UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES

TUESDAY MARCH 7, 2023

The Commission met in the Commissioners Conference Room, Suite 2-500, Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Washington, D.C., at 9:00 a.m. EST, the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT
CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA E. MATE, Vice Chair
CLARIA MURRAY, Vice Chair
CLARIA HORN BOOM, Commissioner
JOHN GLEESON, Commissioner*
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex officio

*Participating virtually
CONTENTS

Opening Remarks .......................... 3

Proposed Amendments on Firearms

Panel I - Executive Branch Perspective
   Hon. Gary Restaino .......................... 9
Panel II - Federal Public Defender Perspective
   Leslie E. Scott ............................. 32
Panel III - Advisory Groups' Perspectives
   Marlo Cadeddu .............................. 69
   Joshua Luria .............................. 78
Panel IV - Community Perspective
   Rob Wilcox .............................. 99

Proposed Amendments on Fake Pills and First Step Act-Drug Offenses

Panel V - Executive Branch Perspective
   Carla Freedman ............................. 119
Panel VI - Federal Public Defender Perspective
   Michael Caruso ............................ 143
Panel VII - Advisory Group Perspective
   Marlo Cadeddu ............................ 166
   Jill Bushaw .............................. 171

Proposed Amendment on Circuit Conflicts

Panel VIII - Executive Branch Perspective
   Carmen Mitchell .......................... 187
Panel IX - Federal Public Defender Perspective
   Michael Caruso .......................... 207
Panel X - Advisory Groups' Perspectives
   Marlo Cadeddu .......................... 229
   Jill Bushaw .............................. 234
   Mary Graw Leary .......................... 239
CHAIR REEVES: Good morning. I'm Carlton W. Reeves, the Chair of the United States Sentencing Commission. I welcome you all to our third day of hearings on our current slate of proposed amendments to the sentencing guidelines. I thank each of you for joining us, whether you're with us in this room or attending via livestream. We appreciate your interest in the work of your United States Sentencing Commission.

I have the honor of opening this hearing with my fellow commissioners. To my right we have Vice Chair Claire Murray, Vice Chair Laura Mate, and Commissioner Claria Boom, and ex officio Commissioner Jonathan Wroblewski.

To my left we have Vice Chair Luis Felipe Restrepo and Commissioner Candice Wong. We also have Commissioner John Gleeson who's attending by phone. But he's with us today, and we appreciate his presence in that capacity.

I must begin by noting the diligence,
dedication, and contributions of every member of
the Commission staff. Their work is hard, their
work is indispensable, and their work is
extraordinarily appreciated by each of the
Commissioners.

I speak on behalf of the Commissioners
and the public when I say to our employees thank
you for all you have done, all you are doing, and
all that you will continue to do.

I want to welcome our esteemed
panelists today. They come from across the
country to provide us with their testimony. In
doing so, they join the over 2,000 people who
have already submitted comments to the
Commission.

At our last hearing, I made a promise.
When you speak to the Commission, you will be
heard. I'm happy to report that we at the
Commission have kept that promise. When we have
read carefully researched written comments, we
have been persuaded.

When we have heard testimony grounded
in lived experience, we have indeed been moved. And when we deliberate, we find ourselves constantly citing what panelists and commentators have told us. If you have spoken to this Commission, I can say for a fact you have been heard. And so I remind our panelists and the public, you will be heard, because you must be heard.

Commissioners and our staff are committed to doing our jobs in our criminal justice system with a focus on that word justice. But we can't do justice without your data, we can't do justice without your expertise, we can't do justice without your perspectives.

While our hearings may be ending this week, our need for your input is not. We will continue to accept public comments until March 14th. Panelists, if you come away from today with more to say, please provide us with supplemental testimony before the deadline.

I also urge members of the public to submit comments via our online portal at
www.ussc.gov. However and whenever you speak to the Commission, you will be heard.

Today we will be hearing testimony on proposed amendments regarding firearms offenses, drug offenses and resolving conflicts among the Courts of Appeals. Tomorrow we will be taking testimony and proposed amendments regarding the career offender guideline and how criminal history is addressed in the guidelines.

Panelists, you will each have five minutes to speak. Know that we have read your written submissions. Your time will begin when the light turns green. You have one minute left when it turns yellow and no time left when it turns red. If I cut you off, please understand I'm not being rude as we have so much to cover today, and tomorrow, and a limited time to hear from everyone.

For our audio system to work, you will need to make sure that your microphone is on before speaking. Look for a little green light. You will also need to speak close to the
microphone, and I mean close, inches, not feet. You need to speak close and into the microphone.

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

But before I introduce this panel, I'd like to take a point of personal privilege. See, they don't know, this is my office now.

(Laughter.)

CHAIR REEVES: At our initial hearing the other week, for those who know me, I always find a way to mention my hometown, Yazoo City. And I mentioned, at the last meeting, that we had two members from our community who were on the NFC championship team that, well, here I go again.

Last week Yazoo City High School boys' basketball team, they were in the semi-final round of the state championship in basketball. And after they won that game last Monday night,
Tuesday morning, a week ago today, I get a call from a grandparent from one of the players. She said, Judge, it will be real nice if we could get our students, if they win the championship, to the White House. You know President Biden.

(Laughter.)

CHAIR REEVES: I said well --

She said they do it for the NBA teams, they do it for the colleges, why not?

Well, I'm proud to report that they did win the championship a few days later. I cannot guarantee that they will be invited to the White House, but I'm giving them a shout out here today, the 4A champions of the state of Mississippi, the coach, Anthony Carlyle, and the boys at Yazoo City, a place which also is the home to -- one of its largest employers is actually FCC in Yazoo City, Federal Correctional Complex.

And it's amazing what Coach Carlyle, Anthony Carlyle, has done for the spirit of that
community with these young men in that community. Between he and his father, they bring home 13, a baker's dozen, of gold balls, state championships. And it's good to bring so much life, so much inspiration into that small hometown.

So I congratulate the boys at Yazoo City High School on their 4A championship. And thank you, Coach Anthony Carlyle, for your inspiration.

Now having said that, I'd like to introduce the first panelist. Our first will present the executive branch's perspective on our proposed amendment on firearms offenses. We have with us the Honorable Gary Restaino who currently serves as United States Attorney for the District of Arizona.

Mr. Restaino currently serves on the Attorney General's Advisory Committee where he elevates the voices of U.S. attorneys in the Department of Justice policies. Mr. Restaino has previously served as acting director of the
Bureau of Alcohol, Tobacco, Firearms, and Explosives and as an assisting United States attorney. Before beginning federal service, Mr. Restaino was a civil rights lawyer with the Arizona Attorney General's Office.

Mr. Restaino, we're ready when you are, sir.

MR. RESTAINO: Thank you, Chair Reeves and the Commissioners. There's no higher priority at the Department of Justice than keeping our communities safe from violent crime, particularly gun violence.

In response to the rising gun violence during the pandemic, the Department issued a comprehensive violent crime reduction strategy that focuses our enforcement efforts on the most serious drivers of violent crime in each community.

The Bipartisan Safer Communities Act, or BSCA, has aided our efforts through new enforcement tools as well as intervention programs aimed at preventing violence before it
occurs. In BSCA, Congress also created sentencing directives to the Commission, and the Department appreciates this opportunity speak about those directives as well as other ways to help make the firearm guideline more tailored and effective.

The Department supports expedited and effective implementation of BSCA's directive to increase sentences for straw purchasers and traffickers to reflect the danger their conduct poses to public safety, yet maintaining the existing parity between these offenders and prohibited possessors of firearms is also critically important. Otherwise a felon who asks a straw purchaser to procure a gun for him could face a lower guideline range than the purchaser.

Congress demonstrated its commitment to parity in BSCA when it raised the statutory maximum from prohibited persons to the same as for straw purchasers. And treating them differently in the guidelines would be inconsistent with that demonstrated intent for
parity.

Second, the offense level for all aggravated straw purchasing offenses should be increased, not just those with the statutory maximum of 15 years in prison. Currently the guidelines treat all straw purchaser offenses with knowledge of future criminal possession the same.

Congress instructed the Commission to ensure increased penalties not only for BSCA's new straw purchaser offenses but also other offenses applicable to the straw purchasers, a category that, as the Commission itself has repeatedly recognized, includes false statement offenses when committed with this heightened knowledge.

Third, the Department requests a larger offense level increase for these aggravated straw purchasers rather than the proposed one to two-level increase. Because straw purchasers generally have no criminal history, such a minor increase will often result
in a range only one month higher than the existing guidelines which the Department contends is inconsistent with Congress's directive.

Fourth, the Department agrees that a mitigating factor reduction is appropriate for a subset of straw purchasers. As potentially drafted, the criteria framed in the disjunctive is overly broad and will result in most straw purchasers qualifying for the reduction. This would wipe out the sentencing increase mandated by BSCA and lead to anomalous results.

The Department's letter sets forth several examples, including a reduction for a gang member who knows that the firearm would be used to further criminal activity when the offense is motivated by gang loyalty rather than direct compensation. The Department supports the criteria but recommends that the Commission adopt the conjunctive formulation.

The Department appreciates the Commission's proposal for a four-level enhancement when the offense involves a firearm
with no serial number, also known as a ghost gun. Serial numbers are necessary to trace firearms used in crime, a critical investigative tool.

Recent data indicates that criminals are increasingly using ghost guns to commit crime. A couple of years ago, for example, more than 20,000 ghost guns were recovered by law enforcement in criminal investigations, a tenfold increase from 2016.

The Commission's proposed amendment would close the gap in the current enhancement which applies only to firearms with altered or obliterated serial numbers.

The Department also appreciates the Commission's concerns about the mens rea requirement for this enhancement, and it recommends the Commission create a rebuttable mens rea presumption.

The Department also strongly recommends updating Section 2K 2.1's definition of a firearm. The current definition lacks cross references to relevant statutory and regulatory
authority which has two significant consequences.

First, under the current definition machine gun conversion devices, those that turn semi-automatic guns into illegal machine guns, don't qualify for trafficking or number of firearms enhancements.

Second, part kits, used to readily assemble those guns, likewise don't trigger these enhancements. So given the rising popularity of these dangerous devices amongst violent offenders, an update to comport with existing federal law is critical.

Finally, the Department encourages the Commission to address the significant gaps in the existing recidivism penalties. For nearly 30 years, Congress has recognized that individuals who possess a firearm after a misdemeanor domestic violence conviction pose a public danger. They should be treated the same as an offender with a prior felony crime of violence or a controlled substance conviction.

As courts have recognized, Congress
enacted Section 922(g)(9) precisely because existing felon and possession laws were not keeping firearms out of the hands of domestic abusers.

In the past year, Congress has reaffirmed the importance of deterring domestic violence both through the BSCA and the reauthorization of VAWA. And the guidelines should similarly treat misdemeanor crimes of domestic violence the same as other crimes.

The current guideline also lacks recidivism enhancement for many prior firearm offenses, such as being a prohibited person in possession of a firearm. And the Commission's own data demonstrates that this population's high rate of recidivism poses a danger to the public.

Thank you, and I'd be happy to answer any questions of the Commissioners.

CHAIR REEVES: Thank you, Mr. Restaino. He says he's happy to hear questions, so I turn to my colleagues. Who wishes to go first?
VICE CHAIR RESTREPO: So your colleagues on the other side of the argument have suggested that doing what you're asking us to do might result in some racial disparities. Has the Department thought about that?

MR. RESTAINO: We have, Judge Restrepo. And I do appreciate the opportunity to speak about this, both in terms of the racial disparities that are possible with respect to defendants in firearms cases but also with respect to the racial disparities in communities impacted by gun violence.

And so I'd like to address this by talking about the Project Safe Neighborhoods program as well as the data-driven efforts to predicate investigations moving forward. We don't talk enough about Project Safe Neighborhoods. It's one of the best things that we do in the Department. It is an effort to combine focused enforcement with community outreach. Because we, as prosecutors, need to get out of the courthouse and into the
communities that surround it.

This program has been around for a long time. When I started as a young prosecutor, it was mostly enforcement, a little bit of outreach. I remember giving out trigger lock devices. It's really come a long way, and it's been amplified by the Attorney General's Equity Action Plan for under-served communities and the Deputy Attorney General's comprehensive strategy on gun violence.

And really it operates in a couple of different ways. It's focused enforcement on the drivers of violent crime in a community, but it's also engaging with those community members through a reinvigorated community relations service, through listening to the community, through, in some cases, academic surveys.

When I came on as U.S. Attorney in Arizona, I was able to look at the surveys from our academic partners to communities impacted by violence. They certainly have suggestions for us, like give us more transparency. None of
those surveys said get out of our communities.

And so we take that as a sign that this is an approach that communities impacted by gun violence, which are often communities of color, are appreciative of the efforts that are being done.

Moving on to enforcement, we are predicing more investigations based on objective criteria rather than traffic stops and the like. The Commission's own data suggests that little more than a quarter of the cases are traffic stops which can have a racial disparity. I'd like to talk about the 75 percent that are really predicated on something else.

From my time at ATF, I know the importance of the data-driven efforts to predicate investigations. eTrace and tracing firearms is critical to telling the story of that particular gun, when it left the regulated stream of commerce from a federally licensed firearms dealer, where it wound up at a crime scene, and what other guns were purchased by the same
purchaser to show the commonality.

It also involves efforts through NIBIN, the National Integrated Ballistics Information Network, which shows the fingerprint of that firearm and the other casings that were ejected from that firearm at various crime scenes as a way of tying together various crimes. What this shows us is an objective effort to go into the communities where gun violence is being impacted and where it's taking place.

Our local partners as well follow along on this. I was in a meeting in Tucson a couple of weeks ago where they were talking about acoustic devices, shot spotters, to detect where shots are being fired in communities, because that too was an indicator of which communities need our efforts.

Finally, there are efforts to work with trauma centers and local law enforcement to get better reporting on non-fatal shooting incidents in order to drive that as an investigative strategy.
Now, are all of these efforts going to completely eliminate racial disparity? We don't know. They are efforts though to engage in objective data-driven policing. We encourage the Commission to adopt the amendments expeditiously and then for the excellent Commission staff to study its impact in the future.

VICE CHAIR MURRAY: Mr. Restaino, thanks so much for being here and for your testimony. I have a question about the Department's suggestion that we increase or we include an enhancement for federal firearms licensees.

And I'm wondering why you don't think that those, you know, that's in the context of federal firearms licensees are already well accounted for in the guidelines by, for example, the enhancements for numbers of firearms, stolen firearms, and especially the paucity of high capacity magazines. Why do we need a special enhancement for federal firearms licensees?

MR. RESTAINO: So we agree that some
of the enhancements can be impacted on a 922(u) conviction for a theft or burglary from an event.

We disagree with the probation officer's statement that stolen firearms are included because of the commentary in the guidelines that excludes stolen firearms from 922(u) offenses.

We do think that a greater enhancement is important to take into account what's going on here. It's not just thefts from federally licensed firearms dealers. It can be burglaries as well.

There is anecdotal support in terms of recent cases without strong data to support what this means as a trend. But anecdotal support that people are in some jurisdictions driving trucks and vehicles into the sides of federally licensed firearms dealers to get inside and take those firearms. That's different than a theft offense.

Right now, 922(u) is categorized as more of a regulatory offense in the guidelines with where it is. And we think offense level
conduct and what has typically happening should
be supported and should support a greater
increase.

CHAIR REEVES: Judge Restrepo?

VICE CHAIR RESTREPO: With respect to
the domestic violence enhancement or considering
those misdemeanor enhancements, I'm sure you're
aware of this Fifth Circuit opinion in light of
the Bruen decision where the Fifth Circuit took
the position that that was unconstitutional to
deprive this individual and his gun rights.

Should we wait and see how it plays
out before we move forward on that particular
issue?

MR. RESTAINO: The Department
certainly encourages the Commission to move
forward on whatever it can move forward on
expeditiously. As to that specific one, Judge,
we don't yet know how Bruen is going to shake
out. But we do expect that the Commission should
take into account current law and should take
into account the importance of domestic violence
misdemeanor convictions.

So we would still encourage the Commission to move forward with an amendment on this. The Department's letter contains just a massive amount of danger that domestic violence creates for the community and for victims.

And certainly with the passage not only of BSCA, but of wonderful VAWA reauthorization amendments as well, the time really is ripe to get a greater increase for domestic violence, given how much of a driver it is then to the local communities for violence.

VICE CHAIR RESTREPO: Thanks.

COMMISSIONER WONG: I have a technical question about the machine gun proposal the Department made with respect to the definition of firearms. So when you have firearm that's outfitted with a Glock converter switch, the switch itself is classified as a machine gun, as well as the firearm with that switch together could be considered a machine gun.

So if the definition of firearm is
expanded and tethered to that definition of
5845(a), if you have a firearm outfitted with the
switch, does that count as two firearms or would
that be one?

MR. RESTAINO: I hadn't really thought
about that particular question. I think I would
defer for the Department to get back to you if we
have any further guidance. My gut sense as a
prosecutor is that's going to be one firearm,
that what we would be looking at there is one
firearm with the combined devices.

But it's still critical to get the
5845 definition under the National Firearms Act.
Because otherwise we're just dealing with a Gun
Control Act definition within the guidelines.

VICE CHAIR MURRAY: So maybe I missed
it, but does the Department have commentary or
advice on the gang enhancement definition? I
didn't see that in the letter.

MR. RESTAINO: The Department does
support the gang enhancement. That is in the
Department. It's a little bit more than just
gangs, it's more of an enterprise scenario. And the Department supports the increase with respect to that.

VICE CHAIR MURRAY: And the Department doesn't have a view on the factors, or the way it's laid out, or the phrasing?

MR. RESTAINO: My recollection is that that particular provision is one with which the Department agrees. And that's an important consideration certainly to get the increase for those firearms that go to end users that are going to do more danger to communities with that material and with those firearms.

VICE CHAIR MATE: I have a question for you on a different specific offense characteristic that came up, and that is regarding the stolen firearms, and the possible addition of ghost guns to that, and the rebuttable presumption on the mens rea. And I was curious about the rationale for kind of flipping the normal burden of proof on the mens rea element there.
MR. RESTAINO: So it's been for years, Commissioner, it's been for years the standard that stolen firearms and firearms without a serial number, or an obliterated serial number, would get an enhancement regardless of mens rea. So the Department is, in many respects, urging some degree of leniency here.

What we're looking for is a model that's been used by the Commission in the past. There's a number of examples in the current guidelines where rebuttable presumptions have used and work. In the mortgage fraud context, Under Section 2(b), there is rebuttable presumption to value the collateral that the bank gets back based on the tax assessed value.

In child sex abuse cases, there is a rebuttable presumption for the imposition of the undue influence enhancement, both in the 2(a) guideline and the related 2(g) trafficking guideline.

And there is a final one in Section 8 for organizational sentencing with respect to
whether or not the benefit to the corporation for
corporate compliance programs applies.

So we think looking at those four
examples through the guidelines, those present a
good opportunity and a good way to do it that has
worked in the past. And that's why we recommend
this method for the future.

VICE CHAIR MATE: One follow-up to
that, do any of those examples relate to mens
rea, or are those -- I can look them up, but are
those all separate from mens rea issues on the
rebuttable presumptions?

MR. RESTAINO: If I were looking at
them, I would say that undue influence is pretty
close to mens rea on the 2A3.2 and 2G1.3.
Certainly for the corporate compliance, it is,
because it has to do with whether or not a
corporation can get a corporate compliance
benefit when people in positions of leadership
are involved in the wrongdoing.

COMMISSIONER BOOM: Good morning,

thank you for your testimony. The Department
urges the Commission to set the base offense level three or four levels above what the current base offense level is. And the Commission, I think in our materials, have suggested or put out for comment a two-level increase.

Some commentators have noted, and I think it was in the Federal Defenders' materials, that, even under the existing guidelines with the current base offense levels, firearms offenders, and certainly in particular straw purchasers, receive variances in their sentences with some frequency. I can't remember the exact percentage.

So what is -- and I guess the argument then is, so the guidelines as they currently stand are adequately addressing, you know, ultimately the conduct and the sentences.

Now certainly there is directive by Congress, but in particular, you know, to that argument that court are varying, or sentences are varying at a fairly not inconsequential clip, what is the justification for the three to four-
level increase to the base offense?

MR. RESTAINO: Commissioner Boom, my recollection of the Commission's data suggests that while firearms variations have increased in recent years, there are still fewer departures and variances from firearm sentences than other sentences under the guidelines. So that would be reason to consider an additional upward adjustment to the base or specific offense characteristics.

It also comes down to specific deterrents, that is incapacitation of an individual who has been a danger to the community. The recidivism statistics that the Commission has tallied, one can read those different ways. But the way we look at it is that taking someone out of the community and providing them a longer sentence is something that leads to less recidivism in the future.

And that's really what we're trying to do, is get rid of drivers of violent crime in the communities that are most impacted by gun
violence and violent crime.

CHAIR REEVES: There will be some who,
I'm sorry, there will be some who testify after
you who will talk, urge the Commission to delay
doing things right now, to study it more. What's
the Department's view on why that might not be
the best thing to do at this point?

MR. RESTAINO: Judge, we're coming off
of a summer of violence last summer. My tenure
at ATF as acting director spanned Buffalo, and
Uvalde, and Tulsa, and Highland Park. Congress
passed the BSCA in relation particularly to
Uvalde. So there is some urgency to act at this
point on those.

This Commission has also had the
opportunity to be studying this in depth with its
staff for the last six months or so. We think
the time is right to do it now, to address the
rising problem of gun violence, particularly in
many communities across America.

CHAIR REEVES: And to adopt the
Department's view in three to four-level increase
as opposed to some other level increase after
having studied it, I'm just curious if any
further study is necessary to look at all those
issues?

MR. RESTAINO: Judge, that's something
that you and the Commissioners obviously need to
decide. The Department really would like
decisions on this and the adjustments that the
Commission is prepared to make expeditiously, in
short order, in order to carry out the directives
of Congress.

CHAIR REEVES: Thank you.

VICE CHAIR MURRAY: Do we have the
authority, in light of our proposal, to raise a
base defense levels one or two levels? Do we
have the authority to raise them four levels, as
a matter of administrative law and fair notice?

MR. RESTAINO: That is not a question
I know the answer to. The Department will have
to get back to you on that.

I will say this. The Commission has,
in the past, raised offense levels beyond the
directives of a Congressional statute. The
defender positions talk about this. They suggest
it should have gone the other way.

But when, in 1995, high capacity
magazine firearms were enhanced, the directive
was only to enhance it for Nexus' particular
activity. And the Commission took the step of
adjusting it upward for all. So we think the
Commission certainly has past precedents to be
able to do that. I defer to any future comments
from the Department on the administrative law
question.

CHAIR REEVES: Commissioner Wroblewski,
quiet today.

COMMISSIONER WONG: Right, man.

(Laughter.)

CHAIR REEVES: All right. Any further
questions of this witness?

As they say in the old, I guess it's
the old Baptist Church back home, speak now or
forever hold your peace.

Thank you, U.S. Attorney Restaino. We
appreciate your testimony today on behalf of the Department of Justice.

MR. RESTAINO: Thank you, Judge Reeves and members of the Commission.

CHAIR REEVES: All right. Good morning.

MS. SCOTT: Good morning, Commissioners.

CHAIR REEVES: Our second panel provides us with the Federal Public Defenders perspective on this issue. To present that perspective we have with us Leslie E. Scott who serves as an attorney with the Sentencing Resource Council for the Federal Public and Community Defenders.

In that role Ms. Scott represents defender interests before the Sentencing Commission, develops litigation strategies, and develops training for defense attorneys. Ms. Scott has previously taught at Detroit Mercy School of Law and served as a public defender in the western district of New York.
Ms. Scott, we're ready when you are.

MS. SCOTT: Thank you, Judge, and thank you Commissioners, for inviting me to speak on this important topic.

Gun violence takes an incalculable toll on our communities and on our country. Where I grew up on the east side of Detroit, it is an ever present reality. Both in my community and in my legal practice, I have witnessed the devastating human cost of this epidemic first hand.

Defenders are eager to help find solutions to protect our communities. But a knee-jerk, punitive response to the directive in the bi-partisan Safer Communities Act will not make us safer. Specifically, option two which would raise these defense levels blindly across 2K2.1 is destructive and counterproductive.

The Commission is uniquely situated to inject empiricism, deliberation, and evidence into a reactive discourse that has for too long been driven by fear. We ask the Commission to do
so and to conduct a careful review to guide a measured and to guide a targeted response.

