UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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WEDNESDAY
FEBRUARY 12, 2025

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The U.S. Sentencing Commission met via Videoconference, at 10:30 a.m. EST, the Honorable Carlton W. Reeves, Chair, presiding

PRESENT:

CARLTON W. REEVES, Chair
LUIS FELIPE RESTREPO, Vice Chair
LAURA E. MATE, Vice Chair
CLAIRE MURRAY, Vice Chair
CANDICE C. WONG, Commissioner
SCOTT A.C. MEISLER, *Ex-Officio* Commissioner

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PROPOSED AMENDMENT ON FIREARM OFFENSES AND CIRCUIT CONFLICTS

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

10:36 a.m.

CHAIR REEVES: Good morning. I'm the Chair of the United States Sentencing Commission Carlton W. Reeves, and I welcome you all to this hearing this morning. I thank each of you for joining us, whether you're in this room or whether you're attending via live stream.

I do apologize for the weather, and we had to delay the hearing this morning. I'm not at fault for that.

(Laughter.)

CHAIR REEVES: But what we will do is make sure that we work through and get all the information we need in the time that we have. I have the honor of opening this hearing with my fellow Commissioners. To my left we have Vice Chair Claire Murray. To her left we have Vice Chair Laura Mate. And to her left we have the Commissioner Ex-Officio, Scott Meisler. To my right is Vice Chair Felipe Restrepo. And to his right is Commissioner Candice Wong.

We're also joined by our Commission employees who have worked with so much dedication to putting this hearing on today. I want to thank everyone, from the camera people making me look good --

(Laughter.)

CHAIR REEVES: From the camera people from, you know, the staff who opened up this building this morning. I want to thank everybody. And for our persons who are attending and coming in to testify. I realize the travel might have been difficult. The travel going back may be even more difficult. But I certainly appreciate you all for bearing with us.

But a special hat tip to our Commission employees. Our staff. They have worked so hard on this. They have drafted these policies, they put this room together. And they've done so much more. So much more. They do so much more every day. And they've done so much to make this hearing possible.

So, on behalf of my fellow

Commissioners, and the public, I want to thank the agency staff for the amazing work that you all do every single day.

Today though we're here to receive testimony on four proposed amendments to the Guidelines Manual. The first regards the career offender guideline. The second is a proposal to simplify the guidelines. The third is a proposal on firearms sentencing. And the last set of proposals addresses certain circuit conflicts.

Panelists, thank you all for attending, whether in person or remotely. Special thanks to those, again, who braved the weather to attend the hearing in person today.

Each of you will be given five minutes to speak. We have read your written submissions. And thank you so very much for them. Your time will begin when this light turns green. Or some light turns green.

(Laughter.)

CHAIR REEVES: It looks like it's white, orange and red, so --

(Laughter.)

CHAIR REEVES: -- maybe that will, I don't know.

(Laughter.)

CHAIR REEVES: You'll have one minute left when it turns yellow. And no time left when it turns red. If I cut you off, please understand I am not being rude as we have so much to cover today. And our time has been truncated a bit, so I will do my best to enforce the rule. Even though I'm a very nice guy.

(Laughter.)

CHAIR REEVES: For our audio system to work though, you'll need to speak closely into the microphones. When all panelists have finished speaking Commissioners may ask you questions. I'm certain they will do so. Or we will do so.

Thank you for joining us. And I look forward today to a very productive hearing. I look forward as well as my fellow Commissioners.

Our first panel, I will introduce my

good friend who's the Chair of the Criminal Law Committee to have their perspective on the proposals we're discussing today. Of course, the person who I'm speaking of is my dear friend Judge Edmond Chang. Judge Chang is a United States District Court Judge for the Northern District of Illinois and Chair of the Criminal Law Committee of the Judicial Conference of the United States. Judge Chang, we're ready when you are, sir.

JUDGE CHANG: Okay, thank you, Chair Reeves. And good morning to you. It's always a pleasure to see you, Judge Reeves. And good morning to all your fellow Commissioners, although I do see your two short. And please give my regards to Judge Gleeson and Judge Boom if you see them soon.

It is a privilege of course to be invited to speak. And thank you for convening this in what we Chicagoans would call a light pleasant dusting of snow.

(Laughter.)

JUDGE CHANG: It seems fine. But it is, it's always a pleasure to work with the Commission in shaping the guidance and advice that you all give to judges for what is really the most difficult duty that we have, which is sentencing. So thank you for that.

This is somehow just the third amendment cycle for this Commission. It feels like your tenth anniversary. And I think that's because of so much, of how much you've accomplished. And it's really a credit to you all. And you have it seems like boundless energy. Speaking of boundless energy, I do want to thank your staff as well. They are the invaluable and industrious backbone of this institution.

And I know our own criminal law committee staff, our terrific staff, really appreciates that line of communication between staff-to-staff. So thank you for that.

I'm going to skip some of the bells and whistles that I usually have, but I do need to note that of course the Criminal Law

Committee's views are not necessarily the views of the Director of the Administrative Office of the United States Courts or the entire 870 member Federal Judiciary. And I, as I saw many comments came in separately from there, and of course respect all those comments as well.

Having said that, the Judicial Conference has adopted the overarching policy that we ought to strive for a guideline system that is fair, transparent, predictable, workable and flexible. And so those are guiding principles.

I'm going to first, and I thank you for allowing me to mix up all the topics together so that I can make a flight out today. First on career offender. The Committee does support the end to the categorical approach. It has caused, as you all know, significant and extensive litigation. It's difficult for judges and attorneys and probation officers to apply. And most importantly, it has resulted in disparate treatment of defendants based on the differences

in state law as opposed to what they actually did.

And so, on the proposed amendment for crimes of violence the Committee does support an amendment that changes the focus to whether the defendant engaged in, and primarily speaking, in violent conduct. We are, as trial judges we're accustomed to assessing evidence and the reliability of information. We find facts, that is what we do. And so we welcome this change to focus on real world facts.

Now it is true, and I had an opportunity to read some of the other public responses, not all 1,200 some odd pages of them but many. I acknowledge that caution is warranted. This is a change that is significant. And a change like this, it may cause additional uncertainty. And there may still be some differences in outcome when looking at state court records, right, which still remains part of the proposed amendment.

Having said that, it does seem to be a

superior and workable framework that gets us away from all the evils of the categorical approach. And so, the Committee does believe that this will result in greater consistency compared to the current approach.

With regard to the sources of information that would be looked to for the government make a prima facie case, let me just take a step back on even the requirement of a prima facie case. That does seem, to us, to be a sensible gateway. It is a kind of a choke point, to focus on the parties, and the court, on those cases and those prior convictions that are most likely to have had the defendant engage in violent conduct.

So by having this prima facie as the first step we think there is some value to that in narrowing the instances in which this will be litigated at all. I am going to, just because we discussed this at some length in the written letter, skip over some of the particular sources of information. You know, edits and proposals

that we had. But we do think it is sensible to have this first prima facie step.

On controlled substance offenses we do support limiting the prior convictions for drug-trafficking to federal drug offenses. Now, we acknowledge, this is going to result in far, far fewer career offender applications to drug only offenders.

And I think it is actually quite rare where I've had two defendants, or anyone on the Committee's overall experience that's had, has had a defendant who has had two prior federal drug offenses. It is going to be very rare.

At the same time I think the Commission's own study has shown, it's getting a little long in the tooth now. I think the study concluded in 2016, but I did show that drug-trafficking only predicates, those defendants did not recidivate at much higher rates than non-career offenders, right? And so, yet we treated them vastly different from non-career offenders.

Judges can still take into account

repeat state drug conviction, drug convictions, in criminal history category assessment and under section 3553. So, you know, looking to that, those state drug convictions will remain part of, of course, sentencing, an important part, but not a driver of the career offender provision.

And I will also note too that aside from the fact that the recidivism rates are comparable for drug-trafficking only defendants and non-career offenders, we have seen the vexing interpretative difficulties of categorical approach that has crept into, or leapt into, drug-trafficking offenses as well. And we've now had to examine state drug laws for divisibility and then compare listings of controlled substances and so on.

And so, all those difficulties, as much as I had not imagined that that would happen and translate over to drug offenses, it has. And so that is a reality that we're dealing with.

Now moving onto a potential minimum sentencing length for the predicate convictions,

whether they be drug or crimes of violence, we do, as a Committee, supporting absent additional data. And I think that's an important caveat. But absent additional data the committee supports tying the, in effect, the minimum sentence length to the preexisting §4A1.1 category. Whether it's A or B.

Those preexisting categories, they already reflect the Commission's sense of the potential and probability of recidivism. And that also includes how old the convictions are and the release dates. And so, that narrowing of the predicate offenses is sensible to us because we already have structure in place.

Now I did say the caveat here is absent additional data because as the Commission asked, whether, should it be §4A1.1(a) predicates only or §4A1.1(b) predicates, or some other minimum sentence length, one year, three years, five years. And like any fun Socratic dialogue I'll answer that question with a question which is, we would encourage the Commission to exam the

data to see if there is some sensible minimum sentence length, combined with the age of conviction as well, in determining what is the appropriate minimum sentence length.

I think it is difficult to answer that question in a data vacuum. And so we hope the Commission explores that going forward.

And the last point is with regard to minimum sentence length is, we do have a concern that if you were to tie a minimum sentence length, not just to the sentence opposed but instead to the amount of time served, that that is, seems like a new concept to us that will engender litigation. It will require us, I think, to look at state law and try to figure out whether certain forms of custody, halfway house for example, would that can be considered time served or not.

Sometimes of course defendants are serving time for multiple offenses and so it's not always clear what the amount of time served has been. So we would discourage the Commission

from pivoting to that concept.

So before I move on to firearms I like, I'll pause if there are any questions on career offender.

(Off-microphone comments.)

VICE CHAIR MURRAY: Freudian slip.

(Laughter.)

VICE CHAIR MURRAY: I have a two-part question for you. And feel free to tell me that this is like too into the weeds and not your job and that will be a very fair answer.

So what we heard, what I think we will hear, judging by written submissions from the next panel, is some people saying your definition of crime of violence is such that everyone will have committed a crime of violence, and for other people your crime of violence is such that no one will have committed a crime of violence.

And so Part A of my question is, it seemed like the CLC did not share those concerns. And just wondering if after seeing those submissions you share any of those concerns?

The second one is, both sets of, my reading of both sets of folks who have those concerns is that they have similar proposals which is a kind of safe harbor that involves bringing the categorical approach back in a limited way. On the thought that, gosh, the judiciary has already kind of done the work of figuring out a large number, I think they say most, state crimes, whether they are crimes of violence or not, and hence just take those as a given and then worry about like additional conduct issues.

And I wonder what your take is on the first part of that. So do you feel like the work is done? Do you feel like bringing it back in a limited way puts you guys back into the fire where you're going to be still stuck posing the categorical approach and parsing divisibility and looking at trying to figure out the elements of the state crimes that are common law crimes or do you feel like that work is done and shouldn't be wasted?

JUDGE CHANG: Yes. So if I may answer that first, the last one first. And so, this, I have not run this by the Committee, so I'm not giving you the sense of the Committee, but from my personal perspective this idea that, let's hang on to the life raft of the existing categorical approach case law because the work is done, it doesn't seem to me that the work is done. And there's a number of things there.

One is, circuit law is not static. I mean, it does change. It can change over time. But, more importantly, I don't think it's the case, certainly in the Seventh Circuit for example, that outside of Indiana, Wisconsin and Illinois, and even within those states, that we've figured out the categorical approach and whether something is categorically crime of violence in the 47 other states.

And so when I see a defendant with a conviction that might be a crime of violence who's been convicted in the state outside the Seventh Circuit, I'll need to make that decision.

Now there might be, if it's a conviction in Arizona, maybe the Ninth Circuit is not binding precedent, right, on courts in any other circuit. And so, of course it is likely to be very persuasive. They have a, they're more depth at assessing the laws in that particular circuit, and so it will be persuasive.

But it's a pure question of law. So I'm going to get, I'm just going to try to get it right. I'm not just going to differ to a non-binding precedent which means that the first thing I'll do, probably, is to look to see if the Seventh Circuit has interpreted a statute that is similar to that Arizona state law to take that as the example. And whether that was divisible.

And so, it will continue, there will continue to be work in those situations. So I don't think the law is static. And then the idea that either it will be, everyone will be, had committed a crime of violence or no one will have committed a crime of violence, on the everyone point the prima facie case will, I think, serve

as this gateway. And so, that gate might not open for many cases because you're still looking at some set of the Shepard documents to even begin that inquiry.

And then on the idea then that everybody would have engaged in a crime of violence, well, I mean, I guess I would say that for those who have, from the Shepard documents, right, appeared to have committed a crime of violence and were no longer asking the categorical approach and hypothetical situations that the state law might apply to, then they likely engaged in a crime of violence. And so, I don't think you should be surprised that if you have a gateway that that might very well end up being the results.

And of course if the defense is still able to challenge the Government's presentation, we'll still have to assess the facts, so I don't think those extremes will happen. Again, I do appreciate the concerns. I mean, this is a very serious change.

CHAIR REEVES: Commissioner Wong.

COMMISSIONER WONG: Thank you. Thanks, Judge Chang. One of the strands of comment we also got was that Commission, you may think by this proposal you bring relief to kind of the arduousness of the categorical approach, but in fact you may be affirmatively injecting greater confusion because of the different definitions now and approaches to crime of violence and controlled substance offense in §2K2.1 and here. Which would require judges to kind of bring a different analysis to bear for career offender versus §2K2.1.

To what extent do you think that will actually confuses judges having the two different approaches or do you think that still it's partial relief, but partial relief is better than no relief?

JUDGE CHANG: Right. That. Exactly that. Because I don't, and I, you know, the Committee certainly is not opining on, because we may have to decide this as individual judges,

whether there is authority to change some of these definitions.

But yes. I think the, at least the vast majority of cases that I see this question arises in this career offender category. And this is where it has the most impact. So we would prefer the partial relief rather than no relief.

CHAIR REEVES: Commissioner Meisler.

COMMISSIONER MEISLER: Judge, you mentioned before the role of the prima, the Shepard documents and a prima facie case. I'm just curious if the Committee has thought about the relationship between those two things, in part that Shepard documents were part of a framework that was designed not to have, basically to avoid judicial inquiry into facts and whether the committee has any concerns about Shepard documents actually not elucidating enough facts to establish under a prima facie framework or otherwise whether a defendant actually engaged in violent conduct during the commission of the

offense.

JUDGE CHANG: Yes. I mean, the Shepard documents, it's true that because of different state practices on the charging instruments and plea colloquies and so on, it's not going to be a perfect answer as to whether or not the defendant actually engaged in violent conduct. And that's, but that's, I think that's fine because it's the first step.

And we are, I think sensibly under this amendment, we would be then focusing litigation on those cases where there was the greatest prospect that the Defendant did engage in violent conduct, and then we move on from there. And, you know, it should be said that even for those cases in which the Shepard documents don't trigger the prima facie case, and so the inquiry for categorical for career offender purposes ends there. That's for career offender purposes.

You know, prosecutors can still, especially for a very serious crimes that, and

they sometimes have knowledge of defendants, in charging cases they're sometimes picking defendants based on their criminal history. And they confer with local authorities. And so they know more about this defendant that this crime did involve violence. And we're going to prove that up. And so, then they can, they can then try to prove that up. So that prima facie case with the Shepard documents we think serves a useful purpose.

Okay, then I'll, if --

CHAIR REEVES: You may.

JUDGE CHANG: -- with the Chair's permission I'll, yes, move on to firearms. And I'll just skip our thoughts on the machine gun conversion devices and leave that to our letter.

On the mental state requirement the Committee does have concerns that adding a mental state requirement for stolen firearms and for modified serial numbers would diminish the seriousness of the offense. And we do understand that strict liability in, certainly for criminal

offenses, and even for most criminal, most sentencing facts, is not the norm, right?

Having said that, there are concepts already within the guidelines which do call for strict liability in some form or another. You know, for example, even drug type and quantity, which will be the subject of another proposed amendment, there is not a knowledge requirement that the defendant knew the drug type, or even the drug quantity, and yet that base offense level is set upon that.

In the fraud guidelines there is a guideline that adds two levels if the offense resulted in substantial hardship for one of the victims. There is no knowledge requirement for that. But, again, we recognize that it is not, it's not the norm.

I think this though is a fair exception to the requirement of knowledge. And as we pointed out in our letter, the Commission, when it originally adopted this strict liability form, at least for stolen firearms, noted the

prevalence of stolen firearms and their prevalence in the commission of crimes.

And it does not seem like that has abated. If anything, it has, seems to have gotten worse. And we cited a study from the ATF that found that in the five year period from 2017 to 2021 there, one million firearms were stolen. One million. That's 550 every day that is stolen. And we also cited a study that not surprisingly stolen firearms are disproportionately the firearm of choice in crimes, right? By definition the firearm has been stolen then that is, it's in the hands of someone who has committed a crime.

And we do think there would be very few instances in which the stolen firearm enhancement would apply because it seems like it would be very difficult to prove that the defendant knew that the firearm was stolen. So while again we appreciate the strict liability is not the norm in sentencing facts, it does seem appropriate here. And these are the tough policy

decisions you all have to make.

So on modified serial numbers I think it's true that it would be easier to assess whether or not the defendant knew that a serial number had been modified. And you can draw inferences one way or the other.

Again, however, the problem with serial numbers and making it more difficult for law enforcement to trace, again, seems like it would diminish the seriousness of the offense if we were to add this knowledge requirement there as well.

So, are there any questions on firearms?

VICE CHAIR RESTREPO: Yes. Judge, thanks for being here. Had the Committee thought at all about a rebuttal presumption in the context of those two mens rea issues?

JUDGE CHANG: No. So, right. So I saw the, I think it was the Justice Department that proposed the possibility of a rebuttal presumption. So I have not taken the sense of

the Committee on that particular proposal. You know, from my personal perspective I think the concern would be what, is there some sort of prima facie showing that the defendant would have to make before it is considered the presumption is rebutted.

And what I mean by that is, I mean, would it be enough for the defendant to simply say, I rebut the presumption because there is just no evidence that I, you have no evidence of when I picked up this gun or how I received it at all. And so, I'm not sure that would alleviate the concern that this would essentially never apply.

And, you know, again, I hasten to add, you know, I understand that strict liability is outside the norm in criminal law so this is, it's a proposal that is certainly worth considering but, yes, I think the concern still would be, it would diminish the seriousness of the offense.

All right. And if I may just move on to the last topic?

CHAIR REEVES: Yes. Yes, you may.

JUDGE CHANG: Okay. Yes. Hopefully my New York City rapid talk, where I grew up, is assisting in moving this along.

So, with regard to simplification, we will just simply say that the Committee does support this proposed simplification. And we're really grateful that the Commission had considered all of the comments from the last proposal on simplification. And I think this is a much cleaner removal of the second step, the departure step, in sentencing and will be much easier to apply.

I do want to add that of course there are some judges who continue to consider departures. And it does have a transparency promotion value to it. Because the heads up that the defendant must receive, and the government too.

And also, it does help by, you know, we did hear from some judges who believe that it helps them like in their own minds, in their own

sentencing have some structure and uniformity to sentencing. That's, we understand that.

It is just simply, however, so time consuming, right? In those courts that even still apply it, which is a shrinking, in shrinking number, but for those courts that still apply to go through the formal fact-finding and legal interpretive texts that they have to with these particular elements of departures, it's just no longer worth the candle and so we do support the simplification.

CHAIR REEVES: Any questions? Oh. Go ahead. Yeah, VC.

VICE CHAIR MATE: Thank you so much for coming today and braving the D.C. version of winter.

JUDGE CHANG: Yes.

(Laughter.)

VICE CHAIR MATE: I had one question on simplification. We heard from some folks an interest in kind of preserving the departures in some form, even if they're removed from the

manual in their current way. Either, like perhaps in an appendix, and some people saying, oh, it's enough to just go back to old versions of the Guidelines Manual, which are available online and et cetera. So I was curious whether the Committee had any view on sort of the record of what's in the book right now --

JUDGE CHANG: Yes. Yes, this is not something the Committee examined in particular. I would say my personal sense is, let's see, you have an Appendix C, right, so this would be Appendix D. But yes, I don't see any downside to having that. Especially for those judges who do continue to use that structure to have some easy place to look for the Magna Carta I guess of departures.

All right. If that's all, I thank you Chair Reeves and --

CHAIR REEVES: No, no, thank you. And have a safe travel, have safe travels.

JUDGE CHANG: Very much appreciate it.

CHAIR REEVES: All right, thank you.

Our second panel will provide us with criminal law practitioners' perspectives on the career offender proposal. First, we will hear from Saritha Komatireddy, the Deputy Chief of Appeals at the United States Attorney's Office for the Eastern District of New York.

Second, we will hear from Shelley Fite, who serves as National Sentencing Resource Counsel for the Federal Public and Community Defenders.

And finally, we will hear from Susan Lin, the Third Circuit's representative to the Practitioners Advisory Group and a criminal defense and civil rights attorney with the firm of Kairys, Rudovsky, Messing, Feinberg & Lin, LLP, in Philadelphia, Pennsylvania.

Ms. Komatireddy, we're ready to hear from you.

MS. KOMATIREDDY: Thank you. A Department of Justice overriding priority is to reduce violent crime in America. So we thank the Commission for trying to amend the career

offender guideline to reach all violent criminals and hold them accountable for the violence that they have actually committed. After all, this guideline is designed to take off the street, repeat violent criminals and drug-traffickers.

