Thank you for attending this public meeting of the United States Sentencing Commission. The Commission appreciates the attendance of those joining us here as well as those watching through our livestream broadcast on the Commission’s website. As always, we welcome and encourage the significant public interest in sentencing issues.

Those of you who regularly attend our meetings may notice that we are joined by two new faces today. I will introduce them momentarily, but first want to take a moment to acknowledge the service of Jonathan Wroblewski, who served as the ex officio member of the Commission representing the Attorney General since 2008. Mr. Wroblewski is currently serving as the Acting Principal Deputy Assistant Attorney General, head of the Office of Legal Policy, at the Department of Justice. As a result of his new job responsibilities, he will not be serving as the Attorney General’s representative to the Commission. Mr. Wroblewski’s service to the Commission was exemplary, and he is already deeply missed. We wish him great success in his new position.

Michelle Morales, seated to my far right, replaces Jonathan Wroblewski, as the designated ex officio member of the Commission representing the Department of Justice. Commissioner Morales is the Acting Director of the Office of Policy and Legislation in the Criminal Division of the Department. She first joined that office on 2002 and has served as its Deputy Director since 2009. Commissioner Morales previously served as an Assistant United States Attorney in the District of Puerto Rico.

Seated on my far left, is Patricia Wilson Smoot, the designated ex officio member of the Commission representing the United States Parole Commission. Commissioner Smoot was nominated to the Parole Commission by President Obama and was confirmed by the U.S. Senate on September 16, 2010. She was designated as Chairman of the Parole Commission effective May 29, 2015. Immediately before joining the Parole Commission, she served as the Deputy State Attorney for Prince George’s County, Maryland. Commissioner Smoot has also been an Assistant United States Attorney in the District of Columbia and a Public Defender in Prince George’s County, Maryland.

I would also note that Chuck Breyer, our Vice Chair, is not present in the room today. Judge Breyer is a district judge in Northern California and is currently presiding over a criminal case in which the jury is deliberating. As a result, he was not able to join us in person but consistent with our Rules of Practice and Procedure, he is joining us telephonically.

While he is also not here with us today, I would like to take a moment to acknowledge the service of Rick Holloway, the former Vice Chair of the Probation Officer’s Advisory Group.
After a long career of distinguished service, Rick is retiring as a federal probation officer and, as a result, will be stepping down from his role as Vice Chair of this important advisory group. The Commission is grateful for his contributions both in his service to the country as well as his additional contributions to the Commission.

In addition, I would like to acknowledge Jennifer Bishop Jenkins and Judge Paul Cassell for their respective second and final terms on the Commission’s Victims Advisory Group (VAG). Each of them has contributed immensely to our understanding of the needs and perspectives of victims in the federal criminal justice system and the Commission has benefited significantly from their work. We look forward to opportunities for ongoing collaboration with them in future work.

Before we begin, I would also like to highlight the Commission’s successful national training seminar in 2015. Approximately 1,000 attendees, including nearly 100 federal judges appointed within the past five years, participated in the event held in New Orleans, Louisiana. Given the robust attendance and participation in this event, we look forward to continuing a wide range of training activities, including next year’s National Training Seminar in Minneapolis, Minnesota, on September 7th through the 9th.

Before we proceed with the other business of the day, I thought I’d take a few moments to update the public on implementation of the retroactivity of the Commission’s 2014 “drugs-minus-two” amendment. That amendment and its retroactivity were an important part of the Commission’s ongoing policy priority of reducing the costs of incarceration and overcapacity in federal prisons consistent with our statutory obligation and our commitment to public safety. Following a one-year delay in implementation, eligible offenders began receiving early release on November 1, 2015.

To be clear, there were no automatic sentence reductions. Every offender seeking retroactivity was required to seek review from a federal district court judge. In each case, a judge carefully determined whether any reduced sentence was appropriate. In doing so, the court considered all the circumstances and factors in the case, including their behavior in prison, as well as input from the probation service. Throughout the process, there continues to be explicit attention to public safety and deterrence.

As of November 1, 2015, the Commission had received and analyzed documentation for 27,824 motions for retroactivity, and the courts had granted 21,003 – or three-quarters – of them. The average sentence reduction was 23 months, from 134 months to 110 months. And we are informed by the Bureau of Prisons that about 6,000 offenders were released on or about November 1.

The Commission continues to monitor and to review this measure and the most recent implementation report was posted on the Commission’s website last month.

At the same time, the Commission continues to look to Congress to fully address the issue of excessive federal prison populations and costs through a reexamination of existing statutory
mandatory minimum penalties, particularly related to drug crimes. As in the past, we continue to strongly support bicameral, bipartisan Congressional action to address these pressing issues which will then inform the Commission’s ongoing work.

As we normally do each January, in a few minutes, the Commission will vote on whether to publish a number of proposed amendments the Commission is considering this amendment cycle. As a reminder, those proposed amendments are just preliminary proposals that we put forward for public comment. I’ll talk a little more about those at the end of the meeting.

At this point, however, we are also considering a vote to adopt amendments to the current federal sentencing guideline definitions relating to the nature and impact of a defendant’s prior convictions for a “crime of violence.” These amendments stem from the proposed amendment we published for comment in August. As I said then, those of you who regularly follow the Commission’s work know that publishing in August and possibly promulgating an amendment today is a little different than our usual practice.

Nevertheless, we felt that it was appropriate to take action as soon as possible in light of ongoing litigation in this area and the added uncertainty resulting from the Supreme Court’s recent decision in Johnson v. United States. In Johnson, the Supreme Court struck down as unconstitutionally vague a portion of the statutory definition of “violent felony” used in a similar penalty provision in the Armed Career Criminal Act (ACCA). While the Supreme Court in Johnson did not consider or address sentencing guidelines, the statutory language the Court found unconstitutionally vague, often referred to as the “residual clause,” is identical to language contained in the “career offender” sentencing guideline. As I noted in August, since the Johnson decision, we have been considering whether – as a matter of policy – the Commission should also eliminate the residual clause in the guidelines.

The amendment we are considering today would do just that by eliminating the residual clause in the career offender guideline definition of “crime of violence.” In its place, the proposal would revise the list of specific enumerated offenses that qualify as a prior crime of violence, and, for easier application, moves the entire list into the guidelines. While a few select definitions are provided, the proposed amendment would continue to rely on long-existing case law for purposes of defining the enumerated offenses. In addition, the amendment also includes a departure provision that allows courts to depart in cases in which the predicate offenses were classified as a misdemeanor under the laws of the convicting jurisdiction.

While we view these potential amendments as significant, this is not necessarily the Commission’s final work in this area. This is a very complex area of law that continues to evolve and garner a great deal of discussion, and we intend to continue to study recidivist enhancements in the guidelines throughout the upcoming amendment cycle. For example, we plan to publish a report on career offenders and other recidivist provisions later this year, which could include recommendations to Congress for statutory changes. Finally, as part of our broader look at the immigration guidelines, we are continuing to consider whether conforming
changes should be made in the illegal reentry guideline’s treatment for enhancements based on prior convictions.

I do want to briefly discuss the topic of retroactivity as I am aware that several commenters have asked the Commission to make any changes it makes in this area retroactive. In deciding whether to make an amendment retroactive, the Commission considers several factors, including the purpose of the amendment, the magnitude of the change and the difficulty of applying the amendment retroactively.

While the potential change in the applicable guideline range could be significant for individual defendants, the amendment’s purpose is to address the complexity and the litigation associated with the “crime of violence” definition in the career offender guideline, which has been exacerbated by the Supreme Court’s decision in Johnson.

With respect to relevant facts, it would be extremely difficult to identify those offenders who might be retroactively impacted by the elimination of the residual clause. Specifically, two major data limitations would preclude staff from being able to complete a retroactivity analysis of this proposed amendment. First, sentencing documentation does not consistently report, and Commission data does not include, information about which prong of the “crime of violence” definition at §4B1.1 was applied.

Therefore, staff cannot identify cases in which the residual clause alone qualified an offender for the career offender provision. Similarly, sentencing documentation does not consistently report which criminal history events the courts used as predicates in order to apply the guideline. Furthermore, a predicate that was counted under the residual clause still may qualify under another prong of the crime of violence definition such as the elements clause.

Under these circumstances, it is difficult, if not impossible, to ascertain the overall effect of the various amendments, and would likely make retroactive application complex and time intensive. The very issue of retroactivity is already being litigated. As a result, the Commission has determined that a meaningful and complete retroactivity analysis is not possible.

As I mentioned earlier, the Commission is continuing to evaluate study the career offender guideline. The Commission acknowledges this is a very complicated area of law that continues to challenge courts and litigants alike. The Commission will continue to study this issue and plans to issue a report to Congress later this year.

I want to briefly address this year’s proposed amendments.

First, the Commission is publishing a proposed amendment on immigration related offenses. The Commission has received comment expressing concern that the guidelines provide for inadequate sentences for alien smugglers, including those who bring in unaccompanied minors.
As soon as possible, the Commission will include a data presentation on the Commission’s website to inform public comment on this proposed amendment. For those interested in obtaining this information, you can subscribe to our email list or Twitter account to receive a notification when this information is posted.

Separately, the Commission is also publishing a series of proposed amendments. First, there is an amendment that revises the guideline pertaining to animal fighting. The proposed amendment would allow for higher penalties for animal fighting offenses and responds to the enactment of two new crimes relating to attending an animal fighting venture, particularly in cases where a child under 16 is brought to one of these events. The proposed amendment also revises the existing upward departure provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

The Commission’s proposed amendment for public comment on supervised release is a result of a collaboration with the Criminal Law Committee which has studied the current conditions in light of recent court precedent as well as the Commission’s own multi-year review of federal sentencing practices relating to conditions of probation and supervised release. In general, the Commission seeks to make the conditions more tailored to a defendant’s needs and problems as well as easier for defendants to understand and probation officers to enforce.

Each year, the Commission considers resolving circuit court splits emerging from conflicting interpretations of the guidelines by federal courts. This year, the Commission has put forward an amendment to address circuit splits dealing with child pornography offenses.

One of the issues typically arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. Another issue typically arises when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses.

The Commission is also publishing a proposed amendment on compassionate release that seeks further comment on whether changes should be made to the Commission’s policy statement found in the guidelines, and if so, how? The proposed amendment contemplates changes to the Commission’s policy statement that would revise the list of extraordinary and compelling reasons for an offender to be considered for compassionate release.

Lastly, as always, the Commission is publishing a proposed amendment to respond to recently enacted legislation and other guideline issues where an update was both appropriate and timely.

I mentioned earlier the need for the Commission to work to make the guidelines more effective and more efficient. We hope that many of the amendments proposed today will do so.

The Commission will continue to provide updates about further opportunities for public comment and future public meetings and hearings through its website and Twitter account.
Please note that the Commission will hold its next public hearings on February 17th and March 16th.

Again, I thank you for your interest in these important issues, and I look forward as always to your further comments and feedback.
Chair Patti B. Saris called the meeting to order at 1:00 p.m. in the Commissioners’ Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Michelle Morales, Commissioner Ex Officio
- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following Commissioner attended via teleconference:

- Charles R. Breyer, Vice Chair

The following staff participated in the meeting:

- Kenneth P. Cohen, Staff Director
- Kathleen Grilli, General Counsel

Chair Saris thanked the members of the public for their attendance, both in person and watching via the Commission’s livestream broadcast, and expressed the Commission’s appreciation for the public’s interest in federal sentencing issues.

Chair Saris called for a motion to adopt the August 7, 2015, public meeting minutes. Commissioner Barkow made a motion to adopt the minutes, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris recognized the service of Jonathan Wroblewski, who served on the Commission since 2008 as the ex officio representative of the United States Attorney General. Mr. Wroblewski has left the Commission to serve as the Acting Principal Deputy Assistant Attorney General of the Department of Justice’s Office of Legal Policy. Chair Saris stated that Mr. Wroblewski’s service to the Commission was exemplary and the Commission wished him success in his new position.

Chair Saris introduced Michelle Morales as the new ex officio commissioner representing the Attorney General. Commissioner Morales is the Acting Director of the Office of Policy and Legislation of the Department of Justice’s Criminal Division. She joined that office in 2002 and has served as Deputy Director since 2009. Commissioner Morales previously served as an Assistant United States Attorney in the District of Puerto Rico.
Next, Chair Saris introduced Patricia Wilson Smoot, Chair of the United States Parole Commission and the Commission’s ex officio member representing the Parole Commission. Commissioner Smoot was nominated to the Parole Commission by President Obama and was confirmed by the Senate on September 16, 2010. She was designated Chair of the Parole Commission effective May 29, 2015. Immediately before joining the Parole Commission, she served as the Deputy State Attorney for Prince George’s County, Maryland. Commissioner Smoot has also been an Assistant United States Attorney in the District of Columbia and a Public Defender in Prince George’s County, Maryland.

Chair Saris noted Vice Chair Breyer was not present in the room, but, consistent with the Commission’s Rules of Practice and Procedure, was attending telephonically. Commissioner Breyer is also a district judge in Northern California and is presiding over a criminal case.

Chair Saris recognized the service of Rick Holloway, former Vice Chair of the Probation Officer’s Advisory Group. Mr. Holloway is retiring as a federal probation officer and, as a result, will be stepping down from this important advisory group. She expressed the Commission’s gratitude for his contributions, both in his service to the country as well as his additional contributions to the Commission.

Chair Saris also recognized the service of Jennifer Bishop Jenkins and Judge Paul Cassell for their respective second and final terms on the Commission’s Victims Advisory Group. Both contributed to the Commission’s understanding of the needs and perspectives of victims in the federal criminal justice system and the Commission has benefited significantly from their work. She stated that the Commission looked forward to opportunities for ongoing collaboration with them in future work.

Chair Saris highlighted the Commission’s successful National Training Seminar in 2015. Approximately 1,000 attendees, including nearly 100 federal judges appointed within the past five years, participated in the event held in New Orleans, Louisiana. Given the robust attendance and participation in this event, she stated that the Commission looks forward to continuing a wide range of training activities, including this year’s National Training Seminar in Minneapolis, Minnesota, September 7-9, 2016.

Chair Saris updated the public on implementation of the Commission’s 2014 drug minus two amendment. That amendment, and its retroactive application, were an important part of the Commission’s ongoing policy priority of reducing the costs of incarceration and overcapacity in federal prisons consistent with the Commission’s statutory obligation and its commitment to public safety. Following a one-year delay in implementation, eligible offenders began receiving early release on November 1, 2015.

Chair Saris stressed that there were no automatic sentence reductions. Every offender seeking retroactivity was required to seek review from a federal district court judge. In each case, a judge carefully determined whether any reduced sentence was appropriate. In doing so, the court considered all the circumstances and factors in the case, including their behavior in prison, as well as input from the probation service. Throughout the process, all parties continued to pay
explicit attention to public safety and deterrence.

Chair Saris reported that, as of November 1, 2015, the Commission had received and analyzed documentation for 27,824 motions for retroactivity, and the courts had granted 21,003 – or three quarters – of them. The average sentence reduction was 23 months, from 134 months to 110 months. The Bureau of Prisons informed the Commission that about 6,000 offenders were released on or about November 1.

Chair Saris stated that the Commission will continue to monitor and to review this measure and has posted the most recent implementation report on the Commission’s website.

Chair Saris added that the Commission continues to look to Congress to fully address the issue of excessive federal prison populations and costs through a reexamination of existing statutory mandatory minimum penalties, particularly related to drug crimes. As in the past, she recalled, the Commission continues to strongly support bicameral, bipartisan Congressional action to address these pressing issues which will then inform the Commission’s ongoing work.

Chair Saris called on Ken Cohen to deliver the Staff Director’s report.

Mr. Cohen announced that Raquel Wilson had accepted the position of Director of the Commission’s Office of Education and Sentencing Practice (ESP). Previously, Ms. Wilson served as the Acting Director of ESP and as a Deputy General Counsel in the Commission’s Office of General Counsel. Prior to joining the Commission, Ms. Wilson was an Assistant Federal Public Defender in the Districts of Southern Texas and Western North Carolina. She earned her law degree from Stanford University Law School and bachelor’s degree from Rice University.

Mr. Cohen introduced Christine Leonard, the new Director of the Commission’s Office of Legislative and Public Affairs (OLPA). Ms. Leonard has previously served as Senior Counsel on the staff of the Senate Judiciary Committee working for Senator Kennedy and as Associate Director of Legislative Affairs for the White House Office of National Drug Control Policy. After leaving federal service, she was Director of the Vera Institute for Justice, Washington, DC, office and Executive Director for Coalition for Public Safety. She earned her law and undergraduate degrees from Boston College.

Chair Saris called on Ms. Grilli to inform the Commission on possible votes to promulgate proposed amendments to the Guidelines Manual. The Chair noted that four affirmative votes were needed to promulgate an amendment.

Ms. Grilli stated that the proposed amendment, attached hereto as Exhibit A, is the result of the Commission’s multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). And it is also informed by the Supreme Court’s recent decision in Johnson v.
The proposed amendment amends the definition of “crime of violence” in subsection (a)(2) at §4B1.2 (Definitions of Terms Used in Section 4B1.1) in three ways. First, it amends §4B1.2(a)(2) to delete the residual clause.

Second, it amends §4B1.2(a)(2) to revise the list of enumerated offenses and move the list of enumerated offenses from the commentary to the guideline. The offenses on the revised list are murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or an explosive material as defined in 18 U.S.C. § 841(c). Conforming changes to the Commentary are also made.

Third, it amends the Commentary to add definitions for the enumerated offenses of forcible sex offense and extortion. As defined, “forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. Extortion is defined to mean obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Finally, the proposed amendment includes two departure provisions. First, it provides an upward departure provision in §4B1.2 to address certain cases in which the instant offense or a prior felony conviction was a burglary involving violence. Second, it provides a downward departure provision in §4B1.1 (Career Offender) for cases in which one or both of the defendant’s “two prior felony convictions” is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of August 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the vote.

Commissioner Morales thanked the Commission for addressing this issue as the Department of Justice viewed it as important. Further, the Department of Justice was pleased by the deletion of the residual clause, which it viewed as problematic in its application and made more complicated by the holding in the Johnson decision.

Commissioner Morales noted, however, that the Department of Justice had advocated for additional changes, including the elimination of the categorical approach in favor of a conduct-
based approach, and the inclusion of additional enumerated offenses, such as carjacking, hostage taking, and others. She believed that the inclusion of such crimes would have made their classification simpler and more predictable. Commissioner Morales expressed the Department of Justice’s disappointment that more of its recommendations were not adopted and hoped that the Commission would closely monitor the impact of the amendment to ensure it will capture the most dangerous offenders. She concluded by stating that the Department of Justice looked forward to working with the Commission on the remaining amendments.

Chair Saris noted that typically in January the Commission will vote on whether to publish proposed amendments the Commission is considering this amendment cycle. Such proposed amendments, she reminded the audience, are just preliminary proposals forward for public comment.

However, Chair Saris stated, the Commission is also considering a vote to promulgate a set of amendments to the current guideline definitions relating to the nature and impact of a defendant’s prior convictions for a “crime of violence” and stem from the proposed amendment we published for comment in August.

Chair Saris stated that the Commission believed it was appropriate to take action as soon as possible in light of ongoing litigation in this area and the added uncertainty resulting from the Supreme Court’s recent decision in Johnson v. United States. In Johnson, the Supreme Court struck down as unconstitutionally vague a portion of the statutory definition of “violent felony” used in a similar penalty provision in the Armed Career Criminal Act (ACCA). While the Supreme Court in Johnson did not consider or address sentencing guidelines, the statutory language the Court found unconstitutionally vague, often referred to as the “residual clause,” is identical to language contained in the “career offender” sentencing guideline. As Chair Saris noted in August, since the Johnson decision, the Commission has been considering whether – as a matter of policy – it should also eliminate the residual clause in the guidelines.

Chair Saris observed that the amendment the Commission was considering today would do just that by eliminating the residual clause in the career offender guideline definition of “crime of violence.” In its place, the proposal would revise the list of specific enumerated offenses that qualify as a prior crime of violence, and, for easier application, moves the entire list into the guidelines. While a few select definitions are provided, the proposed amendment would continue to rely on long-existing case law for purposes of defining the enumerated offenses. In addition, the amendment also includes a departure provision that allows courts to depart in cases in which the predicate offenses were classified as a misdemeanor under the laws of the convicting jurisdiction.

Chair Saris stressed that while the Commission views the potential amendments as significant, they are not necessarily the Commission’s final work in this area. She cautioned that this was a very complex area of law that continues to evolve and garner a great deal of discussion, and the Commission intended to continue to study recidivist enhancements in the guidelines throughout the upcoming amendment cycle. For example, the Commission plans to publish a report on career offenders and other recidivist provisions later this year, which could include
recommendations to Congress for statutory changes. Finally, as part of the Commission’s broader look at the immigration guidelines, it is continuing to consider whether conforming changes should be made in the illegal reentry guideline’s treatment for enhancements based on prior convictions.

Hearing no further discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli advised the Commission that the amendment the Commission just promulgated may have the effect of reducing the term of imprisonment recommended in the guidelines applicable to a particular offense or categories of offenses. As such, she continued, the Commission has the statutory authority under 28 U.S.C. § 994(u) to make the amendment retroactive. Ms. Grilli asked whether there was a motion pursuant to Rule 2.2 of the Commission’s Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis for the crime of violence amendment.

Chair Saris called for a motion as suggested by Ms. Grilli. Hearing none, Ms. Grilli indicated that the proposal failed for lack of a motion.

Chair Saris addressed the topic of retroactivity as several commenters have asked the Commission to make any changes it makes in this area retroactive. She explained that when deciding whether to make an amendment retroactive the Commission considers several factors, including the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.

While the potential change in the applicable guideline range could be significant for individual defendants, Chair Saris observed that the amendment’s purpose is to address the litigation associated with the crime of violence definition in the career offender guideline.

Chair Saris added that, with respect to relevant facts, it would be extremely difficult to identify those offenders who might be retroactively impacted by the elimination of the residual clause. Specifically, two major data limitations would preclude staff from being able to complete a retroactivity analysis of this proposed amendment. The sentencing documentation does not consistently report, and Commission data does not include, information about which prong of the “crime of violence” definition at §4B1.1 was applied. Therefore, she noted, staff cannot identify cases in which the residual clause alone qualified an offender for the Career Offender provision.

Similarly, Chair Saris observed, sentencing documentation does not consistently report which criminal history events the courts used as predicates in order to apply the guideline. Furthermore, a predicate that was counted under the residual clause still may qualify under another prong of the crime of violence definition such as the elements clause.

Under these circumstances, Chair Saris continued, it is difficult, if not impossible, to ascertain the overall effect of the various amendments, and would likely make retroactive application complex and time intensive. She added that the very issue of retroactivity is already being
litigated. As a result, the Chair stated, the Commission has determined that a meaningful and complete retroactivity analysis is not possible.

Chair Saris then called on Ms. Grilli to inform the Commission on possible votes to publish proposed guideline amendments and issues for comment in the Federal Register for public comment. The Chair noted that three affirmative votes were needed to approve publication.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, is a miscellaneous amendment package which responds to recently enacted legislation and miscellaneous guideline issues. The proposed amendment has four parts. Part A of the proposed amendment responds to the act commonly referred to as the USA FREEDOM Act of 2015, Pub. L. No. 114–23 (June 2, 2015), which, among other things, set forth changes to statutes related to maritime navigation and provided new and expanded criminal offenses to implement certain provisions in international conventions relating to maritime and nuclear terrorism. The Act also added these new offenses to the list of offenses specifically enumerated at 18 USC § 2332b(g)(5) as federal crimes of terrorism.

The new offenses cover a broad range of conduct and Part A of the proposed amendment addresses these new offenses at section 2280a by referencing them in Appendix A (Statutory Index) to the following Chapter Two guidelines: §§2A1.1, 2A1.2; 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1; 2B1.1; 2B3.2; 2K1.3; 2K1.4; 2M5.2; 2M5.3; 2M6.1; 2Q1.1; 2Q1.2 2X1.1; 2X2.1; and 2X3.1.

In addition, the USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2332i that prohibits (i) the possession or production of radioactive material or a device with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment; and (ii) the use of a radioactive material or a device, or the use, damage, or interference with the operation of a nuclear facility that causes the release of radioactive material, radioactive contamination, or exposure to radiation with the intent (or knowledge that such act is likely) to cause death or serious bodily injury or substantial damage to property or the environment, or with the intent to compel a person, international organization or country to do or refrain from doing an act. Section 2332i also prohibits threats to commit any such acts. The penalties for violations of section 2332i are a fine for not more than $2,000,000 and imprisonment for any term of years or life.

Part A of the proposed amendment amends Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. § 2332i to §§2A6.1, 2K1.4, 2M2.1, 2M2.3, and 2M6.1.

Finally, Part A makes clerical changes to Application Note 1 to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction) to reflect the redesignation of a section in the United States Code by the USA FREEDOM Act.

Part A of the proposed amendment also sets forth two issues for comment.

114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208, 811, and 1632 of the Social Security Act. The three amended statutes are currently referenced in Appendix A (Statutory Index) of the Guidelines Manual to §2B1.1 (Theft, Property Destruction, and Fraud). The Act added new subdivisions criminalizing conspiracy to commit fraud for selected offense conduct already in the three statutes. For each of the three statutes, the new subdivision provides that whoever “conspires to commit any offense described in any of [the] paragraphs” enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

Part B amends Appendix A (Statutory Index) so that sections 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1. Part B of the proposed amendment also includes issues for comment.

Part C addresses violations of Section 1715 of title 18, United States Code which makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person and declared nonmailable (as prescribed by Postal Service regulations). For any violation of section 1715, the statutory maximum term of imprisonment is two years. The current Guidelines Manual does not provide a guideline reference in Appendix A for offenses under this section.

Part C of the proposed amendment amends Appendix A (Statutory Index) to reference offenses under section 1715 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). It also adds 18 U.S.C. § 1715 to subsection (a)(8) of §2K2.1, establishing a base offense level of 6 for such offenses.

Part C of the proposed amendment also includes an issue for comment regarding section 1715 offenses and whether other changes to the guidelines are appropriate to address these offenses.

Finally part D of the proposed amendment amends the Background Commentary to §2T6.1 (Failing to Collect or Truthfully Account for and Pay Over Tax) to delete a sentence relating to violations of 26 U.S.C. § 7202 that states “The offense is a felony that is infrequently prosecuted.”

Ms. Grilli advised the commissioners that a motion to publish the proposed amendment with a 60-day comment period, ending March 21, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.
At this point in the meeting, Vice Chair Breyer announced that he had to return to the trial he was conducting. Before leaving, the Vice Chair stated that he supported the publication of the remaining proposed amendments for public comment.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, concerned compassionate release. The proposed amendment contained two parts. Part A sets forth a detailed request for comment on whether any changes should be made to the Commission’s policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). Among other things, the issues for comment ask whether the Commission should amend the current policy statement describing what constitutes “extraordinary and compelling reasons” and, if so, how, whether the Commission should revise §1B1.13 to address the recommendations in the Department of Justice’s Office of Inspector General’s report on the Bureau of Prisons’ implementation of the compassionate release program provisions related to elderly inmates, and whether the Commission should further develop the policy statement at §1B1.13 to provide additional guidance or limitations regarding the circumstance in which sentences may be reduced as a result of a motion by the Director of the Bureau of Prisons.

Part B illustrates one possible set of changes to the policy statement at §1B1.13. The proposed amendment would revise the list of “extraordinary and compelling reasons” for compassionate release consideration in the Commentary to §1B1.13 to reflect the criteria set forth in the Bureau of Prisons’ program statement. The language used in this part parallels the language in the Bureau’s program statement.

Ms. Grilli advised the commissioners that a motion to publish the proposed amendment with a 60-day comment period, ending March 21, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, revises, clarifies, and rearranges the conditions of probation and supervised release. It is a result of the Commission’s multi-year review of federal sentencing practices relating to conditions of probation and supervised release. In general, the changes are intended to make the conditions more focused and precise as well as easier for defendants to understand and probation officers to enforce. For some conditions that do not have a mens rea standard, a “knowing” standard is inserted.

First, the proposed amendment amends the “mandatory” conditions set forth in subsection (a) of §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release). It inserts new language directing that, if there is a court-established payment schedule for making restitution or paying a special assessment, the defendant shall adhere to the schedule. This new language is
similar to paragraph (14) of the “standard” conditions; accordingly, paragraph (14) of the “standard” conditions is deleted, as described below.

Second, the proposed amendment amends the “standard” conditions set forth in subsection (c) of §§5B1.3 and 5D1.3. Paragraphs (1)-(3), (5)-(6), and (9)-(13) are revised, clarified, and rearranged into a new set of paragraphs (1) through (12). A new paragraph (13) is added, which provides that the defendant “must follow the instructions of the probation officer related to the conditions of supervision.”

Several provisions are moved from the “standard” conditions list to the “special” conditions list, or vice versa. Specifically, paragraph (1) of the “special” conditions list (relating to possession of a firearm or dangerous weapon) is moved to the “standard” conditions list. Paragraphs (4) and (7) of the “standard” conditions list (relating to support of dependents and child support, and alcohol use, respectively) are moved to the “special” conditions list. In addition, as mentioned above, paragraph (14) on the “standard” conditions list (relating to payment of special assessment) is incorporated into the “mandatory” conditions list. Finally, paragraph (8) of the “standard” conditions list (relating to frequenting places where controlled substances are trafficked) is deleted.

Third, the proposed amendment adds two new provisions to the “special” conditions set forth in subsection (d) of §§5B1.3 and 5D1.3. The first new provision, based on paragraph (7) of the “standard” conditions, would specify that the defendant must not use or possess alcohol. The second new provision, based on paragraph (4) of the “standard” conditions, would specify that, if the defendant has one or more dependents, the defendant must support his or her dependents; and if the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child, the defendant must make the payments and comply with the other terms of the order.

Issues for comment are also included.

Ms. Grilli advised the commissioners that a motion to publish the proposed amendment with a 60-day comment period, ending March 21, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit E, revises §2E3.1 (Gambling Offenses; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and to respond to two new offenses, relating to attending an animal fighting venture, established by section 12308 of the Agricultural Act of 2014.

Animal fighting ventures are prohibited by the Animal Welfare Act, 7 U.S.C. § 2156. Under that
statute, an “animal fighting venture” is an event that involves a fight between at least two animals for purposes of sport, wagering, or entertainment. Section 2156 prohibits a range of conduct relating to animal fighting ventures, and for any violation of section 2156, the statutory maximum term of imprisonment is 5 years.

However, two new types of animal fighting offenses were added by the Agricultural Act of 2014. They make it unlawful to knowingly—

- attend an animal fighting venture, or
- cause an individual under 16 to attend an animal fighting venture.

The statutory maximum is 3 years if the offense of conviction is causing an individual under 16 to attend an animal fighting venture, see 18 U.S.C. § 49(c), and 1 year if the offense of conviction is attending an animal fighting venture, see 18 U.S.C. § 49(b).

All offenses under section 2156 are referenced in Appendix A (Statutory Index) to §2E3.1 (Gambling Offenses; Animal Fighting Offenses).

First, the proposed amendment revises §2E3.1 to provide a base offense level of [14][16] if the offense involved an animal fighting venture.

Next, the proposed amendment responds to the two new offenses relating to attendance at an animal fighting venture. It establishes new base offense levels for such offenses. Specifically, a base offense level of [8][10] in §2E3.1 would apply if the defendant was convicted under section 2156(a)(2)(B) (causing an individual under 16 to attend an animal fighting venture). The class A misdemeanor at section 2156(a)(2)(A) (attending an animal fighting venture) would not be referenced in Appendix A to §2E3.1; it would receive a base offense level of 6 in §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

In addition, it revises the existing upward departure provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

Issues for comment are also included.

Ms. Grilli advised the commissioners that a motion to publish the proposed amendment with a 60-day comment period, ending March 21, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit F, addresses circuit conflicts and application issues that have arisen when applying the guidelines to child
pornography offenses. First, the proposed amendment responds to differences among the circuits in cases in which the offense involves minors who are unusually young and vulnerable (such as infants or toddlers). There are differences among the circuits over whether the vulnerable victim adjustment applies when the victim is extremely young, such as an infant or toddler, in light of the fact that the child pornography guideline includes age-related enhancements. The Ninth and Fifth Circuits have permitted simultaneous application of the under-12 enhancement and the vulnerable victim adjustment under certain circumstances. See, e.g., United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004); United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013).

The Fourth Circuit, in contrast, has indicated that the vulnerable victim adjustment may not be applied based solely on extreme youth or on factors that are for conditions that “necessarily are related to . . . age.” See United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The court concluded that the line drawn by the under-12 enhancement “implicitly preclude[s] courts from drawing additional lines below that point,” and “once the offense involves a child under twelve, any additional considerations based solely on age simply are not appropriate to the Guidelines calculation.” Id.

The proposed amendment generally adopts the approach of the Fifth and Ninth Circuits. It amends the Commentary in the child pornography guidelines to provide that application of the age enhancement does not preclude application of the vulnerable victim adjustment. Specifically, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, subsection (b) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim) applies, assuming the mens rea requirement of §3A1.1(b) is also met (i.e., the defendant knew or should have known of this vulnerability).

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancement for distribution at subsection (b)(3) in §2G2.2 ( Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic), which provides an enhancement ranging from 2 levels to 7 levels depending on specific factors.

The Fifth, Tenth, and Eleventh Circuits have each held that the 2-level distribution enhancement applies if the defendant used a file sharing program, regardless of whether he did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015). The Second, Fourth, and Fifth Circuits, in contrast, have held that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009). And other circuits appear to follow somewhat different approaches. The Eighth Circuit has stated that knowledge is required, but knowledge may be inferred from the fact that a file sharing program was used, absent “concrete evidence” of ignorance. See United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has stated in an unpublished opinion that there is a “presumption” that “users of file-sharing software understand others can access
their files.” See United States v. Conner, 521 Fed. App’x 493, 499 (6th Cir. 2013). The proposed amendment generally adopts the approach of the Second, Fourth, and Fifth Circuits. It amends §2G2.2(b)(3)(F) to provide that the 2-level enhancement requires “knowing” distribution by the defendant.

As a conforming change, the proposed amendment also revises the 2-level distribution enhancement at subsection (b)(3) of §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) to provide that the enhancement requires that the defendant knowingly distributed.

The 5-level distribution enhancement at §2G2.2(b)(3)(B) applies if the offense involved distribution “for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.” The Commentary provides, as one example, that in a case involving the bartering of child pornographic material, the “thing of value” is the material received in exchange.

The circuits have taken different approaches to this issue. The Fifth Circuit has indicated that when the defendant knowingly uses file sharing software, the requirements for the 5-level enhancement are generally satisfied. See United States v. Groce, 784 F.3d 291, 294 (5th Cir. 2015). The Fourth Circuit appears to have a higher standard. It has required the government to show that the defendant (1) “knowingly made child pornography in his possession available to others by some means”; and (2) did so “for the specific purpose of obtaining something of valuable consideration, such as more pornography.” See United States v. McManus, 734 F.3d 315, 319 (4th Cir. 2013). The proposed amendment revises §2G2.2(b)(3)(B) to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. Specifically, this means that the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

Ms. Grilli advised the commissioners that a motion to publish the proposed amendment with a 60-day comment period, ending March 21, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Ms. Grilli stated that the last proposed amendment, attached hereto as Exhibit G, is a result of the Commission’s multi-year study of the guidelines applicable to immigration offenses and related criminal history rules. The Commission is publishing this proposed amendment to inform the Commission’s consideration of these issues.

The proposed amendment contains two parts. The Commission is considering whether to
promulgate any one or both of these parts, as they are not necessarily mutually exclusive. Part A of the proposed amendment revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The Commission has received comment expressing concern that the guideline provides for inadequate sentences for alien smugglers, particularly those who smuggle unaccompanied minors.

First, the proposed amendment revises the alternative base offense levels at §2L1.1(a). Two options are provided. Option 1 would raise the base offense level at subsection (a)(3) from 12 to [16]. Option 2 adds an alternative base offense level of [16] if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization.

Second, the proposed amendment addresses offenses involving unaccompanied minors in alien smuggling offenses. The proposed amendment would amend §2L1.1 to address the issue of unaccompanied minors. The proposed amendment first amends §2L1.1(b)(4) to make the enhancement offense-based (with a mens rea requirement) as opposed to exclusively defendant-based. The proposed amendment would also amend the commentary to §2L1.1 to clarify that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to §1B1.1 (Application Instructions), which states that “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

Finally, the proposed amendment would revise the definition of “minor” for purposes of the “unaccompanied minor” enhancement at §2L1.1(b)(4) and change it from minors under the age of 16 to minors under the age of [18]. The proposed amendment also brackets the possibility of including a new departure provision in the commentary to §2L1.1 for cases in which the offense involved the smuggling, transporting, or harboring of six or more unaccompanied minors.

Part B is also informed by the Commission’s recent report on offenders sentenced under §2L1.2 (Unlawfully Entering or Remaining in the United States).

Part B of the proposed amendment amends §2L1.2 to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, post-reentry convictions and a corresponding reduction in the enhancements for past, pre-deportation convictions. The enhancements for these convictions would be based on the sentence imposed rather than on the type of offense (e.g., “crime of violence”) — in other words, the proposed amendment would eliminate the use of the “categorical approach” for predicate felony convictions in §2L1.2. Also, the proposed amendment accounts for prior convictions for illegal reentry separately from other types of convictions.

First, the proposed amendment amends subsection (a) of §2L1.2 to provide alternative base offense levels of [14] and [12] if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. For defendants without such prior convictions, the proposed amendment increases the otherwise applicable base offense level from 8 to [10]. The alternative base offense levels at subsection (a) apply without regard to whether the prior conviction receives criminal history points.
Second, the proposed amendment changes how subsection (b)(1) accounts for pre-deportation convictions — basing them not on the type of offense (e.g., “crime of violence”) but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivision (A) through (C) at subsection (b)(1). Specifically, if the defendant had a felony conviction and the sentence imposed was [24] months or more, an enhancement of [8] levels would apply. If the defendant had a felony conviction and the sentence imposed was at least [12] months but less than [24] months, an enhancement of [6] levels would apply. If the defendant had a felony conviction and the sentence imposed was less than [12] months, an enhancement of [4] levels would apply. Finally, an enhancement of [2] levels would apply if the defendant had three or more convictions for misdemeanors involving drugs or crimes against the person. If more than one of these enhancements apply, the court is instructed to apply the greatest.

Third, the proposed amendment would permit prior convictions to be considered under subsection (b)(1) only if they receive criminal history points under Chapter Four.

To account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(2) to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more felony offenses after the defendant’s first deportation or first order of removal. The structure of the new subsection (b)(2) parallels the proposed changes to subsection (b)(1), both in the sentence length required and the level of enhancement to be applied. As with subsection (b)(1), prior convictions would be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Finally, the proposed amendment provides a new departure provision for cases in which the defendant was previously deported on multiple occasions not reflected in prior convictions under 8 U.S.C. § 1253, § 1325(a), or § 1326. It also revises the departure provision based on seriousness of a prior conviction to bring it more into parallel with §4A1.3 (Adequacy of Criminal History Category) and provide examples related to: (1) cases in which serious offenses do not qualify for an adjustment under subsection (b)(1) and the new subsection (b)(2) because they did not receive criminal history points; and (2) for cases in which a defendant committed one or more felony offenses but no conviction resulted from the commission of such offense or offenses. The proposed amendment also brackets the possibility of deleting the departure based on time served in state custody.

In addition, the proposed amendment would make conforming changes to the application notes, including the consolidation of all guideline definitions in one place.

Issues for comment are also included.

Ms. Grilli advised the commissioners that a motion to publish the proposed amendment with a 60-day comment period, ending March 21, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a
motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris addressed the Commission’s proposed amendments. She noted that the Commission is publishing a proposed amendment on immigration-related offenses. The Commission has received comment expressing concern that the guidelines provide for inadequate sentences for alien smugglers, including those who bring in unaccompanied minors. The Chair announced that, as soon as possible, the Commission will include a data presentation on the Commission’s website to inform public common on this proposed amendment. For those interested in obtaining this information, please subscribe to our email list or Twitter account to receive a notification when this information is posted.

Chair Saris recounted that the Commission is also publishing a series of proposed amendments. One of the proposed amendments revises the guideline pertaining to animal fighting that would allow for higher penalties for animal fighting offenses. The amendment responds to the enactment of two new crimes relating to attending an animal fighting venture, particularly in cases where a child under 16 is brought to one of these events. The proposed amendment also revises the existing upward departure provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

The Commission’s proposed amendment for public comment on supervised release is a result of a collaboration with the Criminal Law Committee which has studied the current conditions in light of recent court precedent as well as the Commission’s own multi-year review of federal sentencing practices relating to conditions of probation and supervised release. In general, Chair Saris explained, the Commission seeks to make the conditions more tailored to a defendant’s needs and problems as well as easier for defendants to understand and probation officers to enforce.

Each year, the Commission considers resolving circuit court splits emerging from conflicting interpretations of the guidelines by federal courts. This year, the Commission has put forward an amendment to address circuit splits dealing with child pornography offenses.

Chair Saris noted that one of the issues that typically arises under both the child pornography production guideline and the child pornography distribution guideline is when the offense involves victims who are unusually young and vulnerable. Another issue typically arises when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses.

The Commission is also publishing a proposed amendment on compassionate release that seeks further comment on whether changes should be made to the Commission’s policy statement found in the guidelines, and if so, how. Chair Saris explained that the proposed amendment contemplates changes to the Commission’s policy statement that would revise the list of extraordinary and compelling reasons for an offender to be considered for compassionate release. Lastly, as always, the Commission is publishing a proposed amendment to respond to recently
enacted legislation and other guideline issues where an update was both appropriate and timely.

Chair Saris stressed, as she has mentioned before, the need for the Commission to work to make the guidelines more effective and more efficient. She expressed the Commission’s collective belief that the amendments proposed today will do so.

Chair Saris concluded her remarks on the proposed amendments by reminding the audience that the Commission will continue to provide updates about further opportunities for public comment and future public meetings and hearings through its website and Twitter account.

Chair Saris also reminded the public that the Commission will hold its next public hearings on February 17th and March 16th.

Chair Saris concluded by again thanking the public for its interest in these important issues, and how the Commission looked forward as always to the comments and feedback it receives.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Pryor made a motion to adjourn, with Commissioner Barkow seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:50 p.m.
PROPOSED AMENDMENT: “CRIME OF VIOLENCE” AND RELATED ISSUES

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). See United States Sentencing Commission, “Notice of Final Priorities,” 79 FR 49378 (Aug. 20, 2014); “Proposed Priorities for Amendment Cycle,” 80 FR 36594 (June 25, 2015).

The proposed amendment is also informed by the Supreme Court’s recent decision in Johnson v. United States, 576 U.S. __, 135 S. Ct. 2551 (2015), relating to the statutory definition of “violent felony” in 18 U.S.C. § 924(e) (commonly known as the “Armed Career Criminal Act”), which held that an increased sentence under the “residual clause” of that definition violates due process. Under the “residual clause,” as the Court explained in Johnson, a crime qualifies as a “violent felony” if it “otherwise involves conduct that presents a serious potential risk of physical injury to another.” See 18 U.S.C. § 924(e)(2)(B)(ii) [emphasis added]. This clause, the Court held in Johnson, is unconstitutionally vague.

The proposed amendment amends the definition of “crime of violence” in §4B1.2(a)(2) in three ways. First, it amends §4B1.2(a)(2) to delete the residual clause.

Second, it amends §4B1.2(a)(2) to revise the list of enumerated offenses and move the list of enumerated offenses from the commentary to the guideline. The offenses on the revised list are murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or an explosive material as defined in 18 U.S.C. § 841(c). Conforming changes to the Commentary are also made.

Third, it amends the Commentary to add definitions for the enumerated offenses of forcible sex offense and extortion. As defined, “forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

Finally, the proposed amendment includes two departure provisions. First, it provides an upward departure provision in §4B1.2 to address certain cases in which the instant offense or a prior felony conviction was a burglary involving violence. Second, it provides a downward departure provision in §4B1.1 for cases in which one or both of the defendant’s “two prior felony convictions” is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense.

Proposed Amendment:

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, burglary of a dwelling, arson, or extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c) involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. For purposes of this guideline—

   “Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

   “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

   “Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

   “Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.
“Crime of violence” does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a “crime of violence.”

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.

3. The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.
4. **Upward Departure for Burglary Involving Violence.**—There may be cases in which a burglary involves violence, but does not qualify as a “crime of violence” as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a “crime of violence.” In such a case, an upward departure may be appropriate.

* * *

§4B1.1. **Career Offender**

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender’s criminal history category in every case under this subsection shall be Category VI.

<table>
<thead>
<tr>
<th>Offense Statutory Maximum</th>
<th>Offense Level*</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Life</td>
<td>37</td>
</tr>
<tr>
<td>(2) 25 years or more</td>
<td>34</td>
</tr>
<tr>
<td>(3) 20 years or more, but less than 25 years</td>
<td>32</td>
</tr>
<tr>
<td>(4) 15 years or more, but less than 20 years</td>
<td>29</td>
</tr>
<tr>
<td>(5) 10 years or more, but less than 15 years</td>
<td>24</td>
</tr>
<tr>
<td>(6) 5 years or more, but less than 10 years</td>
<td>17</td>
</tr>
<tr>
<td>(7) More than 1 year, but less than 5 years</td>
<td>12.</td>
</tr>
</tbody>
</table>

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and
(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

<table>
<thead>
<tr>
<th>§3E1.1 Reduction</th>
<th>Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No reduction</td>
<td>360-life</td>
</tr>
<tr>
<td>2-level reduction</td>
<td>292-365</td>
</tr>
<tr>
<td>3-level reduction</td>
<td>262-327</td>
</tr>
</tbody>
</table>

**Commentary**

_Application Notes:

1. “Crime of violence,” “controlled substance offense,” and “two prior felony convictions” are defined in §4B1.2.

2. “Offense Statutory Maximum,” for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant’s prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the “Offense Statutory Maximum” for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.

3. Application of Subsection (c).—

(A) In General.—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).

(B) Subsection (c)(2).—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.

(C) “Otherwise Applicable Guideline Range”.—For purposes of subsection (c)(2)(A), “otherwise applicable guideline range” for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:

(i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender; the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).
(ii) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).

(D) Imposition of Consecutive Term of Imprisonment.—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).

(E) Example.—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI. The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with §5G1.2(e).

4. Departure Provision for State Misdemeanors.—In a case in which one or both of the defendant’s “two prior felony convictions” is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain “career” offenders receive a sentence of imprisonment “at or near the maximum term authorized.” Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .” 28 U.S.C. § 991(b)(1)(B). The Commission’s refinement of this definition over time is consistent with Congress’s choice of a directive to the Commission rather than a mandatory minimum sentencing statute (“The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee’s view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers.” S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E.1.1 (Acceptance of Responsibility) does not apply), offense
level 35 (assuming a 2-level reduction under §3E.1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).

* * *

* * *
Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues.

A. USA FREEDOM Act of 2015

Part A of the proposed amendment responds to the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. 114–23 (June 2, 2015), which, among other things, set forth changes to statutes related to maritime navigation and provided new and expanded criminal offenses to implement certain provisions in international conventions relating to maritime and nuclear terrorism. The Act also added these new offenses to the list of offenses specifically enumerated at 18 USC § 2332b(g)(5) as federal crimes of terrorism.

The USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction) to prohibit certain terrorism acts and threats against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The prohibited acts include (i) the use against or on a ship, or discharge from a ship, of any explosive or radioactive material, biological, chemical, or nuclear weapon or other nuclear explosive device; (ii) the discharge from a ship of oil, liquefied natural gas, or other hazardous or noxious substance; (iii) any use of a ship that causes death or serious injury or damage; and (iv) the transportation aboard a ship of any explosive or radioactive material. Section 2280a also prohibits the transportation on board a ship of any biological, chemical or nuclear weapon or other nuclear explosive device, and any components, delivery means, or materials for a nuclear weapon or other nuclear explosive device, under specified circumstances, but this conduct does not contain a mens rea requirement. Further, section 2280a prohibits the transportation onboard a ship of a person who committed an offense under section 2280 or 2280a, with the intent of assisting that person evade criminal prosecution. The penalties for violations of section 2280a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2280a also prohibits threats to commit the offenses not related to transportation on board a ship and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment addresses these new offenses at section 2280a by referencing them in Appendix A (Statutory Index) to the following Chapter Two guidelines: §§2A1.1 (First Degree Murder); 2A1.2 (Second Degree Murder); 2A1.3 (Voluntary Manslaughter); 2A1.4 (Involuntary Manslaughter); 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault), 2A2.3 (Assault); 2A6.1 (Threatening or Harassing Communications); 2B1.1 (Fraud); 2B3.2 (Extortion); 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials); 2K1.4 (Arson); 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License); 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants); 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

The USA FREEDOM Act also created a new criminal offense at 18 U.S.C. § 2281a (Additional offenses against maritime fixed platforms) to prohibit certain maritime terrorism acts that occur on a fixed
platform or to a fixed platform committed in a manner that may cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. Section 2281a prohibits specific conduct, including (i) the use against or discharge from a fixed platform, of any explosive or radioactive material, or biological, chemical, or nuclear weapon and (ii) the discharge from a fixed platform of oil, liquefied natural gas, or another hazardous or noxious substance. The penalties for violations of section 2281a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2281a also prohibits threats to commit the offenses related to acts on or against fixed platforms and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2281a are referenced to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, and 2X1.1.

In addition, the USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2332i that prohibits (i) the possession or production of radioactive material or a device with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment; and (ii) the use of a radioactive material or a device, or the use, damage, or interference with the operation of a nuclear facility that causes the release of radioactive material, radioactive contamination, or exposure to radiation with the intent (or knowledge that such act is likely) to cause death or serious bodily injury or substantial damage to property or the environment, or with the intent to compel a person, international organization or country to do or refrain from doing an act. Section 2332i also prohibits threats to commit any such acts. The penalties for violations of section 2332i are a fine for not more than $2,000,000 and imprisonment for any term of years or life.

Part A of the proposed amendment amends Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. § 2332i to §§2A6.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), and 2M6.1.

Finally, Part A makes clerical changes to Application Note 1 to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction) to reflect the redesignation of a section in the United States Code by the USA FREEDOM Act.

Part A of the proposed amendment also sets forth two issues for comment.

B. Bipartisan Budget Act of 2015

Part B of the proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. No. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively). The three amended statutes are currently referenced in Appendix A (Statutory Index) of the Guidelines Manual to §2B1.1 (Theft, Property Destruction, and Fraud). The Act added new subdivisions criminalizing conspiracy to commit fraud for selected offense conduct already in the three statutes. For each of the three statutes, the new subdivision provides that whoever
“conspires to commit any offense described in any of [the] paragraphs” enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

Part B amends Appendix A (Statutory Index) so that sections 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

Part B of the proposed amendment also includes issues for comment.

C. 18 U.S.C. § 1715 (Firearms as Nonmailable Items)

Section 1715 of title 18, United States Code (Firearms as nonmailable items), makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person and declared nonmailable (as prescribed by Postal Service regulations). For any violation of section 1715, the statutory maximum term of imprisonment is two years. The current Guidelines Manual does not provide a guideline reference in Appendix A for offenses under section 1715.

The Department of Justice in its annual letter to the Commission has proposed that section 1715 offenses should be assigned a guideline reference, base offense level, and appropriate specific offense characteristics. The Department indicates that in recent years the United States Attorney's Office for the Virgin Islands has brought several cases charging section 1715, where firearms were illegally brought onto the islands by simply mailing them from mainland United States.

Part C of the proposed amendment amends Appendix A (Statutory Index) to reference offenses under section 1715 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). It also adds 18 U.S.C. § 1715 to subsection (a)(8) of §2K2.1, establishing a base offense level of 6 for such offenses.

Part C of the proposed amendment also includes an issue for comment regarding section 1715 offenses and whether other changes to the guidelines are appropriate to address these offenses.

D. Technical Amendment to §2T1.6

The Internal Revenue Code (Title 26, United States Code) requires employers to withhold from their employees' paychecks money representing the employees' personal income and Social Security taxes. The Code directs the employer to collect taxes as wages are paid, but only requires a periodic payment of such taxes to the IRS. If an employer willfully fails to collect, truthfully account for, or pay over such taxes, 26 U.S.C. § 7202 provides both civil and criminal remedies. Section 7202 provides as criminal penalty a term of imprisonment with a statutory maximum of five years.

Section 7202 is referenced in Appendix A (Statutory Index) to §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax). The Background commentary to §2T1.6 states that “[t]he offense is a felony that is infrequently prosecuted.” The Department of Justice in its annual letter to the Commission has proposed that the “infrequently prosecuted” statement should be deleted. The Department points out that while that statement may have been accurate when the relevant commentary was originally written (in 1987), the number of prosecutions under section 7202 have since increased substantially. The use of §2T1.6 increased from three cases in 2002 to 46 cases in 2014. See United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2002), at http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/guideline-application-frequencies-2002; United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation

Part D of the proposed amendment amends the Background Commentary to §2T6.1 to delete the sentence that states “The offense is a felony that is infrequently prosecuted.”

Proposed Amendment:

(A) USA FREEDOM Act of 2015

§2M6.1. Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

“Nuclear byproduct material” has the meaning given that term in 18 U.S.C. § 831(g)(2).

“Nuclear material” has the meaning given that term in 18 U.S.C. § 831(g)(1).

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 2280 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2A6.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1

18 U.S.C. § 2280a 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.3, 2K1.4, 2M5.2, 2M5.3, 2M6.1, 2Q1.1, 2Q1.2, 2X1.1, 2X2.1, 2X3.1

Issues for Comment:

1. The USA FREEDOM Act was enacted as a reauthorization of the USA PATRIOT Act, Pub. L. 107–56 (October 26, 2001), relating to the collection of telephone metadata by various national security agencies. Title VII of the Act also amended four existing criminal statutes and created three new criminal statutes to implement certain provisions in international conventions relating to maritime and nuclear terrorism. One of the existing criminal statutes amended by the USA FREEDOM Act was 18 U.S.C. § 2280. Although the Act did not amend the substantive offense conduct in section 2280, it added 19 new definitions and terms to the statute and made them applicable to other criminal statutes, including the new offenses created by the Act.

The Commission seeks comment on whether the guidelines should be amended to address the changes made by the USA FREEDOM Act. Are the existing provisions in the guidelines adequate to address the changes to existing criminal statutes and the new offenses created by the Act? If not, how should the Commission amend the guidelines to address them?

2. The proposed amendment would reference the offenses under 18 U.S.C. § 2280a, 18 U.S.C. § 2281a, and 18 U.S.C. § 2332i to various guidelines. The Commission invites comment on offenses under these new statutes, including in particular the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses. Do the guidelines covered by the proposed amendment adequately account for these offenses? If not, what revisions to the guidelines would be appropriate to account for these offenses? In particular, should the Commission provide one or more new alternative base offense levels, specific offense characteristics, or departure provisions in one or more of these guidelines to better account for these offenses? If so, what should the Commission provide?
In addition, the Commission seeks comment on whether the Commission should reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment. Alternatively, should the Commission defer action in response to these new offenses this amendment cycle, undertake a broader review of the guidelines pertaining to offenses involving terrorism and weapons of mass destruction, and include responding to the new offenses as part of that broader review?

(B) Bipartisan Budget Act of 2015

APPENDIX A - STATUTORY INDEX

* * *

<table>
<thead>
<tr>
<th>Statute</th>
<th>Amendment</th>
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* * *

Issues for Comment:

1. Part B of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses?

2. In addition to the amendments to the criminal statutes described above, the Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant social security programs. The Act included a provision in all three statutes identifying such persons as:
a person who receives a fee or other income for services performed in connection with
any determination with respect to benefits under this title (including a claimant
representative, translator, or current or former employee of the Social Security
Administration), or who is a physician or other health care provider who submits, or
causes the submission of, medical or other evidence in connection with any such
determination . . . .

In light of this new provision, a person who meets this criteria and is convicted of a fraud offense
under one of the three amended statutes may be imprisoned for not more than ten years, double the
otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all
of the fraudulent conduct in subsection (a) of the three statutes.

The Commission seeks comment on whether the guidelines should be amended to address cases
involving defendants convicted of a fraud offense under one of the three amended statutes and who
meet this new criteria set forth by the Bipartisan Budget Act of 2015. Are the existing provisions in
the guidelines, such as the provisions at §2B1.1 and the Chapter Three adjustment at §3B1.3
(Abuse of Position of Trust or Use of Special Skill), adequate to address these cases? If not, how
should the Commission amend the guidelines to address them?

(C) 18 U.S.C. § 1715 (Firearms as Non-mailable Items)

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition;
Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of
accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C.
§ 5845(a); and (B) the defendant committed any part of the instant offense
subsequent to sustaining at least two felony convictions of either a crime of
violence or a controlled substance offense;

(2) 24, if the defendant committed any part of the instant offense subsequent to
sustaining at least two felony convictions of either a crime of violence or a
controlled substance offense;

(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of
accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C.
§ 5845(a); and (B) the defendant committed any part of the instant offense
subsequent to sustaining one felony conviction of either a crime of violence or a
controlled substance offense;

(4) 20, if—

(A) the defendant committed any part of the instant offense subsequent to
sustaining one felony conviction of either a crime of violence or a
controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of
accepting a large capacity magazine; or (II) firearm that is described in 26
U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) 12, except as provided below; or

(8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or § 1715.

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

<table>
<thead>
<tr>
<th>Number of Firearms</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) 3-7</td>
<td>add 2</td>
</tr>
<tr>
<td>(B) 8-24</td>
<td>add 4</td>
</tr>
<tr>
<td>(C) 25-99</td>
<td>add 6</td>
</tr>
<tr>
<td>(D) 100-199</td>
<td>add 8</td>
</tr>
<tr>
<td>(E) 200 or more</td>
<td>add 10</td>
</tr>
</tbody>
</table>

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by 15 levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by 2 levels.

(4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level 29, except if subsection (b)(3)(A) applies.
(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 1715, 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. Definitions.— For purposes of this guideline:

“Ammunition” has the meaning given that term in 18 U.S.C. § 921(a)(17)(A).
“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

“Crime of violence” has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

“Destructive device” has the meaning given that term in 26 U.S.C. § 5845(f).

“Felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

“Firearm” has the meaning given that term in 18 U.S.C. § 921(a)(3).

2. **Semiautomatic Firearm That Is Capable of Accepting a Large Capacity Magazine.**—For purposes of subsections (a)(1), (a)(3), and (a)(4), a “semiautomatic firearm that is capable of accepting a large capacity magazine” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition.

3. **Definition of “Prohibited Person.”**—For purposes of subsections (a)(4)(B) and (a)(6), “prohibited person” means any person described in 18 U.S.C. § 922(g) or § 922(n).

4. **Application of Subsection (a)(7).**—Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

5. **Application of Subsection (b)(1).**—For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

6. **Application of Subsection (b)(2).**—Under subsection (b)(2), “lawful sporting purposes or collection” as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant’s criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.
7. **Destructive Devices.**—A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

Offenses involving such devices cover a wide range of offense conduct and involve different degrees of risk to the public welfare depending on the type of destructive device involved and the location or manner in which that destructive device was possessed or transported. For example, a pipe bomb in a populated train station creates a substantially greater risk to the public welfare, and a substantially greater risk of death or serious bodily injury, than an incendiary device in an isolated area. In a case in which the cumulative result of the increased base offense level and the enhancement under subsection (b)(3) does not adequately capture the seriousness of the offense because of the type of destructive device involved, the risk to the public welfare, or the risk of death or serious bodily injury that the destructive device created, an upward departure may be warranted. See also §§5K2.1 (Death), 5K2.2 (Physical Injury), and 5K2.14 (Public Welfare).

8. **Application of Subsection (b)(4).**—

(A) Interaction with Subsection (a)(7).—If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply subsection (b)(4)(B).

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. § 922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the enhancement in subsection (b)(4)(A). This is because the base offense level takes into account that the firearm had an altered or obliterated serial number. However, if the offense involved a stolen firearm or stolen ammunition, apply subsection (b)(4)(B).

(B) Knowledge or Reason to Believe.—Subsection (b)(4) applies regardless of whether the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

9. **Application of Subsection (b)(7).**— Under subsection (b)(7), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

10. **Prior Felony Convictions.**—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2).
Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

11. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following circumstances:  
(A) the number of firearms substantially exceeded 200;  
(B) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable (“plastic”) firearms (defined at 18 U.S.C. § 922(p));  
(C) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or  
(D) the offense posed a substantial risk of death or bodily injury to multiple individuals (see Application Note 7).

12. **Armed Career Criminal.**—A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal.  See §4B1.4.

13. **Application of Subsection (b)(5).**—

(A) **In General.**—Subsection (b)(5) applies, regardless of whether anything of value was exchanged, if the defendant—

(i) transported, transferred, or otherwise disposed of two or more firearms to another individual, or received two or more firearms with the intent to transport, transfer, or otherwise dispose of firearms to another individual; and

(ii) knew or had reason to believe that such conduct would result in the transport, transfer, or disposal of a firearm to an individual—

(I) whose possession or receipt of the firearm would be unlawful; or

(II) who intended to use or dispose of the firearm unlawfully.

(B) **Definitions.**—For purposes of this subsection:

“Individual whose possession or receipt of the firearm would be unlawful” means an individual who (i) has a prior conviction for a crime of violence, a controlled substance offense, or a misdemeanor crime of domestic violence; or (ii) at the time of the offense was under a criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. “Crime of violence” and “controlled substance offense” have the meaning given those terms in §4B1.2 (Definitions of Terms Used in Section 4B1.1). “Misdemeanor crime of domestic violence” has the meaning given that term in 18 U.S.C. § 921(a)(33)(A).

The term “defendant”, consistent with §1B1.3 (Relevant Conduct), limits the accountability of the defendant to the defendant’s own conduct and conduct that the defendant aided or abetted, counseled, commanded, induced, procured, or willfully caused.

(C) **Upward Departure Provision.**—If the defendant trafficked substantially more than 25 firearms, an upward departure may be warranted.

(D) **Interaction with Other Subsections.**—In a case in which three or more firearms were both possessed and trafficked, apply both subsections (b)(1) and (b)(5). If the defendant used or
transferred one of such firearms in connection with another felony offense (i.e., an offense other than a firearms possession or trafficking offense) an enhancement under subsection (b)(6)(B) also would apply.

14. Application of Subsections (b)(6)(B) and (c)(1) —

(A) In General.—Subsections (b)(6)(B) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively. However, subsection (c)(1) contains the additional requirement that the firearm or ammunition be cited in the offense of conviction.

(B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6)(B) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6)(B) and, if the firearm was cited in the offense of conviction, (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.

(C) Definitions.—

“Another felony offense”, for purposes of subsection (b)(6)(B), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.

“Another offense”, for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.

(D) Upward Departure Provision.—In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

(E) Relationship Between the Instant Offense and the Other Offense.—In determining whether subsections (b)(6)(B) and (c)(1) apply, the court must consider the relationship between the instant offense and the other offense, consistent with relevant conduct principles. See §1B1.3(a)(1)–(4) and accompanying commentary.

In determining whether subsection (c)(1) applies, the court must also consider whether the firearm used in the other offense was a firearm cited in the offense of conviction.

For example:

(i) Firearm Cited in the Offense of Conviction. Defendant A’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant A used the shotgun in connection with a robbery. Ordinarily, under these circumstances, subsection (b)(6)(B) applies, and the cross reference in subsection (c)(1) also applies if it results in a greater offense level.
Ordinarily, the unlawful possession of the shotgun on February 10 will be “part of the same course of conduct or common scheme or plan” as the unlawful possession of the same shotgun on October 15. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3). The use of the shotgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsections (b)(6)(B) and (c)(1). See §1B1.3(a)(4) (“any other information specified in the applicable guideline”).

(ii) Firearm Not Cited in the Offense of Conviction. Defendant B’s offense of conviction is for unlawfully possessing a shotgun on October 15. The court determines that, on the preceding February 10, Defendant B unlawfully possessed a handgun (not cited in the offense of conviction) and used the handgun in connection with a robbery.

Subsection (b)(6)(B). In determining whether subsection (b)(6)(B) applies, the threshold question for the court is whether the two unlawful possession offenses (the shotgun on October 15 and the handgun on February 10) were “part of the same course of conduct or common scheme or plan”. See §1B1.3(a)(2) and accompanying commentary (including, in particular, the factors discussed in Application Note 5(B) to §1B1.3).

If they were, then the handgun possession offense is relevant conduct to the shotgun possession offense, and the use of the handgun “in connection with” the robbery is relevant conduct because it is a factor specified in subsection (b)(6)(B). See §1B1.3(a)(4) (“any other information specified in the applicable guideline”). Accordingly, subsection (b)(6)(B) applies.

On the other hand, if the court determines that the two unlawful possession offenses were not “part of the same course of conduct or common scheme or plan,” then the handgun possession offense is not relevant conduct to the shotgun possession offense and subsection (b)(6)(B) does not apply.

Subsection (c)(1). Under these circumstances, the cross reference in subsection (c)(1) does not apply, because the handgun was not cited in the offense of conviction.

15. Certain Convictions Under 18 U.S.C. §§ 922(a)(6), 922(d), and 924(a)(1)(A).—In a case in which the defendant is convicted under 18 U.S.C. §§ 922(a)(6), 922(d), or 924(a)(1)(A), a downward departure may be warranted if (A) none of the enhancements in subsection (b) apply, (B) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense, and (C) the defendant received no monetary compensation from the offense.

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1711 2B1.1
18 U.S.C. § 1712 2B1.1
Issue for Comment:

1. Part C of the proposed amendment would reference offenses under 18 U.S.C. § 1715 to §2K2.1. The Commission invites comment on offenses under section 1715, including in particular the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses. What guideline or guidelines are appropriate for these offenses? Does §2K2.1 adequately account for these offenses? To the extent the Commission does provide a reference to one or more guidelines, what revisions, if any, to those guidelines would be appropriate to account for offenses under section 1715?

(D) Technical Amendment to §2T1.6

§2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax

(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.

(b) Cross Reference

(1) Where the offense involved embezzlement by withholding tax from an employee’s earnings and willfully failing to account to the employee for it, apply §2B1.1 (Theft, Property Destruction, and Fraud) if the resulting offense level is greater than that determined above.

Commentary


Application Note:

1. In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. Subsection (b)(1) addresses such cases.

Background: The offense is a felony that is infrequently prosecuted. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines.
PROPOSED AMENDMENT: COMPASSIONATE RELEASE

In August 2015, the Commission indicated that one of its policy priorities would be “possible consideration of amending the policy statement pertaining to ‘compassionate release,’ §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons).” See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015). The Commission is publishing this proposed amendment to inform the Commission’s consideration of the issues related to this policy priority.

The proposed amendment contains two parts. Part A sets forth a detailed request for comment on whether any changes should be made to the Commission’s policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). Part B illustrates one possible set of changes to the policy statement at §1B1.13.

(A) Request for Public Comment on Whether Any Changes Should Be Made to the Commission’s Policy Statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons)

Issue for Comment:

1. Statutory Provisions Related to Compassionate Release. Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant in certain circumstances, i.e., if “extraordinary and compelling reasons” warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3582(c)(1); see also 28 U.S.C. § 994(t) (stating that the Commission, in promulgating any such policy statements, “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples”).

Policy Statement at §1B1.13. The Commission’s policy statement, §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), provides that “extraordinary and compelling reasons” exist if (1) the defendant is suffering from a terminal illness; (2) the defendant is suffering from certain permanent physical or medical conditions, or experiencing deteriorating physical or mental health because of the aging process; or (3) the defendant has a minor child and the defendant’s only family member capable of caring for the child has died or is incapacitated. See §1B1.13, comment. (n.1(A)(i)–(iii)). In addition, the policy statement provides that extraordinary and compelling reasons exist if, as determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described above. See §1B1.13, comment. (n.1(A)(iv)). The policy statement was last amended in 2007 to provide the current criteria to be applied and a list of the specific circumstances which constitute “extraordinary and compelling reasons” for compassionate release consideration.

Bureau of Prisons Program Statement on Compassionate Release. On August 12, 2013, the Bureau of Prisons issued a new program statement, 5050.49, that changes how the Bureau implements section 3582(c)(1)(A). Among other things, the new program statement expands and details the range of circumstances that the Bureau may consider “extraordinary and compelling reasons” warranting such a reduction. Under the program statement, a sentence reduction may be based on the defendant’s medical circumstances (e.g., a terminal or debilitating medical condition; see 5050.49(3)(a)–(b)) or on certain non-medical circumstances (e.g., an elderly defendant, the death...
or incapacitation of the family member caregiver, or the incapacitation of the defendant’s spouse or registered partner; see 5050.49(4),(5),(6)).

Report of the Department of Justice’s Office of the Inspector General. In May 2015, the Department of Justice’s Office of the Inspector General (OIG) released a report on the Bureau of Prisons’ implementation of the compassionate release program provisions related to elderly inmates. See U.S. Department of Justice, Office of the Inspector General, The Impact of the Aging Inmate Population on the Federal Bureau of Prisons, E-15-05 (May 2015), available at https://oig.justice.gov/reports/2015/e1505.pdf. The report found that while aging inmates (age 50 years or older) make up a disproportionate share of the inmate population, are more costly to incarcerate (primarily due to medical needs), engage in less misconduct while in prison, and have a lower rate of re-arrest once released than their younger counterparts, “BOP policies limit the number of aging inmates who can be considered for early release and, as a result, few are actually released early.” In addition, the report found that the eligibility requirements for both medical and non-medical provisions as applied to inmates 65 years or older are “unclear” and “confusing.”

In light of its review, the OIG recommended that the Bureau of Prisons should consider revising its compassionate release program to facilitate the release of appropriate elderly inmates. The report provided the following specific recommendations, among others: (1) revising the inmate age provisions to define an aging inmate as age 50 or above; and (2) revising the time-served provision for those inmates 65 and older without medical conditions to remove the requirement that they serve 10 years, and require only that they serve 75 percent of their sentence. In April 2015, the Bureau of Prisons responded to a draft of the OIG report and concurred with each of the recommendations made by the OIG.

Issue for Comment. The Commission seeks comment whether any changes should be made to the Commission’s policy statement at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). Should the Commission amend the current policy statement describing what constitutes “extraordinary and compelling reasons” and, if so, how?

Should the list of extraordinary and compelling reasons in the Guidelines Manual closely track the criteria set forth by the Bureau of Prisons in its program statement? Should the Commission develop further criteria and examples of what circumstances constitute “extraordinary and compelling reasons”? If so, what specific criteria and examples should the Commission provide? Should the Commission further define and expand the medical and non-medical criteria provided in the Bureau’s program statement?

In addition, the Commission seeks comment on how, if at all, the policy statement at §1B1.13 should be revised to address the recommendations in the OIG report. Should the Commission adopt the recommendations in the OIG report as part of its revision of the policy statement at §1B1.13? Should the Commission expand upon these recommendations to revise the Bureau’s requirements that limit the availability of compassionate release for aging inmates? Alternatively, should the Commission defer action on this issue during this amendment cycle to consider any possible changes that the Bureau of Prisons might promulgate to its compassionate release program statement in response to the OIG report?

Finally, the Commission adopted the policy statement at §1B1.13 to implement the directive in 28 U.S.C. § 994(t). As noted above, the directive requires the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” The Commission also has authority to promulgate general policy statements regarding application of the guidelines or other aspects of sentencing
that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). See 28 U.S.C. § 994(a)(2)(C). Under this general authority, should the Commission further develop the policy statement at §1B1.13 to provide additional guidance or limitations regarding the circumstance in which sentences may be reduced as a result of a motion by the Director of the Bureau of Prisons? If so, what should the specific guidance or limitations be? For example, should the Commission provide that the Director of the Bureau of Prisons should not withhold a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as “extraordinary and compelling reasons” in §1B1.13?

(B) Proposed Amendment

Synopsis of Proposed Amendment: This part of the proposed amendment illustrates one possible set of changes to the Commission’s policy statement at §1B1.13. The proposed amendment would revise the list of “extraordinary and compelling reasons” for compassionate release consideration in the Commentary to §1B1.13 to reflect the criteria set forth in the Bureau of Prisons’ program statement. The language used in this part parallels the language in the Bureau’s program statement.

Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subdivision (1)(A) —

(A) Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances set forth below:
(i) The defendant is suffering from a terminal illness.

(ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

(iii) The death or incapacitation of the defendant’s only family member capable of caring for the defendant’s minor child or minor children.

(iv) The defendant meets the following criteria—

(I) the defendant is at least 65 years old;

(II) the defendant has served at least 50 percent of his or her sentence;

(III) the defendant suffers from a chronic or serious medical condition related to the aging process;

(IV) the defendant is experiencing deteriorating mental or physical health that substantially diminishes his or her ability to function in a correctional facility; and

(V) conventional treatment promises no substantial improvement to the defendant’s mental health or physical condition.

(v) The defendant (I) is at least 65 years old; and (II) has served at least 10 years or 75 percent of his or her sentence, whichever is greater.

(vi) The death or incapacitation of the family member caregiver of the defendant’s child.

[“Incapacitation” means the family member caregiver suffered a severe injury or suffers from a severe illness that renders the caregiver incapable of caring for the child. “Child” means an individual who had not attained the age of 18 years.]

(vii) The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

[“Incapacitation” means the spouse or registered partner (I) has suffered a serious injury or suffers from a debilitating physical illness and the result of the injury or illness is that the spouse or registered partner is completely disabled, meaning that the spouse or registered partner cannot carry on any self-care and is totally confined to a bed or chair; or (II) has a severe cognitive deficit, caused by an illness or injury, that has severely affected the spouse’s or registered partner’s mental capacity or function but may not be confined to a bed or chair. “Spouse” means an individual in a relationship with the defendant, where that relationship has been legally recognized as a marriage, including a legally-recognized common-law marriage. “Registered partner” means an individual in relationship with the defendant, where the relationship has been legally recognized as a civil union or registered domestic partnership.]
(iii) As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii) through (vii).

(B) Rehabilitation of the Defendant.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).

2. Application of Subdivision (3).—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: This policy statement implements 28 U.S.C. § 994(t).
PROPOSED AMENDMENT: CONDITIONS OF PROBATION AND SUPERVISED RELEASE

Synopsis of Proposed Amendment: This proposed amendment revises, clarifies, and rearranges the conditions of probation and supervised release. It is a result of the Commission’s multi-year review of federal sentencing practices relating to conditions of probation and supervised release. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015). It is also informed by a series of opinions issued by the Seventh Circuit in recent years.

Specifically, the Seventh Circuit has found several of the standard conditions to be unduly vague, overbroad, or inappropriately applied. See, e.g., United States v. Adkins, 743 F.3d 176 (7th Cir. 2014); United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013); United States v. Quinn, 698 F.3d 651 (7th Cir. 2012); United States v. Siegel, 753 F.3d 705 (7th Cir. 2014). The Seventh Circuit has also suggested that the language of the conditions be revised to be more comprehensible to defendants and probation officers, and to contain a stated mens rea requirement where one was lacking. United States v. Kappes, 782 F.3d 828, 848 (7th Cir. 2015) (“We have suggested that sentencing judges define the crucial terms in a condition in a way that provides clear notice to the defendant (preferably through objective rather than subjective terms), and/or includes a mens rea requirement (such as intentional conduct). We have further suggested that the judge make sure that each condition imposed is simply worded, bearing in mind that, with rare exceptions, neither the defendant nor the probation officer is a lawyer and that when released from prison the defendant will not have a lawyer to consult.” (quotation and alteration marks omitted)).

The Statutory and Guidelines Framework

When imposing a sentence of probation, the court is required to impose certain conditions of probation listed by statute. See 18 U.S.C. § 3563(a). In addition, the court has discretion to impose additional conditions of probation “to the extent that such conditions are reasonably related to the factors set forth in sections 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2).” See 18 U.S.C. § 3563(b). Similarly, when imposing a sentence of supervised release, the court is required to impose certain conditions of supervised release listed by statute, and the court has discretion to impose additional conditions of supervised release, to the extent that the additional condition “is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)” and “involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D).” See 18 U.S.C. § 3583(d). The additional condition of supervised release must also be consistent with any pertinent policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3583(d)(3).

In addition, the court is required to direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which he or she is subject, which must be “sufficiently clear and specific to serve as a guide for the defendant’s conduct and for such supervision as is required.” See 18 U.S.C. §§ 3563(d), 3583(f). The Judgment in a Criminal Case Form, AO 245B, sets forth a series of mandatory and “standard” conditions in standardized form and provides space for the court to impose additional “standard” and “special” conditions devised by the court.

The Commission is directed by its organic statute to promulgate policy statements on the appropriate use of the conditions of probation and supervised release. See 28 U.S.C. § 994(a)(2)(B). Sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) implement this directive. Subsections (a) and (b) of §5B1.3 set forth the conditions of probation that are required by statute. Subsections (e), (d), and (e) of §5B1.3 provide guidance on discretionary conditions of probation, which are categorized as “standard” conditions, “special” conditions, and “additional” special conditions, respectively. Subsections (a) through (e) of §5D1.3 follow the same structure in setting forth the
mandatory conditions of supervised release and providing guidance on discretionary conditions of supervised release.

The Proposed Changes to §§5B1.3 and 5D1.3

The changes made by the proposed amendment would revise, clarify, and rearrange the provisions in the Guidelines Manual on conditions of probation and supervised release. These changes would not necessarily affect the conditions of probation and supervised release as set forth in the Judgment in a Criminal Case Form, AO 245B. However, in light of the responsibilities of the Judicial Conference of the United States and the Administrative Office of the United States Courts in this area, the Commission works with the Criminal Law Committee and the Probation and Pretrial Services Office on these issues and anticipates that the Commission’s work on this proposed amendment may inform their consideration of possible changes to the judgment form.

In general, the changes are intended to make the conditions more focused and precise as well as easier for defendants to understand and probation officers to enforce. For some conditions that do not have a mens rea standard, a “knowing” standard is inserted.

First, the proposed amendment amends the “mandatory” conditions set forth in subsection (a) of §§5B1.3 and 5D1.3. It inserts new language directing that, if there is a court-established payment schedule for making restitution or paying a special assessment, the defendant shall adhere to the schedule. See 18 U.S.C. § 3572(d). This new language is similar to paragraph (14) of the “standard” conditions; accordingly, paragraph (14) of the “standard” conditions is deleted, as described below.

Second, the proposed amendment amends the “standard” conditions set forth in subsection (c) of §§5B1.3 and 5D1.3. Paragraphs (1)-(3), (5)-(6), and (9)-(13) are revised, clarified, and rearranged into a new set of paragraphs (1) through (12). A new paragraph (13) is added, which provides that the defendant “must follow the instructions of the probation officer related to the conditions of supervision.”

Several provisions are moved from the “standard” conditions list to the “special” conditions list, or vice versa. Specifically, paragraph (1) of the “special” conditions list (relating to possession of a firearm or dangerous weapon) is moved to the “standard” conditions list. Paragraphs (4) and (7) of the “standard” conditions list (relating to support of dependents and child support, and alcohol use, respectively) are moved to the “special” conditions list. In addition, as mentioned above, paragraph (14) on the “standard” conditions list (relating to payment of special assessment) is incorporated into the “mandatory” conditions list. Finally, paragraph (8) of the “standard” conditions list (relating to frequenting places where controlled substances are trafficked) is deleted.

Third, the proposed amendment adds two new provisions to the “special” conditions set forth in subsection (d) of §§5B1.3 and 5D1.3. The first new provision, based on paragraph (7) of the “standard” conditions, would specify that the defendant must not use or possess alcohol. The second new provision, based on paragraph (4) of the “standard” conditions, would specify that, if the defendant has one or more dependents, the defendant must support his or her dependents; and if the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child, the defendant must make the payments and comply with the other terms of the order.

Issues for comment are also included.
Proposed Amendment:

§5B1.3. Conditions of Probation

(a) Mandatory Conditions—

(1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));

(2) for a felony, the defendant shall (A) make restitution, (B) work in community service, or (C) both, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));

(3) for any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a));

(4) for a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));

(5) for any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant’s presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule;

(7) the defendant shall notify the court of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a));

(8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));

(9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the
defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) Discretionary Conditions

The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).

(c) “Standard” Conditions

The following “standard” conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.]

(1) The defendant must report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer tells the defendant to report to a different probation office or within a different time frame.

(2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant must report to the probation officer as instructed.

(1) The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(3) The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) The defendant must [answer truthfully][be truthful when responding to] the questions asked by the probation officer;

(6) The defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(10) The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(6) The defendant must allow the probation officer to visit the defendant at his or her home or elsewhere, and the defendant must permit the probation officer to take any items prohibited by the conditions of the defendant’s supervision that he or she observes in plain view.

(5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) The defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the
probation officer in advance is not possible due to unanticipated circumstances, the
defendant must notify the probation officer within 72 hours of becoming aware of a
change or expected change.

(9) The defendant shall not associate with any persons engaged in criminal activity, and
shall not associate with any person convicted of a felony unless granted permission
to do so by the probation officer;

(8) The defendant must not communicate or interact with someone the defendant knows
is engaged in criminal activity. If the defendant knows someone has been convicted
of a felony, the defendant must not knowingly communicate or interact with that
person without first getting the permission of the probation officer;

(11) The defendant shall notify the probation officer within seventy-two hours of being
arrested or questioned by a law enforcement officer;

(9) If the defendant is arrested or has any official contact with a law enforcement officer,
the defendant must notify the probation officer within 72 hours.

(10) The defendant must not own, possess, or have access to a firearm, ammunition,
destructive device, or dangerous weapon (i.e., anything that was designed, or was
modified for, the specific purpose of causing bodily injury or death to another
person, such as nunchakus or tasers).

(12) The defendant shall not enter into any agreement to act as an informer or a special
agent of a law enforcement agency without the permission of the court;

(11) The defendant must not act or make any agreement with a law enforcement agency
to act as a confidential human source or informant without first getting the
permission of the court.

(13) as directed by the probation officer, the defendant shall notify third parties of risks
that may be occasioned by the defendant’s criminal record or personal history or
characteristics, and shall permit the probation officer to make such notifications and
to confirm the defendant’s compliance with such notification requirement;

(12) If the probation officer determines that the defendant poses a risk to another person
(including an organization), the probation officer may require the defendant to tell
the person about the risk and the defendant must comply with that instruction. The
probation officer may contact the person and confirm that the defendant has told the
person about the risk.

(13) The defendant must follow the instructions of the probation officer related to the
conditions of supervision.

(4) The defendant shall support the defendant’s dependents and meet other family
responsibilities (including, but not limited to, complying with the terms of any court
order or administrative process pursuant to the law of a state, the District of
Columbia, or any other possession or territory of the United States requiring
payments by the defendant for the support and maintenance of any child or of a child
and the parent with whom the child is living);
(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.

(d) **“Special” Conditions (Policy Statement)** The following “special” conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) **Possession of Weapons**

   If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(1) **Support of Dependents**

   If the defendant—

   (A) has one or more dependents — a condition specifying that the defendant must support his or her dependents; and

   (B) is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant must make the payments and comply with the other terms of the order.

(2) **Debt Obligations**

   If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) **Access to Financial Information**

   If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) **Substance Abuse Program Participation**
If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant must not use or possess alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)—

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant’s person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer’s supervision functions.

(e) Additional Conditions (Policy Statement)

The following “special conditions” may be appropriate on a case-by-case basis:

(1) Community Confinement
Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation. See §5F1.1 (Community Confinement).

(2) Home Detention

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of probation. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. See §5F1.8 (Intermittent Confinement).

**Commentary**

**Application Note:**

1. Application of Subsection (a)(9)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

* * *

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions—
(1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));

(2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));

(3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));

(4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));

(5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule;

(7) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;
(8) The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) Discretionary Conditions

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) “Standard” Conditions

The following “standard” conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.]

(2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(1) The defendant must report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment, unless the probation officer tells the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant must report to the probation officer as instructed.

(1) The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(3) The defendant must not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
(4) The defendant must answer truthfully the questions asked by the probation officer.

(5) The defendant must live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(6) The defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) The defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she must try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant must notify the probation officer at least 10 calendar days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, the defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.

(8) The defendant must not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

(10) The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
(9) If the defendant is arrested or has any official contact with a law enforcement officer, the defendant must notify the probation officer within 72 hours.

(10) The defendant must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

(11) The defendant must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant’s compliance with such notification requirement;

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to tell the person about the risk and the defendant must comply with that instruction. The probation officer may contact the person and confirm that the defendant has told the person about the risk.

(13) The defendant must follow the instructions of the probation officer related to the conditions of supervision.

(14) The defendant shall notify the probation officer of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay any unpaid amount of restitution, fines, or special assessments.

(4) The defendant shall support the defendant’s dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
The following “special” conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Support of Dependents

If the defendant—

(A) has one or more dependents — a condition specifying that the defendant must support his or her dependents; and

(B) is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant must make the payments and comply with the other terms of the order.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant must not use or possess alcohol.

(5) Mental Health Program Participation
If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) **Deportation**

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) **Sex Offenses**

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant’s person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer’s supervision functions.

(e) **Additional Conditions (Policy Statement)**

The following “special conditions” may be appropriate on a case-by-case basis:

(1) **Community Confinement**

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

(2) **Home Detention**

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) **Community Service**
Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) **Occupational Restrictions**

Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

(5) **Curfew**

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) **Intermittent Confinement**

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

**Commentary**

**Application Note:**

1. Application of Subsection (a)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(7)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

**Issues for Comment:**

1. The Commission seeks comment on the bracketed options in paragraph (3) of the “special” conditions, which would become (4) under the proposed amendment. Specifically, the proposed amendment brackets whether the defendant should “answer truthfully” the questions of the probation officer or, instead, should “be truthful when responding to” the questions of the probation officer. The Commission seeks comment on the policy implications and the Fifth Amendment implications of each of these bracketed options. Which option, if any, is appropriate? Should the Commission clarify that an offender’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this special condition?

2. The Commission seeks comment on the standard condition of supervised release in §5D1.3(c)(15), which states that the defendant “shall notify the probation officer of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay any unpaid
amount of restitution, fines, or special assessments.” Under the proposed amendment, this would remain a standard condition and would be redesignated as subsection (c)(14). The Commission seeks comment on whether this condition should be made a special condition rather than a standard condition.
PROPOSED AMENDMENT: ANIMAL FIGHTING

Synopsis of Proposed Amendment: This proposed amendment revises §2E3.1 (Gambling; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and to respond to two new offenses, relating to attending an animal fighting venture, established by section 12308 of the Agricultural Act of 2014, Pub. L. 113–79 (Feb. 7, 2014).

Animal fighting ventures are prohibited by the Animal Welfare Act, 7 U.S.C. § 2156. Under that statute, an “animal fighting venture” is an event that involves a fight between at least two animals for purposes of sport, wagering, or entertainment. See 7 U.S.C. § 2156(g)(1). Section 2156 prohibits a range of conduct relating to animal fighting ventures, including making it unlawful to knowingly—

- sponsor or exhibit an animal in an animal fighting venture, see § 2156(a)(1);
- sell, buy, possess, train, transport, deliver, or receive an animal for purposes of having the animal participate in an animal fighting venture, see § 2156(b);
- advertise an animal (or a sharp instrument designed to be attached to the leg of a bird) for use in an animal fighting venture or promoting or in any other manner furthering an animal fighting venture, see § 2156(c); and
- sell, buy, transport, or deliver a sharp instrument designed to be attached to the leg of a bird for use in an animal fighting venture, see § 2156(e).

The criminal penalties for violations of section 2156 are provided in 18 U.S.C. § 49. For any violation of section 2156 listed above, the statutory maximum term of imprisonment is 5 years. See 18 U.S.C. § 49(a).

However, two new types of animal fighting offenses were added by the Agricultural Act of 2014. They make it unlawful to knowingly—

- attend an animal fighting venture, see § 2156(a)(2)(A); or
- cause an individual under 16 to attend an animal fighting venture, see § 2156(a)(2)(B).

The statutory maximum is 3 years if the offense of conviction is causing an individual under 16 to attend an animal fighting venture, see 18 U.S.C. § 49(c), and 1 year if the offense of conviction is attending an animal fighting venture, see 18 U.S.C. § 49(b).

All offenses under section 2156 are referenced in Appendix A (Statutory Index) to §2E3.1 (Gambling Offenses; Animal Fighting Offenses). Under the penalty structure of that guideline, a defendant convicted of an animal fighting offense receives a base offense level of 12 if the offense involved gambling — specifically, if the offense was engaging in a gambling business, transmitting wagering information, or part of a commercial gambling operation — and a base offense level of 10 otherwise. The guideline contains no specific offense characteristics. There is an upward departure provision if an animal fighting offense involves exceptional cruelty.

Higher Penalties for Animal Fighting Offenses

First, the proposed amendment revises §2E3.1 to provide a base offense level of [14][16] if the offense involved an animal fighting venture.

In addition, it revises the existing upward departure provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.
Next, the proposed amendment responds to the two new offenses relating to attendance at an animal fighting venture. It establishes new base offense levels for such offenses. Specifically, a base offense level of [8][10] in §2E3.1 would apply if the defendant was convicted under section 2156(a)(2)(B) (causing an individual under 16 to attend an animal fighting venture). The class A misdemeanor at section 2156(a)(2)(A) (attending an animal fighting venture) would not be referenced in Appendix A (Statutory Index) to §2E3.1; it would receive a base offense level of 6 in §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Issues for comment are also included.

Proposed Amendment:

§2E3.1. Gambling Offenses; Animal Fighting Offenses

(a) Base Offense Level: (Apply the greatest)

(1) [14][16], if the offense involved an animal fighting venture, except as provided in subdivision (3) below;

(2) 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or

(2) 10, if the offense involved an animal fighting venture; or

(3) [8][10], if the defendant was convicted under 7 U.S.C. § 2156(a)(2)(B); or

(34) 6, otherwise.

Commentary


Application Notes:

1. Definition.—For purposes of this guideline: “Animal fighting venture” has the meaning given that term in 7 U.S.C. § 2156(g).

2. Upward Departure Provision.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted; or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).
APPENDIX A - STATUTORY INDEX

7 U.S.C. § 2156 (felony provisions only) 2E3.1

Issues for Comment:

1. The Commission seeks comment on offenses involving animal fighting. How prevalent are these offenses, and do the guidelines adequately address these offenses? If not, how should the Commission revise the guidelines to provide appropriate penalties in such cases?

What, if any, aggravating and mitigating factors are involved in these offenses that the guidelines should take into account? Should the Commission provide new departure provisions, enhancements, adjustments, or minimum offense levels to account for such aggravating or mitigating factors? If so, what should the Commission provide, and with what penalty levels?

For example, should the Commission provide an enhancement if the defendant possessed a dangerous weapon (including a firearm)? Should the Commission provide an enhancement if the defendant was in the business of breeding, selling, buying, possessing, training, transporting, delivering, or receiving animals for use in animal fighting ventures, or brokering such activities?

2. The proposed amendment includes an upward departure provision if the offense involved animal fighting “on an exceptional scale (such as an offense involving an unusually large number of animals).” What additional guidance, if any, should the Commission provide on what constitutes animal fighting on an exceptional scale?

Under the proposed amendment, the factors of exceptional cruelty and exceptional scale are departure provisions. Should the Commission provide enhancements, rather than departure provisions, for these factors? If so, what penalty levels should be provided?

3. The Commission seeks comment on how the multiple count rules should operate when the defendant is convicted of multiple counts of animal fighting offenses. How, if at all, should the guideline calculation be affected by the presence of multiple counts of conviction? For example, should the Commission specify that multiple counts involving animal fighting ventures are to be grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts)? Should the Commission specify that multiple counts involving animal fighting ventures are not to be grouped together?
PROPOSED AMENDMENT: CHILD PORNOGRAPHY CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: This proposed amendment addresses circuit conflicts and application issues that have arisen when applying the guidelines to child pornography offenses. One of the issues typically arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. The other two issues typically arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. See United States Sentencing Commission, “Report to the Congress: Federal Child Pornography Offenses” at 33-35 (2012), available at http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses.

Offenses Involving Unusually Young and Vulnerable Minors

First, the proposed amendment responds to differences among the circuits in cases in which the offense involves minors who are unusually young and vulnerable (such as infants or toddlers). The production guideline provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years. See §2G2.1(b)(1). A similar tiered enhancement is contained in §2G2.6 (Child Exploitation Enterprises). See §2G2.6(b)(1). The non-production guideline provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. See §2G2.2(b)(2).

These three guidelines do not provide a further enhancement for cases in which the victim was unusually young and vulnerable. However, the adjustment at §3A1.1(b)(1) provides a 2-level increase if the defendant knew or should have known that the victim was a “vulnerable victim,” i.e., a victim “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” See §3A1.1, comment. (n.2). The Commentary further provides:

Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

See §3A1.1, comment. (n.2).

There are differences among the circuits over whether the vulnerable victim adjustment applies when the victim is extremely young, such as an infant or toddler. The Ninth Circuit has indicated that the under-12 enhancement “does not take especially vulnerable stages of childhood into account” and that, “[t]hough the characteristics of being an infant or toddler tend to correlate with age, they can exist independently of age, and are not the same thing as merely not having ‘attained the age of twelve years.’” United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004). Accordingly, it held, a vulnerable victim adjustment may be applied based on extreme youth and small physical size, such as when the victim is in the infant or toddler stage. Id. Similarly, the Fifth Circuit has stated, “we do not see any logical reason why a ‘victim under the age of twelve’ enhancement should bar application of the ‘vulnerable victim’ enhancement when the victim is especially vulnerable, even as compared to most children under twelve.” United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013).

The Fourth Circuit, in contrast, has indicated that the vulnerable victim adjustment may not be applied based solely on extreme youth or on factors that are for conditions that “necessarily are related to... age.” United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The line drawn by the under-12
enhancement “implicitly preclude[s] courts from drawing additional lines below that point,” and “once the offense involves a child under twelve, any additional considerations based solely on age simply are not appropriate to the Guidelines calculation.” Id.

The proposed amendment generally adopts the approach of the Fifth and Ninth Circuits. It amends the Commentary in the child pornography guidelines to provide that application of the age enhancement does not preclude application of the vulnerable victim adjustment. Specifically, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, §3A1.1(b) applies, assuming the mens rea requirement of §3A1.1(b) is also met (i.e., the defendant knew or should have known of this vulnerability).

Two Issues Relating to the Tiered Enhancement for Distribution in §2G2.2

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancement for distribution in §2G2.2(b)(3), which provides an enhancement ranging from 2 levels to 7 levels depending on specific factors.

There are two related issues that typically arise in child pornography cases when the offense involves a peer-to-peer file-sharing program or network. The first issue is when a participant’s use of a peer-to-peer file sharing program or network warrants at minimum a 2-level enhancement under subsection (b)(3)(F). The second issue is when, if at all, the use of a peer-to-peer file sharing program or network warrants a 5-level enhancement under (b)(3)(B) instead.

(1) The 2-Level Distribution Enhancement at Subsection (b)(3)(F)

The Fifth, Tenth, and Eleventh Circuits have each held that the 2-level distribution enhancement applies if the defendant used a file sharing program, regardless of whether he did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014) (the enhancement applies “regardless of the defendant’s mental state”); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013) (the enhancement “does not require that a defendant know about the distribution capability of the program he is using”; the enhancement “requires no particular state of mind”); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015) (“No element of mens rea is expressed or implied ... The definition requires only that the ‘act ... relates to the transfer of child pornography.’”).

The Second, Fourth, and Fifth Circuits, in contrast, have held that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2nd Cir. 2015) (requiring knowledge); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard).

Other circuits appear to follow somewhat different approaches. The Eighth Circuit has stated that knowledge is required, but knowledge may be inferred from the fact that a file sharing program was used, absent “concrete evidence” of ignorance. United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has stated in an unpublished opinion that there is a “presumption” that “users of file-sharing software understand others can access their files.” United States v. Conner, 521 Fed. App’x 493, 499 (6th Cir. 2013).

The proposed amendment generally adopts the approach of the Second, Fourth, and Fifth Circuits. It amends subsection (b)(3)(F) to provide that the 2-level enhancement requires “knowing” distribution by the defendant.
As a conforming change, the proposed amendment also revises the 2-level distribution enhancement at §2G2.1(b)(3) to provide that the enhancement requires that the defendant knowingly distributed.

(2) The 5-Level Distribution Enhancement at Subsection (b)(3)(B)

The 5-level distribution enhancement at subsection (b)(3)(B) applies if the offense involved distribution “for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.” The Commentary provides, as one example, that in a case involving the bartering of child pornographic material, the “thing of value” is the material received in exchange.

The circuits have taken different approaches to this issue. The Fifth Circuit has indicated that when the defendant knowingly uses file sharing software, the requirements for the 5-level enhancement are generally satisfied. See United States v. Groce, 784 F.3d 291, 294 (5th Cir. 2015) (“Generally, when a defendant knowingly uses peer-to-peer file sharing software . . . he engages in the kind of distribution contemplated by” the 5-level enhancement).

The Fourth Circuit appears to have a higher standard. It has required the government to show that the defendant (1) “knowingly made child pornography in his possession available to others by some means”; and (2) did so “for the specific purpose of obtaining something of valuable consideration, such as more pornography.” United States v. McManus, 734 F.3d 315, 319 (4th Cir. 2013).

The proposed amendment revises subsection (b)(3)(B) to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. Specifically, this means that the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

Proposed Amendment:

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material: Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

(a) Base Offense Level: 32

(b) Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.

(2) (Apply the greater) If the offense involved—

(A) the commission of a sexual act or sexual contact, increase by 2 levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.
(3) If the offense involved distribution defendant knowingly distributed, increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.

(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary


Application Notes:

1. Definitions.—For purposes of this guideline:

“Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.
“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

2. Interaction of Age Enhancement (Subsection (b)(1)) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(1) applies, §3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. See §3A1.1, comment. (n.2). However, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply §3A1.1(b).

23. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

“Conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

“Sexual act” has the meaning given that term in 18 U.S.C. § 2246(2).

“Sexual contact” has the meaning given that term in 18 U.S.C. § 2246(3).

34. Application of Subsection (b)(5) —

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

45. Application of Subsection (b)(6). —
(A) Misrepresentation of Participant’s Identity.—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, coerc, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant’s name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

56. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

67. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 minors.

* * *

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:
(1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) 22, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

(3) (Apply the greatest) If the offense involved:

(A) If the offense involved distribution of material for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) If the offense involved distribution for the receipt, or expectation of receipt, of a thing of value, If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by 5 levels.

(C) If the offense involved distribution to a minor, increase by 5 levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

(F) If the defendant knowingly distributed, other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.
(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by 2 levels;

(B) at least 150 images, but fewer than 300, increase by 3 levels;

(C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary


Application Notes:

1. Definitions.—For purposes of this guideline:

“Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“Distribution for pecuniary gain” means distribution for profit.

“Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain” means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. “Thing of value” means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the “thing of value” is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received. “The defendant distributed in exchange for any valuable consideration” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person, for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.
“Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.

“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Pattern of activity involving the sexual abuse or exploitation of a minor” means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

“Sexual abuse or exploitation” means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). “Sexual abuse or exploitation” does not include possession, accessing with intent to view, receive, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. Interaction of Age Enhancement (Subsection (b)(2)) and Vulnerable Victim (§3A1.1(b)).— If subsection (b)(2) applies, §3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. See §3A1.1, comment. (n.2). However, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply §3A1.1(b).

3. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.

4. Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

45. Application of Subsection (b)(7).—

(B) **Determining the Number of Images.**—For purposes of determining the number of images under subsection (b)(7):

(i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

(ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

§6. **Application of Subsection (c)(1).**—

(A) **In General.**—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.

(B) **Definition.**—“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

§7. **Cases Involving Adapted or Modified Depictions.**—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term “material involving the sexual exploitation of a minor” includes such material.

§8. **Upward Departure Provision.**—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

**Background:** Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

* * *

§2G2.6. **Child Exploitation Enterprises**

(a) **Base Offense Level:** 35

(b) **Specific Offense Characteristics**

(1) If a victim (A) had not attained the age of 12 years, increase by 4 levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by 2 levels.
(2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(3) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 2 levels.

(4) If a computer or an interactive computer service was used in furtherance of the offense, increase by 2 levels.

Commentary


Application Notes:

1. Definitions.—For purposes of this guideline:

   “Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

   “Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

   “Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. Interaction of Age Enhancement (Subsection (b)(1)) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(1) applies, §3A1.1(b) ordinarily would not apply unless the minor was unusually vulnerable for reasons unrelated to age. See §3A1.1, comment. (n.2). However, if the minor’s extreme youth and small physical size made the minor especially vulnerable compared to most minors under the age of 12 years, and the defendant knew or should have known this, apply §3A1.1(b).

3. Application of Subsection (b)(2).—

   (A) Custody, Care, or Supervisory Control.—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

   (B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
Application of Subsection (b)(3).—For purposes of subsection (b)(3), “conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

* * *

Issues for Comment:

1. With respect to the interaction of the age enhancements and the vulnerable victim adjustment, the proposed amendment would respond to the circuit conflict by clarifying the circumstances under which the vulnerable victim adjustment would also apply. Should the Commission use a different approach to resolving the circuit conflict? If so, what approach should the Commission use to clarify how the age enhancements interact with the vulnerable victim adjustment? For example, should the Commission revise the tiered age enhancements to provide an additional tier, 2 levels higher than the existing tiers, for cases involving unusually young and vulnerable victims, such as infants or toddlers? In the alternative, should the Commission provide an upward departure provision to address this factor?

Application Note 2 to §3A1.1 provides that, “if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.” Should the Commission revise this provision to change or clarify how age enhancements in the guidelines (whether for child pornography offenses or otherwise) interact with the vulnerable victim adjustment? For example, should the Commission change “unless the victim was unusually vulnerable for reasons unrelated to age” to “unless the victim was unusually vulnerable for reasons not based on age per se”?

2. With respect to the 2-level distribution enhancement, the proposed amendment generally adopts the approach of the circuits that require “knowing” distribution. The Commission seeks comment on whether a different approach should be used, particularly in cases involving a file sharing program or network. For example, should the Commission provide a bright-line rule that use of a file sharing program qualifies for the 2-level enhancement, even in cases where the defendant was in fact ignorant that use of the program would result in files being shared to others?

3. With respect to the 5-level distribution enhancement, the proposed amendment would generally require an agreement with another person in which the defendant trades child pornography for other child pornography or another thing of value, such as access to a child. The Commission seeks comment on whether a different approach should be used, particularly in cases involving a file sharing program or network. For example, should the Commission provide a bright-line rule that use of a file sharing program qualifies for the 5-level enhancement?

4. The proposed amendment amends §2G2.2 to provide that the 2-level enhancement at subsection (b)(3) requires “knowing” distribution by the defendant. Should the Commission change any other enhancements in subsection (b) from an “offense involved” approach to a “defendant-based” approach? If so, should the Commission include a culpable state of mind requirement, such as, for example, requiring “knowing” distribution by the defendant?
5. The guideline for obscenity offenses, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), contains a tiered distribution enhancement similar to the tiered distribution enhancement in §2G2.2. If the Commission were to make revisions to the tiered distribution enhancement in §2G2.2, should the Commission make similar revisions to §2G3.1?
PROPOSED AMENDMENT: IMMIGRATION

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s multi-year study of the guidelines applicable to immigration offenses and related criminal history rules. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015). The Commission is publishing this proposed amendment to inform the Commission’s consideration of these issues.

The proposed amendment contains two parts. The Commission is considering whether to promulgate any one or both of these parts, as they are not necessarily mutually exclusive. They are as follows—

**Part A** revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). An issue for comment is also provided.

**Part B** revises the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States). Issues for comment are also included.
(A) Alien Smuggling

Synopsis of Proposed Amendment: This part of the proposed amendment revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The Commission has received comment expressing concern that the guideline provides for inadequate sentences for alien smugglers, particularly those who smuggle unaccompanied minors. See, e.g., Annual Letter from the Department of Justice to the Commission (July 24, 2015), at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/DOJ.pdf.

First, the proposed amendment revises the alternative base offense levels at §2L1.1(a). Two options are provided. Option 1 would raise the base offense level at subsection (a)(3) from 12 to [16]. Option 2 adds an alternative base offense level of [16] if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization.

Second, the proposed amendment addresses offenses involving unaccompanied minors in alien smuggling offenses. The Department of Justice in its annual letter to the Commission has suggested that the enhancement for smuggling, transporting, or harboring unaccompanied minors under §2L1.1(b)(4) is inadequate in light of the serious nature of such offenses. The Department states that “[t]hese smugglers often treat children as human cargo and subject them to a multitude of abuses throughout a long and dangerous journey, including sexual assault, extortion, and other crimes.” The proposed amendment would amend §2L1.1 to address the issue of unaccompanied minors. The proposed amendment first amends §2L1.1(b)(4) to make the enhancement offense-based (with a mens rea requirement) as opposed to exclusively defendant-based. The proposed amendment would also amend the commentary to §2L1.1 to clarify that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to §1B1.1 (Application Instructions), which states that “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

Finally, the proposed amendment would revise the definition of “minor” for purposes of the “unaccompanied minor” enhancement at §2L1.1(b)(4) and change it from minors under the age of 16 to minors under the age of [18]. The proposed amendment also brackets the possibility of including a new departure provision in the commentary to §2L1.1 for cases in which the offense involved the smuggling, transporting, or harboring of six or more unaccompanied minors.

Proposed Amendment:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:

(1) 25, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

(2) 23, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

[Option 1:

(3) [16], otherwise.]
Option 2: (which also includes changes to commentary):

3. [16], if the defendant smuggled, transported, or harbored an unlawful alien as part of an ongoing commercial organization; or

4. 12, otherwise.

(b) Specific Offense Characteristics

1. If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by 3 levels.

2. If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

<table>
<thead>
<tr>
<th>Number of Unlawful Aliens</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Smuggled, Transported, or Harbored</td>
<td></td>
</tr>
<tr>
<td>(A) 6-24</td>
<td>add 3</td>
</tr>
<tr>
<td>(B) 25-99</td>
<td>add 6</td>
</tr>
<tr>
<td>(C) 100 or more</td>
<td>add 9</td>
</tr>
</tbody>
</table>

3. If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.

4. If the defendant smuggled, transported, or harbored a minor who the defendant knew [or had reason to believe] was unaccompanied by the minor’s parent or grandparent, increase by 2 levels.

5. (Apply the Greatest):

   (A) If a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level 22, increase to level 22.

   (B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20.

   (C) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.
(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

<table>
<thead>
<tr>
<th>Death or Degree of Injury</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) Bodily Injury</td>
<td>add 2 levels</td>
</tr>
<tr>
<td>(B) Serious Bodily Injury</td>
<td>add 4 levels</td>
</tr>
<tr>
<td>(C) Permanent or Life-Threatening</td>
<td>add 6 levels</td>
</tr>
<tr>
<td>Bodily Injury</td>
<td></td>
</tr>
<tr>
<td>(D) Death</td>
<td>add 10 levels</td>
</tr>
</tbody>
</table>

(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.

(9) If the defendant was convicted under 8 U.S.C. § 1324(a)(4), increase by 2 levels.

(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

[Option 2 (continued):]

“As part of an ongoing commercial organization” means that the defendant participated (A) in a continuing organization or enterprise of five or more persons that had as one of its primary purposes the smuggling, transporting, or harboring of unlawful aliens for profit, and (B) with
knowledge [or reason to believe] that the members of the continuing organization or enterprise smuggled, transported, or harbored different groups of unlawful aliens on more than one occasion.

“The offense was committed other than for profit” means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.

“Number of unlawful aliens smuggled, transported, or harbored” does not include the defendant.

“Aggravated felony” is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).

“Child” has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

“Spouse” has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

“Immigration and naturalization offense” means any offense covered by Chapter Two, Part L.

“Minor” means an individual who had not attained the age of 18 years.

“Parent” means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

“Bodily injury,” “serious bodily injury,” and “permanent or life-threatening bodily injury” have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

2. Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.—Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

3. Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.

4. Upward Departure Provisions.—An upward departure may be warranted in any of the following cases:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.
4. Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).

6. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

Issue for Comment:

1. The Department of Justice has stated that alien smuggling offenses often involved sexual abuse of the aliens smuggled, transported, or harbored, particularly of unaccompanied minors. The proposed amendment would amend the commentary to §2L1.1 to clearly state that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to §1B1.1 (Application Instructions), which is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law. The Commission invites comment on whether the 4-level enhancement at §2L1.1(b)(7)(B) adequately accounts for cases in which the offense covered by this guideline involved sexual abuse of an alien who was smuggled, transported, or harbored. If not, what revisions to §2L1.1 would be appropriate to account for this conduct? For example, should the Commission provide one or more specific offense characteristics or departure provisions to better account for this conduct? If so, what should the Commission provide?
(B) Illegal Reentry


The key findings from the report include—

- the average sentence for illegal reentry offenders was 18 months;
- all but two of the 18,498 illegal reentry offenders — including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the ten-year statutory maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (i.e., those without “aggravated felony” convictions);
- the rate of within-guideline range sentences was significantly lower among offenders who received 16-level enhancements pursuant to §2L1.2(b)(1)(A) for predicate convictions (31.3%), as compared to the within-range rate for those who received no enhancements under §2L1.2(b) (92.7%);
- significant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most illegal reentry offenders were prosecuted;
- the average illegal reentry offender was deported 3.2 times before his instant illegal reentry prosecution, and over one-third (38.1%) were previously deported after a prior illegal entry or illegal reentry conviction;
- 61.9 percent of offenders were convicted of at least one criminal offense after illegally reentering the United States;
- 4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions; and
- most illegal reentry offenders were apprehended by immigration officials at or near the border.

The statutory penalty structure for illegal reentry offenses is based on whether the defendant had a criminal conviction before he or she was deported. The offense of illegal reentry, set forth in 8 U.S.C. § 1326, applies to defendants who previously were deported from, or unlawfully remained in, the United States. Specifically, the statutory maximum term of imprisonment is—

- two years, in general (see 8 U.S.C. § 1326(a)); but
- 10 years, if the defendant was deported after sustaining (A) three misdemeanor convictions involving drugs or crimes against the person, or both, or (B) one felony conviction (see 8 U.S.C. § 1326(b)(1)); or
- 20 years, if the defendant was deported after sustaining an “aggravated felony” — a term that covers a range of offense types, listed in 8 U.S.C. § 1101(a)(43), that includes such different offense types as murder and tax evasion (see 8 U.S.C. § 1326(b)(2)).

The penalty structure of the guideline is similar to the statutory penalty structure. The guideline provides a base offense level of 8 and a tiered enhancement based on whether the defendant had a criminal conviction before he or she was deported. Specifically, the enhancement is—

- 4 levels, for (A) three misdemeanor convictions for crimes of violence or drug trafficking offenses, or (B) any felony (see §2L1.2(b)(1)(D),(E));
• **8 levels**, for an “aggravated felony” (see §2L1.2(b)(1)(C));

• **12 levels**, for a felony drug trafficking offense for which the sentence imposed was 13 months or less (see §2L1.2(b)(1)(B)); and

• **16 levels**, for specific types of felonies: a drug trafficking offense for which the sentence imposed was more than 13 months, a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, or an alien smuggling offense (see §2L1.2(b)(1)(A)).

The penalties in the illegal reentry statute apply based on the criminal convictions the defendant had before he or she was deported, regardless of the age of the prior conviction. Likewise, until 2011, the enhancements in §2L1.2 applied regardless of the age of the prior conviction. In 2011, the Commission revised the guideline to provide that the 16- and 12-level enhancements would be reduced to 12 and 8 levels, respectively, if the conviction was too remote in time (too “stale”) to receive criminal history points under the timing limits set forth in Chapter Four (Criminal History and Criminal Livelihood). See USSG App. C, Amend. 754 (effective Nov. 1, 2011). The other enhancements continue to apply regardless of the age of the prior conviction (i.e., without regard to whether the conviction receives criminal history points). See §2L1.2, comment. (n.1(C)).

Part B of the proposed amendment amends §2L1.2 to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, post-reentry convictions and a corresponding reduction in the enhancements for past, pre-deportation convictions. The enhancements for these convictions would be based on the sentence imposed rather than on the type of offense (e.g., “crime of violence”) — in other words, the proposed amendment would eliminate the use of the “categorical approach” for predicate felony convictions in §2L1.2. Also, the proposed amendment accounts for prior convictions for illegal reentry separately from other types of convictions.

First, the proposed amendment amends subsection (a) of §2L1.2 to provide alternative base offense levels of [14] and [12] if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. For defendants without such prior convictions, the proposed amendment increases the otherwise applicable base offense level from 8 to [10]. The alternative base offense levels at subsection (a) apply without regard to whether the prior conviction receives criminal history points.

Second, the proposed amendment changes how subsection (b)(1) accounts for pre-deportation convictions — basing them not on the type of offense (e.g., “crime of violence”) but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivision (A) through (C) at subsection (b)(1). Specifically, if the defendant had a felony conviction and the sentence imposed was [24] months or more, an enhancement of [8] levels would apply. If the defendant had a felony conviction and the sentence imposed was at least [12] months but less than [24] months, an enhancement of [6] levels would apply. If the defendant had a felony conviction and the sentence imposed was less than [12] months, an enhancement of [4] levels would apply. Finally, an enhancement of [2] levels would apply if the defendant had three or more convictions for misdemeanors involving drugs or crimes against the person. If more than one of these enhancements apply, the court is instructed to apply the greatest.

Third, the proposed amendment would permit prior convictions to be considered under subsection (b)(1) only if they receive criminal history points under Chapter Four.

To account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(2) to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more felony offenses after the defendant’s first deportation or first order of removal. The
structure of the new subsection (b)(2) parallels the proposed changes to subsection (b)(1), both in the sentence length required and the level of enhancement to be applied. As with subsection (b)(1), prior convictions would be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Finally, the proposed amendment provides a new departure provision for cases in which the defendant was previously deported on multiple occasions not reflected in prior convictions under 8 U.S.C. § 1253, § 1325(a), or § 1326. It also revises the departure provision based on seriousness of a prior conviction to bring it more into parallel with §4A1.3 (Adequacy of Criminal History Category) and provide examples related to: (1) cases in which serious offenses do not qualify for an adjustment under subsection (b)(1) and the new subsection (b)(2) because they did not receive criminal history points; and (2) for cases in which a defendant committed one or more felony offenses but no conviction resulted from the commission of such offense or offenses. The proposed amendment also brackets the possibility of deleting the departure based on time served in state custody.

In addition, the proposed amendment would make conforming changes to the application notes, including the consolidation of all guideline definitions in one place.

Issues for comment are also included.

Proposed Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level (Apply the Greatest): 8

(1) [14], if the defendant committed the instant offense of conviction after sustaining two or more convictions for illegal reentry offenses;

(2) [12], if the defendant committed the instant offense of conviction after sustaining a conviction for an illegal reentry offense;

(3) [10], otherwise;

(b) Specific Offense Characteristics

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after If, before the defendant’s first deportation or first order of removal, the defendant sustained—

(A)—a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;
(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was [24] months or more, increase by [8] levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was at least [12] months but less than [24] months, increase by [6] levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than [12] months, increase by [4] levels; or

(D) three or more convictions for misdemeanors involving drugs, crimes against the person, or both, increase by [2] levels.

(2) Apply the Greatest:

If, at any time after the defendant’s first deportation or first order of removal, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was [24] months or more, increase by [8] levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was at least [12] months but less than [24] months, increase by [6] levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was less than [12] months, increase by [4] levels; or

(D) three or more convictions for misdemeanors involving drugs, crimes against the person, or both, increase by [2] levels.

Commentary
Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Application of Subsections (b)(1) and (b)(2).**

   **(A) In General.**—For purposes of subsection (b)(1) this guideline:

   (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

   (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

   (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

   (iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.

   **(B) Interaction of Subsections (b)(1) and (b)(2).**—Subsections (b)(1) and (b)(2) are intended to divide the defendant’s criminal history into two time periods. Subsection (b)(1) reflects the convictions, if any, that the defendant sustained before his first deportation or order of removal (whichever event occurs first). Subsection (b)(2) reflects the convictions, if any, that the defendant sustained after that event (when the criminal conduct that resulted in the conviction took place after that event).

2. **(B) Definitions.**—For purposes of subsection (b)(1) this guideline:

   (i) “Alien smuggling offense” has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

   (ii) “Child pornography offense” means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

   (iii) “Crime of violence” means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.
“Drug trafficking offense” means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

“Felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

“Illegal reentry offense” means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a) (regardless of whether the conviction was designated a felony or misdemeanor).

“Misdemeanor” means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

“Firearms offense” means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).


(IV) A violation of 18 U.S.C. § 924(c).


(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

“Human trafficking offense” means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

“Sentence imposed” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.
(viii) “Terrorism offense” means any offense involving, or intending to promote, a “Federal crime of terrorism”, as that term is defined in 18 U.S.C. § 2332b(g)(5).

(C) Prior Convictions. In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

2. Definition of “Felony”. For purposes of subsection (b)(1)(A), (B), and (D), “felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Application of Subsection (b)(1)(C).

(A) Definitions. For purposes of subsection (b)(1)(C), “aggravated felony” has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General. The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).


(A) “Misdemeanor” means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) “Three or more convictions” means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

5. Aiding and Abetting, Conspiracies, and Attempts. Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

63. Computation of Criminal History Points. The alternative base offense levels at subsection (a) apply without regard to whether a conviction for an illegal reentry offense receives criminal history points. However, for purposes of applying subsections (b)(1) and (b)(2), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c), and that are counted separately under §4A1.2(a)(2).

A conviction taken into account under subsection (a) or (b)(4) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Departure Based on Multiple Prior Deportations not Reflected in Prior Convictions. There may be cases in which the alternative base offense levels at subsections (a)(1) and (a)(2) do not apply and the defendant was previously deported (voluntarily or involuntarily) on multiple occasions not reflected in prior convictions under §1253, §1325(a), or §1326. In such a case, an upward departure may be warranted to reflect both the increased culpability of a defendant with multiple prior deportations, as well as the increased risk of future illegal reentry (as reflected in the
departure’s record of multiple prior deportations). For example, an upward departure may be warranted for a defendant who is convicted under 8 U.S.C. § 1326 for the first time but was deported five times prior to the instant offense of illegal reentry.

75. Departure Based on Seriousness of a Prior Conviction Criminal History.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction defendant’s criminal history. In such a case, a departure may be warranted. See §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which the 12-level enhancement under subsection (b)(1)(A) or the 8-level enhancement in subsection (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted. In a case in which an adjustment under subsection (b)(1) or (b)(2) does not apply because a prior serious conviction (e.g., murder) is not within the time limits set forth in §4A1.2(e) and did not receive criminal history points, an upward departure may be warranted to reflect the serious nature of the defendant’s prior conviction. (B) In a case in which a defendant committed one or more felony offenses but subsections (b)(1) and (b)(2) do not apply because no conviction resulted from the commission of such offense or offenses, an upward departure may be warranted.

8. Departure Based on Time Served in State Custody.—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense. Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant’s other criminal history.

96. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.
In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant’s continued residence in the United States, (4) the duration of the defendant’s presence outside the United States, (5) the nature and extent of the defendant’s familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant’s criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

Issues for Comment:

1. Some commentators have expressed concern about the operation of the illegal reentry guideline and the severity of the enhancements available in subsection (b) for some offenders. The Commission’s recent report found that the rate of within-range sentences differed substantially depending on the level of enhancement under §2L1.2(b)(1). The rate of within-guideline range sentences was significantly lower among defendants who received the 16-level enhancement (31.3%) as compared to the within-range rate for those who received no enhancements (92.7%). The report showed that the greater enhancements result in the lowest within-range sentences (52.3% within range for 4-level enhancement, 46.7% within range for 8-level enhancement, 32.8% within range for 12-level enhancement).

   The Commission seeks comment on whether illegal reentry offenses are adequately addressed by the guidelines. Should the Commission consider amending §2L1.2 and, if so, how?

2. Currently, §2L1.2 requires the court to classify the defendant’s prior convictions by type (e.g., is it a “crime of violence” or is it an “aggravated felony”?), a task that involves the Supreme Court’s “categorical approach.” In recent years, the Commission has received commentary from stakeholders in the federal criminal justice system — including district and circuit judges, federal probation officers, the Department of Justice, and some defense counsel — that the use of a “categorical approach” to determine if a predicate conviction qualifies for an enhancement under §2L1.2(b) requires a cumbersome, overly detailed, and resource-intensive legal analysis that often is under- or over-inclusive regarding the actual seriousness of offenders’ predicate convictions. See, e.g., Comment Received by the Commission in Response to Request for Public Comment on Proposed Priorities from 2010 to 2015 (available on the Commission’s web site at www.uscc.gov/amendment-process/public-comment). Cf. Almanza-Arenda v. Lynch, ___ F.3d ___, 2015 WL 9462976 at *8-*9 (9th Cir. Dec. 28, 2015) (Owens, J., concurring, joined by Tallman, Bybee & Callahan) (“The bedeviling . . . ‘[categorical approach]’ will continue to spit out intra- and inter-circuit splits and confusion, which are inevitable when we have hundreds of federal judges reviewing thousands of criminal state laws and certain documents to determine if an offense is ‘categorically’ [a predicate offense] . . . A better mousetrap is long overdue. Rather than compete with Rube Goldberg, we instead should look to a more objective standard, such as the length of the underlying sentence [to determine what is a predicate offense].’”).

   The proposed amendment would eliminate the use of the “categorical approach” for predicate felony convictions and provide for enhancements based on the sentence imposed rather than on the type of offense. What are the advantages and disadvantages of basing the enhancement on the type of the prior conviction? What are the advantages and disadvantages of basing the enhancement on the length of the sentence imposed on the prior conviction? If the Commission were to adopt the sentence-imposed model, are the 24- and 12-month gradations included in the proposed enhancement model desirable?
amendment appropriate? Should the Commission adopt different gradations, such as the ones currently used in Chapter Four of the Guidelines Manual (i.e., “exceeding one year and one month” and “at least sixty days”), or more or fewer gradations? If the Commission were to provide a different approach to apply the enhancements at §2L1.2, what should that different approach be?

3. As noted in the Commission’s recent report, both the illegal reentry statute and §2L1.2 provide enhanced penalties only if the defendant sustained a conviction before being deported. A defendant receives at most a single enhancement under §2L1.2 — based on the most serious conviction. Additional convictions that occurred before the defendant’s most recent deportation, and convictions that occurred after the defendant’s most recent illegal reentry, are not taken into account in the calculation of the offense level (although they may be taken into account in the criminal history score).

Should the Commission amend how the enhancements at §2L1.2 work and, if so, how? Should the Commission amend §2L1.2 to account not only for pre-deportation convictions but also for other aggravating factors relevant to a defendant’s culpability and need for incapacitation and deterrence?

For example, the proposed amendment would amend subsection (a) of §2L1.2 to provide alternative base offense levels if the defendant had one or more prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. What are the advantages and disadvantages of basing alternative base offense levels on illegal reentry convictions? Should the Commission use a different approach for such alternative base offense levels? Should the Commission use deportations and orders of removal instead to apply the base offense levels?

If the Commission provided additional enhancements to account for aggravating factors relevant to a defendant’s culpability other than pre-deportation convictions, how should these enhancements interact? How much weight should be given to pre-deportation convictions in relation to prior illegal reentry convictions or post-reentry convictions in driving the guideline range? Should the guideline provide greater emphasis on one or more of these factors? For example, should the guideline give more weight to post-reentry convictions and less weight to pre-deportation convictions (e.g., a 10-level enhancement for a post-reentry conviction for which the sentence imposed was 24 months or more with a corresponding 6-level enhancement for a pre-deportation conviction for which the sentence imposed was 24 months or more)?

What other aggravating factors, if any, should the Commission incorporate into §2L1.2, and how should the Commission incorporate them? Should the factor be an enhancement, an alternative base offense level, a minimum offense level, an upward departure provision, or some combination of these? If so, what level of enhancement should apply?

What mitigating factors, if any, should the Commission incorporate into §2L1.2, and how should the Commission incorporate them? For example, should the Commission provide a new departure provision for cases in which the defendant’s predicate felony conviction is based on an offense that was classified by the laws of the state as a misdemeanor?

4. Currently, §2L1.2 provides enhanced penalties based on convictions sustained prior to the defendant’s most recent deportation from the United States. The proposed amendment would modify how the enhancements work in the illegal reentry guideline. Specifically, it would divide the defendant’s criminal history into two time periods. Subsection (b)(1) would reflect the convictions that the defendant sustained before his or her first deportation or order of removal (whichever
event occurs first). Subsection (b)(2) would then reflect the convictions that the defendant sustained after that event (when the criminal conduct that resulted in the conviction took place after that event).

What are the advantages and disadvantages of using a particular deportation or order of removal as the determining event for whether a prior conviction qualifies for an enhancement under subsection (b)(1) or subsection (b)(2)? Should the Commission use a different approach to distinguish pre-deportation convictions from post-reentry convictions? For example, should the Commission provide instead that a prior conviction sustained before any deportation would qualify for an enhancement for pre-deportation convictions? If so, how should such enhancement interact with an enhancement based on post-reentry convictions as provided in the proposed amendment?

5. In 2014, the Commission amended the Commentary to §2L1.1 to add a departure provision for cases in which the defendant is located by immigration authorities while the defendant is in state custody for a state offense unrelated to the federal illegal reentry offense. In such a case, the time served is not covered by adjustment under §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment or Anticipated State Term of Imprisonment) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). Under the current guideline, the departure allows courts to depart to reflect all or part of the time served in state custody for the unrelated offense, from the time federal immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. The proposed amendment brackets the possibility of deleting the departure provision at Application Note 8 to §2L1.2.

If the Commission were to promulgate the proposed amendment revising how the enhancements at the illegal reentry guideline work, should the Commission delete the departure based on time served in state custody? If not, how should the new enhancements at §2L1.2 interact with the departure provision? For example, should the Commission limit the applicability of the departure provision?

6. The Commission recently promulgated an amendment that amends the definition of “crime of violence” in subsection (a) of §4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016 (to be published in a forthcoming edition of the Federal Register). The changes made by that amendment include revising the list of enumerated offenses and adding definitions for the enumerated offenses of extortion and a forcible sex offense. Finally, the amendment includes a downward departure provision in §4B1.1 for cases in which the defendant’s prior “crime of violence” or “controlled substance offense” is based on an offense that was classified by the laws of the state as a misdemeanor.

The proposed amendment would eliminate the use of the term “crime of violence” in §2L1.2. In the event that the Commission does not promulgate the proposed amendment, and retains the term “crime of violence” in §2L1.2, should the Commission incorporate all or part of the definition of "crime of violence" provided in the recently amended §4B1.2 into §2L1.2? If the Commission were to conform §2L1.2 to the new definition in §4B1.2(a), are there any particular offenses that would no longer qualify as a “crime of violence” but that nonetheless should receive an enhancement under subsection (b)(1) (e.g., statutory rape or burglary of a dwelling)?

COMMISSIONERS PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RACHEL E BARKOW
DABNEY L. FRIEDRICH
WILLIAM H. PRYOR, JR.

