

UNITED STATES SENTENCING COMMISSION

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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE
FEDERAL SENTENCING GUIDELINES

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WEDNESDAY
MARCH 8, 2023

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The Commission met in the
Commissioners Conference Room, Suite 2-500,
Thurgood Marshall Federal Judiciary Building,
One Columbus Circle NE, Washington, D.C., at
9:00 a.m. EST, the Honorable Carlton W. Reeves,
Chair, presiding.

PRESENT

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

*Participating virtually

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

2 9:05 a.m.

3 CHAIR REEVES: Good morning. I'm
4 Carlton Reeves, Chair of the United States
5 Citizen Commission. I welcome you all to our
6 fourth and final day of hearings on our current
7 slate of proposed amendments to the Citizen
8 Guidelines. Some of you have been with us at
9 each hearing and I appreciate that. Others may
10 be joining us for the very first time and I
11 appreciate that as well. Regardless of which
12 group you fall into, I thank each of you for
13 joining us. Whether you're with us in this room
14 or you're with us at your desk or you're with us
15 wherever you are via livestream.

16 I again have the honor of opening this
17 hearing with my fellow Commissioners. To my
18 right, I have Vice Chair Claire Murray, Vice
19 Chair Laura Mate, Commissioner Claria Boom, and
20 our ex-officio member, Jonathan Wroblewski. To
21 my left, we have Vice Chair Luis Felipe Restrepo
22 and Commissioner Candice Wong. John Gleeson as

1 you see, his chair is empty, but he's in the room
2 with us via phone. We appreciate all the
3 Commissioners and the work that we've done.

4 The Commissioners are not the only one
5 who are working however. We also have a deeply
6 dedicated staff. All of them -- some of them
7 present in this room. Others are working
8 elsewhere. They have worked tirelessly to make
9 this day possible. I want to thank them again
10 and again before this audience and every audience
11 that I speak to for the work that they do, for
12 the work that they are doing, and for the work
13 that they will continue to do. We appreciate
14 you. And I say that on behalf of myself and I
15 say that on behalf of every Commissioner along
16 this table and even on the phone.

17 While our hearings may be ending
18 today, our need for your input is not. We will
19 continue to accept public comments until March
20 14th. Panelists, if you will come away from
21 today with more to say, please provide us with
22 your supplemental testimony before the deadline.

1 I also members of the public to submit comments
2 via way of our online portal at www.ussc.gov.
3 However and whenever you speak to the Commission,
4 you will be heard.

5 Yesterday we heard testimony on
6 proposed amendments regarding firearms offenses,
7 drug offenses, and resolving conflicts among the
8 Court of Appeals. Today, we will be taking
9 testimony on proposed amendments regarding the
10 career offender guideline and how criminal
11 history is addressed in the guidelines. While
12 these are the last proposals discussed at our
13 hearings, they are just as important as our other
14 proposed amendments as the testimony of today's
15 esteemed panelists will make clear.

16 Panelists, thank you for being with us
17 today. You will each have five minutes to speak.
18 Know that we have read your written submissions.
19 Your time will begin when the light turns green.
20 You have one minute left when it turns yellow,
21 and no time left when it turns red. If I cut
22 you off, please understand, I'm not being rude as

1 we have so much to cover today as we have had to
2 cover in past days and we have a limited time to
3 hear from everyone.

4 For our audio system to work,
5 yesterday I think we've ironed out all the
6 glitches. For our audio system to work though,
7 you'll still need to make sure that your
8 microphone is on before speaking, look for the
9 green light. And you'll also need to make sure
10 you're speaking as loud as I'm speaking now and
11 speak directly into the microphone. And don't be
12 shy about leaning in and getting close to the
13 microphone if necessary.

14 When all panelists have finished
15 speaking, I'm sure our Commissioners will ask
16 questions. For the past three times, I said
17 "may" ask questions, but we've asked questions
18 every time, so I can guarantee you, we're going
19 to ask them questions. So thank you for joining
20 us and I look forward to a very productive
21 hearing.

22 Now on a point privilege again, you

1 know, I have to bring up Yazoo City. Well, I
2 learned yesterday after the close of the hearing
3 last night, the basketball team that I was
4 telling you about, they were the 4A Champions,
5 they have been named the number one team in the
6 state of Mississippi among all the divisions.
7 Congratulations Yazoo City High School boys 4A
8 team who are the number team in the whole state
9 of Mississippi. Congratulations to you, Coach
10 Anthony Carlyle. Thank you so much for what you
11 all are doing for my hometown. I certainly
12 appreciate that.

13 Now that's a great way to start.
14 Right? Follow that, Mr. Zauzmer. All right.
15 With that, I'd like to introduce our first
16 panelists who will present the Executive Branch's
17 perspective on our proposed amendment regarding
18 the career offender guideline. We have with us
19 Robert A. Zauzmer who serves as Chief of Appeals
20 in the United States Attorney's Office for the
21 Eastern District of Pennsylvania. Mr. Zauzmer
22 has served as Chair of the Department of Justice

1 Appellate Chief's Working Group and as an ex-
2 officio member of the Attorney General's Advisory
3 Committee. Mr. Zauzmer has spent over 30 years
4 working as an Assistant U.S. Attorney in
5 Pennsylvania. Mr. Zauzmer, we're ready to hear
6 from you whenever you are, sir. Thank you.

7 MR. ZAUZMER: Thank you, Mr. Chairman.
8 I don't know if I can follow on the success of
9 the Yazoo City High School team, which I am
10 delighted to hear about. But I will turn to the
11 matter at issue here.

12 Chairman Reeves and members of the
13 Commission, thank you very much for the honor of
14 appearing before the Commission and for the
15 opportunity to present the views of the
16 Department of Justice regarding proposed
17 amendments to the career offender guideline. I
18 have served for 25 years as the Chief Appellate
19 Attorney in my office. And in addition, during
20 the past 15 years, I have provided input to
21 Department policy makers and guidance to
22 prosecutors nationwide regarding sentencing

1 issues.

2 In my various roles, including in my
3 service as pardon attorney in 2016, I have seen
4 firsthand the broad and legitimate concerns about
5 severity levels associated with many recidivist
6 provisions, including in the guidelines. Indeed,
7 the Attorney General recently encouraged
8 prosecutors to seek variances in appropriate
9 cases involving the career offender guideline
10 citing the increasing rate of below guideline
11 sentences in these cases.

12 The Department would therefore welcome
13 the opportunity to work with the Commission to
14 analyze severity levels associated with this
15 guideline as part of our broader efforts to
16 ensure that the guidelines are fair and
17 consistent in their application. The
18 Commissioner however has not sought input at this
19 time regarding the severity of the career
20 offender guideline. Rather, it's important
21 questions focus on matters that go to consistency
22 of application of the guidelines. And no

1 doctrine produces greater inconsistency at the
2 cost of a tremendous investment of resources than
3 the categorical approach.

4 I last had the privilege of testifying
5 before this Commission on this topic on behalf of
6 the Department in November 2015. At that time, I
7 spent a significant portion of my statement
8 explaining the incongruity and harm of this
9 approach. I do not believe that, that is any
10 longer necessary. Indeed, judicial criticism of
11 the doctrine has become a crescendo as digested
12 in our letter. Numerous judges have forcefully
13 and often colorfully condemned this approach in
14 which courts and litigants are compelled to spend
15 enormous resources focusing not on the offender's
16 actual conduct, but on whether some other
17 hypothetical person could violate the same
18 statute, but do it in a less violent way. With
19 the frequent result that some defendants who
20 committed even the most horrific acts; murder,
21 sexual assault, and vicious attacks are
22 incredibly found not to have committed "crimes of

1 violence".

2 Notably in the application of the
3 sentencing guidelines, this approach was never
4 required by this Commission. It was imported by
5 the courts from the Supreme Court's
6 interpretation of the Armed Career Criminal Act,
7 which was motivated by concerns that do not involve
8 the current guidelines, most notably, the
9 restriction on judicial fact-finding that
10 increases the maximum sentence. This is most
11 evident from application of the so-called Shepard
12 Rule, very severely restricting the examination
13 of criminal records to documents that so
14 frequently do not reveal the full background of
15 the case at issue. All of this prevents courts
16 from doing what they do expertly and what the
17 Sentencing Reform Act demands; considering each
18 offender before the court based on their actual
19 conduct and actual history in an effort to impose
20 consistent sentences on similar offenders.

21 Accordingly, the Department has
22 consistently advocated that the definitions in

1 the career offender guideline rest on actual
2 conduct. We support the Commission's sensible
3 proposals to fix anomalies in recent case law by
4 making clear that Hobbs Act robbery is a crime of
5 violence, that the guideline reaches inchoate
6 offenses, and as discussed yesterday, clarifying
7 the definition of controlled substance offenses.
8 We also support the suggestion that the elements
9 clause should be expanded to reach conduct that
10 matches either the elements or means of the
11 statute of conviction. These suggestions would
12 also courts to consider readily available and
13 reliable information and reach consistent
14 determinations regarding the treatment of violent
15 and controlled substance offenses.

16 We appreciate the Commission's efforts
17 to address the problem through a new approach,
18 which would call for comparison of the offensive
19 conviction to specific guidelines. Although that
20 may be an efficient approach with respective
21 federal crimes, we have serious concerns that it
22 would create in effect a new categorical approach

1 for state offenses as courts struggle to match
2 hundreds and even thousands of state offenses
3 with particular guidelines. We therefore welcome
4 the opportunity to work with the Commission to
5 improve on these proposals and hopefully rid the
6 system of this problem. Again, I am privileged
7 for the opportunity to testify and I welcome your
8 questions.

9 CHAIR REEVES: Thank you, Mr. Zauzmer.
10 He welcomes our questions, ladies and gentlemen.
11 Have at it.

12 VICE CHAIR RESTREPO: I know Mr.
13 Zauzmer, so I'll start. It's good to see you,
14 Mr. Zauzmer.

15 MR. ZAUZMER: Good to see you, Judge.

16 VICE CHAIR RESTREPO: Mr. Zauzmer, you
17 opened your letter suggesting that we may
18 consider postponing this decision and suggest
19 that we hold hearings for further consideration.
20 If we do that, who do you think we should invite?
21 What sorts of issues should we be exploring with
22 these folks? And I'd really like to know what

1 your suggestion is to the best fix with respect
2 to the categorical approach.

3 MR. ZAUZMER: There were a number of
4 questions there. Thank you, Judge. First of
5 all, there are proposals that are made that we
6 support that we think can be done right now; the
7 Hobbs Act robbery issue. That is just an
8 anomaly. This Commission in 2016 amended the
9 definition of extortion to say "physical injury".
10 The goal was to exclude "harm to reputation" and
11 things like that. Had very unintended
12 consequences, which it essentially eliminated
13 Hobbs Act robbery as a crime of violence as hard
14 as that is to believe in five circuits, it
15 jeopardizes the application to any extortion
16 statute anywhere. That's an easy fix in our
17 view.

18 Same with inchoate offenses. That was
19 a completely unintentional result of -- I think
20 of the Kisor decision. No one has ever seriously
21 disputed this condition from day one as included
22 inchoate offenses attempt conspiracy, et cetera.

1 Now in some circuits, they're not included
2 because of this odd administrative law rule about
3 where in the guideline the thing can fall. So
4 those are easy fixes that would be quite helpful.

5 And the last of those, I think is the
6 controlled substance definition, which I know you
7 exhaustively talked about yesterday at the
8 hearing with my colleague, Ms. Mitchell. What we
9 have is this very strange application of the
10 categorical approach such that if a state hasn't
11 removed a radio pharmaceutical substance used to
12 diagnose Parkinson's Disease, that no cocaine
13 offense qualifies. That should be fixed by
14 making clear that it rests on a state definition.
15 We support those proposals. We believe that
16 should be done now.

17 Our bigger goal and what we have
18 consistently advocated including when I was here
19 in 2015 is that -- especially for crimes of
20 violence that courts be permitted to focus on
21 actual conduct. That wasn't published by the
22 Commission in this proposal. What was is the

1 listed guideline approach that we have concerns
2 about. And that's where we do suggest that if
3 the Commission is looking at that, that it hear
4 from a broader range of people than I think it's
5 heard from so far.

6 This Commission, I don't think you
7 need my advice. It's historically so good at
8 reaching out to the courts, to the bar, to
9 prosecutors, to victims, to other advocates. And
10 those are the people I think who would have much
11 to say if this actual conduct proposal were again
12 put forward.

13 VICE CHAIR MURRAY: Thank you so much
14 for being with us, Mr. Zauzmer. One of the
15 arguments that's often used against an actual
16 conduct approach is the prospect of mini trials
17 being hugely intensive reports and it being
18 difficult to get old evidence about priors for
19 those mini-trials. Do you have any thoughts on
20 this issue?

21 MR. ZAUZMER: I do. As you can tell,
22 I have a number of thoughts about these things.

1 I don't believe that's a legitimate concern. I
2 think in most cases it's very straight forward to
3 show from reliable documents, what the evidence
4 was. This is what courts do all the time. And
5 in every other aspect of the sentencing
6 guidelines, courts have always been expected to
7 look to any reliable information to find facts by
8 preponderance of the evidence. This has worked
9 efficiently for 35 years. And so there's no
10 reason to think that, that wouldn't happen with
11 regard to prior offenses.

12 When we have these concerns -- when
13 this matters come up that produce such anomalous
14 results, especially with regard to violent
15 felonies, we have no doubt as to what the facts
16 are. We have reliable police documents. We have
17 reliable interview reports, and perhaps the
18 Government needs to call a witness and let the
19 judge hear from a victim or hear from a witness.
20 That's not burdensome and it's not inappropriate
21 in the pursuit of justice. I just read the
22 opinion, I think from yesterday regarding, you

1 know, where he had to spend 30 pages analyzing
2 whether an assault was a crime of violence, that
3 defendant killed a man. That doesn't take long
4 to prove. And I don't think that, that would be
5 a problem across the board. And again, I think
6 it's a worthwhile endeavor.

7 And when you compare it to what's
8 happening now in terms of the investment of
9 resources, I think we would be in far better
10 position -- if I could just use one more example.
11 The Third Circuit, you know, where I reside
12 recently decided this case called Brasby. And I
13 know that -- I know Judge Restrepo's familiar
14 with it -- you know, would have read this opinion
15 and reviewed it when it was circulated to the
16 court. Brasby's a decision again involving
17 whether in New Jersey aggravated assault statute.
18 Brasby involved whether a New Jersey aggravated
19 assault statute qualifies as a crime of violence.
20 Again, a matter in which the defendant shot a man
21 four times in the back.

22 But to resolve this under the

1 categorical approach, the Third Circuit Panel, an
2 opinion written by Judge Julio Fuentes, had to
3 spend an extraordinary amount of time. The court
4 was required to find the generic definition of
5 aggravated assault. That's what's required by
6 the guideline. And had to review the aggravated
7 assault statute of all 50 states and the District
8 of Columbia and treatises to reach the conclusion
9 that yes, this man committed a crime of violence.
10 That's an expenditure of resources that just
11 makes no sense.

12 CHAIR REEVES: I understand
13 Commissioner Gleeson has a question now.
14 Commissioner Gleeson, if you can hear me, please
15 ask your question.

16 COMMISSIONER GLEESON: I can. Thank
17 you, Chair Reeves. Thank you, Mr. Zauzmer for
18 your testimony and for giving us your time. My
19 question steps back a bit from the criminal
20 history approach and the categorical approach and
21 asks your thoughts about the degree to which --
22 if there are any guardrails on the degree to

1 which the Commission might stray from
2 congressional or Supreme Court prescriptions.

3 And what I mean by that is obviously
4 this categorical approach, which was fashioned by
5 the Supreme Court has kind of the implicit
6 dressing of the Congress that has essentially
7 ignored (audio interference) to fix it for
8 decades. There's other concepts as well that
9 we've discussed, you know, whether we stray from
10 -- whether the Commission should feel free to
11 stray in connection with safety (audio
12 interference) the statute or the judicial
13 interpretations of the statute.

14 And I'm just curious as to what your
15 thoughts are in terms of how the Commission
16 should think about starting a separate course
17 than the one charted by Congress or the one
18 charted by Supreme Court precedence. And the
19 degree to which sound sentencing policy, that
20 could be something the Commission should feel
21 free to promulgate even if it's different than
22 we've worked, you know, with policy fashioned by

1 Congress or the ones -- the policy that has been
2 revoked at Supreme Court precedent. I'm kind of
3 curious as to your thoughts as to -- as to the
4 freedom of the Commission to do what it thinks is
5 fair. Any number of the context in which we
6 might change policy, depending on what the
7 guardrails, if any, are.

8 VICE CHAIR RESTREPO: Yes, Judge. I
9 think this Commission has considerable leeway,
10 which it has always exercised to develop
11 sentencing policy. The guardrail set by statute
12 are there and must be abided. The career
13 offender guideline is an excellent example that
14 is mandated by Congress. But once you get into
15 the details, that's what this Commission is
16 about, the entire sentencing guideline manual
17 consists of specific details that do not flow
18 directly from any congressional directive.
19 Congress for example set the statutory penalties
20 in very broad ranges for drug offenses and then
21 this Commission fine-tuned it down to very
22 specific quantities. There are millions of

1 examples -- maybe not millions, but certainly
2 hundreds of examples in the sentencing guidelines
3 of this Commission exercising its authority to
4 develop policy subject of course every year to
5 the rejection by Congress -- if it disagrees with
6 particular guidelines that this Commission has
7 adopted.

8 So the categorical approach then is a
9 very good example that is not dictated by
10 Congress. It hasn't been approved by Congress.
11 Perhaps as Judge Gleeson, as you suggest,
12 Congress by its silence has approved the
13 application of the categorical approach with
14 regard to the Armed Criminal Act because that is
15 a statutory interpretation that the Supreme Court
16 made that Congress has never seen fit to correct.
17 But there's never been any suggestion by the
18 Supreme Court, by Congress, by anyone else that
19 the categorical approach is required in the
20 application of the guidelines.

21 To the contrary, what this Commission
22 said in its, you know, very first introductory

1 statement that has always been there and it has
2 never been disapproved by Congress, this
3 Commission focuses on actual conduct. The goal
4 of the guidelines is to impose similar sentences
5 on similar offenders meaning looking to their
6 actual conduct in history. And I think it's
7 fully consistent with that principle not to
8 accept the categorical approach with regard to
9 the application of the guidelines. And that's
10 been the position of this Department, you know,
11 for at least the last ten years.

12 COMMISSIONER GLEESON: Thank you.

13 Thank you, Judge Reeves.

14 CHAIR REEVES: All right. Yes?

15 VICE CHAIR MURRAY: I have another
16 question. Would you mind responding to the
17 arguments of the public defender to the extent
18 that you that you're aware of them regarding
19 robbery and inchoate offenses? So with respect
20 to robbery -- Hobbs Act robbery, the argument is
21 the Hobbs Act robbery really should not be
22 treated as a crime of violence because it could

1 involve non-imminent threats of force and force
2 against property and persons. And with respect
3 to inchoate offenses, the argument is that
4 inchoate defenses are inherently less severe than
5 the principal offense.

6 MR. ZAUZMER: Right, I'm happy to.
7 You know, I have such great respect for the
8 Defenders. And you know, I've worked with them
9 for so many years. But I really appreciated Mr.
10 Caruso's testimony yesterday that I watched
11 before this Commission when he said they take
12 their opportunities, you know, when they come up.
13 And I think that with respect to the objection to
14 the categorical approach, that's what this is. I
15 fully understand and respect that they wish to
16 see fewer long sentences imposed on their
17 clients. And if an opportunity arises, they're
18 going to take it. But I don't think that, that's
19 a legitimate basis, especially with regard to
20 what you're talking about, Commissioner Murray,
21 those two examples of robbery and inchoate
22 offenses.

1 Hobbs Act robbery is the traditional
2 violent crime that Congress has always targeted.
3 In fact, if you go to the statute, which again, I
4 don't think should govern here, but if you look
5 at the Armed Career Criminal Act, the first
6 version of the Armed Career Criminal Act did not
7 have an elements clause. It didn't have what
8 we're now familiar with. It had robbery, that
9 was it. Robbery was the typical violent crime
10 that Congress has always focused on. And if you
11 have these extreme examples, which I actually --
12 I don't think I've ever seen in practice in over
13 30 years of somebody threatening property in the
14 future or whatever those examples are, then
15 certainly a court could address that through a
16 variance or some other means.

17 But Hobbs Act robbery, what we deal
18 with day in and day out -- and it's always been a
19 particular problem in my district -- are violent
20 crimes. These are forcing people to turn over
21 their property at the point of a gun. I mean
22 that's what this crime is. This Commission --

1 and I think what we have here from the Defense
2 side is an opportunity. This Commission never
3 said that Hobbs Act robbery is not a crime of
4 violence. Hobbs Act robbery was always treated
5 by the courts as a crime of violence under the
6 guidelines because it fell within the rubric of
7 both robbery and extortion of the generic
8 definitions.

9 The Commission in 2016 was concerned
10 that extortion might reach threats to reputation
11 and not threats of harm. And so made this one
12 tweak in the application note that said extortion
13 involves physical injury. The extremely
14 unintended consequence of that was to eliminate
15 Hobbs Act robbery and probably extortion as a
16 crime of violence everywhere. And that's not
17 what the Commission intended. The fix to that is
18 very straight forward. It's either to make clear
19 that physical injury includes injury to property,
20 which has always been true.

21 You know, you look at extortion and
22 you go back to why that has always been targeted

1 by Congress. It goes back nearly 100 years.
2 It's all concerned about organized crime. It's
3 the classic, you know, that's a very nice store
4 you have. It would be terrible if anything
5 happened to it. That's a violent crime to
6 threaten extortion like that. So make clear the
7 physical injury includes injury to property.

8 Or another solution, which I think
9 would be totally appropriate is to match the
10 elements clause that exists now to Section
11 924(c), which refers to person or property. And
12 that's why oddly, Hobbs Act robbery remains a
13 924(c) crime of violence and it's not a guideline
14 crime of violence in many places at the moment.
15 But robbery is a violent crime.

16 Inchoate offenses again, a product of
17 unintended consequences. This Commission, I
18 don't believe it was the first version of the
19 guidelines, but it was the second included
20 inchoate offenses of conspiracy attempt, aiding
21 and abetting. There was never any argument that
22 I know of before the Commission over the decades

1 that, that was inappropriate. Instead an
2 opportunity arose. The Supreme Court decided the
3 Kisor case in 2019. It said that an agency can't
4 interpret an otherwise unambiguous regulation.
5 Clever people said let's apply that to the
6 guidelines even though we know that the guideline
7 manual was always written as one book with the
8 text and the application notes. But now we have
9 courts saying nope, that's an agency
10 interpretation. And thus application notes like
11 that addressing inchoate offenses go by the
12 wayside. That has nothing to do with whether
13 these are appropriate offenses to look at as
14 career offender predicates and we hope that gets
15 corrected.

16 VICE CHAIR MURRAY: Could you address
17 the argument on the merits? I mean I know the
18 providence, I know that it's somewhat accidental
19 that inchoate offenses are no longer included.
20 But now the media is, you know, very justly or
21 you know, is fine with the attempt saying yeah,
22 but these aren't as serious. They shouldn't be

1 included as crimes of violence. Why are they as
2 serious to you as principal offenses?

3 MR. ZAUZMER: Sure. Well, they are
4 serious. I mean aiding and abetting always
5 involves an actual completed offense. Conspiracy
6 to commit an offense, the law going back
7 centuries recognizes that as a dangerous crime.
8 When multiple get together and agree to commit a
9 crime -- I don't want to take everybody back to
10 law school, but when multiple people get together
11 and agree to commit a crime, the odds are that
12 crime is more likely to happen and that's a
13 serious matter. And attempts what we see are
14 very violent.

