

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

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THURSDAY
MARCH 7, 2024

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The United States Sentencing Commission met in the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Washington, D.C. at 9:00 a.m., the Honorable Carlton W. Reeves, Chair, presiding.

PRESENT:

CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA E. MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
CLARIA HORN BOOM, Commissioner
JOHN GLEESON, Commissioner
CANDICE C. WONG, Commissioner
JONATHAN J. WROBLEWSKI, Ex-Officio Member

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Adjourn

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

9:05 a.m.

CHAIR REEVES: Good morning. I'm Carlton W. Reeves, Chair of the United States Sentencing Commission, and I want to welcome you to our second day of hearings on our proposed amendments for the 2023-24 policy cycle. I want to thank each of you for joining us, whether you are in this room, upstairs, or out there somewhere, those who are attending via live stream.

I have the honor again this morning of opening this hearing, and to introduce my fellow Commissioners. To my left, we have Vice Chair Claire Murray. To her left, we have Vice Chair Laura Mate. To her left, we have Commissioner Candice Wong, and we have on the end there, Mr. Jonathan Wroblewski, the ex officio member of the United States Sentencing Commission with the Department of Justice. To my right, is Vice Chair Felipe Restrepo, and to his right, and we're so glad that she's here today, Commissioner

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Claria Horn Boom. And on the end down there is Commissioner John Gleeson.

I always repeat and say often, as I did yesterday, we can never thank enough our staff of the Commission for the work that they do. They put together this room, they made sure that our witnesses who are here -- I hope your stay last night was comfortable. For those who are attending remotely, they've made arrangements to have you do that, as well.

These two days of hearings -- I don't run marathons, okay, so I can't say anything about a marathon, okay? But we're more than halfway. We had 12 panels yesterday, and it was a very good day, but it was because of our staff who had prepared us, who had prepared the witnesses, made it such an easy day, and I think today is going to be just as easy.

As I mentioned, Commissioner Boom is here. She has overcome her medical emergency. So again, I'm thanking everybody for doing whatever they could do to be here yesterday and

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today. It has been quite a task, I would imagine. Our witnesses have traveled thousands of miles, and some have rescheduled very important events to be here to testify, to give us their comments.

And again, our staff has been up day and night to make sure that this day runs as smoothly as possible, but the work will not be done after today. They, along with the Commissioners, will still be working. I speak on behalf of myself and my fellow Commissioners, and actually, I speak for our country on this here: We thank you, the staff, so very much for all that you do every day.

Today, we will be hearing testimony on two of our proposed amendments. We will spend most of our time talking about our proposed amendment to change the way the guidelines deal with sentences for, and histories of, youthful individuals. We will also spend some time discussing our miscellaneous amendment to §2D1.1 (Drug Trafficking) of the guidelines.

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To all who are speaking in person, I promise that your extensive journeys and your preparations will be worth it. Again, when you speak with the Commission, you will be heard, and you will be read too, because your testimony is available for the public to access on our website, www.USSC.gov.

Panelists, you will each have five minutes to speak. 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 do have a lot to cover today and a limited time to hear everyone.

For our audio system to work, you will need to speak closely into the microphones, and when you finish speaking, the Commissioners may ask questions. I'm certain we will. Thank you for joining us, and always assume that your mic is hot. Always assume that. So, I look forward to a very productive hearing today.

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With that said, I would like to introduce our first set of panelists, who will provide us with perspectives on the neuroscience and psychology that reflect on our proposed amendment regarding youthful individuals.

First, we have Dr. BJ Casey, who is the Christina L. Williams Professor of Neuroscience at Barnard College, Columbia University, and is a member of the Justice Collaboratory at Yale Law School. Dr. Casey is a cognitive neuroscientist and expert on brain development using brain imaging to examine developmental transitions across the lifespan, especially during the period of adolescence. Dr. Casey's research has been published extensively in distinguished scientific journals, including the Proceedings of the National Academy of Sciences.

Second, we have Dr. Elizabeth Cauffman, who is a professor in the Department of Psychological Science in the School of Social Ecology at the University of California, Irvine

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and holds courtesy appointments in the School of Education and the School of Law. Dr. Cauffman's research addresses the intersection between adolescent development and juvenile justice.

Her findings were incorporated into the American Psychological Association's amicus brief submitted to the United States Supreme Court in Roper v. Simmons, which abolished the juvenile death penalty, and in Graham v. Florida and Miller v. Alabama, which placed limits on the use of life without parole as a sentence for juveniles. And again, we thank you for being here.

Testifying remotely, we have Dr. Stephen Morse, who is the Ferdinand Wakeman Hubbell Professor of Law at the University of Pennsylvania School of Law; professor of Psychology and Law in Psychiatry, University of Pennsylvania School of Medicine; and associate director of the Center for Neuroscience & Society at the University of Pennsylvania. Dr. Morse works on problems of individual responsibility

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and agency, and his research has been published in numerous interdisciplinary articles.

Also testifying remotely, we have Dr. Kirk Heilbrun. He is a professor in the Department of Psychological and Brain Sciences at Drexel University, where he has also served as a department head. His research is centered on forensic mental health assessment, violence risk assessment and management, and interventions to reduce the risk of reoffending and promote behavioral health in justice-involved populations.

Dr. Heilbrun also directs a forensic assessment clinic at Drexel University that provides psychological evaluations to courts and attorneys on issues that include juvenile commitment and decertification, competence to stand trial, mental state at the time of the offense, and federal sentencing.

I know I said a lot, and so now, Dr. Casey, I turn it over to you. We are ready to hear from you, and following you, we'll hear from

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Dr. Cauffman. You may proceed.

DR. CASEY: Thank you. And I would like to thank the Commission for inviting me here today. I will keep my comments focused on the current state of empirical evidence relevant to the proposed amendment on youthful individuals.

And I would like to begin by saying, or just underscoring, the scientific evidence shows unequivocally that there are continued changes in brain and behavior throughout the lifespan, but particularly during this period that's relevant for our conversation today of adolescents, that's roughly between the ages of ten and extends into the 20s.

There are many expert organizations, like the World Health Organization, that refer to young people as being between the ages of ten to 24, and the United Nations has recently set a new designation of youth as being between 15 and 24.

And this is in recognition that these young people share many developing attributes even still.

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So, during adolescence, there are a lot of changes in the brain. All the parts are there, but the way the different brain regions are communicating with one another is what is changing, and that communication gets more efficient with age and, importantly, with experience, too. And what you see is strengthening of connections that help the brain communicate with distal regions, and also elimination of connections that are irrelevant.

If we look across the entire brain and examine this type of development, across hundreds of studies, what we see is, the last developing region of the brain is the prefrontal cortex. The prefrontal cortex and its connections with other brain regions are absolutely key in decision-making, planning, and self-regulation.

Now, this region of the prefrontal cortex shows significant changes that extend throughout the 20s, but there are other regions of the brain that show peak changes earlier, such as those that are involved in emotion, so reward,

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threat, gains, losses. And this differential development that we're seeing in the brain over this extended period of adolescence is paralleling how we characterize adolescents as a group behaviorally. That is in terms of a tendency for making risky decisions, making more short-sighted or impulsive actions, showing heightened sensitivity to stress in emotionally and socially charged situations.

Now, this is, as a group, how we characterize them. I want to make sure that it's perfectly clear that adolescents in their mid-teens are quite capable of making decisions, even more accurate and faster than some of us here and virtually, but those decisions are ones where they're not rushed, and it's not in the emotional, stressful situations where we're seeing diminished cognitive processing and abilities in young people after chronic stress or threat or negative influences.

I want to also just to highlight some of the other psychological research that's

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important. Just as the brain and the behavior are changing throughout the life course, so too is our personality. We're all a work in progress, but I just want to highlight two personality traits that are changing during this period of adolescence and beyond, and those that are relevant to self-regulation. These include a conscientiousness, where we see steady changes and improvement, and also emotion regulation.

Most of the evidence that I have cited so far is based on relatively healthy individuals, but we see these same changes in young people who engage in extreme behaviors too, the majority of which show a decline. And I think the most robust evidence of this is the age-crime curve that we're all familiar with, where we see a peak in the late teens, and then a dramatic decrease throughout the 20s.

We get an even bigger decline as with targeted treatments. Even young people that are high on antisocial traits are showing this change, which suggests, basically, from the data

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that young offenders are not incorrigible or less responsive to remediation. It's about getting the right intervention or treatment.

We know that development doesn't occur in isolation or in a vacuum, it's in an environment, and so as such, youths require opportunities to help them develop the very social, emotional, and cognitive skills necessary for becoming a contributing member of society. I would like to thank you again for allowing my statement.

CHAIR REEVES: Thank you, Dr. Casey.

DR. CAUFFMAN: Good morning. Thank you so much for having me here today. I'm excited to be here.

And thank you, Dr. Casey.

As you heard, I'm going to let the expert here on the developmental science speak to the brain. What my focus will be on is, the last 25 years, I've really been trying to take the developmental science and apply it to youth in the justice system, and I want to tell you about

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two studies in particular that we've done.

The first is called Crossroads. Now, Crossroads was a study done with, what do you do with a kid who has committed their very first offense? It's a low-level misdemeanor offense. What do you do? Do the crime, do the time, or kids are different, second chances? What's the right response? Well, to be honest, when we started this study over nine years ago, we didn't really know the answer.

There's been some research looking at the impact of the justice system, but what's the impact developmentally long term? So, we have been following these young people for nine years to see, what is the impact? So, imagine you have two kids, they're identical, but one gets formally processed, one gets adjudicated. They both committed the same crime, right? Imagine they're identical twins. They both committed the same crime, but one gets adjudicated, incarcerated, gets the harsh sentence. The other kid gets diversion or some side of community

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service.

We follow these kids, and what we see is, the more harsh you treat a child, the more likely you are to see reoffending, reincarceration, problem behavior. Realize, they were the same to begin. What happens to a young person? I can tell you today, five years later, you're going to see more rearrest, more reincarceration. The kids who got diverted, the kids who got community services, the kids who had what we called a sanction and dismiss, where they had to write a letter and apologize, more likely to graduate from high school, more likely to have an optimistic view of their future.

This is really important findings, because I can tell you today, what you do to a kid today, five years later, what the outcomes will look like. This is a prospective study that's been published, peer-reviewed, and vetted. It's also in your reports and available to you. So that's just one study that we've been doing. That's Crossroads, and there's a lot more

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research on that, and I'm happy to share more research about that -- or more data about that research.

The other study I want to tell you about is Pathways, Pathways to Desistance. So, Crossroads was with a kid who committed their very first offense, misdemeanor, low-level, but what do you do with a kid who has committed a very serious crime, a crime that our society is typically afraid of, that we do the harshest sentencing for? Aggravated assault, robbery, even murder, what do you do with those kids?

Most research looks at what gets kids into crime, but what gets kids out? That was the goal of the Pathways to Desistance Study. So, we started with kids who had committed very serious, felony-level offenses, and we followed those kids for seven years. And here's the question. I'm not going to lie, when we started this study, we didn't know if anybody would stop. Nobody had ever done this before. We followed these young people for seven years. What we found were two

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very important findings.

First, just because you know the offense doesn't mean you know the offender. That means kids are equal-opportunity offenders. There's no specialization. You can have a kid who commits a very serious crime, or a less serious, and lo and behold, they followed different paths. We're very poor at predicting who is going to stay in that path.

Second big finding, the majority of these young people, by the time they reach their late 20s, desisted from crime. They stopped. So, if you followed the path, we had kids who were committing very serious, high-level offenses between the ages of 14 to 17. By the time they reached their mid-20s, their criminal patterns had desisted.

These were two very big findings. There's variability and heterogeneity among kids who commit serious offenses, and two, by the time they reach their mid-20s, they desist. Needless to say, this aligns very well with what we see

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with brain development. If you're looking at the frontal lobe developing, that prefrontal cortex, that's what we see.

So, these two studies have really allowed us to better understand how kids in the justice system behave. There's no question kids need to be held accountable. That, we all know.

Every parent knows a child needs to be held accountable. It's not whether you hold them accountable, it's how, and so what we need to do is use the developmental science to find the developmentally appropriate ways to hold young people accountable.

So, I want to thank the panel, and I'm happy to address any other questions you might have about these two studies or any other of the research that we've done. Thank you.

CHAIR REEVES: Next, we'll have Dr. Morse.

Make sure you're unmuted, and you may proceed when you get ready, sir.

DR. MORSE: Good morning and thank you

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for inviting me to be here. I favor giving young offenders more of a break, but science cannot answer how much of a break is just. I do not favor the proposed amendments in their current form. I will make suggestions about alternative approaches.

In his dissenting opinion in Miller v. Alabama, Chief Justice Roberts wrote, quote, teenagers are less mature, less responsible, and less fixed in their ways than adults, not that a Supreme Court case was needed to establish that, end quote. Precisely.

The centuries-old immaturity excuse, and the creation of the juvenile court well over a century ago, confirmed that the law long recognized that teenagers are different for legal purposes. Psychological science and neuroscience were not necessary for this recognition. Whether the Commission should accept any of the proposed amendments or reject them all is not a scientific question. It is a social, moral, and ultimately, it is a legal question that science can inform

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but cannot answer.

Any decision, any decision the Commission reaches is entirely consistent with the science of juvenile and young adult psychosocial and brain maturation. Science does not compel any particular outcome concerning the proposed amendments. I have no quarrel whatsoever with the relevant science, including what you've just heard this morning from my distinguished colleagues, but the law's criteria for responsibility are behavioral.

Roughly, the capacities for rationality and self-regulation, and the person's amount of life experience, I call these the "right stuff." The question is, at what age do people have enough of the right stuff to be treated as an adult? Even if behavioral maturation is incomplete at a given age, the law can properly decide that they have enough of the right stuff to be held fully or almost fully responsible.

In particular, the neuroscience of

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juvenile and young-adult brain development is only indirectly relevant because the law's criteria are not neural. Psychosocial maturation is directly relevant to the law's criteria, but such maturation continues long past the mid-20s, as I assume everyone here today knows. This is true even if certain brain structures apparently associated with behavioral maturation ceased developing in the mid-20s. Further, focusing on the brain may cause us to underestimate the social and economic contributions to criminal offending.

Before turning to my suggestions about the amendments, please let me say a few words about the maturation and morality of younger offenders. On measures of psychosocial maturation and brain development, there will be great overlap in outcome as people are closer in age. For instance, 16, 17, 18, and 19-year-olds will be quite similar on average. Seventeen and 18-year-olds may be almost indistinguishable.

Moreover, adolescents and young adults

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know that criminal behavior is wrong and gives people the strongest reasons not to hurt others.

They have a moral compass. Science cannot draw the bright line between full and lesser responsibility. Nonetheless, as a social and moral and legal matter, I do favor giving some juvenile offenders a break because they may not have enough of the right stuff.

In my written statement, I offer the Commission suggestions about what I consider the helpful approaches. Let me review them briefly.

I would not count juvenile convictions for less-serious crimes in the criminal history calculation. For serious crimes, say, index offenses, I would count them the calculation if they were committed by 16 and 17-year-olds, and especially if the conviction was in adult court.

I am ambivalent, deeply ambivalent, about whether to count serious crimes committed by those who are 15 or younger. Such offenders have considerably less of the right stuff on average, but some do have enough, and they may be

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very dangerous. I would have a presumption against counting the history for these juvenile offenders, but would permit counting it after an individualized search and inquiry into whether a particular 15-and-younger offender had enough right stuff when they were convicted.

I would not adopt the proposed Age Policy Statement Amendment. In my written statement, I gave detailed reasons why, but in short, it is too directive and too brain focused.

I proposed alternative language that is more consistent with the law's required normative judgment and the relevant science.

Except in unusual cases, I would be disinclined to favor downward departures for serious crimes committed by those 18 years old and older, because in my opinion, these offenders generally have enough of the right stuff, even though they will surely have more of it as they age. Thank you again for inviting me.

CHAIR REEVES: Thank you, Dr. Morse.

Dr. Heilbrun, thank you for unmuting.

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And you can stay on the camera. You can keep your camera unmuted after you do your opening, sir, because we'll have questions, I'm sure. You may proceed.

DR. HEILBRUN: I will do that.

I would like to thank the Commission and my colleagues who have provided earlier testimony, and I would begin with the comment that there is good consensus in the scientific literature on two points that you have heard about.

First, that youthful offenders are within the cohort of highest risk being between the ages of 15 and 24, and secondly, youthful offenders are also within the cohort of more limited culpability due to developmental immaturity and the various things that go with that. There is no additional science, to my knowledge, that is available, that would modify those conclusions. As Professor Morse has noted, there are also a number of questions that the science cannot answer.

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But let me turn to a somewhat different perspective which involves individual differences, because what you have heard so far are what scientists would refer to as main effects, that youthful individuals differ as a group from older individuals on several dimensions. But one of the considerations that's important for me is to observe that risk and developmental immaturity also vary within this age cohort.

Risk is affected by a variety of risk and protective factors. Some are personal, some are situational. These have been identified in the scientific literature for some time. These can be appraised with reasonable accuracy, by well-validated risk-assessment measures that exist, such as the Structured Assessment of Violence Risk in Youth ("SAVRY") and the Level of Service family measures, that I cited in my statement, and this kind of risk is subject to being lowered through rehabilitative intervention.

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Dr. Cauffman noted that if you follow kids over a seven-year period, it also gets lowered for a variety of life-related reasons, but it's important to note that it can also be lowered for reasons related to interventions that you might deliver, assuming that you deliver the right interventions, and you have the right programs, and it's delivered in a way that is reasonable and has integrity, as scientists would say, and so on.

One of the biggest unanswered questions that science can't really help us with has to do with what we call responsivity, which is the question of what you deliver, to who, and how they are likely to respond. I wish science had more to say about that. It has not been studied as much as it should have been.

And I would also make an important point, important to me, that one of the things that you might do if you were, as a legal system, interested in using science more effectively is, you would seek out the option of using risk

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assessment to appraise individual differences more, and you would de-emphasize the punitive aspects of what you might do based only on the behavior of individuals within this age cohort.

This is an approach that my colleague, Christopher Slobogin, terms preventive justice, and it involves focusing more on individuals, appraising their risk, describing how you might use that risk and needs to intervene, and gauging what you do and how you respond to individuals. Not so much based on the offense or the immediate behavior, but on the level of risk, and the needs, with the desire to intervene and reduce subsequent risks.

So, with that, I will stop, and I, once again, thank the Commission, and I thank my colleagues who have testified before me.

CHAIR REEVES: Thank you so much, Dr. Heilbrun.

I now turn to my colleagues. Who wants to be first this morning?

Okay. Thank you.

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VICE CHAIR RESTREPO: Good morning.
Thanks to all of you for being here.

Dr. Morse, I'm curious as to this term you refer to as the "right stuff," and I'm curious as to whether or not socioeconomic factors in an individual's life, such as exposure to violence, trauma, food, insecurity, lack of educational opportunities, growing up in difficult neighborhoods, does that impact the development of the right stuff?

DR. MORSE: Those kinds of factors, sir, are certainly risk factors for not developing the right stuff as well as we would like. The only question is, in an individual case that a sentencing judge has to decide, what is this kid -- as Dr. Heilbrun said, everything is individual differences. What is this kid like? And that you can only determine by looking at this kid's behavior today. Some kids with really favorable backgrounds turn out miserably and vice versa.

VICE CHAIR RESTREPO: I'll ask the

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same question of the other professors, Dr. Casey and Dr. Cauffman, Dr. Heilbrun.

DR. CASEY: So, we do know that the circumstances in which you described can exacerbate some of this differential development of different brain systems, cognitive and emotional, and so that can result in more dysregulation of self and emotions. But with time and intervention, it's been shown that that behavior can change, as well.

DR. CAUFFMAN: We measure those things both in the Crossroads study and Pathway studies.

So, it's a very important question, how do these risk factors play out long term? We actually have seen that kids who have been exposed to violence actually then have more difficulties later.

But as Dr. Casey and my colleagues, as Dr. Heilbrun will point out, plasticity of the brain, capable of change, right interventions with the right person. When you're making guidelines, you're making them on everybody, but

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then you need to move to that individual in the moment, so the guidelines need to fit that individual in that process. So, it's an interaction of fact on those things.

DR. HEILBRUN: I would say two things in response to that question. First, if you identify risk factors as those are, there is a cumulative effect. The more risk factors you experience, the more difficult it becomes to develop what Professor Morse has called the right stuff, which I like. That's a really important consideration.

But the second is, I would echo what my colleagues have said about the individual differences and the single case and make the important point that there are any number of individuals who experience the sort of risk factors, but do not become justice involved.

And so, the one thing that you might look at in addition with that justice involved kid is, what are the protective factors? Is there a port in the storm? Is there someone who

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helps: a mentor, a coach, a grandmother, or something like that? Because that's something that you can identify and help to build on that strength as well as approaching this only from a risk factor, deficit-based perspective.

CHAIR REEVES: Commissioner Gleeson, and then VC Murray.

COMMISSIONER GLEESON: Thank you. Thank you all for your written input and for being here today.

I'm struck by a couple of things. One is the, this age crime curve and how steep it is until adolescents reach the age of 18. But then also how steep it is, it's almost as steep in decline. And even though it takes until you're 60 to reach the rate of violent crime that you are at ten, you get, near as I can tell, about 70 percent of the way there by the time you're 25. So, it's a steep decline.

I'm also struck by what I hear from three of the four of you, at least, and that is promise even in that period before age 25, that

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promising interventions, to use the terminology from Dr. Casey and Dr. Somerville's report, and informal processing, to use the terminology of Dr. Cauffman and Dr. Baskin-Sommers' report, are a promising way of treating youthful folks who get enmeshed in the criminal justice system.

I actually have a question. I'm going to get to it in a second. And lastly, you know, I'm struck by Dr. Heilbrun's very informative testimony about how they're not, it's not uniform across the universe of young offenders, and risk assessment is important. And lastly, and I really want your advice on what's going on in the federal system. I'm struck at how little what you have to say to us has insinuated itself into at least federal criminal justice.

And there are these grassroots programs that are not federally guided, federally monitored in any sense. Many of them are youth programs, that one of them in my old district, I was a judge in Eastern New York, calibrates the intensity of the supervision of youthful

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offenders by reference to risk, is a risk measurement pretrial services risk assessment. And the more intense supervision is reserved for the higher risk. Sounds sensible.

But this isn't terrain that we've been traversing at all in the federal system. And I guess the advice I would like to get, and we'll start with Dr. Heilbrun, but I would like to hear from all of you, is what can or should we do to reap the benefits of these, you know, informal processings or these intervention, supervision. Incarceration costs so much. Supervision doesn't. Supervision seems to have a dramatic downward effect on recidivism rates.

What advice do you have for a centralized body? Maybe the advice is to leave these grassroots courts alone, grassroots programs alone, and let them develop as laboratories. Should we be involved? Should we provide assistance to them through social science or neuroscience or data collection? I'll stop there.

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DR. HEILBRUN: What I would say is you've described a program that seems quite well informed about basic principles of risk, need, and responsivity. The idea that you would treat individuals and vary the intensity and the supervision and so on according to risk is a well-accepted, so-called, risk principle. And whatever we do, I wouldn't interfere with that kind of thing. I would promote it and underscore how important that is.

Unfortunately, I think that many, many programs out there aren't guided in that way. And one of the things that we can do, as the legal system and as a Commission as exists today, is promote that kind of thinking in a broader way is to promulgate principles and guidelines and so on that have to do with, if you're going to run something like this, and we really hope you do, here are some of the ways that you can do it.

Because there are people out there who can provide the sort of support and scientific evidence and guidance in how you set that up and

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run it, but it really, a lot of it has to do with how well you do at the grassroots level in implementing that sort of thing. And it sounds like, at least in that particular case, they're doing quite well.

DR. CAUFFMAN: I'm just going to echo what Dr. Heilbrun said. I mean, one of the things we know from our research is kids who are at the lowest risk, need the least amount. Like you put your high risk needs with your high-risk kids, and that research has been shown over and over again. And so, one of the things, you know, you don't need a sledgehammer to put in a tack, right?

So, you try to figure out the best fit. And I have a feeling, sometimes, our laws sometimes use a sledgehammer on everything when you could just use your thumb. And so, it's really figuring out the right balance, because all the risk assessment processes, and intervention techniques have shown that.

DR. MORSE: One of the problems that

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has bedeviled the legal system is the failure to use what evidence we had. So, at this point we make risk assessments, predictions of future violence in many areas of civil and criminal law.

And there is now good risk assessment evidence, as my colleagues have said, and they're not used even when they are relatively inexpensive and the like. So, the question is, how can this Sentencing Commission get this kind of evidence into the right hands?

And my sense is, and I don't know precisely your remit, but I think the federal probation officers are the people who need to get this information. They're the ones that are going to be most involved in sentencing other than the actual assignment of the sentence itself, and they're the people who need to know this. I've spoken to the federal probation officers on a couple of occasions, and they are thirsting for this knowledge in most of the districts, not all.

DR. CASEY: And I would just echo that

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the National Academy of Sciences has formed committees and workshops and have reports about the importance of using a neurodevelopmental approach and the treatment of young people in young offenders. And Steven, by neurodevelopmental, I mean behavior, too, just to make sure I qualify that for you.

DR. MORSE: Thank you.

VICE CHAIR MURRAY: Thanks so much to all of you for being here. This has been tremendously helpful to me, and I'm sure to all of us. But I was struck in listening to all of you how much agreement it seems like there is on the -- I'm worried I'm getting get the word, both the brain science and the behavioral science.

