UNITED STATES SENTENCING COMMISSION

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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9:00 a.m.

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

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

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

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

To my immediate right is Judge Charles
Breyer, who is the Senior District Judge for the Northern District of California and has served as the United States District Judge since 1998.

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

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

Zach, can you hear us okay?

COMMISSIONER BOLITHO: I can, Judge.

Can you hear me?

ACTING CHAIR PRYOR: Yes. Thanks.

COMMISSIONER BOLITHO: Thank you.

ACTING CHAIR PRYOR: Thanks for joining us by phone.

Zach has a very good reason for not being here in person. He is, as he should be,
with his spouse this week in North Carolina because they just welcomed the birth of their new daughter.

So, congratulations.

COMMISSIONER BOLITHO: Yes. Thank you.

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

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

On Monday, the Commission launched our web app containing a mobile-friendly version of the current Guidelines Manual. I've already
downloaded mine. The Guidelines app is an interactive web-based application accessible through any internet browser and features new tools to assist in understanding and applying the Federal Sentencing Guidelines. It allows users to quickly search through the Guidelines Manual by guideline or keyword and can assist in determining Guideline ranges in the Sentencing Table, base offense levels in the Drug Quantity Table, and marijuana equivalencies for substances referenced in the Drug Equivalency Tables. The app is accessible on a wide variety of devices, including desktops and mobile devices, and the Commission hopes it will be a useful resource for practitioners and the public.

Tomorrow, the Commission will issue a publication analyzing mandatory minimum penalties for firearms offenses in the federal system. This is the third publication in our series on mandatory minimum penalties. Firearms offenses are the second most common offenses carrying mandatory minimum penalties in the
federal system after drug offenses, which the Commission previously analyzed in a report released last October.

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

Today's public hearing will focus on synthetic drugs, first offenders, and alternatives to incarceration. During the current amendment cycle, the Commission voted to publish proposed amendments to the Federal Sentencing Guidelines to address the treatment of synthetic drugs under the guidelines and to provide adjustments in the guidelines for first-time offenders. The Commission's proposed amendment on synthetic drugs would adopt a class-based approach for synthetic cathinones and cannabinoids, two types of synthetic drugs
studied by the Commission over the past few years. The proposed amendment defines the term "synthetic cannabinoid" and establishes a single marijuana equivalency for each class.

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

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

We look forward to hearing from our expert witnesses on the proposed amendments on the agenda today. At the end of each panel's
testimony, panelists may receive questions from Commissioners, and I will then give Commissioner Bolitho the opportunity to ask his questions over the phone. We look forward to a thoughtful and engaging discussion.

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

(Laughter.)

Be mindful of our time.

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

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

Welcome.

MR. DUNCAN: Thank you, sir.

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

Welcome, Mr. Butler.

Mr. Duncan?

MR. DUNCAN: Thank you, sir.

Judge Pryor, Members of the Sentencing Commission, thank you for the opportunity to present the Department of Justice's views on the Commission's proposed amendments to the U.S.
Sentencing Guidelines related to synthetic drugs.

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


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

MR. DUNCAN: I will speak up.

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

As DEA witnesses explained at the October 4th hearing, all synthetic cathinones share a common chemical structure well accepted in the scientific community.
ACTING CHAIR PRYOR: Mr. Duncan, maybe the issue is to move that microphone.

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

As for the equivalency that the Commission should assign to the class, two approaches present themselves. First, the Commission could look closely at the equivalencies the courts have adopted in all past synthetic cathinone cases and simply apply an average. According to the Commission's data for the fiscal year 2015, in 186 cathinone cases, predominantly involving methylone, A-PVP, and MDPV, the mean equivalency was 1-to-364 and the median equivalency, 1-to-380. The Department has no objection to setting the equivalency at 1-to-
380. As the second approach, the Commission could start with the median equivalency from past cases, but then go beyond the confines of Application Note 6 and also address the relative toxicity of these substances.

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

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

As concerns synthetic cannabinoids, for largely the same reasons, the Department also
supports a class approach. A class approach will address the ongoing problem of new synthetic cannabinoids being introduced into the illicit drug market in a manner designed to circumvent the existing statutory and regulatory framework. Adding an equivalency for each known synthetic cannabinoid would be impractical, as there are thousands of possible synthetic cannabinoids derived from the indole or indazole chemical structures alone.

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

However, just as with synthetic cathinones, Application Note 6 does not ask the court to evaluate the most serious dangers associated with a substance. Dr. Trecki
explained that, unlike THC and marihuana, synthetic cannabinoids have produced multi-organ failures, seizures, and deaths. As noted by Dr. Gatch, it is synthetic cannabinoids, unlike THC and marijuana, which produce the most severe adverse effects, including central nervous system effects such as extreme agitation, seizures, stroke, and coma.

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

The Commission has also asked whether the guidelines should distinguish between synthetic cannabinoids in actual form, such as in powder form, and the synthetic cannabinoid as part of a mixture. As you are aware, the general rule in guidelines is that the weight of a controlled substance set forth in the table
refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. As a practical matter, it would be virtually impossible for DEA laboratories to readily determine the amount of synthetic cannabinoid that has been applied to plant matter in a particular drug packet.

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

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

On a daily basis, I see the death and destruction caused by fentanyl and fentanyl analogues. We have prosecuted numerous death-
resulting cases, many of which involving fentanyl, and there are more in the pipeline. The lethality of fentanyl and fentanyl analogues is virtually unmatched, but that unmatched lethality is not currently reflected in the guidelines.

Although opioid tolerance may develop in users, as little as 2 milligrams is a lethal dose for most people. In contrast, the average lethal dose for heroin is approximately 200 milligrams. Yet, the lowest quantity threshold for fentanyl in the Drug Quantity Table, 4 grams, is at a level 12. Thus, a defendant trafficking in up to 4 grams of fentanyl receives a base offense level of 12, or 10 after the common two-level reduction for acceptance of responsibility. For a defendant who pleads guilty and falls within criminal history Category I, a base offense level of 10 yields a Zone B guidelines range of 6 to 12 months. A defendant who sells enough fentanyl to kill almost 2,000 people should not be eligible for probation. In
contrast, for heroin, a similar, but less lethal
opioid, the same guideline range would apply up
to 10 grams of heroin, which is enough for 50
lethal doses.

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

For example, a defendant who sells 2.5
grams of fentanyl today would receive, before an
acceptance of responsibility adjustment, a base
offense level of 12 and a guideline range of 10
to 16 months. Under the proposed amendment, that
same defendant would receive a base offense level
of 16 and a guideline range of 21 to 27 months.
This is a step in the right direction, and the
Department urges the Commission to adopt the
change.

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

Finally, I would like to discuss the
proposed enhancement for offenses involving
fentanyl and fentanyl analogues misrepresented as
another substance. Drug traffickers are now
mixing fentanyl and fentanyl analogues with other
drugs and using commercially-available pill
presses to produce pills that contain fentanyl
and fentanyl analogues, but appear to be less
lethal prescription drugs like oxycodone and
hydrocodone. Both of these practices are
dangerous and are directly related to the
increase in overdose deaths that our country is
experiencing right now. The Department supports the amendment, and we thank the Commission for this important change.

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

ACTING CHAIR PRYOR: Thank you.

Mr. Butler?

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

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

Consequently, drug punishments have never been based on an empirical analysis of what
a fair and proportionate sentence should be. The
most infamous example of this flaw was basing
 cracking guidelines on mandatory minimums. I have
personally represented hundreds of people charged
with crack offenses. Most were low-income. Most
were minority. Most had minor criminal history.
Most were addicted to drugs or couriers, low-
level street dealers, or facilitating family
members. Many had mental health issues. Most
were charged with nonviolent offenses involving
5 to 50 grams of crack.

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

The Commission rightly urged changes
regarding crack. Now the Commission's proposed
synthetic drug amendments not only have the
potential of repeating the disastrous crack sentencing structure but exacerbating its flaws.

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

I provide this case to underscore the point that, under our current guidelines, the courts already have the authority to impose
severe sentences when serious bodily injury or death results. A person with no criminal history who is convicted under 21 U.S.C. § 841(a)(1) is subject to a penalty of 235 to 292 months in jail. A person with one prior drug offense could be facing a mandatory life sentence.

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

Furthermore, this amendment undermines the Commission's and the guidelines' goal of providing just and proportionate sentences. First, instead of targeting major traffickers, the amendment will most directly and
dramatically increase the penalties for couriers, lookouts, and other minor participants whom the Commission's own data shows didn't know they possessed fentanyl.

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

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

(Pause.)

Can you all hear me?

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

MR. BUTLER: Keep going? Okay.

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

The definition proposed by the Commission we believe also is too vague. I'm not a chemist, but Dr. Logan testified, I believe, on
December 5th, that when determining if a given substance is a fentanyl analogue, the chemical must have three characteristic domains. That form of specificity is missing in this definition. Because this detail is missing, chemicals that may not be related to fentanyl may be included because they are similar.