15 I'll just give you an example of what
16 we're dealing with. The Supreme Court decided
17 the Taylor decision as you know last year,
18 holding that attempted Hobbs Act robbery is not a
19 crime of violence. And as a result, in my
20 district alone, I'm handling about 70 cases in
21 which we're going back and re-sentencing people
22 whose 924(c) offenses no longer qualify. And I

1 can tell you, almost every single one involves
2 horrific conduct where the robbery didn't succeed
3 because the person was caught, the person was
4 tackled, the person was shot, but not before
5 accosting a point of a gun, even shooting people,
6 very violent matters, which we now have to go
7 back into court and say Judge, look. This is
8 violent. The example that the Supreme Court gave
9 of the person making plans, gathering equipment,
10 being caught on the way into the store, that
11 doesn't happen. It's not our real life
12 experience of what attempt offenses are. They're
13 violence crimes.

14 VICE CHAIR MATE: Can I sort of
15 followup? Thank you, Mr. Zauzmer, for your
16 testimony today. We appreciate your time and
17 being with us today. On the culpability issue
18 with the inchoate offenses, the examples you gave
19 were for violent offenses. What about those
20 offenses as to the drug offenses? Keeping in
21 mind the Commission's 2016 report too and
22 concerns that have been raised by the Commission

1 about the drug predicates for a career offender?

2 MR. ZAUZMER: That's a very good
3 question. I would likewise say with regard to
4 conspiracy and attempt that those involve actual
5 conduct which involves the type of conduct that
6 is serious and that we're targeting. I also
7 can't think of examples of where for example
8 there was a conspiracy charge without actual drug
9 trafficking. Often as you know, the conspiracy
10 charge is used to embrace a good deal of activity
11 in order to make the charge more efficient. And
12 similarly with regard to attempt, it's an unusual
13 case in which there hasn't been actual
14 trafficking. And if there is some anomalous
15 case, again I think that can be addressed through
16 a variance.

17 I do think though that what you're
18 saying, I think raises an important point about
19 the problem with the categorical approach which
20 is that the problem historically, meaning over
21 the last 30 years or so, has not been so much on
22 the controlled substance side. It's really a

1 violent crime issue. And the reason I say that
2 is that it's only in recent years where we have
3 these anomalous problems that I've talked about;
4 the inchoate offense arising because of the Kisor
5 decision and this controlled substance definition
6 problem, which we've only seen in the case law in
7 the last couple years. Before that, we really
8 had no difficulty in applying the career offender
9 guideline to controlled substance offenses. Now
10 I am well aware of the concern that this
11 Commission has raised and others have raised
12 regarding the severity of the guideline as
13 applied to controlled substance offenses. And as
14 I said in my statement, I do believe that's an
15 important issue for the Commission to address.
16 And I hope the Department has the opportunity to
17 engage with the Commission on that.

18 The problem with the categorical
19 approach though has been on the crime of violence
20 side. That's where we get judges like Judge
21 Fuentes being compelled to spend a year
22 researching aggravated assault. That's where we

1 get results such as people who've committed rape
2 and robbery and murder being found not to commit
3 violent crimes. The whole resource problem, the
4 whole inconsistency problem was always on the
5 crime of violence side and will still be there
6 even when this Commission hopefully fixes those
7 anomalies regarding the controlled substance
8 definition and regarding inchoate offenses.

9 COMMISSIONER WONG: Mr. Zauzmer, we
10 hear a lot about the burdens of applying the
11 categorical approach sort of at the front end. I
12 think that's very well-known and widely
13 established. But you referred just now to a
14 large number of re-sentencings you've been
15 handling in the wake of Taylor. And I'm just
16 wondering if you can talk a little bit about the
17 burdens to the extent there have been based on
18 the categorical approach being the current state
19 of law.

20 MR. ZAUZMER: Yes, absolutely. I mean
21 the burden exists at all levels of the judicial
22 system. The District judges of course have to

1 deal with this problem on a daily basis and then
2 Appellate judges as well in doing the types of
3 exercises I've talked about. And often there are
4 reversals on this basis or even concessions.
5 That's where people like me come in when you're
6 the Appellate lawyer and you take a look and -- I
7 recently had a case involving a District judge in
8 which he strayed just a little off base and we
9 had to say it. He looked at the actual crime
10 that the person committed and said are you
11 serious? You know, you're telling me this is not
12 a violent crime? And he moved on to the other
13 issues in this case. And we had to agree to a
14 remand. And yes, it's a significant burden on
15 judges and on prosecutors, and having to deal
16 with these issues on -- I know I'm repeating
17 myself -- on what should be the most straight
18 forward questions. You know, did the person
19 commit a violent crime in the past?

20 I should also mention that, you know,
21 we've talked a lot about career offenders.
22 That's not the only place as you all well know

1 that these definitions apply. They also
2 prominently apply for example on the firearm
3 guideline. And in fact, the firearm guideline is
4 applied by the courts far more often than the
5 career offender guideline. And our most serious
6 problem as this Commission's data has shown is
7 with violent offenders who then re-arm
8 themselves. They are the most dangerous
9 recidivists. And so we have this crime of
10 violence definition being applied to them. And
11 that creates difficulties in coming up with
12 consistent sentences.

13 And all of this again is not just a
14 burden problem and it's not just an anomaly
15 problem, it's also an inconsistency problem. It
16 is a problem if somebody who commits a robbery in
17 my home state of Pennsylvania is looking at a
18 completely different guideline range than someone
19 who commits the exact same forceful robbery five
20 miles away in Camden, New Jersey. But that's the
21 situation that we're dealing with.

22 CHAIR REEVES: To follow up on

1 Commissioner Wong's question. Mr. Zauzmer, has
2 DOJ -- you said you have like 70 cases that you
3 know if in your situation that you have to, you
4 know, look back at. Is DOJ keeping any stats --
5 you know, has DOJ asked all U.S. Attorney's
6 Office for example, for data or information on
7 the number of cases they might have in each of
8 the circuits or in your circuit or in any of the
9 circuits or whatever?

10 MR. ZAUZMER: We have not been asked
11 for that yet. We could ask it at the
12 Commission's suggestion. The Taylor problem is
13 focused and the Taylor problem is recent in
14 needing to go back and look at attempted Hobbs
15 Act robbery predicates for 924(c) offenses. The
16 career offender problem spills, you know, into
17 many different areas. And no, we have not been
18 asked for data on that. I can just tell you from
19 experience and from my dealings with the
20 Department and with prosecutors around the
21 country, this is a significant regular burden on
22 prosecutors and courts to have to deal with these

1 issues.

2 CHAIR REEVES: Thank you. Yes,
3 Commissioner Murray.

4 VICE CHAIR MURRAY: Are there
5 specific, I don't know how much -- what granular
6 level you have dug in, but are there specific
7 state statutes the application of which gives you
8 concern in the context of the listed guidelines
9 approach? The Department's letter read a little
10 bit to me as if it wasn't so much a concern with
11 the listed guidelines approach per se as just the
12 thought of like starting over. So obviously
13 there's a lot of water under the bridge on the
14 categorical approach. I think if you were to
15 modify it by undoing Decamps and opposing
16 methods, then maybe you could, you know, use some
17 of that work already. Whereas listed guidelines
18 approach really means like you have to start
19 fresh with all of the state statutes and figuring
20 out how they apply. And obviously one of the
21 things we're trying to get a handle on is how
22 complicated would this be? How often would it be

1 a problem? And you know, we've heard -- our
2 Tribal Issues Advisory Group has told us in the
3 context of the Major Crimes Act that they have
4 done this analysis quite a bit or they have seen
5 it done quite a bit in the tribal context. And
6 it hasn't been a huge problem. Our probation
7 officers seem willing to tackle it, but the
8 Department seems very wary. And I wonder if
9 there are like particular scenarios that are
10 giving you pause. Like where does the
11 Department's hesitancy about the practicalities
12 come from?

13 MR. ZAUZMER: I mean sure, well on the
14 federal side, we don't have a concern. On the
15 federal side, it's very straight forward and it's
16 a very clever proposal. The alternative approach
17 also on the federal side would be simply to list
18 statutes, you know, which we don't think would be
19 a difficult endeavor.

20 It's on the state side that -- it's
21 sort of we're concerned about what we don't know.
22 What we do know is that defense lawyers are

1 really smart, really capable people. And they
2 will find the discrepancies between state
3 statutes and particular federal guidelines. We
4 focused on assault as an example. There are
5 myriad assault provisions, and you can see this
6 in all the case law regarding the categorical
7 approach, very often not called assault, but
8 expressed in terms of domestic violence and other
9 things like that. And yet, we'd be dealing with
10 one specific guideline to fit into in the current
11 listed guidelines regarding aggravated assault.
12 And it would be an endeavor and it would be
13 difficult.

14 And I guess I'm just speaking from my
15 experience of being involved in this litigation
16 for so many years. I just feel confident that
17 there would be not just a great deal of
18 litigation, but inevitably inconsistent results
19 and disagreements between courts. And would take
20 us back -- you know, even with all the
21 difficulties we've had, it would take us back on
22 some matters that were already settled. That's

1 why if this Commission does go with a listed
2 guideline approach, we do suggest some ways to
3 ameliorate that.

4 One is leave the elements clause and
5 expand the elements clause to address means as is
6 in the proposal. That will at least keep us with
7 the precedent that we already have regarding
8 many, many statutes. And that would be very
9 helpful. Do not have a limit to Shepard
10 documents. That is just an artificial limitation
11 that prevents us from looking at what was the
12 conduct that led to the offense that the listed
13 guidelines approach proposals. And we also have
14 concerns as we wrote about the recklessness
15 exclusion and we had suggestions about that. So
16 those things would definitely help. But again, I
17 just know from experience that I could be sitting
18 here a year from now and talking to you about
19 this sea of litigation that will result.

20 VICE CHAIR MURRAY: Doesn't leaving
21 the elements clause leave us in the worst of both
22 worlds? Because it may be settled that Kansas

1 burglary is a crime of violence in the Tenth
2 Circuit, but you could have a defendant who lives
3 in Virginia who has a prior Kansas burglary and
4 it might be not settled in the Fourth Circuit.
5 So aren't we still going to -- Aren't courts
6 still going to then going to have to do the
7 categorical approach?

8 MR. ZAUZMER: Well, no. What I'm
9 saying is that in the listed guidelines approach,
10 it says look at the conduct that led to the
11 offense, but limit yourself to the Shepard
12 documents, which very often doesn't tell you the
13 conduct. What would be an improvement on that is
14 yes, look to the conduct, but look to the
15 elements or means of the offense. In a court
16 that has already decided that the elements of the
17 offense are sufficient by themselves, you're
18 done if you keep the elements offense. In those
19 courts that might not have concluded that, then
20 we're in a better place. Now according to the
21 proposal, we can look to the conduct and we can
22 look at the means and we can now have a different

1 result in those places.

2 VICE CHAIR MURRAY: But won't -- and
3 maybe I don't understand -- but won't courts and
4 prosecutors and defense attorneys basically still
5 be -- have to be in the position of still having
6 to do the categorical approach because there will
7 now be two places where it's not settled -- there
8 will now be two methods of proving that someone
9 is -- has done a crime of violence?

10 MR. ZAUZMER: Right. But I don't
11 think that's a laborious process. I think you
12 know instantly from precedent whether it
13 qualifies under the categorical approach under
14 the elements clause. And if it doesn't, then you
15 would now have this new permission that the
16 Commission has proposed to look further than
17 that. And I think that's definitely an
18 improvement.

19 Again to recap, I mean the ultimate
20 improvement that we suggest is that -- is to make
21 the more modest changes the Commission has
22 suggested to include Hobbs Act robbery and

1 inchoate offenses, state controlled substance
2 offenses, but then permit us to look at actual
3 conduct, not artificially limited to Shepard
4 documents in showing what was the basis of the
5 crime of conviction to show that yes, that person
6 unfortunately shot a man four times in the back.
7 He's a violent offender and should be treated as
8 such.

9 CHAIR REEVES: One of the things that
10 I think that the Federal Public Defenders will be
11 saying is that at least the categorical approach
12 sort of cabins how we look at things and does not
13 lead to unwarranted citizen disparity. What, if
14 anything is the Department's view on that because
15 we do have to always be mindful of unwarranted
16 citizen disparity and all of that. And if you
17 have any response?

18 MR. ZAUZMER: I do. Thank you, sir.
19 The cabining of what we look as is inappropriate.
20 I remember one quote. I believe it was from the
21 Eleventh Circuit. It began, the decision some
22 years ago talking about why a sexual assault

1 statute was not a crime of violence. And I said,
2 here we go again down the rabbit hole. You get
3 into a place where we have to close our eyes to
4 what we know as men and women. And focus only on
5 the elements of a crime and how it may be
6 committed by someone else. That's wrong. Yes --
7 Yes, it cabins what we can look at and it leads
8 us to unjust and inconsistent results.

9 And with regard to disparity, it's the
10 categorical approach that produces disparity.
11 It's the reason that just in my circuit that a
12 first degree aggravated assault, one of the most
13 serious crimes one can commit other than murder,
14 a first degree aggravated assault in New Jersey
15 is a crime of violence.

16 A first degree aggravated assault in
17 Pennsylvania is not. Why? Because there's a
18 Third Circuit decision that we've consistently
19 challenged regarding Pennsylvania first degree
20 aggravated assaults that there was one case in
21 which a woman was convicted of that statute for
22 starving her child to death. And the Court of

1 Appeals said that, that is a not a use of force.
2 That is an absence of use of force and therefore
3 it doesn't categorically qualify. So then no one
4 in Pennsylvania who commits first degree
5 aggravated assault has committed a crime of
6 violence even though those in every other state
7 and jurisdiction in our circuit has. That's
8 disparity. And I think that undermines
9 confidence in the law. It's not appropriate and
10 it's something that we urge the Commission to
11 fix.

12 CHAIR REEVES: Thank you. Oh, did you
13 -- No, no. Did you have -- No, no. Please, if
14 you had a --

15 COMMISSIONER WONG: Mr. Zauzmer, I
16 know the Department's made its support for an
17 actual conduct approach known in the past and
18 there's been some concerns about the actual
19 conduct approach. And I'm just wrestling a
20 little bit with whether the Department's position
21 here is letting sort of the perfect, in your
22 view, be the enemy of the good. And I'm

1 wondering if in the event that an actual conduct
2 approach is not viable, what kind of relief to
3 the enormous burdens you started out here talking
4 about the current status quo are truly relieved
5 by your sort of fallback position that just
6 pertain, you know, the current definitions, Parts
7 B to D of the of the Commission's proposal?

8 MR. ZAUZMER: Well the advantage,
9 Commissioner is that again, we've had to litigate
10 so many of these issues. We'll continue to
11 litigate them. Judge Cabrena's and others will
12 continue to write these opinions. But obviously,
13 there's been progress. And the modest
14 suggestions that the Commission has made do
15 resolve many of the disparities I've talked
16 about. Hobbs Act robbery should be a crime of
17 violence everywhere. So should inchoate
18 offenses. State cocaine and heroin offenses
19 should be controlled substance offenses. Get
20 everybody to the same playing field on that and I
21 think we're in a much better position.

22 We then have this very significant

1 issue to talk about, especially with regard to
2 controlled substance offenses as to whether the
3 penalties are too long. And that should be done,
4 but at least we would have a much greater amount
5 of consistency. We would have less litigation on
6 these issues, on these very straight forward
7 questions. And I think we would be in a better
8 place.

9 VICE CHAIR MURRAY: Would the
10 Department be happy if we went with your fallback
11 your approach, which as I understand is undoing
12 Descamp and applying the Mathis approach broadly?
13 But then we did not go with your approach opening
14 beyond the Shepard documents, so we said no,
15 you're still limited to Shepard documents?

16 MR. ZAUZMER: Yes, that would be very
17 helpful. Being able to look at means. The
18 difficulty with the Shepard documents is that
19 they often don't discuss the means. You know,
20 mens rea as an example. If we have a
21 recklessness exclusion, most often in a charging
22 document as you know, a prosecutor will just

1 recite the terms of the statute. He did
2 intentionally knowingly and recklessly do X. And
3 thus, the Shepard document has not answered
4 anything. But there certainly will be cases in
5 which they are helpful and do explain what the
6 means of the crime were. And so yes, that's
7 progress. Any progress here is helpful. I think
8 that's one of the points that, you know, I hope
9 I'm getting across.

10 VICE CHAIR MURRAY: Are there any
11 documents -- like discrete documents you think
12 could be added to the Shepard universe without
13 opening things up completely though that would be
14 particularly helpful?

15 (Simultaneous speaking.)

16 MR. ZAUZMER: -- what judicial
17 documents are. The next step and what Shepard
18 precludes is looking at police reports and other
19 investigatory documents. And that's where we
20 urge the Commission to look at its traditional
21 rule, which is that Courts should rely on
22 reliable information. That's what 6A1.3 says.

1 And that's where, you know, we think this should
2 go. So no, I can't tell you a specific document
3 label that would be added.

4 VICE CHAIR MURRAY: Thank you for your
5 indulgence on that.

6 VICE CHAIR MATE: I'm sorry. I'm
7 going to extend this even further with just one
8 last question kind of related to before. If we
9 were to postpone doing anything with the listed
10 guideline approach to kind of get more evidence
11 and hear more voices on that, would it also be
12 useful for us to update the research and work
13 that was done in connection with the 2016 career
14 offender report? Is that something that would
15 advance that conversation?

16 MR. ZAUZMER: Yes. Yes, I definitely
17 think it would. I mean we know the basics. We
18 know that 80 percent of cases involving
19 controlled substance crimes result in a variance.
20 And I think we've heard from the courts loud and
21 clear as to the severity of the guideline. But
22 additional data would certainly be helpful to

1 specify it. And I do think what it would show is
2 that the courts appropriate focus is on severe
3 punishment for armed recidivist criminals. That,
4 that will always remain appropriate who are
5 violent criminals. But yes, I think that would
6 bolster that and would be worth looking at.

7 VICE CHAIR MATE: Thank you.

8 CHAIR REEVES: Thank you for being
9 patient with us, Mr. Zauzmer.

10 MR. ZAUZMER: Thank you very much for
11 your time.

12 CHAIR REEVES: All right. This
13 concludes his time with us. We'll get ready for
14 our next panel. Our second panel provides us
15 with the perspective from the Federal Public
16 Defenders on this particular issue. To present
17 that perspective, we have Juval Scott who serves
18 as a fellow public defender for the Western
19 District of Virginia.

20 Ms. Scott has previously talked
21 criminal procedure at Washington and Lee School
22 of Law and served in the Training Division of the

1 Defender Services Office. Ms. Scott has
2 previously served as a public defender in
3 Wisconsin and Indiana. She regularly teaches at
4 local CJA panel trainings and programs sponsored
5 by the Defender Services Office Training
6 Division, as well as the National Criminal
7 Defense College National Association Criminal
8 Defense Lawyers and its affiliates, among others.

9 Ms. Scott, thank you for coming.
10 We're ready to hear from you whenever you are.

11 MS. SCOTT: Good morning, Chairman
12 Reeves and Commissioners. Career offender, this
13 label evokes a certain image. A person who
14 breaks the law with purpose and impunity. A
15 professional criminal. The Defenders who have
16 represented thousands who received this label
17 know this often doesn't match our reality. Our
18 clients who are designated as career offenders
19 include minimally involved people who are pulled
20 into street level sales at a young age. They
21 include people grappling with substance misuse
22 who have sold drugs to sustain their own habit.

1 Many are Black and Native youth who were waived
2 into adult criminal court way before they could
3 vote. And many have never spent more than days
4 behind bars and they now stare down the barrel
5 decades in prison. And many have been subjected
6 to enhanced penalties triggered by the racists
7 unscientific crack cocaine disparities.

8 Because it only takes two prior
9 convictions to qualify for the career offender
10 designation, career criminal history categories
11 are often doubled. Placing someone who falls
12 into criminal history category 3 into criminal
13 history category 6. This drastic shift causes
14 judges to rely on the guideline to sentence
15 clients who have served little time in jail for
16 prior offenses to 30 years or more. And this is
17 done even though the guideline lacks an empirical
18 basis.

19 If the Commission extends the reach of
20 the career offender guideline which each part of
21 the proposed amendment would do, many more people
22 would face the possibility of a guideline based

1 draconian sentence like the ones we've lamented
2 for decades. This is untenable. My written
3 submission dives into the details, but today I
4 will discuss three primary reasons the Commission
5 should not adopt any part of the proposed
6 amendment.

7 First, the career offender guideline
8 is overly punitive, lacks empirical basis, and
9 drives significant racial disparities. During
10 the height of the failed war on drugs, the
11 Commission crafted a guideline that nearly 80
12 percent of judges no longer follow because it
13 fails to reflect sentences that are no greater
14 than necessary to serve the purposes of
15 sentencing. Individuals identified as career
16 offenders are a small percentage of those
17 sentenced in Federal Court. But because lengthy
18 sentences are a driver of mass incarceration,
19 those individuals make up a disproportionate
20 percentage of federal -- of the federal prison
21 population.

22 By expanding both the methods of

1 identifying career offender predicates and the
2 predicate categories themselves, the Commission's
3 proposals will vastly increase the pool of
4 impacted individuals. The Commission cannot
5 ignore that these exceedingly severe sentences
6 are imposed disproportionately on Black
7 individuals who are designated career offender
8 status at nearly six times their White
9 counterparts. Because the career offender
10 guidelines identifies categories of individuals
11 subject to near maximum term sentences based
12 solely on criminal history, it bakes in our
13 nation's racially disparate law enforcement
14 practices.

15 Second, it is important to consider
16 why the Commission has recommended the expansion
17 of the guideline. The impotence behind some of
18 these proposals seem to be a desire to simplify
19 federal sentencing. But if that is the
20 objective, these proposals won't work. The
21 proposals will span increased litigation. To be
22 clear, simplification should not justify the

1 wrongful and broader imposition of harsh
2 penalties. But even if it were a valid
3 justification, the Commission's proposal will
4 create more, not less work. As our written
5 testimony explains, the Commission's proposal
6 will increase litigation.

7 With the Commission's proposal for the
8 alternative categorical approach, courts will be
9 required to make an accusation-based finding in
10 each case undermining the simplification and
11 uniformity that the Commission seeks and the
12 materials judges use may be unreliable to
13 identify conduct. The proposed amendment would
14 also seek inchoate convictions, which are quite
15 literally not a crime of violence. And the
16 charge will generate new and unique issues for
17 the courts to decide.

18 Finally, the Commission's data
19 supports the Defender's assertion that the career
20 offender guidelines should be contracted rather
21 than expanded. Commission data over several
22 decades have indicated that the career offender

1 guidelines calls for sentences that are too high
2 in most of the cases it captures. Importantly,
3 the data suggests that recidivism rates of
4 individuals placed in criminal history category 6
5 because of the career offender designation are
6 actually more in line with the criminal history
7 category that they would fall in if you went with
8 the original calculation. And there's no
9 empirical data that supports this.

10 And the Commission, if I could just
11 briefly conclude has previously acknowledge the
12 longstanding policy concerns with the career
13 offender guideline and recognized the need to
14 narrow the guidelines. My testimony today is
15 driven by the lives of the people my colleagues
16 and I stand beside in court every day. I have
17 seen too many of their lives destroyed by an
18 unjust and racially disparate punishment regime.
19 The Commission's proposal would maintain and
20 exacerbate this broken, nonempirically status
21 quo. The result would be more needless
22 incarceration of Black men, more broken families

1 left behind, more promise lost. I urge the
2 Commission to not expand this broken guidelines
3 reach.

4 CHAIR REEVES: Thank you, Ms. Scott.
5 Turning to my fellow Commissioners.

6 VICE CHAIR RESTREPO: Ms. Scott, I
7 solely agree with all your criticisms of the
8 current state of the law. You heard Mr. Zauzmer
9 testify. I've got two questions for you. Do you
10 have any common ground with the Department's
11 position? In other words, do you agree with any
12 of the suggestions Mr. Zauzmer made in order to
13 move the needle in the right direction? And what
14 do you propose in lieu of the current state of
15 the law? Should we look at actual conduct?

16 MS. SCOTT: Thank you, Commissioner.
17 I will attempt to be brief in my comment. I
18 agree with the DOJ and their acknowledgment that
19 we need to address the severity of the guideline.
20 I think it's a bit out of step to expand the
21 reach of the career offender guideline when we
22 know that we need to address the severity of the

1 guideline. If we understand, and I think we all
2 do because your data says it, that 80 percent of
3 individuals that falls into this category aren't
4 being sentenced pursuant to the guideline, it
5 suggests that we need a broad critical look -- a
6 thoughtful look at the guideline. One that
7 allows us to determine when the guideline should
8 apply, who it should apply to, and in what
9 manner? And until that's done, it doesn't seem
10 as though we should expand the guideline --
11 expand the reach of the guideline.