EX OFFICIO COMMISSIONERS PRESENT

MICHELLE MORALES, Department of Justice

PANEL I: VIEWS FROM THE EXECUTIVE BRANCH

KATHLEEN M. KENNEY, Assistant Director/General Counsel, Bureau of Prisons, U.S. Department of Justice
JONATHAN WROBLEWSKI, Principal Deputy Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice
PANEL II: VIEWS FROM THE EXECUTIVE BRANCH

MICHAEL E. HOROWITZ, Inspector General, U.S. Department of Justice

PANEL III: DEFENSE BAR PERSPECTIVES

MARGARET LOVE, Non-Voting Member, Practitioners Advisory Group
MARIANNE MARIANO, Federal Public Defender, Western District of New York

PANEL IV: EXPERT AND ADVOCACY GROUP PERSPECTIVES

MARY PRICE, General Counsel, Families Against Mandatory Minimums
DR. BRIE WILLIAMS, Associate Professor of Medicine, Division of Geriatrics, University of California, San Francisco
JEFFREY WASHINGTON, Deputy Executive Director, American Correctional Association

PANEL V: VIEWS FROM THE JUDICIARY

HON. RICARDO S. MARTINEZ, Member, Criminal Law Committee of the Judicial Conference

PANEL VI: STAKEHOLDERS' PERSPECTIVES

VIJAY SHANKER, Deputy Chief, Appellate Section, Criminal Division, U.S. Department of Justice
MARIANNE MARIANO, Federal Public Defender, Western District of New York
DR. VIRGINIA SWISHER, Member, Victims Advisory Group
C-O-N-T-E-N-T-S

Panel I - Compassionate Release: Executive Branch View
Kathleen M. Kenney, Assistant Director/General Counsel, Bureau of Prisons, U.S. Department of Justice

Jonathan Wroblewski, Principal Deputy Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice

Panel II - Compassionate Release: Executive Branch View
Michael E. Horowitz, Inspector General, U.S. Department of Justice

Panel III - Compassionate Release: Defense Bar Perspectives
Margaret Love, Non-voting Member, Practitioners Advisory Group
Marianne Mariano, Federal Public Defender, Western District of New York

Break

Panel IV - Compassionate Release: Expert and Advocacy Group Perspectives
Mary Price, General Counsel, Families Against Mandatory Minimums
Dr. Brie Williams, Associate Professor of Medicine, Division of Geriatrics, University of California, San Francisco
Jeffrey Washington, Deputy Executive Director, American Correctional Association

135
Panel V - Conditions of Supervision: View from the Judiciary
   Hon. Ricardo S. Martinez, Member, Criminal Law Committee of the Judicial Conference.........................173

Panel VI - Conditions of Supervision: Stakeholders' Perspectives
   Vijay Shanker, Deputy Chief, Appellate Section, Criminal Division, U.S. Department of Justice.................210

   Marianne Mariano, Federal Public Defender, Western District of New York ..................218

   Virginia Swisher, Ph.D., Member, Victims Advisory Group.................................225

Meeting Adjourned ............................................243
CHAIR SARIS: Good morning. Good morning to everyone and welcome to the United States Sentencing Commission's public hearing on two of the current pending amendments to the Federal Sentencing Guidelines.

I'd like to extend a warm invitation and welcome to all of you coming here. Especially, we have bad luck at Valentine's Day. We tend to get ice and snow and storms and I know a lot of you went through a lot just to get here. So, thank you for coming and we look forward to a thoughtful and engaging discussion on these important issues.

But before we get started today, I would like to state that the Commission joins the nation in morning the passing of Justice Antonin Scalia.

The Supreme Court and we have all lost a devoted and dedicated public servant who's had
a big impact on federal sentencing. Many of the commissioners have had the pleasure of knowing him on a personal level.

I got to know him just a little bit, but some of us -- actually, one of us was actually a law clerk to Justice Scalia, Commissioner Barkow, and we will miss him. And we extend deepest sympathies to his entire family.

So, do you want to say a few things?

COMMISSIONER BARKOW: Sure. I actually did not come prepared to talk about this today. It's been a very difficult weekend, as I'm sure you can imagine.

A lot of people have asked me -- I'm a Democrat, and have asked me, gosh, wasn't it tough clerking for Justice Scalia? And it was a joy and an honor and he is one of the most amazing, brilliant people I have ever met, and what's tough is losing him.

So, the only thing I'll say this morning since we are here for a Sentencing
Commission meeting, is he was really a visionary in terms of thinking about how our system works with sentencing.

And because of his commitment to the Sixth Amendment and constitutional interpretation, I believe the opinions that he's written in this area, they have been phenomenally wonderful for our society and the functioning of our government.

And thanks to the commitment to those issues even when he was a lone voice until he was able to pull together more voices to realize exactly how right he was.

Now, we're in a time where I think we have a very good approach to sentencing that takes into account the jury's role in our system and I think we should all be grateful for that.

And I miss him very much and I thank you for the moment to reflect upon him. So, thank you.

CHAIR SARIS: Thank you, and I know
how difficult that was.

So, today we will hear testimony relating to compassionate release, as well as the amendment dealing with conditions of probation and supervised release.

I look forward to hearing from many distinguished witnesses, including a judge, senior officials, public defenders, academics, policy experts and advocates, all who share their unique perspectives on the amendments the commission is considering.

We will start with a discussion about compassionate release, then turn to another proposed amendment on conditions of supervision.

As I will discuss in more detail later, the Commission's proposed amendment on conditions of supervision seeks to make the conditions of release more tailored to a defendant's needs and problems, as well as easier for defendants to understand and probation officers to enforce.
Looking ahead, we have a busy winter/spring. Can't wait for that spring. On March 16th we will be hearing testimony on the other four pending amendments during the cycle. And a full list of those amendments are posted on our website, as well as in the Federal Register. Public comment period for those amendments is open until March 21st. We hope to hear not only from today's witnesses, but also from those of you watching this hearing through our livestream broadcast -- hello to all of you -- about the proposed amendments here today.

If you haven't already, please visit our website, www.ussc.gov, to receive updates on the proposed amendments, as well as our reports.

Now, I'd like to introduce the other members of the Commission. Immediately to my right is Judge Charles R. Breyer, who is a senior district judge for the Northern District of California and has served as a United States District Judge since 1998. He joined the
Commission in 2013 and serves as vice chair.

Next is William Pryor, who also joined
the Commission in 2013. Judge Pryor is a United
States Circuit Judge for the Eleventh Circuit
Court of Appeals appointed in 2004. Before his
appointment to the federal bench, Judge Pryor
served as the Attorney General for the State of
Alabama.

Next is Rachel Barkow, who also joined
in 2013. Commissioner Barkow is the Segal Family
Professor of Regulatory Law and Policy at the New
York University School of Law where she focuses
her teaching and research on criminal and
administrative law. She also serves as the
faculty director of the Center on the
Administration of Criminal Law at the law school.

To my immediate left is Dabney
Friedrich, who has served on the Commission since
2006. Immediately prior to her appointment to
the Commission, Commissioner Friedrich served as
Associate Counsel at the White House. She
previously served as counsel to Chairman Orrin
Hatch of the United States Senate Judiciary
Committee and as an Assistant U.S. Attorney for
the Southern District of California, and then for
the Eastern District of Virginia.

Seated -- where is -- there she is, is
Michelle Morales, who serves as the designated
ex-officio member of the Commission representing
the Department of Justice. Commissioner Morales
is the Acting Director of the Office of Policy
and Legislation in the Criminal Division of the
Department. She first joined that office in 2002
and has served as its deputy director since 2009.
Commissioner Morales previously served as an
Assistant United States Attorney in the District
of Puerto Rico.

Now, let's turn to our discussion
today. The Commission's proposed amendment on
compassionate release seeks further comment on
whether changes should be made to the
Commission's policy statement found in the
guidelines. And if so, how?

The proposed amendment contemplates changes to the Commission's policy statement that would revise the list of extraordinary and compelling reasons for an offender to be considered for compassionate release.

The Commission believes the issue of compassionate release warrants our particular attention today. After a series of reports calling attention to current practices by the Bureau of Prisons and calling for wholesale changes to the compassionate release program, the Commission included compassionate release as a priority with this amendment cycle.

Today's hearing will allow us to hear the views of these distinguished witnesses on whether the Commission should amend its policy statement on compassionate release found in the Sentencing Guidelines at Section 1B1.13.

The Commission-proposed amendment included a detailed issue for comment on whether
any changes should be made to this policy statement.

The amendment also offered one set of possible changes to the statement that would revise the list of extraordinary and compelling reasons for compassionate release to reflect criteria set forth in the Bureau of Prisons' program statement. Again, I look forward to hearing from our witnesses on this very important subject.

Now, I will introduce the witnesses on our first panel representing the Executive Branch. First, Kathleen M. Kenney, who is the Assistant Director and General Counsel for the Federal Bureau of Prisons, Office of General Counsel, and has held that position since 2004.

Ms. Kenney has worked for the Bureau of Prisons, which we'll be calling here "BOP" for people who don't know that acronym, in various capacities since 1992.

Now, no stranger to any of us, sitting
next to her is Mr. Jonathan Wroblewski who sat right over there for a very long time as the ex-officio member of the Commission. He became the Principal Deputy Assistant Attorney General of the Office of Legal Policy at the Department of Justice in December 2015.

Prior to that, as I mentioned, he was Director of the Office of Policy and Legislation for the Criminal Division. And in that position, was sitting at the end of the table as the ex-officio. So, welcome back. We love seeing you in this position.

(Laughter.)

CHAIR SARIS: So, I think we have the light system. It sort of makes me think I'm an appellate judge. So, it's great. But, anyway, we're going to put on the lights and basically Department of Justice -- folks should be limited to about 10 minutes.

We did read your remarks which came in, when was it, late last week and I think all
MS. KENNEY:  Good morning, Chair Saris and other members of the Commission. Thank you for inviting me to join you today to talk about the Bureau of Prisons reduction in sentence or compassionate release authority.

While the statute has been in place for many years, we recently expanded our policies implementing this authority. Before discussing our reduction in sentence program, also referred to as RIS, I'd like to give you a brief update about the Bureau generally.

The Bureau currently incarcerates approximately 196,000 inmates across the nation. This is a substantial reduction from the nearly 220,000 inmates we housed just a few years ago. This reduction is due, in part, to Amendment 782.

The decline in our population has led to a substantial reduction in crowding in our institutions and we appreciate the Commission's efforts in passing Amendment 782. It has
contributed greatly to the reduction in our crowding.

As crowding decreases and our inmate-to-staff ratio declines, we are able to enhance our reentry programming, programming that is critical to our mission of assisting inmates and returning them to our communities as law-abiding citizens, but we are not out of the woods yet.

Overall crowding remains at 19 percent and the crowding at our high-security facilities is at 45 percent. However, we are hopeful that we will continue to see decreases in the size of the inmate population in the next few years.

Turning now to the subject of RIS, the first thing I should mention is that the Department views the RIS authority as an opportunity to release a number of offenders who do not pose a danger to the community and who are near death, incapacitated or face other extraordinary and compelling circumstances warranting early release.
However, the goal of the program is not to substantially reduce prison crowding or the prison population. The RIS authority was enacted as part of the Comprehensive Crime Control Act of 1984 and is codified in 18 USC Section 3582.

For many years after the law was passed, the Bureau considered RIS requests from inmates with terminal medical conditions initially defined as a life expectancy of six months or less, and later expanded to 12 months or less.

Approximately 15 years ago the Bureau again expanded the RIS program to include requests from inmates who suffered from severely debilitating conditions that made it difficult or impossible to attend to self-care.

A subsequent expansion included requests from inmates when a life expectancy could not be determined, but the medical condition was so poor there was no hope for
Later, we expanded our review to include debilitating medical conditions such as amyotrophic lateral sclerosis and other neurological diseases. Finally, we considered inmates who suffered organ failure and were not eligible for an organ transplant.

In 2007 at the same time that the Sentencing Commission revised its guidance regarding extraordinary and compelling circumstances for RIS, the Bureau advised wardens that there may be an increase in the number of RIS requests submitted for consideration from inmates at both medical and non-medical facilities.

The Bureau continued to review RIS requests for medical circumstances feeling these circumstances were clearly extraordinary and compelling, and further that they were circumstances for which the Bureau could substantiate the facts as they related to the
In April 2013, the Bureau expanded RIS medical criteria to include terminally ill inmates who have a life expectancy of 18 months or less, and for inmates who are either completely disabled or capable of only limited self-care and confined to a bed or a chair more than 50 percent of their waking hours. This was, in part, due to concerns about the scope of the program noted by advocacy groups and others.

In August of 2013, the Bureau further expanded RIS to three new categories of inmates; elderly inmates who meet certain criteria regarding age and the length of time served, and, in some cases, medical impairments related to aging; inmates for whom there has been a death or incapacitation of the family member caregiver of the inmate's child; and inmates whose spouse or registered partner has become incapacitated.

We have designated a RIS coordinator and an alternate at each facility to assist
inmates and staff with understanding the RIS program and to help process the requests.

We established regional social workers to assist staff with release planning. We also increased the number of attorneys reviewing the RIS requests in the Office of General Counsel to further expedite processing.

These changes to the RIS policy have resulted in an increase in approvals. In 2012, prior to our amended policy, the Bureau approved 39 request. In the past two years, our annual approval rate has averaged 100.

Regarding the request of elderly inmates, as of February 1, 2016, the Bureau has approved 31 RIS requests for elderly inmates.

It is important to note, however, that the RIS provisions by their very nature are only applicable to a small percentage of Bureau inmates. As such, they will likely have little impact on our overall crowding.

For example, almost 60 percent of
older federal inmates were sentenced after reaching age 50. Moreover, within the older inmate population, 13.5 percent of them were convicted of sex offenses, 12 percent were convicted of fraud, bribery or extortion offenses, and 11.8 percent were convicted of weapon offenses.

These offenses in many instances weigh against compassionate release due to the seriousness of the offense and public safety concerns.

Additionally, the Bureau does not house a large percentage of inmates with significant medical concerns or disabilities. Less than one percent, which equals about 1600 of the Bureau's population, has been identified as medical care level 4, our highest care level reserved for our most seriously ill inmates.

Many of those individuals are neither terminal, nor debilitated, but rather undergoing treatment for conditions from which they will
recover.

While older inmates, meaning inmates age 50 or older, are more likely to have health conditions requiring full-time assistance than younger inmates, the vast majority, about 97 percent of them of older federal inmates, are generally healthy and capable of self-care.

In April 2013, the Department of Justice, Office of Inspector General, conducted a review of the RIS program and made recommendations for program improvement.

The Bureau implemented these recommendations by amending our policy and regulations, providing additional training to staff, establishing an electronic tracking system and database and making information about the program more widely available to the inmate population through the electronic law library, electronic bulletin boards and the admission and orientation handbook.

We are planning to provide time frames
for processing requests when our policy is next amended, which will address the final open recommendation of that audit.

The Bureau remains committed to our mission of safety, security and effective reentry. We are committed to continuing to work expeditiously to identify potential RIS candidates and conduct thorough review of all RIS requests to ensure deserving inmates avail themselves of the program.

Judge Saris, Vice Chair Breyer and the commissioners, I thank you for the opportunity to appear before you today and I look forward to hearing of the Commission's consideration on the proposed amendments. I will now turn it over to Mr. Wroblewski.

CHAIR SARIS: Thank you.

MR. WROBLEWSKI: Judge Saris, Commissioners, good morning. It's nice to be back.

It's my pleasure to be here with my
colleague, Kathy Kenney, to discuss the Department's implementation of the authority granted under 18 USC 3582(c)(1)(A) to seek reduced sentences in extraordinary and compelling circumstances.

Ms. Kenney has just discussed the program in general, some relevant data, some changes that we've made to the program, as well as some current statistics.

I'm here to share our view of the policy underlying compassionate release and our response to the Commission's consideration of proposed amendments to the relevant guideline provision.

There are three topics I'd like to address in my oral statement. The first is coordination between the Executive and Judicial Branches on compassionate release.

The second is how the Department has interpreted its duties under the applicable statute. And finally, I'd like to touch on the
Department's ongoing efforts reviewing the program and how we can work together to find the best policy.

Under the legal framework created by the Sentencing Reform Act, once a lawfully imposed sentence has been affirmed on appeal, it is presumptively final.

To change such a final sentence, there must be an explicit grant of authority from Congress. We think this policy is generally sensible, because in most federal criminal cases the defendant has been zealously represented, has been given the opportunity to fully present all mitigating evidence, and a federal judge with lifetime tenure has been required to consider not only the applicable sentencing guidelines, but also all of the sentencing factors spelled out in Section 3553, including all circumstances surrounding the offense and the offender.

The judge, then, is required, as you know, to impose a sentence sufficient, but not
greater than necessary, to achieve the purposes
of sentencing.

Upending a final sentence was intended
to be a rare event. In the Sentencing Reform
Act, congress delineated the limited
circumstances under which final sentence could be modified.

The legislative history of the compassionate release provision is clear.
Congress contemplated that such a reduction would be appropriate in only, and I'm quoting here from the Committee report accompanying the Act, only in the unusual case in which the defendant’s circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner.

Under the compassionate release program, Congress vested the sole power to make a motion for a reduction in sentence in the Bureau of Prisons. It also created a system whereby an inmate could only receive a reduction if both the
Bureau made the motion and a court granted such motion after finding that indeed there were extraordinary and compelling reasons.

In making that finding, the court is required to act consistent with the applicable policy statements issued by the Commission.

To work well, the compassionate release program requires coordination across and within branches of government. This is why we believe the criteria for extraordinary and compelling reasons should be developed in a collaborative manner and that the criterion in the guidelines manual and the Bureau's relevant program statement should be consistent if at all possible.

In our efforts to amend the program statement in 2013, we specifically look to Section 1B1.13 promulgated by the Commission and incorporate its criteria.

We believe at this point it would be appropriate to cross-reference the Bureau's
program statement in 1B1.13 to ensure optimal coordination of policy.

We think it would be counterproductive and confusing to inmates, their families and the public for the policy statement adopted by the Commission to be significantly inconsistent with the Department's program statement.

In contrast, Section 3582(c)(2), which allows sentence reductions based on guideline changes on motion of the defendant, the Bureau of Prisons or the court, that section expressly provides that the court may reduce a sentence on compassionate release, but only here on the motion of the Bureau.

Given the law that any reduction of sentences for extraordinary and compelling reasons must be initiated by a department motion, we think any changes to the policy should be done collaboratively.

This administration's view of what is extraordinary and compelling reasons for a
sentence reduction is broader than the views of earlier administrations. It is consistent, though, with the view of this Commission as expressed in 1B1.13.

We agree with every administration that has implemented the Sentencing Reform Act that the authority to seek reductions in sentences for extraordinary and compelling reasons was not intended by Congress to be a parole-like early release mechanism for older offenders, but rather it was intended as part of a system whose fundamental premise is that offenders should serve most of the sentences imposed by the courts.

An overly broad reading of the statutory authority to seek a reduction in sentence for extraordinary and compelling reasons would nullify the principles of certainty, finality and truth in sentencing that undergird the act, as well as the need to avoid unwarranted sentencing disparities among defendants with
similar records who have been found guilty of similar conduct.

The Department has never taken Section 3582(c)(1)(A) as an open-ended invitation to second-guess the legislative decision to abolish parole, to undermine the guideline sentencing system, or to generally revisit the decisions of courts in imposing sentences. Rather, it has always been seen as a limited authority to address inmates who are near death or profoundly incapacitated or who face other genuinely extraordinary and compelling circumstances.

Unlike the suggestion of the Inspector General, we do not believe the compassionate release program provides an appropriate vehicle for a broad reduction in the federal prison population.

As Ms. Kenney mentioned, we have reviewed our program statement in 2013, and we are again reviewing it in light of the recent reports of the Inspector General.
Consistent with Recommendation No. 8 of the 2015 OIG report, the Department has tasked a new working group with reexamining the Compassionate Release Program Statement.

This work is ongoing and we hope we can find a way to collaboratively consider the various suggestions that have been made by the IG and others to amend the current policy.

In so doing, we will continue to take into account the SRA's goals of transparency, certainty and truth in sentencing while we strive to equitably meet our goals of public safety and justice in the imperative to ensure humane treatment of infirm and incapacitated offenders and those facing other truly extraordinary and compelling circumstances.

Thank you for having us here today, and we welcome your questions.

CHAIR SARIS: Thank you. Do you want to jump in?

VICE CHAIR BREYER: Yeah, I wanted to
ask -- I don't need a microphone, according to my
wife. I have two questions. One of Ms. Kenney, and then one of Mr. Wroblewski.

My concern with all of this is not the language that is being used, nor is it really quarreling with what congress said with respect to the -- where the motion resides. My concern is how effective has this policy been implemented.

And I note that there are roughly, just taking these figures, and I'm sure that they can be, you know, further refined, but there roughly were 3,000 requests for relief of which about 260 or 300 were granted. So, I mean, that's a very, very small percentage.

It may be warranted, it may not be warranted. I don't know, but my concern is that the process takes so long that people who are in this type of situation that otherwise might qualify are not given relief because they died, quite simply. And not so simple for them, but
they, you know, it's become mooted by that.

And my question to you is, what is your experience with respect to when a request is made, how quickly does the Bureau act upon it, and what has been the history of resolving these applications?

MS. KENNEY: Sure. Judge Breyer, with regard to inmates who are terminally ill, those requests take precedent over any of the other requests that we have.

We, too, are concerned that an inmate -- should an inmate die during the process, and to try to streamline and expedite the process we took out the regional director as a layer of review that was in our previous regulations. We did that in 2013. And we have also dedicated some more staff at the institution as far as having a RIS coordinator. We've done more training. We also have added the regional social workers to assist with release planning.

Each individual case has its own
complications whether -- depending on what kind of care the inmate is going to need after, what kind of financial care, but it is certainly the message from our director, from my office, from everybody that -- in any of these cases that are terminally ill, we need to do everything we can to expedite that.

In our next amendment to our policy, we will be putting in time frames, guidelines for staff to follow. And I think that will have a huge impact on assisting us with getting these things through as quickly --

VICE CHAIR BREYER: That's fine, but what is your -- and I appreciate the steps that you've taken.

MS. KENNEY: Yeah.

VICE CHAIR BREYER: I think they were really important, but my question is a bit more specific is because you have a history here, you know, you started keeping these figures at a certain date. You have all these figures.
I would like to know from the Bureau of Prisons, on the average, how many days it takes to process these types of complaints.

I'd also like to know how many inmates died while their request was being considered.

So, do you have the -- I don't know that you have those figures today, but --

MS. KENNEY: I don't have the figure on --

VICE CHAIR BREYER: -- could you supplement the record?

MS. KENNEY: -- the average -- I can supplement the record on the average number of days.

VICE CHAIR BREYER: Great.

MS. KENNEY: And you're looking for terminal cases; is that right?

VICE CHAIR BREYER: That's right. I mean, I know that there are other --

MS. KENNEY: Right.

VICE CHAIR BREYER: I understand that
there are other, but the vast majority are medical.

MS. KENNEY: Right.

VICE CHAIR BREYER: And though there are other criteria.

MS. KENNEY: Right.

VICE CHAIR BREYER: So, if you could supplement the record --

MS. KENNEY: Sure.

VICE CHAIR BREYER: -- I'd appreciate it.

MS. KENNEY: And I do have the data on -- in 2015, 11 inmates died while their request was pending.

VICE CHAIR BREYER: Okay. Thank you.

MS. KENNEY: Uh-huh.

VICE CHAIR BREYER: I'd like to ask Mr. Wroblewski a question, if I can. You and I have had discussions in the past about where the authority comes from with respect to reductions. What I am concerned about is that I
think that as it is done today with the Bureau of Prisons contacting, if they do, victims, people who have been wrongfully -- who have been harmed by this offense, that what we've done is indirectly incorporated some of the -- some of the considerations which justified eliminating parole.

In other words, it was not the Bureau of Prisons or the Executive Branch to determine a particular sentence. That was solely the judiciary. And one of the criticisms of the pre-guideline process was the Parole Commission and their adjudication.

Why is it that the Bureau of Prisons is particularly well-suited for conducting the inquiry as to the impact on the community in terms of one of the 3553(a) factors rather than a court looking at it who imposed the sentence, took those factors into consideration?

I'm now talking about -- not about health. I'm talking about impact on the
community and victims. Why shouldn't the court have an input on that rather than the Bureau of Prisons?

So, while the motion -- while the motion would have to be made under the statute by the Bureau of Prisons, the Bureau of Prisons could seek the opinion of the trial court, the sentencing court, as to what impact it would have on victims, because I don't think that runs afoul of the statute like your views.

MR. WROBLEWSKI: Yes, Judge Breyer. Thanks so much for the question. We think that the mechanism that you suggest may very well be a reasonable one. And we're going to be thinking about it as part of our working group, and, again, we're happy to have this collaborative dialog and this is part of it, but that's not what the statute is now.

The statute gives the director of the Bureau of Prisons a responsibility. And no administration since the Sentencing Reform Act
has viewed that responsibility as simply a mechanical task of making a motion any time an offender reached a certain age or had a certain illness.

Every administration has taken the position that part of our responsibility is to ensure that public safety is not undermined and that we'd only make the motion if all of the circumstances warrant it, not just if a person reaches a particular age.

COMMISSIONER BARKOW: Can I ask just a quick clarification --

MR. WROBLEWSKI: Sure.

COMMISSIONER BARKOW: -- question on that? When you're making that decision, does the Department feel bound by what the Sentencing Commission says the factors are?

Because one thing I couldn't quite gather from your testimony was whether or not BOP maybe looks at what we've said, but has its own list -- and, frankly, its own list is the trumping
list -- or whether or not BOP's view is this is the list from the Sentencing Commission, we'll go through all of those things. If all of those things are satisfied, then we'll go forward and we'll file the motion.

What's the Department's view?

MR. WROBLEWSKI: So, if you take a look at our program statement, you'll see that we have a long list of factors that go beyond the specific medical criteria or non-medical criteria.

I would argue that those factors are consistent with the Commission's guidelines, because the Commission's guideline in 1B1.13 requires courts to look at all the 3553(a) factors. And that's basically what our list is.

COMMISSIONER BARKOW: Well, let's say we came up with a -- just, I mean, maybe the current state isn't ideal for this question, but let's say we came up with a list and we said, you know, these are the four things. These four
Would the Department's view be, yes, those are the four things and only the four things we look at? Or would the Department's view be, actually, we believe there's also Items 5 through 8. And if we don't find 5 through 8, we're not filing the motion.

I'm just trying to get a sense of what your view is on the scope of your authority.

MR. WROBLEWSKI: No administration has ever felt bound by the Commission's guidelines. The Commission's guidelines as we read the statute, is to guide courts once a motion is filed.

The government's responsibility is laid out in the statute --

COMMISSIONER BARKOW: Right, which I'm looking at.

MR. WROBLEWSKI: -- and it says that the director of the Bureau of Prisons may, not must, file a motion if there are extraordinary
and compelling reasons.

CHAIR SARIS: So, as I understand your position, it's that we should cross-reference the program statement so that we'll be consistent.

I mean, is that -- am I reading that correctly?

MR. WROBLEWSKI: Well, I think our position is a little -- is a little -- goes beyond that.

What we're saying is if the Commission believes that there are changes that should be made to the program, we think that we should have an ongoing dialog and try as best we can to collaboratively come up with a policy that can be both embodied in the Bureau of Prisons' program statement, and in the Commission's guidelines that are consistent. And if we can't get there, we may end up with competing policies.

At the moment, we don't have that and we think that's a good thing and that we should try to avoid it.
CHAIR SARIS: But as I understand it, I haven't been here forever, but I have now been here six years, we've never done that before.

In other words, you haven't called us up and said, oh, we're going to add this limitation onto our program statement, you know, Commissioner, what do you think about it?

Are you calling for a brave new day kind of thing that we'll talk? Because as I understand, the Congress told us to do it in the sentencing guidelines.

I mean, maybe ours can be improved, but they told us to set the standards, not simply defer to you. So, I was surprised when I read it here that we should just simply cross-reference the program statement as, okay, this is what meets our duty.

COMMISSIONER BARKOW: Yeah, I share that and just -- I just would like to know how we're not nullified by the Department's view. Like I'm not totally sure what the Department
feels our function is if you get to set those standards and do whatever you want.

I mean, I guess I don't really understand where there's any affect to the Commission's role in the statute under the Department's reading of it.

MR. WROBLEWSKI: The statute specifically says that the Commission is to promulgate guidelines that are to be used by courts to decide whether to grant the motion. It does not talk about setting guidelines to tell the Justice Department when to make a motion.

And so, there are two separate responsibilities. There are two keys that have to be turned for somebody to receive a reduction in sentence for extraordinary --

CHAIR SARIS: To have their keys turned.

MR. WROBLEWSKI: -- and compelling reasons. Yes. There needs to be the motion from the Justice Department, and there needs to be a
granting of that motion by the court.

VICE CHAIR BREYER: But why is the Bureau of Prisons particularly well-suited for making determinations about how victims are viewing this type of release?

Why are they better than the judges who have to do it? They have to do it in the first instance when they sentence the person.

And I'm trying to figure out, because I think it's used as an excuse, by the way, but I don't know, I think that I don't know that there is a prohibition, as an example, under the statute that they couldn't -- the Bureau of Prisons in determining whether to make the motion or not couldn't seek the court's input as to whether or not it would be inconsistent with some of the 3553(a) factors.

May be duplicative, I understand that, but it -- the problem I see, as you point out, two keys, but the first key goes first. That is, we don't even get these cases unless a motion is
made.

And I'm just trying to figure out why you wouldn't want the court's input on that issue, because it seems to me the courts are better suited. And that's what the Sentencing Guideline -- the Sentencing Reform Act recognizes, better suited than have been the Parole Commission in making that type of determination.

MR. WROBLEWSKI: So, excuse me. I think your suggestion, Judge Breyer, is a good one. And I will make certain that we consider the idea of seeking the judge's, you know, sending a letter, for example, to the sentencing judge and seeing what that judge's opinion is, but the fact of the matter is that the statute is what it is at the moment and --

COMMISSIONER PRYOR: Well, let me make a suggestion for you.

MR. WROBLEWSKI: Yes.

COMMISSIONER PRYOR: Isn't the way
the statute is set up is for the judiciary to act as a check on what is basically the preliminary determination by the Bureau that this is an offender who is eligible for release and then the Sentencing Court has the full opportunity to consider these factors?

Could be the same factors, could be other factors, but to consider them independently as a check, if you will, on the Executive Branch's determination.

It's not that we don't have a role to play. It's just our role is at the back end instead of the front end, right? Isn't that the way this works?

MR. WROBLEWSKI: Yes.

COMMISSIONER PRYOR: That doesn't make us -- our role nullified. It just means it comes at the end, not at the beginning, right?

MR. WROBLEWSKI: Yes.

COMMISSIONER BARKOW: Do we have any indication from the legislative history that
congress had in mind -- and I feel guilty even asking about the legislative history, I got to be honest with you. But do we have any indication from the legislative history that congress had in mind BOP with this robust, all-inclusive role? Because I just -- I don't see it in this very brief statutory structure.

And the part I'm having a hard time making sense of is why that would be, because given the questions that Judge Breyer has asked, it just seems kind of crazy that if I were to think of all the possible places to put a unilateral decision where if the Department says no, it never goes any further, to put that in BOP.

It seems to me that it would make more sense to have it be, let the Commission think about all of the factors and put those in, and then BOP follows those factors having been set out. And so, both BOP and the judge take into account the things that the Commission has laid
out.

And so, I'm just kind of curious and I think the statute can be read either way, you know. I think it's got -- it's got room for -- is there something in the legislative history that -- I get the rarity part that you mentioned, but anything else that suggests that?

MR. WROBLEWSKI: So, I'm going to channel at great risk my inner Justice Scalia and look to the text of the statute itself.

The text of this particular provision gives the authority to the Director of the Bureau of Prisons. In the same very section for different motions, for motions for reduction of sentence based on a change guideline applied retroactively, the congress gives the authority to the Director of Bureau of Prisons, the defendant and the judge.

COMMISSIONER BARKOW: No, I see all of that, but I assume -- just bear with me. Assume I don't read that as a clear textual
indication that says all the authority goes to BOP, because I think it could also be read that, yeah, you get to file the motion. I totally understand that. And if BOP doesn't file the motion, all bets are off.

But when BOP is thinking about whether to file a motion, there's really two possible interpretations. One is the one that Judge Pryor mentioned, which is that BOP takes into account whatever it wants and then the Sentencing Commission's role is just to guide the judge once it gets there. So, if anything, all we do is limit how many can get granted.

The other view would be the Commission sets the policy statement that applies to this entire structure both at the front end for BOP, and for the judge afterward.

And I'm just curious if in the legislative history there is any indication as to which of those two competing interpretations might be --
MR. WROBLEWSKI: Not that I'm aware of.

COMMISSIONER PRYOR: Would it make any sense for the Sentencing Court to be considering the front end determination when it considers things like terminal illness of the inmate, medical condition, spouse -- wouldn't BOP have far more expertise about those issues than the Sentencing Court?

MR. WROBLEWSKI: We believe the Bureau of Prisons and the prison authority will have the best ability to look at certain circumstances. At the same time, we do recognize what Judge Breyer has spoken about.

COMMISSIONER PRYOR: But the Sentencing Court is not going to know what the medical condition of any inmate is, right?

MR. WROBLEWSKI: No.

CHAIR SARIS: So, let me -- if we were to change our list, we have a lot of people urging us to do that, and maybe this is Ms. Kenney, what
actual impact would it have?

You have a whole program statement
which someone obviously spent a lot of time
thinking about expanding in 2013.

MS. KENNEY: Yes.

CHAIR SARIS: For us to just
incorporate it essentially freezes that into law.
Maybe the next head of the Bureau of Prisons might
not like that. I mean, it has that problem.

But if we were to differ from you and
say, well, there's certain things we think are
too limited or should be expanded, does that have
an impact on your thought process?

MS. KENNEY: I would say it has. You
know, in 2007 when the Commission came up with
the guidelines that are now effect when we had
our DOJ Working Group at the time, which was
formed in 2011, it did inform our decision-making
that came to be the current program statement.

So, while there are some differences,
there were certain categories that you identified
that we did look at those categories and incorporated them into our current program statement.

CHAIR SARIS: And if we said "should," you should file a motion where certain things are present, would that have an impact on you?

MS. KENNEY: I think that -- I think the Department's view on that is that that does raise the separations of powers issue that we would -- we recognize that the Commission may want those motions filed, but we do think the statute in and of itself gives the director complete authority on filing a motion, or not filing a motion.

MR. WROBLEWSKI: We think the better approach, again, is to continue this discussion, find out where the Commission thinks the program should either be expanded or contracted.

What I find interesting is if you look at the ALI proposal and if you look at most of
the state provisions that are similar, I think
the categories are pretty common.

And of course we can have a great
debate with the Inspector General and others
about whether someone is elderly at 50 or 55 or
60 and even the experts are all over the place
about that, but I think the general categories
that the Commission identified, we have embraced.

We think that the general categories
in the American Law Institute proposal that's
pending are basically the same. There are
disagreements about when we should file and not
file.

I think that is better directed to
Congress. And, again, we're happy to discuss
that and perhaps, you know, work together to
address that.

COMMISSIONER FRIEDRICH: Mr.
Wroblewski, what is the timing -- or Ms. Kenney
-- of this ongoing review? I'm pleased to hear
that you are considering suggestions the IG made
and I'm just curious what are we talking about? Is this happening now as we speak? When do you expect it to be complete?

MS. KENNEY: The work group is ongoing and we hope to have some consensus and results by early spring -- late spring, early summer.

COMMISSIONER FRIEDRICH: Of this year?

MS. KENNEY: Of this year. Now, that would require if we're going to make changes to our program statement, we will need to negotiate that, those changes with our union. So, I can't -- I can't predict an actual implementation date, but the work in the Department of Justice we anticipate being done by the summer.

COMMISSIONER FRIEDRICH: I would consider -- I would recommend that you consider carefully some of the suggestions that Dr. Williams from UCSF has made in her testimony particularly with respect to streamlining the procedures, the administrative hurdles.
A number of people will testify today here, point out the difficulty in inmates being able to gather information that you need for you to process their request whether it's the defenders or some other surrogate. That seems a reasonable accommodation to make.

I thought you made some excellent points about the vagueness of medical terms and the need to consult with medical experts both within BOP, as appeared did not happen the first round at least according to IG, as well as outside.

And then, finally, the difficulties with making clear prognoses with short-term death. Many doctors can't say within 18 months this person will die, but, yet, the expectation or the likelihood, the probability is.

So, I would hope that you would consider some of those suggestions and of course I would welcome ongoing conversation with this, but I agree with you that the simpler and the
more certain approach is to incorporate BOP's statement.

Given BOP's track record on this, the statement that's before us right now I'm not confident, as you say, will bring the desired results. So, I'm encouraged that you're continuing this process.

COMMISSIONER BARKOW: Could I just to get a sense of those 11 inmates who passed away while their request was pending, do you kind of go back and try to figure out where in the process things went wrong and if there were any lessons learned there and I guess related to that?

I'm just curious if, you know, what the holdup is. You know, was it uncertainty about the medical condition, or was it uncertainty about how to weigh that against whatever it is that they did?

Because you said in your statement that, you know, these are the -- there's certain offenses like big chunks of --
MS. KENNEY: Right.

COMMISSIONER BARKOW: And I'm curious for those, you know, is it any weapons offense, or are they just kind of out, or do you look at the underlying facts of the case to say it was a weapons offense, but this person actually, you know, it was in the house locked away, but they got shot, I mean, do you go into that level of detail?

MS. KENNEY: We absolutely do.

COMMISSIONER BARKOW: Is that what, I mean, I guess I'm just trying to figure out what the holdup was in those 11 cases, if you have --

MS. KENNEY: I don't have the specifics on each of those cases as to where -- at what point in the process where the inmate passed away, but it is certainly something that we do take a look at.

In the past year or so we've made a point of going back and reviewing the denials at the local level from headquarters to see are we
seeing a pattern here? Are there things that we need to step in and try to correct some behavior?

The one thing I think that has been a very positive change is Director Samuels made a focus of saying if anybody meets the objective criteria, I'd like to see them.

So, even if you have concerns with public safety or other things, note those and send them up to me and we'll make sure we're looking at it as a more national reaching that kind of consensus.

COMMISSIONER BARKOW: Okay.

MS. KENNEY: So, we have seen more cases that have come up to Central Office. But to your point as to where the slowdown is on those particular 11 cases, I don't know that. We can certainly go back and look at it.

COMMISSIONER BARKOW: If the warden says no, that's the end of the --

MS. KENNEY: That's the end of the process. The inmate does have the ability to
file an administrative remedy challenging that
decision, but it is the end of the process.

VICE CHAIR BREYER: Okay. So, could
you then in addition to what I've asked for --


VICE CHAIR BREYER: -- could you take
those 11 inmates and advise us when they applied
and where they were in the process at the time
that their -- that they passed away?

MS. KENNEY: Sure.

CHAIR SARIS: And I should add to that
the one time in 22 years I've had a compassionate
release issue, the person actually did die before
it was resolved.

And I remember the defense attorneys
came to me and as the sentencing judge, I didn't
know what it was I could do. There's no clear
process for either -- for you all seeking input
of the sentencing judge, or the sentencing judge
reaching out to you saying, you know, the guy is
really Stage 4 cancer and dying. I have no
problem with letting him go, you know, he's old
and that sort of thing.

So, if we really, I mean, this is
beyond our purview. Our job is to set the
standards for the judges, but I think it's
incredibly unclear as to what role, if any, the
trial judge has at your stage even if it's just
providing information how to do it.

And I certainly agree with the other
statements that you all should be reaching out to
the sentencing judge for the 3553(a) factors.
That could be helpful to you.

MS. KENNEY: Right.
CHAIR SARIS: So, anything else at
this point? Okay. Thank you very much.

MS. KENNEY: Thank you.

(Whereupon, the above-entitled matter
went off the record at 9:38 a.m. and resumed at
9:40 a.m.)

CHAIR SARIS: So, our next panel isn't
really a panel. It's one witness, but he's also
from the Executive Branch.

Mr. Michael Horowitz is the Inspector General in the Department of Justice, Office of Inspector General, and has held that position since 2012.

Under his leadership, the OIG issued several reports about compassionate release. Before joining the OIG, Mr. Horowitz was a partner in the Washington, D.C. Office of Cadwalader, Wickersham & Taft.

Like Mr. Wroblewski, Mr. Horowitz also served as a commissioner from 2003 to 2009. It's hard to believe it was that long ago, and was the Department's ex-officio member prior to that.

So, you know us well. Welcome back.

MR. HOROWITZ: And it's good to be here. Thank you for having me testify on this important issue on compassionate release.

For the past several years my office has identified overcrowding in federal prisons as
one of the top management challenges facing the Department of Justice. We've even referred to it in our reports as a crisis that the Department is facing, something the Department I think itself has essentially acknowledged.

As of December 2015, BOP facilities were 20 percent over rated capacity and its inmate-to-correctional officer ratio remains troublingly high.

The BOP has the largest budget of any Justice Department component other than the FBI accounting for 26 percent of the Department's budget. Over a third of the Department's spending goes to the BOP and it employs -- sorry.

CHAIR SARIS: Thank you.

MR. HOROWITZ: And the BOP employs 37 percent of the Justice Department staff. Almost one out of every four Justice Department employees works for the Federal Bureau of Prisons.

Inmate medical costs are a major
factor in these rising costs. In FY2014, the BOP spent 1.1 billion dollars on inmate medical care, an increase of almost 30 percent in five years.

One reason for the growth in medical costs is the aging inmate population. Inmates age 50 and older are the fastest growing segment of the BOP's inmate population, increasing 27 percent from 2009 to 2014. By contrast during that same period, inmates under age 50 decreased, actually, by approximately three percent.

To help address the burden of both overcrowding and prison costs, we found in our reviews that the Department should more effectively utilize programs such as compassionate release.

We've issued two reports recently addressing these issues. In 2013, we issued a report that assessed BOP's use of the program from 2006 to 2011. And last year we issued a report that assessed the new BOP provisions expanding compassionate release eligibility for
Inmates age 65 and older.

In our 2013 review, we found the BOP's compassionate release program had been poorly managed and implemented inconsistently resulting in, among other things, deaths of inmates waiting to have their applications considered.

We also found on average that only 24 inmates were released each year through the compassionate release program.

Our review also found that the Department had not evaluated recidivism rates for inmates who had been granted compassionate release. The OIG, therefore, undertook such an evaluation and found a recidivism rate of about 3.5 percent for inmates released through the compassionate release program.

By comparison, the BOP has used the general recidivism rate than the Department has for federal prisoners, an estimate of as high as 41 percent.

As we noted in our report, the OIG
recognizes that approving and releasing more eligible inmates through the compassionate release program could result in some increase in the number of inmates who are rearrested, but we also noted that the recidivism data we found demonstrated that a carefully and effectively managed program could minimize the risk if careful consideration were given to an inmate's potential risk in the community as part of that assessment process.

On the same day we issued our report, the BOP issued its new compassionate release statement that sought to address the issues that we identified in our report.

In 2015, we issued our second review. And in that one we assessed, as I noted, the Department's modification of its compassionate release program statement which sought to expand a number of elderly inmates eligible to apply for compassionate release.

The program statement was released on
the same date in August 2013 as part of Attorney
General Holder's Smart on Crime Initiative.

In the first 13 months after the BOP
announced its expansion of compassionate release
eligibility for elderly inmates, we found that
only two inmates were released under the new eligibility programs.

Specifically, we found that 93 elderly inmates applied for the non-medical provision resulting in two release, while none of the 203 inmates who applied, elderly inmates who applied under the medical provision had been approved for release.

As I learned earlier today from the testimony, it appears that that number has now grown as a total to about 30 inmates, elderly inmates, in the two and a half years since the statement release, which is obviously somewhat of an increase, but hardly a significant increase in the number of inmates who have been released under these new provisions announced as one of
the pillars of the Attorney General's Smart on Crime program.

Based on the results of our review, the OIG found that the BOP could do more to improve its compassionate release program much like we had found in our review from 2013.

Our report made a number of recommendations that the Department and the BOP should consider, including one that would lower the eligibility age from age 65 to age 50.

Multiple studies, including one published by the BOP's own National Institute of Corrections, recommended that inmates be considered aging starting at age 50.

CHAIR SARIS: That's sad to hear.

MR. HOROWITZ: And I agree completely. I was struck by that as well when I learned that fact. But according to the studies, an inmate's physiological age averages 10 to 15 years older than his or her chronological age due to the combination of stresses associated with
incarceration and the conditions an inmate may have been exposed to prior to incarceration. Indeed, seven state correctional systems from around the country have defined aging inmates as those inmates who are age 50 and older.

We found that lowering the eligibility provision to age 50 could assist the BOP in addressing its overcrowding issues particularly in its minimum and low security institutions where inmates age 50 and older represent 24 percent of the population in FY2013.

We also found that reducing the eligibility age could result in cost savings. We found that based on BOP's cost data, BOP spent approximately $881 million, or 19 percent of its total budget, to incarcerate aging inmates, those 50 and over, in FY13.

We also recommended the BOP consider eliminating the 10-year minimum time served requirement that they put in place with the new aging inmate provisions, so that all aging
inmates would be eligible to apply for consideration for compassionate release once they had served 75 percent of their sentences.

We found the 10-year provision excludes almost half of the BOP's aging inmate population, because many sentences are actually too short to be considered for compassionate release under the provision.

We were particularly concerned about this provision, because it categorically prohibits early release consideration for aging inmates who did not receive at least a 10-year prison sentence even though those inmates are likely to be the best candidates for early release consideration precisely because they were given lower sentences and almost certainly got less serious criminal convictions. And they, therefore, pose a less risk of danger to the community. Yet, they are categorically removed from consideration under the policy statement.

We found that taking both steps,
reducing the age from 65 to 50 for eligibility consideration, and eliminating the minimum 10-year requirement, would increase the number of aging inmates eligible, using the word "eligible," for consideration from 4,000 or so inmates to 30,000 or so inmates based on that data that we have from FY2013.

We recognize that not all inmates age 50 and over are appropriate candidates for compassionate release. As a former prosecutor, I completely understand that concern. And that the evaluation will necessarily include many factors such as the nature and circumstance of the inmate's offense, the criminal history, the inmate's conduct in prison, the inmate's release plans and whether release would undermine the deterrent effect of the punishment imposed.

Nonetheless, as we noted in our prior reports, the Justice Department itself has already determined that aging inmates are a low public safety risk as a general manner, which is
why the provision was put in place.

For that reason, we found reevaluating the compassionate release eligibility provisions for aging inmates could substantially increase the pool of eligible inmates.

Let me make clear that when I talk about expanding the pool of inmates, I'm talking about those eligible for applying for compassionate release, not those that actually should be released. That's a decision that would be made, as the prior discussion indicated, through a variety of processes. What our reviews focused on were the eligibility of the applicants.

Within that larger pool of eligible inmates, we believe the BOP could further identify more aging inmates presenting low risk to public safety if released resulting in reduced overcrowding and cost savings to the Justice Department.

Thank you, and I am pleased to answer
any questions the Commission may have.

CHAIR SARIS: So, if I jump right in, if we -- if you -- we lowered it to 50, let's say we did everything you want, what about the basic argument, well, we're, at most, hortatory to the BOP, you know? The BOP has its own jurisdiction and could simply say no.

What is your thought about that impact of the guideline change would be? You've studied this program.

MR. HOROWITZ: Yeah. You know, from our standpoint, the issue really is, has been and really what we're charged with is not making policy, but looking at how the Department has implemented policies and handled the policies.

And what we found in both reviews that even under the standards that they put in place, it had not been managed effectively and there wasn't clarity around the program.

What we've also found is that, for example, in putting in place the 10-year rule, we
heard about the danger and the risk that inmates
let out under compassionate release, even elderly
inmates, for example, would be -- potentially
endanger the community.

And one of the things, as I said in
my statement, we noted was, well, if that's a
concern, the 10-year rule really makes little
sense, because you are then only making eligible
the most serious inmates for consideration and
that's going to result in numbers like we're
seeing, which is -- I understand the Department
noting that the overcrowding problem that they're
facing can't be resolved simply through
compassionate release.

And that's certainly something that
we've never in the OIG in our report suggested
for a minute, but what we have found is that it
is one of the few tools the Department has been
given by Congress to deal with these issues on
the back end, which are inmates already in jail
who have served a lengthy period of their
sentence.

And what we found is that the Department hasn't used that tool that Congress has given it effectively by putting the rules in place that they have, and by then even using the rules they've put in place in evaluating their program.

VICE CHAIR BREYER: Well, I'm trying to figure out why the Bureau of Prisons or the DOJ is in some manner released from the very sorts of things that the sentencing judge has to do.

As an example, when the judge sentences a defendant, one of the 3553(a) factors is the danger that this person presents to the community of future crimes.

Okay. And we are taking a hard, hard look at recidivism to see whether or not given the sentence that's imposed, this person really does have a risk of recidivism.

What I'm trying to figure out is where does this 10-year come from? Where is the
science behind the 10 years?

I don't see it. I'm unaware of it, but is there something that the Justice Department or the Bureau of Prisons have figured out that 10 years? Because it looks to me that all they are saying is, we want to make sure that somebody receives an adequate punishment. And that for the most serious offenses where a person has been sentenced 120 months or longer, we want to make sure that they have done the 10 years.

That's fine. That's a factor. And I don't have any quarrel with the punitive aspects of punishment, but I -- if, in fact, what you are going to do is let people out because they otherwise qualify for release, I'm trying to figure out where is the inquiry, where is the science based upon the 10-year rev and five year or some other time.

MR. HOROWITZ: In our review, we found no basis provided to us for why 10 years versus no floor, a five-year floor, a seven-year floor,
a 10-year floor. And of course, you know, from dealing with the guidelines for an inmate to be considered for compassionate release or a good candidate for compassionate release presumably would have had to have received the time credit.

VICE CHAIR BREYER: But I would say that any sentencing judge looking at this and looking at the criteria would say it's irrelevant. It's irrelevant to the consideration of what sentence I should impose, because I'm going to -- because if it's going to be at least -- a person has to serve at least 10 years, fine. Okay. It's not my concern.

MR. HOROWITZ: Right. And to add to that if you've served at least ten years, you've probably got a sentence of at least 11 to 12 years, because you need the good time to be considered.

So, you're really looking at people who got 11 to 12 or more years of a sentence who have to demonstrate that in order to be eligible,
and we were not given any basis for why the 10-year number was picked.

Frankly, one of the things we identified in both our first report and in the most recent report was a concern about the lack of data on metrics or other information kept by the Department just generally on, for example, recidivism rates was the most obvious, but timeliness standards were not in place.

We made that recommendation in our 2013 report. We're still waiting. That's still open, as you heard, and we're still waiting for that timeliness standard to be put in place.

We found the possibility of inconsistent decisions across wardens in institutions, because it's a decentralized process that's done at the warden level. And when we interviewed wardens, we heard varying views on what the standards meant to them.

And that has resulted in multiple revised guidance being issued by the BOP whether
it's on medical conditions or otherwise. So, that's been a concern in a number of areas that we've looked at in terms of how this program has been managed.

COMMISSIONER BARKOW: Just one quick question and one other -- did you receive the -- your request to get the minutes of the meetings of BOP with their various stakeholders?

I know you had asked for those by July 31st, 2015.

MR. HOROWITZ: Yeah, on that, that's the recommendation in our most recent report where we asked for a report by July 31 of last year.

What we learned was that the group was not constituted and didn't meet until December of last year, December 2015. We were given a PowerPoint presentation that was used as part of that meeting. And we're told that that was, in essence, the record of the meeting.

We're obviously disappointed that
we're going to be coming up in April on the one-year anniversary of the issuance of our report and the working group has just gotten started. And, to our knowledge, hasn't made much progress.

COMMISSIONER BARKOW: So, the follow-up to that or the related question to that is, you know, so there's a couple different things that we're looking at, at this hearing. One is kind of what the substantive standard should be, but in some sense, it doesn't matter if the process by which BOP processes these or it's just so delayed and riddled with inconsistencies among wardens, things like that.

And so, even if you, for example, change the eligibility so that you didn't have to serve 10 years, you had to serve 75 percent or some percent of your sentence, whatever it was, there's this question of whether or not any of that takes -- really means anything. It's the process that BOP has various places in it where it's not functioning on all cylinders.
And so, from your experience studying it in terms of improving the process at BOP, is there anything related to that that you can see that we could help with if the standards were clearer?

I mean, you know, putting aside they just view them as advisory in any event and not pay attention to them, but is it the lack of clarity that is a problem for the wardens on a case-by-case basis that slows them down so Dr. Williams' suggestions would be helpful?

Is it that there's some other -- what could the substantive standards do, I guess, is what I'm asking, to help improve the process? Because it seems like a lot of the things at BOP are out of our control. We can't dictate how they process these kinds of things, but could we help with the clarity of our standards?

MR. HOROWITZ: I think what we've looked at is the BOP standards themselves and the policy statements and any supplementary guidance.
We found the BOP has responded to the concerns as we've identified them and tried to address them.

And so, for example, they've issued multiple new guidances on medical conditions and considering medical conditions, but that, we found, remains an issue, we found that in our most recent report, as a source of confusion.

We were -- and we also found that what was seemingly clear in the statement about it being 10 years or 75 percent turned out to be a conflict. I mean, 10 years is 10 years and 75 percent is 75 percent. There shouldn't be much room there, but what it turned out to be the case was that the word "or" was really "and."

And so, the BOP had interpreted the statement to be both requiring 10 years and 75 percent and we found that the wardens and others who had to handle the statement to be confused by that issue.

COMMISSIONER PRYOR: That's because
they have whichever is greater at the end of the
-- of that line.

MR. HOROWITZ: Right.

CHAIR SARIS: We're so data-driven, as you know, that the staff put together
statistics on recidivism at different age groups, which I thought was very helpful in trying to
understand what should be the right age.

So, between 51 and 55 there's a 26.8 percent recidivism rate. Whereas if you're over 65, it's 13 percent, about half. So, I don't understand that we should take into account the very learned testimony of the experts on geriatrics, something I'll probably be increasingly leaning on, however, in terms of recidivism it really -- it's really a stark difference, the age 65 to 50. And at what level -- we can't totally say it's irrational to pick one versus another in terms of public safety.

Did you look at --

MR. HOROWITZ: Yeah.
CHAIR SARIS: Maybe you didn't have access to this.

MR. HOROWITZ: We didn't have access to precisely that, but we did have access to general studies that indicate the same issue, which is why we undertook our own recidivism review on the compassionate release program. And we're, you know --

CHAIR SARIS: But you can understand why it's 3.5 percent if they are only taking people who are about to die, I mean, you know. So, as you say, it would likely go up.

But if you made everyone eligible, you might see statistics like that after age 50.

MR. HOROWITZ: Well, the issue is of course making more people eligible doesn't mean that those are the individuals that would ultimately be approved for release. And that's, I think, one of the things we've seen is that by categorically restricting the people who could be considered, you're potentially losing
individuals who, in fact, are among the sickest
and among the, perhaps, safest to be released.

And so, you know, for example, just in
terms of data, 65 and older in medical
institutions, and I'm using our 2013 data that we
had, there were at that point 582 of the 4,000
plus 65 and older inmates in medical centers.
So, those are among the sickest individuals.

You heard testimony that 1600 inmates
are in Stage 4 facilities, which are among the
sickest. And yet if you consider how many
erly inmates total in two and a half years
have been released under the program, we're
talking about 30.

So, we're talking far less than one
percent of those sickest individuals. Many of
those may be, and I don't know the answer to this,
but many of them may be because they are
absolutely barred from being considered because
they haven't yet served 10 years of their
sentence.
CHAIR SARIS: So, it's the 10-year rule you're really --

MR. HOROWITZ: Well, I think that was the starkest one that stuck -- that eliminates half the population. So, whether you chose age 50 or 65 if you have a 10-year rule, you basically cut in half the number of inmates eligible to be considered right off the top. They just can't be considered, period.

COMMISSIONER FRIEDRICH: Two quick questions. One is I think DOJ testified that -- or someone will, that almost 60 percent of BOP's older population began serving their sentences after age 50.

I'm just curious if we were to drop the age limit to 50, do you have any thoughts on whether or how it should affect those who are sentenced after that age?

MR. HOROWITZ: Well, I think this 75 percent rule still stays in place, right? So, no matter what age you're sentenced at whether
it's 50 or 65, there's still this -- you have to have served three-quarters of your sentence.

So, it's not as if it's a get-out-of-jail-free card because of your age. It's when should you be considered by the BOP and ultimately by the sentencing judge for consideration for possible release given all of the potential concerns, severity of the crime, inmate's history, medical condition, deterrent need for the sentence, other factors the judge and the BOP need to consider.

So, it's really what we've looked at just to be clear, is not about who should be granted compassionate release, it's about this issue of is the program being run well and do the categorical decisions being put in place make sense given the data we're seeing?

COMMISSIONER FRIEDRICH: One thing we've heard from the past from BOP is that for those inmates who need significant medical care, life-threatening illness, one of the reasons
they're not releasing them is they're having a hard time finding a place for them on the outside to have the care that they will need.

Is that something that you found in your investigation? And if so, what percentage do you think that accounts for some of the folks dying in prison?

MR. HOROWITZ: Yeah, we -- that was a concern and it was a concern we heard about in our reviews. We didn't get data on that from the BOP. I'm not sure if they now have such data.

That was, you know, among the various issues of trying to sort through this was the data issue, but that is clearly an issue that needs to be in place. There has to be a release plan, which is again why, in our view, is you sort of put in place restrictions on who can even apply.

You're potentially shrinking the pool of people who you might think did have release plans in place, but that is clearly a legitimate
and very important reason, a concern.

CHAIR SARIS: Anybody have any other questions?

COMMISSIONER PRYOR: I'm puzzled. It seemed to me -- you've looked at our proposed amendment, right? And the circumstances, our list of circumstances, No. 4, we have the 65-year requirement for a defendant who suffers from a chronic or serious medical condition related to the aging process. That's someone who's served at least 50 percent of his or her sentence. It would seem to me it would make a lot of sense to lower that age for that circumstance.

But when you look at Circumstance 5, which I think is what Commissioner Friedrich was referring to that has the 10-year requirement, dispensing with the 10-year requirement might make sense.

But if the only other circumstance other than having served 75 percent of his or her sentence even with inmates being older than the
average age because of their circumstances, doesn't seem to me that just lowering the age in that circumstance to 50 would make sense.

Do you think otherwise?

MR. HOROWITZ: Well, I think on this issue and these considerations, I think the real question is how broad a pool of eligible applicants do you want to try and create?

Because between age 50 and 65 you have about, if I have the numbers here, there are 14,000 inmates who are over 50 and received less than a 10-year sentence.

COMMISSIONER PRYOR: Right.

MR. HOROWITZ: So, you have that group. And then you have inmates age 65 and older who have received less than a 10-year sentence, is about 2,000. And all the data I'm using, by the way, is from FY2013.

So, you have these relatively large numbers as you consider, say, 30 people total being released in two and a half years. You have
2,000 inmates over 65 who have been excluded because of the 10-year rule.

COMMISSIONER PRYOR: Right.

MR. HOROWITZ: And to us, that made little sense.

COMMISSIONER PRYOR: Right.

MR. HOROWITZ: Particularly when the chief argument that we heard in opposition or as a concern about compassionate release was the safety issue, which is obviously a very legitimate issue.

But the people who got age --

COMMISSIONER PRYOR: Lowering the age requirement in that circumstance doesn't make nearly as much sense, does it, as it would for those who are suffering from the serious or chronic medical condition and have served half their sentence.

MR. HOROWITZ: Well, certainly you can make the argument that the latter makes more sense of the two.
COMMISSIONER PRYOR: Okay.

MR. HOROWITZ: We're not in a position, frankly, to make a policy judgment on it. We're much more in the point of laying out what the numbers look like and allow others like the Department and like policymakers such as the Commission to decide what the right place to set things is.

CHAIR SARIS: Ms. Morales has a question.

COMMISSIONER MORALES: Yeah. Isn't one of the issues that BOP has is that they have limited resources in order to evaluate all these different requests and all the different factors? And in particular, those release plans that we've discussed, how complicated those are, isn't that an issue?

And wouldn't broadening the eligibility pool make that even a -- aggravate that problem making it perhaps harder for the BOP to then identify which of those applicants are
actually more deserving of the release?

MR. HOROWITZ: Well, I think we've found and heard concerns from BOP about staffing levels and the support and ability to go through them, but I don't think, frankly, that should be the basis for not having considered for this program those who are eligible or should be eligible for it or who are the sickest inmates.

It, frankly, argues for the Department putting more resources into addressing these issues.

We found in a number of places, frankly, in our aging inmate report which went beyond the compassionate release program, where BOP needed additional staffing in a variety of areas to support aging inmates.

And so, from our standpoint the answer should be the Department making an evaluation as to whether to give more resources to BOP rather than just not handling the program the way it needs to be.
COMMISSIONER MORALES: But my question is really about broadening the pool, and wouldn't broadening the pool exacerbate that problem?

MR. HOROWITZ: And I think at that point it just becomes a question of whether the Department is supportive of the program and going to put in place the resources to address it.

It's certainly been our concern that the way the program has been handled as we saw in 2013 and more recently, that the timeliness has been an issue.

We found that, you know, in our first report, that about 13 percent of the inmates had died while waiting to have their compassionate release application be considered. 28 out of, I think, 200 or so. A pretty high number.

So, something the Department, we think, and BOP needs to address.

VICE CHAIR BREYER: I'm sorry. I wasn't going to ask a question, but --
CHAIR SARIS: Last question.

VICE CHAIR BREYER: Two-thirds? Your analysis is that two-thirds of these individuals have died while they're --

MR. HOROWITZ: No, I'm sorry. 28 percent. A quarter of them -- I'm sorry, 28 out of 200 or so. 13 percent.

VICE CHAIR BREYER: 13 percent, okay.

MR. HOROWITZ: Thank you. I'm sorry.

VICE CHAIR BREYER: Thank you.

MR. HOROWITZ: That was under, to be clear, the old program, the program that was in place prior to 2013 when we issued our report.

CHAIR SARIS: Well, thank you very much for testifying and for all the work you've done in this area.

Why don't we all stand up and stretch as we hit the third panel.

(Whereupon, the above-entitled matter went off the record at 10:12 a.m. and resumed at 10:15 a.m.)
CHAIR SARIS: I think we've lost a couple of our commissioners, but I've just been informed we have 600 people online, so -- watching us. So, here we go. We will have a break after this, I promise.

I think I'll start with the introductions. I'm sure Judge Breyer will be here in one second.

So, thank you for making it. I understand Ms. Mariano had a particularly difficult -- did you have a tough trip up here?

MS. MARIANO: I did. I did, Your Honor. It's a little snowy in Buffalo. We've had a good winter, except for yesterday.

CHAIR SARIS: Yes. So, glad you did make it.

MS. MARIANO: Thank you.

CHAIR SARIS: All sorts of reasons. So, thank you for making that trek. So, our next panel will offer the defense perspectives on compassionate release.
The first witness is Margaret Love, who is testifying today on behalf of the Commission's Practitioners Advisory Group. Ms. Love is a practicing attorney specializing in executive clemency and restoration of rights after conviction, and was the United States pardon attorney for the Department of Justice from 1990 to 1997.

She is joined by Marianne Mariano, who has been the Federal Public Defender for the Western District of New York since 2008. She has also served on the Federal Defender Sentencing Guidelines Committee, served as a detailee to the Commission, and has testified for the federal public defenders at other commission hearings.

She's also a detailee, right, to the Criminal Law Committee; is that right?

MS. MARIANO: Yes, I am.

CHAIR SARIS: So, she does all sorts of good work cross the country. Welcome back, and I'm glad you made it through that ice storm
in Buffalo.

MS. MARIANO: Thank you.

CHAIR SARIS: So, I think, Ms. Love, are you the first?

MS. LOVE: Yes.

CHAIR SARIS: Okay. And here I think the -- I don't know if you've been warned about the light system. I don't know if you heard before, but I think here it's five minutes apiece or so and then we pepper you with questions. Okay? Thank you.

MS. LOVE: I'm very, very pleased to be here, Judge, and commissioners. And I'd like to say on behalf of the Practitioners Advisory Group that we are very, very grateful for the Commission's inclusion of this item on its list of priorities for the coming amendment cycle.

I'm personally very pleased to be here having testified at the Commissioner's very, very first hearing on this subject in 2006 almost exactly 10 years ago.
I'd like to make three points. The first is -- goes to this issue of structure and legislative history.

Congress intended this statutory sentence reduction authority to be administered primarily by the judiciary. To this end, it designed a balanced tripartite decision-making structure.

This commission was tasked under 28 USC 994(t) with defining what constitutes extraordinary and compelling reasons warranting sentence reduction.

BOP was to identify defendants in its custody who met the Commission's criteria and then bring them back to the attention of the Sentencing Court.

The Sentencing Court would then decide whether the defendant's sentence should be modified applying general principles of sentencing. That is not how it works at least, in part, because of this Commission's modest view
of its policymaking role over the years.

BOP has played all three decision-making roles. It applies its own policies to determine when a case warrants sentence reduction. And those policies include consideration of factors that are committed to the Sentencing Court under 3553(a) such as seriousness of the offense and likelihood of re-offending.

In this regard, the United States Attorney's Offices have played -- come to play a very key role in BOP's decision-making process frequently discouraging filings that BOP might otherwise be inclined to make.

This is where a lot of cases get stuck, frankly, and we have heard from -- I have heard from many people who have handled cases where a case gets stuck in the U.S. Attorney's Office and is never seen again.

Because a government motion is jurisdictional, the court has no ability to act
even when it is sympathetic to a defendant's situation.

The upshot is that what congress intended as a judicially-administered safety valve, a word that appears three or four times in the legislative history, is instead controlled by an executive agency responsible for prosecutions, which generally bring defendants back to court only when they are at death's door.

The second point I'd like to make is that this Commission can restore the proper balance to the decision-making process under 3582(c)(1) by vigorous exercise of its policymaking authority.

If the Commission develops a detailed set of extraordinary and compelling reasons and a range of examples applying those criteria as required by 994(t), this will facilitate an appropriate role for the courts in administering the statutory scheme and guard against unwarranted disparity.
The clearer and more precise the policy developed by the Commission, the easier it will be to hold the Justice Department accountable for applying it in particular cases.

In turn, if the Department confines its gatekeeping role to deciding whether the Commission's criteria apply in particular cases, courts will then be able to play their intended part in determining whether the defendant circumstances considered as a whole warrant sentence reduction.

For this reason, we agree that the revised 1B1.13 ought to include a provision stating that the director of BOP should not withhold a motion if a defendant meets all of the criteria, any of the criteria, I should say, listed as extraordinary and compelling reasons in 1B1.13.

I was really struck by Ms. Morales' comment about the difficulty that BOP has in determining whether individuals who meet the
criteria are deserving. I believe that that's a
decision for the court to make, with all due
respect.

The third point that we want to make
is that congress intended a broader scope for
this judicial sentence reduction authority than
is reflected in the current 1B1.13, or the BOP
program statement.

The legislative history of the
Sentencing Reform Act indicates that the safety
valve in 3582(c)(1) was intended to apply
whenever a defendant's changed circumstances make
continued confinement inequitable -- and that's
a phrase that comes directly out of the senate
report -- not simply when a defendant is ill, or
disabled, or aging, though we believe even these
compelling reasons are too narrowly drawn in the
current 1B1.13.

We have a particular concern about the
criteria for non-terminal illness and disability
which seem unnecessarily complex and limiting,
and about the age-related criteria.

We also urge the Commission to make clear that compelling reasons need not have been unforeseen at the time of sentencing. The only limit in the statute on the Commission's authority is that rehabilitation alone should not be a basis for sentence reduction.

The appearance of the word "alone" seems to suggest that rehabilitation has some relevance and may be considered.

In conclusion, we encourage the Commission to use its full policy-making authority to broaden and clarify the existing eligibility criteria under 1B1.13 and to give serious consideration to including additional categories of changed circumstances such as changes in the law that have not been made retroactive.

We have appended to our testimony a marked-up version of Commission's proposed amendment to 1B1.13 and would be happy to answer
any questions you may have about it.

CHAIR SARIS: Thank you.

Ms. Mariano.

MS. MARIANO: Thank you. I'd like to thank the Commission for giving me the opportunity to testify today on behalf of the federal public and community defenders regarding compassionate release and later regarding conditions of supervision.

I'd like to thank our Sentencing Resource Council for preparing our written testimony. I am particularly thankful that it is not 100 pages long, but I wouldn't want our brevity to be read as our opinion that this is unimportant. Quite to the contrary.

Defenders are pleased that the Commission is revisiting the compassionate release guideline. It is important to do so, and to do so now, because the current process is broken.

Individuals who are dying or who are
desperately needed at home to care for aging parents or sick children are being kept in prison longer than necessary.

To fix this problem, we support the proposed amendment submitted by the Practitioners Advisory Group and agree with the reasons set forth in their testimony as to why the changes are necessary.

In my oral remarks today, I want to focus on two things. First, the Commission has a very important role to play in addressing the current problem with compassionate release because Congress delegated to the Commission, not the Bureau of Prisons, the authority to define extraordinary and compelling reasons that should trigger a motion for a reduction in sentence.

And second, we, the defenders, can help. The Commission should encourage the Bureau of Prisons to reach out to defense counsel or the defender in deciding whether -- sorry, before deciding whether an inmate meets the criteria for
As to our first point, we encourage the Commission to adopt a comprehensive guideline that defines extraordinary and compelling circumstances independent of the Bureau of Prisons policy and makes clear that the BOP should file a motion for a sentence reduction if those criteria are met.

In our view, Congress did not intend to delegate exclusive authority to the Bureau of Prisons in deciding what extraordinary and compelling reasons merit a motion for a reduced sentence.

Congress explicitly gave the Commission that role, the role of setting the standard, and gave the judiciary the penultimate role of determining whether a person should have a reduced sentence. The statutory scheme is clear and the Commission must lead.

In addition to defining extraordinary and compelling circumstance, the Commission
should also amend the guideline to instruct the
director of the BOP to file the motion when the
criteria set forth are met. There is sound legal
basis for doing so and it could have legal affect.

Under well-established principles of
administrative law, the BOP's construction of
3582 is not entitled to deference, because
Congress spoke directly as to which agency or
authority should define extraordinary and
compelling reasons, and it is this one. There
is no gap for the BOP to fill, no weight need be
given to its policy statement by this commission.

Moreover, even if it could be argued
that congress left a gap, the BOP -- and the BOP
has now filled it, the decision-making process on
whether or not to file a motion is not entitled
to deference because it's unreasonable, which
we've outlined in greater detail in our written
statement.

Even if the guideline is not binding,
the Commission's independent work on expanding
Section 1B1.13 is essential and its guidance on a compassionate release will likely have an anchoring affect and play a significant role in BOP decisions and when to file a motion.

The BOP exists over time and despite its testimony here today, we fully believe this Commission taking the lead will influence that important agency. Finally, we can help. Defenders can help.

The most startling thing in preparing for this today was how very little contact we have with this issue. The BOP should be encouraged to solicit information from counsel -- excuse me, defense counsel, before declining to seek a reduction for an inmate.

The BOP collects information from the U.S. Attorney, the prosecuting attorney at times, the victims and the Office of Probation and Pretrial Services, when making this life-and-death decision on whether an individual meets the criteria for compassionate release.
This fact-finding, decision-making process would be more equitable and much improved if the BOP also involved defense counsel who can help gather the many records the individual is required to produce.

Counsel can also confirm, clarify or refute information provided by the prosecutor, or contained in the PSR ensuring that the BOP has accurate information upon which to base its decision.

As the process stands now, there are horrible inequities. Inmates of means can and do hire counsel to fight for them while indigent languish without help in their hour of need. We can help.

Accordingly, we request the Commission to encourage the BOP to contact defense counsel of record or the federal defender in the district where the person was sentenced, or where they will be released.

If the BOP is unwilling to notify
defense counsel before deciding whether a motion to file compassionate release should be filed, it should at least notify counsel when the decision to make the motion is made and the issue sent to the court. Thank you.

CHAIR SARIS: Thank you.

COMMISSIONER PRYOR: I have a question on that last point. Do they not serve counsel with a copy of the motion?

MS. MARIANO: No, they do not. We are -- I have been in the Defender's Office for 21 years, Your Honor.

COMMISSIONER PRYOR: Yeah.

MS. MARIANO: I have had contact with two issues. One was a white-shoe law firm attorney from New York contacting me to see if I could help when a motion got stuck in chambers in our district.

The second -- very informal contact, obviously. The second actually was just this past year. The Bureau did, in fact, make the
motion. The judge did, in fact, ask Probation for the release plan and was inclined to grant it. And Probation refused to approve the home where the person would be sent to live with his family, because it was Section 8.

Well, Section 8 does not bar a person who is terminally ill from temporarily, as that is temporary, living with a loved one, but the Probation Office, and I had come from a district with a great Probation Office, did not act and did not act timely. And the BOP actually did reach out -- or suggested the family reach out for us.

And when we got the call from the family, we contacted the BOP who was grateful for our assistance. We have many contacts especially through our reentry program that can facilitate this.

So, no, they do not contact us at all. But in this instance because the family was very excised and the person was very near death, we
were able to provide assistance.

COMMISSIONER BARKOW: This is -- I guess it's for both of you, but I'll start off with Ms. Love.

In your testimony, you had mentioned that -- or suggested that maybe DOJ in filing this motion shouldn't take into account the public safety factor for -- I'm looking at Page 4. When looking at -- so, it's footnote 7, that it doesn't look like the Department's authorized in deciding whether this exists to take into account whether defendant is a danger to public safety, because another provision explicitly says it. And so, the idea is it's cited here.

I got to admit that struck me as -- we certainly have in the guidelines, public safety, and 3553(a) would have public safety be part of it. And so, it's a two-parter.

So, the first one is, you know, are you standing by that that public safety is not something for BOP? And then if you assume that
it is, it's got to be something that BOP takes into account before they file the motion. The question would be whether that kind of swallows up any other reform, because, you know, I understand what both of you have been saying about how we could give more specifics, how we could give more examples, how we could go through all of that. But if at the end of the day, BOP will weigh that against public safety.

And if you assume, but maybe I'm wrong and you can convince me that it's not in there, but if you assume public safety has to be something that BOP takes into account, then I'm not sure where it gets us at the end of the day, because it seems like a lot of this is BOP saying, no, because it's just we're weighing it and we just think the public safety weighs too high and we're not going to file it.

MS. LOVE: I was struck in reading the statute, I had never read it the way I did in the past couple of weeks, where the 3582(c)(1)(a)(2),
which is the three strikes, 30-year authority, does task BOP with determining as a matter of eligibility whether the defendant is a risk. However, that same authority is not in (c)(1) -- or (a)(1), I should say. And that was sort of interesting to me.

Obviously, BOP has information relating to discipline and different things that have gone on that will be tremendously important for the court to know. And of course the court will take that into account as a matter of 3553(a).

But as a matter of threshold eligibility, the way we read the statute, it doesn't look to us as if that should be a disqualifying factor at the threshold, but should be taken to the court.

COMMISSIONER BARKOW: So, you're saying if BOP -- I'm going to give you a stylized hypothetical here. Okay. So, just bear -- but BOP looks at someone and they say, oh, my gosh,
the prison record is, you know, off the charts. This person has really been -- had lots of behavioral problems in prison, but they meet the terminal illness and the age requirements. So, we'll go ahead and we'll file the motion and we'll just have the -- but we'll tell the court we don't think you should grant it.

That's the model that you think this imposes?

MS. LOVE: Well, frankly, yes. I think as a matter of statute, reading the statute, that's the model, yes.

COMMISSIONER BARKOW: What would be your response to DOJ's argument, though, that it says they're supposed to look at the 3553(a) factors? That, you know, all of this BOP has this gatekeeping role. And as long as they're supposed to look at 3553(a), they've got to take into account safety there.

MS. LOVE: Well, I'm not sure where you're reading that in the statute.
COMMISSIONER BARKOW: Well, so that's --

MS. LOVE: It's the court.

COMMISSIONER BARKOW: But the idea would be that's going to be the court's decision, but DOJ anticipating that they're filing a motion in good faith with the court, should also be prepared to say that they think it meets those criteria as well.

MS. LOVE: Well, again, as a matter of eligibility we think that the clearly defined reasons that the Commission puts forth ought to be what brings a case to the court.

The big problem with this statute, frankly, if you look at the program statement carefully after the reasons are defined, there's a list of seven factors. And those seven factors include the seriousness of the offense.

And that, we strongly believe, is not appropriate to keep a case from the court. That those are factors that the court weighs, and
that's certainly the way we read the statute.

VICE CHAIR BREYER: I think there's a lot of confusion based upon the fact that I don't actually think this statute is workable. And I think it's a confusion over the roles of what you want the various institutions to play.

I think Judge Pryor's point is excellent about who better should determine the health of the person and so forth than the Bureau of Prisons. Absolutely. I would give enormous deference to that.

Who better to determine the nature and circumstances of the offense? The judge. Prison judge knows almost nothing about it.

Be that as it may, I can't rewrite statutes, much to the relief of the general public. However, I think your suggestion is an interesting one, which is that perhaps an ameliorating factor can be if you involve the defense early on in this process, at least they're in the position to point out things to
the director that may be useful in determining in an outcome whether or not to make the motion.

So, my question to you is, under the law, is it your understanding that the federal public defender can represent these people at this stage of the proceedings? Because traditionally you don't have a public defender representing defendants in this -- in a writ, in other types of proceedings. So, I'd like your answer on that.

MS. MARIANO: Sure. Well, since 2008 this Commission has given us plenty of work under 3582 with all of the retroactive guidelines. And it has differed district to district and maybe circuit to circuit on defender involvement, but most jurisdictions do involve the defender on sentencing reductions. And that's what this statute is.

It is not a parole proceeding. The Sentencing Reform Act is clear we do not have parole. It is a sentencing reduction, which is
an adversarial proceeding in our point of view.  

I would also say that ethically as an attorney I have an ongoing obligation to my clients to provide them with a duty of loyalty.

I have many of the records the BOP seeks for these individuals. I can get other records very readily. So, I do think that there is authority for us under 3582 and the CJA to take on the limited role that I envision, Your Honor.

I do think that indigent people in the Bureau of Prisons are not abandoned by the Sixth Amendment, nor are there obligated attorneys to continue to fight for them in every appropriate avenue.

CHAIR SARIS: I have a question on foreseeability. So, post-Booker every defense attorney worth her gold is going to raise with me the person's physical problems if they've got an illness.

I can't think of a situation where
cancer hasn't been raised or a severe mental illness or some such. I mean, it comes up routinely in sentencing hearings and sometimes I'll vary based on the fact the person has cancer.

I've already sort of reduced the sentence, or, frankly, often the Assistant United States Attorney agrees to reduce it because of that.

So, at what point -- I understand you're saying that it's a flat cutoff, you know, that compassionate release can't be granted if the court considered it. But at some point when I consider cancer, I just know the person has cancer, I'm not thinking they're at final stages of death.

So, I see it as being a factor, but maybe not a brick wall. How would you word it?

MS. LOVE: I think the foreseeability issue is a bit of a red herring. I mean, aging is always foreseeable.

So, to suggest that foreseeability is
now a disqualifier seems to me to ignore some of the factors.

Now, it is used as a basis for refusing to file. I have had a case myself where BOP said, well, exactly as you say, the person had early stages of cancer. Therefore, we are not going to file.

We think that just as you suggest, Judge, you may have known that it was a mild or early stage, but if it gets to Stage 4 or a very serious stage, you may well feel that allowing the person to go home to die with their family is a compassionate and appropriate thing.

So, the foreseeability issue, it seems to me, is for the court certainly where illness is concerned.

CHAIR SARIS: But your impression is that right now it's a -- if the Judge mentions it or varies based on it, the BOP won't file the motion at all?

MS. LOVE: I have had a case in which
that occurred and I have heard stories of other cases. I don't know whether it's a flat policy that if the judge mentioned it that a case can never go back. I don't know that.

MS. MARIANO: Your Honor, I'm not sure that I understand the BOP to look that closely at what happened at the sentencing hearing. The fact that the condition existed at the time of sentencing is what I think is considered.

And I would note that there are a lot of individuals for whom the court can exercise no discretion, because they suffer from mandatory minimums.

Before Booker, it was also mandatory guidelines and your physical health was a discouraged factor for departure from those guidelines.

So, there are many people who may have had a condition at the time of their sentencing to which the court felt they could do nothing about. So, there are a number of people within
the BOP that would fall into that category as well. Thank you.

CHAIR SARIS: Anybody else have any questions? Anything else?

(No response.)

CHAIR SARIS: Thank you very much.

MS. MARIANO: Thank you.

CHAIR SARIS: Now, our break and, so, we should come back here -- we have our last panel on this and we'll have a 15-minute break. So, we'll be back here at five of.

(whereupon the above-entitled matter went off the record at 10:42 and resumed at 10:54 a.m.)

CHAIR SARIS: Hello. Hope you're all back out there. There are apparently -- how many -- we think there are hundreds of people watching. So, I'm really pleased that you're able to do that.

So, our next panel -- our final panel, actually, addressing compassionate release
presents the perspectives of experts and advocacy
groups.

The first witness is Mary Price, who
has been the general counsel for Families Against
Mandatory Minimums, FAMM, since 2000. She
directs the FAMM Litigation Project and works on
federal sentencing reform.

Among other publications, she is the
author of "The Answer is No: Too Little
Compassionate Release in the U.S. Prisons,"
published by FAMM and Human Rights Watch in 2012.

The next is Dr. Brie Williams, an
Associate Professor of Medicine and Associate
Director of Tideswell -- did I pronounce that
right? I did, good -- at the University of
California, San Francisco.

She also currently serves as Medical
Director of the San Francisco VA Geriatrics
Clinic where she attends on the San Francisco VA
Acute Care for Elders Unit. She is board
certified in geriatrics, hospice and palliative
medicine and internal medicine.

Dr. Williams has authored or co-authored numerous publications on the topic of compassionate release.

Mr. Jeffrey Washington will testify next. He has served as Deputy Executive Director of the American Correctional Association since 1995.

Previously, Mr. Washington served in the Standards and Accreditation Department as Acting Director at ACA, and as Administrator, Deputy Administrator and Regional Administrator dating back to 1986. So, you certainly are extremely knowledgeable.

Now, the one sad thing, there's an empty chair there for an old friend of mine, actually, Professor Kate Stith, who I went to law school with. She tried to get here.

She, as I understand it, I'm not sure if I get the story correctly, but the plane was hit by lightning. And then she got on a train
that broke down. So, she actually did everything humanly possible to be here, but she has submitted short of running --

VICE CHAIR BREYER: I wouldn't push my luck.

(Laughter.)

CHAIR SARIS: So, she has submitted very, very interesting testimony about her work on the ALI. And she -- American Law Institute. She is a professor of law at Yale Law School and is currently serving as an advisor for the American Law Institute Project, Model Penal Code: Sentencing, and by appointment of Chief Justice Rehnquist on the Advisory Committee of the Federal Rules of Criminal Procedure.

We very much miss having her here, but we do have her testimony for the record. So, Ms. Price.

MS. PRICE: Thank you so much for inviting me to testify today.

CHAIR SARIS: Yes.
MS. PRICE: And I will just note that it sounds like Professor Stith has extraordinary and compelling reasons --

(Laughter.)

MS. PRICE: As you know from my written statement, which I'm not going to recount here, I believe that the compassionate release program is not used as intended, because the BOP has arrogated to itself the decision of whether a prisoner who otherwise meets the criteria actually deserves to be released.

Until the BOP relinquishes that role, we will continue to see stories like the ones contained in my statement of prisoners denied not because they didn't meet the criteria, but because the BOP believes they should not go home.

As it turns out, right after I submitted my testimony last week, I received a letter from a prisoner that convinced me again that the question that you asked at the end of the issue for comment is the most important
question of all.

Should the Commission provide that the BOP not withhold a motion if defendant meets any of the circumstances listed as extraordinary and compelling reasons in Section 1B1.13?

And I think absolutely that should be done. And here is what I learned from the prisoner who wrote to me and from his pro bono counsel with whom I consulted afterward.

In 2004, he was sentenced 300 months for convictions stemming from his operation of an asbestos abatement company. His crimes were serious, nonetheless, nonviolent.

He has excelled in prison. He's bettered himself, assisted others and achieved and received commendations from wardens and from staff.

On November 2nd, 2014, his wife suddenly and unexpectedly passed away and left behind their three minor children. No family member could take them in and the children were
taken in by kind neighbors. No one in the family had stepped up when on March 30th, 2015, the father requested a compassionate release from the warden. A month later the warden recommended to the Bureau of Prisons that they release this gentleman, because they could find no family member willing and able to take care of the children.

While the lack of any family caregiver alone should be enough to prompt a motion for compassionate release to the court, as is evidenced by it being one of the examples that you use for extraordinary and compelling reasons, this family has faced very, very special challenges.

As the warden's recommendation to the Central Office of the Bureau of Prisons pointed out, the eldest child, Junior, was born with multiple congenital and developmental conditions that make him extremely medically fragile.

He had VACTERL syndrome, a series of
congenital malformations, and renal and limb abnormalities, among other things. He suffers as well from autism. He must have special treatments throughout the day to help his body eliminate waste and his medication and antibiotic regimen must be closely monitored and strictly adhered to. He's had 14 surgeries in his 15 short years of life, including the implant of a donor kidney, which is the only kidney he has.

In short, he requires constant round-the-clock personal care to keep him alive, maintain his dignity and help him thrive.

Both his parents were specifically trained to provide for those needs, and both did so until his father was incarcerated for offenses that occurred before he was born.

After his wife's death, the neighbors who took the children in became overwhelmed with the round-the-clock responsibilities for which they were not trained. Mistakes were made. The child landed in the hospital for a while.
In October 2015, they announced they could no longer care for the children. The small family was separated. The younger children went off to another state to live with a relative. That relative refused to take Junior, the eldest with the medical concerns.

Today Junior lives in a foster home with strangers and the State having looked and failed to find a family member to take Junior in, is taking steps to declare Junior neglected by his father. The finding of neglect is the first step in the process of terminating parental rights.

15 months have passed since the death of the mother. Nine months have gone by since the warden recommended the father's release. His letter to me expressed his deep concern for his children's emotional well-being and especially the terrible toll that these losses have taken on his eldest son Junior. Yet, no one has communicated with the father officially regarding
the recommendation -- since recommendation was made, rather.

The father did learn informally that the division that advises the Office of General Counsel about compassionate release was recommending against the release, because it could not be proven that there was no family member capable of caring for all the children. A request for an opinion with the U.S. Attorney's Office has been pending for some time.

That no family member will take Junior in has been clearly established by the State's effort to find a family member and then moving to terminate the father's rights.

This prisoner clearly meets the criteria enunciated by the Commission in Section 1B1.13. Something else has to be going on here and I don't know if your proposed guidance to the Bureau of Prisons to not withhold a motion if the prisoner meets the criteria would result in this prisoner's release. I would hope so, but it's
I do believe that including that guidance should send a clear message from this body to the Bureau of Prisons to confine itself to the task of determining who in this population meet the criteria that you enunciate and move into court for their release. The rest should be up to the court. Thank you.

CHAIR SARIS: Thank you.

DR. WILLIAMS: Judge Saris and the commissioners, thank you very much for the opportunity to talk today.

As Judge Saris said, I'm an Associate Professor of Medicine at UC San Francisco where I specialize in geriatrics, which is the care of older adults and in palliative care, which is the care of the seriously ill.

My work as an academic focuses on older and seriously ill prisoners and I also train criminal justice professionals in geriatrics and palliative care.
So, the issues that bring me here today are three-fold. First, the precipitous rise in the number of older prisoners. Second, a rise in illness-related prison mortality. And third, that evaluations of compassionate release which we heard this morning have revealed opportunities for improvement.

I'll offer my medical perspective on these three issues, and I offer my opinion that there really is a critical role for the medical profession in health-related policies. And I applaud you for inviting me today.

I'll start with three policy recommendations related to older prisoners. First, I would recommend that the Commission recommend to the Bureau of Prisons that they lower the age of eligibility for evaluation of age-related release policies to 55 years.

This is because as you heard a little bit before, many prisoners experience so-called accelerated aging, which they appear to be on
average 10 to 15 years older than they are. Because age-related compassionate release policies are intended for prisoners whose incarceration will require considerable complex healthcare and potentially considerable health-related needs at high cost, the definition of older prisoners should take into account this concept.

The most conservative approach here would use -- would be to use the age of 55 or older.

Second, I recommend eliminating requirements of a minimum number of years served before older prisoners can be assessed for compassionate release.

For example, as we heard a little bit this morning, requiring at least 10 years served runs the risk of penalizing the exact prisoners for whom the policy is intended to reach, those who have served a reasonable proportion of a relatively short sentence who are not deemed --
or unlikely to be deemed to be a safety risk.

Third, I agree with this concept of adding a terminology like aging-related chronic or serious medical conditions to eligibility guidelines, but I caution that it will be very important to list specific examples of what is meant by those chronic or serious medical conditions to ensure that the policy includes serious conditions that are common with advanced age such as advanced dementia and debilitating physical impairment.

Next, I have two recommendations about eligibility criteria for prisoners with serious or life-limiting illnesses. First, I recommend that medical eligibility criteria reflect the limitations and the science of prognosis.

Unfortunately, prognosis is a very difficult and inexact science. When it's applied correctly, it provides merely a probability of death over a very general time frame.

For many serious illnesses, it's
actually extremely difficult to pinpoint the exact month or day in which a patient will die. And because of this, physicians are very unwilling and uneasy and very reluctant to prognosticate at all.

And when they do, multiple studies have shown that physicians are far more likely to actually overestimate prognosis. So, they expect that their patients are going to live much longer than they actually do, but physicians are much better at prognosticating the trajectory of serious illness.

And what I mean by this is that it's easier for a physician to say that within the next several months this patient in front of me is bound to develop such profound cognitive or mental or physical incapacity that they are going to require 24-hour nursing care if they have not died already.

So, I strongly recommend that in addition to life expectancy, sort of an estimated
number of months, eligibility criteria include
this other perspective, a physician's assertion
that a prisoner with a serious condition is on an
end-of-life trajectory that's heading towards 24-
hour nursing care in the upcoming months.

I also recommend that this definition
of serious illness be expanded to reflect
terminal illnesses that are often profoundly
debilitating for several years before they lead
to death. Things like end-stage dementia where
people can live for multiple years, certainly
months, or end-stage organ disease like heart
failure where they are quite debilitating.

Second, I recommend that the
compassionate release policy should be reviewed
by a panel of healthcare professionals on a
regular basis to ensure that it keeps pace with
current medical evidence.

I recognize this might be beyond the
Commission's purview, but I have to say it as a
medical professional.
And I'm going to end with four very brief recommendations that I elaborated on in my written testimony that are related to some of the health-related administrative burdens that can limit access to compassionate release.

So, the first is that it's going to be important to include guidelines for the appointment and training of surrogates for those prisoners who may meet eligibility criteria, but are simply unable to initiate or complete the application process themselves either because they're too sick, too cognitively impaired or have too low health literacy.

Second, I recommend streamlining the review process. We heard a little bit about that this morning.

Third, I recommend developing a fast-track options for prisoners who are deemed by a physician to face imminent death.

And fourth and finally because very few correctional healthcare providers are trained
specially in the care of older and seriously ill patients, I recommend training select medical and custodial care in geriatrics and palliative care, and also on how to implement whatever final compassionate release policy is developed.

Thanks so much for your time and attention.

CHAIR SARIS: Thank you.

MR. WASHINGTON: Good morning. Thank you for the opportunity for me to be able to testify on behalf of the American Correctional Association regarding compassionate release.

In considering your decision on the proposed amendments, I'd like to provide you with some context regarding the care and treatment of offenders and corrections, some of the challenges corrections professionals face and end-of-life planning in correctional settings.

As background, the American Correctional Association is the oldest and largest professional correctional organization
in the world.

We represent all disciplines within corrections profession. Adult and juvenile. Prisons and jails. Community corrections, academics and others. Our members come from local, state, federal and private prisons and international.

ACA promotes excellence in corrections by offering several forms of professional development, certification, facility accreditation and by regularly publishing research and surveys to the field.

As you are well aware, the current federal offender population and many states populations have risen to unsustainable levels. Roughly 10 percent of the current federal offender population is over the age of 55. We heard some of that this morning.

However, the cost associated with providing them with their constitutionally mandated care and treatment is an enormous
obligation on the federal budget just as it is
for the state correctional systems with aging
offender populations.

It is estimated that 3300 inmates die
of natural causes each year. As offenders age,
it's critical that corrections accommodate the
needs of its geriatric or terminally ill
offenders.

The ACA's public correctional policy
on correctional healthcare states that
incarcerated individuals or those in custody of
criminal justice and juvenile justice agencies
have a legal right to adequate healthcare in
accordance with generally recognized
professional standards utilizing comprehensive
holistic approaches that are sensitive to
cultural, age, gender responsive needs for a
growing and diverse population.

Whether they are offenders or elderly
or both, sometimes those with serious illness
feel guilty about their circumstances. In
particular, the guilt stems from the perceived hardship or burden it imposes on others physically, emotionally and financially.

The question becomes how can we possibly secure quality care for offenders as they die? Correctional facilities are crowded. Thus, stretching the facility's staff and resources to their limits and beyond. Healthcare budgets are lean and often insufficient.

ACA has several standards through its accreditation process throughout our publication manuals requiring facilities and agencies to meet chronic care and special healthcare needs of all offenders either through available resources within the agency, or by timely transfer of an offender to an appropriate treatment facility that can meet their needs.

The public correctional policy on correctional healthcare adopted by ACA requires healthcare programs for offenders include comprehensive medical, dental and mental health
services, and that such programs should establish hospice services for the terminally ill offenders supported by a compassionate release program for those who qualify.

For corrections, like in the community, care for the terminally ill should start long before the final weeks of life. 28 correctional systems in the United States offer special care, treatment and programming for geriatric offenders.

A number of systems also accommodate the needs of geriatric offenders in special sections of one or more of their units. Iowa, Louisiana and Texas have complete facilities dedicated to the geriatric care.

13 states have laws in place for early release of geriatric offenders. However, most of these jurisdictions combine the requirements for those for terminally ill offenders.

43 states provide special services for offenders who are chronically or terminally ill,
including chronic care clinics, separate housing units, palliative care, hospice services, skilled nursing, separate prison hospitals and inpatient medical referral centers like in the Bureau of prisons.

26 states have statutes in place for the early release of terminally ill offenders under the title "compassionate release." Conditions for release include being mentally incapacitated or physically incapable of engaging in criminal activity, receiving clemency approval from the governor or having a life expectancy less than one year.

There are a number of departments. The Maine Department of Corrections provides great hospice programs for those individuals who are within their care. And Maine has been very successful in what they've done.

In Louisiana, the Angola Prison operated by Warden Burl Cain, had a great hospice program that included the use of inmates to take
care of those inmates who aren't able to be released. And it's showing great, great promise.

They've put that program in six of their other facilities. They've also received an award from the American Hospital Association for what they do.

And in the State of New York they have two forms of release. One, medical parole. And the other, parole that's done by a full board that takes a look at those cases on a case-by-case basis.

Also in New York, the warden at facilities -- I'm sorry, the Commissioner with advice from the wardens have been given the ability to also release individuals from the facility if that's necessary. Thank you.

CHAIR SARIS: Do any of the states have anything that look like our system where you go back to the court, or is it all the power within the warden or the Parole Commission?

MR. WASHINGTON: I think in different
cases, especially in the case of New York and in Kansas, they've built in a network where the process runs through the Department of Corrections, but they also have to have advice and consent from the judge and/or the Parole Board and also victims. So, there's a mechanism for them to be able to contact all of those entities to get a response.

COMMISSIONER BREYER: I was interested in your written testimony that New York State had a rule about 50 percent. You have to have served 50 percent of the term. And that would be across the board, not just terminally ill, but elderly and so forth, though it disqualified certain offenses for being considered. I think it was 50 percent of non-violent offenders.

How does that work? Would you say that's been a success? Would you say that it results in a lot of people who are ostensibly, you know, low in terms of recidivism? Has it
been successful? Not successful?

MR. WASHINGTON: I've not done enough research or have the information to be able to convey that to you. What I was able to do was to find the different programs that are in effect around the country.

I'd be happy to provide that information to --

VICE CHAIR BREYER: I'd be interested to see whether New York, you know, we want to take a look -- I do, anyway -- want to take a look at other states that have this program and try to figure out whether it makes sense to have like 10 years, or it has X percentage, or it makes sense to restrict it to certain types of offenses. So, I would be very interested in the success.

Do you have any information on that?

DR. WILLIAMS: Just a few weeks ago in the New York Times, a colleague of mine wrote about one of her patients who was in New York,
one of the New York State prisons.

So, here's a 60-year-old prisoner. He had metastatic liver cancer. It had rendered him virtually paralyzed. He was going to be eligible for parole within the year. His wife and children were desperate to care for him at home. Everybody agreed that there was a good parole plan in place and a hospice care plan in place.

His prison physician had already petitioned for early release several months ago. His health declined quickly in prison while he was awaiting New York to make a decision. He was admitted to a nearby hospital, which was approximately two hours away from where his wife and children lived.

On the night he died, his wife was in her car making the long drive home and a date to review his application was scheduled for over a month after the day that he died.

VICE CHAIR BREYER: Do you have a
sense of cost? Do you have a sense of how much in terms of medical costs are devoted to end-of-life care?

And I know that that's a sort of soft term that you really have to define, but do you have -- can you give us some information on that subject?

DR. WILLIAMS: So, two answers. One answer is what we do know is that older adults account for approximately four to nine times the cost of younger prisoners to incarcerate.

Some of the problem with understanding exactly what healthcare-related costs are is that first of all many states are not actually obligated to release some of that information.

Secondly, there's a real question about what is a healthcare-related cost? I mean, do you -- are the costs associated with officers who are -- two officers who are standing with a comatose patient in a hospital, you know, collecting their overtime, is that a health-
related cost, or is that a corrections cost? So, there's some questions about how to even really start to drill down and what exact healthcare-related costs are.

I will say that recently we looked at one state and I'm not actually sure if this is publicly available data, so I have to find out before I give the Commission the information about this, but we looked at one state and we looked at prisoners who had died within the last two years and we found that healthcare-related costs were exorbitantly higher in the last year of life than they were on average for Medicare recipients in the community.

And those are just the very specific hospitalization and healthcare-related costs. So, I can't exactly answer your question. What I can say is that if you're asking about costs, the answer is really, really high.

MS. PRICE: And I'll just add I think that the Office of Inspector General report
discusses the medical costs as they relate to aging prisoners in the Federal Bureau of Prisons. So, that information should be available at least for them.

CHAIR SARIS: I understand you're objecting a little bit to putting a certain time period on what "terminal" means, because you say the doctors can't predict.

So, I understand what you're recommending is just using the word "terminal" and "chronic."

What would your exact wording be?

DR. WILLIAMS: So, great question. I guess I would backup for a minute and say physicians can prognosticate in certain circumstances, you know.

We're very good at saying the person in front of me is probably going to die in the next 48 hours. And I'm really good at saying a seven-year-old girl is probably going to live for another 80 years. And then everything sort of
in the middle depends on what the condition is that I'm being asked about.

So, there's certain solid tumor metastatic cancers where the end-of-life trajectory is very clear and it's very predictable, and I can make a recommendation about that.

What's less easy to make a prognosis about is some of the debilitating conditions that are becoming more and more common with an aging prisoner population. Things like dementia. Things like profound functional impairment. Things like end-organ disease like liver failure and heart failure.

Some of these conditions actually have more of a kind of oscillating trajectory where it's very difficult to see where in that process the patient necessarily is until way at the end of their condition.

So, what I would say is that in terms of terminology, number one, it will be important
to think about different trajectories of end-of-life illness which is why I say "serious" and "advanced" life-threatening condition with profound cognitive or functional impairments.

And so, I think that there are times when a physician can say this is a patient with a terminal life-limiting illness, but there are times when we can say this is a life-limiting illness with a clear trajectory towards cognitive and functional impairment in the next one to two years.

CHAIR SARIS: So, the exact language would be?

DR. WILLIAMS: I'm an academic. Are you really asking me to make an exact --

CHAIR SARIS: I'm a lawyer.

(Laughter.)

DR. WILLIAMS: Just kidding. The exact terminology would be advanced -- serious advanced illness with a clear terminal trajectory.
CHAIR SARIS: You know, I just read a compelling book over the weekend, "When Breath Turns to Air." I don't know if anyone has had a chance to read that about a 37-year-old that was diagnosed with -- a neurosurgeon with stage 4 lung cancer.

And it's now coming to me as you are speaking, there was a point at which he says to his doctor, tell me about the graph. How long do I have to live? And she knew and wouldn't tell him, because they don't want to take away hope, I guess, is the theory.

But what was true from that book, anyway, I just want to know if you agree, is that actually there are graphs out there.

DR. WILLIAMS: Yes, there are graphs. And there are -- there are very clear sort of four or five general trajectories and they differ where, you know, there are trajectories, like I said, the metastatic solid tumor cancer, there are -- there is an advanced illness that is sort
of very quickly and has a very profound cliff
where people sort of move along and then
suddenly, you know, there's just a matter of a
couple of weeks and then they've died. There's
sort of the sputtering decline.

So, there are a lot of different
trajectories, but there's a lot of different ways
that people die, but really they fall into four
or five overarching trajectories.

CHAIR SARIS: And is 18 months
consistent with that with most, I mean, they keep
expanding it. Six, 12, 18. I think they're
trying to be expansive.

DR. WILLIAMS: Yeah, I think that
they're trying to be expansive. And I think the
question really is how much do you want the
physician -- how much do you want to pin down the
physician? What's the wording that the physician
has to say? This person is going to be dead in
18 months? Is it --

CHAIR SARIS: How about --
DR. WILLIAMS: -- there's a 50 percent chance that this person is going to be dead?

CHAIR SARIS: Oh, likely. More likely true than not true that the person --

DR. WILLIAMS: More likely true than not true. I would agree with that. So, more than 50 percent likelihood that the person is going to be dead in the next 18 months. Because what happens is even if they're not dead, they're probably going to need 24-hour nursing care in those 18 months.

CHAIR SARIS: So, actually --

DR. WILLIAMS: And a physician feels much better about saying that than they do about the exact date.

CHAIR SARIS: -- the BOP is -- so, if that's the standard, the BOP actually is sort of --

DR. WILLIAMS: Is moving --

CHAIR SARIS: Is moved in the --

DR. WILLIAMS: -- in that direction.
CHAIR SARIS: -- right direction there.

DR. WILLIAMS: Yes. Yes.

COMMISSIONER BARKOW: So, I have a couple questions. First, for Dr. Williams, with the list that you have, is there any concern with any of these about malingering?

Because I'm just going to guess that part of the delay of the Department or the Bureau is making sure someone really is as ill as they're saying they are.

So, when thinking especially about dementia or things, will all of these be pretty easily validated, proven, or is it the kind of thing that is subject to debate and it may be more difficult for an inmate to actually show this is a real thing?

DR. WILLIAMS: Well, it's hard to make a general sweeping kind of opinion about that, because there are so many different types of diseases that cause death.
What I would say is, again, from my perspective we're talking about medical eligibility for evaluation. And so, this is sort of the first gatekeeping door.

And then of course, I mean, there's - - I can only imagine and I also know that there's a whole host of considerations that come into play. I mean, people are being watched when they don't know they're being watched. There are medical records that may document when the disease happened, whether or not there have been improvements or unexpected worsening, you know, in the week before request for release, you know. So, I think that there's a whole slew of documentation that is incorporated into decision-making that is beyond just the diagnosis.

What I would say is, you know, 50 percent of people over the age of 80 have dementia. That in the criminal justice population, this is a lot higher.

There have been insufficient studies
to show how high the burden of severe age-related
cognitive impairment, dementia is in the criminal
justice population, but suffice it to say early
studies are showing an extremely high number of
people have this.

And so, I think that question of
malingering, you know, when you look at
population estimates, that is also something that
goes into ferreting out what is malingering and
what is real diagnosis.

COMMISSIONER BARKOW: And also for
Ms. Price, I'm curious where you see the -- where
are the delays happening at -- if you have a sense
from the -- so, you gave the example of the warden
was for it and it's the Central Office that seems
to have slowed things down. And then it seems
like in other instances it's that there's no
filing by the -- do you have a sense if there is
any rhyme or reason into kind of where the
bottleneck occurs?

MS. PRICE: It probably happens at all
levels. It was an important step to remove the regional office review that Kathleen Kenney mentioned to you earlier. That took out a step that could take quite a long time because the regional offices, you know, would sometimes sit on these for a fairly long period of time.

I think that there are probably delays at all levels. One of the things that the Inspector General’s report on compassionate release pointed out, is that there was confusion at all levels of the Bureau of Prisons about its own criteria and its own guidance on this.

And so, there were delays, perhaps, for example, in determining some of the elderly prisoners who were made eligible in 2013, there was a great deal of confusion, nonetheless, at the institution level about those criteria. So, they had to write new guidance for them and add that to the -- so, that slowed everything down.

And while that was happening, as I understand it, a lot of these decisions were
sitting in the Central Office, because even though the wardens had forwarded opinions, there wasn't sort of this finality about what is our actual final determination of what an elderly prisoner is with a medical condition.

So, I think some of it has to do with institutions not being clear. I tell the story of a woman who, like the gentleman I just discussed, lost her husband who was caring for their children. And several times she reached out to staff to help her with a compassionate release.

And even though it had been enunciated already by the Sentencing Commission that this was a ground and the Bureau of Prisons says that they had advised the institutions about what the Sentencing Commission had provided as grounds for compassionate release, the staff were unaware and said, look, you need to go read our manual, because this clearly does not fall within this. So, lots of time was wasted right there.
So, on a case-by-case basis I can't always tell and I certainly am not inside the process enough to know, but I do know that sometimes certainly there are significant delays once, as this gentleman's recommendation is certainly undergoing, there are significant delays once a recommendation from a warden reaches the Central Office.

Now, they're also reaching out to the U.S. Attorney and there may be delays associated with that, but, again, I don't have an inside track on that at all.

COMMISSIONER BARKOW: Do any of you know is there any model out there where there isn't a gatekeeping function done by the Department of Corrections, if there's any alternative model without flooding the courts or what -- is this it? Is this like the --

DR. WILLIAMS: Variations on a theme.

CHAIR SARIS: We'll just go down to Judge Pryor. We'll just go right down the --
COMMISSIONER PRYOR: Dr. Williams, when you get to your recommendations in Recommendation 3, you recommend corresponding with your first recommendation lowering the age of eligibility for those with qualifying medical conditions to 55 or 50.

My question is from your perspective just from a medical perspective, is there really any reason to have an age requirement for that one at all?

DR. WILLIAMS: That's a great question.

COMMISSIONER PRYOR: And so to remind you what they are, I mean, you suffer from a chronic --

DR. WILLIAMS: I think that that's -- yeah, that's a great point and I would say no. Actually, you make a great point, but in geriatrics what we say is age is just a number.

MS. SPEAKER: I like her.

(Laughter.)
DR. WILLIAMS: There are 70-year-olds who run marathons. And there are 30-year-olds who are, you know, multiple gunshot wound victims who are paralyzed and they look much more like -- they develop many more of the sort of so-called accelerated aging characteristics that we think of for people in their 80s, and they're 30. So, I think that you're absolutely right and I would agree with that assessment.

COMMISSIONER FRIEDRICH: Dr. Williams --

DR. WILLIAMS: Yes.

COMMISSIONER FRIEDRICH: -- just curious. Have you worked with institutions other than BOP to help them set their standards? Have you worked with --

DR. WILLIAMS: Well, to be clear, I actually have not worked for the BOP to set standards.

COMMISSIONER FRIEDRICH: I mean, I know you haven't, but --
DR. WILLIAMS: Yeah, so I have -- I have worked a bit with two different states, really, people who are making recommendations to their policies and sort of weighed in on those two policies.

COMMISSIONER FRIEDRICH: And are there other models that have incorporated the surrogate recommendation which seems to make a lot of sense?

DR. WILLIAMS: Yeah. So, actually at one point, if I'm not mistaken, New York State had a surrogate model. The surrogate model makes a lot of sense, because it's really grounded in the science of palliative care, which really does show us that the vast majority of people who have a terminal illness, whatever we decide to call it, have cognitive capacity.

Even if they don't have dementia, per se, they have some degree of cognitive incapacity that would make the process of petitioning and pulling all the work together and identifying
sort of all the processes that they need to follow
to make the petition successful extremely
problematic.

And, frankly, older adults have been
shown -- older prisoners have been shown to be
the population who is sort of the most
unbefriended and least likely to have continuing
relationships with people outside.

So, they don't sort of have
necessarily the same likelihood of a built-in
surrogacy sort of community that could come to
their aid as well.

COMMISSIONER FRIEDRICH: Thank you.

CHAIR SARIS: Judge Breyer.

VICE CHAIR BREYER: Yeah, I was
alerted with your choice of words that there are
people who otherwise would qualify, Ms. Price,
yes, to -- for compassionate release, but didn't
or weren't -- or the motion was made too late or
something of that nature.

And because I don't quite know what it
means to say otherwise qualify since under the statute I think the Bureau of Prisons could take into account any number of things, I think the interesting question is how many of these people who applied would qualify under the medical aspect of it, but under the other aspects which are the other 3553(a) factors, would not in the warden or the director of prison's judgment.

So, my question to you is, has there been that type of analysis? Have you looked and said, look, if they only just did the medical, but didn't do the other 3553(a) factors, what would the statistics show?

MS. PRICE: I don't know of any study. I mean, certainly it would show more motions, if that's what you're getting at.

VICE CHAIR BREYER: Well, I'm trying to figure out, I mean, I don't know that I want more motions or fewer motions. I'm just trying to figure out what's going on. What is happening? How long is it taking? Why are these
people denied compassionate release? What's the reason for it?

Is the reason medical? Is the reason the victims? Is the reason the nature and circumstance of the offense?

We have the New York situation where maybe certain offenses you simply don't qualify, and I think the research that would be helpful would be what is going on? And, also, how long it takes.

MS. PRICE: Well, I do know of a number of cases, we talk about them in our report and they're discussed elsewhere, a number of cases where people who clearly met the criteria, were soon to die, nonetheless, were not released because in the Bureau of Prison's opinion they hadn't served a long enough sentence that has been cited, their crime was too serious.

In the case of Michael Mahoney, whose case I discuss in this case -- in our testimony, rather, because the nature of his offense
although when one took a close look at it, the judge himself asked for the motion to be presented.

So, there are a number of reasons extraneous to the determination that the person fits underneath the 1B1.13 criteria, or even the Bureau of Prison's medical criteria that are cited by the Bureau of Prisons for the proposition that they're not going to bring the motion.

And of course once the motion is presented, the court has no jurisdiction to consider this.

The gentleman who I talked about today in my testimony, there's no way, I mean, he happens to have a lawyer who's sort of sending material and information to the Bureau of Prisons, but there's no way for him to meaningfully interact with this conclusion that has been reached by at least one component of the Bureau of Prisons that there is somebody out
there who is going to take care of this children.

There is no process. And if this was to move into the courtroom, if the Bureau of Prisons was going to bring the motion, they can say, look, we think there might be somebody out there, at least somebody could step into that process and say, no, Judge, there really isn't and here's the evidence. We have the State moving to terminate his parental rights for this very reason, but they never get to that point.

COMMISSIONER MORALES: I want to thank the whole panel, but in particular Dr. Williams. I think your testimony is exactly the kind of information that the working group that we talked about earlier that the Department is heading can focus on in order to develop new guidance. So, I thank you for that in particular.

And I do thank Ms. Price and Ms. Williams for the -- and Dr. Williams for the sort of heartbreaking stories that you brought before
Undoubtedly, again, this is a very difficult topic and these are very sad situations, but we are talking today mostly about the idea of broadening the pool of motions that the Bureau of Prisons will be filing.

And I -- can you tell me what you think the -- it seems to me from what you've told me, that both of these cases that you mentioned, of course Dr. Williams is a state court, so it's not quite applicable, I don't see how broadening the pool at BOP would actually have any impact on those types of cases.

In Dr. Williams' case, for example, it's only the BOP. The BOP actually recommended it, not the BOP, but the State prison system. In the case of Ms. Price's example, it just seems to me that it would be -- it could, again, as I mentioned before in my question to Mr. Horowitz, I worry that broadening the pool would actually take away from the most eligible applicants.
And if you -- can you talk about your thoughts about how broadening the pool, the impact that that would have on cases such as the ones you raise?

MS. PRICE: The statute calls for the motion to be brought when a prisoner presents extraordinary and compelling reasons. And I think that the reason we're talking about broadening the pool at all is because it's been so narrow for so long.

There are more reasons why people ought to at least be considered for a reduction in sentence than have reached the courts until now.

I don't worry about the resource issue. I know you raised that question earlier about whether or not this would take away resources if we're going to go out there and sort of hunt up all these people who are aging and so on and so forth, but really what you're talking about is resources that are currently being spent
on an aging population that's extraordinarily expensive to support and maintain with dignity.

We're talking about maintaining people who are dying in prison who need round-the-clock care, who they have to train prisoners to do hospice care for them, because the staff are not trained, eligible or able and maybe can't.

So, yes, let's broaden the pool as broadly as we can. And I think what it will do in the balance is if we're moving some of the people who are the most expensive people to maintain the system, we'll actually make more resources available. And I think that was the point of Mr. Horowitz' report as well.

CHAIR SARIS: Did you want to jump in?

COMMISSIONER PRYOR: Yeah, I do. I don't see how that's responsive to her question.

MS. PRICE: Oh, sorry. Maybe I didn't understand.

COMMISSIONER PRYOR: I mean, it seems
to me that if you broaden the pool, perhaps more will get consideration, but it doesn't change the problem with the example that you provided us, right?

I mean, if that person was eligible under the current criteria and is not getting relief, how does broadening the pool help it?

MS. PRICE: Right, broadening the pool does not help it.

COMMISSIONER PRYOR: It doesn't.

MS. PRICE: I'm sorry, I didn't understand the question. No, it doesn't. My point about presenting that story wasn't about broadening the pool. You already broadened the pool to include him.

COMMISSIONER PRYOR: Right.

MS. PRICE: That was a change that the Commission wisely made a couple of years ago.

COMMISSIONER PRYOR: Well, then the -

MS. PRICE: The problem that I have -
COMMISSIONER PRYOR: But the second part of her question is that if we broaden the pool, though, that will mean more motions or more requests for BOP to file motions, and that will necessarily tax whatever finite resources BOP has.

Now, whether or not -- I understand your response on that is there's a lot of money to be saved for those who are released through a proper program. That would be true now, right? And maybe even more true if the pool is broadened.

But if you have more requests, then whoever is administering this program is going to be -- is going to have to devote more resources to the additional requests, right?

MS. PRICE: I think those are resources that would be well spent, because at the end of the day they will free up resources.

COMMISSIONER PRYOR: They're going to be necessarily spent, right?
MS. PRICE: Yes.

COMMISSIONER PRYOR: Not just well spent. I mean, it's going to be absolutely necessary, because there are going to be more requests.

MS. PRICE: There are already exhaustive inquiries now into these individual cases that deal not just with whether they meet the criteria, as this gentleman clearly does, but as to whether he should be released.

The point of my story was to say whatever we advise about broadening the criteria and the rest of the criteria, the one thing that we absolutely hope that you will do is to say once the Bureau of Prisons makes that determination that this is a person who meets the criteria enunciated by the Sentencing Commission that there is no family caregiver available, take that to the court.

I mean, that is a motion that can be readily taken. You can take away from the Bureau
of Prisons the worrying about whether he deserves to be released, has he served enough time in prison, was his crime particularly heinous? This is something that the court knows. Knows when he was sentenced.

VICE CHAIR BREYER: But I agree --

MS. PRICE: Knows --

VICE CHAIR BREYER: I understand that, but I'm concerned about the way the statute reads. And I don't know that the court has jurisdiction to decide any of these things absent a change in the statute.

MS. PRICE: The Bureau of Prisons --

VICE CHAIR BREYER: And I think we can make any recommendations we think are appropriate, but I really think that this process where you're deeply concerned about it can benefit from an analysis as to; one, what is going on, and; two, is it medical or is it otherwise?

You go through that process. That may or may not, may or may not broaden the pool. I
don't know, but at least it may address the problem that I see, which is you have 3,000 people apply, you have 250 people pass, go through it, and there's something going on here.

Now, it may be that anybody takes advantage of it. I understand that. So, numbers don't tell the whole story, but time between making a motion and resolution of the decision does take time. And it will take resources.

And I guess your answer to DOJ is, and response to that question is, look, it may take more resources. You don't deny that at the front end it takes more resources, but it may result in the savings if, in fact, somebody is eligible for it.

MS. PRICE: Absolutely. And I agree with you that more needs to be done to understand where the delays occur and why they occur. And I think we should also note why there are denials, why are people actually denied. And that information is not made available at least so
far.

CHAIR SARIS: Thank you very much. This is extremely helpful and I hope you stay involved, Dr. Williams, and I learned a lot. Thank you.

MS. PRICE: Thank you very much.

CHAIR SARIS: I know how much FAMM does and ACA. So, thank you very much. And to Professor Stith, wherever you are, we miss you.

(Laughter.)

CHAIR SARIS: We're moving on now to conditions of probation and supervised release. I learned my lesson. No standing, no stretching. Takes too much time.

(Pause.)

CHAIR SARIS: I guess I can still say "good morning," Judge.

HON. MARTINEZ: Good morning. Still is morning, yes.

CHAIR SARIS: Still is the morning.

So, as I mentioned, we're turning now to
conditions of probation and supervised release.

And I first want -- the Commission's proposed amendment for public comment on supervised release is a result, didn't come out of nowhere, it's a result of collaboration with the Criminal Law Committee, which has studied the current conditions in light of recent court precedent, as well as the Commission's own multi-year review of federal sentencing practices relating to conditions of probation and supervised release.

This proposed amendment revises, clarifies, rearranges conditions of probation and supervised release found in the manual. In general, the changes are intended to make the conditions more focused and precise, as well as easier to understand and to enforce.

So, I look forward to all our witnesses today and I'm pleased to begin with Judge Martinez, who is testifying on behalf of the Criminal Law Committee of the Judicial
I know how much time you all have spent on this. You have also been experienced, Judge, as a judge in the Western District of Washington since 2004, and the new chief judge out there.

So, welcome, Judge Martinez.

HON. MARTINEZ: Thank you.

CHAIR SARIS: As much time as you want.

HON. MARTINEZ: Judge Saris and members of the Sentencing Commission, on behalf of the Criminal Law Committee of the Judicial Conference of the United States, thank you so very much for providing us the opportunity to comment on proposed amendments to the sentencing guidelines.

As you indicated, the thrust of my oral comments today are on the conditions of supervision. However, having sat through the morning and listening to the panelists speak on
compassionate release, let me just point out a couple things to the Commission on that issue. As we indicated in our written comments, our committee defers to your Commission, does not offer any comment about what changes, if any, you should make. However, remember now, federal probation officers develop and implement the supervision plans for inmates who are compassionately released to the community.

That federal supervision program is designed to address criminogenic risks and needs rather than general medical or geriatric care.

Under current law, someone who is released to the community even for a compassionate release, they are required to complete at least one year of supervision.

It makes little policy or financial sense to keep these offenders under supervision in our -- from our perspective.

Because of that, we have recommended,
and the Judicial Conference has approved, seeking legislation that permits the early termination of supervision terms for those individuals.

I don't need to remind you that supervision of these people poses dramatically different in resource-intensive challenges that have to be considered.

Now, turning to the conditions of supervision, the Committee is in favor of the Commission's proposed amendments to revise, clarify and rearrange the conditions of probation and supervised release.

These amendments are consistent with changes that we recently endorsed after an exhaustive review.

The conditions of supervision define the sentence to be executed, establish behavioral expectations for defendants, and provide the probation officer with tools to keep informed and bring about improvements in a defendant's conduct and condition.
Discretionary conditions of supervision are differentiated into either "standard" and "special" conditions.

Standard conditions represent core supervision practices required in every case to fulfill the statutory duties of probation officers.

Special conditions provide for additional restrictions, correctional interventions or monitoring tools as necessary to achieve the purposes of sentencing in the individual case. And in the case of probation or parole, they provide for additional sanctions.

Our committee has had an active and ongoing role in developing, monitoring and recommending revisions to the conditions of supervision both before and after the Sentencing Reform Act.

The standard conditions in the national judgment form were last approved by the Judicial Conference of 2011.
Over the last year the Committee has reviewed the standard and most common special conditions to assess whether all of the standard conditions are required for supervision in all cases.

The language for some of the standard and common special conditions can be refined and additional guidance can be provided concerning the appropriate language and the legal and/or criminological purposes of the standard and most common special conditions.

As I'm sure you're aware, this review was prompted in part by the Seventh Circuit opinions in recent years expressing concern about the wording of standard and special conditions and the manner in which they were imposed.

In May of 2014, the Seventh Circuit issued the opinion in United States v. Siegel where it summarized the common, but largely unresolved problems in the imposition of conditions of supervised release. And one of the
most serious problems identified by the court is that the conditions are often vague and inadequately defined.

A second problem is that the probation office's pre-sentence report or sentencing recommendation generally suggests conditions of supervised release with only brief justifications. Judges then often merely repeat the recommendations and do not explain how they comport with the sentencing factors listed specifically in 3553(a).

One reason for this, according to the court, is that the sentencing hearing may be the very first time in which defense counsel learns of the probation office's recommendation for conditions of supervised release. Without advance notice, counsel may have nothing to say about the conditions. The judge may, therefore, be less likely to question them about those conditions.

An additional problem is the large
number and variety of possible discretionary conditions. According to that court, the sheer number may induce haste in the judge's evaluation of the probation service's recommendations and is doubtless a factor in the frequent failure of judges to apply the sentencing factors set out in 3553(a) to all the recommended conditions included in the sentence.

And finally, because conditions are imposed at the time of sentencing, the sentencing judge often has to guess what conditions are likely to make sense when the offender is eventually released.

Obviously the longer the sentence, the less likely that guess is to be accurate. Conditions that may seem sensible at the time of sentencing may not be so sensible many years or even decades later.

Since Siegel, the Seventh Circuit has reiterated and expanded upon these concerns in numerous additional opinions. It has vacated or
expressed concern about individual standard and special conditions for a variety of reasons including being too vague, being overbroad, not including a knowledge requirement for violation, and not having an adequate justification for how that condition is reasonably related to either the offender or the offense characteristics, how they are reasonably related to the relevant statutory sentencing factors, and how they involve a minimal deprivation of liberty.

So, in response to this developing case law, individual districts in the Seventh Circuit and other circuits have reexamined their practices concerning the recommendation and imposition of standard and special conditions.

Some districts have changed the wording of the conditions. Some have reduced the number of standard conditions and included the recommended conditions and a more comprehensive justification in the pre-sentence report.

At the national level, the DOJ has
requested that the Commission amend the conditions of supervision and commentary in the Guidelines Manual to specifically address the concerns of the Seventh Circuit.

As the DOJ reasoned, courts and litigants within that circuit are addressing the concerns of the Seventh Circuit in a variety of ways. They are spending a great deal of time and effort proposing and reviewing responses to conditions prior to sentencing and justifying those conditions at sentencing case-by-case often struggling to find the appropriate support and justifications for various conditions of release.

We feel that some level of national uniformity in standard conditions is necessary for a variety of reasons. First, they represent core supervision practices required in every case.

Second, approximately 20 percent of offenders under supervision were sentenced in districts other than the district of supervision.
Finally, uniformity in standard conditions ensures efficient policy development and training at the national level.

In February of last year the Committee asked the AO to conduct a comprehensive review of the standard and most common special conditions. This review included an analysis, exhaustive analysis of case law and numerous discussions between AO staff and probation officers concerning legal policy and practical issues surrounding the recommendation, imposition and execution of conditions of supervision.

As a result of these efforts, AO staff proposed revisions to the standard conditions on the national judgment form.

Additionally, it developed a document to provide policy guidance to judges, probation officers, prosecutors, defense attorneys and other criminal justice practitioners.

The document describes the legal authority, model condition language, purpose,
including reference to any criminological research, and method of implementation for the standard conditions and the most common special conditions.

One purpose of that document is to provide notice to the defendant of the standard and special conditions.

Additionally, it may assist the parties in determining when specific special conditions are appropriate and in providing individualized justifications for the conditions.

Finally, the document may even aid appellate courts when reviewing the imposition of conditions in those individual cases.

In November of last year, the AO distributed drafts of the proposed standard conditions and guidance document to judges, probation officers, DOJ and federal defenders, and it solicited feedback which was then used to make necessary revisions.
Additionally, AO staff collaborated with the Sentencing Commission staff with the intent of harmonizing the conditions listed in the Guidelines Manual with those on the national judgment form.

At our next meeting in June, our committee will consider whether to approve the issuance of the new guidance document and amend the national judgment forms.

Our committee supports the Commission's proposed amendments to revise, clarify and rearrange the standard conditions of probation and supervised release. The proposed language is more clear and plainly worded.

Additionally, many of the proposed conditions include a requirement that the defendant knowingly violate the conditions.

Finally, the proposed amendments remove a number of requirements from the list of standard conditions because they are not applicable in every case or otherwise addressed.
by other conditions.

Indeed, the Senate Report accompanying the Sentencing Reform Act makes clear that the list of possible conditions in the statute, which includes supporting dependents, meeting family responsibilities, refraining from excessive use of alcohol, is only suggestive.

It may be helpful to provide a more detailed discussion regarding several of the proposed changes. First, the Committee supports the proposal to remove the current standard condition requiring that the defendant support his or her dependents and meet other family responsibilities.

This condition would not be reasonably related to the history and characteristics of the defendant if he has no dependents or family obligations.

Additionally, the scope of the term "meet other family responsibilities," is vague and unclear.
A group of probation officers that assisted with the review of these standard conditions unanimously agree that the term is vague and often leads to uncertain and inconsistent enforcement.

Of course if a probation officer or court determines that a condition requiring support of dependents or the satisfaction of other family responsibilities is necessary, then that probation officer and the court may recommend and impose such a requirement as a special condition.

Secondly, the Committee is in favor of the proposal to remove the current standard condition requiring the defendant to refrain from excessive use of alcohol.

Again, the Senate Report accompanying the Sentencing Reform Act made clear that it is not intended that this condition be imposed on a person with no history of excessive use of alcohol and that to do so would be an unwarranted
departure from the principle that conditions must be reasonably related to the general sentencing factors.

Now, to be sure, alcohol use may, in individual cases, have a criminogenic effect or inhibit the satisfaction of other conditions such as maintaining employment or supporting families.

If a probation officer or court determines that an alcohol restriction condition is necessary, then the probation officer and court may make such a recommendation and impose such a requirement as a special condition in the individual case.

It's also noteworthy that the probation officers who assisted with the review of these standard conditions also unanimously agreed that the current standard condition prohibiting excessive use of alcohol is vague, very difficult to enforce and really not valuable as a supervision tool.

In fact, the officers opined that it
is more common and effective to request alcohol
treatment and a complete alcohol ban if it is
determined in any individual case that such a
case is reasonably related to the nature and
circumstances of the offense and the history and
characteristics of that defendant.

Third, the Committee agrees with the
proposal to add as a standard condition the
requirement that the defendant not own, possess
or have access to a firearm, ammunition,
destructive device or other dangerous weapon.

This condition promotes the public
safety and reduces safety risks posed to
probation officers. To the extent that the
nature and circumstances of the offense or the
history and characteristics of the defendant
indicate that a prohibition on possessing other
types of weapons is necessary, probation officers
may recommend that as a special condition.

Fourth, with regard to the current
standard condition requiring that the defendant
answer truthfully questions of the probation officer, the Commission seeks comment on whether the defendant should answer truthfully or, instead, be truthful when responding to the questions of the probation officer.

The Commission requests feedback on both the policy and Fifth Amendment implications of these options.

The purpose of the current "answer truthfully" condition is to build positive rapport and facilitate an open and honest discussion between the probation officer and the defendant.

Accurate and complete information about the nature and circumstances of the events and the history and characteristics of the defendant is necessary to implement effective supervision practices.

The probation officer attempts to develop and maintain a positive relationship with the defendant through transparent communication
and the implementation of evidence-based correctional practices.

Our committee believes that a condition requiring that the defendant answer truthfully the questions of probation officers, along with policy guidance directing probation officers how to ensure that Fifth Amendment rights are not violated, satisfies constitutional requirements.

The Committee does not support the alternative proposal to require only that the defendant be truthful when responding to the questions of the probation officer.

Such a condition, in our opinion, would interfere with the probation officer's ability to establish open communication with the defendant and it would allow defendants to refuse to answer questions about compliance with conditions of supervision.

For instance, if it is determined that a defendant has several risk factors for
recidivism including such things as negative social networks, antisocial cognitions, educational or vocational deficits, the probation officer may arrange a meeting with the defendant and ask questions such as, who were you hanging out with last night? Why were you yelling at your wife? Why didn't you go to work today?

