over the Internet, and just in one case, we had 34 Internet facilitation sites.

Now, the average -- and those -- each Internet facilitation site was a brick and mortar pharmacy.
Now, the average pharmacy in that time period -- in 2006 -- dispensed about 70,000 hydrocodone tablets. Those 34 pharmacies dispensed over 98 million tablets in total.

Now, where were they going? They were going to places like Kentucky and Tennessee, and in Kentucky it got so bad, that they were following the common carrier trucks to see if they could get their packages off the truck before they're delivered to the locations they were supposed to go to.

Now, that all changed after Ryan Haight came into effect. Ryan Haight -- the Ryan Haight Act -- basically shut down the Internet.

So, what did we see? We saw a total shift in what was being dispensed. We saw a total shift; Internet went away, and we started seeing pain clinics.

Now, what's interesting to note is if you were in Texas, your pain clinics were doing hydrocodone, but if you were in Florida -- which was where all the Internet pharmacies were -- they
moved to oxycodone.

So, you the Texas people at hydrocodone and the Florida people at oxycodone, dispensing in huge quantities.

Now, we always -- they always said, "Well, why is it that somebody would go from hydrocodone to oxycodone?" Well, it's because you build a tolerance to the drug. Eventually, you're going to need more drug.

Now, the problem is up until this year, last year, there was no single entity hydrocodone high-potency tablet. The highest tablet you could get was a 10-milligram hydrocodone tablet. That was it.

But what we saw was 15- and 30-milligram oxycodone immediate release tablets, and everybody who couldn't go to those hydrocodone anymore -- because they needed 10, 12, 14, 20 tablets to get that same effect -- they started moving to the oxycodone, but it's not because the oxycodone was any more potent. It was because there was more drug active ingredient in the dosage forms.
Now, I would like to see what would have happened if there was a single entity product for the marketplace when all this was occurring, but there wasn't, and we don't know exactly what's going to happen with those single entity products now that hydrocodone is in Schedule II.

But I could tell you that if you're in different places of the country -- like I understand that in West Virginia, oxycodone is king. Of course, it is. I've been to West Virginia. Actually, I went up to Oceana, which is near Beckley, and I talked to community groups up there a couple of years ago, and they were saying oxycodone is just ravaging their community.

But I could go to several communities in Appalachia or Texas and hydrocodone is the king still, and it will always be the king because now they have these single entity high-potency hydrocodone tablets, and once they're made available -- once they're out in open marketplace -- that's what they're going to be going to.

But you don't -- it's not a marketplace
issue. They're both coming out of -- they're both coming out of rogue pain clinics. They're both coming out of dealers; there are dealers who are dealing both drugs.

CHAIR SARIS: How many prosecutions have you had for hydrocodone? What is the comparison between that and oxycodone?

MR. RANNAZZISI: I can't tell you prosecutions; I could tell you cases.

CHAIR SARIS: You mean open investigations?

MR. RANNAZZISI: Yes, investigations. Our NFLIS data -- our National Forensic Lab Information System -- when we talk about National Forensic Lab Information System, these are samples of drugs going in that are related to a case.

Hydrocodone cases far exceeded oxycodone cases in 2000 to 2008. But there was a substantial shift in 2009. Oxycodone started to be king, and the hydrocodone cases started to go away because there was a shift in Florida.

CHAIR SARIS: So, the last few years,
what would you say the differences between --

MR. RANNAZZISI: Oxycodone definitely was more than hydrocodone.

CHAIR SARIS: Well, do you have like a ballpark number for the two?

MR. RANNAZZISI: I could give you the NFLIS -- the number of NFLIS cases.

In 2000 --

CHAIR SARIS: Say 2012 or 2013 or something -- 2014?

MR. RANNAZZISI: In 2012 we had 34,832 case samples.

CHAIR SARIS: For?

MR. RANNAZZISI: For hydrocodone, the hydrocodone products, that was pre-single entity high-potency products. These are just the combination -- the 5-, 7.5- and 10-milligrams pills -- as compared to 41,915 for the oxycodone products.

That includes the high-dose oxycodone, the OxyContin 60's and 80's. It includes Percocet, Percodan, which is 5-, 7.5- and
10-milligram tablets. It includes --

VICE CHAIR BREYER: When you say cases, what do you mean?

MR. RANNAZZISI: When a law enforcement agency does an arrest or search warrant, or an undercover purchase, they take the drugs and they send it into State, Local and Federal labs for analysis.

Each one of those drug samples opens a case. They have to have a case number to open it. So, that would be the cases.

So, the samples, now, there could be several samples under that case number, but that's the number of case numbers that were opened.

COMMISSIONER FRIEDRICH: Mr. Rannazzisi, Mr. Coleman makes a compelling point in his written testimony that the Commission may have strayed off course in 2003, when we changed the marijuana equivalencies for oxycodone, and in his testimony, he says that although heroin is more potent, it is punished less severely with the marijuana equivalency of 1,000 grams.
In your view, is he correct, that we do have a proportionality problem, putting what we do with hydrocodone aside right now? Do you think with the opioids, there is a problem in proportionality between the different drugs?

MR. RANNAZZISI: No, and when you're comparing oxycodone to hydrocodone, no.

I think that heroin is becoming a problem, but you have to understand that our use of heroin is a symptom of our opioid abuse.

In 2011, we had over 16,900 people die of an opioid overdose. That's not heroin. That's drugs like oxycodone, hydrocodone, morphine, methadone, fentanyl and oxymorphone.

Only 4,400 people died of heroin that same year. So the --

COMMISSIONER FRIEDRICH: Is that because of accessibility, rather than potency?

MR. RANNAZZISI: I think that it's a little of both. I think potency has a lot to do with it but so does accessibility.

Remember: hydrocodone is the number one
prescribed drug in the United States of all drugs, including antibiotics. It's over 130 million prescriptions written for hydrocodone. So, it's a highly accessible drug.

Now, that number is going to go down because of the rescheduling action, but everybody believed that hydrocodone was not as potent because it was in Schedule III. That's where the legal fiction comes in. It should have never been in Schedule III; it should be treated as a very potent opioid, because it is a very potent opioid.

So, I believe that the sentencing, if you make it in parity with oxycodone, you're not doing an injustice. You're actually --

COMMISSIONER FRIEDRICH: I understand that. I'm just wondering whether oxycodone, as compared to heroin, whether we've got it right.

MR. RANNAZZISI: Absolutely. You absolutely have it right.

I think that, again, oxycodone is, in my view, more dangerous than heroin because it's a legitimate drug. People don't realize that you
could overdose just as easy on oxycodone as you can with heroin, and it could be used similarly to heroin. It could be injected just like heroin.

Those 15- and 30-milligram tablets are being injected. They're being snorted. They're being smoked -- just like heroin.

So, in the end, I think that yes, you got it right. It's just bringing the hydrocodone up to the oxycodone, since they're very, very similar drugs.

MR. COLEMAN: Sorry, I'm making faces while I hear some of this. Joseph is hitting on some points from his background.

CHAIR SARIS: We have to switch the camera right over there.

MR. COLEMAN: And some of the data. I have to strongly disagree.

You'll note the points made in my written testimony, but keep in mind, Congress set the 1,000 to one with what? Heroin to marijuana. That's why we have the initial focus on heroin, besides it is very illegal.
All this started with the opium poppy; it's got three alkaloids - morphine, thebaine and codeine. What historically has been the biggest addiction problem in the United States going back to the 1800's? Morphine.

We have the “Soldier's Disease” after the Civil War. Addiction to morphine. In all these other opioids that we currently use in Europe were developed as alternatives to get the analgesic effect -- without all the consequences and addiction problems -- of morphine.

If we look at the definition of opiate in the 1986 Act, it defines it as something that has morphine or morphine-like qualities.

So, when you look at the drug equivalency table in the application, you've got a 500 to 1,000 ratio between morphine and heroin, which makes sense because it's pretty accepted that heroin is twice as potent as morphine.

Remember that heroin came along, and before they understood what it did metabolically, it was to stop morphine addiction, and then they
found -- and I had a medical chemist tell me, and this was really interesting -- all heroin is, is putting a vinegar molecule on top of a morphine molecule.

It gets in the body. It's stripped down for faster application with metabolism, and boom, it goes in.

So, when the Germans and Bayer came up with, I believe -- yes, ma'am, the hydrocodone was developed as an attempt to synthesize codeine. It's chemically different because it's from different alkaloids. They're in the same family. It's organic chemistry. They've got the same base five-point structure, but then they differ with what's put on the ends, and you can ask your experts about the chemistry.

But these rogue clinics, pain clinics, this is coming back. Again, in my district, I know in Eastern Tennessee, I worked there 14 years. I was on the CJA [Criminal Justice Act] Panel from '98 through 2006. I never had a hydrocodone case. I never heard of too many beyond maybe less than
10 Lortab cases -- that was in the Eastern District; that was in the Chattanooga Division.

CHAIR SARIS: Have you surveyed the Federal Defender's offices across the country to see if your experience is indicative?

MR. COLEMAN: The defender services did survey different offices, and it's really kind of coming down to what's unique with the five top districts that are identified -- with the exception of Florida -- where they do have some pill mills down there.

But I know in the Eastern District -- and there are some in the Eastern District Kentucky. The dynamic my co-panelist is describing is -- it's not that it's not existent --

CHAIR SARIS: Are the defenders seeing an increase in hydrocodone cases?

MR. COLEMAN: No, ma'am.

CHAIR SARIS: All right.

MR. COLEMAN: I did --

CHAIR SARIS: So, you would say your
district is representative?

MR. COLEMAN: Yes, ma'am.

CHAIR SARIS: All right, I just wanted to --

MR. COLEMAN: No, and when Zohydro was approved, when I heard it had no tamper-resistant qualities at all, the first thing was like, my God, this is going to be a contact crush. There are going to be people dying everywhere, and I tried to protect our panels with that when we had our CJA conferences, and did a very lengthy presentation, the whole thing. I got the weights from the manufacturer, because I knew the probation officers and everybody were going to be worrying about the weight.

We haven't seen Zohydro approved by the Board of Pharmacy to be distributed in West Virginia yet.

So, we seem to be pre-mature and jumping the gun by jacking up the multiplier. Moving to Schedule II has a practical benefit on legal dispensation. Let's give it a year and see how it
works; if the cases spike, we'll know what to do.

CHAIR SARIS: Thank you. Judge Breyer?

VICE CHAIR BREYER: Well, I was interested in your testimony that you've done extensive scientific inquiry, and I wanted to flesh that out a bit, because this -- are you referring to the inquiry that was done in the rescheduling of the drug?

MR. RANNAZZISI: Yes, sir.

VICE CHAIR BREYER: And that was -- can you give me a little bit more of a context of that? Flesh it out a bit.

MR. RANNAZZISI: Sure. When we do a rescheduling action, our scientists -- we have Ph.D. pharmacologists just like FDA. Our scientists look at all the literature, review the drugs, review the pharmacology of the drug, review the medicinal chemistry of the drug, you know, look at different things regarding receptor affinity, things like that.

Their research is done, then it's sent
over to FDA and FDA's research is done, and then it comes back, and then they sit down and they talk.

VICE CHAIR BREYER: And how long is this process?

MR. RANNAZZISI: Well, for this drug, the process started in 1999, and we finished in 2014.

VICE CHAIR BREYER: So, it was about a 15 year inquiry?

MR. RANNAZZISI: Approximately, yes.

VICE CHAIR BREYER: And are you familiar with any similar inquiry with respect to marijuana?

MR. RANNAZZISI: There have been a lot of studies --

VICE CHAIR BREYER: Schedule I, right?

MR. RANNAZZISI: Schedule I, correct, sir.

VICE CHAIR BREYER: And the FDA claims that there is absolutely no medical use of that?

MR. RANNAZZISI: Yes, sir.

VICE CHAIR BREYER: And is a similar
inquiry going on with respect to marijuana?

MR. RANNAZZISI: There have been several inquiries going on with respect to marijuana, sir. In fact, we've had, I think, at least two reviews where both our scientists and FDA scientists have done those reviews, and they've come back with a -- there is no medical --

VICE CHAIR BREYER: Is there presently any inquiry going on with respect --

MR. RANNAZZISI: I believe there is.

VICE CHAIR BREYER: -- to marijuana?

MR. RANNAZZISI: Yes, sir; I believe there is.

VICE CHAIR BREYER: And do you have any idea when that is going to come back?

MR. RANNAZZISI: Again, that would be a better question to be posed to the FDA.

VICE CHAIR BREYER: Okay; thank you.

CHAIR SARIS: I was going to -- I, myself, and Boston, haven't seen hydrocodone cases. Maybe they're there. I haven't received any, whereas, really, everyone is focused on
oxycodone, and you -- so, it does strike me
geographically, there must be huge differences on
what's happening.

So, I am interested if you could get the
data on how many actual prosecutions there have
been and geographically where that is, because it
isn't something that at least many of us have had
experience with.

You say in your testimony, or the
Department does -- and I'd be curious about both
what you all say -- is that an addict may start with
hydrocodone combination tablets, which cost $5 to
$10 a tablet, then progress to the oxycodone, which
is $30 to $80 a tablet, and then once she can no
longer afford that, she may buy ten bags of heroin.

Is that something that is a
hypothetical addict or something that you've seen
statistically as the course that an addict will go
through?

MR. RANNAZZISI: That's what we're
seeing; that's a reality.

What's happening is hydrocodone,
because of its schedule -- because it was scheduled
in Schedule III, it was widely available.

So, say you're a kid, and you start --
either you've been injured and you start taking
hydrocodone because a doctor prescribed it, or
you're at a party and somebody got into their
parents' medicine cabinet and got some hydrocodone,
and they pass it around.

Some kids have a very, very great
euphoric effect when they take this drug. So,
they're chasing that effect. So, they want more
carf.

CHAIR SARIS: So, why would they go to
oxycodone? If you're saying that they're
equivalent, what was it? Euphoric values? I can't
remember what that was.

MR. RANNAZZISI: Because --

CHAIR SARIS: And it's --

MR. RANNAZZISI: Because your body
builds --

CHAIR SARIS: It seems from this --

MR. RANNAZZISI: -- a tolerance.
CHAIR SARIS: -- as if they prefer oxycodone, because it's got a higher potency.

MR. RANNAZZISI: Because you build a tolerance to the drug. And remember, we're only dealing with back then, hydrocodone combination products -- the 5-, 7.5- and 10-milligram pills -- and it's got aspirin or acetaminophen or ibuprofen in it.

When you're dealing with a small quantity and you're building a tolerance to the drug -- and tolerance is not addiction; tolerance is tolerance -- but you need more drug to get that same effect, and pretty soon, you're looking for a stronger, more potent drug.

Now, oxycodone is not 10-milligrams. You could find the immediate release oxycodone in a 15- to 30-milligram tablet, and it doesn't have any acetaminophen, and it doesn't have any aspirin. So, they go to that.

But those tablets are not $5 a tablet. Those tablets are between $20 and maybe $50 a tablet, and now, as you build a tolerance to that
drug -- to that particular oxycodone -- you need more drug onboard. You can't afford it anymore, because it's just too expensive. You can't afford a $300 or $400 a day habit because you're taking multiple pills, so then you go to heroin at $10 a bag.

Heroin is the cheapest opioid on the market right now at $10 a bag, and that's why everybody is going to it.

CHAIR SARIS: Commissioner Friedrich?

COMMISSIONER FRIEDRICH: So, you don't agree with Mr. Coleman's testimony, that the quality of the high with oxycodone is greater than hydrocodone?

MR. RANNAZZISI: No.

CHAIR SARIS: Are you seeing -- you say you don't see very much hydrocodone, Mr. Coleman, but do you --

MR. COLEMAN: The migration --

CHAIR SARIS: Do you see that progression?

MR. COLEMAN: Well, the migration --
the migration isn't based on something -- they all
give a euphoric effect, but then as soon as the
80-milligram OxyContin dried up, and they got the
tamper-resistant qualities in 2010, people started
turning to Opana. They started turning to
Dilaudid. They didn't immediately go to heroin.
There was a big crack down on that, because, well,
that's what we were seeing. We weren't seeing
hydrocodone or Vicodin or Lortab. Now we see
people going to heroin because they are so strung
out, they have abused buprenorphine, Suboxone and
methadone.

At some point, it becomes fungible, just how do we get rid of being dope-sick and
getting high?

There is a degree of tolerance, sure.
There is also a great degree of interchangeability,
but when you get down to actual preference -- and
we cite that in our written testimony -- you know,
nine out of the eight studies we hit on identified
a much stronger preference and euphoric --
perceived, at least -- euphoric effect with
oxycodone.

There is one, and I believe the author of that is going to be testifying on another panel, who says they're the same, but that's not what is being reflected in the field.

There is -- the tolerance does have some impact, but once they start getting truly addicted, at that point they want the strongest thing they can get, and it's only when there's nothing to buy, they go to heroin, and hydrocodone is not weaving its way into that mix as an HCP or a single entity product -- at least not where we're working.

COMMISSIONER BARKOW: I was just curious, what is the state of the abuse deterrence, which I guess DEA works with the FDA to talk about the potential for abuse of the pills, how easily they're crushed and what not.

So, what is out there now that is easily abused, and which ones seem to be ones that have been regulated sufficiently by the FDA? That it's less of a worry? Because I know that was part of this, sort of how easy is it to crush or use in these
kinds of forms. Has the FDA done its job in making sure that these drugs aren't -- I know that's a little -- that's outside of our jurisdiction, but it seems related to the law enforcement needs.

MR. RANNAZZISI: FDA, no, FDA is actually pushing the manufacturers towards abuse deterrence. But remember, abuse deterrent formulations don't have anything to do with oral abuse, which is the number one type of abuse.

The only thing those abuse deterrent formulations will do is stop them from crushing and snorting, crushing and injecting or crushing and smoking.

For instance, the OxyContin, the OP (OxyContin Purdue) tablet, that tablet is very difficult to circumvent. That delivery system is almost impossible to circumvent, and it's done a great job, but that doesn't mean OxyContin is not being abused. It's being abused orally. They double the dose and take a potentiator with it.

But in the end, we will see a lot less deaths, if we have a lot more abuse deterrent
formulations for all of the opioids. That is --
that is the -- the FDA is right on track. That's
the gold standard. If we could get all these
drugs, but those Oxy 50s, just so you know the
extent of this.

OxyContin was not the drug of choice in
Florida back in 2008, 2009, 2010, coming out of
those pain clinics. They were Oxy 15s and Oxy 30s.

Those are immediate release with no
abuse deterrents. That was -- OxyContin pre-2010
had no abuse deterrent formulation. The delivery
system was easily circumvented.

But in 2010, 43 percent of all of the
oxycodone products, the 15s and 30s were going down
into Florida. Forty-three percent of the whole
country, oxycodone 15 and 30s were going down into
Florida.

Okay, OxyContin was not the problem in
Florida. It wasn't even close to the problem in
Florida. The problem was those immediate release
products, and they had no abuse deterrent
formulation, and as far as going to oxymorphone,
oxymorphone is another regional drug.

If you're in Appalachia, oxymorphone is the drug. But if you're outside of Appalachia, no one is going to oxymorphone.

CHAIR SARIS: Mr. Coleman, can I ask you one question on the -- it -- we're about to hear from the experts.

MR. COLEMAN: Yes, ma'am.

CHAIR SARIS: But we've read the testimony. I mean, the scientific evidence, a lot of it seems to suggest they're equivalent, and you say they're not.

Do you have an expert or a particular report you want to focus? You say there are six reports there. Is there a particular expert?

MR. COLEMAN: I know Mr. Cicero was -- I don't know why he's not a witness before the panel. But I know he was --

CHAIR SARIS: So, is there a report in here that we should be reading?

MR. COLEMAN: I don't have one from him. We can certainly submit it with the comments...
for consideration by the Commission, and would like you to certainly consider that.

CHAIR SARIS: It's not cited in here.

MR. COLEMAN: There is a -- the Rachel Wightman article from September of 2012 is in our written testimony. That's with the Journal of Medical Toxicology, where they surveyed the leading articles through a pretty rigorous survey methodology, and it was just the relative abuse liability of hydrocodone and oxycodone and morphine, and the consensus from that study and the review of the nine studies they pulled out of 16, again, with a pretty rigorous criteria, it would suggest the abuse liability, at least for oxycodone is substantially greater.

CHAIR SARIS: So, you would have us focus on that, rather than the scientific equivalence, in terms of analgesic properties?

MR. COLEMAN: The problem with that is that we have one textbook that says they're even. Every pharmacist -- I've tried to consult and talk about it when I was trying to get up to speed on
this, not for the Commission, but in my practice, was you know, it's always relative.

It's relative to individual metabolism, body size, and prior opioid use that while we have one textbook that says there is a direct equivalency, it's not the only source out there.

We cite some sources in our testimony where they feel they're different, and that alone, I think -- we had proposed we need to study this some more for that reason. We need more sources of information before we just jump up to 6,700 or 4,475, and that's why we have proposed, I believe in the HCP is where they are, and if we're going to go to a higher ratio with actual ingredient weight, which really we should do --

CHAIR SARIS: So, you -- but you say if we read this Wightman article, that's going to say that it doesn't have the same abuse liability?

MR. COLEMAN: Yes, ma'am, absolutely.

CHAIR SARIS: Thank you.

COMMISSIONER WROBLEWSKI: So, you
cited in that -- if I could, you cite an article that talks about a -- something called the opioid analgesic converter. I don't know if you recall that.

But that is one of those where you said there was a difference, and yet, when we looked at it, the table there seemed to say that they were -- that the doses were, in fact, equal or at least overlapping.

MR. COLEMAN: I will need to go back and look at that.

COMMISSIONER WROBLEWSKI: Okay, if you could cite to us anything that is -

MR. COLEMAN: Sure.

COMMISSIONER WROBLEWSKI: -- just the difference, because the two articles that you cite seem to suggest something consistent with what the FDA witness is going to be testifying, that the dosages are the same for oxycodone and hydrocodone.

MR. COLEMAN: I would simply point out, I will supplement that, but let's say at the end of the day, the consensus is the analgesic effect
is the same.

That doesn't validate the 6,700 multiplier or that big a difference between heroin, where we have the statutory relationship established, and the 6,700 multiplier we've done since 2003.

How deterrent -- how -- what is the deterrent effect of that then, if we look at the numbers, because using the time Joseph was talking about between 2006 and 2012, there were 3,251 oxycodone cases and 469 hydrocodone cases. That big a difference, even though --

CHAIR SARIS: Just could you say those numbers again?

MR. COLEMAN: Yes, ma'am, 3,251 versus 469.

CHAIR SARIS: And that time period was?