12 If we expand the reach of the
13 guideline with the current severity in place,
14 more judges are going to ignore the guideline.
15 So it doesn't fix the issue. Judges aren't
16 ignoring the career offender guideline because
17 the categorical approach is complicated. They're
18 ignoring the guideline because they don't agree
19 with the guideline range that the sentencing
20 commission has set forth. And so I think we need
21 to start there. So I do agree with the
22 Department of Justice. And I was elated to hear

1 them say that they believe that this is something
2 that should be addressed. And like the
3 Department of Justice, the Defenders would
4 happily work with the Commission to figure out
5 ways that we can come up with meaningful,
6 thoughtful approaches to the career offender
7 guideline.

8 To answer your second question, what
9 do I believe that you should look at -- what
10 documents I think should be looked at, it was
11 curious to me that the Government believes that
12 you should be able to look at police reports and
13 things of that nature. I've actually been a
14 prosecutor before and so I recall that when I was
15 prosecutor, I would go in front of the court and
16 I would give a factual basis or we would have
17 these accusations that were before the court.
18 But I remember on occasion, defense attorneys
19 would object to the factual basis that was laid
20 down. And my response was always objection's
21 noted. The elements have still been met and the
22 Court moves on.

1 I've also on the defense side been in
2 front of a court and objected to the factual
3 basis and things of that nature that were put
4 before the court and had a judge tell me that if
5 my client didn't accept the factual basis as is,
6 that, that client would just simply need to
7 proceed to trial. So we have accepted on many
8 occasions, factual bases that did not act -- that
9 did not encompass behavior that the accused --
10 that the person who ultimately pled guilty agreed
11 to. And I think that, that's important when we
12 say that these are reliable documents.

13 I think it's even more farfetched to
14 say that police reports are reliable documents.
15 It's as if the Government fails to recognize that
16 police reports often contain false information.
17 Need we look beyond Tyre Nichols, that happened
18 just in January where we know the police reports
19 contained false information, but for rotated
20 cameras and national news coverages, that would
21 have been the narrative. I have personally
22 handled cases where evidence has been suppressed

1 and judges have found law enforcement testimony
2 to be incredible. I don't think that we need to
3 expand this. I think that we need to come up
4 with a data based approach to figure out who
5 deserves the punishment, what the punishment
6 should be, and what it should look like so judges
7 will pay it attention.

8 VICE CHAIR RESTREPO: What data should
9 we be looking for?

10 MS. SCOTT: So I think that this is a
11 very nuanced issue. I mean it appears that the
12 Department of Justice agrees with us that, you
13 know, the overreach of drugs and the impact of
14 prior drug convictions and what it means in the
15 context of career offender really, it's
16 overstated. So I think that we've got some
17 agreement there. We too agree that drug
18 convictions are not a reliable marker in terms of
19 determining the career offender guideline.

20 I think that we need to call in a
21 group of stakeholders. I think it's nice to talk
22 to prosecutors and defense attorneys who have

1 kind of this vetted interest in our side. I
2 appreciated that the Government said that we are
3 taking advantage of opportunity, but I choose to
4 disagree with that. We're not taking advantage
5 of opportunity. What we're taking advantage of
6 is the ear that you are willing to lend is and
7 the ear that's willing to finally understand the
8 clients that we represent and the stories that
9 underlie the paths that lead them into the
10 federal legal system.

11 So I think that we need to look at
12 sociological psychological data. I think we have
13 to look at community based data. I think we have
14 to, you know, take a bigger look at the impact of
15 sentences. So many of the studies that they do
16 on the impact -- on the impact of the
17 incarceration, they do -- they look at it in
18 larger swaths. I think they need to be broken
19 down more critically. We do know as my
20 colleague, Leslie Scott, and I believe also
21 Michael Caruso testified yesterday that the
22 longer individuals are in prison, the reported

1 deterrent effect turns into criminogenic factors.
2 And so I think that we need to like pull the
3 layers back. This is an opportunity. The
4 Commission is vested with the power to engage in
5 those studies. And I'd happily sit and/or
6 provide written followup into various areas that
7 we believe the Commission could look at to really
8 make the guideline in this instance meaningful
9 and powerful. And something that judges would
10 actually pay attention to.

11 CHAIR REEVES: Commissioner Boom and
12 then Vice Chair Murray.

13 COMMISSIONER BOOM: Good morning and
14 thank you for your testimony. I'm very familiar
15 with the 2016 Commission report on career
16 offenders and frankly cite it frequently when
17 varying with offenders who qualify for the career
18 offender guideline application. When those
19 offenders qualify for the drugs only, you know,
20 via the path of a drugs only predicate offense,
21 that report specifically was aimed -- I think the
22 conclusion was the recidivism rates for those

1 offenders do not match or lower than the
2 recidivism rates for those who qualify based on
3 crimes of violence. And so the Commission's
4 suggestion was that Congress should amend the
5 statute. And ultimately that the career offender
6 enhancement should not automatically apply for
7 those who qualify based on the drugs only. And
8 you know, that was based on the data driven
9 approach. And as I said, I've very familiar with
10 the report and frankly cite it often for those
11 who qualify for the drugs only -- you know, by
12 the drugs only path.

13 My question is though how then does
14 the Commission comply with Congress's directive,
15 in particular to those who qualify based on
16 crimes of violence? And how does it drive if
17 we're not looking at actual conduct with 3661 and
18 the courts -- what the courts do every day, which
19 is look at the total conduct of each and every
20 crime and each and every offender and try then to
21 impose a sentence that is sufficient, but not
22 greater than necessary? And so I guess, you

1 know, the point of my question is how then do we
2 comply with Congress's directive for those
3 especially qualifying under the crimes of
4 violence path to the career offender status?

5 MS. SCOTT: Thank you, Commissioner.

6 I believe that this is why empirical data is
7 helpful. I think that the Commission really
8 needs to use a data based approach to figure out
9 what those sentences should look like even in the
10 context of those who have committed offenses that
11 you describe as violent. I think it is important
12 to note that when we say we want to look into the
13 actual conduct, there's often times -- and I
14 can't say this enough, there's often times
15 disagreement as to what the conduct was for a
16 predicate offense.

17 It's not enough to say that the
18 charging document said this and the person, you
19 know, pled to X. And so that in and of itself is
20 -- it's not enough to say that a police report as
21 my colleague said says someone shot a person four
22 times. The police report is not one, sworn

1 testimony. And even though they're technically
2 crafted under the penalty of perjury, I can find
3 you multiple examples both public and not public
4 where they've had false information. Now what I
5 haven't seen is the Department of Justice taking
6 an approach where they stop that by prosecuting
7 those same officers for perjury. Right? And so
8 when we say that we can rely upon this back
9 information, essentially what we're doing is
10 opening up every single sentencing hearing that
11 has a career offender predicate where there's
12 some sort of disagreement into a mini trial. And
13 I don't think that, that's what is intended.
14 Right?

15 And even in terms of factual basis, I
16 think that there's some assumptions in factual
17 basis, and I gave an example prior where my
18 client was prohibited by the court from objecting
19 to a factual basis or he could go to trial and
20 get a more harsh sentence, but there other
21 instances. It doesn't account for whether or not
22 a person had, you know, competent counsel. It

1 doesn't account for all of the things that we --
2 that regularly represent individuals in the field
3 know to be true. People feeling compelled.
4 Remember, the Government has the power in any and
5 all plea negotiations. And many times our
6 clients are sitting there with the foot of the
7 Government on their neck while they take the
8 factual basis that they're required to take in
9 order to get the deal that's there. And many
10 times that deal is the best thing for them and so
11 they do it. It doesn't make every fact correct.

12 COMMISSIONER BOOM: Understood. And
13 I think those are all very good points. But
14 what's your response to the Department's
15 testimony previously where they're very clear,
16 often admitted, you know, crimes of violence that
17 have been committed. And the current categorical
18 approach simply does not address those instances
19 of clear violent crime. And I'm trying to figure
20 out how do we -- how do we reconcile, right, when
21 we know either because it's admitted or someone
22 is dead or has been shot, how we do we reconcile

1 that and address Congress's directive, which
2 specifically requires that the Commission set
3 those penalties at or near the statutory max?

4 MS. SCOTT: So I think there's two
5 things; Congress's directive says that you set
6 the sentences at or near the statutory max for
7 some individuals. It should be a limited number
8 of individuals is the way that I read the
9 statute, but I suppose it could be read
10 differently. But also the categorical approach
11 doesn't -- you know, it provides a level of
12 certainty that -- yesterday Judge Lohier issued a
13 concurring opinion out of the Second Circuit in
14 an opinion called Morris and he praised the
15 categorical approach. And I think the reason why
16 he praised it is two reasons; just kind of
17 distilling them down. You know, it serves an
18 important practical person, but also it's more
19 protective of clients at sentencing.

20 And the reality is if a court -- if a
21 judge is looking at an individual in attempting
22 to determine one, whether there's a career

1 offender and they disagree, right? They
2 disagree. They say, you know what? I don't like
3 that the law says this is not a crime of
4 violence. They can vary upward. That
5 opportunity is always available to a judge. So I
6 don't think that we need to create a more
7 expanded category of people that judges will
8 consider to fall into the career offender
9 guideline when judges already have an option to
10 address it.

11 But also I would like to address what
12 my colleague said about having never seen, you
13 know, any kind of conspiracy or any kind of --
14 you know, I've never seen -- I think he said
15 something to the effect that he'd never seen a
16 conspiracy that wasn't, you know, completed that
17 didn't have some sort of act. I guess he's
18 practiced in jurisdictions different than mine.
19 I've practiced in three. I've trained attorneys
20 that practice in every single jurisdiction in
21 this country. I've actually physically trained
22 in more than 40 states and I can tell you that my

1 experience is different. Many instances that is
2 the case.

3 So I think that to address your
4 concern, Commissioner, if you are looking at an
5 individual where the categorical approach
6 suggests that it's not a crime of violence and
7 you do not believe that the resulting guideline
8 is harsh enough, every judge in the country does
9 have the ability to vary up. I'm not suggesting
10 that they do, but it is an option that's
11 available for every judge.

12 CHAIR REEVES: Murray.

13 VICE CHAIR MURRAY: Thank you so much
14 for being with us, Ms. Scott. I very much take
15 to heart your comments and concerns about the
16 severity of the career offender guideline regime.
17 I guess one thing I'm wondering is if we can
18 imagine a world where those penalties were set at
19 levels that you thought were just -- you thought
20 they were calibrated correctly. Is there an
21 alternative to the categorical approach that you
22 would advocate for or be comfortable with? Or

1 would you still kind of be most comfortable with
2 what we have, which does create these anomalous
3 results where cocaine is not, you know, a
4 controlled substance and Hobbs Act robbery is not
5 a crime of violence?

6 MS. SCOTT: Thank you for the
7 question. You have to excuse -- this is not
8 question dodging. I just so happen to -- in
9 college, I studied Biology and Chemistry. So one
10 of the things that we learned in Science is that
11 data was important. And so I do coming back to
12 it would be great to have some information before
13 making that determination. I do believe that the
14 Defenders can come to a consensus, but we believe
15 that it should be empirically based. And so we
16 would love to work with the Commission to figure
17 out how we can come up with an empirically based
18 change to the guideline to make it mean what it's
19 supposed to mean. I think that if you have 80
20 percent of individuals not being sentenced to a
21 guideline, you know, it says that it needs to be
22 re-tooled in its entirety. And I think that,

1 that's really the starting point for us.

2 VICE CHAIR MURRAY: Okay. Do you
3 think in that case the Defenders would be open to
4 considering an alternate -- I mean because it
5 does strike me that from a defense attorney
6 perspective, the categorical approach is always
7 going to let some -- reduced sentences let some
8 people off. While I get it's a useful defense
9 tactic, but are you bothered by the anomalies
10 such that, you know, if there weren't a severity
11 issue, the Defenders would learn to look at other
12 approaches?

13 MS. SCOTT: I do find the language
14 reduced penalty let some people off. Our clients
15 still go to prison. They still are taken away
16 from their families.

17 VICE CHAIR MURRAY: Sure.

18 MS. SCOTT: And so again, I'm less
19 concerned anomalies than I am with justice and
20 fairness. And a guideline that is racially
21 disparate and bakes in everything we know about
22 our nation's history and the legal system. And I

1 think that it's more important at this juncture,
2 especially with where we are in terms of racial
3 reckoning in every area of our lives for the
4 Commission to engage in a critical thoughtful
5 process that does not continue to further
6 perpetuate those racial inequities.

7 CHAIR REEVES: Commissioner
8 Wroblewski.

9 COMMISSIONER WROBLEWSKI: Thank you. Thank
10 you so much. And thank you, Ms. Scott for being
11 here, for your testimony, and for your service to
12 our country. I can't let this moment pass
13 without noting the agreement between the Justice
14 Department and the Defenders on all kinds of
15 things. I just jotted a few of them down.

16 We agree with you that the new listed
17 guideline approach will lead to more litigation
18 and that's your ethical responsibility. We can
19 call it different words, but I think that's
20 likely to happen. We agree with you about the
21 career offender penalties as they apply to drug
22 offenders. And we've said that many times. We

1 agree with you about the data from the judges and
2 their -- I think Mr. Zauzmer mentioned this --
3 about varying departing from the career offender
4 guideline. We agree with you that the Commission
5 should be data driven.

6 One thing I really, really hope is
7 that after the Commission makes whatever
8 decisions it makes on the proposed amendments
9 that the Commission, the Justice Department, the
10 Defenders, the Judicial Conference can walk arm
11 in arm up to Congress and seek legislation to
12 allow the Commission to take the steps that
13 you're talking about in terms of the data driven
14 approach to repeat controlled substance and
15 violent offenders under the career guidelines.
16 So I just want to note that, that I hope we can
17 get there in four weeks and then we can go to
18 Congress together.

19 But I do want to focus on one part
20 that we may or may not agree with. I'm trying to
21 sort of channel my inner Judge Restrepo about
22 trying to find that common ground. The

1 Commission's research and data have shown
2 repeatedly that the most dangerous offenders
3 prosecuted in the federal system are gun
4 offenders who have prior crimes of violence. And
5 the Commission as you know is considering changes
6 to the firearms guideline. And it seems to me
7 that those penalties as I said are data driven
8 and directly lead to public safety because of the
9 very, very high recidivism rates associated with
10 these gun offenders.

11 Would it be something that the -- that
12 the Defenders could possibly consider supporting,
13 which is to go into that particular guideline --
14 and not every gun offender, but gun offenders who
15 have prior crimes of violence and consider
16 reforming the way those crimes of violence are
17 determined under that one guideline so that those
18 penalties, which I think are data driven and are
19 and can support public safety can work as they
20 were intended? In other words that people who
21 genuinely have prior crimes of violence and then
22 who re-arm themselves and commit new crimes, that

1 those people can be incapacitated for the length
2 of time to improve public safety. Is that one
3 area where we might be able to find common
4 ground?

5 MS. SCOTT: Thank you for your
6 questions. I believe my colleague testified
7 yesterday that though there is some data on
8 2K2.1, that the Commission has come up with over
9 the years, I believe she mentioned about ten
10 additional data points that would be helpful in
11 terms of further interpreting that guideline to
12 ensure, you know, fairness in application. So
13 I'm not in a position to say that we agree that
14 the data is complete as it underlies 2K2.1 and
15 therefore then would be influential in the way
16 that we address the career offender guideline.

17 I appreciate your comment about
18 marching to Congress arm in arm. You know, I
19 seek opportunities for the parties to agree
20 always with an eye towards fairness supports for
21 our clients. I don't know that I think that the
22 Commission is not able under its current mandate

1 to use a data driven approach. And so I would
2 note that when I ask for a data driven approach,
3 I believe it's within the realm of what the
4 Commission is able to do now.

5 VICE CHAIR MATE: Good morning. Thank
6 you for being here. I really appreciate your
7 testimony and taking the time to be here with us.
8 One question on the data driven work that we had
9 to do and same question I asked Mr. Zauzmer
10 earlier is whether it would be helpful in that
11 approach for us to be updating the work that was
12 done in 2016, which to me doesn't seem like that
13 long ago, but I realize now it was a long time
14 ago. And whether that would be a useful step to
15 take as we work on this complicated issue.

16 MS. SCOTT: I think always updating
17 data. You know, you want new, fresh data. But I
18 think also expanding the information that the
19 Commission is looking at to ensure that we're
20 getting the proper data for the guideline.

21 VICE CHAIR MATE: Thank you.

22 CHAIR REEVES: Further questions of

1 this witness? Ms. Scott, thank you so much for
2 your testimony. We appreciate you.

3 MS. SCOTT: Thank you, Commissioners
4 for your time and attention.

5 CHAIR REEVES: Good morning. Our
6 third group of panelists will provide us with
7 perspectives on this issue from three of our --
8 three of our advisory groups. First, we will
9 hear from the honorable Ralph Erickson who serves
10 as Chair of the Sentencing Commission's Tribal
11 Issues Advisory Group. Judge Erickson served as
12 a District Judge for the District of North Dakota
13 before being elevated to the United States Court
14 of Appeals for the Eighth Circuit. Judge
15 Erickson has a long history of service on both
16 the State and Federal courts there in North
17 Dakota and he's served in various capacities on
18 State and National Ethics Panels, including
19 service as Chair of the Judicial Conferences
20 Committee on Code of Conduct.

21 Second, we have -- we will hear from
22 Susan Lin who serves as a Third Circuit

1 representative on the Citizen Commissions
2 Practitioners Advisory Group. Ms. Lin is a
3 criminal defense and Civil Rights attorney in
4 Philadelphia -- Philadelphia, Pennsylvania that
5 is. There's a Philadelphia, Mississippi. We get
6 confused all the time. She teaches in the
7 Training Division of the Defender Services Office
8 at Temple University Beasley School of Law and
9 the University of Pennsylvania Carey School of
10 Law. Ms. Lin currently serves as President of
11 the Asian Pacific American Bar Association of
12 Pennsylvania.

13 Finally, we will hear from Joshua
14 Luria who serves as Vice Chair of the Citizen
15 Commission's Probation Officers Advisory Group.
16 Mr. Luria serves as a supervisory U.S. probation
17 officer in the Middle District of Florida. He
18 has previously served as a U.S. probation officer
19 in Brooklyn, New York as well.

20 Judge Erickson, thank you. We're ready
21 to hear from you whenever you are.

22 JUDGE ERICKSON: Chairman Reeves,

1 members of the committee, I want to thank you for
2 the opportunity to be here today. I also want to
3 thank you for the opportunity to serve on TIAG.
4 It is one of the great privileges of my career.
5 And I think it's some of the most important work
6 I've ever done. And if I might take just a
7 minute to explain kind of the issues that we deal
8 with. Because I think there are people in this
9 room who have no idea what kind of tribal issues
10 we're talking about. And I'm certain that people
11 online have no idea.

12 And so basically we start with this
13 proposition. There are 574 recognized federal
14 Indian tribes in the United States. We use the
15 terms "Indian" and "Indian country" because those
16 are terms of art that are found in the United
17 States Code. And so these 574 native nations are
18 broadly diverse in ways you can't really imagine
19 until you start working in Indian country. The
20 bottom line is this, the largest tribe in the
21 United States is the Cherokee tribe with over 730
22 members. The smallest tribe consists of 16

1 members of the Cahuilla -- the St. Augustine
2 Cahuilla tribe has 16 enrolled members.

3 Obviously the governmental structures,
4 the courts that they operate are different. TIAG
5 itself is made up of people who are involved in
6 Indian country legal issues where the federal
7 courts and the tribal courts intersect. And what
8 we try to do is address issues that are uniquely
9 problematic within the communities that we serve.
10 Right? Now if you think about that, our
11 committee -- our advisory group is different than
12 all the other advisory groups because it has a
13 very broad membership.

14 We have a tribal judge. We have a
15 tribal prosecutor. We have a federal prosecutor.
16 We have a federal defense lawyer. We have a
17 probation officer. We have academics and we have
18 people who have experience across the board. We
19 have tribal judges. We have tribal prosecutors.
20 We have federal public defenders. And so we have
21 a broad practice spectrum.

22 We have a policy that we have followed

1 for the most part than unless we can come to a
2 broad consensus within the TIAG, we don't take
3 positions.

4 And so, you know, we don't show up here very
5 often on issues that you're considering because,
6 frankly, we have deep division within our group,
7 right. We have the people who appear mostly in
8 tribal courts. They don't have much to say about
9 what we're talking about oftentimes.

10 We have the people who prosecute and
11 the people of the defense that are sometimes at
12 odds. When we show up, it's usually because
13 we've identified an issue that either has a
14 unique application in Indian Country that you may
15 not anticipate the sort of problems that we might
16 find.

17 Or it's something that we've come to
18 a broad consensus. And in the -- with a goal of
19 trying to build consensus and succinct policy, we
20 think we have something to add because of the
21 just constituency of our TIAG.

22 And so that's sort of the background

1 information. On this particular issue, we are
2 here with no position on any of the proposed
3 amendments.

4 Our purpose in appearing here today,
5 and why I'm here today, is to just speak about
6 the questions that have been raised about the
7 administrative -- the administratability and the
8 ability to manage or to make workable, taking the
9 most appropriate corresponding guideline
10 approach, right.

11 And I want to start with a little
12 ancient history. Before the guidelines existed,
13 in Indian Country, what happened is the United
14 States courts have always had jurisdiction --
15 well, since the 1890s we've had jurisdiction over
16 felonies committed in Indian Country.

17 Indian Country consists of
18 reservations, allotted lands and Aboriginal title
19 lands. Aboriginal title lands are lands that a
20 tribal group has held from time immemorial and
21 never been dispossessed of. And they hold that
22 land by usufruct.

1 If it's a reservation, most of the
2 time, the land is held communally with some
3 allotments within it, at least in our experience
4 in the Dakotas, and then allotted lands are just
5 allotted and we're allotted in fee title but
6 still remain in Indian Country.

7 You may think of Oklahoma and what's
8 happened after McGirt as an example of that type
9 of land. Now what happened because the advent of
10 the guidelines is tribal judges or federal judges
11 sitting in cases involving Indian Country claims
12 would apply the Common Law of Sentencing that
13 arose out of the states, right.

14 Because the way that it generally
15 worked is that, you know, we have the Major
16 Crimes Act and we have the Assimilative Crimes
17 Act. Under the Assimilative Crimes Act, very few
18 of those crimes have any corresponding guideline
19 directly within the guidelines.

20 And so we go out and try and apply the
21 closest guideline because that's what 2X5.1 tells
22 us to do. And what happens is a body of law

1 develops rather quickly if the judges are
2 applying these guidelines.

3 And the reality of it is, when there's
4 a new crime enacted, we go through this process.
5 Appeals are taken. We're actually very rarely
6 reversed by the Courts of Appeals. And then
7 there is a body of common law that develops as to
8 what's the appropriate guideline.

9 Now I don't want to tell you it's
10 always easy because you will know, from my
11 September letter to the Commission when we were
12 talking about the priorities that we thought, we
13 asked about, let's take a look at 2X5.1 as it
14 applies to crimes against children, child abuse,
15 and how it applies to sex abuse crimes in Indian
16 Country.

17 And the reason for that is that they
18 don't match up very well, and judges have had a
19 difficult time. Now, there's an explanation for
20 it. Usually what happens is that you can be
21 charged with a child neglect case that's just,
22 you know, very kind of garden variety child

1 neglect or you could be charged with having
2 starved a child to death, a death has ensued.

3 They're very different crimes. And so
4 what ends up happening is you may have the same
5 judge applying separate guidelines, back to back,
6 within two weeks. And on the outside, if you're
7 sitting here like all the people here that work
8 in the Census Commission, they look at the
9 Statement of Reasons.

10 They look at the judgments. They look
11 at the pre-sentence reports. And they're saying,
12 how do we make this fit statistically? And
13 frankly, as judges, we worry little about how it
14 fits statistically when we're looking at, we have
15 a dead child here and we have a child that maybe
16 was, you know, just, like I say, garden variety
17 neglect.

