

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

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TUESDAY
FEBRUARY 17, 2026

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The Commission met in the Meham Conference Room in the Thurgood Marshall Federal Judiciary Building, One Columbus Circle NE, Washington, D.C. 20002, at 9:09 a.m., Carlton W. Reeves, Chair, presiding.

PRESENT

- CARLTON W. REEVES, Chair
- LAURE E. MATE, Vice Chair
- SCOTT A.C. MEISLER, Ex Officio Commissioner, U.S. Department of Justice
- CLAIRE MURRAY, Vice Chair
- LUIS FELIPE RESTREPO, Vice Chair
- CANDICE WONG, Commissioner

ALSO PRESENT

- BARRY BOSS, Co-Chair, Commercial Litigation Department, Cozen O'Connor
- MICHAEL CARUSO, Assistant Federal Public Defender, Federal Public Defender for the Southern District of Florida
- COLLEEN CLASE, Member, Victims' Rights Advisory Group
- ADAM CLAUSEN, Member, Sentence Impact Advisory Group

1 HON. EDMOND E-MIN CHANG, Chair, Criminal Law
Committee, U.S. District Judge, Northern
2 District of Illinois
SAMI GEURTS, Fourth Circuit Representative,
3 Probation Officers Advisory Group
CELESTE KINNEY, Assistant Federal Defender,
4 Federal Community Defender for the Eastern
District of Maryland
5 JAMI JOHNSON, Member, Tribal Issues Advisory
Group
6 VINCENT T. LOMBARDI, Supervisory Assistant U.S.
Attorney and Lead Task Force Attorney, U.S.
7 Attorney's Office for the Western District of
Washington
8 JOSHUA LURIA, Chair, Probation Officers Advisory
Group
9 DAVID PATTON, Chair, Practitioners Advisory
Group
10 CHRISTOPHER QUASEBARTH, Chair, Victims' Rights
Advisory Group
11 CARL M. REDDIX, Chair, Sentence Impact Advisory
Group
12 ABRAHAM J. REIN, Third Circuit Representative,
Practitioners Advisory Group
13 AMANDA RIEDEL, Acting Assistant Director, EOUSA
Legal Programs and White Collar Crime
14 Coordinator, Executive Office for United States
Attorneys
15 KAITLIN SAHNI, Money Laundering, Narcotics, and
Forfeiture Section, Narcotic and Dangerous Drug
16 Unit, U.S. Department of Justice
JEREMY R. SANDERS, Assistant Deputy Chief,
17 Litigation Unit, Fraud Section, U.S. Department
of Justice
18 NATASHA SILAS, Executive Director, Federal
Defender Program for the Northern District of
19 Georgia
PATRICIA RICHMAN, Assistant Federal Public
20 Defender, Federal Public Defender for the
District of Maryland
21 WILLIAM G. VOIT, Assistant United States
Attorney and Appellate Chief, U.S. Attorney's
22 Office for the District of Arizona

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

2 (9:09 a.m.)

3 CHAIR REEVES: Good morning. Good
4 morning.

5 GROUP: Good morning.

6 CHAIR REEVES: There you go. All right.
7 I'm the Chair of the United States Citizen
8 Commission, Carlton W. Reeves, and I welcome you
9 all to this hearing. I thank each of you for
10 joining us, whether you're in the -- this room
11 or attending us -- or attending via livestream.
12 I have the honor of opening this hearing with my
13 fellow commissioners. To my left, we have Vice
14 Chair Claire Murray. And to her left, Vice
15 Chair Laura Mate. And to Vice Chair Laura
16 Mate's left is our Ex Officio Commissioner
17 Representative of the Department of Justice
18 Scott Meisler. To my right is Vice Chair Luis
19 Felipe Restrepo and Commissioner Wong. Thank
20 you for being here with us today.

21 I'll take this point for -- point of
22 personal privilege. I got the news this morning

1 that Reverend Jesse Jackson died. And, you
2 know, he was one who spoke out about racial
3 injustice, criminal justice reforms, so I don't
4 think I, as chair of this Commission, where
5 there's a straight through line from his run and
6 for his laying -- for others' laying the
7 foundation for me. He always referred to my
8 homegirl, Fannie Lou Hamer. My homeboy, Medgar
9 Evers in his run in all the things that he did.

10 There's also one very personal
11 connection. In 1984, when he was running for
12 president, he came to Jackson State University
13 where I was attending. That happened to be the
14 first date that I had with my bride. We were
15 out, attending his speech. And we left there,
16 because we were encouraged to move our
17 registration from Yazoo City, Mississippi, to
18 Jackson State where we could have the most
19 impact, he told us. And we marched from Jackson
20 State University to the highest county circuit
21 clerk's office, and went to register to vote.
22 That was our first date. And from there,

1 because the hours of standing in line waiting to
2 vote, by the time I got back at Jackson State,
3 the cafeteria had closed.

4 So her sister, with whom she was living
5 with, said, why don't you invite him over for
6 dinner? And we -- and I had dinner with her and
7 her family. And for the next nearly 40 years,
8 we were -- almost 40 -- 40 years, we were all
9 together, but -- so he brings all those things
10 full circle. And just think of -- I think of
11 Jesse Jackson in that way. Of course, we all
12 think about him, keep hope alive, and all of
13 those things. So I just wanted to take that
14 point of personal privilege. And thank you for
15 indulging me.

16 Our agenda today reflects the dedicated
17 work of our commissioners. We have been busy,
18 and I want to thank each of them for their
19 dedication and extensive contributions. I'm
20 always honored to be among this group. Of
21 course, though, no matter how dedicated and busy
22 we are, it pales in comparison to the awesome

1 public service through -- servants throughout
2 this agency who always make the impossible seem
3 easy.

4 Some of them are in this room, but, of
5 course, most of them are not. They have done
6 the research. They have coded every pre-
7 sentence report, every judgment, and every
8 commitment order, every statement of reason.
9 They have drafted the policies. They have set
10 up this room. And they have done so much else,
11 to make this hearing possible. On behalf of the
12 commissioners, ladies and gentlemen, and the
13 public, I thank all of our agency staff for the
14 amazing work you do every single day.

15 The Commission has issued Proposed
16 Amendments on Drug Offenses, Economic Crimes,
17 Sophisticated Means, and Post-Offense
18 Rehabilitation. We have received many, many
19 comments on each subject, and we are so grateful
20 to everyone who has taken the time to share with
21 us your perspectives and insights on ways we can
22 improve our system of justice. Today, we will

1 hear from individuals to help us determine
2 whether, and how sentencing guidelines, should
3 be amended.

4 Each witness has different views on
5 these subjects and specifics of sentencing
6 policy. The Commissioners too have different
7 views. Today, though, we are here to listen and
8 ask questions. The comments we received are
9 posted on our website, www.USSC.gov. You can
10 also find the videos and transcripts of the
11 hearings we conducted on these amendments, and I
12 encourage the public to read these comments and
13 watch our prior hearings. Today, the comments
14 we have already received will be buttressed by
15 testimony from a distinguished group of
16 individuals, whose more complete biographical
17 information is included on our website. To all
18 who are speaking with us today, I promise that
19 your extensive journeys and preparations will be
20 worth it. When you speak to the Commission, you
21 will be heard, and you will be read, too. We
22 have read your written submissions, and your

1 testimony will be available for the public to
2 access our -- on our website.

3 If some things come up today that you
4 would like to elaborate or -- on or respond to,
5 please do so. Each panelist, except for our
6 very first one, will have five minutes to speak.
7 Your time will begin when the light turns green.
8 You have one minute left when it turns yellow
9 and no time left when it turns red. I hope I
10 got that right. Thank you.

11 But if -- ladies and gentlemen, please
12 come on, bear with me. If I cut you off, please
13 understand, I'm not being rude, because a guy
14 from Mississippi just can't be rude. So -- but
15 if I cut you off, I'm not being rude. We have
16 so much to cover today and a limited time to
17 hear from everyone.

18 For our audio system to work, you'll
19 need to speak closely into the microphone. When
20 all panelists have finished speaking,
21 commissioners may ask you questions. I am
22 certain we will. Thank you for joining us. I

1 look forward to a very productive hearing.

2 That takes us to our first panel. I'd
3 like to introduce, who will offer the
4 perspectives of the Criminal Law Committee of
5 the Judicial Conference of the United States, on
6 all four subjects, my good friend and the Chair
7 of the Criminal Law Committee, Judge Edmond
8 Chang, who will present that testimony. In his
9 other job, Judge Chang as a District Judge of
10 the Northern District of Illinois.

11 Judge Chang, please, sir, we are ready
12 when you are.

13 JUDGE CHANG: All right. Good morning,
14 Chair Reeves. And thank you for sharing those
15 profound remarks on the Reverend Jackson. I had
16 not heard the news. And he, of course, leaves
17 enormous footprints, nationally, globally, and
18 in -- particularly in Chicago with his rainbow
19 push organization. Thank you for those profound
20 remarks.

21 Greetings to all of the commissioners.
22 A happy lunar new year. It is the year of the

1 horse, which represents vigor and action, and
2 that certainly describes this Commission. It's
3 always as -- it is as always a true privilege to
4 speak with you all here today, and it's an
5 absolute pleasure to continue working with all
6 of you on sentencing policy. And to work with
7 your expert staff, who it's -- you have staff
8 that is, of course, populated with sentencing
9 policy experts, and the nation is much better
10 off for that.

11 And Chair Reeves for all the Commission
12 has done in just a little over three years. It
13 is hard to believe that it's just been that
14 amount of time since the Commission was
15 reconstituted under your strong leadership. As
16 always, the Criminal Law Committee tries to
17 apply the principles that the judicial
18 conference has set forth for our Committee, and
19 that is that the guidelines ought to be fair,
20 transparent, workable, predictable, and
21 flexible. And, of course, my comments don't
22 reflect the views of the administrative office

1 director or all 1,000 or so federal judges
2 across the nation, but this is our deliberative
3 consensus from our Committee's perspective.

4 Today, I'll focus my testimony on
5 really three things. One is the methamphetamine
6 proposed amendments. And then, the loss table,
7 including the inflationary adjustments. Just a
8 brief note on that and then, the restructuring
9 of the loss table. And then, lastly, post-
10 offense rehabilitation.

11 On methamphetamine, the Committee does
12 support, generally speaking, treating meth
13 offenses equally across the board. The
14 Commission's data does show that current
15 methamphetamine purity levels are uniformly
16 high, no matter the form of methamphetamine,
17 more than 90 percent. And as a practical and
18 really deeply tragic matter, that is the reality
19 of methamphetamine trafficking at this point,
20 that it is almost always in a purely -- in a
21 very high purity form.

22 And this is an example of intense

1 capitalism, working in an illegal market, and
2 supply and demand have converged in this way so
3 that meth is at this tragically high purity. So
4 the time when purity of methamphetamine was an
5 accurate proxy for role culpability, that is to
6 say the higher the purity, the higher up you are
7 in the supply chain, I think those days have
8 come and gone. And we see that -- the high
9 purity at the very, very retail level.

10 The Commission has also focused
11 everyone's attention, I think, quite
12 appropriately, on the geographic disparities and
13 the availability of laboratory testing. Or even
14 if available, the practices of sending samples
15 to get tested among the various districts. And
16 so, sentencings that do not involve a purity
17 calculation with meth actual ends up being a
18 result, not of differences in purity in meth
19 trafficking, but in differences of laboratory
20 testing across the nation. Not surprisingly,
21 courts have thus reacted in various ways, and
22 the data shows that one third of -- fewer than

1 one third of defendants in methamphetamine cases
2 are being sentenced within the range. So the
3 Committee does support treating methamphetamine
4 across the board the same.

5 Having said that, the Committee does
6 oppose what was labeled as Option 2 in the
7 Proposed Amendments. And that is to say the
8 option in which there would be different base
9 offense levels, based on different factors --
10 and a -- some a very long list of different
11 factors to consider. Now, some of those factors
12 are cross references. So in theory, you know,
13 we would've thought about those cross references
14 in any event.

15 Having said that, some of them are not.
16 And, for example, one of the ways to mitigate
17 the offense level is this kind of new proposed
18 specific offense characteristic that is a blend
19 of aberrant behavior and more than minimal
20 planning. And so, these would be new factors
21 that would get litigated, and the courts would
22 have to apply -- come up with definitions, and

1 so on. And so, I think that is an overly
2 complicated way of approaching the need for
3 change here.

4 Having said that, the Committee, at
5 this time, does not have a recommendation on
6 where exactly the quantity threshold should be
7 set for methamphetamine. And instead, we
8 encourage the Commission to conduct a study of
9 the relative risks of addiction and other harms
10 that are posed by this very highly pure
11 methamphetamine that is now being trafficked.
12 As the Sentencing Commissions and Materials
13 explained, put together by that terrific staff
14 of yours, the meth mixture purity used to be
15 something south of 50 percent. And now, we are
16 north of 90 percent.

17 So on the one hand, the purity no
18 longer reflects role culpability. So it -- it's
19 not the case that you are necessarily high up on
20 the supply chain if there is a high purity of
21 meth that is trafficked. But at the same time,
22 bringing down meth actual sentencing down to

1 where meth mixture is also is not necessarily
2 appropriate given the purity of methamphetamine
3 and the additional effects of the highly pure
4 methamphetamine.

5 And I -- I'll just make a quick note
6 that -- because I think this has been
7 interpreted maybe slightly differently by
8 different groups, that the testimony that you
9 all heard on methamphetamine -- I believe it was
10 in August of last year, the way I read that
11 testimony, both from the DEA pharmacologists as
12 well, and then, the social worker who testified,
13 and also the San Antonio Police Department
14 Sergeant, all of them did seem to opine that the
15 higher the purity, the greater the stimulant
16 effect, which leads to a greater addictive
17 effect. I -- and I suppose it's -- the
18 testimony is subject to interpretation, but that
19 is -- that's how I interpret it. The more
20 active ingredient, the more the stimulant
21 effect.

22 So at this point, the Committee's

1 recommendation is to study the relative harms of
2 methamphetamine as compared to, you know, other
3 drugs, as you are trying to figure out, where do
4 you land on the quantity thresholds? It is
5 worth, I think, comparing it to -- making a
6 comprehensive examination of the various
7 forms -- the most commonly distributed forms of
8 controlled substances, so that you can then pick
9 the right -- the quantity threshold.

10 I mean, just give you an example, as
11 you're -- as the fact sheet points out, the
12 Commission's fact sheet points out that fentanyl
13 is involved in 80 percent of overdoses that
14 occur each year. And whereas methamphetamine
15 is -- it's hard to put the word "only" in front
16 of overdose, but, you know, relatively speaking,
17 you know, 1 percent of overdoses. And yet, it
18 takes 400 grams of fentanyl to reach a offense
19 level 30, and it only takes 50 grams of meth
20 actual to get there.

21 And so, there -- recognizing that
22 fentanyl does have this graver risk to the

1 population, it might not be appropriate to set
2 it at that level. At the same time, again,
3 studying those relative effects is, I think,
4 crucial to making that decision on where to set
5 the threshold.

6 I understand that the Commission might
7 want to act before doing something like this, if
8 you even take up this suggestion, because the
9 sentencing is not reflecting the reality of
10 methamphetamine distribution now -- and this is
11 something you've been studying for years. And
12 so, this has been on the table, you know, for a
13 while. And so, it may be appropriate to do some
14 adjustment in the interim, and then, come back
15 and examine this again. That's -- it's, of
16 course, not necessarily going to satisfy
17 everyone, but we believe it does represent the
18 most deliberative approach to this particular
19 issue.

20 So those are my remarks on
21 methamphetamine. So I should pause here before
22 moving on to the next topic if there are

1 questions. And I'd be happy to answer them.

2 VICE CHAIR MURRAY: Thanks so much,
3 Judge Chang. We always enjoy having you with
4 us. Do you have kind of specific thoughts on
5 how we can get to those questions of relative
6 harms? I mean, we were trying to do that, I
7 think, in our August-September round table on
8 meth. We talked to experts about
9 pharmacological effects and about harms in
10 communities.

11 Are there like specific pieces of that
12 puzzle you think we're missing?

13 JUDGE CHANG: Well, and it may be that
14 you have most of the data, it's just surfacing
15 it, and then, actually making that comparison.
16 I think the testimony, it -- the oral testimony,
17 I'll confess I didn't -- had not looked that
18 deeply into the written testimony, was much more
19 speaking relative wise, rather than empirical
20 wise. Like, getting to that real concrete data,
21 like the fact sheet did a few weeks ago on the
22 comparison of overdoses and what is the drug

1 that is causing the greatest harm there.

2 So it may very well be that you have
3 those answers, and it's just a matter of surfing
4 them into a concrete empirical data. Because
5 certainly, the witnesses did speak about cocaine
6 and heroin compared to methamphetamine, but I
7 don't think, in a way, that would let you really
8 pick the quantity threshold, at least not quite
9 yet.

10 CHAIR REEVES: Judge Restrepo?

11 VICE CHAIR RESTREPO: Judge, good to
12 see you.

13 CHAIR REEVES: Good to see you.

14 VICE CHAIR RESTREPO: You commented
15 that fewer than a third of defendants or cases
16 are sentenced within the guideline range. So
17 I'm assuming you mean a good number, maybe close
18 to two thirds or underneath the guideline range.
19 How -- what should we make of that? Should we
20 interpret that as judges thinking across the
21 board the meth guidelines are too punitive, that
22 they overrepresent harm? And should we factor

1 in what's happening on the ground in our
2 calculations?

3 JUDGE CHANG: Well, I do think you
4 ought to factor in what is happening on the
5 ground in making a choice to move forward with
6 an amendment. It -- I would be hesitant to say
7 that it's an across the board judgment at this
8 point, because there are still, you know, one
9 third that are within the range. But having
10 said that, I do think that reflects a
11 dissatisfaction, generally speaking, with how --
12 you know, how punitive the guidelines are.

13 At the same time, it's not quite -- and
14 I haven't done this specific comparison yet, but
15 we certainly saw with crack cocaine, you know,
16 the variances that were happening in that
17 context when there was not a mandatory minimum
18 involved. And I would wager the discrepancy is
19 not as significant in meth sentencing at this
20 point.

21 So while the two thirds are below the
22 range, their position relative to that, you

1 know, minimum range number, it -- it's not
2 likely as steep as it was with crack cocaine, so
3 that would be worth studying. So I don't think
4 it tells you the actual -- you know, the precise
5 quantity threshold to pick. But I do think it
6 speaks to the fact that many judges are looking
7 at the current guidelines, that they are too
8 severe.

9 VICE CHAIR RESTREPO: So as a policy
10 matter, do you think we should take -- we
11 should -- I'm sorry.

12 As a policy matter, do you think we
13 should factor into the equation what judges that
14 are actually doing when we're trying to come to
15 terms with the breaking equation?

16 JUDGE CHANG: I do. I think there -- I
17 mean, you all have, you know, a general
18 philosophy on, you know, when is it appropriate
19 to both issue a guideline and to amend a
20 guideline? And, I think, you know, different
21 judges have different thoughts on that, too.
22 And sometimes, it is to adjust the guidelines to

1 match what judges are doing and doing in the
2 field. So long as what the judges are doing in
3 the field reflects sound sentencing policy,
4 it -- you know, it might be that the Commission
5 disagrees if -- with, you know, what judges are
6 doing.

7 So that is a common rationale, for
8 amending a guideline, is to reflect what our
9 judges are actually doing. So -- and maybe the
10 import of your question is, if the idea is that
11 you want to take some interim step, you know,
12 before conducting a wider inquiry and a wider
13 examination of the drug guidelines generally,
14 that where judges are sentencing, you know,
15 might be an interim step.

16 CHAIR REEVES: Thanks.

17 Vice Chair Mate?

18 VICE CHAIR MATE: Good morning. Thank
19 you so much for joining us. As always, it's
20 very helpful to hear from you.

21 Following up on this, kind of looking
22 to what courts are doing to -- as evidence of

1 maybe what we should be doing, you talked about
2 sort of policy disagreements and the sentences
3 that are within the range and the -- and the
4 percentage that are below. With those policy
5 disagreements, or -- are you aware of any upward
6 movement from mixed -- like if a court's dealing
7 with a mixture case, have you seen any where
8 folks have said this -- like, I'm going up, as
9 a -- or is it all kind of been from that actual
10 down or --

11 JUDGE CHANG: Yeah, I -- so I'm not
12 personally aware that judges have varied
13 upwards, from meth mixture to meth actual. And
14 I -- and I believe the data showed that it's
15 across the board, in -- even in meth mixture
16 cases that the sentences are -- the majority are
17 below the range. And so, while there might be,
18 like, sporadic one-offs, you know, here and
19 there, I think, generally speaking, the data
20 shows it -- it's under the range.

21 CHAIR REEVES: Any additional questions
22 on that particular topic?

1 JUDGE CHANG: Yeah. If not, then I'll
2 move on. Thank you, Chair Reeves.

3 On the inflationary adjustment, just a
4 brief comment on this. It has been a decade --
5 I guess, now, over a decade, since the last time
6 the Commission has adjusted the tables for
7 inflation. And the Committee does support that,
8 given how much time has passed, there were years
9 of significant inflation, that it is time to
10 adjust the tables again for inflation. I mean,
11 2015, we were on iPhone 5 is one way to think
12 about it, and the Patriots actually beat the
13 Seahawks in the Super Bowl. So we have moved on
14 at this point, and so, we do think that it is
15 time for the inflationary increases to happen
16 again.

17 One of the issues for comment was
18 whether the Commission ought to just have some
19 kind of automatic period of time where there is
20 an increase in the tables to account for
21 inflation. And the Committee would urge the
22 Commission to not constrain itself on this and

1 to simply decide when the time is right to make
2 those inflationary adjustments. There could be,
3 you know, heaven hoping, that years of very low
4 inflation, and so that you would not have really
5 a benefit of adjusting the tables, but then, you
6 add the complication of the tables having
7 changed and figuring out when offense conduct
8 ended and so on, to pick the right table.

9 And it is also, I think, possible that
10 there may be instances where there's -- there is
11 an increase in inflation over the years, but
12 there might also be an increase in economic
13 crimes. And it might not be appropriate to
14 water down those tables in that time period.
15 And so, rather than constrain yourself, we would
16 urge you to just retain that discretion to bring
17 this up when it is appropriate as it is now.

18 On restructuring the loss table --
19 unless there are any questions on that
20 inflationary adjustment comment. On
21 restructuring the loss tables, the Criminal Law
22 Committee is typically all for simplification

1 and alleviating, you know, fact finding burdens
2 on courts and, by extension, on our probation
3 officers. And it's true that there are some
4 guidelines loss calculations that are
5 extraordinarily, you know, complex and that a
6 reasonable estimate of loss that falls within a
7 wider band, you know, might actually make things
8 easier. And I'm certainly thinking of several
9 securities fraud cases I've had where that was a
10 complex -- certainly a complex task, and I wish
11 the table had been from \$0 to, you know, \$50
12 million.

13 But that is a relatively rare and -- at
14 least in the Committee's experience, it's a
15 relatively rare issue. And so, our concern is
16 that, if the purpose of this proposed change in
17 the loss table is to alleviate fact finding and
18 to simplify, that that advantage actually won't
19 be realized. And in part, because we do make
20 more specific loss findings for restitution
21 purposes, right? Like we -- there -- it may not
22 be every case where the guidelines' loss

1 definition matches restitution, obviously, and
2 intended loss being one of them, but we do often
3 have to make that restitution calculation.

4 Because it's mandatory restitution. So it's not
5 quite, you know, good enough to just say, well,
6 it falls within this very, very broad range, and
7 now, we're done with that. We need to figure it
8 out for restitution.

9 Also, although it's true, that minor
10 differences in loss amounts might not make a
11 material, 3553(a) difference, they -- the loss
12 amount still does represent, I believe, to most
13 judges, a very important consideration of the
14 nature and circumstances of the offense and the
15 seriousness of the offense. And so, the
16 restructured loss tables would really minimize
17 those nuances, including -- if -- as an example,
18 a \$260,000 loss would be treated the same as a
19 \$1.4 million loss, it would be -- it would be
20 within the same band. And so, we think it's
21 unsound policy to widen the bands by that kind
22 of extent.

1 And, you know, relatedly, the concern
2 is that, especially at the lower tiers of the
3 table as well, we would see a dampening of the
4 importance of loss amount. And the Commission's
5 data showed that, had this amendment been in
6 effect in the -- in FY '24, 46 percent of the
7 cases sentenced under 2B1.1 would've received a
8 two level reduction, which is a substantial
9 change in the offense level. So bringing the 16
10 bans down to eight would eliminate these, we
11 think, important distinctions in loss. And of
12 course, loss doesn't control the sentencing, but
13 it is an important factor and would be watered
14 down by this change in the loss table.

15 So I'll pause here if there are any
16 questions on the restructuring question.

17 CHAIR REEVES: Thank You.

18 JUDGE CHANG: Thank you.

19 COMMISSIONER MEISLER: Thanks for being
20 here. I'm just curious if the Committee
21 considered the interaction between the
22 inflationary adjustment and the loss table. So

1 obviously, you support inflationary adjustment,
2 have opposed the adjustment of the loss bans,
3 but in your deliberation, did you consider how
4 the two interact? Like if -- yeah. Okay.

5 JUDGE CHANG: Right. Yeah. No, we
6 decided to just keep that separate. And in
7 part, because we're not sure which, if either,
8 you know, the Commission would go forward with
9 and so we did not blend the two.

10 COMMISSIONER WONG: Hi, Judge.

11 JUDGE CHANG: Hi.

12 COMMISSIONER WONG: You hit on one of
13 the aspects of balancing and weighing that we
14 frequently encounter in different contexts,
15 which is balancing sort of the need -- or the
16 value add of providing some additional structure
17 and guidance versus simplification. And
18 sometimes, they -- there was some tension
19 between where to strike the right balance. And
20 I'm just curious if you have some more general
21 thoughts on when, what, how to weigh those two
22 different things, and when the, you know,

1 marginal loss of guidance is more detrimental
2 than in other situations.

3 JUDGE CHANG: Yeah. I mean, these are
4 the, you know, philosophical questions. And if
5 there were a guideline, it would be like, you
6 know, whatever the letter before A would --
7 there would be, you know, 1.1, which is -- so
8 I -- you know, I think of the guidelines as
9 being most helpful with concrete facts, when
10 there's a concrete fact that ought to
11 differentiate a crime from its base, you know --
12 the way it's committed in the most -- its basic
13 form. But concrete facts in particular, like
14 possession of a weapon or a drug quantity, you
15 know, a loss amount, and so on. So the more
16 concrete the fact is, that -- the more simple it
17 is for judges to apply. And that gives it the
18 structure that judges would seek from, you know,
19 expert sentencing policy bodies like the
20 Commission. So concrete facts.

21 And so, as an example, post-offense
22 rehabilitation, that is not so much a concrete

1 fact. Like, that is a more kind of general
2 standard. And so, I conceive of 3553(a) as
3 typically taking care of, like, the issues that
4 are less concrete, right? It's not as concrete
5 about either the person, the defendant, or the
6 offense. And so, I think, at its ideal form,
7 the guidelines are giving us the guidance and
8 structure on concrete facts. So that's the
9 general philosophy.

10 VICE CHAIR RESTREPO: Judge, has the
11 Commission -- your -- the Committee, I'm sorry,
12 has the Committee given any thought to other
13 ways to measure culpability besides loss? Are
14 there other considerations we should be looking
15 at in terms of measuring culpability, other than
16 just loss?

17 JUDGE CHANG: I think what the
18 Commission has done appropriately, and, you
19 know, arguably given the potential reduction in
20 specific offense characteristics, but that's
21 what specific offense characteristics, you know,
22 do, in terms of both aggravation and mitigation.

1 And that's what minor role does, right? And
2 that's what vulnerable victim does, and so on.
3 But I -- when it comes to the crimes covered by
4 2B1.1, I think loss does make, you know,
5 intuitive and concrete sense, that that is
6 reflective of the seriousness of the offense,
7 not dispositive. You know, most certainly not
8 dispositive, given all the aggravation and
9 mitigation, but it does -- it is our starting
10 point. Yeah.

11 All right. Then it -- with your leave,
12 Chair Reeves, I'll move on to -- then to the
13 last topic, which is post-offense
14 rehabilitation. And so, here, I think it's
15 probably a universal truth that, you know,
16 judges support the idea that, when a person
17 engages in post-offense rehabilitation, that we
18 ought to take that into account as substantial
19 mitigation under 3553. And indeed, the -- our
20 pretrial services office, which the Criminal Law
21 Committee works with -- all of the offices
22 across the country are dedicated to assisting

1 those who are accused in starting, you know,
2 that rehabilitation process, respecting the
3 presumption of innocence, you know, to be sure,
4 but at the same time, assisting in mental health
5 counseling, employment efforts, right, and so
6 on, reconnecting with family, all of those
7 things that are a first step to rehabilitation.
8 So we recognize the importance of post-offense
9 rehabilitation.

10 At the same time, in the Committee's
11 overall experience, Section 3553(a) is where
12 this should be located, that judges do vary from
13 the guidelines, and take into account that kind
14 of rehabilitation without the need for a formal
15 guideline on this. The Committee had said would
16 prefer that there -- the Commission instead
17 create an application note, right, that would
18 encourage judges to vary based on atypical post-
19 offense rehabilitation. And that would serve
20 the purpose of incentivizing defendants to begin
21 the rehabilitative process. It would allow
22 defense lawyers to tell their clients, like,

1 here, look, this is going to be relevant at
2 sentencing. You've got to attend these
3 programs. You know, you've got to try to find a
4 job and go to job training and so on.

5 And so, it would provide that kind of
6 concrete information to allow there to be that
7 incentive. Adding an actual formal guideline on
8 this, I -- would increase the fact-finding
9 burden, would complicate the guidelines, because
10 then, the rehabilitation mitigation would be
11 anchored to some kind of guideline text, right?
12 And because there's guideline text, it's got to
13 be interpreted, it's got to be defined, and
14 then -- and litigated over, rather than the
15 discretion under 3553. And that's especially a
16 vice of Option 1, where there are these 11
17 factors, and then, the factors, those factors,
18 that the text will be defined, and will be
19 through case law and litigation and so on. And
20 so, this would, I think, complicate sentencing
21 on this particular issue.

22 If you are going to pass an amendment

1 on this, then at least Option 2 is a bit more
2 straightforward and workable. But again, it
3 would be formal guideline text, and all the
4 litigation would ensue from that. So we believe
5 that an application note would be the middle
6 ground. And that way, we encourage post-offense
7 rehabilitation as mitigation, but not create
8 these extra burdens. And I will say that, I
9 think, as a judge who takes into account post-
10 offense rehabilitation, you know, quite
11 significantly, I would have some concern that,
12 if there were a formal guideline on this, then
13 judges would be kind of locked into the one,
14 two, three, or four, however many levels, and
15 not exercise really the fuller discretion that
16 we have under 3553. So that's our suggestion as
17 an application.

18 CHAIR REEVES: I have a question about
19 that central point. You believe that anchoring
20 the -- if we were -- if we were to do a
21 guideline -- a guideline amendment or something,
22 anchoring to one of those would cause judges

1 themselves to anchor the discretion that they
2 have? Or is there a way that we could explain
3 to judges that, you know, this may be the floor
4 of what you can do, you know, and considering
5 all of your options, you're -- you obviously
6 should look to the 3553(a) factors and
7 everything about -- take in your full discretion
8 to do what's needed? Is there a balance in
9 there somewhere? Because you did mention an
10 application note.

11 JUDGE CHANG: Yeah, and there's -- I
12 think there's just a risk. I mean, it is hard
13 to predict, and certainly, whether it's an
14 amendment or an application note that then says,
15 and we're not trying to constrain your 3553, you
16 know, authority, would -- that would be helpful
17 as well. But there -- in those districts -- you
18 know, in my district, the majority of the
19 sentences are no longer within the guidelines.
20 And even without 5Ks, it's just -- you know,
21 we're at 50 percent downward variances setting
22 aside 5Ks. And so -- but in those districts,

1 you know, where there is still more of this
2 anchoring effect of the guidelines, I would have
3 the concern that, no matter what you say, that,
4 if there's an actual guideline on this, that
5 judges would not, you know, go further with --
6 under 3553.

7 CHAIR REEVES: Can I follow up on what
8 you just said? You said 50 percent of your
9 sentencing is some -- across the board, drugs,
10 fraud, or whatever.

11 Could you explain how that might be?
12 Is it that what we have here, at least for the
13 Northern District of Illinois, is too high
14 across the board? Is that --

15 JUDGE CHANG: Yeah, I don't know. I
16 mean, I -- and it's not a topic, you know, we
17 discuss as a court as a whole. I mean, I just
18 tell you from my perspective that I take
19 seriously the Supreme Court's admonition that,
20 even at the district court level, the guidelines
21 are a -- they're like a chronological starting
22 point. They are very important. It's important

1 advice. It's not even necessarily the correct
2 starting point of the sentence though, right?
3 And so, even the word "variance" is not -- it's
4 a little bit of a misnomer, right? Because
5 it's -- it -- the guidelines, they represent
6 advice, and that's what they are.

7 So I'm not -- it's not necessarily the
8 case that the guidelines are, from a, you know,
9 punitive standpoint, you know, too high across
10 the board, as I think you were asking. It might
11 also be -- and I put "might" in there, because I
12 am speculating now, it might be also that the --
13 that 3553 has all the other factors and
14 discretion in there and that we are exercising
15 our discretion on less of these concrete facts,
16 like guns, drug quantity, you know, number of --
17 you know, number of guns, and so on, it -- and
18 more on this person's personal history and
19 characteristics, you know, their post-offense
20 rehabilitation. So that's my speculation.

21 CHAIR REEVES: Yes, Commissioner Wong?

22 COMMISSIONER WONG: Judge Chang, you,

1 as a judge who takes into account at sentencing
2 post-offense rehabilitation, do you find that
3 that information is available to you, either
4 through -- generally through counsel's argument
5 or the PSR? Or is that something you find you
6 have to affirmatively inquire into?

7 JUDGE CHANG: Oh, it's there. Yeah. I
8 mean, it -- both the -- it -- actually, the
9 starting point really is the pre-sentence
10 report, which our probation officers do a
11 terrific job with even the resource constraints
12 they have, in laying out, what has the defendant
13 been doing on pretrial release? And we have
14 considered whether we ought to just, you know,
15 make that even more informative. But at least
16 the PSRs that I see are very informative on, you
17 know, here are the classes the defendant is
18 taking, the counseling, how he's been doing on
19 release.

20 And then, of course, the defense
21 lawyers add to that. They rely on that
22 argument, and then, they add to that. And I do

1 demand evidence of it. If they say that they
2 have been working, that -- you know, our -- we
3 need to verify the employment. And they go
4 in -- go into counseling sessions. Like, have
5 we called the provider and -- but we -- I think
6 we do have that information.

7 That does remind me, I should note
8 that, if -- whether it's a formal guideline or
9 an application note or some other variation,
10 that the idea of requiring 100 percent
11 compliance of -- on -- of all release conditions
12 or all the custodial institution rules, in the
13 Committee's view, that is too constraining.
14 I -- we -- I think many judges -- I certainly
15 have had many cases where a person on release
16 misses curfew by 15 minutes, right, and maybe
17 doesn't have a really good reason. It wasn't,
18 you know, a commuting issue or something, but
19 they just missed it by 15 minutes. But then,
20 they do all this other extraordinary
21 rehabilitation. It would not make sense to
22 disqualify that person from receiving that kind

1 of mitigation effect.

2 CHAIR REEVES: Vice Chair Restrepo?

3 VICE CHAIR RESTREPO: Your comments
4 have been focused on folks that are on release.

5 What about individuals that are in
6 custody? Would this create a disparity in terms
7 of how somebody in custody could demonstrate
8 rehabilitation, as opposed to somebody that's on
9 pretrial release?

10 JUDGE CHANG: Yeah. And so, I -- a
11 couple points on that. You know, first, it does
12 point out the importance of pretrial release,
13 successful pretrial release. And so, the
14 Committee is in focus on its efforts in trying
15 to promote successful release across the
16 districts as a whole. And it -- there may very
17 well be disparity, because of course, there are
18 different opportunities. I mean, I would say on
19 this disparity point that really all that really
20 does is point out the importance of pretrial
21 release. It shouldn't be a reason to not
22 encourage -- hopefully by an application note,

1 not by amendment, but to not encourage some
2 additional mitigation for post-offense
3 rehabilitation. Because there's a difference in
4 access.

5 That does mean that, you know, we ought
6 to promote, as we do. I mean, we ask the Bureau
7 of Prisons and the Marshal Service about, you
8 know, the -- what's available in the detention
9 centers. And it's always made more difficult,
10 because so many defendants are housed in county
11 jails, and they're not -- you know, their county
12 defendants are there for short term. They're
13 not there for the long term. So there is that
14 gap, but it's not a reason to not give
15 mitigation to someone who's on pretrial release
16 and has been, you know, successful. And it does
17 make sense to take into account the relative
18 access. And so, I certainly have defendants
19 whom I've sentenced who have done all they can
20 in custody. And then, I take that into account
21 as, you know, very serious mitigation.

22 CHAIR REEVES: Yes.

1 COMMISSIONER WONG: Think this --
2 through this idea of an application note, I
3 wonder if it sticks our nose into your business,
4 by which I mean, you know, we've kind of
5 historically seen our lane as we set the
6 guidelines, and then your lane is 3553. I mean,
7 I remember when we were thinking through getting
8 rid of departures, there was this question of,
9 should we make all the departures just kind of
10 hortatory, as a -- you know, something that we
11 should tell judges they should think about for
12 3553? And then, the decision was, like, no,
13 that's not really our business. Like, we
14 shouldn't be sticking our noses into 3553.

15 Do you have any concerns -- I mean,
16 that seems like a -- an equity of the CLCs. Do
17 you have concerns about that? It -- I mean, it
18 almost sounds like what you want and maybe would
19 be good policy is a departure. Now, obviously,
20 we aren't in departure world any more, but
21 anyway.