Indeed, Senators Cory Booker and Christopher Murphy, both lead sponsors of the BSCA, wrote the Commission in December to make this request. They asked the Commission to engage in a, quote, thorough process of research and collecting and analyzing data before implementing changes to, quote, avoid any unintended consequences that result in unfair or unjust policies.

There are two primary reasons why the Commission should stay its hand. First, historical patterns prove that a reactive and a punitive response to the BSCA would entrench and expand significant and pervasive racial disparities in federal firearm enforcement.

Criminal law enforcement in America is a story of gross racialized inequities with Black, Brown and poor individuals often facing much harsher penalties than others. We saw that with the failed war on drugs. And we saw that
with the racial disparities caused by the now
discredited 100 to one crack to powder cocaine
sentencing ratio.

We see this pattern play out today in
federal firearm prosecutions as well. In the
District of Arizona, which has a large proportion
of straw purchasing cases, a staggering 79
percent of individuals convicted under the pre-
BSCA straw purchasing statutes in the past five
fiscal years were Hispanic.

And in the eastern district of
Michigan where I live, in the fiscal years of
2017 through 2021, an astounding 85 percent of
people sentenced under 2K2.1 with a 922(g) count
were Black.

The Commission's recent firearms
report also described a significant number of
2K2.1 cases that originated from traffic stops or
from routine street patrols with Black
individuals making up the majority of both of
those groups.

Defenders applaud that report and
applause the Commission for taking important steps to understand the complex interplay between firearms sentencing policies and the racially uneven enforcement of criminal of criminal laws in this country.

This is the type of information that this Commission should continue to gather, build upon, and address before implementing more punitive measures that will undoubtedly have an outsized effect on communities of color.

The BSCA drafters shared this concern about this outsized effect in their December letter. The significant cost would not be offset by an improvement in community safety. Lengthy and unnecessary imprisonment destabilizes families and destabilizes communities, cutting off the essential social and economic lifelines that are most likely to thwart violence.

Research consistently shows that higher incarceration rates are not associated with lower violent crime rates. Indeed, years of felon and possession prosecutions with
increasingly severe penalties have not curbed gun
violence. And there's no reason to think that
they will start working now.

The second reason to delay is that
another set of reactive amendments to 2K2.1 will
further compromise an already flawed guideline.
2K1.1 has seen significant increases over the
years, often in response to legislative changes,
and directives, and requests from law enforcement
and the DOJ.

But sentencing data suggests that the
current penalties are either too high or are high
enough as the majority of judges sentence within
or below the range in 2K2.1.

If you feel you cannot delay, we ask
you to reject, across the board, upward ratchets
under option two. Senators Booker and Murphy
have urged the Commission to reject the
Government's proposal of a four-level increase
across the board. The intent is to have the most
culpable players in straw purchasing targeted,
not the low-level individuals who have been
targeted in the past.

To conclude, we cannot punish our way out of the social ills that result from decades of economic, political, and social disinvestment in communities of color. These are structural and systemic problems that require more thoughtful and nuanced methods than a back-end tough on crime response.

We're finally starting to employ some of these evidence based, public health community intervention measures to drug crimes and a growing consensus is calling on us to do the same for gun crime prevention.

We ask the Commission to please proceed cautiously so as not to inadvertently repeat the historic policy failures from the past that have led to the marginalization, stigmatization, and the mass incarceration of communities of color.

Thank you. And I'd appreciate questions.

CHAIR REEVES: Thank you, Ms. Scott.
I turn to my fellow Commissioners. Commissioner Mate, Vice Chair Mate?

VICE CHAIR MATE: Thank you, Ms. Scott, for your testimony today and for, we understand, pinch hitting here at the end, so we appreciate you being here today.

You mentioned today, and it's mentioned in the written submission, this encouragement of careful study before we act. Do you have specific ideas on the kind of study that we maybe haven't done that should be done, or that maybe we have done?

MS. SCOTT: Absolutely, thank you for that question. And I think that that's an important one. You know, first and foremost I think it would be important for the Commission to gather data about these brand new BSCA statutes, and they are relatively new. The BSCA was passed less than one year ago.

And there was a question that was presented to my colleague this morning about whether or not there would be sort of a
disproportionate impact on minority communities through these penalty enhancements. And the answer was we hope not, you know, but we're not sure yet.

And I submit that that's not good enough. This is an important topic, and we need to be sure. And so I'd ask the Commission to start by gathering data about who is currently being prosecuted under these two new statutes, 932 and 933.

Look at these cases to determine, for instance, whether the majority of these prosecutions involve low level straw purchasers, which is frankly what we've seen in the past with the pre-BSCA statutes, which were fairly low level, vulnerable individuals.

It's part of the reason why, as Commissioner Boom pointed out, courts are sentencing below the guidelines approximately 70 percent of the time in these statutes which suggests that these are not sort of the upstream, high level cases that the BSCA is purportedly
intended to target.

We want to avoid some of the mistakes that we've seen with the Commission's drug quantity table, for instance, where drug quantities were set sort of as a proxy for role. But as public defenders on the ground, what we were seeing is that a lot of low level, excuse me, drug addicted street dealers are getting charged with these high quantities, despite the fact that they are not major drug traffickers.

And so we're concerned that these new prosecutions under the BSCA will sort of track those same mistakes. We want the Commission to gather data on demographics, what are the demographics of the people who will be sentenced under the new BSCA statues.

Senators Booker and Murphy were concerned about demographics and wrote about it in their December letter where they talked about the Commission needing to take the time to ensure that any sort of guideline enhancement will not disproportionately affect low income communities
and communities of color.

Second, the Commission should review its guideline to look at unwarranted racial disparities more broadly in 2K2.1. And the Commission has done a lot of this work already. And we commend the Commission and appreciate that.

The 2022 firearms report for the summer looked at the frequency of certain SOC enhancements in the 2K2.1 guideline, but it would be important to look at the race breakdown of who is receiving those enhancements.

Sentencing data also can only tell us so much. And so the Commission could do a special coding project to determine if there are racially disparate patterns in not just sentencing but also in charging, and in plea bargaining.

Beyond race it would be important to look at ethnicity and to look at gender. Many straw purchase cases involve women, mothers, girlfriends, wives, who are in coercive
relationships. And many trafficking cases originate at the southwest border, but prosecutions historically have targeted, as I mentioned before, these low level fungible purchasers.

In addition, we would hope that the Commission would gather information to better execute the Congressional directive on straw purchasers without significant criminal history. Congress has made it clear that it wants these individuals' sentences to reflect the defendant's role, and culpability, and any coercion, domestic violence survivor history, or other mitigating factors. And we don't think that this proposed amendment sufficiently does so at this time.

The Commission could do a special coding project to learn more about straw purchasing offenses and the circumstances of the people committing those offenses.

Fourth, the Commission could gather additional information to better execute the directive on gangs and cartel affiliation. The
commission can use its empirical prowess to study current cases and to find limiting principles.

We know the many pitfalls and the many inaccuracies of gang databases. The Commission can explore data driven ways to avoid making mistakes in terms of identifying affiliated persons, mistakes that would be unjust but would also result in unwarranted disparities and lifelong consequences for the people involved.

Many trafficking cases in the southwest involve young Hispanic American individuals who are paid a small amount to purchase a firearm that may eventually make its way, excuse me, into the hands of the cartel. But the individuals themselves are not affiliated with the cartel at all. And so this enhancement, it risks sort of looping these individuals in with individuals who are more culpable.

I believe it was Vice Chair Restrepo who mentioned the Rahimi case. And PAG also, in their letter, suggested that the Commission needs to study the effects of that Fifth Circuit
decision and how it might impact implementation of the BSCA.

And also, Commissioner Wong, you mentioned earlier studying the definition of firearm and how the Government's proposal related to incorporating machine guns into this definition could potentially lead to unintended consequences such as individuals being enhanced for having two firearms when they really do not.

So this area is just ripe for study, and we're happy to expand upon this and give other ideas.

VICE CHAIR RESTREPO: Let me ask a question, a potential study of this --

MS. SCOTT: Sure.

VICE CHAIR RESTREPO: And we should go down this road. So in response to the question about the racial disparity, your colleague suggested that firearms might just have a disparate impact in terms of violence in communities of color.

Should we study that? I mean, should
we study who the victims of this firearm violence are? And if we do, what would we do with that information?

    MS. SCOTT: Absolutely. I think it would be important to study who the victims of firearm crimes are. I think that there's research in this area already that show that low income, minority communities disproportionately face firearm violence. And I think the importance -

    VICE CHAIR RESTREPO: Hypothetically speaking, let's assume that's true.

    MS. SCOTT: Correct.

    VICE CHAIR RESTREPO: What do we do with that information?

    MS. SCOTT: I think the important thing to do would be to figure out why what we've done in the past hasn't worked for these communities. In the past, with respect to firearms, with respect to drugs, the approach that the justice system broadly, I think, has taken, and sentencing as well, has been to
enhance penalties sort of in the name of or for
the sake of enhancing public safety in these
communities.

But what we've seen is that that has
not worked. And so I think that what you do with
that information is you study what these
communities, the people in these communities
would like to see in terms of enhancing safety.

And also look at what the research
that's out there on deterrents already tells us
about why enhancing penalties does not promote
public safety. This idea that we can sort of
punish our way out of crime in these low income
communities is born, I think, from at least three
false presumptions.

The first false presumption is that
there aren't already penalties baked into the
guidelines, and Congressional legislation,
mandatory minimums, that are sufficient to
incapacitate people that are perceived as
dangerous. We know that there are.

With respect to firearms, there are
mandatory minimums that apply under 924 when a firearm is possessed in drug trafficking or for furthering crimes of violence. We know that there are enhancements baked into the base offense level, the 2K2.1, for people that have certain prior convictions, both drug trafficking and crimes of violence.

Potentially these categories will be expanded if this Commission decides to abandon the categorical approach. And there's the career offender, there's ACCA. So we know that there are enough penalties in place at this point.

The second false presumption is that long periods of probation or supervised release are somehow a walk in the park for our clients. And they are not. I can't tell you how many conversations I had in Buffalo with clients of mine who pondered whether it might be easier to go back to jail and get off papers than to remain free in the community and stay on papers.

And that's simply because there is a significant intrusion on people's privacy.
interests, their travel interests, and their liberty interests, not to mention the collateral consequences that come with a felony conviction, especially for somebody like a straw purchaser who does not have significant criminal history.

Third, and this is really my last point to answer your question, Judge, and that is that the question presumes that we can punish our way out of gun crimes and gun violence. But the research simply doesn't support that premise.

The research suggests that lengthier sentences in service of deterrence and public safety don't work, just like draconian drug war sentences did not do anything to decrease drug crimes, or drug overdose death rates.

We heard this morning a discussion about Project Exile, Project Safe Neighborhoods, and Operation Ceasefire. And frankly, the studies of those programs found little to no impact of harsher gun penalties on crime rates.

The positive impacts were largely attributed to intervention measures that were put
in place sort of at the front end. And that's really what has a positive impact, job training, social services, mental health counseling, education programs.

Studies of mandatory minimums in Michigan, Florida, Massachusetts, also found no deterrent effect to mandatory minimums for gun crimes. So I would suggest that we focus on front end intervention and community prevention measures of the post-enhanced penalties.

CHAIR REEVES: Commissioner Gleeson has a question. So, Commissioner Gleeson, if you can hear me, please ask your question.

COMMISSIONER GLEESON: I can, and thank you, Judge Reeves, thank you, Ms. Scott.

MS. SCOTT: Thank you.

COMMISSIONER GLEESON: You know, my there's no question that the racial disparity issue that's already been referenced is front and center, and given the sordid history of racial disparities when it comes to firearm punishments.

But my question is kind of half
comment and half question. My question is what does increasing the sentence length for these offenders accomplish besides obviously incapacitating them for a little bit longer?

But I'm interested in the correlation between the recidivism rates and increased sentence length. And it's not clear to me that it might make us make some segment of the community we care about, the communities we care about, feel better if there are longer sentence lengths. But I think there might be some data out there that show that those increased sentence lengths do nothing but increase recidivism rates for those who serve them.

So is there anything, Ms. Scott, that you can point us to or that we might do so we can have, like, an informed, make an informed decision as to whatever we might choose, four levels, or two levels, what that would accomplish in terms of the goals of sentencing.

Because I'm not sure an incremental increase in the sentence lengths of these
offenders is a value add. Let me just stop there and see if you can point us to in that regard.

MS. SCOTT: Absolutely. Thank you for that question, Judge. I think, you know, I certainly have done research in this area of recidivism, and public safety, and deterrents. And a lot of my scholarship focuses on these questions.

We cite to some of the studies in our written testimony that we submitted in February. Certainly I could point to Daniel Nagin at Carnegie Mellon. He is one of the sort of lead researchers in this area. And he's pointed to the fact that it's really the certainty of punishment that has stronger deterrent effect than the severity of any sentence length.

And in fact in 2016, I believe it is, or it was, excuse me, the DOJ published a short report called the five things about deterrents, or five things you need to know about deterrents. And the DOJ itself cited Daniel Nagin's research for the authority that really it's the certainty
of punishment over and above any sort of enhancement in sentence length that serves as a deterrent purpose.

And I think that DOJ report also talked about some of the significant costs that are associated with increasing sentencing lengths and concluded that any sort of slight or minimal deterrence impact was significantly outweighed by those costs.

In the gun context in particular, and I'm happy to provide the Commission with these studies, there was a report by Michael Tonry, I believe his name is, also a scholar and professor, who makes the same argument, that lengthening punishment does little to no good in terms of decreasing rates of gun crime.

The other suggested reading piece that I have is Emily Bazelon. Her book, Charged, Chapter 4 talks about gun courts. She does interviews with young men, predominately Black men, I believe, in the inner city Chicago area, who talk about the perceived need to carry a gun
to feel safe because of the danger in lower income inner-city communities, Black and Brown communities, the danger of living there. Danger that’s sort of result of our policies and our disinvestment in these communities.

So there are a number of reading materials that we’re happy to provide. My own research has found that all of this make sense. And it makes sense for a couple of reasons. One, actors who commit crimes often are not consciously and rationally weighing the costs and benefits of their actions.

They’re not thinking about will I get caught. I think most presume they will not or they would not engage in the conduct. And so they’re just not weighing those risks and benefits. They’re not thinking, if I get caught will I be sentenced in federal court and subject to harsher federal guidelines?

The fact of the matter, most people are prosecuted in state court. And so they’re not thinking about that. They’re not aware of
the penalties in federal court. They're not aware of the federal sentencing guidelines.

And so really it's this sort of rational calculation that I think is the foundation for this belief that enhancing penalties will somehow deter. It's just not there. Instead it's really the certainty of punishment and also increasing legitimacy in the eyes of these communities.

If these communities feel as though policing and law enforcement is legitimate, and prosecutorial initiatives are legitimate, they will respect the law. And that requires eradicating some of these race-based differences.

CHAIR REEVES: I think Vice Chair Murray and then Commissioner Boom, I believe.

VICE CHAIR MURRAY: Thank you so much for being here, Ms. Scott. And I especially thank you for jumping in at the last minute. We really appreciate it.

MS. SCOTT: Thank you.

VICE CHAIR MURRAY: And maybe someone
else's written testimony that's a good thing too.

I had a question about the kind of
list of research projects that you gave in
response to Vice Chair Mate's comment, which was
helpful. It struck me that for one of those that
is the most new is studying the kind of
implementation of the BSCA, how will enforcement
go. Because that's something we haven't been
able to study before, because there was no BSCA.

MS. SCOTT: Correct.

VICE CHAIR MURRAY: But I wonder if
you could play out a little bit how the kind of
results of that sort of study would help us and
would kind of operationalize. I mean, it strikes
me that we are in a context where Congress gave
us a directive. And part of that directive --
and we can delay it for a year without violating
the technical terms of the directive. But, you
know, we have this directive that says we have to
increase penalties on straw purchasers, right.

And so 932 and 933 are part of that.

And what we've proposed is a one or two level
increase which is kind of the lowest you could do as an increase. So say we were to get the results of this kind of study. And it says, yeah, these are all really low level people who don't, you know, you should not, the national inference says you should not be increasing levels very much.

How would that leave us in a place different than where we are right now, which is you have to increase them by directive of Congress, and we've proposed the smallest possible increase.

MS. SCOTT: Yes. And that's a good question. I think that one thing that the Commission could do, and one thing that the Commission has done in the past is inform Congress about the results of the studies that it has done. And not just inform Congress but the Commission has made recommendations to Congress based on its findings.

With respect to the career offender guideline, the Commission has made
recommendations to Congress with respect to 924 and the way that that has been implemented. And so we appreciate this very important role that the Commission plays in sort of filling in some of the gaps, frankly, for Congress.

I think the Commission was set up to do just that. You have the skilled staff. You have the expertise, you have the empirical prowess to report back to Congress, to let Congress know that you've asked us to implement this directive.

We understand that we have to do that, but what you intended when you asked us to implement this directive was to target a certain group of individuals. You intended to target the more culpable, high level, I've heard people refer to them as upstream, you know, people who are perceived to be facilitating the gun violence that occurred tragically over the summer.

And here's why we believe that this directive misses the mark. Here's why we believe that if we implement the directive in the way
that it's written we will not be furthering Congressional intent. I think you could do that. And you could wait for a response from Congress to see how to move forward.

Certainly I think that Senators Booker and Murphy, in their letter, suggested that the Commission has to take a pause and think about these issues, study these issues, research them before taking further actions because of the racial disparities that we've been talking about today.

COMMISSIONER BOOM: Thank you for your testimony --

MS. SCOTT: Thank you.

COMMISSIONER BOOM: -- and for stepping in last minute. That's a difficult thing to do. The federal defenders have urged the Commission either to wait and study these issues.

But if we're going to select one of the options to narrow any increase in the base offense level to only straw purchasers and
traffickers, pursuant to the, sort of the most narrow reading of the Congress's, I guess directive.

But as the Department of Justice points out, at the same time Congress increased the statutory maximum for prohibited persons when they enacted the statute.

And so, you know, the argument is, isn't that an indication that Congress also intended that the base offense levels for prohibited persons under 922(g) also increase?

And so, my question is, you know, to address that, and then address the, you know, the parity issue. Why would a trafficker, as you note, often times it can be a girlfriend, it can be a grandmother, it can be a relative, why should that base offense level be higher than the actual prohibited person? So, that's one question that I had.

And then the other is, you certainly give us a lot of great ideas on additional data gathering. One of the more recent of studies, or
series of studies that the Commission recently
put out was the recidivism study.

And the recidivism study shows that
firearms offenders recidivate at the highest
rate, approaching 70 percent. And so, in light
of that, the Department of Justice argued in the
previous panel that increasing the offense level
would protect the public, and at least provide a
deterrent for folks who are proven to recidivate
at these really high levels.

So, I guess, I'm sorry, I just kept
thinking of, you know, additional questions as I
was sitting here. So, I have two. And that's
the two if we have time.


COMMISSIONER BOOM: Okay.

MS. SCOTT: And feel free. I know I
can be long winded. So, feel free to cut me off
if I'm going over my time. But I appreciate both
of those questions. I think they are important
questions, so I will address them in order.

First is proportionality question.
And sort of this perceived lack of parity between prohibited persons and straw purchasers. I have four points that I think I want to make in response to that question.

First is just to sort of remind everybody that the Commission's overarching obligation is to establish sentencing policies that are proportional to the severity of the conduct.

In other words, we've all heard the saying, the punishment should fit the crime. And should fit the crime that this individual committed, not some arbitrary statutory norm created for a crime that somebody else committed.

And so, the enabling act, that's for one primary purpose of the Commission, which is to establish sentencing policies that reflect the purposes of 3553(a).

And in turn, 3553(a) requires courts to impose a sentence that is sufficient but not greater than necessary. And so, it's important not to lose sight of that proportionality.
question.

And so, how does the Commission know whether the sentences that are anchored to its guidelines are sufficient? Of course, the Commission knows by looking at the data, by the sort of continual feedback loop between the Commission and the Court.

And the data for 2K2.1 show that courts are either sentencing within or below the guidelines, including for felon and possession crimes. There are only, I believe the figure is five percent of sentences under 2K2.1 that are above the guideline range.

And so, that tells us that there is no need to increase base offense levels across the board, even for proportionality's sake.

Second, for straw purchasers with mitigating circumstances who could be viewed as the least culpable, Commissioner Boom, you mentioned grandparents and mothers.

It is our hope that, and frankly it's our hope and it's also the BSCA stated intention
that increases in punishment will be offset by the mitigating role reduction.

The Deputy Attorney General in her October letter expressed this concern that sentencing ranges for straw purchasers would be higher than the ranges for people they are purchasing for.

But the reality on the ground we believe is, that just isn't going to be the case. And that's because straw purchasers are in Criminal History Category 1, whereas felon and possession, typically they are in higher Criminal History Category.

And also, because the guideline at 2K2.1 compounds criminal history in so many different ways with the base offense level enhancement, we believe that it will be a rare case where a straw purchaser will actually face a higher guideline range than a prohibited person, even if you don't increase across the board, which we're arguing against.

For those straw purchasers where there
is sort of an outlier outsized guideline we know that sentencing courts are sentencing below the guidelines in these cases, and will likely continue to do so.

Our third point is that you simply don't fix something that's broken by breaking it more. The straw purchasing guidelines have been inflated over the years. In some instances it's our belief that those have not been empirically based increases.

And so, it's counterproductive, counterintuitive, and unfound policy to anchor the prohibited person guideline to an arbitrarily inflated straw purchasing guideline.

The last point I'll make before I move to your second question is, relates to the intention of the BSCA, and the letter that you all received in December from Senators Murphy and Booker. It was the intent of the BSCA to hold accountable those most culpable in the firearms trafficking chain.

And as I've already said, it remains
to be seen whether the new BSCA statutes will be
used in this way, or if the bulk of prosecutions
will continue to be what we seen now, low level
people being prosecuted for straw purchasing.

Senators Booker and Murphy urged you
to review the data to devise evidence based
policies to execute this directive. And this is
the type of inquiry we would like to see the
Commission make.

My answer for the second question is
much shorter. And it's that we hear your
concerns related to recidivism and the recidivism
reports that the Commission has come out with.

I think it's a complex topic. It's a
nuanced topic. I can't, you know, do it justice
in this short time. So, I'll just make a couple
of observations about the two reports that you're
referring to.

The Commission's firearms research on
recidivism has been inconclusive as to the impact
of sentence length on recidivism. And so, while
there are suggestions that firearms offenders
recidivate at a higher level, what we're really concerned with is what does this mean? What is the impact of length on the likelihood of recidivism down the line?

And so, for firearms offenses generally the 2021 Firearms Recidivism Report found, quote, that the data did not show a clear relationship between sentence length and recidivism.

And the 2019 report found, quote, that the association between sentence length and rate of recidivism among both firearms and non-firesarms offenders was less clear.

And when you look, and I won't get into it. But when you look more closely at the data there is even a suggestion that as you sort of increase in sentence length for firearms offenders that recidivism increases as well.

And that's something the Commission should be thinking a lot about. Because it suggests that the deterrent research is correct that lengthening imprisonment is not a sound sort
of basis to cut off the risk of recidivism and re-arrest.

COMMISSIONER BOOM: But what about public protection?

MS. SCOTT: Public protection should be sort of at the forefront of the Commission's mind. And I guess the point that I've been trying to make is that it does not serve the public. It does not protect the public to enhance sentences.

There are, there have been shown criminogenic effects of prison. And I think we need to be thinking beyond sort of the short term public protection.

You can incapacitate somebody for a few years, maybe even five years. But eventually they will be released back into their communities. And so we should be thinking about long term public protection.

And when we're releasing individuals back into their communities after ripping them from their families, from educational
opportunities, from their work, we're sort of destabilizing these individuals and their families. And potentially leading to greater public safety risks down the line.

This Commission is considering ATI initiatives as part of, you know, this amendment cycle. And so, I'd urge you to think about sort of the ATI measures that you're considering, and how those are sort of in tension with this amendment, and in tension with the idea that we can incarcerate our way out of the crime problem.

CHAIR REEVES: Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you, Mr. Chairman. And thank you so much, Ms. Scott.

MS. SCOTT: Thank you.

COMMISSIONER WROBLEWSKI: Can I just follow up on that? What if the Commission decided to focus on the increased penalties just on those repeat offenders, people who have had prior crimes of violence in their record?

