

UNITED STATES SENTENCING COMMISSION

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PROPOSED GUIDELINE AMENDMENTS

+ + + + +

PUBLIC HEARING

+ + + + +

WEDNESDAY  
MARCH 14, 2018

+ + + + +

The United States Sentencing Commission met in the Suite 2-500, One Columbus Circle, N.E., Washington, D.C., at 9:00 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  
ZACHARY BOLITHO, Ex Officio Commissioner\*

ALSO PRESENT

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

\*participating via telephone

PANEL I

The Honorable ROBERT M. DUNCAN, JR., United States Attorney  
Eastern District of Kentucky  
KEVIN L. BUTLER, Federal Public Defender  
Northern District of Alabama

PANEL II

JOHN P. BENDZUNAS, Chair  
Probation Officers Advisory Group  
KNUT S. JOHNSON, Vice-Chair  
Practitioners Advisory Group

PANEL III

KEITH GRAVES, Member, National Narcotic Officers' Association Coalition  
DET. HECTOR ALCALA, Kentucky State Police  
LINDSAY LaSALLE  
Senior Staff Attorney, Drug Policy Alliance  
MARY PRICE  
General Counsel, Families Against Mandatory Minimums

PANEL IV

The Honorable ANDREW E. LELLING, United States Attorney  
District of Massachusetts  
MIRIAM CONRAD  
Federal Public Defender, Districts of Massachusetts, New Hampshire, and Rhode Island

PANEL V

JOHN P. BENDZUNAS, Chair, Probation Officers  
Advisory Group  
KNUT S. JOHNSON, Vice-Chair, Practitioners  
Advisory Group  
T. MICHAEL ANDREWS, Chair, Victims Advisory Group  
TIMOTHY Q. PURDON, Member, Tribal Issues Advisory  
Group

PANEL VI

LAUREN E. JORGENSON, Member, Board of Directors,  
and Chair, Sentencing Committee, National  
Association of Assistant U.S. Attorneys  
KRISTINE LUCIUS, Executive Vice President for  
Policy, The Leadership Conference on Civil  
and Human Rights  
HEATHER RICE-MINUS, Vice President for  
Government  
Affairs, Prison Fellowship

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

2 9:00 a.m.

3 ACTING CHAIR PRYOR: (presiding) Good  
4 morning. Welcome to the United States Sentencing  
5 Commission's public hearing on synthetic drugs,  
6 first offenders, and alternatives to  
7 incarceration.

8 The Commission appreciates the  
9 attendance of those joining us here as well as  
10 those watching our livestream broadcast on the  
11 Commission's website. As always, we welcome and  
12 encourage the significant public interest in  
13 federal sentencing issues and the work of the  
14 Commission.

15 I want to start by introducing the  
16 other members of the Commission.

17 To my immediate left is Professor  
18 Rachel Barkow, who is the Segal Family Professor  
19 of Regulatory Law and Policy at the New York  
20 University School of Law. She serves as the  
21 Faculty Director of the Center on the  
22 Administration of Criminal Law at the law school.

23 To my immediate right is Judge Charles

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1 Breyer, who is the Senior District Judge for the  
2 Northern District of California and has served as  
3 the United States District Judge since 1998.

4 And two to my left is Judge Danny  
5 Reeves who is a District Judge for the Eastern  
6 District of Kentucky and has served in that  
7 position since 2001.

8 Zachary Bolitho is the Ex Officio  
9 Commissioner from the Department of Justice.  
10 Commissioner Bolitho serves as the Deputy Chief  
11 of Staff and Associate Deputy Attorney General to  
12 the Deputy Attorney General of the United States.  
13 And he's supposed to be joining us by phone.

14 Zach, can you hear us okay?

15 COMMISSIONER BOLITHO: I can, Judge.  
16 Can you hear me?

17 ACTING CHAIR PRYOR: Yes. Thanks.

18 COMMISSIONER BOLITHO: Thank you.

19 ACTING CHAIR PRYOR: Thanks for  
20 joining us by phone.

21 Zach has a very good reason for not  
22 being here in person. He is, as he should be,

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1 with his spouse this week in North Carolina  
2 because they just welcomed the birth of their new  
3 daughter.

4 So, congratulations.

5 COMMISSIONER BOLITHO: Yes. Thank  
6 you.

7 ACTING CHAIR PRYOR: Before we begin  
8 the hearing, I want to briefly update the public  
9 on some of the Commission's most recent  
10 publications and actions.

11 Last week, the Commission released its  
12 2017 Annual Report and Sourcebook of Federal  
13 Sentencing Statistics, which is available on our  
14 website. The Sourcebook is a comprehensive  
15 compilation of sentencing data on every felony  
16 and Class A misdemeanor sentenced in the federal  
17 courts. In fiscal year 2017, there were 66,873  
18 cases reported to the Commission, a decrease of  
19 869 cases from the prior fiscal year.

20 On Monday, the Commission launched our  
21 web app containing a mobile-friendly version of  
22 the current Guidelines Manual. I've already

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1 downloaded mine. The Guidelines app is an  
2 interactive web-based application accessible  
3 through any internet browser and features new  
4 tools to assist in understanding and applying the  
5 Federal Sentencing Guidelines. It allows users  
6 to quickly search through the Guidelines Manual  
7 by guideline or keyword and can assist in  
8 determining Guideline ranges in the Sentencing  
9 Table, base offense levels in the Drug Quantity  
10 Table, and marijuana equivalencies for substances  
11 referenced in the Drug Equivalency Tables. The  
12 app is accessible on a wide variety of devices,  
13 including desktops and mobile devices, and the  
14 Commission hopes it will be a useful resource for  
15 practitioners and the public.

16 Tomorrow, the Commission will issue a  
17 publication analyzing mandatory minimum  
18 penalties for firearms offenses in the federal  
19 system. This is the third publication in our  
20 series on mandatory minimum penalties. Firearms  
21 offenses are the second most common offenses  
22 carrying mandatory minimum penalties in the

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1 federal system after drug offenses, which the  
2 Commission previously analyzed in a report  
3 released last October.

4 This publication provides sentencing  
5 data on firearms offenses that carry mandatory  
6 minimum penalties and their impact on the federal  
7 prison population. This publication also  
8 highlights changes and trends regarding firearms  
9 offenses that have occurred since the  
10 Commission's 2011 Report.

11 Today's public hearing will focus on  
12 synthetic drugs, first offenders, and  
13 alternatives to incarceration. During the  
14 current amendment cycle, the Commission voted to  
15 publish proposed amendments to the Federal  
16 Sentencing Guidelines to address the treatment of  
17 synthetic drugs under the guidelines and to  
18 provide adjustments in the guidelines for first-  
19 time offenders. The Commission's proposed  
20 amendment on synthetic drugs would adopt a  
21 class-based approach for synthetic cathinones and  
22 cannabinoids, two types of synthetic drugs

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1 studied by the Commission over the past few  
2 years. The proposed amendment defines the term  
3 "synthetic cannabinoid" and establishes a single  
4 marijuana equivalency for each class.

5 The Commission also proposed an  
6 increase to penalties for fentanyl offenses and  
7 a more exact guideline definition of the terms  
8 "fentanyl" and "fentanyl analogue." An  
9 enhancement for misrepresenting or marketing  
10 fentanyl or fentanyl analogues as another  
11 substance was also proposed.

12 Finally, the Commission's proposed  
13 amendment regarding first-time offenders would  
14 increase the pool of offenders eligible for  
15 alternative sentencing options. This proposed  
16 amendment is informed by the Commission's multi-  
17 year study of approaches to increase the use of  
18 alternatives to incarceration and the  
19 Commission's multi-year study of recidivism.

20 We look forward to hearing from our  
21 expert witnesses on the proposed amendments on  
22 the agenda today. At the end of each panel's

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1 testimony, panelists may receive questions from  
2 Commissioners, and I will then give Commissioner  
3 Bolitho the opportunity to ask his questions over  
4 the phone. We look forward to a thoughtful and  
5 engaging discussion.

6 Your time will begin when the light  
7 turns green. Yellow means there is one minute  
8 left, and red means your time has expired. As I  
9 like to say when I'm back in court, please do not  
10 treat the red light as aspirational.

11 (Laughter.)

12 Be mindful of our time.

13 Our first three panels will focus on  
14 the Commission's amendment regarding synthetic  
15 drugs. Our first panelists are Robert Duncan and  
16 Kevin Butler.

17 Mr. Duncan is the United States  
18 Attorney for the Eastern District of Kentucky, a  
19 position he has held since November 2017. Before  
20 his appointment, he served more than a decade as  
21 an Assistant United States Attorney in the same  
22 District. He is a graduate of Centre College and

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1 the University of Kentucky School of Law.

2 Welcome.

3 MR. DUNCAN: Thank you, sir.

4 ACTING CHAIR PRYOR: Mr. Butler is the  
5 Federal Public Defender for the Northern District  
6 of Alabama, where my home chambers are. He has  
7 served as an attorney in the Federal Defender  
8 Program for 25 years, serving as the Chief Deputy  
9 Defender and the Chief Trial Attorney for the  
10 Middle District of Alabama and as an Assistant  
11 Federal Defender in the Eastern District of  
12 California and the District of Nevada. Mr.  
13 Butler is a graduate of Cornell University and  
14 the Sandra Day O'Connor College of Law at Arizona  
15 State University.

16 Welcome, Mr. Butler.

17 Mr. Duncan?

18 MR. DUNCAN: Thank you, sir.

19 Judge Pryor, Members of the Sentencing  
20 Commission, thank you for the opportunity to  
21 present the Department of Justice's views on the  
22 Commission's proposed amendments to the U.S.

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1 Sentencing Guidelines related to synthetic drugs.

2 COMMISSIONER BREYER: Sorry. Could  
3 you move the microphone close to you?

4 MR. DUNCAN: Closer? Yes, sir. Yes.  
5 Is that better? Okay.

6 ACTING CHAIR PRYOR: I'm not sure.  
7 Keep speaking and we'll tell you.

8 MR. DUNCAN: I will speak up.

9 First, I'd like to discuss the  
10 proposed guideline amendments for synthetic  
11 cathinones. The Commission proposes adopting a  
12 class approach that would result in a single  
13 marijuana equivalency for all synthetic  
14 cathinones. The Department supports the class  
15 approach for these substances, and we believe it  
16 will make sentencing under the guidelines more  
17 efficient and promote consistency and uniformity  
18 in sentencing outcomes.

19 As DEA witnesses explained at the  
20 October 4th hearing, all synthetic cathinones  
21 share a common chemical structure well accepted  
22 in the scientific community.

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1                   ACTING CHAIR PRYOR: Mr. Duncan, maybe  
2                   the issue is to move that microphone.

3                   MR. DUNCAN: Independent scientists  
4                   Dr. Dudley and Dr. Gatch, called by the  
5                   Commission to testify at the same hearing, made  
6                   the same characterization. Moreover, a class  
7                   approach makes sense, given that traffickers pass  
8                   one cathinone as another and users rarely know  
9                   the specific compound they are, in fact,  
10                  consuming.

11                  As for the equivalency that the  
12                  Commission should assign to the class, two  
13                  approaches present themselves. First, the  
14                  Commission could look closely at the  
15                  equivalencies the courts have adopted in all past  
16                  synthetic cathinone cases and simply apply an  
17                  average. According to the Commission's data for  
18                  the fiscal year 2015, in 186 cathinone cases,  
19                  predominantly involving methyldone, A-PVP, and  
20                  MDPV, the mean equivalency was 1-to-364 and the  
21                  median equivalency, 1-to-380. The Department has  
22                  no objection to setting the equivalency at 1-to-

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1 380. As the second approach, the Commission  
2 could start with the median equivalency from past  
3 cases, but then go beyond the confines of  
4 Application Note 6 and also address the relative  
5 toxicity of these substances.

6 The Commission has been presented with  
7 a great deal of evidence on unexpected adverse  
8 health reactions, hospital emergencies, and  
9 impacts on first responders following the use of  
10 synthetic cathinones, including psychosis,  
11 paranoia, hallucinations, combativeness,  
12 agitation, tremors, seizures, and death.

13 For the second approach, the  
14 Commission could also consider that, as discussed  
15 by DEA chemists and pharmacologists, synthetic  
16 cathinones, such as methyldone, MDPV, methadone,  
17 and A-PVP, have characteristics similar to  
18 amphetamine, methamphetamine, MDMA, and cocaine,  
19 and that three of the four substances have  
20 equivalencies higher than 1-to-380.

21 As concerns synthetic cannabinoids,  
22 for largely the same reasons, the Department also

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1 supports a class approach. A class approach will  
2 address the ongoing problem of new synthetic  
3 cannabinoids being introduced into the illicit  
4 drug market in a manner designed to circumvent  
5 the existing statutory and regulatory framework.  
6 Adding an equivalency for each known synthetic  
7 cannabinoid would be impractical, as there are  
8 thousands of possible synthetic cannabinoids  
9 derived from the indole or indazole chemical  
10 structures alone.

11 But, once again, the Commission must  
12 decide which precise marijuana equivalency should  
13 be applied to the class. The Commission has  
14 provided three options, 1-to-167, 1-to-334, and  
15 1-to-500. A review of the cases involving  
16 different synthetic cannabinoids demonstrates  
17 that many courts have arrived at an equivalency  
18 of 1-to-167 under the Application Note 6 process.

19 However, just as with synthetic  
20 cathinones, Application Note 6 does not ask the  
21 court to evaluate the most serious dangers  
22 associated with a substance. Dr. Trecki

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1 explained that, unlike THC and marihuana,  
2 synthetic cannabinoids have produced multi-organ  
3 failures, seizures, and deaths. As noted by Dr.  
4 Gatch, it is synthetic cannabinoids, unlike THC  
5 and marijuana, which produce the most severe  
6 adverse effects, including central nervous system  
7 effects such as extreme agitation, seizures,  
8 stroke, and coma.

9 Finally, unlike THC and marijuana,  
10 synthetic cannabinoids were specifically  
11 developed and marketed to evade U.S. law.  
12 Accordingly, the Department believes for  
13 synthetic cannabinoids, the equivalency should be  
14 higher than the 1-to-167 equivalency currently  
15 provided for THC.

16 The Commission has also asked whether  
17 the guidelines should distinguish between  
18 synthetic cannabinoids in actual form, such as in  
19 powder form, and the synthetic cannabinoid as  
20 part of a mixture. As you are aware, the general  
21 rule in guidelines is that the weight of a  
22 controlled substance set forth in the table

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1 refers to the entire weight of any mixture or  
2 substance containing a detectable amount of the  
3 controlled substance. As a practical matter, it  
4 would be virtually impossible for DEA  
5 laboratories to readily determine the amount of  
6 synthetic cannabinoid that has been applied to  
7 plant matter in a particular drug packet.

8 In December testimony, DEA scientist  
9 Dr. Daniel Willenbring explained the number of  
10 practical difficulties. There's a problem of  
11 getting the chemical off the leaf. Then, there's  
12 the problem of having a validated method for  
13 every synthetic cannabinoid. And even if the lab  
14 has done all this, because of the fact that  
15 traffickers use cement mixers and garden sprayers  
16 in manufacturing and packaging these products,  
17 causing hotspots and coolspots, if the lab opens  
18 one packet and simply takes a sample of that  
19 packet and figures out how much drug is in that  
20 particular sample, the estimate may not apply to  
21 the rest of the packet or to any of the other  
22 packets. In sum, this proposal would create

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1 serious practical problems.

2 Now, turning to the amendments  
3 concerning fentanyl and fentanyl analogues, it  
4 would be difficult to overstate the impact of the  
5 opioid crisis that is currently gripping our  
6 nation. The Eastern District of Kentucky where  
7 I serve as United States Attorney has been one of  
8 the hardest hit by the crisis. The 2016 Overdose  
9 Fatality Report for Kentucky, prepared by the  
10 Kentucky Office of Drug Control Policy, noted  
11 that there were 1,404 overdose deaths in  
12 Kentucky. Fentanyl was a factor in 47 percent of  
13 those overdoses. For Fayette County, the  
14 overdose deaths for 2017 -- and Fayette County is  
15 Lexington, Kentucky, where the U.S. Attorney's  
16 Office Headquarters is -- there were 179 overdose  
17 deaths. Ninety-five involved fentanyl, 5  
18 involved fentanyl analogues, and 2 involved  
19 carfentanil.

20 On a daily basis, I see the death and  
21 destruction caused by fentanyl and fentanyl  
22 analogues. We have prosecuted numerous death-

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1 resulting cases, many of which involving  
2 fentanyl, and there are more in the pipeline.  
3 The lethality of fentanyl and fentanyl analogues  
4 is virtually unmatched, but that unmatched  
5 lethality is not currently reflected in the  
6 guidelines.

7           Although opioid tolerance may develop  
8 in users, as little as 2 milligrams is a lethal  
9 dose for most people. In contrast, the average  
10 lethal dose for heroin is approximately 200  
11 milligrams. Yet, the lowest quantity threshold  
12 for fentanyl in the Drug Quantity Table, 4 grams,  
13 is at a level 12. Thus, a defendant trafficking  
14 in up to 4 grams of fentanyl receives a base  
15 offense level of 12, or 10 after the common two-  
16 level reduction for acceptance of responsibility.  
17 For a defendant who pleads guilty and falls  
18 within criminal history Category I, a base  
19 offense level of 10 yields a Zone B guidelines  
20 range of 6 to 12 months. A defendant who sells  
21 enough fentanyl to kill almost 2,000 people  
22 should not be eligible for probation. In

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1 contrast, for heroin, a similar, but less lethal  
2 opioid, the same guideline range would apply up  
3 to 10 grams of heroin, which is enough for 50  
4 lethal doses.

5 As the Commission is aware, the  
6 Department asked the Commission to increase the  
7 penalties for both fentanyl and fentanyl  
8 analogues. The Commission's proposed amendment  
9 takes a slightly different approach by changing  
10 the base offense levels for fentanyl to parallel  
11 those established for fentanyl analogues.  
12 Although the Department would like to have seen  
13 a proposed amendment increasing the penalties for  
14 both fentanyl and fentanyl analogues, we support  
15 the proposed amendment because it will ultimately  
16 result in increased penalties for those who  
17 traffic in fentanyl.

18 For example, a defendant who sells 2.5  
19 grams of fentanyl today would receive, before an  
20 acceptance of responsibility adjustment, a base  
21 offense level of 12 and a guideline range of 10  
22 to 16 months. Under the proposed amendment, that

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1 same defendant would receive a base offense level  
2 of 16 and a guideline range of 21 to 27 months.  
3 This is a step in the right direction, and the  
4 Department urges the Commission to adopt the  
5 change.

6 The Commission has also proposed a new  
7 guideline definition for fentanyl analogue. The  
8 new definition will resolve an ambiguity in the  
9 guidelines, and the Department supports that  
10 amendment.

11 Finally, I would like to discuss the  
12 proposed enhancement for offenses involving  
13 fentanyl and fentanyl analogues misrepresented as  
14 another substance. Drug traffickers are now  
15 mixing fentanyl and fentanyl analogues with other  
16 drugs and using commercially-available pill  
17 presses to produce pills that contain fentanyl  
18 and fentanyl analogues, but appear to be less  
19 lethal prescription drugs like oxycodone and  
20 hydrocodone. Both of these practices are  
21 dangerous and are directly related to the  
22 increase in overdose deaths that our country is

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1 experiencing right now. The Department supports  
2 the amendment, and we thank the Commission for  
3 this important change.

4 Thank you, Commissioners, for the  
5 opportunity to share the Department's views on  
6 these important issues. I look forward to  
7 answering your questions.

8 ACTING CHAIR PRYOR: Thank you.

9 Mr. Butler?

10 MR. BUTLER: Thank you very much. I  
11 thank the Commission for providing me the  
12 opportunity to testify on behalf of the Federal  
13 Defenders.

14 I've had the great fortune of serving  
15 as an attorney in the Federal Defender Program  
16 since 1992. Unfortunately, during my entire  
17 practice the sentencing guidelines have been  
18 inseparably intertwined with the mandatory  
19 minimums set forth in the Anti-Drug Abuse Act of  
20 1986.

21 Consequently, drug punishments have  
22 never been based on an empirical analysis of what

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1 a fair and proportionate sentence should be. The  
2 most infamous example of this flaw was basing  
3 crack guidelines on mandatory minimums. I have  
4 personally represented hundreds of people charged  
5 with crack offenses. Most were low-income. Most  
6 were minority. Most had minor criminal history.  
7 Most were addicted to drugs or couriers, low-  
8 level street dealers, or facilitating family  
9 members. Many had mental health issues. Most  
10 were charged with nonviolent offenses involving  
11 5 to 50 grams of crack.

12 However, for this nonviolent offense,  
13 these people received sentences ranging from 60  
14 months to the rest of their life in prison that  
15 is recommended under the guidelines. As a  
16 consequence of sentencing policy tied directly to  
17 what we call politically-motivated mandatory  
18 minimums, the prison population exploded and  
19 families and communities were decimated.

20 The Commission rightly urged changes  
21 regarding crack. Now the Commission's proposed  
22 synthetic drug amendments not only have the

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1 potential of repeating the disastrous crack  
2 sentencing structure but exacerbating its flaws.

3 The defender community is mindful of  
4 the impact and harms posed by fentanyl. In one  
5 tragic case, the defender represented a middle-  
6 aged man with serious mental health issues who  
7 voluntarily entered a drug treatment program. He  
8 was seduced by a drug counselor at that program  
9 who let him out of the program, gave him money,  
10 and took him to a dealer to buy heroin. After he  
11 almost died of an overdose, a friend reached out  
12 to this man to get heroin. She died after he  
13 unknowingly gave her heroin that was laced with  
14 fentanyl. At sentencing, his guideline range was  
15 210 to 240 months in prison. However, the court  
16 accepted the plea offer by both the government  
17 and the defense and sentenced him to 15 years.  
18 This sentence was the equivalent to second degree  
19 manslaughter in New York.

20 I provide this case to underscore the  
21 point that, under our current guidelines, the  
22 courts already have the authority to impose

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1 severe sentences when serious bodily injury or  
2 death results. A person with no criminal history  
3 who is convicted under 21 U.S.C. § 841(a)(1) is  
4 subject to a penalty of 235 to 292 months in jail.  
5 A person with one prior drug offense could be  
6 facing a mandatory life sentence.

7 As the Commission concluded in 2015,  
8 ratcheting up a penalty for a drug guideline does  
9 not deter crime, but, instead, it increases  
10 sentencing disparity. Additionally, in 2016, in  
11 63 percent of the fentanyl cases, courts imposed  
12 sentences below the current guidelines. This  
13 data strongly suggests that, if penalties are  
14 increased, litigation will increase and courts,  
15 using the guidance provided by the Supreme Court  
16 in Kimbrough, will set aside these unempirically-  
17 based ratios.

18 Furthermore, this amendment  
19 undermines the Commission's and the guidelines'  
20 goal of providing just and proportionate  
21 sentences. First, instead of targeting major  
22 traffickers, the amendment will most directly and

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1 dramatically increase the penalties for couriers,  
2 lookouts, and other minor participants whom the  
3 Commission's own data shows didn't know they  
4 possessed fentanyl.

5 Second, by setting the same ratio for  
6 fentanyl and its analogues without consideration  
7 of purity, the proposed amendment will lead to a  
8 disproportionate sentence, as an addict who  
9 possesses the same weight of an adulterated  
10 mixture containing a minute fraction of fentanyl  
11 and will be subject to the same sentence as a  
12 major trafficker who possesses the same weight of  
13 the pure substance.

