UNITED STATES SENTENCING COMMISSION

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JUDICIARY BUILDING

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PUBLIC MEETING

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THURSDAY
FEBRUARY 8, 2018

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The United States Sentencing Commission met in the Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 9:30 a.m., the Honorable William H. Pryor Jr., Acting Chair, presiding.

PRESENT
WILLIAM H. PRYOR JR., Acting Chair
RACHEL E. BARKOW, Commissioner
CHARLES R. BREYER, Commissioner*
DANNY C. REEVES, Commissioner
J. PATRICIA WILSON SMOOT, Ex Officio Commissioner
ZACHARY BOLITHO, Ex Officio Commissioner

*participating via telephone

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

(9:32 a.m.)

ACTING CHAIR PRYOR: Good morning.

Welcome to the United States Sentencing Commission's public hearing on some of the proposed amendments for the current amendment cycle.

The Commission's hearing today focuses on three topics impacted by our recently proposed amendments, including the Bipartisan Budget Act of 2015, Tribal Issues, and the Guideline that relates to acceptance of responsibility by defendants.

The Commission appreciates the attendance of those joining us here, as well as those watching our live-stream broadcast on our website.

As always, we appreciate the significant public interest and the work of the Commission, particularly this year, as we tackle the important and emerging issue of synthetic drugs.

I would like to start by introducing the other Members of the Commission. First, I'd like to introduce Commissioner Rachel Barkow. Commissioner Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law and serves as the Faculty Director of the Center on the Administration of Criminal Law at the law school.

Joining us today by phone, Judge Charles Breyer is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998.

Judge Danny Reeves is a District Judge for the Eastern District of Kentucky and has served in that position since 2001.

Zachary Bolitho is the Ex Officio Commissioner from the Department of Justice. Commissioner Bolitho serves as Deputy Chief of Staff and Associate Deputy Attorney General to the Deputy Attorney General of the United States.

Finally, Patricia Wilson Smoot, the designated Ex Officio member of the Commission,

represents the United States Parole Commission. Commissioner Smoot has served on the Parole Commission since 2010 and was designated as Chair in 2015.

As we get started on today's hearing, I would like to make a brief comment about the Bipartisan Budget Act of 2015. The Commission appreciates the constructive comment it received from the Senate Committee on Finance, the House Ways and Means Committee, and the House Judiciary Committee regarding the Bipartisan Budget Act and values their past and current interest in the topic.

Through this hearing, we look forward to hearing from our expert witnesses on the three proposed amendments on the agenda today. At the end of each panel's testimony, the Commissioners may ask some questions. We look forward to a thoughtful and engaging discussion.

Each witness has been allotted five minutes for their statements. Your time will begin when the light turns green. And now, Mr.

Caruso is going to be with us, yellow means there's one minute left and red means your time has expired.

Our first panel focuses on the Bipartisan Budget Act of 2015. Our panelists are Mr. Trent Shores, Mr. Michael Caruso, and Mr. Ronald Levine.

Mr. Shores was sworn in as the United States Attorney for the Northern District of Oklahoma in September 2017. Before his appointment, he served as an Assistant United States Attorney in that district from 2007 until 2017.

He previously served as the Deputy Director of the Department of Justice's Office of Tribal Justice in Washington, D.C., and has also represented the United States at the United Nations and the Organization of American States. Mr. Shores graduated with a political science degree from Vanderbilt University and received his J.D. from the University of Oklahoma.

Mr. Caruso has been the Federal Public

Defender for the Southern District of Florida since 2012. He joined the office in 1997 as an Assistant Federal Public Defender and later became the First Assistant Federal Public Defender.

After graduating from the University of Florida College of Law in 1995, Mr. Caruso served as a law clerk to the Honorable William J. Zloch, United States District Judge for the Southern District of Florida.

Mr. Caruso recently became the Chair of the Federal Defender Sentencing Guideline Committee.

Mr. Levine has served on the PAG, Practitioners Advisory Group, since 2012 and as Chair since 2016.

He's currently the Chair of Post & Schell's White Collar Defense, Corporate Compliance, and Risk Management Practice Group in Philadelphia.

Before entering private practice, Mr. Levine spent 17 years as an Assistant United

States Attorney in the Eastern District of Pennsylvania, the last four as Chief of the Criminal Division.

We'll begin with Mr. Shores.

MR. SHORES: Good morning, members of the Commission. It's an honor to be here and it's an honor to represent the Department of Justice and also to represent my office, the U.S. Attorney's Office of the Northern District of Oklahoma and the men and women that work there.

The Department agrees with the Commission's proposal to enhance the guideline range for those defendants who face the increased ten-year statutory maximum provided by the Bipartisan Budget Act for Social Security fraud.

A defendant faces this increased statutory maximum if he or she received a fee or other income for services performed in connection with any determination with respect to benefits under this title, including a claimant, representative, translator, or former employee of the SSA, or, if the defendant is a physician or

other healthcare provider, who submits, or causes the submission of, medical or other evidence in connection with any such determination.

The Commission has proposed amending the fraud guideline, §2B1.1, by providing either a two or four-level enhancement for defendants who face this newly created ten-year statutory maximum.

The Department believes the four-level enhancement is the better option. It would be consistent with other similar enhancements already set forth in §2B1.1.

For example, the four-level enhancement applies to defendants committing theft of medical products while serving as an employee in a pre-retail medical products supply chain, to defendants committing securities fraud while serving as a director of a publicly traded company or as a registered dealer, broker, or as a person associated with a broker, or dealer, or is an investment advisor, or a person associated with an investment advisor, and also to

defendants committing violations of commodities laws who are officers, or directors of a futures commission merchant.

These enhancements involve fraudulent conduct that, we believe, is comparable to that at issue today. Indeed, a fair argument can be made that the class of Social Security fraud defendants targeted by this Act are worse offenders because they have defrauded a government program that is absolutely essential to millions of Americans.

The Department also supports the Commission's proposal for a minimum level for defendants who face the ten-year statutory maximum offense under this Act.

As between the two options of a minimum of 12 or 14, the Department supports the 14. Most the defendants targeted by this Act will be defendants with little or no criminal history, and thus, even with an offense level of 14, they will receive a recommended guideline range of 15 to 20, 21 months.

In practice, as you know, most defendants plead guilty, and when they do so they will typically receive the two-level reduction, and this would result in a Zone C guideline range of 10 to 16 months.

So even with the minimum offense level of 14, many defendants, because they fall within Zone C, could receive a five-month sentence of imprisonment combined with some period of home detention as qualifying as a guideline range sentence.

The Commission has also asked whether the addition of an enhancement in Chapter Two would affect the availability of the two-level adjustment for abuse of trust in Chapter Three, that's §3B1.3.

The Department does not object to precluding the Abuse of Trust adjustment if the Commission adopts the proposed four-level enhancement.

The reason for this, if the Commission adopts the two-level enhancement and then opposes

the two-level adjustment for abuse of trust, they essentially cancel each other out and that would result in defendants receiving the same sentencing range as they do today.

Such an outcome would be inconsistent with congressional intent, as expressed in the Bipartisan Budget Act, specifically, section 813 and subsection813b, which talk about the increased penalties.

Finally, regarding the conspiracy offense added by the Bipartisan Budget Act, the Department has no objection to the Commission's proposed reference to §2X1.1. I think that would be consistent with the Commission's typical treatment of conspiracy provisions.

I appreciate the opportunity to share these remarks with you and look forward to answering any questions the Commissioners may have.

ACTING CHAIR PRYOR: Mr. Caruso.

MR. CARUSO: Good morning. On behalf of the Federal Public and Community Defenders I

want to thank the Commission for allowing us to address our views, both in writing and at the hearing today.

And because we're here to talk about the Bipartisan Budget Act, I do want to start with, I think, our bipartisan agreement that we have no objection to the conspiracy offenses being listed in the appendix.

I think that's where the bipartisanship ends today. But that's something, right? The Defenders' position, as we put forth in writing both recently and in the past, is that we believe that §2B1.1 is already overly complex and, with these new offenses, we urge the Commission not to add specific offense characteristics to further complicate this particular guideline.

We believe that the interaction of §§2B1.1, 3B1.3, and 3B1.1, all working together in individual cases will allow the Government and defense lawyers to advocate for individual sentences that fall within those guideline

ranges. And we see that from the data.

For one of the offenses, there doesn't seem to be any federal prosecution for a significant period of time. For the two other offenses, the statistics show that there are sentences within the guideline ranges, I believe, one of the offenses has a 60 percent within guideline range, the other statute has a 40 percent within guideline range.

So that seems to demonstrate to us that the Guidelines are working as they should be. As I read the material, not only from the Department of Justice, but also from the Office of Inspector General, it seems that there are other institutional issues that may be at play that, we think, Counsel, a wait and see approach given the amended statute.

One, I think we would like to see, before any change to the guidelines, that the Department of Justice to Attorney General Jeff Sessions and the individual U.S. Attorney's Offices make these offenses a priority given the

significant conduct that's at issue.

Another concern is, you know, when we read the letter from the Office of Inspector General, there's an issue with the loss range.

I was taken, when I read in the letter from OIG that they said, in Social Security fraud cases, the loss figure is inapplicable, so I didn't understand what that meant.

There is a footnote that describes, not an inapplicability of the loss figure, but just that, in these cases, the loss figure is too difficult to obtain.

And so, that is something that really can't be solved by an amendment to the guidelines, that is something that the Department of Justice and the Social Security Administration have to work on together.

That, when they bring these cases, they bring them in such a matter that an accurate loss figure can be given to the judge, because as we all know, the loss figure largely drives the guideline.

The other point I would make is that the Department of Justice put together a hypothetical in their presentation. And, if you actually look at it, if you actually look at those guideline ranges, and they're hypothetical, it gets quite high. In fact, it goes over the five-year previous statutory max, if you include, which they didn't, in their papers, the two-level adjustment for abuse of trustor use of special skill.

If you then account for, perhaps, a more robust loss figure, if the party, if the governmental parties work on that together, plus the availability of an upward role adjustment, you are looking at sentencing, without credit for acceptance of responsibility, almost up to the ten-year statutory maximum.

So, we think that, given the institutional problem with these cases, the guidelines should be allowed to work as the guidelines work and, I think, if they continue to be a problem, the Commission can readdress the

issue.

I thank you for your time and, of course, I'm available to answer any questions.

ACTING CHAIR PRYOR: Thank you. Mr. Levine.

MR. LEVINE: Thank you, Mr. Chairman, and members of the Commission. I want to thank the Commission for the opportunity to serve on the Practitioners Advisory Group and, along with my Deputy Chair Johnson, and our able members, we really value the opportunity to give you some input here.

We have written a few letters on these topics back in February and October of 2017. I'm happy to briefly address them here and take any questions.

As to the Bipartisan Budget Act, which increases the statutory maximum from five to ten years and, as described by my colleague from the U.S. Attorney's Office, an increase in the statutory maximum, in our view, does not inevitably, or even logically, require the

addition of the guidelines for a specific offense characteristic.