And the harder question, I think, is just the translation into policy. And we, you probably know this, but we have sort of two sets of amendments we're looking at, and I'm trying to think through how to translate what you've told us into policy.

And one of those amendments we're

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looking at is a policy statement on age, right? So, it's kind of our chance to talk directly to judges about age. And that one seems really kind of apples to apples to me on what you have also have all told us, and it's kind of like Crossroads or Pathways, right? Like, we can tell judges, here's how we think age is important. So that one seems relatively straightforward. I mean, you would have to like work on wording and things like that.

But the harder one, to me, seems like the one about criminal history. So, this is an amendment we're looking at where we're saying, when you have a group of offenders, that actually really is kind of different than the Crossroads and Pathways people. It's people who are a little further down the age crime curve, right? They're 23-type-thing, but they have previous offenses from when they were juveniles or when they were considered young adults, but were, you know, 18 or 17. Like, is that relevant, right?

So if you're a judge, and you're

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trying to figure out how to deal with an offender who is a recidivist and has this criminal history, does the brain and behavioral science tell us anything about whether that is probative or not? Like, doesn't it make sense to say, here Judge, you're looking at someone who is in their 20s who is relatively not super far -- they're not 60, but they're a little further down the age crime curve.

Are those juvenile, whether they're an adult or a juvenile adjudication, are those irrelevant, or is there something probative that the judge might want to know when figuring out how to address that defendant? And so that's the part that I'm struggling with based on everything you guys have told us today, and I, anyone who wants to chime in, would love to hear your thoughts.

DR. CAUFFMAN: Kirk, I'm going to throw it to you first because --

DR. HEILBRUN: One more --

(Simultaneous speaking.)

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DR. CAUFFMAN: Oh, go ahead.

DR. HEILBRUN: Go ahead.

DR. CAUFFMAN: I was throwing it to Kirk. But I mean, I have some of the research side but --

DR. HEILBRUN: We're going back and forth to one another. I'll be happy to start briefly. From a risk assessment perspective, you don't want to disregard information like that. Now, you might weigh it differently because you might think of things that occur before the age of 15, or of lesser severity as having less culpability and for the reasons that you've heard about. But from, simply from a risk assessment perspective, you don't want to disregard criminal history entirely.

And one of the things that I would add to this is, you've heard from all of us that there's this phenomenon, which has been called in the literature desistance and life course persistence in offending, and I'm sure people are familiar with that. As you heard from Dr.

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Cauffman, most young offenders desist. The great majority do, but some do not.

And one of the things that you have to consider, I think, if you're a sentencing judge, is do you have an individual who, as suggested by a longer and more serious history of offending as well as other things, is going to be difficult with the rehabilitation and the desistance. And that's what I would add. You have to treat it carefully, but it's valuable information.

DR. MORSE: I agree with Kirk Heilbrun. It is very valuable information, and that's why I am not in favor of Option 3 as it is written.

One of the things we haven't talked about, although I think it was Dr. Casey who brought up the question of corrigibility, corrigibility is important to you only if you have consequential concerns for criminal justice.

If you're concerned more fundamentally with whether the person deserves a particular sentence, then corrigibility becomes less

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important. I'm not here to tell you how this Commission should balance desert against consequential concerns like the need for incapacitation and deterrence.

But it is perfectly consistent with the science to decide that even though younger offenders don't have as much of the right stuff, they do have enough, and therefore, they deserve perhaps more harsh penalties than you would impose if you were just considering incapacitation and deterrence. These are very hard moral and legal questions.

DR. CAUFFMAN: I want to just echo what was just said. And the reason I threw to Dr. Heilbrun first is because risk assessment is where we start, right? We always use those risk assessment processes, and you never want to disregard information. But that's also why Crossroads and Pathways were so important. Now, Crossroads was first time, no prior offenses. Like that was, that was the goal of Crossroads, and low-level offenses.

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The Pathways to Desistance Study was with kids who committed very serious offenses, and they had a history. I mean, these are the kids that you're worried about, right? These are the kids with prior criminal histories, very serious offenses, and following those kids for seven years. And the fact that the majority of those young people desisted reminds us that kids are still malleable and changeable. That said, as Dr. Heilbrun point out, about ten percent so of -- you know, a small percentage do persist.

Now, the problem with that is risk assessment, and maybe Dr. Heilbrun and I will arm wrestle on this one. I like to refer it like it's, we're really good at predicting short term.

I'm going to steal from John Monahan, a very well-known law professor, it's like predicting the weather. If the weatherman told us this afternoon it's going to rain, you're going to bring your umbrella. If the weatherman told you in 362 days and five hours, it's going to rain, are you going to bring your umbrella? Maybe.

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Maybe not, right?

And so, we're really good, particularly with kids. And this is where the developmental science is really important. We're really good at predicting the short term. We're not good at predicting long term. And one of the things that we see in the research is the further we get out, the less well we do at prediction. So, when you're making decisions about kids, it's short term, short and swift.

In fact, one of the things we saw in the Pathways to Desistance Study, after six months of incarceration, you don't get a return on your investment. If you are an economist or you are a businessperson, you would look and go, we're not getting any more bang for our buck. Now, it doesn't address what Professor Morse is talking about, which is the moral, the ethical, those kinds of concerns. But if you're looking at science, that's what science is showing you.

So that's where your tension is. You have the science and then the balance. And as

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long as you know what the science is, it can help you at least guide what you think fits with the other pieces as well, because both are important.

DR. CASEY: So, I would just add one more element to this in terms of the potential for bias and the research that we know there. So, there are going to be more arrests in areas where we monitor more frequently. I live in Harlem. We are monitored very frequently there.

We also know that harsher sentences are applied to Black youth, and they're perceived as more threatening, and as up to four-and-a-half years older than they are based on Phil Goff's work that was published in the Proceedings of the National Academy.

And so, I think we need to be careful in terms of thinking about how would you weigh that? I'm a scientist. I would just throw it back to you. How would you weigh that equally given some individuals are going to be at greater risk for being arrested and incarcerated in terms of trying to make that statement?

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And then I just have to say, as a scientist, I wish the science were there, but we're not at a point where we can infer from group to individual. So, all of these issues that my colleagues have raised are very important and significant here.

CHAIR REEVES: First of all, I was looking around to see if anybody else have -- I do have --

You were pointing? No?

(Simultaneous speaking.)

CHAIR REEVES: Oh, I'm sorry.

COMMISSIONER BOOM: I was going to let you go first.

CHAIR REEVES: No. No. No.

COMMISSIONER BOOM: All right. So, I want to thank each and every one of you. I think that your materials were really, really informative. So interesting. I am a district court judge, so I sentence folks routinely. And I really appreciated the balance, Dr. Heilbrun, as far as, you know, there are two clear

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consensus, right, in the scientific literature that youthful offenders are within the cohort of the highest risk for violence and other criminal offending. And that youthful offenders are also within the cohort of more limited culpability due to developmental immaturity.

And so, at the place where I see these folks, they have been in and out of the juvenile justice system typically receiving graduated punishment, many, many times in and out, and they have now become adults and are continuing to recidivate. And so, my challenge is to balance all of this incredibly helpful scientific information that you have provided to us, that I certainly want to be more and more conscious of in all sentencing matters, but at the same time balancing that, right, with the data that we have, that youthful offenders recidivate at higher risks.

I mean, we had very recent data that demonstrate that. And so, I appreciate this idea of the individualized risk assessment type of

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tool, which I have not seen used really frequently that I do believe would be incredibly helpful. And the point, I can't remember who made the point, sentencing is individualized, right? That's our job as a judge is to impose the least sentence possible that still promotes or honors the purposes of punishment. And it is an individualized assessment each and every time.

Just because, you know, one person has a juvenile conviction that scores two points or one point, it's going to be different than someone else's juvenile conviction. And those are the kinds of normative judgements that we as district court judges have to make every single day. And I think we have to have that information in order to say, is this two-point like this other two-point? How can I try and predict if this is someone who is going to beat the odds and not recidivate at a rate of 70 percent?

And so, I want to thank each and every one of you. I think that your materials are

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super helpful and enlightening. If there are other ideas on how we can take that science and translate it into these judgments that we have to make each and every day, but I agree that ignoring information is not helpful at all. So I don't know if that's much of a question other than a thank you. And if you have other ideas, the individualized risk assessment, I think, is a really great idea and could be a really useful tool.

DR. MORSE: Let me --

CHAIR REEVES: Go ahead. Somebody want to address that?

DR. MORSE: Yes. I just wanted to make a brief response to what was just said, which I agree with every word. I agree with every word of it.

One of the problems for sentencing judges is there is no consistent set of sentencing goals that the sentencing judges have.

It's sort of a mish-mosh, I'm sorry to say. And the Supreme Court has contributed to that. It's

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so difficult. How do you weigh and balance incapacitation, deterrence, desert? There's no algorithm. So, every judge faces a sort of very difficult decision every time they make a sentencing decision.

CHAIR REEVES: I, as I said, I have a couple of, probably three questions, but I'll try to make them very brief. For Dr. Casey and Dr. Cauffman, it's going to be a similar question, and it somewhat dovetails off of what Judge Boom said. We're a policy-making body, so I'm just trying to figure out what is it that we could do? How could we best incorporate for you, Dr. Casey, incorporate neuroscience around cognitive development into our federal sentencing practices? Do you have any thoughts on how we might do that, where that journey might take us?

Similar question on the psychology end, because we need to consider this information, Dr. Cauffman. How do you know, and, you know, should we do road shows? Should we have you experts come to us and help us develop

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specific policy? What do you suggest from a neuroscience perspective, and Dr. Cauffman, from a psychology perspective?

DR. CASEY: So, I believe that the neuroscience is additional support for the psychological treatment of young people in the system. As a neuroscientist, I can tell you less about what you do in the law and the policy.

But I think there's converging evidence in terms of the potential for change for so many of these youth, and the work that Dr. Cauffman presented today really shows, in terms of diverting someone or the treatment that you use, not only helps that individual, but it actually protects society because we see less recidivism when we go that approach.

Dr. Cauffman?

DR. CAUFFMAN: That's a great question. I wish I had a great answer. It's a hard question. I mean, I don't envy your job. That's a hard -- I mean, wow. So, you know, it's easy to talk about the research, but how do we

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actually apply it? Some of the things that we have come away with our research, formal versus informal processing. That's what Crossroads was about.

We know from that research, more informal processing, diversion. For instance, one of the biggest findings we saw was a sanction and dismiss, which was write a letter of apology.

And this was for first time offenders. Now, realize, looking at who you're dealing with. We saw that to have the biggest effect on reducing criminal behavior six months later.

So you are at the risk of this is the population who is going to be doing the most stuff. I mean, if you think back to your own adolescence, this is when you were doing the most stuff. But how do you respond? Kids are approach focused, which means they're reward focused. We actually know if you want to change a kid's behavior, it's four rewards to every one punishment. Everybody is like, I'm going to give a kid a reward for doing?

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Thanks for showing up on time today. I really appreciate the effort you put in today. Those kinds of things. That's a reward. Like this morning when you thanked us all, that was a reward. Rewards can be really small. And if you want to actually shape behavior, it's four rewards to every one consequence that actually shapes and changes kids' behavior. So, we know informal processing works.

We know with Pathways, we actually saw -- I didn't get into this part of the research. When you incarcerate a young person, you're hearing all about the developmental science, incarceration actually makes and does the exact opposite of what we're trying to achieve. So, if you have kids who are developing impulse control, future orientation, all the developmental things we talk about, if they spend half of their one year, so let's say from 17 years to 18 years in a jail, they're less immature than their counterparts. A full year, even more so.

We actually see incarceration have

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more detrimental effects and do the exact opposite thing than what we want to achieve. Now, don't get me wrong, we need to do something.

But incarceration, the way we are incarcerating young people right now, is having the exact opposite effect. And if you think about what kids are supposed to be doing, they're supposed to be going to school, they're supposed to be making mistakes. But we put them in a setting when they're told when to wake up, when to go to bed. They can't make a mistake.

The way in which we have designed, you are a body that has the power to change how people do things. Like the way in which our system incarcerates young people should fit the developmental science, giving that freedom a way in which we know kids would change and grow in a better way. Because if you're going to hold them accountable, you need to do it in that developmentally appropriate way. We know we're making them worse.

And I do want to tell you just one

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outcome of that study. Upon release, kids can rebound. Again, it goes to their plasticity. So, it's not a permanent detrimental effect. But while they're incarcerated, we're actually doing more harm and doing less of what we are hoping to achieve than better.

CHAIR REEVES: The final question, and I apologize, the final question dovetails off of what Judge Restrepo opened with, the other type of factors that might go into a kid leading to antisocial behavior of children. Are there any environments, specific environmental stressors that might lead to that? Like we know that there are lead poisoning in the paint, for example.

Are there any specific -- are there any? I guess I should ask that question. Are there specific environmental factors, including antisocial behavior, within the family itself? But what other type of environment, or if there are environmental factors that might affect a child's ability to go along the path of least resistance, if you will?

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DR. HEILBRUN: I can start with a very brief answer. I'll give you two words in response to that. Family and peers. If there are problems within the family, and there very often are for justice involved youth, that's a big risk factor, and our best empirically supported interventions for reducing those problems in the community, focus on the family.

Secondly, peers are enormously important for kids in this age range, and to the extent that you interact mostly or see mostly antisocial peers and somewhat older models, then your risk goes up for antisocial behavior.

DR. MORSE: I would like to answer your original question by simply saying that this Commission can't do much about intact families. It can't do much about neighborhoods. It can only decide how we can respond after these factors have occurred.

And there, I think, again, I would urge you to encourage the federal probation offices to be exposed to this kind of evidence

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through programs, through education, and the like. That is your best bet, I think, for getting this kind of information. About the age policy statement and the criminal history calculation, you have my statement from my specific suggestions.

CHAIR REEVES: Thank you, Dr. Morse.

DR. CAUFFMAN: I'll just echo what's already been said. We know that there are certain risk factors that get kids in environments, you know, whether it's trauma, whether it's poor neighborhoods. Family and peers, I think Dr. Heilbrun said really well. One other thing that I think is really important to discuss that we haven't is substance use. Substance use. Alcohol and drug abuse.

COMMISSIONER GLEESON: Oh, okay.

DR. CAUFFMAN: Substance use. Sorry, I wasn't being --

COMMISSIONER GLEESON: Okay.

DR. CAUFFMAN: -- being clear. But alcohol, drug use, that's also very important to

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pay attention to, as well.

CHAIR REEVES: Thank you.

DR. CASEY: It's a ditto.

CHAIR REEVES: Doctors, we certainly appreciate all that you have done and the information that you provided to us. It is so useful, and we thank you all.

And we've gone over time, and we'll move to the next panel.

Thank you so much.

DR. CASEY: Thanks all of you.

DR. MORSE: Thank you.

DR. HEILBRUN: Thank you.

CHAIR REEVES: Dr. Morse, you and Dr. Heilbrun did great. Thank you.

DR. MORSE: Thank you.

DR. HEILBRUN: Thank you everybody.
Take care.

COMMISSIONER GLEESON: Dr. Cauffman, I'm going to go get some. Do you want any?

DR. CAUFFMAN: I'm good. Thank you.
Stick with my water, I think.

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CHAIR REEVES: Now that you've seen how we do it, thank you all. Our second panel will provide us with perspectives from experts in criminal justice.

First, we have Marsha Levick, the Chief Legal Officer and co-founder of the Juvenile Law Center in Philadelphia, Pennsylvania. She is an adjunct faculty member at Temple University Beasley School of Law. Ms. Levick has authored or co-authored numerous appellate and amicus briefs, including the lead child amicus briefs in the United States Supreme Court cases of Roper v. Simmons, Graham v. Florida, J.D.B. v. North Carolina, and Miller v. Alabama.

After her, we will have Professor Erin Collins, who teaches evidence law, criminal procedure, sentencing law, and immigration law at the University of Richmond School of Law. Her scholarship examines popular criminal justice reforms, such as specialized criminal courts, gender-responsive punishment practices, and

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actuarial sentencing with a particular focus on how evidence-based data-driven reforms can replicate systemic inequities and stall decarceration efforts.

Third, we have Dr. John Laub, a distinguished University Professor Emeritus in the Department of Criminology and Criminal Justice at the University of Maryland, College Park. Dr. Laub's areas of research include crime and the life course, crime and public policy, and the history of criminology. He has published widely, and his publications have earned major awards. He previously served as the director of the National Institute of Justice, in the Office of Justice programs, in the Department of Justice, and has served as a president of The American Society of Criminology.

Ms. Levick, you may start when you're ready. Thank you.

MS. LEVICK: Thank you. Good morning.

Thank you for inviting me to testify this morning to address proposed amendments to the

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treatment of youthful individuals under the Federal Sentencing Guidelines. I have spent decades advocating nationwide for the rights and interests of youth in the justice and child welfare systems.

As reflected in our written comments, unlike the federal criminal justice system, the American juvenile justice system is a 51-jurisdiction patchwork of diverse policies and practices, rife with variations, inconsistencies, and discrepancies. With core objectives of individualized consideration and indeterminate sentencing, and nearly unbridled discretion at every decision point, inconsistent and arbitrary outcomes for youth are inevitable. The last 20 years have been a watershed in developmental research, as the previous panel just shared. This research led to six landmark U.S. Supreme Court decisions striking the most extreme sentences for youth and expanding youth rights during custodial interrogation.

Collectively, they established that

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young people are different and our constitutional and legal practices must be reformed where necessary to reflect these differences. The amendments under consideration today go to the heart of these research findings, and we welcome them.

As the Juvenile Law Center has noted in our written comments, it is largely because of the inconsistencies and discrepancies inherent in the juvenile justice system that we urge the Commission to adopt Option 3 of Part A, and we support the proposal to explicitly include consideration of youth at sentencing, but counsel against specifying further criteria to be addressed. In preparation for today's hearing, I reviewed all of the comments submitted in response to the proposed amendments. In the few minutes I have, I will address what I believe are false assumptions that are driving opposition to these proposals.

With respect to Part A, opponents of Option 3 contended adult convictions of youth

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must be available to ensure federal sentencing takes account of the most serious criminal history of young people. This concern is premised on the false assumption that only youth who commit the most serious crimes are prosecuted in criminal court.

According to data collected by the National Center for Juvenile Justice, in 2020, around 60 percent of all youth transferred to criminal court were charged with person offenses, including simple assaults as well as more aggravated crimes. About a quarter were charged with property offenses, and the balance were for drugs or public order offenses. Further, in states like Wisconsin, Georgia, and Texas, where all 17-year-olds are prosecuted in criminal court, the percentage of property and non-violent offenses, including any and all misdemeanors, is obviously much higher.

And given that another eight states only raised the age of juvenile court jurisdiction to 18 in the last five or ten years,

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there is another substantial cohort of 16 and 17-year-olds who were prosecuted as adults for any and all crimes whose records could also fall within this lookback. I would also note that all but four states allow for youth to be tried in adult court based solely on drug offenses.

In addition to the inaccurate assumption about what crimes these youth have committed, the opposition also wrongly assumes that these youth are somehow more mature or more adult-like than their juvenile court peers. There's no research to support such a claim. The research actually confirms that all youth in this cohort generally share the same developmental traits and characteristics. Depending largely on where a youth lives, the criteria for adult prosecution vary widely with no national consensus on such key considerations as age, type of offenses, who the decision maker is, or even how much due process a youth should receive.

This lack of consensus leads to arbitrary outcomes across the transfer landscape.

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At the same time, despite this lack of uniformity in the criteria for transfer, uniform and pervasive racial disparities have persistently plagued the adult prosecution of youth. Data from 2020 reveal that Black and Brown youth made up two thirds of all transfers to criminal court, and Black youth in particular were more than twice as likely to be transferred for person offenses.

With respect to Part B, opponents rely on reported higher rates of recidivism to urge support for consideration of this data in sentencing youth. This reliance, I argue, is likewise misplaced. Setting aside questions about the accuracy of any particular methodology for measuring recidivism, decades of research also confirm that the vast majority of youth naturally age out of criminal engagement by their mid to late 20s, referred to as the age crime curve, which you just heard about.

It is also true that there is heightened criminal activity among older teens

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and young adults, but to enhance punishment for this age-related and time-limited elevation in criminal offending that is not, in fact, indicative of later criminal conduct, is not smart criminal justice policy. This Commission's mandate is to develop guidelines that are certain, fair, avoid unwarranted disparities, and reflect the advancement of human knowledge.

Our support for Option 3 and for the explicit consideration of age in Part B is consistent with this mandate. Across the country in every state, the failures of the juvenile justice system subject children to injustice by race and injustice by geography. Failure to adopt these bold and smart amendments will simply export and nationalize this injustice at the federal level. Thank you.

CHAIR REEVES: Thank you.

Professor Collins.

PROFESSOR COLLINS: Good morning. Thank you so much for having me. I'm so excited to be here. I'm going to focus my commentary on

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the proposed amendment to the Age Policy Statement in §5H1.1 (Age (Policy Statement)) of the guidelines. I'm encouraged by the possibility that the Commission will expand the opportunity for more people to be eligible for a downward departure based on age by removing the unusual degree limitation.

I'm concerned, however, with the proposed instruction to judges to consider research regarding the correlation between age and rearrest rates when deciding whether to grant such a departure, and I urge the Commission to reject this part of the proposed amendment for the reasons that I'll explain. In essence, the proposed amendment requires judges to consider group recidivism data when assessing the suitability of a downward departure in an individual case. Recidivism has a straightforward definition. It connotes a return to criminal activity. As measured and analyzed, however, recidivism becomes a malleable concept.

In some context and for some purposes,

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we measure recidivism by a new conviction. In others, a new period of incarceration, the filing of a new charge, or, as we see in this proposed amendment, a new arrest. Using arrest rates to assess recidivism is the least accurate and most concerning method of measuring whether somebody has relapsed into criminal behavior. As Professor Anna Roberts has explained at length, arrest and guilt are factually and legally distinct concepts.

An arrest reflects a determination by law enforcement that there is probable cause to believe someone has engaged in criminal activity.

Arrest, as the Supreme Court reminds us, happens to the innocent as well as the guilty. That someone was arrested does not tell us whether the arresting officer's assessment was correct, whether the government has proof to substantiate those allegations beyond a reasonable doubt, or whether that arrested person actually committed a crime.

Therefore, arrest is a misleading

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measure of recidivism. It identifies many people as recidivists who have not actually engaged in criminal behavior. I also encourage the Commission to scrutinize the relevance of group recidivism data to sentencing decisions. Using an individual's criminal history records to predict a person's future behavior is an established sentencing practice. Many scholars have offered powerful analyses of how criminal history data reinforces embedded racial biases, and I hope the Commission will consider these critiques as it develops future amendments.

For purposes of the proposed amendment, however, I would like to emphasize one key difference between criminal history information and group recidivism data. Criminal history information consists of documented convictions of a particular person being punished. Historic group recidivism data lacks this direct connection to the behavior of the person being sentenced.

The past behavior of young people who

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were arrested, even if it was criminally culpable, does not dictate that a particular person who is being sentenced will behave similarly in the future simply because they are young. And yet, that's the very inference that's required to render this group data relevant to individual sentencing decisions.

Notably, the guidelines prohibit judges from considering an individual's arrest record without more as the basis for an upward departure. I believe it would be logically inconsistent, therefore, to allow a judge to deny a downward departure because of the possibility one may be arrested in the future, an inference based on how people other than the individual being sentenced may have behaved in the past.

I would also like to offer a few comments on the limits of recidivism data in general. Recidivism data provides only a glimpse of who is suspected of engaging in or who does in fact engage in behavior deemed criminal. And what we see in that glimpse is shaped by the

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structurally unequal and racially biased context in which the criminal law is enforced. Quite simply, and we heard this on the previous panel, arrests occur where the police officers are. And certain communities in certain locations, specifically low-income urban communities of color, are policed more heavily than others.

The racial biases embedded in the data emerging from these disparate policing practices are then replicated in the data that forms the basis of recidivism predictions. Moreover, while recidivism data is often used as a shorthand for public safety, this is a deeply flawed proxy. Even if we assume recidivism statistics accurately reflect criminally culpable behavior, it tells us nothing about the severity of that behavior.

Most recidivism statistics do not distinguish between those who recidivate by committing quality of life crimes with those who commit homicide. And some studies, including one cited in the proposed amendment, define as

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recidivists, those who are arrested for behavior that is not criminal, but that is prohibited because they're on some form of supervised release. I'll just underscore that recidivism is simply one way to define and measure public safety and criminal system impacts, and that it, in my opinion, provides a limited and limiting view of what safety means and how it can be achieved.

For all of these reasons, I hope the Commission will reject the proposed amendment that would require sentencing judges to consider historic group rearrest data when deciding whether to grant a downward departure. Thank you so much for your consideration.

CHAIR REEVES: Thank you, Professor Collins.

Dr. Laub.

DR. LAUB: Thank you very much for the invitation. I really appreciate the opportunity to provide you with information about crime and the demographics of criminal offending and

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victimization. In addition, I also want to highlight findings from a long-term longitudinal study that I've been involved in over the life course that I believe is relevant for your considerations of youthful individuals. My first point I want to make is facts matter --

CHAIR REEVES: Make sure you --

DR. LAUB: Sure.

CHAIR REEVES: Make sure you're speaking up. We want those people way back there to be able to hear you.

DR. LAUB: Yes. I decided to put water on my papers instead of in my mouth. So, I'm struggling here a little bit, but I'll do my best to --

CHAIR REEVES: Oh.

DR. LAUB: Okay.

CHAIR REEVES: That's all right. We struggle on this side of the table, too.

