UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING

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WEDNESDAY
MARCH 12, 2025

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The U.S. Sentencing Commission met in Suite 2-500 of the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE, Washington, DC, at 9:30 a.m. EDT, 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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P-R-O-C-E-E-D-I-N-G-S

(9:30 a.m.)

CHAIR REEVES: Good morning. I'm the Chairman of the United States Sentencing Commission, Carlton W. Reeves from the Southern District of Mississippi, and I welcome you all to this hearing today. I thank each of you for joining us, whether you're in this room or with us attending via livestream.

I have the honor of opening this hearing with my fellow Commissioners. To my left is Vice Chair Claire Murray, and to her left is Vice Chair Laura Mate. And to Vice Chair Mate's left is the ex-officio from the Department of Justice, Scott Meisler. To my right is Vice Chair Luis Felipe Restrepo, and to his right is our Commissioner, Candice Wong. We welcome each of you to our hearings today.

We're also joined by our Commission employees. Of course, some of whom are in this room, but most of whom, because we have a dedicated staff of several tens of dozens of

whatever, we have many more who can't -- we have over 100 employees, they can't be in this room, but they have done so much to make this hearing and all of our work possible. They've drafted our policies, they've set up this room, and they've done so much more, and they do so much more each day to make the Commissioner's lives tolerable and easy. So we appreciate everything that they do. So on behalf of the Commissioners, employees who are watching, who are listening, or who will hear about this, we appreciate you so very much. You are dedicated public servants. We know, as I spoke with the Judicial Conference yesterday, my hat is off to these public servants because they could be off doing other things, but they've decided to do the work for the benefit of the public and we cannot appreciate them any more than we do. So I thank each of you for your dedication.

Today we are here to receive testimony on two sets of proposed amendments to the Guidelines Manual. Most of our hearing will deal

with proposals regarding the drug guideline. At the very end of today and for the remainder of our time tomorrow, we will receive testimony on supervised release proposals. Panelists, I want to thank you all for being here. We've read your written submissions. Your time will begin when this light turns green and you will have one minute left when it turns yellow, and no time left when it turns red. It is my job to keep you on task today and tomorrow. So if I cut you off, please understand I'm not being rude. People from Mississippi just can't be rude, okay? Or people from Yazoo City in particular can't be rude. But we have -- we do have a lot to cover today, and again, we appreciate everything you've done in preparation of your testimony, but we do have a limited time to hear from everyone. For our audio system to work you will need to speak closely into the microphone, make sure your green light is on when you're speaking. And I ask that you keep it on red when you're not speaking so that there won't be any feedback with anyone

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

Now our first panel, since we've gotten all that out the way, I'd like to introduce our first panel, presenting practitioners perspectives on drug trafficking proposals. First, we have Kimberly Sanchez, who serves as an Assistant United States Attorney in the United States Attorney's Office for the Eastern District of California. Second, we have John Gibson, who serves as the -- as the Chief of the Criminal Division for the United States Attorney's Office for the Western District of Texas. And finally, we have Francisco Morales who serves as a senior litigator for the Federal Public Defender for the Southern District of Texas.

Ms. Sanchez, we're ready to hear from you when you are.

MS. SANCHEZ: Thank you, Your Honor. Chair Reeves, honorable members of the Commission, I'm grateful for this opportunity to present the Department's views on the proposed amendments relating to fake pills and machine gun MCD enhancements, and the safety valve commentary. I'll turn to fake pills first. Drug deaths, especially those from fentanyl and fake pills are a significant problem. A problem only compounded by social media. The Department appreciates the Commission's efforts to refine the fake pills enhancement so prosecutors can use it to effectively address the pervasive and deadly fake pill market. I helped create a multi-agency team of agents and prosecutors in my district called the Fentanyl Overdose Resolution Team or FORT, which investigates and prosecutes fentanyl overdoses and traces the drug to the source. Through this team's work we have learned that most pills are produced from non-industry pill presses and labs and sold in the clandestine market.

The Commission added this amendment in 2018 and refined it in 2023 to address fake pills. But the current language of the enhancement makes it difficult to use in practice. It requires a combination of proof of a defendant's mens rea and also affirmative marketing or misrepresentation. Together this level of proof is beyond that which is required to prove the underlying crime, often inaccessible to the government, and results in the enhancement being rarely used. In the age of coded sales and encrypted messages affirmative marketing presents inherent proof problems. Instead, we recommend a hybrid of the Commission's three proposals. Our proposal accounts for people who knowingly put these pills out for distribution in a way that their knowledge of the pills' composition seems obvious as a factual matter, but prosecutors often have difficulty proving in a concrete fashion. Our proposal will provide for an additional level of accountability for those higher up in the distribution chain who direct

the manufacturer and distribution of these fake pills.

Turning to the machine gun proposal. We join the Probation Officers Advisory Group and the Criminal Law Committee in supporting the proposed machine gun amendment, and we thank the Commission for considering it. Possession of a firearm unquestionably increases the dangerousness of drug trafficking. Machine guns and MCDs increase the dangerousness even further. We think this amendment helps address that increased danger. We also recommend expanding the proposed amendment to provide additional sentencing impact for drug dealers with arsenals of weapons or especially dangerous items, such as high-capacity magazines, hand grenades or NFA firearms. Finally, the Department opposes the Commission's proposed revision to the commentary on section 5C1.2 safety valve. We share the Criminal Law Committee's concern that highlighting the option of a written submission would undermine the amendment's intent and invite

distracting litigation. Practices among districts vary, but a common practice is to conduct most debriefings in person. This practice materially advances the goal of obtaining a defendant's truthful account of the offense.

In my district almost all safety valve debriefings are done in person, while making very limited exceptions for a written submission in appropriate circumstances. Highlighting the availability of a written submission stands to virtually eliminate in person debriefings. In over 20 years of doing this work, I know the value of the back and forth afforded in a debriefing. Moreover, truthfulness is thereby fostered because there is a heightened sense of immediate accountability for the defendant and their counsel. In my district and others, safety concerns have successfully been addressed for decades by thoughtful consideration of logistics to avoid the appearance that a defendant is cooperating with the government. I appreciate

the opportunity to testify today, and I look forward to your questions. Thank you.

CHAIR REEVES: Thank you.

Mr. Gibson.

MR. GIBSON: Chair Reeves and Commissioners, thank you for having me here today. My district has the largest share of the southern border. It includes two of our nation's largest cities, along with many isolated small communities. Our district prosecutes among the most defendants in the country, drug defendants, covering the full spectrum of offenders, from street level dealers and drug couriers, to the leaders of international cartels. My comments today will focus on the proposed amendments to methamphetamine, eliminating the highest base offense levels in the drug quantity table, and the low-level trafficking proposal.

Turning first to the Commission's methamphetamine proposals. Meth today is highly pure. Highly pure meth means that the distinctions between actual meth, ice and a

mixture of meth do not carry the same significance anymore. The Department is not necessarily opposed to eliminating these distinctions and favors one uniform rule, but such changes may first require seeking legislative changes from Congress. If the Commission decides to proceed, setting the guidelines at the current actual meth levels would result in fewer complications. Setting to the current mixture amounts would untether the guidelines from the mandatory minimums and create inappropriate disparities. For some defendants the mixture levels would yield guideline ranges that are less than half of the mandatory minimums associated with the quantity of actual meth. Setting the levels for those currently established for actual meth would avoid these anomalies, reflect the reality of the quality of meth sold today, result in more uniform sentences, and be consistent with Congress's intent.

Turning to the proposal to lower the highest base defense levels in the drug quantity table, we oppose this for three primary reasons. First, drug type and quantity are rooted in the structure of the Controlled Substances Act. This proposal would undermine the structure, setting all sentences, regardless of quantity, at, near, or below the mandatory minimum sentence. Doing so would provide less guidance for judges in many significant drug cases. Second, we share the concerns of the Criminal Law Committee and some judges that such a significant reduction for the most culpable traffickers may result in unwarranted reductions. In my experience, drug quantity and type present a very strong correlation to seriousness and culpability. This is especially true at the highest levels of the drug quantity table. These are generally not low-level people. Cartel leaders and major traffickers simply don't trust low-level people with higher quantities of their valuable product. These large quantities also represent higher

numbers of potential deaths and overdoses in account for the tremendous profits. Third, we think that existing statutory and guideline mechanisms such as safety valve, mitigating role, and zero-point offender reduction and other guidelines provide sufficient reduction in cases where drug type and quantity don't tell the whole story. The prosecutors in my district know that not all individuals charged with drug trafficking crimes or major drug traffickers are members of a drug cartel. The guidelines provide many avenues to reduce the sentencing exposure for less culpable traffickers. Should these tools prove inadequate judges can and do sentence below the guidelines.

Finally, for many of the same reasons, the Department opposes a new adjustment for low-level trafficking function. District judges have considerable collective experience and an established body of case law to rely upon when applying to current mitigating role adjustment. This proposal would add a host of new terms that

would introduce uncertainty and prove difficult to demonstrate given the illicit nature of the drug trade. Drug traffickers purposely operate in a manner that makes these new terms difficult to determine and apply. As a result, this proposal would add complexity, uncertainty, and disparity without clear benefits for defendants. If the proposal is motivated by concerns about the scope of the current mitigating role adjustment, we recommend conducting a review of §3B1.2 and its commentary, instead of this substantial change to §2D1.1. This may better accomplish the Commission's goal without adding complexity and litigation. Thank you.

CHAIR REEVES: Thank you, Mr. Gibson.

Mr. Morales?

MR. MORALES: Thank you, Chair Reeves, and may it please the Commission. I come to this hearing motivated by humility and empowerment, knowing what we cannot change and knowing what we can. For my 27 years as a public defender and working with my brothers and sisters in the

defense bar, whether public defenders or CJA attorneys, we know what we cannot change. I know that we cannot solve the public health crisis of substance abuse disorder and overdoses with guideline amendments. But we know what we can change. We can change a guideline that currently calls for sentences that are way too high based upon a failure to distinguish between cogs in a multinational economic system, which is the vast majority of the people we represent, and kingpins who are rarely prosecuted.

I know that the Commission can reduce sentences to reflect the Commission's statutory mandates and the reality of what sentences judges are finding appropriate under Section 3553(a), without letting the very real fears of the harms that come from substance abuse cloud our better judgment. Section 2D1.1 over punishes the least culpable in a drug scheme, applying base offense levels that equate kingpins with low-level cogs like couriers and street level dealers. My 27-year career began in the Western District of

Texas in the Del Rio division where most drug cases were people who were coming on through the ports of entry, couriers, if you will. From 2009 to the present, I work in the Southern District of Texas, in the Corpus Christi and Victoria divisions. There, my clients are couriers or checkpoints and street level dealers. So I run the gamut from port of entry folks to checkpoint folks to street level folks.

My experience, together with the experience of the collective defense bar, has taught us that there's a common through-line with these clients. None of these thousands of clients were kingpins, but each of them was subjected to base offense levels that did not differentiate between them and the capos. Nothing accounts for the level of culpability that a person has in their participation in the venture. Nothing saves the lowest level participants from the highest level of punishment.

Consider Joe, whose name I've changed.

Joe was a young man in his early 20s, who was charged with moving a significant amount of methamphetamine. Two persons that recruited him eventually faced prosecution. Those prosecutions resulted in the same base offense level for the recruiters, the mid-level folks, as it did for Joe. Clearly the least culpable of the group. At first glance, a reasonable observer would suggest that the way to handle this is through Chapter 3 role adjustments.

However, as my Defender colleagues and I have observed and as data has borne out, minor role adjustments are applied inconsistently throughout the country. And in my practice, judges are very hesitant to grant role adjustments in cases where a sole defendant is charged. This miserly approach, even in the face of this Commission's urging over the years to apply role adjustments more liberally, leads Defenders to support the Commission's approach in Part 1.

Done right, it can be a full-hearted

approach in making base offense levels more reflective of the heartland of cases, the cases we see, the heartland being low-level workers. You might analogize the drug trafficking market to any multinational retailer. I'll take Walmart, for example. The people I have represented and who are most frequently prosecuted in Federal Court have consistently been the greeters, the cashiers, the stock boys.

These roles are essential to the business, no doubt. Walmart needs those folks. But they're occupied by people who reap little for their efforts and are replaced immediately if they leave. Yet in every case, my clients have been subject to quantity-based guidelines as though they were the CEO or the Walton family themselves. My experience is not unique. To represent drug trafficking defendants is to represent people who have already been replaced in the trafficking system before their very first appearance in court.

My low-level clients' common

through-line is that they have an acute and particularized necessity from their standpoint to engage in their conduct, unfortunately. It is common to learn of my clients struggle with addiction as a reason to engage in criminal conduct. It is common to learn of my clients turning to trafficking when recent unemployment came for people who had only known nothing but work their entire lives. It was common to learn of my clients being driven to acute -- by acute medical necessity, whether it's themselves or a family member, problems that only money could fix.

And, yes, it is not unheard of to learn of clients who turn to drug trade to make money, often having been shut out from the legal economy or coming from a place where the legal economy just doesn't have anything to offer. My clients are not rich. In fact, while the power of forfeiture is at the government's disposal, that tool is not visited upon my clients because they have nothing. They start with nothing, and

they end with nothing.

The lion's share of people prosecuted across the country are not the people the current base offense level was meant to punish. By lowering base offense levels as proposed and adding the function focused SOC, the Commission can reformulate the guidelines to reflect the reality of the culpable players who are the ones actually getting prosecuted in Federal Court, and not impose a kingpin sentence on the least culpable players.

Defenders further support the proposal to change the way the guidelines handle meth actual and meth mixture for two good reasons. First of all, the Defenders believe that the commission should set the quantity threshold for meth at the current level for meth mixture for a very good reason, because the data tells us that even judges are going lower at the meth mixture levels than what the guidelines suggest. And, secondly, in my practice, and it's not just in my practice, the decision to charge actual versus

mixture depends in large part on which agency conducted the investigation.

If Texas's Department of Public Safety, for example, conducts the investigation, their lab does not test for purity, while the DEA lab does. This is especially pernicious in a place like Victoria, Texas, where I practice. It is a small town of 65,000 people, one federal courthouse, two presiding judges. A person's culpability and subsequent prison exposure should not turn on the vagaries of agency supremacy. And this quirk is not unique to my practice. It is one reported by my colleagues across the country, and it exacerbates an already overly severe guideline faced by, again, the least culpable.

Defenders oppose a proposed amendment that would obviate the mens rea requirement for an upward adjustment related to fentanyl. It goes against the core value that one's criminal liability should be tied to their knowledge and awareness of the proscribed conduct. Fentanyl no

doubt represents a serious public health crisis. I don't question that. But we cannot let fear, no matter how reasonable, and tragedy lead us down a well-worn road of failed criminal sentencing enhancements. That road leads nowhere near a solution.

I want you for a moment to just consider John, whose name I've also changed. John was a former client of mine who was charged with distributing small amounts of pills that were, unbeknownst to John, laced with fentanyl. Twice, not once, John took his own supply and overdosed both times. Nothing, not even the specter of death, stopped him from taking the drug again. But John was, and remains now, a member of the community that myself, the prosecutor, and the judge all call home. He is our neighbor. As a community, the plight of one is the plight of all.

What got John back on track was intervention and drug treatment. All of us involved in the case, from the prosecutor,

myself, to the Court, and to John, inherently realized that prison time was not going to end his cycle of addiction. Humility tells us that there's only so much that the criminal justice system can do in the face of a public health crisis. Sentences have been too high for too long, and they've been so during the entirety of the guidelines and the problems have only gotten worse.

And in my practice, I have watched the unending evolution of drug trafficking with substances become cheaper, more prevalent, and deadlier, all despite decades of Draconian mandatory minimums and the threat of overly severe guidelines. When I started my remarks, I said I came with a sense of humility and empowerment. Humility tells us who we can't change while empowerment allows us to make those changes that we can. I thank you for your time, and I welcome your questions.

CHAIR REEVES: Thank you. Thank you, Mr. Morales.

I turn to my colleagues. Any questions from this esteemed panel?

VICE CHAIR RESTREPO: May I?

CHAIR REEVES: Yeah. Oh, yes, sir.

VICE CHAIR RESTREPO: Ms. Sanchez, could you walk us through your hybrid and tell us why you think it's better than the proposals in front of us?

CHAIR REEVES: Make sure your mic is on.

MS. SANCHEZ: The hybrid does retain part of what the Commission's proposal has. There is a defendant-based provision and then there is an offense-based provision. However, there's also a provision in subsection B that does not have a mens rea requirement. It's offense based, but it does have a provision that a defendant can show that he or she did not reasonably know that the substance contained fentanyl. So it has an essential escape patch.

What the difference between the Department's proposal and the Commission's

proposal is, is it does allow for that class of offenders. And it's a large number that falls within this. And the statistics bear out that this enhancement is not applied very often, where the evidence of the offender's mens rea, or their knowledge of what is in the pill, is not easily accessible.

For example, in a business that's operating the sales of fake fentanyl pills, in my district, in my experience, we have a large number of M30s or blues. The sources of supplies of for those pills don't necessarily engage in direct communications. Or if they do, it may be in -- via encrypted devices that would be easily accessible -- or I shouldn't say easily – it would be more accessible to the government so that they could show that the offender knew what was in the pill, that they said to somebody, "I'm going to send you a shipment of these pills from the pill press or from the super lab. They're M30s and they look like Oxycontin pills, but really, they contain

fentanyl."

And so the enhancement as it's proposed doesn't address that gap in what is really baked into or is natural in the business itself, that it doesn't require that everybody in that chain of commerce actually discuss what's in the pills because they already know. It's an ongoing business.

VICE CHAIR RESTREPO: So it's really a reverse -- it's a reverse burden. The burden would be on the defendant to disprove that he or she knew that there was fentanyl in the pill?

MS. SANCHEZ: Yes.

VICE CHAIR RESTREPO: So that would in essence require the defendant to testify. And if the judge disbelieved the defendant, you're looking at obstruction points. Is that something you thought about?

MS. SANCHEZ: It could require the defendant to testify or show by other circumstantial evidence. For example, in one of our overdose cases, we did not prosecute the

person who shared some cocaine with his friends. But in that instance, that person went to get some cocaine from a source that he had gone to for quite some time, and he always bought cocaine.

So he believed that he was buying cocaine that he was going to share with his friends. It ended up that what he got was fentanyl. He had a long-standing relationship with that person. He had been buying for quite some time. And so he did not know. He had no reason to know that there was going to be fentanyl in that powder.

CHAIR REEVES: I was just going to follow up in that context where he did not know. You would not try to charge him with knowingly selling fentanyl then, right? Or whatever the drug it was. If he -- if he engaged with the producer, I guess, on multiple times, and on this one time, it had fentanyl in it, what did you all charge him with?

MS. SANCHEZ: So let me back up a

little. We didn't charge that person. He was sharing with his friends. We charged the source of supply. The source of supply didn't tell him, "I'm providing you with cocaine that's now laced with fentanyl." But that was just an example of if we would charge that person. That would be an example of a situation where he had no reason to know that there was fentanyl in the substance.

COMMISSIONER WONG: Can I just follow up on that too? So option one that we had proposed was offense based and it said the offense involved representing or marketing mixture substance. And I understand the Department's proposal, at least the B section, to be broadening that, so you don't lead with the language representing or marketing. Representing or marketing is part of it, but also just, you just have an offense that involved the substance.

But can you help us unpack from a practical perspective what you have seen as problematic about that representing or marketing implementation of that language, I guess? What

I'm -- what I'm getting at there is, are you finding that judges are, or courts, or do you know, are they applying that inconsistently where they are requiring differing levels of affirmative actions on the part of a specific defendant? Is there -- is the problem inconsistency in application, or is it just too stringent, or is it -- you know, do you have a sense of sort of what we're seeing across the country?

MS. SANCHEZ: Yes, Commissioner. In my experience, in our cases, we haven't had the enhancement applied. And in large part, that was because we couldn't show the marketing or the active misrepresentation on the behalf of the defendant. So the fact that somebody merely sold an M30 pill or a blue wasn't enough to prove that there was misrepresentation, active marketing.

Particularly when you have an established relationship between the consumer and the seller or the seller and the source of supply, there's not that direct communication

between them to say, "I'm providing you with an M30 pill that contains fentanyl." So there wasn't any active misrepresentation or marketing that there was a fake pill being sold.

CHAIR REEVES: Yes?

VICE CHAIR MURRAY: Thanks to all of you for your testimony. My question is a meth question for the government. So in your letter, you say that the proposed amendment fails to comply with congressional directives. I totally understand the Department's argument about liquid meth and about the prevalence of liquid meth and how as a policy matter, that would fall under the new SOC because it's non-smokable and non-crystalline.

And that might not be a good idea from a policy perspective, but I -- I'm not sure I understand what the legal problem is. Why doesn't the existence of the SOC put the amendment in compliance with the congressional directive?

MR. GIBSON: Are you referring to the

Minus Two on the proposed amendment having to do that? If it's not smokable, then you get a Minus Two --

VICE CHAIR MURRAY: Exactly. Yeah.

MR. GIBSON: Again, I think this is a -- it's a congressional mandate. And I think if you look at it, they wanted to punish more harshly those individuals with smokable meth. And so I think reducing it is an opposite approach. And I don't think it necessarily is consistent with what the -- what Congress is intending. In addition to that, I think today's meth is -- it's universally smokable, even if it's -- if it's liquid. It -- eventually, the end user uses it in a way in which it is. It is smokable.

I understand that. Why -- it is an approach -- it is a potential approach to take. I think it's inelegant also because what does -- what does smokeable mean? It will -- it will result in litigation. There will be -- it will be difficult to determine, our own chemists have

told us this is. You know, what is smokeable and what is not is a very fact determined, region by region, and area by area.

VICE CHAIR MURRAY: But so is the concern that the amendment does not leave smokeable or crystalline or smokeable crystalline meth punished more severely than non-smokeable, non-crystalline meth?

MR. GIBSON: Yeah. Correct. And I think that's because of the you know -- meth comes -- we've seen meth in cardboard. We've seen meth in liquid. And eventually that product is turned into a substance, which is smokeable. And as a result, making that differentiation, that minus two, it's based on the market date doesn't make any sense.

VICE CHAIR MURRAY: So is it more of a policy concern than a legal concern? I mean, it seems like you're saying, oh, there wouldn't be a lot of things that fall under the SOC.

MR. GIBSON: I don't think the -- you know, as a fact of matter, we rarely see the ice.

It's almost -- it's not something I've seen in a number of years in my district. And it's a -- it is a function of the meth that's being sold today. I do worry that the minus two approach, I think it is both a policy, but I do think Congress did weigh in on this. They, at that time, which I guess now is in the early '90s, we're dealing with a different problem. I think the -- if we're going to go -- if the Commission decides to go to the -- that approach, the best approach would be to make -- to equalize the ice with the actual meth, because that is in reality what is being sold today on the streets.

VICE CHAIR MURRAY: Thanks.

MR. GIBSON: All right.

VICE CHAIR MATE: Good morning. Thank you all so much for your written testimony, and for being here with us today and your testimony this morning, we really appreciate it. I know it's a big time commitment and we're grateful. Mr. Morales, I want to turn to Part A of the amendment and I had a question. Maybe it was

just a clarification question on your position about one aspect of it. There -- in your -- in the written comment, there was a note that the proposed low-level drug trafficking specific offense characteristic would serve a different purpose than the Chapter 3 Mitigating Role adjustment. And I was wondering if you could elaborate a little bit on how you would propose the -- they interact, like the SOC and the Chapter 3. Should they -- if one applies -- you know if you are -- you're applying the SOC in Chapter 2, never turn to Chapter 3? I think some other people commented pick whatever's highest. There may have been someone who said do them both. So I was just curious about your position on that possible interaction.

MR. MORALES: Thank you for the question. The Defenders believe that sentences are too high across the board and we're shooting toward moving sentences low for a number of reasons, not the least of which is the problems that we're seeing at the Bureau of Prisons with

the overcrowding and the violence and the -- everything, the lack of staffing, lack of morale, all those things. So we have taken the position that the best thing to do across the board is lower sentences as much -- as much as possible. And what we are seeing judges doing in just merely in the context of §2D1.1 is going below those guidelines, even where there's a §5K1, even where there's a §5K3.1. Going even below those guidelines for those reasons. We're also seeing judges inconsistently apply the minor role adjustment. Even though this Commission has done basically everything except scream at judges across the country to be more liberal about the approach.

So we believe that a combined -- we didn't -- the Defender's position is not that we settled on 30 because that's where it should be. Our position was that it probably should be less. And so we are coming at this and trying to urge the Commission to support both proposals because 30 reasonably sets where the heartland of our

cases land. But then there's also specific functions that the Commission has addressed in its proposal that exists that will give judges and courts more of an idea as to how to reduce by way of mitigating role to be more specific about it. And that's why we suggest both should apply.

VICE CHAIR MATE: Okay. And just to follow up on that, when you say -- I want to clarify because there's the kind of capping of the base offense level, and I understand wanting, you know -- the Defenders want that. But is it that if with the minus two or the minus four, the minus six for the specific offense characteristic, if that applied, would Chapter 3 also apply or not?

MR. MORALES: I -- no. No.

VICE CHAIR MATE: Okay.

MR. MORALES: The Chapter 3 minor role? No.

VICE CHAIR MATE: Okay.

MR. MORALES: No. We think that would be taken care of through the SOC.

VICE CHAIR MATE: Through the SOC. Okay. And then -- okay. And can I ask one other question?

CHAIR REEVES: Of course.

VICE CHAIR MATE: Okay. It's kind of related to the mitigating role aspect. And you mentioned that the Commission has taken steps to encourage people to apply mitigating role in the past. I had a question about how that relates to your preference for Option 2 in the listing of examples in the SOC. And I was curious whether you think a kind of discretionary example approach as opposed to the sort of trigger approach in Option 1 would result in the same issues that we've seen with Chapter 3.

MR. MORALES: What I've seen in my experience is when judges sit down and have one sole defendant in front of them, they -- whether it's a lack of imagining that there are bigger parts to the organization or for whatever reason, they get stuck on this notion that this courier, this low-level cog, this mule is fundamental,

essential to the -- to the action. And so they get lost on that. And so in my experience, it's almost a shut-off completely. So I think either respect is a step up from where I'm at. And that's not just speaking from where I'm at in the Southern District of Texas, that's also all of my experience in the Western District of Texas as well. And when you put those two districts together, that's a lot of cases. And that's a lot of judges who feel at times bound by, for example, a Fifth Circuit case law on the periphery, requiring that a person be in the periphery to get a minor role. And that's just -- it sets up litigation in a very weird way about how do we show periphery? How are you peripheral to this to this suggestion? So these, any of these are better than where we're at right now.

VICE CHAIR MATE: Thank you.

MR. MORALES: I thank you.

CHAIR REEVES: Yes.

COMMISSIONER MEISLER: Just to follow

up with Mr. Morales on the -- on the low-level of function adjustment. So one of the things that you mentioned and stuck with me was potential difficulties in having courts apply the adjustment in single case defendants. And so some of the proposed language the Commission has here, it says that this reduction shall apply regardless of whether the defendant acted alone or in concert with others. Would -- suppose the Commission did not do the full workup here on §2D1.1, but were inclined to add that §3B1.2. Would that adequately address the issue?

MR. MORALES: I don't think it will. I don't think it will. And thank you for the question. Because again, the -- this Commission has in the past given specific examples of people unloading drugs, of people having this function and that, and the judges are still stuck on what they believe to be current. For example, in my practice, current Fifth Circuit law on the periphery. And they just hold the view that it -- this person is fundamental to this crime being

committed in this indictment, so therefore no. And so I think that wouldn't go far enough because they've had that carrot in front of them for a long time and it's not gone anywhere.