And here, the Practitioner Advisory Group, PAG, recommends that the Commission not adopt either the additional offense characteristic or the floor. Let me give you some reasons.

First, with regard to these offenses, we found little or no research or empirical data suggesting that the guideline calculations fail to generate sufficient legal consensus. And, as my compatriots from the Defenders notes, some of the statistics would indicate the opposite.

Second, we think the guidelines already adequately address this specific subset of Social Security fraud cases that are now subject to this ten-year maximum, precisely, because §3B1.3, the Abuse of Position of Trust or Use of Special Skill provision exists.

It exists to further POIs, if applicable, who are culpable defendants, who exploit their trust or skill to facilitate Social

Security benefit-related fraud, whether it's a translator using that skill or a physician using his or her skill or trust.

And, third, as already noted, §2B1.1 is already latent with 19, by my count, specific offense characteristics, many of which have multiple subsections.

It’s already complicated further offense characteristics contribute to a creep, the guidelines creep, as noted, potentially, very harsh sentencing ranges.

Yet, given the absence of data suggesting that sentences are too low for this category of cases, we don't think the tinkering with §2B1.1 is necessary.

I will add this footnote to these comments. If the Commission was to determine that it needed to differentiate these new cases, we would recommend, at most, only the proposed two-level increment and make it clear it only applies to this subset of defendants, the ten-year max defendants, and that, if it applied,

§3B1.3 would not be applicable.

At least, this would, at least, allow the Commission to isolate and analyze cases brought under the new provisions, use that empirical data to further tailor its consideration of specific offense characteristics to the actual on-the-ground experience and demonstrate a need. But that's a footnote; we don't think it's necessary. Thank you.

ACTING CHAIR PRYOR: All right, thank you. Any questions?

(No audible response.)

ACTING CHAIR PRYOR: All right, no questions. Judge Breyer, do you have a question?

(No audible response.)

ACTING CHAIR PRYOR: Right. Okay, thank you very much.

MR. LEVINE: Thank you.

ACTING CHAIR PRYOR: Thank you for your presentations --

MR. LEVINE: Thank you.

ACTING CHAIR PRYOR: -- both, your written and oral presentations. We'll move on to our second panel.

Mr. Levine.

MR. LEVINE: Still here.

ACTING CHAIR PRYOR: Okay. We appreciate you making the sacrifice of missing the parade today.

MR. LEVINE: Yes, sir.

(Laughter.)

ACTING CHAIR PRYOR: Our second panel focuses on tribal issues. Our panelists include Judge Ralph Erickson, Mr. Trent Shores, who was introduced during the last panel, and Mr. Jon Sands.

Judge Erickson is currently the Chair of the standing Tribal Issues Advisory Group, which we affectionately refer to, because everything needs an acronym in the District, as TIAG. He previously served as the Chair of the ad hoc Tribal Issues Advisory Group.

Judge Erickson was appointed to the

Eighth Circuit Court of Appeals last year. Before that appointment, he was the United States District Judge for the District of North Dakota beginning in 2003.

His judicial service also includes ten years on the state court bench in North Dakota. Judge Erickson earned a B.A. from Jamestown College in 1980 and a J.D. from the University of North Dakota in 1984.

Due to travel difficulties, Neil Fulton has been unable to join us today. Mr. Sands has graciously agreed to testify on behalf of the Federal Public Defenders in his place.

Mr. Sands has been the Federal Public Defender in the District of Arizona since 2004. He joined that district as an Assistant Federal Public Defender in 1987.

He is the former Chair of the Federal Defenders Sentencing Guidelines Committee and currently serves as one of its members. He also served as Special Counsel to the United States Sentencing Commission in 1993.

Mr. Sands graduated magna cum laude from Yale University in 1978 and received his law degree from the University of California-Davis School of Law in 1984. Judge Erickson.

JUDGE ERICKSON: Thank you, Mr. Chairman, and members of the Commission. And, I would first like to thank you, on behalf of TIAG, for the opportunity to speak here today.

And we would be remiss if we did not thank you for your interest and the action that you've taken related to sentencing in Indian country, an area that we, who serve in Indian country, believe is the most important work that we do, or, at least, among the most important work that we do.

We generally support the proposed amendments to the Commentary under §4A1.3, which gives greater guidance to sentencing judges for when it is appropriate that sentences should be enhanced, because of a tribal court history.

We offer our support, because we are convinced that a totality of the circumstances

approach will more effectively [?] the real circumstances in Indian country than the application of any single determinative factor or list of factors.

We especially want the Commission to strongly consider the nuanced issues that are inherent in the issue of tribal sovereignty and the trust relationship that exists between the tribes and the United States Government.

I think we all do well to bear in mind that the tribes are not political subdivisions of the United States. That they have a tribal sovereignty that is pre-constitutional in nature and that, since the founding of the Republic, the courts, if not always the broader general government, have recognized that the tribes have a right of self-governance that may not be interfered with by the Government, except by clear, intentional act of Congress.

We, specifically, wish to comment on three points that are addressed to the lower-case numbers, Roman numerals in the Commentary parts

(i), (ii), and (v).

And, if we look at Part (i), we are somewhat concerned and urge that the Commission consider carefully the references to the due process requirements that are “consistent with those provided criminal defendants in the United States Constitution.”

We're not so concerned about judges who regularly operate in Indian country, we're more concerned about judges who operate outside of Indian country because that reference, which points to due process as it relates to criminal defendants, may cause them to go down a path where they fail to recognize that the rights afforded under the Indian Civil Rights Act are far more relevant to a consideration of what is due process in Indian country than what happens in the ordinary criminal case.

And that's because, once again, it's dependent upon the fact that tribes are neither the Indian Nations, are neither subdivisions, nor foreign countries and that, in this trust

relationship, the Government has allowed them to continue to govern themselves, within certain broad parameters, and that they're allowed to run courts that provide certain attributes of what would be considered Western due process. But it's cognizant of the fact that, tribal courts and tribal governments do not operate, necessarily, on a Western model.

Now, if you look at what Indian country looks like, there are 351 tribal courts that are being operated by the over 560 Indian nations in this country.

A large swath of those tribes are covered by Public Law 280 and they have deferred to the states for the prosecution of crimes.

But when we look at those 351 courts, they cover a broad spectrum, some are very traditional. They may involve sentencing circles, elder consultations, all the way up to courts that you and I would recognize, very quickly, as Western style. We'd walk in there; we could represent people almost immediately. We

would recognize all the forms and in between there lies a broad spectrum.

And so all of them are governed by ICRA and all of them must provide some sort of due process. And we think that it's important that that process be the process to be considered by the Sentencing Commission.

On the second point, we believe that the references to the Tribal Law and Order Act and the Violence Against Women Act should be separated into two separate subparts.

The reason is really fairly simple. They provide different decisional and procedural rubrics and frameworks for decision. They recognize different rights. And that, by mixing them together, we think, once again, that the uninitiated might be led down a path that doesn't plainly give them the direction that we need, and so we would urge the Commission to split those into two sections.

And, finally, the wishes of the tribe. When we did our tribal consultation -- and, I'm

sorry, I'm going over, but when we did our tribal --

ACTING CHAIR PRYOR: It's a new experience, isn't it, for you and me?

(Laughter.)

JUDGE ERICKSON: It's, it's horrible. I can't say my name in five minutes, which you've probably already figured out. But, but --

ACTING CHAIR PRYOR: And now you know how the lawyers feel, Judge.

MR. SHORES: Welcome to our world, Judge.

(Laughter.)

JUDGE ERICKSON: It's been a long time since I represented anybody in a courtroom. All I can tell you is this, about the last thing is, when we did our listening and consultative process with the Indian nations, we found that a number of nations believed that they ought to be able to go ahead and make ad hoc determinations on which people ought to have their tribal convictions scored and which ones should not.

And we think there ought to be guidance given that, whatever that is, that's not the kind of uniformity that we expect to see in the Sentencing Guidelines, or in the application of them.

And that what we need to look for, is some sort of a note directing the tribes that they need to pass a formal resolution, from its governing board, that it provide for some uniform application and that there should be a framework created that would allow for the sharing of conviction history with the federal courts. And I'll be happy to answer any questions and thank you for your indulgence.

ACTING CHAIR PRYOR: Thank you, Judge. Mr. Shores.

MR. SHORES: Good morning, again. It's my honor to be here, not only as the U.S. Attorney, but also as a citizen of the Choctaw Nation of Oklahoma, whose career with the Department of Justice has been largely focused working with indigenous peoples, both in the

United States and around the world.

The Commission has proposed two amendments, based on the recommendations made by the TIAG, in its 2016 Report. The first amendment was factors for district courts to consider when deciding whether to depart upward under Section §4A1.3 based on the exclusion of tribal court convictions from the criminal history score.

The second amendment defines the phrase, “court protection order” in a manner intended to provide consistency regarding the treatment of tribal court protection orders.

Although tribal court convictions do not currently receive criminal history points, a court may depart upward based on a finding that the defendant's criminal history category is inadequate, due to the exclusion of one or more tribal court offenses.

The Commission has proposed changing the current language in the guidelines, from “tribal court offenses” to “tribal court convictions,” and amending the Commentary of

§4A1.3 to include five non-exclusive factors that a court may consider when deciding whether to grant an upward departure in such cases.

Arguably, changing the word "offense" to "conviction" may narrow what courts typically consider in this context, nevertheless, the Department does not object to this change. In fact, we support the first four factors set forth in this proposed amendment.

The Department does, however, have concerns, with regard to the fifth proposed factor, which asks the court to consider whether, "at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual."

This fifth factor may lead courts to conduct an inquiry, for which there is no clear answer, based on the language of the proposed amendment.

The fifth factor, I believe, actually

raises more questions than it does answers. For example, what would be required to constitute a formal expression of tribal intent? Would a statement by the tribal court suffice?

Would a statement by a tribal executive, or is it the tribal council that is the representative body of the tribe? If so, could it vary from judge to judge, within one tribal judicial system?

If a tribal council, would it be a tribal resolution? What if there was a change in political party or governance in that particular tribe and that statement of support, for the inclusion of tribal convictions, were to change, how would federal district courts keep track of such changing political tides?

The approximately 573 federally-recognized tribes, with the addition, recently, of the five new Virginia tribes that were recognized by the Congress and signed into law by the President recently, they vary, dramatically, in size and governmental structures. That's 573

different forms of government, potentially. And, as my colleague here mentioned on the panel, there's over 351 tribal courts.

For these reasons and the various differences among the tribes, we believe it would render it nearly impossible for courts to apply this fifth factor with any degree of uniformity.

And, for that reason, we propose that the court, that the Commission adopt the first four factors and decline to adopt the fifth at this time.

We respect the Commission's request for comment on how the factors should be balanced. Sentencing courts, we believe, should consider these, as Judge Erickson said, as a part of the totality of the circumstances analysis.