14 If a comprehensive review of the drug  
15 guidelines is not favored -- one moment.

16 (Pause.)

17 Can you all hear me?

18 ACTING CHAIR PRYOR: I can hear you,  
19 but I was just wondering if maybe use that other  
20 microphone. I'm just concerned, with that red  
21 light blinking, that you're not being picked up,  
22 Mr. Butler.

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1 Keep going.

2 MR. BUTLER: Keep going? Okay.

3 If a comprehensive review of the drug  
4 guidelines is not favored, we would ask the  
5 Commission to use the same analysis it did with  
6 LSD when assessing fentanyl. Like LSD, we would  
7 ask the Commission to utilize a dosage system  
8 that excludes the weight of the carrier mixture  
9 or substance, which oftentimes far exceeds the  
10 weight of the controlled substance itself, in  
11 setting the base offense level. This can  
12 possibly be done by amending §2D1.1 to encourage  
13 a downward departure whenever the weight of the  
14 mixture or substance containing a detectable  
15 amount of the drug exceeds the weight of the  
16 active ingredient. And, two, encouraging a  
17 downward or upward departure whenever the potency  
18 of fentanyl is greater or lesser than alpha-  
19 Methylfentanyl.

20 The definition proposed by the  
21 Commission we believe also is too vague. I'm not  
22 a chemist, but Dr. Logan testified, I believe, on

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1 December 5th, that when determining if a given  
2 substance is a fentanyl analogue, the chemical  
3 must have three characteristic domains. That  
4 form of specificity is missing in this  
5 definition. Because this detail is missing,  
6 chemicals that may not be related to fentanyl may  
7 be included because they are similar.

8 To avoid non-fentanyl analogues being  
9 swept in, we would ask the definition to include  
10 "effect similar to fentanyl." We would also ask  
11 the definition not use "represented or intended  
12 to have the same effect." This vague language  
13 will lead to circumstances where substances that  
14 are not chemically similar to fentanyl, but  
15 represented by someone as fentanyl, are subject  
16 to enhanced penalties.

17 We also don't think the guidelines  
18 should punish people who do not knowingly  
19 misrepresent a given substance as something else,  
20 as this option would penalize a significant  
21 percentage of individuals whom the Commission's  
22 own data shows unwittingly possessed the drug

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1       fentanyl, that is, in a mixture usually with  
2       heroin.

3               However, if the Commission opts to  
4       include a specific offense characteristic related  
5       to knowledge, it should add no more than two  
6       levels and, two, require that the defendant  
7       knowingly misrepresented or knowingly marketed  
8       the mixture or substance as another substance.

9               Turning to synthetic cannabinoids,  
10       the proposed amendments to synthetic cannabinoids  
11       highlights the empirical flaws of the current  
12       guideline drug equivalency table and, two,  
13       underscores the perils of building a  
14       classification and sentencing ratios whose  
15       foundations are based upon a fiction. Over 30  
16       years ago, the United States Sentencing  
17       Guidelines promulgated the ratio of 1 gram of THC  
18       equals 167 grams of marijuana. The ratio appears  
19       to have been plucked from thin air. And in  
20       litigation, the government has conceded there was  
21       no scientific basis for the ratio of 1-to-167.

22               However, the proposed amendment, the

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1 synthetic cannabinoid amendment, builds upon this  
2 phantom ratio. Rather than use or even set higher  
3 ratios, we ask the Commission to adjust the THC  
4 ratio to reflect the empirical data that has been  
5 developed that indicates that the average THC  
6 content in marihuana is 14 percent. The lack of  
7 empirical data supporting this 1-to-167 ratio is  
8 reflected in the fact that in 2015, in over 70  
9 percent of synthetic cannabinoid cases, the court  
10 imposed a sentence below the current advisory  
11 range set at 1-to-167.

12 In addition to the flawed ratio, the  
13 proposed class and definition has three problems.  
14 First, there are multiple variations in chemical  
15 composition of different synthetic cannabinoids.  
16 In fact, there's been internal disagreement  
17 within the DEA whether certain chemical  
18 structures are, in fact, synthetic cannabinoids.

19 Second, these widely varying  
20 compounds do not have the same pharmacological  
21 effect as THC on CB1 receptors. Some, for  
22 instance, have no effect on CB1 receptors. Some

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1 impact CB2 receptors.

2 Third, synthetic cannabinoids have  
3 varying potency and strength per unit.

4 Because of the lack of consensus in  
5 the scientific community, we ask the Commission  
6 not to adopt a class-based approach and amend  
7 Note 6 to give the courts a simpler harms-based  
8 analysis. If the Commission does impose a class,  
9 we ask two things. First, to reduce chances of  
10 unwarranted disparities, the definition should  
11 focus on drugs that are full agonists of CB1  
12 receptors. Additionally, list specific examples  
13 of what substances fall within the class. This  
14 would help avoid confusion and disparity.  
15 Second, there should be a distinction between  
16 synthetic cannabinoids possessed in actual form  
17 and those in a substance or mixture.

18 Finally, we would ask that a base  
19 offense level 12, which essentially mandates  
20 prison, not be included. The guidelines  
21 shouldn't mandate prison where there is no harm  
22 and if there are mitigating circumstances present

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1 that the court might determine warrant a sentence  
2 other than prison.

3 I ask the Commission to review my  
4 written testimony as to synthetic cathinones. It  
5 addresses all my points.

6 ACTING CHAIR PRYOR: Yes, if you  
7 needed a minute or so more, Mr. Butler, that's  
8 okay, since we interrupted your testimony.

9 MR. BUTLER: Oh, this should only take  
10 a minute or two more.

11 ACTING CHAIR PRYOR: Okay.

12 MR. BUTLER: Thank you.

13 In over 70 percent of synthetic  
14 cathinone cases in 2015, the court imposed a  
15 sentence below the advisory guideline range.  
16 Additionally, because there's such a multitude of  
17 different types of synthetic cathinones, and the  
18 potency and effects amongst this multitude of  
19 synthetic cathinones varies greatly, a class-  
20 based approach would be unfair and lead to  
21 disparate sentences.

22 For example, ethylone is less powerful

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1 than methylone. Methylone is 50 percent less  
2 powerful than MDMA. However, if I was a low-  
3 level drug dealer in possession of 50 grams of  
4 ethylone, I'd be subject to the same sentence as  
5 somebody -- which is very much less powerful than  
6 MDMA -- I'd be subject to the same penalty as  
7 somebody who did possess MDMA.

8 If the Commission sets ratios for  
9 synthetic cathinones, it should set different  
10 ratios for different synthetic cathinones. Just  
11 specify the pharmacological effects associated  
12 with each cathinone, provide information on how  
13 to apply the class, identify in commentary the  
14 specific substances it considered in adopting the  
15 class, and set the ratio at no greater than 1-  
16 to-100, as this synthetic, on average, is less  
17 potent than MDMA. And finally, include a  
18 departure provision tied to potency and direct  
19 harms.

20 If a class is established,  
21 methcathinone should not be included. It is not  
22 chemically similar. It is substantially more

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1       potent than the most common -- it should not be  
2       included.

3                       Finally, for the same reasons stated  
4       as to cannabinoids, the Defenders strongly oppose  
5       the base offense level recommended, that being  
6       12, for the same reasons.

7                       Thank you for this opportunity to  
8       address the Commission.

9                       ACTING CHAIR PRYOR:    Thank you, Mr.  
10       Butler.

11                      Questions?

12                      COMMISSIONER BARKOW:    One question  
13       that I have for both of you, I guess, really is,  
14       we have other testimony that talks about, if we  
15       continue to take the approach we do that's based  
16       on weight, there will be an incentive for the  
17       distributors of these drugs to make them ever  
18       more potent.    And I'd like to just get the  
19       reaction particularly of the Government about  
20       that concern, but also you as well, Mr. Butler,  
21       if you do, about just the worry that it would be  
22       counterproductive to do that because of the

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1 incentives it would create if we don't take  
2 potency into account in some way, either with a  
3 departure provision or otherwise, because of what  
4 it will mean for the incentives.

5 MR. DUNCAN: I think, from the  
6 perspective of law enforcement, we recognize that  
7 drug traffickers will often consider increasing  
8 potency if a product doesn't sell. And  
9 specifically with the synthetics, the self-  
10 selection of those products that aren't selling  
11 will wither away and not be available.  
12 Naturally, they'll want to increase the potency  
13 to make it more profitable for the drug seller.

14 COMMISSIONER BARKOW: But do they also  
15 have an incentive to do that if we're basing this  
16 on weight without a consideration of potency at  
17 all? So, if it's a strictly weight-based kind of  
18 calculation, the idea is to make the product more  
19 potent, so it weighs less than what you need to  
20 distribute it. Has the Government considered  
21 that relationship?

22 MR. DUNCAN: I don't know that it

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1 would affect the drug distributor making the  
2 substance weigh less to get more potency.  
3 Specifically with synthetic cannabinoids,  
4 they're going to use the same 1 gram-2 gram dose  
5 packet, and they'll just put more chemical, or  
6 mixture of the chemical. It won't necessarily  
7 increase or decrease the weight of the actual  
8 packets.

9 COMMISSIONER BARKOW: And with  
10 fentanyl?

11 MR. DUNCAN: With fentanyl, there  
12 doesn't have to be nearly as much. You know, the  
13 doses of fentanyl are much, much less, and  
14 fentanyl is deadly with as low as 2 milligrams.  
15 So, I don't know that it would necessarily lead  
16 to -- because fentanyl is plenty deadly enough.  
17 To increase the base offense levels, recognizing  
18 the danger of fentanyl, is appropriate.

19 COMMISSIONER BREYER: Well, I would  
20 like to ask the Government, there's no question  
21 now -- and we've received a lot of testimony about  
22 the dangers, the horrific dangers of very, very

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1 small quantities of fentanyl in different drugs.  
2 And that's a problem that I think, appropriately,  
3 we have to address.

4 The question really is, in my mind,  
5 whether or not we add, for example, a requirement  
6 that the defendant know that there was the  
7 introduction of this drug or fentanyl into other  
8 controlled substances, whether that is going to  
9 make a difference in terms of enforcement. And  
10 in particular, I mean, you take a look at the  
11 whole drug structure, the law that's been around  
12 for years, which is, to the satisfaction of  
13 prosecutors, is that all you need to do for a  
14 conviction, basically, is to show that the  
15 defendant knew that the substance was a  
16 controlled substance, not which substance. But  
17 it seems to me a rather large extension to say  
18 not only are we going to attribute criminal  
19 responsibility to a defendant for the controlled  
20 substance, we're also going to assign an  
21 augmentation of that sentence if, in fact, the  
22 controlled substance, which the defendant may not

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1 have known what it was, further has to know that,  
2 not even knowing what it was, he or she has to  
3 know that it was corrupted by the introduction of  
4 fentanyl, as an example.

5 I don't for a moment question the  
6 seriousness of the harm that can be caused. What  
7 I'm trying to do is figure out how you assign  
8 criminal responsibility, because, ultimately,  
9 that's what judges have to do. So, I'd like to  
10 know, is there any evidence in your experience,  
11 or the Department's experience, that suggests  
12 that, if you don't have a requirement that the  
13 defendant knew, for example, that the substance  
14 was adulterated by this other drug, that that  
15 would reduce or otherwise address the harm or the  
16 incidence of criminal activity?

17 Is that question clear? It's sort of  
18 a long speech. So, I apologize for that, but my  
19 family gives long speeches.

20 (Laughter.)

21 ACTING CHAIR PRYOR: Y It did remind  
22 me of somebody.

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1 (Laughter.)

2 COMMISSIONER BREYER: However, I mean,  
3 really what I'm asking you is, what evidence is  
4 there, because we have to base this on evidence,  
5 what evidence is there that, if you do away with  
6 or don't include a requirement of knowledge of  
7 the defendant that the substance is adulterated,  
8 that that will affect law enforcement?

9 ACTING CHAIR PRYOR: Got that?

10 MR. DUNCAN: I am trying to process --

11 COMMISSIONER BREYER: It's not easy.  
12 I apologize for that.

13 (Laughter.)

14 MR. DUNCAN: If I understand your  
15 question, Judge, you're asking about the  
16 knowingly requirement? Regarding the knowledge  
17 requirement, we believe that the state of law and  
18 the state of the guidelines as currently set is  
19 appropriate, that you just have to know that  
20 you're distributing a controlled substance to  
21 sustain the conviction. We believe that is  
22 sufficient as is.

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1                   COMMISSIONER BREYER:     Okay.     Thank  
2     you.

3                   ACTING CHAIR PRYOR:    Go ahead.

4                   COMMISSIONER REEVES:        Just     one  
5     question.    This really relates to fentanyl more  
6     than it does the other substances.    And I would  
7     like for both of you to respond, if you could.

8                   It goes to this whole concept that  
9     we've always had that we draw these distinctions  
10    between major drug traffickers and street-level  
11    dealers.     In light of the dangerousness of  
12    fentanyl, where a street-level dealer can kill a  
13    dozen people on a weekend, is it fair to draw  
14    that distinction now?  Or can we say that street-  
15    level dealers are now major dealers when we're  
16    talking about fentanyl?

17                  MR. DUNCAN:     Judge, I would say for  
18    fentanyl, since the quantities for lethality are  
19    so low, that you can be a major fentanyl dealer  
20    and have a relatively, what we would consider a  
21    small quantity of any other drug, when you  
22    consider that the lethal dose is 2 milligrams, if

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1       you have 4, 5, 10 grams, that's a significant  
2       amount of fentanyl that can kill potentially or  
3       at least harm a very significant segment of the  
4       population.

5                   MR. BUTLER: I guess my response will  
6       be similar to what was echoed in my earlier  
7       comments. The focus of both the guidelines and  
8       I think our criminal justice system has been,  
9       well, our guidelines -- purity, for instance, is  
10      related to role in the offense. People who tend  
11      to have the most concentrated portions of this  
12      drug are more culpable than those who are lower  
13      in the chain and have less concentrated.

14                   Under your hypothetical, if a courier  
15      or a street-level dealer unknowingly comes into  
16      possession of a mixture or substance that has not  
17      been processed correctly, and is potentially more  
18      lethal, the fact remains, though, that that  
19      individual is not knowingly in possession of that  
20      lethal dosage. When it goes out, it might have  
21      impact, but that was not his intent at the time  
22      of the distribution.

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1           My point, simply being, is, under our  
2 criminal justice system and the guidelines, it  
3 is, it has always been our position that people  
4 who are more culpable, the leader or the  
5 organizers, the major traffickers, should receive  
6 sentences that are greater than the lower-level  
7 persons.

8           Yes, with fentanyl, in the example,  
9 for instance, that I have, an individual  
10 distributed drugs that were laced, but the  
11 guidelines provide the courts with the tools  
12 necessary to impose adequate punishment if  
13 serious bodily injury or death results. Simply  
14 ramping up the ratio for fentanyl will not serve  
15 as a deterrent to that lower-level person in the  
16 scheme.

17           COMMISSIONER BARKOW: I have one other  
18 question, if I could, just to shift to the  
19 cannabinoids. So, we have testimony -- and we'll  
20 hear more later from probation officers -- about  
21 one possibility to deal with the mixture versus  
22 the pure form when it's sprayed on the plant

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1 material. That, if it's basically roughly 1 gram  
2 of the material, you could kind of get 14 times  
3 the plant quantity. They have a suggestion that  
4 we could just divide by 14, how we treat a mixture  
5 as opposed to the pure form. So, you know,  
6 whatever number we would set, if we did, for a  
7 class-based approach, that could be the amount  
8 that we would set for the pure form, but then we  
9 could divide that by 14, and that's how we would  
10 treat the mixture.

11 And I'd like to get your reaction of  
12 that as a possible solution. So, instead of  
13 having to do, as you have pointed out, Mr. Duncan,  
14 the testing and figure out if you've got a hotspot  
15 or a coldspot, it would avoid that by just  
16 basically saying we'll just assume it's roughly  
17 14 times the plant material. And so, we divide  
18 whatever the plant quantity was by 14 to get our  
19 number.

20 If that's a decent surrogate for  
21 trying to get this balance between the fact that  
22 it's going to be far greater in weight than it

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1 would be with potency, is just this kind of  
2 dividing by 14?

3 MR. BUTLER: Well, I guess our  
4 response and our position is we're not in favor  
5 of that proposal, given the fact that there's  
6 such wide -- speaking, for instance, on  
7 cathinones; I mean, excuse me, cannabinoids --

8 COMMISSIONER BARKOW: This would be  
9 for the cannabinoids.

10 MR. BUTLER: Cannabinoids. Speaking  
11 as the cannabinoids, there's just a wide variety  
12 of chemical compositions and potency. Setting a  
13 ratio that's not based upon empirical data, and  
14 then, doing this 14-division ladder, we still  
15 have the fundamental flaw of setting this ratio  
16 inappropriately. So, I guess our position is we  
17 would oppose the ratio that is currently being  
18 set.

19 MR. DUNCAN: And, Professor, our  
20 position would be that the Commission should  
21 assign one of the three proposals that the  
22 Commission has put forth. I think that the

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1 scenario proposed by the probation office, I  
2 think, again, would be too difficult, too  
3 unwieldy to employ. And we would suggest the  
4 Commission just go with a class-based approach  
5 for picking one of those three numbers for those.

6 ACTING CHAIR PRYOR: Zach, do you have  
7 any questions? Commissioner Bolitho?

8 COMMISSIONER BOLITHO: No. Thank you,  
9 Judge.

10 ACTING CHAIR PRYOR: Okay. Thank you.  
11 Of course, we have your written testimony as  
12 well.

13 MR BUTLER: Thank you, Your Honor.

14 ACTING CHAIR PRYOR: Okay. Our second  
15 panel will continue our discussion of the  
16 Commission's synthetic drug amendment with input  
17 from members of the Commission's advisory groups.  
18 Our panelists include John Bendzunas and Knut  
19 Johnson.

20 Mr. Bendzunas is the Chair of the  
21 Commission's Probation Officers Advisory Group.  
22 He began his career as a United States Probation

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1 Officer in the District of Vermont in 2000. He  
2 was promoted to a Sentencing Guidelines  
3 Specialist in 2008 and then to a Supervisory  
4 United States Probation Officer in 2014. He  
5 holds a Bachelor of Arts degree from Marywood  
6 University and a Master's of Arts degree from the  
7 State University of New York at Albany.

8 Mr. Johnson is the Vice Chair of the  
9 Commission's Practitioners Advisory Group. He  
10 has practiced in his own law firm in San Diego  
11 since 1996. Previously, he worked for several  
12 other law firms, as well as the San Diego Office  
13 of the Federal Public Defender. He is a graduate  
14 of Tulane University, a well-educated  
15 man -- (laughter) -- and the University of San  
16 Diego School of Law.

17 Mr. Bendzunas?

18 MR. BENDZUNAS: Thank you, Judge  
19 Pryor, both for the introduction and the  
20 invitation to be here today. We appreciate it.

21 POAG has followed the Commission's  
22 study of synthetic drugs, and we have seen how

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1 they have impacted public health institutions,  
2 law enforcement agencies, and observed the  
3 various complications, some serious  
4 complications, in federal sentencing. We've  
5 assisted courts as they struggle to apply  
6 guidelines to substances that are constantly  
7 changing, and supervision officers have been  
8 forced to adapt to some new realities in the  
9 field. We discussed a few of these issues,  
10 supervision issues, in our written submission as  
11 they relate to the cost, the availability, and  
12 the reliability of drug testing.

13 POAG strongly recommends the class-  
14 based approach forwarded by the Commission, along  
15 with assigning a minimum base offense level of 12  
16 to each of the substance classes.

17 Regarding synthetic cathinones, the  
18 District's reporting issues of these drugs, from  
19 our feedback, tend to be more metropolitan in  
20 nature, where they are used as club drugs, and  
21 also in isolated rural pockets across the  
22 country.

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1           Although there is some variation  
2 between the substances, they are similar enough  
3 to form a class. We recommend the elimination of  
4 methcathinone from the Equivalency Table and  
5 folding that into the class.

6           We would endorse either a 1-gram-to-  
7 250-gram or 1-gram-to-380-gram equivalency for  
8 the cathinones. We observed that in the 2015  
9 data extraction, most district courts, after  
10 hearing the science and the evidence behind it,  
11 they chose those two equivalencies most often.  
12 And we would support either one.

13           Regarding synthetic cannabinoids, we  
14 would note that there are over 120 different  
15 chemical variants within the class, and Districts  
16 across the country have been forced to repeatedly  
17 hold evidentiary hearings. It has caused a lot  
18 of resources to be utilized to process this.

19           POAG strongly supports the class-  
20 based approach for synthetic cannabinoids. While  
21 there may be some differences between the  
22 substances, we believe they're sufficiently

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1 similar to be treated as one group.

2 We also support the definition  
3 forwarded by the Commission regarding synthetic  
4 cannabinoids and prefers the "binds to and  
5 activates" language option. We find that to be,  
6 a little bit, simple and direct, it will be easy  
7 to apply.

8 However, we do believe that the  
9 definition needs modification. There's two  
10 distinct forms of synthetic cannabinoids that  
11 tend to pop up, the pure powder form, the  
12 substance that is often imported into the U.S.,  
13 and it's in powder form before it's applied to  
14 the inert plant material. And we feel that the  
15 coated plant material should receive a different  
16 equivalency.

17 Expert witnesses provide testimony  
18 that 1 kilogram of pure synthetic cannabinoids,  
19 the powder, can be used to manufacture 14  
20 kilograms of the smokable product. Utilizing the  
21 current mixture and substance rule and guideline  
22 application, an obvious disparity arises.

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1 Individuals who possess the pure product will  
2 unfairly realize the benefit from those who only  
3 deal in the smokable product.

4 As such, we have recommended two  
5 separate equivalencies. For the pure synthetic  
6 cannabinoids, the pure powder product, we're  
7 recommending a 1-gram-to-334-gram equivalency.  
8 We base this on the testimony that we have heard  
9 that, in the pure form, synthetic cannabinoids  
10 are twice as harmful as THC. We would note that  
11 powder seizures typically occur higher in the  
12 distribution chain, so there's a level of  
13 culpability that the Commission could consider.  
14 People in powder are often involved with  
15 production labs, direct importation, and actually  
16 manufacturing the smokable product.

17 So, taking that 334 grams and dividing  
18 it by 14, we arrive at a second conversion for  
19 the smokable synthetic cannabinoids, the coated  
20 plant material, and we arrive at 1-to-24 grams.  
21 We would note that in the 2015 data extraction  
22 the majority of courts utilized the 1-to-167

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1 ratio. I believe it was 91 percent. We don't  
2 know how many cases involved the pure powder or  
3 the smokable product, but what we do know is that  
4 in 80 percent of those cases, courts using that  
5 equivalency ultimately either departed or varied.  
6 So, there's a low fidelity to the 167 ratio.

7 And from what we have seen and the  
8 cases that we have observed, cases are often at  
9 or near the statutory max. So, we believe the  
10 lower equivalency will produce a more rational  
11 result.

12 Lastly, fentanyl and fentanyl  
13 analogues, as the Commission has heard, it is a  
14 very dangerous substance. It has affected our  
15 agency significantly. We've had many overdose  
16 deaths, and within our pretrial release and post-  
17 conviction release populations it's a new reality  
18 that officers, unfortunately, have to deal with.  
19 And some officers are even carrying Narcan in the  
20 field, not only if they are to -- I realize I'm  
21 about to run a red light here, but I'll try to  
22 wrap it up -- not only if they encounter an

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1 overdose, but also if they're inadvertently  
2 exposed to the substance themselves.