CHAIR REEVES: I have a follow-up then for you, Mr. Morales. Did -- were you through Commissioner Meisler? You mentioned in §2D1.1 with the cap. What -- with what we're suggesting, 30 I guess, and I think you're advocating that it ought to be maybe 20 or below or something in that regard. I know you've given some sort of anecdotal sort of talking issues with respect to that. Is there any data that we can look at that suggests that judges might be sentencing people around the highest level of 20 that you might suggest?

MR. MORALES: Judge, I am -- I am unaware of that. But I know that on the whole, they are sentencing folks outside the guidelines and below those guidelines in massive amounts. So on the one hand they have this the North Star being § 3553, trying to guide them to where they

think is correct. And what I'm asking this Commission to do is get us to where -- to reality on the ground, to what the judges are doing, to what they see as proper and appropriate under our North Star. And so I think on the data question, I'll have to get back with the reply brief and we might be able to find something to give the Commission later.

CHAIR REEVES: And the part two of my question with respect to the role adjustments that we put forth with the reducing as to six levels. I think in your -- in your information, you suggest, well, maybe it ought to be as low as 17 for a – low-level drug traffickers. I mean, is that the appropriate range in your view?

MR. MORALES: Judge, I think from my experience, that's where I see my judges going. I see them going even where it's a 10-year mandatory minimum with other considerations and everything else, them going down to that range, approximately level 17. And so they're ahead of it on -- in some of these cases, and across the

country, they're ahead of it. I just think that -- that's the more appropriate range for people who are -- who are the Walmart stock boys, if you will. Or the Walmart cashiers, if you will. That's clearly the lowest level folks. And the way that we know that they're the lowest level folks is because -- and we've gotten this through intel. The organizations hire them and they don't know where to take anything until they get past the checkpoint or into a city where the drugs are supposed to get to. And that's to camouflage the identity of the multinational organization so that the person with the least culpability has the least information and can least help themselves. And so we think that a change of the -- in the BOL is going to better reflect the cog nature of -- and I hate to refer to them as cogs. But if we see them that way, that -- that's what I'm -- that's what we have. That's the heartland of the cases that my brothers and sisters and myself have been seeing in the Defense Bar.

VICE CHAIR RESTREPO: Mr. Gibson question for you and this, I -- I'm curious to everybody's view on this. Everybody in this room has long struggled with drug guidelines. And I understand your position to be that quantity and type are typically fairly reflective of the individual's culpability. But in light of relevant conduct considerations and conspiracy considerations, oftentimes you have low-level folks getting swept up and taken the entire way to the conspiracy. If you were writing on a blank slate or an open book, and we're always looking for ideas, how should we -- or what are the real accurate measures of culpability in a drug organization that can be -- that can be quantified.

MR. GIBSON: Well, I think obviously type and quantity are very important. They're mandated by Congress as far as review. And it is -- it is an accurate reflection of the seriousness of the -- of the crime. But I think we're in -- obviously, my district, a lot of the

judges drop part below the guidelines, especially on meth, especially like when we're couriers into the country. And I think what they do -- they struggle is that you have one or two kilograms of methamphetamine, you have a what is -- a person who is -- has a little -- limited knowledge. But they struggle with the role. That you look at the minimal role, the minor role, they struggle with that because it could -- you may have an individual who did somewhat of a substantial planning. They registered a car in Mexico in their name. They did other things in Mexico that helped facilitate the -- their drugs crossing into the United States.

And so it disqualifies them for -- from minor minimum role and the resulting reduction in caps on the base offense levels. And I would echo what the Criminal Law Committee said is that perhaps looking at the -- at §3B1.2, because there is a relationship between rolling and where the guidelines should be. And I think that's where judges struggle is that you have

these drugs that had, score up high on the -- on the base offense level. You have someone that's low-level. They feel, I guess, miserly in some circumstances doing that. But in approach to §3B1.2 via by way of commentary or other substantial changes, might, you know -- if I'm -- if I'm driving on a -- or creating a blank slate, that's what I would think.

VICE CHAIR RESTREPO: And again, Ms. Sanchez and Mr. Morales, your thoughts on this.

MS. SANCHEZ: I would echo what -- oh, I'm sorry.

Regarding what you could quantify in terms of sentencing for lower-level folks in a drug organization. But I do think that the amount of the drug matters. If you're dealing with an organization that's dealing in hundreds of kilograms or multi kilograms of any kind of drug versus a street organization that's dealing in smaller amounts, the scope of the organization does quantify the severity of everybody in that organization. I think that the minor role

reduction accounts for minor roles. There are variances. There are other ways where people who are new to the organization, they don't have a criminal history, they can safety valve. There's a whole laundry list of ways that can account for their overall role in that organization. But it -- the significance of the organization and the amount of drugs that organization deals should play a role in determining or quantifying, I guess the base level of where somebody starts, where a judge starts looking at someone's significance.

VICE CHAIR RESTREPO: Do you see any issues with over representing or excessively punishing somebody in light of relevant conduct considerations? Somebody's on the corner selling drugs and the folks upstairs are moving kilos and he's part of this conspiracy and under relevant conduct considerations, he could take the entire weight.

MS. SANCHEZ: In my experience, that's not the way our judges have sentenced. And I've

practiced in the middle district of Pennsylvania, albeit 20 years ago, and I've also collaborated with many of my colleagues. In my experience, the low-level courier or the stash house operator is not being held accountable, probation isn't recommending that to be included in their guideline calculation, the overall amount that the organization's responsible for. And I can say that from the perspective of doing larger drug cases where we have people in various levels of the organization where the courier gets caught with 20 kilos and the whole organization maybe was bringing in 200 kilos and that -- we've seized that. That courier isn't being held responsible for the 200 kilos.

VICE CHAIR RESTREPO: Mr. Morales?

MR. MORALES: Thank you. I wanted to return back to the example I gave of Joe. Joe who came in, he was moving, in his case, liquid methamphetamine. That got him to level 38. There's no higher guideline offense level than level 38. And Joe was kept away from all the

information about the people who were to receive this drug, and he was held to the -- to the standard of a kingpin. And all that he could do to try to get away from those hundreds of months of exposure would be hope to God that everything works with Safety Valve, hope to God that maybe I can convince a judge that minor role in there, hope to God and hope and hope and hope.

And so I think when I came to this hearing and talked about humility, there's some things we can't change, and then there's some that we can. And that I hope to empower -- to bring a sense of empowerment to what we can change. And with all respect to my co-panelists, Ms. Sanchez talked about holding an individual responsible for the organization's conduct. That's where we think the train is off the rails. With respect to Mr. Gibson, he spoke earlier about no one would entrust anybody with that level of drugs but for if they were a great grand player. That's not my experience. My experience is that people get involved in the drug trade

because their mom got sick and has cancer and needs treatment, or they themselves are -- need medicine for something, or they are a drug addict. It's an acute, particularized need for some money.

And the worst part of it's when you have a defendant who, having the least amount of culpability, has worked their entire lives, and one little thing goes wrong in their life. One thing. Whether it's an immediate emergency medical situation to where they need something quickly, money, and -- or they lose their job, and they've known nothing but work their entire lives, and they have to go to their family and say I can't do Christmas this year, or I can't take care of you, or I can't get all your clothes for school.

So these are not the kingpins. These are not the capos. These aren't even the mid -- mid-level folks. These are folks with an acute, particularized need. And we think that for years, our guidelines have been misrepresenting

their level of culpability. And we think that the proposals that this commission has put forth is going to address those, I think, for once and for all, I think.

CHAIR REEVES: Commissioner Meisler -- you had a question?

COMMISSIONER MEISLER: One follow-up.

CHAIR REEVES: Yeah.

COMMISSIONER MEISLER: I'm just -- your mention of the Safety Valve and §5K1.1 and those kind of mechanisms just maybe raised one question in my mind, which is basically how -- whether the Commission should be concerned about any disparities introduced by measures like these that have the potential to set ranges. That would be below -- that would be trumped by mandatory minimum sentences in some cases. So should we -- should that be a concern for us if we have situations where folks basically may put pressure on Safety Valve, on §5K1.1, on § 3553(e) and (f), and those kind of functions, because you're going to have folks who may have similar quantities,

some qualify and some don't, but the guidelines are no longer playing that kind of central role. Instead it's the statutory minimums and whether the defendants qualify for those limited mechanisms of -- from relief for those.

MR. MORALES: Thank you. And what I spoke about earlier was when I have a client who comes in and is looking at that high-level exposure, whether it's 38 or 36, it -- it's almost on a prayer that we have to hope that we get below everything. And we can qualify for Safety Valve if we otherwise qualify, but we're really at the mercy of the government on a §5K1.1, and they get to decide whether this person has given information that's worthy or substantial. And a lot of that turns on the vagaries of investigation itself. In other words, maybe a U.S. Attorney will hear it, but not really do anything with it, turn it over to one of their investigators and maybe not do anything with it. I have heard more often than not, we believe him, we trust what he's saying is

-- to be the truth, we just didn't do anything with it. And when we leave those low-level individuals to that eventuality, I'm left with nothing else to argue, even though they're the least culpable. And so I think -- the Commission I think is honing in, I think, on the problem. And I hope that answered your question. I don't know if it did.

COMMISSIONER MEISLER: Right. I guess -- I guess I take the point being that -- I don't mean to put words in your mouth, but it's kind of like if we can help anyone, we should, but then we do run into the problem, right, that you're going to have some folks who are in, some folks who are out, and they may -- and may -- and you may seem -- they may be similarly situated in ways where the guidelines aren't reflecting that. The guidelines aren't what's driving them there. I'm just wondering why the -- whether the Commission should be concerned about disparities and untethering the system from those statutory criteria.

MR. MORALES: I think that the -- setting the base offense level at 30 does tether it to the mandatory minimums. I think 30 is 97 to 121 in Category I. So it's reflecting that. So I think we -- it's not -- it's not an arbitrary number. It's certainly tied to the guidelines. So I don't -- I don't -- I don't see it as an untethered, quite frankly.

CHAIR REEVES: Ms. Sanchez, I wanted to follow up. It sounded like you mentioned that in your practice, there is a -- an attempt, or has been, you've seen, where they've gone -- where the government has gone after not only that low-level person, but mid-level and kingpins, if you will. What about those districts where we don't see that? We only see low-level people being prosecuted. How should we address -- how should we attempt to sort of -- with respect to meth, for example, should we make sure that those very low-level people who might be selling hand to hand, and as Commissioner Restrepo said, hand to hand dealing be subjected to the pure sort of

level, even though it may be pure, or to the mixture, which will obviously have a sentence that might be less than what a peer would be. You understand what I'm saying? Because I don't see it in my district. I only see low to mid-level people at best, mostly low. So -- and I don't know what's happening out there in other districts, but for those districts where there are no prosecutions of kingpins, there are no search for kingpins, there's nothing that may not even be a search for mid-level people, how should we deal with that?

MS. SANCHEZ: Well, I can say I have experience with that, too. When I practiced in the Middle District of Pennsylvania, we did not have the same type of drug organizations as I deal with now in California. So we had a lot more of the lower-level, mid-level street drug trafficking defendants. I will say one thing for the Commission to consider that I think is also in the guidelines themselves is the fact that that has a different impact on that area, too,

right? Like, in Pennsylvania, where I came from, we didn't have large drug trafficking organizations, but the smaller organizations had a very strong impact on the communities in that area because they were dealing and creating new users. But to whether the amount in those situations accounts -- should be something that quantifies or drives the guidelines, I think the analysis is same, because you're still going to be holding them accountable for the amount that that organization is dealing. So they aren't bringing in 100 or two kilograms, or 200 kilograms of methamphetamine in that organization. They might be bringing in a kilo or ounces of heroin or meth. Back when I was there, the meth hadn't appeared yet. So the guideline, the base offense level is going to be driven by that and not by the larger organization that they're getting sourced from, if we're not identifying them.

CHAIR REEVES: Commissioner Wong?

COMMISSIONER WONG: Mr. Gibson and Ms.

Sanchez, so one of the government's letters -- or one of the points made in the government's letter is that maybe we should be exploring and focusing more on §3B1.2 and whether or not they're, you know, without creating this §2D1.1 specific granular definition of low-level functions, there's something more that could be done in §3B1.2. And just thinking ahead, one argument we've heard is that §3B1.2 is applied very rarely because of the multiple participant rule. Can you foresee -- and I know this hasn't -- you know, I'm talking more hypothetically here, so it's hard, but can you foresee a way in which §3B1.2 could be broadened beyond a multiple participants context where you could evaluate, perhaps through changes in §3B1.2, analyses of more minor roles or functions, but on an individual level, so in a way that that could apply to individuals? Because that -- is that one way in which you're -- you -- you're urging us to kind of explore through further study, or do you see that as problematic because any kind

of analysis of someone's minor role has to be in the context of a broader multi-defendant matter?

MR. GIBSON: I think that's a -- that's a -- it's a difficult question to answer. I do think that is the -- that is the place to focus on is §3B1.2. I understand the disparity we got one person versus multiple. There is the understanding that those who conspire are more dangerous because there's a -- the full course multiplier of having other individuals, though I think it may be an area to look into. I don't have any particular insight to say exactly how that would look. We see that with the judges. Judges talk about that. They talk about that provision quite a bit. I can see there could be some definite issues with it, but it's something probably to look at. But honestly, I can't -- I don't know a good answer to that, Commissioner.

MS. SANCHEZ: And I would agree with Mr. Gibson you know, I don't know a good answer, and I think it's something that we could follow up on and perhaps submit some supplemental

information to the Commission. I mean, there are some things that I can think of preliminarily that if you have somebody that you've identified as a stash house operator, obviously they're operating a stash house for someone even if there aren't other people who have been charged. How that would play out in the guidelines and how you could define that in a way that doesn't cause vagaries and extra litigation, I'm not sure. So it'd be something that I think the Department needs to discuss further and perhaps submit some supplementation on.

COMMISSIONER WONG: I guess anecdotally, have any of you -- do you frequently encounter folks that might otherwise have qualified for the §3B1.2 mitigating role, but for the fact that they're -- it's a single defendant case? Is that something you regularly -- so -- okay.

MR. MORALES: Just for the answer, if you're a single defendant in a single indictment, you're the dude. You're getting everything. No

minor role. It just doesn't happen.

COMMISSIONER WONG: Right, I know, but I'm saying, are they -- are -- is that because of our multiple defendant requirement, or is that because the judge disagrees, for instance, that they are low-level?

MR. MORALES: I believe it's because of the multiple defendant rule.

COMMISSIONER WONG: All right.

MS. SANCHEZ: And I would say one area of our practice that ebbs and flows, we have a consistent chain of couriers because of our geographic location, and they do get consideration for being minor in the organization, despite the fact that they're the only defendants.

MR. GIBSON: And we have plenty of single defendants, but it's obviously part of a -- an individual who's part of a larger organization. There's unindicted co-conspirators. There's information we have based on what the defendant has said post-arrest, I bought this

from this person, or I worked for this person, or other information that we've derived from phones and other types of devices to say. But generally it -- the -- in my experience and what we do, the -- one person alone saying -- you know, getting charged by a drug offense in the federal courts is generally not a standalone person. They're part of an organization. It is the -- it's the basis of the types of work that we do.

COMMISSIONER WONG: I see. So your understanding is actually, that §3B1.2 could extend to that context? Oh, it does actually -- could be applied in that context because you can argue that the offense involved multiple participants, even if there's one defendant charged?

MR. GIBSON: That's very -- and that's very common in our -- in our jurisdiction, because we do -- you know, at the bridge, so maybe we will get caught with a bunch of methamphetamine. Well, I talked to this person who put me in touch with this person, and I got

paid by this person, and I was to deliver it to this person, and I was getting directions from this person, even though we only caught one person, only one person's charged.

COMMISSIONER WONG: That's very helpful. Thank you.

CHAIR REEVES: All right. To repeat myself, thank you all so much for your written testimony and your oral testimony today. We appreciate you.

(Pause.)

CHAIR REEVES: -- with some perspectives from the Commission's Advisory Groups.

First, we will hear from Susan Lin, the Third Circuit Representative to our Practitioners Advisory Group and a criminal defense and civil rights attorney with the firm of Kairys, Rudovsky, Messing, Feinberg & Lin, LLP, which is in Philadelphia, Pennsylvania. I was about to say Philadelphia, Mississippi. There is one.

Second, we will hear from Melinda Nusbaum, the Vice Chair of our Probation Office Advisory Group and a supervisory probation officer in the Central District of California.

Third, we will hear from Jami Johnson, a member of our Tribal Issues Advisory Group, and enrolled member of the Choctaw Nation of Oklahoma, and an Assistant Federal Public Defender for the District of Arizona.

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

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

MS. LIN: Good morning and thank you, Chair Reeves. Thank you, members of the Commission. I appreciate the chance to testify on behalf of the Practitioners Advisory Group.

I'm going to start out with Part A of the proposed amendment. The PAG supports

de-emphasizing the importance of drug quantity and type in determining the guideline range, because in our experience, drug quantity does not always and often actually does not reflect the actual culpability of the defendant. And I'm not going to repeat the testimony or the examples that were provided by Mr. Morales in the prior panel, but I would like to say that all of us have represented people who simply were a family member who lived in the stash house or the courier who did not have control over the quantity that they were bringing over the border or the person who was both taking pills and selling pills to their friends in order to support their own addiction. We need to address those cases.

The PAG also supports lowering overall, or capping, the top base offense level under the drug guidelines because it's necessary in order to reflect actual sentencing practices. And I'd like to take a moment to talk about why it's important that the guidelines reflect actual

sentencing practices. Our sentencing judges across the nation are the ones who actually determine the culpability level of any particular defendant that appears before them. And if, on average, if consistently, our sentencing judges are sentencing below a certain guideline range as calculated under the guidelines, then the message being sent is, on average, the guidelines are not appropriately reflecting what a right sentence is. What the actual culpability of the average defendant is.

The purpose of the guidelines is not to come up with a guideline range that's so high that it serves as a bludgeon to encourage defendants to cooperate. That's not the purpose of the guidelines. The purpose of the guidelines is to reflect what is, on average, given certain circumstances, an appropriate sentence in any particular case. And if sentencing judges are consistently sentencing below the guidelines, the message that's being sent is that these guidelines do not reflect appropriate sentences

in the average case. That's why actual sentencing practice must inform what the guidelines are.

So overall, PAG does support both capping the highest base offense level under the drug guidelines based on quantity, and we support having low-level function adjustments for those defendants who actually do low-level functions in the drug trafficking trade. With some details, we support Option 2 of Subpart 2, which provides a list of examples of low-level functions as opposed to having a rigid checklist for the -- for the judge to apply. We think that that provides the sentencing court with the most flexibility. I think actually POAG's letter does talk about that in more detail.

We also ask that the Commission not exclude the possibility of minor role adjustments under §3B1.2 for those defendants who are sentenced under §2D1.1. And I'd like to provide an example of a case in which a defendant may actually qualify for a minor role adjustment, but

not necessarily qualify for the low-level function adjustment as it's currently written or currently written in the proposed amendment.

And the example I have is a pharmacy technician in a pill mill case. In such a conspiracy, you have the doctor, who's using their position of trust, writing all the fake prescriptions and profiting from writing their fake prescriptions. You have the typical drug seller who's arranging for the fake patients to go to the doctor to get the fake prescriptions, and then ultimately getting the pills that are being obtained through those fake prescriptions. You have the pharmacy owner/ pharmacist who's getting a kickback from the drug seller for filling what the pharmacist knows are fake prescriptions. And then you have the person who works in the pharmacy, the technician who's working for an hourly wage who's doing what the pharmacist tells him or her to do, who's handling a lot of the pills, who's filling a lot of those prescriptions, who's accepting money for those

prescriptions, who wouldn't qualify for any of those low-level function adjustments because of the actual actions that person is taking. But in this conspiracy, everybody agree -- would agree with -- is minor in their role compared to the doctor, the drug seller, and the pharmacist.

It's situations like that, which make it necessary to include §3B1.2, or the option of §3B1.2, for people who are sentenced under §2D1.1. So I'd encourage the Commission to give sentencing courts as many options as possible when it comes to sentencing folks under drug -- who are being charged with large drug conspiracies because we -- because we all know that the drug trafficking business changes with time.

I also want to say that PAG has been influenced by comments that have been submitted by other people. In our written letter, we indicated that we did not necessarily -- or that we understood the necessity of excluding those who possess firearms from qualifying for the

low-level function adjustments. After reading POAG's letter, we are convinced that perhaps we need to give sentencing judges more flexibility. And we can think of examples where a person serves a low-level function, such as being the owner of a stash house where a family member is keeping their stash, but also having a gun -- a legally possessed gun, which they hide for purposes of defending their home. And it is -- it appears unreasonable, now, especially after reading POAG's letter, to exclude that person from the possibility of a low-level function adjustment. So we do -- we are changing our position, as far as that aspect is concerned.

I'd like to move on to Safety Valve, simply because I think it hasn't really been addressed yet. And I want to describe what it's like for my clients who are being held in the pretrial detention facility in Philadelphia, and clients who would otherwise qualify for Safety Valve, they have minimal prior records, they have no violence, they don't have a leadership role,

they're facing a 10-year mandatory minimum, and they're too scared to engage in an in-person proffer.

These are defendants who are being kept in a cell block that has often more than 100 people from various districts. And the conversation in the cell block is all about who is cooperating? Who is snitching or who is a rat? And everybody in the cell block knows when somebody is getting pulled to go to court, when they're getting transported over to court, they're being transported with other people. And they can see when somebody is all of a sudden being taken away from others, not by a marshal, but by a case agent.

People are getting quizzed when they come back from court, supposedly, as to what the Court hearing was about, what happened? There may be people on the outside checking dockets to see if somebody actually went to court. The conversation in these cell blocks is about who was cooperating. And if you have a young

defendant who has zero or minimal experience with this system, who is terrified about being labeled a rat, to require that they have to engage in an in-person proffer where there are all these clues to the people who they're incarcerated with, that they've had a proffer, it's scary to them. It's going to discourage them from doing it.

We need to give these defendants another option to engage in this telling of what they did, of what happened. We need to give them more options to be able to qualify for Safety Valve. It shouldn't have to be an in-person proffer because there are people who are choosing not to do it just because they are terrified about being labeled a rat in the -- in the Federal Detention Center. It doesn't take away from the requirement of truthfulness and completeness. That's still part of a guideline under the current proposed amendment. We just -- it -- the courts need to understand that there are a variety of options of how to fulfill this.

Moving -- I've run out of time.

CHAIR REEVES: Yes. Thank you. We'll -- you'll get it back on our questions, I'm sure. Next, Ms. Nusbaum?

MS. NUSBAUM: Thank you, Chairman Reeves and the Commission for the opportunity to provide commentary on the issue of drug offenses on behalf of the Probation Officers Advisory Group.

POAG is in support of lowering the drug quantity tables highest base offense level to mitigate the harshness of the guidelines. POAG observed that the highest base offense level under §2D1.1(c) is greater than the highest base offense level in the Career Offender Guideline. The highest offense level for a career offender, where the statutory maximum sentence is life, is 37, while the highest base offense level under §2D1.1(c) is currently 38. A reduction will allow for an appropriate realignment in the guidelines. If base offense levels are reduced, POAG favors eliminating the mitigating rule cap reductions at §2D1.1(a)(5) and instead suggests

putting greater emphasis on a reduction through the proposed amendment at §2D1.1(b)(17) or greater reductions in Chapter 3 for mitigating role.

Turning to the new trafficking functions adjustment at §2D1.1(b)(17), POAG is supportive of some Commission action on this, as the current mitigating role adjustment is inconsistently applied. Along the same lines, POAG believes that capturing function distinctions would be more suitable as an alternative Chapter 3 consideration, perhaps to expand the scope of mitigating role considerations at §3B1.2.

If the Commission adopts the proposed trafficking functions adjustment, POAG poses a bracketed language in B, which excludes a defendant from receiving the adjustment because the defendant possessed a firearm or other dangerous weapon. While this is an aggravating factor, the possession alone does not appear to be a good proxy to determine an individual's

function or role in the offense. Further, those defendants would receive the two-level dangerous weapon enhancement under Subsection (b)(1) and would also be disqualified from Safety Valve and Zero Point Offender considerations. This would be another reduction that an individual who otherwise served as a low-level trafficker would not receive.

Within the options at C, POAG was unanimously in favor of Option 2, because we believe examples, rather than an exhaustive list, will allow for more ease of application as courts consider the defendant's conduct in relation to the scope and structure of the criminal activity, as provided in the example introductory paragraph. POAG also believes the defendant's primary function should be adopted because it more closely correlates with the defendant's culpability and allows courts to view the totality of the defendant's involvement, rather than litigate isolated acts, which may be viewed more seriously.

As detailed in our written testimony, POAG is concerned that some of the undefined terms in the examples may result in confusion and inconsistent application, including significant share in profit in Example A, selling in Example B, in retail or user-level quantities in Example C. POAG suggests the Commission provide clarification as to these definitions so as to adequately capture the defendant's intended to benefit from this reduction.

Additionally, there may be instances when a defendant could qualify for an aggravating role adjustment under §3B1.1 and the function adjustment. POAG suggests that language be included to clarify the Commission's intentions as to the application of both adjustments.

POAG appreciates the Commission's efforts to address methamphetamine's purity-based framework. As a practical matter, inconsistent testing practices across the nation have led to disparate outcomes as methamphetamine offenses rely on laboratory reports to confirm the purity

of and the type of substance. POAG unanimously supports removing ice from the drug quantity table and drug equivalency tables. Some districts only consider methamphetamine of at least 80 percent purity of -- as ice if the laboratory analysis reflects d-methamphetamine hydrochloride, as specified in Comment C of the Notes to the drug quantity table.

Other districts consider all methamphetamine of at least 80 percent purity as ice, even if the analysis reflects another form of the substance. Given that the majority of methamphetamine is highly pure, it is rare that the net weight of ice and the pure weight of the methamphetamine actual falls on the cusp of different offense levels, causing a different result in the guideline calculation. Likewise, given the various forms of methamphetamine and ways to convert it, the new proposed amendment of subsection (b)(19) for non-smokeable, non-crystalline form may be difficult to apply, as there may not be universal consensus on the

meaning of these terms. POAG encourages the Commission to clarify this language if it intends to adopt it.

POAG unanimously supports consolidating the current three-category approach to methamphetamine actual, ice, and methamphetamine mixture into a single substance measure. As a result of inconsistent testing practices, some courts use methamphetamine mixture regardless of purity to determine the guideline calculations. Some courts calculate the guidelines with methamphetamine actual and methamphetamine mixture and then resolve the difference with a variance. Other courts do not account for the testing differences and calculate the guidelines based on the information available. A single substance measurement of methamphetamine would create a more unified approach across and even within various jurisdictions. POAG did not reach a consensus as to what measure should be appropriate for a unified methamphetamine ratio, and believes the ratio should be somewhere in

between the two options proposed by the Commission. POAG respectfully defers to the opinions of experts in determining an appropriate measure for methamphetamine.

Regarding the misrepresentation of fentanyl and fentanyl analogs, POAG prefers Option 1 with no mens rea, given the deadly danger these counterfeit drugs possess. In practice, it is difficult to prove that the defendant knew that the specific pills they trafficked contained fentanyl, given the vague coded language used between drug traffickers and their suppliers. If the Commission does adopt a mens rea standard, POAG prefers Option 3, which provides graduated punishment. This tiered approach holds a defendant more accountable if it can be shown they had knowledge the drug contained fentanyl, while also recognizing the seriousness of the offense. If a mens rea standard is included, POAG suggests that the Commission include guidance on when a defendant's mental state is sufficiently culpable for this

enhancement to apply and factors to consider when trying to determine whether the mens rea standard has been met. POAG also supports any effort to clarify the term "represented and marketed." A defendant simply possessing a large quantity of fake pills may not be subject to the enhancement if one cannot establish the fake pills have been misrepresented in a sale to a consumer. Further, those involved in the production of the pills may not be considered to have marketed the pills until the pills enter the stream of commerce.