18 And they're just very different cases
19 and they result in very different sentences. And
20 they don't account well on the guideline, on any
21 of the documents that we put together when we
22 sentence people, right.

1 In any event, the bottom line is, is
2 that, as a group, the members of TIAG have a long
3 experience in dealing with sentencing by looking
4 for the most analogous sentencing guideline. And
5 we have found it to be a workable process.

6 The people who've spoken earlier, who
7 said that there will be litigation, it's true.
8 There will be a transitional period where we will
9 litigate these issues. But these crimes will be
10 identified, you know, case by case and we never
11 really go visit them again, right.

12 For example, you know, I haven't had
13 anybody argue about whether or not what guideline
14 we should apply to a robbery conviction in the 14
15 years that I sat as a district judge in North
16 Dakota because that was settled law. Everybody
17 knew what it is. The law will settle. It will
18 be -- we'll be able to address it.

19 And I've gone over what I should but
20 that's really the point that the TIAG wanted to
21 bring here, as that it's not as unworkable and
22 it's not as terrifying as it appears in real

1 life. Any questions? Ms. Lin?

2 CHAIR REEVES: Well, any questions?

3 That's right.

4 MS. LIN: Permission, Ms. Lin?

5 CHAIR REEVES: I mean, Ms. Lin?

6 JUDGE ERICKSON: Okay, sorry.

7 MS. LIN: I'm sorry.

8 JUDGE ERICKSON: I don't know what I'm
9 doing.

10 CHAIR REEVES: Sorry, just to lure
11 you. Come on.

12 JUDGE ERICKSON: Sorry about that, Ms.
13 Lin.

14 MS. LIN: Oh, no problem. I learned
15 a lot from that. I know nothing about the tribal
16 issues of the Advisory Group.

17 JUDGE ERICKSON: I'm the circuit
18 judge. I think I'm the center of all attention.

19 CHAIR REEVES: And a district judge
20 would never cross over you.

21 JUDGE ERICKSON: I don't know how I
22 did that.

1 CHAIR REEVES: That's fine. No, no,
2 that's fine.

3 MS. LIN: Chair Reeves, members of the
4 Sentencing Commission, thank you for the chance
5 to be able to be here, to provide testimony on
6 behalf of the Practitioners Advisory Group.

7 The PAG is a group of individuals who
8 practice in the private sector who represent
9 people and organizations who are charged with
10 federal criminal laws. We appreciate your
11 willingness to consider our perspective.

12 I'm going to touch on Part A, B and C
13 of the proposed amendments to the Career Offender
14 Guidelines. And I'm going to start with Part A.

15 We recognize all of the criticisms out
16 there about the categorical and the modified
17 categorical approach. However, even with all
18 those criticisms, the PAG is unable to support
19 Part A of the proposed amendments.

20 The Supreme Court has explained the
21 rationale for the categorical and modified
22 categorical approach. In Mathis, the court

1 stated, an elements focus avoids unfairness to
2 defendants. Statements of non-elemental fact in
3 records of prior convictions are prone to error
4 precisely because their proof is unnecessary.

5 That reasoning explained in Mathis, in
6 our opinion, applies equally in the guideline
7 context, going beyond the elements. To look at
8 the manner in which a prior offense was
9 supposedly committed invites uncertainty and
10 unreliability in how the guideline is applied.

11 The actual conduct underlying a prior
12 offense is often not clear from the documents
13 that are available for the court's review.
14 Moreover, the documents or the plea colloquy even
15 often reflect only the police or the
16 prosecution's version of how the underlying
17 offense supposedly occurred.

18 For strategic reasons or in the
19 context of plea bargaining, a defendant and his
20 or her attorney may choose not to contest alleged
21 facts that simply are not material to the
22 elements of the offense or to the ultimate

1 outcome or the plea negotiation reached in the
2 case.

3 Yet, the proposed amendment would
4 allow a sentencing court to rely on such
5 immaterial alleged facts. Take, for example, a
6 prior assault conviction. The underlying police
7 report or charging document may allege the
8 defendant used some degree of force to commit the
9 offense.

10 But because of proof concerns or
11 evidentiary issues, the prosecution may agree to
12 to offer, in state court, the defendant a plea
13 deal to a lesser charge involving a negligent or
14 a reckless mens rea.

15 In those situations, under the
16 proposed amendment, what controls? Is it just
17 the actual offensive conviction? Is it what is
18 contained in the charging document? Is it the
19 purported facts, as read out loud by the
20 prosecutor during the guilty plea hearing?

21 In PAG members' experience, the
22 prosecution may want the defendant to not contest

1 certain facts in order to resolve the case with
2 a lesser offense. Or the defendant's attorney
3 may advise the defendant that it is not necessary
4 to contest the prosecution's version of the
5 offense since it is not material to the ultimate
6 outcome in that particular case.

7 This type of plea bargaining and plea
8 proceeding is pervasive at the state level. The
9 PAG believes the Commission's proposal will
10 create confusion and uncertainty over how such
11 prior convictions are considered under this
12 guideline.

13 Additionally, certain prior offenses
14 which should never be classified as crimes of
15 violence may be classified that way simply due to
16 immaterial and inaccurate allegations that were
17 not contested at the prior state proceeding.

18 Moreover, the Commission's current
19 proposal will not actually eliminate the
20 categorical approach. I believe prior speakers
21 have already talked about that. The current
22 proposal appears to employ both the categorical

1 approach and an alleged conduct-based approach in
2 determining what federal sentencing guideline
3 most closely matches a prior state offense.

4 A sentencing court and the parties
5 will still have to engage in the categorical
6 approach under certain recidivist statutes such
7 as the Armed Career Criminal Act before moving
8 onto a more conduct-based approach under the Part
9 A of the proposal.

10 For all of these reasons, and for
11 reasons that are more detailed in the written
12 testimony and the comments which we will submit,
13 the PAG does not support the Commission's Part A.

14 Moving onto robbery, I'm going to
15 speak more quickly. With regard to the proposed
16 amendment to the definition of robbery, we ask
17 you not to adopt the amended definition.
18 Multiple courts have explained why Hobbs Act
19 robbery does not constitute a crime of violence.

20 It's a substantive amendment to expand
21 crimes of violence to violence against property
22 only. Under the proposal crimes that do not

1 involve violence towards another person, such as
2 vandalism or criminal mischief could potentially
3 qualify as crimes of violence if they were
4 coupled with a demand for money. I have
5 examples, if you would like to ask about them.

6 Inchoate offenses, Part C. PAG
7 believe that inchoate offenses should not be
8 considered crimes of violence or controlled
9 substance offenses for the purposes of the Career
10 Offender Guidelines. In a nutshell, they are
11 substantively different.

12 A state of mind, intent, a mental
13 agreement can all constitute inchoate offenses,
14 sometimes even without an overt act or
15 substantial step. Even if it requires the overt
16 act or a substantial step, it could still be far
17 from an actual completed offense. So we ask you
18 not to adopt that proposal either. Thank you.

19 CHAIR REEVES. All right. Mr. Luria?

20 MR. LURIA: Thank you and good
21 morning.

22 CHAIR REEVES: Good morning.

1 MR. LURIA: On behalf of the Probation
2 Officer Advisory Group, we appreciate the
3 opportunity to provide testimony regarding the
4 proposed amendments to the Career Offender
5 Guidelines.

6 At the beginning of the POAG's
7 consideration of the Career Offender amendment,
8 there was a threshold question. Do we continue
9 with the elements and enumerated clauses or not?

10 So I'm going to start off with
11 something that seems obvious to me. The current
12 definitions do not work well. They produce odd
13 results often and in every jurisdiction.

14 The best arguments I've heard for
15 keeping them is so that we don't have to engage
16 with two separate processes for career offender
17 and armed career criminal. The POAG does not
18 think that reason is sufficient to continue with
19 a structure that is not working well.

20 The current definitions have created
21 such problems that POAG was nearly unanimous in
22 support of the new listed guideline method. In

1 our written testimony we shared an example of
2 Florida's battery on a law enforcement officer as
3 compared to resisting arrest with violence.

4 However, today, I wanted to share
5 another example of how the new method could
6 improve the career offender application. We've
7 had several cases dealing with sexual battery
8 under Florida Statute Section 794.011, sub 5.

9 These cases have horrendous facts,
10 many of which are well-documented in the charging
11 instrument. However, because the statutory
12 definitions include an invisible clause that has
13 penetration by or union with, the offense is not
14 considered a crime of violence.

15 Under the new proposed system, the
16 judge would be able to look at everything from a
17 Shepard document, not just the statute reference,
18 and they would likely end up connecting this
19 conviction to Section 2A3.1. The offense would
20 then be considered a crime of violence predicate.

21 This is just one example from one
22 jurisdiction. There are hundreds of similar

1 stories of where the current method continues to
2 fall short of capturing truly violent conduct.
3 All of this and we haven't even touched on
4 controlled substance offenses which are seeing
5 similar categorical approach arguments.

6 The listed guideline method is widely
7 untested and it will likely lead to litigation.
8 However, the current method has led to litigation
9 and is currently still being actively litigated.
10 As we have an adversarial system, litigation is
11 always and should always be a part of the
12 structure of things.

13 However, we believe the new listed
14 guideline method will produce a result in which
15 the conduct that is truly violent or has the
16 potential to lead to violence is better captured
17 as a crime of violence.

18 If this method is adopted, we will
19 have two processes to apply. But POAG believes
20 that the new career offender method would
21 actually work well. So while there will be
22 litigation, that litigation will at least be

1 within a better system.

2 The change to elicit guideline
3 approach in 4B1.2 is also really good. And by
4 that, we don't just mean well written. POAG
5 thinks it moves us closer to what is just. As
6 such, POAG supports it as better than the current
7 structure.

8 POAG reviewed the documents that would
9 be relied upon and agrees that sources expressly
10 approved in Taylor and Shepard should continue to
11 be used. POAG recognizes that there are three
12 other proposed amendments that are made as
13 mutually exclusive to the listed guideline
14 method.

15 While we are in favor of many of the
16 changes suggested in Part B through D, our first
17 choice is still the new listed guideline
18 approach.

19 POAG is in favor of adjusting the
20 definition of robbery as noted in the proposed
21 amendment. We believe it will help resolve the
22 disparity on the issue amongst the different

1 circuits.

2 For continuity's sake, we also
3 recommend that this definition be mirrored in
4 Section 201.2. POAG is also in favor of the
5 Commission defining the phrase, "actual or
6 threatened force" for the purposed of the
7 proposed robbery definition based on the Supreme
8 Court's holding in Stokeling.

9 POAG is in favor of the adoption of
10 the inchoate offense amendment. POAG prefers
11 Option 1 because it is a simpler approach that
12 eliminates the need for a two-step analysis.
13 POAG believe inchoate offenses should receive
14 consideration regardless of whether an overt act
15 occurred or what overt act is required by the
16 state law in question.

17 POAG also likes the idea of including
18 this and other adjustments into the main body of
19 the guideline rather than the commentary as we
20 believe this also reduces circuit application
21 differences.

22 Lastly, POAG supports the inclusion of

1 offer to sell under Title 46 offenses in the
2 controlled substances offense definition. We
3 believe this will further alleviate
4 jurisdictional differences.

5 Again, thank you for the opportunity
6 to share POAG's perspective. And I'm also ready
7 to answer any questions you have.

8 CHAIR REEVES: Thank you. I turn now
9 to my fellow commissioners. Yes?

10 VICE CHAIR MURRAY: Thanks so much,
11 all of you, for your testimony. My first
12 question is for Judge Erickson. I wonder if you
13 have any experience with assault.

14 Specifically, the sort of primary
15 example of a concern that both the executive
16 branch and the defenders gave to us was the
17 complications of applying state assault offenses
18 in the 2X5.1 context and --

19 JUDGE ERICKSON: Yeah, if you look at
20 the assault offenses, you know, I would say that,
21 you know, the second or third most common crime
22 that we see out of Indian Country cases is

1 assault.

2 And, you know, and we've developed
3 over the years an approach that, you know, to the
4 guidelines that has not been particularly
5 complicated. You know, I said it was the robbery
6 guideline before that nobody litigated.
7 Actually, I meant the burglary guideline that no
8 one ever litigated.

9 But the reality of it is those things
10 you see every day, we sort through. And there's,
11 you know, all the judges that sit in North
12 Dakota, there's, you know, they get to the same
13 place. The guidelines are the same. The
14 probation officers come up with the same
15 guideline range.

16 Then the discussion is like it always
17 is. And so, you know, I think that -- I don't
18 know how to say this other than to say, you know,
19 look, 30 percent of my caseload when I was a
20 United States District Judge was ordinary street
21 crime.

22 You know, I mean, I've tried felony

1 DUIs as a United States District Judge, right.
2 That's a weird thing, right. You can look in the
3 guidelines all you want, 'til the end of time and
4 you're not going to find anything that helps you
5 with that, right.

6 But, you know, you get used to sort of
7 working without a net. It's not all that
8 difficult. We're judges. We're in the business
9 of making decisions. And the body of laws
10 developed and in some ways, those things that are
11 fairly unpredictable are more easily addressed.

12 You know, the biggest problem that we
13 get, the biggest complaint we get in Indian
14 Country is the Native American people are being
15 treated differently than state defendants who've
16 committed the same crime in the same place,
17 sometimes together, right.

18 Because the burglary sentences or the
19 robbery sentence is longer in federal court than
20 it is in state courts. You have two people, they
21 commit a robbery together. One's in Indian
22 Country with an Indian in Indian Country with an

1 Indian victim. Man, that's a federal crime.

2 It's not going any place else.

3 And so there we have it. And the co-
4 defendant gets the same, you know, is in state
5 court. And because they happen to be, you know,
6 non-Native, not -- and so it's just -- that's the
7 bigger problem for us.

8 Now I think that if you look at the
9 uniformity of sentencing, that's going to be the
10 problem. It always is. But, you know, I look at
11 the uniformity of sentencing, the biggest problem
12 is not that somebody complains to the federal
13 judge in Fargo that there's -- those people in
14 South Carolina are getting much shorter
15 sentences.

16 It's more the claim that people who
17 have done exactly the same thing and who would
18 not have been in federal court but for their
19 membership, as an enrolled member of a tribe that
20 they're doing twice as long.

21 And it leads to untoward results. It
22 leads to, you know, the federal government

1 choosing not to prosecute crimes that would
2 otherwise be prosecuted in the states. And so
3 people tend to think they can get away with
4 things if they're not prosecuted.

5 And so we go from, like people are
6 getting, you know, ten-day sentencing in tribal
7 court and then sort of full stop, go away for
8 seven years, you know, and there's nothing in
9 between which doesn't really happen other places,
10 right. So I don't know if I answered your
11 question.

12 VICE CHAIR MURRAY: That's very
13 helpful, thank you.

14 JUDGE ERICKSON: Yes.

15 CHAIR REEVES: Commissioner Wong?

16 COMMISSIONER WONG: My question's for
17 Ms. Lin. Thank you. Thank you for being here.
18 My colleague, Judge Restrepo sings you praises.

19 So you -- the Department of Justice
20 framed their concerns or reservations about the
21 listed guidelines approach in terms of a
22 preference for an actual conduct approach.

1 And you had talked, in your testimony,
2 about some concerns with even the listed
3 guidelines' limited sort of window into actual
4 conduct through looking at the Shepard documents,
5 saying that swept into sort of immaterial facts
6 from your perspective.

7 I'm curious, do you have -- between
8 the actual -- would you consider it to be
9 exacerbated by a full-on actual conduct approach?

10 MS. LIN: Let me see if I understand
11 your question correctly. Is Part A preferable to
12 an actual, a full-on actual conduct approach?

13 COMMISSIONER WONG: Yes.

14 MS. LIN: Without having spoken with
15 other member of the PAG, with the qualification,
16 I don't think it's possible to implement an
17 actual conduct approach fairly. So then by
18 default, my answer has to be yes to your
19 question.

20 But I would say that even under Part
21 A of the proposed amendment there seems to be a
22 window that allows for looking into documents

1 even outside of the Shepard documents.

2 The language of Part A isn't -- it
3 doesn't seem like it's written strictly enough to
4 be -- to look only at what the Supreme Court has
5 said one can look at in Taylor and Shepard. So
6 that does cause me concern with the current
7 language of Part A.

8 MS. SCOTT: May I follow up on that?
9 When you said -- I know, just speaking for
10 yourself, that it can't -- an actual conduct
11 approach cannot be implemented fairly, what do
12 you mean by that?

13 MS. LIN: Precisely because of the
14 difficulty that I explained in my testimony. In
15 order to look backwards into what happened in a
16 prior offense that may have happened ten years
17 ago, 15 years ago, even like closer in time, one,
18 in order to do that right and do that fairly, one
19 has to basically bring in all the parties in and
20 have a full-on hearing at that point in time.

21 When you're in state court, doing a
22 plea -- and frankly, these are some people who

1 have -- there are attorneys in the room who are
2 often handling multiple defendants all at the
3 same time. It's a list room. There's a good
4 deal on the table. You just grab the deal and
5 you go.

6 You're not looking at what exactly is
7 read out loud into the record. As long as it
8 satisfies the elements and the judge is satisfied
9 and the prosecution is satisfied, the defendant
10 is satisfied by the deal that's on the table,
11 nobody's thinking about the possibility that some
12 fact, some accusation that seems immaterial at
13 this particular time may come back and be
14 material ten years down the road in a way that
15 nobody anticipates.

16 So I just -- given that that is a
17 common phenomenon in state court practice, I
18 don't know how it's possible to implement an
19 actual conduct approach fairly without full-on
20 litigating every single past conviction.

21 VICE CHAIR RESTREPO: Ms. Lin, it's
22 good to see Philadelphia's well represented here

1 today.

2 MS. LIN: With Mr. Zauzmer, yes it is.

3 VICE CHAIR RESTREPO: Pennsylvania.

4 To be fair, there's a lot confusion out there.

5 We've heard testimony from some of your

6 colleagues. And I'll ask you the same question I

7 asked Ms. Scott in terms of common ground with

8 the department.

9 So I understand your criticisms of

10 what we've proposed. How do we fix it? And what

11 common ground do you think POAG would have with

12 the department's positions, if any?

13 MS. LIN: So I'm going to put this out

14 there. I don't know that a fix is required. So

15 it is clear that if the elements of a prior

16 offense match the definition of crime of

17 violence, then it's a crime of violence.

18 And there are definitely statutes out

19 there where the elements of the offense fully

20 match the elements of crime of violence. So

21 you're looking at the outliers, right. You're

22 looking at the things that, I would suspect, the

1 Department of Justice would say are mere
2 technicalities.

3 They're the loopholes. They're the
4 things that aren't captured by the current
5 definition of crime of violence. And for those,
6 I would call, anomalies or exceptions, that is
7 where the ability to impose a variance comes in.
8 That is within the discretion of a district court
9 judge.

10 So, yes, there's a lot of litigation.
11 There's going to be a lot of litigation no matter
12 what. We are all lawyers. We're judges. Well,
13 you all are judges. That's what we do. It's
14 going to happen. That's what happens when you
15 have people who are, rightly so, advocating for
16 their particular positions.

17 We should not be afraid of that
18 litigation. It is okay for a sentencing judge to
19 calculate the guidelines using the categorical
20 approach. And if they think that the ultimate
21 result does not match what actually happened,
22 they can put their reasons on the record for an

1 upward variance.

2 Judges have done that before. Judges
3 have said, this is what it would have been under
4 the Career Offender guidelines. For this reason,
5 I don't think the Career Offender guidelines
6 apply, but I'm going to impose this sentence
7 because I think the non-Career Offender guideline
8 is not appropriate for this particular defendant.

9 Do I like it when that happens? As a
10 criminal defense attorney, maybe not. But I
11 think that that is how this situation is fixed.

12 VICE CHAIR RESTREPO: What about the
13 severity issue with respect to the Career
14 Offender guideline. There's a lot of talk --

15 MS. LIN: Right.

16 VICE CHAIR RESTREPO: -- about the
17 severity issue. Does POAG have a position on
18 that? And if so, what should we be looking at?

19 MS. LIN: So PAG, definitely --

20 VICE CHAIR RESTREPO: Right. A lot of
21 the -- I'm sorry.

22 MS. LIN: You want me to join you?

1 I'll have a go. PAG

2 VICE CHAIR RESTREPO: No, I'd like to
3 hear that same question that Mr. Luria --

4 MS. LIN: So I'll be brief. I feel
5 confident that the PAG agrees that the Career
6 Offender guideline is too severe. I'm a little
7 worried about 994, the language of 994(h) and
8 it's requirement that certain people have
9 sentences close to the Sat Max.

10 I think the fix there is to restrict
11 how many people the Career Offender guideline
12 covers. But yes, absolutely, I agree. Overall,
13 given the number of variances that happen across
14 our country, I think everybody agrees the Career
15 Offender guideline is too severe. Pass it on to
16 Mr. Luria.

17 MR. LURIA: As for POAG's take on
18 that, we would certainly be interested to see
19 what you were to come up with related to that.
20 We're kind of focused on fixing the front end,
21 perhaps, instead of the offense level outcome.

22 However, you know, it's hard to ignore

1 that the 2016 report that's been talked about
2 extensively already, I've personally heard that
3 brought up in court numerous times since it came
4 out. And there's a lot of validity to it.

5 But from our end, I think when we talk
6 about it being a more just circumstance, it's
7 really about can we actually capture what's
8 actually violent.

9 And, you know, the other component
10 within that is it's unclear whether these are too
11 high or is there such a disparity occurring in
12 terms of the definitions that judges are
13 unwilling to rely on it.

14 So it's kind of unclear to me which
15 one is really driving that. It's probably an
16 amalgamation of the two. So I'd love to see what
17 you come up with, though.

18 CHAIR REEVES: Commissioner Wroblewski
19 and then Vice Chair Mate.

20 COMMISSIONER WROBLEWSKI: Thank you so
21 much. And thank you all for being here. We
22 really appreciate your testimony and you taking

1 the time to come here.

2 Ms. Lin, I just want to followup a
3 little bit on your position.

4 CHAIR REEVES: Just make sure you
5 speak into the -- clearly.

6 COMMISSIONER WROBLEWSKI: I'm sorry.
7 And I really want to -- I'm curious if you -- I
8 just want to explain sort of how I see this. And
9 then I want you to tell me why I'm seeing it
10 wrong or why you think maybe I'm seeing it right.

11 So it seems to me that with the Career
12 Offender, there are several elements that we're
13 throwing all together. There's fact finding
14 which judges do all the time.

15 There's the timing of the fact
16 finding. So in other words, when the fact
17 apparently happened that the judge is looking at
18 and then there are the sentencing consequences
19 that result from the fact finding.

20 And I think we're all in agreement
21 that at least for some subset of Career Offender,
22 the sentencing consequences are trouble. And

1 that, I think, has some effect on our thinking
2 about fact finding. And let me tell you why I
3 think so.

4 The guidelines are full of factors
5 that judges have to do fact finding on -- full of
6 them. And we basically, typically, under Chapter
7 6, rely on judges to look at any reliable
8 evidence to do that. And there may be litigation
9 or not. But there aren't typically many trials
10 at sentencing. There are contested facts.

11 We have a process under Rule 32 of the
12 Federal Rules of Criminal Procedure. We go
13 through that process. Sometimes we have to call
14 witnesses, sometimes not. But it seems like
15 we've adjusted to that world and we've lived with
16 that world.

17 So fact finding, it seems to me, which
18 is the conduct approach, what you're calling it.
19 I'm now just calling it fact finding. It seems
20 like in most situations, we've been able to deal
21 with that related to the offense which is most of
22 the factors that are listed in the guidelines.

1 But then you have this special
2 category which is prior offenses. And those
3 prior offenses could have happened a year ago,
4 five years ago, ten years ago, 20 years ago. And
5 that makes the fact finding a little more
6 difficult.

7 And then, of course, we have the
8 sentencing consequences. So put that aside.
9 We've dealt with that. We're going to go arm-in-
10 arm to Congress. But on the fact finding with
11 the priors, what if we created a system that
12 says, Judge, if your fact finding deals with a
13 prior conviction -- in other words, something
14 that happened five years ago or more than ten
15 years ago -- and we said, in that situation we
16 want you to find the facts more than by a
17 preponderance of the evidence but perhaps by
18 clear and convincing evidence?