MR. COLEMAN: Between 2006 and 2012.

COMMISSIONER FRIEDRICH: When heroin abuse is rising, are you all going to be back here in a year or two saying we need to raise heroin up to match oxycodone and hydrocodone?
MR. RANNAZZISI: I can't speak for the Department, but what I can tell you is heroin abuse is rising because of hydrocodone and oxycodone. That's the reason, and if we control hydrocodone and oxycodone, if we could -- if we could limit -- limit the amount that's going into the abuse -- limit the amount that's going into the drug seeking community, we're going to save lives and we won't have a problem with heroin.

Our issue right now is controlling the pharmaceuticals, and if I can make one more comment.

CHAIR SARIS: And then we do need to wrap up.

MR. RANNAZZISI: Okay.

VICE CHAIR BREYER: Before you do, I just want to follow up.

Are you saying that if we raise -- if we raise this level, as suggested, the level of punishment, we are then going to reduce the heroin abuse, and there is scientific evidence of that?

MR. RANNAZZISI: No, what I'm saying is
VICE CHAIR BREYER: Or is that a hope? Is that an aspiration? Is it -- is there scientific evidence that supports that statement?

MR. RANNAZZISI: There is scientific -- well, there is evidence that shows that people are starting on drugs like oxycodone and hydrocodone and moving to heroin.

If we had an addiction specialist at this table, that addiction specialist would say the vast majority of their clients started with hydrocodone and oxycodone.

VICE CHAIR BREYER: Well, but you start somewhere. It doesn't necessarily mean that that then causes the higher -- the use -- the use of another drug later on. I mean, that is -- that's -- I've heard of that for now 50 years, that -- and it's been in the field of marijuana.

You start with marijuana, people, they're going to be heroin addicts. I mean, I've listened to that.

So, the question really is, is there
some controlled satisfactory, scientific evidence that shows that if we raise the penalty for hydrocodone, we will then reduce the incidents of heroin abuse? Is there -- is that what you're saying? There is scientific evidence for that?

MR. RANNAZZISI: I don't have any study that shows that, but hydrocodone and oxycodone and heroin is not marijuana. People don't die from marijuana. People don't overdose from marijuana, but they do --

VICE CHAIR BREYER: But we know that marijuana is a Schedule I drug.

MR. RANNAZZISI: Yes, but we also know that there is a natural progression based on tolerance, from one opioid to another, until it reaches heroin.

I mean, I could -- this is not marijuana. This is not the gateway theory. This is -- this is science. You build a tolerance to the drug. Once you build a tolerance to the drug, you need more drug.

You have a panel coming up with two
very, very distinguished scientists, Dr. Hertz and Dr. Walsh. They could much better explain tolerance, but eventually, they're going to need more drug onboard if they're chronic users.

CHAIR SARIS: All right, we're really over, but Commissioner Friedrich has one burning question and then we're moving onto the --

COMMISSIONER FRIEDRICH: Just talk to my original question. Which is more potent, heroin or oxycodone?

MR. RANNAZZISI: Relative potency, I think you need to talk to the two doctors that are coming up in the next panel.

CHAIR SARIS: And we will. So?

MR. COLEMAN: If I could wrap up? Judge Breyer, to answer your question --

CHAIR SARIS: Ten seconds, because we're really now way over.

MR. COLEMAN: Page 23 of the government's testimony, footnote 20, you will find the exact opposite that this is not -- hydrocodone is not a gateway drug to heroin.
The study cited by the government's own testimony has a different conclusion. The vast majority do not within five years of having used it, which is --

CHAIR SARIS: Thank you very much. We'll move onto the next panel.

You're all welcome to stand. I say to my juries, stretch in between.

Welcome. The experts have arrived.

Dr. Sharon Hertz is the Acting Director for the Division of Anesthesia, Analgesia and Addiction Products, Center for Drug Evaluation and Research at the U.S. Food and Drug Administration, and has held that position since September 2014.

She's been on the staff at the Food and Drug Administration since 1999, serving in various capacities in the Division of Anesthesia, Analgesia and Addiction Products.

Dr. Sharon Walsh joined the University of Kentucky Colleges of Medicine and Pharmacy in 2005, is a Professor of behavioral science, psychiatry, and is Director of the Center on Drug
and Alcohol Research.

   Dr. Walsh's clinical research has focused on pharmacological and behavioral issues and opioid abuse and dependents.

So, Dr. Hertz, welcome.

DR. HERTZ: Thank you, Chair Saris, Vice Chair Breyer and Distinguished Commissioners.

So, I will not read my statement, and I'll go over to say that we've been considering many aspects of this issue over time, as we've also worked to address issues of misuse, abuse and addiction, and pursuant to the specific questions and information that you seek here, I will say that hydrocodone and oxycodone and analgesic products have a number of similarities.

So, they are both opioid analgesics. They are both available in immediate release formulations, in combination with other drugs, most frequently acetaminophen and both as single entity extended release formulations, although as stated, only oxycodone is available currently as single entity immediate release product.
Both drugs are now in Schedule II of the Controlled Substances Act and they both share long marketing history and substantial market share.

The potency refers to the dose of a drug required to produce a given effect, and there is not a lot of information available about the actual potency for different opioids, the relative potency, but the data that we do have from a variety of sources suggests that hydrocodone and oxycodone are similar in potency, when used as an analgesic for pain management.

The relative potency can differ based on different pharmacodynamic effects.

However, there are many factors that result in inter-individual variability. I will also just state that our controlled substances staff has reviewed a number of studies, six studies published in the time between 2003 and 2010, and they concluded that based on those studies, single -- hydrocodone single entity and combination products produce similar euphoric effects to morphine and oxycodone in a dose dependent manner.
I'm happy to answer any questions that you have.

CHAIR SARIS: Thank you. Dr. Walsh?

DR. WALSH: So, am I on? It's a great pleasure to be here today, and I thank the Chair and the panelists.

I will try not to read from my statement, and I wanted to actually just give an abbreviated statement that would highlight two points that I felt were the things that I was specifically asked to address with respect to the report.

However, after hearing the last panel, there probably are some other things that I would like to add in --

CHAIR SARIS: Sure.

DR. WALSH: -- maybe during the panel time, and so, in starting out, I'd like to say that what I actually do, aside from those titles, is that I work with the substance abusers every day.

So, we do -- we provide treatment to opiate dependent individuals. We enroll them into studies, both as in-patients and out-patients. We
get to know them. So, we know a lot about what their patterns of abuse are, and certainly, we know what it looks like on the ground in Kentucky.

I had been in Baltimore in the inner-city for 15 years before that, so I know a lot about what heroin looked like there, as well.

So, with that, I'll go on to addressing the two topics that I specifically wrote about, and the first was with respect to having sentencing tied to actual drug weight versus the unit of drug, and I think, in agreement with the prior speakers, it is very clear that using actual drug weight is the only really appropriate answer here.

Hydrocodone is available in literally hundreds of different formulations, in combinations with all kinds of other things, sometimes active ingredients that are not narcotics, like antitussives or acetaminophen. There are a lot of inactive ingredients and with the new abuse deterrent formulations, some of those ingredients actually can weigh quite a bit.

So, in thinking about trying to
harmonize things, looking at actual weight seems to be the most fair and appropriate approach and this is what has been done with oxycodone, and so, that seems to harmonize between those two.

The second issue is a little bit more complicated and this is with respect to trying to determine the severity of sentencing with respect to equivalencies, and so, you've heard a lot about that already this morning, about whether or not oxycodone and hydrocodone are equipotent.

So, there are two proposed amendments. One that proposes an equivalency of 4,500 grams and the other that is more severe, that proposes 6,700 grams, and that is because the reports that were used, in order to establish those estimates for this consideration, were two different written published sources that have disagreeing potency comparisons.

In both cases, those are actually analgesic equivalency tables, and so, I just want to say a word about using analgesic equivalency tables.
This is actually not necessarily a scientific document. It's not necessarily something that has been derived from scientific studies. These are important guidelines that physicians need to have in their back pocket, when they're treating patients with pain and they're trying to convert them from one drug to another, so that they make sure that they don't overdose or underdose somebody.

But the way that those data are derived are often unknown, and if you look at the source documents that are in the report, you'll see that many of them don't have any references that actually tie them back to the scientific literature, and that is because some of them are done from clinical experience, and others come from pharmacology textbooks. Some come from studies where people were dosed chronically and maintained on an opioid, and then they were rotated to something else, which is common in terminal care, for instance.

But others are with single acute doses,
and you can imagine that all of these things make for a mixed bag of findings, and so, I think that really defines the reason why you can look at -- I have a stack here of different analgesic tables, and there is a big number of different outcomes, when you compare the drugs.

But the other thing to think about, I think that's important, is that when we think about drugs of abuse for which penalties have been devised, really for instance, like with cocaine or hallucinogens, there isn't some clinical therapeutic application that you're going back to, to look at and determine the strength of the drug, and how it's been used clinically to help make decisions about punishments.

In this case, it just so happens that the opiates are used as analgesics, and so, that seems to be the reason why there is some reliance on this.

In my opinion, I think that the more important thing here is because the drugs that we're talking about, we're talking about them being
abused and not being used as analgesics, is that
what's relevant is the relative abuse liability.

So, we've done studies in our
laboratory, examining the relative abuse liability
of these drugs directly.

I will say that there are very defined
criteria that are approved and codified by the Food
and Drug Administration. The Food and Drug
Administration requires these types of studies for
new drug approvals, and these studies are used to
inform the Drug Enforcement Agency about
scheduling decisions.

With respect to the former speaker who
referenced a review article that concluded that
oxycodone was more potent than hydrocodone by
review of some number of papers, most of those
studies were actually done in normal healthy
controls, and the FDA guidelines recommend that
abuse liability studies be conducted in a target
population, and that is the people who -- that are
actually abusing the drug, because if I were to give
the panel morphine or heroin, and I asked you how
much you liked it this morning, you might not like it very much, because you probably are not a heroin or morphine user, and lots of people, if you've had the experience in the hospital of having an opiate say, after a surgical procedure, it's very, very unpleasant.

So, when you're thinking about abuse liability, it's really important to target the population who self-selected. They know -- they're using these drugs. They like these drugs, and so, if you're interested in the like-ability of these drugs or the street value of these drugs, that's the population that you want to study, and there actually are only a handful of studies.

So, the one review article that was referenced, many of those studies don't actually qualify under what the FDA would recommend.

So, with that being said, I can tell you that we have directly examined, within the same subjects, a whole range of doses of oxycodone, hydrocodone and hydromorphone given orally under very controlled laboratory settings, and we find
that the drugs are very, very similar, with respect to the profile of effects.

They produce all positive effects. There is no negative effects in this population, unlike in normals, and then there is a more sophisticated statistical technique that can be used, that is accepted in pharmacology for understanding how to actually calculate with validity, the relative potency between or amongst drugs and in this case for that study, we were able to use those data, and do this Finney bioassay, and we found significant findings, where we had valid comparisons across a number of different measures, both subjects telling us how much they like the drug, observers who were in the room, watching how intoxicated the person is, but not knowing what dose they got that day, and then also, some objective measures, like physiological responses to the opiates.

What we found was that the relative potency estimate was .929, and what that means is that .929 milligrams of oxycodone is needed to
achieve the effects of one milligram of hydrocodone.

    So, it's not one-to-one. But it's quite -- it's about as close to one-to-one as you can get, with respect to not just these abuse liability outcomes, but also some other objective markers.

    So, that is really the end of what I had wanted to share with two specific topics, but if I have permission, I'd like to go on to say one other thing, and that is one of the things that didn't come up in the discussion with the earlier panel, you know, if these drugs are equal in their potency and equal in their euphoric effects, and in fact, hydrocodone has actually historically been more available, why do we hear more about oxycodone and why is that more of a problem?

    One of the things that wasn't raised is the fact that hydrocodone has historically been available only in these combination products, and people who are escalating their drug use, they may -- they may remain an oral user, but more often than
not, when someone is actually really getting into trouble, they're going to escalate to use a different route of administration that provides a better drug delivery.

So, they'll start crushing and snorting the drug, because you get better bang for your buck that way. That's a very -- that's an official pharmacological term there. You get improved bio-availability, but from their perspective, it's a better high for less money, for the same pill. Or you inject it, where you get 100 percent of the active ingredient and none of it is going into your gut and being excreted out without getting the fun of it.

The problem with hydrocodone products is that opiate abusers know that acetaminophen is dangerous. Everyone knows that it -- and they know people who have landed in the hospital in liver failure, because of this. And so, they know that it hurts when they snort it, and that people can develop holes in their septum that don't heal, and ulcerations.
So, we don't see people escalating their use with hydrocodone products, I think largely from the reports of all the people that we see, because of the fact that it hasn't been available as a single entity product.

It is now. We all know that. Zohydro was in the news. It was a big controversial thing. It really, from my perspective, where we are, it hasn't penetrated the market. But we now are doing a study with it and it costs more than $500 for one bottle.

So, that doesn't surprise me that it hasn't really penetrated the marketplace yet, and also some -- because of the concerns about it not having abuse deterrent protection, a lot of formularies actually are not putting it onto their formulary. So, I think it's a little bit challenging to get.

So, with that, I'll stop and take any questions.

CHAIR SARIS: Thank you. That was very helpful.
COMMISSIONER WROBLEWSKI: I have a couple of questions. Dr. Walsh, do you agree with the statements that were made in the last panel, that the increase in heroin use is related to pharmaceutical use and abuse. That's number one. And then, in addition to the changes in the guidelines, are there any steps, beyond criminal penalties that you think we should, as the Commission, recommend to Congress or the Office of National Drug Control Policy, to address this serious problem?

DR. WALSH: So with respect to the first question, whether I agree that the prescription opiate epidemic has led to an increase in heroin abuse, I think the evidence is strongly supporting that that is the case.

So, and a lot of it is an unfortunate byproduct of effective strategies that the government has used to try to crack down on prescription drug abuse.

So the FDA has been very committed to encouraging pharmaceutical companies to develop
abuse deterrent formulations. The new OxyContin formulation essentially suppressed its use.

I mean, we have data from Appalachia that are just remarkable in looking at the decline in abuse. In a cohort of drug abusers that we're following, and at the time that that drug came on the market and the old one was pulled off the market, people immediately moved to 30 milligrams of a generic oxycodone product.

But what has happened in addition, of course, is that there are prescription monitoring programs that are really enforcing things much more rigidly with physicians. Physicians are becoming more aware of prescribing practices and require -- there are now some requirements for additional education for physicians.

The DEA has been much more active with physicians, they are investigating physicians who are prescribing high volumes.

So, with all of that, what that has led to is an increase in the street price for prescription opioids, and a declining
availability, and so, I know that for the last
couple of years, the sales for oxycodone have
actually gone down nationally, which -- and that's
provided an opportunity for a new marketplace,
where we have Mexican heroin being transported into
places where it never was.

I can tell you that 10 years ago, moving
from Baltimore, which has always been a heroin city
as they like to say, when I came to Kentucky, there
was no heroin and everyone that came through my
door, and I interviewed about what they were using,
and they were all using prescription opioids.

They looked the same as heroin abusers.
The degree of their disease and disorder was just
as extensive, but they had not experienced heroin,
and if they told me that they ever had, I knew it
was because they had been someplace else. They had
gone to Chicago, or they had been to Cincinnati.
We just didn't have it in our area.

Now, in 2015, I can tell you that
virtually every person that walks through the door
is using heroin. Not alone. They're using it to
supplement their prescription opiates. But the heroin is much cheaper, and so, we're seeing more advances to intravenous use, as well.

Then your second question, is there any --

COMMISSIONER WROBLEWSKI: Other steps.

DR. WALSH: Yes, are there other steps that can be done?

So, I have to confess that because I'm a scientist and I'm very treatment oriented, that I have not done much research on how the impact of laws work on suppressing use.

What I know is that I see people using all the time, and so, we haven't eradicated the problem.

I think that there are a number of different strategies that are being implemented right now and they're working. It's just that there is a balloon effect, and to your point earlier about people advancing, you know, from marijuana to another drug, these actually are all in the same
class of drugs.

So, that -- it's a little bit different. You know, once you are dependent, physically dependent and you need that drug, any one will do. It will substitute and suppress your withdrawal symptoms.

So, I think the one thing that I would say is that I really did hear the prior speaker's concerns about whether or not the penalties were balanced with heroin, and I realized in looking back that, I don't know or understand historically, how all of that evolved. But, I do know that we have science that could inform it, just as though we are talking about the science today, and that if that was something that was under consideration, that we could apply that, and there are data on heroin potency that we could look at, to see whether or not the penalties were in balance.

COMMISSIONER FRIEDRICH: Dr. Walsh, that was the question I was about to ask you.

Your testimony is very compelling, suggesting that these penalties for oxycodone and
hydrocodone should be equivalent. But what I'm wondering, based on all the testimony we've read, is whether we've got it right across the table, and you've certainly suggested that actual weight is the way to go, and our table right now doesn't do that across the board.

So, I was going to ask you if you had a sense as to whether these drugs are calibrated appropriately, proportionately to other drugs, and it sounds like you don't have an opinion right now.

DR. WALSH: So, I don't have an informed opinion. We all have opinions, right?

I don't have an informed opinion because I haven't had enough time to really look at it, but I was really -- I was so amazed that all of the penalties were tied back to marijuana, when I first got the report to review, and I didn't really understand how that came to be.

Then when I saw Mister -- I read Mr. Coleman's testimony, and I actually wrote to the people who were organizing my visit and I said, "You know, I didn't think I was asked to change the whole
Like, this -- he's really recommending quite a few changes. I thought that I was being asked to comment very specifically on the pharmacology. But, I think that there is some merit to the things that he's saying, and if that was something that the Commission wanted to visit, that I would be willing to help with that, because I actually do think that we have data that can inform that, and I'm not going to sit here in judgment and say that the way that it's arranged is not correct, because I don't really feel like I understand enough.

COMMISSIONER FRIEDRICH: But you do agree that we should move to actual weight, rather than --

DR. WALSH: Yes.

COMMISSIONER FRIEDRICH: -- mixtures and --

DR. WALSH: Yes, I mean, there are -- well, actually, Dr. Hertz can speak to this probably more carefully than I can, because she
knows a lot about drugs that are in the pipeline. Maybe you can't because of confidentiality, but you know, there are many drugs that are being developed say, as abuse deterrent agents, where the weight of the excipients or the other ingredients are a lot more, a lot more than the weight of the active drug.

So, if someone is being punished for the plastics that are in there, for instance, or whatever, that would be really most unfortunate, because they you could have someone who has pure tablets and has -- you know, I mean, so, it just makes it for a -- it makes it for an uneven playing ground.

So, I think that that, to me, is very logical.

CHAIR SARIS: Can I ask you, Doctor Hertz, just a follow up on that?

So, as I'm understanding this, it's very helpful that Dr. Walsh is saying that the reason people weren't using the hydrocodone, rather than the oxycodone is because it was in
combination with acetaminophen, is that right, and now that we've got these single release tablets, that that may change.

So, what does the FDA think about when they approve these drugs that can actually create the abuse liability?

DR. HERTZ: So --

CHAIR SARIS: Maybe I'm backing into something, but hydrocodone, it sounds like wasn't such a big problem because it was in combination with these other things, and now, we have Zohydro. As you know, there's a big case up in Massachusetts on this.

DR. HERTZ: I am aware. As a representative of my agency, I can say that our appearance here today is limited to providing the Commission with scientific information related to relative potency of hydrocodone and oxycodone, and I'm not able to offer information related to other policy issues. I know that's not a satisfactory answer, but --

VICE CHAIR BREYER: Well, perhaps I ask
this question.

If I understand the testimony today, it is that drugs are being developed and being approved, and being encouraged, in a sense, that will have some abuse characteristics to it, in order to curb --

DR. HERTZ: Abuse deterrents.

VICE CHAIR BREYER: I'm sorry, abuse deterrents that will discourage the inappropriate use of the drug.

DR. HERTZ: Yes.

VICE CHAIR BREYER: Is that -- that's correct?

DR. HERTZ: That is true.

VICE CHAIR BREYER: And that that has some real weight, that is to say that if you analyze the drug that will be a significant component in the weight.

DR. HERTZ: Yes.

VICE CHAIR BREYER: And so, it would seem to me, if both of those things are true, it would be odd, it would be odd to punish in a more
severe way, a drug that has the abuse deterrent than
one that would not. It would be absolutely
counter-intuitive that one would give a more severe
sentence to the -- to drugs that have an abuse
deterrent, than one that does not.

DR. HERTZ: Yes, I can say --

VICE CHAIR BREYER: If the idea is to
discourage the use of unsafe drugs or without a
prescription.

DR. HERTZ: Yes, several of the
approaches to develop abuse deterrent products can
add a substantial amount of weight, can double or
triple the weight even of the actual tablet, without changing --

VICE CHAIR BREYER: Double or triple?

DR. HERTZ: -- without changing the
amount of opioid in the tablet.

VICE CHAIR BREYER: Okay.

COMMISSIONER BARKOW: So, on the
actual weight issue, so, I'm thinking about our
drug policy overall, and it's actually unusual for
us to look at the actual weight in other context.
So, you know, we don't see how pure the cocaine is or for other drugs, and the argument there has been, that I've seen, has been well, that's because that's not the market. Is it really about that? You know, you kind of buy or sell in doses and it's not so much about purity.

I'm just curious if either of you have a sense in your experience, if this market is different, in terms of people paying attention to the dose amounts on the tablet, or is it something that if we think actual weight is the thing that matters here, it's something we should think about broadly for all of our drugs, because it turns out all the things you were saying would transfer to the other drugs that we look at.

The counter-argument I've seen there has just been yes, but the market isn't reflecting that in the same way.

So, I'm just curious if you could comment on what this market might look like, in terms of the drugs.

DR. WALSH: Yes, so, it may -- all of
this, for me participating today, has been fun, to be able to read all the background and to think about some of the questions that I haven't thought about before, and that's one in particular, because there are big differences between drugs that are only sold illicitly, where someone goes to the street corner or their favorite dealer, and they don't actually know what they're getting, right, and the test of whether or not it's good or not is whether they decide to come back and buy more.

So, when you arrest someone and they're in possession of cocaine, for instance, or heroin, you have no idea what the purity of that is.

So, we could do a test in the laboratory and find out what the absolute relative potency of heroin is to oxycodone, for instance, but what is sold on the street could be 80 percent pure heroin or it could be 20 percent pure heroin, and the rest of it could be quinine or something like that, and you -- and you just have no way of knowing that, and I had asked the DEA, Mr. Rannazzisi earlier about whether or not for all arrests, like do you
test purity, so that you can assess what the
punishment should be? Like, do you know actually
what number of milligrams somebody was holding?