POAG supports the proposed four-level increase for the possession of a machine gun. Machine gun conversion devices, known as MCDs, present an extraordinary threat to public safety. However, because MCDs are small and easily concealable, a defendant may not be aware, and it may not be reasonably foreseeable that a co-participant possessed an MCD. This may cause relevant conduct application issues. As, such POAG suggests that the Commission consider defendant-specific language rather than

offense-specific language, as a defendant would still receive a two-level increase under the proposed §2D1.1(b)(1)(B). Thank you for the opportunity to share POAG's perspective.

CHAIR REEVES: Thank you, Mr. Nusbaum.

Ms. Johnson?

MS. JOHNSON: Good morning. Thank you, Chair Reeves and the Commission, for the opportunity to speak to you on behalf of the Tribal Issues Advisory Group. TIAG supports the Commission's proposal to amend the drug guidelines in a way that substantially lowers the maximum base offense level for drug offenses and also provides a robust mitigation for individuals whose primary function in the enterprise is low. Indian Country is diverse. We have rural reservations like the Navajo Nations, which is roughly the size of South Carolina and spans three different states in the four corners area, or the Pine Ridge Reservation in Southwestern South Dakota, which is about the size of Connecticut. We also have border communities

like the Tohono O'odham Nation that straddles the border in Southern Arizona on into Mexico. And we have urban reservations like the Muskogee Creek Nation and the Cherokee Nation, both of which have part of their reservations in Tulsa, Oklahoma.

Our collective experience among these diverse communities accords with what we saw in the data briefing, which is that there's very often a mismatch between the guidelines' recommended sentence and the sentence warranted by the application of the § 3553(a)(2) factors. We've also observed, and the data shows, that this mismatch tends to get larger as you move up the drug table towards the larger-quantity offenses. We support the Commission's efforts to bring the guidelines in closer alignment in a way that we think will ultimately make the guidelines more helpful to courts. As you saw from our comment, we think that's best accomplished through a combination of an across-the-board reduction in base offense level combined with a

new proposed specific offense characteristic that provides for reduction based on the individual's primary function.

With respect to the new proposed base offense levels, TIAG supports a reduction in the maximum base offense level to 30 and a shifting down of the levels that come below it. We elected this proposal because we do recognize that quantity is not wholly irrelevant, particularly in terms of the harm that's done to the community by larger quantities of drugs, but we think it's over weighted in the current scheme, particularly at the highest quantity levels, which we most commonly see in our border communities with individuals who are in fact very low-level participants.

With respect to the new specific offense characteristic, we think that this is a good idea that will provide more standardization for lower-level participants and help ameliorate some of the inconsistencies that we've seen between and even within districts in -- regarding

the application of the Chapter 3 minor role reduction. With respect to this particular -- with a proposed specific offense characteristic, another consideration for TIAG that's particular to Indians and Indian Country, and this is a consideration that we also discussed in our career offender comment, is that for Indians and Indian country, there are no state crimes. All crimes are tribal or federal or both, so what we see on reservations is federal prosecutions for things that would more commonly be prosecuted by the State if it happened in a non-tribal area.

So to give you a concrete example, we've seen federal law enforcement operations on reservations where law enforcement uses a cooperator, who's a person from the community who is known to the community to be a drug user. And this cooperator contacts other people in the community, who that person knows to also be drug users and asks them if they know where they can buy some drugs. And the person the cooperator contracts -- contacts is not usually a drug

dealer. They're a drug user. The person may not have any drugs. They may not have money or transportation to get drugs. But because they are a drug user, they do generally know where drugs can be purchased, and so they'll agree to take the cooperator's money, sometimes even accept a ride from the cooperator, to go buy drugs in return for either a very small amount of money or sometimes even just the share of the drugs that they're able to procure. And then this person is charged with drug trafficking.

Now, under Chapter 3 minor role analysis, it's very difficult to argue that the person who went and bought the drugs is a minor participant. They're usually the only participant in the particular transaction. And I don't know that the proposed amendments that were being discussed to sort of tinker around the margins with the Chapter 3 amendment by some folks in the last panel, I don't know that that's really going to address this. This individual person, although they may not qualify for a minor

role -- Chapter 3 minor role reduction, they're not the person who's bringing the drugs into the community. They don't have a relationship to a larger organization, except as a consumer. And they're not making their livelihood off of buying and selling drugs. And we think that the new proposed specific offense characteristic does a good job of capturing these individuals and providing with -- them with additional consideration that we think is appropriate. And because what we've seen is that many of these individuals, if they're placed on pretrial release and are able to get into drug treatment programs, they ultimately do very well. And we welcome the proposed specific offense characteristics that would include people like this who might get -- otherwise be excluded from traditional minor role analysis and who we do see with frequency in Indian Country jurisdiction, perhaps more than in other areas by virtue of the exclusive federal jurisdiction.

We also welcome the proposal to reduce

or eliminate the artificial distinction between meth mixture and meth actual. There are tribal communities and districts that always test the drugs, and there are tribal communities and districts that almost never test the drugs or don't test unless the case is going to trial. This creates artificial disparities in the guidelines between what is otherwise identical behavior, and we do support proposals to eliminate this artificial disparity to the greatest extent possible. We propose standardizing them using the meth mixture quantities as opposed to the meth actual in order to mitigate some of the harshness, the existing harshness, of the guidelines, and also to reduce disparity between the meth guideline and the cocaine guideline. Meth and cocaine are in many senses substitute goods, both in terms of weight and effect on the user, and the most significant difference between them appears to be that cocaine is more expensive, which is why we see it less frequently in economically disadvantaged

communities. So thank you again for the opportunity to speak, and I look forward to any questions that you may have.

CHAIR REEVES: Thank you so much, Ms. Johnson. Mr. Quasebarth?

MR. QUASEBARTH: Thank you. Good morning, Chair Reeves, Vice Chairs. The Victims Advisory Group -- thank you. Good morning.

CHAIR REEVES: Good morning.

MR. QUASEBARTH: The Victim Advisory Group appreciates the opportunity to provide our views on how your proposed amendments may and will affect federal crime victims. Victim survivors are harmed by criminal offenders and seek to have that harm righted in a fair and just manner. Victim survivors are important stakeholders in the federal court process, with federal legal rights under the Crime Victim Rights Act. Victim survivors also need fairness and finality that sentencing brings to the criminal court process without concern over whether future sentencing guideline amendments

will retroactively be applied to reduce sentences that were already imposed. The current pandemic of deadly drugs like fentanyl, methamphetamine, and opioids make people suffer, as individuals, as families, as communities. Some of these victim survivors of drug trafficking are not victims from use of the drugs themselves, but from the horrible violence prerogative to drug trafficking.

As to the proposed amendment reducing for defendants with low-level trafficking in §2D1.1(b)(17) to protect victims from drug trafficking violence, the Victim Advisory Group supports the proposed amendment as follows. We believe that you should adopt the proposed exclusion at §2D1.1(b)(17)(A) for defendants using violence, credible threats of violence, and the direction of violence. We also believe that you should adopt the proposed bracketed language in §2D1.1(b)(17)(B), excluding from this reduction defendants possessing firearms or other dangerous weapons. We also believe that you

should adopt the first clause of the bracketed language in §2D1.1(b)(17)(C), excluding from reduction defendants whose most serious conduct is above the limitations prescribed in §2D1.1(b)(17)(C)(i), (ii), or (iii). A defendant whose conduct is above these limitations should not qualify for low-level trafficker reduction. A defendant whose most serious conduct may include participation in a conspiracy or an aggravating role includes targeting vulnerable victims or participation in a conspiracy to commit or attempt to commit a sexual offense against a victim should also be excluded from low-level drug trafficking reduction. While certain low-level drug traffickers of deadly controlled substances may gain a proposed reduction, which should not exceed two levels, drug traffickers whose conduct involves violence or violent means or conspiring to do so should gain no reduction.

As to misrepresentation of fentanyl and fentanyl analogs, one pill can kill. This

amendment addresses traffickers of fentanyl who represent or market the drug as any other substance. The Victim's Advisory Group asks that you adopt option three and its second set of bracketed language in §2D1.1(b)(13)(A) and the four level increase. Fentanyl makes it clear that drug crimes are victim crimes. Fentanyl is the leading cause of death for 18 to 45-year-old Americans. Some overdose victims are users aware that they're using fentanyl, but are sold a violently potent pill. Those deaths are tragic. More tragic are overdoses and addictions resulting from lies. Pressed pills containing fentanyl are disguised to look like FDA approved pharmaceutical drug or an over-the-counter drug to treat menstrual cramps or headaches.

Precursor chemicals for illicit fentanyl often originate in China, often are sent into Mexico to be crudely mixed with cutting agents. The resulting powder or liquid is then smuggled to the United States as raw powder or pressed pills. Many fake pills are made to look

like prescription drugs, Oxycontin, Percocet, Vicodin, Xanax, Adderall, but actually contain unknown amounts of fentanyl. The user falsely believes that they're consuming a drug approved by the FDA and prescribed by a licensed doctor. DEA lab testing reveals that two out of five pills with fentanyl contain a potentially lethal dose. All around the country people mourn their overdose victims. Many victims may be young athletes or students who died making what should have been a small mistake, taking a pill not prescribed to them, but a pill prescribed to someone. Instead, they consumed a fake pill containing a lethal amount of fentanyl.

As to mens rea, the government is not required to prove a defendant knew which drug they were distributing as long as the defendant knows the -- that they are distributing a drug and that drug is federally prohibited. To prove distribution of fentanyl the government must prove that the defendant knowingly distributed a measurable or detectable amount of fentanyl, and

the defendant knew that it was fentanyl or some other federally controlled substance. When that distribution results in death the government also must prove that but for the use of fentanyl, the victim would not have died. The government does not need to prove that the death from the distribution was foreseeable by the defendant. Proposed option three with its second set of bracketed language and the four level increase most harshly punishes a defendant when they actually know, have reason to know, or recklessly disregard that the drug traffic contains fentanyl.

Proposed option three, subparagraph B recognizes a defendant's mental state may not be the same when they don't know the drug contains fentanyl, but the harm that the victim suffers is not reduced and properly provides a two-level increase. As to machine guns, the VAG supports the proposed amendment in §2D1.1(b)(1), which creates a four-level enhancement for drug traffickers, who possess machine guns. Machine

guns are extraordinarily dangerous compared to other types of weapons, including other firearms. There's the increased risk of injury, which eliminates any opportunity that a victim may have to flee, find cover, or defend themselves. The potential for mass casualties increases when used in public or crowded places. A drug trafficker possessing a machine gun makes the offense far more dangerous. The four-level enhancement is justified. We thank you very much. And if you have any questions, we'd be happy to review them.

CHAIR REEVES: Thank you. Mr. Quasebarth.

Turn it over to the Commissioners now for questions.

COMMISSIONER WONG: Ms. Johnson?

CHAIR REEVES: Yeah. Commissioner Wong, and then VC Restrepo.

COMMISSIONER WONG: I was surprised that TIAG didn't take a position on the machine gun proposal, noting that you weren't doing so given the small number of cases in Indian country

involving machine guns. We just received a comment letter from TIAG taking positions on machine gun proposals last month. I was just wondering --

MS. JOHNSON: I think we -- so we had a discussion about the machine gun enhancement. I think that what we do not see very often in Indian country is machine guns or machine gun parts used in connection with drug activity. Certainly, there are a lot of guns on reservations. It's a -- it's an important part of many tribal cultures. So I wouldn't say that we never see guns, but we do not see them often linked to drug activity, which tends to be more sort of low-level. And not -- I -- at least personally, I've never seen a stash house case on a reservation or things of that nature.

COMMISSIONER WONG: So the group wasn't comfortable taking any position at all on this because that particular iteration doesn't arise?

MS. JOHNSON: You know, there were

diverse views among the group. And I think at the end of the day, we decided that it was not an issue of pressing enough importance to our communities for us to take a position.

COMMISSIONER WONG: And so things like the physically restrained enhancement, that issue on which we received TIAG's views last month, do you think there are more cases in Indian country involving the physically restrained enhancement in robbery cases for instance?

MS. JOHNSON: Certainly, I actually just had one of those trials earlier this year. So that is an issue that we see. Obviously, all issues arise with varying degrees of frequency or a lack of frequency. But we do see robbery cases with some with some regularity, sometimes involving guns, sometimes not involving guns. Sure.

CHAIR REEVES: VC Restrepo?

VICE CHAIR RESTREPO: I want to follow up on some questions I had with the previous panel. So the Commission's always struggled with

the drug guidelines and for years we've kind of tethered culpability to quantity and type of drug. Do you think that's an accurate marker or are there other markers we should consider when we're trying to determine the culpability of an individual defendant? And do relevant conduct and conspiracy considerations kind of at times over represent somebody's culpability? And I turn to anybody on the panel that's willing to talk to us about this.

MS. LIN: Okay. So I'm the only one pushing the button.

VICE CHAIR RESTREPO: Okay.

MS. LIN: I'm going to take this. I think that the Commission's actually received proposals from folks who have thought about if they had a chance to rewrite §2D1.1 from the very beginning, what they would do. I think that Professor Seigler submitted something along with their clinic. I think that the former ex-officio member of this Commission, Mr. Wroblewski, I apologize to him for his name, and Mr. Shannonsen

also submitted proposals.

And I think that what those proposals do is they do consider quantity and type, but they don't emphasize it as much. And I think that some people also are proposing that you look at profit, how much somebody made. You look at the decision- making power of an individual who's in a conspiracy. And I do think that the prosecution, at least for all the conspiracy trials I have done, are able to tease out the roles of various people in a conspiracy because that's what they're presenting to the jury when they do these trials.

If the guideline can somehow be written to consider profit, decision making power, use of violence, and motive for why somebody's participating in the conspiracy, whether it's because of their own addiction, whether it's because of love for a family member or pressure from a family member, if those can be weighted just as much as drug quantity and drug type, I think you can get a guideline that can

more appropriately reflect culpability.

MS. NUSBAUM: So there's two parts to this, and the first part is the relevant conduct aspect. POAG has observed that sometimes relevant conduct can drive up the guidelines. So for instance, you might have an individual who's personally involved in small sales on the street. However, because of how it might be charged, they might be responsible for the -- all the amount that's sold that day or the amount that's sold over the course of a few days. This might also happen in a stash house. So you might have an individual who's only responsible for the amount of packaging, but because they're in the location as others, they're responsible for everything in that house or everything that's coming in and out of that house. So POAG discussed that if quantity is going to be the driving factor, quantity and type, then having a more substantial reduction through this function or through more options with mitigating role might be a way to counterbalance that relevant conduct situation.

And there is also some concern because relevant conduct is not applied consistently even within districts or one case versus another case. So that was a concern that we did discuss. Thank you.

CHAIR REEVES: Anyone else wish to address that? Okay. Any questions on this side of the table?

VICE CHAIR MATE: Thank you all so much for your testimony. And thank you also for the work of your full advisory groups and all of the comments that come together and the sharing the different views of folks on the advisory groups. We really appreciate all of that input. So thank you for the time and work that's involved in all of that.

From the bigger picture question, I'm going to turn to a wider question and I'm going to -- I wanted to start with the you Ms. Lin, on the issue. I'm going to go back to something that I raised with the first panel, this relationship between the proposed chapter two

low-level function adjustment and chapter three, I just want to make sure I'm understanding where you all are falling on this. It -- am I correct that you're not saying that they should be applied cumulatively? It's just that if you -- that a court should be able, and it should be encouraged, to consider both? That if someone doesn't apply for the chapter two low-level, they then should -- at least there be consideration for -- just not be precluded from chapter three. Is that accurate?

MS. LIN: Yes. And so I -- I'm going to say right now, the disclaimer that I'm going to speak for myself and not necessarily for PAG. I know that the PAG letter said that the court should have the option of considering the minor role adjustment for those who don't qualify for low-level function. I don't know that we particularly considered the applicability of both on one defendant. I do think that there is, I, not PAG, I think that there is a risk of double counting in that situation and I don't know that

double counting is appropriate. But the way the amendment's currently written is that it takes out anybody who's sentenced under §2D1.1 from consideration of the minor role adjustment. And I -- and PAG certainly thinks that that is not appropriate.

VICE CHAIR MATE: Thank you. I have more questions, but I'll let other people go.

CHAIR REEVES: Okay. Go ahead, VC Murray.

VICE CHAIR MURRAY: I have a safety valve question for anyone who'd like to answer it. I thought that Ms. Lin very eloquently put forth the reasons why the amendment is in the package that we proposed. The sort of countervailing factors that we hear are, I think anyone who's done civil discovery knows that when you have interrogatories and you have a deposition, you learn a lot more from a deposition than you learn from interrogatories. So there's a concern, I think, that the government would not learn the same amount and

they would not be the same candor and the same free exchange of ideas. I wonder if people have thoughts on that. And then just to sort of taking your temperature question about what you're hearing from your clients, in cases where you have people who get the safety valve, are you hearing that they're getting in trouble in prison or having trouble in prison just from having gotten it? Even if they're not -- even if people haven't figured out that they are doing a proffer with the government by them coming up with a case agent rather than with the marshal, just the fact that when they get their eventual sentence, the eventual sentence is below the mandatory minimum. Is that enough already to clue people into the fact that they made a proffer? Thanks.

MS. LIN: So the first part of your question about the candor and the ability for the back and forth, yes, it is true. In person meetings, there is a lot more back and forth. I'm sure that the case agents and the prosecutor are able to get more information. But including

the requirement that any other kind of proffer, even if it's not in person, must be complete and truthful, I think takes care of that concern. There's always the possibility of back and forth. And you don't get multiple opportunities interrogatories necessarily in civil discovery, but who's to say that that can't happen in a criminal case. I think the importance here is just making sure that judges know that it doesn't have to be an in-person proffer, as long as the requirements of completeness and truthfulness have been met.

As for post-sentencing for my clients who did get safety valve, every single one of my clients tell me that when they get to their designated facility, they have to show their paperwork to everybody else in their block. If anything's under seal, if there's any indication at all that somebody's met with the government, they get crap for it. They get bullied. They have a hard time. It impacts them. It -- it's easier for those who've done safety valve because

they can show I got nothing under seal here, this is not a §5K1.1. Look, this is my plea agreement. Or look, there is no plea agreement, I'll go look at my docket. I frankly am more concerned about the people who are actually in the pretrial detention facility when they have to make that decision and the discouragement from them from making the decision to do that in person proffer.

MS. JOHNSON: I agree largely with Ms. Lin, I think that the distinction between safety valve and a §5K1.1 or any meeting with the government that might be construed as cooperating, is it safe to have it requires you to talk about what you did and doesn't necessarily require that you provide all the information about things that you might have heard about or know about that were not part of your personal participation, and so we have always sort of relied on the fact that somebody is just talking about themselves. And I think that meetings with the government, it's

interesting, our -- the district that I primarily practice in does things a little bit differently. We almost only do letter proffers, and that was actually instigated by the government because of volume in the district and the extremely low quantity of information that most of the defendants had.

It's a courier district, I met someone at a bar, I only have a nickname for him. I don't know where he lives. He was in Mexico. I don't know where I was taking the drugs. I was going to get a call once I got through the border. And that's a full day for two agents and a prosecutor, and we're talking hundreds and hundreds of people a year. And the government was like, certainly there have been requests for individual meetings for people who they might think have more information, but I would be surprised. I think that the government appreciates the ability to have -- to do letters, too, as a matter of efficiency and resources, has always been my impression. I don't want to speak

for the Department of Justice, but in -- but I share with the observation of Ms. Lin, like things that are perceived as private meetings with the government, particularly for people who have very little information, are -- can just be extraordinarily risky. And there have been back and forths, there is the ability to ask follow-up questions and to go back. And I certainly have seen letters submitted and seen a reply saying, this is not enough information. We need more information about X, Y, and Z. And that process has always worked very smoothly, in my experience.

VICE CHAIR MURRAY: I have just --

CHAIR REEVES: Yeah.

VICE CHAIR MURRAY: -- quick follow up. So the -- I saw several, I can't even remember who, but several folks in their written submissions, both who favored this and didn't favor this said, oh gosh, this amendment would be the end of the in person proffer. Some people thought that's a good thing and some people

thought that's a bad thing. That was not my impression when we were putting it out. Do you -- my impression is that the amendment still leaves the government in the driver's seat on when, as they have to be statutorily, right, as to whether or not a proffer has been sufficient and would still allow for, probably on -- the mark probably shifts when it's used, but there would, even post this amendment, there would still be both kinds of proffers. Is that also what you guys saw?

MS. JOHNSON: That is certainly my impression. I think that there are judges who just think that a letter can never be satisfactory. And certainly there might be disputes, as there are about in-person proffers, about whether it was complete and truthful and sufficient. But I think I agree with your interpretation and the -- what we would ask is just not that the person who wrote the letter be categorically excluded simply by virtue of having written a letter instead of having had an

in-person meeting.

MS. LIN: As a defense attorney, I know that it would be easier on my part and easier at time of sentencing to convince the judge to apply safety valve if there's been an in-person proffer. I just want to make sure that my client and the court understands what all the options can be.

VICE CHAIR RESTREPO: So I'm just curious to follow up on my colleague's questions. What happens to these letters? Who writes the letter? Does the lawyer write the letter saying, my client -- this is my client's statement, or does the client write the letter? And when -- what happens? Where do these letters go? How are they kept?

MS. JOHNSON: I can only speak to the practice in my district, which is that our -- many of our clients do not speak English, do not speak well, have -- generally have literacy problems, literacy struggles. I think that writing the letter with the assistance of a

lawyer is more likely to produce a -- an output that would be useful to the government in my experience. And so I can speak to my personal practice, which is that I sit down with the individual and I ask them the questions that are generally asked in free talks about how did you become involved in this? Who did you talk to? Where did you pick things up? Where were you going? Were you given a phone? Were you given, you know -- and things like that. And then send them to the assigned Assistant United States Attorney, they do not get docketed. They do not get docketed. I believe that they're probably shared with the probation office probably by the assigned Assistant United States Attorney so that the probation office is aware that there has been a proffer, and then they are not discussed at sentencing and they aren't -- they don't appear in the docket.

VICE CHAIR RESTREPO: So the information in the proffer is shared with probation or just the fact that they're

proffering is shared with probation?

MS. JOHNSON: I'm not actually sure. We do not send them to probation. I had sort of assumed that the Assistant United States Attorney might share them to -- with probation. But I guess I don't actually know the answer to that.

MS. NUSBAUM: Probation usually just gets information from the government that a proffer has been conducted and they believe that they were truthful. But the contents are not incorporated in the PSR or shared.

CHAIR REEVES: The government gives information to probation that either they were truthful or not truthful. We are accepting -- we're going to recommend a safety valve or not, right?

MS. NUSBAUM: Right. That they have -- that they've met the fifth criteria of the safety valve and then we would apply thereafter.

CHAIR REEVES: Commissioner Mate, and then Meisler.

VICE CHAIR MATE: I want to turn back

to -- oh, thank you.

I wanted to turn back to Part A of the proposed amendment. And Ms. Nusbaum, I have a question for you. You mentioned that POAG and this one again gets a little bit weedy, but POAG is supporting if we did the low-level function adjustment, looking to the examples approach rather than the triggers approach for the listed functions, and also looking to primary function instead of most serious function. And I was wondering if you could share a little bit about the rationale behind those preferences with POAG?

MS. NUSBAUM: Yeah. So examples, the introductory paragraph to the examples, say to look at the scope and nature of the offense. So -- which is different than in option one. Option 1 doesn't have that same language. So with the examples, it's being able to better identify what this person's actual role, because a lot of people might be doing various low-level functions within their function, right? It might not just be like a one time courier, might be that they're

also maybe packaging and they're also now driving it to somewhere, but they're not involved in negotiations of sales or end user distribution. So having the examples gives a little bit more flexibility and ease of application because we can look at what is the totality of the circumstances in this case, what is actually happening, and then being able to say, look, this person maybe had done a few different functions, but they're all within these low-level functions. So that was the part about examples. Can you repeat, I'm sorry, the second part?

VICE CHAIR MATE: The other one was related with looking to primary function rather than most -- or as opposed to the most serious function --

MS. NUSBAUM: Right. So in --

VICE CHAIR MATE: -- serious conduct.

MS. NUSBAUM: Oh, yeah. So with that, because somebody might be doing more than one function. So I'll give you an example. What if an individual was going to be couriering drugs,

but they also maybe recruited a friend. They said, hey I have this way to get money. So what is more serious? Is bringing the friend in more serious or is transporting multiple kilograms of drugs more serious? So now you're getting into the weeds of, well, what is actually more serious? Because maybe transporting a large amount of fentanyl or some type of other substance might be more serious than saying, hey friend, come join this conspiracy.

VICE CHAIR MATE: Thank you.

CHAIR REEVES: Commissioner Meisler.

COMMISSIONER MEISLER: To follow up with Ms. Nusbaum, this may be kind of a more general question, also in the same -- the same topic of low-level trafficking function. I'm just curious, how do you envision the probation officer's role or task changing between the inquiry you currently conduct under §3B1.2 and what you would have to do under the proposed low-level trafficking functions in §2D -- in §2D1.1.

MS. NUSBAUM: So both of these -- both

of these functions and role capture a lot of the same attributes of the offense. We're looking at a law of the same conduct. One is looking at role comparing to other participants. So there's like a hierarchy. It's like who where -- who's high, who's medium, who's low? Where did they fall? How's this person's conduct compared to this person? Are they substantially less culpable or more? With function, you're just looking at the individual activities. What did this person do? So you're looking at the same body of evidence generally, it's just that your analysis might change in terms of how would you apply it? Would you apply it based on solely what this person's activity is, or is it more about their comparing to the other individuals?

COMMISSIONER MEISLER: I think you -- your letter got into this a bit, but do you see any new areas that would be new for officers that they weren't being asked to tackle, not just the comparison but new kind of substantive determinations they'd be asked to make that they

weren't being asked to make under §3B1.2?

MS. NUSBAUM: So for instance, the profit and some of the terminology. Right now, we're not investigating what would be the profit of this offense? We would maybe look at what their compensation is, and how does that look compared to the overall scheme? But some of the information about profit, the retail level, some of that terminology, we're not really looking at is this actually a retail amount? What is it? Or is it just this is the amount that they're tasked to transfer over to another person?

COMMISSIONER MEISLER: One more quick question, I think hopefully. Just for Ms. Lin.

Something you said in your opening, the example you gave of the pharmacy tech kind of stuck with me. And I'm just trying to figure out if I -- if I understood your position correctly. We -- we're using that example to distinguish between the kind of two options that we have here for Option 1 and Option 2 for the level of trafficking enhancement. I guess I'm trying to

think about a situation in which the kind of pharmacy tech you describe would qualify under an examples based approach, would qualify for the reduction, but not under option one, because I -- I'm just -- I'll just put my cards on the table, like the way I read it, it's kind of like you have your primary function, your primary function in that situation, probably compare to packaging controlled substances, right? You're filling a prescription being -- so I'm -- that's how I kind of read option one and it's not clear to me why that would be a different outcome for someone like that under option two. I just wasn't sure if that's what you're getting at with your example.

MS. LIN: So my example was why it's important to preserve the possibility of §3D1.2 for those sentenced under §2D1.1, because I didn't think that the pharmacy tech's role or function actually easily fit into the examples given for low-level function. If the judge wants to read it as fitting in as an example and imply

the low-level function, then great. I'm just worried that because it's not specifically described that judges may not.