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

We also don't think the guidelines should punish people who do not knowingly misrepresent a given substance as something else, as this option would penalize a significant percentage of individuals whom the Commission's own data shows unwittingly possessed the drug.
fentanyl, that is, in a mixture usually with heroin.

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

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

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

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

Second, these widely varying compounds do not have the same pharmacological effect as THC on CB1 receptors. Some, for instance, have no effect on CB1 receptors. Some
impact CB2 receptors.

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

Because of the lack of consensus in the scientific community, we ask the Commission not to adopt a class-based approach and amend Note 6 to give the courts a simpler harms-based analysis. If the Commission does impose a class, we ask two things. First, to reduce chances of unwarranted disparities, the definition should focus on drugs that are full agonists of CB1 receptors. Additionally, list specific examples of what substances fall within the class. This would help avoid confusion and disparity.

Second, there should be a distinction between synthetic cannabinoids possessed in actual form and those in a substance or mixture.

Finally, we would ask that a base offense level 12, which essentially mandates prison, not be included. The guidelines shouldn't mandate prison where there is no harm and if there are mitigating circumstances present.
that the court might determine warrant a sentence other than prison.

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

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

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

ACTING CHAIR PRYOR: Okay.

MR. BUTLER: Thank you.

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

For example, ethylone is less powerful
than methylnone. Methylnone is 50 percent less powerful than MDMA. However, if I was a low-level drug dealer in possession of 50 grams of ethylone, I'd be subject to the same sentence as somebody -- which is very much less powerful than MDMA -- I'd be subject to the same penalty as somebody who did possess MDMA.

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

If a class is established, methcathinone should not be included. It is not chemically similar. It is substantially more
potent than the most common -- it should not be included.

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

Thank you for this opportunity to address the Commission.

ACTING CHAIR PRYOR: Thank you, Mr. Butler.

Questions?

COMMISSIONER BARKOW: One question that I have for both of you, I guess, really is, we have other testimony that talks about, if we continue to take the approach we do that's based on weight, there will be an incentive for the distributors of these drugs to make them ever more potent. And I'd like to just get the reaction particularly of the Government about that concern, but also you as well, Mr. Butler, if you do, about just the worry that it would be counterproductive to do that because of the
incentives it would create if we don't take potency into account in some way, either with a departure provision or otherwise, because of what it will mean for the incentives.

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

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

MR. DUNCAN: I don't know that it
would affect the drug distributor making the substance weigh less to get more potency. Specifically with synthetic cannabinoids, they're going to use the same 1 gram-2 gram dose packet, and they'll just put more chemical, or mixture of the chemical. It won't necessarily increase or decrease the weight of the actual packets.

COMMISSIONER BARKOW: And with fentanyl?

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

COMMISSIONER BREYER: Well, I would like to ask the Government, there's no question now -- and we've received a lot of testimony about the dangers, the horrific dangers of very, very
small quantities of fentanyl in different drugs. And that's a problem that I think, appropriately, we have to address.

The question really is, in my mind, whether or not we add, for example, a requirement that the defendant know that there was the introduction of this drug or fentanyl into other controlled substances, whether that is going to make a difference in terms of enforcement. And in particular, I mean, you take a look at the whole drug structure, the law that's been around for years, which is, to the satisfaction of prosecutors, is that all you need to do for a conviction, basically, is to show that the defendant knew that the substance was a controlled substance, not which substance. But it seems to me a rather large extension to say not only are we going to attribute criminal responsibility to a defendant for the controlled substance, we're also going to assign an augmentation of that sentence if, in fact, the controlled substance, which the defendant may not
have known what it was, further has to know that,
not even knowing what it was, he or she has to
know that it was corrupted by the introduction of
fentanyl, as an example.

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

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

(Laughter.)

ACTING CHAIR PRYOR: It did remind
me of somebody.
(Laughter.)

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

ACTING CHAIR PRYOR: Got that?

MR. DUNCAN: I am trying to process --

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

(Laughter.)

MR. DUNCAN: If I understand your question, Judge, you're asking about the knowingly requirement? Regarding the knowledge requirement, we believe that the state of law and the state of the guidelines as currently set is appropriate, that you just have to know that you're distributing a controlled substance to sustain the conviction. We believe that is sufficient as is.
COMMISSIONER BREYER: Okay. Thank you.

ACTING CHAIR PRYOR: Go ahead.

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

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

MR. DUNCAN: Judge, I would say for fentanyl, since the quantities for lethality are so low, that you can be a major fentanyl dealer and have a relatively, what we would consider a small quantity of any other drug, when you consider that the lethal dose is 2 milligrams, if
you have 4, 5, 10 grams, that's a significant amount of fentanyl that can kill potentially or at least harm a very significant segment of the population.

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

Under your hypothetical, if a courier or a street-level dealer unknowingly comes into possession of a mixture or substance that has not been processed correctly, and is potentially more lethal, the fact remains, though, that that individual is not knowingly in possession of that lethal dosage. When it goes out, it might have impact, but that was not his intent at the time of the distribution.
My point, simply being, is, under our criminal justice system and the guidelines, it is, it has always been our position that people who are more culpable, the leader or the organizers, the major traffickers, should receive sentences that are greater than the lower-level persons.

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

COMMISSIONER BARKOW: I have one other question, if I could, just to shift to the cannabinoids. So, we have testimony -- and we'll hear more later from probation officers -- about one possibility to deal with the mixture versus the pure form when it's sprayed on the plant.
material. That, if it's basically roughly 1 gram of the material, you could kind of get 14 times the plant quantity. They have a suggestion that we could just divide by 14, how we treat a mixture as opposed to the pure form. So, you know, whatever number we would set, if we did, for a class-based approach, that could be the amount that we would set for the pure form, but then we could divide that by 14, and that's how we would treat the mixture.

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

If that's a decent surrogate for trying to get this balance between the fact that it's going to be far greater in weight than it
would be with potency, is just this kind of dividing by 14?

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

COMMISSIONER BARKOW: This would be for the cannabinoids.

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

MR. DUNCAN: And, Professor, our position would be that the Commission should assign one of the three proposals that the Commission has put forth. I think that the
scenario proposed by the probation office, I think, again, would be too difficult, too unwieldy to employ. And we would suggest the Commission just go with a class-based approach for picking one of those three numbers for those.

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

COMMISSIONER BOLITHO: No. Thank you, Judge.

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

MR BUTLER: Thank you, Your Honor.

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

Mr. Bendzunas is the Chair of the Commission's Probation Officers Advisory Group. He began his career as a United States Probation
Officer in the District of Vermont in 2000. He was promoted to a Sentencing Guidelines Specialist in 2008 and then to a Supervisory United States Probation Officer in 2014. He holds a Bachelor of Arts degree from Marywood University and a Master's of Arts degree from the State University of New York at Albany.

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

Mr. Bendzunas?

MR. BENDZUNAS: Thank you, Judge Pryor, both for the introduction and the invitation to be here today. We appreciate it. POAG has followed the Commission's study of synthetic drugs, and we have seen how
they have impacted public health institutions, law enforcement agencies, and observed the various complications, some serious complications, in federal sentencing. We've assisted courts as they struggle to apply guidelines to substances that are constantly changing, and supervision officers have been forced to adapt to some new realities in the field. We discussed a few of these issues, supervision issues, in our written submission as they relate to the cost, the availability, and the reliability of drug testing.

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

Regarding synthetic cathinones, the District's reporting issues of these drugs, from our feedback, tend to be more metropolitan in nature, where they are used as club drugs, and also in isolated rural pockets across the country.
Although there is some variation between the substances, they are similar enough to form a class. We recommend the elimination of methcathinone from the Equivalency Table and folding that into the class.

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

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

POAG strongly supports the class-based approach for synthetic cannabinoids. While there may be some differences between the substances, we believe they're sufficiently
similar to be treated as one group.

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

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

Expert witnesses provide testimony that 1 kilogram of pure synthetic cannabinoids, the powder, can be used to manufacture 14 kilograms of the smokable product. Utilizing the current mixture and substance rule and guideline application, an obvious disparity arises.
Individuals who possess the pure product will unfairly realize the benefit from those who only deal in the smokable product.

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

So, taking that 334 grams and dividing it by 14, we arrive at a second conversion for the smokable synthetic cannabinoids, the coated plant material, and we arrive at 1-to-24 grams. We would note that in the 2015 data extraction the majority of courts utilized the 1-to-167
ratio. I believe it was 91 percent. We don't know how many cases involved the pure powder or the smokable product, but what we do know is that in 80 percent of those cases, courts using that equivalency ultimately either departed or varied. So, there's a low fidelity to the 167 ratio.

