UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON
PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

THURSDAY,
MARCH 13, 2014

The United States Sentencing Commission met in the Leonidas Ralph Mecham Conference Center, One Columbus Circle NE, Washington, DC, at 9:00 a.m., Patti Saris, Chair, presiding.

PRESENT

PATTI SARIS, Chair
CHARLES BREYER, Vice Chair
RICARDO HINOJOSA, Vice Chair
KETANJI BROWN JACKSON, Vice Chair
RACHEL BARKOW, Commissioner
DABNEY FRIEDRICH, Commissioner
WILLIAM PRYOR, Commissioner
JONATHAN WROBLEWSKI, Ex Officio, Commissioner
ALSO PRESENT

CHRIS BOEHM, Assistant Director, Investigations and Internal Affairs, U.S. Forest Service
TERESA BRANTLEY, Chair, Probation Officers Advisory Group
DAVID DEBOLD, Chair, Practitioners Advisory Group
ALAN DUBOIS, First Assistant Federal Public Defender, Eastern District of North Carolina
HON. ERIC H. HOLDER, JR., Attorney General of the United States
MICHAEL MCCRUM, Member, Practitioners Advisory Group
RAYMOND F. MORROGH, Director at Large, National District Attorneys Association
VIKRANT REDDY, Senior Policy Analyst, Right on Crime/Texas Policy Foundation
MOLLY ROTH, Assistant Federal Public Defender, Western District of Texas
CHARLES E. SAMUELS, JR., Director, Federal Bureau of Prisons
HON. KIRK G. SAUNOOKE, Associate Judge, The Cherokee Court, Eastern Band of Cherokee Indians
JULIE STEWART, President, Families Against Mandatory Minimums
ROBERT ZAUZMER, Chief of Appeals, Eastern District of Pennsylvania, U.S. Department of Justice
KRISTEN ZGOBA, Supervisor of Research and Evaluation, New Jersey Department of Corrections
TABLE OF CONTENTS

Panel IA Drugs: Executive Branch
Views I
Hon. Eric H. Holder, Jr. ............. 12

Panel IB Drugs: Executive Branch
Views II ................................. 45
Charles E. Samuels, Jr.
Director, Federal Bureau of Prisons

Chris Boehm
Assistant Director, Investigations
and Internal Affairs, U.S. Forest
Service

Panel II Drugs: Defense Bar Views ........ 83
Molly Roth
Assistant Federal Public Defender

David Debold
Chair
Practitioners Advisory Group

Panel III Drugs: Community & Law
Enforcement Views ....................... 123
Julie Stewart
President
Families Against Mandatory Minimums

Vikrant Reddy
Senior Policy Analyst
Right on Crime/Texas Public
Policy Foundation
Panel IV Felon in Possession Amendment .. 175
Robert Zauzmer
Chief of Appeals, Eastern District of Pennsylvania, U.S. Department of Justice

Alan DuBois
Fist Assistant Federal Public Defender, Eastern District of North Carolina

Michael McCrum
Member, Practitioners Advisory Group

Teresa Brantley
Chair, Probation Officers Advisory Group

Panel V Violence Against Women Act and Miscellaneous Amendments ................. 225
by Hon. Kirk G. Saunooke
Associate Judge, The Cherokee Court, Eastern Band of Cherokee Indians

Dr. Kristen Zgoba
Supervisor of Research and Evaluation, New Jersey Department of Corrections

Robert Zauzmer
Chief of Appeals, Eastern District of Pennsylvania, U.S. Department of Justice

Alan DuBois
Fist Assistant Federal Public Defender, Eastern District of North Carolina
CHAIR SARIS: Good morning. Good morning to everyone. I want to welcome everybody to the Sentencing Commission's Hearing on our proposed amendments to the federal sentencing guidelines for this year. I also want to welcome our witnesses and the public who have come. Many of you are sitting in this room, many are sitting in overflow rooms, so thank you to all of you.

We are particularly honored to have the Attorney General of the United States, Eric Holder, joining us this morning. His presence is an indication of the very important issues in federal sentencing, particularly, in the area of drug sentencing.

I look forward to hearing his testimony and discussing key sentencing policy considerations with him today. I also look forward to hearing from the other distinguished witnesses, judges, prosecutors, defense
attorneys, probation officers, senior officials, law enforcement officers, policy experts, and advocates who’ve come from all over the country to share their thoughts with us.

When the Commission identified its priorities for this amendment cycle last summer, we set out, as an overarching priority, reducing the costs of incarceration and the overcapacity of the prisons, one of the purposes set out in the statute that first established the Commission.

The Commission hopes to find ways to reduce prison populations and costs without endangering public safety. Since drug offenders make up the majority of the federal prison populations, drug sentences were a logical place to start.

The Commission has published a proposed amendment to reduce guideline levels with drug quantities across all drug types. We look forward to hearing from the Attorney
General, and many of the other witnesses today, as to whether this proposed amendment will reduce prison populations and costs in a way that is fair and proportionate and does not endanger public safety.

We also are examining whether guidelines for drug sentences adequately account for environmental and other harms from the cultivation of marijuana. On these drug sentencing issues we will here, first, from the Attorney General, then from the Director of the Bureau of Prisons, Director Samuels, and Chris Boehm, an expert from the United States Forest Service within the Department of Agriculture.

We will then hear a panel of defense bar view and a panel of community and law enforcement experts. We're considering other important amendments today. We're looking at guidelines to resolve certain circuit conflicts about when and to what extent the commission of other crimes should be considered when sentencing offenders convicted of being
felons in possession of a firearm.

On our final panel, we are glad to finally have a chance to hear from Judge Kirk Saunooke, who is from the Eastern Band of the Cherokee Nation, Cherokee Indians, who was prevented by weather from attending, not just weather, the last hearing was in the middle of a snowstorm and he got stuck at the airport, so he's coming in to talk to us about the Violence Against Women Reauthorization Act.

We'll also be hearing from experts on a number of other sentencing issues, including how to address supervised release for sex offenders. Public comment period is now closed. We've received boxes of letters. We hope to hear from many of you, in addition to today's witnesses, about the proposed amendments.

Welcome to all of you and we look forward to a lively discussion. Now, I want to introduce the other members of my Commission. Seated immediately to my right is Judge Ricardo
Hinojosa. Judge Hinojosa is the chief district judge for the Southern District of Texas, and has been the district judge on that court since, wait, I know you won't believe it, 1983.

Judge Hinojosa has served on the Commission since 2003. He's now a Vice Chair and he used to be the Chair of this Commission. Next to him is Judge Charles Breyer. He is a senior district judge for the Northern District of California. Judge Breyer has served as a United States district judge since 1998.

He joined the Commission last year and also serves as a Vice Chair. Next is Judge William H. Pryor, who also joined the Commission this year. Judge Pryor is a United States circuit judge for the 11th Circuit Court of Appeals, appointed in 2004.

Before his appointment to the federal bench, Judge Pryor served as Attorney General for the State of Alabama. Next is Rachel Barkow, our other new Commissioner.
Commissioner Barkow is a Segal Family Professor of Regulatory Law and Policy at New York University School of Law, where she focuses her teaching and research on criminal and administrative law.

She also serves as the faculty director at NYU of the center on the administration of criminal law at the law school. Next to me, on my left, is Judge Ketanji Brown Jackson. Judge Jackson was confirmed as a United States District Judge for the District of Columbia last year. She has served as Vice Chair of the Commission since 2010.

Next to her is Dabney Friedrich, who has served on the Commission since 2006. Immediately prior to her appointment to the Commission, Commissioner Friedrich served as associate counsel at the White House.

She served as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee, and as an Assistant U.S.
Attorney for the Southern District of California, and then for the Eastern District of Virginia.

And finally, next to Commissioner Friedrich is Jonathan Wroblewski. Commissioner Wroblewski is the designated ex-officio member of the United States Sentencing Commission representing the Department of Justice. Mr. Wroblewski serves as Director of the Office of Policy and Legislation in the Department's Criminal Division.

So we begin, of course, with the Attorney General. And Mr. Holder, just a little bit more on him, although, everybody, of course, knows who he is. He was nominated to serve as the Attorney General of the United States by President Barrack Obama and has served in that capacity since February 3, 2009.

Mr. Holder was named by President Clinton to be the Deputy Attorney General, and prior to that, he served as the U.S. Attorney
for the District of Columbia. In 1988, Mr. Holder was nominated by President Reagan to become an Associate Judge at the Superior Court of the District of Columbia.

And prior to become A.G., he was a litigation partner at Covington & Burling in Washington, D.C. So enough of the introductory comments and we're thrilled to have you. You have the floor.

HON. HOLDER: All right. Well, thank you so much, Chief Judge Saris and members of the Commission. Good morning, and thank you for the invitation to appear before you, and to discuss our shared goals, and to provide the Justice Department's views on proposed changes to the federal sentencing guidelines related to certain drug trafficking crimes.

Now, in particular, I appreciate the opportunity to speak in support of the amendments that are under consideration today. The Department strongly supports the Commission's proposed change to the drug
If adopted, this amendment would lower, by two levels, the base offense levels associated with various drug quantities involved in drug trafficking crimes. This would have the effect of moderately reducing guideline penalties for drug trafficking offenses, while keeping the guidelines consistent with current statutory minimums, and continuing to ensure tough penalties for violent criminals, career criminals, or those who use weapons when committing drug crimes.

Now, this straightforward adjustment to sentencing ranges, while measured in scope, would, nonetheless, I believe, send a strong message about the fairness of our criminal justice system. And it would help to reign in federal prison spending, while focusing limited resources on the most serious threat to public safety.

Now, let me be clear, my primary obligation as Attorney General of the United
States is to ensure the safety of the American people. The changes that I have implemented over the past year are designed to do exactly that, while making our system more fair and more efficient at the same time.

This proposed amendment is consistent with the Smart on Crime Initiative that I announced last August. Its implementation would further our ongoing effort to advance common sense criminal justice reforms, and it would deepen the Department's work to make the federal criminal justice system both more effective and more efficient when battling crime in the conditions and the behaviors that breed it.

As it stands, and as this Commission has recognized, certain types of cases result in too many Americans going to prison for too long, and at times, for no truly good law enforcement reason. Although the United States comprises just 5 percent of the world's population, we incarcerate almost a 1/4 of the
world's prisoners.

One in twenty-eight American children currently has a parent behind bars. State and federal governments spend a combined, or spend a combined, $80 billion on incarceration during 2010 alone. And as you know, of the more than 216,000 current federal inmates, nearly half are serving time for drug-related crimes.

Now, this focused reliance on incarceration is not just financially unsustainable, it comes with human and moral costs that are impossible to calculate. And that's why in recent years, under the leadership of President Obama, and alongside Members of this Commission, and support of policymakers, as well as prosecutors, and with the expertise of advocates, researchers, law enforcement officials, and government leaders on both sides of the aisle, we have taken significant steps to improve criminal justice policies and implement targeted reforms.
And I'm particularly proud of the work that we did together to reduce the inappropriate, and I think unjust, 100 to 1 sentencing disparity between crack and powder cocaine. A disparity that this Commission had correctly found to be unjustifiable and which President Obama alleviated with the signing of the Fair Sentencing Act of 2010.

Just over a year ago, in an effort to take our collective work to the next level, I launched a targeted Justice Department review of the federal criminal justice system to identify areas for improvement, and to seek ways to make the system more efficient, more effective, and more closely aligned with our highest ideals, while not sacrificing our duty to promote public safety.

Last August in a speech, I announced a new Smart on Crime Initiative, based on the results of this review, and it is already allowing the Justice Department to make critical improvements, to conserve precious
resources, to improve outcomes, and to disrupt the destructive cycle of poverty, incarceration, and crime. It traps too many Americans, and that weakens entire communities.

Now, among the key changes that I mandated as part of this initiative is a modification of the Justice Department's charging policies to ensure that people convicted of certain low-level, non-violent, federal drug crimes will face sentences appropriate to their individual conduct, rather than stringent mandatory minimums, which will now be applied only to the most serious criminals.

The Commission's proposed amendment to the federal sentencing guidelines would help to further advance and to institutionalize this work, controlling the federal prison population and ensuring just and proportional sentences.

I am pleased to note that this
approach enjoys significant bipartisan support on Capitol Hill, where a number of leaders, including Senators Patrick Leahy, Dick Durbin, and Mike Lee, along with Representatives Bobby Scott and Raul Labrador, have introduced legislation that would give judges more discretion in determining appropriate sentences for those convicted of certain crimes.

By reserving the most severe penalties for dangerous and violent drug traffickers, we can better promote public safety, deterrence, and rehabilitation, while saving billions of dollars and strengthening communities.

And as my colleagues and I work with Congress to refine and to pass this legislation, we are simultaneously moving forward with a range of other reforms. We're investing evidence-based diversion programs, like drug treatment initiatives and veterans courts that can serve as alternatives to
incarceration in some cases.

We are working to reduce unnecessary collateral consequences for formerly incarcerated individuals seeking to rejoin their communities. And we are building on innovative, data-driven reinvestment strategies that have, in many cases, been pioneered at the state level.

In recent years, no fewer than 17 states, supported by the Department's Justice Reinvestment Initiative, and led by officials from both parties, have directed significant funding away from prison construction and toward evidence-based programs and services, like, supervision and drug treatment that are proven to reduce recidivism, while improving public safety.

Now, rather than increasing costs, in a report funded by the Bureau of Justice Assistance, projects that these states will actually save $4.6 billion over a ten-year period. Many have already seen drops in
recidivism rates, as well as overall crime rates, even as their prison populations have declined.

And although the full impact of our Justice Reinvestment policies and other reforms remains to be seen, it is clear that these efforts are bearing fruit and showing significant promise across the country. I think we can be encouraged by this ongoing work, which is enabling us to better promote public safety, deterrence, and rehabilitation while making our expenditures smarter and more productive.

Yet, each of us is here this morning because we recognize that we cannot yet be satisfied, and a great deal of work remains to be done. By adopting these proposed amendments to the federal sentencing guidelines, this Commission can take, I believe, an important step to allow judges to make common sense determinations, to provide legal professionals and law enforcement
leaders with the 21st-century solution that they need to address 21st-century challenges, and to build on the progress that we've already seen in constructing a criminal justice system that deters and punishes crime, keeps us safe, and ensures that those who have paid their debts have a chance to become productive citizens once again.

As the Commission considers these and other actions, and as you hear testimony from a diverse group of expert panelists over the course of today's hearing, I urge you to seize this opportunity to make our criminal justice system more fair and to keep the American people more safe.

I look forward to continuing to work closely with each of you, and with leaders in Congress, and throughout our administration, to strengthen America's criminal justice system, and to forge the more just society that everyone in this country deserves.

So I want to thank you once again for
the opportunity to appear before you today and I would be happy to take a few questions at this time.

CHAIR SARIS: Why don't I start it off and thank you for your remarks. The departments have experience with reductions in the guidelines when the crack powder guidelines were reduced, so what is your experience in terms of public safety, cooperation, the ability to go after high-level offenders?

HON. HOLDER: I think with the reduction in the crack penalty, we have not seen any falloff in the level of cooperation that we have seen from those offenders, which would have been a very legitimate concern, but the statistics released by this Commission, the Commission's data, shows that, in fact, that has not occurred.

At the same time, I think that those changes have encouraged a greater sense of fairness, a greater belief in the system, which ultimately encourages people to cooperate, to
share information with police officers, federal law enforcement officials, it makes the system, I think, more effective, more efficient, and the perception of fairness, I don't know, I don't think can be underestimated.

VICE CHAIR BREYER: General, thank you very much for your time. Thanks for your comments. Do you think the anticipated savings of, perhaps, over a period of time, maybe billions of dollars in savings by reducing lengthy sentences for these offenses, that some of those savings can be devoted to programs such as re-entry courts, increased supervision on supervised released, drug testing, some rehabilitative efforts?

HON. HOLDER: That's precisely what we want to do, Judge. Take these savings and use them in, what I had described as 21st-century ways, to come up with good prevention programs, good rehabilitation programs while people are incarcerated, and
then good re-entry programs to transition people from prison back into their communities. The savings that we will reap will allow us to do all of those things. In addition, it will allow us to hire greater numbers of prosecutors, greater numbers of agents. There's a whole variety of positive things that flow from reducing the amount of money that we spend in our prison systems. Now, it takes up about 30 percent, or so, of the Justice Department's budget.

COMMISSIONER FRIEDRICH: Mr. Attorney General, thank you for your testimony here today. We appreciate you taking time out of your busy schedule. I have a broader question about sentencing disparities, which, as you know, the Commission's recent research shows increasing disparities in federal sentencing, not just across the country, but also within districts, and in some cases, even within courthouses.

And one of the reasons for this
disparity, although certainly, not the only, is the different charging decisions that prosecutors make across the country. And I recognize that this problem is not unique to this administration, but I am concerned about whether the Department is taking adequate steps to ensure that individuals who commit crimes are not treated differently simply because, either where they commit the crime or because of the prosecutor assigned to the case.

And as you may know, some of our recent reports highlight some areas where the Commission has seen particular problems in the charging decisions. I don't have time to mention them all here, but I'd like to highlight just a couple.

One relates to the filing of 851 enhancements in drug trafficking cases. And as you know, the filing of that enhancement can increase the mandatory minimum up to life imprisonment for offenders who have two prior felony drug offenses. And what our data shows,
and I'm basing this on 2010 data, is that, prosecutors in six districts filed 851 enhancements in more than 75 percent of the cases in which they could have been charged, while prosecutors in eight districts never charged the 851 enhancement.

Similarly, we see with respect to 924(c) charges, firearms offenses, we see great unevenness there, particularly with respect to the filing of multiple 924(c) offenses. And as you know, this doubles the offense, on average, for many offenders who are subject to more than one 924(c) charge.

And according to our 2010 data, ten districts accounted for the vast majority of all cases involving multiple 924(c) counts, while 59 districts reported no cases involving multiple 924(c) counts. And I understand that you, and you referred to it here today, that you have increased the discretion that line prosecutors have, both in terms of their charging decisions as well as their sentencing
recommendations.

And in contrast to historical practices, which directed the prosecutors to charge the most serious readily provable offense, you support a more individualized assessment that encourages prosecutors to consider a number of factors, many of which are broad and subject to varying interpretations.

So my question is, and while I understand that your memoranda certainly emphasize the importance of having supervisory approval with respect to charging, plea, and sentencing determinations, I'd like to hear what specific steps, if any, you are taking to ensure, both, that the prosecutors across the country get consistent supervisory guidance, and second, that they implement that guidance in consistent ways, both within districts and across the country.

HON. HOLDER: Well, let me start by answering the question this way, I don't think that we should look at the past and think that
we had a uniform application or that we did not
see disparities, even under the prior system.
There is statistical evidence that shows that,
depending on where you were, depending on who
you were, you could have received a different
sentence from somebody who was similarly
situated.

The system was not perfect as it
existed before, and it is not perfect as it
exists now, and under the reforms that I have
implemented. But what we want to do is to work
with the Commission. Your data is really
important for us.

This is an ongoing effort and if we
notice that there are disparities, unwarranted
disparities that exist with regard to
sentencing or the use of certain kinds of
sentencing procedures, those are the kinds of
things that we will address.

There's a great deal of training
that goes on with regard to how we want to
implement these reforms. There is, as you
indicated, supervisory responsibility for the filing, or non-filing, of certain kinds of enhancement papers.

We're trying to get to a point where -- and let me say that, you know, at base, I have great faith in the men and women of the United States Department of Justice, and great faith in the men and women who serve on a federal judiciary, given all that you all have to go through to get confirmed, I don't envy you for that, but I do envy the fact that you provide us great public service.

What I'm looking for is that individualized determination to see what is it that is just for that defendant who is before a particular prosecutor, charged with a particular crime. What is justice? What is an appropriate sentence for that person?

Now, I understand that that necessarily means that we are putting a human element into this and that means that there are going to be certain amounts of disparity. I
think certain amounts of disparity, if we achieve, overall, a more just system, can be tolerated.

But we want to always understand what the nature of that, what the amount of that, disparity is like, what are the causes of that disparity, and to try to minimize it to the extent that we can. No system that we have ever put in place has come up with a system that has been free of disparity.

I think by focusing on more just outcomes, by training, by putting in place, these new, as we call them, 21st-century approaches, that we can have a system that is both more just and less disparate, but it is an ongoing effort, and it is one that we are mindful of our obligations to understand and then to modify our policies where that's appropriate.

CHAIR SARIS: Thank you.

Commissioner Barkow.

COMMISSIONER BARKOW: Thank you.
Thanks for your time this morning and your testimony. I was hoping you could comment on the Department's view of the relationship between our proposed amendment and the pending legislation in Congress that also addresses sentencing reform.

HON. HOLDER: I think they are complementary. I think that we support the two proposals that are being considered in the Senate, the bill that is being sponsored for, I think it's, the backend reforms by Senators Whitehouse and Cornyn, we have a few concerns with, we want to work with them, about making that bill as good as it might be.

But with regard to that which, I guess, has been put forth by Senators Durbin and Lee, we are in support of that, and we think that the proposal that you are discussing today, and about which I am testifying, compliments that effort.

CHAIR SARIS: Judge Hinojosa.

VICE CHAIR HINOJOSA: General
Holder, thank you so much for spending the time with us today. I have to confess that confirmations in 1983 were a lot easier, even easier than the 2003 confirmation to be on this Commission.

As we, for those of us who live on the border, we talk about this side of the border, for those of us who are from this side of the border and have a great understanding of our close relationship with the country of Mexico, and as we talk about over-incarceration and lessening penalties for drug traffickers, and at the same time, we see and insist more incarceration and more crackdown on that side of the border with regards to the drug trafficking in Mexico because of the drug usage on this side of the border, and what it has done to that great country, with regards to the violence and the price that they had paid in their cooperation with us with regards to the drug trafficking.

What response do we have, as they
see in our society, there’s a desire for less incarceration, less prosecution, legalization in some states of some drugs, how do we respond to them if at the same time we’re insisting that they continue to pay the price and continue to crackdown on drug trafficking?

HON. HOLDER: Well, by having a more sensible incarceration policy that does not necessarily mean that we are being, to use an old term, less tough on crime. We’re being smart when it comes to dealing with those who commit crimes. We are holding people accountable, we are getting better results, and we are reducing our crime rate while spending less money.

The message that I would send to our dear colleagues south of the border is that, we have to continue to work together. And the United States does bear a significant responsibility for the violence that we see in Mexico, because of the drugs that we consume in the United States, because of the weapons that
are produced in the United States and that get transported to Mexico, that iron river, that they talk about.

These are realities that we have to confront, but I do not think that the policy changes that I am espousing, and that are consistent with the amendment that you are considering, should be viewed by our Mexican colleagues as a retreat from our shared desire to reduce violence on both sides of the border.

We still devote substantial resources, we still have substantial numbers of people who are in Mexico working side-by-side with very brave Mexican law enforcement and military officials to deal with the violence problems that they are confronting, and I would say more successful than they have in the recent past.

Our joint efforts have to continue, but there should not be a misunderstanding about what it is that we are doing there. We are not retreating from a strong, tough fight
against those who would engage in drug trafficking and in violence.

What we are talking about is a better approach so that we can keep this country and Mexico more safe.

CHAIR SARIS: One of the things you learn on the Commission is what a big country this is, and in my neck of the woods, up in the Northeast, what we hear about is heroin, and heroin overdoses, and we hear about OxyContin. And so will this amendment, in any way, affect your ability to combat illegal trafficking in those areas?

HON. HOLDER: No. I think, you know, this heroin issue that we are confronting, both regionally and as a nation, is one that I spoke about, I think, about a week or so ago. This is a national health problem that we have to deal with, both by using enforcement tools, treatment tools, and educational tools. This focus on the use of opioids and then the movement from opioids to
heroin is something that we have to recognize.

The amendment that we are considering today will not have a negative impact on that ongoing effort, that holistic effort, that we want to use to try to reduce heroin use, which has spiked in recent years.

As I went around the country and talked to various U.S. Attorney's Offices, I was struck early on in my time to hear about this rise in heroin, which I thought was a drug usage, therefore, you know, needed to be looked at as a significant drug, was one that was going to be relegated to the past. That is clearly not the case, and certainly, not the case as what we've seen over the last, I'd say, 18 months, 2 years, or so.

But it is something that our DEA is focused on. I think we have good policies in place. I think we understand the nature of the issue and the relationship of heroin usage to opioids and pill factories, things like that.

And so we are attacking this
problem, but doing so, I think, in a smart way, by combining enforcement, as I said, with treatment and with education.

CHAIR SARIS: Thank you.

COMMISSIONER JACKSON: I'll ask a question. Good morning. You mentioned that public safety is your primary obligation, and I believe that's true, and I'm just wondering what assurances you can give to the Commission, and to the American people, that a reduction in this area is not going to impact public safety.

HON. HOLDER: Well, I think we can look at the state. If you look at what's happened in Texas, and Kansas, and Kentucky, in particular, where they have reduced the amount that they have spent on their prison systems, where they have put policies in place to specifically reduce their prison systems. They have seen reductions in the amount of money they have spent, but without any negative impacts on public safety. And in fact, you've seen, in some of those 17 states
that I've mentioned, you've seen enhancements with regard to public safety.