22 JUDGE CHANG: Yeah, I -- that's a great

1 question, because I think we typically do look
2 askance at blending the -- you know, blending
3 the guidelines with just 3553 in general.
4 Having said that, in this particular instance,
5 there were some members of the Committee who
6 were of the view that there is -- there's
7 insufficient attention to post-offense
8 rehabilitation, and in particular, atypical
9 post-offense rehabilitation, and that, if the
10 Commission were to state, you know, that we
11 believe this is sound sentencing policy, that,
12 as the experts, that would weigh heavily in --
13 for those judges who are, you know, maybe more
14 hesitant right now. And so, while I wouldn't
15 promote open season on this idea, I think this
16 is one of those instances where it would work.

17 CHAIR REEVES: And I'll ask another
18 question. In talking about post-offense
19 rehabilitation, I think you used the word
20 "extraordinary" in describing what a person
21 might do.

22 I guess, what would be ordinary that --

1 or what reaches to the level of extraordinary,
2 in your view, with respect to the things the
3 judges ought to consider vis-a-vis the things
4 that, you know, would not rise to the level of
5 extraordinary post-offense rehabilitation?

6 JUDGE CHANG: Yeah, I mean, and I think
7 my response to this is that this is another
8 reason why it should be 3553, because it's so
9 dependent on the particular person. I mean, for
10 some persons who have been, for example, you
11 know, addicted and participated in a drug crime,
12 and that was their motive, and -- for them to
13 just stay clean is a huge step forward in that,
14 you know, person's life. And then -- and you
15 can compare that to then, all right, before
16 their addiction, and we see this all too often,
17 someone is -- has no criminal history. They've
18 been a productive member of society. They --
19 they're connected with family. They have
20 employment. And then -- and, you know, then
21 they get addicted and turn to the drug trade.
22 And so, you have a sense in those cases where,

1 if that person just, you know, stays clean, that
2 they're more likely to return to that life.

3 And so, it is just -- the circumstances
4 are just so varied. But I -- and I'm sure
5 you've seen defendants like this, too. On the
6 first day, when they come in for their initial
7 appearance, just how they look and how they're
8 acting, because they are -- they're still coming
9 down from a high. And then, a year and a half
10 later, at sentencing, they've just turned it
11 around, you know, on that. And so, I think it
12 is -- this is just another reason why it
13 should -- ought to be under 3553. It's very
14 hard to define.

15 COMMISSIONER WONG: I have one more.

16 CHAIR REEVES: Okay.

17 COMMISSIONER WONG: Sorry.

18 CHAIR REEVES: Mm-hmm.

19 COMMISSIONER WONG: This is bringing
20 you to one of the areas in your letter that you
21 didn't make in your oral remarks, so I
22 apologize. But there's this note in your

1 discussion of the fentanyl -- the proposed
2 fentanyl SOCs, which it seems like the CLC
3 supports, that you think, in future cycles, we
4 should look at whether some of them should be
5 applied to other drug types as well, like, not
6 just fentanyl.

7 And I was -- are you thinking of
8 distribution to a minor and use of the dark web?
9 Are those the two that were --

10 JUDGE CHANG: Right, because the other
11 ones wouldn't --

12 COMMISSIONER WONG: Apply more to
13 fentanyl.

14 JUDGE CHANG: -- yeah, they don't
15 apply.

16 COMMISSIONER WONG: Yeah.

17 JUDGE CHANG: But those two, I recently
18 had a heroin case, which, tragically, there was
19 fentanyl laced into it. There was a heroin case
20 on the dark web. And I thought it was
21 particularly egregious that they were using
22 that, you know, mode of distribution. So yeah,

1 those were the two.

2 CHAIR REEVES: Judge Chang, boy, you
3 got us started off on the right foot. You --
4 we -- we're getting through with you a little
5 bit early.

6 JUDGE CHANG: Yeah. Well, I appreciate
7 you taking the time. Thank you.

8 CHAIR REEVES: Thank you so much, man.
9 We'll prepare for our second panel.

10 Our second panel provides us with the
11 perspective of our stakeholders in the Proposed
12 Amendment on Drug Offenses. First, we have
13 Vincent T. Lombardi, Supervisory Assistant
14 United States Attorney and Lead Task Force
15 Attorney for the Western District of Washington.
16 Mr. Lombardi has been an AUSA in that office for
17 at least 22 years. Second, we have Kaitlin
18 Sahni, who is an acting chief of the Narcotic
19 and Dangerous Drug Unit, NDDU, of the DOJ
20 Criminal Division's Money Laundering, Narcotics,
21 and Forfeiture section, where she oversees a
22 portfolio of international narcotics trafficking

1 cases and related firearm and financial crimes.
2 Third is Natasha Perdeu Silas, the Executive
3 Director of the Federal Defender Program for the
4 Northern District of Georgia, where she has
5 represented indigent persons accused of federal
6 crimes for more than 30 years. Rounding out
7 this panel is Patricia Richman, an Assistant
8 Federal Defender in the District of Maryland.
9 Prior to assuming this role, Ms. Richman was
10 National Sentencing Resource Counsel for the
11 Federal Public and Community Defenders.

12 Mr. Lombardi, we're ready when you
13 are, sir.

14 MR. LOMBARDI: All right. Chair
15 Reeves, honorable members of the Commission,
16 thank you for the chance to present the
17 Department's views on the proposed amendment's
18 addressing methamphetamine sentencing. As Judge
19 Reeves noted, I've been an AUSA for more than 20
20 years, and during my career, I've seen the
21 methamphetamine threat change and,
22 unfortunately, grow. When I was a new AUSA, I

1 prosecuted individuals making small amounts of
2 not very pure meth in makeshift labs in my
3 district. Now, I supervise investigations and
4 prosecutions of transnational criminal
5 organizations making and moving hundreds of
6 pounds of very, very pure methamphetamine into
7 the United States from abroad.

8 The Department recognizes that the
9 methamphetamine threat has changed, and we
10 understand that the Commission wants to ensure
11 that guidelines reflect those changes. We
12 nonetheless believe that the Commission's
13 current proposals are likely unworkable, because
14 they fail to reflect congressional policy
15 decisions and directives, and in particular, the
16 statutory mandatory minimums. That will, in
17 some cases, divorce the guidelines from those
18 mandatory minimum penalties, which could give
19 rise to unwarranted and unjustified sentencing
20 disparities.

21 You know, it's easy to forget, given
22 our current and justified concern with fentanyl,

1 just how dangerous methamphetamine is. As noted
2 in Commission materials, overdose deaths from
3 methamphetamine and other stimulants did
4 increase dramatically over the last 10 years,
5 but equally important, methamphetamine abuse has
6 powerful adverse effects on the physical and
7 psychological wellbeing of the folks who use it.
8 That danger is what caused Congress to, over
9 time, regularly increase the statutory penalties
10 for methamphetamine trafficking, and often to
11 direct the Commission to do the same. That
12 danger is still present, and Congress has not
13 rolled back any of those penalties. Until it
14 does, we believe that the current amendment
15 proposals are problematic.

16 I want to touch briefly on the issues
17 we see with the three parts to the proposed
18 amendments. First, the proposal to equalize
19 methamphetamine at a single base offense level
20 with different options as to what that would be.
21 Second, Option 2, which proposes to set the base
22 offense level based on the absence or presence

1 of certain factors. And last, the proposal to
2 add a specific offense characteristic to address
3 the ice issue.

4 As to Option 1, Congress set the
5 current mandatory minimums for mixture and
6 actual. Now, since almost all methamphetamine
7 is highly pure, equalizing at the actual level,
8 which is one of the proposals, would not, in
9 most cases, significantly divorce the guidelines
10 from the mandatory minimums, at least where the
11 methamphetamine has been tested for purity. But
12 that's obviously going to result, as noted in
13 your data briefing, in some guideline sentences
14 going up, which the Commission may wish to
15 avoid.

16 However, equalizing methamphetamine
17 base offense levels to correspond with crack
18 cocaine, fentanyl, meth mixture, or even powder
19 cocaine, as has been proposed, would divorce the
20 guidelines from the mandatory minimums and
21 basically untether the two. There are specific
22 reasons not to pick these other levels as well.

1 As to fentanyl, I think many believe
2 the current fentanyl base offense levels are too
3 low for fentanyl, and that's been noted by some
4 other comments. Crack cocaine is also a poor
5 substitute. While the two were originally set
6 at the same, if you look at how crack cocaine is
7 made and trafficked, it's pretty much the same
8 as it always has been. Methamphetamine is
9 dramatically different than what it used to be,
10 and we can talk about that further. But more
11 important, Congress changed the mandatory
12 minimums for crack cocaine. They have not
13 changed the mandatory minimums for
14 methamphetamine, at least not yet.

15 So at any level other than actual,
16 you're going to get these cliffs as set forth in
17 our written materials, and that's going to
18 present problems for folks caught with drugs
19 around the methamphetamine mandatory minimums.
20 And you'll get defendants who are otherwise
21 dissimilar just end up getting the same
22 mandatory minimum sentence.

1 Talk briefly about Option 2. It's a
2 creative attempt to attack the problem, but we
3 agree with every other stakeholder, that it is
4 simply too complicated and will be impractical
5 to administer.

6 I last want to talk about the ice
7 special offense characteristic. Again, Congress
8 directed the Commission to punish crystalline
9 smokeable methamphetamine more harshly. And we
10 understand the Commission's concerns with
11 administering that directive, but there's not a
12 straightforward way to reduce it unless Congress
13 takes it back. What is, you know, non-
14 crystalline, non-smokeable methamphetamine isn't
15 always going to be obvious, and it's going to
16 result in some odd results if it's implemented.

17 And the one I think of the most is
18 liquid meth. As you've heard in other hearings,
19 methamphetamine is often smuggled into the
20 United States in liquid form. That liquid can
21 be highly pure. And the goal is to convert it
22 into crystalline smokeable meth. That's what

1 the users want. That's the end product.

2 If you catch someone with highly pure
3 liquid meth and the plan is to convert it into
4 crystal, it's not obvious why they should get a
5 break under the guidelines because of the
6 fortuity of when they're caught. You're also
7 seeing methamphetamine converted into tablets.
8 That can be very dangerous, because it looks
9 like a prescription drug like Adderall. And
10 again, that can be snorted, it can be inhaled.
11 So just implementing it is going to be
12 problematic as a factual matter.

13 Thanks for the chance to address you.
14 I look forward to talking to you about these
15 issues further.

16 CHAIR REEVES: Thank you, Mr. Lombardi.

17 Ms. Sahni?

18 MS. SAHNI: Chair Reeves, honorable
19 members of the Commission, thank you for the
20 opportunity to discuss the Department's views on
21 the Commission's proposed amendments related to
22 fentanyl. The Department appreciates your

1 continued attention to fentanyl trafficking and
2 your efforts to ensure that the enhancements and
3 the guidelines address those harms, harms with
4 which I am personally familiar through my work
5 as a Department of Justice Prosecutor for eight
6 years in both the Criminal Division, where I am
7 the acting chief of the Narcotic and Dangerous
8 Drug Unit, and in the Civil Division, where I
9 was part of the Consumer Protection Branch's
10 Opioid Initiative.

11 As a preliminary matter, the Department
12 holds the consensus view that the quantity
13 threshold for fentanyl related substances as
14 defined by the HALT Fentanyl Act should be set
15 to the same level as fentanyl analogs. Also
16 consistent with the Act, the fentanyl
17 enhancements proposed by the Commission should
18 at minimum apply to fentanyl, fentanyl analogs,
19 and fentanyl related substances.

20 The Department agrees with the CLC that
21 the Commission should examine if the proposed
22 enhancements should apply to all drugs and not

1 just fentanyl, but because the current proposals
2 are focused on fentanyl, that will be my focus
3 here too. Regarding the proposed fentanyl
4 enhancements, last cycle, the Commission amended
5 the fake pills enhancement in response to
6 stakeholder concerns and solicited comments on
7 additional actions the Commission could take to
8 address the serious and often deadly threat
9 posed by the proliferation of fentanyl.

10 This cycle, you've proposed several
11 enhancements to address certain aggravated
12 conduct associated with fentanyl offenses. We
13 applaud your efforts and think that these
14 enhancements are necessary and complement your
15 changes last cycle. They also address the full
16 range of fentanyl trafficking, from illicit
17 manufacture, which often involves pill presses
18 and dangerous adulterants, to distribution to
19 the end user, which often involves the dark web
20 and sales to young people.

21 First, we think it is important to
22 provide an enhancement for distributing fentanyl

1 to a minor or a young adult, or for using a
2 minor or a young adult to commit the offense.
3 Drug traffickers leverage social media to
4 market, buy, sell, and deliver deadly fake
5 prescription pills and other fentanyl laced
6 drugs on social media, gaming, and other similar
7 platforms. Such an enhancement should apply to
8 individuals under the age of 21 and not just 18.

9 If the Commission chooses to adopt a
10 defendant based enhancement, the mens rea should
11 only apply to the defendant's knowledge of the
12 individual's age and not require the prosecutor
13 to show the defendant's specific knowledge that
14 the substance involved is fentanyl. Based on
15 our experience with the marketing and
16 misrepresentation enhancement, the Department
17 believes that requiring specific knowledge of
18 fentanyl will greatly limit the enhancements
19 application.

20 We also think requiring an age gap
21 would be inappropriate. The danger of selling
22 fentanyl to a young adult is present regardless

1 of the defendant's age, and excluding defendants
2 from this enhancement may create an incentive
3 for drug traffickers or dealers to recruit
4 younger co-conspirators who would have lower
5 sentencing exposure. Moreover, a sentencing
6 judge can already take the defendant's age into
7 account when determining the appropriate
8 sentence.

9 Next, I want to discuss the enhancement
10 for adulterated fentanyl. Adding xylazine or
11 other similar substances to fentanyl introduces
12 complications to treating overdoses, and
13 xylazine is showing up in a growing number of
14 samples of seized fentanyl. The adulterant
15 enhancement should be offense based, because
16 adding a mens rea, again, would undermine
17 application. Additionally, the enhancement
18 should apply to the specific class of
19 adulterants into which xylazine falls, not just
20 xylazine, to deter drug traffickers from
21 switching to a different substance with similar
22 effects.

1 Further, the Department supports an
2 enhancement for the use of the dark web or dark
3 nets in drug trafficking cases. The intentional
4 use of the dark web or anonymizing technology to
5 conceal drug trafficking activities makes
6 investigation and prosecutions more difficult
7 and resource intensive. The Department supports
8 a two or four level enhancement, but urges the
9 Commission to consider applying this enhancement
10 to all controlled substances.

11 Finally, we believe the proposed pill
12 press enhancement addresses a fundamental part
13 of the illicit supply chain for fentanyl laced
14 pills, the creation of the pills themselves. An
15 offense-based enhancement is the best approach
16 to ensure that the enhancement applies to all
17 culpable defendants, including those who direct
18 others to use pill presses to create dangerous
19 fentanyl-laced pills. Again, I want to thank
20 the Commission for its continued attention to
21 the harms of fentanyl trafficking and the
22 opportunity to testify here today. I welcome

1 your questions.

2 CHAIR REEVES: Thank you.

3 Ms. Silas? Just punch.

4 MS. SILAS: Okay. Great. Good
5 morning. My name is Natasha Perdew Silas. And
6 as Chair Reeves mentioned, I'm the executive
7 director of the Federal Defender Program in the
8 Northern District of Georgia. Although my post
9 as leader began on July 1st, 2024, I have
10 proudly served my community for the past 30-plus
11 years, since November of 1994, and exclusively
12 representing indigent people facing federal
13 criminal charges.

14 Thank you for the opportunity. I'm
15 honored to testify on behalf of Federal
16 Defenders. So over my career, I have
17 represented more than 1500 people. And that
18 means I have defended drug offense clients
19 through every wave of federal drug enforcement.
20 Crack was king when I began my career, and I can
21 remember sitting across from clients, most of
22 the time in a jail attorney visitation room,

1 with this 1994 book, somewhat of a relic, trying
2 to help my clients make sense of why crack
3 carried such a different penalty than powder
4 cocaine. And I was very unsuccessful. Not one
5 of my clients ever said, okay, I get it. And it
6 was unfair, and my clients knew it. And so, it
7 was irrational, it was unwarranted, and this
8 Commission had the wisdom to tackle the crack-
9 powder disparity.

10 So now, we turn to meth. I applaud the
11 Commission for taking on this really important
12 issue. Today, everyone in this room knows that
13 meth is uniformly highly pure. In my own
14 district, two clients with identical drug
15 packages can face very different outcomes,
16 depending on whether the drugs were sent to the
17 DEA lab or to the GBI, which is far less likely
18 to conduct purity testing. That is not a
19 principled distinction. It is an arbitrary one.

20 I'm thinking now of a client that I
21 will refer to as Carlos, finding himself in dire
22 financial straits. Carlos turned to what some

1 call shady delivery work for extra money. For
2 just \$200, he carried a three-pound package
3 across town and delivered it to a man who turned
4 out to be a confidential informant. So Carlos
5 soon found himself sitting across from me. I
6 explained that because the meth in his case had
7 been sent to the DEA lab, and therefore tested
8 at over 99 percent pure, his guideline
9 calculation started at a level 34, yielding a
10 range of 87 to 108 months after acceptance and
11 safety valve, rather than the 57 to 71-month
12 range, he would have faced if the substance had
13 been sent to the GBI lab.

14 Carlos protested that he had no
15 knowledge of, and nothing whatsoever to do with,
16 the purity of the drug. He was the delivery
17 guy. Just like my crack clients, Carlos could
18 not understand why the purity distinction should
19 make such a difference to his guidelines. As we
20 fashion rules, let us remember: they must make
21 sense to the people who will be subject to them.
22 When guidelines produce results based on

1 distinctions that defy rationality and do not
2 resonate with real people, the messages -- those
3 sentences are meant to convey does not land.

4 Defenders strongly support Option 1.
5 We greatly admire the Commission's commitment to
6 follow science and data. Dr. Jonathan Caulkins
7 testified here, six months ago, that both
8 scientific and drug market evidence show meth is
9 most comparable to powder cocaine, while crack
10 has been associated with higher observable harm.
11 This is consistent with experts that I have
12 consulted with in my own district.

13 For this reason, Defenders urge the
14 Commission to set unified meth thresholds at
15 powder cocaine levels. The Commission's own
16 data show that setting them at crack levels
17 would increase sentences for up to a third of
18 individuals, even as judges are already varying
19 downward, because they believe current meth
20 penalties are too high. And most defendants are
21 lower-level participants. This statutorily
22 independent body should ground its decisions in

1 science and reason. Setting thresholds at
2 powder cocaine levels follows the science,
3 follows the data, advances simplification, and
4 moves us closer to a system that produces
5 sentences we can explain and that people can
6 understand.

7 Thank you. And I look forward to
8 questions.

9 CHAIR REEVES: Thank you, Ms. Silas.
10 Ms. Richman?

11 VICE CHAIR MATE: The middle button of
12 the (inaudible).

13 MS. RICHMAN: Well, I've gone through
14 the first challenge. Chairman Reeves,
15 commissioners, thank you for the opportunity to
16 speak today about the proposed fentanyl and
17 fentanyl analog amendments. The devastating
18 impact of fentanyl and its analogs cannot be
19 overstated, but we fear that the Commission's
20 approach will not help us to address this
21 crisis. It will not make our communities safer.
22 I spent many years defending people charged with

1 federal drug crimes in Maryland.

2 I often meet my client just a few
3 moments before their initial appearance. And,
4 it sounds, like Judge Chang, I've come to
5 recognize the signs of drug withdrawn, to know
6 when it's necessary to pull a trash can next to
7 my client during their initial appearance, in
8 case they need to vomit, to push for emergency
9 room treatment when they cannot competently
10 proceed, to ask the marshals for a blanket when
11 my client's teeth are chattering and their hands
12 are shaking uncontrollably, and when those
13 clients are detained, to beg that they be placed
14 at the single facility in Maryland that offers
15 medically assisted treatment to pretrial federal
16 detainees, and to know that it will rarely
17 happen. Most of my clients will get, at best,
18 Tylenol and a blanket.

19 For decades, Baltimore has tried to
20 solve its drug problem with arrests and
21 aggressive policing. My clients are already
22 casualties of war-on-drugs enforcement and

1 centuries of racial discrimination and
2 redlining. They grew up where excessive
3 punishment for drug crimes created an unbroken
4 cycle of trauma and socioeconomic
5 marginalization, which are the root causes of
6 many substances use disorders.

7 Today, much of Baltimore, and many
8 urban areas in Maryland, remain treatment
9 deserts. And in 2024, the New York Times called
10 Baltimore the U.S. overdose capital. The city's
11 overdose rate soared higher than the rest of the
12 country from 2018 to 2022. Why? Because
13 campaigns to reduce deaths and increased
14 treatment withered on the vine, discarded in
15 favor of prosecution and jail. The resulting
16 overdose crisis is what happens when we choose
17 punishment over public health.

18 Chairperson Reeves, commissioners, we
19 are grateful for your commitment to empiricism,
20 innovation, and evidence. Today, we ask for the
21 Commission to ground itself in those principles.
22 Please scrutinize each proposed change and ask

1 yourself three questions: What data shows this
2 change is needed? How will it address the harms
3 of drug misuse? Is it rooted in evidence and
4 science? I anticipate it'll be hard to answer
5 that question today.

6 When I look around this room, and even
7 when I look at the comments that have been
8 submitted to the Commission, who's missing?
9 Public health researchers, emergency room
10 doctors, addiction specialists, epidemiologists,
11 community health workers, chemists,
12 pharmacologists. The lawyers in this room do
13 not have the expertise to diagnose the
14 antecedents of harmful drug trends or to propose
15 effective responses. We all see only the
16 aftermath, the drugs that are seized, the
17 overdose victim, the client sitting next to you
18 in the courtroom, and withdrawal.

19 Last August, the Commission held a
20 hearing with public health experts on
21 methamphetamine. They gathered many of those
22 experts -- people on the ground. That was a

1 very good idea, a step towards bringing invoices
2 that have too long been absent from these
3 deliberations. And I urge the Commission to
4 take a similar approach when it comes to
5 fentanyl analogs and fentanyl-related
6 substances. Consult the experts before acting.
7 Knee-jerk increases and punishments are not the
8 way.

9 Finally, the specific proposal. First,
10 fentanyl-related substances. There are many
11 different fentanyl-related substances and many
12 fentanyl analogs. Not all of them are harmful.
13 Some of them are inert, and some, the FDA has
14 testified, even have the potential to treat
15 opioid overdoses.

16 The blanket addition of FRS to the
17 guideline without potential for a downward
18 adjustment captures none of this nuance. It
19 doesn't make sense for someone to face an
20 offense level four times higher than fentanyl
21 levels when their offense involved far less
22 harmful substances or ones that are not harmful

1 at all. And I direct the Commission to Dr.
2 Gregory Dudley's comment. He is a scientist and
3 a chemist for important information about the
4 necessary fix.

5 The enhancements. The Commission asks
6 whether adding these would address fentanyl's
7 harms. They will not. They will punish for the
8 sake of punishment. Where is the data showing
9 that enhancements will reduce harm, decrease
10 drug sales, stave off overdose deaths? There is
11 none. These proposals lack empirical support.
12 They all add unnecessary complexity and directly
13 contravene the Commission's laudable efforts to
14 simplify guidelines and recenter for courts the
15 3553(a) factors. Moreover, they are largely
16 redundant.

17 Each proposed enhancement already
18 overlap substantially with existing enhancements
19 in 2D1.1 and Chapter III, and these enhancements
20 will likely trigger more and larger downward
21 variances. When judges sentence our clients,
22 they look at far more than to -- whether they

1 distribute it to a 17 or 20-year-old friend or
2 co-conspirator or whether they use the dark web.
3 They see the whole person, their backgrounds,
4 their addictions, their ages, their roles, and
5 countless other factors that the guidelines
6 cannot capture one by one. We urge the
7 Commission not to repeat past mistakes. Allow
8 judges to address these factors through 3553(a),
9 rather than enshrining them in 2D1.1.

10 Thank you for considering Defenders'
11 views. I'm happy to answer any questions you
12 may have.

13 CHAIR REEVES: Thank you.

14 Any questions? Who wants to start us
15 up? This is an excellent panel, not that others
16 aren't.

17 VC Mate?

18 VICE CHAIR MATE: Thank you all for
19 being here today. I appreciate all of the
20 efforts to be here and the work in preparation.

21 Oh, is it working there? Is that
22 better?

1 I have a question -- I have a bunch of
2 questions, but starting with meth. So -- and I
3 was thinking about the testing issue, and I'm --
4 if the Commission were to proceed and set meth
5 all at one level, is the -- am I correct in
6 thinking that the only role then for purity
7 testing, which I understand is what's kind of
8 happening in some places and not others, but
9 that would just exist for purposes of mandatory
10 minimums and there wouldn't be purity testing
11 for purposes of the guidelines? Do I understand
12 that correctly from the testing perspective?

13 MR. LOMBARDI: I think that's probably
14 correct. In my district, I think we would still
15 continue to ask that it all be tested for purity
16 for those purposes, but obviously, it would be
17 less important than under the current
18 distinctions.

19 MS. SILAS: I think I'm going to agree
20 with my brother there. There would be less need
21 for the purity testing. And a few months ago, I
22 went out and visited the lab -- the GBI lab in

1 our district -- and they were complaining that
2 they kept getting calls to go back and test
3 things they already tested for purity. And they
4 have a big backlog. So I think they would be
5 happy about that.

6 VICE CHAIR MATE: Thank you. That's
7 helpful.

8 CHAIR REEVES: Yes?

9 VICE CHAIR MURRAY: And then, I'm
10 sorry, this is a follow-up, and then, I have my
11 real question. But -- there'd be no need for
12 isomer testing at all; is that right? So
13 purity, you would still need for mandatory
14 minimums, but no need for isomer testing because
15 the only reason we have that is because of ice.

16 MR. LOMBARDI: I -- I'm not quite sure
17 the answer to that. In my district, regardless
18 of whether it was tested by a local lab, we have
19 them send it to the DEA lab so we get a purity
20 test. And then, in my district, it's all 95
21 percent-plus pure. And so, that tends to be
22 what drives the guidelines. You know, just --

1 we have almost 100 percent, you know, testing on
2 drugs that are seized in my district. So --

3 VICE CHAIR MURRAY: I maybe -- I'm
4 being dense, but am I right that the only reason
5 we do isomer testing, though, is because of this
6 definition of ice that the Commission kind of
7 invented?

8 MR. LOMBARDI: I'm not 100 percent sure
9 the answer to that question.

10 VICE CHAIR MURRAY: Okay. And then, I
11 have more questions about ice, if you don't
12 mind. But --

13 MR. LOMBARDI: Sure.

14 VICE CHAIR MURRAY: -- I was -- the --
15 it seems like the department has two concerns
16 about the elimination of ice. One is this
17 concern about tablets and liquid, and one is a
18 kind of a concern about the directive. And it
19 seems to me like at least the policy one is --
20 can be dispensed with or -- by a change to the
21 amendment. And I'm wondering if this would
22 resolve your policy-based concern. If we

1 were -- you know, we have this -- we -- the
2 amendment has this sort of two-step downward for
3 things that are not -- that are non-smokeable,
4 non-crystalline. If we were to explicitly
5 exclude from that liquid and tablets, you know,
6 to say -- or they can readily be converted into
7 crystalline, smokeable, and then, divide it into
8 application, no, to make clear that what we mean
9 is, you know, liquid and tablets are at the
10 higher level, would that alleviate the
11 Department's policy concern? I realize there's
12 also still a directive-based concern.

13 MR. LOMBARDI: I think it would
14 partially alleviate it. I still think there'd
15 be some issues. One, are you creating a null
16 set? I mean, what meth is going to fall, you
17 know, once you exclude those? You know, is
18 there anything -- in which case, why are we
19 making the amendment?

20 VICE CHAIR MURRAY: That's a little bit
21 of a question for Congress, rather than us,
22 right?

1 MR. LOMBARDI: Well, that -- that's
2 fair.

3 VICE CHAIR MURRAY: We didn't create
4 the null set.

5 MR. LOMBARDI: Sure.

6 VICE CHAIR MURRAY: And so, I guess
7 that goes into my second question, which is I
8 saw that you guys kind of gestured it maybe that
9 wouldn't meaningfully comply with the directive.
10 And I'm wondering, then, if you think that the
11 current regime meaningfully complies with the
12 directive, because the meaning -- the current
13 regime does not distinguish between smokeable
14 crystalline meth and other kinds, right?

15 We -- the Commission that drafted the
16 current regime didn't know what that directive
17 meant, and so, grafted this 80 percent rule
18 on -- which did not come from Congress. And so,
19 I'm wondering if you think this -- the new null
20 set would be more problematic than the current
21 regime in terms of the directive.

22 MR. LOMBARDI: I don't think the

1 current regime does set quite a null set. I
2 mean, there are districts that have applied it
3 successfully. I'm not aware of anybody
4 contending that the current regime doesn't
5 comply with the directive. So I think the
6 answer is no, but --

7 VICE CHAIR MURRAY: But you think the
8 current regime distinguishes between smokeable
9 crystalline meth and other kinds of meth?

10 MR. LOMBARDI: I think, on the ground,
11 it does, yes. I think people understand what it
12 means. It's been --

13 VICE CHAIR MURRAY: So in fact, people
14 are not using the 80 percent definition, they're
15 using smokeable crystalline versus not?

16 MR. LOMBARDI: I think it's both. I
17 mean, I think it's all part of the analysis.

18 VICE CHAIR MURRAY: Okay.

19 CHAIR REEVES: VC Restrepo?

20 VICE CHAIR RESTREPO: It's a question
21 for Ms. Silas and Mr. Lombardi.

22 So if the original thinking was purity

1 was kind of reflection of relative culpability,
2 that the guys at the top of the food chain, so
3 to speak, had access to the most pure, now,
4 everything's pure, how do you suggest we
5 evaluate relative culpability in the meth
6 context?

7 MR. LOMBARDI: Well, I think it's, you
8 know, already set forth in the guidelines, and
9 the Commission has recently expanded, you know,
10 people that can qualify for downward role
11 adjustments. So there are certainly still tools
12 under the guidelines for a judge to, you know,
13 weigh relative culpability, who's a leader,
14 who's just a courier, and may be is appropriate
15 for a downward role adjustment. And then, of
16 course, the 3553(a) factors will come into play.
17 So I think the current regime, you know, will
18 let judges do that.

19 And it's one thing we mention in our
20 written materials. I do think the change to
21 role adjustment that the Commission just made,
22 that are just coming into effect, you know,

1 might have a significant impact in at least some
2 methamphetamine cases. Again, meth is largely
3 being produced abroad. You know, many of the
4 people that are being caught up in meth offenses
5 here in the United States now are going to be
6 couriers. They're going to be stash-house
7 operators and may qualify for those role
8 adjustments. And it may make sense to let that
9 play out a little bit, see how that affects
10 methamphetamine sentences before you start
11 revisiting the other parts of the guideline.
12 But I do think it's still going to be possible,
13 without the amendment -- any of these
14 amendments, to still reflect that.

15 MS. SILAS: I guess I think that the
16 Commission's recent amendments on role are very
17 welcome. And in Carlos' case in particular, I
18 made a very impassioned plea for a minor role,
19 and that was before the recent amendments. And
20 that was denied for Carlos, even though everyone
21 agreed that he was the delivery guy, but still,
22 our district court judge hung her hat on the

1 fact that he was the only one prosecuted in that
2 particular instance.

3 So that's why the new amendments, I
4 think, are very helpful. We do talk about
5 relative culpability in every one of the
6 sentencings that I appear in. It's just that we
7 have been having trouble with a stuck faucet
8 when it came to minor role and minimal role. So
9 that's very helpful.

10 CHAIR REEVES: Yes. VC Mate?

11 VICE CHAIR MATE: I have a follow-up
12 question on that, Ms. Silas, and just kind of
13 listening to Mr. Lombardi. And when it comes to
14 us setting the appropriate level for meth, you
15 know, we've heard from a lot of stakeholders
16 that a lot of meth cases involve sort of low-
17 level actors. We heard from one commenter that
18 about 20 percent of those prosecuted for
19 methamphetamine are women. And I'm curious
20 whether you think our mitigating role adjustment
21 kind of takes care of that or whether that
22 should also inform what level we might set the

1 meth at if we were choosing a single point.

2 MS. SILAS: Well, I think the current
3 meth level is too high. And even though we've
4 gotten the faucet unstuck on mitigating role,
5 that really doesn't answer the question fully.
6 I still think I would be trying to explain to
7 Carlos why his offense level is higher on
8 account of a purity that he had nothing to do
9 with.

10 So I think that it's not enough to just
11 say, we're going to adjust for role, because
12 there's more than that involved. And the
13 science and the data that the Commission has
14 pursued tells us that methamphetamine is much
15 more comparable to powder cocaine. And so, I
16 think you need to still set the levels
17 appropriately, independently on what -- of what
18 you've already done on the role.

19 VICE CHAIR MATE: Thank you.

20 CHAIR REEVES: Mr. Wong?

21 COMMISSIONER WONG: Mr. Lombardi and
22 Ms. Silas, I -- one of the arguments we have

1 heard for considering the meth amendments are
2 that this could alleviate some of the testing
3 burdens that there are. And if I heard
4 correctly earlier, both of you indicated that,
5 in fact, even if it is less significant for the
6 guidelines, but the testing would go to
7 mandatory minimums, you would still envision
8 testing in 100 percent of cases or close to the
9 same amount of cases regardless. I'm just
10 curious if you could unpack that a little bit
11 for us, because I think there has been sort of
12 an underlying assumption that the need for
13 testing may be minimized dramatically or
14 significantly with some of these proposals.

15 MR. LOMBARDI: Yeah, I do think we
16 would still see a considerable amount of it
17 tested just to get the purity for figuring out
18 whether the mandatory minimum applies.
19 Obviously, if he sees, like, a thousand pounds
20 of something that tests positive for
21 methamphetamine and the levels at something
22 below actual, maybe it just kind of doesn't --

1 it's a base 38 no matter how you kind of slice
2 it. Maybe then you don't need a purity testing,
3 but for smaller quantities, you're still very
4 often going to need purity testing.

5 So I don't know that it would result in
6 a significant cost saving. If I could, can I
7 respond to one other thing that was said
8 earlier? I disagree that methamphetamine is the
9 same as powder cocaine. You know, I think we've
10 all seen, you know, thinking back a few years,
11 that poster faces of meth, I've never seen a
12 poster like that faces of cocaine.

13 Methamphetamine is a more significant,
14 more addictive stimulant. That's not to say
15 that cocaine is great. Cocaine is also bad, but
16 I don't think that they're, you know, really
17 comparable. Congress certainly didn't think it
18 was comparable. The other difference is --
19 there -- again, very different trafficking
20 patterns. You know, cocaine is a plant-based
21 drug. It was a reference in the written
22 materials. Cocaine costs more money, it must be

1 worse. No, it's a function of how it's
2 produced. It's grown from a plant, and it has
3 to be refined. It's much more complicated and
4 expensive to produce than methamphetamine. So I
5 just -- I don't think the comparison between
6 methamphetamine and powdered cocaine is well
7 taken.

8 CHAIR REEVES: You can follow up. You
9 can follow up.

10 VICE CHAIR MURRAY: Could I just follow
11 up on sort of the first point? On the testing
12 and whether there would be cost -- at savings,
13 would there still need to be -- and this is just
14 a granular question on the ground, would there
15 still need to be lab testing to confirm, through
16 a lab test, the presence of methamphetamine? Or
17 would a field test suffice for sort of that, and
18 then, you know, it's a mixture, you know? Or do
19 you think there would still need to be the lab
20 test?

21 MR. LOMBARDI: You would still need a
22 lab test. You would still need a lab test.

1 VICE CHAIR MURRAY: And does that
2 actually provide any cost savings, or at that
3 point, if you're testing -- a lab is testing for
4 the presence of meth, the -- is there additional
5 cost associated with testing the quantity? Or
6 was it going to be one test regardless -- if
7 it's a test that's happening regardless, just to
8 confirm the presence of meth?

9 MR. LOMBARDI: So as I recall, the
10 testimony that you had in August, someone from
11 the lab did testify and said that there is
12 additional testing for purity. So there's a
13 test just to confirm meth at the lab, which, in
14 my judgment, that's beyond a reasonable doubt
15 that it's meth, and then, they do additional
16 testing for purity that they wouldn't
17 necessarily have to do if you're not looking for
18 purity.

19 But I don't know that it's a huge cost
20 savings. You know, there is additional testing,
21 it does tack on a little bit of time to finish
22 it, but I don't know that the difference is that

1 significant. But again, I'm not the lab expert.

2 MS. SILAS: My recollection is that
3 there's a different process for determining
4 purity than the identity of the substance, at
5 least at the GBI lab. And so, it -- there would
6 be a cost savings. If you're just looking for
7 the identity of the substance, I don't think any
8 of us would be willing to rely on field testing
9 for methamphetamines. So you're going to have a
10 test, yes. But the extra step of the purity --
11 and now, I'm relying more on the testimony you
12 all heard in August that I listened to. So I
13 think there's a cost savings for sure.

14 CHAIR REEVES: Ms. Murray?

15 VICE CHAIR MURRAY: I have a xylazine
16 question. There's a little bit of a debate in
17 the comments that we heard about whether
18 xylazine makes -- or mixing with xylazine makes
19 fentanyl more dangerous and whether it makes it
20 less susceptible to naloxone. And I think the
21 government said yes, and it seems like both the
22 Defenders and our Practitioners Advisory Group

1 cite a study that seems to call that into
2 question. I'd be interested in hearing from
3 both of you about xylazine.

4 MS. RICHMAN: Thank you. We agree that
5 there's a considerable question about the role
6 of xylazine in overdoses, with mixed information
7 coming in, some of it showing that the presence
8 of xylazine could be reducing overdose death.
9 And that comes in the form of data and studies
10 that are being published on government websites.
11 Like NIDA. There's NIDA-funded research showing
12 that emergency outcomes are better. And there's
13 also research beginning to show that it might be
14 responsive to Narcan. I think that this is an
15 area of considerable study and research, and
16 it's evolving rapidly, which really speaks to
17 the need to stop and hear from the experts about
18 the particular harms posed by xylazine in the
19 fentanyl drug supply or in the drug supply
20 generally.