And so, to try to avoid the people who
you're talking about, who are in the midst of an educational experience, and ripping them out of the educational experience which you talked about, and just focused strictly on that.

And that's where, you know, the Commission's research and the empirical studies, not about deterrents, but about incapacitation, that those people are the ones who really are the dangerous ones.

And if we focused there would you still have the same concerns? And then I have a quick question about another slightly off topic.

MS. SCOTT: Yes. Thank you for that question. I guess I'm still struggling to see how the Commission would focus there. And again, this goes back I guess to our point of the need for further study and discourse on the topic.

Because straw purchasers who are sort of targeted in the BSCA by virtue of being a straw purchaser, they do not have a significant criminal history.

COMMISSIONER WROBLEWSKI: Yes. That's
what I was, what I meant was the felon in possessions, the felon possession cases that have prior crimes of violence. I agree with you on the straw purchasers. We're not going to see those --

MS. SCOTT: Right. So, I guess my answer to that would be that the guideline already focuses its sort of the most punitive measures on the individuals that you are talking about.

So, the structure as you know of 2K2.1 is that the Subpart A provision have enhancements baked in for people with certain types of prior convictions that are deemed to be more dangerous than others.

So, you have the, you know, people with certain crimes of violence and drug trafficking priors will receive higher base offense levels. People who possess a large capacity magazine are at heightened base offense levels by virtue of that.

There's a four level enhancement for
people who commit the instant offense in connection with another felony. There's up to I believe a ten level enhancement for people who traffic in extremely large numbers of firearms. There's a enhancement for obliterated serial numbers and stolen weapons.

So I guess my response to your question would be that the defenders feel that those concerns, those valid concerns that you raise, they are already baked into this guideline in numerous ways.

Not to mention the ACCA career offender, 924c, all which carry a significant, sometime mandatory imprisonment. So, we just don't see a need to do anything more than what has already been done.

And certainly the courts do not see a need to do anything more, based on the sentencing data that courts are going below the guidelines in these cases.

And you had several judges that have actually been fairly outspoken about the problems
with the firearms guideline. I think of Chief Battalion in Nebraska, who has talked about, you know, the problems with the guideline.

Some of these decisions to enhance penalties have not been empirically based. And have instead been pursuant to directives. And so, you have some judges that are refusing to follow the guideline for that reason.

And so I risk that doing what you're asking or suggesting the Commission might do, Judges will just continue not to follow the guidelines.

CHAIR REEVES: Okay. thank you, Ms. Scott. It's time for us, you've done well.

MS. SCOTT: Thank you, Judge.

CHAIR REEVES: It's time for us to move on to our next panel. We appreciate your testimony.

MS. SCOTT: I appreciate being invited today. Thank you.

CHAIR REEVES: Our third group of panelists will provide us with the perspectives
of this issue from two of our advisory groups.

First we will hear from Marlo Cadeddu, who serves as the Fifth Circuit representative to the Sentencing Commission's Practitioner's Advisory Group.

Ms. Cadeddu is a solo criminal defense practitioner who handles federal cases across the nation. Ms. Cadeddu has previously served as a Steering Committee Member on the American Bar Association's Death Penalty Representation Project.

Second, we will hear from Joshua Luria, who serves as Vice Chair of the Sentencing Commission's Probations Officers Advisory Group. Mr. Luria serves as a supervisory U.S. Probation Officer in the Middle District of Florida. He has previously served as a U.S. Probation Officer in Brooklyn, New York.

Ms. Cadeddu. We're ready whenever you are.

MS. CADEDDU: Thank you, Judge Reeves and Members of the Sentencing Commission. I
appreciate the opportunity on behalf of the Practitioners Advisory Group to address you.

As you know, the Practitioners Advisory Group is composed of attorneys in private practice who engage in criminal defense practice. My testimony today, obviously, will cover firearms.

Many of the Commission's proposed changes to Section 2K2.1 are in response to the passage of the Bipartisan Safer Communities Act, which requires the Commission to both review and amend its guidelines.

The PAG recommends against any amendment of 2K2.1 at this time. And instead recommends that review and study be conducted before any amendment.

While the BSCA directs the Commission to amend its guidelines it does not contain any timetable for that, and directs the Commission to review and amend prior to, review prior to amending. Amending without review would be in fact contrary to Congress's directive.
There are several reasons why careful review is warranted here. And first, as other commentators have noted, there are disproportionate racial disparities in charging under the current firearms statutes.

The PAG recommends that any amendment to 2K2.1 be structured to ameliorate rather than exacerbate racial disparities.

Second, historically courts have imposed below guideline sentences at a significant rate when sentencing straw purchasers and other offenders under 2K2.1.

The Commission's statistics show that a significant number of sentences imposed pursuant to 2K2.1 were below the guidelines. But the Commission is now considering increasing the recommended sentencing ranges under 2K2.1 for many defendants.

Implementing substantial increases without first understanding and accounting for the reasons for those increases, or for the reasons behind the historical prevalence of below
guideline sentences either ensures an even higher rate of below guidelines --

CHAIR REEVES: Has your microphone gone off?

MS. CADEDDU: I think my microphone has gone off.

CHAIR REEVES: Yes. Just speak louder. Because I think it is off. I don't see a green light.

MS. CADEDDU: It's blinking red.

CHAIR REEVES: It's blinking red.

MS. CADEDDU: All right. I'll do my best. I'll use my courtroom voice.

Implementing substantial increases without first understanding and accounting for the reasons for those increases either ensures an even higher rate of below guideline sentences in the future, or guarantees that less culpable individuals will be incarcerated for longer periods of time.

Review and study would yield an understanding of why courts so frequently elect
to depart downward, and could suggest more appropriate modifications to the guidelines.

Third, many sentences under 2K2.1 arise from prosecutions under Section 922, 18 USC Section 922. One provision of this statute, (g)(8), criminalizes possession of a firearm by persons subject to domestic violence protective orders.

As the court is aware, recently the Fifth Circuit held this portion of 922 unconstitutional in Rahimi. The rationale of the Rahimi Court potentially calls into question the constitutionality of several other portions of that statute.

The applicability of the current version of 2K2.1, and the proposed amended version depends in some respects on the defendant being found to be a prohibited person.

Likewise, some of the new offenses created by the BSCA and accounted for in the proposed amendments depends on the transfer of firearms to prohibited persons who are prohibited
due to domestic violence protective orders.

If the Rahimi decision withstands further challenge then of course it will be, it seems prudent that revisions or amendments to 2K2.1 should await further study and review of the impact of that case.

There are other aspects of 2K2.1 that merit review and study prior to amendment. These include changing the standard of proof from knowingly to the ambiguous heading reason to believe.

And I would point out that the PAG certainly would oppose the Department's proposal for a rebuttable presumption mens rea that is in, stands for obliterated or stolen guns, or ghost guns.

I believe that the Department of Justice has advocated for a rebuttable presumption. The PAG would definitely oppose that. That is contrary to the way the guidelines operate. It's contrary to our system of justice. The Department has the burden of proof at all
times at sentencing.

In the alternative, if the Commission does decide to amend 2K2.1 without further study the PAG recommends Option 1, because that is the more narrowly drawn.

The PAG recommends -- oh thank you. The PAG does however recommend an important change to Option 1. Because in the PAG's view the current version of 2K2.1(b)(9) in Option 1 is inconsistent with the BSCA in several respects.

First, the BSCA requires that mitigating factors be considered for defendants who are straw purchasers without significant criminal histories.

However, Option 1 places a number of additional limitations on the consideration of mitigating factors beyond those in the BSCA.

Second, the BSCA does not define without significant history, criminal histories. But Option 1 is written to apply only to a defendant who does not have more than one criminal history point.
We believe, the PAG believes that it should be left to the Court to determine what without significant criminal histories means.

Third, the BSCA requires that any guideline amendment in this area should reflect the defendant's role and culpability in any coercion, domestic violence, survivor history, or other mitigating factors.

But the language of Option 1 is more restrictive than the language in BSCA. Option 1 contemplates only consideration of a defendant motivated by an intimate or familiar relationship, or by threats or fear.

Nowhere, moreover, nowhere in Option 1 is the sentencing court directed to consider the all-important catch all of other mitigating factors that BSCA suggests.

Finally, the BSCA does not quantify the extent of a reduction that a defendant should receive. Yet, the amendment proposes a one point reduction.

In order therefore for Option 1 to be
consistent with the directives of BSCA the PAG recommends that 2K2.1(b)(9) be redrafted as follows.

A downward departure may be warranted for any defendant convicted under the list, the requisite list of statutes if that defendant is without significant criminal history.

The extent of the downward departure may be based on consideration of the defendant's role in culpability, any coercion, the defendant's domestic violence survivor history, or other mitigating factors.

Without these changes to 2K2.1(b)(9) straw purchasers with these and other mitigating factors risk being sentenced to longer sentences than the prohibited persons for whom they are purchasing. And that concept runs contrary to the intent of BSCA and also common sense. Thank you.

CHAIR REEVES: Thank you, Ms. Cadeddu.

Mr. Luria.

MR. LURIA: Good morning. On behalf
of the Probation Officer Advisory Group thank you for the opportunity to provide testimony regarding the proposed amendment to Section 2K2.1.

According to a recent study on federal firearms offenses conducted by the Commission and published in July of 2022, Section 2K2.1 has a higher than average fidelity to within guideline range sentences, with 49.6 percent in range sentences compared to the 39.9 percent for all other offenders.

Section 2K2.1 has a strong anchor effect on sentencing. And POAG recognizes that is at least in part due to how seriously federal system takes firearms offenses, as it should.

Considering, the study further pointed out that defendants sentenced under Section 2K2.1 had the highest average number of prior convictions, at 9.4. And that 53.1 percent of the defendants under Section 2K2.1 had a criminal history category of four, five or six.

Additionally, 60.6 percent of the
firearms offenders in 2021 had at least one crime of violence conviction as compared to 29 percent of all other offenders.

I'd like to observe that this guideline has been well adhered to while handling offenders with the longest and most serious histories. Straw purchasers account for just under five percent of all Section 2K2.1 defendants in 2021.

This will likely change as a result of the Bipartisan Safer Communities Act. But POAG believes that many of the changes proposed will continue to keep high fidelity to the outcomes produced by 2K2.1.

POAG is in favor of Option number 1, and relies heavily on our written testimony. The proposed amendment on this issue has many options within options.

While we have written in favor of some options and stayed silent on others, I'm happy to answer any questions about any of the options. Though I'm going to focus my initial statement on
some of the areas that we think are the most important parts for our position.

POAG proposes that Subsection (b)(5)(A) and (b)(5)(B) be combined into a single paragraph. We observe that the two issues are similar enough to be contained as part of a single paragraph of analysis. And we recommend that the paragraph's enhancement be two levels.

The (b)(5)(C) section would then become (b)(5)(B), and POAG would suggest that this conduct result in a five level increase.

POAG has several recommendations related to the proposed amendment to create a Subsection (b)(8), the first of which is to make this subsection offense based. The rationale behind this was to try to include those who are also receiving firearms from straw purchasers.

POAG also supports the use of the reference to Subsection (b)(5) as part of Subsections (b)(8)(A) and (b)(9)(A), mainly because this will include false statement cases, and make Subsection (b)(8) and (b)(9) easier to
navigate.

POAG also recommends that language in Subsection (b)(8)(B) be adjusted from participated to something more akin to affiliated with. POAG’s thinking is that showing someone to be a participant may be harder than showing they were affiliated.

POAG also recommends the removal of the language of five or more persons from (b)(8)(B). POAG viewed this language as reductive in terms of the applicability. Often times a straw purchaser may be only working directly with a single point of contact for a cartel or a gang.

Further as it pertains to (b)(8) POAG recommends that the proposed Subsection (b)(8)(C) be deleted in its entirety. The mens rea component in this section would be extremely difficult to meet.

As to Subsection (b)(9)(C) POAG also believes that ands rather than ors should be used. And that section that deals with minimal
knowledge should be amended to, I quote, had no
reason to believe that the firearm would be used
or possessed in connection with further criminal
activity, end quote.

POAG favors this different standard
because of how devastating the outcomes can be
when a criminal is able to circumvent the
protections to obtain a firearm.

As for ghost guns enhancements, POAG
is in favor of the changes that are proposed to
create this enhancement.

However, POAG recommends the inclusion
of a firearm manufactured prior to the Gun
Control Act of 1968 as part of the other than
provision in the main body of the guidelines and
the respective commentary sections.

The Commission has also asked about
further revisions to Section 2K2.1. POAG does
not recommend the creation of special
enhancements for -- particular to a federal
firearms license holder. POAG observes that a
defendant engaged in that conduct will likely
face appropriate enhancement as captured under a variety of other sections.

POAG also favors the Commission implementing some method for accounting for prior federal or state convictions for felon in possession of firearm and ammunition offenses, perhaps through the base offense level, similar to a prior conviction for a crime of violence or a controlled substance offense.

Again, thank you for the opportunity to share POAG's perspective. I stand ready to answer any questions.

CHAIR REEVES: Thank you.

Commissioner Wong.

COMMISSIONER WONG: The question is for Mr. Luria.

MR. LURIA: Yes.

COMMISSIONER WONG: If you've read the Department's comments here, there seems to be just a disagreement on complexity, on hypothesizing which of the two options is more complex as an application.
And I was just wondering, you know, the Department says that because of the complicated structure that Option 1 would exacerbate challenges in applying 2K2.1. And I know POAG in overwhelming majority favored Option 1 because of ease of application.

So, I was hoping you could just flesh that out and explain POAG's view that, about the prospective merits in terms of complexity.

MR. LURIA: Certainly. And in our discussions regarding it many of the members looked at that Section (b)(5) and thought it was really good to have all that in one area.

We were going through an analysis there that's all located in one spot, versus when you put that into the base offense level structuring it's kind of like you're integrating that into a variety of other considerations.

And that stratification ends up being a bit more versus when you're trying to really focus in on this specific issue as it pertains to straw purchasers. All of that is in one
location. It's all in an SOC.

VICE CHAIR RESTREPO: Is it Cadeddu?

MS. CADEDDU: It is, yes.

VICE CHAIR RESTREPO: The question I have for you is, I mean, everybody's concerned about racial disparities. And you referenced we should make an effort to ameliorate rather than exacerbate these racial disparities.

What specifically should we study to try go get there?

MS. CADEDDU: Well, in terms of racial disparities obviously there are a lot of intersecting factors. But one area that we think ought to be studied, and that may in part at least address that question is the rate of departures and variances from the guidelines, and why those departures and variances occur in these particular cases.

It's not clear I think at this juncture whether those variances and departures occur in a way that is not, that themselves exacerbate racial disparities.
In other words, people of color are receiving higher sentences than people who are, and other folks are receiving below guideline sentences or variances based on factors that perhaps are not clearly race based, but are sort of factors that end up creating that disparity itself.

VICE CHAIR RESTREPO: So, if I understand you correctly we should study the race of the defendant, and whether they were given a variance or departure on a firearms offense?

MS. CADEDDU: Well, we certainly think that certain variance, we are concerned that variances and departures may be occurring in a way that is racially disparate.

And so studying departures and variances, as well as some of the other factors that were suggested by the testimony of the defenders we believe will assist in determining why those race disparities occur.

VICE CHAIR RESTREPO: Thanks.

CHAIR REEVES: Commissioner
And thank you both for being here and for testifying. I have one particular question that I want to ask you, Ms. Cadeddu, about the mitigating factors.

You and others have suggested that if any one of the mitigating factors is present that there should be a reduction. So the net effect is no increase. And first of all, am I getting that correct?

MS. CADEDDU: Well, I'm not sure. So, the net effect?

COMMISSIONER WROBLEWSKI: The net. So, if the Commission raises the penalties by one or two levels for straw purchasers in conformity with the directive, but then also provides for a mitigating adjustment of one or two levels, also pursuant to the directive, the net effect would be no new increase from current penalty level.

MS. CADEDDU: Well, certainly for those defendants who qualify under those
mitigating factors. I think as the defender's testimony points out, the purpose of BSCA was to address straw purchasers who are sort of in this, who are more culpable than say the mom buying the, a gun for her son to use for target shooting, that sort of thing. And then that gets used in a way that the mom didn't anticipate.

So, it's our view that those mitigating factors ought to be, I mean, it, essentially if we follow the Department's view and make them conjunctive, such that you have to have, you have to qualify under every one then the application would be almost nil of the mitigating factors.

COMMISSIONER WROBLEWSKI: Well, let me ask you a specific --

MS. CADEDDU: Sure.

COMMISSIONER WROBLEWSKI: -- a specific hypothetical.

MS. CADEDDU: Yes. Okay.

COMMISSIONER WROBLEWSKI: Let's say your best friend comes to you and says, can you
go and buy me a gun? I'm going to use the gun to 
rob a bank. Okay. So, if there's, and I'm not 
going to pay you anything. So, there's no 
financial remuneration.

Presumably it's an intimate 
relationship. Do you think that, but he also 
says, I'm going to use the gun to rob a bank. 
And then does go and use the gun to rob a bank. 

Do you think that person should be 
getting the mitigating adjustment? Because I 
think under your framework, which is because it's 
an intimate relationship, because there's no 
money changing hands, this person would get the 
mitigating adjustment.

MS. CADEDDU: I'm not certain that 
the, well, I'd say a few things. I think it's, 
that's a, would be an unusual circumstance I 
think, where a straw purchaser would be 
specifically told that the gun is going to be 
used for a particular offense. 

So, I'm not sure how often that 
particular scenario will occur. I also am not
certain that under those circumstances the
mitigating adjustment --

Well, in fact, I think I'm going to
ask, on the fly I think it's a little difficult
to answer that. I need to go back and speak with
the other PAG members, and perhaps answer your, I
think we have a couple of other of your
hypotheticals that we're addressing in our
written statement. So, I think I'll go ahead and
address that.

I don't want to speak off the cuff,
because my sense is that the mitigating
adjustment wouldn't apply under those
circumstances. But I want to ensure that I'm
correct in that, and not, not speak out of turn.

COMMISSIONER WROBLEWSKI: Can I ask
another question along the same lines. But, and
if you need to address it in the written
statement that's fine.

Are you familiar with the criminal
history proposal that the Commission has
published, that would provide a sentence or a
MS. CADEDDU: Yes, I am. I have read that. Although that is not, I'm not --

COMMISSIONER WROBLEWSKI: Right. So, the thing I want to ask you is, as a defense lawyer there's a provision in there, there's an exclusion that says, if you possess a weapon in connection with the offense you don't get the one level reduction.

And I'm curious if you have a straw purchaser who walks into a gun store and fills out an ATF form, that's the crime, lying on the ATF form. Do you agree that that person has committed --

And then of course, after the crime is completed they presented the form, they then get a gun. So, they don't actually hold the gun until after they've presented the form of course, because then they've purchased the weapon.

In that scenario do you think that person would be eligible for the reduction? And
if so, and the reason I'm concerned about this is because the interplay between these two amendments, Congress said raise the penalties.

And if we raise the penalties here, but then reduce them over there, then that effect again is no increase in penalties and non-compliance with the directive. Do you follow the question that I'm asking?

MS. CADEDDU: I'm not sure. I think what I'll have to do --

COMMISSIONER WROBLEWSKI: Okay.

MS. CADEDDU: -- is review it and respond in our written testimony. I will say that I think generally speaking our, the penalties, I'm not as concerned about reductions in penalties as I am about increases. Because our guidelines seem to be a one way ratchet upward.

And I think the Department's proposal here with increasing base offense levels, and with implementing the rebuttable presumption, all of those provisions I think will have a much
greater increase in sentencing guideline ranges
than some of these interplays of sections that
you're discussing. But we'll address both of
those hypotheticals in our written statements.

VICE CHAIR MURRAY: First off, thanks
to both of you for being here, and for your
testimony. Our advisory groups are so wonderful
and so thoughtful.

Mr. Luria, I have a question for you
about your comment on application of B to the
ghost guns.

MR. LURIA: Okay.

VICE CHAIR MURRAY: Could you say a
little bit more about why POAG thinks you should
have the reference to the Gun Control Act of 1968
at all?

MR. LURIA: Certainly. That Act,
actually prior to that manufacturers were not
obligated to put serial numbers on firearms. So,
the point that, you know, that Act, it's put in
there.

Now everybody who's manufacturing for
distribution in a kind of a extremely market kind
of concept, they are having to put serial numbers
on.

So prior to that you might find guns
that are really ghost guns. But they weren't
really intended to be. They were just not serial
numbered because that was not the obligation at
the time.

CHAIR REEVES: Commissioner Gleeson
has a question. Commissioner Gleeson, if you can
hear me, go ahead and ask your question.

COMMISSIONER GLEESON: I can. Thank
you, Judge Reeves. Yes. It's a, I have a
concern. And I wonder whether it's overblown.
And it relates to tinkering with the mens rea.

There are at least two different ways
in which it's been suggested that we could. And
my concern arises out of any allocation, any
sense in which we allocate the burden on the
defendant produces the following kind of real
world in the well of the courtroom concern.

And that is, I don't know how you
prove the negative, except make a statement, you
know, the defendant, you know, articulates why he
or she had no reason to believe, or tries to
rebut a rebuttable presumption. And I don't know
how you do that except make a statement.

The fact findings associated with that
are kind of notoriously difficult to make. I
mean, it's not a science, determining whether
those are truthful.

And here's my concern. And adverse
credibility determination then I think has the
capacity to result in an instruction enhancement,
a deprivation of a few levels of acceptance.

So, between the adjustment, the
adjustment for not being able to prove the
absence of the mens rea, the other five levels, I
just wonder whether this in its implementation
would produce dramatic claims in sentence ranges
that, you know, tinkering with the mens rea
really doesn't contemplate, and really have in
mind.

I'd be curious to -- first of all,
thanks to our two panelists for your, for being present and for your input. But I'd be curious for your comment on whether that might be an unintended (audio interference) in tinkering with the mens rea burden.

CHAIR REEVES: You may proceed.

MS. CADEDDU: Thank you, Judge Gleeson. That's a great question. And it's a concern that the PAG shares. We are on the ground every day in courtrooms dealing with these questions. And we have to often make decisions about how to proceed.

Sometimes decisions to concede points that we believe that we can prove, because we are afraid of enhancements or of losing acceptance of responsibility. Or now potentially losing the third point of acceptance of responsibility for making objections.

So, we're always making these strategic decisions. And I would agree that this particular strategic decision about whether in fact to make an effort to rebut this rebuttable
presumption, if there were one, would put us
again in a bind that would be extremely difficult
to manage.

I can see situations, I can imagine
clearly situations where a defendant might be
able to present evidence to rebut this
presumption, but would elect not to do so for
fear of exactly the collateral consequences that
you mention.

And so, aside from the fact that a
rebuttable presumption is, just goes in the face
of the way our criminal justice system works, and
the fact that the Government always bears the
burden of proof, I think that these additional
negative consequences certainly should be
considered by the Commission.

CHAIR REEVES: Mr. Luria, do you wish
to respond?

MR. LURIA: This kind of, you know,
the inquiry kind of, I want to speak to the issue
under the (b)(8)(C) issue.

So, POAG has kind of recommended that
this language be taken out in entirety. I've had cases that I've dealt with where straw purchasers were buying guns for cartel members. And I wouldn't be able to make this mens rea work.

Because they're paid handsomely. They have no real affiliation. They don't want to be members of the group. They don't want to be, you know, they don't want to have that maintenance of their position. There is no position to maintain.

And so, you know, I think that that mens rea component under (b)(8)(C) really doesn't necessarily connect too well with that group that's doing this kind of thing in furtherance of those criminal enterprises.

You know, that's just our observation that mens rea aspects tend to be really hard to apply. But I do think that they get well balanced out through departure considerations, through variance considerations by judges. They do balance that well in those instances where that's a factor that needs to be balanced. So --
CHAIR REEVES: Thank you. That concludes --

COMMISSIONER GLEESON: Thank you.

CHAIR REEVES: Oh, I'm sorry, Commissioner Gleeson. That concludes our testimony for this part of the morning. We'll take a brief break. Please, let's agree to start back up about 11:05 a.m.

And please make sure you're in your seats at that point, and we'll begin with the next round of testimony. Thank you, Mr. Luria. And thank you, Ms. Cadeddu, for your testimony.

MR. LURIA: Thank you.

(Whereupon, the above-entitled matter went off the record at 10:49 a.m. and resumed at 11:05 a.m.)

CHAIR REEVES: All right. We're ready to resume. I'm going to remind the Commissioners when you're speaking to please try to talk as loud as I talk.