Assigning weights to the individually-listed factors would undercut the idea that the factors are non-exclusive considerations that the sentencing court may consider.

Giving discretion to the judge who is

at the District Court level, who is in the best position to make that call and how to weigh those factors, is what we believe is the best setup for this current circumstance.

With respect to the Commission's proposed amendment to define “court protection order,” as it appears in the Commentary, the Department supports this proposed definition and we believe it may help to alleviate confusion regarding whether violating a tribal court protection order triggers an enhancement under §§2A2.2, 2A6.1, or 2A6.2.

I would note, with interest, that, with regard to the protection order language, we're not asking in that regard that tribes have some sort of statement that they want their tribal court protection orders considered of equal status by district courts, but we are asking for that for tribal convictions. Thank you for the opportunity to share the Department's views on these issues and, again, I'd welcome the opportunity to answer any questions the

Commission has. Thank you.

ACTING CHAIR PRYOR: Mr. Sands.

MR. SANDS: I am not Neil Fulton. Neil Fulton was waylaid by a frozen water pump on his plane. I note that Arizona was 77 degrees when I left.

I am the Defender in the District of Arizona, which has an extensive Indian jurisdiction. Neil was the Defender of North and South Dakota, which, as the Judge said, has also an extensive Indian practice.

We, as the Defenders, support the recommendations of TIAG and of the proposed amendment. We believe they are nuanced, that they advance sentencing policy, they recognize Indian tribes for the diversity that they are, and it is a result of careful calibration by all stakeholders in the system.

We support the Commission's proposed amendment to address tribal convictions at federal sentencing as a possible basis for a departure. This has been an issue that's been

raised over the years and decades.

It was addressed by the first ad hoc working group, or the second, and this nuanced approach that has a factored approach tries to recognize and factor into the wide disparity of Indian tribes.

Everyone has told you that, about the number of tribes. In Arizona, we are looking at tribes that may have a few hundred members. Everyone knows one another.

The system is quite different from a sophisticated court system that some tribes have. We have urban tribes, where their tribal courts are, as mentioned here, very much on a state or local model.

And then we have some tribes where it would be completely different for a person to deal with an offense. Neil Fulton, in Dakota, has a similar approach, where he has ten tribal courts over two districts, each one is different.

To try to factor this is impossible and will lead to unwarranted disparity. It is

far, far better to allow a district court judge, with the parties in front of her, to deal with these factors in the way the Commission has stated in its proposed amendment.

There seems to be a controversy, or disagreement, with the fifth factor. Again, it is, these factors are non-exclusive; a judge can weigh and balance. A judge will know what is in his or her district and the parties can advocate as to what the tribe might be.

By allowing a tribal authority to state what his position is, recognizes, for the tribe, their sovereignty. It says to the tribe, "We hear you. We look at your political system," whatever it is.

There was some discussion about who it would be and that highlights how different the tribes are. You may have an executive, a legislative, and you may have a tribal council, but, whatever their tribal government might be, there is a way for it to speak with one voice or to express itself.

You could send a letter saying, “At this point, the tribes, the courts say this,” or, “At this point, the Attorney General believes this.” We should give the tribes the opportunity to weigh in.

It's not that it is set in stone, but it's a factor to consider. It also allows the tribe to state its position, and isn't that what we want, a tribe to say, “We feel these convictions should be counted.”

So, we are in favor of the five factors and we believe the Commission should follow that. Lastly, we support the amendment for the protective order. And I finished before the red light flashes.

COMMISSIONER BARKOW: I was wondering, if I could ask Judge Erickson and Mr. Sands about the fifth factor? What I'm concerned about is Mr. Shores' point that, if this is a factor that is designed to respect the sovereignty of these tribal nations, if we don't actually know the source that speaks with that sovereignty, that

you might have judges making mistakes, or not making -- I'm worried it may have the opposite effect of what is intended here, if it turns out that judges don't have the competency to assess who, in fact, would be speaking. And so, if you could just shed some light on how a judge would know whether or not that is, in fact, their view?

JUDGE ERICKSON: You know, one of the things I think it is important to bear in mind that the vast majority of these decisions are still going to be made by district judges who routinely interact with those tribal governments and have some knowledge of what the governing bodies look like on the reservations that they have jurisdiction over.

I think that if you leave it, just sort of up in the air, without further guidance, there could be the problems that the Department of Justice has referred to.

I think that, if you look at what we've asked you to do, and that is to give more specific guidance saying that, it's got to be a

resolution of some type coming out of the governing body of the tribe, that it has to have uniform application, and it has to contemplate a system of sharing conviction information, that those are going to fall, mostly, by the wayside.

Now, I would concede that there's always a potential problem when one looks at Indian country sentencing and you're a judge in the Southern District of New York, which doesn't ordinarily deal with that.

And, I think that, it's still a totality of the circumstances task. I would hope that that sentencing judge might call a judge who actually sits in the district or that has knowledge of what happens in Indian country.

And, you know, I think that the bigger problem is just leaving it without any guidance at all and allowing the tribes to feel that they're not given input.

Now you might ask, why do we care at all? And I think that, ultimately, this is part of the issue. And it is that, if you think about

what the tribes' perceptions are about sentencing in Indian country, it varies mightily across Indian country as to how they view sentencing disparity.

For example, in the northern plains in Minnesota and the mountain states, there's a perception that sentences are inordinately long in federal court and that all you do is pile on and that it creates greater disparity for people committing exactly the same crimes in exactly the same place that happened to be non-native.

Now, on the flip side, if you go in the desert southwest, there's a perception that those sentences are short in federal court in comparison.

And we've never been able to develop the data and you'll look that that's part of what we've asked for in the past. And I think that all those things, sort of, dovetail together and that we ought to give the tribes a voice in this process.

ACTING CHAIR PRYOR: One follow-up.

MR. SANDS: Briefly. The Department of Justice does not have this problem when a tribe opts in for the death penalty. So, the Sac and Fox have opted in and the Department of Justice took their proposal.

But, likewise, there are a number of tribes that are opposed to the death penalty in the Indian country and they have acted legislatively. This would be a process that we would see what the tribes would do, and a judge could factor that in.

In a sophisticated tribe, or in a tribe that has a government that would have a legislature, that would be signed by an executive that would be one thing; if it's a tribal council, maybe another, but we could do, we could deal with it on a tribe-by-tribe basis.

COMMISSIONER REEVES: Is this the kind of information that you can obtain from a probation officer?

JUDGE ERICKSON: Yes. You know, we, in the District of North Dakota, which I'm

intimately familiar with, we've always had strong working cooperation with the tribal governments.

They've always made available to us their history of convictions. They've always made available to us the tribe's position, and so really, when this came up, with those of us who have that background, it seemed perfectly normal that this is what you'd do. And it was, really, it had fairly broad support within the ad hoc TIAG group.

COMMISSIONER REEVES: As to the first factor, Judge Erickson, are you suggesting that the factor include, or that it's included very clear language that should fully emphasize sovereignty?

JUDGE ERICKSON: I would prefer that the language that says that we should consider due process afforded in ordinary criminal cases, be modified to say that, you “should consider due process giving consideration to the processes and rights considered, under the Indian Civil Rights Act.”

MR. SANDS: If I could just add, for those that don't practice in Indian country, it's just not a tribe within a district. For example, the Navajo Reservation spans four districts, it has various time zones, various laws, so while some Indian members might feel that some state sentences are too short, some people in the same reservations in the different districts feel that they are too long, and that's why the more discretion we can give to the tribal courts, the better.

COMMISSIONER BARKOW: I just --

(Simultaneous speaking.)

COMMISSIONER BARKOW: -- Mr. Shores, if you'll respond? I was -- I would just like to get the Government's sense of a possible solution to this uniformity issue with respect to the tribes' views and how sentencing should be treated. I mean, does it seem like it could be dealt with with the ways that they suggested, where you call someone who's in the district that has familiarity?

MR. SHORES: Respectfully, no. I think that what we're going to see is unwarranted disparities. One of the great things about our justice system, especially the judicial process, is that it should be apolitical. It should not be susceptible to political influences or change in political tides.

I can imagine a circumstance in government, where an executive and a legislative branch don't exactly get along. And, in such a circumstance, you may see that a district judge is trying to figure out-- or a tribal council, the legislative body, has expressed a desire for tribal convictions to be considered and a tribal executive disagreeing with that position.

Well, what is the district court to do? How is the district court to weigh that? What about when there is an election the following year and a different party, or a different group takes power in that tribe, what is it that's going to occur at that point?

With regard to a point about the Sac

and Fox having opted into the death penalty. They are one of 573 tribes that has opted into the death penalty.

They did so, I believe, in the 1994 Crime Ominous Bill and that was a one-time thing. And, and that was actually done in coordination with the Justice Department. It was a clear statement of intent, so that's not an ongoing issue.

When we're talking about the consideration of tribal court convictions and that being a continuing process, where courts are asked to consider on an ongoing rolling basis, does that mean a district judge is going, or a probation officer, is going to have to keep calling to check in at every sentencing, where tribal convictions are in place, as to whether or not the tribal council, or the tribal court, or the tribal executive, at that point, is or is not in support of the tribal court convictions being counted?

And, again, we're asking here for

tribes to be doing something that we don't ask state court convictions, or state court judges to do. Those are appropriately considered as a part of the process.

It's representative of those convictions, whether somebody wants them considered, or not, are a part of that defendant's criminal history.

And I would suggest that, as a general matter, tribe sovereignty is not derived from statements or Commentary that are going to be contained in the Federal Sentencing Guidelines.

Those are inherent powers. They're not even powers in all circumstances that we would say are granted to them, or given to them, by the United States Congress, and so I don't think that the omission of the fifth factor will have any sort of negative impact, or perception that tribal sovereignty has been limited in some way.

In fact, I think this protects the process and protects the integrity of a district

court's consideration of tribal court convictions, especially when you look at the totality of the circumstances and you consider, just as Judge Erickson mentioned, the significance of each sovereign tribe having their own court system and their own level of sophistication as it pertains to due process. Thank you.

ACTING CHAIR PRYOR: Okay. If there are no further questions, then we'll move on to our third panel.

(No audible response.)

MR. SHORES: Thank you.

ACTING CHAIR PRYOR: Thank you. After this panel, we'll take a break.

Okay, our third panel continues our discussion about tribal issues. Our panelists are Mr. Ron Levine, who was introduced during our first panel, Mr. John Bendzunas. And, did I pronounce that correctly?

MR. BENDZUNAS: Correct.

ACTING CHAIR PRYOR: And Mr. Michael

Andrews. Mr. Bendzunas is the Second Circuit Representative and Vice Chair of the Probation Officers Advisory Group.

He began his professional career as the United States Probation Officer in the District of Vermont in 2000. In 2008, he was promoted to Sentencing Guidelines Specialist and later promoted to Supervisory United States Probation Officer in 2014.