COMMISSIONER MEISLER: Thank you.

CHAIR REEVES: Did you have one last question --

COMMISSIONER WONG: Do we have time?

CHAIR REEVES: -- Commissioner Wong?

COMMISSIONER WONG: Ms. Nusbaum, POAG on the meth -- on the meth equalization question had said that you believe that the offense levels should be equalized, but perhaps somewhere in between Options 1 and 2, and to talk to experts. Can you help unpack the kinds of questions we should be asking experts that you think would inform where within that middle would be an appropriate line?

MS. NUSBAUM: I think one of the concerns is that right now the ratio for methamphetamine is so large, it's, like, one to 20, and how the meth would compare to other types of substances such as fentanyl, for instance, I

think is -- I don't have the exact numbers in front of me, one to eight. So it's just kind of maybe looking at how this substance and how those other determinations for the ratios have been determined compared to the current methamphetamine purity levels.

CHAIR REEVES: And I have just a couple of very brief questions starting with you, Ms. Lin. You heard Mr. Morales in -- on the previous panel, and I've heard you talk about today, and I read your stuff about the highest base offense level under §2D1.1 should be no higher than 30. That suggests no higher than 30. If there's something lower than 30, is there -- would -- is PAG suggesting that it can be lower than 30?

MS. LIN: Absolutely. I think that it should be set at a place where the -- ultimately the average sentence being imposed matches with the guidelines. Like, what we're trying to do is get sentencing practice to match what the guidelines are, otherwise, what's the point of

the guidelines?

CHAIR REEVES: All right.

And Ms. Nusbaum, with respect to the -- I think your -- you eliminated -- the proposal is for the POAG to eliminate the proposed exclusion of those who possess firearms on the low-level trafficker SOCs. Is -- can you just explain that?

MS. NUSBAUM: Yeah. There was a lot of discussion because a lot of people felt that it was very aggravating that a person had a firearm and the dangerousness with that. But on the other hand, there was a lot of districts that commonly see individuals possessing firearms for their own protection. And so given the other adjustments that they would be precluded from, such as zero point offender, safety valve, they'd already get an increase under §2D1.1(b)(1), it felt like the guidelines had already captured that aggravating factor sufficiently that this preclusion for low-level function would be -- it would -- it didn't need to be applied as a factor

to consider for low-level function. And then as also mitigating role right now, it doesn't consider if a defendant has a firearm possessed. So that was also something we discussed.

CHAIR REEVES: And Ms. Johnson, thank you so much for the on the ground realities of what happened in the tribal communities with respect to hand to hand little drug buys put up by CIs. I think that's what I heard you talking about. And those persons ultimately might end up being indicted as career offenders at some point in time because of those multiple small sales of drugs, right?

MS. NUSBAUM: Certainly if there were multiple of them over a period of time, yes.

CHAIR REEVES: All right. Thank you.

Mr. Quasebarth, because you've been so -- nobody's called on you. I'm going to ask you something. No, no, that's not the reason why I'm asking. But I did hear your opening reference. The victims we all care about, and that the victims have suffered and will suffer.

And then you tied that to retroactivity, I think, saying if you go back and look at these opportunities they might open up some wounds. And yeah, I think you did mention the word retroactivity.

MR. QUASEBARTH: Yes.

CHAIR REEVES: What about what if there is no retroactivity in play with respect to the -- ultimately, I know it will be in play because the law says it can be, but what if on a prospective basis and there is no retroactive, how might that impact victims in a way that suggests that we should not lower the offense levels?

MR. QUASEBARTH: That's a good question, Chair. And I can't say that we discussed it specifically as a group, but I think part of what victims -- and you all well know, we realize in federal criminal cases, the number of identified victims are a small percentage of all the cases that are being handled. And the number of those victims that have lawyers representing

them to get them through is an even smaller percentage. So the practical application of the guidelines is sometimes more than we have good experience with. But part of what victims understand when they come into the criminal court process is in anticipation of what's going to happen to the defendant. And if those anticipations are based on what the statute requires and what the guidelines require, then at least their expectation can be met. And I would think that that's why it's reflected when we say we approve of amendments that you might make. We're just concerned about that retroactive application of people having to come back maybe years later, and you have to pull those scabs off all over again, how difficult that it is. And I know that you're about to hear from a victim as well that may touch on issues of that type of harm.

CHAIR REEVES: Okay. I'd like to thank the members of our Advisory Groups. You all play such a vital role for the work that we

do here, and we certainly appreciate everything that you do. Thank you for your testimony. Thank you.

(Pause.)

CHAIR REEVES: Good morning. Yeah. Our third panel will provide us with the victim's perspective. Presenting that perspective is Ms. Ann Marie Portillo. Ms. Portillo works as an accounts receivable manager for SERVPRO of Phoenix, Arizona. She recently earned a Master's Degree in Substance Abuse Counseling from Grand Canyon University. She also works part-time as a substance abuse counselor for adolescents struggling with addiction.

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

MS. PORTILLO: Good afternoon. I'm extremely grateful to be here today. As you said, my name is Ann Portillo. And I'm here today to speak about my only child, Alexandria, who I lost to fentanyl poisoning. It's difficult to capture who she was in the time allotted, but

I will say that Alex was beautiful. She was kind and she was deeply loved by many. Growing up, she played sports, dance, ballet and tap, and she was passionate about animals and dreamed of a career in Veterinary Medicine one day. She had a rare heart that was full of compassion for those who were less fortunate. Towards the end of her 22 years on this earth, Alex struggled with addiction, likely inherited by her parents, who we are both in recovery. Around the time of her death, she was fighting hard to stay clean and was nearing her seventh month in sobriety.

She was living in a sober apartment complex, and she was very involved in the recovery community. She worked at a popular restaurant, and she was rebuilding her life and finding happiness. Around the holidays that year, she tested positive for COVID-19 and was temporarily asked to leave her sober living apartment until she could provide a negative test. She came home to quarantine. The plan was for her to get better and return to her support

network as soon as possible. Unfortunately, that's not what happened. On January 3rd, 2022, I found my only child cold on the bedroom floor. That image is forever burned into my memory. I remember screaming a sound I didn't recognize as my own, and I called 911. Within minutes, the first responders arrived and confirmed what I already knew. My beautiful child was dead.

We later learned that in a moment of weakness, Alex reached out to an old using friend on Facebook and asked for a small amount of drugs. She wanted to use one time before returning to sober living, and I believe she was under the impression that nobody would know. We did not know she was struggling in that moment. The house that she was at was located in a heavily guarded community, and I was confused how anyone was granted access without my knowledge, and we know that she hadn't left the house either. It turns out that the guy had a small amount of very potent fentanyl powder delivered to our doorstep using Uber's package delivery

service called Uber Connect. We granted access through the gate thinking that it was Uber Eats, a service that we used often.

I was able to find out exactly what happened after spending five minutes logged into her Facebook account that night. I tried for months to deliver this information to the assigned detective. But the only response I would get is these cases are hard to prove. I felt defeated until the following May when two DEA agents contacted me and told me that they were picking up her case. I was so grateful. Eight months after Alex passed, they arrested the person who had a sizable quantity of fentanyl on him, still selling the drug that he knew claimed my daughter's life months earlier. I have since learned that most families will never get that kind of closure. I bring with me today, the voices of thousands of other bereaved parents that I've met in my support groups. Most of whom will never see anyone held accountable. Every day we welcome new grieving families at an

alarming rate, and my heart breaks for them knowing that they're at the beginning of a very -- the most difficult road, they will ever travel. The grave reality is that there is nothing unique about my story. Fentanyl is killing an entire generation and it's in every neighborhood and does not discriminate by race, class or background. Fentanyl didn't only take my daughter, it took my future grandchildren. It took my identity as a mother. I still struggle with the question, am I even still a mom? After her death, I stayed in bed for nearly a year. Simple tasks like showering or going to the store felt impossible. But I made a promise to Alex -- thank you.

I made a promise to Alex that I would not let her die in vain. Through the pain I somehow earned my Master's Degree in Addiction Counseling and have had the opportunity to work with adolescents struggling with substance use disorders, and I worry about their future every day. Historically, I have always believed in

rehabilitation over punishment whenever possible. But in 2025, we are years into this epidemic. We know the statistics. Those who manufacture, distribute and sell this poison know what they are doing. They're playing Russian roulette with human lives for pennies on the dollar. People who are distributing drugs in general are acting recklessly by not assuming that their drugs may contain fentanyl. The laws need to reflect that reality by removing the mens rea requirement. I understand this crisis is complex, and stronger laws alone won't solve it, but they are a step in the right direction, and we must do everything we can to stop this devastation. And I appreciate you all for letting me speak on a topic that is very important to me.

CHAIR REEVES: Thank you for your bravery. Any questions? Yes.

VICE CHAIR MURRAY: Thank you so much for your testimony. And I'm so sorry for your loss.

MS. PORTILLO: Thank you.

VICE CHAIR MURRAY: I wondered if either through your experience after what happened to Alex or from your more recent education, if you have any sense of how often these folks who are dealing in fentanyl know that they're dealing in fentanyl or how often they're turning a blind eye or how often they too are taken by surprise. Do you have any sense of this?

MS. PORTILLO: You're asking about the people who are actually dealing it. Well, I can say that I've been sober for several years. And if we go back to 2016-ish, 2017, when these Blue M30s were making their way into our community, I know that any seasoned person who was pedaling this knew what they were. Fast-forward ten years, I think you have to live under a rock to assume that you know what's in the stuff you're distributing. I just feel like in 2025, there's no more benefit of the doubt. They say when they teach you about Gun Safety Act as if every gun you handle is loaded, and I feel that it is the

same with drugs. I mean, these people need to realize that every substance that they are dealing with might have the potential to contain fentanyl in it.

CHAIR REEVES: You deal with substance abuse with adolescents. Could you tell us what age bracket that is and what type of drugs do you see or substances, if you will?

MS. PORTILLO: Sure.

CHAIR REEVES: Or types of substances do you see --

MS. PORTILLO: So I do group therapy for adolescents between the age of, I think the youngest person I've had is 14 and it goes up to 19. And the level of care that I deal with are people who are just getting in trouble for the first time, like marijuana. The kids that are doing fentanyl are usually, they go straight to an inpatient rehab facility. But for the most part, the kids I deal with, like I said, it's marijuana. They're not really at that stage yet to have dealt with harder drugs. But I worry

about their futures because there's a lot of people dying. I think I made it to my 40s with only going to my grandparents' funeral. And in the past three years, I've been to so many funerals, I lost count. Young people are dying at alarming rates and it's very sad.

VICE CHAIR RESTREPO: Please to follow up on the chairman's question, and thanks for the work you do on addiction.

MS. PORTILLO: Thank you.

VICE CHAIR RESTREPO: What seems to work in the in the group therapy sessions and in your individual counseling to push people in the right direction so to speak?

MS. PORTILLO: It's hard with teenagers because a lot of them are there because they got in trouble in school. They have to be there. I think for someone to have internal motivation to want to get sober, they have to live through certain consequences or hit their bottom as they say.

But I think with kids, younger kids, I

think it's important to help them work on their self-esteem. To let them know that they're better than what you know, they're better than that. And to kind of plant a seed that allows them to know that when they are ready to get help they have the tools or know how to find the tools to get that help. So --

CHAIR REEVES: Any further questions? Ms. Portillo, thank you so much again for your bravery, and we are all sorry for the loss of your daughter.

MS. PORTILLO: Thank you. And again, I'm very grateful to be here, so thank you.

(Pause.)

CHAIR REEVES: Still good morning. Our next panel will provide us with perspectives from those who have served federal sentences. First, we will hear from Ms. D'Marria Monday. Did I pronounce that right? Okay. Tell me -- I want to say -- I said --

MS. MONDAY: D'Marria.

CHAIR REEVES: D'Marria?

MS. MONDAY: Yes.

CHAIR REEVES: D'Marria Monday.

MS. MONDAY: Thank you.

CHAIR REEVES: Thank you. She is a founding director of Block Builderz and Return to Hope. She is also a Public Voices Fellow on Transformative Justice. Ms. Monday holds a Bachelor's Degree in Entrepreneurship from Oklahoma State University.

Then we will hear from Ms. Amy Ralston Povah?

MS. POVAH: Yes.

CHAIR REEVES: All right. She is the founder of CAN-DO Foundation, which educates the public about the conspiracy law and advocates for clemency applicants. Ms. Povah is also a filmmaker, writer and public speaker.

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

MS. MONDAY: Thank you. My name is D'Marria Monday and I am a survivor of mass incarceration. Thank you for the opportunity to

share my testimony with you today in hopes that you will understand the impact that incarceration has on families. I would like to also thank the National Council of Formerly Incarcerated of Women and Girls for putting the call to action out. Today, I bear my soul to you in hopes that you will understand the devastation that incarceration has on families throughout the generations. I was sentenced to 120 months under 21 USC § 841(b), a mandatory minimum sentence for 50 grams or more to distribute cocaine base, also known as crack.

There were 24 people on my case and I was number 19. So if we're classified in terms of hierarchy, I was low on the totem pole. The mandatory minimum sentence, it did not take into consideration that at the time of sentencing -- at the time of sentencing, my first-born child was only four months old and I was his primary source of nutrients. He didn't even take a bottle. There's a program that's offered to incarcerated mothers, the MIC program, Mothers,

Infants and Children, but you have to have 30 months or less in order to qualify. At 121 months -- at 120 months, that didn't apply to me.

Mandatory minimum sentences, they produce mass incarceration. Mass incarceration is modern day slavery. I was sold into slavery and shipped away. The property of the U.S. federal government. I was taken from my home state of Texas and sent to serve my sentence in Tallahassee, Florida thousands of miles away from my child. How was I supposed to be his mother? At that time my breast was still full of milk. There was not any medical equipment to help me with that discomfort.

My mother brought him to come see me at nine months old and I was so worried that my child would not know who I was. And he alleviated that fear because as soon as he saw me, he started patting on my breasts, searching for his milk supply. The environment was cold and sterile and the straight back chairs. And we were under scrutiny and surveillance. It wasn't

an environment conducive to me even feeling comfortable to nursing my child, but there's no policies in place to state what the environment is. That visit was such a financial burden on my mother that I advised her not to bring him to see me again until I was closer to home. I was transferred to Texas 18 months later, I didn't see my child again until he was two years old. He was a stranger staring back at me with my eyes.

But before I was a mother, I was also a young girl. A child who survived every form of abuse. Emotional, physical and sexual. And I started running away at 12 years old in order to escape the chaos in my home. And I learned -- I started learning to survive in the streets from shoplifting, truancy. I was often reported a runaway. And that began my -- you might as well call it a career. That became my entanglement with the justice system.

Now I do want to stress that according to studies, 85 percent of women have endured some

form of abuse. So I am one of many and this is so common that Senator Corey Booker, he coined the term, the sexual survivors pathway to prison. And mind you, prison is not free. I was often faced to -- forced to make the choice of do I buy commissary with my cents that I earned or do I call home? How do you be a mother? Make those choices to be a mother in prison?

So today I'm still paying the price 20 years later. My family relationships are strained. My oldest child that I had to leave behind is estranged because I had to make the decision, do I leave him with my abusive mother or let him go into the system? I've changed my life and it didn't take 10 years for me to find a change to become a better person. That was cruel and unusual punishment. Really a violation of my Eighth Amendment right. It doesn't take that long. And as a minor -- a minor offender in the conspiracy, today I urge you to reimagine what justice looks like. Justice that's just, that's fair. And I would also urge you to look at what

alternatives to incarceration look like so that more families don't have to be torn apart. And I know that that's not one of the recommendations. So I urge you -- I -- to consider Option 3 with the lowest base level of 30 to be able to take the steps to repair the harm so that other families don't have to be torn apart like mine. Thank you for your consideration.

CHAIR REEVES: Thank you, Ms. Monday.

Ms. Povah.

MS. POVAH: Thank you. Okay. My name is Amy Ralston Povah.

PARTICIPANT: -- the green light?

MS. POVAH: Sorry. Sorry. Thank you so much for this opportunity. This has literally been kind of a dream come true because I don't know that anybody's addressed the conspiracy law from the -- from the Sentencing Commission to date. And I'd never heard about the conspiracy law until I was introduced to it by the Feds who had busted into my home and threw me in the proverbial hot seat and said, you're looking at

20 to life for conspiracy unless you work with us and cooperate. I'm not going to read from my statement that -- my written statement, because I hope everybody has an opportunity to do that. But I just feel like this is a full circle moment because I started the CAN-DO Foundation that became a nonprofit in 2004. And the two mission statements, as you said, were to educate the public about the conspiracy law, which in my mind is still the best kept secret in the nation.

The Council, the National Council, we went to all universities at Yale, Vanderbilt, NYU, Washington State, Harvard, Columbia, and we would have a program called Real Women Real Voices. And it was always my job to talk about the conspiracy law to students. And even attorneys would be there and walk up later and say, I've never heard about the conspiracy law. And one of the reasons why I provided the Glamour Magazine article that is part of the -- my written statement is because that was in 1999.

And David France who stumbled across

my story wanted an exclusive. And I said, I won't do it if you're just going to talk about the mandatory minimums because at the time, that was the only thing people were being told was the reason why people were getting these long sentences. And that's the last thing that happens to you. The first thing that happens to you is that the federal government has to be able to indict you. And they could not have even indicted me without the conspiracy law. And so I felt the need that somebody's got to fill this void to explain why people are put in this vice where they're initially told that you'll either work with us or face indictment for conspiracy.

So the thing that happened with the Glamour Magazine article in 1999, and I didn't add them all, but I have 16 letters all here from sitting members of Congress and Senators who wrote to Roger Adams, who was the pardon attorney at the time. And it really sparked kind of -- kind of outcry as to finally getting a story about someone. Additional women are in here,

like Kemba Smith, who has a movie out about her story right now, Serena Nunn who got out when I did. And yet we this is a quarter of a century later. This is a quarter of a century later. And here we are, and I can't tell that anything has really moved the needle on the application of the conspiracy law.

I don't know if they're applying them the way they did back when it was utter zero tolerance and we were referred to as the scourge of society by both sides of the aisle who were all trying to out tough one another with conspiracy mandatory minimums and other draconian laws. So I would just like to say that the only thing that I know when I was in prison that came along and some of it may be in part due to the Sentencing Commission was that the safety valve was passed. And so we were all excited because we were hearing about the safety valve, the safety valve. And then when it came out, those of us who needed it the most read the criteria. And the criteria was, this doesn't apply to

anybody who refused to cooperate. So right off the bat, the people who really needed it the most were exempt, and those who entered into a plea bargain received sentence reductions, typically. So that was a head-scratcher because I think the second piece of legislation that came out also said anybody who didn't cooperate, it doesn't apply to them. And it started really beginning to seem very vindictive as if the Department of Justice was very heavy-handed in these decisions.

And even to this date, when I work on clemency, we are really up against a lot of prosecutors who continue to carry a grudge. And I have even spoken to some of these prosecutors who have stated, well the person didn't cooperate and they've never said, I am guilty, even if the person writes into the clemency petition that they were responsible, they express remorse and everything else.

So I would like to -- also, reasonable foreseeability was added after a while. And the reasonable foreseeability didn't seem to apply

either to my case because I was literally put at the top of the chart. And people who had -- who were major dealers, major importers got full immunity, absolute immunity even though prosecutors were saying, we need to get the low person and go up the chain to be able to get the bad guys and put the bad guys in prison. That was the narrative.

That's not what's happening. That's not what happened in my case and that's not what happened in nearly all the cases of the people who served time with me. The person who's first in is first out. The person who has the most information gets the best deal. And the low hanging fruit who don't have information to trade for a plea bargain and who do not give substantial assistance, which I was told you have to give substantial assistance to even receive the benefit of a plea bargain, which means aiding the government in the conviction of additional people.

So I think we have a really long way

to go with the conspiracy. I can't believe the red light is on already. It seems like I've only been talking for three minutes, but I will try to wrap it up. I just would like to say that my friends didn't know why I got 24 years. I lost a lot of friends. My family kept it a secret from the community because nobody -- even politicians could understand, how did she end up with 24 years? She must have done something really horrible.

When this article came out, some friends contacted me, even came and visited me in prison and said that they were so sorry. Eric Sterling was a critical -- one friend of mine said, oh my God. I read that the guy who said he helped write the laws is fighting them, and the fact that my prosecutor said that, well, we wouldn't have even prosecuted her if she just worked with us. So it really wasn't about putting me in prison for what I did. It was about putting me in prison for failure to cooperate.

And I hope that we can get a handle on this and somehow stop applying a conspiracy law in a way that is so injurious to individuals such as myself. And thank you for your time. This really means a lot to finally be able to talk about the conspiracy law because everyone in prison that I know that I'm trying to help with clemency is in there for conspiracy.

CHAIR REEVES: Thank you, miss --

MS. POVAH: Yeah.

CHAIR REEVES: Thank you, Ms. Povah.

Any questions from Commissioners?

VICE CHAIR MATE: Thank you both for being here today and for your testimony. I had one question that could go to either or both of you since you both were sentenced for participating in drug conspiracies. I'm curious whether there's -- whether there are things that we could provide in the guidelines that would help courts identify the folks who are playing kind of lower-level functions in these things that assuming the conspiracy conviction goes

through and you're at sentencing.

And kind of what factors should courts be looking at to identify -- appropriately identify folks who are in those lower-level functions?

MS. POVAH: First of all, the government is given a hearsay exception for co-conspirators. So I heard that all through my trial. So hearsay was allowed, if you were a co-conspirator. And even if there wasn't tangible evidence, they always would invoke the hearsay exception, if an attorney were to object to it. So co-conspirators who were major players, they get to use hearsay to convict those of us who are going to trial. If anyone tried to testify in my favor, it was objection to the hearsay. And we -- we're not allowed to use, well, Amy -- as far as I know, Amy said this, or Amy did this or whatever.

So I think the hearsay exception to the conspiracy law is a horrible tool for prosecutors to be given to people who are getting

plea bargains. And I also think that people should only be held responsible for what they're actually culpable for. Nancy Pelosi said, "Amy was doing money laundering." I never ran money through a bank or through a business. So I didn't really launder it, but I did collect money. And for that, I'm sorry and I wish I hadn't done it.

MS. MONDAY: Thank you. And to follow up on miss -- Ms. Povah, in addition to hearsay, I think it's really important to look at decision making on if that person, if they had any knowledge of what all was going on. Because with 24 people on my case, I only knew a handful. So therefore, I didn't have -- I wasn't privy to a lot of the information.

So therefore, I couldn't tell anything, but hearsay played an important role when you have the larger players who are -- who are cooperating. So definitely look at the -- you know, use those as mitigating factors when you -- when deciding. Thank you.

CHAIR REEVES: You each spent time in the custody of the Bureau of Prisons. Just want to ask you -- and I know this is not part of your testimony. I don't know how many different facilities you might have because they do have the right to move you around. But did they offer you any -- I realize the MAT program was not offered to you, Ms. -- Ms. Monday, but I'm trying to figure out what type of programs to help rehabilitate you in some way. Were those offered to you at the -- at Bureau of Prisons?

MS. MONDAY: Not initially due to the length of my sentence. So when I began my sentence in Tallahassee, you had to have a -- certain -- a certain time frame for most classes and also for tuition. And I couldn't afford out of state tuition. Could barely afford to live inside of prison. So when I was -- when I transferred to Carswell for a program, for the Life Connections program.

And so with that, I did that and I was able also to take college classes. And UNICOR

offered scholarships for that. So there was some rehabilitation. They didn't look at time, but majority -- of the -- of the programs offered look at the length of your sentence.

CHAIR REEVES: And you mentioned UNICOR. You did -- were you able to work at UNICOR?

MS. MONDAY: Yes, sir. I worked at UNICOR for five years.

CHAIR REEVES: And what was your pay per hour then?

MS. MONDAY: So I started out at 23 cents. That's a grade four. And so because I worked there for five years -- but each pay increment increases by 23 cents. So a grade five is 23 cents, a grade four is 46 cents, and then it goes up to 69. And then if you make a dollar, you're making a lot of money. And so -- and then if you've been in there -- if you've worked at UNICOR for 18 months, then you get an additional 25 cents. So really modern-day slavery.

CHAIR REEVES: Thank you. Ms. Povah,

did you find any sort of rehabilitation sort of programs or anything?

MS. POVAH: I was so committed to the law library that I had to do my own § 2255. I had to learn the law. I also tried to help other people. I always felt like, why would God help me if I don't do what I can to help others, which was usually trying to -- after I learned how to even file my own § 2255 on my own. And that was before the piece of legislation that only gave us one year after our direct appeal was over, so I had about three years to learn it.

And there was some psychiatric programs, but the RDAP wasn't even -- had not even been introduced. But even in my PSI, they noted that I did not have addictive properties. I didn't have an addiction habit. So you have to sign that you have to literally under penalty of perjury, say that you were an addict in order to be able to benefit from the RDAP program. So I didn't take that, but a lot of people thought I was crazy. They said that she's nuts because I

had a plan after my § 2255 to go for clemency.

And if it weren't for my little bitty hometown of Charleston, Arkansas, where Senator Dale Bumpers is from, and then the Glamour Magazine article, I would not have been released because it really was the catalyst that broke open concern and interest. But I must admit, no, I didn't get -- I was 25 years. Like she said, you don't really get any benefits unless you're closer to the door. And that's another thing that needs to change, so.

MS. MONDAY: Can I --

CHAIR REEVES: Yes, you may. And then --

MS. MONDAY: Okay. And I just want to add to that real fast of what she said. I also -- I did RDAP, but I also learned to -- I learned law. I started studying law and I did file my own § 2255. And with that, the same things that we're speaking to today with the mitigating factors of -- I argued to be held responsible for my weight, for my actions, and also even

consideration for -- of the abuse that I that I endured. And so this is really a full circle moment, so thank you.

VICE CHAIR RESTREPO: Just following up on the chairman's question. Another off-topic question. What was your experience like on supervised release?

MS. MONDAY: Well, I had five years of supervised release. And so that's a ten-year sentence plus five years. So I had multiple different probation officers. So I never really had the chance to gain a rapport with most of them because of the transition. But what I will say is that 15 years. And if you take into consideration the time from juvenile at 12, from 12 to 38, that's how much time I've spent in the incarceral system under some type of supervision.

VICE CHAIR RESTREPO: Did you get any benefit? I guess is what I'm asking, were they -- were they -- was it helpful in your -- in your coming home, what you were offered by way of supervised release?

MS. MONDAY: No, it wasn't beneficial. I didn't receive resources. I didn't receive -- there was a time when I did -- when I struggled later on. Because mind you, coming home from prison and dealing with the trauma, you know, there's struggles of anxiety and also what's known now as post-incarceration syndrome.

So I wasn't immune to that. So with my struggles, then my probation officer, he would -- he did recommend me to different programs, but that was towards the end of my -- of it. This was almost five years later.

MS. POVAH: I'll just say that I got a wonderful probation officer. We're still friends to this day. In fact, she wanted me to spend Christmas with her last year. And she came out to Los Angeles, where I lived, and brought her children. And she supported me getting off of probation one year after, which you have the right to file, and I filed that myself. And I think I didn't cry when I heard about my -- that I was getting clemency, which was sort of a shock

because it's that day. And I had to be out by 5:00 that day.

But when I read my jurisdiction was changed from Waco, Texas to Arkansas, and the judge there signed off on it, I provided the six affidavits from my co-defendants who said that they knew that I was shielded from the bigger picture. And so the prosecutor got to weigh in on whether to release me from supervised release. And it was the first time that I ever read anything from the Department of Justice, where he said he didn't want to cast aspersions against his colleagues. But he said, I feel like this is one that we got wrong.