Individuals who commit the kinds of crimes that are devastating American cities and communities. Crimes like robbery, carjacking, and fentanyl dealing. Crimes that undermine everyday citizens' sense of safety as they walk through their neighborhoods, down their streets to their kids' school, to the grocery store, to go get their car.

Individuals who commit such crimes three times are appropriate called career offenders in the commonsense understanding of that term. Yet, in the overly technical world of the categorical approach such individuals all too often do not technically qualify as career offenders under the guidelines. So we thank the Commission for moving beyond the categorical approach and eliminating the artificial and

arbitrary effects that it has on sentencing.

In doing so, however, the Commission's amendments have also introduced several major flaws. In the Departments view these flaws must be corrected or the guideline will not work as intended. Thankfully they are easy to fix. There are three.

First, the amendment requires proof that the defendant engage in certain violent conduct but limits the means of proof to Shepard documents. This will not work. Here's why. One, as probation officers and judges have pointed out, Shepard documents for state convictions are generally not available. And two, even where they are Shepard documents do not prove conduct. Let me say that again, Shepard documents do not prove conduct they prove the count of conviction.

The limitation to Shepard documents will mean that the guideline will not apply to many cases of obvious violence. This does not appear to be what the Commission intended. To

fix this problem the Commission should strike Subsection (b)(4) in entirety and allow district courts to consider any reliable evidence in the record just as they can for other aspects of sentencing.

Second, the amendment requires proof of the defendant's conduct with respect to every prior offense in every case. Even when the use of force is obvious from the nature of the defendants' prior conviction. This is unnecessary. If a defendant has a prior conviction for murder, the court should be able to count that as a crime of violence and move on.

To fix this flaw the Commission should establish a categorical baseline. In essence, use the categorical approach as a first cut. If an offense necessarily involves the use of force or is one of the enumerated offenses it qualifies as a crime of violence and no further inquiry is needed. This fix also addresses the concerns about consistency that other commenters have shared and honors the hard work and

thoughtfulness of the federal judiciary in developing the law around the categorical approach.

Third, the amendment eliminated state drug offenses as qualifying offenses which will drastically reduce the number of cases where the guideline applies. Now, if the Commission is looking for a way to distinguish the more serious drug crimes from others, that's understandable. But whether a drug offense was prosecuted in a federal or state system is not it.

Federal prosecutors and agents worked hand-in-hand with state and local prosecutors to go after deadly drugs and violent drug cartels. In my hometown of New York, for example, there are five district attorney's offices and a special narcotics prosecutor. In just the last few months the special narcotics prosecutor seized 300,000 fentanyl pills and 11 pounds of fentanyl that was trafficked into New York City from Mexico by the drug cartels.

In Brooklyn they seized over 85 pounds

of fentanyl and cocaine and eight loaded guns in a residential neighborhood in Williamsburg.

In the Bronx they seized $2 million of fentanyl and heroin in an apartment building that had a packaging mill in it where the defendants were literally throwing bags of drugs off the balcony down on the street across from a public school.

In Queens, they arrested ten members of Tren de Aragua with cocaine and assault rifles. And a few years ago in Suffolk County, they arrested 96 members of MS-13 with fentanyl, heroin, cocaine, and other substances.

These are serious drug crimes. And in each one of those cases the DEA worked with state and local prosecutors and the defendant was prosecuted in the state's system convicted of state drug crimes.

These crimes should count for purposes of the guidelines. The fact that they were prosecuted in the state has nothing to do with the seriousness of the offense or the offender

but rather jurisdictional concerns, resources related to culpability.

Precluded state drug crimes from consideration under the guideline would produce arbitrary results. To fix this flaw the Commission should add state drug offenses back into (A)(1) and make clear that the categorical approach does not apply to them.

If the Commission is looking for a proxy for seriousness, we would encourage the Commission to look at the time imposed for a prior sentence rather than the jurisdiction of prosecution. With these changes the department believes that the Commission can promulgate a new commonsense career offender guideline that accurately and efficiently reflects whether a criminal defendant is a career offender and sets an example for courts to follow in this context and others, and how to move beyond the categorical approach. Thank you.

CHAIR REEVES: Thank you. Ms. Fite.

MS. FITE: Thank you, Chair Reeves.

I'm going to keep my remarks quite short as I want to more quickly get to your questions. And in the Defender's comment we tried to be pretty comprehensive.

The first and the third parts of the proposal are great. Eliminating state drug priors from the controlled substance defense definition ends the categorical approach for that definition with a pen stroke. And it reduces a group of folks who are being sentenced under the career offender guideline where judges already don't find those sentences warranted.

We see that in the data. We heard that at the roundtable last February. And then we see it in the comments that are coming in now from judges. So the Commission should adopt at least that part of the proposal without delay.

The third part of the proposal, the prior sentence litigation, that also came up at the roundtable last year and it does a lot of work keeping this new system administrable. And with the crime of violence definition, in

particular where we're talking about this whole new methodology, it's a way of ensuring that we don't have weird anomalies that arise and we're talking only about actually violent offenses.

A lot of defenders have had the experience of representing individuals who they're very first prison sentence is a career offender sentence. That really should not happen.

Our big concerns are all with the new crime violence methodology. We were pleased in looking through the comments. You know, we're not seeing comments with people very glad that like relevant conduct for dismissed and uncharged conduct could be used.

Folks aren't happy that potentially non-violent offenses would need to get assessed in every case, they're focused, like my friend here just mentioned, on things like robbery and carjacking. And so, we're hopeful that the problems in the crime of violence definition are solvable.

And actually the Department of Justice's comment, which like the Defender's comment, really does kind of get into the weeds more. We actually agree kind of on a lot of things. Maybe more than you would expect.

Most of the comments on this proposal don't get into the weeds. They say great things about the categorical approach. This is the best approach we have. Or they're really happy that we're moving beyond the categorical approach. But I do think this is somewhere where getting into the weeds is essential because the words that are used are going to make a huge difference in how this applies.

So we're going to cover, you know, the stuff that came up in the Department's comment in our reply potentially next week, but I'm also very happy to get into the weeds here today as much as you want to. And I'll save anything else for your questions. Thank you.

CHAIR REEVES: Thank you. Ms. Lin.

MS. LIN: Thank you, Judge Reeves.

Thank you, Commissioners. I appreciate the chance to be, to testify before you. We're mostly going to rely on our written submissions but there are a few things that I want to highlight.

First of all, the PAG urges the Commission to adopt the proposed amendment to the definition of control substance offense even if the PAG is not, or even if the Commission is not ready to adopt any amendments at this point in time to the definition of crime of violence. It seems like many stakeholders agree, and when I say many I include the Criminal Law Committee, I include all defense counsel. I even include prior letters that have been written by the Department of Justice. And I include the Commission itself.

But many people, I would say a majority of the people agree, the career offender guideline is over inclusive when it comes to drug-trafficking only defendants. It is apparent in the 2016 study. It is apparent in the

sentencing practices of district courts on the ground and the amount that they vary.

This is an easy fix. The statutory language itself does not require, congress did not contemplate the inclusion of state drug-trafficking offenses when it passed the career offender statute. As we refer to it, section 994(h). That statute only lists federal drug offenses.

And frankly that distinction makes sense. And at this point I'd like to address commenters who have said that state drug offenses and federal drug offenses target the same kind of behavior. Respectfully, I disagree.

I have practiced in state court, I have practiced in federal court. The state defendants that I have representing in drug-trafficking offenses, for the majority, for the most part, are people who are selling consumer level quantities of drugs on the street corner. They're people sitting on the step selling dime bags. They have less than two grams of crack on

them. Less than $200 in their pocket when they get arrested.

These defendants who have those convictions are different from federal defendants who's typically involved in cases that involves kilos or far larger quantities of drugs, involved quantities of money that is far greater, involve guns, involve large drug-trafficking organizations. That typically describes my federal client, my federal drug client, not my state drug client.

I recognize that there are state drug prosecutions that involve large quantities of drugs. Those are the headline cases that you read about in the newspaper. But they're not the norm. They're not the cases that are going in and out of state court every day.

So it makes sense. If the career offender guideline is meant to target the more serious offenders when we're talking about drug cases it makes sense to target federal drug convictions only.

I guess I would like to bring it down to reality, right? I have represented many young people. Young people who are in their early 20s who have already had two or more arrests for selling drugs on the same block in their neighborhood and they got arrested by state officials, they went to state court. They probably consolidated their cases, and they got a single sentence for maybe a year in prison. And then they get out, and then they pick up a drug, a federal drug case, and they are still in their early 20s.

And I am talking to them in prison, and they cannot comprehend how somebody, how they, who are in their early 20s who have only ever sold drugs on their block cannot be considered a career offender. They cannot comprehend how they, who have only ever served approximately a year in prison, now is looking at a 15-year sentence. And I have a hard time explaining it to them because it doesn't make sense. It doesn't make sense that somebody who

is in their early 20s who's only ever sold drugs to users on their block is now considered a career offender deserving a sentence close to the statutory maximum.

There are times when I talk to these clients of mine, and I talk to the prosecutor on the case. And we may both say in our conversations, no, this person does not deserve a sentence in the range of the career offender guideline range.

And we may agree upon that. And yet both the prosecutor and myself, in my conversations with this particular young federal defendant, is not using the career offender guidelines as a tool to get that defendant to plead guilty or to cooperate. And it doesn't make sense to me that if the parties involved agree that a sentence in the career offender guideline range is not actually the just sentence, that the guideline can then be used to influence to pressure a person in depleting or providing substantial assistance to the

government.

So I urge the Commission to consider, to seriously consider amending the controlled substance offense definition to eliminate state drug priors even if it's not ready to tackle the definition of crime of violence. Thank you.

CHAIR REEVES: Thank you. Any questions? Yes, VC Restrepo.

VICE CHAIR RESTREPO: Thank you. Ms. Lin, question for you. And in response to what the Department's position is, do you think there is some common ground, or could you imagine common ground if we tethered the state predicates to the sentence served? Or sentence, I believe it was sentence imposed.

MS. LIN: Yes.

VICE CHAIR RESTREPO: Sentenced imposed. Do you think there is a way to differentiate the street corner guy from some of the examples we heard from the Department based on length of the sentence imposed? Would that --

MS. LIN: Resolve some of this?

VICE CHAIR RESTREPO: Yes.

MS. LIN: I do think the devil is in the details and I'm not, I don't know that I entirely disagree with that. But it would require both of them being combined, right? And I do think that when we talk about sentence length that the most accurate way to determine the seriousness of a prior conviction is to look at the actual time served. And that is because of the differences in sentencing practices across states.

So I agree that a minor drug-trafficker probably isn't going to get a five year sentence of imprisonment. But what they may get is they may get a sentence that's like three to 23 months with immediate parole after three months.

So an individual like that, right, would be counted as a more serious offender if we use either the criminal history point approach or the time imposed approach. But they are no more serious of offender than somebody who got three

months of incarceration followed by probation.

And so while I think that there, there is room to discuss the possibility of like tying seriousness with prior drugs to this sentence length, the sentence length, state sentence practices is too different to solely rely on sentence imposed for the criminal history points.

VICE CHAIR RESTREPO: The former regime, so to speak, focused on sentence served?

MS. LIN: I would. Yes.

VICE CHAIR RESTREPO: Do you see any recordkeeping issues with that down the line?

MS. LIN: So I can only speak to my own personal experience. But in all the PSRs that I have seen in my practice, in the description of prior convictions there is usually a notation as to when the person was released from prison. When they were paroled.

And that data is obviously necessary for the probation to determine whether or not that prior conviction counts, whether it's lapsed or not. Whether it counts for purposes of the

criminal history score calculation. So with that information, that date release, it should be possible to calculate how much time a person is actually served.

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: I wanted to start, first of all, by just thanking you guys so much for your letters. I thought they were incredibly constructive and helpful, and it was clear that a lot of time had gone into them. The devil is really, I mean, as we all know in the details, on categorical approach. And so much of the game is looking around corners to figure out unattended consequences and really, really appreciated the work that had gone into these letters in doing that I think it's hugely helpful.

The concerns, speaking only for myself, the concerns around Pinkerton liability, accomplice liability, relevant conduct, the nature of the priority showing very well taken, and thank you very much. So I have a billion questions for you but I'll start with one.

So first question for the Government, I, you sort of said at the end of your remarks if you're looking for a better proxy for seriousness of a state drug offense, or of drug offenses in general, the right one to look at is sentence length rather than state versus federal very much taken as a policy matter. Am I right in assuming then, if you're suggesting that, that the government does not have legal concerns about sentence length as a cutoff in the, first of all, on the controlled substances offense side, and second, on the crime of violence side?

MS. KOMATIREDDY: We go into this somewhat in our letter that we do have some concerns about the legal authority under section 994(h) to have a sentence cut off. I think with crimes of violence in particular we don't see a basis to cut off crimes of violence.

With respect to the state drug crimes, because there's been, the way that it's been interpreted it has been, the state drug crimes are those described in the various enumerated

federal drug crimes that are enumerated in the statute. We could image that the Commission might consider itself having some leeway there. Of course we can't predict ultimately what the courts will hold, but there is a little bit more ambiguity on that front.

VICE CHAIR MURRAY: You probably could predict though what the Department's position would be on it. Would the Department's position be that it was legal?

MS. KOMATIREDDY: I think right now the Department has some concerns about it, but we understand that the Commission is looking for some proxy. And as I noted, we think taking state drug offenses completely off the table would be a terrible thing for the guideline and for a criminal offense. And so we would urge you in the direction of a time or a proxy. If you are assisting on adopting one.

VICE CHAIR MURRAY: I'll yield to others and then come back to you all.

VICE CHAIR RESTREPO: Just a follow-up

for the Government. Do you have a number in mind?

MS. KOMATIREDDY: Yes. In our letter we advocate for 60 days or less. In other words, the offenses that don't count already under §4A1.1. For those offenses to drop out.

CHAIR REEVES: Ms. Fite?

MS. FITE: I would just like to raise two concerns with this particular part of the proposal. The first is, we would have to grapple with the categorical approach then. So we have to make a conduct based approach for the drug offenses too whereas the proposal on the table very elegantly just sort of gets rid of that in a way that we don't have to have a further discussion. And given this is our only hearing on this, and we have the words that we have, it makes me very nervous what sort of comes out at the end.

Another issue I have is that drug offenses, much more than the violence offenses, and almost exclusively drug offenses around the

country often come with mandatory minimums. They were sort of triggered by what the federal government did in the '80s. And so, honestly with drug offenses sentence length is, I think less indicative of seriousness to some extent that it is with violent offenses where it really is sort of definitional to the seriousness of the offense, the violence that was used in the offense. You can see that in the sentence there.

I'm not at all saying that the sentence length is arbitrary but it's a concern. And I think the Department mentioned in its comment that like, hey, in most of these drug sentences do go through any cutoff, a lot of that is because of these mandatory minimums.

And then the other issue is, there is this looming sort of section 994(h) problem. And it is, we don't see a problem necessarily, but to the extent there is one the controlled substance offense is a bigger question, I think, than the crime of violence where it is the Commission that is defining what is a crime violence, what goes

into that definition. And I just can't even really imagine a winning section 994(h) argument saying that something the Commission decides is definitional to what is a crime of violence having a problem with the directive.

CHAIR REEVES: Yes, you may.

COMMISSIONER MEISLER: Thanks. For Ms. Fite. Just in terms of the authority issues and the different pieces fitting together here, does the defenders have concerns about potentially multiple definitions for crime of violence and controlled substance offense?

And I guess I'm trying to ask whether, if you take as a given, and you may not agree with this, if you take a given that the Commission may feel constrained in its ability to amend crime of violence definition into §2K2.1, for example, assume that they couldn't change it there and it has to remain tied to the Armed Career Criminal Act, does it bother you that you potentially have different definitions for the terms like crime of violence and Controlled

Substances Act even within the book?

MS. FITE: So, I mean, as we said in your comment we're just not sure where there is the need for that. We think it can all be a unified definition. I think that would be less confusing. I think it's important that the definition be the right definition. If it's a bad definition we surely don't want it to proliferate across the book.

I think the Department and the Defenders are kind of on the same page that §2K2.1 presently isn't exactly tracking the Armed Career Criminal Act and we're, you know, I don't think anybody is too worried about the directive there. And so, I guess maybe I'd put it back to the Commission, is this just a, hey, we want to take a first step and then take another step or is there some other reason to have the multiple definitions because we do of course still have the other definitions out there in the Controlled Substances Act, and the Armed Career Criminal Act. So we've got a lot of definitions we're

keeping track of.

COMMISSIONER MEISLER: All right. Just to add one piece, if I could, on the controlled substance aspect of this though. If the Armed Career Criminal Act says state offenses are in and congress says you have to do that for purposes of §2K, do you think the Commission could eliminate those for §2K purposes? Putting aside career offender for a second.

MS. FITE: Sure. Well, sort of two answers there. So number one, we have talked before in the past about how we don't believe that uncodified directives then bind the Commission for all of eternity even as circumstances change and needs arise for amendments. The Commission complied with the directive. And having complied with it, it can continue to sort of assess data and needs as they go on.

But then separately, the Armed Career Criminal Act, I mean, it offenses with a minimum of ten years. So it's already quite a bite over

inclusive from what the Armed Career Criminal Act is which is a much smaller universe of drug crimes.

In my State of Wisconsin we have quite a few drug crimes that are, that do not come with a maximum sentence of ten years. They do not count for armed career criminal but they do with career offender.

CHAIR REEVES: Commissioner Wong and then VC Mate.

COMMISSIONER WONG: I do think, I thank you all for being here. I do think we are wrestling with some of the concerns that drawing a categorical line that federal drugs offenses are categorically more serious than state drug offenses brings a large degree of arbitrariness.

And one of the comments, or one of the threads of the comments, was that while other Commission action is very much informed by empirical data we haven't really, in your proposal, cited the empirical data that would indicate that federal drug offenses are

categorically, or as a whole, empirically more serious. So I'm wondering if there are empirical sources you could point us to for that specific dividing line?

And the second question I have, related is, we, of course elsewhere in the guidelines do treat federal and state similarly. Or similarly in terms of seriousness and tabulating criminal history, et cetera, et cetera. To what extend if we do draw that line here would we stop there, or do you think there are necessarily carry over effects in other parts of the Guidelines Manual?

MS. FITE: Who was the question for, Commissioner Wong, is that anybody?

COMMISSIONER WONG: You can answer.

MS. FITE: I'll answer first.

(Laughter.)

MS. FITE: So, I mean, I guess I sort of feel like really anybody who works in the federal system has a general sense that federal cases are more serious than state cases based on

what we all see day-after-day.

In terms of empirical data, I'm not aware of any, but I'm not sure that I read this proposal as being, because federal crimes are more serious therefore we are getting rid of state drug priors. I think part of the problem with the career offender guideline is that it's not being complied with in drug cases to a large extent because judges aren't finding these sentences appropriate in those cases.

In our 2023 comment we talked about how really the career offender guideline itself is sort of an unwarranted disparity making machine. People who come within it are, you know, it's a dramatic difference than people who come without it.

And anywhere we're, we're drawing lines somewhere. And so, the, what we have is the Commission's report from back in 2004 talking about how the career offender guideline might actually work better and have fewer racial disparities if drug crimes were just not part of

it at all.

We have the 2016 report, which is a little more nuance about sort of these drug only career offenders. And so, the question is, is there any group that the Commission right now, without congressional change, can remove under section 994(h).

And it's clear that that group is state drug priors. And it's appropriate to get, to get that group out and get the sentences for cases that fall within this guideline closure to where the guideline is which, you know, is always supposed to be sort of the speed back loop between what judges are telling the Commission and how the Commission is responding.

And then the other piece of it is just, we know that federal drug priors, those are federal prosecutorial priorities. We know that federal requirements and procedures were used. In my district if, I know that if federal prosecutors, if there is some stuff that's kind of weird about how the drugs were found and the

traffic stop, they generally won't take those cases.

The state is kind of the, they'll take anything and everything. It makes sense to keep it to federal drug priors as well. And also, it makes sense that Congress would have written the statute that way.

You know, back in 1984 they were thinking of this as a mandatory minimum. And really, it just sort of occurred to me as I was preparing for this, this was the harshest sentence enhancement in the book really because it was a mandatory minimum that was essentially the maximum for crimes with very high maximums.

And so it makes perfect sense that they wanted a very narrow group of people that they could feel assured had been prosecuted under federal priorities. So I think it makes perfect sense for all those reasons even if we don't currently have empirical data on seriousness.

CHAIR REEVES: VC Mate.

VICE CHAIR MATE: Thank you. I want

to echo Commissioner Murray's earlier appreciation for all of your comments. It really did dive into the weeds and was really, all of the comments were extremely helpful in working through this, so I really appreciate you being here and your careful submissions.

I want to turn back to the crime of violence issue for a minute. And one of the things we've heard from many people, and I think we, you know, one impetus for looking at the categorical approach, is this concern about anomalies in the context of crime of violence and certain offenses not qualifying as a crime of violence.

And I want to, this is a question for Ms. Fite. In terms of, you have kind of specific proposal that's a little bit different than ours, can you just walk me through a little bit how that would address the anomalies concern?

MS. FITE: Sure. And I think the, sort of what PAG was talking about is really quite similar to what we're talking about. And

so, I mean, the first thing is that the elements clause remains the elements clause. You know, I think we sort of described our like journey in our comment of thinking originally, okay, well, this is going to be a conduct-based approach, this kind of makes sense. And then thinking, wait, wait, wait, when you take this sort of conceptual definition and start applying to conduct how does that work?