3 So, we recommend marrying the  
4 penalties for fentanyl and fentanyl analogue at  
5 1-to-10 kilograms. It quadruples the penalties  
6 for fentanyl, which we believe is reasonable,  
7 given the nature of the drug. We agree with the  
8 definition for fentanyl analogue, and note that  
9 marrying up the conversions with the definitions  
10 clears up a lot of application error that was  
11 happening in the field.

12 We are opposed to the phrase  
13 "substantially similar" being used in the  
14 fentanyl analogue definition. We prefer a wider  
15 definition that's more inclusive of substances.  
16 We think it will help the process.

17 Lastly, we are opposed to the SOC for  
18 marketing or misrepresenting fentanyl as another  
19 substance. We do acknowledge that fentanyl is in  
20 everything. We find it in heroin. We find it in  
21 cocaine. We're finding it in methamphetamine.  
22 It's something that we see in lab reports, and

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1 it's also something that we're seeing in our drug  
2 testing results within our released population.

3           However, we believe the penalty  
4 increase for fentanyl generally accounts for the  
5 harmfulness of the substance. Courts have many  
6 options to deal with. If you have carfentanil,  
7 something that's obviously more potent than  
8 standard fentanyl, the court can use that in  
9 determining where to sentence a defendant within  
10 a particular range, and there's also upward  
11 departures for death, physical injury, and  
12 endangering public welfare.

13           Thank you.

14           ACTING CHAIR PRYOR: Thank you.

15           Mr. Johnson?

16           MR. JOHNSON: Thank you, Your Honor.

17           First, I'd like to thank the  
18 Commission for considering our written submission  
19 and, also, for inviting the Practitioners  
20 Advisory Group to testify today.

21           I'd also like to say a special thanks  
22 to the Commission staff who have been superb in

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1 their help of us, and as I am sure they are of  
2 all of you, in our preparing for this,  
3 particularly in the synthetic drug area, which  
4 I'm sure the Commissioners are aware the  
5 Practitioners Advisory Group doesn't come into a  
6 lot of contact with, which reflects the data,  
7 which is one-half of 1 percent of all guideline  
8 sentences from the fiscal year quoted in our  
9 written testimony, was related to synthetic  
10 drugs.

11 The Practitioners Advisory Group is  
12 not in favor of a class-based approach, for a lot  
13 of reasons. I know that, from the testimony  
14 you've received and what you've heard this  
15 morning, is that it seems as though it would  
16 provide some clarity, but we don't believe it  
17 would because, first off, none of us are  
18 chemists. And what we're concerned about is the  
19 potency, and the addictiveness, and the danger to  
20 the community from each particular drug. And  
21 even from the Department of Justice this morning,  
22 I heard, they conceded that there are some of

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1       these synthetic drugs that are going to be less  
2       potent and dangerous to the community, and in  
3       those instances there should perhaps be an  
4       adjustment or a reflection by the court or the  
5       ability of the court to depart.

6               We just don't believe that there's  
7       anything wrong with the system as it is presently  
8       set. I know there's been time-consuming hearings  
9       that eat up district courts' time from time to  
10      time on this. Most of that, I would suggest, is  
11      taken care of my plea negotiations between the  
12      United States and defense when a case is charged.  
13      Those cases that are litigated, about  
14      particularly, we cited, I think it was the Moreno  
15      case out of the 7th Circuit, there is a lot of  
16      testimony and it's difficult, but the court in  
17      those cases ends up sentencing the defendants to  
18      quite a bit of time, based on the actual potency  
19      of the drug, rather than us having to do it  
20      backwards, which is assuming that each particular  
21      substance has a particular potency, and then,  
22      we're going to have to go in and litigate it

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1       anyway. We believe it would still take up the  
2       time, and because it is such a small amount of  
3       the work that's done, it's best to leave the  
4       system as it is.

5               We cited statistics that I really  
6       don't need to go over in-depth, other than to  
7       remind all of you that almost all of the sentences  
8       imposed for fiscal year 2015 were within or below  
9       the guideline range in these sort of cases. The  
10      only ones that were above were for fentanyl. Six  
11      percent of those cases were above. And I think  
12      that reflects the fact that we all agree that  
13      fentanyl is a terrible thing and it's terribly  
14      dangerous for the community and for the people  
15      who take it.

16             But we have to ask ourselves, I  
17      believe, not only why are we putting people in  
18      prison for particular amounts of time, but what  
19      are the reasons that would cause them to spend  
20      more time in prison after a just and fair  
21      analysis of all the facts. And the Practitioners  
22      Advisory Group is very concerned that, if people

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1 are continually enhanced under their sentences  
2 for unknowing adjustments, for instance, for the  
3 marketing, false marketing, or misrepresentation  
4 of what is in the product, that that doesn't  
5 reflect what they did. It may reflect a  
6 negligence in some case or an absolute innocence  
7 case in others, which is why the Practitioners  
8 Advisory Group supports, if the Commission does  
9 adopt a class-based approach, the Commission  
10 should not have an enhancement without knowing  
11 that that's happening, and also allow for  
12 adjustments and/or guided departures in those  
13 instances where someone absolutely doesn't know  
14 that that's what they're dealing in.

15 Now I'm in a border district. Most of  
16 our cases are, quite frankly, people caught at  
17 the border with a large amount, and to many  
18 districts it would be a shocking amount, of  
19 narcotics in a vehicle. For instance, I've had  
20 cases where someone was arrested at the border  
21 smuggling, and the cartels have gone to smuggling  
22 lots of different drugs in one occasion, like

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1       some heroin, some cocaine, and even some  
2       fentanyl, and some shocking amounts of fentanyl  
3       where the driver was being paid \$150 simply to  
4       cross the border, had no idea whatsoever what was  
5       in there, which is also why the Practitioners  
6       Advisory Group hopes that the Commission, at some  
7       point, considers guided adjustments or amendments  
8       for any offender that commits a narcotics crime  
9       after having been misled about what it is that  
10      they're trafficking.

11                   And I see that I've got the red light,  
12      and after my fine education at Tulane, I know  
13      that means stop.

14                   (Laughter.)

15                   ACTING CHAIR PRYOR: Questions?

16                   COMMISSIONER REEVES: Mr. Johnson, the  
17      example that you just gave, isn't that the reason  
18      that courts are often sentencing below the  
19      guideline range and doesn't that show up in the  
20      numbers that you've talked about?

21                   The person that brings 6 kilograms of  
22      heroin and 5 kilograms of cocaine across and is

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1       paid \$150, courts vary downward for those  
2       reasons.

3                   MR. JOHNSON:   Well, not always.   I  
4       would say it's a mix among the court in San Diego,  
5       in my experience.   Some courts will recognize  
6       that they have someone who has been absolutely  
7       misled, deserves a variance or a departure, and  
8       others will not.

9                   I think the Commission's input, if you  
10      believe it's appropriate, the Commission should  
11      say it.   I know that goes against my belief that  
12      it's getting more complicated all the time, but  
13      I think that's a simple thing for the Commission  
14      to say.

15                  So, I agree with Your Honor that that  
16      does happen from time to time, but it certainly  
17      doesn't happen all the time.

18                  ACTING CHAIR PRYOR:   It goes against  
19      your belief; you said that it's getting more  
20      complicated all the time.   What do you mean by  
21      that?

22                  MR. JOHNSON:   Well, the guidelines

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1 themselves. I mean, we end up as tax attorneys  
2 in some respects in that there's something to be  
3 said for considering -- and it's not the subject  
4 of this hearing -- but the overarching  
5 simplification of the process.

6 ACTING CHAIR PRYOR: You might get an  
7 invitation to come back.

8 (Laughter.)

9 Yes? Sure.

10 COMMISSIONER BARKOW: So, one question  
11 I have is, I know the benefits of a class-based  
12 approach would be to save some of these  
13 administrative costs, but because there's such a  
14 wide number of drugs within these classes, if we  
15 were to have a departure provision to go up or  
16 down, based on potency or toxicity that is higher  
17 or lower than kind of the average set for the  
18 class, do we still save the administrative costs  
19 if we have to have hearings on that departure? I  
20 mean, I'm just trying to get a sense of if we  
21 would lose it all with the departure provision or  
22 if we still have quite a bit to gain by setting

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1 a class-based number and allowing an up-or-down  
2 departure.

3 MR. BENDZUNAS: I think that's a fair  
4 approach. The existing system takes a long time.  
5 The courts parade in a witness to talk about  
6 chemistry and pharmacology, and it just  
7 takes -- I've been a part of them in a cathinones  
8 case myself -- and it takes a long time.

9 I think the departure authority would  
10 be a great improvement, because if we look at  
11 fentanyl, you have those -- that's a great  
12 example because you have some pharmaceutical  
13 grade fentanyl that's less powerful and stuff  
14 that's elephant tranquilizer. So, I think that  
15 would give the court some flexibility within the  
16 class system while saving resources.

17 MR. JOHNSON: I don't think it would  
18 save any resources. As defense counsel on one of  
19 these cases, as soon as it comes in, regardless  
20 of the system that's set up by the Commission,  
21 I'm going to have to figure out what the potency  
22 is. And in those cases that require litigation,

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1 we're going to have to have litigation or an  
2 agreement with the United States, which would be  
3 typically how you would handle it. So, I'm not  
4 sure it saves anything. It just turns things  
5 from turning left to turning right, but we're  
6 going to end up in the same place.

7 COMMISSIONER BREYER: How complicated  
8 is it to determine the potency of a seized drug,  
9 in terms of, if it's cut 100 times or not cut at  
10 all? When I talk about potency, I'm actually  
11 talking about the purity of the drug. I mean,  
12 I've received a lot of reports where it says this  
13 was a 92 percent, or something, and then, I  
14 receive reports which said, well, we don't know.  
15 Is that a complicated task for chemists or for  
16 the defense or for -- I mean, I know that the  
17 probation department has to do it -- or the  
18 Government, to make that chemical determination?

19 MR. JOHNSON: I think in many cases it  
20 is, Your Honor. Certainly not in all of them.  
21 I've seen many similar reports to, I'm sure, what  
22 Your Honor has seen, which include -- I mean, at

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1 the border we get a lot of cases that it's pretty  
2 darn pure as it's being smuggled across the  
3 border. And then, in the distribution cases, it  
4 may be less so, although I will say most federal  
5 cases it's very close to 100 percent pure. But  
6 if there are reports being issued by DEA chemists  
7 that they can't tell the purity, that implies to  
8 me that it is difficult to determine, at least in  
9 some cases.

10 MR. BENDZUNAS: Yes, I think purity is  
11 a scientific answer. It is what it is, and it  
12 shows up on a lab report. We see methamphetamine  
13 cases, cocaine cases. You get a percentage  
14 purity.

15 The difficulty will be with like the  
16 synthetic cannabinoids where you have 120  
17 different substances, and how are we to determine  
18 in a departure question what substance is at the  
19 higher end or the lower end of the class? That  
20 is going to be difficult.

21 COMMISSIONER BREYER: So, in those  
22 cases, it's easier for the court and the parties

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1 to determine the role in the offense as distinct  
2 from what exactly is the potency of the drugs?  
3 In other words, I'm ready to sentence a courier.  
4 Okay. So, if we know that the courier is just a  
5 courier, was paid \$100, and so forth, that's a  
6 basis for a particular sentence, without regard  
7 to the potency of the drug. I think that's what  
8 judges do, but I don't know. I don't know whether  
9 that's -- I mean, I think that does account for,  
10 as Judge Reeves points out, it does account for  
11 variances. And maybe the argument is it should  
12 be a departure. I don't know.

13 MR. BENDZUNAS: I mean, I agree every  
14 case is an individualized assessment. I come  
15 from a high-variance circuit, and we would look  
16 at the characteristics of that defendant and kind  
17 of formulate it in the context of the other  
18 factors in the case.

19 MR. JOHNSON: I think that courier  
20 cases at the border tend to be pretty high purity  
21 in terms of the substances they're smuggling.  
22 And the purity does come up at sentencing. I

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1 cannot recall a case -- I'm sure I've been  
2 involved in some -- that involved an  
3 exceptionally low level of purity, but that's  
4 something you would expect more on the street  
5 level than in what we typically see in the  
6 Southern District of California in federal cases.  
7 So, I would say there's not a lot of departure or  
8 variance because of the different purities in our  
9 district, but I'm just speaking anecdotally. I  
10 don't have any statistics at my fingertips on  
11 that.

12 ACTING CHAIR PRYOR: Thank you.

13 MR. JOHNSON: Thank you very much.

14 ACTING CHAIR PRYOR: We have your  
15 written testimony as well.

16 Oh, yes, I'm sorry. Commissioner  
17 Bolitho, do you have any questions?

18 COMMISSIONER BOLITHO: No, thank you,  
19 Judge.

20 ACTING CHAIR PRYOR: Okay. Thank you.  
21 We have your written testimony, and we appreciate  
22 you appearing today.

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1                   MR. JOHNSON:        I appreciate it.  
2           Thanks.

3                   ACTING CHAIR PRYOR: We'll move to our  
4           third panel.    Our third panel concludes our  
5           discussion of synthetic drugs with input from law  
6           enforcement and stakeholders in the criminal  
7           justice community.    Our panelists are Keith  
8           Graves, Detective Hector Alcala, Lindsay LaSalle,  
9           and Mary Price.

10                   Mr. Graves is a retired police  
11           sergeant who worked in the San Francisco Bay Area  
12           for 29 years. He is the founder and President of  
13           Graves and Associates, a company dedicated to  
14           providing drug training to law enforcement and  
15           private industry. He was named as California's  
16           Narcotics Officer of the Year and was a winner of  
17           the Mothers Against Drunk Driving's California  
18           Hero Award. He has years of experience as a  
19           narcotics detective and a narcotics unit  
20           supervisor, and is a drug recognition expert  
21           instructor. Mr. Graves earned a Bachelor of Arts  
22           degree in business management from St. Mary's

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1 College of California and a Master of Arts degree  
2 in criminal justice from American Military  
3 University.

4 Detective Alcala has served in the  
5 Kentucky State Police since 2005. He was named  
6 Kentucky Trooper of the Year in 2008. In 2010,  
7 he began working as an undercover narcotics  
8 detective in the Drug Enforcement Special  
9 Investigations Unit. In that role, he received  
10 the 2012 Kentucky Narcotics Officer of the Year  
11 Award. He is currently assigned to an FBI Safe  
12 Streets Task Force, where he investigates violent  
13 crimes and gang-related offenses. He is a  
14 graduate of the Kentucky Department of Criminal  
15 Justice training and the Kentucky State Police  
16 Academy.

17 Ms. LaSalle is a senior staff attorney  
18 for the Drug Policy Alliance Office of Legal  
19 Affairs. She engages in litigation, legislative  
20 drafting, and public education in support of drug  
21 policy reform. She received her Bachelor of Arts  
22 and a Juris Doctorate from the University of

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1 California, Berkeley, where she served as a  
2 development editor of the California Law Review.

3 Ms. Price is General Counsel of  
4 Families Against Mandatory Minimums, where she  
5 has worked since 2000. She directs their  
6 litigation project and advocates for reform of  
7 federal sentencing and corrections law and policy  
8 before Congress, the U.S. Sentencing Commission,  
9 the Bureau of Prisons, and the Department of  
10 Justice. Ms. Price graduated cum laude from  
11 Georgetown University Law Center, where she was  
12 a public interest law scholar and the Law  
13 Center's first recipient of the Bettina Pruckmayr  
14 Human Rights Award. She graduated Phi Beta Kappa  
15 from the University of Oregon.

16 Mr. Graves?

17 MR. GRAVES: Members of the Sentencing  
18 Commission, thank you for the opportunity to give  
19 the National Narcotics Officers Association  
20 Coalition's view on the Commission's proposed  
21 amendments to the Federal Sentencing Guidelines  
22 related to synthetic drugs.

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1                   Synthetic drugs, including fentanyl  
2                   and its analogues, synthetic cathinones, and  
3                   synthetic cannabinoids, have had a profound  
4                   impact on American law enforcement. In past  
5                   decades, law enforcement only had to worry about  
6                   a few drugs, like heroin, methamphetamine, and  
7                   cocaine, but the new century brought with it new  
8                   drugs. These new drugs brought with them a new  
9                   scourge that's impacted our community in ways  
10                  that we weren't prepared to handle. These  
11                  synthetic drugs can't be combatted like  
12                  traditional street drugs of the past, and law  
13                  enforcement officers around the country are  
14                  having to change their tactics due to the  
15                  strength/potency of not only fentanyl, but of  
16                  synthetic cathinones and synthetic cannabinoids.

17                  As an example, prior testimony has  
18                  shown the potency of synthetic cannabinoids and  
19                  their chemical structure. However, how synthetic  
20                  cannabinoid drug dealers operate and the impact  
21                  that they have on our society needs attention. A  
22                  high-level drug dealer will order multiple kilos

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1 of synthetic cannabinoids from China. Once in  
2 the United States, the dealer will take it to a  
3 facility where the chemical is going to be  
4 modified and sprayed on vegetable matter, such as  
5 damiana. After spraying the chemical compound on  
6 an herb, it's then placed in fancy foil packaging  
7 and shipped to internet dealers or retail  
8 facilities around the U.S., like smokeshops,  
9 liquor stores, and gas stations. The foil  
10 packaging often depicts logos and  
11 characterizations that are often attractive to  
12 younger Americans.

13 I've spoken to narcotics detectives  
14 whose job it is to investigate these spraying  
15 centers. They report that their team members are  
16 experiencing side effects from exposure to  
17 synthetic cannabinoids, including kidney damage.  
18 As an example, one Nevada narcotics detective  
19 went to the doctor who said that his kidneys, the  
20 detective's kidneys, looked like he had been  
21 abusing drugs for years. And another HSI special  
22 agent has severe kidney damage that's tracked

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1 back to chronic exposure from these spraying  
2 centers.

3 The CDC accompanied one Nevada task  
4 force and monitored them prior to raiding a  
5 synthetic spice factory and, then, monitored them  
6 after the raid. All team members were wearing  
7 personal protective equipment that is standard  
8 for most drug lab investigations. The task force  
9 members provided a urine test prior to the raid  
10 and again after the raid. Four of five team  
11 members tested positive for synthetic  
12 cannabinoids after that raid. It's apparent  
13 that, even with protective equipment, these  
14 powerful synthetic cannabinoids are causing  
15 damage to our narcotics investigators.

16 In regards to fentanyl and its  
17 analogues, there's been much disinformation put  
18 out about fentanyl and its impact on law  
19 enforcement in our community. First and  
20 foremost, most of the medical community uses  
21 pharmaceutical fentanyl as the baseline for their  
22 comments about the drug. However, there are two

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1 types of fentanyl. You've got pharmaceutical  
2 fentanyl and then street fentanyl.

3 As an example, you can't compare  
4 fentanyl in a pharmaceutical patch form to  
5 fentanyl found in the street. Pharmaceutical  
6 fentanyl is produced in a clean laboratory that  
7 must meet scientific standards as well as  
8 government standards. Street fentanyl is made in  
9 a lab, either in China or Mexico, with no  
10 safeguards in place and no governmental  
11 oversight. Sometimes it may truly be traditional  
12 fentanyl formula that we see in a hospital.  
13 However, some are analogues that were never meant  
14 for human consumption. Some analogues are more  
15 powerful than fentanyl; some are less powerful  
16 than fentanyl.

17 We know that fentanyl has had a  
18 profound effect on America. We only have to look  
19 at the overdose statistics to realize how bad the  
20 problem is, but it's our belief that it's only  
21 going to get worse. A simple review of economics  
22 and logistics can make you come to the

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1 realization that fentanyl will become worse in  
2 the near future.

3 Mexican drug cartels have realized the  
4 value of fentanyl and have started producing it  
5 and smuggling it into the United States. It makes  
6 economic sense for them to do this. As an  
7 example, cultivating an opium poppy field is  
8 labor-intensive. It takes time and money to  
9 process that. But, if the drug cartel has a  
10 fentanyl lab, they can produce a kilo of fentanyl  
11 for as little as \$3,500 without the intensive  
12 labor listed above.

13 One kilo of fentanyl is the equivalent  
14 of 50 kilos of heroin when you compare potency.  
15 So, drug cartels need only to smuggle a fraction  
16 of the fentanyl into the U.S. compared to heroin.  
17 It makes economic sense for them to do this.

18 Additionally, fentanyl dosage units  
19 are measured in micrograms; whereas, traditional  
20 drugs are measured in milligrams. So, it only  
21 takes a minute amount to add to another drug,  
22 like heroin, to make it much more powerful. A

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1 drug dealer could purchase 1 kilo of Mexican  
2 fentanyl for \$19,000. This kilo is going to make  
3 1 million pills, which would be the equivalent of  
4 about a million heroin points. At \$20 to \$40 per  
5 dose, 1 kilo can net a drug dealer millions of  
6 dollars. You don't see that with any other drug  
7 that we have dealt with in the past.

8 As you can see, the future of drug  
9 abuse lies with these new synthetic drugs. The  
10 problem is not going to go away. It's only going  
11 to continue to grow and flourish under our  
12 antiquated drug laws. We'll need to rethink how  
13 we go about investigating and prosecuting drug  
14 dealers that have turned to the future of drug  
15 abuse.

16 ACTING CHAIR PRYOR: Detective Alcala?

17 MR. ALCALA: Acting Chair Pryor and  
18 Distinguished Members of the United States  
19 Sentencing Commission, we want to thank you for  
20 holding this very timely meeting today regarding  
21 the impact of synthetic drugs in our communities.

22 Today, I will specifically testify on

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1 some disturbing distributing methods used by  
2 large-scale dealers and street-local dealers.  
3 I'm assigned the 9th Circuit Eastern District of  
4 Kentucky, which, this geographical location, as  
5 most cities in the United States, is a convenient  
6 location for the Mexican cartel to operate.  
7 Lexington, a city of approximately 318,000  
8 persons in population, happens to be the largest  
9 city in the Circuit. We have two major  
10 interstates that connect and have access to the  
11 northeast part of the United States.

12 For the past couple of years, we have  
13 seen a significant increase of fentanyl and  
14 fentanyl analogues in our communities. Through  
15 our investigations, we have learned that heroin  
16 and fentanyl supply lines are often essentially  
17 the same. The Mexican cartel hide fentanyl and  
18 heroin inside vehicles and bring into our  
19 communities to be delivered in person. Once the  
20 dealers receive these drugs, they basically break  
21 them down and sell them by ounces or kilograms.

22 Data from the Kentucky State Police

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1 laboratories regarding the fentanyl and fentanyl  
2 analogues, in the past years the results are  
3 clear. In 2010, the Kentucky State Police  
4 laboratories only received -- .1 percent of all  
5 submissions were fentanyl. By 2017, the results  
6 had increased with 9.2 percent of all  
7 submissions. As of March 1st of 2018, the numbers  
8 are staggering. We're resulting, on submissions,  
9 of 8.8 percent just in two months of all  
10 submissions of drugs.

11 Just recently, the Kentucky State  
12 Police, Federal Bureau of Investigation, and  
13 Lexington Police Department conducted a multi-  
14 agency investigation targeting the career-long  
15 trafficking offender. Through the  
16 investigations, we learned that he had ties to  
17 the Sinaloa Cartel in Mexico. This offender  
18 would order kilograms of fentanyl and heroin to  
19 be delivered to Lexington through phone  
20 conversations. By his own confession, he knew he  
21 was purchasing fentanyl, purchasing between  
22 \$55,000 to \$60,000 per kilo. Fentanyl, in our

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1 area, ranks the most highest of all narcotics.