DR. LAUB: We'll trade places. So, my first point is facts matter. Facts are the foundation for effective policies to reduce

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crime. What does the research tell us about crime, criminal offending, and criminal victimization? One of the major developments in the last 40 years in criminology is the recognition that there's no single cause or risk factor for criminal behavior. In fact, there are multiple pathways to crime.

We also know from many studies that chronic offending begins in childhood and early adolescence. Chronic offenders in particular have multiple risk factors in their background. For common law crimes, the known patterns of criminal offending are remarkably stable across age, gender, race, and socioeconomic status. Crime, especially serious crime, is the province of the young. In the aggregate, crime is most likely to occur between ages of 15 and 25. Crime, especially serious crime, is heavily dominated by male offenders.

The relationship between race, ethnicity, and crime is complex. On the one hand, the majority of offenders who are arrested

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or self-report crime are white. However, crime is disproportionately concentrated amongst Blacks and other minorities when examining rates of offending, taking into account population size. This is especially a case for crimes like homicide and robbery. Like race, the relationship between socioeconomic status and crime is complex.

We also know that the more serious and frequent offending occurs amongst those in the lower socioeconomic status. Again, this is the case for crimes like homicide and robbery. Like criminal offending, patterns of criminal victimization are also remarkably stable across age, gender, race, ethnicity, and socioeconomic status.

There's an inverse relationship between the age of the victim and the risk of personal victimization. Relationship between age and victimization is particularly strong in homicide, aggravated assaults, and robberies. Victimization rates for males are considerably

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higher than comparable rates for females, and the rate of violent victimizations, especially aggravated assaults and robberies, is greater for Blacks than whites. The Black-white rate disparities for homicide victimization are especially striking. As income goes up, risk of personal victimization goes down. In some, criminal offending and victimization are not randomly distributed across persons and places.

My second point is that it's important to consider crime across the life course. Since 1987, Robert Sampson and I have been leading a long-term research project examining continuity and change in criminal offending from childhood through old age. Two findings from this, from what is considered to be one of the world's longest longitudinal studies, are especially relevant here. And if I could turn my papers that are totally wet, I'll see what I can do here. Not really.

The two findings that I want to talk about in a minute -- bear with me, Chairman. You

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know what? I'm just going to go from memory. The two findings that I want to talk about are, one, we know that crime occurs early in childhood, and that those who are most likely involved in childhood and adolescent crime, are likely to continue crime in adulthood.

However, I want to make the point that those background factors in childhood are not predictive of later criminal offending. I want to really challenge the idea of what I would call childhood and adolescent determinism. We know that people change over time and it's important to think about that. The second finding is we did learn in our study that people can get their lives back on track.

And this typically has happened through things like stable marriage, stable employment, military service, and neighborhood change. And so those things seem to be important in terms of understanding how people change over their life course with respect to their criminal behavior, despite having a whole host of risk

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factors in early childhood.

The last point I want to make is that I think that it's important for you to give serious consideration to the proposed amendments regarding youthful individuals. On the one hand, we heard earlier about the importance of neuroscience and particularly in thinking about how kids make decisions and their ability to resist peer influences. But secondly, more important, I think our longitudinal study, our prospective longitudinal study shows that the effects, over the life course, shows that many offenders desist from crime.

And it's important for the criminal justice system to embrace the idea of behavioral change going forward. Finally, I will say that if you do decide to institute the proposed amendments, I encourage you to do rigorous research on their effects. Unfortunately, we have a long history of criminal justice reforms leading to unintended negative consequences going forward. Thank you very much.

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CHAIR REEVES: Thank you, Dr. Laub.

Questions from the panel?

Commissioner Wroblewski.

COMMISSIONER WROBLEWSKI: Thank you so much, Mr. Chairman, and thank you all for being here.

It's good to see you again, Ms. Levick. I have a question for you. In your statement, you said pretty definitively that the prior criminal record is, and I think this is your words, not indicative of future behavior and should not be considered at all.

It seems to me, at first blush, that that's inconsistent with both the prior panel that seemed to uniformly say that this is very valuable information, and it also seems to be inconsistent with the Commission's recidivism study, I don't know if you've seen it, that the Commission published on its website just in the last couple of weeks that showed recidivism rates in the high 60s and so forth. Am I getting that wrong, or can you explain?

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MS. LEVICK: Well, you're definitely not getting the study wrong. And I just wanted to say that I know there was one particular comment that was shared with the Commission, presented to the Commission, that I thought did a very effective job of critiquing the methodology and some of the findings in this study. So, I'm going to leave it to them and for you to look at that. So, I'm both inconsistent, and I think I'm not inconsistent. So, I will defend the statements that I made.

I think it is absolutely true, and I think that the desistance studies that Dr. Cauffman spoke about in the age crime curve that the prior panel addressed, it is true that there is a heightened level of criminal activity between the ages of, as Professor Laub said, 15 and 25. That's where most crime occurs. But the propensity for desistance, the likelihood of desistance, the percentage we heard in the prior panel was 90 percent of youth in that cohort, of young adults in that cohort, will desist, it

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seems to me poses a dilemma and a critical question for the Commission: What is the purpose of sentencing?

The purpose of sentencing has multiples. Incapacitation, it's deterrence. Hopefully, it's also a bit for rehabilitation. It's also retribution. But when you are elevating by relying on prior criminal history, using that to elevate the potential sentence for a group of individuals who are, in fact, going to naturally desist, my position is that it doesn't make sense. It's not that I disagree with the recidivism studies. It's that it doesn't make sense from a policy perspective.

Two other points that I would make. One is that I do think, and this was also stressed in the prior panel, to the extent that this Commission is concerned with disparities of all kinds, including racial disparities, the racial disparities in prior criminal record history are abundant. And that has been documented in multiple ways, commented on by

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multiple individuals. Books have been written about it.

The other point that I want to make is that the recidivism data, I think that Professor Collins' point about how we sort of extrapolate from a group perspective to presume things about individuals. It can also within -- there are pockets of it that are wildly inconsistent and probably would seem unusual to you.

So, we assume that individuals who commit the most serious offenses, that's why you want to look back at that criminal record history, are the most likely to reoffend. There is in fact now research that has examined thousands of young people under the age of 18 who have been adjudicated delinquent for sex offenses, including aggravated sex offenses and rape.

The recidivism rate is 3 to 5 percent.

That group, however, would be lumped into this recidivism data because of the assumption if they have a prior adjudication or a prior adult

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criminal record that might involve a sex offense, that's not going to be pulled out as, oh, but this one isn't likely to be a recidivist. So, I think that the methodology is uncertain.

Again, are you measuring arrests? Are you measuring conviction? Are you measuring incarceration? How many years are you going forwards or backwards? I think there are questions about the reliability. I think that it is inherently racially discriminatory, and it doesn't make sense because this population is going to desist from crime.

CHAIR REEVES: Commissioner Gleeson.

COMMISSIONER GLEESON: Thank you. Thank you all for being here and for your oral and written input. My question relates to this recidivism data, and we wrote, and this is consistent of what we've heard from you, but we wrote in one of our recidivism reports from June of 2022, using rearrest does result in higher recidivism rates than reconviction or reincarceration.

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And Dr. Casey mentioned she lives in Harlem. I live in an ethnically, racially diverse neighborhood in Queens. And I'm just wondering whether we have disaggregated whether it results in higher recidivism rates across the board, or whether it results in higher rates for people of color, youthful offenders?

We're passed stop-and-frisk in New York where there were literally hundreds of thousands of arrests of young people of color that didn't result in conviction or reincarceration. But that phenomenon still exists to a lesser degree in my experience, but it's not scientific.

So, I guess my question, Professor, is whether there's any data out there that shows that if one were to use convictions as opposed to rearrests, if one were to exclude arrests based on technical violations of supervision, whether the recidivism rates would be reduced differently among the universe of folks that we study, if you understand the question?

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PROFESSOR COLLINS: Thank you for that question. I don't know a specific study off the top of my head, but maybe my panelists do. But I think the question is: What are we using recidivism for, and who is coming into the criminal system who then gets their future predicted based on what they've done in the past, right? So, I think it's clear from studies that whether we use arrest data or conviction data, there are racial biases because of the structures of law enforcement baked into those data points.

So, people who are people of color from low-income neighborhoods are more likely to have arrest records and more likely to have criminal records, whether it's for low level offenses or high-level offenses. And then once they come into the criminal system, again, they have that record that then is a basis for predicting recidivism in the future, whether we use arrest or conviction.

So, it might ameliorate some of the harms by using conviction. It might be a

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slightly more reliable metric, but I think that there's problems inherent in using conviction in criminal -- our over reliance on criminal history records in general. I think it's just a different variation of the same problem.

CHAIR REEVES: Thank you.

Commissioner Wong, did you want --

Well, with respect to that answer, Professor Collins, I think your comment sort of focused on moving away or moving away from centering the policy away from the recidivism data, rearrest, or the data that's tied to this.

Are there any other institutions, policymaking institutions, that have done what you wish -- you know, how you wish we ought to look at it?

PROFESSOR COLLINS: That's the hard question. That's for you all. I think that we're at this inflection point where there's a lot of attention to problems with recidivism data. And yet, it's the data that we have, and so it's easy to kind of follow this path dependence and use what we have and what we think

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we know about how the system operates to move forward. I welcome this opportunity. I think we're at a time when we can gather a lot of different ideas about what else we could use.

I know there's been robust proposals to use -- instead of focusing on recidivism, to focus instead on desistance, and how can we encourage desistance instead of recidivism? I think that also it's a moment to think more holistically about what we use recidivism as a proxy for. And I think there are a lot of grassroots movements right now looking at how we can envision public safety and define public safety and work towards public safety in ways that are kind of more proactive about addressing needs of folks in communities before they become targeted by the criminal system itself.

So, I don't have any one model, but I think now is a great time for the Commission to be listening and imagining what other kinds of data are out there beyond just the data that we have. Because I think one problem with

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recidivism data itself is that it's backwards looking, right? And so, if we want to replicate the system that we have going forward, a great way to do that is to keep doing what we've been doing. But if we want a different future, if we want the system to look differently in the future, I think we need to look at different sources of data to envision different futures.

CHAIR REEVES: Yes.

MS. LEVICK: And I think this also goes to the prior question. I think that another point that we can't overlook is that to the extent that the use of criminal records, which is all tied to the recidivism data as well, also is looking at periods of confinement. The crazy thing about the juvenile justice system is that confinement is not rational. We would like to think that the confinement follows the seriousness of the offense. It doesn't.

It is often not tethered to what the particular child did because of the indeterminate, individualized, and inherently

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arbitrary ways in which decisions are made in the juvenile justice system. It's a very imperfect system. And so, you end up having -- for example, I can say recently in the last couple of years in Pennsylvania, about half of the youth who are incarcerated in Pennsylvania through our juvenile justice system are, actually, they're on probation violations.

That doesn't make any sense if you're trying to look at that information as being a predictor of some type of future criminal behavior. The same is true for youth who are convicted in the criminal justice system because of the wide variability that we see across the ways in which children come into the criminal justice system.

So again, we want to imagine, we want to believe that the system is logical. It's not that logical, unfortunately. We have a lot of work to do in the juvenile justice system. But the ways in which the system is illogical will create the same kinds of arbitrary outcomes, I

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suggest, in the criminal system, in the federal system, if you continue to rely on that experience as indicative of future behavior.

CHAIR REEVES: I have a follow-up and thank you. I was struck by you when you opened.

You talked about the 51 systems patchwork, the 50 states and D.C. and whatever else, I guess. And you also talked about the unbridled discretion at every level.

Take us through all the -- well, not all, but as many -- what are those discretionary decisions that are made? Because I think about something that happened back in my home state just recently. A mother is in some shop or somewhere left her 10-year-old child in the car by himself. 10-year-old child has to relieve himself. Gets out.

MS. LEVICK: Yes.

CHAIR REEVES: Police arrest him. The judge says that that's fine. You know, orders, just a whole lot of things. So, tell me about this unbridled discretion at those levels that

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persons who are in authority can exercise that might result in criminal history points for the child.

MS. LEVICK: Yes. Thank you for that question, Judge Reeves. And I know exactly the case that you're talking about. Unfortunately, it received a lot of national attention. So, it begins with arrest. As you've heard from the other panelists, communities of color are over-policed. They're over-surveilled. They are more likely to be arrested.

At the point of arrest, that's a discretionary decision by law enforcement. Once they are arrested, there's another discretionary decision made by the prosecutor whether or not to charge, or in some jurisdictions where they may have robust or not robust diversion programs, whether or not to divert. Entirely discretionary. No one is checking that determination. Once the child comes into the juvenile court, the decision, first of all, whether or not to detain that child, very

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discretionary. Very vague standards that determine whether or not an individual child is going to be detained.

There's lots of research that suggests that children who are detained pretrial will have worse outcomes as they travel down the journey through criminal court. When they are before the judge, we like to think, again, I'm kind of like the very negative person here, we like to think the system works appropriately, but when you are before a juvenile court judge in juvenile court, it's not so much about, did you do this thing that you are charged with? It is often a focus on, what is in your best interest?

Still, in 2024, what are your best interests? What are your needs? Do you have mental health needs that I should perhaps be tending to? What is your family situation? Are you able to return home to your family? These kinds of considerations are in the judge's head often. Not all judges. That's what makes it a patchwork.

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Some individual judges will be more fixated on what is happening in the child's life than perhaps what the actual crime or circumstances of the offense might be. Whether or not to then incarcerate the child, to place the child on probation, to possibly give them some kind of consent decree where they might be on probation for six months and then have the charges dismissed.

Those decisions: probation, incarceration, or short-term supervision with dismissal, are highly racially charged. And we see enormous racial disparities in which kids get to go home and which kids are placed. And in fact, I think the numbers are around nine to one for Black youth who are more likely to be incarcerated in the juvenile justice system. Who gets out?

Because it's an indeterminate sentencing system, there is no rule about when a child might actually be released from incarceration except that, at some point,

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juvenile court jurisdiction ends. So, in almost every state it ends at age 21. They will have certainly all be released either from incarceration or from supervision by age 21.

But between the ages of 15, 17, 19, 21, that is a very subjective decision about whether or not the child has, in fact, met the so-called requirements of the program or the expectations of the program or has been rehabilitated. In the eyes of who? It might be a judge. It might be a parole board type situation. It might be an executive agency that is running the juvenile justice system in that state, and their employees and officials are making those decisions. So, at every step of the way, there is so much discretion and individualized decision making.

And I just want to underscore, it's really not 51 different juvenile justice systems in this country. The fact that the judge in the particular jurisdiction, county, I assume in Mississippi, decided it was okay to arrest that

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little boy. It may be there was another judge in a different county who wouldn't have done that. We see that every day across the juvenile justice system. There is no uniformity in how judges perceive the children and the conduct before them.

And so, I can say in Pennsylvania, we have 67 counties. We probably have 35 different juvenile justice systems. Some behave more or less the same, some not so much. And so, I just think it is -- you're looking at a very challenging environment from which to draw useful information in predicting behaviors with extraordinary consequences, because what you will do with this information is to increase sentencing of young people.

And I think we all know, certainly in the juvenile justice system, but there's evidence as well in the criminal justice system, that incarceration, it does incapacitate people. It does not necessarily rehabilitate them.

CHAIR REEVES: Thank you.

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Vice Chair Murray and Vice Chair Mate?

VICE CHAIR MURRAY: I had a question about sort of relative rates of rearrest. I mean, in particular, I think you probably know that we always use -- I mean, using rearrest as proxy for recidivism is not new. Just, that's how we've done our data for a long time, just because it's what's available. And you probably also know that last year we made several sets of pretty significant reforms to criminal history.

In particular, we discovered that folks with zero criminal history points had markedly lower rates of rearrest than folks with one criminal history point, and so we gave them a sort of a break, right? A lowering of criminal history. And similarly with folks who were on status, we saw a lower recidivism rate as measured by rearrest. And I'm wondering if you think that's kind of a legit thing to do.

Do you think it was okay that we were using relative rates of rearrest given all of your critiques of rearrest rates, or do you think

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that that was a big mistake? Thanks.

PROFESSOR COLLINS: Oh, my goodness. I'll lead with, I come to this, I come to academia as a former public defender. So, I'm never upset seeing people get shorter sentences for a variety of reasons but including the impact on that person's life. I think conceptually, though, I want to think about how we frame that, right? So, if we think about, if it's giving -- using rearrest rates to give someone a break also might be seen on the flip side as using rearrest rates to justify longer sentences for other folks.

So, if we frame it in that way, then I actually do think that there's a conceptual problem with what we're doing. Now, the impact of getting some folks shorter sentences, I am on board with because of all the harsh impacts of incarceration and the consequences to people in their communities. But I do think we need to be cognizant of whether we're doing that, justifying that, by also at the same time justifying longer

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sentences for others, which I think can be a problem.

VICE CHAIR MATE: Thank you all so much for your testimony today and for your written statements, as well. They're very helpful.

Ms. Levick, I have a question for you. Based on what you were talking about today and some of your written testimony about the wide variety of practices, yet you spoke a lot about the transfer and the direct files, but also in your written work, about the variety of practices in juvenile courts in terms of due process, quality of interventions, and things like that. And as we think about that background and how the best way to handle that in a guidelines manual going forward, it comes to mind that another area where there's sort of a wide variety of practices that way is tribal convictions.

And the Commission in the manual has said, those don't count as a rule. Of course, courts can consider it and they can go above and

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below the guideline range, but it's not a factor in the guideline calculation. And that is another situation where there are those wide variety of practices. And I was curious about your thoughts on whether, which of those models, the counting or the not counting given the -- and whether those are similar or not for purposes of our analysis.

MS. LEVICK: So, I support not counting. I think that makes sense for the reasons that I've said. And, you know, I guess I would just I would add that the disparities in the variations that we see in the juvenile justice system, I kind of talked about process. We also have to understand that there are several states across the country that have no lower age of juvenile court jurisdiction. So, in New Jersey, who would think New Jersey was, you know, not a relatively progressive state. I tend to think it is. They have no lower age for juvenile court jurisdiction at all.

A four-year-old could technically be

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arrested in New Jersey and have a juvenile record. There are other states that have an age of 10 or 12 or 14. So the lack of consistency about who comes into the system, I think, is indicative of how -- your job is to try to make policy that necessarily affects a wide group of individuals, more or less should affect everyone the same. That's the goal. And yet when everyone coming into the system is not remotely the same because of the wide variations in the system from which they are coming, it seems to me it complicates that ultimate goal of creating this kind of uniform response.

The other thing that I would say is that to the extent that the prior panel, and I know that Dr. Heilbrun particularly talked about, he raised the issue of risk assessments. So, our recommendation is to, of course, specifically reference youth in Part B, but to not include other specific things that you should consider so that you are not tying the hands in any way of what judges can appropriately consider when they

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are making these kinds of sentencing decisions and upward departures or downward departures.

But there's no reason why a judge couldn't use a risk assessment if they wanted to.

It seems to me if you're considering age, these are things that you could look at. And I think that all of the -- both, again, you heard a lot of the protective factors and risk factors, all of that is information that it seems to me an individual public defender might want to bring into the equation and into the conversation at sentencing.

You shouldn't be foreclosed from doing that. Relying on youth and youthful characteristics, I think, opens the door to do that. But again, by not specifying, I think it doesn't tie the hands of judges.

COMMISSIONER WROBLEWSKI: Judge, can I just follow up on --

CHAIR REEVES: Commissioner Wong.

COMMISSIONER WROBLEWSKI: Oh, I'm sorry. I apologize.

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COMMISSIONER WONG: Professor Collins, I take your point about the difference between rearrest and reconviction, but I wonder if, for our purposes as the Sentencing Commission, at the point in which our policies have an impact, you know, we're obviously talking about the point of sentencing when someone has not only been rearrested but is being sentenced for a conviction. And the question would be then to what extent should a prior conviction, not a prior arrest, but a prior juvenile conviction count?

And so, when we see the sort of glaring data that we have, which is showing -- you know, the Commission's report just said that about 67 percent of those defendants with at least one criminal history point for juvenile adjudication is likely to be rearrested within three years compared to 43 percent. I mean, that's a 23 percent difference, right? 67 percent with the juvenile point versus 43 percent. I definitely take it that we should

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take that with a grain of salt.

Those were not convictions. There was probable cause. There wasn't a conviction. But isn't that still a really relevant data point for a body that has to evaluate dangerousness? And we're all grappling with the same dilemma of differentiating those that are likely to desist from those that are likely to reoffend. That's a big difference, 23 percent. And I just wonder if we should be discounting that or just taking it with a grain of salt in your view?

PROFESSOR COLLINS: May I ask a clarifying question? Are you talking about using an arrest record from that individual being sentenced or kind of the arrest statistics as embodied in the policy statement? Because I think those are different questions.

COMMISSIONER WONG: No. I just meant the fact that we are trying to assess, the Commission itself, on whether our criminal history guidelines, whether that counting of a juvenile point is doing any work. And the two

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relevant comparison groups, one where it's counting, there's a juvenile point, versus the broader study group, it does appear that there's a difference and that counting it is differentiating a particular group that is likely to recidivate in a meaningful way as compared to a regime in which they're not counted. And I just wonder if not withstanding the concerns about over-relying on rearrest data, you're saying we should not even consider that at all.

PROFESSOR COLLINS: At the very least, take it with a huge grain of salt, I would say. But I do have concerns about using rearrest statistics, especially if it's rearrest statistics of a general population looking at a one single characteristic that they all have in common to make projections about that individual's future.

Most young people are not arrested. And I think we heard from the previous panel that many young people actually do desist, right? And so, I guess, are we focusing on the many who do

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desist or the ones who are rearrested? And so, I think these are all valid questions to be asking.

And I think at the very least, I just hope that the Commission keeps in mind the limits of the data that we have and the ways it's structured by the choices that researchers have made. And so, I would lean towards discount it, not considering group rearrest statistics, but if you do choose to keep them in, just keeping in mind what the limits of those insights are in considering how heavily we might weigh them in making very consequential decisions for individual defendants.

MS. LEVICK: I would just echo that. I think that, yes, it feels like a big difference, 40 percent versus 60-some percent, but it's rearrest data. It's not conviction. We know that, again, the disparities that drive that rearrest data and the fact that even if they're rearrested, the desistance numbers are so much more powerful from a policy perspective. The concern is public safety at the end of the day,

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whether or not we are keeping communities safe. And if, in fact, 90 percent of this cohort is going to desist, that's a very powerful statement about the potential for public safety across the country.

COMMISSIONER WONG: I think some of the reasons the data has focused on rearrest data as opposed to reconviction is that data is more readily available. If there were comparable numbers or statistically significant numbers showing a difference between those two groups as far as reconviction, would that be reliable data for the Commission to rely on?

MS. LEVICK: Well, I think we can assume that it's probably not available, right? I mean, we're not seeing it, number one. And number two, again, I think the desistance numbers argue against your being able to find that data.

CHAIR REEVES: Commissioner Wroblewski?

COMMISSIONER WROBLEWSKI: I apologize for jumping in before, but I was puzzled, Ms.

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Levick, by your response. I think you were saying that the Commission should not outline in the departure provision that we're considering a number of the factors that a court should consider. Again, that seems inconsistent with the advice that we were getting from the last panel.

And I'm just puzzled why you would suggest that we don't consider the things that, for example, Judge Restrepo was talking about, about whether someone is living in a situation where they're not getting enough food or whether their cognitive development or emotional development or psychosocial development, why wouldn't we give that kind of guidance to judges as they're considering whether or not to bury up or down, to part up or down for a youthful offender?

MS. LEVICK: I think my assumption is that if you, in fact, explicitly require that youth and youthful characteristics be a part of the sentencing calculation -- right now it's just

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age. And age, as I understand it historically, has tended to favor older individuals who are incarcerated, so it doesn't really focus on the youthful characteristics of the person in front of the sentencing judge.

My worry, and it's certainly something that I believe is shared by the experts who testified at the prior panel, Dr. Casey and Dr. Cauffman, research isn't fixed. It's dynamic. It's not static. And so, to the extent, for example, that the guidelines specifically reference utilizing neuroscientific studies, we oppose that because I don't know what the next five years will bring in terms of that research, other psychological or behavioral research.

And our concern was, again, in tying the hands of sentencing judges about the extent of information that they consider. My hope, and perhaps this is an idealized hope, is that when federal judges are now specifically presented with the responsibility to specifically consider youth, not just age generally, that the kinds of

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factors that Judge Restrepo identified, again, those kinds of socioeconomic factors, community factors, family factors, the protective factors, the risk factors, hopefully all of that will be presented. But prescribing it, what have we left out?

That's the concern that I'm raising. Not at all that I don't think that information is highly relevant to the decisions that sentencing judges are being asked to make.

CHAIR REEVES: Thank you all, ladies and gentlemen. We appreciate your testimony. Thank you for your comments as well that you submitted.

Our third panel will provide us with the perspective of the executive branch's perspective on this issue. That view will be presented by the Honorable Matthew Graves, who serves as the United States Attorney for the District of Columbia. He was nominated in 2021 by President Biden and confirmed that same year.

Mr. Graves joined the U.S. Attorney's Office as

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a line AUSA, investigating and prosecuting a wide range of criminal matters, including violent crime, drug trafficking, and illegal firearms possession.

Mr. Graves, we're ready for to hear from you. Whenever you get started, I've already promised Commissioner Wong that she gets a chance to ask the first question, the middle question, and the end question.

MR. GRAVES: I expect to receive the hardest question.

CHAIR REEVES: Right. You may proceed, sir.

MR. GRAVES: Good morning and thank you for the opportunity to testify before you today. It bears noting that when we discuss violent crime committed by juveniles, we are talking about an exceptionally small subset of the juvenile population. FBI 2022 arrest data suggests that only about 0.1 percent of the juvenile population is arrested for a serious violent felony, let alone convicted of one.