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

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

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

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

Lastly, we are opposed to the SOC for marketing or misrepresenting fentanyl as another substance. We do acknowledge that fentanyl is in everything. We find it in heroin. We find it in cocaine. We're finding it in methamphetamine. It's something that we see in lab reports, and
it's also something that we're seeing in our drug testing results within our released population.

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

Thank you.

ACTING CHAIR PRYOR: Thank you.

Mr. Johnson?

MR. JOHNSON: Thank you, Your Honor.

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

I'd also like to say a special thanks to the Commission staff who have been superb in
their help of us, and as I am sure they are of all of you, in our preparing for this, particularly in the synthetic drug area, which I'm sure the Commissioners are aware the Practitioners Advisory Group doesn't come into a lot of contact with, which reflects the data, which is one-half of 1 percent of all guideline sentences from the fiscal year quoted in our written testimony, was related to synthetic drugs.

The Practitioners Advisory Group is not in favor of a class-based approach, for a lot of reasons. I know that, from the testimony you've received and what you've heard this morning, is that it seems as though it would provide some clarity, but we don't believe it would because, first off, none of us are chemists. And what we're concerned about is the potency, and the addictiveness, and the danger to the community from each particular drug. And even from the Department of Justice this morning, I heard, they conceded that there are some of
these synthetic drugs that are going to be less potent and dangerous to the community, and in those instances there should perhaps be an adjustment or a reflection by the court or the ability of the court to depart.

We just don't believe that there's anything wrong with the system as it is presently set. I know there's been time-consuming hearings that eat up district courts' time from time to time on this. Most of that, I would suggest, is taken care of by plea negotiations between the United States and defense when a case is charged. Those cases that are litigated, about particularly, we cited, I think it was the Moreno case out of the 7th Circuit, there is a lot of testimony and it's difficult, but the court in those cases ends up sentencing the defendants to quite a bit of time, based on the actual potency of the drug, rather than us having to do it backwards, which is assuming that each particular substance has a particular potency, and then, we're going to have to go in and litigate it
anyway. We believe it would still take up the
time, and because it is such a small amount of
the work that's done, it's best to leave the
system as it is.

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

But we have to ask ourselves, I
believe, not only why are we putting people in
prison for particular amounts of time, but what
are the reasons that would cause them to spend
more time in prison after a just and fair
analysis of all the facts. And the Practitioners
Advisory Group is very concerned that, if people
are continually enhanced under their sentences for unknowing adjustments, for instance, for the marketing, false marketing, or misrepresentation of what is in the product, that that doesn't reflect what they did. It may reflect a negligence in some case or an absolute innocence case in others, which is why the Practitioners Advisory Group supports, if the Commission does adopt a class-based approach, the Commission should not have an enhancement without knowing that that's happening, and also allow for adjustments and/or guided departures in those instances where someone absolutely doesn't know that that's what they're dealing in.

Now I'm in a border district. Most of our cases are, quite frankly, people caught at the border with a large amount, and to many districts it would be a shocking amount, of narcotics in a vehicle. For instance, I've had cases where someone was arrested at the border smuggling, and the cartels have gone to smuggling lots of different drugs in one occasion, like
some heroin, some cocaine, and even some fentanyl, and some shocking amounts of fentanyl where the driver was being paid $150 simply to cross the border, had no idea whatsoever what was in there, which is also why the Practitioners Advisory Group hopes that the Commission, at some point, considers guided adjustments or amendments for any offender that commits a narcotics crime after having been misled about what it is that they're trafficking.

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

(Laughter.)

ACTING CHAIR PRYOR: Questions?

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

The person that brings 6 kilograms of heroin and 5 kilograms of cocaine across and is
paid $150, courts vary downward for those reasons.

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

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

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

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

MR. JOHNSON: Well, the guidelines
themselves. I mean, we end up as tax attorneys in some respects in that there's something to be said for considering -- and it's not the subject of this hearing -- but the overarching simplification of the process.

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

(Laughter.)

Yes? Sure.

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

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

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

MR. JOHNSON: I don't think it would save any resources. As defense counsel on one of these cases, as soon as it comes in, regardless of the system that's set up by the Commission, I'm going to have to figure out what the potency is. And in those cases that require litigation,
we're going to have to have litigation or an agreement with the United States, which would be typically how you would handle it. So, I'm not sure it saves anything. It just turns things from turning left to turning right, but we're going to end up in the same place.

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

MR. JOHNSON: I think in many cases it is, Your Honor. Certainly not in all of them. I've seen many similar reports to, I'm sure, what Your Honor has seen, which include -- I mean, at
the border we get a lot of cases that it's pretty
darn pure as it's being smuggled across the
border. And then, in the distribution cases, it
may be less so, although I will say most federal
cases it's very close to 100 percent pure. But
if there are reports being issued by DEA chemists
that they can't tell the purity, that implies to
me that it is difficult to determine, at least in
some cases.

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

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

COMMISSIONER BREYER: So, in those
cases, it's easier for the court and the parties
to determine the role in the offense as distinct from what exactly is the potency of the drugs?
In other words, I'm ready to sentence a courier. Okay. So, if we know that the courier is just a courier, was paid $100, and so forth, that's a basis for a particular sentence, without regard to the potency of the drug. I think that's what judges do, but I don't know. I don't know whether that's -- I mean, I think that does account for, as Judge Reeves points out, it does account for variances. And maybe the argument is it should be a departure. I don't know.

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

MR. JOHNSON: I think that courier cases at the border tend to be pretty high purity in terms of the substances they're smuggling. And the purity does come up at sentencing. I
cannot recall a case -- I'm sure I've been involved in some -- that involved an exceptionally low level of purity, but that's something you would expect more on the street level than in what we typically see in the Southern District of California in federal cases. So, I would say there's not a lot of departure or variance because of the different purities in our district, but I'm just speaking anecdotally. I don't have any statistics at my fingertips on that.

ACTING CHAIR PRYOR: Thank you.

MR. JOHNSON: Thank you very much.

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

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

COMMISSIONER BOLITHO: No, thank you, Judge.

ACTING CHAIR PRYOR: Okay. Thank you. We have your written testimony, and we appreciate you appearing today.
MR. JOHNSON: I appreciate it.

Thanks.

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

Mr. Graves is a retired police sergeant who worked in the San Francisco Bay Area for 29 years. He is the founder and President of Graves and Associates, a company dedicated to providing drug training to law enforcement and private industry. He was named as California's Narcotics Officer of the Year and was a winner of the Mothers Against Drunk Driving's California Hero Award. He has years of experience as a narcotics detective and a narcotics unit supervisor, and is a drug recognition expert instructor. Mr. Graves earned a Bachelor of Arts degree in business management from St. Mary's
College of California and a Master of Arts degree in criminal justice from American Military University.

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

Ms. LaSalle is a senior staff attorney for the Drug Policy Alliance Office of Legal Affairs. She engages in litigation, legislative drafting, and public education in support of drug policy reform. She received her Bachelor of Arts and a Juris Doctorate from the University of
California, Berkeley, where she served as a
development editor of the California Law Review.

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

Mr. Graves?

MR. GRAVES: Members of the Sentencing
Commission, thank you for the opportunity to give
the National Narcotics Officers Association
Coalition's view on the Commission's proposed
amendments to the Federal Sentencing Guidelines
related to synthetic drugs.
Synthetic drugs, including fentanyl and its analogues, synthetic cathinones, and synthetic cannabinoids, have had a profound impact on American law enforcement. In past decades, law enforcement only had to worry about a few drugs, like heroin, methamphetamine, and cocaine, but the new century brought with it new drugs. These new drugs brought with them a new scourge that's impacted our community in ways that we weren't prepared to handle. These synthetic drugs can't be combated like traditional street drugs of the past, and law enforcement officers around the country are having to change their tactics due to the strength/potency of not only fentanyl, but of synthetic cathinones and synthetic cannabinoids.

As an example, prior testimony has shown the potency of synthetic cannabinoids and their chemical structure. However, how synthetic cannabinoid drug dealers operate and the impact that they have on our society needs attention. A high-level drug dealer will order multiple kilos
of synthetic cannabinoids from China. Once in the United States, the dealer will take it to a facility where the chemical is going to be modified and sprayed on vegetable matter, such as damiana. After spraying the chemical compound on an herb, it's then placed in fancy foil packaging and shipped to internet dealers or retail facilities around the U.S., like smokeshops, liquor stores, and gas stations. The foil packaging often depicts logos and characterizations that are often attractive to younger Americans.

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

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

In regards to fentanyl and its analogues, there's been much disinformation put out about fentanyl and its impact on law enforcement in our community. First and foremost, most of the medical community uses pharmaceutical fentanyl as the baseline for their comments about the drug. However, there are two
types of fentanyl. You've got pharmaceutical fentanyl and then street fentanyl.

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

We know that fentanyl has had a profound effect on America. We only have to look at the overdose statistics to realize how bad the problem is, but it's our belief that it's only going to get worse. A simple review of economics and logistics can make you come to the
realization that fentanyl will become worse in
the near future.