So, we were having that discussion, and
I think with the pharmaceuticals, it does make a
difference because we know exactly what's in it,
and so do the consumers. They know, you know, so,
if you buy a Xanax, you know what's in it. If you
buy an Oxy 30, you know what's in it.

But back to, you know, another aspect
of the weight issue, if you have a five milligram
tablet, which is not currently -- well, maybe with
the high single, I'm not sure, of hydrocodone, but
then you have another hydrocodone that also has 325
milligrams of Tylenol in it, you know, the weight
there is very different, but the actual amount of
active drug is the same.

CHAIR SARIS: So, it's interesting,
I've learned a lot, just listening to the two of
you.

So, essentially, the scientific
equivalent -- scientifically, they're equivalent,
in terms of potency, but on the street, people want oxycodone because it's -- they get it in the purer form more easily, at least until this other product came out.

DR. WALSH: Right, because it's more flexible because you can use it by snorting, you can inject it. You shouldn't. It's not a good idea, because it's got things in there that aren't good for you, but it doesn't have acetaminophen in it necessarily.

So, I think that that plays a big role. I think one of the things that we're talking about and one of the things that FDA has to be thinking about, whether they're allowed to say it publically or not, you know, is that what the concern is, is that, you know, once Zohydro got onto the marketplace, and that was very controversial, although you had no choice because they had proven efficacy, right, and --

CHAIR SARIS: She can't say --

DR. WALSH: No, I mean, I think that the rules are that if they can demonstrate safety in
the population and efficacy, then it has to be approved, and I think that that was the basis for the FDA approval, although they took a lot of flak for that.

I think that, you know, there are -- the concern is that now that there's this precedent that there will be more single entity hydrocodone products, and it's going to become exactly like oxycodone, so that, you know, it's just -- it's a big bubble and there is a bunch of opioids that you can choose from, and if you squeeze here, and you prevent, you know, this one from being available by cracking down, it expands someplace else, and that's where we see the heroin expansion coming.

COMMISSIONER BARKOW: Can I follow up on Commissioner Wroblewski's question then, in terms of, you know, things we would recommend to Congress or policy things?

Is it the case that the FDA, in making this approval process, doesn't take into account abuse potential, sort of the off label abuse kinds of things? Like, would it be the case, your hands
are tied, you have to say yes, without considering that doing it, is that a legislative fix?

DR. HERTZ: I can answer that.

COMMISSIONER BARKOW: Okay.

DR. HERTZ: So, we can take abuse liability into consideration when we approve a product with an abuse liability, and we do look at it in the context of the armamentarium and the relative risks.

So, we do, and that is within our authority.

DR. WALSH: And they did, with the Zohydro, and that's how we know each other, and then if I'm correct, then that information gets sent onto the Drug Enforcement Agency for them to make decisions about where to place something in the schedule.

COMMISSIONER BARKOW: But I mean, you have to find that the benefits, in terms of -- like how much pain relief do people need?

Some of these numbers seem, you know, to a layperson, I'm just trying to think in terms
of the kind of pain relief that people would need for pain management or the kind of controlled setting in which they'd have it, whether they're hospitalized or what not.

Is it that kind of cost benefit that you do, to try to figure out where the drug would be administered, the risk to an abuse population? Is it a pretty broad scale inquiry like that?

DR. HERTZ: I'm looking over my shoulders to see if anyone is holding a break sign or not.

But what I can tell you is --

CHAIR SARIS: You've got five minutes.

DR. HERTZ: That wasn't the sort of break I was looking for.

But when we approve an opioid product, we look at how it compares to what already exists, and I can tell you with regard to any recent approvals, that we have not approved anything stronger than comparable other products on the market, and in fact, if we look at some of the information that we've discussed here about
relative potency and look at what is available with other prior existing opioids, one can see that Zohydro is, in fact, no stronger than what has already existed using these rough relative potency estimates.

When we think about the needs of individual patients, we know that there is a very wide range in needs, and we know that there is a lot of individual variability on many factors that will influence the amount of an opioid analgesic that they will need, both in the short term and the long term.

So, what we try to do is ensure that within the spectrum, when we approve a product, that it's meeting a need that it has adequate evidence of efficacy and safety in the intended population for the indication, and we also look at it from a public health perspective, as well.

VICE CHAIR BREYER: Dr. Hertz, if I might, later on in our hearing today, we're going to address the issue of drugs which are flavored in a way that might be attractive to children, to
I know you're here only on the hydrocodone, but obviously, we have the example of what's happening in Colorado with respect to marijuana, and I am interested because of your -- the previous witness has told us that the FDA is conducting a study or studies, in determining whether there was any medical justification for the use of marijuana.

My question to you is, do you have any prediction as not -- as to outcome, but as to when the results of that study would be known to the public?

DR. HERTZ: Yes, I'm not entirely sure of exactly what that study is that was referred to. I know that there are analyses underway of existing data, and I know that there is interest in the medical community, but I don't have specifics that I could share a time table for, because I am not directly involved in that.

VICE CHAIR BREYER: Okay, thank you.

CHAIR SARIS: I'm actually glad -- I
was going to ask you, Dr. Walsh, you see so many boots on the ground in Maryland and Kentucky. Have you see any issues of marketing these drugs to children, through special packaging or advertising or colors or flavors?

DR. WALSH: Not with the opioids specifically, we haven't.

I mean, what our concerns about with children largely, surround the medications that are already in the home, that are in prescription bottles, sitting around, available and the idea that because it comes from a doctor, it's legitimate and safe, and that leads to, you know, these pill parties, where high schoolers are -- you know, who really have almost no drug experience what so ever, you know, suddenly find themselves taking some really potent opiate, and you know, tragically having some terrible outcome.

But we haven't seen -- we haven't seen that, and I haven't heard about that, as the -- as the heroin marketplace has infiltrated in the Lexington area, the bluegrass area.
CHAIR SARIS: Thank you. Any other questions? Thank you very much, and we'll take a brief recess, I guess a break, and we'll be back here at 10:30 a.m. for economic crime. Thank you.

(Whereupon, the above-entitled matter went off the record at 10:15 a.m. and resumed at 10:30 a.m.)

CHAIR SARIS: Moving on to two panels involving the economic fraud amendments.

The first panel consists of practitioners, and I want to remind, in case you weren't here, about our red light system. So please, don't read your statement, and at some point the hook comes, so -- and then we're very active, the group. So, we'll jump in at the end of all of the presentations.

We begin with the Honorable Benjamin B. Wagner who is the U.S. Attorney for the Eastern District of California. He previously served as Chief of the Special Prosecutions Unit, which is responsible for prosecutions of public corruption, financial fraud, tax evasion and corporate fraud.
Michael Caruso has been the Federal Public Defender for the Southern District of Florida since 2012. He joined the office in 1997. Eric Tirschwell is the -- did I say that right?

MR. TIRSCHWELL: Yes.

CHAIR SARIS: Good, is the Vice-Chair for the Practitioners Advisory Group. He is a partner at Kramer, Levin, Naftalis & Frankel, LLP, and his practice focuses on white-collar criminal defense and related litigation.

Catherine M. Foti is the Chair of the Sentencing Guidelines Committee for the New York Council of Defense Lawyers. She's a partner at Morvillo, Abramowitz, Grand, Iason & Anello, PC. Welcome to everybody. We begin with Mr. Wagner. Thank you.

HON. WAGNER: Thank you very much. Thank you for having me here this morning. I appreciate the opportunity. It's also, as one of the earlier speakers said, it's my first time to the rodeo, so I appreciate being here.
As Your Honor mentioned, I've been the U.S. Attorney in the Eastern District of California for a little over five years. Prior to that, I was an Assistant U.S. Attorney in the office for about 17 years, including nine years as a supervisor.

So, in that time period, I have handled a lot of different types of economic crimes, all types of crimes, but investment frauds, tax evasions, Federal program fraud, and of course, I've supervised a lot of people who have handled those kinds of cases.

The Eastern District of California covers about 50 percent of the area of the State of California. We have about eight million residents. In case there is anyone from Congress listening, we really need more judges.

We have about 90 Assistant U.S. Attorney authorized positions, we're what within the department is categorized as a large district.

Over the last five years, we have prosecuted a wide variety of economic crimes cases, particularly heavy in the mortgage fraud area. We
were very hard hit by that.

Over the last five years, we have convicted something in excess of 230 defendants in mortgage fraud cases, and those are a wide variety of types of conduct. Some of them are cases which targeted financial institutions, and so those tend to be smaller numbers of victims, but large dollar amounts. Other types of cases has huge numbers of victims, targeting distressed homeowners, foreclosure rescue schemes, that sort of thing. Often smaller dollar amounts, but very profound impact on a large number of victims.

We also have charged and resolved a lot of investment fraud scheme cases over the last few years. We just finished sentencing, I think, what is the largest Ponzi scheme in the history of the Sacramento area. It ran for about ten years. The defendant fleeced his victims for a net loss of about $108 million.

We had a similar case last year, involving a larger number of victims and about $45 million in loss.
In my brief comments to start this morning, I just wanted to touch on a couple of things. Obviously, the submission by the Department was quite voluminous. I just wanted to touch on two or three issues.

The first is, I am quite concerned that the amendments as a whole -- taken as a whole, will create a considerable confusion and difficulty in the sentencing of financial fraud cases under §2B1.1, and may sow the seeds of error for appeal and are going to cause considerable difficulty for judges, practitioners and probation officers. And the specific problem that I'm concerned about has to do with the kind of Balkanized way in which the -- in the course of the sentencing proceedings, you have to evaluate the defendant's conduct in different ways, in different parts of §2B1.1.

Under the relevant conduct rules generally, and the amendment that's proposed today, which we generally support, to §1B1.3, of course, you consider defendant's conduct and all acts and omissions of others that were within the
scope of the activity that the defendant jointly agreed to undertake, were in furtherance of that activity and were reasonably foreseeable to the defendant.

So, that would be the general -- obviously the general rule, as you go through §2B1.1. But, under the amendments, under the proposed amendment to the intended loss, that would be determined by what the defendant purposely sought to inflict, the losses that he would purposely -- he or she purposely sought to inflict, and I'm concerned that that is looking at the same sort of conduct, but looking at it through a different lens.

Then when you get to the sophisticated means proposal §2B1.1(b)(10), that the lens there, under the proposed amendment, is that the sophisticated means would only apply to that conduct in which the defendant aided, abetted, counseled, commanded, induced, procured or willfully caused that conduct which is sophisticated.
So, my concern is that it puts -- sentencing is already fairly complex, in large significant cases under §2B1.1, and you essentially have to slice the conduct three different ways under three different standards, and that is going to create, I think, tremendous confusion in the course of the sentencing of those cases.

I wanted to say just a moment, I see my yellow light is on. I just wanted to say just briefly about the fraud on the market proposal, which is -- and I can elaborate this more -- in greater detail, as we go on with the panel.

But it seems to me that that is a proposal designed to address a very small number of cases, but definitely significant cases, large cases, and there may be important ways in which we need to look at those large cases, but it's a policy that is intended to target a very small number of cases, but I think will create mischief in a much larger number of cases, as many other types of defendants who are not strictly fraud on the market
defendants are going to attempt to get within the scope of that proposal of using gain rather than loss.

I noted that in the end of Mr. Felman's statement for the next panel, I think in the very last page of his statement, he made the point that there is really no principle distinction between the fraud on the market cases and other types of cases, and that he believes that gain should generally be used in fraud cases.

I think that is a widespread view among defense counsel, and I think there are going to be a lot of ways in which they are going to argue to sentencing judges, that they ought to go to this new proposal, that their offense, even if it's not strictly fraud on the market, is analogous to it, that they should get the benefit of that.

So, I think it's going to create issues that are much broader than the narrow set of cases that it was intended to address. I look forward to your questions. Thank you.

CHAIR SARIS: Thank you. Mr. Caruso.
MR. CARUSO: Thank you, Judge. I first wanted to start by thanking the Commission for soliciting the defender’s views on this important subject, and personally inviting me to speak and join the conversation.

As you know, economic crimes constitute a significant part of the federal court's docket, and a significant portion of all federal public defenders’ offices’ caseload, where the public perception may be that these are strictly white-collar crimes and white-collar offenders, and that the federal public defender focuses on drugs and guns and immigration. Nothing could be further from the truth.

Day in and day out, all over the country, and specifically in the Southern District of Florida, where I am from, our lawyers are dealing with a heavy caseload of economic crimes, and based on our experience with §2B1.1, given that our clients are the largest consumers of that guideline in the federal system, and also based on the statistics that the Commission has generated, our
belief is that this guideline is not properly calibrated.

If you look at first the statistics, you see that for the vast majority of the cases the within-guideline sentences being imposed by federal judges are very low. For the vast majority of cases, the statistics seem to indicate that the within-guideline rate is 35 percent.

I don't think any reasonable person could say that that's a properly calibrated guideline.

We also know that from seeing the extent of the variance and the vast majority of cases, whereas the numbers may be clearer at the high end, if you look at the percentages, you see again for the vast majority of cases federal judges are varying from this guideline at a rate of 19 to 24 percent in cases involving $30,000 in loss to a million.

So, whereas, at the low end, a sentence reduction of two months or four months or six months, the result doesn't seem significant. When
you look at the percentage, I think that demonstrates that the extent of the variances are significant, and our position of course is that, you know, any extra day in prison that doesn't need to be served should not be served, because of the enormous impact that prison has on our clients individually and their families.

But it also has a practical effect, because even at the low end, when you're talking about a reduction of two, four, six months, you're talking about the decision as to whether to put a person in prison solely, just prison time, versus giving that person a split sentence.

So, for example, it's a difference between in Zone D, where there has to be a term of imprisonment with compared to being in a lower zone, where there could be a straight probation or a split sentence.

So, I think the Commission needs to focus on the impact of the variance rate and the extent of the variances at the lower ends, and I think you will come to the conclusion that the
guideline is not properly calibrated.

That being said, we believe that the Commission's proposals all move in the right direction, except for the Commission's decision not to tackle the loss table head on.

But the other proposals that the Commission has set forth all move in the direction of basing a sentence on a person's individual culpability.

So, if we look to inflate the inflationary adjustments, stealing $5,000 today is much different than stealing $5,000 in 1987. That's just a fact of life.

If we look at the sophisticated means proposal, we would like that proposal limited to sophisticated conduct that was caused by the defendant.

There seems to be no rational punishment policy for punishing a person more severely just because of the happenstance that he or she aligned themselves with clever criminals.

We should focus on the -- we should focus in meting
out punishment on the person's own conduct.

We think also the victims proposal moves in the right direction. We would suggest a modification. We would suggest an elimination of the victims table and a replacement with the substantial financial hardship question, because again, there is a problem in our view with the victims table, in that it overlaps with the loss table. It's duplicative, and we think it gets to a much better answer, with regard to a person's moral culpability and responsibility, to focus on the substantial financial hardship that that person has caused, and we would limit it to financial hardship.

You know, we think the guidelines already account in a departure provision for non-financial hardship, and we believe that if non-financial hardship was included, that would actually have the impact of raising sentences in this area because of the cumulative effect of the victims table and the hardship question, and we don't think at this point in time, when sentences
are already too long, that the Commission should be moving toward raising sentences.

With regard to intended loss, again, I think that's a move toward focusing on a person's personal culpability. You know, we've cited a number of cases in our materials of rather extensive conspiracies. We cited a telemarketing fraud case but we have it in the healthcare field, the mortgage fraud field and the securities field, where the crimes are being perpetrated in an office setting with a large number of people, and people at the lower end, who are essentially performing as functionaries, are drawing a limited salary, but because the people at the high end of the hierarchy are intending a greater loss, they're not only getting hit with sophisticated means or a victims adjustment, but they're also getting an intended loss adjustment up from actual loss.

So, we think again, the Commission's proposals are moving in the right direction, focusing on an individual's culpability in determining what present sentence they should
serve. Thank you.

CHAIR SARIS: Thank you.

MR. TIRSCHWELL: Good morning, and on behalf of the Practitioners Advisory Group, for which as you said, I serve as Vice-Chair, I want to thank everybody on the Commission for the opportunity to address you this morning.

We strive to provide the perspective of those in the private sector who represent individuals and organizations charged under the federal criminal laws.

Perhaps not surprisingly, economic crimes are, for many of us, a large, if not the largest portion of our dockets, so we are especially appreciative of your willingness to listen to us and consider our thoughts this morning.

In our written testimony we have reiterated our abiding belief that -- which we've expressed on numerous occasions to the Commission, that instead of proposing what we respectfully submit are only modest adjustments, the Commission...
should undertake a more wholesale revision of the fraud and related economic crimes guidelines.

That said, and notwithstanding our continuing hope that at some point the Commission will consider such larger scale revisions, we're here this morning to applaud you all for the proposals that we're discussing today.

We do believe that these proposals at least begin the hard work of moving toward a sentencing framework for economic crimes that takes greater account of many non-law-centric considerations, which I think we've been advocating, should be elevated in the sentencing considerations.

So, what I thought I'd do is focus on two particular issues where I think we've made some fairly concrete proposals.

The first is the victims table, and in particular, we agree with the Commission's decision to try to reduce the impact of the enhancement for victim numerosity standing alone.

We believe where no victim has been
substantially harmed, the loss enhancement in subsection §2B1.1(b)(1) sufficiently captures the magnitude of the harm caused by the fraud.

So, we have endorsed the Commission's suggestion raised in the first issue for comment, to limit the victims -- the impact to the victims table, where no victims were, in fact, substantially harmed by the offense.

Our proposal is that the Commission do so by eliminating the current §2B1.1(b)(2) entirely, which enhances, as you know, based solely on numerosity without regard for substantial harm, and we've advocated instead replacing it with the new proposed §2B1.1(b)(3), Option 2, which as laid out, provides for the enhancement if, and only if, the offense resulted in substantial hardship to at least one victim.

We think that by making substantial harm to even a single victim, the trigger or the initial aggravator, and then providing for additional enhancements where larger numbers of victims suffered substantial harms, Option 2 will
adequately account for victim impact aggravators not already captured in the loss calculation in §2B1.1(b)(1), but will eliminate or at least substantially reduce some of the double-counting and redundancy problems that have been identified and talked about in decisions of the current §2B1.1(b)(2).

The second issue I wanted to talk about briefly was -- or is the fraud on the market proposal.

We endorse the Commission's suggestion that all fraud on the market cases be sentenced under §2B1.4, and that's sort of a broader potential change than some of the proposals suggest, but we see many benefits to moving these kinds of cases to §2B1.4.

Section 2B1.4 already relies on gain rather than loss, which as we understand what the Commission seems to be expressing at this point, is something that has been recognized as a place where some movement in fraud on the cases is warranted.
We don't think §2B1.4 would require dramatic modification to bring in these fraud on the market cases. The lengthy list of specific offender characteristics set out in §2B1.1 are largely inapplicable in fraud on the market cases. So, we don't think there would be a need to wholesale, import or cross-reference those specific offense characteristics.

There are a couple that may be applicable in fraud on the market cases. We mentioned in our written testimony, §2B1.1(b)(19), which relates to defendants who are officers, directors, registered persons or investment advisors. That certainly seems like it would apply, and there may be one or two other provisions.

But for the most part, we think that moving these cases over to §2B1.4 would really simplify and really better capture the new proposed focus on gain.

We are concerned, and we noted this in our testimony, that the proposal as written is too narrow. It applies, as proposed, only to cases of
the submission of false information in a public filing, and we've suggested that that should be expanded to include misleading disclosures or material omissions. Many of the fraud on the market cases involve not necessarily affirmatively false information. So, that's one suggestion that we've made.

We've also raised concerns about the proposed floor that the Commission has laid out. We didn't see any persuasive explanation for why a floor would be necessary, and so, while we agree that relying on loss in fraud on the market cases should be set aside, we think that replacing it with sort of what looks like an irrebuttably presumed baseline amount of gain, without any real basis or explanation for where that comes from, would re-inject some arbitrariness into the offense level calculation.

So, we're strongly urging the Commission not to impose any floor if this change is made. So, thank you, and I'll be happy to answer any questions.
CHAIR SARIS: Thank you. Ms. Foti?

MS. FOTI: Thank you. Good morning, Judge Saris and distinguished members of the Commission.

So, I have the benefit of going last, which allows me to echo what my panel, the two defense attorneys on this panel have said.

It is interesting, I think, that the three defense attorneys here all really have the same position, and I think we have lengthy testimony that is very similar, some differences, but the NYCDL's position is that there is still significant problems with the economic crime guidelines, and we really think we should start over again.

In particular, we support the ABA Task Force report that you will hear about in the next panel. But that report basically says let's look at this and let's try a different way of approaching the problem of economic crimes.

Again, I think the fact that three panelists here with extensive experience in
criminal defense, have echoed the problems that
defendants are facing with these guidelines is
significant and something I would hope the
Commission really takes to heart.

Specifically, what we are hoping is for
an approach to the economic crimes that we defend,
which is much more particularized, much more
focused on an individual defendant’s culpability.

In addition, on the sophisticated means
enhancement, we recommend that -- we recommend that
the Commission amend the enhancement to specify
that it applies, as it is suggested, to the
defendant's own conduct, and focuses on the same
kind of offense the defendant is accused of.

Now, on the fraud in the market, the
NYCDL believes that the 2012 amendments to the
guidelines for economic crimes did not properly
address the issues with fraud in the market.

So, we do support using §2B1.4 as the
guideline, similar to what Mr. Tirschwell has
suggested. We believe that it is conceptually
similar, because it is dealing with insider trading
and the issues are conceptually similar to fraud in the market cases.

Also, we believe that the lack of the very specific offense characteristics make that -- make that guideline much easier to apply, much easier to deal with in fraud on the market cases.

What we would suggest, and we've stated -- said in our testimony, is that if we do use fraud -- use §2B1.4 for fraud on the market cases, that that guidelines comes with the presumption of sophisticated means, given the fact that there is a suggestion that the sophisticated means be amended to focus more specifically on individual's conduct, that there be an additional adjustment placed under §2B1.4, that would focus on whether or not there was, in fact, sophisticated means used in a particular case.

There certainly could be fraud in the market cases where an individual defendant did not use sophisticated means.

Generally, the NYCDL believes that reliance on either loss or gain does not properly
account for culpability of defendants. Notwithstanding that, we think the suggestion that gain be used in fraud in the market cases is, in fact, a good suggestion and we would support that, and in connection with -- and the issue of adjustment for inflation, we certainly would support that and we would suggest that that be implemented every four years.

Again, on behalf of the NYCDL, I thank you very much for inviting me here today, and I look forward to your questions.