If the defendant refuses to answer and he is subject to a condition to be truthful when responding to questions, then the probation officer would only be able to note in the file that the defendant refused to answer, criminogenic risk factors would not be addressed, the court would not be informed.

If the defendant is subject to a condition requiring her to answer truthfully questions, the probation officer could submit a report to the court that the defendant declined to answer questions.

The court can then schedule a hearing, question the offender in camera, if necessary,
about why he or she declined to answer the
questions.

If the court determines that the
invocation of the privilege is not valid because
there is no realistic chance of incrimination,
then the court can instruct the defendant to
answer those questions.

The Commission also requests comment
about whether it should clarify that an
offender's legitimate invocation of the Fifth
Amendment privilege against self-incrimination
in response to a probation officer's questions
shall not be considered a violation of this
condition.

The Committee supports including such
a clarification in the commentary of the

In April of 2011, the Committee
approved this type of guidance for defendants
convicted of sex offenses when it endorsed a new
sex offender management procedures manual for
probation and pretrial officers.

Under the approved guidance, if the defendant refuses to answer a specific question during an interview on the grounds that it is incriminating, the probation officer is instructed not to compel the defendant to answer the question through threat of revocation.

If there is any uncertainty about whether that invocation of the privilege is valid, the probation officer is instructed to refer the matter to the court to make the final determination.

Our committee believes that adding this guidance to policies concerning all types of offenders would address any Fifth Amendment concerns without having unintended consequences on the ability of probation officers to effectively supervise defendants.

And finally, the Commission seeks comment on the condition of supervised release requiring the defendant shall notify the
probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines or special assessments.

This condition is currently listed as a standard condition in the Guidelines Manual, but not on the national judgment form.

The Commission seeks comment on whether this condition should be made a special condition rather than a standard one.

Our committee supports classifying this obligation as a special condition, again, because it may not be applicable in all cases.

In many cases, there is no fine or restitution imposed and the special assessment is usually paid while the defendant is in the Bureau of Prisons.

For those defendants who are released to the community with any outstanding criminal monetary penalties, a requirement to notify the
probation officer of a change in economic circumstances can be address by requesting or imposing a special condition.

I want to take a few minutes to discuss other measures that the Criminal Law Committee is working on relating to the conditions of supervision.

At the national level, some guidance currently exists concerning the imposition of standard and special conditions of supervision.

For instance, under Section 3563(d) and 3583(f), the court is required to direct that the probation officer provide the offender with a written statement that sets forth all the conditions to which the sentence is subject and that it's sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

Under Judicial Conference policy, in recommending a unique special condition, probation officers should ensure that the
recommended wording is clear, legally sound and meets the intended purpose.

The federal supervision model is founded on the conditions of supervision and comprised of strategies that are sufficient, but no greater than necessary, to facilitate achievement of the desired outcome.

Every supervision activity should be related to the statutory purposes for which the term of supervision was imposed and the related objectives established for that individual case.

Special conditions are to be sought by probation officers only when the deprivation of liberty or property they entail are tailored specifically to address the issues presented in the individual case.

Before recommending special conditions, probation officers should consider all of the mandatory and standard conditions that may already address any particular risk or need.

If the officer determines that the
mandatory and standard conditions do not adequately address those risks and needs, he or she then should consider recommending a special condition.

Under Judicial Conference policy, courts are further discouraged from adding additional conditions to the list of standard conditions such as substance abuse testing or treatment since they impose an obligation on the probation office that has implications for both staffing and funding.

When considering special conditions, probation officers should avoid presumptions or the use of set packages of conditions for groups of offenders and keep in mind that the purposes vary depending on the type of supervision.

Officers should ask first whether the circumstances in this case require such a deprivation of liberty or property to accomplish the relevant sentencing purposes at this time.

For defendants facing lengthy terms of
imprisonment, probation officers should truly consider whether the risks and needs present at the time of sentencing will be present when the defendant returns to the community.

In some cases, it may be very appropriate to avoid recommending special conditions until such time as the defendant is preparing to reenter the community.

Despite the existing national guidance, the Committee feels that it may be necessary to provide further guidance concerning the language and justification for standard and special conditions to assist the courts with ensuring that condition language is clear and legally sound, providing the required justification for conditions, and providing proper notice to defendants about the types of conditions that may be imposed.

AO staff is in the process of finalizing a document to provide guidance to the judges, probation officers, prosecutors, defense
attorneys and other criminal justice practitioners.

The document describes the legal authority, model condition language, purpose, including references to research where applicable, and method of implementation for the standard conditions, as well as the most common special conditions.

At our June 2016 meeting, the Committee will consider whether to approve the issuance of the new guidance document.

In addition to this document, the Committee will also assess whether to recommend any changes to policies or procedures to provide defendants with sufficient notice and justification for discretionary conditions before and during the sentencing hearing.

This could be achieved by having probation officers include proposed conditions in the pre-sentence report or sentencing recommendation.
Additionally, our committee will assist --

CHAIR SARIS: I'm just wondering -- at some point we're going to want to jump in with questions.

HON. MARTINEZ: I'm almost done.

CHAIR SARIS: All right.

HON. MARTINEZ: All right.

Additionally we will assess whether to endorse or recommend changes in policies and procedures regarding the imposition and modification of discretionary conditions at the time the defendant is released from prison.

Finally, any changes in condition language, policies and procedures requires training for effective implementation.

Our committee will collaborate with the Federal Judicial Center and others to provide all necessary training for judges and probation officers.

Once again, thanks to the Sentencing
Commission for providing us the opportunity to comment on these proposed changes to the sentencing guidelines.

As we have always in the past, the members of our committee look forward to working with the Commission to ensure that our sentencing system is consistent with the central tenets of the Sentencing Reform Act.

CHAIR SARIS: Thank you very much, and we very much appreciate the collaboration as well. These proposals came over from Criminal Law.

I didn't realize it would generate so many comments, actually, from both -- from everybody. And we're about to hear from folks, but I want to know if there are any questions.

VICE CHAIR BREYER: I have a couple of questions. I wanted to address the point that I think you answered spontaneously today in light of the supervised release, compassionate release.

Is it your understanding that if
somebody is -- I've been on 19 years and I've never had one of these cases.

Is it your understanding that if somebody is released on compassionate release, that they would then be placed on supervised release and they are out of the custody of the Bureau of Prisons?

So, it's different from, quote, a halfway house where they're still in the custody of the Bureau of Prisons. Your understanding is that they simply go over to the Probation Department.

HON. MARTINEZ: In the 15 and a half years that I've been on the federal court bench, I've never had one of these either, but that is exactly my understanding that under current law they would have to serve at least one year of supervised release.

VICE CHAIR BREYER: Okay. The second question I have is that at least in our circuit, please, and you are in our circuit, the way I
have dealt with these conditions that may no longer be applicable is that when the defendant is returned to the District or is in the District in which the conditions were imposed in 80 percent of the cases or otherwise, and the probation officer believes that a condition is inappropriate or that a different condition should be added, I then would get a request. We get requests all the time to modify and so forth.

Do you find that satisfactory? Is that something that -- rather than bringing the defendant in front of the judge for the recitation of all those conditions, they go in front of the probation officer.

The probation officer says, you may not remember what happened eight years ago, but here were the 12 conditions. I want to go over them with you to make sure that in the passage of time you still understand them. And if there is one that is inappropriate, whatever reason, they then come to the court.
Do you follow that practice?

HON. MARTINEZ: That's exactly what we do in our district. And as you're aware, you know, as time goes by, judges retire and then other judges come on board.

I inherited several judges' caseloads from prior sentencings. And many, many times when those people are finally released, we will get modifications simply from their probation officer.

Now, remember, if the defendant objects to any of those modifications, then they have a right to bring it back into court.

But for the majority of time, I'll say well over 90 percent, the defendant agrees and we simply sign off on it and modify it.

VICE CHAIR BARKOW: Thank you.

CHAIR SARIS: Commissioner Barkow.

COMMISSIONER BARKOW: Yeah, I was just curious in the issue about -- the Fifth Amendment issue that comes up in terms of
requiring people to answer truthfully, one of the proposals we got from the defenders was this language, which I'm just going to read to you and see if this is a compromised position, if this covers what your concerns would be.

What if we said something along the lines of the defender must -- defendant must answer truthfully or be truthful when responding to the questions asked by the probation officer regarding compliance with the conditions of supervision, but the defendant remains free to exercise the Fifth Amendment right against self-incrimination when the question is posed, a realistic threat of incrimination in a separate criminal proceeding.

Would something like that balance the interest of needing the open communication when you're talking about anything related to the conditions of supervision, but at the same time reminding the defendant that if it's anything that might be self-incriminating, you have this
Fifth Amendment right.

HON. MARTINEZ: Our committee does not make that specific recommendation, but I think that your suggestion makes some sense. Clearly, you know, offenders in supervision retain their constitutional right against self-incrimination.

In my opinion, it really comes down to training. Because if an officer has any doubt about whether that refusal to answer is legitimate, it can always be referred to the court for a finding. And that's what we would recommend.

COMMISSIONER BARKOW: Okay. Thank you.

CHAIR SARIS: Let me ask this. In the 22 years now I've been on the bench, I've never had most of these issues come up.

They come up in child pornography, but for the most part they come up later in revocations or requests for modifications, not at
sentencing.

So, and for the first time I've actually started thinking about the difference between a standard condition and a special condition, but it's generally not litigated.

And the big question that I have, which I guess is an overarching philosophical issue, is sometimes we keep imposing conditions. There's the standard conditions, and then I add to them the special conditions to the point where when someone comes out, they've got so much they have to comply with, you know.

I often say batterers programs and mental health programming and drug treatment programming and vocational education and, you know, blah, blah, blah and it goes on and on.

And most of these people have just come out of prison. Maybe they don't need it anymore, or maybe it's just asking too much of somebody when they're just coming back.

And so, some of, I think, the debate
was should this be a standard condition or a special condition? And I'm wondering whether in your experience that makes -- we should be pushing more into the special and then we should be focusing more when they come out, as to what they need.

HON. MARTINEZ: That's exactly what we're saying. I've been a judge for 26 years now in the state system and the federal system. I've sentenced hundreds of defendants.

In the federal system, you're right. The only time we've had an issue in court has been on the child pornography people, because those are very specialized conditions.

You're also talking about prohibiting them from using computers, being connected to the internet, which now, you know, is almost necessary to be able just to get along and survive and get a job, but I agree with you that we can very easily end up over-supervising people and putting way too many conditions on their
supervision.

For a lot of these people, now, remember, many of these defendants got there in criminal court because they couldn't follow all the rules at that point, and we are loading more rules onto their plate. Placing too many of those, I think, is almost guaranteeing that they are going to fail.

Research has shown that supervision should be targeted towards higher-risk, higher-need offenders. It also has shown that if you over-supervise low-risk people, that actually results in a worse outcome in the long run.

So, yes, we have to be careful about doing that. I agree with you.

CHAIR SARIS: Any questions? Anybody else have anything?

VICE CHAIR BREYER: I just want to thank you for being on the -- being on the Criminal Law Committee. It is an extraordinarily valuable committee for the Sentencing Commission.
I've seen it now work and you really are the voice of the judiciary coming in and talking to us from a judge's point of view. The sentencing guidelines are directed to judges. So, thank you so much for your service. It's very, very valuable.

HON. MARTINEZ: Thank you very much.

VICE CHAIR BREYER: I know I speak on behalf of --

HON. MARTINEZ: This is my favorite committee. Thank you.

CHAIR SARIS: Thank you. Last, but by no means least, our final panel of the morning.

(Pause.)

CHAIR SARIS: You ready?

MR. SHANKER: I'm ready. No longer good morning.

(Laughter.)

CHAIR SARIS: Absolutely correct.

MR. SHANKER: Judge Saris --

CHAIR SARIS: Wait. No, I've got to
introduce you.

MR. SHANKER: Oh, I'm sorry. I'm sorry. I thought no introduction required.

CHAIR SARIS: No introduction needed, but let me just quick go through it. So, I'll tell everyone who you are, because we have lots of people out there listening.

So, the first witness is a representative from the Department of Justice, Vijay Shanker. Mr. Shanker currently serves as Deputy Chief of the Appellate Section in the United States Department of Justice where he worked since April 2005.

Before then he practiced law in D.C. in the areas of white collar criminal defense, complex civil litigation and appellate litigation.

So, you've seen both sides of this.

MR. SHANKER: Yes.

CHAIR SARIS: Mr. Shanker is joined by Marianne Mariano for the federal defenders.
I already -- everyone knows her. So, I need not go on.

And then Dr. Virginia Swisher is testifying on behalf of the Commission's Victims Advisory Group. Dr. Swisher is the founder, director and CEO of Problem Solving Consultants, a conflict resolution consulting service.

Dr. Swisher previously worked for 20 years as a federal probation officer. Where?

DR. SWISHER: District of Connecticut.

CHAIR SARIS: District of -- oh, a New Englander. So, why don't we get going with you? You are chomping at the bit. Come out of the box.

MR. SHANKER: That's right. Judge Saris and members of the Commission, thank you for the opportunity to share the views of the Department of Justice on the Commission's proposed amendments to the sentencing guidelines regarding conditions of probation and supervised
release, Sections 5B1.3 and 5D1.3.

I am Vijay Shanker. I am Deputy Chief of the Criminal Division's Appellate Section. I have represented the Department in dozens of criminal cases involving probation or supervised release and I recognize the importance of the issues the Commission is addressing.

The Department appreciates the Commission's efforts to revise and clarify the conditions of supervised release and probation.

As a general matter, the Department is in favor of the Commission's desire to resolve ambiguities and simplify the guidelines and we think the proposed amendments include a number of improvements.

We do, however, have several concerns which are addressed more fully in our written submission. And I will speak to just a few of those today.

First, the Department recommends that the proposed fourth standard condition of both
probation and supervised release should read as follows: "The defendant must answer truthfully all questions asked by the probation officer."

The current condition states that a defendant shall answer truthfully all inquiries by the probation officer.

The Department believes that the proposed deletion of the word "all" could be read as a substantive reduction in the defendant's obligations and is unwarranted.

In addition, in response to the Commission's solicitation of comment, the Department's view is that there is no basis for altering the condition to require the defendant only to, quote/unquote, be truthful when responding to questions by the probation officer, nor is there a basis for including a proviso that an offender can invoke his Fifth Amendment privilege against self-incrimination in response to a probation officer's question.

First, as the Supreme Court has
recognized, imposing a general obligation to respond truthfully to a supervision officer's questions does not conflict with the right against compelled self-incrimination.

Second, there is no requirement that a probationer be affirmatively advised of his or her Fifth Amendment right against self-incrimination so long as a condition of probation merely requires a probationer to appear and answer truthfully rather than requiring the probationer to choose between making an incriminating statement and jeopardizing his or her conditional liberty by remaining silent. There is no Fifth Amendment concern.

Restricting this condition or interjecting Miranda-like cautions about self-incrimination into the supervision context where there is no legal basis for doing so, could curtail questioning of or responses by supervisees regarding offenses they may have committed to the detriment of both supervision
interests and law enforcement interests.

Second, the Department recommends that the conditions requiring defendants to refrain from excessive use of alcohol and to support dependents and meet other family responsibilities be retained as standard conditions.

Excessive alcohol use contributes to criminal behavior, hinders rehabilitation and conflicts with other conditions of supervision, including those relating to employment and family support obligations.

Vagueness concerns can be addressed by making the language more specific and indeed the Department suggests that the condition be rewritten to say that the Defendant must follow any instructions of the probation officer to limit or refrain from the use of alcohol.

This would enable probation officers to assess whether the extent of alcohol used by their supervisees is interfering with their
rehabilitation or compliance with other supervision conditions and to issue remedial instructions.

Similarly, we suggest that the standard condition relating to family responsibilities be rewritten as follows: The defendant must meet any legal obligation to support or make payment toward the support of any person and must follow any instructions of the probation officer with respect to meeting other family responsibilities.

In the Department's view, the special condition proposed by the Commission is too limited and fails to account for the fact that meeting the full range of legal and social obligations to one's children, spouse and parents is conducive to rehabilitation and should be promoted as an aspect of supervision.

Finally, the mandatory condition concerning compliance with the Sex Offender Registration and Notification Act, or SORNA, is
inconsistent with applicable law.

As currently drafted in the guidelines, the condition assumes that there are some states in which SORNA does not apply. For those states, it improvises a non-SORNA set of registration requirements for sex offenders based on provisions of older laws that SORNA repealed.

SORNA, however, is a federal law and its requirements apply to sex offenders in all states regardless of whether the state has implemented SORNA's requirements in its registration program.

The condition would correctly reflect the law if formulated to track the corresponding statutory language as follows: If the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act.

In closing, I would again thank the Commission for this opportunity to share the views and concerns of the Department of Justice.
The Commission's efforts to clarify the supervision conditions guidelines are commendable and the Department looks forward to working with the Commission on this important issue. Thank you.

CHAIR SARIS: Thank you.

MS. MARIANO: Good afternoon. The federal public and community defenders appreciate the Commission's decision to review the conditions of supervision in your interest in making the conditions easier for our clients to understand.

However, we question the necessity of many of the standard conditions as standard conditions instead of special conditions and we are concerned about the over-breadth and ambiguity of some of the proposed language.

For too long the focus of sentencing has been on how long a person's prison sentence should be, and too little focus on other aspects of the sentence, including supervision.
Supervised release primary purpose is to facilitate reintegration of a defendant into the community thereby reducing the chances of recidivism and protecting the public, but the long list of blanket conditions does not serve that purpose.

As a threshold matter, we believe the Commission should reduce and limit the number of standard conditions making most special conditions for several reasons.

First, the slate of conditions undermines the statutory requirement that the court make specific findings when imposing additional conditions of supervised release, including the requirement that any condition be reasonably related to a specific 3553(a) factor and that it involved no greater deprivation of liberty than is reasonably necessary to serve that purpose.

The standard conditions do not require such findings and ignore the need for
consideration of the history and characteristics
of the defendant.

For example, the proposed standard
condition regarding the notification of third
party risk to another person or organization
should be a special condition.

Not only is the condition not
applicable in every case, it is also now
sufficiently narrow, because it fails to specify
the nature of the offense or characteristics of
the defendant that pose the risk, facts that must
be tailored by the court to the specific
defendant.

Moreover, one-size-fits-all
conditions are not compatible with the approach
to supervision that the U.S. probation system has
been trying to implement.

According to the evidence-based
practices of probation and pretrial services,
conditions of supervision should be directed
toward a particular criminogenic need.
If conditions of supervision are to be consistent with that approach, there should be few standard conditions and more special specifically targeted to the needs and responsivity of the individual defendant.

For example, the travel restriction. If a defendant resides near the border of a federal judicial district, it may be appropriate for him to routinely leave the current district to facilitate employment, healthcare needs or reintegration with family.

The condition that he may not knowingly leave the federal judicial district without permission is not appropriate as a standard condition, but must be tailored to the defendant and possibly the District's specific circumstances, and I believe it often is.

Studies have shown that extensive standard conditions of supervision may be unnecessarily burdensome.

Rather than help reintegrate a person
into the community, too many conditions can set
him or her up for failure.

Defenders' experience shows the
technical violations leading to revocations even
where there's no evidence of criminal activity
and where the defendant might otherwise succeed
at reintegration.

One example is the condition regarding
full-time employment. For some of our clients,
this is simply unattainable possibly because they
are elderly when they are released, or they're
infirm or mentally -- physically or mentally
infirm after they've served a lengthy prison
sentence.

The same is true of a GED condition
that seems completely appropriate not only to the
court, but maybe the parties involved, when
imposed on a 20-something-year-old defendant, but
who isn't going to be released until he's in his
40s.

For these reasons we urge the
Commission to limit the number of standard conditions making many of them special conditions to be imposed by a court on a case-by-case, defendant-by-defendant basis.

Defenders will rely on our written testimony regarding our concerns as to specific conditions. However, I will briefly address the one condition that was highlighted in the Commission's issue for comment. Specifically, the condition that a defendant shall answer truthfully the inquiries of a probation officer.

We appreciate the Commission's interest in the supervisee's Fifth Amendment concerns against self-incrimination, which is not sufficiently protected under the current language.

Under the current language, a supervisee may be placed in the position of having to choose between answering the question truthfully and incriminating himself, or not answering and face revocation. However, we do
not believe that language proposed by the Commission, either option, is sufficiently clear and does not adequately convey to the average supervisee that he or she need not answer every inquiry posed by the probation officer.

Accordingly, we've proposed the language that has been read by Commissioner Barkow in the previous -- to the previous panel.

It is our position that this straightforward language will make clear both the obligations and the rights of the supervisee, and we applaud the Criminal Law Committee's position that invoking your Fifth Amendment right would not be grounds for a revocation. Thank you.

CHAIR SARIS: Thank you.

Dr. Swisher.

DR. SWISHER: Judge Saris, if I could update my credentials since my bio information was submitted, I was recently appointed as a lead faculty area chair for the College of Security and Criminal Justice for the University of
Phoenix at the Tempe, Arizona campus. So, it really is good morning still for me, but good afternoon.

CHAIR SARIS: Lucky you in that beautiful climate there.

DR. SWISHER: And I'm loving watching your winter from Arizona. Thank you, Judge.

I would like to thank you and all the commissioners for the opportunity to represent the Victims Advisory Group at this important hearing.

At this time, I would like to focus or take a few minutes to reiterate our comments that were put into our written testimony concerning the proposed amendment on third party risk.

In the current conditions at Sections 5B1.3(c) and 5D1.3(c), third party notification shall be made either by the defendant as instructed by the probation officer, or the probation officer if risks are posed by the defendant's criminal history, personal history or
characteristics.

Under the proposed amendment, the language of the standard conditions at both sections would be modified from a "shall" to a "may" while removing the probation officer's ability to make independent notification of the defendant.

As currently presented, the proposed amendment states that if a probation officer makes a determination that a defendant under supervision poses a risk to another person or an organization, the defendant may be required to notify that person of the risk.

The proposed amendment does clearly state that if the defendant is instructed to make notification, that he must or she must comply with that instruction.

It is the position of the Victims Advisory Group that removing the emphasis inherent in the word "shall" and eliminating the probation officer's ability to make independent
notifications, may create a situation where individuals or the community are put at risk.

If a risk has been determined, the probation officer is not required to ensure third party notification is made as would be the case with the language such as "shall make notification," but rather the probation officer may require the defendant to make the notification.

Follow-up by the probation officer may or may not occur. As stated in the proposed amendment, the probation officer may contact individuals and confirm that notification has been given.

If the probation officer confirms that the defendant has not made notification, the proposed amendment does not clearly permit the probation officer to make that notification.

The current condition is enforced in those situations where a defendant clearly victimized members of the community in the
commission of the offense of conviction.

I note that a third party notification is not required in all instances and implementation of the current guideline can vary from circuit to circuit.

For example, there are differences in the way the current guideline is implemented in the Second Circuit and the way it is implemented by the districts in the Ninth Circuit.

If the proposed amendment is adopted, the variation has the potential for increasing the chances that the community is at risk of future victimization by defendants on supervision.

Maintaining the third party risk condition in its current mode will provide the sentencing court with a valuable tool to try to prevent any further victimization of the community by a defendant for as long as supervision continues.

Retaining the current language may
also help inform the general public and reinforce a sense of confidence within the community that the court truly does take the protection of the community very seriously, a message that may also resonate with the defendant and perhaps enhance the deterrence goal of sentencing.

Judge Saris and commissioners, thank you for considering my comments on behalf of the Victims Advisory Group.

CHAIR SARIS: Judge Breyer.

VICE CHAIR BREYER: Mr. Shanker, let me turn to the DOJ's position with respect to whether an individual can be required to answer truthfully, especially in cases in which he or she may be incriminating themselves.

The Ninth Circuit says you don't. Ninth Circuit, you know, which a number of us have to follow, the law is different from your stated policy. So, how do you deal with that?

If, in fact, the person retains his or her Fifth Amendment privilege, it is not a basis
for revocation of probation that that person failed to respond to a question.

How do you deal with that?

MR. SHANKER: Your Honor, we agree that a probationer or supervisee retains the Fifth Amendment right not to answer a question that would give them -- that would put them between the option of answering and incriminating themselves or being punished. And so, we don't disagree with that.

The question is, do they have to be affirmatively advised of that fact --

VICE CHAIR BREYER: Okay. That's what I didn't understand. In other words, the part that you're objecting to is the duty of the probation officer to advise a person that he or she need not answer --

MR. SHANKER: Correct.

VICE CHAIR BREYER: -- questions on a Fifth Amendment --

MR. SHANKER: Now, I will say --
VICE CHAIR BREYER: You're not quarreling with the exercise of the privilege.

MR. SHANKER: No, absolutely not.

VICE CHAIR BREYER: You're quarreling with --

MR. SHANKER: If a probationer invokes his or her Fifth Amendment right in response to a question, as I think Judge Martinez said, that could be taken to a court to determine whether the invocation is appropriate or not.

VICE CHAIR BREYER: Thank you. I think I misunderstood your comment and --

MR. SHANKER: I will add, though, not to belabor the point, though, that the mere fact of being required to appear and answer a probation officer's questions does not in and of itself put the Fifth Amendment choice to the defendant. It's being asked a question that might or might not incriminate him.

VICE CHAIR BREYER: I think that's right. And I think if it were otherwise, you
would defeat a lot of the purpose of supervised release, which is to try to --

MR. SHANKER: Exactly.

VICE CHAIR BREYER: -- give some guidance to the people and to protect victims on an ongoing basis.

MR. SHANKER: Exactly.

VICE CHAIR BREYER: I thank you for your answer.

CHAIR SARIS: I suppose one of the debates is how much power should be on the probation officer versus the court.

So, I know in the area of drug testing in our circuit, the court decides how frequent the drug testing is and not the probation officer.

So, you're suggesting an area of excess alcohol that it should be the probation officer making the call as to what's excessive.

Is that your proposal?

MR. SHANKER: Well, I think that the
proposal would be that the probationer must follow the probation officer's instructions with respect to refraining from or limiting alcohol use.

So, at some level we are relying on the judgment, the discretion and the experience and expertise of the probation officers and I think that's what the conditions are founded on.

The whole principle behind conditions of supervised release are founded on those principles, judgment and discretion of the probation officer.

The courts are overburdened. We don't want to involve the courts in all of those questions.

I think the reason that the Department has proposed phrasing this in terms of an instruction by the probation officer is, in part, to eliminate the vagueness concern that courts have raised about the blanket use of the word "excessive use."
CHAIR SARIS: Other than the Seventh Circuit, I come back to, you know, sort of at some point, and I've been a judge a long time and the issue has never come up. So, I'm trying to just figure out how widespread an issue this is for both of you who see the nation as a whole where the people are litigating how much is excessive alcohol or how much is too much child support or how much is overuse of the risk notification.

I get it that sometimes maybe these are overused and Seventh Circuit is worried about it, but is this a national problem that you've seen?

MR. SHANKER: You know, from our perspective in criminal appellate, we have seen the vast majority, if not all of these decisions, coming from this one court, the Seventh Circuit.

VICE CHAIR BREYER: But then maybe you can answer it this way, because I think the battle that we have -- not battle. I glorified it. The
discussion that we're going to have is, what should be standard? What should be special? And we understand -- at least I understand when you say these conditions ought to be standard in terms of desirability.

That is, if I were running a Sunday school, I'd like to have the person pay for his obligations for support. I'd like the person not to drink excessively. I'd like this, I'd like that, I'd like that.

So, if I -- I could put a big list of standard conditions out there in terms of desirable conduct, ways to avoid criminal conduct. But if you accept the logic of the Seventh Circuit, if you accept their logic, they're saying all of these conditions should be looked at in terms of the individual probationer and the problem that that individual probationer has demonstrated.

And I'm sort of saying basically the same thing. What has that person demonstrated
to the court?

And so, what is -- what's wrong?

Maybe I could ask it this way: What's wrong if we take this collection of desirable conduct and put it into special conditions where that defendant seems to have a lackey, you know. Is anything harmed?

CHAIR SARIS: And the court looks at it.

VICE CHAIR BREYER: And the court looks at it. Is there anything harmed by that? I mean, let me tell you, all you have to do is sit and listen to these judges sentence.

It's mind-numbing. It is mind-numbing and I know, I know they don't hear half the things that we say. And the judge's modus operandi is to get through it as quickly as possible, because they have so many of these conditions.

And I guess my question is, what law enforcement purpose is hindered, not furthered,
by putting these things as special conditions rather than general conditions?

MR. SHANKER: I think the primary risk with that approach is that the conditions can be excluded inadvertently or otherwise. And they -- in addition, the concerns that may be placed in special conditions might arise later on and might not be in place when the defendant --

VICE CHAIR BREYER: We do have a vehicle for that.

MR. SHANKER: There is. There is. But that, again, takes up the court's time. And if we put these in the standard conditions and they may not apply in a hundred percent of the cases, they may not apply to that defendant at all, the probation officer has the discretion and the judgment to basically not -- to basically ignore that condition with respect to that particular defendant.

I guess with due respect not to flip the question --
VICE CHAIR BREYER: I hear that all the time.

CHAIR SARIS: I know. Right when someone says that, they're about to --

MR. SHANKER: To flip the question, I guess the question is what harm is there in having these as standard conditions if when in cases where they don't apply the probation officer doesn't have to --

VICE CHAIR BREYER: Well, there is some harm in making pronouncements that are irrelevant to the particular --

MR. SHANKER: Well, so then I would go back to Judge Saris' question, which is that we really are not seeing -- as much as the Seventh Circuit has suggested with a long list of hypotheticals, we are not seeing these problems.

We are not seeing a lot of revocations on this, the Commission's own study has found.

And so -- and I don't want to monopolize my --

CHAIR SARIS: Do you see a lot of
these issues being debated in the context of sentencing? Maybe they come up in revocations.

MS. MARIANO: So, they do come up in revocations, but I would say this that I do think it is a national problem within which maybe we've all been complicit.

My federal defender colleagues in the Seventh have led the charge in these cases and I, frankly, applaud them for it.

I have litigated these issues. I litigated a case called Peterson, which we cite in our papers. That client got probation. So, of course his conditions were front and center and I was successful for him on appeal, one of which was the risk assessment that wasn't tailored specifically to him, among other conditions.

CHAIR SARIS: Risk of --

MS. MARIANO: Third party notification. Sorry. I think I said "risk assessment," which is an entirely other thing.
I apologize.

I also say what is the harm in setting the standard conditions that actually apply to a specific defendant at the outset and to allow probation to come back -- standard and special. Let me qualify of course there's special conditions in almost every one of our cases.

In my district, we actually get written notice in the PSR of the special conditions. And so, those often do get litigated at sentencing, but the standard conditions, this blanket 14-condition list, I feel, has been largely ignored nationally --

CHAIR SARIS: Right.

MS. MARIANO: -- and often doesn't apply. And I also going back again to this third party risk assessment, you know, I'm in a ban-the-box state. So, what does that mean and why is that being delegated to the probation office to decide?

I think the error, the judgment has to
include only the conditions that the judge finds on a case-by-case, defendant-by-defendant basis apply, and probation will come back if circumstances change after a lengthy sentence.

But as a national problem, I just think we're all complicit because there is such lengthy terms of in prison usually front and center that our clients are asking us to fight on that and a lot of this has gone by the wayside.

DR. SWISHER: If I may, in the District of Connecticut a Second Circuit decision came down. It was interpreted that it would be the judge at the time of sentencing who would impose the third party notification.

It caused a paradigm shift in how it was -- how it was determined for each defendant to have this happen, but it has worked, to my understanding.

I have been in contact with the deputy chief there and she's indicated that it continues to work. That at the time of sentencing if a
third party risk has been identified through the course of the pre-sentence investigation, that they will impose that condition.

And if the person goes away to prison and comes back and that risk has been reduced, the probation officer can say to the judge, this is going to work.

Or if the person comes back and the risk has increased, the probation office can go back and ask for a modification. And because it will create a more onerous set of conditions, there is usually a hearing, but it resolves itself.

It seems to be working, because that way it's being tailored for that particular individual.

CHAIR SARIS: Thank you.

COMMISSIONER FRIEDRICH: Ms. Mariano, you mentioned that you get notice of special conditions in the PSR.

MS. MARIANO: Yes.
COMMISSIONER FRIEDRICH: Is that a national practice, or is that just your district?

MS. MARIANO: It is our district and I think it may actually be throughout the Second Circuit, but I can't speak definitively, but there were some Second Circuit decisions particularly in the sex offender area that suggested that would be a good practice, because we brought it up on review having not really litigated some of that in front of the district court. So, now it's presented to us in the PSR.

I don't know if it's done -- it's certainly not done nationally. I don't know if it's circuit-wide, but I would suspect it is.

CHAIR SARIS: Any other questions here?

(No response.)

CHAIR SARIS: I want to thank you all. It's very interesting. I really wasn't sure what to expect on this one, but you all made it very lively.
So, thank you very much for your comments, for coming here through the snow and into -- actually, it turns out it is quite beautiful outside, but wasn't necessarily so. Thank you very much.

(Whereupon, at 12:45 p.m., the meeting in the above-entitled matter was adjourned.)
UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON PROPOSED AMENDMENTS
TO THE FEDERAL SENTENCING GUIDELINES

WEDNESDAY, MARCH 16, 2016

The Commission met in the Thurgood Marshall Judiciary Building, One Columbus Circle, N.E., Washington, D.C., at 8:30 a.m., Patti B. Saris, Chair, presiding.

PRESENT

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, JR., Commissioner
MICHELLE MORALES, Ex-Officio Commissioner
J. PATRICIA WILSON SMOOT, Ex-Officio Commissioner

PANEL I: IMMIGRATION VIEW FROM THE BENCH

HONORABLE RANER C. COLLINS, Chief United States District Judge, United States District Court, District of Arizona
HONORABLE ANDREW S. HANEN, United States District Judge, United States District Court, Southern District of Texas
HONORABLE PHILIP R. MARTINEZ, United States District Judge, United States District Court, Western District of Texas
HONORABLE BARRY TED MOSKOWITZ, Chief United States District Judge, United States District Court, Southern District of California
PANEL II: IMMIGRATION: VIEW FROM THE FIELD

RICHARD C. BOHLKEN, Chair, Probation Officers Advisory Group
RICHARD L. DURBIN, JR., United States Attorney, Western District of Texas, U.S. Department of Texas, U.S. Department of Justice
KNUT S. JOHNSON, Ninth Circuit Representative, Practitioners Advisory Group
MARJORIE A. MEYERS, Federal Public Defender, Southern District of Texas

PANEL III: IMMIGRATION: ACADEMIC AND EXPERT PERSPECTIVE

VICTOR M. MANJARREZ, JR., Project Director, Center for Law and Human Behavior, University of Texas at El Paso
JENNIFER PODKUL, Senior Program Officer, Migrant Rights and Justice Program, Women's Refugee Commission
CHRIS RICKERD, Policy Counsel, American Civil Liberties Union, Washington Legislative Office
WENDY YOUNG, President, Kids in Need of Defense

PANEL IV: ANIMAL FIGHTING: PRACTITIONER AND PUBLIC GROUPS

JENNIFER CHIN, Vice President of Legal Advocacy, American Society for the Prevention of Cruelty to Animals
CHRIS SCHINDLER, Director of Animal Crimes, Animal Cruelty, Rescue and Response Department, The Humane Society of the United States
JEAN WILLIAMS, Deputy Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice
PANEL V: CHILD PORNOGRAPHY CIRCUIT CONFLICTS AND
MISCELLANEOUS AMENDMENTS: ADVOCACY AND ADVISORY
GROUPS

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# CONTENTS

Opening Statement by Chairman Patti Saris ................................. 5
Introductions of the Committee ................................................. 5

Panel I: Immigration View from the Bench

Chief Judge Raner Collins ...................................................... 13
Judge Philip Martinez ............................................................ 15
Judge Andrew Hanen .............................................................. 22
Chief Judge Barry Ted Moskowitz .............................................. 34

Panel II: Immigration View from the Field

Richard L. Durbin, Jr. ............................................................... 81
Margie Meyers ..................................................................... 88
Knut Johnson ....................................................................... 94
Richard Bohlken ................................................................. 100

Panel III: Immigration: Academic and Expert Perspective

Jennifer Podkul ................................................................. 174
Victor Manjarrez, Jr. ............................................................ 179
Wendy Young ................................................................. 185
Chris Rickerd ................................................................. 192

Panel IV: Animal Fighting: Practitioner and Public Groups

Jean Williams ................................................................. 225
Chris Schindler ............................................................... 230
Jennifer Chin ................................................................. 239

Panel V: Child Pornography Circuit Conflicts and Miscellaneous Amendments: Advocacy and Advisory Groups

Alexandra Gelber ............................................................. 284
Neil Fulton ................................................................. 290
Richard C. Bohlken .......................................................... 296
Mary G. Leary ............................................................... 300
CHAIR SARIS: Good morning to everyone. It's a little late, but we're all excited because I should just sort of break out of my written remarks to say that first of all, welcome to everyone. Thank you for coming this great distance.

But, also we got our nomination yesterday for a new Commissioner's spot. Judge Reeves was nominated by the White House. So, that's a very exciting new news for us that was announced.

But, today we're here to focus our discussion on the proposed Immigration Amendment. And what we're going to be doing is starting with immigration and then moving to animal fighting and child pornography this afternoon.

All of the proposed amendments on our agenda today have garnished a great deal of interest and public comment. I spent the weekend...
reading them.

It was extremely interesting. Very robust debate. And a lot of time went into making the remarks. So, thank you very much.

Looking ahead, we will hold another public meeting on April 15. At that time we’ll vote on the pending proposed amendments during the cycle.

The full list of the proposed amendments is posted on our website as well as in the Federal Register. As a reminder though, although our hearing is being held today, the public comment period remains open until March 21 so that additional comments will be taken until that time.

We hoped to hear not only from today’s witnesses, but I know this is our new -- and I feel so tech savvy. There are lots of people who are now coming into us live streaming. So, this is being broadcast by live stream today.

And so, but first I want to introduce
my colleagues on the Commission, who are all just abuzz here about our news. The first is Judge Charles Breyer who serves as the Vice Chair of the Commission. He is a Senior District Judge for the Northern District of California, and joined the Commission in 2013.

Dabney Friedrich to left has served on the Commission since 2006. Prior to her appointment to the Commission she served as Associate Counsel at the White House. Is counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee. And as an Assistant United States Attorney first for the Southern District of California and then for the Eastern District of Virginia.

To her left is Judge William Pryor who joined the Commission in 2013. Judge Pryor is a United States Circuit Court Judge for the 11th Circuit Court of Appeals and a former Attorney General for the State of Alabama.

And Rachel Barkow is second here from
my right, joined the Commission in 2013. She is a Segal Professor of Regulatory Law and Policy at the New York University School of Law. And serves as the Faculty Director of the Center on the Administration of Criminal Law in the Law School -- at the Law School.

And Commissioner Michelle Morales serves as the Designated Ex Officio member of the Commission representing the Department of Justice. Commissioner Morales is the Acting Director of the Office of Policy and Legislation in the Criminal Division of the Department.

I appreciate that all of you are here today for this important discussion. To begin we have a very substantive discussion planned around a multi-part amendment on immigration.

This immigration amendment could potentially be very significant because illegal reentry comprises almost one quarter of the Federal case load. And most of those cases are concentrated along the southwest border.
Which is why we are so pleased today to have four judges from those districts here today. You're the ones most affected.

If adopted, the proposed amendment would make comprehensive changes to the illegal reentry guideline. It would eliminate the categorical approach, which is so vexing to many, based on guideline enhancements for prior criminal convictions on the length of the sentence imposed.

And build in new factors that may be relevant to the culpability and dangerousness of the defendant. Such as whether the defendant has multiple prior illegal entry convictions. And whether the defendant has been convicted of additional felony offenses after reentering the U.S. Or whether he has led an otherwise law abiding life.

Also in the area of immigration, the Commission published a proposed amendment that would increase penalties for alien smuggling
offenses. The Commission proposed these changes in part in response to concerns raised by the Department of Justice following the widely publicized surge in unaccompanied minors that was seen around the border last year.

As you can see, the range of these immigration amendments is potentially quite significant. The issues we are considering today, we all realize are complex and must be examined in the context of both the data and the potential impact on implementation.

And for that reason, the Commission has been informed by a multi-year study of the guidelines applicable to immigration offenses. Today's hearing will allow us to hear the views of many distinguished witnesses, beginning with those right here today, on whether and how the Commission should amend Section 2L1.1 and 2L1.2.

So, this -- I've read all the comments. This promises to be a very lively discussion today on the merits of the proposal.
So, our first panel represents the views of the bench. And we're fortunate to have Judges from four of the five border districts joining us here today. So, let me introduce them.

Chief Judge Barry Ted Moskowitz is the Chief Judge of the United States District Court for the Southern District of California. Prior to being elevated to Chief Judge on January 23, 2012, he has served as the United States District Judge for that District since 1995.

I've served on Committees with Judge Moskowitz. I'm thrilled that you've been able to make it here today.

Chief Judge Raner Collins is the Chief Judge for the District of Arizona. Before being elevated to Chief Judge on September 3, 2013, Judge Collins has served as United States District Judge for the District of Arizona since 1998.

Judge Philip Martinez, whom I know
well, has served as United States District Judge for the Western District of Texas since February 12, 2002. Previously he was a Judge on the 327th Judicial District in Texas. I was amazed when I saw how many districts you had, from 1991 to 2002. And on the County Court at Law Number One for El Paso County, Texas from 1991 to 1994.

And Judge Andrew Hanen, who's really helped the Commission many times giving us comments, has served as a United States District Judge for the Southern District of Texas since May 10, 2002. Prior to taking the Federal bench, Judge Hanen was in the private practice in a Houston-based firm, Andrews Kurth from 1979 to 2002.

So, thank you all for joining us this morning. We've all received your remarks. So, why don't we start with Judge Moskowitz.

JUDGE MOSKOWITZ: Can I defer?

CHAIR SARIS: Yes, you may. So, if you want us to go to Judge Collins, that's fine.
JUDGE COLLINS: Can I defer too?

(Laughter)

CHAIR SARIS: Actually, this hearing is moving very quickly.

(Laughter)

JUDGE COLLINS: Good morning. I will -- I'll go ahead and make a couple of comments.

CHAIR SARIS: We have read everything. So you can -- you don't have to -- okay, go ahead.

JUDGE COLLINS: All right. My biggest concern then as you've read what I had to say, is that we may be trading something that we have now for something else.

I certainly don't like the categorical approach. I don't like the Taylor analysis. I think it's very difficult to do it. It can be very time consuming.

But, I'm not sure that changing it the way the Commission wants to change it is actually
going to bring about the results that you want to have brought about. One thing that you can do now when you see a guy with a 16 level enhancement and his crime may have taken -- happened 20, 30 years ago at some point, you can do something about that still. You can vary, you can depart. There are things you can do.

The other thing that concerns me is that State Court sentences and even District Court sentences sometimes don't necessarily reflect the true measure of what an underlying crime was.

Sometimes a State Court Judge will give a guy time-served sentence without the person being turned over the Feds. Sometimes a Federal Judge will do the exact same thing.

So, looking at just the sentence as someone guiding the past doesn't necessarily cure or take care of the problem in my opinion. I certainly want to see the categorical approach done away with, and a modified approach and so
forth.

But I'm not sure if this is the way that you're going to do it.

CHAIR SARIS: Can I just on a technical note, are you -- do you think -- I want to make sure your voice is being -- all being caught for this.

Is this -- because it's --

JUDGE COLLINS: I'm very soft spoken.

CHAIR SARIS: That's fine. I'm just not sure. All right, go ahead. It's -- do you want to add anything else? Or --

JUDGE COLLINS: I would also say, we'll just the worrying more about when someone was actually deported, what the documents are to support the deportation and things such as that.

CHAIR SARIS: Thank you.

JUDGE MARTINEZ: Chairman Saris, good morning and good morning Commissioners. I'm here first on behalf of Chief Judge Orlando Garcia, who was unable to be here.
And he asked that I certainly preface
my remarks by indicating that we're neither
advocating for nor advocating against a change in
the revisions. But we're hopefully here to
provide some feedback about what the challenges
may continue to be and certainly, you know what
the challenges have been.

The group of Western District Texas
submitted written testimony. I won't say it's
reflective of every individual Judge's views.
But, it is a consensus based upon the responses
that were received from a number of those Judges.

I do think that generally there is
something that is appealing about looking to an
objective factor. The categorical approach is a
lot of work. It takes a lot of time. It takes
a lot of resources.

So, that's true not only for Judges.
It's also true for probation officers,
prosecutors, defenders. And certainly one can
look at the body of case law that is out there
and come away with an impression that there continues to exist some degree of disparity.

I have to say, and I'll go on my written remarks, I'm not going to read those to you. But, I think we're not going to eliminate disparity in this area even if we move to a new framework.

The new framework that you've offered I think does some things very, very well. It asks us certainly to take into consideration the totality of the conduct of the offender both prior to deportation as well as after deportation.

I think that's a plus. I think that allows us to certainly recognize who is being sentenced. It's not surprising to me that the greatest number of departures or variances occur when the largest enhancements are applied.

Recognizing what we're invited to consider in assessing a sentence certainly allows us to take into consideration issues relating to
fairness. As well as certainly applying the
guidelines and making that mathematical
computation.

I do think that the other benefit to
the existing system is that we will be able to do
the mathematic calisthenics to get to the
guidelines. I don't necessarily favor adding
prior deportations to the base offense level.

Because the base offense level for me
has always been something that you could indicate
was with respect to the crime of conviction. And
I think Judges, even though we don't analyze the
issue in the new current framework that's being
proposed, we always take into account the number
of prior deportations, the number of returns.

And certainly we're mindful of both
charged and uncharged conduct. And so, I do
think an effort is made in that regard.

I do have a concern in raising the
base offense level to 10. That in and of itself
it doesn't seem to make a lot of sense.
I do think some of the most violent offenders, some of those that would give us all some pause, will probably result in more lenient sentences. I think although we can certainly depart based upon the nature of the conviction.

And at the bottom end, some of those that probably don't merit as long a sentence, will probably see higher sentences under the new framework. I had requested one of my divisions actually do a sampling test.

And the Austin Division did a sampling test considering current cases. I don't know that it's in any way scientific. I think that perhaps more study ought to be done.

I wasn't comfortable with the conclusions that it reached. That it will result overall in higher prison sentences. I'm not sure that's ac -- it's accurate for the sample that was done.

I don't think it's going to necessarily be accurate across the board. And
so certainly I think I would like to look at that a little further.

I will say that notwithstanding the attraction of having an objective standard to use as a basis for determining prior convictions and what enhancements should be warranted, I do think that many of the comments that Judge Hanen includes in his written remarks are appropriate. And should be taken into consideration.

I do think in many ways we're going to be challenged to determine what the nature is of those prior convictions, and certainly post-convictions. But overall, we appreciate the opportunity to provide information to this Commission.

We -- one of the questions that we each had was the motive for the change. We understand the cry that you heard in terms of the resources required to determine the enhancements.

But, if the goal was to reduce the prison population, or if the goal was to reduce
the resources, I guess I end up where Judge Hanen ended up. And that is, are we really deterring the repeat offenders? Are we really incapacitating those most violent offenders?

And we didn't know if the means achieves the ends. Because we weren't sure of what the ends were.

We think there will be departures. We think there will be variances still. There is always going to be a concern about disparity.

I will say for myself, and this is a personal comment, relying on 12 months and 24 months is problematic. Because I am a Judge that will typically sentence someone to 12 months and a day.

And that will play differently than someone who gives a 364-day sentence. And so, you know, simply changing some of the dates might address that issue.

But, overall, the judges were in favor of it, just given the objective standard. It was
easier for us.

CHAIR SARIS: All right, thank you.

Judge Hanen?

JUDGE HANEN: Chairman Saris, thank you for letting us speak. I'm here obviously on behalf of the Southern District of Texas.

And I think overall to sum it up, we're against the proposal. Because we think it sacrifices justice in the name of speed and efficiency.

I don't think any Judge that you are going to ask is going to get up and really support the categorical approach. I mean, it takes time, it takes effort.

But what this proposal does, is it lowers the penalty on some of the most violent criminals. And it raises the penalty on those that haven't proven that they were violent.

Like Judge Martinez said, I mean, we understand the motive in so far as it makes things easier for Judges. But, what we don't understand
is why you think two things with regard to departures.

Why you think the number of departures now indicates the guideline is bad. And secondly, why you think the change is going to prevent the number of departures.

Quite frankly, I think if you change it the way you're talking about, departures are going to go way up. Because the guideline just won't work.

It doesn't take into account how most courts, not just on the border, but most State courts throughout, sentence illegal aliens. I mean, you can be convicted of the most heinous crime and get a suspended sentence or a probated sentence.

Because they know what's going to happen is you're immediately turned over to the Feds and theoretically deported and theoretically not to return again. And so, that's the way that most jurisdictions, at least in our experience,
that's the way the underlying crimes are sentenced.

The second reason for departures and the one I didn't mention this in my written submission, but I think it's important at least in our area, is we see what's going on in Mexico. And the cartel wars that are happening, you know, literally, you know, a mile from our courthouse.

And why people are coming back. And that leads to departures. It's not the guideline that's bad. It's the circumstances.

And Judges have to be able to look at that and say, you know, this guy knew he was coming back in the country illegally. He knew it was wrong. But look, he's got objective proof that the cartels just murdered three members of his family.

And you know, we've seen police reports where that -- they can show us that he had, you know, he feared for his life. Now that's a situation where we might depart.
And so, you know, we're kind of the boots on the ground on the border and we see these different situations. I mentioned one in my written presentation about, you know, was this guy a human trafficker or did he just stop and give somebody a ride?

All right, he got -- he gets a 16-point enhancement either way because of the 1324 conviction. But, that's a situation where we'd take the facts into consideration.

And what really worries us about the proposal is, you know, we're not in love with the category approach because it doesn't let us consider the underlying facts. This proposal not only doesn't let us look at the facts, it doesn't let us look at the nature of the crime.

It only says you can only look at the sentence imposed. And so, we're very concerned about this. And we think it quite frankly is contrary to the dictates of the Statute, 1326.

And it's definitely contrary to the
spirit of the Statute. Which differentiates between a (b)(1) offense and a (b)(2) offense.

And I will add just for your 1324 changes that we think some of those are good. We think the increase level for when there's a sexual assault, we think it ought to be increased more quite frankly.

And we think the proposals with regard to whether they're working for a commercial organization, we of course call the cartel, that that's a good change. Although we were worried if you put a mens rea in there, that they have to actually know.

Now reason to believe, we liked. But if you say they have to know, what we're going to have is a bunch of mini trials. And there's no way that that is going to work given the number of our cases.

But, we appreciate the chance to be able to weigh in on this. But our overall conclusion is, you know, the cure is worse than
CHAIRMAN SARIS: Thank you.

VICE CHAIR BREYER: Well yes, I have a question. Since -- especially about your example of the person who comes over who's a victim obviously of a drug cartel or the murders that occur and so forth.

And you say, and that's been my experience in looking at some of these, that indeed a Judge will depart because of the individual's circumstances surrounding that particular individual.

Is it your view that if this change comes about you still would -- you would not be able to depart?

JUDGE HANEN: No. I think Judges would depart in that situation.

VICE CHAIR BREYER: Well, I mean, it's not going to change. I mean, I'm just trying to figure out, you know, for all the complaints we get about the categorical approach, and everybody
here is saying gee, you know, it's -- that
categorical approach it's extraordinarily
difficult.

That it's basically not working for a
lot of reasons. We see examples of it not
working. So, we're proposing that we get rid of
that.

And I'm trying to figure out okay, if
we got rid of that, would it also make it more
difficult for you? Or somehow impede your
ability to depart in that particular case in
which somebody has come over as a result of
violence in Mexico?

JUDGE HANEN: No. My point is no, it
won't impede our ability to depart. It's not
going to lower departures, it's going to raise
it.

You're going to see a lot more people
departing upwards. Almost -- you know, I can't
remember the last time I ever departed upwards.
But I gave you four scenarios that were sitting
on our desk in the Brownsville division in my written submission. And we will depart upwards in all those cases.

So, if the guideline, the current guideline is bad because of a large percentage of departures, then the proposal you're going to make is going to be real bad. Because people are going to be pardoned right and left.

COMMISSIONER FRIEDRICH: Judge Hanen, I agree with you completely that departures are going up under this proposal. Upward departures probably will go up.

And when I look at the Southern District of Texas and I look at your data for the plus-16 level increase under the current guideline, your District's departure rate is over 56 percent at a plus-16 right now currently.

So, I'm not so sure that the overall departure rate, while upward departures will certainly go up, I agree with you, you overall departure rate, it's over 56 percent at a level
16. To me that's a high enough number that does in fact suggest that there's a problem with our existing guideline.

You, unlike the other Districts, don't have the fast track to speak of. So, that's playing a role. But, the bottom line --

JUDGE HANEN: We do have a fast track.

COMMISSIONER FRIEDRICH: Well, very minimal. I mean, I'm looking at this data here that shows fast track -- complete fast track for all 1326s is less than one percent. And this is data for fiscal year 2014.

So, maybe that's changed in 2015. But, the bottom line is we've got a guideline right now at a level 16 that has a large percentage of departures in every District including those with fast track. An extraordinarily large number.

I don't think the Commission intends to remove any of your abilities to depart for the nature of the offense or the facts of the case.
JUDGE HANEN: Um-hum. You're missing my point though. What you're doing though is you're -- it's not that you're taking away the ability to depart. I'm not sure quite frankly that the Commission has the ability to take away these rights.

COMMISSIONER FRIEDRICH: Right.

JUDGE HANEN: But, you're replacing it with a system that for a lot of reasons is worse. And it's not going to cure the departures.

COMMISSIONER FRIEDRICH: Well would -- and I -- any system, because of the nature of this offense that relies on priors that for the most part come out of the State systems with bearing statutes, with bearing documents that are available.

There's going to be disparity no matter what approach we take. There's disparity under the existing categorical approach.

So, part of it is the nature of the
offense itself that makes this a guideline that we can never craft a perfect guideline. It's one of all --

JUDGE HANEN: But, you're not going to -- you're taking away our ability to look at the nature of these.

COMMISSIONER FRIEDRICH: No. We're not. We're not.

JUDGE HANEN: All we're -- yes, you are. All we're looking at is how long they got in jail.

COMMISSIONER FRIEDRICH: No, no, no. That's where you start. And if we need to invite a departure that makes perfectly clear to you all that once you do the guideline calculation, if you've got the murderer who got probation as a prior, we would in fact expect you to look at the fact and depart up.

JUDGE HANEN: Okay.

COMMISSIONER FRIEDRICH: I mean, that's --
JUDGE HANEN: And I understand it. But I'm just telling you, I mean, if you think this is going to cure departures, it's not.

COMMISSIONER FRIEDRICH: No, we don't. We don't. We just --

CHAIR SARIS: Can I just -- no, go ahead.

COMMISSIONER PRYOR: You know, so it can't be the -- that a high departure rate doesn't evidence a problem with the guideline. Which is what I understood your letter to say.

Your letter suggests, well that's just -- Judges can vary from that. Well, if that were -- if that's not a problem, then we don't have a problem with the career offender guideline. We don't have a problem with the child porn guideline.

Surely, high variance rates is evidence that we have a problem with the guideline. You would concede that wouldn't you?

JUDGE HANEN: No. I don't concede
COMMISSIONER PRYOR: Well, wait a minute. That's hard to have a conversation with someone who doesn't concede that.

(Laughter)

JUDGE HANEN: Well, wait a minute Judge, it's hard to have a conversation with someone who says you have to agree with me.

COMMISSIONER PRYOR: No, but if we're to -- if our task is to develop a guideline, it really works as a guideline. It helps Judges in the amount of cases.

And we're told oh, forget the fact that in more than half the cases that you're looking at here, we vary. That's just built into the system.

Well then, how are we to do our jobs?

CHAIR SARIS: Can I -- can -- oh, Judge Moskowitz, go ahead.

JUDGE MOSKOWITZ: I had a few comments. There in our District is generally in
favor of the amendment. And I find with certain modifications as I mentioned in my written submission.

The biggest problem is with the categorical approach. First, trying to figure out the circuit does sometimes changes their view on what is a crime of violence.

The Descamps case threw a curve into the issue that makes it more difficult. And your proposal has merit.

The other problem with 2L1.2(b) is that it groups various plus-16 disparate offenders. An illegal alien who drives a car with his fellow illegal in it for the purpose of deferring more important thing is, or a part of his smuggling would be when he comes back, he gets a plus-16 the same as the rapist, or a murder or a violent robber. That just makes no sense.

And we're departing because we disagree with the guideline. Also, a small drug dealer is punished the same as a rapist, some are
less than a murder. I don't think anybody here thinks that's fair.

Your proposal assumes that the sentencing Judge imposes a sentence commensurate with the seriousness of the offense. And that I think is a fair assumption. Now too, I agree that the 12 month and a day point is very well taken. The only problem is that I didn't think of it myself.

(Laughter)

JUDGE MOSKOWITZ: And by deferring I can support that. The other problem is that the two-year sentence and now I've tried too many people, but disparate offenses equally.

I think you need to break that apart in half. And further, maybe lower the age and have more for a five year and above. And the most for ten years and above.

And that I think would make it more clear as to the punishment. I think the idea of having a look at it before they're deported and
what they do after is a wise proposal because the
whole idea of this is what I call community self-
defense.

That we want to defend ourselves from
people that should be here and come back and harm
the community. And the way you broke it up, I
think it does that.

The -- make sure I cover. The other
thing that I think makes it a wise proposal is
that it takes into account more as it will be, a
category of -- and I'll talk first about the three
categories of defendants we see in San Diego.

One are people who come back to work.
And they need to be obviously deterred, but not
to the same as the next category, people who come
back to commit crimes.

And then there's the third category
that we see so often. The kid who was brought
here illegally by his parents as a teenager.
Grew up here, his whole family's here.

And now he gets involved with a gang,
does drugs now, and he's deported. And when he
gets to Mexico, he looks around and says I don't
speak Spanish well. I have no family, and he
turns around and comes back right away.

We have done nothing to date other
than departures or variances for general
mitigation to cover that situation. And then
there's the category of people who come back
after a while because their family members have
health issues or died, for humanitarian reasons.

If they had a prior plus-16 they would
be hammered. If they have behaved themselves
after deportation, the plus-8 max, I think
ameliorates the situation somewhat.

But I encourage the Commission to take
and too again the people who come back because
their family are here, or for humanitarian
reasons. They in no doubt should be punished and
deterred, but not to the same extent as the other
categories.

Just a few more points.
CHAIR SARIS: Excuse me. You think we should take the cultural assimilation departure and build it into the guidelines? Is that what you're --

JUDGE MOSKOWITZ: I think so.

CHAIR SARIS: Okay.

JUDGE MOSKOWITZ: And the problem with that is it assumes to require them to be here a longer period of time. So, someone brought here when they were two has a better chance than someone who came when they were 14 and dropped out of school.

CHAIR SARIS: Can I just ask, one of the things we've struggled with are the people who keep coming back. And as you say, they fall into different buckets.

People come back to commit crimes. People come back to work. People come back for their families. What is the -- if you were to say that someone who keeps coming back at some point needs further deterrence, what would that
point be?

Is it three returns -- because some of these people that just, I mean, they're just poor and they're coming back to work. But some people are just not getting the message.

Even in Boston we have these cases. And they keep, you know, their fourth time, it's their fifth time, and they keep coming.

At what point, maybe none, you would say none, do you feel as if there's an additional need for deterrence?

JUDGE MOSKOWITZ: Well, I like and this was one of my two last points. I like that the proposed guideline take the prior illegal entry offenses into account.

You can do it by base offense level as opposed to a very characteristic as in 2L1.1, but it's a good idea. The way a deportation is a government directive to stay out of the United States.

Someone who violates it should be
punished. But the punishment must fit the crime. And so, perhaps even the first time a sentence to act as a warning is necessary.

Otherwise the perception is catch and release. That you catch them, you release them. The word gets out there are not problems. Nothing will happen to them.

VICE CHAIR Breyer: But Judge Moskowitz, I recall that it was actually 15 years ago I came down and sat in your District in order to learn something about this particular problem.

And what struck me as remarkable is I would get a sheet from the U.S. Attorney of how many "voluntary," I don't know if they're called voluntary returns or whatever the euphemism is, to take care of a situation where somebody crosses over. And then is turned around by the, you know, border police of other law enforcement and sent back.

And the number, the staggering -- not the number of people who cross over, that's
another issue. The number of voluntary returns.

And I was told by the U.S. Attorney
then that you don't even prosecute. That is
bringing to a Judge the case unless that person
has been returned. And I think the number was
over 20 or over 30. I mean, it was a staggering
number.

So I go back to Judge Saris' question.
And maybe there's no answer that any of us can
give. Which is what is that penalty that would
serve as a deterrent?

A deterrent without being draconian.
I mean, obviously to lock up people for life. As
being a deterrent to somebody coming back, who is
coming back because of cultural assimilation,
coming back because of family, coming back for a
job.

But not, not the group who is coming
back to commit crimes in addition to coming back.
Is there some number? Is there something we
ought to look at to make that determination?
JUDGE COLLINS: I don't think there's a magic number, because everyone's reason for coming back is different. Whether you talk about necessity, you talk about trying to take care of a family and things such as that.

People calculate it's worth the risk to them to come back and try to get a job rather than stay in Mexico and not have a job. And not be able to support their family.

So, there's just no magic number you're going to be able to create anyway.

JUDGE HANEN: We've had people that I've sentenced that basically tell me, I'm coming right back.

VICE CHAIR BREYER: Yes, I've had that too. I've had that too.

COMMISSIONER BARKOW: Can I ask just for clarification though, is it commonplace then for Judges to take into account the motive that somebody has for coming back?

JUDGE HANEN: Yes.
COMMISSIONER BARKOW: Irrespective of whether you have it in a guideline?

JUDGE HANEN: Yes.

COMMISSIONER BARKOW: That that's just kind of universal?

JUDGE HANEN: Yes.

COMMISSIONER BARKOW: Do you think it's something that we should think about putting into the guidelines and talk about potential buckets of reasons? Or is it better to just kind of leave a base number and have there some wriggle room for that?

JUDGE HANEN: I think we all do it anyway. I mean, I think we all graduate sentences upward, you know, with an increase in --

JUDGE MARTINEZ: I don't see how you would have a guideline with a comprehensive way of knowing what the motive is. I mean, I think that's the reason you have human beings that are conducting the sentencing hearings and
recognizing and trying to gauge the sincerity.

But, I will say, just as a sentencing Judge, if you come back and you have prior convictions for illegal reentry, I'm generally of the opinion that you shouldn't serve less time then you did the last time.

Unless there's just been some huge period of time during which there's been no prior convictions or prior scorables conviction, it's no longer scorables.

So, I think we're all mindful of the need to deter. But, like every Judge here, I'm sure we have those offenders who will say life in a Federal prison is better than life in Mexico.

And when they say that, I mean, all we have is the statutory max. And yet you see very few sentences that ever approach the statutory maximum.

JUDGE COLLINS: Right. One of the problems is that all 16-level enhancements are looked at as the same. And they're not the same.
That's a big problem.

What you can do to eliminate that would be very helpful. Because the guy who gives someone a ride and gets a transportation offense, gets a 16-level enhancement.

The guy who is actually smuggling people across gets a 16-level enhancement. The guy who robs somebody gets a 16-level enhancement. They're all different people. They're doing different types of things.

And that enhancement treats them the same at the beginning of the calculation. And that's something you need to take a look at more than anything else I think.

CHAIR SARIS: Can I say, given the number of departures from the 16, that's one big thing we looked at. We looked at the Southern District, and it's something like -- of California, it's within range of the -- on the plus-16 it's 5.2 percent.

I mean, it's just that the -- but, if
you were to go down to -- a lot of those are fast tracked. But those are -- 85 percent are, apparently no one's get -- very few people are getting it.

So, I'm trying to figure out, if you think that some of the 16s are too harsh, I mean, that's where people are going, where the stakeholders are going. But, -- and we're trying to think well, who's more culpable?

And one of our thoughts was well, the people who keep coming back multiple times. People -- certainly people who commit crimes when they come back.

So, we're trying to build in -- listen to the feedback from the Judges and from the U.S. Attorney's office as they're prosecuting them at plus-16. You know, shifting the culpability from the plus-16 to people who maybe come back multiple times and maybe for bad reasons, people who get convicted.

And the question is whether in general
what you're seeing is that you're saying, Judge Hanen, that's not worth a dime to you. That in general you don't want us to be working with this guideline.

Is that what you were saying?

JUDGE HANEN: Well no, no. I think there are -- I actually think there are ways you could fix the guideline that you proposed.

CHAIR SARIS: So it's just the categorical picture you're really most worried about?

JUDGE HANEN: Well, I'm not -- believe me, you're not going to find any Judge in the Southern District who loves a categorical approach.

But there may be ways to fix what you've done. For instance, you say okay, if you've served two years, or if you've committed murder, robbery, rape, sexual abuse of a child, regardless of how long you've served.

Something like that where you pick up
these really bad people and heinous criminals.

VICE CHAIR BREYER: I was intrigued by -- because I've heard it before, Judge Hinojosa pointed this out. Was that in Texas there has been the experience that State Court Judges, exactly the example you cited.

State Court Judges will look at a defendant who has committed a particularly heinous crime and say, okay, I know what's going to happen to you. The State of Texas is not going to have to pay for your confinement. We're sending you over to the Federal government and you're going to be deported after you serve a substantial sentence.

And I was trying to figure out, because that's not actually what happens in California in my experience. And maybe Judge Moskowitz has a different one.

But my experience has actually been that the State Courts do quote, whatever -- however you want to say, "appropriately" punish
or not, do take that into account. And that is
the seriousness of the crime.

But, is this common? Or is it --

JUDGE HANEN: Well, it's not only
common, I had originally written a letter that
said, basically down here this is how they
sentence. And Judge Kazen who's, you know,
probably our most senior Judge on the Board,
called me up and he said, Andy, you need to fix
this. They do this everywhere.

And that's been my experience too. I
mean, it's a common way of sentencing. That's
why we're worried about you key it off of criminal
history points, or you key it off the length of
sentence, that's what bothers us.

COMMISSIONER BARKOW: But Judge
Hanen, if we did that correction that you have in
mind, where if you could use years as one
threshold, which might work better in other
Districts, but to account for this particular
problem, if we did have a list.
I guess so the list could be named offenses without a residual clause. Without getting back into --

JUDGE HANEN: I don't think we want to bring Johnson into this.

(Laughter)

COMMISSIONER BARKOW: Yes. Well, I don't either. And so, I guess if you were to construct that list, where would you take the list from? Or how would you define those things?

Well, because the other alternative would be -- I guess it wouldn't fix your problem if we had five years, 10 years, 24 months. Because you're saying they're not getting any at all.

JUDGE HANEN: They're not getting the time. That is the problem. Well, I would, you know, I guess it would have to be -- you'd have to get input from most people.

But, obviously I would include murder, kidnaping, rape, sexual abuse of a child,
robbery, and probably--

VICE CHAIR BREYER: But don't you do that now? In other words, don't you use--

JUDGE HANEN: Well, but you're getting rid of it.

VICE CHAIR BREYER: Well no. I'm not talking about -- I'm not talking about the categorical approach. I'm saying when you sentence now, and you see that somebody got a particularly light or inappropriate sentence for the criminal act for which he was convicted by the State Court, don't you look at that?

And if you see that he was shipped over immediately, take that into account in that departure?

JUDGE HANEN: Oh, absolutely. And that brings us back to the discussion I was having with Ms. Friedrich and Judge Pryor. And that is, I mean, they're looking at us saying it's the -- you're departing X number of percent, therefore the guidelines must be bad.
The new guideline's going to be just as bad if we do that -- if we do what you're suggesting Judge Breyer.

VICE CHAIR BREYER: Well you just said that. I'm just -- no, actually I'm not suggesting, I mean, yes, I was intrigued by the suggestions. And I think the public hearing is very, very helpful to clarify my thinking.

But, I'm trying to figure out in my mind whether the practice that is followed on the, you know, boots on the ground, are you taking these things into account anyway?

And if what you're saying is yes, we take it into account because if we see that inappropriately light sentence in the State Court or no sentence at all, of course we take that into account. We do it by way of the departure.

And that's what I think you do. But, if you don't do it that way, you should let me know.

JUDGE COLLINS: I don't do it that
way. I don't make the assumption that a Judge in another jurisdiction gave someone a particular light sentence just because he thought they were going to be deported.

VICE CHAIR BREYER: Well, in Texas they seem to.

COMMISSIONER PRYOR: And if I could respond. Given the current guideline, you're just not considering the sentence at all?

JUDGE COLLINS: Well, what I may do is, he's got a 46 to 57 month range. I may not cut him any slack for those 46 months. That's all I'll take into account.

I'm not going to upward depart because a Judge in another State didn't give him enough time upward depart. I will say that.

COMMISSIONER PRYOR: Judge Hanen, you gave us four -- was it four or five big cases --

JUDGE HANEN: That's why I had to give it some thought. That's why I didn't want to be put on the spot. I could come up with --
COMMISSIONER PRYOR: How many did you
-- what was your sample size? How many did --
were you all looking -- I mean, you have a lot of
cases.

JUDGE HANEN: Oh, those were not
cherry picked. They were not cherry picked at
all.

COMMISSIONER PRYOR: Well, how do I
know that?

JUDGE HANEN: Well, you have to take
my word for it I guess.

(Laughter)

COMMISSIONER PRYOR: Well, what was
it at the --

JUDGE HANEN: But, I mean, three of
those people had -- the defendants' files were
sitting on my desk. The murder case was sitting
on my desk.

CHAIR SARIS: What sentence did that
murder person get?

JUDGE HANEN: He got probation.
CHAIR SARIS: But how can a case, a murder case -- that just doesn't --

COMMISSIONER MORALES: I'm really curious about that. Can you describe that case a little bit more for us?

JUDGE HANEN: Just a -- because they -- they're not -- they're getting rid of the person.

VICE CHAIR BREYER: Well so, then maybe that's a logical consequence of this whole guideline system in terms of immigration. Is that now State Court Judges believe that it's going to be a Federal problem, and let them deal with the whole thing themselves. And get rid of "the bad people."

JUDGE HANEN: I mean, I'm amazed at some of the probated or suspended sentences. And it may have been a suspended sentence. I can't actually remember. But --

CHAIR SARIS: But I've never seen anything like that.
JUDGE HANEN: Now, he may -- it may have fallen the other way. He may have been the one -- one of them was one who just got no criminal history points. So, he fell into that category.

CHAIR SARIS: Because I just -- I just

JUDGE HANEN: He may have been -- it may have been the murder. But I had, what, a sexual abuse of a minor and some other examples in there that -- where they got no time.

CHAIR SARIS: Can I say I get it. That Texas has more than anybody else. But I've never seen anything like these scenarios in Massachusetts, where someone commits one of these serious crimes and gets no time because they're going to be deported.

I just -- I've just never seen it. So, I'm wondering how -- whether it's just unique to Texas?

COMMISSIONER PRYOR: Well, that's the
border.

CHAIR SARIS: Yes.

COMMISSIONER PRYOR: Well, what about when they --

CHAIR SARIS: Well, wait, wait.

JUDGE MOSKOWITZ: You know, I've never seen this. And if the State does that, they're being foolish because after the Federal sentence, they will likely be back.

And if they're committing murder, they're going to kill someone else.

CHAIR SARIS: Go ahead.

COMMISSIONER FRIEDRICH: Judge Hanen, one thing I want to correct. I said that there was no fast track to speak of. But, it's actually 4.5 for all 1326, 4.5 percent.

But, with respect to level 12 increases and 16, it's zero according to our data.

JUDGE HANEN: We don't have any fast track for anything above and eight.
COMMISSIONER FRIEDRICH: Okay. So that departure figure is a level 16, over 56 percent. But, my question is for Judge Moskowitz, Judge Collins and Judge Martinez, you've raised some great points about the threshold.

And you raise them at the low end. And maybe the Commission needs to look at a safety valve for the true offender with no criminal history who's going to bump from an eight to a ten.

As we looked at our data, 77 percent of those offenders who were at the lowest end now, 77 percent will still remain in zero to six. So, this is a small percentage. But, maybe the Commission does need to look at a safety valve carve out for that low end.

At the high end, you make -- at the high end you make some great points about these maybe five year sentence, ten year. And you're year and a day point is a valid one.
So, assuming the Commission takes in some of your comments, or all of them, and deals with these threshold issues, my question is, if we make these adjustments, would you prefer that system? Recognizing it's not perfect and there will be a need for departures.

And maybe we need to enhance our departure language to make clear, you should look at the nature of the underlying offense. You should look at the facts. We do not want Judges to stop doing that.

If we did all that, would you prefer that amended guideline to the status quo that requires a categorical approach?

JUDGE MOSKOWITZ: Yes. For two basic reasons. One it's more objective. Two, it's what the event before deportation for those who come back and they prey upon the community again.

COMMISSIONER FRIEDRICH: Judge Collins?

JUDGE COLLINS: I think I would prefer
that better than the other proposal too. When I first started back in 1998, there was something called Application Note 5, which allowed a Judge to take a onetime departure in a level 16 case and give a guy a break.

That went away sometime in the early 2000s. So, it's been a long time. But, something in that -- something that can allow you to do that would be great.

CHAIR SARIS: So, if we have fixed it, you'd be okay with it the way --

COMMISSIONER FRIEDRICH: And Judge Martinez?

JUDGE MARTINEZ: The consensus in the Western District of Texas is that this new framework can be made to work. And getting away from the categorical approach is a huge move in the right direction. Notwithstanding the concerns that Judge Hanen has pointed out.

I will say, it is a little bit inconsistent to me that on the one hand, we're
getting away from crimes of violence, aggravated felony, and yet for the three misdemeanors, we're still looking at --

COMMISSIONER FRIEDRICH: Well, that's a Congressional directive.

JUDGE MARTINEZ: Oh, okay.

COMMISSIONER FRIEDRICH: So, we can't eliminate that.

CHAIR SARIS: We might agree you on that. But, we can't --

COMMISSIONER FRIEDRICH: It's a Stature.

JUDGE MARTINEZ: Okay. Wait a minute --

COMMISSIONER FRIEDRICH: But Judge Hanen, for you, if we were to add this list of offenses, would it change your view on whether this is a plus?

JUDGE HANEN: Oh, I think it would change a lot of our -- the Southern District Judges. If we're going to start picking up some
of these --

COMMISSIONER FRIEDRICH: Some of these key murder, rapes --

JUDGE HANEN: This serious crime.
CHAIR SARIS: A crime of violence.

JUDGE HANEN: What you would call a crime of violence, because we're back to that compliant term.

COMMISSIONER FRIEDRICH: Right.

CHAIR SARIS: But, the most heinous.

JUDGE HANEN: But yes, if you started picking up the most heinous crimes --

VICE CHAIR BREYER: Enumerated offenses.

CHAIR SARIS: Right, a few select.

JUDGE HANEN: Exactly. Right.

COMMISSIONER MORALES: I have one. And whether -- going back a little bit to the sentences that were imposed in those that are either probated or suspended, is that how they usually are imposed?
Is it, okay, you would have gotten ten years, but I'm suspending it? Or is it, okay, you committed murder, but you're getting nine months?

I mean, is it -- so, that -- if it's usually suspended, would just having language that suspended sentences count as if imposed, have an impact on your views as well? I mean, would that -- do you think that would help a lot? A little?

JUDGE HANEN: I think -- I mean, you know, now we get to consider whether it's suspended, deferred, probated. I mean, if we were able to do that, I think that would cure the problem.

VICE CHAIR BREYER: Are the sentences in Texas out of State Court, are they imposition of sentence suspended? Or are they State prison suspended?

In other words, I sentence you to State --
JUDGE HANEN: It can be both ways, right.

VICE CHAIR BREYER: It can be both ways?

JUDGE HANEN: Yes.

VICE CHAIR BREYER: So, in one case we have "no sentence," because it's imposition of sentence suspended. I place you on probation for six months or nine months, and goodbye, you're going off to the Federal system.

JUDGE HANEN: Right.

VICE CHAIR BREYER: Versus, I impose a State prison sentence which could be five to life or whatever it is. And -- but I suspend it. And so you have two different kinds of sentences.

JUDGE HANEN: Absolutely.

VICE CHAIR BREYER: One in which there is no sentence. One in which there's a State prison sentence. And yet they both can be exactly the same crime.

CHAIR SARIS: And in the current
guideline it says 13 month sentence imposed for
drug trafficking.

VICE CHAIR BREYER: Thirteen, yes.

CHAIR SARIS: It's 13 months. Did I say years? It says condition for felony drug
trafficking offense for which the sentence imposed was 13 months or increased by a 12 level.

Sorry, you all know that.

So, just in terms of the ease of imposition, has that been easy to apply? In other words, you go, you find the conviction. I mean, we heard some concerns about documentation. Or -- has that worked basically?

JUDGE COLLINS: Well, most of those drug convictions are going to be Federal court and you'll have the documentation of it. But keep in --

CHAIR SARIS: Those happen in Federal court.

JUDGE COLLINS: Keep in mind though that most of those drug trafficking convictions
are backpackers. They're not people selling drugs on the street. They're not people making huge drug deals. They're backpackers.

That's a lot of the people getting who are getting a 16 level enhancement.

JUDGE MOSKOWITZ: In California it's difficult to apply for the very reason that we're here. The Ninth Circuit will find it not a drug trafficking offense because it was transportation/sale of a controlled substance.

They don't list the controlled substance in California sanctioned substantive that the Federal Act does not. So, that doesn't count where here it would.

Just before I forget, if the commentary included something like this, if most of the defendant's family resides in the United States, and the defendant returned to be with his family the court may consider a departure.

If there was something open-ended like that, I think it would be helpful for that. So,
as a defendant wouldn't require, it's just something in writing recognizing the departure there.

And last, before I run into done. And 2L1.1, the smuggling guideline, I share Mr. Johnson's view. He'll speak of it as to the increase for if the defendant smuggled, transported or harbored an unlawful alien as part of an ongoing commercial organization.

It has to have five people by definition. But, the pickup driver from the homeless shelter goes down to the border free to drive the aliens, but he gets sucked into this. And we then have a big debated as to whether he's minor or minimal just like the drug carriers.

I just don't think this is needed. If the government wants to press this, they have a mandatory minimum of three years or five to use if they want to prosecute the case that way.

CHAIR SARIS: Thank you. Judge Pryor?
COMMISSIONER PRYOR: Judge Hanen, if we had a few enumerated offenses, would you want to look at the facts too as part of the guidelines?

JUDGE HANEN: Well, so far we can't look at them.

COMMISSIONER PRYOR: I know.

CHAIR SARIS: If that we could.

COMMISSIONER PRYOR: We could say that that's -- yes.

JUDGE HANSEN: Well, I think depending upon the enumerated offenses you pick, I mean, I'm not sure you need to do that.

COMMISSIONER PRYOR: Okay.

JUDGE HANSEN: I mean, I think if you -- the ones I named and probably just given some more thought, you all would come up with some that you'd want to include as well.

But, I think that would go a long way to curing our problem with this. And I think quite frankly, it goes a long way to matching
what's in the actual Statute, 1326, where they make a gradation between a felony and an aggravated felony.

You know, I think you'll be a lot closer to the Statute if you do that.

CHAIR SARIS: Thank you. And I just -- we don't have that much -- I don't know if we have any more questions -- that much more time. But I know that Judge Moskowitz mentioned the alien smuggling. I don't want to lose track of that for the others.

Do the rest of you have views on whether it needs to be adjusted the way we -- in one of the two options we've suggested? Or is it appropriate the way it is?

JUDGE COLLINS: I don't have any feeling one way or the other about that one.

JUDGE MARTINEZ: I'd agree with Judge Hanen.

CHAIR SARIS: That?

JUDGE MARTINEZ: The inclusion of
those more serious and egregious situations that merited a higher bump.

JUDGE HANEN: Like the sexual abuse of a --

JUDGE MARTINEZ: Yes.

JUDGE HANEN: Of a customer or captive --

CHAIR SARIS: Of a minor.

JUDGE HANEN: Whatever you want to call it. These, you know, the people -- the alien that's being transported.

JUDGE MARTINEZ: Right.

CHAIR SARIS: And do you think we should change the definition of minor? In other words, the way it is now is I think is under 16 and should it be consistent with the Alien Act of 16 to 18?

Or are we capturing too many -- I understand in Mexico, I read some testimony that in fact in Mexico it's 16 is the dividing line.

So, is that appropriate? Have you seen many
cases where this matters?

JUDGE MARTINEZ: Not that many, no.

CHAIR SARIS: All right.

JUDGE HANEN: But, if you're going to
-- I don't think you should put a mens rea into
that. I think, you know, these people that
traffic in human beings, I mean, if you say well,
I didn't know it was a minor. I mean, we'll have
a mini trial in every case.

I mean, or I didn't --

COMMISSIONER PRYOR: Would reason to
believe be good enough?

JUDGE HANEN: Well, reason to believe
would be helpful. Because that way, you know,
at least if the minor's young enough. Of course
if it's a 16 or 17 year old as Judge Saris is
talking about, I mean, you know, we're never
going to -- you know, I thought he was 18.

VICE CHAIR BREYER: Don't we have that
problem all the time? I mean, we have that
problem with a lot of criminal cases.
CHAIR SARIS: The Man Act.

COMMISSIONER PRYOR: Isn't the circumstantial evidence in a lot of these cases going to be --

JUDGE HANEN: Pretty good.

COMMISSIONER PRYOR: Pretty overwhelming.

JUDGE HANEN: And pretty much the minor enhancement comes automatically. If there's a minor in the group --

COMMISSIONER PRYOR: Yes.

JUDGE HANEN: It gets assessed. And you know, whether the person knew about it or not.

CHAIR SARIS: So, the testimony from the experts was compelling on this point. I mean, I was just gripped with it over the weekend actually, on what's actually happening.

That young people are being recruited or forced to be smugglers coming across the border. And it's getting more and more
dangerous.

So that let's say you had a young person and then somebody else in the stash house rapes the kid. You would attribute that to the smuggler?

And that's what you're hearing is happening. These young people are being forced to be the smugglers. They come across the border with unaccompanied minors and then they're getting raped and tortured and kidnaped in these stash houses. That's what you're reading about.

And so, if you don't have a mens rea do you attribute that rape to the smuggler?

JUDGE HANEN: Well, first of all, it's the young person, the smuggler wouldn't be in front of us.

CHAIR SARIS: Well, 18, 19, yes.

JUDGE HANEN: Okay. I mean, I wouldn't. And I don't think our probation department. I mean, we would -- it would be applied to the person that ran the stash house.
that was involved in the rape or doing something like that.

But, we wouldn't apply it to someone that didn't have anything to do with it.

CHAIR SARIS: So, you need some mens rea in there. You'd have to know that the person was raped. And you'd have to -- right, you'd have to have --

JUDGE HANEN: Yes, that's a different situation. It's --

CHAIR SARIS: But you're just talking about the minor --

JUDGE HANEN: What I'm talking about is the minor. Because then we're going to get an argument well, she was 12 years old, but she looked 15 or you know, whatever.

We don't want to try those.

CHAIR SARIS: All right. Anybody else that has any parting ideas? But yes, you're just saying that's yours?

JUDGE HANEN: Can I make one very
frivolous suggestion?

CHAIR SARIS: That's yours? Yes.

JUDGE HANEN: If you implement these, can you renumber them so they're not (b)(1) and (b)(2)? I mean, they don't match the Statute.

CHAIR SARIS: Yes. That's a great point. Yes. Very confusing.

COMMISSIONER PRYOR: So Judge Hanen, if we make the kinds of modifications that we've discussed to this proposal, do you still think the departures will go up?

JUDGE HANEN: I doubt it actually. I think if you were to add an enumerated list that said, you know, and regardless of what sentence you got, if you are guilty of murder, rape, sexual abuse of a child, those things, I don't think you're going to see that.

Because those are the instances what we were looking at that, you know, all of us --

COMMISSIONER PRYOR: The way you're looking at them now?
JUDGE HANEN: Yes. I think that's actually --

COMMISSIONER BARKOW: But would they go down though if they're -- right now they're not really upward departures though. The reason you're departing is to go down.

So, the question is whether we fix that with the other reasons.

JUDGE HANEN: Well but at least for my purpose, we're not going to replace it with a different one. That's right.

COMMISSIONER BARKOW: With an upward one.

JUDGE COLLINS: Let me just one -- sexual abuse of a child, be careful how you define that also. Because sometimes you find out that they're now married. They were 15 and 17 or 17 and 14 and now they're married.

JUDGE HANEN: But that's another reason we depart down.

JUDGE COLLINS: So, a number of
departures in those areas will go down.

JUDGE HANEN: And in those cases we actually look at the facts.

JUDGE COLLINS: If it's brought to our attention.

COMMISSIONER MORALES: That's good. I have one. Judge Hanen, earlier you said that you had a bunch of fix -- that you had a number of fixes that you thought could help. And I think we've already discussed the idea of having this enumerated list of offenses, the idea of it, incorporating suspended sentences and of course renumbering.

Are there any others that you have in the back of your head that we should know about?

JUDGE HANEN: Well, no. Those are the main ones. I think if we capture the serious crimes, and as far as a gradation of, you know, just this is a second time or a third time you've had a 1326, I mean, I think I don't have an opinion one way or the other because I think
Judges are doing that anyway.

I mean, every time I sentence somebody for that, I tell them, you know, next time you come back here's what you're looking at. You know, I -- because I want them to know that the penalties go up if nothing else because of criminal history points.

COMMISSIONER MORALES: So would you like to see that in sort of -- in writing?

JUDGE HANEN: It's fine with me. And it's fine with the Judges there. But, we're okay either way.

CHAIR SARIS: Thank you. I think -- are we all set? Thank you all very much for making the trip.

And we'll just take -- we'll just do a second for the swap. I learned my lesson last time, no break.

Okay. So, now we hear the view from the field. We begin with the Department of Justice.
Richard L. Durbin, Jr. has been the United States Attorney for the Western District of Texas since 2014. And prior to that he was an Assistant United States Attorney since 1983.


Knut Johnson is testifying on behalf of the Practitioners Advisory Group on which he serves as the 9th Circuit representative. He has practiced in his own law firm in San Diego since 1996.

And finally, Richard Bohlken, no stranger to this Commission, is the current Chair of the Probation Officers Advisory Group. And has been a member of the group since 2010. He is also the Assistant Deputy Chief Probation Officer in the District of New Mexico.
So, thank you. And I would -- I didn't -- you'll notice there's a little bit of discrimination here. I didn't do this with the Judges, but we still have our light system for the members of the field.

So, we have these, I guess, everyone's been told, sort of in the vicinity of five minutes for oral statements. And then these lights go off, I think.

So, it will go beginning with you Mr. Durbin. Thank you.

MR. DURBIN: Thank you. And thank you all for having me. As you said, I've been the U.S. Attorney for about a year and a half almost.

I've been an Assistant U.S. Attorney in the Western District for a long time.

CHAIR SARIS: You need to -- this is a tough room just because it's --

MR. DURBIN: Can you hear me?

CHAIR SARIS: You need to just speak
up a little bit because we have people who are listening in.

MR. DURBIN: I have -- we do a lot immigration cases. And I'm here this morning mostly to answer your questions.

But, let me say a couple of things. I wrote out some. But, I'm in the middle of a conversation and so I'm not going to do the written part. I'm just going to tell you a couple of things and then get it going.

On the guidelines pertaining to smuggling, there wasn't a whole lot of discussion of that, but I do want to mention a couple of things. I mean, it's our belief that the guidelines should be raised.

And that it should not be based on specific proof of membership in an organization. Our experience on the border is that everybody almost who's involved in transporting people is somehow connected to an organization.

The organizations don't all look like
what we think drug organizations look like in terms of a very, very carefully vertically integrated organization.

But, there is a tremendous amount of coordination that has to go on to move people across the rivers or across the border, through the checkpoints, or around checkpoints to stash houses. And ultimately to get into the stream to go farther north or east and west.

You have different kinds of people or different kinds of jobs that are done. There are those that cross them over the river. There are those that guide them by foot.

There are those who pick them up and drop them off. There are those who lead them around checkpoints through the brush.

And there are those who run the stash houses again. And who are then involved in the money, collecting the money. And then shipping the money or wire transferring the money to funnel accounts and then ultimately back to
Mexico.

And what we see is that we have groups that are affiliated but they will use each other based upon who's available. So that a particular smuggler may be using this driver this week, but if that driver's not available, they'll use somebody else.

And they'll use somebody who might "be part of another organization." But they're all sort of -- it's a confederacy. They're all sort of loosely affiliated with one another.

With respect to the juveniles, let me say first of all, we see a number of juveniles. Especially in the El Paso area.

In El Paso the river is basically a concrete culvert that crosses into downtown El Paso. They use juveniles to cross the river, to break through the fence, and then to lead them to a staging area.

They are not people -- the juveniles are not the ones being smuggled. These are
juveniles that are now part of the organization
that are smugglers themselves. That know where
to go.

And if you think about it, I mean,
it's hard to take somebody who's never been here
before who's part of the smuggled load and say
all right, you're now a guide. Where are they
going to guide them? They don't know where
they're going themselves.

And so, the stories that the kids
become the guides, the kids become the guides
because that's what they're doing. Because
that's what they're doing consistently.

We don't prosecute most juveniles.
We think that the smuggling organizations
understand that. But, we have made it a practice
that if we catch them multiple times with loads
of multiple people, then we will certify them
under the juvenile prosecution statute and we
will proceed against them.

We've done a couple dozen maybe over
the last five or six years. But, the border
patrol has asked us not to completely ignore it.

That's basically what I have to say
about the alien smuggling. With respect to the
illegal reentry, a couple of points.

We're not crazy about the categorical
approach. I had a breakfast with Chief Judge
Stewart not too long ago in which he said the
U.S. Attorneys do a lousy job on the categorical
approach.

Which I thought was -- it hurt. And
I thought it was a little bit unfair. I don't
think it's all our doing.

Going to a sentence imposed is -- I
suspect it's going to be simpler. It's not that
there won't be issues. But I suspect it will be
overall simpler.

The problem with it in part is, is
what Judge Hanen was talking about. I think he
overstates the Texas sentencing practice. I
don't think every defendant who's an illegal
alien gets a suspended or probated sentence.

But Texas sentencing is weird. Juries impose sentences in cases. So, it's not all Judge imposed sentences. And that's something to take into consideration.

And the thought I would leave you with is sort of whether you're using the categorical approach or you're using a sentence imposed, we're sort of like the occupants of Plato's cave. What we're doing is we're looking at shadows to try to infer the reality.

And I think what you heard from the Judges, and I know that it would be what we would advocate is something that allowed the courts and the prosecutors to look at the underlying facts. Formally look at the underlying facts.

The problem with categorical, and then I'll stop, the problem with categorical is if the Judge gets it wrong, it still goes up on appeal. And so any departure from the wrong determination for the categorical is still going to go to
appeal.

And so the appeal as it were of the imposed sentence model is, there's probably going to be fewer mistakes. So, there won't be such long drawn out appeals.

And if there are departures based upon the underlying facts of the conviction, there probably will be less litigation, less expense. And it won't take so much time. Thank you.

CHAIR SARIS: Thank you.

MS. MEYERS: And I'm going to have to talk fast. I've been doing this as long as Mr. Durbin has.

And I should mention that I have represented thousands of undocumented aliens from the magistrate misdemeanor level where you've got 60 at a time, all the way to the Supreme Court. So, I really have done a lot of this.

And I've also represented people in Texas State court. I will join Mr. Durbin in saying Texas is weird.
I mean, I've had people -- undocumented aliens got seven years for a robbery that was shoplifting with a push. So, for every alien that you have who's getting a lower sentence, they're getting higher sentences.

There was a study done in San Antonio about retained versus appointed counsel. And there was a showing that poor people got much longer sentences.

So, I don't think you can assume that. But, I think what that reveals is that sentence imposed is a poor proxy for seriousness. And that's what we're trying to deal with.

I understand the desire to get away from categorical. You can't. It's in the Statute. And in fact a number of years ago, we proposed aggregated felony plus crime of violence or drug trafficking as the highest level so that you don't have to do this twice.

I will say that of course we welcome the effort to reduce the sentences at the top.
I think those departures do show it's too high. And it's partly because it ranges from murder to alien transporting.

On the other hand, the tradeoff where you're talking about raising the sentences for the lowest people, in all honesty, in my personal opinion, is unconscionable. Your own data shows that these people are getting at or below the guidelines as well.

The idea that multiple reentry makes them more culpable or more dangerous just doesn't make any sense. Your own data shows that overwhelmingly these people enter for three reasons, family, finances and fear.

Some of them commit crimes when they come back. But they are almost all coming because they have family here. They have people they are supporting.

And what is happening not just in Mexico, but in Central America is so horrific that that's why these people come. And you can
raise the sentences all you want, they will come back.

And they are being warehoused in dangerous private prisons. And there is just no basis to raise the sentence for those people either because they come back, because they haven't come back, or because they have relatively minor sentences.

I note also that the U.S. Attorney themselves takes that into consideration. When they decide whether to prosecute they look at how many deportations. It takes a certain number apparently more in San Diego then in Laredo.

That's their incremental punishment. You start with illegal reentry and you add up to reentry. And as you heard from the Judges, all of the Judges consider how many deportations there were, whether they have prior convictions.

In spite of my clients' desires, they never give less time then you got on the previous reentry. So, there is simply no basis, the
trade-off is just wrong.

As we document in our testimony, 24 months is simply too low. I know that Mr. Johnson can talk more about California, but again, in Texas, the category -- the felony three, the lowest sentence if you don't get probation is two years.

You are not reaching the really serious offenses by going to two years. Using sentence imposed but probated would be the same mistake the immigration statute makes.

People get probation because they are a less serious offenders. And to use the sentence imposed but probated, will reach the least serious offenders rather than the most serious offenders.

So, also I think what we recognize or as we've talked about, there continues to be too much emphasis on prior convictions. Whether it's the reason they came -- whether it was a long time ago.
And what this guideline starts to move toward, and which we do recognize, what really matters is this time when the defendant is here, are they committing serious crimes against the people of the United States? And that's what we should look at.

This only partially looks at it. And the problem once again is it's double counting. When you look at it in felony possession, you also agree that the sentence should run concurrent.

Which brings me to the departure issues. First of all, to take away the departure for time spent in State custody increases the double counting. And fails to take account what actually happens.

There needs to be a departure for sentences that count merely because the guy's been here for ten years and being law abiding other than the fact that he's here illegally. And we've also proposed you might start from the
date they're found.

In terms of the smuggling, obviously we disagree with increasing the base offense level. And the issues raised by the Department of Justice are generally already identified.

For example, substantial risk results in the base offense level of 18 already. Why would you raise it for 16 for many people who are driving to pay their fee, the hooks, we're not getting, or the government is not getting the people who are organizing this.

They're certainly not getting the people who are abusing the aliens. That's happening before they ever come. Thank you.

MR. JOHNSON: Good morning. And thank you for letting me speak to you today. My name is Knut Johnson. I'm a criminal defense lawyer in San Diego. I started at the Federal Defender office in 1988. I was there about seven years.

And I too have represented in the --
probably up to about a thousand people in these sorts of cases starting before Judge Moskowitz when he was a Magistrate in Magistrate's Court. Where we used to console and pled, you know, up to 20, 30, 40 people a day for coming in illegally or driving people.

Since then, since leaving Federal Defenders, I was with a fairly large firm for a while, for a couple of years. And I convinced them to let me get on the CJA Panel. And after that two-year stint, I've been on the Panel for many years. And I'm the Panel Representative in the Southern District.

I feel like I'm very familiar with these cases. And I want to give you just a sample of a couple of clients I typically represent.

And there certainly are those people that come into this country and commit very serious crimes. And I don't think anyone's disputing they should be punished.

But I can tell you about a woman I
just sentenced two days ago who is -- who her entire family was immigrated here legally. All her brothers and sisters became U.S. citizens.

She didn't because INS ran out of Visa numbers. And we have the letter from the INS saying we've run out of Visa numbers and the family just didn't have it together enough to understand how to follow up with that.

And she fell through the cracks. She is now exiled from the United States. And can't come back.

I represented a man who'd served two tours in Afghanistan as part of the United States Marines. He had come here when he was two or three. He has suffered traumatic brain injury and post-traumatic stress disorder and he committed a robbery when he came back to the United States.

He too -- and there were no specified departures for him. Certainly, you know, I would hope that you would consider setting out that
people who had -- and I put it in my paper, you
know, had ties to the United States, pay taxes or
maybe even served in the Armed Forces, would be
worthy of a departure downward in some
circumstances, people like him.

And I don't want to overstate it.
That you know, that there's -- everyone has these
wonderful compelling stories. But I have many,
many stories like that.

And it's for those reasons that -- and
the difficulties that you've heard about, the
categorical approach that I hope that if you go
away from that, if you go away from the plus-16
and you look at the sentence imposed, you'll
consider a -- the time actually served.

Because if you think a sentence is a
good proxy of how bad someone's conduct was, I
think it's really the time service. Because, you
know, I talked this through with one of our Judges
in our District, and his comment was people with
similar facts should get similar sentences.
And the problem is someone sentenced for a robbery in California where it's -- what you heard from Ms. Meyers, which is what we call an Estes robbery in California, where you -- like you just snatch someone and you bump into someone on the way out, that sentence maybe very different from a sentence in Connecticut, but they serve about the same amount of time.

And Judges will understand how much good time credit and how much time the person's actually going to serve for that offense. So, I think that time actually served is a better indicator then the sentence imposed.

Along that line you should understand our position why the two years should be higher. In California two years is the presumptive midterm of a prison sentence. The lowest prison sentence is 16 months, two years, three years.

To get higher than two years you have -- under Cunningham versus California, the Supreme Court said you have to prove the
aggravating facts beyond a reasonable doubt. So, at a two-year sentence that's your average prison sentence.

And that also doesn't reflect the fact that some people who receive a two-year prison sentence in California might serve a very short period of time in custody. Whereas others who get -- would only be eligible for 15 percent good time credit because the California legislature has said they have a very serious offense, they would get a -- they will serve much, much closer to the two years.

I see we've gone yellow, so let me -- I'll read through the rest of this.

On the smuggling cases, I believe the age should be 16. Stay at 16 rather than go up to 18. And we would point out that many of our migrants from Mexico are working at 17.

And if you've ever sat through a calendar where you have a whole group of people from Mexico pleading guilty, and they're
immigrants, and the Judge will say, how far did you get in school? Almost everyone says sixth grade.

And that's because they're emancipated and working after that. And that's a very different group then those who are 13, or 14 when they're being smuggled.

And now I've gone red.

CHAIR SARIS: Okay. Thank you. Mr. Bohlken?

MR. BOHLKEN: Thank you, Judge Saris and Commissioners for the opportunity to be here today. I was telling Richard, I just met Richard, I enjoy coming out here every time I come out here.

But this trip was especially exciting for me because I feel very passionately about this guideline or this proposed amendment. And the POAG loves the amendment.

We received almost unanimous support across the nation for the amendment. And it's
not lost on us that it's a major and a significant change.

The 2L1.2 guideline is used more than any other guideline in the book except for maybe 2D1.1. And over the years we've heard a lot of issues with the 2L1.2 guideline as it stands now, whether it be the disparity argument, the categorical approach, the plus-16 is too harsh, recidivism isn't taken into account.

And we believe that in this amendment all of that is taken into account. And I kind of wanted to go into that a little bit.

In large part in our paper we talked about the categorical approach being reduced or significantly reduced. The only reason we said not eliminated is because we do feel that the categorical approach is going to come into effect in (b)(1)(d) and (b)(2)(d), the three misdemeanors or crimes against persons, misdemeanors involving drugs.

That that language has to be in the
guideline. And we know that. But other than that, it would eliminate the need for the categorical approach.

We appreciate the fact that the way the proposed amendment is written right now, we would only be needing to track down one court document in most cases. That one court document being the judgement, to find out what the sentence imposed was.

And that reduces -- I've been before you before where I've told you stories of how difficult some of the court documents are to obtain. And when we're trying to employ the categorical approach.

POAG supports the proposed tier system for the base offense level because we feel like it addresses one of those factors that hasn't been taken into account adequately before. And that's recidivism.

And for that same reason we concur with the amendment in that the base offense level
when taking into account prior reentry convictions, the applicable time frame, they should be imposed without regard to the applicable time frame.

We also support the specific offense characteristic structure. We feel like the demarcation date of the first deportation or first removal is easy to calculate.

It generally comes in the discovery. And it's a clear line of conduct before and conduct after that date.

We concur and support the enhancements under (b)(1) and under (b)(2). And even the recommended (a)(6) four level enhancements.

We do -- we did also discuss some of what was discussed on the previous panel about sentences along the border and sentences in the heartland of the country or in the northeast being different from -- for immigration defendants. Because along the border it's more of a numbers thing.
And they get them in and they get them out quickly. And sometime the sentences along the border aren't as significant as maybe a similarly situated defendant that's in the northeast or the Midwest.

But, that's -- that brings me back to the way that the proposed amendment is written. I think there's something in there for immigration defendants across the country.

And that along the border what we see is a lot of repeat recidivism type conduct. Where they just come in, come in, come in, come in. That's being addressed in the base offense level.

Whereas the SOCs are talking about the criminal history. And that is going to go down a little bit we believe.

A couple of recommended improvements that we mentioned in our writings was the definition for the sentence imposed. We believe that sentence imposed is a good calculation to
judge the seriousness of a crime because we have
to come up with something.

There's arguments about whatever it is we use. I would -- POAG would be opposed to coming back with any type of list of predicated offenses like burglaries, robberies, sex offenses.

The reason being, the only predicate offense on that list that I've seen that wasn't -- didn't need a detailed analysis or categorical approach is murder. The rest of them, you're comparing generic model penal code definitions of terms that are on the list.

And trying to find -- so you're employing some sort of a categorical approach any time there's a list. There is no perfect list. So, we like there not being any list. And just going with sentence imposed.

One of the recommendations that we wanted to make to the sentence imposed is to (b)(1)(c) and (b)(2)(c). We wanted there to be
some sort of a clarification in the application
note, application note two that says that those
sentences would include sentences of probation,
sentences of fine, non-custodial sentences.

Because we do feel like we'd lose a
lot of those predicate offenses along the border
where someone's just turned around and they
suspend the whole sentence and send them back.

We also talked about the probation
terms and how they would be calculated, along
with predicate offenses in (b)(1) and (b)(2).
And we feel like there's already an application
note in place for the prior to the demarcation
line of 4A1.2(k).

And after the first deportation, we
feel like we can -- it should be cumulative. The
last thing, and I know I'm on red, is the single
sentences that could result where someone has a
reentry offense combined with maybe a backpacker
offense, a drug offense.

We laid out in our paper that we feel
like we're getting two instructions in Chapter One of how that could be parceled out. And we would recommend that you use the previous reentry for the base offense level.

Just in closing, we really like the amendment. And feel like it addresses all of the concerns that we've heard about and written about over the past six years.

CHAIR SARIS: Thank you. Did you want to jump in?

VICE CHAIR BREYER: Yes. Well, your observation of course about listing specific offenses, my guess is that you've been here at Commission meetings for the last two, three years where we have tried to put lists together. It's a nightmare to put a list together.

But I'm intrigued whether there's -- there seems to be a real difference on, Ms. Meyers, between your position and those of our co-panelists here.

MS. MEYERS: I'm shocked.
VICE CHAIR BREYER: Shocked. Well yes, but I want to explore, I want to try to figure it out with respect to sentence imposed versus time served.

And you -- your reaction was, as I understood it, maybe I misunderstood what you said. Is that you don't want some system to look at well, previous. We're talking about previous sentences, sentence imposed.

That it's sort of a -- it's not a good measure. And I'm trying to figure out, because it's a measure of something. We're trying to address past conduct.

And once you get past the position of gee, we shouldn't -- we're doing double counting or we shouldn't discourage that, which I think are all sort of policy considerations we always talk about.

But once you get past that, and let's say you think, or the Commission thinks, look, we have to do something here. We disagree with you.
Okay. Then the question is well, there are disagreements and disagreements. Let's try to figure out what you're saying about sentence imposed.

And I'm, in my mind, I'm trying to figure out if we're not going to say all rape is rape, and assault is assault, and murder is murder, and dah, dah, dah. We're going to look at what the State Court Judge did in the initial sentencing of this defendant.

And found that this defendant ought to be, you know, "three years, five years, sentence imposed." I mean a sentence suspended or imposition of sentence suspended.

We're trying to figure out what's a good measure here for the purpose of determining how dangerous that person is. And how serious that underlying offense is.

And I don't know. I mean, I would have thought that time served, as Mr. Johnson points out, is a pretty good measure of it.
But yet there's a lot of difference of opinion. And I want to -- I want you to further explore that. And of course, hear from the U.S. Attorney again.

MR. DURBIN: Judge Breyer, the reason I shake my head --

VICE CHAIR BREYER: Yes?

MR. DURBIN: Is that we've had the experience in Texas of serious prison overcrowding. And so you may -- somebody may be sentenced to 30 years. And if the prisons have to release people, they start releasing people. And they may serve 18 months. And there are sort of the traditional role -- the traditional formulas. But the actual time that they're in prison doesn't really reflect what they've done.

It can reflect a whole lot of other policy things that have nothing at all to do with the prisoner. And may not even correlate to what it is that he did.
Now that's not to say don't consider sentence imposed. And I didn't mean to suggest that in my opening comments. You've got to have something. And there's nothing that's perfect.

VICE CHAIR BREYER: But Ms. Meyers did suggest that.

MS. MEYERS: Well, I suggest -- there are three measures. Categorical, which we can handle it. You're going to have to do it on the Statute anyway, sentence imposed and time served.

I agree with my colleague that time served is actually the fairest. Because it does reflect State Judge's imposed sentences knowing how much somebody's going to serve.

And I might add, in Texas that the most serious offenses are what are called 3G offenses. In which a defendant must serve at least half of their sentence.

So in fact time served can be looked at. I'm just saying if you're going to use sentence imposed that two years is ridiculously
low for the most serious.

And that what you should not do is what Ms. Morales suggested, which is sentence in -- 10 years probated for 10 years. Because a State Judges views that as probation.

That's much less serious to the State Judge then a five-year sentence.

VICE CHAIR BREYER: So -- okay, well I think I understand your position.

CHAIR SARIS: Could I ask Mr. Durbin, so would you -- this all started in some ways because we kept seeing the departure rates for 16s, all right? And categorical parts as sort of the two of those.

So, would you agree that that's essentially plus-16 is not followed mostly on the border states? If you look at the numbers and your office's policy?

MR. DURBIN: I guess that is. I mean, I looked at that. And I was puzzled by that. And that may be right.
But, I don't know how much of that is a function of fast track.

COMMISSIONER FRIEDRICH: But we do know. We've got it broken down. And it's still over 30 percent.

MR. DURBIN: To what extent is it? Because we didn't do fast track.

COMMISSIONER FRIEDRICH: The numbers are stunning without it.

CHAIR SARIS: Even with a fast track. I'm just saying people aren't getting the plus-16. So, it's a sign to us, you know, red flag. Not red light. Red flag you've got to look at.

And so, I mean, would the Department of Justice agree that that's being broadly perceived both by DOJ and by courts as too harsh?

MR. DURBIN: You know, I can't draw that inference. I don't know that that's what's going on.

What I think in part has gone on is sort of because of the way fast track has worked,
it's shifted the whole framework. And it's shifted it all down. It shifted it down in 1326 and it shifted it down for the smuggling also.

And so, I look at it as kind of like well, if we want to get back to what are the appropriate sentences, because we have to do fast track, then maybe the frame should be shifted back up to where it ought to be. And that's what this might do.

CHAIR SARIS: I just noticed you didn't comment on the plus-16. I mean, that's -- in my neck of the woods and in much of the northeast and, you know, fast track isn't as much a factor.

And people are looking at plus-16. It's a harsh --

MR. DURBIN: Well, I think the way you've got it structured though, and it makes sense to us that you look at pre-deports and post-deport criminals. And what we're looking for is the most serious criminals.
The ones that are the threat to us not just because they keep coming back and forth. But because they come here and they do bad things.

And the States don't always address it for a number of financial reasons. They see it as a Federal problem. And they don't think they should pay for a Federal problem.

And that is a very common issue.

VICE CHAIR BREYER: But why is that?

That's what I don't understand. Because number one I don't think we are here to report on the State Court systems.

And I've become quite concerned that the answer to the problem is the State's aren't doing it right. I don't know whether they're doing it right or not.

But our jurisdiction's very, very limited. We are -- we're limited jurisdiction. We're not the general jurisdiction court.

We get a small percentage of the criminal cases, not the overwhelming number of
cases. And we get as a general rule the far less serious cases and the States deal with the more serious cases.

That being the case, I think that we have to take a look at what is an appropriate measure for a sentence for somebody who has committed a serious State crime. And I'm just amazed when I hear Judge Hanen and so forth say well, the State simply -- in Texas they simply take the position it's a Federal problem.

And I think that's what you said. It's sort of a Federal problem to deal with these people who are very bad people, who have committed all sorts of crimes, and they've come back.

And they've come back and committed crimes in the State system.

MR. DURBIN: But that's -- but if you're going to use the measure, you have to know what you're measuring. And all I'm telling you is that that is the attitude of State officials
in the State of Texas.

Is the border is a Federal problem.

They love to pound on us and say you haven't controlled the border. And --

VICE CHAIR BREYER: I don't disagree with that. The border is a Federal problem.

What I'm concerned about is bad people coming across the border is actually in part a State problem because there are these bad people that keep coming back.

MR. DURBIN: Only because they're in Texas. They don't come across in Massachusetts. They don't come across in Illinois.

MS. MEYERS: Can I just address part of that? Because I mean, part of this issue is they come back and they commit new crimes.

And I'm in Houston, which is not the border. But many of our clients, what ICE does is it's like a whale in a bucket. They go to the Texas Department of Corrections and they find them serving State sentences.
They are serving long State sentences in many cases. Anywhere from three, five, ten years. The Federal government waits until they serve their sentence before they bring their case.

Which is my double counting concern. But it's not like the State isn't addressing this problem where they are seriously bad actors. They are putting them in prison for a long time.

I think the problem with the 16 levels, and I will say I've never -- I've rarely seen a prosecutor say that the 16 level was too high. But, I think it's what you heard the Judges say, 16 levels ranges from statutory rape, which you recognize under career offender.

Transporting a few people where the defendant got eight months for the transporting and is now looking at five years for reentering. All the way up to murder and forcible rape.

And so I think the biggest problem, the reason you see so many departures under the
16 level is that it -- the range of conduct it covers is just too broad.

MR. BOHLKEN: I wanted to talk about the 16 level a little bit. We're not capturing all the defendants that the plus-16 was meant to capture now.

In fact, we have repeat reentry offenders that -- and I was talking to Judge Collins on the van on the way over here this morning. We have -- there's offenders that come through and get a real harsh sentence in 2005, 2006, that come back now because of the categorical approach.

And they may have went from a 96 month sentence down to an 18 month sentence because they were a plus-16, now they're a plus-4. The sentence in moving away from the plus-16, a 12 and going to a sentence imposed, we have to have some sort of measurement.

Like Richard just said, there isn't a perfect measurement that's going to be perfect
across the board. But I think sentence imposed
is the best one to go to.

Because let's think about the
documents that we've relied on to apply some of
these enhancements. If we went to a structure
where we were using sentence imposed, we'd be
relying on documents received from Departments of
Corrections, some of which I've seen are still
handwritten.

Case managers in prisons calculating
good time figuring.

VICE CHAIR BREYER: You mean if we
went -- if you went to sudden --

MR. BOHLKEN: If we went to time
served. If we went to sentence served, the
documents that we'll be relying on would not be
reliable.

For a sentence imposed, that's a court
document.

MR. JOHNSON: So, if I could say
something to that. You know, I wouldn't defer
to Mr. Bohlken about -- he's a probation officer, I'm not.

But I've seen plenty of pre-sentence reports that I can look at it and tell what someone's served. And I have looked at the Bureau of Justice statistics numbers on how long someone serves in State court in general.

Now, it's not specific cases. But, they can tell you on average if you're a sentence of X years results in Y months.

So, those numbers are out there and available. And so, you know, I think it's certainly doable.

VICE CHAIR BREYER: I mean, I would also just point that the one person in the room who knows how long they served is the defendant. And now whether that's reliable or not, I'm just saying that where a defense lawyer wants to make an issue of time served, and by the way, this cuts against the time served argument.

Where a person wants to make an issue,
and say look, I only -- I actually served eight months or 10 months or 14 months, or whatever it is. There could be -- where it's determined under 6A1.3, you might have to have a hearing on that.

But the better way I can understand would be the imposition of sentence. Because there you have a document. And the defendant would be hard put to challenge that particular document. Because it's whatever the Judge set at the time he imposed the sentence.

So, I think that that's the different way of approaching it.

MS. MEYERS: But probation is already figuring out time served in the criminal history. Because it says sentence imposed on such date, released on such date, on parole.

I mean, they're figuring it out already.

VICE CHAIR BREYER: Well, what are they figuring it out from?
MS. MEYERS: I guess you'd have to ask probation. I assume from either the NCIC or the parole documents.

MR. BOHLKEN: No, from the available documents that we get. But my point is, is those documents aren't nearly as reliable as a court document that's received.

I mean, we do call or try to call Departments of Corrections, State prisons, case managers for the criminal history calculation that she's talking about.

But like I said, to rely on that to apply an SOC is a lot lesser standard I think then a judgement.

VICE CHAIR BREYER: And also you may have like the State of California reducing sentences after the fact. And then that further complicates it because the time served is far -- is less than the sentence imposed.

And so you get into sort of a nightmare of changing laws, changing practices.
Yet it's all supposed to be imposed, you know, looking at whatever the past is.

COMMISSIONER BARKOW: Can I ask if we had a -- so, we're trying to kind of target the norm, knowing that this is -- there's no norm. Because the jurisdictions are so variable.

And so, if we -- so whatever we do, there's going to be disparity and it's going to be an imperfect metric.

So, if we went with this one that looked at sentence imposed, and we talked on the prior panel about but having language in there that if it turns out something's very serious, that should also go up.

We could have a countervailing thing in there that said, if the sentence imposed overstates the seriousness of the conduct, that's the basis for going down. Would that address the concerns that some of you have raised about sentence imposed being an imperfect metric the other way?
Because as I see our task, we are supposed to find the best metric we can knowing it's imperfect. And then let Judges work around it when it doesn't apply in a given case.

And I don't think we have the right data to know which one of these is the worst. Like you've made a case why this one is bad. But we have a whole ample record about why the categorical approach is bad.

So, if we did this one and we had that, what would that kind of departure or language look like that tries to capture sentence imposed not being the right kind of metric?

MS. MEYERS: Can I respond? Just a couple of things. And the defenders have proposed sentence imposed at various times.

So, part of the argument is what number rather than to use sentence imposed. And in fact in 2007 the Commission had nine proposals. Sentence imposed, categorical, you might go back and look at that.
So, I think I believe in spite of its problems, categorical is the best measure. Because we care about the nature.

But, I think you could get to sentence imposed. But the numbers that you're proposing are too low.

The other thing that concerns me about all of this departure language is that we have to get the guidelines right. Because that is the starting point.

And some Judges follow the guideline lock step. And so if you rely on departures too much, you are increasing -- I mean, I love departures because most of them are going down.

COMMISSIONER FRIEDRICH: But we clearly don't have it right now.

MS. MEYERS: No. And I agree. I think it's broken. But when I hear well, we could just put a departure in there.

COMMISSIONER FRIEDRICH: But that's because you can never create the perfect
guidelines, right?

MS. MEYERS: Absolutely. But, you can't rely on that to fix a guideline that's broken. And I am particularly concerned about this idea of looking at the underlying facts.

Because the reason for the categorical approach is not just that that's what the Statute says. As the court recognized in Descamps, the problem with underlying facts is figuring out what those are and talk about mini trials where the defendant has no ability to fight it.

Judges already do look at underlying facts in the right case. But you can't -- I mean, yes. So the answer is yes. You should have a departure that goes up and down as you do.

But, you can't just rely on departures. You have to try to find the best measure of seriousness. Whether that's categorical or sentence imposed or sentence served.

COMMISSIONER BARKOW: If the numbers
were higher, would you prefer sentence imposed to
categorical? Is your dispute just kind of --

MS. MEYERS: I don't -- I don't really
care. I'm fine under either one. And in fact
we propose both.

COMMISSIONER BARKOW: But sentencing
aiming the -- if it wasn't 24 months or four years
--

MS. MEYERS: It was -- I mean the
Commission previously proposed 48. And we've
heard 10 years. I love 10 years.

CHAIR SARIS: Do you have a -- the
statistics to back up a higher number of those?
Have you done your own?

You always do such good research.

Research as to why you'd have a higher break
point?

MS. MEYERS: In our -- well, first of
all, in our testimony we have some statistics
about, for example, DOJ reports on the average
State sentence.
I know for example in Texas, you know, most felony are five to 99. So, five is significant. I understand California has a whole different -- I mean, in California, Arizona and Texas are probably your biggest producers.

But -- so, I don't -- we do have some information in our testimony about what studies have shown is the average State sentence.

MR. DURBIN: Professor Barkow, I like your suggestion. That's exactly where I think it should go. And they can go up and down.

The problem is, any measure you're going to pick is going to -- when you get into actually applying it to the messiness of the way the criminal justice system works, you're going to find cases where it doesn't work.

And yes, the -- it's difficult to figure out sometimes what the facts are. But, I mean, we heard four Judges here this morning. And they're astute people.

They see a lot of cases. Especially
on the southwest corridor, they see a ton of cases.

And I think that they have developed really good skills in figuring out okay, this is a troublesome guy, this is not so troublesome. I think I know what's going on at the State court in this prior case.

And it may not be plainly written and I don't think it's plainly writable in a guideline. I mean, I was going to tell you at one point that sort of this is a microcosm of what the immigration problem is.

I mean --

COMMISSIONER BARKOW: We agree.

MR. DURBIN: It's hard to come up with agreement across the board. And this is just one aspect of it.

But, something that's easier to apply makes a lot of sense. Even if it's not perfect.

MR. JOHNSON: And that's why I think it should be time actually served. And I know
there's a lot of resistance to this.

But, let me go back to that one more time. And one of the concerns is that oh, those sentences are sometimes reduced later because of overcrowding or other reasons.

But, the seriousness of an offense is reflected in a whole lot of things. One is the minimum and maximum sentence that the legislature decides a Judge can impose.

Then it's what the Judge imposes. But the third part of it is if the legislature later decides that we're going to start releasing people, and that is a political judgement that people are getting sentences that are too long.

And so, even though the sentence is reduced and it's not what the Judge thought was. But it's still just like seriousness as established by both the legislature and the Judge.

And so I think that is as good as you're going to get. And I think that the time
imposed varies so wildly across the country and
depends on so many different factors like good
time credit, you know, work release and all that.

And let's be realistic here too. People who are not in this country legally are
not going to get early release programs that they
would get if they were U.S. citizens.

So, they're going to necessarily serve
more time. So, it is a little bit unfair to some
people who are not U.S. citizens to use that as
a factor.

But I think it is more accurate and
fairer then the time imposed.

CHAIR SARIS: Can I ask, so one big
piece of this we haven't focused on is maybe the
worst of the people who return or the people who
come back and commit serious crimes. Right?

We all agree, I think, with that. So,
have we got that right in terms of how we've
calibrated culpability when you return after
being removed? And do we have that calibration
correct?

MR. BOHLKEN: I think so. With the base offense level increased that generally they come back repeatedly. So, they're going to get an increase on the front end of the base offense level.

But also, in the defendants I've seen over the years, generally they have a serious crime that led to their deportation. They're going to get an enhancement under (b)(1).

And then if they come back to commit more serious crimes, they're going to get (b)(2). And so, you're going to get -- see significant sentence for the worst of the worst.

And then even if the sentence imposed isn't 24 months or greater, to your point I think that there are departures built into this guideline right now that can allow a court to depart upward or downward depending on the circumstances of the -- either prior to deportation convictions or after deportation
I think they're already built into the guideline.

MS. MEYERS: In terms, first of all, I guess evident, I don't think repeat reentry means that you're dangerous. And nor will you be deterred after you got seven months and came back. But in terms of the after, I do think, I will agree that if you come back, particularly now that you're banned and you're committing a serious crime, you should get -- that should be taken into account.

Again, I don't think 24 months does it. That being said, I'm not sure that this guideline, which also doesn't focus on when you -- right now. I mean you may have come back before, but now you got arrested at your home and nothing happened. It needs to take into account how much time you did do in state court which is, for example, what you do in felony possession cases where a firearm is used in commission of
another offense and that person gets state time, under 5G1.3 you reduce the sentence.

And my only concern is that you are triple counting the bad behavior. It's not like it's not included because it's in from the history. If you're going to increase the offense level because they committed a serious crime while they were here illegally you need to also take that into account on the back end, how much time they've already served, because you're supposed to figure out what is sufficient but no greater than necessary.

CHAIR SARIS: I just don't -- Oh, go ahead.

MS. MEYERS: No, please.

CHAIR SARIS: I was just saying on the multiple returns I agree. Some people keep coming back for really sad personal reasons. And we've got the departure for cultural assimilation and we have basic variance capability, you know, family circumstances, that sort of thing. And
you can vary it apart.

But some people, as I see in Boston, they just keep coming back because they want to work. I mean they're poor and they want to work.

MS. MEYERS: Right.

CHAIR SARIS: I mean it's incredibly sad but they come back again and again and again. Is there some point at which you would say they're not getting the message and have to be bumped up?

MS. MEYERS: I don't, I think there are many studies that show that increasing prison sentences are not a deterrent. I think that the statistic --

CHAIR SARIS: Not a general deterrent but what about specific to the person?

MS. MEYERS: No, I think with the deterrent, and this is again what the statistics say, are certainty of getting caught. In fact, immigration from Mexico has gone down and Mexicans are leaving the United States for two major reasons: likelihood of getting caught, and
there are no jobs because you have to present papers.

So I don't think that you're -- that there is nothing that shows that it's a deterrent. Plus, as you heard from the judges, the second time you get more time, but the reality is for many of these people being in prison in the United States where their family can visit them is a much better choice than being in Honduras where the gangs are killing their families.

MR. DURBIN: But at some point there's got to be punishment. Deterrence isn't the whole story.

MS. MEYERS: There is punishment.

MR. DURBIN: We don't deter murder with life sentences. And we don't ask, well gee, should we lower murder sentences because it's not deterring murders? And it's not just deterrence.

VICE CHAIR BREYER: It's not just deterrence. What it is saying this person who
committed these crimes we don't want in the United States, period. We don't want in the United States. And if you come, you're going to get a more severe sentence than you would if you didn't come. Maybe it doesn't deter them, but there's an argument that it protects the people in the United States from these people who --

MR. DURBIN: And it incapacitates them for a hearing.

VICE CHAIR BREYER: Yes.

COMMISSIONER FRIEDRICH: And moreover, Ms. Meyers, you said that -- this is hard to understand -- but that someone who comes back repeatedly, --

MS. MEYERS: Right.

COMMISSIONER FRIEDRICH: -- violates multiple court orders, violates the statute multiple times is not more culpable than the one who comes one time after deportation. We've heard all the judges say without question, every one of them said we look at that and we depart.
And you're telling us not to rely solely on departures. We've been told this is something judges looked at. Why should that not be integrated into the guidelines?

MS. MEYERS: Because it is integrated in the guidelines in the criminal history score.

COMMISSIONER FRIEDRICH: Not multiple deportations. I mean we're using this --

MS. MEYERS: No, not -- well --

COMMISSIONER FRIEDRICH: We're using this as a proxy because what we've learned is multiple illegal reentry convictions basically show six or seven times as many deportations. So we don't want to create a complicated situation for you all, challenging deportations and all that. We say the conviction is a clear proxy that shows greater culpability.

How can you say someone with one or more illegal reentry convictions is not more culpable than someone who has none?

MS. MEYERS: I think we've used
culp -- if you view breaking a law as a culpable event probably, yes?

(Laughter and simultaneous conversation.)

MS. MEYERS: Because it is counted in the criminal history to increase the offense level. It's like they keep coming back when what we know is they come back because conditions at home are horrific, their family is here, and they're working.

COMMISSIONER FRIEDRICH: And many commit really terrible crimes. And that's where the sentences are going to go up under this. Not for, not for the people who are just coming back here to see family and not committing a crime. They're going to stay here to six months. And we can create a safety valve to the extent we hit some inadvertently.

But we want to talk about backlash, we'll keep them at zero to six months. What we're talking about are the people who come back
and commit crimes.

VICE CHAIR BREYER: Could I get your comments, could I get all of your comments on the question of aging out of priors? Because this is in the immigration study for sentences it's actually one of the few cases that we don't age out --

MS. MEYERS: Right.

VICE CHAIR BREYER: -- past. And so you do get into whether it's several times and so forth, it's a different, if it's a different thing.

And I'm trying to figure out why we don't age them out.

MR. DURBIN: You mean totally?

VICE CHAIR BREYER: Pardon?

MR. DURBIN: You mean totally?

VICE CHAIR BREYER: More than 10 years.

If it doesn't count as a criminal history count, it's not criminal history points and so forth.

MR. DURBIN: But the proposed guideline
VICE CHAIR BREYER: Okay, yeah. But I mean do you have any views on that?

MS. MEYERS: It doesn't do it enough because you're -- no, I mean it's 5 percent. The problem is that the date of the offense --

VICE CHAIR BREYER: You don't have a problem with that?

MR. DURBIN: Totally aging it out, yes. Because what we're looking at for, especially under the specific offense characteristics, we're looking for the dangerousness of this person. And that they happened to have committed their first crime and gotten convicted for it more than 15 years ago doesn't make it irrelevant.

Now, the current guideline discounts them. Well, you get 12 for this and 8 for that, or 16 and 12 and so forth, which does make sense if you want to place some value on the age of it or some recognition of the age of it. But to discount it completely, to not consider it I
think overlooks a complete assessment of what
this individual's dangerousness is.

And, again, the District Courts can
look at it and say, okay, well, you've got one
old conviction. That's what you got. And that's
all you've got. And you've been back multiple
times.

VICE CHAIR BREYER: Deputy Ocean used
to use the example of somebody who committed a
statutory rape or some type of sexual offense and
then went back, was deported, went back to
Mexico. Lived 25 years in Mexico and then came
back into the United States a totally different
person, you know, I mean but illegally,
illegally. And said, you know, why should we
consider that 25-year-old sexual assault?

MR. DURBIN: I mean it should be in the
calculus. But that doesn't stop the judge from
saying, you know, you really are a different
person and so you fall outside of these
guidelines.
COMMISSIONER FRIEDRICH: So in other words you take the departures as departures were intended to address the out of heart land case, the case where the person has an unusual set of circumstances.

MR. DURBIN: I think that's right, I mean as I say, because what you're doing is you're excluding -- I mean what if they've got multiple convictions for various types of offenses that are all more than 15 years old and they've come back and they've committed another one. None of those count but they're all relevant to figuring out how dangerous is this person, how dangerous does he continue to be?

CHAIR SARIS: Can I make sure that we spend time on the other amendment which is the alien smuggling, that amendment.

COMMISSIONER BARKOW: I have alien smuggling.

CHAIR SARIS: Hot stuff. Go for it.

COMMISSIONER BARKOW: All right. This
I was puzzled by the fact that the death rate that you have in your footnote, that they fell in 2015 by a lot. Do you have a sense of what's going on in terms of the risk? It's an odd posture for us to be saying this a super dangerous thing right as it looks like it's actually getting safer for some reason.

Or what do you make of that data?

This is in footnote 8 on page 4 of this amendment.

COMMISSIONER FRIEDRICH: And it also shows that it peaked in 2005. Fifteen years ago was the peak.

MR. DURBIN: Yes, I think it -- there's a couple of things that are interesting.

If you look at, if you look at apprehensions along the Southwest border for a period of years you'll see that the apprehensions were sky high in the early 2000s. And they go on a curve that goes like this. And they're at the bottom of the curve in probably about 2010,
somewhere around there.