You know, when I talk about reducing money spent, it doesn't simply mean cutting people's sentences and letting them go. We're using the money that we save to rehabilitate people while they are in prison, making programs available to them to deal with the deficiencies that helped bring them into the prison system, and then also spending money on re-entry programs so that they can have skills to deal with the deficits that they have, to try to make them more productive once they leave.

So it is, in some way, I understand that people feel a certain tension in this notion that we're going to spend less, we're going to put people in jail for smaller amounts of time, and yet, you're going to tell me that we're going to be more safe.

And yet, the empirical studies that I have seen, and which I have faith in, indicate that, if done appropriately, those are, in
fact, the results that you can get. But again, these are always things that we have to continue to monitor. We have to adjust our approaches so that if we see that a particular approach that we're taking is not having that desired result, will that change it?

COMMISSIONER JACKSON: Thank you.

VICE CHAIR HINOJOSA: General, I have one more question. We have discussions and concerns in this country about our incarceration rates. When you look at the numbers in the federal system and you look at the number of prosecutions in the '80s, as opposed to what it is now, we have doubled the number of prosecutions, which is exactly comparable to what we have done with the number of people in prison.

So my question is, do you think that we have prosecuted too many people and that's what's causing the incarceration rates to be so high at the federal level?

HON. HOLDER: Well, I mean, I think
we certainly have to ask some serious questions about our enforcement policies. Are we prosecuting the right people? Are we using our limited jail space to incarcerate the right people? Are we not making better use of alternatives to incarceration and prosecution?

You know, there's a whole variety of things we've done over the past 20 years, including an increase in the number of people we have prosecuted, that I think have led to historic drops in crime and we are, again, I want to emphasize, committed to maintaining those historic lows when it comes to the crime rate.

But I think that there are ways in which we can do that, that encompasses more than simply prosecuting significant numbers of people and putting significant numbers of people in jail.

There are people, we must understand, who have to be prosecuted and who deserve to go to jail for extended periods of
time. But there are also ways in which we can maintain public safety and reduce the prison population, reduce the number of people we are sentencing.

As I've done around the country and seen what some federal district courts have done, with regard to veterans courts, drug courts, there are really creative things being done by members of the federal judiciary working with federal public defenders offices and U.S. Attorney's offices, that I think are a real guide to the kind of system we can have that has a greater degree of balance than, perhaps, it has in the past.

I'm not critical of what has happened in the past. I'm not critical of the decisions that were made in the past. I was a United States Attorney here in Washington, D.C. when this city was called the murder capital of the country. And we had to have a strong law enforcement response that focused, really focused, on incarceration, detection and
incarceration.

As time passed, we were able to broaden the number of tools and approaches that we were using to deal with that problem. But I only mention that to say that my experiences have shaped the approaches that we are espousing now, being tough, for lack of a better term, where that's appropriate, but being smart where that's appropriate as well.

And it is the combination of all of these things that, I think, will ultimately lead to fewer prosecutions, fewer incarcerations, less money spent on prisons, and better outcomes, and a more safe America.

CHAIR SARIS: Judge Breyer and then Judge Pryor.

VICE CHAIR BREYER: All right. The decision whether to prosecute, which rests exclusively with your Department, is, of course, central to the question of eventually what happens to all of these people. Will you, as the Attorney General, encourage the
increased use of diversion programs for first-time offenders, or for small-time offenders, so that they may, at the front end, avoid the possibility of incarceration?

HON. HOLDER: Yes, I would, and I think that's a very valuable tool. And I think it's a tool that we need to develop so that prosecutors who again, these men and women who I have great faith in, and who see a particular individual, and they understand, this is not a reason for this person to go to jail, and they need options. They need tools. They need alternatives.

And to the extent we can develop those diversion programs, I'm sure that you will see our people make use of them.

CHAIR SARIS: Judge Pryor.

COMMISSIONER PRYOR: General Holder, I believe I heard you say in your opening remarks that you support the proposed amendment, and in part, because the lowering of the base offense levels for the drug quantity
table would still be tied to the statutory mandatory minimums. Am I right in understanding that that is a key element of the Department of Justice's support for this proposed amendment?

HON. HOLDER: Yes, there is still that connection and I think that the way in which the Commission has formulated the proposal makes a great deal of sense, and so that it is why I wanted to make sure that I put in my remarks, that connection as one of the reasons why we are supportive of the proposal.

CHAIR SARIS: Thank you. Anyone else? Thank you very much.

HON. HOLDER: Well, thank you very much for the opportunity and I look forward to working with you on, not only this proposal, but others as we try to make our system as good as it can be.

CHAIR SARIS: Thank you. Moving on to our next panelist. Director Samuels.

DIR. SAMUELS: Yes.
CHAIR SARIS: Okay. Welcome.

Thank you for coming. The rest of the story from the Executive Branch, no stranger to these hearings, we want to welcome back Charles E. Samuels, who has served as the Director of the Federal Bureau of Prisons since his appointment on December 21, 2011.

Director Samuels began his career with the Bureau in 1988 and has served in many capacities, including corrections officer, case manager, associate warden, and warden. And from January 2011 until his appointment as Director, he served as the Associate Director of the Corrections Programs Division.

Chris Boehm, how do I pronounce it?

MR. BOEHM: Boehm.

CHAIR SARIS: Boehm is an Assistant Director of Law Enforcement for the United States Forest Service, and is responsible for the investigations, internal affairs, and counter drug program areas. He has significant experience conducting and
supervising public land marijuana cultivation investigations and eradication operations.

Welcome.

Just a few words about how we're operating today, you'll both give your presentations and then we'll ask questions after both of you have spoken. I think we have this light system, which is a rough indication of timing and then the hook. We've read your materials and we certainly read everything that's been submitted to us.

And so as you can tell, we're a hot bench and like to ask questions and get involved, so, Director Samuels.

DIR. SAMUELS: All right. Thank you. Good morning, Chief Judge Saris and Members of the Commission. It is an honor to be here today to share with you some information about the Federal Bureau of Prisons.

I'm happy to report that for the first time in decades, we're experiencing a period of significant negative growth. We
have nearly 4000 fewer inmates than we did at the end of the last fiscal year. We remain very crowded and our inmate population is 32 percent over capacity, system wide, and 52 percent over capacity at our high security institutions.

While we are guarded in our optimism, as to future population growth, we appreciate the current trend and hope it continues. The Bureau of Prisons' mission is to protect the community and reduce crime. We have not had any escapes during the past year, nor have we had any significant disturbances, despite the fact that we are the largest corrections department in the country, with 119 federal prisons and more than 215,000 inmates.

Our staff works in a dangerous environment. The Bureau of Prisons' staffing level is significantly lower than the five largest state corrections systems. Last year, more than 120 staff and nearly 200 inmates were seriously assaulted by other inmates.

In regards to re-entry, I'm pleased
to report that 80 percent of offenders who were released from our facilities do not return during a three-year period following release. This relatively low rate of recidivism is due to the effective evidence-based treatment programs we provide to inmates.

In November 2013, our re-entry services division began overseeing and coordinating the many re-entry programs, services, and functions that we perform on behalf of all inmates, but particularly, the more than 40,000 that return to U.S. communities each year.

I'm certain that this new structure will allow us to have an even greater impact on our inmate population and to work more effectively with our partners in the community.

This past November, we hosted the first ever Bureau of Prisons Universal Children's Day. Nearly 8500 children came to visit 4000 inmate mothers and fathers. For many inmates, it was the first time they read
a book to their child or drew a picture with them.

The event was well-received by staff and we plan to repeat the event again. We continue to expand our highly-effective residential substance abuse treatment program. We now have 89 programs at 77 locations. By the end of this fiscal year, we expect to have sufficient capacity to allow all eligible inmates to receive their full sentence reduction.

We continue to increase the amount of time inmates spend in our residential re-entry centers and to expand our use of home confinement for low risk offenders who have a place to live and do not need the structure of an RRC.

Our focus on re-entry has broadened to include inmates returning to the general population from a restrictive housing unit within the prison. Specifically, we have established a mental health unit in Atlanta for
high-security inmates, such as those from the administrative maximum facility in Florence, Colorado, who are seriously and mentally ill, and have demonstrated an inability to function in an open setting.

We also opened a reintegration housing unit that provides a more open environment for protective-custody-type offenders. And finally, we established a gang-free institution for inmates who have relinquished their affiliation with street and prison gangs, and are devoted to taking a new approach to their life in prison, and in the community after they are released.

As part of the Attorney General's Smart on Crime Initiative, we expanded our criteria for sentence reduction based on extraordinary and compelling circumstances. We expanded the medical criteria to reach inmates who have a life expectancy of 18 months, rather than the 12 months, and those who are not terminally ill, but have an incurable
progressive disease, or a debilitating injury from which they will not recover.

Non-medical criteria was established for inmates who are 70 or older, and have served 30 years or more; 65 or older, and have served at least 50 percent of their sentence and suffer from a serious medical condition; and 65 and older, and have served greater than 10 years, or 75 percent, of their sentence.

Additionally, criteria was established for inmates with children where the family member caregiver died, or became incapacitated, and inmates whose spouse or registered partner became incapacitated.

In calendar year 2013, I approved 61 compassionate release requests, up from 39 in 2012 and 29 in 2011. Currently, I have approved 15 in the first two months of 2014, which would put us on pace to reach 90 petitions for the year.

I recently testified before the
Senate Judiciary Committee/Subcommittee on Constitution, Civil Rights, and Human Rights regarding our use of restrictive housing. Certainly, there are times when restrictive housing is an important tool for the protection of staff, inmates, the general public, and/or the individual, him or herself.

This is particularly true for a system as large and diverse as ours. And given that we often take the worst offenders from states to provide assistance, but we understand the various negative consequences that can result from housing inmates in restrictive housing units, such as interfering with re-entry programming, and limited interactions with family and friends.

I'm proud of the work we do in federal prisons around the country, to incarcerate individuals in prisons that are safe, secure, humane, and cost-effective. I'm equally proud of the work we do to help these individuals gain the treatment, skills, and
training they need to return to their families and their communities as productive, law-abiding citizens.

Thank you again for having me here today and I am happy to answer questions.

CHAIR SARIS: Thank you.

MR. BOEHM: Good morning, Madam Chair, Vice Chairs, and Members of the Committee, I'd like to thank you very much for the opportunity to provide testimony today on the environmental impacts of marijuana cultivation on public lands. It's an honor to be here.

Our nation's national forests and other public lands are under attack by sophisticated drug-trafficking organizations. DTOs are exploiting our public lands to illegally cultivate marijuana. These operations present a great threat to the safety, health, and sustainability of our nation's national forests and other public lands.
DTOs have been found on 72 national forests in 22 states. In 2013, approximately 80 percent of marijuana grown on federal public lands was grown on national forests. Almost 90 percent of this DTO activity on national forest lands occurs in California alone.

Since 2005, over 19 million marijuana plants and over 5500 sites have been eradicated nationally from national forest lands. The estimated value of the eradicated marijuana is well over $20 billion. Typical marijuana growth sites are generally in remote forested areas that have access to water and are near road or trail systems. Many of these sites are within designated wilderness areas or other pristine or sensitive landscapes.

They're generally occupied by three to four individuals that live in or near the sites. These individuals are often armed with semi-automatic rifles and handguns, and will protect their sites against anyone entering the area. The sites have sleeping and kitchen
areas, and provides trail systems that connect different parts of the sites, and harvesting and drying areas to prepare the marijuana. The growing areas are generally 10 to 20 acres in size, but the total impacted area is often 50 or more acres.

To address this problem, the Forest Service's goal is to identify, disrupt, and dismantle DTOs operating on national forest lands. This is a collaborative effort with our federal, state, local, and tribal law enforcement partners, and allows us to implement a strategic multi-agency approach to target DTOs. The strategy's focus is to investigate, eradicate, prosecute, share intelligence, and cleanup and reclaim the land to deny its future use.

However, marijuana cultivation on national forests is not just a law enforcement or a drug problem. Marijuana cultivation also poses a severe threat to the environmental health of our forests. Growers clear native
vegetation, divert large volumes of scarce water for irrigation, and use herbicides, pesticides, and other chemicals that kill competing native vegetation and wildlife. The activity also damages native soils and creates severe erosion issues. The accumulated fertilizers, poisons, human waste, and trash wash into streams and rivers during rain events, or leech into the soil to contaminate our drinking water.

These growth sites also have significant effects on wildlife and their habitat. Many of the chemicals and poisons used in these sites are extremely dangerous and could damage sensitive ecosystems in multiple ways. Some of the chemicals we have found in sites are banned in the U.S. or restricted to limited commercial use only. Many are also so toxic that they not only kill the wildlife through direct exposure at the site, but enter the food chain and can sicken or kill wildlife many miles away. Some of the animals affected
are also sensitive or protected species, such as the Pacific fish or the spotted owl.

The diversion of scarce water resources also has its severe effects on native wildlife and their habitat. Many growth sites monopolize the limited sources of water in an area and deny use by animals and native vegetation. In drought-stricken areas such as California, any diversion of water can be devastating for local wildlife.

To help address the environmental damage, the cleanup and restoration of these sites is a priority for the Forest Service. The typical cleanup requires cooperation and assistance from other Forest Service staff areas, our partners, and volunteers. The removal of trash and debris, infrastructure, and hazardous materials from the site, and the necessary restoration activities are labor intensive and extremely costly.

There are also significant exposure issues and risk to cleanup personnel. It is
not uncommon for personnel to encounter unknown chemicals or be inadvertently exposed to a chemical, or other potentially hazardous substance, during operations.

The effects of illegal marijuana cultivation and the associated environmental impacts are severe and far-reaching. Although I have limited my comments to national forest lands, I would also like to stress that these operations threaten many national parks, national monuments, wildlife refuges, and other public, state, and private lands. We must do everything we possibly can to care for our nation's treasures and protect them for future generations. Madam Chair, Vice Chairs, I close my statement and am really happy to answer any questions. Thank you.

CHAIR SARIS: Thank you very much.

VICE CHAIR HINOJOSA: Yes, Director Samuels, you talked about the 80 percent that don't return to the federal prison system, that doesn't count anybody who might
have gone to the state system, right, so it's not a 20 percent recidivism rate, it's just 20 percent to the federal system.

DIR. SAMUELS: Yes, 20 percent to the federal system and 40 percent overall when you include --

VICE CHAIR HINOJOSA: So it's 40 percent recidivism rate, the other 20 percent re-violate in the state system.

DIR. SAMUELS: Correct.

COMMISSIONER JACKSON: Yes, you talked about the BOP's re-entry programs and the kinds of interventions that you do --

CHAIR SARIS: Could you speak up?

COMMISSIONER JACKSON: Sorry. The kinds of interventions that you do in prison rehab. And of course, in listening to the Attorney General, those kinds of programs are key to the Smart on Crime Initiative. But if we shift from longer terms of incarceration, it seems to me that there's going to be greater need within BOP to prepare people to get back
into society, so is BOP ready for that?

I mean, do you have programs in every facility and do you think that there's going to be increased need for those kinds of programs?

DIR. SAMUELS: Thank you for your question, and I would respond, the Bureau is ready, as always, seen as a critical part of our mission. We've always stated that re-entry begins on the first day of incarceration, and we've been doing that for decades.

And my focus as Director of this agency is to ensure that every facility is providing cognitive behavioral therapy programs, and not just within the Bureau, we want to ensure that when those individuals, ultimately, are being released, and they move on to our RRC programs, and ultimately, to any type of supervision through the course, that there's continuity of care throughout the entire system, and with us taking the lead for that.
So for our inmate population, we are addressing this issue every single day with the population. And so if there are any changes, it's not going to have any impact on us relative to our mission to carry it out. It's something that we continue to do and expect with that being, again, part of our mission, which I constantly tell the staff is more than just the enforcement of housing, but ensuring that we're doing the other part of our mission, and that's ensuring that we're reducing crime.

COMMISSIONER JACKSON: But the programs will be able to absorb the increased capacity, I guess, is what I'm saying.

DIR. SAMUELS: Yes, with our numbers right now, at 215,000, and if the initiatives work, and there is a reduction, I mean, if anything, it would allow us to be able to take on more than less.

CHAIR SARIS: Judge Breyer and then Commissioner Barkow.

VICE CHAIR BREYER: Director, I'd
like to find out from you a couple things. First of all, with respect to your prison population, what percentage of your prisoners are subject to deportation or illegal entrants subject to deportation?

DIR. SAMUELS: About 23 percent of our population are criminal aliens, so it's about 54,000 inmates in our system are non-U.S. citizens.

VICE CHAIR BREYER: So when we talk about re-entry, of course, we're not talking about re-entry with respect to them. We're talking about deportation with respect to them. I mean, maybe that's another way of re-entry, but it's not re-entry into the United States; at least, hopefully.

And what I'm trying to figure out is, if you have two classes of prisoners, those people who will re-enter the United States and those people who will be deported, and with respect to the people who will re-enter the United States, you have a number of programs
which would envision, in a number of cases, early release, either a halfway house or a reduced sentence, by virtue of the RDAP program, and otherwise.

Does the Bureau of Prisons have the authority to take, with respect to the prisoners who are subject to deportation, to take them sooner than their prison sentence and the outside term of their prison sentence and place them in some facility that they would be then deported from?

In other words, if it's not clear, what I'm trying to figure out, if you have two people, they each have five-year sentences or ten-year sentences -- with respect to group 1, they actually serve four years, or three and a half years, or maybe four-plus years, some sort, and then you have group 2, those people who are going to be deported.

Do those people have to serve their full term of confinement or are they then sent to some facility short of their full term of
confinment in order to be deported? And I ask that in the context that we have approximately 1/3 overpopulation, and at some point, you're going to run afoul of the Supreme Court's decision with respect to incarceration.

DIR. SAMUELS: Yes, thank you, Your Honor. The response to your question, the individuals have to serve their time in our facilities and/or contract facility. We do not have anything in place where we are moving them out any sooner. And what we try to do with immigration is, we have procedures in place for hearings to take place, so when they are towards the end of their sentence, they don't have to stay any longer than necessary within the Bureau of Prisons and we can actually turn them over.

VICE CHAIR BREYER: Do those people, however, actually serve longer periods of confinement in the Bureau of Prisons than a citizen who would be re-entered into the general population of the United States?
DIR. SAMUELS: Once their term expires with the Bureau of Prisons, they fall under immigration.

VICE CHAIR BREYER: Well, I mean, what I'm trying to figure out is, who serves longer; United States citizens who are in prison, or non-United States citizens who are in prison? Who serves the longer sentence on the average, or with respect to the same given sentence, as to those two classes of people?

DIR. SAMUELS: In that case, it would be the criminal alien, without a doubt.

COMMISSIONER JACKSON: And that's because the criminal aliens don't have access to these re-entry programs that you are talking about?

VICE CHAIR HINOJOSA: Well, they can't have home confinement. They can't have community confinement.

COMMISSIONER JACKSON: I see.

VICE CHAIR HINOJOSA: And so therefore, they will serve more time in the
federal prison system rather than re-entry through community confinement or home confinement.

DIR. SAMUELS: They're not eligible for the programs.

CHAIR SARIS: Commissioner Barkow.

COMMISSIONER BARKOW: I have a question for each of you actually, if that's okay.

CHAIR SARIS: Oh, yes. We haven't even gone around to marijuana cultivation yet.

COMMISSIONER BARKOW: All right. I'll keep with the Bureau of Prisons for a minute. First, I'm curious if you at the BOP track what the recidivism rates are for people who are released and try to correlate it with the programming that you have internally.

And also, if it's tracked and correlated with things like the use of segregated housing units or those kinds of things to see what effect, if any, treatment inside the facility, how it relates to
recidivism afterwards. That's my question for you.

DIR. SAMUELS: Okay. Thank you. We are in the process, and ultimately, we will have a review that we'll be releasing where we are currently with our recidivism rates because the number that I gave earlier for the overall rate, the 40 percent, that is dated.

And in regards to restrictive housing, we have not had a study done to look at any impact from individuals being placed in restrictive housing; if it has any effect on recidivism when they are released, but we are in the process of having an independent study that's being done now, but it's generally looking at procedural, operational issues, and best practices within the corrections profession.

And ultimately, at some point, I mean, that would be something that I would invite to include my colleagues in corrections, to look at relative to recidivism.
COMMISSIONER BARKOW: Thank you. And then if I could ask you, Mr. Boehm, a question. So in trying to understand what role sentencing might play in the harms that you've identified, I was trying to figure out if the current framework adequately covers everything that you had mentioned in your testimony.

And so to the extent, you know, the people involved with this are armed, we have sentencing enhancements for that. We also have an enhancement for the release of toxic and hazardous substances. And so I was just trying to figure out if you could identify where there might be a gap in current sentencing related to the kinds of harms you have identified or if you think that we currently have things covered and it's an enforcement problem.

I'm just trying to get a sense of where, if any, the law enforcement deficit is or if this is how you see what we could be doing here related to the problems that you've identified or if the guidelines already
adequately capture it.

MR. BOEHM: And I apologize for -- it's not like I'm trying to duck the question, but I would be hesitant to respond. Sentencing is not really my area of expertise. Actually, Robert Zauzmer will be on later today and I'm sure he will address that. I apologize.

COMMISSIONER BARKOW: Okay.

Thank you.

VICE CHAIR HINOJOSA: A slight follow-up there, Director Boehm, but is it your understanding, some of the written testimony on this issue has been that the people who actually get arrested for this kind of situation tend to be the people who do not actually own the crop itself as opposed to those who might be here illegally and are hired temporarily to be the caretakers.

Is that your experience and if that's the experience, do you all ever get an opportunity to actually get to the people who might be the ones who are growing this crop on
federal property?

MR. BOEHM: I would say that is some of our experience. Some of the people that we encounter in there are low-level laborers brought into the growth sites. However, the overwhelming majority of them weren't someone picked up on some corner and pressed into growing marijuana in the national forest.

They're somewhat skilled. They're equivalent to farmers. I mean, I can barely grow tomatoes in my backyard and these guys are growing thousands of plants out in the middle of nowhere. They are skillful and we've also found that, because of the nature of these sites, I mean, they're extremely secretive. They face a lot of threats from other rival organizations, rival people.

These are all trusted members of whatever organization or whatever group they're working with. Does that mean that the average person there growing marijuana on the grounds knows which cartel or organization it
works for? No, I don't think so. The majority of them are generally related to each other, either closely related or distantly related. They often come from the same area of Mexico, the same village or same area, so there's obviously a level of trust which makes it difficult for us to investigate. They know what they're doing. The majority of the ones that I've dealt with actually come to the United States in the spring to grow marijuana, and then return back to Mexico in the fall, to live there in the fall and winter, and spend the time with their family.

So it's difficult to say if these are really low-level people. In one respect, yes, they are low-level, but they're obviously skilled, valuable assets of the cartel and they know exactly what they're doing. They're here to do it for a reason.

CHAIR SARIS: Commissioner?

COMMISSIONER FRIEDRICH: Mr. Boehm, thank you for your testimony and these
photographs are extremely helpful and enlightening. I wanted to follow-up on Judge Hinojosa's question about the nature of the offender here. Later testimony emphasizes that, for the most part, these are farmers. However, when we look at our statistics in the roughly 250 outdoor grow cases we have, the weapon enhancement applied in roughly 38 percent of those cases.

So I'm curious, are the growers themselves armed or are there different groups that are arming and protecting, and looking out, and then the farmers who are working or are they all one in the same, if you have a sense?

MR. BOEHM: It's been our experience they're all one and the same. I've been in hundreds of sites in my career, and I've only been in one or two sites where there hasn't been some evidence of some type of firearm in the sites; although it's only been charged in 38 percent.

There are, generally, firearms in
the site, and those firearms may be used for various, some of them are hunting implements to poach local animals, but the majority of them are pistols or semi-automatic rifles designed to protect the millions of dollars of marijuana in the growth site. So the majority of them I deal with, there are actually -- and it's everybody. Anybody can have a weapon.

COMMISSIONER FRIEDRICH: And with respect to the environmental issue, and I know you say sentencing is not your expertise, but there is a specific offense characteristic that applies when a hazardous or toxic substance is involved, and yet, when we look at the statistics, it's not applied in any of these cases, but your materials certainly suggest that there are toxic substances.

So I'm just curious whether that's a little bit too narrow for what you're finding and it needs to be broadened or do you think that this is just a lack of education for the courts? I mean, am I right that toxic substances -- from
your materials, it seems that they are a part of what you find in these sites.

MR. BOEHM: Absolutely.

Absolutely, they are, and I guess I can somewhat answer your question. From my experience, the majority of these cases, they never go to trial. They're usually going to plea to one charge and one charge only. And I guess maybe that's what the answer is, are they adequately taking the environmental on that one track of getting a conspiracy to manufacture charge, can you adequately take into effect the significant environmental damages under just that one charge.

COMMISSIONER FRIEDRICH: The prosecutors might be pleading that specific offense character stick out and not --

MR. BOEHM: Correct. Correct. So I mean, not being an expert on sentencing, then --

CHAIR SARIS: Stick around today, you --
COMMISSIONER JACKSON: Director Samuels -- I'm sorry.