CHAIR SARIS: Thank you. Can I -- I'm going to start with a letter the Department of Justice sent us, literally three years ago, I noticed, March 12, 2012 and --

HON. WAGNER: I'm sure I haven't read that letter.

CHAIR SARIS: And it basically -- it says, "The Department has also observed that the impact of the loss in victim tables and securities fraud cases involving fraudulent statements to the market can sometimes be disproportionate and that
as a result, some sentencing courts are departing downward dramatically from the guidelines."

That refrain was echoed at the Symposium on Economic Crimes held in 2013 at the John Jay College of Criminal Justice. In fact, it was because of all the stakeholders, including the Department of Justice, that we actually started engaging in this multi-year study, the table, which is on the web and everyone has seen before, started showing the dramatic departures at about $1 million in loss.

As the Defenders point out, there is some before that, but the dramatic stuff happens at over $1 million.

So, I'm trying to figure out what -- the Department of Justice doesn't like a lot of our proposals or the suggestions. What are you proposing to deal with this?

HON. WAGNER: So, I think the issues here, as I suggested in my opening statement, the number of cases at the very high end is very, very small. I think in that data, I think it reflects
something like 56 cases out of -- in 2012, out of 8,500 defendants sentenced under §2B1.1, only 56 involved loss amounts of over $50 million.

So, I don't think we have a serious disagreement that there is a tweak of some sort that is needed to address some of these cases at the high end. Not every one of these cases is over-valued at the high end.

We had a mortgage fraud case recently in my district, in which the defendant was sentenced to 35 years in prison by Judge Muller, who was appointed by this President, not known as a very severe sentencer, but that was a case in which the loss amount was tremendous. There was a huge amount of victims, very predatory behavior, the worst kind of white-collar type of case you could imagine.

So, not every high dollar case, I think is necessarily over-scored by the guidelines, but there probably are some.

I think there was an interesting proposal in Mr. Bowman's submission, which I think
the Commission should consider, about collapsing
the top four levels in the loss table and looking
at whether or not you should end it at everything
over $20 million, that is -- is 22 levels, and that
that's your cap.

I'm not necessarily saying that's the
right thing to do, but I think that is certainly
worth --

CHAIR SARIS: That's a tweak worth
considering.

HON. WAGNER: That's a tweak worth
considering. It is a tweak worth considering, and
so, it's not that there isn't something that should
be done here.

I think with the fraud in the market
proposal, the language that was just put in, in
2012, on the downward departure, seems to be being
utilized, and I think we ought to give that a
chance.

Our concern really is that with this
fix, in my view, is it going to create more problems
than it solves, which isn't to say there isn't a
problem that needs some attention.

COMMISSIONER WROBLEWSKI: So, I have
two questions. Mr. Caruso, you talked a lot about
how the guidelines treat jointly undertaken
activity, and as I'm sure you know, there's a long
history in the law and the penal code and the
guidelines, for dealing with jointly undertaken
activity.

The Commission is considering a
proposal to address that, in particular, this
amendment year, and part of relevant conduct is
designed to limit the exposure of a person for a
jointly undertaken activity.

Your testimony suggests that at least
for sophisticated means and intended loss, that we
should eliminate all responsibility for activities
of others that were part of jointly undertaken
activity.

So, for example, and tell me if I have
the testimony wrong. So, if somebody is involved
in some sort of fraud that involves sophisticated
hacking, and hires a person to do that programming
and hacking, that the individual who did the hiring should not be held responsible because of that individual person did not engaged in sophisticated means.

So, that's one question, if you could address that.

Then to Mr. Tirschwell and Ms. Foti, you spoke about fraud on the market and using the insider trading guideline.

There was a directive that came from Congress in the Dodd-Frank Act, which told the Commission to focus on the harms and the actual and possible harms that are done to victims and the market.

Do you think it's consistent with that directive, for the Commission to have a sentencing scheme that focuses on the gain and on the perpetrator, rather than on the victims?

MR. CARUSO: Thank you, Commissioner. First, I would disagree with your premise.

The defenders don't view the jointly undertaken activity portion of the guideline as a
limiting principle. You know, in our experience collectively and in my experience individually, the jointly undertaken activity component of the guideline sweeps in a broad array of conduct and increases punishment for our clients, as opposed to limiting it, and our proposal, you know, drafting upon the Commission's proposal, is to limit punishment for those who actually cause the harms, as opposed to sweeping in those who, for whatever reason, associated themselves with the people who created the harms.

So, for example, in your hacking example, I don't believe the defenders would have any issue with both of those persons being held accountable for sophisticated means. Both the person who designed the scheme and the person who caused the hacking activity.

You know, what we're looking to limit the sophisticated means adjustment is to those people who willfully cause the sophistication.

So, if this is hacking activity, and there are other participants, so perhaps the
computer that's being used to commit the hacking breaks, but the hacker has a DUI, so he can't drive and he's going to draw the line in committing criminal conduct at that point.

So, he needs someone to drive him to the computer store, and he hires our client, and our client knows he's engaged in this hacking activity. Drops him off at the computer store, brings him back to pick up the computer.

That person, we believe, had no part in willfully causing the sophistication, although he has participated in the conduct and is going to be sent to prison for that activity, we think the Commission should draw the line by increasing punishment only for those who willfully cause the sophistication.

COMMISSIONER FRIEDRICH: Mr. Caruso, is it the better way to get consistent with the manual as a whole, to focus on role, greater role reduction for that individual, because in the drug courier case, the person carrying the pounds across the border is part of a larger conspiracy and can
be, depending on the facts, held responsible for the larger drug couriers, but yet, he did just one importation.

So, is it the better approach, consistent with the first principles in our manual, to work on role for those folks, minimal role, perhaps?

MR. CARUSO: I would love to get minimal role in that case, Your Honor, but our experience shows that we don't get minimal role.

COMMISSIONER FRIEDRICH: But shouldn't the Commission be focused on getting at that problem from the role provision, as opposed to the sophisticated means because of the way the guidelines are designed with relevant conduct?

MR. CARUSO: You know, I believe that because the loss table is the primary driver of this guideline, it's not sufficient to ameliorate the harshness of the guideline by looking to another area of the guideline.

I mean, I think there is a real reason within the fraud guideline that the Commission
wants to set a guideline, and judges want to punish
more severely, those who create a sophisticated
scheme, for the reasons that have been addressed
by the Commission earlier.

But I think the problem has to be
addressed within the guideline because people are
going to get the upward adjustment.

So, it's only fair if people are getting
the upward adjustment under the guideline, if they
didn't do anything to willfully cause the
sophistication, they shouldn't then get it, only
to be deducted out later on, because to them, in
practical terms, it's not a benefit.

They get the two levels up for
sophistication and then they -- and then they get
it, you know, back in the -- in a minor role
reduction. They're still left at the same level,
and we don't think that takes care of the issue.

CHAIR SARIS: Commissioner Barkow and
then Commissioner --

COMMISSIONER BARKOW: So, this is just
on that same point.
I guess I'm not quite sure. So, normally in the law, we don't think about somebody causing someone else to do something, right. That's just not foundational, criminal law. So, we use aiding and abetting, right?

So, if we were to use your suggestion on page 15, and I think this gets at what Commission Wroblewski was asking, there would be a conflict with all the rest of criminal law, in the sense that, you know, I can't cause you to do something. That's not how we do it.

So, I'm wondering if it would address what you had just said, if we talked about intentionally aiding and abetting such conduct, right. If we had that same idea, instead of saying causing, but you are intentionally aiding and abetting the conduct of the hacker, because I'm not so sure causality -- that would be a whole new concept or for criminal losses, we don't normally think of one person causing some other person to do something. We've always used aiding and abetting.
So, I just don't know how adopting this proposal might actually play itself out in the Courts, and I'm wondering what you think about instead saying, intentionally aiding and abetting or willfully doing it.

MR. CARUSO: I think willfully aiding and abetting is better than what is being proposed, but I would disagree with you, in the sense that, you know, I think the substantive criminal law and what we're doing in sentencing, they're different concepts, as you know.

I think there are provisions in the guideline, you know, especially in, you know, the upward role adjustment scenario, where people are held accountable for directing others to do something.

So, I view if I hire you to do something, if I say to you, "Listen, I have this great scheme, but I don't know how quite to execute it, so I want to hire you to do this hacking job, will you do it," in my view, that is causation, you know, because you're entering into an agreement with that person,
to cause the hacking activity, whether you want to
call it -- I would say it gets closer to directing,
as opposed to aiding and abetting.

My hesitancy in agreeing to any aiding
and abetting language is then, that sweeps in the
driver that's taking the hacker to fix the
computer, because that is aiding and abetting. He
is intentionally doing it, and it serves no
rationale for punishment, to punish the mere driver
or errand runner, for participating in a scheme
that someone else made complex.

COMMISSIONER WROBLEWSKI: But that
driver is only going to be swept in if it is part
of the jointly undertaken activity, as defined by
the Commission, and the Commission is likely to
make that clear, that there has to be an agreement.
It has to be part of the agreement.

So, he's only going to be held liable
if he knows what's going on, he's agreeing to the
whole enterprise and so forth.

MR. CARUSO: But in my example, he
meets that criterion, and we see this not only in
your hacking example, but in healthcare fraud.

You know, my office represented a woman who became, you know, a nominee owner of a healthcare clinic. All she did was sign her name to a piece of paper, and then her function in the healthcare fraud was to drive the real owner of the fraud around town, because that person couldn't drive.

At sentencing, our client got held accountable for every loss the healthcare clinic caused, sophisticated means and the victims -- the victim enhancement, and in our view, since she was a mere functionary in this criminal activity, and her punishment was driven overwhelmingly by the loss, we think that the line should be drawn there, and she shouldn't be held accountable for victim's enhancement or sophisticated means, even though she aided and abetted the crime.

CHAIR SARIS: Judge Breyer?

VICE CHAIR BREYER: Mr. Wagner, let me start out in the area of agreement.

I certainly agree with you that your
district is overwhelmed by the number of cases. It actually is the district that leads the United States in cases per Judge, and has for a number of years, and so, I have no -- I wish I could do more, to assist in getting judicial resources to your district. You do a fine job.

CHAIR SARIS: He's going to plan on coming down and visiting.

VICE CHAIR BREYER: I would, actually, with the Eastern District. It's a wonderful district and they are overwhelmed.

But I wanted to -- I've been intrigued, because I sort of have one idea about the victim's table, that by virtue of the testimony that's been submitted, I'm now trying to rethink it, and especially in light of what happened in New York in the symposium, where the victim's group got up and said, "Look, you're measuring the wrong thing here. You're measuring numerosity. You're not measuring impact," and impact is really, when you go back to the very fundamentals of the guidelines, the guidelines, when they were set up, was to
measure harm.

So, harm may be characterized by numbers, but it's not necessarily the case that you have harmed, caused that much greater harm by having 1,000 victims who lose a dollar, than 10 victims who lose a lesser amount, or the same amount, but cumulatively the same amount.

So, I'm interested from a prosecutor's point of view, what if we were to change that victim? What if we were to say, "Look, let's get rid of the victim's table?"

In one sense, that is we simply won't count the victims, but we will count the victims who have received whatever you want to say, substantial harm, individual harm, significant harm. If we look at it that way, is that in any way, impact, though I also understand that you have the general argument and the general objection that we've made things -- that we're making things more complicated.

I'm sympathetic to that, to one -- at one level, but I'm also mindful of the fact that
sentencing is individualized. The Congress of the United States, in the statute and the Supreme Court has said that we must give an individualized sentence.

So, the fact that Judges may have to work harder or make distinctions, is not discouraging, at least to this Judge, that -- to engage in that enterprise. I understand that.

But from a prosecutor's point, I'd like to know, if we were to reconfigure the victim's table in a way that measures harm caused to that particular victim, does that make any difference, or would it impede your ability to prosecute, or on the other hand, would it be more gratifying or satisfying to a prosecutor to know that if somebody has been substantially harmed by it, even though it may be a smaller number of people, the Court is going to take that into consideration?

HON. WAGNER: One area in which we, I think agree with a lot of our co-panelists is our support for Option 2 in the victim adjustment, and I think it's terrific, that the Sentencing
Commission is considering introducing the concept of looking at the substantial harm that is done, the serious harm.

So, I think that is a big step forward and we support that.

We don't support the idea of sort of doing away with the numerosity, with the quantity, as well as the quality, sort of, of the harm that is done.

I don't agree that the counting victims is duplicative of counting the loss amount. In the mortgage fraud type of cases, for example, in a $10 million case, it's quite a different situation, where that $10 million was extracted from three banks versus 300 desperate home owners, and I think for that reason, you can't just say, "Well, they're both $10 million cases," and I think there, what I like about Option 2 is it looks at both of the breadth of the conduct, the number of victims and sort of the depth of it, were they substantially harmed?

I think all of those are relevant.
considerations for the Court.

The one thing, as a practical matter, since that's what you're asking about, that we suggested as a tweak to Option 2, which I really would advocate, is the top level in the proposal for substantial harm is at 25 victims, and as a prosecutor, if I'm preparing that case for sentencing, you don't know which 25 victims the Court may agree are ones that suffered substantial harm.

So, you've got to work up maybe 30 or 40 victims, and you know, sort of present facts relating to all of those different victims to the Court, so that you have a decent shot of hitting your 25.

I think that's an awful -- and I agree that just because sentencing is hard doesn't mean it's not important for the Courts to do, but I think it may needlessly add an extra layer of difficulty for probation officers and the Courts and the practitioners, to sort of litigate, you know, 40 different cases of how hard were you harmed, and
it ought to be capped at about 10, in which it both
measures the substantial harm, but doesn't impose
sort of an incremental additional burden on
everybody.

VICE CHAIR BREYER: Do you think we
ought to expand the term of harm to include
non-financial harm, that is to say, you may have
an identity theft case. You may have a person who
didn't lose a dollar, but now, must spend the next
two or three years, trying to sort out their credit
record, and trying to get financial assistance.

So, as a matter of analysis, it's going
to be very hard to quantify it, but it's not hard
to qualify it.

HON. WAGNER: Right. I do support that,
and I think one of the things that has been -- I
think it has been a welcomed trend, that Courts have
increasingly -- because of victim's rights
legislation and so on, the harm done to the victims
has assumed an increasingly important part in
sentencing.

But one thing that has been
under-valued, I think is the harm that results from these sorts of crimes that are not necessarily measured by well, your cashier's check that was stolen was for $3,000 or whatever. There are a lot of consequences that deserve a place in there. So, we support the idea of it not being limited to financial harm.

Now, one thing that I will say, and so, in that respect, we agree with the Victims Advisory Group, but one thing that I would caution, however, that we disagree with the Victim Advisory Group is, they had a suggestion to have sort of five different levels of harm, of substantial harm, significant harm, life-altering harm and then two levels if it's in between those, five different level swing. That, to me, imposes a tremendous burden in trying to litigate between someone, well, you suffered significant harm, but it wasn't really substantial, and trying to measure this person, what they felt was significant, that person was substantial.

That really complicates things, and I
understand it's well intended, but I think it doesn't add substantially to the general Option 2 as it exists, which is just measuring harm, which I think should include --

CHAIR SARIS: Thank you.

VICE CHAIR BREYER: One other question, if I can. On the loss on the fraud on the market --

HON. WAGNER: Yes.

VICE CHAIR BREYER: -- if you can't successfully measure loss, that is to say scientifically, it's simply too uncertain to measure. Yet gain, in a particular case, may be easier to mention -- to use.

Would you say that that would be a satisfactory alternative?

HON. WAGNER: I think it is certainly --

VICE CHAIR BREYER: Or a preferable one?

HON. WAGNER: Certainly, in individual cases, if it is really impossible to measure loss, and there may well be cases like that, then in that
case, starting with gain, and saying, "Well, let's look at the gain," I think it may not -- depending on the case, it may be a somewhat reasonable proxy to start with or it may not be.

As a general matter, what I'm concerned about with the fraud on the market proposal is that it carves out a sub-section of fraud cases where you're looking at gain, as opposed to every other fraud case, and there doesn't seem to me, sort of a principle distinction, why these particular cases should be looking at gain, except that it's -- they're high dollar and that it's very complicated.

CHAIR SARIS: Thank you. Judge Pryor?

COMMISSIONER PRYOR: So, Mr. Wagner, I noticed in your -- in the limited time that you had, you did not address inflation area adjustments, but I take it, you're here to defend the Department's position on that issue.

HON. WAGNER: I'll do my best.

COMMISSIONER PRYOR: Good luck. I found it singularly un-persuasive, and I'm having
a hard time understanding how it advances either just deserts or crime control, to say that punishment should increase by operation of inflation. How can that be?

HON. WAGNER: So, inflation, obviously, is a fact of life. It affects across the board, sentences, fines, penalty assessments, and etcetera.

COMMISSIONER PRYOR: Right.

HON. WAGNER: Congress hasn't taken any action to index those other factors to inflation. They haven't, to my knowledge --

COMMISSIONER PRYOR: We're not proposing indexing. I notice that you're -- you're -- the letter says, "Congress hasn't seen fit to index for inflation." This is, for the first time in nearly 30 years, deciding to adjust the loss table, to account for inflation.

That is very different from an annual indexing for inflation.

HON. WAGNER: Right, right. It seems to me a little bit of an odd thing, when Congress
hasn't taken any action, or to my knowledge, asked the Commission to do this.

There doesn't seem to be -- aside from the -- I don't at all, dispute the effect of inflation over time, but we're talking about factors that have nothing to do with the defendants, with the offense conduct, with the 18 U.S.C. § 3553 factors. This is sort of a totally extraneous consideration, which would result in a trimming of the loss tables, effectively the sentencing effect, and it seems, after 30 years, in a period of historically low inflation, a somewhat odd thing to do at this point.

If I could just make two points though.

If the Commission doesn't accept --

COMMISSIONER PRYOR: Let's -- I'm puzzled by all of that, but go ahead.

HON. WAGNER: If the Commission does go forward with an inflation adjustment, I would have two observations.

One is, I think if it does, then it's -- I think there is no principled reason not to do
it for fines, that if you're going to do it for loss --

COMMISSIONER PRYOR: But there are ex post facto concerns there.

HON. WAGNER: Well, and there are other concerns, which I think were pointed out --

COMMISSIONER PRYOR: That don't operate in the loss table.

HON. WAGNER: Well, not for -- I mean, for new offenses, for somebody who commits an offense now.

COMMISSIONER PRYOR: Well, you would have to account for that. You would have to account for when the crime was committed.

HON. WAGNER: Yes, yes.

COMMISSIONER PRYOR: But that's -- that is different, materially different than with the loss tables.

HON. WAGNER: Yes, for those -- for that time period where you're talking about cases that have been --

COMMISSIONER PRYOR: We're talking
about --

HON. WAGNER: -- committed, as of the
date, but not yet sentenced, certainly in that
bubble, as with a lot of adjustments by the
Commission.

The other factor, which I think was
pointed out by the Probation Officers Advisory
Group is that at the high end of the fine table,
you -- if you adjust for inflation, you go over the
statutory maximum for an individual for a single
count, which then creates a situation where the
high dollar exposure people get a break by virtue
of the cap, that others don't.

The only other thing I would add is
that, I know that the proposal was made to do this
every four years, and I'm concerned that that would
create a lot of instability and delay in the system.
I know that --

COMMISSIONER PRYOR: I think the
proposal is only that it would be considered every
four years.

HON. WAGNER: And if I were a defense
attorney and I was three years between -- I would do everything I could to stall my sentencing, until that next time, to see if my guy was going to get a break.

COMMISSIONER PRYOR: Well, this period of historically low inflation, it wouldn't really make much of a difference, would it?

HON. WAGNER: It might not. Certainly, today it probably wouldn't, but if --

COMMISSIONER PRYOR: Don't you think that this has something to do with the Commission's obligation to reduce unwarranted disparities?

HON. WAGNER: Yes, but --

COMMISSIONER PRYOR: That's one of the section 3553(a) factors, isn't it?

HON. WAGNER: Sure, and I think the Commission has --

COMMISSIONER PRYOR: So, how can it be that -- how can it be that someone who was sentenced 30 years ago should get effectively, a lower sentence for the same crime that someone today commits, and that where Congress and the Commission
have not adopted any kind of new policy, but the person today who commits essentially the same crime, but by operation of inflation, is now going to get a harsher sentence?

That's an unwarranted disparity, isn't it?

HON. WAGNER: But there are dollar amounts throughout title 18, United States Code, for lots of different amounts --

COMMISSIONER PRYOR: Yes, but --

HON. WAGNER: -- and those have --

COMMISSIONER PRYOR: -- I mean, Congress is doing a broad range, and it's not saying it can't be revisited, right.

But we have a much narrower range for setting a guideline range, right, that ought to account for these kinds of, you know, contemporary concerns in a way that a large, wide statutory range does not. Isn't that right?

HON. WAGNER: I think it probably is, although the Commission has had the opportunity, and has looked generally at the loss table for a
lot of reasons over the years, and has, for whatever
reason, not adjusted them downward, and doing it
this way, as kind of an inflationary haircut, I
think is not -- I don't -- I don't really see the
-- an inflation, it seems to me, is a fact of life
--

COMMISSIONER PRYOR: But what's wrong
--

HON. WAGNER: -- and has been for 30
years.

VICE CHAIR BREYER: You may not like
the way we're doing that, and I was equally puzzled
by the Justice Department's response. But what's
wrong with it?

I mean, you're not saying when Congress
passed these -- you know, passed on the loss table
years ago, years ago, they thought, "This is
great," because now, we're capturing these people
and guess what? We're going to capture more people
over time, because inflation generally goes up over
time.

They didn't contemplate that it would
never be changed.

HON. WAGNER: Maybe not. I don't think Congress has expressed --

VICE CHAIR BREYER: They haven't expressed a view, but why wouldn't they equally think that the Sentencing Commission, who is looking at this all the time, and who is instructed by Congress, to make appropriate amendments as circumstances warranted it, why wouldn't they think this is your job?

They don't want to have to look at it all the time. I don't understand why the Justice Department doesn't even recognize that.

You ought to embrace this position, not reject it.

HON. WAGNER: Well, there may be good reasons for looking at the loss tables, and adjusting them, as I suggested at the outset, particularly at the high level.

So, it's not -- it's not that they should be frozen for all time. I just think introducing this concept --
VICE CHAIR BREYER: Fifty years?

HON. WAGNER: -- after 30 years -- I'm sorry?

VICE CHAIR BREYER: It's 50 years instead of 30.

CHAIR SARIS: Commissioner Friedrich, yes?

COMMISSIONER FRIEDRICH: Mr. Wagner, just following up on this.