21 CHAIR REEVES: Ms. Sahni?

22 MS. SAHNI: The Department's

1 understanding is that xylazine creates
2 complications related to overdose, because
3 naloxone does not treat xylazine of it -- there
4 are additional emergency procedures that need to
5 be done in order to ensure that someone is not
6 having an overdose. And so, because of these
7 complications, we think xylazine is particularly
8 problematic and leading to negative health
9 outcomes.

10 VICE CHAIR MURRAY: Are you familiar
11 with the study about the tag and other
12 (inaudible)?

13 MS. SAHNI: Yes, but it -- I think
14 this -- I agree that this is an area where more
15 study needs to be done.

16 MS. RICHMAN: And I'm sorry, may I just
17 add, because I think it's important, you know,
18 it's rare to have an unadulterated xylazine
19 overdose. It's usually mixed with fentanyl.
20 It's really important that first responders keep
21 using Narcan because it binds to the same
22 receptor that the fentanyl does. Even though we

1 need to keep studying the role of xylazine,
2 Narcan still really works and is essential in
3 those types of overdoses.

4 CHAIR REEVES: I have one last
5 question -- I'm sorry, for the Department. And
6 we've been talking about the cost of testing for
7 meth. The offender says that -- the defender
8 say, and maybe you ought to be sentencing meth
9 like powder cocaine, which I presume is a much
10 lower level than crack or anything else. Has --
11 does the Department take a view on, you know,
12 the cost of incarceration?

13 Because I think, in every PSR that we
14 receive, every year of incarceration costs over
15 \$55,000 -- I think it is. \$55,711 as of today.
16 The exponential cost, you know, in months and
17 years, the difference between how persons are
18 sentenced. And I know the Bureau of Prisons is
19 within the DOJ, and there's some question of
20 whether the Bureau of Prisons is providing
21 everything that it can under the current
22 constraints of budgets and things.

1 I understand you have to enforce the
2 law, but is that something that the Department
3 looks at as well? The cost of the
4 incarceration?

5 MR. LOMBARDI: I don't think, in this
6 context. Again, Congress has set these
7 mandatory minimum penalties. It's Congress'
8 indication of how serious they see this drug.
9 And so, you know, people who are committing
10 these violations, you know, need to be sentenced
11 accordingly. And that just kind of is what it
12 is. If, you know, Congress decides to change
13 the statute, well, that might be a reason to do
14 that. But, you know, it's a serious offense and
15 it should be dealt with accordingly. And I
16 don't think cost is necessarily a huge factor in
17 that regard.

18 CHAIR REEVES: What determination does
19 the Department of Justice take in pursuing
20 charges of mandatory minimum versus anything
21 else? I don't think Congress dictates to the
22 Department exactly who is to be charged with a

1 mandatory minimum.

2 So tell me, how does the department
3 determine which defendant or which case you will
4 pursue the mandatory minimum of and not the
5 other?

6 MR. LOMBARDI: So certainly, we do have
7 limited resources, both prosecutors and law
8 enforcement. We have to pick our places. You
9 know, in almost every jurisdiction, there's
10 concurrent jurisdiction with state authorities
11 who can do drug cases, you know, so we are
12 trying to pick the cases where we're prosecuting
13 the higher-level traffickers or prosecutions
14 that are going to have a more significant
15 impact. And there's a lot of factors that going
16 into making that determination, how we charge
17 the case. You know, again, I've been doing this
18 for a while. For most of my career, not all of
19 it, there have been some variation between
20 administrations.

21 The directive has been to prosecute the
22 most serious, readily provable offense. So

1 regardless of what drug it is, if it's
2 triggering a mandatory minimum, we're typically
3 going to charge that, because that's what the
4 policy directive is. And that's, you know,
5 what's consistent with what Congress has
6 enacted. But, you know, obviously, there's
7 going to be all sorts of cases where we pass on
8 the case for one reason or another.

9 CHAIR REEVES: Thank you for the
10 engagement.

11 Commissioner Meisler, you may have had
12 a question and not seen. You were jumping in
13 ahead, too.

14 VICE CHAIR RESTREPO: I'll defer --

15 CHAIR REEVES: I'm sorry.

16 VICE CHAIR RESTREPO: -- I'll defer to
17 Commissioner Meisler.

18 COMMISSIONER MEISLER: I -- mine was
19 more of a theoretical question. The opposite of
20 the granular question that Commissioner Wong
21 asked earlier, but I'm just curious. And this
22 is primarily for maybe Ms. Richman, but others

1 should feel free to weigh in. I'm just curious
2 about, you know, as a -- at a high level, what
3 we should be thinking about purity given all of
4 the information we've heard, purity, potency of
5 these concepts.

6 Because I was thinking, Ms. Richman, in
7 particular with respect to fentanyl-related
8 substances, it seems like, on meth, maybe the
9 Defenders' view is, this purity thing doesn't
10 matter. Forget about it. When we get over to
11 fentanyl-related substances, it's, we should
12 look at it. And yes, you can set the levels
13 equivalent to analog. But when purity and
14 potency come in, those considerations weigh in
15 favor of kind of a downward exclusion at some
16 point.

17 So just conceptually, do you
18 acknowledge that purity and potency can play a
19 role in the Commission's policymaking?

20 MS. RICHMAN: Thank you for your
21 question. I think your question illustrates
22 some of the problems with approaching changes to

1 2D1.1 piecemeal. And there's widespread
2 agreement that drug type and quantity are
3 particularly poor metrics for gauging
4 culpability and figuring out the right amount of
5 punishment for somebody. And we think that's
6 true.

7 Fentanyl and its analogs are within a
8 framework right now that looks at potency and
9 looks at type to determine how they're punished.
10 And so, if we're taking that into consideration,
11 we think it's really important to note the huge
12 swings and potency and harmfulness between
13 fentanyl and its analogs. You know, I couldn't
14 help but notice, in the 2024 quick facts, one of
15 the substances involved was benzo fentanyl.
16 That's a substance that the DEA has acknowledged
17 has no pharmacological effect whatsoever.

18 So we have this mix -- this vast
19 quantity of substances that are being brought
20 into federal sentencing. And I think it's
21 important for the Commission to understand the
22 complexity of the pharmacology and chemical

1 determinations while it continues to value
2 potency and harmfulness as a factor in its
3 sentencing decisions.

4 Thank you.

5 VICE CHAIR RESTREPO: Briefly for Mr.
6 Lombardi. You were -- you -- in response to the
7 Chair's -- in response to the Chair's question,
8 you referenced this department policy approving
9 the most readily most serious offense.

10 Does the Department take a similar
11 review with respect to 851 notices? Is there
12 a -- any sort of uniform policy on meth cases
13 and 851 notices?

14 MR. LOMBARDI: I believe there is, but
15 I'm not sure that we've changed that -- or this
16 administration has changed it. You know, my
17 district, it is very, very rare that we file 851
18 enhancements. So I think we'd have to get back
19 to you on that. I'm not that familiar with that
20 part of the discussion.

21 VICE CHAIR RESTREPO: Thanks.

22 MS. SILAS: If I can offer this as

1 well. It's very rare that we see 851
2 enhancements. And also, with respect to
3 mandatory minimums, I don't think that the
4 Commission needs to be concerned about the
5 cliffs, because it's very few cases that end up
6 getting governed by the mandatory minimums. Or
7 most cases -- and I think your data shows, only
8 24 percent of cases are sentenced according to a
9 mandatory minimum. Most cases anchor on the
10 guidelines. So we hope that you'll make the
11 guidelines, follow the data and the science.

12 CHAIR REEVES: Thank you.

13 Thank you all so much. We appreciate
14 your confidence.

15 Our third group of panelists will
16 provide us with a perspective of our advisory
17 groups on the proposed amendment on drug
18 offenses.

19 First, we will hear from David Patton,
20 chair of our Practitioners Advisory Group. Mr.
21 Patton is a partner at Hecker Fink LLP in New
22 York City, where he represents clients, both

1 retained and appointed in federal court.

2 Prior to joining Hecker Fink, Mr.
3 Patton was the executive director of the Federal
4 Defenders of New York serving Southern and
5 Eastern Districts of New York for about 12 years
6 or so.

7 Second, from our Probation of --
8 Probation Officers Advisory Group, we have Sami
9 Geurts, who is supervisory probation officer in
10 the Eastern District of Virginia. She has been
11 with the U.S. Probation Services since 2003.

12 Adam Clausen will be the third. He is
13 a member of our newest advisory group, Sentence
14 Impact Advisory Group. Mr. Clausen was
15 sentenced to approximately 213 years in prison
16 and served over 20 years before court granted
17 his motion for compassionate release. Since his
18 release, Mr. Clausen has founded and worked with
19 many organizations that aid those who have been
20 impacted by the correctional system.

21 Fourth, we have Jami Johnson of our
22 Tribal Issues Advisory Group. Ms. Johnson is an

1 enrolled member of the Choctaw Nation of
2 Oklahoma. She is an assistant federal public
3 defender for the District of Arizona where she
4 represents indigent defendants, primarily in
5 federal criminal appeals.

6 Rounding out this panel would be
7 Colleen Clase of the Victims' Rights Advisory
8 Group. Ms. Clase is the chief counsel for
9 Arizona Boards for Crime Victims, a non-profit
10 organization that provides pro bono social
11 services and legal representation for the
12 purposes -- for the purpose of asserting and
13 enforcing victims' rights in criminal
14 prosecutions.

15 Mr. Patton, sir, we are ready when you
16 are.

17 MR. PATTON: Thank you, Chair Reeves.

18 And thank you, Commissioners, for
19 inviting me here to share the views of the
20 Practitioners Advisory Group.

21 In short, our positions are that we
22 support Option 1 of Part A, the Proposed

1 Amendment to the Methamphetamine Guideline. And
2 we encourage the Commission to set the quantity
3 thresholds at the current level for mixture.

4 And secondly, we oppose the proposed
5 specific offense characteristics for offenses
6 involving fentanyl and fentanyl analogs.

7 So I'll start with methamphetamine.
8 Along with many commentators that you've heard
9 from, the PAG has been critical of the meth
10 guidelines for many years, and we're very
11 pleased to see the Commission proposing to
12 eliminate the purity distinction.

13 Sorry, am I back on?

14 The Commission itself, in discussing
15 the feedback it's received from stakeholders,
16 and probably, most significantly, from judges,
17 has noted the many problems with the current
18 purity-based regime. Purity is no longer a
19 proxy for role or culpability to the extent that
20 it ever was, but it surely is not now.

21 Testing procedures vary widely from
22 district to district and sometimes even within

1 districts, as you've heard. There is no
2 empirical support for the current distinctions.
3 And most judges find the guidelines to be too
4 severe and by a substantial amount, not just by
5 a minor amount.

6 One example we provided in our comments
7 to really highlight how irrational this can be,
8 in one case in the Eastern District of Kentucky,
9 two co-defendants in the exact same case
10 involving the exact same drugs were sentenced at
11 different points in time, one before purity
12 testing had been done and one after. And the
13 one after got a substantially higher sentence
14 based purely on the happenstance of the timing
15 of the testing. And that far greater sentence
16 was upheld on appeal.

17 Due in no small part to a lot of the
18 issues that you've been hearing about, when it
19 comes to purity testing, there are quite a
20 number of districts where the majority of
21 judges, just as a policy matter, do not apply
22 the ten to one ratio, and a number of circuits

1 have authorized that. And so, I think we are at
2 a point where it's important for respect for the
3 guidelines to address, what are some really
4 irrational disparities to make this change that
5 you've proposed?

6 Secondly, when it comes to fentanyl and
7 the specific offense characteristics, we really
8 feel strongly that these would run counter to a
9 lot of the efforts that the Commission has made
10 to simplify the guidelines to take a step back
11 from the really thinly slicing of human behavior
12 and trying to quantify individual things that
13 are just better left to judges and 3553(a)
14 factors. The Commission itself, in recent
15 years, has really, I think, been taking
16 seriously and trying to fix this issue with
17 factor creep. And this would just move in the
18 wrong direction.

19 I was struck in particular on the age-
20 based proposal in the data briefing by how high
21 the sentences already are for the very small
22 number of cases that would apply if that SOC

1 were enacted. They're already far higher than
2 typical fentanyl sentences, even though,
3 according to the data briefing, 77 percent play
4 a very low level role. And what that suggests
5 to me is judges are paying attention to these
6 things and they're accounting for them. And
7 there really isn't a need to continue digging
8 when it comes to the factor creep.

9 And I look forward to answering your
10 questions.

11 CHAIR REEVES: Thank you, Mr. Patton.

12 Ms. Geurts?

13 MS. GEURTS: Chairman Reeves and the
14 commissioners, thank you so much for the
15 opportunity to share POAG's perspective on the
16 proposed drug offense amendments.

17 POAG unanimously supports reducing the
18 disparity between the treatment of
19 methamphetamine mixture, methamphetamine actual,
20 and ice, and is unanimously in favor of Option 1
21 of Part A, which sets the same quantity
22 thresholds for all methamphetamine offenses.

1 The availability of lab reports varies
2 greatly between districts and even within
3 districts, depending on the agencies involved
4 and not all lab reports reflect purity. The
5 varied testing practices have led to unwarranted
6 disparities and growing policy disagreement as
7 to whether purity is an appropriate indicator of
8 culpability.

9 As a result, some courts are treating
10 all cases involving methamphetamine as
11 methamphetamine mixture even when the purity
12 level is known. A single substance measurement
13 for methamphetamine would eliminate the current
14 ten to one ratio difference between meth actual
15 and meth mixture, while simplifying the process
16 and eliminating these disparities.

17 While POAG agrees that all meth cases
18 should have the same quantity threshold, we have
19 opted not to weigh in as to which measurement is
20 most appropriate. And instead, we defer to the
21 subject matter experts for that determination.

22 POAG is unanimously opposed to Option 2

1 of Part A, which provides different offense
2 levels for meth offenses, depending on a wide
3 variety of factors. POAG believes that Option 2
4 is complicated, provides too many variables, and
5 moves away from the goal of simplification.

6 Providing alternate meth quantity ranges based
7 on certain aggravating or mitigating factors
8 would require additional fact finding and result
9 in significant legal challenges. Further, many
10 of the proposed factors are already considered
11 elsewhere under the guidelines.

12 Turning now to fentanyl offenses, POAG
13 unanimously supports adding fentanyl-related
14 substances to the drug quantity table and
15 believes that would be most appropriate to set
16 the quantity thresholds and base offense levels
17 at the same level as fentanyl analogs.

18 POAG is in favor of creating an
19 enhancement based on the use or possession of a
20 tableting machine and fentanyl offenses, as this
21 conduct is not always captured under the
22 guidelines.

1 In cases involving pill press
2 operations, the operator may not qualify for an
3 enhancement under 2D1.1(b)13 because they did
4 not misrepresent the substance. This could
5 result in a lower offense level for pill press
6 operators compared to distributors.

7 POAG believes that this enhancement
8 should be offense-based, because in most cases
9 involving tableting machines, many individuals,
10 not just the operators, are aware of and benefit
11 from the pill press operation.

12 POAG is also in favor of an enhancement
13 for offenses involving fentanyl that is
14 adulterated with xylazine, but in a broadened
15 state. Specifically, the enhancement should
16 apply to any adulterated substance that,
17 "negatively impacts lifesaving measures," or
18 that, "increases the risk of serious bodily
19 injury or death."

20 The broadening of this enhancement may
21 require additional fact finding, but we believe
22 this change best meets the goals of this

1 enhancement, while not eliminating it to
2 xylazine, given the introduction of new drugs
3 that could have the same effect.

4 POAG is not in support of creating an
5 enhancement for distribution of fentanyl to
6 minors or for the use or attempted use of minors
7 in fentanyl offenses. While we agree with the
8 intent behind this proposed amendment, it does
9 not appear the enhancement for this conduct
10 would be applied often. Because in most cases,
11 unless there's a death or an overdose, the age
12 of the person who the drugs were sold to is
13 unknown.

14 Similarly, unless there's an arrest,
15 the age of the participants is unknown.
16 Further, in cases where such information is
17 available, those usually result in higher base
18 offense levels and Chapter III adjustments.

19 POAG is also opposed to an enhancement
20 for the use of the dark web or similar
21 technologies and fentanyl offenses. Currently,
22 this conduct is generally captured at 2D1.1(b)7

1 for distribution of a controlled substance
2 through mass marketing.

3 Additionally, based on ever-changing
4 technology, the enhancement may become obsolete.
5 Or alternatively, as use of the dark web becomes
6 more commonplace, it could be applied more
7 ordinarily. Rather than an enhancement under
8 2D1.1, we believe use of the dark web may be
9 better served as a qualifier under the proposed
10 Chapter III Amendment for sophisticated means.

11 Thank you for your time.

12 CHAIR REEVES: Thank you.

13 Mr. Clausen?

14 At the bottom. There you go.

15 MR. CLAUSEN: Thank you.

16 Chairman Reeves, commissioners, thank
17 you for the opportunity to testify today.

18 My name is Adam Clausen, and I'm here
19 on behalf of the Sentencing Impact Advisory
20 Group or SIAG.

21 Prior to today, we submitted extensive
22 written comments to the Commission, laying out

1 our positions on all of the proposed amendments.
2 And I would encourage, if you have not, to
3 please read those in their entirety. It's well
4 worth the read.

5 SIAG brings our first -- firsthand
6 lived experience into this process, and I am
7 honored to carry that perspective into the room
8 today. We can speak with real authority about
9 how the federal criminal code and the
10 Commission's amendments actually function in
11 practice and about the consequences those
12 decisions create for both the people and the
13 families who actually have to live with those.

14 I also want to acknowledge something
15 directly. The Commission has made great efforts
16 and made meaningful progress towards
17 strengthening both the efficacy and the fairness
18 of the system. And we want to acknowledge that.
19 I'm genuinely grateful for us having a seat at
20 the table. So thank you.

21 What I want to do now is give you
22 SIAG's position on the drug amendments plainly

1 from that lived experience vantage point.

2 On methamphetamine, SIAG supports
3 Option 1. We support eliminating the purity-
4 based distinctions and moving to a simpler,
5 single set of thresholds. I've heard plenty of
6 support for that position, but from our
7 perspective, it's the people who are on the
8 ground, who don't -- they're not in a position
9 to take into account any of the more complex
10 procedures that are used to determine what the
11 ultimate sentence would be.

12 Second, if the Commission adopts Option
13 1, we would suggest that it implement it using
14 the current mixture thresholds and not the
15 actual thresholds applied across the board. And
16 SIAG supports removing references to ice and
17 supports a two-level decrease for non-smokeable,
18 non-crystalline methamphetamine.

19 On the fentanyl-related substances,
20 SIAG supports treating fentanyl-related
21 substances and analogs similarly for guideline
22 purposes. We recognize the extraordinary danger

1 posed by this substance here, and we're not
2 minimizing the harm that fentanyl has caused to
3 our communities and to our families.

4 Where SIAG is more cautious is around
5 the additional enhancements. In our submission,
6 there were differing views amongst our members,
7 but the majority of participating members
8 opposed several of the proposed enhancements as
9 they were written. And our concern is based on
10 our lived experience and that a more broad and
11 duplicative enhancements can ultimately expand
12 punishment in ways that don't reliably track a
13 person's knowledge, a person's intent, or their
14 actual role. And that can produce outcomes that
15 feel arbitrary for the people who are living
16 through them.

17 Prisons are filled with drug users.
18 And yes, there are some higher level dealers,
19 but they're in the minority. Currently, the
20 vast majority of people that we have sentenced
21 under our drug laws are there because they've
22 been swept into a large net. We want to make

1 sure that there is no further disparity created
2 by any of the enhancements.

3 I would encourage everyone, and
4 especially those following these proposals
5 closely, to read our formal submission where
6 members of our group discussed our differing
7 views on some of those enhancements. It lays
8 out our positions in detail. And in the areas
9 where members held differing views, it captures
10 the nuance of our lived experience and the
11 context behind those differences, which is
12 important in considering what SIAG brings to
13 this conversation.

14 So the clearest way for me to summarize
15 SIAG's position is this, we want to simplify
16 methamphetamine in a way that improves clarity
17 and proportionality. Option 1 is what we are
18 suggesting with the mixture thresholds. And we
19 want to remove ice reference and adopt the two
20 level decrease for non-smokeable, non-
21 crystalline methamphetamine.

22 Second, treat meth -- treat fentanyl-

1 related substances, like fentanyl, acknowledging
2 the seriousness of that threat.

3 And finally, please use restraint with
4 the enhancements and make sure that any increase
5 in punishment is tied closely to culpability,
6 personal knowledge, intent, and the role.

7 And I'll close with this. SIAG's
8 comments are not theoretical. They come from
9 people who know personally how the guidelines
10 and the choices that we make here ripple outward
11 into families and across communities and
12 throughout both the rehabilitation and reentry
13 process. Our goal is to support the Commission
14 in creating a guideline system that is easy to
15 understand, proportionate, and credible, because
16 credibility and fairness are what makes public
17 safety a reality.

18 Thank you.

19 CHAIR REEVES: Thank you, Mr. Clausen.

20 Ms. Johnson?

21 MS. JOHNSON: Thank you.

22 Thank you, Chair Reeves and

1 commissioners, for the opportunity to address
2 you today on behalf of the Tribal Issues
3 Advisory Group.

4 As you have seen from our written
5 submissions, TIAG, like many commentators,
6 supports eliminating the artificial distinctions
7 between meth mixture and meth actual.

8 TIAG supports Option 1 and supports
9 setting the levels at the current levels for
10 meth mixture.

11 And rather than repeat some of the
12 other arguments you've heard today that are
13 present in our letter, I want to talk to you a
14 little bit about some issues that are specific
15 to tribal jurisdictions that may not apply in
16 other locations.

17 Mr. Lombardi, the gentleman from the
18 Department of Justice, talked about how, you
19 know, in his jurisdiction, when meth cases are
20 prosecuted, the federal government goes after
21 the kingpins and the large quantity dealers and
22 the large conspiracies. This isn't true for

1 Indians in Indian country. For jurisdictional
2 reasons, the state has no jurisdiction over most
3 crimes on most reservations and exclusive
4 jurisdiction is with the federal government or
5 the tribes themselves.

6 So what we do see in Indian country is
7 prosecutions of individuals selling small
8 quantities who are not part of a larger
9 conspiracy.

10 Take an individual, for example, who
11 might sell something slightly south of 5 grams
12 of methamphetamine. Generally, this is somebody
13 who is themselves addicted and they are sharing
14 or trading or selling small quantities to
15 support their own habit.

16 And I practice in a jurisdiction where
17 the drugs are almost never tested unless someone
18 proceeds to trial. So currently, this person
19 with this, you know, slightly less than 5 grams
20 of meth has guideline levels of -- would face a
21 base offense level of about 12. That is a base
22 offense level that makes this person eligible

1 for probation, pretrial release. They can get
2 into rehabilitation, they can get therapy, they
3 can get services they need.

4 And what we see is that these people,
5 when provided with services, they often do quite
6 well and succeed and go on to receive
7 noncustodial sentences or very short custodial
8 sentences and are able to be rehabilitated into
9 the community and continue to do well on
10 supervision.

11 Setting the base -- setting the offense
12 level for meth actual would mean that that same
13 person with this small quantity of drugs faces a
14 base offense level of 22. This is an offense
15 level where a noncustodial sentence is not
16 recommended or even close to being recommended
17 by the guidelines. It would require a very
18 substantial variance and incorporated within the
19 guidelines appear to be this assumption that, if
20 anyone has very pure meth, as we've heard from
21 other people, that this person must be a kingpin
22 or a leader. And that assumption is just

1 outdated.

2 And so, what TIAG does not want to see
3 happen is to see Indians and Indian country with
4 very small quantities who are not professional
5 dealers, who are people who are substance
6 addicted themselves, who are selling,
7 exchanging, trading, small quantities of drugs,
8 with very high offense levels that -- and result
9 in very long periods of incarceration that do
10 nothing to protect the community, that do not
11 provide the people with the services they need
12 and do not give people the incentive to do well
13 on pretrial release in the hopes that, perhaps,
14 they can avoid a custodial sentence.

15 With respect to the fentanyl
16 amendments, TIAG does support, with limitations,
17 the age amendment, with the important limitation
18 being that the age threshold be set at 18 and
19 that there be an eight-year age gap -- at least
20 an eight-year age gap between the defendant and
21 the minor in question. And that age gap is
22 important to TIAG because in a lot of these

1 reservation communities, people's peer groups
2 encompass a larger diversity of age individuals.
3 We're talking about rural communities where
4 people don't have very many neighbors.

5 And TIAG does not want to see this age
6 amendment, which it does support, turned into an
7 enhancement that generally applies to young
8 people who are selling drugs to each other or
9 using each other in -- to facilitate drug
10 transactions so that it becomes a sort of
11 defacto sentencing amendment or a sentencing
12 enhancement for young people.

13 With respect to the other amendments,
14 TIAG does not support the other amendments,
15 because we believe that there hasn't been enough
16 study and enough empirical evidence to support
17 their enactment at this point.

18 For example, the use of the dark web,
19 we appreciate that the dark web may make it more
20 difficult for law enforcement to investigate and
21 prosecute crimes. It is unclear that it -- that
22 that necessarily merits a harsher sentence.

1 For example, one can imagine that the
2 use of the dark web, if it's a substitute for
3 street transactions, could not potentially have
4 solitary ancillary effects upon the surrounding
5 community, if it reduces street crime, if it
6 produces fewer negative externalities for people
7 who live in the community where the behavior is
8 happening. I don't know if that's true, but
9 I -- we don't believe that there's been enough
10 study to determine that.

11 And TIAG generally opposes adding
12 amendments without sufficient study. And so, we
13 would appreciate more information on those, but
14 do not support them at this time.

15 CHAIR REEVES: Thank you.

16 Ms. Clase?

17 MS. CLASE: Good morning.

18 Good morning, Commissioner -- good
19 morning, Commissioner Reeves, members of the
20 Commission.

21 My comments today reflect the position
22 of the Victims' Rights Advisory Group, and our

1 comments -- our position is informed by our
2 collective experience providing direct legal and
3 social services to victims of crime.

4 Drug-related crimes do not stay
5 contained within users or traffickers, it
6 devastates families, communities, and to often
7 cost innocent people their lives.

8 Drug trafficking frequently results in
9 death whether through overdose, tainted supply,
10 or drug-induced violence.

11 Certain drugs, like meth, are
12 scientifically proven to increase aggression and
13 antisocial behavior. And victims, including
14 third parties, often suffer long after the
15 offense itself. Sentencing should reflect the
16 rural -- excuse me, the real world harm.
17 Victims deserve a framework that prioritizes
18 accountability, deterrence, and public safety,
19 not one that rewards technical distinctions.

20 Amendments to the guidelines should
21 prioritize victim harm, public safety, and
22 accountability.

1 The Victims' Rights Advisory Group
2 urges the Commission to adopt Option 2 for
3 methamphetamine offenses without reducing
4 existing penalties.

5 Option 1 oversimplifies the guidelines
6 and risks the minimization of real world harm to
7 victims.

8 Simplicity should not come at the
9 expense of justice. The impact on a victim
10 cannot be simplified. Whether a methamphetamine
11 user commits a property crime to fuel their
12 addiction or a violent assault or a homicide,
13 the harm to victims is profound and long-
14 lasting. The CVRA provides victims a right to
15 fairness and fairness demands accountability and
16 that the guidelines reflect the purposes of
17 sentencing.

18 A potential reduction in penalties for
19 methamphetamine offenses would conflict with the
20 intent of Congress.

21 With respect to the fentanyl-related
22 substances, the Victims' Rights Advisory Group

1 does support the Commission's proposal to treat
2 fentanyl-related substances the same as fentanyl
3 analogs. The harm caused by fentanyl is --
4 excuse me, fentanyl-related substances is
5 indistinguishable from fentanyl itself, and the
6 harm is extraordinarily potent.

7 We also support adding fentanyl-
8 related -- a fentanyl-related substances
9 enhancement for misrepresentation and false
10 marketing. The Victims' Rights Advisory Group
11 also supports special offense characteristics
12 addressing distribution to minors. And finally,
13 we support all four proposed fentanyl
14 enhancements. The Victims' Rights Advisory
15 Group recommends a four-level enhancement for
16 distribution to the -- or to -- excuse me, for
17 distribution to minors, using a bright line
18 under 18 standard with no age differential
19 requirement. We also support a four-level
20 enhancement for dark web trafficking,
21 enhancement for xylazine and similar. And a
22 four-level enhancement for possession of

1 tableting machines.

2 With that, I would welcome any
3 questions that the Commission has as it relates
4 to the victim perspective, the harm that victims
5 endure, and the victim impact. Thank you.

6 CHAIR REEVES: Thank you all for your
7 openings.

8 Any questions?

9 Yes?

10 VICE CHAIR RESTREPO: Mr. Clausen,
11 thanks for being here. So the -- as you know,
12 the guidelines include a lot of specific
13 offender characteristics. Do you think that
14 individuals factor these SOCs into their
15 calculation before they engage in prohibited
16 conduct?

17 MR. CLAUSEN: Thank you for the
18 question, sir. I would say, unequivocally, no.
19 There's no consideration from the vast majority
20 of people who ultimately end up in court about
21 whether what the mixture is, what the weight is.
22 Those are not considerations that are taken on a

1 day-to-day basis. And in my experience, the
2 majority of people in -- caught up in our
3 criminal justice system are there out of drug
4 addiction and substance misuse. They're there
5 for a multitude of reasons, but it's not
6 carefully planned or executed or weighed out
7 how -- what their actions are ultimately going
8 to result.

9 CHAIR REEVES: Commissioner Wong and
10 the VC Mate.

11 COMMISSIONER WONG: Thank you all for
12 being here. POAG -- POAG's position that you
13 support Option 1, but you don't take a position
14 on where the level should be drawn, I think
15 underscores part of what we're wrestling with in
16 this option, which is there's kind of two
17 components of it. One is whether there should
18 be one uniform level, which I think there's some
19 broad agreement on, but Differing Views and
20 differing commentator views on where that level
21 should be drawn. And so my question is really
22 for PAG and TIAG and SIAG, who did take the

1 position that you support Option 1 and came out
2 at a particular threshold level. To what extent
3 are the advisory groups support of Option 1
4 contingent on that being the threshold level?
5 In other words, do you still see a value that
6 may be worthwhile in the uniform single
7 threshold even if the Commission were to come
8 out differently on the threshold? If you can
9 answer that.

10 MR. PATTON: I -- I'll take a first
11 crack. We would certainly not support a unified
12 threshold that raises sentences as it would
13 occur if they were all set to actual. And
14 that's in part because I think what the data
15 demonstrates and what the Commission is seeing
16 from a lot of the stakeholders, and in
17 particular, the judges, is that it's not just a
18 matter of uniformity. It is also a matter of
19 severity. There is, as Judge Chang was pointing
20 out this morning, a real minority of cases that
21 are being sentenced within the guidelines range.
22 And so I do think it is both an issue of

1 uniformity and severity.

2 MS. JOHNSON: On behalf of TIAG, we did
3 not discuss this as a group, so -- and we also
4 did -- I did not conduct a survey as to the
5 various Indian country jurisdictions and where
6 drugs were being tested and where drugs were not
7 being tested. I would largely agree with Mr.
8 Patton. I think that TIAG would be unlikely to
9 support Option 1 if the -- if everything were
10 set at meth actual, because there is not just a
11 uniformity interest, but also an equity
12 interest. And, you know, as I mentioned, as
13 somebody who practices in a jurisdiction where
14 drugs are pretty uniformly not tested, this
15 would be a very dramatic increase in sentencing
16 for the Indians in Indian country, at least in
17 the jurisdiction in which I practice. It would
18 be a radical -- a negative transformation for a
19 population group that generally does receive
20 downward variances in the instances in which
21 they are able to engage in, you know, post-
22 offense rehabilitation, drug treatment, and show

1 a measured commitment to change.

2 MR. CLAUSEN: And simply stated, from
3 SIAG's position, I would agree that although
4 this was not specifically discussed, I could say
5 from our discussions, it could be easily
6 inferred that the consensus was that meth
7 sentences are already very high. And as we
8 heard from the judge earlier, many of the
9 districts are recognizing that in the same way
10 that we have, that these sentences are high.
11 And we would strongly suggest that they need to
12 come down. So we would want, if Option 1 is the
13 preferred option there, that those sentences
14 remain at the lower than the actual level.

15 CHAIR REEVES: Right.

16 VC Mate.

17 VICE CHAIR MATE: Thank you. And thank
18 you all for being here today. I appreciate all
19 of your efforts. This is actually a follow-up
20 question to Judge Restrepo's question to you,
21 Mr. Clausen. And maybe this goes to everyone.
22 But I've been looking recently, actually, at

1 deterrence research in general. And I -- I'm
2 wondering if anyone can point me to any research
3 that shows that the type of marginal increases
4 we're talking about in connection with the
5 proposed fentanyl enhancements has a deterrent
6 effect. Does anyone -- if anyone has any
7 research, I guess. And if not today, later, I
8 would appreciate seeing anything. Thank you.

9 CHAIR REEVES: Oh, yeah. I thought you
10 had -- well, okay. Go -- did you have another?

11 VICE CHAIR MATE: No.

12 CHAIR REEVES: Okay.

13 Ms. Murray, I'm sorry.

14 VICE CHAIR MURRAY: I had a question
15 for Mr. Patton about pill presses. The -- it
16 was -- there was an interesting kind of a side,
17 kind of, argument in your letter about
18 legitimate uses of pill presses and how there
19 might be proof issues, because there are
20 legitimate proof -- uses of pill presses. I --
21 this is just, like, a place of ignorance for me.
22 Are there, like, plausible -- when we're in a

1 preponderance world, are there, like, plausible
2 reasons that people -- like, non-drug related
3 reasons that people may use pill presses?

4 MR. PATTON: So I will admit, I'm
5 personally not familiar with them. But yes, we
6 had members who discussed it. And I can -- I'm
7 going to -- but I'm going to have to get back to
8 you on the details of that because that didn't
9 come from my own personal experience.

10 VICE CHAIR MURRAY: Sure. Thanks.

11 CHAIR REEVES: I have a couple of
12 questions. I note, Mr. Patton, you represent
13 people who have been accused of these drug
14 related offenses, meth included. And I know
15 that the offenders were talking about, if you
16 peg it to an amount, peg it toward the powder
17 cocaine, which I believe would be less than the
18 mixture. And I think a lot of people have said
19 mixture. What about the sentence that might be
20 pegged to mixture versus -- okay. Does that,
21 sort of, reflect more seriousness or what?

22 MR. PATTON: I think that that falls

1 into the category of, we didn't dare to dream.
2 We were really responding to the specific
3 proposals that the Commission had set out. I do
4 think going back to the severity point, it would
5 be good of the Commission to set it at an even
6 lower level. And based on the experts that you
7 heard from and the harms -- the equivalence of
8 the harms for the various substances that an
9 equivalence to powder cocaine makes a lot of
10 sense. I think at the time we were generating
11 our comments, we were looking at the specific
12 proposals and the lowest proposal that was
13 specifically mentioned was the mixture.

14 CHAIR REEVES: All right and to
15 follow -- and a different question for Mr.
16 Clausen, because you're the only one on this
17 panel, at least, who could talk about this.
18 But, you know, we're -- we've been talking about
19 either incrementally, months, the difference
20 between a month in prison, a year. You served
21 20 years with the expectation that you would
22 serve 213. I sentenced a 51-year-old and he was

1 facing a -- his guideline range was 360 months.
2 So if I chose the guideline range, from 51 to
3 81, he would be in prison. Tell us -- I mean,
4 you know, the difference between the -- your
5 first day going there, your tenth year being
6 there, what is it like?

7 MR. CLAUSEN: Excellent question. So
8 people often ask me what it's like to live with
9 a 213-year sentence, which seems pretty
10 incomprehensible. And whenever someone would
11 come in to prison, because I ran ANO (phonetic),
12 and I tried to get people off on the right foot,
13 make sure that they were utilizing their time in
14 a positive manner, they almost felt guilty
15 telling me how much time they had. Whether that
16 was six months, whether that was six years,
17 because my sentence was so extreme. What I
18 learned from that experience was, to every
19 single person who receives a sentence, no matter
20 how long it is, it's significant. It's
21 significant to that person. It's significant to
22 their family. To those who have children. To

1 those, especially, who leave those people behind
2 on the outside because they are directly
3 impacted as well. And that's a part of this
4 that is not often considered. We're here
5 talking about a sentence as if it's this thing,
6 when there are people on the other side of it.

7 And if I can express one thing, it's
8 the human impact. And I believe that's my role
9 here, right? To represent those people who are
10 receiving these sentences, how they will have to
11 manage however much time they receive and how
12 their families will cope and adjust without
13 them. Those are the ripple effects, right? So
14 when we talk about increasing sentences,
15 personally, I'm always going to urge caution
16 because this is the punishment. The base level
17 time that we impose based on congress's laws,
18 like, that's the minimum threshold that we have
19 said is required for justice. When we start
20 increasing that time for whatever additional
21 factors, I would say we all need to be extremely
22 cautious because of those far-reaching effects.

1 So if I could speak to the time in any
2 particular way, for me, that was my greatest
3 experience over 20 years. I had the opportunity
4 to deal personally with a lot of people,
5 literally thousands of people, who were directly
6 impacted by the decisions that we make right
7 here.

8 CHAIR REEVES: Any additional questions
9 from this group? Thank you so much. And
10 appreciate your testimony.

11 MR. CLAUSEN: Thank you.

12 CHAIR REEVES: At this time, I believe
13 we're slated for a 15-minute break. And we're
14 right on time, actually. Well, I'm looking at
15 that clock. I think it's different from our
16 clock-clock. But we'll take a 15-minute break.