CHAIR SARIS: No, go ahead and then I'll --

COMMISSIONER JACKSON: You've testified before us a number of times, and we've always appreciated your information and your time. This is the first time that I have heard from you that there's been a significant period of negative growth. You know, we've heard on and on and on, upward, upward, upward on all the previous times, so can you tell us when, in your statistics, did this downturn begin and to what do you attribute it?

DIR. SAMUELS: Yes, we believe a lot of it has to do with the reduced number of prosecutions that have occurred with sequestration and a lot of other factors because right now, we have a -3521 for growth for the Bureau. That's unprecedented. On average, typically over the years, we have looked at 6500 or plus over a period of time,
so we welcome it.

And we would hope that with the Smart on Crime Initiative and many of the comments that were made by Attorney General Holder, we will continue to see that decline. And we realize, you know, that a lot of it has to do with the charging practices and what is decided as far as the U.S. Attorney's Office and what they're going to look at. But that has, in our opinion, been a large part of what has happened.

VICE CHAIR Breyer: I was curious whether the experiment of legalization of marijuana in Colorado has had any impact on forest lands in Colorado? There's vast forest lands in Colorado, isn't that correct?

MR. BOEHM: Correct. Correct.

VICE CHAIR Breyer: And it may be too early to tell, but do you have any preliminary indication as to whether or not legalization of marijuana in Colorado has impacted federal lands in Colorado?
MR. BOEHM: Our preliminary estimate and based on similar situations in California, the market will produce whatever the market needs. And until a legal system of growth to produce the marijuana that's needed Colorado gets into place, gets up and running, it took California years and years and years to --

VICE CHAIR BREYER: Well, California's a very progressive state. Organic farming, so perhaps it doesn't have the impact that --

MR. BOEHM: But if they can't produce it legally, which --

VICE CHAIR BREYER: But they can't in California. I mean, you still have problems with respect to legalization for growth in California, not so in Colorado. In Colorado, the marijuana is legalized, so I would assume that the growth is also legalized, but of course, not on federal lands.

MR. BOEHM: It is legalized, but as
in most other places, the demand will quickly outstrip the supply --

VICE CHAIR BREYER: I see.

MR. BOEHM: -- and the criminal organizations, they're generally not eligible or it would be difficult for them to get legal operations, so they're going to grow as close as they can to the market. We fully expect an increase in activity in the Rocky Mountains of Colorado.

VICE CHAIR BREYER: Have you seen it yet?

MR. BOEHM: We have not seen it yet. We probably will start to see it. It may be a little early in Colorado, but there are probably guys out right now looking for areas because we have had DTO issues in Colorado in the past, and we expect it again, and we expect a resurgence again in Washington.

CHAIR SARIS: First of all, thank you both for coming out. I wanted to ask Mr. Samuels the following question. So if this
guideline is adopted, the drugs minus 2, and is, over five years, a decrease in beds. What happens with that savings? Do you close prisons? Do you have more treatment programs? What do you anticipate will be the effect on you?

DIR. SAMUELS: Good question. I believe there will be a number of things, and definitely, we support the Attorney General in regards to looking at what can be done on the front end with any cost savings to the taxpayers, but within the Bureau of Prisons, I mean, we still have an issue and a concern with staffing.

Right now, our inmate to correctional officer ratio is 10:1. And when you look at the largest five state correctional systems is right around 5:1, so we still have significant crowding issues and we have to ensure that we're doing everything that we can to ensure, obviously, the safety of staff, the inmates, and the public, and how we ensure that
the requirements we have to maintain our prisons safely, that we're taking care of all that.

And any other opportunities to use funding for all of our recidivism reduction programs, expanding, as I mentioned to Judge Jackson, we would like to do more and it takes staffing, because our programs are carried out by our subject matter experts for various re-entry programs. And when you're utilizing psychologists and teachers, it takes a lot of resources to carry those out, so we would hope that any savings, again, there would be consideration for expanding programs to include staff.

CHAIR SARIS: Anything else from anybody? Thank you very much to both of you. Thank you for coming.

DIR. SAMUELS: Thank you.

CHAIR SARIS: A stand and stretch opportunity for everybody.

Welcome. Another point of view.
We begin with Molly Roth, who is an Assistant Public Defender for the Western District of Texas and San Antonio. In 2008 and 2009, she worked in Washington, D.C. as an attorney adviser to the Defender Services Office, and as the visiting assistant federal public defender at the Commission.

What year was that in?


CHAIR SARIS: All right. Right before I came.

MS. ROTH: Yes, that's right.

CHAIR SARIS: David Debold is no stranger. He is the Chair of the Practitioner's Advisory Group, as we call them, PAG, to the Commission. He is a partner at the law firm of Gibson Dunn and practices in the firm's appellate and constitutional law, securities litigation, white collar defense, and investigations practice group.

And has always been willing to come here and provide wise advice, so why don't we
begin with you?

    MS. ROTH: Thank you. Good morning.

CHAIR SARIS: Good morning.

    MS. ROTH: Your proposal to reduce drug offense levels by two is critical. Fundamentally necessary, and an example of the Commission's responsiveness. Like the Commission's efforts to reduce the disparity between people sentenced for crack and powder cocaine, your current proposal will prove to be a significant step in the right direction.

    2D1.1 is the most used guideline provision of all. Your action in 2007 to reduce the crack/powder disparity was important and impactful, but your current proposal will be far more wide-ranging, affecting everyone's sentence under this guideline.

    Your action now is a fundamentally necessary step in the right direction towards decoupling the link between quantity and
culpability, a link that simply does not exist in the real world. It is critical now because of the vast number of people positively affected, defendants and defendants' families, without increased risk to public safety.

This action could well help our communities by bringing families together sooner and placing defendants in the best hope for rehabilitation, out of prison into programs that best meet their needs for education and treatment. A fair system makes our community safe.

When reflecting on how your action could positively affect defendants and their families and communities, I think of my client Hannah. Hannah began using methamphetamine when she was 15 years old and had been addicted for nearly 15 years when I represented her. She sold drugs to support her habit. Her father had served time in federal prison for drug dealing, while her alcoholic mother tried to raise Hannah and her siblings, and Hannah was
now staring prison in the face while being the sole provider for her two children.

She was released on bond into an intensive drug treatment program, the first she had ever been in, and her life made a 180-degree turn because she embraced that treatment, got a better job than she ever had, and felt as though she were truly a part of our community.

For the first time, Hannah received meaningful assistance for her ADHD, her depression, and her anxiety. Before her sentencing hearing, she told me that for the first time in her life she realized that other people -- even strangers like the probation officer who interviewed her and the judge who released her on bond -- actually cared that she did not use drugs.

Her change was striking and noticed by all she encountered, even the probation officer who did her home visit, took the extraordinary step of calling me to tell me how impressed she was at keeping her home and caring
for her children.

Her guideline level, in Category 2, was 97 to 121 months. There was no societal need or purpose to incarcerate Hannah for that long or even incarcerate her at all. Yet, the guidelines linked to quantity called for her to become one of the many people who make up a bar graph that is before you, who are incarcerated for non-violent offense.

If incarceration were working to stop addiction in our families, or Hannah's addiction, or drug-trafficking by Hannah and people like her, maybe incarceration would be a tool to consider, but it hasn't worked. It has been proven not to work, and we applaud the Commission for its proposed action to shorten unnecessary prison terms.

We urge the Commission to take this action at all guideline levels. We cannot discern a reason why you would not want to lower level 38 to 36. It seems arbitrary to retain the highest base offense level at 38 when the
other base offense levels are being lowered by 1.

In light of the fact that there are 16 specific offense characteristics that can be used when sentencing an individual who might be a high-level drug-trafficker, it is simply unnecessary. A life sentence could be easily obtained even starting at level 34, as we have suggested.

An across-the-board two level reduction would be in keeping with the reasoning that supports the Commission's decision to decrease the base offense level in 1994, and also in keeping with the principles behind your proposed action this year. The fact that Level 38 is not reserved for high or even medium level of traffickers is known across the country by prosecutors and line defense attorneys like myself.

It's exemplified by my client, 22-year-old Oscar. He had no convictions and no arrests when he was arrested. He knew he was
transporting drugs in his truck, but he had no idea the type or quantity. He agreed to transport the drugs so that he could pay for his vocational school and help pay for a lawyer to legally emigrate his parents from Mexico.

He was born in the United States, and at age 15, came to the United States by himself, had no daily parental support from 15 years old to when I represented him at 22. He came to work and to go to school. He kept working, but never made it past the 9th grade. He started vocational school, but couldn't make ends meet, and succumb to the temptation of this crime. His guideline level in Category 1 is 135 to 168 months.

We also urge the Commission to drop the Level 12 to Level 10 -- again, consistent with your action. We see no reason not to do this. Doing so would afford judges the full range of sentencing options within the guidelines; split sentences, community confinement rather than prison, no
incarceration, or incarceration, whatever the court deemed fit.

The Commission should reduce the minimum offense level floors in related drug guidelines by 2. This is particularly significant when considering the offense level floor of 17 in the safety valve provision in 5(c)1.2. We hope that this is part of the discussion of the reform to the safety valve now being considered by Congress, but we urge the Commission to act now by reducing this floor to at least 15.

We have suggested, also, two departure provisions that we think would assist sentencing judges in their determinations in these cases. One is that the weight of the mixture overrepresents the actual dosage. In other words, a mirror to the current upward departure provision that when the drugs are particularly pure, an upward departure be considered. When they are particularly not pure, this downward departure would allow for
the courts to consider lowering the guideline range within the guidelines.

The second departure provision we ask that the Commission consider adding is a recognition that a person whose offense level overrepresents his or her role should be considered for a downward departure.

Finally, as to marijuana cultivation, there are ample provisions in the current guidelines and statutes to address the harms to the environment associated with marijuana growing. For example, deprivation of government property is a very broad statute that covers damage to public lands. Combined with a charge for marijuana cultivation or trafficking, it would provide for sufficient punishment of a financier or a high-level trafficker.

But, an increase in the guidelines would result in longer sentences for very low-level individuals involved in marijuana cultivation; people who are just looking for
field work at a living wage. For every one of these people who is arrested, another person in need of feeding his or her family will be there to fill that empty place. Imprisoning these people for long periods of time separates them from their families, and importantly, does absolutely nothing to protect the environment. We urge the Commission to make no change to the guidelines in this area. Thank you.

MR. DEBOLD: Chief Judge Saris and Members of the Commission, it's always a pleasure to speak on behalf of the Practitioner's Advisory Group, and it's an especially distinct pleasure today. It occurred to me that as you read our group's written testimony, you may have been thinking something along the lines of, you guys always complain that we never take you anywhere nice, and then when we do, it's just not good enough.

So I want to start by saying that, although we have a few suggested tweaks to what you're proposing with Drugs Minus 2, if adopted
as written, it would be an incredible, tremendous improvement to how drug sentences are handed out today.

In our written testimony, we say that we strongly support this proposal. I wish we had put it in bold with double underline and yellow highlighting, and that flashing neon kind of thing you can get when you look at a document on the computer.

In the interest of time, I'll just make three brief points that we think are very important. One is that there is a smarter way, and this proposal does it, to strike the balance between mandatory minimums and the guidelines. There's been a longstanding debate about how the two should interact, and there's been talk, certainly over the years, about the so-called cliff effect; if you have the mandatory minimum and the guideline range not closely aligned.

First, we agree with the Attorney General that you will not see that kind of cliff effect with this proposal, just given the way
the numbers play out. But even if there were cases where it would occur, you're never going to have a perfect system. The mandatory minimums basically impose that fact on you, and we believe that it would be better for people who are not subject to the mandatory minimums because they aren't the types of people that the mandatory minimums are aimed at, should not necessarily have their sentences calibrated so that they are consistent with what a mandatory minimum penalty is.

Our second point is that direct sentences, I think there's almost universal agreement, are higher than necessary to achieve all the various purposes of punishment. I thought it was very helpful to hear both the Attorney General and Mr. Samuels talk about the need to decide, how do we best use limited resources?

We don't have as much money as we want to spend on things like criminal justice.

And in my 17 years as an Assistant U.S. Attorney
before I went into private practice, I have to say, I cannot recall a single time when one of my colleagues, or anybody, frankly, said, gee, I wish we could have gotten a higher sentence under the guidelines for this drug defendant.

And if anybody ever said it, I'm sure it didn't happen in a case where a mandatory minimum wasn't applicable because the person simply was not the type of person for which mandatory minimums apply. And that was before, and that was more than ten years ago, before a lot of the Commission's targeted amendments and enhancements to deal with the types of factors that do warrant a higher sentence, such as violence and the use of weapons.

My third and final point is that we do have a few suggestions for better integrating this amendment into the existing guideline. One is to apply it also to the mitigating role cap at A5. Some of the defendants with the least culpability would not
get the benefit of a reduced sentence under this amendment, and these are the people that we believe are, in fact, most deserving because they are the lowest level people who are getting a reduction in their offense level based on playing the smallest of the roles.

We also support the defender's suggestion about applying this to the entirety of the drug quantity table, meaning both the top and bottom of the table, and we think that the Commission ought to take that into consideration. And finally, I would just like to make one additional comment.

One of our former voting members, Riley Ross, who was the 3rd Circuit representative, and after his two-year term, or two terms, gladly became a non-voting member, was the person in charge of putting together these comments and led the group very well. We have a lot of support within the group.

Riley, when he was a federal defender, represented Derrick Kimbrough, and
we thought it was especially appropriate for him to take the lead and I do want to thank him and the other members of the group for assisting us in putting together the comments for today. Thank you.

CHAIR SARIS: Thank you.

Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Thank you. Ms. Roth, if we take your suggestion and drop the drug quantity table down to a Level 4, won't that create proportionality problems with other drug guidelines like guideline for possession and regulatory offenses? Won't the base of those levels for certain drugs be the same level or even lower under the drug-trafficking guideline if we were to take that step?

MS. ROTH: I don't believe so, although our specific comments are to not keep the lower end of some of the drugs at 12. I know that marijuana takes us down to 6 right now, but some of the drugs are still at the Level 12 limit.
and we urge the Commission to consider strongly reducing that to 10. We don't see a reason not to reduce that by 2.

That would not impact, I think, what you're talking about and overlap with the possession guidelines.

CHAIR SARIS: Okay. Judge Hinojosa.

VICE CHAIR HINOJOSA: Thank you both for being here in this room. Welcome to the second best district court in the country.

MS. ROTH: Thank you, Your Honor.

VICE CHAIR HINOJOSA: Guess which is the best.


VICE CHAIR HINOJOSA: Oscar, that you mentioned, that range was before acceptance and before safety valve or after?

MS. ROTH: After.

VICE CHAIR HINOJOSA: What was it that he was involved in? What was the drug and
the amount?

    MS. ROTH: He had two drugs in his truck. He didn't know the quantity or the type. Most was methamphetamine. It was a large amount of methamphetamine.

    VICE CHAIR HINOJOSA: How much?

    MS. ROTH: Over 12 kilos of methamphetamine and then heroin.

    VICE CHAIR HINOJOSA: How much of that?

    MS. ROTH: Seven kilos.

    VICE CHAIR HINOJOSA: Being from the Western District of Texas and my opinion from the Southern District of Texas, you and I both know that there are hundreds of thousands, and some people say millions, of people like Oscar in this country who are here illegally. Many of them are working as field workers, not in the pot situation, in the forest service land, but out in the fields where they might get low wages and working day-in and out, most of the time in the sun.
They have not succumbed to the fast money that somebody might get for bringing drugs across, or transporting drugs, or delivering drugs. And so the question that we often face in the courtroom, and those people don't come in the courtroom, and there are so many of them, the question is, what message do we send to them for not succumbing to the fast money and working their heads off, and then saying, well, we're punishing someone for something that they had to succumb to?

And that's something that we face day-in and day-out, and it crosses your mind as a sentencing judge. And so I'm sure that it would cross your mind if you had to sit on the bench also. So that's part of the problem here with regards to the length of sentences; the punishment versus other situations as to what we should do with each one of these cases and I think we can't forget that part of it.

MS. ROTH: Yes, and I think your question, if I'm understanding it correctly, is
about the terms. And over and over again, social science continues to teach us that --

VICE CHAIR HINOJOSA: Well, and just desserts. It's not just deterrence. It's for the person who actually took this and he did it as opposed to the hundreds of thousands and maybe millions who don’t, although given the same opportunity.

MS. ROTH: The certainty of arrest is a much greater deterrent than any length of sentence. And certainly, 135 months, even at the low end, is a tremendous sentence for a 22-year-old. In this particular example, Oscar is a United States citizen. He lacked parental guidance in our country because he needed to work here to help his family, but his parents were not in this country.

In any respect, he, like many other 22 year olds, certainly didn't have the judgmental capacity, even when we're talking neurologically, that a 32-year-old should have. But most important, the question, I
think, is, is 135 months necessary to send a signal? I would submit, no.

This graph shows, and I wish we had data from earlier, from the '20s, and data to the present, but it shows the incredible spike in incarceration after the Sentencing Reform Act, and after the drug legislation in the 1980s. If incarceration worked to stop addiction, to stop the drug flow, it would have worked in these past many years, and it simply hasn't.

Your Commission proposal for a 2 level reduction is a modest, but extremely significant, step. I think it would make about an 11-month difference, which would be an incredible difference to Oscar, would make the lesson of him being caught no less emblazoned in his mind and in the mind of the people who knew about him being caught, but would reduce this tremendous over-incarceration and bring him back to his family sooner.

CHAIR SARIS: I was going to ask
about your proposed departure for mixtures.
Are you the one who did the marijuana cookie?
That was somewhere. That wasn't one of the brownie --

(Simultaneous Speaking.)

VICE CHAIR HINOJOSA: I have heard that defense many times.

CHAIR SARIS: I don't know what's happening on that, but in general, I've never heard a challenge to that. I mean, that's the one thing that I've not actually heard was an issue, so I'm trying to understand how big a problem that that is. In other words, is it typical that the amount of the actual drug is a tiny portion as opposed to the majority of it?

I would like to understand a little bit more the data that would support the request there.

MS. ROTH: I don't have specific data for you other than what is in our written testimony, but I can tell you anecdotally that it is certainly the case that clients of mine
have had drugs of a high purity and drugs of a very low purity. And because the charge can be for mixture and substance, what we're proposing here is a mirror to what already exists as an upward departure provision in the guidelines.

So right now, there's an upward departure provision that urges sentencing courts to consider when a person is responsible for a very pure drug. And our suggestion is that when it is not pure, when it's the opposite, and the mix, it's been cut, so to speak, so much when the mixture far outweighs the amount of drug, that the court also be urged by the sentencing guidelines to consider downward departure.

COMMISSIONER JACKSON: Can I just ask you as a practical matter though, it's been my experience that defense counsel rarely, if ever, ask for departures, that we're now in a world in which the sort of departure realm is really not, at least in my experience, a part of sentencing.
And I'm wondering what your experience is in light of the fact that we have these two requests relating to departures. I was surprised to see them, given the realities, at least as they are in my district.

MS. ROTH: The Supreme Court in Gall reminds us and orders us to consider the guidelines as the initial benchmark. And I think that when we're looking at sentencing policy and seeing those guidelines as an initial benchmark, they should incorporate departure grounds.

MR. DEBOLD: If I could speak to that, too, from my experience, judges in a number of districts do, in fact, follow the dictate of Gall and look first at what the guidelines say. And quite often, the arguments that I make when I'm seeking a lower than guideline sentence is that the lower sentence is supported, not just on variance grounds, but also by the way the guidelines are worded, where they encourage departures or you
can tell by the language of the guidelines that something hasn't been taken into account, but would take somebody out of the hard line.

So I think there is a value to the Commission using its voice in these types of things.

VICE CHAIR BREYER: I want to say I was pleased to see your remarks concerning impurity or lack of purity as a basis for departure. And the reason is that the great difference that I have in my years on the bench is that, if you're going to treat it as a variance, or you treat it as a departure, and you're interested in transparency, you're interested in the accountability, you're interested in finding out why is the court doing whatever it's doing.

It's much clearer in terms of a departure to recognize departure rather than a variance, because a variance masquerades all sorts of things that can happen. I have found, in California at least, that there is this wide
variety of purity with respect to the drugs, which, of course, is an upward departure with respect to drugs of a high purity.

I don't know why it would be so difficult to quantify the degree of purity and to sort of calibrate it in some sense to the quantity, because if what you're going to do is set the drug sentence based upon quantity, which is what this table does, which our table does, then it seems to me that you have to take a look, in honesty, at the ingredients that go into what the quantity is.

And so you may have a very different, may have the same quantity with respect to a supplier, with respect to a middleman, with respect to the third or fourth person, and the ultimate seller of the good, but you won't have the same purity, and that's the difference.

And do you have some proposals with respect at how these measurements are done and whether they ought to be incorporated either in
the form of departure or some other way? Have we seen anything like that?

    MS. ROTH: My experience is that different law enforcement laboratories test the drugs that come before the sentencing judge in federal court. Sometimes they test for purity as part of their routine, in other cases, they don't, and that might be something that a prosecutor might ask, for instance, for a retest of purity, or that the defense attorney might ask for.

    CHAIR SARIS: It's just this thing has not been litigated, and myself, 20 years on the bench this year, it's never really been litigated that way, so I'm trying to understand that, theoretically anyway, they may use a huge amount of cut, but still sell it at the same price, right?

    MS. ROTH: Could be, or at a reduced price.

    CHAIR SARIS: So I just feel as if I don't have a handle on the issue well enough,
and if there was additional information, it might be useful. Because if they're selling it on the street at the same street value, should you get a reduction? I suppose you could discount it because the stuff is cheap and terrible, but I don't know that it's sold that way.

I'm just trying to understand it better and it'd be useful if you had anything else. Commissioner Barkow.

COMMISSIONER BARKOW: So I guess I'm asking about the nicer restaurant that you want to go to. If we thought about de-linking completely, I'd be curious what your thoughts would be on how we would do that or what factors we would look at. How would you advise actual nuts and bolts process that would involve doing something like that?

Because right now, when it's linked to what Congress has told us to do in the statutes, if that's the key on which we operate, you know, you can imagine how you can
proportionately go from there, but if it's
de-linked entirely, what does that landscape
look like for us in terms of the actual
pragmatic thing you want the Commission to be
doing setting up the quantities?

MR. DEBOLD: Yes, I think it would require, basically, going back to where the
guidelines started with drug quantities and
looking at the ways in which they have changed
over time driven by these mandatory minimums.
I don't think there's an easy way to approach it. You know, some part of it, I think, will be empirical, looking at what sentences have been over time, what the guidelines have been over time, and trying to get a sense of the recidivism rates that may be associated with particular types of sentences.

The main point that we're trying to make with that suggestion is that, right now, we are taking the mandatory minimums as a given in terms of what the appropriate sentence should be for all of these drug quantities up
and down the table proportional to those sentences. And, you know, it may turn out, empirical research, that there's some, purely by chance I would say, rationality to that, but right now, the way they were set, it's not tied to things like, what is really necessary to deter, what is just desserts, it's just -- it happens to be because that's where the mandatory minimums were set.

And when Congress set those mandatory minimums, it was to get at particular offenders who were either kingpins or I think they refer to the others as, sort of, mid-level dealers. And so, you know, I think in combination with not just drug quantity, but other factors that relate to culpability, which the guidelines do already, to some extent, take into account.

I think that the objective would be to look at the types of drug defendants we're dealing with, what factors are associated with them, what makes somebody a lesser involved
person, and then try to tie the drug quantity
and those other factors together in such a way
that those are producing sentences where you've
got the right kind of proportionality.

You know, I don't know that there's
any particular formula that goes with that, and
certainly, we're not suggesting that there is
something that we can hand to you in the short
term and say, this is what would work better
instead, but our criticism is on the approach
that has been taken, which starts with the
mandatory minimums rather than starting with,
what are the purposes of sentencing and what do
these drug quantities have to do with those
purpose in light of the other factors that are
both aggravating and mitigating?

CHAIR SARIS: Commissioner

Wroblewski.

COMMISSIONER WROBLEWSKI: Thank
you, Judge Saris, and thank you both for coming,
Ms. Roth and Mr. Debold. You mentioned where
we started and as I think you're aware, the
sentencing guidelines actually, not only went to Level 38, they originally went to Level 42, and we are all working within a context of statutes that the Congress has put in place, which do, in fact, tie drug-trafficking sentencing to drug type and drug quantity.

Over the course of many years, the Commission has tried to do precisely what I think you're suggesting, Mr. Debold, which is to identify aggravating and mitigating factors that better differentiate those offenders who need very long incarceration sentences from those who need less.

And of course, part of what we're doing now is further along that same trajectory, and some of that's being considered in Congress. But I'm curious because the way the system is supposed to work now, in the case of someone like Oscar, is, if you're involved in very, very, very large quantities of drugs, I'm talking about under the Commission's proposal, it would take 90 kilograms of heroin,
which is 90 times the amount that would trigger
the ten-year mandatory minimum, to get you to
Level 38.