Because we want to, I realize we're in a real small room, and we can basically hear each
other we think. But please make sure we're
making sure that everyone hears the conversation.

Our fourth panel will provide us with
a perspective, obvious issue from academics and
advocates. Here to provide that perspective is
Rob Wilcox, who is testifying on behalf of the
Zimroth Center/NYU Law Working Group, which
consists of researchers, policy makers, and
advocates who focus on gun violence prevention,
federal sentencing reform, and the prosecution of
federal firearms offenses.

The mission of the Zimroth Center is
to promote good Government practices in criminal
matters, with a special focus on the exercise of
prosecutorial power and discretion.

Mr. Wilcox is an expert on gun safety
who currently serves as Senior Legal Director at
Everytown for Gun Safety. Mr. Wilcox has
previously worked as a private practitioner and
at the Brady Center to Prevent Gun Violence.

Mr. Wilcox, we're ready when you are,
sir. We're getting the red signal. But speak in
it and let's see if this works.

MR. WILCOX: All right. Thank you, Judge Reeves. I appreciate this invitation to appear before the Commission. I don't know that the mic is working.

CHAIR REEVES: You can have mine. I'm not talking. You can have mine. It's more important that we hear you.

MR. WILCOX: We're good. So, as you said, an expert in gun safety, not on microphone technology.

You know, I do want to mention our group members at the Zimroth Center/NYU Law, because it really is a distinguished group that I get to present on behalf of.

In includes United States, former United States Attorneys, Brady United, Everytown for Gun Safety, Giffords, Community Justice Action Fund, and academics at Johns Hopkins and Loyola University of Chicago.

As the Chair said, I'm the Senior Director at Everytown, and draw on about 20 years
of experience in the policy and litigation space. Proud son of Brooklyn who had a family member be shot and killed from gun violence. And have honestly met way too many survivors than I care to count who were victims of this public health and public safety crisis.

I've been a key advisor on gun violence prevention legislation and executive action. And was incredibly deeply involved in the negotiation and passage of the bipartisan Safer Communities Act.

But I do think that the Acts overall context and substance is incredibly useful as you undertake your work. Because this Act created several new tools and programs across multiple policy areas to take a novel approach to address the complexity of gun violence.

For instance, the Act targets unlicensed sellers, and creates enhanced background checks for individuals under 21. The Act invests hundreds of millions of dollars in implementing state extreme risk laws and
community violence intervention programs.

And the two new federal offenses, the subject of today's hearing, that prohibits straw purchasing and gun trafficking shifts federal enforcement upstream into the up deal legal gun pipeline.

Congress's approach last session matched this administration's efforts to establish gun trafficking strike forces in their efforts to crack down on rogue gun dealers, while also increasing investment in community violence intervention programs.

Data show why this upstream approach is so important. A 2000 report from ATF showed that crime guns come from a highly concentrated set of gun dealers.

And Everytown study showed that 75 percent of likely trafficked crime guns that cross state lines came from states without background check laws.

And an ATF trafficking report released just last month, the first major report in 20
years, showed that guns are moving from dealers to crime at alarming speed.

From 2017 to 2021 46 percent of crime guns were recovered less than three years after purchase, a significant sign of gun trafficking.

And this Act now finally addresses the straw purchasers, gun traffickers, and rogue gun dealers that all feed this diversion of illegal guns, but have rarely been subject to federal prosecution.

The straw purchasing and gun trafficking provisions, as well as the addition of Subsection 10 and 11 to Section 922(d) provide enforcement mechanisms that go up and down each link of the gun trafficking chain.

The law applies to any seller, including federal firearms licensees. It's important because licensed gun dealers hold a position of public trust. They're on the front line to keep firearms from being diverted into the legal market.

But some gun dealers do have a strong
connection to crime guns. ATF data showed that ten percent of one Georgia gun dealer's average monthly sales were traced crime guns. Ten percent of the average monthly sales were traced crime guns.

So Congress didn't just create this new tool to target significant gun trafficking operations. But also to reflect the complexity of the different links in that chain.

The licensed gun dealer who's willfully blind, the girlfriend coerced into acquiring firearms as a straw buyer, the person directing the buys, the person securing the funding, the person finding the buyers, and the guy who's delivering straw purchases up the iron pipeline.

The sentencing directive itself is a balanced approach reflecting this complexity. And we believe Option 1 best reflects Congress's intent to bake the complexities into the guidelines, because it requires specific findings by the sentencing judge.
We recommend that Option 1 be further refined to take into account the different mens rea of the person being sentenced. That we treat knowing and reasonable cause to believe different, and give each different weight.

We think that approach reflects the Congressional directive for the Commission to take into account, as they say, role and culpability.

The Commission should also make clear how federal firearms licensees fit into the guidelines, and how a violation of that public trust should be handled.

I do want to spend my last moment just talking about the mitigation language, which I believe is novel and deliberate. It shows Congress’s intent for the Commission to strike the right balance and make sure people lacking culpability are not caught up in sentencing increases for those the law wants to target.

Most importantly, and potentially different from some of the prior witnesses, the
reduction should apply broadly, because the key sentence in the directive has two coequal instructions based on the use of the word reflect in that sentence.

First, the Commission is to reflect deterrents. Second, it's to reflect fairness. The reduction should not require all the mitigating factors to be met in order for the departure to apply.

Because Congress is clearly using or language in the directive, and provides a list of circumstances that don't necessarily all have to be met in order to apply.

And finally, if you look at the very end of the sentence, other mitigating factors. Congress clearly is leaving it to the Commission to capture additional un-enumerated factors that are equally important when considering culpability.

Congress's approach to address gun trafficking established new crimes to address the severity and danger of gun trafficking. And make
no mistake how critically important that is to go upstream.

But it explicitly recognized different levels of culpability and other mitigating factors.

To be clear, the gun safety organizations that advocated for this law were not seeking an across-the-board enhancement without nuance to the sentencing guideline.

I truly appreciate the opportunity to represent this working group, represent Everytown for Gun Safety, and look forward to your questions.

CHAIR REEVES: Thank you, Mr. Wilcox.

Vice Chair Murray.

VICE CHAIR MURRAY: Thanks so much for your testimony, for being here. We appreciate your expertise and willingness to share. I wondered if you had thoughts on Commissioner Wroblewski's hypothetical from before.

So, a friend comes to you and says, can you buy me a gun? I'm a prohibited person,
and I want to accomplish a burglary. I'm not going to pay you, but we're friends. And you say, yes and buy the gun. So there's no remuneration.

So, under a disjunctive theory of the mitigating factors you would qualify for the mitigating factors. Do you think you should qualify for the mitigating factors?

MR. WILCOX: I think remuneration on its own is too limited way to look at kind of role and culpability. I think it is about kind of understanding who the ultimate buyer is, and what their intent is.

And if the hypothetical's true where an individual knows that there is a potential violent crime that is to be committed that is a serious factor that I don't think we should, anyone should be taking lightly.

And if you look at the directive itself it asks coercion. And in the hypothetical we didn't hear that. Domestic violence survivor history, we didn't hear that.
Role and culpability, which I just said, we heard knowledge of the future crime. And so, in some cases the lack of remuneration can be incredibly important, especially in cases of domestic violence or other cases of coercion.

So, I'm not saying to take it off the table. But I don't think it's a simple binary choice, where that fact alone would lead to an outcome where we don't see kind of the seriousness of the crime reflected in the guideline.

VICE CHAIR MURRAY: So, you're not advocating for our proposal in the disjunctive, the or version of our proposal. You're advocating for maybe a third, like a third way.

MR. WILCOX: I think it is clearly a disjunctive. I think that it, the language in the directive is a disjunctive. And to read coercion and domestic violence history together means that you have to have both, which I do not think could have been Congress's intent at including that.
And if you have a broad term at the end, other mitigating factors, well if it is a conjunctive how does a broad term like that ever be met in connection with any of the other specific terms?

So, I think certainly it's a disjunctive. I'm just not sure that I agree that the lack of remuneration would be sufficient to escape culpability in the hypothetical.

VICE CHAIR MURRAY: All right. I was, you're not advocating for the, you don't, you, okay. You're not advocating for the conjunctive version of ours?

CHAIR REEVES: Commissioner Mate, VC Mate.

VICE CHAIR MATE: Thank you. First I want to echo our appreciation for you coming today, and for your written testimony. Really appreciate your expertise and thoughts.

An issue that's come up a couple of times today is the issue of parity. And whether the increased penalties for straw purchasers,
whether we should do that for illegal possession
as well. And I was wondering if you could
address that point a little bit.

MR. WILCOX: I think the directive was
heavily focused on the need to address gun
trafficking channels, both straw purchasing
crimes and the larger networks that are funneling
guns into the hands of prohibited purchasers.

I think the prior testimony
articulated well that to enhance the penalties
for those crimes doesn't require an enhancement
for the possession crime. And we haven't seen a
need for that in how the guidelines have been
applied to date.

And so, I think our position is that
those are separate issues. And the directive
should truly focus on looking at the gun
trafficking and straw purchasing crimes, both the
enhancements and the mitigating and fairness
factors.

VICE CHAIR RESTREPO: Mr. Wilcox,
there's been a lot of talk today about inequities
with respect to racial disparities in this context. Has your group looked at that? Or is that not within your purview?

MR. WILCOX: Our group's looked at that. And it's quite concerning. I think, you know, we certainly agree with Senators Booker and Murphy in their letter when they tried to, when they explained the intent behind this new provision.

And I think if you take a step back it's important to look at the law in context, the entire law, where yes, we had a provision on straw purchasing and gun trafficking that gets to the source of illegal guns. But we also saw a $250 million dollar investment in community violence intervention programs.

The first witness, the U.S. Attorney, spoke about some of those efforts to work with communities. And Congress clearly sees that it's part of the solution with the significant investment in this law.

They also put investment in state
crisis intervention programs, extreme risk laws, 
enhancing background checks, cracking down on 
unlicensed sellers. 

Taking that all together what you see 
is Congress not looking to exacerbate the racial 
disparities that we've seen in the enforcement of 
the law as it existed pre-BSCA. 

What I believe they're looking for, 
and Senator Booker and Murphy articulated, is the 
next chapter, the next verse, which does truly 
look upstream, and looks at how guns are getting 
to the hands of people who shouldn't have them. 

And for the guidelines to reflect that 
I think will go a long way towards both reducing 
racial disparities and increasing public safety. 

VICE CHAIR RESTREPO: Thank you. 

CHAIR REEVES: You've heard some of 
the other witnesses talk about delaying, you 
know, doing some more research, more study I 
guess. What is the Zimroth Group's thoughts on 
that? 

MR. WILCOX: I think one area that
certainly could have increased study is other mitigating factors. That is intentional language offered by Congress. And we know the Supreme Court has said time and again that they don't offer language in surplus.

And what are the other mitigating factors that truly should be considered as part of the downward departure?

I think Congress, as I said, in its directive really is laying out two coequal directives, you know, to think about the straw purchasers without significant criminal histories that are getting sufficient to deter, and the mitigating factors.

And so, I think to really understand that balance and have it reflect in the guidelines is an area to study, to make sure that the Commission gets it right.

CHAIR REEVES: Commissioner Wroblewski, I think you had a question.

COMMISSIONER WROBLEWSKI: Yes. I just want to, can I just make --
CHAIR REEVES: Make sure you're speaking up.

COMMISSIONER WROBLEWSKI: I'm sorry. Can I just follow-up on the directive? What do you think the words sufficient to deter mean? Because there's been a lot of testimony already about deterrents, and about what it means, and how effective it is. What do you take that specific language to mean?

MR. WILCOX: Well, I think as mentioned previously a straw purchaser often won't have prior criminal history, at least sufficient to keep them from purchasing a firearm. And we know that there's, you know, nine specific prohibitions.

And I think Congress does want to ensure that those individuals see this as an incredibly serious crime. And it goes to the fact that Congress, to the Chair's point, is looking upstream.

They're looking away simply from illegal possession, especially legal possession
that may not be connected to violent crime or violent conduct, but are looking to the sources of illegal guns.

So, I think that is what Congress is getting at, is they want to make sure the Commission is addressing the source of illegal guns, and so the individual straw purchaser.

But honestly the gun trafficker and operations, and those who are directing it, as well as the licensed gun dealers. All are within the ambit of the guidelines.

But because the sentence is written in two parts that has to be balanced with the second reflect. Like, they used reflect twice in that sentence, which I believe does separate the two halves of the sentence.

So yes, sufficient to deter is in the first part. But then we have a reflect in the second part that honestly isn't limited just to straw purchasers with limited criminal history.

But that sentence in fact to me applies to the appropriate amendment.
COMMISSIONER WROBLEWSKI: I get it.

So you're suggesting there are two sides to this. One is provide the mitigating factors for those who are low-level, but then provide something which we say is sufficient to deter, which at least I interpret as the Congress saying what you have now is insufficient to deter. Am I reading that wrong and do you think a one- or two-level increase, for that side, recognizing that there's another side as well for the mitigating people.

But for the people upstream, the people that you're concerned about, do you think that's complying with the -- reflects Congressional intent that the Commission provide increased penalties to sufficiently deter these particular straw purchasers and traffickers?

MR. WILCOX: I think looking at the prior guidelines and the code that was used to enforce the law is a bit of apples and oranges because the code that was being enforced for straw buyers was the paperwork violation of lying on the federal form.
And now what we have is Congress specifically authorizing prosecution for those who know or have reasonable cause to believe they're buying a gun for someone who's prohibited. And so, I think it's very challenging to compare those two since they're quite different crimes, and so I do think what Congress is asking the Commission to undertake is how do you really look at someone in their entirety who is the straw buyer? So that they can be deterred, in their words, but also you can recognize what may have put them in the position of being a straw buyer in the first place.

The other big advantage that we now have with the code is lying on the form was very challenging to get at who was directing the network, who was arranging multiple straw buyers, and so many of the prosecutions for straw purchasing were about just that individual. This new section of the code does allow you to go deeper and get to the person who was arranging and conspiring to set up the entire network, as
well as, as I mentioned, the licensed dealer
who's willfully blind to the straw purchase
that's occurring in the store.

So I think this is a new tool that has
broad application to a number of links in the
straw purchasing chain, and I think that's the
challenging work that the Commission has.

CHAIR REEVES: Anyone else has any
questions for Mr. Wilcox?

VICE CHAIR MATE: I have one more. I
just wanted to follow up and make sure I was
clear and understanding one thing regarding the
mitigating factors. Your suggestion is that we
include a reduction for a subset of individuals
and then a broader departure as well. So kind of
a two-part approach to mitigating circumstances.
Am I understanding that correctly or not?

MR. WILCOX: That's a great question,
and I apologize for any lack of clarity. I read
that sentence as really having two ideas in it
that the Commission then has to take up. It's an
appropriate amendment to reflect the intent of
Congress and then you have the enhanced language. And then an appropriate amendment to reflect the defendant's role and culpability, which is one.

Then we have a conjunctive and, any coercion, domestic violence survivor history, or other mitigating factors, a disjunctive. I actually think it's a quite complicated sentence, but it does I think, require, for any of the amendments that relate to trafficking and straw purchasing to look at role and culpability, and then the other factors, coercion, domestic violence, and other mitigating factors.

As I would be thinking about the amendments, I would be really trying to parse this language carefully, apply it broadly, and give full weight to what Congress was quite novel and deliberate in doing, which is -- for I think, one of the first times, instructing the Commission to look specifically at these type of mitigating factors. They certainly didn't list them all, and they certainly didn't get it all right. And I think that is the value of the
Commission, is that to dig deep and really give meaning to these terms.

CHAIR REEVES: Thank you, Mr. Wilcox, for your testimony. We're ready for our next panel.

MR. WILCOX: Thank you so much.

CHAIR REEVES: Now we're about to move to our next panel. I'd like to introduce our fifth panel, which will present the Executive Branch's perspective on our proposed amendments regarding what we define as fake pills and First Step Act drug offenses. To present their perspective we have with us the Honorable Carla Freedman, who is the first woman to serve as United States Attorney for the Northern District of New York.

Ms. Freedman is chair of the Controlled Substances Subcommittee of the Attorney General's Advisory Committee. Ms. Freedman has over 30 years of experience prosecuting organized crime, violent crime, and drug offenses as a state and federal prosecutor.
Ms. Freedman, we're ready when you are.

MS. FREEDMAN: Chairman Reeves and members of the Commission, thank you very much for the opportunity to appear before the Commission to discuss the problem of fake pills. I want to thank the Commission for working with the Department, including the DEA, to address the ongoing crisis of deaths from fentanyl poisoning.

As you know, Subsection b(13) of Section 2D2.1 currently provides a four-level enhancement when the defendant knowingly misrepresented or knowingly marketed as another substance, a substance that in fact contained fentanyl or a fentanyl analog. In response to concerns over the usefulness of this enhancement, the Commission has proposed an alternative to level enhancement with a lower mens rea.

That is, where the defendant had reason to believe that a substance that the defendant represented or marketed as a legitimate drug was not legitimately manufactured, and the substance in fact contained fentanyl. The
Commission has also published as an issue for comment application of this enhancement to other synthetic opioids.

First, regarding the mens rea requirement, the current enhancement applies so infrequently in part because it requires proof that the defendant had actual knowledge that the substance contained fentanyl or a fentanyl analog. This actual knowledge standard is higher than the mens rea required for a Section 841 drug trafficking conviction.

Although it is common knowledge that among drug traffickers that most fake pills contain fentanyl, it is often difficult to prove if the defendant knew the specific pills that he or she trafficked contained fentanyl because defendants claim ignorance of the pills' contents and because they use vague, coded language when discussing the drugs.

Even when fentanyl was sold in baggies, the enhancement rarely applied. Now that fentanyl is so often sold in pill form, the
enhancement is even harder to apply. To reflect this reality, we recommend a rebuttable presumption, that is the enhancement should apply presumptively, but a defendant can show that he lacked actual or constructive knowledge, with the defendant bearing the burden of such proof.

Such a rebuttable presumption would properly reflect the fact that drug traffickers should know that there is an extremely high probability that the black market pills they are selling contain deadly fentanyl. And that any proof that the defendant had no reason to believe they contained fentanyl lies primarily with the defendant.

If the Commission instead adopts a reason to believe standard, it would be helpful to define that term. One option would be to define the term to require specific and articulable facts combined with reasonable and common-sense inferences from those facts that provide an objective basis for believing that the pills are not legitimately manufactured. The
Department also recommends that the Commission amend the requirement that the defendant market or represent the drug as legitimate.

Unfortunately, this formulation does not reflect the reality of a market flooded with pills that look like legitimate prescription drugs, such as pills in various colors that are marked M30 to look like oxycodone. And as currently written, the enhancement might apply more regularly to street level dealers, rather than to the high-level traffickers who distribute fake pills without making any representations about their content.

We thus recommend that the enhancement apply not just when a defendant represents or markets the drug as legitimate, but also when the offense involved a substance that would appear to a reasonable person to be legitimately manufactured. Finally, the Commission is asked whether (b)(13) should be broadened beyond fentanyl and fentanyl analogs to include synthetic opioids. It should. Although the vast
majority of fake pills contain fentanyl, the DEA has seen an increasing number of fake pills with other synthetic opioids.

If, however, the Commission elects to focus on fentanyl and fentanyl analogs for the time being, we ask that you monitor the situation during the 2023-24 amendment cycle and propose additional changes to address all synthetic opioids as appropriate. Thank you.

CHAIR REEVES: Thank you, Ms. Freedman. I turn now to my fellow Commissioners.

VICE CHAIR RESTREPO: Ms. Freedman, following up on -- I don't know if you heard Judge Gleason's question earlier, the same question really with respect to this rebuttable presumption and the impact it would have on individual -- jeopardizing acceptance points, a judge finding obstruction points, any Fifth Amendment concerns. Has the Department thought this through in terms of putting the burden on the defense?

MS. FREEDMAN: We have, Vice Chair
Restrepo, and I appreciate the question. I would point out as my colleague, US Attorney Gary Restaino, pointed out the concept of a rebuttable presumption is not due to the guidelines. It exists in four separate areas, and the Department's position focuses on the fact that this is such a well-known concept now, that these pills that mimic legitimate prescription drugs oftentimes, most times now, in fact, are containing fentanyl.

To put the burden on the government to establish whether or not the defendant knew is really in many ways unfair and impossible. As I'm sure Your Honor is aware, frequently in drug trafficking, particularly at higher levels, there is no conversation. I can't tell you the number of wiretaps that I've listened to where the most you hear is a number and a meet up. So it's very difficult to apply this enhancement where the government bears the burden of establishing the mens rea. We're not suggesting that there be no mens rea.
We're giving the defendant, who's in the best position to have a defense, an excuse, a reason why he or she had no idea that the pills contained fentanyl, to provide that to the court and for a judge to be able to consider that.

COMMISSIONER WONG: Ms. Freedman, one of the comments from the Practitioner's Advisory Group argued that the reason to believe standard here is akin to strict liability. The concern generally would be that this language could encompass anyone based on strict generalized risks, generalized knowledge in the community about the risks of fentanyl.

What is your response to that? Do you think the current proposal does sweep in the entire universe here, and are there ways to tailor the language that you think would sufficiently target a more nuanced recklessness standard here than what's currently drafted?

MS. FREEDMAN: Thank you, Commissioner Wong. I appreciate the question. I would say that first of all it's actually not strict
liability. I would also point out that there are several enhancements currently in the guidelines that are offense-based or more particularly, strict liability.

For example, we've heard this before, under 2K2.1 if a firearm is stolen or the serial numbers obliterated. There's also examples with respect to drugs. The distribution of a controlled substance in a prison setting is an automatic enhancement. The distribution -- I had to look this one up -- steroids with a masking agent also. I don't know that we see that that often, but there are, in other words, prior examples in the guidelines currently for strict liability.

This really isn't. This is providing, it's taking what's so widely known now about pills that look like legitimate drugs but in fact contain fentanyl and are killing people at alarming rates, and it recognizes that tragic and scary fact and still allows for defendants who are perhaps wrongly caught up and really had no
knowledge the ability to not be strictly liable
but to present their evidence. Again, only by a
preponderance. That's the standard to present it
to a judge for consideration.

Quite frankly, the proposal that the
Department is putting forth, you talked about or
asked the question about encompassing people who
shouldn't be encompassed. The goal here is
really to get at higher level drug traffickers,
and quite frankly, as written -- and I appreciate
the Department very much appreciates the
Commission's recognition that the current
four-level enhancement is not addressing the
problem that we have now.

And in recognizing that, you've
proposed a two-level enhancement to make that a
workable and functional enhancement that actually
reaches out to the people who are higher level,
the true drug traffickers that the government
believes that our proposal would encompass that.
While still, I should say, offering protection
since I say with a rebuttable presumption for
those who should not get the enhancement.

COMMISSIONER BOOM: Good morning.

Thank you for your testimony. In thinking about this mens rea component and how the government would prove the knowing standard, is there -- this is a fairly technical question. Is there, I would think, a pretty significant difference between the street value of a real oxy 30 and a manufactured synthetic one that contains fentanyl? I presume the latter is significantly less expensive? I'm just presuming, so I don't know for sure. If you know.

MS. FREEDMAN: I think the DEA would be in a better position to answer the price point variance, but I would say this. One of the things that is so frightening, and I think that has led to us being in what is clearly a crisis, nobody can deny this, is the fact that fentanyl is so cheap and easy to make. Unlike heroin obviously, which is a plant and so you can only have so much of it because it is plant-based, there seems to be an endless supply of the
ability of in particular, Mexican cartels to manufacture this.

So I'm not sure whether in fact a fake oxycodone pill that contains deadly amounts of fentanyl is in fact cheaper than the black market true M30 or oxycodone pill. But I think that's what makes this so frightening right now, is that there are people from teenagers and kids to the elderly trying to get a black-market oxycodone and instead they're ending up with a pill that in fact looks like oxycodone but contains deadly amounts of fentanyl.

CHAIR REEVES: Yes?

VICE CHAIR MURRAY: Thanks so much for being here, Ms. Freedman. I had a question about your written testimony regarding guideline 5C1.2 and in particular, the floor. You know there's this issue about whether the floor to 5C1.2 should be set at base offense level 17 or it should be set to the guidelines range.

The Department's position seems to be that you need to keep it at base offense level 17
in order to make that floor applies in a kind of graduated way to people with lower and higher fentanyl history. I'm wondering why the guidelines themselves, apart from the floor, don't already do that work?