19 So we raise the standard of proof for
20 those, for that fact finding which may have
21 happened some time ago, but otherwise we rely on
22 the same kind of fact finding we do in all the

1 rest of the guideline areas.

2 If we address the consequences, so
3 instead of it being taking someone from Level 20
4 to Level 35, as we may do in Career Offender,
5 it's more of a modest thing, is that the kind of
6 world that you could live with, that you would
7 think was more sensible? And so you think that
8 this framework of thinking about it makes sense?

9 MS. LIN: I'm not going to -- I don't
10 think I'm going to have a definite answer for you
11 right now. I have to be honest. It's an
12 interesting proposal.

13 I am slightly worried about the idea
14 of having anything that was involved in a prior
15 conviction that could so severely raise -- and
16 I'm going to get to the -- address the sentencing
17 consequences in a minute -- but that could so
18 severely raise a potential guideline range be
19 found only by clear and convincing evidence,
20 right.

21 Like it seems to me that anything that
22 greatly increases a defendant's potential

1 exposure to prison time, at some point in time,
2 to me, becomes just as important as an element of
3 offense, just because of the consequence.

4 The jurisprudence out there may not
5 agree with me but that's how I feel about it.
6 Now you coupled that, though, with the idea of
7 lowering the potential sentencing consequence.
8 It's an interesting thing to think about.

9 I don't have a response right now as
10 to whether or not I think it's great or not. But
11 it's something that I would want to think about a
12 lot more. And I would certainly discuss it with
13 other people.

14 COMMISSIONER WROBLEWSKI: Thank you.

15 CHAIR REEVES: Commissioner Mate?

16 COMMISSIONER MATE: Thank you all for
17 being here this morning and taking the time to
18 talk with us. I'm moving from that big question
19 to a really little question for you, Mr. Luria.

20 There was something in the written
21 testimony about there should be further
22 assessment of whether some of the listed offenses

1 should be included. Was that a concern that some
2 of them might be overly broad in sweep of things
3 that shouldn't be there? Or you explain a little
4 bit more about that?

5 MR. LURIA: Yes, ma'am. During our
6 discussion of the listed offenses, one of the
7 ones that caught a lot of people's attention was
8 threatening or harassing communications, hoaxes,
9 stalking and domestic violence.

10 That one caught a lot of people's
11 attention as possibly being, you know, maybe some
12 of that wasn't -- capturing something that wasn't
13 necessarily as risky a violence.

14 I know in the New England area,
15 there's, you know, harassing is kind of a
16 misdemeanor felony that's kind of a odd
17 misdemeanor felony structure sometimes.

18 And there was a concern, a voice that
19 they might be kind of catching something is not a
20 very severe offense in some jurisdictions because
21 of the name and because of the elements of it
22 but, you know, could end up on a list here that's

1 treated much more severely.

2 We also talked a little bit about the
3 firearms component here too. One of the thought
4 processes that we kind of looked at with this is
5 there's going to be a wider expansion of Career
6 Offender because of this, because the instant
7 offenses will now be predicates that allow for
8 Career Offender consideration to come in.

9 So while we're discussing 2K2.1, for
10 example, one of the members was talking about
11 what would happen if you had these circumstances
12 where you had a person who had a machine gun or a
13 short-barreled shotgun. Well, that's on the list
14 here as a firearm under 5845(a).

15 And if that person has a base offense
16 level that has two crimes of violence or
17 controlled substance offenses, well, they're now
18 no longer really under the 2K2.1(a). They're
19 actually going to be under Career Offender.

20 And so, you know, kind of looking at
21 that and seeing this list also kind of impacts a
22 lot of other areas that aren't necessarily

1 connected directly with predicates but also how
2 instant offenses are considered.

3 VICE CHAIR MATE: Thank you. May I
4 have one more question? And --

5 CHAIR REEVES: Yes.

6 VICE CHAIR MATE: -- this one's for
7 Judge Erickson. Thank you for all of the way
8 that TIAG does. That plays a super important
9 role and is a unique body in your work. We
10 really appreciate it.

11 And this maybe goes outside the scope
12 of what you're prepared to talk about today but
13 since it kind of came up, I wanted to ask, you
14 raised the issue of the disparity between state
15 and federal sentencing in Indian Country.

16 And I'm wondering whether there was
17 any discussion in TIAG about this proposed listed
18 approach which would expand the number of
19 offenses that qualify as Career Offender
20 predicates, whether that would have an adverse
21 impact on Native American individuals.

22 JUDGE ERICKSON: We had discussion and

1 we arrived at no consensus. You know, I mean, it
2 boils down to this. If you just think about it,
3 we're going to sweep in more offenses and so
4 you're going to expose more people.

5 And we already have severity and
6 disparity problem. But that disparity problem,
7 as I described it, it's actually -- that's only
8 half the problem.

9 There are state in the United States
10 where the federal sentencing guidelines are less
11 severe than the state sentencing practices,
12 right. And so, you know, it's kind of odd.
13 Everybody in Indian Country operates in their own
14 little sphere. And we're, you know,
15 geographically, we're thousands of miles apart.

16 And so, where we sit, in the Northern
17 Great Plains -- Montana, North Dakota and South
18 Dakota -- there's a widespread belief that the
19 sentencing practices are unduly harsh in
20 comparison to the state sentencing practices.

21 You can go into the desert Southwest
22 and it gets really interesting because in

1 Arizona, the perception is that state sentences
2 are more severe than the federal sentences. You
3 cross over into New Mexico, they see the world
4 like we see it, that generally the sentences in
5 federal court are more severe than state
6 sentences, right.

7 And so that disparity problem is a
8 real problem. It's hard, you know, if we're
9 trying to look at uniformity. So I don't have a
10 very good answer for that. I just want to make
11 sure you understood that within TIAG itself,
12 there's sort of a broad sense that we disagree
13 because we have different circumstances on the
14 ground.

15 VICE CHAIR MATE: Thank you.

16 CHAIR REEVES: Commissioner Gleeson
17 has a question and I have a question after that,
18 so we may be going a little bit longer unless
19 Gleeson asks the question that I want to ask.
20 Commissioner Gleeson, you may proceed, sir.

21 COMMISSIONER GLEESON: Thank you,
22 Judge, and thanks to all three members of the

1 panel for your contribution and for taking the
2 time to appear. I wish I were there.

3 I had a -- I just really had an
4 observation that I welcome a comment, any
5 response to from any or all three of you. And
6 it's this. You know, we all bring our baggage to
7 the table and the older you are, the more baggage
8 you bring.

9 And I'll confess that mine includes
10 ten year working as a prosecutor with police and
11 relying on them. And they -- I thought they were
12 great and I would, you know, there was a point in
13 my life when I thought you can retrospectively
14 find facts based on police reports and you can
15 take that to the bank.

16 And I'm also on the panel now in the
17 Southern -- the CJA panel in the Southern
18 District of New York. And I recently had this
19 case where my client got arrested on a violation
20 of supervision for assaulting a cop.

21 And two cops came in and said that
22 when they broke up a fight, he assaulted them.

1 And I was just about to plead him guilty when I
2 found out there was a recording made by someone
3 in the neighborhood. And it turns out the cops
4 had assaulted my client.

5 And the AUSA immediately dismissed the
6 violation. Now this client of mine's a pro bono
7 client in a 1983 case, you know. We're working
8 out a settlement with the cops who assaulted him.

9 So, you know, I've been on both sides.
10 I question the ability to take that reality and
11 you take the vagaries of plea policy, of plea
12 bargaining in states. And, you know, as
13 previously mentioned that sometimes you just take
14 a plea that looks like a favorable outcome
15 without challenging a police report, recitations
16 on what happened in the crime.

17 So I'm really troubled by the
18 accuracy. I believe in real offense sentencing.
19 I believe in basing sentences on actual facts.
20 But I have grave concerns about the reliability
21 of using the documents that some would say can
22 properly be used to determine what the real

1 offense was in a prior conviction.

2 And I just wonder if there's any
3 comment by any of you as to how we reconcile
4 those problems and those experiences. I'm
5 wrestling with it, I'll be honest with you.

6 CHAIR REEVES: Whoever wants to start
7 off first. Judge Erickson, any --

8 JUDGE ERICKSON: Because everyone's
9 looking at me, I think that's really the \$64,000
10 question, right. I mean, the bottom line always
11 is -- and you're sitting there as -- yeah, and
12 you're the trial judge and you're about to
13 sentence somebody and you realize that there's
14 been a plea bargain made in a state court where
15 somebody's plead somebody in a way that's
16 creating a huge problem for you now.

17 And the question is, you know, what do
18 we do with variances? And how do we make that
19 work? I mean, that's a problem, right. And, you
20 know, there's another problem that -- and
21 obviously, these are all my views, not TIAG's
22 views.

1 There's another problem, if you just
2 think about it. The further back we start to
3 look, the more likely all the records have been
4 purged. And we don't really know anything beyond
5 what's in the documents of conviction.

6 I mean, I started being a judge in
7 1993 so it's been a long time. And I can go
8 back, and when I first started, I mean, we had,
9 you know, transcripts going back to the 1870s and
10 all the files were still intact and nobody ever
11 purged anything.

12 We just had these musty old rooms.
13 Now they're all gone. And we're going to have a
14 whole series of problems trying to figure out,
15 you know, what's out there and how does it work,
16 you know.

17 Is it unworkable? Probably not
18 because in the end, what do judges do? Well, we
19 judge. And we make decisions based on the
20 burdens of proof and the standards that we
21 developed and in the law of sentencing generally.
22 But, you know, whatever we do, there are going to

1 be difficulties.

2 CHAIR REEVES: Anyhow, I think
3 Commissioner Gleeson said anyone else who wishes
4 to chime in may do so.

5 MS. LIN: So I don't think this is
6 going to be very popular. But the dilemma that
7 Judge Gleeson referred to, it's sort of one of
8 the reasons why the categorical approach came up
9 in the first place, right, is because the only
10 thing that's really reliable is the elements and
11 what had to be proven in order for the conviction
12 -- or had to be admitted to in order for the
13 conviction to be entered in the first place.

14 So in a way, it's almost like we're
15 going in a full circle, to be revisiting this
16 again. Not popular, but we got to wrestle with
17 that too.

18 CHAIR REEVES: Thank you, Ms. Lin.

19 MR. LURIA: I wouldn't go as far as
20 that, perhaps. But I do think that we've kind of
21 landed on recommending Shepard documents.

22 I think a lot of this has has to do

1 with the most appropriate guideline component of
2 this, hopefully smoothing out a lot of these more
3 de minimis components with some of the additional
4 information that's in the Shepard document that
5 would help the court figure out kind of what
6 happened in that little bit more of a controlled
7 structure versus instead of going straight to
8 police reports or something along those lines.

9 Those Shepard documents don't always
10 provide that information but they frequently do
11 give a lot more insight than we're currently
12 allowed to consider.

13 You know, some of the things that we
14 also discussed was the prospect of using third-
15 party information. And along those lines, we
16 were not able to get to consensus on it. But we
17 were, you know, one of the things that was
18 discussed was, what about medical records for
19 victims?

20 It's not always in the court file,
21 very frequently not. But when it is, oftentimes
22 it's very, kind of dispositive on the kind of

1 injury that occurred, descriptive of the kind of
2 possible attack that had occurred as well.

3 And it's medical. It's not intended
4 by one party or another to create culpability,
5 simply a report of what happened to the victim.
6 But again, we were not able to come to consensus
7 on that.

8 We've also written, history on 2018 on
9 this, under different circumstances, of course.
10 And a lot of the focus on that was still unvetted
11 -- vetted by the court, documents that were
12 vetted by the court -- additionally, documents
13 that were sworn under the penalty of perjury.

14 And I've heard other individuals say
15 that all police reports are kind of like that.
16 That's not really -- all police reports lie --
17 but not all. And from Judge Gleeson's example,
18 it sounds like the officers who lied in that
19 circumstance are certainly, you know, receiving
20 some court related attention for that conduct,
21 appropriately.

22 So all that said, I think that staying

1 with Shepard within this structure that's being
2 proposed is where POAG is currently.

3 CHAIR REEVES: I did say I have a
4 couple of questions, but to address that last
5 part, Judge Gleeson mentioned a 1983 action,
6 which is civil action. So they're many more
7 tools in the shed for people who lie under oath.
8 So, but that's for another day.

9 My question, Ms. Lin, to you, I
10 thought you were here when the federal defendant
11 testified. And I thought she made some very
12 compelling points about disparity and baking in
13 the disparity and driving racial disparity, that
14 sort of things.

15 You also, you know, the Practitioner's
16 Advisory Group -- she was coming from the Federal
17 Public Defender, sort of view. Do you have any
18 comments about that aspect, of what she was
19 saying? Have you found that sort of similar
20 thread in the types of people you represent, the
21 type of people you teach the observations you
22 see?

1 MS. LIN: Absolutely. I completely
2 agree with the things that Ms. Scott was
3 describing in her testimony regarding the
4 racially disparate impact of the Career Offender
5 guidelines. It does fall more heavily on black
6 and brown defendants and, frankly, more heavily
7 on black defendants.

8 As a private practitioner, I
9 absolutely see that in my clients. I take a lot
10 of CJA appointed cases which means a lot of my
11 clients don't have a lot of money. And, hey,
12 guess what, it coincides with a lot of the --
13 they just happen -- many of them are people of
14 color as well.

15 It's impossible to get around how much
16 the impact of the Career Offender guideline falls
17 more heavily on black and brown defendants. Yes,
18 we agree with her.

19 CHAIR REEVES: Oh, I'm sorry. And a
20 lot of that could be attributed to the state
21 prosecutorial decisions made in various
22 communities as well, right?

1 MS. LIN: Yeah, so there's absolutely
2 the systemic idea that if, locally, in a certain
3 neighborhood, in a certain zip code, in a certain
4 city, if certain areas are policed more heavily,
5 then convictions of individuals who live in those
6 areas are going to be higher than individuals who
7 live in other areas.

8 And if, like individual who live in
9 those areas more likely are black and brown, then
10 you see how this system gets perpetuated and how
11 the disparities may start at a state and local
12 level.

13 If the federal system looks at those
14 state convictions and used those state
15 convictions to calculate the criminal history
16 score and therefore drive up somebody's potential
17 sentencing exposure, you see how it is all baked
18 into the system.

19 I don't know how we get around that.
20 We certainly don't get around it by increasing
21 the number of people who are impacted by the
22 Career Offender guideline because that just

1 seems, to me, to exacerbate the problem of racial
2 disparity.

3 CHAIR REEVES: And I see in a
4 different way, an additional way back in my home
5 state with no really indigent defense system,
6 nobody investing in the indigent defense system
7 which leads to a whole host of issues of persons
8 pleading guilty to certain crimes that maybe they
9 didn't do or a whole lot of things.

10 The other aspect I wanted to ask you
11 about, you made -- Ms. Scott alluded to the
12 testimony of her colleague yesterday with respect
13 to the types of research that could be done.

14 She just alluded to it. She didn't
15 specify but I think it was -- I forget the --

16 MR. LURIA: Ms. Scott.

17 CHAIR REEVES: Ms. Scott? That was
18 Ms. Scott too? Okay. She gave an account of
19 various categories of things that the Commission
20 can research to expand to sort of get more data,
21 more research, more knowledge about things.

22 Has the PAG talked about what other

1 type of research, if any, the Commission could
2 sort of direct to help try to address or try to
3 figure these issues out?

4 MS. LIN: So I have to confess that I
5 don't remember conversations specifically about
6 the Career Offender guidelines and what
7 additional research would be helpful to that
8 other than an update, I guess, of the 2016
9 report. So I could take that back to the PAG and
10 absolutely we can address that in our written
11 comments.

12 CHAIR REEVES: Okay. Thank you. Any
13 other comments, questions from any other
14 commissioners? Thank you, Ms. Lin. Thank you,
15 Mr. Luria. Thank you, Judge Erickson.

16 It's now time for us to take our
17 morning break. We're still doing good with
18 respect to time. Our commissioners, again, we've
19 been working, we will work.

20 We'll take about a 15-minute break so
21 everybody should be in their seats at least by
22 11:40. That's a little bit more than 15 minutes,

1 but be in your seat by 11:40, we're good. Thank
2 you so much.

3 (Whereupon, the above-entitled matter
4 went off the record at 11:21 a.m. and resumed at
5 11:45 a.m.)

6 CHAIR REEVES: For those who are
7 tuning in, I know yesterday there was jazz
8 playing during the intermission. I hope that's
9 the same as today. Welcome back. I'd like to
10 introduce our fourth panel which will present the
11 executive branch's perspective on our proposed
12 amendment regarding use of criminal history.
13 To present that perspective, we have the
14 Honorable Phillip A. Talbert, who served as U.S.
15 Attorney for the Eastern District of California.
16 Mr. Talbert has spent over 20 years in that
17 office, where he has spent time supervising the
18 office's appellate practice and training incoming
19 assistant U.S. attorneys.

20 Prior to his time as an assistant U.S.
21 attorney, Mr. Talbert worked as a trial attorney
22 and assistant counsel in the Department of

1 Justice's office in Washington, D.C., including a
2 time as associate counsel at the Office of
3 Professional Responsibility of the Department of
4 Justice, where he investigated claims of
5 prosecutorial misconduct and other allegations
6 made against DoJ attorneys.

7 Mr. Talbert, thank you for coming.
8 We're ready when you are, sir.

9 MR. TALBERT: Great. Thank you, Chair
10 Reeves, Vice Chairs, and Commissioners. My name
11 is Phil Talbert and I have the honor of serving
12 as the United States Attorney for the Eastern
13 District of California.

14 We understand your concerns and
15 appreciate your goals. The Department supports
16 including convictions for the simple possession
17 of marijuana without an intent to sell or
18 distribute as grounds for downward departure.

19 The commission's proposal is
20 consistent with the President's views that no one
21 should be in jail for the simple possession of
22 marijuana, and his pardon proclamation.

1 It will also account for the many
2 jurisdictions that have decriminalized personal
3 use marijuana possession. We have a different
4 view on status points.

5 Status points have been part of the
6 guideline since 1987. Since 2017, about 37.5
7 percent of all offenders have received status
8 points.

9 The Department wants to better
10 understand and consider the commission's analysis
11 of status points and recidivism in its June 2022
12 study before the commission make such a
13 significant change.

14 Our concern is that the amendment
15 lacks sufficient empirical bases. The June 2022
16 study may not have used widely accepted
17 methodology and the dataset is not public, and
18 there's been no independent analysis.

19 A more rigorous recidivism analysis is
20 appropriate. And as the June 2022 study
21 suggests, status points may actually have a
22 meaningful relationship with recidivism for 40

1 percent of all reoffenders.

2 The Department also notes that any
3 proposed amendment to Section 4A1.1 should
4 meaningfully address the guidelines twin goals of
5 recidivism reduction and just punishment, and not
6 solely focus on recidivism prediction.

7 If the commission were to adopt one of
8 the proposals now, we believe option one's
9 retention of the current provision with the new
10 downward departure language offers the best
11 option.

12 We strongly disagree with option
13 three's elimination of status points, even with
14 additional upward departure language.

15 The Department opposes creating a new
16 zero-point offender criminal history category and
17 a presumption of non-incarceration for those
18 offenders.

19 We appreciate the commission's
20 interest and leniency for first time offenders,
21 but this significant change would presumptively
22 sweep in defendants who committed serious

1 offenses, including hate based or civil rights
2 offences, public corruption offenses, national
3 security offenses, and serious economic and
4 corporate crimes.

5 As an example, in 2021, offenders with
6 zero criminal history points included 11
7 convicted murderers, 119 sexual assault
8 offenders, 53 robbery offenders, and 454
9 offenders with convictions for assault. These
10 offenders should not be rewarded a two point
11 reduction.

12 District courts already can and
13 regularly do vary downward for true zero-point
14 defendants. Only 38 percent of offenders with
15 zero prior convictions receive a guideline
16 sentence.

17 The commission's data shows that
18 courts already are, on average, effectively
19 varying down by 11 months. The Department
20 supports the district court exercising its
21 discretion to do so in an appropriate case after
22 a careful review of the specific facts.

1 In contrast, this new category zero
2 would add complexity and litigation to
3 sentencing. All proposed options would
4 potentially include up to six different
5 exclusionary criteria, leading to increased
6 litigation over whether one or more apply.

7 These changes would affect up to
8 17,000 defendants a year, or over 32 percent of
9 all federal offenders. Such an across the board
10 departure for offenders will undermine general
11 deterrence and respect for the law.

12 If the commission were to proceed, the
13 Department believes a one level reduction is
14 consistent with the guidelines structure. But
15 this benefit should be limited to offenders with
16 no prior convictions ever and include more robust
17 exclusionary criteria.

18 Regarding section 994(j), as we did in
19 2018, we support the commission's desire to
20 implement section 994(j) faithfully. But we
21 disagree with any categorical presumption of non-
22 incarceration.

1 We believe the current sentencing
2 regime already fulfills 994(j)'s mandate for
3 sentencing table zones, variances, and
4 departures. Through individualized assessment,
5 courts are always able to offer a noncustodial
6 sentence when appropriate.

7 The Department appreciates the
8 opportunity to provide our views and looks
9 forward to continuing to work with you. I look
10 forward to your questions.

11 CHAIR REEVES: Thank you, Mr. Talbert.
12 I turn to my commissioners, anyone wish to accept
13 his invitation? All right, Vice Chair Murray.

14 VICE CHAIR MURRAY: Thanks so much,
15 Mr. Talbert, for your testimony. I had a
16 question about the Department's suggestion that
17 in the context of zero-point offenders, if we
18 were to go with zero-point offenders who have no
19 criminal history points rather than no
20 convictions, that we back out folks who have a
21 prior violent offense.

22 Do you have a way of doing that

1 without resorting to the categorical approach?

2 MR. TALBERT: Well, unfortunately,
3 when we get into this, it will require more
4 litigation. Our suggestion is that the
5 commission has already proposed a number of
6 exclusionary categories.

7 In our view, those exclusionary
8 categories are much too narrow. For example, the
9 violent crime one focuses only on the defendant's
10 own conduct. It doesn't consider whether the
11 defendant might be part of a group that under
12 law, groups can, you know, cause even more harm,
13 it's recognized, than others through conspiracy
14 and that.

15 Other categories like the covered sex
16 offense excludes the trafficking of child sex
17 abuse material, which the Department thinks of as
18 a very serious offense, that if there were
19 exclusionary categories, all of that would be
20 covered rather than an errant category.

21 VICE CHAIR MURRAY: And in terms of
22 violent priors, if we were to exclude people of

1 violent priors, is there a way to do that without
2 resorting to the categorical approach?

3 MR. TALBERT: I don't see that. The
4 -- there would be increased litigation. There'd
5 be arguments over whether something fit with, you
6 know, the elements, and we'd have the situation
7 come up.

8 And I listened to Judge Erickson's
9 testimony earlier, where Judges are in the
10 business of judging and they want to look at the
11 facts in front of them and make decisions, but
12 sometimes with these layers that come in that are
13 created for them, it causes, you know,
14 unnecessary litigation, but also unnecessary
15 decision making on their part.

16 VICE CHAIR MURRAY: Thank you. Back
17 to the zero-point offenders, does the Department
18 have a position with respect to, well, for lack
19 of a better term, a true zero-point offender?
20 Someone who's never had any contacts whatsoever
21 with the system?

22 MR. TALBERT: So the Department, the

1 Department thinks that the current guideline
2 structure already accounts for and allows judges
3 sufficient discretion to deal with true first
4 time offenders.

5 And in fact, that's why we cited the
6 statistic that only 38 percent of true first time
7 offenders receive a guideline sentence. So most
8 are receiving -- and the vast majority of those
9 are varying downward, below that.

10 So judges are already looking at that.
11 Many of these first time offenders fall in Zone A
12 anyway, and so they're eligible for probation.
13 And the application note four to that section
14 says that judges should consider if it's a first
15 time offender with a nonviolent offense, the
16 judge should consider a sentence other than
17 incarceration.