2 Again, by his own confession, once the  
3 offender received these narcotics, he would cut  
4 1 kilogram into 3 kilograms of fentanyl,  
5 increasing his monetary profits 340 percent.  
6 When asked, this unconcerned offender informed  
7 investigators of the way he was testing the  
8 purity of his products, by simply giving a sample  
9 of the product he just processed to a street-  
10 level dealer, who will, in turn, give the  
11 narcotics to a user and simply sit and watch their  
12 reactions. It is unknown how many overdose  
13 deaths this practice might have cost.

14 There's a misconception of  
15 traffickers adding fentanyl to heroin, when  
16 basically, they are adding fentanyl to heroin  
17 because fentanyl being a most potent drug. As we  
18 all know, traffickers can use all types of  
19 cutting agents to increase their profits. They  
20 use heroin, cocaine, and, ladies and gentlemen,  
21 we are receiving reports of street-level dealers  
22 adding fentanyl to marihuana just so they can

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1 gain edge on their competition. That is why we  
2 are seeing fentanyl and fentanyl analogues used  
3 as the primary drug of drug trafficking  
4 offenders.

5 The question was asked regarding the  
6 proposed enhancements on the sentencing  
7 guidelines. As we all know, enhancements do not  
8 fit every charge. Proposed language of knowingly  
9 misrepresenting fentanyl during a transaction or  
10 knowingly marketing fentanyl as another  
11 substance, we feel, as investigators, it will be  
12 hard to prove.

13 Previously used by the Commission,  
14 2016 sentencing results regarding fentanyl on  
15 traffic offenders, it shows that only 16 percent  
16 of the offenders knew that they were dealing  
17 fentanyl. The majority, 53 percent, did not know  
18 that they were trafficking fentanyl, and the  
19 remaining 31 percent, investigators could not  
20 prove or could not tell if the offender knew or  
21 did not know that they were trafficking fentanyl.

22 To conclude, it has been our

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1 investigating experience dealing with large drug  
2 trafficking offenders, they have a knowledge of  
3 the product that they're selling. Depending on  
4 the customer base, somewhere down the chain, the  
5 transparency of the product changes, often  
6 leading the street-level dealer not having  
7 complete knowledge of the product they're  
8 selling. And these type of practices lead to  
9 overdose deaths.

10 Thank you, and I look forward to your  
11 questions.

12 ACTING CHAIR PRYOR: Thank you,  
13 Detective.

14 Ms. LaSalle?

15 MS. LaSALLE: Yes, thank you, Judge  
16 Pryor, and thank you to the Commission for  
17 inviting me here today to share the perspective  
18 of the Drug Policy Alliance.

19 The Drug Policy Alliance is an  
20 organization that advances policies that aim to  
21 do two things. One, reduce the harms of drug use  
22 itself, but, two, also reduce the harms of drug

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1 criminalization and drug prohibition. So, it's  
2 with that framework that I would like to evaluate  
3 the Commission's proposed amendments today.

4 With respect to the harms of drug use,  
5 I know that the Commission has taken lots of  
6 testimony on the public health harms of synthetic  
7 drugs and, in particular, fentanyl. And I  
8 certainly share law enforcement's concerns about  
9 the public health crisis that fentanyl has now  
10 become, particularly the increasing and  
11 skyrocketing rates of overdose deaths.

12 But I must stress that there are  
13 public health solutions to this public health  
14 crisis, and we don't need to revert back to this  
15 knee-jerk reaction of criminalization,  
16 particularly because the public health solutions  
17 are based on science. Whereas, we know from the  
18 research and evidence that there is not an ounce  
19 of -- there's really not a shred of evidence that  
20 proves that criminalization has any impact  
21 whatsoever on reducing the harms of drug use.  
22 All the research shows that sentence severity has

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1 no deterrent effect whatsoever. So, increased  
2 penalties, as the Commission proposes, is not  
3 ultimately going to impact supply and it's not  
4 going to impact demand.

5 On the other hand, what is well-  
6 documented is the replacement effect. So, we  
7 know that, when you incarcerate one seller, for  
8 synthetic drugs or otherwise, the market responds  
9 and another seller pops up to take their place or  
10 the sellers already in the market just assume  
11 that share.

12 And so, if these proposed amendments  
13 go into effect, people are still going to be  
14 selling drugs; people are still going to be  
15 buying drugs, and people are still going to be  
16 dying of drug-related overdoses. And so,  
17 ultimately, they won't have had any impact on  
18 reducing the harms of drug use.

19 And in fact, if we evaluate the  
20 proposed amendments with respect to the potential  
21 harms of criminalization, we see that, in fact,  
22 that risk of death and the risk of other health

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1 harms is potentially amplified. Taking a broad  
2 view, drug law enforcement efforts have been  
3 associated with a number of unintended harms and  
4 consequences, and these are often the exact  
5 opposite of the initial intent behind these laws.  
6 So, we see that there is a reduced price of  
7 illicit drugs, increased purity, health-related  
8 harms like the ones we've been talking about  
9 today, overdose, but also addiction, transmission  
10 of infectious diseases, social harms like gun  
11 violence or homicide, and many others. And I  
12 worry that the Commission's proposed amendments,  
13 particularly with respect to the class-based  
14 categorization of synthetic drugs and the  
15 equivalencies between fentanyl and fentanyl  
16 analogues, are similarly going to have unintended  
17 consequences and consequences that are severely  
18 detrimental to public health.

19 The Commission itself acknowledges,  
20 for instance, that the fentanyl analogue  
21 carfentanil -- and we have also heard this from  
22 law enforcement -- carries significantly greater

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1 risks than fentanyl and is significantly more  
2 potent, but then proposes, kind of seemingly in  
3 the same breath, that the sale and distribution  
4 of fentanyl receive equivalent penalties and  
5 sentences to that of the more dangerous  
6 analogues.

7 And similarly with respect to  
8 synthetic cannabinoids or synthetic cathinones,  
9 there is a recognition that drugs within these  
10 categories vary widely in terms of their potency,  
11 purity, and potential harms. And yet, there's a  
12 proposal to categorize them all similarly and  
13 sentence them all similarly.

14 I think the black market can be  
15 expected to respond to these changes, and I think  
16 we have to recognize that the sentencing  
17 guidelines at large and these proposed amendments  
18 will impact the way that the black market  
19 operates. People will not change their behavior.  
20 Or people will not stop their behavior. We know  
21 there is no deterrent effect. But certainly we  
22 know that people alter and adjust their behavior

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1 to account for the criminal law, and do so in a  
2 way to minimize their risk. And we saw this in  
3 the case of the context of alcohol prohibition,  
4 for instance.

5 So, amendments that don't account for  
6 the disparate harms of these particular drugs  
7 within these categories will actually have the  
8 perverse effect of incentivizing the manufacture,  
9 distribution, and sale of the most potent  
10 substances that pack the biggest punch in the  
11 smallest dose. In other words, there would be no  
12 reason, no incentive, not to put the most potent,  
13 dangerous, and harmful products to market.

14 This is especially true, given that  
15 the guidelines don't distinguish, as we've heard,  
16 between mixtures and pure substances. So,  
17 fentanyl is safer the more diluted it is, but  
18 under the guidelines, research is showing that  
19 low-level sellers are, in fact, diluting fentanyl  
20 with other substances or with cutting agents as  
21 a harm-reduction measure. It's actually to ward  
22 off potential death. But those folks would be

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1 sentenced higher than people who are distributing  
2 and selling the more pure and potent version of  
3 the substance.

4 And so, I'll just conclude by saying  
5 that I don't believe that these amendments impact  
6 the harms of drug use. I think they compound  
7 them. I think they compound the harms of  
8 criminalization. And I would just ask that the  
9 Commission reconsider the amendments in light of  
10 the implications that it could potentially have  
11 on public health.

12 Thank you so much.

13 ACTING CHAIR PRYOR: Ms. Price?

14 MS. PRICE: Thank you, Judge Pryor and  
15 Members of the Commission, for inviting me to  
16 testify.

17 Many of FARM's 75,000 members are  
18 affected by the guidelines that you write and  
19 amend. They follow guideline developments  
20 closely. Sometimes we help them with that.  
21 Sometimes they participate in public comment.  
22 You get letters from them. I'm really honored to

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1 represent them on this panel today.

2 I speak today cognizant of the deep  
3 concerns that have been expressed by law  
4 enforcement and medical experts about the impact  
5 of these substances on individuals and on our  
6 communities. And I want to be sure that  
7 everything that I say today, that nothing is  
8 taken to mean or to make the impression that we  
9 make light of those concerns or to diminish what  
10 we see as the harmful effects and the tolls that  
11 are incurred by these substances.

12 I'm not a drug policy expert. I'm  
13 certainly not a member of law enforcement. I'm  
14 not a scientist. I'm not even a practitioner.  
15 I've not been personally affected by these  
16 substances in the way some people on the panel  
17 have described. Nonetheless, I'm a long-time  
18 student of the sentencing guidelines. And as a  
19 student of the guidelines and as an advocate  
20 before the Sentencing Commission, I have  
21 witnessed over the years, and FAMM has pushed  
22 back over the years, over efforts to convince the

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1 Commission to increase sentences, drug sentences  
2 particularly, as a way to address public safety  
3 and public health problems. These efforts have  
4 been misguided for the most part. These problems  
5 are not solved by locking more people up for  
6 longer periods of time.

7 As you know, drug guidelines are  
8 dominated by drug quantity questions, and drug  
9 quantity has been shown time and time again to  
10 correlate poorly with culpability and to lead to  
11 unjust outcomes. And so, you're preparing, once  
12 again, to assign values on the Drug Quantity  
13 Table in response to heightened concerns about  
14 health and safety risks of these substances. And  
15 I urge you to approach this task with great  
16 restraint. Getting this decision right, as you  
17 know better than I, is really important, but it's  
18 also very tough in this rather overheated  
19 environment.

20 It parallels, this environment  
21 parallels in some ways the environment in which  
22 crack cocaine sentences were adopted in the mid-

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1 1980s, as earlier witnesses testified. A mistake  
2 was made at that time in the heat of extreme  
3 concerns about the threats that were posed by  
4 crack. Those mistakes were fueled by, also,  
5 misperceptions and misconceptions around crack  
6 cocaine. It took 20 years, more than 20 years,  
7 over three reports from the Sentencing Commission  
8 with recommendations, and an act of Congress to  
9 partially correct that mistake.

10 People went to prison for  
11 unconscionable lengths of time. Families were  
12 torn apart, and communities were scarred by  
13 incarceration. Retroactivity could only do so  
14 much to heal some of those wounds and to restore  
15 faith in the criminal justice system.

16 So, we're in the midst of another  
17 epidemic, and we appreciate your deliberative  
18 approach, but we're very concerned about the  
19 variety of views and the different approaches to  
20 how to classify these substances, whether to put  
21 them in a class, and how to correctly assign  
22 marijuana equivalencies that will lead to

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1 sentences that meet the purposes of punishment.

2 I mention some, but not all, of them  
3 in my written submission. They're better and I  
4 think more thoroughly addressed in comments from  
5 others, like Drug Policy Alliance and the Public  
6 Defender.

7 But I do want to say that the  
8 uncertainty and disagreement about these  
9 substances should caution restraint. But we also  
10 encourage restraint and lenity for another  
11 reason. Every time you amend a drug guideline,  
12 it's another opportunity for you to ensure that  
13 that guideline helps a judge impose a sentence  
14 that deters criminal conduct, imposes just and  
15 appropriate punishment, promotes real  
16 rehabilitation, and, of course, protects the  
17 community. As we know, and as has been mentioned  
18 earlier, certainty and swiftness of apprehension  
19 and punishment does more to deter drug crime than  
20 the length of the sentence.

21 And just this week, actually, the Pew  
22 Charitable Trust, which tracks federal and state

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1       sentencing and other matters, released a report  
2       about the relationship between sentence length  
3       and public safety and public health concerns.  
4       And the question that Pew posed itself was,  
5       quote, "whether, how, and to what degree  
6       imprisonment for drug offenses affects the nature  
7       and extent of the nation's drug problems," and  
8       they reviewed data from 50 states from 2014, I  
9       believe, from law enforcement, corrections  
10      agencies, and public health agencies.

11               And what they concluded was this: the  
12      analysis found no statistically-significant  
13      relationship between state drug imprisonment  
14      rates and three indicators of state drug  
15      problems, drug use, drug overdose deaths, and  
16      drug arrests. And so, given those findings, the  
17      Pew Trust called again for alternatives to  
18      incarceration that are both less costly than  
19      imprisonment, but also can lead to better  
20      outcomes.

21               So, the Commission has also led the  
22      way in exploring alternatives to incarceration.

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1 And the knowledge and principles that animate  
2 those inquiries should, likewise, lead you to set  
3 ratios that err on the side of lenity and  
4 restraint, rather than severity.

5 I can't think of any reason to do  
6 otherwise, given the overwhelming evidence that  
7 sentence length can't curb drug abuse and  
8 overdose deaths or drug crimes, and in light of  
9 the damage done to families and individuals and  
10 communities by unduly long sentences.

11 Thank you so much.

12 ACTING CHAIR PRYOR: Thank you.

13 Questions?

14 COMMISSIONER REEVES: The first  
15 question, Mr. Graves --

16 MR. GRAVES: Yes, sir?

17 COMMISSIONER REEVES: -- in light of  
18 the arguments that have just been made, is it  
19 fair to compare crack and powder cocaine with the  
20 epidemic that we're now seeing with fentanyl and  
21 fentanyl analogues? We've heard that a couple of  
22 times today.

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1                   MR. GRAVES: Yes, you can't compare.  
2 Besides one's a stimulant and one's an opiate,  
3 but --

4                   COMMISSIONER REEVES: In terms of the  
5 consequences.

6                   MR. GRAVES: Let's talk about the  
7 consequences. I was in narc back when crack was  
8 around and, obviously, a narc recently. You  
9 don't see the numbers of deaths back then that  
10 you see now. So, with crack cocaine, the deaths  
11 were more related to the violence from drug sales  
12 and stuff like that, turf issues. But here, with  
13 the opioid epidemic, I've never seen anything  
14 like this ever, to see the numbers of people that  
15 are dying, the numbers of people that are  
16 affected. And even still, with crack cocaine,  
17 you can identify crack cocaine. It's very  
18 obvious just by the look, the texture. When  
19 you're talking about fentanyl, we're finding  
20 fentanyl, as you've seen in prior testimony, in  
21 everything.

22                   And one of the issues that I don't

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1 think has been brought up, that these labs  
2 aren't, some labs aren't testing for fentanyl.  
3 And so, when they actually learn about it, and  
4 then, they go back and test for it, they're  
5 finding out that, yes, they've had fentanyl in  
6 their community for some time.

7 COMMISSIONER REEVES: Probably it's  
8 been underreported to the Sentencing Commission  
9 in terms of the cases that --

10 MR. GRAVES: Oh, I have no doubt, yes.  
11 And as an example, I go around the country  
12 teaching officers how to deal with fentanyl on  
13 the street. A lot of them will say, "We don't  
14 have fentanyl in our area." But, after we give  
15 them a class, then they'll go back and they'll  
16 review their cases and send stuff back to the  
17 lab. Then, they find out, yes, they have had it  
18 and it's been around for quite some time.

19 One of the indicators that we tell  
20 them to look at is look at your overdose deaths.  
21 Look at your overdose deaths compared, like right  
22 now, compared to, let's say, three-four years

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1 ago, and you'll see that there's a significant  
2 increase. And again, it's because people aren't  
3 testing for fentanyl specifically. They might  
4 just test for heroin or something like that. So,  
5 if somebody had taken meth that had fentanyl in  
6 it, then they only tested for meth; they didn't  
7 test for fentanyl. So, it won't even show up as  
8 a statistic. So, I think the statistics are off.  
9 But, just going back to the crack-fentanyl  
10 relationship, it is a lot different and you can't  
11 compare the two.

12 COMMISSIONER REEVES: The second  
13 question, Detective Alcala --

14 MR. ALCALA: Yes, sir?

15 COMMISSIONER REEVES: -- there was a  
16 comment made earlier about fentanyl being safer  
17 if it's diluted. Have you seen fentanyl on the  
18 street that's safe?

19 MR. ALCALA: No, sir, I have not. And  
20 the key to remember, and me dealing with,,  
21 sometimes undercover officer and dealing with  
22 confidential informants all the time, the key to

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1 remember is there is no fear of the consequences  
2 out there. When it comes to large trafficker  
3 drug offenders and when it comes to mid-level  
4 dealers, and sometimes street-level dealers, the  
5 only thing they're looking at is their profits.  
6 They're not caring about how am I packaging this,  
7 right or not. These are not chemists. They don't  
8 have no background in anything like that.  
9 They're main thing they're looking at, how can I  
10 gain more profits, but with this right here,  
11 monetary gain.

12 COMMISSIONER REEVES: Thank you.

13 COMMISSIONER BREYER: My takeaway of  
14 their testimony may be different because I don't  
15 think Ms. LaSalle or Ms. Price are saying this  
16 isn't a very dangerous drug, and nor are they  
17 saying this is like the same thing that we dealt  
18 with crack, and so forth and so on.

19 What I take is that the issue that  
20 they're raising is, does the length of the  
21 sentence correlate with the concerns that we have  
22 with respect to recidivism? Let's just take

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1       recidivism, not seriousness of the wrongdoing,  
2       not the impact in a sense of these drugs, which  
3       I think your characterization is absolutely  
4       correct and alarming to the Commission, all of  
5       us.

6                   So, the question really is, is there  
7       evidence out there that suggests that, when you  
8       have a 16-year sentence or a 14-year sentence,  
9       that there is going to be a higher rate of  
10      recidivism with respect to that particular drug  
11      or that particular transaction or that particular  
12      overall scope?

13                   And I'm interested, actually, Mr.  
14      Graves, in your experience -- and you've been  
15      right out there for years -- whether you're aware  
16      of evidence that a 14-year sentence, as an  
17      example, is less effective than a 16-year, other  
18      than the obvious fact that a person who is in  
19      jail for the longer period of time is less likely  
20      while in jail to commit the criminal offense.

21                   MR. GRAVES: So, I can only give you  
22      anecdotal evidence, you know, just my experience

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1 on the street.

2 COMMISSIONER BREYER: Sure.

3 MR. GRAVES: I can tell you like in  
4 28 years -- I was an officer for 28 years 11  
5 months. I tried to make it 29, but retirement  
6 was too attractive.

7 Like I say, I dealt with the same  
8 people over and over and over again. I would see  
9 them over and over, and it just would never stop.  
10 I started in narcotics at the end of "We Say No"  
11 and we were tough on everything. And people went  
12 away and I didn't see them for a long time. And  
13 it just seemed like those people tend to not come  
14 back and reoffend.

15 Now, towards the end of my career,  
16 California is very lenient in their drug laws,  
17 and I'm seeing people repeat constantly. And  
18 they're coming out of jail and, then, reoffending  
19 and, then, going back in. You know, it's this  
20 constant revolving door. I don't like it.

21 We're not here to say that we want to  
22 put addicts in jail. The best thing in my career

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1 was to have a guy come up to me and tell me, "You  
2 arrested me on March 11th," whatever date, "and  
3 I've been drug-free ever since then." And that's  
4 what I want to hear. I have seen less and less  
5 of that as California has gone towards just a  
6 more liberalization view of drugs.

7 MS. LaSALLE: May I just respond to  
8 that briefly?

9 ACTING CHAIR PRYOR: Sure.

10 MS. LaSALLE: With respect to the  
11 recidivism and it being tied to leniency of drug  
12 laws, I certainly appreciate your experience in  
13 the field. But the research, the empirical  
14 evidence shows that exact opposite. And I would  
15 posture that the reason that people are  
16 recidivating, if they are, is because they have  
17 a drug felony on their record and they're totally  
18 disenfranchised from being able to participate in  
19 society and aren't able to get a job. So, it's  
20 the collateral consequences of that conviction  
21 and of that sentence to begin with that leads to  
22 the recidivism.

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1                   COMMISSIONER BREYER:    But isn't it  
2           really -- I'm hearing both of you, and I think  
3           both of you may be right.  And so, the question  
4           is, how can you both be right?  And it seems to  
5           me that you have to look at the details, whether  
6           you're talking about short sentences, which I  
7           think you find in California, coming from  
8           California and seeing what happens in the State  
9           court system, I think you're correct.  I think  
10          that six months or nine months -- and this may  
11          upset other people -- but I do see this rate of  
12          recidivism rather high at those levels.

13                   I'm looking at the longer sentence.  
14          I'm looking at the 10-year, the 12-year, the 14-  
15          year, the 16-year sentence because, No. 1, it's  
16          expensive.  No. 2, it certainly eliminates or  
17          reduces the possibility that that individual can  
18          reintegrate into society.  And that's why I'm  
19          very interested in aging out.

20                   But I'm not sure that you're both  
21          saying different things.  I'm just saying that  
22          you have to look at the details.

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1 MS. PRICE: You also have to take into  
2 account the collateral cost to the community of  
3 removing people for long periods of time from the  
4 community. And I think that has been well-  
5 documented.

6 ACTING CHAIR PRYOR: Collateral costs  
7 and benefits.

8 MS. PRICE: Well, yes, but --

9 ACTING CHAIR PRYOR: There are some.  
10 There are some who are removed from the community  
11 and that's not a bad thing on balance.

12 MS. PRICE: Right. We're not against  
13 incarceration. It's not our position --

14 ACTING CHAIR PRYOR: Sure. Right.

15 MS. PRICE: -- but we do think that  
16 it is very important that sort of the first step  
17 to reducing recidivism is a right sized sentence.  
18 And so, you have a big job to do, and we  
19 appreciate that.

20 COMMISSIONER BARKOW: Just two  
21 questions. First, for Detective Alcalá, on the  
22 question of proving knowledge, I'm trying to get

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1 a handle of how much of it is a question of  
2 proving it versus some people don't know. So, I  
3 know you gave the example of the dealer who said  
4 he was doing it intentionally and, then, they  
5 would give drugs to people and see if they died.  
6 So, that would be an easy case to prove knowledge.

7 MR. ALCALA: Right.

8 COMMISSIONER BARKOW: And I think we  
9 would all agree those people are more culpable  
10 than the people who just unwittingly get the  
11 drugs.

12 And so, from the perspective of trying  
13 to have sentences that reflect varying levels of  
14 culpability, the first part of my question is, do  
15 you agree that people who knowingly do it are  
16 worse than the people who sell fentanyl and they  
17 don't realize that it's in there?

18 MR. ALCALA: Oh, absolutely.

19 COMMISSIONER BARKOW: Okay. And then,  
20 the second question is, for the people who do  
21 know, and why it's difficult to prove, I guess in  
22 the weight, could it be demonstrated by the

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1 Government by showing either repeat sales after  
2 someone has been seriously injured or died, or  
3 the price that the drug -- I'm trying to get the  
4 ways in which the Government could overcome the  
5 hurdle of knowledge. If you could just, in the  
6 cases where you have to show it, what kind of  
7 facts you use?