But even someone like Oscar, who's
a first-time, non-violent, low-level offender,
the way the guidelines are supposed to work is
that person is supposed to get a reduction based
on the mitigating role cap, a reduction based
on mitigating role, a reduction based on the
safety valve, a reduction based on acceptance
of responsibility that would drive that
sentence far lower than 135 months.

One-hundred and thirty-five months
is a Level 30 and criminal history Category 1
is a Level 33 Category 1. I'm not saying that
the guidelines work exactly the way the policy
is written, but that's the way the policy is
written and it's the policy that we're
supporting, which is, again, to identify those
low-level, non-violent offenders and bring
their sentences way down, but staying within
the context of the mandatory minimums.
Explain to me why that didn't work for Oscar and why that's not the right approach.

MS. ROTH: Well, I looked at the pre-sentence report again and -- to make sure that I had the numbers right --

CHAIR SARIS: Excuse me, do you want a Guidelines Manual?

MS. ROTH: I think I'm okay right now.

CHAIR SARIS: Okay.

MS. ROTH: But in Category 1, that 135 to 168 month range was with two levels off for safety valve and three levels off for acceptance of responsibility. The role adjustment was not included in that because he was a single defendant. And in many parts of the country, that is, indeed, the way the guidelines are applied.

In that case, the court sentenced him significantly below that, but that was not how the guidelines came out. The judge needed to do that on his own.
COMMISSIONER WROBLEWSKI: The Commission has tried a number of times to tweak, to make a direction to courts to apply it. If that was applied correctly though, the sentence would drop significantly below that 135.

MS. ROTH: It would drop, but it's still linked to quantity, and that link is still not a real-world link. So if we're talking about punishing people for their actual roles in this crime, in drug-trafficking in our country, linking it to quantity still starts us at an incredibly high level.

CHAIR SARIS: Judge Hinojosa and then anybody else.

VICE CHAIR HINOJOSA: Right. Well, I just want to echo Commissioner Wroblewski's comments about how the guidelines are written so that somebody should have considered overall adjustments here. And that's certainly the view of the Commission and we've tried to make that as clear as possible, so maybe the guidelines weren't properly
The idea that weight is not the process that should be used with regards to a gradual increase or decrease seems odd to me. I did five years without the guidelines and if somebody told me that weight didn't matter, in my mind, with regards to how I determined a sentence in a drug case, I would have thought that was an odd thought, because the arguments before the guidelines and before the mandatory minimums were always the amount of weight and the type of drug. Of course that was a big discussion at the sentencing process without the guidelines and without the mandatory minimums, because it certainly would be logical that the damage to society is much different when you've got 5 pounds versus 1000 pounds.

The usage, the type of harm that comes to society with regard, the number of users that would be using the drugs, I just have always found the comment that weight shouldn't matter in a drug case a little odd because I did
five years of sentencing without the
guidelines, and it certainly was a huge part of
the discussion at the sentencing hearing, and
certainly, in the pre-sentence report.

MS. ROTH: One of the striking
things that we found in reviewing the data
preparing for our testimony was that it seems
that the lower a person's role, the higher the
quantity he or she had. So I'm looking now at
Page 5 of our written testimony, and note that
19 percent of couriers had amounts below the
five-year level, 27 percent of them had amounts
exposing them to five-year minimums, and 54
percent of them had amounts exposing them to ten
years or more.

So certainly, we don't want drugs
coming into our country or on our streets, but
when we're talking about punishing the
individual before us who was caught, it seems
that the lower the level that individual has,
the higher the quantity he or she's going to be
caught with.
So if we continue at a quantity-based scheme, we're not accounting for that person's actual culpability.

VICE CHAIR HINOJOSA: But we do in the guidelines. We do. We talk about the role adjustment, we talk about the safety valve, and so if somebody qualifies for that and you have a proper determination of the guidelines, that is going to be accounted for just as if the person was an aggravator as far as you go up.

That's the argument that you all make with regards to how factors get considered.

MR. DEBOLD: You had a point there that, I think if you take the data that Ms. Roth just mentioned, all of the things being equal, I would agree that the courier who brings in 10 kilos is more culpable than the courier that brings in 1 kilo. The whole issue here is not whether weight is a significant factor. The question is, how much, or the discussion on how much weight should weight play in the
sentencing process?

I'm sure we're going to have this discussion when we talk about the fraud guidelines in the next year or so, where we talk about how dollar amount is definitely a way of distinguishing people who are otherwise equal. But the question is, how much of a role in the overall sentence should that play?

I think the point here is that Congress, in setting the mandatory minimums, treated weight as a, I would submit, very rough proxy for culpability. And we all know, because you have a guideline system that has a whole bunch of other factors that you take into account before somebody's sentence is determined, that the drug quantity is a proxy, but it's rough.

The issue is, how do we take a big-time dealer who has the same drug quantity as the mule and figure out how their sentences should be proportional to one another? And that's the challenge here and one that I'm glad
the Commission is engaged in.

COMMISSIONER PRYOR: Ms. Roth, you mentioned that this is the one most widely used guideline and I wondered whether you think it's also the most widely respected guideline in the sense that we see a lower percentage of non-government-sponsored below-range sentences with this guideline than we do with other guidelines and how that should play in our consideration.

MS. ROTH: I think judges across the country would welcome your proposal to reduce the base offense levels by two; embrace it.

CHAIR SARIS: Anything else? Thank you very much. We're going to take a 15-minute break. Maybe 11:10, 11:15, that'd be great.

(Whereupon, the foregoing matter went off the record at 10:58 a.m. and went back on the record at 11:14 a.m.)

CHAIR SARIS: Order. So now we have our panel of community and law enforcement
views. We start with Julie Stewart. Ms. Stewart is president and founder of Families Against Mandatory Minimums. Prior to establishing FAMM, she worked at the Cato Institute for three years as Director of Public Affairs. Welcome back, I should say.

MS. STEWART: Thank you.

CHAIR SARIS: Mr. Reddy is a policy analyst at the Texas Public Policy Foundation Center for Effective Justice, where he coordinates the Right on Crime Campaign. He previously worked as an attorney in private practice and as a law clerk to a justice of the Texas Court of Appeals. Thank you for coming such a distance.

CHAIR SARIS: Raymond Morrogh is a director-at-large for the National District Attorneys Association. He has served as the Commonwealth's attorney for Fairfax County Virginia since 2007.

Mr. Morrogh first joined that office in 1983 and was appointed as Chief Deputy
Commonwealth's Attorney in 1988. He also has served on the Board of Governors of the Virginia State Bar Criminal Law Section. Welcome, Ms. Stewart.

MS. STEWART: Thank you so much, Judge Saris, and Commissioners. It is a pleasure to be here again. As you noted, I started FAMM in 1991 shortly after my brother was arrested for growing marijuana and sentenced to five years in federal prison. He was arrested in Washington State, which, I have to say, is just a little ironic given that they legalized marijuana there now.

But his offense and conviction certainly started me on a career that I never knew I would be doing still 23 years later. Although, I have to say, where it was a third-rail issue in 1991, sentencing reform is pretty much mainstream today and it feels so good, so very good.

But I'm pleased to be able to say that FAMM supports your proposed amendment...
wholeheartedly. We believe that the Commission got it wrong when they created guidelines that were above the mandatory minimum sentence. We do view this proposal though as a very modest proposal. It's definitely not a major shift in policy or policy change.

My testimony gives you other ways in which we support the amendment and why, but I think the most compelling one is the human reason. And because I'm not burdened with a law degree, I don't have to give you all the legal reasons that we have to change this amendment, or support this amendment, but I do very much feel that one of the things that often gets lost in the discussion of sentencing guidelines, and grids, is that it becomes this arcane process by which the human being gets forgotten.

And I know that you try very much to keep them in mind, and you hear from other witnesses who talk about the individuals they
represent, and I'm just here to add that voice
to this discussion. I think that the average
sentence reduction of 11 months seems very
small, and yet, at the same time, 11 months
makes an enormous difference in people's lives.

A friend of mine started a 20-month
prison sentence two months ago, and he had to
leave his children. He was a primary caretaker
of him. Twenty months sounds so small to
people who don't work in this world every day,
and yet, 20 months is a very, very long sentence
and a lot can happen in that time.

So an average sentence reduction of
11 months can make a huge difference in many
people's lives. One of the people whose cases
I talk about in my testimony is Dana Bowerman,
and she was a methamphetamine addict from a very
young age who was engaged in a conspiracy that
involved her father and a lot of family members.

She was sentenced at age 30 to 19
years and 7 months. That's 235 months in
prison. And if this amendment had been in
place at the time that she was sentenced, she
would have received a sentence of 188 months,
about 15 years and 6 months, so about four years
less than she received.

She has been in prison for a very
long time. She will be released in 2018 at the
current rate if this minimum does not go through
and is not made retroactive. But she's an
example of someone whose life would have been
changed dramatically had this been in place at
the time she was sentenced.

And then more closer to home,
yesterday I went to a memorial service for the
uncle of two young men who served prison time,
Lamont and Lawrence Garrison, you've heard
their mother testify here before, Karen
Garrison.

The boys, Lamont and Lawrence, each
received sentences of 15 years and 19-1/2 years
in prison for a crack cocaine offense in 1998.
When you dropped the crack cocaine guidelines
in 2007, and then made them retroactive, they
both received reductions, one of three years
and one of four years.

So each of these gentlemen were able
to be present yesterday at their uncle's
funeral service. One of them would not have
been able to be there. He would still be in
prison if not for the reforms that you passed
in 2007.

And it was such a strong reminder of
the real human element; the living, breathing
embodiment of these sentencing guidelines, to
see these young men paying tribute to the uncle
that raised them, pretty much, as sons.

So I urge you to continue along this
path that you have taken so boldly since 2007,
and even before, to continue to offer drugs
minus 2 to everyone serving a drug offense.
It's not an enormous reduction in sentence. It
does correct the problem that we think needs to
be corrected. The guidelines should capture
the mandatory minimums, not give up them.

And we're really very delighted
that you're taking this modest change and support you every step of the way. Thank you.

CHAIR SARIS: Thank you. Mr. Reddy.

MR. REDDY: Thank you very much, Judge Saris. It's a real honor to be before you and the Commissioners today. I do work with Right on Crime. Since our watch in 2010, we have been focused almost exclusive on state-level criminal justice reform, but that doesn't mean that we're uninterested in federal criminal justice issues.

In fact, we're all familiar with Louis Brandeis' conception of the states as laboratories of democracy. He said that the states should learn from one another. I think you could extend that a step further and say that the Federal Government could learn from the very best practices of the states also.

I think that today's amendment follows in the footsteps of some of the very best work that the states have done over the
last ten years. You have seen several states throughout the United States, states that we've been involved in, look at adjusting penalties for drug offenses, and they have seen outstanding results.

They have found that crime rates, which have been climbing for about two decades in this country, have continued to decline even after they have made these sentencing adjustments. They have found terrific support from all components of government, from both parties, from all sorts of stakeholders across the spectrum, and that support is coming in large part because the crime rates keep dropping.

I think we're finding that the reason the crime rates are dropping, even after these penalty adjustments have been made is that, incarceration is something that has diminishing returns. Now, a certain level of it is obviously necessary, but at a certain point, I think you start to realize that each
additional dollar that is spent on incarceration can be better allocated towards law enforcement and other prevention techniques, and that you get better results that way.

I want to, today, speak specifically about four states that we've worked in and reforms they've implemented: South Dakota, in 2013; Georgia, in 2012; South Carolina in 2010; and Texas in 2007. I want to focus on these states because they are, plainly stated, conservative states.

These are states that are dominated by conservative legislatures. The governorships are conservative. I don't think that any of these states could be considered states with political cultures that are soft on crime, and yet, every one of these states has made reforms that would be similar to the kinds of reforms we're talking about with today's amendment, and I think we can learn a lot from their successes.
So briefly, beginning with South Dakota, in South Dakota's Senate Bill 70, passed in 2013, the penalty for drug possession was reduced from a Class IV felony, which carried a maximum penalty of ten years in prison, to a Class V felony, which carried a maximum penalty of five years in prison.

Also, the state established presumptive probation for all of their Class V felonies, also, their Class VI felonies. Those reforms are expected to save South Dakota $207 million in prison construction and operating expenses over the next ten years.

In Georgia, which implemented its reforms in 2012, the state created degrees of seriousness for simple drug possession. This is based on the weight of the drugs. Amounts below 1 gram can now be charged as simple felony possession so that they can better identify and treat offenders whose conduct is most likely due to addiction.

The Georgia reform bill passed
unanimously in both Senate chamber and the House chamber. And a poll conducted by the key charitable trusts revealed that Democrats, Republicans, and Independents support the legislation by at least 79 percent or above. I think the lowest figure was among the Republicans. That was 79 percent. That's still 4 out of 5 Republicans supporting the bill.

The legislation is expected to save Georgia about $264 million in prison costs.

South Carolina provided for persons convicted of a first or second drug offense to be eligible for probation or a suspended sentence, or parole, work release, or good conduct, and other sorts of credits. Additionally, persons in South Carolina who are convicted of a third or subsequent drug offense were made eligible for probation, for parole, and for credits, and other loaded circumstances.

The South Carolina bill, because it
passed a little bit longer ago, has actually provided us with some results that we can look at. The prison population in the state has decreased by 8.2 percent and crime has dropped in the state by 14 percent.

I'll now turn to Texas, and I'll spend an extra moment on Texas because, as Judge Hinojosa said, they do contain the best district in the country, probably the best four districts in the country, Judge.

Texas, in 2007, is also worth spending a moment on because just this weekend, a few days ago, our governor, Rick Perry, was here in Washington, D.C. at the Conservative Political Action Conference. He was just a few miles away from where we're sitting right now, and participated in a panel on drug policy in Texas.

He made some really remarkable comments. He was on a panel with Grover Norquist, the prominent tax reform crusader, and he said there are very few things that I
agree with Barrack Obama and Eric Holder on, but
this issue is one of them. And at that moment,
there was applause throughout the room. I was
in the gallery, there were thousands of people
there, and yet, it was Rick Perry and Grover
Norquist. I think it's a sign of a real culture
shift.

In 2007, Texas instituted a cite and
summons program for marijuana offenses. I'll
briefly say that it was a bit of a myth that
marijuana offenses were causing people to be
locked up for very lengthy sentences, but what
is true, even though these people were
receiving probation, is that, while they were
awaiting their trial, they were sitting behind
bars, and Texas taxpayers were paying for that.

So the Texas legislature and the
governor said, well, if you could just issue a
cite and summons where the officer can issue a
ticket and have this person arrive in court for
their court appearance, you wouldn't have to
pay for those costs. This is something that
passed very easily with Texas legislature, and again, was signed into law by the governor.

That same year, Texas also capped probation terms for drug offenders of five years instead of ten years. You've seen a 25 percent drop in recidivism in the State of Texas since these changes took place in 2007. The state has its lowest crime rate since 1968. And Texas, of all places, has closed three prisons in the last three years.

The commonalities in all four of the states I just described come down to the buy-in. They got significant buy-in from the governors, from the legislators, from the judiciary, from prosecutors, whom they included in the process at the earliest stage, and from prominent thought leaders and think tanks, such as ours, the Texas Public Policy Foundation in Texas.

But on a final note, I'll just conclude by saying that in each of those states I identified today, the penalty adjustments were coupled with expansions of drug and mental
health treatment, rehabilitation, and community supervision programs. That, I think, is what Americans want, not just modified drug sentences, but real action to replace the long drug sentences with more accountability for drug offenders.

Accountability does not just mean sitting in a cell. It means getting treatment, paying restitution to any victims, and being forced to maintain steady employment upon release. Now, I realize that the sentencing Commission is not empowered to ensure that those improvements are made to federal drug treatment and re-entry, but I do hope that the Commission will be a strong champion for these changes if Congress considers today's important and excellent amendment. Thank you.

MR. MORROGH: Judge Saris, distinguished Judges, Counsel on the Commission, thank you also for allowing me to be here today to speak. It is indeed an honor and I thank you for your important work that you
do for Americans.

I'm here, obviously, representing the National District Attorneys Association, which represents approximately 39,000 state, local prosecutors across the nation. And it so happens that the local prosecutors, such as myself and my brother in that organization, prosecute approximately 95 percent of the crime in the country.

In my jurisdiction, which is Fairfax County, not far from here across the river, we have about 1.3 million citizens. Most of the big drug cases go federal. If it's a big quantity, it goes to the federal authorities, because they have the manpower, the resources, and truly, the hammer of these mandatory sentences, and some strict sentences, I'd say, with respect to some of these drug cases, which allow them to sort of attack these organized drug organizations, whether it's violent gangs, which we go have in Fairfax County, which is a pretty suburban
jurisdiction, but they can dismantle those entities using these tools, which we simply just don't have.

Now, I will tell you that in my jurisdiction, Fairfax, I haven't tried a drug case in 30 years, and I'm an active trial lawyer. I try murders and you name it, all the time because we're busy, but no one tries them because the jurors give out such extraordinarily high sentences.

The jury sentence, in Virginia, judges can reduce, so you almost never try a drug case. I think that's, maybe, unique to Virginia, but I think it kind of says something about where the public is on this. We're here to consider these amendments, and I have to tell you, I'm not a federal expert.

I don't know beans about the guidelines. They gave me the guidelines, I read them, now I know why I'm a lawyer, it's a lot of math involved in that. I'm getting my usual D that I got in high school, but I think
I appreciate, generally, where they are and I've been schooled by others wiser than I.

I guess what we're saying is, we want to try to balance the budget, which is necessary, and here's a way we might be able to do it without really harming anyone because we've heard a lot of people talk about public safety and so forth.

And one of the things that's cited is a study that says, I think it was in 2007, that it was a reduction in the minimums for crack sentenced individuals and the study showed that they did not recidivate at a higher level than anyone else who served the full sentences.

But I wonder, what is the recidivism rate there? Is it 5 percent? And what are the crimes they committed upon recidivism? I mean, are they serious crimes? I heard some stories today about Oscar and other people, and certainly, they pull at your heart strings to a certain extent, but I want to tell you about
last summer, I tried a case, and the victim's name was Vanessa Pham, and she was a beautiful 19-year-old college student that attended VCU.

She went to get her nails done before she could go on a job interview over in Seven Corners, just about 12 miles from here. A man approached her carrying a baby in a baby carrier, and asked her for a ride to the hospital because his baby was sick. She got in the car, he abducted her, forced the car off the road, and stabbed her almost 20 times; killed her.

The defense, I came over to the District, I bought PCP, I was smoking it, I'm sorry. He's serving 49 years in prison and Vanessa Pham will never see her family again.

The last murder case I tried before the one -- not the last one, but the last drug-related case a few years before that, Jenny Orange, a beautiful 29-year-old woman, lived in the Crestwood Apartments, again, about 15 miles from here. Hard-working young woman,
only child of her mother, and she was in her apartment watching "Heroes", the television program", when a man broke into her apartment and beat her 47 times with a hammer, disrobed her, and raped her; killed her.

Now, he's on death row. The defense, I came over to the District, I bought PCP, I smoked it, and he had witnesses to it, they were all smoking PCP, and I just lost it. It's not me. You know, I'm sorry. And he's on death row and Jenny Orange is never going to see her mother again, and her mother is disabled now as a result of what happened.

So I say that not to shock you, and I know as federal judges you probably see it all, just like I do, but just to sort of be one of the voices here, maybe the only voice, to remind us all that things like that are not reflected in the statistics. A box isn't going to get checked on anyone's sentencing guidelines because we didn't find out who did, we don't know where the drugs came from, but we
know that drugs are pernicious substances and that they're fungible.

And once they're introduced into the community, they have a ravaging effect upon the populace, especially in the inner-city and minority areas, where African-American males are five times more likely to be murdered than White males. That's why these laws are tough.

And I remember one of the judges mentioned the 1980s, and I'm old enough to remember that, when we had open-air drug markets, crack markets in Fairfax County, which is, as I say, a suburban jurisdiction, and it was horrible. We toughened the sentences, we put people away, and now we have safer communities.

Homicides are down 50 percent in the last 30 years. I just ask you all just to keep that in mind when making these difficult decisions. Thank you.

CHAIR SARIS: Thank you.

COMMISSIONER FRIEDRICH: Mr.
Reddy, you mentioned a number of state reforms that have occurred, and correct me if I'm wrong, but is Texas the only one where you mentioned a recidivism study?

MR. REDDY: I think Texas is the only one in which I mentioned a recidivism study, but that doesn't mean that it's the only state in which we can point to some of those figures. I think that in South Carolina, you know, some of the figures show that recidivism has declined.

I will say that in South Dakota and Georgia, which I mentioned, we wouldn't have those figures because recidivism rates are calculated three years out and they're too soon.

COMMISSIONER FRIEDRICH: Well, with respect to Texas, I'm not familiar with all the specifics, but you mentioned two. You mentioned that there were summons issued for minor marijuana offenses, and there was reduction probation for certain offenses.
It’s hard to tie those changes to reduction in recidivism. Were there broader scale reforms that are connected to recidivism?

MR. REDDY: Yes, there were actually far broader reforms. I didn't mention them because I didn't know how germane they were to today's amendment, but as long as I get the chance to brag on these terrific reforms, I will do it.

In 2007, the state had a budget surplus but was told that a large portion of that surplus was going to need to be directed towards prison expansion. I think the exact figure was 17,000 extra prison beds at a cost of $2 billion. And that these beds would be needed by the year 2012.

The legislators did not want to spend all of those funds, so they put $240 million, a much smaller amount than $2 billion, into expanding drug courts, to better monitoring and parole and probation, and they really, really improved community supervision
in the State of Texas. And I think the results speak for themselves.

As I said, 2012 rolled around, and rather than needing those extra 17,000 prison beds, the state found that it could actually shutter a prison. One year later, the state legislature shutdown another two. So I didn't mention them at first because those moves towards improving community supervision policies are probably not things that we can work on today.

But I do think that they're within Congress' purview, and I do think that, in a sense, today's amendment is step one, and some of the bills that are being considered by Congress are step two. I think Attorney General Holder had said, they complement each other. I think I would agree with that.

COMMISSIONER PRYOR: I have, really, a question that can be answered by any or all of you and it involves two sides of what we have to consider, Mr. Reddy, you mentioned
what has happened in Texas, where, apparently, they have great courts, but not as good of a football team.

MR. REDDY: We never cheat.

VICE CHAIR HINOJOSA: I'm in the middle of this.

COMMISSIONER PRYOR: But doesn't the experience of the states really tell us very limited information for what we have to consider with the federal system? Mr. Morrogh was mentioning so many of the big cases were prosecuted on the federal side, and they really involved different kinds of offenders, and far more serious kinds of offenders.

Ninety-five percent of the cases he was mentioning are prosecuted on the state side, and the far-lower risk offenders, lower-level offenders, the ones who might expect not to be as great a risk if penalties are reduced, are going to be on the state side. That's one side of the equation, and then the other side is, what we're really talking about,
Mr. Morrogh, is, the starting point for a
district court's calculation of the
appropriate sentencing guideline.

And since this issue was last
visited by the Commission, there have been a
great number of enhancements added to the
federal sentencing guidelines that can bring
that sentence a lot further up and help the
district court differentiate between lower and
higher risk offenders.

So what I wanted to know is your
reaction to those two sides of what we have to
look at.

MR. MORROGH: From my perspective,
I think, you know, I am both generally aware of
the guidelines, of course, and I know that there
are enhancements now for firearms and levels of
involvement, and it's more subtle than it used
to be. So some might say, well, quantities,
Isn't it sort of less important to the calculus?

But to me, it's just sort of from a
common sense standpoint as a state prosecutor,
quantity, to me, is one of the big indicators of the level of criminal involvement, and the greater the quantity, the greater the potential harm to the community.

It's one thing to sell a small amount of drugs to your neighbor. It's another thing to have kilos of heroin in a truck and deliver them here. So I think quantity is just a very important factor, just in my opinion.

CHAIR SARIS: Judge Breyer.

VICE CHAIR BREYER: Yes, I'd like to thank all of you for your remarks, and certainly, even though you were the only speaker today to address the particular issues of victimization, I think we are all well-aware of it. My own career, I started as a district attorney in San Francisco in the "Summer of Love", and in the beginning, in 1966, '67, drugs were sold everywhere.

No one viewed, and when I say no one, I would say that the population as a whole, didn't view them as particularly pernicious
until the next year or so when we saw the increase in homicides, the destruction of lives, and especially young children who came out to California. I, myself, prosecuted a triple homicide caused by PCP.

I am keenly aware of the terrible harm that drugs can cause, the devastation it can cause, to victims, the families of victims, and the community-at-large. So I am mindful, and I know we all are mindful, of that.

I wanted to ask you a question about your last response, because I do think quantity matters. And I think that's shared by a number of us, maybe all of this quantity, certainly, does make a difference, but when you start looking at quantity, the interesting thing about quantity may be its component parts.

And it may be that the purity may make the real difference in connection with the harmful effect that a drug can cause. So in your career as a district attorney, do you take a look at the purity? Does that make a
difference in your charging decisions? Do you view it as a significant component in the decision as to how to prosecute and what to ask for?