He holds a Bachelor of Arts degree from Marywood University and a Master of Arts degree from the State University of New York at Albany.

Mr. Andrews is the Chair of the Victims Advisory Group. He currently serves on the Board of Directors for the D.C. Crime Victims Resource Center, as well as the Advisory Board for the Maryland Crime Victims Resource Center, Inc.

He has over 15 years' experience in victims' rights advocacy. He has a law degree from Roger Williams University School of Law and

an LLM from the George Washington University School of Law. Mr. Levine.

MR. LEVINE: Mr. Chairman. The PAG supports the Commission's recognition, based on the recommendations of the TIAG that, tribal court convictions should not be assigned history points and that only some, but certainly not all, may warrant consideration for an upward departure.

We make the following comments and recommendations, regarding the amendment of §4A1.3(a)(2)(A). First of all, as regards upward departures, based on tribal court convictions and consideration for proposed Application Note 2(C) factors, we would recommend a modification to effect that an upward departure would be barred, absent a threshold finding of, either the absence of due process rights, as explained in the amendment, or a conviction based on the same conduct that formed the basis for another conviction that entered into criminal history.

So, we think those threshold

considerations are important factors for the Sentencing Board to consider up-front. Similarly, as regards to Application Note 2(C), it currently reads in that preamble to the factors that, the court may, in addition, "consider relevant factors such as the following."

We would recommend a modification to that language. That the court should consider the presence or absence of these relevant factors.

Again, we think we want to emphasize, it needs to be emphasized that, that consideration of the reliability of the conviction as a basis for the departure should be something the Sentencing Board should be thinking about first and foremost.

As regards to the court protection orders, the PAG supports defining the "court protection order" phrase, to clarify that it includes tribal protection orders, which meet certain due process requirements.

Again, we recommend a change in the language, to the proposed amended §1B1.1, Application Note 1(D), to make clear that the due process requirements of section2265(b) must be met.

The Commission's proposed, current proposal, as we read it, reads that the court protection order means any protection order, as defined in section 2266(5) and consistent with section 2265(b).

The phrase “consistent with,” in the context of due process rights, appears to afford some latitude, which may not be intended, and so we recommend that language read that, “court protection order means the protection order that meets the definition of section 2266(5), and that also meets the requirements of section 2265(b).

Finally, PAG does not support a general Chapter Three adjustment for violation of protection orders. We don't think an adjustment is needed in the bulk of cases in which this may be of concern.

The assault and the threat-related guidelines in §2A of the guidelines carry extremely high offense levels as it is. They often have an applicable offense adjustment for degree of injury or injury to partner, and they, and some do contain already, provisions related to protection orders.

Thank you, again.

ACTING CHAIR PRYOR: Mr. Bendzunas.

MR. BENDZUNAS: Yes, Judge Pryor, members of Commission. It's a privilege to be here representing the Probation Officers Advisory Group.

Before the 500 tribal nations across the United States, U.S. Probation Officers with the richness and diversity of Native American culture and the unique sentencing issues that occur with an Indian tribe.

In preparing for this testimony, POAG reached out to colleagues working in high-concentration tribal areas. It is clear that our agency works hard to foster positive

relationships with tribal nations. These relationships are essential to our ability to gather information and sentencing process and to effectively supervise individuals living in those nations.

Evaluating the Commission's amendment to §4A1.3, POAG is generally supportive of the proposed Commentary. However, before discussing the amendment, it's important to understand the realities of gathering records in the future.

As the primary records gatherers in the sentencing process, U.S. Probation Officers often face challenges obtaining official records in tribal areas.

Some districts reported working with over 20 different tribal nations that demonstrate varied levels of responsivity. Tribal arrests and conviction records are rarely revealed in automated record queries, which require officers to coordinate directly with the tribes.

While some tribal nations are very reliable making records either available by mail

or email, others require officers to physically travel to the locations of the reservations, which can be hours of travel.

Other tribal courts are reported to be completely unresponsive. Feedback indicates that some tribal areas have modern, automated systems, while many others rely on non-automated, non-standardized handwritten notes that require manual searches through paper files.

Officers indicate that records will often lack clarity with regard to charges, findings, guilty findings, time spent in custody, and attorney representation.

Tribal courts also range from having systems to be supported by law-trained attorneys and judges, tribal bar associations, to courts being operated by lay people.

It's important to understand this landscape to appreciate the challenges district courts have in evaluating these tribal court proceedings.

Officers surveyed by POAG described

common characteristics of Native American criminal history profiles are, first and foremost, alcohol-related presence are, unfortunately, very common. They range from public intoxication and disorderly conduct to DWIs and violent assaults.

Being in possession of alcohol is unlawful on many reservations and tribal police often use jail as a de facto detoxification facility.

At the extreme, a subset of Native American defendants demonstrate patterns of purposeful violent conduct, many times domestic in nature, with histories of unlawful possession and use of weapons.

With regard to the proposed amendment, POAG is in favor of Application Note 2(C)(i) and 2(C)(ii), but we do not believe that they should be threshold factors for upward departure.

While POAG believes that due process protections are an important factor, they should not be determined as if given the diverse

patterns of practice in tribal courts with the varied factual scenarios presented.

POAG also supports Application Note 2(C)(iii) and 2(C)(iv) in the evaluation of tribal court proceedings. Scoring rules for prior federal, state, or local convictions need to be a guiding factor in determining evaluation for upward departures.

Given the characteristics of the Native American criminal history profiles, rules associated with recency, treatment of minor offenses, and double counting, all need to be consulted in determining whether and how far to upwardly depart.

Lastly, POAG is opposed to the adoption of Application Note 2(C)(v). We understand that some tribal courts have sophisticated systems that adhere to due process considerations.

The creation of these institutions is rightfully a great source of pride for many tribal communities and the commentaries are a

reflection of that pride, however, POAG is concerned about potential disparity that may be by this Commentary, the result in some tribes being treated differently than others.

We believe the district courts already have the ability to consider the spirit of Application Note 2(C)(v) within the provisions provided at 2(C)(i) and 2(C)(ii).

We have no issues with the definition of the court protection order. We think it provides, at least, clarity. It also provides explicit authorization for district courts to consider court protection orders issued in tribal, tribal courts. And that --

ACTING CHAIR PRYOR: Thank you. Mr. Andrews.

MR. ANDREWS: Thank you and Good morning, Chairman Pryor, and members of the Commission. Thank you, again, for this opportunity to be with you this morning.

On behalf of the Victims Advisory Group, the Victims Advisory Group, just for

background, are made up of professionals that include former prosecutors, attorneys, former probation officers, a law professor, and respected clinicians in the field.

Commenting on the recommendations from the Tribal Issues Advisory Group to the Commission, I would say, is near and dear to me, for several reasons.

First, it was this Commission's idea, back in 2014, through the recommendation of the VAG to have the Tribal Issues Advisory Group, and it was Chairwoman Saris, at the time, with consultation from many members here, and I just first want to say, thank you for that. I think that provides the clarity that tribes need, in terms of playing in the field of sentencing.

I recall, back then, there was a lot of discussion about tribal court protection orders. There was a lot of discussions about convictions and how were they ever going to be played. The issue, of course, with full faith and credit and how that was going to enacted with

tribal governments.

So, from a personal standpoint, I think it's just amazing that we're here today talking about some proposed amendments. I, obviously, want to shamelessly thank Judge Erickson for his leadership during the tenure as Chair of the TIAG, and his continued leadership, as well as Kathleen Grilli and Ken Cohen, who are also part of that dynamic, so I wanted to, at least, mention them and their support.

Regarding the tribal issues, I'd like to focus my comments regarding factors for the district court to consider when deciding, whether to depart under §4A1.3, in order to assist the Commission, I'd like to touch on three of the five factors.

Factor (i), the defendant was represented by a lawyer, had the right to a jury, right to a trial by jury, and received other due process protections.

I was present during the first, or the second panel, and I'd like to, of course, remind

the court about the Indian Civil Rights Act of 1968, which, by the way, turns 50 years old this year.

It's a seminal piece of Indian policy legislation and what ICRA allows for is that the accused does not need to be represented by counsel. It is not part of the U.S. Constitution in that regard.

ICRA was a standalone that gave tribes inherent rights by the Congress. I'm going to talk about plenary power that Congress has over federal Indians.

I think that's important, if we're going to add an additional requirement that tribes have to have a lawyer trained, I would say, again, that's a conflict of what ICRA stands for.

The second part supports this, and that was a recent case, *U.S. v. Bryant*, also supports and reaffirms that the Indian Civil Rights Act with regard to the use of prior convictions as a predicate offense, in terms of

prosecution, is also constitutional.

As the Court recalls, the defendant was an enrolled member of the Northern Cheyenne Nation and had several tribal court convictions that occurred without having appointed counsel representing him. The Bryant court held that those convictions were still valid under 18 U.S.C. § 117(a).

Therefore, the VAG recommends that factor (i) be modified to include that defendant was afforded the same rights under the Indian Civil Rights Act, and spell it out.

The second factor of the Commentary is whether the tribe was exercising expanded jurisdiction under TLOA of 2010, another piece of legislation that's also near and dear to me.

I know the Congress is working on the reauthorization of TLOA as we speak, however, I would be remindful to acknowledge that there are only, of the 573 federally-recognized tribes, which is up from 567, only six tribes today are using the TLOA expansion and sentencing

capability.

So, if we're going to use factor (ii), I would say that's sufficiently going to limit the amount of tribes that are going to be able to participate or be able to play in the same space for sentencing consideration.

Surely this does not mean that the rest of the Indian country and the tribal courts that exist today do not have lawyer-trained attorneys. I'm not saying that at all.

It just simply means that those non-TLOA-expanded tribes fall under ICRA, the Indian Civil Rights Act; therefore, the VAG recommends that this factor be limited in scope.

The last factor, which I understand has taken a lot of the discussion is, whether or not the tribal government had formally expressed the desire that convictions from its courts should be counted for purposes of computing criminal history points, pursuant to the guidelines.

It is clear that this amendment has

significant meaning. And I think we've all touched about the important role for sovereignty for tribes. And I will just sum it up in about 30 more seconds.

The Commerce Clause of the U.S. Constitution provides that Congress shall have the power “to regulate Commerce with foreign Nations, among several states, and with the Indian tribes.”

It's Congress' plenary power over the tribes over laws. So, when Congress has spoken, through legislation, through enacted statutes, such as 18 U.S.C. § 117(a), I would surmise that Congress has acted and it does not pierce tribal sovereignty, but there is an acquiescence of inherent power that the Federal Government has.

So therefore, I would say that tribal sovereignty is not pierced and, therefore, really, relevant factor (v), really, is not needed in this particular analysis. Thank you.

ACTING CHAIR PRYOR: Okay, questions?

Judge Breyer, do you have any?

COMMISSIONER BREYER: No.