8 MR. ALCALA: Right. That's a very  
9 good question, Your Honor, and thank you for  
10 that.

11 So, as we all know, and like I  
12 testified earlier, enhancements do not fit every  
13 charge. And when it comes to proving it in court  
14 and getting enough evidence, that means that us,  
15 the investigators, would have to go to a greater  
16 length to try to find. You know, we have to try  
17 to get warrants for telephone conversations,  
18 trying to get warrants for any type of ledger,  
19 devices, or even in some interviews, you know, we  
20 can gain that knowledge. But it would be hard to  
21 prove.

22 So, in my opinion, the sentencing

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1 guidelines, the proposed sentencing guidelines,  
2 are correct. I'm glad I'm not in your shoes  
3 because this is a very important step.

4 And I'm sure back when the crack  
5 cocaine was around they didn't have this type  
6 of -- you guys didn't, or whoever was in charge,  
7 they didn't have that type of knowledge or  
8 previous history before that we have now. So, it  
9 is our experience that the investigators will  
10 have to go to a greater length trying to provide  
11 evidence that these offenders knew or did not  
12 know.

13 ACTING CHAIR PRYOR: But, if you  
14 enhance the sentence, that's not necessarily a  
15 bad thing, right?

16 MR. ALCALA: No, sir.

17 ACTING CHAIR PRYOR: So, Mr. Graves,  
18 I have a technical question.

19 MR. GRAVES: Yes, sir.

20 ACTING CHAIR PRYOR: To the extent you  
21 know, you talked about law enforcement officer  
22 exposure to synthetic cannabinoids and causing

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1 kidney damage.

2 MR. GRAVES: Yes, sir.

3 ACTING CHAIR PRYOR: Extreme kind of  
4 damage. Do you have any idea of just what kind  
5 of exposure produces that damage?

6 MR. GRAVES: So, I just found out  
7 about this recently. I found out about it last  
8 November. And it's been with one specific team  
9 in the Las Vegas area that had been hitting  
10 repeatedly different spice labs where they're  
11 getting the chemical, putting the acetone,  
12 spraying it on, just like with earlier testimony  
13 with the cement mixer and doing all that.

14 That team, initially, they -- there's  
15 not a lot of data. This is all anecdotal. But  
16 it reminds me of when we were raiding meth labs  
17 and all of us were getting cancer. In fact, some  
18 of us are waiting for the chemical bullet to hit  
19 us.

20 With these guys -- with us, with the  
21 meth issue, our cancers developed many years  
22 later -- with these guys, they're raiding these

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1 labs. They're hitting them. And then, all of a  
2 sudden, you've got like that HSI agent who, all  
3 of a sudden, is in the hospital; he's in ICU, you  
4 know, and he's got this severe kidney damage.  
5 They start backtracking, figuring out what it is.

6 ACTING CHAIR PRYOR: Does this take  
7 months, days? I mean, what --

8 MR. GRAVES: We're talking, I think,  
9 I'm trying to think how long back that they've  
10 been dealing with this. I mean, it's at least a  
11 year, right? But, I mean, we're not talking  
12 multiple years.

13 ACTING CHAIR PRYOR: Yes.

14 MR. GRAVES: I mean, this is a short  
15 amount of time. To be honest, it's kind of  
16 freaking me out. I mean, drug enforcement has  
17 not been good to my health.

18 ACTING CHAIR PRYOR: Yes.

19 MR. GRAVES: And I'm looking at what's  
20 happening to these guys and I'm scared. They're  
21 going back. They're now taking a look, bringing  
22 in CDC and do the monitoring. We'll see what

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1 happens when everybody gets done with their  
2 studies.

3 But they're using the standard PPE  
4 that we would use in a lab. They're not Level A.  
5 They're just using an air-purifying respirator.  
6 They're not an SCVA. I don't know if it's an  
7 issue with their decontamination. I can't see it  
8 getting through a Tychem suit, but I'm sure what  
9 they were doing was treating it just like we would  
10 do a meth lab and just using that same procedure.  
11 Well, apparently, that's not good enough with  
12 what we're looking at.

13 Like I had in my written testimony,  
14 this is all new.

15 ACTING CHAIR PRYOR: Right. Okay.

16 MR. GRAVES: And this is happening  
17 fast.

18 ACTING CHAIR PRYOR: Detective  
19 Alcala --

20 MR. ALCALA: Yes?

21 ACTING CHAIR PRYOR: -- you said, in  
22 response to a question from Judge Reeves, that

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1       there's no safe fentanyl. But you also said,  
2       though, that these dealers are responding to  
3       competition --

4                   MR. ALCALA: Correct.

5                   ACTING CHAIR PRYOR: -- and mixing  
6       fentanyl and drugs.

7                   MR. ALCALA: True.

8                   ACTING CHAIR PRYOR: And my question  
9       is, why in the heck would that give you a  
10      competitive advantage if it's so potentially  
11      lethal?

12                  MR. ALCALA: Correct. So, as previous  
13      studies have been done, I'm no doctor, but  
14      previous studies that I've read, it shows that  
15      humans, they increase their tolerance when  
16      they're using a certain type of drugs. So, if  
17      heroin -- you know, it's a disease; the addiction  
18      is a disease. If a heroin addict takes heroin  
19      and he uses 1 gram a day, and he gives into a  
20      tolerance of 2 grams per day, well, that's around  
21      \$250. But, if a person finds out that this other  
22      dealer has a stronger heroin or better quality,

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1 they're going to go spend \$100 to try to  
2 accommodate for the cost.

3 And that's why this person is gaining  
4 the edge on the other competition. Again,  
5 they're looking at monetary gain. They're very  
6 unconcerned what's happening to the public.

7 MS. LaSALLE: May I just add a few  
8 clarifications to what the research has borne out  
9 with respect to what the fentanyl market looks  
10 like? So, fentanyl, essentially, entered the  
11 market around 2013. Heroin deaths started  
12 skyrocketing around 2010. So, you have an  
13 enormous transition from people who are using,  
14 misusing prescription opioids who transition to  
15 the illicit market around 2010. And once you had  
16 this huge market of heroin users around 2013,  
17 fentanyl entered the market.

18 Fentanyl, by and large, is not a drug  
19 that people are seeking. They don't want  
20 fentanyl in their product. They were getting  
21 heroin contaminated with fentanyl.

22 Now, particularly new and younger

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1 users who don't have a 20-year history, for  
2 instance, of using heroin, some of those folks  
3 are now seeking fentanyl. But, by and large,  
4 this is not a drug that most people want to use.  
5 In many parts of the country, unfortunately, now  
6 fentanyl is totally ubiquitous with the heroin  
7 supply. So, you really can't get heroin without  
8 fentanyl in many parts of the Northeast and the  
9 Midwest.

10 But the idea that people are adding  
11 fentanyl because it's what the consumer wants and  
12 to increase profits isn't really borne out by  
13 what the research is showing in terms of drug  
14 user preferences. They're adding it just simply  
15 to cut costs, as was mentioned before, in terms  
16 of the ease of making synthetic drugs as opposed  
17 to cultivating the poppy. But I do think it's an  
18 important distinction in terms of what the market  
19 looks like on the ground in terms of the user's  
20 awareness and the low-level sellers who are --

21 ACTING CHAIR PRYOR: I would think the  
22 manufacturer doesn't want to kill the customer.

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1 MS. LaSALLE: Precisely.

2 ACTING CHAIR PRYOR: And I don't  
3 understand exactly why we have this phenomenon.

4 MS. LaSALLE: Right.

5 ACTING CHAIR PRYOR: Commissioner  
6 Bolitho, do you have any questions, if you're  
7 there?

8 COMMISSIONER BOLITHO: No, Judge. No,  
9 Judge. Thank you.

10 ACTING CHAIR PRYOR: Okay. We have  
11 gone a fair amount over, but I think this has  
12 been helpful testimony.

13 I want to thank all of you for being  
14 here today. We have your written submissions as  
15 well.

16 We're going to take a 12-minute break.  
17 We'll start again at the top of the hour.

18 (Whereupon, the foregoing matter went  
19 off the record at 10:50 a.m. and went back on the  
20 record at 11:02 a.m.)

21 ACTING CHAIR PRYOR: Let's come back  
22 to order.

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1           Our final three panels will focus on  
2           the Commission's proposed amendment regarding  
3           first offenders and alternatives to  
4           incarceration. Our first panelists on this topic  
5           will be Andrew Lelling and Miriam Conrad.

6           Mr. Lelling is the United States  
7           Attorney for the District of Massachusetts, a  
8           position he has held since December 2017. Before  
9           his appointment, he was a federal prosecutor for  
10          over 15 years, serving, first, in the Civil  
11          Rights Division at the Department of Justice and  
12          later at the U.S. Attorney's Offices for the  
13          Eastern District of Virginia and the District of  
14          Massachusetts. Before joining the Justice  
15          Department, Mr. Lelling was in private practice  
16          and he once clerked for then-Chief Judge B. Avant  
17          Edenfield of the Southern District of Georgia, my  
18          circuit. I knew Judge Edenfield. Mr. Lelling is  
19          a graduate of the Binghamton University and the  
20          University of Pennsylvania Law School.

21          Ms. Conrad has been the Federal Public  
22          Defender for the Districts of Massachusetts, New

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1 Hampshire, and Rhode Island since 2005. She  
2 became an Assistant Federal Defender in 1992  
3 after working as a trial attorney for the  
4 Committee for Public Counsel Services, the State  
5 Public Defender's Office. She is Vice Chair of  
6 the Defenders Sentencing Guidelines Committee.  
7 And, after graduating from Harvard Law School cum  
8 laude, she clerked for Judge Zobel of the U.S.  
9 District Court in Boston. She earned a  
10 bachelor's degree in journalism from Northwestern  
11 University.

12 COMMISSIONER BARKOW: Another fine  
13 university.

14 (Laughter.)

15 ACTING CHAIR PRYOR: Another, indeed.  
16 Mr. Lelling?

17 MR. LELLING: Thank you, Judge Pryor  
18 and Members of the Sentencing Commission for  
19 having me today, for the opportunity to present  
20 the Department's views on the proposed amendments  
21 concerning first offenders and alternatives to  
22 incarceration.

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1           The Department respectfully disagrees  
2 with these amendments. I'll start with the  
3 proposal that defendants who qualify as first  
4 offenders should receive a one- or two-level  
5 reduction from the otherwise applicable offense  
6 level.

7           As the initial matter as written, this  
8 proposal would apply across all offense types,  
9 ignoring the fact that first offenders are not  
10 necessarily nonviolent and have not necessarily  
11 committed a minor offense, but, instead, may have  
12 committed a very serious one. This is especially  
13 so in the white collar context where defendants  
14 are often first-time offenders and often commit  
15 serious predatory frauds that destroy the  
16 financial lives of victims. Ponzi schemes, which  
17 are not uncommon, are a good example. Similarly,  
18 the amendment would apply to distribution of  
19 child pornography, selling fentanyl, murder for  
20 hire, or other morally egregious offenses.

21           The primarily rationale offered for  
22 this across-the-board change is that defendants

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1 with zero criminal history points have the lowest  
2 rate of recidivism, clocking in at about 30  
3 percent. The Department has a few concerns with  
4 this approach.

5 Initially, this rationale reminds me  
6 of the metaphor about glasses being half-empty or  
7 half-full since, of course, a 30 percent  
8 recidivism rate means that about one in three  
9 offenders are offending again, despite the  
10 expense and extreme stress of a federal  
11 prosecution. This is not a low figure.

12 Second, the low recidivism rationale  
13 only makes sense as a reason for lower federal  
14 sentences if we ignore all sentencing  
15 considerations in 18 U.S.C. § 3553 except for  
16 specific deterrents. Considerations of general  
17 deterrents, especially respect for the law,  
18 protecting the public, and just punishment are  
19 equally important, yet do not seem to have  
20 figured into the Commission's rationale for the  
21 proposed amendments.

22 Third, correlation is not causality.

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1 That is, the recidivism rate among first  
2 offenders might be lower precisely because of the  
3 federal penalties that are currently in place to  
4 deter them from offending again, but the proposed  
5 amendment would surely lessen the deterrent  
6 effect of the federal penalties that are  
7 currently available.

8 Using the Commission's own data, in  
9 2014, this proposal would have lowered the  
10 sentencing guideline ranges for 5,700 drug  
11 dealers about 80 percent of whom trafficked in  
12 opioids, meth, opiates, heroin, or cocaine,  
13 addictive dangerous substances; 3,600 fraud  
14 defendants, over 1,000 alien smugglers, 940 child  
15 pornographers, and 300 robbery defendants. These  
16 are real crimes. The Commission should not amend  
17 the guidelines to encourage lower sentences for  
18 them. Just because someone is a first offender  
19 does not mean that they are a minor offender.  
20 But the proposed amendment does not draw that  
21 distinction.

22 Turning to alternatives to

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1 incarceration for first offenders, the amendment  
2 would recommend that first offenders receive  
3 sentences other than imprisonment if they are in  
4 Zone A or B and their offense of conviction was  
5 not a crime of violence and did not involve a  
6 firearm or dangerous weapon.

7 The Department is concerned that the  
8 practical impact of this proposal will be to  
9 provide first offenders with an offense level of  
10 11, or if all aspects of the amendments were  
11 accepted, of 13 or below, a presumptive guideline  
12 range of zero to zero. So, if you're a first-  
13 time offender and your guideline range is, say,  
14 13 or below, if the entire amendment were  
15 adopted, it is most likely that you would not go  
16 to jail at all.

17 The proposal offers little support for  
18 this significant change in sentencing policy.  
19 White collar defendants would receive the most  
20 benefit from this proposal. Tax fraud is of  
21 particular concern. Eighty-one percent of tax  
22 fraud defendants are in criminal history Category

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1 I. I would wager that the bulk of those have no  
2 criminal history points at all.

3 But, in §2T1.1 of the guidelines, the  
4 Commission has already recognized the inherent  
5 limits of the Government's ability to prosecute  
6 tax fraud and the acute need for general  
7 deterrence. So, it's widespread and it's hard to  
8 detect.

9 Meanwhile, under the current  
10 guidelines, courts already routinely give tax  
11 defendants sentences well below the guideline  
12 range. About 25 percent of such sentences are  
13 within the guideline range.

14 But there's a deeper, in some ways  
15 more subtle, issue here. In the post-Booker  
16 world, federal courts already have near total  
17 discretion to vary downwards when it suits them  
18 and oppose alternatives to incarceration. And  
19 courts have routinely exercised this discretion,  
20 as the Commission's own data has shown. So, the  
21 amendment remedies no particular perceived  
22 injustice. All it does do is signal to the courts

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1 that certain offenses are taken less seriously  
2 than others, a signal that courts will use to  
3 impose sentences well below whatever incremental  
4 adjustments the Commission may intend with these  
5 amendments.

6 Finally, I would like to address the  
7 proposed amendment to consolidate Zones B and C.  
8 The Commission has already addressed this issue  
9 seven years ago when it expanded Zones B and C.  
10 That had an impact. A higher percentage of  
11 defendants now find themselves in Zone B, and  
12 that has had an impact on sentencing.

13 Finally, if you combined all aspects  
14 of the Commission's proposed amendments, the  
15 impact would be that a first-time offender in a  
16 white collar case who causes about \$100,000 of  
17 loss or less simply will not go to prison, and  
18 that is not in the public interest.

19 Thank you for the opportunity to share  
20 the Department's views on these important issues.  
21 I look forward to answering your questions.

22 ACTING CHAIR PRYOR: Ms. Conrad?

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1 MS. CONRAD: Good morning. Thank you  
2 very much, Judge Pryor, for inviting me here  
3 today and for allowing me to speak on behalf of  
4 the Defenders on this very important proposal.  
5 The Defenders are grateful for the Commission's  
6 willingness to consider putting into effect  
7 guidelines that reflect its findings about  
8 reduced risks of recidivism for defendants with  
9 zero criminal history points or who are first  
10 offenders, and to alleviate prison overcrowding  
11 and encourage alternative sentences for those who  
12 would benefit from them in terms of reduced  
13 recidivism and who would not pose a danger to  
14 public safety.

15 And I'm going to deviate for a moment  
16 from what I wrote in advance because I would like  
17 to address some of the points made by Mr. Lelling,  
18 who I have had the pleasure to know and work with,  
19 or not actually against, but have cases with for  
20 quite a number of years. And I have tremendous  
21 respect for Mr. Lelling's intelligence,  
22 practicality, and so forth, but I think that

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1       there is a fundamental flaw in the Department's  
2       position with respect to these proposals, maybe  
3       two fundamental flaws.

4                   One is they act as if this reduction  
5       is a get-out-of-jail-free card. It's a one- or  
6       two-level reduction in the offense level. Major  
7       fraudsters, major drug traffickers, are not going  
8       to be looking at probation. They're not going to  
9       be in Zones A or B. They are still going to have  
10      extremely high offense levels.

11                   And I have my little pocket-sized copy  
12      of the table that I carry with me everywhere.

13                   ACTING CHAIR PRYOR: You should look  
14      at our web-based app.

15                   (Laughter.)

16                   MS. CONRAD: I'm really excited about  
17      the app.

18                   ACTING CHAIR PRYOR: It is going to  
19      change your life.

20                   MS. CONRAD: If only the jails would  
21      let me take my iPad or my iPhone into the prison  
22      to visit my clients, then it would be awesome.

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1 But it's still awesome.

2 (Laughter.)

3 ACTING CHAIR PRYOR: And some judges,  
4 you never know about them.

5 (Laughter.)

6 MS. CONRAD: Right.

7 So, at the lower levels, these  
8 reductions, even of two levels, would mean a  
9 decrease of three months at the low end of the  
10 guideline. At the higher ranges, the one-level  
11 reduction would still result in overlapping  
12 guideline ranges. So, we're not talking about a  
13 major difference.

14 In addition -- and I think this is a  
15 really important point -- the proposal with  
16 respect to combining Zones A and B and the  
17 proposed language that says, that gives meaning  
18 to 28 U.S.C. § 994(j), when it says that,  
19 ordinarily, defendants who are first offenders  
20 who are not convicted of violent offenses should  
21 receive a non-incarcerative sentence. Nothing in  
22 that says they have to. The judges are still

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1 free to impose appropriate imprisonment sentences  
2 in appropriate cases. The Government makes this  
3 sound like it's the reverse of a mandatory  
4 minimum, like it's a mandatory maximum. It's  
5 not. It just simply isn't.

6 So, then, the question, I suppose,  
7 is -- and this is part of what the Department  
8 argues -- why should we implement, because judges  
9 can vary anyway, and so forth? And I think the  
10 answer -- and it's an important one -- is that  
11 the guidelines have historically exercised a  
12 gravitational pull on judges. Some judges give  
13 them more weight than others. Some judges give  
14 them more weight in some cases than others. But,  
15 ultimately, they give a gravitational pull.

16 And what these proposals in  
17 combination will do is they will give judges more  
18 of a reason to stop and to consider a sentence  
19 that does not involve incarceration. I think  
20 it's important to note the empirical evidence  
21 that supports this type of approach, not just,  
22 first of all and most importantly, the very

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1 significant work that the Commission has done in  
2 the area of research on recidivism in a number of  
3 reports, but also the study that we cited that  
4 shows that, for first offenders, probationary  
5 sentences can result in a lower rate of  
6 recidivism than prison.

7 And this is something that was alluded  
8 to in the very interesting discussion on the  
9 prior panel with Judge Breyer and Ms. Price and  
10 the gentleman from the Drug Narcotics Officers  
11 Association, which is, you know, how much time is  
12 enough and how much time is too much, and what  
13 are the collateral consequences, not just for the  
14 communities, of imprisoning someone, but the  
15 collateral consequences for the individual? When  
16 people go to prison -- or excuse me -- when people  
17 are sentenced or found guilty of a felony, it has  
18 a huge impact on their livelihood, their  
19 employability, their home, and their family.  
20 When they go to prison and they come out, the  
21 hurdles that they face are even greater. We  
22 should be concerned -- and I know this Commission

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1 and its staff is concerned -- about what happens  
2 when they come out.

3 I think the Probation Department has  
4 done a phenomenal job of working on measures,  
5 evidence-based measures, that can reduce  
6 recidivism, and they have shown in their most  
7 recent statistics that recidivism among those on  
8 supervision has declined, probably as a result of  
9 those.

10 So, as a result of all of those  
11 points, I think this is an incredibly significant  
12 point. I, of course, haven't made all the points  
13 I have written down because I wanted to address,  
14 I think, what's before you now.

15 And I see the red light is on, but  
16 thank you so much for your time.

17 ACTING CHAIR PRYOR: Thank you, Ms.  
18 Conrad. Of course, we have your written  
19 testimony.

20 Questions?

21 COMMISSIONER BARKOW: I have a  
22 question that I think goes to -- it's for both of

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1       you, which is, so the difference between somebody  
2       who is a first offender -- and we could talk about  
3       the different definitions that we have -- versus  
4       someone with criminal history. So, I guess maybe  
5       I'll start with the Government's position, if I  
6       could, Mr. Lelling.

7               The Government, I assume, would agree  
8       that those are different -- I mean, all else being  
9       equal, if you have someone who is committing an  
10      offense for the very first time versus someone  
11      who has a criminal history, that that is a  
12      meaningful difference between the two, if  
13      everything else was equal about them?

14             MR. LELLING: Well, the difficulty  
15      with that, the difficulty with the question as  
16      you're phrasing it is that the Commission's  
17      proposal --

18             COMMISSIONER BARKOW: I know. I  
19      understand. Don't worry about the proposal. I'm  
20      just trying to -- I understand what the  
21      Government's issue was with how the proposal is  
22      written. Because what I want to get to a place

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1 is if you agree with that, I want to try to figure  
2 out which categories of first offenders don't  
3 raise some of the issues that you have here.

4 Because when you talk about, well,  
5 they could be orchestrators of the world's  
6 largest Ponzi scheme or armed carjackers, or  
7 child sex abuse, if we could put aside, because  
8 28 U.S.C. § 994(j) tells us that we shouldn't do  
9 this for the violent and serious first offenders,  
10 if we can identify that category -- and we might  
11 not all agree what that is -- but that category  
12 of people who they are genuine first offenders  
13 and, therefore, they should be treated  
14 differently from people who have repeated  
15 criminal activity.

16 And so, first, I just want to make  
17 sure that I am right that the Department does  
18 agree that someone who's doing something for the  
19 very first time, in fact, should be treated  
20 differently than someone who is a repeat  
21 offender.

22 ACTING CHAIR PRYOR: All other things

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1 being equal?

2 COMMISSIONER BARKOW: Equal. Exactly.

3 MR. LELLING: Well, of course. And  
4 the guidelines do.

5 COMMISSIONER BARKOW: Okay. So,  
6 that's the -- well, the guidelines --

7 MR. LELLING: The guidelines build  
8 in --

9 COMMISSIONER BARKOW: Category I  
10 groups people together that actually don't treat  
11 them differently.

12 MR. LELLING: Well, that is sort of a  
13 two-step answer. One, yes, I think there's a  
14 substantial difference between a person who has  
15 no prior conviction and a person with a prior  
16 conviction that happens to fall outside the  
17 parameters of §4C1.1. I think those are two very  
18 different kinds of people.

19 COMMISSIONER BARKOW: So, we could  
20 define first offender. Let's say for just a  
21 moment that we're talking about somebody who has  
22 no convictions whatsoever. Okay. And so, it's

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1 the difference between that person and someone  
2 who does. So, not the aged out of convictions --

3 MR. LELLING: Right.

4 COMMISSIONER BARKOW: -- not, you  
5 know, falls out for other reasons, but they have  
6 no convictions on their record.