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

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

Additionally, fentanyl dosage units
are measured in micrograms; whereas, traditional
drugs are measured in milligrams. So, it only
takes a minute amount to add to another drug,
like heroin, to make it much more powerful. A
drug dealer could purchase 1 kilo of Mexican fentanyl for $19,000. This kilo is going to make 1 million pills, which would be the equivalent of about a million heroin points. At $20 to $40 per dose, 1 kilo can net a drug dealer millions of dollars. You don't see that with any other drug that we have dealt with in the past.

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

ACTING CHAIR PRYOR: Detective Alcala?

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

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

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

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

Just recently, the Kentucky State Police, Federal Bureau of Investigation, and Lexington Police Department conducted a multi-agency investigation targeting the career-long trafficking offender. Through the investigations, we learned that he had ties to the Sinaloa Cartel in Mexico. This offender would order kilograms of fentanyl and heroin to be delivered to Lexington through phone conversations. By his own confession, he knew he was purchasing fentanyl, purchasing between $55,000 to $60,000 per kilo. Fentanyl, in our
area, ranks the most highest of all narcotics.

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

There's a misconception of traffickers adding fentanyl to heroin, when basically, they are adding fentanyl to heroin because fentanyl being a most potent drug. As we all know, traffickers can use all types of cutting agents to increase their profits. They use heroin, cocaine, and, ladies and gentlemen, we are receiving reports of street-level dealers adding fentanyl to marihuana just so they can
gain edge on their competition. That is why we are seeing fentanyl and fentanyl analogues used as the primary drug of drug trafficking offenders.

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

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

To conclude, it has been our
investigating experience dealing with large drug
trafficking offenders, they have a knowledge of
the product that they're selling. Depending on
the customer base, somewhere down the chain, the
transparency of the product changes, often
leading the street-level dealer not having
complete knowledge of the product they're
selling. And these type of practices lead to
overdose deaths.

Thank you, and I look forward to your
questions.

ACTING CHAIR PRYOR: Thank you,
Detective.

Ms. LaSalle?

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

The Drug Policy Alliance is an
organization that advances policies that aim to
do two things. One, reduce the harms of drug use
itself, but, two, also reduce the harms of drug
criminalization and drug prohibition. So, it's with that framework that I would like to evaluate the Commission's proposed amendments today.

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

But I must stress that there are public health solutions to this public health crisis, and we don't need to revert back to this knee-jerk reaction of criminalization, particularly because the public health solutions are based on science. Whereas, we know from the research and evidence that there is not an ounce of -- there's really not a shred of evidence that proves that criminalization has any impact whatsoever on reducing the harms of drug use. All the research shows that sentence severity has
no deterrent effect whatsoever. So, increased penalties, as the Commission proposes, is not ultimately going to impact supply and it's not going to impact demand.

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

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

And in fact, if we evaluate the proposed amendments with respect to the potential harms of criminalization, we see that, in fact, that risk of death and the risk of other health
harms is potentially amplified. Taking a broad
view, drug law enforcement efforts have been
associated with a number of unintended harms and
consequences, and these are often the exact
opposite of the initial intent behind these laws.
So, we see that there is a reduced price of
illicit drugs, increased purity, health-related
harms like the ones we've been talking about
today, overdose, but also addiction, transmission
of infectious diseases, social harms like gun
violence or homicide, and many others. And I
worry that the Commission's proposed amendments,
particularly with respect to the class-based
categorization of synthetic drugs and the
equivalencies between fentanyl and fentanyl
analogues, are similarly going to have unintended
consequences and consequences that are severely
detrimental to public health.

The Commission itself acknowledges,
for instance, that the fentanyl analogue
carfentanil -- and we have also heard this from
law enforcement -- carries significantly greater
risks than fentanyl and is significantly more potent, but then proposes, kind of seemingly in the same breath, that the sale and distribution of fentanyl receive equivalent penalties and sentences to that of the more dangerous analogues.

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

I think the black market can be expected to respond to these changes, and I think we have to recognize that the sentencing guidelines at large and these proposed amendments will impact the way that the black market operates. People will not change their behavior. Or people will not stop their behavior. We know there is no deterrent effect. But certainly we know that people alter and adjust their behavior
to account for the criminal law, and do so in a way to minimize their risk. And we saw this in the case of the context of alcohol prohibition, for instance.

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

This is especially true, given that the guidelines don't distinguish, as we've heard, between mixtures and pure substances. So, fentanyl is safer the more diluted it is, but under the guidelines, research is showing that low-level sellers are, in fact, diluting fentanyl with other substances or with cutting agents as a harm-reduction measure. It's actually to ward off potential death. But those folks would be
sentenced higher than people who are distributing and selling the more pure and potent version of the substance.

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

Thank you so much.

ACTING CHAIR PRYOR: Ms. Price?

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

Many of FAMM's 75,000 members are affected by the guidelines that you write and amend. They follow guideline developments closely. Sometimes we help them with that. Sometimes they participate in public comment. You get letters from them. I'm really honored to
represent them on this panel today.

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

I'm not a drug policy expert. I'm certainly not a member of law enforcement. I'm not a scientist. I'm not even a practitioner. I've not been personally affected by these substances in the way some people on the panel have described. Nonetheless, I'm a long-time student of the sentencing guidelines. And as a student of the guidelines and as an advocate before the Sentencing Commission, I have witnessed over the years, and FAMM has pushed back over the years, over efforts to convince the
Commission to increase sentences, drug sentences particularly, as a way to address public safety and public health problems. These efforts have been misguided for the most part. These problems are not solved by locking more people up for longer periods of time.

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

It parallels, this environment parallels in some ways the environment in which crack cocaine sentences were adopted in the mid-
1980s, as earlier witnesses testified. A mistake was made at that time in the heat of extreme concerns about the threats that were posed by crack. Those mistakes were fueled by, also, misperceptions and misconceptions around crack cocaine. It took 20 years, more than 20 years, over three reports from the Sentencing Commission with recommendations, and an act of Congress to partially correct that mistake.

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

So, we're in the midst of another epidemic, and we appreciate your deliberative approach, but we're very concerned about the variety of views and the different approaches to how to classify these substances, whether to put them in a class, and how to correctly assign marijuana equivalencies that will lead to
sentences that meet the purposes of punishment.

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

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

And just this week, actually, the Pew Charitable Trust, which tracks federal and state
sentencing and other matters, released a report about the relationship between sentence length and public safety and public health concerns. And the question that Pew posed itself was, "whether, how, and to what degree imprisonment for drug offenses affects the nature and extent of the nation's drug problems," and they reviewed data from 50 states from 2014, I believe, from law enforcement, corrections agencies, and public health agencies.

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

So, the Commission has also led the way in exploring alternatives to incarceration.
And the knowledge and principles that animate those inquiries should, likewise, lead you to set ratios that err on the side of lenity and restraint, rather than severity.

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

Thank you so much.

ACTING CHAIR PRYOR: Thank you.

Questions?

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

MR. GRAVES: Yes, sir?

COMMISSIONER REEVES: -- in light of the arguments that have just been made, is it fair to compare crack and powder cocaine with the epidemic that we're now seeing with fentanyl and fentanyl analogues? We've heard that a couple of times today.
MR. GRAVES: Yes, you can’t compare.

Besides one's a stimulant and one's an opiate, but --

COMMISSIONER REEVES: In terms of the consequences.

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

And one of the issues that I don't
think has been brought up, that these labs aren't, some labs aren't testing for fentanyl. And so, when they actually learn about it, and then, they go back and test for it, they're finding out that, yes, they've had fentanyl in their community for some time.

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

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

One of the indicators that we tell them to look at is look at your overdose deaths. Look at your overdose deaths compared, like right now, compared to, let's say, three-four years
ago, and you'll see that there's a significant increase. And again, it's because people aren't testing for fentanyl specifically. They might just test for heroin or something like that. So, if somebody had taken meth that had fentanyl in it, then they only tested for meth; they didn't test for fentanyl. So, it won't even show up as a statistic. So, I think the statistics are off. But, just going back to the crack-fentanyl relationship, it is a lot different and you can't compare the two.

COMMISSIONER REEVES: The second question, Detective Alcala --

MR. ALCALA: Yes, sir?

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

MR. ALCALA: No, sir, I have not. And the key to remember, and me dealing with, sometimes undercover officer and dealing with confidential informants all the time, the key to
remember is there is no fear of the consequences
out there. When it comes to large trafficker
drug offenders and when it comes to mid-level
dealers, and sometimes street-level dealers, the
only thing they're looking at is their profits.
They're not caring about how am I packaging this,
right or not. These are not chemists. They don't
have no background in anything like that.
They're main thing they're looking at, how can I
gain more profits, but with this right here,
monetary gain.

COMMISSIONER REEVES: Thank you.