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Nevertheless, this 0.1 percent has played an outsized role in the violent crime landscape in the District of Columbia.

For some crimes in the district, such as armed robbery and armed carjacking, the majority of people arrested are juveniles. By way of example, in 2023, more than 75 percent of the individuals arrested for armed carjacking were juveniles. Regarding youthful adults, in 2023, 64 percent of the adults arrested for armed carjacking with a firearm, and 58 percent of the adults arrested for armed robbery with a firearm in the district, were between the ages of 18 and 24 at the time of offense. With these offenses, there are very few people arrested who are not juveniles or youthful adults.

For instance, of the 182 people arrested for armed carjacking in the district in 2023, just 15 were 25 or older at the time of offense. In light of these facts, we have some overarching thoughts. First, while the science is clear that people's cognitive control systems,

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which help modulate recklessness and impulsivity, typically continue to develop into the mid-twenties, no basis exists to conclude that this is a primary factor as to why a crime occurred, let alone a dispositive one. Again, 99.9 percent of juveniles were not arrested for violent crimes in 2022.

Second, the circumstances of the violent crimes committed by juveniles vary widely, ranging from calculated and cold-blooded acts to random disputes that inexplicably escalate to extreme violence. We consider such circumstances when deciding whether we should use our authority under D.C. law to charge 16 and 17-year-olds as adults for certain violent offenses.

One case where we exercised this authority was a first-degree murder prosecution of a Malik Holston, who in 2018, at age 17, hunted 15-year-old Gerald Watson and shot him 16 times.

The evidence introduced at trial showed that Holston targeted Watson, who had simply gone outside after school to play

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basketball, because Holston was looking to retaliate against someone, anyone, from Watson's neighborhood. Compare this case with the well-documented case where a 16-year-old girl stabbed one of her friends to death during a fight that had broken out over McDonald's dipping sauces. We did not prosecute that juvenile as an adult. While both crimes involved the senseless death of a child, there are substantial differences in premeditation and deliberation with these crimes.

Turning specifically to the Commission's proposals: Regarding Part A and whether the court should ignore previous convictions and adjudications for offenses committed before age 18 when a defendant commits a new crime, a federal crime, as an adult, my concern is the district is already struggling with a perceived lack of consequences for serious juvenile crimes, and that the Commission's actions may compound matters by unintentionally sending a message that the federal government will also ignore juvenile convictions.

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Moreover, these proposals ignore the recidivism risk this population poses, which was discussed at great lengths in the prior panel, with respect to individuals who have one prior point as an adult versus one prior point for a juvenile conviction. Neither the science regarding cognitive development nor the recidivism data supports turning a blind eye to all violent offenses. Finally, regarding Part B, just as with Part A, I'm concerned that the Commission's proposal will send the wrong message at the worst possible time.

In 2023, nearly a quarter of defendants arrested for armed robbery using a firearm in the district had a previous conviction under D.C.'s Youth Rehabilitation Act, which applies to offenders under 25. We simply have a problem in the district and elsewhere around the country with a very small number of youthful adults engaging in repeated violent criminal conduct. Having recently experienced a surge in shootings, armed robberies, and armed carjackings

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in the district, creating what could be perceived to be a presumed downward departure for the youthful offenders contributing to the surge risks fueling this fire.

I believe that the best practice is what courts already do, and in fact are required to do under section 3553(f)(1), considering on a case-by-case basis the nature and circumstances of the offense, and the history and characteristics of the defendants. Thank you, and I look forward to your questions.

CHAIR REEVES: Thank you, Mr. Graves.

Commissioner Wong didn't take the bait. Okay.

Any questions from any other of the Commissioners?

COMMISSIONER GLEESON: Not yet. Thank you.

CHAIR REEVES: Okay.

COMMISSIONER BOOM: So, your letter is very different than what your statement is today, and so I'm just curious about the disconnect

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there. And your letter says, the Department opposes Part A and the research supports a more nuanced approach than the bright line provision in the current proposals. And so, my question is, what is that nuanced approach? And I guess you will supplement the letter that was provided because it is sparse on detail and very different, I think, than your statement today. So, I'm just curious about that, as well.

MR. GRAVES: I understand the question. I think the top line conclusion is the same, both with respect to my oral statement and the testimony, that we oppose Part A, and we take no position on Part B, but have some concerns and wanted to share those concerns.

With respect to Part A, I think the challenge for us is, and I hope this came through in my statement, we do think that a number of these points, including whether a particular defendant, when compared to other individuals of the same age, was particularly behind on cognitive development, the nature and

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circumstances of the underlying offense, the accuracy of the records. We acknowledge that different jurisdictions have different practices, and some records might be more reliable from the juvenile system than others, depending on the jurisdiction.

All of that should go into consideration. But the bright line rules that are expressed in Options 1, 2, and 3 we think kind of ignore all of that nuance. So, our request, with respect to Part A, is that the Commission just not act on any of the options and that we effectively all go back to the drawing board and, kind of, think through some of these issues, because there are incredibly important issues that have been raised by a number of the other commenters.

But our concern is a lot of this is, well, there are problems with some of the data, therefore we should exclude all of the data. And we think this is incredibly relevant data. If I might, because we've been talking so much about

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violent crime and it being a crime of the young, that is true for certain offenses, as I outlined in armed robbery and armed carjacking. It's not true in other offenses. So, the District Commission from the National Institute for Criminal Justice, did a gun violence problem analysis that looked at known homicide and shooting suspects and victims, what their background was.

And what they found was that the mean age for a homicide victim suspect was 31.7, otherwise between 31 and 32, and that the victims and suspects who had prior contact with the criminal justice system, they averaged around ten arrests. So, I say that because I think two things are true, and I think they're both getting lost. The second point is getting lost, rather, and we're over-focusing on the first.

It is very true that it is a very small percentage of the juvenile population that engages in serious violent crime. It's an even smaller subset that recidivates. And most

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desist, but if it's ten percent or so that doesn't desist, they are of great concern. And they are the people who wind up with these ten arrests and wind up killing someone when they're 31 or 32.

And I know it's hard given the state of the records, but I just think it's incumbent on the Commission and in turn sentencing judges to try to figure out whether the individual before them who has the juvenile record is on a path to desistance or is on a path to committing a homicide when they're around 31 or 32.

COMMISSIONER BOOM: Thank you.

CHAIR REEVES: It looks like we must be scared you're going to arrest us when we leave here since you have jurisdiction over this area, Mr. U.S. Attorney. No one else wants to ask any questions.

MR. GRAVES: I'll choose to hear that as complete agreement with my position, and happy to cede the floor to the next panel.

CHAIR REEVES: All right.

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Any other questions?

All right. All right.

Oh, well, okay. VC Murray.

VICE CHAIR MURRAY: Sorry. It was hard to make questions ahead of time for you because the statement is --

MR. GRAVES: Understood.

VICE CHAIR MURRAY: -- very unusual.

MR. GRAVES: Yes.

VICE CHAIR MURRAY: There's been quite a bit of back and forth about whether it's okay to look at recidivism/rearrest data or whether that data is largely useless. And I wondered if the Department has a view on that. As you know, we put out extensive recidivism data a couple of weeks ago. I wondered if you had a chance to take a look at it.

MR. GRAVES: I did have a chance to take a look at it and agree with the impetus behind Commissioner Wong's questions before. That is a big difference. And I understand the points about over-policing and disparate

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enforcement. And I understand that it would be more probative if we had actual conviction data.

But when you see that much of a difference, that's literally a 50 percent increase, I just think it's really hard to ignore that data. And we have to look at the data, but we have to take it with, as we said in a prior panel, a grain of salt. And we should be thinking about all of these issues at the time of the sentencing on an individual basis.

COMMISSIONER GLEESON: Thank you, sir.

COMMISSIONERS: Thank you. Thank you.
Thank you.

CHAIR REEVES: We will now take our morning break, so let's try to be back about 15 minutes, please. Thank you.

(Whereupon, the above-entitled matter went off the record at 11:13 a.m. and resumed at 11:34 a.m.)

CHAIR REEVES: Welcome back. And I would like to introduce our fourth panel, which will present the Federal Public Defender's

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perspective on our Proposed Amendment on Youthful Individuals. To present that perspective, we have Gabriela Leija, who serves as Associate Federal Defender based in Milwaukee with the Federal Defender Services of Wisconsin. She joined the Federal Defender Services of Wisconsin in November of 2016. Previously, Ms. Leija served as a legal assistant, client services specialist, and finally, as an attorney for the Wisconsin State Public Defender's Office.

Ms. Leija, we're ready for you whatever you are.

MS. LEIJA: When I became a mom in 2021, I didn't realize that one of the toughest challenges that I was going to have to face was learning how to face adversity in life. I am not a stranger to tough circumstances. I came to this country when I was about five years old. I grew up poor. I was a victim and witnessed crime because of the neighborhoods that I lived in.

I watched my parents hurt each other, all while trying to assimilate and, at the same

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time at a very young age, try to understand why I felt so unwanted in this country. I mean, I thought I was pretty awesome, but I learned to cope and overcome those struggles. And yet when I became a mom, it became really, very quickly, apparent that the way that I had learned to cope was just not going to work with being a mother.

While I got help, I really struggled, and there were days where it was really hard to get up in the morning and put on a brave face. But from the beginning of my day, until the end of my day, I had someone holding me up, my husband, my mother, my siblings, my boss, my coworkers, my friends. I could not fail even if I tried, and it made me realize that I had overcome impossible challenges in life, not because I am special, not because I made the best decisions in my life, and certainly not because I didn't screw up in ways that could have ruined the rest of my life, but because I had people surrounding me every day of my life that believed in me when I didn't believe in myself and that

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held me up while I tried to figure things out.

My clients, they don't have that, and it's oftentimes the reasons that they end up in court. I live in Wisconsin where adult jurisdiction begins at 17 years of age. So, at 17, the law requires, it's mandatory, that a person is charged in adult court without considering the nature of the offense or the seriousness of that offense. And as a state public defender, some of the toughest cases that I had were my 17-year-old clients. And it wasn't because their defense was hard, it was because they were teenagers, and I often found myself having to parent them, to call them, text them reminders of court, to pick them up, to take them to appointments, to help them fill out paperwork.

It also felt really wrong to know that I was making decisions for them, because when I told them about Option A, they would say, okay, let's do Option A. And then I would say, no, wait, there's also Option B, and they'd say, okay, let's do B. And when I said, no, you have

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to think about A and B and pick, they would inevitably tell me to tell them what to do. They would ask me, what do I do? They weren't old enough at 17 to understand the significance of the decision that they were making and the long-term impact that it could have on their future, so they just went along with what I said, the adult in the relationship.

My young clients' lack of autonomy also presented unexpected issues in their defense. Because while the court system treated them like adults, the rest of the world continued to treat them as if they were children. I once represented a client who was placed in a group home because his mother was homeless, and while he was there, he was diagnosed with PTSD, and they knew the medicine that could help with his symptoms.

They couldn't give him the medicine without his mother's approval, and because they couldn't find his mom, they didn't give him the medicine. It wasn't until he turned 18 and was

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able to make those decisions for himself that he finally was able to get that help. You see, for the same reason that minors are not allowed to drink or vote or join the Army, they also can't handle their own mental health prescriptions.

The guidelines assume that an adult conviction is a good proxy to assess the seriousness of the offense. There's an assumption that if that child is in adult court, that means that the offense was really serious. But I can tell you that it's not, not only because of laws and practice in my state, but also because of the advancements that we have in your biology, which confirm that a poor choice made by a juvenile should not carry the same culpability as that same poor choice made by an adult.

The vast majority of my 17-year-old clients that I represented in state court had cases that involved fighting in school, which was charged as a felony child abuse, a crime of violence; stealing a neighbor's game console,

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charged as a felony burglary, which is also a crime of violence in my district until 2019; fighting in a detention facility, charged as a battery to a prisoner, also a crime of violence; taking grandma's car without permission, a felony car theft. The same types of crimes that you would expect from an individual whose brain development has not reached the same clarity and rational thinking as that is an adult.

And I want to be clear, juveniles have and absolutely can commit very serious offenses.

Our comment and the testimony that I give today in no way intends to diminish the seriousness of those offenses or the impact that it has on the victim or of their communities. The point that I am trying to convey here is that the weight of a person's prior juvenile record by a federal court at a later sentencing hearing should be tailored to that individual person in his unique case.

Option 3 advances that goal. It's the choice that eliminates disparity based on arbitrary factors, like state of residence, the

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choice that addresses the shocking and disturbing racial disparities that is currently perpetuated by the current rule, the choice that recognizes the involvement of our knowledge in the human brain, and it's the choice that I believe makes certain that the court imposes a sentence with a good, accurate measure of the person's level of culpability and their unique characteristics individual to that person.

That information is going to get to the court. It's not going to be ignored. It's just not going to be measured by the guidelines.

It's not going to start off people in different footing based on where they live. In that way a unique and individualized consideration of that person's prior criminal record, we can achieve a sentence that is sufficient, but not greater than necessary. I thank you for your time, and I welcome your questions.

CHAIR REEVES: Thank you, Ms. Leija.

She welcomes your questions.

MS. LEIJA: I have more answers for

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you guys.

CHAIR REEVES: No. Go ahead.

VICE CHAIR RESTREPO: Thanks for being here. So, should judges consider juvenile convictions at all, and if so, how should they go about considering the juvenile adjudications?

MS. LEIJA: So, I work in a district, and I think that I have the privilege in practicing in front of some judges that take their jobs incredibly serious and really do try to do a good job. I also work with a probation office that has the same approach to the cases and goals.

And so, the PSR reports that I receive have not just names and labels, but if they have the records, they will include, like, a short summary of what that case involved or that arrest involved, even when, there's no conviction or even when there is no point assessed to that conduct. And so, what ends up inevitably happening is that the court doesn't look at it and pretend that it's not there. They look at

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it, and then we fight about the weight that that material has.

The reason that the guidelines don't work in my district and that they're not a good guidance for the judges that we have is because we are an outlier in the country. And I know that I'm not -- I guess our district isn't alone in the issues that we have and isn't alone, because there are three other states that start the adult jurisdiction at an earlier age. But we also have jurisdictions that changed their laws more recently, and so we have people even within the same districts that have points counting in some cases, but points not counting in other cases, merely based on when they had that conduct.

And so, what happens is the starting point is not even. The starting point is not the same, and so they're not useful in that regard. And there's a lot of fighting about where that baseline should start because there's no uniformity. So, if the guidelines are trying to

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start -- the guidelines are trying to capture, as someone else said, like, where does everybody start off at unequal footing?

I can tell you that they're not starting off on equal footing in my state, and it creates not only disparities from other states, but also disparities even within our own courtrooms about how a judge is going to treat these types of convictions. Some judges, as you heard, will really take a look at the circumstances and weigh them and hear arguments.

Others just say the guidelines say this, and so this is where I'm starting off. So, it's not actually uniform, and it's affecting people differently in different ways.

I hope that answers your question. So, I think that the more direct answer is judges are absolutely considering and the difference is how to weigh it. And I think that the Option 3, it furthers that. It forces judges -- or it tells judges to consider it all and weigh it appropriately.

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CHAIR REEVES: Yes.

VICE CHAIR MURRAY: Thanks so much for your testimony. I'm trying to sort of wrestle with how to make the way the guidelines are more qualitatively useful. Like, it seems to me that, you know, all the criminal history is in, is kind of wooden. All the criminal history is out, is kind of wooden. It seems like what we want is something, sort of, textured where we explain to judges, kind of, what you just explained to us, right, which is that, like, sometimes juvenile adjudications mean all sorts of different things. In Wisconsin, you're an adult right away.

Like, you know, I mean, obviously, you couldn't put it this way, but some juvenile crimes are very serious and indicate going forward that something really serious is happening, and some of them, like, really overstate things and indicate that someone doesn't have a safety net. Can you think of a way -- I mean, I guess maybe the obvious way is just write something really long, a §5H1.1, but

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can you think of other ways to add that kind of textured information in in a way that would be helpful to judges?

MS. LEIJA: I think that where I'm struggling to answer that question is, I think I'm assuming with a starting point that the judges are doing that, that they're looking at the PSR, and that they're not pretending that information that gets to them is not there, because they can't. And I also struggle because, again, in my district, the prosecutors look at that material, and they say, you know, this is an outlier, so it should be more.

The reason that the current rule, and that I think that Option 3 kind of does state, take a look and tailor it for what it's worth. Everybody's starting at same footing. We're getting rid of all of the things that could result in disparate or different results without any good reason. And when that information is relevant and when it is presented, then the judges can just consider it.

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I think that Option 3 does it, which is why it's a little hard for me to answer. I'm sorry. I don't know that I am capturing the question.

VICE CHAIR MURRAY: It sounds like you think the texture is already there from the PSR, like, they already understand that not every juvenile adjudication is the same as every adult adjudication. They understand the, kind of, background that's going into.

MS. LEIJA: I think so, but I think that the problem with the way that it currently is, is that the rule is saying, count it.

VICE CHAIR MURRAY: Right.

MS. LEIJA: The rule is saying this has --

VICE CHAIR MURRAY: That you can kind of default low and go high or default high and go low.

MS. LEIJA: Right. But, like, the rule is saying, add three points to my 17-year-old state clients, but not three points to

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someone from Minnesota or Michigan who had that same, you know, conduct and just didn't have that adult conviction. And so, the judges are struggling with -- the rule says, apply it, and I'm saying, this is overstating it. This is overstating it. And it's making the judges either having to make a choice between following the guidelines or not having any starting point to begin with.

So that's why the current rule is problematic. Either way there's going to be disparity. If the judge chooses to follow the guidelines, they are doing it with the knowledge that it will be a different result and higher than someone living somewhere else, or they're choosing not to follow the guideline, and then we have no starting point and no guidance on how do --

(Simultaneous speaking.)

VICE CHAIR MURRAY: Well, I guess that's why I'm thinking about a more robust §5H1.1 to tell them when they should be

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departing. I mean, my experience of sentencing, which I'm sure is much less extensive than yours, is just that every courthouse and even every courtroom has its own kind of culture in terms of, like, whether you're a below-the-guidelines or a bottom-of-the-guidelines type place. And you would think that the culture could adjust to that, right?

The culture could say, oh, well, we're in Wisconsin, and Wisconsin, everyone 17 and above is going to be getting points. So if we want to be -- particularly if there was something in §5H1.1 that said like, maybe take into account whether you're a jurisdiction is one that counts people as adults or even more --

MS. LEIJA: Yeah. I think that it makes a judge's job very difficult because they're trying to be fair and ignoring the guidelines and what they're saying do takes it out of that realm. And so, if the guidelines are supposed to capture -- so there were a couple of commentary that were made today. Actually, the

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individual that presented -- I'm sorry, I don't remember his name -- that testified earlier -- he kept talking about an exceptionally small and very small group of people.

So, the exceptional part means that they're outliers. The guidelines are not supposed to be capturing the outliers. They're supposed to be capturing the heartland of the individuals that come before the court. And so, if the guidelines are capturing more people than they're intended to, then that guideline needs to come down so that everybody starts off on equal footing. We don't have that. And so, it's going to depend on -- because it's not just the culture.

I think that there are places -- I mean, there are times where I make arguments, and I know that the judges won't care about the issue the way that I do. And if that issue is because there's a rule, they're being told to follow this, right, to consider it, that's where they have to start. And so that's why there's a need

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to bring those down so that it's not just -- like, if you want to capture an outlier group, then there should be a new rule created for an outlier group.

But this rule captures the entire nation. And even though I don't live in D.C., but I see and hear the news. I am not going to say that there's not, you know, a spike, but that's not the case for the rest of the country, and we shouldn't have a rule that captures the entire country when just a smaller jurisdiction is having those issues. I hope that answers your question. I'm sorry.

CHAIR REEVES: You indicated that in Wisconsin as 17-year-olds mandatory to go to adult court?

MS. LEIJA: Yeah.

CHAIR REEVES: Is that for every type of crime, every felony?

MS. LEIJA: All of them. Misdemeanors, too. All crimes. If you're arrested, and you're 17, you are an adult.

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CHAIR REEVES: Oh, okay. And with respect, you gave us some anecdotal --

MS. LEIJA: Yeah.

CHAIR REEVES: -- sort of talk about representing the young person who you tell them Option A, Option B. I think you were focusing in primarily on a young person, 17, 18, or so. What's your experience in representing persons who are beyond that age, if you have any, between 18 and 25?

MS. LEIJA: I do. And particularly with the 17-year-olds, it made me not have children for a very long time, and it also confirmed my decision to not work in a juvenile system because of the issues that everybody here is struggling with. You can have a -- like my niece, she's amazing. She's 16 years old. She's, like, a straight-A student. She is involved in all the things.

And sometimes she does things, and we're all, like, what were you thinking? What did, like, what because you expect her? Because

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she's so smart and she's so reasoned. And then she does these, like really wonky things that are not well-reasoned, that are not in alignment with who we know her to be, which is a really smart person.

And the answer to that is because your brain is not fully developed yet, right? That right stuff that they're talking about is still not there. And so, she's not intentionally or purposely making these poor decisions. It's just she really isn't thinking because she's just not there yet. And so, trying to work with someone that is in that frame of mind and asking them to make decisions about entering a plea or going to trial and understanding what that conviction is going to be like in the future, they can't think beyond that day.

And so, understanding what that looks like, five, ten years from now is impossible. And so, it does feel really wrong to work with that population because I am making decisions for them because I know how -- I am trained to

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persuade federal judges, so of course, I can persuade a young person to do what I want them to do, and sometimes even when I'm not even trying.

And so, it was it was hard for me to practice with that group of people because I recognized that I had that impact in their cases and in their lives and in their decisions.

And it was often a very stressful case for me. Again, not because their defenses were hard. Their defenses were on, you know, fighting in school. Wisconsin, or at least Milwaukee, had cops in school for a long time. And so, it made that path very easy because there are 17-year-olds and 18-year-olds, and sometimes 19-year-olds that are still in high school, and so that path was there. They did away with it.

But now there's legislation from last year that they're putting it back. So, it's a school fight. And so, when I go in front of a prosecutor, in front of a judge, that defense is not difficult. It's not complicated, but all of those issues that I am aware of, which is that

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they're young, and they don't understand, and that I am making decisions for them, really, was just -- weighed on me. Like, there's a reason that I'm not a judge. I don't want those kinds of decisions and impact on people's lives, and I definitely had that with the young population that I worked with.

CHAIR REEVES: Judge Boom.

COMMISSIONER BOOM: Thank you for your submission. It was very detailed and very helpful. It seems to me that two things are fairly clear from the brain science and the recidivism data and a number of our panelists. And one is youthful offenders have far less impulse control. They're less able to appreciate the harm that their actions cause to others. They engage in risky decision-making. So, you know, as a sentencing judge, we have that.

And the other is, youthful offenders with juvenile records have, what appears to be, maybe, the highest recidivism rates, so we have that, as well, based on some of the recent data

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that the Commission released. And so, to me, the logical conclusion of those two things is not to disregard documented juvenile convictions, including adult convictions, you know, while they were still under the age of 18 and lower their guideline range, that is, one plus two does not logically correlate to me to lower sentences necessarily and release while they remain quite young in some instances.

You know, the CLC made a number of points in their letter and, you know, one of those is it seems like Option A is inconsistent with the statutory mandate that we as sentencing judges have, and that is to consider, you know, the history and characteristics of each individual. And part of what I find inconsistent with advocating for Option 3 is that, as a sentencing judge, under the section 3553(a) factors, we take in -- we consider a lot of information about the individual, trying to individualize that sentence and make it fair specifically to that person. And so those

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arguments you're making about, you've got to get behind those juvenile points, you know, we've got to talk about what this conviction actually was about, what their home life was about.

As a sentencing judge, I accept those arguments, and oftentimes, those considerations are based on scant or little, sort of, documented evidence, right, that there was a history of trauma, or that a co-defendant abused that person. But I accept that, and because I, you know, believe that these the history and characteristics of these defendants, and it almost always ensures to the benefit of the individual being sentenced, because they have these compelling stories, much like your own personal story, which I appreciated very much, and then at the same time, to tell the sentencing judge that we should not be scoring.

You know, juvenile and adult adjudications seem really inconsistent to me that I would accept certain information about the history and characteristics of the defendant,

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which is significantly mitigating. But at the same time, I should not consider, or we should not accurately score, documented convictions. And so, you know, I'm looking to you to try and reconcile that for me. And as a second point, one of the points that the defender's letter made on Point 9 -- on Page 9 was that §4A1.2(d) assumes as a fact what in many cases is not a fact, that a prior-sentence type, adult or juvenile, and the length of confinement are not meaningful proxies for offense seriousness and culpability.

But the CLC pointed out that the way we score these juvenile convictions, based on the recent recidivism data, does seem the guidelines are appropriately scoring and differentiating because, for instance, more than half of the juvenile two-pointers were violent offenses compared to about one-third of the one-pointers.

Then defendants with the two-point juvenile adjudications had a higher three-year arrest rate, 72 percent, whereas the one-pointers, 63.5

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percent. So, it does seem like -- and, of course, the two-pointers recidivated faster than the one-pointers. So, it does seem like the guidelines are doing some of that work in differentiating accurately between two-pointers and one-pointers.

So, I know that was a very long question. One is a general question about, you know, here we are as sentencing judges and as the Commissioners, you know, why should I accept your argument that without any, you know, empirical data that I should consider factors that are mitigating to the defendant, but should at the same time disregard actual convictions? So that's just sort of a big question.