Not to keep mentioning my home state of Wisconsin, but we don't have a grand jury system that's used in our criminal process. Our criminal complaints are used in all of our felony cases. They often have police reports stapled to them or they incorporate entire police reports. There are all kinds of stuff going on in those Shepard documents.

And here, so we are focusing in on the elements because that's what's works for the sort of conceptual. But the enumerated offenses are where you get rid of the anomalies that people are complaining about because they are worried

about robberies and they're worried about carjackings and murders, and they want those in.

And we feel very confident that our language takes care of that which is language from the Commission's 2018 proposal which was, I think at least this part of the language was supported by the Department, was supported by the victim's advocacy group, was supported by POAG. And it sort of just modified with this conduct of the defendant piece that comes from this year's proposal in the commentary.

And also, I don't know if I'm getting even too deep in the woods, but in the, I notice that in the Department's response to the 2018 proposal they, it seemed like there was a concern that the word defendant wasn't in there because they wanted to be sure that we were looking at the defendant's conduct and there wouldn't be any sort of looking at more general conduct.

So anyway, we know that the more enumerated offenses are going to come in. I think there is no worry, we can use the

categorical approach case law as it exists right now because if they were convicted of an offense that categorically is defined in accordance with the definitions here, then they were found guilty beyond a reasonable doubt. Or they admitted to it. And that's the end of it.

So that the conduct would just pick up the anomalies and eliminate those. By getting rid of the relevant conduct language I think we resolve the Department's concern about like accomplice liability. I think part of it was like using part of the relevant conduct definition and not the other part. And it gets very confusing.

We have completely different terms related to the use of relevant conduct. But by focusing in on the offensive conviction and given that every jurisdiction in the modern criminal law defines, you know, everyone is treated as a principle regardless of their liability. That's just sort of fundamentally.

So those accomplice liability,

Pinkerton liability, is part of the defendant's conduct under how the criminal law works. And then we sort of keep things how they are within co-defenses. I'm not sure if that goes --

VICE CHAIR MATE: That was very helpful. Thank you.

CHAIR REEVES: Let me just ask one question. The state drug offenses, I heard Ms. Lin talk about what a state drug offense might look like in Pennsylvania.

But in state drug offenses in Mississippi, it's jurisdiction by jurisdiction on how judges punish a person. So if you were to use the length of sentence, for example, outside, in one jurisdiction versus the other, you're going to get a wide disparity because judges have zero to 20 years, for example.

And in my courtroom I have a package of Sweet in Low to show how, you know, for this amount of drug, crack or whatever it is, one might get as much as ten or 20 years from a sale of a confidential informant who is told to go

sell something to an individual. And I think those are the types of incidents you're talking about with respect to the hand-to-hand sale, is that right, Ms. Lin?

MS. LIN: That's correct. Let me be clear, eliminating all state drug priors from the career offender guideline is a much cleaner, simpler and manageable way to truly focus on the serious offenders that I think the career offender is meant to get at.

And I agree with you, Judge Reeves, it is a sugar packet. That's the quantity of drugs that are on some of my clients in state court who then ended up getting convicted of a state drug-trafficking offense. And I don't see how anyone can possibly claim that the person who is selling that on the street corner to the consumer should be consider a career offender.

But yes, I agree with you, the kind of case that you just describe is exactly the kind of cases that I was dealing with in state court. And because of the wide variation in state

sentencing practices, it is far cleaner just to eliminate state drug priors from the career offender guideline.

CHAIR REEVES: Thank you all so very much for, and I appreciate like everyone else, you're written comments, they were very, very thorough and very, very helpful to us. Thank you so very much for your time.

Our third group of panelists will provide us with perspectives from various stakeholders in federal sentencing on the Career Offender Proposal.

First, we will hear from Joshua Luria who is the Chair of the Commission's Probation Officers Advisory Group and an Assistant Deputy Chief Probation Officer from the Middle District of Florida.

Second, we will hear from The Honorable Ralph Erickson who currently serves as Chair of the Commission's Tribal Issues Advisory Group and is a United States Judge for the 8th Circuit Court of Appeals.

Third, we will hear from Christopher Quasebarth who serves as Chair of the Commission's Victims Advisory Group and is a Senior Staff Attorney for the Maryland Crime Victims Resource Center.

Finally, we will hear from Stephen Russell who lives in his home state of Tennessee. Mr. Russell owns a duct cleaning business and has started a non-profit that provides legal education resources for young people and their parents.

Mr. Russell most enjoys spending time with his three children, now adults, and was thrilled to attend his youngest son's high school graduation last year.

So, Mr. Luria, we'll start with you whenever you are ready.

MR. LURIA: Thank you to the Commission for the opportunity to provide POAG's perspective on the proposed amendments related to the Career Offender Guideline.

While we deeply appreciate the

Commission's continued effort in this area, POAG is opposed to the Career Offender amendment this cycle.

We feel that the trading of an element-based approach for a conduct-based approach ends up creating substantial application issues and shifts the disparity without necessarily resolving it.

While the Commission's adjustment to the serious drug offense definition appears to be de-emphasizing of those predicates, POAG opposes this change as it creates another form of disparity.

POAG is also against any alteration of point system considerations as either unworkable or creating unnecessary limitations on considering convictions that should be considered.

POAG observed that the conduct-based approaches in practice, as outlined here, would trade one set of application issues in disparity for another.

Each case would present a unique set of circumstances that needs court evaluation. The beginning of this process would be on the obtaining of Shepard-approved documents to meet a prima facie indication of violence that would then lead to a more robust evidentiary hearing.

As a practical matter the Probation Office is frequently the entity that first obtains these documents. There are differences in availability and details within these documents due to jurisdictional practices.

The Probation Office summarizes these records in the disclosure of the initial pre-sentence report 35 days before sentencing. This is a narrow window for the parties to work up their various evidentiary positions.

It is foreseeable that there would be cases requiring substantially more preparation and court resources. POAG is concerned that many of these circumstances will result in protracted hearings and litigation.

Additionally, the appeals on these

cases would likely result in a less useful holding because of their case-specific nature.

The elements-based approach produces results that are too narrow to accurately capture violent conduct, but the conduct-based approach produces results that are too broad and feel like outcomes that were characteristic of the residual clause.

With a conduct-based approach there will be a higher degree of uncertainty on the part of the defendant when assessing litigation risk.

As we and many have pointed out, the categorical and modified categorical methodology has produced absurd results. While that is true, those outcomes are at least at this point predicable.

A defendant with the assistance of counsel would go into their plea decision with the reasonable certainty as to whether the career offender enhancement would apply to them.

However, under a conduct-based

approach many of the factors that would determine the outcome would rely upon prosecutorial discretion, availability of prima facie documents of reported and historical evidence, of victim testimony, and the judge's interpretation of the evidence available.

For example, a defendant was convicted of a felony theft, but the prima facie documents reflect some use of force. The documents in that case were prepared for litigation of a theft offense.

Using these documents for a secondary purpose leaves the probation officer in the position of trying to determine if these documents are reliable and sufficient for career offender purposes. It only gets more complicated when the case involves co-defendants or inchoate considerations.

POAG observed that we currently have the ACCA rules and the Career Offender rules that are then further imparted to the other guidelines.

This approach would divide those two approaches into three, each with slightly different rules and standards. It would create added complexity that would need to be learned and tracked for appropriate application.

If it were a workable solution, it would only be a partial solution. As noted, POAG does not support the exclusion of state drug offenses from the controlled substance offense definition.

POAG acknowledges it would be easier in its application. However, it would an extremely rare circumstance in most jurisdictions to have a federal defendant who has a prior federal drug conviction.

Additionally, it would disproportionately impact rural areas due to lack of resources and Indian Country due to federal jurisdiction.

It also seems discordant for one predicate to dig deeply into the conduct of the defendant while another type of predicate limits

applicability based solely on the jurisdiction that pursued the charges.

POAG is also not in favor of any of the options related to point system considerations for Career Offender. The use of "sentence served" will always cause disparity because there are areas where it is difficult to get release dates.

It is also difficult to discern the sentence served on multiple concurrent sentences even when release dates are available. While it is easier to obtain records on sentence imposed, use of "sentence imposed" creates large disparity between jurisdictional treatment for reasons that have nothing to do with the seriousness of the conduct.

The removal of single point offenses also doesn't allow for the capture of violent conduct that was leniently treated the first time.

POAG appreciates the Commission's continued effort on this issue. Thank you for

the opportunity.

CHAIR REEVES: Judge Erickson.

JUDGE ERICKSON: I want to thank the Commission for the very hard work that you have been doing in this area.

This is really one of the most difficult sections of the book to deal with for judges. It's really difficult for day-to-day application. TIAG appreciates the efforts that the Commission has put into this.

We do support the proposed amendment to define controlled substance offenses in such a manner as to exclude state offenses and the reason for it is fairly straightforward and it has been mentioned already, and that is that, you know, the felony drug convictions in state court are oftentimes just hand-to-hand street corner deals and the sentences are felony sentences but they just are a lot less serious than the drug trafficking that we see in the federal courts generally.

Now add to that the problem that

you've got in Indian Country and that is that all what would ordinarily be straight court offenses are being prosecuted in federal court, right.

So our concern on state court offenses is actually that is solves a problem for a large number of people with criminal history that are really oftentimes young people with small quantities of drugs that they are selling to other users, so oftentimes alternating to each other to support their own habits.

That's not going to happen in Indian Country because those drug offenses are going to be prosecuted in federal court almost all the time, right, and so the benefit will not be recognized by many Indian Country defendants.

Now the other piece of the puzzle that is of concern to us is that if we look at how do we look at violent offenses and how do we decide what counts and what doesn't count, there seems to be in the data that has been developed by the Commission some anomaly for Indian Country defendants.

If you look at it, 2 percent of the population of the United States are Native Americans. 2.9 percent of the population of the Bureau of Prisons are Native Americans.

We're over-represented in that sense already because the nature of just ordinary street crime being prosecuted in the federal courts.

But when we look at what the elimination of the categorical approach generally we do hear is that we're going to -- right now, 1.9 percent of people who receive the §4B1.1 sentencing enhancement are Natives, are Indians, and that's -- well, actually, they are "other," right, because Native Americans are just in the statistical category of "other," but the data tends to show that that's going to rise to 6 percent if the proposed amendments take place.

We don't know why that's happening in Indian Country and, you know, I don't think that the statistical evidence that's available to the Commission at this point can explain why that's

happening either, right.

There're two possibilities. One is that there are going to be more prior convictions simply because of the fact that all ordinary street crimes being prosecuted in federal courts and that crimes that may otherwise be plea bargained differently in the state courts it just doesn't happen in federal courts because there are not as many alternatives available in federal sentencing generally, right.

The other thing is that it is capturing something that's going on in Indian Country and it may in fact be a justifiable thing that they are capturing, right, I mean we can't tell and we don't know that anyone can really tell.

When we look at the -- and I am kind of all over the place on this and I apologize, but I think that if we look at the offense conduct section, you know, the offense conduct section of the PSRs is, there's a problem and that if objected to oftentimes district judges

never rule on it, you'd just rule on it by saying I'm not considering that, I don't think that's a factor I'm going to consider in sentencing, I'm going to give it no weight, and rather than order the probation officer to re-draft the agreement I just am not going to consider it.

Well that's never really captured anywhere and so if you look at the Shepard documents and you start looking at the offense conduct and you rely on that you may have things in there that don't count or shouldn't score.

It has previously been noted that with a lot of Indian Country States they proceed by complaint and on serious felonies the complaint may progress to an information, but on both they just attach police reports or incorporate police reports.

The plea bargains will eventually sort out what's provable conduct and what's not provable conduct, but it's not always plain from the record what's there, and so without -- I should just -- I got one other thing I have to

mention, and I know I'm way over, and that is that when you look at contested evidentiary hearings in Indian Country we have a problem culturally in Indian Country because, you know, it's hard to get information from people who live on the reservation about what happened if you are a person from not on the reservation and you come there.

If you look at prosecutors who are there frequently, FBI agents who are there frequently, and their investigating officers, it's hard for them to get information. It's almost impossible for, you know, defendants to get that information.

If you think about it, you know, the judge doesn't want to pay the CJA appointed investigator to make four trips out to the reservation and develop a rapport such that they can get the information they need, and so in the end it's a problem.

Now I think a lot of our concerns would be alleviated if you did not count as

crimes of violence cases where less than five years was actually served because that's a, you know, people actually serving five years have committed crimes that are serious. With that I will pass. Thank you.

CHAIR REEVES: Thank you, Judge Erickson. Mr. Quasebarth.

MR. QUASEBARTH: Thank you and good morning. I think we're still in morning for right now. Thank you for this opportunity. I also want to thank you for appointing five new members to our nine-member Victim Advisory Group recently.

I think they will each significantly contribute to our responsibility of providing you advice on how your work affects victims.

We are always working from the basis of reconsiderations. One is that crime victims have been harmed by offenders and they want that harm righted.

Two, crime victims have rights under the Crime Victim Rights Act. Three, if you

approve proposals we're always thinking will they be applied retroactively which is going to further procedurally harm victims as well.

But from that, looking at career offenders, and let me start with some agreements that we have with you all, we agree that looking at a defendant's actual conduct in a prior offense make better sense than the categorical approach, so I am glad you are headed in that direction.

We think that the crime of violence definitions using the terms "force" and "actual" or "threatened force" based on the common law provisions, as referenced in the Supreme Court cases and in your definitions of robbery, makes sense to us as far as being beneficial for victims. Those things are laid out in Pages 5 and 6 of our public comment.

We don't have any objection to covering inchoate offenses and the determination of whether an offense is a crime of violence, again Page 7 of our public comment.

But we do ask you to reject excluding state controlled substance offenses from the definition of controlled substance offenses and AUSA Komatireddy, if I pronounced your name correctly, I think better articulated some of the concerns that we had in our public comment, our public comment is on pages 2 and 4, that you are creating two disproportionate categories of prior drug offenders if you take the state offenders out.

I think that has concerns for victims in communities who are affected by drug offenses and should have concern as well to make sure that sentences are uniform for federal offenders coming through.

We ask you to modify your definition of "sex offenses." It seems to us that excluding certain acts of sexual abuse of a minor and statutory rape by limiting it to 18 U.S.C. § 2241(c) is too limiting and we offered a proposal in pages 6 and 7 of our comment.

I won't go through it here right now

in the interest of time, but you can take a look at that. Just make it broader to make sure that we are including those victims as well.

In pages 7 and 9 of our public comment we ask that you add public reports, trial transcripts, or other documents with an opportunity for the defendant to object to their reliability to the proposed list of sources that can be used by the government to establish a prima facie case.

Perhaps AUSA Komatireddy's response was better of take the Shepard list out. When I speak with our group again, I am sure that they might nod their heads like we should have said that as well, but primarily the Shepard list is not going to cover the actual conduct in many state offenses.

In Arizona, for an example, a plea hearing apparently does not include a factual representation by the State as to what happened, but the defendant, or defense counsel, just lists the elements that they agree that they have had,

so it's going to get away from the actual conduct that you are looking to impose.

Finally, we ask you to reject all three of the options and sub-options on limiting the prior offenses. Pages 9 and 10 of our public comment, you know, speak to those reasons.

That no consideration given to the defendant's actual conduct in those prior offenses is going to I think undercut victim rights and victim sense of what's fair and reasonable and then we're looking at prior offenses before the victim of the current federal offense, you know, well what happened to the fact that he's got all this other stuff behind him, shouldn't there be some penalty for that.

I think that it also limits the judge's ability to get that full picture of the defendant's character as required by 18 USC § 3553(a). Thank you very much.

CHAIR REEVES: Thank you, Mr. Quasebarth. Mr. Russell.

MR. RUSSELL: Thank you and the

Honorable Commissioners for allowing me to come and speak today.

I would like to give you a picture of a real application of the career offender. Imagine getting off of work from being a drug counselor, driving, going home, and then being pulled over for your taillight but the police tell you that you now no longer have a license because of child support.

You go to child support court, and you don't come home for 12-1/2 years. This is what happened to me. I took a plea for 30 to 37 months.

After the plea I found out months later that instead of getting 33 months and going back home to my kids I wouldn't come home for 12-1/2 years.

I was convicted in 1994 for less than a sugar pack drug offenses that were ran concurrently. The State gave me five years that was ran concurrently. I did one sentence for 17 months. 2010 I go to federal court and here I am

now facing 15 years and serving 12-1/2.

Imagine your kids being three years old, five years old, driving them to school every day and singing with them, preparing them to go learn, and when you drop them off you don't see them again until they're 17, 18 years old.

Imagine your parents all dying while in prison because you were told you was going to get three years, instead they hit you with the career offender for less than a sugar pack and you lose everybody.

You have the real application of the law and then you have real actions of the law. This is why I am here today, to let you see what happens when you impose a law versus really considering it.

Me, myself, I propose elimination of all state drug offenses, and the reason is because, like everyone has stated here today, in Tennessee first offense you're looking at anywhere from four to five years, six years, just for a first offense.

In North Carolina you're looking at, first offense you're looking at eight to 12 months. Every State has its own right to impose, you know, their laws, but when it comes to federal law we have to have a uniform version of this.

So the simplest way is either to eliminate them all or go with just a simple time served of 18 months or more. The armed career deals were ten years or more. It's things like this, okay.

But when you are thinking about imposing the career offender, okay, for low-level drug offenses, what's not being considered is what was the actual amount.

While in prison I had two choices, I could go in there and I could think about all the things that was done or I could educate myself. I chose to educate myself because I didn't have time to sit around and -- I had to fight for my life.

So I educated myself, obtained a

criminal justice degree, a paralegal degree, I taught GED for ten years or more, and I helped as many people as I could because I knew I needed help, too, and I didn't understand how to get it.

But when you're putting people in prison with very limited resources it's a very serious matter and there's so much that's lost, so much that's lost.

I only made it to one of my kids' graduations out of three for that much drugs, that much drugs, that little bitty piece, 0.4 grams in federal court.

Since I've been out I've thought about everything that was wrong with how did I get there, you know, what was considered and what was not considered.

I never will forget the judge telling me himself, well, young man, I'm glad that you changed your life prior to it, because, like I said, I was a drug counselor when I got arrested that day, but you're just going to have to finish doing it behind the bars. Fifteen years for

that.

There is a lot to be considered when you are sentencing people. There is a lot to be considered when it comes to a career offender. I will leave this here.

I thank you all very much, you know. I've read many of your rulings in the past because, of course, when I was learning the law I had to learn how each judge and DA and everybody thought, so I had to consider all of these types of things.

I thank you all for this Commission that is here today because you all deserve to be here. Thank you for all the changes that are about to come and I do propose the elimination of all drug offenses from being used for the career offender.

With that, I will leave the questions up to you all now.

CHAIR REEVES: Thank you, Mr. Russell. Any questions of these panelists? Yes, VC Murray.

VICE CHAIR MURRAY: This is a question primarily for Mr. Luria, although I'm happy to hear from anyone else that would like to jump in.

So I understand the concerns people have with a time served approach in terms of it being difficult to find documents and the evidentiary issues there.

I guess I'm wondering if there isn't -- So what our proposed amendment tries to do to get around those difficulties is to say, look, by default you do time imposed but then if the defendant has access to documents that allow him to show the time served was below a certain threshold then that's a safe harbor, so to speak, right, like we'll use time imposed unless the documents happen to be there and you put the onus on the defendant who has access to the documents.

I am wondering whether that gets around or if not why it doesn't around some of the problems that Mr. Russell so eloquently set forth of very -- obviously, there are state variations on sentence like overall, but some of

those go away when you look more narrowly at sentence served or at least allow it to sneak in in that way because you get rid of the differences of the suspended sentences and so forth.

I guess I'm wondering whether that gets around the concerns about evidentiary issues around sentence served.

MR. LURIA: There's a couple things in there. When you have sentence-imposed timeframes where it's one year or three years, five years, the concern is that a lot of times urban areas treat offenses very differently than rural, and so already baked within that is disparity.

As soon as you start measuring that more on those terms of one, three, five as seriousness that disparity seemed to grow more in my view.

The cure on that in terms of using a rebuttable structure is that they are going to have the same problems we have in getting the records.

There are areas where if the probation officer can't get the record I don't think anybody really can, and even if you can get the records, on those multi-sentence cases you're really trying to pick apart, you know, what's really very hard to discern, multiple sentences running concurrent, where one begins and the other ends, it's just unclear.

It then means that people who could get a handle on those records would have the ability to rebut it and other people wouldn't just because of where they are at.

That's another area of concern because there are whole jurisdictions and whatnot that don't have that availability of data and so those defendants are curtailed from that rebuttable issue because they don't have the data, it just adds some more disparity.

VICE CHAIR MURRAY: Would it add any additional administrative difficulty to put that rebuttable safe harbor in there?

So if you're going to go with a

sentence imposed regime, which I am with you 100 percent about the disparities that are baked into that, is it any skin off your nose, so to speak, to add in that rebuttable presumption where if the defendant does happen to have the documents they could show their sentence served did not match?

MR. LURIA: I think the pressure becomes higher for us to get the records and in some areas it's just they're never going to get those records.

It would be very hard I think. Probation officers like to have uniformity. We really strive for it. We love the fact that you guys strive for it as well.

The lack of uniformity in terms of record collection on the date released creates problems all over the place if we were to rely on it and to now have the defendant relying on that, trying to find a way to rebut that without the information, I image that would be a very frustrating circumstance for them.