If the Commission were to take this action and adjust for inflation, don't the defenders have a point that the year we should use as a benchmark is 1987, given that the Commission, neither the Commission nor Congress has ever explicitly addressed inflation.

Yes, there have been other amendments to §2B1.1 over time, but given that this has never been an issue, aren't there proportionality concerns and other reasons why we should go back to 1987 and be uniform, to the extent we do this at all?

HON. WAGNER: I mean, I think it should
be uniform. I don't really have an opinion, as to what the starting point should be.

COMMISSIONER BARKOW: Can I ask one question, just on this?

I have this -- I have the same puzzling reaction. This has been fun.

So, I'm just wondering, is it -- is the Department of Justice of the view that we're doing this as a back-handed way to lower loss, because that's not what this proposal is.

So, I'm just kind of -- I'm just wondering --

HON. WAGNER: No.

COMMISSIONER BARKOW: -- if I could state it that this is a good government suggestion, that applies, as you can see, across a range of places in the whole manual, that has never accounted for the passage of time.

So, we have decades now of money, you know, I wish I could have -- like, it doesn't make any sense to me, just as a matter of governance, to not account for inflation.
So, I guess if you took it outside the loss table box and thought about it more generally, is the government still is opposed to the idea?

HON. WAGNER: Well, you know, I'm not questioning the Commission's motives to doing that. I'm just saying --

COMMISSIONER BARKOW: Well, you said it was a haircut.

HON. WAGNER: Well, that's the effect of it. I think that's the effect of it.

From a prosecutor standpoint, you're going to take people who are sentenced at one level last month, and then get a lower sentence next month, by virtue of the --

VICE CHAIR BREYER: Well, by that we can do anything. We could only -- by that law --

HON. WAGNER: Yes, I mean --

VICE CHAIR BREYER: That's the government's logic. We just shouldn't do anything at all.

HON. WAGNER: No, as I've said, there may be -- there may be good reasons to revisit the loss
table, and particularly, certain areas of it.

But in general, I mean, in title 18 in the Criminal Justice System, you know, it's not like a sort of the Social Security Administration where they are dealing constantly with these types of issues.

Generally, it's a policy matter. Congress sets these policies, and it has not been an area where they have generally --

COMMISSIONER BARKOW: But it is interesting that the last time they looked at it was right before the Commission was founded. I mean, you know, they thought about this in 1987 and then, you know, here we are.

HON. WAGNER: Yes, right.

COMMISSIONER BARKOW: It seems temporally that the thought is there is an agency that can account for it.

CHAIR SARIS: So, let me jump for a minute to the defense, since we have three sitting here.

As you can tell, we're going to --
MR. CARUSO: We're doing okay.

CHAIR SARIS: Always know when you're winning the argument.

Let me say, we have struggled a lot with fraud on the market. That was primarily -- the Judges in New York have been struggling with that issue. We've struggled with it, and come up -- it's hard to calculate loss, and we put it out there, a proposal possibly to consider gain.

But by your referencing it, no one sort of has actually, I think of any of the comments, no one has embraced that, all right.

But you've put it in insider trading, and the concern I have is that at some point, we heard about this guy in New York who was an executive and he was a good guy, and he was trying to save his company, and so, he didn't gain anything. He just had his salary, but he lied and it caused millions and millions of dollars of loss.

Now, if you put it in insider trading, there's no gain, and you don't have a floor, this guys is looking at zero to six, all right.
I understand why the defense community loves this. I get it, but what I'm trying to understand is, the reason for a floor, and maybe this is just sort of a fact check, by looking at what Judges in the field are doing, and maybe you shouldn't use median. Maybe you should average. I mean, there are different ways of doing it.

But the way of having a floor is some sense that that's a really serious crime, even if you didn't personally gain from it, all right.

So, I wanted to know how -- I'm not saying our proposal is the perfect one. It may be terrible. You know, it's why you put it out there.

But how would you deal with the very real issue, even if it's only seven cases or over the course of 15 years, you know, a handful of cases, these fraud on the market cases, where gain doesn't quite capture it, and loss is so hard to figure out, and that the high end is not followed anywhere?

Your proposal can't fly, right? We can't be giving zero to six months, or would you
say that we should? Yes?

MS. FOTI: No, I agree that, I mean, it would be difficult to support a position where someone like that would get zero to six.

But I think what you've done, in terms of the floor, is that there is no -- you know, there has to be exceptions then. So, there has to be a much more well-developed discussion, as to you know, as to the situations in which that floor would apply.

Unfortunately, it seems that the floor would apply in the situations that we're concerned about, which is where you have someone who has gotten, you know, a very small gain, in a very large conspiracy, and potentially that floor is going to apply though, and that's the concern.

The real problem with fraud in the market is the lack of consideration of the market forces, right?

So, that's why we do support the gain, because the market forces are --

CHAIR SARIS: But suppose --
MS. FOTI: -- very, very difficult.

CHAIR SARIS: -- there's no gain and millions and millions of dollars of loss? All right, that's not -- we've heard examples of that.

MS. FOTI: Right, I think that -- my only thing I was going to suggest is, certainly there could be a provision put in for a departure.

I mean, that -- many things in -- many times, the guidelines provide for those concerns, by providing for reasons why a departure might be appropriate upward.

COMMISSIONER WROBLEWSKI: But that's exactly what we have now. You just want the presumption to start at zero and depart up.

Right now, we have start at loss and depart down. That's exactly what we have.

MR. TIRSCHWELL: Well, I think the question is what is the more common case that the general rule should apply to and what are the exceptions, and it seems to me, my experience and our experience, talking to the practitioners is that it is unusual, the case you described, Judge
Saris, is I think the exception, not the rule.

It is much more common in a fraud on the market case, that the individuals who perpetrated the fraud on the market actually are gaining.

There certainly are cases where they're not, but there is -- and if that is the norm, then I think the idea is to set the guideline based on the more common set of cases, and then whether it's through a departure in an unusual case, I would suggest that that case you described is an unusual case, or there are enhancements, for example, if there are cases where the victims suffered millions of dollars of losses --

CHAIR SARIS: But there aren't, if you put it in insider trading, right?

MR. TIRSCHWELL: Well, there are certain enhancements that I think could be cross-referenced.

VICE CHAIR BREYER: Let me follow up on that, Judge Saris.

I mean, maybe I come from an unusual district, and I'm an unusual Judge, both of which
everyone in the room will agree with, but I've had at least three of these cases, and I will tell you that the losses are, you know, are very, very hard to measure, very inexact. Everybody from Judge Frank H. Easterbrook to Judge Jed S. Rakoff, to all over the political spectrum has said, "This situation of trying to measure the market, except in the pump and dump cases, is really inadequate. It's false science. It doesn't work."

However, your suggestion of putting in the insider trading, which sounds good, bothers me, because they're very different cases.

Somebody working on a tip, while it's improper and while it's a crime, is very different from the Chief Financial Officer signing a statement that gets filed with the SEC, upon which purportedly, the entire market operates on, and that is a different crime.

So, the idea of putting a base in there and not have the loss definition, but having a substantial base in there is an attempt to try to address the issue of where you can't measure loss,
but the crime is serious, and therefore, it's worthy of something more than zero to six months.

I don't know if you want to respond to that, but that -- it just seemed to me, I have a little bit of the apples and oranges, when I hear about insider trading.

MR. TIRSCHWELL: I don't disagree that those kinds of cases are often deserving of something more substantial than zero to six.

You know, the insider -- and I think when we suggested that those cases be sort of imported into the insider trading, I mean, obviously, there needs to be adjustments made to the insider trading guideline, to broaden it.

There is a base or a floor in the insider trader guideline for an organized scheme to engage insider trading in 14, so, it's sort of the lowest of the suggested floors in the proposal.

So, you know, if the Commission thought there has to be some baseline, there is an analog in the insider trading guideline already, and you know, whether you want to call it an organized
scheme related to, you know, a fraud on the market
or a false statement in a public filing, or you
wanted to tie it to something with a substantial
impact on the market and a floor there, that -- you
know, that wouldn't be, I think, unreasonable to
address that concern.

I think what we were particularly
focused on and concerned about is, you know, a floor
of something like 22 levels. When the floor starts
to rise to a fairly substantial level, then I think
you are introducing a certain arbitrariness that
wouldn't be justified.

But I think it may not be our first
preference, but a more measured floor, a lower
floor, something maybe similar to what is already
in the insider trading guideline, you know, might
be more of a reasonable compromise there.

CHAIR SARIS: I know we're past our
time for the Panel. Does anyone have any other
questions?

I want to thank you very much.

HON. WAGNER: Thank you.
CHAIR SARIS: Thank you for coming.

VICE CHAIR BREYER: Judge Saris and I will be in the Eastern District soon to try all those cases.

HON. WAGNER: Wonderful.

VICE CHAIR BREYER: Maybe we can get Judge Pryor, as well.

HON. WAGNER: You can have all our cases.

COMMISSIONER PRYOR: I'm on the Circuit Court.

VICE CHAIR BREYER: Well, you can review our cases.

CHAIR SARIS: Thank you. We're just standing and stretching. We're going right to our other Panel, and then --

Okay, we're all set. Okay, so, welcome. You notice we're a shy lot here. So, many of you have been to this rodeo before.

I begin with T. Michael Andrews, the Chair of the Victims Advisory Group, he is also the Managing Attorney for the D.C. Crime Victim's Resource Center and an Assistant Professor at the
University of Maryland, University College in the Public Safety Department.

He previously worked at the Department of Homeland Security and before that, served as an Assistant U.S. Attorney in the District of Arizona.

Richard Bohlken is the Chair of the Probation Officers Advisory Group. He has been a member of the Probation Officers Advisory Group since 2010. Mr. Bohlken is the Assistant Deputy Chief Probation Officer in the District of New Mexico.

James E. Felman is the Chair of the ABA's Criminal Justice Section and Liaison to the Sentencing Commission. He is a named partner at -- I should know this, Kynes, Markman & Felman in Tampa, Florida. His practice focuses on criminal matters and some related civil litigation.

Frank Bowman has taught at the University of Missouri School of Law since 2005. Before entering academia, Professor Bowman was an Assistant United States Attorney in the Southern District of Florida from 1989 to 1996, and didn't
you do a brief stint at the Sentencing Commission?

MR. BOWMAN: I was -- yes, I was Special Counsel to the Commission.

CHAIR SARIS: Thank you. We begin with Mr. Andrews. Thank you.

MR. ANDREWS: Thank you, and good morning to the Commission and Chair. I thank you for this opportunity to come here and speak about very important issues, and that is victim's rights and the impact of economic crimes on victims.

But I would be remiss if I didn't say that I'm humbled to be here. I'm following the footsteps of a good friend of mine, who served as Chair on the Victims Advisory Group, named Russell Butler, and I hope to follow in his footsteps and the path that he has laid out.

I have submitted for the Commission, written testimony and I would ask that that be incorporated into any record that is before the Commission to consider.

I did briefly just want to highlight three issues that I hope we can take up in the next
hour, that relate to victims.

The first is, as the Commission is aware, victims’ crime in relation to economic crime is tremendous.

I can tell you that as a managing attorney who runs a crime victims -- pro bono crime victims clinic, it is one of the most centered parts, in terms of what we deal with, with the day-to-day public, whether it is identity theft or fraud or your simple theft, the impact on victims is tremendous.

The second, which kind of dovetails, is our proposal. We know that one size doesn't fit all within terms of victims, and we have proposed some options for the Commission to consider to help identify those truly hard impact victims, whether it's life-altering, substantial, those I think need to be characterized, so they can cover those victims that have been hit the hardest.

Then the third, the psychological and trauma that also goes along with those economic crimes that impact victims.
I think there should be an opportunity for the Court to consider how that impact affects those victims.

Now, I'd tell you that happens all the time, but it doesn't, but for those one or two percent of those victims that have that severe traumatization as a result of being defrauded or impacted, that will go a long way for them to have their day in Court.

Again, I'd like to thank the Commission and the Chair, for giving me this opportunity, and I stand ready to answer any questions that you have before me. Thank you.

CHAIR SARIS: Thank you.

MR. BOHLKEN: Good morning. I also would like to thank the Commission, the Commission Chair and the other Commissioners, for giving me this opportunity to participate.

You have POAG's written testimony. I did want to highlight a few things, first on the inflationary adjustment. POAG agrees that the guidelines should be adjusted periodically to keep
everything relative to inflation and to the value of the dollar. We think that it is people being punished today, compared to people -- defendants being punished 10 years ago, that's created an unwarranted sentencing disparity between the two.

On the inflationary adjustments, we did want to point out that in the robbery guideline, the special offense characteristic that has the table of actual losses in it, we didn't see a lot of cases that had robberies involving substantial or a loss of $10,000 or more.

So, if we did increase that table, it would effectively do away with that. It's applied very infrequently now.

I'd like to also address briefly, the intended loss. We couldn't arrive at a consensus on Option 1 or 2, but the one thing that we did agree on is that it -- in intended loss, we would be looking at a different standard than we look at currently in relevant conduct, and we believe that that could cause some confusion or misapplications by narrowing what we look at in relevant conduct,
and then narrowing it in what we look at in the intended loss.

On the victims table, we preferred the Option 1. We think Option 2 could be overly burdensome for probation officer, to try to -- try to verify the substantial hardship of 25 or more individual victims.

We did think that if there was a fraud case or a §2B1.1 case, where there were numerous victims substantially harmed, it could be addressed through a departure or variance.

As far as the sophisticated means goes, POAG supported the Commission's version and its corresponding commentary.

The one thing that we would recommend or suggest is additional examples or case scenarios in the commentary that would talk about applying sophisticated means enhancements, relative to the offenses of the same kind.

Once again, thank you for giving me the opportunity to be here today and I'm ready to answer any questions you might have.
CHAIR SARIS: Thank you.

MR. FELMAN: Chair Saris, distinguished members of the United States Sentencing Commission, good morning.

Since 1988, I've been engaged in the private practice of Federal Criminal Defense Law, with a small firm in Tampa, Florida. I'm a former Co-Chair of your Practitioners Advisory Group, including the years 1998 to 2001, the so-called economic crime package.

I'm appearing today on behalf of the American Bar Association for which I serve as Chair of the Criminal Justice Section. Thank you for letting me be here.

In my more than 25 years of doing this, there are two things that have struck me. The first is the broad array of the people that I've represented who have committed these kinds of crimes, and the second is the increasing severity of the punishments that I have to advise them that they face.

The first jury trial I conducted, I
represented a Vice President of a bank that committed a fraud on a government program, and he learned of it, and it took him a while before he personally made the decision to stop it, after reporting it to his supervisor.

The bank was indicted and his supervisor and he were indicted, and we went to trial, which you could do in those days. It was a pre-guidelines case, and even though we were convicted -- he was convicted, the Judge sentenced him to probation.

It seemed a fitting result, he was disgraced. He lost his -- well, his good name. He lost everything that every meant anything to him. Of course, he never re-offended.

Had it been a guidelines case, he would have been looking at six years. Today, those guidelines have more than doubled, and we would have had to have sentenced him to 13 years and he would have died in prison.

On the other hand, I've also represented people who are true predators, people
who intend to steal money and do, and put it in their
pocket and try to walk off with it, and have they
-- could they have stolen more, they would have.

   The moral span of the people that I see
is so varied, and it's quite a challenge to write
a guideline that captures this variety.

   But unfortunately, the first guideline
effort was pegged to the drug guideline in its
severity, which we now recognize, was too high.

   It was raised again multiple times over
the years. The initial set of guidelines, the laws
could drive your sentence by no more than a factor
of five.

   Under the current guideline, the laws
can drive your sentence by a factor of 40.

   Unfortunately, the amendments don't do
anything about what I take to be the core severity
and complexity and over-emphasis on loss and not
enough emphasis on culpability, and in my humble
opinion, this is Clemency Project 2020 waiting to
happen.

   What I've tried to do about that is to
assemble under the auspices of the American Bar Association, a task force of the people that I most respected in this area, and we've done our best to write what we think would be a preferable guideline.

But at the end of the day, we understand that the Commission's options are limited to some of what has now been published in its views. So, I will address that.

I would say that the assumption may be that where the culpability considerations that our task force identified, but which are not in the guideline are present, the Judges depart, and know that you all see that Judges depart from the guidelines.

What I want to emphasize is that not all Judges do that. There are Judges out there who look at what you do as sacrosanct, and they don't depart, generally speaking, unless there is really an overwhelming reason to, and something that you all have indicated is okay.

What doesn't happen is Judges departing
for no good reason. That is not happening, and that is why I urge you to consider the expansion of the application note, regarding the circumstances in which a downward departure may be appropriate, so that Judges who are confronted with these culpability considerations have been essentially told by the Commission, these are legitimate considerations.

You could craft it as more -- as narrowly as you need to. You can make it that Judges have to articulate why they're doing what they're doing.

I don't see frivolous departures. What I see are Judges who are not comfortable departing because this Commission has not yet said that it would be appropriate.

I do think that though, that the standard should not be whether the guideline is broken or not. It should be whether it can be improved, and I think this application would improve it, and I think that Judges do indicate their dis-satisfaction at a lower point in the loss
When I look at the Commission's data briefing, it seems to me that the rate of non-government below range sentences goes to 30 percent at $30,000, and it stays there pretty much flat across the table, and the extent of the variance hits 25 percent at around $120,000, and that percentage stays pretty constant.

So, I do have things today about the specific amendments that the guideline has proposed, but I see that the red light is on, so I'll wait to respond to questions on this. Thank you.

CHAIR SARIS: Thank you. Professor Bowman.

MR. BOWMAN: I want to thank Judge Saris and the members of the Commission for your kind invitation to me, to testify here today. It's always a pleasure to come back and talk to old friends at the Commission and to make new ones.

By curious coincidence, it's almost exactly 20 years since I was serving as Special
Counsel to the United States Sentencing Commission on detail from the Justice Department, and Andy Purdy, who was then, I think Deputy General Counsel of the Commission, came to me and asked me to begin thinking with him and others about how loss might be better defined and how the economic crime guidelines could be improved.

That conversation sucked me into the maw of §2B1.1, from which I've never completely escaped. Jim and I have been in that maw together for almost a quarter of a century. Now, I'm not going to repeat here, the long story of how §2B1.1 was created, as a consolidation of the then separate fraud and theft guidelines or the effect of the Sarbanes-Oxley Act on what we've produced. I've laid all that out in my written testimony and several tedious law review articles, which you're at liberty to read.

Instead, I will merely say that while much of what we did back then made good sense, with respect to the sentences prescribed, certainly for the most serious economic offenses, we screwed up.
And that screw up was promptly exacerbated by Congress and the Commission, and the grip of the moral panic that was caused by Enron and the -- and the wave of corporate scandals of that period.

The basic structural error, the way we screwed up, arises from the interaction of three factors. The logarithmic structure of the sentencing table. The loss table, which now adds so very many offense levels for high loss cases. And the number of specific offense characteristics and role adjustments that are customarily applicable to these very same cases.

The result of that structural error is the guidelines, if honestly applied, and I emphasize if honestly applied, routinely generate sentencing ranges that neither judges nor anyone else take seriously.

I was therefore, gratified to read Judge Saris' statement accompanying the current round of proposed amendments to §2B1.1, in which she suggests that the economic crime guidelines for cases with less than $1 million dollars in loss seem
to be okay, but that sentences for what she refers to as, quote, "the highest dollar values over $1 million in loss do not", as she said, hew fairly closely to the guidelines.

I inferred from that statement that the Commission recognized the problem with high loss cases, which is to say a loss table that is pitched too high interacting with a host of SOCs and role adjustments, and I assume therefore, that the Commission would propose amendments to cycle to fix it. To my surprise, and I think to the surprise of a fair number of folks, that's not what is being proposed here.

There are only two proposed amendments that would, I think, really affect the sentences of high loss offenders, the proposed inflation adjustment, even that's not why you meant to do it, and the reduction in the size of the multiple victim enhancement. Neither of those would, of course, affect all high loss defendants, and neither would change the guideline ranges of those that they do affect very much.
Now, I can only surmise that the Commission doesn't really believe that there's a problem with high loss cases, and I've been kind of puzzling over how that could be so. Indeed, like the Grinch, I have puzzled and puzzled until my puzzler is sore. Now, you'll be able to tell me if I'm right about this. But what I think may have happened is that you may perhaps, have been misled by, or perhaps may have misinterpreted your own data, and here is what I imagine at least some of you to be thinking.

You recognize that there are some cases in which the fraud guidelines, if honestly applied, generate unrealistically high census, cases where the offense levels end up being multiple levels higher than the level 43 required for a life sentence, cases where in consequence, the guidelines treat stealing as orders of magnitude worse than murder. And you recognize also, I assume, that even below that stratospheric improbability, there are cases where the guidelines prescribe multi-decade sentences for
people who don't deserve it.

But perhaps you think that those -- that such cases are rare and therefore, of not -- of not much systemic concern. Why might you think that? Well, that's a bit hard for me to figure, because if we take Judge Saris' benchmark of cases over $1 million in loss as being the problem, we find that, at least as of 2012, the data set that was analyzed by your staff, there are actually 1,444 such cases, a full 17 percent of all the fraud cases sentenced that year under §2B1.1.

Parenthetically, by the way, from the point of view of the loss table itself, eight of the 16 steps on the loss table concern loss more than $1 million. So, half of the loss table, and 17 percent of the actual cases, fall into the presumptively problem category. Therefore, you must be thinking, I guess, that only a few of the 1,400 cases over $1 million are really a problem, and you may perhaps be supporting that conclusion in a number of ways.

First, you might think well, everybody
is telling us that a big part of the problem is the interaction of the loss table with specific offense characteristics that correlate with large loss. But the staff is showing statistics that say most of the high loss cases have very few SOCs.

So, the thing that everybody is complaining about really isn't a problem most of the time. But as I point out in some detail in my written statement, those statistics are, if I may be so blunt, plainly bogus. Not that they don't accurately report what is showing up in PSIs, they do.

But what shows up in the PSI in a plea bargain case, which is to say, 98 percent of all federal cases, is what the parties have agreed to, and what your own statistics show you, if you look at them carefully, is the fact that in high loss cases, the parties are plainly bargaining away all or most of the applicable SOCs.

If you take a look, for example, at Figure 8 of the data -- staff data briefing, which shows that in cases over $1 million, 47 percent of
the defendants in that category supposedly engaged in no conduct that triggered even a single SOC, and another 33 percent engaged in conduct with only -- which only triggered one.

Thus, 80 percent of $1 million frauds in that year had only -- had either zero or one SOC, and reading across the table, we are to believe that 67 percent of $2.5 million frauds have either zero or one SOC. Fifty-seven percent of $7 million frauds, 65 percent of $20 million frauds, and 66 percent of the $200 million and $400 million frauds supposedly had only zero or one SOC. That's obviously bologna. Nobody believes that.