And then the second is, it does seem like that the guidelines are appropriately scoring two points versus one point and then also discounting these juvenile convictions with just the five-year look-back and things like that that are already in there as protective measures, so anyway.

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MS. LEIJA: I have so many answers.

COMMISSIONER BOOM: Good. I'm so glad because I need them.

MS. LEIJA: I think that you demonstrated that judges do look at these PSRs, and really try to understand the information and the circumstances of that individual person and try to come to a fair decision. I think that the first point that I would like to address, because I kind of already talked about it, is that so for Wisconsin in the -- or Wisconsin, Georgia, and Texas, the guidelines don't reflect what they reflect in your district, which is that those convictions are going to be made by an adult, or at least an adult by the system, which is 18 years old. So right off the bat, your district is different than mine. And one of the questions that you started out with was, why should I accept -- you know, your argument for mitigation of a lower sentence, but not these numbers?

It's kind of the point that I was making, which is that I'm begging and pleading,

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please take a look at this information about the juvenile record that we have here and lower the criminal history category because they didn't have a trial, or they didn't have the options for juveniles. So, there was a discussion about this before, but Wisconsin has 72 different counties.

And in each one of those counties, there are different juvenile systems, and the options that they have for that juvenile person is going to be based on the funding that that county has and the resources that county has.

And so, if one of the poor counties that we have in Wisconsin does not have resources, does not have social workers, does not have mental health processes, does not have conditions that can address the issues of that minor, that minor is very likely to end up in jail because of a lack of resources or a lack of options, rather than because their crime was so serious. It's just the only tool that court may have is that jail.

So, I think that was one of the points

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that I was trying to make earlier, is that if the guidelines are saying this is how it should be treated, then I am in a position where I'm saying, please, please, please, this is different than what the guidelines are capturing.

The other point is that, I guess, I don't know, there's been some discussion, and I know that the panel before me had a lot of answers about that data, when I was preparing for this, and I was looking at it, one of the things that struck me was that the data provides information about rearrest, not about convictions and not about, like, what happens after that rearrest. And so, we are looking at people who are going to be arrested for supervision violations, like missing appointments and those sorts of things.

In fact, I think that the graph shows that those are the highest ones. And even though that's the case, we're looking at -- the material seems to be treated at times as if it is indicative of new crimes or the person, like, is

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committing violent offenses. And we're talking about not convictions, not charges, but rearrest based on a probable cause, which is not anything, but probable cause is, like, probably a crime and probably committed by that person.

The other thing, too, is that the age that that rearrest data is capturing is going to, naturally, be young people. And so, it's going to capture that same group of people that we've been talking about, of the person that is going to be impulsive and not making great decisions. I also don't know that I agree with the premise that recidivism data is telling us, that young people are committing new crimes, because it's not convictions, and it's not charges, and it's including probation and supervision violations.

And so, I don't know that that would be empirical data supporting a premise that the person is more dangerous or more likely to commit crimes. I think that our comment on Page 28 talks about that quite a bit, and I also think that the Juvenile Law Center provided some pretty

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thorough analysis on some of the issues that should give the Commission pause or at least, like, take a closer look to rely on that, than that data to say that it is these young people making and committing new crimes.

I do have a second point on that, because even assuming that that was the case, that we do have more recidivism from this group of people, there are other problems that the rule is not intending to create but does. So, from the beginning, based on the review of the material that I received, I think it like, 1987, I think, is when this rule was created. And even at that time, there was a lot of discussion that there could be a potential of disparity in the results of how this rule was impacting people because the juvenile system began as a civil system in trying to help the kids, the children, in making better decisions at a point where they really can't make better decisions for themselves.

And so, there was this kind of,

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suspicion or thought that there may problem problems with this rule. But at the time, they didn't know that there were problems with the rule, and now we do. We know that there are unwarranted disparities based on the jurisdictional practices, which is what we were just talking about. There's going to be -- like in Wisconsin, the seven -- two different counties and the way that they handle it. In preparing for this, I met with the former head of the juvenile division. And this is one of the things with labels that's a problem.

I would say, okay, like, sentencing.

She would be like, no, that's disposition.

So, there's all these words to basically try to mimic, but they're not calling it what it is. They're not calling it charges, they're not calling it convictions, they're not calling it sentencing even though that's what it is. But the way that they're being treated within those individuals' counties and the way

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that they're handling it is going to be different. And so, the information that we are receiving, that you as a judge are receiving, I think you probably start off with the point of thinking, oh, everybody is uniform, everybody is being treated the same way, everybody has the same options, the same opportunities, perhaps.

And they don't. And either you either get information from the lawyer or from probation office, or someone saying, like, no, that's not the case. But if there's no records and people can't get them, then you can't get that information. And so then again, we're making a lot of assumptions when we know that there are a lot of differences in how juveniles are being treated.

I think that the other issue that we come into is, of course, the racial issues. Somehow, we ended up with 88.8 percent of people who are affected by this rule are Black and Brown kids. That is a really high number. And it is not because Black and Brown children are

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committing more crimes, or different crimes. It's just the way that that same conduct as their non-white counterparts is being captured and logged and labeled.

And it's making incredible disparities, on just race alone, in a way that is really harmful because -- so I, kind of, was trying to figure out where does this rule -- because you started out with this way of saying the adult convictions at three points, the non-adult, two points, and then every other one is one year. So, it's kind of considering, like, what is the impact of this rule? Especially when we know the 88.8 percent of Black and Brown people are being affected.

So that adult, that three pointer -- so my district is going to have significantly more three pointers than any other district, because my 17-year-old clients are being convicted and sentenced at a rate, and in the system, that is not the same as everybody else. And, you know, I think that someone can say,

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well, like, well, if they're getting a sentence of over a year and a month, then isn't it a really serious offense? And the answer is no. Because that time frame is capturing not only the offense, but also, like, the rearrest and the violations of supervised release. And the aggregate is counted as that amount.

And so it can be that my client got probation from the start, and so the judge said, because of all of the circumstances, I'm going to give you probation. But then maybe they had a substance abuse issue, or maybe they had housing -- and so then they keep coming back, and then in the meantime, they're locking them up and all that time is adding up. And then it's going to capture those three points even though those three points is not based on the seriousness of the offense, it's based on that person trying to get their life back together.

So, there's going to be an overwhelming amount of people in my district that are going to be captured by that first -- by

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§4A1.2(d). And that three pointer is going to be used to make them career offenders. It is potentially going to make it so that they're not going to be eligible for the safety valve. 70 percent, based on the data that you received, are going to increase the criminal history category.

Because those points are going to bump them up to the next one, which means that their sentences are going to be higher to start off with.

And then it doesn't actually end there. Because those points are also going to impact the BOP designation of where they go. And so, these individuals are also going to be at higher security facilities. And again, all based on the way that Wisconsin is treating these 17-year-old children. The not adult -- the look back period, the 60 to 12 months, has the same impact in terms of the criminal history category being bumped up, the sentences being higher, and also the BOP designation security also being higher.

Any other within five years is one

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point. Again, we're assuming that the conviction and that the criminal conduct, it was severe enough that it garnered a point. But it is ignoring the disparities in the way that that person was treated, where they were arrested and convicted, the options that that jurisdiction had, the labels that they were using in that particular place. And --

I was on a roll. I just forgot what I was going to say. Because I think I was going to answer one of the questions that you had, which was --

COMMISSIONER BOOM: Maybe my question about -- I mean, again, you know, the guidelines that recidivism data that we have indicates that two pointers are different than one pointers, because their recidivism rates are higher and their time to recidivate is more compressed the more points that they have. And so that's my question. And I understand we have a patchwork of 51 jurisdictions and to some extent, that exists under state law, even with adults, right?

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Just different criminal laws magnified, it sounds, in the juvenile justice system.

But you know, the particular question is that -- as raised by the CLC, which is that the guidelines appear to appropriately be scoring and differentiating, because those with a two point juvenile offense have a higher recidivism rate based on the data that we just published, than those with a one point. And they recidivate at a faster pace.

And so, it's not that these points or the way criminal history is being scored is useless, irrelevant, or that the guidelines aren't appropriately categorizing seriousness of offense. I mean, this data indicates to us, and certainly that there are extremes and there are exceptions and so forth, but this data seems to indicate that two pointers versus one pointers are different, and that the guidelines are capturing that.

MS. LEIJA: Yeah. I was just talking about this with Summer earlier today. I think

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that the reason that there is a little bit of a disconnect is that because in my district, because 17 starts out as adult, for me, those two pointers are going to be those misdemeanors.

COMMISSIONER BOOM: Understood. Right. And so that's, you know, where at sentencing, we as judges are trying to individualize that sentence and understand, get us behind that, so that we can then, you know, move you down or vary, or, you know, impose the appropriate sentence. But yeah. No. I think I understand exactly --

MS. LEIJA: Yeah. And I think Option 3, I was a little confused in some of the remarks. Because Option 3 doesn't have the judge ignore it or not consider it, it's just going to become part of section 3553 analysis, then. And I think that the change in the rule is actually going to encourage the government and the defense to look closer at that information and provide the court with more accurate information about what that conduct was, that juvenile conduct was.

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And so, it will make it so that you will have more information rather than less, because I think that the way that the guidelines capture that information gives, kind of, an out into looking closer at what actually happened. And the rule is, like, forcing the parties to look closer, so that there are not assumptions that everybody is starting off on equal footing.

I really do think that this will result in you, as the judge, receiving more information rather than less information, and that you can then tailor that section 3553(a) analysis to that person in front of you.

Because the prosecutors are not going to want you to not know about that juvenile conduct. And the defense attorney is not going to not want you to know the specific circumstances of that, to give you information about how to weigh it. You will, as a judge, get that information. Perhaps you are likely to get more information with the change in the rule in Option 3 that we're proposing, so that you can

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more adequately weigh it to that specific person in front of you.

And I think that that's what I was going to answer, is that think that the goal that Option 3 tries to further is getting you more information than less. It is encouraging everybody to look closer and understand that jurisdiction, and those practices, and that culture in a way that you can then make your sentence more individual. And perhaps, hopefully, more effective.

Because, you know, some of the stuff that we heard earlier today is that we're too harsh. That's why we want to classify the risk more adequately and more correctly, so that you can tailor what you're doing to the actual individual's risk, and help them be better. Particularly at a time where they have the opportunity and the ability to get better, because they're very young.

CHAIR REEVES: Thank you, Ms. Leija. We appreciate you. I know you started off slow

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and thought it was done. Thank you so much for your testimony.

MS. LEIJA: Of course. Thank you so much.

CHAIR REEVES: Thank you all so much and thank you for your patience. Our fifth panel provides us with perspectives from the Commission's advisory groups on this issue. First, we'll have the Honorable Ralph Erickson. As I mentioned yesterday, he's a judge on the United States Court of Appeals, Eighth Circuit Court of Appeals, after having served as a district judge and many rounds as a state court judge in North Dakota, right?

North Dakota, right? Yeah. Thank you. Thank you.

He's our chair of the Commission's Tribal Issues Advisory Group.

Second, we'll have Debb Roden who is a managing partner at the law firm of Woodhouse Roden Ames & Brennan, LLC, in Cheyenne, Wyoming.

She is an at-large representative of the

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Commission's Practitioners Advisory Group. Her practice focuses on business representation, civil litigation, juvenile representation, and criminal defense. And she practices in the state and federal courts at the trial and appellate levels on a weekly basis.

Jill Bushaw. She is here. She serves as our Deputy Chief U.S. Probation Officer from the Northern district of Iowa, and she is the chair of our Probation Officers Advisory Group. I'll remind you that she has a career with the Iowa Department of Corrections in 1998 and joined the United States Probation Office in 2003, where she has previously held positions as a sentencing guideline specialist as well as a supervisor, and Assistant Deputy Chief overseeing the Pre-Sentence Investigations Unit.

Finally, we have Ms. Mary Graw Leary, who is a professor at Catholic University of America in Washington, D.C. She currently is visiting at the University of Georgia School of Law. She serves as the chair of the Commission's

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Victims Advisory Group. Professor Leary is a former AUSA for the District of Columbia, a former policy consultant and deputy director in the Office of Legal Counsel at the National Center for Missing and Exploited Children, and the former director of the National Center for the Prosecution of Child Abuse.

Judge Erickson, I turn to you, sir.

JUDGE ERICKSON: Thank you very much.

I think that as we look at the situation of youthful offenders at the TIAG, it really boiled down to what's our lived experience, right? And it's interesting, because we divided almost unanimously that we would favor Option 3, but we have one dissenter. And that's because the lived experiences are different, right? The one dissenter is a person who is responsible for prosecuting major felonies arising off of Indian reservations and his lived experience is the most violent crime, the most inexplicable crime, that is being committed in the district is being committed by these youthful

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offenders, right?

Now, all the rest of the people are living in a different world in which they say, well, we have an experience, or we deal with juveniles who have a different outcome and a different experience, right? And how we balance that is problematic. And I don't envy you, your ultimate decision. But we still come down, as a majority, firmly in favor of Option 3, and we unanimously support Part B of the proposed amendment.

If you would indulge me for just a minute, I know you do all the time, but I'm still going to ask. You know, here's the story for me, personally. I started adjudicating juvenile delinquents, when we called them that, when I was 33 years old, and I was a county court magistrate. And I continued to adjudicate delinquents, which are juveniles, until I took the circuit bench because 61 percent of the juveniles serving in the federal penitentiary in the U.S. Bureau of Prisons are Indians from

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Indian country, all right?

And so, here's my lived experience. I heard somebody say this morning, in a state of shock, that, they are still considering the best interests of child. Some judges, some place in juvenile courts, are still doing that. And I can tell you why we're still doing that, because I did it until the day I left the bench as a trial judge. It's because there are inadequate resources to take care of the juveniles that we are confronted with all around the country. And it is exacerbated in Indian country.

Take for example, one of the Indian nations that I dealt with in Eastern North Dakota. Small population in a single county, 9,000 people. It has a status of sovereign state of a sovereign nation. It's trying to do everything that a state would do with a budget that 9,000 people can raise, okay?

Now, if you think about what kind of a juvenile justice system you can create under those circumstances and what resources are

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available to you, and you would say that that might be mighty thin, that would be a true statement. And so those kids, if they are incorrigible, and we can't figure out where they're going, they eventually end up sitting in a federal United States district court. And a United States district judge or a magistrate judge is going to make a decision as to what are we going to do with these kids?

Some of these kids are kids that -- I mean, in my mind, I have an example of a kid that was sitting in front of me that was sexually abused as an infant and a toddler, neglected for a considerable period of time, developed PTSD. Probably is suffering from bipolar disorder and is sexually acting out at the age of 16. And what do we do with that kid? Well, we're going to adjudicate that kid. Because the only way we can get that kid into a place where they can get treatment, and that treatment is going to be meaningful, is if we adjudicate them, right?

Now, when we take that juvenile, and

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we send that juvenile off, we send them off 900 miles away to Denver. Because while there's a facility in Rapid City which might be appropriate for that child, which is only 500 miles away, it's filled with Native American kids from South Dakota, all right? The Bureau of Prisons doesn't know what to do with these people, and so we develop contracts with local agencies to do what we can. And so, yeah. That's part of the people that we adjudicate.

I think of another kid who really was just kind of out of control and liked to steal cars. When I was a state judge, I used to say, there's a whole category of human beings out there that operates under the see car, steal car principle. And that is you see the car, and if you can start it, you will drive it.

Because you ask him, why did you steal the car?

Keys were in it.

Why did you steal the car?

They left it running.

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You know, and you're going, what? I mean, that doesn't make any sense, but they're kids, and they do this. Well, we're all now frustrated, there's nothing they can do. The cognitive behavioral therapy that they've got available in the juvenile system, under tribal system, has been exhausted. And so, they bring this person to me, and we adjudicate that person so that we can get cognitive behavioral therapy paid for at a more intense level than we could get somewhere else, all right?

Now, if that's your lived experience, you're going to say, gosh, scoring all these things is mighty unfair, right? And that's where the majority of the people on our committee are.

But we are cognizant of the fact that, you know, what? The very worst violent crimes that I saw, senseless crimes, were being committed by 17, 18, 19-year-olds that, you know, like, beat kids to death with golf clubs. I mean, you're sitting there saying, you're kidding me, what kind of a crime is that?

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My colleague had a crime where a guy was snoring, and so an 18-year-old kid dropped a bowling ball on a 17-year-old kid's head, right?

What is that? And how do we deal with that? You know, those are horrible crimes. And so, it's easy to say, well, we got to score them. And a system that says don't score them doesn't seem right.

But I can tell you that TIAG does urge that we go to a system that doesn't score that conduct because it's all going to show up with a significant description in either other crimes or other charges, or in other arrests, in the pre-sentence report. And one thing I can tell you is that the pre-sentence reports that we had in our district were extremely detailed when it came to juvenile conduct.

And even when they were scored as we're going to score it, there's still a detailed explanation there as to what happened. Because in our district, it matters that we know what the information is that led to this person being

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adjudicated as a delinquent. Because it could be all over the board, and the crimes convicted of could be identical, okay?

So you know, the real issue for us is do you start with the thumb on the scale, or do you put the thumb on the scale when you look at the conduct later in section 3553? And, you know, and that's the same thing I had to say yesterday, it's where do we anchor it, you know?

And, you know, if you think that our theme coming out of TIAG is that we should anchor it in the section 3553 as opposed to in the guidelines itself, it's because the lived in experience of Native Americans in Indian country is that the guidelines operate in a manner that is unfair to Native American people in comparison to people committing the same street crimes in the state.

And that's our circumstances, but I think that this has been a very fascinating group of panels. I think it's really been informative.

I want to thank the Commission for gathering

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such an impressive group of people to testify, myself excluded, of course. But I think that in the end, you know, this is a hard choice.

But we firmly believe that the best option is Option 3, because it allows the judge to still consider everything but it doesn't start by weighting cases based on just the nature of the adjudication, and the length of time served, which we don't think is representative of the severity of the crime that's committed by juveniles in the way that it's being adjudicated.

Thank you.

CHAIR REEVES: Thank you, Judge Erickson.

Ms. Roden.

MS. RODEN: Thank you.

I want to thank the Commission for allowing me to testify here today. And I'm particularly excited to speak on youthful individuals, because in addition to doing federal criminal defense work for about the last 20 years, I've also appeared in my local state

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juvenile court system. Sometimes as direct counsel and often as the guardian ad litem in that realm. So, this is an issue I care deeply about. On behalf of the PAG, we prefer Option 3.

And there are three reasons for that.

But before I get into that, a lot of the discussion today, I think it's critical for the Commission to remember that the proposal Option 3 does not disallow judges from considering juvenile records. As my colleague pointed out, they're there. They're in the pre-sentence report.

The question is, what's the starting point? What's the jumping off point? As I mentioned earlier, there are three bases for that. And so, case law and scientific evidence, I will not even begin to pretend like I can present scientific evidence like you already heard this morning from the panelists. But case law also suggests that this is the trend that we are moving to in, sort of, taking into account juvenile offenses in different ways.

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There has been lots of United States Supreme Court case law on this. I would also note that there's some emerging case law from different states where they're treating what's called emerging adults, so your 18, 19, 20-year-olds, differently, as well. And that's on the forefront, and that's primarily based on the scientific evidence and the psychological evidence.

I would also note that the Department of Justice, in their Office of Juvenile Justice and Delinquency also references that, sort of, the current system doesn't work well. We need different systems for juveniles, and I would agree with that. There are such disparity, as you've heard earlier today, in how each state or even each district addresses juvenile delinquencies. And it results in unwarranted disparities, which is one thing that we are supposed to avoid in federal sentencing.

Things like placement options. Where I am at, which is Wyoming, we have very limited

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resources in terms of where you can place children, delinquencies. And the default, if you have a couple of facilities that are busy or booked, or the children don't meet the criteria, then they go to what's called our boys' school, which is our lockdown facility, which then results in criminal history points for them. So, I would also add that the disparity is not only in race and in geography, but even in resources that are available per state.

And what I want to mention, too, is there can be great disparity in the underlying basis for the points. So, a kid could take his grandma's car, who he's living with, right, and take it out for a half-hour drive and then get charged with a delinquency. He could, in my state, end up at the boys' school for a significant amount of time depending on, even, how his family back home is going. If they don't have stable housing, if they aren't doing well, then he, by default, stays at the boys' school. So that individual could wind up with criminal

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history points, federally, later.

Same as if you have a violent carjacking. Those individuals may have the same two criminal history points. It just varies so greatly. And that disparity is just not taken into account. Because we start with the points, we start with the presumption that they should apply instead of starting with the presumption that they don't apply, but we have all the information. So that if this is a violent carjacking, the sentencing judge will address that, will sentence accordingly, versus if he took his grandma's car out for a joyride, then the sentencing judge can take that into consideration.

But it's the starting point. Are we starting from the place of automatically assuming that all these juvenile convictions should receive two points, or are we starting from the point in conjunction with science and neuroscience, that these shouldn't be counted, that we should start with no points and then if

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there is a violent history, we can account for that?

The other issue that the PAG has seen and is concerned about is due process in juvenile courts. It's entirely different than adult courts. There are different goals in juvenile court cases. The focus is often on the entire family, not just the juvenile who's before the court. So, there are different services, there are different bases for revocation. So, the kid who borrowed his grandma's car could have a delinquency, be out on probation, and refuse to go to school. I have a judge in my district who says, I can assure you, you're going to go to school. Because he will put you in the boys' school and ensure that you're in school.

Additionally, in juvenile court, the advisements are very different. And the due process considerations are very different. In juvenile court, we often tell juveniles, this won't follow you, this is just your juvenile record, no one is going to see this, you know.

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And I sit there in court knowing that's not true.

Because if this individual winds up in federal court later, the juvenile adjudications will absolutely be on the pre-sentence report. But I think that advisement is common in juvenile court, that we think it's somehow magically sealed or done away with, and it simply isn't.

It's also difficult as a practitioner to advise our clients of potential sentencing ranges based on juvenile adjudications. Clients often don't even realize that a juvenile adjudication could bump up their criminal history score, and so we might advise inappropriately without recognizing those points are coming. Because they don't even mention, oh yeah, I was in the boys' school when I was younger. So that makes it a challenge, as well.

I understand the concerns raised by multiple panels about, you know, what do we do with those violent juveniles? But section 3553 specifically says, you take into account the history and the characteristics of the defendant

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so those can be accounted for properly. It's just that we shouldn't start with the premise that they should all start with criminal history points. With respect to Part B of the amendments, the PAG actually in its position of simplifying, the PAG's position is that we should not have those in there.

However, if this commission is going to do that, we certainly would request that there is a reference that youth does matter. There is a reference currently in there, but it's sort of, like, you can account for youth, but if it's just present to an unusual degree. Which I'm not sure what that even means. But youth is not really taken into account, and I think that's important.

Thank you.

CHAIR REEVES: Thank you.

Ms. Bushaw.

MS. BUSHAW: Thank you, Commissioner Reeves, again, on behalf of the Probation Officers Advisory Group for the opportunity to provide comment. For our testimony today, POAG

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intends to focus on the areas that we are most familiar with and are most relevant to our role in the system, and that is our experience with records collection and interpreting the definition of confinement. An essential feature of every pre-sentence investigation report is Part B, where the details of each and every known arrest and conviction are summarized and scored.

Ideally, such an important section of the pre-sentence report would have a consistent baseline of reliability. Especially because the criminal history scoring is 50 percent of what determines the sentencing range in every criminal case. Unfortunately, because of our role and range in every criminal case. Unfortunately, because of our role in collecting criminal history records, we are keenly aware that such is not the case when it comes to juvenile adjudications.

During 2017, POAG submitted comment regarding proposed priorities and discussed our concern with the wide range of varying access to

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juvenile records from state to state, jurisdiction to jurisdiction, and even from judicial officer to judicial officer. As a result, the pre-sentence report ends up being a representation of what we were able to collect versus a representation of what the defendant actually has for prior juvenile convictions.

Seven years have since passed and the current new group of officers who make up POAG are also of the consensus that records availability remains an issue. While POAG was able to come to a consensus that this is an issue we believe should be addressed, we were unable to come to a consensus as to how the issue should be addressed. POAG's vote on this issue revealed that we are evenly divided between Options 1 and 2. The lack of consensus within POAG demonstrates the tension between the many factors that should be considered in identifying a solution, which is something we've seen in public commentary, as well.

Option 1 largely continues with the

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current scoring practices under Chapter Four but limits the scoring of offenses that involved confinement to instances where defendants are charged in adult court. Unlike adult sentences of confinement, juveniles are placed in a variety of different types of residential facilities that make it difficult to discern if they meet the definition of confinement. Option 1 offers a simple solution to resolve a complex issue, yet leaves the remaining processes of scoring juvenile adjudications intact.

It also seeks to hold defendants accountable for past criminal behavior and seeks to distinguish defendants who have prior juvenile convictions from those who did not sustain any juvenile convictions. The other half of the voting members of POAG preferred Option 2, as it not only resolves the issue of confinement, but it also largely resolves the issue of juvenile records availability and minimizes the impact from the varied charging practices among jurisdictions. Also, Option 2 provides for a

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level of accountability that would still capture the serious offenses that are ultimately prosecuted as adult convictions.

With regard to Option 3, where offenses committed prior to age 18 do not receive criminal history points, POAG reached a consensus that offenses committed under the age of 18 should still be considered in criminal history scoring if the defendant was charged and convicted as an adult. Option 3 does not appear to capture the seriousness of the defendant's prior conduct, because youthful individuals facing charges in an adult court are often reserved for more serious offenses.