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

What I take is that the issue that
they're raising is, does the length of the
sentence correlate with the concerns that we have
with respect to recidivism? Let's just take
recidivism, not seriousness of the wrongdoing, not the impact in a sense of these drugs, which I think your characterization is absolutely correct and alarming to the Commission, all of us.

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

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

MR. GRAVES: So, I can only give you anecdotal evidence, you know, just my experience
on the street.

COMMISSIONER BREYER: Sure.

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

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

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

We're not here to say that we want to put addicts in jail. The best thing in my career
was to have a guy come up to me and tell me, "You arrested me on March 11th," whatever date, "and I've been drug-free ever since then." And that's what I want to hear. I have seen less and less of that as California has gone towards just a more liberalization view of drugs.

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

ACTING CHAIR PRYOR: Sure.

MS. LaSALLE: With respect to the recidivism and it being tied to leniency of drug laws, I certainly appreciate your experience in the field. But the research, the empirical evidence shows that exact opposite. And I would posture that the reason that people are recidivating, if they are, is because they have a drug felony on their record and they're totally disenfranchised from being able to participate in society and aren't able to get a job. So, it's the collateral consequences of that conviction and of that sentence to begin with that leads to the recidivism.
COMMISSIONER BREYER: But isn't it really -- I'm hearing both of you, and I think both of you may be right. And so, the question is, how can you both be right? And it seems to me that you have to look at the details, whether you're talking about short sentences, which I think you find in California, coming from California and seeing what happens in the State court system, I think you're correct. I think that six months or nine months -- and this may upset other people -- but I do see this rate of recidivism rather high at those levels.

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

But I'm not sure that you're both saying different things. I'm just saying that you have to look at the details.
MS. PRICE: You also have to take into account the collateral cost to the community of removing people for long periods of time from the community. And I think that has been well-documented.

ACTING CHAIR PRYOR: Collateral costs and benefits.

MS. PRICE: Well, yes, but --

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

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

ACTING CHAIR PRYOR: Sure. Right.

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

COMMISSIONER BARKOW: Just two questions. First, for Detective Alcala, on the question of proving knowledge, I'm trying to get
a handle of how much of it is a question of proving it versus some people don't know. So, I know you gave the example of the dealer who said he was doing it intentionally and, then, they would give drugs to people and see if they died. So, that would be an easy case to prove knowledge.

    MR. ALCALA: Right.

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

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

    MR. ALCALA: Oh, absolutely.

    COMMISSIONER BARKOW: Okay. And then, the second question is, for the people who do know, and why it's difficult to prove, I guess in the weight, could it be demonstrated by the
Government by showing either repeat sales after
someone has been seriously injured or died, or
the price that the drug -- I'm trying to get the
ways in which the Government could overcome the
hurdle of knowledge. If you could just, in the
cases where you have to show it, what kind of
facts you use?

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

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

So, in my opinion, the sentencing
guidelines, the proposed sentencing guidelines, are correct. I'm glad I'm not in your shoes because this is a very important step.

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

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

MR. ALCALA: No, sir.

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

MR. GRAVES: Yes, sir.

ACTING CHAIR PRYOR: To the extent you know, you talked about law enforcement officer exposure to synthetic cannabinoids and causing
MR. GRAVES: Yes, sir.

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

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

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

With these guys -- with us, with the meth issue, our cancers developed many years later -- with these guys, they're raiding these
labs. They're hitting them. And then, all of a sudden, you've got like that HSI agent who, all of a sudden, is in the hospital; he's in ICU, you know, and he's got this severe kidney damage. They start backtracking, figuring out what it is.

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

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

ACTING CHAIR PRYOR: Yes.

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

ACTING CHAIR PRYOR: Yes.

MR. GRAVES: And I'm looking at what's happening to these guys and I'm scared. They're going back. They're now taking a look, bringing in CDC and do the monitoring. We'll see what
happens when everybody gets done with their studies.

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

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

ACTING CHAIR PRYOR: Right. Okay.

MR. GRAVES: And this is happening fast.

ACTING CHAIR PRYOR: Detective Alcalá --

MR. ALCALA: Yes?

ACTING CHAIR PRYOR: -- you said, in response to a question from Judge Reeves, that
there's no safe fentanyl. But you also said, though, that these dealers are responding to competition --

MR. ALCALA: Correct.

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

MR. ALCALA: True.

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

MR. ALCALA: Correct. So, as previous studies have been done, I'm no doctor, but previous studies that I've read, it shows that humans, they increase their tolerance when they're using a certain type of drugs. So, if heroin -- you know, it's a disease; the addiction is a disease. If a heroin addict takes heroin and he uses 1 gram a day, and he gives into a tolerance of 2 grams per day, well, that's around $250. But, if a person finds out that this other dealer has a stronger heroin or better quality,
they're going to go spend $100 to try to accommodate for the cost.

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

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

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

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

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

ACTING CHAIR PRYOR: I would think the manufacturer doesn't want to kill the customer.
MS. LaSALLE: Precisely.

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

MS. LaSALLE: Right.

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

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

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

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

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

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

ACTING CHAIR PRYOR: Let's come back to order.
Our final three panels will focus on the Commission's proposed amendment regarding first offenders and alternatives to incarceration. Our first panelists on this topic will be Andrew Lelling and Miriam Conrad.

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

Ms. Conrad has been the Federal Public Defender for the Districts of Massachusetts, New
Hampshire, and Rhode Island since 2005. She became an Assistant Federal Defender in 1992 after working as a trial attorney for the Committee for Public Counsel Services, the State Public Defender's Office. She is Vice Chair of the Defenders Sentencing Guidelines Committee. And, after graduating from Harvard Law School cum laude, she clerked for Judge Zobel of the U.S. District Court in Boston. She earned a bachelor's degree in journalism from Northwestern University.

COMMISSIONER BARKOW: Another fine university.

(Laughter.)

ACTING CHAIR PRYOR: Another, indeed.

Mr. Lelling?

MR. LELLING: Thank you, Judge Pryor and Members of the Sentencing Commission for having me today, for the opportunity to present the Department's views on the proposed amendments concerning first offenders and alternatives to incarceration.
The Department respectfully disagrees with these amendments. I'll start with the proposal that defendants who qualify as first offenders should receive a one- or two-level reduction from the otherwise applicable offense level.

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

The primarily rationale offered for this across-the-board change is that defendants
with zero criminal history points have the lowest rate of recidivism, clocking in at about 30 percent. The Department has a few concerns with this approach.

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

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

Third, correlation is not causality.
That is, the recidivism rate among first offenders might be lower precisely because of the federal penalties that are currently in place to deter them from offending again, but the proposed amendment would surely lessen the deterrent effect of the federal penalties that are currently available.

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

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

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

The proposal offers little support for this significant change in sentencing policy. White collar defendants would receive the most benefit from this proposal. Tax fraud is of particular concern. Eighty-one percent of tax fraud defendants are in criminal history Category
I. I would wager that the bulk of those have no criminal history points at all.

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

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

But there's a deeper, in some ways more subtle, issue here. In the post-Booker world, federal courts already have near total discretion to vary downwards when it suits them and oppose alternatives to incarceration. And courts have routinely exercised this discretion, as the Commission's own data has shown. So, the amendment remedies no particular perceived injustice. All it does do is signal to the courts
that certain offenses are taken less seriously than others, a signal that courts will use to impose sentences well below whatever incremental adjustments the Commission may intend with these amendments.

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

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

Thank you for the opportunity to share the Department's views on these important issues. I look forward to answering your questions.
MS. CONRAD: Good morning. Thank you very much, Judge Pryor, for inviting me here today and for allowing me to speak on behalf of the Defenders on this very important proposal. The Defenders are grateful for the Commission's willingness to consider putting into effect guidelines that reflect its findings about reduced risks of recidivism for defendants with zero criminal history points or who are first offenders, and to alleviate prison overcrowding and encourage alternative sentences for those who would benefit from them in terms of reduced recidivism and who would not pose a danger to public safety.

And I'm going to deviate for a moment from what I wrote in advance because I would like to address some of the points made by Mr. Lelling, who I have had the pleasure to know and work with, or not actually against, but have cases with for quite a number of years. And I have tremendous respect for Mr. Lelling's intelligence, practicality, and so forth, but I think that
there is a fundamental flaw in the Department's position with respect to these proposals, maybe two fundamental flaws.

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

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

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

(Laughter.)

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

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

MS. CONRAD: If only the jails would let me take my iPad or my iPhone into the prison to visit my clients, then it would be awesome.
But it's still awesome.

(Laughter.)

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

(Laughter.)

MS. CONRAD: Right.

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

In addition -- and I think this is a really important point -- the proposal with respect to combining Zones A and B and the proposed language that says, that gives meaning to 28 U.S.C. § 994(j), when it says that, ordinarily, defendants who are first offenders who are not convicted of violent offenses should receive a non-incarcerative sentence. Nothing in that says they have to. The judges are still
free to impose appropriate imprisonment sentences in appropriate cases. The Government makes this sound like it's the reverse of a mandatory minimum, like it's a mandatory maximum. It's not. It just simply isn't.