7 MR. LELLING: Right.

8 COMMISSIONER BARKOW: This is the very  
9 first time they're in contact with the criminal  
10 justice system.

11 MR. LELLING: So, assuming the person  
12 with no convictions, yes, as the guidelines  
13 reflect, the person with more convictions who  
14 commits a later offense is treated more harshly  
15 than someone with no convictions. And that seems  
16 appropriate.

17 COMMISSIONER BARKOW: Well, but we  
18 currently lump them together in Category I. And  
19 so, what we're trying to figure out is if, in  
20 fact, we should separate out those two groups of  
21 people. And it sounds like you agree they are  
22 different.

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1 MR. LELLING: Yes.

2 COMMISSIONER BARKOW: So, then, the  
3 next question is, are there certain serious  
4 violent types of crimes where that distinction  
5 doesn't matter because the underlying current  
6 offense is so serious that the fact that it's a  
7 first -- it's the first time you kill many people,  
8 you know, the fact that it's a first offense  
9 really isn't the relevant factor there. Your  
10 underlying substantive events is doing the  
11 culpability work.

12 So, my next question for you is, in  
13 trying to figure out what kinds of offenses would  
14 fit the answer to my question for you, the kinds  
15 of things, is there anything that the Government  
16 would recognize is a non-serious, non-violent  
17 type of offense? Because I tried to read your  
18 comments to figure out what that would be, and I  
19 couldn't figure out if you would recognize that  
20 there was any.

21 MR. LELLING: Well, of course, there  
22 are non-serious and non-violent offenses, and

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1 non-serious, non-violent offenses already skew to  
2 the very low end of the guidelines.

3 COMMISSIONER BARKOW: But I'd like  
4 you, just for me, to identify what those are.  
5 Because I hear what you're saying. So, our issue  
6 is that, right now, they're all in Category I.  
7 And if we wanted to separate out those people who  
8 have not had a conviction before in Category I,  
9 it would be helpful for me if you could identify  
10 the non-serious, non-violent ones.

11 MR. LELLING: So, is your question  
12 what crime is sufficiently non-serious that the  
13 Commission could justify an extra level off?

14 COMMISSIONER BARKOW: I would phrase  
15 it differently, which is we're statutorily  
16 obligated under 994(j) to treat the crimes that  
17 are not violence and serious differently when  
18 someone is a first offender. And so, I'm trying  
19 to identify what Congress told us we have to do.  
20 So, I want the Department of Justice to tell me  
21 which crimes are the ones that don't meet  
22 994(j)'s definition of violent and serious.

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1                   MR. LELLING:       Well, two things.  
2       First, it seems to me the Commission has already  
3       matched requirements under 994, a statute that's  
4       been around probably -- well, I'm going to  
5       hazard -- almost as long as the Commission has  
6       been around.

7                   And I think what the guidelines do is  
8       skew higher for violent crimes and skew higher  
9       for serious crimes than they do for non-violent  
10      and less serious crimes.

11                  COMMISSIONER BARKOW: I understand. I  
12      do. I apologize.

13                  Do you want to try?

14                  ACTING CHAIR PRYOR: Let me try. Let  
15      me try.

16                  COMMISSIONER BARKOW: Okay.

17                  (Laughter.)

18                  ACTING CHAIR PRYOR: Let's take an  
19      offender with no criminal history points, no  
20      prior conviction of any kind. Do you think that  
21      there are certain kinds of offenses where the  
22      guidelines should presume a non-incarceration

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1 sentence? And if so, how would we go about  
2 determining what those offenses are?

3 MR. LELLING: Well, first, yes, I  
4 think there are offenses where it can be  
5 appropriate to have a non-incarcerative result.  
6 I think the guidelines already show you where  
7 that is.

8 ACTING CHAIR PRYOR: A presumption,  
9 though. Do you think that there ought to be a  
10 presumption for some offenders who are no  
11 criminal history points, no prior convictions,  
12 who have certain non-violent, less serious  
13 offenses? How would we go about determining just  
14 for them where there should be a presumption of  
15 a non-incarceration sentence? Would it be, say,  
16 offense level 13 and below?

17 MR. LELLING: Thank you. No.

18 (Laughter.)

19 ACTING CHAIR PRYOR: Okay. What would  
20 it be?

21 MR. LELLING: Well, I think it would  
22 be Zone A. I think the guidelines already take

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1 a shot at showing you what class of crimes should  
2 fall in that area. I think the greater  
3 difficulty, which I think you are perhaps  
4 implying, Your Honor, is the word "presumption."  
5 Is it a presumption? I don't think the Department  
6 would agree it should be a presumption. I think  
7 the guidelines already reflect that for certain  
8 kinds of crimes it can be appropriate. I think  
9 that's so, and I think we see that in the courts  
10 every day. I think presumption would be too  
11 strong for the Department's blood.

12 ACTING CHAIR PRYOR: Okay.

13 COMMISSIONER REEVES: Is the problem  
14 with the question that it's usurping the job of  
15 the judge to make that determination after the  
16 arguments have been made about whether someone  
17 should or should not receive an incarcerated  
18 sentence?

19 MR. LELLING: Well, I think that  
20 that's right, and I think my other hesitation is  
21 that you could have a first-time offender, a true  
22 first-time offender, who has committed a crime,

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1 as Professor Barkow implied, who has committed a  
2 crime so serious that the fact of the first-time  
3 offense is simply irrelevant. And that is a  
4 simple example of how complex the sentencing  
5 calculus is in every single case, as each judge  
6 considers 18 different things to decide what  
7 sentence should be given.

8 This proposal is driven by a single  
9 consideration, which is specific deterrence.  
10 That's it.

11 COMMISSIONER BARKOW: That's not true,  
12 actually, if I could just interject. There is a  
13 proportionality concept that we're trying to get  
14 at, and I guess what I'm trying to -- I recognize  
15 that individual judges are in a good position to  
16 assess some of these things. And I appreciated  
17 your comment that in a Booker world that takes  
18 care of everything. But that would suggest we  
19 should disband as a Commission because we are  
20 still supposed to be setting principles for  
21 judges to follow, even in an advisory guideline  
22 regime, to try to bring some order to it.

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1           And so, I mean, yes, we could just let  
2 every individual judge decide in his or her case  
3 how to deal with it. But, if we wanted to try to  
4 set some general principles, the questions for  
5 comment -- and maybe the proposed amendment made  
6 you think that -- but our questions for comment  
7 asked, if this isn't the right way to do it, are  
8 there certain categories that should be in,  
9 certain categories that should be out?

10           And that's what I was trying to get  
11 your help with because I think, with the  
12 guidelines, what we try to do is create a  
13 heartland environment where, if we say, hey,  
14 look, if the bulk of the people in the guidelines  
15 world were all committing homicides as their  
16 first offense, then I would say, well, you know,  
17 actually, it's kind of crazy to think about doing  
18 this. But that's not what the community of people  
19 in federal prison look like. And, in fact,  
20 they're not actually all the world's largest  
21 Ponzi schemes, child sex abuse, armed carjackers,  
22 right?

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1                   And so, I was trying to figure out in  
2                   that heartland what might be the cases that the  
3                   Government would recognize don't meet 28 U.S.C.  
4                   § 994(j)'s definition of serious and violent.  
5                   So, we could sort of think about this is the group  
6                   of folks that it makes sense for this Criminal  
7                   History Category to think about zero points  
8                   because we have a ream of data now that the zero-  
9                   pointers are different than the one-pointers.  
10                  And so, I just wanted to reflect the empirical  
11                  reality about not just specific deterrence, but  
12                  proportionality and what we know as an empirical  
13                  means. These are different categories of folks.

14                  And so, at least I'm only speaking for  
15                  myself now. When I try to go through the comments  
16                  and figure out who's serious and violent and who  
17                  isn't, I would love help in that regard. Because  
18                  to figure out who are the zero-pointers who are  
19                  really zero-pointers -- because our empirical  
20                  evidence shows that is a different category. And  
21                  who is that a different category for?

22                  MR. LELLING: But the distinction you

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1 seek to draw, the guidelines already draw. If  
2 you have no criminal history points -- the  
3 underlying premise of your concern is that the  
4 guidelines are too high, and we simply disagree.  
5 The guidelines already give an escalating scale  
6 of punishment based on how much of a criminal  
7 history you have, how much money was involved,  
8 how much drugs, how many people you hurt. If  
9 it's none, you're here. If it's lots, you're  
10 here. So, the guidelines already contain the  
11 distinction that you are drawing. The underlying  
12 premise, though, I think is that they're just too  
13 high as stated or --

14 COMMISSIONER BREYER: Well, I am not  
15 too sure of that. I mean, I'm not sure that  
16 that's the premise. I think the battle is the  
17 presumption. And I've heard it from Judge  
18 Gleason. I've heard it for years, which is, why  
19 are you sending white collar people to prison?  
20 They have a lower rate of recidivism and, as a  
21 general rule, their Criminal History Category is  
22 much lower. Why do they go to prison?

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1                   Well, if you ask me, just as one  
2                   judge, I agree with, actually, Sarbanes, who  
3                   spoke to the Commission several years ago and was  
4                   asked the question, "What have you found  
5                   effective in terms of white collar crime? What's  
6                   the effective penalty?" Because we had to jack  
7                   up penalties when that occurred. I wasn't on the  
8                   Commission at that time, but that's actually what  
9                   happened.

10                   And what Sarbanes said was, the  
11                   deterrent, the real deterrent is sending a white  
12                   collar offender to prison. That's the deterrent.  
13                   It's not fine him, the shame of a felony, on and  
14                   on and on. It is that person serves some time in  
15                   jail.

16                   He said, the question may be, how long  
17                   should he go? That's a fair question. But, from  
18                   his experience as an author of Sarbanes-Oxley, it  
19                   was send the person to prison.

20                   So, I mean, I think I'm much closer to  
21                   the Government's position, respectfully, than I  
22                   am to yours, because I think you could take all

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1 the statistics, and we all know as sitting judges  
2 that that person who cheats on his income tax,  
3 that person who does the small scheme, that  
4 person who commits a Social Security offense,  
5 stealing, you know, getting that extra money when  
6 Grandma Sadie is dead, all those people -- I'll  
7 tell you, if they thought all they would have to  
8 do is pay it back and have the shame of a felony,  
9 my view, that's not enough. Okay.

10 But I think the interesting question  
11 is, should we have a collapse of, the second part,  
12 of the zones? Because if you collapse the zones,  
13 I think -- or eliminate C -- I think that really  
14 what you've done is just give courts a little bit  
15 more discretion with respect to appropriate  
16 sentencing. And I'm not quite sure why DOJ should  
17 be so opposed to it. I mean, I understand. I  
18 understand the rigor and I understand their  
19 overall philosophy. But, really, given what  
20 Congress has told us to do, which is to consider  
21 for first-time offenders this non-incarceration,  
22 why wouldn't that be achieved in part by the

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1 collapse of the zones?

2 I guess to you.

3 MS. CONRAD: If I may just very  
4 briefly? Thank you, Judge.

5 First of all, 994(j) doesn't just say  
6 "consider," 994(j) says ensure that the  
7 guidelines reflect the general appropriateness of  
8 imposing a sentence other than imprisonment. So,  
9 just as 994(h), I think it is, says that the  
10 Commission shall ensure that someone with two  
11 prior violent offenses or drug convictions is a  
12 career offender and gets near the top, it's the  
13 sort of flip side of that. One has been  
14 implemented; the other one has not.

15 With respect to Your Honor's point  
16 about the securities fraud defendant who is  
17 really shaken by having to go to prison, that  
18 person is generally going to have a high loss  
19 figure and a high offense level. That person, I  
20 would respectfully submit, is not the same as  
21 someone whose mother's Social Security checks  
22 keep getting deposited and that person uses it.

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1 That person is not only -- and it's not just the  
2 shame of a felony conviction -- that person may  
3 be barred from certain jobs, may be barred from  
4 certain benefits.

5 I just would like to give, in response  
6 to Professor Barkow's question to Mr. Lelling,  
7 one example of a recent case of somebody who was  
8 sentenced to prison who would have benefitted  
9 from these proposals. And perhaps Mr. Lelling  
10 will or won't agree that that person perhaps  
11 should have received probation, but I think it's  
12 illustrative.

13 And that is a woman, a single mother  
14 with five children, two of them disabled, who was  
15 a bank teller, and she cashed fraudulent tax  
16 refund checks. She cooperated with the  
17 Government. Her guideline range -- two of her  
18 children, one of her children had complex medical  
19 issues. She lost her job, obviously, as a bank  
20 teller after she was arrested. She got a job as  
21 a manager in a group home where she was hard-  
22 working, worked far in excess of 40 hours caring

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1 for these adults with special needs.

2 Her guideline range was 15 to 21  
3 months, so offense level 13. Under the proposal,  
4 that would have been reduced down to either 12 or  
5 11. She would fallen in Zone C. That would have  
6 been collapsed --

7 ACTING CHAIR PRYOR: Did she have a  
8 criminal history points?

9 MS. CONRAD: She did not have any  
10 criminal history points.

11 COMMISSIONER BREYER: So, then, it's  
12 the loss, right? Your example has to be the loss.

13 MS. CONRAD: Right.

14 COMMISSIONER BREYER: And the loss  
15 before the acceptance of responsibility --

16 MS. CONRAD: Correct.

17 COMMISSIONER BREYER: -- in your case  
18 would be --

19 MS. CONRAD: It was about \$200,000.

20 COMMISSIONER BREYER: Two hundred  
21 thousand dollars?

22 MS. CONRAD: Although one could argue,

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1       also, I'm sure she got abuse of position of trust  
2       as well on top of that.

3                   COMMISSIONER BREYER:   Okay.

4                   MS. CONRAD:    I mean, you know, all  
5       those things were factored in.

6                   But the fact of the matter, this is a  
7       woman who had taken steps toward post-offense  
8       rehabilitation.  Allowing her probation, perhaps  
9       with house arrest, would allow her to care for  
10      her children, would have lessened the burden on  
11      society, would have cost less, since prison costs  
12      nearly eight times as much as supervision does,  
13      and would not have had these sort of ripple  
14      effects on her family, on the community, on the  
15      individuals she cared for in the group home, and  
16      so forth.

17                  So, it seems to me that that's  
18      somebody -- she got a year and a day.  But that  
19      is someone for whom it would have been helpful  
20      for the judge to have had guidelines under the  
21      amendments that suggested that (a) a probationary  
22      sentence was available, and (b) that it was

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1 something to be considered under the presumptive  
2 language that has proven to be so controversial  
3 today.

4 COMMISSIONER REEVES: Let me change  
5 your hypothetical just a little bit.

6 MS. CONRAD: Sure.

7 COMMISSIONER REEVES: Let's add a  
8 defendant to it, the husband who forces the bank  
9 teller to do all of the terrible things that she  
10 did. They end up in the same zone, no criminal  
11 history. Under this proposal, both would be --  
12 there would be a presumption of no incarceration.  
13 Arguably, the wife would be entitled to that, but  
14 the husband wouldn't, but there would still be a  
15 presumption for both of those. So, it's  
16 essentially the same crimes.

17 MS. CONRAD: And I would suggest that  
18 a judge would be more inclined, the sentencing  
19 judge would be more inclined to adopt the  
20 presumption with respect to the woman, not  
21 because she's a woman, but because of her role in  
22 the offense.

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1                   COMMISSIONER REEVES: The judge can do  
2 so now.

3                   MS. CONRAD: Not under the guidelines.  
4 Only with a variance.

5                   COMMISSIONER REEVES: As the judge can  
6 do now.

7                   MS. CONRAD: Well, again --

8                   COMMISSIONER REEVES: It's another  
9 presumption. You're presuming -- there are  
10 presumptions that go both ways, is my point.

11                   MS. CONRAD: Well, yes, and that's the  
12 point. The question is, should the presumption  
13 be reversed? Should the presumption for someone  
14 who is on the cusp between Zones C and D, should  
15 the presumption be reversed for that person where  
16 that person has no criminal history?

17                   And it's a rebuttable presumption, and  
18 I certainly could imagine an able prosecutor like  
19 Mr. Lelling arguing effectively that the man,  
20 because he essentially brought his wife into the  
21 scheme, and so forth, and he was the  
22 organizer/leader, he might have higher guidelines

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1 as a result of that, which would put him solidly  
2 in Zone D, if he got an enhancement for being an  
3 organizer/leader.

4 The judge doesn't have to do it. The  
5 question is whether the judge should stop and  
6 think, is sending this woman to prison a good use  
7 of government funds when we have, BOP is 14  
8 percent overcrowded, understaffed. Section  
9 994(g), I think it is, tells the Commission to  
10 take into account in devising the guidelines the  
11 impact on the prison population and to take steps  
12 to avoid increasing it.

13 Well, the guidelines, up until I think  
14 it's about 2012, ratcheted up the federal prison  
15 population year after year after year, along  
16 with --

17 COMMISSIONER REEVES: Is the  
18 population increasing or decreasing now?

19 MS. CONRAD: I'm sorry?

20 COMMISSIONER REEVES: If we look at  
21 current numbers, is the prison population  
22 increasing or decreasing now?

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1 MS. CONRAD: It is slightly  
2 increased -- I mean, excuse me -- slightly  
3 decreased in recent years. However, I think with  
4 the Department's new guidance with respect to  
5 implementation of mandatory minimums and the  
6 like, I'm not sure that that trend is going to  
7 continue.

8 COMMISSIONER BREYER: I think you're  
9 going to drug offenses.

10 MS. CONRAD: I'm sorry?

11 COMMISSIONER BREYER: I think your  
12 argument relates to drug offenses, essentially.  
13 The increase in confinement in prisons, and so  
14 forth, I think could be attributed to charges and  
15 to convictions in drug offenses. I don't think  
16 white collar offenses have necessarily increased  
17 the -- maybe they have; I don't know. I'm not  
18 aware of that.

19 MS. CONRAD: Well, perhaps I lost the  
20 thread of my point. But here it is: my point is  
21 that, if this proposal resulted in fewer people  
22 going to prison, that would reduce the prison

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1 population.

2 COMMISSIONER BREYER: Yes.

3 MS. CONRAD: And I'm not saying that  
4 would reverse -- continue the trend or reverse  
5 the trend, but it would at least reduce the  
6 population by not spending money on sending  
7 people to prison who don't need to be there,  
8 either for purposes of specific deterrence or for  
9 purposes of reduced recidivism, who would  
10 actually, and studies seem to demonstrate, pose  
11 less of a danger if they were on some sort of  
12 probation or supervised release with all of the  
13 evidence-based practices that U.S. Probation has  
14 come up with in recent years.

15 ACTING CHAIR PRYOR: I take it, Ms.  
16 Conrad, that you would recognize that the  
17 offender you described, a bank teller who steals  
18 \$200,000, that there are principles about the  
19 seriousness of the offense and general deterrence  
20 that cut the other way?

21 MS. CONRAD: I recognize it, that  
22 certainly, as I said, a capable prosecutor could

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1        argue -- and obviously, in this case did make  
2        arguments -- about why that person should go to  
3        prison, because a variance was available. But I  
4        think that there are other defendants similarly  
5        situated who perhaps the loss isn't as high,  
6        perhaps the circumstances are not the same, and  
7        it's just a question of considering the  
8        alternative.

9                    And I disagree with Mr. Lelling,  
10        respectfully, because I do not think the  
11        guidelines as written do recommend probation,  
12        even in Zone A. They make it available, but they  
13        don't recommend it. And that is a failure to  
14        implement 994(j).

15                    ACTING CHAIR PRYOR:        Commissioner  
16        Bolitho, do you have any questions, if you're  
17        there?

18                    (No response.)

19                    We appreciate both of you appearing  
20        today, and we have your written testimony as  
21        well. Thank you for a spirited presentation.

22                    MS. CONRAD:        Thank you.

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1 MR. LELLING: Thank you.

2 ACTING CHAIR PRYOR: We'll move on to  
3 our fifth panel. Okay. Our fifth panel on first  
4 offenders and alternatives to incarceration -- I  
5 should say it's our second panel on that subject  
6 and fifth panel overall -- includes both Mr.  
7 Bendzunas and Mr. Johnson, who have been  
8 introduced before, and two new panelists, Michael  
9 Andrews and Timothy Purdon.

10 Mr. Andrews is the Chair of the  
11 Victims Advisory Group. He currently serves on  
12 the Board of Directors for the D.C. Crime Victims  
13 Resource Center, as well as the Advisory Board  
14 for the Maryland Crime Victims Resource Center.  
15 He has over 15 years' experience in victims'  
16 rights advocacy. He has a law degree from Roger  
17 Williams University School of Law and an LLM from  
18 George Washington University School of Law.

19 Thank you for being with us again  
20 today, Mr. Andrews.

21 MR. ANDREWS: Thank you.

22 ACTING CHAIR PRYOR: Not his first

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1 time.

2 Mr. Purdon -- is that right?

3 MR. PURDON: Purdon.

4 ACTING CHAIR PRYOR: Purdon, is a  
5 partner at Robins Kaplan, LLP, in Bismarck, North  
6 Dakota, and serves as a member of the  
7 Commission's Tribal Issues Advisory Group. He  
8 served as U.S. Attorney for the District of North  
9 Dakota from 2010 to 2015, during which time he  
10 focused his office's efforts on public safety in  
11 Indian Country and organized crime. He is a  
12 graduate of Minnesota State University and  
13 Hamline University School of Law.

14 Mr. Bendzunas?

15 MR. BENDZUNAS: Thank you, Judge  
16 Pryor.

17 POAG has been writing about  
18 alternatives and first offender for what it seems  
19 like three years, and it's nice to finally get to  
20 present our testimony in person.

21 The core mission of U.S. Probation and  
22 Pretrial Services is conducting community

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1 supervision. During the past 30 years of the  
2 guidelines, we have changed significantly as an  
3 agency.

4 In the late 1980s, we were a more  
5 reactive law enforcement agency. Our treatment  
6 services were limited, and we supervised everyone  
7 the same, regardless of the risk they presented.  
8 Much has changed in the past 30 years. We have  
9 become an outcome-driven and evidence-based  
10 agency that leverages risk instruments and now  
11 utilizes cognitive behavioral therapy  
12 methodologies in our supervision practices.

13 It's important to understand this  
14 context because I think it forms our position  
15 when it comes to the rezoning proposal, and we  
16 believe it justifies an expansion of straight  
17 probation as an alternative to imprisonment.

18 Within the past decade, our national  
19 system has adopted a risk assessment that is not  
20 only predictive of general recidivism, but  
21 identifies those most likely to engage in violent  
22 recidivism. Within our strategic plan, we seek

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1 to abide by what we call the "risk principle,"  
2 meaning that supervision activities or  
3 supervision dosages be commensurate with an  
4 offender's objective risk.

5 Research has repeatedly demonstrated  
6 that high-intensity interventions on a high-risk  
7 case can decrease recidivism. And by these, I  
8 mean location monitoring, frequent field  
9 contacts, treatment interventions, and  
10 participation of reentry courts. These high-  
11 intensity interventions imposed on low-risk cases  
12 have the opposite effect. It has been shown to  
13 increase negative outcomes, rearrest and  
14 revocation.

15 With policy demands requiring  
16 supervision officers to focus their time and  
17 attention on high-risk clientele, POAG is  
18 concerned that the rezoning proposal will create  
19 a conflict between the sentencing guidelines and  
20 our "risk principle."