And to hear that from that side of the aisle was like -- because there -- it's pretty brutal when you file any kind of appeal because they just crush you and you're looking for a little bit of mercy from that side. And so that was the first time that I heard someone from the Department of Justice kind of give me a little bit of a glimmer of mercy.

And so I benefited from -- well, when my clemency came through, and she came and brought the thing that Pres. Clinton had signed, my commutation, it had been passed around the office because nobody had seen one. And there's still grease stains on this thing from people handling it. But I think that really helped with me getting off after a year, was the commutation. Thank you.

CHAIR REEVES: Thank you. We're at the time that we will -- thank you, Ms. Povah. Thank you, Ms. Monday. Thank you so very much.

MS. POVAH: Thank you.

CHAIR REEVES: We're now ready for our break for lunch. We will resume at 1:30 p.m. Please make sure you're in your seats before then, and we'll see everyone back then. Thank you.

(Whereupon, the above-entitled matter went off the record at 12:18 p.m. and resumed at 1:33 p.m.)

CHAIR REEVES: Good afternoon. We are

ready to start up the second half of our hearings for today. Our next panel will provide us with community perspectives on our drug trafficking proposals. First, we will hear from Eric Sterling who serves as counselor to the executive directors of the Law Enforcement Action Partnership, I think people call them LEAP. All right. Second, we will hear from Catherine Sevcenko, all right, who serves as a Senior Legal Counsel at the National Council for Incarcerated and Formerly Incarcerated Women and Girls. Finally, we will hear from Elissa Johnson who serves as the Vice President, excuse me, of Criminal Justice Campaigns at FWD.us.

Mister -- Mr. Sterling, we're ready to hear from you whenever you are.

MR. STERLING: Thank you, Mr. Chairman, distinguished Commissioners, thank you for inviting the Law Enforcement Action Partnership. You know that the processing of the sentence of an offender holds the offender accountable for their wrongful conduct. This

Commission in its studies holds the federal criminal justice system accountable for its investigations and prosecutions. And in some sense, it's wrongful conduct in who it has punished -- the conduct that -- who's been -- what the nature of their conduct is and so forth. This study from 2002, this study from 2007, these from this Commission were both instrumental in identifying the fact that the Department of Justice was focusing overwhelmingly on low-level offenders and overwhelmingly people of color. And in enormous detail your work was groundbreaking in setting the basis for the modern discussion about what we should be doing about sentencing today. Your most recent study last week about overdoses in federal cases, again, extremely important in helping the public understand sort of what the role of federal prosecution can be. I brought with me my Narcan, I -- this is Naloxone, this is used for reversing drug overdoses. This is the kind of thing that's going to save people's lives, not locking up

people for ten or 20 years who are relatively minor offenders in the -- in the -- in the -- some traffic -- drug trafficking organization.

The federal government should be focused on the money launderers, the international level traffickers, the people who are outside the jurisdiction of the tens of thousands of state and local law enforcement officers and prosecutors have -- who have the ability to put in hundreds of thousands, excuse me, millions of state prison beds, offenders who are the biggest offender in the city, the biggest offender in the county, the biggest offender in the neighborhood. That's not the job of the -- of the feds. And your reports are the foundation for showing how misplaced in focusing on neighborhoods and so forth the federal drug effort has been, and that helps perhaps explain why we're facing the crisis that your witness, Ms. Portillo spoke about and the tragedy, how we had -- we created mandatory minimums for fentanyl in 2000 -- excuse me, in 1986. And they only

started getting used in significant numbers in the last few years.

Commissioner Restrepo you have asked repeatedly about the -- how we measure real culpability and I -- and I want -- it brings me to the opinion that the Chair wrote in the -- in December '22 in U.S. v. Robinson, about the lack of the empirical foundation for the guidelines with respect to drug weights. Sadly, the guidelines are tied to the statutory weights and there is absolutely zero empirical basis to support the statutory weights. I was the counsel to the House Crime Subcommittee that pulled these numbers out of the air with the aid of a unreliable Metropolitan Police Department detective in DC, named Jehru St. Valentine Brown. He was the most famous narc in DC and was -- he was staffing the House Select Committee on narcotics abuse and control. He has gone to prison for his extensive perjury in federal drug cases. And even in his sentencing, he submitted forged letters in support of his -- of his

sentencing. You can look up the background and see how misconceived the numbers are that underlie our mandatory minimums, and then by extension, the quantities that underlie the guidelines.

I think that as we think about the base offense level, the base offense level in some sense by tying it -- by tying drug weights to the minimum of five years helps lead to the excessive imprisonment of low-level offenders. The base offense -- there is so much opportunity to truly add on for the high-level offenders, the people who are the appropriate targets of federal prosecution through the -- through the guidelines. And I suggest going much level -- much lower on the -- on the -- on the base offense level that's your initial approach. DOJ -- you know, with respect to drugs, Congress wanted the Justice Department to focus on the highest-level offenders, and that hasn't happened. And just to conclude by saying none of the defendants in the federal system should be so

impoverished that they require -- that they require a federal defender. The Federal Defenders don't belong here talking about these cases in a truly just situation, because you should -- because the Department of Justice be focused on people who can afford the most expensive counsel to represent them. Thank you, Mr. Chairman. Thank you, members.

CHAIR REEVES: Thank you -- thank you, Mr. Sterling.

Ms. Sevcenko?

MS. SEVCENKO: Chairman Reeves --

CHAIR REEVES: Make sure your microphone is on the green.

MS. SEVCENKO: Can you hear me now?

CHAIR REEVES: Bring it a little closer.

MS. SEVCENKO: A little closer. All right. There, I'll do it this way.

Chairman Reeves, and Commissioners, thank you so much for this opportunity to speak to you. And I am particularly grateful that you

are willing to hear such a diversity of views. On behalf of the National Council, let me thank you for considering lowering the sentencing ranges for drug convictions. We agree that equating drug amounts with culpability does not serve the interest of justice. And I'd like to dig into that a little bit. I think every lawyer has a client that they just can't forget. And my client is Sarah. Sarah is currently imprisoned at FMC Carswell. Ten years ago, Sarah was living her best life. She was married. She had three beautiful children and one on the way. Her husband went on a business trip and was murdered. She found herself a single mother of three, then four children.

She struggled. She found a job. She was doing okay. And in fact she was working through a temporary agency and the employer wanted to hire her full-time. They did a background check. They found out that years earlier she had answered an ad on MySpace for someone who wanted someone to buy a car and

deliver it. She did that and it turned out that the person she was bringing the car to was a drug dealer. She was arrested. She was given -- pleaded to a level 6 felony in Arizona, did her probation and went on her way. Until disaster struck, she finally had to go turn to her in-laws who were drug traffickers. And they said, sure, we'll help you, but could you do us one favor? Could you take this money order to Western Union? It's a birthday present and she did that and her name was an alleger.

And then she was surveilled, arrested, and she was arrested on the way with a friend to target practice. This is Texas. This is what's -- what you do. And she got a 15-year sentence plus an extra five. Her children are now with her mother. Her mother has had two heart attacks in the last six months. They are holding on by a thread. And so while I am deeply grateful for the work you're doing, when I read section (b)(17), and yes, please, we would appreciate it if you could use that as examples rather than as

a definitive list, I don't see Sarah. I don't see other members of the National Council, one of whom was doing time because she shared an apartment with her brother who was dealing drugs. I don't see the woman who moved out of an apartment and ended up getting caught up in the conspiracy because her name was still on the lease.

And so we are asking you to consider another category of bystander. These are people who get in trouble just because they are literally in the wrong place at the wrong time. The National Council has surveyed women in federal prison. We have over 300 responses. And over and over again we hear the story, the girlfriend problem. Yeah, my brother, husband, boyfriend, whatever, was doing things, I got caught up in it. I -- he had information, he got off. I had been shielded. I had no information. I got the full sentence. I -- and so that is sort of our primary concern is to fix that problem.

Secondary, and I'll go really fast, but I think we have to look at the political reality that we are in. Government spending and government staffing is being slashed and burned, there is no reason to think that the BOP will be exempt. And in fact, they have had staffing problems for years, and this is causing all sorts of issues, lack of programming, poor medical care, lockdowns. And frankly, if you can't add more money to the problem, you've got to let people out, and starting with folks who were just in the wrong place in the wrong time is good. We would also advocate those who are elderly and ill who have served sentences for decades. And I know retroactivity is a sensitive topic and I respect the victim's perspective, but I would also ask you to balance the need for finality with the recognition of redemption. And with that, thank you very much.

CHAIR REEVES: Thank you.

Ms. Johnson?

MS. JOHNSON: Chairman Reeves and

members of the Commission, FWD.us is a bipartisan advocacy organization that focuses on using data and research to advance safe and effective policies to reduce incarceration. We support the adoption of Parts A, B, and E of the drug amendments. These changes will begin to address the disproportionately long sentences that don't improve public safety, as well as continue the commission's important work to take a more evidence-based approach to drug sentencing. More than 40 years ago federal and state law changes created lengthy prison sentences and mandatory minimums in an attempt to stem drug use and sales. However, in the intervening decades we've learned, and a growing body of research shows us that increased penalties and longer sentences don't deter drug use or trade, and they don't make our communities safer. In addition because of the impact of the replacement effect in drug sale and trafficking cases in particular, there isn't a benefit of incapacitation or keeping people behind bars longer, because unfortunately

they're often replaced. That individual is replaced, and to continue drug sales.

Coupled with the data that we know that incarceration can actually make it more likely that someone goes back to jail or prison, these long sentences aren't an effective deterrent. And instead they separate families, destabilize communities, and drain public funds. We support the adoption of Part A, Subpart 1, Option 3, as well as a hybrid approach to Subpart 2.

It's clear that using drug quantity as a primary factor in federal sentencing is a flawed approach. The Commission's own 2010 study showed drug quantity to be a poor indicator of culpability, and Option 3 that reduces the highest offense -- base offense level to 30 would be an impactful change that aligns with the overwhelming research that long sentences don't advance public safety.

And Subpart 2 ensures that individuals that have a limited involvement in drug

trafficking don't receive excessively long sentences. We can see that the current guidelines aren't working to reflect a person's role. Adopting this new specific offense characteristic would help ensure consistency and fairness in sentencing of people who play a limited role in drug trafficking.

We agree with the hybrid approach on Subpart 2 that's outlined in the public comment from the Federal Public and Community Defenders. In particular, it lists examples of roles that would necessitate a sentence reduction, but also leaving judges flexibility for unforeseen circumstances and requiring only one, if any, factors for a person selling drugs at the street level to receive a reduction. The Commission's prior amendments, such as Drugs Minus 2, Crack Minus 2, demonstrate that base offense levels can be reduced safely.

We also support the adoption of Part B, making some necessary changes to eliminate purity distinctions in the methamphetamine

guidelines. Since the penalty disparities for meth offenses was established, we've learned that a higher purity is not an accurate indicator for having a higher involvement in the drug distribution chain.

From 2011 to 2019, the average purity of meth that was seized and tested by the DEA was consistently over 90 percent, and the Commission's own study also found that there was no statistically significant difference in the purity of meth and a person's role in the offense. Assigning a higher base offense level in the guidelines for meth actual and meth ice just results in disproportionately harsh sentences that don't advance public safety.

For instance, people who are sentenced for trafficking meth ice receive sentences that are an average of 20 months longer than people sentenced for trafficking meth mixture. Based on the data that purity is not an indication of increased involvement, it should not be used to significantly increase someone's sentence.

And lengthy sentences for meth are also at odds in federal drug sentencing more broadly. In fiscal year '22, the average and post sentence for meth offenses was 30 months longer than the average for all other drug trafficking offenses. The purity distinction is likely driving that sentencing disparity between meth offenses and other drug offenses, and so specifically, we want to see a change to Subpart 1 and then also Subpart 2, Option 1, that would set those quantity thresholds for meth at the current level for meth mixture.

We also support Part E of the drug offense amendment and urge the Commission to provide much-needed clarity to ensure that people who do provide truthful information to the government receive appropriate departures, regardless of if that information is provided in person or in writing.

And lastly, we would just urge the Commission to reject Part C and Part D. We're very concerned that these amendments would only

increase prison terms without corresponding improvements to public safety. If the Commission takes any action, we propose further study before making any changes to the guidelines.

Thank you so much for considering our recommendations and the opportunity to testify today.

CHAIR REEVES: Thank you, Ms. Johnson. I turn to my fellow Commissioners. Any questions of this esteemed panel?

Oh, go ahead, VC Mate.

VICE CHAIR MATE: Thank you. Thank you all for your testimony this afternoon and your written comments as well. We really appreciate your time and work on these important issues.

Mr. Sterling, could I wanted to start with a history question, I guess it is. When you and others were working on the legislation that established the 10-year mandatory minimums for certain drug offenses, do I understand the history correctly, that 10 years was seen as the

appropriate floor for kingpins, for that function in drug trafficking?

MR. STERLING: Yes.

VICE CHAIR MATE: Okay. Just so -- and then leaving -- then there are the quantity issues, but that was seen as a sufficient place to start subject to --

MR. STERLING: Right. For -- so -- and obviously one might ask, what does a kingpin mean? And the -- when I -- when I originally presented to the subcommittee a draft for their consideration and markup, I used the DEA's highest-level trafficker of in a four-part schema that they had at that time.

And this would've been someone who was involved in the distribution of hundreds of thousands of doses a month for a half -- for a half a year. You mean -- to just give you a sense of scale of what was originally proposed. That was rejected because there weren't traffickers that big in Louisville, Kentucky.

And instead -- and the Congressman's

colleagues instead of saying, well good thing Louisville isn't Miami.

No. It was like, Ron's right -- Ron Rizzoli, you're right, and we're going to, you know -- and Eric, that's not, you know -- you're going to have to come back with something else.

And it was a very -- it was a mad scramble to come up, then with other kinds of data. And so that -- the numbers were wholly the wrong -- the wrong direction in terms of the guidance to what should be -- you know, who qualifies. I mean, it was, you know -- it -- there was -- we had no hearings. We had no input from judges, from Main Justice, from anybody.

There were no hearings. I mean, this was picked out of the air. This was decided in a matter of hours before it -- it's reported out of full committee to go to the floor in time for Labor Day. You got to be back after Labor Day. It was a very, very rushed process for, you know -- for partisan political advantage.

VICE CHAIR MATE: Thank you. I have

other questions, but I don't want to step on --

VICE CHAIR RESTREPO: Staying with my theme of the day, how should we measure culpability?

MR. STERLING: Sure. And so to the extent that you're able to gather evidence about the decision-making capacity of the offender, the amount of share of the profit of the enterprise, or the kind of lifestyle that it supports -- I mean, somebody could be a solo -- a solo LSD chemist and make -- you know, and be caught and, you know -- but they're making hundreds of thousands of dollars a year. But it's -- to me, it's inconceivable that someone who, at the time the investigation takes place, has no money and has to go to the Federal Defender. That's a sign that that's not someone who's terribly culpable in the level of what should be a federal case. Those would be examples, it would seem to me, of ways to identify, you know -- you're both trying to identify both their -- the -- their function. Now, someone who is a -- who's an executioner,

who's a murderer in an organization, that's a high level of culpability, even if they're taking orders from someone else. But that's not, of course, the typical kind of case that you're faced with.

VICE CHAIR RESTREPO: Ms. Johnson, any thoughts?

MS. JOHNSON: I think what we know is that the one size fits all isn't working. And so as we -- you know, some of the amendments and proposals put forth by the Commission that allow to look at specific characteristics of what's happened, but also understanding that there has to be opportunities for rehabilitation and learning that incarceration is one of the most expensive and least effective public safety strategies.

So as we're thinking about, how do we -- how are we prioritizing public safety? We have to look at reducing sentences and understanding that, again, as we've -- as we see right now in the scheme that exists, that so many

people are facing these excessively long sentences that had very little culpability or, because of mandatory minimums, are facing extremely long sentences.

MS. SEVCENKO: Oh, sorry.

MR. STERLING: I was just going to -- please go ahead.

MS. SEVCENKO: Oh, I was just going to add really quickly. I think it's also important to look at the pressures that the defendant is under. Lots of women are in abusive relationships. They are forced to do things to protect their children.

And so there are a lot of pressures that people are under, which will make them make the choice to be engaged in drug trafficking, whereas it's against their will, but they have another -- they're trying to protect someone.

MR. STERLING: Mr. Chairman, just briefly. Professor Mark Osler at St. Thomas University suggests the Commission consider using the kinds of financial measures that you use for

your financial crimes, that you tie the amount of a fraud, the dollar amounts. Those kinds of amounts could be sort of similarly used for thinking about how much money is acquired by the defendant in the drug case.

CHAIR REEVES: I want to follow up on something you were saying, Ms. Sevcenko, and then you, Commissioner Meisler. You mentioned the pressures. Wouldn't that necessarily come out during the course of a sentencing after someone had pled guilty or in the -- in the -- not necessarily in the plea colloquy, but the obvious pressures that a person might be under. The judge can take all that into consideration in imposing a sentence; is that right?

MS. SEVCENKO: I think if you have a good lawyer, it's right. I think if you have a federal defender who has a lot of other clients, you are told to stand there, say nothing; this is the best deal you're going to get. So again, it depends upon the person and the situation. But even if you are able to tell your story, if

you're looking at a mandatory sentence, then we get these statements from judges that say, gee this is really terrible. My -- but my hands are tied.

And that's the problem that I'm hoping you folks can address through putting in lowering levels and putting in greater flexibility and more opportunities for judges to be able to go down to zero in terms of incarceration and look at other forms of penalties, whether it's, you know, a fine or a community service or whatever it happens to be.

CHAIR REEVES: Thank you. We have found in our experience at the Federal Public Defender's Office, when compared to those who are otherwise practicing, doing an extreme job, doing a great job, but --

MS. SEVCENKO: Yes. No, no, no. I did not mean -- and very often, the federal defenders do an amazing job, but then you have some people that are private attorneys that may be are just less experienced.

CHAIR REEVES: Mr. Meisler.

COMMISSIONER MEISLER: Thanks, Chair.

This is just for Ms. Johnson. I appreciate your organization's focus on in empirics and data analysis and your reference to some studies that could be conducted. But the Commission did do a study last year in methamphetamine sentencing, and I was just going to fly one aspect of it and get your reaction to it.

Relying on CDC data, the study pointed out that overdose deaths from psychostimulants comprised mostly of methamphetamine, increased 703 percent between 2001 to 2021. I'm just trying to figure out how we should account for that and the risks posed by these -- some of these substances in making any changes to the guidelines. Thanks.

MS. JOHNSON: Thank you. I think what's important to realize is that -- I'm not saying that the recommendations that I'm making in terms of lowering sentence doesn't mean that

we don't need to come with full-throated solutions to address substance use, abuse, and addiction. But I think what we know very clearly is that the solution to that is not these long sentences.

Obviously, that's a troubling statistic and know that communities and families are hoping for real evidence-based solutions that will address overdose. But I think as we look at the fact that prisons -- long prison sentences will not deliver that, we have to think about alternatives and the range of whether it's more community-based investments and addiction and substance use and housing and a mental health and a range of other services that has both a nexus to improving public safety, reducing addiction, as well as ensuring that we're able to help communities with these -- with these ongoing issues.

VICE CHAIR MATE: Ms. Johnson, I have a question for you based on your work on federal and state drug laws. If we proceed with an

amendment that includes an adjustment based on that low-level function, whether we do the triggering examples or the -- or the triggering factors or the example approach, is the list that we have in there -- like, did we get that right? Are we missing things? Do we over-include things? You know, based on what you've seen from the states, is that -- have we done a good job of capturing what would -- should fall into a low-level function category?

MS. JOHNSON: I think you all have captured a lot. I think that's kind of the fact that it's difficult to fully capture every scenario is why we supported kind of a hybrid approach that both gives some required reduction but also allows judges to look and appreciate potentially unforeseen circumstances or kind of balance that based on the individual case.

VICE CHAIR MATE: Thank you.

CHAIR REEVES: And to follow up with that question, I know your group is keenly involved across the country in all 50 states or a

bunch of states, including my own, but the reforms that we're sort of been talking about as part of this hearing today, how do they fit with the reforms that might be going across the country, if there are any reforms going across the country?

MS. JOHNSON: Well, I won't pretend to be able to tell you all the updates of all 50 states, but I think what we've seen in the last 15 years is an absolute shift around drug policy, right? There are states that have defelonized simple drug possession and understanding addiction states that have essentially removed enhancements that we're allowing and creating longer penalties.

So I think what the Commission is doing is in line with an understanding that long sentences for drug offenses aren't what makes us safer and it don't actually address a public safety need as it relates to potentially addressing addiction and substance use with a high level of effectiveness. And so I think in

terms of reducing the sentence ranges, offering additional flexibility for judges to consider the circumstances, and also understanding that what we want is for our communities to be safe.

And also that right now, the investment that we're getting with long sentences isn't helping our communities and isn't making us safer as we continue to advance. And I think looking at these specific -- both the -- you know, all of the changes that we've supported in this amendment cycle are meaningful steps to begin to think about how that we can take a more evidence-based drug sentencing approach.

VICE CHAIR MURRAY: For Ms. Sevcenko, do you think the way we've crafted the (b)(17), potential SOC, would capture the girlfriend problem?

MS. SEVCENKO: I would think -- I mean, I think (b)(17) probably captures about 80 percent maybe of what's going on out there. I would suggest maybe on what you did with the compassionate release, is to have some sort of

catchall that says something of it wouldn't be gravity, but similar minimal participation or minor influence on the enterprise as a whole would be very helpful.

Because then you could capture the -- you know, the instances that we can't dream up right here because particularly since the trigger is so light for the conspiracy. I mean, it can be your -- you know, your name is on the wrong lease. And so yeah, I think it's a great foundation, but either it should be examples or you should have a catchall.

CHAIR REEVES: I have one last question. This is to you, Ms. Sevcenko. I think in your written materials we've put out that --

MS. SEVCENKO: Yep.

CHAIR REEVES: -- you know, sort of adjusting the level with 30 being the high.

MS. SEVCENKO: Yeah.

CHAIR REEVES: I think you'd come back and said the cap base offense could be less. And when you say "less than 30", what cap are you

talking about in your proposal?

MS. SEVCENKO: I mean, I --

CHAIR REEVES: Or --

MS. SEVCENKO: Yeah, I should start by saying I am not a brilliant technician, like you all are in terms of the sentencing guidelines. But I think what we were after is to lower -- to have a zero sentence be available at a higher offense level. I sort of get confused on whether we're lowering offense levels or raising drug rates, but where they meet.

And I think we were talking about level 14, that to address the girlfriend problem, to address a lot of these things to make it possible for judges to have a non-carceral sentence for a higher drug rate weight that is available now. And because you have a range, you also have the opportunity to give a carceral sentence, if that's appropriate. I hope that answers the question.

CHAIR REEVES: Thank you all so much.

MR. STERLING: We support that.

CHAIR REEVES: Okay. Thank you, sir. Thank you so much for your testimony. We appreciate your written testimony as well. Thank you.

(Pause.)

CHAIR REEVES: Our next group of panelists will provide us with additional community perspectives on our drug trafficking proposals. First, we will hear from Dr. Shaneva D. McReynolds, who serves as the President of FAMM. Next, we will hear from Rachel Wright, who serves as a National Policy Director for Right On Crime. Finally, we will hear from Norman Reimer, who serves as a consultant to the Tzedek Association.

Dr. McReynolds, we're ready to hear from you whenever you are.

MS. MCREYNOLDS: Thank you, Judge, Chairman, and other Commissioners. I appreciate the opportunity to testify today. My name is Dr. Shaneva McReynolds. I am the President of FAMM, formerly known as Families Against Mandatory

Minimums. My testimony is rooted in the work of our organization, the organization, I proudly lead, which amplifies the voices of families and their incarcerated loved ones.

I met my childhood sweetheart in one of Chicago's most challenging neighborhoods, Englewood. In our city, many hold the adage that nothing good comes from Englewood. He is the baby boy of six children and was shaped by the harsh realities of our community. After dropping out of high school, he turned to selling drugs, not as a way to gain wealth or power, but simply to survive and support his family.

It was in Englewood that I experienced some of the most formative moments of my childhood. And sometime later, I returned to live with my military father. And therefore, I was exposed to opportunities that others in the neighborhood I had left would not have been exposed to. 22 years had passed when I was reconnected with Jeffrey. When I was reconnected with him, I then learned that he had taken a plea

deal. I want to emphasize "plea deal" of ten years to life for a conspiracy.

Due to the well-known sentencing disparities between crack and powder cocaine, he ultimately received a 235-month sentence, nearly 20 years. And although he certainly knew the difference between right and wrong and also accepted accountability and responsibility for his actions, that punishment did not reflect who he was as a person or his circumstances. By pushing his earliest release date to 2025, the guidelines forced a sentence that was far too long overshadowing any sense of justice or rehabilitation.

The need for change was evident, not only to our family and others in the community, but also to lawmakers, judges, and this Commission. After reforms implemented during previous administrations' measure -- measures recognizing that sentencing must account for mitigating factors, my husband's sentence was significantly reduced and we were reunited

earlier than the original guidelines would have allowed.

In 2012, we reconnected. 2013, he proposed to me in a federal prison. 2014, we married in that federal prison in 15 minutes. And I'd do it again today. And then he came home in 2015 in enough time to share the last year of his mother's life. Today, we celebrate milestones, amazing ones. We celebrate the fact that he has successfully transitioned into civilian life. We started a trucking company that employees returning citizens. And last July, we celebrated our tenth wedding anniversary.

His story stands as a testament to the transformative power of reform and the potential for renewal. It also demonstrates just how excess -- excessive his original sentence was as he did not need another 12 years to become the man he is today. This amazing man, who I am proud to do life with, also appeared before this very Commission in July of 2023 to testify about

the retroactivity guideline amendments, those very provisions that brought him home over a decade earlier.

Our legal system too often fails to consider the full context of an individual's life. It disregards mitigating factors that can and do change the trajectory of a person's life, and you have the power to make this system a little more just. I do not believe the current approach aligns with what Congress intended. This morning, I listened remotely to witnesses and I fully and wholly support Mr. Morales's testimony.

My husband is a prime example of a low-level offender, who turned to selling drugs to survive while also working as an airport porter. There's a misconception that those who sell drugs don't seek legal work. But in the early 2000s, his jobs simply wasn't enough. If I could have spoken to AUSA Sanchez, I would've asked her, how is it justified to hold a low-level offender accountable for an entire

organization?

From my experience, my husband and others like him never chose an organization. They simply bought and sold drugs from a neighborhood supplier. I listened earlier to testimony from a victim's advocacy advisory group, and I want to address the misrepresentation of victims as a singular voice. There is no one-size-fits-all experience. Sixteen years ago, when I was 29, my first husband was murdered and I still today do not know who murdered him.

And if you would've asked me 16 years ago, I would've told you, I absolutely wanted an eye for an eye because that's pain. That's trauma. I also want you to know that what we want is not vengeance. We want true justice, one that prioritizes rehabilitation, accountability, and the restoration of both individuals and the communities that they will one day return to. People change. And just as individuals that commit crimes change, so do victims that sustain

these offenses.

I respectively ask that you consider stories like my husband's and mine when evaluating sentence guidelines, sentencing guidelines. Not every offender is a hardened criminal or a mastermind. Many like my husband are ordinary people caught in circumstances that demand compassion and understanding. And I urge you to account for the mitigating factors, such as their upbringing, their intent, and the possibility of rehabilitation so that justice may be tempered with mercy and that our system can allow for redemption and true reintegration into society. Thank you for your time.

CHAIR REEVES: Thank you, miss -- Dr. McReynolds.