17 (Whereupon, the above-entitled matter
18 went off the record at 11:35 a.m. and resumed at
19 11:52 a.m.)

20 CHAIR REEVES: Welcome back. I'd like
21 to introduce our fourth panel, which will
22 present perspectives from our stakeholders on

1 Proposed Amendment on Economic Crimes. First,
2 we have Jeremy Sanders, assistant deputy chief
3 of the fraud section of the Criminal Division of
4 the Department of Justice. Second, we have
5 Michael Caruso. Currently, an assistant federal
6 public defender for the Southern District of
7 Florida, in whose many years of service with the
8 defenders include chairing the Federal and
9 Community Defenders Sentencing Guideline
10 Committee.

11 Mr. Sanders, you may proceed when
12 you're ready.

13 MR. SANDERS: Judge Reeves,
14 commissioners, good morning. First, let me
15 thank you for the opportunity to share the
16 department's views on the commission's proposed
17 amendments to Section 2B1.1. As set forth in
18 greater detail in our written submission,
19 although we appreciate the commission's goals
20 with respect to this guideline, the department
21 has some concerns with some of the proposed
22 economic crimes amendments. Although we support

1 the creation of a specific offense
2 characteristic to address non-economic harm, the
3 department opposes the proposed revisions to the
4 loss table in Section 2B1.1, as well as the
5 suggested reductions for claims of duress or
6 coercion and post-offense remedial conduct.

7 Our opposition to many of the
8 commission's proposed economic crimes amendments
9 stems from the concern that the proposed
10 revisions would result in an unwarranted
11 reduction in sentences for white collar
12 offenders, in diametric opposition to the
13 department's mission to combat fraud and related
14 economic crimes by appropriately punishing those
15 who were responsible for such offenses. Indeed,
16 white collar criminals disproportionately stand
17 to benefit when these proposals are taken
18 together, particularly in conjunction with the
19 recently enacted Zero-Point Offender reduction.
20 That risks returning us to a world that prompted
21 the Sentencing Reform Act and the guidelines
22 themselves when congress expressed concern that

1 economic crimes were not being appropriately
2 punished.

3 While I'm prepared to answer questions
4 about any of the department's comments on the
5 proposed economic crime amendment, I'd like to
6 focus my comments this morning on the proposed
7 revisions to the 2B1.1 loss table and two of the
8 three proposed specific economic -- specific
9 offense characteristics. Given the time
10 limitations, I plan to directly address the
11 proposals related -- I -- excuse me. I do not
12 plan to directly address the proposals related
13 to sophisticated means and post-offense
14 rehabilitative conduct, but rather defer to my
15 colleagues from the department, Amanda Riedel
16 and William Voit, who will be addressing those
17 topics later during those specific panels.

18 First, like the criminal law committee,
19 the department opposes the commission's proposal
20 to restructure the loss table by reducing the
21 number of categories into which economic loss is
22 divided. When combined with the commission's

1 proposed inflationary adjustment, which the
2 department also opposes, the widening of the
3 bands in the loss table would result in an
4 offense level reduction for two-thirds of
5 offenders, with 20 percent of those receiving a
6 four level reduction. Reducing the advisory
7 guidelines range for a substantial number of
8 defendants convicted of economic crimes is the
9 wrong message to send.

10 The department also has concerns that
11 the commission's proposed amendment to the loss
12 table would not adequately distinguish among
13 those convicted of economic crimes. For
14 example, the widen bands would -- also would
15 treat an offender who causes just over \$250,000
16 worth of loss the same as an offender who causes
17 up to \$1.5 million worth of loss. Nor does the
18 proposed restructuring meaningfully advance the
19 goals of reducing the Court's fact finding
20 burden or simplifying the application of the
21 guidelines.

22 Judge Chang noted this morning, on

1 behalf of the CLC, that district courts are
2 already required to calculate actual loss when
3 calculating restitution, which is usually
4 mandatory for economic offenses under the MVRA.
5 Thus, widening the bands will not substantially
6 reduce litigation or the need for judicial fact
7 finding.

8 Turning to the proposed specific
9 offense characteristics, the department is
10 pleased to support the commission's proposed
11 amendment to increase the offense level for
12 economic crimes that also result in substantial
13 non-economic harm. The proposed amendment will
14 appropriately account for non-economic harm in
15 identity theft and healthcare fraud cases in
16 which the damage inflicted goes far beyond
17 financial loss. For example, this proposed
18 amendment would appropriately account for non-
19 economic harm suffered by individuals in many
20 healthcare fraud prosecutions brought by the
21 department. In those cases, the victim for
22 purposes of the guidelines is usually the

1 federal healthcare offense, which suffered the
2 financial loss from either claims that were not
3 provided or claims that were not medically
4 necessary. Excuse me.

5 However, the individual patients may
6 experience psychological harm or emotional
7 trauma in the course of the fraud. They may,
8 for example, receive unnecessary medical
9 treatments or may be suggested to living in
10 unsafe environments as is in the case of the
11 sober homes cases that have been prosecuted
12 recently by the department. The department does
13 not share the concerns of the Federal public and
14 Community Defenders, that the proposed specific
15 offense characteristic is vague and difficult to
16 define. To the contrary, we think the non-
17 economic harms this proposed amendment is aimed
18 at covering are identifiable harms. And in
19 response to those concerns expressed about over-
20 application, the department believes the word
21 substantial does significant work to avoid
22 overreach in cabin's application of the

1 enhancements to appropriate cases.

2 I welcome the commission's questions.

3 CHAIR REEVES: Thank you, Mr. Sanders.

4 Mr. Caruso.

5 MR. CARUSO: Good morning, Chair Reeves

6 and commissioners. Thank you for inviting me to

7 speak today on a guideline that has long

8 concerned the defenders.

9 CHAIR REEVES: Make sure your
10 microphone is on. I'm sorry.

11 MR. CARUSO: Oh, there you go. Thank
12 you for the --

13 CHAIR REEVES: No. No, it's off again.

14 MR. CARUSO: The -- what's happening?

15 CHAIR REEVES: The speaker --

16 MR. CARUSO: We're going to talk about

17 sophisticated means later, but this is not a --

18 this is a very sophisticated sound system.

19 So thank you for the opportunity to
20 speak to you today on a guideline that has long
21 concerned defenders. You know, I recently saw a
22 clip of a congresswoman from Los Angeles, who --

1 you know, who said at a House hearing that Los
2 Angeles was the fraud capital of the country.
3 I -- I'm more than happy to let her claim that
4 title for her district. But I think the data
5 show that the Southern District Florida may have
6 the edge.

7 You know, in the course of my career at
8 the Federal Public Defender's Office, I -- I've
9 handled nearly every type of economic crimes
10 case. You know, when I was a younger AFPD, I
11 had clients who were accused of stealing mail
12 out of mailboxes. You know, in the later stages
13 of my career, I represented a CEO of a hedge
14 fund. The Southern District of Florida annually
15 leads the country in trials. So many of these
16 were not resolved by plea, although most of them
17 were. And but we've had many, many trials
18 involving these issues.

19 While not every defender may have had
20 my specific experience, I think we've all had
21 the same general experience that 2B1.1 is
22 fundamentally broken. And that's a

1 conversation, you know, that I think we want to
2 start having today in light of the commission's,
3 you know, sustained attention to these issues.
4 We think these proposals are a step in the right
5 direction for the most part, but they're a
6 significant step backwards as well as we'll talk
7 about.

8 The first matter I want to talk about
9 is regarding, you know, the inflationary
10 adjustment, which I think there's -- with one
11 notable exception, there's widespread consensus
12 that should apply. With regard to the loss
13 table, we believe that reducing the number of
14 loss categories is long overdue. The current 16
15 tier structure forces courts into burdensome
16 time-consuming fact finding over, you know,
17 small differences in dollar amounts that carry
18 no real relationship to culpability. We think
19 wider bands would likely reduce litigation,
20 better reflect the inherent imprecision of loss
21 calculations, and really focus the sentencing
22 court on what the person actually did, not in

1 arbitrary dollar threshold.

2 But where we part ways with the
3 commission, is that your proposal pairs this
4 simplification with four level increases between
5 categories. We think that the cliffs that would
6 occur with regard to four level adjustments are
7 inconsistent with proportional punishment and
8 will simply shift the litigation to those new
9 thresholds. We recommend three level increases
10 instead, and we think the data support this.
11 For the last four years, 56 percent of 2B1.1
12 cases resulted in below guideline sentences.
13 And in the highest loss cases, the average
14 imposed sentence was roughly 35 percent the
15 guideline minimum. As you -- and you -- you'll
16 see from our submission, the chart we have on
17 Page 2, that the divergence between the
18 guideline minimum and the actual sentence
19 imposed doesn't really start at the very high
20 levels. I think you can see a significant
21 difference, even starting at \$250,000, which is
22 important because now the median loss is

1 \$210,000. So like, right from the start, the
2 guideline doesn't seem to be a -- to working to
3 that extent.

4 We also urge the Commission to
5 restructure the loss bands around 25 percent
6 quartiles. You know, essentially, we took Judge
7 Newman's suggestion, that judges -- and I can
8 say on behalf of practitioners, when we get a
9 case, you know, we generally try to gauge, is
10 this a small, medium, large, or extra large
11 case? And that's how we think about these
12 cases. So as we have a conversation about how
13 to reconstruct 2B1.1, I think that's an idea
14 that's worth considering.

15 We strongly oppose the non-economic
16 harm specific offense characteristics for a
17 number of reasons. You know, unlike the
18 Department of Justice, we do find these terms
19 very vague. And we do believe that they'll act
20 as automatic enhancements in nearly every case.
21 These harms are captured, not only by the loss
22 table, but other specific offense

1 characteristics as well as Chapter III. And of
2 course, it goes against the commission's anti --
3 or not anti, the simplification efforts from
4 last year. With some hesitancy, we also oppose
5 the mitigating specific offense characteristics
6 that you've proposed. And again, we believe
7 that the language that the Commission has
8 proposed is unnecessarily cabined and will not
9 reach very many cases. You know, especially if
10 you compare the language that the Commission
11 used with regard to the mitigating SOCs as
12 compared to the non-economic harm SOC, you can
13 see how that difference in that language
14 actually might result in a net loss to
15 defendants who are sentenced under this
16 guideline, throwing an already broken guideline
17 further out of whack.

18 I'm happy to answer any questions that
19 you have. Thank you again.

20 CHAIR REEVES: Thank you. Thank you,
21 Mr. Caruso.

22 Open it up.

1 Yes. VC Restrepo and then VC Murray.

2 VICE CHAIR RESTREPO: Mr. Sanders, is
3 it Sanders -- is it Sanders or Saunders?

4 MR. SANDERS: Sanders.

5 VICE CHAIR RESTREPO: Sanders. Could
6 you elaborate a little bit on the department's
7 opposition to the inflation adjustment? I mean,
8 you folks seem to be an outlier on that one
9 issue. I'm curious as to why.

10 MR. SANDERS: Certainly, I think our
11 response is twofold, as we said in our written
12 submission. The first being, congress makes a
13 determination as to whether to -- with certain
14 criminal offenses, whether those amounts are
15 going to be indexed to inflation, and has
16 decided by and large not to do so. And so we
17 think similarly, not indexing or adjusting for
18 inflation, the guidelines, 2B1.1 table, will --
19 is appropriate because otherwise it would put it
20 in, sort of, an inconsistency with it. And the
21 second thing that I'd like to point out is just
22 simply, as I said in my opening comments, the

1 result will result in a substantial reduction
2 for criminal sentences, particularly for white
3 collar offenders, but across all offenses if
4 they -- adoption is adopted, along with some of
5 the similar and recent amendments, including the
6 Zero-Point Offender reduction.

7 CHAIR REEVES: Yes. VC Murray.

8 VICE CHAIR MURRAY: Thanks to both of
9 you for being here. I have a question for both
10 of you, which is, I wonder if you can do a kind
11 of thought experiment and divorce, in your mind,
12 the -- any severity change from the widening of
13 the bands in the loss table. Does that change
14 for either of you, the position -- say we were
15 able to calibrate it in such a way that the mine
16 run of cases stay the same or on average cases
17 stay the same in terms of severity. Does that
18 change your position on the widening of the loss
19 bands?

20 MR. CARUSO: You know, I don't know if
21 I totally understand the question, how it
22 wouldn't change the severity.

1 VICE CHAIR MURRAY: Well, so obviously
2 the -- you know, there's two parts to the
3 amendment.

4 MR. CARUSO: Right.

5 VICE CHAIR MURRAY: One is deleting
6 half of them. And what is -- one is what number
7 you have bracketed here.

8 MR. CARUSO: Right.

9 VICE CHAIR MURRAY: And you -- say you
10 could change the number in these brackets such
11 that, on average, people were -- you know,
12 obviously, some people would change in each
13 bracket, but you were centering the first two
14 levels around whatever the average of these
15 folks would be, in such a way that the average
16 guidelines range or at least offense level was
17 going to be the same or on average the same for
18 defendants?

19 MR. CARUSO: Well, I think if you
20 divorce the proposal from any severity
21 concerns -- I know Judge Chang and Mr. Sanders
22 had raised this regarding the fact finding. And

1 so I'd like to give you a definitive answer on
2 whether fact finding would stay the same or be
3 reduced. And if this is a thought experiment, I
4 would say that it's likely to be reduced. So
5 for example, obviously, if you reduce the number
6 of loss bands, you're reducing the number of
7 instances where people would argue around the
8 margins, obviously.

9 You know, that being said, if the
10 Commission stays with four level increases
11 because that is such a steep increase or
12 decrease, depending on what side of the aisle
13 you sit, I think the litigation will tend to be
14 more intense because there's a larger swing. So
15 when you look at 2B1.1, there are a lot of
16 moving parts, obviously, right? You have the
17 loss amount, you have the 20 SOCs, you have
18 Chapter III. When a person goes into court to
19 advocate for a sentence, again, on either side,
20 you're mindful of the judge's -- the amount of
21 time the judge wants to be in court, you know,
22 litigating these issues. So if you don't have a

1 very strong argument around the loss band, you
2 might focus on other matters. Sophisticated
3 means, we'll talk about later, you know, is one
4 of those. But if you have a four level swing,
5 you know, you -- you're not going to, sort of,
6 give that argument up.

7 VICE CHAIR MURRAY: It's hard to see
8 what the severity neutral way to smooth the
9 cliffs is?

10 MR. CARUSO: Right. Well, you can
11 obviously keep the plus two with the reduced
12 bands, and I think that would smooth -- I think
13 that would smooth that out.

14 VICE CHAIR MURRAY: Right. But that
15 wouldn't be severity neutral if you're --

16 MR. CARUSO: Right. Right.

17 VICE CHAIR MURRAY: Right. Exactly.

18 MR. SANDERS: Yeah. I also am not
19 entirely sure I understand the concept of
20 lessening the severity of the bands. But if I
21 do understand your question appropriately, I
22 think I agree with Mr. Caruso that you're

1 shifting the litigation to those cases that are
2 going to be at the margins. And so there will
3 still be a significant amount of litigation for
4 those people who are, you know, going from one
5 level to the next, particularly if there's a
6 four level adjustment. I also think there's
7 still a conceptual problem the department has
8 with treating a \$250,000 loss with -- as
9 equating it with 1.5 million, and similarly to
10 other levels like that. So I don't think that
11 any effort to adjust the severity, as you say,
12 will address the problems that the proposed
13 amendment has.

14 VICE CHAIR MATE: Just to -- thank you
15 both for being here. I really appreciate it. A
16 follow-up on that, sort of, question. One of
17 the other things I was wondering about, and I
18 don't know whether anyone has had a chance to
19 discuss it, is there's all of the -- our
20 proposal and the comments we received suggested
21 if we were to make adjustments there, that the
22 increases in each of those things would stay the

1 same. It would be two or three or four. Was --
2 have -- did you think or talk at all about
3 whether that should change at different -- for
4 those different buckets? Like, if you got to
5 the extra large bucket, should that one, you
6 know, maybe be a bigger increase than it -- you
7 might be looking at for the lower loss amounts
8 or --

9 MR. SANDERS: In other words, if I
10 understand you, for something that causes a \$65
11 million loss, that might be plus eight. For
12 something that causes a \$16,000 loss, a plus
13 two; is that --

14 VICE CHAIR MATE: Correct.

15 MR. SANDERS: Okay.

16 VICE CHAIR MATE: Yeah. That's a --
17 yeah. That's my thought experiment.

18 MR. SANDERS: We certainly -- the
19 Department certainly hadn't considered that,
20 because it was wasn't, obviously, part of the
21 proposal. So I don't know that I have any
22 particular comments on that.

1 MR. CARUSO: Having a seat at the
2 field, I'll take a crack at the question. You
3 know, I think, although Defenders have not
4 spoken about that specifically, I think,
5 conceptually, you know, giving larger increases
6 at the high end, again, would, you know, break
7 even more a fundamentally broken guideline.
8 Because again, if you look at the chart that we
9 put on Page 2, that, when you get to the higher
10 loss amounts, judges are varying down
11 significantly, you know, in terms of years and
12 years. So if you're pushing those higher end
13 sentences up by even more levels, I think that
14 it -- that is, you know, either judges are going
15 to be departing at the same variance rates or
16 even more.

17 CHAIR REEVES: Mr. Meisler?

18 COMMISSIONER MEISLER: Just a follow-up
19 on the line of questioning or your comments
20 about the fact-finding burden. I think, from my
21 experience, when I've seen these -- some of
22 these fraud cases, at least if they're measuring

1 actual loss under the guidelines, are also going
2 to trigger restitution obligations, some of
3 which are mandatory by statute. Judge has to do
4 those. How much -- if we're trying to -- if
5 reducing the fact-finding burden of courts, some
6 of the Commission's interested in, how much
7 should the Commission be considering that the
8 judge is going to be calculating guidelines
9 alongside other loss amounts for restitution
10 purposes?

11 MR. CARUSO: I think very little is my
12 answer, you know, for two reasons. As
13 commenters have already pointed out today, the
14 actual loss amount is not always the same as the
15 restitution amount. And it's been my experience
16 in practice that restitution is very rarely
17 litigated. Like, as you know, most cases
18 resolved by plea. You know, I think the
19 circumstances where a person agrees to plead
20 guilty and then, contests restitution are very
21 rare. You know, under the guideline system, the
22 person may be putting acceptance or

1 responsibility and other, you know, issues
2 before the court.

3 But even when cases go to trial, you
4 know, what ordinarily happens is that a person
5 is sentenced. Any restitution hearing is
6 deferred for 90 days. And then, a again, almost
7 invariably, the parties stipulate to a
8 restitution amount before the district court
9 judge. I'll tell you an example. I'm handling
10 an appeal currently. There was a restitution
11 matter outstanding when I was appointed. So I
12 had to handle that in the district court. We
13 disputed restitution. We appeared in front of a
14 senior district court judge appointed by
15 President Clinton, who said it was his first
16 contested restitution he's ever had. So I think
17 that that concern should not give you pause at
18 all.

19 CHAIR REEVES: Go ahead.

20 MR. SANDERS: Unsurprisingly, we have a
21 different view. I mean, perhaps from where I'm
22 seated in the appellate world, I see a wide

1 number of cases where restitution is contested.
2 Obviously, some of those cases are ones that
3 went to trial, but I do have other cases where
4 they are contested as part of a plea where we
5 leave open the restitution amount for
6 sentencing. So I do think there's going to be
7 those occasions for district judges that are
8 going to have to determine restitution under the
9 MVRA and it is going to require a painstaking
10 fact-finding mission that would just as easily
11 have to happen if there was an intended loss
12 calculation.

13 MR. CARUSO: I have a brief follow up.

14 CHAIR REEVES: Yes?

15 MR. CARUSO: Yeah. So with regard to
16 the restitution piece and to the extent that you
17 want to consider this, you know, it does seem
18 that the Supreme Court is poised to hold that
19 restitution is subject to Apprendi. And so,
20 then again, you know, if a jury makes the
21 determination with a regarding restitution,
22 there'll obviously be less fact-finding for the

1 district court judges.

2 CHAIR REEVES: I have a couple of rapid
3 fire questions, I think, for the Department of
4 Justice. I know you -- it appears that you seem
5 to agree that 2B1.1 should be simplified. I
6 guess my question is, how?

7 MR. SANDERS: I -- we do -- we have
8 agreed to support the Commission's
9 recommendation to reduce some of the lesser-used
10 enhancements, in particular with respect to
11 offense from the person and one of the ones that
12 applies an offense level for particular
13 statutes. We do oppose the exclusion of those
14 in the business of selling property offenses for
15 the reasons put in our submission. So we do see
16 there's an effort to simplify by removing those
17 uncommonly applied characteristics. I think
18 there -- another way it may add more words to
19 the commentary and may increase that a little
20 bit, but we also support the instances of, as we
21 said in our submission, if defining loss is so
22 difficult, there can be further examples, like

1 there are with Ponzi schemes, like there are
2 with federal healthcare offenses and things like
3 that, to give great -- greater detail to
4 district judges. So again, it may increase the
5 book, but it does simplify -- have the effect of
6 simplifying, I believe.

7 CHAIR REEVES: And Mr. Caruso, for
8 you -- thank you, I'm sorry. And for you, I
9 think you -- the FPD recommends that the floor
10 be 15,000 -- so change the floor from 15,000 to
11 26,000 --

12 MR. CARUSO: 26,000, I think, is an
13 inflationary adjustment.

14 CHAIR REEVES: How did you come up --
15 how did they come about that particular number?

16 MR. CARUSO: So I think it -- I think
17 we were trying to follow what the Commission did
18 with determining sort of the heartland of sort
19 of small, medium, large, and very large cases,
20 trying to get -- trying to get them grouped.
21 But, you -- you know, at the -- at sort of
22 the -- at the end of the day, you know, and when

1 we point this out in our submissions, I think,
2 when those levels, you know, were first
3 established, you know, the median fraud loss was
4 very low. I -- you know, I think around
5 \$17,000. Now, it's \$210,000. So I -- that's
6 another reason to raise the threshold.

7 CHAIR REEVES: And I guess, finally,
8 when we talk about the -- you mentioned that the
9 wider bands in most fraud seem to get the
10 variances or whatever at far more frequency and
11 much more levels downward.

12 Might that be because those who have
13 access to committing that type of fraud be like
14 a person like your CEO of a hedge fund, and that
15 person who's standing before the judge is not
16 the drug dealer or the one person who's --

17 MR. CARUSO: Yeah. Well, because we're
18 on camera, I'll take the opportunity to say the
19 CEO of the hedge fund was acquitted by the jury.
20 But I -- but I do -- I do --

21 CHAIR REEVES: I was wondering why you
22 were representing the CEO here.

1 MR. CARUSO: Right. Because he was
2 innocent. But no, but I have -- but obviously,
3 in the high -- in the high dollar cases, I think
4 you do see greater variances again by the piling
5 on effect. You know, the loss amount, the
6 specific offense characteristics, the Chapter
7 III adjustments. You know, I was talking to Mr.
8 Sanders before the hearing. You know, he had
9 participated in a case in Miami at the same time
10 I was participating in another economic crimes
11 case. This person was a CEO of a pharmaceutical
12 company. He was convicted by the jury and had
13 to appear before the judge in sentencing.

14 And so, he wound up receiving a 30-year
15 sentence by the district court judge. This was
16 a function, you know, of the loss amounts, a few
17 specific offense characteristics, a Chapter III
18 role adjustment. And he received a 30-year
19 sentence in prison. You know, at the same time,
20 the Department of Justice was prosecuting a
21 person who was accused of submitting fraudulent
22 billing of over \$1 billion in a healthcare fraud

1 scheme. He was convicted by the jury and the
2 judge gave him a significant variance to 20
3 years. So I think -- and then, President Trump
4 later commuted his sentence.

5 So I think district court judges who
6 either take a plea or preside over trial do see
7 how these very high value cases bear no
8 relationship to a person's actual culpability.
9 That's not saying they're not deserving and the
10 district court judges might up a significant
11 sentence. It's just that the guidelines don't
12 reflect what they believe is the appropriate
13 sentence.

14 CHAIR REEVES: I'm sorry, I have one
15 more, because nobody's mentioned the ABA task
16 force thing, I don't think. And they've been
17 studying -- they've studied this for a while.

18 What is right or wrong about that
19 particular approach as it should inform us how
20 we are to proceed?

21 MR. CARUSO: So I think -- I -- I'm not
22 here to say what's wrong with it, because my

1 memory of that proposal, you know, is vague on
2 that point. But I think what's right about
3 it -- and I think this gets to what Judge
4 Restrepo's question to an earlier panel was, is,
5 you know, how do we focus on culpability? You
6 know, like various judges over the years have
7 submitted, you know, comparisons. You know,
8 what's worse, a person who steals \$1 from a
9 million people or someone who steals \$1 million
10 from one person?

11 And so, I think that's where the
12 Defenders want to work with the Commission on a
13 comprehensive overhaul of 2B1.1 to focus more on
14 how to advise judges how to sentence, focusing
15 on culpability, you know, factors like motive
16 and intent. You know, how long the person was
17 involved in the offense. Were they the
18 initiator of the offense? You know, were they
19 recruited into the defense?

20 All these role -- all these role
21 issues, well, we'll talk about this afternoon
22 with regard to the sophistication of the

1 offense, you know, whether the person -- whether
2 the defendant was the person who created the
3 sophistication or is just taking orders to
4 fulfill the scheme on behalf of the higher ups.
5 So that's what is monumental about the ABA
6 approach, that they're focusing on individual
7 culpability, rather than sort of artificial loss
8 thresholds.

9 MR. SANDERS: I think I would just
10 briefly note that one of the ways where I think
11 I would diverge from my friend on the other side
12 here is the Department doesn't view the 2B1.1
13 loss table as a broken system. Although there
14 are difficult decisions that have to be made by
15 judges in terms of fact-findings in particular
16 cases, the overall approach and layout of 2B1.1
17 is rather easy. You pick a -- you determine the
18 loss amount. There's a specific offense
19 characteristic for that. You determine whether
20 it's sophisticated means, whether that's now
21 going to be in 2B1.1 or in a Chapter III
22 adjustment. You adjust it for that. The number

1 of victims. All those other specific offense
2 characteristics. I don't have specifics about
3 the ABA's proposal, so I'm not prepared to go
4 into that, but if there's a specific proposal
5 that you'd like me to comment on, I'm happy to.

6 CHAIR REEVES: All right. Thank you
7 all so much for bearing with me. I appreciate
8 it. Thank you.

9 MR. CARUSO: That's it?

10 CHAIR REEVES: All right. You --
11 you're excused, Mr. Caruso.

12 MR. CARUSO: I don't get up until the
13 judge tells me to get up.

14 CHAIR REEVES: Thank you. Our fifth
15 panel right before lunch, we'll present our --
16 the practitioner's perspectives on the Proposed
17 Economic Crimes Amendment. First, we will hear
18 from Abraham Rein, our Third Circuit
19 representative to the Practitioners Advisory
20 Group. He is the chair of the White Collar
21 Defense and Investigations Practice Group and
22 the Data Privacy and Cybersecurity Practice at

1 the Post & Schell P.C. Second, we have Barry
2 Boss, who is a co-chair of the Commercial
3 Litigation Department at Cozen O'Connor and a
4 former member of the ABA Criminal Justice
5 Sections Task Force on the Reform of Federal
6 Sentencing for Economic Crimes.

7 Mr. Rein, please start us off.

8 MR. REIN: Thank you, Chair Reeve --
9 Reeves, and thank you, members of the
10 Commission, for having us here. It's a
11 privilege. First of all, add us to the group of
12 folks -- the Practitioners Advisory Group, to
13 the group of folks who support the Inflationary
14 Amendment and see no reason why it shouldn't
15 happen on a regular basis. Putting that aside,
16 I have basically three high level points I want
17 to make about the economic crimes guidelines.

18 Point number one, at a high level, is
19 simply that the PAG continues to be of the view
20 that it's been -- that it has maintained, going
21 back at least a decade and a half, and I think
22 probably further, that allowing the economic

1 crime guidelines to be driven as heavily as they
2 are by the bare loss number, you know, this
3 difficult concept that can mean a variety of
4 things. It can mean actual loss, it can mean
5 intended loss, it can mean gain, which everyone
6 agrees is hard to calculate and which many of us
7 agree isn't really appreciably tied to
8 culpability allowing the economic crime
9 guideline to be driven the way it is, to the
10 extent that it is, by loss, is a mistake and the
11 whole guideline should be revised.

12 That's point number one. I'm going
13 to -- I won't dwell on that further, unless, of
14 course, the Commission wants to hear more from
15 me on it. The other two high level points I
16 want to make are fairly straightforward. We
17 have a proposal on the table that has two parts.
18 The first part would simplify the loss table by
19 removing half of the tiers, and we're in favor
20 of that idea. We generally favor simplifying
21 and we're in favor of it in this instance, with
22 some additional nuance, which I'll get to

1 momentarily. That's point number two.

2 And then, the third high level point is
3 Part 2 of the proposal that's on the table would
4 add various culpability factors, some
5 enhancements, some reductions. We're opposed to
6 all of that. We think it's, you know, contrary
7 to the mission of simplifying things and we --
8 so we oppose it. And for clarity, that goes for
9 both the enhancements and the reductions. Now,
10 let me rewind to point number two, which had to
11 do with simplifying the loss table by removing
12 half of the bands, and give a little bit more
13 detail on our view on that.

14 You know, I'm here on behalf of the
15 Practitioners Advisory Group. We represent
16 practitioners. The perspective that we offer,
17 among other things -- and this is shared by many
18 of the other advisory groups, but we offer the
19 perspective of folks who deal intimately with
20 clients whose lives and the lives of their
21 families and the lives of their loved ones are
22 going to be defined by a decision that's made in

1 a courtroom, that's going to be driven
2 profoundly by the guidelines.

3 So speaking from that perspective,
4 we're generally in favor of simplifying. Making
5 them simpler means making them easier for
6 everyone to apply, courts, obviously, lawyers on
7 both sides, obviously, probation victims, and
8 the defendants themselves. And we think that's
9 important. Defendants need to be able to follow
10 the sometimes, perhaps, seemingly arcane
11 calculations that, you know, professionals will
12 be applying that's going to impact their lives
13 so profoundly.

14 Simplifying also means fewer
15 opportunities for error, and as we've talked
16 about a fair amount already today, it means
17 easing the fact-finding burden associated with
18 sentencing. And I -- when I say "the fact-
19 finding burden," I mean, that goes for courts,
20 but it also goes for parties and lawyers, you
21 know, the people who are -- the individual
22 defendants and victims, and also their lawyers

1 and the courts. And I think everyone has
2 slightly different considerations in terms of
3 the fact-finding burden.

4 So with all -- with that perspective,
5 it seems to us that removing half of the tiers
6 is a no-brainer. If the goal is to simplify and
7 to ease some of the fact-finding burden, you
8 know, taking away half of the tiers means
9 removing half of the hard cases where we really
10 have to fight, the litigants really have to
11 fight over, what's the loss amount? The obvious
12 drawback to this, as has been alluded to already
13 today, is that the proposal as written
14 introduces these incredibly high sentencing
15 cliffs for four levels at each tier.

16 And to put a little meat on the bones
17 of what that can mean for an -- for a specific
18 defendant, take Defendant 1 and Defendant 2, who
19 are exactly the same in every other -- in every
20 way, except that Defendant 1 has a \$95,000 loss,
21 Defendant 2 has a \$96,000 loss. That four level
22 difference can mean the difference between a

1 Zone B guideline range and a Zone D guideline
2 range. That's meaningful and it matters. So
3 there's an obvious easy fix to this, which we
4 support, which is rather than bumping up the
5 levels by four at every tier, bump it up by just
6 two. I'll stop there. I see my time's out, but
7 I'm happy to answer any questions.

8 CHAIR REEVES: Thank you. Thank you,
9 Mr. Rein.

10 Mr. Boss?

11 MR. BOSS: Thank you, Chairman Reeves.
12 Thank you, commissioners. I appreciate the
13 opportunity to be here today. I should say
14 also, I'm here on behalf of Jim Feldman and
15 David Debold. We submitted our statement
16 together. We're all former co-chairs of the
17 Practitioners Advisory Group, and we've been
18 focused on 2B1.1 for an extremely long period of
19 time. And so, we welcome the opportunity to
20 present our perspective to the current
21 Commission, and we are so happy to see the
22 Commission focused on 2B1.1.

1 We agree with what many have said, that
2 there's a widespread recognition among the
3 practitioners and the judges that 2B1.1 is
4 flawed. And the reason that it's flawed is the
5 overemphasis on the loss amount. And we
6 appreciate what the Commission is doing by
7 trying to account for inflation. That's
8 certainly a positive step, but the overemphasis
9 on loss in the guideline calculation results in
10 the guideline itself being unworkable in terms
11 of providing for a fair and just sentence. We
12 support an approach that incorporates loss, but
13 also factors beyond loss into that guideline
14 calculation.

15 Chairman Reeves mentioned that ABA task
16 force report, which we believe provides the
17 right structure for the guideline. It has only
18 three specific offense characteristics, the loss
19 amount, culpability, and the victim impact. And
20 the culpability, which is what is missing from
21 the present guideline, is something that
22 accounts for the motive of the person, the

1 degree of sophistication, the duration, the
2 efforts to mitigate, which I know the Commission
3 is looking at in its current proposed amendment,
4 and the extenuating circumstances also, which
5 the Commission is considering in its current
6 amendment, things like family coercion and
7 things of that nature.

8 The idea is to distinguish between the
9 predatory defendant, somebody who goes in with
10 the intent to steal money from vulnerable
11 victims, versus somebody who maybe just gets
12 into something over their head. They had a
13 positive mindset and going into it, they did it
14 with good faith, but circumstances resulted in
15 them doing something like underestimating the
16 value of the collateral that they were using as
17 security for a loan.

18 Also, somebody who -- one of the
19 examples that we provided is somebody who
20 provides oxygen to people who need it. Turns
21 out the oxygen was fine, but the person didn't
22 get certified by Medicare. There was no harm to

1 anybody, but the loss was substantial. That
2 person should be judged differently than the
3 Madoff type who goes into a Ponzi scheme with
4 the idea of stealing from people. The current
5 guideline just relying on loss doesn't allow for
6 those kinds of distinctions.

7 And so, we believe that the way the
8 task force approached it was the right way and
9 something that the Commission should consider.
10 We're not talking necessarily about a reduction
11 in sentences. We're talking about a different
12 way of determining the sentence. In fact, in
13 the ABA proposal, the predatory defendant winds
14 up with a more severe sentence than they would
15 under the current guidelines.

16 It's about how we get to that result.
17 And I know -- I believe it was Commissioner Mate
18 asked about deterrence. The one thing that
19 we've seen in the studies -- and this is
20 something that we rely on consistently in our
21 sentencing memos, is what matters for deterrence
22 is the certainty of punishment, in going to

1 prison at all. The length of the prison,
2 according to all the studies I've seen, doesn't
3 have any impact on a deterrent effect. So we
4 believe that we should move away from the
5 scattershot specific offense characteristics
6 into a more simplified guideline that more fully
7 accounts for somebody's culpability. Thank you.
8 Thank you.

9 CHAIR REEVES: Thank you. Any
10 questions of this panel?

11 VICE CHAIR RESTREPO: Mr. -- Mr. Boss,
12 I understood you to suggest that we capture
13 culpability looking at the individual defendant,
14 as opposed to just a loss, correct? Then how do
15 you reconcile that with moving away from
16 specific offender characteristics? How would we
17 capture culpability?

18 MR. BOSS: Well, that would be the --
19 what we proposed was a threefold -- three types
20 of specific offense characteristics: loss,
21 culpability, victim impact. So culpability is
22 just these specific impact with a variety of

1 factors, the ones that I mentioned.

2 VICE CHAIR RESTREPO: Which are SOCs,
3 right?

4 MR. BOSS: Right. Exactly. Well, no.
5 The specific factors wouldn't be SOCs. They
6 would be commentary describing how you would put
7 somebody into a culpability level and they would
8 start with the lowest culpability, which was in
9 our view, I think, minus six points, low
10 culpability, minus three point, moderate
11 culpability, which would be the presumptive
12 place everybody would be, and then high
13 culpability plus three, highest culpability plus
14 six.

15 VICE CHAIR RESTREPO: And we do that by
16 way of commentary?

17 MR. BOSS: Well, no. That would be the
18 specific offense characteristic under
19 culpability. You would have lowest, low,
20 moderate, high, highest. The commentary would
21 give the judges some guidance as to where you
22 would put somebody within that category. So for

1 example, the predatory defendant would be
2 somebody who would presumptively be in the
3 highest culpability category, where somebody who
4 didn't intend any loss would be in the low or
5 the lowest. The -- we -- in our view, the
6 defendant would have the burden of proving a
7 decrease, lower, lowest. The government would
8 have the burden of proving the higher, so high
9 or highest.

10 VICE CHAIR RESTREPO: Thank you.

11 CHAIR REEVES: Any -- VC mate?

12 VICE CHAIR MATE: Thank you both for
13 being here and for your written testimony and
14 your remarks today.

15 I have a question for you, Mr. Boss, I
16 think, because in your testimony, you kind of
17 walked through those examples and whether they
18 would change under our proposal versus the
19 changes that would happen with the ABA proposal
20 comparing to the current guidelines. And I was
21 curious whether, in light of that analysis,
22 there's anything on the table in our amendments

1 this year or, you know, on the table in our
2 amendments this year that -- like variations on
3 it, like PAG's proposal to do the two level
4 increments rather than the four, the Defenders
5 to look at three, whether any of those are worth
6 considering this year or whether your view is
7 just, you know, wait, like, really do a complete
8 overhaul? So I was just interested in your
9 thoughts on that.

10 MR. BOSS: Well, I appreciate the
11 question. And I don't want the perfect to be
12 the enemy of the good. And I do think that
13 changing the table to account for inflation,
14 especially if you do it at the two levels, as
15 suggested by the Practitioners Advisory Group
16 and by the Defenders, I think that's a very
17 positive change. And I wouldn't want to stand
18 in the way of moving forward and making
19 progress, but I would hope that that could be a
20 first step into looking at a broader overhaul of
21 the guideline.