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

And what these proposals in combination will do is they will give judges more of a reason to stop and to consider a sentence that does not involve incarceration. I think it's important to note the empirical evidence that supports this type of approach, not just, first of all and most importantly, the very
significant work that the Commission has done in
the area of research on recidivism in a number of
reports, but also the study that we cited that
shows that, for first offenders, probationary
sentences can result in a lower rate of
recidivism than prison.

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

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

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

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

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

Questions?

COMMISSIONER BARKOW: I have a question that I think goes to -- it's for both of
you, which is, so the difference between somebody
who is a first offender -- and we could talk about
the different definitions that we have -- versus
someone with criminal history. So, I guess maybe
I'll start with the Government's position, if I
could, Mr. Lelling.

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

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

COMMISSIONER BARKOW: I know. I
understand. Don't worry about the proposal. I'm
just trying to -- I understand what the
Government's issue was with how the proposal is
written. Because what I want to get to a place
is if you agree with that, I want to try to figure out which categories of first offenders don’t raise some of the issues that you have here.

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

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

ACTING CHAIR PRYOR: All other things
being equal?

COMMISSIONER BARKOW: Equal. Exactly.

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

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

MR. LELLING: The guidelines build in --

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

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

COMMISSIONER BARKOW: So, we could define first offender. Let's say for just a moment that we're talking about somebody who has no convictions whatsoever. Okay. And so, it's
the difference between that person and someone
who does. So, not the aged out of convictions --

MR. LELLING: Right.

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

MR. LELLING: Right.

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

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

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

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

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

MR. LELLING: Well, of course, there are non-serious and non-violent offenses, and
non-serious, non-violent offenses already skew to the very low end of the guidelines.

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

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

COMMISSIONER BARKOW: I would phrase it differently, which is we're statutorily obligated under 994(j) to treat the crimes that are not violence and serious differently when someone is a first offender. And so, I'm trying to identify what Congress told us we have to do. So, I want the Department of Justice to tell me which crimes are the ones that don't meet 994(j)'s definition of violent and serious.
MR. LELLING: Well, two things. First, it seems to me the Commission has already matched requirements under 994, a statute that's been around probably -- well, I'm going to hazard -- almost as long as the Commission has been around.

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


Do you want to try?

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

COMMISSIONER BARKOW: Okay.

(Laughter.)

ACTING CHAIR PRYOR: Let's take an offender with no criminal history points, no prior conviction of any kind. Do you think that there are certain kinds of offenses where the guidelines should presume a non-incarceration
sentence? And if so, how would we go about determining what those offenses are?

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

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

MR. LELLING: Thank you. No.

(Laughter.)

ACTING CHAIR PRYOR: Okay. What would it be?

MR. LELLING: Well, I think it would be Zone A. I think the guidelines already take
a shot at showing you what class of crimes should
fall in that area. I think the greater
difficulty, which I think you are perhaps
implying, Your Honor, is the word "presumption."
Is it a presumption? I don't think the Department
would agree it should be a presumption. I think
the guidelines already reflect that for certain
kinds of crimes it can be appropriate. I think
that's so, and I think we see that in the courts
every day. I think presumption would be too
strong for the Department's blood.

ACTING CHAIR PRYOR: Okay.

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

MR. LELLING: Well, I think that
that's right, and I think my other hesitation is
that you could have a first-time offender, a true
first-time offender, who has committed a crime,
as Professor Barkow implied, who has committed a
crime so serious that the fact of the first-time
offense is simply irrelevant. And that is a
simple example of how complex the sentencing
calculus is in every single case, as each judge
considers 18 different things to decide what
sentence should be given.

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

COMMISSIONER BARKOW: That's not true,
actually, if I could just interject. There is a
proportionality concept that we’re trying to get
at, and I guess what I'm trying to -- I recognize
that individual judges are in a good position to
assess some of these things. And I appreciated
your comment that in a Booker world that takes
care of everything. But that would suggest we
should disband as a Commission because we are
still supposed to be setting principles for
judges to follow, even in an advisory guideline
regime, to try to bring some order to it.
And so, I mean, yes, we could just let every individual judge decide in his or her case how to deal with it. But, if we wanted to try to set some general principles, the questions for comment -- and maybe the proposed amendment made you think that -- but our questions for comment asked, if this isn't the right way to do it, are there certain categories that should be in, certain categories that should be out?

And that's what I was trying to get your help with because I think, with the guidelines, what we try to do is create a heartland environment where, if we say, hey, look, if the bulk of the people in the guidelines world were all committing homicides as their first offense, then I would say, well, you know, actually, it's kind of crazy to think about doing this. But that's not what the community of people in federal prison look like. And, in fact, they're not actually all the world's largest Ponzi schemes, child sex abuse, armed carjackers, right?
And so, I was trying to figure out in that heartland what might be the cases that the Government would recognize don't meet 28 U.S.C. § 994(j)'s definition of serious and violent. So, we could sort of think about this is the group of folks that it makes sense for this Criminal History Category to think about zero points because we have a ream of data now that the zero-pointers are different than the one-pointers. And so, I just wanted to reflect the empirical reality about not just specific deterrence, but proportionality and what we know as an empirical means. These are different categories of folks.

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

MR. LELLING: But the distinction you
seek to draw, the guidelines already draw. If you have no criminal history points -- the underlying premise of your concern is that the guidelines are too high, and we simply disagree. The guidelines already give an escalating scale of punishment based on how much of a criminal history you have, how much money was involved, how much drugs, how many people you hurt. If it's none, you're here. If it's lots, you're here. So, the guidelines already contain the distinction that you are drawing. The underlying premise, though, I think is that they're just too high as stated or --

COMMISSIONER BREYER: Well, I am not too sure of that. I mean, I'm not sure that that's the premise. I think the battle is the presumption. And I've heard it from Judge Gleason. I've heard it for years, which is, why are you sending white collar people to prison? They have a lower rate of recidivism and, as a general rule, their Criminal History Category is much lower. Why do they go to prison?
Well, if you ask me, just as one judge, I agree with, actually, Sarbanes, who spoke to the Commission several years ago and was asked the question, "What have you found effective in terms of white collar crime? What's the effective penalty?" Because we had to jack up penalties when that occurred. I wasn't on the Commission at that time, but that's actually what happened.

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

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

So, I mean, I think I'm much closer to the Government's position, respectfully, than I am to yours, because I think you could take all
the statistics, and we all know as sitting judges that that person who cheats on his income tax, that person who does the small scheme, that person who commits a Social Security offense, stealing, you know, getting that extra money when Grandma Sadie is dead, all those people -- I'll tell you, if they thought all they would have to do is pay it back and have the shame of a felony, my view, that's not enough. Okay.

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

I guess to you.

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

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

With respect to Your Honor's point about the securities fraud defendant who is really shaken by having to go to prison, that person is generally going to have a high loss figure and a high offense level. That person, I would respectfully submit, is not the same as someone whose mother's Social Security checks keep getting deposited and that person uses it.
That person is not only -- and it's not just the
shame of a felony conviction -- that person may
be barred from certain jobs, may be barred from
certain benefits.

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

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

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

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

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

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

MS. CONRAD: Right.

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

MS. CONRAD: Correct.

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

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

COMMISSIONER BREYER: Two hundred thousand dollars?

MS. CONRAD: Although one could argue,
also, I'm sure she got abuse of position of trust
as well on top of that.

COMMISSIONER BREYER: Okay.

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

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

So, it seems to me that that's
somebody -- she got a year and a day. But that
is someone for whom it would have been helpful
for the judge to have had guidelines under the
amendments that suggested that (a) a probationary
sentence was available, and (b) that it was
something to be considered under the presumptive language that has proven to be so controversial today.

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

MS. CONRAD: Sure.

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

MS. CONRAD: And I would suggest that a judge would be more inclined, the sentencing judge would be more inclined to adopt the presumption with respect to the woman, not because she's a woman, but because of her role in the offense.
COMMISSIONER REEVES: The judge can do so now.

MS. CONRAD: Not under the guidelines.

Only with a variance.

COMMISSIONER REEVES: As the judge can do now.

MS. CONRAD: Well, again --

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

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

And it's a rebuttable presumption, and I certainly could imagine an able prosecutor like Mr. Lelling arguing effectively that the man, because he essentially brought his wife into the scheme, and so forth, and he was the organizer/leader, he might have higher guidelines
as a result of that, which would put him solidly
in Zone D, if he got an enhancement for being an
organizer/leader.

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

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

COMMISSIONER REEVES: Is the
population increasing or decreasing now?

MS. CONRAD: I'm sorry?