MS. FREEDMAN: Vice Chair Murray, I very much appreciate the question, and while I could spitball the Department would probably be not happy. I have been focused on addressing the fake pills. I do believe that one of my colleagues, Carmen Mitchell, who is going to be speaking about the circuit split may be able to address that.

VICE CHAIR MURRAY: Great, thanks.

CHAIR REEVES: Has Congress asked us to do anything with the fake pills issue specifically?

MS. FREEDMAN: Chairman Reeves, I'm not aware of them doing that specifically, but I will say this. And I was thinking about this a little bit earlier with all the conversation about Congress and firearms and where their
priorities are.

In my role as chair of the Controlled Substances Subcommittee, one of the many tasks that I am tasked with is reviewing proposed legislation, both from the House and from the Senate. I am struck with how many potential bills are coming from both sides of the chamber. Both House and Senate trying to address the fentanyl crisis. I've seen legislation where they -- and none of them are looking for a less severe punishment.

I've seen proposed legislation -- I mean, we currently, as the Commission is well aware, we have mandatory minimums for certain thresholds of fentanyl and fentanyl analogs. And obviously even from death resulting from these drugs or other drugs. The proposed legislation that we've reviewed is looking to increase the penalties.

I've seen things wanting to label the cartels as terrorist organizations. So certainly, the mood that I'm seeing from the
legislation that's making its way across my desk
talks about a recognition by Congress about how
severe the problem is with fentanyl and fentanyl
analogs, but in particular fentanyl, and trying
to address that is the best way possible.

I know the Commission has proposed a
two-level enhancement that didn't previously
exist, and the Department endorses that as at
least a small measure that may address one
particularly dangerous and insidious aspect of
the fentanyl crisis, which is not just selling
fentanyl in baggies where the consumer may think
that he or she is getting heroin and that I
believe, was one of the issues that the
Commission confronted in 2018 when they
promulgated the four-level enhancement.

Who could have envisioned that five
years later we are now seeing -- whereas I
believe DEA's latest statistics were there were
three million pills seized in 2019. Last year,
there were 61 million. From 3 million to 61
million fake pills seized. These numbers are
astronomical, and obviously, as the Commission is
well aware, the number of people dying because
they thought they were taking Percocet and
instead they were taking a pill with a deadly
amount of fentanyl, and it takes just so little.

This is something that clearly if a
two-level enhancement will help save some lives
and properly punish those people involved in this
insidious conduct -- I haven't heard Congress
speak about it, but clearly the impression that
I'm getting is that this is a serious problem
that Congress wishes to address.

VICE CHAIR RESTREPO: Do you see any
parallels between this and Congress' efforts
years ago to address the crack epidemic, and how
did that work out?

MS. FREEDMAN: That's an excellent
question, and obviously, I didn't sit in Congress
then, didn't sit now. I'm aware of some of the
discrepancies that have happened. I'd like to
point out that as the Commission is well aware,
the discrepancies among the black and brown
community with respect to crack is well recognized. And although there was legislation proposed, the Equal Act, that in fact has not passed Congress.

The Department has handled this, and regardless of the fact that legislation didn't pass -- and quite frankly, the guidelines right now still have the disparity between powder cocaine and crack cocaine. The Department no longer recognizes a distinction. The Department is aware of the empirical evidence.

The Department is aware of the racial disparity and is taking it upon themselves under the direction of Attorney General Garland to the entire Department that we now treat powder cocaine and crack cocaine the same. So we are aware and to the extent that there is evidence-based reasoning -- and certainly issues of racial disparity I believe that the Department tries to address that.

One of the things that's so, I think, fundamentally different about fentanyl is number
one, even based on the statistics that the Commission has, the racial disparity is not the same as it is for powder cocaine or crack cocaine. When we think about the victims, they cut across all races and ethnicities and ages. There is not a state that has not been affected by this opioid crisis, and in particular, the opioid crisis in the form of deadly, poisonous pills.

VICE CHAIR MURRAY: So I understand the Department prefers a rebuttable presumption mens rea. If we were to keep the mens rea the way it is in terms of reason to believe and perhaps flush it out with examples the way you suggest, do you think that that would end up being helpful, significantly helpful in terms of the Department's efforts to fight this scourge? It was relatively minimal unless we adopt the rebuttable presumption.

MS. FREEDMAN: Vice Chair Murray, obviously the Department will welcome anything to help us in this fight, and anything we can do to
make some sort of an impact on this crisis. We
certainly believe that we would have a greater
impact and a better ability to hold these people
accountable, particularly the higher-level people
that really should be held accountable, if the
Commission adopts the proposal that we've given
with a rebuttable presumption.

But if for whatever reason the
Commission felt that that was not appropriate,
obviously a reason to believe standard is more
likely to at least encompass the ability to prove
some of these drug traffickers and pill pushers
pushing deadly fentanyl than the current
standard, which I would point out, since this was
promulgated I believe there have been 5,700
fentanyl drug traffickers sentenced. Of that
5,700, that four-level enhancement, the only
enhancement we currently have, applied 57 times,
which I think comes out to one percent though
math is not my strong suit.

CHAIR REEVES: I'm looking back at
your written testimony, I believe. When you talk
about Section 2D1.1 (b)(13), it should be
broadened, and I see some language where you say,
"But the most critical data point on which the
Commission should base its decision is the CDC
estimate." I think this is some good testimony,
and you go on to say, "We ask the Commission to
monitor the situation during the next amendment
cycle and propose additional changes if
appropriate."

I may be reading from the wrong
testimony. I thought it was yours. I'm just
going to ask is it any need for the Commission to
sort of look at this issue, get more empirical
information about its fanning or broadening with
fake pills, something beyond fentanyl or
whatever?

MS. FREEDMAN: I appreciate the
question, Chairman Reeves. The Department would
certainly ask and believes that there is enough
empirical data so far provided by the DEA and
other agencies to demonstrate that not only
fentanyl and fentanyl analogs but other synthetic
opioids should be included. I'm not a chemist, and I'm sure I'll pronounce this wrong, but things such as nitazines, which are other synthetic opioids, are being included in many of the prescription pills, although clearly the vast majority still contain fentanyl.

So to solve the problem in a holistic way, we would certainly ask that you include the language of other synthetic opioids. Again, as a fallback position, sort of as I said before with respect to the reason to believe standard. Something needs to be done, so if at this point the Commission isn't comfortable in including all synthetic opioids, we certainly would appreciate the enhancement, the two-level enhancement as written by the Department that includes at least fentanyl and fentanyl analogs.

CHAIR REEVES: Thank you.

VICE CHAIR MATE: I have one follow-up question as it's kind of related to the crack question earlier. Congress and the Commission for years have tried to solve various drug crises
within this country by increasing sentences, and
I think we can look to recent overdose deaths and
the rate of those as indication that we've failed
in that regard. Is there some reason to think
that this particular change would be different
and bring success that we haven't seen in the
past?

MS. FREEDMAN: I think the critical --
it would be ridiculous for me to argue that this
is going to fix the problem, and that we'll
immediately see overdoses go down. I know from a
Department standpoint, we understand you're not
going to prosecute and arrest and jail our way
out of this problem, and prevention and
deterrence is equally important to the
Department. We are trying as best we can to do
that.

What I would say about this, unlike
the current problem with respect to fake pills,
unlike all the other drug problems that we've
seen is that these are pills that are designed to
look like something else, like oxycodone. Is it
right for somebody to be buying a black market oxy pill? No, it's not. Is it a crime to sell a black market oxycodone pill? It is. The problem is that we are masking -- these drug traffickers are masking what looks like oxycodone, Percocets, Xanax, Adderall with deadly fentanyl, and it takes so little for it to be deadly. It looks appealing to children. Sometimes it looks like candy. They're colorful pills. For people that might have been reluctant to inject something into their body or snort something into their body, this is a pill.

And we're hearing every single day about another teenager or youngster, and I don't mean to just focus on them, but the entire age range of people who think that they're getting black market oxycodone pills -- I keep focusing on that because that's the majority, when in fact they're getting fentanyl. And that's the difference.

CHAIR REEVES: I take it no additional questions for U.S. Attorney Ms. Carla Freedman?
Thank you so much for your testimony.

MS. FREEDMAN: Thank you.

CHAIR REEVES: Oh, oh, I'm sorry.

Judge Gleeson, Commissioner Gleeson has a question.

COMMISSIONER GLEESON: Thank you, Judge. My question is whether -- you can't help but feel the increased culpability of offenders of the sort just described. Thank you for your remarks by the way. My question is whether there are insufficient tools already in the toolbox of sentencing judges to mete out sentences that are commensurate with that increased culpability? And the degree to which there's a need to tinker with the guideline ranges in order for that to happen?

Obviously, the Department feels there is, but I'm just curious whether, by way of departures or variances or other tools that judges have whether there's a felt need for the guideline ranges to be higher as well?

MS. FREEDMAN: Thank you, Judge
Gleeson, for the question. I guess my first answer is that we cannot ever have enough tools in the toolbox, so we appreciate even one more. But that being said, I would make this important distinction. There are, of course, tools to prosecute fentanyl and fentanyl analog trafficking, like all drugs.

The difference here is that we are not, and judges are not able to treat the person who knowingly sells a pill that looks like oxycodone that has fentanyl in it, any differently than the drug trafficker who's got a little bag of heroin or fentanyl and even indicates that he or she is selling fentanyl to a willing buyer of fentanyl. That person, where to some degree both the seller and the buyer understand the transaction and the danger that they're engaged in.

Now, when someone is selling a pill and marketing it or representing it or saying nothing at all, but just from the way that the pill looks, the buyer believes that he or she is
getting a Percocet, but in fact they're getting fentanyl. And that is a huge difference that right now there's nothing that a judge can do, unless somehow the government is able to show that the trafficker -- and in this case it would likely have to be street-level trafficker.

We can't get at the suppliers to those traffickers. Knowingly misrepresented and knowingly marketed that, that's a standard that even though this is happening day in, day out in all 50 states, I think the numbers bear it out. That application, that enhancement has been able to be applied one percent of the time, while the number of pills have gone from 3 million to 61 million.

COMMISSIONER GLEESON: Thank you.

MS. FREEDMAN: Thank you, Judge.

CHAIR REEVES: Thank you, Ms. Freedman.

MS. FREEDMAN: Thank you.

CHAIR REEVES: Thank you for your testimony. We're ready for our next panel. Our
sixth panel provides us with the federal public
defender's perspective on this issue. To present
that perspective, we have with us Michael Caruso,
who has worked as a federal defender for nearly
30 years and currently serves as a federal public
defender for the Southern District of Florida
since 2012, when the 11th Circuit Court of
Appeals appointed him to that position. In that
capacity, Mr. Caruso supervises over 50 assistant
defenders to handle a wide range of cases,
including those involving narcotics.

Mr. Caruso also serves as chair of the
Federal and Community Defenders Sentencing
Guidelines Committee. Mr. Caruso, we're ready to
hear from you, sir.

MR. CARUSO: Thank you, Chair Reeves,
Vice Chairs, and Commissioners for inviting me to
testify today on First Step implementation and
counterfeit pills. While the three proposed
amendments addressed today are distinct in many
ways, our position for each of them shares the
same bottom line. Do not promulgate amendments
that will unnecessarily increase sentences for drug offenses and unnecessarily complicate the guidelines.

Section 2D1.1, as you know, is one of the most highly criticized and consistently rejected federal sentencing guideline. Sentences imposed within the guideline range produced by 2D1.1 are diminishing. Last year, only 28 percent of cases under this guideline were within the range, with nearly all cases sentenced below. For more than a decade, federal judges nationwide have called for 2D1.1 to do a better job at recommending sentences that satisfy 3553(a).

For example, courts around the country have recognized the unwarranted disparity between the methamphetamine mixture and purity guidelines. In the Third Circuit, a lawyer is ineffective not to request a Kimbrough variance from the MDMA guideline. And even in the face of the opioid addiction crisis, the fentanyl and analog guidelines are so severe that in 2021 courts imposed below guideline sentences in 36
percent of fentanyl cases and almost 50 percent in analog cases.

Above guideline sentences, by contrast, were rare. In the face of the sustained criticism, 2D1.1's unwarranted harshness. Defenders oppose any amendment that would increase penalties under this guideline any further. Such amendments would be contrary to the spirit of the First Step Act and would be contrary to our lived experience that we cannot punish our way out of a public health crisis.

Turning to the specific proposals the Commission is considering. First, safety valve implementation. The Commission should not substantively limit safety valve relief in 2D1.1 and 2D1.11. This is particularly true given the Supreme Court's decision last week to resolve the conflict as to how the circuits have been interpreting each new law. The Commission should not take any action that would appear to weigh in on this litigation and should instead wait for the Supreme Court.
Second, 2D1.1 enhanced-base offense levels. The Commission does not need to promulgate the proposed amendment to account for the new statutory definitions for serious drug felony and serious violent felony. Instead, we ask the Commission to delete those provisions that we submitted in our written testimony entirely and let the few cases that would normally be assigned those base offense levels play themselves out.

The Guidelines and statutes already provide sufficient increases for when a person commits a drug crime resulting in death after previously sustaining a prior conviction. These base offense levels are frequently misapplied and deleting them would be the simplest way to account for the new First Step Act definitions and would better ensure that people are only being subject to enhanced base offense levels if they are also subject to the enhanced statutory penalties.

Third, counterfeit pills. We urge the
Commission to reject the proposed two-level enhancement. Defenders do not dispute that our country faces a public health crisis and that drug addiction and overdoses pose critical public health challenges. We have learned, however, as Ms. Freedman just said, that ratcheting up criminal penalties in response to such challenges does not remedy them. It does however result in unjust punishment that takes years to unwind.

As the Commission recognized last cycle when it rejected a strikingly similar proposal, the proposed enhancement lacks an adequate mens rea requirement that we've talked about today. This standard proposed, which failed to distinguish between different gradations of conduct and culpability. As DOJ as recognized in its letter to the Commission, the reason to believe standard has already proven difficult to apply and will likely spawn confusion, litigation, and unwarranted disparity.

The proposed amendment would also entrench broad negligent-based sentencing in the
guidelines right as the Supreme Court has repeatedly re-emphasized the fundamental importance of mens rea in our criminal legal system. Indeed, the Department's most recent letter to the Commission has already foreshadowed the government's litigation strategy should this proposed amendment be promulgated. The government would argue that the presence of fentanyl in counterfeit pills is so well-known that this enhancement should apply in every single counterfeit case.

The dangerousness of fentanyl and its analogs is already more than captured in the drug guidelines and the statutes, and history and data confirm that increasing penalties in these cases would not reduce the availability of counterfeit pills or mitigate our country's increasingly tainted drug supply. I heard Ms. Freedman concede today that adding a plus-two level upward adjustment would not cause one overdose death to be avoided. For these reasons, the Commission should not promulgate this amendment. I welcome
your questions.

CHAIR REEVES: Thank you, Mr. Caruso.

Turn to my fellow commissioners. Yes, Ms. Laura Mate?

VICE CHAIR MATE: Thank you, Mr. Caruso. I found your testimony, as I always do, very helpful. I had a question about 2D1.1. I mean, as you know, we are not required to tether 2D1.1 to statutory safety valves. We have the query of the wisdom, but we have the power to tether or untether 2D1.1's safety valve to whatever the Supreme Court decides in Pulsifer. I guess one question I have is, in terms of kind of implementing Congressional intent. Maybe there was a scrivener's error or something, but is there any real way that we can think that Congress intended for the safety valve factors to be conjunctive.

The reason I ask that is -- you probably saw in the preamble, it's our amendment. We kind of lay out the numbers there. Of 17,500-ish drug traffickers, if the factors are
conjunctive, only 300 people don't qualify for
the safety valve. Like everybody qualifies for
the safety valve. It almost seems like an
elephant in a mouse hole right now. Obviously,
Congress intended for it to be broader, right?
But I think the numbers are -- the old safety
valve would be 4,000 would not qualify and
disjunctive 2,000 would not qualify, and then
300. It just seems so low. Does Congress intend
to get rid of mandatory minimums in the drug
context altogether? Wouldn't we have seen more?
So I guess I'd love your thoughts on that.

MR. CARUSO: Yes, and I appreciate the
question by Chair Murray. One, I'm not in a
position to say that Congress makes scrivener's
errors in important statutes like this. Two, I
think we should also step back and recognize -- I
think you have been or the Commission has, that
the spirit of the First Step Act was to reduce
the severity of the guidelines, as almost
everybody, including this one, has recognized.
While we might debate other terms of art and
whether Congress had made a mistake. When we're talking about the words and or or, I think we're in a completely different category.

For better or for worse, I'm a product of Florida State public schools, and for me and has always meant conjunctive and or has always meant disjunctive. And I don't see how Congress could think otherwise. As you know, I practice in the 11th Circuit, so any time I have an opportunity to stand shoulder to shoulder with Chief Judge Prior on an issue, I embrace that opportunity. I think -- obviously he was the author of the on bond Garcon majority case, and I think he, in our mind, presents a compelling statutory construction pace as to why and means and -- I can go through those if I need to, but I think you're well familiar with that opinion and all the canons of statutory construction that he discussed.

Thankfully, the 4th Circuit recently in Jones essentially provided an executive summary of the issue, which is also been helpful.
So I think we should wait and see what the
Supreme Court does. That being said, if the
Commission does not want to wait and see for all
the reasons Chief Judge Prior set forth, we do
think and is the superior reading. The one final
point I would put to the Commission as to how to
approach this issue.

Under an advisory scheme, and I'm not
telling you anything that you don't know, the
Commission's power is in its legitimacy and
credibility. I'll compliment today in this
public hearing the research and data explanation
that this body does, it's tremendous and helpful
to practitioners and to judges, I believe. But I
think weighing in on this issue certainly now
once the Supreme Court has decided to take up
this case, probably to be argued in October, a
decision shortly after that. We think the most
prudent course is for the Commission to wait and
see.

COMMISSIONER WROBLEWSKI: Can I follow
up on that?
CHAIR REEVES: Yes, you may.

COMMISSIONER WROBLEWSKI: Can I follow up?

MR. CARUSO: Of course.

COMMISSIONER WROBLEWSKI: Implicit though in your answer is that the Commission has the authority. You may not think it's wise, but I just want to clarify that. Am I reading it right that the Commission -- that you believe the Commission has the authority in 2D1.1, not in Chapter 5, but in Chapter 2 to give its own policy judgment and reflect that within its decision whether to use and or whether to use or. Within its decision whether to use and or whether to use or.

Am I getting that right? And then if I am getting that right, what does it matter what the Supreme Court says? So the Supreme Court says Congress meant and. They said and. They meant and. Okay, then it still comes back here and doesn't the Commission still have a policy judgment to make as to what is the right policy
for the two-level adjustment in Chapter 2?

MR. CARUSO: To answer the first part of your question, I think we do believe that under your broad-based powers this body has the authority to make policy under the guidelines. But to answer the second part, I'm going to refer back to my answer to Vice Chair Murray. Why you wouldn't want to do that because imagine -- and we've talked a lot today about disparity.

Well, think about the disparity that would occur if the Supreme Court decided that and means and, but this body decided that and means or. We would have circuit conflicts about who would be eligible for the mandatory minimum versus who would not get this benefit under the guidelines.

I think that would just cause chaos and I do wonder what the judges in my circuit would do with regard to not only is the Supreme Court weighed in and said and means and, but also the circuit previous had done and. There would be a real dissonance between ordinary canons of
statutory construction and the Commission's policy making. I think if I were a Commissioner, I'd be very worried about the perception of this body's legitimacy if you do go down that road.

COMMISSIONER WROBLEWSKI: Okay.

There's one other question on a different subject.

CHAIR REEVES: Yes.

COMMISSIONER WROBLEWSKI: So you're suggesting that the Commission strike from the guidelines the recidivist provision? And you say that the statutes can take care of it. I'm sure you're well aware that Attorney General Garland directed prosecutors not to charge mandatory minimums, including recidivist provisions in most situations.

I'm curious. Do you really want the government to be charging those? Do you want them to be stricken from the guidelines, and then the government would be charging those enhancements, the statutory enhancements that would apply? Is that really your preferred
policy?

MR. CARUSO: That is not my preferred policy, but I'm old enough to remember the Holder memo, and in my district how that memo was not strictly followed by line AUSAs. I think this is a real issue, and Ms. Freedman referred to by the part of the charging memo regarding crack cocaine. Attorney General Garland issued these memos, and we're very pleased with the provisions of those memos. In particular, the not charging mandatory minimums.

It's yet to be seen how that plays out district from district and whether that guidance is followed because I think we all can agree there's no mechanism in my district that if the U.S. Attorney is not following the Garland memo that I can take an appeal to Main Justice. While I agree with what Attorney Garland said is good policy, I think it's too soon to say how that's going to play out on the ground.

CHAIR REEVES: Vice Chair Mate?

VICE CHAIR MATE: Thank you. Thank
you for your testimony today. We appreciate it.

I have a follow-up question on the 2D and the striking. If we didn't strike 1 and 3, but 1 is made clear that those enhanced base offense levels only apply based on offense conduct. Is the language we have in our proposed amendment adequate to accomplish that, or is there different language we should be looking to?

MR. CARUSO: Thank you for that question. I think the language you should be looking to is found in 1(b)1.2(a), and that provision provides -- you determine the offense guidelines section in Chapter 2 applicable to the offense of conviction, i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted.

We think that type of language will present more clarity because as you know in our statement -- while we say on the one hand that the work that these base offense levels do is contained in other guidelines and statutes. They are misapplied, and we would want to -- if you
don't eliminate that to make clear that it's based on the offense of conviction.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: Mr. Caruso, to shift gears back to the pills. U.S. Attorney Freedman painted the contrast for the need to differentiate between two scenarios, and she talked about where there's sort of a knowing buyer and seller of an illicit substance and what's very predominant in the fentanyl context, which is this misrepresentation idea where two milligrams is a lethal dose. But it's packaged in non-lethal form of controlled substance in pill form, and of course, what's interesting is we're not writing a blank slate.

The Commission, with the currently drafted enhancement, appear to be trying to get at some kind of that differentiation. I'm curious if you think the fact that it's only been applied at a one percent rate because it is very difficult to qualify. Is that sufficiently getting at that compelling interest and
differentiating between those two scenarios?

MR. CARUSO: I think my answer to you may sound like questions to you, and I don't mean that. On the one hand, I haven't seen the data about how many times the government has sought this enhancement and failed. I would like to know that information because just knowing in the abstract if a probation officer hadn't recommended that enhancement, if line AUSA hadn't asked for that and it was denied because of a lack of evidence, I would want to know that.

But also, I think we don't -- as a trial lawyer, when I hear Ms. Freedman's testimony, when I read the Department of Justice's written testimony, I just think that there is a fundamental disagreement about if the fact was true how hard this would be to prove. Prosecutors all across the country every day have to prove up knowledge in a variety of contexts. I know Ms. Freedman talked about wiretaps and drug traffickers being wily and not talking them about on the phone. To be clear, those are not
my clients. I have not seen a fentanyl or an
analog case that is dependent on wiretaps.

What I do know is my clients often
carry iPhones and other cell phones and do to
their detriment. Text frequently with the people
that they're conspiring with and selling with.
They also have that source. Prosecutors would
have that source of evidence to present to a
court. Also, for better or for worse, when my
clients are arrested, most of them waive Miranda
and speak to the police.

These are certainly questions that can
be asked in interrogation, along the lines of did
you know what you were selling? Was it real or
fake? That's another avenue for the government
to marshal proof to get this adjustment.
Finally, with regard to -- I believe this was in
the Department's written testimony and Ms.
Freedman represented it earlier today, the use of
coded words and again, for all the lawyers here
and judges we know that the government frequently
employs experts, usually in the form of law
enforcement agents to decode the code our clients think they're using.

I think prosecutors do have all those avenues to prove up knowledge, whether they're trying that and being rejected or just not trying, I don't know. I would want the answer to that question before we embark on a new adjustment.

VICE CHAIR MURRAY: On the pills, I very much took your point about the point of the enhancement should not be just that oh, it's in here. Everyone knows that every oxy could be fentanyl at this point. I know you don't think we should go forward with the pills enhancement, but if we were to go forward and we were to stick with the reason to believe standard, are there factors you think it would be useful for us to kind of flesh out as examples in an application node or -- the Department has a list. I don't know if you have thoughts on what would be useful.