   MR. MORROGH: It certainly is a factor, Your Honor. I mean, we look at the purity for sure, but again, when it's really large quantities, like kilos of drugs, at least in our jurisdiction, the federal prosecutors step in and take it. But prosecutors across the country in other states, maybe, Boston and places like that, they probably do really big cases because they're better staffed and whatnot. I say big cases, large quantities.

   We do look at it, but it was an interesting discussion earlier about how you can step on the drugs and how much, you know, cut you put in there. I actually had that issue come up in a case, and I went to the lab and asked them, can you separate out? And they looked at me like I was crazy. And they said, we'd have to go through every grain to figure that out.
So I don't know if it's literally impossible, but it may be virtually impossible, at least from what I was told, but I do think purity matters to a certain extent. If you've got someone with a lot of very pure drugs, that indicates they've got a good source and they're probably major dealers.

But on the other hand, if you have somebody with kilos that's been stepped on two or three times, it's still going to be sold and it's still going to put harm out there, and hurt families and people, so again, it's a factor.

CHAIR SARIS: Everybody's talking. Hold on a second. Judge Jackson?

COMMISSIONER JACKSON: Well, thank you all for being here. I wanted to follow-up on Judge Pryor's comments and, Mr. Reddy, do you agree that the experience of the states is not something that is easily translatable to the federal system? That's one question, and then the other was, you mentioned in your comment that there was a lot of buy-in in the states that
you mentioned from all across the political spectrum, and I'm just wondering whether you've seen that same sort of buy-in at the Federal Government level.

MR. REDDY: Sure. Well, to go back to Judge Pryor's question, you know, it's not a perfect analogy, but I do think that, ultimately, the experiences of the states are useful, and the reason I would say that is because I think what we're getting at is kind of a question of human psychology, that it wouldn't matter whether it was at the state or federal level, and here's what I mean by that.

The question is, if a sentence for any sort of a crime increases from one year to two years, does the likelihood of committing that crime drop by half, or do the number of people committing it, does that drop in half? And if the answer to that is simply, no, we've learned something there.

We've learned that we need to do other things than incarceration when
addressing these kinds of crimes. And I think these are the kinds of things we've seen at the state level, that sentences are being reduced, and yet, they're still seeing that crime is falling.

And so I think that you can see something of that human psychology there, that for a long time, we were increasing, or ratcheting up, penalties year, after year, after year, and it's not clear to me that that is what got us the results we wanted.

I would secondly say, talking about buy-in, yes, there's terrific buy-in at the federal level. Actually, I'll go back and mention Texas briefly here and tell you why that relates to the federal level. We conducted a poll at the Texas Public Policy Foundation on attitudes among Texans on the 2007 reforms.

And we found that the highest levels of support came from people who self-identified as Liberals, and who self-identified as Tea Party-leaning Republicans. That was very
interesting, and I think if you look at the federal level to see where the buy-in is coming from, you just look at some of the bills that we talked about today.

The alliances are Senator Leahy and Senator Rand Paul, and you can't conceive of two people with more different world views in the U.S. Senate right now, but they're the ones who are sponsoring the bill together.

You see the same kind of thing with a prominent bill that's being pushed by Senator Mike Lee. He's considered a member of the Tea Party, a caucus of Republicans, that bill is co-sponsored by Senator Ted Cruz of Texas. And so I do think that political buy-in is coming from both sides. I think that, across the three branches in the Federal Government, you have buy-in.

I mean, you're obviously getting it from the legislatures, who are obviously getting it from the Executive Branch, Attorney General Holder was here this morning, and we're
getting it from the judiciary, apparently, because you are proposing this amendment to the guidelines, and considering it, so I'm very optimistic about the buy-in that's occurring at the federal level.

MS. STEWART: Can I just add one thing to that? I totally agree. I also want to mention that Senator Durbin is on the Senator Lee and Senator Cruz bill as far as sentencing act. That's the bipartisan piece. Also, to quantity, I think quantity should be a factor, it shouldn't be the driving factor, and I think that's what we all complain about with the guidelines; that the quantity starts you at the bottom of the guidelines, and you can go up from there, and that the guidelines are so high.

And I'm curious, Judge Breyer, if I can turn the tables on you, do you remember how much time your triple homicide person got?

VICE CHAIR BREYER: No.

MS. STEWART: Because I contend that in the time that you were prosecuting cases
to today, sentences have escalated so ridiculously that what used to satisfy the public safety need and everything 20 to 30 years ago, today, no longer does.

VICE CHAIR BREYER: Well, we have

the indeterminate sentence in California --

MS. STEWART: I understand.

VICE CHAIR BREYER: -- and those here, so it was set, ultimately, by the Parole Commission.

MS. STEWART: Right, but let's say he got 30 years assuming that's what non-violent drug offenders get. It's just that the escalation of punishment is so high today.

VICE CHAIR HINOJOSA: And, Julie --

CHAIR SARIS: That's fine. We'll go down and then --

VICE CHAIR HINOJOSA: A follow-up to that question, and I should have said Ms. Stewart --

MS. STEWART: No, that's fine.
VICE CHAIR HINOJOSA: The response from the other side is, but crime rates are so much lower, and, you know --

MS. STEWART: Then I turn you to Mr. Vikram, who can tell you that, in fact --

VICE CHAIR HINOJOSA: Well, I was going to turn next to him.

MS. STEWART: And that's why the state experiment is so valuable, because, in fact, they have lowered -- you know, they've changed -- made reforms, lowered penalties, done all these various things, and crimes keep dropping in those same states.

VICE CHAIR HINOJOSA: Right. And so my question is really a follow-up to -- and I need to respond to Judge Pryor, Texas is bigger than France, so therefore, big enough to have many good football teams, not just one.

COMMISSIONER PRYOR: Just no great ones.

VICE CHAIR HINOJOSA: All play within the rules. The four states that you
mentioned, and I listened to what kind of crimes you talked about, and that's, also Judge Jackson has mentioned this, they seem to be simple possession-type of crimes. I mean, as Mr. Morrogh pointed out, a big enough case, it goes to the federal system.

And so this same thing happens in Texas. Department of Public Safety, big enough case with regards to drugs and quantity, type of drug and quantity, goes to the federal system. And so my question is, in any of these four states, did we have -- and I don't even remember ever having a possession case, except during the Reagan administration when there was a very limited policy that everybody, even for simple possession, would come into the federal system, and that was a long time ago. It didn't last very long.

And I haven't seen a possession case since then; just simple possession. Any of these four states that actually involve drug-trafficking and drug-trafficking of
certain drugs and in certain quantities where there have been reductions? Is Texas one of them?

South Dakota and Georgia, you specifically mentioned possession, but are any of those states that we can look at as people setting national policy for federal cases where we could find some correlation to the type of case that we have in the federal system?

MR. REDDY: The honest answer, Judge, is that it's hard to know the answer to that, because as you're indicating, and as Judge Pryor pointed out, the amounts are so much larger and so the trafficking cases are different, but I still maintain that the example of the states is useful.

And the reason I would say that is that, although I focused exclusively on drug crimes during my testimony, these states, they reduce sentences across the board for all kinds of things; for burglary, they changed offense thresholds; they reduced penalties for certain
assault crimes.

So it's clear that, on a whole host of crimes, you are seeing that even though penalties were reduced, you, nevertheless, saw gains in public safety. So I think you could extrapolate from that that the question is not just the specific crime. It's that we just reached a point where, across the board in the United States, we had ratcheted up the penalties far too high and we weren't getting the results we deserved.

CHAIR SARIS: Thank you. I feel like I should state, being from New York, where there's no claim to having the best football team, but we have big traffickers and New York did lower the drug penalties quite substantially, and our homicide rates are at record lows, and we're experiencing great public safety there.

So a little plug for New York, which actually brings me to my question for you, Mr. Morrogh, which is, I think we all share the goal
of public safety and crime reduction, and doing
so on limited budgets. And hearing from the
Federal Government and the Attorney General
about what the best crime fighting strategy is,
is, you know, we've been told repeatedly that
with the limited federal budget and more and
more of it getting eaten up by the Bureau of
Prisons, there have been a hiring freeze on
enforcement agents, on prosecutors, that's
actually hampered the Department's ability to
fight crime and be a partner to the states in
this effort.

And so I guess my question is, if you
have a reason to doubt his assessment as to what
the best allocation of the resources would be,
because he seems to think spending less on the
terms of incarceration and shifting those
resources towards, you know, a combination of
more law enforcement plus these alternatives,
like, community supervision treatment kind of
thing, that that package, overall, would reduce
public safety better than the current setup
that we have right now.

MR. MORROGH: Thank you. I'm from New York as well. I was born in Queens. How can I say it? I guess on behalf of NDAA, I respectfully disagree with Attorney General Holder. You know, NDAA doesn't believe the system is broken. We don't believe that the federal prisons are packed with low-level drug possessors and low-level people. They're either people who have offended four, five, six times or dealing in large quantities of drugs.

Drug possession crimes aren't even really treated very seriously at the state level anymore. Most people are diverted, and rightly so. We've moved to things like Project Hope. Even at the state level we're looking at the veterans. All sorts of diversionary programs, that component is important.

It's just that, to cut sentences of what looks like it could be 70,000 people who are in prison for drug dealing-related offenses is going to have an impact on public safety. It
sort of seems to us that we learned that lesson in the '80s, and now it seems like we're doomed to repeat history.

I mean, and again, it goes back to, what's the recidivism rate of these people who are in there and what crimes do they recidivate with, because one more Jenny Orange is too many, and one more Vanessa Pham is too many. And to see people in neighborhoods, you know, hard-working people, have to deal with people selling drugs on the street is just, we don't think, in the interest of public safety.

And treatment is important but people have to want to get treatment, and we should divert as many people as possible, but we should be strong when it comes to serious, and we think drug dealing is a serious crime. We should treat it seriously and we shouldn't try to balance the budget on the back of the criminal justice system, because victims are involved, and public safety is involved, and we think that the prime duty of government is to
CHAIR SARIS: All right. Thank you. Commissioner Friedrich.

COMMISSIONER FRIEDRICH: Mr. Morrogh, I had a question relating to crack cases. We've seen a pretty significant drop in the federal crack docket following the Fair Sentencing Act and our 2007 amendments, as well as the 2011, and I'm wondering, have you seen a corresponding increase in Fairfax County in the number of crack cases, and if so, how do the sentences, average sentences, imposed in those cases compare to what they would get in the federal system?

MR. MORROGH: Well, like I say, nobody tries crack cases to juries in my county because juries would give you a very, very severe sentence, in the dozens of years. So we don't try them, we make people plead guilty and they get, compared to the federal system, comparatively light sentences, but they're always low amounts of crack. We're talking
about several grams.

When we get kilos or even a kilo, typically, it would go federal because the federal prosecutors could use that person to penetrate a larger drug empire and maybe divert that person, or do something with them, if they were lower level, to get at the real big cheeses, I guess you could say.

But, no, I don't see an increase in crack cases in my county, and I don't think there is one around the country. I see an uptake in heroin recently.

COMMISSIONER JACKSON: Can I just ask, Ms. Stewart, in your testimony, you mentioned that the guidelines should capture the mandatory minimums and not be above them. And I'm just wondering whether or not FAMM has a position on something we discussed in a previous panel, which was whether the guidelines should be completely divorced from the mandatory minimum.

MS. STEWART: Well, that would be
my preference, and I testified in 1994 to, or 1993 perhaps, to change LSD penalties and in '94, I think it was marijuana penalties, to de-link them from the mandatory minimums, and the Commission did that.

So the Commission, I mean, no one is prosecuted for LSD anymore, practically, but the Commission made a standard dosage weight for each hit of LSD, instead of weighing the paper or the sugar cube that the LSD is transferred on, which is how it's done under the statute, so those were de-linked.

And in 1994, the Commission established a standard weight for marijuana plants, 100 grams per weight; whereas, under the statute, it's 1000 grams per weight. So it's been done before. Those may have been the easier ones to de-link, but it certainly has been done, it's possible, and those have been in effect since the '90s and there certainly has been no uproar about it.

VICE CHAIR BREYER: Well, I asked
Mr. Morrogh, but I wanted to ask you as well, do you think that if there was an analysis as to the purity of the drug, that that would be significant in terms of sentencing; that we ought to consider that in terms of sentencing?

MS. STEWART: Well, you do that already with methamphetamine, meth versus ice, those are different sentences. I think it -- I mean, I certainly am no expert in this. There's probably no reason not to. If you can determine the purity of the drug, why not make a distinction between them and give the lower sentence to one that's the mixture.

But again, I think it's focusing a little too much on the drug and less on the culpability of the defendant, so if the drug wasn't driving the starting point, and if the starting point wasn't so high, I think that we would end up with sentences that are more applicable to each defendant.

MS. STEWART: Anything else from anybody? Just one last question for you, Mr.
Reddy, because you're the one who knows the numbers from the states, and someone asked this before. We're all worried about recidivism. Am I right, Mr. Morrogh? Everyone's worried, is the person going to go out and hurt somebody and, sort of, doing something stupid and ending up back in jail?

So when you look at all of these states, what are the -- in particular, not just the possession cases, that's not as much our issue, but the people who traffic, have there been recidivism programs that standout for you that we can learn from the states as laboratories of experience, in Texas, say? That great state that's bigger than France.

MR. REDDY: I suppose the programs that standout the most at the state level are the problem solving courts, and they've come up several times in the testimony of other witnesses today who have mentioned the veterans courts, they've mentioned the drug courts. There are prostitution courts. There's a
prominent one in Dallas. There are mental health courts.

These are really terrific programs that get right to the heart of some of these problems. They're great diversion programs. We're able to address a lot of these problems without having to utilize very expensive incarceration-oriented solutions, and they've been some of the most effective.

CHAIR SARIS: And do they prove up? Do you have numbers for us?

MR. REDDY: I can get you numbers, but I'm afraid I wouldn't be able to quote those off the top of my head.

CHAIR SARIS: Okay. I would love to see them because that's the pushback you get, which is --

MR. REDDY: Of course.

CHAIR SARIS: -- I'm sure everybody here is interested in having effective, the new term is, evidence-based programs. We're studying recidivism on the Commission. It's
one of our big initiatives is to actually track people to answer some of these questions. And you're right, that'll be at least three years. We're going to track for more years than that, so it's very useful for us. And the questions that we always get asked is, and then what?

And so it'd be very useful if we can get that information.

MS. STEWART: I do think you might want to say though that the recidivism rates from the 2007 crack cocaine retroactivity were 30 percent, which was lower than the non --

CHAIR SARIS: The other cohort.

MS. STEWART: Right. Exactly.

CHAIR SARIS: Yes.

MS. STEWART: And I'm just saying this for Mr. Morrogh, because I think he was asking what the percentage was. It was 30 percent.

CHAIR SARIS: About 30 percent.

That's exactly right. Anything else from everyone? Lunch. All right. Thank you very
much. We'll see you back at around 1:15.

(Whereupon, the foregoing matter went off the record at 12:01
p.m. and went back on the record at 1:18 p.m.)

CHAIR SARIS: Well, welcome back.
I hope you had a nice lunch. Some of you come
back here many times. Others are probably
brand new, so for those who weren't here this
morning, we have our little light system here,
with the red light, green, yellow, the hook.
We ask a lot of questions for those of you who
weren't here this morning.

You have the unenviable position of
grabbing everyone after lunch. On the other
hand, it's a really, really important subject,
so thank you for coming. We have, and I hope
I'm going to pronounce this right, Robert
Zauzmer. That's right. Who is the appellate
chief in the United States Attorney's Office
for the Eastern District of Pennsylvania, and
has served in that office since 1990.

He was an active participant on the
team of Department of Justice attorneys that
oversaw the Department's response to the Commission's crack cocaine amendments to the guidelines. Thank you for all that work.

Alan DuBois or DuBois?

MR. DUBOIS: I'll answer either one, but DuBois.

CHAIR SARIS: DuBois. All right. I took French. Mr. DuBois is the First Assistant Federal Public Defender for the Eastern District of North Carolina, and has served in that office since 1989. He previously served as a staff law clerk at the United States Court of Appeals for the Fourth Circuit, and in 2005, was the Visiting Assistant Federal Public Defender at the Commission, and also served as the visiting attorney with the Legal Policy Branch of the Office of the Federal Defender in Washington, D.C. Welcome.

Mr. McCrum is a member of the Practitioner Advisory Group to the Commission. Thank you for your service on that. His
litigation practice in San Antonio focuses on white collar criminal defense, federal and state government investigations, and federal commercial litigation.

Mr. McCrum previously served as an Assistant United States Attorney for the Western District of Texas. Welcome.

And Teresa Brantley, well-known to us all, welcome back for more. She's the Chair of our Probation Officers Advisory Committee to the Commission. She is the Supervisory United States Probation Officer in the Pre-Sentence Unit of the Central District of California, and has worked for the United States Probation Office for 12 years.

She previously practiced as a civil law attorney for five years and worked as a manufacturing engineer for ten years. And we want to thank you and all the probation officers who do such a good job guarding the guidelines, so thank you. We always love hearing your comments about how they're really working out
there in the field, so thank you. So we start with you.

MR. ZAUZMER: Thank you very much, Your Honor. I'm here to talk about the felon in possession proposed amendment. My understanding is that I have five minutes and that we'll have a second panel on all the other amendments, and I'll talk about those then if that's all right.

CHAIR SARIS: It's speed dating. You just keep going to panels.

MR. ZAUZMER: Right. So if that's all right, I'll focus now on felon in possession. On behalf of the Department of Justice, thank you very much for having us here and considering our views. We appreciate it very much and it's an honor for me, personally, to appear before the Commission.

With regard to the proposed felon in possession amendment, the Department supports Option 2 in the materials that were presented, which would amend the felon in possession
provision to make clear how relevant conduct works.

As you all well know, there have been different decisions from different courts that vary quite a bit with regard to how relevant conduct is applied, both in considering other weapons that may be involved in the offense, and also, most particularly, with regard to the other offense that is committed with the firearm, or in connection with, as it is said in the guideline.

And so we think that Option 2 is very helpful in clarifying matters, that it's very important to consider relevant conduct and to consider other offenses that are committed with a gun that's the subject of a felon in possession offense. Now, I've read very carefully, my new friend, Mr. DuBois' commentary on behalf of the defenders, which really is an attack that is considered, and we've all seen it before, on relevant conduct in general.
As we all know, relevant conduct, the notion of real offense sentencing, permeates the guidelines. It's not unique to this provision. It would be a radical change, and it would start here, to not look at relevant conduct. And we think it's very important, still, to consider relevant conduct.

What it comes down to with the felon in possession amendment is the question of dangerousness. It's a question of, how dangerous is this particular felon who has violated the law by possessing a firearm? And there's no question that there are different levels of dangerousness with different felons.

If you could have a felon who's guilty of the offense because he keeps a weapon in his living room in a case, maybe for protection, maybe for some other reason, and you could have a felon who goes out on the street with three or four guns and opens fire. Those are very different people, and the court will always consider that fact.
When I've always thought about relevant conduct over the years, and really, a lot of guidelines provisions, it comes back to what I think is the purpose of the guidelines, which is to help a judge, guide a judge, in categorizing, quantifying, the different types of conduct that come before him or her, that if we take away the guidelines, before there were guidelines, or if there were no guidelines now, there's no doubt that a judge who is sentencing those two people I just described, one felon with the gun in the living room, one out on the street opening fire, there's no doubt that that judge would consider those facts and give different sentences, recognizing how different the dangerousness is of these two felons.

And so what the relevant conduct provisions do, and particularly, the other offense enhancement, is it channels that and it gives the court guidance. Doesn't have to follow it now, as we know. We know the guidelines are advisory, but we think it's so
very important in serving the function of this Commission, and for that reason, we endorse it.

This Option 2 does appropriately corral relevant conduct. If we're talking about another gun that's possessed by the felon, it has to be part of the same course of conduct under (a)(2) of 1B1.3, relevant conduct. If we're talking about another offense, we already have the limitation there. It has to be in connection with the felon in possession offense.

For example, I think there was a reference in the materials somewhere, someone suggested, well, boy, this could sweep in someone who committed the other offense, even before they were a felon. And of course, that's not true. It has to be in connection with the felon in possession offense, with the unlawful possession of the firearm.

Besides that, one other quick comment about relevant conduct. As I said, it permeates the guidelines, it permeates this
guideline. If you look at 2(k)2.1, there are many other factors other than the charged conduct that are considered, whether the gun is stolen, whether there was trafficking, the number of guns.

Every circuit has held that the number of guns rests on relevant conduct and can result in an enhancement, all for the same reason, to quantify the dangerousness of the offender.

The last thing I'll say, and of course, I'll welcome your questions, but the last thing is that we hear these scary hypotheticals, that you're going to charge somebody only as a felon in possession, and then sentence them for murder, or for some other heinous offense.

By and large, it doesn't happen, and there are a number of reasons that it doesn't happen. One, of course, is that it doesn't really vindicate society's interests, for a crime as serious as murder, to prosecute it in
this fashion.

But the other very important thing to consider is the statutory maximum here. We're talking about felon in possession. Generally, it has a ten-year statutory maximum, and the judge has the authority to sentence anywhere within that range. And again, I submit he's going to give, or she's going to give, a different sentence for somebody who's more dangerous than another.

But I've yet to meet the prosecutor who said, you know, I'm not going to prosecute this murder because I'd rather do it by a preponderance of the evidence at sentencing and only get a ten-year statutory maximum sentence. It doesn't happen that way.

What appropriately happens is that the judge particularly considers the nature of the felon in deciding what sentence is appropriate, and that's where the suggestion in Option 2 is very helpful and clarifies the law. Thank you.
CHAIR SARIS: Thank you.

MR. DUBOIS: Thank you, Commissioners, and again, I would like to thank you for giving me the opportunity to testify, and it really is my pleasure to be here. As Mr. Zauzmer said, the defenders are troubled by the use of uncharged, dismissed, or acquitted conduct to increase the defendant’s punishment. And we, therefore, would like to see its use limited wherever possible, especially in cases where that conduct threatens to become the primary driver of punishment.

And accordingly, we support the elimination of the (c)(1) cross-reference and the (b)(6)(B) enhancement found in the felon in possession guideline; both of which, in many cases, relegate the defendant's actual offense conduct to little more than an afterthought in the determination of his punishment.

However, if the Commission is unwilling to delete these provisions
altogether, we support, with some caveats, the amendment set out as Option 1, as a means of ensuring that a meaningful connection between the offensive conviction and the punishment imposed is preserved.

While Option 1 doesn't completely resolve all our concerns about the use of uncharged, dismissed, or acquitted conduct, it's definitely a step in the right direction. Option 2, on the other hand, in our view, would be a huge step backwards. It would, essentially, eliminate the relevant conduct rules in felon in possession cases, and expose the defendant to greatly enhanced punishment for conduct only minimally related to his offensive conviction.

And to address Mr. Zauzmer, let me illustrate this with a real-world example from our office. We had a case not too long ago where a defendant in April of 2013 was found in possession of two weapons and was charge with two counts of 922(g). He was also arrested by
the state in connection with a shooting that had occurred in December 2012, five months later, and involved a completely different gun.

Under current Fourth Circuit law, law that Option 2 would eliminate, or aggregate, the Chapter 2 Part K enhancement in the cross-reference did not apply to our defendant because the state offense didn't group. As a result, our defendant was punished in federal court for the conduct supporting his federal conviction of unlawful possession of a firearm, and he's currently facing trial in the state court for the state offense of attempted murder, and faces punishment for that offense if he's found guilty beyond a reasonable doubt, after a trial, in which he would receive all the procedural protections that he's entitled to.

We submit this is how the system should work and we further submit this is how the system would work if Option 1 were adopted. The outcome under Option 2, however, would be really very different. There, as long as there
was some minimal connection shown between the firearms possession in December of 2012 and those possessed months later in April 2013, the attempted murder would be relevant conduct, per se, no further connection between the offensive conviction and the state offense would be required.

The Federal Government can then punish the defendant as if he had been convicted of the attempted murder based on proof by nothing more than a preponderance of the evidence and with no core Constitutional protections. No right to confrontation, no right to call -- no jury trial rights, no rules against hearsay.

And because Option 2 allows the Federal Government to reach out and punish any offense, however tangentially related to the federal offensive conviction, without affording any of these procedural protections, the state actually does have little incentive to maintain their prosecution, and in fact, in
many cases, it would likely not pursue it.

And this is not supposition. This is actually what happened in a case out of my circuit, United States v. Horton, where the state did drop a murder prosecution in favor of the federal felon in possession of firearm prosecution.

We really don't believe that this type of shortcut is how the Founding Fathers envisioned that the system would work. Though Option 2 purports to place limits on the application of the enhancement and cross-reference by requiring the uncharged gun and the charged gun to bear some relation to one another, given the continuing possessory nature of the felon in possession offense, we fear this limitation is really likely to prove toothless.

If Option 2 were adopted, any defendant convicted of possessing a firearm would be subject to punishment for any offense he was alleged to have committed which involved
a firearm with very little limitation.

At a time when the wisdom, fairness, and practicality of real offense sentencing is increasingly being questioned, Option 2 would be a dramatic lurch in the opposite direction, largely eliminating the modest protections the relevant conduct rules provide, and further untethering a defendant's punishment from the actual conduct supporting his conviction.