A specific crime that came up in our discussions, and came up in public comment as well, is the violent offense of carjacking. While that was also a crime that provided heightened concern, the example cases POAG discussed also resulted in the juvenile defendants being convicted in adult court for those serious offenses. Because Option 3 would

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not score those types of offenses, POAG does not support Option 3.

In conclusion, POAG recognizes the Commission is considering a wide range of issues addressed within the public commentary, including an analysis of recidivism rates, the consideration of updated brain development research, the varied charging practices involving juvenile offenders, concerns with procedural safeguards within the juvenile system, varied records availability, the purpose and definition of confinement, and the present scoring practices impact on minority youth.

POAG recognizes the validity of each and every one of these factors. It is of the position that a collective assessment of all of these factors weighs in favor of change.

CHAIR REEVES: Thank you, Ms. Bushaw.

Ms. Leary.

MS. LEARY: I wish I were as smart as Ms. Bushaw, then I would be in good shape. Good afternoon, ladies and gentlemen of the

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Commission. Thank you so much for your time. I want to focus on a word that's been said twice so far today, and that would be victims, and two, groups of victims. The victims in the instant case for which the federal judge will be sentencing -- maybe even three groups. A little bit about the victims of the prior cases of the youthful offender, and then the future victims, which statistically will be created to a greater degree, in our view, if you adopt these proposals.

But before I drill into that, let's talk about what's not in dispute. We, at the VAG at least, don't favor only things that increase sentences. We accept so much of what we heard this morning, right? We accept that, compared to middle-aged people or older people, that people in this age range definitely are less culpable as a group, that they definitely have less impulse control, and as a result of that, their criminal behavior seems more significant, et cetera, and puts the public in more danger.

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We accept that. We also accept so much of the information from the first panel, which I thought was really excellent, which really seemed, if we were going to boil it down to just a JD summarizing, not a PhD, more information is better, right? More information is better because this is really about the individual. And in fact, those experts said that. They said we are not at a point where we can infer from group information individual information.

And they also said that what we're looking at when we look at culpability here, is not just whether they have as -- well, one witness said this, and we agree with this. It's not just whether or not someone has the maximum amount of judgment. I certainly don't have that yet in my middle-aged years. But whether or not they have enough judgment for it to be relevant to the court's consideration.

What is in dispute here is how we deal with all this information on the individual

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level. It requires an individual assessment. And while one witness earlier today said, our concern is tying the hands of the judge, that is our concern, and we believe that these proposals do exactly that. Notwithstanding, more information is better. Focus on the individual. That is what is right and just for the offenders, as well as for the victim survivors. Part A and Part B reject this concept of an individualized approach. To quote another witness, these, in fact, use a sledgehammer when perhaps a tack would be appropriate.

With regard to Part A, we asked judges to get a full picture of the defendant because that is what you need to figure out deterrents, to figure out evaluating how much treatment have they gotten before, will treatment work in this instance, et cetera. And yet the proposal is to remove data about prior juvenile adjudications or convictions, to remove that data from the scoring. That's important data that will help a judge figure out these answers, okay?

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And I just have to say there's been a lot of talk about comparison. Our experts were very clear. Among the group, there's a lot of diversity and heterogeneity, and we have to think who we're comparing to. A lot of discussions on, why is this in the score? Here's why it's in the score. It's in the score because compared to the millions of youthful people in this country who never commit a crime, these offenders stand in a different place. So, they shouldn't start in the same position that the vast majority of people who also do not have fully developed minds have not committed crimes. They stand in a different position.

And this Commission adheres to that. Because a year ago we were here discussing zero-point offenders. And this Commission said, we see a distinction between people who have actually never committed crime and people who have got some points, but that's a distinction. And the basis for that distinction was recidivism. If it mattered a year ago, it

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matters now. And that's why, where we start, these offenders are in a very different position.

Turning to Part B. Our view is, based on membership in a group, we shouldn't make any determinative statements about departing upward or downward. That's not nuanced. And yet that's what Part B wants to do. As Commissioner Boom said, the guidelines currently draw distinctions amongst offenders. The length, the seriousness of the offense, how long ago it was, what were the outcomes? And we think that that is the appropriate thing to do.

And what was mentioned earlier was that if we just move it all into section 3553, that judges will work harder. Litigants will work harder. I cannot believe that any defense attorney would say, well, it's already baked into the score, so I'm not going to explore these points. Of course, we're going to explore these points. And we know from the data, for those who are getting two points, judges vary significantly from your own data on those groups.

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I just want to close with an example to bring home what I'm talking about. About three weeks ago in Kansas City, Missouri, there was a terrible incident we all know about where there was a shooting at what should have been a very celebratory event. And two juveniles and two young adults have been arrested for 22 people being shot, hundreds of people in the community being victimized. At least half of these 22 people were under 16. A 6-year-old and an 8-year-old and Lisa Lopez-Galvan was killed.

Assuming that the two youthful offenders that have been arrested were involved, and of course we don't know, if they stay in juvenile court or if they stay in juvenile court or not, under Option 3, they will have no points at all if they find themselves in federal court five years later. No points at all. They will start in the same position as someone who has never been involved in criminal activity. And this treatment of these offenders as though they have no criminal history is contrary to what this

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Commission has done.

And then Part B of the proposal will be triggered as well, because the young adults, there's an 18-year-old and a 20-year-old who have admitted to shooting into this crowd, knowing that there were children there, that Part B would say essentially that, well, they weren't 25 yet so let's treat it differently because of that group, as opposed to an individual assessment as to what was going on there. And in our view, that's simply the wrong outcome. It doesn't speak to all of the sentencing criteria.

And it certainly sends a message to the victims in Kansas City, Missouri, what a federal court thinks about their victimization, which they will carry for the rest of their life, what the victims in the case, in the instant case, what the court thinks about them when they're going to artificially sentence the defendant as though they had no criminal conviction.

And what the court thinks about the

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victims of the future cases, which statistically speaking, if my math is correct, will be about 2,250 potential future victims if 75 percent of the over 3,000 offenders implicated by this recommit a crime. And the VAG thinks that that is not the way to go. Thank you.

CHAIR REEVES: Thank you all so much.

Any questions?

Commissioner Wong.

COMMISSIONER WONG: Thank you all for being here. And I wanted to pick up with something that Ms. Leary touched on, which is you all are our advisory group. So, with the exception of Ms. Roden, I think you've all appeared before us last cycle, as well. And it strikes me, you know, we have Chapter Four. The goal of Chapter Four is to accurately predict recidivism. And over the years, Commissions before us have always, you know, re-examined, seen if there are tweaks or calibrations needed to make sure that that is as accurate as it should be and as functioning as it should be.

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What strikes me as a little bit different here, and you mentioned zero point, but also the status point issue that we addressed last cycle, you know, there were Commission studies on recidivism that at least highlighted issues that caused us to look at it again and see if tweaks or calibrations were needed. So, you know, with zero-point offenders, there was Commission study showing that the status points themselves, the Commission concluded in a report, that they added little to the overall predictive value associated with the criminal history score.

And so, the view was, although we did not all agree, but the view was that taking out those status points or minimizing them would not undermine the ultimate goals of the predictive value of Chapter 4. And then with zero points, there was data by the Commission on recidivism that showed marked differences between the zero pointers and the one pointers, even though they were all within Criminal History Category I.

What seems a little odd here is that

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we have advisory groups telling us, you know, you favor changes this way or that way, but we have Commission data, again, on recidivism that's showing that the current system is not only strongly showing that there's a difference in rates of recidivism between those that have at least one juvenile point counting from the population, again, we said there's a 23 percent difference in the Commission's data, but that there's a difference even between the two pointers and the one pointers, as we currently distinguish.

And so, I guess we do have that same kind of data that's showing that Chapter Four is doing what it should do. And so, I'm wondering for those of you that are here today taking the position that we should change that, we should tweak that, we should be calibrating that and going to Option 3 or Option 1 or Option 2, why you have confidence that that is not going to undermine the overall predictive value of our Chapter Four calculations.

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JUDGE ERICKSON: The way I see it is that if you look at the vast majority of adjudications throughout the country are operating in a system that is so pieced together that we're really not comparing apples to apples.

And so, the recidivism predictions are capturing a larger, you know, the scoring is capturing a larger percentage of people than actually will recidivate. The other thing is, and I've had some issue with recidivism statistics that focus on arrests because, you know, arrests don't mean much in the real world, right?

I mean, let me just give you an example. When I was for five years presiding over a juvenile drug court, and I looked at the recidivism statistics that came in there, you know, we got a lot of kids that were being arrested for just ordinary kid stuff. Driving under suspension, you know, their curfew violations if they were under the age of 16 and subject to the curfew, and so they were arrested.

And so, when we looked at our

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statistics, we would say, yeah, that's not good.

But did we see increased drug use? Did we see increased violent crime? We did not for most of the people that we were working with, right? And so now I get that I'm in the middle of nowhere in North Dakota, and I'm looking at a drug court that's got, you know, 50 kids in it, you know, and maybe that's not really a statistically valid pool, but I look at it, and I just think that, you know, that they may be rearrested at higher rates.

Every kid who commits any crime has already shown some predisposition to be beyond the 95 percent of the people that don't commit crimes, right? And so that's out there, but I don't know that hanging these two-point offenses on people that will dramatically increase the sentence is appropriate when you look at what some of the underlying conduct is.

And I just will come back to the fact is that, you know, when I was sitting in court, a lot of the juvenile adjudications that the kids

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that we saw in Indian Country were different than when we saw on the south side of Fargo where people with money lived, right? Because nobody was being adjudicated as a juvenile delinquent in order to access treatment. And that's happening in places that are under-resourced, right?

And so, I think that's the driving point for TIAG, you know. And like I said, this is not an easy decision, right? It's one of those things, if you just look at numbers and I get that that's part of what the Commission does, but Indian Country is just different. And the numbers are not being captured in the same way. That's probably an unhelpful answer.

CHAIR REEVES: VC Mate.

VICE CHAIR MATE: Thank you all for being here today. And actually, before I move on to questions, since we had a whole large number of basketball shout-outs yesterday, I think we need to acknowledge Caitlin Clark in Iowa. So, thank you for representing.

CHAIR REEVES: Yes, indeed.

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VICE CHAIR MATE: But turning back to the recidivism data for a minute and kind of the things that matter when we're looking at that, as we were talking about it, I was wondering about several other things. Like, does recidivism in what form matter?

For example, if it's recidivism in the form of a supervised release violation versus a conviction for a new violent offense, you know, are those different things? Does it matter whether the thing we're looking at we know is predictive or whether it's just another thing that's correlated? Are those things that are also relevant in us thinking about recidivism data?

JUDGE ERICKSON: I think so. And I think that, you know, when it comes to sentencing, isn't that the question we all ask as sentencing judges? We're sitting there and looking at, what happened? Why are they here? What did they do, right? I mean, the reality of it is, if you've got a person who's been engaged

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in all sorts of violent conduct, and now what you're seeing them for is that, you know, they're skipping school, you know, and they're, you know, not showing up at their probation officer's appointment, that's a different thing.

Now, they will both be arrested, right? Because there's a revocation going on. We're going to have a conversation. You know, one person we're going to incarcerate again, and the other person we're going to, you know, just have a long talk to.

And if you're me, you just know that this is going to result in some community service, and you just go out there and say, you're going to work for a few hours. So, if you'd rather work than go see your probation officer, I'm good with that. You want to work rather than going to school, I can live with that. But guess what? They all go back to school and start seeing their probation officers.

I mean, that's, you know, part of what we do.

CHAIR REEVES: Ms. Leary.

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MS. LEARY: May I respond to that? A couple of thoughts on recidivism. And I would agree with you, more information. I agree entirely more information matters, and I would draw distinctions between those, absolutely, because it's the whole defendant. But you know, it's interesting for me to hear challenges to arrest rates as not good measures of recidivism.

Because we're normally, meaning the Victim Advocacy Group, are saying that because we point out, those are just when they're arrested.

With less than 50 percent of crimes being reported across the country, and when we get to sexual offense, we're down to less than 20 percent of crimes. There's a whole host of crimes that are never measured at all.

Now, of course, we're not asking the Commission. There's no way for you to keep that, so I'm not saying that. But I think that yes, arrest rates are not perfect, but it goes both ways. And I would say just something, and I would agree totally that a violation of probation

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is less serious in some cases, but let's keep in mind, sometimes, because the person is on probation, and let's say it is something sexual or something of that nature, the violation of probation will be the way to deal with it.

But also, a violation of probation, and again, I'm not equating this to more significant violent offenders, but a violation of probation is a situation where somebody who has engaged in an illegal activity, has now been put in a situation where they're being monitored. You got to walk the straight and narrow. You got to do X. You got to do Y.

And this will be a good measure to see whether you can follow the laws, et cetera. And then in some instances, they don't. Those aren't all the same for all the reasons that my able colleagues and everyone has said, but they're not insignificant all the time. And I think we just have to be careful with these blunt instruments.

And I realize that, Commissioner, you were not using a blunt instrument, but there's

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nuances here to all of these scenarios. And that's why individual sentencing within a framework matters. And if I could just say another thing about the disparities. And I mentioned the Rheingold case in our paperwork. I think it's important to note that without some cabining here, especially with regard to Part B, we're going to have judges doing exactly what we're all expressing frustration about.

With no guidance, I think someone is youthful, somebody else thinks someone is not. I think this juvenile conviction matters, somebody else thinks it doesn't. Having it anchored in scoring helps prevent that disparity of sentencing, in my view.

CHAIR REEVES: Ms. Bushaw.

MS. BUSHAW: Yeah. If I could just comment briefly. I get the point of the question, and it's a good one because last year we embraced the statistics that the Commission was putting out on why we needed change. And so, I guess the question of that comment is, you

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know, we have statistics that the guideline is functioning as designed when it comes to Chapter Four and predicting recidivism, so why change it?

And I would say that the big difference is, last year recidivism was the main factor. But this year, it's one of many factors that we're dealing with this amendment.

So, when we were trying to figure out which option we wanted to vote for, we were looking at the confinement issue, the records issue, the disparate act or impact on minority youth, safeguards in juvenile court. Recidivism was a factor. Brain development was a factor, and then distinguishing juveniles who have no priors with juveniles who do have priors. So that's the only thing I would comment, is that we just believe there's a lot more factors to consider this year, but it is one of many.

COMMISSIONER BOOM: And just going back to the data though, I agree completely that, you know, the underlying juvenile conviction, the seriousness of it, is important for judges and

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policy makers to understand and ultimately take that information and impose a sentence that is sufficient, but not greater than necessary, and is individualized.

But again, you know, according to the data that the Commission recently published, more than half of the juvenile offenses that received the two points were violent offenses: robbery, assault, and other violent offenses, compared to approximately one-third of the one-point offenses.

So, you know, certainly there are circumstances where someone scores for taking grandma's car for a joyride that, you know, grandma really didn't mind. Maybe she was inconvenienced. And so, our data is on that granular level to tell us what those juvenile offenses are.

And so, you know, one point that I thought was really interesting that you made, Ms. Leary, is, you know, the notion that we should treat everyone the same, and by removing all the

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points, we are treating everyone the same, but these folks are not the same. I believe the percentage is 0.4 percent of juveniles are committing juvenile offenses. And so, to remove that scoring completely seems as though we're treating folks who are differently situated very similarly to or the same as the vast, vast, vast majority.

And I thought that was a really interesting point, so. And I think to Commissioner Wong's point, you know, that the data means something when we are considering recidivism and lower recidivism on status points and zero-point offenders, then it seems like the data must also mean something as well for juveniles.

CHAIR REEVES: Any additional questions of this panel?

Thank you, ladies and gentlemen, particularly those who have been with us yesterday and today. We appreciate you so much.

This concludes our morning session,

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and I realize it is afternoon, and we're behind on our lunch break, but we'll try to catch up. We'll come back here at 1:50 p.m. 1:50 p.m.

(Whereupon, the above-entitled matter went off the record at 1:04 p.m. and resumed at 2:00 p.m.)

CHAIR REEVES: Our sixth group of panelists will provide us with victims' perspectives on this issue. First, we will hear from Shari Ellithorpe, a retired member of the San Diego, California, Police Department. While with the San Diego Police Department, she spent 27 years as a patrol officer, and 20 of those years, were with the K-9 Unit. Ms. Ellithorpe is also a wife, mother, and grandmother.

Second, we will hear from Lynette Duncan, who is employed by the Veteran Administration as both a prosthesis --

MS. DUNCAN: Prosthetist.

CHAIR REEVES: Prosthetist. Okay, prosthetist.

MS. DUNCAN: I am a prosthetist.

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CHAIR REEVES: A prosthetist --

MS. DUNCAN: Whole body parts, not my own.

CHAIR REEVES: -- and --

MS. DUNCAN: An orthotist.

CHAIR REEVES: -- and an orthotist.

MS. DUNCAN: That's great.

CHAIR REEVES: Okay.

MS. DUNCAN: Prosthetic limbs --

(Simultaneous speaking.)

CHAIR REEVES: Okay. At a hospital in Northern California. She's been working in prosthetics.

MS. DUNCAN: Yes.

CHAIR REEVES: That's right?

MS. DUNCAN: Yeah.

CHAIR REEVES: All right. And orthotics?

MS. DUNCAN: Yes.

CHAIR REEVES: For over 20 -- we love each other.

MS. DUNCAN: I love you so much.

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CHAIR REEVES: For over 20 years.

Third, we will hear from Ashley Carvalho, who currently works in the fashion industry. She previously spent eight years in the Army National Guard to pay for school, where she earned an Associate Degree in Criminal Justice and a Bachelor's Degree in Psychology. Ms. Carvalho has spent the last two years volunteering as a contact person for Parents of Murdered Children, a non-profit organization that provides emotional support to families and friends of those who have been murdered.

Finally, we do have a fourth one, all right, who will be appearing via video with us. Ms. Rosemary Brewer, who is testifying remotely.

Ms. Brewer is the executive director of the Oregon Crime Victims Law Center, a non-profit organization that provides free legal representation to Oregon crime victims to assist with the assertion of and protection of their rights.

The center represents victims in all

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stages of both the adult and juvenile criminal justice systems, including in post-conviction matters on issues such as the right to protection, the right to notice and to be present, the right to be heard, and the right to restitution.

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

MS. ELLITHORPE: Thank you for having me here. It's going to take a second.

On October 5th of this year, will be 29 years since my father was murdered in cold blood over a bicycle. Even with almost three decades, it was like it was yesterday or today. I was just talking about this five minutes ago, and it wasn't this bad. Late at night on October 4th, 1995, two teenage boys, Gregory Valencia, at 17, and Ronnie Vera, 16, entered into the complex where my parents lived. They were there to commit burglaries. Valencia, the 17-year-old, knew that the complex was a good place to steal bikes. They wanted bicycles to ride home.

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Valencia came to the complex with a loaded .22 in his waistband. They had already taken a bicycle from one of the condos, and he was in the common area. Valencia attempted to steal the bicycle from my parents' locked patio.

My dad heard the noise, and he went to see what the problem was. He saw Valencia just outside their walled patio, and he went to talk to him. Valencia was already in the -- Vera was already in the common area with his stolen bicycle, and Vera was walking out towards him when Dad came out to talk to them.

He's trying to walk them out of the complex. My mom was standing on the patio, watching what was going on. And as they're walking out of the complex, Valencia picked up the bicycle he had stolen and threw it at my dad.

Dad kind of bent over to avoid getting hit, and it hit him in the upper shoulders and the back. And as he ducked over, Valencia pulled the gun out of his waistband and shot him in the back of the head.

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And my mom watched. My mom saw it happen from the patio. So, she went out to help him. The two juveniles ran out of the complex, and my dad died at about 2:25 a.m. on the 5th. Both juveniles were tried as adults and sentenced to prison. Both juveniles had prior history in the juvenile courts. Excuse me. Valencia is currently in prison. Vera was released on probation, May 6th, 2022.

The purpose of being here today is considering sentencing. As a survivor of a cruel and horrific crime, sentencing is a step towards healing. For some, it allows closure, a sense of justice served. As a career law enforcement officer, I've always believed in the system. I had faith in the system. My heartfelt plea would be to allow a sentencing judge to see all the records and the history. This allows the judge to see the whole picture. In my case, the escalation of crimes.

My own brother has got juvenile history issues and these issues continue through

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adulthood. He's spent over half of his adult life in jail or in prison, and he's currently on parole. That's a whole another -- you cannot minimize my pain, trauma, and loss by eliminating or downplaying the juvenile criminal history. Families and victims are further traumatized by minimizing their pains. We, as survivors, cannot be forgotten in favor of our perpetrators.

Each case is unique. Each victim and family is unique. A sentencing judge would find their hands tied without access to full criminal history, not just a pre-sentencing report. I've read my brother's pre-sentencing report, and that was quite the interesting reading. Sentencing has to be balanced.

Having dealt with my father's murder for almost 30 years does not erase the loss or the pain. If his murderer was to commit another crime after release, and able to have my dad's murder erased from his history, that would be devastating. His murderers made their choices, and they should have to live with their choices.

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My family and I have been given life sentence we can't escape or hide from.

We, like many other families, have not been given a choice. Please consider the victims. Don't make us less because our perpetrators were juveniles. There should be fitting punishment for crimes. I can't tell you how many times I've heard juvenile offender or child regarding my father's murder. My father was 44 years old when he was shot in the back of the head by a 17-year-old.

The 17-year-old was not simply throwing a temperature tantrum. He was committing murder. He came armed to commit burglary and he chose to commit murder along with it. The violence of the crime does not become any less due to age of the perpetrator. This one drew the loaded weapon, pointed, and fired. Don't minimize this murder due to age.

Thank you for hearing my dad's story.

I know he's watching, and I hope I can make him proud, standing for him, and hopefully giving my

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family and maybe others a voice. Thank you.

CHAIR REEVES: Thank you, Ms. Ellithorpe, for sharing your father's story and your story.

MS. ELLITHORPE: Thank you.

CHAIR REEVES: Ms. Duncan.

MS. DUNCAN: I have written a longer, more complete statement for the record, and you guys have that, along with a photo of my dad's murdered body. I just thought it's important to see my dad the way I saw him last. Today, I'm reading an abridged version.

I was just 17 the night two juvenile assailants violently murdered my family. They were 17 and 18 at the time. One of them was even an escapee from the juvenile correction system. They both had long criminal records. They had spent many months robbing and burglarizing numerous homes and businesses, but nine days before my family's attack, they began murdering their victims. My family's attack was the third family victimized in their nine-day murderous

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crime spree.

My dad owned a family billiard center.

The two assailants followed him home after he closed for the night. My dad arrived home around 4:00 a.m. He was unlocking the front door when the assailants ambushed him and shot him in the back of the head. My dad died instantly.

My mom and 18-year-old sister got up to check out the noise, and by then the assailants were on our front porch, searching my dad's body. When my mom opened the front door, they began shooting. My mom was shot three times. She fell back, and then my sister was shot. The assailants ran back to the car, but before leaving, they used a shotgun and sprayed pellets at the house and family. My mom had 187 pellets up and down her legs. My mom survived. My dad and sister did not.

My 11-year-old sister, Donna, and I woke to gunshot. To get out of the house, we both had to jump over my dad's body and all of his blood as the body was blocking the front

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steps of the house. I still remember standing in the middle of the street, screaming. It was a low guttural sound that I never want to hear come out of my body ever again. I could hear sirens coming in all directions toward me. They were just getting louder and louder and seemed like forever. It would be years before I could hear another siren and not have a panic attack, thinking this was happening to another family.

Eventually, we were at the neighbor's house, which had become the temporary police command post. I walked into their kitchen. One of the officers set me aside, and he told me, your dad and sister didn't make it, but your mom is going to be fine. Then he said, now go in the back bedroom and tell your little sister.

She was 11. I was 17. It was before there were Office of Victim Services. It was a whole different time. I remember wanting to tell him, I can't. I can't tell her. But I knew I had to because I didn't want her to hear it from him.

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Thank you.

She was in her friend's bedroom closet in a fetal position, hiding as far away from the boogeyman that she could get. I had to scoop her up and tell her they were gone. We both just held each other and screamed.

Telling Donna they had died has been the hardest thing I have ever done in my life, and I have done some really hard things. But I know when I'm on my deathbed, and I think back on my life, that will still be the hardest thing I've ever done. Many years later, Donna would begin her victim impact statement, saying, that was the night I learned that monsters were real, and daddies don't always kill them.

Later that morning, I was responsible for notifying relatives and friends, including my dad's mother, my paternal grandmother, and my older sister's fiancé. The friends living locally learned about it from the local news media. That Monday was spent planning a funeral, including purchasing cemetery plots, caskets, and

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headstones. I was just 17.

In 1977, there weren't companies to clean crime scenes. Men from our church took care of that and patched the walls and the many gunshot holes. I am so grateful for their service.

Life became incredibly hard after that. My mom checked out emotionally and spent most of her time either working at the pool hall or being alone in her bedroom, sobbing. We all fell apart, both individually and as a family. I've worked many different jobs. Most of them terrified me, as I was so afraid of being robbed.

When you don't feel safe in your own home, you don't feel safe anywhere.

PTSD was not a diagnosis and therapy was not done. It wasn't until in my 30s when I was taking a psychology class as a prerequisite for the prosthetics program that I read about PTSD. And I remember screaming out loud, I've got that, and I started getting therapy. My life has began improving after that. I know I

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shouldn't be functional, but I am.

There are evil people in this world. When sentencing someone, you can't just ignore those who are evil. Violent crimes must be taken into consideration. I know your decision will not affect my life at all, but if truly evil assailants get released, what about the next family they slaughter, and the family after that, and the family after that? Thank you.