If you look at, if you look at the Census Bureau's housing starts and housing sales for those same years it has the same curve. And so what, you've had fewer deaths I think because you have fewer apprehensions because you have fewer people that are coming across.

As somebody mentioned here earlier today, the Mexicans that are crossing has gone way down. The apprehensions of Mexicans has gone way down. What has gone up is apprehensions of others than Mexicans, a lot, most of those coming from Central American countries.

And I think the figure is -- first of all, one year I don't think is necessarily representative. I think you've also got some circumstances where the Border Patrol specifically is very concerned about alien deaths and they're on the lookout for it.

And so I think there's a number of different factors that go into it. I don't think
it's any single particular thing.

COMMISSIONER BARKOW: I guess it's just if the numbers of people coming over are lower it would suggest that you don't necessarily need to change the sentencing regime to affect the influx. Or I mean because we have a lot of testimony it's just it won't be a deterrent anyway. So if there's a strong enough pull for people to come over for the factors, for example, that Ms. Meyers mentioned, they're going to come over anyway.

MR. DURBIN: Yeah, but that doesn't make it right.

COMMISSIONER BARKOW: No, no, I understand that. But I'm thinking about where the numbers should be. You know, whether we should move it from where it currently is. There is this question of whether or not there is a right record to do -- why would we do that now if it doesn't look like we need to do it as a matter of deterrent.
And there's a question of whether or not these folks are any more culpable than -- if they've always been part of organizations before, kind of worried that they're going to be, we're going to sweep into a block of drivers and people.

And I guess what I related to that is the fact that, you know, this is another area where the government sponsors below range rates. And, you know, if the within range rate is so lofty, so in your district it's 51 percent and the government-sponsored outside is 40 percent, so if it's --

MR. DURBIN: Most of that's fast track.

COMMISSIONER BARKOW: Right. But if you're really serious, I would assume you wouldn't do fast track.

MR. DURBIN: No, we have no choice. We're required to do fast track. It's a directive from the Deputy Attorney General's Office.

COMMISSIONER BARKOW: In smuggling
cases?

MR. DURBIN: Well, we do it in those
because -- well, I'll tell you why we do it in
smuggling cases is in order to prove a smuggling
case what we do is we rely on the material
witnesses, those are the people doing smuggling.
Under a local court rule they can be held for
only 45 days and then they have to be released or
returned to their country of origin. And they
must be deposed within that time.

Although they're deposed, the
deposition isn't necessarily admissible. So in
order to establish the admissibility of the
deposition if we go to trial, we have to show
that we have taken steps to secure that person's
testimony. Well, if they've been sent back to
Mexico we have to go through a bunch of hoops to
contact the embassies, to give them the notice
and so forth. And the practicality -- and this
is why I say the frame shifts because we give
them something to get the cases done so we don't
incur the expense of the depositions, so that we don't incur the expense of a trial.

And so those peculiarities of alien smuggling cases because the witnesses have these particular characteristics about them have caused us to use the fast track. And we don't do as many depositions as we once did. And the depositions aren't terribly simple because you've got to have the alien, the alien's lawyer, the defendants, the defendants' lawyers, the prosecutor, the interpreter, the court reporter, but there's no judge.

And the other thing that we find in those is in that type of circumstance material witnesses are easily intimidated by the presence of the defendant. And so the depositions are difficult to take.

CHAIR SARIS: But is that going to be the same no matter what we do with the guidelines?

MR. DURBIN: It's always there. But that doesn't mean you don't raise it up. It just
means that now what the discount is, is the
discount's going to be higher.

COMMISSIONER FRIEDRICH: But basically
that's what you're asking us to do, is to factor
in your EDP discount so you have a high enough
sentence with the EDP program that you think is
high enough; right? That's basically what you're
saying?

MR. DURBIN: I think I'd agree to that.

COMMISSIONER FRIEDRICH: You looked at
EDP and it's over 28 percent in the Western
District of Texas, and it's 1.9 for illegal
reentry. And that's astounding to me if the
Department feels these are the most serious
cases.

And I did, I used to try these cases.
I get the mat wit problem. It's a big, big
problem.

CHAIR SARIS: The what problem?

COMMISSIONER FRIEDRICH: The mat wit,
material witness problem. It's a really big
problem. And you don't necessarily know that you're going to be able to get them back.

I did all of that. But basically --

MR. DURBIN: What's the 1.9 percent?

COMMISSIONER FRIEDRICH: Your EDP for illegal reentry cases.

MR. DURBIN: Right.

COMMISSIONER FRIEDRICH: Is 1 point -- I need reading glasses -- I think it's 1.5.

MR. DURBIN: Most of them are 0 to 6.

CHAIR SARIS: Join the aging group.

COMMISSIONER FRIEDRICH: Right. I'm in the aging group.

But the bottom line is, for convenience to the government and, you know, I did it, these are tough cases, and in my view they are some of the worst cases. They are some of the most horrific facts. And defendants should go to jail for these offenses. But the problem is it's not that so much has changed in
the last ten years in the way that Commissioner Barkow is suggesting, if anything the facts are suggesting mitigation --

MR. DURBIN: I don't think a whole lot of change in 33 years.

COMMISSIONER FRIEDRICH: I mean you basically think the guideline's just too low. And it's mainly too low because you're doing EDP a lot and you need to get, you need to get the sentence high enough so when you give them that break you're still sending them to jail. Right? And isn't that the --

MR. DURBIN: That's a fair statement.

COMMISSIONER FRIEDRICH: And your district's doing EDP. Is the whole country doing it consistently? Because what we find is one district does it at 28 percent, and one does it at 9. You know, Boston does it at 9. I mean, until the Department has conformity across these EDPs it's very hard to ask us to make policy based on their EDP practices.
MR. DURBIN: I understand. Most of these smuggling cases I suspect are in the Southwest border district.

COMMISSIONER FRIEDRICH: But even your EDP rates when you look at these different districts for alien smuggling, and they vary district to district.

MR. DURBIN: They do.

CHAIR SARIS: Boston just started one. It's so strange it's hardly ever used. I'm just saying it's so different across the country.

VICE CHAIR BREYER: But I don't even understand how on the border of Texas there can be different EDP programs. I mean which I, I see it before for the Justice Department. I mean they are the ones who put these so the defense takes to it.

COMMISSIONER FRIEDRICH: But they do it, but they do it for ease of prosecution for some cases, but they should be uniform on all -- we're not, we're not going to be making
policy based on varying EDP programs when it's ranging from 35 percent to 28. How can you ask us as a Commission to say, okay, you need to factor in this 28 percent. And so, you know, it's not --

MR. DURBIN: I'm not sure I'm asking. You're asking why there are such things. And I'm saying that's what the realities are.

VICE CHAIR BREYER: Yeah, but there's an easy answer to that. The easy answer, I'm sorry, I mean your department sets the policy for EDP, not the Congress and not the Sentencing Commission, you do it. So if you're saying, gee, we have these odd results because of different programs, I'd say, yeah, that's great. Right, you certainly do. So when you go home at night maybe you can do something about it.

I mean it's not our job to do it. It's not our job to try to address differences in EDP programs that are implemented by the Justice Department. It's the Justice Department's job.
MR. DURBIN: I know, but you all proposed the increase to 16. What I'm telling you is we support it. And we do support it. And then you're asking me why we have the departures. And I'm saying that this is the reason we have the departures.

COMMISSIONER FRIEDRICH: But no, no. But on the alien smuggling it's a particularly tough one.

MR. DURBIN: That's what I'm saying though is that your proposal recommends 16. We agree with that. We think that's right.

Now, we may have problems with our internal policies. And I'm explaining to you, you asked me, well, why do you have this departure rate? And that's the reason for it. But that doesn't, that doesn't address the question: but is 16 appropriate? And I think, yes, 16 is appropriate because of all of the risks and dangers that are involved in these crimes. There's serious conduct.
COMMISSIONER FRIEDRICH: Yeah. But my point is this is not a new problem. And maybe these penalties are just too low. But it's not because anything in recent years has changed suggesting that we need to increase the numbers for that reason. And maybe EDP, EDP has changed.

MR. DURBIN: Maybe it's too low to start with?

COMMISSIONER FRIEDRICH: Well, but there wasn't, when I prosecuted there was not the EDP program for alien smuggling.

VICE CHAIR BREYER: And we have to be careful here about what now, in response to whatever the programs were and the practices were, the professional smuggler in Mexico is now using kids, 18, 19 year olds, to bring people over. And they're the people who are being apprehended. And they're the people who are "the smugglers." And they're the people that you're asking to be given more serious sentencing. Which I can understand, given the harm that's
1 caused, it may justify. But are you really
2 reaching the people that you want to reach by the
3 penalties that you are imposing?
4
5 MR. DURBIN: Well, the investigative
6 challenges we're aware of, and we work on those.
7
8 Yes, I agree completely with you,
9 Judge Breyer, a lot of the problem is beyond our
10 border. It's extra-territorial. We are working
11 with HSI. We are working with the Mexicans to
12 try to figure out how to reach those people. We
13 haven't talked about the unaccompanied children
14 today.
15
16 CHAIR SARIS: Well, I was just going to
17 ask.
18
19 MR. DURBIN: I know the Department is
20 very concerned about that.
21
22 Our problem with those cases is we see
23 unaccompanied children in loads, but they come in
24 in little handfuls. What our problem with the
25 unaccompanied children right now is they, they
26 are led to the northern border of Mexico. They
are told, Go across and turn yourself in to the first blue or green uniform. Because then they have, then they get in the administrative process and they're not sent back immediately.

And we are struggling with how do we reach those smuggling organizations? They're beyond our reach. They're beyond our, some of our investigative powers. We're working on those to try to figure out how to get to those.

But that's a different problem than what's the appropriate punishment for those who are found here that are doing it? And that's what my argument is that --

VICE CHAIR BREYER: I'm sorry. But those people, like the 18 and 19 year olds?

MR. DURBIN: Well, I don't know that they're all 18 and 19.

VICE CHAIR BREYER: Well, I don't know whether they are or not.

MR. DURBIN: There are 18 and 19 year olds but I -- that's not what our typical smuggler
VICE CHAIR BREYER: Well, I mean that's not the person that is bringing the kids over or the people over?

MR. DURBIN: Not always, no.

VICE CHAIR BREYER: Not always; all right. But there's a big difference between always and not our typical problem. I'm trying to figure out --

You know, we could raise it, not 16. There's a 24 level.

And my question is, what's the correlation between the length of the sentence and the likelihood that you're going to have -- that it's going to serve as a deterrent effect to 18 and 19 year olds smuggling people over? What's the correlation and what's the evidence of the correlation?

MR. DURBIN: I don't know that high punishments deter anybody. After 33 years as a prosecutor I am convinced that most people commit
crimes because they have an opportunity and because they think they're not going to get caught. And that's what motivates people. They don't sit down and say, let's see, if I get caught I'm get 11 to 15, and how's that going to work out? I just don't think that's how it works. And so that what we have to look at it from is the standpoint of where do we draw the line for this kind of conduct and where do we put the punishment?

Now, if it has some deterrent effect, great. That's wonderful. But we spent time two years ago trying to measure the deterrent effect of prosecuting misdemeanor entry without inspections. We do that in my district. We've done it since 2005 or 2006. I probably shouldn't say it, but I am not convinced that it has a deterrent effect.

The Border Patrol thinks that it has, has consequences. They think they have to have consequence delivered in it. But we can't
statistically show that it has a deterrent effect on entries.

What we can show is that when there's enhanced enforcement along one part of the border, apprehensions go down, the aliens move to someplace where there's not so much enforcement, and that's where they cross. Now, what draws them and what pushes them, those we don't have control over. That is the question of immigration policy, which is a fascinating question, but we don't get to answer that question.

I mean if we've got jobs here and people that want to come for jobs from countries where they don't have them, should we allow them to come? That's above my pay grade. I don't get to go there.

CHAIR SARIS: If we throw some deterrents off the table, especially when people are fleeing from countries where there's violence and that sort of thing, so what is -- why is it
significantly you need a bump-up on just
desserts, the penalty for alien smugglers? I
mean has it gotten, are the people worse than
they were before? If we're not talking
deterrence but just like what does this crime
deserve.

MR. DURBIN: Right.

CHAIR SARIS: What we're hearing, I
guess it's the next panel, is that a lot of these
people are themselves the smugglers, are
themselves children or just above being children,
and they're smuggling because they have to.

MR. DURBIN: That's not our experience.

CHAIR SARIS: Okay. So what's with
that?

MR. DURBIN: That's not our experience.

Our experience is that the people who are driving
the loads, the people who are running as coyotes,
they may sometimes recruit children. We're
finding dope traffickers doing the same thing,
they're using kids to bring dope loads across.
But that's not the norm. That is done but that's
not the norm.

Most of these people they're adults. They know what they're doing. It may not be the
only thing they do for their livelihood but they're engaged in picking up people and moving
them from somewhere south of San Antonio up to a stash house in San Antonio.

CHAIR SARIS: Do you have any evidence
that they're worse than they used to be? In
other words that the statistical evidence -- I
get your impression because you prosecute
cases --

MR. DURBIN: No.

CHAIR SARIS: -- that they're now all
linked to the drug cartels.

MR. DURBIN: They're not all linked.

I don't want to suggest that.

What we have is we have in some places
we know that there are cartels that control
passage across the border. They charge a fee for
aliens to cross. So the alien smugglers are now paying a fee to the seconds. They're paying $500 a person for the privilege of using that crossing zone or using that crossing area.

We are finding probably some others that have moved into, since marijuana's been legalized in some places, we are seeing some that are using or that are branching out into it. But that's not really what's going on. It's more it's part of this affiliation, coordination that --

CHAIR SARIS: So it's more of the same, it's not a different brand of smuggler? They're not suddenly now terrorists or narco, what do you call it, cartel people?

MR. DURBIN: But it's a recog -- I think what we have is a recognition that this is really dangerous conduct. They load people into the trunks of cars. They load people into cars without seats. They load people into sealed refrigerator trucks. And this can happen in any
load. We don't catch every load that that occurs in, but that risk is there every single time.

And what my argument to you is, because of that inchoate risk, the offense level should take that into consideration, in addition to the adjustments when bad things happen. Bad things don't always happen but the conduct is very dangerous.

MS. MEYERS: There is a base offense level of 18 if there is a substantial risk for all of the things you're talking about and nothing has changed. And the bad stuff that we see is covered by other statutes: hostage taking, sex trafficking, all of that. And I think, as Commissioner Barkow says, nothing has changed that justifies raising the offense level, the base offense level.

MR. JOHNSON: And you're taking an ordinary alien smuggling case and turning it -- increasing the base offense level just because it's almost every case, and I agree with
Mr. Durbin on this, almost every case you can argue would be tied to an ongoing criminal organization. I mean just --

CHAIR SARIS: Go right ahead. And then we're going to finish up, take a break and --

COMMISSIONER FRIEDRICH: So I think, I may be wrong, but I think when I handled these cases in San Diego years ago, I think the base offense level was 9 or something, 11. It was really low.

The Commission at some point raised it. And I don't remember what that date was. I think it's before I joined the Commission. But what I would like to know is from the last time the Commission raised the base offense level I'd like to know what the EDP rates were for the border districts then and compare it with now. Because, again, my sense is the real driver here is that you have made a choice to increase EDP prosecutions, and there's all kinds of legitimate reasons why you've done that, but that's the
pull-down here on these sentences now. That's the driver here.

And they are horrific crimes. And the base offense level should be high. But I think ten years ago when you weren't asking this, or maybe you were asking this, but I think the big change, and I could be wrong, but I'm interested in the data was what were the EDP rates at the time the Commission last increased the base offense level? And let's compare those to what it is now. And I think that's the data we should have.

MR. DURBIN: I would ask you to also consider there's another factor in there, and that factor is prosecution threshold. And we have changed our thresholds over the years. And there was once upon a time that we would not take a smuggling case unless there were at least six people in the load. And finding that there were less than six people in loads, we changed those thresholds. And we changed them to basically if
it's not family and we can prove the offense, we will prosecute it.

VICE CHAIR BREYER: But you see that that's exactly the sort of thing that sort of sets me off which is for the Sentencing Commission to set long-term policies and alter them whenever the Department of Justice feels we're going to change our priorities here, or we're going to use a different set of criteria, or we're going to expand it, we're going to lower the EDP program.

Those are all, I say those are all Executive Department decisions, as I can't as a federal judge say that person should be prosecuted and that person should not be prosecuted. Because that's not my job under the Constitution, I don't know that our job telling judges how to sentence ought to be in response to changing policies within the Justice Department, which by the way, as you candidly admit, are not uniform --
MR. DURBIN: No, they aren't.

VICE CHAIR BREYER: -- across districts.

MR. DURBIN: But I'm not -- What I'm saying is the EDP rates may not be --

VICE CHAIR BREYER: Okay.

COMMISSIONER FRIEDRICH: But likewise, you're now charging and convicting and having people sentenced who before you weren't even prosecuting; right? And so that's a double-edged sword. It's you've increased penalties because you've got people before you used to let go.

MR. DURBIN: Well, maybe we should have been doing them before and we weren't.

COMMISSIONER FRIEDRICH: Right.

Right.

MR. DURBIN: And there was a resource issue.

MR. JOHNSON: I think mandatory minimums too because to take a charge and should take care of that problem.
CHAIR SARIS: Okay. So it's 5 past. So we're going to make this -- very interesting and helpful -- 11:05 to 11:20, 15 minute break, and then we'll come back for our academic and experts.

Let me just say, lunch will probably be in the vicinity of 12:00 to 1:00 for those of us pod streaming for your planning purposes. And then we move on to animal fighting this afternoon.

(Whereupon, at 11:05 a.m., the hearing recessed, to reconvene at 11:24 a.m.)

PANEL III: IMMIGRATION:

ACADEMIC AND EXPERT PERSPECTIVE

CHAIR SARIS: It was hard to break away from the presidential announcement but we're all here right now. And I want to welcome you all. As I mentioned, I've read everything you wrote over the weekend. It was fascinating and important. So let me introduce you.

The first witness on this panel is
Jennifer Podkul who is the Senior Program Officer for the Migrant Rights and Justice Program at the Women's Refugee Commission. Prior to joining the Women's Refugee Commission Ms. Podkul represented immigrant children and immigrants at Immigration and Family Court in Ayuda in Washington, D.C., and at Kids in Need of Defense.

Next is Victor Manjarrez -- Did I say that right?

MR. MANJARREZ: Manjarrez.

CHAIR SARIS: Manjarrez. All right, thank you.

-- the Project Director for the Center of Law and Human Behavior at the University of Texas at El Paso, who serves as the university's subject matter expert in issues relating to border security and the Homeland Security enterprise.

Before joining the Center of Law and Behavior he was the Associate Director for the National Center for Border Security and
Immigration at the university, and also served the United States Border Patrol for more than 20 years.

Wendy Young I just met outside, serves as President of Kids in Need of Defense, KIND, where she has served for more than seven years. Before joining KIND, Ms. Young served as Chief Counsel on Immigration Policy for the Senate Judiciary Subcommittee on Immigration, Border Security, and Refugees for Senator Edward Kennedy.

Finally, Chris Rickerd, okay, is a Policy Counsel at the American Civil Liberty Union's Washington Legislative Office who does administrative and legislative advocacy on border, immigration and voting issues.

So you may not have heard, but we have this light system going off here. So I'm not a strict enforcer, but at some point the hook comes. Why don't we start with Ms. Podkul.

MS. PODKUL: Thank you.
Women's Refugee Commission greatly appreciates the opportunity to testify today. The WRC is a non-profit research and advocacy organization that works to improve the lives and protect the rights of women and children displaced by conflict and hardship.

Since 2012 there has been a large increase in the number of Central American women and children encountered at the border with Mexico and the United States. The WRC has focused on identifying the issues that affect these migrants and working to improve the manner in which they are treated at all parts of their journey.

Through my conversations with individuals at every step of their journey I have had the opportunity to better understand the individuals who take this enormous risk to travel to the U.S. My testimony this morning, as well as the written testimony I have submitted, is based on my research and accumulated knowledge.
The proposed changes to the alien smuggling guidelines encourage significant changes in migration patterns at the U.S. southern border. The vast majority of the unaccompanied minors and family units who have arrived at the United States since 2012 are fleeing violence in three Central American countries: El Salvador, Guatemala, and Honduras. Pressures from gang recruiters, rampant killings, create a situation so hostile to children they are unable to even go to school.

Law enforcement in certain regions of these countries is either under the control of gangs or so corrupt that they present a threat to the minors' well-being equal to that posed by the gangs. The recent violence in these three countries are approaching unprecedented levels as the region grapples with growing instability. And the murder rates in the Northern Triangle are currently among the highest in the world.

The mothers and children fleeing these
circumstances are desperate. So are the parents and other family members who are sending them. In their desperation they turn to smuggling organizations to make the journey to the United States.

These smuggling organizations have many components. They rely on coyotes who move migrants on much of the journey from the Northern Triangle to the U.S.-Mexico border. The coyotes then hand the migrants over to foot guides who are responsible for bringing the migrants through the final step of their journey across the border.

Migrants often report they don't pay a coyote to show them the way north, they pay them because they know who to pay off during the journey. The foot guides used to cross the U.S.-Mexico border often work for a larger organization of smugglers. The people at the top of these organizations rarely see the migrants coming to the U.S.
Smugglers often rely on children to be their foot guides because a child can be quickly and can be smuggling again. One such child I interviewed told me after having been repeatedly caught and released back into Mexico, "I can't get out of the smuggling gang. It's too late."

The U.S. rarely prosecutes these minors. However, in 2014 U.S. Customs and Border Protection piloted the juvenile referral process in the attempt to get these children out of the smuggling ring. The U.S. CBP continues to refer these children for criminal prosecution.

It is important to note that many of these children who make it to the United States have experienced violence sufficient to make them eligible for a claim and to receive asylum under both the U.N. Convention on Refugees and U.S. law. I make this point because although we all know there are smugglers out there capitalizing on and taking advantage of the most vulnerable people imaginable, they are also helping them...
access territorial protections.

So WRC is concerned that some of the proposed amendments might have the unintended effect of increasing the offense levels of family members who assist or pay for an unaccompanied minor to be smuggled into the U.S. Family members sending for their loved ones have begun to get caught up in the heated political debate around immigration. Judges, politicians and border agents often cite to their actions in using smugglers to send for their children.

These family members are desperate, and do the only thing they believe they can to keep their children safe. As a mother, I know I would do anything I needed to in order to ensure that my girls were safe. No parent should be punished for trying to protect their children.

Make no mistake, leaders of criminal entities who abuse and mistreat women and children escaping danger should pay for their crimes. However, it is important to remember
that those who are likely to be apprehended in the United States are not the masterminds of these organizations. They are the lowest hanging fruit, and some of them may be victims themselves.

The current lack of effective refugee protection is forcing many to lose hope and undertake dangerous journeys. The WRC believes comprehensive immigration reform, a more protective refugee processing system, and increased security in the home countries is what will eventually stop smugglers from preying upon vulnerable children.

Thank you.

CHAIR SARIS: Thank you.

MR. MANJARREZ: Good morning and thank you for the honor to present testimony regarding the proposed amendments to revise the alien smuggling guidelines. This is an important topic for protection for those who are being smuggled. I believe that the changed dynamics of alien
smuggling dictates that the current justice system takes a closer look at this crime.

As you stated, I retired as the Chief Patrol Agent of the Tucson Sector Border Patrol, so I come to you with a perspective of a Homeland Security practitioner and someone that has actually had the opportunity to conduct research at the university regarding this topic and other topics that are relevant to the Homeland Security enterprise.

As you understand, the difference between alien smuggling and human trafficking are different, but unfortunately in the last several years the differences between the two are getting smaller and smaller. They both certainly include exploitation and violence towards the people who are being smuggled.

Early in my career as a Border Patrol agent I saw smuggling as multiple mom and pop operations, really with not much organizational structure. That's clearly not the case now. Mom
and pop operations are very few, if they exist at all. They have been replaced by organizations that are structured enterprises and have long tentacles that reach far into Mexico, Central America and the United States. It's clear that human smuggling in the United States is much more like organized crime, and the organizations have become very specialized in their trade and the territory that they operate in.

Now, I'm often asked about the involvement of drug cartels with alien smugglers. On this point there's really not much involvement other than generally that they're guardians of certain clauses where they dictate, whether it's money or human smugglers or move people, and they pay, and they will pay a fee. Now, this fee gets passed on to individual smugglers. There's nothing that happens on the border that's free. There's always a cost. It's either a financial cost or a cost to the body.

Now, unfortunately many times these
locations dictated are areas that are dangerous and very remote, which causes alien smuggling fees to increase substantially. In the last few years it's increased substantially from something that was, I would say, very affordable, things that were below $1,000 that could be arranged to pay on a Mexican national, Central American or bodies that could be moved from $1,900 up to $45,000 for some of the parties.

Now, smugglers have become more violent towards the individuals being smuggled, in most cases to extort additional funds. Often the ones that are being smuggled are held against their will till the smuggler receives their fee. In fact, it resembles a kidnapping offense. In addition, there is an unmistakable trend that increasing sexual violence is being committed on individuals being smuggled, both women and children.

Now, the nature of alien smuggling or the nature of smuggling aliens has changed
significantly over the years. It's pretty routine that most people arrested on the southern border are 97.5 percent Mexican nationals, about 2 percent are from Central America. And that last 2 percent being from the three countries, either Honduras, El Salvador and Guatemala.

CHAIR SARIS: Make sure you keep your voice up so they can hear on the phone.

MR. MANJARREZ: Yes, ma'am.

CHAIR SARIS: Thank you.

MR. MANJARREZ: This is no longer the case.

For example, in the last three years U.S. Customs and Border Protection reported that 44 percent of all those arrested on the southern border of the United States were from Central American countries. Whereas in 2014, there were more non-Mexican nationals arrested than Mexican nationals. And this hasn't occurred in several decades. This simply wasn't the case back then.

In addition, the U.S. Department of
Homeland Security is reporting large increases of unaccompanied women and children, and the smugglers have adjusted to now exploit weaknesses in the systems, in the governmental systems in how they handle these children. They quickly understood there was no need to smuggle aliens in confidential covert buildings. In many places like Brownsville they would point to a Border Patrol agent, cross successfully undetected, they would drive up to a Border Patrol station and tell them to ring the doorbell.

What that provided to a smuggler was the opportunity to charge higher prices in order to guarantee the safe passage.

The other question that I’m often asked is, is there a nexus to alien smugglers and terrorists? That’s obviously a fear that occurs in the U.S. and Mexico, often exploited by the media. And I will tell you the patrols around Tucson there was no way ever to support that. There is no current limits to support that now.
But I believe that the changes you have here is a response, of course, to the efforts.

Thank you.

CHAIR SARIS: Thank you.

Ms. Young.

MS. YOUNG: Thank you.

I appreciate the opportunity to testify on behalf of Kids in Need of Defense, or KIND, and to share our views on the situation of unaccompanied immigrant and refugee children seeking protection in the United States and the intersection with the growing and increasingly problematic phenomenon of smuggling.

KIND was founded by the Microsoft Corporation and UNHCR Special Envoy Angelina Jolie in 2008 to ensure that unaccompanied immigrant and refugee children are provided pro bono legal representation in their immigration proceedings. We are also increasingly doing work in the Northern Triangle of Central America and Mexico to address the root causes of child
migration in the region and to assist children who are returning home because they've been deported or are voluntarily returning.

We have also implemented an assessment on sexual and gender-based violence against migrant children, particularly girls.

KIND has assisted more than 8,500 children and trained over 11,000 volunteer attorneys in our seven years of operation. So we're very familiar with the situation of these very vulnerable children. More than 100,000 children have come alone from Central America in the last two years, far outpacing previous years, many escaping the pervasive and growing gang and narcotrafficking-related violence in the region.

The crisis began in fall 2011 when the number of children coming alone to the United States started to increase significantly, and peaked in 2014 when more than 68,000 unaccompanied children were apprehended at the U.S. southern border, a nearly tenfold increase.
from the historical norm.

The numbers have been rising again in comparison to the same time last year. Starting in August 2015 we saw the numbers significantly increase. They dropped a bit in January but they're now increasing again, which tells us that this crisis is not over.

Until recently, these children had little or no way of gaining access to the U.S. protection system from their home country or from the region. As a result, many children who feared for their lives or families who feared for their children felt they had no choice but to find a way for the child to come to the United States.

In the case of children traveling without a parent or legal guardian this has meant resorting to smugglers who they are forced to rely on to lead them hundreds or thousands of miles to cross into the U.S. Desperate situations cause people to do desperate things.
Children have been specifically targeted by the gangs and criminal rings that terrorize large parts of the Northern Triangle. The gangs attempt to forcibly recruit children, especially those in their early teens, but sometimes as young as kindergarten age. They are also forced to become "girlfriends" of gang members, which in reality are non-consensual relationships that result in rape by one or more gang members.

If children resist gang recruitment, they and their families face kidnaping, murder and rape. These governments that characterize the region are unable to unwilling to patrol that violence. As a result, according to the U.N. Refugee Agency, at least 58 percent of children arriving at the U.S. border have been forcibly displaced and are potentially in need of international protection.

Families do not take the decision to send their child with a stranger to the U.S.
lightly. They are often terrified for their child but, as one mother put it, "I would rather my child die on a journey to the United States than die on my doorstep." A heartbreaking calculation, but this is the reality for many families in Central America.

KIND recently conducted an intake for a 3-year-old whose family sent him to the U.S. because his family was receiving threats from a gang that they would kill the little boy. The police refused to help.

Smugglers are taking advantage of vulnerable families and children and facilitating the travel to the U.S. Smuggling rings are highly organized and closely associated with the same criminal cartels that are generating the violence in countries of origin. They prey upon their victims and exploit them even further by charging high fees to transport children as young as 2 years old to the U.S. border.

Children referred to KIND have told us
about smugglers who denied children the food they
were paid to provide, numerous instances of
sexual assault and rape of both boys and girls,
and other abuses. Smugglers have also at times
sold the children they agreed to transport to
local criminal elements who then hold the
children and demand ransom from their families to
release them.

As border controls in the U.S. have
tightened in recent years, smugglers have changed
the routes to more remote and more dangerous
passages that put the children they have been
charged with transporting at even greater risk.

KIND has been deeply concerned that
the U.S. has addressed this surge in child
migration using primarily a border enforcement
approach that fails to acknowledge the need to
protect vulnerable individuals from the violence
in their countries. KIND is also concerned that
the greater the law enforcement approach targets
migrants, the further underground they will go
and the more vulnerable they will become. Trafficking victims and those in situations in which smuggling has turned into trafficking are particularly at risk for KIND.

More effective than a focus on border enforcement is to ensure that all children in adversarial proceedings are afforded counsel. Upon release from the law or custody, approximately half of unaccompanied children appear in Immigration Court without representation, which is fundamentally unfair and contradicts the U.S. principle of due process and respect for the rule of law.

The answer to this crisis is to address the root causes in sending regions and to restore order to the migration so that people can safely access protection in the United States. We must prioritize a protection-oriented approach to the child migration issue that upholds our nation's commitment to the most vulnerable. There are no easy answers, but if protection is
our guiding light, we will better serve the children who are coming to the U.S. to seek safety. As children, they deserve nothing less.

Thank you.

CHAIR SARIS: Mr. Rickerd.

MR. RICKERD: Judge Saris, thank you and your colleagues on behalf of the ACLU for this opportunity to testify today.

The ACLU's top organizational priority is currently de-incarceration. And my testimony aims to connect reentry to this vital effort. We also stand up for immigrant's rights through special attention to family separation and due process in deportation.

We commend the Sentencing Commission for its important attention to reducing excessive sentences under the current reentry guideline, a need which judges' sentences now reflect and we wholeheartedly support. I will, however, highlight two concerns about the proposed amendment from my written testimony.
First, the Commission should reject the proposal's premise that after reform the average guideline minimum sentence must remain the same. There is no zero-sum mandate requiring sentences at the lowest end of the spectrum to increase for persons without aggravating factors in order to correct disproportionate sentences driven by features of the current guideline’s 16-level enhancements. The Commission data presented alarmingly shows that for individuals in the least serious category with no current criminal conviction enhancements or upward departures, the average guideline minimum sentence increases from 1 to 6 months without justification provided beyond mathematical parity.

Second, we agree with the proposal's focus on serious recent criminal convictions that come after reentry. We recommend, however, that the Commission de-emphasize the proposed increases in sentence severity based on old
convictions preceding the most recent date of reentry, and not include a departure for prior deportations, many of which lack due process.

The proposed amendments use of an individual's first entry date, which can be decades ago in a broken immigration system that has sent anything but consistent messages to reentrants, and has had no consistency district to district about who is prosecuted for reentry, to use an old date for counting convictions that enhance a sentence is at odds with the correct effort to focus on recency as best informing society's interest in punishing reentries.

Our larger purpose is to urge the Commission to consider this guideline in full context. As part of its mandate, the Commission is tasked with assessing how sentencing affects the federal prison population. Since 2007 especially, reentry sentences have been a leading driver of Bureau of Prisons' overcrowding, with immigrants housed in substandard, privatized
criminal alien requirement facilities that were
the subject of a 2014 ACLU report titled
"Warehoused and Forgotten."

There has been a massive increase in
total criminal immigration prosecutions from
under 10,000 in 1997 to 40,000 in 2007, and almost
100,000 in 2013. This includes a doubling of the
proportionate cases involving individuals with no
felony convictions.

Keeping average sentences steady
would fail to address the devastating impact
these convictions have had on individuals who do
not meet any national security or public safety
priorities. Judge Robert Brack in Las Cruces,
New Mexico, told the Wall Street Journal in 2013,
"Every day I see people who would never have been
considered as criminal defendants two years ago.
It's just a completely different profile."

That profile is borne out by the
Commission's statistics. Half of those
sentenced for illegal reentry had at least one
child living in the United States. As a whole, sentence reentrants have an average and median age of 17 at the time of initial entry, while the average offender age is 36. Many persons sentenced under the guideline across the country therefore have deep family and other ties to which they returned.

The Department of Homeland Security's Office of Inspector General issued a critical report last year concluding that "Border Patrol is not fully and accurately measuring border prosecutions' effect on deterring aliens from entering and reentering the country illegally."

A University of Arizona study tracking 1,200 people deported found that there is no statistically significant reentry difference for those who went through prosecution. The Migration Policy Institute has noted that for border crossers with strong family and/or economic ties "even high-consequence enforcement strategies, i.e. criminal prosecutions, may not
deter them from making future attempts."

And I would add a citation to Mr. Durbin who echoed that point in speaking about the Western District of Texas.

Within this context, we strongly urge the Commission not to feel bound by a see-saw approach in reducing the injustice of excessive enhancements by increasing base offense levels, and also to revise the proposal to more accurately reflect its animating principle of focusing on serious recent convictions after reentry, not outdated criminal and immigration history.

Thank you again for inviting the ACLU.

CHAIR SARIS: Thank you. Any questions?

I was going to start with all the folks who understand this, if we're talking about alien smuggling I understand how horrible it is for the women and children. Has the nature of the smugglers changed over time? In other words
are they more violent? Are they nice guys who are trying to help somebody over the border or they really these horrible people who stick them in stash houses and they get raped? I mean has it changed so that we should increase that penalty?

MR. MANJARREZ: Yes, ma'am, it has increased and changed significantly over the last ten years. For example, I remember a time in Naco, Arizona, where there was nationals that were arrested. And it was part of the interview process and we asked them, "How did you, you know, pick Arizona?"

"Because we saw it on T.V."

And it was like a tourist, it was a gateway to the Southwest. The people were really nice, they gave us -- they offered them a package deal.

And that dynamic has changed. There's nothing nice about the smugglers. And the people that are smuggled will tell you that.
Although they make a contractual agreement to be smuggled, they fear these people. So the dynamic has significantly changed and there's a genuine fear.

COMMISSIONER BARKOW: But that shift happened ten years ago would you say?

MR. MANJARREZ: No, I would say that within the last ten years, ma'am.

COMMISSIONER BARKOW: Within the last ten years.

MR. MANJARREZ: Yes, ma'am.

VICE CHAIR BREYER: But isn't there then a way to address what I would call the subsequent bad conduct from the conduct of simply bringing the person over? In other words, if you simply bring the person over -- bad enough -- bring the person over, that's punishment X.

If you in fact you sexually assault them and you do all the things of the parade of horrors, which I think happens, and that's what
you're telling us, it happens, that's, that's a separate harm, isn't it? I mean that's a harm that can be addressed separately with a severe penalty or an increased penalty.

The question I have is why are we increasing the penalty for X when what we're concerned about is Y, unless there is some evidence showing that the people who commit X understand that Y is going to occur and facilitate it? I understand you won't have Y without X, but that doesn't mean that there's a causal relationship between the two that we ought to address.

That was one point. The other thing I wondered about is unaccompanied minor. And I wanted to find out your experience in this, is that as it's written now, we talk about increasing the penalty for unaccompanied by a minor's parents or grandparents. And you raised the question, well, what about other members of the family bringing the person over?
First, is that -- does that occur? And does that occur with such frequency that we ought to address it?

And secondly, there is an argument that that a person stands in a different relationship from the type of person that we're trying to address here when we talk about unaccompanied.

So I don't know how you want to respond to it.

MS. PODKUL: Well, a few facts. I think the first thing is that the crimes that we're talking about that are happening to the migrants, particularly those who I've spoken with, are often occurring in Mexico. They are not necessarily occurring once the person has crossed into the U.S.

And as Mr. Manjarrez has said, you know, oftentimes, especially where there’re refugees’ stories of rape, they're probably being dropped off, dropped off and told, “Go find a
Border Agent.” So there's no time for these crimes to be happening here after the smuggling has happened.

And the most egregious acts we've seen are in Mexico. Mexico has set up a new office to deal with crimes against migrants in Mexico. It seems like that would be the appropriate place and that's where the prosecution would happen. And the people who are bringing them here and not necessarily engaging in those behaviors in the U.S. would not necessarily be subject to any of these enhancements anyway, they would be prosecuted but these incidents are not happening in the U.S.

And then to your second point, I think the confusion is, you know, immigration law has a definition through the Homeland Security Act of an unaccompanied child, which is just a little different here. And so I think, you know, what does that mean? I think we have to kind of unpack what does that mean.
What we are often seeing is that children are traveling with family members who aren't necessarily a parent or legal guardian. We're seeing a lot of the grandparents who are bringing the children because the parent may have been here on temporary protected status for years, so the parent is already here. A lot of siblings are traveling together where one sibling may be an adult and another one is a child. We're seeing cousins and aunts and uncles traveling together.

So "unaccompanied" is difficult to describe in kind of the sense that we're thinking of and under the Homeland Security definition --

VICE CHAIR BREYER: But that would be cured, wouldn't it, if we simply said "family member." "Unaccompanied by a family member."

MS. PODKUL: Uh-huh.

VICE CHAIR BREYER: Now, I know there are non-family members who are like family members. I understand that. But there's no end
to it if you have a loose definition. And from
the due process point of view it's extremely
difficult, even from a judge's point of view, to
try to figure out, well, he's like my mother,
like my father, like my brother, like my sister.
There's no answer to that.

I mean, yes, there's some lengthy
hearing you could have that maybe will give you
an idea. But judges aren't any better at that
than anybody else. We're probably worse.

So, you know, why isn't your problem
addressed at least in part? Because grandparents
are already in there. But at least addressed by
saying no family member -- unaccompanied by a
family member. Doesn't that deal with it?

MS. PODKUL: Yes.

VICE CHAIR BREYER: I mean what do you
think? You've got to be curious. Are cousins,
older brothers, older sisters bringing people
over?

MR. MANJARREZ: They are accompanying
them. And call it a distinction, are they smuggling or are they simply accompanying across? And what we've found in not only the research but in my practical experience is, you know, they will hire a guide. They will hire a guide, a series of guides in fact that will take them through interior of Mexico up to the border area, kind of sold like a commodity to other smugglers that will bring them across.

Now that dynamic is particularly interesting in the South Texas area where the flood of other Mexican nationals has been occurring. And it's slightly different than what's in Arizona right now and New Mexico where they're actually crossing over, literally being driven to a Border Patrol Station, pointed at the door and they say, “Ring the doorbell on that.” And they may be family members on that with the idea of, okay, we're all going to be placed together; we're brothers and sisters, aunt and uncles. So let's start with those definitions.
CHAIR SARIS: But we're not going to catch those people because they're staying on the other side of the border. So the ones that are coming over we're getting. So right now the base offense level puts them at I think at 12 before you take into account other things. Which basic -- you know, 10 to 16 months if you don't have other criminal history.

And we're proposing asking whether it's time to move it to 21 to 27 months, potentially dramatically increasing, doubling the penalty.

So from what you're seeing, is the smuggler who makes it across the border -- not the Mexico person, you know, the person who's doing these horrible things in Mexico -- who comes across, does he merit a substantial increase in the kind of penalties he's getting?

MR. MANJARREZ: Yes.

CHAIR SARIS: Because?

MR. MANJARREZ: Again, the act of
smuggling in the past was a mom and pop. It was relatively slight. There was a level of comfort on that. Now it's so organized there's really a disregard for the commodity they bring. The commodity are people.

Now, the smuggling, the levels of criminal activity in terms of smuggling that was discussed in one of the previous panels is down, and migrant deaths and things of that nature, certainly down. But the violence is not. There's violence that is occurring to the women, particularly women and children.

VICE CHAIR BREYER: I understand that. But I think that, as we said, will it deter? But let me ask you this: do we have any information on the age of these people who are bringing the people over? That is, do we know, are they 18, 19 year olds or are they older? Do you have any idea, anecdotally or --

MR. MANJARREZ: They're typically older. They're not minors. They're
VICE CHAIR BREYER: Well, naturally.

MR. MANJARREZ: -- 18, 19, 20.

But again, what you have to remember, in a smuggling cycle and there are smugglers that have or guides have different portions of that cycle. One's responsible for bringing them to a certain point, who's handing it over to another person and rather over to another point. And that could happen all the way in the interior of Mexico all the way to destinations in the interior of the United States.

So typically the age is of an adult age.

COMMISSIONER BARKOW: How many of those people that are on that last leg, the folks that are likely to get caught who stay on the other side of the border, how many of those folks are in some way victims themselves or caught up in coercive kind of situations where they take on this task? Do you have a sense of what kind of
percentage we're looking at of those folks? Any of you?

MS. PODKUL: Yeah. And I would like to disagree with my colleague that it should be increased for the people who are bringing over, because it's my experience it's younger people, and it is that these organizations specifically are targeting minor children because a minor is able to withdraw their application for admission at the border. Which means if you're a Mexican child and you're screened by Customs and Border Protection, you're allowed to withdraw your application and say, “Never mind, I'll turn around and go home if we pretend this never happened.” I don't get put into removal proceedings and I might not get prosecuted because I'm a child.

So these smuggling organizations are taking advantage of this and saying --

CHAIR SARIS: What about the adults? Let's assume we're not dealing with the juveniles
who rarely get prosecuted. Are the adults, is
the typical adult worse? And just what you're
seeing, are they, rather than the mom and pop?

MS. PODKUL: I guess my point is
they're specifically using children for that last
point because they're children. They're not
going to get prosecuted. And, you know, it's
easier to coerce and force a child to do that
work and to victimize the child and to pressure
them into doing this work.

And so the smuggling units, you know,
there's 100 other Mexican, you know, 16- and 17-
year-olds who are able to easily either convince
or coerce them to do this work. So it's no big
deal if that kid gets prosecuted, and no big deal
if I could end up in detention.

MS. YOUNG: And just to offer the
point, and I understand the jurisdiction of the
Commission, but some way to take a look at just
the person who's actually doing that final
physical sending the child to the border, that's
a very narrow slice of what's happening. There's really transnational organized criminal rings behind all of this that are organizing it.

So if you really want to crack down on the smuggling you really have to go after the people that are organizing it. And the connections to what's happening in the home countries can't be ignored either.

So I think in many ways the solution to this problem is really not to focus on that one person who actually effects the final --

VICE CHAIR BREYER: That's the person who is in trouble.

MS. YOUNG: I know. I understand your frustration.

VICE CHAIR BREYER: I'm sure you're right, I mean but that's not what we do -- what we do is -- I'm not saying we won't, I hope we don't, get too many of them -- but we have to focus on that person who the judge has to sentence. And the question is, who is that
person he's sentencing?

And I take it a step further. If we increase the sentence, is that either, one, to deter this type of conduct, which I don't hear anybody saying it is, or two, appropriately punish the person who is actually doing it? And what I'm concerned about is if people who are either minors or 18, 19 year olds, really young kids -- I know they make a choice -- but that are being, as Commissioner Barkow points out, maybe themselves are being forced to do this sort of thing, are we accomplishing anything, anything other than ratcheting up sentences? Which we can do or not. Are we accomplishing anything? That's what my question is.

MS. YOUNG: I guess I would say, sir, if the goal is deterrence, to prevent this from happening, I doubt that ratcheting up the sentences will have much influence.

COMMISSIONER FRIEDRICH: That's not the end of this. But that's addressing
CHAIR SARIS: But if it's a worse person than we used to have, do they merit more punishment? What would you say?

MS. YOUNG: Yes. But I think you have to go to looking at exactly what activities that person is engaged in besides smuggling.

COMMISSIONER MORALES: But if they enroll in an organization that has increased risks so, so let's say that before a person may have been the cousin of the mom and pop organization that Mr. Manjarrez mentioned, but now he's playing a crucial role in an organization that is indeed putting these people at risk and is resulting in increased harms and rapes and all these things, isn't that what -- is the fact that that person's playing that critical role, doesn't that need to be accounted for in some way?

MS. PODKUL: The reality is that the people who are the foot guides have the last
level, they don't have much affiliation beyond the here's money, you know, take this group of people this way, with the kind of the masterminds of it, the, you know, is there any sort of connection to the drug trade or the -- you know, they're not in those conversations. They're the conversation of, yes, here's X amount of dollars to take these people. You're just taking them right here, you know, and we'll see you again next week.

COMMISSIONER BARKOW: Would they be aware of the previous act -- I mean what's the kind of general sense of knowledge that the person at the last end of this cycle would have of what takes place before?

Like do they have any awareness, knowledge? Would it be more likely that they'd know, yeah, well look, I'm part of this organization and I know they do these things in Mexico, or I know these other things are happening with other folks? What would you say
the kind of -- if you had to pick a prototypical
high percentage, the person that's on that last
leg, how much knowledge does that average person
have?

MR. MANJARREZ: It's pretty high. In
the . . . what I submitted to you as evidence is,
if you were to take a trip down to the Tohono
O'odham Nation in southwestern Arizona, you've
got mesquite bushes where they're bringing up the
alien groups, the smuggling up there, there are
these bushes that are quite honestly are
disgusting because they have women's underwear,
undergarments hanging on there as trophies on
that, and that's often on that. So that is
pretty predominant. To sit here and give you a
percentage -- it's average 50 percent, 60
percent-- I simply couldn't do that. But it's
often enough that it's very identifiable.

COMMISSIONER BARKOW: Would it be easy
to prove if it was a requirement that the
defendant had to have that knowledge? Do you
think that would be something that would be
difficult for the government to bring in evidence
of?

MR. MANJARREZ: Yes, ma'am, it would be
very difficult. Just like if we look at the
elements of alien smuggling. You go, “Did you
smuggle or not?” You ask the material witness
on that. You know, sometimes there's the fear,
there's the whole idea. He goes, “Well, I guess
so.” And what did you pay on that? So I think
it would be very difficult.

I would like to kind of backtrack on
one spot and make clear that I've heard a couple
times said that the last leg of smuggling to bring
them across the border. That is not the last leg
of smuggling across the border on that. That is
the guide bringing them to the ultimate
destination in the United States. Delivery of
that person to that destination is the last act
of smuggling on that. And that is not typically
a juvenile. That is an adult.
COMMISSIONER FRIEDRICH: And is it fair to say that that is then taking them from the border to the stash house, not crossing the border? It’s a higher-level person in the organization than the one who crosses the border and takes the high risk?

MR. MANJARREZ: Yes.

COMMISSIONER FRIEDRICH: All right. So, Mr. Manjarrez, you talked about the change in the nature of the organization and how they're more complex. I'm curious whether at the same time these organizations have increased in sophistication, has the number of aliens smuggled changed?

And I ask because, as you know, we have these significant enhancements based on the number of aliens. So we started at 12. But you do get the plus 3 if it's 6 to 24. So are you seeing any reduction in the number of aliens that are being moved by these organizations such that that SOC, that plus 3, is applied less frequency?
Are they becoming sophisticated in traveling with one or two here and there such that you're not able to get the enhancement for 6 to 24 aliens?

MR. MANJARREZ: Yes, ma'am. What's amazing about the organizations is how quickly they adjust. When you talk about --

VICE CHAIR BREYER: They apparently read our guidelines.

MR. MANJARREZ: They do.

COMMISSIONER FRIEDRICH: But you do? I mean is there data you can show that in these organizations when the defendant's apprehended they have fewer defendants -- fewer mat wits with them than they used to? Is that -- is there data to support that?

MR. MANJARREZ: That is something actually HSI actually carries.

COMMISSIONER FRIEDRICH: Can you provide that kind of data --

MR. MANJARREZ: Yes, ma'am.

COMMISSIONER FRIEDRICH: -- that
shows us over time from the time we increased the base offense levels till now how the number of aliens has changed over time?

MR. MANJARREZ: Yes.

COMMISSIONER FRIEDRICH: Because if the number of aliens has dropped, then this guideline is not the same guideline, it's not operating the same way it was in 2006.

MR. MANJARREZ: Absolutely. That is pretty clear to state. So I will bring it.

CHAIR SARIS: Let me just ask Mr. Rickerd, I don't want to ignore you because I very much appreciate your comments about over-incarceration. I just want to know whether the ACLU has a particular point of view on this alien smuggling operation, where you think it should be going?

MR. RICKERD: We share Ms. Young's and Ms. Podkul's concerns about the root causes of the smuggling.

CHAIR SARIS: If you could speak up a
little to catch the mike.

MR. RICKERD: We share Ms. Young and Ms. Podkul's concerns about where the root causes of the smuggling operations are taking place. We also think that some of the mens rea issues here are very pertinent in terms of proving up on some of the knowledge.

We haven't submitted particular comments on that but we will be happy to follow up with the Commission.

CHAIR SARIS: Anything, anybody else?

(No response.)

CHAIR SARIS: Well thank you. We're going to break for lunch and we'll be back here in an hour to talk about animal fighting.

Thank you.

(Whereupon, the hearing recessed for lunch at 12:05 p.m., the reconvene at 1:06 p.m.)

CHAIRPERSON SARIS: All right. We're ready for the next panel on animal fighting. But before I introduce the panel, I'd like to
introduce Commissioner Patricia Smoot who has joined us this afternoon.

Commissioner Smoot is the chair of the United States Parole Commission and is the ex-officio member of the Commission. Commissioner Smoot has served on the Parole Commission since 2010 and as chairman since 2015.

Welcome this afternoon.

COMMISSIONER SMOOT: Thank you.

CHAIRPERSON SARIS: So we're turning our attention to the guidelines relating to animal fighting. The Commission has received extensive public comment on this topic from members of Congress in the House and the Senate, from judges, as well as from individuals across the country urging the Commission to undertake a review of the penalties for these offenses.

To date the Commission has already received 36,000 pieces of public comment. I think it is the case that that is the most comment we've ever received on an amendment. So right
now you are in our "Guinness Book of World
Records" --

(Laughter.)

CHAIRPERSON SARIS: -- for public
comment.

This is an issue obviously of great
importance to stakeholders.

The proposed amendment would increase
penalties for animal fighting, particularly those
cases demonstrating extraordinary cruelty, and
would also address the statutory amendments to
the Animal Welfare Act, which was enacted after
the original Animal Fighting Guideline Provisions
were promulgated in 2008. The proposed amendment
would also respond to new offenses relating to
attending an animal fighting venture that were
established by law.

I look forward to hearing from all our
witnesses. Let me begin by introducing them.

The first witness represents the
Department of Justice. Jean Williams was
appointed Deputy Assistant Attorney General for the Environmental and Natural Resources Division of the U.S. Department of Justice in 2010. Before her current appointment Ms. Williams served for 27 years in the Wildlife and Marine Resources Section as a trial attorney and as Assistant Chief and later as Section Chief.

Next is Chris Schindler, who is the Director of Animal Crimes for the Humane Society of the United States and previously served as its Senior Manager of Animal Fighting Investigations. Prior to joining the Humane Society of the United States, Mr. Schindler was the Senior Humane Law Enforcement Officer and Field Advisor for the Washington, D.C. Humane Society.

The final witness on the panel is Jennifer Chin, who is the Vice President for Legal Advocacy for the American Society for the Prevention of Cruelty to Animals. Ms. Chin has held that position since November 2013 and previously served as its legal advocacy counsel.
Now, just a few mechanics in case you weren't here this morning. We have a light system that goes off. Red light when it's time to end the testimony. So I sort of give a gentle reminder and then the hook.

(Laughter.)

CHAIRPERSON SARIS: But we're very lively again, so if you don't finish everything you want, I'm sure there will be a shot at getting it in later on.

The second thing is we have people being live streamed in, and while it's tempting because we're in this little cozy room talking one on one, we really have to keep our voices up so that people can hear it in the whole room as well as live streaming.

So why don't we begin with you, Ms. Williams? Thank you.

MS. WILLIAMS: Thank you and good afternoon.

I am the Deputy Assistant Attorney
General of the Environment Division with
oversight responsibility for our Environmental
Crimes Section. Environmental Crimes prosecutes
both pollution and wildlife crimes. On the
wildlife side the section is responsible, along
with United States attorneys around the country,
for prosecuting illegal wildlife trafficking,
Endangered Species Act violations, migratory bird
crimes and related matters. Because of their
expertise in wildlife crimes, DOJ decided to
consolidate the authorities for animal protection
in this section.

I'm appearing before you today to
support guidelines revision for animal fighting
prohibitions. As outlined in our comment letter,
Congress has recognized the seriousness of these
offenses both in regard to the treatment of the
animals involved and in terms of the negative
impact on society resulting from the violent,
cruel nature of these crimes.

We at DOJ believe that an increase in
the base offense level from 10 to 16 for these offenses is appropriate in response to Congress' enhancement of the maximum term for animal fighting and the addition of two new animal fighting offenses. It is now unlawful to attend an animal fight or to cause a person under the age of 16 to attend an animal fight.

This congressional action is in response to society's heightened awareness of the horrors of animal fighting and our recognition of the growing problem we face. And because we do believe that animal fighting activity is on the increase, we have taken steps at DOJ to enhance our enforcement program. Fellow prosecutors around the country have begun to prioritize animal fighting crimes for prosecution. Over 250 defendants have been charged with animal fighting in the last 7 years.

In 2014 DOJ, through the leadership of then-Associate Attorney General Tony West, formed the Animal Cruelty Working Group. One of the
recommendations of that group was to consolidate
authority for the animal protection statutes
within the Environmental Crimes Section. And as
I mentioned, this recommendation was implemented
by DOJ leadership through the 2014 revisions to
"The U.S. Attorneys' Manual," which assigned
these statutes to our Crimes Section.

Since then we have worked with
prosecutors and other investigating agencies to
enhance enforcement. At our annual
Environmental Crimes Seminar at DOJ's National
Advocacy Center, the session on prosecuting
animal protection crimes was greeted with great
interest by our prosecutor audience.

We have engaged with federal
investigating agencies to encourage referrals of
cases. For example, we provided training on
animal fighting crimes at USDA, at Department of
Agriculture's Professional Development
Conference in Pittsburgh presenting to over 100
employees and agents of the Inspector General's
Office.

We have worked with DOJ's Asset Forfeiture Section to make sure we fully utilize applicable forfeiture tools. And we are also looking at utilizing our state/federal relationships to work with state investigative partners.

We plan to move this new program forward to increase the number and effectiveness of federal prosecutions. Consistent with this effort and congressional direction we believe that an increase in the base offense level of animal fighting prohibitions to Level 16 is called for.

With regard to the Commission's proposal and issues for comment as detailed in our letter, we believe the Commission should retain extraordinary cruelty language in the application note as a basis for upward departure, but not include exceptional scale. Other than these matters we are not aware of other
aggravating and mitigating circumstances
specific to animal fighting that warrant
inclusion in the guideline.

On extraordinary cruelty we support
the proposed revision of the application note
because the level of cruelty exhibited in these
cases is so fact-specific that we believe it is
more meaningful to leave the extraordinary
cruelty as an application note rather than
assigning an enhancement number. We think this
is best left to the discretion of the sentencing
trial judge in consideration of the note.

Regarding exceptional scale we ask the
Commission to address issues of scale by
specifying that the animal fighting offenses
which are focused on individual animals or
individual persons now do not group for purposes
of the multiple count rules in Section 3D. We
believe that this approach, rather than a new
enhancement or a new departure will better
address the measurable indicia or larger criminal
operations allowing a sentencing judge to not group multiple counts. Involving the individual animals and individual offenses furthers the congressional purpose underlying these statutes, namely protecting all animals from inhumane treatment.

Thank you for your interest in this heinous crime and for your consideration of our comments on the proposed revision.

CHAIRPERSON SARIS: Thank you.

MR. SCHINDLER: On behalf of the Humane Society of the United States, the nation's largest animal protection organization, I would like to thank the United States Sentencing Commission for holding this public hearing on proposed amendments to the federal sentencing guidelines and considering an amendment to the animal fighting guideline. The Commission's attention to this issue is welcomed by our organization and I thank you for inviting me to speak to you all today on the importance of
My name is Chris Schindler and I oversee the Humane Society of the United States' work on animal fighting. Over the course of my 18-year career, I've worked with law enforcement on thousands of dogfighting and cockfighting cases throughout the country providing key intelligence, expert testimony and critical investigative assistance. I've also worked on shutting down some of the country's most significant animal fighting operations and I have unique knowledge on this criminal industry.

For more than 50 years the HSUS has worked with federal law enforcement on dogfighting and cockfighting cases. In 2013, for example, the HSUS was part of a federal crackdown on dogfighting that spanned across four states. More than 300 dogs were seized and federal charges were brought against 15 individuals. HSUS has worked with federal and state law enforcement on hundreds of animal fighting cases.
across the country including cases that involved major animal fighting operations.

We are urging the Commission to include three specific characteristics for sentencing of animal fighting crimes. I'm going to talk about those three recommendations and give an example from my own experiences with animal cases as to why we believe the Commission should accept these characteristics.

An enhancement of two points when the offender intentionally and cruelly kills an animal or subjects the animal to severe animal abuse. The worst animal fighters commit acts of unimaginable cruelty and the animals suffer every day of their lives. Over the many years of my working against animal fighting, we have recovered animals who have suffered immeasurable and unnecessary pain and suffering. I believe some photographs were shared with the Commission just demonstrating some of the wounds and injuries --
CHAIRPERSON SARIS: Why don't you just hold it up because --

MR. SCHINDLER: -- I'm sorry --

CHAIRPERSON SARIS: -- the cameras can see them.

MR. SCHINDLER: -- demonstrating some of the wounds and injuries that are sustained from some of the most egregious actors in animal fighting. And these are just a few instances of these types of injuries that are sustained in some cases.

A specific offense characteristic for particular egregious acts of cruelty is necessary because the cruelty of the fighting ring does not necessarily encompass the extent of suffering endured by animals used in animal fighting ventures. The treatment before and after fights often constitutes the worst brutality. For example, dogfighters kill losing dogs in very cruel ways. If the losing dog is perceived to be a particular embarrassment or affect the
reputation or status of the owner, they're typically executed or tortured. We have known dogs to be dowsed with chemicals, hung, burned alive and even beaten to death, as with a case we worked on last year where the dogs were brutally beaten with a sledge hammer for not performing. Dogs who are mauled in a fight may also be left and abandoned to die from their extensive injuries, which can oftentimes take hours or even days.

Roosters used in cockfighting are cast aside after a fight into large dead piles or barrels. While some cockfighters ensure the birds are deceased, others do not take the time to ensure their suffering ends. On raids we have assisted on with our team, we have found birds still alive with devastating wounds, punctured lungs and even intestines wrapped around their legs while still fully conscious.

Violent animal cruelty is inexcusable and it is important to allow for a two-point
increase in cases of animal fighting that involve serious animal abuse, an enhancement of two points when the offender demonstrates an exceptional degree of involvement in the business of animal fighting.

Animal fighters who commit the most violent acts of cruelty deserve elevated sentences, especially who are actively involved in perpetrating a crime, a criminal enterprise of animal fighting. Those who engage in the breeding, organizing, sponsoring, promoting or animal fighting are most responsible for the proliferation of the crime and they should be held accountable. They not only cause harm to a large number of animals; they also encourage the high profits that draw people in the blood sport.

Creating a specific offense characteristic for those that demonstrate an exceptional degree of involvement in the business of animal fighting would ensure higher sentences for those most responsible. For example, in June
of 2009, we assisted the USDA OIG in the raid of
a significant dogfighting operation in Michigan.
The defendants in this case were not only
breeding a popular bloodline of fighting dogs,
they were also hosting high-stakes fights and
publishing an internationally significant
dogfighting publication. Despite their high
level of involvement in an enormously significant
dogfighting operation, the defendants received
six months in jail with two years’ probation.

In 2014, federal authorities raided
one of the largest cockfighting operation pits in
the country in Kentucky. That brought upwards
of 400 attendees to fight throughout the
cockfighting season with hundreds of thousands of
dollars changing hands. The pit operator, his
family and others who were significantly involved
received sentences ranging from 6 to 18 months.

And I also provided some pictures of
examples of what would be considered more
organized than a typical operation. We have a
A cockfighting pit with bleacher seating. This particular location had concession stands, food that was offered, as well as a day care area for children that was in the back at the time of the raid.

Another pit that also -- arena seating. These are the more significant operations that are causing the most amount of damage to animals and perpetrating crime.

This was a dogfighting pit in Benton County, Mississippi, where there was actually seating on the second tier with several hundred people in attendance.

Next, an enhancement of two points when the offender possesses a dangerous weapon. Through our experience in assisting federal law enforcement agencies in animal fighting raids weapons can be present. The presence of knives and guns escalates the danger to law enforcement and bystanders, especially when used in a criminal enterprise. Animal fighters who
possess dangerous weapons are a greater threat to the community and the sentencing guidelines should reflect that.

Am I up?

CHAIRPERSON SARIS: Yes, why don't you just finish up?

MR. SCHINDLER: Okay.

CHAIRPERSON SARIS: That's fine.

Finish your thought.

MR. SCHINDLER: So in 2015, we assisted with a raid in South Carolina with more than 400 people in attendance. After the property was secured, dozens of firearms were found throughout the woods. In the Benton County case that I discussed, showed the picture, the defendants fired shots at officers upon making entry.

The updated guidelines should count for this risk to law enforcement, bystanders, field staff and those who are participating in the raids. We are pleased the Commission is
proposing an increased baseline for animal fighting crimes and we encourage you to adopt these three specific offense characteristics based on the examples I suggested today. Thank you for inviting me to speak and for your consideration.

CHAIRPERSON SARIS: Thank you, Mr. Schindler.

Ms. Chin?

MS. CHIN: Good afternoon. My name is Jennifer Chin. I am Vice President of the Legal Advocacy Department at the American Society for the Prevention of Cruelty to Animals, the nation's oldest animal protection organization. Among our many programs we provide a full menu of support to law enforcement and prosecutors in animal cruelty and animal fighting cases nationwide including investigative, sheltering, legal, forensic and veterinary services.

Prior to joining the ASPCA in 2012, I served as an assistant United States attorney in
the Appeals Division of the United States Attorney’s Office for the District of New Jersey where approximately 70 percent of my caseload involves some instant matters.

On behalf of the ASPCA and its 2.5 million supporters nationwide, I thank the Sentencing Commission for considering an amendment to the animal fighting guideline. We're pleased to provide you with our testimony today.

We applaud the Commission for proposing to amend the guidelines to reflect recent statutory changes to the federal animal fighting statute, 7 USC Section 2156. We encourage the Commission to adopt the higher of the two proposed base offense levels, 10 rather than 8, with the new felony adopted by Congress in 2014 of bringing a child to an animal fight.

We also support the Commission's proposal to raise the base offense level for the crime of animal fighting to 16 rather than 14,
which achieves greater consistency with the increased statutory maximum enacted by Congress in 2008. However, that change alone falls short of Congress' intent to provide for longer sentences of up to 60 months to punish the most egregious animal fighting crimes and warrants the inclusion of specific offense characteristics.

Specifically, we recommend that the guideline should include the following three specific offense characteristics:

First, the guideline should provide an enhancement of two points when an animal is intentionally killed by methods, including but not limited to shooting, hanging, electrocution or drowning, or when an animal suffers due to lack of veterinary care for an injury sustained during fighting or from neglect. All animal fighting is cruel and violent, but some practices are even more so, and those demand longer sentences.

The cruelty of animal fighting is not
confined solely to the fighting pit. Fighters may escalate the level of cruelty by withholding food and shelter or by failing to seek professional medical attention for wounds. Animals who no longer have value to their owners may be executed by horrific methods. A specific offense characteristic should provide for longer sentences in these instances.

And I believe you have a handful of photographs as well. The first three are from a case: a multistate federal dogfighting case that was prosecuted out of the Middle District of Alabama. And you can see from these photos some of the conditions that the dogs were in. These were emaciated dogs that were without food or water. The third photo is of a dog that's tethered with two tires attached. So that dog is forced to bear the weight of those tires if it chooses to move around. And that's to serve the purpose of training that animal for fighting.

This photo shows a bit of the scale of
the operation of one of the sites in which a
search warrant was executed. This is a young
puppy that we refer to as Timmy. And you can see
that Timmy is a very young puppy with an
incredibly heavy and large chain around his neck
to which he's tethered.

And the last photo is a closeup of a
dog that illustrates some of the injuries/wounds
that these animals can sustain.

Secondly, the guideline should
provide an enhancement of two points when there
is a pattern of activity showing that the
defendant has had a substantial amount of
involvement in the business of animal fighting as
indicated by breeding animals, selling animals or
organizing, sponsoring or promoting animal
fights. Animal fighters who perpetuate this
criminal enterprise through these activities harm
large numbers of animals and make the blood sport
more profitable.

A specific offense characteristic for
those who demonstrate a substantial degree of involvement in animal fighting ventures would ensure longer sentences for those who profit and allow others to profit from inflicting large-scale harm. Activities that constitute organizing, sponsoring and promoting animal fighting include financing the cost of the fighting animals and training, securing and financing the venue, putting up money for wagers, obtaining security and soliciting participants and spectators. Activities that indicate involvement in the business of breeding and selling include profiting from stud fees for the sale of puppies, breeding dogs or birds from fighting bloodlines.

Lastly, the guideline should provide an enhancement of two points when a dangerous weapon is present. Animal fighting is commonly linked with other felonies, including drug and human trafficking, child abuse, domestic violence and money laundering. Often animal fighting
operations are discovered while law enforcement is investigating these other crimes. The presence of firearms escalates the level of danger to the communities in which these crimes are perpetrated to law enforcement responding to these offenses and to the public and private animal welfare organizations that are often called upon to assist law enforcement with animal fighting investigations and seizures.

The heightened danger presented by possession of weapons is not currently being captured by other criminal charges because offenders are rarely charged for illegal possession of weapons at animal fights unless the offender has a prior felony conviction, nor is animal fighting generally treated as a crime of violence or a drug trafficking crime that would warrant a firearm charge.

CHAIRPERSON SARIS: You need to --

MS. CHIN: In many cases sentencing likely has not accounted for the increased danger
posed by weapons. Thank you very much for your attention to this important matter and for the opportunity to present our testimony.

CHAIRPERSON SARIS: All right. Thank you.

VICE CHAIRMAN BREYER: I'd like to first of all thank everybody here and just say that you give a voice to the animals. They can't speak, so it's really -- I'm grateful. I know the whole Commission is grateful for your coming here today.

I wanted to ask about the weapons, because is it the Justice Department's view that in the event a perpetrator violating the animal fighting laws -- that that perpetrator has to have a weapon on him or herself, or that at the -- in the arena where spectators would have a weapon? Are they charged -- is it your idea for the enhancement if in fact somebody at the arena has weapons or that the perpetrator him or herself has to have a weapon?
MS. WILLIAMS: Well, Your Honor, we didn't affirmatively advocate for an enhancement for a weapon. Our letter simply stated that if the Commission was interested in putting in an enhancement for guns that we would support that.

When we looked at what aggravating/mitigating circumstances might be important here, we were looking at things specific to animal fighting. I guess I'd have to say we were more focused on the actual perpetrators, but it is an offense to attend. And so I think if there was a gun present -- but the concern here is the safety of officers, so I think it would be both.

But that wasn't our --

VICE CHAIRMAN BREYER: Well, my concern is this: Is it -- in light of court decisions, in light of the 2nd Amendment, a lot of people -- not my choice, but other people will be carrying weapons. They carry weapons. I don't know whether there's a higher incidence of carrying weapons with people who attend these
events or not, but I wanted to make sure that if we did put some enhancement, it would punish those people who are carrying on the other illegal activities and then increase the danger of that activity by virtue of the fact that that person has a weapon. And that maybe that's a view you all share, or maybe it's not. I don't know.

MS. WILLIAMS: Do you want to --

MS. CHIN: I mean, I think that would be right, that there should be some nexus between the possession of the weapon and the offense.

COMMISSIONER BARKOW: Doesn't there have to be? I mean, as purposes of the 2nd Amendment, if someone has a right to carry a firearm, I don't see how we could possibly enhance on that basis.

CHAIRPERSON SARIS: Can you let Judge Pryor -- could we start there and then --

COMMISSIONER PRYOR: So, the whole reason we proposed the amendment is we had
complaints, among them Chief Judge Watkins from
the Middle District of Alabama, in the case that
you referenced earlier, about this guideline
being inadequate. And there's certainly a
concern on our part that it might not be severe
enough in a lot of cases.

On the other hand, we've had history
with guidelines that have a lot of special
offense characteristics that really do not
distinguish the worst offenders from other
offenders. They in fact are just special offense
characteristics that are going to apply in
basically all of the cases because they're all
perpetrated that way. Now, that's the experience
with a lot of the enhancements for the child
pornography guideline. We wouldn't want this
guideline to be like that. We would want it to
be severe enough to reflect the punishment that
is deserved in a lot of cases.

So my concern about your request for
these special offense characteristics is are
these not going to be cases that are typical as opposed to truly exceptional?

MS. CHIN: Right, and Chris may be able to speak also to his firsthand experience deploying on these cases with law enforcement, but I think in thinking about crafting these proposed special offense characteristics the idea was that there are the sort of ordinary cases, right? And these particular factors that we tried to delineate with some specificity are the ones that actually take that crime away from that ordinary case and in fact make them far more harmful.

COMMISSIONER PRYOR: How do we know that? How do we know that that really though is not the ordinary case? At some point use of a computer becomes a special offense characteristic with child pornography. And that's how it's perpetrated, right, is with the use of a computer. How do we know that the ones that you've carved out really are distinguishing some
that are not going to be most of the cases that
a federal judge will see: How do we know that?

MR. SCHINDLER: If I could speak for
a moment on that issue. So we participate -- I
mean, I've been overseeing our Animal Fighting
Division and I've worked in this field for 18
years and participated in a lot of investigations
and raids on these crimes. Not every -- you
know, the electrocution and drowning, I mean,
that is a very unique subset of individuals. And
unfortunately we do come across it, but it's not
on every case and it's not necessarily the
standard.

Certainly we feel when somebody takes
it upon themselves to not only commit the act of
animal fighting, which we agree, yes, that's the
standard. The dogs get injured. Those animals
are obviously maimed during that. But that's the
typical. Somebody who then takes it a step
further because they're embarrassed by their
dog's lack of winning and then electrocutes the
dog in front of a crowd is a different subset of individual. And that's not something that we hear about at every fight or anything like that. Those are --

COMMISSIONER PRYOR: What about -- I mean, aren't the large-scale animal fighting ventures going to be ones that don't -- I mean, that those sponsors have weapons? Are they all going to do that?

MR. SCHINDLER: It depends on the location. Some of the large cockfighting pits actually prohibit weapons and some of the more significant cockfighting pits actually do not allow weapons to come into the facility. So the individuals who bring guns to those events they're prohibited by their own counterparts in cockfighting, but they may bring weapons. You know, there was a couple of individuals that were shot and killed at a cockfight in Texas a few years ago because somebody went out to their car, got their gun and came back and killed two
individuals over a fight that happened there. And so those are the type of people. There, nobody had weapons and this individual went out to his vehicle and came and killed two individuals.

COMMISSIONER PRYOR: Yes, but there are other ways to address that.

MR. SCHINDLER: Huh?

COMMISSIONER PRYOR: There are other ways to address that --

(Simultaneous speaking.)

MR. SCHINDLER: Well, obviously there was murder, but I mean I guess I'm saying that it is not a standard.

COMMISSIONER PRYOR: Well, but what I'm kind curious about that is if I were a sponsor --

MR. SCHINDLER: Yes.

COMMISSIONER PRYOR: -- of one of these kinds of events, trying to put myself in that framework --
MR. SCHINDLER: Of course.

COMMISSIONER PRYOR: -- I'd be concerned about individuals and -- I mean, I've lived in Louisiana and Alabama. Okay? And I would be concerned that individual customers might want -- might get angry and might go to their car or truck and retrieve a weapon. Right? I would think that all the sponsors would have weapons.

MR. SCHINDLER: Yes, and that's very likely. We do come across guns. I mean, there's been some fights in progress, or dogfightings that we haven't found guns, but then there are others like South Carolina and some of these other ones where there was an exorbitant amount --

(Simultaneous speaking.)

COMMISSIONER PRYOR: Right. That would be the typical. Right?

MS. WILLIAMS: And some -- you know,
pits that we've had informants in -- you know, normally guns are concealed. A lot of times people aren't having guns out, but there've been several locations where there are actually people with AKs and other weapons providing -- you know, basically standing at the pit-side, which is a little bit more unusual for somebody to -- for them to actually be presenting a gun and saying we're going to do something if something occurs here.

COMMISSIONER BARKOW: Were those -- do you know if those are open carry states, too, where that's occurred?

MR. SCHINDLER: I don't know, is Georgia open carry? Georgia, Alabama. I'm not sure if those are open carry states or not.

COMMISSIONER PRYOR: Yes, you have to have a permit to carry concealed, not to carry open in Alabama.

COMMISSIONER BARKOW: Can I ask a quick question about the grouping rule?
CHAIRPERSON SARIS: Well, I was just going to just -- I've got a whole --

COMMISSIONER BARKOW: Okay.

CHAIRPERSON SARIS: I'll get you. I'll get you. I guess everyone's interested in this topic. We're going to -- do you want to --

COMMISSIONER FRIEDRICH: Okay. Ms. Williams, I too wanted to explore the grouping rule argument you're making. I get -- I understand a little better the argument you're making with respect to individual animals being harmed and treating them in the same way we might treat individual assaults of different people. The more difficult argument for me is that we would treat individual children at the same event as not being grouped when -- I'm just thinking of an alien smuggling case when you have multiple victims, multiple aliens being brought in. Those group. In other situations if there's drug dealing and minors are present, I don't think we individually calculate the individual minor.
So I'm just interested in you exploring that more. To what extent would this approach be consistent or inconsistent with the way we've handled grouping in other parts of the guidelines?

MS. WILLIAMS: I guess I'd have to say not being completely familiar with those statutes underlying the crimes, the other crimes you're referring to, our view was just that this was a reflection of this new crime that Congress has created to make it a crime to bring a child and to --

(Simultaneous speaking.)

COMMISSIONER FRIEDRICH: But it's a crime to bring an alien.

MS. WILLIAMS: Right.

COMMISSIONER FRIEDRICH: So it's a new crime. But I'm just wondering whether the focus of the statute is on the animals or the children? Does that play a -- should that be a factor in the Commission's decision?
MS. WILLIAMS: I think the -- clearly
the focus of these statutes are on the individual
animals, but I do think part of why, for instance,
you've had so many comments here is that there's
just a really swelling societal awareness of how
awful and violent and heinous these crimes are.
And to bring a child to something like that and
expose that child to that violence -- I
understand that groups of children would be
coming in and smuggled, but this is really
focused on the exposure to the child. And in
terms of scale and size and how many people attend
and how many are children, that was our thought
in suggesting the approach that we suggested to
multiple counts.

COMMISSIONER BARKOW: And you're
saying that though with respect to the individual
animals as well, right?

MS. WILLIAMS: Yes.

COMMISSIONER BARKOW: So if you had

a --
MS. WILLIAMS: Yes.

COMMISSIONER BARKOW: I don't know what the average number of -- at a cockfight what the average number would be, but you'd say each of those is a separate --

MS. WILLIAMS: And it just really varies. I mean, a cockfight is between two roosters, two birds. And it may be one event with just that happening that evening. It may be 10 in a row. But in our view --

CHAIRPERSON SARIS: Would you group each bird separately of the one fight?

MS. WILLIAMS: You could. You could.

COMMISSIONER FRIEDRICH: What would that mean, plus-2, plus-2, or how --

MS. WILLIAMS: Well, if you had an enhancement. Our view was not to do --

COMMISSIONER FRIEDRICH: No, no, no. I mean, with the grouping rule. So when they don't --

(Simultaneous speaking.)
MS. WILLIAMS: Oh.

COMMISSIONER FRIEDRICH: On the levels in terms of the -- it's been awhile since I've done this, but you've got --

(Simultaneous speaking.)

MS. WILLIAMS: Yes, it's a little complicated.

COMMISSIONER FRIEDRICH: -- level and if they don't group, then you're going to in effect add units, which often is a question.

MS. WILLIAMS: You know --

COMMISSIONER FRIEDRICH: And of course the rules are somewhat complex, but that's why I think that would be --

MS. WILLIAMS: Very complex.

COMMISSIONER FRIEDRICH: But you all have done this? You've run this in your stereotypical case and you've done the calculation with these rules and think that in cases involving large number of animals and children the sentence wouldn't get too severe?
MS. WILLIAMS: I don't think so, but I think in some ways we are also at DOJ grappling with what is really a new initiative on our part to pursue animal fighting crimes. I mean, that was the whole reason that the authorities were moved to our Environmental Crimes Section because they were somewhat consistent with our work on wildlife. And certainly we've dealt with the grouping issues in the wildlife crimes where who you -- what you charge in each crime and et cetera.

And I think so much goes into what's in an indictment and how the charges are made that at the end of the day it might well be that you wouldn't break them one by one, but we just felt that for something like scale where you could measure it and with the focus on the new provisions of exposing a child to these provisions that it would apply, that if we did have some exception to the grouping that it should apply to any of the individual --
COMMISSIONER FRIEDRICH: And you think a departure wouldn't address that sufficiently?

MS. WILLIAMS: I think if we -- if the Commission believes that it does not want to proceed with specifying that, the scale would be addressed by not grouping, then our preferred alternative would be the upward departure for exceptional scale.

CHAIRPERSON SARIS: Thank you. Questions?

COMMISSIONER SMOOT: No, I'm still sitting here grappling with the -- go ahead.

CHAIRPERSON SARIS: Rachel, did you have your chance?

COMMISSIONER BARKOW: No. I mean, I think you covered it. I guess would you want -- I mean, the concern I have is similar to Commissioner Friedrich's, which is in other contexts where we have multiple victims, we don't dispense with the grouping rules. Number of
victims in a fraud case. I mean, there's lots of other places where people are affected, but there's still a sense that if you treated each one specifically separately, very quickly things would add up. And I just wanted to get a sense of whether or not you thought through kind of whether that would actually produce a punishment that seems about right given the level of activity or if it would go far beyond even what the stat max is in some of these cases. That would be my only concern.

CHAIRPERSON SARIS: Thank you.

COMMISSIONER MORALES: No, my question was going from the typical case to the typical defendant and I wanted to hear from both Ms. Williams and from -- well, from all of you really as to what your average defendant -- typical defendant looks like. Is it somebody that generally has a criminal background or is it somebody that's sort of a first offender? And is there some overlap
between these activities and other kinds of criminal activities? If you could just talk about that for a minute.

MR. SCHINDLER: So for like a typical offender, you know, unfortunately this crime is -- there's somebody in every state. This is a very widespread crime, especially organized dogfighting, but not every offender is going to be at the highest level of organization of dogfighting. And so there are different tiers.

There are individuals who may just be breeding dogs, right? And they're breeding and they're selling dogs to other individuals for fighting. They may not be involved to any higher extent than that. That would be kind of a more common event. Or they may match dogs -- or sorry, fight dogs every once in awhile just to keep their bloodline going because they need to show and demonstrate their dogs can fight.

There's also individuals that are just the participants. They may bring a dog to a
fight every once in awhile to that pit. These are like the common guys.

But then you have the ones that are at the highest level that are what they call “hooking matches.” These are the guys who I would call him and say, “I have a 32-pound female,” and then he would connect with other people who have those dogs and he would facilitate setting that match up. And without that person -- I mean, that's a higher level individual that is very unique. There's not -- it's not like there's droves of these guys that are out there that hook matches. And it makes it possible for that to occur.

You also have the people who are hosting these fights that don't always have to be a dogfighter. Some of the individuals that are providing a space to host the fight are not actually fighting. Actually in that -- we also participated in the case from the Middle District of Alabama. One of the defendants was a
restaurant and bar owner who was not a
dogfighter, but when it rained, they moved from
Donnie Anderson's property, who was the primary
defendant, to his bar so that they could fight
indoors. And without him being involved in that
operation they would not have a space to fight
the dogs.

And so, obviously those are what I
would consider the people who are more the
facilitators that are not -- there's thousands of
people involved in animal fighting. There's not
thousands of people who are providing and hosting
the space, that are making it possible to set the
matches up or the fights.

Same goes for cockfighting. And even
for cockfighting there's people who are illegally
distributing knives and gaffs. That's
not -- there's not somebody in every state who
sells those. Without those little knives they
strap onto the birds feet you wouldn't be able to
fight birds. And so in one case that we did
we -- there was a distributor who was the U.S. representative for a Mexican company, a company from Mexico who was basically importing illegally these knives and gaffs in Pringles containers and selling them, distributing them throughout the United States. We seized several thousand knives from his house. And that would be another person that would -- I -- he's not the guy that we raid who has his little box, right, of knives. This is an individual who actually fuels the industry.

And so, I mean, I don't know if that answers how we separate them --

COMMISSIONER MORALES: There's a huge range is what you're telling me. There's not a --

(Simultaneous speaking.)

MR. SCHINDLER: There is.

COMMISSIONER MORALES: And which ones -- Ms. Williams, so which ones do we generally take --

MS. WILLIAMS: I think we see exactly
the kind of different -- the different levels of
involvement that Chris was talking about, but
sometimes we do refer to this crime as the sort
of criminals, because it is often connected to
folks who are very involved in gambling or very
involved in the drug trade, very involved in the
gun trade. And certainly part of our initiative
at Justice is to really reach as much as possible
those kinds of offenders who are multiple
offenders.

COMMISSIONER SMOOT: Can I just ask
one question? I think this is what concerns me
about the whole weapon offense. So you talked
about a whole array of different types of folks
who would be involved in this kind of activity.
And when you're talking about the enhancement of
two points, who are you directing that towards?
I think that goes to some of the conversation we
talked about before, that there are people who
are able to carry weapons because it's their
right. Who are you targeting this -- the two
point -- who would you be looking to charge that additional two points for?

MS. CHIN: Well, I think it would be those participants who have those weapons in order to further the animal fighting enterprise.

COMMISSIONER SMOOT: Not to protect those involved? Or is it the people who are using the weapons to do something to the animals, which would be then -- would be the nexus, or protecting the enterprise? That would also be the nexus?

MS. CHIN: I think it might be a bit broader, as you just articulated.

CHAIRPERSON SARIS: Let me ask -- I don't -- many of your really compelling examples involve dogs. I don't know as much about cockfighting. We don't do a lot of it --

MR. SCHINDLER: Yes.

CHAIRPERSON SARIS: -- in Boston, so I just would like to understand it better. Because we're potentially tripling this penalty.
I mean, that's -- if you go from a 10 to a 16, you could potentially go from a 6 to 12 to 21 to 27. So I'm trying to understand: who's the typical cockfighter? The horrible stories were about the dogs and the pictures. But who's involved in that and is it the same level of culpability as the people who do the dogs?

MR. SCHINDLER: So cockfighting is actually one of those industries that I -- there are probably more people involved in cockfighting nationally than in any other illegal activity with animals. Some of these large-scale pits draw 400 to 500 people in a weekend that are coming from all over the country. And so when you -- like a cockfighting pit basically operates with -- you know, with a dogfight there may be only two matches or three, you know, two or three or four fights in a night.

For a cockfight, which they call a derby, it depends on how many entries. And so they have a schedule that literally they put out.
I mean, these individuals do not feel that it's illegal. They feel that even with the federal penalties -- they actually print a schedule that they send out to all these people that they carry in their wallet that tells you how much the entry fee is, whether it's knife -- which is the little curved -- they look like a knife, or a gaff, which looks like an ice pick, which type of instrument they're using. So it kind of specifies all of these things, which is good --

CHAIRPERSON SARIS: Now do they typically use those knives and gaffs, or is it more typical --

MS. WILLIAMS: They --

CHAIRPERSON SARIS: -- just the two birds going at each other?

MS. WILLIAMS: They strap them on their legs. And so typically both birds --

CHAIRPERSON SARIS: Typically?

MS. WILLIAMS: -- die because of the extent of the injuries. And it depends on the
weapon. Like a gaff is like an ice pick. And so if you think about how thin an ice pick is, it takes much longer time for the birds to die. The injuries, while they're significant, they're -- it's more punctured lungs, things like that. A knife or a -- a knife is -- they have short knife and long knife. The short knife is just a short knife about that long [indicating], but they're razor sharp. There have actually been cockfighters who have been killed in the pit by their own birds. And the long knife is about three inches long.

And so for those fights, if you raid a decent sized pit where there's several hundred people there, there could be more than 100 birds there for that night. I mean, we've seized several hundred. And while it doesn't look like there could be that many, the fights go on basically all -- sometimes they start at 10:00 a.m. and go all the way through the night. And so the individuals that are involved range also.
They run the gamut of all the different people.

COMMISSIONER MORALES: So that day there will be like 200 -- you say they all die, so over the course of that day 200 --

MR. SCHINDLER: I didn't want to bring truly disturbing photos today --

COMMISSIONER MORALES: Thank you.

MR. SCHINDLER: -- so I wanted to spare everyone. But the --

CHAIRPERSON SARIS: What do you think these --

MR. SCHINDLER: I tried. I mean, not that those aren't, but I tried to be aware. And so normally a lot of these places, like a pit we did in South Carolina, you could almost go by smell to be able to find where their dead pit is. And so they'll either dig a big pit where they'll throw birds in --

CHAIRPERSON SARIS: So you would put the level of culpability of dogs and cockfighting as equivalent?
MR. SCHINDLER: I would.

COMMISSIONER BARKOW: And, Ms. Williams, you would not group those though? So there could be -- that would be like 100 plus-2s?

MS. WILLIAMS: I think we are having -- yes. Technically yes, we would -- our view is that on any of these it would be the better approach to not group. But again, you're -- there are so many things that go into how a prosecutor is going to cast an indictment to be reasonable. I don't know that you'd see an indictment of 100 counts involving 2 birds each.

COMMISSIONER FRIEDRICH: The end effect in that scenario would be to add plus-5 to the offense level, right, where you max out at plus-5? So you'd increase from a 16 to a 21.

MS. WILLIAMS: That's --

(Simultaneous speaking.)

COMMISSIONER FRIEDRICH: Yes, is right? So you're talking about a maximum offense
level of --

(Simultaneous speaking.)

MS. WILLIAMS: But you're not -- what my colleague Mr. Eddy was just mentioning to me is mostly you'll have one owner with two or three birds, so it would be a very unusual situation in one of these environments. You're running owners through. It's not one owner of all 100 birds.

COMMISSIONER FRIEDRICH: But that's a -- I mean, you wouldn't charge sort of conspiracy and they're accountable for these animals?

VICE CHAIRMAN BREYER: What about the person who's running it?

COMMISSIONER FRIEDRICH: Yes.

VICE CHAIRMAN BREYER: I mean, the person who's running it from 10:00 a.m. to midnight has 100 fights.

COMMISSIONER FRIEDRICH: But under that scenario, let's say they're accountable for all, it adds plus-5, you max out under the
MS. WILLIAMS: Well, I'm counting from 16. I'm hoping I'm counting from 16. And some of the scenarios we were looking at when we were devising our comments to you we were getting to 21 or 22 for the offense level. Again, we think that if this seems like not an appropriate approach that an upward departure would give you that flexibility with the sentencing judge and --

CHAIRPERSON SARIS: All right. Thank you.

COMMISSIONER BARKOW: Can I ask one last quick question?

CHAIRPERSON SARIS: One last one. We have --

(Simultaneous speaking.)
COMMISSIONER BARKOW: -- states on this? I mean, so I guess it's a federal offense because of the gambling and the interstate, but in terms of the animal cruelty part of this, where are the states on this? Do these cases ever get -- I mean, it this federal because of the scope of the gambling operation? This becomes federal because of the level of cruelty? And do you seek to get relief in state prosecutions for these?

MS. CHIN: I think both of our organizations work both with federal law enforcement as well as state. I mean --

MR. SCHINDLER: They do --

(Simultaneous speaking.)

MS. CHIN: -- there are many, many state cases. We assist with both on the blood sports cases and with the --

(Simultaneous speaking.)

CHAIRPERSON SARIS: So the federal nexus is the gambling? Is that how they get
(Simultaneous speaking.)

CHAIRPERSON SARIS: -- commercial?

It has to be --

(Simultaneous speaking.)

MR. SCHINDLER: I would say the scale. We do a lot of intelligence gathering. We work with a lot of different federal agencies and state agencies. And for us when we reach out to any of our federal contacts about a case, it would really be the size and scope and the level involved of the individuals. When we're talking about like a huge cockfighting pit, that's not what they're all like. Those are -- I was giving examples of the most egregious ones. A lot of cockfighting pits can be much smaller. Those cases tend to be prosecuted on the state level. But when you're talking about places like the pit in Kentucky that was raided, I mean, that was -- literally people were coming from all over the country to go to that location.
COMMISSIONER BARKOW: So does that mean though that -- I guess it goes back to Judge Pryor's question --

MR. SCHINDLER: Yes.

COMMISSIONER BARKOW: -- which is I'm just wondering if the typical federal case is actually one of fairly large scope as a matter of what cases are likely to come into this. Are they like -- is the typical one for us likely to be a bigger --

MR. SCHINDLER: I think it depends on --

MS. WILLIAMS: I think that's generally fair.

MR. SCHINDLER: Yes.

MS. WILLIAMS: Certainly it's the kind of investigation we're looking at now with our initiative our authority.

COMMISSIONER BARKOW: Okay.

CHAIRPERSON SARIS: Thank you very much. As I say, there's enormous interest in
this across the country and we're taking it really seriously. Thank you.

MS. WILLIAMS: Thank you very much.

MR. SCHINDLER: Thank you so much.

CHAIRPERSON SARIS: So if that wasn't a serious enough panel, we're now moving onto child pornography. So I thank you all for coming, bearing with us through the day.

This proposed amendment addresses two circuit conflicts and application issues that have arisen when applying the child pornography guidelines. As I'm sure many of you know, under the Supreme Court's decision in Braxton v. United States, the Commission has the responsibility for resolving circuit conflicts. The Commission is always interested in doing this.

Actually it can be very hard. There's a reason why the circuits don't agree sometimes. I think Commissioner Friedrich would agree that sometimes the hardest issues we hit on are conflicting interpretations of the guidelines,
but it does lead to disparate calculations for similarly-situated defendants. So we are hearing testimony about two such issues.

The first involves the vulnerable victim adjustment when the offense involves minors who are unusually young and vulnerable such as infants and toddlers. And the second involves the application of the tiered distribution enhancement.

On the latter issue the proposed amendment seeks to achieve the appropriate enhancement for offenses involving a peer-to-peer file sharing program or network.

So thank you for coming. Our witnesses are Alexandra Gelber, who is Deputy Chief of the Child Exploitation and Obscenity Section in the Criminal Division of the Department of Justice. Ms. Gelber works with the U.S. Attorney Offices around the country on the investigation and prosecution of federal child exploitation crimes involving cases of child
pornography, sex trafficking of minors, sex tourism, enticement and coercion of minors.

Neil Fulton has been the Federal Public Defender for the Districts of North Dakota and South Dakota since 2010. He previously served as Chief of Staff to South Dakota Governor Mike Rounds and was in private practice in Pierre, South Dakota and was a law clerk for our former chair, Diana Murphy. Were you her law clerk when she was here?

MR. FULTON: Before.

CHAIRPERSON SARIS: Before? So and the final witness is Mary -- well, no.

MR. BOHLKEN: You've already introduced me before.

CHAIRPERSON SARIS: It jumps right over.

(Laughter.)

CHAIRPERSON SARIS: So I'm looking up and I'm seeing you, Mr. Bohlken, who was introduced as part of the last panel, so thank
you for coming back to us, the chair of POAG.

And our last and final witness on the panel is Mary G. Leary, who is a professor of law at the Catholic University of America in Washington, D.C. You served as a member of our Victims Advisory Group. Thank you very much for your service. Among other things, Professor Leary is a former Assistant U.S. Attorney for the District of Columbia, former policy consultant and Deputy Director, Office of Legal Counsel, National Center for Missing and Exploited Children, and the former Director of the National Center for the Prosecution of Child Abuse.

You're probably sick of hearing me say it, but of course. When the red light goes off, I'm polite in the beginning, then I start getting antsy and then I start saying "When." So please keep an eye on that light. And keep your voice up. I mean, I said that last time, but really towards the end, voices dropped again and people can't hear. There's a lot of background noise
Ms. Gelber?

MS. GELBER: Good afternoon and thank you for the opportunity to discuss the three proposed changes to the child pornography guidelines.

Let's start with where we agree. We agree with the proposal to use the vulnerable victim enhancement in cases involving infants and toddlers. For 2G2.2, we agree in concept with the knowing or mens rea element for distribution and we agree in concept that the defendant should know he was receiving a benefit for his distribution.

Where we disagree is with respect to the distribution enhancement in the production guideline. There is no circuit split here.

For first generation distribution; that is, the first instance when child pornography is shared, the enhancement should not be changed. It should apply broadly to those who
distribute what they produce, even more broadly
than enhancements covering redistribution to
account for the unique and lifelong wound
inflicted on these victims.

For the rest, our concerns are not
with concept, but with execution. The Department
is especially concerned about the proposed change
in the language from "if the offense involved" to
"if the defendant." Over our objection, courts
could interpret this to mean that these
enhancements could no longer be based on
conspiratorial or group behavior-- conduct the
Commission's own report identifies as especially
severe.

Instead, courts may find that this
enhancement would only apply if the defendant
personally engaged in the distribution. This
would substantially restrict the scope of these
enhancements far beyond what is called for to
resolve the circuit splits and would lead to the
unintended consequence of reducing the guidelines
for the worst offenders who seek and join online
groups to collectively share child pornography.

As for the plus-5 enhancement for
distribution for a thing of value, the
Commission's proposal would reverse settled
precedent. The "for a specific purpose" language
would invite litigation as to the application of
the enhancement when the defendant had multiple
motives for his distribution. The revision would
also set the bar so high that this enhancement
may not apply to online groups, which often have
implicit understandings about the need to share
in order to receive benefits.

To illustrate this point, consider the
following case against seven defendants currently
being prosecuted in the Southern District of
Indiana: Defendant Domminich Shaw sent an email
to 64 individuals, which stated, quote, "I'm
pruning out all the dead email addresses and
those I never hear from. I know some of you are
active and keen to share, and I already have some
of your email addresses saved to keep, but I would
like anyone that would like to stay in contact/on
my mailing list to reply to this email with
something hardcore that I haven't sent you. This
part is important. This way I get rid of all the
people who are just hovering waiting for
something who I never hear from. And of course
the reason for the hardcore material is to rule
out any of you as cops," end quote.

As would be required under the
proposal, does this email set forth an agreed
person-to-person exchange? What agreements have
been made among the 64 recipients with each
other? What valuable consideration will anyone
receive? There are no explicit promises as to
what will happen once the others send the
hardcore material. The specific purpose of the
distribution according to the writer is to
establish identity, not to add to his collection.

The proposed revision is so demanding
that it is an open question as to whether the
plus-5 enhancement would apply to this group of defendants, who I should add regularly shared child pornography via email and online. This group preferred children age zero to three. Shaw's screen name, Nepi, derives from nepiohilia, or a sexual attraction to infants. One member shared a picture of a sonogram describing his plans to abuse the baby once it was born.

The goal of any changes to the guidelines cannot be simply to lower the average guideline range. To be effective and meaningful the guideline must have a proper gradient that treats more serious conduct more seriously. The design of these two proposals, however, could create an inverse gradient so that less serious offenders have a higher guideline range than more serious offenders. This would happen if conspiratorial or group conduct could not be considered when determining if the enhancement should apply.
Further, and if I may just briefly make two more points, it is absolutely critical that at the end of this amendment process the distribution enhancements work for all types of child pornography cases, not just peer-to-peer or P2P cases. Because the majority of the cases today involve P2P technology, it is very easy to only consider those fact patterns. But the Commission should not craft these amendments to suit a particular moment in time or a particular technology.

We've already heard reference to the plus-2 for use of computer, which in its day was a useful enhancement. With one or two technological developments, some of which are already underway, the use of P2P networks to circulate child pornography could effectively end. The guideline must be placed to handle whatever comes next.

Thank you. I look forward to answering your questions.
CHAIRPERSON SARIS: We're a hot bench, so you'll be able to get time.

MR. FULTON: Well, Madam Chair and members of the Commission, thank you for the opportunity. And I think it's important as we start today to look at these proposed amendments to resolve circuit splits through the lens of the experience of this guideline. And as the Commission knows well, this is a guideline that since you reported to Congress last in 2012 has been recognized by many people as not working.

In 60 percent of the cases under 2G2.1 -- the production guideline -- judges are going below the guidelines. In 66 percent of the cases under 2G2.2 -- the trafficking, which would be the receiving/distribution/possession guideline -- judges are going below the guidelines. That's without government motion. That's just judges going below the guidelines. So the guideline as it sits today isn't working, isn't being accepted.
So we would ask the Commission, as you resolve the splits, to keep that in mind and look at a resolution that simplifies operation of the guidelines, that rather than expanding that divergence between those few cases where the guidelines are being accepted and the vast majority where variances are being given, that it work to bring those bands closer together and down.

To talk briefly about the specific proposals, the vulnerable victim enhancement we believe would effectively become another almost automatic enhancement like the computer, like the image enhancement. Under the proposal, it would essentially make age for children of a certain age an automatic enhancement. Age is already factored into the guidelines as an enhancement. And if you look at most cases, the S&M and violence enhancement applies to most instances involving a sex act involving small children. So age is built in a couple of times.
And again, in 2010 the production
guideline, judges were going below on 45 percent
of the case. In 2014 they were going below in
60 percent of the cases, the guidelines being
less accepted, not more. In distribution in 2010
it was 55 and in 2014 it was 66 percent of the
cases where judges were going below. It's
going less accepted, not more. And I think
perhaps most telling, in 2014, the number of
upward variances and departures was less than
three percent. So the experience on the ground
is not one that judges are finding the guideline
is inadequate to what they're doing. They're
finding it's vastly more than adequate.

I think, too, when you look at the
circuit splits, if you go to the 9th and the 5th
Circuit where these two issues come from and you
start to break it down at the district court
level, you find disparities that already
significantly exist in this problem. In the 9th
Circuit and the 5th Circuit both, more than 50
percent of the district courts that had dealt with this issue had never applied the vulnerable victim enhancement. The range in the 9th Circuit was 4.4 percent of the cases to 17.8 percent. In the districts that had ever applied it, it was 4.9 to 12.7 in the 5th for those districts that had applied it.

The point in throwing the numbers out there is simply that this is a problem that is relatively isolated and contained right now, and our concern is that by adopting the proposal on vulnerable victim it metastasizes across the country and throughout the guidelines. We think a better approach would be to stick with the existing language and clarify that age is already accounted for and that vulnerable victims shouldn't pile on top of it.

To turn to 2G2.2 on the distribution, I'd like to just briefly talk about that through the lens of the example of a client of my office. I'm going to refer to this individual as Greg.
Greg was at the time we tried his case 20 years old. He had never lived independently from his parents, he had never dated, we learned in the psychosexual evaluation that was ordered for sentencing by the sentencing judge. He had undergone special programming in school and he eventually moved out of that and back into the general school, but he never thrived.

He was tried for distribution, receipt and possession. He was acquitted by the jury of distribution and receipt and sentenced only for the possession count. The fight at sentencing came down to whether the 5-Level enhancement or the 2-Level enhancement should apply for peer-to-peer.

We had expert testimony in that instance from a forensic computer expert who looked at his download history. He found that Greg had begun using a peer-to-peer network to obtain porn, adult licit porn. Might not be tasteful, but it's legal. From that point in
doing a generalized search for the word "porn," he found child porn. There were five downloads from FrostWire in a less-than-30-day period where all of the images came onto his computer. Less than one percent of them were child porn.

When he was asked by officers about his download history, they said, "Well, isn't there a torrent on your computer?" He said, "What's a torrent?". He was not a sophisticated user. This was a program that we can about more that mandated sharing. He was not a knowing user and he is an example of why it is necessary to have knowledge as a component to distinguish among those people who are purposely distributing, who are more culpable distributors, and the vast majority of folks who are generalized peer-to-peer users. Thank you.

CHAIRPERSON SARIS: Thank you.

Mr. Bohlken?

MR. BOHLKEN: Thank you again, Commission, for having me here today and giving
me the opportunity to speak on this proposed amendment. To take up where my co-panelist left off, we kind of agreed with the knowingly -- and I know I'm going backwards from the amendment, but we agreed with the knowingly requirement being added to the 2G2.1(b)(3) and the 2G2.2(b)(3), because we do think that some of the programs that are out there today in the data dumps and stuff like that -- programs are automatically sharing. Whenever they send one of those programs or receive, they're automatically sharing. So we agreed with the knowingly requirement being applied.

We also agreed with the proposed change to the (b)(3)(b), which created a higher standard for the SOC for distribution, for the receipt, or expectation of receipt of something of value not for pecuniary gain. We believe that the investigators are generally discovering evidence during their interviews or forensic computer analysis when the defendants are
engaging in some sort of quid pro quo exchanges involving child pornography. And we think this change will help with consistency across the country in reducing the application of (b)(3)(b) enhancements for the use of peer-to-peer file sharing without creating the need for a bright-line rule regarding file-sharing programs and such.

On the application note for vulnerable victim being included in all three of the child porn guidelines, when we talked about this, it is currently being applied differently across the country. One circuit rep applies it frequently, and she was in the 5th Circuit. She was aware of it. The rest of the circuit reps very infrequently have ever seen it applied.

But we did feel like the application note would bring consistency across the board on how that is applied. And it makes sense in the 2G2.1 and the 2G2.6 guidelines given the severity of those offenses. And in the 2G2.1 guideline,
the defendants generally have contact with their victims, they know the age, relative age of the victim, so they have firsthand knowledge.

The one addition that we were kind of hung up was with regard to the 2.2, 2G2.2 guideline. And we discussed complications with the application note being included there because the defendants in that guideline don't always typically have contact with the individuals that are in the images.

Secondly, the possession. Defendants often get large volumes of images in what are called data dumps containing a wide variety of images or videos for which they're accountable, and they may not even have requested that age group or even viewed the contents of all the different images that are on that file.

And thirdly, there's cases where evidence reflects that possession -- defendants have actively sought the actual toddler or infant on the images. And we believe those are the
people that should be more targeted by this -- using the Chapter 3 enhancement in addition to the age enhancement within the guideline.

We discussed the terms that were used in the proposed -- the synopsis of the proposed amendments. And instead of using the term "extreme youth" or "small physical size," we thought the more specific term that was used in the synopsis of the proposed amendment -- that being "infant" or "toddler," while still not perfect, was a better use. Using those terms was better than the "extreme youth" and "physical size." Thank you.

CHAIRPERSON SARIS: Thank you.

MS. LEARY: Good afternoon, members of the Commission. I'd like to thank you for holding these hearings and for inviting the Victims Advisory Group to share the perspective of victims in what we refer to as “child sexual abuse images,” as this Commission knows is the
preferred term and a number of courts are going to that.

As to the first point involving unusually young and vulnerable minors, we'll rest on our written testimony as we agree with the proposed changes in that because these children are uniquely unable to defend themselves, report the crime and to even to identify the crime.

Turning to the 2-Level distribution enhancement, the Victims Advisory Group strongly opposes the proposed amendment to the guidelines and to insert the term "knowingly" in these provisions. And I should note at this juncture that our objection is to that language in (b)(3)(f) of both 2G2.1 and 2G2.2. In the extent that our written testimony reflected just 2G2.2, I want to be clear that it's to both.

We have two main reasons: One is the reality of the peer-to-peer network file sharing as a massive distribution mechanism that requires affirmative participation by offenders. And
two, the proposed amendment also fails to reflect the resulting compounded harm to a victim when peer-to-peer networks are used in the circulation of these images.

For purposes of time perhaps it would be just best to refer back to the Commission's own statements in 2012 in their report where it says quite directly that the very existence and purpose of peer-to-peer networks is to share digital content. These offenders choose this way to distribute these images as opposed to other ways of doing so. As a result, victims are more extremely hurt. As a result, these are traded on a massive platform and their images are injected into an electronic stream where they will exist in perpetuity.

That attraction of the peer-to-peer networks for offenders is that it offers the best of both worlds: the ability to be a part of a community not only that they can exchange their images, but that they can receive affirmance for
their criminal activities or proclivities. But secondly, they can obtain a large number, a large amount of child abuse images through a centralized system which gives them anonymity and decreased risk. But personal distribution should not be confused with the lack of knowing distribution. And just because it's impersonal does not mean that it is any less damaging to the victims or that it is any less harmful.

A second reason to follow the lead of a number of these circuits is that victims' images -- the victims are more severely hurt when they are shared in this peer-to-peer context. The choice to share via peer-to-peer as opposed to some other method is a choice to support a marketplace that demands the production of more images, thus increasing the risk of victimization, and it's the choice to be a part of a community that affirms this value system.

This amendment really turns the system -- I would suggest, our sentencing system
on its head. If adopted as proposed, if a
defendant were to hand one photograph to the
person next to them and say, hey, look at that,
it would seemingly apply beneath this knowing
standard. However, if a defendant seeks out and
joins a large child pornography community for the
very purpose of obtaining and sharing massive
amounts of child pornography and risking that the
victimization will continue for eternity for
these victims, that defendant wouldn't
necessarily get the enhancement.

With regard to the 5-Level
distribution enhancement, the Victims Advisory
Group also strongly opposes that proposed change.
The amendment is far too narrow and it changes
the meaning of the guideline and fails to account
for the additional harm to the victims as well.
The reality is that in the wake of the Internet,
the barter system is responsible for much of the
trade of child abuse images and is often done
with people unknown to the defendant as part of
a larger system. Thus, there is rarely the specific agreement with the terms laid out to the level of detail and the language -- that the language seems to require.

Secondly, the proposed amendment requires that the item of value the defendant expects to come from that person, thus it would arguably not apply in an instance where an offender produces images to an individual in order to gain access to a group of child pornography traders because they're not necessarily getting the quid pro quo from that individual with whom they distributed the image.

Secondly, when a victim's image is used to obtain other images, the victim suffers additional harm that should be accounted for at sentencing.

It's actually a bad -- it's terrible to be a victim of child sex abuse crimes, of course. It's terrible to have that memorialized in eternity. It's terrible and compounding to
have that distributed throughout the world. But it is even -- it is compounded even more when those images are used as currency. And as the District of Massachusetts noted, this is another layer of exploitation felt by the victim because it gives her, quote, "the indelible knowledge that not only will her images be reviewed in perpetuity, but that they will be utilized as currency to further victimize other children."

I see my time is expired, so I welcome your questions. Thank you very much.

CHAIRPERSON SARIS: Thank you.

I was just going to start off with asking the Department of Justice -- see, I've been doing -- I've been a judge for a long time and I get a lot of these cases. And I've never seen it charged as a conspiracy. It's usually an individual distribution or receipt count, so I'm trying to understand your concern that you've articulated that somehow the amendment would interfere with your conspiracy prosecutions.
MS. GELBER: I can't speak to what you may have seen in terms of the prosecutions that are brought in your district, but in my office it's very common for us to bring large conspiracy cases. We most frequently indict these under the child exploitation enterprise statute and we always have several of these cases going at any given time.

For example, there was a case you -- on, no, no, it was Nebraska, not the Dakotas. I'm sorry. There was a case --

CHAIRPERSON SARIS: No, it's --

(Simultaneous speaking.)

MR. FULTON: I know it wasn't, because we've never seen a conspiracy.

MS. GELBER: It was called -- there was a case prosecuted in the District of Nebraska. There were 28 defendants. Twenty were ultimately identified enough for arrest. Nineteen of them have been convicted. The case I referred to in the Southern District of
Indiana, which is also a conspiracy case against the seven defendants --

CHAIRPERSON SARIS: How many would you say there are a year?

MS. GELBER: I think we could check that data and get back to you.

CHAIRPERSON SARIS: Less than 12?

MS. GELBER: I wouldn't want to answer off the top of my head.

CHAIRPERSON SARIS: So the question is in the typical case would our -- I understand some -- I'm not -- well, let me just say in your case, in the conspiracy case how does the amendment hurt you? Because you have to have shared intent, right, to be convicted?

MS. GELBER: Our concern is that if you change the specific offense characteristic from "if the offense involved" to "if the defendant" that would impact our ability to bring in evidence under relevant conduct under the jointly undertaking criminal enterprise theory.
That's our concern, that if you have 20 or 30 -- there was a case in the Western District of Louisiana involving 70 defendants where -- that were all part of a group, that it would focus exclusively on what the individual defendant did and not his role in the larger community.

COMMISSIONER BARKOW: I have the same question about this. I don't see how it -- I mean, that's not my intent or how I'm personally just, me speaking for myself, thinking that was -- was this would not change anything related to conspiracy law. It would just change the definition for a particular offender. And then if anyone else was in conspiracy to help achieve that result, they would still be held responsible like they always are under our relevant conduct and jointly undertaken rules.

And so I guess I just -- I wasn't sure why you thought the wording change would have that effect just because the particular target crime speaks about what kind of mens rea or
whatnot a defendant needed. That wouldn't change anything about conspiracy mens rea or conspiracy requirements.

MS. GELBER: Well, this may be impolitic, and forgive me if it is, but then I don't understand the point of changing it from "if the offense involved" to "if the defendant." I assume by proposing that change that it's meant to change something.

COMMISSIONER BARKOW: Well, in a case where there was an individual being prosecuted who's not part of a conspiracy you'd have to show that that person had knowledge, but you wouldn't change if there was someone else who wanted to also further that crime by taking part in the activity. I mean, that was my understanding, and maybe I'm misunderstanding what -- how the circuit splits developed in these cases, but in an individual prosecution wouldn't it change the law in those cases?

MS. GELBER: I don't follow your
question. I'm sorry. I got lost in it.

COMMISSIONER BARKOW: Well, you were saying it's a meaningless -- what we've done here is meaningless.

MS. GELBER: No, no, no. I --

(Simultaneous speaking.)

MS. GELBER: So, let me be clear. I'm just talking about the change of the focus from the offense to the defendant.

COMMISSIONER BARKOW: Right, so this is in 2G2.1.

MS. GELBER: This is for all of the --

COMMISSIONER BARKOW: For all of them?

MS. GELBER: Yes.

COMMISSIONER BARKOW: So wouldn't it be changing -- or clarifying, I guess is maybe the better way to put it, in jurisdictions that were confused about what it requires, that you'd have to show you had a defendant who knowingly distributed. And let's say that the only person
being charged was that defendant. From now on it would put the burden on the government to show that the defendant knew, for example --

MS. GELBER: Right.

COMMISSIONER BARKOW: -- this was a program that distributed. So that would be the change.

MS. GELBER: Okay.

COMMISSIONER BARKOW: But it wouldn't change anything that had to do with whether or not there was a conspiracy around that particular defendant engaging. So let's say this defendant said -- and three of his friends, they say we'd love to help you. We know we're going to distribute this.

MS. GELBER: Right.

COMMISSIONER BARKOW: How can we help you? It wouldn't change anything about that scenario.

MS. GELBER: I think it wouldn't intend to make that change, but as we say in our
comments, we fear that it is -- it makes it vulnerable to such an interpretation. That's why we agree that the distribution enhancements should be changed to incorporate a mens rea element. We propose doing that by adding it to the definition of distribution in the application notes so it's clear that anyone -- that any distribution has to be done knowingly. And we propose that as an alternative because then it doesn't create this question as to whether the scope of conduct has changed. So our counterproposal we think achieves the goal of the -- and it resolves the circuit split without introducing this potential vulnerability.

COMMISSIONER PRYOR: But those jurisdictions weren't necessarily confused.

COMMISSIONER BARKOW: Right. Right.

They were --

COMMISSIONER PRYOR: They were just --

COMMISSIONER BARKOW: -- following --
COMMISSIONER PRYOR: -- reading the plain text --

COMMISSIONER BARKOW: Yes. Exactly.

COMMISSIONER PRYOR: -- of the guidelines.

COMMISSIONER BARKOW: Correct. To clarify what the -- yes.

COMMISSIONER PRYOR: I think that someone from one of those jurisdictions might even support the clarification.

MS. GELBER: Well, I mean, if you look at the cases where the -- that found a strict liability application, they said, well, the guideline doesn't say it's required. So I mean, that -- so if you add it in, it takes care of it.

COMMISSIONER FRIEDRICH: So you agree there should be a mens rea. You're just worried that courts are going to improperly apply this guideline if we draft it the way we've proposed?

MS. GELBER: I don't --
(Simultaneous speaking.)

COMMISSIONER FRIEDRICH: -- your approach better, but substantively you're on the same page?

MS. GELBER: Yes, as I said, we agree in concept, but not in execution. We think our proposal -- and we actually offer two. One is to add it to the definition of distribution in the application note. And the other is to add "knowing" or "reckless" to the introductory language to the specific offense characteristic, that this accomplishes the goal without introducing the litigation vulnerability that we've identified.

CHAIRPERSON SARIS: I like the proposal, or at least to think about the proposal adding "reckless." I was wondering if anyone else wanted to comment on that. Yes?

MR. FULTON: I certainly would, Madam Chairman. I mean, I think it becomes very important to some degree to get down in the weeds
on this because when we talk about how child porn
is moving right now and how it is being obtained,
I mean, we say peer-to-peer as though that is one
monolithic thing. And it's 74 percent of the
receipt cases. It's 85 percent of the
distribution cases. It is how child porn is
moving, period.

But within that realm, I mean, there
are very different levels of users. There are
peer-to-peer networks that are moderated, that
are user-protected where you have to obtain
admission, where you purposely seek it out, you
ask to be let in and the keeper of the club lets
you in.

There are also P2P networks like
FrostWire, LimeWire -- and Ares that we talked
about that was used in my client's case -- where
there is no they to let you in. It is an
open-source program out there that has again
licit uses. There are totally licit music files
on there, there are video files on there that are
licit, there are licit adult porn files that are on there. And there's also child porn.

There are people who go onto those peer-to-peer networks and search terms like "pre-teen hardcore." They are looking for a very specific thing. There are also people who go on there and search porn. I would analogize it to the very homespun example if I walk into the grocery store and say I want a high fiber muesli to my grocer, or I say I want cereal. I'm casting a very different net.

And our point on this is if you don't interject knowingly in mens rea in this, this net just sweeps up everyone because Greg, as an example again, searched the term "porn" and he got 167,000 files. And that is not an isolated example. I think --

CHAIRPERSON SARIS: So you're saying that would be the difference between "knowing" and "reckless." He didn't know he was going to get the child porn. So if we had "knowing," you
wouldn't be attributed to it. You said "reckless." You should have known that if you put in "porn," you were going to pick up the kiddie porn. Is that --

MR. FULTON: What I think I'm saying, Madam Chairman, is that to draw a meaningful distinction among the levels of culpability on this front you should really think about three groups of people. The people who are doing what I think of as a 5-Level enhancement, the old first year contracts, bargained for exchange. I offer you porn or ask for porn. I give you some valuable consideration back. And that's five levels.

The 2-Level people who are knowingly pushing porn out into the world either because they've produced an image and shove it out or because they knowingly enter a peer-to-peer to share -- which again, remember, you have to know how the peer-to-peer network works. If you use FrostWire like our client did, there is a nine
window -- not just clicks, nine windows you have
to go through to disable that program's
shared -- when you set it up, it sets up a shared
file and automatically downloads the image into
the shared file. Some programs automatically
upload including partial images, meaning you can
be distributing child porn before you have a
complete child porn file or know you do.

And then there are the people like
Greg who I would say are unsophisticated users
who ultimately do move child porn back out
distributing because of how the program works,
but they're not intending to. And our concern
with "reckless" is you still sweep those people
up.

So we think you should have three
bands of culpability: the people who
are -- bargain for exchange, the people who are
knowingly pushing it and the people who are
getting swept up into that because of how that
system works. How you smith that language rests
with you, but I think that's where the bands lie.

CHAIRPERSON SARIS: The first time

ever I heard about the situation where some

people are bargaining for faster speeds -- it's

whether that should be considered something for

value. In other words, you agree for the

distribution and exchange for a faster download.

Is that it?

So how frequent is that? Is that a

serious concern for us to think about and how we

word this?

MS. GELBER: Well, I think it's a

little bit difficult to assess how frequent it is

because there's a circuit split. So we don't

know in the circuits whether it -- where they

don't require specific evidence of knowledge,

it's hard to capture how many cases -- this

evidence isn't presented in those circuits

because it's not necessary to do so.

What I would say with respect to

faster download speeds, we would urge the
Commission not to reverse the settled precedent in this area. And it's very easy to think, oh, you know, faster downloads speeds, like why should we account for that, but I think it's important to finish the sentence. It's faster download speeds in order to obtain more child pornography more quickly. Faster download speeds is a tool of the crime that augments the extent to which that crime is committed. It's like buying more ammunition.

So it's not just some sort of like ancillary benefit, like my computer is going to run faster. It is intimately connected to the very commission of the crime. And that's why it's entirely appropriate to leave the settled precedent in place, that in cases where there's evidence that the defendant knew that by distributing he would receive that benefit.

VICE CHAIRMAN BREYER: But I wonder -- I was intrigued by your remark about making sure that we -- whatever we do we take
into account that technology can change. And you cited as an example the enhancement, as I understood your testimony, for use of a computer, which is the two-point enhancement.

So is it your -- is it the Justice Department's position that we ought to do something about that?

MS. GELBER: Well, yes. I mean, the Department is on -- you mean with respect to use of computer?

VICE CHAIRMAN BREYER: Right.

MS. GELBER: Yes.

VICE CHAIRMAN BREYER: Since it's clearly the heartland of cases.

MS. GELBER: Yes, the Department is on record on that. Following the Commission's report in 2012, the Department issued a letter, a written response to it and in that outlines a number of changes that we recommend to the guidelines in one of them. Even though the Commission did account for the fact that that
would apply all the time by lowering the base offense level, it's just -- it's kind of like a human appendix and it's -- there are more meaningful --

VICE CHAIRMAN BREYER: Of course I would refer example. I just saw that there's proposal for Google in San Francisco to install the highest speed free --

MS. GELBER: Yes.

VICE CHAIRMAN BREYER: -- Internet connections and put in a whole new fiber and so forth and give it to everybody in the city. So I just have to wonder when we start marrying criminal enhancements to changes of technology whether we're just going to walk ourselves into another situation of where it's -- in a year, two years, it's going to be totally inappropriate.

MS. GELBER: I absolutely agree. I absolutely agree with that, as I said in my opening statement. So that is a big concern. If you start talking about -- and that's, frankly,
one of the reasons why we respectfully disagree with the suggestion to include a bright line rule that courts cannot consider the use of a peer-to-peer program in deciding whether these enhancements should apply.

Peer-to-peer programs, you know, there are many different kinds. They have many different features. They're changing every day. It is a piece of evidence and the courts should be left to assign whatever value and make any interpretation from that evidence that they deem appropriate.

But making a statement about the evidentiary value of peer-to-peer programs when you don't know what they're going to look like tomorrow I think could be quite a mistake.

CHAIRPERSON SARIS: Ms. Leary?

MS. LEARY: Thank you. Just a reference to the analogy about buying the cereal or whatever, I think a better analogy might be to look at the distributor. And as the court did
in United States v. Shaffer talked about the self-serve gas station. And there we say just because the distributor doesn't know the exact person or doesn't know the exact transaction doesn't mean any less they're not distributing gasoline.

And this is really a time framing issue with regard to peer-to-peer. If we focus on that very moment and getting down into the weeds, there may be issues about that specific transaction, but if we open up the time framing, at some point these offenders decide: I want to get my child pornography and I therefore am going to download this and I'm going to go through these nine things or not. But when we open up that time frame, then we see this is a series of affirmative decisions on the part of these offenders. And while we would prefer not reckless or knowing, reckless is certainly better than knowing, because knowing is really artificial.
CHAIRPERSON SARIS: Go ahead.

MR. FULTON: May I just briefly, Madam Chairman? That's not right. I mean, if you look at how the peer-to-peer are working, you have to opt out in many of these instances, many of the programs. If you've opted out when you reboot or start the computer, they change your preferences back to the sharing mode. You see that by looking at the fact in our comments. Ivy League institutions full of reasonably smart folks are, in their IT protocols, telling people about this risk of P2P programs because you don't know it. So to say that people are consciously choosing just because they use a P2P is not right. There are people --

(Simultaneous speaking.)

MS. GELBER: That's not what I said.

MS. LEARY: And we can get into a factual dispute. I would defer to this Commission's 2012 report which discusses a different approach. Thank you.
COMMISSIONER BARKOW: Can I ask one quick -- we want to develop a language of the extra-vulnerable victims, so you had suggested, Mr. Bohlken, that we might be better off saying "infant" and "toddler." And I was just curious if the rest of the panelists had a view on the phrasing of that particular provision. Right now I don't know how -- we phrase it as if the minor's extreme youth and small physical size made the minor an especially vulnerable compared to most minors under the age of 12. And the defendant knew or should have known this applied. And the question is would that be better stated as "infants and toddlers."

MS. LEARY: The position of the Victims Advisory Group, and we agree with what Mr. Bohlken very wisely said, none of these is perfect. I think we would certainly agree with that. But from our perspective I think the proposed language would be a little bit superior. And the question is this: Is this a relevant
consideration for a trial . . . for a sentencing judge to look at the seriousness of the offense and just punishment/adequate deterrence? And I think the broader language would more give the sentencing court that flexibility to be able to do it rather than getting into a debate about what's an infant, what's a toddler?

CHAIRPERSON SARIS: I worry about it a little bit though. If you say -- every seven-year-old is little, I mean, on the scale of things. So how little is little before you add it? Whereas infant and toddler, I mean, it's horrifying they're taking kids who can't really talk or complain or protest. So infant and toddler catches it.

We originally started off -- we've gone back and forth on it, so we were sort of thinking that we weren't sure what the right wording was.

So what do you think?

MS. GELBER: I think I could make
arguments that there is definitely something appealing to infants and toddlers because it's plain language, it's words that everyone understands. My one concern with that is that sometimes the images are of such close-up that you -- all you really see are -- like for example are hips and you have to make a relative comparison of the size of the child relative to the adult. So in that situation having something like "extremely small size" would provide a little bit more flexibility in those scenarios.

The one thing we would recommend with respect to 3A1.1, just adding something that says "except as otherwise provided in the guidelines" so it's clear that the two -- in the application note so that it's clear that everything should be read together.

CHAIRPERSON SARIS: Thank you.

COMMISSIONER FRIEDRICH: So for the three of you who support the infant/toddler change, do you all agree that if the Commission's
going to do it, it's got to do more than just solve the circuit conflict, that we need to make this correction in the production and the child exploitation guidelines as well?

Mr. Bohlken, you say you have concerns about it in the distribution because sometimes these come en masse and you feel more comfortable if the defendant actually knew that -- in that bulk that they download -- actually knew about the infant and toddler. Is that -- did I understand you right?

MR. BOHLKEN: Yes, but for consistency we did agree that the application note should be in all three guidelines. But we did have additional discussions in the 2G2.2 guideline because -- for some of the same reasons Mr. Fulton was talking about, the different types of offender.

CHAIRPERSON SARIS: We said that they knew they were infants and toddlers in there.

COMMISSIONER FRIEDRICH: But not for
production and exploitation?

    MR. BOHLKEN: Right.

    COMMISSIONER FRIEDRICH: You're talking about for distribution?

    MR. BOHLKEN: Right. Right.

    COMMISSIONER FRIEDRICH: But my question is if we're going to do this, and I'm not sure we should, but if we're going to do this, are we better not -- are we better off just addressing this in 3A1.1? And I haven't thought of all the possibilities, but the initial Commission who created this guideline made pretty clear that if you've got an age enhancement, you shouldn't have the vulnerable victim enhancement. Now maybe they didn't foresee that child pornography offenses and child exploitation offenses one day would involve infants and toddlers, but there's a pretty clear policy decision in 3A1.1. And I just throw out -- I mean, is it time to revisit that? If we're going to -- we're doing more than solve this circuit
conflict to do this is a logical way -- do we need to go so far as look at that across the guidelines if we're really going to delve into this?

MS. GELBER: Well, I think what we would say is what matters to us most is outcome. So we support the -- some sort of recognition in the guidelines in cases where the defendant knows or should have known it involves infant and toddlers. It's important to keep in mind that having a mens rea element here distinguishes this from the other content enhancements. So the prepubescent and S&M can be strict liability. This one would not be. It would therefore not apply in cases where there was a large data dump unless there was some sort of evidence that the defendant was aware of that specific image.

So we are more interested in outcome on this one than in structure, so if it's an additional plus-2 in the SOC so it doesn't invite these questions about the policy of the
vulnerable victim enhancement, we would defer to you on that one as long as the concept is reflected somewhere.

MR. BOHLKEN: One more point I wanted to make about the application note being in all three guidelines, we kind of looked at this and talked about the computer enhancement and how when that was first written in it wasn't applicable in every single case and now it's become -- it's applied in every single case. I can remember the days when child porn defendants actually got the stuff in the mail box. But we've moved way past that. We believe that this -- with this application note that it's going to be applied in almost every case now. So it's going to make the guideline ranges go even higher. And the circuits that vary or depart as a practice are going to continue to do that. And the circuits --

VICE CHAIRMAN BREYER: There you're going to have a wider non-compliance.
MR. BOHLKEN: Exactly. I mean, there could be -- you could maybe distinguish, because I know some of the circuit split was the age, taking the age alone doesn't necessarily identify like super vulnerable victims, the toddlers or something. I had thought that there could also -- an alternative could be maybe do a 4-Level increase for a toddler or an infant instead of a -- just someone under the age of 12.

COMMISSIONER FRIEDRICH: Mr. Bohlken, do you ever find courts avoid this issue by simply saying I'm going to depart in this case?

MR. BOHLKEN: Yes.

COMMISSIONER FRIEDRICH: Based on the infant/toddler? Have you seen that? Is that happening, or is it always that they engage on this particular guideline?

MR. BOHLKEN: I think from my personal experience with this guideline that I -- the trouble I think a lot of courts have is that the guideline ranges have become way too high. And
I also have seen firsthand that judges kind of like to look at hands-on sex offenses and child porn sex offenses and see which ones are being punished more severely by the guideline.

COMMISSIONER FRIEDRICH: For example, in a production case where it might have actually involved a toddler or infant the defendant interacted with, in your experience is that the kind of case where a judge is going to depart upwards despite the lack of application for vulnerable victim enhancement?

MR. BOHLKEN: Currently?

COMMISSIONER FRIEDRICH: Yes.

MR. BOHLKEN: Currently I haven't seen an upward departure or an upward variance in a child porn case.

COMMISSIONER FRIEDRICH: No --

(Simultaneous speaking.)

MR. BOHLKEN: I would say they would sentence within the guideline range.