21 Normalizing 12-month terms of home  
22 detention on cases the guidelines define as low-

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1 risk will affect our resources, because any  
2 location monitoring supervision is resource-  
3 intensive. LM is a difficult function of our  
4 work and has demanding policy requirements.  
5 There are mandatory field contacts, 24-hour  
6 responsibilities with regard to responding to  
7 alerts, and burnout and wellness is an issue for  
8 any officer conducting LM supervision.

9 Furthermore, based on the universal  
10 feedback we receive from the field, 12 months of  
11 location monitoring is simply too long. It's an  
12 onerous condition that serves more of a punitive  
13 purpose rather than assisting in reentry. There  
14 are certainly cases where long terms of location  
15 monitoring are appropriate, but those cases are  
16 generally not found in Zones B and C of the  
17 Sentencing Table.

18 POAG has recommended two possible  
19 approaches to increase straight probation  
20 sentences produced by the guidelines. The first  
21 involves bifurcation of the Sentencing Table and  
22 eliminating the mandate requiring sentencing

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1 alternatives to be used to satisfy the low end of  
2 the guideline imprisonment range. This would  
3 obviously require the Commission to adopt a more  
4 expansive interpretation of the 25 percent rule.

5 So, alternatively, we have also  
6 recommended authority under §5C1.1 permitting  
7 downward departure where application of home  
8 detention or community confinement is not  
9 warranted due to a defendant's risk profile. At  
10 the heart of our proposal, we seek to bring  
11 increased flexibility to the guideline system  
12 that is rigid by design. We believe more  
13 flexibility within the guidelines will better  
14 align with modern supervision practices.

15 With regard to the first offender  
16 amendment, as we could see from the last  
17 discussion, we struggle to find consensus. We  
18 talked about it in probably four meetings, and we  
19 had a very similar conversation to what the  
20 previous panel had. We're essentially equally  
21 split between the two extremes of the proposal.

22 Our written submission lays out the

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1 analysis in more detail, but there are certain  
2 drawbacks to each proposal. The broad category,  
3 which I'll call Criminal History Category Zero,  
4 encompasses a larger population of defendants,  
5 some of whom have many non-scoring convictions,  
6 including aged-out felonies. The more  
7 restrictive category, true first offenders, is a  
8 much more narrow classification that could  
9 eliminate defendants based on very minor  
10 convictions. Critics of this narrow approach  
11 express concern rooted in racial and  
12 socioeconomic disparity.

13 Officers also raise concerns, like the  
14 last panel, regarding first offenders being  
15 convicted of long-duration criminal conspiracies  
16 and how you take that into account in the  
17 analysis. After several discussions, we resolved  
18 these differences in a manner I think Judge Pryor  
19 was alluding to, in a proposal to modify -- well,  
20 Judge Reeves; I'm sorry -- in a proposal to  
21 modify §4A1.3, a downward departure for  
22 overstatement of Criminal History Category.

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1           We propose eliminating the current  
2           restriction prohibiting courts from departing  
3           below Criminal History Category I.     This  
4           modification would allow courts to consider the  
5           seriousness of the defendant's criminal history  
6           and their likelihood of recidivism.   We believe  
7           this will allow district courts the ability to  
8           reconcile all the differences that we identified.

9           Thank you.

10           ACTING CHAIR PRYOR:   Mr. Johnson?

11           MR. JOHNSON:   Thank you, Your Honor.

12           I will stray from my script, which I  
13           have a presumption that everyone can read.

14           COMMISSIONER       BREYER:           It's  
15           rebuttable.

16           (Laughter.)

17           MR. JOHNSON:   If the Commission adopts  
18           the proposal that, if you have any prior contact  
19           or, we'll say, start with conviction, that that  
20           will preclude them from the first offender  
21           reduction of one or two points.

22           The Practitioners Advisory Group

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1 asked the Commission to consider exempting  
2 misdemeanor priors. And that would go partway to  
3 addressing the Probation Officers Advisory Group,  
4 at least some of their concerns, that there are  
5 some minor and there are communities where there  
6 are more likely to be offenders for almost  
7 lifestyle priors that would take them out of the  
8 ability to get a one- or two-level reduction, if  
9 they had just grown up in a different part of  
10 town. I think that's fairly clear on its face.

11 And for those reasons and the others  
12 presented, we think that the reduction should not  
13 be limited or eliminated for those offenders who  
14 have a minor or misdemeanor prior offense. You  
15 know, a lot of this discussion revolves around  
16 those offenders at the low ends of the guideline  
17 range who are not in Zone A, and those are the  
18 people who are going to benefit from this and who  
19 the court may benefit from by being able to assert  
20 more control over them.

21 We have a judge in the Southern  
22 District of California that likes to give

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1       probationary sentences in some cases because he  
2       can impose five years of probation; whereas, if  
3       he imposes a 6 months or 12 months in custody,  
4       supervised release, then, may be limited. So,  
5       the person will end up under a longer period of  
6       court supervision and, then, if they violate  
7       during the term of that, they can come back and  
8       will get resentenced to what they could have  
9       gotten, or probably more.

10               That seems to us a more intelligent  
11       way to address these offenders who are less  
12       likely to reoffend statistically than other  
13       offenders. They're also more likely to have good  
14       jobs, to have families to support, and to not use  
15       drugs. Those are important characteristics that  
16       probably warrant some consideration for a first  
17       offender reduction.

18               I can give an example from our  
19       district, two different cases, almost identical  
20       in facts, both of them charged with alien  
21       smuggling, both young women about the same age  
22       who had both gotten involved in the smuggling

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1 activity because of what they perceived as  
2 pressure from someone while they were visiting  
3 Mexico.

4 In both cases, someone, one or two  
5 people were put in a compartment in a vehicle.  
6 They came across at the exact same port of entry,  
7 and they were both arrested, both charged with  
8 felony alien smuggling, and both pled guilty.  
9 And both had identical guidelines, no prior  
10 convictions. Both young women had jobs and  
11 aspirations for the future.

12 Now, of course, what we forget in this  
13 discussion sometimes is that every single felony  
14 conviction, if it's a federal felony conviction,  
15 is a mark for life, and that affects their future  
16 employment, their ability to earn money, and  
17 numerous -- there's a website where you can go  
18 through all the collateral consequences of  
19 federal convictions, and it's in the thousands.  
20 And so, it is not unpunished simply if they get  
21 probation.

22 One of these two young women went to

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1 prison for five or six months. The other one was  
2 given probation. And the woman who got five  
3 months, the judge felt that she had no -- nothing  
4 she could do under the guidelines because the  
5 guidelines were what the guidelines were, and  
6 that fitting within the guidelines, she wasn't  
7 Zone B or Zone A. She could give her a little  
8 adjustment and adjust the time.

9 The other woman got straight  
10 probation, and by getting straight probation,  
11 saved her job at Macy's, where she's supporting  
12 her handicapped mother. And she's very unlikely  
13 to reoffend.

14 I think those two women, treated  
15 disparately, I think the first woman, if the  
16 judge had understood that this is a first  
17 offender and you can have an adjustment of one or  
18 two levels, and Zones B and C are combined, she  
19 could have come up with an alternative, straight  
20 probation, home detention, intermittent  
21 confinement, but that was precluded under her  
22 view of the guidelines. And so, those are other

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1 reasons we support it.

2 Thank you very much.

3 ACTING CHAIR PRYOR: Mr. Andrews?

4 MR. ANDREWS: Thank you, Judge Pryor  
5 and Members of the Commission. Thank you again  
6 for this opportunity to speak to you today on  
7 behalf of the Victims Advisory Group.

8 Kind of like my predecessor, Mr.  
9 Johnson, we, as the VAG, you know, we had a  
10 spirited discussion on whether or not a first  
11 offender is truly a first offender. I think our  
12 consensus was it really depends.

13 I can tell you that the VAG's position  
14 is they didn't feel that any amendment needed to  
15 be adopted at this point. Kind of like the  
16 Government's position, they felt there was enough  
17 guidance already in the Sentencing Commission for  
18 the judges to utilize to determine whether or not  
19 a first-time offender is truly a first-time  
20 offender.

21 But the premise and the focus of the  
22 VAG, however, wasn't so much on option 1 or option

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1       2. The premise was, if either one is adopted or  
2 strong consideration by this Commission, the  
3 types of crimes that the VAG would like to be  
4 excluded from consideration, and those are any  
5 offenses involving crime of violence as specified  
6 in §4B1.2(a)(1), (a)(2), any type of crime  
7 involving a victim or a group of victims that  
8 have been identified, burglary, residency, any  
9 type of crimes involving minor children, whether  
10 it's pornography, or really any type of defendant  
11 that has a prior conviction or criminal history  
12 points that involve predicated offenses  
13 previously involving victims.

14               As presently proposed, the first-time  
15 offender can be an individual who has engaged in  
16 serious criminal conduct, but not has been  
17 criminally charged. For example, a college  
18 student has engaged in repeated sexual assaults  
19 on campus and who are disciplined by that  
20 university, but whose conduct has not been  
21 reported to law enforcement, would technically be  
22 a first-time offender under the proposed

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1 amendments. Likewise, individuals who purchase,  
2 view, or distribute child pornography may not  
3 have been previously convicted, and again, would  
4 technically be qualified as a first-time  
5 offender.

6 The exclusion that the VAG purports  
7 helps ensure that true distinction is drawn  
8 between first-time offenders whose offense  
9 conduct did not seek to harm any individual and  
10 those offenders who specifically sought to harm  
11 others.

12 Finally, if the Commission does not  
13 support our exclusion, we would, then, support  
14 option 1, to decrease the offense level for first  
15 offenders by one level.

16 Thank you, and I look forward to  
17 answering your questions.

18 ACTING CHAIR PRYOR: Mr. Purdon?

19 MR. PURDON: Judge Pryor, Members of  
20 the Commission, I want to thank you for the  
21 invitation to appear today on behalf of the  
22 Commission's Tribal Issues Advisory Group. The

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1 ability of the TIAG to comment on amendments and  
2 their impact on Indian Country is becoming an  
3 important tool for Indian Country practitioners  
4 and those of us interested in fairness in  
5 sentencing and the cases prosecuted in Indian  
6 Country.

7 I'll note that, in addition to my  
8 testimony today, we filed a written comment in  
9 October of 2017 on this amendment as well.

10 As currently proposed, there are two  
11 alternate definitions of first offenders in the  
12 amendment. One option defines first offender as  
13 a defendant who has no criminal history points;  
14 the second option, a person with no prior  
15 convictions of any kind.

16 The TIAG believes that either choice  
17 could create some unintended consequences for  
18 Indian Country defendants, and we are advocating  
19 for a blended middle course definition of first  
20 offender. To understand what I'm saying, you  
21 have to understand tribal courts across the  
22 country, and they're varied; they vary widely

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1 from reservation to reservation.

2 Some of them, they routinely handle  
3 criminal matters ranging from petty offenses to  
4 crimes of violence. Status offenses such as  
5 public intoxication, vagrancy, or protective  
6 custody are common offenses of convictions in  
7 tribal courts, and they can often be used as a  
8 means to provide services to the defendant.  
9 Public intoxication leads to detox services, but  
10 it does produce a conviction in tribal court.  
11 Tribal courts also handle serious violent crimes,  
12 including misdemeanor domestic violence cases on  
13 many reservations.

14 Currently, as you know, tribal  
15 convictions are not scored under the guidelines  
16 when determining a defendant's criminal history  
17 points. The TIAG believes there should be a  
18 distinction between petty offenses and crimes of  
19 violence in tribal courts in determining whether  
20 or not a defendant with a prior tribal court  
21 conviction qualifies as a first offender.

22 Take, for example, a scenario where

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1 you have two defendants in federal court. Both  
2 have two prior convictions in tribal court. One  
3 has two prior convictions for public  
4 intoxication; another has two prior convictions  
5 for misdemeanor domestic violence. The TIAG  
6 believes that those two offenders should be  
7 treated differently, despite the fact that none  
8 of their previous convictions have produced  
9 criminal history points.

10 A definition of first offender that  
11 relies solely on criminal history points would  
12 allow both of them, including a defendant with  
13 multiple prior domestic violence convictions, to  
14 be treated as a first offender. A definition of  
15 first offender that requires no criminal  
16 convictions at all would, alternatively, exclude  
17 someone who has tribal court convictions merely  
18 for public drunkenness, public intoxication.

19 We feel that this dichotomy in tribal  
20 court is important enough to raise and to  
21 highlight all too often in my experience  
22 sentencing guideline amendments have unintended

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1 consequences for defendants in Indian Country and  
2 for those 30 or so U.S. Attorneys' Offices around  
3 the country that prosecute violent crimes off the  
4 reservation.

5 Our suggestion for alternate  
6 definition of first offender is as follows, and  
7 it's in our written submission. A defendant is  
8 a first offender if the defendant did not receive  
9 any criminal history points from Chapter 4 and  
10 the defendant has no prior convictions of any  
11 kind except for convictions from tribal or foreign  
12 jurisdictions which are not for violent crimes.

13 As I want to save time to answer your  
14 questions, I'll end there. Thank you.

15 ACTING CHAIR PRYOR: I'm puzzled by  
16 that, Mr. Purdon. So, if I had a public  
17 intoxication conviction in Alabama, I would not  
18 be a first offender, but if I had a tribal one,  
19 I would?

20 MR. PURDON: Yes. That is our  
21 concern, is that in --

22 ACTING CHAIR PRYOR: Now your

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1 definition would allow for that, right?

2 MR. PURDON: Right. That person would  
3 be eligible for treatment as a first offender.  
4 If they had non-violent crimes of conviction in  
5 a tribal court, they would be eligible for  
6 treatment as a first offender, that's correct.

7 ACTING CHAIR PRYOR: Even though if  
8 they had the same kind of state conviction, they  
9 wouldn't be?

10 MR. PURDON: So, when I was U.S.  
11 Attorney for North Dakota, I spent a lot of time  
12 in front of tribal councils, and I would hear  
13 this concern: "Crime on my reservation is a  
14 problem. Violent crime is a problem. You at the  
15 Department of Justice, you, Mr. Purdon, you're  
16 not doing enough to make my community safe. We  
17 need more resources. We need more prosecutions.  
18 And if this was happening in your home in  
19 Bismarck, people wouldn't stand for it."

20 Then, the next speaker would say,  
21 literally, sometimes even the same speaker would  
22 say, "And another thing, because of our unique

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1 sovereign and historical relationship with the  
2 United States, when a young offender, someone  
3 with a chemical dependency problem, gets in  
4 trouble on our reservation, he gets hauled into  
5 federal court. He gets stuck with the  
6 guidelines, and he often goes to prison for an  
7 offense that, if it had occurred off-reservation  
8 and the state authorities had handled it, he  
9 wouldn't have gotten prison time."

10 So, both of those concepts I think are  
11 true in Indian Country. That is the issue. And,  
12 of course, our comments are broader. There are  
13 also tribal amendments that you're considering.  
14 But that dichotomy of the view of the federal  
15 system and the impact in Indian Country is  
16 different than -- the person with the public  
17 intoxication conviction in Alabama, if they get  
18 involved in a fight and beat somebody up, they're  
19 still going to be in Alabama state court. The  
20 person with the tribal intoxication conviction,  
21 if they get into a fight and beat somebody up,  
22 they're going to be in federal court under the

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1 sentencing guidelines. That's the difference  
2 between those two offenders, Your Honor.

3 ACTING CHAIR PRYOR: That may be. I'm  
4 just trying to understand your proposal from the  
5 standpoint of treating one as a first offender  
6 and the other one as not. And I'm not sure you've  
7 explained it to me.

8 MR. PURDON: Okay.

9 ACTING CHAIR PRYOR: Any questions?

10 COMMISSIONER REEVES: Just one  
11 question. Mr. Andrews, I just want to make sure  
12 I understand your position. So, let me just give  
13 you a hypothetical. Take the defendant with a  
14 criminal history section that indicates violent  
15 activity by the defendant, but no convictions.  
16 Let's say either because things were amended down  
17 or dismissed, but there's a clear pattern of  
18 domestic violence. What is your position there?

19 MR. ANDREWS: Yes, our position would  
20 be that that individual should not be considered  
21 or would not be considered a first-time offender  
22 under that. Any type of violence predicate

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1 previous history should be excluded.

2 COMMISSIONER REEVES: That would even  
3 take into account the fact no convictions, no  
4 criminal history points?

5 MR. ANDREWS: Yes. And we debated  
6 that long and hard, and that was what I kind of  
7 alluded to, is really a first-time offender is  
8 truly really not a first-time offender,  
9 especially with domestic violence, sexual assault  
10 cases, because, generally, those perpetrators  
11 have a history of that violent conduct before  
12 they actually are even apprehended.

13 COMMISSIONER REEVES: Thank you.

14 COMMISSIONER BARKOW: This is about  
15 the proposed departure language that you came up  
16 with, because I'm still trying to figure out  
17 that. So, just so I understand, the way that the  
18 probation officers had in mind, is it essentially  
19 to get rid of what is the current prohibition we  
20 have now in §4A1.3(b)(2)? So, right now, you're  
21 not allowed a departure below the lower limit of  
22 that applicable guideline range for Criminal

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1 History Category I, would it be basically to get  
2 rid of that? Or would it be to get rid of it and  
3 replace it with guidance along the lines of some  
4 of the things that people suggested? I'm just  
5 trying to get a sense of, when you all discussed  
6 it, the resolution you reached, was it just to  
7 get rid of it or was it to get rid of it and also  
8 offer some guidance?

9 MR. BENDZUNAS: Yes, guidance is  
10 always good. So, we would definitely -- we have  
11 proposed that it be eliminated first, but provide  
12 some parameters; give the court some guidance as  
13 to what they should be looking at in terms of  
14 some of the things that we talked about today,  
15 you know, whether or not a prior offense was  
16 essentially an indiscretion, underage drinking,  
17 something to that effect, and, also, bringing in  
18 elements of the instant offense.

19 COMMISSIONER BARKOW: Okay. Thank  
20 you.

21 ACTING CHAIR PRYOR: Commissioner  
22 Bolitho, do you have any questions?

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1 (No response.)

2 COMMISSIONER BARKOW: I bet it's a  
3 really cute baby.

4 (Laughter.)

5 ACTING CHAIR PRYOR: Okay. Thank you  
6 very much. We have all of your written testimony.

7 We'll move on to our final panel for  
8 the day. Our final panelists are Lauren  
9 Jorgenson -- is that right?

10 MS. JORGENSON: Yes, sir.

11 ACTING CHAIR PRYOR: Kristine Lucius,  
12 is that right?

13 MS. LUCIUS: Yes.

14 ACTING CHAIR PRYOR: And Heather Rice-  
15 Minus.

16 MS. RICE-MINUS: Minus.

17 ACTING CHAIR PRYOR: Minus.

18 Ms. Jorgenson serves on the Board of  
19 Directors of the National Association of  
20 Assistant U.S. Attorneys and chairs that  
21 organization's Sentencing Committee. She has  
22 been an Assistant U.S. Attorney in the Southern

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1 District of Florida since 1990, specializing in  
2 white collar crime. There's a bit of that in the  
3 Southern District.

4 MS. JORGENSON: A little bit.

5 ACTING CHAIR PRYOR: Before that, she  
6 was in private practice in New York City. Ms.  
7 Jorgenson is a graduate of Cornell Law School.

8 Ms. Lucius is Executive Vice President  
9 for Policy at the Leadership Conference. She has  
10 worked in all three branches of the federal  
11 government, including 14 years with the Senate  
12 Judiciary Committee as then-Chairman Leahy's top  
13 legal and policy advisor. I should say it's the  
14 Leadership Conference on Civil and Human Rights.  
15 In 2015, she was named by The National Journal as  
16 one of the 20 most powerful women staffers on  
17 Capitol Hill. Before working for the Senate, Ms.  
18 Lucius was in private practice with Jenner &  
19 Block, clerked for two federal judges, and served  
20 in the Office of Policy Development at the U.S.  
21 Department of Justice. She is a graduate of the  
22 University of Minnesota and the Georgetown

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1 University Law Center.

2 Ms. Rice-Minus serves as Vice  
3 President of Government Affairs at Prison  
4 Fellowship, the nation's largest Christian  
5 nonprofit serving prisoners, former prisoners,  
6 and their families. As leader of Prison  
7 Fellowship's policy staff, Ms. Rice-Minus directs  
8 lobbying, research, and legislative campaigns on  
9 criminal justice issues at the state and federal  
10 levels. Before her tenure at Prison Fellowship,  
11 she managed advocacy efforts on behalf of the  
12 National Religious Campaign Against Torture. She  
13 is a graduate of Colorado State University and  
14 George Mason University's Antonin Scalia Law  
15 School.

16 Ms. Jorgenson?

17 MS. JORGENSON: Good morning, Judge  
18 Pryor and Members of the Commission.

19 First, I have to point out that I am  
20 also the parent of a graduate of Tulane  
21 University, a recent graduate.

22 ACTING CHAIR PRYOR: Apparently, well-

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1       educated.

2                   (Laughter.)

3                   MS. JORGENSEN:  Yes, sir.

4                   Good morning.  I really appreciate, on  
5       behalf of the National Association of Assistant  
6       U.S. Attorneys, the opportunity to come before  
7       you, my first time here.  But thank you very much  
8       for inviting the Association to be here.

9                   We also are referred to as NAAUSA, the  
10       National Association of Assistant U.S. Attorneys.

11                  ACTING CHAIR PRYOR:  Because everyone  
12       has to have an acronym.

13                  (Laughter.)

14                  MS. JORGENSEN:  That's right, Judge.

15                  I'm sure you all know that NAAUSA does  
16       represent the interest of about 5,400 prosecutors  
17       throughout the nation who are responsible for  
18       prosecuting federal offenses, and we will see on  
19       a daily basis the very real effects of this  
20       amendment that is being proposed.

21                  To jump right in -- and I hope you'll  
22       allow me to go off-script just a little bit to

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1 try to get maybe quicker to our question and  
2 answers -- the proposed amendment would carve out  
3 an entirely new category. And Ms. Conrad talked  
4 about the Sentencing Table. Of course, we're all  
5 very familiar with that Sentencing Table. But  
6 this new category would almost push off the  
7 Sentencing Table. It would create a new category  
8 where defendants will be closer to that top left  
9 corner that they want to be in. Across the board  
10 it would paint with such a broad brush, rather  
11 than with a specific fine tip, addressing the  
12 crimes where the Commission feels really need to  
13 be addressed. That is our biggest objection to  
14 this. It would carve out this new reduction in  
15 sentencing guideline range, regardless of the  
16 type of offense that has been committed.

17 You've already heard the testimony and  
18 discussed a little bit the recidivism rates. And  
19 again, I just want to echo what was said by the  
20 Department of Justice representative, that we  
21 still have a recidivism rate of 30 percent, even  
22 for those who have zero criminal history. So, it

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1 is significant.

2 One area, as you've also heard, where  
3 this proposed amendment would wreak a special  
4 havoc is with purchasers of firearms for violent  
5 felons, straw purchasers. As we know, and as has  
6 been well-documented, the majority of firearms  
7 that are used to commit these felonies are  
8 purchased through the use of a straw purchaser.  
9 And due to the need for the straw purchaser to  
10 pass a background check, they are, by definition,  
11 a first offender. Yet, as drafted, this broad-  
12 brush amendment would not make an exception for  
13 them and would actually reward them for having  
14 that clean criminal history that they need to  
15 commit the crime.