VICE CHAIR MURRAY: Got you.

COMMISSIONER MEISLER: Can I ask a follow-up question to that?

CHAIR REEVES: Yes, you may.

COMMISSIONER MEISLER: In your experience when you've been able to obtain those records do they indicate generally the reason for the release, right, if a sentence imposed was, you know, 18 months and it turns out the person was released after serving six?

When you get those records does it indicate to you whether that was for rehabilitation, overcrowding, things like that, or does it just tell you the dates?

MR. LURIA: I imagine that also is very different based on jurisdiction. I being from Florida am a little bit more familiar with my experience, we have very open records in Florida, but that specific information would still be lacking in the records that I see.

I feel certain that there are probably other jurisdictions that give better reasoning

when the date is even available, but there's also quite a bit of variance in that, too.

CHAIR REEVES: VC Mate?

VICE CHAIR MATE: A related question, and this may be more for Judge Erickson, maybe Mr. Luria, too, because this one is about mandatory minimums.

There was another commenter that pointed out looking at kind of time served rather than sentence imposed that the First Step Act has some provisions where Congress looked to sentence served rather than sentence imposed.

Have you seen any problems in the implementation of that?

JUDGE ERICKSON: I have been on the Appeals Court ever since the First Step Act really started coming into play. I only dealt with it for the last few months of my time as a district judge.

I don't see that as a particular problem, and I think its application has been relatively straightforward. You know, one of the

things that Chairman Reeves mentioned was just sentencing disparity amongst judges by location, right.

You know, when I was a state judge in North Dakota, which I was for ten years, on every single offense with three or four exceptions the range was from zero to the statutory maximum and judges were free to impose whatever they wanted to, right.

So there were judges -- and our judges are elected, and so there were judges that on every single thing they sentenced them to the maximum and they decided that the parole commission, or the parole board, would solve the problem.

The reality is the parole board did. I mean so when Ralph Erickson imposed a sentence they served a lot larger percentage of that sentence than they did for, you know, really the guy whose office was right next door to me because he just went like screaming towards the max all the time, right.

So, you know, time served I think is actually a pretty good proxy. You know, how good of a proxy do I think it is? Well, I went to my congressman and my senators a couple of times and I said, you know, we got this whole problem with this sort of three strike theory that we've got going on here that it's a bearcat.

We can't figure out. We keep trying to tweak it on the edges. Judges are pulling their hair out. We keep telling the Supreme Court to save us from it.

The Supreme Court literally -- justices come to our conferences and say we know you don't like it, we can't fix it, all right. And so, well, wait a minute, the guys that can fix it are sitting there on the Hill, right.

When I talked to them I said, you know, really what you ought to do is you say if somebody serves five years or more that's a person who has usually been convicted of a serious offense or is a slow learner in custody and not behaving, right.

That's a pretty good proxy if we're going to say the third time we're laying the hammer down on you, right. You know, and it seems to me that really it's kind of like a -- you cut the Gordian knot because you can't untie it and I think that's kind of where we're at here.

The issue really is, well, if we can't convince Congress to do it then maybe we should take own piece of the pie and just cut the Gordian knot ourselves in the areas where we can, right, and I would be in favor of that.

Now when TIAG talked about this generally nobody stated any giant, huge objections to Ralph's great plan to solve the problem, but it's also not the thing that we put in our letter so to that point I am speaking for myself.

But I do think that we did all agree and it is in our written testimony that, you know, if you have an actual time served of five years and those offenses are scoreable that that

works for us and it alleviates our concerns about what's going on separately in Indian Country, because otherwise there is something going on within the data that Indians in Indian Country are being treated differently and we don't know why that disparity exists.

MR. LURIA: Within our experience with that it's very limited to the §4A1.1(a)(5)(i) issue. That metric was shifted to have that one year component and I think that the lower that is the easier it is to work with because already you are kind of dealing with that a little bit with your §4A1.1(a)'s, so there's a familiarity to it already.

It hasn't been a problem that we've seen, but the trick with that is we only see it when it works. If it's not working then it never gets filed and we never see those cases as §4A1.1(Aa)(5)(1i) issues.

So from our end, from our perspective, we only see it when it's successful because that's when the §4A1.1(Aa)(5)(1i) is filed. If

it isn't then it wouldn't be filed, so we don't -- that's the conundrum we're in.

CHAIR REEVES: Any further questions of this panel?

Thank you, gentlemen, for your testimony.

All right. You can turn your camera on if you wish. Thank you. Our final panel before the lunch break will give us a Criminal Law Practitioners' perspectives on a simplification proposal. Is that right? I'm looking at my notes here. Okay.

(Laughter.)

CHAIR REEVES: Thank you. All right. First, we will hear from Kathleen Stoughton who is Appellate Chief at the U.S. Attorney's Office for the District of South Carolina.

Then we will hear from Ms. Natasha Sen, who is here in person, who currently chairs our Practitioners Advisory Group and is an attorney based in Middlebury, Vermont, with a solo practice focusing on federal criminal

defense.

We will hear from Ms. Marianne Mariano, who is a Federal Public Defender for the Western District of New York. Ms. Stoughton. Stoughton?

MS. STOUGHTON: Stoughton.

CHAIR REEVES: Stoughton. Oh, boy. Thank you so much. I apologize for butchering your name.

MS. STOUGHTON: Happens all the time. Chair Reeves and Members of the Commission, thank you for the opportunity to testify on behalf of the Department of Justice on the Commission's proposal to simply the sentencing process.

Last amendment cycle the Commission proposed to eliminate departures from the sentencing guidelines and create a new Chapter 6 that in our view would have improperly intruded on a sentencing judge's authority.

The Commission's current proposal similarly seeks to remove departure provisions but this time without the new Chapter 6

addressing the District Court's exercise of its sentencing discretion.

The Department appreciates this change, and we agree with the Criminal Law Committee that this year's amendment proposes a much cleaner excision of departures from the guidelines.

The Commission's new proposal better reflects the relationship between the guidelines and sentencing court's authority under the section 3553(a) factors after Booker.

As the Practitioners Advisory Group said, it reflects actual sentencing practice given that courts use departures far less often than variances.

The Department does not oppose the adoption of a two-step process and to the extent permitted by law the elimination of departure provisions needed to make that change, but we remain concerned that the amendment fails to comply with some congressional directives.

Congress has on several occasions

instructed the Commission to ensure that appropriate punishments are imposed for particular types of offenses.

Take for example the directive in the Violence Against Women Reauthorization Act of 2005 that the Commission amend the guidelines to assure that when a defendant commits a federal offense while wearing the uniform or insignia of a public employee his sentence reflects the gravity of that aggravating factor, or the directive in the Drug Trafficking Vessel Interdiction Act that the Sentencing Commission promulgate guidelines to provide adequate penalties for persons convicted of operating a submersible vessel without nationality.

The Commission responded to those directives by creating departures. If the Commission now chooses to eliminate departures we urge you to also take the necessary steps to ensure continued compliance with these and other congressional commands.

The Commission may also wish to

suggest conforming amendments to federal statutes and rules of procedure that reference departures like 18 USC §3742 and Rules 11 and 32.

Finally, we recognize that a meaningful number of defendants still receive departures, particularly in prosecutions for crimes that are less frequently charged or that arise under statutes raising particular complexities.

We appreciate the concern of the Victims Advisory Group that removing departures from the manual may remove important guidance for courts considering the statutory sentencing factors.

In light of the continued reliance on departure provisions by at least some litigants and judges and given the accumulative wisdom reflected in those provisions, the Department believes it is of vital importance to preserve the provisions in a readily-accessible form.

Appendix C and its supplement already contain a historical record of the more than 800

guidelines amendments and the reasons for each providing a valuable resource to judges and practitioners when disputes arise over the interpretation of a guideline.

We leave that an appendix compiling deleted departure provisions could serve a similarly-important end. We would also encourage the Commission to include in that appendix the background information accompanying departures that the Commission has previously determined may be relevant to the sentencing court's consideration.

The Department supports the Commission's efforts to simplify the three-step process and we reiterate our position that simplification must be done in a thoughtful, deliberative, and fully-researched process to ensure both its legality and its effectiveness. I welcome the Commission's questions.

CHAIR REEVES: Thank you. Ms. Sen.

MS. SEN: On behalf of the Practitioners Advisory Group I thank you for the

opportunity to provide testimony this morning, or afternoon, on the Commission's proposed amendment on simplification.

As reflected in our written comment, the PAG very strongly supports this proposal. We believe that -- and we would urge the Commission to vote to approve it for two strong reasons.

One, as recognized by almost every commenter who is involved in working with the guidelines, it reflects actual sentencing practice and in the PAG's experience in courts from Hawaii to New York and Maine to Florida, courts that we appear before largely rely on the variance process as opposed to the departure process during sentencing hearings.

A second strong reason is that this reliance on variance as opposed to departure is something that is supported by the Commission's data which the Commission has collected over years.

I think we cited in our letter, we talked about how since 2009 when only 16 percent

of cases involved downward variances to now in, I think, fiscal year 2023 it's almost a third of cases rely on variances, but more importantly only 4 percent of cases involved departures that are not related to substantial assistance in early disposition programs.

So it's a very, very small percentage of the total number of cases and we appreciate the Department's position that this still represents a significant number of cases, but the PAG believe very strongly that any of those considerations that courts rely on for departures are very appropriately considered in the context of speaking of variances.

I just want to provide an example from a sentencing hearing that I had last week. I had a client and after the sentencing we were talking and, you know, and with all of our clients we go through the guidelines, they read the PSR, they acknowledge their understanding of it, but afterwards my client turns to me and says I almost blacked out when the judge was talking to

me, I just couldn't think about anything, and then the judge started talking about the sentencing factors and I totally understood what they meant.

You know, when the judge turns to me and starts saying to me these are the things that I thought were really important in your case, these were the aggravating or mitigating circumstances of the offense, these are things that I think are important about your history and characteristics.

Those things make sense to clients and defendants, and not just to my clients, their families and the public. I think a lot of our discussion is about administratively how do we simplify this guideline process at sentencing.

But I think it's very important to not forget that it's our clients and the people who are being sentenced who also deserve some transparency and I think the discussion of departures, I will have clients who -- in the few cases now where I make departure arguments, you

know, the court will consider them and then the court will deny them because the standard is just a very different standard and my client is freaking out thinking, oh, my gosh, you know, the court just denied this and, of course, then the court talks about the section 3553(a) factors and it's a different ball game altogether.

So I think collapsing those considerations, and I appreciate the things that the Department has raised regarding unusual statutes or things that aren't litigated very frequently, but that isn't going away.

You know, we have the old manuals, whether they are collected as old manuals, whether they're collected in an appendix, that guidance is still there, it's just not -- we would just support it not being used within the framework of talking about departures within the guidelines.

But, for example, one of the examples I think the Department gave was you would consider the guidelines or departures in the

context of talking about plea negotiations or sentencings and I think that that knowledge is all still there, it just would be used in a different way.

I will stop there and answer questions. Thank you.

CHAIR REEVES: Thank you, Ms. Sen. Ms. Mariano.

MS. MARIANO: Thank you, Chairman Reeves. Thank you for this privilege of addressing the Commission today on behalf of Federal Public, and Community Defenders on the important topic of simplifying the guidelines.

I wish I was there in person. I was looking forward to seeing a lot of old friends, but I appreciate being able to do so remotely, and the irony of the witness from Buffalo not getting there due to weather and not the weather in Buffalo is not lost on me.

So last year my friend and colleague, Michael Caruso, represented us on this important topic and he started his remarks with a terrible

dad joke about being asked because he had an AARP card.

I am going to assume that I have been asked because I can provide a more youthful perspective, albeit one with 30 years of experience.

I began my career as an Assistant Federal Public Defender in 1995 when the guidelines were mandatory. I have watched the evolution of sentencing proceed from there through Blakely, Booker, and all that followed.

In fact, I was detailed to the Sentencing Commission in 2001 and little did we and some of your current staff know what a sea change in sentencing we were in for in just a few years.

Since that time, mandatory guidelines time, I have watched departures go from my client's only slim hope of an at all individualized sentence to just a vestige of the past with variances.

Me and my colleagues welcome the

Commission's revised simplification proposal as a means of making the guidelines match present day practice.

Defenders support the Commission's proposed rewrite of Chapter 1 and appreciate that the new language accurately describes present day sentencing landscape.

Two aspects of the proposal are especially welcome. First, the revised Chapter 1 appropriately describes the importance of guidelines post-Booker without overstating their role.

Second, it also clarifies that there is a meaningful statutory difference between the factors the Commission was permitted to consider in crafting the guidelines and virtually the unlimited array of considerations that a court may consider at sentencing.

Regardless of the Commission's decision on what to do with the departure provisions, which I'll address next, Defenders encourage you to at least promulgate these

revisions to Chapter 1 this amendment cycle.

With respect to the departure provisions Defenders continue to support the Commission's proposal to remove departures from the guidelines.

We have long contended that the departures needlessly complicate sentencings by compelling judges to examine restrictive departure provisions first before moving on to the section 3553(a) factors, factors that then override any restrictions.

While Defenders have identified a handful of provisions worth altering and preserving, the time has come to jettison departure language from the Guidelines Manual.

We addressed thoroughly in our written submission last year and again this amendment cycle the Commission's authority to eliminate departures.

The Commission's enabling statute makes clear beyond dispute that the guidelines are evolving and responsive, adjusting to changes

in law, like Booker, social science, and on-the-ground realities. No congressional directive overrides this forward-looking requirement.

However, the Defenders support for this amendment is with considerable concern about the uncertainty of the real world ramifications of this change.

As we have noted there is significant limitations in the Commission's data that make the scope of current departure practice unknowable.

The Commission has been clear that it does not intend to alter sentencing outcomes, but, rather, to simplify the sentencing process and bring the manual into conformity with what is already happening in most courtrooms around the country. Outcome neutrality is the goal.

This year's proposed revision of Chapter 1 more accurately captures the Commission's intent in this regard. If the Commission moves forward with the simplification proposal, we encourage you to use all of the

tools at your disposal to ensure and alert, I'm sorry, to alert and educate practitioners and courts of the Commission's neutrality intent. This includes guideline text, your reasons for the amendment, and any trainings.

Defenders are encouraged by the Commission's improved and streamlined approach to simplifying the Guidelines Manual, an approach that is more faithful to the amendment's purpose and to the statutory sentencing framework than last year's proposal and one that is fully consistent with the Commission's statutory authority and obligations.

The time has come. We urge the Commission to act this cycle. Thank you. I will take any questions.

CHAIR REEVES: Thank you. Questions? V.C. Restrepo, please.

VICE CHAIR RESTREPO: I have a question for Ms. Mariano. You referenced that there are certain provisions of the departures or certain departures you would want to preserve.

How do you suggest we go about preserving what you would like keep?

MS. MARIANO: So we highlighted four different departure provisions, Judge, in our written comments. We proposed language that would take out the departure language, but would leave the sentiment or the guidance of those provisions in the manual.

The four that we highlight we think are used very often, §4A1.3, for example, under criminal history. I would note -- I am no expert at the Commission's data, but I did take a look at the data you put on your website around simplification and criminal history is number two overall and number one for upward departures.

So we think that the guidance there, we proposed language that would continue to recognize that Chapter 4 may limit, may have limitations in arriving at the right criminal history category, just as one example.

As a second example, and I will rely on our written submissions for the other two, but

the second example is one that is near and dear to my heart, which is Chapter … at §5G1.3, concurrent and consecutive sentencing.

It's an area that I think has, it probably is worthy of revisiting and I would note that other stakeholders have highlighted this provision as well, including offering some proposals on how to re-write that particular guideline.

I find that I get calls after the fact with clients serving sentences or folks that weren't clients of my office, but judges asking me to take a closer look at why the BOP isn't executing the sentence the way the court had intended.

So there is language in §5G1.3 that I think provides valuable guidance to courts in trying to arrive at the appropriate sentence when multiple jurisdictions are involved.

So we highlighted four that we thought were used frequently in both upward and downward departures and where we thought that language

could be preserved, taking out the departure language until the Commission could re-visit, perhaps, even those and other topics.

VICE CHAIR RESTREPO: Thank you.

CHAIR REEVES: Commissioner Meisler and then VC Murray.

COMMISSIONER MEISLER: This question I think is also for Ms. Mariano, although I'll be happy to hear Ms. Sen's views as well, but I'm just struggling a bit with the authority issue in the Defender's submissions and I am just trying to get my head around something that I guess Ms. Fite said earlier as well about how directives work.

So I'm just trying -- under your view if Congress says to the Commission something like make the robbery guideline harsher and the Commission says we're going to do that via a departure and then does that and then the following year it gets cold feet and says, actually, that was too hasty, withdrawn, repealed, has the Commission complied with that

directive by doing it and then taking it away right away?

MS. MARIANO: So I think -- first of all, let me say that our position on this is outlined beautifully in last year's written submission at pages 18 through 24, and so I want to direct the Commission's attention to that.

But I will say that if a departure guideline is never referenced or cited has the Commission actually answered Congress's question in the first place.

Departures are no longer cited, so I'm not sure that any directive is answered in that respect.

COMMISSIONER MEISLER: I guess the basic gist to my question though is do you think that directives have some kind of baked in expiration date and they just, the Commission just does something once and they never have to do it again?

MS. MARIANO: Sure. I'm sorry, Commissioner, I misunderstood your question. I

wouldn't use the phrase "baked in" expiration date, but I do believe that the Commission's enabling legislation makes it very clear that the Commission is meant to be focused on the evolution of criminal justice and the criminal statutes, and so I don't think any particular directive is meant to be set in amber.

COMMISSIONER MEISLER: Thank you.

CHAIR REEVES: Yes, VC Murray.

VICE CHAIR MURRAY: My question is for Ms. Stoughton. Thanks very much for your letter and your oral submission and thanks in particular drawing our attention to VAWA and the Maritime statute. I think those points are very well taken by me at least.

I was a little bit unclear on the Department's position on the PROTECT Act. Do you think that the proposed -- I mean you are urging us to adopt the proposal and not to make any amendments with regard to the PROTECT Act, so I assume the government's position is that the amendment complies with the PROTECT Act?

MS. STOUGHTON: So we appreciate the view that was shared by other stakeholders in the last amendment cycle that Congress limited the Commission's authority to amend the provisions of Chapter 5 that the PROTECT Act directly changed only until 2005.

So assuming the Commission agrees with that, we don't think it poses any absolute bar to eliminating those departure provisions.

VICE CHAIR MURRAY: So the Department agrees with?

MS. STOUGHTON: Yes.

VICE CHAIR MURRAY: Okay. Great, thanks.

CHAIR REEVES: VC Mate.

VICE CHAIR MATE: Thank you. Thank you all for testimony today and for your written submissions.

I have one question I think for Ms. Stoughton on one of the specific things that the Defenders raised as, you know, this is great but there are a couple we want to hold on to.

One of them was this criminal history thing, which, you know, and the data of how frequently that is used, does the Department have a position on retaining that sentiment?

I don't know if you've had a chance to look at the Defenders submission on that one.

MS. STOUGHTON: No, I have. Thank you. So we think if the Commission wants to eliminate departures to simplify the sentencing process it should do so to the extent permitted by law, just an across the board an outcome neutral change.

We understand the desire motivating the change here is to better conform with current sentencing practice, and so it's a point well taken that that is an often relied on provision.

But we think that keeping specific provisions sort of undermines the goal of simplifying and eliminating the departure provisions across the board.

But we do think, you know, to the extent these often relied on provisions are

something that courts or litigants may want to continue to rely on as a basis for a section 3553(a) variance, like that's something that could be retained in an appendix and still equally used by judges and practitioners as a point of reliance in the future.

CHAIR REEVES: Yes?

VICE CHAIR MURRAY: I wanted to go back to, this is for Ms. Stoughton again, to the section of your letter on retaining, you know, the substance of departures or at least the text that goes with them. Do you think an appendix gets the job done?

I mean one concern that I have particularly with the kind of factors that you highlighted where it's you have a complicated statute that isn't applied commonly and there is some sort of guidance right now in the departure, if it's somewhere else in an appendix do people see it?

Like I get that if people find it then it can be used, but is there -- does it just get

lost?

MS. STOUGHTON: I don't know that it does. I think Ms. Sen said it very well this morning, anything that is currently a ground for a departure is equally appropriate for consideration under the section 3553(a) factors for a variance.

So, you know, some of these issues, in particular on discharge, terms of imprisonment, or anticipated state terms, like they do, they confuse courts and they confuse litigants, and so I think it would be good to have a place where people can go, you know, this is what the Commission used to advise on this when departures were still a thing.

I don't know if 15 years from now people will actively seek out an Appendix D if they don't remember that something used to be a departure, but I think at least in terms of easing the transition from a three-step to a two-step process that an appendix would be a helpful guide for everybody.

VICE CHAIR MURRAY: Is that the view of others on the panel, too, that if there is sort of like a particular guidance regarding especially like a more uncommonly used statute that's in the departure right now that if we move it to an appendix then when that statute is rarely applied even though it's not in the book where people are looking people will still find it?

MS. MARIANO: Is that question to me?

(Off-microphone comment.)

MS. SEN: Go ahead.

MS. MARIANO: I'm so sorry. The problem is I thought you were looking at me. I apologize, Commissioner Murray. I apologize.

VICE CHAIR MURRAY: I was.

MS. MARIANO: I know it's TV, the TV is talking to me.

(Laughter.)

MS. MARIANO: So actually three very quick things. One, I think someone on the Commission, it might have been you, Commissioner

Murray, last year said does anyone even read Chapter 1.