MR. CARUSO: First and thank you for
you've noted sort of the cognitive dissonance of Ms. Freedman's testimony where she said, "There are unsuspecting buyers coupled with everybody knows that counterfeit pills have flooded the market." I think that's a real issue that the Commission has to grapple with and whether this is going to make any appreciable difference.

The standard that the Department of Justice has proposed, I think in addition to be contrary to recent Supreme Court cases like Ruan and Rehaif, is also unworkable because as I understand the standard there are two parts. One is present with regard to every sensing issue that the party has to prove by preponderance of evidence. So that means more likely than not. Now, this new rebuttable presumption involves reason to believe. Defense lawyers would be in the position of having to prove that it's more likely than not our clients did not have a reason to believe --

VICE CHAIR MURRAY: Oh, I'm sorry.
Can I interrupt you?

MR. CARUSO: Yes.

VICE CHAIR MURRAY: I was saying in the -- maybe that wasn't it. In the event that we reject the government's proposal, we stick with the reason to believe with the burden of proof on the government proposal, that we had initially promulgated. Not the government's proving the burden.

MR. CARUSO: I apologize for misunderstanding. I don't believe that there can be any factors that the Commission could flesh out. Again, because I think if this adjustment goes forward, there would be a default in an almost automatic plus-two in all of these cases. Again, because as we heard, as the defenders acknowledge, as the Department acknowledges, this is so commonplace that everyone knows.

So for our clients not to receive this adjustment would just be nearly impossible, and it would essentially just be a new base offense level for counterfeit pills.
VICE CHAIR MURRAY: You think in general your clients do know that they're probably marketing fentanyl?

MR. CARUSO: You know I can't -- obviously I'm not here to break attorney-client privilege, but I think you don't have to be a lawyer, a judge, or a commissioner to know that we're in the midst of a significant public health crisis. It's in the newspaper. It's on TV nearly every week. I think the public is well aware that our drug supply has been tainted, and that there is a risk that whatever pill they're buying on the black market may not be what they think they're buying.

COMMISSIONER BOOM: So I mean, I guess your point there then it's sort of adopts part of the Department of Justice's reasoning, which is everybody knows, and so it's just buyer beware? Because some of the data demonstrates that 70 percent, I think, of all overdose deaths in the United States are fentanyl deaths, and so how do you -- you've acknowledged, I think everyone will
keep generalizing. Everyone knows there is a public health crisis, so what do we do about that?

MR. CARUSO: I think there is what the big we and what the small we does. So the big we -- I know I listened to President Biden's State of the Union address and I'm appreciative that he raised the point about this crisis. I think we also know that this is a public health crisis, so when you look to federal government agencies like the Centers for Disease Control and what they're doing, when you look to state and local health agencies to see what they're doing. That is us trying to tackle this problem.

I got from Ms. Freedman's testimony today -- and I feel it too. It's not just her. A sense of helplessness. People are dying. This is a serious issue, but it's a multifaceted problem that the criminal legal system really cannot address. But we know that from decades of experience, again in the last 10 years I've been part of a national and local efforts to unwind a
lot of these unwise Trump policies. For example, President Obama's clemency and commutation initiative, Drugs Minus Two, First Step litigation.

So we believe that the federal government as a whole needs to work on this issue. What we're saying is that history has taught us, and my colleague, Ms. Scott, spoke eloquently about that this morning, that we can't punish our way out of this crisis. I heard Ms. Freedman to concede that earlier today. Again, your fentanyl report issued recently is an amazing piece of work. In Pages 10 to 12, you all set forth all the statutory and guideline provisions that are out there, are ready to punish fentanyl and fentanyl analog traffickers.

At the end of the day, it is up to each AUSA and each defense lawyer to advocate under 3553(a) for a sentence, and it's up to the judges who have been appointed and confirmed, and we trust to reach those decisions. In addressing this issue, I would also ask you to look at the
racial disparity of the people who are being
sentenced under these guidelines.

I do disagree with Ms. Freedman when
I thought I heard her say that there was not a
disparity issue here. I think the data will show
that the defendants prosecuted in fentanyl and
fentanyl analog pieces are primarily people of
color. We know that judges are bearing downward
in those cases, but ultimately at the end of the
day, the Department of Justice and U.S. Attorneys
have adequate tools to address this problem from
a criminal legal standpoint.

CHAIR REEVES: Any further questions
for Mr. Caruso? Thank you, Mr. Caruso, for your
testimony.

MR. CARUSO: Thank you.

CHAIR REEVES: Our seventh group of
panelists will provide us with perspectives on
this issue from two of our advisory groups.
First, we will hear from Marlo Cadeddu, who
serves as the 5th Circuit's representative to the
Citizen Commission's Practitioners Advisory
Ms. Cadeddu is a solo criminal defense practitioner who handles federal cases across the nation. Ms. Cadeddu has previously served as a steering committee member of the American Bar Association's Death Penalty Representation Project.

Second, we will hear from Jill Bushaw, who serves as chair of our Probation Officers Advisory Group. Ms. Bushaw serves as Deputy Chief, United States Probation Officer for the Northern District of Iowa. She joined the U.S. Probation Office in 2003, and has previously held positions as a citizen gatherer and specialist and as a supervisory and assistant deputy chief in the Presentencing Investigation Unit. Ms. Cadeddu, we're ready to hear from you.

MS. CADEDDU: Thank you, Judge Reeves, and thank you, Commissioners. I'm afraid you're going to be seeing me three times today.

CHAIR REEVES: That's not enough.

MS. CADEDDU: Oh, I think it's plenty.
I represent the POAG, as you know, which is a group of private practitioners who represent criminal defendants. We very much appreciate the opportunity to present our views to POAG on these issues. Today, I'll be talking about fake pills and First Step Act drug offenses.

I'll start with fake pills. The POAG understands the DEA's concern about the proliferation of fake pills that contain fentanyl and the public's concern about the sharp increase in deaths related to these synthetic opioids containing fentanyl. Based on POAG members' experiences with the drug guidelines, however, we cannot support the new two-level enhancement proposed in 2D1.1(b)(13).

First, it is unclear what evidence supports the creation of this new enhancement with its reduced mens rea standard. Other than increases in the availability of fake pills and the increase in overdose deaths, which are, we all agree, horrifying and certainly a public health crisis.
There does not appear to be any evidence-based reason or empirical basis for establishing this new two-level enhancement. The Commission has not explained what correlation there is between this new enhancement and the DEA's concerns.

Second, the proposal sweeps far too broadly. In POAG's experience, this enhancement could apply in any case where a defendant provided pills that were not directly obtained from a pharmacy. I think you mentioned earlier, we do believe that this reason to believe standard is akin to a strict liability standard that would apply essentially in any case where a pill was not obtained through legitimate legal source, such a pharmacy, and perhaps even where it was obtained from, for example, a Mexican pharmacy or from a friend who claimed that they had obtained it from a pharmacy. Each of those persons could be subject to the new two-level enhancement.

With regard to the mens rea standard,
the Department is once again proposing a rebuttable presumption, which I addressed earlier today in the context of firearms. The government proposes that this enhancement doesn't apply unless the defendant can prove by a preponderance that he or she did not know or had no reason to believe the substance contained fentanyl or a fentanyl analog.

Our criminal justice system, again, is based on the government bearing the burden of proof and the POAG would strenuously disagree with the government seeking to shift its burden of proof in this manner. We believe that that's improper and without legal foundation. We believe that the existing four-level enhancement adequately addresses the concerns regarding fentanyl pills using an appropriate mens rea standard, and for that reason, we oppose this amendment.

With regard to the First Step drug offenses and the safety valve, the POAG supports the Commission's amendment of 5C1.2 to reflect
the provisions contained in the First Step Act, including the proposed amendments, to the commentary, and conforming changes to 4A1.3. As the Commission is aware, since the date of submission of our written testimony, the court has granted cert. and Pulsifer.

Although we initially requested that the Commission consider amending the commentary to provide that the criteria should be read conjunctively. Obviously, we now all await the Supreme Court's determination.

However, with respect to amendments to 2D1.1(b)(18) and 2D1.1(b)(6), the POAG continues to endorse option 1, and asks the Commission to consider providing guidance in the commentary to these guidelines. That as to the applicability of the specific offense characteristics, the criminal history criteria of 3553(f)(1) that are referenced therein should be read conjunctively rather than disjunctively.

As the Department of Justice pointed out in its written testimony, the two-level
reductions in those Sections of 2D1.1 are available in narcotics prosecutions whether or not the defendant is subject to a statutory/mandatory minimum and can avail himself of the safety valve. Those provisions serve arguably different purposes than the safety valve.

It's the position of the POAG that those reductions should apply as broadly as possible. In addition, the POAG believes the Commission should provide guidance on what constitutes one-point, two-point, or three-point offenses to make clear that those offenses for the purposes of those sections of 2D1.1 should not include old or otherwise uncountable sentences. If the court or if rather, the Commission -- sorry. I'm used to doing arguments so I'm just not used to calling you the Commission.

If the Commission were to do so, that would make these terms consistent across the guidelines and provide uniformity in application.
Thank you very much for the opportunity to provide our testimony.

CHAIR REEVES: Thank you, Ms. Cadeddu. Ms. Bushaw?

MS. BUSHAW: Good afternoon. Not sure of the microphone again.

CHAIR REEVES: I believe you might be able to use that one.

MS. BUSHAW: Okay, I'll just go with that. Thank you again for the opportunity to testify before the Commission today on behalf of the Probation Officers Advisory Group. I'm going to talk to you today about safety valve and fake pills, starting first with the topic of safety valve. Due to unforeseen delays since the First Step Act was signed in 2018, districts have been employing different methods to account for the fact that the sentencing guidelines have not yet been amended to correspond with the current version of 18 U.S.C. 3553(f).

The initial issue districts had to address was whether they should continue to apply
the guidelines as they appear in the 2018 and 2021 Guidelines Manual, follow that same process but then account for the reduction by way of a two-level variance, or apply the two-level reduction, treating the current version of 18 U.S.C. 3553(f) as being incorporated into 5C1.2.

POAG supports the proposed amendment as it will resolve that initial ongoing issue.

POAG also discussed the possibility of Congress further amending the statutory language under 3553(f), leaving again that period of interpretation between statutory changes and guideline changes. Therefore, POAG inquired if the best format moving forward would be to instead refrain from citing the statutory language within the guidelines and simply refer to the statute instead.

However, as you are well aware, another application issue remains, and that is the conjunctive and disjunctive analysis in relation to the criminal history criteria established by the First Step Act. POAG's
discussions regarding this matter largely focused on the results and districts where case law follows the conjunctive analysis of the statute. In those districts, examples were discussed in which defendants who have a serious and lengthy criminal history were eligible for safety valve relief, meaning that the reduction essentially no longer applied to defendants who had a reduced criminal culpability. These results are counterintuitive to the intent of safety valve and resolving that issue was the primary basis that POAG recommended option two. Some members of POAG expressed concerns that procedurally this may become very complicated. With option two in some circuits, defendants wouldn't be eligible for statutory relief or the guideline reduction, but in other circuits defendants would be eligible for statutory relief, but not eligible for the guideline reduction. However, with option two the guideline application would at least be consistent, regardless of the circuit within
which the defendant was charged.

POAG maintains the recommendation for option two, but we also recognize now that the Supreme Court will soon weigh in on the statutory matter. Now that proposed amendment under 2D1.1 addresses the recidivist penalties pertaining to definitions of serious drug felony, felony drug offense, and serious violent felony, there have also been questions in prior cases regarding the term a similar offense. This amendment clearly resolves that issue moving forward.

Finally, another proposed amendment under 2D1.1 is set forth under Subsection (b)(13) to add an alternative two-level enhancement for drugs that are represented or marketed as a legitimately manufactured drug. POAG believes that a strict liability-type approach is appropriate, given the extreme risks associated with having the fentanyl pressed into pill form. The dealer should receive a higher total offense level because of the risks he or she has introduced into the market.
Without the proposed amendment, those distributing those kinds of pills aren't being held accountable for the fact that they ignored the potential dangers of distributing such a substance. For a victim to suffer overdose or death, the result is the same regardless if the dealer who sold the pill knew it contained fentanyl. The dealers who distribute these pills take advantage of the fact that the users are under the impression that the pills are safe and legitimate.

Along those same lines, POAG also advocates for this enhancement to be offense-based rather than defendant-based, meaning Subsection (b) would begin with "if the offense involved" so those who manufacture these pills for distribution are held accountable for their role in the process as well. Then we also inquired if there could be some clarification to the terms represented and marketed and how they're intended to apply.

For example, is the fact that the pill
resembles a legitimately manufactured pill, is that sufficient or is more information needed? Regardless of the final decision regarding this amendment, POAG recognizes the harm these pills have on our communities and appreciate the attention to this matter. Thank you.

CHAIR REEVES: Thank you. Any questions from my fellow commissioners? Yes?

VICE CHAIR MURRAY: Thank you so much for your testimony. I had a question for Ms. Bushaw about the minimum offense level 17 and Section 1.2. I know POAG took the position that the minimum offense level should be kept at 17 in order to keep the gradation between defendants that's lower from a higher criminal history.

Why don't the guidelines take care of that on their own regardless? You know what I mean? So Congress didn't want the total punishment to fall below a certain threshold. This used to correspond to 17, but no longer would. Why can't we just keep that floor there and allow for the guidelines to take care of
predations?

MS. BUSHAW: Just keep the 17? Why can't we just keep the base level 17 or are you asking should we just create a 24-month minimum?

VICE CHAIR MURRAY: Right, exactly. Different month minimum.

MS. BUSHAW: Okay, yes. We discussed that. We just didn't see that there was a need to change. We thought the way it was working now was fine. Obviously, more people are going to be eligible for safety valve with the new provisions, and some of them are going to have higher criminal history categories, but keeping it at a minimum offense level of 17 would just account for that and the varied criminal history categories that could present.

CHAIR REEVES: V.C. Mate?

VICE CHAIR MATE: Thank you. Thank you both for your testimony today. We really appreciate it, but I had one little tiny technical question for you, Ms. Bushaw. On the 2D1.1 height and base offense levels -- kind of
the same question I asked at the last panel, which is -- it sounded like POAG was in favor of us adding the language that's there. If we're wanting to make clear that we're capturing the conduct of the charged offense and the 851 context.

Do you think we need additional language to clarify that, or is what we've proposed sufficient to capture that?

MS. BUSHAW: For the recidivist penalties?

VICE CHAIR MATE: Correct.

MS. BUSHAW: It's always been my understanding it was offensive conviction-based based on how the guidelines are currently written. There has been case law on that issue though, so I think that in order to resolve that issue and make it more clear it would probably be a good idea to clarify that a little bit more within the current language.

VICE CHAIR MATE: Thank you.

VICE CHAIR MURRAY: A question for
both of you. If we wanted to clarify that our
reason to believe -- and this is in the fake pill
context. Our reason to believe mens rea
standard, we were to reject the government's
suggestion that we shift the burden of proof. We
stick with our proposal and use reason to
believe. Are there specific ways you think that
we could flesh it out in an application node to
make clear that we are not trying to capture --
I understand POAG's recommendation, but we, with
that recommendation or not, trying to capture
everyone.

See what I'm saying? So I understand
that it is well-known in the press, et cetera,
that many or the most oxy, Adderall, et
cetera, pills that are available on the black
market contain fentanyl. If we're not trying to
capture everyone because of that general
knowledge, but we're trying to capture people
who, for example, have had sold part of a batch
of pills with adverse results and then continued
to sell the rest of the pills. Are there
specific factors you think that we could outline
to avoid capturing everyone?

    MS. CADEDDU: I think that that
determination would be so fact-intensive that it
would be very difficult to set out a set of
factors to say that this would be an acceptable
-- this would not constitute a reason to believe
and this wouldn't constitute. You'd sort of have
to end up having a laundry list of the types of
facts that would constitute reason to believe.

    It's our position at POAG that that is
just unworkable and it's going to apply too
broadly to everyone, and so we advocate, as you
know, for maintaining the current mens rea. I
think the prior panel has noted, the Department
of Justice has a lot of tools in its arsenal, and
there are a lot of enhancements that it can
apply. I'm not sure why that particular
enhancement hasn't been utilized, but it
certainly is available and it can elect to pursue
the existing enhancements already. We don't see
the need for an additional one.
MS. BUSHAW: POAG's position, and this has actually evolved a little bit as we've discussed further, and we are leaning towards the reason to believe isn't needed to be included in the guideline itself. When we talked about this enhancement, first what we talked about was do we even need this enhancement in the guideline? Yes, or no? POAG supported it being included for the very reasons the DOJ stats indicated and how dangerous it is and defendants who were selling these drugs need to be held more culpable than the ones who aren't.

After we thought that this definitely was an enhancement, we would support then we focused on how it should be written, and then we just have to think about what kind of facts do we usually have when we see these cases. I mean, it gets manufactured, it goes from dealer one to dealer two, dealer two to dealer three, dealer three to user, who has an overdose. What facts do we have when we write the report? So when reason to believe is in there, we need knowledge
on what the defendant knew and what they were
doing when we write the report.

    It's not likely we're going to have
that, so I think that's part of the reason
Subsection (a) is not applied very often as well.
If Subsection (b) is intended to capture this
type of conduct, we're leaning towards it doesn't
need to be in there. This would just score in
circumstances where a drug was sold. It had the
appearance of being legitimately manufactured,
and it contained fentanyl, and then the two-level
increase applies.

    COMMISSIONER WONG: Sorry. What was
that language look like? Can you say that one
more time? You're leaning towards the --

    MS. BUSHAW: Of not including the
reason to believe provision.

    COMMISSIONER WONG: And the language
would now be --

    MS. BUSHAW: It would be if the
offense involved a representation or marketing as
a legitimate known manufactured drug or mixture
of substance containing fentanyl, fentanyl analog, and it was not a legitimately manufactured drug. Then increase by two levels.

That's the only two things we would consider when we scored it. Did it appear to be legitimately manufactured and did it contain fentanyl? Because honestly when we write these cases, the Department of Justice testified to it earlier, they use code words. You don't have a lot of the information, so if this is intended to account for that behavior it needs to be written in such a way that we can apply it. I don't know that we would know defendant's position until we scored it. Maybe they objected to it, and it was addressed at sentencing.

COMMISSIONER BOOM: Just to follow up and clarify then, POAG's position is essentially a two-point enhancement based on the offense, no mens rea. It's essentially a strict liability. If fentanyl is in the pill or whatever it was, there's two points.

MS. BUSHAW: Yes.
VICE CHAIR MURRAY: And if it looks like a --

COMMISSIONER BOOM: And if it looks like --

MS. BUSHAW: If those two prongs are met, then we would recommend a score.

CHAIR REEVES: Would that include anybody who sells it? I mean, anybody who passes it on from one person to the other? Either for sale or for whatever? I could imagine young people giving it to someone, a friend, because they got it from someone, and they all thought it was Percocet. And they've used Percocet before, but this is not Percocet. This has fentanyl in it. So you have one high school kid give it to another high school kid, and the second high school kid dies because of the fentanyl. Would that two-level enhancement that you've been speaking of automatically apply to the person A who gave it to person B?

MS. BUSHAW: Yes. I think that's probably a pretty standard practice of how it
works. They just keep getting passed on. If we believe the people putting these in the market are accountable, then we think it's essential to be written that way.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: Ms. Bushaw, can you talk about when you're scoring or when you're preparing presentence reports, maybe you alluded to this a little bit. But why it's difficult for a probation officer to assess that four-point enhancement that's currently in the guideline? Our previous speaker said there's all kinds of evidence in the case. Maybe there's a custodial interview where they've acknowledged it. What kind of difficulties or challenges on the ground level have you encountered?

MS. BUSHAW: It's just such a fact-based enhancement. If they knowingly misrepresented and knowingly marketed the substance -- I think with Subsection (a) specifically, they're dealing drugs that they don't necessarily know have been laced with
fentanyl. Whereas with Subsection (b), they're dealing a legitimate pill.

    Again, they may not know it's got fentanyl in it, but the harm is a little bit greater with Subsection (b) because (a) is you're buying drugs and you intend to use drugs. (b), you're buying what you think is a safe pill that maybe was manufactured, and you have that level of trust in the pill that it has a certain amount of drug in it. That's the aggravating factor under Subsection (b). Like the Department of Justice mentioned before, the amount of information we have on each case varies quite a bit. But with Subsection (a) specifically, that's a case where defendants might not know what they distributed had fentanyl in it.

    COMMISSIONER BOOM: I know this is a very fact-specific question. What if the POAG's proposal also included a caveat that unless the purchaser was aware that the drug contained fentanyl?

    MS. BUSHAW: They received what they
were looking for in terms of purchasing it?

COMMISSIONER BOOM: Right. Right.

MS. BUSHAW: Is that a less serious offense?

COMMISSIONER BOOM: Right, because you were acknowledging Subsection (b) addresses a greater harm when someone who unknowingly purchases a pill that contains fentanyl, and they thought it was a really cheap oxy30. Do you think POAG's position would change if that was the case? If there was clear evidence. Sometimes there is a wiretap, and the dealer says these are great. These are loaded with fentanyl, and the buyer says oh, great. I know that's a very specific factual question, but do you think the harm is a little different there?

MS. BUSHAW: Yes, yes. And that's what we focused on when we were discussing this was the harm is different when you're selling what looks like a legitimately manufactured pill. It's absent when the circumstance that you discussed, when they knowingly purchased the
fentanyl, and that's what they were looking for.
So that type of caveat makes sense for this kind
of buying.

CHAIR REEVES: Any further questions
from this panel? Well, thank you. That
concludes our morning. We'll take a brief break
for lunch. We will resume testimony at about an
hour and 15 minutes or so. Please let's be in
our seats at 2:00, and we'll begin the next round
of testimony. Thank you all so much for your
patience with us today. We're recessed, as the
court would say.

(Whereupon, the above-entitled matter
went off the record at 12:46 p.m. and resumed at
2:03 p.m.)

CHAIR REEVES: Now, our eighth panel
will present the executive branch's perspective
on our proposed amendments that seek to resolve
conflicts among our federal circuit courts.

To present that perspective, we have
Carmen Mitchell, who serves as appellate chief
for the United States Attorney's Office in the
Southern District of Texas.

Ms. Mitchell serves as chair of the Department of Justice's Appellate Chiefs Working Group and as a member of the Sentencing Policy Group. Ms. Mitchell has over 25 years of experience as a prosecutor at the state and federal levels in Texas.

Ms. Mitchell, we are ready when you are, ma'am.

MS. MITCHELL: Thank you.

Chairman Reeves and distinguished Commissioners, thank you for the honor of appearing before you and for the opportunity to present the Department of Justice's views regarding proposed amendments to Sentencing Guidelines 3E1.1 and 4B1.2 to resolve circuit conflicts.

First, as to 3E1.1, acceptance of responsibility, we urge the Commission to resolve the disagreement among the circuits by preserving the government's discretion to withhold a third-level reduction.
The guideline currently provides that a court may grant an additional one-level reduction only upon motion of the government. That language came directly from Congress, in 2003, through the PROTECT Act.

As Congress emphasized, the government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial and permitting the government and the courts to allocate their resources efficiently.

The Department supports amending 3E1.1(b) to include the framework provided by the Supreme Court in Wade. In accordance with that standard, the government retains the discretion to withhold a motion based on any reason that is rationally related to any legitimate government end but may not withhold a motion based on an unconstitutional motive.

But the Commission should decline to define preparation for trial as it would not resolve the existing conflict amongst the
circuits. Section 3E1.1(b), as amended by the
PROTECT Act, does not focus exclusively on the
government's interest in avoiding preparing for
trial. Instead, it more generally recognizes the
government's interest in allocating its resources
efficiently. Again, the government is in the
best position to determine whether the defendant
has timely and sufficiently assisted authorities.

Lastly, amending 3E1.1(b) to constrain
the government's discretion afforded by Congress,
is unnecessary. If a district court disagrees
with the government's decision not to recommend a
third-level reduction, the court has discretion,
under 3553(a) to vary below the advisory
guideline range.

I'll next turn to the definition of
controlled substance offense in 4B1.2. The
Department urges the Commission to adopt the
definition in Option 2, that is, controlled
substance refers to substances that are either
included in the federal Controlled Substances Act
or otherwise controlled by applicable state law.
First, Option 2 is faithful to the current section 4B1.2(b) language, which defines controlled substance offense as an offense under federal or state law. Because 4B1.2(b) specifically refers to state law in defining the offense, it follows that 4B1.2(b)'s definition of controlled substance offense covers offenses involving substances controlled under federal or relevant state law.