Ms. Wright?

MS. WRIGHT: Chair Reeves, members of the Commission, thank you very much for the opportunity to testify before you today. My name is Rachel Wright. I'm the National Policy Director for Right On Crime, which is a national

criminal justice campaign of the Texas Public Policy Foundation, where we focus on conservative data-driven solutions to the criminal justice system that look at reducing crime, restoring victims, reforming offenders, and being very cognizant of the taxpayer dollar.

The Sentencing Commission's proposed amendments today on drug sentencing cover issues and seek to improve a very complicated and evolving area of law. I will be focusing my remarks on Part A and Part B, the drug quantity table and the methamphetamine purity distinction. I'm also happy to answer any questions on Part C as it pertains to fentanyl and mens rea.

The laws and sentencing guidelines on federal drug crimes have evolved over time. The types of drugs and the type of offender has also changed. Therefore, the sentencing guidelines and the policies surrounding this crime should also change. We have seen cartel members in transnational drug organizations, who are pedaling drugs, manipulating low-level offenders,

and poisoning those with substance use disorder. I think that most people would agree that the punishment should fit the crime there.

On the other side, the punishment should fit the crime whenever you have individuals who are not those transnational drug organizations and are not taking advantage of those with substance use disorder. To that end, we should look at the guidelines as a way to not be overly punitive, but rather, to find options for reprieve for those who can be rehabilitated and reenter society as a law-abiding taxpayers.

The Sentencing Commission has been at the forefront of rectifying many of the wrongs of drug sentencing policy. For example, it was this body that first called to attention how the disparate sentencing between crack and powder cocaine was unnecessary and overly punitive. The Sentencing Commission also regularly reevaluates drug sentencing based on what's actually happening in the courtrooms, and this body does not shy away from the controversial and evolving

areas of drug policy, such as fentanyl analogs and other synthetic drugs.

So today, the Sentencing Commission is tackling another important issue, a thoughtful reevaluation of the drug quantity table. Does it measure culpability? Right now, the drug quantity table serves a purpose and quantity does have a valid basis, but it is over-relied upon. Individual culpability, individual role, should also play an important part in measuring the length of the sentence and an individual's culpability. Right On Crime believes that the Commission should consider revisions that would focus on an individual's culpability in addition to the quantity.

So there are tools at a prosecutor's disposal right now to seek enhancements depending on if the person can be identified as a leader, an organizer, or a manager of a criminal enterprise, and these role-based characteristics are important for those enhancement procedures. And yes, there are opportunities to also depart

downwards, but I am very encouraged by the Commission's proposal on the specific offense characteristics for role-based departures. I'm happy to discuss that potentially non-exhaustive list in more detail with the Commission. Ultimately, as we can see from the methamphetamine purity distinction issue and the prevalence and expansion of synthetic drugs, quantity alone is no longer the strongest indicator of culpability, and this Commission should be doing excellent work as it is on evaluating how to best move forward.

The Commission is also considering an amendment to address methamphetamine sentencing. As you all know, there is currently a 10-to-one statutory and guideline ratio where it takes 10 times less pure methamphetamine to trigger the same penalty as it would for more pure detectable amount of methamphetamine. And purity is a unique proxy only for this methamphetamine drug, and no other drug in the sentencing -- I'm sorry. No other drug in the Controlled Substances Act is

purity alone used as a proxy for culpability.

Now, the impetus behind this purity distinction I think was well-meaning. It was in response to the domestic methamphetamine production crisis earlier this century. However, most methamphetamine now is made in Mexico, smuggled across the southwest border, and is incredibly pure, so the alleged purpose now in that purity distinction is largely moot. A growing number of federal courts have recognized this somewhat absurd purity distinction and have called for its abandonment in the sentencing guidelines. And to that end, Right On Crime would urge this Commission to eliminate the purity distinction and focus the sentencing guidelines on the mixture range for all methamphetamine cases. This would still allow for dangerous methamphetamine offenders to still be facing long sentences where it is appropriate but would also provide for consistency and accountability within the system. I thank you again for your time and I'm happy to welcome your

questions.

CHAIR REEVES: You'll get them in a minute. Mr. Reimer.

MR. REIMER: Thank you. Thank you very much, Mr. Chair, members of the Commission. I'm honored to be here today on behalf of the Tzedek Association, an international humanitarian organization that has focused keenly on criminal justice reform in recent years. I've had the privilege previously of being here during my tenure as the Executive Director of NACDL, but I also want to put my discussion in some context because I am part of the fast-vanishing cadre of lawyers who actually practiced pre-guidelines. Not just pre-Booker, but pre-guidelines. Like many, I feared from the very beginning that they would lead to Draconian sentences, and they did, and I'm enormously grateful to the work that the Commission has done. And so at Tzedek in particular, we are grateful tremendously for what you've done in recent years to try to ameliorate some of the harms that have resulted from this

ill-conceived approach to sentencing.

And I'll just exploit the prerogatives of age to offer this observation. I think from the very beginning, the concerns about sentencing disparity were misplaced and overrated. I don't think that they took into account the fact that capable lawyers were getting good results, positive results with very harsh judges, and incapable lawyers were getting bad results with lenient judges. And secondly, the effect of the guidelines, even post-Booker, is that judges are extremely tethered to what you -- to what the guidelines -- to how -- to what you put out there, and so what you do really matters. I also want to make this overarching point and then get to three or four points specifically, and that is this.

We are overly -- we are extremely concerned with the unjustified degradation of mens rea in the criminal law. And that's on the front end and it's on the back end. So on the front end, we've already heard discussion today

about the impact of conspiracy law, how broad it is, how wide a net it casts. But on the back end, you also have all of these other enhancements, relevant conduct, role in the offense, all of which come in under a preponderance of the evidence standard. And ultimately, what we have is a problem with the exaltation of quantification. And I'm talking about quantification both in the context of §2D1.1 with regard to drugs, but also with respect to loss -- the emphasis on loss value in the economic crime area. Quantification is an unjust and unreliable proxy for individual consideration of culpability, which, as was expressed more than 15 years ago in a report that I worked on with Heritage, is the moral anchor of our criminal justice system. And that's what we've lost.

So with that as a -- as a context, we applaud the efforts that you're making. We urge you to go to the lowest level you're considering for the base offense level of 30. We urge you to

consider reducing the other lower levels accordingly by whatever scale you come up with. We hope -- we know that this will ameliorate some of the worst impacts of quantification in this area, but I can't stress enough how much we are also urging you to let this just be the first step and to continue down this road and move away from quantification across the spectrum of all criminal activity. And I -- and I -- and Commissioner Restrepo, you've had -- you've raised this a few times. I have my answer to you. If I were writing on a blank slate, I would say what we need is individualized factors, not arithmetic. And that's where I hope you'll go.

With regard to the specific offense characteristics for low-level offenders, we support that. We would urge you to go to the maximum of six. But in our testimony, we have raised a couple of questions, and this goes, I think, to some of the issues, Commissioner Mate, that you have raised, which is how does this interrelate with the -- with the -- with the

mitigating role? Well, for one thing, if you choose anything other than six, you've got to have a provision that allows the mitigating role of up to four to be added into it. It should not be one or the other. So we hope you'll -- we've made some specific suggestions with regard to how to do that, but we think that's really important.

We also think that there should be some additional language in 17 to the effect -- we propose some language, but you could come up with probably better language, but to make it clear that whatever listing you have or whatever factors you have or examples you give, that it's clear to judges that they are to look at all of the attendant circumstances to see whether or not the limited role applies.

The last part of this that I really want to address is to tell you that we strongly oppose the evisceration of mens rea with respect to the fentanyl issue. And I listened to the -- to the testimony. I'm a father. I'm hoping to be a grandfather soon. I -- you know, it breaks

your heart to hear what Ms. Portillo has been through, but the fact is there are four reasons. One, we've learned our lesson -- we should have learned our lesson by now with other drugs. You know, whatever the drug of the moment is, the answer isn't just to increase penalties. Secondly, without empirical evidence that there's a deterrent effect on offenders or that it's going to benefit society, there's no reason to ratchet it up. Number three, the standards that are in there, I could go on all day, but reason to believe as one of the alternatives is an example of something that is a -- is -- I don't know what it means except that it was a great Rod Stewart song. But it's certainly something in the law that I don't think we can recognize.

And finally, and most importantly, I guarantee you that if you -- if you lower the threshold -- and remember, it's only a preponderance of the evidence to add these enhancements. If you lower the threshold, this will be another tool in the arsenal of the trial

penalty, and it will be used time and time again to crush people into taking pleas because of that threat.

And lastly, with the red light on, I just want to -- I'm not -- today is not or this section is not devoted to anything other than the drug amendments, but we strongly urge -- we applaud -- we are big supporters of alternatives to incarceration. We love what you're trying to do with regard to supervised release. We just ask that you clearly add language that takes into account post-arrest, pre-sentence conduct, and conduct in prison. Thank you very much.

CHAIR REEVES: Thank you. Questions from my colleagues. I was about to say, Ms. Wright is waiting on one.

VICE CHAIR RESTREPO: Yeah. Ms. Wright, you referenced the list that you think we missed a few items. Could you tell us what we missed?

MS. WRIGHT: Well, with all due respect, Commissioners, I think that you all did

an excellent job drafting that list. But you did ask for an issue for comment was what other things could be included. And as I was thinking about cases that I've seen come across my desk whenever I was a prosecutor or I've talked to individuals, I think that consideration with the specific offense characteristic would be a history or a showing of substance use disorder, as there is this perception of falsity.

Whenever people say the drug users are also those suffering with substance use disorder, I will tell you that in some circles that is seen as false. So I think that there -- the idea that a kingpin is a businessman, right? Whereas the low-level offender is a person who might also use their drugs. I think that showing a history of substance use disorder, be it through drug treatment court program or a previous conviction, et cetera, would be beneficial.

And then also, the way I think the language is written right now pertaining to text messages and phone calls might be unintentionally

narrow, because right now, a lot of drug traffickers use social media. So I would hate for that to be read too narrowly as to not include direct messages, WhatsApp, et cetera.

CHAIR REEVES: Mrs. Mate? Yeah. All right.

VICE CHAIR MATE: Thank you all very much for your time here today, and for your work before today. We really appreciate it. Dr. McReynolds, I have a question for you. And this is turning to something that was in FAMM's written comment. There, FAMM asked us to amend §2D1.1, the quantity table, to set the highest base offense level at 30. And so I had two questions about this, just to kind of echo some questions that came earlier today with other panels.

What data or research supports going to that level 30? And for your position. And is there -- are you aware of any data or research that would support its current existence higher than 30?

MS. MCREYNOLDS: In full disclosure, I am going to say we would like to follow up in writing. Let me tell you why. I have my amazing general counsels here that help draft that and I probably should allow them to respond to that.

VICE CHAIR MATE: That's perfectly acceptable. Thank you so much.

CHAIR REEVES: Any other questions? Well, one of the topics that -- oh, go ahead. One of the things that have been consistent, and I'm looking at you, Mr. Reimer, because you say you've been around here a long time. But one of the things that we've heard from prior panels and stuff, the 30 offense level being -- you know, we're asking. We're sort of asking for comments to our solution of bringing it down to 30. And many have said, yes, 30 is a -- is a -- is a great ceiling, I guess, but it shouldn't be the floor, I guess. And I think many people have said, well, it could be less than 30. If it were less than 30, do you have any thoughts about where that range ought to be tied to or what the

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MR. REIMER: Well, I associate myself with earlier comments suggesting that we need to get to a place where for an appropriate offender, there -- you can -- you -- the guideline permits a non-incarceratory sentence, so -- and maybe it seems like it's asking for too much in order -- the way that the guidelines are structured right now, but that's really where we need to go. We need to have a situation where a judge can get to the place with a -- with an appropriate case where they don't have to send them to prison or the guidelines at least don't indicate a prison sentence.

And again, I'm -- it's dismaying to me when I -- and I've been involved in bar work, so I know and have great affection for so many judges. But judges who didn't -- weren't exposed to the system before the guidelines just don't think that it's okay to disregard what the guideline is and sentenced accordingly. So that's my answer. I don't have the specific

number, but we need to get to a place where you can have an alternative to incarceration.

CHAIR REEVES: Any other questions? Ladies and gentlemen, thank you so much for your testimony today. We appreciate you.

(Pause.)

CHAIR REEVES: -- group of panelists who will provide us with academic perspectives on drug trafficking proposals. First, we will hear from Jonathan Caulkins. Who serves as a stellar university professor of Operations Research and Public Policy at Carnegie Mellon University's Heinz College.

He also serves as a member of the National Academy of Engineering. Second, we will hear from Jelani Jefferson Exum, -- who serves as Dean of John's -- St. John's University School of Law. There, she also holds the Rose DiMartino, and Karen Sue Smith, Professor of Law Endowed Chair.

Professor Caulkins, we're ready from -- to hear from you, whenever you are, sir.

MR. CAULKINS: Thank you. Thank you for the chance to address the Commission.

One of the central comments and criticisms is whether or not quantity is an adequate measure of culpability, and I want to comment on that a little bit. Quantity is a reasonable indicator, not a perfect one, but a reasonable indicator of market level. And what I mean by that is there are roughly six layers of the market between the original organization, say, in Mexico and the retailer. So there's the exporter in Mexico, there's an importer in the United States. There's a regional distributor who moves it from the southwest border into an area. And then within a big city, you'll typically have a second level wholesaler, a first level wholesaler, and a retailer. So about six levels.

And in very rough terms, the retailers work in grams, the first level wholesalers work in tens of grams, second level wholesalers work in hundreds of grams, the regional distributors

are moving kilograms, multiple kilograms at a time, the transaction between the importer and the regional distributor can be a multiple, tens of kilograms, and the Mexican organizations often want to do transactions that are 100 kilogram. Very, very simplistic, but in a ballpark, that's reasonable, and that's a reason why quantity should be part of it.

But there's also role and there's a difference between the owners who make money by the price going up between transactions, and the regular workers who do ongoing labor for the organization, and then the sort of gig workers who are doing piece rate work. And so in the best of all possible worlds, you might want to have three different drug quantity tables, one for the owners, one for the regular workers, and a third for the people who are just doing gig work, getting hired to do the occasional thing. But we don't have three separate tables. So there's one table, and then there are all these adjustments, trying to go down for minor roles

and up for owners.

And what I think you hear is that if we had three tables, there'd be a very big difference between the table for the owners and a table for the gig workers, and that the existing sets of adjustments don't fully compensate for there being only a single table, and so there's generally support for more and bigger adjustments. Anyway, that's a frame by which I think it's possible to understand both my comments and other folks' comments.

And the other option is to say, well, this one table that was perhaps designed for the owners, maybe it should just be recalibrated to be designed for the workers. Because there are far more workers who come through the system than there are owners, especially at the kingpin level. The kingpin could easily have a dozen or two dozen assistants, and those assistants are at higher risk of apprehension than are the kingpin. So inside the court system, you see a lot more workers than owners, and that's why the average

sentence given is much lower than the right sentence for the owners.

But if the base in the one table gets adjusted to be right for the workers, then you just have to make sure that there are enough upward enhancements that in those rare instances, when you actually get the chance to prosecute a Mexican exporter kingpin, you're able to give a sentence that is just for that person as well. Anyhow, that's one framing.

Where am I on time? I didn't start my timer.

UNIDENTIFIED SPEAKER: One minute and 15 seconds.

MR. CAULKINS: I will yield the one minute and 15 seconds, and look forward to questions.

CHAIR REEVES: Okay. Thank you.

MS. EXUM: Chairman.

CHAIR REEVES: Yes.

MS. EXUM: Thank you, Chairman, Vice Chairs, and Commissioners. Thank you for

inviting me to speak to you today about the very issue that's been the entire focus of my academic career. Namely, tying punishment outcomes more closely to legitimate sentencing purposes and goals in order to achieve just punishment and to ameliorate racial disparities.

Quite simply, sentencing ought to achieve a goal or a set of purposes, and when we have evidence that it does not, we ought to change course. This is especially true. When current sentencing outcomes are actually harmful.

In the case of federal drug sentencing, the racial disparities are unconscionable. This is -- there's perhaps no other area of federal sentencing where the disturbingly wide gap between sentencing purpose and sentencing practice is as well researched as in the case of federal drug sentencing under §2D1.1. The Commission has the noble task of guiding judges toward imposing sentences that are sufficient, but not greater than necessary to achieve the statutory purposes of sentencing,

specifically retribution, deterrence, public safety, and rehabilitation.

Retribution or a focus on the seriousness of an offense is meant to be guided by an assessment of moral blame worthiness. However, in establishing §2D1.1, the Commission abandoned its empirical data-driven approach and instead structured drug sentencing guidelines around weight-based mandatory minimums, even though Congress chose those weights without examining whether they would meaningfully sort individuals based on moral blame worthiness. And we know that they have not.

Those who perform the lowest level of drug trafficking offenses are often associated and punished for the highest quantities. De-emphasizing weight and centering function are crucial steps in correcting this ill-fated decision.

We see the same failures to satisfy purpose in the data regarding deterrence and public safety. The Commission itself has

acknowledged that the empirical research on the relationship between length of incarceration and recidivism is limited and insufficient for developing sentencing policy, and follow-up studies have not cured that insufficiency. When we focus on data regarding general deterrence, that is interventions that reduce overall drug trafficking, research compiled over the past 40 years tells us that long prison sentences do not meaningfully curb drug trafficking crime. We know that as low-level participants, namely street dealers, mules, and couriers are arrested, new individuals take their spot in the marketplace. And rehabilitation is certainly not served because research shows that people are best rehabilitated by community-based alternative sentencing rather than incarceration. So we have the evidence to show that §2D1.1 is not fulfilling its purposes, and so we should change course, but this new course should be cognizant of and responsive to the human harms that we've discovered as well.

We know that there is racial bias in sentencing. The Commission has found that Black males and Hispanic males receive longer sentences than white males. This is fundamentally unjust and should not be tolerated in any system that purports to impose just punishment, but rather than addressing it, the drug sentencing guidelines exacerbate this racialized injustice. 97.2 percent of individuals sentenced under §2D1.1 are sentenced to prison, and Black and Hispanic individuals constitute 70 percent of those sentenced under the guidelines -- under these guidelines.

We've seen and heard about the destabilizing effect that over-incarceration has on underserved Black and brown communities for decades. So how can this be justified when the guidelines causing these harms are not satisfying the purposes of punishment? It simply cannot be justified.

I believe that truly rectifying the harms of overly punitive drug sentencing requires

moving away from lengthy incarceration and focusing instead on alternative court programs and partnerships with entities that address substance use disorders, as well as those that increase economic opportunities in underserved communities. However, I'm encouraged by certain of the Commission's proposed amendments that would be steps toward meaningfully reconstructing the current sentencing approach in a purpose-focused manner by increasing the opportunity for shorter prison sentences, lessening the emphasis on weight, and elevating function. The options that best do this repurposing work are Option 3 for Part A, Subpart 1, so setting the base offense level at 30, and Option 1 for Part A, Subpart 2, including imposing a six-level reduction across the board for low-level functions listed in the amendment and others sufficiently similar.

I also support the Commission's proposal in Part B to eliminate the purposeless distinctions between methamphetamine purity

levels. I hope that the Commission will refocus on sentencing purpose while also centering the human harms that have been associated with drug sentencing in order to develop a meaningful framework for adjust -- for achieving just punishment. Thank you.

CHAIR REEVES: Thank you.

Questions for this group?

Yes.

VICE CHAIR RESTREPO: You've both thought more about this than probably everybody in this room combined. So I -- the question I have for you both is a question I've asked other panels, and both to the Dean and to the Professor, if you were writing on a blank slate, what do you suggest -- how would you approach just punishment in -- on drug offenses, understanding that type and quantity is something you have to factor into the mix, but what other markers, quantifiable markers should we be looking at?

MS. EXUM: Thank you for that

question. I anticipated it because I've been -- I've been here all day. And so I would like to say that starting out, if you're thinking about the purposes of sentencing and the directive to have sentencing that is sufficient, but not greater than necessary to achieve those purposes, that in my view, it necessarily means starting with opportunities for alternatives to incarceration and for lower -- for lessened punishment as far as length of sentences, because then that leaves the opportunity to increase sentences where necessary. So rather than starting at the top and having people having to work their way out of very lengthy sentences, you start some place where it really captures the heartland of cases that we're seeing in court. So the low-level offenders, the low-level offenses and the low-level functions, and then ratcheting that up using aggravating factors.

But to your question specifically about how to measure culpability, I think we've heard over and over today, that weight doesn't

quite capture that. And so that opportunities to elevate function are really where I hope the Commission will focus. And so if we think about what can illuminate function that's relevant to culpability, we're thinking about things like the level of decision-making authority, thinking about motivation, as we've heard today. So what actually got someone into that situation in the first place, thinking about levels of ownership as well, as well as thinking about profit in a -- in a larger sense. And so I think a lot of that is captured by the specific offense characteristics, and giving an opportunity for that to be the most meaningful, which is why I would go with a level six is I -- is I think the way to most elevate function that captures culpability and gets us tied to purposes.

MR. CAULKINS: So I'll start by endorsing some of those statements. Things like if there's evidence that they had authority to negotiate, for instance, over price, that's an indication that they were an owner, not a gig

worker. Likewise, if they've got $100,000 in cash, that's an indicator. But I'll add a few things.

The first is figuratively that idea of three different tables is not a bad image, even if it can't be literal, because I think it's the interaction of weight and role that's key. It's not good to have it all be weight. It's also not good to have it all be role. Most retail sellers are owners. They do profit from the price markup between what they pay to acquire the drugs and what they sell it for. They're not hourly workers. So role alone also wouldn't do it. It's an interaction between weight and role.

The purpose varies up and down the chain. Most of the comments about purpose, I think, have had in mind, the typical person who is the worker. But another purpose is to continue the successful deterrence of the horrific tactics that drug trafficking organizations employ routinely across the border in Mexico, where they murder journalists and law

enforcement officers and corrupt and intimidate politicians. Almost none of that happens on our side of the border. You can be in El Paso or Ciudad Juarez and have an enormous difference in the degree to which the drug traffickers feel free to undermine the institutions of government in that way. It is no coincidence that there is that sharp line.

And that is in part an accomplishment of the current sentencing system. So you do want to be able to, in some sense, scare the very high level people into staying on the other side of the border and keeping their violence mostly on the other side of the border and in some sense, just tossing the drugs across. They don't vertically integrate down that distribution chain I described. They don't do that for a good reason. Most of the money is made further down the distribution chain and they choose not to go after that money for a reason.

Last quick comment is the gig workers are always going to be the most disadvantaged

people in our society. Who is it who would say, yes, I'll accept $500 to take a mysterious mission involving moving a car from point A to point B? It -- it's not people who have a lot of other good alternatives. So those people who are accepting piece rate payment for suspicious gig work, there're always going to be people who are disadvantaged. And those are people who we do want to be as compassionate towards as we want to be tough towards the people who are capable of murdering journalists and law enforcement officers and corrupting politicians.

CHAIR REEVES: Yes.

VICE CHAIR MURRAY: Mr. Caulkins, I was going to ask you about a mysterious to me passage from your statement, which I'm interested to hear more about. So in your statement, there's a discussion of the change in the meth market and how meth has gone to being almost exclusively quite pure. And then you say that may not always be the case. There is a history of successful precursor control --

CHAIR REEVES: -- just speak up.

VICE CHAIR MURRAY: Interventions producing downward shocks, varying between 16 and 18 months to meth potency and associated harms. Could you talk a little bit more about that?

MR. CAULKINS: Yeah, sure. The McKetin literature review would be very good and Giacomo has just produced one in the last year. I'd be happy to email them to you all. So in the long history of methamphetamine, and some people argue also with cocaine, there have been precursor control regulations that have shocked the market temporarily. And following that shock, purity goes down. Purity dusted, price goes up, things like emergency room mentions go down, indicating less use until the market recovers and shifts to a different production technology.

So I think the main message I wanted to give though there, really is sometimes you do want to adjust for purity or potency broadly construed. And fentanyl today has that

character. A kilogram pile of fentanyl laced counterfeit pills has 20 grams of pure fentanyl. A kilogram pile of powder fentanyl sometimes has five times that, sometimes can have 40 times that. So the general concept of sometimes wanting to adjust for potency makes total sense. It just turns out that where the meth market is today and has been for a decade, it's no longer relevant. So I'm kind of trying to signal that it's nothing wrong -- there's nothing in principle wrong with choosing different sentences based on the form of the substance. It just so happens that in the world we live in today, it's not really applicable for meth.

CHAIR REEVES: I have a question. I'm raising my hand. Professor Exum, I think I heard you when you opened up about the long history of work that you've done in this area, but you've also done some stuff in criminal comparative international procedure or whatever. And the Commission was visited just the other week by some justices from the Supreme Court of Finland.

And we were talking about their -- the sentences that are imposed there. And I think I recall remembering that the Justice said that most severe sentence they impose in that country is 20 years, and it is really just only tied to murder, but there's an opportunity for folk to even petition the Court after serving 15 years, if they can get out sooner than the 20.

Obviously, a lot of the drug convictions that we sentence people are under -- are nonviolent crimes and they can cause for sentences beginning at the 20 year range and going up to life, I think is what Dr. McReynolds said that her husband faced. If you know anything about any of the compared -- comparisons to what this country is doing vis-a-vis what some others because I've heard Mexico talked about plenty throughout the day, but could you just tell us?

MS. EXUM: Thank you for that -- for that question because it -- I do think it's very important to think about even when we -- to think

about sentencing length and sort of readjust or recenter our thinking about it. There are many European countries, mainly for which a sentence of 20 years is a max -- is a high sentence that's -- that is only used in cases of extremely violent offenses. Usually those offenses that are resulting in death. And so when we think about even the Commission's proposed amendment to reduce the base offense level to 30, I would like to just put out there that that is still extremely long sentencing. We're talking about sentences that can be anywhere from eight to 22 years. And so just to make sure that even these adjustments still leave us in a place that is really imposing very long sentences of incarceration on -- potentially on non-violent offenders, which is not in line with what we see in many countries that we like to see as our sort of counterparts, contemporaries when we think about how to think about justice and fairness and equality.

So that -- that's one thing that I --

that I did want to address based on studies of other systems. And so we're already starting from a place of very high, very lengthy sentences, which is why in my response to the first question, I think that an approach that actually allows for more alternatives to incarceration so that we're not so reliant on taking people from their communities, is really important. And if I could and just in response to the professor's last comment about using long sentences to basically threaten kingpins and to keep the violence on a different side of the border, just a reminder that there's a real human cost to that, because what that means is using these long sentences understanding that we're going to have low-level individuals who are caught up. And we know that. We know that from the sentencing outcomes, that -- that's who's getting these long sentences, that we are -- we are keeping that violence at bay, if you will but the punishment is actually on individuals. And that is in an increasing public safety threat to

communities where we are removing people for decades and destabilizing communities.

We heard from mothers today. I'm a mother as well. And I -- when I think about those lengthy sentences, the eight, the 10, the 15 to 20 years, I think about my own children. I have an 11-year-old, a 9-year-old, a 6-year-old. And that -- what that time away would mean. You know, my 11-year-old would be 19 if up to 22 years, she's 32, that is hugely disruptive. And I don't believe that that can be justified when the sentences are not showing us that there's -- they're deterring overall drug offenses, drug misuse, or that they're making us any safer. And so I would just caution any thought about sort of the folks that are -- that are not being caught up in these sentences being the ones who are getting a signal, because the ones who are being caught up are being are being -- there's a huge injustice in that. Thank you.

CHAIR REEVES: Commissioner Meisler?