In this instance, Option 1 is clearly preferable. It preserves the link between defense conduct and punishment, is simpler, easier to administer, and far less likely to result in many trials over the defendant's involvement in uncharged crimes, which he may or may not have committed, and which may or may not have involved a gun.

Finally, Option 1 returns to the original understanding of the guideline, which contained the precise limitation that Option 1 reinstates, limiting it to the gun of conviction. However, Option 1, in our view,
can be improved. We see no need to eliminate the existing requirement that there be a relevant conduct link between the offensive conviction and the uncharged offense, even in cases involving one gun.

The current relevant conduct rules are familiar and basically cover every situation where it would be right and fair to take the uncharged offense into account.

Accordingly, we see no need to resort to 1B1.4 and establish a per se rule that any offense involving a gun brings the enhancement or cross-reference into play. This would really represent a novel expansion in the use of (a)(4) and deprive the defendant of even the minimal protections of the relevant conduct rules for no good reason that we can see.

This seems to us to be a dramatic shift into uncharted waters to address the issue that really doesn't appear to be a problem. I'd be happy to answer any questions.
you guys might have about these issues. Thank you.

CHAIR SARIS: Thank you.

MR. MCCRUM: Commissioners, thank you very much for the opportunity to be here on behalf of the Practitioners Advisory Group, and I personally also am honored to be here for the first time. The Commission has proposed two options in the amendment of section 2K2.1. The Practitioners Advisory Group joins with the defenders in stating that Option 1 is clearly more appropriate and consistent with the fundamental principles of sentencing.

It limits the sentencing as all other sections in the guidelines do, to the factors related to the offensive conviction as opposed to reaching outside to uncharged, acquitted, or unrelated conduct. Contrary to what my former colleague with the Department of Justice says, Option 2, or the choosing of Option 1 does not eliminate consideration of other factors, of other unrelated conduct.
The guidelines already provide that in 1B1.4, consideration of those factors both within guideline, within range sentencing, as well as departure and variance considerations. And so it doesn't eliminate consideration of those factors.

Our position continues to be that we have strong issues with respect to whether or not relevant conduct should be considered, or the extent to which it should be considered under 1B1.3, but that being said, if subsections (b)(6)(B) and (c)(1) remain, the PAG recommends two revisions to the proposed amendment to the commentary.

First, we recommend that application of subsections (b)(6)(B) and (c)(1) be limited to the standard set out in section 1B1.3(a)(1) and (a)(2) alone, and not allow an enhancement based on section 1B1.3(a)(4). As this Commission is aware, the language of subsection 1B1.3(a)(4) is circular.
It directs the parties back to section 2K2.1 and its broad phrase, in connection with another offense. The current problem of inconsistency by courts would remain by not providing clarity or limitation as to what offenses are to be concluded in that phrase, in connection with.

Effectively, the reference to 1B1.3(a)(4) would create an unclear per se rule of enhancement for non-charged conduct.

Second, we recommend revision of Section E in the commentary to specify that 1B1.3 must be applied if the enhancements of (b)(6)(B) or (c)(1) are considered.

The proposed language that this Commission put out in Section E of the commentary directs courts to consider, but not necessarily apply, relevant conduct provisions of 1B1.3. This permissive language continues to leave open the possibility of application of these subsections to conduct unrelated to the offense of conviction.
As we know, different courts have not only applied, different subsections of 1B1.3, but also applied their own standards in coming up as to what should -- how this uncharged conduct should be applied. This has led to inconsistent application of (b)(6)(B) and (c)(1).

Accordingly, we strongly recommend that the proposed language of Section E direct courts to consider as opposed to leave it permissive. An important issue, though, is the Commission's question put out as to whether or not the cross-reference in subsection (c) should even be deleted.

Clearly, application of subsection C, the cross-reference section, leads to the most disparate sentencing possible. As the Commission is aware, cross-references to other guideline provisions are included in many other parts of the guidelines. We all know that.

In these other sections, however, there's a reasonable relationship between the
offense of conviction and the conduct that is a natural consequence of that offense. For example, in offenses against persons in Part A of the guidelines, the cross-references address the degree of harm caused to the person.

In the drug offenses in Part D, or the racketeering offenses in Part E, the cross-reference sections also address crimes that naturally are associated with, or flow from, the offenses of conviction. In the case of felon in possession, however, courts have applied the cross-reference subsection C1 to a wide range of offenses that often have had no reasonable relationship to the offense of conviction.

An immigration document, possession of an immigration document, for example, and a felon in possession. There is an added problem, however, though, even if you revise subsection C1 to limit its application to closely related conduct under or (a)(2), that does not adequately address the
fundamental problem that a person is being convicted of a possessory-type offense, but will be sentenced under a sentencing structure of a completely, wholly different type of crime.

This is vastly different from other cross-reference sections in the guidelines. A felon in possession, as we all know, is a possessory crime. In contrast with those crimes which contain cross-references to conduct naturally flowing from the conduct of the offense of conviction, it is unjust to apply a different crime sentencing structure where the offense of conviction is a possessory crime. I thank you for this opportunity to be here.

CHAIR SARIS: Thank you. Ms. Brantley.

MS. BRANTLEY: Good afternoon, Judge Saris and Commissioners. Thank you so much for allowing me to come here and talk to you today. POAG asked if we could comment on
this particular proposed amendment. We look at these things, as you know, from an application point of view. What kind of application issues might arise, intended or otherwise, under some of these proposals?

In this one, we could not reach consensus as to Option Number 2. The majority of the folks on POAG liked Option Number 2 because they felt like that was the way that we should be applying them in terms of the relevant conduct analysis that we do all the time across cover to cover of the guidelines.

But there were a couple who still felt and expressed concerns that you've already heard from other members of this panel, about bringing in conduct wholly unrelated to the possession charge, and having a person charged with felon in possession end up being sentenced for something different.

Now, we make no comment as to whether or not it should or should not be that way, but for that reason, we couldn't reach
consensus on Option Number 2. However, we did reach consensus on Option Number 1, in that, as a group, we rejected it. We asked you to consider some of the consequences of that that may not be intended.

We see, in cases like this where we start to carve out exceptions to the way the guidelines operate, in this case, in the way relevant conduct would operate, for this particular part of this particular Chapter 2 offense, and we anticipate, or fear, that what will happen is, the first argument will be, well, if this exception to the way you're going to interpret relevant conduct applies to the cross-reference in 2K2.1, well, then, maybe it should apply to determining the base offense level as well.

And if that happens, then maybe it should apply to other 2K offenses, and maybe then other Chapter 2 offenses. And we worry, then, that we will end up with case law and application procedures in various districts.
that are applying the relevant conduct in a way that, perhaps, was not intended by this well-intentioned proposal, and that was what we asked you to consider when looking at whether or not you would want to impose Option Number 1 to carve out an exception to relevant conduct for this cross-reference.

In fact, we did feel so strongly about it that if you were to ask us, we would say, rather than carve out an exception, don't do the cross-reference. And that was the main comment that my colleagues asked me to come in here and make to you today. Thank you very much.

CHAIR SARIS: Thank you.

Questions?

VICE CHAIR BREYER: I think we're all in agreement that it's very important in sentencing any defendant to try to ascertain level of dangerousness, which is how you start with it. While that's the goal, the way you get to the goal is to be satisfied with the
evidence, support whatever you conclusion you would come to with respect to the level of dangerousness.

And that's the devil in the details, which is that, does one simply accept a preponderance of evidence test in looking at the relevant conduct in determining whether or not it ought to be considered in order to ascertain the appropriate level of dangerousness.

For example, one circuit has held that where this is a great disparity between the base offense level and the enhancements that can occur as a result of relevant conduct where there's a great disparity. The evidence of the relevant conduct must be established by clear and convincing evidence as distinct from preponderance of the evidence, because then you're more convinced than ever that the person is dangerous in uncharged or even acquitted conducted.

So I'd like to hear your comments on
that aspect of the test.

MR. ZAUZMER: Yes, Your Honor, the preponderance standard is used for all facts found under the guidelines now that the guidelines are advisory, for mitigating factors, for aggravating factors. There are many things -- now, here, we have to be talking about what could be and likely is other criminal conduct, and thus, our senses are sharpened and we're focused on it.

But judges are considering good things and bad things about defendants, are allowed to consider any fact that comes up at sentencing, and finds those facts by a preponderance standard.

In terms of the case you're addressing, unless there's another case I'm not familiar with, I'm intimately familiar with the original case that applied that clear and convincing standard, which was Kikumura, which was a case in the 3rd Circuit, where I live, I think it was in 1991, and that was one of these
rare instances of a dramatic enhancement.

The person was convicted of possession of an explosive device that was in his trunk while he was driving up the New Jersey Turnpike, and he got an enormous enhancement based on the fact that it was in connection with a terrorist act because he was a terrorist, and that's what he was doing was planning to do something nefarious in New York City.

The Third Circuit held in Kikumura what Your Honor described, which is that, for an enhancement like that, I think it was 30 levels, that you needed clear and convincing evidence. Two things, first, we've never seen an enhancement since like that in the 3rd Circuit, but second, the 3rd Circuit has withdrawn the Kikumura holding after Booker, because Booker made the guidelines advisory.

And, so, since Booker pretty much held, and every court has since confirmed, that now we have a preponderance standard in determining the facts that will guide a judge,
but not bind a judge. And so since Booker, the 3rd Circuit held that the Kikumura clear and convincing standard is moot. It doesn't apply. Preponderance applies across the board.

And we don't see a reason that this should be different, because again, at the end of the day, once the judge has made all these findings by a preponderance, the good and the bad, at the end of the day, this is advice, and the judge then decides, within the statutory maximum allowed by the conviction for felon in possession, what the sentence will be. I hope that answers your question.

MR. DUBOIS: Can I?

CHAIR SARIS: Go ahead.

MR. DUBOIS: That's fine. I just wanted to try to point out a couple of reasons why this particular guideline is different than many other guidelines and why, Judge, your concerns are especially well-taken in this context. Chapter 2 Part K, when we're talking
about it, especially in the context of two different guides, we're talking about two completely unrelated episodes.

So at the time that the defendant is charged with the possessing of the one gun, he may very well not know that he is even, potentially, on the hook for some completely unrelated criminal activity that may have taken place at a different time, years before. There's an issue of notice and the issue of preparation that you can plead guilty to this one gun and you don't know until the pre-sentence report comes in that they're going to try to cross-reference you to some wholly unrelated episode.

That really puts the defendant at a disadvantage and it's a problem that's easily solved. To the extent that you want to link the dangerousness to the actual criminal activity that brings a person into federal court, charge that gun, and if you can't charge that gun for some reason, maybe that's a sign that you don't
have enough evidence to apply the cross-reference.

We had a case in our district not too long ago similar to this. Felon charged with one gun, they attempted to cross-reference him based on a separate home invasion-type episode involving a different gun, but the evidence in that case was only that there was a home invasion, the victim thought the person had an object that appeared to be a gun, the gun was never recovered, the gun was never described, but the judge, in our case, made the finding that that was a gun and applied the enhancement.

That's the type of disconnect between offense, conduct, and punishment that really, I think, implicates some very real due process concerns and I think concerns that would be alleviated under Option 1 where there is at least involving the gun of conviction in the same, you know, or similar criminal episode.

COMMISSIONER JACKSON: Yes, that
was going to be part of my question and perhaps
even to Ms. Brantley or whoever can answer.
The cross reference, or (c)(1), is very
troubling to me because I view it as a different
scenario. You said this is sort of like the
same as other relevant conduct in that the
probation officers are worried about having
this work differently, but it seems to me that
this is almost two layers.

We're talking about double relevant
conduct, right, because it's the first layer of
relevant conduct that gets you to the other gun,
I think, or in a situation in which there is a
gun and then that gun, the one that's charged,
is used for the commission of another offense.
That's one layer of relevant conduct.

But it seems to me that when you are
using relevant conduct Level 1 to get you to
another gun and then using relevant conduct
related to that gun to get you to another
offense, we're talking about something totally
different.
I mean, did you all discuss that and was that any concern for the probation office?

MS. BRANTLEY: Yes, we did discuss that. And first, let me back up a minute and say that if we limit, as Option 1 suggest, to the weapons that are charged in the indictment or charging instrument, we're not only talking about a cross-reference issue, but we're also talking about another specific offense characteristic within that particular guideline for the number of weapons.

So that was our main focus in our comments, at least intended to be, and I apologize if it was not, but if we limit it to what's charged in the indictment, whatever weapons are found on the premise that might otherwise be included in that specific offense characteristic under a relevant conduct analysis are now eliminated, and that's most of our concern.

The reason we could not reach a consensus on Option 2, when we looked at that
cross-reference, we were thinking there are so many other reasons why it would limit bringing in other conduct to those of us who disagree.

For example, if you have a prior offense, a prior felony possession, that was charged and sentenced the relevant conduct guideline tells you, you can't bring that in. It doesn't say felon in possession, it just says, generally, there's an application note, application note eight, that says, if something was already prior conduct that was already sentenced before the conduct at issue happened, you treat that as a prior sentence and not relevant conduct.

We also felt that the Horton analysis that it went through with going through 1B1.3(a)(2) saying, well, murder doesn't group with felon in possession. We thought that was a good enough block, a stop, the way that the relevant conduct analysis already works.

So that was kind of the focus that
we took, that if you follow the letter of what's in there and the instructions in the guidelines, that we would get to the Horton end result most often.

MR. MCCRUM: May I add something to her response? Are you finished? I didn't want to interrupt you. The way I like to refer to it is, you said it was one step removed. It is. It's two degrees of separation, is the way I think of it, is not only is the unlawful possession or possession of another firearm, and then you piggyback and you go back to leap up to the robbery, or whatever the other offense is.

Actually, it's even one degree further than that that's problematic, is the proposed Option 2 language refers to two 1B1.3(a)(2), but it doesn't refer to the grouping requirement in there. It indicates that under these circumstances the threshold question for the court is whether the two unlawful possession offenses, not the robbery,
were part of the same course of conduct or common scheme, and it says, see 1B1.3(a)(2), but it doesn't refer to the grouping requirement of (a)(2).

So that gets even a third degree of separation is the problem. And I think the underlying issue, is that there's an implication that if you don't do Option 2 you're not going to be able to consider all of this conduct, as it's been said, and yet, there are numerous provisions in the guidelines that already account for that.

This Commission and Congress has passed these guidelines, or recommended and passed these guidelines, such I'd refer to 1B1.4, the commentary in there isn't instructive. It says, if the defendant committed two robberies, but as part of plea negotiation, entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range,
or it may provide a reason for upward departure.

This section already accounts for other conduct. It's not as if the guidelines don't account for that type of thing. In Ms. Brantley's situation, it's already accounted for in criminal history reports, the situation that she referred to, and so this language is flawed in two or three respects, the proposed language that's in Option 2.

CHAIR SARIS: I was going to ask this. You said it's hardly ever used, is what you're saying at the cross-reference in ways that would be problematic, I forget exactly how you worded it, from the government's point of view.

And so I was trying to think it through. I think no one's disagreeing, maybe I'm wrong, that if you had a gun and you were a felon in possession, and you had used that gun in a robbery or a home invasion that day, I didn't hear huge amounts of disagreement that you could count that. Alright. Am I wrong
about that? Nobody's disagreeing you should be able to do the enhancement.

So the cross-reference, though, brings you to another gun, a different gun, at a different point in time, and a crime that wasn't connected with the offense of conviction. So when you think about this from a government point of view, you say it's hardly ever used, or it's not that big, when would you use it?

What is your thought process, because it does seem as if you're expanding one conviction into another?

MR. ZAUZMER: Well, first, let me clarify, as I understand what the Commission advanced here. There are really two separate issues. One is, how far do you look at other conduct with regard to the gun of conviction.

CHAIR SARIS: The gun. Yes.

MR. ZAUZMER: And the other is, other guns. Even with regard to the gun, a question was presented of should we discard the
(c)(1) cross reference, and I think you've effectively just had a concession that maybe that's not as big a dispute as I thought it might have been, which is a good thing. That's where it comes up most often is involving the gun.

CHAIR SARIS: The gun.

MR. ZAUZMER: And where it starts is with (b)(6), which gives you a four-level enhancement if it's committed in connection with another felony offense, and/or Level 18 if it's less than 18. So right there, you're up to Level 18. So the cross reference (c)(1) only comes into play when you're looking at a cross reference offense that would be above Level 18. So already, you've limited the field and the answer to your question is, it happens less often, that you're looking to the cross reference.

The Commission may have the data on this, I don't have the data on my fingertips, but it just doesn't come up as often as the (b)(6) enhancement is applied. When would we
do it? There are instances involving violent
cconduct that the person engaged in, an assault
or an attack, where there is a cross reference
that's above Level 18, where often, there's no
federal jurisdiction of that offense in
particular, but it's necessary to bring that in
front of the sentencing court to know about it.

And the main point that I'm making
here today is that what we see is that, this
fulfills the normal function of the Commission.
You could say to judges out there, look, you're
on your own. Maybe do a departure, as one of
my colleagues here just suggested, maybe do a
variance, because you see that this felon is
using the weapon in a particularly dangerous
way, or you channel and guide what a judge
should be thinking about in this situation,
which I think is the normal function of the
Commission, and say, look at the cross
reference, look at what that other offense
would entail, and use that as guidance in
evaluating the dangerousness of this felon and
his or her possession of a gun.

But in terms of numbers, I can't
give you the numbers right now.

COMMISSIONER JACKSON: Okay. But
that was Option 1. So go to the scenario in
which the gun, it's not the gun, but it's the
other gun.

MR. ZAUZMER: Oh, sure. Where
it's the other gun is the situation where you've
charged and you normally will get a plea to one
gun with everyone knowing that the sentencing
issues are going to be resolved in sentencing,
but you have a case in which the person had an
arsenal. You know, they had four guns in their
trunk, or they had a whole wall of
semi-automatic weapons.

The elements of the offense require
that there be a conviction for one felon in
possession, but I don't think it's a stretch in
the least, particularly with regard to what Ms.
Brantley referred to with regard to the number
of gun enhancements. This is a standard
approach, which is to convict for a gun, but then look at what was immediately connected there.

This (a)(2) restriction, which was what's suggested in Option 2, is significant. It has to be part of the same course of conduct or common scheme. We're not saying, what guns did you ever possess in your life, and you're now going to be sentenced for every crime you've committed with those other guns. It's connected to exactly the conduct of conviction and that's already done under the guidelines.

COMMISSIONER JACKSON: Right. But maybe I'm confused. I'm now in another world, which is, he has an arsenal and then there's an allegation that with one of the guns in the arsenal, he committed a robbery and we're somehow cross-referencing through C1 to the robbery guideline. Is that not when that works?

MR. ZAUZMER: No, that's right, and I think the two-step process you've broken
down, Your Honor, is exactly right. I mean, first, the other gun has to be relevant conduct under (a)2, pursuant to the proposal, and then second, there has to be an offense committed in connection with that other gun, so it is a two-step process, but not a difficult one, and one that, again --

COMMISSIONER BARKOW: Can I just ask a clarifying on that?

MR. ZAUZMER: Sure.

COMMISSIONER BARKOW: If the crime you're charged with, though, is felon in possession, is the thing that will link all the things together that you had a felony status while you possessed all those guns? I'm just trying to figure out what the limiting principle in your mind would be for that additional crime that's committed with the other gun.

So if you have a defendant who, let's say, is picked up and you find one gun at that time, and then you go to the house and
there's another gun, and then you make an
allegation that with that other gun, the
defendant committed some other crime. What,
if any, link does there have to be with that
second gun-related crime to the first crime,
because isn't the first crime just that he's a
felon in possession?

MR. ZAUZMER: Right. Well,
certainly, the status as a felon is required to
link all of these things, and what's proposed
here is the 1B1.3(a)(2) limitation, which is
the same course of conduct or common scheme,
meaning that he, as a felon, possessed the
multiple guns as part of a common scheme or
course of conduct.

COMMISSIONER BARKOW: But is the
common scheme just being a felon? I guess
that's what I'm trying to get at. What's the
scheme that --

MR. ZAUZMER: Sure. It's being a
felon and it's being in possession. Probably,
courts, in applying this, as they always have
applied (a)(2), are going to look at it temporally. It needs to be, roughly, at the same time, it needs to be part of the same goal, which is to possess weapons, here purposefully as opposed to accidentally. Generally, you're dealing with situations where a number of guns are possessed at the same time, usually in the same place.

VICE CHAIR BREYER: See, that's the inherent problem. Go ahead.

MR. DUBOIS: Yes, I think the (a)(2) problem is really an issue. The proposal certainly doesn't give any guidance and what does it mean? Does it mean that the guns were obtained at the same time? That they were possessed at the same time? That they were used at the same time, or would it be enough that they were possessed serially, solely based on the guy's status as a felon?

I certainly think that, given the expansive language of (a)(2) and the nature, continuing nature, of the felon in possession
offense, that it, essentially, would give courts license to find that type of connection in any case that they so wanted.

And so I think it would be really no limitation at all. It would be a free-for-all. Any gun could be linked to any other gun and by then, piggybacking on to whatever offense. I mean, I think all these problems can be solved by Option 1 and then charging the gun that was involved in the crime that you want to link to that gun.

It seems to me that that really slices through pretty much every issue that the government would have with this proposal.

MR. MCCRUM: And if I may clarify a response to your question, Your Honor. When you said, does anybody really have an issue with, when you have a gun, if he uses that gun in connection with something else that we can consider that. And I agree, I don't think there's much of an issue, generally speaking, but my response would be limited to (b)(6)(B)
as opposed to (c)(1).

That goes back to when you apply (c)(1), you get into a whole different sentencing structure for a robbery, or a murder; a structure that was never intended to apply in the guidelines. You just don't see that in other types of guidelines where there's cross references.

And so while it's certainly reasonable to conclude that you can consider that other conduct under relevant conduct provisions of (a)(1) and (a)(2), 1B1.3, cross referencing back to (b)(6)(B), but not under (c)(1), where it takes it to a whole different dramatic change.

CHAIR SARIS: Thank you for the clarification.

MR. ZAUZMER: And I would just make, if I could, one clarification, which is that, again, (b)(6) is one-size-fits-all, top of Level 18, and that may not capture the full nature of the conduct of the felon, and that's
why the cross reference was put in there, I believe.

CHAIR SARIS: Yes. Okay. I think we understand where everyone is. Any other questions? Thank you very much, panel. You kept us going right after lunch. Thank you. I know some folks are on the same panel and Judge Hinojosa just had to run up and get something for a second, so take a two-minute stretch.

(Whereupon, the foregoing matter went off the record at 2:01 p.m. and went back on the record at 2:06 p.m.)

CHAIR SARIS: Alright. We're ready for our last panel of the day, so welcome back to some of you who I think need no further introductions, so thank you for coming back, Mr. Zauzmer and Mr. DuBois. But next, is the Honorable Kirk G. Saunooke.

HON. SAUNOOKE: Yes.

CHAIR SARIS: As I was saying to him privately, I gave him an extra special thanks for coming because he was supposed to come at the last panel, got snowed out, and has made the
effort to come back the second time on the
Violence Against Women Act, so thank you for
making that extra effort.

Judge Saunooke is a tribal member of
the Eastern Band of Cherokee Indians and serves
as an associate judge at the Cherokee court.
He has been affiliated with tribal justice
since 1996 when he became a magistrate judge at
the Court of Indian Offenses under the
authority of the Bureau of Indian Affairs.

The tribe took over the Cherokee
court in 2000. Judge Saunooke is also the
chairman of the American Bar Association's
Tribal Courts Council. I should have, while I
was standing there talking to you, asked how to
pronounce -- Dr. Kristen Zgoba, correct?

DR. ZGOBA: Correct. Very good.

CHAIR SARIS: So thank you for
coming. Dr. Zgoba is the supervisor of
Research and Evaluation at the New Jersey
Department of Corrections and serves as
Co-Chairperson for the Department's Research
and Review Board. She's received the National
Institute of Justice grant to be the first to
test the effectiveness of New Jersey's Megan's
Law and to examine the utility of the SORNA
guidelines, so welcome and thank you.

So I guess what we're going to do right now is start again here.

MR. ZAUZMER: All right. Well, this time we have a basket of other amendments to talk about and so in my introduction, I'll just go quickly through our points on that and then welcome any questions. Yesterday, I met with the Attorney General and others, and I offered to trade with them, where I would handle the Drug Minus Two and he could talk about undischarged terms of imprisonment, but with characteristic wisdom, he turned down my offer, and so here I am.

But again, it's a pleasure to do this and to address you on these issues. With regards to the marijuana grower that was talked about this morning, I think, Commissioner
Friedrich, you had questions about that, we have stated in our papers what our concern is and how the current 2D1.1, which does, as you mentioned, address some environmental harms, and also, in particular, with regard to methamphetamine, we don't think captures everything involved that you heard about this morning from Director Boehm.