Second, Option 1 is unduly narrow and would lead to unnecessary complexities at sentencing. If the Commission were to limit the definition to that of the federal Controlled Substances Act, litigants and courts would have to resort to the complicated categorical or modified categorical approach to determine whether a state drug statute sweeps more broadly than its federal counterpart.

Courts have grappled with slight difference between the federal and state drug schedules for cocaine and methamphetamine, for example. Some courts have even determined that
prior state convictions involving cocaine did not qualify as a controlled substance because the state definition was categorically broader than the federal definition of cocaine. Adopting Option 2 would avoid such complex litigation.

The Department urges the Commission to add language to Option 2's definition to address timing. The Commission should clarify that the substance at issue must have been controlled at the time the defendant committed the predicate offense. This will resolve the circuit conflict on the issue.

Finally, if the Commission amends 4B1.2(b) to include Option 2's definition of controlled substance, the Department recommends that the Commission add the same definition to 2L1.2 Application Note 2, without otherwise changing Application Note 2's definition of drug trafficking offense. This would promote consistency in the Guideline's manual.

And with this, I welcome your questions.
CHAIR REEVES: Thank you, Ms. Mitchell.

I now turn to my colleagues who've just had lunch too.

(Laughter.)

VICE CHAIR RESTREPO: One example of a problem I see on the horizon would be the marijuana laws, so are changing all the time in different states.

So, if we were to incorporate the definition including state predicates, wouldn't that lead to some disparities in terms of folks who may have been convicted of marijuana offenses in one state when it was legal then or another state where it wasn't legal now, as opposed to just sticking to the federal definition of a controlled substance?

MS. MITCHELL: Thank you for the question.

It would create unwanted disparities if we didn't include state law offense, and that's because there are very minute distinctions
from one state to the next or from one state to
the federal drug schedules. In that, there have
been instances where courts have determined that
for example, a state includes ioflupane in
their drug schedules and since 2015, I believe it
was; the federal Controlled Substances Act
excluded ioflupane in the cocaine definition
because it is medically used to diagnose
Parkinson's.

And so, there are some states, and
there's a case law that we have cited in our
Department letter including, out of the Eighth
Circuit, where a defendant, who actually was
trafficking in cocaine, does not receive an
enhancement in the Eighth Circuit because that
particular state statute included ioflupane, and
the federal court definition or Controlled
Substances Act definition no longer includes
that. There are several other examples.

And that is, out of the Second
Circuit, there, the New York Statute holds or --
I'm sorry, the New York Statute defines
trafficking in cocaine to include several substances that are not included in the federal Controlled Substances Act, such as the drugs HCG and naloxegol. Those were included in the state definition but not included in the federal Controlled Substances Act, and so, the Second Circuit held that the defendant, while convicted of cocaine trafficking offense, actually did not get the enhancement under the guidelines.

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: Thanks very much for your testimony. I found them very helpful.

But, I guess, one question I have about the Government's fallback argument on 3E1.1, which is that there's no real need to -- that courts can be a backstop, basically, when prosecutors are stingy about the third point. Is -- would that be reversible error?

I mean, do you think that courts have -- if prosecutors have withheld the third point for something other than an unconstitutional Wade-type factor, do you think that courts --
would courts be abusing their discretion if they accord the third point when it hasn't been moved for?

MS. MITCHELL: So, I --

VICE CHAIR MURRAY: Before the part based on that -- yeah.

MS. MITCHELL: Right. So you're saying if the court were to vary downward, would that be an abuse of discretion in appeal from that decision?

It would not because, under 3553(a), the courts and, in fact, the Department looks at the defendant who's standing before the district court for sentencing, and, of course, all of those 3553(a) factors can be looked at to see what the defendant's actual conduct was, at what point was the -- with regard to the 3E1.1, at what point was the motion to suppress litigated or the pretrial matters litigated; how lengthy were they?

And so, again, as you mentioned, in the Department's letter, we urge that the
Congress, through the PROTECT Act, provided the
government with the discretion to determine when
to move for that third level.

And we have to remember that a
defendant who pleads guilty still receives, under
3E1.1(a), receives the two-level reduction for
that acceptance, and so, here, we're merely
talking about the third-level reduction and the
government determining did the defendant plead
guilty with sufficient time to allocate the
resources correctly for -- or appropriately for
the government and the courts.

VICE CHAIR MURRAY: But what if the
Court says, on the record, I'm varying downwards
solely for one reason: because the government
withheld that third point because of a special
motion -- because they had to prepare for a
special motion?

MS. MITCHELL: You know, I think,
there, the circuits would look at what kind of
record evidence did the district court place,
with regard to its decision, on 3553(a). I'm not
sure how the circuits would go if it said that was the sole reason. Of course, right now, the majority of circuits hold that it's appropriate because it's not an unconstitutional motive for the government not to move for that third-level reduction.

And so, in the majority of circuits, that would be okay, and it -- for the government not to move because it's not based on an unconstitutional motive, rather it's a legitimate governmental reason for legitimate government, and then, again, that's the allocation of resources.

CHAIR REEVES: Yeah.

COMMISSIONER BOOM: Thank you for your testimony.

What guidance does the Department of Justice give to your US Attorneys' Offices related to accept -- at the third level for acceptance of responsibility? Is there a policy? Is there some kind of, you know, guidance? Is it a memo?
MS. MITCHELL: Thank you for the question.

There's currently not a Department-wide guidance memo with regard to the third-level reduction. Again, so, if that person's in a circuit that holds one way or the other, they're going to, of course, follow their circuit law, but once this Commission, if it determines the decision -- makes the decision on this third level, there could be, ultimately, guidance in the end.

But what we would -- do have our district guidance, right? And so, there could be in place, in certain US Attorney's Offices, some district guidance on how to proceed. Just currently, there's not Department-wide guidance because there is -- the circuit is split on the issue right now.

COMMISSIONER BOOM: I guess it -- as a follow-up question, you know, the -- I believe it was in the Defenders' submission -- state that it varies widely, district to district, whether
the Department moves for the third level decrease
for acceptance of responsibility. And so,
therefore, it's important for the Commission to
set some parameters or try to give some
structure.

And so, what would be your response to
that, where, let's just say, if you're in the,
you know, Eastern District of Kentucky, where I
am, you know, they routinely, even if you get to
the eve of trial -- this is just hypothetical --
will move for the third level, or let's say,
versus the Western District of Kentucky, where I
also sit, that they, you know, almost never --
they sort of have a, you know, a rule -- and,
again, this is purely a hypothetical.

But the argument is -- I think that it
was made in the Defenders' submission -- that it
really varies widely district to district, and
so, that creates a lot of disparity.

So how do you respond to that?

MS. MITCHELL: Well, we urge -- the
Department urges the Commission to include the
Wade standard by the Supreme Court, again, just saying that it's okay if the government withholds that third level, so long as it's rationally related to legitimate government end, and also -- and not in an unconstitutional motive.

And to that -- answer to that question as well, is, you know, the Department urges -- it's going to be based on the specifics of a particular fact. And so, I think it would be difficult line drawing should the Commission adopt a definition of preparing for trial.

I think that would be difficult line drawing because it's going to depend, case to case, and it's going to depend at -- if, for example, we're litigating a motion to suppress. There, it depends on the case, where we might have to call victim -- witnesses, and you're getting the victims involved early in pretrial litigation, or you might be prepping and providing testimony by expert witnesses, and so, there's that -- all that preparation to prepare those witnesses to testify; you're doing the
legal research and writing for those.

And so, again, I do think that, so long as we rely on the Wade standard, it's constitutional, and it would depend by the defendant standing before trial, before the sentencing court, and the court itself, the district court.

COMMISSIONER BOOM: And I think, certainly, it's very fact-driven, but I don't think the Wade standard necessarily supplies a standard, other than so long as it's not unconstitutional, right? I mean, so there's still no specific guidance from the Department to the various districts, US Attorneys' Offices. Do you understand my --

MS. MITCHELL: I do.

COMMISSIONER BOOM: I mean, that's pretty wide open, right? I mean, it's, basically, as long as it's not -- there's no unconstitutional motive. That's not really guidance, but I certainly get your -- you know, I understand the point that it is very fact-driven
in many circumstances, but I'm just curious to see if there's any guidance that's provided by the Department of Justice.

MS. MITCHELL: You know, certainly, Congress, again, provided that discretion, so it's a Congressionally afforded discretion to the government, and that's why they expressly stated upon motion by the government. And so, that's been since 2003, and it's been -- it's been workable since then.

COMMISSIONER BOOM: Thank you.

COMMISSIONER WONG: Just a follow-up --

MS. MITCHELL: Yes.

COMMISSIONER WONG: -- on Judge Boom's question. Is there -- I'm trying to figure out -- is there any kind of middle ground, here, at all? The government doesn't really provide a fallback option to the Wade standard, which is really an unbridled government discretion standard, because it's really stating what's obvious, right? The government can't act
unconstitutionally.

Is there some fallback formulation of preparing for trial that would provide more guidance but in a way that's still -- perhaps more so than the proposal for what that definition would look like -- afford sufficient discretion for the government, while also some parameters and uniformity?

MS. MITCHELL: I do think it would be difficult line drawing. So, for the proposal, when it talks about early, you know -- again, define early or the term that's used ordinarily, and so, I think, the proposal still makes difficult line drawing on where is that line. And it just would provide more opportunity for district courts to interpret it differently.

And so, I think, you know, mostly, we're looking at allocation of resources, not simply pretrial matters. And so, I think it would be difficult to draw the line between what is early preparation and one of the counter -- the counterproposals to the proposal, I think,
perhaps, by the Defenders', was to make it, instead of time intensive question, to make it more of a purpose-driven, and I think that, too, is an unworkable solution because, there, you're getting into the specifics of the confidential preparations that the government is making.

COMMISSIONER WONG: What about -- and just thinking of some ideas -- but the government, in some contexts, has proposed rebuttable presumptions, and is there a way that you can provide some guidance and uniformity among courts with a presumption that would still leave opportunity for exceptional circumstances, where not every case is the same and you don't have that fixed, rigid definition of early, but there's some guiding principles there? And then the government could justify it based on some extraordinary circumstances. I don't know. Is there -- is there some middle ground at all between the Wade standard and the proposal?

MS. MITCHELL: I appreciate the question and the Department would be happy to
follow up with written testimony on that.

However, it really is just about the
not constraining the government to parameters,
such as the defining of the amount of time
they've spent on the preparation and at what
point -- again, district court's dockets vary,
and so, litigating some of these pretrial
proceedings are going to vary from one courtroom
to the next.

And so, we would just lean back,
certainly, on the discretion provided us by
Congress, but, certainly, I could follow up with
some Department testimony if there was some
middle ground there between the Wade standard and
the proposal.

VICE CHAIR MURRAY: What about pre and
post-trial? I mean, you could -- you could -- it
would make sense of the preparing for trial
language, and arguably, everything pretrial
happens in the shadow of trial, if you're heading
to trial, whereas, you know, sentencing appeals
really don't.
MS. MITCHELL: Right.

VICE CHAIR MURRAY: With a white line, it'd be easier to administer.

MS. MITCHELL: Right. And so, as the Commission knows, there's a circuit conflict on that as well, with regard to sentencing and what about when there's objections to enhancements and the like, or relevant conduct.

And so, really, the Department urges the Commission to adopt the majority of circuits that hold that, still, an allocation of resources, that it's still within the government's discretion to determine how much resources it has allocated in preparing for that challenged sentencing hearing.

Oftentimes, let's say, for example, in a fraud case, if there's a -- there's a guilty plea, but there's a challenge to the loss amount or the actual amount, the government is still having to bring victims into the courtroom to testify in a fraud offense. And so, it could be that even though there was a guilty plea at
sentencing, that could add days, with regard to proving up the amount of loss. Likewise, with relevant conduct, or some of the case law I read on the circuit conflicts, was where a defendant might plead guilty to a drug trafficking but challenges the amount of the drug, right? Of course. Or perhaps, was it tested accurately?

And so, one of the cases in the Department's letter is a case where the defendant challenged the type of drug and the weight, and so, the government had to expend resources in getting an expert witness, following the chain of custody to go get it independently tested, and so, therein, the government is still allocating its resources and spending time on that.

So the Department urges the position that the majority of the circuits have taken on that issue.

CHAIR REEVES: Is there any additional questions?

Maybe you didn't have the hot seat after all.
(Laughter.)

CHAIR REEVES: Well, thank you for your testimony, Ms. Mitchell.

MS. MITCHELL: Thank you very much.

CHAIR REEVES: For those who are just tuning in, we have with us on this ninth panel, the Federal Public Defender's perspective. It would be presented -- again, we're joined by Michael Caruso, who serves as Federal Public Defender for the Southern District of Florida.

In that capacity, Mr. Caruso supervises over 50 assistant defenders who handle a wide range of cases, including those involving narcotics. Mr. Caruso also serves as chair of the Federal and Community Defenders Sentencing Guidelines Committee.

Welcome back, Mr. Caruso.

MR. CARUSO: Thanks for having me back.

(Laughter.)

MR. CARUSO: Thank you, Chair Reeves, Vice Chairs, and Commissioners, for inviting me
1 to testify again, today, on two important issues
2 that require Commission action.
3
4 First, the definition of controlled
5 substance offense in 4B1.2. The phrase
6 controlled substance offense appears nowhere in
7 the career offender directive or anywhere else in
8 the Sentencing Reform Act.

9 In identifying prior offenses that
10 must trigger a near maximum sentence, 994(h)
11 refers generally to crimes of violence, then
12 lists five specific federal drug trafficking
13 felonies. The phrase controlled substance
14 offense was a shorthand the Commission chose in
15 attempt to capture the offenses listed in
16 994(h)(1)(B) and (2)(B).

17 Over the years, the Commission
18 expanded the list of controlled substance
19 offenses and explain that even though 994(h) did
20 not mandate a near maximum sentence for these
21 other offenses, the Commission was acting under
22 its general guideline promulgating an amendment
23 authority. If the Commission has the authority
to expand the list of offenses that trigger
extreme federal penalties, it also has the
authority to contract them, all the way down to
what is required by the mandate.

We are gratified to see that the
Department of Justice acknowledges the legitimate
concerns about the severity levels associated
with the guideline's recidivist provisions, that
the career offender guideline, in particular, has
been the subject of considerable criticism for
producing overly long sentences, and that decades
of research show that the career offender
guideline produces a clear racial disparity in
its application. We stand together on these
issues.

Based, in part, on these joint
concerns, the Commission, in 2016, called on
Congress to amend 994(h) to narrow the categories
of individuals that come within the directive.
While the Commission waits for Congress to narrow
the directive, nothing prevents this body from
dialing the career offender guideline back to the
current directive.

Given the data and the moral imperative of the guidelines not impose punishments that are unduly harsh and exacerbate racial disparities, the Commission must not wait to contract the definition of controlled substance offense. And the simplest and the most parsimonious way to do so would be limit it to those offenses the phrase was originally designed to capture: the federal felonies listed in the directive.

We do recognize, however, that this proposal, if adopted, would significantly narrow the reach of the guideline, but, as the Commission acknowledged in its 2016 report, the evidence plainly supports this restriction. To do less would be to continue to maintain the unsupportable status quo.

If the Commission insists as retaining state drug offenses as predicates, it must limit the definition of controlled substances to federally controlled substances. As we set forth
in our written statement, controlled substance
has a clear definition under federal law.
Expanding the definition to any substance a state
elects to regulate would not only vastly expand
the reach of this unjustifiable guideline, but it
would do so with no clear limiting principle and
spawn litigation.

The second guideline that requires
Commission attention is 3E1.1, acceptance of
responsibility. We ask the Commission to clarify
two aspects of this guideline. First, we agree
with the Commission that you should clarify the
term preparing for trial. Second, the Commission
should slightly revise the existing commentary at
Application Note 6 to clarify that the government
should not withhold the third level for interests
not identified in 3E1.1(b).

I just described in my written
statement how the 3E1.1(b) motion is being used
some by some prosecutors on the ground, how,
despite the guideline's plain language and the
Commission's clarifying efforts, some prosecutors
still withhold or threaten to withhold the 3E1.1(b) motions for reasons far beyond obtaining a timely plea and avoiding a trial, for leverage. The reasons include for legitimate and critical conduct that occurs post-plea, such as insuring a person's right to be sentenced on accurate information by challenging unreliable or incorrect information in the PSR.

Prosecutors also threaten to withhold the 3E1.1(b) motion for pretrial litigation that has nothing to do with trial and seeks to vindicate our client's constitutional rights, including for motions to dismiss for lack of jurisdiction, to move to suppress for evidence unlawfully obtained, and for ask for discovery regarding exculpatory evidence. This conduct is critical to ensuring that our client's rights are protected and that any subsequent conviction, whether by plea or trial, is warranted.

We've asked that the Commission focus its examples of pretrial work that does not constitute preparing for trial on the purpose of
that work and not on its timing, in other words, a functional approach. And I want to offer some additional context on why that is important.

As public and community defenders, our clients never choose us. A judge appoints our clients to us. We meet them on one of the worst days of their lives, invariably, in court or in jail. Our clients must get to know us, to trust us, have confidence in us, and be able to discuss the details of their case and life-altering options with us. In many of our case, it's about our clients choosing the least worst option for them. If we are doing our job right, that takes some time.

None of the changes Defenders propose would alter the meaning of 3E1.1(b) or amend the scope of the government's discretion to move for the third level. These changes would merely confirm what should already be clear: that the government's discretion to withhold the third point must be exercised within the guideline's limits and should not be used to prevent good
faith litigation unrelated to timely pleas.

I welcome your questions. Thank you.

CHAIR REEVES: Thank you, Mr. Caruso.

Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: How are you?

It's good to see you again.

MR. CARUSO: Good to see you again.

COMMISSIONER WROBLEWSKI: I've got a couple questions. Have -- I just want to clarify what I -- just clarify what you said.

Were you suggesting that you're asking the Commission to say that any -- that for a prior controlled substance offense, that the person must be convicted of a federal statute? Is that -- is that sort of your lead position, and then, your fallback is just described in the federal law?

MR. CARUSO: So our lead position is that the plain language of the statute and ordinary canons of construction dictate that only federal offenses count and not state offense, and we could walk through that if you'd like.
COMMISSIONER WROBLEWSKI: I kind of would, just for a second, because the Congress didn't say that you were -- you were in 994, I think it's (h), that the person was convicted of these statutes. It says it was convicted of an offense described in these statutes.

So, yes, walk me through how that becomes the

MR. CARUSO: Right. So, earlier this morning, I described my simple education and maybe this is part of that as well as the way I read this statute.

So you know 994(h)(2)(B) uses the same described in language as (1)(B), and (1)(B) is the federal triggering conviction, correct? So, in (1)(B), it uses a described in to clearly delineate only federal convictions. So using the same phrase in the same statute, the canon of consistent usage means, to me, that they mean the same things, right? So using it -- described in to refer to only federal convictions in one subpart and using that same phrase in the
subpart, indicates to me that Congress meant the same thing.

And if you look further down in the statute, after (h) comes (i), of course, and in (i), Congress specifically denoted state -- federal, state, and local offenses. So my memory is not great, but what I generally can remember is the sentence I wrote immediately preceding the one I'm writing now. So it seems odd to me that Congress would write (h) in a way that conforms with only federal convictions, and then, in the very next sentence, spell out federal, state, and local, if they meant the same thing as described in.

COMMISSIONER WROBLEWSKI: Got it.

Okay. Can I ask one other question? And that is if the Commission sticks with the policy that it has had up until now, which is that state convictions, in some respect -- whether that's in the career offender, which is the statute that we're talking about, or elsewhere in the guidelines, like 2K that uses prior convictions
for controlled offense -- it seems to me that the problem that we're having is because of this intersection between the definition of controlled substance but, also, the categorical approach.

So if you have someone who was convicted in state court of selling cocaine, which is on the federal list, but because the state list may include something else that's not on the federal list, all of a sudden, that doesn't count as a prior because of the categorical approach, not necessarily because of the definition.

First of all, am I getting that right? And is there a way for the Commission to say, okay, we'll focus on the state -- on the federal crimes and this federal controlled substances, but we'll get rid of the categorical approach so that if, in fact, you've trafficked in cocaine or heroin or fentanyl or anything on the federal system, regardless of what the state law encompasses, that's going to count? I know that's a two-parter.
MR. CARUSO: So, and, yes. I'm going
to do this thing where, as to your first part,
hopefully, we can address that in our
post-hearing comments, but as for the second
part, I can forcefully say the Defenders are
believers in the categorical approach.

You know, as a long-time trial lawyer
now, my experience tells me that the only -- the
only thing we can determine by a plea or
conviction are what the elements showed, right?
Because even in -- even in federal court, when
the assistant United States attorney proffers
something to the court out of a change of plea
hearing, there are always these strategic and
tactical decisions to make as, like, do I push
back up against that? Do I not? You know,
ultimately, keeping our eye on trying to get our
sentences a fair and -- fair and just sentence.

So we would continue to ask the
Commission to rely on the categorical approach
and not deviate that.

VICE CHAIR MURRAY: So you think we
should import the categorical approach here? So for, like -- the Department had, what I thought, was a compelling example about cocaine being amended in 2015 to no -- federal cocaine -- to no longer include ioflupane.

MR. CARUSO: Right.

VICE CHAIR MURRAY: And a vast number of state statutes -- apparently, cocaine is still including ioflupane. And so, in those states, you think that cocaine should not be considered a controlled substance?

MR. CARUSO: Right. Our first position is that no state conviction should count.

(Simultaneous speaking.)

MR. CARUSO: But, of course, if the Commission decides state offenses should count, then, yes, we would ask the Commission to adhere to the categorical approach.

VICE CHAIR MURRAY: And do you think it makes policy sense for cocaine not to count as a -- in a large number of states, not to count as
a controlled substance?

MR. CARUSO: So, I think -- and I'm not trying to be flip -- I think the answer is that no drug conviction should count under the career offender guideline. I mean, this body's own research has shown that. You wrote a pretty blunt assessment to congress to undo that, and I think, at bottom, what the Defenders are saying, like, every problem is an opportunity in disguise. And I think that's -- I think that's what we can do here.

If we consider a circuit conflict a problem, then I think -- as I said in my, you know, written testimony and my statement today -- I think the Commission can use this opportunity to narrow the career offender guideline, which, as you know, judges vary 80 percent of the time, that it's not a good indicator of recidivism, that it goes far beyond what the Senate originally intended for drug offenders. So I think it does make good policy.

COMMISSIONER WONG: Mr. Caruso, can we
go back to what you had said earlier? Can you
just repeat what you had said about attempts to
get Congress to -- you said something about
amending 994(h), and --

    MR. CARUSO: So, my understanding, I
mean, the staff here is in the best position to
know this, but my understanding is that this
Commission has urged Congress to amend the career
offender directive to be able to exclude at least
a certain category of drug offenders from its
reach.

    COMMISSIONER WONG: And, within the
backdrop -- I appreciate the candor of your
testimony because you were, sort of, laying forth
that what the Defenders are proposing now, would
be a significant narrowing of what has been the
reach for a long time.

    I guess, absent some kind of
Congressional change here, what would be -- you
know, we've had this status quo for a long time,
and Congress has not made these changes, and what
are we to make of that?
MR. CARUSO: So, I think we have to go back to first principles, and in -- like in my answer to Mr. -- Commissioner Wroblewski's question about 994(h), I mean, I think it's a simple statutory construction issue.

I don't know what led the Commission to have these -- have these rules that have been the status quo, but I know time and time again in our nation's history, like, we have stepped back and looked at past practices and said is that the best practice? Is this the best reading of this law or statute? We know the Supreme Court has recently overruled cases that had been long-standing precedent.

So, I think, if you go back to 994(h) and just look at the statutory construction of that statute, how they used the same terms, and how that's been interpreted to mean different things, how another subpart of that statute is more explicit about describing when Congress wanted state, federal, and local offense used, I think you can rationally come to the conclusion
that the statute has been wrongly read in this
case for a very long time.

VICE CHAIR MATE: Thank you for your second round of testimony today. I appreciate it.

MR. CARUSO: Be gentle.

(Laughter.)

VICE CHAIR MATE: I'm going to go back to acceptance of responsibility for a second.

Our data show that the vast majority of individuals, who receive acceptance of responsibility, get the three levels, so it's a small handful of people who are, kind of, in that range who aren't getting it.