22 VICE CHAIR MATE: One follow up on

1 that. That's very helpful. Do you think the
2 widening of the bands in addition -- you know,
3 that -- even wider than what we've proposed,
4 which I think was suggested by some commenters,
5 would be a helpful step in that effort? Or
6 does -- is that less important than the kind
7 of --

8 MR. BOSS: I think the widening -- I
9 think the fewer categories, the better. But the
10 critical question is, how much of an increase
11 are you going to have between categories?
12 Because you do have the cliff problem once you
13 start decreasing the categories.

14 VICE CHAIR MATE: Thank you.

15 CHAIR REEVES: Anything additional from
16 this esteemed panel, right before lunch? I'm so
17 sorry. Somebody had to get there.

18 MR. BOSS: We just appreciate the
19 opportunity to be here.

20 CHAIR REEVES: No. Thank you all so
21 much for your testimony. We really appreciate
22 it.

1 MR. BOSS: Thank you.

2 MR. REIN: Thank you.

3 CHAIR REEVES: We're now going to take
4 a break for my lunch for 55 minutes, since I've
5 gone -- instead of one hour. So let's be back
6 in about 55 minutes. Thank you.

7 (Whereupon, the above-entitled matter
8 went off the record at 12:40 p.m. and resumed at
9 1:26 p.m.)

10 CHAIR REEVES: Welcome back. Our sixth
11 group of panelists will provide us with our
12 Advisory Groups' perspectives on our Economic
13 Crimes Proposed Amendment. First, we will hear
14 from Joshua Luria, Chair of the Probation
15 Officers Advisory Group. Mr. Luria is an
16 assistant deputy chief probation officer in the
17 Middle District of Florida.

18 Next, we will hear from Dr. Carl M.
19 Reddix, the chair of our newly formed Sentence
20 Impact Advisory Group. Dr. Reddix was sentenced
21 to 72 months in prison after pleading guilty to
22 bribery. He is a retired obstetrician with over

1 30 years of practice and is currently a
2 physician providing public health interventions
3 to vulnerable populations.

4 Third, we will welcome back Jami
5 Johnson, who will provide us with the
6 perspectives of our Tribal Issues Advisory
7 Group.

8 And finally, we will hear from the
9 chair of our Victims' Rights Advisory Group, Mr.
10 Christopher Quasebarth. Mr. Quasebarth is a
11 senior state -- excuse me, a senior staff
12 attorney for the Maryland Crime Victims Resource
13 Center.

14 Mr. Luria, you can kick us off.

15 MR. LURIA: Thank you for the
16 opportunity to share POAG's perspective on the
17 proposed Economics Crimes Amendments. Well, I
18 could split on the proposed changes to the loss
19 table. This amendment could cause circumstances
20 wherein there are less challenges to the process
21 when the loss clearly falls within the range.
22 However, courts must still make a finding of

1 fact about loss, which is often challenging,
2 given the need to extrapolate from complex or
3 incomplete records. While the broader ranges
4 may create circumstances that reduce the
5 intensity of disputes there is concerns that
6 those cases which fall close to the cusp between
7 tiers may end up being strongly challenged with
8 a more significant outcome.

9 We are also concerned that the expanded
10 ranges will remove meaningful distinctions
11 between the loss amounts, reducing opportunities
12 for more gradual incremental punishments. On
13 the other hand, this may also reduce some
14 arguments about the difference between actual
15 and intended loss, according fewer instances
16 where intended loss would push the loss amount
17 into a higher range. Further, we are concerned
18 that the lowest tier may leave individual
19 victims who have experienced less than \$15,000
20 in loss with a perception that their losses are
21 unimportant.

22 We are in favor of an enhancement

1 related to substantial non-economic harm.
2 However, we believe that definition and examples
3 of psychological harm, emotional trauma, harm to
4 reputation, and invasion of privacy interests
5 are necessary to provide guidance on how to
6 apply this enhancement with consistency and
7 reduced disparity in application. For example,
8 there may be instances when a victim reports
9 having suffered emotional distress, but did not
10 seek professional counseling, maybe even because
11 the victim was indigent. In such a case, there
12 may be disparities if a victim's statement alone
13 is insufficient to apply this enhancement. If
14 the intent is to focus on harm to individual
15 victims, not just government, business, and
16 corporations, then we suggest an increase on
17 this basis.

18 If the victim of the offense was an
19 individual, increase by two levels. We also
20 suggest considering whether these victim
21 considerations should not be relocated to
22 Chapter III with other victim related

1 adjustments. We are not in favor of the
2 proposed section 2B1.1(b)22 related to
3 motivation considerations. The concerns about
4 this approach revolve around fact-finding, and
5 whether the probation office must rely on the
6 defendant's uncorroborated statements as to
7 Subsections A or B. It is really hard to make a
8 determination as to whether the defendant did or
9 did not experience fear.

10 Additionally, Subsections B and C
11 appear to capture similar considerations taken
12 into account for mitigating rule. We also do
13 not support the proposed section 2B1.1(b)23
14 reduction related to withdrawal, restitution,
15 and voluntary secession. I have noted that it
16 is rare to encounter this type of defendant. If
17 they have all three, they probably have been
18 diverted from prosecution. If they have one or
19 two of the three Courts consider it as a
20 mitigating factor through a variance.

21 With regard to Subsection B making a
22 good faith effort to return money would be a

1 better approach as well. It allows individuals
2 of different levels of means to be considered
3 rather than just those who have the means to
4 return the money and property to victims.

5 Regarding returning property. The
6 property may not be returned in the same
7 condition. Car stolen and returned with
8 substantial damage, is still returned. There
9 are other problems with this approach. It is
10 likely that the defendant will request a longer
11 time frame before sentencing to demonstrate
12 their good faith effort, causing delays in the
13 Court docket and delays in providing closure for
14 victims. We also believe voluntarily ceased
15 will likely create application problems.

16 When a fraud is perpetrated against a
17 temporary government program or perpetrated
18 during a temporary window of opportunity, did
19 the defendant cease the fraud voluntarily or did
20 the opportunity cease to be available?

21 Lastly, the proposed amendment may end
22 up being somewhat detrimental to those

1 defendants who do meet one or several of the
2 criteria. If they have made a good faith effort
3 towards returning the money or goods, but did
4 not voluntarily cease, they would not get a
5 reduction. Additionally, it is our experience
6 that individuals who do engage in even some of
7 these types of efforts often get substantial
8 variances in excess of the levels this reduction
9 would establish. In articulating the levels
10 that the Commission believes this mitigation
11 should be awarded, the Commission may be
12 anchoring these considerations to a level that
13 Courts would previously have surpassed, absent
14 the articulation. We believe this is an area of
15 consideration best left to the Court through the
16 statutory sentencing factors. Again, thank you
17 for the opportunity to share POAG's thoughts on
18 this.

19 CHAIR REEVES: Thank you, Mr. Luria.
20 Dr. Reddix.

21 DR. REDDIX: Thank you, Judge Reeves.
22 Thank you, Commissioners. First and foremost, I

1 want to thank you for the establishment of the
2 Senate's Impact Advisory Group. We are
3 divergent group of individuals from different
4 demographics, both geography, income and
5 educational attainment. I thought that I was
6 going to be the only nerd in the bunch. And as
7 it turned out and as you heard from Mr. Clausen,
8 we've got a lot of nerds, very opinionated, very
9 passionate and very communicable about what it
10 is that we are trying to -- our mission in
11 helping the commission.

12 The Commission is considering
13 consolidating the monetary thresholds at 2B 1.1.
14 SIAG supports simplifying the sentencing
15 guidelines so that the average American can
16 understand the potential consequences of
17 antisocial conduct. Clear and predictable
18 standards promote fairness and enhanced
19 deterrence.

20 The current sentencing guidelines for
21 economic offenses overemphasizes intended loss.
22 Commission's proposed inflation and restructured

1 2B 1.1 loss table, which simplify and
2 consolidate loss categories and SIAG strongly
3 encourages its adoption. In addition, SIAG
4 recommends that loss be calculated using a
5 consistent and objective accounting methodology.
6 Our preference is generally accepted accounting
7 principles or GAP accounting reliance on
8 intended loss is inherently subjective and
9 serves as an imperfect proxy for culpability.
10 Evidence-based sentencing should rely on
11 clearly-defined and transparent methods rather
12 than arbitrarily assigned accounting
13 assumptions.

14 Justice is best served when sentencing
15 aligns with actual culpability and the harm
16 caused. The guidelines should promote
17 consistent adjudication of similarly situated
18 defendants across circuits. A culpability focus
19 framework would more accurately distinguish
20 among intent, role, greed and harm.

21 The current framework fails to account
22 for meaningful differences among categories of

1 the different economic crimes. Data from the
2 2024 interactive data analyzer demonstrates the
3 resulting inconsistencies. The median loss in
4 bribery cases is \$43,700 and an average sentence
5 of 20 months. The median loss in theft and
6 property destruction cases is 210,000 with an
7 average sentence of 22 months. And the median
8 loss in healthcare fraud cases is \$2.5 million
9 with an average sentence of 27 months. There's
10 no linear consistency in amongst these different
11 economic crime cases.

12 These outcomes indicate that downward
13 departures play a significant role, especially
14 in healthcare fraud sentencing. SIAG's concern
15 is a clear inconsistency in the application of
16 downward departures across the spectrum of
17 economic offenses. While monetary loss is
18 relevant -- is a relevant consideration, it is
19 only one component of accountability. Over-
20 reliance on loss amounts can result in sentences
21 greater than necessary to achieve the goals of
22 federal justice sentencing.

1 SIAG urges Commission to place a cap on
2 the enhancements of 2B 1.1 at offense level 16.
3 This adjustment would help mitigate the
4 imposition of excessively punitive sentences in
5 certain cases.

6 Finally, SIAG strongly recommends
7 permitting reductions in offense levels where
8 there is little or no actual loss or intended
9 monetary gain. Over the longer term SIAG
10 encourages the Commission to transition toward a
11 culpability based framework that accounts for
12 the defendant's role, intent, nature of the
13 harm, and degree of greed when determining
14 sentences for economic crimes, I stand ready to
15 answer questions. Thank you.

16 CHAIR REEVES: Thank you, Dr.Reddix.
17 Thank you, dr. Reddix. Ms. Johnson?

18 MS. JOHNSON: Yes. Good afternoon.
19 Thank you, again, Chair Reeves and fellow
20 commissioners for our (inaudible) Thank you for
21 allowing me to weigh in on behalf of TIAG on
22 this imprtant issue. So this is obviously the

1 loss calculations and the loss tables. It's a
2 very complicated issue. And TIAG does not
3 pretend to have the full access to the full
4 universe such that we can make a concrete
5 recommendation about how this should be amended.
6 We do encounter fraud. It is not one of the
7 more commonly -- one of the more common
8 guidelines that we see. So my goal here today
9 is to just give you a little bit of insight into
10 the kinds of offenses that we are seeing that
11 are covered by the fraud guidelines in Indian
12 country and some of the issues that we are
13 having with them.

14 We, up until 2020, I would say most of
15 the fraud issues that we were seeing in Indian
16 country were government contracting fraud,
17 occasionally Medicare fraud, large dollar
18 amounts very often through -- arrived at through
19 intended loss as opposed to actual loss. And
20 very often there would be some degree of
21 services delivered, but perhaps not the full
22 extent that was contracted for or there might

1 have been fraud in the procurement of government
2 contract or funds may have been misused. The --
3 this resulted in very large, outsized guidelines
4 calculations that were perhaps excessive to the
5 actual damage or harm caused, especially when
6 calculated or when seen in with respect to the
7 gain of the particular person who ends up being
8 convicted of that say. And so we have -- that's
9 one of our concerns is that the over reliance on
10 loss amounts was resulting in excessively long
11 sentences in cases like this.

12 Since 2020 and when McGirt happened,
13 and we now have jurisdiction in Eastern
14 Oklahoma, what we are seeing more and more in
15 Tulsa and around there is relatively small
16 dollar frauds that are prosecuted by the federal
17 government for jurisdictional reasons, because
18 the state can't prosecute them. So smaller
19 dollar amounts, which are requiring -- or which
20 are very resource intensive to figure out where
21 they exist on these very small bans that are
22 provided for in the loss tables, particularly

1 when you consider that sometimes the records
2 that are under consideration may be tribal
3 records that may be old, or not particularly
4 reliable.

5 You know, my friend here to the left
6 was talking about generally accepted accounting
7 principles. Tribes are, of course not obligated
8 to use generally accepted accounting principles
9 or to keep records in according to generally
10 accepted accounting principles. And so trying
11 to calculate loss in these very small bands is
12 very difficult and excessively resource
13 intensive. And it's very difficult to figure
14 out where someone lands on this table. And it's
15 unclear that making such fine-grain calculations
16 is really providing a lot of information about
17 how culpable someone is or what the appropriate
18 sentence is.

19 So TIAG supports -- we support the
20 inflation adjustments that I believe most people
21 support and also support larger bands that will
22 hopefully ease some of the burden in doing these

1 very fine-grain calculations on fairly low loss
2 amount cases.

3 I would say TIAG also, and I think this
4 didn't make it into our letter, we do oppose the
5 enhancement for substantial non-economic harm,
6 principally on grounds of administrability. It
7 is -- no one seemed excited about litigating
8 this, about who was psychologically harmed,
9 whether somebody was more psychologically harmed
10 than somebody else. And I think particularly in
11 the Tribal contacts, people were very concerned
12 that people are having to make -- the judges are
13 having to have to make cross-cultural
14 assessments of relative harm that were
15 uncomfortable, that they were not well-equipped
16 to make. And it was also unclear how this would
17 be administered, whether a victim would have
18 to come forward and self-report, whether you
19 would have case agents probing psychological
20 harm and whether they would be equipped to do so
21 in cross-cultural contexts. So that is our
22 position in the economic -- on the economic

1 amendments in a nutshell. And I would welcome
2 any questions you have.

3 CHAIR REEVES: Mr. Quasebarth.

4 MR. QUASEBARTH: Thank you. Good
5 afternoon. And thank you for the opportunity to
6 speak on behalf of victims as to your proposed
7 amendment. Just in summary, the Victim Rights
8 Advisory Group does not recommend --

9 CHAIR REEVES: Turn on your microphone,
10 sir.

11 MR. QUASEBARTH: I'm sorry. I'm sorry.
12 All right.

13 The Victim's Advisory Group does not
14 recommend the Part A restructuring of the loss
15 table. The Victim Rights Advisory Group
16 supports the non-economic harms inclusion in
17 Part B. And as to the Part B mitigating
18 factors, we would oppose Subsection 22, but we
19 could support Subsection 23 with modifications
20 that we proposed in our public comment, which
21 would have the offenders held more fully
22 accountable.

1 As to Part A, economic crimes are
2 directed towards victims, whether those victims
3 are people, businesses, or government agencies.
4 In every instance, actual people are harmed
5 whether an individual, the owners or employees
6 of a business, or the taxpayers. We
7 respectfully ask the Commission not to adopt
8 Part A of the proposed amendments.

9 Minimum loss thresholds for each
10 described quintile in the loss table increased
11 tremendously if you were to adopt Part A and
12 even higher, if you also adopt the inflationary
13 adjustments. Increasing the minimum thresholds
14 lowers the deterrent value of the guidelines.
15 The lowest minimum threshold would rise from
16 \$6,500 to \$15,000 and would cause a true level
17 reduction for offenders previously in that same
18 range. Combining part A with the inflationary
19 adjustments would raise the level to \$20,000
20 according to your data briefing. And that would
21 result in a reduction of two to four levels for
22 36 percent of the 848 offenders sentence in

1 fiscal year 2024. And of course, each of the
2 quintiles increased dramatically as well.

3 In fiscal year 2024, with these
4 proposed amendments, 66 percent of all offenders
5 sentenced would receive a reduction of two to
6 four levels, and that is a huge increase that
7 affects victims. Your August 2025 crime victims
8 fact sheet on economic offenses for fiscal year
9 2023, identified over 2.5 million persons as
10 victims of economic crimes under Chapter 2, Part
11 B and your projection is that 66 percent of
12 those offenders if we mix fiscal years together,
13 would receive reduced sentences of two to four
14 levels. And that's just a huge jump in
15 magnitude. The Department of Justice and the
16 Probation Officer's Advisory group also seem to
17 support for similar and other better articulated
18 reasons perhaps, that the loss table should not
19 be restructured.

20 We do support in Part B, the
21 substantial non-economic victim harms. You've
22 listed examples in your proposed guidelines,

1 including physical harm, psychological harm,
2 emotional trauma, harm to reputation or credit
3 rating, and invasion of privacy. We think they
4 are all apt. Your data briefing also
5 indicates, -- I'm sorry, your fiscal year 2023
6 crime victims data shows that of 1,455 cases,
7 non-economic harms included death, bodily
8 injury, psychological and emotional harms,
9 reputational and social harms, and child
10 pornography. So all of those things could be
11 encompassed if you would include that with the
12 culpability factors. We do agree with the
13 Department of Justice as they spoke earlier
14 today, that perhaps the substantial non-economic
15 harm should be to one or more persons rather to
16 and to one or more victims as having a broader
17 scope for the reasons they set forth in their
18 public comment.

19 As far as the Part B mitigating
20 factors, we do not support Subsection 22.
21 Subsection 23 with the modified language that we
22 proposed, we could support, which would make it

1 more restrictive, making it more of a
2 accountability for the offender, including the
3 payment of monies that were taken or the return
4 of property. I think that Mr. Luria identified
5 a good problem with the return of property. How
6 can we determine that that property is in the
7 same condition it was when it was stolen. But
8 for those reasons, we think that you should go
9 ahead and adopt that, because it requires an
10 accountability from the defendant, which can be
11 healing for the victim. Thank you very much.

12 CHAIR REEVES: Thank you, Mr.
13 Quasebarth. Any questions of this path?

14 COMMISSIONER MEISLER: It is
15 feasible -- okay. Go ahead.

16 VICE CHAIR RESTREPO: Mr. Quasebarth,
17 how would you suggest we take into the
18 victim's -- the impact on the victim without
19 overburdening victims to, kind of, prove
20 substantial harm this financial crime may have
21 caused them. Is there a middle ground here?

22 MR. QUASEBARTH: Well, that -- that's a

1 very good question. And I don't know, you know,
2 I don't know if the data from the economic
3 crimes, the crime victim fact sheet, how things
4 like bodily injury, death, child pornography,
5 how those were identified. Did they just show
6 up in the file from the information that you
7 have? Was that something that was specifically
8 addressed as part of sentencing? I don't know
9 that information. Certainly, if there are 2.5
10 million victims of fiscal year 2023, there's no
11 way to talk to all of those people. But I think
12 you also identified a smaller percentage of
13 people in the data that you went through, the
14 number of cases that had ten or less victims, so
15 it may be more accessible for the probation
16 office to be able to contact those people.
17 Certainly they would have to be willing to want
18 to come forward and to speak and to provide
19 information about the harms that they've
20 suffered. Some victims are willing to do that,
21 others are not. But I think that that is
22 something that perhaps and I'll defer to my

1 esteemed colleague here from COAG as to whether
2 that is something that they could include.
3 Certainly they work with victims, they talk with
4 victims about these sorts of things and there
5 could be an accessible way for that to happen.

6 CHAIR REEVES: Mr. Luria, I think he
7 just called on you.

8 MR. LURIA: Certainly, we have a
9 longstanding effort to connect with victims
10 about the impacts these offenses have on them.
11 Victim impact statements oftentimes touch upon a
12 lot of the issues that are listed there. Where
13 we get concerned about it is in terms of what
14 level of proof and to what degree are you going
15 to create a circumstance where every victim has
16 one or several of those as long as they're
17 willing to respond. That's, kind of, why we
18 recommended that making that victim enhancement
19 based solely on their individual -- them as an
20 individual because that's where you see all of
21 those attributes most frequently. If somebody's
22 had a theft of their property, there's some

1 shame in it. There's some frustration. There's
2 some concern about -- some apprehension about
3 what might happen next time they open their bank
4 account. Or if they've had something stolen
5 from their house or their person, what happens
6 when I open that door or turn that key,
7 what's -- what am I going to -- what am I going
8 to see?

9 And so every single victim seems to
10 have at least one of those things on there as
11 long as they're willing to respond. And so
12 it -- that's from our perspective to simplify
13 it, simply say if they're an individual, they've
14 almost certainly had had some, one or two, of
15 those attributes in their life as a result of
16 being victimized. And so you know, by having it
17 as that individual, there's less of a need to
18 get statements from them to get a circumstance.
19 We understand that this is going to be something
20 that's going to happen because we see it all the
21 time. So by simplifying it and not having it so
22 that they're required to respond, you, kind of,

1 meet the same end without a as much of the
2 trauma, the relived trauma of it. Thank you.

3 CHAIR REEVES: Any -- VC Mate.

4 VICE CHAIR MATE: Thank you all for all
5 of your work preparing to be here and the effort
6 to be here, we appreciate it. Dr. Reddix, I had
7 a question for you. You'd mentioned capping the
8 enhancements at 16. Can you explain a little
9 bit about how you arrived at that decision, that
10 16 mark or what the thought was behind that?

11 DR. REDDIX: Right. The -- in looking
12 at the other loss tables, I don't -- I can't --
13 I don't know them all by number, but I think
14 there are three in the economic crimes
15 categories. And while they may start at a
16 higher base level, they only increase by one
17 from category to category and they -- the cap is
18 at 9.5 million or thereabouts on both on 2B 1.1.
19 And there are only either seven or eight
20 different categories in the other two tables.
21 But in the 2B 1.1, there are 30 enhancements,
22 but they -- the base offense starts at seven.

1 So you know, the question is, you know, how if
2 an economic crime, whether it's a robbery or
3 fraud, there still should be some level of
4 linear increase for one crime over the other.
5 That -- that's essentially our position.

6 VICE CHAIR MATE: Thank you.

7 DR. REDDIX: And how did we get to 16
8 by decreasing the number of levels from 30 down
9 to toward eight? It just seems a natural, you
10 know, decrease to a number. It wasn't a
11 tremendous amount of debate as to what that
12 number should be. We just picked one.

13 VICE CHAIR MATE: Thank you.

14 CHAIR REEVES: Yeah, you got another
15 one?

16 VICE CHAIR MATE: I have -- oh, did you
17 have a question there?

18 CHAIR REEVES: Go ahead.

19 VICE CHAIR MATE: I just have a similar
20 type of question for you, Ms. Johnson. You
21 talked about the that 15,000 threshold as being
22 updated and suggested it was time to move it.

1 Did you have -- did TIAG have something in mind
2 about where it should go instead of that or just
3 that we should be looking at that?

4 MS. JOHNSON: We do not have a
5 particular number. I think that we viewed the
6 proposals, kind of, holistically. And so
7 starting with an inflation adjustment as the of
8 baseline to that number, but we do support the
9 wholesale reconsideration of broader bands and
10 fewer of them. And so if that is going to
11 happen, then the just the simply inflation
12 adjusting may not be a sufficient -- may not be
13 sufficient -- a sufficient adjustment. I know
14 that there was a tentative suggestion of perhaps
15 having bands where, you know, a quarter of
16 defendants fell in one and then another quarter
17 and then another quarter. And we would be
18 interested in seeing what those numbers were.
19 So I think the answer is that we didn't arrive
20 at a particular number. We think it should be
21 substantially higher than 15,000, but I -- we
22 didn't land on a final figure.

1 VICE CHAIR MATE: Thank you.

2 CHAIR REEVES: Yes?

3 COMMISSIONER MEISLER: Turns out, I'm
4 not very creative, so I was just going to ask
5 Mr. Luria the same question I'd asked earlier
6 for the previous panel, just to get your
7 perspective on the, kind of, fact finding burden
8 issue and the relationship, if any, between fact
9 finding for restitution and fact finding for
10 loss. I'm just curious from your experience in
11 POAG, what do you see in that regard? Do you
12 see that Courts are often required to make
13 restitution findings that are going to overlap
14 with the findings they're required to make for
15 loss under 2B 1.1?

16 MR. LURIA: Our experience with this is
17 that Courts are always looking to find a
18 specific number. I think a lot of the
19 retroactivity we've experienced in the last 20
20 years has taught us that ranges don't really
21 work for retroactivity. We've had -- you look
22 back 20 or 25 years, somebody might have come up

1 with a quantity that was 15 to 50 in terms of
2 the quantity. And then on retroactivity, you
3 have to go back and try and figure out well,
4 what did they mean? Where was that?

5 A similar circumstance, I think, with
6 losses is that lesson was learned throughout the
7 guidelines, in terms of you come to a specific
8 number on quantity, you come to a specific
9 number on loss. I think with restitution, it
10 certainly has a tie to it. And we certainly see
11 circumstances where there's plea agreements, or
12 there's agreed amount -- agreed upon amounts of
13 restitution. It's not a perfect circumstance
14 that that happens and sometimes you'll get
15 additional information that drives that number
16 up.

17 But I think that the fact that they
18 have to find restitution doesn't necessarily
19 mean that they're not going to feel compelled to
20 find a specific number. It's very rare that you
21 find courts in my experience in at you find
22 Courts that are willing to accept a range and

1 say it's around this or it's around that.

2 There's a lot of specificity to it.

3 COMMISSIONER MEISLER: And with
4 respect, Mr. Luria, I think you identified that
5 four levels has caused for some, I guess,
6 greater advocacy, I guess, of what's
7 (inaudible).

8 Is the answer making those -- is the
9 answer to that reducing those levels to one to
10 two, two to three, or something less than four
11 or --

12 MR. LURIA: I'm really not certain.
13 What I can say is that Courts are going to be
14 compelled to find that number. And if that
15 actual loss falls on one side of that number and
16 the -- of that cusp and the intended loss falls
17 on the other, that's going to be quite a
18 contentious hearing.

19 Or if there's some fact pattern or
20 component that causes it so that if you take one
21 set of facts, you end up on one side of the cusp
22 or one side on fact -- or one set of facts, you

1 can end up on the other side of the cusp.
2 There's going to be a lot of argument about
3 that. And I think in all likelihood, you might
4 even see a lot of variances based on that too,
5 simply because for such a large jump in terms of
6 the overall outcome.

7 We do think that there's a benefit to
8 having graduated increases. You know, I realize
9 this is still graduated, but it is with such a
10 much larger range that it's really hard to see
11 how -- hard to gauge how this might impact
12 that -- those arguments and that outcome with
13 variances.

14 CHAIR REEVES: And Dr. Reddix, I think
15 I heard you say in your opening, sort of, do
16 away with this issue, maybe not do away with
17 this issue of intended loss as far as, you know,
18 not weighing so much on the calculation of the
19 final sentence?

20 DR. REDDIX: Correct. I think the
21 issue is how you calculate intended loss and
22 consistency with that calculation. The only

1 thing that as a defendant, you know, the
2 intended loss is -- was millions more than the
3 actual loss. And the -- and in my case, the
4 state never even injected that a loss had
5 occurred. So you know, the intended loss seems
6 to me to be simply an area to enhance punitive
7 punishment rather than to mitigate the harm that
8 was caused by the antisocial act.

9 And I think, you know, whatever the
10 methodology is for accounting should be the same
11 across all circuits and I don't believe that it
12 is. Obviously it's not the third circuit
13 certainly does not even look at intended loss,
14 only the actual loss.

15 CHAIR REEVES: Any further (inaudible).
16 Well, thank you, lady and gentlemen.

17 Our seventh panel. It's my time to
18 introduce them who will present the stakeholders
19 perspectives on our proposed sophisticated means
20 amendment. First we have Amanda Riedel, right?

21 MS. RIEDEL: Perfect.

22 CHAIR REEVES: All right. Okay. All

1 right. Thank you. Well, perfect. I don't get
2 that often. The acting assistant director in
3 the legal program section of the executive
4 office for the United States Attorney EOUSA.
5 She also serves as EOUSA's white collar crime
6 coordinator and returning to the dais is Michael
7 Caruso, who is will provide the federal
8 defender's perspective.

9 Ms. Riedel, please start us off.

10 MS. RIEDEL: Thank you so much for
11 inviting me here to discuss sophisticated means.
12 The incorporation of sophisticated means into
13 Chapter III supports the commission's efforts to
14 promote clarity and fairness in the federal
15 sentencing process. It holds responsible those
16 who commit the most serious and harmful crimes.
17 It deters criminal activity and creates a level
18 playing field for defendants. The proposed
19 language should however be tweaked to remove a
20 reliance on technology. Should the Commission
21 decide to leave sophisticated means in Chapter
22 2, the Department believes the current wording

1 should be maintained and the examples be remain
2 as is.

3 So why do we need a sophisticated means
4 adjustment in Chapter III? Applying a base
5 level of 12 plus 2 for the most serious, complex
6 and concealing conduct is consistent with the
7 aims of the guidelines. It recognizes that the
8 most injurious criminals do not function in
9 silos, either committing drug crimes or violent
10 crimes or economic crimes. Instead, the most
11 nefarious criminals layer their finances, hide
12 behind stolen identities and shell corporations,
13 and conduct crimes across borders. The
14 adjustment captures this conduct and provides
15 simplification in line with these -- this
16 Commission's aims.

17 Let us now turn to what sophisticated
18 means is not. It is not an invitation for a
19 broad application to any crime that includes a
20 bank account or use of the internet. First, the
21 adjustment is self-limiting at two levels and a
22 base offense level of 12. It will provide

1 context to the guideline calculation and
2 acknowledge the magnitude of harm.

3 Next, the Commission's own sentencing
4 statistics show the current enhancement is
5 applied in 14.1 percent of economic crimes that
6 tend to be more complex and only 1 percent of
7 cases overall. There's no reason to think
8 relocation to Chapter III will significantly
9 change that.

10 Third, courts are comfortable analyzing
11 what is and what is not sophisticated. It goes
12 back to the origins of the sentencing
13 guidelines. Settled law directs judges to
14 evaluate complexity and concealment efforts,
15 notably in relation to similar crimes. They
16 know to compare a defendant who committed a
17 complicated overseas child exploitation
18 operation to a similar defendant, not to a
19 defendant that conducted hand-to-hand drug
20 transactions.

21 Fourth, a Chapter III sophisticated
22 means adjustment addresses sentencing

1 disparities. People, regardless of what kind of
2 crimes they commit, who commit more
3 sophisticated crimes and conceal their
4 identities cause more harm. They require more
5 law enforcement resources and their guidelines
6 should reflect that.

7 Finally, the Department believes that
8 putting sophisticated means in Chapter III would
9 allow for additional streamlining and get rid of
10 the need for specific enhancements for mass
11 marketing or dark web in the drug guidelines.

12 Now let's discuss the proposed
13 language. We agree with the Federal Defenders
14 and with POAG that the proposals focus on new
15 and emergent technologies, creates ambiguity and
16 could limit the usefulness of this enhancement.
17 Ask yourself, what is new and emergent
18 technology? My 79-year-old father who still
19 works full time thinks YouTube TV is a new and
20 emergent technology. Is it new or emergent to
21 the victim, to the perpetrator, or to the judge?
22 It creates a confusing and ever-changing

1 landscape for judges to navigate.

2 Next, the focus on technology belies
3 the purpose of the guideline enhancement, which
4 is to punish conduct that is more damaging due
5 to concealment and sophistication. This
6 analysis isn't reliant exclusively on
7 technology. And, in fact, the Department
8 believes it would be a mistake to create the
9 impression that everyone who uses WhatsApp or
10 pays in cryptocurrency is automatically entitled
11 to this enhancement. Rather, sophisticated
12 means is and should be reserved for those
13 defendants whose conduct is especially
14 intricate. Looking at, as the settled law
15 suggests, the duration of the scheme, the number
16 of participants, the use of multiple accounts,
17 and the efforts to avoid detection. None of
18 those factors necessarily include technology.

19 And finally, if sophisticated means
20 remains in Chapter 2, we believe the language
21 should just remain the same. If anything
22 relocating the examples from the commentary into

1 the text. Introducing amended language at
2 Chapter 2 would invite confusion and litigation.
3 At a minimum, the Department supports retaining
4 the examples, which set an important baseline
5 against which courts can measure the
6 sophistication of a given defendant. Thank you.

7 CHAIR REEVES: Thank you. Mr. Caruso?

8 MR. CARUSO: Thank you, Chair Reeves
9 and members of the Commission. If the
10 sophisticated means adjustment were a financial
11 event, I think your account would tell you to
12 take a write-off. And certainly, your
13 accountant would not tell you to export it to
14 all your different business lines. And so that
15 is essentially the position of the Defenders.
16 We think, unlike the Department of Justice, that
17 this adjustment hasn't brought clarity and
18 hasn't brought fairness to the sentencing
19 process, so we urge you to eliminate it.

20 For three reasons: As the data show,
21 this adjustment generates unwarranted
22 disparities. We see that in the inter-district

1 applications of this adjustment. We cited the
2 circumstances in the Northern and Southern
3 Districts of Mississippi and the Western and
4 Middle Districts of Tennessee. Of course,
5 bordering districts that have widely disparate
6 application rates. We also think the data show
7 that this double counts conduct already captured
8 in the loss table, especially at the higher
9 levels. And we also don't think this is sound
10 sentencing policy because of the way the
11 guideline is current -- the specific offense
12 characteristic is currently constructed. It not
13 only punishes the people who are involved in the
14 offense that created the sophisticated scheme,
15 but also punishes those who were involved in
16 carrying out the -- carrying out the scheme and
17 we don't believe that that's sound.

18 Process: The Commission's not prepared
19 to eliminate the adjustment. We do urge you to
20 narrow the specific offense characteristic and
21 we've submitted proposed language and, of
22 course, under no circumstances, should this

1 adjustment be exported to Chapter III.

2 Since the Commission severed
3 sophisticated means from the more than minimal
4 planning standard in 2003, it seems that courts
5 have largely ignored that severance. You know,
6 we cited cases from three circuits, the Seventh
7 and Eighth in DC, who I think counter the
8 position of the Department of Justice that there
9 is this settled law across the country, that
10 this adjustment is applied in a certain way.
11 And certainly, the Commission's 2015 amendment
12 has not minimized the application of this
13 adjustment.

14 Today, nearly the same percentage of
15 individuals sentenced under 2B1.1 receive this
16 enhancement. And the disparity is staggering.
17 You know, as I've talked about in the two
18 districts we mentioned in our submission. Also
19 nationally, ten districts exceeded 20 percent
20 application rate, while 15 districts were below
21 5 percent, including five districts where no one
22 received the enhancement at all. This is the

1 same guideline, vastly different outcomes. And
2 I think establishes our point that there is no
3 clarity or fairness to this adjustment.

4 While we appreciate the Commission's
5 concern and attention to this guideline, we
6 don't think their proposed definition, if it
7 remains in 2B1.1 sort of goes as far as it needs
8 to go. For example, a judge could reasonably
9 read the phrase to cover conduct in the upper
10 half of all fraud cases and that's not a
11 narrowing in our view, just a relabeling. I
12 think we're in agreement about the emergency
13 technology language, so I'll adopt my friend's
14 remarks. And our written comment proposes as an
15 alternative definition to address what we see as
16 the flaws. That sophisticated means should
17 require conduct that is highly complicated or
18 entails great skill resulting in unusual
19 difficulty in detecting, investigating, or
20 prosecuting the offense. We believe that this
21 adjustment should be narrowly construed and
22 reserved for exceptional cases and the

1 Commission should make this clear.

2 We also urge the Commission to address
3 double counting directly. The Commission's data
4 shows that sophisticated means adjustment is
5 applied in nearly 20 percent of cases at the
6 plus 14 loss level and nearly 49 of cases at the
7 plus 24 loss level. At those levels,
8 sophisticated means is not an independent
9 aggravating factor. It's a near automatic add-
10 on.

11 Finally exporting the sophisticated
12 means adjustment to the entire guidelines manual
13 will generate more litigation and more
14 disparity, not less. The only voices calling
15 for expansion are the Department of Justice and
16 in passing, the probation office. Neither has
17 offered empirical support for this expansion and
18 we know of none. I'm happy to answer any
19 questions you may have.

20 CHAIR REEVES: Thank you. VC Mate?

21 VICE CHAIR MATE: Good afternoon.

22 MS. RIEDEL: Hello.

1 VICE CHAIR MATE: Thank you both for
2 being here. I have a question for both of you,
3 I think, that -- and maybe for you first, Ms.
4 Riedel, because I think this kind of came up in
5 a little bit in your comments today and
6 definitely in your written submission. In
7 encouraging us to adopt a Chapter III
8 sophisticated means adjustment, your letter
9 mentions a couple of similar SOCs, specific
10 fence characteristics and shares our thoughts on
11 whether we should kind of change those. Whether
12 we should or could, because I think there's some
13 discussion of directives to us around those and
14 whether we could even change those if we were to
15 consider a Chapter III adjustment.

16 So I guess I'm -- my question is,
17 before we can even evaluate the wisdom of
18 adopting a Chapter III adjustment for something
19 like sophisticated means that would apply to
20 every single Chapter 2 guideline, wouldn't we
21 need to review every base offense level and
22 every specific offense characteristic in the

1 manual to assess whether it would need to be
2 lowered to accommodate this addition in Chapter
3 III? And, you know, as an example, the manual
4 currently treats the offenses of insider trading
5 and bribery as, I quote, "sophisticated frauds."
6 And those start at a higher base offense level.
7 They already have some provisions in them. So
8 wouldn't we need to ensure that the
9 sophistication of the offense isn't already
10 baked into those guidelines?