As anyone who has ever handled any cases like that can tell you, it's just not possible to commit frauds of that size without triggering at least, and most times, multiple SOCs. So, what's happening? Well, plainly, the parties are bargaining away routinely, most of the SOCs and high loss cases, because applying the guidelines honestly to the facts of those cases would generate sentences that no defendant would agree to plead
to and, frankly, very few judges would agree to impose.

But interestingly, even then after the parties have potentially rigged the outcome, judges are still declining to impose the suggested sentences to an ever-increasing extent as loss amounts go up from $1 million, as figure 6 of the briefing shows. Now, I'm about to finish here, but the second data point on which you may be relying, in concluding that not much needs to be done, is the survey of the judges, in which they express generalized satisfaction with the guidelines for most cases.

But I'd suggest to you that that general conclusion shouldn't really afford you much comfort. In the first place, in discussing high loss cases, cases more than $1 million, where by definition, we're only talking about 17 percent of the cases. So, the fact that the judges are happy with most of the cases, most of the time, isn't really -- really isn't germane.

But more to the point, the phenomena of
ramping -- rampant factor bargaining in high loss cases means that judges are rarely confronted with the implications that the current guidelines honestly applied, and as an advisory regime, even when they are confronted with the guidelines calculations they're uncomfortable with, they can't undo -- blithely ignore it.

But none of this, I think should give you, as a sentencing commission, any comfort at all. If the data shows, as I think it plainly does, that you are stewards of guidelines which for an identifiable class of defendants are so out of whack that all of the parties of the system routinely evade them, in order to achieve sentencing outcomes they can live with, then I don't think the proper response for you to say is, well, in effect, no harm, no foul.

Rather, it ought to be to all for the applicable guidelines, so that lawyers and judges can take them seriously, as meaningful guides to proper sentences in high loss cases ought to be, and I know my time has long since passed, so I'm
not going to talk about the particular measures
that I'd suggest, that you might use to try bring
about that end, but I'd be happy to do so in the
questioning period.

CHAIR SARIS: Thank you.

VICE CHAIR BREYER: Mr. Felman, you
wanted to address some specific proposals, and I'd
like you to do that.

MR. FELMAN: Thank you. Well, the
adjustment for inflation, for the reasons stated
by the Commissioners, seems a good idea. I think
it is frankly, adjusting not just for economic
inflation, but in my view at least, adjusting for
political inflation. This is something that ought
to be done.

The victim piece, I do think should be
limited to economic harms. Once you get into
non-economic harms, and there is already an upward
departure provision there for unusual non-economic
harm, these are things that parties don't know.
Generally, prosecutors are looking for how they're
going to prove my client's guilt. They're not
looking into what are the non-economic emotional harms that the victims might have suffered, so when we sit down to plea bargain a case, neither of us know what the guidelines are going to be, and I think when you put into the guideline, facts that the parties don't know, it's problematic, and frankly, I think is going to be the subject of a lot of collateral litigation. And bear in mind, you're a system where there are no rules.

There is no discovery here. I'm not going -- the government is not going to have to give me anything about these victims. I don't know how I'm going to litigate what their non-economic harms are. So, I think for a lot of reasons, it ought to be kept to the economic harms. Bear in mind that in Chapter 3, you already have an adjustment for vulnerable victims.

CHAIR SARIS: To jump in, do you get that information about the economic harms and the bargaining?

MR. FELMAN: No.

CHAIR SARIS: So, you're not getting
any of that?

MR. FELMAN: At least the prosecutor could know it or it sometimes -- I mean, there are no rules of discovery at all, frankly, governing sentencing. So, they don't have to tell me what the discovery is anyway.

VICE CHAIR BREYER: Well, under §6A1.3, you're entitled to a hearing if you want to dispute it, if it's a material thing, and are you saying the judges wouldn't direct the prosecutor to present, in a discovery format, that type of evidence that he or she is going to rely on for the sentencing hearing?

MR. FELMAN: Some judges may, but it's at a point in the process where it's after we've already tried to negotiate the resolution of the case. So, what I'm saying that it works better as a system, when the parties to the negotiation, know the relevant facts. But I also think that frankly, it's the victim issue that could be dealt with much more simply.

You already have an adjustment in
Chapter 3 where the victims are vulnerable, and then you have an additional objection -- adjustment on top of that for a large number of vulnerable victims. I think in the ordinary case, the reason loss is being used is to measure harm. We're not measuring loss for the sake of measuring loss. We're doing it to measure relative culpability of different defendants who commit these crimes.

Ordinarily, the amount of the loss ought to reflect the impact on the victims. So, it seems to me that in an advisory system, as opposed to a binding system, we can be more general here, and we could say something to the effect that, where there is unusual victim impact, either in terms of number or effect on an individual or a group of individual victims, increase by plus-two or plus-three, or you know, whatever you want to do there.

But you could combine both concepts, put it in an adjustment and put a number on it, but you don't need to worry about vulnerability because that's in Chapter 3, and you don't need large
numbers of vulnerable, because that's in Chapter 3, and ordinarily in most cases, the loss ought to do it.

So, that was my thinking about the victims. I think we're still stuck in a binding mind set, where we think we have to lay everything out in so much detail and this is a plus-two and that's a four, we're just not there anymore. On the sophisticated means, I obviously would want to see that tightened up. I see it basically as a trial penalty, often. If you go to trial, it was sophisticated, if I'm bargaining, they're willing to say, okay, if you plead, it's not, and that's just not how a system ought to be.

I would note that 18 U.S.C. § 2, the aiding and abetting statute, does use the word “cause”. So, the idea of causes is not totally foreign to us, and so, I don't know whether the defender language is what the Commission would want to use, but I don't think the idea of cause would be a new thought.

On the fraud on the market, I didn't
have a specific suggestion, in terms of whether it should or shouldn't go to the insider trading piece. I don't think there would be a zero to six months, because you'd get the role adjustment, you get a number of victim adjustments, you get the sophisticated mean adjustments if you're -- if you used those to cross-reference over.

I would just have the same concern, that some -- the floor, if it's set too high, it's like a mandatory minimum. I mean, now all of the sudden, the judge's hands are tied based on one consideration, where we all know there is a rich mix of circumstances that might be appropriate. So, if you're going to use floors, I think you want to use them carefully, and not set them so high that it has some of the same defects that we see with mandatory minimums. In terms of intended loss --

CHAIR SARIS: So, what should it be?

MR. FELMAN: Well, I mean, I guess the suggestion was level 14. You know, I think that gets you jail and then you go up from there, for a leadership role, and a number of victims.
(Simultaneous speaking)

MR. FELMAN: It's just as empirical as everything else.

COMMISSIONER WROBLEWSKI: Actually, the Commission is looking at this --

CHAIR SARIS: It doesn't -- we looked at --

COMMISSIONER WROBLEWSKI: -- at the data of where Judges are sentencing now. The Commission is looking at empirical data to come up with a number.

MR. FELMAN: In that case, I withdraw my suggestion. It's based on the --

VICE CHAIR BREYER: No so fast.

MR. FELMAN: I mean, in any event, you have to understand when I answer a question like that, it's not on behalf of the American Bar Association, for certain, and it’s just me talking. The only thing I was going to say about intended loss is that the idea that we would treat losses that are solely in the mind of a person as hoping they would come about, identically with actual
loss, is really problematic to me.

I mean, I see cases where the loss happened, and they took the money. My clients, if they're predators, they intend all the loss in the world, but it ain't going to happen, and so, you really shouldn't weigh intended loss the same as actual loss. If you're going to do it, crank it back as tight as you can. At least make it be the losses that are intended by the defendant.

When you get into losses that are solely in the minds of somebody else, even if they're reasonably foreseeable, which these days, everything is with the benefit of hindsight, you're really risking unwarranted disparity between the true predators and the mopes, if you will. So, I think that intended loss was always intended to be subjective, but it would be improved if it was limited to the defendant's individual subjective.

CHAIR SARIS: Thank you. I was going to jump in and ask, Professor Bowman. I enjoyed reading your remarks, because you've been in the trenches, trying to figure it out, and I notice how
many times you said, I went down that rabbit hole and now I've changed my mind. So, it's been a very difficult area, and I notice the Department of Justice just sort of embraced your tweak of lopping off the --

MR. BOWMAN: I was stunned. Delighted, but stunned.

CHAIR SARIS: -- lopping off the top ends, but let me ask you this. What was the issue that we have with directives, and there is a directive, which is not a mandatory one, but a discretionary one, but what Congress asked us, to ensure that the guideline offense levels and enhancements under §2B1.1 are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50.

So, one of the things that your piece doesn't discuss or address is the role of directives. Congress has been so active in this area, so that let's say, you lop off some -- I am not saying we are, but you lop off some amounts, you've recommended this, but then the big issue is
the victim table, and you struggle with that.

    Should it be quantitative? Should it be qualitative? Should it be some combination of the two? But something -- but Congress is quite interested in actually having us think a little bit about the number of victims over 50, at least Congress thinks is more than one victim.

    So, how would you -- you know, you said that you -- you haven't yet dealt with specific proposals, but we're right there, specific proposals. If you lopped off a certain amount or whatever, as the Department of Justice is willing to take the tweak, you still -- still, what do you do with these victim tables?

    MR. BOWMAN: Well, first of all, I would support the Commission's proposal to reduce the number of levels associated with the number of victims. I think that is a good idea to start with, particularly because of the whole logarithmic effect, as we go up particularly at high levels. I mean, a six level increase essentially doubles your sentence, I mean, which is, I think -- so, 250
victims doubles your sentence, which I think is
crazy. So, dropping that down, I think makes good
sense in the first instance.

I guess in here, I think maybe I'll pick
up on something that Mr. Felman just said, and that
is that I think in a particularly in an advisory
era, I think maybe the court -- or the Commission
should continue to -- or should begin to think about
adding provisions to the guidelines that are more
in the nature of guidance, right.

So, for example, one could say with
respect to either number of victims, or for that
matter, with respect to victims who have suffered
some sort of qualitative degree of harm, you might
say -- might rather than adding or subtracting
offense levels, you might put in a provision that
essentially suggests a departure or suggests that,
for example, the presence of a certain number of
victims over say, a level of 50, would be a factor
the judge might consider in sentencing at the top
end of the advisory range.

I mean, that's something we -- you know,
actually for decades now, we've forgotten the fact that there are ranges, right? I mean, there is a bottom end that basically, most judges seem to sentence at most of the time, but there is a whole range in here, and the Commission has not given much in the way of guidance about where a judge might want to sentence in that range.

So, if you want to talk about that, rather than adding another two levels or three or six or 10 or whatever it is, you might say, well, this is a factor that a judge should consider within the range, or if it's -- or the judge could consider as a departure, rather than ramping up the number of levels. And I think particularly in this guideline, rife as it is with all of these SOCs with their logarithmic effect and high loss cases, I think you should be very, very reluctant to be adding any new SOCs at all. It not only adds complexity, but in cases over $1 million, it's almost always going to have a huge multiplying effect on the ultimate guideline range.

CHAIR SARIS: Thank you. Professor
Barkow and then Jonathan.

COMMISSIONER BARKOW: So, my question is somewhat related to this, which is — well, maybe not entirely. So, it's the question of how much we do that's specific to the fraud guideline, versus how it relates to the rest of the manual. So, this is really for you, Mr. Felman, because of the ABA proposal, but part of what the ABA proposal really focused on was this idea of what it called the culpability, or you might think of mens rea, and that's just not the way the guidelines manual overall, approaches sentencing, right.

So, the ABA has a really interesting proposal that is grounded in fundamental concepts of culpability and criminal law, and yet, it's not the approach of the manual. So, you know, one issue is, is there a reason that — you know, fraud gets the special culpability treatment, right, but we don't do it for drug quantity. We don't say did you -- you know, what was your mens rea, with respect to the quantity of the drugs, you know, it's just it is what it is, and that would be the way
it would work with the whole rest of the manual.

So, you know, so, one issue I think that at least I have, I won't speak for anybody else, is, you know, how to think about piecemeal fixing of the guidelines manual, versus issues that are broader, and then, you know, Professor Bowman's point is about the logarithmic nature of the table is -- you know, it may have particularly pernicious effects when it meets this particular guideline, but that's true for everything, because that's the way the whole table works.

So, you know, one issue is just whether you have given any thought to the fraud context as being specifically the place to tackle these, or whether they're so fundamental that really, those kinds of issues have to be the big-think thing that the Commission does, as it rethinks a guideline regime in an advisory world, because it just seems like some of these transcend the specifics of fraud.

MR. FELMAN: There were two areas in particular that our task force just couldn't get
away from the obvious comparison. The first was
drugs, because that guideline is driven by
quantity, just as the fraud guideline is driven by
loss. The other area in which we have strong ABA
policy are the child pornography guidelines, where
there are instances where you could get more time
for looking at pictures, than actually molesting
the child, as I understand it.

So, without question, there may be
aspects of this manual that could dramatically be
improved by a wholesale revision. Now, I don't do
a lot of bank robberies or immigration. There may
be similar places --

CHAIR SARIS: Glad to know that.

MR. FELMAN: Well, not personally yet,
but there may be other places in the manual, and
my sense is that the reason that the fraud guideline
is such a great place to start, and we need to start
somewhere, unless you want to start on it all. I
mean, I guess one approach can say, well, I don't
want to do anything until I'm doing it all, but I
don't know that you have to take that approach.
I think you could start here, and say, let's see how it works, is because peculiarly, I think that this guideline captures a much broader array of not only types of offenses, but at least in my judgment, types of offenders, and so, I think that it does lend itself to a fundamental rework, and I don't think you have to wait to write the whole book, but obviously, there are other parts of the book that, as you point out, I think are exactly the same sorts of issues.

MR. BOWMAN: I suppose if that question was partly directed to me, I mean, I think I probably share much of what Jim has had to say, with the addition that I don't -- assuming you're going to start somewhere, it may be -- whether it's to go the ABA direction or to simply try some things this guideline, that you haven't tried elsewhere, it's not a bad place to start, right?

I mean, there's two approaches. You can try to -- if you're going to try to re-invent the universe, I mean, you're going to sort of start in a small corner of the universe and see how it works
out, or you can try to do, you know, go back to the
beginning and do the whole seven days thing.

Maybe it's not a bad idea to start in
one corner of the universe and see if your ideas
actually, you know, play out in practice, and I
think there is some areas for -- that you could
experiment on here that would make sense, and
moreover, I think the problem, in my view, the top
end of the guideline is so fouled up right now that
you really need to do -- you need to do something,
and more than you're doing.

CHAIR SARIS: All right, thank you.
We're going to go down. Everybody has questions.

COMMISSIONER WROBLEWSKI: Yes, so,
I'll try to be quick.

CHAIR SARIS: Go down the --

COMMISSIONER WROBLEWSKI: For Mr.
Felman, the ABA proposal specifically directs
judges to consider non-economic harm. So, can you
explain that with your testimony? And then for
Professor Bowman, you were around in 2001, when the
Commission did a tremendous amount of research, of
empirical analysis, of public hearings and decided to amend the loss table, lowering the loss table in some areas and raising the loss table in other areas, looking at all the purposes of sentencing, balancing them out, coming up with something.

If the Commission decides to make an inflationary adjustment, can you first of all, explain what the Commission did, and whether you agree or disagree with me? And if the Commission makes and inflationary adjustment, why should it go back before 2001, at a time when the -- at a time when the Commission examined all the purposes of sentencing and made adjustments, considering all of the aspects of sentencing we're supposed to consider?

MR. FELMAN: So, I don't think there is any inconsistency. What I'm saying is, the task force approach to victims was to say, look, counting the number doesn't make any sense. Let's look at what happened to them. So, we came up with just general categories of victim impact, minimal, low, moderate, high, something like that, off the
top of my head and it was based on a mix of all information, including potentially extreme non-economic harm.

But it's much more of an advisory kind of an approach. I think that here, these guidelines, if you're going to stick -- you know, we're only going to look at what the impact was, and it's going to be plus-two and that's it, well, then we ought to keep that to economic impact and leave these other unusual circumstances to upward variances or upward departures, which are already there. That's been in the book for a long time, and which ought to stay there. So, I don't think there is a difference of approach there.

CHAIR SARIS: Okay, thank you.

MR. BOWMAN: But with this, I think there -- it was a question addressed to me, as well. Well, Commissioner Wroblewski. I think with respect to what happened in 2001, I might disagree with you a little bit about what we did in 2001, in terms of the loss table, because your characterization of it, I think is that -- gives
the idea that perhaps it was a little more systematic and perhaps scientifically based than I think it was.

I think it was more -- I mean, there was certainly some considerations of purposes of sentencing and so forth. But I think what happened with the loss table is also an awful lot of horse-trading, with various of the players wanting different things, and what we got was a loss table which increased, you know, the table at the top and decreased it a little bit at the bottom, and I -- my own personal sense, and I don't know if Jim has a different one, is that that was primarily the outcome of a bunch of horse-trading, rather than a whole heck of a lot of really scientific thought.

But the other thing that I think is clear and I -- about that, which I put in my written testimony, is that the trouble with what happened in 2001, with respect to the guideline as a whole, is that the processes -- that 2001 economic crime package proceeded essentially on two tracks.

On the one track, there were the people
who were worried about severity, and they were working on the loss table, and on the other hand, there were the people who were worried about sort of loss definition. That was mostly what I did, and the trouble is that the two sides of those -- the two tracks basically didn't intersect very much.

We didn't really think very carefully about what would happen when you took the increased loss table and you put together with what we were doing on the loss and reconfiguration of definition side. Very few people actually sat down to figure out what the intersection of those things would do, except for Jim, who did point that out.

With respect to your last question is, you know, what -- should you go back before 2001. I mean, I take your point, which is these numbers were considered, by horse-trading or scientifically, in 2001 and they were set at that point. Does it make sense to go back historically before that? Probably not.

MR. FELMAN: Having been there --
CHAIR SARIS: We just need to make sure we get through --

MR. FELMAN: I have one comment. I would say to this Commission, that which I said to the Commission in 2001, because we could see what this meant. History will judge this period as a time in which we experimented for the first time, with the imprisonment of non-violent first-time offenders, for periods previously reserved only for those who had killed someone. This is Clemency Project 2020 waiting to happen.

CHAIR SARIS: Thank you. Judge Breyer?

VICE CHAIR BREYER: I'd like to ask you, Mr. Andrews, in your submission, you recommend -- you say recommendation Option 3 on page two, with respect to victims, and I was impressed by your choice of words, because you say victim impact, you said substantial, you say, if the offense resulted in significant financial or other hardship to one or more victims, and you used the term “or other hardship”.

So, I think maybe there is a consensus
on this, maybe not quite, but almost, that that
would then capture people who are victims of
identity theft, where they may not have lost any
money, but they're spending years trying to
straighten out their financial credit, or their
credit. Was that your intention? Are those the
words, the so-called magic words that one would put
in this, in order to capture that type of conduct?

MR. ANDREWS: That's exactly right.
You know, we're living in the reality of the
different types of economic crime victims today
that are a lot different perhaps, than earlier on.
So, it's tough to capture all the possible type of
victims out there that are being harmed by
predators out there. So, you're exactly right.
We're trying to make it at least as open, so folks
can get -- fall right into those.

VICE CHAIR Breyer: Thank you.

CHAIR SARIS: Judge Pryor?

COMMISSIONER PRYOR: So, I have good
news and bad news, Professor Bowman. The good news
is, at least speaking for me, is that what you
imagined we thought, isn't what we thought.

MR. FELMAN: Well, that's good, I guess.

COMMISSIONER PRYOR: So, the bad news is perhaps we just haven't figured out a good way to deal with the 15 percent problem. So, we have a guideline that for 85 percent of the offenders, the judges think works most of the time. And for 15 percent, it doesn't, and maybe we just haven't figured out a good way of dealing with that, in a way that we would have to explain to Congress, is something different from just lowering punishments, for the fraudsters who cause the most harm, at least in dollar amounts.

MR. BOWMAN: If I might respond to that. I mean, one of the things -- I think you can fix it. I think there are a number of ways to do that. You just have to work carefully -- I think you have to -- and I've suggested some mechanisms by which I think you can bring sentences for that 15 percent back within a reasonable range.

I guess one of the things I would say,
I guess I'm a little puzzled by, I mean, even though
I spent 10 years in the Department of Justice, I'm
a little puzzled by the Department's apparent
resistance to the kinds of things that might change
that.

If I am in AUSA, in a high loss case,
I'd really like some guidelines that when we run
the calculations honestly, not jiggering the
numbers, but honestly, you come up with a sentence
that I can walk in front of any of you as judges
and say, Judge, this -- the guidelines, which the
Commission seriously means, they really thought
about this, prescribes 20 years for this joker, and
I want you to impose that 20 years, and nobody is
kidding you. We really mean that, and the
Commission means that, and you know they mean that.

I want that. So, why the Justice
Department seems to be so deeply reluctant to
adjustments that would produce that outcome is a
little bit of a surprise to me, and in terms of
selling it to Congress, if that's the thing, that
to me, is the way to sell it, right? We want
guidelines that we can actually take seriously and therefore, the judges will use to impose serious penalties on serious offenders.

COMMISSIONER PRYOR: I can only speak for myself, but you know, there may be a lot of sympathy on the part of some of us, about how we rethink the guidelines in an advisory world, but starting or isolating -- starting with or isolating the fraud guidelines, from the larger perspective that we have to deal with, I think it's a hard sell.

CHAIR SARIS: Any other questions at this point? I just -- I had a question for you, Professor Bowman. You suggest a cap, basically of a cumulative effect of all the SOCs at 10. That's -- your proposal, it actually --

MR. BOWMAN: Right.

CHAIR SARIS: -- while I get it, it still would often bring a 20 to 30 year sentence.

MR. BOWMAN: Right, I mean, I actually --

CHAIR SARIS: In other words, your proposals aren't doing much more than -- for many
of these, the stat cap is about there anyway, regardless of whether it's hitting at 43, you got a 30 year statutory max.

MR. BOWMAN: I am not wedded to the cap of ten in the ABA’s proposal. Matter of fact, after I, you know, after I wrote that and I sent it off, I said, you know, that's probably too high. Because I think what we should -- here's the last thing I would say, I guess. I think what all of us, and I think what the Commission should learn to think in terms of is not offense levels, but multiples of, you know, sentencing, that is to say when you say, let's add two -- let's add a two level enhancement, realize when you say that, you just increase somebody's --

VICE CHAIR BREYER: So, that is the -

(Simultaneous speaking)

MR. BOWMAN: Pardon?