COMMISSIONER REEVES: If we look at
current numbers, is the prison population
increasing or decreasing now?
MS. CONRAD: It is slightly increased -- I mean, excuse me -- slightly decreased in recent years. However, I think with the Department's new guidance with respect to implementation of mandatory minimums and the like, I'm not sure that that trend is going to continue.

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

MS. CONRAD: I'm sorry?

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

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

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

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

MS. CONRAD: I recognize it, that certainly, as I said, a capable prosecutor could
argue -- and obviously, in this case did make arguments -- about why that person should go to prison, because a variance was available. But I think that there are other defendants similarly situated who perhaps the loss isn't as high, perhaps the circumstances are not the same, and it's just a question of considering the alternative.

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

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

(No response.)

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

MS. CONRAD: Thank you.
MR. LELLING: Thank you.

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

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

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

MR. ANDREWS: Thank you.

ACTING CHAIR PRYOR: Not his first
Mr. Purdon -- is that right?

MR. PURDON: Purdon.

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

Mr. Bendzunas?

MR. BENDZUNAS: Thank you, Judge Pryor.

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

The core mission of U.S. Probation and Pretrial Services is conducting community
supervision. During the past 30 years of the guidelines, we have changed significantly as an agency.

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

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

Within the past decade, our national system has adopted a risk assessment that is not only predictive of general recidivism, but identifies those most likely to engage in violent recidivism. Within our strategic plan, we seek
to abide by what we call the “risk principle,” meaning that supervision activities or supervision dosages be commensurate with an offender's objective risk.

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

With policy demands requiring supervision officers to focus their time and attention on high-risk clientele, POAG is concerned that the rezoning proposal will create a conflict between the sentencing guidelines and our “risk principle.”

Normalizing 12-month terms of home detention on cases the guidelines define as low-
risk will affect our resources, because any location monitoring supervision is resource-intensive. LM is a difficult function of our work and has demanding policy requirements. There are mandatory field contacts, 24-hour responsibilities with regard to responding to alerts, and burnout and wellness is an issue for any officer conducting LM supervision.

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

POAG has recommended two possible approaches to increase straight probation sentences produced by the guidelines. The first involves bifurcation of the Sentencing Table and eliminating the mandate requiring sentencing.
alternatives to be used to satisfy the low end of the guideline imprisonment range. This would obviously require the Commission to adopt a more expansive interpretation of the 25 percent rule.

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

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

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

Officers also raise concerns, like the last panel, regarding first offenders being convicted of long-duration criminal conspiracies and how you take that into account in the analysis. After several discussions, we resolved these differences in a manner I think Judge Pryor was alluding to, in a proposal to modify -- well, Judge Reeves; I'm sorry -- in a proposal to modify §4A1.3, a downward departure for overstatement of Criminal History Category.
We propose eliminating the current restriction prohibiting courts from departing below Criminal History Category I. This modification would allow courts to consider the seriousness of the defendant's criminal history and their likelihood of recidivism. We believe this will allow district courts the ability to reconcile all the differences that we identified.

Thank you.

ACTING CHAIR PRYOR: Mr. Johnson?

MR. JOHNSON: Thank you, Your Honor.

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

COMMISSIONER BREYER: It's rebuttable.

(Laughter.)

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

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

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

We have a judge in the Southern District of California that likes to give
probationary sentences in some cases because he can impose five years of probation; whereas, if he imposes a 6 months or 12 months in custody, supervised release, then, may be limited. So, the person will end up under a longer period of court supervision and, then, if they violate during the term of that, they can come back and will get resentenced to what they could have gotten, or probably more.

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

I can give an example from our district, two different cases, almost identical in facts, both of them charged with alien smuggling, both young women about the same age who had both gotten involved in the smuggling
activity because of what they perceived as pressure from someone while they were visiting Mexico.

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

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

One of these two young women went to
prison for five or six months. The other one was
given probation. And the woman who got five
months, the judge felt that she had no -- nothing
she could do under the guidelines because the
guidelines were what the guidelines were, and
that fitting within the guidelines, she wasn't
Zone B or Zone A. She could give her a little
adjustment and adjust the time.

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

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

Thank you very much.

ACTING CHAIR PRYOR: Mr. Andrews?

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

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

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

But the premise and the focus of the VAG, however, wasn't so much on option 1 or option
2. The premise was, if either one is adopted or strong consideration by this Commission, the types of crimes that the VAG would like to be excluded from consideration, and those are any offenses involving crime of violence as specified in §4B1.2(a)(1), (a)(2), any type of crime involving a victim or a group of victims that have been identified, burglary, residency, any type of crimes involving minor children, whether it's pornography, or really any type of defendant that has a prior conviction or criminal history points that involve predicated offenses previously involving victims.

As presently proposed, the first-time offender can be an individual who has engaged in serious criminal conduct, but not has been criminally charged. For example, a college student has engaged in repeated sexual assaults on campus and who are disciplined by that university, but whose conduct has not been reported to law enforcement, would technically be a first-time offender under the proposed
amendments. Likewise, individuals who purchase, view, or distribute child pornography may not have been previously convicted, and again, would technically be qualified as a first-time offender.

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

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

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

ACTING CHAIR PRYOR: Mr. Purdon?

MR. PURDON: Judge Pryor, Members of the Commission, I want to thank you for the invitation to appear today on behalf of the Commission's Tribal Issues Advisory Group. The
ability of the TIAG to comment on amendments and their impact on Indian Country is becoming an important tool for Indian Country practitioners and those of us interested in fairness in sentencing and the cases prosecuted in Indian Country.

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

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

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

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

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

Take, for example, a scenario where
you have two defendants in federal court. Both
have two prior convictions in tribal court. One
has two prior convictions for public
intoxication; another has two prior convictions
for misdemeanor domestic violence. The TIAG
believes that those two offenders should be
treated differently, despite the fact that none
of their previous convictions have produced
criminal history points.

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

We feel that this dichotomy in tribal
court is important enough to raise and to
highlight all too often in my experience
sentencing guideline amendments have unintended
consequences for defendants in Indian Country and for those 30 or so U.S. Attorneys' Offices around the country that prosecute violent crimes off the reservation.

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

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

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

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

ACTING CHAIR PRYOR: Now your
definition would allow for that, right?

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

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

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

Then, the next speaker would say, literally, sometimes even the same speaker would say, "And another thing, because of our unique
sovereign and historical relationship with the
United States, when a young offender, someone
with a chemical dependency problem, gets in
trouble on our reservation, he gets hauled into
federal court. He gets stuck with the
guidelines, and he often goes to prison for an
offense that, if it had occurred off-reservation
and the state authorities had handled it, he
wouldn't have gotten prison time."

So, both of those concepts I think are
ture in Indian Country. That is the issue. And,
of course, our comments are broader. There are
also tribal amendments that you're considering.
But that dichotomy of the view of the federal
system and the impact in Indian Country is
different than -- the person with the public
intoxication conviction in Alabama, if they get
involved in a fight and beat somebody up, they're
still going to be in Alabama state court. The
person with the tribal intoxication conviction,
if they get into a fight and beat somebody up,
they're going to be in federal court under the
sentencing guidelines. That's the difference between those two offenders, Your Honor.

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

   MR. PURDON: Okay.

   ACTING CHAIR PRYOR: Any questions?

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

   MR. ANDREWS: Yes, our position would be that that individual should not be considered or would not be considered a first-time offender under that. Any type of violence predicate
previous history should be excluded.

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

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

COMMISSIONER REEVES: Thank you.

COMMISSIONER BARKOW: This is about
the proposed departure language that you came up
with, because I'm still trying to figure out
that. So, just so I understand, the way that the
probation officers had in mind, is it essentially
to get rid of what is the current prohibition we
have now in §4A1.3(b)(2)? So, right now, you're
not allowed a departure below the lower limit of
that applicable guideline range for Criminal
History Category I, would it be basically to get 
rid of that? Or would it be to get rid of it and 
replace it with guidance along the lines of some 
of the things that people suggested? I'm just 
trying to get a sense of, when you all discussed 
it, the resolution you reached, was it just to 
get rid of it or was it to get rid of it and also 
offer some guidance?

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

COMMISSIONER BARKOW: Okay. Thank 
you.

ACTING CHAIR PRYOR: Commissioner 
Bolitho, do you have any questions?
COMMISSIONER BARKOW: I bet it's a really cute baby.

(Laughter.)

ACTING CHAIR PRYOR: Okay. Thank you very much. We have all of your written testimony. We'll move on to our final panel for the day. Our final panelists are Lauren Jorgenson -- is that right?

MS. JORGENDORF: Yes, sir.

ACTING CHAIR PRYOR: Kristine Lucius, is that right?

MS. LUCIUS: Yes.

ACTING CHAIR PRYOR: And Heather Rice-Minus.

MS. RICE-MINUS: Minus.

ACTING CHAIR PRYOR: Minus.