11 MS. RIEDEL: That's a big and meaty
12 question.

13 VICE CHAIR MATE: It's a long one.
14 Sorry.

15 MS. RIEDEL: No, it is -- it's okay. I
16 mean, right. What the Department was trying to
17 do was respond to this in context. There are
18 lots of contextual discussions going on here.
19 One is we want to make this simpler, simpler for
20 judges, more clarity to understand for victims
21 and the public. But we also want to maintain
22 the context of what's happening in the white

1 collar space. In the white collar space, we've
2 already seen a reduction for zero point
3 offenders that you're more than twice as likely
4 to get if you're sentenced under 2B1.1 than the
5 rest. And what we were trying to do is say, if
6 there is an effort to streamline, but while also
7 maintaining this important principle that's been
8 since the beginning of the guidelines, to
9 capture more sophisticated conduct because it's
10 more harmful, how can we do it? And in the most
11 fair way to do that is to apply it to everyone.
12 And that's because I do not think we started out
13 with the guidelines looking at each individual
14 crime. And these individual crimes, like you
15 just point out, were written specifically, but
16 now we're asked, well, what if we apply
17 something to everything?

18 So you're absolutely right. It would
19 require going back and looking. But the
20 language that the department proposes sort of
21 takes that into account because it looks at
22 things that are -- take a particular level of

1 complexity, a particular level of
2 sophistication, more than minimal planning for
3 those specific offenses. So if you have
4 something like bribery that starts out with, it
5 is a sophisticated offense, in order to get this
6 Chapter III enhancement, you would need
7 something that even in the context of a
8 particularly sophisticated offense would be more
9 so. And I think that's how judges have applied
10 this, relative to that type of crime. How do
11 you make it appropriate? Well, it's appropriate
12 if on the scale of how you commit insider
13 training, how you commit security fraud, it is
14 particularly complex, particularly concealing
15 and particularly harmful.

16 VICE CHAIR MATE: Thank you. Mr.
17 Caruso?

18 MR. CARUSO: Right. So no, I agree
19 with your point. So I know in the Department of
20 Justice's submission, they -- I think I'm
21 representing this position correctly. They said
22 for the assault and the burglary guidelines that

1 contain more than minimal planning adjustments
2 do away with those. I think for an obstruction
3 offense, they said, we need to look at it
4 further. But then I think their position is for
5 every other guideline that touches either more
6 than minimal planning or sophistication, keep
7 it.

8 And you know, that -- that's our
9 ultimate concern that the problems with the
10 sophisticated means adjustment in 2B1.1, the
11 lack of clarity, the lack of fairness, are now
12 going to be exported to every offense in the
13 manual. And I think you're absolutely right,
14 before the Commission goes there, there has to
15 be a comprehensive review, not just looking at
16 whether, you know, in this one particular
17 guideline, there's an SOC for more than minimal
18 planning, but seeing how the base offense level
19 is calculated, seeing how other specific offense
20 characteristics in the guideline may impact on
21 sophistication, to make sure that it's a clean
22 process.

1 But before we do that, and again, I
2 think it'll be a hard sell for me to convince
3 you all to eliminate the adjustment in 2B1.1,
4 but where we also fundamentally agree with the
5 Department of Justice, based on the data, is
6 that the -- and the Commission's prior work in
7 2015, that more work needs to be done
8 reconfiguring the definition.

9 So if you want to keep the
10 sophisticated means adjustment in 2B1.1, we urge
11 you to reconfigure the definition, then see how
12 that definition plays out in the context of
13 2B1.1 before you come to a decision whether to
14 put that in Chapter III. And then of course, in
15 the meantime, you can conduct the comprehensive
16 review of every guideline in the manual to see
17 whether it could be significant or partial
18 overlap.

19 VICE CHAIR MATE: Thank you.

20 CHAIR REEVES: Mr. Caruso, I was struck
21 by the -- about your finding, if you will, of
22 the difference between what is occurring in the

1 Southern District of Mississippi versus the
2 Northern District. And I think I heard you say
3 the Western and maybe the Middle District --

4 MR. CARUSO: Of Tennessee.

5 CHAIR REEVES: -- Tennessee. Did you
6 all look and see if there's a difference between
7 a Western District of Tennessee and a Northern
8 District of Mississippi? I just -- I -- you
9 know, because that's Memphis --

10 MR. CARUSO: Right. That -- I don't
11 believe we looked at that. If we did, we
12 certainly can -- we certainly can submit follow
13 up questions.

14 I think while the reason we focused on
15 intra-district disparities, of course, is that
16 both U.S. attorneys in the same state are
17 appointed by the same president, recommended by
18 the same senators, you know, generally have
19 similar demographics. So that's why we --
20 that's why we focused on, you know, these two
21 districts in these two states because there
22 doesn't seem to be any explanation based on the

1 cases or prosecutorial objectives, why there
2 would be such disparate rates of application.

3 CHAIR REEVES: Right. And that's under
4 the existing rules.

5 MR. CARUSO: That's right.

6 CHAIR REEVES: So I mean, do you all --
7 do you have any way to think -- how can we
8 address that now? Because that does seem
9 totally with 30 and 1?

10 MR. CARUSO: I agree. So if, you know,
11 if you pull back and sort of look at the
12 national statistics where it says, you know,
13 applied in 14 percent of cases, like on the face
14 of it, that sounds reasonable, right? As far as
15 these things go. But like as the pollsters say,
16 if you look at the cross tabs and you see
17 exactly what's going on, you see the other data
18 show that in some districts all across the
19 country, there are very high application rates.
20 In other districts, very low. And like, to be
21 honest, we don't know why that's occurring. You
22 know, in my mind, the way I think about it, it's

1 like the flip side of minor role, right? I know
2 the Commission has struggled over the years.
3 Like why don't more district court judges give
4 minor role, right? In drug cases certainly.
5 And you've given advice a few times about that,
6 and your data will show like, whether that's
7 worked or not.

8 But the minor role adjustment in 2B1.1,
9 I think is even worse. There's even a lower
10 rate. So like what I come back to, is this
11 actually just a cultural issue? Does this have
12 anything to do with case law? Does this have
13 anything to do with sort of prosecutorial
14 objectives? Or is this just the culture in
15 various districts, whether driven by the U.S.
16 attorney's office, the probation office, or the
17 judges that we either apply -- you know, we seek
18 out and apply sophisticated means, or we don't.

19 Like I see that in my district, I come
20 from a very large district and, you know, to
21 draw on the minor role, sort of counterpart to
22 this, there's very much a cultural issue. When

1 I started in the office, half of my cases were
2 drug importation cases. And like the only
3 things at issue, some cases went to trial, but
4 most pled. And so at issue would be acceptance
5 of responsibility, safety valve, and minor role.
6 Half the judges always gave minor role to
7 couriers. About a third, never did. And then
8 the remaining judges, it would be a case by case
9 basis. I think the same holds true, although
10 not based on data, based on sort of my
11 experience in courtrooms that, you know, certain
12 prosecutors, certain probation officers, and
13 certain judges have just embedded views of what
14 sophistication means.

15 The other problem that we see is, and
16 again, I touched on this in my opening remark,
17 that we don't think it's sound or fair
18 sentencing policy to hold someone accountable
19 for just participating in a sophisticated fraud
20 if they had nothing to do with creating that
21 sophistication. Like many of these fraud cases
22 are very hierarchical, right? Like I have a

1 healthcare fraud case where there's essentially
2 a CEO, COO, and CFO and I have a client at the
3 very bottom and he's just taking orders. He's
4 writing checks. Whereas the CEO created 100
5 shell companies, created 100 bank accounts. But
6 at the very lower level, my client is just
7 performing a very limited function. And under
8 the guideline, because he's involved in that
9 sophisticated scheme, he would be eligible for
10 this adjustment. So I think I answered more
11 than I -- than you wanted me to.

12 CHAIR REEVES: No, no. I -- I'm trying
13 to find out what's going on between Mississippi,
14 Jackson, Biloxi and Oxford and Greenville.

15 COMMISSIONER WONG: I'm -- I don't know
16 if you were here when Judge Chang started off
17 the today, but it's hearkening back a little bit
18 to one comment he made, which was that where the
19 guidelines are dealing with more of a standard
20 as opposed to what he called a concrete fact,
21 that there is discretion and he -- you're giving
22 the example of minor role. Of course, we still

1 have minor role. And I think anytime it's sort
2 of a standard, we recognize that baked into that
3 system, there's going to be some discretion.
4 The example he gave was post-offense
5 rehabilitation. Of course, we are proposing,
6 you know, there's an amendment on post-offense
7 rehabilitation.

8 And so I guess I wonder if, you know,
9 does that necessarily mean that, like what in
10 this particular context makes us feel that that
11 discretion is just so beyond the bounds when we
12 have many examples of situations where there is
13 going to necessarily be discretion where there's
14 some kind of relative judgment made, which might
15 in here in many parts of the guidelines. And so
16 it's just an observation, I guess.

17 Mr. Riedel, do you also have, maybe
18 related to this, any reaction to what might lie
19 behind some of these inter-district --

20 MS. RIEDEL: Yes.

21 COMMISSIONER WONG: -- question?

22 MS. RIEDEL: As a federal prosecutor

1 for more than 20 years and someone who's
2 prosecuted cases across the country, and now my
3 role at EOUSA who was intimately involved with
4 the types of cases across the country. The
5 answer lies in the fact that we have 94
6 different U.S. attorney's offices that have
7 different communities and respond to different
8 needs, different types of crimes and different
9 emphasis. The districts that are very small,
10 like small districts, like the ones in the South
11 Mississippi -- southern Mississippi, all of
12 their AUSA's are generalists. They have less or
13 fewer law enforcement resources. They're doing
14 more violent crime, they're doing more drugs,
15 more reactionary crimes. And their white color
16 crimes, frankly, that they have the capacity to
17 do are often less sophisticated. That's just
18 the reality of the resources that they have.

19 Comparing that to someplace that has,
20 like Nashville, just because something is a
21 neighboring state doesn't mean the districts are
22 the same. I'll compare our districts, because

1 I'm from the Middle District of Florida that
2 always feels like the redheaded stepchild
3 compared to the Southern District of Florida.
4 They have twice as many prosecutors as we have
5 in the Middle District of Florida. Even though
6 we are also an extra large district, they have
7 more than twice as many law enforcement
8 officers. They bring more white collar cases.
9 They bring more sophisticated and difficult
10 white collar cases. We would not look to the
11 Southern District of New York, which is home to
12 Wall Street and does the most complicated
13 financial crimes and compare them to what goes
14 on in Arkansas, which may do a white collar
15 crime that simply involves lying to your
16 neighbor to get them to invest in your, you
17 know, you want to sell soap and it's a pyramid
18 scheme. That is why there are discrepancies.
19 And this could be an education issue, it could
20 be a victim issue, but simply saying
21 geographically, that shows that the guideline
22 enhancement doesn't work. I don't think truly

1 captures all of the context.

2 And to your point, this is guidance
3 that we ask judges to keep in mind when
4 sentencing and to use their discretion. That's
5 why we give them examples. That's why we have
6 helpful language. And we rely on judges
7 practitioners and the probation officers to
8 guide that process. I saw Mr. Luria here, he
9 did a bunch of my PSRs. He told me no to
10 sophisticated means on multiple occasions. So I
11 as the prosecutor thought it was sophisticated,
12 he thought something else. The defense attorney
13 thought something else. The judge was able to
14 look at the guideline and the case law and make
15 a judgment call.

16 MR. CARUSO: If I may? And again, just
17 to be -- just to be clear, our starkest examples
18 are interstate where -- I agree, comparing the
19 Southern District of New York or the Southern
20 District of Florida with smaller districts is
21 not the most appetence comparison. So that's
22 why we looked for, you know, the two districts

1 in Mississippi and two out of the three in
2 Tennessee. Because if you look at the Western
3 District of Tennessee with Memphis in the middle
4 with Nashville, again I don't know if there are
5 differences in resources or priorities. And
6 that is something that the Commission can figure
7 out.

8 But to your point about Judge Chang's
9 comment, you know, I would say we're in
10 agreement with him with regard to this guideline
11 when we're talking about, like what we consider
12 very broad and vague guideline language about,
13 especially complex or especially intricate. Of
14 course, you're going to have divergent views of
15 what those terms mean, especially when you're
16 trying to find facts. And that -- and that's
17 why the Defenders propose more criteria. Now,
18 again, is this anti-simplification? Maybe. But
19 we think with more criteria and stronger
20 language, that is a -- that is a way to smooth
21 out all these disparities in application that we
22 see.

1 CHAIR REEVES: Oh, yes. Meisler?

2 COMMISSIONER MEISLER: Mr. -- Mr.
3 Caruso, I think earlier you were talking about
4 the different reasons that could explain some of
5 these disparities. You mentioned case law as
6 being one of them. And I'm just curious,
7 because -- let's see, it said time up. It seems
8 like some of the case law that I think was cited
9 in the Defenders' submissions and others is
10 quite a bit older, I think predates the 2015
11 amendment that you talked about, which I
12 understood have narrowed sophisticated means to
13 make it more defendant specific in certain ways.

14 So I'm just wondering if you think that
15 part of the problem could be that circuits have
16 carried forward older, pre-2015 standards in a
17 way that's not commensurate with the changes the
18 Commission meant to effectuate, and if that was
19 a way, one way to get at some of the breath
20 concerns that you mentioned?

21 MR. CARUSO: That could be. I haven't
22 looked at that specifically. And again that we

1 can follow up and submit comments after the
2 hearing. You know, aside from that, because
3 that does happen in many contexts. There is
4 this carry over depending on, you know, sort of
5 the level of litigation and sort of the
6 attention of the courts.

7 You know, the other issue that I can --
8 that I have to raise that I don't think can be
9 ignored in terms of guidelines, specific offense
10 characteristics, is the concept of harmless
11 error at sentencing now. So for example, in my
12 district and again, this is not every judge, but
13 so for example, if the litigants are arguing
14 over a sophisticated means adjustment and they
15 both have cases to make, a judge can say, you
16 know what? Either way, it's not going to impact
17 my ultimate sentence under 3553(a). So
18 that's -- that -- that's another issue that our
19 criminal legal system has to confront that
20 perhaps now, because of these harmless error
21 rules, there's not going to be this full
22 throated litigation that's going to develop case

1 law like it did in the -- like it did in the
2 past. And there's no sort of common law of
3 sentencing because district judges by and large
4 don't publish their sentencing orders.

5 COMMISSIONER MEISLER: Thank you.

6 CHAIR REEVES: Yes. No, no, no. Go
7 ahead, Commissioner Murray.

8 VICE CHAIR MURRAY: So I fully
9 appreciate -- oh, first of all, thank you both
10 for being here. But I completely appreciate
11 what you all have been saying about
12 administerability and about drafting. My guess
13 is that part of what is driving maybe your
14 different views on this is that probably, Mr.
15 Caruso is a little bit less excited about
16 Chapter III enhancements than --

17 MR. CARUSO: A lot.

18 VICE CHAIR MURRAY: -- than just
19 throwing it out there -- than Ms. Riedel. But
20 I'm wondering if it's possible to kind of like
21 bracket those issues to just talk about whether
22 sophisticated means make sense if we were able

1 to abstract those things as a kind of retail or
2 wholesale thing.

3 So do we think that some crimes are
4 more aggravated by being sophisticated than
5 others or do we think that if we were able to,
6 you know, not increase severity and not have
7 drafting errors and not have disparities, it
8 would make sense for it to be kind of a thing
9 that would be applied across the board?

10 MR. CARUSO: So across the board, I
11 don't know. But with regard to 2B1.1, I think
12 the answer is yes. And I think this is where we
13 are in agreement, as part of our definition, I
14 think we call it an impact, the Department of
15 Justice calls it effects, or I have that
16 opposite. So I think there is a rational
17 sentencing policy to look at a person who
18 devises, you know, based on the language of a,
19 you know, highly skilled or difficult to detect
20 a sophisticated crime to hold them more
21 responsible than a person who does not.

22 MS. RIEDEL: Agree. We have extremely

1 limited resources to protect the public to
2 detect crimes. And if you're hiding, concealing
3 the mechanisms of those crimes, your identity,
4 and the proceeds of those crimes, regardless of
5 what it is, if it's drug trafficking, those
6 people's guidelines should reflect that. Their
7 crimes go on longer. They commit more harm.
8 They hurt more people. They require more
9 resources that are very in demand and their
10 guidelines should reflect that.

11 CHAIR REEVES: Okay. Okay. Okay. One
12 more.

13 VICE CHAIR MATE: I think this is a
14 quick one, but it's just a clarification
15 question. Just because I wanted to make sure
16 that I was hearing this correctly. In the
17 discussion about technology and the -- you
18 were -- Ms. Riedel, you were talking about, you
19 know, kind of, we don't want this to apply, you
20 know, to -- you know, all the -- to, you know,
21 YouTube and things that aren't, you know, that
22 some people might view as emerging and other

1 people wouldn't. But the -- in your proposed
2 definition, you go about that by just striking
3 the limitation of advanced or emerging and keep
4 technology. And then I'm looking at the
5 Defenders' suggestion for the definition, which
6 doesn't have the term technology. And so I'm
7 wondering whether there -- just kind of a --

8 So is the Department's position that
9 technology is a factor courts should be
10 considering in the sophistication and is the
11 Defenders' position that it's not necessarily,
12 or --

13 MS. RIEDEL: I don't think we're that
14 far apart on this and maybe the verbiage --

15 VICE CHAIR MATE: That's kind of my
16 question. Yeah.

17 MS. RIEDEL: -- suggests that it is. I
18 think the Department's position is new and
19 emergent technology creates more problems than
20 it solves. I saw in one of the submissions,
21 they said, new and emergent using like AI.
22 Every single time you hit in a Google search,

1 you are using AI. We -- if we use terms like
2 that, it becomes so inherently subjective, it's
3 not anchored on anything. The word
4 sophisticated, complex, those things can refer
5 back to the nature of the crime and the tools
6 that they use to commit that crime. Which in --
7 of course, can, may include technology, but we
8 don't talk about other things. We don't talk
9 about using false identities when that's
10 certainly a level of sophistication. And I
11 think the Department's position is it should be
12 more like that. A factor, but to put it front
13 and center creates confusion and can potentially
14 really narrow it or ridiculously expand it,
15 right? You can have some judges that say, oh,
16 use WhatsApp. This tells me technology and it
17 becomes de facto. We don't want that. And
18 then, you can have somebody else that says,
19 well, this isn't new and emergent because it's
20 been out for two years and they're an early
21 adopter and then, it becomes impossible to me.

22 MR. CARUSO: So mostly agree with Ms.

1 Riedel's comments. So we do agree that there
2 should not be a focus on advanced or emerging
3 technology, but we also believe that the word
4 "technology" should not appear in the specific
5 offense characteristics. Because I think that
6 will naturally drive judges to look at
7 technology. We don't think that should be a
8 focus, although it should be a circumstance, of
9 course, they could look at.

10 COMMISSIONER WONG: Thank you. That
11 was really helpful. And thanks for your
12 indulgence.

13 CHAIR REEVES: All right. Thank you
14 all --

15 COMMISSIONER WONG: Thank you.

16 CHAIR REEVES: -- so very much.

17 MR. CARUSO: Thank you.

18 CHAIR REEVES: Our eighth panel needs
19 no introduction, but I have to do it because
20 these -- they represent the perspectives of our
21 Advisory Groups. And I thank you all for being
22 with us again. Abraham Rein, who is -- who will

1 provide the perspective of the PAG, the
2 Practitioner Advisory Group. Joshua Luria again
3 from POAG, our Probation Advisory Group. Dr.
4 Carl Reddix with our Sentence Impact Advisory
5 Group. And Jami Johnson again. Boy, you're
6 doing triple or quadruple duty. Perspective of
7 our TIAG. And of course, Mr. Quasebarth for our
8 VRAG, our Victims' Rights Advisory Group.

9 Mr. Rein, could you get us started,
10 please?

11 MR. REIN: Sir, thank you again, Chair
12 Reeves and members of the Commission. It's a
13 pleasure to be back. I have two primary points
14 I want to make about a sophisticated means
15 proposal. Number one, I'll say briefly, it
16 seems to us at the PAG that Option 1 under the
17 proposal, adding an adjustment to Chapter III
18 that would be -- have to be analyzed in every
19 single case, you know, does this robbery, this
20 drug offense involve sophisticated means is
21 problematic for a variety of reasons. Not least
22 because sophisticated means is proven to be

1 problematic in a problematic concept in
2 practice. And that's true for a variety of
3 reasons as well, which I'll get to next. So
4 that's point number one. We think adding an
5 adjustment to Chapter III, it would be analyzed
6 in every case is a mistake.

7 My second point is more fundamental and
8 it has been covered, I think, to a great degree
9 already today, so I'm going to cut short a fair
10 amount of what I have written on the piece of
11 paper here. But to state it simply, our view is
12 that sophisticated means has proven in practice
13 to be unworkable and is not really tied to
14 culpability or at least independently of other
15 factors that are captured in other ways in the
16 guidelines.

17 So why do I say this? Again, I'll cut
18 this relatively short, but number one, it's
19 applied inconsistently for reasons that have
20 been -- that are -- my friends at the Federal
21 Defender have already discussed. And number
22 two, it's a highly abstract concept and think of

1 the distinction that Judge Chang made between
2 concrete facts and standards, which, you know,
3 highly abstract is not necessarily in its -- of
4 itself, always a problem. But in this
5 particular case, it's problematic because it's a
6 constantly moving target.

7 What's sophisticated today is likely to
8 be commonplace tomorrow for reasons, again, that
9 we've already talked about. The technology
10 examples that I think generally are -- seem to
11 be reaching an agreement on. Emerging
12 technology is probably not a workable basis to
13 ascribe culpability to a particular defendant,
14 just because it's relative to what is emerging
15 and what's emerging changes at any given
16 historical moment. And that's a difficult thing
17 to ask judges and litigants to keep track of
18 without some sort of expert-driven litigation in
19 every case.

20 And I would add that the language in
21 the proposed amendment doesn't really fix this
22 problem and that's not to fault the drafters,

1 but that's the -- it's a -- it's a feature of
2 the problem itself. It can't really be fixed.
3 The language -- the proposed language, as it has
4 to be, is phrased in terms of -- in relative
5 terms. More complex than typical or every day
6 or ordinary, but what's typical every day or
7 ordinary changes constantly. And again,
8 difficult to ask litigants and courts to stay on
9 top of that.

10 Sophisticated means has also been
11 subject to what I think of as conceptual
12 inflation over time and I'm not sure that this
13 has been covered to a great degree yet today,
14 but it's a pretty straightforward concept in
15 itself. You know, courts -- we have in our
16 written submission, examples of courts
17 finding -- forging documents using a PO box.
18 I've -- looking at, you know, case law last
19 night, found examples of courts finding -- using
20 an alias to be sophisticated means. Disguising
21 the origin of funds. It seems to us that it's
22 just not proven to be a workable concept,

1 because it's so abstract and it's gotten to the
2 point where it's essentially meaningless.

3 The thing that I think distinguishes
4 the PAG's view from what's already been
5 discussed today is -- or somewhat distinguishes
6 our view is here's what we think should be done
7 to address this issue. We think the abstract
8 concept of sophisticated means should just be
9 taken out of the guidelines and it should be
10 replaced with the concrete facts, to use Judge
11 Chang's concept, that are listed as examples in
12 the commentary. So we have concrete examples of
13 sophisticated means appearing in the commentary.
14 The commentary says sophisticated means and this
15 is true everywhere. Sophisticated means is used
16 in the existing guidelines.

17 Sophisticated means includes hiding
18 assets and transactions using fictitious
19 entities, corporate shells, and/or offshore
20 financial accounts. You know, if that's what
21 we're talking about when we're talking about
22 sophisticated means, let's specify that and

1 leave it at that, take away this difficult to
2 apply abstract concept that everyone seems to
3 agree is problematic in one way or another and
4 leave it at that. And with that, I will stop
5 and I welcome any questions. Thank you.

6 CHAIR REEVES: All right. Thank you.

7 Mr. Luria?

8 MR. LURIA: Thank you again for the
9 opportunity to give POAG's position. POAG is in
10 support of finding ways to improve the way
11 sophisticated means is captured within the
12 guidelines. We believe that it -- if either
13 option, one or two are adopted, both would
14 benefit from more definitions and examples.
15 While we are in favor of this change being made
16 through amending into Chapter III, there are
17 areas that could be better clarified.

18 For instance, there are certain terms
19 which could be interpreted narrowly or broadly.
20 The word typical can have alternate
21 interpretations, depending on the circumstances.
22 This can readily be seen in 2B1.1 cases. What

1 is typical in a wire fraud case is not always
2 typical in a bank fraud case, though both are
3 captured by 2B1.1. When we compare a case to
4 all 2B1.1 cases, it may be that certain types of
5 cases are naturally more sophisticated than a
6 typical 2B1.1 offense. For example, in general,
7 bank fraud cases are more complex than false
8 statement offenses. If a bank fraud case is
9 compared to all the cases that fall within
10 2B1.1, it may be that more bank fraud cases
11 receive the adjustment. However, if we compare
12 a bank fraud case against other similar bank
13 fraud cases, that narrower focus could impact
14 the outcome. It would help to provide guidance
15 on how broadly or narrowly this should be
16 interpreted.

17 While POAG is also supports an increase
18 based on advanced or emerging technologies, we
19 suggest not including the additional bracket
20 language. The terms routinely employed and
21 everyday user can have different baseline
22 interpretations depending on the type of offense

1 and even where the offense is committed. The
2 term everyday user has similar application
3 issues, as it is unclear whether it would be
4 interpreted broadly to be any person or narrowly
5 to be individuals who commit an offense of this
6 type.

7 Similarly, the other bracket that
8 includes more specialized, elaborate or unusual
9 way, and ordinary user also have definition
10 challenges that could lead to disparity. POAG
11 believes that it would be more appropriate to
12 use neither bracket language and simply stop at
13 emerging technologies, which in and of itself
14 has some surmountable challenges. Emerging
15 technologies is hard to define and we suggest
16 that the Commission clarify if the emerging
17 technology was based on the time of the offense
18 or the time of sentencing. Further, it is
19 difficult to pinpoint when technology has moved
20 from emerging to general adoption. For example,
21 at one point, email was emerging technology, but
22 over time, it became something everyone uses.

1 If we look back at the history of email, we may
2 be able to determine when it was no longer
3 emerging, but that timeline may differ between
4 districts and even within districts.

5 Pinpointing when a technology is no longer
6 emerging while you're living in that moment
7 would probably be extremely difficult.

8 POAG believes that examples in the
9 commentary may provide guidance on how to work
10 with this terminology. POAG supports Option 1.
11 Creating a new Chapter III adjustment that
12 replaces the existing specific offense
13 characteristic related to sophisticated means.
14 This change would allow for consideration of
15 sophisticated conduct in all Chapter II
16 offenses. There has been an increase in the use
17 of cryptocurrencies for illicit purposes, in the
18 use of the dark web for a variety of offenses,
19 not just fraud-related. 3D printers are
20 becoming more widely available. Artificial
21 intelligence is a cutting edge technology that
22 could be used for nefarious purposes. Who knows

1 how we might see these technologies used in the
2 future. What technologies may follow them? For
3 these reasons, it seems prudent to allow
4 sophisticated means to be considered in a
5 broader sample of cases. We also support this
6 being an offense-based standard and do not
7 support the bracketed mens rea language. The
8 mens rea standard can create application
9 problems that may be compounded by having
10 offense-based standard followed by a defendant-
11 based mens rea standard.

12 Lastly, we suggest retaining some of
13 the applicable examples from the current
14 sophisticated means commentary.

15 Thank you for the opportunity to share
16 our thoughts.

17 CHAIR REEVES: Thank you, Mr. Luria.
18 Dr. Reddix?

19 DR. REDDIX: Thank you, Chair.

20 CHAIR REEVES: Make sure your
21 microphone is on.

22 DR. REDDIX: Okay. Thank you, Chair

1 Reeves and thank you, commissioners, for we have
2 another opportunity to make the Sentence Impact
3 Advisory Group's positions clear.

4 The interpretation of sophisticated
5 means is ambiguous, difficult to apply, and
6 duplicative of other enhancements.

7 Unfortunately, this enhancement has the strong
8 potential to subject people to double
9 punishment. Commission has proposed redefining
10 and refining the definition to provide -- of
11 sophisticated means provide greater clarity and
12 consistency for federal judges. When
13 considering this sentencing enhancement, the
14 proposed -- SIAG specifically supports Option 2
15 of your proposed change. Expanding its
16 application by moving it to Chapter III as
17 contemplated in Option 1 would significantly
18 widen its reach and risk enhancing sentences in
19 a far greater number of cases. Such a shift
20 would extend the enhancement beyond its current
21 scope to create substantial concerns about over-
22 application.

1 In an era of rapidly evolving
2 technology, the Commission cannot and should not
3 attempt to catalog every technological tool or
4 method that could potentially qualify as
5 sophisticated. Rather, trial courts are best
6 positioned to assess whether a defendant's
7 conduct satisfies a proposed definition based on
8 the specific facts of each case. Critically,
9 the enhancement should focus on how the offense
10 was carried out or concealed, not merely its
11 size, duration, or its financial impact. This
12 determination should be guided by, number one,
13 meaningful complexity and its structural
14 operational or technological complexity. And
15 that's what should inform the analysis.

16 Secondly, heightened difficulty of
17 detection, conduct that goes beyond ordinary
18 concealment practices, such as the use of multi-
19 layered corporate or financial structures,
20 multiple intermediaries, or advanced
21 technological systems designed to frustrate
22 detection should inform the application of this

1 enhancement. To promote uniformity and avoid
2 over-application, the Commission should
3 expressly identify certain practices as standing
4 alone do not qualify as sophisticated means,
5 including routine use of computers, email,
6 widely available communication devices and
7 services such as WhatsApp or Signal and the use
8 of shell entities where their structure does not
9 materially increase complexity or materially
10 conceal the offense.

11 Judges should focus on the defendant's
12 specific conduct when determining whether the
13 enhancement applies. The inquiry should assess
14 the defendant's intentional involvement and role
15 relative to complexity of the charged offense.
16 This enhancement should not be imposed solely
17 because co-conspirators employ sophisticated
18 means. Absent the proof that the defendant
19 personally used, directed, or knowingly
20 exploited those methods should it only apply.

21 Finally, SIAG urges the Commission to
22 address the existing inconsistencies across

1 circuits. Federal judges should be provided
2 with a precise uniform and objective framework
3 to ensure consistent and fair application of the
4 sophisticated means enhancement nationwide.

5 Thank you.

6 CHAIR REEVES: Thank you, Dr. Reddix.

7 Ms. Johnson?

8 MS. JOHNSON: Thank you, Chair Reeves,
9 again.

10 CHAIR REEVES: Make sure your
11 microphone --

12 MS. JOHNSON: Yeah.

13 After lengthy discussion, TIAG elected
14 not to take a specific position on sophisticated
15 means. This is, again, one of the enhancements
16 that we do see in Indian country, but not with
17 great regularity, but we have nevertheless seen
18 it enough that we have observed, as have many
19 other people have spoken today, that it is
20 inconsistently applied and that there is a lack
21 of clarity as to when it is appropriate to apply
22 it.

1 And that is -- we had a lot of
2 discussion about that and I would like to
3 respond to actually Mr. Meisler's question from
4 a little bit earlier about the anchoring effect,
5 which I think animates our concerns about giving
6 examples. To provide a very concrete example of
7 what you were talking about, about old case law
8 being imported even after amendments, I actually
9 was working on a case recently where -- a
10 financial fraud case where a substantial amount
11 of money had been returned to victims prior to
12 the detection of the fraud. And prior to 2001,
13 when 2B1.1 and/or 2B2.1 and 2T1.1, that merger,
14 there was a body of case law in -- among certain
15 courts that said that loss amount in cases like
16 that could be determined by amount to put at
17 risk. So you got no credit for any money that
18 you return to people.

19 When those guidelines were merged, the
20 commentary very specifically says amounts put at
21 risk no longer has any application to loss
22 amount in these cases. Could not be clearer.

1 In my case, I had a prosecutor cite a case
2 saying, well, amounts put at risk are an
3 appropriate -- are appropriate for lost
4 calculations in this case. And I looked at the
5 case and it was pre-2001 and so I was like,
6 oops, the prosecutor messed up. I'm going to
7 cite this amendment, but, you know, I take the
8 case, I shepardize the case and I find out that
9 this amounts put at risk case has been cited by
10 courts in 2004, 2005, 2006 for the same
11 proposition well after the change has been made.

12 And I think that that's what's
13 animating a lot of our concerns about these
14 examples, is that things tend to creep into the
15 case law that then make it very hard for when
16 changes actually happen in technology and things
17 like that to get rid of them. So if you have
18 cases saying the use of email is a sophisticated
19 means, it's very hard to approach a judge and
20 say, look, email is not sophisticated. Like, I
21 know that we have 50 cases saying email's
22 sophisticated means and so we don't oppose a

1 sophisticated means enhancement, but we all
2 agreed that it needed to be something that made
3 it very clear that sophistication was to be
4 assessed relative to offenses occurring now of a
5 similar kind.

6 You know, with all respect to Mr. Luria
7 here, cryptocurrency, maybe that's a
8 sophisticated means now. Is that going to be a
9 sophisticated means in five years? I'm not
10 sure. And so if you write cryptocurrency into
11 the guidelines, are we going to be sitting here
12 in 10 years now talking about how 80 percent of
13 fraud defendants are getting this enhancement
14 because, you know, the word cryptocurrency is in
15 the guideline? And so TIAG really only supports
16 this amendment to the extent that it could be
17 made clear that it really needs to apply to
18 things that are the most sophisticated as, you
19 know, compared to similar crimes existing in the
20 United States today.

21 So thank you.

22 CHAIR REEVES: Thank you.

1 Mr. Quasebarth?

2 MR. QUASEBARTH: Thank you, Chair, and
3 good afternoon, everyone, again.

4 Let me admit -- just let me turn my
5 microphone on. Thank you.

6 CHAIR REEVES: Emerging technology.

7 MR. QUASEBARTH: I'm not 79 years old
8 like the DOJ attorney's father. But anyway, I
9 got my microphone on.

10 We're not experts in our group on
11 sophisticated means. Let me just admit that
12 right up front. In our work representing crime
13 victims in criminal cases, we're working on
14 their behalf. We don't litigate issues of
15 sophisticated means. But in our discussions, we
16 do have a sense of what may be valuable to crime
17 victims in this area. And in our public
18 comment, we cited to a number of cases from 2022
19 and 2024 where the federal courts have applied
20 sophisticated means. And I won't go through
21 those details because you've got it in the
22 public comment.

1 But the Victims' Rights Advisory Group
2 supports the Commission's Option 1, inclusion of
3 sophisticated means in Chapter III.

4 Technological developments make it far easier
5 for crimes to be committed, which harm victims
6 financially and in non-economic ways. And

7 Option 1 seems to us to be the more
8 comprehensive application of a sophisticated
9 means adjustment than the Option 2 proposal.

10 The technologies that allow criminal offenders
11 to be less identifiable directly affect crime
12 victims. And those changing technologies make
13 it more difficult for law enforcement to
14 investigate and prosecute those cases, making it
15 easier for victims to be harmed.

16 The broad scope of harmful criminal
17 activity using sophisticated means includes
18 broad and economic harms, but also applies to
19 other violent offenses as well that affect
20 victims. And that may include drug trafficking,
21 child pornography, sexual offenses, and
22 terrorism. It also allows crimes to be

1 committed in the United States, but it might be
2 based from international locations or movable
3 jurisdictions within the United States. So we
4 understand the importance of being able to
5 address sophisticated means and to try to
6 capture the new technologies that come out.

7 In our research, you know, we looked at
8 some cases, we read the responses to your
9 priorities since last week when we had public
10 comment available, as I have read and many other
11 members of our group were able to read some of
12 the public comment, including from the DOJ and
13 from POAG and I heard comments here today. We
14 ask the Commission to strongly consider the DOJ
15 recommendations here as to the appropriate
16 placement and the definition of sophisticated
17 needs.

18 Thank you.

19 CHAIR REEVES: All right.

20 Thank you all. Any questions from the
21 commissioners?

22 Yes. Commissioner Wong?

1 COMMISSIONER WONG: Thank you all for
2 being here again.

3 It seems to me like we're getting a lot
4 of commentary on various different strands, and
5 the way I'm thinking about this, there's, like,
6 a first order question, a second order question,
7 and a third order question.

8 The first order question is what
9 Commissioner -- Vice Chair Murray asked the last
10 panel, which is, if we take a step back here,
11 are some crimes more sophisticated than others?
12 And I think there was consensus at least on the
13 last panel that, yes, there are. Then I think
14 the second question is, so if we agree that
15 there are some crimes that are more
16 sophisticated than others, the sophisticated
17 means enhancement only applies to fraud tax and
18 money laundering. Do we think those are the
19 only three crimes that have a differentiation
20 between more sophisticated versions of those
21 crimes or not? And I think, from my perspective
22 and from the examples, some that we've seen,

1 that certainly, we would think, once we can see
2 that there are more sophisticated crimes, that
3 that can apply to violent crimes as well. Not
4 that -- that's certainly not limited to white
5 collar crimes, right? There can be more
6 sophisticated kidnapping schemes, burglary
7 schemes, child abuse, sex crimes and the like.

8 And then, it seems like then, if we
9 acknowledge it's not like there's something
10 specific and unique to these white collar crimes
11 where there's more -- somehow more diversity
12 there, so there needs to be a sophisticated
13 means differentiation within white collar. It's
14 not like all these other crimes, all the crimes
15 are routine, so there's no need to try and
16 differentiate. Then I think then we're left
17 with one strand of the commentary here, which
18 is, well, is there a way if we had our druthers
19 of stepping back here, thinking about ways to
20 differentiate, recognizing that sophistication
21 isn't limited to fraud, tax, and money
22 laundering? Are there ways to bring clarity to

1 that analysis?

2 And then, I think, really, what we're
3 left with is a very practical question, which
4 is, how would we provide clarity? Is it through
5 going through as many examples as we can? And
6 the more examples you can that eliminates
7 disparity because you've given examples, or is
8 there a trade-off? Because technology evolves.
9 You know, there are changing things in society
10 all the time and we prefer, because of that
11 trade-off, to go with a looser, more standard-
12 like discretionary judgment.