COMMISSIONER FRIEDRICH: Or
MR. BOHLKEN: I would say within guideline range for something like that that has an aggravated factor like there were several toddlers or infants involved. I would say where that's not a typical case where they go down or very downward. It's a within-guideline range sentence.

CHAIRPERSON SARIS: All right. So anything else anybody has questions?

(No audible response.)

CHAIRPERSON SARIS: Thank you very much. Very interesting and important area. Thank you.

We're going to adjourn. That's it.

(Whereupon, the above-entitled matter went off the record at 2:49 p.m.)
Chief Judge Patti B. Saris  
Chair, United States Sentencing Commission  
Remarks for Public Meeting  
April 15, 2016

Thank you for attending the United States Sentencing Commission’s second public meeting of the year.

The Commission appreciates the attendance of those joining us here today as well as those watching through our livestream broadcast on the Commission’s website. Once again, I appreciate the strong public interest in sentencing issues and the work of the Commission.

As those of you following our work already know, the Commission unanimously voted to adopt an amendment relating to the definition of “crime of violence” in the Career Offender and other federal sentencing guidelines in January. The effective date for this amendment is August 1st and the Commission will publish a supplement to the Guidelines Manual that incorporates the new amendment at that time.

The January amendment is not our final work related to this area of “crimes of violence.” We are busily working on a report to Congress on career offenders and other recidivist provisions later this year, which may include recommended statutory changes.

Also, the Commission is currently accepting written public comment on proposed revisions to the Commission’s Rules of Practice and Procedure. Please note—if you are interested, written public comment on these changes should be submitted by June 1, 2016. The proposed changes can be found at the Commission’s website at www.ussc.gov. Instructions on the submission of public comment are on the website as well as a link to sign up for the Commission’s Twitter and e-mail alerts.

Briefly, I’d like to highlight a few of the Commission’s recent research projects and publications. A few weeks ago, the Commission released its first in a series of publications on its multi-year recidivism study. The study is groundbreaking in both its breadth and in its duration, analyzing recidivism in multiple ways, including rearrest, reconviction, and/or reincarceration.

Let me mention a few key findings:

• Nearly one-half (49.3%) of the federal offenders studied were rearrested within 8 years of release for either a new crime or for some other violation of the conditions of their probation or release. Almost one-third (31.7%) were reconvicted, and one-quarter were reincarcerated.

• The Guideline’s criminal history score remains a very good predictor of future recidivism. Age, offense type and educational level were also associated with future recidivism.
• In addition, with the exception of very short sentences (less than 6 months), the rate of recidivism varies very little by length of prison sentence imposed.

• Again, these are just a few findings of the recidivism report, and there will be more to come in the coming months.

Recently, the Commission also published its Fiscal Year 2015 Annual Report and Sourcebook, and perhaps the most interesting trend is that the federal criminal caseload continues to shrink. In past years, the decreased caseload was largely driven by declining immigration cases, but this year the decreases were more evenly distributed across the major offense types.

Regarding sentencing training, last September we had approximately 1,000 judges, probation officers, and practitioners attend our National Training Seminar in New Orleans. This year, the seminar will be held in Minneapolis on September 7th to the 9th. Please look for registration information on our website in the weeks ahead.

So, as always, there is a great deal of work going on here at the Commission and I wanted to provide this short summary of a few activities before we turn to the business before us today. As we ordinarily do in April, the Commission will now vote on whether to adopt the pending amendments to the federal sentencing guidelines.

As the Commission votes on changes to its policy statement on compassionate release, I want to thank everyone who testified at our hearing in February or submitted public comment, including representatives from the Criminal Law Committee, the Department of Justice, the Bureau of Prisons, the Inspector General, the Federal Public Defenders, the Practitioners Advisory Group, Dr. Brie Williams, ACLU, FAMM, and NACDL, among others. Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentence reduction. With the vote on this proposed amendment, the Commission is exercising its authority in this area by broadening the criteria beyond that in the Commission’s current policy statement and the Bureau of Prisons’ program statement.

The revised policy statement also encourages the Director of the Bureau of Prisons to file a motion for a sentence reduction if the defendant meets any of the circumstances set forth in the Commission’s policy statement. While the BOP testified that the agency is trying to expedite consideration of compassionate release requests, we are concerned that so few have been granted.

We hope that these revisions prove to be a constructive step in addressing some of the concerns we heard both in public comment and at the public hearing regarding eligibility for compassionate release for the elderly, the terminally ill, and prisoners with other extraordinary and compelling circumstances.

I also want to briefly discuss the proposed amendment to Chapter Five of the Guidelines Manual, which concerns conditions of probation and supervised release. Based on a series of circuit court decisions criticizing several “standard” and “special” conditions of supervision over the past two years, both the Commission and the Criminal Law Committee reviewed the conditions of
supervision that appear both in the Guidelines Manual and also in the judgment form used by the Administrative Office of the U.S. Courts. Over the past year, our staff worked closely with the Criminal Law Committee’s staff to obtain helpful input from all of the stakeholders in the federal criminal justice system. From this process, the pending amendment seeks to revise many of the “standard” and commonly-imposed “special” conditions. One goal is to make sure that the conditions are not imposed woodenly and, instead, are designed to reflect the individual characteristics of each offender.

I want to thank Congressmen Blumenauer, Fitzpatrick, Marino, and McGovern and Senators Feinstein and Vitter for their public comment on our animal fighting amendment, as well as the many other stakeholders who also wrote to us, including the ASPCA and its members, the Humane Society, and various other animal welfare organizations. In fact, we received more pieces of public comment on this amendment than any in the history of the Commission!

The Commission has heard your concerns and today we vote to significantly increase the penalty for these offenses by increasing the base offense level for this crime from a level 10 to a level 16. This change will result in a 250 percent increase in the bottom of the applicable guideline range for the typical offender prosecuted for these offenses.

This change reflects the recent increase in the statutory maximum penalty from three to five years and better accounts for the cruelty and violence inherent in animal fighting crimes. We heard testimony about dogs who were being beaten, tortured, and killed. We found further support for this increase from Commission data evidencing a high percentage of above-range sentences in these cases. With today’s amendment, average sentences are more likely to be within or near the new sentencing range.

The Commission has also revised and expanded the existing departure language to address issues of extreme cruelty and neglect and animal fighting on an exceptional scale.

As the Supreme Court recognized in Braxton v. United States, it is the Commission’s responsibility to resolve conflicting interpretation of the guidelines by circuit courts, and today we vote to resolve several long-standing circuit conflicts in the area of child pornography. In doing so, we do not intend to either increase or decrease the guideline ranges or sentences for this class of offenses. Rather, the Commission merely intends to simplify several unnecessarily confusing issues that have arisen with great frequency in the context of the child pornography guidelines. In doing so, we are acting to make sure that these guidelines relating to distribution of child pornography will apply if any defendant knowingly distributed, conspired or willfully caused another person to distribute any sexually explicit material involving a minor.

While we believe these specific improvements to the child pornography guidelines are helpful, we recognize that they are limited in scope. We continue to urge Congress to act on the recommendations outlined in the Commission’s 2012 Report to Congress on federal child pornography offenses so that the Commission can make more comprehensive changes to the guidelines to better reflect the current spectrum of offender culpability and technological changes.
Today, the Commission will also vote on whether to promulgate a set of amendments to the guidelines for the two most common immigration offenses, alien smuggling (section 2L1.1) and illegal reentry (section 2L1.2). In recent years, immigration offenses have been either the most common federal offense type or a close second to drug offenses. Approximately 18,000 federal offenders were sentenced under just these two immigration guidelines in Fiscal Year 2015.

I want to address the amendments to the two immigration guidelines separately. I’ll start with the alien smuggling guideline. Back in the fall of 2014, former Deputy Attorney General James Cole wrote to the Commission, stating that the Department of Justice considered guideline penalties to be inadequate for alien smuggling offenders, particularly those offenders who smuggle unaccompanied minors. He observed that unaccompanied minors are the most vulnerable of all persons being smuggled and that they are sometimes subject to “unspeakable abuses,” including sexual abuse.

In recent years, our country has experienced an unprecedented migration of children from Central America. More than 100,000 children have come alone in the last two years, far outpacing previous years and seriously straining the U.S. system designed to provide care and custody for these particularly vulnerable refugees. Beginning in the fall of 2011 and every year forward, the numbers of children arriving at the border doubled until the height of the crisis in 2014 when more than 68,000 unaccompanied children were apprehended. This represented a nearly tenfold increase from the historical norm of 7,000-8,000 children from 2004-2011. Unaccompanied minors are being smuggled into the United States in record numbers, particular minors from Central American countries. At the Commission’s public hearing in March, we also received testimony from expert witnesses that these vulnerable minors are often subject to abuse – sexual and otherwise – during the course of smuggling offenses.

The amendment addresses the smuggling of unaccompanied minors in two important ways. First, it will increase the enhancement for smuggling unaccompanied minors from a 2-level increase to a 4-level increase. Second, the amendment will clarify that any sexual abuse, not just limited to minors, results in a 4-level increase in smuggling cases. These two changes better reflect the increased culpability of offenders who engage in some of the most serious types of alien smuggling offenses.

Next, I want to address the proposed amendment to the illegal reentry guideline, section 2L1.2. Based on the Commission’s most current data, this amendment is particularly important because illegal reentry comprises approximately 22 percent of the federal caseload, concentrated along the southwest border. In April of 2015, the Commission issued a report on illegal reentry offenses which can be found on our website.

There are two main points about that proposed amendment that I want to highlight: first, the amendment greatly simplifies the operation of the guideline, which has been the source of a great deal of litigation, uncertainty, and criticism. The proposed amendment does so by abandoning the so-called “categorical approach” to determine whether illegal reentry offenders’ prior felony convictions warrant an enhancement.
Courts and stakeholders for many years have complained that the categorical approach is too complex and resource-intensive. For example, because every state defines its crimes differently and state records are hard to obtain, it is often difficult to determine if a crime falls within the definition of a “crime of violence.”

Currently, courts, probation officers, and practitioners devote enormous resources to applying the “categorical approach” to determine whether prior convictions should receive an enhancement as a “crime of violence,” a “drug trafficking” offense, or an “aggravated felony.” The categorical approach also has proven to be an ineffective way of identifying the most severe offense types for enhancement.

Instead of the categorical approach, the proposed amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. In other words, the level of the sentencing enhancement will be determined by the length of the sentence imposed by the sentencing judge.

We think this change is appropriate because the length of sentence imposed by a sentencing judge is a good indicator of how serious the court viewed the offense at the time. This significant change also avoids all the complications of the categorical approach.

The vast majority of the witnesses at our March hearing favored the sentence-imposed model. We received support for this approach from four of the five districts with the highest illegal reentry caseload. In addition, the Department of Justice and two of the Commission’s advisory groups – the Probation Officers Advisory Group (POAG) and the Practitioners Advisory Group (PAG) – support the proposed amendment. Witnesses for both advisory groups testified that the sentence-imposed model would be much easier to apply than the categorical approach and would result in savings of judicial resources, at both the trial court and appellate levels. Some witnesses suggested that the sentence-imposed model can be problematic because different counties punish crimes differently, particularly if a judge thinks that a defendant is about to be deported. The Commission has addressed those concerns by clarifying that a departure is available in cases where the sentence imposed either overstates or understates the seriousness of the prior offense.

I would like to recognize that the Commission also did receive a great deal of public comment in favor of a “sentence served” model. While we reviewed and considered these views carefully and seriously, ultimately, this approach is not feasible given the limits of state recordkeeping. The sentence-imposed approach is also consistent with how the guidelines score criminal history generally.

The second point I would make is that the proposed amendment accounts for the past criminal conduct of these offenders in a broader – and more proportionate – manner. Specifically, the amendment addresses concerns raised about the severity of the current 16-level enhancement for prior felonies based solely on a defendant’s single most serious conviction prior to his or her first deportation. Depending on the nature of that conviction, an enhancement of as much as 16 levels can occur.
Even if an offender’s predicate conviction is so old that it does not receive criminal history points under the guidelines, a defendant still can receive as much as a 12-level enhancement. For this reason alone, the Commission has heard repeated complaints about this guideline, particularly these 16 and 12 level enhancements, which apply to nearly one-third of all illegal reentry cases. The Commission’s sentencing data is consistent with these concerns. Indeed, only 27.4 percent of defendants who currently receive the enhancement are sentenced within the recommended guideline range. Accordingly, the pending amendment reduces the level of enhancement for a single pre-deportation conviction to a maximum of 10 levels.

But at the same time, it addresses a concern that the existing guideline only captures criminal conduct that occurs prior to the offender’s first deportation. In its recent report, the Commission concluded that 48 percent of illegal reentry offenders in the study sample were convicted of at least one offense after their first deportation other than a prior illegal reentry conviction.

In addition, immigrants convicted of illegal reentry have reentered the country an average of 3.2 times. Yet, the current guideline does not account for any criminal conduct that may be committed after the offender illegally reenters the United States. The proposed amendment adds a new tiered enhancement specifically aimed at criminal conduct occurring after the defendant has reentered the country illegally. It also adds an enhancement to account for the number of times an offender has been convicted of illegal reentry.

I would also point out that the amendment differs from the proposal published in January in that it does not increase the base offense level in the illegal reentry guideline. The Commission received a great deal of public comment on this particular issue citing statistics in the Commission’s 2015 report. The report found that:

- one-half of these offenders had at least one child living in the United States;
- these offenders had an average age of 17 at the time of their initial entry into the United States; and
- nearly three-quarters had worked in the United States for more than one year at some point prior to their arrest for the instant offense.

Many unlawful immigrants keep returning to work and/or to be with their family, or out of fear of drug traffickers, not to commit crimes. The Commission was persuaded by the majority of public comment and its own sentencing data that the current base offense level of 8 should remain unchanged.

I would note that the Commission is unable to conduct its typical impact analysis for this proposed change because it is impossible to predict how the various fast-track programs, which expedite deportation, may be revised after its implementation, and fast-track programs play such a large role in illegal reentry cases, particularly along the southwest border. I can say, however, that the Commission estimates that the average guideline minimum would decrease from 21 months to 18 months as a result of the new amendment. This does not mean that the average sentence will decrease and, yet, for the reasons that I already mentioned, there may even be some sentences that will increase.
In sum, we believe that the proposed amendment will be easier to apply, reduce litigation and uncertainty, mitigate areas of over-severity, and properly account for criminal conduct that currently is not reflected in the illegal reentry guideline.

Next, I want to briefly discuss the topic of retroactivity. The Commission has statutory authority to make any amendment retroactive if it will have the effect of lowering penalties for a category of offenses or offenders. In deciding whether to make an amendment retroactive, the Commission considers several factors, including the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.

First, with respect to the immigration amendment, as I mentioned earlier, the purpose of that amendment in great part was to simplify its operation, reduce litigation and uncertainty, and to more broadly and proportionately account for criminal conduct. The amendment is expected to decrease guideline ranges for some offenders but increase them for others. Furthermore, it would be extremely difficult to identify offenders who might benefit from retroactivity because the Commission does not routinely collect data about deportation dates or about which prior conviction or the type of prior offense that resulted in an enhancement under the current illegal reentry guideline.

Similarly, the purpose of the amendment to the child pornography guidelines was not to effectuate an overall reduction in guideline penalties, although it may have the effect of reducing the guideline range for some offenders. The amendment is intended to simplify guideline application and resolve the litigation surrounding certain aspects of its operation. Like the immigration amendment, the Commission does not routinely collect the information concerning the intent of the distributor necessary to identify and characterize the offenders who might benefit from retroactivity. Ascertaining the overall effect of the amendment would be difficult because that determination depends on data that the Commission does not routinely collect.

For these reasons the Commission has decided against retroactivity.

Finally, I would like to take a few minutes to address the Bipartisan Budget Act of 2015. The Act passed in November 2015, after the Commission’s amendment cycle had commenced. When new legislation is enacted in the waning days of the calendar year, it is not uncommon for the Commission to delay action and to defer to the following amendment cycle because of the abbreviated time frame in which to work on the issue.

In this particular instance, the Commission voted in January to publish a proposed amendment that would provide a guideline reference for the new conspiracy offenses created by that Act but did not publish any specific offense characteristics or other guideline changes to specifically address the increased statutory maximum for certain types of offenders, such as third-party facilitators. The Commission received written comment from Members of Congress, the Justice Department and the Inspector General of the Social Security Administration suggesting that the change, as initially proposed, does not adequately address the type of cases and offenders covered by the new 10-year statutory maximum penalty. I would like to acknowledge the important years of work, as well as the continued oversight, led by the Senate Committee on Finance and the House Ways and Means Committee, as well as the Senate and House Judiciary
Committees, to ensure aggressive implementation of these new penalties relating to Social Security fraud.

Specifically, I would like to acknowledge the thoughtful letter from Chairmen Goodlatte, Brady and Hatch expressing their views on the proposed amendment. The Commission continues to take into consideration this feedback as well as the public comment in support of specific sentencing enhancements.

At this juncture, the Commission is persuaded that this issue merits additional study before making a final policy decision. Accordingly, the Commission has decided to defer action on the Act until the next amendment cycle. This issue will remain a priority for us next year and we look forward to working with the Congress, the relevant agencies and the stakeholders as we move forward into the next amendment cycle.
Chair Patti B. Saris called the meeting to order at 1:30 p.m. in the Commissioners’ Conference Room.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Michelle Morales, Commissioner Ex Officio

The following Commissioner was not present:

- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Chair Saris welcomed the members of the public, both in person and watching via the Commission’s livestream broadcast, and thanked the attendees for their continued interest in the Commission’s work.

Chair Saris called for a motion to adopt the January 8, 2016, public meeting minutes. Commissioner Pryor made a motion to adopt the minutes, with Vice Chair Breyer seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris recounted that in January the Commission unanimously voted to adopt an amendment related to the definition of “crime of violence” in §4B1.1 (Career Offender) and other federal sentencing guidelines. The effective date for that amendment is August 1, 2016, and the Commission will publish a supplement to the Guidelines Manual that incorporates the new amendment at that time.

Chair Saris stated that the January amendment was not the Commission’s final work related to the area of “crimes of violence.” She noted that the Commission was working on a Report to Congress on career offenders and other recidivist provisions, which may include recommended statutory changes.

Chair Saris also noted that the Commission was accepting written public comment on proposed revisions to the Commission’s Rules of Practice and Procedure. She added that written public comment on the proposed changes should be submitted by June 1, 2016. The proposed changes
can be found at the Commission’s website at www.uscc.gov. Instructions on the submission of public comment were on the website as well as a link to sign up for the Commission’s Twitter and e-mail alerts.

Chair Saris next highlighted the Commission’s recent research projects and publications. She announced the release of the first in a series of publications on the Commission’s multi-year recidivism study. The Chair stated that the study was groundbreaking in both its breadth and in its duration, analyzing recidivism in multiple ways, including re-arrest, re-conviction, and/or re-incarceration.

Some of the key findings of the report were:

- Nearly one-half (49.3%) of the federal offenders studied were re-arrested within 8 years of release for either a new crime or for some other violation of the conditions of their probation or release. Almost one-third (31.7%) were re-convicted, and one-quarter were re-incarcerated.
- The guideline’s criminal history score remains a very good predictor of future recidivism. Age, offense type and educational level were also associated with future recidivism.
- In addition, with the exception of very short sentences (less than 6 months), the rate of recidivism varied very little by length of prison sentence imposed.

Chair Saris also noted that the Commission recently published its Fiscal Year 2015 Annual Report and Sourcebook of Federal Sentencing Statistics. She observed that one of the most interesting trends was that the federal criminal caseload continued to shrink. In past years, Chair Saris explained, the decreased caseload was largely driven by declining immigration cases, but for fiscal year 2015, the decreases were more evenly distributed across the major offense types.

Chair Saris stated that the Commission’s 2016 Annual National Training Seminar will be held in Minneapolis, MN, on September 7th to the 9th. Registration information will be posted on the Commission’s website. She noted that last September approximately 1,000 judges, probation officers, and practitioners attended the Commission’s Annual National Training Seminar in New Orleans, LA.

Chair Saris called on Ms. Grilli to inform the Commission on possible votes to promulgate proposed amendments to the Guidelines Manual. The Chair noted that four affirmative votes were needed to promulgate an amendment.

Ms. Grilli stated that the first proposed amendment, attached hereto as Exhibit A, was a multi-part amendment that responds to recently enacted legislation and miscellaneous guideline application issues. Part A of the proposed amendment responds to the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. No. 114–23 (June 2, 2015), which, among other things, set forth changes to statutes related to maritime navigation and provided new and expanded criminal offenses to implement certain provisions in international conventions relating to maritime and
nuclear terrorism. Part A responds to the USA FREEDOM Act of 2015 by referencing the new offenses in Appendix A (Statutory Index) to various Chapter Two guidelines and making appropriate clerical changes.

Part B of the proposed amendment amends Appendix A to reference offenses under 18 U.S.C. § 1715 (Firearms as nonmailable; regulations) to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) and establishes a base offense level of 6 for such offenses.

Part C of the proposed amendment amends the Background Commentary to §2T6.1 (Failing to Collect or Truthfully Account for and Pay Over Tax) and makes corresponding changes to the Introductory Commentary to Chapter Two, Part T, and in the Background Commentary to §§2T2.1 (Non-Payment of Taxes) and 2T2.2 (Regulatory Offenses).

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion, and, hearing no discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, was a result of the Commission’s work in reviewing the policy statement pertaining to “compassionate release” at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons). First, the proposed amendment revises the Commission’s guidance on what should be considered “extraordinary and compelling reasons” for compassionate release. It provides four broad categories: “Medical Condition of the Defendant,” “Age of the Defendant,” “Family Circumstances,” and “Other Reasons.”

Second, the proposed amendment amends the Commentary in §1B1.13 to provide that an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction.

Third, the proposed amendment adds a new application note encouraging the Director of the Bureau of Prisons (BOP) to file a motion if the defendant meets any of the circumstances listed as “extraordinary and compelling reasons”.

Finally, the proposed amendment adds a reference to the Commission’s general policy-making authority under 28 U.S.C. § 994(a)(2) to the Background Commentary at §1B1.13.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.
Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. Chair called for discussion on the motion.

Commissioner Barkow noted that the Department of Justice had requested the Commission to consider adopting criteria equivalent to the Bureau of Prison’s current compassionate release criteria. Additionally, the Department of Justice emphasized that no inmate can be released without first filing a motion for compassionate release with the Bureau of Prison, signifying that it is the gatekeeper for this process.

However, Commissioner Barkow emphasized, Congress did not give the Bureau of Prison exclusive authority over the compassionate release program. Rather, Congress charged the Commission with describing in general policy statements what should be considered extraordinary and compelling reasons for a sentence reduction under 28 U.S.C. § 994(t). Thus, while the Commission takes the Bureau of Prison’s views seriously, she stated that the Commission nevertheless has an independent responsibility to set out such criteria.

Commissioner Barkow explained that where the Commission made changes from Bureau of Prison criteria, it did so based on significant evidence. For example, whereas the Bureau of Prison insists that a terminal illness be considered serious only where it is accompanied by a life expectancy of 18 months or less, the Commission’s record showed that this did not comport with medical practice, which instead emphasized an end-of-life trajectory. As a result, she continued, the Commission’s criteria removed the 18-month requirement and reflected what the Commission learned from research. In this regard, Commissioner Barkow expressed the Commission’s appreciation for the testimony of Dr. Brie Williams on this issue. In the proposed amendment, she noted, there were specific examples of the kinds of serious and advanced illnesses with an end-of-life trajectory that are covered, including amyotrophic lateral sclerosis (ALS), end-stage organ disease, and metastatic solid tumor cancer.

Commissioner Barkow stated that the Commission’s criteria made clear that compassionate release was available to inmates 65 years old or older, experiencing seriously deteriorating health, and who had received sentences of less than ten years. Under BOP’s current policy, she explained, an individual must serve at least ten years before being considered for compassionate release, which had the perverse effect of extending this option to those who commit more serious offenses, but not to those who commit less serious offenses and are suffering from equally deteriorating health. The Commission made clear, she added, that you do not have to have a sentence of ten years, but are eligible if you serve at least 75 percent of your sentence, whichever is less, to make clear that compassion is not reserved only for those who commit crimes that are more serious.

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1 Dr. Brie Williams, Associate Professor of Medicine, Division of Geriatrics, University of California, San Francisco, testified before the Commission at its February 17, 2016, public hearing. Dr. Williams’ testimony is available on the Commission’s webpage at: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/williams.pdf.
Commissioner Barkow stated that she would have extended the criteria to include individuals as young as 60 years old based on the Commission’s recidivism data and Dr. Williams’ testimony on aging, but believed the proposed amendment reaching 65 year olds was amply supported by the record. She observed that the Commission in the proposed amendment encouraged the Bureau of Prison to file motions when individuals meet the criteria as that was all the statute allows the Commission to do, to encourage. She expressed her wish that the Commission could do more as the record is filled with heart-breaking cases of individuals dying in prison and their families and friends shut out from spending their last days with them because of a Bureau of Prison process that was broken, which was well-documented by a report published by Department of Justice’s Inspector General and the Commission’s own record.⁡

Commissioner Barkow emphasized that the issue is not just a question of compassion, but public safety and the rational deployment of resources. Inmates over 50 years old are the fastest growing segment at Bureau of Prison and the Department of Justice’s Inspector General found that the Bureau of Prison spends about one-fifth of its budget on aging inmates who are more costly because of their medical needs. The Inspector General found that Bureau of Prison lacks specific programming to meet the needs of this growing population and has a woefully inadequate number of social workers to address their needs: There are only 36 social workers for the entire Bureau of Prison. Commissioner Barkow noted that this population also has lower recidivism rates and releasing these individuals would free up space in overcrowded prisons and the resources saved could be spent on more significant law enforcement needs. She expressed her hope that the Commission would work with Bureau of Prison to get more compassionate release motions filed in court because it was in the interest of everyone to do so.

Chair Saris thanked everyone who testified at the Commission’s hearing in February or submitted public comment, including representatives from the Criminal Law Committee, the Department of Justice, the Bureau of Prisons, the Inspector General, the Federal Public Defenders, the Practitioners Advisory Group, Dr. Brie Williams, the American Civil Liberties Union, Families Against Mandatory Minimum, and the National Association of Criminal Defense Lawyers, among others.

Chair Saris stated that Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentence reduction. With the vote on the proposed amendment, she continued, the Commission was exercising its authority in this area to broaden the criteria beyond that in the Commission’s current policy statement and the Bureau of Prisons’ current program statement.

Chair Saris explained that the revised policy statement also encourages the Director of the Bureau of Prisons to file a motion for a sentence reduction if the defendant meets any of the circumstances set forth in the Commission’s policy statement. She noted that, while the Bureau of Prisons testified at the Commission’s February public hearing that the agency was trying to

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expedite consideration of compassionate release requests, the Commission was concerned that so few have been granted. The Bureau of Prisons reported that between August 2013 and December 2015, it received 3,142 requests for compassionate release based on medical- or age-related reasons. For the same time period, the Bureau of Prisons granted 261 requests based on medical- or age-related reason, and 68.2 percent of the requests granted were for terminally ill offenders.

Chair Saris expressed the Commission’s hope that the proposed amendment would be a constructive step in addressing some of the concerns it heard both in public comment and at the February public hearing regarding eligibility for compassionate release for the elderly, the terminally ill, and prisoners with other extraordinary and compelling circumstances.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, revises, clarifies, and rearranges the conditions of probation and supervised release. It was a result of the Commission’s multi-year review of federal sentencing practices relating to conditions of probation and supervised release. It was also informed by a series of opinions issued by the Seventh Circuit in recent years. In general, the changes were intended to make the conditions of supervision found in §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) easier for defendants to understand and probation officers to enforce.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the vote.

Chair Saris explained that, based on a series of circuit court decisions criticizing several “standard” and “special” conditions of supervision over the past two years, both the Commission and the Judicial Conference of the United States’ Criminal Law Committee reviewed the conditions of supervision that appear both in the Guidelines Manual and also in the judgment form used by the Administrative Office of the United States Courts. Over the past year, she continued, Commission staff worked closely with the Criminal Law Committee’s staff to obtain helpful input from all of the stakeholders in the federal criminal justice system. From this process, the proposed amendment revises many of the “standard” and commonly-imposed “special” conditions. Chair Saris observed that one goal was to make sure that the conditions are not imposed woodenly and, instead, are designed to reflect the individual characteristics of each offender.

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3 See, e.g., United States v. Adkins, 743 F.3d 176 (7th Cir. 2014); United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013); United States v. Quinn, 698 F.3d 651 (7th Cir. 2012); United States v. Siegel, 753 F.3d 705 (7th Cir. 2014).
Hearing no further discussion, the Chair called for a vote. The motion was adopted with at least four commissioners voting in favor of the motion.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, concerned animal fighting offenses. The proposed amendment revises §2E3.1 (Gambling Offenses; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and responds to two new offenses relating to attending an animal fighting venture.

The proposed amendment also revises §2E3.1 to provide a base offense level of 16 if the offense involved an animal fighting venture. It establishes a base offense level of 10 in §2E3.1 if the defendant was convicted of causing an individual under 16 to attend an animal fighting venture and a base offense level of 6 in §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)) for attending an animal fighting venture.

Finally, the proposed amendment revises the existing upward departure provision in §2E3.1.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to promulgate the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the vote.

Chair Saris thanked Congressmen Blumenauer, Fitzpatrick, Marino, and McGovern, and Senators Feinstein and Vitter, for their public comment on the animal fighting amendment, as well as the many other stakeholders, including the American Society to Prevent Cruelty to Animals, the American Humane Society, and other animal welfare organizations. In fact, she added, the Commission received more pieces of public comment, approximately 50,000 pieces, on this amendment than any other in the Commission’s history.

Chair Saris stated that the Commission heard the stakeholder’s concerns and the proposed amendment would significantly increase the penalties for these offenses by increasing the base offense level from a level 10 to a level 16. The proposed change would result in a 250 percent increase in the bottom of the applicable guideline range for the typical offender prosecuted for these offenses.

Chair Saris explained that the proposed change reflected the recent increase in the statutory maximum penalty from three to five years and better accounted for the cruelty and violence inherent in animal fighting crimes. She noted that the Commission heard testimony at the Commission’s March public hearing about dogs who were beaten, tortured, and killed, and found further support for an increase from Commission data evidencing a high percentage of above-range sentences in these cases. Under the proposed amendment, she added, average sentences were more likely to be within or near the new sentencing range. The proposed amendment also revised and expanded the existing departure language to address issues of extreme cruelty and
neglect and animal fighting on an exceptional scale.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit E, addressed circuit conflicts and application issues that have arisen when applying the guidelines to child pornography offenses.

First, the proposed amendment responds to differences among the circuits in cases in which the offense involved infants or toddlers. The applicable guidelines, §§2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) and 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), currently include an age enhancement for minors under the age of 12, but these two guidelines do not provide a further enhancement for cases in which the victim was unusually young and vulnerable, i.e., infants or toddlers. Courts have differed over whether the vulnerable victim adjustment at subsection (b)(1) of §3A1.1 (Hate Crime Motivation or Vulnerable Victim) may be applied when the victim is an infant or toddler. The proposed amendment responds to the circuit conflict by providing higher penalties for cases involving infants or toddlers. It does so by amending existing enhancements in those guideline to include infants and toddlers within the scope of those enhancements.

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancements for distribution in §2G2.2 and similar enhancements in §2G2.1 and §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names). There are two related issues that typically arise these cases.

The first issue is when a participant’s use of a peer-to-peer file-sharing program or network warrants at minimum a 2-level enhancement under §2G2.2(b)(3)(F). The proposed amendment amends §2G2.2(b)(3)(F) to provide that the 2-level enhancement applies if “the defendant knowingly engaged in distribution.” An accompanying application note defines that term. Similar changes to the 2-level distribution enhancements at §§2G2.1(b)(3) and 2G3.1(b)(1)(F) are also made.

The second issue is when, if at all, the use of a peer-to-peer file-sharing program or network warrants a 5-level enhancement under §2G2.2(b)(3)(B) instead. The proposed amendment revises §2G2.2(b)(3)(B) and the accompanying commentary to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. The proposed amendment makes parallel changes to §2G3.1(b)(1)(B) and the accompanying commentary.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and
conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the vote.

Chair Saris stated that as the Supreme Court recognized in *Braxton v. United States*, it is the Commission’s responsibility to resolve conflicting interpretation of the guidelines by circuit courts, and the Commission would be voting to resolve several long-standing circuit conflicts in the area of child pornography. In doing so, she continued, the Commission did not intend to either increase or decrease the guideline ranges or sentences for this class of offenses. Rather, the Commission intended to simplify several unnecessarily confusing issues that have arisen with great frequency in the context of the child pornography guidelines. Chair Saris emphasized that by doing so, the Commission was acting to make sure that these guidelines related to distribution of child pornography will apply if any defendant knowingly distributed, conspired, or willfully caused another person to distribute any sexually explicit material involving a minor.

Chair Saris expressed the Commission’s belief that these specific improvements to the child pornography guidelines would be helpful and recognized that they are limited in scope. She urged Congress to act on the recommendations outlined in the Commission’s 2012 *Report to the Congress: Federal Child Pornography Offenses* so that the Commission can make more comprehensive changes to the child pornography guidelines to better reflect the current spectrum of offender culpability and technological changes.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli stated that the final proposed amendment, attached hereto as Exhibit F, had two parts and was the result of the Commission’s multi-year study of the guidelines applicable to immigration offenses and related criminal history rules. Part A of the proposed amendment revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The proposed amendment amends the existing enhancement at §2L1.1(b)(4) by making it offense-based rather than defendant-based. Second, it provides that an unaccompanied minor is a minor unaccompanied by a parent, adult relative, or legal guardian. Third, it revises the definition of “minor” from an individual under the age of 16 to an individual under the age of 18. Finally, it raises the enhancement from 2 levels to 4 levels.

The proposed amendment also addresses offenses in which an alien (whether or not a minor) is sexually abused. To ensure that the existing “serious bodily injury” enhancement of 4 levels will apply in such a case, the amendment amends the commentary to §2L1.1 to clarify that the term “serious bodily injury” includes conduct constituting criminal sexual abuse.

Part B of the proposed amendment amends §2L1.2 (Unlawfully Entering or Remaining in the United States) eliminates the use of the “categorical approach” for predicate felony convictions in §2L1.2.
First, the proposed amendment provides at §2L1.2(b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses.

Second, the proposed amendment changes how §2L1.2 accounts for pre-deportation convictions — basing them not on the type of offense but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivisions (A) through (D) at §2L1.2(b)(2).

Third, to account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(3) in §2L1.2 to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more offenses after the defendant was ordered deported or ordered removed from the United States for the first time.

The proposed amendment also makes several changes to the commentary, including a revised departure provision reflecting these structural changes.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment, with an effective date of November 1, 2016, and with staff authorized to make technical and conforming changes as needed would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion.

Commissioner Friedrich stated that she supported the proposed amendment because, in her view, it would dramatically simplify the application of §2L1.2, a guideline applied in nearly a quarter of the cases federally prosecuted each year, in a manner that would result in more proportionate punishment for illegal re-entrants.

Commissioner Friedrich noted that during her nearly ten years of service on the Commission, the Supreme Court has decided every term one or more cases involving the categorical approach, which applies to §2L1.2, the re-entry guideline. As four appellate judges opined in a recent case addressing the categorical approach in a different context, she continued, “[a]lmost every Term, the Supreme Court issues a ‘new’ decision with slightly different language that forces federal judges, litigants, lawyers and probation officers to hit the reset button once again.” In the view of these judges, “[a] better mouse trap is long overdue,” one that uses “a more objective standard, such as the length of the underlying sentence.”

Commissioner Friedrich stated that this is exactly what the proposed amendment does. It abandons the categorical approach in favor of a simpler model that bases key enhancements on the length of an offender’s prior sentence rather than on the nature of the offender’s prior

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4 See Almanza-Arenas v. Lynch, 815 F.3d 469, 483 (9th Cir. 2016).

5 Id.
offense. Case after case, she recalled, as well as the testimony of numerous stakeholders who have appeared before the Commission over the past ten years, has demonstrated the difficulty in applying the categorical approach to state statutes that vary tremendously across jurisdictions. Not only does this process raise complex legal issues, Commissioner Friedrich observed, it also requires probation officers and litigants to track down dated state criminal records, often without success.

Commissioner Friedrich emphasized that the proposed changes to §2L1.2 would simplify the work of federal courts, probation officers, and litigants, and ensure that additional aggravating factors, such as recent criminal conduct and prior illegal entry convictions, would be taken into account in calculating an offender’s offense level. These additions, she noted, as well as mitigating aspects of the proposed amendment, would better account for the culpability of individual offenders.

Commissioner Friedrich acknowledged that there was little doubt that in some cases the newly restructured amendment would over- or understate the seriousness of an offender’s prior criminal conduct. However, the proposed amendment’s revised departure language also grants judges explicit authority to depart upward and downward as warranted by the facts of the offender’s prior criminal record.

In closing, Commissioner Friedrich noted that the proposed amendment was supported by, among others, the vast majority of border judges who provided testimony to the Commission, the Department of Justice, the Practitioners Advisory Group, and the Probation Officers Advisory Group.

Commissioner Barkow noted that the Department of Justice had asked for an increase in the base offense level at §2L1.1, which would have been effectively an across the board increase in all alien smuggling cases. In the Department of Justice’s view, all such cases were increasingly dangerous and were tied to criminal organizations. She stated that while the Commission looked very closely at the issue, its data did not justify such an across the board increase. Critically, Commissioner Barkow continued, the Department of Justice itself seeks a sentence below the current base offense level in 37.2 percent of all cases as part of its fast-track disposition program, which undercuts its view that all cases are equally serious.

Commissioner Barkow stated that the Commission also found that the majority of alien smuggling offenders perform low level functions in the smuggling operation, making it inappropriate to raise the base offense level for all offenders. Instead, she explained, the proper course of action would be to address the cases with higher risk with special offense characteristics, which is what the guidelines do. If an alien smuggling offense involved the intentional or reckless creation of a substantial risk of death or serious bodily injury to another person, the offense level is increased to level 18, a level higher than the level 16 requested by the Department of Justice. If a person is actually seriously injured during the offense, 4 levels are added; if the injury is permanent or life threatening, 6 levels are added; if death results, 10 levels are added; if a dangerous weapon is possessed, the offense level will be 18.
Commissioner Barkow observed that the proposed amendment addressed the increasing instances of cases involving unaccompanied minors by increasing the specific offense characteristic from 2 levels to 4 levels. She explained that the guidelines link the offender’s offense level with his or her culpability. If the offense creates a risk to human life or causes injury, the guidelines account for that conduct. But, Commissioner Barkow emphasized, it makes no sense to change the base offense level for everyone on this record when the cases themselves are not uniform, which is what the Commission’s record and the Department of Justice’s own practices reflect.

Commissioner Morales thanked the Commission on behalf of the Attorney General of the United States for its work during the amendment cycle as the Commission and Department of Justice worked together to improve the sentencing guidelines. She also personally thanked the commissioners and staff for welcoming her when she joined as an ex officio commissioner in the middle of the amendment cycle.

Commissioner Morales stated that the Department of Justice was grateful to the Commission for eliminating the categorical approach from the illegal re-entry guideline, an approach, she added, that resulted in vastly different results in cases across the country and consumed many prosecutorial and judicial resources. While not a perfect solution, and the Department does not believe there is a perfect solution, Commissioner Morales acknowledged, the Commission’s action will have an immediate and substantial positive impact. She stated that it was especially appreciated that the Commission also amended the guideline to account for the defendant’s recent criminal conduct, not just the defendant’s pre-deportation conduct, and to account for multiple previous convictions.

However, Commissioner Morales expressed the Department of Justice’s frustration concerning the Commission’s failure to raise penalties across the board for smuggling offenses. The Department of Justice did not believe the penalties properly reflect the seriousness of the offense. She recounted how the Director of United States Immigration and Customs Enforcement, Sarah R. Saldaña, noted in a letter to the Commission that alien smuggling offenses exposed migrants to a wide-variety of dangers at every stage of the process regardless of the roles the defendants appearing before the courts performed. She also noted that these offenses resulted in countless injuries and deaths, most of which are not accounted for in the enhancements.

On the other hand, Commissioner Morales continued, the Department of Justice thanked the Commission for increasing the enhancement for smuggling minors and expanding the scope of the enhancement to include victims under the age of 18 years. She stated that the Department of Justice intends to leverage these and other applicable sentencing enhancements to get sentences that correlate more closely to the seriousness of aliening smuggling offenses.

Commissioner Morales thanked the Commission for raising the penalties for animal fighting offenses. Deputy Attorney General Jean Williams noted in her testimony at the March public hearing that trends point to an increase in both unlawful animal fighting activity and law enforcement’s response to it. Commissioner Morales indicated that the Department of Justice is working to reverse this trend and the increased guideline penalties will serve as a very useful tool.
in combating this offense.

Regarding the child pornography circuit conflict amendment, Commission Morales stated that the Department of Justice supported the Commission’s decision to add a mens rea element to address the circuit conflict, and while the language does not track the Department’s recommendations, it was encouraged that the Commission clarified that the enhancement for distribution will apply to those who engage in a conspiracy to distribute, that it will specifically reference distribution in exchange for valuable consideration, and the sexual abuse of infants and toddlers was specifically referenced. She emphasized that these victims were the most vulnerable and defendants targeted them because they are the least able to communicate their victimization.

Concerning compassionate release, Commissioner Morales stated that the Bureau of Prisons engages in a rigorous analysis of the defendant’s circumstances to include the nature of the underlying offense, public safety concerns, victims’ comments, and institutional adjustment, among many other factors, before determining whether to file a motion pursuant to its statutory authority.

Nevertheless, Commissioner Morales continued, the Department of Justice was re-examining its policies to determine whether, and to what extent, changes to current sentence reduction policies were necessary and advisable. In light of this review, Commissioner Morales expressed the Department of Justice’s disappointment that the Commission decided not to work more closely with it in developing guidelines so that all the criteria could be more closely aligned. Additionally, she expressed concern that the Commission’s new criteria were too broad and too vague, and would seem to make eligible inmates that, in the Department of Justice’s view, should not benefit from an early release.

Commissioner Morales concluded by stating that she and the Department of Justice looked forward to working with the Commission in the next year.

Vice Chair Breyer agreed with Commissioner Morales’ statement that the Bureau of Prisons had its own set of considerations regarding the compassionate release process, but noted that the Commission’s organic statutes empowers and directs the Commission to set forward a set of criteria that judges can follow in exercising their judgment.

Vice Chair Breyer stated that, normally, the Commission would not have to consider a set of guidelines or criteria different than the Bureau of Prisons, but in his view the Bureau of Prisons has not rigorously analyzed the companionate release petitions filed by inmates. He noted that the Inspector General’s report indicated that that the Bureau of Prisons has not been vigorous in carrying out the congressional directive with respect to compassionate release. And because of that inactivity, he asserted, and because the Commission believed it has a responsibility to carry out congressional directives, the Commission developed its own set of criteria.

Vice Chair Breyer stated that while there are differences between the Commission and Bureau of Prisons’ criteria, that is not really the problem. In his view, the real problem was that the Bureau
of Prisons has not been responsive to this congressional directive. Vice Chair Breyer recounted Chair Saris’ earlier remarks that numerous prisoners have died pending consideration by the Bureau of Prisons of their request for compassionate release, and it was that inactivity, in his view, that prompted the Commission to respond to the concerns raised by a number of witnesses at the March hearing.

Vice Chair Breyer expressed his delight that the Department of Justice and the Bureau of Prisons wanted to work with the Commission as he believed they should all work together. But, he continued, working together was not a substitute for inaction and therefore the Commission’s role in establishing a set of criteria demonstrated the urgency and the necessity for the Bureau of Prisons to respond to congressional directive. He closed by asserting that the Commission has responded and he trusts that the Bureau of Prisons will do so as well.

Chair Saris stated that the Commission was voting to amend the guidelines for the two most common immigration offenses, alien smuggling (§2L1.1) and illegal reentry (§2L1.2). In recent years, immigration offenses have been either the most common federal offense type or a close second to drug offenses. Approximately 18,000 federal offenders were sentenced under §2L1.1 or §2L1.2 in Fiscal Year 2015.

Regarding the alien smuggling guideline, Chair Saris noted that in fall 2014, former Deputy Attorney General James Cole wrote to the Commission that, in the Department of Justice’s view, the guideline penalties for alien smuggling were inadequate, particularly for those offenders who smuggle unaccompanied minors. Mr. Cole observed that unaccompanied minors are the most vulnerable of all persons being smuggled and that they are sometimes subject to “unspeakable abuses,” including sexual abuse.

Chair Saris stated that in recent years our country has experienced an unprecedented migration of children from Central America. More than 100,000 children have come in the last two years alone, far outnumbering previous years and seriously straining the United States system designed to provide care and custody for these particularly vulnerable refugees. Beginning in the fall of 2011 and every year forward, she continued, the numbers of children arriving at the border doubled until the height of the crisis in 2014 when more than 68,000 unaccompanied children were apprehended. This represented a nearly tenfold increase from the historical norm of 7,000-8,000 children from 2004-2011. Unaccompanied minors are being smuggled into the United States in record numbers, particular minors from Central American countries. Chair Saris recalled how, at the Commission’s public hearing in March, the Commission received testimony from expert witnesses that these vulnerable minors are often subject to abuse – sexual and otherwise – during the course of smuggling offenses.

Chair Saris stated that the proposed amendment addressed the smuggling of unaccompanied minors in two important ways. First, it would increase the enhancement for smuggling unaccompanied minors from a 2-level increase to a 4-level increase. Second, the amendment will clarify that any sexual abuse, not just limited to minors, results in a 4-level increase in smuggling cases. The two proposed changes, she added, better reflect the increased culpability of offenders who engage in some of the most serious types of alien smuggling offenses.
Turning to the proposed amendment to the illegal reentry guideline, §2L1.2, Chair Saris noted that, based on the Commission’s most current data, the amendment was particularly important because illegal reentry comprises approximately 22 percent of the federal caseload, concentrated along the southwest border. In April of 2015, she continued, the Commission issued a report, Illegal Reentry Offenses, which can be found on the Commission’s website.

Chair Saris highlighted two main points about the proposed amendment. First, the amendment would greatly simplify the operation of §2L1.2, which has been the source of a great deal of litigation, uncertainty, and criticism. The amendment would do so by abandoning the so-called “categorical approach” to determine whether illegal reentry offenders’ prior felony convictions warranted an enhancement.

Chair Saris recounted how the courts and stakeholders, for many years, have complained that the categorical approach is too complex and resource-intensive. For example, because every state defines its crimes differently and state records are hard to obtain, it is often difficult to determine if a crime falls within the definition of a “crime of violence.”

Currently, Chair Saris noted, courts, probation officers, and practitioners devote enormous resources to applying the categorical approach to determine whether prior convictions should receive an enhancement as a “crime of violence,” a “drug trafficking” offense, or an “aggravated felony.” The categorical approach also has proven to be an ineffective way of identifying the most severe offense types for enhancement.

Chair Saris explained that, instead of the categorical approach, the proposed amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. In other words, she added, the level of the sentencing enhancement will be determined by the length of the sentence imposed by the sentencing judge.

Chair Saris stated that the Commission believes the proposed change was appropriate because the length of sentence imposed by a sentencing judge is a good indicator of how serious the court viewed the offense at the time and also avoids the complications of the categorical approach.

Chair Saris recalled how the vast majority of the witnesses at the Commission’s March hearing favored the sentence-imposed model. She noted that four of the five districts with the highest illegal reentry caseload supported the proposed approach. Additionally, the Department of Justice, and the Commission’s Probation Officers Advisory Group and Practitioners Advisory Group supported the proposed amendment. Witnesses for both advisory groups testified that the sentence-imposed model would be much easier to apply than the categorical approach and would result in savings of judicial resources, at both the trial court and appellate levels.

Alternatively, Chair Saris noted, some witnesses suggested that the sentence-imposed model could be problematic because different counties punish crimes differently, particularly if a judge believes that a defendant will be deported. She observed that the Commission addressed those concerns by clarifying that a departure is available in cases where the sentence imposed either overstated or understated the seriousness of the prior offense.
Chair Saris also reported that the Commission received a great deal of public comment in favor of a “sentence served” model. While the Commission reviewed and considered these views carefully and seriously, ultimately, this approach was not feasible given the limits of state recordkeeping. She added that the sentence-imposed approach was also consistent with how the guidelines scored criminal history generally.

The second point Chair Saris wished to address was that the proposed amendment accounted for the past criminal conduct of these offenders in a broader – and more proportionate – manner. Specifically, the amendment addressed concerns raised about the severity of the current 16-level enhancement for prior felonies based solely on a defendant’s single most serious conviction prior to his or her first deportation. Depending on the nature of that conviction, an enhancement of as much as 16 levels can occur.

Chair Saris explained that, even when an offender’s predicate conviction is so old that it does not receive criminal history points under the guidelines, a defendant still can receive as much as a 12-level enhancement. For this reason alone, she continued, the Commission has received repeated complaints about the guideline, particularly about the 16- and 12-level enhancements, which apply to nearly one-third of all illegal reentry cases. The Commission’s sentencing data is consistent with these concerns. Indeed, the Chair observed, only 27.4 percent of defendants who currently receive the enhancement are sentenced within the recommended guideline range. Accordingly, the pending amendment reduces the level of enhancement for a single pre-deportation conviction to a maximum of 10 levels.

But at the same time, Chair Saris continued, the proposed change addressed concerns that the existing guideline only captured criminal conduct occurring prior to the offender’s first deportation. In its recent report, the Commission concluded that 48 percent of illegal reentry offenders in the study sample were convicted of at least one offense after their first deportation other than a prior illegal reentry conviction.

Additionally, the Chair noted, immigrants convicted of illegal reentry have reentered the country an average of 3.2 times. However, the current guideline does not account for any criminal conduct that may be committed after the offender illegally reentered the United States. The proposed amendment adds a new tiered enhancement specifically aimed at criminal conduct occurring after the defendant has reentered the country illegally. It also adds an enhancement to account for the number of times an offender has been convicted of illegal reentry.

Chair Saris pointed out that the proposed amendment differs from the proposal published in January in that it does not increase the base offense level in the illegal reentry guideline. The Commission received a great deal of public comment on this particular issue and citing statistics from the Commission’s April 2015 Illegal Reentry Offenses Report. The report found that:

- one-half of these offenders had at least one child living in the United States;
- these offenders had an average age of 17 at the time of their initial entry into the United States; and
- nearly three-quarters had worked in the United States for more than one year at
some point prior to their arrest for the instant offense.

Many unlawful immigrants return to work and/or to be with their family, or out of fear of drug traffickers, not to commit crimes. The Chair stated that the Commission was persuaded by the majority of public comment and its own sentencing data that the current base offense level of 8 should remain unchanged.

Chair Saris noted that the Commission was unable to conduct its typical impact analysis for the proposed change because it was impossible to predict how the various fast-track programs, which expedite deportation, may be revised after its implementation, and fast-track programs play a large role in illegal reentry cases, particularly along the southwest border. She did state, however, that the Commission estimated that the average guideline minimum would decrease from 21 months to 18 months as a result of the new amendment. The Chair cautioned that this did not mean that the average sentence would decrease and there may be some sentences that will increase.

In sum, Chair Saris concluded, the Commission believed that the proposed amendment would be easier to apply, reduce litigation and uncertainty, mitigate areas of over-severity, and properly account for criminal conduct that currently is not reflected in the illegal reentry guideline.

Hearing no further discussion, the Chair called for a vote. The motion was adopted unanimously.

Ms. Grilli advised the Commission that the immigration and child pornography circuit conflict amendments the Commission just promulgated may have the effect of reducing the term of imprisonment recommended in the guidelines applicable to a particular offense or categories of offenses. As such, she continued, the Commission has the statutory authority under 28 U.S.C. § 994(u) to make the amendment retroactive. Ms. Grilli asked whether there was a motion pursuant to Rule 2.2 of the Commission’s Rules of Practice and Procedure to instruct staff to prepare a retroactivity impact analysis for either of these amendments.

Chair Saris called for a motion as suggested by Ms. Grilli. Hearing none, Ms. Grilli indicated that the proposal failed for lack of a motion.

Chair Saris explained that the Commission has statutory authority to make any amendment retroactive if it will have the effect of lowering penalties for a category of offenses or offenders. In deciding whether to make an amendment retroactive, she continued, the Commission considers several factors, including the purpose of the amendment, the magnitude of the change, and the difficulty of applying the amendment retroactively.

Chair Saris stated, first, with respect to the immigration amendment, the purpose of that amendment in great part was to simplify its operation, reduce litigation and uncertainty, and to more broadly and proportionately account for criminal conduct. The amendment was expected to decrease guideline ranges for some offenders but increase them for others. Furthermore, she continued, it would be extremely difficult to identify offenders who might benefit from retroactivity because the Commission does not routinely collect data about deportation dates or
about which prior conviction or the type of prior offense that resulted in an enhancement under the current illegal reentry guideline.

Similarly, the purpose of the amendment to the child pornography guidelines was not to effectuate an overall reduction in guideline penalties, although it may have the effect of reducing the guideline range for some offenders, Chair Saris added. The amendment was intended to simplify guideline application and resolve the litigation surrounding certain aspects of its operation. Like the immigration amendment, she explained, the Commission does not routinely collect the information concerning the intent of the distributor necessary to identify and characterize the offenders who might benefit from retroactivity. Ascertaining the overall effect of the amendment would be difficult because that determination depends on data that the Commission does not routinely collect.

For these reasons, Chair Saris stated, the Commission decided against retroactivity.

Chair Saris addressed the recently enacted Bipartisan Budget Act of 2015, which was signed into law in November 2015, after the Commission’s amendment cycle had commenced. The Chair explained that when new legislation is enacted in the waning days of the calendar year, it is not uncommon for the Commission to delay action and to defer to the following amendment cycle because of the abbreviated time frame in which to work on the issue.

In this particular instance, Chair Saris continued, the Commission voted in January to publish a proposed amendment that would provide a guideline reference for the new conspiracy offenses created by that Act but did not publish any specific offense characteristics or other guideline changes to specifically address the increased statutory maximum for certain types of offenders, such as third-party facilitators. The Commission received written comment from Members of Congress, the Justice Department, and the Inspector General of the Social Security Administration suggesting that the change, as initially proposed, did not adequately address the type of cases and offenders covered by the new 10-year statutory maximum penalty.

Chair Saris acknowledged the important years of work, as well as the continued oversight, led by the Senate Committee on Finance and the House Ways and Means Committee, as well as the Senate and House Judiciary Committees, to ensure aggressive implementation of these new penalties relating to Social Security fraud. Specifically, Chair Saris acknowledged the thoughtful letter from Chairmen Goodlatte, Brady, and Hatch expressing their views on the proposed amendment. She stated that the Commission continued to take into consideration this feedback as well as the public comment in support of specific sentencing enhancements.

At this juncture, Chair Saris noted, the Commission was persuaded that this issue merited additional study before making a final policy decision. Accordingly, the Commission has decided to defer action on the Act until the next amendment cycle. This issue will remain a priority for the Commission for next year and the Commission looks forward to working with the Congress, the relevant agencies and the stakeholders as we move forward into the next amendment cycle.
Chair Saris concluded by again thanking the public for its interest in these important issues, and noting how the Commission looked forward as always to the comments and feedback it receives.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Friedrich made a motion to adjourn, with Vice Chair Breyer seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 2:25 p.m.
EXHIBIT A

PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline application issues.

A. USA FREEDOM Act of 2015

Part A of the proposed amendment responds to the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act (USA FREEDOM Act) of 2015, Pub. L. 114–23 (June 2, 2015), which, among other things, set forth changes to statutes related to maritime navigation and provided new and expanded criminal offenses to implement certain provisions in international conventions relating to maritime and nuclear terrorism. The Act also added these new offenses to the list of offenses specifically enumerated at 18 U.S.C. § 2332b(g)(5) as federal crimes of terrorism.

New Offense at 18 U.S.C. § 2280a

The USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2280a (Violence against maritime navigation and maritime transport involving weapons of mass destruction) to prohibit certain terrorism acts and threats against maritime navigation committed in a manner that causes or is likely to cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The prohibited acts include (i) the use against or on a ship, or discharge from a ship, of any explosive or radioactive material, biological, chemical, or nuclear weapon or other nuclear explosive device; (ii) the discharge from a ship of oil, liquefied natural gas, or other hazardous or noxious substance; (iii) any use of a ship that causes death or serious injury or damage; and (iv) the transportation aboard a ship of any explosive or radioactive material. Section 2280a also prohibits the transportation on board a ship of any biological, chemical or nuclear weapon or other nuclear explosive device, and any components, delivery means, or materials for a nuclear weapon or other nuclear explosive device, under specified circumstances, but this conduct does not have to be committed with the above purpose of intimidating a population or compelling a government or international organization to do or abstain from doing any act. Further, section 2280a prohibits the transportation onboard a ship of a person who committed an offense under section 2280 or 2280a or an offense set forth in an applicable treaty (as defined in section 2280(d)(1)), with the intent of assisting that person evade criminal prosecution. The penalties for violations of section 2280a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2280a also prohibits threats to commit the offenses not related to transportation on board a ship and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment addresses these new offenses at section 2280a by referencing them in Appendix A (Statutory Index) to the following Chapter Two guidelines: §§2A1.1 (First Degree Murder); 2A1.2 (Second Degree Murder); 2A1.3 (Voluntary Manslaughter); 2A1.4 (Involuntary Manslaughter); 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder); 2A2.2 (Aggravated Assault); 2A2.3 (Assault); 2A6.1 (Threatening or Harassing Communications); 2B1.1 (Fraud); 2B3.2 (Extortion); 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials); 2K1.4 (Arson); 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License); 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose); 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction); 2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic
EXHIBIT A

Substances, Pesticides or Other Pollutants; 2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides); 2X1.1 (Conspiracy); 2X2.1 (Aiding and Abetting); and 2X3.1 (Accessory After the Fact).

New Offense at 18 U.S.C. § 2281a

The USA FREEDOM Act also created a new criminal offense at 18 U.S.C. § 2281a (Additional offenses against maritime fixed platforms) to prohibit certain maritime terrorism acts that occur either on a fixed platform or to a fixed platform committed in a manner that may cause death, serious injury, or damage, when the purpose of the conduct is to intimidate a population or to compel a government or international organization to do or abstain from doing any act. Section 2281a prohibits specific conduct, including (i) the use against or discharge from a fixed platform, of any explosive or radioactive material, or biological, chemical, or nuclear weapon and (ii) the discharge from a fixed platform of oil, liquefied natural gas, or another hazardous or noxious substance. The penalties for violations of section 2281a are a fine, imprisonment for no more than 20 years, or both, or, if the death of a person results, imprisonment for any term of years or life. Section 2281a also prohibits threats to commit the offenses related to acts on or against fixed platforms and provides a penalty of imprisonment of up to five years.

Part A of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2281a are referenced to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.4, 2M6.1, 2Q1.1, 2Q1.2, and 2X1.1.

New Offense at 18 U.S.C. § 2332i

In addition, the USA FREEDOM Act created a new criminal offense at 18 U.S.C. § 2332i that prohibits (i) the possession or production of radioactive material or a device with the intent to cause death or serious bodily injury or to cause substantial damage to property or the environment; and (ii) the use of a radioactive material or a device, or the use, damage, or interference with the operation of a nuclear facility that causes the release of radioactive material, radioactive contamination, or exposure to radiation with the intent (or knowledge that such act is likely) to cause death or serious bodily injury or substantial damage to property or the environment, or with the intent to compel a person, international organization or country to do or refrain from doing an act. Section 2332i also prohibits threats to commit any such acts. The penalties for violations of section 2332i are a fine of not more than $2,000,000 and imprisonment for any term of years or life.

Part A of the proposed amendment amends Appendix A (Statutory Index) to reference the new offenses at 18 U.S.C. § 2332i to §§2A6.1, 2K1.4, 2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities), 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities), and 2M6.1.

Clerical Changes

Finally, Part A makes clerical changes to Application Note 1 to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction) to reflect the redesignation of a section in the United States Code by the USA FREEDOM Act.

B. 18 U.S.C. § 1715 (Firearms as nonmailable; regulations)

Section 1715 of title 18, United States Code (Firearms as nonmailable; regulations), makes it unlawful to deposit for mailing or delivery by the mails pistols, revolvers, and other firearms capable of being concealed on the person and declared nonmailable (as prescribed by Postal Service regulations). For
any violation of section 1715, the statutory maximum term of imprisonment is two years. The current Guidelines Manual does not provide a guideline reference in Appendix A for offenses under section 1715.

The Department of Justice in its annual letter to the Commission has proposed that section 1715 offenses should be assigned a guideline reference, base offense level, and appropriate specific offense characteristics. The Department indicates that in recent years the United States Attorney’s Office for the Virgin Islands has brought several cases charging section 1715, where firearms were illegally brought onto the islands by simply mailing them from mainland United States.

Part B of the proposed amendment amends Appendix A (Statutory Index) to reference offenses under section 1715 to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). It also adds section 1715 to subsection (a)(8) of §2K2.1, establishing a base offense level of 6 for such offenses.

C. Technical Amendment to §2T1.6

The Internal Revenue Code (Title 26, United States Code) requires employers to withhold from an employee’s paychecks money representing the employee’s personal income and Social Security taxes. The Code directs the employer to collect taxes as wages are paid, but only requires a periodic payment of such taxes to the IRS. If an employer willfully fails to collect, truthfully account for, or pay over such taxes, 26 U.S.C. § 7202 provides both civil and criminal remedies. Section 7202 provides as criminal penalty a term of imprisonment with a statutory maximum of five years.

Section 7202 is referenced in Appendix A (Statutory Index) to §2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax). The Background commentary to §2T1.6 states that “[t]he offense is a felony that is infrequently prosecuted.” The Department of Justice in its annual letter to the Commission has proposed that the “infrequently prosecuted” statement should be deleted. The Department points out that while that statement may have been accurate when the relevant commentary was originally written (in 1987), the number of prosecutions under section 7202 have since increased substantially. The use of §2T1.6 increased from three cases in 2002 to 46 cases in 2014. See United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2002), at http://www.ussc.gov/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/guideline-application-frequencies-2002; United States Sentencing Commission, Use of Guidelines and Specific Offense Characteristics: Guideline Calculation Based (Fiscal Year 2014), at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2014/Use_of_SOC_Guideline_Based.pdf.

Part C of the proposed amendment amends the Background Commentary to §2T6.1 to delete the sentence that states “The offense is a felony that is infrequently prosecuted.”

Consistent with the changes to §2T6.1, Part C of the proposed amendment deletes similar language found in the Introductory Commentary to Chapter Two, Part T, Subpart 2 (Alcohol and Tobacco Taxes), and in the Background Commentary to §§2T2.1 (Non-Payment of Taxes) and 2T2.2 (Regulatory Offenses).
Proposed Amendment:

(A) USA FREEDOM Act of 2015

§2M6.1. **Unlawful Activity Involving Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy**

* * *

**Commentary**

* * *

**Application Notes:**

1. **Definitions.**—For purposes of this guideline:

   * * *

   “Nuclear byproduct material” has the meaning given that term in 18 U.S.C. § 831(f)(g)(2).

   “Nuclear material” has the meaning given that term in 18 U.S.C. § 831(f)(g)(1).

   * * *

**APPENDIX A - STATUTORY INDEX**

* * *

18 U.S.C. § 2280 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2A6.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1

18 U.S.C. § 2280a 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A6.1, 2B1.1, 2B3.2, 2K1.3, 2K1.4, 2M5.2, 2M5.3, 2M6.1, 2Q1.1, 2Q1.2, 2X1.1, 2X2.1, 2X3.1

18 U.S.C. § 2281 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1

18 U.S.C. § 2282A 2A1.1, 2A1.2, 2B1.1, 2K1.4, 2X1.1

* * *

18 U.S.C. § 2332h 2M6.1

18 U.S.C. § 2332i 2A6.1, 2K1.4, 2M2.1, 2M2.3, 2M6.1

18 U.S.C. § 2339 2M5.3, 2X2.1, 2X3.1

* * *

(B) 18 U.S.C. § 1715 (Firearms as nonmailable; regulations)

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(1) 26, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) 22, if (A) the offense involved a (i) semiautomatic firearm that is capable of accepting a large capacity magazine; or (ii) firearm that is described in 26 U.S.C. § 5845(a); and (B) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) 20, if—

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the (i) offense involved a (I) semiautomatic firearm that is capable of accepting a large capacity magazine; or (II) firearm that is described in 26 U.S.C. § 5845(a); and (ii) defendant (I) was a prohibited person at the time
the defendant committed the instant offense; (II) is convicted under 18 U.S.C. § 922(d); or (III) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(5) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a);

(6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

(7) 12, except as provided below; or

(8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1), or § 1715.

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

<table>
<thead>
<tr>
<th>Number of Firearms</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) 3-7</td>
<td>add 2</td>
</tr>
<tr>
<td>(B) 8-24</td>
<td>add 4</td>
</tr>
<tr>
<td>(C) 25-99</td>
<td>add 6</td>
</tr>
<tr>
<td>(D) 100-199</td>
<td>add 8</td>
</tr>
<tr>
<td>(E) 200 or more</td>
<td>add 10</td>
</tr>
</tbody>
</table>

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

(3) If the offense involved—

(A) a destructive device that is a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by 15 levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by 2 levels.

(4) If any firearm (A) was stolen, increase by 2 levels; or (B) had an altered or obliterated serial number, increase by 4 levels.

The cumulative offense level determined from the application of subsections (b)(1) through (b)(4) may not exceed level 29, except if subsection (b)(3)(A) applies.
EXHIBIT A

(5) If the defendant engaged in the trafficking of firearms, increase by 4 levels.

(6) If the defendant—

(A) possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense,

increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(7) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition cited in the offense of conviction in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition cited in the offense of conviction with knowledge or intent that it would be used or possessed in connection with another offense, apply—

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o), 1715, 2332g; 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

APPENDIX A - STATUTORY INDEX
EXHIBIT A

18 U.S.C. § 1715  2K2.1

18 U.S.C. § 1716 (felony provisions only)  2K1.3, 2K3.2

18 U.S.C. § 1716C  2B1.1

* * *

(C) Technical Amendment to §2T1.6

§2T1.6.  Failing to Collect or Truthfully Account for and Pay Over Tax

(a) Base Offense Level:  Level from §2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.

(b) Cross Reference

(1) Where the offense involved embezzlement by withholding tax from an employee’s earnings and willfully failing to account to the employee for it, apply §2B1.1 (Theft, Property Destruction, and Fraud) if the resulting offense level is greater than that determined above.

Commentary


Application Note:

1. In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. Subsection (b)(1) addresses such cases.

Background: The offense is a felony that is infrequently prosecuted. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines.

* * *

2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

This subpart deals with offenses contained in Parts I-IV of Subchapter J of Chapter 51 of Subtitle E of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement
No effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

* * *

§2T2.1. Non-Payment of Taxes

(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the “tax loss” is the amount of taxes that the taxpayer failed to pay or attempted not to pay.

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct constitutes non-payment, evasion or attempted evasion of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco, or that the defendant was attempting to evade.

2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.

Background: The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1).

* * *

§2T2.2. Regulatory Offenses

(a) Base Offense Level: 4

Commentary

Statutory Provisions: 15 U.S.C. § 377, 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).

Background: Prosecutions of this type are infrequent.

* * *
PROPOSED AMENDMENT: COMPASSIONATE RELEASE

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s work in reviewing the policy statement pertaining to “compassionate release” at §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), including the possible consideration of amending the relevant provisions in the Guidelines Manual. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015).

Background

Section 3582(c)(1)(A) of title 18, United States Code, authorizes a federal court, upon motion of the Director of the Bureau of Prisons, to reduce the term of imprisonment of a defendant in certain circumstances, i.e., if “extraordinary and compelling reasons” warrant such a reduction or the defendant is at least 70 years of age and meets certain other criteria. Such a reduction must be consistent with applicable policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3582(c)(1); see also 28 U.S.C. §§ 994(a)(2) (stating that the Commission shall promulgate general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing, including, among other things, “the sentence modification provisions set forth in section[] . . . 3582(c) of title 18”); and 994(t) (stating that the Commission, in promulgating any such policy statements, “shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples”).

The Commission’s policy statement, §1B1.13 (Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons), provides that “extraordinary and compelling reasons” exist if:

(1) the defendant is suffering from a terminal illness;
(2) the defendant is suffering from certain permanent physical or medical conditions, or experiencing deteriorating physical or mental health because of the aging process; or
(3) the defendant has a minor child and the defendant’s only family member capable of caring for the child has died or is incapacitated.

See §1B1.13, comment. (n.1(A)(i)–(iii)). In addition, the policy statement provides that extraordinary and compelling reasons exist if, as determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described above. See §1B1.13, comment. (n.1(A)(iv)). The policy statement was last amended in 2007 to provide the current criteria to be applied and a list of the specific circumstances which constitute “extraordinary and compelling reasons” for compassionate release consideration.

On August 12, 2013, the Bureau of Prisons issued a new program statement, 5050.49, that changes how the Bureau implements section 3582(c)(1)(A). See U.S. Department of Justice, Federal Bureau of Prisons, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Program Statement 5050.49, CN-1), available at http://www.bop.gov/policy/progstat/5050_049_CN-1.pdf. Among other things, the new program statement expands and details the range of circumstances that the Bureau may consider “extraordinary and compelling reasons” warranting such a reduction. Under the program statement, a sentence reduction may be based on the defendant’s medical circumstances (e.g., a terminal or debilitating medical condition; see 5050.49(3)(a)–(b)) or on certain non-medical circumstances (e.g., an elderly defendant, the death or incapacitation of the family member caregiver, or the incapacity of the defendant’s spouse or registered partner; see 5050.49(4),(5),(6)).
In May 2015, the Department of Justice’s Office of the Inspector General (OIG) released a report on the Bureau of Prisons’ implementation of the compassionate release program provisions related to elderly inmates. See U.S. Department of Justice, Office of the Inspector General, The Impact of the Aging Inmate Population on the Federal Bureau of Prisons, E-15-05 (May 2015), available at https://oig.justice.gov/reports/2015/e1505.pdf. The report found that while aging inmates (defined by the report to be age 50 years or older) make up a disproportionate share of the inmate population, are more costly to incarcerate (primarily due to medical needs), engage in less misconduct while in prison, and have a lower rate of re-arrest once released than their younger counterparts, “BOP policies limit the number of aging inmates who can be considered for early release and, as a result, few are actually released early.” In addition, the report found that the eligibility requirements for both medical and non-medical provisions as applied to inmates 65 years or older are “unclear” and “confusing.”

The Proposed Changes to the Policy Statement at §1B1.13

First, the proposed amendment revises the Commission’s guidance on what should be considered “extraordinary and compelling reasons” for compassionate release. It provides four broad categories: “Medical Condition of the Defendant,” “Age of the Defendant,” “Family Circumstances,” and “Other Reasons.” “Medical Condition of the Defendant” applies if the defendant: (i) has a “terminal illness” (including a definition of the term and examples), or (ii) is (I) suffering from a serious condition, (II) suffering from a serious functional or cognitive impairment, or (III) experiencing deteriorating health because of the aging process, that substantially diminishes the defendant’s ability to provide self-care within a correctional facility and from which he or she is not expected to recover. “Age of the Defendant” applies if the defendant (i) is at least 65 years old, (ii) is experiencing a serious deterioration in physical or mental health because of the aging process, and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment (whichever is less). “Family Circumstances” applies to circumstances related to (i) the death or incapacitation of the caregiver of the defendant’s minor child, or (ii) the incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver. “Other Reasons” permit the Bureau of Prisons to determine that, in any particular defendant’s case, an extraordinary and compelling reason other than (or in combination with) a reason identified by the Commission exists.

Second, the proposed amendment amends the Commentary in §1B1.13 to provide that an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction.

Third, the proposed amendment adds a new application note to provide that the Commission encourages the Director of the Bureau of Prisons to file a motion under 18 U.S.C. § 3582(c)(1)(A) if the defendant meets any of the circumstances listed as “extraordinary and compelling reasons” in §1B1.13. The note states that, in such cases, “the court is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted (and, if so, the amount of reduction), including the factors set forth 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant’s medical condition, the defendant’s family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.”

Finally, the proposed amendment adds to the Background Commentary to §1B1.13 a reference to the Commission’s general policy-making authority under 28 U.S.C. § 994(a)(2).
Proposed Amendment:

§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subdivision (1)(A).

(4)—Extraordinary and Compelling Reasons.—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances set forth below:

(A) Medical Condition of the Defendant.—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a permanent serious physical or medical condition, or

(II) suffering from a serious functional or cognitive impairment, or

(III) is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement from which he or she is not expected to recover.
EXHIBIT B

(B) **Age of the Defendant.**—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) **Family Circumstances.**—

(iii) (i) The death or incapacitation of the defendant’s only family member caregiver of capable of caring for the defendant’s minor child or minor children.

(ii) The incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) (iv) **Other Reasons.**—As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii) (A) through (C).

2. **Foreseeability of Extraordinary and Compelling Reasons.**—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

3. **Rehabilitation of the Defendant.**—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A) this policy statement.

4. **Motion by the Director of the Bureau of Prisons.**—A reduction under this policy statement may only be granted upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant’s medical condition, the defendant’s family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

5. **Application of Subdivision (3).**—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

**Background:** The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including, among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.” This policy statement implements 28 U.S.C. § 994(a)(2) and (t).
PROPOSED AMENDMENT: CONDITIONS OF PROBATION AND SUPERVISED RELEASE

Synopsis of Proposed Amendment: This proposed amendment revises, clarifies, and rearranges the conditions of probation and supervised release. It is a result of the Commission’s multi-year review of federal sentencing practices relating to conditions of probation and supervised release. See United States Sentencing Commission, “Notice of Final Priorities,” 80 Fed. Reg. 48957 (Aug. 14, 2015). It is also informed by a series of opinions issued by the Seventh Circuit in recent years.

Specifically, the Seventh Circuit has found several of the standard conditions to be unduly vague, overbroad, or inappropriately applied. See, e.g., United States v. Adkins, 743 F.3d 176 (7th Cir. 2014); United States v. Goodwin, 717 F.3d 511 (7th Cir. 2013); United States v. Quinn, 698 F.3d 651 (7th Cir. 2012); United States v. Siegel, 753 F.3d 705 (7th Cir. 2014). The Seventh Circuit has also suggested that the language of the conditions be revised to be more comprehensible to defendants and probation officers, and to contain a stated mens rea requirement where one was lacking. United States v. Kappes, 782 F.3d 828, 848 (7th Cir. 2015) (“We have suggested that sentencing judges define the crucial terms in a condition in a way that provides clear notice to the defendant (preferably through objective rather than subjective terms), and/or includes a mens rea requirement (such as intentional conduct). We have further suggested that the judge make sure that each condition imposed is simply worded, bearing in mind that, with rare exceptions, neither the defendant nor the probation officer is a lawyer and that when released from prison the defendant will not have a lawyer to consult.” (quotation and alteration marks omitted)).

The Statutory and Guidelines Framework

When imposing a sentence of probation, the court is required to impose certain conditions of probation listed by statute. See 18 U.S.C. § 3563(a). In addition, the court has discretion to impose additional conditions of probation “to the extent that such conditions are reasonably related to the factors set forth in sections 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2).” See 18 U.S.C. § 3563(b). Similarly, when imposing a sentence of supervised release, the court is required to impose certain conditions of supervised release listed by statute, and the court has discretion to impose additional conditions of supervised release, to the extent that the additional condition “is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)” and “involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D).” See 18 U.S.C. § 3583(d). The additional condition of supervised release must also be consistent with any pertinent policy statements issued by the Sentencing Commission. See 18 U.S.C. § 3583(d)(3).

In addition, the court is required to direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which he or she is subject, which must be “sufficiently clear and specific to serve as a guide for the defendant’s conduct and for such supervision as is required.” See 18 U.S.C. §§ 3563(d), 3583(f). The Judgment in a Criminal Case Form, AO 245B, sets forth a series of mandatory and “standard” conditions in standardized form and provides space for the court to impose additional “standard” and “special” conditions devised by the court.

The Commission is directed by its organic statute to promulgate policy statements on the appropriate use of the conditions of probation and supervised release. See 28 U.S.C. § 994(a)(2)(B). Sections 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) implement this directive. Subsections (a) and (b) of §5B1.3 set forth the conditions of probation that are required by statute. Subsections (c), (d), and (e) of §5B1.3 provide guidance on discretionary conditions of probation, which are categorized as “standard” conditions, “special” conditions, and “additional” special conditions, respectively. Subsections (a) through (e) of §5D1.3 follow the same structure in setting forth the
EXHIBIT C

mandatory conditions of supervised release and providing guidance on discretionary conditions of supervised release.

The Proposed Changes to §§5B1.3 and 5D1.3

The changes made by the proposed amendment would revise, clarify, and rearrange the provisions in the Guidelines Manual on conditions of probation and supervised release. These changes would not necessarily affect the conditions of probation and supervised release as set forth in the Judgment in a Criminal Case Form, AO 245B. However, in light of the responsibilities of the Judicial Conference of the United States and the Administrative Office of the United States Courts in this area, the Commission works with the Criminal Law Committee and the Probation and Pretrial Services Office on these issues and anticipates that the Commission’s work on this proposed amendment may inform their consideration of possible changes to the judgment form.

In general, the changes are intended to make the conditions more focused and precise as well as easier for defendants to understand and probation officers to enforce.

Court-Established Payment Schedules

First, the requirement that the defendant shall adhere to any payment schedule established by the court is changed from a “standard” condition to a “mandatory” condition. Specifically, the proposed amendment amends §§5B1.3(a)(6) and 5D1.3(a)(6) to set forth, as a “mandatory” condition, that if there is a court-established payment schedule for making restitution or paying a special assessment, the defendant shall adhere to the schedule. See 18 U.S.C. § 3572(d). As a conforming change, similar language at §§5B1.3(c)(14) and 5D1.3(c)(14) is deleted.

Sex Offender Registration and Notification Act

Second, the requirement that the defendant shall comply with the Sex Offender Registration and Notification Act (a “mandatory” condition) is updated and simplified to reflect that federal sex offender requirements apply in all states. Specifically, the proposed amendment amends §§5B1.3(a)(9) and 5D1.3(a)(7) to clarify that, if the defendant is required to register under the Act, the defendant shall comply with the requirements of the Act. Language indicating that the Act applies in some states and not in others — in the guideline provisions and the accompanying Commentary — is deleted as obsolete.

Reporting to the Probation Officer

Third, the requirement that the defendant shall initially report to the probation officer and submit a written report each month (a “standard” condition) is divided into two provisions and made more definite. Specifically, the proposed amendment amends §§5B1.3(a)(2) and 5D1.3(a)(2) to require the defendant to report to the probation office in the jurisdiction where he or she is authorized to reside, and to do so within 72 hours, unless otherwise directed. Thereafter, the defendant shall report to the probation officer as instructed by the court or probation officer.

Leaving the Jurisdiction

Fourth, the requirement that the defendant not leave the federal judicial district without the permission of the court or probation officer (a “standard” condition in §§5B1.3(c)(1) and 5D1.3(c)(1)) is revised for clarity and to insert a mental state (mens rea) requirement — the defendant shall not leave the jurisdiction “knowingly.”
Answering Truthfully; Following Instructions

Fifth, the requirement that the defendant answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer (a “standard” condition in §§5B1.3(c)(3) and 5D1.3(c)(3)) is divided into two separate requirements and revised for clarity.

With respect to the requirement that the defendant “answer truthfully,” Commentary is added to both guidelines to clarify that a defendant’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.

The requirement that the defendant “follow instructions” is revised to reflect that the defendant shall follow the instructions “related to the conditions of supervision.”

Residence; Employment

Sixth, the proposed amendment revises the requirements relating to the defendant’s residence and employment, including a requirement that the defendant notify the probation officer of any change of residence or employment (a “standard” condition in §§5B1.3(c)(6) and 5D1.3(c)(6)) and a requirement that the defendant “work regularly” unless excused for specified reasons (a “standard” condition in §§5B1.3(c)(5) and 5D1.3(c)(5)).

As amended, the residence requirement affirmatively states that the defendant shall live at a place “approved by the probation officer.” Furthermore, the defendant shall notify the probation officer at least 10 days before changing his or her living arrangements or, if this is not possible, within 72 hours of becoming aware of a change.

As amended, the employment requirement affirmatively states that the defendant shall work full time (at least 30 hours per week) at a lawful type of employment — or seek to do so — unless excused by the probation officer. Furthermore, the defendant shall notify the probation officer at least 10 days before changing his employment arrangements or, if this is not possible, within 72 hours of becoming aware of a change.

Visits by Probation Officer

Seventh, the requirement that the defendant permit the probation officer to visit at any time at home or elsewhere and to “permit confiscation of any contraband” in plain view (a “standard” condition in §§5B1.3(c)(10) and 5D1.3(c)(10)) is revised to provide more clear and specific guidance. As amended, the defendant shall permit the probation officer “to take any items prohibited by the conditions of the defendant’s supervision” that are in plain view.

Association with Criminals

Eighth, the requirement that the defendant not associate with persons engaged in criminal activity or persons convicted of a felony unless granted permission to do so (a “standard” condition in §§5B1.3(c)(9) and 5D1.3(c)(9)) is revised and clarified and a mental state (mens rea) requirement is added. As amended, the defendant shall not “communicate or interact with” such a person if the defendant knows the person is engaged in such activity or has such a conviction.

Arrested or Questioned by a Law Enforcement Officer
Ninth, stylistic changes are made to the requirement that the defendant notify the probation officer after being arrested or questioned by a law enforcement officer (a “standard” condition in §§5B1.3(c)(11) and 5D1.3(c)(11). The changes are clerical.

**Firearms and Dangerous Weapons**

Tenth, the requirement that the defendant not possess a firearm or other dangerous weapon is moved from the list of “special” conditions (see §§5B1.3(d)(1), 5D1.3(d)(1)) to the list of “standard” conditions and is revised and clarified. As amended, the defendant shall not “own, possess, or have access to” a firearm, ammunition, destructive device, or dangerous weapon. The term “dangerous weapon” is defined to mean “anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers.”

**Acting as an Informant**

Eleventh, the requirement that the defendant not enter into an agreement to act as an informer without permission of the court is revised and clarified. As amended, the defendant shall not act, or make any agreement to act, “as a confidential human source or informant,” without first getting the permission of the court.

**Duty to Notify of Risks Posed by the Defendant**

Twelfth, the requirement that the defendant “notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics” (a “standard” condition in §§5B1.3(c)(13) and 5D1.3(c)(13)) is revised to be made more clear and definite as to when and how it applies. As amended, the condition provides that, if the probation officer determines that the defendant poses a risk to another person, the probation officer may require the defendant to tell the person about the risk and confirm that the defendant has done so.

**Support of Dependents**

Thirteenth, the requirement that the defendant support his or her dependents (a “standard” condition in §§5B1.3(c)(4) and 5D1.3(c)(4)) is moved to the list of “special” conditions in subsection (d) and revised and clarified. As amended, the condition requires that, if the defendant has dependents, he or she shall support the dependents; and if the defendant is ordered to make child support payments, he or she shall make the payments and comply with the other terms of the order.

**Alcohol; Controlled Substances**

Fourteenth, the requirement that the defendant refrain from excessive use of alcohol and not possess or distribute controlled substances or paraphernalia (a “standard” condition in §§5B1.3(c)(7) and 5D1.3(c)(7)) is replaced with a new special condition that the defendant “shall not use or possess alcohol.” The portion of this requirement relating to controlled substances is redundant with other prohibitions on engaging in criminal activity and is deleted for that reason. A related requirement that the defendant not frequent places where controlled substances are illegally sold or used (a “standard” condition in §§5B1.3(c)(8) and 5D1.3(c)(8)) is redundant with other provisions and is vague, and is deleted for those reasons.

**Material Change in Economic Circumstances (§5D1.3 Only)**
Finally, the requirement that the defendant notify the probation officer of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay any unpaid amount of restitution, fines, or special assessments is both a “mandatory” condition of probation (see §5B1.3(a)(7)) and a “standard” condition of supervised release (see §5D1.3(c)(15)). With respect to supervised release only, the proposed amendment moves this requirement to the list of “special” conditions in subsection (d).

Proposed Amendment:

§5B1.3. Conditions of Probation

(a) Mandatory Conditions—

(1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));

(2) for a felony, the defendant shall (A) make restitution, (B) work in community service, or (C) both, unless the court has imposed a fine, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));

(3) for any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a));

(4) for a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));

(5) for any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant’s presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule;

(7) the defendant shall notify the court of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a));
EXHIBIT C

(8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));

(9) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915; if the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (see 18 U.S.C. § 3563(a));

(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) Discretionary Conditions

The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).

(c) “Standard” Conditions

The following “standard” conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of
the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant’s supervision that he or she observes in plain view.

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment; 

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(8) The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

(11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

(12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(11) The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

(13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant’s criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant’s compliance with such notification requirement;

(12) If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The
probation officer may contact the person and confirm that the defendant has notified the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

(4) The defendant shall support the defendant’s dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living).

(7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician.

(8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court.

(14) The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.

(d) “Special” Conditions (Policy Statement) The following “special” conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(1) Support of Dependents

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening
additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) **Access to Financial Information**

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) **Substance Abuse Program Participation**

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) **Mental Health Program Participation**

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) **Deportation**

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) **Sex Offenses**

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release)—

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant’s person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media,
and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer’s supervision functions.

(e) **Additional Conditions (Policy Statement)**

The following “special conditions” may be appropriate on a case-by-case basis:

1. **Community Confinement**

   Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation. See §5F1.1 (Community Confinement).

2. **Home Detention**

   Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

3. **Community Service**

   Community service may be imposed as a condition of probation. See §5F1.3 (Community Service).

4. **Occupational Restrictions**

   Occupational restrictions may be imposed as a condition of probation. See §5F1.5 (Occupational Restrictions).

5. **Curfew**

   A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

6. **Intermittent Confinement**

   Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. See §5F1.8 (Intermittent Confinement).

**Commentary**

**Application Note:**

1. **Application of Subsection (a)(9)(A) and (B).** Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(9)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex
Offender Registration and Notification Act, subsection (a)(9)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

I. Application of Subsection (c)(4).—Although the condition in subsection (c)(4) requires the defendant to “answer truthfully” the questions asked by the probation officer, a defendant’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions—

(1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));

(2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));

(3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));

(4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant’s presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));

(5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));

(6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S.C. § 3572(d)), the defendant shall adhere to the schedule;

(7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105–119, § 115(a)(8), Nov. 26, 1997) shall report the address where the
defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

(B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915; if the defendant is required to register under the Sex Offender Registration and Notification Act, the defendant shall comply with the requirements of that Act (see 18 U.S.C. § 3583(d));

(8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) Discretionary Conditions

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

(c) “Standard” Conditions (Policy Statement)

The following “standard” conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

[The proposed amendment would revise and rearrange subdivisions (1) through (14). To aid the reader in comparing the current language and the revised language, this reader-friendly version of the proposed amendment shows how each subdivision would be revised, and shows the revised subdivisions in the order in which they would appear after revision and rearrangement.]

(2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

(1) The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of release from imprisonment.
EXHIBIT C

unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

(2) After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

(1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;

(3) The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

(3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) The defendant shall answer truthfully the questions asked by the probation officer.

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(5) The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

(10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

(6) The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant’s supervision that he or she observes in plain view.

(5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;

(7) The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or
her work (such as the position or the job responsibilities), the defendant shall notify
the probation officer at least 10 days before the change. If notifying the probation
officer in advance is not possible due to unanticipated circumstances, the defendant
shall notify the probation officer within 72 hours of becoming aware of a change or
expected change.

(9) the defendant shall not associate with any persons engaged in criminal activity, and
shall not associate with any person convicted of a felony unless granted permission
to do so by the probation officer;

(8) The defendant shall not communicate or interact with someone the defendant knows
is engaged in criminal activity. If the defendant knows someone has been convicted
of a felony, the defendant shall not knowingly communicate or interact with that
person without first getting the permission of the probation officer.

(11) the defendant shall notify the probation officer within seventy-two hours of being
arrested or questioned by a law enforcement officer;

(9) If the defendant is arrested or questioned by a law enforcement officer, the defendant
shall notify the probation officer within 72 hours.

(10) The defendant shall not own, possess, or have access to a firearm, ammunition,
destructive device, or dangerous weapon (i.e., anything that was designed, or was
modified for, the specific purpose of causing bodily injury or death to another
person, such as nunchakus or tasers).

(12) the defendant shall not enter into any agreement to act as an informer or a special
agent of a law enforcement agency without the permission of the court;

(11) The defendant shall not act or make any agreement with a law enforcement agency
to act as a confidential human source or informant without first getting the
permission of the court.

(13) as directed by the probation officer, the defendant shall notify third parties of risks
that may be occasioned by the defendant’s criminal record or personal history or
characteristics, and shall permit the probation officer to make such notifications and
to confirm the defendant’s compliance with such notification requirement;

(12) If the probation officer determines that the defendant poses a risk to another person
(including an organization), the probation officer may require the defendant to notify
the person about the risk and the defendant shall comply with that instruction. The
probation officer may contact the person and confirm that the defendant has notified
the person about the risk.

(13) The defendant shall follow the instructions of the probation officer related to the
conditions of supervision.

(15) the defendant shall notify the probation officer of any material change in the
defendant’s economic circumstances that might affect the defendant’s ability to pay
any unpaid amount of restitution, fines, or special assessments.
(4) the defendant shall support the defendant’s dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

(7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;

(8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;

(14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;

(d) **“Special” Conditions (Policy Statement)** The following “special” conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) **Possession of Weapons**

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense — a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(1) **Support of Dependents**

(A) If the defendant has one or more dependents — a condition specifying that the defendant shall support his or her dependents.

(B) If the defendant is ordered by the government to make child support payments or to make payments to support a person caring for a child — a condition specifying that the defendant shall make the payments and comply with the other terms of the order.

(2) **Debt Obligations**

If an installment schedule of payment of restitution or a fine is imposed — a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) **Access to Financial Information**
If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine — a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) **Substance Abuse Program Participation**

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol — (A) a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol; and (B) a condition specifying that the defendant shall not use or possess alcohol.

(5) **Mental Health Program Participation**

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment — a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) **Deportation**

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable — a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) **Sex Offenses**

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) —

(A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.

(B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.

(C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant’s person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer’s supervision functions.

(8) **Unpaid Restitution, Fines, or Special Assessments**
If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant’s economic circumstances that might affect the defendant’s ability to pay.

(e) **Additional Conditions (Policy Statement)**

The following “special conditions” may be appropriate on a case-by-case basis:

1. **Community Confinement**
   
   Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

2. **Home Detention**
   
   Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

3. **Community Service**
   
   Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

4. **Occupational Restrictions**
   
   Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

5. **Curfew**
   
   A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

6. **Intermittent Confinement**
   
   Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

**Commentary**
Application Note:

1. Application of Subsection (a)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(7)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

I. Application of Subsection (c)(4).—Although the condition in subsection (c)(4) requires the defendant to “answer truthfully” the questions asked by the probation officer, a defendant’s legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer’s question shall not be considered a violation of this condition.
PROPOSED AMENDMENT: ANIMAL FIGHTING

Synopsis of Proposed Amendment: This proposed amendment revises §2E3.1 (Gambling Offenses; Animal Fighting Offenses) to provide higher penalties for animal fighting offenses and to respond to two new offenses, relating to attending an animal fighting venture, established by section 12308 of the Agricultural Act of 2014, Pub. L. 113–79 (Feb. 7, 2014).

Animal fighting ventures are prohibited by the Animal Welfare Act, 7 U.S.C. § 2156. Under that statute, an “animal fighting venture” is an event that involves a fight between at least two animals for purposes of sport, wagering, or entertainment. See 7 U.S.C. § 2156(g)(1). Section 2156 prohibits a range of conduct relating to animal fighting ventures, including making it unlawful to knowingly—

- sponsor or exhibit an animal in an animal fighting venture, see § 2156(a)(1);
- sell, buy, possess, train, transport, deliver, or receive an animal for purposes of having the animal participate in an animal fighting venture, see § 2156(b);
- advertise an animal (or a sharp instrument designed to be attached to the leg of a bird) for use in an animal fighting venture or promoting or in any other manner furthering an animal fighting venture, see § 2156(c); and
- sell, buy, transport, or deliver a sharp instrument designed to be attached to the leg of a bird for use in an animal fighting venture, see § 2156(e).

The criminal penalties for violations of section 2156 are provided in 18 U.S.C. § 49. For any violation of section 2156 listed above, the statutory maximum term of imprisonment is 5 years. See 18 U.S.C. § 49(a).

However, two new types of animal fighting offenses were added by the Agricultural Act of 2014. They make it unlawful to knowingly—

- attend an animal fighting venture, see § 2156(a)(2)(A); or
- cause an individual under 16 to attend an animal fighting venture, see § 2156(a)(2)(B).

The statutory maximum is 3 years if the offense of conviction is causing an individual under 16 to attend an animal fighting venture, see 18 U.S.C. § 49(c), and 1 year if the offense of conviction is attending an animal fighting venture, see 18 U.S.C. § 49(b).

All offenses under section 2156 are referenced in Appendix A (Statutory Index) to §2E3.1 (Gambling Offenses; Animal Fighting Offenses). Under the penalty structure of that guideline, a defendant convicted of an animal fighting offense receives a base offense level of 12 if the offense involved gambling — specifically, if the offense was engaging in a gambling business, transmitting wagering information, or part of a commercial gambling operation — and a base offense level of 10 otherwise. The guideline contains no specific offense characteristics. There is an upward departure provision if an animal fighting offense involves exceptional cruelty.

Higher Penalties for Animal Fighting Offenses

First, the proposed amendment revises §2E3.1 to provide a base offense level of 16 if the offense involved an animal fighting venture.

In addition, the proposed amendment revises the existing upward departure provision in two ways. First, it clarifies that animal fighting offenses are assumed to involve violent fights between animals and the severe injury or death of defeated animals, but, nonetheless, there may be cases in which an upward
departure may be warranted. Second, it expands the provision to cover not only offenses involving exceptional cruelty but also offenses involving animal fighting on an exceptional scale.

New Offenses Relating to Attending an Animal Fighting Venture

Finally, the proposed amendment responds to the two new offenses relating to attendance at an animal fighting venture. It establishes new base offense levels for such offenses. Specifically, a base offense level of 10 in §2E3.1 would apply if the defendant was convicted under section 2156(a)(2)(B) (causing an individual under 16 to attend an animal fighting venture). The class A misdemeanor at section 2156(a)(2)(A) (attending an animal fighting venture) would not be referenced in Appendix A (Statutory Index) to §2E3.1; accordingly, it would receive a base offense level of 6 in §2X5.2 (Class A Misdemeanors (Not Covered by Another Specific Offense Guideline)).

Proposed Amendment:

§2E3.1. Gambling Offenses; Animal Fighting Offenses

(a) Base Offense Level: (Apply the greatest)

1. 16, if the offense involved an animal fighting venture, except as provided in subdivision (3) below;

2. 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation; or

3. 10, if the offense involved an animal fighting venture; or

4. 6, otherwise.

Commentary


Application Notes:

1. Definition.—For purposes of this guideline, “animal fighting venture” has the meaning given that term in 7 U.S.C. § 2156(g).

2. Upward Departure Provision.—The base offense levels provided for animal fighting ventures in subsection (a)(1) and (a)(3) reflect that an animal fighting venture involves one or more violent fights between animals and that a defeated animal often is severely injured in the fight, dies as a result of the fight, or is killed afterward. Nonetheless, there may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such a case, an upward departure may be warranted. For example, an upward departure may be
warranted if (A) if the offense involved extraordinary cruelty to an animal that resulted in, for example, maiming or death to an animal, an upward departure may be warranted beyond the violence inherent in such a venture (such as by killing an animal in a way that prolongs the suffering of the animal); or (B) the offense involved animal fighting on an exceptional scale (such as an offense involving an unusually large number of animals).

APPENDIX A - STATUTORY INDEX

7 U.S.C. § 2156 (felony provisions only) 2E3.1
PROPOSED AMENDMENT: CHILD PORNOGRAPHY CIRCUIT CONFLICTS

Synopsis of Proposed Amendment: This proposed amendment addresses circuit conflicts and application issues that have arisen when applying the guidelines to child pornography offenses. One of the issues typically arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable. The other two issues typically arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. See United States Sentencing Commission, “Report to the Congress: Federal Child Pornography Offenses” at 33-35 (2012), available at http://www.ussc.gov/news/congressional-testimony-and-reports/sex-offense-topics/report-congress-federal-child-pornography-offenses.

Offenses Involving Infants and Toddlers

First, the proposed amendment responds to differences among the circuits in cases in which the offense involves infants or toddlers. The production guideline, §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years. See §2G2.1(b)(1). The non-production guideline, §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. See §2G2.2(b)(2).

These two guidelines do not provide a further enhancement for cases in which the victim was unusually young and vulnerable, i.e., infants or toddlers. However, the adjustment at §3A1.1(b)(1) provides a 2-level increase if the defendant knew or should have known that the victim was a “vulnerable victim,” i.e., a victim “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.” See §3A1.1, comment. (n.2). The Commentary further provides:

Do not apply subsection (b) if the factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

See §3A1.1, comment. (n.2).

There are differences among the circuits over whether the vulnerable victim adjustment applies when the victim is an infant or toddler. The Ninth Circuit has indicated that the under-12 enhancement “does not take especially vulnerable stages of childhood into account” and that, “[t]hough the characteristics of being an infant or toddler tend to correlate with age, they can exist independently of age, and are not the same thing as merely not having ‘attained the age of twelve years.’” United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004). Accordingly, it held, a vulnerable victim adjustment may be applied based on extreme youth and small physical size, such as when the victim is in the infant or toddler stage. Id. Similarly, the Fifth Circuit has stated, “we do not see any logical reason why a ‘victim under the age of twelve’ enhancement should bar application of the ‘vulnerable victim’ enhancement when the victim is especially vulnerable, even as compared to most children under twelve.” United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013).
The Fourth Circuit, in contrast, has indicated that the vulnerable victim adjustment may not be applied based solely on extreme youth or on factors that are for conditions that “necessarily are related to . . . age.” United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The line drawn by the under-12 enhancement “implicitly preclude[s] courts from drawing additional lines below that point,” and “once the offense involves a child under twelve, any additional considerations based solely on age simply are not appropriate to the Guidelines calculation.” Id.

The proposed amendment responds to the circuit conflict by providing higher penalties for cases involving infants or toddlers. Specifically, it provides in §2G2.2 that, if the offense involved material portraying the sexual abuse or exploitation of an infant or toddler, the 4-level enhancement for depictions of sadistic or masochistic conduct or other depictions of violence in subsection (b)(4) applies. Similarly, it provides in §2G2.1 that, if the offense involved material portraying an infant or toddler, the 4-level enhancement for depictions of sadistic or masochistic conduct or other depictions of violence in subsection (b)(4) applies. It also amends the Commentary to §§2G2.1 and 2G2.2 to specify that if this enhancement applies, do not apply the vulnerable victim adjustment.

Two Issues Relating to the Tiered Enhancement for Distribution in §2G2.2 and Similar Enhancements in §2G2.1 and §2G3.1

Second, the proposed amendment responds to differences among the circuits in applying the tiered enhancement for distribution in §2G2.2(b)(3), which provides an enhancement ranging from 2 levels to 7 levels depending on specific factors. Relatedly, section §2G2.1(b)(3) contains a simple 2-level distribution enhancement and the obscenity guideline, §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), contains a similar tiered enhancement ranging from 2 levels to 7 levels.

There are two related issues that typically arise in child pornography cases when the offense involves a peer-to-peer file-sharing program or network. The first issue is when a participant’s use of a peer-to-peer file-sharing program or network warrants at minimum a 2-level enhancement under subsection (b)(3)(F). The second issue is when, if at all, the use of a peer-to-peer file-sharing program or network warrants a 5-level enhancement under (b)(3)(B) instead.

(1) **The 2-Level Distribution Enhancement at Subsection (b)(3)(F)**

The Fifth, Tenth, and Eleventh Circuits have each held that the 2-level distribution enhancement applies if the defendant used a file-sharing program, regardless of whether he did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014) (the enhancement applies “regardless of the defendant’s mental state”); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013) (the enhancement “does not require that a defendant know about the distribution capability of the program he is using”; the enhancement “requires no particular state of mind”); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015) (“No element of mens rea is expressed or implied . . . The definition requires only that the 'act . . . relates to the transfer of child pornography.'”).

The Second, Fourth, and Seventh Circuits, in contrast, have held that the 2-level distribution enhancement requires a showing that the defendant knew, or at least acted in reckless disregard of, the file-sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015) (requiring knowledge); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard).
Other circuits appear to follow somewhat different approaches. The Eighth Circuit has stated that knowledge is required, but knowledge may be inferred from the fact that a file-sharing program was used, absent “concrete evidence” of ignorance. United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has stated in an unpublished opinion that there is a “presumption” that “users of file-sharing software understand others can access their files.” United States v. Conner, 521 Fed. App’x 493, 499 (6th Cir. 2013); see also United States v. Abbring, 788 F.3d 565 (6th Cir. 2015).

The proposed amendment generally adopts the approach of the Second, Fourth, and Seventh Circuits. It amends subsection (b)(3)(F) to provide that the 2-level enhancement applies if “the defendant knowingly engaged in distribution.” An accompanying application note makes clear that this provision applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly. Similar changes to the 2-level distribution enhancements at §§2G2.1(b)(3) and 2G3.1(b)(1)(F) are also made.

(2) The 5-Level Distribution Enhancement at Subsection (b)(3)(B)

The 5-level distribution enhancement at subsection (b)(3)(B) applies if the offense involved distribution “for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain.” The Commentary provides, as one example, that in a case involving the bartering of child pornographic material, the “thing of value” is the material received in exchange.

The circuits have taken different approaches to this issue. The Fifth Circuit has indicated that when the defendant knowingly uses file-sharing software, the requirements for the 5-level enhancement are generally satisfied. See United States v. Groce, 784 F.3d 291, 294 (5th Cir. 2015) (“Generally, when a defendant knowingly uses peer-to-peer file sharing software . . . he engages in the kind of distribution contemplated by” the 5-level enhancement).

The Fourth Circuit appears to have a higher standard. It has required the government to show that the defendant (1) “knowingly made child pornography in his possession available to others by some means”; and (2) did so “for the specific purpose of obtaining something of valuable consideration, such as more pornography.” United States v. McManus, 734 F.3d 315, 319 (4th Cir. 2013).

The proposed amendment revises subsection (b)(3)(B) and the accompanying commentary to clarify that the enhancement applies if the defendant distributed in exchange for any valuable consideration. Specifically, this means that the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

The proposed amendment makes parallel changes to §2G3.1(b)(1)(B) and the accompanying commentary.

Proposed Amendment:

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production
EXHIBIT E

(a) Base Offense Level: **32**

(b) Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.

(2) (Apply the greater) If the offense involved—

(A) the commission of a sexual act or sexual contact, increase by **2** levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.

(3) If the offense involved distribution defendant knowingly engaged in distribution, increase by **2** levels.

(4) If the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler, increase by **4** levels.

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.

(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary
Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a)-(c), 2251(d)(1)(B), 2260(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. **Definitions.**—For purposes of this guideline:

   “Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

   “Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

   “Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

   “Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

   “Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

   “Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

2. **Application of Subsection (b)(2).**—For purposes of subsection (b)(2):

   “Conduct described in 18 U.S.C. § 2241(a) or (b)” is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

   “Sexual act” has the meaning given that term in 18 U.S.C. § 2246(2).

   “Sexual contact” has the meaning given that term in 18 U.S.C. § 2246(3).

3. **Application of Subsection (b)(3).**—Subsection (b)(3) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly.

4. **Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).**—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).

55. **Application of Subsection (b)(5).**—
In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Application of Subsection (b)(6).—

(A) Misrepresentation of Participant’s Identity.—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant’s name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.
Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 minors.

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) 18, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) 22, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant’s conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

(3) (Apply the greatest) If the offense involved:

(A) If the offense involved distribution Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value. If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by 5 levels.

(C) If the offense involved distribution Distribution to a minor, increase by 5 levels.

(D) If the offense involved distribution Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) If the offense involved distribution Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.
EXHIBIT E

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler, increase by 4 levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.

(7) If the offense involved—
   (A) at least 10 images, but fewer than 150, increase by 2 levels;
   (B) at least 150 images, but fewer than 300, increase by 3 levels;
   (C) at least 300 images, but fewer than 600, increase by 4 levels; and
   (D) 600 or more images, increase by 5 levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

   “Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

   “Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the
sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“Distribution for pecuniary gain” means distribution for profit.

“Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain” means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. “Thing of value” means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the “thing of value” is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received. “The defendant distributed in exchange for any valuable consideration” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.

“Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.

“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material” includes a visual depiction, as defined in 18 U.S.C. § 2256.

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Pattern of activity involving the sexual abuse or exploitation of a minor” means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

“Sexual abuse or exploitation” means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). “Sexual abuse or exploitation” does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. Application of Subsection (b)(3)(F).—Subsection (b)(3)(F) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly.
Application of Subsection (b)(4)(A).—Subsection (b)(4)(A) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.

Interaction of Subsection (b)(4)(B) and Vulnerable Victim (§3A1.1(b)).—If subsection (b)(4)(B) applies, do not apply §3A1.1(b).

Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

Application of Subsection (b)(7).—

(A) Definition of “Images.”.—“Images” means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).

(B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):

(i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

(ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.

(B) Definition.—“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term “material involving the sexual exploitation of a minor” includes such material.

Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the
EXHIBIT E

defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

* * *

§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) (Apply the Greatest) If the offense involved:

(A) If the offense involved distribution of obscene material for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) If the offense involved distribution of obscene material for the receipt, or expectation of receipt, of a thing of value, increase by 5 levels. If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by 5 levels.

(C) If the offense involved distribution to a minor, increase by 5 levels.

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) If the offense involved distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

(F) If the defendant knowingly engaged in distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the source code of a website, increase by 2 levels.

(3) If the offense involved the use of a computer or an interactive computer service, increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(c) Cross Reference
EXHIBIT E

(1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465, 1466, 1470, 2252B, 2252C. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

“Computer” has the meaning given that term in 18 U.S.C. § 1030(e)(1).

“Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

“Distribution for pecuniary gain” means distribution for profit.

“Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain” means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. “Thing of value” means anything of valuable consideration.

“The defendant distributed in exchange for any valuable consideration” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other obscene material, preferential access to obscene material, or access to a child.

“Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.

“Interactive computer service” has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

“Material that is harmful to minors” has the meaning given that term in 18 U.S.C. § 2252B(d).

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.
“Prohibited sexual conduct” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

“Sexually explicit conduct” has the meaning given that term in 18 U.S.C. § 2256(2).

2. Application of Subsection (b)(1)(F).—Subsection (b)(1)(F) applies if the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or conspired to distribute, and did so knowingly.

23. Inapplicability of Subsection (b)(3).—If the defendant is convicted of 18 U.S.C. § 2252B or § 2252C, subsection (b)(3) shall not apply.

34. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.

Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 15.
EXHIBIT F

PROPOSED AMENDMENT: IMMIGRATION


The proposed amendment contains two parts. They are as follows—

**Part A** revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien).

**Part B** revises the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States).

(A) Alien Smuggling

Synopsis of Proposed Amendment: This part of the proposed amendment revises the alien smuggling guideline at §2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien). The Commission has received comment expressing concern that the guideline provides for inadequate sentences for alien smugglers, particularly those who smuggle unaccompanied minors. See, e.g., Annual Letter from the Department of Justice to the Commission (July 24, 2015), at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20150727/DOJ.pdf.

Unaccompanied Minors

The proposed amendment addresses offenses involving unaccompanied minors in alien smuggling offenses. Section 2L1.1(b)(4) currently provides a 2-level enhancement if the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent or grandparent. The proposed amendment amends §2L1.1(b)(4) in several ways. First, it makes the enhancement offense-based rather than defendant-based. Second, it provides that an unaccompanied minor is a minor unaccompanied by a parent, adult relative, or legal guardian. Third, it revises the definition of “minor” from an individual under the age of 16 to an individual under the age of 18. Finally, it raises the enhancement from 2 levels to 4 levels.

Sexual Abuse of Aliens

The proposed amendment also addresses offenses in which an alien (whether or not a minor) is sexually abused. Specifically, it ensures that a “serious bodily injury” enhancement of 4 levels will apply in such a case. It achieves this by amending the commentary to §2L1.1 to clarify that the term “serious bodily injury” included in subsection (b)(7)(B) has the meaning given to that term in the Commentary to §1B1.1 (Application Instructions), which states that “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

Proposed Amendment:

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

(a) Base Offense Level:
EXHIBIT F

(1) 25, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);

(2) 23, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or

(3) 12, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant’s spouse or child (or both the defendant’s spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by 3 levels.

(2) If the offense involved the smuggling, transporting, or harboring of six or more unlawful aliens, increase as follows:

<table>
<thead>
<tr>
<th>Number of Unlawful Aliens Smuggled, Transported, or Harbored</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) 6-24</td>
<td>add 3</td>
</tr>
<tr>
<td>(B) 25-99</td>
<td>add 6</td>
</tr>
<tr>
<td>(C) 100 or more</td>
<td>add 9</td>
</tr>
</tbody>
</table>

(3) If the defendant committed any part of the instant offense after sustaining (A) a conviction for a felony immigration and naturalization offense, increase by 2 levels; or (B) two (or more) convictions for felony immigration and naturalization offenses, each such conviction arising out of a separate prosecution, increase by 4 levels.

(4) If the defendant smuggled, transported, or harbored a minor who was unaccompanied by the minor’s parent, or grandparent, adult relative, or legal guardian, increase by 2 levels.

(5) (Apply the Greatest):

(A) If a firearm was discharged, increase by 6 levels, but if the resulting offense level is less than level 22, increase to level 22.

(B) If a dangerous weapon (including a firearm) was brandished or otherwise used, increase by 4 levels, but if the resulting offense level is less than level 20, increase to level 20.

(C) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.
(6) If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.

(7) If any person died or sustained bodily injury, increase the offense level according to the seriousness of the injury:

<table>
<thead>
<tr>
<th>Death or Degree of Injury</th>
<th>Increase in Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) Bodily Injury</td>
<td>add 2 levels</td>
</tr>
<tr>
<td>(B) Serious Bodily Injury</td>
<td>add 4 levels</td>
</tr>
<tr>
<td>(C) Permanent or Life-Threatening Bodily Injury</td>
<td>add 6 levels</td>
</tr>
<tr>
<td>(D) Death</td>
<td>add 10 levels.</td>
</tr>
</tbody>
</table>

(8) (Apply the greater):

(A) If an alien was involuntarily detained through coercion or threat, or in connection with a demand for payment, (i) after the alien was smuggled into the United States; or (ii) while the alien was transported or harbored in the United States, increase by 2 levels. If the resulting offense level is less than level 18, increase to level 18.

(B) If (i) the defendant was convicted of alien harboring, (ii) the alien harboring was for the purpose of prostitution, and (iii) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels, but if the alien engaging in the prostitution had not attained the age of 18 years, increase by 6 levels.

(9) If the defendant was convicted under 8 U.S.C. §1324(a)(4), increase by 2 levels.

(c) Cross Reference

(1) If death resulted, apply the appropriate homicide guideline from Chapter Two, Part A, Subpart 1, if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

“The offense was committed other than for profit” means that there was no payment or expectation of payment for the smuggling, transporting, or harboring of any of the unlawful aliens.
“Number of unlawful aliens smuggled, transported, or harbored” does not include the defendant.

“Aggravated felony” is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States) has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

“Child” has the meaning set forth in section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)).

“Spouse” has the meaning set forth in 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

“Immigration and naturalization offense” means any offense covered by Chapter Two, Part L.

“Minor” means an individual who had not attained the age of 16-18 years.

“Parent” means (A) a natural mother or father; (B) a stepmother or stepfather; or (C) an adoptive mother or father.

“Bodily injury,” “serious bodily injury,” and “permanent or life-threatening bodily injury” have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).

42. Prior Convictions Under Subsection (b)(3).—Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

53. Application of Subsection (b)(6).—Reckless conduct to which the adjustment from subsection (b)(6) applies includes a wide variety of conduct (e.g., transporting persons in the trunk or engine compartment of a motor vehicle; carrying substantially more passengers than the rated capacity of a motor vehicle or vessel; harboring persons in a crowded, dangerous, or inhumane condition; or guiding persons through, or abandoning persons in, a dangerous or remote geographic area without adequate food, water, clothing, or protection from the elements). If subsection (b)(6) applies solely on the basis of conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). Additionally, do not apply the adjustment in subsection (b)(6) if the only reckless conduct that created a substantial risk of death or serious bodily injury is conduct for which the defendant received an enhancement under subsection (b)(5).

4. Application of Subsection (b)(7) to Conduct Constituting Criminal Sexual Abuse.—Consistent with Application Note 1(L) of §1B1.1 (Application Instructions), “serious bodily injury” is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.

65. Inapplicability of §3A1.3.—If an enhancement under subsection (b)(8)(A) applies, do not apply §3A1.3 (Restraint of Victim).

26. Interaction with §3B1.1.—For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others. In large scale smuggling, transporting, or harboring cases, an additional adjustment from §3B1.1 typically will apply.
EXHIBIT F

37. **Upward Departure Provisions.**—An upward departure may be warranted in any of the following cases:

(A) The defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior.

(B) The defendant smuggled, transported, or harbored an alien the defendant knew was inadmissible for reasons of security and related grounds, as set forth under 8 U.S.C. § 1182(a)(3).

(C) The offense involved substantially more than 100 aliens.

**Background:** This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986.

(B) **Illegal Reentry**


The key findings from the report include—

- the average sentence for illegal reentry offenders was 18 months;
- all but two of the 18,498 illegal reentry offenders — including the 40 percent with the most serious criminal histories triggering a statutory maximum penalty of 20 years under 8 U.S.C. § 1326(b)(2) — were sentenced at or below the ten-year statutory maximum under 8 U.S.C. § 1326(b)(1) for offenders with less serious criminal histories (i.e., those without “aggravated felony” convictions);
- the rate of within-guideline range sentences was significantly lower among offenders who received 16-level enhancements pursuant to §2L1.2(b)(1)(A) for predicate convictions (31.3%), as compared to the within-range rate for those who received no enhancements under §2L1.2(b) (92.7%);
- significant differences in the rates of application of the various enhancements in §2L1.2(b) appeared among the districts where most illegal reentry offenders were prosecuted;
- the average illegal reentry offender was deported 3.2 times before his instant illegal reentry prosecution, and over one-third (38.1%) were previously deported after a prior illegal entry or illegal reentry conviction;
- 61.9 percent of offenders were convicted of at least one criminal offense after illegally reentering the United States; and
- 4.7 percent of illegal reentry offenders had no prior convictions and not more than one prior deportation before their instant illegal reentry prosecutions.

The statutory penalty structure for illegal reentry offenses is based on whether the defendant had a criminal conviction before he or she was deported. The offense of illegal reentry, set forth in 8 U.S.C. ...
§ 1326, applies to defendants who previously were deported from, or unlawfully remained in, the United States. Specifically, the statutory maximum term of imprisonment is—

- **two years**, in general (see 8 U.S.C. § 1326(a)); but
- **10 years**, if the defendant was deported after sustaining (A) three misdemeanor convictions involving drugs or crimes against the person, or both, or (B) one felony conviction (see 8 U.S.C. § 1326(b)(1)); or
- **20 years**, if the defendant was deported after sustaining an “aggravated felony” — a term that covers a range of offense types, listed in 8 U.S.C. § 1101(a)(43), that includes such different offense types as murder and tax evasion (see 8 U.S.C. § 1326(b)(2)).

The penalty structure of the guideline is similar to the statutory penalty structure. The guideline provides a base offense level of 8 and a tiered enhancement based on whether the defendant had a criminal conviction before he or she was deported. Specifically, the enhancement is—

- **4 levels**, for (A) three misdemeanor convictions for crimes of violence or drug trafficking offenses, or (B) any felony (see §2L1.2(b)(1)(D),(E));
- **8 levels**, for an “aggravated felony” (see §2L1.2(b)(1)(C));
- **12 levels**, for a felony drug trafficking offense for which the sentence imposed was 13 months or less (see §2L1.2(b)(1)(B)); and
- **16 levels**, for specific types of felonies: a drug trafficking offense for which the sentence imposed was more than 13 months, a crime of violence, a firearms offense, a child pornography offense, a national security or terrorism offense, a human trafficking offense, or an alien smuggling offense (see §2L1.2(b)(1)(A)).

The penalties in the illegal reentry statute apply based on the criminal convictions the defendant had before he or she was deported, regardless of the age of the prior conviction. Likewise, until 2011, the enhancements in §2L1.2 applied regardless of the age of the prior conviction. In 2011, the Commission revised the guideline to provide that the 16- and 12-level enhancements would be reduced to 12 and 8 levels, respectively, if the conviction was too remote in time (too “stale”) to receive criminal history points under the timing limits set forth in Chapter Four (Criminal History and Criminal Livelihood). See USSG App. C, Amend. 754 (effective Nov. 1, 2011). The other enhancements continue to apply regardless of the age of the prior conviction (i.e., without regard to whether the conviction receives criminal history points). See §2L1.2, comment. (n.1(C)).

Part B of the proposed amendment amends §2L1.2 to lessen the emphasis on pre-deportation convictions by providing new enhancements for more recent, post-reentry convictions and a corresponding reduction in the enhancements for past, pre-deportation convictions. The enhancements for these convictions would be based on the sentence imposed rather than on the type of offense (e.g., “crime of violence”) — in other words, the proposed amendment eliminates the use of the “categorical approach” for predicate felony convictions in §2L1.2. Also, the proposed amendment accounts for prior convictions for illegal reentry separately from other types of convictions.

First, the proposed amendment provides at subsection (b)(1) a new tiered enhancement based on prior convictions for illegal reentry offenses under 8 U.S.C. § 1253, § 1325(a), or § 1326. It provides that if there is a conviction for a felony that is an illegal reentry offense, the enhancement is 4 levels. If there are two or more convictions for misdemeanors under §1325(a), the enhancement is 2 levels. The proposed amendment permits prior convictions to be considered under subsection (b)(1) only if they receive criminal history points under Chapter Four.
Second, the proposed amendment changes how §2L1.2 accounts for pre-deportation convictions (other than an illegal reentry offense) — basing them not on the type of offense (e.g., “crime of violence”) but on the length of the sentence imposed for a felony conviction. The proposed amendment incorporates these new enhancements in subdivisions (A) through (D) at subsection (b)(2). Specifically, if the defendant had a felony conviction and the sentence imposed was five years or more, an enhancement of 10 levels would apply. If the defendant had a felony conviction and the sentence imposed was two years or more, an enhancement of 8 levels would apply. If the defendant had a felony conviction and the sentence imposed exceeded one year and one month, an enhancement of 6 levels would apply. If the defendant had a conviction for any other felony offense, an enhancement of 4 levels would apply. Finally, an enhancement of 2 levels would apply if the defendant had three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses. If more than one of these enhancements apply, the court is instructed to apply the greatest. The proposed amendment permits prior convictions to be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Third, to account for post-reentry criminal activity, the proposed amendment inserts a new subsection (b)(3) to provide a tiered enhancement for a defendant who engaged in criminal conduct resulting in a conviction for one or more offenses after the defendant was ordered deported or ordered removed from the United States for the first time. The structure of the new subsection (b)(3) parallels the proposed changes to subsection (b)(2), both in the sentence length required and the level of enhancement to be applied. As with subsection (b)(2), prior convictions would be considered under subsection (b)(2) only if they receive criminal history points under Chapter Four.

Fourth, the proposed amendment revises the definition of “crime of violence” to bring it into parallel with the definition of “crime of violence” provided in the recently amended 4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016. See United States Sentencing Commission, Notice of Submission to Congress Of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 Fed. Reg. 4741 (Jan. 27, 2016).

Fifth, the proposed amendment revises the definition of “sentence imposed” to provide that revocations of probation, parole, or supervised release count towards the initial sentence length, regardless of when the revocation occurred.

Sixth, the proposed amendment adds a new provision clarifying the use of predicate offenses for cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time. The new Application Note instructs the court to use both offenses: the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), and the other felony offense in determining the appropriate enhancement under subsection (b)(3).

Finally, the proposed amendment revises the departure provision based on seriousness of a prior conviction.

Proposed Amendment:

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic
EXHIBIT F

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug-trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human-trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels if the conviction receives criminal history points under Chapter Four or by 12 levels if the conviction does not receive criminal history points;

(B) a conviction for a felony drug-trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels if the conviction receives criminal history points under Chapter Four or by 8 levels if the conviction does not receive criminal history points;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).

   (A) In General—For purposes of subsection (b)(1):

   (i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

   (ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

   (iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.
(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the
defendant was eighteen years of age unless such conviction is classified as an adult
conviction under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) “Alien smuggling offense” has the meaning given that term in section 101(a)(43)(N) of the
Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) “Child pornography offense” means (I) an offense described in 18 U.S.C. § 2251, § 2251A,
§ 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct
that would have been an offense under any such section if the offense had occurred within
the special maritime and territorial jurisdiction of the United States.

(iii) “Crime of violence” means any of the following offenses under federal, state, or local law:
murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where
consent to the conduct is not given or is not legally valid, such as where consent to the conduct
is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery,
arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense
under federal, state, or local law that has as an element the use, attempted use, or threatened
use of physical force against the person of another.

(iv) “Drug trafficking offense” means an offense under federal, state, or local law that prohibits
the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled
substance (or a counterfeit substance) or the possession of a controlled substance (or a
counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) “Firearms offense” means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution,
transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an
explosive material as defined in 18 U.S.C. § 841(e).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm
described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C.
§ 841(e).


(IV) A violation of 18 U.S.C. § 924(c).


(VI) An offense under state or local law consisting of conduct that would have been an
offense under subdivision (III), (IV), or (V) if the offense had occurred within the special
maritime and territorial jurisdiction of the United States.

(vi) “Human trafficking offense” means (I) any offense described in 18 U.S.C. § 1581, § 1582,
§ 1582, § 1584, § 1585, § 1586, § 1587, § 1589, or § 1591; or (II) an offense under state or
local law consisting of conduct that would have been an offense under any such section if the
offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) “Sentence imposed” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release, but only if the revocation occurred before the defendant was deported or unlawfully remained in the United States.

(viii) “Terrorism offense” means any offense involving, or intending to promote, a “Federal crime of terrorism”, as that term is defined in 18 U.S.C. § 2332b(g)(5).

(C) Prior Convictions—In determining the amount of an enhancement under subsection (b)(1), note that the levels in subsections (b)(1)(A) and (B) depend on whether the conviction receives criminal history points under Chapter Four (Criminal History and Criminal Livelihood), while subsections (b)(1)(C), (D), and (E) apply without regard to whether the conviction receives criminal history points.

2. Definition of “Felony”—For purposes of subsection (b)(1)(A), (B), and (D), “felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Application of Subsection (b)(1)(C).

(A) Definitions—For purposes of subsection (b)(1)(C), “aggravated felony” has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).


(A) “Misdemeanor” means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) “Three or more convictions” means at least three convictions for offenses that are not treated as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

5. Aiding and Abetting, Conspiracies, and Attempts—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

6. Computation of Criminal History Points—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Departure Based on Seriousness of a Prior Conviction—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case,
a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) or (b)(1)(B) applies but that enhancement does not adequately reflect the extent or seriousness of the conduct underlying the prior conviction, an upward departure may be warranted. (C) In a case in which subsection (b)(1)(A) applies and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(13), a downward departure may be warranted.

8. Departure Based on Time Served in State Custody. In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant’s other criminal history.

9. Departure Based on Cultural Assimilation. There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant’s illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant’s continued residence in the United States, (4) the duration of the defendant’s presence outside the United States, (5) the nature and extent of the defendant’s familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant’s criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

§2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristics
EXHIBIT F

(1) (Apply the Greater) If the defendant committed the instant offense after sustaining—

(A) a conviction for a felony that is an illegal reentry offense, increase by 4 levels; or

(B) two or more convictions for misdemeanors under 8 U.S.C. § 1325(a), increase by 2 levels.

(2) (Apply the Greatest) If, before the defendant was ordered deported or ordered removed from the United States for the first time, the defendant sustained—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

(3) (Apply the Greatest) If, at any time after the defendant was ordered deported or ordered removed from the United States for the first time, the defendant engaged in criminal conduct resulting in—

(A) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was five years or more, increase by 10 levels;

(B) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed was two years or more, increase by 8 levels;

(C) a conviction for a felony offense (other than an illegal reentry offense) for which the sentence imposed exceeded one year and one month, increase by 6 levels;

(D) a conviction for any other felony offense (other than an illegal reentry offense), increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 2 levels.

Commentary
Statutory Provisions: 8 U.S.C. § 1253, § 1325(a) (second or subsequent offense only), § 1326. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. In General.

(A) “Ordered Deported or Ordered Removed from the United States for the First Time.”—For purposes of this guideline, a defendant shall be considered “ordered deported or ordered removed from the United States” if the defendant was ordered deported or ordered removed from the United States based on a final order of exclusion, deportation, or removal, regardless of whether the order was in response to a conviction. “For the first time” refers to the first time the defendant was ever the subject of such an order.

(B) Offenses Committed Prior to Age Eighteen.—Subsections (b)(1), (b)(2) and (b)(3) do not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted.*

2. Definitions.—For purposes of this guideline:

“Crime of violence” means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another. “Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. “Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

“Drug trafficking offense” means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.**

“Felony” means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.**

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* The provision marked with an asterisk (*) currently appears in note 1(A)(iv). The proposed amendment only renumbers the provision without making substantive changes to the text.

** The definitions marked with double asterisks (**) currently appear in the commentary scattered throughout the application notes. The proposed amendment places these definitions without substantive changes as part of new application note 2.
“Illegal reentry offense” means (A) an offense under 8 U.S.C. § 1253 or § 1326, or (B) a second or subsequent offense under 8 U.S.C. § 1325(a).

“Misdemeanor” means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

“Sentence imposed” has the meaning given the term “sentence of imprisonment” in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History). The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

3. **Criminal History Points.**—For purposes of applying subsections (b)(1), (b)(2), and (b)(3), use only those convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of subsections (b)(1)(B), (b)(2)(E), and (b)(3)(E), use only those convictions that are counted separately under §4A1.2(a)(2).

A conviction taken into account under subsection (b)(1), (b)(2), or (b)(3) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. **Cases in Which Sentences for An Illegal Reentry Offense and Another Felony Offense were Imposed at the Same Time.**—There may be cases in which the sentences for an illegal reentry offense and another felony offense were imposed at the same time and treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). In such a case, use the illegal reentry offense in determining the appropriate enhancement under subsection (b)(1), if it independently would have received criminal history points. In addition, use the prior sentence for the other felony offense in determining the appropriate enhancement under subsection (b)(3), if it independently would have received criminal history points.

5. **Departure Based on Seriousness of a Prior Offense.**—There may be cases in which the offense level provided by an enhancement in subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense, because (A) the length of the sentence imposed does not reflect the seriousness of the prior offense; (B) the prior conviction is too remote to receive criminal history points (see §4A1.2(e)); or (C) the time actually served was substantially less than the length of the sentence imposed for the prior offense. In such a case, a departure may be warranted.

6. **Departure Based on Time Served in State Custody.**—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense. Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the
seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant’s other criminal history.

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In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant’s continued residence in the United States, (4) the duration of the defendant’s presence outside the United States, (5) the nature and extent of the defendant’s familial and cultural ties inside the United States, and the nature and extent of such ties outside the United States, (6) the seriousness of the defendant’s criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

*** The application notes marked with three asterisks (***)) appear in the current guideline at the end of the commentary. The proposed amendment only renumbers these notes without making substantive changes to the text.
UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING ON THE TRIBAL ISSUES ADVISORY GROUP REPORT AND RECOMMENDATIONS

THURSDAY, JULY 21, 2016

The Commission met in the Thurgood Marshall Judiciary Building, One Columbus Circle, NE, Washington, DC, at 11:00 a.m., Patti B. Saris, Chair, presiding.