On -- you know, the Government has suggested this, kind of, fallback argument of relying on variances. Are variances sufficient in this context with acceptance of responsibility and that third point?

MR. CARUSO: So, you know, as a trial lawyer for over 20 years -- and I have to say, most of my cases have resolved by plea and, of
course, led to sentencing. Most of my trials have also led to sentencings, so I -- so, I think, this is, you know, an area that not only am I familiar with, but every defender is familiar with.

And I think, to answer the first part of your question about -- and I haven't seen that data, but I assume it to be true that there is a small percentage of people who don't get the third point. And, like the Commission, our Defenders are believers in data, but I think there is a data gap in this particular circumstance because, as I alluded to in my opening remarks, this is about leverage, right? We're all lawyers here, and, in the civil context, and certainly in the criminal context, lawyers seek to exert leverage to get the resolution they want.

And, you know, I think you know, I pointed out a -- an example from my district in these maritime drug trafficking cases, where the AUSA, who prosecutes those cases, was fairly
straightforward. If you file a motion to dismiss for lack of jurisdiction -- which, again, Chief Judge Pryor wrote that decision, giving us that framework -- and go to an evidentiary hearing, he would not file the motion for the third point and, in addition to that, would not agree to a conditional plea. I think that's just wrong.

I mean, you know, again, a lot of these pretrial matters are lawyer-driven decisions, right? You know, my clients don't generally have a knowledge of criminal court's jurisdiction, Fourth Amendment law, Brady/Giglio, discovery, due process law. You know, these are issues that we assert on behalf of our clients that are constitutionally based.

And part of that also harkens back to what I said earlier about developing this relationship with your client, so your client can trust you, so when you're saying I know, like, both door A and door B are bad, but I think you should go through one of those doors, they know that we worked exhaustedly to try to get them the
best outcome.

That being said, lawyers, and our clients, are risk averse. So, when standing in the face of a threat to withhold the third point, a lawyer may -- I don't want to be derogatory here but -- cave. Because, you know, as I think Justices Sotomayor and Gorsuch said recently in the Fifth Circuit case, that one point can mean a tremendous difference in our client's life. You know, at the low end, it might mean the difference between going to prison and not going to prison; at the higher end, it can mean -- it could mean years in prison.

So -- and I don't think a judge's decision to vary down should really -- I mean, this -- I think this law and this guideline is fairly straightforward, and we shouldn't have to rely on the judge to, sort of, undo what the government has chosen not to do.

CHAIR REEVES: Is there a point where the Defenders may agree or concede that the government has been pushed too far to give the
point? I mean, jury selection maybe? But, of course, a defendant can learn a lot, during their jury selection, about his case. So is there a point?

MR. CARUSO: Right. I -- and I'm not going to dodge your question. You know, all of these are fact-driven. But I think, of course, there can be cases where, you know, under our reading of what the guideline should be, that the government could legitimately withhold the third point, certainly. We're not asking for a sort of strict liability ruling that the government always has to file the third point if the client pleas, but we want more -- you know, we want more clarity. We want a functional approach to this that, you know, sort of -- we're putting the government to their burden of specifically preparing for trial. And I think, you know, the examples given, motions and limiting jury instructions and matters like that, come much, much closer than filing a motion to dismiss or a motion to suppress.
CHAIR REEVES: But nothing requires a party to wait 14 days to file their motions in limine, right? Motions in limine can be filed whenever, right? Can't they?

MR. CARUSO: Right. That's why --

right, that's why. And, you know, in my experience, you know, well, you know, sort of, I think, one of the secrets about, you know, criminal law is that there are various categories of cases, and the various categories have, you know, certain defenses that we raise, and the prosecutors have certain rebuttals. So most of the time, there's not a tremendous amount of work because the prosecutor in this type of case knows this motion in limine should be filed; these jury instructions should be filed.

In fact, in my district -- I'll give Judge Middlebrooks a shout-out. He was a proponent of this jury instruction builder. I don't know if that's -- if that's in any other districts, but, generally, you just start checking boxes, and it emails you a set of jury
instructions, so that, even in our district, that
doesn't take much time.

But we would -- we wouldn't want to
focus on the early preparation that could be seen
relevant for trial for two reasons. You know,
districts vary in the pace in which they operate.
You know, I come from a rocket docket, so we have
to move very quickly. But, you know, just
because a prosecutor, because he or she wants to
get ahead of the game, drafts a motion in limine,
you know, two weeks after arraignment; we also
don't think that should that bear on, you know,
either the government's decision to file for the
third point or the judge awarding the third
point.

Okay. And I haven't been asked a
question about this, so -- but I know a previous
witness had been asked about the Wade standard.
You know, Defenders absolutely disagree that this
-- the Wade standard should be used, and if there
are no questions about that, we'll fully brief
that in our post-hearing comments.
(Simultaneous speaking.)

CHAIR REEVES: Thank you, Mr. Caruso.
Do we need to get you some more water?

PARTICIPANT: I think they're --

CHAIR REEVES: We'll make sure we get you it, okay?

PARTICIPANT: I got some, but I may not have left my compatriots with enough.

(Laughter.)

CHAIR REEVES: Our tenth and final group of panelists for today will provide us with the perspectives on this issue from two of our advisory groups.

First, we will hear from Marlo Cadeddu, who serves as the Fifth Circuit Representative to the citizen -- commissioners -- Practitioners Advisory Group. Ms. Cadeddu is a solo criminal defense practitioner who handles federal cases across the nation.

Ms. Cadeddu has previously served as a Steering Committee member of the American Bar Association's Death Penalty Representation
Project. I say all that again for those persons who are just joining us.

Second, we'll hear from Ms. Jill Bushaw, who serves as chair of our Probation Advisory Group. Ms. Bushaw serves as deputy chief United States probation officer for the Northern District of Iowa.

She joined the US Probation Office in 2003 and has previously held positions as a citizen guideline specialist and as a supervisory and assistant deputy chief in the presentence investigative unit.

Finally, we'll hear from Professor Mary Graw Leary, who serves as chair of our Victims Advisory Group. Professor Leary is the senior associate named for academic affairs and a professor of law at the Catholic University of America.

Professor Leary has previously worked in a range of positions in the criminal justice system, including as an assistant US attorney for the District of Columbia, as the director of the
National Center for Prosecution of Child Abuse, and as deputy director in the National Center for Missing and Exploited Children's office of legal counsel.

We have these ladies before us, and we'll begin with Ms. Cadeddu.

MS. CADEDDU: Thank you, Judge Reeves, Vice Chairs, and Sentencing Commission. We appreciate, very much, the opportunity to provide the PAG's views on circuit conflicts. The PAG, as we've discussed, is comprised of private practitioners who represent criminal defendants in the federal criminal system.

I'm going to start, with your permission, with 4B1.2 and the definition of controlled substances offenses because I have more to say, I think, for 3E1.1, so I'll -- I don't want to run myself out of time.

The PAG supports the Commission's proposed Option 1, which defines controlled substance as those substances identified under the federal Controlled Substances Act 21 USC 801.
This definition provides a straightforward framework for analyzing whether a defendant's prior conviction is a predicate offense for purposes of the career offender guideline, and it will promote uniformity in sentencing law across the country.

In contrast, the PAG believes that the second option's use of inconsistent state law definitions of controlled substances offenses will increase unwarranted sentencing disparities among similarly situated defendants nationwide.

Under Option 2, two vastly -- two defendants convicted of the same offense, with similar criminal records, may be subject to vastly different guideline ranges depending on the state in which he or she is prosecuted, and we have a couple of examples.

Can -- I never can say this.

Cannabidiol, CBD, cannabidiol has been legal in Wisconsin since 2014; thus, the defendant's pre-2014 CBD distribution conviction would serve as a career offender predicate, even though CBD
is legal, both in Wisconsin and federally. Such a conviction is not a proxy for dangerousness or recidivism, given that state and federal governments have legalized CBD.

Hemp is another good example. In 2018, the government removed hemp from the list of controlled substances, and as of 2020, all states, except for Idaho, have legalized hemp. If state law is used to determine the definition of controlled substance for purposes of the career offender guideline, an Idaho conviction for hemp manufacturing, prior to 2021, would be characterized as a predicate offense. This is so, even though this conduct is now legal in Idaho and was legal across the country at the time. Whether a defendant is subject to the enhanced penalties under the career offender guideline should not depend on an accident of geography.

The sentencing implications for the second option are especially troubling given the astronomical increases in sentences for career
offenders and the fact that between 2016 and 2021, 75 percent of defendants sentenced as career offenders were people of color. The PAG believes that adopting the second option will undermine the uniformity that the guidelines strive to promote and could exacerbate unwarranted race-based disparities.

Now, with regard to acceptance of responsibility, the PAG endorses the Commission's proposed amendment to resolve the circuit conflict that has arisen regarding whether the government may withhold the third point for acceptance of responsibility, with one addition that I'll mention in a moment.

The PAG's experience with this issue varies widely across the country. In some districts, the government rarely, if ever, withholds motions for the third point of acceptance. In other districts, practitioners face a dilemma over how to advise clients who may have grounds to file a motion to suppress or file sentencing -- substantive sentencing objections,
but by doing so, may face a penalty at sentencing, namely the loss of the third point.

Importantly, requiring defendants to forego filing suppression motions in order to obtain the third point insulates law enforcement misconduct from judicial oversight, and, of course, it has constitutional implications.

This amendment, thus, will serve the important salutary purpose of promoting the integrity of the criminal justice system.

Accordingly, the Commission -- accordingly, the PAG welcomes the Commission's proposal to clarify the circumstances when the third point may be withheld by defining the term preparing for trial, but we do have one request regarding that definition.

The PAG suggests that this definition be further modified by replacing the term drafting, in the second sentence, with filing. The PAG believes that this minor modification will limit litigation about whether an action is, in fact, preparation for trial and will
facilitate district courts' ability to make this determination since the docket sheet will reflect what has been, in fact, filed.

I wanted to mention, for a moment, the Department of Justice's statement said something about how the court can -- if the court disagrees with the decision to withhold the third point, the court can vary from the guidelines. And I would contend that this, what they call in film, fixing in post is really not the way that we should go about taking care of this -- of this issue. That will lead to disparate impacts.

In my circuit, for example, 60 percent of guidelines are with or -- 60 percent of sentences are within guideline sentences, and those guidelines are, in fact, the default. And so, this idea that judges willy-nilly will depart to fix this issue is just simply not going to be the experience in every -- in every circuit.

So, with that, I will -- I see that my time is up, and I will pass the floor.

CHAIR REEVES: All right, Ms. Bushaw.
MS. BUSHAW: Good afternoon, again, and thank you for the opportunity to speak on behalf of the Probation Officer's Advisory Group. I'll start with the acceptance issue.

There are numerous issues before the Commission this amendment cycle, but the proposed amendment to acceptance of responsibility is capable of having the broadest impact. Whether an acceptance reduction is applicable is a guideline finding the court makes in every single federal case. Ideally, straightforward application principles would be characteristic of such a universally applied guideline.

The Commission heard testimony during 2018 regarding whether objections at sentencing jeopardize the defendant's eligibility for a two-level reduction for acceptance of responsibility under subsection (a). The issue before the Commission today is how those exact same objections can impact the defendant's eligibility for the additional one-level reduction under subsection (b), as well as the
issue of pretrial suppression motions.

POAG observed the overlap of this issue and believes such an amendment to this guideline would help clarify if issues such as suppression motions and sentencing objections are a relevant factor under subsection (a) and/or subsection (b). POAG believes such a clarification is essential as the parties have indicated they rely on the potential impact of a sentence reduction early in the case and prior to the plea but also at the time of sentencing and will need sufficient notice of how this guideline is intended to operate.

With regard to whether suppression motions and sentencing challenges impact eligibility for acceptance of responsibility, POAG observes there are opposing positions on this issue.

On the one hand, POAG defers to the Government's position regarding the amount of resources required to prepare for a suppression hearing or address sentencing challenges. The
government is in the best position to articulate that issue.

On the other hand, POAG defers to the defense's position regarding the suppression motions and sentencing challenges that they did not pursue after discussing with their client the potential risk of losing an acceptance reduction. The defense is in the best position to articulate that issue.

But how does our system handle instances where there are opposing positions regarding suppression motions and sentencing challenges? We present the issue to the court. The court holds a hearing on the contested matter. The parties present their evidence and make their arguments, and the court makes a finding.

POAG believes it's essential that both parties have the same opportunity to argue their position with the same amount of aggressive effort and without the concern for collateral consequences. Therefore, POAG supports the
proposed amendments to 3E1.1.

The other circuit conflict the
Commission is seeking to resolve is the
definition of controlled substance. POAG, first,
observes that the pending amendment related to
the listed offense approach is an alternative
process to this pending issue.

But, in relation to this issue,
though, Option 2 includes state controlled
substances, but the means and elements of those
state offenses may not be covered by a chapter 2
guideline under the listed offenses approach
because those guidelines only pertain to offenses
covered by the Controlled Substances Act.

Therefore, POAG inquires if the listed
offense approach effectively adopts Option 1 as
the definition of controlled substance or if
there is, at least, an argument that such is the
case?

The members of POAG who favored Option
1 had concern that Option 2 does invite some
disparity into the federal process by relying on
the various controlled substances that could be charged in each state. Those state offenses will still qualify as prior criminal convictions in determining their criminal history category, but under Option 1, they wouldn't be used as a basis for career offender or an increase to the base offense level.

Given the variance rate related to career offender, especially when the predicates aren't based on a crime of violence, some members of POAG thought this would be a good opportunity to address that issue while staying true to the perceived intent of 28 USC 994(h), but the sentencing guidelines provide for an increased sentence when the predicate involves substances involved in the federal system.

However, a majority of POAG favored Option 2, as the identified goal of this proposed amendment is to resolve a circuits conflict. Option 2 maintains the current practice within a majority of the circuits. It accounts for the defendant's increased level of culpability for
knowingly distributing an illicit substance. It
resolves concerns that a state controlled
substance offense would be deemed overly broad
and categorically wouldn't qualify, and most
importantly, it relies on the long-standing
definition that controlled substance includes
both state and federal law.

Thank you.

MS. LEARY: Good afternoon. The VAG
appreciates the Commission inviting us to discuss
on the one issue that we are going to address:
the circuit conflict regarding 3E1.1, acceptance
of responsibility.

Let me begin by saying the VAG really
appreciates what the Commission seems to be
trying to do to, sort of, on the one hand,
balance the -- Congress's directive that the
government is in the best position to determine
whether a defendant has assisted authorities in a
manner that avoids preparing for trial and
allocating resources efficiently, as well as
Congress's directive that an adjustment under
this subsection may only be granted by the
government's formal motion, and the idea that, of
course, we don't want prosecutors to refusing to
make this motion for unconstitutional motives.

However, the VAG opposes the method
that the Commission is using to address this
issue for three reasons: first, the proposed
amendment does not achieve the stated purpose of
clarity; second, its language is so broad that it
categorically precludes appropriate withholding
of 3E1.1(b) reduction, which is a decision best
left to a case by case analysis; and third, the
breadth of this language fails to consider the
victim experience of several pretrial motions,
and it risks harm to victims' interests.

First, the proposed amendment does not
serve the purpose it states. It doesn't provide
clarity. The purpose of 3E1.1(e) -- (b), excuse
me -- is to allow the government the discretion
to move for a one-level reduction if the
defendant has been timely, permitted the
government to avoid preparing the trial, and
permitted the government and the courts to use
its resources efficiently.

The amount of work necessary for trial
or a motion preparation varies from case to case,
as has been discussed already. And only the
prosecution knows the work that it's done in
preparing for these motions or preparing for
trial. The proposed amendment denies the
government this discretion -- congressionally
mandated discretion, in direct opposition to
Congress's text and purpose, and it doesn't
provide clarity.

It doesn't provide clarity because the
definitions proposed are too broad, and they
propose a categorical approach to a case-specific
issue. Whether the government had to
inefficiently allocate resources to prepare for
motions turns on substantive questions: the type
of case, the type of motion, the witnesses
involved, the legal research necessary, the
preparation needed.

But the proposal suggests that this
determination is best made, not by a
fact-specific inquiry, but by applying phrase
such as actions taken close to trial or early
pretrial proceedings, and that's unworkable, in
our view, for two reasons.

    First, it's vague and subjective, but
secondly, it's choosing a temporal measure for
determining whether a pretrial motion demands
similar resource expenditure to preparing for
trial, and that's simply not an accurate measure.
How many resources were expended and the measure
of this can happen early in the process or later
in the process, something could not require a lot
of preparation.

    But most importantly, to the VAG, is
our third reason that we oppose this motion, and
that is it ignores the victim experience. Some
pretrial motions involve the direct participation
of victims or witnesses. They might have to
prepare to testify themselves or work with the
prosecutor to prepare for the motion or be
retraumatized by the very fact that the motion is
being filed, all of which require resources of
the government, prosecutors, advocates, law
enforcement.

The more troubling, certain kinds of
cases, sometimes, we regret to say, our
observation has been the defense is simple: put
the victim through retraumatizing pretrial
motions, which are designed to dissuade the
victim from continuing to participate in the
trial process. Examples of this could include
discovery of personal medical records, seeking
psychological records, et cetera. And let me be
clear, we're not saying that's always the motion,
but our experience in working with
victim-survivors across the country is sometimes
it is.

And should the prosecution
successfully keep the victim survivor on board
through all of these retraumatizing motions to be
ready for trial, the defendant should not, then,
be able to claim acceptance of responsibility.
And in our view, the government is well within
what Congress intended: to refuse to file the
motion for an additional deduction because of the
trauma the victim or witnesses have experienced,
which required significant expenditure of
resources on the part of the government to
continue to trial.

This is a matter that, by design, is
for the prosecutor to determine, and because the
proposal does not add clarity, it is a blunt
instrument, and it ignores the victim experience.
The VAG opposes it.

Thank you very much.

CHAIR REEVES: Thank you.

I now turn to my fellow Commissioners
to see if there are any questions of this group.

Commissioner Mate.

VICE CHAIR MATE: Thank you all for
your testimony again, every single one of you. I
appreciate you coming back. I have one question.

Ms. Bushaw, in your written testimony,
you talked a little bit about the relationship
between this proposed amendment and the acquitted
conduct proposed amendment. Could you address that a little bit more? I just want to make sure I understood what the POAG's position was on those two together.

MS. BUSHAW: Sure. I'd be happy to.

I testified on February 4th of 2023, that POAG didn't have any concerns about acquitted conduct being used against a defendant at the time of sentencing, just like any other type of relevant conduct, because there's due process available at the time of sentencing. And the type of objections that they're going to have to relevant conduct, acquitted conduct is most likely going to be disputed at the time of sentencing compared to others. And then, so -- and -- but that testimony was based on probation office perspective and experience.

So we sit through hearings. We talked about this at our meeting, and it's our observation of the process that everybody gets to kind of object to what they want to. We see plenty of objections from defense. We've seen
plenty of objections from the government, and so
I was comfortable with that.

But the next morning, started working
on my testimony for today, and then, when you
start reading cases, there's case after case
after case where a defendant loses acceptance for
doing that very thing and asking for acquitted
conduct to be approved at the time of sentencing
or any other type of relevant conduct.

So just the interrelation to these
two, we just thought it would be appropriate to
point it out. It doesn't change our position on
acquitting conduct because we still think it's
largely -- defense are largely able to prove that
or -- have the government prove that at
sentencing, but it just became apparent that
maybe that body of case law out there, that says
that they could lose that, has an impact on
defense that probation wouldn't necessarily be
aware of. We wouldn't be aware of what they
would have done had that case law not existed.

COMMISSIONER WROBLEWSKI: Can I follow
up though?

So you see many, many presentence reports.

MS. BUSHAW: Mm-hmm.

COMMISSIONER WROBLEWSKI: Are most of those -- did most of those include some defense objection, very few of them include a defense objection? Because most -- because the data that we see shows that there -- that the vast majority of cases where a defendant pleads guilty gets three points.

And I get it. I -- and I get, especially, Mr. Caruso's concerns that you're, I think, reflecting, which is, if no one was objecting, there might be a chilling effect. So everybody's getting a third point, but they're not objecting because they're afraid that they won't get the third point.

But I'm curious, in the cases that you see, the presentence reports that you write and then circulate and then bring back, did most of those include objections or not include
objections?

    MS. BUSHAW: Several objections from both parties, and we talked about this at our POAG meeting just to make sure because -- and of course, you can't testify to what happens in every case, and in every federal court, there are always exceptions -- but we went around the room, and generally, as long as there weren't objections to plea agreement stipulations or elements, there was a perception that defense could object to as much as they needed to at the time of sentencing.

    But, again, that would be our perspective because we aren't aware of what would have been objected to or what would have been brought forth to the court to address.

    COMMISSIONER WROBLEWSKI: Thank you.

    VICE CHAIR MATE: I actually have a follow-up on that.

    (Laughter.)

    VICE CHAIR MURRAY: Bounce back and forth -- and maybe this is too long a time period
because it's been a while since the Commission last amended that acceptance of responsibility provision, and you addressed that, and that kind of went to some of those non-frivolous -- I can't remember what the words were at the time, but those challenges.

Has POAG noticed a change in objections since the Commission amended that guideline in 2018?

MS. BUSHAW: Yeah, it was 2018. That was one of the comments we had in 2018 was if -- to make sure whatever is changed in this guideline, it's significant enough that it has an impact on the case law.

I -- we didn't discuss that as a group, but just the fact that it's on the agenda again makes me think it didn't have the effect of making a big change on the case law, that edit from 2018.

CHAIR REEVES: Any other questions for this panel?

Ms. Leary, I do have just a couple of
questions. You indicated that you thought the language that we've put out there is too broad, and I know, in other instances, panelists have come back with different language or suggested language.

Is there language that you can provide that might narrow it, and the same question with respect to attempt -- doing it temporally as we've done it? Is there a suggestion as to -- well, how should we do it?

MS. LEARY: I'm going to take the second question first. Just say -- I just think temporally doesn't get you where it seems that the Commission wants to go just because every case is so different, you know, and a -- in front end.

You know, we've heard discussion about building trust. Try building trust with a victim who's been traumatized by violent crime, you know? That has to happen early and takes a long time in order to get to the place where they can, in front of 12 strangers, describe the worst
thing that's ever happened to them. So that
starts really, really early as well. So I don't
think temporally is the way to go.

I'm happy to submit to writing some
alternative language, at the invitation of the
Commission, after talking with my -- our advisory
group. I would offer a way of thinking about it,
but if I could put on my law professor hat and
take off my chair hat, which means everyone's
going to fall asleep and start getting on their
phones, but hopefully that won't happen.

And I think that it's very clear from
the text that Congress intended this discretion
to be for the government. That was what it was
intended for, and I think, if the Commission
wanted to reframe this to think about what's
called -- what I've labeled -- again, I'm
speaking almost individually -- as structured
discretion, right? So guiding principles but the
discretion is still with the government, I think
that is an avenue to go.

I'm happy to bring it back to the
Victim Advisory Group to get through the group sign-on on that, but it's a principle -- academics are the worst because they, like, hawk their own wares -- but this is a principle that I've written about in a couple law review articles, and I don't mean to talk about just myself, but that's sort of the idea is discretion. But, if there's agreed upon, sort of, points to consider beforehand, it can limit something wide open or, like Commissioner Wong was discussing, something between Wade and absolute discretion.

So I'm happy to -- I'm not dodging your question. I'm happy -- but I'm hesitant to speak from the whole group on that specific alternative language because we didn't reach any to suggest to the Commission.

CHAIR REEVES: Thank you.

All right. I guess, tomorrow, everybody's going to want to be on the afternoon panel.

(Laughter.)
CHAIR REEVES: Ladies and gentlemen, here, and those who are online, we appreciate you for spending this day with us because this, here, closes our third day of testimony. And on behalf of my fellow Commissioners, I want to thank each of our panelists, those who remain here, those who have gone on to your other duties. I do thank each of you immensely for spending this day with us, providing your testimony, and where needed or where desired, if you wish to supplement your testimony, we just ask that you do so by March 14th.

We will be back tomorrow at 9:00 a.m. to receive testimony on our proposed amendments regarding the career offender guideline and the use of criminal history scores. I look forward to seeing every one of you then and hearing those who might be on the line.

But thank you so much for spending this day with us. We are now adjourned.

(Whereupon, the above-entitled matter went off the record at 3:17 p.m.)
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Public Hearing

Before: US Sentencing Commission

Date: 03-07-23

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