COMMISSIONER MEISLER: This is for

Professor Caulkins. You've -- I think thought and obviously researched a lot in this area. I'm interested in whether you -- your research reveals whether it's common to have indicia or evidence of things that concern ownership interests, profit sharing, things like that. In essence, does this show up in the data that whether a certain character of or a certain class of offenders are those who profit from the offense who have an ownership share of the drugs as opposed to taking them on consignment, for example?

MR. CAULKINS: I think that's an excellent question that I'm not the right person to answer. That is that's the question for the judges and the prosecutors. So my comment is, if one were to try to use a single table with the base numbers being more appropriate for employees, you would want before doing that to find out whether you thought it was possible to add enough enhancements back. So all I can do is signal that's something you would want to be able

to do, but I think it's the judges and the prosecutors, not an academic who are in a better position to indicate whether or not wiretaps indicate who negotiated over price or gave other indications. That -- that's an empirical question for people who are involved in the court cases to answer.

CHAIR REEVES: VC Mate.

VICE CHAIR MATE: Thank you. Thank you both for your testimony today. I really appreciate it. Professor Caulkins, there's already been one question about one paragraph on meth in your written submission. I wanted to ask a question about a different provision on meth where you mentioned that a case could be made for equalizing the treatment of methamphetamine mixture and actual at the same level as cocaine, but I don't know whether such a large shift is permissible. Let's assume that what's permissible is what's the best policy. And is that where you would go if that was permissible or do you have other thoughts about where meth

should be landing on that table?

MR. CAULKINS: Yes.

VICE CHAIR MATE: Okay.

MR. CAULKINS: Like, the first time in history a professor has ever answered a question with a single word. But yeah, it sort of in the market and functionally ballpark a kilogram of meth is like a kilogram of cocaine. They're ballpark the same price. They ballpark are supplying the same B-

(Audio interference.)

MR. CAULKINS: -- of heavy scale of the market metric tons consumer country. They're in the ballpark. Some substances really are very different by the extreme of cannabis. Yeah. Those radically different, but --

(Audio interference.)

MR. CAULKINS: -- cocaine. They're in the -- in the market, some relative close to a one weight ratio. So it's a little -- to understand why the sentencing rules would treat them as so different.

VICE CHAIR MATE: Thank you. I have a very different question. If I'm allowed one more.

CHAIR REEVES: Yes. You --

VICE CHAIR MATE: This one is for Dean Jefferson-Exum. You wrote in your letter that -- about how drug -- what drug trafficking looks like, has changed and evolved over time. And as I think about kind of where we are now and what we're thinking about and setting ourselves up for success going forward as that continues to change and evolve, do the kinds of changes that we're contemplating here, do -- would those help or hinder in that sort of measure of all stressing --

MS. EXUM: Right.

VICE CHAIR MATE: -- where it might go?

MS. EXUM: The changes are helpful steps toward recognizing out and that all the elevation -- as drug markets change over time we can -- we can go back to thinking about the

height of being what where everyone's changed. So the drugs, the drug manufacturing change just as folks who are involved in this at high levels, adapt and to maintain the work that they're -- that they're doing. That remains constant really -- that lead people as folks who are involved in it that lead people into these decisions to maintain drug sales -- work that they're doing. And so it remains constant really and deemphasizes weight, which is not closely tied to culpability.

Anything that does really are good steps. And so I am encouraged by the -- by the direction that the Commission's amendments would be going. I of course would like to see even broader changes as you all -- as you all well know. But I do think that this is a direction that will help to alleviate some of the concerns that we've learned over the many decades.

CHAIR REEVES: Thank you. I believe that concludes all the questions we have. Thank you so much for your written comments and for

your testimony. We will now take a 15 minute break. If everyone will be back in their seats at 3:15, we'll start back in about 15 minutes. Thank you.

(Whereupon, the above-entitled matter went off the record at 3:02 p.m. and resumed at 3:23 p.m.)

CHAIR REEVES: Now we have our next panelist perspective who bring it on behalf of the Criminal Law Committee's -- on the Criminal Law Committee on the proposals we're discussing today. The person before me is my good friend, Judge Edmond Chang, who is a district judge out of the Northern District of Illinois and the Chair of the Criminal Law Committee of the Judicial Conference of the United States. He's a true leader in our Judiciary, and I appreciate all that he has done for the Judiciary and in particular, the Commission itself.

So Judge Chang with that, you may follow up.

JUDGE CHANG: Yeah. Thank you, Chair

Reeves. And I'll have, for those kind of words, I'll have your payment ready here on -- yeah, I appreciate that, and greetings to you again and greetings to your fellow Commissioners. It's again, a privilege to be invited to speak on behalf of the Criminal Law Committee of the Judicial Conference. And I want to give you special thanks for scheduling me later in the afternoon to accommodate my meeting schedule, and allow me to get back to Chicago tonight. Out of the last ten days, this is my seventh day in Washington, DC, and so I thank you, and my family thanks you, and my docket thanks you for that accommodation. All right. It continues to be an absolute pleasure to work with all the Commissioners and your cracker-jack staff, all under your strong leadership, Chair Reeves, the Commission, the Judiciary, and the criminal justice system is really deeply lucky that you agreed to serve in this important role, so thank you.

As always, the Criminal Law Committee,

we've done our best to try to stick with the longstanding Judicial Conference policy that we ought to have a guideline system that is fair, and transparent, and predictable, workable and flexible. And my comments today will focus on a few specific points on the drug guidelines and supervised release. I should note, as always, my comments reflect the views of the Criminal Law Committee and have not been adopted by the AO Director. And of course, do not necessarily reflect the views of the entire Judiciary across 94 districts and 12 regional circuits.

On the drug offenses proposal, the Committee does appreciate the efforts of the Commission to address the effect of drug type and weight on drug sentences. We recognize that there are significant numbers of variances from the drug guidelines. I mean, literally thousands every year. So we understand that. And the percentage is somewhere north of 45 percent in the most recent data of sentences each year are downward variances. We do have some concerns

about certain aspects of the proposal, though. And first, on the idea of dropping base offense level 38, the highest base offense level and the drug quantity table down to something like 34, 32 or 30, we are concerned that that groups together defendants of varying culpability. And in particular, for example, it takes about 90 kilos of heroin and 450 kilos of cocaine to reach level 38 in the current guidelines. And in contrast, at level 34, it takes 50 kilos of cocaine and 10 kilos of heroin to reach level 34. So to group together defendants of those kinds of quantities, and for those particular types of drugs does seem to be bringing together defendants of qualitatively different culpability. And the harms that arise out of distributing 90 kilos of heroin versus 10 or 450 kilos of cocaine versus 50 does seem to compress the culpability.

And to put it in terms of the guideline ranges themselves, at the low end of the range of formally level 38, would be brought down by about 35 percent if the top of the top

offense level in the drug quantity table ended up being option one, which is 34. And that is a significant difference. I will note too that it -- it's sometimes easy to forget that the individual doses of drugs for heroin and cocaine, for example, is typically around a tenth of a gram, and it could be greater for users who have been using for a longer period of time, but we very often see expert testimony that it's about a tenth of a gram. So just -- so one kilo of cocaine or one kilo of heroin, that represents 10,000 individual doses, and that is a significant harm in the community -- Committee's view.

Now, having said that, again, we recognize that there are significant variances from the drug guidelines, and so some reform could very well be warranted. And I think to inform the appropriate change, we would hope that the commission could examine from current sentencing data, where are judges landing when there are defendants in these top offense levels,

and where are they landing in terms of their downward variances? Maybe it is 34 or 32 or 30, but it might be something north of it. It might be 36. We just think that that would really inform the proposed amendment so that it could reflect what judges are doing in actual cases. The other possibility would be to adjust, and again, I mean, this -- because this has happened, an adjustment has happened before in this area, the base offense level caps for those who receive mitigating role adjustments. So if the idea is that, at least in part, that drug type and quantity at these higher offense levels is too far emphasized for the least culpable defendants who have played a minor role or a -- or a minimal role, then it may very well be warranted, again, based on sentencing data, to bring those caps down even further.

And so it ought to be possible, I think, to study what's happening in §2D1.1(a)(5), where these -- the mitigating role caps kick in. And are judges downward varying even from those

current caps? And so it may be that you ought to drop, for example, right now, if you receive minimal role and your base offense level is still north of 32, it comes down to 32, maybe that should be lower for those who play a minimal role. So I think there may be some way and a balanced way to reform the emphasis on drug type and quantity. Now that of course, turning to the mitigating role caps as a potential reform would of course require that there still be a mitigating role function in the -- for §2D1.1. And that's the other part of the proposal, the low-level trafficking functions would remove the §3B1.2 considerations, and instead insert the low-level trafficking functions amendment.

And we do have some concerns that the proposal -- that proposal would introduce new terms into the guidelines that would have to be litigated and would generate litigation. And it does seem like it would be adjusting the mitigating role caps or looking for a top offense level that is south of 38, but not as low as some

of the options, would be another way, right, to mitigate the extent of drug typing quantity effect on sentencing, but really take care of those defendants who are -- who are -- who are less culpable through mitigating role, right? §3B1.2 is quite well-developed law I think at this time, in the circuits. There's a stable platform through which we can effectuate this potential change.

And so we would ask that the commission consider perhaps increasing the possible reduction for minimal role. Maybe instead of four levels that ought to be six levels. And in -- it could be confined to drug cases, or maybe maybe it should be explored that the minimal role adjustment allows for even greater decrease than it does at this point. So we would prefer that there not be a new specific offense characteristic for low-level trafficking functions, and instead use that stable platform of §3B1.2 to its maximum extent.

I did want to make another comment on the proposed drug guidelines. Of course, our letter includes other thoughts, but on the idea of including in the commentary for the safety valve, that the safety valve might be satisfied by a written disclosure. I mean, we do have concerns on that, in that it might encourage more written disclosures instead of in-person meetings. It is, of course, a correct proposition of law that a written disclosure can theoretically satisfy the proffer requirement of providing complete information on the offense and relevant conduct. But realistically, at least in the experience of the members of the Criminal Law Committee -- but realistically, at least in the experience of the members of the Criminal Law Committee that is so rarely even attempted because it is so difficult to give a complete account of the offense and relevant conduct in a written disclosure in which the government has no interaction with the defendant in trying to elicit information about suppliers, and other

participants and buyers and their contact information and descriptions and their names and frequency and so on. And the -- it's just, I think just generally true that government counsel is better able to connect dots and ask questions to get that complete accounting.

And so what would possibly happen if we had more written disclosures is that at sentencing we would start litigating, is this a complete account? And then you start having these -- kind of an extemporaneous back and forth between government counsel, defense counsel, and then the defendant, perhaps and having the defendant, at that point is he is he testifying, is he writing additional information down? And so I think that has a great potential of disrupting the sentencing process itself. And it might end up with fewer defendants receiving the safety valve reduction. We do understand the safety concern of these in person meetings and at least in Northern Illinois agents and the government try to take steps to make sure that

it's not well known if the defendant is detained, that he's providing safety valve information, but it's -- of course that's not foolproof.

On the other hand, it does seem like there are significant risks with written disclosures, especially if you start litigating in sentencing, in open court, the -- this proffer. And that seems -- it -- it's an open process, which in -- which anyone can attend. And at the same time, we typically do need to put on the docket publicly, filings that are the basis of our judicial decision-making. And so the written disclosure would be potentially on the docket. So it seemed uncertain to us that it -- there was -- it would be superior from a safety perspective to have written disclosures for proffers. I -- I'll move on to supervised release amendments, but I do want to pause in case there are questions on our drug comments. Okay.

CHAIR REEVES: Thank you.

JUDGE CHANG: Yeah. And so I'll -- on

supervised release, thank you for taking a fresh look at supervised release, which has not been freshened up, but we've had the OG supervised release guidelines for a few decades now. And so we are -- we're grateful that the Commission has undertaken this task. And first on the length and conditions of supervised release and the proposed amendment there, we welcome the explicit citation to 18 USC § 3583(c), which are the factors that govern setting the length and conditions of supervised release. Section 3583(c) is not nearly well -- as well-known as its famous cousin, § 3553(a). And I think many judges had not really focused on the fact that there is a -- there's a statutory subsection on what factors to consider in setting the length and conditions of supervised release. So we welcome the explicit reference to that.

And of course, we all understand that the Supreme Court has under advisement Esteras and which is a § 3583 case, but the language is quite similar to § 3583(c), and that may have

some impact on those factors. It is, I think, worth noting, just as a point of emphasis, that again, thank you for requiring courts to make an individualized assessment of length and the conditions of supervised release, and tying that explicitly to § 3583(c). I mean, we think it is important that they match exactly so that there's no question or need to litigate what that means. It means § 3583(c). So thank you for that. And again, also, thank you for disconnecting the minimum required terms of supervised release, the length of supervised release, disconnecting that from statutory maximum. You know, as we know, statutory maxima, they tend to be all over the place for offenses.

And as just one stark example, bank fraud has a 30-year statutory max and bank robbery has a 20-year statutory max. And so statutory max seemed an very imperfect proxy for what the length of supervised release ought to be and the -- and so thank you for removing that. We do think it may -- there may be some value in

having at least some recommended terms of supervised release that are tied perhaps to the length of imprisonment, right?

I think it is quite natural that someone who has been imprisoned for a substantial period of time is going to have difficulty reintegrating back into society. This is one of the reasons why every sentencing decision is a -- is a sobering and very serious decision because we are taking someone out of -- from -- away from their family and their community and depriving them of their liberty, and then -- and then bringing them back from that prison setting into the -- back into the community.

Some transition help is needed. And that is what the probation office is there for, to protect the public, but -- and also, right, to serve the rehabilitative needs of the supervisee. And those goals are -- they're not competing goals, right? They go hand in hand because the more we can rehabilitate, the safer the public will be. And so it may be that sentencing data

could help inform that decision as well. If the data show that a certain length of imprisonment, which naturally would mean a harder -- a more difficult reintegration to society, if there's a -- if there's a point during the supervised release in which defendants are more likely to recidivate, then perhaps that could inform what the recommended terms of supervised release ought to be.

Okay. Then moving on from length to the conditions. Again, very much appreciate that the guideline proposes that the judges conduct an individualized assessment of what the conditions ought to be. We do have a concern about the potential change in the terminology, just the nomenclature of standard conditions to, example, of common conditions. And I understand the risk that standard conditions means that the judges just think, well these are absolutely going to apply in every single case and it perhaps ought not apply in every single case. But these standard conditions, to use today's nomenclature,

do seem broadly applicable to most defendants when you require employment efforts or that if you're going to change your residence, that you must inform the probation officer before doing that.

And one of the conditions is that the supervisee asks for court permission in order to become a confidential informant or assist law enforcement. That is for the vital protection of the probation officer's safety, right, because the probation officer should not be in a situation where he or she's going on a home visit, for example, and they walk into the middle of a law enforcement operation that they don't, you know, know about. So some of these conditions are -- they are broadly applicable and we think even the change in nomenclature might weaken their applicability.

And I'll just make one other note on this, which is -- or two other notes. One is, again, from the probation officer perspective, and of course, you've -- you have their comments

and perhaps testimony, but probation officers, they sit down with supervisees as they're released from prison, and they read aloud the conditions to them. And I think there's -- there is some more power to calling a condition a standard condition as opposed to something else so that the supervisee understands these are very important conditions. The second point I suppose is, I do understand that some of these conditions could be quite burdensome to defendants and -- including requiring a supervisee to inform someone of risks that the supervisee might pose. Just as a -- as a personal practice, I insert on the objection period into that condition so that the supervisee understands that if he or she objects to that, they can bring an objection to court. And I tell them at sentencing, and you -- if they have appointed counsel, you can call the federal defender, attorney, file an objection, and then I will decide whether it -- it's appropriate. So there are ways, I think if needed, to modify these conditions without

changing the nomenclature.

On modification, just a brief point on that, which is, that the idea of requiring or encouraging, I think is the term in the proposed amendment, a post-release assessment of the conditions of release, that does happen already. The probation officers are doing this during the pre-release period and during the initial period of supervision. And I -- it -- this change could increase the work on courts unnecessarily because probation officers are already doing this. I know some judges do this as a matter of course to great effect, and certainly they ought to continue that. But inserting it into a guideline and increasing the likelihood of that happening when our probation officers are already conducting this evaluation seems unnecessary.

And then on early termination, of course, the Committee supports having a provision or a subsection in the provision that explicitly references early termination. As you know, the Criminal Law Committee has been -- has been

studying the significant differences across districts in their rates of early termination. And we're trying to understand why there is this difference from district to district. And that's an -- a really important endeavor because the data does support that those who are early terminated do not recidivate at any higher rate than those who complete their full term of supervised release. And so in those districts that are using early termination to great effect to lessen the burdens on the defendant and his family and also to free up probation officer resources, they're getting it right most of the time, and so we're trying to study whether that should be imported to other districts.

But for now -- I think for now, trying to list not a non-exhaustive list of factors in considering early termination might be premature. And I say that because although we appreciate that this non-exhaustive list of factors comes essentially from the Guide to Judiciary Policy as well as to the pending bill or maybe soon to be

pending bill if it hasn't been re-sponsored yet. So we appreciate looking to those sources, but we are in the midst of updating, right, that list of factors based on the latest research.

And there's a post-conviction working group within the Judiciary that is examining that. And so we might have more information for you on that in the upcoming year as opposed to enshrining the current factors in the guidelines. So we would ask you to just maybe pause on that until we finish our work. So yeah, that concludes my remarks on supervised release. And then I welcome any questions you have.

CHAIR REEVES: He's invited questions. Okay. VC Murray and then -- did you have -- oh, okay.

COMMISSIONER MEISLER: Yeah, I do, but let's not.

CHAIR REEVES: Okay.

VICE CHAIR MURRAY: Thanks so much for your comments and for your written testimony, Judge Chang. Very much appreciated your comments

about it being preferable in the -- in the Committee's view to modify §3B1.2, rather than adding a new §2D1.1(b)(17). One sort of countervailing critique we've heard from a number of witnesses is just that judges are "miserly," their word, not mine, in applying §3B1.2. Do you think that's a fair critique, and if so, what would we be able to do if we were going to go that route to convince judges to like really use §3B1.2?

JUDGE CHANG: Yeah. I mean, I don't -- I would, before opining on that, I would want to see, yeah, and assess what the different circuits have set as their -- as their standard and what the data is. And so I don't know whether it's actually miserly or not. I mean, one possibility would be to take some of the low-level trafficking functions that have been expressed in that -- in the potential amendment and put it in commentary in §3B1.2. And so that might be a way to encourage judges to look at those functions as relevant to mitigating role.

And that, at least, would have the benefit of not requiring litigation over the text of a -- of a new guideline. And instead is just -- is -- it's commentary and perhaps that would increase the frequency of the mitigating role application.

COMMISSIONER WONG: Can I -- can I go on?

CHAIR REEVES: Commissioner Wong, yes.

COMMISSIONER WONG: Just sort of in a related vein. Judge Chang, I thought it was interesting when you said that -- one thing that -- one thing the Commission might want to take a look at is where the most culpable defendants -- where they are landing on -- in the 30 scale. In terms of their ultimate sentences, what if -- and I was thinking about this after Professor Caulkins' testimony earlier which I don't think you're here for, but he was talking about, what if the data showed that those most culpable defendants that we're talking about, that we don't want to conflate with lower level folks, are landing at 38. And that the reason that

there are statistical variations from the guidelines is just because it's more of the intermediaries and the middlemen and the redistributors that, as Professor Caulkins was saying are more easily apprehended. And so they're just greater numbers of them and that's pulling the average sentence down below the guidelines. What would we make of that if the most culpable were actually landing precisely where the guidelines put them, but that they're just numerically fewer of them?

JUDGE CHANG: Yeah. I mean, it's not a matter, I don't think, of statistical significance, right? That -- that's -- we get into statistical significance when we're not sure if there might be measurement error. We know these are the sentences, and so if the sentences of level 38 defendants because they're -- they are the wholesale suppliers, they're the cartel figures, they're still at level 38. I -- that suggests that they ought to stay at level 38 and that there should not be this compression. And

then it -- and it seemed like that the primary motive, which is quite valid, that the drug quantity and type is unfairly increasing the sentences of those who play -- they drive the car across the border and they don't know how much is in the -- in the trunk. They might not even know the drug type or quantity and -- but it -- it's still relevant, but based on mitigating role, they ought to be able to drop much further down or perhaps there's a cap. So I -- yeah, I think if level 38 defendants are staying there, then that suggests that there ought not be a change in -- a compression across the board.

COMMISSIONER WONG: The data question for us, then actually to look at level 36 and 38 defendants and where they fall along the function line, sort of on a more ad hoc basis?

JUDGE CHANG: Yeah. That would explain -- that could explain the variances and that still though would end up, I think, with the proper approach being to adjust for their role, right, their mitigating role in our view and not

having across the board drop that then would benefit those who don't play a mitigating role and are distributing these enormous quantities of drugs.

CHAIR REEVES: VC Mate?

VICE CHAIR MATE: Thank you, Judge Chang, for fitting us into your busy DC schedule this week. As always, we appreciated your testimony. I wanted to switch to supervised release and I have a couple of questions that are completely unrelated other than they're both about supervised release. So my first question is whether you could explain a little bit more why the Committee supports giving courts the flexibility in deciding -- well, I guess they have the flexibility either way, but it -- the guidelines specifying that the courts should be exercising discretion on whether a revocation sentence should run consecutively or concurrently with any new offense in the revocation context I'm talking about.

JUDGE CHANG: Yeah. So -- right. We

generally do support more discretion, yeah, than less.

VICE CHAIR MATE: Okay.

JUDGE CHANG: And so yeah, I -- the idea would be that there is still this breach of trust concept and that we're not necessarily sentencing for the new criminal conduct as such. Although again, we do have to look in the revocation context at § 3583(e), and some of those goals may very well be satisfied by longer revocation sentences, depending on what the misconduct was, but yeah -- but overall, there ought to be discretion, I think, on whether or not there is consecutive or concurrent sentences.

VICE CHAIR MATE: Okay. Thank you. Now, can I ask my very different supervised release question, which is about data collection, and you know, you've kind of urged us to kind of make data informed decisions as you always do, and we appreciate that and that's always our goal as well. And there's something you -- in your written testimony that made me think about how we

collect -- if we were to make changes in supervised release, how we collect data going forward that would help us continue to improve the guideline based on what's happening. And it was your comment about the on-the-record provision and the -- it might be easier if we just said in open court in terms of the administrative burden on Courts to do something like that in connection with the reason for the imposition and the length of this sentence. And it just got me thinking about all of these decision points throughout supervised release and are there things we should be putting in this provision that will help us -- well, will facilitate us gathering data on what is informing these decisions without being unduly burdensome to the courts in their already full workload?

JUDGE CHANG: Yeah. It's a great question because they -- I think in the J&Cs, we might look askance at adding another page in which we are having to check boxes and -- which I understand is typically the way that you collect

data. And so I -- and know, I suppose one way would be and this would require the standard conditions though, and we would have to work together on some kind of coding that makes the conditions like numerically more uniform.

And so it might be easier then for all of us to track what conditions are being imposed, and what kinds of cases, and what those defendant's characteristics are. So I, of course, my -- the AO staff might be having a heart attack right now as I say this contemporaneously, but I just offer that as something to explore. But yeah, I appreciate the need to think about how we collect supervised release related data as opposed to just on the J&C, the sentence of imprisonment itself.

VICE CHAIR MATE: Okay. Thank you.

VICE CHAIR RESTREPO: Judge, a question for you. In your in the context of being a District Court Judge in the Seventh Circuit, we heard some testimony recently from the folks at POAG as well as a lot of written

submissions saying that if we do emphasize this individualized assessment or determination, it's going to slow the process down, sentencings will become much more cumbersome. What are your views on that having been in the Seventh Circuit?

JUDGE CHANG: Yeah. So I won't ask you for the identity of the probation officers who said that to see if they were talking about me, but yeah, I -- so as you know, some years ago, the Seventh Circuit decided a line of cases in which it -- the Court required sentencing judges to focus more on supervised release and give these individualized assessments in setting length and also the conditions in particular. And so I -- we adapted to that, I think pretty well. And I am -- I actually heartened by the fact that the Seventh Circuit gave us this directive because we were moving through supervised release very quickly in part. I think because supervised lease was coming at the end of most sentencings. And at that point you've just delivered typically very, very difficult news to

the defendant and his family is in the courtroom and no one at that point is emotionally ready, including the judge to really go through these conditions.

And so after that decision came down that line of cases, I actually even moved supervised release up before the defendant's allocution and the actual -- my imposition of sentencing. And I always say that, depending on the allocution, I may just conditions or length and where it's not clear where that it's going to be a custodial sentence, I -- then I still wait to the end. But in most cases, I'm addressing it before the defendant's allocation. And so it really helps. And I -- we go one by one and it doesn't I don't think take all that much time. And it does focus me. For example, one of the mandatory conditions is expressed in a way that says that the drug test -- defendant shall not use controlled substances and will take one test within 15 days of release and then periodic tests up to 104 per year. And so now I'm I am looking

at the PSR to determine, all right, well, if there's been a substance use problem and it's marijuana, they don't need two tests per week to detect that. And every test is them leaving a job or needing childcare and transportation and that burden. And so I will knock that down.

And so it's those kinds of -- that kind of focus is, I think important, and it doesn't take that long because I've read it all beforehand and I can just -- and usually I'm the one proposing the changes and I ask whether there's an objection, typically not. And then we move on.

VICE CHAIR RESTREPO: Thank you.

CHAIR REEVES: Yes.

COMMISSIONER WONG: Judge Chang, you had -- the point you made about how the Commission should be careful about encouraging the post-release assessment, lest it sort of complicate what probation officers are already doing as a matter of course, is there a concern -- I understand sort of a redundancy or a just a

judicial discretion case load management concern there -- is there also a concern or not that if you're encouraging it, it might actually run crossroads to cause complications to what the probation officers are doing, terms of changing sort of their normal time frame for doing that or anything like that? Or is it just purely some districts are very busy and cannot I don't know.

JUDGE CHANG: Yeah. I don't think the concern is premised on that we would get crosswise with yeah, probation office recommendation.

COMMISSIONER WONG: Okay.

JUDGE CHANG: I think it is more the idea that as -- that all judges as opposed to those who are able to -- and I applaud them to for this able to dedicate that time to hold that kind of a hearing.

CHAIR REEVES: Go ahead, please go. No. Go ahead.

VICE CHAIR MURRAY: One of the kind of through lines of the comments that we've

received, is that the current way the funding scheme works for probation officers discourages early term, even when an early term may be appropriate. Is the CLC engaged on this issue?

JUDGE CHANG: We are.

VICE CHAIR MURRAY: Yeah.

JUDGE CHANG: And we need to engage with other committees on how that work credit is accomplished, but I -- and I understand that concern, and we're so we're going to work on it in parallel, to have a budgetary concern like that drive, like substantive decision making on supervised release, I think I would prefer not to have that the dollars issue overcome sound policy.

VICE CHAIR MURRAY: Yeah. No. And we just have to act against the backdrop of the way the scheme --

JUDGE CHANG: Oh yeah, absolutely. Yeah. Thank you for that question.

CHAIR REEVES: Commissioner Meisler.

COMMISSIONER MEISLER: Well, it's kind

of a timing question. I think -- I think I heard you say during your testimony, just your opening statement, just a few moments ago that maybe because of the working group that the AO has convened on early termination policies, may be premature to list out factors to consider.

You also mentioned a couple times in your written submission, the pending Esteras case before the Supreme Court, we can't rush them, right? And so the Commission operates in a certain cycle, and I was just wondering in light of those two things, whether the Committee's ultimate bottom line is maybe wait a while or is it just those particular provisions you think might have to wait or could use refinement in the future cycle?