PRESENT:

PATTI B. SARIS, Chair
CHARLES R. BREYER, Vice Chair (by telephone)
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, JR., Commissioner
MICHELLE MORALES, Ex-Officio Commissioner

WITNESSES:

HONORABLE RALPH R. ERICKSON, Chair, Tribal Issues Advisory Group, Chief U.S. District Judge, District of North Dakota
HONORABLE ROBERTO A. LANGE, Chair, Drafting Subcommittee, U.S. District Judge, District of South Dakota
BRENT LEONHARD, Co-chair, Tribal Court
Convictions/Criminal History/Court
Protection Orders Subcommittee, Tribal
Attorney,
Confederated Tribes of the Umatilla Indian
Reservation
BARBARA CREEL, Co-chair, Tribal Court
Convictions/Criminal History/Court
Protection Orders Subcommittee, Professor
of Law, University of New Mexico School of
Law
HONORABLE JEFFREY VIKEN, Chair, Sentencing
Disparities Subcommittee, Chief U.S.
District Judge, District of South Dakota
KATHLEEN BLISS QUASULA, Chair, Juvenile
Justice/Youthful Offenders/Crimes Against
Children Subcommittee, Kathleen Bliss Law
Group PLLC
## Table of Contents

<table>
<thead>
<tr>
<th>Page</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Opening Remarks</strong></td>
<td></td>
</tr>
<tr>
<td>Patti Saris</td>
<td>4</td>
</tr>
<tr>
<td><strong>Presentation of Final Report and Summary of Drafting Process</strong></td>
<td></td>
</tr>
<tr>
<td>Hon. Ralph Erickson</td>
<td>12</td>
</tr>
<tr>
<td>Hon. Roberto Lange</td>
<td>21</td>
</tr>
<tr>
<td><strong>Presentation of Subcommittee Recommendations</strong></td>
<td></td>
</tr>
<tr>
<td>Hon. Ralph Erickson</td>
<td>33</td>
</tr>
<tr>
<td><strong>Recommendations of the Tribal/Federal Working Group</strong></td>
<td></td>
</tr>
<tr>
<td>Hon. Roberto Lange</td>
<td>33</td>
</tr>
<tr>
<td><strong>Recommendations: Tribal Court Convictions and Court Protection Orders</strong></td>
<td></td>
</tr>
<tr>
<td>Brent Leonhard</td>
<td>38</td>
</tr>
<tr>
<td>Barbara Creel</td>
<td>43</td>
</tr>
<tr>
<td><strong>Recommendations: Sentencing Disparities and Data Collection</strong></td>
<td></td>
</tr>
<tr>
<td>Hon. Jeffrey Viken</td>
<td>80</td>
</tr>
<tr>
<td><strong>Recommendations: Youthful Offenders in Indian Country</strong></td>
<td></td>
</tr>
<tr>
<td>Kathleen Bliss Quasula</td>
<td>94</td>
</tr>
<tr>
<td><strong>Closing Remarks</strong></td>
<td></td>
</tr>
<tr>
<td>Hon. Ralph Erickson</td>
<td>119</td>
</tr>
<tr>
<td><strong>Adjourn</strong></td>
<td>119</td>
</tr>
</tbody>
</table>
CHAIR SARIS: Good morning to everybody and welcome to the United States Sentencing Commission's public hearing on the report and recommendations of the Tribal Issues Advisory Group, whom we call TIAG.

I would like to extend a warm welcome to all our witnesses, some of whom I know, who have traveled far to be here today, and to the public audience that joins us both here in Washington, D.C.; we're pleased to have so many people from the public, and also by live stream via the Internet. We look forward to a thoughtful and engaging discussion about this important subject.

Today we will hear testimony that summarizes the important work of the TIAG over the past year-and-a-half which culminated in the publication of the TIAG report last month. The report is available to everyone on the Commission
I look forward to hearing from our distinguished witnesses which include federal judges, tribal law experts and tribal members who bring together their perspectives from Indian country. The Commission is incredibly grateful to the witnesses who are here today and for all the TIAG members for their dedication to their topics and for their hard work on behalf of the Commission over the past several months. I'm sure we'll hear about it, but they've met not just in Washington, D.C., but more importantly I think they've been in Bismarck, the Standing Rock Reservation in North Dakota; the Pascua Yaqui Reservation in Arizona. And that was important to the work of TIAG.

The Commission formed the TIAG in February 2015 to study the impact of the sentencing guidelines on Native American defendants, victims and tribal communities and to make recommendations on sentencing and policy reforms based on the TIAG's analysis. The
Commission charged the TIAG with studying certain topics such as sentencing disparities and the use of tribal court convictions in the calculation of criminal history.

The Commission also left open the possibility of the TIAG to study any other issues relating to criminal justice in Indian country, and it's done so. The result is that the TIAG report includes recommendations for concrete amendments to the sentencing guidelines as well as requests for further study by the Commission and for legislative and policy reform by lawmakers and the criminal justice community. It also highlights the need for more data in certain areas. We will hear about the specifics of those recommendations in just a few moments.

Let me remind the public audience on a different subject about where we are in the amendment cycle. Just last month on June 9th the Commission published its proposed priorities for the upcoming year. You can find a full listing of those priorities on our web site and in the
Publication of those priorities triggered a public comment period which will close on July 25th. Let me repeat that: July 25th, next Monday.

We hope to hear not only from today's witnesses, but also from members of the general public about the Commission's response to the TIAG report. We also welcome comment on any of our proposed priorities and about any other topics you would like us to address during this amendment cycle.

So let's get going. First, I'd like to introduce our Vice Chair, Judge Charles R. Breyer. You don't see him, but he's here with us. He's on the telephone.

Can you hear us?

VICE CHAIR BREYER: Yes, I can --

CHAIR SARIS: Okay.

VICE CHAIR BREYER: -- and I'm with you audio and in spirit.

CHAIR SARIS: Okay. He's a senior district judge for the Northern District of
California and has served as a United States district judge since 1998. He joined the Commission in 2013.

Right next to me is Rachel Barkow who joined the Commission in 2013. She's the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law where she focuses her attention on teaching and research in criminal and administrative law. She also serves as the faculty director of the center on the administration of criminal law at the law school.

Next to Commissioner Barkow is Dabney Friedrich who is also now from California, who's served on the Commission since 2006. Immediately prior to her appointment to the Commission she served as an Associate Counsel at the White House. She's served as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant United States Attorney first for the Southern District of California and then for the Eastern District of Virginia.
And far to the end of the table here is Judge William H. Pryor, a United States Circuit Judge for the 11th Circuit Court of Appeals appointed in 2004. Before his appointment to the federal bench Judge Pryor served as attorney general for the State of Alabama. He joined the Commission in 2013.

Finally, to my left is Michelle Morales who serves as the designated ex-officio member of the Commission representing the Department of Justice. She is the acting director of the Office of Policy and Legislation in the Criminal Division of the Department. She first joined that office in 2002 and has served as its deputy director since 2009. She previously served as an Assistant United States Attorney in the District of Puerto Rico.

So now let me discuss for a minute the format of today. This is not our usual time for the Commission to start a public hearing. We're usually here bright and early at 8:30 or 9:00, but we realized that so many people here who are
interested in this come from the West Coast and a large portion of the Indian country population might want to chime in, so what we decided to do is start this later in the day, which I think is pleasing to everyone in this room.

So our hearing will begin with a presentation of the TIAG report and a summary of the drafting process. And after that we'll hear from each of the -- I think there were four TIAG Subcommittees -- about their recommendations, followed by closing remarks.

So we have asked each witness to limit their remarks to roughly 10 minutes. Usually we have these lights that go off. We don't have the lights today. Nonetheless, you still have my hook if things go on a little too long. But the topic is so interesting we've decided to start with the judges here who know the most about it. We will take a short break in the middle and throughout the hearing the Commission will ask questions and we'll jump in on topics. We're not a shy group.
So let's get started. And I start off with our first panel which will provide an overview of the TIAG and the drafting process, and it's comprised of two federal judges from Indian country who are well known to us. Judge Ralph Erickson is the chair of the TIAG and Chief United States District Judge of the District of North Dakota. We've heard from Judge Erickson before on other topics. He just came to our training session.

And we welcome you back.

And Judge Roberto A. Lange, whom we call Bob, chaired the Drafting Subcommittee for the TIAG, which means we can thank him for the monumental task of putting the report together. I don't know why Judge Lange came back here. The last time he came and testified in front of us he got stuck in a snowstorm over Valentine's Day and wasn't home with his family. So I don't know --

JUDGE LANGE: It made me feel at home coming from South Dakota.

CHAIR SARIS: Yes.
(Laughter.)

CHAIR SARIS: So I thank you for risking it coming back. We tried for the summer so this wouldn't happen to you again. And welcome back.

The floor is yours, Judge Erickson.

JUDGE ERICKSON: Thank you, Chairman.

I want to start off by just thanking the Commission for the opportunity to serve in this capacity. I will start by telling you what I told the members of the TIAG when we first met at the very first meeting, and that is that I fundamentally and from the deepest part of my heart believe this is the most important professional work I have ever done and am likely ever to do in my career as a federal judge. And I say that with full knowledge that every day I make decisions that deeply impact people's lives.

But the reality of the relationship between the tribal nation and the United States and the relationship between the United States Sentencing Commission and sentencing in Indian
country is such that this is a once in a lifetime opportunity to work together to improve the quality of life for tribal people in a way that can make a substantial difference. And I thank you from the bottom of my heart for the opportunity for our Commission, our Committee to go about this very important work.

I also want to thank you for the time and the effort that you put into selecting a diverse group of people who brought to the TIAG a broad background. If you think about the group of people that you selected for us to work with, you gave us five United States judges, a representative from the Department of the Interior, two representatives from the Department of Justice, a representative from the Office of the Federal Public Defenders, a tribal chairman, two tribal judges, a member of the Nevada Indian Commission, a victim specialist with the Bureau of Indian Affairs, three academics, tribal counsel, a private practitioner, a retired tribal police chief and director of public safety and
liaisons from the Practitioners Advisory Group, the Probation Officers Advisory Group and the Victims Advisory Group.

All of these people have been very active in Indian country issues over a period of years. All of them were known to me by at least reputation. And when I read their writings, they staked out a broad diversity of opinions and background. And when Chair Saris asked me to take this position, I agreed because I could think of no reason that it was possible to say no, but I did so with great trepidation because these were committed people who had a long-standing history in Indian country and who were extremely committed to moving forward. And with that broad diversity of strong opinions I was quite fearful that it might be hard to build a consensus.

What I found instead was that you had selected a group of people that shared two fundamental traits that I think are important as we think about sentencing in Indian country: No.
1, each of them was committed to recognizing, understanding and fostering the pre-
constitutional nature of these sovereign governments and these sovereign people and they
were committed in doing what was best for the people who lived in Indian country.

I probably should explain that "Indians" and "Indian country," while not politically correct terms, are terms of art and they are in the statute and that's why we refer to those titles.

The group of people you gave me to work with were absolutely phenomenal. I have never worked with a group of people that were better in my entire life. I say the same thing about the staff. There was no task that we asked them to undertake that they didn't undertake with great alacrity and with tremendous skill and perseverance. We kept asking, we kept pushing, we kept asking for things that maybe were not very fair, and yet they responded cheerfully, and to the best of their efforts they got all the
information that was necessary. You should be justly proud of the people that you employ. They are fantastic to a person.

Now, our group met monthly and we met three times in person. We met once here in Washington, D.C., once in North Dakota spending time at the Standing Rock Reservation and in Bismarck, and we met once in Arizona at the Pascua Yaqui Reservation. We had an opportunity to see tribal governments function and to get information from our experiences in holding those hearings. We also held a consultation where we invited Indian people from around the country to contribute to our work.

The people who report from the substantive committees are going to talk in more detail about both those things, so I won't go into great detail about it, but I think it's important for us to understand that Indian Nations are in a trust relationship with the United States. They are pre-constitutional sovereigns. They have an interest that is unlike
anything else that exists in our legal system. And consultation and respect for their customs and traditions is inherent in any type of sentencing process that we want to consider and we think it's extremely important that those efforts continue to be of paramount importance to the Commission.

The way that the Committee was organized, we formed four substantive working groups. We had a working group that was the Tribal/Federal Working Group, we had the Tribal Court Convictions, Criminal History, Court Protection Orders Working Group. We had the Sentencing Disparities Working Group. We had a Juvenile Justice, Youthful Offenders, Crimes Against Children Working Group. Each of the substantive committees met at least monthly in addition to the monthly meetings that were held telephonically or in person.

And so, over this 18-month period we have gotten to know each other exceptionally well and a lot of hard work was done. I'm proud of
the report. I think that it pulls together a broad diversity of opinion and I'm exceptionally proud of the fact that we were able to produce a report that has not resulted in any minority reports or minority positions, which is difficult when you look at the interests that this party represents.

And I want to thank from the bottom of my heart the members of the TIAG for being willing to sacrifice their own personal stakeholder interests to look towards doing what was best for the people of Indian country.

I think that that's really a summary of what we did. My time is nearly up, but I do want to add one last thing. I'm sure most of you are familiar with Judge Myron Bright of the Eighth Circuit. He's a 98-year-old senior judge. He called me to his chambers at the beginning of this week and he wanted to tell me that there's something that I should bring to you, and I told him I would do so. And I do so because I think it's important as a piece of information.
What he wanted me to point out was that the lack of statistical data should not be confused with a lack of evidence and that the fact that there is anecdotal evidence and evidence from opinions and evidence from people who reside in Indian country that they believe that there is significant sentencing disparity, that that's important, because it's nearly universally held as a belief. And as we traveled around Indian Country, it seems that everyone believes that there is some sentencing disparity.

When we first started this process one of the things that I hoped to discover was each of us works in Indian country, but we each work with two or three tribal nations. And as a result, we have sort of a deep experience in Indian country, but a narrow experience. And the question that we are confronted with frequently is whether or not our personal experiences are normative or whether or not they are parochial.

And one of the things that we were looking for statistical data for was to answer
that question, because we do know that while there's universal accord that sentencing disparity exists, there is not universal acceptance as to what that disparity is. In some parts of the country there's a perception that the disparity is that federal sentences are short and in some that they're long. And in our part of the world it's firmly believed that the Indian country sentences are uniformly long.

It is also true that in the Southwest there's more of a split and the inability to get the data has made that difficult for us to really tease out. Our hope is that at some point the data can be developed in a way that allows us to tease those things out.

Having said that, I don't want to distract from the meaningful work that we have accomplished and that we have recommended some concrete changes to the sentencing guidelines, which we think are important. We have recommended some things that only Congress can fix and the question becomes how do we move
forward from here? And we have also identified at least one issue with juvenile and youthful offenders that we think is much broader than just an Indian country issue, although for juvenile offenders they are primarily Indian country juveniles that we see.

I think I've gone on longer than I should. I want to just once again close by thanking you and I'll let Judge Lange explain to you the drafting process.

JUDGE LANGE: All right. Thank you, Judge Erickson.

I want to echo Judge Erickson's gratitude to the Commission and to the members of the TIAG for the work that was done.

Drafting for a group of 20 different committee members is a challenge. And I did not do it alone. There was a Drafting Committee that I worked with comprised of representatives of all four of the working groups. Diane Humetewa, who's a district court judge in the District of Arizona, and Neil Fulton, a federal public
defender for North and South Dakota represented the group that dealt with the tribal court convictions. Bill Boyum, who is a supreme court judge for the Cherokee Nation worked with me from the Tribal/Federal Working Group. Mike Cotter, U.S. Attorney in the District of Montana, represented the Sentencing Disparities Group. And Angela Campbell, who's a private practitioner, worked for the Juvenile Justice Group.

We formed relatively early in the process and did the status update for all of you late last year. We chose to do the status update reporting from the four working groups, and that became the format as you see in the final report of the TIAG. The final report initially was drafted after our Arizona meeting in February. The committee did some of the work. Some of the work was from the various working groups as well.

There was a process as you'd expect of the drafts going back to the working groups for feedback, other revisions that were done.
Ultimately this was presented to the entire TIAG in March -- or excuse me, in April with final revisions. The sentencing disparity section was the latest to come together because there was some delay and some hope that there would be further data that could be used to make more specific recommendations. Ultimately the final draft was approved in May.

I would say that this draft represents a consensus of all of the members. There is one place, and that is the treatment of tribal court convictions, where I think it's more appropriate to describe it as a substantial majority joining in that recommendation. But it was an interesting process, one that I had a great deal of help with, and in particular I would like to thank Nicole Snyder for her help in this regard. She and my judicial assistant Leslie Hicks did much of the work in terms of just making sure the changes got made. And I think as a group we're comfortable and proud of the final outcome.

CHAIR SARIS: Are there any
questions? Yes, go ahead.

COMMISSIONER BARKOW: Thanks very much for this report, which is excellent.

It's okay -- we're on the topic of the report if we want to ask --

(Simultaneous speaking.)

CHAIR SARIS: Yes, although I think we're going to have -- the subcommittees are going to come present on -- I think, right, on the substantive recommendations?

JUDGE ERICKSON: Right. Right.

COMMISSIONER BARKOW: I guess I wanted to get a little bit of a sense of the majority in favor of the use of tribal convictions. I guess if there was a spectrum of views from the group. To the extent there wasn't absolute unanimity, what kinds of things might have been the source of the -- where you --

JUDGE ERICKSON: Well, I --

COMMISSIONER BARKOW: -- couldn't get complete consensus, I guess.

JUDGE ERICKSON: Yes, let me
address --

COMMISSIONER BARKOW: If it's okay to --

(Simultaneous speaking.)

JUDGE ERICKSON: Yes, I think that if you look at the inner workings of the committee --

CHAIR SARIS: But we'll probably hear about it again, right?

JUDGE ERICKSON: Yes, we will.

CHAIR SARIS: That's fine.

JUDGE ERICKSON: And I'll be quite brief on this.

I think that if you think about what happens with tribal court convictions, there really are two fundamental questions that come to play. The first question is what are the attributes of tribal sovereignty that are tied up in the tribal court and what dignity should be afforded to the tribal courts and the tribal court judgments? And right now we treat them as we would foreign courts. And so, there's that
issue.

And so, there is a concern among some of our members, a minority, that would put a higher priority on the tribal court's dignity. There's another group of people that -- and this would be a clear majority of the committee, nearly two-thirds, not quite, that says, well, you know, the problem with that is that tribal courts are very different. There are over 500 tribal nations, over 300 tribal courts.

The tribal courts range from being very traditional, in which there would be very few parameters set that we would recognize as being consonant with the ordinary due process in a western system. They range to a set of tribal courts that are very nearly western in their nature and have a full panoply of due process rights. And frankly, they function at as high or higher a level of due process as any state court.

And what happens with all of us who serve in this capacity is we come from different
areas where we have different experiences and it depends on what the courts look like where you are.

Now amongst the majority there was a concern that if we just said all tribal convictions should score regardless, that there would be a tendency to have much higher criminal history scores and it would exacerbate the disparity that already exists in Indian country sentencing.

On the other side there was a recognition while that may be possible that it was not consonant or consistent with tribal dignity as sovereign nations to not treat their convictions with that type of dignity. As we went about the business of resolving it; and you'll hear a lot more about it, we drafted what we perceived to be a way to make it work for every single tribe because it gives the district judge the opportunity to really evaluate the tribal courts that have imposed those prior judgments and how they should be viewed.
The other thing that you just should be aware of is that the tribal courts have a broad variation between the nature of the record keeping that they have, some of which have fantastic records that are better or as good as any state in the union. Others keep almost no records. You could write them on the back of a matchbook cover. And so that's a problem.

Did I answer the question, Bob?

JUDGE LANGE: Absolutely. And I would add to that some tribes do provide criminal history to the presentence writers. Some tribes will not do so because they have a sense that their members are being treated too harshly. And I happen to have four, sometimes five tribes that have members whom I routinely sentence. And I have both situations. I have one tribe that will not provide criminal history on defendants at all. Some tribes that do. So that would create a disparity if it's counted uniformly in my own case law.

And I think it was unanimous among the
five federal judges that it ought not to be automatically counted, but rather sort of guidance for where an upward departure is appropriate in criminal history category.

JUDGE ERICKSON: Thank you.

CHAIR SARIS: I know you've emphasized the importance of consultation, and I have been thrilled that you've gone into Indian country and that basically such a broad array of people were consulted as part of this report. As we as the Commission go forward -- the issue of consultation is daunting because there are so many tribes; and there are 500 tribes and probably, as you say, in huge swaths of the country, different regions with different points of view -- what kinds of things would you think consultation should involve and how?

JUDGE ERICKSON: Well, we consulted with -- every federally-recognized tribe was given notice as well as other people who are academics interested in Indian country. We sent out notice. We had the cooperation of the
Department of the Interior, Bureau of Indian Affairs in sending out notice. And we held a telephone consultation, which actually we felt was really very useful. We heard from a number of people from around the country. And so, I think that that's a tool that you can use on a -- with more routine matters. If in --

CHAIR SARIS: Like a listserv? Is that what it is --

JUDGE ERICKSON: Yes, well, it was just a -- Nicole can probably answer this, but for us it looked like a big giant conference call where we were all in different parts of the country on our telephones and answering questions. And I'm afraid that the technology piece was sort of beyond me, but I called the consultation to order. I made a brief statement. People asked questions from all over the country, some of whom I know, some of whom I don't know. And we had a number of people from the -- and really we're kind of stealing the thunder of the federal committee, and so I should let them
explain it.

JUDGE LANGE: That's okay.

JUDGE ERICKSON: But we answered the questions and they made statements and it was really a very kind of -- for us relatively painless. You'll have to ask your staff how painful it was for them, because they sure made it look painless from where we sat.

I do think that there are issues that are uniquely tied to Indian country that really the Commission ought to consider meeting in one of the larger Indian country states when those sorts of issues come to bear, because I do think that -- for example, if you look at it, if you decide to change the sexual assault guidelines, almost all the sexual assault cases that we see in federal court come out of Indian country and has unique application there and we ought to look at consulting on a more direct basis there.

And if you think about the Indian Nations, some of them are huge and it becomes relatively easy to identify where it might make
sense to hold a field hearing. But on the ordinary run-of-the-mill kinds of things that effect Indian country that are not sort of substantial changes, it seems to me that this sort of telephonic consultation would be appropriate.

CHAIR SARIS: All right. Well, thank you very much.

For our next panel we will hear recommendations from two of the TIAG subcommittees. First we will again hear from Judge Roberto Lange about the recommendation of the TIAG's Tribal/Federal Working Group. Next we will hear from the co-chairs of the Tribal Court Convictions and Court Protection Orders Subcommittee.

Barbara Creel is professor of law at the University of New Mexico School of Law where she directs the Southwest Indian Law Clinic. Ms. Creel is also a member of the Pueblo Jemez Tribe.

Brent Leonhard is the tribal attorney for the Confederated Tribes of the Umatilla
Indian Reservation.

We welcome you. Thank you for coming such a long distance and we're excited to hear your comments. Thank you.

For this Judge Erickson is staying as the -- somebody to ask questions of and he'll be here to chime in. So welcome to all of you.

So I don't know if you've agreed which order to go in.

JUDGE ERICKSON: Yes, Judge Lange is going to present on behalf of the Tribal and Federal Working Group. I would just note that Judge Morris from the District of Montana and Judge Boyum, who's on the Supreme Court of the Eastern Band of Cherokee Indians are both unavailable to be here, and they were the chairs of this working group. But Bob was on the working group.

And so, Judge Lange?

JUDGE LANGE: Thank you, Judge Erickson.

In addition to Judge Morris and Judge
Boyum on this working group were Wendy Bremmer, who is with the BIA as a victim's assistant; Kevin Washburn, who was at the Department of the Interior and now I believe is at the University of New Mexico; fascinating guy, really enjoyed Kevin; and Tracy Toulou, who's with the Department of Justice.

I think it's important to be mindful in discussing a tribal/federal working relationship of the history that exists in this nation of the treatment of Native Americans and tribal groups. It has been a history where the Federal Government has imposed its will for the most part on Native Americans and on tribes rather than working together and consulting together. There is an outline that I believe was submitted separately regarding the history. I won't belabor that. That's not our purpose in being here.

But with that background this working group thought that it would be a valuable recommendation to the Sentencing Commission to
consider a standing advisory group on Native American issues and on Indian sentencing. We began by calling this the mini-TIAG idea. Our charter included no more than 20 members, and we thought a group of 6 to 8 individuals with a cross-section of a federal judge, a Department of the Interior, Department of Justice representative, federal public defender, tribal judge and a couple of at-large members, hopefully Native Americans, would be a good cross-section to work with.

And the idea of that group would be to not only advise the Sentencing Commission on issues that particularly affect Indian country, but also perhaps to help or actually do consultation with Indian tribes as was done by the TIAG as a whole.

The thought then was that perhaps every decade or so there could be a reformulation of a group like this to study in particular possible sentencing disparities and make recommendations for changes in the guidelines.
As you know from reading the report and will hear later, the TIAG was frustrated with the absence of the ability to do good comparisons of possible sentencing disparities.

And then the other suggestion that Judge Erickson has mentioned, the consideration of having hearings in or near Indian country for issues -- revisions of the guidelines that particularly affect Indian country.

There were some more general recommendations that this group came up with; this was a very wide-thinking group, about how we could improve relations with tribes and Native Americans generally. And I know there's been some communication between Judge Erickson and the FJC and AO about establishing a working group. Some of the federal judges discussed mentoring new judges who would take the bench in Indian country districts, and there was discussion also about encouraging greater law enforcement in Indian country where non-Indians, whites, non-Indians offend against Indians possibly even
through encouraging greater use of misdemeanor CVBs.

That's the summary of the Tribal/Federal Working Group recommendations.

JUDGE ERICKSON: Any questions related to that?

CHAIR SARIS: Okay. I think what we'll do is just take everybody and then we'd jump in and ask. That way we get through everybody. Is that okay?

JUDGE ERICKSON: That's fine.

CHAIR SARIS: Okay.

JUDGE ERICKSON: The next report will come from the Tribal Convictions and Protection Orders Working Group. Brent and Barbara will report on that.

I don't know if you've figured out who's going to speak first.

MR. LEONHARD: I think I'll go first.

JUDGE ERICKSON: All right. The one thing I would say, if I've mis-spoken on anything and it needs to be corrected, feel free to correct
me at any time. Okay?

MR. LEONHARD: Great.

JUDGE ERICKSON: Very good.

MR. LEONHARD: So I'm Brent Leonhard. I'm an attorney with the Office of Legal Counsel for the Confederated Tribes of the Umatilla Indian Reservation. By way of background I've been a state prosecutor, head of the prosecution unit at White Mountain Apache, head public defender at Colville Tribe, and a Special Assistant United States Attorney in Arizona and Oregon. Umatilla was the first jurisdiction in the nation along with the State of Ohio to implement sex offender registration under the Adam Walsh Act. It was the first tribe to implement felony sentencing under the Tribal Law and Order Act of 2010, and the first tribe along with Tulalip and possibly Pascua Yaqui to be authorized to exercise criminal jurisdiction authority of non-Indians in domestic violence cases under VAWA.

So there's a great deal of interest
and concern about public safety in Indian country, and coming into this group on these issues my position has been strongly that tribal court convictions should be considered automatically in calculating sentences the same way as state court convictions because if you go to Umatilla tribal court, all the due process that are given them are the same you'll find in any municipal or state court system, if not more.

And it doesn't matter if it's a felony, misdemeanor, Indian or non-Indian. We give them all the same rights. And in fact, anybody who wants an attorney gets an attorney whether or not they have the income. So there's a great deal that you'll find in tribal court that provides all the protections you'd be concerned about.

However, coming into this group it was immediately apparent within our subcommittee that there's a broad diversity of views from people from a broad diversity of backgrounds, and in fact diametrically opposed positions. And we
were tasked with trying to come to a consensus on a recommendation for the Commission, and from our sub-group I think we did. It was a difficult task. TIAG as a whole I think a majority did.

So the recommendation is that instead of automatically counting under 4A1.2 to continue to allow for enhancements under 4A1.3. However it gives some guidance to federal judges as to what to look for in those circumstances. And there are five factors that we've laid out. And one is whether or not due process, like the U.S. Constitution due process rights have been guaranteed.

Second is if the conviction itself was pursuant to the Tribal Law and Order Act or VAWA, 2013. Those mandate that all of those due process, federal constitutional due process rights are in place.

Third is whether or not it's already been counted. So you can have tribal court crime occur on the reservation, tribe prosecutes it, gets a conviction and then the feds later take it
and get a conviction for the same crime. Shouldn't be counted twice.

   Fourth is whether or not if it were a state conviction it would have been counted under 4A1.2. So public intoxication, those sorts of crimes wouldn't be counted.

   And fifth is I think the most important one to me. It reflects a real understanding of tribal nations and a real respect for tribal nations, and that is what the tribal nation itself would like done with its own court convictions. I think that they're the most capable of deciding whether or not it's appropriate, they're the most likely to reflect what the community wants and expects, and they're from the local jurisdiction where these occurred. So I think that's a very important factor.

   However, our group has not made any one factor determinative. It isn't exhaustive, but I think those are helpful factors for any federal judge to look to. So we've made that recommendation.
In regard to protection orders, it was a difficult issue as well. I mean, as to whether there should be enhancements for categorical or for particular crimes based on an underlying violation of a protection order. It's a much larger issue than TIAG to address, and we don't feel terribly comfortable addressing that directly.

On the question of whether that will disparately impact Indian defendants in the federal system, the reality is we just don't have any data. We don't know how many tribal court convictions get considered, how they're considered, if it's consistent in obtaining them, any of that.

So our recommendation is to pursue more data so that that can be looked at in the future. However, there is one recommendation, and that is to actually define what a protection order is under the federal guidelines. And it's a simple way to do it and it would treat state, tribal and territorial protection orders equally.
So the definition would refer back to 18 USC 2266, which is a definition of protection order under the full faith and credit provisions of federal statute, as well as 2265, which guarantees due process was in place for those protection orders, which is really simple of jurisdiction, notice and opportunity to be heard. I think those are reasonable things and I think that would be helpful in making it very clear that tribal, state and federal -- or tribal, state and territorial protection orders are treated equally.

So that's what I have to present. I want to thank you for allowing me to be part of this group. It was a diverse group. It was insightful for me to hear from people who are just as passionate on these issues and diametrically opposed to my position, so it was good.

CHAIR SARIS: Professor Creel?

MS. CREEL: Thank you. I'm Barbara Creel, an enrolled member of the Pueblo of Jemez,
one of the 19 Indian pueblos in New Mexico.

As a Native American Indian I am one of the few people that can be subjected to legal double jeopardy, dual successive prosecutions in tribal and federal court for the same offense. I also legally can be denied indigent defense counsel and imprisoned. Also, those un-counseled prior convictions can be used against me in a federal prosecution. Take these ideals and try to square them with the United States Constitutional principles of due process and the U.S. Sentencing Commission's goals of fairness and to remove disparity, increase predictability and justice for all.

Coupled with the statistics that Native Americans face: overall incarceration in federal court, juveniles, men and women outside of our representation in the United States population, as well as the violent crime statistics that we face, both men and women are subjected to violence at a greater rate than any other population in the United States.
These are not the statistics that define me as a person or my people, but they are a reality in the United States. And my co-counsel, or my co-chair has deftly tried to explain our roles as attorneys. And my role as a former Assistant Federal Public Defender and as a mother and a tribal member came into play when I analyzed the data that was given to us by the Sentencing Commission, as well as the cases and the stories that we hear from the people in the field. We had a shared commitment to separate sovereignty, tribal sovereignty and respect for tribal courts and the work the tribal courts do in prosecuting some serious crime on the reservation.

I tried to decide what word I was going to use. "Diametrically opposed" kept coming up for me as well. We were on opposite sides of the spectrum on how to both promote that respect for tribes and tribal sovereignty when you take it outside to a foreign government in the United States. That's when my law professor
and my federal defender experience kicked in.  
And looking at the United States Constitution and 
what is afforded for people who are not citizens 
of the United States, I thought that Indian 
citizens should at least have that much.  

We had some very difficult 
conversations among our working group that 
included Mr. Ed Reina who was the Director of 
Public Safety at Tohono O'odham formerly, Judge 
Diane Humetewa, a member of the Hopi Nation, 
federal defender Neil Fulton, who saw this work 
every day in tribal and federal court in North 
and South Dakota, myself, Mr. Leonhard and a 
victim's advocate Mr. Mike Andrews. And we 
wrestled with the ideas both as our 
responsibility as attorneys and representatives 
of our community, as well as our other 
commitments.  

One of the things that happened, as 
Chief Judge Erickson explained, was that tribal 
sovereignty has gotten tangled up with respect 
for the decisions of the tribal government. What
we tried to do is untangle those two and look at what the United States Constitution affords to people throughout the United States and we found some help in 18 USC 2265 and 66 that defined the due process that should be afforded for a court order, a protection order.

And so, our committee's charge to look at tribal convictions, criminal history and protection orders dovetailed quite well together. And we wanted to afford at least that level of due process for Native Americans when looking at both tribal criminal history and tribal protection orders.

I can tell you that I do have a deep respect for my sovereign government and their decision making, but we have such a vast array of tribes in the United States. According to the National Archives when the Indian Reorganization Act was passed in 1934, about 200 tribes adopted a constitutional-based government out of about 360 at the time, and that constitutional government mirrored the United States, which is
very different than a traditional government that I come from and my people know.

The Pueblo of Jemez was under three separate sovereigns: Spain, Mexico and the United States, and has kept their -- our government intact throughout time. It's very different than a United States mirror constitutional government. And at the time in 1934 the laws on the books of the United States prohibited attorneys for Indians in courts of federal regulations and in tribal courts. That stayed on the books until 1961. And so, we have a very different history with the United States and the imposition of what is called justice.

I want to thank Judge Erickson and Judge Viken for their foresight and for their commitment. When I work with Native people in Indian country; and there are -- over half of the federal judicial districts include Indian country; most of them are in the West, it's really difficult to feel like there is justice for all, even the appearance of justice when you see the
degradation of rights under the United States Constitution. And Chief Judge Erickson and Chief Judge Viken have given me hope that there are people that are endeavoring to understand the issues that tribal people face and the difficulty under federal jurisdiction.

And I want to also thank my co-chair Brent Leonhard for his unwavering commitment to the respect given to the Umatilla Tribe as well as other tribes that are working very hard in Indian country and the other council members or committee members who were really very adamant and passionate about their positions. And they didn't give up. I think our recommendations based on those discussions reflect a really intelligent consensus in order to provide due process, the kinds of due process rights that all Americans can expect.

And I thank you for giving me the opportunity to work on the Tribal Issues Advisory Group and I encourage the Sentencing Commission to continue the work in consultation with tribes
throughout the nation. Thank you.

CHAIR SARIS: Just off the bat I have a question about -- if you were to look at these factors -- and I really -- would you put as a minimum that the due process rights have been met in backing up the tribal conviction? I mean, is that sort of first legally required in your opinion? And second, should as a policy matter -- we never -- a judge never considers a conviction unless it had been achieved with a due process, and then get to the other factors?

JUDGE ERICKSON: One of the things if you just look at what the Indian Civil Rights Act does, it allows prosecutions to move forward in Indian country without certain conditions that would seem to us to be very basic, right? And so, things can happen in Indian country that just wouldn't happen anywhere else.

And in saying that I want to also remind everyone that there are high-functioning courts that are, as I've said, equal to or frankly much better than state or municipal courts around
the country, I mean from a Western due process model. But if you just think about it, there's no requirement in a tribal court that -- well, you can have a traditional court in which there's actually no confrontation that actually takes place. You may have a sentencing circle that involves people sitting down, discussing a problem, arriving at a settlement imposed by elders. You may have a court that requires a religious test in order for someone to be an elder or a judge on that court. I mean, those things happen in Indian country and they become models that are really very different than anything that we would ordinarily see.

That being said, they also bring to the table things that we can learn from. I mean I'll tell you what, I have learned as much from watching a sentencing circle work and how it brings peace and justice in a way that is different than the Western model that is of absolute importance to me as a judge, and I have from time to time from the bench engaged in some
of those types of conversations to the way that it's possible.

I want you to think about -- this is a personal view. It's not TIAG's view. But I want you to think about this: The common law as it's developed in the United States is the product of a subjugated people. The Anglo-Saxon law had overlain on top of it a Norman conquest law and it developed in a way that brought together the best elements of Norman law and the best elements of Anglo-Saxon law to what I believe is the best legal system the world has ever known. It is not however a perfect legal system.

And I know that tribal nations would hate to be called subjugated peoples, but the reality of it is what they bring to the table in this grand panoply of judicial systems is a great laboratory of justice that as we look at restorative models, as we look at moving forward, they provide us with opportunities to learn, to know and to move forward in a way that really is
sort of mind-boggling.

All that being said, not all tribal convictions are alike, and there are some that frankly if you look at them, the courts function in a way that is so foreign from the traditional Western model that it's difficult to really say what does this conviction actually mean?

The other thing is that some tribal governments are struggling. These are small entities sometimes without very good funding with a long history of internal dissention. They may have disparate clans that have been pushed together onto a piece of land by the Federal Government 100 years ago and those clan differences continue to be a significant problem. And so the clan that's in takes one position. A next clan wins the next tribal election. They take a different position. Files disappear sometimes in tribal courts.

I mean, if you're the federal judge, you know what the tribes' courts look like in the district where you're serving. At least you
ought to. And I think that the tools that we put in place give us an opportunity to really honestly evaluate the process and to score those things in a way that makes sense.

And I want to give both Brent and Barbara an opportunity to respond to what I just said because however else you look at this, I am still a white guy talking about what goes on in Indian country, and think that frankly people that work in Indian country probably have a lot more to say than I do.

MR. LEONHARD: I'd like to respond to it. I am a white guy working in Indian country, but if the question is whether that -- does due process restraints have to be in place before considering an upward departure, my answer would be no. If it's an automatic, yes.

But if you're talking about upward departure in Indian country generally, on that basis it's deeply problematic. Crime is a serious problem in Indian country and tribes have been hamstrung in their ability to hold people
accountable with the Indian Civil Rights Act. Even with the Tribal Law and Order Act you can only sentence up to three years if it's murder, rape, whatever. And those cases get prosecuted in Indian country. It would be deeply disconcerting with somebody who has 10 prior very, very serious convictions out of a tribal court that doesn't have those factors in place that you might be used to.

The other thing to consider is that I think, in my experience, tribal courts are much more truth seeking than federal and state systems. They aren't as hung up on process and the importance of process. They want to get to what happened. And they're much more focused on trying to come up with a conviction that tries to heal everybody.

So the fact that they don't look like the federal or state model does not mean that they don't guarantee due process. Within that community it's the understanding of what process is due and fair and reflects their cultural
values and whatnot. I don't think you should discredit the convictions that come out of those simply because they don't look like what comes out of state and federal court particularly if you're talking about upward departure.

CHAIR SARIS: Well, that's what we're talking about.

MR. LEONHARD: Yes. Yes. So, no, I would not in any way make that a minimum factor.

MS. CREEL: I think the problem that you're listening to now with the question of due process and upward departure is that you're comparing apples and oranges. And tribal courts traditionally served a very different purpose than the crime and justice punishment of the Western model, the adversary model.

So when we start talking about how sophisticated a tribe is or how functional it is, it makes -- those are judgment calls that are denigrating the work of tribal courts. And we can't use that language. We have to look at the process that was due. That's why the compromise
of treating a tribe as a foreign nation is ultimately the best idea to try to weigh this out, because they're different. They're not United States courts. They're not Article 3 courts. And they even shouldn't be compared to state courts.

What I come down to with your question with regard to due process are two things: One is a valid conviction in tribal court is illegal, unconstitutional in the United States constitutional courts. That means that a person -- I represented a man who represented himself against a law-trained prosecutor and got eight years in the tribal court order. He was denied counsel. They didn't have an indigent defense system and there was no one that -- there was no way he would get the note out from jail, but he needed help. We didn't even know he existed until after he'd received the sentence.

The second one is the racial disparity. Non-Indians don't have this problem. They will have -- at least be afforded counsel in
state courts, municipal courts or be able to hire one themselves. They can waive counsel or they can go pro se by choice, but the judge is going to go through a panoply of questions and a colloquy about the rights that they're giving up. And so the racial disparity even under the Violence Against Women Act is really paramount and something that we discussed that non-Indians are guaranteed counsel in tribal court if they're facing prosecution. In tribal court in order to make sure that non-Indian citizens' rights are the same in tribal, state and federal. That's not true for Indians.

COMMISSIONER BARKOW: Do you mind if I ask you where do -- who appoints counsel for those people in tribal courts? Who's paying or funding the counsel representative?

MS. CREEK: That was the question from the very beginning, like who's going to pay for this, right? They're separate sovereigns, but who pays for counsel? The tribe -- it's indigent defense counsel, and so the tribe, the government
is required to provide that if they're going to have enhanced sentencing or take on the special criminal jurisdiction in domestic violence cases.

CHAIR SARIS: But they're not required for Indians?

MS. CREEL: Only if they're going to seek a sentence longer than a year. So that's that zero to one year sort of gap that has been thrown by the wayside.

The idea that tribes have to do this because there isn't any other group that can do this is just wrong, because the Federal Government does have jurisdiction in many of those cases, but they're not -- they don't reach the level of a major crime or some kind of important purpose in Indian country. And that's what we see a lot of in Indian country, frankly, is that there aren't -- we aren't statistically present enough to warrant the kind of resources that are needed in these really difficult problems of crime and punishment that you all know very well.
JUDGE ERICKSON: Just for background information the ordinary jurisdictional limits of a tribal court is one year unless they qualify for enhanced sentencing abilities under TLOA and VAWA. And then they can sentence up to three consecutive three-year terms. But generally speaking, if you get convicted of murder in a tribal court that doesn't qualify, you get one year, all right, as a maximum sentence.

And so, what happens in those courts that haven't complied and therefore are not qualified under these enhanced sentencing acts, many of them provide -- there's a lot of lay public defenders, some no public defenders at all and some law-trained defenders. And it's just a very broad spectrum. And so, that's kind of the lay of the land.

MS. CREEL: And even in the court that we viewed in Standing Rock Sioux where they had a law-trained prosecutor and a law-trained defender, people were routinely pleading guilty to the charges without -- immediately after
arraignment or without more because they were seeking drug treatment and the judge was sentencing them to 30 days or more, we were told they were allowed to go to county drug treatment. And so, those are the kinds of things that you might see to deal with a case load, but that conviction would be valid in United States courts, but I don't know that it would be something -- it leads you to something to look into and drill down to see what the circumstances were of those guilty pleas.

JUDGE ERICKSON: And so what you do find in Standing Rock obviously in North Dakota you do find that people get sentences of longer than 30 days for the sole purpose of accessing drug treatment, or you may see a sentence of banishment, which is something that you don't really see --

MS. CREEL: We saw that, too.

JUDGE ERICKSON: -- in a lot of places. And that's because of the bad man language in the Great Sioux Nation treaties, the
Fort Laramie treaty. And so, those sorts of things exist out there. And so, there are just some things that happen that would be unusual, and so the question is how exactly do you treat a banishment sentence if you're the judge? I mean, the conviction really is get out, we've had enough of you. Okay? And what does that really mean?

CHAIR SARIS: Sounds good.

JUDGE ERICKSON: Yes.

(Laughter.)

MR. LEONHARD: So on the issue of people pleading without a public defender at arraignment to seek treatment and maybe agreeing to more than 30 days in order to get it, that's not unusual. I mean in municipal and state courts those sorts of things happen as well. So that's not unique to Indian country. It happens all the time. And I want you to consider those things.

But I think fundamentally the problem with putting too many restraints on looking at a
tribal court conviction is that public safety in Indian country is a serious crisis, a serious problem and if you can't treat somebody who engages in serious crime seriously, it's going to happen again and again and again and again and again. And it does in Indian country all the time.

As for cases that are very serious cases like rape, murder, those sorts of things, they're routinely not prosecuted by the Federal Government. Tribes are often the ones that are left having to deal with it. So they're very serious crimes. They aren't minor crimes. And they need to be considered. Whatever the process was it needs to be considered. Doesn't mean the judge accepts it, but it needs to be considered.

COMMISSIONER FRIEDRICH: I have a question for the two judges. I'm just curious, when you took the bench it seems like there's so many details about these individual tribes that you need to know before you sentence an individual from the tribe. Does the FJC give you
any particular training on the tribes? I mean, we could list all kinds of departure factors here, but we're really not going to give the kind of guidance that the judges need to make informed decisions without a lot of detail on all of these nuances that each of you have mentioned. And I can imagine you've mentioned hundreds, so you really need some specialized training, don't you?

JUDGE LANGE: There is no formal training when becoming a district judge in Indian law even if you're in an Indian country jurisdiction. That is part of the reason why several of us discussed the possibility of mentoring incoming judges.

Now, I will say that -- I'm not sure, Judge Erickson, if your experience was the same, but I'd lived in South Dakota nearly all of my life. I had represented a tribe. I was not terribly active in doing federal defense work, but the existing judges were very helpful to me in understanding the issues in Indian country sentencing. And of course immediately it's a
baptism by fire, at least where I am. So I did come to appreciate those issues on the fly. But we thought about that, and that's part of the reason why we've contacted the AO and the FJC about forming a working group.

Judge?

JUDGE ERICKSON: Yes, I was fortunate. I grew up in a little town that's nestled between two separate Indian reservations in North Dakota. Thirty miles to the north there's a Chippewa reservation. Thirty miles to the east there's a Sioux reservation. My mother's family were French-Canadian trappers and traders. My family's history with Native people goes back to the 1600s. My family wouldn't be here but for their relationship with Native peoples. And so, there has never been a time in my life where I haven't been exposed to Native peoples.

That being said, I was completely unprepared for what happened with federal sentencing and tossed to the wolves. And I'm
telling you, federal Indian country jurisdiction is complicated. I have a chart that I wrote out that I put on the bench that -- just shorthand as to who I've got jurisdiction over and why. It still sits on the bench. I look at it far less frequently today than I did when I first started, but it was like fed to the wolves. I mean, it truly is.

And for judges that sit in Indian country they have a different level of attachment to Indian country prosecutions. I was fortunate that Judge Rodney Webb had been around a long time, had been the U.S. Attorney, was willing to mentor me. I know that there are other judges including judges on our committee who literally walked into court, had no idea that they -- what it meant to have jurisdiction over Indian country and no one bothered to tell them anything and they came out of baby judge's school with like the same training that all of you had and just had to figure it out on their own.

COMMISSIONER BARKOW: I wanted to ask
a question about that fifth factor that you all listed about whether or not the tribal government has expressed a desire that their convictions should be counted. And I'm just curious how you get that information. I mean, how you would know what they've expressed and would they know what purpose it was going to be used for. So a judge trying to follow that particular factor, what would the process look like to get that information?

MR. LEONHARD: I think we talked about that a little bit and I think we left it alone. I think each tribe is different and who you contact is different and what their expectation for the communication is different. So I think it's important to treat each tribe as what they are, separate sovereigns, and dealing with them immediately.

COMMISSIONER BARKOW: So I guess to drill down a little bit on that, does that mean -- like so if you had a court that didn't tell you about the conviction or they don't want to use --
is that their way of expressing don't use this or
is there kind of a formal mechanism that you find
out the position is X? I'm just trying to figure
out if this is -- how this would operationalize
for --

MR. LEONHARD: It could be through
consultation. A board could pass a resolution
saying what its desire is one way or the other.
It could be any number of different ways. In
Umatilla we're working on -- we have access to
federal criminal databases which most tribes
don't. We're working on trying to get our
convictions in the NCIC and what have you so that
you'll have them automatically that way. But
each tribe is different and there are different
expectations, different backgrounds, different
cultures. I think you need to approach them
individually.

COMMISSIONER FRIEDRICH: From your
experience and outreach for this group do you
have a sense of what percentage of those tribes
that actually have the due process protections
that our Constitution guarantees -- what percentage of those would nonetheless say don't count them? Do you have any sense from your survey and telephone calls, or did you not get into that kind of detail with them?

JUDGE LANGE: There are relatively few tribes, my understanding, that have been certified in TLOA or VAWA.

I don't know if you know, Brent, how many.

MR. LEONHARD: I think there's a little more than eight for each.

JUDGE LANGE: Out of 566, 315 separate -- or 316, I think, separate tribes.

COMMISSIONER FRIEDRICH: But of those eight would they -- I mean, by creating those due process protections is it in part so that their convictions are considered or completely divorced from --

MR. LEONHARD: Depends on the tribe. I mean, different tribes may have different opinions.
JUDGE ERICKSON: Each of these tribes are unique in the way that they approach their question of whether they want to qualify or don't want to qualify is a unique decision. And the reality of it is for some the driving force is, look, there are high declination rates on serious crimes by the United States Attorneys. And that happens in a lot of places where the tribes are small, the districts are large and the U.S. Attorney does not see as one of their primary goals the prosecution of Indian country crime. Well, if you sit in North Dakota or South Dakota or Arizona and New Mexico, our U.S. Attorneys understand and perceive that a big piece of what they do is the prosecution of Indian country crime. And there's a difference.

So someone might say the enhanced sentencing penalties, they're huge for us, because we could have someone who is guilty of a sexual assault, an attempted murder and we can't get anyone to turn their head. And so, we want to be able to sentence them to the longest
sentence possible and we're willing to provide those sorts of due process rights. Or they might look at it and just say we just are much more comfortable with the Western model and we want to adopt that.

On the flip side you may have a very traditional Indian Nation that says we're very comfortable with what we've done forever and this represents our culture, our people. And we afford all the due process we believe is appropriate and the penalties that we believe are appropriate are the penalties that we impose. And we don't need to look beyond our own culture and our own traditions.

And so, that's the sort of -- I don't think you can infer anything in any individual case without actually knowing the tribal organizational structure and what the tribe is doing and asking them why.

In a consultation process some federal judges are in regular contact with tribal judges and tribal chairs. Others, even with significant
Indian country cases, are uncomfortable with that. And so, that consultation thing I think that part of what we've got to do is we've got to get the judges to understand that it's perfectly okay to consult with them.

JUDGE LANGE: Just briefly, I would not think it the role of the federal judge to seek out the tribe to find out whether we should be counting their convictions or not. Ideally I would foresee a tribal council vote probably at the behest of the U.S. Attorney looking to see, well, should we be making the argument that there should be upward departures here from various convictions in various tribes within the district? I would think that practically is how it ought to work as tribal resolution --

MS. CREEL: But, Your Honor, there's no petit policy that's applicable to tribal convictions and there is no avenue for tribes to divulge this information that you're asking. So it would probably be up to the council or the probation --
CHAIR SARIS: We do need to wrap up, but I just want to look at protection orders for a minute.

MS. CREEL: Yes.

CHAIR SARIS: Is that a -- what I didn't get a sense of is I assume it's primarily sexual assault, the protection orders for domestic violence. Is that primarily what we're talking about?

MS. CREEL: The concern?

CHAIR SARIS: Yes.

(No audible response.)

CHAIR SARIS: No. No?

MR. LEONHARD: There could be just sexual assault versus regular assault or anything.

CHAIR SARIS: So are protection orders across the span of the different tribal jurisdictions a common way of handling that? Is that why this is such a big issue for you?

JUDGE ERICKSON: These are insular communities and there's lots of people that are
closely connected and there would not necessarily be family connections that you would --

CHAIR SARIS: I see.

JUDGE ERICKSON: -- that we would see. And there are protection orders that may sometimes be put in place because of violence of threats of violence. Some of them would fit very neatly into the standard state definition of a domestic violence protection order. Some of them would be pretty far removed.

Being called a grandfather is an honorific title in many respects. It's a person who has obtained a certain age who is closely related, acts as a mentor and guide. And so, they would be viewed as part of this family structure being very close, but not uncommon for somebody to walk in and have their third grandfather die and everybody looks and says say what? And it's just the way it is. I mean, and so these protection orders may be recognizable and are sort of the traditional Western construct and may not.
Just like the process that Judge Lange just described as to how you consult, that would be very common in some tribes that they would go about that, but I'm going to tell you that there are tribal entities that exist in North Dakota where they do really expect that there is at least once a year that the federal judge will sit down and talk with the tribal chair and the tribal commission. It's the long tradition that's been going on since the first federal judges were appointed and it's sort of an ordinary thing.

CHAIR SARIS: Yes, I'm just trying to get -- because that's one big recommendation is protection orders and it makes sense to me, the definition, but why is it such a big deal? Is it a crime with --

MS. CREEL: Your Honor, in the materials that we were given from the Sentencing Commission staff there was a memo that was prepared in conjunction with the Victims Advocacy Group, and the idea was that how should tribal protection orders be handled under the sentencing
guidelines? And what we found was there just isn't any data. And so, the question is sort of like tribal court convictions, like should they be given the same weight, should they be counted, should a violation of one allow for or require an upward departure or an automatic enhancement as a special characteristic or sentencing factor? And there just isn't the data.

And so, where we ended up was we looked and looked and looked, but all we could come up with was in order to understand the issue we should at least define that tribal court protection orders are within that universe of protection orders that are under 18 USC 2265.

CHAIR SARIS: Okay. Thank you. Are there any other --

MS. CREEL: Is that right?

COMMISSIONER PRYOR: I have one. I mean, I've got to tell you the tribal court convictions piece concerns me. The protection orders not as much. I'm concerned about an application note that says no factors shall be
determinative. These may be relevant. And it's a host of factors. It seems to me that it invites disparity. It's not something that can be meaningfully reviewed when it's applied.

Do you have a reaction to that?

JUDGE ERICKSON: Judge Pryor, what I would say is the way it sits right now you're asked to consider tribal court convictions when you feel it's appropriate, and it provides no guidance. And I'm just telling you that as a federal judge who sits down on the first day on the bench, boy, I would sure like to know what are the sorts of factors I ought to consider. There's no case law that's developed in this area. It's just sort of if you do it, then the question is on review is it an abuse of discretion?

And what you get back from the appellate courts is the judge explained something, no abuse of discretion. If you say nothing and just do it, then they say, well, we can divine from the record that it makes some
sense, if they can. Or they say, yes, we don't get it. Try again, judge. Explain to me.

COMMISSIONER PRYOR: That's necessarily going to mean though, isn't it, that similarly situated offenders are going be treated dissimilarly?

JUDGE ERICKSON: But they already are. And I think the way it is now --

COMMISSIONER PRYOR: Shouldn't we do something to make that better? I mean --

JUDGE ERICKSON: Well, I think that this actually does make it better because it gives us a list of factors to actually look at and to work with. I mean, I think the -- I just think that it actually does provide some guidance to judges in Indian country. It will take it from being a purely arbitrary decision making process to something with some structure and it allows a decisional rubric to move forward.

I continue to just say that you could take this and make it a guideline and say this is where we're at rather than having it in an
application note. The issue there becomes that if in fact there is a broad problem with a sentencing disparity already, it's going to aggravate it.

CHAIR SARIS: I think it's time for our break. I want to thank the panel very much. And we'll -- 10 minutes and we'll be back for the next panel. Thank you.

MS. CREEL: Thank you, Your Honor.

(Whereupon, the above-entitled matter went off the record at 12:20 p.m. and resumed at 12:34 p.m.)

CHAIR SARIS: It's fun during the break to talk to everyone, but we've got to get to this next panel, who will discuss recommendations from the Sentencing Disparities Subcommittee and the Youthful Offender Subcommittee.

First Judge Jeffrey Viken is the Chief United States District Judge for the District of South Dakota and he chaired the Sentencing Disparities Subcommittee for the -- I say ty-ag,
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you say tee-ag?  Whatever.

JUDGE ERICKSON:  Bob said tee-ag.  We

all say ty-ag.

CHAIR SARIS:  Okay.

(Laughter.)

CHAIR SARIS:  See, there are some

things you didn't work out.  That's fine.

And Kathleen Bliss Quasula is a

private practitioner from Las Vegas, Nevada, a

commissioner for the Nevada Indian Commission and

a member of the Cherokee Nation.  She served as

chair of the Youthful Offenders Subcommittee and

of course we still have Judge Erickson who will

chime in.  So thank you all for being with us.

Do we start with you, Judge Viken,

or --

JUDGE VIKEN:  Yes, thank you, Judge

Saris.  I appreciate it.  And I do echo Chief

Judge Erickson's comments about the privilege it

is to serve on the Tribal Issues Advisory Group

to the United States Sentencing Commission.

The committee that I chaired was
charged with looking at sentencing disparities in Indian country jurisdiction. I had an extraordinary committee, and like Judge Erickson it is really the most extraordinary group of thinkers from disparate backgrounds with which I have ever worked.

I had Mike Cotter, the U.S. Attorney in Montana, of course a major Indian country jurisdiction; Judge Robert Blaeser, who's the chief judge of the White Earth Nation in Minnesota; Troy Eid, of course who's been involved in VAWA and many other Indian policy issues nationally; and Dr. Miriam Jorgenson, who is an extraordinary statistician. She's at the University of Arizona and is the research director for the Native Nations Institute, and her understanding of and hard questions put with regard to the compilation of data and its utility was critical. And then Kathleen Bliss assisted us greatly and Professor Creel also participated in some of our conference calls.

Our process was that we did meet by
conference call at least monthly and worked through it that way.

Now, let's start out with I think a very important question that Judge Saris asked and which our committee was I guess helpful in developing a solution. I do think on TIAG there's a universal view that the United States Sentencing Commission should find a way, a method, a process to consult with Indian nations and tribes.

One of the ways to do that as a practical matter, Judge Saris, is to adopt this recommendation that there be a mini-TIAG or an ad hoc Tribal Issues Advisory Group which will continue on with a smaller group of members and resources yet to be determined as to which most effective, but a group that can with their experience and background and wisdom go around to the Native nations who are subject to the federal sentencing guidelines and consult and determine whether there are real or imaginary positions with regard to sentencing disparities for Native
people in federal courts, and whether or not there's a real or imaginary perception with regard to the handling of Native people from those tribes and nations in state courts.

So when you think about a burglary being committed inside the boundaries of a county which is subject to Major Crimes Act jurisdiction, where I am, Oglala Lakota Nation County, you can walk five feet across the line and commit exactly the same offense as a Native person and be subject to state court jurisdiction only, no federal jurisdiction, no tribal or federal jurisdiction. It will be tribal and federal jurisdiction within Indian country. And so, the handling of these people just puts forward some very fundamental questions.

One could look at the application of the sentencing guidelines to Major Crimes Act jurisdiction in Indian country as an unhappy marriage. You've struggled here even this morning in our brief conversations with how do these systems fit together. And if the
Sentencing Commission's organic act charges you in part with defining fairness in federal sentencing as the avoidance of disparity, you run into very specialized problems in dealing with Native nations and tribes. The fit is complicated and the fix is not easy to identify.

And so, this consultation process is critically important. It's not only a treaty obligation of the United States Government generally, but certainly if you're going to work on the sentencing of Native people under the Major Crimes Act and other federal jurisdiction applying only to Indian country and members of tribes and people subject to federal jurisdiction in Indian country, that consultation is absolutely critical.

That is a piece of your work which needs to be addressed and that is a part of the loop that needs to be closed. And so, we'd really -- our committee and I think TIAG generally would encourage you.

If we define fairness and sentencing
in part as avoiding disparities, the treatment of
like offense behavior differently under different
circumstances, I have to tell you that our group
looking at sentencing disparities cannot bring to
you much guidance beyond what was provided to you
in 2003. Here we are 13 years later. You had a
report in 2003 advising the Commission that the
data did not exist in order to make comparisons
which would be reliable enough or deep enough
that you could formulate guideline or policy or
commentary language. And we come to you now and
again say to you that this is the reality.

Let's just look at the first component
of that. We are in no position as an advisory
group or you as a commission even to compare
potential disparities or real disparities in the
sentencing of Native people under federal
criminal jurisdiction in federal courts. Just
in federal courts.

So when we think of Arizona, New
Mexico, Montana, North and South Dakota and the
other districts which have substantial federal
Indian country jurisdiction, we have no ability to compare the sentences between what Judge Erickson and I are doing or what Brian Morris, a judge in Montana, or Dana Christensen in Montana -- what we're doing. Why is that?

Because when we submit our judgment and order of conviction and our Statement of Reasons, nowhere is there demographic data with regard to did this person fit the legal definition of an Indian? Well, if it's in 1153, if that's a Major Crimes Act offense, they did. All right. But unless the United States Probation Office starts putting in presentence reports, I'm told, that identifies the 1153 Indian country jurisdiction, your staff at the Commission has no way to compile data even on the sentencing of Native people under the federal sentencing guidelines on Indian country offenses. We are not there.

And so, we have made specific recommendations as to the type of data which should be compiled so that we can determine even
within our own federal sentencing system whether
disparities exist between the districts. It
seems to me that would be a fundamental goal for
the Commission to address.

Now, to accomplish that we've made
some recommendations working with the Judicial
Conference committees, working with the United
States Probation, seeing that the appropriate
data for jurisdiction in Indian country is
compiled so it can be compared. The only time
it's been done certainly in recent history was
the Special Coding Project for the Violence
Against Women Act Reauthorization. There the
jurisdictional data was compiled and it could be
used as a database.

So beyond that we then looked at the
much more complicated issue of what about the
perception in Indian country that a Native person
is treated differently in state court as opposed
to federal court for sentencing purposes for the
same or very similar criminal conduct: assault,
burglary, larceny. Okay? Basic offenses.
Because the Major Crimes Act of course removed from the sovereign nations the power to prosecute rape, murder, manslaughter, the whole list of Major Crimes Act offenses. So the tribes may have their own authority over that, but the Federal Government has exclusive jurisdiction with regard to felony sentencing of more than a year in prison.

So what do we do with that? Well, what happens is we're even in a less helpful position in 2016 than we were in 2003. States are not compiling data. Arizona and New Mexico, very significant Indian country jurisdictions with large numbers of Native people subject to federal jurisdiction, are keeping no records with regard to whether a person would qualify as an Indian person for purposes of federal jurisdiction so that a comparison could be made.

You'd think the correctional system might have demographic information on the people being incarcerated in Arizona and New Mexico. Not true. There's actually nothing. And so,
Minnesota, North and South Dakota, Oregon provided what data was available, but of course what we found was for your purposes it would be an insufficient and unreliable database from which to draw any conclusions. That leaves you in a very unfair position, and our committee made some specific recommendations.

Now, I think it's easier to deal with how do you create a database to avoid sentencing disparities or study the issues among federal sentences involving federal/Indian country jurisdiction. When you get on the state side, you have what, I think something like 34 districts that have significant Indian country jurisdiction. They all have their own state laws. They all have their own sentencing systems. Some of them have guidelines; some of them do not. So to ask the question is necessarily to invoke the reality that there are sentencing disparities which are very hard to study.

Now, can it be done? Well, if the
states would compile the data necessary for the United States Sentencing Commission to develop databases and proper analysis, then yes, we could have comparisons as to whether Native people are treated differently in federal and state court for the same or similar conduct. We are in no position to do so for a lack of data.

The recommendations would include something that some people would perhaps consider a bit far-fetched. It would take an act of Congress of course to tie federal funding for correctional systems or law enforcement in the states, then federal money flowing out to the states. And to put in there a requirement that data be compiled so that at least we know in the United States what's going on with regard to this aspect of sentencing in the states and our ability to compare it to federal sentencing.

Now, whether that's practical or not is something that certainly the Commission can consider. And we've made other recommendations to try to accomplish those things. But to say
that we were surprised from our various backgrounds on the committee to find that this data did not exist, that would be an understatement. We were very demanding. Professor Jorgenson had a wide range of ideas on what should be compiled and how it could be analyzed, and much of that, notwithstanding the intellectual effort, did not take us anywhere.

This will not be an elegant process. If you're going to start comparing state sentencing data and outcomes with the wide range of sentencing alternatives available to state judges and try to compare it to the federal system, you're going to run into a very significant problem unless uniformity can be accomplished in the way it's compiled.

And then of course; Kevin Blackwell, who was extraordinarily helpful to us, pointed out that the elements of a federal statute and the elements of a state statute, they don't match perfectly. So one can always take the position that the data is unreliable because the elements
of the offenses that we're studying don't match exactly. Exactitude is not going to work on many levels for you when you're in Indian country. It simply will not. It is an alternative historical reality and a form of federal jurisdiction that will present challenges to you that you will find nowhere else in the federal sentencing system.

And so, we present our report to you. We strongly encourage consultation and serious consideration of what TIAG has come forward with for your future consideration.

JUDGE ERICKSON: Before there are any questions, there is one thing that I think you probably are concerned about, and that is the idea when we talk about comparison to state court convictions, it seems like, well, that's sort of a run-of-the-mine question that we've already moved beyond for everyone else in the system, that state sentences are different than federal systems. That's just a reality of separate sovereigns. So why does it matter in Indian country?
It matters in Indian country for two fundamental reasons: First of all, the Major Crimes Act took away the jurisdiction of the tribes to deal with these crimes that were traditionally matters that were left to the states.

Second of all, many prosecutions occur under the Assimilative Crimes Act, and under the Assimilative Crimes Act we actually absorb the state crime and the state elements to that crime and we try them in federal court. So in federal court I try felonies that are just run-of-the-mine street crime that nobody else tries. And that's why I have the best job for a federal judge anywhere, as a trial judge, is that I continue to try ordinary street crime like I did as a state trial judge and I have all of the usual and customary federal questioning cases as well.

But the reality of it is that if you think about this -- and it happens in cases, it's happened in a case, Norquay, which I think is a 1990 case out of the 8th Circuit, where a white
man and an Indian man commit a crime jointly. The Indian man tried in federal court gets a sentence that's twice as long as his co-defendant who's tried in state court. And you know what? You end up in situations where grandmothers come to me and they stand in front of me and say why did my son go to prison or my grandson go to prison for longer than those white boys did? And there is no profoundly good answer to that question.

And so, the reason why it matters is just the fundamental justice of it all, and particularly with the Assimilative Crimes Act. I mean, I'll just tell you the strangest thing I've ever tried. At one point I tried a felony DUI case. I mean, it's like really? Who knew you did that in federal court? But it can happen.

MS. QUASULA: Let's see. Good afternoon.

The Juvenile and Youthful Offenders Subcommittee was tasked with the responsibility
for looking at the impact of the sentencing
guidelines on youthful offenders, because as we
know juveniles, those under the age of 18, the
sentencing guidelines don't apply unless that
juvenile then is transferred to adult status.

So what I'm going to address with you
are some specific recommendations that we're
making and then also the weight of the Sentencing
Commission to make some recommendations to the
Executive Branch, as well as the Legislative
Branch.

First though I want to give you a
little bit more background about this particular
subcommittee. We were comprised of probation
officers, United States probation officers.
Lori Baker was our most recent member. Rick
Holloway, a senior probation officer who worked
in South Dakota, had enormous experience,
retired, but a member of the Probation Officers
Advisory Group. Rick was incredibly significant
in his voice that he loaned to us and to this
report and some of the recommendations because he
saw it from the ground.

We also were so fortunate to have Eric Shepard from the Indian Affairs section of the Solicitor's Office and Angela Campbell. I can't tell you how wonderful it was to work with her, too, because Angela Campbell has actually -- she was a federal public defender prior to going into private practice. She's also successfully litigated before the United States Supreme Court. She's responsible for the Burrage decision, or also pronounced as "barrage," according to Mr. Burrage.

A little bit more background about myself. I was a federal prosecutor for 22 years. I served in the U.S. Attorneys Offices for the Northern District of Oklahoma, where I started; the District of New Mexico, where I predominantly prosecuted Indian country cases and was a tribal liaison both there as well as Northern District. My last 12 years were in the District of Nevada, where I was with the Organized Crime Strike Force. I've been in private practice now as a
criminal defense attorney, so I've changed positions. New hat, same Constitution. And that has given me yet another perspective.

I also want to say that my husband Ted Quasula was a member of the TLOA Commission. He was a commissioner appointed by President Obama along with Troy Eid, who was the chair. Within the TLOA Commission, which I think its report, with unbelievable consultation in person through regions of the United States -- if you haven't read that report, I think it's a good context for you -- that Miriam Jorgenson was also a key member of the working group that helped write the TLOA report. There's an entire chapter that's devoted the juvenile justice, a very disconcerting, if not demoralizing chapter.

While the Federal Government probably deals with juveniles more than anyone else, any other body -- and I neglected to say another incredibly key member of our group was Chairman Dave Archambault, who is the chairman of Standing Rock, one of the Indian nations we visited and
observed. He, too, gave us a very personal and unique perspective into the formation of the recommendations that we're giving to the Commission.

That said, even though the sentencing guidelines don't apply to juveniles, juveniles encompass 98 percent of federal prosecutions. It's very high as far as juveniles go. I personally prosecuted a lot of juveniles, transferred them to adult status for unbelievably heinous crimes. But we had to go beyond that to really address what we saw was the important situation here, and that was to expand it into considerations by the sentencing judges as to youthful offenders.

And so here's what we came up with. We all know that juveniles and youthful offenders are different. They have different brain development. They have different life experiences. And especially when you're talking about Indian country there are different cultural, social, traditional values that should
not be disrupted if at all possible because of the effect.

We also know from the studies that we cited in our report that when you sentence a youthful offender to a term of imprisonment, you've got to look at the impact of that detention or term of imprisonment, because based upon the studies that we saw, gasp, you're almost guaranteed recidivism. So we want our recommendations to actually be looked at as having an effect in the impact on the disposition of conduct of what occurred with that juvenile or youthful offender.

So here's what we came up with, if I may just kind of rattle it off very quickly. We're actually asking for a modification to the offender characteristics that would be contained in Chapter 5H1.1. And we laid it out on page 33 of the report. And we added in our recommendations to modify the language.

Instead of looking at age as something that requires a combination of factors, that you
can look at age alone, so long as it's consistent with 18 USC Section 3553, because of course the nature of the offense, things like that are going to be something that we believe we shouldn't fall back from, but also look at these social behaviors, activities, relationships, things like that that I just mentioned. So that would be in Chapter Five, part H.

So we're also asking for a new departure basis. So in 5K it would be 2.25 where there's actual -- a basis for a sentencing judge to depart downward based upon a youthful offender given the factors that we have there. So those are the two specific provisions that we're recommending the Commission look at and modify or add in the case of 5K2.25.

Additionally, we would like the weight, the brilliance, the power of the Commission to make recommendations to those who do have the power to address whether or not a prosecution is going to be one that asks for a term of imprisonment under the guidelines. And
that is to ask the Executive Branch, specifically
the United States Attorneys Offices, to expand
their view on pretrial diversion. Okay? All
right. So I was an Assistant U.S. Attorney.
I've actually done pretrial diversions. Okay?
You go to other offices, it's just something
that's unheard of. It's something that's just
not done. So we would like a little urging that
would show a pretrial diversion under certain
circumstances is appropriate with a youthful
offender. Again, we're looking at what is the
impact of that sentence? And so, pretrial
diversion is one of those options.

Also we are asking that the Commission
take a look at -- and I know that this stems from
recommendations by the Practitioners Advisory
Group as well as the POAG, and that would be to
simplify the sentencing table where there would
be alternatives to incarceration and you would
have a section A and then B as opposed to four:
A, B, C and D.

So anything under A would allow the
sentencing judge to impose a sentence of
imprisonment or a combination of different means
of sentencing that particular defendant based
upon such factors as the youth, socioeconomic
ties, tradition, culture, etcetera.

(Cuckoo clock chiming.)

MS. QUASULA: So the two-zone is
something -- it's either I'm making you guys go
cuckoo or --

(Laughter.)

VICE CHAIR BREYER: That would be
our --

(Laughter.)

VICE CHAIR BREYER: That's my
problem.

MS. QUASULA: Oh.

(Laughter.)

MS. QUASULA: Sorry, Your Honor.

VICE CHAIR BREYER: It's actually a
commentary on some of my judicial decisions.

MS. QUASULA: Okay. Then finally one
thing that would be a legislative fix, and this
does then go back into the consultation and the need for recognition of tribal consultation, and that's to actually fix the Juvenile Delinquency Act, which is 18 USC, Section 5032. TLOA also made a very strong recommendation to Congress for this fix. And what it does is it basically adds a certification that the U.S. Attorney has consulted with the tribe about what to do with the kid. That's the requirement with state authorities. States don't have jurisdiction for the most part over these crimes, so the tribes should be able to weigh in. And we made that consultation, not with the tribal court; we're very specific about it, with the prosecuting authority of that particular tribe. U.S. Attorneys Offices could accomplish this pretty easily because since 1994 Attorney General Janet Reno required U.S. Attorneys Offices to create a position of tribal liaisons. I know, I was one of the first ones being in Oklahoma. So it's been around for a long time as far as the U.S. Attorneys Office
being able to consult.

Thank you so much. I know it's hard right before lunch. My stomach's growling.

COMMISSIONER MORALES: I'll say a few things.

MS. QUASULA: Yes.

COMMISSIONER MORALES: Thank you first of all for your recommendation about the pretrial diversion because you may or may not know the Department is definitely focused on that. You're preaching to the choir a little bit. We're really interested in those types of programs and we're trying to replicate them and multiply them around the country.

I do also want to note that as you know the Executive Office of U.S. Attorney does that. They have the tribal liaisons. They've always been very focused on it and we are honored here today to have some representatives of that office who came here to express their support for the TIAG and the work that you've done. And as you know, always want to hear from you whether
through the TIAG or outside the TIAG as to the
issues and experts on it.

But if I can go beyond that a little
bit, it's been stated and restated by now a few
times in the last couple of hours, but I also
wanted on behalf of the Department to thank the
ty-ag or the tee-ag for the impressive and very
important work that you've done.

In my long Department career in policy
making I've been part of many, many groups and I
think it's really special what we've heard as to
how this group has come together, especially
keeping in mind what everybody's noted that it
came from such a diversity of backgrounds and
opinions and the fact that there were
diametrically opposed positions on some things
and that you've all come together with a report
or recommendations that you all support.

I think it's very impressive and we're
just -- I'm impressed and we're very, very
grateful to everyone that participated, to the
Commission for putting it together, to Nicole who
everybody lauded as sort of the engine behind it. So I just wanted to put that for the record how thrilled we are. And we're sorry that our members to the TIAG couldn't be here, Director of Tribal Justice Tracy Toulou and U.S. Attorney Mike Cotter, but again we've been in communications with them and they've -- it's just everyone to a fault has spoken so highly of how this group has come together that -- again, you've been congratulated a lot already, but you can always use more.

CHAIR SARIS: I'm going to jump in and ask you, Judge Viken -- so some of this data is not within our control, and what's your recommendation as to what we can do in terms of -- not the federal to federal, but the state data so that we're not back here in another decade with the same report saying, gee, we told you 10 years ago we couldn't do this?

JUDGE VIKEN: Judge Saris, unless a uniform system can be developed requiring the states to compile the data necessary for the
Sentencing Commission to conduct the type of analysis to determine sentencing disparities in the states, we're going to be in the same position 10 years from now.

Now, what we thought through from our different backgrounds the only real tie to the states and their corrections systems and their justice systems is federal money. And Congress of course accomplishes many things in this society by enacting a sensed federal need for information with the provision of federal resources. And that's why this recommendation tied together a requirement that states provide the data.

And of course you have a very skilled staff that can identify with Professor Jorgenson or others -- identify exactly what type of data you need to compile so that the request isn't overly burdensome, whether the states would want something with regard to their ability to develop systems within their states to provide the data. Those are all policy issues and those are matters
that this Commission would have to raise with Congress if you're serious about compiling it. But until you do so, no advisory group is going to come forward with reliable information of the type of empirical data the Commission uses to make its policy and guideline judgments.

CHAIR SARIS: Well, what Judge Erickson said is true. I mean, I often hear the complaints in Massachusetts that the federal sentences are so much tougher than the state sentences, and it resonates in many states I think across the nation. But the strength of the argument is the strongest in these I guess assimilative crimes. Is that what it would be? Is there a way of studying that sub-group of crimes where really the concern of disparities -- it's peaking. Normally it's a state crime, but you're picking up the crime and you're trying it in federal court. So would there be a way of us facilitating a study of that sub-group of crimes? I don't even know how many there are of them really as a practical matter.
JUDGE VIKEN: Well, look, if you undertake that task, we have to begin with the reality that -- for example, just take Arizona and New Mexico, major Indian country districts and states with large Native populations. Their justice systems and their courts and their state governments are not even determining whether a Native person, non-Native person, Hispanic or African-American person was the subject of sentencing. The demographic data is absent. There is none.

And so, for you to make any sort of determination -- for example, in a state assimilated crime; take burglary for example, there's no federal definition. We look to state law. You take the state definition of burglary. One would think we could compare federal sentences under the Assimilated Crimes Act for burglary in federal court and compare it in the same district, Arizona or New Mexico, the state in which the district resides with the sentencing data for burglary.
You can't determine because there is no data if an Indian person was involved in the state sentencing, whether the Indian or Native person involved fit the definition of an Indian person for purposes of federal jurisdiction. You can't begin because you don't have that information. I think it would be a mistake to get overly concerned about the states having different elements of something as fundamental as burglary or larceny.

You could always throw a barrier up as a statistician and say there's no reliable data for the Commission to consider because the elements don't match perfectly. I think that's a false approach to the compilation of analysis of data. But that's how fundamental the question is under the Assimilated Crimes Act, Judge Saris.

CHAIR SARIS: Yes, I'm just trying to get my handle around what we can do about it, whether there's a --

JUDGE VIKEN: You know, one of --

CHAIR SARIS: -- Short of maybe
writing -- asking was it -- there must be committees in Congress who focus on this, just to ask them to think about this.

JUDGE VIKEN: Well, how about their Department of Justice, the Bureau of Justice Statistics and the Department of Justice.

CHAIR SARIS: That would be another.

JUDGE VIKEN: Well, there isn't any information because the states don't provide it. They can only deal with the data that flows to them from the states and if the Indian country jurisdiction states aren't providing data to the Department of Justice, there can be no compilation. That's where we are.

JUDGE ERICKSON: Well, one of my great fears about disparity, if you don't ever develop any kind of statistical basis to understand what's going on and we never answer this question and there continues to be this sort of disparity -- one of the perceived problems and anecdotal problems in Indian country is because the sentences in federal court are so harsh that
information that should be being sent on to the Department of Justice for review for question of prosecution just never gets there, that the local law enforcement community tries to fix it as best they can because as they see it, the alternative is we get a sentence in tribal court that's six months to a year and it's something.

Or if we send them off for federal prosecution, they're going to get seven years, which is twice what they would serve in state court and they're going to serve 85 percent of the sentence. And there is no parole and there's no diversion, meaningful diversion programs and there's no deferred prosecution or deferred imposition of sentence programs, all of which exist in great numbers in states. And it contributes to a low level of lawlessness on the reservations, which is a huge continuing problem on some Indian nations. In some Indian nations, right?

And once again, we can't say this is a blanket problem, but if you talk to people in
Indian country, there's a sort of -- we throw up our hands because our choice is we send our children away for the better part of a decade or we treat it like it's a misdemeanor. It's a hard choice and people are making it every day although very few people will stand up in public and say that's a decision they're making.

I mean, anecdotally we hear that happens. To paraphrase kind of a Yogi-ism, ain't nobody talking about it today. I mean, it's just kind of how it is, I think.

CHAIR SARIS: On the juveniles where is the closest -- where are the juvenile facilities? Is part of this that they're sent so far way?

MS. QUASULA: Well, yes, that's always been a concern. And I think it's relatively fluid, but they're typically based upon a contract with the Bureau of Prisons, so they're private facilities that are operating under contract. And when I was in New Mexico, that was always a very deep concern about these
youth being hauled off so far. Devil's Lake. That was always something that struck fear is that the kid's going to Devil's Lake.

There was a facility for a while I know outside of Santa Fe, New Mexico. It seemed to be operating pretty well because they actually understood Indian country to some extent. And the federal judge sitting in Santa Fe, that I've got to give great praise to, Judge Martha Vazquez, was one of the first judges who actually went to that juvenile facility and took a look at it to make sure that they were actually doing what they said that they would be doing. I don't even know if it exists anymore. But there are very few.

And so, that's yet another reason for -- not only with juveniles, but even if you have a youthful offender, if you're talking about a kid from Indian country, there's no federal facility in New Mexico. They're going to go probably to Stafford, Arizona. But that's still going to be so far away if you're talking about
Jicarilla, which is over by the Colorado border. So, and then of course designations are by the Bureau of Prisons as to where that person's going to go. So that's why we want the Commission to look at the impact. What is the impact of the sentence if I impose a sentence to a term of imprisonment on this youthful offender, especially a first-time offender, especially a non-violent offender? Unfortunately a lot of the youthful offenders are going to be committing crimes of violence, but what is the context with which that occurred, excuse me.

So, yes, that's definitely something for consideration. In our report we cite two facilities for juveniles, one in Idaho and then -- I can't recall where the other one is. Devil's Lake. But they're very few and far between. But it's not that common, I don't believe, for juveniles, those under the age of 18, to actually be sentenced to a term of incarceration.

CHAIR SARIS: I see. So that's the
atypical case? It's the most violent of the violent?

MS. QUASULA: Right. And then if it's the most violent of the violent, depending on their age and what their prior criminal history is, then it's probably a situation where you want to move to transfer that juvenile. If a juvenile has a prior predicate, it may be a mandatory transfer.

CHAIR SARIS: So it doesn't happen that much that juveniles, except the most violent offenders, are being sent to --

JUDGE ERICKSON: Well --

CHAIR SARIS: -- jail or incarcerated?

JUDGE ERICKSON: There's kind of a constant state of flux with these juvenile facilities and the reality of it is -- I want you to think about what she just said. They take people from New Mexico and send them to Devil's Lake, North Dakota. That's 1,000 miles away from home. These are people who maybe never ever have
been 100 miles away from their homes before. They are completely isolated from their cultural group, they're completely isolated from their families. I mean, this is not an ideal situation for rehabilitation under any circumstances. And even in North Dakota it is not infrequent for us to have kids that are taken from Belcourt, North Dakota and sent 600 miles away. All right?

And when we say they're the violent, the most violent offenders, that's true, but they're still juvenile-type offenses sometimes. I mean, the reality of it is -- I want you to -- there are no juvenile drug treatment centers. I mean, if you think about it, if you have a tribe that has 6,000 people, it's a sovereign nation, it ought to have the full panoply of protections and social services that a state would have. They may have limited access, if at all, into the state mental health and mental treatment situations.

So if I get a sex offender in North Dakota, it is not uncommon for them to be sent
600 miles away. And you may have a 15, 16-year-old kid where I'm the judge. I have to decide in like -- they're terrible cases. I mean, like say a fondling case involving a 6-year-old sister and 15-year-old boy. Well, we've got to make a choice. It's like what do we do next? I mean, do we take this 15-year-old, we send him 700 miles away to the nearest place where they'll provide that kind of sex offender treatment, or do we try and cobble something together that we can kind of make work in the state court, move them in with his auntie or his uncle and see what happens next?

And I'm telling you, this is not an easy day for Ralph. I mean, and I'm sure it's not for anybody who does this kind of work. I mean, you're sitting there and there is no magic wand, and that's true in a lot of federal cases, but it breaks your heart when you're looking at a 15-year-old kid.

CHAIR SARIS: I know we're running late here. Does anyone else --
(No audible response.)

CHAIR SARIS: Thank you very much.

MS. QUASULA: Thank you so much.

CHAIR SARIS: Thank you.

I think Judge Erickson is going to wrap up. Right?

JUDGE ERICKSON: Yes, well, I'm wrapped up. I just want to say --

(Laughter.)

JUDGE ERICKSON: I wanted to say thank you very much. I apologize for talking too much. It's in my nature.

CHAIR SARIS: Well, let me just say this, that it's -- you've fulfilled everything that we wanted when we set you up. And I know how hard you worked and you've given us a lot of food for thought. So thank you very much.

(Whereupon, the above-entitled matter went off the record at 1:19 p.m.)
Chair Patti B. Saris called the meeting to order at 1:01 p.m. in the Commissioners’ Conference Room.

The following Commissioners were present:

- Patti B. Saris, Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Michelle Morales, Commissioner Ex Officio
- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Chair Saris welcomed the members of the public, both in person and watching via the Commission’s livestream broadcast, and thanked the public for its interest in federal sentencing and the Commission’s work.

Chair Saris introduced the commissioners. Judge Charles R. Breyer is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998. He joined the Commission in 2013 and serves as a Vice Chair.

Dabney Friedrich has served on the Commission since 2006. Immediately prior to her appointment to the Commission, she served as Associate Counsel at the White House. Commissioner Friedrich previously served as counsel to Chairman Orrin Hatch of the Senate Judiciary Committee and as an Assistant United States Attorney, first for the Southern District of California and then for the Eastern District of Virginia.

Judge William H. Pryor, who also joined the Commission in 2013, is a United States Circuit Judge for the Eleventh Circuit Court of Appeals, appointed in 2004. Before his appointment to the Federal bench, Judge Pryor served as Attorney General for the State of Alabama.

Rachel Barkow, who also joined in 2013 as a Commissioner, is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, where she focuses her teaching and research on criminal and administrative law. She also serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

Michelle Morales serves as the designated ex officio member of the Commission representing the Department of Justice. Commissioner Morales is the Acting Director of the Office of Policy
Patricia Wilson Smoot serves as the designated ex officio member of the Commission representing the United States Parole Commission. Commissioner Smoot was nominated to the Parole Commission by President Obama and was confirmed by the Senate on September 16, 2010. She was designated as Chairman of the Parole Commission effective May 29, 2015. Immediately before joining the Parole Commission, she served as the Deputy State Attorney for Prince George’s County, Maryland. Commissioner Smoot has also been an Assistant United States Attorney in the District of Columbia and a Public Defender in Prince George’s County, Maryland.

Chair Saris noted that with the current Commission’s final meeting in December, it will end the year with a number of transitions and vacancies. However, she added, the Commission was moving forward in the meantime as there were important issues pending before it.

Chair Saris called for a motion to adopt the April 15, 2016, public meeting minutes. Commissioner Friedrich made a motion to adopt the minutes, with Vice Chair Breyer seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris reported that in July the Commission published several reports including a Report to the Congress: Career Offender Enhancements. Building upon a multi-year analysis, the report analyzed career offenders’ prior criminal history, incarceration terms and recidivism rates, and found that there are important differences between violent career offenders and those engaged only in drug trafficking.

Chair Saris highlighted one of the report’s key findings. Compared to offenders who have only engaged in drug trafficking, violent career offenders generally had a more serious and extensive criminal history, recidivated at a higher rate, and were more likely to commit another violent offense in the future. The career offender provision, however, has the greatest impact on drug trafficking offenders because they often face higher statutory maximum penalties, and the career offender directive requires the Commission to set their guideline penalties at or near the statutory maximum. Commission research indicated that career offenders whose qualifying criminal conduct is limited to drug trafficking are not meaningfully different from other federal drug traffickers and should not categorically be subject to the significant increases in penalties required by the career offender directive.

Chair Saris stated that for these and other reasons, the Commission concluded that the career offender directive should be amended to differentiate between career offenders with different types of criminal records, and is best focused on those offenders who have committed at least one “crime of violence”.

Chair Saris expressed the Commission’s hope that Congress would consider these recommendations, as well as others it has made, as career offenders now account for more than
11 percent of the total Federal Bureau of Prisons (BOP) population. She noted that efforts to reduce the over population of the BOP has been an overarching policy priority of the Commission for the past several years.

Chair Saris reminded the public that earlier in the year the Commission voted unanimously to amend the definition of “crime of violence” in the federal sentencing guidelines. That amendment became effective August 1, 2016, and a new supplement to the Guidelines Manual has been distributed to the field and is also available on the Commission’s website. In the Commission’s recent report, she noted, was a recommendation to Congress to adopt a new, single definition of “crime of violence” that is consistent with the Commission’s revised approach.

Chair Saris announced that the Commission recently released the latest report on the implementation of Amendment 782 – the so-called “Drugs Minus Two” amendment which made comprehensive changes to federal sentences for drug-related offenses. Since the amendment was adopted unanimously by the Commission in 2014, federal courts have granted a motion for a sentence reduction in nearly 29,000 cases.

Chair Saris closed her report by observing how the Commission’s work continues to have an impact and thanked the numerous individuals and groups, including the Judicial Conference of the United States, Federal Public Defenders, Department of Justice, and advisory groups, who submitted thoughtful comments and recommendations during the most recent notice and comment period.

Chair Saris stated that the next item of business was a possible vote to amend the Commission’s Rules of Practice and Procedure and called on the General Counsel to advise the Commission on that matter.

Ms. Grilli explained that a notice of proposed amendments to the Commission’s Rules of Practice and Procedure was published in the Federal Register on March 31, 2016, and the Commission received and reviewed public comment pursuant to that notice. She stated that a motion to adopt the amended rules of practice and procedure, attached hereto as Exhibit A, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Vice Chair Breyer. The Chair called for discussion on the motion, and, hearing no discussion, the Chair called for a vote. The motion was adopted unanimously.

Chair Saris stated the next item of business was a vote on the final policy priorities for the 2016-2017 amendment cycle. She again called on the General Counsel to advise the Commission on that matter.

Ms. Grilli explained that a notice of possible policy priorities was published in the Federal Register on June 9, 2016, and the Commission received and reviewed public comment pursuant
to that notice. She stated that a motion to adopt and publish in the Federal Register the final notice of policy priorities for the Commission’s 2016-2017 amendment cycle, attached hereto as Exhibit B, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to promulgate the proposed amendment, with Vice Chair Breyer seconding.

Chair Saris stated that, as a continuation of the Commission’s work over the past decade, it intended to study possible approaches to simplify the operation of the guidelines that will promote proportionality and reduce sentencing disparities. As part of this effort, the Commission will look for ways for the federal sentencing guidelines to better account for a defendant’s role, culpability, and relevant conduct. In doing so, she continued, the Commission expects to continue its examination of mandatory minimum penalties, including a review of the severity and scope of these penalties. To that end, the Commission will continue to review expansion of the so-called “safety valve” as well as the elimination of mandatory stacking penalties. Chair Saris stated that the Commission will look to see if there are any appropriate guideline amendments that may be necessary in response to any federal legislation as well as to continue its work with Congress on any statutory changes.

Chair Saris noted that the Commission’s appointed Tribal Issues Advisory Group (TIAG) also released its findings and recommendations following a very comprehensive work period. This report reflected the hard work for over a year by the federal judges, tribal law experts and tribal members who are devoted to serving the tribal community. On behalf on the Commission, Chair Saris thanked those who participated – especially Judges Ralph Erickson, Roberto Lange, Diane Humetewa, Jeffrey Viken, Brian Morris, Robert Blaeser, and William Boyum – as well as all of those who worked so hard to provide a very thoughtful set of recommendations to inform the Commission’s work. Last month, the Commission held a hearing on TIAG’s recommendations and learned a great deal more about the group’s work and recommendations. Chair Saris expressed the Commission’s appreciation for the contributions of the TIAG to its ongoing discussions, especially regarding the importance of data collection on and how tribal court convictions should be considered in the criminal history section of the Guidelines Manual.

Chair Saris announced that the Commission will further build upon TIAG’s recommendations by examining the treatment of all youthful offenders in light of the evolving case law and scientific research relating to adolescent brain development.

Chair Saris observed that, based on the recommendations from the alternatives to incarceration policy team, the Commission will engage in a multi-year study focusing on which particular defendants would be appropriate for alternatives to incarceration as well as a deeper examination of the issues surrounding prior sentence terms served in prison. She stated that the Commission will also expand its study of certain illegal drugs including MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone) as part of ongoing efforts to ensure that the federal sentencing guidelines are both current and effective. The Commission will also begin another study relating to environmental offenses where the conduct involved knowing endangerment resulting
Chair Saris briefly addressed the Bipartisan Budget Act of 2015, enacted in November 2015, after the Commission’s amendment cycle had commenced. She acknowledged the important years of work, as well as the continued oversight, led by the Senate Committee on Finance and the House Ways and Means Committee as well as the House Judiciary Committee to ensure aggressive implementation of these new penalties relating to Social Security fraud. The Chair explained that when new legislation is enacted in the waning days of the calendar year, it is not uncommon for the Commission to delay action and to defer to the following amendment cycle because of the abbreviated time frame in which to work on the issue.

Chair Saris recounted that, in response to the Bipartisan Budget Act of 2015, the Commission voted last January to publish a proposed amendment, but received written comment from Members of Congress, the Justice Department and the Inspector General of the Social Security Administration, that led the Commission to conclude that additional study of this issue was warranted to ensure that the new legislation was adequately addressed. Accordingly, Chair Saris stated, the Commission plans to take action on the Act’s provisions in this amendment cycle in addition to several other changes to the guidelines that reflect recent developments and evolving issues.

The Chair called for any additional discussion on the motion. Commissioner Morales expressed the thanks of the Attorney General to the Commission for prioritizing the study of synthetic drugs.

The Chair called for any additional discussion on the motion, and, hearing none, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion.

Chair Saris reminded the public about the Commission’s upcoming annual National Training Seminar, which will be held in Minneapolis from September 7th to the 9th. She stated that the Commission looked forward to another successful event to update users of the guidelines on changes in the guidelines and emerging case law. The Chair noted that last year’s seminar was attended by approximately 1,000 judges, probation officers, and practitioners and another great turnout was expected this year.

Chair Saris also reminded the audience that all of the Commission’s policy priorities as well as the updated rules of practice and procedure will be on the website and how the Commission looked forward to working with all interested parties in the upcoming year. She closed by thanking everyone for attending the Commission’s meeting.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Pryor made a motion to adjourn, with Vice Chair Breyer seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:17 p.m.
About the Commission

The United States Sentencing Commission is an independent agency in the judicial branch of government. Its principal purposes are:

(1) to establish sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes;

(2) to advise and assist Congress and the executive branch in the development of effective and efficient crime policy; and

(3) to collect, analyze, research, and distribute a broad array of information on federal crime and sentencing issues, serving as an information resource for Congress, the executive branch, the courts, criminal justice practitioners, the academic community, and the public.

PART I. PURPOSE OF RULES; RULES AMENDMENT PROCEDURE

Rule 1.1 – Application and Purpose

Pursuant to 28 U.S.C. § 995(a)(1) and other applicable provisions of its organizational statute, the United States Sentencing Commission (“the Commission”) has established these rules governing its usual operating practices.

The Commission, an agency within the judicial branch of government, is subject to only that provision of the Administrative Procedures Act, section 553 of title 5, United States Code, relating to publication in the Federal Register and a public hearing procedure, with regard to proposed sentencing guidelines or amendments thereto. See 28 U.S.C. § 994(x). The Commission is not subject to a variety of other statutes, such as the Federal Advisory Committee Act (5 U.S.C. App.), the Government in the Sunshine Act (5 U.S.C. § 552b), and the Freedom of Information Act (5 U.S.C. § 552), typically applicable to rulemaking agencies in the executive branch. The Commission nevertheless desires to involve interested members of the public in its work to the maximum extent practicable.

* Editorial Note: These rules were originally adopted by the Commission on July 11, 1997, and amended in August 29, 2007, and August 18, 2016.
Accordingly, these rules are issued for the purpose of more fully informing interested persons of opportunities and procedures for becoming aware of and participating in the public business of the Commission. These rules are not intended to create or enlarge legal rights for any person.

**Rule 1.2 – Rules Amendment Procedure**

(a) Except as provided in subsection (b), amendment of these rules shall require the affirmative vote in a public meeting of a majority (and not less than three) of the voting members then serving. Any such amendment shall be adopted only after notice and reasonable opportunity for public comment.

(b) The Commission temporarily may suspend any rule contained herein and/or adopt a supplemental or superseding rule by affirmative vote in a public meeting of a majority of the voting members then serving.

**PART II – ACTION BY THE COMMISSION**

**Rule 2.1 – Members**

For purposes of the voting procedures set forth in these Rules, “member” of the Commission shall mean a voting member and shall not include an *ex-officio*, non-voting member. *Ex-officio* members may not vote or make or second motions.

**Rule 2.2 – Voting Rules for Action by the Commission**

(a) Except as otherwise provided in these rules or by law, action by the Commission requires the affirmative vote of a majority of the members at a public meeting at which a quorum is present. A quorum shall consist of a majority of the members then serving. Members shall be deemed “present” and may participate and vote in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

(b) Promulgation of guidelines, policy statements, official commentary, and amendments thereto shall require the affirmative vote of at least four members at a public meeting. See 28 U.S.C. § 994(a).

Publication for comment of proposed amendments to guidelines, policy statements, or official commentary shall require the affirmative vote of at least three members at a public meeting.

Approval of a notice of priorities shall require the affirmative vote, at a public meeting, of a majority of the members then serving.
Adoption or revision of the minutes of a public meeting shall require the affirmative vote, at a public meeting, of a majority of the members then serving.

(c) Action on other matters may be taken (1) at a nonpublic meeting; or (2) without a meeting by written or oral communication (e.g., by “notation voting”), and shall be based on the affirmative vote of a majority of the members then serving. Such matters include the approval of budget requests, administrative and personnel issues, decisions on contracts and cooperative agreements, decisions on workshops and training programs, decisions on publishing reports and making recommendations to Congress, decisions to hold hearings and call witnesses, decisions on litigation and administrative proceedings involving the Commission, decisions relating to the formation and membership of advisory groups, the approval pursuant to 28 U.S.C. § 994(w) of a statement of reasons form, notices of proposed priorities, extensions of public comment periods, notices of proposed amendments to these rules, approval of technical and clerical amendments to these rules, and decisions to hold a nonpublic meeting. The Commission is not precluded from acting on such matters at a public meeting.

(d) A motion to reconsider Commission action may be made only by a commissioner on the prevailing side of the vote for which reconsideration is sought, or who did not vote on the matter. Four votes are necessary to reconsider a Commission vote on any question on which a four-vote majority is required.

PART III – MEETINGS AND HEARINGS

Rule 3.1 – Meetings

The Chair shall call and preside at Commission meetings. See 28 U.S.C. § 993(a). In the absence of the Chair, the Chair will designate a Vice Chair to preside.

Members may participate in meetings from remote locations by electronic means, including telephone, satellite, and video conference devices.

Rule 3.2 – Public Meetings

The Commission shall meet on at least two occasions in each calendar quarter to conduct business. See 28 U.S.C. § 993(a). Except as provided in Rule 3.3, meetings of the Commission with outside parties shall be conducted in public.

To the extent practicable, the Chair shall issue, through the Office of Staff Director, a public notice of any public meeting at least seven days prior to the date of the meeting. The public notice, to the extent practicable, shall indicate the general purpose(s) of the meeting and include an agenda and any related documents approved by the Chair for public release. The notice shall be made available to the public on the Commission’s website.
Any related documents approved for public release shall be made available to the public as soon as practicable (e.g., if not in advance of the meeting, then at the start of the meeting or in a timely manner after the meeting), on the Commission's website.

At the discretion of the Chair, members of the public may be afforded an opportunity to comment on any issue on the agenda of a public meeting.

**Rule 3.3 – Nonpublic Meetings**

The Chair may call nonpublic meetings for purposes of the following:

1. To take actions on other matters (see Rule 2.2(c)).

2. To receive information from, and participate in discussions with, Commission staff or any person designated by an *ex officio* Commissioner as support staff for that Commissioner.

3. To receive information from, and participate in discussions with, (A) members of advisory groups; (B) interested parties within the judicial branch (e.g., federal judges; the Criminal Law Committee; the Federal Public and Community Defenders); or (C) interested parties within the executive or legislative branches.

4. Upon a decision by a majority of the members then serving, to receive or share information, from or with any other person, that is inappropriate for public disclosure (e.g., classified information; privileged or confidential information; trade secrets; or information the disclosure of which would interfere with law enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal privacy, compromise a confidential source, disclose law enforcement investigative techniques and procedures, endanger the life or safety of judicial or law enforcement personnel, or be likely to significantly frustrate implementation of a proposed agency action).

5. Upon a decision by a majority of the members then serving, to receive information from, and participate in discussions with, outside experts, on matters unrelated to the merits of any pending proposed amendment to the guidelines, policy statements, or commentary (e.g., to hold a symposium, convene an expert roundtable, or discuss local practices with a locality's judges and practitioners). At the discretion of the Chair, such a meeting may be held under "Chatham House Rule." Subject to the discretion and control of the Chair, one or more persons may be permitted to attend such a meeting as outside observers. Where the number of outside observers is limited, the Chair may give priority to individuals referred to in subdivision (3).

**Rule 3.4 – Public Hearings**

The Commission may convene a public hearing on any matter involving the promulgation of sentencing guidelines or any other matter affecting the Commission's business. See 28 U.S.C. § 995(a)(21). A request for comment on a proposed matter does not necessarily mean that a public
hearing will be held on the matter or that a public hearing, if scheduled, will pertain to all issues raised in the request for comment.

Notice of a public hearing shall be given as soon as practicable. The notice shall include, as applicable, information regarding a procedure for requesting an opportunity to testify, and the availability of documents or reports relevant to the subject of the hearing.

The Commission may specify the format for public hearings, invite witnesses, choose witnesses from among those who request the opportunity to testify, and require that written testimony be submitted in advance of the hearing.

The Commission may exclude from such a hearing any electronic devices that record the voice or image of any or all witnesses, as well as cameras of any kind.

At the request of any witness to turn off any such electronic device(s) during that person’s testimony, the Chair of the Commission may order, at his or her discretion, that use of such devices be discontinued during the testimony of that witness.

**Rule 3.5 – Live Webcasts and Written Records**

To the extent practicable, and at the discretion and control of the Chair, the Commission shall provide a live webcast or audiocast of its public meetings and public hearings, and shall make available a recording of the webcast or audiocast through the Commission’s website.

The Commission shall prepare and maintain written minutes of public meetings and make them publicly available after their approval by the Commission. The Commission shall make an audio recording of public meetings and make the recordings publicly available after the approval of the minutes of such meeting. No such recording shall be copied or removed from the Commission’s offices.

The Commission shall maintain a written transcription of public hearings that shall be publicly available for inspection.

**PART IV – GUIDELINE AMENDMENT PROCESS**

**Rule 4.1 – Promulgation of Amendments**

The Commission may promulgate and submit to Congress amendments to the guidelines after the beginning of a regular session of Congress and not later than May 1 of that year. Amendments shall be accompanied by an explanation or statement of reasons for the amendments. Unless otherwise specified, or unless Congress legislates to the contrary, amendments submitted for review shall take effect on the first day of November of the year in which submitted. 28 U.S.C. § 994(p).
At other times, pursuant to special statutory enactment, the Commission may promulgate amendments to accomplish identified congressional objectives.

Amendments to policy statements and commentary may be promulgated and put into effect at any time. However, to the extent practicable, the Commission shall endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year.

**Rule 4.1A – Retroactive Application of Amendments**

Generally, promulgated amendments will be given prospective application only. However, in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants (see 28 U.S.C. § 994(u); 18 U.S.C. § 3582(c)(2)), the Commission shall—

1. at the public meeting at which it votes to promulgate the amendment, or in a timely manner thereafter, vote to publish a request for comment on whether to make the amendment available for retroactive application;

2. instruct staff to prepare a retroactivity impact analysis of the amendment, if practicable, and make such an analysis available in a timely manner to Congress and the public;

3. hold a public hearing on whether to make the amendment available for retroactive application; and

4. at a public meeting held at least 60 calendar days before the effective date of the amendment, vote on whether to make the amendment available for retroactive application.

**Rule 4.2 – Prison Impact of Amendments**

Prior to promulgating amendments to the guidelines, the Commission shall consider the impact of any amendment on available penal and correctional resources, and on other facilities and services. See 28 U.S.C. § 994(g). Prison and sentencing impact assessments of amendments to the guidelines shall be made available to the public as soon as practicable, through the Commission’s website.

**Rule 4.3 – Notice and Comment on Proposed Amendments**

In proposing and promulgating guidelines and amendments thereto, the Commission shall comply with the requirements of section 553 of title 5, United States Code, relating to publication in the *Federal Register* and public hearing procedure. 28 U.S.C. § 994(x).

The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x). Nevertheless, the Commission will endeavor
to provide, to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments.

Where appropriate, the Commission may divide a comment period into an original comment phase and a reply comment phase. For example, the Commission may divide a comment period of 60 calendar days into an original comment phase of 40 calendar days and a reply comment phase of 20 calendar days. Comments during a reply phase are limited to issues raised in the original comment phase.

Public comment regarding a proposed amendment received after the close of the comment period, and reply comment received on issues not raised in the original comment phase, may not be considered.

The Commission does not intend to solicit ex parte communications (i.e., communications outside the public comment process) on the merits of a proposed amendment from outside parties.

**Rule 4.4 – Federal Register Notice of Proposed Amendments**

A vote to publish a proposed amendment to a guideline, policy statement, or official commentary in the *Federal Register* shall be deemed to be a request for public comment on the proposed amendment. At the same time the Commission votes to publish proposed amendments for comment, it shall request public comment on whether to make any amendments retroactive.

The notice of proposed amendments also shall provide, to the extent appropriate and practicable, reasons for consideration of amendments and a summary of or reference to publicly available information that is relevant to the issue(s). In addition, the publication notice shall include a deadline for public comment and may include a notice of any scheduled public hearing(s) or meetings on the issue(s).

In the case of proposed amendments to guidelines or issues for comment that form the basis for possible guidelines amendments, the Commission shall allow, to the extent practicable, a minimum period of public comment of at least 60 calendar days prior to final Commission action on the proposed amendments.

**Rule 4.5 – Public Hearing on Proposed Amendments**

In the case of “emergency” amendments issued pursuant to special statutory authorization, the Commission ordinarily will not conduct a public hearing on the proposed amendments but will afford such opportunity for written comment as time allows.

In the case of other amendments to guidelines or policy statements issued pursuant to 28 U.S.C. § 994, the Commission shall conduct a public hearing on the proposed amendments, unless the Commission determines that time does not permit a hearing or that a hearing will not substantially assist the amendment process. Notice of the hearing shall be given in the *Federal Register* and by other means designed to inform persons likely to be interested in participating in such a hearing.
PART V – PUBLIC PARTICIPATION IN GUIDELINE AMENDMENT PROCESS

Rule 5.1 – Public Comment File

The Office of Legislative and Public Affairs shall receive and maintain public comment and public hearing testimony received by the Commission. As soon as practicable after the close of the comment period (or the comment phase, as applicable), public comment and public hearing testimony shall be made available to the public through the Commission’s website.

“Public comment” means (1) any written comment submitted by an outside party, including an agency represented by an ex-officio commissioner, pursuant to or in anticipation of a request for public comment by the Commission; and (2) any other written submission, from an outside party, that the Chair or a majority of the members then serving has not precluded from being made available to the public. “Public comment” does not include any internal communication between and among commissioners, Commission staff, and any person designated by an ex-officio commissioner as support staff for that commissioner.

Where appropriate, the Commission may decline to make available public comment that is duplicative and may redact sensitive information from public comment.

Rule 5.2 – Notice of Priorities

(a) The Commission shall publish annually in the Federal Register, and make available to the public, a notice of the proposed priorities for future Commission inquiry and possible action, including areas for possible amendments to guidelines, policy statements, and commentary. Any such notice shall include an invitation to, and deadline for, the submission of written public comment on the proposed priorities.

Subsequent to the deadline for comment on the proposed priorities, the Commission shall publish in the Federal Register, and make available to the public for inspection, a notice of priorities for Commission inquiry and possible action.

(b) In setting its priorities, the Commission shall consider the impact of the priorities on available penal and correctional resources, and on other facilities and services. See 28 U.S.C. § 994(g). The Commission shall also consider, among other factors, the number of defendants potentially involved and the potential impact.

(c) The Commission’s priorities may include resolution of circuit conflicts, pursuant to the Commission’s continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts. The Commission will consider the following non-exhaustive list of factors in deciding whether a particular guideline circuit conflict warrants resolution by the Commission:
(1) potential defendant impact;
(2) potential impact on sentencing disparity;
(3) number of court decisions involved in the conflict and variation in holdings; and
(4) ease of resolution, both as a discrete issue, and in the context of other agenda matters scheduled for consideration during the available amendment cycle.

(d) There may be circumstances in which the Commission receives — before the comment period on the next year’s priorities begins — a written submission from an outside party or a petition of a defendant under section 994(s) of title 28, United States Code (see Rule 5.6), that raises an issue more appropriately considered for the next year’s priorities. In such circumstances, the Commission shall consider that issue when it sets the next year’s priorities.

Rule 5.3 – Information Relevant to the Amendment Process

To fulfill Commission priorities and inform consideration of potential amendments, the Staff Director shall direct the preparation of relevant data, reports, and other information for consideration by the Commission. Upon authorization by the Staff Director, the Office of Legislative and Public Affairs shall make the data, reports, and other information available to the public as soon as practicable.

Rule 5.4 – Advisory Groups

Upon authorization of the Commission, the Staff Director may facilitate the creation, membership, and periodic meeting at the Commission offices and elsewhere, of advisory groups of defense attorneys, academics, probation officers, judges, prosecutors, and others, to facilitate formal and informal input to the Commission.

Two types of advisory groups are authorized: standing and ad hoc. The following groups are standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, the Tribal Issues Advisory Group, and the Victims Advisory Group.

Upon creating an advisory group, the Commission may prescribe such policies regarding the conduct of meetings and operation of the group as the Commission deems necessary or appropriate. The Commission also may delegate to an advisory group the responsibility for developing such policies.

Rule 5.5 – Petitions Filed By Defendants Under Section 994(s)

Pursuant to section 994(s) of title 28, United States Code, a defendant may file a petition with the Commission requesting a modification of the guidelines used in sentencing that defendant. To be
covered by section 994(s), the petition must be on the basis of changed circumstances unrelated to the defendant, including changes in (1) the community view of the gravity of the offense; (2) the public concern generated by the offense; and (3) the deterrent effect particular sentences may have on the commission of the offense by others. See 28 U.S.C. § 994(s).

The Commission shall give due consideration to petitions covered by section 994(s) when it sets its priorities under Rule 5.2.

As soon as practicable after submission, petitions covered by section 994(s) shall be made available to the public through the Commission’s website. Where appropriate, the Commission may redact sensitive information from such petitions.

**PART VI – INFORMATION ABOUT THE COMMISSION**

**Rule 6.1 – Office(s)**


The office can be reached by telephone between 8:30 a.m. and 5:30 p.m., Monday through Friday. The main telephone number is (202) 502-4500. The fax number is (202) 502-4699. The e-mail address is pubaffairs@ussc.gov.

**Rule 6.2 – Availability of Materials for Public Inspection; Office of Legislative and Public Affairs**

The Office of Legislative and Public Affairs is the repository of all materials that are available to the public.

Generally, the Office of Legislative and Public Affairs will maintain for public inspection the following: (1) agendas and schedules for Commission public meetings and public hearings; (2) approved minutes of Commission public meetings; (3) transcripts of public hearings; (4) public comment as defined in Rule 5.1; and (5) data, reports, and other information made available pursuant to Rule 5.3.

The Office of Legislative and Public Affairs also will make available upon request: (1) information available pursuant to the Commission’s policy on public access to Commission data; and (2) *A Guide to Publications & Resources* that lists all publications and datasets available from the Commission.

**Rule 6.3 – Internet Site and Other Electronic Resources**

The Commission maintains and updates information and documents on an Internet website. The website is found at [http://www.ussc.gov](http://www.ussc.gov). This resource includes general information, such as
background information about the Commission and Commissioners, notices for scheduled meetings and hearings, minutes of recent meetings, transcripts of public hearings, listings of Commission priorities and projects, outstanding public comment solicitations, recently promulgated amendments, the text of numerous reports and resources available from the Commission, and the text of the Guidelines Manual and Commission reports.

To the extent practicable, the Commission shall use a variety of electronic means to distribute public meeting notices and provide other information about the Commission. For example, the Office of Legislative and Public Affairs shall, where practicable and appropriate, use social media platforms (such as Twitter) and electronic distribution mechanisms (such as an email listserv). Information about these platforms and mechanisms shall be posted to the Commission's website.

**Rule 6.4 – Information at Federal Depository Libraries**

Commission publications printed by the Government Printing Office, and other selected documents, are available in hard copy or microfiched form through the Government Printing Office's Depository Library system. The location of the nearest Federal Depository Library can be determined in several ways: (1) by requesting a free copy of the Directory of Depository Libraries from the U.S. Government Printing Office, Library Programs Services, Stop: SLLD, Washington, DC 20401; (2) by asking at any local library for the address of the nearest Federal Depository Library; or (3) by using the Internet at [http://www.access.gpo.gov/su_docs/locators/findlibs/index.html](http://www.access.gpo.gov/su_docs/locators/findlibs/index.html).

**Rule 6.5 – Access to Commission Data**

The Commission collects and analyzes a broad array of data from federal courts concerning sentences imposed, and maintains a comprehensive, computerized data collection system of federal sentencing information. The Commission makes various datasets of sentencing information, without individual identifiers, available to the public through the Commission's website.

In addition, the Commission provides its various datasets, excluding individual identifiers, to the University of Michigan's Inter-University Consortium for Political and Social Research (ICPSR). Researchers interested in studying federal sentencing practices through quantitative methods can access Commission sentencing data through this means. Contact ICPSR, P.O. Box 1248, Ann Arbor, MI 48106; or call 1-800-999-0960; or use the following Internet address: [http://www.ICPSR.umich.edu/NACJD/archive.html](http://www.ICPSR.umich.edu/NACJD/archive.html).
UNITED STATES SENTENCING COMMISSION

Final Priorities for Amendment Cycle

AGENCY: United States Sentencing Commission.

ACTION: Notice of final priorities.

SUMMARY: In June 2016, the Commission published a notice of possible policy priorities for the amendment cycle ending May 1, 2017. See 81 FR 37241 (June 9, 2016). After reviewing public comment received pursuant to the notice of proposed priorities, the Commission has identified its policy priorities for the upcoming amendment cycle and hereby gives notice of these policy priorities.

FOR FURTHER INFORMATION CONTACT: Christine Leonard, Director, Office of Legislative and Public Affairs, (202) 502-4500, pubaffairs@ussc.gov.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant
to 28 U.S.C. § 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. § 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. § 994(p).

Pursuant to 28 U.S.C. § 994(g), the Commission intends to consider the issue of reducing costs of incarceration and overcapacity of prisons, to the extent it is relevant to any identified priority.

As part of its statutory authority and responsibility to analyze sentencing issues, including operation of the federal sentencing guidelines, the Commission has identified its policy priorities for the amendment cycle ending May 1, 2017. The Commission recognizes, however, that other factors, such as the enactment of any legislation requiring Commission action, may affect the Commission’s ability to complete work on any or all of its identified priorities by the statutory deadline of May 1, 2017. Accordingly, it may be necessary to continue work on any or all of these issues beyond the amendment cycle ending on May 1, 2017.

As so prefaced, the Commission has identified the following priorities:

(1) Continuation of its work with Congress and other interested parties on statutory mandatory minimum penalties to implement the recommendations set forth in the Commission’s 2011 report to Congress, titled Mandatory Minimum Penalties in the Federal Criminal Justice System, including its recommendations regarding the severity and scope of mandatory minimum
penalties, consideration of expanding the “safety valve” at 18 U.S.C. § 3553(f), and elimination of the mandatory “stacking” of penalties under 18 U.S.C. § 924(c), and to develop appropriate guideline amendments in response to any related legislation.

(2) Continuation of its multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate. As part of this examination, the Commission intends to study possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant’s role, culpability, and relevant conduct.

(3) Continuation of its study of approaches to encourage the use of alternatives to incarceration.

(4) Continuation of its multi-year study of statutory and guideline definitions relating to the nature of a defendant’s prior conviction (e.g., “crime of violence,” “aggravated felony,” “violent felony,” “drug trafficking offense,” and “felony drug offense”) and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal), possibly including recommendations to Congress on any statutory changes that may be appropriate and development of guideline amendments that may be appropriate.
(5) Continuation of its comprehensive, multi-year study of recidivism, including:

(A) examination of circumstances that correlate with increased or reduced recidivism;

(B) possible development of recommendations for using information obtained from such study to reduce costs of incarceration and overcapacity of prisons, and promote effectiveness of reentry programs; and

(C) consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.

(6) Study of the findings and recommendations contained in the May 2016 Report issued by the Commission’s Tribal Issues Advisory Group, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.


(8) Examination of Chapter Four, Part A (Criminal History) to (A) study the treatment of revocation sentences under §4A1.2(k), and (B) consider a possible amendment of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for instances in which the time actually served was substantially less than the length of the sentence imposed for a conviction counted under the Guidelines Manual.

(9) Study of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the Guidelines Manual that may be appropriate in light
of the information obtained from such study.

(10) Possible consideration of whether the weapon enhancement in §2D1.1(b)(1) should be amended to conform to the “safety valve” provision at 18 U.S.C. § 3553(f) and §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

(11) Study of environmental offenses involving knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides, or other pollutants, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.


(13) Resolution of circuit conflicts, pursuant to the Commission’s continuing authority and responsibility, under 28 U.S.C. § 991(b)(1)(B) and Braxton v. United States, 500 U.S. 344 (1991), to resolve conflicting interpretations of the guidelines by the federal courts.

(14) Consideration of any miscellaneous guideline application issues coming to the Commission’s attention from case law and other sources, including possible consideration of whether a defendant’s denial of relevant conduct should be considered in determining whether a
defendant has accepted responsibility for purposes of §3E1.1.
AUTHORITY: 28 U.S.C. § 994(a), (o); USSC Rules of Practice and Procedure 5.2.

Patti B. Saris

Chair
Thank you for attending this public meeting of the United States Sentencing Commission.

This is the Commission’s final meeting in 2016. The Commission will end the year with a number of transitions and vacancies as it marks the final meeting of my six-year term as Chair of the Commission which expires when the Congress adjourns. So sadly, this will be my last address to you as Chair of the Commission. Typically, my remarks to you focus on our recent activities and plans for the immediate future. Today I also will look back at this important and exciting period in the Commission’s history.

Before I do that, I would like to introduce the other members of the Commission. I’ll start with Judge Charles R. Breyer. He is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998. He joined the Commission in 2013 and serves as a Vice Chair. Judge Breyer is one of the best known and loved judges in the federal judiciary. His insights from many years as a trial judge have been invaluable. Hopefully, he will have the opportunity to serve a second term, as his first term is also ending at the end of this congressional session.

Next, we have Dabney Friedrich, who has served on the Commission since 2006. Immediately prior to her appointment to the Commission, Commissioner Friedrich served as Associate Counsel at the White House. She previously served as counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee and as an Assistant U.S. Attorney, first for the Southern District of California and then for the Eastern District of Virginia. This also marks the final meeting for Commissioner Friedrich. For the last decade, Dabney has been an active and hard-working member of the Commission contributing greatly to the Commission’s decisions. Our staff, would like to thank her for being very supportive of their efforts. She has also been very impactful in prison reform efforts to better educate prisoners in the Bureau of Prisons, particularly those with learning disabilities. She has been a valued member of the Commission often offering that one idea or insight that makes a compromise possible on important amendments like drugs minus 2 and we wish her well.

Next is Judge William H. Pryor, who also joined the Commission in 2013. Judge Pryor is a United States Circuit Judge for the Eleventh Circuit Court of Appeals, appointed in 2004. Before his appointment to the Federal bench, Judge Pryor served as Attorney General for the State of Alabama and he is also responsible for the creation of the Alabama Sentencing Commission. Judge Pryor is a true scholar who thinks deeply about the big picture of sentencing policy.

Next is Rachel Barkow, who also joined in 2013. Commissioner Barkow is the Segal
Family Professor of Regulatory Law and Policy at the New York University School of Law, where she focuses her teaching and research on criminal and administrative law. Commissioner Barkow brings extensive academic knowledge to the Commission, not just relating to sentencing policy but also in other substantive areas like mens rea law. She also serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

I’d also like to recognize Michelle Morales, who serves as the designated *ex officio* member of the Commission representing the Department of Justice. Commissioner Morales is the Acting Director of the Office of Policy and Legislation in the Criminal Division of the Department. She first joined that office in 2002 and has served as its Deputy Director since 2009. Commissioner Morales previously served as an Assistant United States Attorney in the District of Puerto Rico.

During this period of transitions, I’d like to acknowledge that next year will mark the thirtieth anniversary of the Commission’s first publication of the sentencing guidelines. Over the last six years the proposed amendments to the guidelines have been developed and adopted in the same tradition of bipartisanship that has shaped the Commission the last three decades. Over the last six years, the Commission’s current membership has continued this remarkable tradition with an evidence-based and collegial approach to decision-making. Our efforts have resulted in significant policy decisions that we believe have contributed to a decrease in the federal prison population, which peaked in 2013 at 219,298 and now has declined to its current level of 190,303. That’s a reduction of more than 28,995 offenders, or 13.2% over three years.

It has been a pleasure to serve as Chair of the Commission. I have learned so much from each and every commissioner I have had the honor to serve alongside with. I started with my friend and former chair Ricardo Hinojosa, Ketanji Brown Jackson, Beryl Howell, William Carr and *ex officio* Jonathan Wroblewski. I have become a big fan of our standing advisory groups: the practitioners advisory group, the probation officers advisory group, and the victims advisory group. I would also like to thank the Federal Defenders Guidelines Committee, Commission Liaison Subcommittee for their assistance. I am enthusiastic about the future contribution of our tribal issues advisory group, newly announced with the members identified on our website. These groups regularly meet with the Commission and help us in the formation of sentencing policy.

I would be remiss if I did not acknowledge the significant impact of the public comment in relation to our amendments to the guidelines sent from a broad range of interested Americans and stakeholders during my tenure as Chair. Your formal comment has helped shape over 50 amendments that were promulgated during my tenure.

It has also been a joy to work with the Commission’s staff of esteemed attorneys, social scientists, and other professionals with expertise in criminal justice and federal sentencing policy, along with many other hard-working individuals who each contribute with their best effort in their respective roles. I want to give a particular shout out to Staff Director Ken Cohen and our staff director before him, Judith Sheon. My first year here was a tough one as I learned the ropes and I have had the best teachers, friends and mentors. Our staff has provided all the
commissioners with invaluable support and expertise. Together, and with you—the listening public—hopefully, we have been active in trying to make the guidelines and federal sentencing fairer and more proportionate while maintaining an ongoing commitment to public safety.

As I mentioned before, when I first became Chair six years ago, the BOP inmate population was 37 percent overcapacity, and now it is about half that. In 2011, my first year on the Commission, the Commission implemented new lower crack cocaine penalties from the 2010 Fair Sentencing Act and voted to apply these changes retroactively to benefit currently incarcerated crack cocaine offenders. In arriving at these decisions, the Commission found that the crack cocaine penalties were not proportionate to the harms on society, and that the impact of the unduly severe penalties were borne most by minorities. That decision resulted in 7,748 offenders receiving an average reduction in their sentences of 19.9% – from 153 to 123 months.

In 2014, the Commission voted to reduce the Drug Quantity Table for all drug trafficking offenses – not just crack cocaine – by 2 levels – which reduced drug penalties going forward by about 17%. The Commission then voted to make those reductions retroactive and to date 28,544 drug offenders have received an average sentence reduction of 17%, or 25 months from 143 months to 118 months. It’s important for the public to know before sentence reductions were granted as a result of the 2011 and 2014 amendments, each individual case was reviewed by a federal judge to ensure that the offender did not pose a public safety risk. Simply put – none of these reductions are automatic.

The Commission also had several other important amendments that became effective this year. In response to the Supreme Court’s decision in Johnson v. United States the Commission eliminated the analogous residual clause from the Sentencing Guidelines definition of crime of violence. The amendment will help relieve some of the strain on the courts and the broader uncertainty that has followed Johnson. In addition, this year the Commission published a report to Congress analyzing career offenders in the federal system and the statutory definition of crime of violence. In our report, the Commission recommended that Congress establish one definition of “crime of violence” for all criminal law purposes, and we encourage Congress to adopt the Commission’s definition of “crime of violence” as that single, uniform definition.

The Commission also strengthened and broadened the criteria for compassionate release with several meaningful changes. Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentencing reduction. Through the Commission’s newly expanded criteria, federal inmates may be eligible for compassionate release based on four categories relating to medical conditions, age, family circumstances, or other extraordinary and compelling reasons. The Commission’s action encourages the BOP to use its current authority if an eligible offender meets any of these circumstances.

This year, the Commission also addressed the guidelines for illegal reentry offenses. The 2016 amendment increased penalties for those immigrants who commit crimes after unlawfully reentering the country or who are convicted of reentering the country multiple times. Immigration offenses comprise a large proportion of the federal docket and these enhancements
may affect a large number of cases. These amendments also simplified the application of immigration guidelines.

Over the past 6 years, I have traveled throughout the nation speaking to different audiences about the challenges confronting the federal criminal justice system today. Whether I’m addressing a room full of federal judges or a group of law students, I have always emphasized that the Commission’s decisions are evidence-based and data-driven. During my tenure as Chair, the Commission’s Office of Research and Data has analyzed 397,248 individual cases, cataloguing the pertinent sentencing data into a comprehensive computer database maintained by the Commission. Our detailed synthesis of sentencing data has culminated in 60 publications ranging from significant research reports to more tailored Quick Facts. We have also responded to 845 special data requests. The Commission’s reports have a continued impact on educating policymakers and the public.

For instance, several of the Commission’s recommendations in its 2011 Mandatory Minimum Report are reflected in bipartisan legislation pending before the House and the Senate. Since 2011, the Commission unanimously concluded that mandatory minimum sentences in their current form are often too high, are applied too broadly to lower level defendants, and the most severe penalties are often applied inconsistently.

That’s why we’ve urged Congress to reduce the current statutory mandatory minimum penalties for drug trafficking.

We’ve also urged Congress to consider expanding the safety valve to allow a greater number of non-violent, low-level drug offenders to be sentenced below mandatory minimum penalties.

In addition, we’ve urged Congress to follow the Commission’s lead and give retroactive effect to the statutory changes made by the Fair Sentencing Act of 2010.

And we’ve urged Congress to reassess the scope and severity of the recidivism provisions in 21 U.S.C. sections 841 and 960, which generally double the mandatory minimum penalties if a drug offender has a prior conviction for a drug trafficking offense.

The Commission plans to update that pivotal mandatory minimum report with more current data in the near future. It is my hope that the courts, Congress, the Executive Branch, and the public continue to base sentencing laws and policies on the Commission’s high-quality data and thoughtful analysis. So much bipartisan progress has been made in criminal justice reform. I am hopeful that the 115th Congress will pass meaningful legislation.

The Commission has also focused on making its reports and data more accessible to the public and Congress. We have started publishing a series of 23 Quick Facts, two page documents focusing on a variety of issues within the federal criminal justice system. Since 2012, the Commission has made its prison and sentencing impact analyses available to the public on its website and this year the Commission launched a redesigned website. The Commission has also expanded its national training opportunities for judges and practitioners in recent years. In June, about 100 judges attended our first-ever training for judges in Chicago, and the feedback was so positive that the Commission is holding another training session for judges in 2017.
On September 7-9, the Commission held its Annual National Training Program in Minneapolis and had approximately 850 attendees. I would like to acknowledge the excellent work of the Commission’s staff who organized the event and conducted the individual sessions offered during the training programs.

We have received some feedback from the seminar participants that National Training Program’s audience has grown too large. To respond to this feedback, but to also accommodate the continued demand for our training programs, we have decided to hold a National Training Program series next year. The first in the series that is open to the public will be on May 31-June 2, 2017, in Baltimore, MD and the second will be on September 6-8, 2017, in Denver, CO. We will also hold a judges-only training program in San Diego, CA on June 22-23, 2017. Registration has not yet opened for these programs but you can check our website for more details in the weeks ahead.

In October the Chair and Vice Chair of the Commission’s Practitioners Advisory Group (PAG) completed their terms of office. I would like to take a moment to acknowledge their service and thank them on behalf of the Commission.

Eric Tirschwell served as the Chair of the PAG from October 2015 - October 2016, following previous service as Vice Chair.

Nanci Clarence served as the Vice Chair for one year and was a member of the PAG since 2013. Nanci practices law in San Francisco, California with Clarence Dyer and Cohen.