I want you to know that every new AFPD in my office reads Chapter 1 because I tell them they have to read it and I have for years, so that's number one.

So do I think that they would find this information in an appendix, I do. I think that to the extent that the folks are practicing now and aware of these provisions not only in the Appendix, but your online guideline resources are outstanding, they are where I go even though I am still a book person and I always have my book.

I would only also point out that we proposed some introductory language to Chapter 5 if you do remove the guideline provisions in our comments that is meant to focus on highlighting the Commission's neutral outcome goal, but it would also direct parties, you know, into eternity for as long as that is in the book, to this year's manual, and that's another place where they would find them.

Defenders had no problem with an appendix, but I think this year's manual serves that function just as well.

MS. SEN: So as contained in our written comment, the PAG's position was that it was unnecessary to actually put all this in the appendix because we have years of Guidelines Manuals, and I think either one would serve.

I think people would use it. I mean I still go back and I'll look at older versions, I'll look at things in the Appendix, and I actually kind of like the Defenders idea about the introduction to Chapter 5 so that if we get too far down the road if people don't remember that this occurred then that would prompt folks to go back and look at those older versions, but I think that the people will use them.

CHAIR REEVES: Thank you. Any further questions for this panel?

Thank you. Thank you, ladies for your comments, great comments, and thank you for your testimony.

It is now time for us to take our lunch break. We will take a 30-minute lunch break so that we can resume these hearings as quickly as possible so that people can get back to their destinations.

Thank you so much for this half of the hearing.

(Whereupon, the above-entitled matter went off the record at 12:49 p.m. and resumed at 1:28 p.m.)

CHAIR REEVES: Thank you, all. Thank you all so much for accommodating us with that very quick lunch break.

Our next panel consists of members of our advisory groups. And just for a point, I do want to thank our advisory groups.

They work with us directly on all that we do. And the advisory groups meet, and they dig into the details on all these things.

And I have a note here to myself to say something special about our advisory groups because we appreciate everything that you all do

for the Commission.

I don't want to say you're our staff, because you're not. You do advise us on everything that we do and we certainly appreciate all of our advisory groups, but our next panel includes members of some of our advisory groups and they will offer perspectives with these various stakeholders in federal sentencing on our simplification proposal.

First, we will have the Probation Officers Advisory Group's perspective from Joshua Luria, who we've heard from earlier.

Then you'll hear from the Tribal Issues Advisory Group's perspective, Judge Erickson. You've heard from him.

And third, you'll hear from our Victims Advisory Group from Mr. Christopher Quasebarth of whom you've heard already.

So, Mr. Luria, you may begin when you're ready.

MR. LURIA: Thank you to the Commission for the opportunity to provide POAG's

perspective on the proposed amendments related to simplification.

As POAG shared last year on a similar amendment, the focus post-Booker has moved from departures to variances, departures with the analysis in every case.

After Booker, the relevance of departures decreased as the relevance of the section 3553(a) factors increased.

Those who currently work in the system have shifted their practice accordingly and section 3553 analysis has largely replaced the departure analysis.

There are notable exceptions with certain departures related to substantial assistance, under- or over-representation of criminal history, early disposition programs and occasionally mental health considerations; however, most departures are generally used, at best, as guidance for court's variance considerations.

This is because what can be done

through departure can be more easily accomplished through variance with a higher degree of procedural flexibility.

18 USC § 3553(a) is extremely broad and it gives the court a lot of autonomy to consider all the factors associated with the departures and more.

One of the residual concerns that members of POAG expressed was the loss of the different considerations as the departures are deleted.

We have seen many instances where the parties in the court look at the departures as a framework for how to structure a variance.

The departures currently in the manual exist for a reason. Some were included to address specific problems or concerns that were being observed in the system. Some were based on congressional directives.

Regardless of the genesis of these provisions, a lot of the work went into their development.

The provisions can often provide good guidance to the court even though the court is using them in their articulation of a variance.

POAG discussed the prospect of moving many of these considerations to an appendix or retaining them in some other historical fashion.

The judges can look at the various lists associated to get a sense of some of the areas of common consideration and frequently impacted -- that frequently impact that type of offense, thereby retaining the analysis that had been done on developing that departure.

It doesn't prevent them from considering something new and outside of a list as the judges retain their authority to consider anything and to balance these factors as they believe appropriate.

Additionally, POAG discussed how the addition of a departure can often come about as the result of a compromise.

When a new problem develops, the Commission may be divided between making that

consideration a specific offense characteristic or not including it at all.

Such a division can result in a compromised approach of departure. The loss of the departures would remove that area of compromise.

Having an appendix in which these compromises may be lodged may allow for that negotiation -- negotiated outcome.

While the retention of these provisions could be helpful, POAG supports the amendment as written with only one suggestion. We suggest including the concept expressed in §5K2.23 somewhere in Chapter 5.

POAG observes the need to retain the intent of Section §5K2.23, which is the departure for Discharged Terms of Imprisonment.

This section accounts for the only avenue within the guidelines by which the court can fashion a reasonable punishment in circumstances where the defendant has already served a term of incarceration on a sentence that

qualifies as relevant conduct for the instant offense.

As we noted post-Booker, the system has already informally changed. POAG believes the Commission should take the next step in adopting a methodology that reflects that change.

The system changed more than 20 years ago and is ready for that change to be reflected in the manual. Thank you for the opportunity to share our thoughts.

CHAIR REEVES: Thank you.

Judge Erickson.

JUDGE ERICKSON: Yes. I want to apologize for my earlier testimony. One of my colleagues tells me that, you have a tendency, Judge Erickson, to filibuster your own questions. And so, I went over on the five minutes and I'm sorry about that. It's hard for me, right? Just hard.

POAG supports the simplification of the -- they too close together? Oh, just the mic.

POAG supports the simplification proposal as set forth. And if we look at -- if I look at where I can ever find where I got it stuck here, yeah, the advisory group support believes that proposed Part B actually will just conform the book to what's really happening day to day most of the time anyhow.

I think it will reduce -- we think it will reduce the number of reversible errors that rise out of the different standards that can happen if you depart as opposed to vary, which is why there are no departures left, for the most part, as the judge don't like being reversed.

And so, they say, well, I know I'm safe if I just say enough and it's in the variance category under section 3553(a).

We also generally support the decision to remove the language from the 2023 proposal that would have recast the departures as additional considerations. We think that's a good thing.

And whether the -- we preserve the

history by referring people back to the manual or we put it into the new appendix, that makes no difference to us, and we would leave that ultimately to the Commission's discretion.

Really, our biggest concern when we talked about this, was just what happens to Tribal Court convictions, which are currently departure within the guidelines, and there is a description in the commentary that sets forth what factors ought to be taken into consideration when making a decision whether or not you should consider a tribal conviction for purposes of sentencing enhancement, and there's a reason for that.

There're 574 recognized tribal nations. They have 574 separate court systems. They operate on a broad range of -- their natures vary broadly, is what I'm trying to say.

And some are very much like Western courts and they're like -- frankly, they're -- some of the tribal courts are, you know, are very similar to Western courts and better than most of

the states' courts because they're better funded and they have college-educated lawyers -- or law-trained lawyers and judges and the system is great.

We have others that really aren't a very traditional sentencing mode. So, the Tribal Court might just really consist of sentencing circles, you know, which is really a culturally appropriate way where elders confront people who've engaged in conduct and they just negotiate a resolution and they require some performative penalty, right?

And so, how we treat those things and how they get reported in the tribal convictions is important and we think that that's got to find a home somewhere in the book, right?

Right now, they're found in §4A1.3 that -- and then Application Note 2(C) and, whatever happens, some places got to exist for that because it does talk about, well, we're going to, you know, the factors we're going to consider are things like were they afforded their

rights under the Constitution or under the Indian Civil Rights Act of 1968? Did the court exercise expanded jurisdiction under Tolowa? Was due process afforded? Were the counsel provided to defendant and those sorts of things.

And that's a very helpful checklist and it's got to be somewhere, we think, in the book rather than just stuck into the appendix because not everybody who takes up an Indian Country sentencing matter -- or takes up a federal sentencing matter has any experience in Indian Country and having some help in saying, well, what should I do when I look at this, is helpful to those judges. And with that, I welcome your questions.

CHAIR REEVES: Thank you, Judge Erickson.

Mr. Quasebarth.

MR. QUASEBARTH: Thank you, Chair Reeves, and thank you, Commission Members.

You know, last year with simplification we expressed concern about getting

rid of departures and we're concerned that removing upward departures were going to directly affect victims.

And we were certainly concerned that Chapter 5, Part H and Part -- some of Part K, were just put into an unexplained list.

And then other parts of Part K kept their explanations, but were put in another place.

We understand the rationale behind wanting to eliminate that second step of departures and -- but we do believe that it's important to keep those pieces of Chapter 5, Part H and Part K, with their explanations.

Maybe the departure language is taken out, but where it's placed in a meaningful way so judges can use it so the other stakeholders know that it's available.

Whether that's putting it in an appendix -- and there was testimony earlier where you all had questions about -- Vice Chair Murray, you were like, is anybody going to look at the

appendix if it's in there?

Yeah, we'll defer to the practical place that that should go but having that information that has historically been considered by the Commission to be relevant is going to be useful for everyone.

And so, we ask that that all be kept in place in some fashion, so it's not completely deleted from the guidelines, and that was our biggest concern. So, you know, I'm kind of tightening up my oral testimony on that basis.

We certainly -- on the other aspect about your legal authority, we had concerns in the group as to whether you could eliminate some of that language that was put in directly from the PROTECT Act. And we still are of the opinion that that would contradict your requirement to be following all statutory provisions.

You've obviously heard the other testimony, other opinions here today on that, and you all will make that decision, but, in our mind because it was direct legislation, we don't think

that you can do it without Congress acting first.

And with that, I'll end. If you have any other questions for me, I'm happy to take them. Thank you.

CHAIR REEVES: Thank you, Mr. Quasebarth.

Any questions from the Commissioners?

Okay, VC Mate.

VICE CHAIR MATE: Thank you all again for coming back, we appreciate it, after a quick lunch.

I have one question, Judge Erickson, about the tribal convictions and you know that I understand the concern there.

Is it enough to include something like that like when we're talking about, you know, the interest in maintaining that, putting it in an appendix or referring to an old Guideline Manual that kind of -- solutions that have been, you know, kind of addressed in other places for retaining that historical reference point, is that sufficient for addressing the tribal

convictions?

JUDGE ERICKSON: I think that -- well, I'm confident that in the conversations that we had, that we did not believe that that would be sufficient mainly because our concern is with judges who have only had tangential connection to Indian Country, that they won't even know enough to look for where it's at.

And then probation officers who are preparing pre-sentence investigative reports in places where there is no Indian Country jurisdiction, if it's not in the book, it's going to be -- you're going to have to be a real expert to know that that's still kicking around out there someplace and you got to think about it, right?

You know, and if it just ends up, you know, in the application notes for, you know, under the guideline for calculation of scoring criminal history, it's at least there.

I mean, it's so arcane, you know. I mean, if you're sitting in the Southern District

of New York, it comes up once every 20 years, right, but it might matter in that one case.

CHAIR REEVES: Any other questions?

Well, hearing no more questions, thank you, gentlemen, for your testimony.

Our next group of panelists will provide us with the practitioners' perspectives on our proposals regarding firearm offenses and circuit conflicts.

First, we will hear from the Department of Justice's perspective from Paige Messec, Assistant U.S. Attorney and the Appellate Chief in the United States Attorney's office for the District of New Mexico.

We'll also be hearing from Desiree Grace, Chief of the Criminal Division at the United States Attorney's Office for the District of New Jersey.

Then, we will hear from Vivianne Marrero, an Assistant Federal Public Defender in the District of Puerto Rico.

And we'll also hear from Michael

Carter, the Executive Director of the Federal Community Defender's Office for the Eastern District of Michigan.

Finally, we will hear again from Susan Lin, representing the Practitioners Advisory Group's perspective.

Ms. Messec, we're ready when you are, ma'am.

MS. MESSEC: Good afternoon, thank you (audio interference) address the proposed amendments on MCDs (i.e., machine gun conversion devices).

It takes just seconds to transform an ordinary rifle into a machine gun with an MCD and, from stray bullets to mass shootings, the uncontrollable lethality of these illegal devices, as Judge Johnston put it, presents a profound danger to the public.

Currently, a felon in possession of a semiautomatic firearm with a large-capacity magazine gets no offense level increase for having an MCD, or 20 MCDs, or any number of MCDs,

even if he intends to sell them to people he knows want to use them to commit violent crimes, and that doesn't make any sense.

This surprising result comes about for two reasons. The first, is that a defendant receives a higher base offense level for either a large-capacity magazine or a firearm covered by the NFA, which includes an MCD.

This structure ignores the exceptionally deadly pairing of an MCD with a large-capacity magazine particularly in the hands of a prohibited person and the Department urges the Commission to restructure the base offense levels to acknowledge that cumulative danger.

The second way the guidelines overlook MCDs is their absence from the special offense characteristics.

There's something odd about recognizing that an MCD is serious enough to raise the base offense level and then entirely omitting them from the second half of the guideline.

This omission may well have been unintentional, but, whatever its cause, it has led to the guideline's failure to account for serious criminal conduct involving MCDs as many judges, probation officers, and other stakeholders have recognized.

This gap is best filled by Option 1. But if the Commission intends to pursue some version of Option 2, it is essential that it does so in a way that recognizes the danger posed by every MCD, affixed or not.

An unaffixed MCD is not a collector's item, it's not a trinket, it's not something you just have casually sitting around.

It's a device that can cost hundreds of dollars and it exists for one purpose, to turn a gun into a machinegun.

If you have an MCD, you're almost certainly either intending to use it to turn your gun into a machinegun or you're planning to transfer it to someone so they can turn their gun into a machinegun.

The more MCDs involved in an offense, the greater the risk to the public and the guidelines must account for that.

They must also ensure punishment for trafficking MCDs and for possessing them in connection with other crimes.

Now, turning to the proposed mens rea amendments, there are very good reasons why these enhancements have been present in §2K2.1 without mens rea since the very first Guidelines Manual.

When a gun is stolen or its serial number is rendered unreadable, that impairs the investigation of serious crimes that may be committed with that gun, and it also makes it more likely the gun will be used to commit a serious crime.

Requiring the government to prove mens rea of the gun's traits will cause a precipitous drop in the application of these safety-promoting enhancements.

Imagine the typical felon in possession case, which is an unplanned encounter

with law enforcement in which the defendant is found with a gun.

The government doesn't know in these cases what the defendant's whole history is with that gun, when he acquired it, or what he plans to do with it.

There's very little evidence of this type in this sort of case that is available to the government with any reasonable degree of effort.

And in case you think we protest too much, the magnitude of evidentiary challenges is widely recognized in the comments the Commission has received from the Committee on Criminal Law, to the Probation Officers Advisory Group, to the individual judges who have written in.

If the Commission does prefer a mens rea requirement, the Department has offered a rebuttable presumption to be uniformly applied across (b)(4).

When the circumstances of the defendant's possession of the gun would show that

he was unaware of its enhanceable traits, evidence that's uniquely within his possession, the defendant would have the opportunity to avoid that enhancement by presenting that evidence.

Such a presumption would be a better balance of the competing interests at stake here than the proposed amendment.

Thank you again and I look forward to any questions you may have.

CHAIR REEVES: Thank you.

Ms. Grace?

MS. GRACE: Thank you. I am here to discuss the Department's position with respect to the circuit conflicts, the definition of "physically restrained" in the robbery guideline, as well as the definition of "intervening arrest" as it relates to traffic stops.

As always, we appreciate the Commission's commitment to resolving circuit splits to attempt to ensure uniformity with the guidelines' application nationwide.

With respect to the definition of

"physically restrained," the Department supports Option One, which will clarify that physical restraint includes the gunpoint immobilization and not -- and is not just limited to physical measures of restraint.

There are three primary reasons that Option One is appropriate. First, Option One is consistent with the purpose and the existing structure of the enhancement provisions in the robbery guideline. That is, apply enhancements to aggravating conduct that extends beyond a standard robbery.

Second, Option One is consistent with the plain text of the definition as currently written.

And third, Option One appropriately accounts for defendant conduct and victim impact in a way that Option Two completely fails to do.

First, with respect to the purpose and existing structure of the enhancement, Option One is most in line with the robbery guidelines as a whole.

The robbery enhancements in §2B3.1 are designed for aggravating conduct. They're focused on some affirmative action of the defendant above the minimal action that constitutes robbery.

Did the defendant have a firearm or a dangerous weapon? Did the defendant use that gun or dangerous weapon in some way? And, relevant here, did the defendant abduct or physically restrain someone?

The Committee determined long ago that physical restraint warrants an enhancement. The reason for that is centered on the defendant's actions, the defendant taking additional affirmative steps to prevent people from interfering with the robbery or preventing escape.

The reason for that enhancement is not focused on the how. It's not focused on the means with which the defendant accomplishes that goal.

The Commission strives to treat like

harm alike, and that's what Option One accomplishes.

The nuance of how a defendant accomplishes restraint, whether it's zip ties, a locked closet, or a gun to the head, is not the point of the enhancement.

The focus should be on the defendant's actions and intent to accomplish physical restraint.

Pointing a gun directly at someone and ordering that person to not move serves the same purpose and achieves the same result as tying that person's wrists.

Turning to our second point, Option one is consistent with the text of the enhancement as it was originally drafted.

Obviously, there has been some confusion and that's why we have a circuit split, but the plain text is not limited to physical measures of restraint.

The restraint must be physical -- in other words, we're talking about a restriction of

physical movement -- but the measures need not be.

And as nearly every court has acknowledged, the enumerated list is not exhaustive.

Finally, Option One is the appropriate proposal because it will resolve the circuit split in a manner that appropriately accounts for defendant conduct and victim impact.

The CLC aptly noted, in expressing its support for Option One, that a reasonable victim may find being restrained at gunpoint just as distressing, or even more so, than other forms of restraint. This is a really critical point.

This observation about the impact on a reasonable victim is not an abstract principle. It's a reality that the Department sees in cases all the time.

In my district, the District of New Jersey, as just one example, we prosecuted a string of liquor store and bodega robberies that demonstrate this distinction.

In a few of the robberies, the defendants used zip ties to immobilize the store occupants.

Because of the physical measures of restraint, the victims were actually left alone during the robbery. They were pretty far away from the robbery and from the defendants.

And during one of these robberies where physical measures of restraint were used, the victims were actually able to escape through the back of the store after one person was able to loosen the ties on his wrists. Here, on these facts, everyone agrees that the enhancement applies.

Contrast this exchange with one of the other robberies we've proved up in that same case. It was a bodega robbery.

The defendant approached the counter and he brandished a gun. He was giving the employee behind the counter commands to empty the cash register, a standard robbery, but there was a customer near the counter, too.

The defendant pointed the gun at her, ordered her to her knees and immobilized her throughout the duration of the robbery with a gun inches from her head.

Option One appropriately acknowledges this disparity. Thank you.

CHAIR REEVES: Thank you, Ms. Grace.

Ms. Marrero.

MS. MARRERO: Good afternoon.

CHAIR REEVES: Good afternoon.

MS. MARRERO: Good afternoon and thank you for having me.

As the supervisory AFPD in the District of Puerto Rico, I have represented countless individuals charging cases involving MCDs for nearly two decades and I look forward to sharing my experience with the Commission today.

Defenders oppose Part A and support Part B on adding a mens rea requirement across §2K2.1(b)(4). I will focus my opening remarks on three reasons the Commission should reject Part A.

First, the current definition of "firearm" in §2K2.1 makes sense in light of the history of the Gun Control Act and the history and purposes of the specific offense characteristics in the guidelines. Both options sweep too broadly and lead to illogical results.

Treating a chip the size of a Lego the same as a functional firearm punishes wholly dissimilar conduct the same.

A person with two firearms with affixed MCDs would be sentenced as if he had four high-powered sniper rifles.

Later today you will hear from Kyler Wallgren, a 22-year-old who delivered six unaffixed MCDs for $100.

Under the proposal, Mr. Wallgren would be sentenced as if he sold six true machineguns raising his guideline -- eight- to 14-month guideline to nearly five years and this makes little sense.

Mr. Wallgren was not an upstream gun trafficker. He is the low-level, low-income,

community member Senators Booker and Murphy caution the Commission to carve out of the Bipartisan Safer Communities Act (BSCA)-related sentencing enhancements.

Second, the data weighs again both options. The data briefing shows that in fiscal year 2023, on average, judge sentence below the guidelines in §2K2.1 cases involving MCDs and this amendment will compound racial and geographical disparities. 82 percent of individuals sentenced in MCD cases were Black or Hispanic.

And for fiscal years 2019 to 2023, Puerto Rico produced 38 percent of cases involving at least one count of conviction under section 922(o).

This is due, in part, to an unusual MOU between the DOJ and the Government of Puerto Rico requiring local law enforcement to refer all eligible firearm cases for federal prosecution.

Sentencing enhancements should not have such a disparate impact on a single district

or group of people who already face systemic inequalities.

Third, as public health experts have been telling us, we cannot punish our way out of gun crime. The incremental increase in §2K2.1 will not stop the production or the flow of MCDs or otherwise make our communities safer.

Born and raised in Puerto Rico, I am part of the Spanish-speaking community that is plagued by poverty, lack of public services, income inequality and racial discrimination.

With no voted representative in Congress, Puerto Rico is subject to loss it cannot shape.