13 Because I look at even what the
14 Defender suggested for their language here.
15 They're saying -- they're suggesting -- I mean,
16 if you take the concrete examples of technology,
17 like, obviously, I think we recognize that's not
18 only used in fraud tax and money laundering.
19 But even if you take the more, you know, highly
20 complicated, entailing great skill, concealment,
21 difficulty in detecting and investigating, those
22 are clearly not just limited to fraud tax and

1 money laundering.

2 Is there a way that -- you know, as we
3 wrestle with that third question of how do
4 you -- is there a way to just provide a more
5 concrete, clear standard or build consensus on
6 where along that spectrum of examples versus
7 discretion is the optimal point? Like, would it
8 be something like just stressing that
9 sophisticated is this discretionary judgment,
10 but should be narrowly construed and reserved
11 for more extraordinary cases? You know, anyway,
12 I just want -- I feel like, in some ways, we're
13 getting lost in all three of those and if there
14 are practical thoughts on that last question on
15 where do we want to be along that spectrum of
16 clear examples versus a discretion or a
17 discretionary standard or, like, a narrowly
18 specified discretionary standard, where could we
19 constructively go? That would be helpful.

20 MR. LURIA: So I'll take a shot at it
21 if that's all right.

22 I think what I've heard a lot today and

1 seen a lot in the writing is a lot of concern
2 about what technology is. I think it's much
3 more -- technology's much more methodology to --
4 than it is a sophistication. It's a methodology
5 for doing something sophisticated and we're much
6 more in awe of the new technology because it --
7 because of its newness, it can kind of bamboozle
8 people more easily. You know, if I'm thinking
9 about a drug case that's sophisticated or a gun
10 case that's sophisticated, a lot of those are
11 going to be traps, things that are built into
12 items to conceal it. That is not new
13 technology. That's, like, something from the
14 15th century kind of technology. But it's the
15 use of that technology, that methodology to
16 engage in something that's concealing, that's
17 intended to conceal something or to hide
18 property or to -- you know, same thing with
19 layering. Layering is hiding property, hiding
20 my identity.

21 So maybe a -- an - a way to approach
22 this issue is not to focus on the technology

1 component as much as what are some of the things
2 that are intended to achieve by sophistication.
3 How -- you know, what am I trying to achieve?
4 And we're not focused on the methodology then,
5 but these are the things that sophistications
6 that -- is attempting to achieve and these are
7 some methodologies that might facilitate that.
8 These are symptoms of that sophistication, if
9 that helps.

10 COMMISSIONER WONG: Gun concealment.

11 MR. LURIA: Concealment. Certainly
12 concealing identity, concealing property,
13 creating layers, creating higher avenues to
14 victims, to allow for, you know, information to
15 go back and forth with them. You know, that
16 kind of access. So I mean, you're not really
17 focused on the technology so much as what are we
18 trying to accomplish in that sophisticated
19 component. And what are those methodologies
20 that might be brought to bear to make that
21 endeavor successful?

22 MR. REIN: If I may, Commissioner, just

1 to respond to your direct question, you know,
2 where on the spectrum do we want to be between
3 highly abstract and highly specific, I think the
4 PAG's view is more specific is better. You
5 know, all -- I -- everyone seems to agree or
6 maybe -- that's probably overstating it, but
7 many of us seem to agree that there is a -- one
8 of the issues with sophisticated means is it's
9 not applied consistently and it's very difficult
10 to apply because the -- what -- the standard is
11 something that's always going to be changing.
12 So the more specific we can be, the better in
13 terms of -- because that addresses that issue.
14 And as I said, the PAG's proposal is get rid of
15 the concept of sophisticated means altogether.
16 Just list the specific concrete examples that
17 are in the commentary. You know, we know
18 that -- we know that the Commission thinks those
19 examples are merit and enhancement. Let's just
20 limit it to those examples. That's easy to
21 apply.

22 The other sort of -- the other thought

1 I have about this discussion is we should
2 think -- I would recommend and this is coming
3 from me speaking for myself. I haven't spoken
4 to the other members of the PAG about this. But
5 I'd recommend thinking about what is it about
6 sophisticated means that we think makes it more
7 culpable, makes it merit greater punishment?
8 And to what extent are those things not already
9 captured in other places in the guidelines? So
10 okay, I've heard sophisticated means -- we need
11 to we need to address sophisticated means
12 because it's a way of increasing the harm.
13 Well, I think the level of harm is captured in
14 many places in the guidelines. We need to --
15 okay. That's one.

16 Another is we need to think about it
17 because it's a way of increasing the magnitude,
18 putting aside harm. I think the same thing is
19 true -- I think the magnitude of the offense is
20 captured in a variety of ways in the guidelines.
21 And another thing I've heard is we need to be --
22 we need to pay attention to sophisticated means

1 because it makes the offense harder to detect.
2 And on that one, my question is, number one, the
3 guidelines do capture obstructive conduct.
4 There's already a enhancement for obstructive
5 conduct.

6 And number two, if the goal is to
7 deter, I don't think that -- I just do not
8 believe -- and this is an empirical question and
9 I don't actually have the data to know the
10 answer to the empirical question, but I don't
11 believe that we will deter criminals from
12 committing crimes and we -- that we will cause
13 people to commit crimes in ways that are easier
14 to detect by punishing it more when they're
15 harder to detect. That's just another thought
16 to add to the to the conversation.

17 CHAIR REEVES: Anyone else wish to take
18 a stab at that? I saw --

19 DR. REDDIX: I debate it.

20 Yeah. I think the issue is that, from
21 a previously sentenced individual, that we've
22 got plenty ammunition in the guidelines for the

1 prosecutors to prosecute any and everything. So
2 the goal should be to simplify the process.
3 And, you know, we are the most incarcerated
4 population in the world. There's no other
5 country in the world that criminalizes more acts
6 than the United States of America. So the goal
7 should be not just -- I mean, obviously, you
8 want to punish criminals. I -- I'm not arguing
9 against that, but the goal should be to simplify
10 the process such that everybody understands the
11 consequences of an antisocial act and have some
12 easily emotionally acceptable manner to accept
13 the punishment for the accountability thereof.

14 And by increasing the number of
15 enhancements that the prosecutors have at their
16 disposal does not increase deterrence. It just
17 increases frustration amongst the folks who were
18 defendants. So I would just encourage the
19 Commission to be cognizant of the real world
20 consequences of adding, you know, tremendous
21 numbers of enhancements because you certainly
22 don't spend as much time on downward departures

1 as we do on enhancements.

2 CHAIR REEVES: Ms. Johnson, because you
3 put on your green light.

4 MS. JOHNSON: I did, and I think it was
5 the word "kidnapping" actually that made my ears
6 perk up. I see Mr. Voit will be addressing you
7 later. I think he may be one of the few other
8 people in the room who has a lot of experience
9 with a lot of kidnapping cases. I've done
10 probably, I don't know, 50, 75, which is
11 probably surprising to most people there. Most
12 people sitting in front of me who do not do
13 reservation cases and do not practice in
14 jurisdictions where there are reservations. For
15 the first 10 years that I practiced, kidnapping
16 was charged every single time. Basically anyone
17 was detained for any amount of time, even non-
18 physically, every -- almost every assault was a
19 kidnapping. Certainly, every robbery was a
20 kidnapping. Now, there has been recent case law
21 in the 9th and 10th Circuit that says that
22 actually, you have -- you do have to detain

1 somebody for more than, you know, ten seconds,
2 more than the one minute that it took to take
3 the property off of them.

4 But, you know, in my experience, if you
5 want to talk about what a more sophisticated
6 kidnapping is, it's anything that's more
7 sophisticated than detaining somebody for a
8 minute or two while you take their wallet off of
9 them or a minute or two while you know, punch
10 them in the face, anything more sophisticated
11 than that would be substantially more
12 sophisticated than what we were used to seeing.
13 Now, somebody sitting in another jurisdiction
14 probably has a different view of what a
15 sophisticated conducting looks like. And I
16 think that -- that's, you know, I think back to
17 what vice chair made -- the question that vice
18 chair made asked, which is that it -- this might
19 be a good reason to take a wholesale review of
20 the guidelines and to sort of go guideline by
21 guideline.

22 I say, well, what does a sophisticated

1 kidnapping actually look like? And does it
2 matter? Does it matter whether you're in
3 Arizona or New Jersey, and what are the
4 ancillary implications? I think that, you know,
5 as I said, you know, using a telephone in
6 connection of the kidnapping or would be
7 probably sophisticated if you're just trying to
8 compare it relative to the sort of baseline
9 kidnapping offense that I generally dealt with.
10 And so I think it is good to use some caution
11 because crime does look different nationwide and
12 it would be -- I think it's good to be cautious
13 about unattended ancillary effects.

14 CHAIR REEVES: Yes. Mr. Meisler?

15 COMMISSIONER MEISLER: Just one
16 question for Mr. Rein. I found the PAG's
17 proposal very interesting about trying to be
18 more -- more concrete and going with a kind of
19 conductor rules based proposal instead of a
20 standard. But I guess I'm wondering if we end
21 up at the same place. And so, the example you
22 gave before, which I thought was an interesting

1 one, was alias. If we cross out kind of
2 sophisticated means, and we're looking at the
3 concrete examples that are given in the guide --
4 the existing guideline, we get, you know,
5 conduct such as hiding assets or transactions.
6 So if you use an alias as the mechanism for
7 hiding the assets for opening an account, it's
8 not in your name.

9 Does the court just end up asking or
10 making the same kind of determination and get us
11 back to the same place?

12 MR. REIN: So I have a very sort of
13 text based answer to that question, which is
14 I -- the way I read the language is hiding
15 assets or transactions or both through the use
16 of fictitious entities, corporate shells, or
17 offshore financial accounts. So no, using an
18 alias would not qualify it. You have to be
19 hiding in assets, hiding assets or transactions
20 through the use of specific things that are
21 described here.

22 COMMISSIONER MEISLER: I appreciate

1 that. And I guess the broader point though ends
2 up being, do you think then the Commission would
3 get -- be asked from time to time, well, the
4 case law says this doesn't qualify because it's
5 not on the list, but it sure seems like it's
6 very similar to conduct that the Commission does
7 deem to warrant an enhancement, you should add
8 this on, we end up with kind of a long
9 laundering list of things?

10 MR. REIN: Do I think that could
11 happen? Yes. I think it would likely -- I
12 think people would likely ask the Commission to
13 add things to the list. I'm not sure that I
14 think it would be a good idea, but I think
15 there's definitely constituencies that would ask
16 for things to be added to the list. Yes.

17 CHAIR REEVES: I have a follow-up
18 question for you, Ms. Johnson. It seems that
19 TIAG supports the notion of talking about
20 exceptional cases, I think. And I think the
21 Defenders in there, things sort of identify sort
22 of said exceptional cases, but narrowly

1 construed -- I'm trying to grapple with how do
2 you identify those exceptional questions? And
3 I'm going to ask Mr. Luria to listen carefully
4 because I got to follow up to you as well.

5 I mean, how would you grapple with
6 that?

7 MS. JOHNSON: That's a very good
8 question. I think there are actually ways of
9 addressing it, and I think that they are,
10 unfortunately, you know, the ways that spring to
11 mind immediately are not ones that are
12 consistent with how things are typically done,
13 unfortunately, with respect to the sentencing
14 guidelines. For example, you know, I'm thinking
15 about the analogy in immigration court where
16 there was a vast disparity between asylum grant
17 rates between judges sitting in courtrooms and
18 next to each other with identical client
19 populations, and one of the things that was done
20 to address that disparity was publishing
21 statistics. You know, what's your grant rate?
22 What's the grant rate of the person next door to

1 you? If they're really far apart, maybe you all
2 need to have a discussion about, you know,
3 getting closer to the same page.

4 I think that information provided to
5 judges about how often they are applying this
6 versus how often other people are applying this,
7 I think that, if there's a general sense that an
8 exceptional case is something that is in the top
9 five percent or whatever number is reasonable,
10 that -- if someone is applying this at a far
11 greater rate than that, then maybe it's time to
12 reassess the definition of exceptional.

13 Now I don't -- the guidelines aren't
14 set up to do that kind of data measurement.
15 That's not -- so I'm -- you know, I'm just --
16 I'm talking in the abstract. I realize that --
17 that's -- that would be something very difficult
18 to do within the current framework of how we
19 work. But I did find that the data that was
20 presented earlier about differences in
21 jurisdiction very compelling. And I think that,
22 you know, we don't have -- or I don't think data

1 has been provided to us about judge by judge
2 variance, but I suspect just based on my own
3 personal practice that, if you took, you know,
4 Phoenix -- I have practiced in Phoenix. Phoenix
5 is a big city. I also practiced in San Diego.
6 San Diego is a big city, that there was a lot of
7 within district variance as well with all due
8 respect to the Department of Justice
9 representative. I don't think that the
10 difference can solely be explained by the fact
11 that well, in rural areas, you think see things
12 that are less sophisticated.

13 So I think that that data would be very
14 helpful and may help judges as well, because I
15 don't think that judges are trying to overly
16 sophisticated means. I think that everybody's
17 doing their best, but I think that people may
18 not have a realistic among all the other things
19 they're trying to do in the world, trying to get
20 a comprehensive view of what kidnapping offenses
21 look like nationwide is really a Herculean task.
22 It's probably unfair to the general judges. I'm

1 sorry. I hope -- it's the best I can do.

2 CHAIR REEVES: Well, and then, follow-
3 up. Mr. Luria, you know, I was sitting here
4 thinking about, you know, the persons who
5 grapple with whether or not how this PSR and
6 stuff might look like where this issue of
7 sophisticated means may first sort of come out.
8 How are probation officers, if you know, trained
9 on this? Because I can imagine that there may
10 be some officers or some people who might think
11 the use of encrypted communications, devices,
12 the Snapchats and the WhatsApp of the world and
13 see that as a little bit different from just
14 regular phones or a long time ago, the beepers.
15 I guess if you sort of transacted your drug
16 transactions by using a beeper, maybe that was
17 sophisticated means back then.

18 But when they shifted from that to
19 cellphones, and cellphones were not widely in
20 use, then that might have been now that we have
21 all that and you have people, the technology,
22 the Apples and I don't want to call anybody out,

1 but basically the companies pushing encrypted
2 devices. What does probation officers train --
3 I mean, are you training on that to sort of
4 suggest what might be sophisticated and what
5 might not be sophisticated?

6 MR. LURIA: So certainly, we look at a
7 lot of examples that you guys have put in there
8 and that's not it to say that it's simply, oh,
9 this matches that. It's does it have the same
10 objective. Does it have the same, you know,
11 effort being put into it? Does it -- is it
12 successful in terms of delaying things? Is it
13 successful in terms of hiding information? You
14 know, certainly there's a limit to the success.
15 They are before the court. So somewhere along
16 the way, it didn't work, but it may have worked
17 in terms of as Ms. Riedel pointed out extending
18 the length of the offense concealing the
19 identity of the people for a short time, giving
20 them greater access to a greater number of
21 victims or a greater amount of the assets of
22 those victims.

1 So I think that we're constantly
2 wrestling with this to -- within the current
3 structure, this newer structure. It has a very
4 similar component to it, but, you know, we do
5 look at case law. Would we go back and say
6 email? It might be a binding case. Would email
7 be sophisticated? I don't think that, you
8 know -- I don't think that we would because it's
9 become so commonplace. It's not a -- it doesn't
10 have that component to it. There are ways to
11 engage in sophisticated conduct even with old
12 technology. So there's still ways phishing
13 attempts. I don't know how to do a, you know,
14 phishing attack or a hacker or whatnot. I have
15 no hacker, you know, skill in that way. But it
16 certainly is, you know, email being weaponized
17 in some fashion to achieve a -- an illegal
18 purpose. You know what I mean?

19 Would I apply a phishing attack as a as
20 possibly sophisticated? Maybe. I'd look at it
21 at least, but you know -- but even that was my
22 example earlier email, it's commonplace. It's

1 everywhere. That doesn't necessarily mean that
2 it -- it's outside of the realm of being used in
3 a sophisticated way. I think that's kind of why
4 the smugglers hold concept is such an
5 interesting one because that's been around for
6 hundreds of years. And you still see it being
7 used. Why? Because it works. And so you know,
8 the degree of technology, the -- how cutting
9 edge it is only as interesting as the things
10 that are being done, what it's actually
11 attempting to achieve. That's the part that I
12 think is really the animus behind sophisticated
13 activity is certainly the technology is a
14 delivery mechanism for it. And we try to deal
15 with that, but we're really trying to get to
16 kind of what Commissioner Wong was talking
17 about, which is, you know, what's the underlying
18 core of this? Well, we're always trying to find
19 that, I think.

20 CHAIR REEVES: Yeah. Phishing example.
21 Would that get -- would that reach the
22 definition of Ms. Johnson and the Defenders'

1 exceptional sort of case the use of regular
2 technology to do exceptional things?

3 MR. LURIA: It's possible. It depends
4 on the phishing attack, honestly. And I imagine
5 that even within that, you're probably going to
6 see that in certain jurisdictions more often
7 than you would others. So you know, we had that
8 discussion earlier about one of the
9 jurisdictions where they just deal with violent
10 crime and so, if somebody were to be doing a
11 phishing attack from that jurisdiction, that
12 might -- even a simple one might come across as
13 very sophisticated, whereas somebody doing it in
14 another jurisdiction, that's a little bit more.
15 It's a little more commonplace that you might
16 have to elevate that. So there's always a bit
17 of a -- with that wrestling, there's always a
18 bit of a sliding scale with it, I think.

19 MR. QUASEBARTH: Chair Reeves, if I
20 could just jump in.

21 CHAIR REEVES: Yes, please.

22 MR. QUASEBARTH: Following up on what

1 Mr. Luria just said. You know, the means of
2 using sophisticated means in a place like South
3 Florida or New York City might be entirely
4 different than in a more rural area. And as far
5 as victims are concerned, victims could be more
6 susceptible because they have access to that
7 technology. They have email or they have
8 phones. So it's easier for them offender to get
9 in touch with people these days because of the
10 technology. And so there might be different
11 standards district to district on what is the
12 sophisticated means is, and I think that's what
13 Mr. Luria was just addressing that somebody in
14 rural area of your state could be more
15 susceptible than someone in New York City and
16 the complexity that sophisticated means might be
17 entirely different.

18 CHAIR REEVES: I'm just trying to find
19 out what's the rural area versus the rural area
20 in Mississippi to be 30 times as high. That's
21 all. This is just amazing to me learning that
22 statistic through this year today. Anything

1 else from this esteemed panel? Thank you all so
2 much. I think, now, we'll take a ten to 15
3 minute break, and we'll start back up with our
4 last panels.

5 Thank you so much.

6 (Whereupon, the above-entitled matter
7 went off the record at 3:48 p.m. and resumed at
8 4:07 p.m.)

9 CHAIR REEVES: We can see the light at
10 the end of the tunnel, not quite there yet, but
11 we'll start this next panel. It's our ninth
12 panel for today, and they will present the
13 stakeholder's perspective on our proposed
14 amendment on post-offense rehabilitation.

15 First, we have William Voit speaking on
16 behalf of the Department of Justice. Mr. Voit
17 is an assistant United States attorney and the
18 appellate chief for the District of Arizona.

19 Next, we will have Celeste Kinney. She'll
20 provide the Federal Defenders' perspective. Ms.
21 Kinney is an assistant federal defender with the
22 Federal Community Defender Office of the Eastern

1 District of Michigan.

2 Mr. Voit, start us off, sir.

3 MR. VOIT: Thank you, Chair Reeves, and
4 good afternoon, members of the Commission.
5 Thank you for the opportunity to speak with you
6 here today. My name is William Voit. I'm the
7 appellate chief in the District of Arizona. I
8 also previously served as criminal chief there
9 for a number of years. And I'm grateful for the
10 chance to share the Department view of the post-
11 offense rehabilitation proposal before you.

12 The Department agrees that sentencing
13 judges should consider and recognize when a
14 defendant's post-offense behavior indicates
15 genuine rehabilitation, but that is a highly
16 individualized inquiry. So too is the extent of
17 any downward adjustment that may be appropriate.
18 We foresee workability problems, disparities and
19 collateral consequences in the creation of a
20 rigid offense level adjustment. Genuine post-
21 offense rehabilitation is best addressed through
22 the tool sentencing judges are already using

1 effectively when cases call for it. Section
2 3553(a). We, therefore respectfully oppose the
3 proposal to create a new guideline. Section
4 3E1.2 and the related proposal to create a new
5 2B1.1(b)23. Our concerns fall in three
6 categories.

7 First, it is unnecessary. The proposed
8 3E1.2 overlaps with other guidelines. Most
9 notably three E 1.1 acceptance of responsibility
10 reduction, it would generate double counting
11 concerns without need. And as POAG has
12 explained, this reduction is operating as
13 intended and without issue. In those cases
14 where a defendant has demonstrated the kind of
15 post-offense rehabilitation that merits further
16 downward adjustments, sentencing judges are
17 already using the right tool to address it.
18 Judges know how to use variances. They have
19 historically done so. And they're doing so
20 effectively today.

21 As the Criminal Law Committee has
22 advised, courts generally have already been

1 rewarding extensive rehabilitation through
2 variances under Section 3553(a) where 3E1.1
3 doesn't fully capture them. This affords
4 discretion and flexibility. By contrast, a
5 mathematically rigid guidelines adjustment would
6 add an additional fact finding burden on judges,
7 probation officers, and litigants, and it would
8 create an unhelpful anchoring effect on this
9 highly individualized issue.

10 Second, the Department is concerned
11 about the proposal's inherent disparate impact.
12 Virtually everyone commenting on the proposal
13 has noted its serious risk of widening
14 disparities. That means the Commission should
15 pause, study data, and refine carefully before
16 proceeding. Everyone seems to agree that the
17 poorest defendants, non-citizen defendants, and
18 defendants in under-resourced districts and
19 localities will lack the same opportunities as
20 wealthy citizen defendants from urban and
21 suburban areas. Coming from the District of
22 Arizona, I can attest that the proposed

1 amendment risks treating a significant number of
2 the people that we prosecute differently given
3 the nature of our border crime and tribal crime
4 dockets.

5 Many defendants will lack access to the
6 kind of programming, resources, and
7 opportunities that the proposed amendment may
8 assume are abundant. By contrast, again, as
9 noted by POAG, such an amendment may become a
10 box checking exercise for affluent citizen
11 defendants in well-resourced areas. But
12 treatment resources are scarce. The unfortunate
13 effect of the amendment may be that those most
14 in need of resources may be less likely to get
15 them.

16 Third, the amendment is not workable.
17 One cannot mathematically define what genuine
18 sustained meaningful post-offense rehabilitation
19 looks like in a typical case, but failing to
20 define it or listing vague criteria would leave
21 judges with little guidance. And as noted by
22 the Victim Rights Advisory Group, the proposed

1 amendment would credit post-offense
2 rehabilitation, even to those defendants
3 committing the most violent crimes with the
4 highest probability of recidivism, yet there is
5 proposed no workable way to exclude them. Given
6 these concerns, we urge the Commission to
7 undertake a rigorous analysis of reliable data
8 before implementing an amendment. We're not
9 aware of data showing for instance, that federal
10 offenders who may take an anger management class
11 or do charity work or pay required restitution
12 are less likely to recidivate.

13 Finally, if the Commission is resolved
14 to implement such a guideline, we would suggest
15 it involves only a limited reduction, avoid
16 double counting, require behavior that is
17 extraordinary, rest on sustained demonstrated
18 rehabilitation not mere aspirations or
19 participation, and focus on behavior occurring
20 prior to the relevant investigation and
21 prosecution. In conclusion, and to be clear,
22 post-offense rehabilitation is a good thing.

1 It's something department attorneys rely on
2 every day in making their charging sentencing
3 and plea decisions we're required to under the
4 justice manual. And it's something that
5 sentencing judges should consider in reaching a
6 sentence. They're required to by 3553(a). But
7 creating a set guidelines, adjustment is not the
8 right tool. The department respectfully urges
9 the Commission to reject the proposals.

10 Thank you again for the opportunity to
11 speak with you here today, and I'm welcoming the
12 motions questions.

13 CHAIR REEVES: Thank you so much.

14 Ms. Kinney.

15 MS. KINNEY: Good afternoon. Thank you
16 for having me. When I explain the sentencing
17 guidelines to a client, I emphasize two things,
18 especially when their guideline range is high.
19 Number one, the guidelines are advisory, and
20 number two, the guidelines cannot numerically
21 capture the full context of the offense or all
22 that is you. This proposal makes sense. The

1 guidelines are a starting point and a person's
2 genuine efforts at rehabilitation should be
3 included in that calculation. Most of my
4 clients are from the same community as me. Some
5 of our experiences living in Detroit overlap.
6 The only difference between myself and most of
7 them is early and consistent access to
8 education, family support, and encouragement.

9 When Defenders look at our clients'
10 social histories, we see devastating
11 similarities. Most have experienced trauma in
12 the form of violence, neglect, or early
13 exposures or harmful influences. Research shows
14 that behavior change often after a significant
15 event and defenders can usually pinpoint the
16 exact moment our clients diverged and should
17 have been in some sort of supportive social
18 service.

19 When a former client of mine was just
20 ten years old, his older brother was viciously
21 murdered. Following this tragedy, his mother
22 became emotionally withdrawn, and my client was

1 not placed in any sort of counseling to process
2 such a profound loss. Unsurprisingly, he
3 started acting out in school. He started
4 misusing and later abusing substances to quiet
5 his grief with no meaningful therapeutic
6 intervention. He adopted habits and routines
7 that resulted in frequent interactions with law
8 enforcement and a staggeringly high guideline
9 range. While that client was ordered detained
10 in our case, he did not sit idly. Even though
11 his detention facility did not offer any
12 programming for him, he read books, he
13 maintained communication with his children, he
14 started having difficult conversations with his
15 mother about his brother's murder and the impact
16 it had on their family.

17 And at 36 years old, he started
18 mentoring younger people at his detention
19 facility to give them the reality check he did
20 not have at their age. He identified the static
21 moments in his life and how they shaped his
22 perspective and behavior, his brother's murder,

1 how young he was when it happened, and the
2 emotional neglect that followed, but he also
3 identified the dynamic factors in his life that
4 he could control and seek help for, his
5 substance abuse, his peer associations, his
6 employment goals, and his emotional regulation.
7 Participation in rehabilitative efforts advances
8 public safety and aligns the goals of sentencing
9 with empirical evidence. We routinely see in
10 cases across the country that sustained efforts
11 result in desistance from crime.

12 A former client who was charged with
13 money laundering, an offense that resulted from
14 her own financial struggles and her efforts to
15 provide for her children as a single mother, was
16 accepted into my district's restart program, a
17 diversionary program that routinely sees long
18 term success. She participated in financial
19 wellness classes. She took advantage of
20 cognitive behavioral therapy. She made timely
21 monthly payments towards her restitution. And
22 by the end of the program, she was able to

1 purchase her own home. Both of these clients
2 made real genuine efforts towards
3 rehabilitation, and they are not alone.

4 Why wouldn't the guidelines include
5 this information? The guidelines are not
6 lacking tools to address bad post-offense
7 behavior. What they currently lack is a clear
8 and defined way to recognize real positive
9 change. This amendment, particularly Option 1
10 with our suggested modifications, pushes the
11 guidelines in the right direction. It
12 acknowledges what social science has shown to be
13 true. People are dynamic, and they can and they
14 do change. When you set people up for success
15 and give them the necessary support, those
16 changes stick around, habits change, routines
17 change, peer associations change. And that's
18 all for the better.

19 It should be indisputable that a person
20 who finally overcomes years of substance abuse
21 or the crushing weight of financial insecurity
22 or attends therapy for the first time after

1 years of devastating life circumstances or takes
2 advantage of educational programming is not
3 deserving of the same starting point as a person
4 who sits idly. To conclude, Defenders are
5 excited about this proposed amendment, as should
6 every member of our judicial system, and we
7 wholeheartedly support its adoption with our
8 suggestions. Thank you.

9 CHAIR REEVES: Thank you, Ms. Kinney.
10 Any questions?

11 VC Restrepo.

12 VICE CHAIR RESTREPO: Thanks for being
13 here. Ms. Kinney, do you have any concerns or
14 do the Defenders have any concerns that, by
15 adopting this sort of an amendment, it would
16 kind of create an anchoring position for judges,
17 and the judges that may factor in this post-
18 offense rehabilitation under 355(a) would kind
19 of see it as a cap and they -- and -- have you
20 thought about that at all?

21 MS. KINNEY: We have thought about
22 that. And one of our suggestions is to add

1 language that emphasizes that judges can still
2 consider a further reduction under 3553(a). And
3 that is why we still have a two-step sentencing
4 process. And so you bring up a good point. The
5 guidelines do have an anchoring effect, and that
6 is why this amendment is so important because it
7 includes information that should give judges the
8 correct starting point to begin to determine how
9 much time in prison is actually justified and
10 how much time is appropriate to consider to take
11 a person away from their community, particularly
12 when it may interrupt the forward momentum that
13 they are on given their sustained rehabilitative
14 efforts. And so by including it into the
15 guidelines and also reminding judges that they
16 can vary further if they find it appropriate
17 under 3553(a), we think that addresses any
18 concern that the Commission may have.

19 VICE CHAIR RESTREPO: Mr. Voit makes a
20 good point suggesting that some folks in
21 underserviced areas or some folks that don't
22 have means to facilitate the rehabilitation

1 would be disadvantaged.

2 What's your perspective on that?

3 MS. KINNEY: That's a very real
4 concern, but that's why flexibility in drafting
5 is important to give judges the ability to
6 consider it holistically and to meet a person
7 where they are. A person like my client that I
8 mentioned in my opening, he took every effort
9 that he could to rehabilitate himself. And I
10 was very proud of him. I thought the sentencing
11 judge was very proud of him, and it should have
12 been included in his guideline range. And so,
13 that is a concern that we have, but our
14 suggested modifications, we think, addresses it
15 appropriately.

16 VICE CHAIR RESTREPO: Thank you.

17 CHAIR REEVES: VC Mate?

18 VICE CHAIR MATE: Good afternoon.

19 Thank you both for being here and for your
20 testimony today. I have a very kind of weedy
21 question for you, Ms. Kinney, about the proposed
22 amendment and then, your comments and the

1 comments of some others about it. Our proposed
2 amendment accounts for or recognizes financial
3 support to family members, and I think Defenders
4 and at least one other commenter raised that
5 there may be other types of family support
6 beyond financial that we should be accounting
7 for if we were to put something -- if, you
8 know -- if this were to go forward, is -- are
9 there specific kind of additional forms of
10 family support that should be accounted for in
11 anything we published?

12 MS. KINNEY: I think so. I think our
13 suggestion that moving the considerations to an
14 application note and emphasizing that they're
15 non-exhaustive would allow for judges to
16 consider the various ways that a that a person
17 is making rehabilitative efforts. So my client
18 that I mentioned in my opening, when I said that
19 he was maintaining communication with his
20 children, he wasn't just calling and saying,
21 hello. He was helping them with their homework
22 over the phone. He was helping them navigate

1 through things that they were going through in
2 school. And so he was still trying very hard to
3 be an active parent. And that is something that
4 would be borne out in our allocution and in
5 letters that would be submitted. And that is
6 certainly something that should be considered as
7 family support.

8 VICE CHAIR MATE: Thank you.

9 CHAIR REEVES: Mr. Meisler?

10 COMMISSIONER MEISLER: Hi. Thanks for
11 being here. Just for Ms. Kinney, I don't need
12 to nitpick -- I don't need to nitpick your word
13 choice, but I think that Defenders expressed a
14 preference for Option 1 if the Commission's
15 going to go forward with either of these with
16 amendments. But I noticed that when you were
17 speaking before you talked about the importance
18 of sustained rehabilitation and that stuck out
19 to me, because Option 2, of course leads with
20 the criterion the defendant must demonstrate a
21 sustained commitment to positive behavioral
22 change.

1 Do you have specific concerns about
2 requiring that level of commitment if the
3 Commission is going to go forward with a
4 adjustment here?

5 MS. KINNEY: Not necessarily, because
6 sustained just means that it can't be something
7 that you started to do three days before
8 sentencing. And so, I do think that you still
9 have to look at it holistically and look at the
10 options that are available to a particular
11 person and the efforts that they took and it
12 should be sustained. It should not be something
13 that is a fly by night attempt at trying to
14 lower your guideline range. It should be
15 something that you can show documented efforts
16 at. And so, we don't -- that's not a concern
17 that we have, but we do prefer Option 1 because
18 of the flexibility that it offers.

19 COMMISSIONER MEISLER: Thanks.

20 CHAIR REEVES: Mr. Voit, I have a
21 question for you. I think your testimony in the
22 writing talks about extraordinary efforts that a

1 person may take, and I guess some people have
2 access to more things than others to do things
3 that might be common might be extraordinary.
4 I'm just trying to figure out, on the grand
5 scheme of things, what is that DOJ is saying
6 might be extraordinary? Those types of things
7 that might be extraordinary?

8 MR. VOIT: Thank you, Chair Reeves.
9 And I think that the first point we would make
10 is, the difficulty in defining that is one of
11 the main reasons that we are recommending
12 against the proposal. It is -- I think that
13 many district judges will have different views
14 of what would be extraordinary. But it's hard
15 to see an amendment that would apply to what
16 defendants typically do. Sort of -- and I think
17 that Judge Chang spoke about this a little bit
18 this morning when he talked about, when you're
19 creating a guidelines adjustment, you want
20 something that's concrete that will
21 differentiate a discreet subgroup of defendants
22 from the whole.

1 And so, if you were to write something
2 that would apply to everybody, it wouldn't
3 really be an effective guidelines adjustment,
4 unless it was just sort of an across the board
5 reduction.

6 Another concern we have is related to
7 the anchoring effect. To the extent that this
8 is something that does apply to the typical
9 defendant and not to people who make
10 extraordinary efforts, then you're applying that
11 anchoring effect to the typical defendants, and
12 you're just exacerbating it more. So I think if
13 you were going to put forward an adjustment, you
14 should probably look at the types of cases in
15 which judges have granted variances based on
16 rehabilitation. To look at things that may have
17 come up in those cases if you can identify them.
18 To look at the extent and the and the
19 distribution of variances. So I think those are
20 things I would look at to try to answer the
21 question.

22 You have, in some cases looked at, you

1 know, for instance, is violating pretrial
2 release typical or extraordinary. It is
3 unusual. So just complying with terms of
4 pretrial or lease wouldn't really be something
5 that I think would categorize a defendant for
6 unusual extraordinary circumstances that merit a
7 downward adjustment.

8 CHAIR REEVES: I think Judge Chang
9 mentioned earlier -- he talked -- he gave the
10 example of somebody who had been morbidly
11 addicted to drugs for a long time and -- or
12 whatever, and post defense has now sought
13 treatment. And by the time of sentencing, you
14 know, months have gone by and that person has
15 done really well. Would that be extraordinary
16 for that individual?

17 MR. VOIT: I think, recognizing that
18 that will have to be a very individualized
19 question for that defendant. He may have had
20 opportunities before, and fallen off the
21 bandwagon, or he may not. He may have, you
22 know, a lot of other things in his background.

1 But sort of taking the question as a whole, I
2 think it very well could be. And there
3 absolutely have been cases in which judges have
4 granted, and I have agreed with, downward
5 variances for defendants who have really turned
6 their life around.

7 And often, we do see -- "often" maybe
8 too strong of a term, but there are cases where
9 we see that even before the government gets
10 involved and we have detected a crime. And
11 those are the cases where we have the strongest
12 confidence that a defendant has committed
13 himself to rehabilitation as a reduced risk of
14 recidivism, and would fall in the heartland of
15 when you would vary down from the guidelines.

16 CHAIR REEVES: And I heard you mention
17 at the outset, according to U.S. Attorney's
18 Manual or DOJ policy, those are -- some of those
19 factors might take it -- you might take into
20 consideration, even in your charging decisions,
21 or your plea negotiations. Because that's --
22 I'm hearing, that's pretty new to me, so --

1 MR. VOIT: Yeah. The principles of
2 federal prosecution is a very long part of the
3 justice manual, and it tells us to take a
4 holistic look at the crime, at the individual,
5 to be sure that we are picking the right
6 individual decisions for a case. Obviously we
7 are just making recommendations. You know, the
8 judge is the one who ultimately picks the
9 sentence. But it is something that we look at
10 when we decide what cases should be prosecuted
11 and how we should dispose of those cases.

12 I have had cases where I have
13 stipulated to a cap. The judge would have to
14 reject the plea agreement where the cap is below
15 the guidelines' range precisely because the
16 individual circumstances of the defendant are
17 such that that wouldn't be a fair range for him
18 to have. And those are some of my favorite
19 sentencings because everyone's on the same page.
20 So yes, it is absolutely something that we
21 consider.

22 CHAIR REEVES: Even in your charging

1 decisions? Because that's a question that I
2 have, because sometimes, we have very vulnerable
3 people who might get caught up in a conspiracy
4 to sell drugs, and their only role might be to
5 sell one dime bag of whatever or one small
6 portion to something to feed that person's
7 addiction. And that person is before me having
8 been charged with being in a whole conspiracy.
9 So your justice manual tells you to consider
10 that individual, who's addicted to drugs
11 possibly, and thinking about whether or not
12 she -- because that's what I've had before,
13 ought to be charged in an overall conspiracy.

14 MR. VOIT: And this might be an area
15 where, being from Arizona, I'm sort of at a
16 disadvantage, because the drugs we see are
17 usually, you know, gigantic loads of kilos and
18 things like that, so I don't think that we have
19 many cases like that where I come from. But
20 yeah, we are supposed to take a holistic look at
21 the defendant, at the crime, at our prosecution
22 priorities as they're provided from the justice

1 department and try to make a smart decision
2 about where we should spend those resources.

3 And there have certainly been cases,
4 particularly violent crime cases, where you
5 might be talking about, you know, an assault
6 that happened a long time ago. The victim has
7 made, you know, peace with it and is not seeking
8 anything. And the smart thing for society as a
9 whole is not to try to bring some high level
10 charge, or even a charge at all.