VICE CHAIR BREYER: That is -- what the real objection here --

CHAIR SARIS: Yes.

VICE CHAIR BREYER: -- and we've talked
about this and struggled with it, and yes, a very
good argument could be made that it's not
appropriate to have a logarithmic effect, because
adding 'x' doesn't correspond to twice the harm,
four times the harm, ten times the harm.

So, isn't that really what's going on
here? You're saying, look, I want to put in some
caps, because it's the caps that can possibly
ameliorate the adverse impact of the logarithm
effect, not the harm effect, but the logarithm
effect. Isn't that what you're saying?

MR. BOWMAN: Right, and I'm saying that
because unless either Congress steps in and amends
the enabling legislation to eliminate the
so-called 25 percent rule, or you, as a Commission,
decide that you're going to revisit the
interpretation of that statute, which was made by
this Commission many years ago, so that you don't
believe that's true anymore, you're stuck with the
logarithm.

So, I make the proposal not because I
think in a perfect world, this is the best thing
to do, maybe if you were reinventing the world. What I am saying is, you're stuck with that, so if you're dealing with a set of cases, the top 15 percent, when you know that you're starting out at a very high number, because you got $1 million or $5 million or $7 million of loss, ask yourself how much more than that should any specific offense characteristic ever multiply somebody's sentence, and I think you ought to be able to arrive at some conclusion about that. Twice? One time? Two times? Three times? And if you figure out what that number is, there is the cap.

MR. FELMAN: The other way that I'll ask it sometimes in advocating for a departure is, is my client's crime really that much worse because of “x”? What would the penalty be, just based on the loss, and then how much have we tacked on, because each one adds on top of the other, and then also, what else could he have done and still scored the same? You have to look at the rest of your guidelines manual, and half the time, my client could have poisoned the public water supply and
scored lower. So, you need to also look at it, in
terms of what else is in the rest of the manual by
the time you've piled all these things on.

VICE CHAIR BREYER: Wouldn't advise
them to do that.

MR. FELMAN: I haven't yet.

CHAIR SARIS: All right, well, any
other questions? Thank you very much. This has
been very helpful. We'll figure it out over lunch
and be back here at 1:30 p.m. with the answer.
Thank you.

(Whereupon, entitled matter went off
the record at 12:30 p.m. and resumed at 1:35 p.m.)

CHAIR SARIS: Okay, so the job of this
group is, after lunch, to keep us all energized.

I want to thank you all for coming. Let
me introduce folks. It's our -- so, welcome to
Robert Zauzmer, who is the Appellate Chief in the
U.S. Attorney's Office for the Eastern District of
Pennsylvania.

He received a BA from the University of
California at Los Angeles in 1982, and his law
degree is from Stanford.

So, David Debold is well known to us, is the Chair of the Practitioners Advisory Group, PAG. He is a partner at the law firm of Gibson Dunn & Crutcher, LLP, practicing in the firm’s Appellate and Constitutional Law, Securities Litigation and White Collar Defense and Investigations Practice Groups.

Richard Bohlken is back for round two, after this morning, and he was on a previous Panel.

Jon Sands has been in the Federal Public Defender's Office in the District of Arizona since 2004, and a frequent testifier here. He loves it. He keeps coming back for more. He joined that District as an Assistant Federal Public Defender in 1987.

Welcome to all of you. I think all of you were here this morning, but just in case you weren't, there is the red light that will go off, and then the hook, and then we jump in, after everybody is done. Thank you.

MR. ZAUZMER: Thank you. Thank you
very much, Your Honor.

Good afternoon, Commissioners. Thank you very much for having me back. It's an honor again to appear on behalf of the Department of Justice here, to talk about several issues, as you know, first with regard to the single sentence rule.

The Department supports the amendment that would adopt the view of the Sixth Circuit, to correct this quirk, regarding the single sentence rule that prevents the application in a handful of cases involving career offenders.

We think it's fairly obvious that somebody should not avoid a recidivism provision simply because they committed extra crimes that were also prosecuted and sentenced at the same time, as the predicate crime of violence or drug trafficking conviction.

We have submitted a detailed letter, which gives particular suggestions on how to do this, because it affects not just the career offender provision, but also other recidivism
provisions in the guidelines, and I'm happy to answer any questions and get down into the details of that, that's in our letter.

Second, with regard to the mitigating role suggestion, the Department, I think in agreement with my friends here on the Panel, largely agrees with the suggestions that the Commission has made, agreeing that a mitigating role should be measured against the average participant in the same offense, as opposed to being measured against the same type of offense in general.

It's just much more practical and simpler to impose, would relieve quite a burden on the parties and the judge, in particular cases.

So, we support that and we also have no objection to the suggestion that there should be an additional list of factors that may be included, in defining what is a mitigating role. The important thing there, of course, is to make clear that it's a non-exclusive list, because of course, these cases are all different, and it shouldn't be
The one objection that we do have, and again, I'm happy to address this in response to questions, involves the change regarding people who are already being sentenced only for the conduct involved in their own offense, usually drug quantity or fraud amount.

The suggestion -- it already says in the guidelines that such people are not precluded from a mitigating role adjustment, even though their sentence is already limited to their own conduct.

The suggestion has been made, and there is no explanation given why, of changing it to 'may receive' as opposed to 'not precluded'.

This has already been read, as we see from the testimony introduced by my defense colleagues here; it's already being read as a suggestion that more of these people should get reductions and that doesn't make sense to us, for the reasons explained in my letter. It's basically giving a bonus to people for engaging in criminal conduct with other people, as opposed to
engaging in criminal conduct by themselves, which
is against the ordinary principles of sentencing.

So, that's the one part of the
mitigating role suggestion that we do not agree
with, and I'll address that more, if you like.

Finally, with regard to relevant
conduct, again, the main proposal that's been made
by the Commission, no disagreement from us, as long
as it's made clear that this is not a substantive
change.

Our basic view regarding the relevant
conduct provision, specifically with regard to
jointly undertaken activity, is that it's not
broke. It doesn't need to be fixed. The courts
well understand this.

The suggestion that has been made is to
make it clear, break down in the rule that the
conduct has to be within the scope of the agreement
that the person has reached. That's already in the
commentary, and we have no objection to that being
in the text of the rule itself, as long as it's made
clear that there is no substantive changes
intended.

In preparation for my testimony, I did review cases from all the Circuits, to make sure that our understanding is right, that judges basically get this, and I didn't find any authority in any of the Circuits that suggest that this is a problem, that there are judges out there who don't understand that jointly undertaken activity has to be within the scope of the person's agreement, and that it's not necessarily as broad as a conspiracy that the person might have been convicted of.

These issues were settled by this Commission back in 1992, and it appears that it's been faithfully applied by the courts ever since.

I mean, you all know well, that in the early days of this Commission, this may have been the number one issue of how to sort out relevant conduct after the initial guidelines were published, and it was sorted out by 1992, and we think that it's well understood and that further adjustments really aren't necessary, and then it comes down to a case by case adjudication, that
judges have to engage in.

So, again, I welcome your questions and I look forward to discussing it further, and thank you for having me.

CHAIR SARIS: Thank you.

MR. DEBOLD: Good afternoon, Judge Saris and members of the Commission. As I neared the end of my second and term-limited final term, as the Chair of the PAG --

CHAIR SARIS: Oh, really?

MR. DEBOLD: -- my pleasure to be before you, speaking once again, about proposed amendments. It was sort of a walk down memory lane, to hear Professor Bowman talk about his time at the Commission 20 years ago. For me, it was 24 years ago, serving in that same capacity, when I was with the Assistant U.S. Attorney.

So, as my colleague has said, I've followed a lot of these issues over those many years.

The two topics that I want to address in my oral testimony today are the relevant conduct
provision and the mitigating role provision that
the Commission has proposed amendments for.

Obviously, there is some overlapping
principles with these two provisions, the most
common element of them obviously is, they both
address situations where a defendant is not acting
alone.

Under the relevant conduct provision
that you are looking at, and this amendment cycle,
it's what conduct by other persons gets counted in
the sentencing of the defendant, as long as that
conduct was part of the same jointly undertaken
criminal activity, and then of course, in the
mitigating role provision, the question is, after
you've determined that universe of conduct and
you've done your Chapter 2 calculations, what --
in what way is the defendant's role, if it's
mitigating in some way, going to lead to a lower
recommended punishment?

As the Commission knows, the PAG has
long recommended changes to the first of those
provisions in general, the relevant conduct
guideline, for at least two reasons.

The first being that the punishment often times is not very closely related to what the defendant's culpability is for the criminal conduct as a whole, and secondly, for purposes of consistency, we found that despite what you may see if you go to the reported cases in the Federal -- in the Federal Reporter, you're going to see each Circuit more or less, agreeing on what the principles are, but as you all know, very few of the cases make their way up to the Court of Appeals, especially when there is a guilty plea.

So, what's really going on, you need to pay attention to is what district court judges are doing on a case by case basis, and I know that's one reason why the PAG exists, is to get our experience in those sort of, in the trenches type situations, and our experience has been that judges do often times take different approaches to what jointly undertaken criminal activity at defendant should be held responsible for.

So, we're very glad that the Commission
is addressing and to the extent, is in the current amendments, as proposing to make clearer that there's a three-part test, the first part being what is the universe of activity that the defendant agreed to be -- to jointly undertake with the other individuals, and then of course whether the other conduct that they're going to be held accountable for was in furtherance of that same universe of activity and finally, to what extent the defendant foresee it or intended or what other level of knowledge, if you will, should apply there.

On the first factor, we do appreciate the Commission offering greater guidance and we do suggest extending that out a little bit, based on the factors that are identified in the case that we cite from the Second Circuit, United States v. Studley [47 F.3d 569 (2d Cir. 1995)], and I think that those factors are very helpful and that would be useful for district judges to have the benefit of that in the guideline provision.

On the third factor, there is an important difference between the foreseeable
consequences of one's own acts, which as my colleagues' letter points out, we frequently hold people responsible for the foreseeable consequences of their own acts, but it gets much more attenuated in terms of responsibility, when you're talking about the foreseeable consequences of a foreseeable act of another person, who is supposedly acting in furtherance of the same activity, and we think that that is a line that often times, will, if it's drawn the way that it currently is in many courts, it leads to greater punishment than is warranted by the circumstances.

On the mitigating role provision, as an initial matter, we are in agreement with the Department of Justice on how to resolve the Circuit split. As a general matter, we think that Chapter 2 is where you look at what the offense conduct is, and in Chapter 3, is when you start looking more closely at the defendant’s part in that offense conduct, not a perfect division. Sometimes there are things in Chapter 2 that also are defendant specific, but it's a good general principle that
we have found to be workable, and therefore, it would be most sensible to have a judge look at the person's role with respect to the criminal activity that has already been accounted for in Chapter 2, under the Chapter 2 guidelines.

Stepping back though, we do disagree with the Department on whether or not judges are using the reduction, under the mitigating role provision for either a minor or minimal participant, at a rate that is commensurate with the facts of the cases that come before the judges.

There are a very small number of cases where this reduction is awarded, and we think that there are a number of situations where defendants do play, but it's truly a minor role, even though they might be essential to the scheme, even though their own conduct has been limited already, and we think that the amendments that are proposed here, along with our suggestions and our letter and my written testimony are a good way to try to get judges to recognize that more frequently.

CHAIR SARIS: Thank you.
MR. BOHLKEN: Good afternoon. Again, I want to thank all of the Commissioners for the opportunity to be here today and the opportunity to speak and participate in these panels.

POAG submitted a letter and I just wanted to highlight a few points on the single sentence rule, the jointly undertaken criminal activity, relevant conduct and the mitigating role.

First on the single sentence rule, the POAG prefers the approach, the United States v. Williams [753 F.3d 626 (6th Cir. 2014)] approach that predicate offenses be evaluated independently when multiple convictions are being considered as a single sentence for criminal history scoring purposes.

The one potential application issue that POAG highlighted are potential circumstances where different time periods may be applicable when multiple counts are independently examined.

The example that's in the commentary of the amendment kind of highlights that, the one that...
has a trespass conviction, has two years imprisonment, grouped with the robbery conviction one year imprisonment, and this example, two different time periods would have applied under §4A1.2(e), 10 and 15 years.

So, there will be circumstances in which the single sentence would have received criminal history points, but the predicate conviction in this case being the robbery, would not have.

POAG also believes that any predicate conviction that independently receives one criminal history point should apply as a crime of violence or controlled substance offense, regardless of whether or not they have four or more one point convictions.

As for the jointly undertaking criminal activity, POAG is pleased with the revisions to §1B1.3, and making the three part analysis structure more visible within the relevant conduct guideline.

Circuit representatives observed that
this area of application is often misunderstood and misapplied, and the members all agree that this change will encourage fidelity to correct guideline application principles.

Regarding the possible policy changes, the Option A and Option B, raising the state of mind requirement, a majority of POAG members believe that a more restrictive state of mind requirement would be a significant policy change to the guidelines. As a potential consequence, defendants could potentially have a greater incentive to falsely deny or frivolously contest what is now considered relevant conduct.

Option B, we believe this change would place prosecutors in a position to have a greater influence on the ultimate sentence of a defendant. The system, as it exists now, defendants are generally treated consistently for the acts of others.

As far as mitigating role, POAG believes limiting the assessment of a defendant’s role in the criminal activity, rather than the
activity in a typical crime doesn't rectify the disparities that we see across the country, of how mitigating role is applied, and it may also even have the reverse effect, and cause more division of how it's applied across the country.

We believe consistency is very important, given the impact of the mitigating role cap in §2D1.1.

One recommendation POAG has is for the Commission to study Circuits that less frequently apply mitigating role, and study circuits that apply it more often, and kind of do an examination of the case law, of why -- what the barriers are for not applying it and what the case law is for applying it, and in the greater number of cases in some districts. Thank you.

CHAIR SARIS: Thank you.

MR. SANDS: I'm gratified and honored to be in front of the Commission, testifying on behalf of the Federal Public Defenders. It is an important function that the Commission has in front of it, and the Defenders play a key role in advising
and commenting on the amendments.

We have submitted extensive comments, and I wish to thank Denise Barrett and Laura Mate of the Sentencing Research Council, for their diligent work.

I had prepared remarks, but I sat here this morning, and I heard the various panels and the Commission wrestle with various aspects, and I am going to take a step back and say, why are these amendments and why, in the case of one, isn't it?

In terms of mitigation, the 'why' is obvious. It cuts across drugs, it cuts across fraud, it cuts across every type of offense.

The original sin from our point, of the Commission was linking culpability with the amount. That sin can be expiated with a role, with culpability. Time and time again, when we have been in front of the Commission, we have urged you to look again at role in the offense.

Last year is an example. We introduced you to Oscar. Molly Roth testified for us. Oscar is a courier that was bringing drugs across the
border. His family was ill. He was trying to make 
a quick buck to help his family, and he was caught. 

We argue that there should be a 
roll-back in the drug offense level, and 
Commissioner Wroblewski said, "Well, of course 
he's going to get a mitigating a role adjustment. 
Of course, he will be reduced, because his role as 
courier is not as significant as others."

Well, the stats that we have provided, 
and that your staff know, indicates the wide 
disparity unwarranted between districts. 

We have the Eastern District of New 
York, where 30 percent are given minimal or minor 
role, and then the middle District of Florida, 
where only five percent, both of those are dealing 
with the various types of drugs. 

Turning to the border, we have Arizona, 
where we're looking at roughly 10 percent, I think 
actually nine percent, getting mitigated role. 
Right next door, in Southern California, we're 
looking at 70 percent and almost 73 percent, where 
New Mexico is looking at 40 percent of those getting
minimal.

Texas is looking at, I believe, 20 percent in Texas Southern and 30 percent in Texas Western.

How could we justify Oscar, the courier, going on a highway and seeing a sign saying El Paso or Las Cruces? He goes to El Paso and gets caught, he's going to have three out of 10 chance. Las Cruces, he's looking at seven out of 10 chance, if he gets diverted to Arizona, he would get me, but unfortunately, he would only get mitigating role 10 percent of the time.

That needs to be changed. Same with fraud. This is a chance for the Commission to really look at role and to expand it broader.

In addition, borrowing from inflation, we think the Commission should actually increase the role for minimal -- increase the adjustment for minimal or minor.

As the drugs and fraud and penalties have ratchet up, the role has stayed the same. If we go back to 1987, there is an argument that it
should be terribly reduced.

In terms of single sentence, as the yellow light comes on, why? It doesn't affect but a handful and it respects the state court judge who has given the sentence. She felt it was appropriate. Let it lay.

The problem is with career offender, which everyone agrees, sweeps too broadly. To do this little tinkering would be just to exacerbate an already unfair situation, and lastly, in terms of jointly undertaken, we believe, with my co-panelists, that a restructuring is in order to make it clearer, and it goes to intent.

All of these things are looking at what the person really intended to do, before we put him in prison. I'd be happy to answer any questions. Thank you.

CHAIR SARIS: Thank you. Okay, I'll jump in. So, I start with what I thought was sort of sleeper, which was single sentence, and it seemed as if the Williams case logically had it correct, and then I started getting worried, and
when I saw the Department say, and we should do it for §2L and we should do it for §2K and we should do it for -- I forget what it all, but adding and adding and adding, and I understand logically, why you did that.

So, but I'm really trying to figure out, because Williams was a career offender case, which has some statutory obligations that come with it.

So, I want to understand this across the board from the prosecutors, the defense attorneys, the probation officers.

What is happening in the field? I'm told from my people that it's impossible -- it's very difficult to code for this, to figure out what is actually happening with these multiple sentences, and to know whether or not your proposal to add in §2L and §2K, and your suggestion that in fact, it's going to dramatically change how career offender people.

So, what is happening in the field right now? Maybe I can talk to -- start with the prosecution. Do you -- in the United States of
America, are most people following the Williams case, the Eighth Circuit or the Sixth Circuit, I guess it is?

MR. ZAUZMER: The issue comes up infrequently, Your Honor. We don't have data. The Commission doesn't have data. We can only speak from talking to all of our colleagues, that it comes up occasionally around the country, but not very often.

We had one case in the Third Circuit I can speak of, where we lost it, the case came back for re-sentencing, because of the King v. United States [595 F.3d 844 (8th Cir. 2010] application of the single sentence rule.

So, it does happen, but it's not a large number. Our view on this is, it's an obvious mistake. It's easy to correct.

The Commission has suggested an obvious correction, and we advocate it.

CHAIR SARIS: But let me ask. So, to your knowledge, would that be changing the practice in the immigration cases in huge numbers, that we
MR. ZAUZMER: Not at all, and you know, I was going -- you know, my colleague Mr. Sands in his submission, said both, this is a minor thing, in fact, in very few cases, and then said it will drastically increase the application of the career offender.

I don't believe the second part of that is correct. I don't think this would have a significant effect on any of these provisions. We're talking about, it's just a logical fix.

CHAIR SARIS: Is it possible afterwards, to just do a survey and find out how often this issue comes out?

MR. ZAUZMER: We'll be happy. I can tell you the quasi sort of survey I did, as you know, I'm part of the Appellate Chief's Working Group of the Department. I asked all my colleagues informally around the country, and the answer I got back is what I have given you, which is that some people have seen it, but this doesn't come up often. If you'd like more than that, we're happy to do it.
CHAIR SARIS: So, from the point of view of the Defense Attorneys, does this come up any place?

MR. SANDS: It comes up very rarely, but when it does come up, it has the pernicious effects of greatly increasing the sentence, as we pointed out in Williams.

The fact is that it hadn't come up for the 15 years that the Sixth Circuit -- sorry, that the Eighth Circuit case was on the books. It's just not coming up in the field.

I have spoken with the Defenders. It's very, very rare. I've spoken with my colleague from the probation office and he's not seeing it, but when you start going across various offense levels, immigration, firearms, you're moving from Chapter 4 to Chapter 2 and you get these pernicious effects, and we would urge the Commission, if they're going to deal with career offender, deal with it honestly, deal with it broadly. Don't tinker in this, which really just affects a few cases and a judge can sentence with an upward or
with a down.

CHAIR SARIS: And from the probation point of view, do most people follow in Williams?

MR. BOHLKEN: Your Honor, I did do an informal survey of all of the Circuit reps and all their points of contact across the country, and this is extremely rare, as my colleagues have said, and I also asked them, "Well, how do you train new probation officers on this very topic," and to be honest with you, they all said, "This is too complex to try to train a new officer on, so we haven't trained it, to be honest."

But I found one Circuit that actually had a case. Most of the responses were, "We've never seen one of these cases." But I had a recent one in the Ninth Circuit that was relayed to me, where the judge did side with more the King side of it, and based on the rule of lenity, and but for a majority of all of the officers across the country, they see a predicate offense in a group that's a single sentence, and they're going to count the predicate offense. That's the way
they're doing it now.

So, the way they're doing it now --

CHAIR SARIS: Are all the -- from all
the recidivist --

MR. BOHLKEN: Exactly, all the
guidelines, they're -- if they see a predicate
offense in there, they're counting it. They're
counting it, and like I said, that is pervasive
across the country.

We did look at the amendment and we
believe that the amendment is -- clarifies the
issue for us, and makes the application easier.

VICE CHAIR BREYER: You have invited
questions, so, I'd like to accept the invitation.

In the submission from the Justice
Department, I'm now talking about the change of
language, with respect to mitigating role, and it
changes or the proposal is to change it from “not
precluded” from a reduction for mitigating role
versus “may receive”.

Then you say, well, you say two things
about it. You say this apparently nudges someone
in -- the judge in favor of something that would result in a lesser sentence, which I think you're absolutely right. I mean, that's the point of it.

The point is that you want the judge to consider, "not precluded" doesn't mean that the judge considers something. You actually want to highlight the fact that the judge ought to consider this, in sentencing.

But you say that the Commission hasn't given any reasons for this change, or for this proposal, and you have information that is contrary to what Mr. Sands is saying.

What Mr. Sands is saying, based upon his viewing of the statistics, there is a fairly wide and significant disparity among judges' practices with respect to this adjustment. Do you have evidence to the contrary, because our job is to try to avoid these disparities.

MR. ZAUZMER: Of course, I do. Let me make a couple points on that, if I may, Your Honor. Thank you for the question.

I think what Mr. Sands is talking about,
very valid points, is different from what this amendment is about, if I may -- once we study it.

The amendment focuses on one type of mitigating role, which is the person who is being held responsible for only for his own conduct, despite the fact that he or she was part of a broader organization. That is one limited subset.

Mr. Sands is looking at the world of mitigating role adjustments, whether somebody is held responsible for their own conduct or joint activity, and he has identified these disparities that may very well exist, and so, my answer is, I think it's totally appropriate and the Department would be happy to participate, for the Commission to examine this issues that Mr. Sands has raised.