These factors contribute to gun violence and other crimes and ultimately to the reason my clients arm themselves for protection, and the MOU has not stopped gun cases in my district.

When my clients buy a gun on the street, it's not like buying a gun at a retail shop. You cannot pick and choose.

Take, for example, Mr. Alcantara, my client, who had no criminal history before his section 922(o) conviction.

And after being held at gunpoint, he bought a gun off the streets because the process of legally purchasing one was too onerous. The gun came with an affixed MCD with a Glock logo and he didn't know it was stolen. Under the proposed amendment, his range would be higher as MCDs don't have a serial number.

And he completed, thank God, his 12-month sentence and did so well on supervised release that it was terminated early. Mr. Alcantara is not an outlier.

In preparing for today, I reviewed over 114 cases, section 922(o) cases from my office, and 77 clients were criminal history Category I and these are not the high-profile stories you hear about in the news or in some of the public comments.

My clients are not committing mass shootings. They're not domestic terrorists. And

while MCDs are sometimes involved in these more serious crimes, those individuals will face far worse consequences without any need to expand the specific offense characteristic to cover MCDs.

And that is why it's important to tailor §2K2.1 to the most common firearm cases, not the outliers.

Defenders understand the concerns raised by the proliferation of MCDs and we want to find solutions.

Part A would lead to unfair and illogical results, it's not supported by data and would exacerbate troubling disparities.

Above all, it does not address the root causes of gun violence in marginalized communities where our clients are just likely to be victims as they are perpetrators.

That is why I urge the Commission to reject Part A and adopt Part B. Thank you.

CHAIR REEVES: Mr. Carter.

MR. CARTER: Yes. Yes, Judge. I'm going to try to keep this under five minutes, but

let's see how it goes.

First, I'd like to thank the Sentencing Commission for giving me the opportunity to express the defender's position on the circuit splits regarding the definition of "intervening arrest" and the Physical Restraint Enhancement.

I'm going to focus my remarks on the Physical Restraint Enhancement, but of course I'm open to any questions you all may have about the definition of "intervening arrest."

My testimony today is based on my almost 20 years of experience of representing clients charged with Hobbs Act robberies, it's based on my own experience of being a victim of an armed robbery, and it's based on my experience of being a Black man and, since the age of 16, being stopped countless number of times for questionable reasons by the police while I was driving.

The question as to whether the Physical Restraint Enhancement requires actual

physical conduct or can be triggered by nonphysical means should be resolved with Option No. 2 for three reasons.

No. 1, it appropriately punishes specific conduct that aggravates the underlying offense of robbery.

No. 2, it avoids impermissible double counting.

And, No. 3, it reflects the current sentencing practices showing the robbery guidelines are overly punitive.

Now, I'm going to focus on the first reason and touch on briefly the double counting concern.

The problems with Option 1 and 3 are that they create almost a de facto increase in the base offense level because Options 1 and 3 are punishing conduct that is inherent in armed robberies.

Every single robbery involves a taking from a person against his will by actual or threatened force or violence or fear of injury.

The threatened force or fear of injury is usually accomplished through the use of a firearm.

And we know this because the Commission's own statistics from fiscal year 2023 show that 77 percent of robberies are committed with a weapon and 78 percent of those are committed with a firearm.

So, in other words, the majority of federal robberies are accomplished with the suspect using a gun to threaten a victim or impose fear of injury.

It's used as a tool to scare and intimidate, right? The gun is used as a tool of psychological coercion.

And because these circumstances are normally present in almost every robbery, the Physical Restraint Enhancement is not acting as an enhancement if we're going to apply Options 1 and 3. It's acting as an automatic increase to the base offense level of 20.

And the problem with that is that the

conducts that Options 1 and 3 impact, it's already captured in the guidelines through the Firearm Enhancement, through the risk of death -- the Threat of Death Enhancement and through the Physical Injury Enhancement.

The Physical Restraint Enhancement punishes conduct that's supposed to address a different sort of harm separate and apart what the Firearm Enhancement is supposed to address.

I have two examples I think hopefully will clarify my position. About 14 years ago I was leaving the jail after seeing a client and I was walking towards my car.

It was late and I -- as I was leaving, I saw these two individuals, you know, they were kind of leaning on the building and they started to follow me.

They weren't talking, I didn't hear them communicating with each other, and I could hear them kind of getting closer and closer.

And before I got to my car, I figured, I mean, I knew what was about to happen. So, I

turned around and I said, what's going on? And I was -- a person pulled a -- the individual pulled a gun in my face and said, you know what's going on.

So, at that point, you know, he asked -- he said, give me your briefcase. And I think one of the -- I can't remember the case off the top of my head, but it talked about the victim who can be foolhardy. I was that victim.

I had a gun to my face and I said, no, I'm not giving you my briefcase. I just have files in here.

He again kind of pushed the weapon into my face and said, give me your briefcase. I handed him the briefcase.

Then he walks kind of towards my car and says, is this your car? It was, but I said, no, it's not my car.

He takes the butt of his gun, breaks the glass. He said, is this your car? I say, yes, yes, it's my car. I open it up. They both rummage through it and they run off, right?

What I just described to you is a typical armed robbery, right, and the Firearm Enhancement applies exactly to everything that individual did.

He used the gun not to physically restrain me because, as I said, even with the gun in my face, in my head, if push came to shove and I thought my life was at risk, I had options.

I could have tried to fight him. I could have taken off running. There were things that I could do.

Now, obviously I did not because the gun was in my face and I decided to comply with whatever he was asking, but everything that he did, all of that conduct was captured with the Firearm Enhancement.

Now, my second example -- let's compare that with this example. About a month and a half ago I resolved a case. It was a conspiracy to commit robbery. It was a string of robberies.

And probably the most egregious

robbery was three young men walked into a cell phone store. One of them had a firearm.

The store operator, they grabbed him, right, forced him -- physically forced him to the ground, flipped him over, grabbed both of his arms, twisted them behind his back and tied him up. Then they beat him. And then after that, they rob the store, right?

That example, right, is qualitatively different than what happened to me. In that example, his will was overborne not from the gun, but from the physicality of the encounter.

It was from the physicality of them grabbing him, putting him on the ground and tying him up.

Unlike me where I had, you know, I thought I had some options if push came to shove, that man had no options, right, and that is what that Physical Restraint Enhancement is trying to cover, right?

If you look at the robbery guidelines, every single enhancement, like, it's just

qualitatively a little bit different, right?

Brandishing a firearm, use of a firearm, discharge of a firearm, did the person threaten your life, did the person physically harm you, all of these things make robbery a little bit scary.

And then finally, were you physically restrained? Were you to the point where these individuals actually grabbed you or tied you up or did something that invaded your presence, you know, so much that you deserve another two-point enhancement?

That is what this enhancement was designed for. That is why they use the word "physical." That is why they use examples like tying up.

It's because the Commission wanted to capture those very limited circumstances where every -- where a suspect is actually tying and physically invading that individual's person.

Thank you. That's why I believe Option 2 is the best option.

CHAIR REEVES: Thank you, Mr. Carter.

Ms. Lin.

MS. LIN: Thank you again for allowing me to offer PAG's perspectives on both the proposed firearm amendments and also the proposed amendments to address circuit splits.

I'm actually going to start with the mens rea requirement for -- or the proposed mens rea requirement for stolen firearms and firearms with modified serial numbers.

The PAG urges the Commission to adopt a mens rea requirement for those particular enhancements.

I hear what people are saying about the need to promote public safety, and I hear what people are saying about how stolen firearms and firearms with modified serial numbers can be more dangerous.

But if the purpose is to promote public safety, then that depends on deterrence, and deterrence can only occur if an individual actually knows that the firearm they have is

either stolen or has a modified serial number and not necessarily knowing, but at least being willfully blind or being deliberately not conscious of the fact.

Promoting safety depends on deterrence. Deterrence depends on knowledge. By imposing a strict liability enhancement, it does not actually promote public safety or promote deterrence.

It's inconsistent with the way our criminal law normally works, as acknowledged by the Criminal Law Committee. And, in this case, there is no purpose other than increasing punishment and that's it. So, we would urge the Commission to adopt a mens rea requirement.

With regards to concerns about proof problems at time of sentencing, I admit I've never worked as a prosecutor; however, it seems like prosecutors generally have to meet proof requirements for mens rea during the case in chief.

They have to prove knowingly, that

somebody knowingly possessed a stolen firearm for any section 922(j) conviction.

Under the enhancement -- I'm sorry, under the proposed amendment, the mens rea standard is even lower. It's not knowingly. It's willful blindness or deliberately being not conscious of it or conscious avoidance.

And also, the standard of proof -- preponderance is lower than what it would be at the trial level itself.

So, from the PAG's perspective, I guess we actually don't understand how there are proof problems for this enhancement if it were to be amended.

Touching briefly on the proposed amendment regarding machine gun conversion devices, sort of piggybacking off of what Ms. Marrero has said, in light of the examples of the real-life clients that she has represented who have been impacted -- or would be impacted by such a proposed amendment, the PAG urges the Sentencing Commission to pause before adopting

such an enhancement.

My understanding, according to the data, is that there are actually very few cases that involve machine gun conversion devices.

I think the number is 4.5 percent of cases sentenced under §2K2.1 involve such devices. That is a small number compared to the total number of gun cases there are out there.

Given the potential disparate impact -- racially disparate impact, given the potentially absurd results there are out there about people who only have machine gun conversion devices being sentenced more harshly than people who have actual firearms, we would urge the Commission to not adopt this until it's done more studying of how MCDs actually -- how such cases are actually treated in real-life sentencing practices.

Moving on to the circuit split. Again, the Practitioner Advisory Group urges the Commission to adopt Option 2 similarly for the reasons that Mr. Carter has stated.

I would just echo what Mr. Carter has stated about the potential double counting that is inherent in the adoption of either Option 1 or Option 3.

Any robbery that involves a firearm being brandished is almost -- I actually can't imagine one where it would not also include a restraint enhancement if the commission were to adopt Options 1 or Options 3.

Requiring physical contact just seems to make more sense, it's more consistent with the actual language and it avoids double counting.

Finally, I don't know that anyone has touched on the intervening arrest proposal. We support the clarification, frankly, that is being proposed by the Commission as to when an intervening arrest actually is an intervening arrest.

There is one addition that we would like to add. The current proposed language includes placing someone in police custody as part of a criminal investigation. Basically, the

current proposal says that should count as an intervening arrest.

I would just caution against that particular phrase because there are circumstances out there where a person may be picked up as part of a Terry stop, say, and actually placed in a police car during the course of the investigation. And then that person is let go because, upon further investigation, it turns out that they were not the actual suspect.

Now, the chances of a probation officer getting paperwork about such a stop is low, but the way the current proposal is written, the placing someone in police custody as part of a criminal investigation, would technically apply to such situations and I actually don't think that that's what the Commission means to cover. So, I would caution against that phrase. The rest of the proposed language covers intervening arrests.

Finally, I believe that the CLC and the -- perhaps probation has raised the issue of

what should happen if somebody gets a summons for a felony case and then has a court proceeding. Not actually an intervening arrest, but the initiation of a new criminal case.

The PAG urges the Commission to not consider such an event an actual intervening arrest.

The reason why intervening arrest is important in considering two priors to be separate sentences is because it signifies that a person has been arrested, released, not learned their lesson and been arrested again.

It basically signifies a more serious criminal history when somebody has an intervening arrest as opposed to the kind of case where somebody has no idea that they're under criminal investigation and then is informed through a summons and brought into court.

Thank you. I am available for any questions.

CHAIR REEVES: Thank you.

My Commissioners, any questions of

this illustrious panel?

VC Mate.

VICE CHAIR MATE: Thank you all for your testimony today and all of your written submissions. The detail in them was helpful. Very helpful. I appreciate it.

I have a question and, Ms. Lin, you maybe anticipated my question in what you just said, but I was wondering whether anyone on the panel, and this relates to the robbery proposed amendment, whether anyone can think of an example -- the guideline already provides for a five-level enhancement for brandishing a firearm.

Are there any circumstances where the physical restraint enhancement, if we adopted Option 1, wouldn't apply on top of that due to the brandishing? Can anyone think of an example?

MS. GRACE: I can. I'd be happy to start the conversation on that.

Definitely, yes. The Department's position is that we are not focused on situations where a firearm is brandished to ensure --

CHAIR REEVES: I'm sorry, make sure the green light is on.

MS. GRACE: Second time.

CHAIR REEVES: Thank you.

MS. GRACE: Third time I'll get it.

CHAIR REEVES: That's all right.

MS. GRACE: We are not focused on situations where a firearm is brandished to ensure compliance, and I think that's an important distinction here.

The word "compliance" is not synonymous with "restraint." Ensuring compliance, that's your typical robbery where you are brandishing a firearm, directing it at a teller and directing that teller to hand over money to complete the robbery, essentially.

We are talking about restraint, using the firearm to keep someone from moving, to keep someone from stopping the robbery, from interfering with the robbery.

And I would submit that the example that Mr. Carter gave, his own traumatic

experience, would not trigger this enhancement because there was no point during that interaction where the firearm was used to keep him from moving.

There is a generalized fear, of course, and there are plenty of robberies where individuals would freeze and would not move to interfere with the robbery because of that generalized fear, but that's not what the Department is focused on.

The Department is focused on situations where firearms are used specifically to direct individuals not to move and to ensure that no one prevents the robbery's completion or prohibits escape.

VICE CHAIR MATE: Thank you. I appreciate that.

Mr. Carter, I'll let you go and then I'll --

MR. CARTER: Any time anyone pulls a gun on you and they're trying to rob you, they want you to stand still.

They want you to cooperate. They want you to comply. They don't want you to move. They don't want you to run away.

So, whether it's me pointing the gun at you, whether it's me acting like I have a gun, the whole idea of a robbery is stand still until I'm done with this robbery.

So, whether it's me telling you to get on the floor, whether it's me telling you to stay right there until you give me your wallet, whether it's me saying, hey, go to your car, like, that's inherent in a robbery, right? That's what the gun is used for.

The gun is used to make a restraint, to make you stand still until the robbery is completed.

I don't -- sorry, that's --

VICE CHAIR MATE: Thank you. And back to Ms. Grace. On the example you were talking about, I understand the distinction you're drawing in terms of, like, a concept.

But in terms of the words that are

here in our proposed amendment, which is, you know, if any person was abducted to facilitate, and it says, a person's freedom of movement was restricted through the physical contact or confinement, then it says, such as being held at gunpoint or having the path of escape blocked.

Under the circumstance you're talking about, would the government not argue this enhancement applied?

MS. GRACE: In the example that I gave?

VICE CHAIR MATE: Mm-hmm.

MS. GRACE: No, because the actions of a defendant are what we're focused on always, right? The aggravating circumstances. The aggravating actions of the defendant.

And if a defendant -- the example from our written submission where there is a gun pointed in the air and there is this generalized fear and there's the inherent circumstances of any robbery where of course, I'm sure, the defendant wants everyone to freeze, I'm sure the

defendant intends the gun to scare everyone, but that's different.

It's fundamentally different from an affirmative action to point a gun directly at a customer in a store, for example, and to order that person to his or her knees and to order that person not to move. Those things are different.

VICE CHAIR MATE: So, just one more. So, under Option 1 in your written testimony where someone pulls a gun and they point it in the air, if they yell "freeze" when they're doing that, then the Department would seek the enhancement? And if they don't yell "freeze," they wouldn't?

MS. GRACE: I wish I could speak for the entire Department in every single criminal case that would come before any judge.

I think the short answer to that is that there will be factual determinations made. There will be cases that are closer to the edge where the defendant's use of the firearm, the statements that he makes, whatever actions

occurred during the robbery, they might require a judge to make difficult factual determinations about whether there was some sort of affirmative act to physically restrain.

One thing I would note on that, and I'll refer to Judge Chang's comments this morning, is that trial judges are accustomed to fact-finding and they welcome that and we are focused not on the cases at the edge that may require difficult fact-finding.

We're focused on the core cases like the example that I provided in my opening remarks where that woman was on her knees with a gun to her head clearly physically restrained in a much more significant way than zip ties, being moved to another location of a store.

And the guidelines don't account for that at all in any way and that's what we're focused on.

VICE CHAIR MATE: Thank you.

CHAIR REEVES: Commissioner Wong.

COMMISSIONER WONG: Sorry, this is not

fully formed as a thought, but I wonder in reading our synopsis again of the proposed amendment, if there's an extent of which we have oversimplified the two sides of the split here as being physical restraint versus not.

As I recall, even in the circuits where they do hold that, you know, the majority of you, First, Fourth, Sixth, Tenth, Eleventh, it's always the use of a gun coupled with essentially a verbal command or, again, we're reading kind of just the parentheses here.

I think it's typically paired with a verbal command, a specific sort of verbal command that does the physical restraint. And so, in a way, it seems like it's not an example.

There wouldn't be a double counting with a -- I'm curious if you all agree with how I'm framing this, but there wouldn't be a double counting with a situation where the firearm is merely shown, for instance, upon entry. This is a specific inducement of the physical restraint involves the possession of the gun coupled with

an actual order for physical restraint.

Am I recalling this correctly or am I reading that side of the split --

MS. GRACE: No, that's correct and clearly far more articulately than I've been attempting to do, but that's right.

The word "restraint" is there. We're very focused on "physical" and what "physical" means and whether that pertains to the movements of the person who is restrained or whether it pertains to the measures that are used; but your point is critical, which is that the word "restraint" is still the focus.

And so, it's not just the presence of a firearm. It's not just inherent, generalized fear. It is the actual use of that firearm to ensure immobilization.

And in these cases, the clearest example and the reason that courts have determined that this must apply, is because in these cases with the verbal directives, that allows the fact-finding of the defendant's intent

to restrain.

VICE CHAIR RESTREPO: Can I just clarify this, Grace? So, in other words, in your example, the woman is on her knees, gun to her head, and the accused doesn't say anything about restraint.

So, she gets six points -- he gets six points for the gun being used and then he would get additional points for restraining?

MS. GRACE: So, with the otherwise used enhancement, I mean, five points for brandishing or six points for otherwise used, but there would be an additional point because the fact of restraint if -- it almost seems like a part of the discussion is whether the physical restraint warrants an enhancement at all because if the -- and obviously we think, yes, but if you -- if you determine that it does, which the Commission has, rightfully, then you're talking about the immobilization of someone who is in the store.

And so, if that person is immobilized

by zip ties or if that person is immobilized because there is a gun to his or her head, that's the comparison and there's really no difference.

And so, because the point is the restraint of this individual's movements, it's not double counting because it's a separate harm.

And that's what's important is the fact that it's not just brandish, it's not just a part of the robbery in its normal course, it is the restriction of movement.

VICE CHAIR RESTREPO: I'm going to go back to Mr. Carter's point. If the woman's got a gun pointed to her head, she's de facto restrained.

MS. GRACE: I'm sorry?

VICE CHAIR RESTREPO: If she has a gun pointed to her head, she's going to feel restrained. And so the defendant is going to get the points -- the robbery points for the use of a gun.

MS. GRACE: I think the distinction is better illustrated when you have a lack of

interaction, direct interaction from the defendant and the woman in this example.

If someone comes in -- if a defendant enters a bank and has a gun, brandishes that gun, I think it's fair to assume that no one in that bank is going to feel free to just walk out of the bank, right?

VICE CHAIR RESTREPO: Right.

MS. GRACE: That's the generalized fear. The distinction here is the defendant taking specific actions to immobilize not relying on the gun's presence by itself.

Taking specific action to point the gun at people, to order people not to move, that's the distinction.

It's that additional conduct beyond just having the gun and assuming that the gun is going to do what it is intended to do, which is scare everyone to stay in place.

MR. CARTER: But if I could, I think that is accounted for in the graduated enhancements of the firearm enhancements, right?

If I come in and I'm brandishing, that's accounted for. If I come in and actually use it, that's accounted for. If I come in and I actually discharge it, that's all accounted for.

Very rarely is anybody pulling a gun and not barking out a verbal order. All of this conduct is wrapped up in the threat of death enhancement and the firearm enhancement.

I think we -- I know it's not an exclusive list, but I think it is telling that the examples that the Commission chose to use of being tied up, that is a qualitatively different situation when a gun is put to my head.

If those two gentlemen had grabbed me and threw me to the ground and tied me up, I promise you the trauma that came with that robbery would have been worse for me because somebody touching me, throwing me to the ground and tying me up, in my opinion, that is a lot scarier than somebody standing at a distance and pointing a gun. It just is.

And whether it's scary for me and not

for another victim, the issue is that it's different.

It is not captured by the firearm enhancement. It's captured by the physical restraint enhancement. So, I do think double counting would be an issue.

COMMISSIONER WONG: Sorry, isn't another way of putting that -- you used the term "qualitatively different."

Isn't the comparison you should be drawing or the question we should be asking whether it is qualitatively different for an individual to walk in and at the doorstep wave a gun showing they have a gun and then put it away, that person has brandished the gun --

MR. CARTER: Mm-hmm.

COMMISSIONER WONG: -- versus someone who has pointed it to someone in front of him and said, get down on your knees? And I think that's sort of the question.

Those are both instances of brandishing, but is there a qualitative

difference there between the person who has the firearm, has brandished it, but not used it to induce physical restraint?

I see there's different views on that, but I think that is kind of the question. Is there a qualitative difference?

MR. CARTER: I think there is, and I think it's captured in the firearm enhancements and it's also captured in 3553.