ACTING CHAIR PRYOR: All right, thank you very much. We're going to take a 15-minute break. So we'll reconvene at ten minutes until 11 o'clock. Thank you.

(Whereupon, the above-entitled matter went off the record at 10:36 a.m. and resumed at 10:52 a.m.)

ACTING CHAIR PRYOR: Let's come to order. Our final two panels will focus on the guideline that relates to acceptance of responsibility by defendants. Our panelists include Trent Shores from the first panel and Mr. Thomas Patton.

Mr. Patton became the Federal Public Defender for the Central District of Illinois in January 2015. Before becoming the Federal Public Defender, he served as an Assistant Federal Public Defender for 18 years in the Central District and in the Western District of Pennsylvania. Mr. Patton also served as a law clerk for Judge Richard Mills. Mr. Patton

graduated from the Southern Illinois University School of Law in 1993.

Mr. Shores?

MR. SHORES: Thank you very much, Chair. The Department, with regard to the amendments regarding challenges to relevant conduct and acceptance of responsibility, strongly objects to the Commission's proposed amendment concerning a defendant's ability to falsely deny relevant conduct at sentencing without losing the downward adjustment for acceptance of responsibility. We object to both of the options proposed because both options raise the same concerns for us.

The first option would provide that “a defendant may make a non-frivolous challenge to relevant conduct without affecting his or her ability to obtain a reduction.”

The second option would provide that “a defendant may make a challenge to relevant conduct without affecting his ability to obtain a reduction, unless the challenge lacks an

arguable basis in either fact or law."

It bears mentioning, I believe at the outset, that albeit for dramatically different reasons, the proposed amendment has been criticized by both the Department of Justice and by members of the defense bar. At least a portion of the defense bar believes that the proposed amendment does not solve the alleged problem. And the Department believes the proposed amendment is unnecessary and will spawn further litigation.

First, as the Department of Justice noted in its comment letter, the proposed amendment is unnecessary. The Commission has not identified a circuit split regarding the interpretation of the current language nor has the Department experienced problems with the current language.

And in my experience in practicing as a federal prosecutor over the last ten years, I will say the district courts in which I've had the honor to appear, the district judges have had

no problem in interpreting the existing language as it pertains to this particular matter.

To put it simply, this proposed amendment seems to be a solution in search of a problem. On the other hand, it is a virtual certainty that if the Commission enacts either of the proposed options, litigation will commence almost immediately.

Defendants and their attorneys will read the new language as providing them with an opportunity to plead guilty then broadly and aggressively challenge relevant conduct and nonetheless seek an acceptance of responsibility adjustment, regardless of whether the sentencing court finds these challenges to have merit.

Litigation will then ensue over whether the challenges made to relevant conduct are "non-frivolous" or "lack an arguable basis in either fact or law."

All of this litigation will negate one of the primary reasons why a defendant who pleads guilty receives an adjustment for acceptance of

responsibility in the first place. That is to allow the parties to avoid litigation costs and to conserve scarce judicial resources. It is called acceptance of responsibility, after all.

Instead, it would effectively turn sentencing hearings into mini-trials consuming judicial resources while sentencing hearings --- while defendants reap the benefit that was designed to conserve those very resources.

And on that point, I want to note that the Department agrees with the Victims Advisory Group that the proposed amendment would not be victim-friendly, because it would result in forcing the victims to testify in a type of mini-trial at the time of the sentencing if the defendant challenges relevant conduct.

A defendant has no right to receive an acceptance of responsibility reduction, and it is a defendant's burden to prove that he has "clearly demonstrated acceptance of responsibility."

The current guidelines appropriately

recognize that a defendant cannot meet that burden if he or she “falsely denies” relevant conduct. In those cases where a defendant has a legitimate concern about relevant conduct, the current guidelines permit him or her to raise that concern without losing the acceptance of responsibility reduction.

While the ground rules for the current provision are well-settled, the proposed amendment will create confusion, and it will generate litigation, and will create more complexity in the sentencing and guideline process.

For these reasons, the Department believes that the risks and downsides of the proposed approach far outweigh any potential benefit.

Thank you again for the opportunity to speak with you and would welcome the opportunity to answer questions that you have.

ACTING CHAIR PRYOR: Mr. Patton?

MR. PATTON: Thank you, Your Honor.

And thanks for having me and addressing what is a serious national problem with the Acceptance of Responsibility adjustment. And it's a national problem because the difference in the way the Commentary language is being interpreted in different circuits is resulting in unwarranted sentencing disparity.

As Judge Pryor mentioned in introducing me, I have practiced both in the Central District of Illinois and for 15 years in the Western District of Pennsylvania. Those two districts take vastly different approaches to this particular issue of “can you challenge relevant conduct and be unsuccessful and yet still get acceptance of responsibility.”

In the Western District of Pennsylvania in 15 years, I never had a probation officer or an Assistant U.S. Attorney, or a Judge suggest that my client would lose acceptance of responsibility because I had filed an objection to relevant conduct, either arguing that conduct that everybody agreed happened simply didn't meet

the legal definition of relevant conduct, or saying the Government hadn't met its burden of proving relevant conduct by a preponderance of the evidence based on sufficiently reliable information.

That's not the case with the Central District of Illinois. I'll give you a couple of examples. We represented a young man, Modesto, who pled guilty to conspiracy to distribute cocaine and distributing cocaine. He drove cocaine from Chicago to central Illinois. He was not involved in setting up the deals, he just was a driver. He knew he was transporting cocaine, but he had no idea of the amounts. He just wasn't given that information.

The Government witness said Modesto had made nine trips. Modesto said yes, that's right. Modesto cooperated, and proffered, and said yes, I did this. I just don't know the amount. The Government witness didn't give any estimates of the amounts.

The last two trips, there were

seizures that were nine ounces each. But the first seven trips, there was just no information on the amounts. And the probation office wrote the pre-sentence report assuming that all nine of the trips were nine ounces.

And we objected saying, look, the last two clearly were nine ounces. But the first seven, we just have no information about what amounts were involved. You know, the Government's witness hasn't said is this the same amount or anything like that.

Then the probation officer's response in the final version of the pre-sentence report was to recommend the denial of acceptance of responsibility, because we were “falsely denying and frivolously contesting all of the conduct.”

Our client, Jordan, was charged with and pled guilty to possessing methamphetamine with intent to distribute. The indictment charged “meth actual,” but at the time of the plea, in the written factual basis of the plea agreement by the Government, it was just meth,

just mixture substance meth. And he pled guilty to that.

And the pre-sentence came back saying it was ”ice” and applying the basic defense levels based on ice. And of course, as you know, ”ice” is a defining term under the guidelines. It has to be at least 80 percent pure. And so, we asked if we could please see the lab reports that showed that the impure substance was at least 80 percent pure. And this was in one of the processes of trying to resolve.

And the probation officer's response was, if you insist on having to get the lab reports, you're risking acceptance of responsibility. And thankfully, at that point, the Government said, look, we'll agree to the ten-year mandatory minimum that applied whether it was actual or ”ice.”

But just asking for a lab report, you say could we see if this really does meet the definition of ”ice,” resulted in the threat of loss of acceptance of responsibility.

And so, what is happening in the circuits and districts in which the caselaw is basically, if you challenge and lose, by definition you have "falsely denied." Your defense counsel and the defendants are basically scared off of making what would be valid objections.

Because you have to tell your client, look, if you make this I think we have a valid argument. But you have to know if we make it and lose, you could lose acceptance. And they look at the sentencing table and say, geez, I'm right here now. I go up three levels, you know, that's two, three, four, five years. I can't risk that. Then we can't make those arguments.

And the whole premise of our system, whether it criminal or civil, is the best way for the judge to give the correct, right answer is for both parties to be able to litigate their positions. And that helps develop the record, the legal arguments in the factual record, to help the judge get it right.

And by not allowing us the opportunity to make those arguments or say if you do you're risking this massive reduction, it's preventing us from helping the judge get the legal conclusions right and make sure the facts are correct.

ACTING CHAIR PRYOR: Okay. So, I have a question about that. Mr. Patton, the examples you just provided are what probation officers said, positions they took. What happened with --

MR. PATTON: In the first case --

ACTING CHAIR PRYOR: -- in those cases with the Court?

MR. PATTON: Sure. All right ---

ACTING CHAIR PRYOR: In the second one we know the Government, what it did.

MR. PATTON: In the first one, the Government eventually, by the time of the sentencing, said yes, we agree. We can't prove nine ounces for each nine times. But the fact that it got worked out in that way, I would

caution you, again saying that shows the system works. Because ---

ACTING CHAIR PRYOR: Well, my concern is, afterwards, whether we really have examples where courts are saying that any denial of any fact or any argument about a guideline issue results in a denial of acceptance. Because there's, that's not what the current guideline says, nor is it what the proposed amendment says.

MR. PATTON: I do have an example where the client lost acceptance -- it was the client's CJA counsel or private counsel representative, in front of Judge Mills after I clerked -- where they did a search warrant of his house.

They found a gun on the top of cabinets in the kitchen where you couldn't see it without getting up on top. And it was a house our client didn't live in, but he admitted he had been selling drugs out of the house.

ACTING CHAIR PRYOR: Yes.

MR. PATTON: And he admitted to the

drugs that were found in the house. But none of the cooperating witnesses said they ever saw the defendant with a gun. They never said, “Hey, he's a guy that carries,” nothing. They fingerprinted the gun, found fingerprints; none of them were the defendant's.

And the defendant said, look, they just haven't established that I possessed that gun. He didn't come up and testify and say they didn't meet the initial burden of proof that I knew that gun was there, and I possessed it.

The Government said no, judge, the gun found in close proximity to drugs, you can assume that he knew about it. And so, he has to prove that it's clearly improbable that the gun was related to the drugs. He hasn't given you anything.

And by the way, if you rule in our favor that, by definition, means he's “falsely denied relevant conduct,” so he should lose the three levels.

Judge Mills said yes, the gun was

there, you didn't produce evidence saying you didn't possess it. And so, I'm finding that the gun bump, the two-level gun bump under §2D1.1 applies. And he said then, by definition, you are "falsely denying" relevant conduct, because I have found that it is relevant conduct, lose your three levels for acceptance of responsibility.

ACTING CHAIR PRYOR: Did he take it up on appeal?

(Simultaneous speaking.)

MR. PATTON: It was an appeal waiver. And that's the thing. I mean, these are folks that have waived their right to a trial, right? And the district court has been saved that time; the Government has been saved that time. No sentencing hearing comes close to taking as much time as a trial. So, they waived that. And the Government's received that benefit; the district courts received that benefit. So, they've waived that. Most of them ---

ACTING CHAIR PRYOR: It appears to me

though that, in the event that you had that kind of circumstance where the judge says that by definition means that you can't get acceptance, that that would be, in the absence of, say, an appeal waiver, something that you could bring to the Court of Appeals and say this was not frivolous objection.