JUDGE CHANG: Yeah. Well, on the Post-Conviction Working Group, what I want to do is get to our Committee's June meeting and then figure out from there, what that timeline's going to be. And so I think we could -- I could provide a little bit more detail on the timeline

after our Committee's next full meeting. On the Esteras question, they -- I mean, presumably it'll come out by June and the -- it does seem like the only question is very specific, § 3553(a)(2)(a), and like whether that is part of it. If you just refer to the statute, which is already progress, then I think whatever comes along with the Esteras will just be imported into that very statutory site. But at least we would all know that those statutes actually control supervised release.

CHAIR REEVES: I have one question, I think. With respect to giving the supervised release conditions prior to a person going to jail or prison. Here, we see sentences of 60 months, 240 months and even higher. The special conditions, or standard conditions, or any conditions might not be appropriate for that individual who is 22 years old before you and when he comes out, he's 45 years old. So should the judge after the person is released, get with the probation officer to sort of do an

individualized assessment at that time. Does -- do our policies allow us to do that now or should it allow us to do that in the future?

JUDGE CHANG: Well, I think internally the probation officers do that now, right? Like that is their -- as a matter of judiciary policy that they conduct an individualized assessment during that pre-release period, when BOP is letting us know that this person's going to be transitioning to the -- to the probation office supervision, because often they're in the community or under BOP custody still formally, and during this pre-release process, the probation officer has access to the supervisee, and can start planning, and talking with family and doing home visits and so on. So I think that's already done. Your point's well taken that we are at sentencing often setting supervised release conditions that are not going to be implemented for a decade or more. And so that's why it is important for the probation officers to do that assessment, but bringing the

Court into it as a matter of overall policy, I think may be redundant and occupied time that is not needed when we have our expert probation officers to rely on.

CHAIR REEVES: Thank you. Any further questions for this gentleman. Thank you so very much, Judge Chang for all that you do. We appreciate you.

JUDGE CHANG: Thank you. Again, I very much appreciate it.

(Pause.)

CHAIR REEVES: For last. This is our last panel for today, and I appreciate everybody's patience. We're going to talk here with these two individuals about the proposals on supervision. First, we will hear from Nicholas Linder, who serves as Chief of the Criminal Division at the United States Attorney's Office for the Southern District of Indiana. And second, we will hear from Kelly Barrett who serves as the First Assistant Federal Defender at the Office of the Federal Defender for the

District of Connecticut, excuse me.

Mr. Linder, we will hear from you first, sir.

MR. LINDER: Thank you. Chair Reeves, good afternoon, Commissioners. The Commission has proposed a number of broad changes with respect to supervised release. So I'll focus on the Department's top line views. There's four of them. First, we support promoting discretion for judges, particularly on the front end when imposing supervised release, meaning we support what's probably the most significant proposal here, not requiring a term of supervision in every year plus sentence case. We know probation officer's time is limited. I have seen how an engaged talented probation officer can change the lives of a person returning from prison in profound ways. But an overloaded probation officer cannot -- who can't devote the time necessary to establish rapport, learn their client's needs and help them overcome the barriers to reentry is not going to accomplish

that goal. So reinforcing judge's discretion in this way, we think will help.

Second. We caution however, that adding new -- when adding new procedures, the Commission should take an incremental approach. Big picture, we think the current guidelines are largely right on the amount of supervision, so to speak that should be applied to the supervised release process. The guidelines already incorporate, with a few of the suggestions made, the legal principles that judges are well accustomed to namely applying the pertinent § 3553(a) factors on an individualized basis, adding layers of procedure, risks, unintended consequences, and increased litigation leading to inefficiency and disparity. For example, as Judge Chang commented, we caution against Court intervention at predetermined times, such as soon after release, or after one year after supervision rather rely on change circumstances to prompt such a review. The guidelines should continue to encourage that bottom-up fact-based

approach, looking the parties and especially the probation officer to bring matters before the Court when necessary.

Similarly, we share POAG's concern that injecting the phrase individualized assessment into various provisions risks misinterpretation and litigation, especially in §5D1.1 when it's coupled with the, when and the only when, language which begs the interpretive question is something more required than an ordinary § 3553(a) analysis?

To be clear, we agree the judge's assessment under §§ 3553(a) or 3583 must be individualized, but that's already set forth in the statutes. Instead, we support reminding judges to state on the record their decisions regarding supervised release, as they do with every other part of sentencing. As Judge Chang pointed out, that's what we do in the Seventh Circuit, and it works. It focuses the judge's mind. We think this more incremental proposal is an elegant way of improving the system while

limiting downsides.

Third, any changes should explicitly reference public safety in addition to rehabilitation as a goal of supervised release. When I worked in our district's reentry courts, I would introduce myself to participants, I'd shake their hands, and I would make sure they knew that I, the prosecutor, wanted them to succeed. And they'd be a little taken aback by that oftentimes, so I'd explain that I believe they paid their debt to society. Their family and them deserves a good life, and I don't want to see them again on another case, both for community's sake and their sake. Rehabilitation is of course central to supervised release, but so is preventing recidivism. We think some of the proposed amendments could better reflect those goals.

Take, for instance, the introduction to Chapter 7. The rehabilitative goal there is explicit, but the public safety goal must be inferred. In Chapter 7's violation context,

though, both can be important. For instance, after a series of repeated violations, it's not uncommon to hear advocacy for terminating supervised release because the person's not benefiting from it. And that may well be true. But continued supervision may be important for the community given the public safety risks that a particular offender poses. We think Chapter 7 should reflect that.

Similarly, the importance of public safety informs the Department's positions regarding sex offenders, terrorism offenders, and illegal aliens. We're also unaware of data -- new data that would support proposed changes regarding the sex crime and terrorism offenders.

Finally, accountability matters. The prospect of revocation lends legitimacy to the system and to the probation officers as they work to both provide support and structure to those reentering society. This is especially true for serious violations, which is why we support the option that includes Grade A and B violations in

the "shall revoke" paragraph. Those violations result from the commission of a felony offense. The Court, of course, retains discretion as to the punishment, but the guidelines should continue to signal that revocation is appropriate in those circumstances.

Similarly, we support the option that revocation sentences should run consecutive to other sentences. To be sure, there will be occasions where their state sentence is sufficient and a concurrent sentence is appropriate, and the proposed use of "should" instead of "shall" will accomplish that and reflects -- rightly reflects well placed discretion, but the starting place should be a consecutive sentence. Thank you Chair Reeves, Commissioners. With that, I'll be happy to address your questions in a moment.

CHAIR REEVES: Thank you, Mr. Linder. Ms. Barrett?

MS. BARRETT: There is nothing in over 12 years of practice that I've seen evoke a more

powerful expression of happiness in another person than early termination of supervised release. Not for a time served sentence, not for a reduction of a life sentence, and not even for a not guilty verdict at trial have grown men shed more tears of joy than when they are finally off paper, for many, for the first times in their lives. Judge Arterton described the psychological toll of supervision, acknowledging the, quote, "Significance to defendants of being off the papers and becoming one's own person without reporting requirements and without having to request permission to engage in travel and other activities." Thus, terminating supervision, i.e., the papers, represents a form of freedom.

Take 44-year-old Vincent Clark, a man who had begun to lose all hope when he was sentenced to over 11 years for a nonviolent drug crime. The flame of hope rekindled when he received a sentence reduction and was released early, his flame burned bright as he joined the

late great Judge Jeffrey Meyers' Reentry Court and successfully graduated in 2023. Subsequently, Judge Underhill granted him early termination, an act that Vincent said gave him so much hope and spirit. He said it was the first time in his life since he was 13 that he was free. Having the judge believe in him empowered Vincent, and he's doing the best he's ever done in his life.

The sublime freedom experienced by those released from the grip of supervised release also reveals the immeasurable power of its dark underbelly. Congress intended supervised release to be principally rehabilitative. But in practice, it is principally punitive. You need look no further than at the unacceptable number of people we imprison for technical violations. According to the AO, there were nearly 17,500 revocations in fiscal year 2024, over two thirds of which were technical violations. And according to the commission's Federal Probation and Super --

supervised Release Violation Report, out of the group of studied cases, almost 95 percent of Grade C violations receive some term of imprisonment.

In my experience, the majority of technical violations are for positive drug tests. Sending people with substance use disorder to prisons and penitentiaries where drugs and violence are prolific and treatment is not, is not, rehabilitation. It punishes substance use disorder, which is a chronic medical condition, not a moral failing.

In my experience, the next most common technical violations are housing instability, ineffective communication, and difficulty obtaining employment, often arising out of disabilities, like ADHD, PTSD, and intellectual disability, which ought to be accommodated, not punished. I'm told that Connecticut is one of the good districts. We do have the lowest rate of violations in the country. It isn't something in the water. It's intentional. We started a

movement to reform supervised release in which defenders, prosecutors, probation officers, clinicians, and judges acknowledge that the goals of protecting the public, deterring crime, and rehabilitation go hand in hand. As Judge Underhill quips, "After all, a rehabilitated offender poses no risk to the public."

While Connecticut is not perfect, here are a few examples. Judges here are imposing shorter terms of supervised release with less conditions. Medical experts educate our stakeholders on the medical model. To ensure that mental health and substance use treatment is helpful and not harmful, it is imperative to view substance use disorder as a treatable illness rather than an act of defiance.

In 2008, Judge Underhill brought Support Court to Connecticut to support people with substance use disorder with a group of stakeholders to meet weekly. Then in 2016, Judge Meyer took a delegation to Philadelphia to observe Judge Restrepo's reentry Court. What

resulted was a program focused on the highest-risk returning individuals, creating a supportive network that transformed participants' relationship with the criminal legal system.

Our office made a concerted push to file early termination motions. In the past two years, we filed 113 motions, 91 percent of which were granted. Stakeholders worked together to develop a collaborative practice for filing. We routinely use options short of revocation: Rule 12(a), notifying the Court, but requesting no action, Rule 12(b), modifications, and Rule 12(n), compliance review hearings and collaborate with stakeholders about interventions before formal revocation is charged. We rarely use warrants for supervised release violations.

We can replicate Connecticut's efforts to reform supervised release in other districts, although the practice has veered off course, you can steer it in the right direction. If you adopt the most discretionary options in this amendment and incorporate our suggestions, it

would rekindle the flame of hope for individuals navigating the important work of rebuilding their lives and community connections after prison. Thank you.

CHAIR REEVES: Thank you. Questions for this panel?

Go ahead. Yeah, yeah. Please do. Please do.

VICE CHAIR MURRAY: This is primarily for Ms. Barrett, but happy to have anyone weigh in. The -- there's sort of two questions when it comes to the standard conditions issue. One is, should there be standard conditions, or should they all be lumped together? The second is, if you're going to stick with the standard conditions that we have or the idea of standard conditions, are there individual conditions that should not be in the standard conditions bucket? I guess my question is about that second question. So if we were going to stick with a standard conditions model. Are there particular conditions that you think are causing big

problems that we should give a hard look at?

MS. BARRETT: Thank you for that question. Defenders would support changing the title from standard to examples of common conditions, and we join Judge Underhill and Lyman Center at Yale on that. We think that the kinds of conditions that make sense are the ones listed at A, B, E, F, and M of the proposal. Judge Underhill and Lyman suggested using seven out of 13 of the standard conditions. In Connecticut, we never use a third party risk condition as a standard condition. That's only ever a special condition and used very rarely.

In the Lyman study, Lyman found that of 66 people that received supervised release in Connecticut in 2023, all 66 received all standard conditions that are used in Connecticut, thus indicating that there isn't really -- there wasn't really an effective individualized assessment being done under §§ 3583(c) and (d). And so Lyman recommended and others have recommended reducing the number of conditions by

taking a more individual look, and we agree with it.

VICE CHAIR MURRAY: And so other than third party risk, are there others you think deserve a particular look?

MS. BARRETT: Yeah, we -- at our -- we actually had a meeting in Connecticut in November among stakeholders, and stakeholders almost uniformly agreed that the travel condition is not necessary in most cases. Neither is the felony association condition, which really is at odds with people rebuilding pro-social context in their community. The government in our district routinely agrees with not having those conditions. Judges have also begun limiting the number of standard conditions imposed to really only, I think one, two, four, five, six, seven, and thirteen, and sort of excluding things that are already required by law, and by including them as a condition, it's just sort of creating a tripwire for punishment when it's already otherwise covered.

But certainly, I think among all stakeholders, we think that the travel condition and the felony association condition are very problematic. Also, frankly, the employment condition is problematic for people with disabilities. It can be extremely difficult. Only 22.5 percent of people who are disabled are employed, and accommodations are not always readily made for people that have disabilities. And so having that as a standard condition I think is problematic.

VICE CHAIR MURRAY: Does the government have views on those actions in particular?

MR. LINDER: Yes. So as a general matter, having a set of standard conditions, and we would stick with the nomenclature largely for the reasons Judge Chang stated, administer-ability. But a set of standard conditions is helpful in terms of how the probation officer, of courses, this is where they come from, exercises supervised release. It's

for their safety, et cetera. In the 7th circuit, the -- we've developed this practice, as Judge Chang noted, of having the conditions listed throughout the PSR and then under each, the rationale given, a brief rationale for the probation officer -- for including them. And it allows at the sentencing hearing for the -- if, for instance -- it's not to say that these are mandatory in every case, right? As my colleague noted here, there are certainly good reasons to remove them. But the presumption in our view should be that the status quo here, which is they are needed as a general matter for administer-ability from the probation officer's perspective. So when there is a predicted issue with employment or travel, it's raised, it's litigated. And it as my colleague pointed out here, we -- the government often agrees to it. But the framework seems to be working where it's teed up -- the standard conditions are teed up by probation in advance, and the and the parties can debate them as necessary.

CHAIR REEVES: May I -- may I follow up with a question? Of course. I read -- I read the Lyman piece, I believe, that they submitted, and it did bring a different perspective for me with respect to employment and family felt the conditions of not associated with other felons probably who might be in your family or employment conditions, or other conditions of not being allowed to leave the district from which you were convicted. In Mississippi, that's probably okay because you could travel three hours and still be in the district. If you're in Suitland, Maryland, and you have family members in DC, that's right across -- that's right down Pennsylvania Avenue, and you're in two different districts. So to read those standard conditions 240 months in advance telling the person -- so I guess my question would be why would -- why then should there not be an individual assessment post-release to see what these conditions are and how they affect that particular individual at that moment in time? And also, with the -- with

the education -- with the educational component, sometimes on the front end at sentencing. All of that doesn't come in. Nobody knows how deficient a person might be, and they may learn that after being in prison, after taking tests and doing otherwise. So how do we balance all that if we're not doing an individualized assessment post-release?

MR. LINDER: Our view there is that, as Judge Chang pointed out, an individualized assessment is being done post-release, it's just who's -- the question is who's doing it? And our view is that, again, the issue should bubble up from the facts. So as opposed to the Court conducting that individualized assessment in sort of a regimented fashion for each defendant, the probation office is already doing that as they prepare the person's in the reentry center, they're meeting with them, they're lining up their employment, they're assisting, if there are at that time, if the job, for instance, that it appears that the person will get and it's

appropriate for that person, is one that will require them to leave the district that can be raised by the probation officer at that time. This system is working that -- this aspect to it. And I think that's -- our view is that it should be -- should continue to work.

CHAIR REEVES: Ms. Barrett, do you have any comments?

MS. BARRETT: Thank you. I would respectfully disagree that the system is working. I think the system is fundamentally broken. And what I've learned is that there is radically different practices and -- that vary from district to district. And while I may be in a good district, there are districts that are suffering mightily in this regard. I think just taking a step back, I -- when I'm talking about not imposing a travel condition, I'm talking about at the time of sentencing, and that's rooted in an idea that the parsimony clause applies at the time of sentencing, sentence has to be sufficient without being greater than

necessary to accomplish the § 3553 factors, and with respect to supervised release § 3583(d) requires a least restrictive approach. At our round table that we held in Connecticut in November at the same time as the Commission's round table, no one could identify what would be the reason why it would be necessary for most people convicted of an offense in Connecticut to limit their travel upon release to the District of Connecticut. No one could say why that's related to the § 3553 factors. There might be a very small percentage of crimes that involve some kind of inter-district transportation, but no one could really cite one.

And so just taking that as a -- as one example, it seems that it would not be consistent with the parsimony clause or the statute in § 3583(d), to impose a travel restriction in every case simply because at first principles it's not necessary. And then on top of that, to think that anytime an issue comes up when someone needs to travel down the line, the immense amount

of energy that goes into trying to modify something after the fact, when they might not have ready access to counsel, by the time the issue percolates up to the court at that point, the person's probably already lost a job opportunity or the chance to travel across state lines to go to a family funeral.

So I think by putting just a little bit more time and thought in on the front end, we'll be saving a lot of time and energy on the back end, and also creating a system that will yield less violations, because right now I think there are too many violations and that takes up too much time on the court's docket. And so if we can -- I think one of the commenters said for every additional condition that's imposed, there's a reduction by 19 percent in compliance rate. And so if we limit the conditions to what are actually necessary, we'll see a greater amount of compliance and less work on the back end.

CHAIR REEVES: Thank you.

VC Mate and then Restrepo.

VICE CHAIR MATE: Thank you.

Thank you both for your testimony today. We appreciate it. I have a follow-up to what we were just talking about there on -- for you, Ms. Barrett, on the is it working on the -- at the reassessment point? I'm curious about whether it's working, too. We've heard this is being done, it's being done by probation officers on release, everything's good here. Is there a need to be doing the -- and that it would be burdensome on the courts potentially to encourage reassessments upon release. So I guess my question is twofold. Is that working right now, with it being done by probation officers and not the return to the court? And is there -- would there be value in doing that -- and how does -- how do we balance that against the additional burden on the court?

MS. BARRETT: From my understanding, in talking to people around the country and different Defender Offices, it's not working

right now. There are many districts where probation officers are not routinely meeting with clients at the start of supervision to review conditions and are not involving counsel. I do know that in Connecticut, we do -- we are -- we do have examples of doing a reassessment when someone comes on to supervised release. I'll just give one example. One of our judges made a condition at the time of sentencing, that we would get together for a telephone conference 30 days after the person was released. And so we had a simple telephone conference, it was 15 to 20 minutes long. And the purpose of it was because the judge wanted to see how the conditions were working, if anything needed to be modified. And in fact, there was an issue with the client's residence, he had been ordered to go into a halfway house, but when he was released, a job opportunity arose in a different part of the state, and so -- and he had a -- an ability to move into a different residence.

So very easily by having that 15

minute phone call, the judge was able to modify the conditions, adjust for the changed circumstance. And at the same time, encouraged the client to participate in our support court program, which the client did, and he ended up graduating support court and getting an early termination of supervised release. And this was someone that had been on supervision, almost his whole life and had never successfully completed a prior term of supervision. And so by having that, it was only 15 or 20 minutes, but by getting all the parties on the line and addressing an issue early on, I think it saved what would've almost certainly been a violation proceeding down the road, and quite to the contrary, it was a success story. So that's one example where it has worked well in Connecticut to have a very simple proceeding, it might be a little bit more time on the front end, but it saves a lot of time on the back end and is more efficient. And I think also does a better job protecting the public, because as Judge Underhill

says, a rehabilitated person is not a risk to the public.

VICE CHAIR RESTREPO: It's a question for both of you. One of the conditions or -- we've included in the -- in the proposed amendments is pursuing a high school, maybe a GED. Good idea, bad idea? And should we limit it to GEDs, or should we include other sorts of vocational training in terms of encouraging folks to participate in some sort of program?

MS. BARRETT: I -- I'd be happy to answer that. You know, I think it would -- it's great if people want to get a high school diploma or GED and if they're able to do so, that's a laudable thing and people can certainly do that. We don't think it should be a condition of supervised release. There's nothing -- that doesn't add anything to the picture other than provide a possible punishment if they're not able to attain that goal. And I can say in my personal experience, having had several instances of clients trying to obtain a GED or a diploma,

who have had disabilities, like intellectual disability or ADHD, it's been nearly impossible to find a program that will accommodate someone with those disabilities to be able to get what they need to get a diploma or GED. And some people aren't going to be able to do that. And probation officers don't always have the clinical skill, although they may be very well-intentioned, they may not know if someone is suffering from that kind of disability. And so it sets up a paradigm where people with disabilities may be punished. Also, although it may be a good thing to get a diploma, I don't think it's something that needs to be a condition in order for that to happen.

VICE CHAIR RESTREPO: Mr. Linder?

MR. LINDER: I think it is a good idea. It's certainly -- it's in the sort of the standard set, I suppose. But to the extent -- or it's in the special set, I'm sorry, that -- so it's optional in any event, right? I think placing the idea in the mind of the judge, as

well as potentially in the mind of the probation officer, and especially the offender that education's important is not a bad thing. And candidly the high school equivalent or high school diploma, just a note of it may prompt, as you point out, I don't think you need to add vocational training, it just may prompt the notion of it. I think folks who take pride in satisfying the goals and I suppose I just view the system with a little more optimism, that it's not a trap. This isn't a trap. To the extent someone does have a disability, it should be individualized, it should be looked at, evaluated. Counsel can advocate for that, of course. And if it's not -- if it is going to turn out to be a trap for someone, it shouldn't be imposed. But I think the possibility placing it on here, education's just critical for employment and for structure in a person's life.

CHAIR REEVES: I have a couple of follow-ups. You said counsel can sort of litigate that on the front end. But on the back

end, nobody asked counsel when they get out. In all likelihood when the person is sitting with the probation officer talking about what is -- what is my life going to be like on supervision. So there won't be any back and forth with counsel at that point, I don't think. But I wanted to ask this other point, early termination has always been around, and I want to ask with respect to your respective districts, how often did you see a move by probation or a supervisee for early termination? And I ask for your respective districts and what you might be hearing from your colleagues in other districts?

MR. LINDER: So in the Southern District of Indiana with maybe the exception of say sex offenses or other different offenses that are very, very serious, if the person is performing well, if there are no history of violations or even if there is at a very, very minor violation, but they are -- they have those pro-social goals, right? I think you -- your factors are in the right place, stable

employment, stable housing, and pro-social relationships, we're going to get that request from probation every single time. And candidly, we're going to agree with that most of the time. It -- certainly we're going to take into account the person's criminal history, we're going to take into account what the offense was, but it's -- there's a strong incentive, at least in the Southern District of Indiana, and from in talking with other criminal chiefs, this is the case in other districts as well, probation officers are tremendously busy. And as I noted in my opening comments, if they have the time they can make such a difference. And if they don't, it's really difficult. So they bring us early term requests frequently for -- because of that incentive when it aligns with the -- when the facts require it and we agree with it.

CHAIR REEVES: Ms. Barrett, what are you hearing from your defendant -- what are you seeing in your district --

MS. BARRETT: In my district in

Connecticut in the last two -- we keep statistics on this. In the last two years, we filed 113 motions for early termination and 91 percent were granted. There were only five denied. We have a collaborative process that we've developed with stakeholders and have presented to our judges on this, where we will work up -- we have a screening process. Probation will send people to us who request early term from them. We have a screening process in our office. I review every motion before it goes out the door. And we have one centralized probation officer that gives the position for the probation officers -- probation office, so that there's some consistency and she's a supervisory officer. So we include probation's position in the motion. We then provide it to counsel for the government, which is usually a centralized person, usually the criminal chief. They provide a position for the government and consistent with our local rule, which requires that we get both positions. And then we file it. And 91 percent of them are

granted.

So it's been very effective. Probation does not generally file them on their own. When I -- in preparing for today and in talking with people from other districts, I was shocked to learn that this is apparently maybe singular in the country, that people in other districts had not heard of filing of early termination motions. People don't have counsel. People expressed a lot of resistance from judges, different standards that are being sort of like lobbed on to it requiring extraordinary or changed circumstances, which is not what the law is. So I think Connecticut, from what I've heard from other defenders is somewhat of an anomaly, but I think we've worked hard to develop a collaborative process with stakeholders and I think it could be mimicked in other districts.

CHAIR REEVES: Thank you.

Meisler, then Mate.

COMMISSIONER MEISLER: This is pretty in the weeds, though. So this is taking us off

the thing. But I was curious, I noticed in response to one, this is for Ms. Barrett, in response to one of the issues for comment concerning the First Step Act, how it interacts, I noticed the defenders who have proposed in red to make it easier on our strained eyes, a solution of a nominal term of supervised release, and I hadn't heard that before. And I was just curious, if you could explain what that -- how that would work in your view?

MS. BARRETT: In our view in order to get earned time credits under the First Step Act while in -- there has to be some term of supervised release imposed. And although it's still a developing area of law, and I think it's unclear exactly how long a term of supervised release would be needed in order to effectuate those credits, I think at least one court has held one month, it might be as little as one day, but that's why we use the term nominal, because I think all stakeholders kind of agree there should be this incentive which helps protect the public

and deter crime and also promote rehabilitation. So that's why we framed it as nominal, because I think the law is still developing as to what exact period of time would be needed.

COMMISSIONER MEISLER: Okay. But the idea is with a one-day term of supervised release, it would just be a technical imposition to trigger the ability to apply the BOP the first time these are -- the first to have that credit, but it wouldn't actually involve any supervision by the provision officer?

MS. BARRETT: Right. With the goal of promoting rehabilitation and protection of the public and deterring crime. Similar to when judges impose a sentence of a year and a day, that triggers good time. Thanks.

VICE CHAIR MATE: I have one question for both of you. Going back to the reassessment possibility in the proposal. Right now it says, I think as the encouragement is as soon as practicable. And I was curious whether either of you -- if we were to have some provision about a

reassessment, what the timing -- what the ideal timing would be on something like that, in your view? Assuming it was actually -- I know that there's opposition to it happening, but assuming it was happening, what would the timing -- what timing would be best?

MS. BARRETT: In my experience in the example I gave earlier, the assessment happened within 30 days, and that was effective in that case. Judge Underhill and his comment suggest a period of 60 to 90 days. I think that this -- the research shows that most violations occur within the first year of supervision. But I think judges can have the discretion to decide in that particular case what exact period of time makes sense. But I think something between 30 and 90 days makes a lot of sense.

MR. LINDER: Coming back to the notion of an individualized assessment, I think it's really hard to say. And that's because one of the other reasons that it -- that the -- getting the court involved at that stage might not be the

best use of resources, is that you just don't have a ton of information at that point. It says 30 days or 60 days or even 90 days, our reentry court, as an example, deals with medium and high risk offenders. So it -- it's going to depend on what who the offenders are. And our reentry court is a two-year process. First year is an intensive period of supervision. Second year is less intensive if you complete both your cut paper, your off paper. The first year, it really does take about a year for certain offenders to really feel -- to feel confident that you can change. To have a picture of how they're going to be -- how they're going to do, how successful they're going to be reintegrating into society. 30 days might make sense for somebody who has that trucking job lined up, but that's something that the probation officer could bring to the court's attention. Again, it's -- your question is sort of leading to me coming back to the opposition as you noted. But I think it just depends on that individual offender and how ready

they are to be able to integrate back into society.

CHAIR REEVES: Any further questions from this illustrious panel? Thank you, Mr. Linder. Thank you, Ms. Barrett.

MR. LINDER: Thank you, Chair.

MS. BARRETT: Thank you.

CHAIR REEVES: With that, I would like to bring today's hearing to an end. On behalf of my fellow Commissioners, I want to thank again each of our panelists, each of those individuals who submitted comments, and to our staff for making this all happen today. We've heard this testimony today, we'll consider the testimony, and we will use and debate that testimony to make our sentencing policy, which we hope ends up being right, fair, and just.

The hearing is now adjourned and we will reconvene tomorrow morning at 9:30 a.m. for the next day of hearing. Thank you.

(Whereupon, the above-entitled matter went off the record at 4:42 p.m.)