CHAIR REEVES: Thank you, Ms. Duncan.

Ms. Carvalho.

MS. CARVALHO: As you deliberate on the proposed amendment aimed at excluding any convictions prior to reaching the age of 18 from a defendant's criminal record, I urge you to recall the story you're about to hear and remember that your decisions have a profound impact on our communities. I ask for your patience as my brother's story must delve into the backgrounds of several juvenile offenders.

My brother, Anthony, was 20 years old when his life was tragically cut short in an act

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of senseless violence. He fell victim to a group of four individuals aged 16 to 19, whose criminal records painted a clear picture of their dangerous trajectory. I cannot understate the gravity of the events that unfolded.

Four juveniles meticulously planned an armed robbery. They made a few stops to arm themselves with loaded guns and to steal bandanas to conceal their identities, strategically opting for a color opposite that of their gang affiliations. They picked a random residential location and set out to find someone to rob. Their actions were calculated, deliberate, and devoid of empathy.

It was at an intersection that my brother inadvertently encountered them and attempted to navigate past them. They blocked his path and escalated the confrontation by raising their guns. My brother began to run towards safety. In a cruel and merciless onslaught, they chased my brother, firing at his back as he sought refuge, finding shelter behind

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parked vehicles. 15 shell casings were found at the scene. He collapsed a block away from the hospital where two beautiful citizens came to his aid. His last words were, please call my mom.

As we grappled with the devastating loss of Anthony, we found ourselves ensnared in a legal system that seemed to offer more loopholes than justice. My father would describe it as a system that poured salt onto the wounds of victims while finding new opportunities for offenders to evade responsibility.

And here is the salt. To start, if the current system was working, my brother might still be alive today. Taxpayers have spent thousands, if not millions of dollars on studies to show us recidivism rates are higher with shorter sentences. I'm now learning that this might be recent.

The lead gunman, 19 at the time, had been released on probation a mere two-and-a-half-months prior to killing my brother on a shockingly short 18-month sentence for armed

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assault with the intent to murder. The leniency of sentencing only served to embolden him further, awarding him with enough street credit before being released back into society. When we look at the data and the science available to us, 18 months is not nearly enough. He would recidivate, he would escalate, and the only unknown was who his next victim would be.

The second gunman was 16 years old. Despite his criminal record, which included charges of armed assault with the intent to murder, he was released on probation, likely because of his age, under the assumption that kids don't think rationally. Despite the court's awareness of his violent tendencies and impulsivity, they opted to monitor him with an ankle bracelet and simply hoped for the best. Was it his bullet that ripped through my brother's shoulder, or was it his leg or his ear, or the fatal one that ripped through his lung?

Here's some more salt. Change in bail reform legislation set off a tragic series of

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events that led to further loss of innocent lives. Just a month after Brangan v. Commonwealth in Massachusetts, bail for one of the defendants plummeted from \$35,000 to a mere \$1,000. The judge's interpretation of this new legislative development, which is focused on the ability to afford bail, swung the pendulum so far in the opposite direction that this dangerous repeat-offender was set free. Somehow the gravity of being indicted for two separate violent crimes occurring within years' time, a mass home invasion resulting in the stabbing of two women, and an armed assault with intent to rob, which ended in my brother's murder, was not considered.

Within a mere ten months of his release, he was arrested for an OUI. The system failed again when the probation office failed to communicate with the DA, leading to another release. Shortly after that, he found himself in a high-speed car chase, evading arrest, and ultimately causing a fatal collision that claimed

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three lives. His own, his passenger, and that of a 32-year-old war veteran in route to meet his newborn child. The aftermath of his actions brought devastation to three more families and added another layer of complexity to my brother's case.

The fourth offender, despite initially agreeing to participate in the robbery, demonstrated a significant deviation from the others. He had no prior criminal record, and he swiftly chose to disclose the involvement to the authorities. He shared similar socioeconomic and racial backgrounds with his peers, and I believe his role is a good example of the impulsivity science would suggest someone his age has. However, the biggest difference here is his lack of criminal record and his moral compass, or what Professor Morse called the good stuff.

Yet, even amidst our grief, we sought solace in the pursuit of justice. Six-and-a-half-years later, my family finally found a semblance of closure as the perpetrators were

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brought to trial and rightfully convicted. However, our journey towards healing was abruptly halted by yet another legal twist, another pour of salt. Massachusetts' highest court deemed it unconstitutional to sentence a juvenile under the age of 21 to life without the possibility of parole. We now face a resentencing.

The significance of the numerous judgments that initially led us into the courtroom, followed by the subsequent instances that demanded every fiber of our being cannot be exaggerated. It reopens wounds, prolongs anguish, and thrusts families into a perpetual state of suffering.

My parents, who have already borne the weight of unimaginable loss, now face the daunting prospect of continuing to fight for justice from beyond the grave. They cry for us, for their daughters, as they realize the journey did not end when trial did.

With each opportunity provided, these juveniles demonstrated their unworthiness of such

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opportunities from the outset. To me, their persistent behavior appears less driven by impulsivity and more indicative of a fundamental lack of moral direction. While I uphold the value of scientific understanding, if a juvenile exhibits both violence and impulsivity, I contend that lenient sentencing falls short in addressing the matter adequately.

Commissioners, I implore you to consider the real life consequences of your decisions. My opinion on lenient sentencing aside, juvenile records serve as red flags, guiding judges toward informed sentencing that prioritize public safety. Removing a juvenile's criminal record from consideration sends a dangerous message that past actions have a no bearing on future behavior. It undermines the very essence of justice and accountability. We cannot afford to ignore the warning signs or to turn a blind eye to the dangerous paths some young individuals may choose.

My brother's story transcends mere

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statistics. It stands as a powerful testament to the pressing need for reform. May his legacy ignite change, motivating us to champion a legal system that prioritizes prevention, accountability, and compassion. A monumental decision looms ahead and its weight lies squarely on your shoulders.

I have made it clear where I and countless other survivors stand, yet what remains unspoken is my commitment, a pledge to my brother, to my family, and to all the survivors that I've met along the way. My promise is that the collective pain we share will never be in vain. Thank you.

CHAIR REEVES: Thank you, Ms. Carvalho.

Ms. Brewer.

MS. BREWER: Thank you for the opportunity to speak to you today regarding the proposed amendments to the sentencing guidelines regarding youthful individuals. My fellow panelists have expressed to you more eloquently

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than I ever could, the effect that juvenile crimes have on victims, but I will try to express my opinion as someone who works in the system.

We recognize that there is a need for criminal justice reform, and we support those efforts. But there is also a need to recognize the significant trauma that victims experience as a result of crimes committed by juveniles.

As an attorney who represents victims of crime and juvenile adjudications, I regularly see victims struggle with their experience with the system. The reality is that many victims are traumatized repeatedly. First when they become victims, and then throughout their experience with the justice system. That trauma is not diminished in any way because the crime was committed by a youthful offender. The harm is the same, whether it was committed by someone who is 16 or 36.

We ask the Commission to reject the proposed amendments and maintain a balance between the rights of victims and the rights of

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youth. Oregon is likely similar to states around the country in its reconsideration of the way youthful offenders are treated at disposition. There have been significant changes to the juvenile justice system here, including a change to the way juveniles who commit the most serious offenses are treated.

Before 2020, juveniles over the age of 15 who committed serious crimes, such as rape and murder, were charged in adult court and their cases could be transferred to juvenile court. That changed in 2019 when the Oregon legislature passed a bill that designates all youth cases to juvenile court. Prosecutors must file a motion to waive a case into adult court, and a hearing is held.

Since this new procedure was implemented in 2020, three juvenile cases in the entire state have been waived into adult court. The result is that juvenile court dockets are now stacked with the most serious crimes that we see and some of the most violent crimes committed.

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For victims, juvenile court can be a very challenging venue. The focus is entirely on the offender, which is appropriate, but one of the keys to true rehabilitation is responsibility. By removing the consideration of criminal history and sentencing, the proposed amendment detaches the youth from the responsibility for his offenses. This would be minimizing a youth's responsibility for prior acts and erasing any prior victim's trauma.

Further, failing to consider a youth's complete criminal history limits the court's ability to consider the totality of the circumstances and places the community and the victim at risk. To appropriately sentence a youthful offender, the court must be able to consider the full history of the youth. This is the only way to meet the objectives of sentencing, which must reflect the seriousness of the offense and protect the public from further crimes. The victim also has a right to protection, and failing to consider previous

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adjudications may put the victim at greater risk of future harm.

As an example, I represented a child victim who had been sexually assaulted by an older cousin. The cousin had previously been involved in the juvenile justice system for several less serious incidents. At disposition, the court took into consideration his previous history and recognized the escalation of the behavior in order to fashion a sentence that would meet several goals. Allow the youth to accept responsibility for his crimes, craft a plan for rehabilitation, and keep the young victim and other family members safe from future harm.

Without (audio interference) the court would've been sentencing in a vacuum and denying the victim the right to protection. This case also points out a reality among the juvenile cases that we often see. The victim of a juvenile is often a juvenile themselves, and it's not uncommon that the victim is younger and more

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vulnerable. These victims are not well served by ignoring prior offenses and sentencing.

For a victim of a juvenile offender, the disposition phase of adjudication is extremely difficult and often retraumatizing. With a focus on the rehabilitation of the youth, there is often a lack of recognition for the harm suffered by the victim. The court hears mitigating evidence on behalf of the youth. There's often a team supporting the youth and there are usually multiple discussions about what is best for the youth.

From the perspective of a victim suffering the loss of a family member, a serious physical injury, or a sexual assault, there is no balance to the proceedings. Supporting victims includes a fair balance at disposition, allowing the victim to be heard, allowing mitigating evidence on behalf of the youth, and including a complete picture of the offender's criminal history in order to fashion an appropriate sentence that meets the goals of sentencing.

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Victims routinely face significant barriers in their attempts to access justice: reporting to police, invasive physical examinations, undergoing multiple interviews, testifying repeatedly, and navigating the justice system can cause significant trauma.

Ignoring a youthful offender's criminal history would be one more barrier victims would face in seeking justice, denying them the opportunity for a sentence that reflects the seriousness of the crime and the whole person who committed it. Fundamental fairness requires the courts to consider the totality of the circumstances in fashioning the most appropriate sentence.

Thank you. And I'm happy to answer any questions.

CHAIR REEVES: Thank you, Ms. Brewer.

Thank you, all. Thank you, ladies.

I turn to my Commissioners. Any questions?

COMMISSIONER BOOM: Thank you all for

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your statements. They're just compelling and certainly give us a really direct and informative view of the victim perspective from the folks who can speak to that the most eloquently and directly.

You know, my only experience is in federal court. And of course, in federal court, we have the Crime Victim's Rights Act. You know, at every hearing, the victim coordinator, with the U.S. Attorney's Office, makes them aware of the hearing and their opportunity to be present and certainly make a statement at sentencing.

Are there other things that we in the court system can do to ensure that those victim voices, you know -- and certainly I understand your positions on the current policy issues that we are, you know, struggling with and grappling with, but are there other things that would be helpful for victims as far as being a part of the process? You know, again, my experience is limited to the federal, and so just wanted to ask that question.

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CHAIR REEVES: Yes.

MS. CARVALHO: So, I can only speak to what I experienced in Massachusetts and how that court system and the victim advocate system, like how all that worked, and it was, honestly, it was amazing. Our victim advocate was great. She made us aware of every trial, every court date. It was phenomenal.

I, as said in my little intro bio, I am a contact person for a non-profit organization, and during these annual conferences that I attend, I hear that not every state has these victim programs, like as solid as Massachusetts does. And it's really, really sad.

Most of the times, if, say, for example, I don't even want to put my name in it, Angela's father is killed, but they haven't found Angela's father's killer. She is never assigned a victim advocate. She is never notified of the resources available to her. And I'm not sure if this is a federal program or if it's a state program, but in Massachusetts, we do offer

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reimbursement for funeral costs for that of one who is murdered.

Somebody like that would never know that those programs exist, and it's really lacking. This isn't my wheelhouse. I'm not sure what the appropriate response to fix that is. However, I can just outline that there are issues state to state, city to city. And I think that it needs to be looked into more. Thank you.

MS. DUNCAN: Mine was in '77, long before there were an Office of Victim Services and before there were crime cleanup companies, but I still have fear. And my fear is the guys come up for parole periodically, if they were to get out of parole, they know who I am, Google, easy to find me, and I honestly think if my assailant ever got out, one of them did the decent thing and died in prison about ten years ago, but the other guy got out, I would be terrified.

And there's no, you know, like federal witness protection program, there's no victim

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protection program. And I honestly don't know how I will function at that point. Right now, I'm functional, but there is a lot of years where I wasn't. And I know if they ever got out, I would really be very frightened.

CHAIR REEVES: Yes. Yes, ma'am?

MS. CARVALHO: Just to kind of build on what she said, a similar thing happened with my family where one of the defendants was released on \$1,000 bail, and after my brother's murder, I ran away, right? I ran away to New Jersey, to New York, pursued something different.

I couldn't bear to live where my brother did. But my parents still live there. They actually bought a house across the street from the cemetery so they can visit him every day.

And when he was released, the fear, the absolute fear in all of us, that something was going to happen to them. We all pitched in, and we got the full works security system. It's like Fort Knox at my parents' house. And it's a real fear, so I --

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MS. DUNCAN: Yeah. That's right.

MS. CARVALHO: -- am with you there.

MS. ELLITHORPE: Fortunately, our case was in Tucson. I lived in California. When my husband wanted to move out of California when we retired, we thought, oh, we can go to Arizona.

I can't. I can't. I actually talked my nephew out of living in Arizona just for the fact that you don't know what's going on. One of the suspects had been released. So, it's like, no, you don't need to be in that area.

So, my husband, there's no way. I can't. I can't live in Arizona.

Went to Texas instead. But we are very fortunate with the way it was set up in Tucson. When that happened, the police came out and they had a victim advocate, a crisis intervention right there. So, Mom had that throughout. So, it was very fortunate to have that victim advocate right there to help her guide her through the steps. And even in San Diego, we travel with victim advocates. So, they

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will go on a ride along if they're readily available. They're a great resource. They're a phenomenal resource. Helps a victim find a path to help them heal.

And so, we have a murder, okay, well, we've got resources. The crime scene cleanup. Because right out the back door is where paramedics were working on my dad and the next day, all that stuff is still there. Walk in and there's all this litter. All the paramedics just drop their stuff all over. But having a cleanup crew come in, take care of all that, it's great to have that resource.

MS. DUNCAN: I would like to add one more thing if I could. Like I said, I'm functional. And I have no problem talking to you. I have no problem talking to large groups of victims and things that I've talked to. But the thought of coming here, flying into Reagan Airport, and taking the Metro to the hotel by myself? No way.

I have a friend came with me because I

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can't ride a city bus alone, still. I can't ride the Metro alone. I can't get in the back of an Uber because I don't know who's driving that Uber. We took a taxi because at least with a taxi, they've been vetted. That fear is real, and it doesn't go away.

I moved out of California years later.

I live in California now, but eight hours away from where I was. The fear is real. And you don't get over it, there's not a healing process for fear. There just isn't. And once you've heard gunshot -- I've been at Disneyland, and the fireworks are going on, and I had to go into a store so it would just be dampened a little bit because it was too loud, and it was sounding too much like my gunshot. It's just -- oh, well, yeah, I did. I was on. Good. Good.

Yeah. The fear is real. And that's something you really need to take into consideration because there's victims after us and victims after us. And they all have the same fear, and it's real and it's debilitating. And a

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lot of people, a lot of times, it's a vicious circle because then they self-medicate and then they have more problems.

I'm fortunate I didn't get involved in self-medication, but I was a mess for a long time. I joke about being a recovering slut. Now everyone knows this, but whatever your weakness is, that's what you're going to do to not feel that fear for just a little while. Just a little while, no one's going to murder me right now. Because the rest of the time, you feel that. And it's traumatizing.

MS. ELLITHORPE: Debilitating.

MS. DUNCAN: It is. Very debilitating. I shouldn't be functional. None of us should be functional. And yet we're here, functional. But I had to force myself to get on that plane because I started having a panic attack just thinking about the commute from the airport to the hotel alone. It's hard.

CHAIR REEVES: Commissioner Wroblewski?

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COMMISSIONER WROBLEWSKI: Thank you so much, Mr. Chairman. And thank you all for being here. Thank you for getting on that plane. And I really appreciate it.

I don't have any questions for you. I just want to say that the courage and grace that you all have shown just being here, but also telling about the pain that you and your families have experienced is extraordinary. I'm personally very sorry that the criminal justice system has added salt onto the wounds. I've worked in the criminal justice system for 30 years on crime policy. I'm embarrassed about some of the things that you talked about, and we're trying to change them and make them better.

You all are a credit to your family and to all the families who have been victimized.

But even more than that, you're doing a great public service by being here, and we're all grateful for that, so thank you very much.

CHAIR REEVES: Ladies, thank you so much for your testimony. Thank you for your

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statements that you've submitted and thank you for your voice. I don't think any other Commissioners have anything. Thank you on behalf of all of us at the United States Sentencing Commission.

MS. DUNCAN: Thank you for listening to us --

MS. ELLITHORPE: Yes --

(Simultaneous speaking.)

MS. DUNCAN: -- and having our voice involved because we're a big part of this. You know, there's always a victim. And it doesn't go away. Thank you.

CHAIR REEVES: Thank you.

Our seventh group of panelists will provide us with the perspective of formally incarcerated people on this issue.

First, we will hear from Dakota Garmany, who lives in Chattanooga, Tennessee, where she works full-time as a logistics clerk and studies full-time as a student at Chattanooga State Community College, whose mascot, I

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understand, is Tigers. Just like Jackson State, so. Upon graduation, though, Ms. Garmany plans to work as a social worker, providing social services to children in the foster care system. Ms. Garmany also participates in the Full Circle Re-Entry Program in the Eastern District of Tennessee and is scheduled to graduate from that program in May.

Second, we will hear from Mr. Ronald Evans, a resident of Hackensack, New Jersey. Mr. Evans works at two jobs, while also volunteering as a mentor for the Incarcerated Children's Advocacy Network. The network is a project of the campaign for the fair sentencing of youth that provides support to formerly incarcerated youth, who, like Mr. Evans, were sentenced to life in prison or other lengthy sentences. Mr. Evans is a father of one and a grandfather of two.

Ms. Garmany, we would like to hear from you whenever you are ready.

MS. GARMANY: First, I want to thank

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you all for inviting me here today. And I also want to thank you all for hearing me today.

I believe for the last ten years of my life, I have not been heard. I grew up in and out of DCS custody. The first time in Tennessee was for a dependent neglect case with my father, for a domestic abuse situation. I went to school with a black eye that day, and the social worker contacted DCS at my school, and I was taken into custody. And I had failed a drug test that day for taking a Xanax, due to the situation that happened, that a friend at school had given me.

Due to that failed drug test, DCS placed me in a rehab facility at that time. When I was placed at that rehab facility, I ended up meeting a lot of people who had drug addictions.

At that point in my life, I did not have a drug addiction. I was treated like an addict way before I was ever an addict.

As a child, in and out of DCS custody, I never really had any rights. I was taken into custody that first time for a dependent neglect

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case. But that was not the only time that I was in and out of custody. I went into custody multiple times for juvenile justice cases as well. I became an addict because I ran from that facility and DCS custody with some girls who were also addicts. That spiraled my juvenile criminal history out of control, that addiction did.

When I was in the system, I never had, like, any rights. I had guardian ad litem, and I had DCS workers that spoke for me, but I didn't have anybody that was there for me. When I was in custody for the dependent neglect case, I didn't have any contact with my father who was my only family at the time. I didn't have contact with anybody. I was just in the system, alone. And this is what made me run to begin with.

I ran all through my juvenile career.

I ran away from everything. I didn't understand what was going on. At 18, I was not old enough to drink. I wasn't old enough to smoke cigarettes, but I was old enough to be sentenced to 60 months in the federal system. I'm not

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going to say that prison was all bad, because that is where I grew up at. That's where I learned to be who I am today. I learned to be a woman there. Unfortunately for me, that's where I had to learn those things.

But I remember I used to sit in prison, and I used to think about how I wanted my life to be once I was finally out. Because I was going to finally be able to have that freedom and be an adult to make these decisions for myself, that nobody ever made for me. I didn't have that support growing up. And once I was released, I really took full advantage of that, and I enrolled in college, like, I think my second or third month out of prison, I enrolled in school.

And I've done that consistently since I've been released.

I also work full time. I'm in that re-entry program through my probation and through the Federal Defender's Office in Chattanooga. I have pretty good relationships with my family now, today. I'm able to have those

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relationships, but from the distance that's necessary to maintain those relationships. I have really, really great friendships. One of my best friends is here with me today, actually, supporting me.

And I have a lot of goals that I want to accomplish. Like my opening statement said, I do want to be a social worker because I do want to be able to help kids that aren't heard in the system because I know how that feels.

With all that being said, I want you all to please just acknowledge the fact that children are different. Children really are different. And I hope and pray that this helps somebody else so that the next child does not have to learn and grow up the way that I did. And yeah. I just want to thank you all again for hearing me today.

CHAIR REEVES: Thank you, Ms. Garmany.

Mr. Evans. Make sure your microphone is on.

MR. EVANS: Morning Commissioners.

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Thank you for having me and giving this opportunity to share my story. When I was 18 years old, I was charged as part of a juvenile conspiracy. When I was 19 years old, I was sentenced to not one, but two life sentences. As a teenager, I was charged and arrested in federal court. At that time for me, it was very hard for me to understand my attorney.

It was very hard for me to understand my attorney at that time. It was like he was speaking different languages. Like, I couldn't understand him, and he couldn't understand me. He was always telling me to take a plea. It's, like, I didn't know him, and I didn't trust him.

The people that I knew and trusted told me to go to trial. So I went to trial, not knowing how much time I would receive, or anything.

I remember when the first time I got arrested, I was 13 years old. I was so scared. Me and my friends was playing in an abandoned school, which triggered a silent alarm, and I was arrested for breaking and entering. When I was

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15 years old, I got charged for possession with intent, 1.5 grams of cocaine. Which I got probation on that and completed my probation. When I was 17 years old, I got charged with obstruction of justice, interfering with a sting operation, which I paid a \$100 fine.

Everybody grows up in different environments. The environment I grew up in was drug infested. Like, everywhere you look growing up, everywhere, it just was drugs everywhere. I mean, all your friends do it. It was just hard to get out of that environment. Growing up, I didn't have a father figure. Was just me and my mother, my mother had me when she was 16 years old. And it always been about me and her. I believe everybody deserve a second chance in life. I got the clemency by President Obama in 2016. I had did 24 years with three juvenile priors that were held against me while I was in federal court.

Oh man, I remember when I was incarcerated, waiting for something like this to

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happen. Just praying for something like this to just happen. And I never thought I would be here speaking to you guys about how it was when I was incarcerated. It took, like, three or four years for me to really understand what a life sentence was.

And it was like my mind wasn't fully developed or anything like that, at that time. I was just hungry for knowledge once I learned how much time I really had and felt it. I just start trying to learn as much as I could and taking as many trades as I could. These certificates right here show you. I was just trying to learn as much as I could because I know one day that I would get released.

I have a good family structure. Work two jobs. Been doing it six years since I've been home. And I'm still learning because I went in there as a kid, and I came home as a grown man. I got my GED when I was in prison, and took as many of these courses that I could. I changed. I changed a whole lot for the better,

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and for my family and my mother, most of all.

I just pray that you all give the people out there that I left behind a second chance. Because everybody deserves a second chance. We all make mistakes. Especially when we're young. As kids growing up in environment that we grew up in, it's just hard to not, like, I would say, not to get in trouble, but it's just hard to understand certain things that's going on around you when you're so young, you know?

I'm an advocate for the Incarcerated Children's Advocacy Network (ICAN), just try to help kids that's been incarcerated and are just coming home. And that helped me a lot when I first came home. Brian Stevenson was my lawyer when I was going through trial. He helped me a whole lot, and I learned a whole lot from him. I'm just thankful to have this opportunity to speak to you. And I pray that you all help the ones that I left behind. Thank you.

CHAIR REEVES: Thank you, Mr. Evans.

Any questions?

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I have a question for each of you.

Ms. Garmany, I believe you said you're still participating in some sort of re-entry program. And I just want to ask you, because that's one of the things that this Commission looks at, and stuff, and the guidelines talk about it. But I want you to tell us, what do you think about the particular program and the success that you're having in that particular program, vis-a-vis any other programs?

MS. GARMANY: Yes, sir --

AUTOMATED: -- is now exiting.

CHAIR REEVES: Not you. You're not exiting. It was --

MS. GARMANY: Oh. I was like, I didn't go nowhere.

When I was first released from prison, I was in the halfway house. And in the halfway house, there was also a re-entry program that I was in, Project Return. And between Project Return and Full Circle, I can say that they have

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helped me so much.

The current re-entry program that I'm in through my actual probation and through the Federal Defender's Office, I have a mentor with them, and I have made connections that will help me in social work. And actually, like, some advocacy programs that are going on in Chattanooga, Tennessee, right now that they have just started.

So, I've made some connections with some really good people as well as learned, like, a lot of different, like, resources. They bring people in to help with, like, credit and buying houses and how to go about those things. Those are things that, one, they're not taught in public school, and they're not taught really at all, period, in life.

And so, it's very good to get that knowledge now. Yeah. Absolutely. And I feel like that knowledge, it helps me when I have people that are willing to help me learn how to do these things that I was never taught. I feel

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like it helps me succeed today.