MR. PATTON: In the Seventh Circuit and the Eighth Circuit, you would lose, because they both say --- they both have caselaw. And it's laid out in our commentary. That says if you challenge it and you lose, you have “falsely denied.”

And the Eighth Circuit has a case that explicitly says we don't have to decide whether it's frivolous or not. If you've challenged it, and the district court has overruled your challenge, by definition you have “falsely denied,” so you lose.

The Seventh Circuit caselaw is terrible. It just --- and again, I would urge you to read the commentary on written comments.

Because it lays it out in great detail.

COMMISSIONER REEVES: I do, I hate to get into the specific cases. I don't think they establish a national trend on anything. But isn't the answer, draft a better plea agreement, that indicates in the plea agreement that we're going to contest this issue? The court's aware of it, not caught off guard. I've never had this issue ever come up when it's clear in the plea agreement.

MR. PATTON: In the last case I told you about, the guy that lost acceptance for the gun, it was made clear at the plea that there was not an agreement about the gun. I mean, it was plain as day that there was a disagreement about that. And he still lost acceptance, because he challenged it. The judge ruled against him, therefore, you're "falsely denying," therefore you lose acceptance.

COMMISSIONER REEVES: So you knew what the caselaw was in the circuit. You knew that there was an issue of a gun. And you included a

plea agreement that had a waiver --

MR. PATTON: But my office didn't represent the person.

COMMISSIONER REEVES: Well, the attorney, correct?

MR. PATTON: Right, yes. Because he wanted them to give acceptance of responsibility. That's why he did it. And I'll note, the Government didn't charge a section 924(c) count saying that he possessed the gun in connection with the drugs. Because they didn't want to, apparently, didn't think they had the proof to show that he knowingly possessed the gun in furtherance of the drugs.

The Government has complete control over what gets charged, right, I mean, complete control. And they have control over what gets pled to. Because, you know, you either plead to everything or, at least in the district we practice in, if there's going to be a count dismissed you must do a written plea agreement that will contain an appeal waiver and a section

2255 waiver. They will not dismiss a count without that written plea agreement that has the waivers.

COMMISSIONER REEVES: And so, yes, and then the problem is in other parts of the country, in the situation that Your Honor talks about, then you say yes, Judge, we have this disagreement.

Fraud cases are a common example. Oftentimes, at the time of the change of plea the parties say, you know, Judge, we haven't come to an exact agreement on the amount of the loss. It's not an element of the offense, so you can plead guilty without saying that there's an exact amount.

And then, between the time of the plea and the sentencing the parties work to see can we get to an agreement. And, of course, from the defense side, you're only fighting about it if it's going to move the guideline range, you know. So, it's $5,000 difference, but it doesn't move the guideline range down.

You're not going to litigate it at sentencing. And if you do litigate it at sentencing, it's not a mini-trial. Because the rules of evidence don't apply, you can use hearsay, you don't have to go through all the foundational stuff. You cut right to the chase. It's a legal argument. You just have the legal argument.

If it's a factual argument, most times it's an agent that testifies, if anybody testifies. In 21 years, I have never, ever had a child victim ever have to testify. I did a child pornography production case where the child victim didn't have to testify, didn't testify. They just don't.

If it's allegations about --- if there are any allegations about hands-on offenses, almost always the child has been interviewed in a forensic interview setting that's videotaped. And so that videotape is introduced as evidence. And defense counsel, you look at it and you find, ”Hey, that's what that is. We're not going to

challenge that."

And witnesses, I've never had a fraud victim have to come in and testify. If the fights are done, most of the time in fraud it's more about legal. Is it part of the relevant conduct rather than factual about "did this happen?"

So, I don't think it appears that victims would have to come in and testify in their mini-trials. And it's not borne out by the experience in the parts of the country where you can make these challenges and not be threatened with losing acceptance of responsibility.

COMMISSIONER BARKOW: So, I have question for the Government here. So, the probation officers gave us comments and feedback that they also think this is a problem, that this is nationwide. It may not be in all places, but there are places where there's a "chilling effect" on the abilities of defense counsel. We have to raise good faith legal arguments.

And, they have the line at the end that sometimes it takes a defendant's objection

to flush out the truth, which is why it's important that objections made in good faith be permitted with an acceptance of responsibility.

And, in everything we know about innocence, trials, and mistakes in cases, justice is really important. So, if the Government would just accept the premise, for the sake of my question, that this is a problem that does need a solution, which I recognize your comments are that it is not, but just work with me and assume that there's a problem out there, or that I think that there is one.

Of the options for solving the problem, we had a couple. And I'm curious what the Government's position is on the two possibilities, because I recognize you don't wrestle with this, because you say there's nothing that we can do that solves it.

But is there a sense, as between the two, which does a better job? Because I'm trying to get at a way that we could clarify for judges that it is acceptable for defendants to make

those base legal arguments, and for them to make, however you want to phrase it, these challenges on facts that are --- they're not frivolous, they're not --- that sends a message different from what we're currently sending where we have districts where judges think this isn't okay.

And, what we know is there are definitely AUSAs out there that tell people you're not going to get acceptance unless you sign the appeal waiver and you don't challenge this.

So, if we were trying to solve it, does the Government have a way in which it could be phrased, that the Government would agree also to the acceptable challenges that wouldn't make somebody lose acceptance of responsibility?

MR. SHORES: Commissioner Barkow, thank you for the question. I cannot agree that either of those options are acceptable. That simply is not based, in what I have experienced in speaking with my colleagues across the country, is the practical experience in

courtrooms, that judges are having these experiences.

And what I want to go to is, I think it is dangerous to generalize some individual experiences, or if there is one AUSA who has said that you will lose acceptance of responsibility if you contest X, Y, or Z.

Because the guidelines as they exist today do provide an avenue through which defendants may make those good faith legal challenges without losing acceptance of responsibility.

And when we look at the development of the guidelines originally, I think that, frankly, as was mentioned recently in the publication, “Federal Sentencing: The Basics,” it's referenced that relevant conduct was a cornerstone of development of acceptance of responsibility, of the guidelines. Because it helps to limit or reduce the effect on the prosecutors charging decision and allows the court to actually get to what the heart of the offense conduct is.

The result or the idea that the facts at sentencing and the relevant conduct is just a "Government's version of the facts," I think is a bit of a misnomer. Plea agreements and the plea process take two people. That is a negotiable document.

And I know as a regular practice in the Northern District of Oklahoma that, when there is a disagreement as to the extent of relevant conduct, the defense attorneys will request a "carve out" and have a conditional plea wherein they reserve the right to appeal a particular contested sentencing issue. It often may relate to relevant conduct. We may have the sentencing hearing on that particular issue.

Where there is no disagreement, the Commentary provides that a defendant does not have to speak in agreement to admit the conduct. He or she may stand silent and still receive credit for acceptance of responsibility and then take that up on appeal if need be.

But I think the plea process certainly

allows for that. And with regard to this idea that it won't create mini-trials, I absolutely think that it will when you have multiple victims.

And one of the benefits, my colleague here referenced a section 924(c) example in which it was not charged. And I believe he stated the Government could have charged that if they had the evidence. Well, but I don't know from that situation is if one of the benefits of entering a plea was that the Government agreed to not file 924(c).

COMMISSIONER BARKOW: No, and I understand that. And I'm not really interested in the facts of any one of these individual examples.

MR. SHORES: Fair enough, thank you.

COMMISSIONER BARKOW: I'm more concerned with the fact that the intent behind the escape valve, as you said, it's already in there. Like, the idea of allowing a defendant to challenge this is one that's already in the

guidelines.

So, I think we all agree we want valid legal challenges, and we want non-frivolous factual challenges, because we want to get to the truth in cases and make sure punishment is proportionate to what someone did.

So my concern is --- so I assume that's the baseline we all agree on, because that's already in here. So, the only question is if the current language is sending a false signal to some judges and some AUSAs that any challenge makes it so that you lose it.

So what I was trying to get at is a way to make this language better so that the agreement that I thought we all had about what to do and -- so if I'm hearing you correctly, it's that the Government doesn't want to change the language, because just by the change of the language you're afraid you're going to get -- I'm worried that if we don't change the language we're going to continue to have the problem.

ACTING CHAIR PRYOR: Well, hold on a

minute, Judge Breyer, and let's have some --- let's let Mr. Shores respond to Commissioner Barkow, and then we'll hear your question if that's okay.

MR. SHORES: Thank you, Your Honor. I appreciate that. I think that the reason that the Government does not view either of those options as better is that we don't agree that the current language is confusing or is a problem. And it should not be and, in my experience, in my practice, it is not a problem in that it is sending the wrong message.

I think it is incumbent on all of us as practitioners to understand the law. We have continuing legal education requirements that I think would benefit perhaps from further understanding that the sentencing guidelines, as they're currently set up, do not preclude defendants from making legal, lawful challenges,

and that doesn't mean that there is an automatic loss of acceptance of responsibility. I think that the proposals actually flip

acceptance of responsibility on its head. It flips that burden wholesale. It's the exact opposite of what acceptance of responsibility was originally intended to do in giving the benefit to the judge to get to the actual offense conduct.

ACTING CHAIR PRYOR: Okay, Judge Breyer?

(Pause.)

COMMISSIONER BREYER: Thank you, Mr. Shores, just want to respond to a couple of points that you made and then ask you some questions. As I understand your testimony, if a defendant wishes to contest a fact or contest the law, he or she can do that provided that their contest is not frivolous. It that correct, or do I not directly understand your testimony?

MR. SHORES: No, Judge. I believe that §3E1.1 clearly reads -- it's stated there in the negative that “a defendant who falsely denies, or frivolously contests, relevant conduct,” in those circumstances is when a defendant would lose acceptance of responsibility

points.

However, in circumstances where a defendant advances during challenges, say, to a pre-sentence investigation report as prepared, and it is not frivolous, or it is not a false denial of that conduct, then the standards as applied allow that defendant to still be considered for receiving their acceptance of responsibility points. So yes.

COMMISSIONER BREYER: But is it your understanding that a defendant is entitled by way of discovery as to all of the information relevant even after a plea?

MR. SHORES: With regard to discovery, it would be my expectation that, if the United States is proposing that a defendant be held accountable at the time of sentencing for relevant conduct, that that defendant should have the --- or that defendant's attorney should have the opportunity to receive discovery, to see what the basis for that allegation or for that inclusion of that conduct is.

But I don't know that a probation office could adequately or correctly calculate the relevant conduct or the sentencing calculation if they did not have the opportunity to review that discovery.

ACTING CHAIR PRYOR: You know, I've got to say ---

COMMISSIONER BREYER: I do understand. You agree with me that frequently the issue of relevant conduct should arise after the --

MR. SHORES: I think that relevant conduct can. I don't know that I would assign the word frequently. But I think that's certainly something that can occur. Because investigations are ongoing.

There are times when defendants participate in a Rule 11 proffer after a change of plea and more conduct comes to light. But in that context, the defendant, if he or she is the one who offered or admitted to that conduct, that is not going to be held against them.