Say a judge is hearing these facts and you get the point for the enhancement. And then as he's going and he's looking at the case and saying, you know, in this case, you know, it's a little different because -- he can still, you know, impose a harsher sentence under the guideline regimen, right? So, it's all captured.

COMMISSIONER WONG: Let's look at the section 3553(a) factor. I do -- but you said it's captured in the firearm enhancement?

How would the difference, if you believe there's a qualitative difference, be reflected in the firearm enhancement? In both

instances I would --

MR. CARTER: You think they both are brandishing.

COMMISSIONER WONG: Yes.

MR. CARTER: I think brandishing is me pulling out a gun and showing you I have a gun. I think "use" is me pointing the gun at you.

I think "use" is directing you to the floor. I think "use" is different than that.

VICE CHAIR MURRAY: So, you come in, shoot straight up and --

MR. CARTER: That's discharge.

VICE CHAIR MURRAY: That's use, right?

MR. CARTER: Right.

COMMISSIONER WONG: My experience has been that use tends to be pistol whipping, a discharge and that typically the government uses brandishing where it's just a verbal command.

MS. GRACE: I'll just say that's my experience as well. I have never saw it or seen seeking the otherwise used enhancement if it's not a scenario like a pistol whipping or

something of that nature.

MR. CARTER: I have.

MS. GRACE: Not to say there wouldn't be circumstances --

MR. CARTER: I have. Yeah, I have.

MS. GRACE: I can only speak to my own experiences on that.

MS. LIN: If I may, this conversation actually suggests that there is a different area for the Commission to be looking at, which is the definition of "use" versus the definition of "brandished," because I have experienced a situation where somebody actually points a firearm at another person and gives them an order to either freeze or to, like, affirmatively do something that the use enhancement ends up applying.

And if that is the harm that people are looking to address here, it seems far better to look at that kind of proposed amendment than playing with what the definition of restraint is.

MR. CARTER: Thank you, Susan.

MS. LIN: No problem, Michael.

(Laughter.)

MS. LIN: From the PAG's point of view, adopt Option No. 2 and then start looking at this "brandish" versus "use" and clarify what the distinction is between those two enhancements.

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: Can I shift this over to mens rea?

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: I guess this is a question primarily for Ms. Messec, although, obviously, interested to hear what the whole field thinks.

So, I take your point that adding the mens rea requirement is maybe just like the end of the enhancement.

Separately, though, is there a reason that independently justifies it? So, like, I think of these, like, non-mens rea areas as one of two things.

Like, one is either an area where things are self-evident and, like, people should just know, right? It's like some people argued this in the fentanyl context for mismarketing -- sorry, some people argued this in the fentanyl context for mismarketing, right, like, at the point at which you have, like, an oxy 30 that didn't come -- that you got from someone other than a doctor, you should be on notice. Some people argue that's not true, but you can see that concept.

The other one I can think of is, like, I kind of, like, not to be too Yale, but, like, a cheapest cost avoider, like, there is a problem and there's, like, you're making someone in charge of solving the problem and the person who should solve the problem is the person who is, in this case, like, sort of closest to the ground, the person who is receiving the gun, and I'm -- I guess I'm wondering what your mens rea theory is on this one.

Like, why are these things where it

is, like, fair to impose them? I get the evidentiary (audio interference) more visually obvious.

MS. MESSEC: Well, let me try to answer that by referring to some of the other --

CHAIR REEVES: Make sure your green light is on. Thank you.

MS. MESSEC: Thank you. Let me try to answer that by referring to some of the other mens rea provisions that are in the guidelines because some of the other commenters have said, you know, these are everywhere in the guidelines. The government knows what to do with this.

I think that those are very different, as a class, from what it would look like to impose mens rea here.

For instance, a half dozen of those provisions deal with misrepresenting somebody's identity in the course of coercing or enticing a victim into sexual conduct.

You know, you can see why that would be a very straightforward enhancement. It's

typically fairly easy to prove as somebody knows who they are and if they're lying about it.

You also see them in the case where you have to prove knowing involvement of contraband. That's something that's typically going to be seen in the offense conduct itself.

There's another class of them that involve knowledge as to drugs. And, again, a drug investigation is going to be very different from your typical felon and possession investigation where in the drug investigation you probably, for No. 1, have an investigation, right?

You may have repeated interactions with the defendant. There may be conversations with the defendant where the mens rea is going to be available.

In a felon and possession case, we don't typically have that at all. These are typically unplanned encounters.

And so, I think the evidentiary difficulties there are much higher than they are

in the cases where we have seen mens rea required by the guidelines.

VICE CHAIR MURRAY: Do you presume, or would you argue, that in most of these cases defendants do have the knowledge, it's just not provable, or is it that it's not provable and we don't know if they have the knowledge?

MS. MESSEC: I don't know that these individuals -- those cases I was referring to come at it from one perspective or another.

I think if there is mens rea in those cases, that is going to typically be discernible from the offense conduct.

And so, there may or may not be mens rea, but if it's there, the government should be able to prove it with reasonable effort.

VICE CHAIR MURRAY: Sorry, I was turning us back to the current amendment.

MS. MESSEC: Oh.

VICE CHAIR MURRAY: In the current amendment, is it that it's okay to not have a mens rea requirement because you think that in

the mine-run of cases, defendants who own, who possess stolen firearms do know they're stolen and so we don't need to prove it because they do know or is it that they have a duty to inquire so they should know?

MS. MESSEC: I think it's more the latter. We don't think it's unfair to apply it here because it's not an accident that you acquire a stolen firearm.

You're acquiring a firearm outside of legitimate streams of commerce where you would have that kind of assurance that it's not been previously stolen.

And so, I do still think that there is culpability there. There is something to deter. It's not unfair to put the mens rea requirement there.

And then separately, it's also a very difficult thing for the government to prove given the offense conduct.

So, I think for both reasons it makes sense not to put a mens rea there. But if the

Commission were interested in doing that, we would suggest that it be something along the lines of rebuttable presumption where the party who has the best access to that evidence is responsible for bringing it to the court.

CHAIR REEVES: Mr. Meisler.

COMMISSIONER MEISLER: Thank you. This is for Ms. Marrero on -- this is maybe a question of curiosity.

I obviously understood the Federal Defender's submission to oppose across the board any kind of specific offense characteristic enhancements for MCDs, but then I think on page 24 of your submission you said, in the alternative, if you're going to do something, do something specific to MCDs. Don't just transform the definition of "firearm."

What would that specific thing look like?

MS. MARRERO: In terms of we just want it to be tailored to MCDs, the specific offense characteristics, like a subsection tailored just

to MCDs, but in the sense of the position of the Defenders -- the Defenders Committee.

I would have to discuss with them and, if necessary, will submit a reply comment to address that particular concern.

COMMISSIONER MEISLER: Okay. But, I mean, we can say this now. We can wait with great anticipation for your reply comment, but is the idea that it would account for some of the things that people have discussed, some of the differences among quantity of MCDs possessed, trafficking, intent to traffic, things like that, or would it just be a general enhancement for possession?

MS. MARRERO: It would be a general enhancement. We do not agree that it should be treated the same, an MCD and affixed -- like a standalone MCD with an actual firearm.

MCDs on its own can inflict no harm. So, it would be -- it would not make any sense to treat them equally.

For purposes of the number of firearms

if you have four MCDs, it would be, like I said, actual fully machinegun and it would not be -- it would not be what we were proposing.

COMMISSIONER MEISLER: The counter argument, to play devil's advocate, would be that the four MCDs, again, if they're trafficked, right, would enable four other firearms to become fully operable machineguns. That would be the theory behind the enhancement.

MS. MARRERO: Yeah.

COMMISSIONER MEISLER: Okay. Thank you.

CHAIR REEVES: Yes, Ms. Mate.

VICE CHAIR MATE: Can I just -- I just want to echo Commissioner Meisler on, you know, if there are kind of alternatives to our Option 1 and Option 2, the people have -- that you thought through, was there a suggestion, you know, maybe an SOC?

And I understand you can't speak to it now, but if you -- if there are concrete ideas on what something like that might look like, I would

be interested in seeing that in your reply comments, not now. I'm not going to put you on the spot.

(Laughter.)

CHAIR REEVES: Any further questions of this panel?

Hearing none, thank you all so very much.

MR. CARTER: Thank you.

CHAIR REEVES: All right.

The next group of panelists will provide us with the practitioner's perspectives on our proposals regarding firearm offenses and circuit conflicts.

First, we will hear from Melinda Nusbaum, the Vice Chair of the Probation Advisory Group and a supervisor probation officer in the Central District of California.

Second, we will hear from Tribal Issues Advisory Group's perspective from Judge Erickson.

And finally, we will hear from Colleen

Clase, a member of the Victims Advisory Group and chief counsel for the Arizona Voice for Crime Victims.

Ms. Nusbaum, we are ready when you are.

MS. NUSBAUM: Thank you, Chairman Reeves and the Commission, for the opportunity to provide commentary on the issue of firearms and circuit conflicts on behalf of the Probation Officers Advisory Group.

For our testimony today, POAG intends to focus on our experience with applying the guidelines to case-specific facts and interpreting guideline definitions.

POAG appreciates the Commission is considering revisions to §2K2.1 to include additional enhancement for machine gun conversion devices commonly known as MCDs.

The guidelines currently do not have a mechanism to account for conduct related to MCDs aside from the base offense level.

As a result, the conduct related to

MCDs is inconsistently considered resulting in disparities.

While Option 1 provides a simple solution in uniformity and definition, POAG does not endorse this option based on the concerns with application issues and the identified scenarios addressed in our written testimony.

Instead, POAG was in favor of Option 2 as POAG believes the expanded definition should only apply to certain specific offense characteristics.

POAG was unanimously in support of the expanded definition of "firearm" being applied to §2K2.1(b)(1), which considers an increase based on the number of firearms.

This enhancement differentiates defendant's conduct in a measurable way. For example, under the current framework, a defendant who possesses who MCDs and a defendant who possesses 50 MCDs are treated the same under the guidelines.

POAG was unanimously opposed to

expanding the definition of "firearm" to §2K2.1(b)(4) for firearms not otherwise marked with a serial number.

As opposed to enhancement for other firearms, this enhancement would be universally applied to MCDs because they do not have a serial number.

The Commission has already acknowledged the dangerousness of these types of firearms by virtue of having a minimum base offense level of 18, whereas ghost guns, for which the subsection primarily applies, could have a base offense level that is significantly lower.

As discussed in our written testimony, POAG did not come to consensus regarding §2K2.1(b)(5) for trafficking and subsection (b)(6) and a cross-reference at (c)(1) for in connection with.

If the Commission expands the definition of "firearm," POAG believes that each standalone MCD should count as one firearm and an

affixed MCD, or MCD in close proximity to a semiautomatic firearm, should count as two firearms.

POAG observed that treating an affixed MCD as one firearm and treating an MCD located in close proximity to a semiautomatic firearm as two firearms may result in an unjust outcome because the affixed MCD is arguably more dangerous due to the firearm having fully automatic capabilities.

Additionally, the MCD affixed to the firearm could be readily separated to be sold or attached to a different firearm.

This is also consistent with the statutory treatment of MCDs. An individual possessing an affixed MCD could be charged with both possession of a firearm and possession of a machinegun.

Moreover, as a practical matter, investigative reports vary in quality and detail and it can be difficult to discern if the MCD was fully affixed to the firearm or compatible with the firearm located nearby.

In light of recent case law, POAG suggests that the body of the guideline, rather than the commentary, specify how MCD should be factored when calculating the number of firearms as the number of firearms can significantly affect the offense level at §2K2.1(b)(1) and (b)(5)(C).

Likewise, POAG believes it is prudent to include additional definitional terms and remaining commentary clarifying any perceived ambiguities into the guidelines itself rather than in the commentary.

Turning now to Part B of the firearms amendment, POAG observed that the mens rea requirement of willfully blind or consciously avoided knowing has been extremely difficult to apply and left to interpretation without uniformity.

POAG is opposed to extending this mens rea to the entirety of §2K2.1(b)(4) without providing further guidance as to what is necessary to apply this enhancement -- this

standard.

Further, POAG believes that a mens rea requirement for the modified serial number subsection would be impractical since it would rely on the defendant's knowledge that the serial number is legible to others.

POAG appreciates the Commission's efforts to strike the right balance between providing one uniform definition of "firearm' and producing a just outcome.

To switch gears to circuit conflicts, POAG appreciates the Commission's efforts to provide a more uniform application of the physical restraint enhancement at the robbery guideline §2B3.1 as this enhancement is inconsistently applied.

POAG overwhelmingly supports Option 3 which strikes a balance between a defendant causing physical restraint by physically touching the victim and a defendant causing physical restraint by affirmatively controlling a victim's movement.

By providing graduated punishment, this tiered approach recognizes the harm caused to the victim under both circumstances without treating the behavior the same.

POAG observed that there are times where a defendant's conduct is similar in nature to the conduct that received an enhancement under §2B3.1(b)(2) related to otherwise used or discharged a firearm; however, the majority of POAG believes that the new proposed enhancement captures additional conduct based on more commonly seen facts, including a firearm focused at the victim for a sustained period, the victim forced to move at gunpoint, or blocking a victim's path of escape.

Furthermore, to ensure that the defendant's conduct is adequately captured, POAG suggests that Subsection C be expanded to include "restricted" or "directed" rather than just "restricted."

The word "restricted" may be narrowly interpreted to only mean limited movement such as

a standstill, whereby the suggested language encompasses additional conduct of a defendant directing a person to move around a building at gunpoint.

To pivot to the intervening arrest amendment, POAG supports the Commission's effort to define "arrest" for intervening arrest purposes under §4A1.2(a)(2) when calculating a defendant's criminal history score.

POAG would like to highlight that the terms "formal custodial arrest," "noncustodial encounter with law enforcement," and "traffic stop" set forth in the proposed amendment may create new ambiguities.

POAG is in favor of using "formal custodial arrest" as a defining intervening event. POAG is concerned, however, that the specific circumstances identified in the proposed definition may have the unintended result of treating persons who are temporarily detained or brought to a police station for questioning as having an intervening custodial arrest.

Further, while POAG recognizes that the definition is intended to align with the majority of circuits, the proposed language is likely to present practical challenges.

The term "traffic stop" is broad and has different interpretations based on case-specific facts.

A traffic stop could result in a traffic citation, a momentary detention during an investigation, the issuance of a citation or summons for a more serious offense or a formal arrest.

If the Commission's intent is to only exclude traffic citations, then POAG recommends that the Commission include the alternative language, "The issuance of a written traffic citation alone is not an intervening arrest."

Of note, the proposed definition does not appear to address situations that fall between a written traffic citation and a formal custodial arrest.

Further, citations or summons do not

necessarily commence from traffic stops and it may involve more serious conduct such as theft or drug possession.

Without guidance, there is inconsistency with how these types of events are handled.

In the absence of a formal custodial arrest, probation officers are left to determine if the issuance of a traffic citation for an offense other than a traffic citation is a sufficiently intervening event. And if so, what date should be used as the arrest date for intervening arrest purposes?

As a practical matter, there are situations when an arrest report is unavailable or a formal arrest date cannot be determined.

POAG suggests that for noncustodial encounters with law enforcement or when a formal custodial arrest cannot be confirmed, at minimum, a defendant's first appearance in court on the charge is an appropriate notice to the defendant and serves as an equally sufficient intervening

event.

Thank you for the opportunity to share POAG's perspective.

CHAIR REEVES: Thank you, Ms. Nusbaum.

Judge Erickson.

JUDGE ERICKSON: I'll start with machine gun conversion devices. TIAG is, in our written testimony, has taken the position that we do not support the proposed amendment. Although, I would note that we agree that it has no unique applicability in Indian Country.

And so, we have fewer specific concerns about it than we would with some of the other issues that we've discussed here today.

On the issue as to the MCDs, what we really are concerned about is the possibility that the proposal would create the potential for a circuit split over how you count an MCD when it's actually attached to a gun.

And we think that resulting machine gun would likely be scored as two and, you know, we think that that's -- when they start counting

firearms, that that's not really appropriate.

I mean, if the machine gun enhancement is not enough, fix the machine gun enhancement because, you know, scoring that gun plus the device as two is -- two firearms, it seems, to us, to be problematic.

Likewise, the MCDs that are unattached and, you know, they are less dangerous. How they should be scored, we think, becomes problematic and, you know, I think that the judges when they look at -- or we think that when the judges are considering the sentencing factors under section 3553(a), the judge will take into consideration whether or not you're a person who's trafficking MCDs, whether there's a large quantity of them that would represent greater dangerousness.

On the mens rea piece, TIAG supports the amendment to establish a mens rea requirement, you know.

When we look at willful blindness, when it comes to a missing or altered serial

number, it seems to me that that's not a complicated thing to show, right?

Because if you think about a firearm and you look at all the firearms that have been presented in court when you're trying these cases and the serial number has been altered, these are not guys that have laboratory-grade finishing devices. They are not machine tool specialists.

I mean, the bluing on the firearm's been destroyed, you know. When you alter the serial number, it's generally quite apparent.

It's hard for me to look at that case and say that circumstantial evidence would show willful blindness in almost every case, right?

You know, and even with pistols that may be chrome, you know, the chrome shows alteration as well. I mean, it just doesn't -- it doesn't seem as difficult as some say.

Moving on from there to the circuit conflicts. When we look at the physical restraint, TIAG is of the opinion that Option 2 with the -- that applies to the enhancement only

when a person's freedom of movement was restricted through physical contact or confinement, is the most appropriate.

We think it's clear administrable standard that avoids overbroad application, you know.

We understand that the presence of the firearm obviously triggers an enhancement, and brandishment of it and use of it will -- and discharge all are important factors.

We actually -- one of the members of TIAG described a case in which a Native American young man on the reservation walked into a convenience store, displayed a firearm, said, step away from the cash register, and pointed the gun at the woman who was working the till.

The woman at the till recognized him and said, you're so and so and your daddy is going to be deeply disappointed in you.

And he said, yeah, just give me the money. And so, she gave him the money. And when she was pulling the money out, she pushed the

firearm away, would you just quit pointing that dang thing at me so it doesn't go off accidentally?

And, you know, and that sounds kind of crazy, but it is the sort of thing that does tend to happen in a lot of places in Indian Country simply because the communities are insular, they're small, everybody actually knows everybody else. And so, it may be a different thing.

And while it's very coercive, it doesn't necessarily follow that a physical restraint has occurred.

Now, as to the traffic stop as an intervening arrest, TIAG supports the proposed amendment that actually requires a formal arrest.

The view in United States vs. Morgan is of some concern to the TIAG members because, frankly, much of Indian Country is remote.

Law enforcement is few in numbers. They are alone and it is frequent when people are stopped in Indian Country, that they are directed to get out of the car and they are moved

physically to the back seat of a patrol car and they are placed in that patrol car mainly because of officer safety.

And that traffic stops that -- where you're concerned about the situation as were they physically, you know, taken into custody or were they moved, you know, for some period of time, it's just going to happen a lot more in Indian Country than it does in a lot of other places because just the physical remoteness and the fact that, you know, police forces are small and the nearest officer who could be called for backup might be, you know, 30 minutes away.

And so, you know, needless to say that when you are unaware of what the situation is, it's late at night and you've made a stop, those officers are more cautious than what you might find in other places in the country.

With that, I will be happy to try and answer any questions you might have.

CHAIR REEVES: Thank you, Judge Erickson.

Ms. Clase, if you can hear us, you may proceed.

MS. CLASE: Yes, Your Honor.

Good afternoon, Commissioner Reeves and members of the Commission. Thank you for allowing me to appear virtually instead of being in the snowy conditions in Washington, D.C.

I will first advise the Commission that my comments today rebut the position of the Victim Advisory Group.

The members of our group work in victim services, we work with victims of crime daily, and our positions are formulated based on our work and our experience with crime victims.

The first item I'd like to address would be the machinegun conversion devices. The Victim Advisory Group supports both options of the Commission's proposed amendment to Section 2K2.1.

We recognize that either option would result in MCDs being included in the guideline definition of a firearm; however the Victim

Advisory Group preference is for Option 2 and expanding the application to subsections B and C.

It is our position that Option 2 offers a more detailed application and is consistent with the sentencing scheme that holds those convicted of firearm offenses accountable.

Additionally, Option 2, and these are things that are extremely important to victims, they're also consistent with the purposes of punishment, deterrence and public safety.

There was nearly a 500 percent increase in §2K2.1 cases involving MCDs between 2019 and 2023, and this data is on the Commission's website.

I recognize that that may be a small percentage of the overall firearm cases, but it is a staggering increase.

In a January 2024 press release, the ATF reported that it had recovered more than 31,000 MCDs over the previous five years.

The data is alarming. Equally alarming are the fact that MCDs are also getting

into the hands of juvenile offenders.

I recently spoke with juvenile crimes prosecutors here in Arizona and they have seen an uptick in cases -- in juvenile firearm cases where juveniles also possess MCDs.

MCDs are cheap, they're easy to manufacture and can be made simply at home with a 3-D printer.

Once a legal firearm has been converted into an illegal automatic weapon with the use of an MCD, the firearm becomes extraordinarily dangerous to anyone nearby.

When the MCD is used, there is increased firepower. The firearm becomes more lethal firing hundreds of bullets in minutes. It will rapidly continue to fire as long as the trigger is pulled and until the magazine is emptied.

The use of an MCD also impacts control and accuracy even for experienced marksmen. This is due to the rapid rate of fire and the increased recoil.

This increases the risk of injury or death when large amounts of ammunition can be fired in a short period of time. It eliminates any opportunity that a victim may have to flee, to find cover, or attempt to defend themselves.