Existing members of the PAG have taken over the leadership roles and I would like to acknowledge them as well. On the advisory group since 2012, the New Chair of the PAG is Ronald Levine, who practices law in Philadelphia, PA. Ron is a principal at Post and Shell in the firm’s Business Law and Litigation Department and Chair of the Firm’s Internal Investigation and White Collar Defense Group.

The new Vice Chair, Knut Johnson, who practices criminal defense in San Diego, California, and is the Criminal Justice Act representative for the Southern District of California. Knut has been a member of the PAG since 2015. We are grateful to them and all the members of the Commission’s advisory groups for their continued service to the Commission. We value their input.

And we have a new advisory group! As you may recall, in July, 2016, the Commission held a hearing, at which the ad hoc Trial Issues Advisory Group presented their report to the Commission and testified about the recommendations in that report. One recommendation that the ad hoc group made to the Commission was that it should create a standing Tribal Issues Advisory Group. The Commission accepted that recommendation and adopted a charter for the advisory group in August and published a Federal Register Notice seeking applicants for membership on the group. I am pleased to announce the membership of the new Standing Tribal Issues Advisory Group (TIAG):

Chief Judge Ralph Erickson from the District of North Dakota, who will also serve as the TIAG’s chair; the other members have been announced on our website and we thank them for their time and service.
We would also like to thank those applicants who were not selected for membership on the TIAG at this time for their interest in working with the Commission. We hope you will seek future opportunities for service to the Commission.

The Commission is considering a proposed amendment to reduce penalties for first-time offenders and to increase the availability of alternatives to incarceration.

Last year, the Commission studied alternatives to incarceration and found that alternative sentences were imposed in only 13% of federal cases. Increasing the use of alternatives may further decrease the overcapacity issues within the federal prison system. We’ve also been informed by our ongoing recidivism research that shows that true first offenders have a significantly lower recidivism rate than offenders with 1 criminal history point (30.2% for offenders with zero criminal history points, compared to 46.8% for those with 1 point).

So, the Commission would like to consider greater use of alternatives, especially for first time offenders. Today, we are publishing a proposed amendment that could increase the use of alternatives by combining Zones B & C, perhaps adding a downward adjustment for certain first offenders, and adding commentary encouraging the use of alternatives for certain categories of offenders.

Based on the dedicated work of Commission staff, federal judges, and stakeholder groups, the Commission successfully established a Tribal Advisory Issues Group (TIAG) which published its report on the unique federal sentencing issues relating to American Indians in June of this year. As a result of that report and the subsequent hearing, the Commission has established a permanent tribal issues advisory group in August of this year.

In considering and implementing this group’s important work, the Commission examined the impact of the federal sentencing guidelines on tribal issues. The Commission is putting forth a proposed amendment that responds to the TIAG’s recommendations regarding tribal court convictions and sets forth five factors for a sentencing judge to consider when determining whether, and to what extent, an upward departure may be appropriate based on a defendant’s history of tribal court convictions.

The Commission is also considering a proposed amendment that targets youthful offenders under the guidelines. This proposal will exclude juvenile sentences from being considered in the defendant’s criminal history score. It also provides a list of certain offenses that should never be counted for purposes of a criminal history score, including “juvenile status offenses and truancy.” In light of the growing adolescent brain development research and recent court decisions, we welcome public comment on this issue.

In response to the Bipartisan Budget Act of 2015, the Commission is also considering a proposed amendment that reflects Congress’s changes to the Social Security Act by increasing penalties for social security fraud. I would like to acknowledge the important years of work, as well as the continued oversight, led by the House Judiciary Committee, the Senate Committee on Finance and the House Ways and Means Committee to ensure aggressive implementation of these new penalties relating to Social Security fraud.
The Commission is publishing an issue for comment that initiates a two-year study on synthetic drugs, including synthetic cannabinoids, cathinones and MDMA. The study will consider, among other things, whether to add new substances to the Drug Equivalency Tables. In light of the increasing trend of synthetic drug cases in the federal docket the Commission believes that it is appropriate to further examine the issue. The Commission welcomes any public comment on the impact of synthetic drugs as we conduct this study. We want to make sure that the penalties are appropriate and the guidelines are well-informed.

Thank you all for your attendance and dedication to these issues today, and during – and in some cases before! – my tenure with the Commission.

It has been a real honor for me to serve in this role. I am pleased with the contributions that we’ve accomplished together to strengthen and improve the federal sentencing guidelines. Also, I am grateful to each of you for your support of my work here and the relationships that we’ve developed.

Looking forward, I remain committed to the ongoing success and contributions of the Sentencing Commission. As we have put forth these serious and important amendments for public comment today, it’s clear that the work remains as critical as ever and there is a full agenda for the year ahead.

To that end, I would like to acknowledge that there will be a new Acting Chair announced as my term ends with the conclusion of this session of Congress. I am confident that the future Commission and the Commission’s staff will remain dedicated and serious about the important mission here.

As we look back on the thirty years of work to improve the nation’s federal sentencing guidelines, I appreciate my opportunity to serve as the Chair during this historic period. While my time is ending, the work goes on and I urge each of you to remain as focused and dedicated as ever to a system of guidelines that is fair, effective and just.

Thank you all.
Chair Patti B. Saris called the meeting to order at 11:30 a.m. in the Commissioners’ Conference Room.

The following Commissioners were present:

- Patti B. Saris, Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Michelle Morales, Commissioner Ex Officio

The following Commissioner was not present:

- J. Patricia Wilson Smoot, Commissioner Ex Officio

The following staff participated in the meeting:

- Kathleen Grilli, General Counsel

Chair Saris welcomed the public to the Commission meeting. She noted that this would be her final meeting as Chair as her six-year term will expire when the Congress adjourns in early January 2017. Additionally, the Commission will end the year with several additional vacancies as other commissioners’ terms will end.

Chair Saris introduced the commissioners. Vice Chair Charles R. Breyer, who joined the Commission in 2013, is a Senior District Judge for the Northern District of California and has served as a United States District Judge since 1998. She noted that Vice Chair Breyer’s insights from his many years as a trial judge have been invaluable and that, hopefully, he will have the opportunity to serve a second term, as his first term will also end with this congressional session.

Commissioner Dabney Friedrich, who joined the Commission in 2006, served as Associate Counsel at the White House, counsel to Chairman Orrin Hatch of the United States Senate Judiciary Committee, and as an Assistant United States Attorney in the Southern District of California and the Eastern District of Virginia. Chair Saris noted it is the final meeting for Commissioner Friedrich. For the last decade, she continued, Commissioner Friedrich has been an active and hard-working member of the Commission contributing greatly to the Commission’s decisions. She has also been very impactful in prison reform efforts to better educate prisoners in the Bureau of Prisons, particularly those with learning disabilities. Chair Saris also thanked Commissioner Friedrich on behalf of the staff for being very supportive of staff’s efforts and wished Commissioner Friedrich well.
Commissioner William H. Pryor, who joined the Commission in 2013, is a United States Circuit Judge for the Eleventh Circuit Court of Appeals. Before his appointment to the Federal bench in 2004, Commissioner Pryor served as Attorney General for the State of Alabama and was responsible for the creation of the Alabama Sentencing Commission. Chair Saris stated that Commissioner Pryor was a true scholar who has thought deeply about the big picture of sentencing policy.

Commissioner Rachel Barkow, who also joined in 2013, is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law, where she has focused her teaching and research on criminal and administrative law. She knows everyone in the academy who studies these issues. Commissioner Barkow brings extensive academic knowledge to the Commission, not just relating to sentencing policy, but also in other substantive areas like mens rea law. She also serves as the faculty director of the Center on the Administration of Criminal Law at the law school.

Commissioner Michelle Morales serves as the designated ex officio member of the Commission representing the Department of Justice. She is the Acting Director of the Office of Policy and Legislation in the Criminal Division of the Department of Justice. Commissioner Morales first joined that office in 2002 and has served as its Deputy Director since 2009, and previously served as an Assistant United States Attorney in the District of Puerto Rico.

Chair Saris next introduced the following special guests:

- Carter Burwell, counsel to Senator John Cornyn;
- Nkechi Taifa from the Open Society and Justice Roundtable;
- Sakira Cook from the Leadership Conference;
- Jocelyn McCurdy from the American Civil Liberties Union;
- Mary Price from Families Against Mandatory Minimums; and,
- Denise Barrett and Laura Mate of the Federal Public Defenders’ Sentencing Research Counsel.

Chair Saris noted how in recent years the Commission has expanded its national training opportunities for judges and practitioners. In June, about 100 judges attended the Commission’s first-ever training for judges in Chicago, and the feedback was so positive that the Commission will hold another training session for judges in 2017.

On September 7-9, the Commission held its Annual National Training Program in Minneapolis and approximately 850 individuals attended. Chair Saris acknowledged the excellent work of Commission staff who organized the event and conducted the individual sessions.

Chair Saris reported that feedback from the seminar participants indicated that the National Training Program’s audience has maybe grown too large. To respond to this feedback, but to also accommodate the continued demand for training programs, the Chair announced that the Commission has decided to hold a National Training Program series next year. The first
program that will be open to the public will be May 31- June 2, 2017, in Baltimore, Maryland, and the second will be September 6-8, 2017, in Denver, Colorado. The Commission will also hold a judges-only training program in San Diego, California, June 22-23, 2017. Registration has not yet opened for these programs but the Commission’s website will publish details in the weeks ahead.

Chair Saris reported that in October, the Chair and Vice Chair of the Commission’s Practitioners Advisory Group (“PAG”) had completed their terms of office. Eric Tirschwell served as the Chair of the PAG from October 2015-October 2016, following his service as PAG’s Vice Chair. Nanci Clarence served as the Vice Chair for one year and had been a member of the PAG since 2013. Ms. Clarence practices law in San Francisco, California, with Clarence, Dyer & Cohen. The Chair thanked both for their service on behalf of the Commission.

Chair Saris announced that other PAG members assumed the leadership roles. The new PAG Chair is Ronald Levine, a PAG member since 2012. Mr. Levine, who practices law in Philadelphia, PA, is a principal at Post & Shell in the firm’s Business Law and Litigation Department and is the Chair of the Firm’s Internal Investigation and White Collar Defense Group.

The new Vice Chair is Knut Johnson, a PAG member since 2015. Mr. Johnson, who practices criminal defense in San Diego, CA, is the Criminal Justice Act representative for the Southern District of California. Chair Saris expressed the Commission’s gratitude to the new Chair and Vice Chair, and all the members of the Commission’s advisory groups for their service.

Chair Saris announced that Chief Judge Ralph Erickson from the District of North Dakota will serve as Chair of the Tribal Issues Advisory Group (“TIAG”). TIAG’s other members were announced on the Commission’s website. Chair Saris thanked the TIAG members for their service.

Chair Saris called on the General Counsel to advise the Commission on the matters before the Commission.

Ms. Grilli advised that the first item of business was a vote to adopt the August 18, 2016, public meeting minutes. She stated that a motion to adopt the minutes would be in order.

Chair Saris called for a motion to adopt the August 18, 2016, public meeting minutes. Commissioner Barkow made a motion to adopt the minutes, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Ms. Grilli stated that the next item was the first of a series of possible votes to publish proposed amendments in the Federal Register for public comment. The first proposed amendment, attached hereto as Exhibit A, concerned first offenders and alternatives to incarceration. This proposed amendment contained two parts, Parts A and B, either or which may be promulgated as they were not mutually exclusive.
Part A sets forth a new Chapter Four guideline, at §4C1.1 (First Offenders), that would provide lower guideline ranges for “first offenders” generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table. Part B of the proposed amendment expands Zone B by consolidating Zones B and C. Part B also amends the Commentary to §5F1.2 (Home Detention) to remove the language that required electronic monitoring. Each part included issues for comment.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to publish the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the motion.

Chair Saris explained that last year the Commission studied alternatives to incarceration and found that alternative sentences were imposed in only 13 percent of federal cases. Increasing the availability of alternatives may further decrease the overcapacity issues within the federal prison system. Additionally, the Commission’s ongoing recidivism research showed that true first offenders have a significantly lower recidivism rate than offenders with one criminal history point (30.2% for offenders with zero criminal history points, compared to 46.8% for those with one point). Chair Saris stated that the Commission would like to consider greater use of alternatives, especially for first time offenders.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit B, arises from the recommendations contained in the ad hoc Tribal Issues Advisory Group report that was submitted to the Commission in summer 2016. The proposed amendment contains two parts, neither of which are mutually exclusive. Part A would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to set forth a non-exhaustive list of factors for the court to consider when determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate.

Part B of the proposed amendment would amend the commentary to §1B1.1 (Application Instructions) to provide a definition of court protection order derived from 18 U.S.C. § 2266(5), with a provision that it must be consistent with 18 U.S.C. § 2265(b). Each part includes issues for comment.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion
to publish the proposed amendment, with Commissioner Barkow seconding. The Chair called for discussion on the motion.

Chair Saris stated that, based on the work of Commission staff, federal judges, and stakeholder groups, the Commission successfully established an ad hoc Tribal Advisory Issues Group, which published its report on the unique federal sentencing issues relating to American Indians in June of this year. As a result of that report and subsequent hearing on its recommendations, the Commission established a permanent Tribal Issues Advisory Group in August of this year.

Chair Saris explained that in considering and implementing the TIAG’s important work, the Commission examined the impact of the federal sentencing guidelines on tribal issues. The Commission has put forth a proposed amendment that responds to the TIAG’s recommendations regarding tribal court convictions and sets forth five factors for a sentencing judge to consider when determining whether, and to what extent, an upward departure may be appropriate based on a defendant’s history of tribal court convictions.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit C, is a result of the Commission’s study of the treatment of youthful offenders under the Guidelines Manual.

Pursuant to Chapter Four, Part A (Criminal History), sentences for offenses committed prior to age eighteen are considered in the calculation of the defendant’s criminal history score. The guidelines distinguish between an “adult sentence” in which the defendant committed the offense before age eighteen and was convicted as an adult, and a “juvenile sentence” resulting from a juvenile adjudication. The guidelines provide different time periods within which each type of sentence is included in the calculation of criminal history score.

The proposed amendment amends §4A1.2(d) to exclude juvenile sentences from being considered in the calculation of the defendant’s criminal history score. The proposed amendment also amends the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which a downward departure from the defendant’s criminal history may be warranted for an adult conviction committed prior to the defendant’s 18th birthday. Issues for comment were also included.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion.

Chair Saris explained that the proposed amendment would exclude juvenile sentences from being
considered in the defendant’s criminal history score. It also provided a list of certain offenses that should never be counted for purposes of a criminal history score, including “juvenile status offenses and truancy.” The Chair noted that, in light of the growing adolescent brain development research and recent court decisions, the Commission would welcome public comment on this issue.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit D, responds to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), which added new subdivisions prohibiting conspiracy to commit fraud for substantive offenses already contained in the three statutes (42 U.S.C. §§ 408, 1011, and 1383a). The three amended statutes are currently referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud). The proposed amendment would amend Appendix A so that sections 408, 1011, and 1383a of Title 42 are also referenced to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

The Bipartisan Budget Act also amended 42 U.S.C. §§ 408, 1011, and 1383a to add increased penalties of ten years’ imprisonment for certain persons who commit fraud offenses under the relevant Social Security programs. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The proposed amendment would amend §2B1.1 to address cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies. It provides an enhancement of [4][2] levels and a minimum offense level of [14][12] for such cases. It also adds commentary specifying whether an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies — bracketing two possibilities: if the enhancement applies, the adjustment does not apply; and if the enhancement applies, the adjustment is not precluded from applying. Issues for comment were also included.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to publish the proposed amendment, with Commissioner Pryor seconding. The Chair called for discussion on the motion.

Chair Saris stated that in response to the Bipartisan Budget Act of 2015, the Commission was considering a proposed amendment that would reflect Congress’s changes to the Social Security Act by increasing penalties for Social Security fraud. She acknowledged the important years of work, as well as the continued oversight, led by the House Judiciary Committee, the Senate Committee on Finance, and the House Ways and Means Committee to ensure aggressive
implementation of these new penalties relating to Social Security fraud.

Hearing no further discussion, Chair Saris called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit E, was a result of the Commission’s work in examining Chapter Four, Part A (Criminal History). Pursuant to Chapter Four, Part A (Criminal History), revocations of probation, parole, supervised release, special parole, or mandatory release are counted for purposes of calculating criminal history points.

Part A of the proposed amendment would amend §4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are not to be counted for purposes of calculating criminal history points. It would also state that such revocation sentences may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). Part A also included issues for comment.

Part B of the proposed amendment would amend the Commentary to §4A1.3 to provide that a downward departure from the defendant’s criminal history may warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit F, concerns §3E1.1 (Acceptance of Responsibility). The proposed amendment responds to concerns that the commentary to §3E1.1 encourages courts to deny a reduction in sentence when a defendant pleads guilty, accepts responsibility for the offensive conviction, but unsuccessfully challenges the presentence report assessment of relevant conduct.

The proposed amendment amends the Commentary to §3E1.1 to revise how the defendant’s challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. An issue for comment was also included.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.
Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Friedrich made a motion to publish the proposed amendment, with Commissioner Pryor seconding. Hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit G, responds to recently enacted legislation and miscellaneous guideline issues. Part A responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016), by amending §2B5.3 (Criminal Infringement of Copyright or Trademark).

Part B responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016), by amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index). Issues for comment are also included.


Part D amends §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) to clarify how the use of a computer enhancement at subsection (b)(3) interacts with its correlating commentary.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Barkow made a motion to publish the proposed amendment, with Vice Chair Breyer seconding. Hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit H, makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) by amending §2D1.1 to replace “marihuana equivalency” in the Drug Equivalency Tables. It replaces that term throughout the guideline with the term “converted drug weight.” It also changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” The proposed amendment is not intended as a substantive change in policy.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017,
Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to publish the proposed amendment, with Commissioner Pryor seconding. Hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the next proposed amendment, attached hereto as Exhibit I, makes various technical changes to the Guidelines Manual. Part A makes certain clarifying changes Chapter One, Part A, Subpart 1(4)(b) (Departures) and Application Note 2(A) to §2B1.1 (Theft, Property Destruction, and Fraud).

Part B makes technical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Part C of the proposed amendment makes clerical changes to correct typographical errors, and correct or add statutory or Appendix A references.

Ms. Grilli advised that a motion to publish the proposed amendment with an original comment period closing on February 20, 2017, and a reply-comment period closing on March 10, 2017, and granting staff technical and conforming amendment authority, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Pryor made a motion to publish the proposed amendment, with Commissioner Friedrich seconding. Hearing no discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Ms. Grilli stated that the final vote concerned the possible publication of an issue for comment, attached hereto as Exhibit J, on drugs. Ms. Grilli explained that, in August 2016, the Commission indicated that one of its priorities would be the study of offenses involving MDMA/ecstasy, synthetic cannabinoids such as JWH-018 and AM-2201, and synthetic cathinones such as methylone, MDPV, and mephedrone. The Commission intended that the study will be conducted over a two-year period.

The proposed issue for comment seeks comment on the following factors as it relates to each of the drugs in the priority: the chemical structure, the pharmacological effects, the legislative and scheduling history, the potential for addiction and abuse, the pattern of abuse and harms associated with abuse, and the patterns of trafficking and harms associated with trafficking. The proposed issue for comment also seeks broader comment on offenses involving synthetic cathinones and synthetic cannabinoids and the offenders involved in such offenses.

Ms. Grilli advised that a motion to publish the proposed issue for comment with an original
comment period closing on March 10, 2017, and authorizing staff to make technical and conforming changes as needed, would be in order.

Chair Saris called for a motion as suggested by Ms. Grilli. Vice Chair Breyer made a motion to publish the issue for comment, with Commissioner Friedrich seconding. The Chair called for discussion on the motion.

Chair Saris stated the Commission was publishing an issue for comment that initiated a two-year study on synthetic drugs, including synthetic cannabinoids, cathinones, and MDMA. The study will consider, among other things, whether to add new substances to the Drug Equivalency Tables at §2D1.1. The Chair explained that, in light of the increasing trend of synthetic drug cases in the federal docket, the Commission believed that it was appropriate to further examine the issue. She added that the Commission welcomed any public comment on the impact of synthetic drugs as it conducts this study as the Commission wants to make sure that the penalties are appropriate and the guidelines are well-informed.

Hearing no further discussion, the Chair called for a vote. The motion was adopted with at least three commissioners voting in favor of the motion to publish.

Commissioner Morales thanked the Commission on behalf of the Department of Justice for undertaking a study of synthetic drugs, which it believes to be an important issue. She did, however, express concerns about some of the other proposed amendments. Commissioner Morales stated that in the Department of Justice’s view some of the proposed amendments, as currently drafted, could be over broad and potentially benefit offenders that do not merit such benefit. She stated that the Department of Justice will express those concerns more fully and recommend ways to address them in the public comment, and will work closely with the Commission to find common ground.

Chair Saris observed that 2018 will mark the 30th anniversary of the Commission’s first publication of the sentencing guidelines. She noted how, over the last six years, the proposed amendments to the guidelines have been developed and adopted in the same tradition of bipartisanship that has shaped the Commission during the last three decades. Over the last six years, the Commission’s current membership has continued this tradition with an evidence-based and a collegial approach to decision-making. Chair Saris stated that the Commission’s efforts have resulted in significant policy decisions that it believes have contributed to a decrease in the federal prison population, which peaked in 2013 at 219,298 and now has declined to its current level of 190,303; a reduction of more than 28,995 offenders, or 13.2 percent over three years.

Chair Saris expressed her pleasure to have served as Chair of the Commission. She stated that she learned much from each commissioner she had the honor to serve with. Chair Saris noted how she started with her friend and former chair, Judge Ricardo Hinojosa, and former commissioners Ketanji Brown Jackson, Beryl Howell, William Carr, and ex officio Jonathan Wroblewski. She recalled how she become a big fan of the Commission’s standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, and the
Victims Advisory Group. She also thanked the Federal Defenders Guidelines Committee, Commission Liaison Subcommittee, and Sentencing Resource Counsel for their assistance. She stated that she was enthusiastic about the future contribution of the new Tribal Issues Advisory Group.

Chair Saris stated that she would be remiss if she did not acknowledge the significant impact of the public comment in relation to the Commission’s guideline amendments, which are submitted from a broad range of interested Americans and stakeholders. She noted how the public’s formal comment helped to shape over 50 amendments that were promulgated during her tenure.

Chair Saris thanked the many organizations that have submitted the most public comment over the years, including the American Bar Association, the American Civil Liberties Union, the Drug Policy Alliance, Families Against Mandatory Minimums (FAMM), noting that FAMM’s Mary Price had not missed a meeting since she joined the Commission, the National Association of Assistant United States Attorneys, the National Association of Criminal Defense Lawyers, and the Sentencing Project.

Chair Saris expressed her pleasure to work with the Commission’s staff of attorneys, social scientists, and other professionals with expertise in criminal justice and federal sentencing policy, along with many other hard-working individuals who each contribute with their best effort in their respective roles. She expressly acknowledged Staff Director Ken Cohen and former Staff Director Judy Sheon. She noted that her first year as Chair was a tough one as she learned the ropes, but she felt she had the best teachers, friends, and mentors. She noted how the staff provided all the commissioners with invaluable support and expertise. Together, and along with the public, Chair Saris hoped that the Commission has been active in trying to make the guidelines and federal sentencing fairer and more proportionate while maintaining an ongoing commitment to public safety.

Chair Saris noted that when she first became Chair six years ago, the Bureau of Prisons’ inmate population was 37 percent overcapacity, and now it is about half that. In 2011, her first year on the Commission, the Commission implemented the new lower crack cocaine penalties from the 2010 Fair Sentencing Act and voted to apply those changes retroactively to benefit already incarcerated crack cocaine offenders. In arriving at those decisions, she continued, the Commission found that the crack cocaine penalties were not proportionate to the harms on society, and that the impact of the unduly severe penalties were borne most by minorities. That decision resulted in 7,748 offenders receiving an average reduction in their sentences of 19.9 percent; from 153 to 123 months.

Chair Saris recounted how, in 2014, the Commission voted to reduce the Drug Quantity Table at §2D1.1 for all drug trafficking offenses by two levels, which reduced drug penalties by about 17 percent. The Commission then voted to make those reductions retroactive and to date 28,544 drug offenders have received an average sentence reduction of 17 percent, or 25 months from 143 months to 118 months. Chair Saris noted that it was important for the public to know before sentence reductions were granted as a result of the 2011 and 2014 amendments, each individual case was reviewed by a federal judge to ensure that the offender did not pose a public safety risk;
Chair Saris recounted several other important amendments that became effective 2016. In response to the Supreme Court’s decision in Johnson v. United States, the Commission eliminated the analogous residual clause from the guidelines definition of “crime of violence.” She believed the amendment should help relieve some of the strain on the courts and the broader uncertainty that has followed Johnson. Additionally, the Commission published a report to Congress analyzing career offenders in the federal system and the statutory definition of crime of violence. In the report, the Commission recommended that Congress establish one definition of crime of violence for all criminal law purposes, and encouraged Congress to adopt the Commission’s definition of crime of violence as that single, uniform definition.

Chair Saris observed how the Commission also strengthened and broadened the criteria for compassionate release with several meaningful changes. Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentencing reduction. Through the Commission’s newly expanded criteria, federal inmates may be eligible for compassionate release based on four categories relating to medical conditions, age, family circumstances, or other extraordinary and compelling reasons. She noted that the Commission’s action has encouraged the Bureau of Prisons to use its current authority if an eligible offender meets any of these circumstances.

Chair Saris also noted how recently the Commission addressed the guidelines for illegal reentry offenses. A 2016 amendment increased penalties for those immigrants who commit crimes after unlawfully reentering the United States or who were convicted of reentering the country multiple times. Immigration offenses comprise a large proportion of the federal docket and these enhancements may affect a large number of cases. Additionally, the amendment simplified the application of immigration guidelines.

Chair Saris observed how, over the past six years, she traveled throughout the nation speaking to different audiences about the challenges confronting the federal criminal justice system today. Whether she addressed a room full of federal judges or a group of law students, she always emphasized that the Commission’s decisions are evidence-based and data-driven. During her tenure as Chair, the Commission’s Office of Research and Data analyzed 397,248 individual cases, cataloguing the pertinent sentencing data into a comprehensive computer database maintained by the Commission. The Commission’s detailed synthesis of sentencing data has culminated in 60 publications ranging from significant research reports to 23 Quick Facts, which are two-page documents focusing on a variety of issues in the federal criminal justice system. The Commission has also responded to 845 special data requests. Since 2012, the Commission has made its prison and sentencing impact analyses available to the public on its website and this year the Commission launched a redesigned website. Chair Saris observed that the Commission’s reports have a continuing impact on educating policymakers and the public.

For example, Chair Saris explained, several of the Commission’s recommendations in its 2011 Report to the Congress: Mandatory Minimum in the Federal Criminal Justice System are reflected in bipartisan legislation pending before the House and the Senate. Since 2011, the
Commission has unanimously concluded that mandatory minimum sentences in their current form are often too high, are applied too broadly to lower level defendants, and the most severe penalties are often applied inconsistently. Chair Saris noted that this is why the Commission has urged Congress to reduce the current statutory mandatory minimum penalties for drug trafficking.

Chair Saris further noted that the Commission has also urged Congress to consider expanding the “safety valve” to allow a greater number of non-violent, low-level drug offenders to be sentenced below mandatory minimum penalties. In addition, the Commission has urged Congress to give retroactive effect to the statutory changes made by the Fair Sentencing Act of 2010.

Chair Saris added that the Commission has urged Congress to reassess the scope and severity of the recidivism provisions in 21 U.S.C. §§ 841 and 960, which generally double the mandatory minimum penalties if a drug offender has a prior conviction for a drug trafficking offense.

Chair Saris stated that the Commission plans to update the mandatory minimum report with more current data in the near future. She expressed her hope that the courts, Congress, the Executive Branch, and the public continued to base sentencing laws and policies on the Commission’s high-quality data and thoughtful analysis. She observed that so much bipartisan progress has been made in criminal justice reform and she was hopeful that the 115th Congress will pass meaningful legislation.

Chair Saris asked if any of the commissioners would like to add anything.

Vice Chair Breyer acknowledged that it was the current Commission’s last meeting together, but stated that more significantly, it was the conclusion of Judge Saris’ leadership of the Commission, and that her leadership has been universally acclaimed as extraordinary. He observed that Chair Saris brought to the Commission a sense, not only of collegiality, but of truly listening to varying points of view to try to resolve differences.

Vice Chair Breyer noted that it was interesting for a judge to be part of an administrative process where compromise must be reached in order to achieve a result that was progressive. The Commission is not non-partisan, it’s bipartisan. Vice Chair Breyer expressed his pleasure to be guided in that task by Chair Saris’ extraordinary leadership.

Vice Chair Breyer recounted how the Commission has received several letters regarding Chair Saris and cited two examples. The first came from the Justice Roundtable, which is a collection of groups interested in establishing communication with the Commission to achieve progress and reform in sentencing. It acknowledged Judge Saris’ leadership.

The second letter was from Congressman Conyers. Vice Chair Breyer read the following excerpts:

Dear Judge Saris:
As your term comes to a close, I would like to thank you for your leadership of the United States Sentencing Commission and your commitment to achieving sentencing reform and equal justice for all.

You were appointed to Chair the Sentencing Commission during a critical period in the evolution of our criminal justice system marked by an increase openness to rethinking sentencing policy. At that time, President Obama spoke of your unwavering commitment to justice and his confidence that you would serve with excellence and integrity. He was correct. Your work on the Commission clearly showed your dedication to justice over the past years. As Chair, you led the Commission with fortitude, dignity, working to address important issues such as sentencing disparities, the unwarranted and costly growth of the federal prison population and the unintended consequences of mandatory minimum penalties, especially among minorities.

Your extensive legal experience and knowledge combined with an obvious passion for justice equipped you to guide the Commission through a time of robust reflection and innovation to accomplish many substantial milestones. Your efforts made certain that the purposes and the goals of the Commission were fulfilled.

After citing particular achievements of Chair Saris, Congressman Conyers concluded:

You served with diligence, distinction, and honor. Always with a sense of urgency in formulating solutions to issues identified by the Commission, seeking to promote fairness and public safety. I applaud your efforts to foster public trust and respect for our criminal justice system.

Although you are leaving the Commission, I know you will continue to work to improve our criminal justice system. Thank you for your leadership, advocacy, and service.

Signed,
John Conyers, Jr.
Member of Congress

Vice Chair Breyer observed that those sentiments have been echoed by many people and captured by Staff Director Ken Cohen in a tribute to Judge Saris.

Vice Chair Breyer noted that at the end of the congressional session, the Commission may be reduced to two members, not having a quorum to act. The question is, he asked, what happens to the Commission?

Vice Chair Breyer suggested that while the Commission in terms of promulgating amendments and taking official action, may have some brief period of hibernation, the Commission’s staff
does not. The work of staff is extraordinarily important. He noted that staff gather the data that is the evidence that drives the decisions of judges, the primary audience of the sentencing guideline system, so judges can make decisions as to what are appropriate sentences. Vice Chair Breyer encouraged Glenn Schmitt, Director, Office of Research and Data, to continue the Commission’s data collection efforts.

Vice Chair Breyer also noted the importance of the training staff conducts by going out and talking to judges, and explaining how the guidelines operate as a way to try to ameliorate the disparities that may occur throughout the country. Vice Chair Breyer stated that credit for the Commission’s training efforts goes to staff, including Raquel Wilson, Director, Office of Education and Sentencing Practices, and her staff of trainers.

Vice Chair Breyer recalled how he’s been associated with sentencing issues since 1967, almost 50 years, as a prosecutor, a defense lawyer, and as a judge. He suggested that, after 50 years, he would know what a right sentence is, a correct sentence in any given situation, but was not confident that he did. Nor did he believe every judge is confident that he or she has articulated the correct sentence in any given case because sentencing is not susceptible of that type of analysis. However, he observed, the guidelines help fashion a sentence to any given situation.

Vice Chair Breyer stated that it has been a remarkable experience for him to work with Commissioner Judge Pryor, who he believes is one of the most principled individuals that he has ever had the opportunity to working with. While they may not share exactly the same ideology on all issues, the purpose of the Commission is to try to articulate those views and to see whether or not there’s common ground. Vice Chair Breyer recounted that Commissioner Pryor has been a leader in arriving in a collegial way at common ground in their deliberations and it has been an honor to work with him.

Vice Chair Breyer stated that Commissioner Friedrich brought not only the institutional memory of the Commission, but also a willingness, indeed, a zeal, for looking at what the evidence is with respect to any particular suggestion that’s been made. He noted it was interesting that when you start talking about the evidence, what does the data show, it informed the judgment of commissioners as to what the proper path is with respect to any given amendment.

Vice Chair Breyer also stated it had been a delight to work with Commissioner Barkow because, while she was an academic, she was a practical academic. He expressed his view that the Commission was extraordinarily fortunate to have Commissioner Barkow as a commissioner going forward.

Vice Chair Breyer concluded by thanking Chair Saris for her leadership and that the country was indebted for her service.

Commissioner Friedrich thanked Chair Saris and Vice Chair Breyer for their kind comments. She stated that it was an incredible honor and privilege to serve as a Sentencing Commissioner for the last ten years and expressed her sadness at leaving.
Commissioner Friedrich thanked both Presidents Bush and Obama for giving her the opportunity to serve on the Commission, which she held to be one of the highlights of her professional career.

Commissioner Friedrich agreed with both Chair Saris and Vice Chair Breyer that Commission staff is extraordinary. She observed that staff brings such expertise and professional judgment -- good judgment -- wisdom and dedication to their jobs and that the Commission simply could not do its work without staff’s help. She expressed her gratitude for all of the hours staff put in and stated that she would miss working with them.

Commissioner Friedrich also thanked the many stakeholders. She noted that all of them do much to enhance the Commission’s decision making and to inform its judgment. She understood that many have other jobs, and yet they provide extensive, thorough, and solid written comment and testimony, in addition to informal feedback, to the Commission.

Commissioner Friedrich addressed two areas of particular interest to her. The first was the Commission’s ongoing work on recidivism. She noted that this research is critically important not just to the Commission, but to all policymakers who are looking at the criminal justice system. She observed that the data that the Commission gathers is impeccable, unique, and helpful to the Commission and other policymakers.

Commissioner Friedrich addressed her second issue, educational and other prison programming. She explained that while it is important to ensure that lengthy prison terms are reserved for those who pose the greatest risk to society, it is also important for the Bureau of Prisons and others to provide effective programming and support that will help prisoners successfully integrate into society without jeopardizing public safety.

Commissioner Friedrich noted that her recent experience as a federal prison volunteer leads her to believe that we can and must do a better job assisting former inmates to reintegrate successfully and safely. She observed that most inmates face significant challenges in terms of addiction, learning disability, and mental health issues. Providing evidence-based programming and support for such individuals is not only the right thing to do, she emphasized, it is the cost-effective thing to do.

Commissioner Friedrich stated that a recent RAND study concluded that for every dollar spent on prison education programming, there was a four- to five-dollar decrease in incarceration costs. Providing effective evidence-based programming makes a difference, and she hopes that the Commission’s continued research will shed further light on this important subject.

Another priority that Commissioner Friedrich hopes the Commission will continue to focus on is the structural reform of the guidelines. She expressed her view that, as currently structured, the guidelines cannot fulfill the goals of the Sentencing Reform Act. She explained that the Commission cannot ignore the increasing disparities in the system, especially the demographic disparities. She encouraged future commissions to work with Congress to restructure and simplify the guidelines to better meet the goals of the Sentencing Reform Act.
Commissioner Friedrich thanked her fellow commissioners, observing that the Commission was one of the most professional and collegial bodies on which she has served and further expressed her appreciation to Chair Saris for her leadership. She stated that Chair Saris set the tone not just within the Commission in terms of how commissioners and staff treat one another, but also in terms of how the Commission interacts with the outside community.

Commissioner Friedrich expressed her gratitude to all and stated she would very much miss working on the Commission.

Commissioner Pryor expressed the view that the last several years will be remembered as one of the golden eras of the United States Sentencing Commission. He noted how the Commission tackled some of the most difficult problems in federal sentencing and resolved those problems with what he believes were thoughtful and data-driven solutions.

Commissioner Pryor highlighted three such issues as examples. First, the Commission satisfied its statutory mandate to address prison overcrowding by reforming the guideline for drug trafficking and by making that reform retroactive. Second, the Commission reformed the career offender guideline to resolve some of the most vexing and difficult problems in federal sentencing. Finally, the Commission reformed the immigration guideline and simplified it in a way that will save considerable tax dollars and result in fairer sentencing.

Commissioner Pryor stated that none of these reforms could have been achieved without the contributions of the commissioners whose terms will soon expire. He noted that Chair Saris has been an exemplary leader for the Commission. She has been thoughtful and hardworking. She was serious, always cheerful, fair-minded and above all, collegial. The Commission could not have asked for a better leader these last few years.

Commissioner Pryor stated that the same was true for Vice Chair Breyer. The wisdom and wit that he has brought to our work has been extraordinary and Commissioner Pryor expressed his hope that hope that Vice Chair Breyer will soon be given the opportunity to serve again on the Commission as it needs him.

Commissioner Pryor thanked Commissioner Friedrich for her long and distinguished service on the Commission. She brought a unique mix of experience, as a Senate staffer, federal prosecutor, and associate White House Counsel, to assist the Commission in its work.

Commissioner Pryor echoed two things regarding Commissioner Friedrich that were highlighted earlier by Chair Saris and Vice Chair Breyer. He noted that, as Chair Saris rightly pointed out, Commissioner Friedrich has often been the necessary commissioner to provide the commissioner the key idea to resolve some kind of problem as they considered amendments to the guidelines. He stated that he did not know how the Commission could have resolved these problems the last few years without her insights.

Commissioner Pryor also agreed with Vice Chair Breyer’s observation that Commissioner Friedrich’s institutional knowledge has been invaluable. Particularly in reminding the
Commission, as it considered and deliberated on various issues, what previous Commissions thought about and how they had tried to tackle those same issues. This helped the Commission to avoid going down trails that would have been unproductive.

Commissioner Pryor stated that he was proud to call all of the commissioners his friends and colleagues. He congratulated them and thanked them for their service to the federal judiciary and, especially, to the American people.

Commissioner Barkow observed that it can be easy to become cynical about bureaucrats in Washington or about what the government can accomplish. But as a member of the Commission for the past three-and-a-half years, she stated she had a front-row seat to government service at its finest and it has highlighted what can be accomplished with the right people.

Commissioner Barkow stated that three of the finest colleagues she has ever were leaving the Commission, while one, thankfully, was staying. She reflected on what an honor it was to serve alongside them, Chair Saris, Commissioner Friedrich, and Vice Chair Breyer, as they represent the best of government service.

Commissioner Barkow observed during her time with the Commission, each of them approached every decision with careful attention to the Commission’s authorizing statutes, the empirical facts, and what would further the public interest. While each commissioner came from different backgrounds and brought different perspectives, they usually reached consensus about what should done because that is what they have been guided by: data, commitment to the rule of law, and well-reasoned arguments.

Commissioner Barkow gave special thanks to Chair Saris. Noting that, as an administrative law professor who often studies why government agencies sometimes fail, she expressed her wish that Chair Saris could run every federal government agency because the culture that the Chair has fostered here at the Commission was the ideal culture for good decision making. Commissioner Barkow stated that it was not surprising that the Commission accomplished what it has under Chair Saris, and it has been one of the honors of her life to be part of it.

Commissioner Barkow noted that the Commission will still have the best staff. She observed that staff is dedicated and hardworking and smart and wonderful to be with, and that the same is true of Commissioner Pryor. She also expressed her hope that Judge Breyer will return because the Commission needs his service.

Commissioner Barkow closed by stating that she, and everyone, will miss the departing commissioners tremendously and they leave a void that will be near impossible to fill, but a legacy that will continue to guide the Commission.

Commissioner Morales thanked the departing commissioners, both personally and on behalf of former ex officio Commissioner Jonathan Wroblewski, and on behalf of the Department of Justice, for their collaboration. She thanked Commissioner Friedrich, and congratulated her on her exemplary career path from working as an Assistant United States Attorney in San Diego,
CA, and Alexandria, VA, to the Senate Judiciary Committee to the White House Counsel Office, and of course, her service on the Commission, which taken together showed a true commitment to furthering the causes of justice.

Commissioner Morales highlighted Commissioner Friedrich’s work with the inmates at the Federal Correctional Institution at Dublin, CA, as her most important contribution. She stated that Commissioner Friedrich has shown an unwavering devotion to the women inmates and bettering their lives through education. Commissioner Friedrich has advocated tirelessly in prison, to the Director of the Bureau of Prisons, and to the Department of Justice’s leadership. Commissioner Morales stated that it is fair to say that the Department of Justice’s new initiative to reform federal prison education programs was due in part to Commissioner Friedrich’s efforts.

Commissioner Morales agreed with previous statements that Chair Saris showed extraordinary leadership during her tenure with the Commission. She recounted how the Commission addressed many important issues from healthcare fraud to the theft of trade secrets. From firearms violence to implementation of the Fair Sentencing Act. Commissioner Morales noted how Chair Saris guided the Commission deftly and ensured that the voices of defendants, law enforcement, crime victims, and the public at large have been heard.

Commissioner Morales observed that Chair Saris was just as pleasant and approachable and no-nonsense in private as she appears in public. When confronted with policy questions, Chair Saris always considered the question head-on, open-mind, and considered science and consulted her real-world experience and arrived at the right outcome. Commissioner Morales expressed her view that Chair Saris leaves the Commission stronger than when she joined and for that the Department of Justice will always be grateful.

Commissioner Morales closed by stating that she hoped Vice Chair Breyer would return to the Commission and rejoin Commissioners Barkow and Pryor in 2017.

Chair Saris thanked everyone for their kind comments. She stated that it was a sad day for her as she had become very close friends with her fellow commissioners. She thanked President Obama for nominating her and the other commissioners, and the Congress for confirming them. She stated that it has been a true honor and she was pleased with the accomplishments of the last six years and grateful to everybody for their help.

Chair Saris emphasized that while many commissioners where leaving, the Commission’s work continued. She noted that reports and amendments were forthcoming. She also noted that an acting chair would be announced when her term ended with the conclusion of the session of Congress. She expressed her confidence that the future Commission and staff would remain dedicated to its important mission.

Chair Saris stated that as we all look back on 30 years of guidelines and work of the Commission, she appreciated the honor to serve as the Chair during a historic period. She urged everyone to remain focused and dedicated as ever to the guidelines, which are fair, effective and just. She thanked everyone for their help to her.
Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Pryor made a motion to adjourn, with Commissioner Friedrich seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 12:39 p.m.
PROPOSED AMENDMENT: FIRST OFFENDERS / ALTERNATIVES TO INCARCERATION

Synopsis of Proposed Amendment: The proposed amendment contains two parts (Part A and Part B). The Commission is considering whether to promulgate either or both of these parts, as they are not necessarily mutually exclusive.

(A) First Offenders

Part A of the proposed amendment is primarily informed by the Commission’s multi-year study of recidivism, which included an examination of circumstances that correlate with increased or reduced recidivism. See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016). It is also informed by the Commission’s continued study of approaches to encourage the use of alternatives to incarceration. Id.

Under the Guidelines Manual, offenders with minimal or no criminal history are classified into Criminal History Category I. “First offenders,” offenders with no criminal history, are addressed in the guidelines only by reference to Criminal History Category I. However, Criminal History Category I includes not only “first” offenders but also offenders with varying criminal histories, such as offenders with no criminal history points and those with one criminal history point. Accordingly, the following offenders are classified in the same category: (1) first time offenders with no prior convictions; (2) offenders who have prior convictions that are not counted because they were not within the time limits set forth in §4A1.2(d) and (e); (3) offenders who have prior convictions that are not used in computing the criminal history category for reasons other than their “staleness” (e.g., sentences resulting from foreign or tribal court convictions, minor misdemeanor convictions or infractions); and (4) offenders with a prior conviction that received only one criminal history point.

Part A sets forth a new Chapter Four guideline, at §4C1.1 (First Offenders), that would provide lower guideline ranges for “first offenders” generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table (compared to otherwise similar offenders in Criminal History Category I). Recidivism data analyzed by the Commission indicate that “first offenders” generally pose the lowest risk of recidivism. See, e.g., U.S. Sent. Comm’n, “Recidivism Among Federal Offenders: A Comprehensive Overview,” at 18 (2016), available at http://www.ussc.gov/research/research-publications/recidivism-among-federal-offenders-comprehensive-overview. In addition, 28 U.S.C. § 994(j) directs that alternatives to incarceration are generally appropriate for first offenders not convicted of a violent or otherwise serious offense. The new Chapter Four Guideline, in conjunction with the revision to §5C1.1 (Imposition of a Term of Imprisonment) described below, would further implement the congressional directive at section 994(j).

The new Chapter Four guideline would apply if [(1) the defendant did not receive any criminal history points under the rules contained in Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind. Part A of the proposed amendment sets forth two options for providing such an adjustment.
Option 1 provides a decrease of [1] level from the offense level determined under Chapters Two and Three.

Option 2 provides a decrease of [2] levels if the final offense level determined under Chapters Two and Three is less than level [16], or a decrease of [1] level if the offense level determined under Chapters Two and Three is level [16] or greater.

Part A also amends §5C1.1 (Imposition of a Term of Imprisonment) to add a new subsection (g) that provides that if (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options.

Finally, Part A of the proposed amendment also provides issues for comment.

(B) Consolidation of Zones B and C in the Sentencing Table

Part B of the proposed amendment is a result of the Commission’s continued study of approaches to encourage the use of alternatives to incarceration. See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016).

The Guidelines Manual defines and allocates sentencing options in Chapter Five (Determining the Sentence). This chapter sets forth “zones” in the Sentencing Table based on the minimum months of imprisonment in each cell. The Sentencing Table sorts all sentencing ranges into four zones, labeled A through D. Each zone allows for different sentencing options, as follows:

Zone A.—All sentence ranges within Zone A, regardless of the underlying offense level or criminal history category, are zero to six months. A sentencing court has the discretion to impose a sentence that is a fine-only, probation-only, probation with a confinement condition (home detention, community confinement, or intermittent confinement), a split sentence (term of imprisonment with term of supervised release with condition of confinement), or imprisonment. Zone A allows for probation without any conditions of confinement.

Zone B.—Sentence ranges in Zone B are from one to 15 months of imprisonment. Zone B allows for a probation term to be substituted for imprisonment, contingent upon the probation term including conditions of confinement. Zone B allows for non-prison sentences, which technically result in sentencing ranges larger than six months, because the minimum term of imprisonment is one month and the maximum terms begin at seven months. To avoid sentencing ranges exceeding six months, the guidelines require that probationary sentences in Zone B include conditions of confinement. Zone B also allows for a term of imprisonment (of at least one month) followed by a term of supervised release with a condition of confinement (i.e., a “split sentence”) or a term of imprisonment only.
Zone C.—Sentences in Zone C range from 10 to 18 months of imprisonment. Zone C allows for split sentences, which must include a term of imprisonment equivalent to at least half of the minimum of the applicable guideline range. The remaining half of the term requires supervised release with a condition of community confinement or home detention. Alternatively, the court has the option of imposing a term of imprisonment only.

Zone D.—The final zone, Zone D, allows for imprisonment only, ranging from 15 months to life.

Part B of the proposed amendment expands Zone B by consolidating Zones B and C. The expanded Zone B would include sentence ranges from one to 18 months and allow for the sentencing options described above. Although the proposed amendment would in fact delete Zone C by its consolidation with Zone B, Zone D would not be redesignated. Finally, Part B makes conforming changes to §§5B1.1 (Imposition of a Term of Probation) and 5C1.1 (Imposition of a Term of Imprisonment).

Part B also amends the Commentary to §5F1.2 (Home Detention) to remove the language instructing that (1) electronic monitoring “ordinarily should be used in connection with” home detention; (2) alternative means of surveillance may be used “so long as they are effective as electronic monitoring;” and (3) “surveillance necessary for effective use of home detention ordinarily requires” electronic monitoring.

Issues for comment are also provided.
Proposed Amendment:

(A) First Offenders

CHAPTER FOUR

CRIMINAL HISTORY
AND CRIMINAL LIVELIHOOD

* * *

PART C — FIRST OFFENDER

§4C1.1. First Offender

(a) A defendant is a first offender if [(1) the defendant did not receive any criminal history points from Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind.

[Option 1:

(b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level determined under Chapters Two and Three by [1] level.]

[Option 2:

(b) If the defendant is determined to be a first offender under subsection (a), decrease the offense level as follows:

(1) if the offense level determined under Chapters Two and Three is less than level [16], decrease by [2] levels; or

(2) if the offense level determined under Chapters Two and Three is level [16] or greater, decrease by [1] level.]

Commentary

Application Note:

1. Cases Involving Mandatory Minimum Penalties.—If the case involves a statutorily required minimum sentence of at least five years and the defendant meets the criteria set forth in subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), the offense level determined under this section shall be not less than level 17. See §5C1.2(b).

* * *
§5C1.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
(3) One day of home detention for one day of imprisonment.

(f) If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

(g) In cases in which (1) the defendant is determined to be a first offender under §4C1.1 (First Offender), (2) [the instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and (3) the guideline range applicable to that defendant is in Zone A or B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options set forth in this guideline.

**Commentary**

**Application Notes:**

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than nine months), the court has three options:

   (A) It may impose a sentence of imprisonment.

   (B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

   (C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community
confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.

4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months community confinement or home detention (also under subsection (d)) would be within the guideline range.

5. Subsection (e) sets forth a schedule of imprisonment substitutes.

6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant,
and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

**Examples:** The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

7. The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.

8. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.

9. Subsection (f) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (e).

10. **Application of Subsection (g).—**

    (A) **Sentence of Probation Prohibited.—**The court may not impose a sentence of probation pursuant to this provision if prohibited by statute or where a term of imprisonment is required under this guideline. See §5B1.1 (Imposition of a Term of Probations).

    (B) **Definition of “Crime of Violence”**.—For purposes of subsection (g), “*crime of violence*” has the meaning given that term in §4B1.2 (Definitions of Terms Used in Section 4B1.1).

    (C) **Sentence of Imprisonment for First Offenders.**—A sentence of imprisonment may be appropriate in cases in which the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon in connection with the offense.

* * *

**Issues for Comment:**

1. The Commission seeks comment on “first offenders,” defined in the proposed amendment as defendants with no prior convictions of any kind. Should the Commission broaden the scope of the term “first offender” to include other defendants who did not receive criminal history points and, if so, how? For example, should the term “first offender” include defendants who have prior convictions that are not used in computing the criminal history points under Chapter Four (e.g., sentences resulting from foreign or tribal court convictions, misdemeanors and petty offenses listed in §4A1.2(e))? Should the Commission instead limit the scope of the term? If so, how? Should the Commission
provide additional or different guidance for determining whether a defendant is, or is not, a first offender?

2. Part A of the proposed amendment sets forth a new Chapter Four guideline that would apply if [(1) the defendant did not receive any criminal history points under the rules contained in Chapter Four, Part A, and (2)] the defendant has no prior convictions of any kind. One of the options set forth for this new guideline, Option 1, would provide that if the defendant is determined to be a first offender (as defined in the new guideline) a decrease of [1] level from the offense level determined under Chapters Two and Three would apply. Should the Commission limit the applicability of the adjustment to defendants with an offense level determined under Chapters Two and Three that is less than a certain number of levels? For example, should the Commission provide that if the offense level determined under Chapters Two and Three is less than level [16], the offense level shall be decrease by [1] level? What other limitations or requirements, if any, should the Commission provide for such an adjustment?

3. Part A of the proposed amendment would amend §5C1.1 (Imposition of a Term of Imprisonment) to provide that if the defendant is determined to be a first offender under the new §4C1.1 (First Offender), [the defendant’s instant offense of conviction is not a crime of violence][the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense], and the guideline range applicable to that defendant is in Zone A or Zone B of the Sentencing Table, the court ordinarily should impose a sentence other than a sentence of imprisonment in accordance with the other sentencing options. Should the Commission further limit the application of such a rebuttable “presumption” and exclude certain categories of non-violent offenses? If so, what offenses should be excluded from the presumption of a non-incarceration sentence? For example, should the Commission exclude public corruption, tax, and other white-collar offenses?

4. If the Commission were to promulgate Part A of the proposed amendment, what conforming changes, if any, should the Commission make to other provisions of the Guidelines Manual?
(B) Consolidation of Zones B and C in the Sentencing Table

PART A — SENTENCING TABLE

The Sentencing Table used to determine the guideline range follows:
<table>
<thead>
<tr>
<th>Offense Level</th>
<th>I (0 or 1)</th>
<th>II (2 or 3)</th>
<th>III (4, 5, 6)</th>
<th>IV (7, 8, 9)</th>
<th>V (10, 11, 12)</th>
<th>VI (13 or more)</th>
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<td></td>
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</tbody>
</table>
Commentary to Sentencing Table

Application Notes:

1. The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. “Life” means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A, except as provided in §§4B1.1 (Career Offender) and 4B1.4 (Armed Career Criminal). The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Background: The Sentencing Table previously provided four “zones,” labeled A through D, based on the minimum months of imprisonment in each cell. The Commission expanded Zone B by consolidating former Zones B and C. Zone B in the Sentencing Table now contains all guideline ranges having a minimum term of imprisonment of at least one but not more than twelve months. Although Zone C was deleted by its consolidation with Zone B, the Commission decided not to redesignate Zone D as Zone C, to avoid unnecessary confusion that may result from different meanings of “Zone C” and “Zone D” through different editions of the Guidelines Manual.

* * *

§5B1.1. Imposition of a Term of Probation

(a) Subject to the statutory restrictions in subsection (b) below, a sentence of probation is authorized if:

(1) the applicable guideline range is in Zone A of the Sentencing Table; or

(2) the applicable guideline range is in Zone B of the Sentencing Table and the court imposes a condition or combination of conditions requiring intermittent confinement, community confinement, or home detention as provided in subsection (c)(3) of §5C1.1 (Imposition of a Term of Imprisonment).

(b) A sentence of probation may not be imposed in the event:

(1) the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
(2) the offense of conviction expressly precludes probation as a sentence, 18 U.S.C. § 3561(a)(2);

(3) the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense, 18 U.S.C. § 3561(a)(3).

Commentary

Application Notes:

1. Except where prohibited by statute or by the guideline applicable to the offense in Chapter Two, the guidelines authorize, but do not require, a sentence of probation in the following circumstances:

   (A) **Where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months).** In such cases, a condition requiring a period of community confinement, home detention, or intermittent confinement may be imposed but is not required.

   (B) **Where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than ninetwelve months).** In such cases, the court may impose probation only if it imposes a condition or combination of conditions requiring a period of community confinement, home detention, or intermittent confinement sufficient to satisfy the minimum term of imprisonment specified in the guideline range. For example, where the offense level is 7 and the criminal history category is II, the guideline range from the Sentencing Table is 2–8 months. In such a case, the court may impose a sentence of probation only if it imposes a condition or conditions requiring at least two months of community confinement, home detention, or intermittent confinement, or a combination of community confinement, home detention, and intermittent confinement totaling at least two months.

2. Where the applicable guideline range is in Zone C or D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is tenfifteen months or more), the guidelines do not authorize a sentence of probation. See §5C1.1 (Imposition of a Term of Imprisonment).

Background: This section provides for the imposition of a sentence of probation. The court may sentence a defendant to a term of probation in any case unless (1) prohibited by statute, or (2) where a term of imprisonment is required under §5C1.1 (Imposition of a Term of Imprisonment). Under 18 U.S.C. § 3561(a)(3), the imposition of a sentence of probation is prohibited where the defendant is sentenced at the same time to a sentence of imprisonment for the same or a different offense. Although this provision has effectively abolished the use of “split sentences” imposable pursuant to the former 18 U.S.C. § 3651, the drafters of the Sentencing Reform Act noted that the functional equivalent of the split sentence could be “achieved by a more direct and logically consistent route” by providing that a defendant serve a term of imprisonment followed by a period of supervised release. (S. Rep. No. 225, 98th Cong., 1st Sess. 89 (1983)). Section 5B1.1(a)(2) provides a transition between the circumstances under which a “straight” probationary term is authorized and those where probation is prohibited.

*   *   *

13
§5C1.1. Imposition of a Term of Imprisonment

(a) A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.

(b) If the applicable guideline range is in Zone A of the Sentencing Table, a sentence of imprisonment is not required, unless the applicable guideline in Chapter Two expressly requires such a term.

(c) If the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one month is satisfied by imprisonment; or

(3) a sentence of probation that includes a condition or combination of conditions that substitute intermittent confinement, community confinement, or home detention for imprisonment according to the schedule in subsection (e).

(d) If the applicable guideline range is in Zone C of the Sentencing Table, the minimum term may be satisfied by—

(1) a sentence of imprisonment; or

(2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

(e) Schedule of Substitute Punishments:

(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);

(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
One day of home detention for one day of imprisonment.

If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment.

Application Notes:

1. Subsection (a) provides that a sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range specified in the Sentencing Table in Part A of this Chapter. For example, if the defendant has an Offense Level of 20 and a Criminal History Category of I, the applicable guideline range is 33–41 months of imprisonment. Therefore, a sentence of imprisonment of at least thirty-three months, but not more than forty-one months, is within the applicable guideline range.

2. Subsection (b) provides that where the applicable guideline range is in Zone A of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is zero months), the court is not required to impose a sentence of imprisonment unless a sentence of imprisonment or its equivalent is specifically required by the guideline applicable to the offense. Where imprisonment is not required, the court, for example, may impose a sentence of probation. In some cases, a fine appropriately may be imposed as the sole sanction.

3. Subsection (c) provides that where the applicable guideline range is in Zone B of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is at least one but not more than twelve months), the court has three options:

(A) It may impose a sentence of imprisonment.

(B) It may impose a sentence of probation provided that it includes a condition of probation requiring a period of intermittent confinement, community confinement, or home detention, or combination of intermittent confinement, community confinement, and home detention, sufficient to satisfy the minimum period of imprisonment specified in the guideline range. For example, where the guideline range is 4–10 months, a sentence of probation with a condition requiring at least four months of intermittent confinement, community confinement, or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

(C) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition that requires community confinement or home detention. In such case, at least one month must be satisfied by actual imprisonment and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 4–10 months, a sentence of imprisonment of one month followed by a term of supervised release with a condition requiring three months of community confinement or home detention would satisfy the minimum term of imprisonment specified in the guideline range.

The preceding examples illustrate sentences that satisfy the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the applicable guideline range. For example, where the guideline range is 4–10 months, both a sentence of probation with a condition requiring six months of community confinement or home detention (under subsection (c)(3)) and a sentence of two months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (under subsection (c)(2)) would be within the guideline range.
4. Subsection (d) provides that where the applicable guideline range is in Zone C of the Sentencing Table (i.e., the minimum term specified in the applicable guideline range is ten or twelve months), the court has two options:

(A) It may impose a sentence of imprisonment.

(B) Or, it may impose a sentence of imprisonment that includes a term of supervised release with a condition requiring community confinement or home detention. In such case, at least one-half of the minimum term specified in the guideline range must be satisfied by imprisonment, and the remainder of the minimum term specified in the guideline range must be satisfied by community confinement or home detention. For example, where the guideline range is 10–16 months, a sentence of five months imprisonment followed by a term of supervised release with a condition requiring five months community confinement or home detention would satisfy the minimum term of imprisonment required by the guideline range.

The preceding example illustrates a sentence that satisfies the minimum term of imprisonment required by the guideline range. The court, of course, may impose a sentence at a higher point within the guideline range. For example, where the guideline range is 10–16 months, both a sentence of five months imprisonment followed by a term of supervised release with a condition requiring six months of community confinement or home detention (under subsection (d)), and a sentence of ten months imprisonment followed by a term of supervised release with a condition requiring four months of community confinement or home detention (also under subsection (d)) would be within the guideline range.

5. Subsection (e) sets forth a schedule of imprisonment substitutes.

6. There may be cases in which a departure from the sentencing options authorized for Zone C of the Sentencing Table (under which at least half the minimum term must be satisfied by imprisonment) to the sentencing options authorized for Zone B of the Sentencing Table (under which all or most of the minimum term may be satisfied by intermittent confinement, community confinement, or home detention instead of imprisonment) is appropriate to accomplish a specific treatment purpose. Such a departure should be considered only in cases where the court finds that (A) the defendant is an abuser of narcotics, other controlled substances, or alcohol, or suffers from a significant mental illness, and (B) the defendant’s criminality is related to the treatment problem to be addressed.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the likelihood that completion of the treatment program will successfully address the treatment problem, thereby reducing the risk to the public from further crimes of the defendant, and (2) whether imposition of less imprisonment than required by Zone C will increase the risk to the public from further crimes of the defendant.

**Examples:** The following examples both assume the applicable guideline range is 12–18 months and the court departs in accordance with this application note. Under Zone C rules, the defendant must be sentenced to at least six months imprisonment. (1) The defendant is a nonviolent drug offender in Criminal History Category I and probation is not prohibited by statute. The court departs downward to impose a sentence of probation, with twelve months of intermittent confinement, community confinement, or home detention and participation in a substance abuse treatment program as conditions of probation. (2) The defendant is convicted of a Class A or B felony, so probation is prohibited by statute (see §5B1.1(b)). The court departs downward to impose a sentence of one month imprisonment, with eleven months in community confinement.
confinement or home detention and participation in a substance abuse treatment program as conditions of supervised release.

75. The use of substitutes for imprisonment as provided in subsections (c) and (d) is not recommended for most defendants with a criminal history category of III or above.

86. In a case in which community confinement in a residential treatment program is imposed to accomplish a specific treatment purpose, the court should consider the effectiveness of the residential treatment program.

97. Subsection (e) provides that, where the applicable guideline range is in Zone D of the Sentencing Table (i.e., the minimum term of imprisonment specified in the applicable guideline range is 15 months or more), the minimum term must be satisfied by a sentence of imprisonment without the use of any of the imprisonment substitutes in subsection (d).

§5F1.2. Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment.

Commentary

Application Notes:

1. “Home detention” means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring if appropriate.

2. The court may impose other conditions of probation or supervised release appropriate to effectuate home detention. If the court concludes that the amenities available in the residence of a defendant would cause home detention not to be sufficiently punitive, the court may limit the amenities available.

3. The defendant’s place of residence, for purposes of home detention, need not be the place where the defendant previously resided. It may be any place of residence, so long as the owner of the residence (and any other person(s) from whom consent is necessary) agrees to any conditions that may be imposed by the court, e.g., conditions that a monitoring system be installed, that there will be no “call forwarding” or “call waiting” services, or that there will be no cordless telephones or answering machines.

Background: The Commission has concluded that the surveillance necessary for effective use of home detention ordinarily requires electronic monitoring is an appropriate means of surveillance for home detention. However, in some cases home detention may effectively be enforced without electronic monitoring, e.g., when the defendant is physically incapacitated, or where some other effective means of surveillance is available. Accordingly, the Commission has not required that electronic monitoring
be a necessary condition for home detention. Nevertheless, before ordering home detention without electronic monitoring, the court should be confident that an alternative form of surveillance will be equally effective is appropriate considering the facts and circumstances of the defendant’s case.

In the usual case, the Commission assumes that a condition requiring that the defendant seek and maintain gainful employment will be imposed when home detention is ordered.

* * *

**Issues for Comment:**

1. The Commission requests comment on whether the zone changes contemplated by Part B of the proposed amendment should apply to all offenses, or only to certain categories of offenses. The zone changes would increase the number of offenders who are eligible under the guidelines to receive a non-incarceration sentence. Should the Commission provide a mechanism to exempt certain offenses from these zone changes? For example, should the Commission provide a mechanism to exempt public corruption, tax, and other white-collar offenses from these zone changes (e.g., to reflect a view that it would not be appropriate to increase the number of public corruption, tax, and other white-collar offenders who are eligible to receive a non-incarceration sentence)? If so, what mechanism should the Commission provide, and what offenses should be covered by it?

2. The proposed amendment would consolidate Zones B and C to create an expanded Zone B. Such an adjustment would provide probation with conditions of confinement as a sentencing option for current Zone C defendants, an option that was not available to such defendants before. The Commission seeks comment on whether the Commission should provide additional guidance to address these new Zone B defendants. If so, what guidance should the Commission provide?
PROPOSED AMENDMENT: TRIBAL ISSUES

Synopsis of Proposed Amendment: In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of the findings and recommendations contained in the May 2016 Report issued by the Commission’s Tribal Issues Advisory Group, and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.” See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016). See also Report of the Tribal Issues Advisory Group (May 16, 2016), at http://www.ussc.gov/research/research-publications/report-tribal-issues-advisory-group. The Commission is publishing this proposed amendment to inform the Commission’s consideration of the issues related to this policy priority.

In 2015, the Commission established the Tribal Issues Advisory Group (TIAG) as an ad hoc advisory group to the Commission. Among other things, the Commission tasked the TIAG with studying the following issues—

(A) the operation of the federal sentencing guidelines as they relate to American Indian defendants and victims and to offenses committed in Indian Country, and any viable methods for revising the guidelines to (i) improve their operation or (ii) address particular concerns of tribal communities and courts;

(B) whether there are disparities in the application of the federal sentencing guidelines to American Indian defendants, and, if so, how to address them;

(C) the impact of the federal sentencing guidelines on offenses committed in Indian Country in comparison with analogous offenses prosecuted in state courts and tribal courts;

(D) the use of tribal court convictions in the computation of criminal history scores, risk assessment, and for other purposes;

(E) how the federal sentencing guidelines should account for protection orders issued by tribal courts; and

(F) any other issues relating to American Indian defendants and victims, or to offenses committed in Indian Country, that the TIAG considers appropriate. See Tribal Issues Advisory Group Charter § 1(b)(3).

The Commission also directed the TIAG to present a final report with its findings and recommendations, including any recommendations that the TIAG considered appropriate on potential amendments to the guidelines and policy statements. See id. § 6(a). On May 16, 2016, the TIAG presented to the Commission its final report. Among the recommendations suggested in the Report, the TIAG recommends revisions to the Guidelines Manual relating to “the use of tribal court convictions in the computation of criminal history scores” and “how the federal sentencing guidelines should account for protection orders issued by tribal courts.”

The Commission is publishing this proposed amendment to inform the Commission’s consideration of these issues. The proposed amendment contains two parts. The
Commission is considering whether to promulgate on one or both of these parts, as they are not necessarily mutually exclusive.

(A) Tribal Court Convictions

Pursuant to Chapter Four, Part A (Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). See USSG §4A1.2(i). The policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history. Among the grounds for departure, the policy statement includes “[p]rior sentences not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).” USSG §4A1.3(a)(2)(A).

As noted in the TIAG’s report, in recent years there have been important changes in tribal criminal jurisdiction. In 2010, Congress enacted the Tribal Law and Order Act of 2010 (TLOA), Pub. L. 111–211, to address high rates of violent crime in Indian Country by improving criminal justice funding and infrastructure in tribal government, and expanding the sentencing authority of tribal court systems. In 2013, the Violence Against Women Reauthorization Act of 2013 (VAWA Reauthorization), Pub. L. 113–4, was enacted to expand the criminal jurisdiction of tribes to prosecute, sentence, and convict Indians and non-Indians who assault Indian spouses or dating partners or violate a protection order in Indian Country. It also established new assault offenses and enhanced existing assault offenses. Both Acts increased criminal jurisdiction for tribal courts, but also required more robust court procedures and provided more procedural protections for defendants.

The TIAG notes in its report that “[w]hile some tribes have exercised expanded jurisdiction under TLOA and the VAWA Reauthorization, most have not done so. Given the lack of tribal resources, and the absence of significant additional funding under TLOA and the VAWA Reauthorization to date, it is not certain that more tribes will be able to do so any time soon.” TIAG Report, at 10–11. Members of the TIAG describe their experience with tribal courts as “widely varied,” expressing among their findings certain concerns about funding, perceptions of judicial bias or political influence, due process protections, and access to tribal court records. Id. at 11–12.

The TIAG report highlights that “[t]ribal courts occupy a unique and valuable place in the criminal justice system,” while also recognizing that “[t]ribal courts range in style”. Id. at 13. According to the TIAG, the differences in style and the concerns expressed above “make it often difficult for a federal court to determine how to weigh tribal court convictions in rendering a sentencing decision.” Id. at 11. It also asserts that “taking a single approach to the consideration of tribal court convictions would be very difficult and could potentially lead to a disparate result among Indian defendants in federal courts.” Id. at 12. Thus, the TIAG concludes that tribal convictions should not be counted for purposes of determining criminal history points pursuant to Chapter Four, Part A, and that “the current use of USSG §4A1.3 to depart upward in individual cases continues to allow the best formulation of ‘sufficient but not greater than necessary’ sentences for defendants, while not increasing sentencing disparities or introducing due process concerns.” Id. Nevertheless, the TIAG recommends that the Commission amend §4A1.3 to provide guidance and a more structured
analytical framework for courts to consider when determining whether a departure is appropriate based on a defendant’s record of tribal court convictions. The guidance recommended by the TIAG “collectively . . . reflect[s] important considerations for courts to balance the rights of defendants, the unique and important status of tribal courts, the need to avoid disparate sentences in light of disparate tribal court practices and circumstances, and the goal of accurately assessing the severity of any individual defendant’s criminal history.” Id. at 13.

The proposed amendment would amend the Commentary to §4A1.3 to set forth a non-exhaustive list of factors for the court to consider in determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate.

Issues for comment are also provided.

(B) Court Protection Orders

Under the Guidelines Manual, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines. See USSG §§2A2.2 (Aggravated Assault), 2A6.1 (Threatening or Harassing Communications; Hoaxes; False Liens), and 2A6.2 (Stalking or Domestic Violence). The Commission has heard concerns that the term “court protection order” has not been defined in the guidelines and should be clarified.

The TIAG notes in its report the importance of defining “court protection orders” in the guidelines, because—

[a] clear definition of that term will ensure that orders used for sentencing enhancements are the result of court proceedings assuring appropriate due process protections, that there is consistent identification and treatment of such orders, and that such orders issued by tribal courts receive treatment consistent with that of other issuing jurisdictions. TIAG Report, at 14.

The TIAG recommends that the Commission adopt a definition of “court protection order” that incorporates the statutory provisions at 18 U.S.C. §§ 2265 and 2266. Section 2266(5) provides that the term “protection order” includes:

(A) any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person, including any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection; and

(B) any support, child custody or visitation provisions, orders, remedies or relief issued as part of a protection order, restraining order, or injunction pursuant to State, tribal, territorial, or local law authorizing the issuance of protection orders, restraining orders, or injunctions for the protection of
victims of domestic violence, sexual assault, dating violence, or stalking. 

Section 2265(b) provides that

A protection order issued by a State, tribal, or territorial court is consistent with this subsection if—

(1) such court has jurisdiction over the parties and matter under the law of such State, Indian tribe, or territory; and

(2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State, tribal, or territorial law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights. 18 U.S.C. § 2265(b).

The proposed amendment would amend the commentary to §1B1.1 (Application Instructions) to provide a definition of court protection order derived from 18 U.S.C. § 2266(5), with a provision that it must be consistent with 18 U.S.C. § 2265(b).

Issues for comment are also provided.

Proposed Amendment:

(A) Tribal Court Convictions

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) Upward Departures.—

(1) Standard for Upward Departure.—If reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) Types of Information Forming the Basis for Upward Departure.—The information described in subsection (a)(1) may include information concerning the following:
(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses convictions).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—

(A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant’s.

(B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant’s criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) DOWNWARD DEPARTURES.—

(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) PROHIBITIONS.—
(A) **Criminal History Category I.**—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) **Armed Career Criminal and Repeat and Dangerous Sex Offender.**—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) **Limitations.**—

(A) **Limitation on Extent of Downward Departure for Career Offender.**—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) **Limitation on Applicability of §5C1.2 in Event of Downward Departure to Category I.**—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) **Written Specification of Basis for Departure.**—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

**Commentary**

**Application Notes:**

1. **Definitions.**—For purposes of this policy statement, the terms “depart”, “departure”, “downward departure”, and “upward departure” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. **Upward Departures.**—

(A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

(i) A previous foreign sentence for a serious offense.

(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

(C) **Upward Departures Based on Tribal Court Convictions.**—In determining whether, or to what extent, an upward departure based on a tribal court conviction is appropriate, the court shall consider the factors set forth in §4A1.3(a) above and, in addition, may consider relevant factors such as the following:

(i) The defendant was represented by a lawyer, had the right to a trial by jury, and received other due process protections consistent with those provided to criminal defendants under the United States Constitution.


(iii) The tribal court conviction is not based on the same conduct that formed the basis for a conviction from another jurisdiction that receives criminal history points pursuant to this Chapter.

(iv) The conviction is for an offense that otherwise would be counted under §4A1.2 (Definitions and Instructions for Computing Criminal History).

(v) At the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for purposes of computing criminal history pursuant to the Guidelines Manual.]
3. **Downward Departures.**—A downward departure from the defendant’s criminal history category may be warranted if, for example, the defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

**Background:** This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant’s criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

* * *

**Issues for Comment**

1. The proposed amendment would provide a list of relevant factors that courts may consider, in addition to the factors set forth in §4A1.3, in determining whether an upward departure based on a tribal court conviction may be warranted. The Commission seeks comment on whether the factors provided in the proposed amendment are appropriate. Should any factors be deleted or changed? Should the Commission provide additional or different guidance? If so, what guidance should the Commission provide?

   In particular, the Commission seeks comment on how these factors should interact with each other and with the factors already contained in §4A1.3. Should the Commission provide greater emphasis on one or more factors set forth in the proposed amendment? For example, how much weight should be given to factors that address due process concerns (subdivisions (i) and (ii)) in relation to the other factors provided in the proposed amendment, such as those factors relevant to preventing unwarranted double counting (subdivisions (iii) and (iv))? Should the Commission provide that in order to consider whether an upward departure based on a tribal court conviction is appropriate, and before taking into account any other factor, the court must first determine as a threshold factor that the defendant received due process protections consistent with those provided to criminal defendants under the United States Constitution?

   Finally, the proposed amendment brackets the possibility of including as a factor that courts may consider in deciding whether to depart based on a tribal court conviction if, “at the time the defendant was sentenced, the tribal government had formally expressed a desire that convictions from its courts should be counted for
pursposes of computing criminal history pursuant to the *Guidelines Manual.*” The Commission invites broad comment on this factor and its interaction with the other factors set forth in the proposed amendment. Is this factor relevant to the court’s determination of whether to depart? What are the advantages and disadvantages of including such a factor? How much weight should be given to this factor in relation to the other factors provided in the proposed amendment? What criteria should be used in determining when a tribal government has “formally expressed a desire” that convictions from its courts should count? How would tribal governments notify and make available such statements?

2. Pursuant to subsection (i) of §4A1.2 (Definitions and Instructions for Computing Criminal History), sentences resulting from tribal court convictions are not counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). As stated above, the policy statement at §4A1.3 allows for upward departures if reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history.

The Commission invites comment on whether the Commission should consider changing how the guidelines account for sentences resulting from tribal court convictions for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History). Should the Commission consider amending §4A1.2(i) and, if so, how? For example, should the guidelines treat sentences resulting from tribal court convictions like other sentences imposed for federal, state, and local offenses that may be used to compute criminal history points? Should the Commission treat sentences resulting from tribal court convictions more akin to military sentences and provide a distinction between certain types of tribal courts? Is there a different approach the Commission should follow in addressing the use of tribal court convictions in the computation of criminal history scores?

(B) Court Protection Orders

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

“Dangerous weapon” means . . . .

[also redesignate succeeding paragraphs accordingly]

* * *

Issues for Comment

1. The proposed amendment would include in the commentary to §1B1.1 (Application Instructions) a definition of court protection order derived from 18 U.S.C. § 2266, that is consistent with 18 U.S.C. § 2265(b). Is this definition appropriate? If not, what definition, if any, should the Commission provide?

2. The Commission has heard concerns about cases in which the offense involved the violation of a court protection order. As stated above, the violation of a court protection order is a specific offense characteristic in three Chapter Two offense guidelines (see §§2A2.2, 2A6.1, and 2A6.2). However, other guidelines in which the offense might involve a violation of a court protection order do not provide for such an enhancement.

The Commission seeks comment on whether the Guidelines Manual should provide higher penalties for cases involving the violation of a court protection order. How, if at all, should the Commission amend the guidelines to provide appropriate penalties in such cases?

For example, should the Commission address this factor throughout the guidelines by establishing a Chapter Three adjustment if the offense involved the violation of a court protection order? If so, how should this provision interact with other provisions in the Guidelines Manual that may involve the violation of an order, such as §2B1.1(b)(9)(C) (“If the offense involved . . . (C) a violation of any prior specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines . . . increase by 2 levels.”), §2J1.1 (Contempt), and §3C1.1 (Obstructing or Impeding the Administration of Justice)?

Alternatively, should the Commission identify and amend particular offense guidelines in Chapter Two to include the violation of a court protection order as a specific offense characteristic? If so, which guidelines should be amended to include such a new specific offense characteristic? For example, should the Commission include such a new specific offense characteristic in the guidelines related to offenses against the person, sexual offenses, and offenses that create a risk of injury? Should the Commission include such a new specific offense characteristic in offenses that caused a financial harm, such as identity theft?
PROPOSED AMENDMENT: YOUTHFUL OFFENDERS


Pursuant to Chapter Four, Part A (Criminal History), sentences for offenses committed prior to age eighteen are considered in the calculation of the defendant’s criminal history score. The guidelines distinguish between an “adult sentence” in which the defendant committed the offense before age eighteen and was convicted as an adult, and a “juvenile sentence” resulting from a juvenile adjudication.

Under §4A1.2 (Definitions and Instructions for Computing Criminal History), if the defendant was convicted as an adult for an offense committed before age eighteen and received a sentence exceeding one year and one month, the sentence is counted so long as it was imposed, or resulted in the defendant being incarcerated, within fifteen years of the defendant’s commencement of the instant offense. See USSG §4A1.2(d), (e). All other sentences for offenses committed prior to age eighteen are counted only if the sentence was imposed, or resulted in the defendant being incarcerated, within five years of the defendant’s commencement of the instant offense. See USSG §4A1.2(d). The Commentary to §4A1.2 provides that, to avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a “juvenile,” the rules set forth in §4A1.2(d) apply to all offenses committed prior to age eighteen.

Juvenile adjudications are addressed in two other places in the guidelines. First, §4A1.2(c)(2) provides a list of certain offenses that are “never counted” for purposes of the criminal history score, including “juvenile status offenses and truancy.” Second, §4A1.2(f) provides that adult diversionary dispositions resulting from a finding or guilt, or a nolo contendere, are counted even if a conviction is not formally entered. However, the same provision further provides that “diversion from juvenile court is not counted.”

The proposed amendment amends §4A1.2(d) to exclude juvenile sentences from being considered in the calculation of the defendant’s criminal history score. The proposed amendment also amends the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide an example of an instance in which a downward departure from the defendant’s criminal history may be warranted. Specifically, the proposed amendment provides that a downward departure may be warranted if the defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults.”

Issues for comment are provided.
Proposed Amendment:

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

1. §4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term “prior sentence” is defined at §4A1.2(a). The term “sentence of imprisonment” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

   Certain prior sentences are not counted or are counted only under certain conditions:

   A sentence imposed more than fifteen years prior to the defendant’s commencement of the instant offense is not counted unless the defendant’s incarceration extended into this fifteen-year period. See §4A1.2(e).

   A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. See §4A1.2(d).
A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. See §4A1.2(h) and (j) and the Commentary to §4A1.2.

2. **§4A1.1(b).** Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term “prior sentence” is defined at §4A1.2(a). The term “sentence of imprisonment” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant’s commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

3. **§4A1.1(c).** One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this subsection. The term “prior sentence” is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant’s commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if imposed within five years of the defendant’s commencement of the current offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.
A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

* * *

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) **Prior Sentence**

(1) The term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(e).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.

“Convicted of an offense,” for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*. 
(b) **Sentence of Imprisonment Defined**

1. The term “sentence of imprisonment” means a sentence of incarceration and refers to the maximum sentence imposed.

2. If part of a sentence of imprisonment was suspended, “sentence of imprisonment” refers only to the portion that was not suspended.

(c) **Sentences Counted and Excluded**

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

1. Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:
   
   - Careless or reckless driving
   - Contempt of court
   - Disorderly conduct or disturbing the peace
   - Driving without a license or with a revoked or suspended license
   - False information to a police officer
   - Gambling
   - Hindering or failure to obey a police officer
   - Insufficient funds check
   - Leaving the scene of an accident
   - Non-support
   - Prostitution
   - Resisting arrest
   - Trespassing.

2. Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:
   
   - Fish and game violations
   - Hitchhiking
   - [Juvenile status offenses and truancy]
   - Local ordinance violations (except those violations that are also violations under state criminal law)
   - Loitering
   - Minor traffic infractions (e.g., speeding)
   - Public intoxication
   - Vagrancy.
(d) Offenses Committed Prior to Age Eighteen

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under §4A1.1(a) for each such sentence.

(2) In any other case,

   (A) add 2 points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

   (B) add 1 point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant’s commencement of the instant offense not covered in (A).

(3) Sentences resulting from juvenile adjudications are not counted.

(e) Applicable Time Period

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant’s commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant’s commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).

(f) Diversionary Dispositions

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.
(g) **Military Sentences**

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) **Foreign Sentences**

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(i) **Tribal Court Sentences**

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(j) **Expunged Convictions**

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(k) **Revocations of Probation, Parole, Mandatory Release, or Supervised Release**

1. In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

2. Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from confinement on such sentence (see §4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).

(l) **Sentences on Appeal**
Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) **Effect of a Violation Warrant**

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) **Failure to Report for Service of Sentence of Imprisonment**

For the purposes of §4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) **Felony Offense**

For the purposes of §4A1.2(c), a “felony offense” means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

(p) **Crime of Violence Defined**

For the purposes of §4A1.1(e), the definition of “crime of violence” is that set forth in §4B1.2(a).

**Commentary**

1. **Prior Sentence.**—“Prior sentence” means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.2(a). A sentence imposed after the defendant’s commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).

Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are counted only if they are of a specified type and length).
2. **Sentence of Imprisonment.**—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). See §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant’s twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant’s twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. See §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. **Application of “Single Sentence” Rule (Subsection (a)(2)).**—

   (A) **Predicate Offenses.**—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted “separately” from each other (see §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

   For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

   Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant’s commencement of the instant offense. See §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

   (B) **Upward Departure Provision.**—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.
4. **Sentences Imposed in the Alternative.**—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., $1,000 fine or ninety days' imprisonment) is treated as a non-imprisonment sentence.

5. **Sentences for Driving While Intoxicated or Under the Influence.**—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category).

7. **Offenses Committed Prior to Age Eighteen.**—Section 4A1.2(d) covers applies only when the defendant was convicted as an adult for an offense offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. This provision also sets forth the time period within which such prior adult sentences are counted. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a “juvenile,” this provision applies to all offenses committed prior to age eighteen.

8. **Applicable Time Period.**—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term “commencement of the instant offense” includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

9. **Diversionary Dispositions.**—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. **Convictions Set Aside or Defendant Pardoned.**—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).

11. **Revocations to be Considered.**—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after
revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. **Example:** A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a “straight” probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

12. **Application of Subsection (c).—**

   **(A) In General.—** In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

   **(B) Local Ordinance Violations.—** A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

   **(C) Insufficient Funds Check.—** “Insufficient funds check,” as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or nonexistent account.

**Background:** Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

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**§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)**

   **(a) Upward Departures,—**
(1) **STANDARD FOR UPWARD DEPARTURE.**—If reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) **TYPES OF INFORMATION FORMING THE BASIS FOR UPWARD DEPARTURE.**—The information described in subsection (a) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.

(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) **PROHIBITION.**—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) **DETERMINATION OF EXTENT OF UPWARD DEPARTURE.**—

   (A) **IN GENERAL.**—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant’s.

   (B) **UPWARD DEPARTURES FROM CATEGORY VI.**—In a case in which the court determines that the extent and nature of the defendant’s criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) **DOWNWARD DEPARTURES.**—
(1) **STANDARD FOR DOWNWARD DEPARTURE.**—If reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) **PROHIBITIONS.**—

(A) **CRIMINAL HISTORY CATEGORY I.**—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) **ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.**—A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) **LIMITATIONS.**—

(A) **LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.**—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) **LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.**—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) **WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.**—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.
(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

**Commentary**

**Application Notes:**

1. **Definitions.**—For purposes of this policy statement, the terms “depart”, “departure”, “downward departure”, and “upward departure” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Upward Departures.**—
   
   (A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

   (i) A previous foreign sentence for a serious offense.
   
   (ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.
   
   (iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.
   
   (iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

   (B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

3. **Downward Departures.**—

   (A) **Examples.**—A downward departure from the defendant’s criminal history category may be warranted if, for example, based on any of the following circumstances:

   (i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

   (ii) The defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults.”
**Downward Departures from Criminal History Category I.**—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

**Background:** This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant’s criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

* * *

**Issues for Comment:**

1. The Commission seeks comment on whether the Commission should consider changing how the guidelines account for juvenile sentences for purposes of determining the defendant’s criminal history pursuant to Chapter Four, Part A (Criminal History). Should the Commission amend the guidelines to provide that sentences resulting from juvenile adjudications shall not be counted in the criminal history score? Alternatively, should the Commission amend the guidelines to count juvenile sentences only if the offense involved violence or was an otherwise serious offense? Should the Commission provide instead that sentences for offenses committed prior to age eighteen are not to be counted in the criminal history score, regardless of whether the sentence was classified as a “juvenile” or “adult” sentence?

2. If the Commission were to promulgate the proposed amendment, should the Commission provide that juvenile sentences may be considered for purposes of an upward departure under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement))? If so, should the Commission limit the consideration of such departures to certain offenses? For example, should the Commission provide that an upward departure under §4A1.3 may be warranted if the juvenile sentence was imposed for an offense involving violence or that was an otherwise serious offense?

3. The proposed amendment would provide that a departure may be warranted in cases in which the defendant had an adult conviction for an offense committed prior to age eighteen counted in the criminal history score that would have been classified as a juvenile adjudication (and therefore not counted) if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults.” Should the Commission provide that a downward departure may be warranted for such cases? How would courts determine
that the defendant would have received a juvenile adjudication if the laws of the jurisdiction in which the defendant was convicted did not categorically consider offenders below the age of eighteen years as “adults”? Should the Commission provide specific examples or guidance for determining whether a downward departure is warranted in such cases? If so, what guidance or examples should the Commission provide? Should the Commission use a different approach to address these cases and, if so, what should that approach be? Are there other circumstances that the Commission should identify as an appropriate basis for a downward departure?
**PROPOSED AMENDMENT: BIPARTISAN BUDGET ACT**

**Synopsis of Proposed Amendment:** This proposed amendment responds to the Bipartisan Budget Act of 2015, Pub. L. 114–74 (Nov. 2, 2015), which, among other things, amended three existing criminal statutes concerned with fraudulent claims under certain Social Security programs.

The three criminal statutes amended by the Bipartisan Budget Act of 2015 are sections 208 (Penalties [for fraud involving the Federal Old-Age and Survivors Insurance Trust Fund]), 811 (Penalties for fraud [involving special benefits for certain World War II veterans]), and 1632 (Penalties for fraud [involving supplemental security income for the aged, blind, and disabled]) of the Social Security Act (42 U.S.C. §§ 408, 1011, and 1383a, respectively).

**(A) Conspiracy to Commit Social Security Fraud**

The Bipartisan Budget Act of 2015 added new subdivisions prohibiting conspiracy to commit fraud for substantive offenses already contained in the three statutes (42 U.S.C. §§ 408, 1011, and 1383a). For each of the three statutes, the new subdivision provides that whoever “conspires to commit any offense described in any of [the] paragraphs” enumerated shall be imprisoned for not more than five years, the same statutory maximum penalty applicable to the substantive offense.

The three amended statutes are currently referenced in Appendix A (Statutory Index) to §2B1.1 (Theft, Property Destruction, and Fraud). The proposed amendment would amend Appendix A so that sections 408, 1011, and 1383a of Title 42 are referenced not only to §2B1.1 but also to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)).

An issue for comment is provided.

**(B) Increased Penalties for Certain Individuals Violating Positions of Trust**

The Bipartisan Budget Act of 2015 also amended sections 408, 1011, and 1383a of Title 42 to add increased penalties for certain persons who commit fraud offenses under the relevant Social Security programs. The Act included a provision in all three statutes identifying such persons as:

- a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . . .

A person who meets this requirement and is convicted of a fraud offense under one of the three amended statutes may be imprisoned for not more than ten years, double the
otherwise applicable five-year penalty for other offenders. The new increased penalties apply to all of the fraudulent conduct in subsection (a) of the three statutes.

The proposed amendment would amend §2B1.1 to address cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies. It provides an enhancement of [4][2] levels and a minimum offense level of [14][12] for such cases. It also adds Commentary specifying whether an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) applies — bracketing two possibilities: if the enhancement applies, the adjustment does not apply; and if the enhancement applies, the adjustment is not precluded from applying.

Issues for comment are also provided.

Proposed Amendment:

(A) Conspiracy to Commit Social Security Fraud

APPENDIX A

STATUTORY INDEX

*    *    *

42 U.S.C. § 408   2B1.1, 2X1.1
42 U.S.C. § 1011   2B1.1, 2X1.1
42 U.S.C. § 1307(a)  2B1.1
42 U.S.C. § 1307(b)  2B1.1
42 U.S.C. § 1320a-7b  2B1.1, 2B4.1
42 U.S.C. § 1320a-8b  2X5.1, 2X5.2
42 U.S.C. § 1383(d)(2)  2B1.1
42 U.S.C. § 1383a(a)  2B1.1, 2X1.1

*    *    *

Issue for Comment:

1. Part A of the proposed amendment would reference the new conspiracy offenses under 42 U.S.C. §§ 408, 1011, and 1383a to §2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Office Guideline)). The Commission invites comment on whether
the guidelines covered by the proposed amendment adequately account for these offenses. If not, what revisions to the guidelines would be appropriate to account for these offenses? Should the Commission reference these new offenses to other guidelines instead of, or in addition to, the guidelines covered by the proposed amendment?

(B) Increased Penalties for Certain Individuals Violating Positions of Trust

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

(1) If the loss exceeded $6,500, increase the offense level as follows:

<table>
<thead>
<tr>
<th>LOSS (APPLY THE GREATEST)</th>
<th>INCREASE IN LEVEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) $6,500 or less</td>
<td>no increase</td>
</tr>
<tr>
<td>(B) More than $6,500</td>
<td>add 2</td>
</tr>
<tr>
<td>(C) More than $15,000</td>
<td>add 4</td>
</tr>
<tr>
<td>(D) More than $40,000</td>
<td>add 6</td>
</tr>
<tr>
<td>(E) More than $95,000</td>
<td>add 8</td>
</tr>
<tr>
<td>(F) More than $150,000</td>
<td>add 10</td>
</tr>
<tr>
<td>(G) More than $250,000</td>
<td>add 12</td>
</tr>
<tr>
<td>(H) More than $550,000</td>
<td>add 14</td>
</tr>
<tr>
<td>(I) More than $1,500,000</td>
<td>add 16</td>
</tr>
<tr>
<td>(J) More than $3,500,000</td>
<td>add 18</td>
</tr>
<tr>
<td>(K) More than $9,500,000</td>
<td>add 20</td>
</tr>
<tr>
<td>(L) More than $25,000,000</td>
<td>add 22</td>
</tr>
<tr>
<td>(M) More than $65,000,000</td>
<td>add 24</td>
</tr>
<tr>
<td>(N) More than $150,000,000</td>
<td>add 26</td>
</tr>
<tr>
<td>(O) More than $250,000,000</td>
<td>add 28</td>
</tr>
<tr>
<td>(P) More than $550,000,000</td>
<td>add 30.</td>
</tr>
</tbody>
</table>

(2) (Apply the greatest) If the offense—
(A) (i) involved 10 or more victims; (ii) was committed through mass-marketing; or (iii) resulted in substantial financial hardship to one or more victims, increase by 2 levels;

(B) resulted in substantial financial hardship to five or more victims, increase by 4 levels; or

(C) resulted in substantial financial hardship to 25 or more victims, increase by 6 levels.

(3) If the offense involved a theft from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved theft of, damage to, destruction of, or trafficking in, property from a national cemetery or veterans’ memorial, increase by 2 levels.

(6) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by 2 levels.

(7) If (A) the defendant was convicted of a Federal health care offense involving a Government health care program; and (B) the loss under subsection (b)(1) to the Government health care program was (i) more than $1,000,000, increase by 2 levels; (ii) more than $7,000,000, increase by 3 levels; or (iii) more than $20,000,000, increase by 4 levels.

(8) (Apply the greater) If—

(A) the offense involved conduct described in 18 U.S.C. § 670, increase by 2 levels; or

(B) the offense involved conduct described in 18 U.S.C. § 670, and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product, increase by 4 levels.

(9) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; (B) a misrepresentation or
other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

(10) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(12) If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

[Insert the following as (13) and renumber other provisions accordingly:]

(13) If the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years' imprisonment applies, increase by [4][2] levels. If the resulting offense level is less than [14][12], increase to level [14][12].

(13) (Apply the greater) If the offense involved misappropriation of a trade secret and the defendant knew or intended—

(A) that the trade secret would be transported or transmitted out of the United States, increase by 2 levels; or

(B) that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 4 levels.
If subparagraph (B) applies and the resulting offense level is less than level 14, increase to level 14.

(14) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(15) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(16) (Apply the greater) If—

(A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees, increase by 4 levels.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(16)(B) shall not exceed 8 levels, except as provided in subdivision (D).

(D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

(17) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1030, and the offense involved an intent to obtain personal information, or (B) the offense involved the unauthorized public dissemination of personal information, increase by 2 levels.

(18) (A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. § 1030, and the offense involved a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the
administration of justice, national defense, or national security, increase by 2 levels.

(ii) 18 U.S.C. § 1030(a)(5)(A), increase by 4 levels.

(iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.

(19) If the offense involved—

(A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or

(B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,

increase by 4 levels.

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate.

(2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
(3) If (A) neither subdivision (1) nor (2) of this subsection applies; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.

(4) If the offense involved a cultural heritage resource or a paleontological resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources or Paleontological Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources or Paleontological Resources), if the resulting offense level is greater than that determined above.

Commentary

Application Notes:

[Insert the following note and renumber other notes accordingly:]

11. **Interaction of Subsection (b)(13) and §3B1.3.**—[If subsection (b)(13) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).] [Application of subsection (b)(13) does not preclude a defendant from consideration for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).]

Issues for Comment:

1. The Bipartisan Budget Act of 2015 amended sections 408, 1011, and 1383a of Title 42 to include a provision in all three statutes increasing the statutory maximum term of imprisonment from five years to ten years for certain persons who commit fraud offenses under subsection (a) of the three statutes. The Act identifies such persons as:

   a person who receives a fee or other income for services performed in connection with any determination with respect to benefits under this title (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination . . . .

The Commission seeks comment on how, if at all, the guidelines should be amended to address cases in which the offense of conviction is 42 U.S.C. § 408, § 1011, or § 1383a, and the statutory maximum term of ten years’ imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). Are these cases adequately addressed by existing provisions in the
guidelines, such as the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill)? If so, as an alternative to the proposed amendment, should the Commission amend §2B1.1 only to provide an application note that expressly provides that, for defendants subject to the ten years’ statutory maximum in such cases, an adjustment under §3B1.3 ordinarily would apply? If not, how should the Commission amend the guidelines to address these cases?

2. The proposed amendment would amend §2B1.1 to provide an enhancement and a minimum offense level for cases in which the defendant was convicted under 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the statutory maximum term of ten years’ imprisonment applies because the defendant was a person described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a). However, there may be cases in which a defendant, who meets the criteria set forth for the new statutory maximum term of ten years’ imprisonment, is convicted under a general fraud statute (e.g., 18 U.S.C. § 1341) for an offense involving conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a).

The Commission seeks comment on whether the Commission should instead amend §2B1.1 to provide a general specific offense characteristic for such cases. For example, should the Commission provide an enhancement for cases in which the offense involved conduct described in 42 U.S.C. § 408(a), § 1011(a), or § 1383a(a) and the defendant is a person “who receives a fee or other income for services performed in connection with any determination with respect to benefits [covered by those statutory provisions] (including a claimant representative, translator, or current or former employee of the Social Security Administration), or who is a physician or other health care provider who submits, or causes the submission of, medical or other evidence in connection with any such determination”? If so, how many levels would be appropriate for such an enhancement? How should such an enhancement interact with the existing enhancements at §2B1.1 and the Chapter Three adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill)?
PROPOSED AMENDMENT: CRIMINAL HISTORY ISSUES

Synopsis of Proposed Amendment: This proposed amendment is a result of the Commission’s work in examining Chapter Four, Part A (Criminal History) “to (A) study the treatment of revocation sentences under §4A1.2(k), and (B) consider a possible amendment of §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to account for instances in which the time actually served was substantially less than the length of the sentence imposed for a conviction counted under the Guidelines Manual.” See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016).

(A) Treatment of Revocation Sentences Under §4A1.2(k)

Pursuant to Chapter Four, Part A (Criminal History), revocations of probation, parole, supervised release, special parole, or mandatory release are counted for purposes of calculating criminal history points. Section 4A1.2(k) provides that a sentence of imprisonment given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence for purposes of computing criminal history points under §4A1.1(a), (b), or (c). The Commentary to §4A1.2 provides that where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), the term of imprisonment imposed upon revocation is added to the sentence that will result in the greatest increase in criminal history points. See USSG §4A1.2, comment. (n.11).

Section 4A1.2(k)(2) further provides that aggregating the revocation sentence to the original sentence of imprisonment may affect the time period under which certain sentences are counted under Chapter Four. See USSG §4A1.2(d)(2) and (e). The resulting total of adding both sentences could affect the applicable time period by increasing the length of a defendant’s term of imprisonment or by changing the defendant’s date of release from imprisonment.

Part A of the proposed amendment would amend §4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are not to be counted for purposes of calculating criminal history points. It would also state that such revocation sentences may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Issues for comment are also provided.

(B) Departure Based on Substantial Difference Between Time-Served and Sentence Imposed

Section 4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) provides for upward and downward departures where the defendant’s criminal history category substantially understates or substantially overstates the seriousness of the defendant’s criminal history or the likelihood of recidivism. The Commentary to §4A1.3 provides guidance in determining when a downward departure from the defendant’s criminal history may be warranted.
Part B of the proposed amendment would amend the Commentary to §4A1.3 to provide that a downward departure from the defendant’s criminal history may warrant in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

An issue for comment is also provided.

Proposed Amendment:

(A) Treatment of Revocation Sentences Under §4A1.2(k)

§4A1.2. Definitions and Instructions for Computing Criminal History

(a) Prior Sentence

(1) The term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or treated as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Treat any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(e).

For purposes of applying §4A1.1(a), (b), and (c), if prior sentences are treated as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

(3) A conviction for which the imposition or execution of sentence was totally suspended or stayed shall be counted as a prior sentence under §4A1.1(c).

(4) Where a defendant has been convicted of an offense, but not yet sentenced, such conviction shall be counted as if it constituted a prior sentence under §4A1.1(c) if a sentence resulting from that conviction otherwise would be countable. In the case of a conviction for an offense set forth in §4A1.2(c)(1), apply this provision only where the sentence for such offense would be countable regardless of type or length.
“Convicted of an offense,” for the purposes of this provision, means that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

(b) **Sentence of Imprisonment Defined**

(1) The term “sentence of imprisonment” means a sentence of incarceration and refers to the maximum sentence imposed.

(2) If part of a sentence of imprisonment was suspended, “sentence of imprisonment” refers only to the portion that was not suspended.

(c) **Sentences Counted and Excluded**

Sentences for all felony offenses are counted. Sentences for misdemeanor and petty offenses are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

- Careless or reckless driving
- Contempt of court
- Disorderly conduct or disturbing the peace
- Driving without a license or with a revoked or suspended license
- False information to a police officer
- Gambling
- Hindering or failure to obey a police officer
- Insufficient funds check
- Leaving the scene of an accident
- Non-support
- Prostitution
- Resisting arrest
- Trespassing.

(2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:

- Fish and game violations
- Hitchhiking
- Juvenile status offenses and truancy
- Local ordinance violations (except those violations that are also violations under state criminal law)
- Loitering
Minor traffic infractions (e.g., speeding)
Public intoxication
Vagrancy.

(d) **Offenses Committed Prior to Age Eighteen**

(1) If the defendant was convicted as an adult and received a sentence of imprisonment exceeding one year and one month, add 3 points under §4A1.1(a) for each such sentence.

(2) In any other case,

(A) add 2 points under §4A1.1(b) for each adult or juvenile sentence to confinement of at least sixty days if the defendant was released from such confinement within five years of his commencement of the instant offense;

(B) add 1 point under §4A1.1(c) for each adult or juvenile sentence imposed within five years of the defendant’s commencement of the instant offense not covered in (A).

(e) **Applicable Time Period**

(1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant’s commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

(2) Any other prior sentence that was imposed within ten years of the defendant’s commencement of the instant offense is counted.

(3) Any prior sentence not within the time periods specified above is not counted.

(4) The applicable time period for certain sentences resulting from offenses committed prior to age eighteen is governed by §4A1.2(d)(2).

(f) **Diversionary Dispositions**

Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding is counted as a sentence under §4A1.1(c) even if a conviction is
not formally entered, except that diversion from juvenile court is not counted.

(g) **Military Sentences**

Sentences resulting from military offenses are counted if imposed by a general or special court-martial. Sentences imposed by a summary court-martial or Article 15 proceeding are not counted.

(h) **Foreign Sentences**

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(i) **Tribal Court Sentences**

Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(j) **Expunged Convictions**

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(k) **Revocations of Probation, Parole, Mandatory Release, or Supervised Release**

(1) In the case of a prior revocation of probation, parole, supervised release, special parole, or mandatory release, add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for §4A1.1(a), (b), or (c), as applicable.

(2) Revocation of probation, parole, supervised release, special parole, or mandatory release may affect the time period under which certain sentences are counted as provided in §4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (see §4A1.2(e)(1)); (B) in the case of any other confinement sentence for an offense committed prior to the defendant’s eighteenth birthday, the date of the defendant’s last release from confinement on such sentence (see §4A1.2(d)(2)(A)); and (C) in any other case, the date of the original sentence (see §4A1.2(d)(2)(B) and (e)(2)).
Sentences upon revocation of probation, parole, supervised release, special parole, or mandatory release are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category).

(l) SENTENCES ON APPEAL

Prior sentences under appeal are counted except as expressly provided below. In the case of a prior sentence, the execution of which has been stayed pending appeal, §4A1.1(a), (b), (c), (d), and (e) shall apply as if the execution of such sentence had not been stayed.

(m) EFFECT OF A VIOLATION WARRANT

For the purposes of §4A1.1(d), a defendant who commits the instant offense while a violation warrant from a prior sentence is outstanding (e.g., a probation, parole, or supervised release violation warrant) shall be deemed to be under a criminal justice sentence if that sentence is otherwise countable, even if that sentence would have expired absent such warrant.

(n) FAILURE TO REPORT FOR SERVICE OF SENTENCE OF IMPRISONMENT

For the purposes of §4A1.1(d), failure to report for service of a sentence of imprisonment shall be treated as an escape from such sentence.

(o) FELONY OFFENSE

For the purposes of §4A1.2(c), a “felony offense” means any federal, state, or local offense punishable by death or a term of imprisonment exceeding one year, regardless of the actual sentence imposed.

(p) CRIME OF VIOLENCE DEFINED

For the purposes of §4A1.1(e), the definition of “crime of violence” is that set forth in §4B1.2(a).

Commentary

Application Notes:

1. **Prior Sentence.**—“Prior sentence” means a sentence imposed prior to sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. See §4A1.2(a). A sentence imposed after the defendant’s commencement of the instant offense, but prior to sentencing on the instant offense, is a prior sentence if it was for conduct other than conduct that was part of the instant offense. Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of §1B1.3 (Relevant Conduct).

Under §4A1.2(a)(4), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.1(c) if a sentence resulting from such conviction
otherwise would have been counted. In the case of an offense set forth in §4A1.2(c)(1) (which lists certain misdemeanor and petty offenses), a conviction for which the defendant has not yet been sentenced is treated as if it were a prior sentence under §4A1.2(a)(4) only where the offense is similar to the instant offense (because sentences for other offenses set forth in §4A1.2(c)(1) are counted only if they are of a specified type and length).

2. **Sentence of Imprisonment.**—To qualify as a sentence of imprisonment, the defendant must have actually served a period of imprisonment on such sentence (or, if the defendant escaped, would have served time). See §4A1.2(a)(3) and (b)(2). For the purposes of applying §4A1.1(a), (b), or (c), the length of a sentence of imprisonment is the stated maximum (e.g., in the case of a determinate sentence of five years, the stated maximum is five years; in the case of an indeterminate sentence of one to five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed five years, the stated maximum is five years; in the case of an indeterminate sentence for a term not to exceed the defendant’s twenty-first birthday, the stated maximum is the amount of time in pre-trial detention plus the amount of time between the date of sentence and the defendant’s twenty-first birthday). That is, criminal history points are based on the sentence pronounced, not the length of time actually served. See §4A1.2(b)(1) and (2). A sentence of probation is to be treated as a sentence under §4A1.1(c) unless a condition of probation requiring imprisonment of at least sixty days was imposed.

3. **Application of “Single Sentence” Rule (Subsection (a)(2)).**—

   (A) **Predicate Offenses.**—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted “separately” from each other (see §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

   For example, a defendant’s criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

   Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant’s commencement of the instant offense. See §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.

   (B) **Upward Departure Provision.**—Treating multiple prior sentences as a single sentence may result in a criminal history score that underrepresents the seriousness of the defendant’s criminal history and the danger that the defendant presents to the public. In such a case, an upward departure may be warranted. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and...
the resulting sentences were treated as a single sentence because either the sentences resulted from offenses contained in the same charging instrument or the defendant was sentenced for these offenses on the same day, the assignment of a single set of points may not adequately reflect the seriousness of the defendant’s criminal history or the frequency with which the defendant has committed crimes.

4. **Sentences Imposed in the Alternative.**—A sentence which specifies a fine or other non-incarcerative disposition as an alternative to a term of imprisonment (e.g., $1,000 fine or ninety days’ imprisonment) is treated as a non-imprisonment sentence.

5. **Sentences for Driving While Intoxicated or Under the Influence.**—Convictions for driving while intoxicated or under the influence (and similar offenses by whatever name they are known) are always counted, without regard to how the offense is classified. Paragraphs (1) and (2) of §4A1.2(c) do not apply.

6. **Reversed, Vacated, or Invalidated Convictions.**—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category).

7. **Offenses Committed Prior to Age Eighteen.**—Section 4A1.2(d) covers offenses committed prior to age eighteen. Attempting to count every juvenile adjudication would have the potential for creating large disparities due to the differential availability of records. Therefore, for offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment exceeding one year and one month, or resulted in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant’s commencement of the instant offense are counted. To avoid disparities from jurisdiction to jurisdiction in the age at which a defendant is considered a “juvenile,” this provision applies to all offenses committed prior to age eighteen.

8. **Applicable Time Period.**—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term “commencement of the instant offense” includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

9. **Diversionary Dispositions.**—Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.

10. **Convictions Set Aside or Defendant Pardoned.**—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. §4A1.2(j).
11. **Revocations to be Considered.**—Section 4A1.2(k) covers revocations of probation and other conditional sentences where the original term of imprisonment imposed, if any, did not exceed one year and one month. Rather than count the original sentence and the resentence after revocation as separate sentences, the sentence given upon revocation should be added to the original sentence of imprisonment, if any, and the total should be counted as if it were one sentence. By this approach, no more than three points will be assessed for a single conviction, even if probation or conditional release was subsequently revoked. If the sentence originally imposed, the sentence imposed upon revocation, or the total of both sentences exceeded one year and one month, the maximum three points would be assigned. If, however, at the time of revocation another sentence was imposed for a new criminal conviction, that conviction would be computed separately from the sentence imposed for the revocation.

Where a revocation applies to multiple sentences, and such sentences are counted separately under §4A1.2(a)(2), add the term of imprisonment imposed upon revocation to the sentence that will result in the greatest increase in criminal history points. **Example:** A defendant was serving two probationary sentences, each counted separately under §4A1.2(a)(2); probation was revoked on both sentences as a result of the same violation conduct; and the defendant was sentenced to a total of 45 days of imprisonment. If one sentence had been a “straight” probationary sentence and the other had been a probationary sentence that had required service of 15 days of imprisonment, the revocation term of imprisonment (45 days) would be added to the probationary sentence that had the 15-day term of imprisonment. This would result in a total of 2 criminal history points under §4A1.1(b) (for the combined 60-day term of imprisonment) and 1 criminal history point under §4A1.1(c) (for the other probationary sentence).

**4211. Application of Subsection (c).**—

(A) **In General.**—In determining whether an unlisted offense is similar to an offense listed in subsection (c)(1) or (c)(2), the court should use a common sense approach that includes consideration of relevant factors such as (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct.

(B) **Local Ordinance Violations.**—A number of local jurisdictions have enacted ordinances covering certain offenses (e.g., larceny and assault misdemeanors) that are also violations of state criminal law. This enables a local court (e.g., a municipal court) to exercise jurisdiction over such offenses. Such offenses are excluded from the definition of local ordinance violations in §4A1.2(c)(2) and, therefore, sentences for such offenses are to be treated as if the defendant had been convicted under state law.

(C) **Insufficient Funds Check.**—“Insufficient funds check,” as used in §4A1.2(c)(1), does not include any conviction establishing that the defendant used a false name or nonexistent account.

**Background:** Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.

* * *
§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

Commentary

The total criminal history points from §4A1.1 determine the criminal history category (I–VI) in the Sentencing Table in Chapter Five, Part A. The definitions and instructions in §4A1.2 govern the computation of the criminal history points. Therefore, §§4A1.1 and 4A1.2 must be read together. The following notes highlight the interaction of §§4A1.1 and 4A1.2.

Application Notes:

1. §4A1.1(a). Three points are added for each prior sentence of imprisonment exceeding one year and one month. There is no limit to the number of points that may be counted under this subsection. The term “prior sentence” is defined at §4A1.2(a). The term “sentence of imprisonment” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than fifteen years prior to the defendant’s commencement of the instant offense is not counted unless the defendant’s incarceration extended into this fifteen-year period. See §4A1.2(e).

A sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted under this subsection only if it resulted from an adult conviction. See §4A1.2(d).

A sentence for a foreign conviction, a conviction that has been expunged, or an invalid conviction is not counted. See §4A1.2(h) and (j) and the Commentary to §4A1.2.
2. §4A1.1(b). Two points are added for each prior sentence of imprisonment of at least sixty days not counted in §4A1.1(a). There is no limit to the number of points that may be counted under this subsection. The term “prior sentence” is defined at §4A1.2(a). The term “sentence of imprisonment” is defined at §4A1.2(b). Where a prior sentence of imprisonment resulted from a revocation of probation, parole, or a similar form of release, see §4A1.2(k).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant’s eighteenth birthday is counted only if confinement resulting from such sentence extended into the five-year period preceding the defendant’s commencement of the instant offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A sentence for a foreign conviction or a tribal court conviction, an expunged conviction, or an invalid conviction is not counted. See §4A1.2(h), (i), (j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court-martial. See §4A1.2(g).

* * *

Issues for Comment:

1. The Commission invites comment on whether the Commission should consider changing how the guidelines currently account for revocations of probation, parole, supervised release, special parole, or mandatory release for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History). Should the Commission consider amending §4A1.2(k) and, if so, how? For example, should revocation sentences not be counted in determining the criminal history score, as provided in the proposed amendment? Should the Commission provide instead a different approach for counting revocation sentences, such as counting the original sentence and the revocation sentences as separate sentences instead of aggregating them? If the Commission were to provide a different approach for counting revocation sentences, what should that different approach be?

2. The proposed amendment would amend §4A1.2(k) to provide that revocations of probation, parole, supervised release, special parole, or mandatory release are not to be counted for purposes of calculating criminal history points, but may be considered under §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)). The policy statement at §4A1.3 provides upward departures for cases in which reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history.

The Commission seeks comment on whether revocation sentences, if not counted for purposes of calculating criminal history points, may be considered for a departure
under §4A1.3. Should the Commission provide specific guidance for determining whether an upward departure based on a revocation sentence may be warranted? If so, what specific guidance should the Commission provide?

3. The Commission recently promulgated an amendment to the illegal reentry guideline at §2L1.2 (Unlawfully Entering or Remaining in the United States) that, among other things, revised the specific offense characteristics to account for prior convictions primarily through a sentence-imposed approach rather than through type of offense approach (i.e., “categorical approach”). See USSG App. C, amendment 802 (effective November 1, 2016). The amendment retained in the Commentary to §2L1.2 a definition of “sentence imposed” that includes as part of the length of the sentence “any term of imprisonment given upon revocation of probation, parole, or supervised release.” USSG §2L1.2, comment. (n.2).

If the Commission were to promulgate the proposed amendment changing how the guidelines account for revocation sentences for purposes of determining criminal history points, should the Commission revise the definition of “sentence imposed” at §2L1.2 and, if so, how? How, if at all, should the Commission revise the “sentence imposed” definition to address any term of imprisonment given upon a revocation sentence? Should the Commission provide that revocation sentences should not be considered in determining the length of the “sentence imposed” for purposes of applying the enhancements at §2L1.2?

(B) Departure Based on Substantial Difference Between Time-Served and Sentence Imposed

§4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement)

(a) Upward Departures.—

(1) Standard for Upward Departure.—If reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

(2) Types of Information Forming the Basis for Upward Departure.—The information described in subsection (a) may include information concerning the following:

(A) Prior sentence(s) not used in computing the criminal history category (e.g., sentences for foreign and tribal offenses).

(B) Prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions.
(C) Prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order.

(D) Whether the defendant was pending trial or sentencing on another charge at the time of the instant offense.

(E) Prior similar adult criminal conduct not resulting in a criminal conviction.

(3) PROHIBITION.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.

(4) DETERMINATION OF EXTENT OF UPWARD DEPARTURE.—

(A) IN GENERAL.—Except as provided in subdivision (B), the court shall determine the extent of a departure under this subsection by using, as a reference, the criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles that of the defendant’s.

(B) UPWARD DEPARTURES FROM CATEGORY VI.—In a case in which the court determines that the extent and nature of the defendant’s criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range appropriate to the case.

(b) DOWNWARD DEPARTURES.—

(1) STANDARD FOR DOWNWARD DEPARTURE.—If reliable information indicates that the defendant’s criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) PROHIBITIONS.—

(A) CRIMINAL HISTORY CATEGORY I.—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) ARMED CAREER CRIMINAL AND REPEAT AND DANGEROUS SEX OFFENDER.—A downward departure under this subsection is
prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) **LIMITATIONS.**—

(A) **LIMITATION ON EXTENT OF DOWNWARD DEPARTURE FOR CAREER OFFENDER.**—The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) **LIMITATION ON APPLICABILITY OF §5C1.2 IN EVENT OF DOWNWARD DEPARTURE TO CATEGORY I.**—A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

(c) **WRITTEN SPECIFICATION OF BASIS FOR DEPARTURE.**—In departing from the otherwise applicable criminal history category under this policy statement, the court shall specify in writing the following:

(1) In the case of an upward departure, the specific reasons why the applicable criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

(2) In the case of a downward departure, the specific reasons why the applicable criminal history category substantially over-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.

**Commentary**

**Application Notes:**

1. **Definitions.**—For purposes of this policy statement, the terms “depart”, “departure”, “downward departure”, and “upward departure” have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. **Upward Departures.**—

   (A) **Examples.**—An upward departure from the defendant’s criminal history category may be warranted based on any of the following circumstances:

   (i) A previous foreign sentence for a serious offense.
(ii) Receipt of a prior consolidated sentence of ten years for a series of serious assaults.

(iii) A similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding.

(iv) Commission of the instant offense while on bail or pretrial release for another serious offense.

(B) **Upward Departures from Criminal History Category VI.**—In the case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant’s criminal history, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant’s criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses.

3. **Downward Departures.**—

(A) **Examples.**—A downward departure from the defendant’s criminal history category may be warranted if, for example, based on any of the following circumstances:

(i) The defendant had two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period.

(ii) The period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score.

(B) **Downward Departures from Criminal History Category I.**—A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited under subsection (b)(2)(B)(A), due to the fact that the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism.

**Background:** This policy statement recognizes that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur. For example, a defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct. Yet, the first defendant’s criminal history clearly may be more serious. This may be particularly true in the case of younger defendants (e.g., defendants in their early twenties or younger) who are more likely to have received repeated lenient treatment, yet who may actually pose a greater risk of serious recidivism than older defendants. This policy statement authorizes the consideration of a departure from the guidelines in the limited circumstances where reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant’s criminal history or likelihood of recidivism, and provides guidance for the consideration of such departures.

* * *
Issue for Comment:

1. Part B of the proposed amendment would amend the Commentary to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) to provide that a downward departure from the defendant’s criminal history may be warranted in a case in which the period of imprisonment actually served by the defendant was substantially less than the length of the sentence imposed for a conviction counted in the criminal history score. Should the Commission exclude the consideration of such a downward departure in cases in which the time actually served by the defendant was substantially less than the length of the sentence imposed due to reasons unrelated to the facts and circumstances of the defendant’s case, e.g., in order to minimize overcrowding or due to state budget concerns?
PROPOSED AMENDMENT:  ACCEPTANCE OF RESPONSIBILITY

Synopsis of Proposed Amendment: In August 2016, the Commission indicated that one of its priorities would be the consideration of miscellaneous guideline application issues, “including possible consideration of whether a defendant’s denial of relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1.” See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016).

Section 3E1.1 (Acceptance of Responsibility) provides for a 2-level reduction for a defendant who clearly demonstrates acceptance of responsibility. Application Note 1(A) of §3E1.1 provides as one of the appropriate considerations in determining whether a defendant “clearly demonstrate[d] acceptance of responsibility” the following:

truthfully admitting the conduct comprising the offense(s) of conviction, and
truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.

In addition, Application Note 3 provides further guidance on evidence that might demonstrate acceptance of responsibility, as follows:

Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

The Commission has heard concerns that the Commentary to §3E1.1 (particularly the provisions cited above) encourages courts to deny a reduction in sentence when a defendant pleads guilty and accepts responsibility for the offense of conviction, but unsuccessfully challenges the presentence report’s assessments of relevant conduct. These commenters suggest this has a chilling effect because defendants are concerned such objections may jeopardize their eligibility for a reduction for acceptance of responsibility.

The proposed amendment amends the Commentary to §3E1.1 to revise how the defendant’s challenge of relevant conduct should be considered in determining whether the defendant has accepted responsibility for purposes of the guideline. Specifically, it would amend
Application Note 1(A) to delete the sentence that states “a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility.” The proposed amendment would instead provide that a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under §3E1.1(a).

An issue for comment is also provided.

Proposed Amendment:

§3E1.1. Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

Commentary

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

   (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility. In addition, a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under subsection (a);

   (B) voluntary termination or withdrawal from criminal conduct or associations;

   (C) voluntary payment of restitution prior to adjudication of guilt;

   (D) voluntary surrender to authorities promptly after commission of the offense;
(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(H) the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant’s acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on
interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

**Background:** The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

Section 401(g) of Public Law 108–21 directly amended subsection (b), Application Note 6 (including adding the first sentence of the second paragraph of that application note), and the Background Commentary, effective April 30, 2003.

*   *   *

**Issue for Comment:**

1. The Commission seeks comment on whether the Commission should amend the Commentary to §3E1.1 (Acceptance of Responsibility) to change or clarify how a defendant’s challenge to relevant conduct should be considered in determining whether a defendant has accepted responsibility for purposes of §3E1.1? If so, what changes should the Commission make to §3E1.1?

For example, the proposed amendment would provide that a defendant who makes a non-frivolous challenge to relevant conduct is not precluded from consideration for a reduction under §3E1.1(a). What additional guidance, if any, should the Commission provide on what constitutes “a non-frivolous challenge to relevant conduct”? Should such challenges include informal challenges to relevant conduct during the sentencing process, whether or not the issues challenged are determinative to the applicable guideline range? Should the Commission broaden the proposed provision to include other sentencing considerations, such as departures or variances? Should the Commission instead remove from §3E1.1 all references to relevant conduct for
which the defendant is accountable under §1B1.3, and reference only the elements of the offense of conviction?
PROPOSED AMENDMENT: MISCELLANEOUS

Synopsis of Proposed Amendment: This proposed amendment responds to recently enacted legislation and miscellaneous guideline issues.

The proposed amendment contains four parts (Parts A through D). The Commission is considering whether to promulgate any or all of these parts, as they are not necessarily mutually exclusive. They are as follows—

**Part A** responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016), by amending §2B5.3 (Criminal Infringement of Copyright or Trademark).

**Part B** responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act, Pub. L. 114–119 (Feb. 8, 2016), by amending §2A3.5 (Failure to Register as a Sex Offender), §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender), and Appendix A (Statutory Index). Issues for comment are also included.


**Part D** amends §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) to clarify how the use of a computer enhancement at subsection (b)(3) interacts with its correlating commentary.
(A) **Transnational Drug Trafficking Act of 2015**

_Synopsis of Proposed Amendment:_ Part A of the proposed amendment responds to the Transnational Drug Trafficking Act of 2015, Pub. L. 114–154 (May 16, 2016). The primary purpose of the Act is to enable the Department of Justice to target extraterritorial drug trafficking activity. Among other things, the Act clarified the _mens rea_ requirement for offenses related to trafficking in counterfeit drugs, without changing the statutory penalties associated with such offenses. The Act amended 18 U.S.C. § 2230 (Trafficking in Counterfeit Goods or Services), which prohibits trafficking in a range of goods and services, including counterfeit drugs. The amended statute is currently referenced in Appendix A (Statutory Index) of the _Guidelines Manual_ to §2B5.3 (Criminal Infringement of Copyright or Trademark).

In particular, the Act made changes relating to counterfeit drugs. First, the Act amended the penalty provision at section 2320, replacing the term “counterfeit drug” with the phrase “drug that uses a counterfeit mark on or in connection with the drug.” Second, the Act revised section 2320(f)(6) to define only the term “drug” instead of “counterfeit drug.” The amended provision defines “drug” as “a drug, as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).” The Act did not amend the definition of “counterfeit mark” contained in section 2230(f)(1), which provides that—

the term “counterfeit mark” means—

(A) a spurious mark—

(i) that is used in connection with trafficking in any goods, services, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature;

(ii) that is identical with, or substantially indistinguishable from, a mark registered on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered;

(iii) that is applied to or used in connection with the goods or services for which the mark is registered with the United States Patent and Trademark Office, or is applied to or consists of a label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature that is designed, marketed, or otherwise intended to be used on or in connection with the goods or services for which the mark is registered in the United States Patent and Trademark Office; and

(iv) the use of which is likely to cause confusion, to cause mistake, or to deceive; or

(B) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of the Lanham Act are made available by reason of section 220506 of title 36 . . . .

Part A of the proposed amendment amends §2B5.3(b)(5) to replace the term “counterfeit drug” with “drug that uses a counterfeit mark on or in connection with the drug.” The proposed amendment would also amend the Commentary to §2B5.3 to delete the
“counterfeit drug” definition and provide that “drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. § 2320(f).

Proposed Amendment:

§2B5.3. Criminal Infringement of Copyright or Trademark

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the infringement amount (A) exceeded $2,500 but did not exceed $6,500, increase by 1 level; or (B) exceeded $6,500, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) If the offense involved the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution, increase by 2 levels.

(3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(4) If the offense was not committed for commercial advantage or private financial gain, decrease by 2 levels, but the resulting offense level shall be not less than level 8.

(5) If the offense involved a counterfeit drug that uses a counterfeit mark on or in connection with the drug, increase by 2 levels.

(6) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(7) If the offense involved a counterfeit military good or service the use, malfunction, or failure of which is likely to cause (A) the disclosure of classified information; (B) impairment of combat operations; or (C) other significant harm to (i) a combat operation, (ii) a member of the Armed Forces, or (iii) national security, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.
Commentary


Application Notes:

1. Definitions.—For purposes of this guideline:

   * * *

   "Counterfeit drug" has the meaning given that term in 18 U.S.C. § 2320(f)(6).

   “Counterfeit military good or service” has the meaning given that term in 18 U.S.C. § 2320(f)(4).

   “Drug” and “counterfeit mark” have the meaning given those terms in 18 U.S.C. § 2320(f).

   * * *

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

   * * *

   Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

   * * *

   Subsection (b)(5) implements the directive to the Commission in section 717 of Public Law 112–144.

   * * *
(B) International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders

Synopsis of Proposed Amendment: Part B of the proposed amendment responds to the International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act (“International Megan’s Law”), Pub. L. 114–119 (Feb. 8, 2016). The Act added a new notification requirement to 42 U.S.C. § 16914 (Information required in [sex offender] registration). Section 16914 states that sex offenders who are required to register under the Sex Offender Registration and Notification Act (SORNA) must provide certain information for inclusion in the sex offender registry. Those provisions include the offender’s name, Social Security number, address of all residences, name and address where the offender is an employee, the name and address where the offender is a student, license plate number and description of any vehicle. The International Megan’s Law added as an additional requirement that the sex offender must provide “information relating to intended travel of the sex offender outside of the United States, including any anticipated dates and places of departure, arrival or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.”

The International Megan’s Law also added a new criminal offense at 18 U.S.C. § 2250(b) (Failure to register). The new subsection (b) provides that whoever is required to register under SORNA who knowingly fails to provide the above described information required by SORNA relating to intended travel in foreign commerce and who engages or attempts to engage in the intended travel, is subject to a 10 year statutory maximum penalty. Section 2250 offenses are referenced in Appendix A (Statutory Index) to §2A3.5 (Failure to Register as a Sex Offender).

Part B of the proposed amendment amends Appendix A (Statutory Index) so the new offenses at 18 U.S.C. § 2250(b) are referenced to §2A3.5. The proposed amendment also brackets the possibility of adding a new application note to the Commentary to §2A3.5 providing that for purposes of §2A3.5(b), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).

Finally, Part B makes clerical changes to §2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender) to reflect the redesignation of 18 U.S.C.§ 2250(c) by the International Megan’s Law.

Proposed Amendment:

§2A3.5. Failure to Register as a Sex Offender

(a) Base Offense Level (Apply the greatest):

(1) 16, if the defendant was required to register as a Tier III offender;
(2) 14, if the defendant was required to register as a Tier II offender; or
(3) 12, if the defendant was required to register as a Tier I offender.

(b) Specific Offense Characteristics

(1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

(A) a sex offense against someone other than a minor, increase by 6 levels;

(B) a felony offense against a minor not otherwise covered by subdivision (C), increase by 6 levels; or

(C) a sex offense against a minor, increase by 8 levels.

(2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by 3 levels.

Commentary


Application Notes:

1. Definitions.—For purposes of this guideline:

“Minor” means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

“Sex offense” has the meaning given that term in 42 U.S.C. § 16911(5).

“Tier I offender”, “Tier II offender”, and “Tier III offender” have the meaning given the terms “tier I sex offender”, “tier II sex offender”, and “tier III sex offender”, respectively, in 42 U.S.C. § 16911.

[2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), a defendant shall be deemed to be in a “failure to register status” during the period in which the defendant engaged in conduct described in 18 U.S.C. § 2250(a) or (b).]

23. Application of Subsection (b)(2).—
(A) **In General.**—In order for subsection (b)(2) to apply, the defendant’s voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.

(B) **Interaction with Subsection (b)(1).**—Do not apply subsection (b)(2) if subsection (b)(1) also applies.

* * *

§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender

If the defendant was convicted under—

(a) 18 U.S.C. § 2250(e)(d), the guideline sentence is the minimum term of imprisonment required by statute; or

(b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

**Commentary**

**Statutory Provisions:** 18 U.S.C. §§ 2250(e)(d), 2260A.

**Application Notes:**

1. **In General.**—Section 2250(e)(d) of title 18, United States Code, provides a mandatory minimum term of five years’ imprisonment and a statutory maximum term of 30 years’ imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a) or (b). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.