However, if they withheld

information, or they did not participate in that proffer and new evidence comes to light, then I think it is appropriate that the sentencing court be allowed to consider it to get to what is the heart of the totality of the offense conduct.

(Pause.)

MR. SHORES: Again, as I think is provided in §3E1.1, we're talking about loss of acceptance of responsibility where a defendant falsely denies or frivolously contests relevant conduct that the judge finds the Government has shown to be true by a preponderance of the evidence. Thank you, Judge.

COMMISSIONER BREYER: Thank you, that's all.

MR. SHORES: Thank you, Judge.

ACTING CHAIR PRYOR: I've got to tell you, this issue has frustrated me. Both sides' positions frustrate, and I'll tell you why. I read the current language, and I read the two options, and I cannot determine, as a matter of law, what the material difference is in any of

them. They appear to me to mean exactly the same thing, and there does not appear to me to be any ambiguity in the guideline as it is presently written.

I appreciate the issues Mr. Patton has raised and that the probation officers have raised about mistakes that are made in understanding the current guideline, and I would like to rectify that.

On the other hand, I expect that courts make mistakes; that's why we have appellate review. On the other hand, I don't understand how, given my view that it all means exactly the same thing, why the Government thinks that it's necessarily going to breed litigation.

It would only, it seems to me, breed litigation if it was materially different. But, you know, both sides can react to it. When I look at it, that's the concern I have.

MR. PATTON: Judge, I understand where you're coming from on where you read the language that's currently there in the proposed language

and say I don't think there's a difference.

ACTING CHAIR PRYOR: Can you explain to me where there is?

MR. PATTON: This is where I think -- - this is how I think it would make a difference if you changed the language. I think we make pretty clear in our written commentary, there are some courts of appeals, not just district courts but courts of appeals, that have agreed that if you factually challenge relevant conduct in any way and lose that objection, that that meets the definition of “falsely denying” relevant conduct. And therefore, whether it's legally frivolous or not, it doesn't matter. Because you have “falsely denied.”

ACTING CHAIR PRYOR: Okay, and the cases that you say stand for that proposition have been identified in your written submission, right?

MR. PATTON: Yes. And they're from -- -- in the Seventh Circuit, they're from the late '80s, early '90s, and from as recent as 2017 where

they just keep citing the same line of cases.

ACTING CHAIR PRYOR: Well, I am interested in that. I was not aware until you made that representation earlier that there was really any evidence of a circuit split on this issue, and in the event that there really is a material difference in the caselaw among the circuits, it may be that there's a way we could clarify the guideline in the context of resolving the circuit split.

But that would be one way of dealing with the problem, right, that we would say, “These circuits say X, correct understanding of the guideline. These circuits say Y, incorrect understanding. We clarify, we agree with X,” right?

MR. PATTON: And that's why, well, in one of the proposed or one of the questions for comment in the proposal is if you should add explicit language that's simply making an unsuccessful challenge. It does not, in and of itself, establish --- now, it's in the language

that's in Option 2 --- does not establish that there was not an arguable basis in law or fact.

That is something that's in addition to what's there now to help clarify, I think, what I'm hearing from the Commissioners is the understanding that there shouldn't be an automatic denial of acceptance just because there's been an unsuccessful challenge.

That is something that is --- it's not in Option 2 or Option 1, but it's one of the --- it's proposed for comment, should you add that. And I think that would be very important to make clear. To take away this, to blunt the argument of, “Your Honor, he challenged relevant conduct, he lost, therefore he's falsely denied, therefore he automatically loses the sentence.”

COMMISSIONER BREYER: Can I ask a question?

ACTING CHAIR PRYOR: Sure, go ahead, Judge Breyer.

(No audible response.)

COMMISSIONER BREYER: Mr. Patton, my

question is this. In listening to the Department of Justice today, they are saying that it's deferred as long as he or she doesn't frivolously contest the evidence, it's not frivolous. It's a good faith challenge that would not justify the elimination of acceptance of responsibility. Taking that interpretation, isn't that good enough? As long as it's not frivolous, as long as there's a basis of fact or law, why is it not good enough?

MR. PATTON: Because that's not the position that the Department of Justice takes in the Central District of Illinois and in other circuits.

COMMISSIONER BREYER: I understand there may be districts that don't accept that, but it is a condition of the Department of Justice ---

MR. PATTON: Your Honor, I understand your point, and I take your point. My experience over the past 20 years is the directives from DOJ do not always get implemented at the line AUSA or

individual U.S. Attorneys' Offices. And that's not to cast aspersions on particular offices or AUSAs, it's just the reality is what the Department of Justice may say their official position is. And I don't at all question Mr. Shores' statement that that's the position of the Department of Justice.

ACTING CHAIR PRYOR: Like district judges, they don't always follow what the court of appeals say, right?

(Laughter.)

MR. PATTON: Yes, sir.

COMMISSIONER BREYER: And no one seems to follow what I think.

(Laughter.)

MR. PATTON: But also, in addition, Judge Breyer, at least in our district, oftentimes it's not the frivolously denied, it's the falsely --- it's falsely denied, not frivolously denied, where "falsely denied" is interpreted to mean if you file the objection and you lose you, by definition, have "falsely

denied," therefore you lose acceptance.

ACTING CHAIR PRYOR: Well, the problem with that one is ---

COMMISSIONER BREYER: I would say that is an ambiguity that exists in our present application. Putting that aside for the moment, if in fact all the districts, all the district attorneys, if they conformed in the view that has been established by the DOJ representative here today, would that be satisfactory?

MR. PATTON: If in fact that would happen, that would be satisfactory. Although our position, if we believe this, would be better if you took relevant conduct out of the acceptance calculus. But, you know, the Commission may not be real keen on doing that at this point.

ACTING CHAIR PRYOR: But that is not on the table.

MR. PATTON: Okay, yes. It was one of the issues for comment.

But, Judge, and I'm not trying to dodge you, Judge Breyer, but it's just if you're

going to still consider relevant conduct, and if every U.S. Attorney's Office and every AUSA would go into every district court and take that position, yes, that would be a big improvement over what we have.

But I don't think that's going to happen absent the Commission taking action to make clear that is what the Commission intends, has always intended §3E1.1 to work.

Because the language that's been there for the past 30 years has not been interpreted that way in some circuits. And I'm not saying it's not been interpreted that way all over the country. But then of course that's what causes the unwarranted sentencing disparities.

MR. SHORES: If I might, I'd like to comment on ---

ACTING CHAIR PRYOR: Yes, I'll tell you this. We're going to bring this to a close soon.

(Laughter.)

MR. SHORES: Judge, and I'm looking

forward to a phone call I'm sure I'll have later today with the U.S. Attorney from the Northern District of California.

Whatever the law may be in each individual circuit, right, there could be disparate interpretations from circuit to circuit or from district judge to district judge. But what I am articulating today and what, I think, Judge Breyer was talking about, is the plain language.

I'm not sure why there's such a groundswell of surprise. I am reading the plain language of §3E1.1. And so whatever the interpretation is in individual cases or by individual AUSAs, that is a matter to be negotiated among the parties during plea negotiations if they so choose.

And if defendants do not agree with relevant conduct, then I would suggest that they not sign up for the plea agreement or to carve out a particular conditional plea so that they preserve their right to pursue that in the

appellate courts.

ACTING CHAIR PRYOR: Okay. Enough is enough.

(Laughter.)

ACTING CHAIR PRYOR: Thank you for your presentations.

MR. SHORES: Thank you, Commissioners.

ACTING CHAIR PRYOR: We're going to go to our next panel. Okay, our final panel continues our discussion regarding acceptance of responsibility. Our panelists include Mr. John Bendzunas, Mr. Ronald Levine, and Mr. Michael Andrews, all of whom have been previously introduced. We'll start with you, Mr. Bendzunas.

MR. BENDZUNAS: Thanks, Judge Pryor. As with many guideline issues, probation officers are often caught in the middle, and this appears to be no exception.

Throughout the past year, POAG has obtained a significant level of feedback on the Commission's proposed amendment for acceptance of responsibility.

The amendment seeks to clarify a defendant's ability to contest non-frivolous, relevant conduct issues that have no basis in either law or facts. The amendment also seeks feedback whether acceptance should remain tied to relevant conduct or become an elements-based test.

While it unanimously supports acceptance of responsibility remaining tied to relevant conduct, it also supports the clarifying amendments explicitly permitting defendants to contest relevant conduct where those objections are made.

Through the open comment period, various advisory and interest groups criticized the current structure of acceptance as creating a chilling effect, discouraging defendants from making objections to relevant conduct and forcing them to make calculated risks with sentencing --- central sentencing consequences.

In certain localities, POAG is aware of AUSAs who assertively object to acceptance of

responsibility in response to factual and/or legal relevant kinds of objections. We've also observed district judges who follow suit and routinely deny the adjustments following contested evidentiary hearings which is a pattern that's generally upheld by the appellate courts.

While we believe that it is not an institutionalized issue, denying defendants due process, we believe that the outlying courts do create some level of disparity.

Make no mistake; they appropriately exercise their discretion under current guideline authority, while we believe the clarifying amendment is necessary to bring consistency across the system.

As the sentencing guidelines have evolved in the past 30 years, applications have grown increasingly complex and there are often shades of gray where reasonable practitioners can disagree.

Estimation of drug quantity and loss, mitigating and aggravating role, evaluating

drugs, undertaking criminal activity, and assessing witness credibility, these are just a few examples.

Our answers cannot always be found in the black and white of the investigative report or grand jury transcript. Sometimes it takes the defendant's objection to flush out the truth, which is why it is important that objections made in good faith be kept within acceptance of responsibility.

As POAG has observed in previous submissions, the current Commentary allows the Government to make guideline objections with no worry of consequence whether the legal or factual merits are strong or marginal. The court simply accepts or denies the objection and the process moves along. We believe the proposed Commentary provides a better sense of balance within the system.

POAG has received some feedback that the proposed amendment could produce a more contentious sentencing environment in which

hearings could evolve into mini-trials. We believe this concern to be somewhat overstated. The pattern of practice in many district courts is already consistent with the spirit of the proposed amendment.

While extending this level of due process can take more time, we do not believe it to be overly burdensome. There are still limits, and when a defendant's objection to relevant conduct is completely unfounded or fits within an overall pattern of frivolous minimization, courts still have the discretion to respond appropriately.

POAG ultimately views this amendment as an opportunity to reduce some level of disparity in the federal sentencing process. We believe the proposed amendment provides increased clarity that recognizes the complexities of sentencing, that defendants can make reasonable, relevant conduct objections and still demonstrate contrition.

Ultimately, the relevant conduct

objection should not necessarily be a threshold determination in every case; it should be one of several factors considered in the totality of the circumstances.

And that's probably one of the more significant aspects of this amendment that hasn't really been discussed in the open comment period. Application Note 1(A) is a threshold determination, someone is deemed to have “falsely contested or frivolously denied” relevant conduct, the court can, at its discretion, pull acceptance of responsibility without looking at any of the other factors.