Right now, we don't have enough data to know, as I think he himself said, we don't have enough data to know what disparity is really going on here. Simply to say that one district has 10 percent and the next one over has 70 percent tells us only part of the story.

We also need to know how do these
districts charge, are they charging people with jointly undertaken activity, such that a mitigating role adjustment then becomes more likely, or are they carefully only charging people who are coming across the border with a specific amount and then a mitigating role adjustment is less likely.

I don't know where we get the data to study things like that, but we need that kind of information, but my real point here is that this amendment only targets one little subset, and that -- and not in a way that is really necessary, given the language that's already there.

VICE CHAIR BREYER: It's the difference between what is necessary and whether something is, as a matter of policy, something that is going to be adhered to or at least considered.

It was not the intention of the proposed amendment to change the policy. I mean, what it was, was to have judges consider it, and there is a real difference, I know, in the administration of sentences.
If something is -- if the word is, you can't consider it, or you're not precluded from considering it, rather, as it is here, then the judge says, "Okay, I could if I wanted to."

When it said, "May consider," it is something that a defense lawyer or a prosecutor would encourage a judge to think about, in terms of sentencing.

So, if you're against the thing in principle, then you're also against the preclusion of it. But if you accept that it can be considered, I don't know why there is a really principle difference between saying it can't be considered -- I mean, it can be -- it can't be prevented from being considered on the one hand, versus may be considered on the other. There is a semantical difference, and I'm concerned about whether as a matter of principle, you're saying.

MR. ZAUZMER: No, Your Honor, we would welcome, if a commentary were added, one line saying what you just said, which is that this is not a change a policy, it's simply to assure that
judges are aware of it, our objection, you know, fritters away at that point.

Our concern was that, and it was read, you know, looking at the defense testimony that was submitted here, Ms. Foti, who was here this morning, who is not here now, she -- her group from New York supported this amendment because they said it should cause courts to apply the mitigating role adjustment more frequently.

The defenders went further and they suggested we just eliminate -- that they -- the language should actually encourage the application of this reduction to everybody.

If what Your Honor is suggesting -- well, I think their language --

VICE CHAIR BREYER: Everybody.

CHAIR SARIS: All right.

MR. ZAUZMER: -- was that it said people who are in this situation, where they've already -- are they only being held accountable for what they trafficked, never the less "should generally be considered for an adjustment". So,
they're going even further.

    If what Your Honor is suggesting is, we want to make it clear to judges, you can do this, we think judges already know it, but if it needs that reminder, and we cited, I think a case from the Eleventh Circuit, that -- or the Seventh Circuit, rather, that reversed the lower court, because they didn't understand it.

    But, so, if more explanation is needed, fine, but we would suggest that the Commission make clear, this is not a change in policy. This is not a suggestion for example that the defenders would advocate.

VICE CHAIR BREYER: But you do see that practically speaking, it's so much -- to tell a judge that something may be considered, is so different from saying, "You're not precluded," hasn't that been your experience?

MR. ZAUZMER: I will never argue with Your Honor over the interpretation of language like that.

VICE CHAIR BREYER: Why? You'd
probably win.

COMMISSIONER PRYOR: The distinction still eludes me.

VICE CHAIR BREYER: No, I mean, we've had discussions about it, and I certainly understand. I am just saying that I've seen enough defense lawyers who are -- who feel that maybe they ought not to make the argument to the judge, that this adjustment to be made, on the basis that it simply says, the judge could if he wanted to, rather than the change in the language to say it may be considered, because that is an invitation, I agree, it's an invitation to the judge to think about it.

MR. ZAUZMER: Well, I can also tell you if it makes the Commission feel any better, I mean, I was there before 2001, when the Department took the position and many Circuits agreed that a person in this situation was simply ineligible, that if you were held accountable only for your quantity, you were ineligible.

I made those arguments in Court. We understand the adjustment that the Commission made
in 2001, by saying 'not precluded'. I and my colleagues have not made that argument since.

CHAIR SARIS: I heard it a month ago.

MR. ZAUZMER: Except for that person that we need to --

VICE CHAIR BREYER: Except for the Third Circuit, right?

COMMISSIONER PRYOR: But your own letter said that the Eleventh Circuit, which had adopted the position that you said was the right position, took the Commission's change as an adoption of its position, right?

MR. ZAUZMER: It was artfully said, but the Eleventh Circuit is certainly in sync --

COMMISSIONER PRYOR: Which would mean they didn't change anything. I would assume the Department's lawyers are arguing in the Circuit.

MR. ZAUZMER: No, I acknowledge that it changed the arguments the Department made. We argued flatly against the mitigating role adjustment. We now recognize, except for that wayward AUSA in Boston, we recognize that it is
permissible and we will make appropriate arguments on the facts in each case.

MR. SANDS: That wayward AUSA jointly undertook this ability and should be punished.

CHAIR SARIS: In all fairness, though, I mean, I don't want to get stuck on this one, but it is the -- it was the culture in Massachusetts that if you were a courier with 'x' amount of drugs, and you were only being attributed to that amount of drugs, that you didn't get minor role reduction, and then I hear, this great thing being on the Commission, well, in other parts of the country, people are routinely getting that -- would you agree with that?

MR. BOHLKEN: Yes, in New Mexico, like my fellow panelist just brought up, 73 percent of the time, you get a role reduction in New Mexico, and 40 percent of that 73 is a minimal role.

So, in back-packer cases coming across the border, they're held responsible for the amount of marijuana that they have on their back, but they also get the minimal role.
But you know, in some districts, it's built into the fast-track program too.

COMMISSIONER FRIEDRICH: I was going to agree with Judge Breyer. The intent of the Commission here is not to change policy, but just to ensure that judges actually consider whether they should give it.

But it doesn't address the big issue that we considered before, and the position used to be in these Circuits that you are precluded if you're the back-packer and you're responsible only for what's on your back or you're the person driving the load in, and there --

CHAIR SARIS: But I think your microphone isn't on.

COMMISSIONER FRIEDRICH: Sorry.

CHAIR SARIS: So, there were --

VICE CHAIR BREYER: Could you say that again?

COMMISSIONER FRIEDRICH: Let me repeat. I do agree with Judge Breyer that we don't -- but so, the Commission wants to ensure that
Courts consider this, and I'm speaking for myself, I'm okay with this.

But the bigger issue is what Mr. Sands points out. When I was in AUSA in San Diego, every single importation case, the defendant was charged routinely, with that amount they brought in, and they routinely got minus-two, rarely got minus-four, but you contrast that with the Western District of Texas, with Middle District of Florida, and we have these different cultures, and different District Court judges are just -- it's the culture of the Court is to give it or not to give it.

So, unless the Commission says no, in all cases or yes in all cases, I don't know that we're going to do anything to eliminate the disparity across the country. Do you all disagree?

MR. ZAUZMER: Can I make a point on that, Commissioner?

MR. SANDS: Language matters. Words matter. A grudgingly “can consider” is sort of the presumption not to, may or better yet, “should
“consider” is more than a nudge. It is a direction that you need to look at the Chapter, to look at the individual and as we suggested in our wording, his role and participants in similar schemes.

It's a way of having a judge focus on this. It makes no sense in Las Cruces for someone to get 70 percent chance and then just across the river in El Paso, to only have a 30 percent chance, while in San Diego, it's close to 70, Arizona, nine percent.

We need to do something and our language and the change would affect that.

MR. BOHLKEN: One point I wanted to make in the discussions that I've had -- been involved in with mitigating role, the term that always seems to come up is, was the participant essential to the drug trafficking conspiracy, and by that logic, the courier is always going to be essential. So, how would they ever get the mitigating role, and I was looking for the language in the guideline. I was just thumbing through it real quick, and I couldn't find it.
I might have read that in some case or something like that, but the language that I come up -- that language of essential to the drug trafficking conspiracy, when you want to examine that sentence alone, it -- you can pretty much preclude everybody from getting a mitigating role.

It's hard to fit somebody into that category and in -- like John said, in the border district that I'm from, we don't look at couriers that way. They aren't couriers. They are essential to the drug trafficking conspiracy, but they're less culpable than other participants in that drug conspiracy.

So, we feel that the mitigating role does apply, but that's not a universal approach across the country, in any -- it's very -- this is probably the one guideline that we find on POAG, that is the most dissimilarly applied across the board, across the country, this one guideline.

COMMISSIONER PRYOR: I'd hate to -- you haven't had your opportunity to respond. But if you did get that language from case law, I really
wonder whether a change by the Commission, especially one where the distinction still alludes me, is going to make much of difference, if the governing case law of the Circuit --

CHAIR SARIS: Excuse me, I think your microphone --

COMMISSIONER PRYOR: But if the case law would suggest that you're not eligible, then this slight change in wording by the Commission is not going to make any difference, is it?

MR. DEBOLD: But it's -- they're interpreting a guideline, which the Commission could change the language on.

I agree on the not -- you know, if they're essential to the scheme, they shouldn't be disqualified, if that's the language that --

COMMISSIONER PRYOR: Yes, but so, if we change it from 'is not precluded' to 'may', that's going to have a seismic shift in the case law in the Circuits?

MR. DEBOLD: No, it won't and our position has been that it's -- it's a helpful
addition among other things, including the factors that we've identified in our written testimony, of things that a judge should consider in deciding whether there's a mitigating role.

We do think -- we agree, I think we all agree that the Courts do need more guidance and, perhaps, more examples.

What you've proposed is helpful, but I don't think it's going to be enough in the long run. I think this is something the Commission is going to want to come back to, if you aren't able to address it more fully this time around, because we are talking on this one issue, about a very small change that, you know, is good as far as it goes, but it's not going to solve the problem.

MR. ZAUZMER: The point I was going to make, and I think it echoes, Your Honor, if I may, it echoes what you're saying, which is that this change that is being suggested doesn't get at the problem that everybody is talking about.

I hear the problem people are talking about is couriers coming across the border, or
somewhere else and there may be a disparity in the way -- and I don't know, in the way people are treated in San Diego and El Paso or wherever.

That needs to be studied. We need to know how they are charging those cases. Is there a disparity? Why is it there?

This proposal, however, applies to every mitigating role. It applies to fraud cases. It applies to robbery cases. It applies to everything, and doesn't seem necessary unless the Commission believes, we need to make this language suggestion, make clear it's not a change in policy; it's just a reminder, fine.

But this is not getting at the issue that everybody else is discussing.

CHAIR SARIS: If you narrowed it down to this particular problem, which is the courier or back-packer problem, where across the country -- we continue to hear it's being disparately applied, could we carve it out -- would the Department agree that if somebody -- those factors we laid out, if there was not much gain and if
someone had narrow view of the scope of the conspiracy, in general, they should get a minor role reduction, which would pretty much pick up most couriers?

MR. ZAUZMER: I think probably. I don't have the final authority to tell you right now, because it hasn't been --

CHAIR SARIS: I know, I said that before, I thought I'd get away with it again.

MR. ZAUZMER: Right, but no, I'll tell you, generally, yes, we would agree. I can also tell you about courier cases that we've handled, where you would not apply the mitigating role adjustment, where you have people who are regular committed couriers, it's what they do for a living, and you would not give them a mitigating role adjustment.

So, we need to make sure what the language says, so that it's not just across the board, every courier gets a mitigating role adjustment.

CHAIR SARIS: Well, sure, but if we sort of put a little thumb on it, through an
example, which is what people are suggesting, for the classic one everyone struggles with, which is the person that doesn't make much money and doesn't know the scope of the conspiracy, but is actually carrying, you know, the ounces across, or the -- a border, or even in a truck, which I see, you would say that that example would at least cabin the possible damage of saying too generally, but also get rid of some of this disparity in way consistent with DOJ policy.

MR. ZAUZMER: I think it's possible and I think it's a very good thing to look at and address promptly.

MR. SANDS: It should be a minimal.

CHAIR SARIS: Okay.

MR. SANDS: Can't the percent -- can the point -- I mean, judges should say --

CHAIR SARIS: You would say that person was minimal?

MR. SANDS: Yes, because you can pick up someone across the border, if that person says no, you just go across. They are fungible.
Unfortunately, the people use them as just a driver at that time.

VICE CHAIR BREYER: But Mr. Sands, I think actually you highlight the problem for judges, which is that judges will take a look at cases, the one you've just cited, and the one you've cited and come up with -- maybe come to very different conclusions, as to how culpable that person was.

What -- the reason for the change in the language was to try to get judges across the country, to consider it, to think about it, to have it presented to them.

They came -- they may adopt your view. They may adopt your view, fine. There will always be these disparities, and by the way, they may be warranted, given local circumstances, given the repeat nature of the offender, or the offender's continuing participation and so forth.

But that's going back, so, I want to leave here with a firm idea that if we put it in -- if we make sure that it's not viewed as a change
of policy, just look at it that way, made it clear, then you don't have a problem with it.

MR. ZAUZMER: That's correct.

COMMISSIONER BARKOW: So, I have a different line of question, and it's really for Mr. Debold and Mr. Zauzmer, and that is whether in jointly undertaken activity, we should have a requirement that it be charged under Pinkerton v. United States [328 U.S. 640 (1946)] or some other form of conspiracy, and what I wanted to get a sense of is, the government said if we were to make that requirement, that would inevitably result in the filing of additional charges, in order to assure that the defendant is properly charged.

But the advisory group's comment was, "Yes, do this. This would be a good thing." I mean, would that still be your view, if the Department is saying, "What we'll just do in response is start charging more people with conspiracy."

I was trying to get a sense of the lay of the land here, in terms of what is the
government's current view on what you charge in a conspiracy, because I think that you just have two different conceptions of whether -- you know, I think the government is of the view, we want the extra sentencing, so we'll start charging more, if that's what we have to, and right now, we're not charging it, because we're getting it anyway under this provision, and I take it, the advisory group's vision of this is, if you really want this, we'd rather have -- maybe you'd rather have them charge it, because you think in some cases, the government actually won't charge because they're not charging it, means that they don't want the extra sentence.

So, I see two different visions of what this would actually do, and I'd like it if you could both comment.

MR. DEBOLD: Yes, I did get a chance to look briefly at the written testimony, and it doesn't change our view on that.

I will say though that the change that we view as more important and probably more workable is the first of those two that we discuss
in the written testimony, which is to raise the intent requirement.

We think that actually is the more important one, and probably -- I mean, I recognize that there is the risk of inconsistency that comes with the -- you have to charge it for it to apply, because then you do put the decision in the hands of the prosecutors, and that does make it harder for consistency across the country.

But in this situation, we're kind of dealing with the lesser of evils, but we do think that if you raise the intent requirement and have the other changes that are in there, and that we also recommend, that that's probably the best way to approach the issue, although we do still advocate the change that you were asking us both about.

MR. ZAUZMER: Well, there are a number of pieces to the answer, Commissioner.

The government generally does charge conspiracy. There are all sorts of good reasons for the government to have a conspiracy charge.
But there will be cases in which by the
time you get to sentencing and you have a fuller
understanding of the facts and you're presenting
all of the relevant facts to the judge, it is
appropriate to argue that there was jointly
undertaken activity, even if there wasn't a
conspiracy charge.

So, our only suggestion in the letter
was is this going to push a prosecutor to
prophylactically add conspiracy charges even where
those few situations where that might not have
happened --

COMMISSIONER BARKOW: Would that be
consistent with the U.S. Attorney's Manual though,
to prophylactically charge? That seems like not
acceptable under your charging --

MR. ZAUZMER: It could -- obviously, we
follow the manual and it would depend on the
circumstances, but let me add that the reason I just
take exception to the fraud in general is that
Pinkerton liability and conspiracy liability, this
Commission has direct -- this was one of the results
of 1992, is broader than jointly undertaken activity, for which somebody is responsible.

So, it doesn't -- it would be odd to say we need to charge somebody with this broader liability, Pinkerton liability, as established by the Supreme Court, is much broader than many people's relevant conduct.

It would also be inconsistent with one of the basic understandings of the guidelines, which is that it looks to the real offense and not to the charging.

The reason, as I understand it from Judge Wilkins writings for that original proposition that we're going to base the guidelines not on the number of charges the government can bring against you, but on what you actually did, is to reduce the government's power, is to reduce the prosecutor's power, to control the sentence, by the number of charges that they bring.

So, these are -- these ideas that I think are inconsistent with the way the guidelines have been set up, which is to look at the person's
specific agreement with jointly undertaken activity, and to look at the real offense, and then decide what is the person's relevant conduct.

So, there are a lot of reasons, we don't think Pinkerton and conspiracy really fit here. What is happening here is the person is convicted of an offense; the person is convicted of what the government has charged. There is a statutory maximum, and this Commission is giving a guideline to suggest where within that maximum the sentence should be imposed. That should include jointly undertaken activity, for reasons that the criminal law has always looked at jointly undertaken activity as being a more serious factor, for purposes of sentencing.

So, I know that's a lot of things I said, but there are just a number of reasons that we don't agree with that.

MR. DEBOLD: If I could just talk. There is one part of that, which I am not sure that it was clear from what -- of what we're proposing.

I agree with the statement that
conspiracy and sometimes Pinkerton liability can be broader than what this guideline is meant to get at.

But our proposal would be to make that the gate, and then you still have the other three points. It has to be within the scope of the criminal activity that the defendant agreed to jointly undertake, furtherance of and either intent or reasonably foreseeable.

I think requiring it as a charging decision by the government will serve an important purpose of putting the defense on notice, especially in a guilty plea situation, that they are looking at that factor of exposure.

CHAIR SARIS: Commissioner Wroblewski.

MR. SANDS: So, there is --

CHAIR SARIS: Did you want to jump in?

I'm sorry.

MR. SANDS: Briefly.

CHAIR SARIS: I'm sorry, I didn't see that, go ahead.
MR. SANDS: Just briefly. The advantage of Pinkerton or Option A is a heightening in the intent. The government would have to prove it beyond a reasonable doubt. There would have to be a specific intent for Option A. Those are good things.

Second, I have to correct the record. The move toward real offense sentencing was not to limit the power of the government. It was to expand the power of the prosecutor, and we would take issue with that.

COMMISSIONER WROBLEWSKI: Mr. Debold, and maybe now for Mr. Sands, as well.

There is an application note in the guideline manual right now, that talks about an example of two people that are driving to a bank robbery. One is the driver and one is actually going to go in the bank and rob the bank, and the driver says, "I know you've got a gun. Just don't shoot the gun," okay, and of course, the guy goes in and he goes and he shoots the gun and he kills somebody.
Now, if I get your position correctly, it would -- the shooting would not be counted under the guidelines, because it was not intended by the defendant, under your proposal.

So, that example would have to be removed from the guidelines, if your example, and the policy that you're suggesting, were adopted by the Commission, am I getting that right?

MR. DEBOLD: Where conduct was not intended by the defendant, even though within the scope of the activity that the parties undertook, yes, that would be our position.

MR. SANDS: A better twist would be that the driver, a girlfriend says, "Just go in with a note. We just need the money for a hit. We don't want any trouble. Don't hurt anyone," and then the boyfriend, bad things happen. The girlfriend would be limited then.

CHAIR SARIS: Always go with the girlfriend.

MR. ZAUZMER: If I can comment on that. Again, it's similar to the answer that I was giving
to Commissioner Barkow.

These are substantial changes in long time criminal law. The United States Supreme Court, long before Pinkerton. Pinkerton was just the ultimate expression of it, has looked to reasonably foreseeable conduct as the scope of a conspirator's liability.

There are reasons for that bedrock principle of law, going back hundreds of years.

Sure, we could look at it from the perspective of the defendant who is sitting in the car, who does not want to be responsible for the person shot inside the bank.

But if we look from the perspective of the victim, it's the same thing that my colleague Mr. Wagner was talking about this morning, with regards to the economic crime.

If we look at it from that perspective, here we have a driver who participated in the robbery, facilitated it, brought the person there, is ready to speed him away and is responsible for what is reasonably foreseeable, intent has never
been a requirement.

COMMISSIONER BARKOW: Well, I just have to add, I don't think that's a bedrock conception and that's why Federal conspiracy law is brought in the Federal system because most states don't go as far as Pinkerton does.

I mean, it is an expansion of where the common law viewed -- which was -- which was usually accessory liability, where you did have to have an intent.

I mean, it's not to say that's not what the Federal law is now, but it isn't true that that's a universal conception of what multi-actor liability would consist of.

MR. ZAUZMER: Sure. Well, I appreciate the focus on Federal law, and that, of course, is what we're dealing with here, and thus, appropriate Federal sentencing.

CHAIR SARIS: Can I -- in my district, typically conspiracy is charged together with the substantive count. I don't know if that's true across the country, but you almost always see the
conspiracy, the 18 U.S.C. § 846 and then you see the individual distribution.

I don't know if that's the issue. Is that required by the manual and is that true across the country, because I'm not sure how much this debate makes a difference.

MR. ZAUZMER: It's not required, but like I said before, Your Honor is exactly right, conspiracy charges are brought when the prosecutor at the outset of the case believes it's useful and appropriate to charge conspiracy.

So, we're not -- we probably are not dealing with a lot of cases, in which it's not there, but still for purposes of sentencing, we believe that the Commission got it right in looking at again, you're within the statutory maximum for the offense of conviction. That can't be changed, but there will be jointly undertaken activity where there may not be a conspiracy charge in a particular case.

As long as you're not exceeding the statutory maximum, that shouldn't be a concern.
CHAIR SARIS: Is that true in your other districts, that conspiracy counts are usually brought, as well?

MR. SANDS: Yes, yes, it's usually a trifecta.

CHAIR SARIS: And in New York?

MR. DEBOLD: Yes, I've seen it, which is why I don't think it's going to be -- it would be a big burden on the government to have that kind of gate, as I said. It gives notice.

So, basically, he's defending the cases, where the government decides not to bring a conspiracy charge, and then lo and behold, we get to sentencing, and the defendant is suddenly hearing that they're going to hold him accountable for conduct that was jointly undertaken, without any kind of notice in the charging document, that that's what was on the horizon.

So, you know, I think in that situation, and an example that we heard from Commissioner Wroblewski, yes, you're going to have two different people with different culpability. The guy who
goes in and uses the gun, even though the discussion was, "Let's not use it," the question is not whether they're both guilty of a crime. They're both guilty of a crime. The question is, who is more culpable and what level of culpability should -- or what level of conduct should you hold the person who is in the car responsible for it, and when you have the cases where that just doesn't make sense to a judge, you depart.

CHAIR SARIS: Thank you very much. You kept us wide awake after lunch. It was very engaged debate. Thank you very much for coming.

(Whereupon, the above-entitled matter went off the record at 2:30 p.m.)