16 And in some cases where you have a  
17 straw purchaser starting at a base offense level  
18 of 12, because the prosecutor may not be able to  
19 prove that the person, the defendant, knew that  
20 firearm or firearms were going to a prohibited  
21 person, you can get down as low as 12 to 18  
22 months. And this is another further reward to

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1 those straw purchasers of those firearms.

2 Another area where this would have a  
3 tremendous impact is white collar crime context,  
4 where it would really provide a windfall to the  
5 offenders who commit a wide range, again, a wide  
6 range of white collar crime, from tax fraud to  
7 Medicare fraud, consumer-targeting fraud, to  
8 public corruption. And as we all know, thanks to  
9 the recent 2017 data that's been released,  
10 actually, 71 percent of all the fraud defendants  
11 have no criminal history. They have no prior  
12 offense. So, we're going to now give them an  
13 added benefit simply because they have no prior  
14 offense.

15 If the Commission does intend to move  
16 forward with this, we do strongly recommend that  
17 you consider using option 2, which would be  
18 purely a first offender with no criminal history,  
19 no points that are countable or otherwise. We  
20 also highly recommend that you limit this  
21 reduction to only one level rather than two.

22 The second part of this amendment,

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1 which is very difficult for our Association, is  
2 the proposed amendment would go even further,  
3 providing that certain non-violent first  
4 offenders who fall within Zone A or B, quote,  
5 "ordinarily should not receive a sentence of  
6 imprisonment". This would, again, be a very  
7 powerful prize for white collar offenders in the  
8 current package of proposed amendments, probably  
9 the biggest windfall for them.

10 Because you would create a presumption  
11 of no jail time, which we believe would send the  
12 wrong message not only in terms of general  
13 deterrence, but really the wrong message to the  
14 crime victims, to the people who have suffered  
15 the financial losses, sometimes ruining their  
16 financial future.

17 And here again, I would like to just  
18 veer off script for a moment. We've heard some  
19 of the Defenders talk about Section 994(j), which  
20 talks about the need for non-prison sentences.  
21 But 994(j) does not exist in a vacuum; 994 is a  
22 very lengthy section. It gives the Commission a

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1 lot of guidance in a lot of areas.

2 And 994(i), in particular, says that  
3 the Commission shall assure a substantial term of  
4 imprisonment where a defendant has, No. 2,  
5 "committed the offense as part of a pattern of  
6 criminal conduct from which the defendant derives  
7 a substantial portion of their income." That  
8 describes a lot of fraud criminals, white collar  
9 offenders.

10 So, you can see that 994, those two  
11 provisions may be opposed to each other in this  
12 case. And we would urge you not to paint, again,  
13 with that broad brush to reward all white collar  
14 offenders, no matter how significant, no matter  
15 whether they've gotten an aggravating role  
16 enhancement or not, by giving them that one- or  
17 two-point reduction.

18 Finally -- and we've had some  
19 discussion already in the area of  
20 narcotics -- over 64,000 deaths from overdoses in  
21 2016. We urge the Commission to consider the  
22 fact that these offenders are not non-violent,

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1 even if they don't possess a firearm during the  
2 commission of their offense. What they're doing,  
3 narcotics dealers, is affecting people in a huge  
4 way and in a violent way.

5 Thank you very much on behalf of the  
6 National Association of Assistant U.S. Attorneys  
7 for considering our views on these important and  
8 very impactful amendments.

9 ACTING CHAIR PRYOR: Ms. Lucius?

10 MS. LUCIUS: Good morning, Judge Pryor  
11 and Members of the Sentencing Commission.

12 I am the Executive Vice President for  
13 Policy at the Leadership Conference on Civil and  
14 Human Rights, a coalition charged by its diverse  
15 membership of more than 200 national  
16 organizations to promote and protect the civil  
17 and human rights of all persons in the United  
18 States.

19 Today's hearing addresses a crucial  
20 problem within the justice system. Over the past  
21 40 years, the American incarceration rate has  
22 ballooned to a level we can no longer maintain.

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1 This has had a disproportionate impact on  
2 communities of color. African-Americans make up  
3 13.3 percent of our population, but nearly 38  
4 percent of the federal prison population.  
5 Hispanics account for 17.8 percent of our  
6 population, but nearly 33 percent of federal  
7 inmates.

8 Prison facilities at all security  
9 levels are operating over capacity as a result of  
10 the overwhelming influx of people being funneled  
11 into incarceration. The Commission's proposed  
12 amendments offer a step toward addressing these  
13 issues. The Leadership Conference joins the  
14 widespread, bipartisan support of the  
15 Commission's efforts to minimize costs, reduce  
16 prison overcrowding, and promote the  
17 effectiveness of reentry programs.

18 People charged with their first  
19 criminal offense pose a substantially lower  
20 threat of recidivism. So, it makes good sense to  
21 focus on this category for amendments. Expanding  
22 the availability of alternatives to incarceration

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1 for people who have committed a low-level offense  
2 for the first time achieves the Commission's  
3 statutory responsibility to guide courts toward  
4 sentences that are sufficient, but not greater  
5 than necessary, and that afford adequate  
6 deterrence to criminal conduct.

7 But we urge the Commission to adopt a  
8 broader definition of first offenders than is  
9 shown in either option 1 or 2. Instead, we  
10 believe it should include anyone in Category I.  
11 The Commission already groups offenders with one  
12 and zero criminal history points together in that  
13 category in the Sentencing Table, and for good  
14 reason. Chapter 4 makes clear that the  
15 differences between those with zero or one  
16 criminal history points is minimal. These  
17 additional people should be eligible for relief  
18 under proposed §4C1.1, given their similarity.  
19 Making offenders with one criminal history point  
20 eligible for the same relief as those with zero  
21 criminal history points is consistent with the  
22 Commission's practice of treating those two

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1 cohorts as part of one Criminal History Category.

2 Second, the Leadership Conference  
3 also supports the Commission's proposed amendment  
4 recommending that first offenders with an offense  
5 level under 16 receive a two-level reduction, and  
6 all other first offenders receive a one-level  
7 reduction. A two-level reduction is better than  
8 one because it better serves the Commission's  
9 stated goals of reducing costs and overcrowding.  
10 And while we support the Commission's proposed  
11 two-level reduction, we also encourage the  
12 Commission to extend the offense level reduction  
13 along the fullest offense level scale and apply  
14 multiple offense level reductions to all first  
15 offenders sentenced to 24 months or less. This  
16 change would not prevent judges from assessing  
17 the individual circumstances of each case and  
18 would still allow a higher sentence, if warranted  
19 by the individual's circumstances.

20 Third, we support the creation of a  
21 rebuttable presumption in §5C1.1 that first  
22 offenders who have a guideline range in Zones A

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1 or B should ordinarily receive a sentence other  
2 than incarceration. This presumption would  
3 substantially advance the Commission's goals to  
4 provide the defendant correctional treatment in  
5 the most effective manner and to reduce costs,  
6 reduce overcrowding, and promote effectiveness of  
7 reentry programs. Keeping these first offenders  
8 out of prison will allow them to keep their  
9 employment and maintain their relationships with  
10 their family and their community, both of which  
11 have been shown to decrease the likelihood of  
12 recidivism.

13 We understand that a portion of  
14 federal prosecutors represented by NAAUSA and the  
15 Justice Department leadership opposes the  
16 Commission's proposal, arguing that judges  
17 already have the discretion under the current  
18 guidelines to impose sentence alternatives and  
19 vary downward under exceptional circumstances.  
20 However, the Commission itself has found that  
21 judges have been exercising that discretion less  
22 and less over the past three decades. Although

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1 the guidelines are technically non-binding,  
2 judges often feel compelled to apply a sentence  
3 within the range given to them. And the  
4 Sentencing Commission, through these amendments,  
5 can provide judges with additional tools to  
6 better tailor a sentence to the circumstances at  
7 hand. The resulting impact, enhanced judicial  
8 discretion, more appropriate sentences, reduced  
9 prison overcrowding, and lower cost to taxpayers  
10 speak all in strong favor of adopting your  
11 amendments.

12 The Leadership Conference remains  
13 committed to working with the Commission to  
14 create more comprehensive and effective  
15 sentencing guidelines that operate to reduce  
16 incarceration rates for individuals with low-  
17 level offenses and promote rehabilitation. These  
18 changes represent an opportunity to mitigate  
19 excessively punitive provisions that have  
20 promoted racial disparities in sentencing and  
21 contributed to a costly explosion in our federal  
22 prison population. The voices of the civil and

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1 human rights community are important in this  
2 ongoing national conversation.

3 Thank you for your commitment to these  
4 issues, and thanks for the opportunity to testify  
5 today.

6 ACTING CHAIR PRYOR: Ms. Rice-Minus?

7 MS. RICE-MINUS: Thank you. Judge  
8 Pryor, Members of the Sentencing Commission,  
9 thank you for the opportunity to testify today.

10 I'm here on behalf of Prison  
11 Fellowship, the nation's largest Christian  
12 nonprofit, serving prisoners and a leading  
13 advocate for criminal justice reform. The  
14 organization was founded in 1976 by Charles  
15 Colson, a former aide to President Nixon, who  
16 served a seven-month sentence for a Watergate-  
17 related crime. He used his second chance to start  
18 our ministry.

19 Today our prison programs reach more  
20 than 365,000 men and women each year. Our Angel  
21 Tree Program provides Christmas gifts to over  
22 300,000 children annually on behalf of their

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1       incarcerated moms or dads. And in terms of our  
2       impact in the federal context, 131 federal  
3       prisons participate in our Angel Tree Program and  
4       36 federal prisons have non-intensive  
5       rehabilitative programming.

6               Prison Fellowship is encouraged by the  
7       Sentencing Commission's focus on the use of  
8       alternatives to incarceration. Our federal  
9       prison system is currently overexceeding its  
10      capacity. So, the need is a practical  
11      consideration in terms of prison safety, program  
12      delivery, and expense. However, alternatives to  
13      incarceration also promote human dignity and  
14      restoration by increasing active accountability.  
15      While retribution is a valid component of the  
16      purposes of punishment, we believe that the  
17      greatest goal of the criminal justice system  
18      should be restoration for all involved, the  
19      affected community, the victim, and the person  
20      responsible for the crime.

21              In a recent Barna poll commissioned by  
22      Prison Fellowship, we found that 87 percent of

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1 Americans agree with this. Too often in the  
2 United States our default punishment is  
3 incarceration, and too seldom do we sufficiently  
4 appreciate the benefits of thinking outside the  
5 bars.

6 Community supervision and  
7 alternative-to-incarceration court programs, in  
8 particular, can provide just punishment for  
9 people with first-time and low-level offenses and  
10 in some cases more serious offenses. These  
11 alternative programs, when implemented  
12 correctly, can be even more effective than  
13 incarceration.

14 And incarceration, while, of course,  
15 the ultimate loss of liberty, is, arguably, a  
16 passive form of accountability. Compelling  
17 someone to make amends for the harm that they  
18 have caused by living differently day by day in  
19 the context of a specialty court or through  
20 community supervision is active and, arguably,  
21 more difficult.

22 The Commission rightly acknowledges

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1 in its report that Congress intended alternatives  
2 of incarceration to apply to people with lower-  
3 level and first-time offenses. And though Prison  
4 Fellowship would support a broader application,  
5 this population is sensible for the Commission to  
6 target for alternatives to incarceration under  
7 both the legal framework and the recidivism data.

8 As the Sentencing Commission's  
9 reports demonstrate, prior criminal conduct is a  
10 strong predictor of recidivism. Individuals with  
11 lower total criminal history scores have lower  
12 recidivism rates. Thus, the populations  
13 contemplated in the proposed amendment options,  
14 these people are not only less culpable, they  
15 present the least risk to the public safety and  
16 they stand to greatly benefit from the ability to  
17 maintain work and family ties that will be  
18 available to them as they are held accountable in  
19 the community.

20 While the proposed amendment  
21 specifically mentions alternatives to  
22 incarceration in the form of fines and community

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1 supervision, the Commission should also encourage  
2 other alternatives such as specialty courts. The  
3 federal system has very limited number of  
4 specialty courts and very limited data about the  
5 outcomes of people who have matriculated through  
6 these programs. And we agree with the Commission  
7 that greater resources are needed to invest in  
8 research and evaluate the outcomes of these  
9 programs.

10 Additionally, although we acknowledge  
11 that the federal system has a unique population  
12 and offenses that limit the application, we would  
13 request that the Sentencing Commission explore  
14 the use of restorative justice programs as an  
15 additional model, where appropriate, feasible,  
16 and agreed to by any involved victims. Studies  
17 that have compared restorative justice with the  
18 traditional criminal justice systems have found  
19 that restorative justice lowers repeat offending,  
20 reduces post-traumatic stress in victims, costs  
21 less, is more efficient, and leaves victims and  
22 the individuals responsible for crime more

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1 satisfied that justice was done.

2 In addition to these requests, Prison  
3 Fellowship recommends, in reference to Part A of  
4 the proposed amendment, that the Commission adopt  
5 option 1 with respect to the definition of first  
6 offender, so that more effective alternatives are  
7 available to the sentencing judge for defendants  
8 with no criminal history points, who we believe  
9 should not burden the already overcrowded federal  
10 prison system. We ask that you adopt option 2  
11 with respect to the decrease of offense level for  
12 people with first-time offenses. And finally, in  
13 reference to Part B of the proposed amendment, we  
14 ask that you maintain application to all offenses  
15 and advance the consolidation of Zones B and C.

16 Thank you.

17 ACTING CHAIR PRYOR: Thank you.

18 Questions?

19 (No response.)

20 MS. JORGENSON: Oh, please, at least  
21 one.

22 (Laughter.)

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1                   ACTING CHAIR PRYOR:    Let me ask you  
2    on the --

3                   COMMISSIONER BREYER:  Oh, you're going  
4    to regret that comment.

5                   (Laughter.)

6                   ACTING CHAIR PRYOR:    Let's take  
7    offenders who have no criminal history points and  
8    no prior convictions.  Is there an offense level  
9    at which you think there ought to be a presumption  
10   of non-incarceration?

11                  MS. JORGENSON:    I would say I would  
12   agree with the way that the table is set up.  That  
13   is, that where we have enhancements for things  
14   like aggravating role, where the loss is larger,  
15   where the crime is more serious, you go down the  
16   table and, then, incarceration becomes more  
17   obvious.  But I think, as it is now, there really  
18   is a presumption of no incarceration at the very  
19   lowest levels for Category I.

20                  ACTING CHAIR PRYOR:  I'd like to get  
21   an answer to my question.

22                  MS. JORGENSON:    Is there one specific

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1 level?

2 ACTING CHAIR PRYOR: So, we'll just  
3 take an offender who has no criminal history  
4 points, no prior convictions. Is there an  
5 offense level at which you think there ought to  
6 be a presumption of non-incarceration?

7 MS. JORGENSEN: No, I would say, no,  
8 sir. I don't believe so.

9 ACTING CHAIR PRYOR: No, ma'am?

10 MS. JORGENSEN: Because the reason is,  
11 I think every single crime and every single  
12 defendant needs to be looked at individually.  
13 And when you lay down a line like that, and make  
14 a presumption that there should be no  
15 incarceration, that takes no account of what the  
16 crime is or the other factors.

17 COMMISSIONER BARKOW: Can I just ask,  
18 are you in favor of mandatory minimums?

19 MS. JORGENSEN: As a general measure,  
20 yes. I'm not a narcotics prosecutor, but I do  
21 think that they have had a significant effect on  
22 reducing those crimes over the years.

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1                   COMMISSIONER BARKOW: I mean in the  
2 sense of also taking away the individualization  
3 in that case.

4                   MS. JORGENSEN: Yes.

5                   COMMISSIONER BARKOW: I mean, if every  
6 case requires an individual look, this would be  
7 the flip side of that.

8                   MS. JORGENSEN: That's true. Well, I  
9 was also in favor of the safety valve, though, as  
10 a young prosecutor who prosecuted those cases and  
11 watched people who had more drugs than they  
12 realized they had, having to watch them get  
13 sentenced to 10 years with no help was difficult.  
14 And I applaud the Commission for coming up with  
15 that.

16                   COMMISSIONER BREYER: I wonder -- I  
17 haven't really thought this through; that may be  
18 evident. But I would tell you that I think  
19 judges -- the advantage of having a zero  
20 category, regardless of whether we attach  
21 presumptions or not, is that judges, then, in  
22 their minds, would make some distinction between

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1 somebody who's never run afoul of the system and  
2 somebody who has. And therefore, in that judge's  
3 mind, they may be more inclined to go to the zero  
4 of the zero to 6 than not.

5 Does DOJ, would you have any objection  
6 to that?

7 ACTING CHAIR PRYOR: She doesn't  
8 represent DOJ.

9 MS. JORGENSON: I'm actually  
10 representing the members who are the National  
11 Association, but --

12 COMMISSIONER BREYER: Okay. Leaving  
13 DOJ aside, but from your point of view as a  
14 prosecutor, and so forth, do you think that that  
15 would create any problems?

16 MS. JORGENSON: Well, again, I think  
17 just by moving over now, we're going to create a  
18 category that's all by itself where all the  
19 others have three different levels?

20 COMMISSIONER BREYER: Well, by virtue  
21 of saying these people actually are different,  
22 they seem to be different. I mean, we're not

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1       creating -- we are creating the category, but the  
2       category relates to whether or not this person is  
3       the same as somebody else. Because we know we  
4       have a lumping factor here.

5               MS. JORGENSEN: Right.

6               COMMISSIONER BREYER: We've taken that  
7       person and lumped that person with others.

8               MS. JORGENSEN: Well, Judge, I think  
9       the fact that your own data shows across the board  
10      judges are varying below the guidelines -- I  
11      mean, there's a pretty significant band there  
12      that's below, the sentences that are given out  
13      are below the minimum --

14              ACTING CHAIR PRYOR: Which suggests  
15      the guideline is not working?

16              MS. JORGENSEN: Your Honor, I would  
17      say no. I would say the judges are simply  
18      applying them, they're looking at them the way  
19      they have to correctly first. And then, they are  
20      taking into account the individual  
21      characteristics.

22              ACTING CHAIR PRYOR: And then, they're

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1       disregarding it.

2                       (Laughter.)

3                       MS. JORGENSEN: Well, as a prosecutor,  
4 I would have to say yes, in many cases, yes.

5                       ACTING CHAIR PRYOR: Yes.

6                       MS. JORGENSEN: But, getting back to  
7 your question, I'll give you an example. A fraud  
8 case where you have a massive fraud, consumer  
9 fraud directed at people who are losing a lot of  
10 money. It happened quite a bit in the Southern  
11 District of Florida. You have a lot of different  
12 people involved. Managers may be committing this  
13 fraudulent activity for a year or two and taking  
14 \$100,000 away from people. They don't have any  
15 criminal history. Most of them walk into court  
16 and they don't. But, yet, they have lied. They  
17 have taken financial -- you know, imposed  
18 financial hardship on people. Should we now  
19 presume that they don't get any --

20                       ACTING CHAIR PRYOR: That's why my  
21 question was about the offense level.

22                       MS. JORGENSEN: Right.

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1                   ACTING CHAIR PRYOR: Presumably, they  
2                   have a higher offense level.

3                   MS. JORGENSEN: Well, they --

4                   ACTING CHAIR PRYOR: I just wondered  
5                   if there's an offense level at which you think  
6                   there ought to be a presumption.

7                   MS. JORGENSEN: Yes, sir. I would say  
8                   no. I mean, if there was one, it would probably  
9                   be 6. But you have to be a fairly minor, either  
10                  a minor participant -- a lot of things have to  
11                  happen to get down that low in a federal case.

12                  COMMISSIONER BREYER: Well, no, there  
13                  are losses. First of all, there are losses. I  
14                  mean, you go through the loss table and you see.

15                  MS. JORGENSEN: Right.

16                  COMMISSIONER BREYER: When I went  
17                  through the loss table, I was looking at  
18                  somebody, if you do all the way in Zone A, I mean,  
19                  you might get up to less than \$500,000. It's  
20                  some large number. I don't know if it's 500,  
21                  250. I don't know what the number is.

22                  MS. JORGENSEN: It is.

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1                   COMMISSIONER BREYER:    But those are  
2   big losses by anybody's -- and especially a big  
3   loss in terms of, maybe in terms of number of  
4   victims or in terms of life savings or in terms  
5   of real harm that can be caused.

6                   So, I'm interested, actually, in Judge  
7   Pryor's question to you.   I mean, why wouldn't  
8   you at least set some level?  Maybe it's 6; maybe  
9   it's 4.  But say, look, as to those people, maybe  
10  they should be treated differently, but you don't  
11  think so?

12                  MS. JORGENSON:   Well, Judge, that's  
13  not the question before the Commission right now.  
14  But I would hesitate to endorse such a broad brush  
15  of just saying one offense level below which  
16  people should simply not go to jail.

17                  ACTING CHAIR PRYOR:   But the question  
18  was a presumption.

19                  MS. JORGENSON:   A presumption, yes.

20                  ACTING CHAIR PRYOR:       It would  
21  allow -- any presumption could be rebutted,  
22  right?

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1 MS. JORGENSEN: Right.

2 ACTING CHAIR PRYOR: And you would --

3 MS. JORGENSEN: I would disagree with  
4 it, yes. Yes, Judge, I would.

5 ACTING CHAIR PRYOR: Judge Reeves?

6 COMMISSIONER REEVES: Just one follow-  
7 up. Getting back to the question about  
8 subjectivity of the judge and what he's thinking  
9 about, have you ever had a case in which a  
10 defendant is in Criminal History Category I with  
11 no criminal history, in which the defendant's  
12 attorney has not argued, "Look at his criminal  
13 history. It's nothing. Please take that into  
14 account"?

15 MS. JORGENSEN: Right, that's correct.

16 COMMISSIONER REEVES: Have you ever  
17 had a case in which that has not occurred? I  
18 haven't.

19 MS. JORGENSEN: No, sir. No, no. I  
20 mean, most of the time, it results in a variance.  
21 I mean, that's a fact.

22 COMMISSIONER BREYER: But, you see,

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1 we're trying to get away, I think -- maybe we'll  
2 get unanimity on it -- I think we're trying to  
3 get away from variances. We're trying to have  
4 guidelines that are heartland guidelines and that  
5 judges will embrace -- will embrace -- for a  
6 variety of reasons. Disparity all across the  
7 country.

8 I mean, that's why, even though you  
9 didn't ask for any questions, I would just say,  
10 while you may be correct in everything you say,  
11 and I understand it and I appreciate it, I don't  
12 know that you've answered the question about  
13 general deterrence.

14 And I understand your views of in  
15 confinement and incarceration, but I must say  
16 that what hits me, as one Commissioner, is, will  
17 we achieve general deterrence by simply saying,  
18 "Look, first time, it's under a certain amount.  
19 Maybe it's under a half a million dollars. You  
20 get probation."? And that's what concerns me.

21 I'm not asking you a question.

22 (Laughter.)

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1                   ACTING CHAIR PRYOR:    If we can, I  
2       would like to wrap this up.       We've gone  
3       considerably over today.

4                   But we appreciate your testimony  
5       today.    We, of course, have your written  
6       testimony.

7                   That concludes our public hearing  
8       today, unless -- oh, I should have asked -- unless  
9       Commissioner Bolitho, if he can speak, has a  
10      question.

11                   (No response.)

12                   He hasn't any questions.    He could  
13      text one, I guess.

14                   (Laughter.)

15                   Okay.    Thank you very much.

16                   (Whereupon, at 12:33 p.m., the hearing  
17      was adjourned.)

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