CHAIR REEVES: And, Mr. Evans, I notice that you're working with a group of incarcerated people in one of the non-profits that you work with. This Commission is trying to receive the best information we can from all groups.

So, what can this agency do to hear more perspectives from people like you, formerly incarcerated, people who had the two-life sentences or a life sentence? Well, what can we do? How can we hear from you all in a B

MR. EVANS: It's a lot of us that come home. And with this ICAN network and Children Incarcerated Network, where we try to help the people that's coming home as much as we can. I remember when I got the clemency by President Obama, everything happened so fast. Like, I was home when I got that announcement. I was home within that week from doing 24 years.

It was so fast that, like, when I got to the halfway house -- like, I haven't seen cars

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in a long time, you know? So, I just sat by the window and just watched the cars go by. Stuff like that. It's just I missed out on a whole lot. But we just try to help as many kids that we can help, you know, in the same situation that I was in or different situations like that.

CHAIR REEVES: Thank you, sir.

Commissioner Gleeson?

COMMISSIONER GLEESON: Just thank you both for being here, for your written and your oral input. Mr. Evans, there's a way in which, when you mentor or speak to kids, there is things you can accomplish because of your experience that none of us could ever hope to. Judge Restrepo has a very successful re-entry program in Philadelphia. They're great at it. The contribution of formerly incarcerated individuals to those efforts, there's just no way to overstate how important that is. So please keep doing it.

MR. EVANS: Yes, sir.

COMMISSIONER GLEESON: And thank you

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for doing it.

MR. EVANS: Yes, sir.

CHAIR REEVES: Thank you all so much for your testimony. Thank you for your written testimony. Thank you for coming forward and --

MR. EVANS: Grateful.

CHAIR REEVES: -- talking to us publicly.

MR. EVANS: Grateful.

CHAIR REEVES: And keep up with our work and let us keep up with yours.

MR. EVANS: Yes, sir.

CHAIR REEVES: All right.

MR. EVANS: Thank you.

CHAIR REEVES: Thank you so much.

MR. EVANS: Thank you.

CHAIR REEVES: All right. Our eighth and final panel for today. Look at all the smiles. They're going to provide us give us testimony regarding our proposed miscellaneous amendment to §2D1.1 (Drug Trafficking) of the guidelines.

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First, we'll have the Honorable Zachary Cunha, who serves as United States Attorney for the District of Rhode Island. He was nominated by President Biden in 2021 and took office in 2021. Mr. Cunha has served in the United States Attorney Offices in the districts of Rhode Island, Massachusetts, Eastern District of New York where he was first appointed as an assistant U.S. attorney and handled and supervised a number of nationally significant civil and criminal cases. I emphasize civil because I did that, too. And everybody always thinks that, yes, attorney's office only does criminal stuff.

Second, we have Deirdre von Dornum again, who serves as an Assistant Federal Defender in the Eastern District of New York. She previously served as an Assistant Federal Defender in the Southern District of New York, the deputy attorney in charge of the Eastern District of New York, and as an attorney in charge of the Eastern District of New York. Ms.

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von Dornum was previously in private practice, engaged in pro bono death penalty litigation with the Capital Defenders of New York and served as an assistant dean for public service at NYU School of Law. Ms. von Dornum will be speaking to our amendment on circuit conflicts.

Third, we have --

Am I right? Oh, I'm sorry. That was yesterday.

MS. RODEN: I have more.

CHAIR REEVES: No, no. No. You're still talking about §2D1.1, right? All right. This is the panel on §2D1.1. All right.

Third, we have Debb Roden, who is a managing partner, excuse me, at the law firm of Woodhouse Roden Ames & Brennan, LLC, in Cheyenne, Wyoming. She is an at large representative on the Commission's Practitioners Advisory Group. Her practice focuses on business representation, civil litigation, juvenile representation, and criminal defense, and she practices in state and federal courts at the trial and appellate levels

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on a weekly basis.

Fourth, we have Joshua Luria, who serves as a Supervisory U.S. Probation Officer for the Middle District of Florida and is the vice chair of the Commission's Probation Officers Advisory Group. He began his career in the Eastern District of New York as a United States probation officer working in the supervision division in Brooklyn, New York. Mr. Luria transferred to the Middle District of Florida in Tampa, and later transitioned to the Pre-Sentence Investigation Unit where he was promoted to Sentencing Guidelines Specialist and supervisor.

Finally, we have Christopher Quasebarth, who is a Staff Attorney for the Maryland Crime Victims Resource Center, Incorporated. Serving crime victims in Frederick and Montgomery Counties, Maryland. Mr. Quasebarth serves as a member of the Commission's Victims Advisory Group. He previously served as a chief deputy prosecuting attorney for Berkeley County, West Virginia.

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Mr. Cunha, we're ready to hear from you whenever you are, sir.

MR. CUNHA: Chair Reeves, let me say, as one former civil chief to another, far more distinguished former civil chief, I appreciate your gracious introduction. Honorable members of the Commission, I cannot tell you how grateful I am for the opportunity to appear here this afternoon and share with you some of the department's thoughts and concerns regarding the proposed amendment to §2D1.1.

I know that every member of this Commission is acutely aware of the fact that drug fatalities remain at crisis levels across much, if not all, of our country. And while the department remains fully supportive of public health efforts to help those who are struggling with addiction, we also believe it continues to be important to hold drug traffickers accountable for the damage that they cause from the distribution of fentanyl and other deadly drugs.

Particularly, when that conduct is motivated by

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profit, and particularly, when that conduct results in death or serious bodily injury.

The Department's goal here is to address this concern in a way that accurately reflects the impact of the criminal conduct, preserves appropriate sentencing discretion on the part of the sentencing judge, and reserves application of mandatory minimums to those cases that truly warrant them. The Department believes strongly that even in cases where a mandatory minimum is not sought, a sentencing judge should be able to make a meaningful and critically and appropriately guided distinction between a drug dealer whose actions lead to death, and one whose do not.

And absent a mandatory minimum or the availability of other guideline factors, a sentence that is based simply on drug quantity may not produce a just outcome when death results. To address that concern, the Department had previously recommended that the Commission adopt a new base offense level and enhancements

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that meaningfully account for death or serious bodily injury resulting from drug distribution, regardless of whether or not a mandatory minimum is charged.

That would allow for more consistent, as well as more moderate sentences, reserving the highest penalties for the cases that warrant them. That continues to be our recommendation. And we would ask that you defer consideration of these amendments to consider that or other approaches.

But should the Commission move forward with the proposed amendments, I want to share some specific concerns. Particularly regarding some potential unintended consequences that may warrant your consideration. We have particular concerns about Option 1. By requiring the government to charge the mandatory minimum to trigger the §2D1.1(a) provisions, Option 1 could be viewed as simply clarifying that these guidelines only apply when the defendant has been convicted of an offense involving death or

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serious bodily injury.

But there is also a reading of the proposed language that could be interpreted to preclude, what is a now common practice of stipulating, to the application of those guideline provisions under §1B1.2 (Applicable Guidelines) in cases where a mandatory minimum isn't charged. Those stipulations are frequently of great benefit because they provide a mechanism within the guidelines to give the sentencing judge a more accurate picture of potential culpability than would drug weight alone in cases where a mandatory minimum may not be necessary or appropriate.

If Option 1 were interpreted to preclude those kinds of stipulations, it could have the unintended consequence of causing prosecutors to seek mandatory minimums more frequently. If the Commission proceeds with Option 1, we strongly recommend that you clarify that the parties still have the ability to stipulate to the application of the §2D1.1(a)

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offense levels in cases where a mandatory minimum has not been charged. I would note that the Federal Defenders likewise recommend this, and there have actually been some preliminary discussions between the Defenders and the Department on this issue this week.

We have a second concern about the portion of Option 1 that addresses recidivist defendants. The current proposal would require prosecutors to file 21 U.S.C. § 851 notices to trigger the higher recidivist base offense levels, but filing those notices will often result in mandatory minimum life sentences, and thus the higher base offense levels predicated on recidivism will not have a meaningful impact on the defendant's sentence.

And so, in that scenario, under Option 1, prosecutors would need to choose between having no enhancement for a recidivist defendant or seeking a mandatory life sentence, which again, could lead to a marked and unanticipated increase in the number of life sentences in such

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cases. To avoid that result, we would recommend that the Commission refrain from linking the recidivist enhancements to the filing of section 851 notices and make no changes to the recidivist provisions.

With respect to Option 2, we do not oppose the removal of the term, offensive conviction, thus permitting judges to apply the death or serious bodily injury offense levels without requiring mandatory minimum charges. And we note that under Option 2, the parties would also remain free to argue for or stipulate to variances or departures from the applicable base offense level.

While we still continue to have some concerns about the applicability of section 851 notices under Option 2, those are somewhat diminished because the notices are less likely to trigger mandatory minimum-type sentences. Thank you.

CHAIR REEVES: Thank you, Mr. Cunha.

Ms. von Dornum.

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MS. VON DORNUM: Good afternoon again.

CHAIR REEVES: Good afternoon.

MS. VON DORNUM: Thank you, Chair Reeves. And thank you Commissioners. We appreciate you taking up this issue this year.

Defenders are not asking for any policy change to §2D1.1(a) or for softer penalties, solely for a language clarification so that the Commission's long-standing intent that these enhanced base offense levels apply only in the case of conviction under circumstances specified in the statute cited. We want that intent to be followed.

We asked for the clarification because we learned that some courts were applying §2D1.1(a)(1)'s base offense level of 43, which results in a guideline range of life where the government not only had not filed an section 851 information, but in fact had entered into express stipulations and plea agreements that it would not be filed in order to avoid a life guideline.

So, situations not where the prosecutor's hands

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were tied, but where the judge was finding it applicable, contrary to the intent of this Commission and the intent of the parties.

While we recognize that such a misapplication has impacted only a small number of individuals, that impact was, of course, severe. Option 1, which explicitly ties the enhanced base offense levels to the statutory requirements, would prevent this misapplication.

We absolutely agree with the Department of Justice that the parties need to continue to have the flexibility to negotiate guidelines that are appropriate to the specific facts.

So, the Defenders are asking the Commission to adopt Option 1, but also to add additional language to it stating that enhanced base offense levels may be applied pursuant to a stipulation of the parties. This would ensure that these enhanced base offense levels, triggering a life guideline, would only apply in two instances.

First, if the person is in fact

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subject to the statutory enhanced penalties for a drug offense resulting in death or serious bodily injury committed after sustaining a prior predicate conviction. That is where DOJ's own charging policies applied to the specific facts of a case lead DOJ to make that decision.

Second, where both parties agree that an enhanced base offense level should apply. In death-resulting cases around the country as Mr. Cunha mentioned, including in numerous cases in the Southern and Eastern Districts of New York where I practice, parties already have been entering into a wide variety of guidelines-focused stipulations that account for the specific facts of each case, but allow a non-life sentence, sometimes in the zero to 20 range, sometimes in the ten to life range, but without the life guideline. And we think it's important that we're able to continue doing that.

Defenders do not support Option 2, which permits application of these enhanced base offense levels if an offense involved death or

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serious bodily injury. I mean, first of all, if you use "involved," you're going to walk yourself into a categorical analysis problem. But putting that aside, by removing the offense of conviction language, Option 2 would wreak a dramatic policy shift from §2D1.1's grounding of the base offense levels in the charging statutes.

It would allow prosecutors to circumvent the burden of proof and would require that courts consider all relevant conduct including the conduct of others, and depending on this year's amendments, acquitted conduct, to calculate a guideline range that tracks enhanced statutory penalties that don't apply. That would be contrary to the Commission's intent and to the opinions of all five circuits to have addressed this issue, all of whom have found that death or bodily injury must be proven beyond a reasonable doubt.

Now, the proposal from last year by DOJ that Mr. Cunha referenced, that the Commission add a new set of intermediate enhanced

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base offense levels to account for situations were death resulting is based on relevant conduct, suffers from these same issues where it disentangles the base offense levels from the statutes of conviction.

And I would suggest, and of course, we've long urged a full overhaul of §2D1.1, and certainly if the Commission were to undertake that, it could consider, rather than having new enhanced base offense levels based on relevant conduct, having a specific offense characteristic based on death or serious bodily injury, which would be more in keeping with how other guidelines treat it. Similarly, they could be a SOC for being motivated by profit or other things as opposed to adding in new enhanced base offense levels.

But for this cycle, we ask that the Commission just make the limited clarification of Option 1 plus the stipulation language. And I think the concern raised by Mr. Cunha, that the department might be forced to file more section

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851s, is addressed by the stipulation language that we agree on. That would not be necessary if the parties had stipulated to a higher offense level.

And certainly, I know in the District of Rhode Island, as in the Southern, Eastern Districts of New York, it's also frequently the practice that the parties enter into a plea agreement, but don't stipulate to the guidelines exactly, or allow certain areas to be argued. And that way the court, where the parties can't agree on the exact guideline, can determine that based on the arguments of the party, as well as based on the section 3553(a) factors.

I think handling it through Option 1 plus the stipulation would give courts discretion, will give the parties who have a granular view of the facts the ability to arrive at reasoned and fair outcomes, and would allow, you know, a taking account of the harm from the victims of these offenses.

Thank you.

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CHAIR REEVES: Thank you, Ms. von Dornum.

Ms. Roden.

MS. RODEN: Thank you once again for the opportunity. The PAG doesn't have a whole lot of extra comments on this topic aside from the Defenders. Our initial option was Option 1. We did have a concern that that was going to force more section 851 filings. We then talked to the defenders as well about this issue.

We would also support clarification in the guidelines where the parties could stipulate to enhancements or to different offense levels based on the severity of the action or if there was a death that resulted. And that's really all the comments I have.

CHAIR REEVES: Thank you, Ms. Roden.

Mr. Luria.

MR. LURIA: Thank you to the Commission for the opportunity to provide POAG's perspective on the proposed amendment. POAG has observed that the current §2D1.1(a) does not

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capture through relevant conduct the harms associated with the cases in which a defendant has been convicted of a drug distribution offense, but whose conduct involved causing death or serious bodily injury.

Currently, there are only two ways in which a defendant, who distributes drugs that caused another person's death, are captured by the guidelines. Either they're convicted of an offense that establishes that accountability, or they engage in a plea agreement under Section 1B1.2 Sub A wherein they stipulate to their accountability for that death and agree that it is their intention that their guideline calculation be based on that more serious offense. Absent these two approaches, the guidelines will not capture the defendant causing a death through relevant conduct.

POAG has also observed that many of these cases involve small amounts of drugs distributed friend-to-friend. Based on whether the defendant's conviction included the causing

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death element, the outcome can be extremely different.

For example, if the defendant was charged with a 21 U.S.C. § 841(b)(1)(c) offense that caused a death, and they are only accountable for a few grams of fentanyl, their base offense level would be 38. However, if they pleaded to the lesser included offense of distribution without the element of having caused the death, but the evidence shows the fentanyl they distributed was in fact, the cause, they would have a base offense level of 12.

An additional consideration in this example would be if they happen to have zero criminal history points. The only guideline accountability for the death would be that they no longer qualify for a §4C1.1 reduction. Chapter Four would be the first time that we are asking whether the offense resulted in death or serious bodily injury through a normal relevant conduct standard.

A significant majority of POAG

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supports Option 2, which allows for the base offense level to be determined under relevant conduct if the offense involved death or serious bodily injury but does not require the defendant to have been convicted of the corresponding increased statutory penalties. This moves the issue of the causation of the death from a standard of beyond a reasonable doubt to that of preponderance of the evidence, which is the standard for all other guideline matters.

For example, if a defendant was charged with a firearms possession, the guideline allows for a cross-reference to a more serious Chapter 2A guideline. When the defendant used the firearm in connection with the commission of a homicide, that cross-reference is based on a preponderance of the evidence. However, when a defendant distributes a drug that causes a death, the standard becomes a reasonable doubt. Presently, something as significant and serious as causing a death is not captured under §2D1.1 and the judges are left without the guidance that

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the manual's intending to provide.

POAG also discussed the change in the language related to, including section 851, as a mechanism for capturing when the prior convictions should be included in the base offense level. When the language was one or more prior convictions for a similar offense, it caused confusion. Last year, the Commission clarified this further by altering this language to, quote, after one or more prior convictions for a serious drug offense or serious violent felony, end quote, in the higher base offense level and then just the, quote, felony drug offense, end quote, in the other relevant base offense levels.

This definitely provided clarity as we are familiar with the applicable standards for those two statutory definitions. However, the proposed amendment is now, quote, as established by the information filed by the government pursuant to 21 USC § 851, end quote. We wonder if this provision written in this manner won't

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return us towards more confusion. This language directs that the increased base offense level applies if the section 851 enhancement is filed, but it does not clarify if those penalties have to actually apply.

If the government files a section 851 notice, they have, quote, established by information filed, end quote, that the defendant had the prior conviction discussed. If they revoke that notice through a separate filing or negotiation, the enhanced penalty falls away, but some might continue to apply the enhancement base offense level, pointing back at the initial filing.

And while they may not be right to do so, they're not technically wrong either, which is just the type of situation that can cause a circuit split. Under this standard, there is no requirement that the enhanced penalties, based on a section 851, needs to have applied, only that the government filed information to establish that there was a prior relevant conviction.

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It may be worth the Commission's time to consider adjusting the section 851 language to effectuate the Commission's intent by adopting something closer to, quote, for a serious drug felony or serious violent felony that resulted in enhancing the statutory penalties, end quote. Thank you for the opportunity to provide POAG's thoughts.

CHAIR REEVES: Thank you, Mr. Luria.

Mr. Quasebarth.

MR. QUASEBARTH: Thank you, Chair Reeves. It's always a pleasure to be scheduled last on the afternoon docket. And VAG appreciates the opportunity to be able to speak this afternoon.

Death and serious bodily injury caused by drug offenses wreck families and communities across America. The CDC notes that in 2021, over 80,000 people died in the United States from opioid overdoses, including heroin and fentanyl overdoses. That number is a tenfold increase from 1999. Victim families suffering a loss of

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loved ones, and communities seeking to provide safe living environments for their people, have a strong interest in drug offenders accepting responsibility and being held accountable for the harms caused by their criminal drug offenses.

The Commission's proposed Option 2 revision of §2D1.1(a) 1-4 removes what we consider rigid language, quote, the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance, end quote, and replaces it with what we believe is more flexible language, quote, the offense involved death or serious bodily injury resulting from the use of the substance. This proposed change allows relevant conduct, which is established by a preponderance of the evidence standard, to be the basis at sentencing for determining whether the offense involved death or bodily injury from the substance.

POAG's public comment, and I think Mr. Luria's comments today, support Option 2 because it allows relevant conduct to better capture the

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actual harms caused by the offense, which is an outcome VAG views as favorable to addressing the harms to victims and victim families. DOJ's public comments note that Option 2 will grant flexibility for the government and the defense to argue or stipulate to variances or departures from the applicable base level and for judges to impose individualized sentences without the restrictions of mandatory minimum sentences.

The government may still charge offenses carrying mandatory minimum sentences for cases deemed appropriate. If Option 2 expands the alternatives by which offenders may accept responsibility for the harms they caused, in this instance, without the risk of facing mandatory minimums, VAG finds that expansion of alternatives helpful to victims and victim families.

Thank you for listening to all of your participants over the last two days. We appreciate that.

CHAIR REEVES: Any questions?

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Yes. VC Mate?

VICE CHAIR MATE: Thank you all so much for braving the last round here today. We really appreciate it.

I wanted to just go back to something that I think I heard and just make sure that I did that. If the Commission were interested in clarifying the original intent of that base offense level, do I understand that the Department of Justice, the defenders, and PAG all would want some language allowing for the parties to stipulate in addition to what is already in §1B1.2?

MS. VON DORNUM: Yes, that's correct.

And in fact, as Mr. Cunha mentioned, and as Ms. Roden mentioned, we've already begun discussions, and we're hopeful that we'll be able to propose language to the Commission specifically as to the stipulation.

MR. LURIA: I just want to be clear that that only resolves some of the government's concerns with Option 1. But yes. Our concern

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would be that because of the subject of the statutorily enhanced language in proposed Option 1 that the Commission should make very clear that stipulations remain available.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: In that same vein, if there were a change to Option 1 where it included the stipulation provision, I think Defender's position is that they would prefer that to Option 2. What is the DOJ's position between that version of Option 1 and the Option 2? And what is POAG's version of that version of Option 1 versus the Option 2 you endorsed?

MR. CUNHA: I don't mean to be in any way flippant. DOJ's preferred option is still, what I'll call Option 3, which is starting from scratch with a new base offense level. As between the two, we have fewer concerns with Option 2. And if the Commission goes with Option 1, we would adamantly support the stipulation language. I think that's the best way I can put it.

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MR. LURIA: Well, again, our discussion actually talked about our experiences in which stipulations would be put into a plea agreement, but had no guideline attachment, really. Under §1B1.2(a), you need to have that second component where the defendant agrees that it's their intention that they be held accountable at that higher level.

So, it isn't enough to just say, as a defendant, I caused the death. Has to also say, I caused the death, and it's my intention that I be held accountable at that higher level under §1B1.2(a). Anything that would make that more easily applicable to solve that issue, I think would be well appreciated. Our position is still Option 2, but that would definitely be a well-appreciated approach.

MS. VON DORNUM: Just to jump into Commissioner Wong's question. Those are the types of plea agreements that we have been entering into, as Officer Luria says, that not only say I was responsible for the death or the

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but for cause, but also stipulate to the offense level. Sometimes the parties then go on to say, and the parties jointly recommend a lower sentence. I have one in front of me where the guideline would be 38, but the parties jointly recommend 120 months in the particular, you know, circumstances of the case. Obviously, there's also Fed. R. Crim. Pro. 11(c)(1)(C)s, you know, and other things.

But I think Officer Luria is right. We need to have plea agreements that hold people accountable, but also that account for the specific circumstances, including, as he said, that a lot of the cases we see are addicts distributing friend-to-friend and the circumstance of which friend died and became the victim, and which one didn't die and became the defendant is only a matter of chance.

VICE CHAIR MATE: I have another question.

CHAIR REEVES: Yes.

VICE CHAIR MATE: I'm curious what

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folks think about POAG's suggested edit to that last line on the, established by the information filed by the government pursuant to section 851, and the switch to result -- I don't have it in front of me. I'm sorry. I know it's in here.

MR. LURIA: Something akin to, for a serious drug felony or serious violent felony that resulted in enhancing the statutory penalties. And the reason why we, kind of, landed at that point is, the idea being that when you file an section 851, that's the triggering action or the initiating action. And the result that really, you're trying to capture is the enhanced penalties have attached or are applied. And so, it made sense to us to, kind of, focus more on that final result, really.

MS. VON DORNUM: I agree with Officer Luria, in we had raised this concern in our written statement and cited the number of times in which DOJ files an section 851 but then withdraws it, and noted that the language as currently written could lead to a finding that it

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had been established, even though it was withdrawn. So, I certainly appreciate POAG's suggestion. I haven't had time to review with my superiors the exact language. But I think it makes good sense and it addresses a concern we had, as well. So we appreciate that.

MR. CUNHA: Likewise, I have not had the opportunity to discuss that at length with the powers that be at DOJ. I think, you know, again, I think we've articulated our concerns about the necessity of the section 851 and how some of those are ameliorated with the stipulation language.

COMMISSIONER GLEESON: We're just about done. I want to thank Mr. Quasebarth and Ms. Roden for coming, and point out that the rest of the panel, 60 percent of the panel, has a very deep roots in the Eastern District of New York, as do I, which makes me feel very proud.

CHAIR REEVES: Makes you feel like you're not alone.

Ladies and gentlemen, this wraps up

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our two days of hearings. We've heard a lot. We've heard from our stakeholders in the system.

We've heard from commenters, experts, the thinkers, the doers. We heard from the victims, and we also heard from the formerly incarcerated.

And we've heard different stuff about maybe people getting involved in the criminal justice system as early as four years old, 17 years old. Automatically, no matter what you do, you're in the adult system. We've heard all of that. We heard about acquitted conduct, most of yesterday about how we will address that. Our work is cut out for us, Commissioners, Commission, staff members, because we've heard you, and we want to do the right thing.

We want to do the right thing. When I heard that the people who had been through BOP actually survived BOP, that's a good thing. When our system adjudicates someone to two life sentences for engaging in a conspiracy, two life sentences, I didn't hear anything about a death having all of that, two life sentences.

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And I think about what I do. As Judge Bryan told me, when I sort of came on to replace him. Carlton, what are you going to do about your day job? And my day job is back in Mississippi. And that huge portion of my day job is to sentence individuals to the custody of BOP who has total control of their life. And as I remind myself and remind the people out there every day, I've never served a day in prison. And most of the people who sentence people have never served a day. We don't know what it's like. We don't know what it's like to serve a day, a month, a year, or a life sentence.

So, our job is tough here, to try to make sure that our policies are applied equitably, make sure our policies work, make sure that we do what Congress has asked us to do through the Citizen Reform Act. And I just ask you all to bear with us and keep giving us the information that we need to make sure that justice is always the focus of what we do.

So, with that said, I thank you all

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for being with us these past two days. I want, again, thank every panelist, everybody who offered testimony, submitted statements, everybody who supported those persons who submitted testimony and submitted statements. Those people who came through the live stream, I thank each of you. I thank the staff.

Because our work is not done. We're really about to work. And the staff is helping us do what we believe would be the best thing for the United States Sentencing Commission.

So we've heard your testimony, we will consider your testimony, and we will use that testimony in making sentencing policy, I hope, that is right, that is fair, and that is just.

The hearing is now adjourned. Thank you.

(Whereupon, the above-entitled matter went off the record at 3:38 p.m.)

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