And so what we've suggested is some addition that would address the particular harms involved with marijuana groves involving the use of pesticides, use of pollutants that pose a danger to human life, and to the environment, and that are not specifically addressed in that part of 2D1.1. I'll talk about it in more detail, if you'd like, when we get into the questions, but we do spell out that we do think that those enhancements should be tweaked to capture all of the harm that's involved in that conduct.

With regard to the Violence Against Women Act, you've heard from other experts from
our department about that a few weeks ago. I don't have anything new to add, I can answer any questions, but I think you heard fully. I'll look forward to hearing what Judge Saunooke has to say on that subject.

1B1.10 is related to crack, but it's really any amended guideline and the application to someone who was previously subject to a mandatory minimum sentence, but did not receive a mandatory minimum because of substantial assistance.

The proposal is to carve that out and allow that person to get the benefit of a retroactive amendment. We support that. I don't think there's any disagreement on this panel about that, but I'll answer questions about that if you have any.

2L1.1 is the suggestion of amending the commentary regarding the threat to human safety involved in illegal alien trafficking and making clear that transit through a dangerous location without adequate food,
water, or shelter is an example of the type of conduct that should get a two-level enhancement.

We agree with that. We suggest one tweak to it. The words that are used there is dangerous terrain, and we've suggested dangerous terrain or remote geographic area, because we do see alien smuggling that's dangerous that's not just on terrain, that certainly involves on the ocean, and in other circumstances where people are held in pretty appalling circumstances that do warrant the enhancement.

And so while we're making this application clearer, that was our suggestion with regard to that. Then we get to the undischarged terms of imprisonment, and that's the one area in which the Department does have a couple of objections to what's been proposed in the Commission's materials.

The first suggestion was that an undischarged term of imprisonment should lead
to credit where it involves relevant conduct. Currently, the guideline says relevant conduct and if the conduct was counted in calculating the offensive conviction. And the proposal is to take out the latter part of that, and we agree that certainly, any time a sentence is imposed for relevant conduct that was also the subject of an undischarged term of imprisonment, there should be credit for it in the federal sentence.

The other two proposals we had more difficulty with. The second one was directing courts to give credit for an anticipated state sentence and the problem there that we see is just predicting an anticipated state sentence.

All of us are practitioners, or judges, and we all know that nothing can be anticipated in the criminal justice system, and the sentence that you think will be imposed, won't, or the case will be dismissed, or it'll be different than you anticipate.

We have no objection to the basic concept that a federal sentence should run
concurrently to a state sentence for relevant conduct, and the way to accomplish that, we think, is to inform the judge to impose his or her sentence to run concurrently with any future state sentence, thus, there is no need to anticipate what that state sentence will be, and then reduce it from the federal term.

Another problem in doing it the latter way is that, you have to become an expert on state sentencing law. You have to know, what is that state sentence going to be? It's all solved by simply directing that the sentence run concurrently.

The Supreme Court in Setser approved a federal court, prospectively ordering its sentence to run consecutively to a state sentence. Its reasoning fully supports doing the same thing and ordering a concurrency with regard to an anticipated sentence for relevant conduct. So that's the suggestion we make there.

And the last one, the undischarged
term of imprisonment, involves someone subject
to deportation, suggesting that a person should
get credit for an undischarged term of
imprisonment for any offense, not just for
relevant conduct. And in fact, if the person
has completed the sentence for the
undischarged, it's not even undischarged, it's
a completed term, and if the person is subject
to deportation, the person should get credit.
We object to that.

The problem with that is twofold.
One is, again, the problem of predicting the
future. You're predicting that someone will
be deported, which we all know is not always
necessarily the case.

The second problem is, we're giving
credit here only to aliens for unrelated
criminal conduct. They're getting a free pass
now for the federal offense of illegal re-entry
because they had this other conduct, which is
not afforded to a citizen who's in the exact
same situation, so we do object to that
proposal.

I look forward to your questions.

Thank you for hearing me out on these.

CHAIR SARIS: Thank you.

MR. DUBOIS: Thank you again, Commissioners. I hope I'm not going to wear out my welcome and you get tired of hearing from me, but I'm going to try to speak to the Chapter 5 Part G amendment in this portion of the hearing. It appears that Amendment A is, essentially, unopposed, so I'll just say that we support this amendment for the reasons outlines in our written testimony.

I would like to discuss Amendment B a little bit, particularly in regard to the DOJ's opposition to it, which seems to us to be based on maybe a bit of understanding of the intent and scope of the amendment.

As we understand it, Amendment B deals with a very particular situation that arises when a federal court imposes a sentence to run concurrent with an anticipated state
sentence. Setser, of course, makes clear that the court has the power to do this, however, a federal sentence commences on the day it's imposed. From that day forward, it can run along with the state sentence, but it doesn't look backwards.

This means that a defendant who was in state pre-trial detention prior to the imposition of his federal sentence would not get any credit for time spent in state pre-trial detention, even if the federal court ordered the sentences to run concurrent.

So if the federal court wanted the sentence to run wholly concurrent, day for day, it must adjust the federal sentence to account for that pre-trial detention, even in the case of an anticipated sentence.

And we just simply think that this is what this amendment would do, and basically, we think that's all it would do. We don't see it as an adjunct. We see it as, like, more of an adjunct or gap-filler to Setser. We don't
see it as a substitute for Setser in any way.

As a matter of fact, we don't think the amendment would give the court the authority to do what the government suggests, which is just to run -- or to make an adjustment to the federal sentence based on an anticipated state sentence whenever there is the possibility such a sentence might exist.

The reason for that is, the amendment limits its scope to situations where the Bureau of Prisons wouldn't otherwise credit the time. Well, of course, any time a court runs a sentence concurrent, BOP will credit that time from the moment the sentence is imposed.

So Amendment B, in our view, is backward-looking to the state pre-trial detention issue and we thought about it as much as we could, that's the only situation we thought it would apply in. And if that is the case, if our understanding is correct, it does nothing more than tell the judge it has the same
authority to do it in the case of an anticipated state sentence as it would in the case of an undischarged sentence, and it just brings the two situations into parity.

We also support Amendment C, far from granting illegal entry defendants a windfall, this amendment provides a mechanism to ensure that non-citizen defendants don't receive unfairly disparate punishment, either in relation to defendants who were citizens or in relation to similarly situated non-citizen defendants.

The first source of disparity, of course, is what Judge Breyer recognized this morning: non-citizen defendants are not eligible for many of the programs that can reduce time spent in prison, or indeed, time spent in custody overall, that are available to citizen defendants.

They're not eligible for RDAP, they're not eligible for halfway house, home detention, or any other early release program.
Also, while in prison, they are not eligible for minimum security and are often housed in private contract facilities that have fewer programming resources, educational/vocational training, and that sort of thing.

The time that the alien defendants spend in prison is much harder time and much longer time than comparable citizen defendants, and this amendment would give the judge a mechanism to make that adjustment in the appropriate case; for instance, where he felt like a reduction for rehabilitation, or something that he might have achieved in prison, would be appropriate.

The amendment also provides me an opportunity to address a particular type of disparity that exists among non-citizen defendants or offenders. Illegal entry is a status offense that continues as long as the defendant is in the country illegally.

Many times, the defendant's immigration status is first discovered
following his conviction on state charges. So while the offenses are not necessarily related, one often leads to the discovery of the other. This discovery may happen near the beginning or near the end of the state sentence, and the prosecution on the immigration offense could happen near the end or the beginning of the state sentence.

This can lead in different outcomes for identical defendants based on a fluke of timing as to when the prosecution occurred rather than any difference in culpability between the defendants. And so absent a court’s ability to make an adjustment to account for this disparity, a defendant prosecuted near the end of his sentence is very likely going to spend more time in prison than a defendant who has fortune to be prosecuted near the start of his state sentence.

And again, this amendment simply provides a means to adjust this disparity. It would allow, for instance, a judge who would
have run both sentences concurrent had the federal prosecution come promptly near the start of the state sentence to achieve the same outcome by making an adjustment if, for whatever reason, the prosecution didn't occur until a later time.

And basically, all it does is ensure the defendant's punishment is based on their relative culpability rather than on the timing of their prosecution. And to the extent that there's any concern about incremental punishment issues, that can be addressed by the court calibrating the extent of the adjustment to achieve whatever incremental punishment it sees fit in a particular case. I would be happy to answer any questions the Commission might have.

CHAIR SARIS: Thank you. Judge Saunooke.

HON. SAUNOOKE: Well, thank you very much for this opportunity and the last one when I was scheduled to be here. But I was snowed
out, so I thought, well, I've dodged a bullet, then the judge said, you're going next week, or next month, so I'm happy to be here.

Just to give you a little background about myself, I'm a member of the Eastern Band and I started out in '96 as a lowly little magistrate in the tribal court, and in the last 17 years I've watched the tribal courts go from a one-room schoolhouses to, now, these massive justice centers with law-trained judges, as I am law-trained, and all of our court at home, I'm happy to say, is law-trained. So we're coming of age, it looks like, and now I'm getting the opportunity to address the Sentencing Commission.

Basically, what I look at when I'm addressing these, at least in tribal court, is the severity of the crime, criminal history of the defendant, and substance abuse issues. I don't know if many of you are aware, but substance abuse issues are quite, in some cases, extraordinary on Indian reservations.
I see that if I could take alcohol out of my docket, I wouldn't have much of a docket; alcohol and drug abuse. Economic conditions of the parties, I take a strong look at it. You know, reservations are often economically depressed areas, however, that has changed somewhat on our reservation. As I'm sure you know, we have a casino that is quite successful.

The casino employs just over 2,000 people and I think we're building another casino, so put another 300 or 400 people to work. That has helped considerably. As for the VAWA amendments, I say, I don't deal much with the sentencing guidelines, so I've asked our Special Assistant U.S. Attorney to help me out here, and we've done some consultation together, so we're going to offer this to you.

First of all, 18 USC Section 113(a)(8), Congress has passed that, by criminalizing assault by strangulation and suffocation, is clear that these types of DV
crimes are considered more serious. The Eastern Band itself has recently passed legislation as well, specifically criminalizing assault by strangulation and suffocation, making the violation felony level crime pursuant to authority granted by the Tribal Law and Order Act.

At one time, under the Indian Civil Rights Act, we were limited up to a year in prison. Now, through TLOA, it's a three-year prison term, with those individuals can be resent, under the pilot program now, to a federal penitentiary. Our court has two people in the federal penitentiary system at this moment. Therefore, the EBCI, of course, supports the specific guideline and has for offenses involving strangulation, suffocating, or attempting to strangle or suffocate.

And the EBCI would support applying such enhancements separately from other enhancements for bodily injury. Furthermore,
we would recommend representing the new offense in Section 113(a)(8), to both the aggravated assault guideline and the domestic violence guideline. The domestic violence guideline should be amended to include strangulating, suffocating, or attempting to do so as a separate aggravating factor, independent of the bodily injury factor.

Generally, the EBCI would support lengthy terms of supervised release following incarceration in cases involving domestic violence and based on my experience alone, we've had more success in dealing with DV crimes the longer we can maintain either on probation or supervision over individuals who have been convicted of domestic violence. It's less likely that they're going to commit again.

We've got an extensive batterers treatment program we send most of our people through so they can go to that. And then, like I said, it decreases the chance that they're going to commit a domestic violence crime in the
Like I said, the EBCI would generally be opposed to application of cross-references on the guidelines. Generally, those convicted of any particularly crime should be punished in accordance with the guideline referenced. Therefore, instead, enhancements for higher base level offenses, more permanently provide for increased punishment in connection with the targeted behavior.

As far as specific, the majority of the domestic violence crimes occurring on Cherokee land, which, our reservation is 56,000 acres, split among two counties, and a few other counties, so an hour or so away, are predominantly misdemeanor level offenses.

We find examples where there have been cases of domestic assault on Cherokee lands, which have only been punishable as petty offenses in federal court, due to the language of 18 USC 113, this is unacceptable even if the
Eastern Band is able to implement a special DV jurisdiction, there are several hoops we have to jump through to even get special jurisdiction, the EBCI hope that the Sentencing Commission can not only make appropriate amendments to the guidelines to account for violence, but also that the Commission would consider generally increasing punishment provisions in cases of misdemeanor level domestic assaults and recommended more stringent supervision for those offenders who are not sentenced to incarceration.

We've had instances where people have been charged in federal court, basically a petty offense, that they don't see -- well, most of them are going to receive probation, even though it's a truly domestic violence crime. We've had an Indian victim and a non-Indian defendant.

The EBCI is also -- the repeated perpetrators of crimes of domestic violence as well as those who violate DV protective orders
pose special dangers to the community and their victims for this fact that Cherokee court routinely imposes different sentences in those cases and would recommend that the Commission consider creating enhancements at all of these guidelines for offenders who have been convicted of domestic violence, previous domestic violence crimes, and all those who repeatedly violate their protective orders, which we see quite a bit.

I see my red light's on, so I thank you for your time. I'd be happy to answer any questions that you have. Thank you.

CHAIR SARIS: Thank you.

DR. ZGOBA: I'd like to thank the Commission for inviting me to speak today about failure to register, the statutes for sexual offenders. I think that my commentary will be a little bit of a deviation from what you've seen here, since I'm a researcher.

So what I'd like to do is provide a little bit of context before I go on to the
number of predictors, or correlates, for failure to register as a sex offender. As we all know, sexual offenders are considered one of the more heinous types of offenses in the United States.

We've seen a series of state and federal laws since the 1990s, most recently, we saw the Adam Walsh Act signed into effect in 2006. The National Center for Missing and Exploited Children has estimated that there are approximately 750,000 registered sex offenders across the United States.

The Adam Walsh Act has ultimately taken those sex offenders and tiered them into one of three tiers, Tier 1 through 3, increasing in the risk factors. Each of those tiers carries different designations for registration statutes.

Only one year after the Adam Walsh Act was passed in 2007, there were immediate accounts that there were approximately 100,000 registered sex offenders that had absconded and
gone missing. U.S. Marshals released statements about the sex offenders that had gone missing, the National Center for Missing and Exploited Children, as a matter of fact, the previous director of the SMART Office, under the Department of Justice, has indicated that the riskiest sex offenders are those that do not register at all.

However, the empirical research that has been published to date does not support this supposition, and that's what I'm really here to speak to you about. Most specifically, the Commission's own numbers indicate that since failure to register became a federal law in 2007, there have been approximately 1400 cases.

And there are a number of variables that I'd like the Commission to consider when thinking about those sentencing guidelines for those failure to register cases, and there are four specific things, and I'm going to speak about two of them more extensively than the
other two.

The first is the conflation of the term failure to register, and the second that I'm going to speak most extensively about are the tier designations for the Adam Walsh Act, and it's linked to recidivism. And then I'll touch very briefly on age and sexual recidivism and length of sentence and its correlation to sexual recidivism.

The first thing I'd like to speak about is the conflation of the term failure to register. There's concern over failure to register, understandably, because most people presume that failure to register means that a sex offender has an intent, some sort of malintent that they intend to go underground to abscond with the hopes of continuing to have more victims.

However, as I stated previously, the supposition has not really panned out in the research. What we have found is that the majority of sex offenders over numerous
studies, over numerous states, both federal and
state research, that most failure to register
offenders are not willful violators, that most
of them are ordinary parole supervision
violations, many of them are probation
violations, or very similar to them.

Most of them are similar in some
capacity to general rule-breaking behavior.
Most research indicates that failure to
register will happen within a one-year time
frame, if it, in fact, does happen at all. And
there have only been a number of studies that
have looked at the failure to register concept
and its link to sexual recidivism.

Our study in New Jersey, with
numerous other states, was one of them, but
there also have been studies in Minnesota, New
York, and South Carolina. All of these
studies, I've indicated in my written
testimony, but will also highlight here, are
that sex offenders who fail to register are not
more sexually dangerous and not more generally
dangerous than their compliant counterparts.

The common findings across the studies suggest that failure to register is not in any way related, either causative fashion or correlated, with sexual recidivism. What most research has looked at is the fact that failure to register seems to tap a different construct and it's not related to sexual deviance. It happens to be related most frequently with general rule-violating behavior, sort of this defiance to authority.

Failure to register offenders also were shown to have different types of victims than compliant offenders. They were not the victims that the laws were previously identified to help, so meaning that the failure to register sex offenders did not have more children victims and as I stated also, it was not predictive of more general recidivism.

There was a study out of Florida that looked at how failure to register and absconding sex offenders were looked at in a
profile sense to regular sex offenders, and absconders, as a group, were less likely than compliant registrants to be listed as predators and were less likely to have minor victims, and also, were to be considered repeat sex offenders.

To go to my second point very quickly, I want to discuss, and I know the Commission was interested in the Adam Walsh Act's tier classifications and its link to sexual recidivism. The Department of Justice was generous enough to give us a federal grant to study the effectiveness of the tier designations to see how they relate to sexual recidivism.

It encompassed a number of states, but what we found across these four states, and then numerous studies after the fact, found that the Adam Walsh risk tiers were unrelated to sexual recidivism, except in Florida, where it was actually inversely correlated with recidivism.
What that ultimately meant was that our Tier-2 sex offenders, once they were re-tiered into Adam Walsh tiers, were actually more sexually dangerous than the Tier-3 sex offenders. The result indicates that the use of the Adam Walsh classification schemes are likely to result in a system that is less effective in protecting the public and ultimately, less useful in identifying those high-risk offenders.

And the reason I bring this up, and I believe the reason that the Commission is interested in this, is because those tier guidelines are linked to the sentencing guidelines for the failures to register in terms of that base level offense.

When I've looked through the literature from the Sentencing Commission, I saw that the majority of failure to registers that you have data on, were listed as a base level Tier 16, which was showing that they were Tier 3 sex offenders. The reason that is
important is because, according to all of the studies out there, it shows that those are the sex offenders that are turning out to be the least dangerous based on this new classification scheme.

This new classification scheme being based on sexual crime of conviction. The other two components that I said I will touch on very briefly, and I'll just breeze through them, are age and its relation to sexual recidivism. Sex offenders are like any other type of offender, they age out of crime.

The reason that's important for the Sentencing Commission to hear is simply because the registration standards under the new federal laws seek to impose registration statutes for 25 years to life, as well as the tier guidelines for FTRE are going up to a ceiling of ten years, I believe.

And then the second and the last thing that I breezed quickly through are the sentence lengths and their link to recidivism.
There currently stands to be no research that supports that lengthier sentences, either in the community or in prison, reduce recidivism moving forward.

Sex offenders are no different from general offenders in that point. Thank you for hearing me.

CHAIR SARIS: Thank you.

MS. BRANTLEY: Thank you again, Judge Saris and Commissioners --

CHAIR SARIS: Go ahead.

MS. BRANTLEY: -- for allowing me to address you. My colleagues asked me to touch briefly and talk to you a little bit about the Proposed Amendment Number 7 for the 5G1.3 amendment. Part A of that amendment would take out of 5G1.3 the requirement that the undischarged term of imprisonment would have caused an increase in the offense level calculation, and we support that.

We have not had any problem determining whether or not a prior sentence was
for conduct that is relevant to the incident offense, but we do have application problems in determining whether or not it caused an increase in the offense level, for example, prior drug offenses.

Often, the state sentences do not indicate how much the drug was, just that it was the exact drug, the exact same cohorts, so we don't know if it would have increased the offense level, and it just seems fair that that person should get credit for that sentence; that time he's already served.

So we're able to determine the relevant conduct, the relevance of it, but we're not able to determine whether or not it would cause an increase, so we think, from an application point of view, that Part A proposed amendment, it would be an easy thing to apply, and kind of what's already going on.

Part B, as you've heard, talks about the anticipated state term of imprisonment, and from an application point of view, we
wholeheartedly ask you to think hard about that one because trying to determine an anticipated state term of imprisonment would probably fall on our shoulders, and it would become somewhat problematic for us to determine that from state to state, particularly for convictions that are not within the district that we're familiar with, and a lot of states have indeterminate sentencing, and that sort of thing, and we just think that that would cause an application problem for us that would be tough to rectify.

And then finally, with Part C, we see, again, the language here that we objected to before with regard to the supervised released amendment, which is, we're talking about deportable aliens who are likely to be deported.

We've found, from an application point of view, that we simply cannot define that. We cannot find that person because we don't know, at sentencing, whether or not someone is going to be deported. That decision
is often made much later, and we find once in a while that a person who is being looked at for deportation now, may not, ultimately, be deported for other reasons that we never learn. It's just that they come back out and they're on our supervision caseload.

And with regard to Part C, we just want you to remember that when we're talking about deportable aliens likely to be deported, we probably mean undocumented people, and they don't only commit immigration offenses. They also commit drug offenses, fraud offenses, just every kind of offense across the board.

So talking about the timing issue of this founding date, as to when someone is being processed federally and losing the opportunity to serve a concurrent sentence, we're not only looking at that within the structure of a deportation offense, but also, all other kinds of offenses as well. And so sometimes that becomes -- when we forget that we're looking at drug dealers, that we're looking at murderers,
that we're looking at fraudsters. We're not just looking at someone who's looking at a federal deportation charge.

So we would ask that you not consider the anticipated state sentence proposal, and that we ask that you not consider the deportable alien, likely to be deported proposal. Thank you very much.

CHAIR SARIS: Thank you. Judge Jackson.

COMMISSIONER JACKSON: Thank you all for being here. I have a question for Mr. Zauzmer about 1B1.10, and I guess it also relates to 5G1.1, which is the section of the guidelines that a court is looking at when you have a statutory minimum that's coming into play.

I guess my question is that, in a situation in which a person is facing a statutory minimum that is above the guideline range, the court would, I think the way that 5G1.1 operates, consider the guideline
sentence to be the mandatory minimum and do the substantial assistance reduction from there.

Is it the Justice Department's position that the court should be taking the reduction from the guideline range that would be otherwise calculated without 5G1.1?

MR. ZAUZMER: Yes, that's our position. The court are split on -- without this amendment, the courts have split on what the current guideline means. It was our view as the Department, the Commission amended 1B1.10 in 2011, and we think addressed this, and said that a person who was subject to 5G1.1, mandatory minimum above the guideline range, that his or her departure for substantial assistance --

COMMISSIONER JACKSON: Right.

MR. ZAUZMER: -- was taken from that mandatory minimum.

COMMISSIONER JACKSON: Right, and 1B1.10, my question is, what I'm worried about is that that policy, in my view, and maybe I'm
wrong, creates a disparity between the person
who is getting their sentence pursuant to a
guideline change through the mechanism of
1B1.10, whereas, the person who does the exact
same crime today, under the operation of 5G1.1,
is having their reduction taken from the stat max.

So my question is whether the
Justice Department would be encouraging me, as
a judge, in sentencing the person today
without, you know, any sort of guideline
amendment 1B1.10 scenario, would you say I'm
supposed to be taking a reduction from the
amended guideline range, rather than the
statutory minimum?

MR. ZAUZMER: Well, if you were
sentencing somebody today, we're not talking
about reductions.

COMMISSIONER JACKSON: Right.

MR. ZAUZMER: We're talking about
the guidelines as they exist. Maybe this helps
and I would suggest there shouldn't be major
disparity, and here's why. Under the people who were sentenced before the crack amendment, they were subject to a mandatory minimum. Say his guideline range, absent the mandatory minimum, was 51 to 63, and now it's 37 to 51, the view we're taking that this person should be given the benefit of consideration of the new range is that the judge, at that original sentencing, probably at least had in his or her mind that it was 51 to 63, absent the mandatory minimum.

When considering, and when presented with a 3553(e) motion that said you don't have to follow the mandatory minimum, at that point, the judge has to decide, what am I going to do, and how am I going to reward the substantial assistance?

So our position is, it's fair now for a judge, given a 1B1.10 motion, to say, I'm going to also consider what the new lower range is. If you're sentencing this similar person today, and using that frame of mind, then you're
COMMISSIONER JACKSON: Well, no, I'm not, really. Under 5G1.1, I consider the range to be the stat minimum, because that's what the guidelines tell me to do. Now, maybe other judges do different things, and perhaps they do, but I just wanted to know the Department's position would be, in that situation, that the person who cooperates should be getting a sentence below the amended guideline range calculated without consideration to the statutory minimum.

MR. ZAUZMER: Well, our position is that under Option 1, the person who gave substantial assistance should have the benefit, or the opportunity, to get a sentencing reduction, and that that opportunity would be, if your original sentence after the substantial assistance reduction was a certain percentage below the range without the mandatory minimum, you should at least be entitled to consideration of a similar
percentage below the new range, and we think that's important to recognize substantial assistance.

We think, in 2011, that's not what the Commission did, but courts, you know, took different views on it.

CHAIR SARIS: Commissioner Barkow.

COMMISSIONER BARKOW: Yes, I wanted to ask the question that I had brought up this morning to the Department, which is, I'm trying to figure out, for the environmental harms from the marijuana growth, whether it's accurately taken into account as it exists or what we would need to do to change it, and I guess if you could just walk me through.

I was trying to figure out under 2D1.1, I'm in paragraph 13, when we already have an increase of two levels if the offense involved a hazardous discharge into the environment that's hazardous or toxic, and then you have an application note that if that two levels isn't enough, if it doesn't adequately
capture it, we should go up even further in No. 18.

And I guess I'm trying to get a sense of what else the Department would want to do, or is the Department already using this and finding it to be insufficient?