2. **Inapplicability of Chapters Three and Four.**—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).

3. **Inapplicability of Chapter Two Enhancement.**—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(e)(d) or § 2260A.

4. **Upward Departure.**—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(e)(d) is an upward departure from the guideline sentence. A departure may be warranted, for example, in
a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.

* * *

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 2250(a)(b) 2A3.5
18 U.S.C. § 2250(c)(d) 2A3.6

* * *
Frank R. Lautenberg Chemical Safety for the 21st Century Act

Synopsis of Proposed Amendment: Part C of the proposed amendment responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. 114–182 (June 22, 2016). The Act, among other things, amended section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615) to add a new subsection that provides that any person who knowingly and willfully violates certain provisions of the Toxic Substances Control Act and who knows at the time of the violation that the violation places an individual in imminent danger of death or bodily injury shall be subject to a fine up to $250,000, imprisonment of up to 15 years, or both.

Part C of the proposed amendment amends Appendix A (Statutory Index) so that the new provision, 15 U.S.C. § 2615(b)(2) is referenced to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants), while maintaining the reference to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce) for 15 U.S.C. § 2615(b)(1).

Proposed Amendment:

APPENDIX A

STATUTORY INDEX

* * *

15 U.S.C. § 2615(b)(1) 2Q1.2
15 U.S.C. § 2615(b)(2) 2Q1.1
15 U.S.C. § 6821 2B1.1 * * *
(D) Use of a Computer Enhancement in §2G1.3

Synopsis of Proposed Amendment: Part D of the proposed amendment clarifies how the use of a computer enhancement at §2G1.3(b)(3) interacts with its corresponding commentary at Application Note 4. Section 2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor) applies to several offenses involving the transportation of a minor for illegal sexual activity. Subsection (b)(3) of §2G1.3 provides a 2-level enhancement if—

the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor.

Application Note 4 to §2G1.3 sets forth guidance on this enhancement providing as follows:

Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

An application issue has arisen as to whether Application Note 4, by failing to distinguish between the two prongs of subsection (b)(3), prohibits application of the enhancement where a computer was used to solicit a third party to engage in prohibited sexual conduct with a minor.

Most courts to have addressed this issue have concluded that Application Note 4 is inconsistent with the language of §2G1.3(b)(3), and have permitted the application of the enhancement for use of a computer in third party solicitation cases. See, e.g., United States v. Cramer, 777 F.3d 597, 606 (2d Cir. 2015) (“We conclude that Application Note 4 is plainly inconsistent with subsection (b)(3)(B). . . . The plain language of subsection (b)(3)(B) is clear, and there is no indication that the drafters of the Guidelines intended to limit this plain language through Application Note 4.”); United States v. McMillian, 777 F.3d 444, 449–50 (7th Cir. 2015) (“[The defendant] points out that Application Note 4 states that ‘Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.’ . . . But the note is wrong. The guideline section provides a 2-level enhancement whenever the defendant uses a computer to ‘entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor . . . . When an application note clashes with the guideline, the guideline prevails.”); United States v. Hill, 783 F.3d 842, 846 (11th Cir. 2015) (“Because the application note is inconsistent with the plain language of U.S.S.G. § 2G1.3(b)(3)(B), the plain language of the guideline controls.”); United States v. Pringler, 765 F.3d 455 (5th Cir.
2014) (“[W]e hold that the commentary in application note 4 is ‘inconsistent with’ Guideline § 2G1.3(b)(3)(B), and we therefore follow the plain language of the Guideline alone.”).

Part D of the proposed amendment would amend the Commentary to §2G1.3 to clarify that the guidance contained in Application Note 4 refers only to subsection (b)(3)(A) and does not control the application of the enhancement for use of a computer in third party solicitation cases (as provided in subsection (b)(3)(B)).

Proposed Amendment:

2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor

(a) Base Offense Level:

(1) 34, if the defendant was convicted under 18 U.S.C. § 1591(b)(1);

(2) 30, if the defendant was convicted under 18 U.S.C. § 1591(b)(2);

(3) 28, if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or

(4) 24, otherwise.

(b) Specific Offense Characteristics

(1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(2) If (A) the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.

(3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.
(4) If (A) the offense involved the commission of a sex act or sexual contact; or (B) subsection (a)(3) or (a)(4) applies and the offense involved a commercial sex act, increase by 2 levels.

(5) If (A) subsection (a)(3) or (a)(4) applies; and (B) the offense involved a minor who had not attained the age of 12 years, increase by 8 levels.

c) Cross References

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

(2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the “consent” of the minor.

d) Special Instruction

(1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

 Commentary

* * *

Application Notes:

* * *
4. Application of Subsection (b)(3)(A).—Subsection (b)(3)(A) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3)(A) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

* * *

13
PROPOSED AMENDMENT: MARIHUANA EQUIVALENCY

Synopsis of Proposed Amendment: This proposed amendment makes technical changes to §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to replace the term “marihuana equivalency” which is used in the Drug Equivalency Tables when determining penalties for controlled substances.

The Commentary to §2D1.1 sets forth a series of Drug Equivalency Tables. These tables provide a value termed “marihuana equivalency” for certain controlled substances that is used to determine the offense level for cases in which the controlled substance involved in the offense is not specifically listed in the Drug Quantity Tables, or where there is more than one controlled substance involved in the offense (whether or not listed in the Drug Quantity Table). See §2D1.1, comment. (n.8). The tables are separated by drug type and schedule.

In a case involving a controlled substance that is not specifically referenced in the Drug Quantity Table, the base offense level is determined by using the Drug Equivalency Tables to convert the quantity of the controlled substance involved in the offense to its marihuana equivalency, then finding the offense level in the Drug Quantity Table that corresponds to that quantity of marihuana. In a case involving more than one controlled substance, each of the drugs is converted into its marihuana equivalency, the converted quantities are added, and the aggregate quantity is used to find the offense level in the Drug Quantity Table.

The Commission received comment expressing concern that the term “marihuana equivalency” is misleading and results in confusion for individuals not fully versed in the guidelines. In particular, they suggested that the Commission should replace “marihuana equivalency” with another term.

The proposed amendment amends §2D1.1 to replace “marihuana equivalency” in the Drug Equivalency Tables for determining penalties for controlled substances. It replaces that term throughout the guideline with the term “converted drug weight.” It also changes the title of the “Drug Equivalency Tables” to “Drug Conversion Tables.” The proposed amendment is not intended as a substantive change in policy.

Finally, the proposed amendment makes certain clerical and conforming changes to reflect the changes to the Drug Equivalency Tables.

Proposed Amendment:

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the
offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant used violence, made a credible threat to use violence, or directed the use of violence, increase by **2** levels.

(3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.
(4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by 2 levels.

(6) If the defendant is convicted under 21 U.S.C. § 865, increase by 2 levels.

(7) If the defendant, or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by 2 levels.

(8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by 2 levels.

(9) If the defendant distributed an anabolic steroid to an athlete, increase by 2 levels.

(10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by 2 levels.

(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by 2 levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by 2 levels.

(13) (Apply the greatest):

   (A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

   (B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or
resides, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(C) If—

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.

(14) If (A) the offense involved the cultivation of marihuana on state or federal land or while trespassing on tribal or private land; and (B) the defendant receives an adjustment under §3B1.1 (Aggravating Role), increase by 2 levels.

(15) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;
(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood,

increase by 2 levels.

(16) If the defendant receives the 4-level (“minimal participant”) reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise,

decrease by 2 levels.

(17) If the defendant meets the criteria set forth in subdivisions (1)–(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in
respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual’s knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

<table>
<thead>
<tr>
<th>CONTROLLED SUBSTANCES AND QUANTITY*</th>
<th>BASE OFFENSE LEVEL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(1)</strong></td>
<td>Level 38</td>
</tr>
<tr>
<td>• 90 KG or more of Heroin;</td>
<td></td>
</tr>
<tr>
<td>• 450 KG or more of Cocaine;</td>
<td></td>
</tr>
<tr>
<td>• 25.2 KG or more of Cocaine Base;</td>
<td></td>
</tr>
<tr>
<td>• 90 KG or more of PCP, or 9 KG or more of PCP (actual);</td>
<td></td>
</tr>
<tr>
<td>• 45 KG or more of Methamphetamine, or</td>
<td></td>
</tr>
<tr>
<td>4.5 KG or more of Methamphetamine (actual), or</td>
<td></td>
</tr>
<tr>
<td>4.5 KG or more of “Ice”;</td>
<td></td>
</tr>
<tr>
<td>• 45 KG or more of Amphetamine, or</td>
<td></td>
</tr>
<tr>
<td>4.5 KG or more of Amphetamine (actual);</td>
<td></td>
</tr>
<tr>
<td>• 900 G or more of LSD;</td>
<td></td>
</tr>
<tr>
<td>• 36 KG or more of Fentanyl;</td>
<td></td>
</tr>
<tr>
<td>• 9 KG or more of a Fentanyl Analogue;</td>
<td></td>
</tr>
<tr>
<td>• 90,000 KG or more of Marihuana;</td>
<td></td>
</tr>
<tr>
<td>• 18,000 KG or more of Hashish;</td>
<td></td>
</tr>
<tr>
<td>• 1,800 KG or more of Hashish Oil;</td>
<td></td>
</tr>
<tr>
<td>• 90,000,000 units or more of Ketamine;</td>
<td></td>
</tr>
<tr>
<td>• 90,000,000 units or more of Schedule I or II Depressants;</td>
<td></td>
</tr>
<tr>
<td>• 5,625,000 units or more of Flunitrazepam;</td>
<td></td>
</tr>
<tr>
<td>• 90,000 KG or more of Converted Drug Weight.</td>
<td></td>
</tr>
</tbody>
</table>

| **(2)**                                                       | Level 36           |
| • At least 30 KG but less than 90 KG of Heroin;               |                    |
| • At least 150 KG but less than 450 KG of Cocaine;            |                    |
| • At least 8.4 KG but less than 25.2 KG of Cocaine Base;      |                    |
| • At least 30 KG but less than 90 KG of PCP, or               |                    |
|   at least 3 KG but less than 9 KG of PCP (actual);           |                    |
| • At least 15 KG but less than 45 KG of Methamphetamine, or   |                    |
|   at least 1.5 KG but less than 4.5 KG of Methamphetamine (actual), or |                |
|   at least 1.5 KG but less than 4.5 KG of “Ice”;             |                    |
| • At least 15 KG but less than 45 KG of Amphetamine, or       |                    |
|   at least 1.5 KG but less than 4.5 KG of Amphetamine (actual);|                |
| • At least 300 G but less than 900 G of LSD;                  |                    |
| • At least 12 KG but less than 36 KG of Fentanyl;             |                    |
| • At least 3 KG but less than 9 KG of a Fentanyl Analogue;    |                    |
| • At least 30,000 KG but less than 90,000 KG of Marihuana;    |                    |
- At least 6,000 KG but less than 18,000 KG of Hashish;
- At least 600 KG but less than 1,800 KG of Hashish Oil;
- At least 30,000,000 units but less than 90,000,000 units of Ketamine;
- At least 30,000,000 units but less than 90,000,000 units of Schedule I or II Depressants;
- At least 1,875,000 units but less than 5,625,000 units of Flunitrazepam;
- At least 30,000 KG but less than 90,000 KG of Converted Drug Weight.

(3) • At least 10 KG but less than 30 KG of Heroin;  
• At least 50 KG but less than 150 KG of Cocaine;  
• At least 2.8 KG but less than 8.4 KG of Cocaine Base;  
• At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);  
• At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of “Ice”;  
• At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);  
• At least 100 G but less than 300 G of LSD;  
• At least 4 KG but less than 12 KG of Fentanyl;  
• At least 1 KG but less than 3 KG of a Fentanyl Analogue;  
• At least 10,000 KG but less than 30,000 KG of Marihuana;  
• At least 2,000 KG but less than 6,000 KG of Hashish;  
• At least 200 KG but less than 600 KG of Hashish Oil;  
• At least 10,000,000 but less than 30,000,000 units of Ketamine;  
• At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;  
• At least 625,000 but less than 1,875,000 units of Flunitrazepam;  
• At least 10,000 KG but less than 30,000 KG of Converted Drug Weight.

(4) • At least 3 KG but less than 10 KG of Heroin;  
• At least 15 KG but less than 50 KG of Cocaine;  
• At least 840 G but less than 2.8 KG of Cocaine Base;  
• At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);  
• At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of “Ice”;  
• At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);  
• At least 30 G but less than 100 G of LSD;  
• At least 1.2 KG but less than 4 KG of Fentanyl;  
• At least 300 G but less than 1 KG of a Fentanyl Analogue;  
• At least 3,000 KG but less than 10,000 KG of Marihuana;  
• At least 600 KG but less than 2,000 KG of Hashish;  
• At least 60 KG but less than 200 KG of Hashish Oil;  
• At least 3,000,000 but less than 10,000,000 units of Ketamine;  
• At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;  
• At least 187,500 but less than 625,000 units of Flunitrazepam;  
• At least 3,000 KG but less than 10,000 KG of Converted Drug Weight.

(5) • At least 1 KG but less than 3 KG of Heroin;  
• At least 5 KG but less than 15 KG of Cocaine;  
• At least 280 G but less than 840 G of Cocaine Base;
At least 1 KG but less than 3 KG of PCP, or
at least 100 G but less than 300 G of PCP (actual);
At least 500 G but less than 1.5 KG of Methamphetamine, or
at least 50 G but less than 150 G of Methamphetamine (actual), or
at least 50 G but less than 150 G of “Ice”;
At least 500 G but less than 1.5 KG of Amphetamine, or
at least 50 G but less than 150 G of Amphetamine (actual);
At least 10 G but less than 30 G of LSD;
At least 400 G but less than 1.2 KG of Fentanyl;
At least 100 G but less than 300 G of a Fentanyl Analogue;
At least 1,000 KG but less than 3,000 KG of Marihuana;
At least 200 KG but less than 600 KG of Hashish;
At least 20 KG but less than 60 KG of Hashish Oil;
At least 200 KG but less than 600 KG of a Fentanyl Analogue;
At least 700 KG but less than 1,000 KG of Converted Drug Weight.

(6) At least 700 G but less than 1 KG of Heroin;
At least 3.5 KG but less than 5 KG of Cocaine;
At least 196 G but less than 280 G of Cocaine Base;
At least 700 G but less than 1 KG of PCP, or
at least 70 G but less than 100 G of PCP (actual);
At least 350 G but less than 500 G of Methamphetamine, or
at least 35 G but less than 50 G of Methamphetamine (actual), or
at least 35 G but less than 50 G of “Ice”;
At least 350 G but less than 500 G of Amphetamine, or
at least 35 G but less than 50 G of Amphetamine (actual);
At least 7 G but less than 10 G of LSD;
At least 280 G but less than 400 G of Fentanyl;
At least 70 G but less than 100 G of a Fentanyl Analogue;
At least 700 KG but less than 1,000 KG of Marihuana;
At least 14 KG but less than 20 KG of Hashish Oil;
At least 700,000 but less than 1,000,000 units of Ketamine;
At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
At least 43,750 but less than 62,500 units of Flunitrazepam;
At least 700 KG but less than 1,000 KG of Converted Drug Weight.

(7) At least 400 G but less than 700 G of Heroin;
At least 2 KG but less than 3.5 KG of Cocaine;
At least 112 G but less than 196 G of Cocaine Base;
At least 400 G but less than 700 G of PCP, or
at least 40 G but less than 70 G of PCP (actual);
At least 200 G but less than 350 G of Methamphetamine, or
at least 20 G but less than 35 G of Methamphetamine (actual), or
at least 20 G but less than 35 G of “Ice”;
At least 200 G but less than 350 G of Amphetamine, or
at least 20 G but less than 35 G of Amphetamine (actual);
At least 4 G but less than 7 G of LSD;
At least 160 G but less than 280 G of Fentanyl;
At least 40 G but less than 70 G of a Fentanyl Analogue;
At least 400 KG but less than 700 KG of Marihuana;
● At least 80 KG but less than 140 KG of Hashish;
● At least 8 KG but less than 14 KG of Hashish Oil;
● At least 400,000 but less than 700,000 units of Ketamine;
● At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
● At least 25,000 but less than 43,750 units of Flunitrazepam;
● At least 400 KG but less than 700 KG of Converted Drug Weight.

(8) ● At least 100 G but less than 400 G of Heroin;
● At least 500 G but less than 2 KG of Cocaine;
● At least 28 G but less than 112 G of Cocaine Base;
● At least 100 G but less than 400 G of PCP, or
  at least 10 G but less than 40 G of PCP (actual);
● At least 50 G but less than 200 G of Methamphetamine, or
  at least 5 G but less than 20 G of Methamphetamine (actual), or
  at least 5 G but less than 20 G of “Ice”;
● At least 50 G but less than 200 G of Amphetamine, or
  at least 5 G but less than 20 G of Amphetamine (actual);  
● At least 1 G but less than 4 G of LSD;
● At least 40 G but less than 160 G of Fentanyl;
● At least 10 G but less than 40 G of a Fentanyl Analogue;
● At least 100 KG but less than 400 KG of Marihuana;
● At least 20 KG but less than 80 KG of Hashish;
● At least 2 KG but less than 8 KG of Hashish Oil;
● At least 100,000 but less than 400,000 units of Ketamine;
● At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
● At least 6,250 but less than 25,000 units of Flunitrazepam;
● At least 100 KG but less than 400 KG of Converted Drug Weight.

(9) ● At least 80 G but less than 100 G of Heroin;
● At least 400 G but less than 500 G of Cocaine;
● At least 22.4 G but less than 28 G of Cocaine Base;
● At least 80 G but less than 100 G of PCP, or
  at least 8 G but less than 10 G of PCP (actual);
● At least 40 G but less than 50 G of Methamphetamine, or
  at least 4 G but less than 5 G of Methamphetamine (actual), or
  at least 4 G but less than 5 G of “Ice”;
● At least 40 G but less than 50 G of Amphetamine, or
  at least 4 G but less than 5 G of Amphetamine (actual);  
● At least 800 MG but less than 1 G of LSD;
● At least 32 G but less than 40 G of Fentanyl;
● At least 8 G but less than 10 G of a Fentanyl Analogue;
● At least 80 KG but less than 100 KG of Marihuana;
● At least 16 KG but less than 20 KG of Hashish;
● At least 1.6 KG but less than 2 KG of Hashish Oil;
● At least 80,000 but less than 100,000 units of Ketamine;
● At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
● At least 5,000 but less than 6,250 units of Flunitrazepam;
● At least 80 KG but less than 100 KG of Converted Drug Weight.

(10) ● At least 60 G but less than 80 G of Heroin;
● At least 300 G but less than 400 G of Cocaine;
● At least 16.8 G but less than 22.4 G of Cocaine Base;
● At least 60 G but less than 80 G of PCP, or
at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or
  at least 3 G but less than 4 G of Methamphetamine (actual), or
  at least 3 G but less than 4 G of “Ice”;
- At least 30 G but less than 40 G of Amphetamine, or
  at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- 60,000 units or more of Schedule III substances (except Ketamine);
- At least 3,750 but less than 5,000 units of Flunitrazepam;
- At least 60 KG but less than 80 KG of Converted Drug Weight.

(11)  At least 40 G but less than 60 G of Heroin;  
       Level 18
- At least 200 G but less than 300 G of Cocaine;
- At least 11.2 G but less than 16.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or
  at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or
  at least 2 G but less than 3 G of Methamphetamine (actual), or
  at least 2 G but less than 3 G of “Ice”;
- At least 20 G but less than 30 G of Amphetamine, or
  at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;
- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III substances (except Ketamine);
- At least 2,500 but less than 3,750 units of Flunitrazepam;
- At least 60 KG but less than 80 KG of Converted Drug Weight.

(12)  At least 20 G but less than 40 G of Heroin;  
       Level 16
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or
  at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or
  at least 1 G but less than 2 G of Methamphetamine (actual), or
  at least 1 G but less than 2 G of “Ice”;
- At least 10 G but less than 20 G of Amphetamine, or
  at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl;
• At least 2 G but less than 4 G of a Fentanyl Analogue;
• At least 20 KG but less than 40 KG of Marihuana;
• At least 5 KG but less than 8 KG of Hashish;
• At least 500 G but less than 800 G of Hashish Oil;
• At least 20,000 but less than 40,000 units of Ketamine;
• At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
• At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine);
• At least 1,250 but less than 2,500 units of Flunitrazepam;
• At least 20 KG but less than 40 KG of Converted Drug Weight.

(13) • At least 10 G but less than 20 G of Heroin;  
• At least 50 G but less than 100 G of Cocaine;  
• At least 2.8 G but less than 5.6 G of Cocaine Base;  
• At least 10 G but less than 20 G of PCP, or  
  at least 1 G but less than 2 G of PCP (actual);  
• At least 5 G but less than 10 G of Methamphetamine, or  
  at least 500 MG but less than 1 G of Methamphetamine (actual), or  
  at least 500 MG but less than 1 G of “Ice”;  
• At least 5 G but less than 10 G of Amphetamine, or  
  at least 500 MG but less than 1 G of Amphetamine (actual);  
• At least 100 MG but less than 200 MG of LSD;  
• At least 4 G but less than 8 G of Fentanyl;  
• At least 1 G but less than 2 G of a Fentanyl Analogue;  
• At least 10 KG but less than 20 KG of Marihuana;  
• At least 2 KG but less than 5 KG of Hashish;  
• At least 200 G but less than 500 G of Hashish Oil;  
• At least 10,000 but less than 20,000 units of Ketamine;  
• At least 10,000 but less than 20,000 units of Schedule I or II Depressants;  
• At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine);  
• At least 625 but less than 1,250 units of Flunitrazepam;  
• At least 20 KG but less than 40 KG of Converted Drug Weight.

(14) • Less than 10 G of Heroin;  
• Less than 50 G of Cocaine;  
• Less than 2.8 G of Cocaine Base;  
• Less than 10 G of PCP, or  
  less than 1 G of PCP (actual);  
• Less than 5 G of Methamphetamine, or  
  less than 500 MG of Methamphetamine (actual), or  
  less than 500 MG of “Ice”;  
• Less than 5 G of Amphetamine, or  
  less than 500 MG of Amphetamine (actual);  
• Less than 100 MG of LSD;  
• Less than 4 G of Fentanyl;  
• Less than 1 G of a Fentanyl Analogue;  
• At least 5 KG but less than 10 KG of Marihuana;  
• At least 1 KG but less than 2 KG of Hashish;  
• At least 100 G but less than 200 G of Hashish Oil;  
• At least 5,000 but less than 10,000 units of Ketamine;  
• At least 5,000 but less than 10,000 units of Schedule I or II Depressants;  
• At least 5,000 but less than 10,000 units of Schedule III substances (except
Ketamine):
- At least 312 but less than 625 units of Flunitrazepam;
- 80,000 units or more of Schedule IV substances (except Flunitrazepam);
- At least 5 KG but less than 10 KG of Converted Drug Weight.

(15) At least 2.5 KG but less than 5 KG of Marihuana; \textit{Level 10}
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine);
- At least 156 but less than 312 units of Flunitrazepam;
- At least 40,000 but less than 80,000 units of Schedule IV substances (except Flunitrazepam);
- At least 2.5 KG but less than 5 KG of Converted Drug Weight.

(16) At least 1 KG but less than 2.5 KG of Marihuana; \textit{Level 8}
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Ketamine;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine);
- Less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam);
- 160,000 units or more of Schedule V substances;
- At least 1 KG but less than 2.5 KG of Converted Drug Weight.

(17) Less than 1 KG of Marihuana; \textit{Level 6}
- Less than 200 G of Hashish;
- Less than 20 G of Hashish Oil;
- Less than 1,000 units of Ketamine;
- Less than 1,000 units of Schedule I or II Depressants;
- Less than 1,000 units of Schedule III substances (except Ketamine);
- Less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 160,000 units of Schedule V substances;
- Less than 1 KG of Converted Drug Weight.

*Notes to Drug Quantity Table:*

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.
(B) The terms “PCP (actual)”, “Amphetamine (actual)”, and “Methamphetamine (actual)” refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The terms “Hydrocodone (actual)” and “Oxycodone (actual)” refer to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) “Ice,” for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) “Cocaine base,” for the purposes of this guideline, means “crack.” “Crack” is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 grams of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one “unit” means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one “unit” means 0.5 milliliters. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (e.g., patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 milligrams of an anabolic steroid is one “unit”.

(G) In the case of LSD on a carrier medium (e.g., a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 milligrams of LSD for the purposes of the Drug Quantity Table.

(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the
tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(31)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (e.g., plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

The term “Converted Drug Weight,” for purposes of this guideline, refers to a nominal reference designation that is to be used as a conversion factor in the Drug Conversion Tables set forth in the Commentary below, to determine the offense level for controlled substances that are not specifically referenced in the Drug Quantity Table or when combining differing controlled substances.

Commentary

Statutory Provisions: 21 U.S.C. §§ 841(a), (b)(1)–(3), (7), (g), 860a, 865, 960(a), (b); 49 U.S.C. § 46317(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. “Mixture or Substance”.—“Mixture or substance” as used in this guideline has the same meaning as in 21 U.S.C. § 841, except as expressly provided. Mixture or substance does not include materials that must be separated from the controlled substance before the controlled substance can be used. Examples of such materials include the fiberglass in a cocaine/fiberglass bonded suitcase, beeswax in a cocaine/beeswax statue, and waste water from an illicit laboratory used to manufacture a controlled substance. If such material cannot readily be separated from the mixture or substance that appropriately is counted in the Drug Quantity Table, the court may use any reasonable method to approximate the weight of the mixture or substance to be counted.

An upward departure nonetheless may be warranted when the mixture or substance counted in the Drug Quantity Table is combined with other, non-countable material in an unusually sophisticated manner in order to avoid detection.

Similarly, in the case of marihuana having a moisture content that renders the marihuana unsuitable for consumption without drying (this might occur, for example, with a bale of rain-soaked marihuana or freshly harvested marihuana that had not been dried), an approximation of the weight of the marihuana without such excess moisture content is to be used.

2. “Plant”.—For purposes of the guidelines, a “plant” is an organism having leaves and a readily observable root formation (e.g., a marihuana cutting having roots, a rootball, or root hairs is a marihuana plant).

3. Classification of Controlled Substances.—Certain pharmaceutical preparations are classified as Schedule III, IV, or V controlled substances by the Drug Enforcement Administration under 21 C.F.R. § 1308.13–15 even though they contain a small amount of a Schedule I or II controlled substance. For example, Tylenol 3 is classified as a Schedule III controlled substance even though it contains a small amount of codeine, a Schedule II opiate. For the purposes of the guidelines, the classification of the controlled substance under 21 C.F.R. § 1308.13–15 is the appropriate classification.

4. Applicability to “Counterfeit” Substances.—The statute and guideline also apply to “counterfeit” substances, which are defined in 21 U.S.C. § 802 to mean controlled substances that are falsely labeled so as to appear to have been legitimately manufactured or distributed.
5. **Determining Drug Types and Drug Quantities.**—Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (e.g., sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance — actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing.

6. **Analogues and Controlled Substances Not Referenced in this Guideline.**—Any reference to a particular controlled substance in these guidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance. Any reference to cocaine includes ecgonine and coca leaves, except extracts of coca leaves from which cocaine and ecgonine have been removed. For purposes of this guideline “analogue” has the meaning given the term “controlled substance analogue” in 21 U.S.C. § 802(32). In determining the appropriate sentence, the court also may consider whether the same quantity of analogue produces a greater effect on the central nervous system than the controlled substance for which it is an analogue.

In the case of a controlled substance that is not specifically referenced in this guideline, determine the base offense level using the marihuana equivalency converted drug weight of the most closely related controlled substance referenced in this guideline. See Application Note 8. In determining the most closely related controlled substance, the court shall, to the extent practicable, consider the following:

(A) Whether the controlled substance not referenced in this guideline has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in this guideline has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.
Whether a lesser or greater quantity of the controlled substance not referenced in this guideline is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

7. **Multiple Transactions or Multiple Drug Types.**—Where there are multiple transactions or multiple drug types, the quantities of drugs are to be added. Tables for making the necessary conversions are provided below.

8. **Use of Drug Equivalency Conversion Tables.**—

(A) **Controlled Substances Not Referenced in Drug Quantity Table.**—The Commission has used the sentences provided in, and equivalences derived from, the statute (21 U.S.C. § 841(b)(1)), as the primary basis for the guideline sentences. The statute, however, provides direction only for the more common controlled substances, *i.e.*, heroin, cocaine, PCP, methamphetamine, fentanyl, LSD and marihuana. In the case of a controlled substance that is not specifically referenced in the Drug Quantity Table, determine the base offense level as follows:

(i) Use the Drug Equivalency Conversion Tables to convert the quantity find the converted drug weight of the controlled substance involved in the offense to its equivalent quantity of marihuana.

(ii) Find the equivalent quantity of marihuana corresponding converted drug weight in the Drug Quantity Table.

(iii) Use the offense level that corresponds to the equivalent quantity of marihuana converted drug weight determined above as the base offense level for the controlled substance involved in the offense.

*(See also Application Note 6.)* For example, in the Drug Equivalency Conversion Tables set forth in this Note, 1 gram of a substance containing oxymorphone, a Schedule I opiate, converts to an equivalent quantity of 5 kilograms of marihuana converted drug weight. In a case involving 100 grams of oxymorphone, the equivalent quantity of marihuana converted drug weight would be 500 kilograms, which corresponds to a base offense level of 26 in the Drug Quantity Table.

(B) **Combining Differing Controlled Substances.**—The Drug Equivalency Conversion Tables also provide a means for combining differing controlled substances to obtain a single offense level. In each case, convert each of the drugs to its marihuana equivalent converted drug weight, add the quantities, and look up the total in the Drug Quantity Table to obtain the combined offense level.

For certain types of controlled substances, the marihuana equivalencies converted drug weights assigned in the Drug Equivalency Conversion Tables are “capped” at specified amounts (*e.g.*, the combined equivalent converted weight of all Schedule V controlled substances shall not exceed 2.49 kilograms of marihuana converted drug weight). Where there are controlled substances from more than one schedule (*e.g.*, a quantity of a Schedule IV substance and a quantity of a Schedule V substance), determine the marihuana equivalency converted drug weight for each schedule separately (subject to the cap, if any, applicable to that schedule). Then add the marihuana equivalency converted drug weights to determine the combined marihuana equivalency converted drug weight (subject to the cap, if any, applicable to the combined amounts).
Note: Because of the statutory equivalences, the ratios in the Drug Equivalency Conversion Tables do not necessarily reflect dosages based on pharmacological equivalents.

(C) Examples for Combining Differing Controlled Substances.—

(i) The defendant is convicted of selling 70 grams of a substance containing PCP (Level 20) and 250 milligrams of a substance containing LSD (Level 16). The PCP converts to 70 kilograms of marihuana converted drug weight; the LSD converts to 25 kilograms of marihuana converted drug weight. The total is therefore equivalent converts to 95 kilograms of marihuana converted drug weight, for which the Drug Quantity Table provides an offense level of 22.

(ii) The defendant is convicted of selling 500 grams of marihuana (Level 6) and 10,000 units of diazepam (Level 6). The amount of marihuana converts to 500 grams of converted drug weight. The diazepam, a Schedule IV drug, is equivalent converts to 625 grams of marihuana converted drug weight. The total, 1.125 kilograms of marihuana converted drug weight, has an offense level of 8 in the Drug Quantity Table.

(iii) The defendant is convicted of selling 80 grams of cocaine (Level 14) and 2 grams of cocaine base (Level 12). The cocaine is equivalent converts to 16 kilograms of marihuana converted drug weight, and the cocaine base is equivalent converts to 7.142 kilograms of marihuana converted drug weight. The total is therefore equivalent converts to 23.142 kilograms of marihuana converted drug weight, which has an offense level of 16 in the Drug Quantity Table.

(iv) The defendant is convicted of selling 76,000 units of a Schedule III substance, 200,000 units of a Schedule IV substance, and 600,000 units of a Schedule V substance. The marihuana equivalency converted drug weight for the Schedule III substance is 76 kilograms of marihuana (below the cap of 79.99 kilograms of marihuana converted drug weight set forth as the maximum equivalent converted weight for Schedule III substances). The marihuana equivalency converted drug weight for the Schedule IV substance is subject to a cap of 9.99 kilograms of marihuana set forth as the maximum equivalent converted weight for Schedule IV substances (without the cap it would have been 12.5 kilograms). The marihuana equivalency converted drug weight for the Schedule V substance is subject to the cap of 2.49 kilograms of marihuana set forth as the maximum equivalent converted weight for Schedule V substances (without the cap it would have been 3.75 kilograms). The combined equivalent converted weight, determined by adding together the above amounts, is subject to the cap of 79.99 kilograms of marihuana converted drug weight set forth as the maximum combined equivalent converted weight for Schedule III, IV, and V substances. Without the cap, the combined equivalent converted weight would have been 88.48 (76 + 9.99 + 2.49) kilograms.

(D) Drug Equivalency Conversion Tables.—

<table>
<thead>
<tr>
<th>Schedule I or II Opiates*</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 gm of Heroin =</td>
<td>1 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Alpha-Methylfentanyl =</td>
<td>10 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Dextromoramide =</td>
<td>670 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Dipipanone =</td>
<td>250 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of 3-Methylfentanyl =</td>
<td>10 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of 1-Methyl-4-phenyl-4-propionoxypiperidine/MPPP =</td>
<td>700 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of 1-(2-Phenylethyl)-4-phenyl-4-acetyloxypiperidine/PEPAP =</td>
<td>700 gm of marihuana</td>
</tr>
</tbody>
</table>
1 gm of Alphaprodine = 100 gm of marihuana
1 gm of Fentanyl (N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] Propanamide) = 2.5 kg of marihuana
1 gm of Hydromorphone/Dihydromorphone = 2.5 kg of marihuana
1 gm of Levorphanol = 2.5 kg of marihuana
1 gm of Meperidine/Pethidine = 50 gm of marihuana
1 gm of Methadone = 500 gm of marihuana
1 gm of 6-Monoacetylmorphine = 1 kg of marihuana
1 gm of Morphine = 500 gm of marihuana
1 gm of Oxycodone (actual) = 6700 gm of marihuana
1 gm of Oxymorphone = 5 kg of marihuana
1 gm of Racemorphan = 3 kg of marihuana
1 gm of Codeine = 80 gm of marihuana
1 gm of Dextropropoxyphene/Propoxyphene-Bulk = 50 gm of marihuana
1 gm of Ethylmorphine = 165 gm of marihuana
1 gm of Hydrocodone (actual) = 6700 gm of marihuana
1 gm of Mixed Alkaloids of Opium/Papaveretum = 250 gm of marihuana
1 gm of Opium = 50 gm of marihuana
1 gm of Levo-alpha-acetylmethadol (LAAM) = 3 kg of marihuana

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

**COCAIN AND OTHER SCHEDULE I AND II STIMULANTS (AND THEIR IMMEDIATE PRECURSORS)**

<table>
<thead>
<tr>
<th>Substance</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 gm of Cocaine</td>
<td>200 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of N-Ethylamphetamine</td>
<td>80 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Fenetyline</td>
<td>40 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Amphetamine</td>
<td>2 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Methamphetamine</td>
<td>20 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Methamphetamine (Actual)</td>
<td>2 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of “Ice”</td>
<td>20 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Khat</td>
<td>.01 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of 4-Methylaminorex (“Euphoria”)</td>
<td>100 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Methylphenidate (Ritalin)</td>
<td>100 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Phenmetrazine</td>
<td>80 gm of marihuana</td>
</tr>
<tr>
<td>1 gm Phenylacetone/P2P (when possessed for the purpose of manufacturing methamphetamine) =</td>
<td>416 gm of marihuana</td>
</tr>
<tr>
<td>1 gm Phenylacetone/P2P (in any other case) =</td>
<td>75 gm of marihuana</td>
</tr>
<tr>
<td>1 gm Cocaine Base (“Crack”)</td>
<td>3,571 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Aminorex</td>
<td>100 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Methactinone</td>
<td>380 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of N-N-Dimethylamphetamine</td>
<td>40 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of N-Benzylpiperazine</td>
<td>100 gm of marihuana</td>
</tr>
</tbody>
</table>

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

**LSD, PCP, AND OTHER SCHEDULE I AND II HALLUCINOGENS (AND THEIR IMMEDIATE PRECURSORS)**

<table>
<thead>
<tr>
<th>Substance</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 gm of Bufotenine</td>
<td>70 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of D-Lysergic Acid Diethylamide/Lysergide/LSD =</td>
<td>100 kg of marihuana</td>
</tr>
<tr>
<td>1 gm of Diethyltryptamine/DET =</td>
<td>80 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Dimethyltryptamine/DM =</td>
<td>100 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Mescaline</td>
<td>10 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Mushrooms containing Psilocin and/or Psilocybin (Dry) =</td>
<td>1 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Mushrooms containing Psilocin and/or Psilocybin (Wet) =</td>
<td>0.1 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Peyote (Dry)</td>
<td>0.5 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Peyote (Wet)</td>
<td>0.05 gm of marihuana</td>
</tr>
</tbody>
</table>
1 gm of Phencyclidine/PCP = 1 kg of marihuana
1 gm of Phencyclidine (actual) /PCP (actual) = 10 kg of marihuana
1 gm of Psilocin = 500 gm of marihuana
1 gm of Psilocybin = 500 gm of marihuana
1 gm of Pyrrolidine Analog of Phencyclidine/PHP = 1 kg of marihuana
1 gm of Thiophene Analog of Phencyclidine/TCP = 1 kg of marihuana
1 gm of 4-Bromo-2,5-Dimethoxyamphetamine/DOB = 2.5 kg of marihuana
1 gm of 2,5-Dimethoxy-4-methylamphetamine/DM = 1.67 kg of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDA = 500 gm of marihuana
1 gm of 3,4-Methylenedioxyamphetamine/MDMA = 500 gm of marihuana
1 gm of Paramethoxymethamphetamine/PMA = 500 gm of marihuana
1 gm of 1-Piperidinocyclohexanecarbonitrile/PCC = 680 gm of marihuana
1 gm of N-ethyl-1-phenylcyclohexylamine (PCE) = 1 kg of marihuana

*Provided, that the minimum offense level from the Drug Quantity Table for any of these controlled substances individually, or in combination with another controlled substance, is level 12.

<table>
<thead>
<tr>
<th>Schedule IMarihuana</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 gm of Marihuana/Cannabis, granulated, powdered, etc. =</td>
<td>1 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Hashish Oil =</td>
<td>50 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Cannabis Resin or Hashish =</td>
<td>5 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Tetrahydrocannabinol, Organic =</td>
<td>167 gm of marihuana</td>
</tr>
<tr>
<td>1 gm of Tetrahydrocannabinol, Synthetic =</td>
<td>167 gm of marihuana</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>FLUNITRAZEPAM **</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 unit of Flunitrazepam =</td>
<td>16 gm of marihuana</td>
</tr>
</tbody>
</table>

**Provided, that the minimum offense level from the Drug Quantity Table for flunitrazepam individually, or in combination with any Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances is level 8.

<table>
<thead>
<tr>
<th>Schedule I or II Depressants (except gamma-hydroxybutyric acid)</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 unit of a Schedule I or II Depressant (except gamma-hydroxybutyric acid) =</td>
<td>1 gm of marihuana</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>GAMMA-HYDROXYBUTYRIC ACID</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 ml of gamma-hydroxybutyric acid =</td>
<td>8.8 gm of marihuana</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Schedule III Substances (except ketamine)***</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 unit of a Schedule III Substance =</td>
<td>1 gm of marihuana</td>
</tr>
</tbody>
</table>

***Provided, that the combined equivalent converted weight of all Schedule III substances (except ketamine), Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 79.99 kilograms of marihuana converted drug weight.

<table>
<thead>
<tr>
<th>Ketamine</th>
<th>Converted Drug Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 unit of ketamine =</td>
<td>1 gm of marihuana</td>
</tr>
</tbody>
</table>
**Schedule IV Substances (except flunitrazepam)***

1 unit of a Schedule IV Substance (except Flunitrazepam) = 0.0625 gm of marihuana

*Provided, that the combined equivalent converted weight of all Schedule IV (except flunitrazepam) and V substances shall not exceed 9.99 kilograms of marihuana converted drug weight.

**Schedule V Substances***

1 unit of a Schedule V Substance = 0.00625 gm of marihuana

*Provided, that the combined equivalent converted weight of Schedule V substances shall not exceed 2.49 kilograms of marihuana converted drug weight.

**List I Chemicals (relating to the manufacture of amphetamine or methamphetamine)***

1 gm of Ephedrine = 10 kg of marihuana
1 gm of Phenylpropanolamine = 10 kg of marihuana
1 gm of Pseudoephedrine = 10 kg of marihuana

*Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.

**Date Rape Drugs (except flunitrazepam, GHB, or ketamine)***

1 ml of 1,4-butanediol = 8.8 gm of marihuana
1 ml of gamma butyrolactone = 8.8 gm of marihuana

To facilitate conversions to drug equivalencies converted drug weights, the following table is provided:

<table>
<thead>
<tr>
<th>MEASUREMENT CONVERSION TABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 oz = 28.35 gm</td>
</tr>
<tr>
<td>1 lb = 453.6 gm</td>
</tr>
<tr>
<td>1 lb = 0.4536 kg</td>
</tr>
<tr>
<td>1 gal = 3.785 liters</td>
</tr>
<tr>
<td>1 qt = 0.946 liters</td>
</tr>
<tr>
<td>1 gm = 1 ml (liquid)</td>
</tr>
<tr>
<td>1 liter = 1,000 ml</td>
</tr>
<tr>
<td>1 kg = 1,000 gm</td>
</tr>
<tr>
<td>1 gm = 1,000 mg</td>
</tr>
<tr>
<td>1 grain = 64.8 mg.</td>
</tr>
</tbody>
</table>

9. **Determining Quantity Based on Doses, Pills, or Capsules.**—If the number of doses, pills, or capsules but not the weight of the controlled substance is known, multiply the number of doses, pills, or capsules by the typical weight per dose in the table below to estimate the total weight of the controlled substance (e.g., 100 doses of Mescaline at 500 milligrams per dose = 50 grams of mescaline). The Typical Weight Per Unit Table, prepared from information provided by the Drug Enforcement Administration, displays the typical weight per dose, pill, or capsule for certain controlled substances. Do not use this table if any more reliable estimate of the total weight is available from case-specific information.
### TYPICAL WEIGHT PER UNIT (DOSE, PILL, OR CAPSULE) TABLE

#### HALLUCINOGENS

<table>
<thead>
<tr>
<th>Substance</th>
<th>Weight (mg)</th>
</tr>
</thead>
<tbody>
<tr>
<td>MDA</td>
<td>250</td>
</tr>
<tr>
<td>MDMA</td>
<td>250</td>
</tr>
<tr>
<td>Mescaline</td>
<td>500</td>
</tr>
<tr>
<td>PCP*</td>
<td>5</td>
</tr>
<tr>
<td>Peyote (dry)</td>
<td>12</td>
</tr>
<tr>
<td>Peyote (wet)</td>
<td>120</td>
</tr>
<tr>
<td>Psilocin*</td>
<td>10</td>
</tr>
<tr>
<td>Psilocybe mushrooms (dry)</td>
<td>5</td>
</tr>
<tr>
<td>Psilocybe mushrooms (wet)</td>
<td>50</td>
</tr>
<tr>
<td>Psilocybin*</td>
<td>10</td>
</tr>
<tr>
<td>2,5-Dimethoxy-4-methylamphetamine (STP, DOM)*</td>
<td>3</td>
</tr>
</tbody>
</table>

#### MARIHUANA

<table>
<thead>
<tr>
<th>Substance</th>
<th>Weight (gm)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 marihuana cigarette</td>
<td>0.5</td>
</tr>
</tbody>
</table>

#### STIMULANTS

<table>
<thead>
<tr>
<th>Substance</th>
<th>Weight (mg)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amphetamine*</td>
<td>10</td>
</tr>
<tr>
<td>Methamphetamine*</td>
<td>5</td>
</tr>
<tr>
<td>Phenmetrazine (Preludin)*</td>
<td>75</td>
</tr>
</tbody>
</table>

*For controlled substances marked with an asterisk, the weight per unit shown is the weight of the actual controlled substance, and not generally the weight of the mixture or substance containing the controlled substance. Therefore, use of this table provides a very conservative estimate of the total weight.

10. **Determining Quantity of LSD.**—LSD on a blotter paper carrier medium typically is marked so that the number of doses (“hits”) per sheet readily can be determined. When this is not the case, it is to be presumed that each 1/4 inch by 1/4 inch section of the blotter paper is equal to one dose.

In the case of liquid LSD (LSD that has not been placed onto a carrier medium), using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.

11. **Application of Subsections (b)(1) and (b)(2).**—

   **(A) Application of Subsection (b)(1).**—Definitions of “firearm” and “dangerous weapon” are found in the Commentary to §1B1.1 (Application Instructions). The enhancement for weapon possession in subsection (b)(1) reflects the increased danger of violence when drug traffickers possess weapons. The enhancement should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at the defendant’s residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), and 2D1.12(c)(1).

   **(B) Interaction of Subsections (b)(1) and (b)(2).**—The enhancements in subsections (b)(1) and (b)(2) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A). However, in a case in which the defendant merely possessed a
dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply.

12. **Application of Subsection (b)(5).**—If the offense involved importation of amphetamine or methamphetamine, and an adjustment from subsection (b)(3) applies, do not apply subsection (b)(5).

13. **Application of Subsection (b)(7).**—For purposes of subsection (b)(7), “**mass-marketing by means of an interactive computer service**” means the solicitation, by means of an interactive computer service, of a large number of persons to induce those persons to purchase a controlled substance. For example, subsection (b)(7) would apply to a defendant who operated a web site to promote the sale of Gamma-hydroxybutyric Acid (GHB) but would not apply to coconspirators who use an interactive computer service only to communicate with one another in furtherance of the offense. “**Interactive computer service**”, for purposes of subsection (b)(7) and this note, has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

14. **Application of Subsection (b)(8).**—For purposes of subsection (b)(8), “**masking agent**” means a substance that, when taken before, after, or in conjunction with an anabolic steroid, prevents the detection of the anabolic steroid in an individual’s body.

15. **Application of Subsection (b)(9).**—For purposes of subsection (b)(9), “**athlete**” means an individual who participates in an athletic activity conducted by (A) an intercollegiate athletic association or interscholastic athletic association; (B) a professional athletic association; or (C) an amateur athletic organization.

16. **Application of Subsection (b)(11).**—Subsection (b)(11) does not apply if the purpose of the bribery was to obstruct or impede the investigation, prosecution, or sentencing of the defendant. Such conduct is covered by §3C1.1 (Obstructing or Impeding the Administration of Justice) and, if applicable, §2D1.1(b)(15)(D).

17. **Application of Subsection (b)(12).**—Subsection (b)(12) applies to a defendant who knowingly maintains a premises (i.e., a building, room, or enclosure) for the purpose of manufacturing or distributing a controlled substance, including storage of a controlled substance for the purpose of distribution.

   Among the factors the court should consider in determining whether the defendant “maintained” the premises are (A) whether the defendant held a possessory interest in (e.g., owned or rented) the premises and (B) the extent to which the defendant controlled access to, or activities at, the premises.

   Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of the defendant’s primary or principal uses for the premises, rather than one of the defendant’s incidental or collateral uses for the premises. In making this determination, the court should consider how frequently the premises was used by the defendant for manufacturing or distributing a controlled substance and how frequently the premises was used by the defendant for lawful purposes.

18. **Application of Subsection (b)(13).**—

   (A) **Hazardous or Toxic Substances (Subsection (b)(13)(A)).**—Subsection (b)(13)(A) applies if the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct) involved any discharge, emission, release, transportation, treatment, storage, or
disposal violation covered by the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b); or 49 U.S.C. § 5124 (relating to violations of laws and regulations enforced by the Department of Transportation with respect to the transportation of hazardous material). In some cases, the enhancement under subsection (b)(13)(A) may not account adequately for the seriousness of the environmental harm or other threat to public health or safety (including the health or safety of law enforcement and cleanup personnel). In such cases, an upward departure may be warranted. Additionally, in determining the amount of restitution under §5E1.1 (Restitution) and in fashioning appropriate conditions of probation and supervision under §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release), respectively, any costs of environmental cleanup and harm to individuals or property shall be considered by the court in cases involving the manufacture of amphetamine or methamphetamine and should be considered by the court in cases involving the manufacture of a controlled substance other than amphetamine or methamphetamine. See 21 U.S.C. § 853(q) (mandatory restitution for cleanup costs relating to the manufacture of amphetamine and methamphetamine).

(B) **Substantial Risk of Harm Associated with the Manufacture of Amphetamine and Methamphetamine (Subsection (b)(13)(C)–(D)).**—

(i) **Factors to Consider.**—In determining, for purposes of subsection (b)(13)(C)(ii) or (D), whether the offense created a substantial risk of harm to human life or the environment, the court shall include consideration of the following factors:

(I) The quantity of any chemicals or hazardous or toxic substances found at the laboratory, and the manner in which the chemicals or substances were stored.

(II) The manner in which hazardous or toxic substances were disposed, and the likelihood of release into the environment of hazardous or toxic substances.

(III) The duration of the offense, and the extent of the manufacturing operation.

(IV) The location of the laboratory (e.g., whether the laboratory is located in a residential neighborhood or a remote area), and the number of human lives placed at substantial risk of harm.

(ii) **Definitions.**—For purposes of subsection (b)(13)(D):

“**Incompetent**” means an individual who is incapable of taking care of the individual’s self or property because of a mental or physical illness or disability, mental retardation, or senility.

“**Minor**” has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).

19. **Application of Subsection (b)(14).**—Subsection (b)(14) applies to offenses that involve the cultivation of marihuana on state or federal land or while trespassing on tribal or private land. Such offenses interfere with the ability of others to safely access and use the area and also pose or risk a range of other harms, such as harms to the environment.
The enhancements in subsection (b)(13)(A) and (b)(14) may be applied cumulatively (added together), as is generally the case when two or more specific offense characteristics each apply. See §1B1.1 (Application Instructions), Application Note 4(A).

20. Application of Subsection (b)(15).—

(A) Distributing to a Specified Individual or Involving Such an Individual in the Offense (Subsection (b)(15)(B)).—If the defendant distributes a controlled substance to an individual or involves an individual in the offense, as specified in subsection (b)(15)(B), the individual is not a “vulnerable victim” for purposes of §3A1.1(b).

(B) Directly Involved in the Importation of a Controlled Substance (Subsection (b)(15)(C)).—Subsection (b)(15)(C) applies if the defendant is accountable for the importation of a controlled substance under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)), i.e., the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the importation of a controlled substance.

If subsection (b)(3) or (b)(5) applies, do not apply subsection (b)(15)(C).

(C) Pattern of Criminal Conduct Engaged in as a Livelihood (Subsection (b)(15)(E)).—For purposes of subsection (b)(15)(E), “pattern of criminal conduct” and “engaged in as a livelihood” have the meaning given such terms in §4B1.3 (Criminal Livelihood).

21. Applicability of Subsection (b)(17).—The applicability of subsection (b)(17) shall be determined without regard to whether the defendant was convicted of an offense that subjects the defendant to a mandatory minimum term of imprisonment. Section §5C1.2(b), which provides a minimum offense level of level 17, is not pertinent to the determination of whether subsection (b)(17) applies.

22. Application of Subsection (e)(1).—

(A) Definition.—For purposes of this guideline, “sexual offense” means a “sexual act” or “sexual contact” as those terms are defined in 18 U.S.C. § 2246(2) and (3), respectively.

(B) Upward Departure Provision.—If the defendant committed a sexual offense against more than one individual, an upward departure would be warranted.

23. Interaction with §3B1.3.—A defendant who used special skills in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). Certain professionals often occupy essential positions in drug trafficking schemes. These professionals include doctors, pilots, boat captains, financiers, bankers, attorneys, chemists, accountants, and others whose special skill, trade, profession, or position may be used to significantly facilitate the commission of a drug offense. Additionally, an enhancement under §3B1.3 ordinarily would apply in a case in which the defendant used his or her position as a coach to influence an athlete to use an anabolic steroid. Likewise, an adjustment under §3B1.3 ordinarily would apply in a case in which the defendant is convicted of a drug offense resulting from the authorization of the defendant to receive scheduled substances from an ultimate user or long-term care facility. See 21 U.S.C. § 822(g).

Note, however, that if an adjustment from subsection (b)(3)(C) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
24. **Cases Involving Mandatory Minimum Penalties.**—Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be “waived” and a lower sentence imposed (including a downward departure), as provided in 28 U.S.C. § 994(n), by reason of a defendant’s “substantial assistance in the investigation or prosecution of another person who has committed an offense.” See §5K1.1 (Substantial Assistance to Authorities). In addition, 18 U.S.C. § 3553(f) provides an exception to the applicability of mandatory minimum sentences in certain cases. See §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases).

25. **Imposition of Consecutive Sentence for 21 U.S.C. § 860a or § 865.**—Sections 860a and 865 of title 21, United States Code, require the imposition of a mandatory consecutive term of imprisonment of not more than 20 years and 15 years, respectively. In order to comply with the relevant statute, the court should determine the appropriate “total punishment” and divide the sentence on the judgment form between the sentence attributable to the underlying drug offense and the sentence attributable to 21 U.S.C. § 860a or § 865, specifying the number of months to be served consecutively for the conviction under 21 U.S.C. § 860a or § 865. For example, if the applicable adjusted guideline range is 151–188 months and the court determines a “total punishment” of 151 months is appropriate, a sentence of 130 months for the underlying offense plus 21 months for the conduct covered by 21 U.S.C. § 860a or § 865 would achieve the “total punishment” in a manner that satisfies the statutory requirement of a consecutive sentence.

26. **Cases Involving “Small Amount of Marihuana for No Remuneration”.**—Distribution of “a small amount of marihuana for no remuneration”, 21 U.S.C. § 841(b)(4), is treated as simple possession, to which §2D2.1 applies.

27. **Departure Considerations.**—

   **(A) Downward Departure Based on Drug Quantity in Certain Reverse Sting Operations.**—If, in a reverse sting (an operation in which a government agent sells or negotiates to sell a controlled substance to a defendant), the court finds that the government agent set a price for the controlled substance that was substantially below the market value of the controlled substance, thereby leading to the defendant’s purchase of a significantly greater quantity of the controlled substance than his available resources would have allowed him to purchase except for the artificially low price set by the government agent, a downward departure may be warranted.

   **(B) Upward Departure Based on Drug Quantity.**—In an extraordinary case, an upward departure above offense level 38 on the basis of drug quantity may be warranted. For example, an upward departure may be warranted where the quantity is at least ten times the minimum quantity required for level 38. Similarly, in the case of a controlled substance for which the maximum offense level is less than level 38, an upward departure may be warranted if the drug quantity substantially exceeds the quantity for the highest offense level established for that particular controlled substance.

   **(C) Upward Departure Based on Unusually High Purity.**—Trafficking in controlled substances, compounds, or mixtures of unusually high purity may warrant an upward departure, except in the case of PCP, amphetamine, methamphetamine, hydrocodone, or oxycodone for which the guideline itself provides for the consideration of purity (see the footnote to the Drug Quantity Table). The purity of the controlled substance, particularly in the case of heroin, may be relevant in the sentencing process because it is probative of the defendant’s role or position in the chain of distribution. Since controlled substances are often diluted and combined with other substances as they pass down the chain of distribution, the fact that a defendant is in possession of unusually pure narcotics may
indicate a prominent role in the criminal enterprise and proximity to the source of the drugs. As large quantities are normally associated with high purities, this factor is particularly relevant where smaller quantities are involved.

**Background:** Offenses under 21 U.S.C. §§ 841 and 960 receive identical punishment based upon the quantity of the controlled substance involved, the defendant’s criminal history, and whether death or serious bodily injury resulted from the offense.

The base offense levels in §2D1.1 are either provided directly by the Anti-Drug Abuse Act of 1986 or are proportional to the levels established by statute, and apply to all unlawful trafficking. Levels 30 and 24 in the Drug Quantity Table are the distinctions provided by the Anti-Drug Abuse Act; however, further refinement of drug amounts is essential to provide a logical sentencing structure for drug offenses. To determine these finer distinctions, the Commission consulted numerous experts and practitioners, including authorities at the Drug Enforcement Administration, chemists, attorneys, probation officers, and members of the Organized Crime Drug Enforcement Task Forces, who also advocate the necessity of these distinctions. Where necessary, this scheme has been modified in response to specific congressional directives to the Commission.

The base offense levels at levels 24 and 30 establish guideline ranges such that the statutory minimum falls within the range; *e.g.*, level 30 ranges from 97 to 121 months, where the statutory minimum term is ten years or 120 months.

For marihuana plants, the Commission has adopted an equivalency of 100 grams per plant, or the actual weight of the usable marihuana, whichever is greater. The decision to treat each plant as equal to 100 grams is premised on the fact that the average yield from a mature marihuana plant equals 100 grams of marihuana. In controlled substance offenses, an attempt is assigned the same offense level as the object of the attempt. Consequently, the Commission adopted the policy that each plant is to be treated as the equivalent of an attempt to produce 100 grams of marihuana, except where the actual weight of the usable marihuana is greater.

Because the weights of LSD carrier media vary widely and typically far exceed the weight of the controlled substance itself, the Commission has determined that basing offense levels on the entire weight of the LSD and carrier medium would produce unwarranted disparity among offenses involving the same quantity of actual LSD (but different carrier weights), as well as sentences disproportionate to those for other, more dangerous controlled substances, such as PCP. Consequently, in cases involving LSD contained in a carrier medium, the Commission has established a weight per dose of 0.4 milligram for purposes of determining the base offense level.

The dosage weight of LSD selected exceeds the Drug Enforcement Administration’s standard dosage unit for LSD of 0.05 milligram (*i.e.*, the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes (A) that offense levels for most other controlled substances are based upon the weight of the mixture containing the controlled substance without regard to purity, and (B) the decision in *Chapman v. United States*, 500 U.S. 453 (1991) (holding that the term “mixture or substance” in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed). At the same time, the weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances and avoid an undue influence of varied carrier weight on the applicable
offense level. Nonetheless, this approach does not override the applicability of “mixture or substance” for the purpose of applying any mandatory minimum sentence (see Chapman; §5G1.1(b)).

Frequently, a term of supervised release to follow imprisonment is required by statute for offenses covered by this guideline. Guidelines for the imposition, duration, and conditions of supervised release are set forth in Chapter Five, Part D (Supervised Release).

The last sentence of subsection (a)(5) implements the directive to the Commission in section 7(1) of Public Law 111–220.

Subsection (b)(2) implements the directive to the Commission in section 5 of Public Law 111–220.

Subsection (b)(3) is derived from Section 6453 of the Anti-Drug Abuse Act of 1988.

Subsection (b)(11) implements the directive to the Commission in section 6(1) of Public Law 111–220.

Subsection (b)(12) implements the directive to the Commission in section 6(2) of Public Law 111–220.

Subsection (b)(13)(A) implements the instruction to the Commission in section 303 of Public Law 103–237.

Subsections (b)(13)(C)(ii) and (D) implement, in a broader form, the instruction to the Commission in section 102 of Public Law 106–310.

Subsection (b)(15) implements the directive to the Commission in section 6(3) of Public Law 111–220.

Subsection (b)(16) implements the directive to the Commission in section 7(2) of Public Law 111–220.

*   *   *

27
PROPOSED AMENDMENT: TECHNICAL

Synopsis of Amendment: This proposed amendment makes various technical changes to the Guidelines Manual.

Part A of the proposed amendment makes certain clarifying changes to two guidelines. First, the proposed amendment amends Chapter One, Part A, Subpart 1(4)(b) (Departures) to provide an explanatory note addressing the fact that §5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. Second, the proposed amendment makes minor clarifying changes to Application Note 2 to §2B1.1 (Theft, Property Destruction, and Fraud), to make clear that, for purposes of subsection (a)(1)(A), an offense is “referenced to this guideline” if §2B1.1 is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction.

Part B of the proposed amendment makes technical changes in §§2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification), 2R1.1 (Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors), 4A1.2 (Definitions and Instructions for Computing Criminal History), and 4B1.4 (Armed Career Criminal), to correct title references to §4A1.3 (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

Part C of the proposed amendment makes clerical changes to—

(1) the Commentary to §1B.1.13 (Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) (Policy Statement)) to correct a typographical error by inserting a missing word in Application Note 4;

(2) subsection (d)(6) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to correct a typographical error in the line referencing Pseudoephedrine;

(3) subsection (e)(2) to §2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy) to correct a punctuation mark under the heading relating to List I Chemicals;

(4) the Commentary to §2M2.1 ( Destruction of, or Production of Defective, War Material, Premises, or Utilities) captioned “Statutory Provisions” to add a missing section symbol and a reference to Appendix A (Statutory Index);

(5) the Commentary to §2Q1.1 (Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants) captioned “Statutory Provisions” to add a missing reference to 42 U.S.C. § 7413(c)(5) and a reference to Appendix A (Statutory Index);

(6) the Commentary to §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting
Hazardous Materials in Commerce) captioned “Statutory Provisions” to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);

(7) the Commentary to §2Q1.3 (Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification) captioned “Statutory Provisions” to add a specific reference to 42 U.S.C. § 7413(c)(1)–(4);

(8) subsection (a)(4) to §5D1.3. (Conditions of Supervised Release) to change an inaccurate reference to “probation” to “supervised release”; and

(9) the lines referencing “18 U.S.C. § 371” and “18 U.S.C. § 1591” in Appendix A (Statutory Index) to rearrange the order of certain Chapter Two guidelines references to place them in proper numerical order.

Proposed Amendment:

(A) Clarifying Changes

CHAPTER ONE

INTRODUCTION, AUTHORITY, AND GENERAL APPLICATION PRINCIPLES

PART A — INTRODUCTION AND AUTHORITY

* * *

1. ORIGINAL INTRODUCTION TO THE GUIDELINES MANUAL

* * *

4. The Guidelines’ Resolution of Major Issues (Policy Statement)

* * *

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10
(Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), the last sentence of §5K2.12 (Coercion and Duress), and §5K2.19 (Post-Sentencing Rehabilitative Efforts) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

*Note: Section 5K2.19 (Post-Sentencing Rehabilitative Efforts) was deleted by Amendment 768, effective November 1, 2012. (See USSG App. C, amendment 768.)

* * *

(d) Probation and Split Sentences.

The statute provides that the guidelines are to “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .” 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are “serious.”

The Commission’s solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.*

*Note: Although the Commission had not addressed “single acts of aberrant behavior” at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See Supplement to Appendix C—USSG App. C, amendment 603.)

* * *
§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level:

(1) 7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or

(2) 6, otherwise.

Commentary

Applicaton Notes:

2. Application of Subsection (a)(1).—

(A) “Referenced to this Guideline”.—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline specifically referenced in Appendix A (Statutory Index) for the offense of conviction, as determined under the provisions of §1B1.2 (Applicable Guidelines); or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of “Statutory Maximum Term of Imprisonment”.—For purposes of this guideline, “statutory maximum term of imprisonment” means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.
(B) Title References to §4A1.3

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

Commentary

Application Notes:

8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

Commentary

Application Notes:

7. In the case of a defendant with previous antitrust convictions, a sentence at the maximum of the applicable guideline range, or an upward departure, may be warranted. See §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

§4A1.2. Definitions and Instructions for Computing Criminal History

(h) FOREIGN SENTENCES

Sentences resulting from foreign convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(i) TRIBAL COURT SENTENCES
Sentences resulting from tribal court convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

(j) EXPUNGED CONVICTIONS

Sentences for expunged convictions are not counted, but may be considered under §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

Commentary

Application Notes:

* * *

6. Reversed, Vacated, or Invalidated Convictions.—Sentences resulting from convictions that (A) have been reversed or vacated because of errors of law or because of subsequently discovered evidence exonerating the defendant, or (B) have been ruled constitutionally invalid in a prior case are not to be counted. With respect to the current sentencing proceeding, this guideline and commentary do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law (e.g., 21 U.S.C. § 851 expressly provides that a defendant may collaterally attack certain prior convictions).

Nonetheless, the criminal conduct underlying any conviction that is not counted in the criminal history score may be considered pursuant to §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

8. Applicable Time Period.—Section 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term “commencement of the instant offense” includes any relevant conduct. See §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

§4B1.4. Armed Career Criminal

* * *

Commentary

* * *
**Background:** This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied. A minimum criminal history category (Category IV) is provided, reflecting that each defendant to whom this section applies will have at least three prior convictions for serious offenses. In some cases, the criminal history category may not adequately reflect the defendant’s criminal history; see §4A1.3 (Adequacy of Criminal History Category Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

* * *

* * *

* * *

Commentary

Application Notes:

4. **Motion by the Director of the Bureau of Prisons.**—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant’s medical condition, the defendant’s family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

* * *

§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy

* * *

(d) **EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE**

(Methamphetamine and Amphetamine Precursor Chemicals)

<table>
<thead>
<tr>
<th>QUANTITY</th>
<th>BASE OFFENSE LEVEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>(6) At least 70 G but less than 100 G of Ephedrine; At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseudoephedrine.</td>
<td>Level 28</td>
</tr>
</tbody>
</table>

* * *

(e) **CHEMICAL QUANTITY TABLE**

(All Other Precursor Chemicals)
### LISTED CHEMICALS AND QUANTITY

<table>
<thead>
<tr>
<th>List I Chemicals</th>
<th>Base Offense Level</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(2)</strong> List I Chemicals</td>
<td>Level 28</td>
</tr>
<tr>
<td>At least 890 G but less than 2.7 KG of Benzaldehyde;</td>
<td></td>
</tr>
<tr>
<td>At least 20 KG but less than 60 KG of Benzyl Cyanide;</td>
<td></td>
</tr>
<tr>
<td>At least 200 G but less than 600 G of Ergonovine;</td>
<td></td>
</tr>
<tr>
<td>At least 400 G but less than 1.2 KG of Ergotamine;</td>
<td></td>
</tr>
<tr>
<td>At least 20 KG but less than 60 KG of Ethylamine;</td>
<td></td>
</tr>
<tr>
<td>At least 2.2 KG but less than 6.6 KG of Hydriodic Acid;</td>
<td></td>
</tr>
<tr>
<td>At least 1.3 KG but less than 3.9 KG of Iodine;</td>
<td></td>
</tr>
<tr>
<td>At least 320 KG but less than 960 KG of Isosafrole;</td>
<td></td>
</tr>
<tr>
<td>At least 200 G but less than 600 G of Methylamine;</td>
<td></td>
</tr>
<tr>
<td>At least 500 KG but less than 1500 KG of N-Methylephedrine;</td>
<td></td>
</tr>
<tr>
<td>At least 500 KG but less than 1500 KG of N-Methylpseudoephedrine;</td>
<td></td>
</tr>
<tr>
<td>At least 625 G but less than 1.9 KG of Nitroethane;</td>
<td></td>
</tr>
<tr>
<td>At least 10 KG but less than 30 KG of Norpseudoephedrine;</td>
<td></td>
</tr>
<tr>
<td>At least 20 KG but less than 60 KG of Phenylacetic Acid;</td>
<td></td>
</tr>
<tr>
<td>At least 10 KG but less than 30 KG of Piperidine;</td>
<td></td>
</tr>
<tr>
<td>At least 320 KG but less than 960 KG of Piperonal;</td>
<td></td>
</tr>
<tr>
<td>At least 1.6 KG but less than 4.8 KG of Propionic Anhydride;</td>
<td></td>
</tr>
<tr>
<td>At least 320 KG but less than 960 KG of Safrole;</td>
<td></td>
</tr>
<tr>
<td>At least 400 KG but less than 1200 KG of 3, 4-Methylenedioxyphenyl-2-propanone;</td>
<td></td>
</tr>
<tr>
<td>At least 1135.5 L but less than 3406.5 L of Gamma-butyrolactone;</td>
<td></td>
</tr>
<tr>
<td>At least 714 G but less than 2.1 KG of Red Phosphorus, White Phosphorus, or</td>
<td></td>
</tr>
<tr>
<td>Hypophosphorous Acid;</td>
<td></td>
</tr>
<tr>
<td>List II Chemicals</td>
<td></td>
</tr>
<tr>
<td>33 KG or more of Acetic Anhydride;</td>
<td></td>
</tr>
<tr>
<td>3525 KG or more of Acetone;</td>
<td></td>
</tr>
<tr>
<td>60 KG or more of Benzyl Chloride;</td>
<td></td>
</tr>
<tr>
<td>3225 KG or more of Ethyl Ether;</td>
<td></td>
</tr>
<tr>
<td>3600 KG or more of Methyl Ethyl Ketone;</td>
<td></td>
</tr>
<tr>
<td>30 KG or more of Potassium Permanganate;</td>
<td></td>
</tr>
<tr>
<td>3900 KG or more of Toluene.</td>
<td></td>
</tr>
</tbody>
</table>

### §2M2.1. Destruction of, or Production of Defective, War Material, Premises, or Utilities

(a) **Base Offense Level:** 32

**Commentary**

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: 24

Commentary

Statutory Provisions: 18 U.S.C. § 1992(b)(3); 33 U.S.C. § 1319(c)(3); 42 U.S.C. §§ 6928(e), 7413(c)(5). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce

Commentary

Statutory Provisions: 7 U.S.C. §§ 136j–136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1), (2), 1321(b)(5), 1517(b); 42 U.S.C. §§ 300h-2, 6928(d), 7413(c)(1)–(4), 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b); 49 U.S.C. §§ 5124, 46312. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

Commentary


* * *

§5D1.3. Conditions of Supervised Release

(a) MANDATORY CONDITIONS

* * *

(4) The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation or supervised release and at least two periodic drug tests
thereafter (as determined by the court) for use of a controlled
substance, but the condition stated in this paragraph may be
ameliorated or suspended by the court for any individual defendant if
the defendant’s presentence report or other reliable information
indicates a low risk of future substance abuse by the defendant (see
18 U.S.C. § 3583(d)).

* * *

APPENDIX A

STATUTORY INDEX

* * *

18 U.S.C. § 371 2A1.5, 2C1.1 (if conspiracy to defraud by interference with
governmental functions), 2T1.9, 2K2.1 (if a conspiracy to violate 18
U.S.C. § 924(c)), 2T1.9, 2X1.1

* * *

18 U.S.C. § 1591 2G1.1, 2G2.1, 2G1.3, 2G2.1

* * *
ISSUE FOR COMMENT: DRUGS

In August 2016, the Commission indicated that one of its priorities would be the “[s]tudy of offenses involving MDMA/Ecstasy, synthetic cannabinoids (such as JWH-018 and AM-2201), and synthetic cathinones (such as Methylone, MDPV, and Mephedrone), and consideration of any amendments to the Guidelines Manual that may be appropriate in light of the information obtained from such study.” See United States Sentencing Commission, “Notice of Final Priorities,” 81 FR 58004 (Aug. 24, 2016). The Commission intends that this study will be conducted over a two-year period and will solicit input, several times during this period, from experts and other members of the public. The Commission further intends that in the amendment cycle ending May 1, 2018, it may, if appropriate, publish a proposed amendment as a result of the study.

MDMA, Synthetic Cathinones, and Synthetic Cannabinoids.—As part of the study related to this policy priority, the Commission intends to examine offenses involving the following controlled substances:

**Synthetic Cathinones**
- MDPV (Methylenedioxypyrovalerone)
- Methylone (3,4-methylenedioxy-N-methylcathinone)
- Mephedrone, (4-Methylmethcathinone (4-MMC))

**Synthetic Cannabinoids**
- JWH-018 (1-Pentyl-1-3-1-(1-Naphthoyl)Indole)
- AM-2201 (1-(5-Fluoropenty1)-3-(1-Naphthoyl)Indole)

MDMA/Ecstasy (3,4-methylenedioxy-methamphetamine)

The synthetic cathinones and synthetic cannabinoids listed above are schedule I controlled substances that are not currently referenced at §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy).


JWH-018 and AM-2201 are synthetic cannabinoids, sometimes referred to as “Spice” or “K2.” These substances are also man-made and, in liquid form, can be sprayed on shredded plant material so they can be smoked. See National Institute of Drug Abuse, DrugFacts: Synthetic Cannabinoids (Revised November 2015) available at [https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids](https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids).

MDMA is a synthetic drug that alters the user’s mood and perception of surrounding objects and conditions. MDMA, also known as “ecstasy” or “molly”, is both a stimulant and

Guidelines Penalty Structure.—When a drug trafficking offense involves a controlled substance not specifically referenced in the guidelines, the Commentary to §2D1.1 instructs the court to “determine the base offense level using the marijuana equivalency of the most closely related controlled substance referenced in [§2D1.1].” See USSG §2D1.1, comment. (n.6). The guidelines establish a three-step process for making this determination. See USSG §2D1.1, comment. (n.6, 8).

First, courts must determine the most closely related controlled substance by considering the following factors to the extent practicable:

(A) Whether the controlled substance not referenced in §2D1.1 has a chemical structure that is substantially similar to a controlled substance referenced in this guideline.

(B) Whether the controlled substance not referenced in §2D1.1 has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance referenced in this guideline.

(C) Whether a lesser or greater quantity of the controlled substance not referenced in §2D1.1 is needed to produce a substantially similar effect on the central nervous system as a controlled substance referenced in this guideline.

Once the most closely related controlled substance is determined, the next step is to refer to the marijuana equivalency from the Drug Equivalency Tables at Application Note 8(D) for the most closely related controlled substance to convert the quantity of controlled substance in the offense into its equivalent quantity of marijuana. The final step is to find the equivalent quantity of marijuana in the Drug Quantity Table at §2D1.1(c) and use the corresponding offense level as the base offense level of the controlled substance involved in the offense.

For example, in cases involving methylone, Commission data indicates that in fiscal year 2015, the courts always identified MDMA as its most closely related controlled substance. The marijuana equivalency of MDMA is 1 gm MDMA = 500 gm marijuana. Pursuant to the Drug Equivalency Tables, when sentencing methylene offenders, this is the equivalency to be used. Thus, if an offender is accountable for 50 grams of methylone, the base offense level at §2D1.1 would be determined by multiplying the 50 grams by 500 grams of marijuana. The resulting equivalency of 25,000 grams of marijuana provides for a base offense level 16.

In recent years, the Commission has received comment from the public suggesting that questions regarding “the most closely related controlled substance” require courts to hold extensive hearings. In addition, the Commission has heard that courts have identified different controlled substances as the “most closely related controlled substance” to the
synthetic cathinones and synthetic cannabinoids included in the Commission’s study and, in some cases, adjusted the marijuana equivalency to account for perceived differences between the “most closely related controlled substance” and the controlled substance involved in the offense. Both outcomes may result in sentencing disparities among similarly situated defendants. To possibly alleviate these issues, one possible outcome of the Commission’s study may be to establish marijuana equivalencies for each of the synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201). The Commission decided to include MDMA in its study because courts have identified MDMA as the most closely related controlled substance referenced in §2D1.1 to methylone.

**Issue for Comment.**—In determining the marijuana equivalencies for specific controlled substances, the Commission has considered, among other things, the chemical structure, the pharmacological effects, the legislative and scheduling history, potential for addiction and abuse, the pattern of abuse and harms associated with abuse, and the patterns of trafficking and harms associated with trafficking.

The Commission invites general comment on any or all of these factors as they relate to the Commission’s study of synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201).

The Commission further seeks broad comment on offenses involving synthetic cathinones (MDPV, methylone, and mephedrone) and synthetic cannabinoids (JWH-018 and AM-2201), and the offenders involved in such offenses. What is the conduct involved in such offenses and the nature and seriousness of the harms posed by such offenses? How these offenses and offenders compare with other drug offenses and drug offenders? How are these substances manufactured, distributed, possessed, and used? What are the characteristics of the offenders involved in these various activities? What harms are posed by these activities?

Which of the controlled substances currently referenced in §2D1.1 should be identified as the “most closely related controlled substance” to any of the synthetic cathinones and synthetic cannabinoids included in the Commission’s study? To what extent does the synthetic cathinone or synthetic cannabinoid differ from its “most closely related controlled substance”? 
UNITED STATES SENTENCING COMMISSION

+ + + + +

PUBLIC MEETING

+ + + + +

FRIDAY
DECEMBER 9, 2016

+ + + + +

The Sentencing Commission met in Suite 2500 of the Thurgood Marshall Building, One Columbus Circle N.E., Washington, DC, at 11:30 a.m., the Honorable Patty B. Saris, Chair, presiding.

PRESENT:

PATTY B. SARIS, Chair
CHARLES B. BREYER, Vice Chair
RACHEL E. BARKOW, Commissioner
DABNEY L. FRIEDRICH, Commissioner
WILLIAM H. PRYOR, JR., Commissioner
MICHELLE MORALES, Ex-officio Commissioner

ALSO PRESENT:

KATHLEEN GRILLI, General Counsel
KENNETH COHEN, Staff Director
CHAIR SARIS: It's time to begin the public meeting. Thank you.

Thank you for attending this public meeting of the United States Sentencing Commission. This is the Commission's final meeting in 2016. The Commission will end the year with a number of transitions and vacancies as it marks the final meeting of my six-year term as Chair of the Commission which expires when the Congress adjourns. So, sadly, this will be my last opportunity to address you as Chair of the Commission.

Typically my remarks to you focus on our recent activities and our plans for the immediate future. At the end of the meeting I will also look back to the important, exciting period in the Commission's history.

But before I do that, I would like to introduce the other members of the Commission.
I'll start with Judge Charles R. Breyer. He is a senior district judge for the Northern District of California and has served as United States District Judge since 1998. He joined the Commission in 2013 and serves as a Vice Chair.

Now I usually have this technical -- sort of, I give credentials. But I'd also like to add this. Judge Breyer has been a friend for a long time. He is one of the best-known and beloved judges in the federal judiciary. His insights for many years as a trial judge have been invaluable to the Commission. Hopefully he will have the opportunity to serve a second term as his first term is also ending at the end of the congressional session.

Next we have Dabney Friedrich who has served on the Commission, really, more than a decade since 2006. Immediately prior to her appointment to the Commission, Commissioner Friedrich served as associate counsel at the White House. She previously served as counsel
to Chairman Orrin Hatch of the United States Senate Judiciary Committee, and as an assistant U.S. attorney for the Southern District of California and for the Eastern District of Virginia.

This also marks the final meeting for Commissioner Friedrich. I first met her when we were bookends together. We came through the confirmation process and we were sworn in together. For the full last decade she has been an active and hardworking member of the Commission, contributing greatly to our decisions. She's actually a math whiz. She understands the statistical analysis and the data analysis and has been so helpful to understanding the policies of the Commission.

Our staff in particular would love to thank her -- they all have told me this -- for her very supportive efforts. She has also been very impactful in prison reform efforts to better educate prisoners in the Bureau of Prisons,
particularly those with learning disabilities.

She's been a valued member of the Commission, often offering that one idea -- you know, like, you're fighting -- you're trying to figure out how we can reach compromise. How are we going to get this important amendment through? And she has often been the one who's given that one extra idea or that one insight that -- that's brought closure to the process. I -- I can't imagine -- she's now in California -- not seeing you a lot.

Next is Judge William H. Pryor who also joined the Commission in 2013. Judge Pryor is a judge for the United States Circuit Court for the Eleventh Circuit Court of Appeals, appointed in 2004. Before his appointment to the federal bench, Judge Pryor served as Attorney General for the State of Alabama. And he's also responsible for the creation of the Alabama Sentencing Commission.

You've heard about thinking fast and
thinking slow. Judge Pryor thinks deeply. Judge Pryor is a true scholar who thinks about the big picture of sentencing policy.

And next is Rachel Barkow. See -- I refused to tell them what I was going to say in advance. Who also joined in 2013. Commissioner Barkow is the Segal Family Professor of Regulatory Law and Policy at the New York University School of Law where she focuses her teaching and research on criminal and administrative law.

She brings extensive academic knowledge to the Commission. She knows everyone in the academy who's thinking about these issues. She is not only knowledgeable about sentencing policy, but also on other important substantive areas that affect our work, like mens rea law. She serves as faculty director of the Center on the Administration of the Criminal Law at the law school.

I'd also like to recognize Michelle
Morales who serves as the designated ex-officio member of the Commission. She has the important and, I'll say -- I think sometimes daunting task -- of representing all the different viewpoints within the Department of Justice.

Commissioner Morales is the acting director of the Office of Policy and Legislation at the Criminal Division of the Department. She first joined that office in 2002 and has served as its deputy director since 2009. Commissioner Morales served previously as an -- AUSA in the District of Puerto Rico.

There are some special guests who, I think, are here. Carter Burwell is here as counsel to Senator Cornyn. Welcome. Nkechi Taifa -- I think I said that correctly -- from the Open Society and Justice Roundtable. Sakira Cook from the Leadership Conference, Jesselyn McCurdy from the ACLU, Mary Price from FAMM, and Denise Barrett and Laura Mate of Sentencing Research Counsel.
Now it's always -- I'm always a little embarrassed to do this because somebody may have come in afterwards and I missed you. And so, if that is the case, I'm sorry. But we really welcome everyone who's here right now.

Want to do a few business items to begin with. As -- as some of you know, we have expanded our national training opportunities for judges and practitioners in recent years. In June about 100 judges attended our first ever training for judges in Chicago. And the feedback was so positive that the Commission is holding another training session for judges in 2017.

On September 7th to 9th the Commission held its annual national training program in Minneapolis and we had 850 attendees. I'd like to recognize and acknowledge the excellent work of the Commission's staff who organized the event and conducted the individual sessions.

We've received some feedback from the seminar participants that the national training
program has grown too large. To respond to this feedback, but to also accommodate the continued demand for our training program, we have decided to hold a national training program series next year.

So, the first in the series that is open to the public will be May 31st to June 2nd in Baltimore. And the second will be September 6th to 8th in Denver. We also will hold a judges-only training program in San Diego on June 22nd to 23rd. Registration is not yet open for these programs, but you can check our website for more details in the weeks ahead.

So, as you know, an important part of our process are the advisory groups. In October, the chair and vice chair of the Commission’s Practitioners Advisory Group -- or, PAG, as we call it -- completed their terms of office. I would like to take a moment to acknowledge their service and thank them on behalf of the Commissioner -- of the Commission.
Eric Tirschwell served as chair of the PAG from October 2015 to October 2016, following his previous service as vice chair. Nanci Clarence served as vice chair for one year and was a member of PAG since 2013. Nanci practices law in San Francisco with Clarence Dyer & Cohen.

Existing members of the PAG have taken over leadership roles and I'd like to acknowledge them and thank them for their services as well. The new chair, who has been on the advisory group since 2012, is Ronald Levine who practices law in Philadelphia. Ron is a principal at Post & Schell in the firm's Business Law and Litigation Department and chair of the firm's Internal Investigation and White Collar Defense Group.

The new vice chair, Knut Johnson, who practices criminal law in San Diego and is the Criminal Justice Act representative from the Southern District of California. He's been a member of the PAG since 2015. We are grateful to them and all the members of the Commission's
advocacy groups for their consent -- continued
service to the Commission.

And as I mentioned, we have a -- a new
advocacy group. And I'll -- Chief Judge Ralph
Erickson from the District of North Dakota will
serve as the TIAG's chair. The other members
have been announced on our website and we thank
them for their time and service. So now we get
down to calling the meeting to order, and I'm
going to turn to our excellent General Counsel,
Kathleen Grilli.

MS. GRILLI: Judge, the first item of
business for your vote is a vote on the meeting
minutes from the August 18th, 2016 meeting. A
motion to adopt the minutes would be in order at
this time.

CHAIR SARIS: Do I hear a motion? A
second? Any discussion? All in favor?

(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No audible response.)
CHAIR SARIS: All right. Motion carries.

MS. GRILLI: The next item of business for you are a series of proposed amendments for publication. The first of which is a proposed amendment on first offenders and alternatives to incarceration. This proposed amendment contains two parts, Parts A and B, either of which may be promulgated since they're not mutually exclusive.

Part A sets forth a new Chapter 4 Guideline at §4C1.1 called First Offenders that would provide lower guideline ranges for first offenders generally and increase the availability of alternatives to incarceration for such offenders at the lower levels of the Sentencing Table.

Part B of the proposed amendment would expand Zone B of the Sentencing Table by consolidating Zones B and C. Part B also amends the Commentary to §5F1.2 for home detention, to remove language requiring electronic monitoring.
Each part includes issues for comment. A motion to publish the proposed amendment as I just stated with a -- an original comment period closing on February 20th, 2017 and a reply comment period closing on March 10th, 2017 with technical and conforming amendment authority to staff would be in order at this time.

CHAIR SARIS: Thank you.

COMMISSIONER BARKOW: So moved.

COMMISSIONER FRIEDRICH: Second.

CHAIR SARIS: Any discussion? All in favor?

(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No audible response.)

CHAIR SARIS: Now, I -- just a few comments here. The Commission is considering this proposed amendment to reduce the penalties for first time offenders and to increase the availability of alternatives to incarceration. Last year the Commission studied alternatives to
incarceration and found that alternative
sentences were imposed in only 13% of federal
cases.

Increasing the use of alternatives may
further decrease the over-capacity issues within
the federal prison system. We've also been
informed by our ongoing recidivism research that
shows that true first offenders have a
significant lower recidivism rate than offenders
with one criminal history point.

Thirty-point-two-percent of -- for
offenders with zero criminal history points
recidivate as opposed to 46.8% for those with one
point. So the Commission would like to consider
greater use of alternatives, especially for first
time offenders. Today we are publishing a
proposed amendment that could increase the use of
alternatives by combining Zones B and C, perhaps
adding a downward adjustment for certain first
time offenders, and adding commentary encouraging
the use of alternatives for certain categories of
offenders.

Now, we have a vote? We just did?

Right. Okay.

(Laughter.)

CHAIR SARIS: We've adopted it. Let the record reflect it was unanimous. So, is there another motion?

MS. GRILLI: Yes, Judge. The next amendment before you for consideration is an issue -- an amendment titled Tribal Issues, which arises from the recommendations contained in the ad hoc Tribal Issues Advisory Group report that was submitted to you this summer.

The proposed amendment contains two parts again, neither of which are mutually exclusive. The first part relates to criminal history and the use of tribal court convictions. Currently those are not counted for purposes of calculating criminal history points, but may be considered for -- for a departure based on inadequacy of criminal history.
Part A of the proposed amendment would amend the Commentary to §4A1.3 to set forth a non-exhaustive set of factors for the court to consider in determining whether and to what extent an upward departure based upon a tribal conviction is appropriate.

Part B of the proposed amendment responds to concerns that the term Court Protection Order has not been defined in the guidelines and should be clarified. The proposed amendment would amend the Commentary to §1B1.1 to provide such a definition.

Each part includes issues for comment. A motion to publish the proposed amendment with -- again, with a public comment period -- an original comment period closing on February 20th, 2017 and a reply comment period closing on March 10th, 2017 with technical and conforming amendment authority to staff would be in order at this time.

COMMISSIONER FRIEDRICH: So moved.
COMMISSIONER BARKOW: Second.

CHAIR SARIS: Any discussion?

(No audible response.)

CHAIR SARIS: I will make the following comment. Based on the dedicated work of commission staff, federal judges and stakeholder groups, the Commission successfully established a tribal advisory issues group which published its report on the unique federal sentencing issues relating to American Indians in June of this year.

As a result of that report and the subsequent hearing, the Commission established a permanent Tribal Issues Advisory Group in August of this year. I mentioned that just earlier. In considering and implementing this group's important work, the Commission examined the impact of the federal sentencing guidelines on tribal issues.

The Commission is putting forth a proposed amendment that responds to the TIAG's
recommendations regarding tribal court
convictions and sets forth five factors for a
sentencing -- sentencing judge to consider when
determining whether and to what extent an upward
departure may be appropriate based on a
defendant's history of tribal court convictions.
A vote is now in order. How many in favor?

(Chorus of ayes.)

CHAIR SARIS: Opposed?

(No audible response.)

CHAIR SARIS: It carries. Thank you.

MS. GRILLI: The next amendment, before
you today for your consideration is titled
Youthful Offenders. Currently under the
criminal history rules in the Guidelines Manual,
sentences for offenses committed prior to the age
of 18 are considered in the calculation of
defendant's criminal history score.

The guidelines distinguish between an
adult sentence in which the defendant committed
the offense before the age of 18 but was convicted
as an adult, and a juvenile sentence resulting from a juvenile adjudication. The guidelines provide different time periods within which each type of sentence is included in the calculation of criminal history score.

The proposed amendment amends §4A1.2(d) to exclude juvenile sentences from being considered in the calculation of the defendant's criminal history score. The proposed amendment also amends the Commentary to §4A1.3 to provide an example of an instance in which a downward departure from the defendant's criminal history may be warranted for an adult conviction committed prior to the defendant's 18th birthday.

The proposed amendment also includes issues for comment. A motion to publish the proposed amendment with an original comment period closing February 20th and a reply comment period closing March 10th, 2017 and technical and conforming amendment authority to staff would be
in order at this time.

CHAIR SARIS: Is there a motion?

COMMISSIONER BARKOW: So moved.

CHAIR SARIS: Is there a second?

COMMISSIONER MORALES: Second.

CHAIR SARIS: Any discussion?

(No audible response.)

CHAIR SARIS: The Commission is considering a proposed amendment that targets youthful offenders under the guidelines. This proposal will exclude juvenile sentences from being considered in the defendant's criminal history score. It also provides a list of certain offenses that should never be counted for purposes of criminal history score including juvenile status offenses and truancy.

In light of the growing adolescent brain development research and recent court decisions, we welcome public comment on this issue. We -- it's time for the vote on this. All in favor?
(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No audible response.)

CHAIR SARIS: It carries. And let the record reflect that at least three commissioners voted in favor of this motion to publish. General counsel will now advise us on a possible vote concerning an amendment on the Bipartisan Budget Act.

MS. GRILLI: Yes, Judge. The Bipartisan Budget Act amendment which is before you responds to the Bipartisan Budget Act of 2015 which added new subdivisions to 48 -- 42 USC Sections 408, 10, 11, 13, 83A, prohibiting conspiracy to commit fraud with the same statutory maximum penalties applicable to the substance of offenses that exist in those statutes.

These statutes that were amended are currently referenced in Appendix A to §2B1.1. But the proposed amendment would amend Appendix
A so they are also referenced to the Conspiracy Guideline, §2X1.1.

The Bipartisan Budget Act also amended those statutes to add increased penalties for certain persons who are specifically defined in the statute who commit fraud offenses under relevant social security programs. The new increased penalties, ten years, apply to all of the fraudulent conduct in subsection A of the three statutes.

The proposed amendment would amend §2B1.1 to address cases in which the defendant was convicted in any one of those statutes and to whom the increased statutory maximum term applies, but provides a bracketed enhancement of either two or four levels and a minimum offense level of 12 or 14 for such cases. It also adds commentary concerning the applicability of the abusive position of trust adjustment in §3B1.3, bracketing two possibilities for that as well.

Issues for comment are also provided.
Motion to publish the proposed amendment with an original comment period closing February 20th and a reply comment period closing March 10th, 2017 would be in order at this time with technical and conforming amendment authority to staff.

COMMISSIONER BRYER: So moved.

CHAIR SARIS: Is there a second?

COMMISSIONER FRIEDRICH: Second.

CHAIR SARIS: Any discussion?

(No Audible response.)

CHAIR SARIS: In response to the Bipartisan Budget Act of 2015, the Commission is also considering a proposed amendment that reflects Congress's changes to the Social Security Act by increasing penalties for Social Security Fraud. I would like to acknowledge the important years of work, as well as the continued oversight, led by the House Judiciary Committee, the Senate Committee on Finance and the House Ways and Means Committee to ensure aggressive
implementation of these new penalties relating to social security fraud. Is there a vote? All in favor?

(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No audible response.)

CHAIR SARIS: Motion carries to publish. The General Counsel will now advise on the first possible vote concerning a proposed amendment on acceptance.

MS. GRILLI: I -- if I may actually go back to an amendment --

CHAIR SARIS: All right.

MS. GRILLI: On criminal history issues?

CHAIR SARIS: All right.

MS. GRILLI: This proposed amendment is a result of the Commission's work in examining Chapter 4. Chapter 4 of the guidelines currently count revocation of probation, parole and supervised release, special parole or mandatory
release for purposes of calculating criminal history points, adding the sentence of imprisonment imposed on revocation to original sentences of imprisonment and treating the total as if it was one sentence for purposes of calculating criminal history points.

Part A of the proposed amendment would amend §4A1.2(k) to provide that those revocations are not to be counted for purposes of criminal history score. It would also state that such revocations may be considered grounds for a departure under §4A1.3, which is departures based on inadequate -- inadequacies of criminal history category. Part A also includes issues for comment.

Part B of the proposed amendment would amend the Commentary to §4A1.3 to provide that a downward departure from the defendant's criminal history may be warranted in cases in which the period of imprisonment actually served by the defendant was substantially less than the
sentence imposed. Motion to publish the proposed amendment on criminal history issues with an original comment period closing on February 10th and a reply comment period closing on March 10th, 2017 and technical and conforming amendment authority to staff would be in order at this time.

COMMISSIONER Breyer: So moved.

CHAIR Saris: Is there a second?

Judge Pryor: Second.

CHAIR Saris: Any discussion? All in favor?

(Chorus of ayes.)

CHAIR Saris: Any opposed?

(No audible response.)

CHAIR Saris: It carries. Ms. Grilli?

Ms. Grilli: Yes, Judge. The next amendment is the Acceptance of Responsibility Amendment. This amendment -- proposed amendment responds to concerns that the Commentary to §3E1.1 encourages courts to deny a reduction in sentence when a defendant pleads guilty, accepts
responsibility for the offensive conviction, but
unsuccessfully challenges the presentence report
assessment of relevant conduct.

The proposed amendment amends the
Commentary to §3E1.1 to revise how the defendants
challenge of relevant conduct should be
considered in determining whether the defendant
has accepted responsibility for purposes of the
guidelines. An issue for comment is also
provided.

A motion to publish the proposed
amendment as I just stated it with a -- a --
again, a public comment period closing February
10th, an original comment -- original comment
period the -- February 20th, sorry. Reply
comment period closing March 10th, 2017 and
technical and conforming amendment authority to
staff would be in order at this time.

CHAIR SARIS: Is there a motion?

COMMISSIONER FRIEDRICH: So moved.

CHAIR SARIS: Second?
JUDGE PRYOR: Second.

CHAIR SARIS: Any discussion?

(No audible response.)

CHAIR SARIS: All in favor?

(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No audible response.)

CHAIR SARIS: Thank you, it carries.

MS. GRILLI: The next amendment for your consideration is the Miscellaneous Amendment which responds to recently enacted legislation and miscellaneous guideline issues. It contains four parts.

Part A responds to the Transnational Drug Trafficking Act of 2015 by amending §2B5.3.

Part B responds to the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders Act by amending §§2A3.5, 2A3.6 and Appendix A. Issues for comment are also included in this part.
Part C responds to the Frank R. Lautenberg Chemical Safety for the 21st Century Act by amending Appendix A. And Part D amends §2G1.3 to clarify how the use of a computer enhancement in subsection (b)3 of that guideline interacts with its correlating commentary. A motion to publish the proposed amendment with an original comment period closing February 20th and a reply comment period closing March 10th, 2017 and technical and conforming amendment to staff is in order at this time.

CHAIR SARIS: Do I hear a motion?
COMMISSIONER BARKOW: So moved.
CHAIR SARIS: Second?
VICE CHAIR BREYER: Second.
CHAIR SARIS: Any discussion?
(No audible response.)
CHAIR SARIS: All in favor?
(Chorus of ayes.)
CHAIR SARIS: Any opposed?
(No audible response.)
CHAIR SARIS: It carries. Thank you.

MS. GRILLI: The next proposed amendment for your consideration is the Marijuana Equivalency Technical Amendment which makes technical changes to §2D1.1 to replace the term marijuana equivalency with the term converted drug weight. It also changes the title of the drug equivalency tables to drug conversion tables.

A motion to publish the proposed amendment with an original comment period closing February 20th, and a reply comment period closing March 10th, 2017 with technical and conforming amendment authority to staff would be in order at this time.

CHAIR SARIS: Do I hear a motion?

VICE CHAIR BREYER: So moved.

JUDGE PRYOR: Second.

CHAIR SARIS: Any discussion? All in favor?

(Chorus of ayes.)
CHAIR SARIS: Any opposed?

(No audible response.)

CHAIR SARIS: All right.

MS. GRILLI: The next amendment is a technical amendment. This proposed amendment makes various technical changes to the Guidelines Manual and it also has several parts.

Part A makes clarifying changes to Chapter 1 Part A and to Application Note 2(A) of §2B1.1. Part B makes technical changes in §§2Q1.3, 2R1.1, 4A1.2, and 4B1.4. Part C of the proposed amendment makes clerical changes to the Commentary to §1B1.13, subsections (d)6 and (e)2 of §2D1.11, the Commentary to §§2M2.1, 2Q1.1, 2Q1.2, 2Q1.3, subsection (a)4 to §5D1.3, and the lines representing 18 United States Code Sections 371 and Sections 1591 in Appendix A.

A motion to publish the proposed amendment with a comment period closing February 20th and a reply comment period closing March 10th, 2017 with technical and conforming
amendment authority to staff would be in order at
this time.

CHAIR SARIS: Thank you. Is there a
motion?

JUDGE PRYOR: So moved.

VICE CHAIR BREYER: Second.

CHAIR SARIS: Any discussion? All in
favor?

(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No audible response.)

CHAIR SARIS: It carries. Ms. Grilli?

MS. GRILLI: Yes, Judge. The final
vote to publish is on an issue for comment titled
Drugs. In August 2016 the Commission indicated
that one of its priorities this year would be the
study of offenses involving MDMA/ecstasy,
synthetic cannabinoids such as JWH-018 and AM-
2201, and synthetic cathinones such as methylone,
MDPV and mephedrone. The Commission intends that
the study will be conducted over a two-year
The issue for comment -- seeks comment on the following factors as it relates to each of the drugs that I just mentioned: the chemical structure, the pharmacological effects, the legislative and scheduling history, the potential for addiction and abuse, the pattern of abuse and harms associated with abuse, and the patterns of trafficking and harms associated with trafficking.

The issue for comment also seeks broader comment on offenses involving mis -- synthetic cathinones and synthetic cannabinoids and the offenders involved in such offenses. A motion to publish the issue for comment with a public comment period closing on March 10th, 2017 and technical and conforming amendment authority to staff would be in order at this time.

CHAIR SARIS: Thank you. Is there a motion to publish the comment -- the issue for comment? Is there a second?
JUDGE PRYOR: Second.

CHAIR SARIS: Any discussion?

(No audible response.)

CHAIR SARIS: Let me just say that the Commission is publishing an issue for comment that initiates a two-year study on synthetic drugs including synthetic cannabinoids, cathinones and MDMA. Now that I'm leaving, I finally can pronounce all these -- these drugs.

The study will consider among other things whether to add new substances to drug equivalency tables. In light of the increasing trend of synthetic drug cases in the federal docket, the Commission believes that it is appropriate to further examine the issue.

The Commission welcomes any public comment on the impact of synthetic drugs as we conduct this study. We want to make sure that the penalties are appropriate and the guidelines are well informed. Is there a vote? All in favor?
(Chorus of ayes.)

CHAIR SARIS: Any opposed?

(No audible response.)

CHAIR SARIS: It carries. Thank you.

So now I move on --

COMMISSIONER MORALES: Judge Saris, may I say a comment about --

CHAIR SARIS: Yes, yes. Of course.

COMMISSIONER MORALES: Thank you. We are indeed, the Department, for the Commission agreeing to do that study of synthetic drugs which we believe is a really important issue.

But I did want to note that we do have some concerns about some of the proposed amendments. We believe that some of the amendments as written could be overbroad and potentially benefit offenders that, frankly, in our opinion, should not -- do not merit such benefit.

That said, we will express those concerns more fully and recommend ways to address
them in the public comment. And as always, we will work closely with the Commission to find common ground so that we can find language that we can indeed support. So, thanks.

CHAIR SARIS: Thank you. So, I'd like to make a few concluding remarks about the transition. During this period of transition, I'd like to acknowledge that next year will mark the 30th anniversary of the Commission's first publication of the sentencing guidelines.

Over the last six years, the proposed amendments to the guidelines have been developed and adopted in the same tradition of bipartisanship that has shaped the Commission during the last three decades. Over the last six years the Commission's current membership has continued this remarkable tradition with an evidence-based and collegial approach to decision making.

Our efforts have resulted in significant policy decisions that we believe have
contributed to a decrease in the federal prison population, which peaked in 2013 at 219,298 and now has declined to its current level of 193,303. That's a reduction of more than 28,995 offenders -- or, 13.2% over three years.

It has been a pleasure to serve as chair of the Commission. I've learned so much from each and every commissioner I have had the honor to serve with. I started with my friend and former chair Ricardo Hinajosa, with Ketanji Brown Jackson -- now a judge -- Judge Beryl Howell and Commissioner William Carr and ex-officio Jonathan Wroblewski.

I have become a big fan of our Standing Advisory Groups, the Practitioners Advisory Group, the Probation Officers Advisory Group and the Victims Advisory Group. I would also like to thank the Federal Defenders Guidelines Committee, Commission Liaison Subcommittee, and the Sentencing Resource Counsel for their assistance. I am enthusiastic about
the future contribution of our Tribal Issues Advisory Group.

These groups regularly meet with the Commission and help us in the formation of sentencing policy. I also would be remiss if I did not acknowledge the significant impact of the public comment in relation to our amendments to the guidelines sent from a broad range of interested Americans and stakeholders during my tenure as chair. Your formal contact, your continued interest by coming, has helped us shape over 50 amendments that were promulgated during my tenure.

And it's always a little dangerous doing this. Just as I -- I mentioned some folks who were here. I may be -- I'm missing people -- but some of the organizations that have really submitted the most public comment over the years, and I'd like to thank, are the American Bar Association, American Civil Liberties Union, the Drug Policy Alliance, Families Against Mandatory
Minimums -- which I -- FAMM. And I'd also like to thank Mary Price who I don't think has missed a meeting since I -- since I've been here. The National Association of Assistant United States Attorneys, the National Association of Criminal Defense Lawyers, and the Sentencing Project. I'm sure there are more here and I apologize in advance, but I -- I just -- in particular, you know, we get these giant white binders with all of your comments, and I sit on my couch and I read everything -- as do all the commissioners -- and we talk about it when we come into our meeting. So, thank you.

It's also been a joy to work with the Commission's staff of esteemed attorneys, social scientists, and other professionals with expertise on criminal justice and federal sentencing policy. Along with the many other hardworking individuals who each contribute with their best efforts in their respective roles.

When I was a judge up in
Massachusetts, I had no idea the -- the level of expertise and knowledge and commitment that went into each one of the guidelines. And that's because of our outstanding staff.

I wanted to give a particular shout out to Staff Director Ken Cohen and our staff director before him, Judy Schoen. My first year here -- those of you who have been following this -- was a tough one as I learned the ropes. And I have had the best of teachers, friends, and mentors.

Our staff has provided all the commissioners with invaluable support and expertise, and together with all of you -- the listening public and the people who send us comments -- hopefully we have been active in trying to make the guidelines in federal sentencing fairer and more proportionate while maintaining an ongoing commitment to public safety.

When I first became chair six years
ago, the BOP inmate population was 37% over capacity. I remember the head of the BOP sitting here and telling us that statistic. Now it is about half that. In 2011, my first year on the Commission, the Commission implemented new lower crack cocaine penalties from the 2010 Fair Sentencing Act, and voted to apply these changes retroactively to benefit currently incarcerated crack cocaine offenders.

In arriving at these decisions, the Commission found that the crack cocaine penalties were not proportionate to the harms on society, and that the impact of the unduly severe penalties were borne mostly by minorities. That decision resulted in 7,748 offenders receiving an average reduction in their sentences of 19.9%, from 153 months to 123 months.

Then in 2014 the Commission voted to reduce the drug quantity table for all drug trafficking offenses, not just crack cocaine, by two levels, which reduced drug penalties going
forward by about 17%. The Commission then voted to make those reductions retroactive. And, to-date, 28,544 drug offenders have received an average sentence reduction of 17% -- or about 25 months -- from 143 months to 118 months.

It's important for the public to know, before sentencing reductions were granted, as a result of the 2011 or 2014 amendments, each individual case was reviewed by a federal judge to ensure that the offender did not pose a public safety risk. Simply put, none of these reductions are automatic.

The Commission also had several other important amendments that became effective this year. In response to the Supreme Court's decision in Johnson versus the United States, the Commission eliminated the analogous residual clause from the sentencing guideline's definition of crime of violence. The amendment will help relieve some of the strain on the courts and the broader uncertainty that has followed Johnson.
In addition, this year the Commission published a report to Congress analyzing career offenders in the federal system and the statutory definition of crime of violence. In our report, the Commission recommended that Congress establish one definition of crime of violence for all criminal law purposes, and we encouraged Congress to adopt the Commission's definition of crime of violence as that single, uniform definition.

We also strengthened and broadened the criteria for compassionate release with several meaningful changes. Congress charged the Commission with issuing policy statements describing what should be considered extraordinary and compelling reasons for a sentencing reduction.

Through the Commission's newly expanded criteria, federal inmates may be eligible for compassionate release based on four categories relating to medical conditions, age,
family circumstances, or other extraordinary, compelling reasons. The Commission's action encourages the BOP to use its current authority if an eligible offender meets any of these circumstances.

We also addressed the guidelines for illegal reentry offenses. The 2016 amendment increased penalties for those immigrants who commit crimes after unlawfully reentering the country, or who are convicted of reentering the country multiple times. Immigration offenses comprised a large portion of the federal docket, and these enhancements may affect a large number of cases. They also simplify the application of the immigration guidelines.

Over the last six years I've traveled throughout the nation. From coast to coast, on the border -- I've traveled throughout our great country and I've spoken to different audiences about the challenges confronting the federal criminal justice system today.
Whether I'm addressing a room full of federal judges or a group of law students, I've always emphasized that the Commission's decisions are evidence-based and data-driven. During my tenure the Commission's Office of Research and Data has analyzed 397,248 individual cases, cataloguing the pertinent sentencing data into comprehensive computer database maintained by the Commission.

Our detailed synthesis of sentencing data has culminated in 60 publications ranging from significant research reports -- so, big, thick things that I know you all love reading -- to those 23 -- two-page quick facts that Glenn Schmitt has been -- and his crew have been so creative in creating. These two-page documents focusing on a variety of issues in the criminal justice system.

We have also responded to 845 special data requests. Since 2012 the Commission has made its prison and sentencing impact analyses.
available to the public on its website, and this year the Commission launched a redesigned website to make it more accessible. The Commission's reports have a continuing impact on educating policy makers and the public. For instance, several of the Commission's recommendations in its 2011 Mandatory Minimum Report are reflected in bipartisan legislation now pending between -- before the House and the Senate.

We uniformly concluded that mandatory minimum sentences in their current form are often too high and applied too broadly to lower-level defendants, and the most severe penalties are often applied inconsistently.

So that's why we've urged Congress to reduce the current statutory mandatory minimum penalty for drug trafficking, to consider expanding the safety valve to allow a greater number of non-violent, low-level drug offenders to be sentenced below mandatory minimum penalties, to give retroactive effect to
statutory changes made by the Fair Sentencing Act of 2010 and to reassess the scope and severity of the recidivism provisions in the statutes which can double the mandatory minimum penalties if a drug offender has a prior conviction for a drug trafficking offense.

We plan to update the pivotal Mandatory Minimum Report with more current data in the future. And it's my hope -- and, I think all of our hope -- that the Congress, the Executive Branch, and the public continue to base sentencing laws and policies on the Commission's high quality data and thoughtful analysis. So much bipartisan progress has been made in criminal justice reform. I am so hopeful that the 115th Congress will pass meaningful legislation.

So, at this point, I have -- I'd like to turn this over to my fellow and sister commissioners and -- to see if they'd like to add anything.
VICE CHAIR BREYER: Well, I'm not shy, so I will. You know, this -- this is our last meeting. But more significantly, it is the conclusion of Judge Saris's leadership on this -- on this Commission. And it has been universally acclaimed as extraordinary.

It's extraordinary because she has brought to this Commission a sense, not only of collegiality, but of truly listening to varying points of view in an effort to try to resolve differences. She has been guided by the principle that the perfect is always, or frequently, the enemy of the good. And so the idea is to try to achieve some basic fairness, some result that will alleviate situations in which injustices occur.

You note that it's -- it's an interesting thing for a judge to be part of a -- to be part of an administrative process where -- where what you have to do is try to achieve some sort of compromise of -- in order to achieve a
result that is progressive. And it is a Commission that's not non-partisan, it's bipartisan. And it's bipartisan because of the effort, when the Commission was established, to try to get different points of view expressed on that Commission.

And it has been my pleasure -- and I think every commissioner's pleasure -- to be guided in that task which is a difficult task because it's a task that always involves some sort of compromise to be guided by Judge Saris. Her leadership has been extraordinary. The Commission has received a number of letters. Let me just cite the two.

One comes from the Justice Roundtable which is a -- which is a collection of -- of groups that are very interested in -- in -- in -- in establishing a -- communication with the Commission in an effort to try to achieve progress and reform in sentencing. And they acknowledge Judge Saris's leadership. That
letter will be part of the -- placed on the web. And also by my -- I'd like to mention a letter that Congressman Conyers wrote a few days ago. And I'd like to read excerpts of that:

“Dear Judge Saris, as your term comes to a close I would like to thank you for your leadership of the United States Sentencing Commission and your commitment to achieving sentencing reform and equal justice for all.

You were appointed to chair the Sentencing Commission during a critical period in the evolution of our criminal justice system, marked by an increased openness to rethinking sentencing policy. At that time, President Obama spoke of your unwavering commitment to justice and his confidence that you would serve with excellence and integrity. He was correct. Your work on the Commission clearly showed your dedication to justice over the past years. As chair, you led the Commission with fortitude, dignity, working to address important issues such
as sentencing disparities, the unwarranted and
costly growth of the federal prison population
and the unintended consequences of mandatory
minimum penalties, especially among minorities.

Your extensive legal experience and
knowledge combined with an obvious passion for
justice equipped you to guide the Commission
through a time of robust reflection and
innovation to accomplish many substantial
milestones. Your efforts made certain that the
purposes and the goals of the Commission were
fulfilled."

He cites the particular achievements
of Judge Saris and concludes: “you served with
diligence, distinction and honor. Always with a
sense of urgency in formulating solutions to
issues identified by the Commission, seeking to
promote fairness and public safety. I applaud
your efforts to foster public trust and respect
for our criminal justice system.

Although you are leaving the
Commission, I know you will continue to work to improve our criminal justice system. Thank you for your leadership, advocacy and service. Signed, John Conyers, Jr. Member of Congress.”

And that sentiment -- those sentiments have been echoed by -- by so many people and captured by Ken Cohen yesterday in his tribute to -- to Judge Saris. As we know, the Commission -- the -- at the end of the session may very well be reduced to two members, not having a quorum to act. And so the question is, well, what happens? What happens to the Commission?

And -- and I want to suggest, as one person, that while the Commission in terms of promulgating amendments and taking official action, may have some brief period of hibernation -- the Commission itself does not. That is the staff itself -- the Sentencing Commission.

The work that these people in the room do is extraordinarily important. It is the gathering of data from which evidence -- and
that's the evidence -- drives decisions. Drives decisions of judges. After all the -- the -- the sentencing guideline system is primarily directed to judges, so judges can make decisions as to what are appropriate sentences.

So, Glenn, your -- your -- you have to redouble your efforts, which are extraordinary anyway, and -- and gather all of that evidence, because it is the evidence that drives it.

A second task that I would just like to acknowledge -- and I can speak to this, I think, because I am a judge -- is the importance of the training that the Sentencing Commission does. The -- the fact of the matter is that by going out and talking to judges, and explaining to judges how the guidelines operate, and how they operate in a way to try to ameliorate the disparities that may occur throughout the country is extraordinarily important.

And in my travels -- and I think in the Commissioner's travels -- we have constantly
been applauded -- we can't give course to the credit -- but the credit really goes to the staff of the Commission -- for engaging in -- in this important task. And -- and Raquel Wilson and her -- her very devoted and very talented individuals who work with her must continue this task of educating judges as to -- as to the relevance -- the relevance of the guidelines.

On this sort of -- a -- a personal note, you know it -- I -- I've now been associated with sentencing issues since 1967. I did the math, I'm not as good as Dabney, but alarmingly, it looks like it's like, 50 years. So, I've been involved in this 50 years as a prosecutor, as a defense lawyer, as a judge. Not yet as a defendant, but --

(Laughter.)

VICE CHAIR BREYER: Those 50 years -- you would think after 50 years I would know what a right sentence is -- a correct sentence in any given situation -- and I'm not confident that I
do. And nor do I think any judge is confident that he or she has -- has articulated the correct sentence in any given case. Because it's not susceptible of that type of analysis.

More importantly, you do know -- or, you should know -- what a wrong sentence is -- what a circumstance that is inappropriate to the circumstances. And the guidelines help fashion it -- anchor a judge in terms of -- of applying a -- a better sentence to any given situation. So it serves a tremendous role.

Now if I may say about our fellow commissioners when we joined this Commission, we all articulated the thought that we cannot allow the perfect to be the enemy of the good. It's important in this type of situation to try to arrive at a compromised positions, at positions that further the purposes of the sentencing guidelines.

It has been, I would say, really a -- a remarkable experience for me to work with Judge
Pryor who is one of the most principled individuals that I have ever had the -- the opportunity of working with. He -- while we may not share, I think it's fair to say, exactly the same ideology on all of these issues -- nor does any judge necessarily share the same ideology. And the purpose of the guidelines and the purpose of this Commission is to try to articulate these views and to see whether or not there's common ground.

He has been a -- a leader of this Commission in -- in arriving in a collegial way at common ground in -- in our deliberations. And it has been my honor to work with you.

Dabney, of course, brings not only the institutional memory of the Commission, but also a willingness -- and indeed, a zeal -- for looking at what the evidence is with respect to any particular suggestion that's been made. And it's interesting -- it's interesting -- you all don't see it -- but it's interesting that when you start
talking about the evidence, what does the data show, it informs the judgment of commissioners as to what the proper path is with respect to any given amendment.

And of course it's been a delight, Rachel, to work with you because while you're an academic -- you are a -- you are a --

(Laughter.)

VICE CHAIR BREYER: You are a -- you are a practical academic.

(Laughter.)

VICE CHAIR BREYER: That is to say you have your feet and your soul rooted in -- in reality and in a sense of improving the system. And I think the Commission is extraordinarily fortunate that you will go forward as a commissioner. It has been a -- an honor, privilege for me to do it.

And I would say that, Patti, just -- none of this would have happened -- none of this would have happened without your -- without your
leadership. And so I -- I'm indebted, but really
the country should be indebted by the service.
The fact is that without that type of leadership,
I don't know what we would have accomplished. So
thank you very much.

CHAIR SARIS: Thank you.

COMMISSIONER FRIEDRICH: What a tough
act to follow. Always.

(Simultaneous speaking.)

(Laughter.)

COMMISSIONER FRIEDRICH: Oh, well. I
will -- I will try. But, thank you Judge Breyer,
and thank you Judge Saris for your very, very
kind comments. It has been for me such an
incredible honor and privilege to serve these
last ten years. I am very, very sad to go.

And I would like to start by thanking
both Presidents Bush and Obama for giving me this
opportunity. Truly an opportunity that has been
one of the highlights of my professional career.

And that's not just because of the important work
this Commission does, but it's the people with whom we serve. And let me start by talking about the staff which is -- both Judge Saris and Judge Breyer have made clear -- is just extraordinary. You all bring such expertise and professional judgment -- good judgment -- wisdom and dedication to your jobs that -- that we the Commission simply could not do what we do without your help. And I am deeply grateful for all the long hours you've put in and treasure your friendship. And I will miss you -- miss you dearly.

I'd also like to thank the stakeholders. All of you do so much to enhance our decision making and inform our judgment. I know many, many of you have other jobs that you do in addition to this, and yet you write very extensive, thorough and solid both written comment -- I know it takes great time to prepare for your testimony before us for hearings -- and also the informal feedback you give us. And we
really appreciate it. We learn from it and benefit from it enormously.

In these next few months, as Judge Pryor and Judge Saris noted, we're going to be in a period of transition here at the Commission. But I have no doubt with this staff -- this expert staff and the commitment of our remaining commissioners here, that the good work will continue.

And I'd just -- I'd just like to talk about two areas in particular that are of most interest to me. The first is the Commission's ongoing work on recidivism. This research is critically important not just to this Commission, but to all policymakers who are looking at the criminal justice system. And it really -- the -- the data is -- is -- the gathering is impeccable. It's data no one else has and it really helps not only us, but all of the outside world and particularly the policymakers.

So, I -- I know that it will continue
to shape criminal justice reform in this interim
and as we continue to face big challenges with
the overpopulation of your prisons, I know the
Commission's work in this area will be
instrumental. Not just ensuring that lengthy
prison terms are reserved for those who pose the
greatest risk to society, but also to help both
BOP and others provide the kind of support and
programming that will help prisoners successfully
integrate into society without jeopardizing
public safety.

And we have to do a better job of
programming. I've spent the last couple years
doing a lot of volunteer work in a federal prison.
And we can do better. We must do better.

Most of the inmates face significant
challenges in terms of -- not just addiction
issues but also learning disabilities and mental
health issues. And we can do better. We must
do better. Not only is it the right thing to do,
it is the cost-effective thing to do.
A recent RAND study concluded that for every dollar spent on evidence-based educational programming, there's a five-dollar decrease in recidivism cost. So programming good, effective evidence-based programming makes a difference, and I hope the Commission's continued research will shed light on this subject.

Another important priority -- the Commission, is its continued focus, I hope, on structural reform of the guidelines. It's currently structured -- the guidelines cannot fulfill the goals of the Sentencing Reform Act and we simply cannot ignore the increasing disparities in the system. Especially the demographic disparities. And I hope that the future Commission will work with Congress to both restructure and simplify the guidelines to better meet the goals of the Sentencing Reform Act.

And finally the Commission -- the commissioners. This is, as I said yesterday, one of the most professional and collegial bodies
that I've ever worked in. And Judge Saris, as I said yesterday, I credit you for the leadership.

You have really set the tone not just within the Commission in terms of how we treat one another and staff treats one another and we treat -- interact with staff. But also in terms of the outside community. And you have done a great deal to make this place the place that it is today. And you've just done an outstanding job. So I thank you for your -- for your service.

It has been such a pleasure to serve with you -- and with all of you. Each one of you really epitomizes the role of a public servant in every way -- what -- what that should be. And I'm deeply grateful for your friendship and I will very much miss working with all of you.

Thank you.

JUDGE PRYOR: I wanted to say a few words, too. I think that the last several years will be remembered as one of the golden eras of the United States Sentencing Commission. We have
tackled some of the most difficult problems in federal sentencing. And the Commission has resolved those problems with what I think are thoughtful and data-driven solutions. I want to highlight three.

We've satisfied our statutory mandate to address prison overcrowding by reforming the guideline for drug trafficking and by making that reform retroactive. We have reformed the career offender guideline to resolve some of the most vexing and difficult problems in federal sentencing. And we have reformed the immigration guideline and simplified it in a way that will save considerable tax dollars and result in fairer sentencing.

None of these reforms could have been achieved without the contributions of the commissioners whose terms will soon expire. Judge Patti Saris has been an exemplary leader for this Commission. She has been thoughtful, hardworking -- I will say more about hardworking.
We will get in Commission meetings and beg her for breaks. She has fortitude.

(Laughter.)

JUDGE PRYOR: She is serious, always cheerful, fair-minded and above all, collegial. We could not have asked for a better leader these last few years.

The same is true for our vice chair, Judge Chuck Breyer. The wisdom and wit that he has brought to our work has been extraordinary and I -- I could say a lot more, but I want to say most of all I certainly hope that he will soon be given the opportunity to serve again on the Commission. We need him.

And I want to thank Commissioner Dabney Friedrich for her long and distinguished service on the Commission. She has brought a unique mix of experience, as a Senate staffer, federal prosecutor and associate White House Counsel, to assist us in our work. And I want to echo two things that were highlighted earlier
by Judges Saris and Breyer.

As Judge Saris rightly pointed out, Commissioner Friedrich has often been the necessary commissioner to provide us the key idea to resolve some kind of problem as we have considered amendments to the guidelines. And I -- you know, I don't know how we could have resolved these problems the last few years without -- without those insights.

And I -- as Judge Breyer pointed out, her institutional knowledge, too, has been invaluable. Particularly in reminding us, as we think about and deliberate about the various issues, that previous commissions have thought about and tried to tackle those same issues. And she's helped us avoid going down trails that would have been unproductive.

I'm proud to call all of these commissioners my friends and colleagues. I want to congratulate them and thank them for their terrific service to the federal judiciary and
most of all, to the American people.

COMMISSIONER BARKOW: So I would like
to say a few words, too. I think it can be easy
to become cynical about bureaucrats in Washington
or what the government can accomplish. But as a
member of this Commission for the past three-and-
a-half years, I've had a front-row seat to
government service at its finest and it's
highlighted for me all that can be accomplished
with the right people.

Three of the finest colleagues I have
ever had are leaving the Commission today.
Thankfully one is staying. And I want to take a
moment and reflect on what an honor it's been for
me to serve alongside them. Judge Saris,
Commissioner Friedrich, and Judge Breyer, they
represent the best of government service.

They've approached every decision
we've made at the Commission in my time here with
careful attention to our authorizing statutes,
the empirical facts and what would further the
public interest. And we come from different backgrounds and we bring different perspectives to the issues, and yet we -- this group -- usually reaches consensus about what we should do, because that is what we're guided by. We're guided by data, a commitment to the rule of law and well-reasoned arguments.

And so our discussions of issues are always respectful and productive. And actually, they're usually pretty funny, too. And I couldn't have dreamed of a better group of colleagues. I want to give special thanks and appreciation to Judge Saris, our chair.

So, my other hat, as has been mentioned is as -- also as an administrative law professor. And what I usually teach is dysfunctional agencies -- agencies that fail. All the ways in which they go wrong. And I will just say that I wish that Judge Saris could run every agency in our government.

(Laughter.)
COMMISSIONER BARKOW: If we could just clone her out, we would solve so many problems. Because the culture that she has fostered here at the Commission is the ideal culture for good decision making. Everyone comes prepared, and she sets that example right at the top.

Everyone feels comfortable speaking his or her mind and representing whatever view they have because you know that's going to be aired and respected and we'll all talk about it. And she keeps us moving along. She runs an efficient meeting. And then she guides us to common ground.

So, it's not surprising to me that the Commission has accomplished what it has under Chair Saris, and it really has been one of the honors of my life to be part of this. I'm very proud of what we've accomplished.

But the credit is really -- is really yours for your guidance. So I always look forward to these meetings. You know, I get on
the train, and I'm excited to come down. I can't wait to talk about it. But that wasn't true this time. I was really sad. Really sad to see you go.

Now, thankfully we're going to still have the best staff. That's the other thing that makes our agency really great is the staff are incredible. They are so dedicated and hardworking and smart and wonderful to be with. And that same is true of Judge Pryor.

So I'm not alone and I'm very happy about that. And I really hope that Judge Breyer will be coming back. Because I echo that -- we -- we need your service and you're tremendous.

But I know I speak for everyone here when I say we will miss you all tremendously. You will leave a void that I think will be impossible to fill, but a legacy that I think will continue to guide us. I fully expect to be hearing your voices in my head in a hopefully sane way as we --
(Laughter.)

COMMISSIONER BARKOW: On future issues. Thank you.

COMMISSIONER MORALES: All right, so on -- on my personal behalf, but also on behalf of Commissioner Jonathan Wroblewski, who preceded me and of course, on behalf of the Department as a whole, I also want to thank the departing commissioners for their collaboration with us.

And starting with Commissioner Friedrich, your exemplary career path from your work as an AUSA in San Diego and in Alexandria to the Senate Judiciary Committee to the White House Counsel’s Office, and of course, your time on the Commission, shows a true commitment to furthering the causes of justice. But what is most important is your work with the inmates at the Federal Correctional Institution at Dublin.

As was previously noted, you have shown an unwavering devotion to the women and bettering their lives through -- through
education. Commissioner Friedrich has advocated tirelessly in prison -- in the prison and to the director of BOP and to department leadership. We think it's fair to say that the Department's new initiative to reform federal prison education programs is due in large parts to your efforts.

So, Commissioner, we thank you for all your tireless work on this, and we hope that our collaboration continues. And of course, Chair Saris, as so many already have noted, you have just shown extraordinary leadership during your tenure here at the Commission.

And together we've addressed many important issues from healthcare fraud to the theft of trade secrets. From firearms violence to implementation of the Fair Sentencing Act. Judge sentencing policy, retroactive application, and simplification. You've guided the Commission deftly and ensured that the voices of defendants, law enforcement, crime victims, and the public at large have been heard. And we
appreciate all that you've done, and for being such a strong partner over the last years.

And for those of you who don't work with her behind the scenes, Judge Saris is just as pleasant and approachable and no-nonsense as fair as she appears in public. And when confronted with policy questions, as others have noted, she's always considered the question head-on, with an open mind, and considered science and consulting her real-world experience and assessing the right outcome. And what's more, she shares all that experience with us -- and it's amazing how she always seems to have a defendant that was just before her that --

(Laughter.)

COMMISSIONER MORALES: Same issue that we're discussing. So she'll walk us through the analysis and lay out her conclusion. And does it in a way that it invites conversation, challenge and it becomes a true give and take that, which as others have noted, is what makes
policy work. And also she always finds a great pun to tie all these things together and make us all laugh.

But, all in all, Chair Saris, your leaving this institution, as others have noted, stronger than you found it. And your leadership has contributed to greater justice in ways large and small. And for that the Department of Justice will always be grateful.

And, Judge Breyer, like others have noted, we are hoping you get extended so you don't -- you don't get a --

(Laughter.)

COMMISSIONER MORALES: You don't get a special -- we really hope to see you as well as Commissioner Pryor and Commissioner Barkow in 2017.

CHAIR SARIS: Thank you. Wow. It's very sad day for me as you can see, all of us have become very close friends as commissioners. It's such a -- thank the President for
nominating, not just me, but everybody here. And also the Congress for confirming us. It's been a true honor. I'm pleased with the accomplishments of the last six years and grateful to all -- everybody in this room for helping.

I -- I wanted to mention that I -- what I'm hoping to convey is regardless of how many commissions -- commissioners there are, our work goes on. We're working hard. We're working hard on reports. We're working hard on amendments. And it's important that you all stay with us as the years go forward.

To that end I'd like to acknowledge that there will be a new acting chair announced as my term ends with the conclusion of the session of Congress. I am confident that the future Commission and the Commission staff will remain dedicated and serious about the important mission. And as we all look back on 30 years of guidelines and work of the Commission, I
appreciate -- it's really my honor to serve as the chair during this historic period. It really was historic. I remember being asked to be chair of the Commission -- I've never been chair of -- led an agency before. And each opportunity -- each new opportunity -- each new challenge, I was helped by everyone here.

So, while my time is ending, the work goes on. And I urge each one of you to remain focused and dedicated as ever to the guidelines which are fair, effective, and just. And to make sure they stay that way. Thank you very much.

Should we call this? Do we have a motion to close?

JUDGE PRYOR: I move to be adjourned.

CHAIR SARIS: Please, no one second.

(Laughter.)

CHAIR SARIS: No one seconds. Sorry.

Not going anywhere.

(Laughter.)

CHAIR SARIS: Is there a second?
(No audible response.)

(Laughter.)

CHAIR SARIS: Now what do I do?

COMMISSIONER FRIEDRICH: I'll second.

CHAIR SARIS: We'll walk out arm-in-arm.

COMMISSIONER FRIEDRICH: Yes.

CHAIR SARIS: Just how we walked in.

And the meeting's now adjourned. Thank you very much.

(Applause.)

(Whereupon, the above-entitled matter went off the record at 12:39 p.m.)