11 CHAIR REEVES: Thank you, Mr. Voit.

12 I think Commissioner Wong has
13 something.

14 COMMISSIONER WONG: I would go back to
15 what Vice Chair Restrepo had asked earlier about
16 whether there would be a cap based on -- I think
17 you were talking about -- well, I guess, any
18 option, but I wanted to start with Option 1. So
19 with Option 1, we provide these various -- as
20 published, various considerations. And I
21 certainly understand the response, but I'm
22 curious. Ms. Kinney, you had said, you know,

1 perhaps there was language that says, the
2 Options here are one, two, or three based on
3 these considerations. And I assume you all
4 would agree, any of those considerations could
5 also be considered at 3553 later on, right?

6 I understand the point that, if you did
7 three levels, that maybe there's some
8 clarification that at 3553 you could say, in
9 fact, I think it's worth even more. So we'd go
10 beyond that. But what if you had a judge -- I
11 just want to unpack this a little bit and test
12 that interaction between this guidelines
13 consideration and the 3553.

14 What if you had a judge that said,
15 based on factors one, two, and four, I'm going
16 to give a one level adjustment. And then in
17 3553 listed the exact same characteristics
18 again, one, two, and four, and gave an
19 additional reduction. Is that appropriate? Or
20 would that actually -- is that appropriate? Is
21 there any difference between someone who gave a
22 two here -- or if -- you know, if you haven't

1 gone the full maximum level reduction in your
2 guideline, can you, based on identical criteria,
3 go further in the 3553?

4 MR. VOIT: I hesitate to tell a judge
5 he couldn't go further if you wanted to. 3553
6 is very broad. And as the Supreme Court has
7 said many times, the things you can consider are
8 virtually unlimited in the sentencing. I think
9 there -- you know, getting to the conceptual,
10 there is a conceptual problem with saying, we
11 want you to look at these things for a guideline
12 reduction, and then look at the exact same thing
13 for a further variance.

14 And here I might add to what Judge
15 Chang said this morning about the anchoring
16 problem. Because anchoring is not a bug, it's a
17 feature of the guidelines. We want judges to
18 eliminate disparities to be saying, the
19 heartland of this factor is this type of
20 reduction. And given how individualized post-
21 offense rehabilitation is, or how any one of
22 these facts might end up being, I think it's

1 just hard to do. You can't mathematically, to
2 quantify that. So I think the judges should be
3 looking at it under 3553(a), and I think that is
4 the safest place for them to be looking at it.

5 COMMISSIONER WONG: And do you think --
6 and what would the difference be, sort of,
7 implication wise, on appeal for a situation
8 where the exact analysis occurred at the
9 guidelines level versus a 35, 53? Would there
10 be any distinction if the analysis was precisely
11 the same?

12 MR. VOIT: I mean, I think there might
13 be a -- and I guess here I'll confess by
14 ignorance for not having researched that
15 particular point. I mean, I know that, you
16 know, under the Kimbrough line of analysis that
17 judges can disagree with guidelines and say, I
18 think it may not go too far, or it may go far
19 enough. So I hesitate to say that there would
20 be an appellate problem from my perspective.
21 But, again, I haven't thought it through so I
22 won't take a firm position on it.

1 CHAIR REEVES: I was looking to see if
2 there was a follow up. I see Ms. Kinney wants
3 to jump in, and she was looking at you. Make
4 sure, I think. I think.

5 MS. KINNEY: Yes.

6 CHAIR REEVES: Okay.

7 MS. KINNEY: Well, that --

8 CHAIR REEVES: I bet.

9 MS. KINNEY: So it's an interesting
10 question. The Defenders are asking for a flat
11 four level reduction to avoid disparity in the
12 application of the reduction. We think a four
13 level reduction is appropriate because
14 acceptance of responsibility, you can get up to
15 three levels. And you cannot have exhibited any
16 rehabilitative effort to get the acceptance of
17 responsibility. As we see it's applied in 95
18 percent of cases, and usually that's just
19 because you've pled guilty. And so by getting a
20 four level reduction based on a judge's judgment
21 about whether that reduction is appropriate,
22 that judge could then go further, if they feel

1 that a person has exhibited more effort, or
2 more -- or have -- has accomplished more than
3 someone else who had just got the four level
4 reduction, they can go further under 3553(a).
5 And we think that that would be appropriate.

6 CHAIR REEVES: Any additional question
7 from this? No. Well, thank you all so much. I
8 appreciate your testimony.

9 Our closers. The 10th and final panel
10 will present our Advisory Groups' views on our
11 Proposed Amendment on Post-Offense
12 Rehabilitation. First, we will hear from David
13 Patton, Chair of our Practitioners Advisory
14 Group. Second, we will hear from Josh Luria,
15 Chair of our Probation Officers Advisory Group.
16 Then Adam Clausen, he'll speak to us on behalf
17 of the Sentence Impact Advisory Group. Jami
18 Johnson has returned once again. She will share
19 the perspective of our Tribal Issues Advisory
20 Group. And finally, we'll hear from Ms. Colleen
21 Clase, on behalf of the Victims' Rights Advisory
22 Group.

1 Mr. Patton?

2 MR. PATTON: Thank you, Chair Reeves.
3 I think the only thing worse than standing
4 between everyone and lunch is standing between
5 everyone and the end of the day, so --

6 CHAIR REEVES: We save the best for
7 last.

8 MR. PATTON: Yes. We are -- we at PAG
9 are grateful to the Commission for proposing the
10 Post-Offense Rehabilitation Amendment. I think
11 we all agree that rehabilitation is a core
12 traditional component of sentencing. It's part
13 of 3553(a). And yet, as central as it is to
14 sentencing considerations, is not reflected at
15 all in the guidelines. And it seems overdue to
16 think about it. Especially in the way that you
17 have.

18 To go back to Judge Chang earlier.
19 Talking about the guidelines' role in being able
20 to point to some more concrete things, most
21 considerations of rehabilitation are sort of
22 forward looking, and aspirational in some sense.

1 What sentence will promote rehabilitative goals?
2 Whereas post-offense rehabilitation, concrete
3 things that have done both -- that have been
4 accomplished, or attempted, or efforts made pre-
5 sentencing, can be a lot more informative. Both
6 about what may lie ahead in terms of further
7 rehabilitation, and what's just. And so we
8 certainly favor the proposal.

9 There are four general things that we
10 would ask you to keep in mind as you think about
11 fashioning the actual language. One is that --
12 and you've already heard about this. That you
13 consider the fact that there are a variety of
14 opportunities for differently situated people to
15 demonstrate rehabilitation. People who are
16 detained are differently situated from people
17 who are not.

18 Within the detained population, there
19 are widely disparate opportunities. Where I
20 practice primarily in the Southern District of
21 New York, there are no fewer than five places
22 that our clients are held. One federal

1 detention center, and at least four local jails
2 in two different states. And so I think some
3 language in the commentary that judges should
4 view post-offense rehabilitation through the
5 lens of, what opportunities were available to
6 the person and what efforts did they make, with
7 an emphasis on efforts.

8 Second, to tie into that efforts piece,
9 we do think that any sort of language along the
10 lines of sustained, or completed, or successful
11 are problematic. Many efforts, genuine efforts,
12 at rehabilitation involve failure. Most people
13 who eventually kick drug habits have a long
14 history of failed efforts at rehabilitation, but
15 that doesn't mean it shouldn't be encouraged in
16 the sort of concrete ways that you're proposing
17 here. And there are other examples.

18 Third, we'd suggest that voluntariness
19 not be a part of any of the language. We
20 often -- we'll ask for court ordered
21 intervention precisely so that probation can get
22 somebody into a particular program. There may

1 be financial aspects to it. There may be even
2 just space constraints, or programs willing, or
3 unwilling to take somebody. And to have the
4 court order and probation behind those efforts
5 can make a big difference.

6 And finally, and this --

7 CHAIR REEVES: This goes to what?

8 MR. PATTON: What we have proposed in
9 our written comments, we'd suggest sort of a
10 blended version of Options 1 and 2, that have
11 sort of broader standard in place with -- but
12 with specific illustrative examples in the
13 application notes. And it -- and making it
14 clear that those are not exclusive. That they
15 are in fact illustrative. And I look forward to
16 answering your questions.

17 CHAIR REEVES: Thank you.

18 Mr. Luria?

19 MR. LURIA: Thank you again for the
20 opportunity to share POAG's views. We
21 appreciate the proposal's goals of incentivizing
22 and rewarding positive conduct and

1 rehabilitation efforts taken by defendants prior
2 to sentencing. However, POAG is unanimously
3 opposed to this amendment as written. We're
4 concerned that both amendment options would
5 increase disparity in sentencing, negatively
6 impact victims, and have unintended consequences
7 resulting in litigation and delays in
8 sentencing.

9 We believe there would be considerable
10 disparities between how this Amendment would
11 impact those who are detained, and those granted
12 pretrial release. Detained defendants do not
13 have access to the same treatment, occupational
14 opportunities, or educational resources as those
15 who are on pretrial release. The disparity of
16 opportunity is further widened when considering
17 regional differences. Resource availability
18 between rural and urban areas vary. Even if
19 resources are available, obtaining records from
20 local detention facilities can be extremely
21 challenging with varied outcomes.

22 While those who are on pretrial release

1 have more opportunities to demonstrate their
2 post-offense rehabilitation, there is also the
3 potential for disparity amongst them. For
4 instance, financially stable defendants are in a
5 position to pay restitution prior to sentencing,
6 or pay for private substance abuse, or mental
7 health treatment. We are concerned about
8 voluntariness as a metric, because those who are
9 indigent do not have money to make restitution
10 payments or to spend on treatment. When
11 treatment is made part of their conditions of
12 release, those defendants have access to the
13 federal resources for the treatment. Once it is
14 a condition placed upon them by the court it's
15 arguably no longer voluntary, even if they
16 initially requested it as a condition.

17 Successful post-offense rehabilitation
18 can be difficult to measure. For example, a
19 lifelong drug user who is able to stay sober for
20 four months, the relapses may look like failure
21 but it also -- but could also be the longest
22 that defendant has been sober in their adult

1 life. Which is success. There are many
2 circumstances wherein a defendant may make
3 substantial progress in one area and demonstrate
4 substantial regression in another. We are
5 uncertain how to balance that under the
6 structure.

7 We believe this amendment may lead to
8 unintended consequences. We have repeatedly
9 seen circumstances wherein defendants who want
10 to participate in the DOP's residential drug
11 abuse program have bolstered or embellished
12 their substance abuse history in order to
13 qualify for the program and the custodial
14 reductions benefits that result. It would not
15 be surprising for a similar outcome to occur
16 with this reduction.

17 The amendment could lead to defendant's
18 requesting conditions that they do not need,
19 wasting resources and setting them up for
20 failure. POAG is concerned that if we establish
21 a system based on checking boxes to get a
22 reduction, defendants will find a way to check

1 as many boxes as they can to get the reduction.
2 We do not want defendants to just check boxes.
3 We want them to take sincere steps towards
4 meaningful change. Option 2 seems like less a
5 box checking list. Even though POAG, again,
6 does not think either option is ready as
7 written.

8 We are also concerned about the
9 interplay this reduction will have with
10 acceptance of responsibility and obstruction.
11 Acceptance and obstruction have a complicated
12 interplay with courts having to balance those
13 two dynamics across a variety of fact patterns.
14 Post-offense rehabilitation does not have any
15 guidance on how to operate within those
16 dynamics, which it will almost certainly brush
17 up against. For example, if a defendant has
18 engaged in treatment and engaged in community
19 service, but at the time of sentencing recounts
20 their admission of guilt, do they still get the
21 post-offense rehabilitation reduction? It seems
22 like if they're not accepting responsibility,

1 they're likely not rehabilitated. If the
2 defendant absconds from pretrial supervision
3 missing a hearing, but is later found to have
4 checked themselves into a substance abuse
5 treatment program where they made progress, does
6 the post-offense rehabilitation reduction apply.

7 Certainly the defendant made progress
8 in their sobriety but engage in obstructive
9 conduct, violating the instructions of the
10 court. A description of the interplay between
11 acceptance, obstruction, and post-offense
12 rehabilitation is pivotal to clear
13 implementation in a change like this -- in a
14 change. POAG also recommends that the
15 stakeholders be given an opportunity in another
16 amendment cycle to provide feedback on how that
17 interplay looks due to its complexity.

18 Lastly, we have observed that
19 individuals who make substantial post-conviction
20 effort often get substantial recognition from
21 the course through variances. There is a
22 concern that if the Commission anchors this

1 reduction to a set level, it may reduce the
2 court's interest in granting a greater reduction
3 for those worthy defendants. POAG appreciates
4 the Commission's commitment to incentivizing
5 post-offense rehabilitation.

6 Thank you for the opportunity to share
7 our views on this.

8 CHAIR REEVES: Thank you, Mr. Luria.
9 Mr. Clausen?

10 MR. CLAUSEN: Thank you, Chair Reeves,
11 commissioners. Again, I appreciate the
12 opportunity to share SIAG's unique perspective
13 on this.

14 What SIAG brings to this conversation
15 is not theory, it's our lived experience. Many
16 of us have served federal time. Many of us have
17 been family members carrying the weight of these
18 sentences, right alongside someone we love. We
19 know what it looks like when a person is truly
20 changing, and we also know what it looks like
21 when the system unintentionally makes it more
22 difficult for individuals to change. Especially

1 when people have fewer resources. SIAG strongly
2 supports recognizing post-offense
3 rehabilitation, and we support it for a simple
4 reason. Because ultimately, it serves public
5 safety.

6 Most people who are sentenced in
7 federal court are going to return home. The
8 question is not whether they will, it's how they
9 will. And a system is better for everyone when
10 it rewards a level of accountability, treatment,
11 education, and real behavioral change beginning
12 before sentencing, not just after.

13 SAIG prefers Option 1, because it's
14 clearer and more objective. If this adjustment
15 is going to work, it has to be applied
16 consistently, not unevenly. Option 2 asks the
17 court to decide, what's sustained and typical.
18 Those words may sound reasonable, but in
19 practice, they can mean very different things in
20 different courtrooms. And that kind of
21 subjectivity can turn good policy into an
22 inconsistent one.

1 Now, here's the part that SIAG wants to
2 say as plainly as possible. Access is not
3 equal. And I think we've heard much of that
4 statement from a number of people already. And
5 if you don't put a system and a structure in
6 place, and create incentives, then there never
7 will be that reason to change. I believe this
8 is a strong first step towards creating that
9 structure. These incentives need to be there to
10 let people know that there is a reason for them
11 to begin investing in themselves. The
12 alternative is what we currently have. There's
13 very little incentive on the front end. People
14 end up biding their time, simply waiting to get
15 through the system. The investment in
16 themselves is more or less an afterthought.

17 And it would be a tragedy, because
18 there are some people who are working the
19 hardest towards change but they have the least
20 amount of options. The longest wait list, the
21 most limitations, and the least amount of
22 support. So SIAG is asking for some guardrails

1 here. Not to complicate the guideline, but to
2 make it fair.

3 First, courts should evaluate
4 rehabilitation in light of just what's
5 realistically available. Second, they should
6 recognize that there's multiple pathways to
7 rehabilitation. It's not one program or one
8 court mandated form of treatment. Third, there
9 should be simple standardized way to document
10 that rehabilitation to a rehabilitative record
11 that the court can look at. And finally, when
12 it's needed, courts should request institutional
13 verification of program availability so that a
14 lack of access is never confused with a lack of
15 commitment. Because currently that's the issue.

16 As was previously stated, programs that
17 are in place are very limited. And individuals
18 who are looking to invest in themselves will
19 basically say whatever is needed to gain access
20 to that program. Not necessarily as they are
21 trying to gain the system, they're just trying
22 to get to the front of the line because the

1 resources are so limited. And if there were
2 additional means for them to achieve the same
3 result to be recognized for the investments that
4 they're making in themselves, then they would
5 not need to take those steps.

6 In closing, I'll speak from my lived
7 experience. People can change. I've seen it.
8 I've lived it. But it's not automatic. It
9 takes work. It takes structure, accountability,
10 and a reason to keep going. When the system
11 communicates that rehabilitation, even before
12 sentencing matters, it creates a sense of
13 urgency and gives people a sense of direction.
14 It gives people a clear incentive to do the
15 hardest part of transformation when it matters
16 most. And it sends a message that strengthens
17 legitimacy. That the system can be firm, and
18 still recognize what redemption looks like when
19 it's real. And this is how we get better, safer
20 outcomes.

21 Thank you.

22 CHAIR REEVES: Thank you, Mr. Clausen.

1 Ms. Johnson?

2 MS. JOHNSON: Thank you. Thank you
3 again for the opportunity to address the
4 Commission on behalf of TIAG. TIAG strongly
5 supports the proposal to add a -- an adjustment
6 for -- post-offense rehabilitation. And to
7 explain why, I want to talk about a documentary
8 that I recently watched.

9 It's on HBO. If you have HBO, you can
10 watch it. It's called Class 57. And it tracks
11 the 57th class of police cadets -- police
12 recruits for the Navajo Nation. The Navajo
13 Nation -- it was about three years ago, needs
14 500 police officers to perform basic policing
15 services, and at the time they had 180. So
16 their goal was to get to 500 within five years.

17 And in order to accomplish this goal
18 they needed to -- they had classes of about 30
19 recruits, and they were looking for an 80
20 percent retention rate. An 80 percent success
21 rate. And their success rate was averaging
22 about 50 percent. So this documentary tracks

1 this 57th class of recruits. It starts off with
2 28 members.

3 And on their first day, they're put
4 through a sort of military style bootcamp.
5 There's yelling. There's, you know, throwing
6 things. The kind of stuff we're familiar with
7 from the movies. The head trainer -- all the
8 cadets are Navajo. The head trainer is not
9 Navajo. I don't -- he's not native. He's not
10 from the community. He formerly was a police
11 officer in the state of Arizona who moved to the
12 Navajo Nation to work on -- to work for their
13 police department.

14 By the end of the documentary there are
15 only 10 cadets out of 28. And this sergeant who
16 is not from the community decides that he's
17 going to talk to one of the recruits about why
18 the attrition rate is so bad. And he's talking
19 to one of the cadets that made it, one of the 10
20 who succeeded. The cadet is very uncomfortable
21 with the conversation. And he said, well, to
22 tell you the truth, the majority of the people

1 who left, they left because of how they were
2 being beat down every day. And the Sergeant
3 says to him, well, do you think that the people
4 who left, do you think that they met the
5 standard? Again a very uncomfortable recruit
6 says, I think so. I think that the majority of
7 the people who left would've been outstanding
8 police officers.

9 And he said, well, you have to
10 understand stand, the majority of these
11 recruits, they've grown up only hearing that
12 they are pieces of trash and that they're
13 nothing. And then they come here and it's more
14 of the same. And they feel like they're working
15 hard, and they feel like there's nothing to show
16 for it, and so they leave.

17 And this is life on a reservation. And
18 these are police cadets. These are not people
19 who have drug and alcohol problems. They're not
20 people who've been involved in the criminal
21 system. But this is still the message that they
22 have received. And this is very common message

1 sent throughout Indian country. And the feeling
2 that you're working really hard, and that you
3 have nothing to show for it, and that your hard
4 work doesn't matter, is -- presents real
5 obstacles to success.

6 This amendment is not just about
7 rewarding and incentivizing good behavior. It's
8 not for TIAG. It is not just about being nice
9 to defendants, or giving people adjustments
10 under the 3553(a) factors, it is about showing
11 people in a concrete way that their hard work
12 will matter. Which is something that for many
13 people who grew up on reservations is something
14 that they have never experienced in their entire
15 lives.

16 And I sit down with native clients all
17 the time, and I go over the guidelines. I'm
18 like, here are your guidelines. And if you're
19 on pretrial release or even if you're in
20 custody, if you do everything right, these are
21 still your guidelines. Now if you mess up,
22 things will get worse. And they could get a lot

1 worse if you mess up a lot. That's all stick
2 and no carrot. All they're hearing is that if
3 you just, you know, do your best, nothing is
4 going to change for you. And I'll say, well,
5 we'll try to make arguments, we'll do our best,
6 but I can't really promise anything.

7 TIAG feels really strongly that the
8 guidelines need to incorporate a carrot. That
9 particularly native defendants need to be sent a
10 message that if they work hard, if they work on
11 themselves, that there is something that they
12 will have to show for it. Not just on path the
13 defendants themselves, but because it promotes
14 community safety by promoting rehabilitation,
15 and promoting success. So we think it's the
16 right answer for everybody and we strongly
17 support the Amendment.

18 Thank you.

19 CHAIR REEVES: Thank you.

20 Ms. Clase?

21 MS. CLASE: Thank you. Thank you,
22 Chairman Reeves, members of the Commission.

1 The Victims' Rights Advisory Group
2 strongly opposes a post-offense rehabilitation
3 adjustment. The amendment doesn't consider the
4 impact of criminal offenses on victims. The
5 traumatic effects of crime are long-lasting.
6 Criminal conduct, particularly in the case of
7 violent offenses, inflicts significant
8 emotional, physical, and financial harm that
9 extends not just beyond the initial
10 victimization, but well beyond the victim's
11 involvement in the criminal justice process.
12 Victims often endure persistent anxiety, loss of
13 personal safety, and disruption to their daily
14 lives. The harm caused by a criminal defendant
15 does not dissipate because the offender later
16 engages in rehabilitative efforts. Granting a
17 sentence reduction for post-offense
18 rehabilitation creates a fundamental imbalance
19 where victims may have -- may not have felt
20 heard, have not been made whole, and continue to
21 experience trauma.

22 Courts may already consider acceptance

1 of responsibility and substantial assistance to
2 authorities. Further reduction is unnecessary.
3 Congress did not intend to reward an offender's
4 personal improvement. Rather sentencing should
5 reflect the purposes set forth in 18 USC S 3553.
6 The proposed amendment undermines the goals of
7 punishment and does not recognize that
8 rehabilitation is already a component of
9 incarceration. And in cases of incarceration or
10 pre-trial release, good behavior is already
11 expected.

12 Another reason our group opposes this
13 amendment is that it invites strategic offender
14 behavior. It raises serious questions about
15 whether purported post-offense rehabilitation is
16 genuine or undertaken solely to influence the
17 outcome at sentencing. This is particularly
18 concerning in cases where an offender is facing
19 a lengthy prison sentence. Option 1, Subsection
20 C is especially concerning to the Victims'
21 Rights Advisory Group. In addition to rewarding
22 strategic behavior, it risks penalizing late

1 reports or delayed disclosures, which would harm
2 victims of sexual offenses.

3 The last reason is that the Victims'
4 Rights Advisory Group is concerned that it
5 creates a substantial risk of unwarranted
6 sentencing disparities. Not all defendants have
7 equal access to therapy or treatment programs.
8 Wealthier defendants may be better positioned to
9 appear rehabilitated more so than an indigent
10 defendant would. And this again would directly
11 conflict with a -- the mandate to avoid
12 unwarranted disparities.

13 If this Commission adopts the amendment
14 despite VRAG's objections, VRAG does have some
15 input and would ask that sentencing courts be
16 required to consider victim -- victim's rights,
17 victim input, and victim objections; that
18 violent offenses such as homicide and sexual
19 offenses are categorically excluded from
20 eligibility; that any offender-initiated contact
21 with a victim is expressly prohibited. We would
22 ask the Commission to also adopt clear and

1 narrowly-tailored definitions of what
2 constitutes a benefit to a victim. And victim
3 consent should be required in all circumstances.

4 We would also ask that victims not be
5 compelled to participate in rehabilitative
6 efforts that serve an offender's pursuit of a
7 sentence reduction. No victim should be
8 required to receive an apology that they don't
9 want to receive or to engage in a dialogue with
10 an offender. We would ask that if this
11 Commission moves forward with this amendment,
12 that it is consistent with the victims' rights
13 under Subsection A1 and Subsection A8 of the
14 CVRA, which is to -- the victims are to be
15 reasonably protected from the accused and to be
16 treated with fairness and with respect for a
17 victim's dignity and privacy. Thank you.

18 CHAIR REEVES: Thank you, Ms. Clase.

19 Questions?

20 Yes, VC Murray?

21 VICE CHAIR MURRAY: I have a question
22 for Mr. Clausen. You yourself are someone who

1 demonstrated remarkable rehabilitation and
2 you've worked with thousands of defendants. I
3 guess I'm interested in hearing your thoughts on
4 the point Ms. Johnson made. Like, to me there
5 are -- just cards on the table, I worry about
6 the anchoring effect. And I think that this is
7 a very hard thing to put on paper in a way that
8 is, like -- is quantifiable. And I think those
9 considerations really give me pause, but this
10 idea of a carrot of something that could be
11 something people could hold onto and that could
12 be transformative for them is very appealing to
13 me. And I wonder whether it's something you've
14 seen in practice or what you think based on
15 your -- what -- based on your experiences.

16 MR. CLAUSEN: Thank you for the
17 question. Two parts to this. Ms. Johnson did a
18 masterful job describing the need, the reason
19 why we -- why this is so important. And it's
20 not just tribal communities. These are the
21 majority of individuals who come through our
22 criminal justice system. Many of them come from

1 underserved communities where there is limited
2 access. I can say from someone who was granted
3 relief due to extraordinary and compelling
4 reasons. So I heard that term mentioned a
5 couple times previously. My concern even while
6 I was going through my own legal process,
7 knowing the record that I had spent 20 years to
8 accumulate was not just extraordinary, it was
9 rare. Just incredibly hard to be able to do
10 that because the system is not set up currently
11 to track those achievements, those personal
12 investments. So that shouldn't stop us from
13 creating the opportunity. And that's why my
14 suggestion was that we focus on putting a
15 framework in place and trust judges to have the
16 wisdom to see whether individuals are making
17 true investments in themselves, even at that
18 early stage.

19 And why would we not create an
20 incentive for people to begin that work? And
21 I'm going to be perfectly frank with you that I
22 actively recruited people as you would into a

1 gang to be a part of programming, right? And --
2 because I wanted to see people transform their
3 lives. And I used whatever incentive I could.
4 I'd tell guys, hey, if you get in this program,
5 you might get a transfer to a better facility.
6 And although they came into those programs for
7 whatever means initially, whatever incentive
8 there was, that was the key to them beginning
9 that path, that journey of personal
10 transformation. Why would we not make that
11 opportunity available, right? Just because it's
12 difficult?

13 So yes, there's some challenges in
14 creating a uniform way to make this easily
15 accessible. But I trust that our judges in a --
16 are in a good position to be able to assess, you
17 know, what an individual is engaged in and
18 whether or not it's genuine.

19 CHAIR REEVES: VC Mate?

20 VICE CHAIR MATE: Thank you all very
21 much for sticking around to the bitter end. We
22 appreciate it. This is a much more kind of

1 technical question, but several commenters have
2 encouraged us to provide a bunch of examples of
3 what this kind of conduct might look like that
4 we're talking -- this post-offense
5 rehabilitative conduct. And also make clear
6 that whatever list we provide isn't exclusive,
7 that it's a list of examples. And then I know
8 at least PAG and the Defenders have suggested we
9 put that in a commentary as opposed to the
10 guidelines -- which we almost never hear
11 anymore, put it in commentary.

12 I was curious about TIAG's position on
13 how, you know, if we were doing this list of
14 examples, you know, and SIAG has, you know,
15 thoughts on this too, is that something that's
16 better in a guideline, better in commentary,
17 whether you have any thoughts on that very weedy
18 aspect of it?

19 MS. CLASE: I think that we were very
20 against commentary for a while because of
21 concerns about -- it was (inaudible) 9th
22 Circuit, I'm not sure in every circuit. I think

1 that there have been developments in case law
2 that have made it less concerning. I think that
3 SIAG is -- well, we didn't discuss this, right?
4 But I think that, knowing what we did talk
5 about, is less concerned about putting -- would
6 be less concerned of putting this language in
7 the commentary, because it's really just
8 guidance about what post-offense rehabilitation
9 might look like and not an exhaustive list that
10 is fixed in stone.

11 And we are very concerned about an
12 exhaustive list that is fixed in stone, because
13 for example, and we provided this example in our
14 letter, Navajo Peacemaking. Very, very powerful
15 for people from that cultural tradition who
16 engage in it. That's not going to be on the
17 list. And we don't want people who are from
18 different cultural backgrounds, who have
19 different cultural traditions, excluded from
20 these benefits because the guidelines don't
21 account for their own particular cultural
22 tradition. And I imagine there are a lot of

1 other cultures -- subcultures in the United
2 States where there could be similar issues. So
3 I don't think that we would object to putting it
4 in the commentary language, because I think it's
5 really just to illustrate for courts the kinds
6 of things that might take -- that they might
7 need to take into account. And I think at the
8 end of the day, it becomes up to the litigants
9 themselves to explain the relevance for -- in
10 cases where it's not obvious, some of them are
11 always going to be obvious, drug and alcohol
12 rehabilitation, where there's some sort of niche
13 rehabilitation that's particular to their
14 culture, to explain and make that clear to the
15 judges.

16 CHAIR REEVES: I have a couple of
17 questions I guess for the lawyers, first. Some
18 say, you know, the 3553(a) factors do all the
19 work for anyone. For the judge, for the person
20 who's being sentenced, even from, I guess,
21 probation. If that's the case, why do this?
22 And I'll just -- that's my question. Why do

1 this if 3553(a) really does do all the work for
2 you?

3 MR. PATTON: I -- I'm happy to chime
4 in. I think in part, this goes back to
5 Commissioner Wong's point earlier about how, you
6 know, could a judge sort of do both. How would
7 the interplay work between 3553(a) and a new
8 adjustment here? I don't think that it's all
9 that uncommon for judges to do both, to consider
10 things in 3553(a) that are also in some way
11 taken into account by the guidelines. I think
12 so many of the possible adjustments, whether
13 it's role-based adjustments or obstructive
14 conduct, or acceptance, there are all sorts of
15 colors of those things. And I think when it
16 comes to 3553(a), judges do holistically
17 consider all of those things. And so you could
18 have some good and bad, you could have some
19 obstructive behavior, and you could have some
20 rehabilitative behavior. And I think it's okay
21 for the guidelines to account for those things
22 and then for judges ultimately to put it

1 together in a 3553(a) analysis while still
2 considering some of the same factors of
3 rehabilitation.

4 I -- I'll also say just to this concern
5 about sort of strategic behavior, that it might
6 incentivize people to do things just sort of
7 solely for the points? That possibility already
8 exists, right? I mean, when I sit down with
9 clients right now to talk to them about what's
10 going to help them at sentencing, one of the
11 things we talk about is what's going to happen
12 between today and sentencing. And I think every
13 lawyer has that discussion right now. And so to
14 the extent that there's some concern about
15 strategic behavior, that -- that's already
16 there. And I just loved what Mr. Clausen said,
17 which is, who cares why they do it, right? If
18 you can get somebody to walk into a program
19 that's going to improve their lives, improve the
20 lives of their families, improve public safety,
21 improve recidivism outcomes generally, who cares
22 why? Whether it's initially maybe a strategic

1 thought or not, we ought to be encouraging it
2 and to do it in a very concrete way I think
3 makes a lot of sense.

4 MS. CLASE: Yes. I appreciate the
5 3553(a) comment. There is a degree to which
6 that argument could be made with respect to
7 almost any adjustment, you know, positive or
8 negative in the entire book. We could make the
9 entire book 20 pages long and just say, you
10 know, 3553(a) covers it all, including many of
11 the things we're talking about today. You know,
12 sophisticated means, (inaudible) distinctions,
13 3553(a).

14 In terms of why TIAG in particular
15 thinks that this is a poor candidate for
16 3553(a), I -- we certainly -- we have that
17 discussion with Native defendants. Note, the
18 guidelines are only advisory. The judge can
19 always give you a downward departure. I think
20 that for people who grow up in tribal
21 communities, the "you do all the work on the
22 front end and trust me we'll take care of you on

1 the back end," said by the federal government,
2 is not a persuasive argument for historical
3 reasons. So showing people that there's
4 something written down, that, like, here are
5 your guidelines now and if you do all of these
6 things and you succeed at them -- which is hard,
7 it's really hard even for people who are trying,
8 not everybody's going to succeed, but here's
9 where they could be is much more effective and
10 much more promoting of success, particularly, I
11 think for our Native communities.

12 CHAIR REEVES: And Mr. Luria, it seems
13 like I always wound back to you and primarily
14 because the judges at least in my district rely
15 heavily on the probation office and officers'
16 advice and the pre-sentence report, the pre-
17 sentence investigation. And I'm wondering, you
18 know, through POAG, what do you know about
19 whether or not in preparing the pre-sentence
20 investigation report, probation officers are
21 looking for, post-offense efforts and people
22 doing better? We get the information for sure

1 when they've done something wrong, when they've,
2 you know, did something in pre-trial or they
3 got -- or, you know, I -- you know, I think
4 about the other offenses that might come up or
5 the other people that they might have been
6 associated with, the things that might be in
7 their home that, you know, these things that
8 ought to count against them. And Judge, you
9 ought to consider this as you're sentencing.
10 This person may be even variant upward or, you
11 know, maybe going a little bit above what the
12 recommendation might be from the -- based on the
13 plea agreement or whatever. So how much effort
14 did the probation office take in finding stuff
15 that might plug this area of post-offense
16 rehabilitation that the judge -- you ought to
17 consider this at sentencing, you know, when they
18 come in here.

19 MR. LURIA: That's a great question.
20 And I'll say that probation officers, if you
21 were probably to poll them to get a sense of why
22 they do the work they do, you'd probably get a

1 response that looks like, I love justice and I
2 love rehabilitation. That is such a substantial
3 part of who we are that when you see
4 rehabilitation occurring in advance of
5 sentencing, we want to foster that. We want
6 that to be a part of what the judge sees. We
7 want to put that on display because it's an
8 important component of what that defendant is
9 experiencing. So often people who are looking
10 at sentencing, they're in that frame of mind,
11 ready to change. Because they're looking at the
12 result of their conduct and this is the moment
13 to change.

14 But we're not the only ones who are
15 looking for that. So often, though, you know,
16 we talked to at length about this when looking
17 at this amendment. And everybody was sharing
18 stories of the times that they've seen
19 individuals receive substantial variances for
20 that post-rehabilitative conduct. And in those,
21 one of the things that struck me about it is how
22 often it's not just us. It's the U.S.

1 Attorney's office. It's the AFPDs, the judge
2 themselves, the pre-trial officer is also
3 getting involved. And you're seeing this
4 trajectory from a variety of sources moving
5 towards that same end, which is this person has
6 done a lot substantially to change their
7 circumstances and to prepare themselves for a
8 life -- regardless of the sentence, for a life
9 that's different. And let's do what we can to
10 recognize that. Let's do what we can to help
11 keep that change going.

12 You know, part of the reason why we
13 talk about the anchoring issue is because when
14 that happens, those variances -- and this is,
15 you know, from a variety of officers all over
16 the country, those variances are substantial to
17 facilitate that continued growth. And, you
18 know, that's something that makes a big
19 difference in terms of that person's success, is
20 trying to prevent them from taking steps
21 backwards. It's always a -- something in our --
22 the forefront of our thought process. And

1 certainly one of the big components about our
2 investigation is looking at how are you're doing
3 in substance abuse treatment. How are you doing
4 a mental health treatment? What does your
5 family life look like? What has it been like
6 since? How have you changed? How have you
7 adjusted to meet different obligations that you
8 previously might not have been considering?
9 Those are all things that we try to make sure
10 are incorporated in. And, you know, I think
11 it's one of those things that gives the judge a
12 complete picture of that person. If you were to
13 not include it, it would be a disservice and I
14 don't think that any of us have gotten into this
15 to ignore rehabilitation. It's what we want,
16 you know, and that's not just the PSI side.
17 That's the post-conviction as well.

18 CHAIR REEVES: Any -- oh, Mr. Meisler.

19 COMMISSIONER MEISLER: Just to follow
20 what Mr. Luria -- though, I think this -- at
21 least as I understood Judge Reeves' question,
22 this kind of empirical bit of it -- question

1 that, too. Are you in -- are PSR drafters
2 including the kind of information you just
3 talked about in the PSR? Is it before judges?
4 And I guess baked into that to my mind is, you
5 know, are the parties making these arguments in
6 a way that judges are able to give meaningful
7 consideration to post-offense rehabilitation
8 when it's genuine and proven?

9 MR. LURIA: I would say absolutely. We
10 work very hard to include that information.
11 We're not the only ones who are presenting it to
12 the court. So often we're also working with the
13 Defenders, we're working with the U.S.
14 Attorneys to get a sense of what that
15 information looks like and make sure that
16 accurately portrayed.

17 CHAIR REEVES: Anything additional?
18 Well, ladies and gentlemen, with that, I would
19 like to bring our hearing on the December, 2025,
20 proposed amendments to an end. On behalf of my
21 fellow commissioners, my good friends here, I
22 want to again thank our panelists. I know you

1 all sacrificed in a number of ways to get here,
2 to prepare. You all have done an extraordinary
3 job for us, I believe. Thank you for your
4 service. I also want to thank our staff and of
5 course, all who have decided to listen to us
6 today. And for your testimony, I thank you. We
7 will consider that testimony. Our work
8 continues along with our staff, again, who will
9 do the real work. We'll use this testimony to
10 make our sentencing policy, to make that policy
11 what we believe is right, what is fair, and what
12 is just.

13 One final note about the continuing
14 work that we'll do. We are currently seeking
15 comments on the proposed amendments we published
16 last month, addressing sentencing options,
17 career offender, circuit conflicts, and human
18 smuggling. There's still time left for you to
19 comment if you wish to do so. Please let us
20 hear from you, though, by March 18th, 2026. Our
21 work continues, and I guess your work does, too.
22 But with respect to this hearing, Kathleen, it

1 is now adjourned, on time.

2 (Whereupon, the above-entitled matter
3 went off the record at 5:22 p.m.)

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1 C E R T I F I C A T E

2 This is to certify that the foregoing transcript
3 was duly recorded and accurately transcribed
4 under my direction; further, that said
5 transcript is a true and accurate record of the
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9 and further that I am not a relative nor an
10 employee of any of the parties nor counsel
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13 outcome of the action.

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