18 But that's all one of the -- and
19 that's really in the structure and sense of the
20 guidelines which is giving judges options once
21 they calculate the correct guideline range, it
22 gives judges options as opposed to telling them

1 what an appropriate sentence may be or not.

2 CHAIR REEVES: Commissioner Gleeson
3 has a question. I'll turn to him. Commissioner
4 Gleeson, you may begin.

5 COMMISSIONER GLEESON: Yes. Thank
6 you, Judge Reeves and thank you, Mr. Talbert, for
7 giving us your time and your input. One of the
8 things that has troubled some of the folks who
9 think that 28 U.S.C. 994(j) hasn't been
10 implemented. And you've already touched on this
11 a little bit.

12 Is the difference between the
13 availability? Between telling judges to consider
14 a sentence that doesn't include incarceration,
15 having a sentence that doesn't include
16 incarceration available on the one hand.

17 And then on the other, to tell the
18 judges through the guidelines that effective non-
19 incarceration is appropriate. And that's, of
20 course, the mandate that Congress issued to the
21 commission in 994(j).

22 I wonder if you could comment on

1 whether you think there's a difference between
2 making a non-incarceration sentence available on
3 the one hand and telling judges it's appropriate
4 to impose such a sentence on the other.

5 MR. TALBERT: I'm happy to, Judge.
6 994(j) directs the commission to ensure that the
7 guidelines reflect the general appropriateness of
8 a sentence of non-incarceration for nonviolent
9 first time offenders.

10 The guidelines do reflect that. So in
11 the Department's view, the commission has
12 satisfied the command of 994(j) by making sure
13 the guidelines reflect that.

14 And the guidelines do that through
15 their entire structure. The zones, which make
16 available and provide guidance like through the
17 application note that I just mentioned, as to
18 what types of sentences should be considered for
19 each of the zones.

20 The graduated offense level system
21 where more serious offenses causing more harm to
22 the public are accorded higher offense level

1 scores, and then enhancements on top of that.

2 And then asking the judge to -- or
3 directing the judge to correctly calculate, even
4 in a post-Booker advisory guideline sentence, the
5 judge has to correctly calculate the --
6 accurately, the guidelines range before
7 considering 3553(a) factors and then deciding
8 whether a guideline range sentence is appropriate
9 or varying upward or downward from there.

10 So the operative word in 994(j) is
11 reflect. And the guidelines through all of those
12 things reflect the general appropriateness
13 because a first time offender who commits a non-
14 serious, nonviolent offense is likely to be at a
15 fairly low guideline range on, you know, fairly
16 low offense level score and fairly low criminal
17 history on both axes.

18 And then the judge, you know, when
19 different types of sentences are available to the
20 judge, then there's a guidance that -- from
21 application note four that non-incarceration in
22 those circumstances is generally appropriate.

1 So the Department would see if it were
2 interpreted otherwise, that there needed to be an
3 affirmative presumption of non-incarceration in
4 those cases, then the judge would go through the
5 same analysis of correctly calculating the
6 guideline range.

7 Would then look at the 3553(a) factors
8 and make all sorts of assessments as to whether
9 variances up or down were required. We'd think
10 about what the appropriate sentence, type of
11 sentence was, given the available types of
12 sentences.

13 But then would have this overlay of,
14 well, does it fit this presumption and if I think
15 that the offense is more serious, then how do I
16 get out of this presumption. There's a -- so
17 there's an overlay there that is unnecessary,
18 given the structure of guidelines that are to
19 reflect.

20 COMMISSIONER GLEESON: Thank you.
21 Thank you, Judge Reeves.

22 CHAIR REEVES: All right. Any other

1 questions for this witness? Vice Chair Murray?

2 VICE CHAIR MURRAY: Say you were
3 satisfied with the data the commission had put
4 forth, or say you did further analysis, you got
5 the data set, you came to the conclusion that
6 there was no increase in recidivism on any level,
7 not just the, you know, criminalize history of
8 categories five and six, but one through four for
9 status points.

10 What would the Department's position
11 be then on proposals one, two, and three for
12 status points?

13 MR. TALBERT: Well, with respect to
14 status points, we are concerned. We are
15 concerned that there's been one study. This is,
16 you know, one of proposed very significant
17 change. It would impact over a third of
18 defendants in the federal system.

19 And we've had one study come out last
20 year, which showed a connection for 40 percent of
21 defendants between status points and recidivism,
22 and then 60 percent not.

1 So as you say, our first concern is
2 there needs to be a lot more studied before we
3 make -- before the commission considers making
4 this big of a change.

5 But second, there is another goal of
6 sentencing that is being ignored here, which is
7 just punishment. And the Department believes
8 that a sentencing judge should be able to
9 consider the fact that a defendant who's on
10 supervision of some kind when the instant offense
11 was committed, and that that plays into the
12 judge's calculation of the severity and pattern
13 of the defendant's conduct.

14 (Simultaneous speaking.)

15 So I think that I bought a minute.
16 I'm sorry if I'm not answering the question. I
17 think we'd have to consider, one, we would want
18 to look and see are status points helpful at all
19 with respect to is there any kind of causal
20 relationship.

21 Not just a predictive value, but some
22 kind of causal relationship with that. And so

1 if, you know, I'm not sure how the Department
2 would feel if there was another study or studies
3 that were independently analyzed and we felt
4 comfortable to say that something that's been
5 part of the guidelines since, you know, they
6 started, that there was really no reason to have
7 them from a recidivism perspective.

8 I, you know, I doubt that's the case
9 given just this one study and the 40 percent
10 figure that it looks like there's some kind of
11 connection. It may be that, I think more likely,
12 would be that the commission would find that
13 there were other sub-relationships in there where
14 maybe they're fine tunes that could happen with
15 respect to status points, where you'd have a
16 range --

17 And again, this would require analysis
18 that compared offenders with status points to
19 similarly situated offenders without status
20 points, and then looked at demographic variables,
21 defense level variables and that.

22 And there may be stronger

1 relationships in some areas than others. So I
2 think that's probably the more likely outcome and
3 so I hesitate to guess at what the Department's
4 position would be on, you know, on a hypothetical
5 result like that.

6 CHAIR REEVES: Commissioner Mate.

7 VICE CHAIR MATE: Thank you. Thank
8 you for your time and testimony today. I really
9 appreciate it. I was about to say this morning
10 but I think we've crossed over, so thank you for
11 hanging in there with us, with all of us.

12 On the commission's research and I had
13 a question. The commission, a few years ago, did
14 a study on recency points and based on that
15 study, eliminated recency points from the
16 guidelines.

17 Is there any difference in the
18 methodology of recency report that was the basis
19 of the commission's study -- decision a few years
20 ago and the status point study?

21 MR. TALBERT: Well, I'll application
22 and say I didn't read the recency points study in

1 preparation for this. I did read the more recent
2 length of incarceration and recidivism study that
3 had a much more robust methodology and mode of
4 analysis than the revisiting status points one.

5 I know that recency points were
6 eliminated for a number of reasons. One of them
7 being the sense that there was double counting
8 with status points. And so now that recency
9 points had been eliminated, then there is less of
10 a concern that there is double counting with
11 status points.

12 But as far as the methodology of that
13 study, I'm unfamiliar, I didn't read that in
14 comparison -- or in preparation for this. In
15 comparison, the length of incarceration and
16 recidivism uses a fairly robust methodology with
17 comparing defendants in like categories to see
18 whether the length of sentence impacted --
19 controlling for all sorts of other variables, had
20 some impact on recidivism.

21 And actually found that it did, and
22 consistent with an earlier study, this one was on

1 2010 releasees, and the earlier study was on 2005
2 releasees. And as they -- as this report notes
3 at the outset that the conclusions in each study
4 were very similar.

5 VICE CHAIR MATE: One follow up on
6 that, if I may. Kind of again, we're looking at
7 kind of us making data driven decisions --

8 MR. TALBERT: Yes.

9 VICE CHAIR MATE: -- in what we're
10 doing here. On the criminal history zero,
11 there's commission data that shows much lower
12 recidivism rates for the criminal history zero
13 category as compared to the scored and twos.

14 And I guess my question is right now,
15 that's not reflected, that data difference
16 between the zeros and the others is not reflected
17 in the guidelines manual. Right? And this would
18 be -- this is one way of doing that?

19 MR. TALBERT: Well, I think as, again,
20 if you looked at each of the criminal history
21 categories, each one contains multiple criminal
22 history point total scores.

1 So category one happens to join
2 defendants with zero points along with one point,
3 and then so on. And each category groups
4 somewhat dissimilar criminal history defendants
5 together.

6 And even within each category, there
7 are differences even if you have the same number
8 of points, that you may have one defendant who's
9 a five pointer have a very different criminal
10 history, much less serious than another defendant
11 who's a five pointer.

12 So again, the guidelines create a
13 starting point and there have to be categories of
14 putting people together, so at some point,
15 there's always the -- and I know the guidelines
16 manual, when it first came out, had this
17 discussion in the introduction that at some
18 point, you have to make categories that bring
19 somewhat dissimilar defendants together into one
20 category.

21 So there is and the Department
22 acknowledges, there's a lower recidivism rate for

1 first time offenders, but again, as the
2 statistics bear out, district judges are taking
3 that into account and they are often varying
4 downward outside of the guidelines. And those
5 first time offenders are often being given a
6 sentence of non-incarceration.

7 VICE CHAIR MURRAY: Just following up
8 on Commissioner Mate's question, the -- could we
9 take into account -- so I take your point about
10 the groupings, but I think what we found is it's
11 not linear.

12 So the difference between someone with
13 five points and six points, and four points and
14 five points, is pretty much the same. And then
15 all of a sudden there's around zero points.

16 Particularly zero pointers who don't
17 have any prior convictions. And I wonder if, you
18 know, again, if you had not mentioned the quality
19 of the study and the sufficiency of the study, I
20 wonder if you think that that -- maybe you do in
21 that study, I don't know.

22 I wonder if you think that we should

1 take that into account?

2 MR. TALBERT: Well it, and again, I
3 think district judges are already taking that
4 into account. I think district judges in each
5 case are looking at the defendant in front of
6 them and are considering the nature and
7 circumstances of the offense.

8 And they're also considering the
9 history and characteristics of the defendant in
10 front of them. And so I think that a judge who
11 has before him or her a defendant who has a long,
12 unscored criminal history, and ends up with one
13 point, is looking at that person very differently
14 when considering them individually than a
15 defendant who's a true first time offender.

16 And is acting accordingly with their
17 -- and as the data bear out, lowering their
18 sentence by varying downward.

19 COMMISSIONER BOOM: I have a follow up
20 question on that. And I understand that the
21 Department's position is that should the core --
22 I'm sorry, should the commission adopt the -- its

1 proposal for the zero pointers, that it would
2 just lead to litigation.

3 But you know, as Commissioner Mate and
4 Commissioner Murray pointed out, there is a
5 fairly substantial difference in recidivism rates
6 for -- which are low, substantially lower for the
7 zero pointers.

8 Does the Department have any other
9 suggestions, you know, other than just saying,
10 oh, it's going to result in too much litigation.
11 Any other suggestions that we might account for
12 that lower recidivism rate for those offenders?

13 MR. TALBERT: Well, the --

14 COMMISSIONER BOOM: Other than just
15 judges varying, which I understand that.

16 MR. TALBERT: But I think that's the
17 appropriate thing for judges to do. And they are
18 doing it and they are considering that the zone
19 is already set up for this, so that many first
20 time offenders, unless they commit a very serious
21 offense that's going to give them a high offense
22 level, will fall within that zone.

1 And then the judge will read
2 application note four, which says you should
3 consider a sentence of non-incarceration for
4 that. And so judges are already doing that and
5 the data bears that out.

6 The flipside is, you know, to just
7 split the category without raising penalties for
8 defendants with one criminal history point, then
9 you have to find someplace on the left of the
10 chart, and there is no place.

11 And so then you need to drop on
12 offense level, which is really the other axis.
13 We're talking X and Y, it's really the other
14 thing that the judge is looking at with respect
15 to the offense itself as opposed to the
16 defendant's criminal history.

17 So there is a -- it does work against
18 the way the guidelines are structured to do that.
19 The Department's not suggesting that we ought to
20 increase penalties for defendants with one point.
21 The Department is suggesting instead, that judges
22 know this and they're doing this every day.

1 CHAIR REEVES: Commissioner Wong.

2 COMMISSIONER WONG: Mr. Talbert, you
3 said earlier that in talking about the
4 presumption proposal that that would be a little
5 bit unclear how the mechanics of that would work
6 with the judge conducting a guidelines
7 calculation, doing 3553(a) analysis, and
8 evaluating whether variance might be appropriate.

9 And also, you described it as sort of
10 an overlay of a presumption, and I'm just -- none
11 of us have a crystal ball, but I'm curious if the
12 Department has thoughts on how that will actually
13 play out consequentially in the real world. Do
14 you see the presumption being something that's
15 considered in the guidelines part of that?

16 That then there's the 3553(a) factor,
17 do you think it's sort of -- the whole analysis
18 is normally done and then there's a presumption.
19 Or do you think it will actually not have any
20 impact? I'm just curious if you thought about
21 how that all applied.

22 MR. TALBERT: It's hard to know in

1 advance. Some judges may consider it part of the
2 guidelines analysis, even though it is something
3 that they would consider at the very end when
4 they're selecting the type of sentence to impose,
5 which is generally after consideration of 3553(a)
6 factors.

7 And those judges may be driven by the
8 concern over the litigation that would result
9 from figuring out whether exclusionary factors
10 applied. Right? That we would have to litigate
11 whether, you know, subfactor A or subfactor B
12 applied in a particular case, and look back at --
13 look at the offense or look at priors.

14 And then other judges may decide that,
15 no, I don't really reach this presumption until I
16 finish the entire analysis and gone through
17 3553(a) factors, which are statutory requirement
18 and can take a fair amount of figuring and
19 consideration by judges.

20 I know, we have one judge in my
21 district who will limit the number of judgment
22 and sentencings that he will do on a particular

1 court day -- court calendar day. He has a
2 general criminal calendar and at the end,
3 judgment and sentencings.

4 And he will limit the number because
5 he says this is the most important decision that
6 I make and it is so onerous, and there's all this
7 preparation ahead of time, and then consideration
8 at the hearing of what the parties say.

9 So I'm only going to do this, and I
10 can't remember how many times each day but not
11 many, because it is such an intensive analysis.
12 So I'm sorry I can't answer your question any
13 better. I don't have a crystal ball as to how
14 each judge will see this play out.

15 But by having a presumption in order
16 to get at something that the guidelines we argue
17 is already doing, because the guidelines already
18 reflect the appropriateness and guide the judges
19 exercise and discretion in this way, that we're
20 adding a layer, wherever it is in the -- wherever
21 it is in the process, is going to cause a lot
22 more litigation and consideration.

1 COMMISSIONER WONG: Along -- if I can
2 follow up just along a similar vein. One thing
3 that's very helpful for us from some of our
4 witnesses have been real world examples. So we
5 talk about zones and all of that.

6 I know the Department was raising a
7 specific concern about zones in C and D, zero-
8 point offenders that are not carved out under the
9 enumerated --

10 MR. TALBERT: Yes.

11 COMMISSIONER WONG: -- carve out for
12 zero-point offenders. Can you give an example
13 which -- what some of those offenses might be
14 that you think we should be keeping in mind?

15 MR. TALBERT: Well, so one that really
16 struck me when I read the exclusionary categories
17 was that for covered sex offenses, that
18 trafficking of child sex abuse material would not
19 be covered. That was something that frankly
20 shocked me when I saw it because we've seen -- we
21 prosecute a lot of child exploitation cases.

22 There is, I can tell you, there is

1 more and more production out there with advances
2 in technology including just having your cell
3 phone be able to make you into a producer of
4 child sex abuse material.

5 But there's a lot more trafficking too
6 that causes harm to victims. So that's just one
7 example. Another example in the categories is
8 the focus in the violence on the defendant's own
9 conduct makes us concerned that what if the
10 defendant's planning violence with others.

11 And it's recognized in the law of
12 conspiracy that when more than one person gets
13 together to decide to commit a crime, then that
14 crime can be much more serious and be punished
15 just at the planned stage as opposed to the
16 actual commission.

17 So that's another one that the
18 Department's concerned that a lot of defendants
19 would be swept in and not excluded, and
20 potentially be able to -- even though the offense
21 level was high, because it was seen as a serious
22 offense.

1 If they're a first time offender,
2 which a potential terrorist might be, domestic
3 terrorist or so, and -- or others. There's a
4 certain interplay.

5 I know the commission is considering
6 raising the offense level for correctional
7 officers who are found to abuse prisoners under
8 their care. Most correctional officers have zero
9 criminal history.

10 The commission is also considering
11 what to do with Congress' concern about straw
12 purchasers of firearms. And the firearms then
13 show up in crimes and that. And straw purchasers
14 by definition, likely have no criminal history.

15 So there's a lot of, one, there's that
16 interplay too that if you're raising offense
17 levels for them, but you're creating a category
18 that would then give them a break, then are you
19 really raising the penalty as you think that
20 you're doing.

21 I can go on and on, there's a number
22 of different ones that we think -- serious

1 economic crimes. So serious economic crimes are
2 defined by the impact on, you know, causing
3 substantial financial hardship to particular
4 victims.

5 And you can imagine if a defendant
6 defrauds one or two people, and takes all of
7 their retirement savings, and the loss is \$1
8 million, that's significant and that would be
9 excluded from this.

10 But if a similar defendant created
11 actual loss of \$1 million, but did that across
12 1,000 different victims, then that might not be
13 substantial hardship -- undue hardship to any
14 particular victim, and so they may not be
15 excluded by the language here.

16 So we may be giving a break to
17 economic criminals where the Department has
18 limited resources and -- in this area and will do
19 a number of prosecutions in order to create
20 general deterrence among a community of potential
21 white collar criminals who want to deter from,
22 you know, committing these crimes.

1 If they see that someone might go to
2 prison, they think they may go to prison too if
3 they do this. But if we start excluding some of
4 those, then there's less of that deterrence.

5 CHAIR REEVES: Thank you, Mr. Talbert,
6 for your testimony. We appreciate it. We're
7 ready to move onto our next panel.

8 MR. TALBERT: Thank you, Chair.

9 CHAIR REEVES: Our next panel provides
10 us the federal public defender's perspective on
11 this issue. To present that perspective, we have
12 Jami Johnson, who serves as an appellate attorney
13 with the Federal Defenders of San Diego.

14 Ms. Johnson previously served as an
15 assistant federal public defender in Arizona and
16 she has also taught criminal procedure classes at
17 Arizona State University, at the Sandra Day
18 O'Connor College of Law.

19 Ms. Johnson, thank you for coming.
20 We're ready to hear from you.

21 MS. JOHNSON: Thank you, Chair Reeves.
22 Good morning and thank you for inviting me to

1 speak on behalf of the Federal Public and
2 Community Defenders. Defenders are polices for
3 the proposed revisions to chapter 4, all of which
4 will contribute to remedying the unjustified
5 influence that criminal history plays in
6 determining our clients' sentences.

7 As a public defender, some of the
8 hardest cases we deal with involve individuals
9 who are having their first real encounters with
10 the criminal legal system. Many of these people
11 become involved in the system for the first time
12 because various other systems in their lives have
13 failed them.

14 And as defenders, we see a persistent
15 underutilization of alternatives to incarceration
16 for people who would be better served by services
17 and supervision, including clients for whom
18 prison is likely to hinder rather than to promote
19 their effective rehabilitation.

20 One of the first clients I represented
21 when I became an assistant federal public
22 defender was a teenager, who I'm going to refer

1 to as Julio. Julio was a 19-year-old United
2 States citizen who had grown up entirely in
3 Mexico.

4 He was born prematurely and was
5 intellectually disabled from birth. Tests of his
6 general intellectual functioning placed him in
7 the extremely low range with serious deficits in
8 the area of memory, learning, and executive
9 function.

10 Julio was raised by a single mother in
11 Mexico after his father died by suicide when he
12 was 10. He was bullied in school and despite
13 receiving special education services, he never
14 learned to read or write very well.

15 When it became generally known in his
16 neighborhood that Julio had the ability to cross
17 the border, a man from his neighborhood
18 approached him and asked him to carry drugs into
19 the United States.

20 Julio impulsively agreed before later
21 realizing that it would be a bad idea and that he
22 didn't want to do it. But then one day a man

1 showed up at his door and told him that today was
2 the day.

3 He told the man he didn't want to, but
4 the man insisted. And that's how Julio ended up
5 at the San Luis Port of Entry with meth taped to
6 his body.

7 When he got to the primary inspection
8 point, Julio was so visibly nervous that the
9 officer sent him to secondary inspection. In
10 secondary inspection, an officer asked him if he
11 was carrying anything, and Julio blurted out, I
12 have ice taped to my thighs before anyone patted
13 him down or called a dog.

14 Julio pleaded guilty to possession
15 with intent to distribute methamphetamine. At
16 sentencing, I asked the judge to impose a
17 sentence that did not involve additional
18 incarceration.

19 The judge, however, sentenced Julio to
20 21 months in prison, citing, "the judgment of the
21 sentencing commission" in declining to vary
22 further.

1 Notwithstanding a high based offense
2 level, Julio is the kind of person for whom an
3 alternative to incarceration would be most
4 appropriate. He was only 19, and his
5 intellectual disability meant that intellectually
6 and emotionally, he was even younger.

7 The psychologist who evaluated him
8 noted that he was impressionable and suggestible.
9 And there were real concerns about the kind of
10 things he was likely to be exposed to in prison,
11 and the effect that those would have on his long
12 term development.

13 On the other hand, he clearly needed
14 services, in particular, services for adults with
15 disabilities.

16 And what we found when he ultimately
17 received those services was that Julio did really
18 well. With the assistance of his probation
19 officer, he was able to relocate to the United
20 States side of the border, to rent a room, and to
21 live and work with a degree of independence.

22 He successfully completed supervised

1 release without incident. Julio's story is not
2 exceptional. We regularly see people who get
3 caught up in the system for the first time
4 because something specific has gone wrong in
5 their life, and that thing can best be addressed
6 in a noncustodial environment.

7 Domestic violence, substance use
8 disorders, intellectual disabilities, and serious
9 mental health problems are things that we see
10 regularly. At one point in my career, I
11 represented two separate female clients in their
12 70's with no criminal history, one of whom was
13 taken advantage of because she had begun showing
14 signs of dementia, and the other whom was a
15 victim of domestic violence by a grandchild.

16 Nevertheless, even in these kinds of
17 circumstances, we regularly see judges who are
18 reluctant to consider alternatives to
19 incarceration and who specifically cite the
20 judgment of the commission in declining to get
21 the kind of variances that would be necessary to
22 get to a noncustodial sentence.

1 For this reason, we welcome the
2 commission's proposals that would make it more
3 likely that noncustodial sentences be imposed in
4 appropriate cases.

5 We also welcome the commission's
6 proposal to eliminate status point, which can
7 have an unduly large effect on the guidelines
8 range, particularly for individuals in lower
9 criminal history categories.

10 Simply being on unsupervised probation
11 for a misdemeanor public order offense is enough
12 to place someone immediately into criminal
13 history category 2.

14 They, in fact, receive twice as many
15 criminal history points for their status as they
16 do for the underlying offense. And a person
17 who's on probation for a misdemeanor offense who
18 had spent 60 days in jail is immediately vaulted
19 into criminal history category 3, which is the
20 same category as someone with two very serious
21 prior three point felony offenses.

22 The commission's own data shows that

1 status points are not reasonably indicative of a
2 likelihood that a person will recidivate, and for
3 that reason and others, we support the proposals
4 to eliminate the reliance on status points in
5 calculating an individual's criminal history
6 score.

7 Thank you for listening, and I welcome
8 your questions.

9 CHAIR REEVES: Thank you. I now turn
10 to my fellow commissioners. Vice Chair Murray.

11 VICE CHAIR MURRAY: Thanks very much,
12 Ms. Johnson. I took very much to heart, I was
13 hoping to turn to the difference between option
14 one and option two for zero-point offenders in
15 terms of prior criminal history, prior criminal
16 contact.