Ms. Jorgenson serves on the Board of Directors of the National Association of Assistant U.S. Attorneys and chairs that organization's Sentencing Committee. She has been an Assistant U.S. Attorney in the Southern
District of Florida since 1990, specializing in white collar crime. There's a bit of that in the Southern District.

MS. JORGENSON: A little bit.

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

Ms. Lucius is Executive Vice President for Policy at the Leadership Conference. She has worked in all three branches of the federal government, including 14 years with the Senate Judiciary Committee as then-Chairman Leahy's top legal and policy advisor. I should say it's the Leadership Conference on Civil and Human Rights. In 2015, she was named by The National Journal as one of the 20 most powerful women staffers on Capitol Hill. Before working for the Senate, Ms. Lucius was in private practice with Jenner & Block, clerked for two federal judges, and served in the Office of Policy Development at the U.S. Department of Justice. She is a graduate of the University of Minnesota and the Georgetown
Ms. Rice-Minus serves as Vice President of Government Affairs at Prison Fellowship, the nation's largest Christian nonprofit serving prisoners, former prisoners, and their families. As leader of Prison Fellowship's policy staff, Ms. Rice-Minus directs lobbying, research, and legislative campaigns on criminal justice issues at the state and federal levels. Before her tenure at Prison Fellowship, she managed advocacy efforts on behalf of the National Religious Campaign Against Torture. She is a graduate of Colorado State University and George Mason University's Antonin Scalia Law School.

Ms. Jorgenson?

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

First, I have to point out that I am also the parent of a graduate of Tulane University, a recent graduate.
MS. JORGENSEN: Yes, sir.

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

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

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

(Laughter.)

MS. JORGENSEN: That's right, Judge.

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

To jump right in -- and I hope you'll allow me to go off-script just a little bit to
try to get maybe quicker to our question and answers -- the proposed amendment would carve out an entirely new category. And Ms. Conrad talked about the Sentencing Table. Of course, we're all very familiar with that Sentencing Table. But this new category would almost push off the Sentencing Table. It would create a new category where defendants will be closer to that top left corner that they want to be in. Across the board it would paint with such a broad brush, rather than with a specific fine tip, addressing the crimes where the Commission feels really need to be addressed. That is our biggest objection to this. It would carve out this new reduction in sentencing guideline range, regardless of the type of offense that has been committed.

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

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

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

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

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

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

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

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

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

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

Finally -- and we've had some discussion already in the area of narcotics -- over 64,000 deaths from overdoses in 2016. We urge the Commission to consider the fact that these offenders are not non-violent,
even if they don't possess a firearm during the commission of their offense. What they're doing, narcotics dealers, is affecting people in a huge way and in a violent way.

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

ACTING CHAIR PRYOR: Ms. Lucius?

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

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

Today's hearing addresses a crucial problem within the justice system. Over the past 40 years, the American incarceration rate has ballooned to a level we can no longer maintain.
This has had a disproportionate impact on communities of color. African-Americans make up 13.3 percent of our population, but nearly 38 percent of the federal prison population. Hispanics account for 17.8 percent of our population, but nearly 33 percent of federal inmates.

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

People charged with their first criminal offense pose a substantially lower threat of recidivism. So, it makes good sense to focus on this category for amendments. Expanding the availability of alternatives to incarceration
for people who have committed a low-level offense
for the first time achieves the Commission's
statutory responsibility to guide courts toward
sentences that are sufficient, but not greater
than necessary, and that afford adequate
deterrence to criminal conduct.

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

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

Third, we support the creation of a rebuttable presumption in §5C1.1 that first offenders who have a guideline range in Zones A
or B should ordinarily receive a sentence other than incarceration. This presumption would substantially advance the Commission's goals to provide the defendant correctional treatment in the most effective manner and to reduce costs, reduce overcrowding, and promote effectiveness of reentry programs. Keeping these first offenders out of prison will allow them to keep their employment and maintain their relationships with their family and their community, both of which have been shown to decrease the likelihood of recidivism.

We understand that a portion of federal prosecutors represented by NAAUSA and the Justice Department leadership opposes the Commission's proposal, arguing that judges already have the discretion under the current guidelines to impose sentence alternatives and vary downward under exceptional circumstances. However, the Commission itself has found that judges have been exercising that discretion less and less over the past three decades. Although
the guidelines are technically non-binding, judges often feel compelled to apply a sentence within the range given to them. And the Sentencing Commission, through these amendments, can provide judges with additional tools to better tailor a sentence to the circumstances at hand. The resulting impact, enhanced judicial discretion, more appropriate sentences, reduced prison overcrowding, and lower cost to taxpayers speak all in strong favor of adopting your amendments.

The Leadership Conference remains committed to working with the Commission to create more comprehensive and effective sentencing guidelines that operate to reduce incarceration rates for individuals with low-level offenses and promote rehabilitation. These changes represent an opportunity to mitigate excessively punitive provisions that have promoted racial disparities in sentencing and contributed to a costly explosion in our federal prison population. The voices of the civil and
human rights community are important in this ongoing national conversation.

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

ACTING CHAIR PRYOR: Ms. Rice-Minus?

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

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

Today our prison programs reach more than 365,000 men and women each year. Our Angel Tree Program provides Christmas gifts to over 300,000 children annually on behalf of their
incarcerated moms or dads. And in terms of our impact in the federal context, 131 federal prisons participate in our Angel Tree Program and 36 federal prisons have non-intensive rehabilitative programming.

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

In a recent Barna poll commissioned by Prison Fellowship, we found that 87 percent of
Americans agree with this. Too often in the United States our default punishment is incarceration, and too seldom do we sufficiently appreciate the benefits of thinking outside the bars.

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

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

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

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

While the proposed amendment specifically mentions alternatives to incarceration in the form of fines and community
supervision, the Commission should also encourage other alternatives such as specialty courts. The federal system has very limited number of specialty courts and very limited data about the outcomes of people who have matriculated through these programs. And we agree with the Commission that greater resources are needed to invest in research and evaluate the outcomes of these programs.

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

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

Thank you.

ACTING CHAIR PRYOR: Thank you.

Questions?

(No response.)

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

(Laughter.)
ACTING CHAIR PRYOR: Let me ask you on the --

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

(Laughter.)

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

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

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

MS. JORGENSON: Is there one specific
level?

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

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

ACTING CHAIR PRYOR: No, ma'am?

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

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

MS. JORGENSEN: As a general measure, yes. I'm not a narcotics prosecutor, but I do think that they have had a significant effect on reducing those crimes over the years.
COMMISSIONER BARKOW: I mean in the sense of also taking away the individualization in that case.

MS. JORGENSON: Yes.

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

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

COMMISSIONER BREYER: I wonder -- I haven't really thought this through; that may be evident. But I would tell you that I think judges -- the advantage of having a zero category, regardless of whether we attach presumptions or not, is that judges, then, in their minds, would make some distinction between
somebody who's never run afoul of the system and somebody who has. And therefore, in that judge's mind, they may be more inclined to go to the zero of the zero to 6 than not.

Does DOJ, would you have any objection to that?

ACTING CHAIR PRYOR: She doesn't represent DOJ.

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

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

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

COMMISSIONER BREYER: Well, by virtue of saying these people actually are different, they seem to be different. I mean, we're not
creating -- we are creating the category, but the category relates to whether or not this person is the same as somebody else. Because we know we have a lumping factor here.

MS. JORGENSON: Right.

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

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

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

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

ACTING CHAIR PRYOR: And then, they're
disregarding it.

(Laughter.)

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

ACTING CHAIR PRYOR: Yes.

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

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

MS. JORGENSON: Right.
ACTING CHAIR PRYOR: Presumably, they have a higher offense level.

MS. JORGENSEN: Well, they --

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

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

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

MS. JORGENSEN: Right.

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

MS. JORGENSEN: It is.
COMMISSIONER BREYER: But those are big losses by anybody's -- and especially a big loss in terms of, maybe in terms of number of victims or in terms of life savings or in terms of real harm that can be caused.

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

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

ACTING CHAIR PRYOR: But the question was a presumption.

MS. JORGENSON: A presumption, yes.

ACTING CHAIR PRYOR: It would allow -- any presumption could be rebutted, right?
MS. JORGENSON: Right.

ACTING CHAIR PRYOR: And you would --

MS. JORGENSON: I would disagree with it, yes. Yes, Judge, I would.

ACTING CHAIR PRYOR: Judge Reeves?

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

MS. JORGENSON: Right, that's correct.

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

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

COMMISSIONER BREYER: But, you see,
we're trying to get away, I think -- maybe we'll get unanimity on it -- I think we're trying to get away from variances. We're trying to have guidelines that are heartland guidelines and that judges will embrace -- will embrace -- for a variety of reasons. Disparity all across the country.

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

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

I'm not asking you a question.

(Laughter.)
ACTING CHAIR PRYOR: If we can, I would like to wrap this up. We've gone considerably over today.

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

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

(No response.)

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

(Laughter.)

Okay. Thank you very much.

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