There is increased potential for mass casualties especially when used in public or crowded places.

The ultimate price of the use of MCDs will be paid by victims and their families. Surviving victims of firearm offenses will experience PTSD. Their lives will forever be altered.

The Victim Advisory Group, based on our experiences with victims and the positions they take and what they have shared with us over the years, we respectfully urge this commission to adopt Option 2 to justly punish offenders, to deter the use of MCDs, and to protect the public.

CHAIR REEVES: Thank you, Ms. Clase.

Vice Chair Restrepo.

VICE CHAIR RESTREPO: Yes. This is

for Ms. Nusbaum. I'm curious as to how the POAG came to this -- it's an interesting suggestion that the first court appearance would be kind of like the inflection point of an arrest.

MS. NUSBAUM: So, the point of the intervening arrest -- the point of the intervening arrest is to have this -- there's like a heightened culpability for a defendant when they're given notice that they've done something wrong and then they go out and commit another crime.

So, when you don't have a formal arrest, what do we use? Do we use the date of the citation? Is that sufficient notice?

And so, when you're going in front of a judge, POAG felt that when you're going in front of a judge, that's sufficient notice, absent a formal arrest, that you committed some crime and you're put on notice that that crime was warranting some type of criminal intervention -- or some type of criminal conduct, some type of criminal charge.

COMMISSIONER MEISLER: Just to follow up on that, I'm not sure if you had a chance to review the letter from the Criminal Law Committee.

They had flagged that -- basically that the Commission's suggestion may not have covered things like wave and file cases and other procedures used in state court for things -- for offenses more serious than traffic citations and they proposed adding to the definition this language: Intervening arrest also includes appearance on a court-issued summons requiring a person to appear on a felony criminal charge even if the person is not formally placed into police custody.

Does that align -- would that take care of some of the concerns that POAG has raised?

MS. NUSBAUM: Well, not every charge would be a felony charge. So, I think the concern that POAG has is when you're actually arrested, you're booked into custody, you're

given your Miranda rights.

When you have that interaction with a police officer, that's sufficient notice that you're alleged to commit a serious crime.

I don't think the point is to have all of the offenses moved to when you're first going in front of a court.

I think it's that when -- there is no specific notice like a citation is given to a defendant or when it's something that -- what would be, like, the hallmarks of an arrest, right? It's like you're arrested, you're booked into custody.

I don't think we need to move to a -- to always having a defendant appear in court to be an intervening event.

I think that it's just for the situations when they don't have a formal arrest, what do we use?

And when you're going in front of a judge and you're being noticed that you have been charged with a criminal -- with a crime, that

that should be sufficient notice.

And then if you go out and then you commit another crime, you're more culpable than a defendant who just gets a citation and then goes and does something else, another offense.

COMMISSIONER MEISLER: That is the sequence, right? You're talking here about a sequence in which the person gets notice of a charge via a nontraditional arrest, we'll call it, via summons, for example, and then appears on that.

The severity and the gravity of the situation should be obvious, then, at that point and that if they continue criminal conduct, that should be taken into account in the way the guidelines score criminal history?

MS. NUSBAUM: Correct.

COMMISSIONER MEISLER: Thank you. I think I understand.

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: I have a physical restraint question. I'm thinking primarily --

I'd be very happy to hear from everyone, but I'm thinking primarily of Ms. Nusbaum because you all were interested in Option 3.

MS. NUSBAUM: Mm-hmm.

VICE CHAIR MURRAY: And Ms. Clase because it's a victim question.

So, the way Option 3 works is it would be more points for a physical restraint by, you know, ropes, et cetera, ropes and ties and then fewer points -- a tiered approach where gun to the head is less.

And I think part of the idea is that it is less traumatizing to victims and I wondered if that does accord with your experience.

To me, it seems like maybe equally terrifying to have someone have a gun to your head versus being tied up with zip ties, but maybe not because you're more helpless.

I took Judge Erickson's example and certainly Mr. Carter. Like, he was very cool in the face of a gun more than I would have been.

So, I am just very interested in

people's thoughts on whether that tiering reflects the sort of trauma to victims, slash, severity of the crime.

Could you hear me, Ms. Clase? Did I do a bad job of --

MS. CLASE: Yes.

VICE CHAIR MURRAY: -- speaking? Okay.

MS. CLASE: I actually had a comment on physical restraint if you want me to move forward, because our Victim Advisory Group does support the Commission adopting Option 1 to the proposed amendment.

It would follow the circuits that have held that restricting a victim from moving at gunpoint is a physical restraint on the victim and that the direct threat of serious bodily injury or death a victim faces, when held at gunpoint, achieves the same ends as being tied or bound or locked up and it justifies the enhancement.

The approach that the Second -- should

I say the opposing circuits, Second, Third, Fifth, Seventh, Ninth and D.C., have taken seem to focus more on the lack of the offender's physical touch on the victim.

The Victim Advisory Group thinks that those circuits have failed to consider the intent of the offender to prevent the movement as well as the effect of being held at gunpoint on the victim.

The Option 1 circuits, by rejecting that touch -- physical touch limitation, seem to appropriately focus on the specific intent of the offender to prevent movement or action as well as the effect on the victim.

That position is -- we don't see an express requirement in the guideline right now that requires the offender to physically touch the victim to restrict their movement.

Whether the offender uses a gun or locks the victim in the trunk of a car or ties the victim up to restrain them, their intent and their motivation is the same to prevent the

victim from moving while the offender is committing the robbery.

The characteristic of the conduct is the depravation of the victim's freedom of movement, not the offender physically touching the victim.

I think pointing a gun at a victim is an effective way of restricting their movement and of ensuring compliance with what the offender hopes to carry out.

As the Option 1 circuits -- excuse me, yes, the Option 1 circuits have reasoned and stated in their opinions, these examples in the guidelines are illustrative rather than exhaustive.

Preventing a victim from doing something because they are held at gunpoint is adherent within the concept of a restraint.

A victim who is held at gunpoint would likely feel that they are physically immobile just as much as they would be if tied or bound or locked in a closet or a trunk of a car.

A victim with the fear of not surviving the ordeal would clearly realize there is a restriction on their movement.

Like other physical restraints that a victim is prevented from attempting to flee the location, they're prevented from attempting to defend themselves.

Being held at gunpoint is just as effective in restraining a victim as it is to bound them with rope or duct tape.

The offender who's holding a victim at gunpoint is creating a situation where the victim is going to feel they have no alternative but compliance.

The fear that victims experience, whether held at gunpoint or with some other type of restraint, is arguably similar.

They're going to question whether they're going to survive the ordeal, whether they will see their loved ones again.

The trauma that victims experience during the victimization, as well as in the

aftermath of the offense, will not be lessened because they were held at gunpoint instead of being tied up or bound.

We feel that justice requires the level of enhancement when a victim is restrained. Justice for the offender and the victim requires that offenders restricting a victim's freedom of movement, regardless of the means the offender chooses to use, should receive that same two-level enhancement.

And the notion of justice for a victim is not a novel concept. Even though the CBRA has only been around just over 20 years, as early as 1934 Justice Cardozo noted in Snyder vs. Massachusetts that justice, though due to the accused, is also due to the accuser.

Did that answer your question regarding a victim position and the trauma?

VICE CHAIR MURRAY: Thank you.

MS. CLASE: Thank you for allowing me to be heard.

CHAIR REEVES: You wanted to mention

something, Ms. Nusbaum?

MS. NUSBAUM: Yes. So, the POAG's position is that this one level compared to being two levels is -- takes that into account because the -- as mentioned in the previous panel, the firearm increase in the robbery guideline for otherwise used or brandishing, there could be overlap with that conduct.

But if a victim is traumatized because of how a defendant controlled their affirmative movement, then courts might look at this and weigh it differently.

This takes that into account and then you don't have that added disparity of some court saying this is more traumatizing to a victim or how you weigh it.

It just kind of puts it all on an even playing field when there is that -- without having a two-level, you're just giving that tier increase and recognizing that at the same time that -- recognizing that the gun enhancements in the robbery guideline account for that.

VICE CHAIR MATE: I see. So, you're seeing it as less of a reflection of a difference in the trauma to the victim and more as a discount to avoid double counting.

MS. NUSBAUM: Correct. And also to account for that conduct equal -- more uniformly.

CHAIR REEVES: I have a question for you, Ms. Nusbaum, on the mens rea requirement. I think you testified about that a little bit, right?

MS. NUSBAUM: Mm-hmm, yeah.

CHAIR REEVES: Okay. And I know it looks like POAG says, you know, a mens rea requirement would better reflect the increased culpability of a defendant who knew that the firearm was stolen compared to a defendant who might have been unaware; however, POAG unanimously is opposed to including the mens rea requirement of willfully blind and consciously avoiding knowing, and that's something that has been placed in other aspects, I think, of the guidelines.

Earlier I think you go on to talk about it being in the fentanyl, I think, and other portions of the guidelines.

And since it's been placed in there, I believe it's POAG's position that has caused some confusion.

I'm just trying to figure out what type of proof have probation officers seen that judges have required to reach this level of knowingly, consciously avoiding, willfully blind, because it seems as though, you know, it may take more fact-finding through testimony and otherwise, but it seems like one cannot easily, but get to that evidence of willful blindness or knowingly engaging in sort of the use of trafficked firearms or stolen firearms or obliterated firearms and things like that.

So, what has been the tension out there in the land, in the courts, if you all have discussed that in your POAG group?

MS. NUSBAUM: Yes. So, I think the concern with the mens real willfully blind or

consciously knowing is it's an unfamiliar term and people don't really know what actually meets that standard.

So, for some districts we hear they would only apply it if the defendant's admitting they're willfully blind and having that in the plea agreement.

So, even between co-defendants it might not be evenly applied, whereas a different mens rea, like, such as new or reason to believe is something that people are more familiar with and kind of understand what evidence is needed to meet that standard.

The concern with the "willfully blind" is that the record -- what records are we going to look at? Is it text messages between defendants? Is it, like, what records do we need to actually meet what is willfully blind?

I think the terminology is just unfamiliar and we don't know what is necessary for that standard.

JUDGE ERICKSON: Go ahead.

MS. NUSBAUM: Oh, okay. So, I think that it's just if you -- if this commission would like to use that terminology, there needs to be more information as to what is necessary so that it's more uniformly applied because currently there is a big disparity.

Some districts report that they only apply it if the defendant's admitting to it. Some are saying, no, we're looking at text messages. We're looking at, you know, evidence that were found in the house during the search. So, that's the concern is just a very -- the term is difficult to understand what support is needed.

JUDGE ERICKSON: Chairman Reeves.

CHAIR REEVES: Go ahead.

JUDGE ERICKSON: I just want to address that. You know, that's one of those issues that I think the judges are far more comfortable with than probation officers are, right?

You know, we instruct people/juries

all the time on willful blindness. We instruct them on knowing and knowledge and we expect them to make those decisions. When cases are tried to us to the bench, we make those decisions day in and day out.

And so, I think that really the issue that's been identified here is just like, you know, the probation officers are not fact-finders generally although they play a fact-finding role in the preparation of the PSIR.

And so, I think that if there's a problem here, it can be relatively easily solved by just saying, what are the parameters of evidence that could be considered for the preparation of the PSIR, and then what evidence could be then admitted to rebut it in an evidentiary hearing, right?

I mean, it seems to me that willful blindness is not all that unusual for us, but it's real unusual for them. And so, I think it's a situation that can be resolved.

COMMISSIONER WONG: Can I follow up on

that? Judge Erickson, you may be familiar from the last cycle when we added -- we differentiated "knowing" --

JUDGE ERICKSON: Mm-hmm.

COMMISSIONER WONG: -- from "willful blindness" in the fentanyl context, that we received commentary from the Department of Justice saying they are not different under case law.

JUDGE ERICKSON: Mm-hmm.

COMMISSIONER WONG: That they have been deemed equivalent.

JUDGE ERICKSON: Mm-hmm.

COMMISSIONER WONG: That willful blindness can be read to and require knowledge.

JUDGE ERICKSON: Mm-hmm.

COMMISSIONER WONG: And so, almost putting the same -- the lack of clarity may not be something that -- it sounds like under the case law we have drawn a distinction that is not reflected by judicial decisions.

Is that something you've encountered?

(Off-record comment.)

JUDGE ERICKSON: Yeah, I've got to say I haven't really studied that issue --

COMMISSIONER WONG: I'm not sure that there's a clear answer.

JUDGE ERICKSON: -- and so it's really hard. I've got opinions because, as you know, I always have opinions, but, you know.

(Laughter.)

JUDGE ERICKSON: But I don't have a very good answer for that other than to say that, you know, all I know is that, you know, if you go into the district courts, these are issues we work through every day and in trials.

And, of course, maybe we are creating all kinds of evidentiary problems for the lawyers that are litigating in front of us, but, you know, we just go marching ahead, I think.

And you've got judges on your commission. They can explain to you what their experiences are.

CHAIR REEVES: We got a court of

appeals judge on our commission.

(Laughter.)

JUDGE ERICKSON: Who used to work for a living just like me.

(Laughter.)

JUDGE ERICKSON: You know, just move forward and became legal, you know, kind of art critics, you know. We just wander around and say, I'm not so sure about that.

(Laughter.)

CHAIR REEVES: Thank you. Are there any other questions as we walk through the myriad of things for this distinguished panel?

And I'm so sorry, Ms. Clase. If you can hear us --

MS. NUSBAUM: She can hear you because she's watching the live stream.

CHAIR REEVES: Okay. Great. Great.

Ms. Clase, thank you so much for your testimony and thank you for your responses to our questions.

Thank you, Ms. Nusbaum and Judge

Erickson. This concludes this panel. Thank you.

We will be in recess for ten minutes. Thank you so much. And then we'll have our last panel.

(Whereupon, the above-entitled matter went off the record at 3:25 p.m. and resumed at 3:42 p.m.)

CHAIR REEVES: Our final panel will provide us with another stakeholder perspective on these proposals.

We will be hearing from Kyler Wallgren. Mr. Wallgren was raised in Alice, Texas. Today, he lives in Corpus Christi.

He has a full-time job as a line handler at a shipyard managing and securing mooring lines on ships docking and leaving the port.

Mr. Wallgren enjoys spending time outdoors with his family and friends and riding his motorcycle. In his free time, he gives back to his community through fund-raising and benefits.

Mr. Wallgren, we are ready when you are. You're closing us out for today, sir.

MR. WALLGREN: Good afternoon, Honorable Commissioners. So, thank you for inviting me down here. I couldn't make it up there. Sadly, I have to work a lot. I just came from work.

My work gave me about an hour to come on down here and do this. Thanks for inviting me to do it digitally.

So, during the time of my offense, I was young, on my own, just freshly moved out of my parents' house, young 20-year-old kid trying to start a life.

I fell behind on some bills. Made a mistake. I regret said mistake to this day. When I was younger, I spent a lot of time on my ranch.

My family had some really good friends out there in Alice, Texas, and we grew up hunting and working on -- working the ranch with the cattle and everything.

I was taught gun safety at a really young age. Funny given my offense. Learned with pellet guns. Moved my way up to shotguns and rifles. It's part of ranch life.

I was given probation for two years and eight months on an ankle monitor. My judge believed that I could turn my life around, which I did. I have a pretty nice life right about now.

Being sent to prison would have completely uprooted my life and turned everything around.

I would have lost everything but my truck and I have a nice house, I have a dog, I have a wonderful girlfriend, lovely, she has a one-year-old little boy. Love him to death just like my own kid and already lost my gun rights.

I don't want to lose everything else, you know. Getting sent to prison would have ruined everything I had going good for me because once I got arrested, I turned my life around.

I got out of everything I was doing

that was slightly illegal. I don't even speed much anymore.

I got a few speeding tickets that counteract that statement, but I don't even speed much anymore and I ride motorcycles. We're known for going a little faster than we should.

Staying out has allowed me to help take care of my mom and my sister. My dad works a full-time job doing 14 and sevens.

So, for two weeks at a time, the only one that can help my mother is me and a few of the brothers in my club that live out there, but usually it's usually me riding out there from Corpus to Flour Bluff, about a 45-minute ride to my mother's house.

My mother has a few disabilities. That means she can't be around much. She can't walk all that far. She can't drive at night.

Sometimes it's hard to take care of family matters and the house she lives in. So, I go over and take care of her and my sister, go cook dinner, some family time.

Currently, I look for work. I got put down to part time with my job, but I'm doing contract work. I never stop working. I'm addicted to it. Probably one of my only good addictions.

I have a felony record and it will be hard to find a new job, but I have a great support system and I do everything probation says.

I go report, do my testing. Haven't failed a single drug test. Haven't missed a single monthly reporting, except in the beginning I didn't know I was supposed to go over and I thought they would call me. That was my mistake.

I missed one month. But since then, I've been on top of everything. I've paid all my fees for my ankle monitor. I got to pay the $100 court fee and do my community service.

Other than that, the only reason community service isn't done is because I ain't really got time because of work.

I work all day every day doing

something, making money somehow just to keep everything going.

But if I had gotten sent to prison for -- what's the minimum now? Four years is what they're trying to do?

Four years is the minimum is what I'm hearing. Y'all bumped it up and a lot of people don't recover from a four-year sentence, but that's all I have on my notes and everything I wanted to say today.

If y'all have any questions, I'll take them.

CHAIR REEVES: Thank you, Mr. Wallgren.

Any questions from anyone?

Go ahead.

VICE CHAIR RESTREPO: A little off topic. Curious what experience you've had on supervision.

MR. WALLGREN: Say again?

VICE CHAIR RESTREPO: I'm curious to your experience with your probation officer.

MR. WALLGREN: So, I've had three probation officers. One I only had for about a month. I didn't talk to him much. I didn't hear from him much. He was all right.

The second one was Victoria. She was a wonderful lady. She let me go out and do what I needed to do for work and everything else.

She was very on top of things and she's a very nice woman. It's not what I was expecting out of a probation officer.

Simon, he was the one I had while I was on my ankle monitor. He's still my current one.

He also -- we had a little bit of a rough start because I was worried about work, but we figured it out. We got past all that and me and him had a very good time working together as well.

I have no -- honestly, no complaints about any of my parole officers.

CHAIR REEVES: What was your time of probation that you received? How long?

MR. WALLGREN: How long was I on the monitor or how long was my probation?

CHAIR REEVES: Okay. Well, how long was your probation first, and then how long are you supposed to be on the monitoring service?

MR. WALLGREN: So, my monitor actually just came off on the 5th, but I was sentenced to two years' probation and then I had eight months on the monitor.

CHAIR REEVES: So, when do you get off probation?

MR. WALLGREN: In 14 months.

CHAIR REEVES: In 14 months?

MR. WALLGREN: Yes, sir.

VICE CHAIR RESTREPO: Have the folks in probation been helpful in terms of work, helping you with resources, things like that?

MR. WALLGREN: So, I personally have not tapped into the work resources that help people find work just yet.

I do plan on reaching out here soon. I do have an interview to go to probably later

this afternoon through another company in the port, but I personally haven't reached out for that just yet. So, I don't have an honest answer for that.

CHAIR REEVES: With respect to the conviction that -- well, the charge that brought you to court and the conviction, I think it was you sold -- it looks like you sold a Glock switch or switches to someone.

MR. WALLGREN: Yes, sir.

CHAIR REEVES: Do you know if the -- how old were you at the time that that occurred that you actually agreed to do that for someone?

And then the second question I want to know, did you do it for an adult? Because I saw that a person paid you for it and do you know if that person was prosecuted either by the federal authorities or the state authorities or anybody?

MR. WALLGREN: So, within my case, everyone was prosecuted within what was going on. We were all of age and we were all around the same age between 20 and 23.

CHAIR REEVES: Did any other persons receive probation?

MR. WALLGREN: The one that was caught with a -- the one that started the investigation that was caught with a gun with a Glock switch device on his gun was given probation.

Only one person was given time and I think he was given two years, if I'm not mistaken.

CHAIR REEVES: Okay. Thank you so much.

MR. WALLGREN: Yes, sir.

CHAIR REEVES: Anyone else has any question for Mr. Wallgren?

Thank you so much. I realize you had to take off your job to do this. We appreciate you so very much for adding your insight and your input into the work that we do.

Please stay in touch with us in any way you wish, Mr. Wallgren.

MR. WALLGREN: My phone is always open for questioning.

CHAIR REEVES: Okay. All right. Thank you, sir.

(Laughter.)

MR. WALLGREN: Alrighty. You have a lovely evening.

CHAIR REEVES: All right. With that, ladies and gentlemen, I would like to bring our hearing on today's topics to an end.

On behalf of my fellow commissioners, I want to thank all of our panelists, the persons who prepped the panelists, all of our commenters because so much has gone into the written testimony and written comments, to all of our staff, all of you, those who are right here with us, those who are working remotely, those who are committed to doing the work that you do every day. We know we're still in business. We're working.

All of you who have taken the time to listen to this hearing today, I thank you. I welcome everyone to return to us next month.

We will be doing this again during the

week of March 10th. I don't know exactly which day yet. I don't right now from my notes. But anyway, please tune in then next month.

But for today's panelists and others, we've heard the testimony. We will consider your testimony. Anything you need to hear or see or figure out from the Commission, www.ussc.gov.

We will use your testimony, ladies and gentlemen, to make our sentencing policy that is right, we believe, that is fair and that is just, but for today our hearing is now adjourned. Thank you.

(Whereupon, the above-entitled matter went off the record at 3:54 p.m.)