MR. ZAUZMER: Well, apparently, from the data, the Department is not using it, and perhaps that's an issue, but what I've been told informally by my colleagues in the West who deal with this quite a bit is that, (b)(13)(A), which is two levels for unlawful discharge, emission, or release of hazardous or toxic substances, that some have seen those as terms of art and are difficult to apply.

And that it would be easier, and they think it would facilitate things better, to look at what is done for meth. If you then look at the next section, which simply deals with a substantial risk of harm to persons or the environment, it results in a three-level enhancement for methamphetamine production.
Our suggestion is, that same language would work very well for the very comparable activity, that if it's shown that a marijuana grove in the outdoors posed a substantial risk of harm to life or the environment, that the same three-level enhancement's appropriate. Now, I know that also has a minimum Level 27. We're not suggesting --

COMMISSIONER BARKOW: But even before that -- I'm sorry, could you just explain why the Department, though, feels like (13)(A) doesn't do that? In fact, I would think that's more favorable to the Department because you don't have to make a showing that it endangers life or the environment. It's just assumed by virtue of the release of the toxic substance. I mean, this is a question for you and whether or not it's been applied in the field and rejected by judges. I'm just trying to present if the problem is as it's currently written, or maybe folks aren't aware of the
ability to use this to get at these kinds of harms.

MR. ZAUZMER: Well, two things, the concern we've heard is that pesticides and other pollutants may or may not fall within the category of hazardous or toxic substances, and that that presents an extra issue to litigate that nothing really should be litigated.

If somebody's using a large amount of pesticide that may go into a water stream or something like that, then that warrants an enhancement, and so it takes away that issue. But the second thing is that what is not captured here at all is the other damage to federal property that's often involved.

When you have these people growing marijuana groves, and you saw a very graphic example in the pictures of the Forest Service, and they chop down, you know, part of an old-growth forest in order to grow marijuana, that's not a discharge, emission, or release of hazardous or toxic substances, so what we're
looking for is a broader application of harm to
the environment or to people.

So there are many more things
happening that these marijuana growers,
unfortunately, are doing, than is captured just
by that limited case.

COMMISSIONER BARKOW: I'm going to
ask you one final question about this, for the
people that you're picking up, so we have some
testimony in here that they're really low-level
folks who don't have information to get you
higher up. Is it the Department's position
that the people that you are picking up for this
are the appropriate ones to give the
enhancement to, or is it that it's really people
higher up in the chain who should get this
enhancement?

MR. ZAUZMER: Yes, thank you for
that question. We do believe that it
appropriately applies to the people doing the
work. It's been suggested, well, you should
apply it to the leaders, but they're subject to
the two, three, or four-level leadership enhancement.

This is the same thing, I think, if a leader told me to go assault somebody; I'm responsible for my actions. I'm going to be punished for the assault. He or she is going to be punished for the assault plus the leadership. If someone tells me, take this canister of chemicals and dump it on a piece of land where it runs off to a common stream used by campers and local communities, I'm responsible for my actions.

CHAIR SARIS: Thank you. Yes.

VICE CHAIR BREYER: I wanted to address your comment that, in our 5G proposals, it seemed to be giving a non-citizen a free ride. Of course, that's not the way I would look at it. I was trying to figure out, first of all, when you talk about a undischarged term, and when you talk about how you have to meld the federal sentence with an undischarged term, you're talking about, for the most part, people
who are citizens, because the issue with
respect to a non-citizen is whether or not he
or she has an undischarged term at all.

If you have two people who are in the
state system who are awaiting federal
prosecution, one a citizen, and one a
non-citizen, who decides when those two
individuals should be brought into federal
court and prosecuted? Who makes that
decision?

MR. ZAUZMER: Well, the federal
prosecutor --

VICE CHAIR BREYER: Exactly, the
federal prosecution. And the federal
prosecutor may be forced to make that decision
because of the Detainer Act, is that correct?

MR. ZAUZMER: That's correct.

VICE CHAIR BREYER: And the
Detainer Act applies only to United States
citizens, doesn't it?

MR. ZAUZMER: I believe that is
ture.
VICE CHAIR BREYER: So with respect to non-citizens, they don't have the right, do they, to insist on a prosecution while they are serving an undischarged term, because Congress hasn't given them that right.

MR. ZAUZMER: That's right.

VICE CHAIR BREYER: So they may be sitting in jail for three years on their state court prosecution, and then at the conclusion of which, they are then brought over to the federal court for the prosecution as being an illegally entry, and there is no undischarged term to determine, to meld with, whatever the federal sentence is, is there?

MR. ZAUZMER: Well, it's often the case, Your Honor, that even aliens are brought to the federal system while their state prosecutions are still pending.

VICE CHAIR BREYER: It's often, but it's often the case that years have elapsed, at least that's true in the 9th Circuit; years have elapsed before they're brought over.
MR. ZAUZMER: Well, if I can answer what you're suggesting, Your Honor?

VICE CHAIR BREYER: Yes.

MR. ZAUZMER: Certainly, I think a court should have the ability to address that situation. If a court finds that an alien, because he is an alien, sat for three years serving a state sentence before getting to federal court and would have gotten to federal court sooner if not for an alien, that should be addressed, but this proposal here is a blunderbuss approach that gives every alien credit for a term of imprisonment that's unrelated to the federal offense.

So I don't know, I can consult with my colleagues, but I doubt we would have an objection to a specific proposal that focused on the concern that Your Honor is expressing.

VICE CHAIR BREYER: I appreciate that.

MR. ZAUZMER: Thank you.

VICE CHAIR BREYER: That's very
helpful.

CHAIR SARIS: Let me ask, Judge Saunooke, thank you, again, for coming. We got a request to have an advisory council on Indian matters involving Indian law, in particular, to focus on perceived disparities between the federal and state way of sentencing, and whether there are disparities, I think I'm getting this correctly, whether or not the sentences are fair if you look at the differences between what's happening in Indian territory and what's happening on the state side.

And I was wondering what you've perceived. I mean, you're in North Carolina. Do you think such a committee is a good thing?

HON. SAUNOOKE: Yes. If you're asking, do I have an opinion on the disparity in sentencing?

CHAIR SARIS: Yes.

HON. SAUNOOKE: Generally, I think it's not been a problem with my tribe. The
Eastern Cherokees have had a great working relationship with the State of North Carolina and the district attorney, both district attorneys, or one district attorney for our district. So I mean, if we run into situations where we can't do anything because of jurisdiction and they take a defendant --

CHAIR SARIS: They, the state?

HON. SAUNOOKE: Yes, the state, I don't recall a specific instance where there's been a great disparity. They've generally been very cooperative.

CHAIR SARIS: Do you see an issue when the Federal Government takes it federal? Do you see any concerns about there being unfair sentences compared to what you'd get in the state or the tribal courts?

HON. SAUNOOKE: Well, yes, just the one example we've had earlier in the year where the guy could only be charged with a petty offense in federal court; it was a DV crime. I believe he was found not guilty though, but then
some of the instances where people would just get probation, this would have been several years ago, whereas, I think if they were tried in the tribal system, they'd probably get -- well, a little more than probation. Is that what you're asking?

CHAIR SARIS: Suppose we were to increase some penalties for assault, for example, and strangulation, and suffocation; all the kinds of things the Violence Against Women Act asked us to take into account, and we're going to be looking at that. Would that put domestic assault, for example, sentences out of sync with what's happening at the state level?

HON. SAUNOOKE: I don't think so. No, I don't think so.

CHAIR SARIS: And how would the tribe react to that? I mean, would that be a good thing from their point of view?

HON. SAUNOOKE: Yes. I think the tribe's position is, if someone comes on the
reservation and commits a crime, for years, nothing ever happened to people. If they can get active time, however much can happen out there, we would be glad to see that.

CHAIR SARIS: All right.

COMMISSIONER FRIEDRICH: Two quick questions. First is for Mr. Zauzmer and Ms. Brantley. As I understand your testimony with respect to the proposed amendment under 5G1.3(b), which is the adjustment for an anticipated state term of imprisonment. As I understand your testimony, neither of you object to a federal judge running the sentence concurrently to an anticipated state sentence, future imposed state sentence, am I correct?

MR. ZAUZMER: For relevant conduct. That's correct.

COMMISSIONER FRIEDRICH: And as I understood Mr. DuBois' testimony, it seemed that he was concerned about the situation where a defendant has been in state custody and served some amount of time, not yet been sentenced,
comes to federal court to be sentenced, and will
never get credit for, say, the year he's been
in state custody.

So my question is, would you have
any objection to a court, or can a court even
do this, reducing the federal sentence by a year
and saying the rest of the sentence runs concurrently. Is that an issue?

MR. ZAUZMER: It's not and thank
you for the question. I wanted to address
that. I think Mr. DuBois and I have common
ground on that, and it's addressed in our letter
as well. Our problem is with trying to
anticipate and predict. If someone has been in
pre-trial custody for relevant conduct in a
state facility, we have no objection to getting
credit off of the federal sentence, because
it's not going to be credited by the Bureau of
Prisons.

COMMISSIONER FRIEDRICH: Right.

MR. ZAUZMER: Our problem is
predicting the future. And now, Mr. DuBois
said, well, that's not an issue. It actually, I think, respectfully, it is. For example, very common situation is, it's a question of who asserts jurisdiction of course. If the state takes the person back after sentencing, and the person then sits in state prison serving the sentence, he or she will not get credit from the Bureau of Prisons for that, because it's being credited to another sentence.

That's the spirit of this amendment. This amendment says, anticipate what that'll be, because he won't get credit for it, and give him credit. And we say, don't give him credit because we don't know what it'll be; just order that it would run concurrently. It'll have the same effect, without having to guess it.

COMMISSIONER FRIEDRICH: But do we need to add some provision to the guidelines as they now exist, so that the court knows that it can reduce it for the amount of time that's already been served in state custody?
MR. ZAUZMER: Yes. Yes, certainly. It's basically an amendment implementing Setser, you know, in a very recent Supreme Court decision, and yes, I think that would be appropriate.

COMMISSIONER FRIEDRICH: The second is for Ms. Zgoba. You've mentioned a lot of research that indicates that a failure to register is not a significant predictor of sexual recidivism, but I just wanted to ask you about a study in New Jersey that appears on the bottom of Page 4 of your testimony, where you say that the failure to register offenders were more likely to have sexually assaulted a stranger, and to have adult female victims.

DR. ZGOBA: Correct. It doesn't mean that it's a significant predictor for sexual recidivism, it just means that when you look at the type that actually do fail to register and commit a sexually violent act after that, they tended to have those victims. So it doesn't mean that it was a significant
predictor, it still happens, it happens very rarely, and it doesn't happen statistically different than the opposing group. However, when it does happen, that is the victim profile.

COMMISSIONER FRIEDRICH: Are you saying there's no greater risk or is it not significant?

DR. ZGOBA: It's not significant.

COMMISSIONER FRIEDRICH: But your research shows that they are more likely to commit maybe not crimes against children, but to have been involved in sexual assault.

DR. ZGOBA: Failure to register is not linked in terms of predicting sexual recidivism, statistically, so it's not considered a predictor variable. When it does happen, this is a totally different statistical question, when, in fact, it does happen, those are the victims. The victims tend to be strangers and they tend to be adult females. Am I clear?

COMMISSIONER FRIEDRICH: Yes.
DR. ZGOBA: Okay. So I'm not saying, ultimately, the research doesn't indicate that sexual victimization post failure to register never occurs --

COMMISSIONER FRIEDRICH: But there's no link.

DR. ZGOBA: No. Statistically. But when, in fact, it does happen, they tend to be stranger victims, and they tend to be females.

CHAIR SARIS: Is that an answer to the same question?

MS. BRANTLEY: I wanted to comment on --

COMMISSIONER FRIEDRICH: I'm sorry. Yes.

MS. BRANTLEY: Yes, on the earlier question on 5G1.3. It is my understanding, and that's why I qualify it, my understanding, it seems every time a question of credit and will the Bureau of Prisons give somebody credit for something, I start at step one and have to
figure that out for every single case.

And it is my understanding that if a person spent time in pre-trial detention in state custody, and ultimately, are federally sentenced for that, if they do not go on and get convicted in the state, then that pre-trial custody is considered by the Bureau of Prisons, because it is relevant and it is not something that is being credited against another sentence.

And I have to qualify and say, that's my understanding, because I imagine a Bureau of Prisons person could come up here and tell me I'm wrong --

CHAIR SARIS: We should get Director Samuels back.

MS. BRANTLEY: And now I'm sorry I didn't hear that testimony earlier.

CHAIR SARIS: And we didn't ask.

MS. BRANTLEY: So here would be the issue with the Part B proposal under 5G1.3, one of them that we're concerned about, which is
that we recommend that the court adjust a
sentence for an anticipated term, let along set
aside the problem of what anticipated means.
The court does that, and then the person isn't
sentenced.

So now they've gotten a break on
their sentence, and the Bureau of Prisons is
going to give them credit for the time they've
served. Now, whether or not they should or
shouldn't, I don't comment on that. I'm just
commenting on the difficulty of applying it and
that would be one problem I would see.

CHAIR SARIS: Judge Breyer.

VICE CHAIR BREYER: Yes, and
actually, I wanted to ask you a question. Your
testimony was very significant today. I'm
just trying to figure out the mechanics, and I
appreciate your comments that the last thing
you want to do is try to figure out what are the
mechanics of an unanticipated sentence. I
certainly understand it.

But I think there's basically
agreement today that under Setser, which I was unaware of until I started getting in to this, a judge has a right to impose a sentence concurrent with a yet to be imposed sentence from the state court judge. I never realized that was the case.

I don't think it was, at least we've been operating from many, many years, that we didn't have the power to run sentences concurrent with a yet to be imposed sentence. Nevertheless, that's taken care of by the Supreme Court.

So the unanswered question is, how can we be sure if we thought that it was important, and I think we do, to give credit for time served before conviction, that is, pre-trial custody; it is something, number one, that’s readily, easily ascertainable by the probation department. Can you figure out when the person went into custody in state court, and what the state court rule is with respect to credit for time served, or at least the federal
rule with respect to credit for time served, and
can that then be incorporated in the federal
judge's sentence, so that there's simply no
misunderstanding as to what the appropriate
credit is?

MR. ZAUZMER: Yes, Your Honor, the
reason there's no problem with time already
served in our deal, is that you're dealing with
known facts. The federal sentencing judge has
it all in front of him or her, knows this person
was in pre-trial custody for a year, now we're
here, the federal sentence is going to start
from today, and decide what's the appropriate
sentence.

And it almost doesn't matter
whether the state ultimately sentences or not.
The federal judge will decide, I want this
person to serve a total of ten years. I want
it to include the one year that he's already
served. I'm doing a nine-year sentence
concurrent to anything that's imposed in the
future starting today.
We're fine with that, because it's based on known facts.

COMMISSIONER FRIEDRICH: But she's saying BOP is going to knock another year off, if the case doesn't go forward in state court.

MR. DUBOIS: I think the Commission, though, has sort of anticipated that. I don't think that problem will arise very often, but to the extent it does, the judge could make a notation on the judgment that, I have made this adjustment in anticipation of the defendant not getting credit, this pre-trial time credited, by the Bureau of Prisons.

And the reason you do it that way is, you can't fix it later. If you do it the other way, and don't give him credit because the state sentence may not occur, then he will never get that credit. Here, you have to do it at the front end, tell the BOP you've already given him that credit in the off chance that the state sentence doesn't materialize, and I think that
solves the problem.

VICE CHAIR HINOJOSA: I'm not sure that that's what the Bureau of Prisons will do because sometimes you can't get an answer from them, and Ms. Brantley is correct. Those cases are extremely difficult because a lot of times, the state, after they see the federal sentence, decides, well, we're not going to prosecute, because this is enough for us, but you've already given them the credit, so they will spend six months less than you actually thought they were going to, because it wasn't credited to the state system.

We have something in these materials from the Bureau of Prisons that I question, Mr. Zauzmer, whether you think this is really the way it is. When you give a sentence and they've received some time, and they're on a writ, and then we sentence them in the federal system, they were in state custody, and then they serve both sentences, and the federal sentence is concurrent, the federal
sentence is longer, there's material here that says that because it's longer, the Bureau of Prisons is going to go back and pick up that time that wasn't credited, because somehow, that was not credited to another case, because they're actually serving a longer federal sentence.

I had never heard that till I saw these materials, and I was wondering if that's really accurate.

MR. ZAUZMER: I've only heard that in the context, again, of where the state sentence does not get a concurrence. And I think that's what Ms. Brantley --

VICE CHAIR HINOJOSA: Well, let me show this to you.

MR. ZAUZMER: I'm happy to look at them more carefully, and we can write to the Commission, if you'd like, on exactly how that works. I do want to say briefly that, my experience is that the Bureau of Prisons is very responsive to federal judges. If a judge gives a direction as to what should happen, what we
do on the district level is, we communicate with the regional counsel’s office where a concern does come up, and we get a response, and we get satisfaction from that.

It would be extraordinary, I think, if a federal judge said, I'm structuring my sentence this way with the anticipation of no credit for this, and then the Bureau of Prisons did something that resulted --

VICE CHAIR BREYER: It probably will not come as a surprise to you that federal judges get, perhaps, 40, or 50, or 100 letters from the Bureau of Prisons explaining why this person can't go into an RDAP program. That probably wouldn't come as a surprise.

MR. ZAUZMER: That does not come as a surprise.

VICE CHAIR BREYER: Because they certainly have been responsive, but not quite the way --

CHAIR SARIS: I was going to ask Dr. Zgoba, we're struggling with what the correct
term of supervised release should be for people who fail to register. You're telling us the tiers aren't significant, but is there data that could help us in making this decision?

DR. ZGOBA: I'm telling you that the tiers aren't predictive of future re-offending patterns the way they stand now. The Federal Government has devised them based on the crime of conviction. Previous to the Adam Walsh Act, the states, under Megan's Law, had the ability to construct their tiers however they imposed.

So for example, Florida had broad community notification, where they just had sex offender versus predator statute. New Jersey, we tier sex offenders based on a risk assessment tool, so we tiered them one through three on a hierarchy system. So prior to the implementation of the Adam Walsh Act, which is only in effect in 16 states, many states still keeping their version of Megan's Law, the states did it differently and the Adam Walsh Act
now removes all of those options and states must
oblige, must utilize, these tiers based on
crime of conviction only.

That crime of conviction has been
shown not to be a predictor of future
recidivism. For the failure to register, what
the research has shown is that failure to
register is not linked to sexual deviance,
sexual recidivism. However, when we do see
that there are multiple failure to registers,
once there is more than one failure to register,
we see that the pattern somewhat changes.

Those offenders are very few and far
between. Failure to register does not occur
very frequently, but when it does occur on
multiple occasions for one offender, we sort of
see that pattern change around that offender.
Now, statistically, they still don't have more
sexual recidivism, but they tend to be more
criminogenic in general.

COMMISSIONER WROBLEWSKI: Just a
quick follow-up, am I correct that the tiers,
though, by stacking, determine the length of
time during which the sex offender has to
register, is that correct?

DR. ZGOBA: Correct. So Tier 3 is
25 years to life.

COMMISSIONER WROBLEWSKI: Right.
So regardless of what the Commission says,
they're going to have to register for the
statutory period of time.

DR. ZGOBA: If the state has
accepted the Adam Walsh Act, yes.

COMMISSIONER WROBLEWSKI: Right.
And you describe these folks as less of a sexual
recidivism threat and more as, I think your term
is, general rule-breakers.

DR. ZGOBA: Well, they would be
more akin to parole violator, in essence, so
more general rule-breaking behavior, yes, more
deviance to authority behavior, so more
technical violations.

COMMISSIONER WROBLEWSKI: Right.
And I think your testimony was that,
irrespective of the fact that, yes, there's no increased risk of sexual recidivism, according to your research, that monitoring for the period of time that they are subject to this requirement --

DR. ZGOBA: Registration. Yes.

COMMISSIONER WROBLEWSKI: -- this registration requirement, makes some sense.

DR. ZGOBA: Yes, absolutely.

COMMISSIONER WROBLEWSKI: Okay.

Thank you.

MR. ZAUZMER: And can I just add one thing, which is that the purpose of the registration law, as I'm sure you know, is not just to avoid or reduce the risk of sexual recidivism, though certainly it is. It's also to provide some comfort and safety to communities that many legislatures have decided want to know and have a right to know, who's living in the community, so that they can be on guard against, even if it's that one time that somebody does recidivate and commit some
horrible act.

And that's the reason, in our papers, we advocate extensive terms of supervised release and compliance with the registration requirement.

COMMISSIONER JACKSON: Let me ask you about that though, because it seems to me that the obligation to register, which is what continues under the tier system for 15, 20, 30, whatever, however many years to life, is substantially different than supervised release. Registering could be one component of a supervised release monitoring program, but supervised release involves a lot more.

And so I'm worried a little bit about conflating statistics. Even though you might have a period of registering for the purpose of community notification, to have a similar 15 or 20-year period of supervision, it seems to me someone might say that could be excessive, especially if the failure to register folks aren't showing any increased
rate of recidivism.

MR. ZAUZMER: Well, sure, they are different, but what's important is supervised release can be at different levels of supervision. Once a person is on supervised release for such a long period of time, as you know, they go much lower in the amount of groups that are being supervised, but they're still subject to some supervision and some punishment for breaking the rules, to use the same term that we've heard here.

So failure to register is relevant to compliance with supervised release. It's not the same. A judge still has to scratch it in, as in all these matters, I think the minimum is five years, but a judge, we think should be able to look at the circumstances, the history of the individual, see the recommendation of the Commission, but at least there should be some supervision structure in place during the period of registration.

CHAIR SARIS: So your thought is
that, let's say you were to make, 25 years, whatever it is for a tier --

DR. ZGOBA: Tier 3 is 25 years to life.

CHAIR SARIS: Twenty-five years to life, and your theory is that the level of supervision is reduced. My experience is that you have these huge supervision requirements; everything from lie detectors, to computer screens, to that word, I don't want to --

DR. ZGOBA: GPS monitoring and notifications.

CHAIR SARIS: Whatever that is, and, basically, all of that continues the entire time. You think no.

MR. ZAUZMER: No, it doesn't, Your Honor, and probation could speak to this better than I can, but they have different tiers themselves, if you want to use that word, getting all the way down to what I believe they call the low-intensity caseload.

CHAIR SARIS: So even on the sex
offenders.

MR. ZAUZMER: It would be on anybody subject to supervised release. At some point, the probation officer has the discretion, dealing with the judge if necessary, to reduce the requirements down to --

VICE CHAIR BREYER: But that's not the way the judgment amendment reads. I mean, I'm pleased to hear that, but that comes to me as a surprise because the way the judgment amendment reads is, I place you on supervised release for a term of X years, here are the ten conditions of supervised release, including the tests, and the this, and the that, the thing about the thing, and the polygraph. I mean, that presents a whole other set of issues with respect to self-incrimination and so forth.

But be that as it may, because that's not what we're talking about, we're talking about whether, really, if a probation department, unilaterally, can eliminate
conditions of supervised release over a lifetime?

MR. ZAUZMER: No, definitely not. Any condition that's expressed by the judge cannot be eliminated unless the judge agrees to it, which can be done, but the judge's conditions do not embrace everything that's involved in daily supervision.

CHAIR SARIS: Mr. Brantley, do you have anything you'd like to add? Do you keep this up unless there's a motion to change it?

MS. BRANTLEY: Well, yes. We do what the conditions say. We enforce the conditions that are imposed until there are no longer conditions.

COMMISSIONER WROBLEWSKI: Dr. Zgoba, am I correct again, I'm trying to just make sure I understand the statutory scheme, that there are these long periods of time for registration, but they can be reduced. Is that correct?

DR. ZGOBA: To my knowledge, only
through litigation, so I'm unaware of any instance where a sex offender has been tiered under the statute and has, in some way, been decreased. There is no incremental decrease, to my knowledge, in supervision over time, in any capacity.

COMMISSIONER JACKSON: And it seems to me that registration and supervision have two different goals. As you pointed out Mr. Zauzmer, the registration is because the community wants to know, because the community feels that it's necessary for them to have this information in order for protection, et cetera, but it would seem that the supervision is not necessarily toward that same end, and so --

DR. ZGOBA: People often interchangeably refer to them that way because supervision often includes the registration and notification, because what you're referring to is actually notification, not the registration process. They're often used interchangeably, because that supervision
takes place during the registration and notification process, but they can varying levels of that supervision.

So it seems to me that the research indicates that incremental decreases over time would be a good thought for these particular offenders because a 25-year timeframe to life, while it makes sense for the community to feel safe, it doesn't necessarily turn into the reality of the situation.

So we've done numerous tests on whether or not people feel safe because of the Adam Walsh Act and Megan's Law, and everybody says they feel safe, but quantitatively, they are no safer.

CHAIR SARIS: That's a very dower note.

VICE CHAIR BREYER: I think today, a whole group of us are going to walk out not feeling very safe.

CHAIR SARIS: Thank you very much to everyone for coming.
(Whereupon, the hearing in the above-entitled matter was concluded at 3:13 p.m.)