By taking out that last line, acceptance of responsibility becomes a totality of the circumstances test. So, if you have a relevant conduct objection in this new system, the court looks at that objection and determines whether or not it's reasonable or fits within some sort of criminal thinking pattern that may be related to potential recidivism.

The court can then look at that

objection in the context of everything else that's going on in the case, pre-trial adjustments, rehabilitation efforts, post-social lifestyle changes. That's how my court approaches acceptance of responsibility. Many courts in the Second Circuit approach acceptance of responsibility that way, and I think most courts. We think that's a positive change.

ACTING CHAIR PRYOR: Thank you.

MR. LEVINE: Thank you, Mr. Chairman. On behalf of the PAG, I'd like to start by presenting a little bit of context for our position.

Probably one of the most difficult, most fraught interactions we have as defense attorneys is discussing with a client what it means to be guilty and accept responsibility, accept responsibility for conduct, his conduct, and at the same time maintaining credibility that we're going to zealously represent them at sentencing as regards to guideline issues. And it's in this context that the issue of relevant

conduct.

The PAG reports, someone corroborated -- just heard that in the significant number of guilty plea agreements and resulting sentences, in some districts, that these are influenced by the perceived risk of losing acceptance credit, that the defense makes good faith, legitimate, legal, and factual challenges to the Government's description.

And so, the defense lawyer has to then balance the potential upside or bring in good faith arguments against conduct believed to be irrelevant or legally inconsequential, balance that against the risk of losing acceptance credit.

And so, it's that “chilling effect” resulting in plea agreements, resulting in sentencings, which are not going to reach the court of appeals to be challenged. Then you throw in the appellate waiver to further explain the lack of caselaw in this area.

And so, one answer, Chairman Pryor, to

your question about what's the difference between the old language and some version of the new language, is there may not be a lot of difference. But just the fact of changing the language, given this existing problem, will signal and reassure, and provide a platform that will be less chilling for the defense.

The dilemma, by the way, arises in a whole bunch of contexts. We've heard about some of them, drug amount, loss amount, use of a firearm, a leader/organizer, arguments about mental health, arguments about the influence of others on the defendant, approximate cause of injury, all of these things broil into the relevant conduct issue.

So the PAG supports the proposal that §3E1.1 should be clarified or modified. We believe the proposed wording should be modified to eliminate ambiguity about challenges to relevant conduct as a matter of law, however.

Option 1 and Option 2 really blend law and fact together. Option 1 says “a non-frivolous

challenge to relevant conduct" is not precluded from consideration for an acceptance reduction. While that wording does affirmatively acknowledge the right of the defendant to make a good faith factual challenge to relevant conduct, the PAG thinks it's important to acknowledge that challenges to relevant conduct may be legal and should not be subject to this "non-frivolous" standard.

Why do I say that? Defense counsel have an obligation to zealously represent their clients. Reasonable lawyers can disagree, obviously on the merits, and the law evolves over time when we're able to raise novel issues and preserve them for appeal.

And perhaps most important to your most dispositive context in this discussion, a defendant's eligibility for acceptance of responsibility should not be tied to perceived quality of a lawyer's legal argument. That says nothing about the clients except it's a responsibility.

So we would recommend modifying the language something like, "A Defendant who makes a legal challenge or a non-frivolous, factual challenge to relevant conduct is not included for consideration or function."

That accords defense counsel a deference to assert aggressive, creative legal challenges to relevant conduct without causing their clients to risk --

MR. ANDREWS: Judge Pryor, and the Commission, thank you again for this opportunity to speak on behalf of the Victims Advisory Group.

As we have heard from the first panel and my distinguished panelists today, the Commission has recommended two options. And I will tell you that the Victims Advisory Group does not support either for a couple of reasons.

First, under the first option, the defendant may make a non-frivolous challenge to relevant conduct without affecting his ability to obtain a reduction. Here, “non-frivolous” is not defined, nor does there appear to be sufficient

evidence that, in our opinion, supports that this is a genuine issue.

With regard to the second option, which the PAG concludes is more expansive, it will allow the defendants to challenge his conduct provided they produce an arguable basis. Again, what is an “arguable basis”? That's what lawyers do, they argue. This, again, is vague.

Both options present a situation where the victim has yet again to testify, and in this case, in a post-conviction mini-trial regarding the defendant's challenge of an acceptance of responsibility adjustment. I would submit to you, that's a “chilling effect” on a victim to be re-victimized.

One of the tools prosecutors levy on behalf of victims, and I don't want to minimize this, is to offer a plea. Even when the Government wants to go to trial, oftentimes a plea is offered to spare the victim from going to court and face her accuser in an adversarial forum. There is no protection in either one of

these options to protect the victim.

I can see a scenario; in fact, we will see a scenario if there is a change, where every case of a pre-sentence report will be open season to litigate for defendants to minimize their conduct especially at the expense of many victims.

Many times, these cases involve "he said, she said." Are we going to be in a position to start arguing facts about what happened at the post-conviction level? I think the response to this is better coordination between the prosecutor and the defense attorney.

A lot of the issues can be negotiated when two parties sit down and hammer out what is the acceptance of responsibility at that level instead of carrying it on to a mini-trial which will then open up the victim or subject the victim to cross examination and perhaps other victimization issues.

If the Commission is looking to clarify, I would ask an exemption for victims to

participate in these mini-trials to protect their dignity and then their respect under the Crime Victims' Rights Act, the CVRA. But as written, the VAG cannot support either option.

COMMISSIONER BARKOW: So, Mr. Bendzunas, if you could just --- I think I come at this similar to Judge Pryor, which, is my understanding, is that everyone would agree that we want defendants to be able to make legal challenges and however we're going to use the adjective, “good faith,” “well-founded,” you know, whatever the word is, to make factual challenges as well.

And my thought was that's what this is already trying to do, but in some places has been interpreted to mean if you make a factual challenge and you lose, you don't get it. So that creates the chilling effect.

So, if that premise is right, that it's just we haven't used the best language to describe what we would like to be able to give defendants the ability to challenge in all cases,

the question is if we could have better language that allows them to do that?

And what I hear the Government and Mr. Andrews saying is if we somehow made the language better, it might open a floodgate that would require mini-trials or having victims come in.

So I guess what I'd like to hear from you is, it sounds like there are already lots of places in the country that are reading this the way that I thought we should always have it be read, and that our language would just be designed to clarify.

So, in those places, can you tell me what the practice is actually like? You know, is it mini-trials, are people asked to --- are victims asked to come in and testify? Because we would already know empirically what that world looks like. Because it would be, in fact, there are places that are ---

MR. BENDZUNAS: Yes. I think the good news is that a lot of courts are applying acceptance of responsibility as you would like it

to apply. There's isolated areas that are.

But I think we've received a lot of feedback. And it was rare to come up with many scenarios where courts are really most attorney's offices where they're really aggressive. But they're out there. And it is a problem in those areas.

We do think that Option 2 is the preferred option. We just want to find a way to provide some level of safety for a defendant to reasonably contest relevant conduct, not just -- losing acceptance is a big deal. It's a 25 percent increase in your sentence. And in some places, I think people are being leveraged to silence.

COMMISSIONER BARKOW: But where they are contesting it, the places that you know, what does the practice look like in those places?

MR. BENDZUNAS: Oh.

COMMISSIONER BARKOW: Because the fear is that, you know, it's going to be too much processing. And it's going to undermine the

reason that we --- one of the reasons why you have that.

MR. BENDZUNAS: Yes. I mean, I can speak for the Second Circuit, and defendants are generally, you know, within reason, when those objections take the shape of a criminal thinking pattern, you might have an issue.

But, you know, it's normal to have evidentiary hearings that require a couple of witnesses. The right result comes out after that. And the courts generally don't hold it against them.

COMMISSIONER BOLITHO: On that point, don't the probation officers make a recommendation to the PSRs on whether the defendant should lose acceptance of responsibility? So, it's not just that you're saying it from the Government's perspective but also the probation officers will interpret it that way, because they wouldn't be comfortable with loss of acceptance as well.

MR. BENDZUNAS: Absolutely. And that

does happen across the country. And there's leverage within --- I've done it myself. You have a defendant trying to resolve a case, and you can tailor the issues with the district judge. Acceptance can come into play in some of those instances if someone's going far afield.

COMMISSIONER BOLITHO: So why would that change by adding a sentence that says it's not based in all of the facts?

MR. BENDZUNAS: I think that it just provides some safety. It just comes down to --- it just comes down to that.

COMMISSIONER REEVES: But really, your quarrel is not with the current language. It's with certain courts. You're asking us to change --- suggest that we change the language because of the courts. The language is fine. That's what's in those cases.

MR. BENDZUNAS: I would tend to agree, but I also look at this through the eyes of one of the defendants that are in court.

COMMISSIONER REEVES: And my next

question would be, point to the particular language that is not working?

MR. BENDZUNAS: Well, "falsely contested," "frivolously denied." That is ---

COMMISSIONER REEVES: But you recognize that the district court has to have some discretion with how it'll affect determination.

MR. BENDZUNAS: I agree. But "falsely contest" is pretty black and white.

COMMISSIONER REEVES: As the issue?

ACTING CHAIR PRYOR: Say, the defendant comes in, and you see the demeanor you've heard at trial. "Falsely contest" for a district judge who looks at some kind of factual issue, it then comes to the court of appeals, and he just has a cold transcript. It's not so black and white, right? That's why those kinds of factual issues are reviewed for clear error.

Judges who have seen witnesses testify, who've tried the defendant, may say, "That is false. You know it's false," and it's

not something that a cold record would necessarily tell you one way or another if the judge is out of bounds or completely right, right?

MR. BENDZUNAS: Yes. Unfortunately, I think people are getting punished for losing objections. And that's not necessarily the intent of acceptance of responsibility. I'm trying to find a happy medium or provide some levels.

I think generally they are.

ACTING CHAIR PRYOR: Judge Breyer, all right, okay.

(No audible response.)

ACTING CHAIR PRYOR: Okay. Thank you very much for your presentations today.

As we wrap up, I want to mention an upcoming event, the Commission's National Seminar on the Federal Sentencing Guidelines in San Antonio, Texas, on May 30th through June 1st. This seminar will provide specialized instruction to probation officers, prosecutors, and defense attorneys on the guidelines.

Registration for the event is open on a first come, first served basis, and many have already registered. Our website has all the details regarding the event and registration.

Finally, the Commission will have several publications released in March as well another public hearing on other proposed amendments relating to synthetic drugs including fentanyl and alternatives to incarceration on March 14th.

Before the hearing, I encourage all of you to review the data presentation on synthetic drugs posted on our website. We appreciate the broad interest in our work and look forward to our next public hearing. Thank you very much.

(Whereupon, the above-entitled matter went off the record at 11:55 a.m.)