17 I noticed that many of your sort of
18 objections were related to these municipal
19 misdemeanors and I took very much to heart your
20 description of them and the due process concerns,
21 et cetera.

22 I wondered if we did a third option

1 that said you count as a zero-point offender if
2 you don't have any prior felony convictions of
3 any kind. How much and to what degree, if at
4 all, would this assuage your concerns?

5 MS. JOHNSON: We do not believe that
6 that would be sufficient for several reasons. In
7 particular, one of the things that we have
8 observed is that the distinction between a felony
9 and a misdemeanor is sometimes actually difficult
10 to determine.

11 There are states, Arizona has
12 something called a class six of felony that is,
13 in fact, in the federal system following much
14 litigation, we learned that it is in fact a
15 federal misdemeanor offense.

16 And so it can be quite difficult to
17 tell what is a felony and what is a misdemeanor
18 offense. And many states use the word felony for
19 offenses that are federal misdemeanor offenses,
20 and the many states make many public order
21 offenses felonies.

22 In Arizona, for example, many simple

1 traffic violations, if done while unlicensed or
2 on a suspended license, become felonies, which in
3 effect means that undocumented individuals who
4 are prohibited from having licenses, who
5 nevertheless drive because they're getting to
6 their job or whatever, who commit what's an
7 ordinary traffic infraction that wouldn't even
8 count for somebody else, suddenly have a felony
9 conviction.

10 So I don't think that simply
11 prohibiting people who have prior felonies or
12 saying we're only going to be just taking into
13 account people with prior felonies would really
14 assuage our concerns with regards to disparity,
15 even on the point regarding municipal and public
16 order offenses.

17 CHAIR REEVES: Commissioner Mate.

18 VICE CHAIR MATE: Thank you. Thank
19 you, Ms. Johnson. We appreciate you being here
20 today and traveling to be here, and your
21 testimony, very much. So thank you.

22 I had a related question on the

1 criminal history, the no prior convictions,
2 related to the no prior convictions or comparable
3 judicial dispositions of any kind. I was
4 wondering, you know, if that is read to kind of
5 include juvenile adjudications, tribal
6 convictions, these minor misdemeanors, does that
7 raise issues with disparity in terms of
8 availability of records when we get at that level
9 of prior conducts?

10 MS. JOHNSON: I think that it does.
11 It raises issues of disparity. It also raises
12 issues of practicality. We appreciated the
13 comment by the probation officers advisory group
14 that records are often very difficult to obtain.

15 And also from the tribal interest
16 advisory group that tribal convictions don't map
17 easily onto the federal system. So you know, as
18 a practical matter, there may be states in which
19 juvenile records can be obtained if they are
20 being used in connection with a subsequent
21 federal prosecution.

22 And there may be states in which they

1 are simply impossible to obtain. And even in
2 cases where they are possible to obtain, it may
3 be unclear in certain circumstances when we're
4 dealing with a very different legal system,
5 whether something was a conviction or not because
6 of the availability of alternative adjudications
7 and things like that, that just raise a lot of
8 logistical hurdles, as well as equity unfairness
9 principles in terms of the disparate treatment of
10 different offenders.

11 And I have a lot of respect for tribal
12 courts. I am myself, I'm an enrolled member of a
13 Native American tribe. But tribal courts are not
14 set up, or not required to establish themselves
15 according to principles and methodologies that
16 map easily onto the federal system.

17 And many have elected to have
18 alternative modes of dispute resolution, and it
19 may be that individuals who are members of
20 certain tribes may have very clear records, and
21 others may not.

22 And so I think that there would be

1 significant disparity considerations if such
2 offenses were taken into consideration and
3 excluding people from the zero-point benefit.

4 CHAIR REEVES: All right. Thank you.
5 Judge -- Commissioner Gleeson has a question.
6 Commissioner Gleeson, you may ask your question,
7 if you hear me.

8 COMMISSIONER GLEESON: I do. Thank
9 you, Judge Reeves. Thank you, Ms. Johnson for
10 donating your time and your views. We're very
11 grateful.

12 As you know, one of the things we're
13 considering and I've asked for public comment on
14 is an amendment that would implement 994(j). And
15 you know, 994(j) isn't quite as explicit as it
16 might be when it says the guidelines should
17 reflect the general appropriateness of imposing a
18 sentence other than imprisonment.

19 In cases in which the defendant is a
20 first offender, who's not been convicted of a
21 crime of violence or otherwise serious offense.
22 And one of the ways it lacks definition is what

1 another otherwise serious offense is.

2 And my question is this, can we rely
3 on the offense table, you know, levels C and D,
4 for example, as a proxy for what an otherwise
5 serious offense is.

6 Is it possible for someone to be a
7 first offender and not have committed a crime of
8 violence or otherwise serious offense and still
9 be in ranges C or D of the guidelines? Do you
10 understand the question?

11 MS. JOHNSON: I believe that I do, and
12 yes, it is possible for somebody to be in zone C
13 and D, and not to have been convicted of
14 something that I think many of us would consider
15 to be a very serious offense.

16 So I think the answer to the question
17 is, is were it originally framed that no, we
18 don't think that relying solely on the sentencing
19 table as a proxy for what is a serious or not
20 serious offense is fair and promotes the interest
21 of equity and justice.

22 Certainly, the zone on the sentencing

1 table and the overall offense level is one of the
2 factors that the courts will take into
3 consideration in determining whether an
4 alternative to incarceration is imposed or not.

5 And I think that will remain true,
6 even if the commission adopts the proposal
7 directing courts to consider alternatives to
8 incarceration. Nevertheless, we routinely, and
9 I'm, you know, going to draw on my experience in
10 two border districts here.

11 We see people whose offense level is
12 elevated by factors largely outside their
13 control, and often outside their knowledge. And
14 I think in particular, the clients who we see
15 most often along the southwest border are these
16 drug couriers like Julio.

17 They generally agree to transport
18 drugs for a fixed fee that's really a very tiny
19 percentage of the overall value of the drugs.
20 They do not know what kind of drugs are involved.
21 They, in the case of car couriers, which are more
22 common than body couriers, they don't know where

1 in the car the drugs are hidden.

2 They don't know the quantity. They
3 have very little information and are
4 intentionally kept in the dark. These are not
5 people who are members of the cartel. They are
6 people who are, in some cases, being taken
7 advantage of by the cartel, in some cases in, you
8 know, just in dire circumstances themselves.

9 And so all of these factors that they
10 have no knowledge of, drug type, drug quantity,
11 ultimately become the single largest factor in
12 driving the offense level in those cases. And so
13 somebody who has, you know, the example that
14 always comes to mind is I think cocaine is about
15 one-tenth -- is valued about one-tenth the rate
16 of meth on the table.

17 And so somebody who has 50 kilograms
18 of cocaine, we are generally talking about very
19 large quantities because of how, just because of
20 how things come through the border. Fifty
21 kilograms of cocaine, it has a lower offense
22 level than somebody who has 50 kilograms of meth.

1 And these are identically situated
2 people. Everything that they have agreed to do
3 is the same. And so we see these really high
4 offense levels that are not necessarily
5 appropriately indicative of the wrongfulness of
6 the conduct, of the likelihood that the person
7 would succeed on supervision and be effectively
8 rehabilitated and not reoffend.

9 And certainly there may be
10 circumstances in which the very high offense
11 level is appropriately reflective of the
12 wrongfulness of the person's conduct, and I think
13 we can trust judges to be able to distinguish
14 between those two.

15 But you know, in my experience, we do
16 see a lot of people in zones C and D who are not
17 considered for alternatives to incarceration,
18 where alternatives to incarceration would be very
19 appropriate in their particular circumstances and
20 would benefit not only them but society.

21 COMMISSIONER GLEESON: Thank you, Ms.
22 Johnson. Thank you, Judge Reeves.

1 CHAIR REEVES: All right.
2 Commissioner Wroblewski.

3 COMMISSIONER WROBLEWSKI: Thank you so
4 much. And thank you, Ms. Johnson, for coming
5 here. I have a couple of questions.

6 CHAIR REEVES: Make sure you speak --
7 (Simultaneous speaking.)

8 COMMISSIONER WROBLEWSKI: I'm sorry.

9 I have a couple of questions. Do you
10 all in San Diego, is there an alternative to
11 incarceration diversion program of any kind in
12 your district?

13 MS. JOHNSON: There are. So I moved
14 to San Diego less than two years ago. I'm not
15 aware of an official first offenders court,
16 though I -- or think that there is. I know that
17 they have some in some districts.

18 I can say with confidence that in
19 Arizona, which had a very similar client profile
20 in many circumstances, especially with respect to
21 border districts, there was a Veterans court.
22 There was a not a first-time offenders court.

1 I think they're experimenting with a
2 reentry court, but that, of course, would not be
3 a pretrial -- an alternative to incarceration
4 program. That's where people have already served
5 their sentences and are coming out.

6 The Department of Justice is, of
7 course, always free to offer diversion to clients
8 and we certainly have had clients who have been
9 offered diversion at the discretion of the
10 Department of Justice.

11 Not as often as I would have liked to
12 have seen, and I'm unaware of anybody who was
13 ever offered diversion who was in zone C or zone
14 D. It may have happened, but that's not
15 something that we regularly saw.

16 We would see that more typically with
17 people who have zero criminal history points and
18 are already in zone A or zone B and have some
19 significant mitigating factors.

20 COMMISSIONER WROBLEWSKI: Okay. My
21 next question is I had the privilege of
22 participating in your district just a few weeks

1 ago in a lunchtime training program. Are you
2 familiar? Were you there?

3 MS. JOHNSON: I was not there but I
4 heard about it and sort of spoke to people in
5 advance about it.

6 COMMISSIONER WROBLEWSKI: Okay.

7 MS. JOHNSON: So I know what you're
8 talking about.

9 COMMISSIONER WROBLEWSKI: And the
10 training program was with some of your
11 colleagues, and it was about the First Step Act.
12 And I'm curious, I don't want to put you on the
13 spot, but I'm curious if you're familiar with the
14 way First Step Act earned credit time works, how
15 those are cashed in.

16 Because I think there's implications
17 for the zero-point proposal. So I don't want to
18 -- before I go on, I don't know if you're
19 familiar but I have a couple of questions about
20 it.

21 MS. JOHNSON: I am.

22 COMMISSIONER WROBLEWSKI: So the

1 pattern score, which determines whether you're
2 low or minimal risk, is driven a lot by criminal
3 history, it seems to me. If you disagree with me
4 on any of this, just let me know.

5 And so it seems that it's very likely
6 that the zero-point offenders are going to be
7 minimal or low offenders, and therefore are not
8 only going to be able to earn credits, but are
9 going to be able to cash those credits in for
10 supervised -- early supervised release or some
11 such thing.

12 First of all, do you agree with that?
13 And then, and if you do, if we reduce penalties
14 for zero-point offenders, commensurate with the
15 way the rest of the table works, which is really
16 just one level, what impact -- actual impact on
17 the time served would that have on somebody who
18 might have a 21 month guideline, you know, bottom
19 of the guideline range sentence?

20 So instead of 21 months, maybe they
21 would get one level off, they'd get 18 months.
22 What would actually be the difference of how much

1 time they actually served given there would be
2 good time credits and earned time credits? And
3 there might be even other credits as well.

4 MS. JOHNSON: So I guess I will answer
5 -- I'll try to answer both parts of your
6 question. And first, I disagree that -- I do
7 disagree that the First Step Act earned time
8 credits will -- are going to take care of the
9 majority of these kinds of offenses that I'm
10 referring to.

11 It certainly will take care of some of
12 them. I do not -- criminal history is one of the
13 factors included in the earned time credits
14 analysis. In our offices' analysis, the actual
15 overwhelming factor, I believe, that was driving,
16 a lot of it was age.

17 And so you know, we see a lot of 18,
18 19 year olds who maybe at moderate risk, I'm
19 talking BOP level in terms of the -- so backing
20 up a little bit. It's the people with minimal
21 risk of recidivism and low risk of recidivism
22 that are eligible to cash in these earned time

1 credits and to get out early, effectively.

2 And people at higher levels are not,
3 and we see people vaulted in the higher levels
4 simply by virtue of their age, their pattern
5 score, by virtue of their age.

6 Things like participating in drug
7 rehabilitation program can lower your pattern
8 score, and that is wonderful for our clients with
9 addiction problems.

10 But you know, Julio for example does
11 not have an addiction problem. So he's going to
12 be unable to avail himself of that reduction
13 simply because he doesn't have an addiction
14 problem to be able to earn that reduction.

15 So there will be many people who will
16 fall, even the zero-point people, who will fall
17 outside that -- the availability of cashing in
18 the earned time credits.

19 With respect to the practical impact,
20 lowering -- providing a, you know, a two-point
21 offense level reduction for people with zero
22 criminal history points will, you know, I don't

1 have the sentencing table memorized off the top
2 of my head, but let's say that that's a six point
3 -- or excuse me, a six month recommended
4 reduction in their offense level.

5 You know, with the earned time
6 credits, it would mean, assuming they were
7 eligible for the earned time credits and received
8 all of them, you know, maybe four months less on
9 their sentence, just sort off the top of my head
10 than they would have otherwise received, which is
11 -- it's four months in somebody's life.

12 It's meaningful and important to the
13 person who's receiving it.

14 CHAIR REEVES: Yes.

15 VICE CHAIR MURRAY: I guess I have a
16 994(j) question, in particular about the portion
17 of our proposal that suggests that for defendants
18 whose conduct falls into zones C and D. As you
19 know, we proposed that the -- that we -- that the
20 test track the statutory language and looked
21 whether the offense is violent or otherwise
22 serious, and the defenders recommending taking

1 off that criteria.

2 And I guess I'm wondering why. It
3 seems to me that there are crimes -- I very much
4 take your point that there are crimes that fall
5 under zones C and D, particularly when they're an
6 amount of things that are not otherwise serious.

7 But aren't there some that are? I
8 mean, one that occurs to me that would not be
9 excluded by the 4C1.1 criteria is a large scale
10 fraud against the government where there's not a
11 vulnerable victim, it's the government.

12 That seems like, given the, you know,
13 depending on the kind of scale, it could be a
14 serious offense that warrants incarceration. I
15 wonder if you can say a little bit more.

16 MS. JOHNSON: Sure. So first, I would
17 want to situate your hypothetical within the
18 overall framework of who we're talking about when
19 we're talking about people with zero criminal
20 history points.

21 I think that economic crimes as a
22 whole are less than 20 percent of people with

1 zero criminal history points. And so -- and
2 that's all economic crimes.

3 And so when you're talking about large scale
4 fraud against the government, which is a smaller
5 subset of economic crimes, we're really talking
6 about, you know, something significantly less
7 than even ten percent, or probably even five
8 percent of everyone who receives zero criminal
9 history points, I'm guessing large scale fraud
10 against the government would be a few dozen
11 people a year or something like that.

12 So we're already sort of well outside
13 the heartland of people who have zero-point
14 offenses. Large scale fraud against the
15 government, you know, I'm sure the commission is
16 very familiar with the fraud guidelines.

17 These are people who are going to be
18 facing a very high offense level by virtue of the
19 loss amount and so I guess your question actually
20 is as it regards alternative to incarceration as
21 opposed to offense level.

22 So the offense level reduction is

1 going to be really relatively modest compared to
2 the overall very large offense level that we
3 drove in, in large part by their -- the loss
4 amount, which would be large in your
5 hypothetical.

6 I would say that in those
7 circumstances, that judges are in the best
8 position to assess whether a particular person is
9 in fact a good candidate for alternatives to
10 incarceration, or not, in those case.

11 And the judges will -- the proposed
12 language regarding 944(j) that would encourage
13 judges to consider alternatives to incarceration,
14 is not a mandate. It's an invited variance in
15 appropriate cases and for appropriate
16 individuals.

17 And of course, judges are still going
18 to be required to consider each and every one of
19 the 3553(a) factors in fashioning a sentence.
20 And so I think that we could leave that to the
21 discretion of the judges to figure out whether
22 certain individuals who have committed, for

1 example, large scale frauds against the
2 government, whether this is a variance that would
3 be appropriate, given the facts of that specific
4 case.

5 VICE CHAIR MURRAY: I guess, I don't
6 know if you'd agree with this, but I guess
7 arguably, if we chose the maybe appropriate
8 bracket rather than the generally appropriate
9 bracket option, that that could resolve that
10 concern to you.

11 MS. JOHNSON: I think that it is
12 generally appropriate. It's generally
13 appropriate does not mean it's always appropriate
14 or shall be imposed. And so again, we're talking
15 about large scale fraud against the government is
16 a very small slice of the overall zero-point
17 offenses that we see.

18 I think the majority of which are drug
19 trafficking. So is generally appropriate does
20 not mean in every case appropriate. I certainly
21 have not in my career asked for an alternative to
22 incarceration for every client who has zero

1 criminal history points and I don't know any
2 defenders who have.

3 So I think that is generally
4 appropriate is language that encompasses the
5 general case and still allows ample room for
6 carve outs for people whose cases are not
7 general.

8 CHAIR REEVES: Yes.

9 COMMISSIONER BOOM: Thank you for your
10 testimony today and your written submission. Do
11 the defenders have any suggestions for courts who
12 are grappling with this issue under 994(j), for
13 defining what is a serious offense? Because, you
14 know, I think uniformity is also a compelling
15 driver for the guidelines.

16 And so if the carve outs that are
17 listed aren't necessarily the right fit, you
18 know, what guidance do you suggest for district
19 judges to determine what's a serious offense and
20 what is not? You mention that the zone is one
21 factor, but what would the other factors be?

22 MS. JOHNSON: I think, well, the carve

1 outs are -- would exclude many people just out of
2 the gate. People who have used violence, people
3 who have been a leader or an organizer, people
4 who have used or committed offenses that resulted
5 in serious bodily injury or a death.

6 These people are already excluded and
7 so provide guidance to judges regarding what is a
8 serious offense. I think that beyond the zones,
9 I mean, the 3552(a) factors are designed to be
10 and are particular to an individual.

11 And so perhaps you have someone who is
12 a, you know, a zero-point -- a person with zero
13 criminal history points, but has previously
14 received a diversion or even an informal warning.
15 Perhaps somebody who I'm thinking in cases of
16 white collar cases, who may have received a visit
17 from the government saying you know, your
18 business practices, we do not believe align with
19 the law or with best practices in your business.

20 But nevertheless continue and make no
21 changes to their behavior. So I think that it
22 would be really case specific and factor

1 specific, and even, although I appreciate the
2 drive for uniformity, I think that there has to
3 be a recognition that there is some regionalism
4 and we're in a federal system, we're in a very
5 vast country with a lot of different areas and a
6 lot of different regions.

7 And that having, you know, a certain
8 quantity of drugs at the border in San Diego may
9 not be the same thing as having that certain kind
10 -- that certain quantity of drugs driving
11 through, you know, Southern Indiana.

12 That these may implicate different
13 conduct, even though it's the same quantity of
14 drugs and the person both have zero criminal
15 history.

16 So I think that it would just have to
17 be case-by-case and I think that we can trust
18 judges to make this decision.

19 CHAIR REEVES: Any other questions of
20 this witness? Well, thank you, Ms. Johnson. We
21 appreciate your time.

22 MS. JOHNSON: Thank you for having me.

1 CHAIR REEVES: Our sixth and final
2 group of panelists will provide us with
3 perspectives on this issue from four of our
4 advisory groups.

5 First, we will hear from the Honorable
6 Ralph Erickson, who serves as chair of the
7 sentencing commissions, tribal and issues
8 advisory group.

9 Judge Erickson served as a district
10 judge for the district of North Dakota before
11 being elevated to the United States Court of
12 Appeals for the Eighth Circuit.

13 Judge Erickson has a long history of
14 service on both the state and federal courts in
15 North Dakota, and he has served on state and
16 national ethics panels, including service as
17 chair of the Judicial Conference Committee on
18 Codes of Conduct.

19 Second, we will hear from Susan Lin,
20 who serves as a third circuit representative on
21 the Citizen Commissions Practitioners Advisory
22 Group.

1 Ms. Lin is a criminal defense and
2 civil rights attorney in Philadelphia. She
3 teaches in the training division of the Defender
4 Services Office at Temple University, Beasley
5 School of Law, and the University of
6 Pennsylvania, Carey School of Law.

7 Ms. Lin currently serves as president
8 of the Asian Pacific American Bar Association of
9 Pennsylvania.

10 Third, we will hear from Jill Bushaw,
11 who serves as chair of our probation officers
12 advisory group. Ms. Bushaw serves as deputy
13 chief United States probation officer for the
14 northern district of Iowa.

15 She joined the U.S. probation office
16 in 2003 and has previously held positions as a
17 citizen guidelines specialist and as a
18 supervisory and assistant deputy chief in the
19 pre-sentence investigations unit.

20 Finally, we will hear from Professor
21 Mary Graw-Leary, who serves as chair of our
22 victims advisory group. Professor Leary is the

1 senior associate dean for academic affairs and a
2 professor of law at Catholic University of
3 America.

4 Professor Leary has previously worked
5 in a range of positions in the criminal justice
6 system, including as an assessment United States
7 attorney for the District of Columbia, as the
8 director of the National Center for Prosecution
9 of Child Abuse, and as a deputy director of the
10 National Center for Missing and Exploited
11 Children's office of legal counsel.

12 Judge Erickson, we'd like to hear from
13 you whenever you are ready.

14 JUDGE ERICKSON: Thank you, Chair
15 Reeves and members of the commission. I'll be
16 quite brief. Ms. Johnson has identified the one
17 issue that TIAG wanted to comment on.

18 We take no position on the proposal
19 generally, only on the use of the language or
20 other comparable judicial dispositions.

21 It boils down to something really
22 quite basic. On the -- in those 574 federally

1 recognized tribes, they -- the types of justice
2 that's administered covers a very broad spectrum.

3 We have tribal courts that operate on
4 a western model. And frankly, they operate with
5 highly trained professionals at least as good as
6 the state -- or at least as well as the state and
7 federal courts do.

8 I mean, they're really just very high
9 functioning courts. And if we were to score
10 their convictions the same that we do state
11 convictions, it would not matter one jot.

12 On the other hand, we have tribal
13 courts where there's non-law trained judges, non-
14 law trained prosecutors, non-law trained
15 defenders, and they operate on something akin to
16 the western model but with very few of the sort
17 of due process considerations that we ordinarily
18 would expect to find.

19 And then we have courts that operate
20 on a very traditional level. Right? So you may
21 have a sentencing circle. The sentencing circle
22 is a situation where we have a group of elders,

1 sits down with the person who is the victim of
2 crime with the alleged perpetrator of the crime,
3 and they just talk it out and they come up with a
4 restorative sentence of some sort. Right?

5 And we've had large discussions within
6 TIAG as to what do you do with tribal court
7 history. And we have large debates among tribal
8 judges and tribal prosecutors, depending on where
9 they find themselves in this spectrum. All
10 right.

11 And so what we came up with a number
12 of years ago and what was adopted by the
13 commission at that time was that the -- whether
14 to include tribal court convictions was left to
15 the discretion of the sentencing judge.

16 And the reason for that is pretty
17 obvious. I mean, if you think about the
18 sentencing judge, the federal -- United States
19 district judge, that judge is fully aware of the
20 courts that are operating on the reservations in
21 their -- within their jurisdiction.

22 And they'll know how those tribal

1 convictions should be treated. And so broad
2 discretion is given. I'll tell you that, you
3 know, there were five reservations that I
4 generally dealt with. There were two that I
5 almost always took into consideration, the tribal
6 history.

7 There were a couple I never took into
8 consideration. And it was just because of the
9 different models and methods of operation that
10 those courts were using.

11 And when we read the proposal, we
12 looked at other comparable dispositions and we
13 thought, well, nobody's mentioning tribal courts.
14 We presume that you didn't intend to change
15 anything relating to what you -- how you score
16 tribal court history.

17 But we'd like a more plain and direct
18 statement that we aren't changing anything as it
19 relates to tribal courts. Thank you.

20 CHAIR REEVES: Ms. Lin.

21 MS. LIN: Thank you, Chair Reeves.

22 Thank you, commissioners. Good afternoon. I am

1 happy again to be able to provide testimony on
2 behalf of the practitioners advisory group.

3 First, with regard to status points,
4 the PAG endorses option three. The commissions'
5 proposal to eliminate all together the assignment
6 of status points under 4A1.1(d).

7 Additionally, the PAG does not support
8 the alternative of applying status points to
9 certain categories of prior offenses, but not
10 others. Status points, as we all know, lengthen
11 a defendant's sentence by driving up their
12 criminal history score and thereby driving up the
13 guideline range.

14 However, as this commissions own
15 report noted in June of 2022, status points are
16 not predictive of recidivism. And the report did
17 not distinguish among certain offenses or other
18 offenses.

19 Therefore, based on that report, we
20 would support option three. I ask -- or we ask
21 that the commission keep in mind that a
22 defendant's back judge, or the parole board will

1 have the ability to punish a defendant for a
2 violation of the supervised release, or
3 probation, or parole.

4 Thus, when we're talking about status
5 points, what is really going on is that an
6 individual defendant is being punished multiple
7 times, or their sentence is being driven up
8 multiple times for what is essentially the same
9 prior conviction.

10 It's being counted in their criminal
11 history score, it's being counted sometimes,
12 frankly, in the offense level under certain
13 guidelines that are out there. And they're going
14 to get hit by their back judge.

15 It's not necessary for the status
16 points to exist on top of those things.

17 With regard to zero-point offenders,
18 the PAG welcomes the commission's proposal this
19 year. The PAG, however, prefers the commission's
20 proposal that it published in 2016, which
21 proposed a decrease in offense levels for
22 defendants who are true, quote, unquote, true

1 first time offenders.

2 Zero-point offenders who have no prior
3 convictions of any kind. The commission's 2016
4 proposal provided for a one or two level
5 reduction in offense level for these true first
6 time offenders.

7 The PAG previously endorsed the 2016
8 proposal and it continues to believe that this is
9 the optimum approach for zero-point offenders
10 with no prior convictions.

11 The PAG's position is based on the
12 commission's own recidivism reports showing that
13 defendants without any criminal history have a
14 demonstrably lower risk of recidivism.

15 The PAG further suggests that the
16 commission incorporate the second option found in
17 the 2016 proposed amendment, which provides for
18 two separate reductions of offense level
19 depending on the offense level for the
20 corresponding offense, similar to the
21 commission's treatment of acceptance of
22 responsibility.

1 In the alternative, if the commission
2 does not revisit the 2016 proposal, we would push
3 or support option one, but we would ask that the
4 commission consider eliminating the five criteria
5 points proposed in 4C1.1(a)(2)-(6).

6 If any of those factors are present,
7 frankly, they are already incorporated in other
8 guideline enhancements. Just as importantly, the
9 commission's recidivism studies were not based or
10 did not take into account any of these other
11 criteria.

12 So it's not like a person's recidivism
13 risk rises just because these other criteria are
14 present when they are true first time offenders.

15 With respect to the commission's
16 proposal to amend the commentary in 5C1.1, the
17 PAG supports the proposal regarding zones A and
18 B. The PAG recommends that the proposal
19 regarding zones C and D be modified to eliminate
20 the requirement that alternatives to
21 incarceration should only be considered if the
22 conviction is not, "an otherwise serious

1 offense."

2 This qualification would virtually
3 eliminate the possibility for alternatives to
4 incarceration for all zone C and D defendants
5 because in the PAG's experience, sentencing
6 judges typically consider virtually every felony
7 a serious offense.

8 Accordingly, the PAG recommends that
9 the comment be modified to state that a non-
10 imprisonment sentence, "may be appropriate," for
11 true first time offenders in zone C or D.

12 Finally, simple possession of
13 marijuana, the PAG welcomes the commission's
14 proposal to provide for a downward departure
15 where defendant receives criminal history points
16 from a sentence for possession of marijuana for
17 personal use.

18 The PAG, however, believes that
19 treating this issue as a departure may lead to
20 inconsistent treatment across the nation of --
21 across the nation regarding prior marijuana
22 possession offenses.

1 The PAG asks the commission to
2 consider adding simple marijuana possession
3 convictions to the convictions enumerated in
4 4A1.2(c) (1) and let whatever sentence is imposed
5 on such offenses drive how it is treated under
6 the guidelines.

7 Thank you.

8 CHAIR REEVES: All right.

9 MS. BUSHAW: All right, good
10 afternoon.

11 CHAIR REEVES: Good afternoon.

12 MS. BUSHAW: This is my final
13 opportunity to testify before the commission this
14 amendment cycle, and I'd like to thank the
15 commission for all of their hard work on these
16 matters the last few weeks and for this
17 meaningful opportunity.

18 Regardless of how the proposed
19 amendment to status points, zero-point offenders,
20 and simple marijuana possession offenses are
21 finalized, POAG recommends the commission's
22 continued review and consideration of the impact

1 criminal history has on determining a sentence
2 that is sufficient but not greater than
3 necessary.

4 Each of the issues we are discussing
5 today all seek to determine if their specific
6 impact on criminal history should be reduced, but
7 through varied means and measuring different
8 factors.

9 POAG's discussion of these issues and
10 the feedback received revealed varying opinions
11 on the matter, but none of them wrong. Status
12 points, for instance, have been the longstanding
13 way to distinguish offenders who engage in the
14 aggravating conduct of committing the instant
15 federal offense while under a criminal justice
16 sentence.

17 It is a fairly common criminal history
18 computation in that it has applied in 37 percent
19 of the cases. So the feedback that we received
20 didn't garner a significant amount of concern
21 regarding the process or a pressing need for
22 change.

1 But if our system is going to evolve,
2 it requires reassessing factors that are routine,
3 including status points.

4 When I first saw these proposed
5 amendments, it reminded me of a conversation I
6 had when I was a new officer and a defense
7 attorney exclaimed his discontent with the fact
8 that his client qualified as a criminal history
9 category three, based upon just one conviction.

10 It was a circumstance similar to what
11 POAG noted in our written testimony, wherein the
12 defendant was on probation at the time of the
13 instant offense, and had since had that term of
14 probation revoked, providing for three points for
15 that offense under 4A1.1(a) and an additional two
16 points for being under a criminal justice
17 sentence under D, resulting in a criminal history
18 category of three.

19 Even if the commission were to adopt
20 option two, providing for one point instead of
21 two points under D, the resulting impact of a
22 criminal history category three would be the

1 same.

2 This example is part of the reason I
3 -- a slim plurality of POAG members favored
4 option three, to eliminate status points from the
5 analysis.

6 The underlying conviction scores
7 criminal history points, so the recency of that
8 criminal conduct is accounted for and impacts the
9 total points assessed. Also, it appears the
10 scoring and the status points are not
11 significantly material in determining risk to
12 recidivate or protect the public based on the
13 commission's research.

14 With regard to the zero-point
15 offenders, while we do favor the idea of
16 conferring a benefit to those offenders who pose
17 the lowest risk of recidivism, that was generally
18 agreed upon by POAG, that this is something that
19 should be addressed.

20 We were unable to reach a consensus
21 regarding the proposed amendment, largely based
22 upon several factors that need to be considered

1 under chapters two, three, and four, before the
2 reduction would apply, and then only apply it to
3 a narrow class of offenders.

4 One application POAG identified
5 without option one was the criteria that the
6 defendant had no prior convictions or other
7 comparable judicial dispositions of any kind.
8 The guidelines have always focused on more recent
9 convictions, meaning the records that we need are
10 available to determine the scoring.

11 This amendment would immediately make
12 really old records essential and relevant. An
13 indication that a defendant had a prior arrest 20
14 to 30 years ago becomes relevant, we would need
15 to do our due diligence on every old criminal
16 history entry to confirm if there ever was a
17 conviction, which can be essentially a difficult
18 process when it's a juvenile disposition.

19 Further, as indicated in our written
20 testimony, some of the factors under this
21 guideline, such as limited criminal history, no
22 firearm or violence, and no aggravating role, are

1 similar to the factors assessed in relation to
2 safety valve, meaning they would be eligible for
3 a second reduction based upon duplicative
4 factors.

5 POAG believes that the criminal
6 history for these types of offenders in the
7 appropriate case is already a 3553(a) factor the
8 court considers in determining the appropriate
9 sentence.

10 And we further believe further
11 research into alternatives to incarceration,
12 including expanding the sentencing actions within
13 the sentencing table zones, could be potentially
14 the vehicle used to address the types of
15 offenders this zero-point offender amendment is
16 intending to capture.

17 And finally, with regard to offenses
18 for simple possession of marijuana, the feedback
19 we received favored addressing this issue by way
20 of departure under 4A1.3, if needed, given that
21 the issue was continually involving and
22 determining if a prior offense for marijuana is

1 no longer subject to penalty and various
2 jurisdictions isn't always an easy analysis.

3 Further, we would note that possession
4 of marijuana has not been legalized federally and
5 marijuana use remains an issue our courts address
6 in relation to supervised release violations.

7 Thank you.

8 CHAIR REEVES: Thank you. Ms. Leary,
9 I apologize.

10 MS. LEARY: Thank you. The VAG once
11 again thanks the commission for inviting us to
12 speak to you on these issues and to echo the
13 comments of Ms. Bushaw, thank you for all the
14 hard work, obviously the commission has put in
15 and your stamina over these four hearings.

16 The VAG has limited comments, focusing
17 on status points and zero-point offenders, we
18 oppose both proposals and find them intentioned
19 with all of the purposes of sentencing, but I
20 want to start first with our comment on zero-
21 point offenders, because that will expand much as
22 to what we provided in our written testimony, and

1 then if there's time, I'll return to status
2 points.

3 The best way to consider the victim
4 advisory group's position is first principles,
5 and second, practical. And principle, the VAG is
6 concerned with the amendment's effect, which is
7 to essentially create a new category and a reward
8 for a convicted criminal defendant for doing what
9 is expected of every citizen, to obey the law.

10 Now, that may be overly simplistic and
11 the VAG does understand the distinction the
12 commission is trying to draw between true zero-
13 point offenders and offenders who have prior
14 convictions.

15 But the VAG's view is that if a
16 convicted defendant has no criminal history,
17 that's already calculated into the applicable
18 sentencing ranges. It's already a part of the
19 consideration for the court.

20 And to get another bonus, a new
21 special category because thank you, you haven't
22 victimized people before that we know of, the VAG

1 feels goes too far.

2 But on a practical level, the VAG has
3 other more specific concerns. The commission
4 bases its extremely sweeping change to the
5 guidelines on its finding that zero-point
6 offenders have, quote, lower recidivism rates
7 than other offenders, including those in criminal
8 history category one.

9 And the victim advisory group shares
10 the observation of the Department of Justice that
11 that is an insufficient basis for such a sweeping
12 change to the guidelines effecting over 13,000
13 offenders, and that would mean thousands of
14 victims in those cases.

15 Some of it's all to whom you compare,
16 and yes, compared to other federal criminal
17 defendants, this group has a lower recidivism
18 rate. However, they still have, to the ordinary
19 citizen, a high recidivism rate of 26.8 percent,
20 and as the Department of Justice pointed out, 41
21 percent of violent offenders with zero points are
22 rearrested within eight years.

1 But more troubling to the victim
2 advisory group is who will receive this benefit.
3 We noted the demographics of some of the
4 defendants who will receive this benefit in our
5 written testimony.

6 We mentioned people that are child sex
7 offenders, but there are other types of offenders
8 that the Department of Justice discussed in their
9 written testimony.

10 From a victim perspective, it bears
11 noting that many of these offenders are in a
12 position in which they can offend for the very
13 fact that they don't have prior criminal
14 histories.

15 They exploit the fact that they have
16 no prior criminal history, so they can be
17 employed as police officers, prison guards, scout
18 troop leaders, school principals, and that gives
19 them access to victims in order to harm them.

20 And then if they are caught, tried,
21 convicted, and sentenced, they can, again,
22 exploit that category to have less of a sentence.

1 And the VAG finds that concerning.

2 But most concerning is the language in
3 the opinion -- excuse me, the language in the
4 guidelines that seems to exclude child sex abuse
5 material possessors, traffickers, and receivers
6 from this category of covered sex crimes.

7 This is extremely alarming to the VAG,
8 and since -- and it flies in the face of over 30
9 years of Supreme Court jurisprudence on this
10 issue.

11 In 1982, the Supreme Court said in
12 Ferber, child pornography poses an even greater
13 threat to the child victim than does sexual abuse
14 or prostitution because the child's actions are
15 reduced to a recording. The pornography may
16 haunt him in future years, long after the
17 original misdeed took place.

18 A child must go through life knowing
19 that the recording is circulating within the mass
20 distribution system for child pornography. From
21 its inception, the Supreme Court has recognized
22 this is not a victimless crime.

1 But if there's any confusion about
2 that, the court clarified that in 2015 in
3 Paroline v. the United States, where it
4 underscored this and shut the door on that
5 assessment saying that it is, quote, it is common
6 ground that the victim suffers continuing and
7 grievous harm as a result of her knowledge that a
8 large indeterminate number of individuals have
9 viewed and will in the future view images of
10 child sexual abuse that she endured.

11 The court went on to say, in a sense,
12 every viewing of child pornography is a
13 repetition of the victim's abuse, and such
14 possessors, quote, conduct -- such possessors
15 conduct produces concrete and devastating harms
16 for real identifiable victims.

17 And the court closes saying it would
18 be inconsistent to apply this statute in a way --
19 the child pornography statute, is a restitution
20 section, in a way that leaves offenders with the
21 mistaken impression that child pornography
22 possession is a victimless crime.

1 And given that, the VAG's strong view
2 is under no circumstances should that be excluded
3 from the types of crimes that severely affect
4 victims.

5 I have other comments about status
6 offenders, but I await questions. Thank you.

7 CHAIR REEVES: Thank you, Professor
8 Leary. Any questions? I have one, Ms. Leary.
9 You wanted to have time on your status points,
10 that's my question.

11 MS. LEARY: Thank you.

12 CHAIR REEVES: All right.

13 MS. LEARY: Very much, Commissioner.
14 Essentially, the -- our view is simply this, that
15 the defendant's criminal history is directly
16 relevant to all the purposes of sentencing, not
17 just one.

18 I mean, again, I state the obvious but
19 if one has status of points, they are
20 recidivists. And that certainly is relevant.
21 And part of the criminal history, part of a
22 defendant's criminal history is if he commits a

1 further crime, well, he's literally either
2 serving a sentence, on probation, on parole or
3 supervised release, in prison, on work release,
4 or escape status.

5 And escape status, and that certainly,
6 we think indicates his offense or her offense is
7 more serious. It certainly indicates that for
8 general deterrence, this would be very important,
9 it certainly indicates that the defendant is not
10 amenable to rehabilitation.

11 So it is the victim advisory group's
12 view that the research does indicate that there -
13 - it has -- it may have something to do with
14 recidivism, however, there are other sentencing
15 guideline provisions that are not affected by
16 this and to have such a sweeping change, we feel
17 is not sensitive to the victim experience.

18 Thank you.

19 CHAIR REEVES: Thank you, Ms. Leary.
20 Any questions from my fellow commissioners?
21 Commissioner Wroblewski.

22 COMMISSIONER WROBLEWSKI: Thank you so

1 much. Thank you all for being here. And Judge
2 Erickson, is it okay if I ask you a question as
3 to your role as a judge rather than as a tribal?

4 JUDGE ERICKSON: Sure.

5 COMMISSIONER WROBLEWSKI: So if the
6 commission goes ahead with the proposal dealing
7 with 994(j), that we were talking about before,
8 so we would say that even if you're in zone C and
9 D, that a sentence of probation, and we've had
10 lots of different iterations, may be appropriate,
11 generally appropriate, we've also hears.

12 Do you, and let's assume we have a
13 hypothetical where there's a Medicaid fraud
14 defendant who stole a certain amount of money and
15 their guideline range was 60 months. So they're
16 in zone D.

17 JUDGE ERICKSON: Yes.

18 COMMISSIONER WROBLEWSKI: Do you think
19 that among your district court colleagues in the
20 Eight Circuit, that they would apply that
21 provision, that sort of separate little provision
22 about probation after going through all of the

1 guidelines calculations and figuring out loss,
2 and litigating role, and all the rest of it, and
3 then they get to 60 months.

4 Do you think they would apply that
5 consistently?

6 JUDGE ERICKSON: I believe that they
7 would do a much better job of applying that
8 consistently than they would a variance downward.
9 The reality of it is, is that if it's authorized
10 without the guidelines, there's a sense of
11 security in imposing that sort of sentence.

12 And it -- and that's, you know, there
13 will be greater uniformity. You know, one of the
14 -- this is a quick aside. One of the issues that
15 we've got right now among our district judges is
16 that there are variances being imposed rather
17 than guideline departures because nobody knows
18 really how it's going to be treated.

19 And they know that the appellate
20 courts are going to say, well, we know they
21 considered everything and it's -- there's no
22 procedural error in it, because it's variance.

1 And so -- and that undermines the guidelines.

2 And so I think if we can give clear
3 guidance on when the departures are available,
4 how they should be considered, that judges are
5 more likely to use those types of departures, and
6 that will actually bolster the guidelines, so
7 they're not constantly being undermined by well-
8 meaning district judges.

9 And I confess to having done it myself
10 a couple of times in my life. You know, and I
11 think that's good for the system as a whole.

12 COMMISSIONER WROBLEWSKI: Okay. Thank
13 you. And then one last question. Do you think
14 that there's anything for us to learn on the
15 Sentencing Commission from sentencing circles?

16 JUDGE ERICKSON: Oh, I do. You know,
17 I gave a speech at a listening conference in
18 Bismarck. It must be almost a decade ago. Where
19 I said that really, if you think about the
20 contributions that have been made to our judicial
21 system by a conquered people, you know, that have
22 the same thing available with the tribes.

1 If you think about it, is that the
2 Anglo-Saxon's are the basis for much of our
3 common law, but overlaying it is Norman law that
4 was imposed by a conquering nation. Right?

5 And yet, the amalgamation and the
6 synthesis of those two systems has created a much
7 stronger judicial system than existed in either
8 the Anglo-Saxon common law tradition, or the
9 Norman legal tradition. Right?

10 And I think that the sentencing
11 circles have the same ability to instruct us on
12 what might be appropriate in a restorative model.
13 Right? I mean, I think there's something really
14 -- I could do speeches for hours. I don't mean
15 to do that because you got work to do.

16 But just think of this, in one of the
17 tribes that's in our state, traditionally, there
18 were only two penalties. You sat at the circle
19 with the elders, with the person who was
20 victimized by the crime, and the perpetrator of
21 the crime, and they talked it all out.

22 And at the end, the tribal elders

1 would make a decision. And there were only two
2 available penalties. One was banishment, which
3 was a sure and certain death sentence, because if
4 you were banished on the Northern Plains, there
5 is no way that you could support yourself, feed
6 yourself, clothe yourself, without some other
7 group picking you up.

8 Now, occasionally, another tribe would
9 accept one of those people into their
10 communities, but usually they'd say, yes, if your
11 own people don't want you, we don't want you.
12 Right?

13 Or you would have a situation where,
14 for example, if I murdered another man, his widow
15 and children would be required -- on the
16 sentencing circle, they'd say yes, you're going
17 to support those people because you're going to
18 provide the first kill of all hunting
19 expeditions, you'll provide for the family that
20 suffered a loss first. Right?

21 And so that man might end up
22 supporting two separate families in that model.

1 But I mean I think -- obviously, murder's not a
2 thing that we do sentencing circles with, but I
3 think that the idea that out of that, there is
4 wisdom because the community heals is an
5 important idea. You know.

6 CHAIR REEVES: Yes.

7 VICE CHAIR MURRAY: Okay. Two
8 questions. My first question is -- thanks, by
9 the way, to the advisory panel. My first
10 question is for Ms. Lin. I was wondering if you
11 could say a little bit more about why PAG prefers
12 the 2016 proposal to option one. Is that because
13 there is a tiered level of reduction, is it the
14 lack of exclusions?

15 MS. LIN: I think it's the tiered, the
16 clarity, the clarity coming from the lack of
17 exclusions. I think the 2016 proposal really is
18 tied directly to what the studies show, which is
19 just plain old, a significant drop in recidivism
20 risks for people who are true first time
21 offenders.

22 There's also a drop in recidivism risk

1 compared to those with one criminal history
2 points, for those with zero criminal history
3 points, but they have priors that aren't
4 scorable.

5 The PAG does advocate these reductions
6 for the true first time offenders solely based on
7 the number, the extreme drop in recidivism risk.
8 2016 is more clear.

9 VICE CHAIR MURRAY: Thanks. My second
10 question is for Ms. Leary, I wondered if you had
11 any thoughts on the 4C1.1 exclusions and in
12 particular, some of the exclusions in there are
13 for, you know, a violent defendant, offenses that
14 involved violence or resulted in death, or where
15 there's been a substantial -- caused a
16 substantial financial hardship to the victim, are
17 geared to minimizing victim impact and I wondered
18 if you had other suggestions for how these are
19 crafted. I assume you may have suggestions of
20 sixth one, we heard about a little bit, but I'd
21 be interested in your thoughts on a, how to craft
22 six and other thoughts too.

1 MS. LEARY: Thank you. I'm going to
2 take the question in terms of discussing the VAG
3 yesterday, discussed with the VAG one of
4 Commissioner Reeves questions also requires me to
5 speak to them to suggest some crafted language,
6 so I will.

7 I would say first, we do appreciate
8 the effort of the commission. I think trying to
9 draw that distinction between crimes that do
10 significantly impact victim survivors, and those
11 that do not.

12 But we do also share the observation
13 of the Department of Justice that victims aren't
14 only in front of us bleeding. Right? You know.
15 There's a massive fraud that can affect people in
16 significant ways as well.

17 Sort of that, the non-immediate victim
18 survivor. So I'm going to take your question, if
19 I could, Vice Chair Murray, and go back to the
20 VAG and ask them craft some -- make some
21 suggestive language for you on that.

22 Again, we, as you can tell, got a

1 little bit upset about one in particular. My job
2 was to convey that. Thank you.

3 VICE CHAIR MURRAY: Yes.

4 CHAIR REEVES: Any additional
5 questions from this panel? I assume it pays to
6 be last. Well, I believe that concludes
7 everything so we'll bring this final day of
8 testimony on this whole thing that we've been
9 considering over the last couple of weeks.

10 We've heard from some great panelists.
11 We got a lot of comments, over a couple thousand
12 now. I expect to get more. I appreciate the
13 effort that everyone has put into this process.
14 This process is important and I deeply appreciate
15 everyone.

16 And I'm talking to the people
17 listening in, who are watching, I'm talking about
18 the people who testified back in February. I'm
19 talking about the many sacrifices some of them
20 really, really made in giving us the information
21 that we needed, that we requested, that they
22 participated in.

1 I'm talking about everyone who's
2 participated on any level. We just appreciate
3 you.

4 And I can promise you, we're going to
5 take all that information. We've been taking it
6 in. We've been talking, we've been listening.
7 We've been trying to figure this out.

8 Nobody's testimony, nobody's comment
9 is being overlooked. It is being taken in.
10 We're trying to balance what the various persons
11 and groups are saying.

12 We want to get to the right decision.
13 We want to get to the just decision. We want
14 this process to be better. I can say that, I
15 mean, we really want this process to be better.

16 So I thank every panelist. I thank
17 every staff member. I thank the public. It's
18 the public who makes our system work. The
19 public, the judicial system, if you will, just
20 does not get the attention normally that the
21 other branches get because we operate in a system
22 where people just don't know much about it.

1 And they don't understand it. But our
2 system works better when we have eye witnesses.
3 That's my view. When we have eye witnesses,
4 people who want to see the process for people,
5 the public being involved.

6 And I do thank the public for being
7 here. So we've heard your testimony, we're
8 considering your testimony. And we will, indeed,
9 use this testimony and these comments to make our
10 citizen policy.

11 To make it right, to make it fair, and
12 to make it just. And I thank each one of you for
13 all that you've done to help us get to that
14 point.

15 This hearing is now adjourned. Thank
16 you so much.

17 (Whereupon, the above-entitled matter
18 went off the record at 1:26 p.m.)
19
20
21
22

C E R T I F I C A T E

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In the matter of: Public Hearing

Before: US Sentencing Commission

Date: 03-08-23

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